

Complaint

IN THE MATTER OF

NEW MILLENNIUM ORTHOPAEDICS, LLC, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4140; File No. 0310087

Complaint, June 13, 2005--Decision, June 13, 2005

This consent order, among other things, prohibits the respondents from entering into, participating in, implementing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent New Millennium. The order also requires Respondent New Millennium to effect its dissolution within 120 days after the effective date of the order.

Participants

For the Commission: *Gwendolyn Fanger, Sylvia Kundig, Jeffrey A. Klurfeld, Daniel P. Ducore, and Louis Silvia.*

For the Respondents: *Michael DeFrank, Hemmer Spoor Pangburn DeFrank, and William Freedman, Dinsmore & Shohl.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.* (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”), herein sometimes referred to as “Respondents,” have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to

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the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns horizontal agreements among competing orthopaedic physicians in the Cincinnati, Ohio, area to fix prices charged to health plans and third party payors ("payors"), and to refuse to deal with payors. The orthopaedic physicians orchestrated these price-fixing agreements and concerted refusals to deal through NMO, and their conduct had the purpose and effect of raising the prices for physician services in the Cincinnati area.

RESPONDENTS

2. NMO, a single-specialty independent practice association ("IPA"), is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4530 Eastgate Blvd., Cincinnati, Ohio, 45245.

3. Wellington, a twenty-two member, orthopaedic physician group, is a for-profit professional corporation, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4701 Creek Rd., Suite 110, Cincinnati, Ohio, 45242.

4. Beacon, a ten member, orthopaedic physician group, is a for-profit limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 6350 Glenway Ave., Suite 415, Cincinnati, Ohio, 45211.

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JURISDICTION AND INTERSTATE COMMERCE

5. Respondents' general business practices, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Except to the extent that competition has been restrained as alleged herein, Wellington's and Beacon's physician members have been, and are now, in competition with each other for the provision of orthopaedic services in the Cincinnati area for a fee.

BACKGROUND

7. Physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees of payors. Payors may also develop and sell access to networks of physicians. Such payors include, but are not limited to, health maintenance organizations and preferred provider organizations. Physicians entering into such contracts often agree to reductions in their compensation to obtain access to additional patients made available by the payors' relationship with the enrollees. These contracts may reduce the payors' costs and permit them to lower medical care costs, including the price of health insurance and out-of-pocket medical care expenses, for enrollees.

8. Physicians organize their practices under several models, including but not limited to, sole proprietorships, partnerships, limited liability companies, and professional corporations (collectively "physician entities"). Absent agreements among competing physician entities on the terms on which they will provide services to the enrollees of payors, competing physician entities decide unilaterally whether to enter into contracts with payors to provide services to the payors' enrollees, and on what prices and other terms and conditions they will accept under such contracts.

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9. Medicare's Resource Based Relative Value Scale ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Cincinnati area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fees for a particular year (*e.g.*, "110% of 2003 RBRVS").

10. Physician entities often are paid for the services they provide to health plan enrollees either by contracting directly with a health plan or indirectly by participating in IPAs. Some physician entities participating in IPAs share the risk of financial loss with other participants if the total costs of services provided to health plan enrollees exceed anticipated levels ("risk-sharing IPA"). Physicians participating in a risk-sharing IPA also typically agree to follow guidelines relating to quality assurance, utilization review, and administrative efficiency.

NMO'S FORMATION AND PURPOSE

11. In 2002, two orthopaedic physician groups, Wellington and Beacon, formed an IPA, NMO, to act as their negotiating agent with health plans. They each appointed two physicians to serve on NMO's Board of Managers ("Board"). Wellington and Beacon also appointed their own administrators to act as the negotiators on behalf of NMO.

12. Wellington and Beacon, through NMO, agreed on the prices to propose to health plans in negotiating their reimbursement rates. The prices included a guaranteed base fee schedule for all orthopaedic services plus a structure for the payment of bonuses. Under this arrangement, health plans would reimburse participating providers under an RBRVS-based fee schedule for all professional services. In addition to the guaranteed base fee schedule, the arrangement included a bonus

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structure under which all NMO physicians could earn additional reimbursement. All NMO physicians, including non-surgeons, would receive additional percentage points to their reimbursement rates as bonuses, even for office visits and non-surgical procedures, provided that NMO, as a whole, met the established performance targets for increasing the percentage of surgical procedures performed at ambulatory surgery centers (“ASCs”).

13. The ASC bonus scheme solely targeted outpatient surgery, which was only one aspect of the practices of some NMO physicians. Under the ASC bonus scheme, the measured change in the physicians’ behavior was limited to the movement of patients to ASCs. Non-surgeon members of NMO, who accounted for approximately 30% of NMO physicians, lacked the ability to change practice patterns related to ASCs. Thus, the ASC bonus scheme did not act as a substantial incentive for all of the NMO physicians to work together to achieve significant efficiencies for all of their services, which had jointly negotiated rates.

NMO’S HEALTH PLAN NEGOTIATIONS

14. Beginning in August, 2002, representatives of NMO sent letters to representatives of the four (4) major health plans in the Cincinnati area. They proposed an arrangement that would implement the guaranteed base fee schedule and ASC bonus scheme. Only one health plan agreed to NMO’s terms and signed contracts with Wellington and Beacon. Under the jointly negotiated and identical contracts, the health plan paid Wellington and Beacon physicians incentive payments for all of their services if the combined group met targets for diverting surgeries to ASCs and away from hospitals. Under the bonus program, the health plan agreed to pay the physicians an additional 2.5 percentage points to the fee schedules, per benchmark period, if Wellington and Beacon, combined, performed 50%, 60%, 65%, and then 70% of their outpatient procedures at ASCs for each six month period starting from January 1, 2003. The agreement did not require the physicians to reach the initial benchmark before receiving the first

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bonus payment. Rather, the health plan pre-paid the bonus percentage points for each period but could suspend additional increases in the following period if the physicians did not meet the set targets. Accordingly, Wellington and Beacon would retain a minimum 2.5 percentage point increase even if they never met any of their targets.

15. NMO performed no role in enhancing the ability of the physicians to increase the number of procedures performed at ASCs instead of at hospitals. NMO did not implement any enforcement mechanisms to monitor and control the physicians' compliance with the bonus scheme. The bonus scheme, alone, did not affect the NMO physicians' ability to work together to control costs or to improve quality for all jointly negotiated services, including office-based, non-surgical procedures. To a large extent, the scheme was a reward for the physicians' pre-existing practice patterns. Prior to signing the agreement, Wellington physicians performed over 50% of their procedures at ASCs without the incentive of the bonus scheme.

16. NMO continued to attempt to negotiate agreements with the other health plans into 2004. In April, 2004, the health plan that had signed identical agreements, negotiated by NMO, with Wellington and Beacon, also negotiated with NMO for a substitute incentive program for the two groups. The physicians had reached the final target and maximum ASC payout prior to the end of the contract. Instead of receiving bonuses under the ASC scheme, NMO and the health plan agreed that the health plan would pay bonuses to the groups under the health plan's own quality initiative that it had created to enhance preventive care by increasing the number of bone density tests ordered for a target patient population. This bonus program would have been offered to both groups separately, at individually adjusted benchmarks and bonus levels, without NMO's joint negotiation, because the health plan had decided to implement the same incentive plan for all of its contracted orthopaedic physicians in Cincinnati. The health plan alone monitored, measured, and implemented the bone

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density program. NMO played no role in the success of this program.

RESPONDENTS' PRICE FIXING

17. In connection with the formation of NMO, Wellington and Beacon agreed on the base reimbursement rates that they would seek from the health plans through their participation on NMO's Board. In that capacity, they participated in decisions of NMO's Board: (a) to develop the joint ASC bonus scheme proposal for the health plans; (b) to authorize negotiations with payors by NMO representatives aimed at gaining acceptance by the payors of physician fee schedules and prices collectively determined by NMO; and (c) to enter into agreements jointly negotiated by NMO.

18. After NMO collectively negotiated with the health plan on behalf of Wellington and Beacon, both groups agreed to participate in the contract.

RESPONDENTS' HORIZONTAL REFUSAL TO DEAL

19. NMO enforced its joint negotiation efforts with one health plan by a concerted refusal to deal in the absence of contract terms agreeable to NMO. In response to one health plan's refusal to negotiate with NMO during the original negotiations in 2002, NMO's Board agreed that both Wellington and Beacon should terminate their existing, separate agreements with the health plan in order to seek contracts with the health plan through NMO. Both Wellington and Beacon jointly terminated their individual agreements with the health plan at the direction of NMO's Board.

RESPONDENTS' CONDUCT NOT JUSTIFIED

20. Respondents' collective negotiation of fees and other competitively significant contract terms was not reasonably necessary to achieving any efficiency-enhancing integration.

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ANTICOMPETITIVE EFFECTS

21. Respondents' actions described in Paragraphs 11 through 19 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of orthopaedic physician services in the Cincinnati area in the following ways, among others:

- A. price and other forms of competition among NMO's physician members were unreasonably restrained;
- B. prices for orthopaedic physician services in the Cincinnati area have increased or been maintained at artificially high levels; and
- C. health plans, employers, and individual consumers were deprived of the benefits of competition among orthopaedic physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

22. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of June, 2005, issues its Complaint against Respondents NMO, Wellington, and Beacon.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”), herein sometimes referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act (“Act”), as amended, 15 U.S.C. § 45; and

Respondents, their attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

Decision and Order

1. Respondent NMO is a for-profit limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4530 Eastgate Blvd., Cincinnati, Ohio, 45245.
2. Respondent Wellington is a for-profit professional corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 4701 Creek Rd., Suite 110, Cincinnati, Ohio, 45242.
3. Respondent Beacon is a for-profit limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 6350 Glenway Ave., Suite 415, Cincinnati, Ohio, 45211.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Respondent NMO” means New Millennium Orthopaedics, LLC, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by New Millennium Orthopaedics, LLC, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

- B. “ Respondent Wellington” means Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Orthopaedic Consultants of Cincinnati, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “ Respondent Beacon” means Beacon Orthopaedics & Sports Medicine, Ltd., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Beacon Orthopaedics & Sports Medicine, Ltd., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- D. “Respondents” means Respondent NMO, Respondent Wellington, and Respondent Beacon, individually and collectively.
- E. “Medical group practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.
- F. “NMO payor” means any payor who, at any time since January 1, 2002, has communicated to Respondent NMO, or to whom Respondent NMO has communicated, with regard to any desire, willingness, or interest of such payor in contracting for physician services.
- G. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This

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definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”

- H. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. “Payor” includes any person that develops, leases, or sells access to networks of physicians.
- I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- J. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- K. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent, pursuant to Paragraph V.A of this Order, of such payor’s right to terminate such contract.
- L. “Principal address” means either (1) the primary business address, if there is a business address, or (2) the primary residential address, if there is no business address.
- M. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
 - 1. all physicians that participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 - 2. any agreement concerning price or other terms or conditions

of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

- N. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services for a capitated rate from payors;
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors;
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, complexity, or length of treatment, or other factors; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

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II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 - 1. to negotiate on behalf of any physician with any payor;
 - 2. to deal, refuse to deal, or threaten to refuse to deal with any payor;
 - 3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
 - 4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent NMO;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

PROVIDED, HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving, or conduct by, Respondent Wellington or Respondent Beacon that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, or that solely involves providers in the same medical group practice. In any proceeding to enforce this Order, Respondent Wellington or Respondent Beacon shall bear the burden of proof with regard to demonstrating that the challenged agreement or conduct is reasonably necessary to any formation, participation, or action.

III.

IT IS FURTHER ORDERED that Respondent NMO shall:

- A. Within thirty (30) days after the date on which this Order becomes final, cease and desist from all business and all other activities of any nature whatsoever, except those activities that are required in order to comply with the terms of this Order or that are necessary to effect a winding down of Respondent NMO's affairs and its dissolution;
- B. Within thirty (30) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.C below, distribute by first-class mail, return receipt requested, a copy of this Order and Complaint to:
 - 1. each officer, director, manager, and employee of Respondent NMO; and
 - 2. the chief executive officer of each NMO payor; and
- C. Dissolve itself within one hundred twenty (120) days after the date on which this Order becomes final.

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IV.

IT IS FURTHER ORDERED that Respondent NMO shall:

- A. Within ninety (90) days after the date on which this Order becomes final, and prior to the dissolution provided for in Paragraph III.C above, file with the Commission a verified written report demonstrating how it has complied and is complying with this Order;
- B. Prior to its dissolution, notify the Commission at least thirty (30) days prior to any proposed change in Respondent NMO, such as assignment, sale resulting in the emergence of a successor, or any other change in Respondent NMO that may affect compliance obligations arising out of this Order; and
- C. Upon dissolution, provide the Commission with evidence of that dissolution.

IV.

IT IS FURTHER ORDERED that Respondent Wellington and Respondent Beacon shall each:

- D. Within thirty (30) days after the date this Order becomes final:
 - 1. send by first-class mail, with delivery confirmation, a copy of this Order and the Complaint to each of its own physicians who participates, or has participated in Respondent Wellington or Respondent Beacon since January 1, 2002;
 - 2. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to each of its own officers, directors, managers, and employees who had any responsibility regarding Respondent NMO; and

3. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to the chief executive officer of each NMO payor, and include in such mailing the notice specified in Appendix A to this Order;
- E. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor, at the earlier of:
1. receipt by Respondent Wellington or Respondent Beacon of a written request from a payor to terminate such contract; or
 2. the earliest termination date, renewal date (including any automatic renewal date), or anniversary date of such contract, unless the payor provides Respondent Wellington or Respondent Beacon with written affirmation of the contract prior to such termination date, renewal date, or anniversary date, and Respondent Wellington or Respondent Beacon has determined not to exercise any right to terminate under the terms of the contract;
- F. Within ten (10) days from receiving a written request from a payor to terminate, pursuant to Paragraph V.B.1 of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each of its own physicians who participates in Respondent Wellington or Respondent Beacon, as the case may be;
- G. For a period of three (3) years after the date this Order becomes final, distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
- a. each of its own physicians who begins participating in Respondent Wellington or Respondent Beacon for the provision of physician services, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such participation begins;

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- b. each payor that contacts Respondent Wellington or Respondent Beacon regarding the provision of physician services, and which did not previously receive a copy of this Order and the Complaint from Respondents, within thirty (30) days of such contact; and
 - c. each person who becomes an officer, director, manager, or employee of Respondent Wellington or Respondent Beacon, and who did not previously receive a copy of this Order and the Complaint from Respondent Wellington or Respondent Beacon, within thirty (30) days of the time that he or she assumes such status with Respondent Wellington or Respondent Beacon; and
- H. For a period of three (3) years from the date that this Order becomes final, annually publish a copy of this Order and the Complaint in any official annual report or newsletter sent to all physicians who participate in Respondent Wellington or Respondent Beacon, with such prominence as is given to regularly featured articles.

V.

IT IS FURTHER ORDERED that Respondent Wellington and Respondent Beacon shall each file verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, which shall include:

- A. A detailed description of the manner and form in which Respondent Wellington and Respondent Beacon have complied and are complying with this Order;
- B. Copies of the delivery confirmations required by Paragraph V.A.1 of this Order; and
- C. Copies of the return receipts required by Paragraphs V.A.2, V.A.3 and V.D.

VI.

IT IS FURTHER ORDERED that Respondent Wellington and Respondent Beacon shall notify the Commission within thirty (30) days prior to any proposed change in Respondent Wellington or Respondent Beacon, such as change of address, assignment, sale resulting in the emergence of a successor, or any other change in Respondent Wellington or Respondent Beacon that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent Wellington and Respondent Beacon shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in their possession, or under their control, relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to such Respondent, and in the presence of counsel, and without restraint or interference from it, to interview such Respondent or employees of such Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on June 13, 2025.

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Appendix A

[Letterhead of Respondent]

[name of payor's CEO]

[address]

Dear _____:

Enclosed is a copy of a complaint, consent order ("Order"), and consent agreement issued by the Federal Trade Commission against New Millennium Orthopaedics, LLC ("NMO"), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine ("Wellington"), and Beacon Orthopaedics & Sports Medicine, Ltd. ("Beacon").

Pursuant to Paragraph V.B of the Order, you have the right to terminate, without any penalty or charge, any contracts with Wellington or Beacon that were in effect prior to your receipt of this letter. If you do not elect to terminate any contracts with Wellington or Beacon, as set forth above, at the earliest of the termination date, renewal date (including any automatic renewal date), or anniversary date, the contract will terminate UNLESS you elect to affirm the contract in writing. Such affirmation can be provided to Wellington or Beacon at any time prior to the renewal or termination date.

Any request either to terminate or to affirm the contract should be made in writing and sent to me at the following address:

[address]

Sincerely,

[name of Respondent]¹

¹ Neither NMO, Wellington, nor Beacon have admitted any wrongdoing.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with New Millennium Orthopaedics, LLC (“NMO”), Orthopaedic Consultants of Cincinnati, Inc., dba Wellington Orthopaedics & Sports Medicine (“Wellington”), and Beacon Orthopaedics & Sports Medicine, Ltd. (“Beacon”) (collectively, “Respondents”). The agreement settles charges that Wellington and Beacon, through NMO, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements between competing orthopaedic physician groups to fix prices charged to health plans, and to refuse to deal with such health plans except on collectively-determined terms. The proposed Consent Order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Consent Order final.

The purpose of this analysis is to facilitate public comment on the proposed Consent Order. The analysis is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify their terms in any way. Further, the proposed Consent Order has been entered into for settlement purposes only and does not constitute an admission by any respondent that said respondent violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the Complaint are summarized below.

NMO is a single-specialty independent practice association consisting of two orthopaedic physician groups, Wellington and

Analysis

Beacon. Both Wellington, a twenty-two member orthopaedic physician group, and Beacon, a ten-member orthopaedic group, provide orthopaedic physician services, including surgical and non-surgical services, in the Cincinnati, Ohio area.

In 2002, Wellington and Beacon formed NMO to act as their negotiating agent with health plans. Through NMO, they agreed on the prices to propose to health plans in negotiating their reimbursement rates. Beginning in August, 2002, representatives of NMO sent letters to representatives of the four major health plans in the Cincinnati area. They proposed an arrangement that would implement a guaranteed base fee schedule and a bonus scheme. Under the bonus scheme, all NMO physicians would receive higher reimbursement rates for all services provided that NMO, as a whole, met established performance targets for increasing the percentage of surgical procedures performed at ambulatory surgery centers (“ASCs”).

The ASC bonus scheme solely targeted outpatient surgery, which was only one aspect of the practices of some NMO physicians. Under the ASC bonus scheme, the measured change in the physicians’ behavior was limited to the movement of patients to ASCs. Non-surgeon members of NMO, who accounted for approximately 30% of NMO physicians, lacked the ability to change practice patterns related to ASCs. Thus, the ASC bonus scheme did not act as a substantial incentive for all of the NMO physicians to work together to achieve significant efficiencies for all of their services, which had jointly negotiated rates.

The Complaint alleges that NMO performed no role in enhancing the ability of the physicians to increase the number of procedures performed at ASCs instead of at hospitals. NMO did not implement any enforcement mechanisms to monitor and control the physicians’ compliance with the bonus scheme. The bonus scheme, alone, did not affect the NMO physicians’ ability to work together to control costs or to improve quality for all jointly negotiated services, including office-based, non-surgical

procedures. To a large extent, the scheme was a reward for the physicians' pre-existing practice patterns. For example, prior to signing the agreement, Wellington physicians performed over 50% of their procedures at ASCs without the incentive of the bonus scheme.

Only one health plan agreed to NMO's terms. Nonetheless, NMO continued to attempt to negotiate agreements with the other health plans into 2004.

NMO also enforced its joint negotiation efforts with one health plan by a concerted refusal to deal in the absence of contract terms agreeable to NMO. In response to one health plan's refusal to negotiate with NMO during the original negotiations in 2002, NMO's Board agreed that both Wellington and Beacon should terminate their existing, separate agreements with the health plan in order to seek contracts with the health plan through NMO. Both groups subsequently jointly terminated their individual agreements with the health plan at the direction of NMO's Board.

Respondents' collective negotiation of fees and other competitively significant contract terms was not reasonably necessary to achieving any efficiency-enhancing integration. Thus, they violated Section 5 of the FTC Act by orchestrating agreements between competing orthopaedic physician groups to fix prices with health plans, and by refusing to deal with one of the health plans that would not meet those terms.

The Proposed Consent Order

The proposed Consent Order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the complaint while, allowing Wellington and Beacon to engage in legitimate, joint conduct.

The proposed Consent Order's specific provisions are summarized below.

Analysis

Paragraph II.A prohibits Respondents from entering into or facilitating agreements between or among any health care providers: (1) to negotiate on behalf of any physician with any payor; (2) to deal, refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms; or (4) not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent NMO.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A. through II.C.

As in other Commission orders addressing health care providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. Paragraph II does not preclude Wellington and Beacon from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements, as defined in the proposed Consent Order. Also, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice, defined in Paragraph I.E, because it is intended to reach agreements among independent competitors.

Paragraph III requires the dissolution of NMO.

Paragraph IV contains filing and notification requirements related to the dissolution of NMO.

Paragraph V applies only to Wellington and Beacon. It contains notification requirements for Wellington and Beacon. Paragraph V.A requires Wellington and Beacon to send a copy of the Complaint and Consent Order to their physician members who participated in NMO, their management and staff who had any responsibility regarding NMO, and any payors who communicated with NMO, or with whom NMO communicated, with regard to any interest in contracting for physician services. Paragraph V.A.3 also requires Wellington and Beacon to send these payors notice of their right to terminate their agreements with Wellington and Beacon.

Paragraph V.B allows for contract termination if a payor voluntarily submits a request to Wellington and Beacon to terminate its contract. Pursuant to such a request, Paragraph V.B requires Wellington and Beacon to terminate, without penalty, any payor contracts that they had entered into during the collusive period. This provision is intended to eliminate the effects of NMO's joint, price setting behavior. Paragraph V.C requires that Wellington and Beacon each send a copy of any payor's request for termination to every physician who participates in each group.

Paragraph V.D contains notification provisions relating to future contact with physicians, payors, management and staff of each group. Paragraph V.D requires Wellington and Beacon to distribute a copy of the Complaint and Consent Order to each physician who begins participating in each group; each payor who contacts each group regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee of each group for three years after the date on which the Consent Order becomes final.

Paragraph V.E requires Wellington and Beacon to publish a copy of the Complaint and Consent Order, for three years, in any official publication that they send to their participating physicians.

Paragraphs VI-VIII impose various obligations on Wellington and Beacon to report or provide access to information to the

Analysis

Commission to facilitate monitoring their compliance with the Consent Order.

The proposed Consent Order will expire in 20 years from the date it is issued.

Commission Opinion

IN THE MATTER OF

KENTUCKY HOUSEHOLD GOODS CARRIERS
ASSOCIATION, INC.

OPINION OF THE COMMISSION AND FINAL ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9309; File No. 0210115
Complaint, July 8, 2003—Opinion and Final Order, June 30, 2005

In a unanimous Opinion, the Commission concluded that respondent's collective ratemaking activities, in preparing and filing collective tariffs for its members violated Section 5 of the Federal Trade Commission Act. The Commission also determined that the state action doctrine did not apply because the state agency responsible for overseeing the respondent's ratemaking did not actively supervise that activity. The Final Order, among other things, prohibits the respondent from entering into adhering to, or maintaining -- any contract, agreement, understanding, plan, program, combination, or conspiracy to fix, stabilize, raise, maintain, or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods, or equipment ("intrastate transportation"). These prohibited practices include but are not limited to knowingly preparing, developing, disseminating, or filing a proposed or existing tariff that contains collective rates for intrastate transportation, and preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers. The Final Order also requires the respondent to cancel and withdraw all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish intrastate transportation rates by common carriers in the Commonwealth of Kentucky, and to amend its by-laws to require its members to observe the provisions of this Order as a condition of membership in KHGCA.

Participants

For the Commission: *Dana C. Abrahamsen, Peggy Bayer Femenella, Harry Schwirck, Ashley Masters, Patrick J. Roach, Geoffrey D. Oliver, Richard B. Dagen, and John Howell.*

For the Respondents: *James C. McMahon and Kevin P. Kelly, McMahon & Kelly.*