

Complaint

106 F.T.C.

IN THE MATTER OF
OKLAHOMA OPTOMETRIC ASSOCIATION

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

Docket 9191. Complaint, Feb. 28, 1985—Decision, Nov. 19, 1985

This consent order requires the Oklahoma Optometric Association, among other things, to cease prohibiting any member optometrist from: affiliating with or operating franchises; operating branch offices; or truthfully advertising the prices, terms and availability of optometric services or optical goods.

Appearances

For the Commission: *Toby G. Singer, Raymond L. Randall and Alan R. Soudakoff.*

For the respondent: *Daniel J. Gamino, Daniel J. Gamino & Associates, P.C., Oklahoma City, Okla.*

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, having reason to believe that the named respondent has violated the provisions of 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:

PARAGRAPH 1. Respondent Oklahoma Optometric Association is a corporation formed pursuant to the laws of the State of Oklahoma, with its mailing address at 4545 N. Lincoln Blvd., Suite 173, Oklahoma City, Oklahoma.

PAR. 2. Respondent is a professional association organized in substantial part to represent the interests of optometrists who practice in Oklahoma and the profession of optometry in Oklahoma. Respondent has approximately 300 members, constituting approximately ninety percent of the practicing optometrists in Oklahoma. A significant portion of respondent's activities furthers its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

viding optometric care or services for a fee. Some are also engaged in the sale of optical goods and devices. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves.

PAR. 4. In the conduct of their business, respondent's members: receive substantial sums of money, which monies flow across state lines, from the federal government and from private insurers for rendering optometric services; prescribe and sell optical goods and devices that are shipped in interstate commerce; receive and treat patients from other states; and use supplies and equipment that are shipped across state lines. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third parties who pay for optometric services, other third parties, and some patients of respondent's members, 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)).

PAR. 5. The practice of optometry is defined by Oklahoma law as the science and art of examining the human eye and measurement of the powers of vision by the employment of any means, including, among other things, diagnosis of conditions of the human eye, the employment of visual training and orthoptics, and the correcting and relief of ocular abnormalities by means including prescribing and adaption of lenses, contact lenses, and eyeglasses. Oklahoma law also provides that a lay person may, pursuant to a written prescription of a licensed optometrist or physician, adapt, provide, and sell optical goods and devices, including lenses and eyeglasses, without a license to practice optometry.

PAR. 6. In Oklahoma, most optometric services have traditionally been provided by private optometrists practicing from a single office location. Most of these optometrists have also sold optical goods and devices such as prescription eyeglass lenses, eyeglass frames, contact lenses, and accompanying paraphernalia from a separate room or area within their office. Most have engaged in little or no advertising of competitive aspects of their services.

PAR. 7. Some optometrists do not sell optical goods and devices in their professional offices. These optometrists either have chosen not to sell such goods or have chosen to sell them from a location that is separate and distinct from their professional office but usually located near it. This method of selling, used by a small number of optometrists in Oklahoma, is often conducted under a franchise arrangement with a national seller of optical goods and devices. For the purposes of this complaint, "franchise arrangement" shall mean an arrangement to market and sell optical goods and devices under the trade name of a franchisor from a location other than a licensed optome-

trist's professional office where optometric services are provided. The franchised retail optical store will, like other optical goods sellers, sell to any person who brings in a valid prescription or request for available optical goods and devices.

PAR. 8. For various reasons, including their scale of operation, franchised retail optical stores are often able to provide quality optical goods and devices at prices lower than those generally charged for comparable items by independent optometrists or opticians in the local area.

PAR. 9. Branch offices permit an optometrist to provide optometric services from more than one location. Where branch offices exist, optometrists can increase consumer access to optometric care, and operating efficiencies can be achieved. Optometrists do not have branch offices in Oklahoma.

PAR. 10. In selecting an optometrist, consumers consider factors such as quality of service, price and other terms of sale, reputation, experience, and convenience. Advertising, including comparative advertising and advertising of guarantees and refund policies, enables optometrists to inform consumers about these factors. Such advertising benefits consumers by increasing the information available to them and promoting competition among optometrists.

PAR. 11. Respondent has restrained competition in the delivery of optometric services and the sale of optical goods and devices in Oklahoma by acting as a combination of at least some of its members, or by combining and conspiring with at least some of its members, to restrict the use of franchise and branch office arrangements and to restrict dissemination by optometrists of truthful information to consumers. In particular, respondent has combined or conspired to:

A. Prohibit, restrict, or coerce its members from selling, or offering to sell, optical goods and devices to the public through any franchise arrangement;

B. Prohibit its members from providing optometric services from a separate or branch office; and

C. Restrict its members' ability to engage in certain kinds of truthful advertising, non-deceptive marketing, and dissemination of information to consumers.

PAR. 12. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Declaring that optometrists who are affiliated with a franchise arrangement are engaging in an unethical and objectionable "mode of practice";

B. Summarily suspending from membership optometrists who are

affiliated with a franchise arrangement, despite having no reason to believe that any of these members were engaged in "capping and steering" or any other deceptive practice, and although none of the suspended members has been charged with, or found liable for, any violation of any Oklahoma law with regard to his or her affiliation with the franchise arrangement;

C. Adopting and maintaining a rule prohibiting each member from practicing optometry "in such proximity to a retail optical establishment so as to induce patronage for himself by such location";

D. Adopting and maintaining an ethical rule that prohibits any member from "associating his title with a lay practice," without regard to whether or not such association deceives the public or in any manner degrades or reduces the quality of visual care received by any person;

E. Adopting and maintaining an ethical rule prohibiting its members from operating a separate or branch office;

F. Adopting and maintaining, for the acknowledged purpose of maintaining "professional unity," a rule that declares it unethical for any member to make any representation in such a manner as to "carry the slightest intimation" of possessing qualities superior to other members, which applies even to truthful representations and which operates to prevent an optometrist from engaging in comparative advertising or otherwise representing that he or she has particular skills, experience, or special training in, for example, providing care to pediatric, geriatric, or low-vision patients;

G. Adopting and maintaining an ethical rule requiring that its members "refrain from specific guarantees," which operates, for example, to prevent optometrists from offering to refund the cost of optical goods if a patient is dissatisfied with them;

H. Adopting and maintaining rules requiring its members to refrain from the display of eyeglasses or representations of eyes under any circumstances; and

I. Adopting and maintaining an ethical rule requiring that its members refrain from all criticism of another optometrist.

PAR. 13. The purposes or effects, and the tendency and capacity, of the combination or conspiracy and acts or practices of respondent as described in Paragraphs Eleven and Twelve above have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

A. Competition in the delivery of optometric services and the sale of optical goods and devices on the basis of price, service, and quality has been frustrated and restrained;

B. Consumers have been deprived of the benefits of truthful infor-

mation about the availability of optometric services and optical goods; and

C. Consumers have been deprived of the potential cost savings, convenience, and efficiency benefits of retail optical franchise arrangements and separate or branch offices in their purchases of optometric services and optical goods and devices.

PAR. 14. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy is continuing and will continue unless the Commission enters appropriate relief against respondent.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Oklahoma Optometric Association is a corporation organized, existing and transacting business under the laws of the State of Oklahoma, with its office and principal place of business located at 4545 N. Lincoln Blvd., Suite 173, Oklahoma City, Oklahoma.

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

I.

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

A. *Respondent* means the Oklahoma Optometric Association, its directors, trustees, councils, committees, officers, representatives, delegates, agents, employees, successors, or assigns.

B. *Optometrist* means any individual licensed to engage in the practice of optometry in the State of Oklahoma.

C. *Franchise Arrangement* means any arrangement to market and sell optical goods and devices under the trade name of a franchisor from a location other than an optometrist's professional office where optometric services are provided.

II.

It is ordered, That Respondent, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall cease and desist from:

A. Prohibiting, restricting, restraining, or coercing any optometrist from entering into or maintaining a franchise arrangement, or from affiliating with an optometrist who has done so or is doing so, through any means, including, but not limited to:

1. Declaring it to be an unethical or objectionable practice or mode of practice for any optometrist to enter into or maintain a franchise arrangement, or to affiliate with an optometrist who has done so or is doing so;

2. Expelling, excluding, suspending, or threatening to expel, exclude, or suspend, any optometrist from membership for entering into or maintaining a franchise arrangement, or for affiliating with an optometrist who has done so or is doing so;

3. Adopting or maintaining a rule, policy, guideline, or ethical standard that prohibits optometrists from practicing optometry in proximity to a retail optical establishment; and

4. Adopting or maintaining any rule, policy, guideline, or ethical standard that prohibits any optometrist from associating his or her title with a lay practice;

B. Prohibiting, restricting, restraining, or coercing any optometrist from establishing or maintaining any separate or branch office; and

C. Restricting, regulating, impeding, declaring unethical, interfering with, restraining, or advising against the advertising, publishing, or disseminating by any person of the prices, terms, availability, characteristics, or conditions of sale of optometric services or optical goods and devices that are offered for sale or made available by an optometrist or by any organization with which an optometrist is affiliated through any means, including, but not limited to, the adopting or maintaining of any rule or policy that prohibits any member from:

1. Representing that he or she has particular or special qualities, including, but not limited to, those that may be the result of special training, skills, or experience;

2. Engaging in comparative advertising, including, but not limited to, advertising that could be construed as criticizing another optometrist;

3. Displaying eyeglasses, representations of eyes, or other optical goods; or

4. Offering guarantees, including, but not limited to, offering to refund the cost of optical goods if a patient is dissatisfied with them or offering to match a competitor's price for the same goods.

Provided, that nothing contained in this part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

III.

It is further ordered, That Respondent shall cease and desist from:

- A. Taking any action against a person alleged to have violated any rule, policy, guideline, or ethical standard without first providing such person with written notice of any such allegation, and without providing such person a reasonable opportunity to respond. The notice required by this part shall, at a minimum, clearly specify the rule, policy, guideline, or ethical standard alleged to have been violated, the specific conduct that is alleged to have violated the rule, policy, guideline, or ethical standard, and the reasons the conduct is alleged to have violated the rule or ethical standard; and

B. Failing to maintain for five (5) years following the taking of any action referred to in this part, in a separate file segregated by the name of any person against whom such action was taken, any document that embodies, discusses, mentions, refers, or relates to the action taken and any allegation relating to it.

IV.

It is further ordered, That this order shall not be construed to prevent Respondent from:

A. Exercising rights guaranteed against infringement by the First Amendment of the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding; or

B. Reporting to appropriate governmental authorities any act or practice that it in good faith believes is a violation of federal or state laws or regulations, along with the basis for such belief.

V.

It is further ordered, That Respondent shall:

A. Within sixty (60) days after this order becomes final, send by first-class mail the letter attached hereto as Attachment A, an application for membership, and a copy of this order and the complaint to each optometrist who has been suspended from membership, whether permanently, temporarily, or indefinitely, because of his or her "mode of practice;" offer to reinstate any such optometrist's membership; and if any optometrist so desires, reinstate such membership within thirty (30) days after the application is returned;

B. Within sixty (60) days after this order becomes final, send by first-class mail the letter attached hereto as Attachment B to every optometrist who is licensed to practice in the State of Oklahoma;

C. For a period of seven (7) years after this order becomes final, provide each applicant for membership in Respondent Oklahoma Optometric Association with a copy of this order and the complaint;

D. Within sixty (60) days after this order becomes final, publish a copy of this order and the complaint in "Oklahoma OD," the Respondent's newsletter, or in any successor publication, with the same prominence as regularly published feature articles;

E. Within ninety (90) days after this order becomes final, remove from its Code of Ethics, Rules of Practice, Constitution, bylaws, and any other existing policy statement or guideline of Respondent, any

provision, interpretation or policy statement that is inconsistent with Part II of this order, or amend any such inconsistency in such a manner as to eliminate the inconsistency so that the amended language does not violate the prohibitions contained in this order, and, within one hundred and twenty (120) days after this order becomes final, publish in the "Oklahoma OD," or in any successor publication, notice of the removal or amendment of any such provision, interpretation, or policy statement;

F. Within one hundred and twenty (120) days after this order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order;

G. For a period of seven (7) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order, including, but not limited to, the rendering of any advice or interpretation with respect to any advertising or franchise arrangement involving any optometrist; and

H. Within one (1) year after this order becomes final, and annually thereafter for a period of five (5) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with any activity covered by Part II of this order, including, but not limited to, any advice or interpretation rendered with respect to any advertising or franchise arrangement involving any optometrist.

VI.

It is further ordered, That Respondent shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution or reorganization resulting in the emergence of a successor corporation, association, or other entity or any other change in the Respondent which may affect compliance obligations arising out of this order.

ATTACHMENT A

Dear Dr. _____:

This letter is to inform you of a Consent Order (copy enclosed) entered by the Federal Trade Commission. Under the terms of this Order, the Oklahoma Optometric Association has agreed that we will not prevent or impede any optometrist from: entering into or operating a franchise arrangement for the sale of optical goods and devices under the trade name of a franchisor from a location other than an optometrist's professional

office, or affiliating with an optometrist who has done so; operating a separate or branch office; or engaging in any form of truthful, non-deceptive advertising.

The Consent Order provides that we may not declare it to be an unethical or objectionable mode of practice for an optometrist to enter into or operate a franchise arrangement, or to affiliate with an optometrist who has done so. In addition, we may not expel, exclude, or suspend an optometrist for entering into, operating, or affiliating with such an arrangement. The Consent Order also provides that we may not prohibit or restrict optometrists from engaging in any form of advertising, except to the extent that there is reason to believe that such advertising is false or deceptive.

Under the Consent Order, we must amend our Code of Ethics and Rules of Practice to comply with the terms of the Order. In addition, if we take action against a person alleged to have violated any of our rules or ethical standards, we must provide that person with written notice of the specific allegations and a reasonable opportunity to respond to them.

Accordingly, you have a right to reinstatement of your membership in the Oklahoma Optometric Association. If you wish to reinstate your membership, please fill out the enclosed application form and return it to the Association.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Oklahoma Optometric
Association

ATTACHMENT B

Dear Dr. _____:

This letter is to inform you of a Consent Order (copy enclosed) entered by the Federal Trade Commission. Under the terms of this Order, the Oklahoma Optometric Association has agreed that we will not prevent or impede any optometrist from: entering into or affiliating with a franchise arrangement for the sale of optical goods and devices under the trade name of a franchisor from a location other than an optometrist's professional office, or affiliating with an optometrist who has done so; operating a separate or branch office; or engaging in any form of truthful, non-deceptive advertising.

The Consent Order provides that we may not declare it to be an unethical or objectionable mode of practice for an optometrist to enter into or operate a franchise arrangement or to affiliate with an optometrist who has done so. In addition, we may not expel, exclude, or suspend an optometrist for entering into, operating, or affiliating with such an arrangement. The Consent Order also provides that we may not prohibit or restrict optometrists from operating a branch office, and that we may not restrict optometrists from engaging in advertising, except to the extent that there is reason to believe that such advertising is false or deceptive.

Under the Consent Order, we must amend our Code of Ethics and Rules of Practice to comply with the terms of the Order. In addition, if we take action against a person alleged to have violated any of our rules or ethical standards we must provide that person with written notice of the specific allegations and a reasonable opportunity to respond to them.

Consequently, membership in the Oklahoma Optometric Association is now open to any optometrist licensed in the State of Oklahoma, regardless of any affiliation with

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a franchisor or franchisee of optical goods and devices, or the structure or location of his or her practice, or the optometrist's decision to engage in truthful advertising.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)

Oklahoma Optometric Association

IN THE MATTER OF
CHESEBROUGH-POND'S INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-602. Consent Order, Sept. 25, 1963—Modifying Order, Nov. 25, 1985

The Federal Trade Commission has modified a 1963 consent order issued against the New York City-based manufacturer and marketer of Vaseline petroleum jelly (63 F.T.C. 927). The modified order deletes provisions prohibiting the company from claiming that Vaseline provides a protective barrier to the skin and is effective for the relief of itching, and allows respondent to make limited claims about the product's beneficial effects, provided respondent has competent and reliable scientific evidence to support its claims. These modifications were granted based on reports from the Food and Drug Administration's over-the-counter drug review program. The modified order also allows respondent to compare Vaseline's effectiveness to that of other products, provided competent and reliable scientific evidence is available.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On April 11, 1985, Chesebrough-Pond's Inc. ("Petitioner") filed a request to reopen and to set aside or modify the consent order entered against it by the Commission on September 25, 1963, in Docket No. C-602 (63 F.T.C. 927). The order prohibits Petitioner from making certain usage and effectiveness claims with respect to the advertising of its over-the-counter drug product, "Vaseline" petroleum jelly.¹ The request to reopen and to set aside or modify the consent order was placed on the public record on April 23, 1985, and a press release regarding the request was issued on the same date. The public comment period ended May 23, 1985. Comments were filed by four individual consumers during that period.² The deadline to rule on Petitioner's request was subsequently extended to November 25, 1985.

The order requires Petitioner to cease making a variety of advertising claims with respect to the therapeutic and protective qualities of "Vaseline." The order contains twelve specific prohibitions relating

¹ "Vaseline" petroleum jelly is the product trade name. It is composed mostly of petrolatum, a purified mixture of semi-solid hydrocarbons derived from petroleum. "Vaseline" contains both white petrolatum and yellow petrolatum, which are essentially identical except for color. The terms "Vaseline", "petrolatum", and "product" are used interchangeably throughout this Decision and Order.

² All four commenters expressed that they have used the product for a number of years and have used it to treat minor burns, cuts, and scratches. Two of the commenters stated that they have used the product as a skin softener. One commenter stated that she has used the product on heat rash, as a preventative for diaper rash, and as a deodorant.