

Dissenting Statement of Commissioner Christine S. Wilson
In the Matter of LCA-Vision, et al.

January 19, 2023

Today the Commission announces a complaint and proposed consent against LCA-Vision (also d/b/a LasikPlus and Joffe MediCenter). The complaint alleges that LCA-Vision engaged in deceptive representations, in violation of Section 5 of the FTC Act, in connection with promotional pricing claims for its LASIK surgery. Specifically, the complaint alleges that LCA-Vision advertised LASIK at a promotional price of \$250, \$250 per eye, or \$295 (Joffe MediCenter) but that the advertisements failed to disclose, or failed to disclose adequately, the requirements consumers must meet to be eligible for the price promotions (Complaint Para. 8). The advertisements included disclaimers but the complaint alleges that the disclaimers were not clear and conspicuous and did not provide sufficient information for consumers to understand the eligibility requirements. (*See, e.g.* Complaint Paras. 16-18).

The complaint further explains that LCA-Vision requires each potential patient to visit a center and undergo multiple eye exams during their consultation, including refraction, full pupil dilation, and a corneal topographical exam (Complaint Para 25). After these examinations are complete, the potential patient learns whether they qualify for LASIK surgery and if they qualify for the promotional price. *Id.* The complaint asserts that the vast majority of consumers learn they do not qualify for the promotional price (Complaint Para. 27) and implies that LCA-Vision should have informed consumers in its advertising of the types of prescriptions that do not qualify, enabling ineligible consumers to avoid the wasted time and expense of traveling to a center and obtaining a consultation. (Complaint Para. 36).

Notably, though, the complaint explains that “[e]ligibility for vision correction surgery depends upon various factors, including a patient’s prescription level, the thickness of the cornea, the size of the pupil, and the stability of the prescription.” (Complaint Para. 7.) In addition, the complaint notes that “Respondent sets surgery price guidelines and parameters, including which prescriptions are eligible for certain pricing, but generally leave decisions as to a patient’s eligibility for LASIK surgery, and the appropriate type of surgery and laser, to the judgment of its surgeons and optometrists.” (Complaint Para. 7.) The company’s centers use two types of laser surgery and the complaint states that the decision of which type to use to correct a patient’s eyesight is left to the surgeon. (Complaint Paras. 6-7.)

It has been said that medicine is as much an art as a science.¹ Even as described in the complaint, eligibility for the surgery – and, as a secondary matter, pricing for those who are good LASIK candidates – present complicated and nuanced questions whose answers depend on the outcome of the eye examination and the judgement of the attending surgeon. There are no clear rules

¹ Joseph Herman, Medicine: the science and the art, 27 J. Med. Ethics: Medical Humanities 42 (2001) (discussing that “[m]edicine has been said to be both a science and an art” and describing scientific and artistic writings that demonstrate this point), available at: <https://mh.bmj.com/content/27/1/42>.

about who does and does not qualify for the two types of LASIK surgery offered at LCA-Vision centers. I believe there could be instances in which patients facially may appear to qualify for the price but, after thorough examination, are found not to qualify because of medical conditions or complications identified during consultation. I also believe there could be instances in which some patients who at first blush may appear to be ineligible in fact end up qualifying for the promotional pricing following consultation due to the discretion the attending surgeon enjoys.

Moreover, I believe the free eye exam provides significant value to the potential patient. Even consumers who do not qualify for promotional pricing learn detailed information about their vision, prescription, and eligibility for LASIK. As a result of this examination, LASIK candidates could learn that their prescriptions have changed, or that they show signs of glaucoma or other eye health issues that might require medical intervention. While the attractive prices advertised by LCA-Vision may have encouraged consumers to schedule consultations, I do not agree that this battery of comprehensive medical exams constitutes a waste of time. To the contrary, I believe that these free, comprehensive exams provide significant value to consumers, and that this value likely outweighs any potential injury that may have resulted from the allegedly deceptive advertising.

Thus, I am not convinced that the claims here constitute deceptive claims in violation of the FTC Act. LCA-Vision offered a price that is available to some consumers and did disclose that there were eligibility requirements. I agree that the disclosures noting eligibility requirements and the need for an examination to determine if one qualifies could have been presented more clearly in LCA-Vision's advertising. But I am concerned that requiring the inclusion of specific medical parameters in advertisements, when those parameters could be either over- or under-inclusive depending upon the results of the consultation, could be more confusing than helpful.

For these reasons, I dissent.