AMY L. DOBBERTEEN
Assistant Deputy Director, Bar No. 155111
DEBRA L. DENTON
Assistant Chief Counsel, Bar No. 164482
MICHAEL D. MCCLELLAND
Staff Counsel, Bar No. 204223
CALIFORNIA DEPARTMENT OF
MANAGED HEALTH CARE
980 Ninth Street, Suite 500
Sacramento, CA 95814-7243
Telephone: (916) 323-0435

Attorneys for Complainant
Department of Managed Health Care

FILED
NOV 01 2007
DEPARTMENT OF MANAGED HEALTH CARE
By Lea Burmas
Filing Clerk

BEFORE THE DEPARTMENT OF MANAGED HEALTH CARE
OF THE STATE OF CALIFORNIA

IN THE MATTER OF: Blue Cross of California, Respondent.	Enforcement Matter No.: 07-351 **CEASE AND DESIST ORDER** **(Health & Saf. Code, §§ 1341, 1344, 1341.8, 1367, 1386(b)(7), 1391, & 1391.5)**

To: Blue Cross of California
Wellpoint Health Networks, Inc.
21555 Oxnard Street
Woodland Hills, CA 91367

The Director of the Department of Managed Health Care (the Department), by and through her designee, Assistant Deputy Director Amy L. Dobberteen, after investigation, determines as follows:

I. PARTIES

1. The Director of the Department of Managed Health Care is vested with the responsibility to administer and enforce the Knox-Keene Health Care Service Plan Act of 1975, Health and Safety Code, section 1340 et seq.

2. Blue Cross of California (Blue Cross or the Plan) is a health care service plan licensed under the Knox-Keene Act, license number 933 0303, and is regulated by the Department.

II. STATUTORY AUTHORITY

3. The Knox-Keene Act requires that health care service plans' contracts with providers shall be fair, reasonable, and consistent with the objectives of this chapter. (Health & Saf. Code, § 1367(h)(1).)

4. The Director is empowered to take disciplinary action against a plan which engages in unfair competition, as defined by section 17200 of the Business and Professions Code. (Health & Saf. Code, § 1386(b)(7).)

5. The Knox-Keene Act requires that every health care service plan shall furnish services in a manner providing continuity of care and ready referral of patients to other providers at times as may be appropriate, consistent with good professional practice. (Health & Saf. Code, § 1367(d); and Cal. Code Regs., tit. 28, §§ 1300.67.1, 1300.67.2.)

6. The Director is empowered to enforce compliance with the Knox-Keene Act. (Health & Saf. Code, § 1391.)

7. Where the director has reasonable grounds to believe that irreparable loss and injury to the plan's enrollee or enrollees occurred or may occur as a result of any act or practice unless the director acts immediately, the director may, by written order addressed to that person, order the discontinuance of the unsafe or injurious act or practice.

III. FACTUAL BACKGROUND

8. In or about January 2007, Blue Cross began requiring all physicians and hospitals with whom it contracts or seeks to contract, to execute a Confidentiality Agreement

(Agreement) prior to opening negotiations. (A copy of the agreement is attached hereto and incorporated by this reference as Exhibit A.) The agents, consultants, and attorneys of those physicians and hospitals involved in the negotiations were required to execute the Agreement as well.

9. The Agreement is presented by Blue Cross to physicians and hospitals on a "take it or leave it basis" and its terms are non-negotiable. Blue Cross has further informed these physicians and hospitals that the failure to execute the Agreement forecloses the opportunity to negotiate and eventually contract with Blue Cross.

10. The Agreement prohibits any provider or consultant from disclosing any Confidential Information, defined as: "information and documents, whether in oral, written, electronic, graphic, or other format, containing or reflecting any of the following information related to PLAN and/or any of its affiliates: (a) rates and rate related information, reimbursement and reimbursement related information, content of the negotiations, including, without limitation, any proposals made, terms of the Agreements, financial condition or performance, business operations, plans, strategies or techniques, products or services, pricing, customer information, systems or system strategies, and marketing and distribution plans, methods or techniques; and (b) any analyses, compilations, collections, studies or other documents (in whatever format) which contain or otherwise reflect such information; provided, however, 'Confidential Information' shall not include information that is disclosed by PLAN and/or its affiliates to the general public."

11. The Agreement provides "CONSULTANT represents and warrants that it has fully disclosed to PROVIDER any actual or potential conflicts of interest, and agrees to respond fully and truthfully to any PROVIDER inquiries concerning possible conflicts of interest. CONSULTANT and PROVIDER shall notify PLAN immediately upon discovery of any unauthorized use or disclosure of Confidential Information or any other breach of this Confidentiality Agreement by CONSULTANT, PROVIDER, or any of their directors, officers, employees, or agents. CONSULTANT and PROVIDER

will cooperate with PLAN in every reasonable way to help PLAN regain possession of the Confidential Information and prevent its further unauthorized use or disclosure."

12. The Agreement provides "CONSULTANT and PROVIDER understand that PLAN reserves its right to negotiate only with PROVIDER or to require PROVIDER to be present whenever CONSULTANT engages in negotiations with PLAN."

13. The Agreement requires that any physician or hospital-retained consultant ("Consultant") "disclose to its client-provider any potential conflicts of interest."

14. The Agreement imposes no contractual obligations on Blue Cross.

15. Blue Cross is one of the top five health care plans in California with an approximate enrollment of 4,200,000 enrollees.

16. Blue Cross has manifested an intent to refuse to negotiate with the selected representative of at least one major hospital network providing critical care in the San Francisco, Sacramento, Los Angeles, San Diego and Irvine metropolitan areas.

17. The Department has received complaints from physicians and hospitals concerning Blue Cross' use of the Agreement.

IV. FINDINGS

18. The Director finds that the Agreement is presented to physicians and hospitals on a "take it or leave it" basis, and is presented concurrently with the threat that any physician or hospital which fails to execute the Agreement will not be permitted to negotiate a contract with Blue Cross.

19. The Agreement's definition of Confidential Information is overbroad, ambiguous, and without limit such that the affected physicians and hospitals and their agents, consultants, and attorneys are both restrained from effective bargaining with Blue Cross and provided no notice as to the limits imposed by the Agreement.

20. Blue Cross' market share in California is sufficiently large that the threat of not being permitted to negotiate a contract with Blue Cross presents physicians and

hospitals with an unfair and unreasonable prospect of financial hardship should they refuse to sign the Agreement. The Agreement is offered as a "take it or leave it" contract of adhesion. The Agreement is thus, not a fair and reasonable contract between a plan and provider. (Health & Saf. Code, § 1367 (h)(1).)

21. Blue Cross' market share in California is sufficiently large that the threat of not contracting with physicians and hospitals who refuse to sign the Agreement presents an unjustifiable risk of insufficient provider networks and lack of access to health care for Blue Cross enrollees. (Health & Saf. Code, §§ 1367, subds. (d) & (e)(1), 1342(g).)

22. In the case of physicians, the threat of loss of Blue Cross contracts and Blue Cross patients presents a serious financial hardship. The Agreement's terms, together with the express threat of losing the opportunity to negotiate with Blue Cross, and hence, treating Blue Cross patients, impairs and restrains physicians' practice of their profession, and is an unlawful restraint of trade in violation of California law and public policy. (Bus. & Prof. Code, § 16600.)

23. In the case of hospitals, particularly rural stand-alone hospitals, the threat of loss of Blue Cross contracts and Blue Cross patients presents a serious financial hardship and threatens those hospitals' ability to provide critical care and access to care. The Agreement's terms, together with the express threat of a loss of opportunity to bargain, and hence, treating Blue Cross patients, impairs and restrains the ability of those hospitals to serve their communities, including, but not limited to critical, emergency, and trauma care to underserved populations in contravention of California law and public policy. (Health & Saf. Code, §§ 1317, 1342(g).)

24. By linking contracting with an unfair and unreasonable contract, Blue Cross has created a likelihood of significant losses in its contracted physician and hospital networks and network coverage, particularly in rural and other areas served by stand-alone hospitals. Such losses create an unjustifiable risk to Blue Cross' enrollees' access to health care services. (Health & Saf. Code, § 1367(d); and Cal. Code Regs., tit. 28, §§ 1300.67.1, 1300.67.2.)

25. The object of the Agreement is to impose an unreasonably burdensome contract on physicians and hospitals, and to restrain both physicians and hospitals and their consultants and attorneys in the practice of their trades. The object of the Agreement is therefore unlawful. (Civ. Code, § 1667.)

26. Blue Cross' violation of Health and Safety Code, section 1367(h)(1), Civil Code, section 1667, and Business and Professions Code, section 16600 constitutes an unlawful and unfair business practice. (Health & Saf. Code, § 1386(b)(7); and Bus. & Prof. Code, § 17200 et seq.)

27. The Agreement is permeated with Blue Cross' interference with the physician/hospital-consultant and physician/hospital-attorney relationship. A physician or hospital's freedom to choose their negotiating representatives is a critical facet of fair and reasonable negotiations and, thus, of fair and reasonable contracts between providers and plans.

28. The Agreement's interference in the physician and hospital-consultant relationship is unfair and unreasonable and threatens the policies articulated by the Legislature in Health and Safety Code, sections 1342, 1367. Blue Cross' use of the Agreement thus constitutes an unfair business practice within the meaning of Business and Professions Code, section 17200. (Health & Saf. Code, § 1386(b)(7); and Bus. & Prof. Code, § 17200 et seq.)

29. Blue Cross has evidenced an intent to not negotiate, and hence not contract, with a statewide hospital system providing critical care in major California metropolitan locations and their voluntarily chosen negotiating representative. The coupling of substantively unfair and unreasonable terms with the threat of a loss of contracting presents an unacceptable risk to the Blue Cross enrollees relying on the Blue Cross network for their access to care. Blue Cross' use of the Agreement and the negotiating tactics set forth above create a substantial risk of irreparable loss and injury to the Plan's enrollees, unless discontinued. (Health & Saf. Code, § 1391.5.)

ORDER

THEREFORE, the Director of the Department of Managed Health Care, by and through her designee, Assistant Deputy Director Amy L. Dobberteen, pursuant to Health and Safety Code, section 1391, **ORDERS AS FOLLOWS:**

1. Blue Cross shall cease and desist from requiring any provider or consultant or attorney retained by a provider from executing the Agreement as a condition of entering into contract negotiations with Blue Cross;

2. Within two weeks from the date of this Order Blue Cross shall notify all providers whom it required to execute the Agreement, and who have not in fact executed the Agreement, that the Agreement is not a condition of entering into contract negotiations with Blue Cross.

Dated: November 1, 2007

By: _____
AMY L. DOBBERTEEN
Assistant Deputy Director
Department of Managed Health Care

Exhibit A

Exhibit A

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement ("Confidentiality Agreement") is entered into as of _____ by and between _____ ("PROVIDER"), _____, ("CONSULTANT") on behalf of itself and any and all of its employees, agents and representatives, and _____ and its affiliates (hereinafter "PLAN").

WHEREAS, PLAN and PROVIDER are currently negotiating one or more provider agreements or amendments to existing provider agreements ("Agreements") under which PROVIDER would participate in one or more PLAN provider networks;

WHEREAS, CONSULTANT desires to advise PROVIDER with regard to the Agreements;

WHEREAS, PROVIDER desires CONSULTANT to have the Agreements and certain other information and documentation concerning PLAN that is highly confidential and/or proprietary so that CONSULTANT can provide advice to PROVIDER with regard to the Agreements; and

WHEREAS, because the information and documentation to be released to CONSULTANT is highly confidential and/or proprietary, PLAN requires specific agreement of all parties to the terms and conditions for the handling of and communications related to such information. "Confidential Information" as used in this Confidentiality Agreement shall mean all information and documents, whether in oral, written, electronic, graphic, or other format, containing or reflecting any of the following information related to PLAN and/or any of its affiliates: (a) rates and rate related information, reimbursement and reimbursement related information, content of the negotiations, including, without limitation, any proposals made, terms of the Agreements, financial condition or performance, business operations, plans, strategies or techniques, products or services, pricing, customer information, systems or system strategies, and marketing and distribution plans, methods or techniques; and (b) any analyses, compilations, collections, studies or other documents (in whatever format) which contain or otherwise reflect such information; provided, however, "Confidential Information" shall not include information that is disclosed by PLAN and/or its affiliates to the general public.

NOW, THEREFORE, the parties agree as follows:

1. CONSULTANT shall not use or disclose to any individual or entity, at any time during or subsequent to the conduct of negotiations for the Agreements, any Confidential Information, in whole or in part, except as required in advising PROVIDER with respect to the Agreements. Without limiting the generality of the foregoing, CONSULTANT specifically agrees that it will not use or disclose any Confidential Information, its representation of PROVIDER in negotiations with PLAN, or its knowledge of Confidential Information in any solicitation of business or any attempt to further the

interests of any of its other clients or any other person or entity, including without limitation other health care providers. CONSULTANT shall not use the Confidential Information in any manner that violates state or federal laws or regulations, including, without limitation, laws relating to price-fixing, illegal boycotts and other antitrust laws. This Confidentiality Agreement shall not be construed to authorize or permit use or disclosure of information by CONSULTANT where such use or disclosure is otherwise prohibited (e.g., under the terms of a prior confidentiality agreement).

2. CONSULTANT warrants that the Confidential Information will be kept in strict confidence in accordance with the terms hereof and that CONSULTANT will maintain the confidentiality of the Confidential Information in a manner not less stringent than the highest standards which it employs to protect its own most proprietary and confidential information, but in no event less than a commercially reasonable degree of care.

3. CONSULTANT shall not disclose any Confidential Information to anyone except its employees or agents who need to know such information as required in advising PROVIDER with respect to the Agreements and who are bound in writing by the confidentiality obligations hereunder. CONSULTANT shall be responsible for any breach of this Confidentiality Agreement by its directors, officers, employees and agents.

4. CONSULTANT represents and warrants that it has fully disclosed to PROVIDER any actual or potential conflicts of interest, and agrees to respond fully and truthfully to any PROVIDER inquiries concerning possible conflicts of interest. CONSULTANT and PROVIDER shall notify PLAN immediately upon discovery of any unauthorized use or disclosure of Confidential Information or any other breach of this Confidentiality Agreement by CONSULTANT, PROVIDER, or any of their directors, officers, employees, or agents. CONSULTANT and PROVIDER will cooperate with PLAN in every reasonable way to help PLAN regain possession of the Confidential Information and prevent its further unauthorized use or disclosure.

5. Upon the completion of the contract negotiation, the completion of CONSULTANT's role as representative for PROVIDER, or the request of PLAN, whichever is first, CONSULTANT shall return all Confidential Information, copies thereof, excerpts therefrom, and materials incorporating any Confidential Information, except to the extent Confidential Information is incorporated in CONSULTANT's attorney work product or a confidential and privileged communication between PROVIDER, as client, and CONSULTANT, as lawyer (in which events, all of the obligations set forth in this Confidentiality Agreement shall continue to apply to the Confidential Information in such retained attorney work product and/or confidential and privileged communication documents).

6. The parties hereto acknowledge and agree that any breach of this Confidentiality Agreement will cause serious, immediate and irreparable harm to PLAN. Therefore, in addition to any other legal and equitable remedies, PLAN shall be entitled to specific performance and injunctive relief against any actual, threatened or contemplated violation of this Confidentiality Agreement.

7. Should any party engage an attorney for the purpose of enforcing this Confidentiality Agreement or any judgment based hereon in any court, including bankruptcy court, court of appeals, or arbitration proceeding, the prevailing party shall be entitled to receive its reasonable attorneys' fees and costs in addition to any other relief granted.

8. CONSULTANT and PROVIDER understand that PLAN reserves its right to negotiate only with PROVIDER or to require PROVIDER to be present whenever CONSULTANT engages in negotiations with PLAN.

9. This Confidentiality Agreement shall be governed by and construed in accordance with the laws of the state of California.

10. This Confidentiality Agreement will be binding upon and inure to the benefit of the parties hereto and their respective permitted successors and assigns.

11. This Confidentiality Agreement constitutes the entire understanding and agreement between the parties concerning the subject matters hereof, and supersedes all prior and contemporaneous discussions, agreements and understandings, whether oral or in writing, between the parties concerning the subject matters hereof. This Confidentiality Agreement shall remain in effect for a period of seven (7) years from the date first above written.

12. If any part of this Confidentiality Agreement shall be determined to be invalid, illegal or unenforceable under any legislative act of, or by any regulation duly promulgated by, the United States or a state acting in accordance with the law, or declared null and void by any court of competent jurisdiction or arbitrator, then such part shall be reformed, if possible, to conform therewith and, in any event, the remaining parts of this Confidentiality Agreement shall be fully effective and operative.

13. Nothing in this Confidentiality Agreement is intended to interfere with PROVIDER's right to select or retain a consultant; provided, however, any consultant retained by PROVIDER who receives Confidential Information must first agree to be bound by the terms of this Confidentiality Agreement.

IN WITNESS WHEREOF, the parties hereto have caused their authorized representatives to execute this Confidentiality Agreement as of the date first above written.

CONSULTANT

Signature: _____

Name: _____

Title: _____

PROVIDER:

Signature: _____

Name: _____

Title: _____

PLAN:

Signature: _____

Name: _____

Title: _____