

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

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) **DOCKET NO. C-4140**

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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:

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 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.

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.

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.

V.

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

- A. 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;
- B. 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;
- C. 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;
- D. 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;

- 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
- E. 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.

VI.

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.

VII.

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.

VIII.

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.

IX.

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

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: June 13, 2005

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.