

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

In the Matter of)	
)	
NEW MILLENNIUM ORTHOPAEDICS, LLC,)	DOCKET NO.
a limited liability company,)	
)	
ORTHOPAEDIC CONSULTANTS OF)	
CINCINNATI, INC., dba)	
WELLINGTON ORTHOPAEDICS & SPORTS)	
MEDICINE,)	
a professional corporation, and)	
)	
BEACON ORTHOPAEDICS & SPORTS)	
MEDICINE, LTD.,)	
a limited liability company.)	
)	

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 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.

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.

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 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 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 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.

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 _____ day of _____, 2005, issues its Complaint against Respondents NMO, Wellington, and Beacon.

By the Commission.

Donald S. Clark
Secretary

SEAL