

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____)
In the Matter of _____)
CALIFORNIA PACIFIC MEDICAL GROUP, INC., d/b/a _____) Docket No. 9306
BROWN AND TOLAND MEDICAL GROUP, _____)
Respondent. _____)
_____)

AMENDED PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties against the improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Amended Protective Order Governing Discovery Material (“Protective Order”) shall govern the handling of all discovery material during the adjudicative proceedings in the above-captioned matter.

DEFINITIONS

1. For the purposes of this Protective Order, the following definitions shall apply:
 - a. “Brown & Toland” means the California Pacific Medical Group, Inc., dba Brown and Toland Medical Group, a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 153 Townsend Street, Suite 700, San Francisco, California 94107.
 - b. “Commission” or “FTC” means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this matter.
 - c. “Confidential Discovery Material” means all discovery material that is confidential or proprietary information produced in discovery that is not generally

known and which the producing party would not normally reveal to third parties or would normally require third parties to maintain in confidence. These are materials which are referred to and protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f); section 4.10(a)(2) of the FTC Rules of Practice, 16 C.F.R. § 4.10(a)(2); section 26(c)(7) of the Federal Rules of Civil Procedure, 28 U.S.C. § 26(c)(7); and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which would likely cause substantial commercial harm or personal embarrassment to the producing party. The following is a nonexhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material. Discovery material will not be considered confidential if it is in the public domain.

- d. "Disclosing Party" means a party to this proceeding that is disclosing or contemplating disclosing discovery material pursuant to this Protective Order.
- e. "Discovery Material" includes deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu of process, and any other documents or information produced or given to one party by another party or by a third party in connection with discovery in this matter. Information taken from discovery material that reveals its substance shall also be considered discovery material.
- f. "Document" means the complete original or a true, correct and complete copy, and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored, or reproduced, and includes all drafts and all copies of every writing, record, or graphic that contain any commentary, notes, or marking that does not appear on the original. "Document" includes, but is not limited to, every writing, letter, envelope, telegram, e-mail, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, photograph, tape, phono record, compact disc, video tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad,

telephone message slip, note of interview or communication, or any other data compilation from which information can be obtained.

- g. “Expert/Consultant” means testifying or consulting experts, and their assistants, who are retained to assist complaint counsel or respondent’s counsel in preparation for the hearing or to give testimony at the hearing.
- h. “Health Plan Industry” includes any health maintenance organization, preferred provider organization, fee-for-service indemnity health insurance plan, employer self-insured health benefit plan, or any other health care plan or insurance of any kind.
- i. “Matter” means the matter captioned *In the Matter of California Pacific Medical Group, Inc., dba Brown and Toland Medical Group*, Docket Number 9306, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.
- j. “Outside Counsel” means Boies, Schiller, and Flexner, LLP; their associated attorneys; persons regularly employed by the law firm (including legal assistants, clerical staff, and information management personnel); vendors retained by the law firm to provide copying, graphic, and other similar litigation support services; and temporary personnel retained by the law firm to perform legal or clerical duties or to provide logistical litigation support with regard to this matter; provided that any attorney associated with outside counsel shall not be a director, officer, or employee of respondent. The term outside counsel does not include persons retained as consultants or experts for purposes of this matter.
- k. “Party” means either the FTC or Brown & Toland.
- l. “Person” means any natural person, business entity, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.
- m. “Physician Organization Industry” includes any physicians practicing medicine as sole proprietorships, partnerships, foundations, and professional corporations, or in independent practice associations, physician-hospital organization, health maintenance organizations, and preferred provider organizations.
- n. “Producing Party” means a party or third party that produced or intends to produce Restricted Confidential or Confidential Discovery Material to any of the parties. With respect to Restricted Confidential or Confidential Discovery Material of a third party that is in the possession, custody, or control of the FTC, or has been produced by the FTC in this matter, the producing party shall mean the third party that originally provided the Restricted Confidential or Confidential Discovery

Material to the FTC. The producing party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of, the FTC.

- o. "Respondent" means Brown & Toland.
- p. "Restricted Confidential Discovery Material" is Confidential Discovery Material stamped "Restricted Confidential Discovery Material," that contains non-public, current information that is highly sensitive (marketing plans, pricing plans, financial information, trade secrets, or documents of a like nature), the disclosure of which would likely cause substantial commercial harm or personal embarrassment to the producing party. It is anticipated that this particularly restrictive designation should be utilized for only a small number of documents.
- q. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this matter, and their employees, directors, officers, attorneys, and agents.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

2. Discovery material, or information derived from it, shall be used solely by the parties for purposes of this matter, and shall not be used for any other purpose, including, without limitation, any business or commercial purpose. Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation of this matter during either the precomplaint phase or postcomplaint phase, to respond to either: (a) a formal request or subpoena from either House of Congress or from any committee or subcommittee of the Congress, consistent with applicable law, including sections 6(f) and 21 of the FTC Act; or (b) a federal or state access request under section 4.11(c) of the FTC Rules of Practice, 16 C.F.R. § 4.11(c). Provided further, that this Protective Order shall not limit the Commission's ability to use the discovery material in any other investigation, or administrative or judicial proceeding, in which event the material shall be

subject to the protections accorded by sections 21(b) and 21(d)(2) of the FTC Act, 15 U.S.C. §§ 57b-2(b) & (d)(2).

3. The parties, in conducting discovery from third parties, shall attach a copy of this Protective Order to any discovery request and include a cover letter that will apprise third parties of their rights.

4. Restricted Confidential or Confidential Discovery Material may be designated as such by: (a) the producing party placing on or affixing to the first page of a document containing the Restricted Confidential or Confidential Discovery Material, in a manner that will not interfere with its legibility, the notation "CONFIDENTIAL - FTC Docket No. 9306" or "RESTRICTED CONFIDENTIAL, OUTSIDE COUNSEL ONLY - FTC Docket No. 9306"; or (b) any party instructing the court reporter, with notice to all parties, within five business days of the publication of the transcript, to designate as "Restricted Confidential" or "Confidential" each page of the deposition transcript containing the Restricted Confidential or Confidential Discovery Material. Such designations constitute a good-faith representation by counsel for the party or third party making the designation that the document or transcript constitutes or contains "Restricted Confidential Discovery Material" or "Confidential Discovery Material." All deposition transcripts shall be treated as Restricted Confidential Discovery Material until the expiration of five business days after the publication of the transcript.

5. A producing party will use reasonable care to avoid designating any discovery material as "Confidential" or "Restricted Confidential" that is not entitled to such designation or that is generally available to the public.

6. All documents obtained by compulsory process or voluntarily in lieu of process from any party or third party, regardless of whether designated or marked confidential by the party or third party, and transcripts of any investigational hearings, interviews, or depositions that were obtained before this Protective Order was adopted, shall be treated as Restricted Confidential Discovery Material for a period of twenty days from the time notice of the intent to produce is given to the producing party. At the expiration of that time, this material shall be treated as Confidential Discovery Material unless otherwise designated by the producing party as either Restricted Confidential Discovery Material or non-confidential.

7. Restricted Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone other than:

- a. complaint counsel and the Commission, as permitted by the FTC Rules of Practice;
- b. outside counsel;
- c. experts/consultants;
- d. the Administrative Law Judge presiding over this matter and other court personnel;
- e. court reporters involved in transcribing proceedings relevant to this matter;
- f. judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this matter;
- g. any author or recipient of the discovery material (as indicated, for example, on the face of the document, record, or material); any individual who was in the direct chain of supervision of any author or recipient at the time the discovery material was created or received; any employee or agent of the entity that created or received the discovery material at the time the discovery material was created or received; or anyone representing an author or recipient of the discovery material in this matter; and

h. any other person(s) authorized in writing by the producing party.

8. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone other than the persons listed in paragraph 7 and to in-house counsel for respondent, provided that a declaration in the form attached as Exhibit A is executed. The designated in-house counsel for respondent is Janet Shestakov, Esq., General Counsel of respondent Brown & Toland and Laurence Kessenick, Esq. of Hanson, Bridgett, Marcus, Vlahos, and Rudy, LLP.

9. Restricted Confidential or Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to an expert/consultant unless the expert/consultant agrees in writing:

- a. to maintain the confidentiality of the Restricted Confidential or Confidential Discovery Material;
- b. to return the Restricted Confidential or Confidential Discovery Material to complaint counsel or respondent's outside counsel, as appropriate, upon the conclusion of the expert/consultant's assignment or retention, or upon the conclusion of this matter;
- c. not to disclose the Restricted Confidential or Confidential Discovery Material to anyone, except as permitted by this Protective Order; and
- d. to use the Restricted Confidential or Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a party to this matter, including providing testimony in judicial or administrative proceedings arising out of this matter.

10. Restricted Confidential or Confidential Discovery Material shall not be disclosed to any person described as an expert/consultant under this Protective Order until such person has executed and transmitted to respondent's counsel or complaint counsel, as appropriate, a declaration, in the form attached as Exhibit A. Respondent's counsel and complaint counsel

shall maintain a file of all such declarations for the duration of the matter. Restricted Confidential or Confidential Discovery Material shall not be copied or reproduced for use in this matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this matter, and all such copies or reproductions shall be subject to the terms of this Protective Order.

11. If any party desires to disclose Restricted Confidential or Confidential Discovery Material to any expert/consultant who is not an FTC employee, and who, beyond that person's employment as an expert in this matter, is an officer, director, or employee of any company the primary business of which is in the health plan industry or physician organization industry, or who regularly consults regarding competitive decision making with any company the primary business of which is in the health plan industry or physician organization industry, or who may otherwise have a financial or pecuniary interest, beyond that of a passive, minority investment, in any company the primary business of which is in the health plan industry or physician organization industry, the disclosing party shall notify the producing party of its desire to disclose such material. The notice shall identify the specific expert/consultant to whom the Restricted Confidential or Confidential Discovery Material is to be disclosed. The identification shall include, but not necessarily be limited to, the full name, professional address and/or affiliation, current curriculum vitae of the proposed expert/consultant, and identify all other present and prior employers and/or firms in the health plan industry or physician organization industries for, or on behalf of, that the identified expert/consultant has been employed or done consulting work in the preceding four years. To prevent the disclosure of Restricted Confidential or Confidential Discovery Material to such an expert/consultant, the producing party must, within five business

days of receiving notice, file a motion with the Administrative Law Judge that includes a written statement of the reasons for the objection to disclosure. If the producing party files such a motion, then the disclosing party shall not disclose the Restricted Confidential or Confidential Discovery Material to the identified expert/consultant, absent a written agreement with the producing party or order of the Administrative Law Judge permitting the disclosure. If the producing party does not file such a motion within five business days of receiving notice, then the disclosing party may disclose the Restricted Confidential or Confidential Discovery Material to the identified expert/consultant without providing further notice.

12. If any party desires to disclose a producing party's Restricted Confidential or Confidential Discovery Material to any person other than those referred to in paragraphs 7 and 8 of this Protective Order, the disclosing party shall inform the producing party of its desire to disclose such material. The notice shall identify those materials sought to be disclosed with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to easily locate the materials), and the specific person (by name and business affiliation) to whom the material is to be disclosed. The producing party may object to the disclosure of the Restricted Confidential or Confidential Discovery Material within five business days of receiving notice of an intent to disclose the Restricted Confidential or Confidential Discovery Material to the person by providing the disclosing party with a written statement of the reasons for the objection. If the producing party objects within five business days of receiving notice, the disclosing party shall not disclose the Restricted Confidential or Confidential Discovery Material to the person, absent a written agreement with the producing party or order of the Administrative Law Judge permitting the disclosure. If the producing party

does not object to the disclosure of the Restricted Confidential or Confidential Discovery Material to the person within five business days of receiving notice, the disclosing party may disclose the Restricted Confidential or Confidential Discovery Material to the identified person.

13. If any party seeks to challenge a producing party's designation of material as Restricted Confidential or Confidential Discovery Material, the challenging party shall notify the producing party and all other parties of the challenge. Such notice shall identify with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The producing party may preserve its designation within five business days of receiving notice of the confidentiality challenge by providing to the challenging party and all other parties to this matter a written statement of the reasons for the designation. If the producing party timely preserves its rights, the parties shall continue to treat the challenged material as Restricted Confidential or Confidential Discovery Material, absent a written agreement with the producing party or order of the Administrative Law Judge providing otherwise.

14. If any confidentiality issue arises and the parties involved have failed to resolve the conflict via good-faith negotiations, a party seeking to disclose Restricted Confidential or Confidential Discovery Material or challenging a confidentiality designation may make written application to the Administrative Law Judge for relief. The application shall be served on the producing party and the other party to this matter, and shall be accompanied by a certification that good-faith negotiations have failed to resolve the outstanding issues. The producing party and other party shall have five business days after receiving service to respond to the application. While an application is pending, the parties shall maintain the pre-application status of the

Restricted Confidential or Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the propriety of a requested disclosure or change in designation.

15. The parties shall not be obligated to challenge the propriety of any designation or treatment of information as Restricted Confidential or Confidential Discovery Material and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not otherwise entitled to access under the terms of this Protective Order. If Restricted Confidential or Confidential Discovery Material is produced without the legend attached, the material shall be treated as Restricted Confidential or Confidential from the time the producing party advises complaint counsel and respondent's counsel in writing that the material should be so designated and provides all the parties with an appropriately labeled replacement. The parties shall either return promptly or otherwise destroy the unmarked documents.

16. Counsel for the FTC, respondent, or any producing party shall have the right to exclude from oral depositions any person not authorized to receive Restricted Confidential or Confidential Discovery Material, during periods of examination or testimony relating to Restricted Confidential or Confidential Discovery Material.

17. The production or disclosure of any discovery material, made after entry of this Protective Order, that a producing party claims was inadvertent and should not have been produced or disclosed because of a privilege will not be deemed a waiver of any privilege that the producing party would have been entitled to had the privileged discovery material not

inadvertently been produced or disclosed. In the event of a claimed inadvertent production or disclosure, the following procedures shall be followed:

- a. The producing party may request the return of the discovery material within five business days of discovering that it was inadvertently produced or disclosed, or inadvertently produced or disclosed without redacting the privileged content. A request for the return of any discovery material shall identify the specific discovery material and the basis for asserting that the specific discovery material, or portions thereof, is subject to a claim of privilege and the date of discovery that there had been an inadvertent production or disclosure.
- b. If a producing party requests the return of any such discovery material from another party, pursuant to this paragraph, the party to whom the request is made shall return immediately to the producing party all copies of the discovery material within its possession, custody, or control – including all copies in the possession of experts, consultants, or others to whom the discovery material was provided – unless the party asked to return the discovery material in good faith reasonably believes that the discovery material is not privileged. Such good-faith belief shall be based on either: (1) a facial review of the discovery material; or (2) the inadequacy of any explanations provided by the producing party, and shall not be based on an argument that production or disclosure of the discovery material waived any privilege. In the event that only portions of the discovery material contain privileged subject matter, the producing party shall substitute a redacted version of the discovery material at the time of making the request for the return of the requested discovery material.
- c. Should the party contesting the request to return the discovery material under this paragraph decline to return the discovery material, the producing party seeking the return of the discovery material may move for an order compelling the return of the discovery material. In any such motion, the producing party shall have the burden of showing that the discovery material is privileged, that the privilege was not waived, or that the production or disclosure was inadvertent.

18. If either party receives a discovery request in another proceeding that may require the disclosure of a producing party's Restricted Confidential or Confidential Discovery Material, the recipient of the discovery request shall promptly notify the producing party of receipt of the request. The notice shall be in writing and be received by the producing party at least ten days before production in the other proceeding, and shall include a copy of this Protective Order and a

cover letter apprising the producing party of its rights. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Protective Order to challenge or appeal an order requiring production of Restricted Confidential or Confidential Discovery Material, to subject itself to any penalties for non-compliance with such an order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the producing party's efforts to challenge the discovery request calling for the production by the recipient of the producing party's Restricted Confidential or Confidential Discovery Material. In addition, nothing herein shall limit the applicability of section 4.11(e) of the FTC Rules of Practice, 16 C.F.R. § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

19. In the event that any Restricted Confidential or Confidential Discovery Material is contained in any pleading, motion, exhibit, brief, or other paper filed or to be filed with the Secretary of the Commission, the party filing the papers shall inform the Secretary, and the papers shall be filed under seal. Restricted Confidential or Confidential Discovery Material contained in papers (including Restricted Confidential or Confidential Discovery Material from the parties and third parties) shall remain under seal until further order of the Administrative Law Judge; provided, however, that the papers may be furnished to persons or entities who may receive Restricted Confidential or Confidential Discovery Material pursuant to this Protective Order. After filing any paper containing Restricted Confidential or Confidential Discovery Material, the filing party must file on the public record a duplicate copy of the paper with the Restricted Confidential or Confidential Discovery Material deleted, within five business days of

the original filing. Further, if the protection for any such material ceases, any party may file on the public record a copy that also contains the formerly protected material.

20. If counsel for a party plans to introduce into evidence at trial any document or transcript containing Restricted Confidential or Confidential Discovery Material produced by the other party or by a third party, they shall provide forty-eight hours advance notice before such introduction to the producing party, or as much notice before the introduction as practicable under the circumstances, for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment pursuant to section 3.45 of the FTC Rules of Practice, 16 C.F.R. § 3.45. Except where an order seeking *in camera* treatment is granted, all documents and transcripts shall be part of the public record. If *in camera* treatment is granted, a copy of the document or transcript with the Restricted Confidential or Confidential Discovery Material deleted must be placed on the public record.

21. At the time that any expert/consultant or other person retained to assist counsel in the preparation of this matter concludes participation in this matter, that person shall return to counsel all copies of documents or portions thereof designated Restricted Confidential or Confidential Discovery Material that are in the possession of that person, together with all notes, memoranda, or other papers containing Restricted Confidential or Confidential Discovery Material. At the conclusion of this matter, and upon request of the producing party, the respondent shall return or destroy all documents obtained in this matter that contain or refer to Restricted Confidential or Confidential Discovery Material, other than trial transcripts and trial exhibits offered into evidence (and, if destroyed, shall provide the producing party with an

affidavit of destruction). The FTC shall retain, return, or destroy documents in accordance with the provisions of section 4.12 of the FTC Rules of Practice, 16 C.F.R. § 4.12.

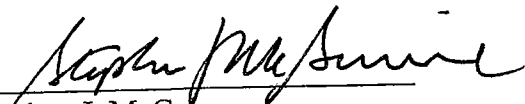
22. The provisions of this Protective Order, insofar as they restrict the communication and use of Restricted Confidential or Confidential Discovery Material, shall, without written permission of the producing party or further order of the Administrative Law Judge hearing this matter, continue to be binding after the conclusion of this matter.

23. This Protective Order shall not apply to the disclosure by a producing party or its counsel of the producing party's Restricted Confidential or Confidential Discovery Material to the producing party's employees, agents, former employees, board members, directors, and officers.

24. Nothing in this Protective Order shall be construed to limit, restrict, or otherwise affect the ability of the parties to seek to modify this Protective Order by application to the Administrative Law Judge for good cause shown.

25. Entry of this Protective Order is without prejudice to the right of the parties or third parties to apply for further protective orders or for modification of any provision of this Protective Order.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Dated: October 24, 2003

EXHIBIT A
TO THE AMENDED PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

CALIFORNIA PACIFIC MEDICAL GROUP, INC., dba
BROWN AND TOLAND MEDICAL GROUP,

a corporation.

Docket No. 9306

DECLARATION CONCERNING THE PROTECTIVE ORDER

I, _____, hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Amended Protective Order Governing Discovery Material"

("Protective Order") issued by Chief Administrative Law Judge Stephen J. McGuire on

_____, in connection with the above-captioned matter. I understand the

restrictions on my access to and use of any Restricted Confidential or Confidential Discovery

Material (as these terms are used in the Protective Order) in this matter and I agree to abide by

the Protective Order.

3. I understand that the restrictions on my use of such Restricted Confidential or

Confidential Discovery Material include:

a. that I will use Restricted Confidential or Confidential Discovery Material only for the purposes of this matter;

- b. that I will not disclose such Restricted Confidential or Confidential Discovery Material to anyone, except as permitted by the Protective Order;
- c. that I will use, store, and maintain the Restricted Confidential or Confidential Discovery Material in such a way as to ensure its continued protected status; and
- d. that upon the conclusion of my involvement in this proceeding, I will promptly return all Restricted Confidential or Confidential Discovery Material, and all notes, memoranda, or other papers containing Restricted Confidential or Confidential Discovery Material, to complaint counsel or respondent's outside counsel, as appropriate.

4. I am aware that, pursuant to section 3.42(h) of the FTC Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

Date: _____

Full Name [Typed or Printed]

Signature