

IN THE MATTER OF

SPINAL HEALTH SERVICES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-3122. Complaint, Oct. 13, 1983—Decision, Oct. 13, 1983*

This consent order requires two Florida chiropractors and the two companies which they operate, among other things, to cease representing without competent and reliable scientific tests or evidence, that their "laser face lift" or "biostimulation face lift" will reduce, smooth out or remove facial lines, depressions and wrinkles, or otherwise give the recipient a more youthful facial appearance; or that their cosmetic treatment will provide as long-lasting an improvement as that of a surgical face lift. The order also requires that respondents retain documentation substantiating claims for a period of three years, and provide its sales and advertising personnel with a copy of the order and an acknowledgement form.

Appearances

For the Commission: *Matthew Daynard.*

For the respondents: *Roger W. Calton, Kansas City, Mo.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Spinal Health Services, Inc., a corporation, Laser Toning Center, Inc., a corporation, Fred J. Gehl, D.C. and Samuel Lux, D.C., hereinafter referred to as respondents, have violated the provisions of that Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint. For purposes of this complaint, the following definitions shall apply:

A. *Commerce* means commerce as defined in the Federal Trade Commission Act (15 U.S.C. 44).

B. *Class II laser device* means a Class II laser device as defined in regulations promulgated by the United States Food and Drug Administration, Performance Standard for Laser Products, 21 CFR 1040.10.

C. *Class III device* means a Class III medical device as defined in the Food, Drug and Cosmetic Act, 21 U.S.C. 360c.

PARAGRAPH 1. Respondent Spinal Health Services, Inc. ("SHS") is

a Florida corporation with its principal place of business located at 6800 NW 169th Street, Miami, Florida.

Respondent Laser Toning Center, Inc. ("LTC"), doing business as the Laser Facial Toning Center, is a Florida corporation with its principal place of business located at 1029 Kane Concourse, Bay Harbor Islands, Florida.

Respondent Fred J. Gehl, D.C. is a licensed chiropractic physician under Florida laws. His principal place of business is located at 7160 SW 62nd Avenue, Miami, Florida. He also conducts business at the same address as LTC.

Respondent Samuel Lux, D.C., is a licensed chiropractic physician under Florida laws. His principal place of business is located at 2072 North University Drive, Pembroke Pines, Florida.

PAR. 2. Respondent Gehl is an officer or director of SHS and LTC, and, individually or in concert with others, formulates, directs and controls the acts and practices of SHS and LTC.

Respondent Lux is an officer of SHS, and, individually or in concert with others, formulates, directs and controls the acts and practices of SHS.

PAR. 3. Each of the respondents advertises or promotes, offers for sale, and sells to the public non-surgical facial cosmetic treatment programs. Respondents represent that these treatment programs produce significant, long-lasting changes in the facial appearance of recipients by reducing, smoothing out, or removing facial lines, depressions and wrinkles. Respondents sometimes refer to the treatment programs as laser "facelifts", or "biostimulation facelifts." A treatment program typically consists of about 12 to 20 weekly (or bi-weekly) applications, for a period of about 15 to 30 minutes each, of a beam of light from a Class II laser device on specified facial points, facial lines, depressions and wrinkles, and other facial areas. Respondents recommend additional applications every 3 to 4 months following the initial treatment program. The laser used by respondents is classified by the United States Food and Drug Administration as an experimental Class III device under the Food, Drug and Cosmetic Act (21 U.S.C. 360c).

PAR. 4. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional material, including but not limited to the advertising referred to herein, to promote the sale of their laser facelift treatment programs. The laser used by respondents is classified by the United States Food and Drug Administration as an experimental Class III device under the Food, Drug and Cosmetic Act (21 U.S.C. 360c).

PAR. 5. Respondents maintain and have maintained a substantial course of business in or affecting commerce.

PAR. 6. In the course and conduct of their businesses and for the purpose of promoting the sale of their laser facelift treatment programs, respondents have disseminated and caused the dissemination of advertisements in newspapers and magazines distributed interstate by United States mail, in brochures, pamphlets and other promotional materials disseminated through the United States mail, and in commercial radio broadcasts having sufficient power to carry such broadcasts across state lines.

PAR. 7. Typical statements and representations made by respondents in advertisements and other written promotional materials and in oral presentations, but not necessarily inclusive thereof, are the following:

1. Facelift Without Surgery—the cold laser beam (or biostimulation) facelift is an attractive alternative for those wishing to look younger.
2. Non-Surgical Facelift—designed by doctors, is only 1/3 to 1/10 the cost of a surgical facelift.
3. This facelift will last approximately as long as the surgical kind; periodic booster treatments can greatly enhance the longevity of results obtained.
4. Look years younger—this treatment will flatten lines, pull up sagging bags and skin.

PAR. 8. By and through the use of the statements and representations set forth in Paragraph Seven and others of similar import and meaning, but not expressly set forth herein, respondents have represented, directly or by implication, that:

1. The laser treatments offered by respondents reduce, smooth out, or remove facial lines, depressions and wrinkles, and result in a non-surgical facelift; and
2. Respondents' laser treatments provide long-lasting improvement in recipients' facial appearance, or improvement lasting about as long as that of a surgical facelift.

At the time these representations were made, respondents possessed and relied upon no reasonable basis for the above representations. Therefore, the dissemination and making of the representations as alleged constituted, and now constitute, deceptive acts or practices in or affecting commerce.

PAR. 9. The acts or practices, as herein alleged, have had, and now have, directly or by implication, the capacity and tendency to deceive members of the public, and to induce the purchase of respondents' laser treatment programs.

PAR. 10. The described acts or practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, deceptive acts or practices in or af-

fecting commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Spinal Health Services, Inc., Laser Toning Center, Inc., Fred J. Gehl, D.C., and Samuel Lux, D.C., respondents, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the described draft of complaint, a statement that the signing of the described agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, 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 the respondents have violated the Federal Trade Commission Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed it on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Spinal Health Services, Inc. ("SHS") is a Florida corporation with its principal place of business located at 6800 NW 169th Street, Miami, Florida.

Respondent Laser Toning Center, Inc. ("LTC"), doing business as the Laser Facial Toning Center, is a Florida corporation with its principal place of business located at 1029 Kane Concourse, Bay Harbor Islands, Florida.

Respondent Fred J. Gehl, D.C. is a licensed chiropractic physician under Florida laws. His principal place of business is located at 7160 SW 62nd Avenue, Miami, Florida. He also conducts business at the same address as LTC.

Respondent Samuel Lux, D.C. is a licensed chiropractic physician

under Florida laws. His principal place of business is located at 2072 North University Drive, Pembroke Pines, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

1. *It is ordered*, That respondents Spinal Health Services, Inc. and Laser Toning Center, Inc., corporations, their successors and assigns, and their officers, and respondents Fred J. Gehl, D.C. and Samuel Lux, D.C., individually (and as officers or directors of said corporations), and respondents, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale, directly or indirectly, of nonsurgical facial cosmetic treatments involving the use of a laser device to reduce, smooth out, or remove facial lines, depressions and wrinkles, or otherwise give recipients a more youthful facial appearance, shall cease and desist from representing, orally or in writing, directly or by implication, (1) that such cosmetic treatment is effective for facelifts, or reduces, smooths out, or removes facial lines, depressions or wrinkles or otherwise gives recipients a more youthful facial appearance, or (2) that such cosmetic treatment provides long-lasting improvement in recipients' facial appearance or provides improvement that will last about as long as that of a surgical facelift, unless, at the time such claims are first made, respondents possess and rely upon adequate substantiation that provides a reasonable basis for the representations, which substantiation shall consist of a competent and reliable scientific test or other competent and reliable evidence; and

2. *It is further ordered*, That respondents maintain and produce for inspection by Federal Trade Commission staff members upon reasonable notice all documents constituting the reasonable basis required by Paragraph 1. of this order. Such records shall be maintained by respondents for a period of three (3) years from the date on which any such representations were last made.

3. *It is further ordered*, That respondents distribute a copy of this order to present or future employees, agents or representatives having advertising, promotion, sales, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of the order.

4. *It is further ordered*, That each corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in

the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

5. *It is further ordered*, That, for a period of 10 years from the date of service of this order, each individual respondent promptly shall notify the Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment involving cosmetic treatment. Each notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

6. *It is further ordered*, That each respondent shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form of compliance with this order.

IN THE MATTER OF

BRISTOL-MEYERS COMPANY, ET AL.

Docket 8917. Interlocutory Order, Opinion, Oct. 14, 1983

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner*:

Respondent, Bristol-Myers Company ("Bristol") has filed a petition for reconsideration asking that the Commission delete two paragraphs of the order entered against it on July 5, 1983 [102 F.T.C. 21]. Bristol asserts that Paragraph II of the order places the company at a competitive disadvantage and is excessively vague and not reasonably related to the violations giving rise to it. Bristol contends Paragraph III-A should be deleted because our order dismissed all the claims on which it was premised. In addition, Bristol asserts that marketplace changes have eliminated entirely the need for the kind of relief ordered in the two provisions. For the reasons stated below, the petition is denied in its entirety.

Paragraph II

Paragraph II of our order reads in pertinent part:

*It is * * * ordered,* That respondent Bristol-Myers * * * do forthwith cease and desist from making any therapeutic performance or freedom from side effects claim for ["Bufferin", "Excedrin", or any other nonprescription internal analgesic] unless respondent possesses a reasonable basis for making that [2] claim. A reasonable basis for such a claim shall consist of competent and reliable scientific evidence supporting that claim. Well-controlled clinical tests conducted in accordance with the criteria set forth in Order Paragraph I shall be deemed to constitute a reasonable basis for a claim.

Bristol contends that Paragraph II places it at an unwarranted competitive disadvantage vis-a-vis its competitor, American Home Products Corporation ("AHP"), because a "virtually identical" provision in the order we entered against AHP (Paragraph II(D)) was deleted by the Third Circuit on AHP's petition for review. *See American Home Products Corp. v. FTC (AHP)*, 695 F.2d 681, 710-711 (3d Cir. 1982).

Preliminarily, we disagree that the two provisions are "virtually identical". The provision deleted on AHP's petition for review was directed to noncomparative representations of effectiveness or freedom from side effects of all over-the-counter drugs. By contrast, Paragraph II of the order in this case applies only to claims concerning the company's internal analgesics. It was this greater breadth of the AHP order that constituted one of the Third Circuit's objections to it.