

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M. Bedoya**

In the Matter of

**LCA-VISION, a corporation, d/b/a
LASIKPLUS, also d/b/a JOFFE
MEDICENTER**

DECISION AND ORDER

DOCKET NO. C-4789

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission’s Bureau of Consumer Protection (“BCP”) prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order (“Consent Agreement”). The Consent Agreement includes: 1) statements by Respondent that it neither admits nor denies any of the allegations in the draft Complaint, except as specifically stated in this Decision and Order, and that only and solely for purposes of this action, it admits the facts

necessary to establish jurisdiction; and 2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 business days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is LCA-Vision, doing business as LasikPlus and Joffe MediCenter, an Ohio corporation with its principal place of business at 7840 Montgomery Road, Cincinnati, OH 45326.
2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For the purposes of this Order, the following definitions apply:

- A. **“Clearly and conspicuously”** means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
 1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure (“triggering representation”) is made through only one means.
 2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
 3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.
 5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.
 6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
 7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- B. **“Close proximity”** means that the disclosure is very near the triggering representation. For example, a disclosure made through a hyperlink, pop-up, interstitial, or other similar technique is not in close proximity to the triggering representation.
- C. **“LASIK”** means both laser-assisted in situ keratomileusis, commonly called LASIK, and photorefractive keratectomy, or PRK, another form of laser eye surgery.
- D. **“The price most consumers pay per eye for Respondent’s LASIK”** means the price range from the 25th to 75th percentile of prices paid per eye by consumers during the previous calendar year, or the second previous calendar year during the first calendar quarter of a then-current year, such as “most consumers paid between \$X and \$Y per eye in 2021.”

Provisions

I. Prohibited Misleading Representations

IT IS ORDERED that Respondent, and Respondent’s officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, promotion, offering for sale, or sale, of a particular LASIK service offering must not misrepresent in any manner, expressly or by implication:

- A. the price of such LASIK service offering from Respondent, including but not limited to the total costs for such LASIK service offering; or
- B. the average price for all LASIK service offerings from Respondent or other providers; or
- C. any material restrictions, limitations, or conditions that affect the price consumers will pay for such LASIK service offering, other than restrictions, limitations, or conditions

resulting from clinical decisions made by Respondent's affiliated independent medical professionals in their professional judgment in the course of their professional medical practice.

II. Required Disclosure of Conditions and Requirements

IT IS FURTHER ORDERED that:

- A. Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with advertising, promoting, or offering for sale, or sale, of LASIK for a price or discount for which a majority of consumers, during the time the offer is valid, likely will not be able to meet the requirements or qualifications necessary to obtain such price or discount, must not make any representation, expressly or by implication, about such price or discount without disclosing, Clearly and Conspicuously, and in Close Proximity to that representation:
1. If the price for LASIK is per eye;
 2. The price most consumers pay per eye for Respondent's LASIK;
 3. The requirements or qualifications necessary to obtain the promoted price or discount, including, but not limited to, any restrictions on eligible prescriptions or eye conditions, such as that the promoted price or discount only applies for
 - a) prescriptions with a diopter (or power) falling within a specified range;
 - b) prescriptions with an astigmatism within a specified range;
 - c) patients who are nearsighted (myopia), farsighted (hyperopia), need bi-focals (presbyopia), or are affected by any other medically recognized diagnosis; or
 - d) patients who have or have not had LASIK surgery of any kind before,but not including requirements or qualifications resulting from clinical decisions made by Respondent's affiliated independent medical professionals in their professional judgment in the course of their professional medical practice.
- B. *Provided, however*, that for a space-constrained advertisement, a disclosure will be deemed compliant with Paragraph A(3) of this Section as long as: (i) the disclosure specifies the types of requirements and medical conditions (e.g., prescriptions, nearsightedness) necessary to obtain the promoted price or discount; (ii) the disclosure is made Clearly and Conspicuously and in Close Proximity to at least one prominent representation of such promoted price or discount; (iii) the space-constrained advertisement includes a hyperlink in Close Proximity to the disclosure that leads to a webpage that Clearly and Conspicuously discloses all of the information required by this Section, including the disclosures required by Paragraph A(3); (iv) any other hyperlink contained in the space-constrained advertisement leads to a webpage that Clearly and

Conspicuously discloses all of the information required by this Section, including the disclosures required by Paragraph A(3); and (v) to the extent that any telephone number or short code/short number is included in such space-constrained advertisement, before any consumer who calls or sends a text message to such telephone number or short code/short number is scheduled for an appointment at Respondent's vision centers, all of the information required by this Section, including the disclosures required by Paragraph A(3), is disclosed Clearly and Conspicuously to such consumer.

- C. *Provided, however*, that a price or discount offered (i) to a limited differentiated consumer group in which the offer Clearly and Conspicuously discloses the group limitation (e.g., that the offer is only available for recent graduates, managed-care members); (ii) on a redeemable coupon only available to the holder; or (iii) to an individual patient in-person or following their pre-operative consultation, is not subject to the disclosure requirement in Paragraph A(2) of this Section so long as the offer does not contain additional eligibility limitations or a representation of a "starting at," "as low as," or "from" price or similar representation.
- D. For purposes of this Section, "space-constrained advertisement" means any communication (including, but not limited to, Internet search results and banner ads) that has space, format, size, or technological restrictions ("Space Constraint") that limit Respondent from being able to make the disclosures required by Paragraph A(3) of this Section. Respondent bears the burden of showing that there is a Space Constraint to make a required disclosure that is Clear and Conspicuous and in Close Proximity to the triggering representation.
- E. In determining whether a majority of consumers, during the time the offer is valid, likely will not be able to meet the requirements or qualifications necessary to obtain such price or discount, Respondent may rely upon generally-accepted industry data or reliable and relevant third-party analyses, research, and studies released during the preceding five years. For purposes of making this determination, "consumers" means all adults—either nationwide or in the applicable advertising target area of such price or discount—with a refractive error in one or both eyes.

III. Monetary Relief

IT IS FURTHER ORDERED that:

- A. Respondent must pay to the Commission One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00), which Respondent stipulates its undersigned counsel holds in escrow for no purpose other than payment to the Commission.
- B. Such payment must be made within 8 business days of the effective date of this Order by electronic fund transfer in accordance with instructions provided by a representative of the Commission.

IV. Additional Monetary Provisions

IT IS FURTHER ORDERED that:

- A. Respondent relinquishes dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.
- B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission to enforce its rights to any payment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.
- C. The facts alleged in the Complaint establish all elements necessary to sustain an action by or on behalf of the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.
- D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other relief (including consumer information remedies) as it determines to be reasonably related to Respondent's practices alleged in the Complaint. Any money not used is to be deposited to the U.S. Treasury. Respondent has no right to challenge any activities pursuant to this Provision.
- E. In the event of default on any obligation to make payment under this Order, interest, computed as if pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for 10 business days beyond the date that payment is due, the entire amount will immediately become due and payable.
- F. Each day of nonpayment is a violation through continuing failure to obey or neglect to obey a final order of the Commission and thus will be deemed a separate offense and violation for which a civil penalty shall accrue.
- G. Respondent acknowledges that its Taxpayer Identification Numbers (Social Security or Employer Identification Numbers), which Respondent has previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

V. Consumer Information

IT IS FURTHER ORDERED that Respondent must directly or indirectly provide sufficient information to enable the Commission to efficiently administer consumer redress to consumers who (i) visited Respondent's centers for a LASIK consultation from January 1, 2014,

to August 30, 2020, (ii) were found to be medically eligible for LASIK, and (iii) declined having LASIK. Respondent must supply such redress data within 8 days of the effective date of this Order. If a representative of the Commission requests in writing any information related to redress, Respondent must provide it, in the form prescribed by the Commission representative, within 14 business days.

VI. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

- A. Respondent, within 10 business days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury;
- B. For 10 years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives having managerial responsibilities for conduct related to the subject matter of this Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 10 business days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.
- C. From each individual or entity to which a Respondent delivered a copy of this Order, that Respondent must obtain, within 30 business days, a signed and dated acknowledgment of receipt of this Order.

VII. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

- A. One year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which:
 - 1. Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of that Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order, including a discussion of all of the changes the Respondent made to comply with this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission.

- B. Respondent must submit a compliance notice, sworn under penalty of perjury, within 14 business days of any change in the following: (a) any designated point of contact; or (b) the structure of Respondent that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.
- C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within 14 business days of its filing.
- D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.
- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: In re LCA-Vision.

VIII. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for 20 years after the issuance date of this Order, and retain each such record for 5 years, unless otherwise specified below. Specifically, Respondent must create and retain the following records:

- A. accounting records showing the revenues from all goods or services sold, the costs incurred in generating those revenues, and resulting net profit or loss;
- B. personnel records showing, for each person providing services in relation to any aspect of this Order, whether as an employee or otherwise, that person’s: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. copies or records of all consumer complaints and refund requests relating to pricing and advertising, whether received directly or indirectly, such as through a third party, and any response thereto; provided this requirement shall not impose a duty upon Respondent to actively monitor third parties or request complaints from parties who may receive such complaints;
- D. all records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and

- E. a copy of each unique advertisement (or the full inventory of the variable elements of any dynamic advertisement campaign) or other marketing material making a representation subject to this Order.

IX. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

- A. Within 10 business days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, and produce records for inspection and copying.
- B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present.
- C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

X. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate 20 years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or 20 years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Provision in this Order that terminates in less than 20 years; and
- B. This Order if such complaint is filed after this Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of this Order, and the dismissal or ruling is either not appealed or upheld on appeal, then this Order will terminate according to this Provision as though the complaint had never been filed, except that this Order will not terminate between the date such

complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Wilson dissenting.

April J. Tabor
Secretary

SEAL:
ISSUED: March 13, 2023