

Complaint

106 F.T.C.

IN THE MATTER OF
MONTANA BOARD OF OPTOMETRISTS

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

Docket C-3161. Complaint, Aug. 29, 1985—Decision, Aug. 29, 1985

This consent order requires the Montana Board of Optometrists (the Board), among other things, to cease adopting or maintaining any rule, regulation, policy or course of conduct that has the effect of prohibiting, restricting, or discouraging any qualified person from advertising price-related terms or claims of professional superiority; and declaring such advertising to be illegal, unethical, or unprofessional. The Board is barred from taking or threatening disciplinary action against any individual or organization that advertises price-related terms and claims of professional superiority; and from inducing or assisting others to take any of the prohibited actions. The Board is additionally required to distribute a copy of the order and an explanatory announcement to all optometrists licensed to practice in Montana; and provide such material to all those applying for a license for a period of five years.

Appearances

For the Commission: *Cynthia Wicker.*

For the respondent: *Geoffrey Brazier*, Montana State Department of Commerce, Helena, Mont.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended*, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, ("Commission"), having reason to believe that the Montana Board of Optometrists ("Board") has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

RESPONDENT

1. Respondent Montana Board of Optometrists is organized, exists and transacts business under the laws of the State of Montana, with its principal office and place of business located at The Department of Commerce, 1424 9th Avenue, Helena, Montana. Mont. Code Ann. Titles 2 and 37. The Board is subject to the Commission's jurisdiction

2. The Board is composed of four members: three optometrists and a public member. Board members are appointed to four year terms by the Governor of the State of Montana, with the consent of the state senate. Mont. Code Ann. § 2-15-1846.

3. When making appointments to the Board, the governor may consider the recommendations of private associations. Mont. Code Ann. § 37-1-132.

4. The governor often appoints to the Board optometrists who are members of the Montana Optometric Association. All of the current Board members who are optometrists are members of the Montana Optometric Association.

5. The Board is the sole licensing authority for optometrists. It is unlawful to practice optometry in Montana unless licensed by the Board. Mont. Code Ann. § 37-10-301(1)(a).

6. The Board is responsible for establishing standards and rules governing the licensing, certification, registration, and conduct of optometrists in the state, so long as such standards and rules are consistent with state law. Mont. Code Ann. §§ 37-1-131(1) and 37-10-202(1). The Board is further authorized to discipline persons who violate its rules or the state laws relating to the practice of optometry. These disciplinary actions include, but are not limited to, revocation, suspension, limitation, or restriction of a license to practice optometry in Montana. Mont. Code Ann. § 37-1-136.

7. While serving their membership terms, members of the Board who are optometrists must engage in the "exclusive practice" of optometry in Montana. Mont. Code Ann. § 2-15-1846. Board members spend a relatively small percentage of their time on Board matters, and compensation is limited to \$50.00 per day of actual service. Mont. Code Ann. § 37-1-133.

8. Except to the extent that competition has been restrained as alleged herein, optometrists compete with one another and Board members who are optometrists compete with other optometrists they regulate.

9. In the conduct of their business, optometrists in Montana advertise in media having interstate circulation, receive and treat patients from other states, receive substantial sums of money that flow across state lines from the federal government and from private insurers for rendering optometric services, prescribe or administer medicines that are shipped in interstate commerce, and use supplies and equipment that are shipped across state lines. The acts and practices described below are in interstate commerce, or affect these and other interstate activities, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act. 15 U.S.C. 45(a)(1).

STATE POLICY FAVORING TRUTHFUL, NONDECEPTIVE
ADVERTISING BY OPTOMETRISTS

10. Since at least 1981 the State of Montana has had a clearly articulated policy protecting the dissemination of truthful, nondeceptive, information about optometric goods and services.

11. The Montana State Law relating to advertising by optometrists is contained in Title 37, Chapter 10 of the Montana State Code. Prior to 1981 Montana banned the advertising of optometric goods and services "at a price or stated terms of a price or as being free." Mont. Code Ann. § 37-10-301(1)(k). In 1980 the Office of the Legislative Auditor, acting under the dictates of the Montana Sunset Law of 1977, reviewed the Montana Board of Optometrists. At the conclusion of that review, the Legislative Auditor reported to the Legislative Audit Committee of the Montana State Legislature that the above statute appeared to be unconstitutional.

12. The Montana Legislative Audit Committee subsequently recommended the introduction of a bill repealing Section 37-10-301(1)(k). That bill passed, and became effective April 29, 1981.

13. The statute states that "(t)his chapter does not prohibit legitimate or truthful advertising by a registered optometrist." Mont. Code Ann. § 37-10-311(i). Title 37, Chapter 10's restrictions on optometric advertising are now limited to "advertis[ements] in which ambiguous or misleading statements are made," and "the use in advertising of the expression 'eye specialist' or 'specialist in eyes' in connection with the name of an optometrist." Mont. Code Ann. § 37-10-311(h) & (i).

14. State law limits the Board's rulemaking authority to rules "not inconsistent with the provisions of [Chapter 10]." Mont. Code Ann. § 37-10-202.

BOARD CONDUCT

15. In direct violation of the state policy protecting truthful advertising the Board has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to unreasonably restrain trade by preventing the dissemination of truthful, nondeceptive, information about ophthalmic goods and services. In furtherance of this combination or conspiracy the Board has adopted:

A. Rule 8.36.407(2), which declares that it constitutes unprofessional conduct to advertise:

1. Free eye examinations;
2. Any stipulated amount of money as down payment, or that no down payment is required;

4. The terms "credit," or "installment," or any "similar word."

B. Rule 8.36.406(f), which bans an optometrist from making claims of professional superiority or of having equipment others cannot obtain.

16. The Board has furthered this combination or conspiracy by using these rules, and other means, to coerce individuals to abandon their efforts to disseminate truthful information about the nature and quality of ophthalmic goods and services.

17. In addition, the Board issued at least two cease and desist orders, in which it cited a Board rule forbidding optometric advertisements containing the terms "Contact Lens Clinic" and "Vision Center" after that rule had been repealed.

18. By these and other means the Board has continued its course of conduct, despite the fact that in 1979 the Montana Attorney General advised it that the above described regulations violate state and federal antitrust laws, and recommended that the Board repeal the regulations.

CONSUMER AND COMPETITIVE INJURY

19. The acts and practices described above have restrained and continue to restrain competition unreasonably and injure consumers in the following ways, among others:

A. Consumers and potential consumers of ophthalmic goods and services are deprived of the benefits of vigorous competition;

B. Consumers and potential consumers are deprived of truthful information about free eye examinations or consultations;

C. Consumers and potential consumers are deprived of truthful information about credit and payment terms for ophthalmic goods and services;

D. Consumers and potential consumers are deprived of truthful information about differences in skills, training and experience among optometrists, and the services they provide;

E. Optometrists are prevented from disseminating truthful information about their fees, credit and payment terms;

F. Optometrists are prevented from disseminating truthful information about their skills, training and experience, and the services they provide; and

G. Optometrists in general are unreasonably restrained from competing in the market for optometric goods and services, and new optometrists in particular are confronted by artificial barriers to entry into the market.

20. The acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section

5 of the Federal Trade Commission Act. The acts and practices are continuing and will continue absent the entry of an order for appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of the draft 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 respondent with violation of the Federal Trade Commission Act; and

The respondent, its counsel and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and also containing 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 respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. The respondent is organized, exists and transacts business under the laws of the State of Montana, with its principal office and place of business located at Department of Commerce, 1424 9th Avenue, Helena, Montana.

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

ORDER

For the purposes of this order, the following definitions shall apply:

A. *Board* shall mean the Montana Board of Optometrists, its succes-

B. *Disciplinary action* shall mean:

1. The refusal to grant, or the restriction, revocation or suspension of, a license to practice optometry in Montana; the refusal to admit a person to examination for a license to practice optometry; the issuance of a formal or informal warning, reprimand, censure, or cease and desist order against any person or organization; or the imposition of a fine, probation, or other penalty or condition; or

2. The initiation of an administrative, criminal, or civil court proceeding against any person or organization.

C. *Price-related terms* are terms that refer to:

1. Free eye examinations;

2. Down payments, or any stipulated amount of money as a down payment, or any indication that no down payment is required;

3. Periodic payments, or any stipulated amount of money as periodic payments;

4. Credit, installment, or any other term relating to deferred payments.

D. *Professional superiority* shall mean any truthful claim of specialization, skill, equipment, treatment, training, experience or service offered, or any other information that would tend to distinguish an advertiser's practice from other ophthalmic practices.

I.

It is ordered, That the Montana Board of Optometrists, its officers, agents, committees, representatives, employees, successors, and assigns, directly or indirectly, through any device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, impeding, or discouraging any person from advertising or publishing the prices, terms or conditions of sale for any ophthalmic service or product offered for sale or made available by any person or organization that may lawfully offer the service or product. Such actions include, but are not limited to:

1. adopting or maintaining any rule, regulation, policy, or course of conduct that has the purpose or effect of prohibiting, restricting, or discouraging any person from advertising price-related terms or claims of professional superiority;

2. taking or threatening to take any disciplinary action against any person or organization for advertising price-related terms or claims of professional superiority;

3. declaring it to be an illegal, unethical, unprofessional, or otherwise improper practice for any person or organization to advertise price-related terms or claims of professional superiority; and

B. Inducing, urging, encouraging or assisting any optometrist or any optometric association, group of optometrists, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this part.

Provided, That, nothing contained in this part shall prohibit the Board from formulating, adopting, disseminating and enforcing reasonable rules or taking disciplinary or other action to prohibit: (1) advertising that uses the expression "eye specialist" or "specialist on eyes" in connection with the name of an optometrist; or (2) advertising in a manner that the Board reasonably believes is ambiguous or misleading within the meaning of Mont. Code Ann. § 37-10-311(2)(h) & (i).

Provided further, That, this order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the practice of optometry.

II.

It is further ordered, That the Board shall:

A. Distribute by first-class mail a copy of the announcement attached hereto as Appendix A and a copy of this order:

1. to each person presently licensed to practice optometry in Montana, and to each person who has on the date of service of this order a pending application for such a license, within thirty (30) days after the date of service of this order; and

2. for a period of five (5) years after the date of service of this order, to each person who hereafter applies for a license to practice optometry in Montana, within thirty (30) days after such person applies for the license;

B. For a period of five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, copies of all records relating to advertising, including but not limited to, written communications, and any summaries of oral communications to or from the Board regarding the offering, publishing or advertising of information about ophthalmic services;

C. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the practice of optometry in Mon-

such as the complete or partial elimination of that authority, the complete or partial assumption of that authority by another governmental entity, or the dissolution of the Board;

D. Within sixty (60) days after the date of service of this order, submit to the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which the Board has complied with this order.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Montana Board of Optometrists has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that the Board may not prohibit optometrists from truthfully advertising their services. The Board may not (1) adopt or maintain rules, regulations, or policies that prohibit truthful advertising of price-related terms and claims of professional superiority with respect to the sale of optometric services, (2) take disciplinary action (such as the suspension or revocation of a certificate of license) or threaten disciplinary action against any person or organization so advertising or (3) declare it to be illegal or unethical for persons to so advertise. The Board is also prohibited from encouraging any optometrist or any professional group or association to take actions that the order prohibits the Board from taking. The order does not affect the Board's authority to prohibit and discipline licensees for advertising that is ambiguous or misleading.

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed. Further information may be obtained from the FTC by calling Jack L. Young at (202) 523-3596.

[Title]

Montana Board of Optometrists

IN THE MATTER OF

ORANGE COUNTY BOARD OF REALTORS, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3162. Complaint, Sept. 9, 1985—Decision, Sept. 9, 1985

This consent order requires, among other things, that an Orange County, N.Y. Board of Realtors and its wholly-owned subsidiary, which provide a multiple listing service for its member real estate brokers, cease restricting or interfering with any broker's offering or acceptance of an exclusive agency listing or with the publishing of such listing on the multiple listing service. The companies are further required to publish exclusive agency listings in a non-discriminatory manner, and to timely amend their by-laws, rules and regulations, and other materials to conform to the provisions of the order.

Appearances

For the Commission: *L. Barry Costilo, Jacques Feuillan and Alan J. Friedman.*

For the respondents: *James R. Loeb, Rider, Drake, Summers & Loeb, Newburgh, New York.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents Orange County Board of Realtors, Inc., and Multiple Listing Service of the Orange County Board of Realtors, Inc., have violated and are violating Section 5 of the Federal Trade Commission Act, 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 as follows:

1. As used in this complaint:

a. *Member or member firm* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondents.

b. *Listing* shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

c. *Exclusive right to sell listing* shall mean any listing under which