CPMA

California Pacific Medical Associates, Inc.

March 8, 2004

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SECRETARY

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue N.W.
Washington, DC 20580

RE: California Pacific Medical Group, Inc., dba Brown & Toland Medical Group

Dear Commissioners:

We have read with interest the proposed Decision and Order, the Agreement Containing Consent Order to Cease and Desist, and the staff analysis that were sent for public comment regarding the above mentioned Medical Group. While we are gratified with many aspects of the proposed settlement agreement, we ask that the Commission strengthen several parts of it to protect the public interest.

Brown & Toland should not be permitted to continue to benefit from the wrongdoing documented in the Analysis. Brown & Toland should not be permitted to use the fact of existing contracts and the transactions costs to physicians and payors to freeze-in its present anticompetitive advantage. Brown & Toland should not be permitted ever to re-institute its exclusive contractor rule with its physicians, because this will freeze-out more efficient competitors such as us. Brown & Toland should not be permitted to offer its services as a contracting facilitator "for free" (subsidized by its at-risk HMO operations) which puts even its presumptively legal future operations at a competitive advantage over nonprofit organizations such as us, who nevertheless must generate operating revenue from members.

1. <u>Cancellation of existing non-capitated payor agreements</u>

We believe the settlement order should be modified so that Brown & Toland is required to cancel all pre-existing payor agreements (except those contracts under which Respondent Brown & Toland is paid a capitated rate.)

By allowing Brown & Toland to continue these agreements by and large nullifies any penalty that Brown & Toland has to pay for past actions, perpetuates the economic damage done to community and competing organizations, and creates an uneven playing field. If the FTC forces Brown & Toland to terminate all existing PPO agreements, then payors would need to redetermine their strategy for network development. This would lead to greater competition among payors and between physicians.

Mailing Address: 1350 Old Bayshore Highway, Suite 560 Burlingame, CA 94010
(650) 375-5800
Fax: (650) 375-5820 ◆ e-mail: CPMA@pacifichealthalliance.com

Without this additional penalty, many payors will simply take the easiest road, which is continuation of the Brown & Toland network access agreement. Further, because of the market concentration of Brown & Toland in the city, any health plan would be fearful that negotiations on their capitated HMO business would become more difficult and expensive. Thus, they would be reluctant to cancel any PPO arrangement. When such payors are obligated to pay higher rates on Brown & Toland's PPO contracts, Brown & Toland can exert upward pressure on capitated rates because the fee-for-service rates no longer provide an economical fallback option to the payor. This leads to higher prices on both the PPO and HMO side of the business.

2. <u>Issues related to Exclusivity</u>

Currently, the FTC is silent in the Order on the issue of the exclusivity provision that was contained in the Brown & Toland physician contracts. We recognize that in certain economic situations, exclusivity among providers can lead to increased efficiencies. **This is not one of them.**

We believe that the settlement order should be modified so as to prevent Brown & Toland from enforcing or re-establishing any provisions related to exclusivity from its providers. At the same time, they should be expressly prohibited from requiring exclusivity in the market from any of their payor agreements.

Brown & Toland's strong position in the HMO market already makes it difficult for payors to choose another network over Brown & Toland's, and the addition of an exclusivity clause merely serves to increase its market position for both. HMO and PPO.

As the staff analysis notes, the FTC alleges that Brown & Toland's acts and practices have restrained trade unreasonably and hindered competition in the provision of physician services in San Francisco.

Our organization, which abides by the FTC recommended practices, was damaged by the anti-competitive actions of Brown & Toland. When Brown & Toland sent out its physician agreements, it demanded that the physicians cancel all other agreements and become "Exclusive" to Brown & Toland's contracting PPO services. Over 200 physicians believed that they could not remain members of more than one organization and dropped membership in California Pacific Medical Associates (CPMA). When we approached payors for agreements, they indicated that they were concerned that Brown & Toland would drop their HMO agreements if they did not deal exclusively with them.

Recently, it appears that Brown & Toland has sent out letters to its physicians no longer demanding exclusivity. However, without a formal consent order, nothing prevents Brown & Toland from re-establishing these anti-competitive practices.

3. Qualified clinically-integrated joint arrangement

We believe that the Commission should further delineate this issue to prevent what will ultimately cost consumers of health care more money.

The Commission defines acceptable practices which include the establishment of "qualified clinically-integrated joint arrangements." We agree that a certain amount of this does occur in risk-bearing agreements. Further, while referrals can be controlled within an HMO system, PPO benefits are specifically designed to allow both patients and physicians substantial leeway in their referral choices.

However, for Preferred Provider Organization (PPO) agreements, the issue of medical quality and clinical integration are generally not delegated to a medical group. If Brown & Toland purports that it will provide a qualified clinically-integrated joint arrangement, who is going to pay for these services? The only answers are: physicians who comprise their PPO panel, the health plans or it will be subsidized by the group's HMO contracts. In pure economic terms, this leads to increased cost for everyone which will ultimately be passed on to the consumers of health care.

We want the FTC to receive written assurance that there will be no charade or sham activities used to disguise coercive and anti-competitive behavior. For example, the collection of PPO encounter data provides hardly represents interdependence among physicians.

Further, Brown & Toland has recently stated at public meetings that the FTC did not set any "bar" for performance in this area, i.e. that there was no minimum requirement for the number of providers who agree to send encounter information to the group. Unless an appropriately high standard is established, it will be quite simple for Brown & Toland to conduct its business as it has to date, but with the further protection of FTC approval.

4. Subsidization of PPO Activities through HMO revenues

Brown & Toland currently does not charge physicians a fee for participating in its PPO business. It uses funds derived from capitation for administration services to do so. Providers who do not participate in Brown & Toland's PPO contract are therefore "charged" the same amount as those who do, while at the same time having to pay membership dues to belong to competing contracting organizations. This cross-subsidization gives Brown & Toland a substantial advantage in the marketplace and threatens the viability of competing entities which do not have HMO revenues. This results in a very real threat to maintaining competition in the San Francisco marketplace.

We therefore recommend that Brown & Toland be required to segregate the expenses of its PPO operations and require its participating providers to directly fund these activities.

5. Notices of proposed contracts sent to the FTC.

We are pleased with the requirement that the FTC be notified 60 days in advance of contracting activities conducted by Brown & Toland. We would also propose that the organization be required to provide official public notification and publication in local newspaper of any proposed contract.

We are requesting this action because we believe that the public and other parties may have knowledge of activities by Brown & Toland that may not be known to the Commission. We believe that this is in the best interest of competition.

Thank you for considering our recommendations and concerns.

Sincerely,

Robert Kimmich MD /R.

Robert Kimmich, MD
President
California Pacific Medical Associates