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Complaint

IN THE MATTER OF

NME HOSPITALS, INC.

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

Docket C-3317. Complaint, Dec. 31, 1990—Decision, Dec. 31, 1990

This consent order requires, among other things, a corporation based in Santa Monica, Ca., that owns a medical center in Boca Raton, Fla., that operates an infertility clinic, to possess a reasonable basis for any future success rate claims for its *in vitro* fertilization procedures, and for claims of success in terms of either live births or pregnancies achieved through any of its infertility treatments.

Appearances

For the Commission: *Michael A. Katz* and *Michael C. McCarey*.

For the respondent: *Milton McKay*, Tampa, FL.

COMPLAINT

The Federal Trade Commission, having reason to believe that NME Hospitals, Inc., d/b/a West Boca Medical Center, a corporation ("respondent"), has violated certain provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 41 *et seq.*, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. NME Hospitals, Inc., is a Delaware corporation with its principal office and place of business located at 2700 Colorado Avenue, Santa Monica, California. Respondent owns and operates West Boca Medical Center, a hospital, which is located at 21644 State Road 7, Boca Raton, Florida.

PAR. 2. Through West Boca Medical Center ("the Center"), respondent is now, and for some time last past has been, engaged in offering for sale and the sale of services in connection with the treatment of infertility in the human reproductive system. The Center dispenses its infertility services to the public under the trade name, "The Fertility Institute of Boca Raton", ("FIBR"). The address of FIBR is the same as the Center.

PAR. 3. Since at least 1987, the Center, acting under the authority

and control of respondent, has placed, or caused to be placed, advertisements in various periodicals that are in general circulation to the public and has mailed letters to potential patients that contain information about FIBR and its services.

PAR. 4. The acts and practices of respondent alleged in this complaint have been and are in or affecting commerce.

PAR. 5. The Center's advertisements and mailings have contained representations through January, 1989, as to the past success rates of achieving pregnancies for patients who purchase FIBR's services in treating infertility, including use of In Vitro Fertilization ("IVF") and Gamete Intrafallopian Transfer ("GIFT"). Typical of these advertisements, but not necessarily all-inclusive thereof, are the attached Exhibits A and B. The aforesaid advertisements, which appeared in publications dated September, 1988 (Exhibit A) and January, 1989 (Exhibit B) contain the following statements:

1. "The Fertility Institute of Boca Raton is producing some very satisfactory results.

In fact, four of our first twelve patients participating in our In Vitro Fertilization program have achieved pregnancy, and our first 'test tube' baby is due in October." [Exhibits A and B]

2. "Our success rate is an impressive 30%, well above the national average." [Exhibit A]

PAR. 6. Through the use of the statements referred to in paragraph five, respondent has represented, directly or by implication, that, as of the date that the advertising containing said statements appeared:

1. FIBR had achieved pregnancies for at least four of its patients who had undergone IVF procedures at its clinic.

2. FIBR's success rate in achieving pregnancies for its patients through IVF procedures has been higher than the national average.

PAR. 7. Through the use of the statements and representations referred to in paragraphs five and six, respondent has represented, directly or by implication, that at the time respondent made those representations, respondent possessed and relied upon a reasonable basis for such representations.

PAR. 8. At the time respondent made those representations, respondent did not possess and rely upon a reasonable basis for such representations. Therefore, the representation set forth in paragraph seven was and is false and misleading.

PAR. 9. The acts and practices of respondent alleged in this

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Complaint

complaint constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Commissioner Starek not participating.

EXHIBIT A



The Fertility Institute of Boca Raton is producing some very satisfying results.

In fact, four of our first 12 patients participating in our In Vitro Fertility program have achieved pregnancy, and our first "test-tube" baby is due this October. Our success rate is an impressive 30%, well above the national average.

Amazing as it seems, couples with serious fertility problems are now able to realize the joys of parenthood. Through IVF (In Vitro Fertilization), GIFT (Gamete Intrauterine Transfer), and state-

of-the-art laser and microsurgery many women can now fulfill their dream of becoming pregnant.

At the Fertility Institute of Boca Raton our experienced team of specialists is dedicated to the comprehensive evaluation and treatment of infertile couples.

Under the direction of reproductive endocrinologist Morrie R. Porcos M.D. and embryologist Joseph E. Sokolowski, formerly senior embryologist at the prestigious Cleveland Clinic, you are assured complete care in a private and

thoroughly comfortable environment that is part of the full-service facility of West Boca Medical Center. And since most procedures are performed on an outpatient basis, your home life remains undisturbed. If you are seriously interested in learning more about these programs - call us in confidence. The results could be quite gratifying!

The Fertility Institute of Boca Raton at West Boca Medical Center, 29644 State Road 7, Boca Raton, FL 33428-8222.

The Fertility Institute of Boca Raton At West Boca Medical Center

EXHIBIT B



The Fertility Institute of Boca Raton is producing some very satisfying results.

In fact, four of our first 12 patients participating in our In Vitro Fertilization program have achieved pregnancy, and our first "test-tube" baby is due this October.

Amazing as it seems, couples with serious fertility problems are now able to realize the joys of parenthood. Through IVF (In Vitro Fertilization), GIFT (Genetic Intrafollicular Transfer), and state-of-the-art laser and microsurgery

many women can now fulfill their dream of becoming pregnant.

At the Fertility Institute of Boca Raton our experienced team of specialists is dedicated to the comprehensive evaluation and treatment of infertile couples. Under the direction of reproductive endocrinologist Moshe R. Peroni, M.D. and embryologist Joseph E. Seikowitz, formerly senior embryologist at the prestigious Cleveland Clinic, you are assured complete care in a private and thoroughly comfortable

environment that is part of the full-service facility of West Boca Medical Center. And since most procedures are performed on an outpatient basis, your home life remains undisturbed. If you are seriously interested in learning more about these programs — call us in confidence. The results could be quite gratifying!

The Fertility Institute of Boca Raton at West Boca Medical Center, 29844 State Road 7, Boca Raton, FL 33428 — 488-8222.

The Fertility Institute of Boca Raton At West Boca Medical Center

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 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 respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, 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 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 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 an agreement 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 NME Hospitals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2700 Colorado Avenue, Santa Monica, California.

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.

It is ordered, That respondent, NME Hospitals, Inc., a corporation, its successors and assigns, and respondent's officers, agents, repre-

sentatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, sale or offering for sale of services relating to the treatment of infertility through *in vitro* fertilization, do forthwith cease and desist from representing, directly or by implication:

A. That its success rate in achieving pregnancies for its patients is higher than or compares favorably with the success rates of other providers of these services, unless at the time of making such representations, it possesses and relies upon a reasonable basis for making such comparison which shall, at a minimum, consist of results for its own patients that are based upon either the same or essentially equivalent test procedures for determining pregnancy that were used to produce the results with which the comparison is made.

B. That any of its patients have achieved pregnancies through respondent's treatment unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for making such representation. Such reasonable basis shall consist of competent and reliable scientific evidence substantiating the representation. For any test to be "competent and reliable" it must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results and shall not consist solely of measuring or evaluating human chorionic gonadotrophin (hCG) risings.

II.

It is further ordered, That respondent, NME Hospitals, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, sale or offering for sale of services relating to the treatment of infertility, do forthwith cease and desist from misrepresenting, directly or by implication, the number or percentage of respondent's patients that give birth or achieve pregnancy, or have given birth or achieved pregnancies, or otherwise misrepresent respondent's past or present success rate in achieving births or pregnancies.

III.

It is further ordered, That respondent shall maintain for a period of three (3) years after the date the representation was last made, and make available to the Federal Trade Commission upon request, business records supporting any claims of success in connection with its infertility treatment programs.

IV.

It is further ordered, That, for a period of five years after the date of entry of this order, respondent shall notify the Commission at least thirty (30) days prior to any proposed change in 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 respondent which may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondent shall, within (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with all requirements of this order.

Commissioner Starek did not participate.

IN THE MATTER OF

FERTILITY INSTITUTE OF WESTERN
MASSACHUSETTS, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3318. Complaint, Dec. 31, 1990—Decision, Dec. 31, 1990*

This consent order prohibits, among other things, a Springfield, Ma., fertility institute and its proprietor from misrepresenting: the number or percentage of patients that achieve success in overcoming infertility, including the number or percentage of patients that give birth or achieve pregnancy; the success rate of any infertility procedure, without competent and reliable scientific evidence to substantiate the claims; or the cost or expense of any infertility test or procedure. The order also prohibits respondents from misrepresenting their qualifications or ability to provide infertility treatments, and any beneficial or therapeutic aspects of any test or procedure relating to the treatment of infertility.

Appearances

For the Commission: *Sara V. Greenberg* and *Phoebe D. Morse*.

For the respondents: *M. Elizabeth Gee*, Winston Salem, N.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Fertility Institute of Western Massachusetts, a sole proprietorship, and Dr. Ronald K. Burke, M.D., individually, hereinafter referred to as respondents, have violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(a), and that an action by it is in the public interest, issues this complaint and alleges that:

PARAGRAPH 1. Respondent Fertility Institute of Western Massachusetts is a sole proprietorship with its principal office and place of business located at 130 Maple Street, Springfield, MA.

Respondent Ronald K. Burke is the sole proprietor of Fertility Institute of Western Massachusetts.

PAR. 2. Respondents are, and have been, engaged in offering and providing services for the treatment of infertility under the name Fertility Institute of Western Massachusetts.