IN THE MATTER OF

MASSACHUSETTS BOARD OF REGISTRATION IN OPTOMETRY

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

Docket 9195. Complaint, July 8, 1985—Final Order, June 13, 1988

This Final Order requires the Massachusetts board to allow truthful advertising by optometrists in the state, requires the optometry board to repeal its current regulation banning advertising of affiliations between optometrists and optical retailers, and also requires respondent to send a copy of the order to all optometrists currently licensed in Massachusetts and to all new applicants for five years.

Appearances

For the Commission: *Elizabeth Hilder.*

For the respondent: *Thomas A. Barnico* and *Steven H. Goldberg, Assistant Attorneys General,* Boston, MA.

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

JUNE 20, 1986

PRELIMINARY STATEMENT

The complaint in this case was issued on July 8, 1985. It charges that the respondent Massachusetts Board of Registration in Optometry ("the Board") has engaged in unfair methods of competition and unfair acts and practices in violation of Section 5 of the FTC Act (15 U.S.C. 45) and that these acts and practices are in or affect commerce.

The complaint alleges that respondent has restrained competition among optometrists in the Commonwealth of Massachusetts by combining or conspiring with some of its members to unreasonably restrict truthful advertising by optometrists by: prohibiting optometrists from truthfully advertising discounts from their usual prices and fees; prohibiting optometrists from permitting optical establishments or other commercial practices to truthfully advertise the optometrists' names or the availability of their services; and prohibiting optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

The complaint further alleges that the effect or tendency of the combination or conspiracy has been to restrain competition unreasonably and to injure consumers by:

(1) depriving consumers of truthful information about optometrists' service, prices, and fees;

(2) depriving consumers of the benefits of vigorous price and service competition among optometrists;

(3) preventing optometrists from disseminating truthful information about prices and fees; and

(4) preventing optometrists from permitting commercial establishments to truthfully advertise or publicize their names or the availability of their services. [2]

On August 27, 1985, the Board filed an answer denying the allegations and asserting as affirmative defenses that it is not a "person, partnership or corporation" under Section 5 and that the state action doctrine immunized its conduct.

The Board moved for summary dismissal or summary disposition of the complaint on October 31, 1985, arguing that the Federal Trade Commission lacks jurisdiction in this proceeding because (1) the Board is exempt from antitrust action under the state action doctrine; and (2) the Board is not a "person, partnership or corporation" subject to the Federal Trade Commission Act. The motion was denied on November 19, 1985.

On January 10, 1986, the Board moved for dismissal or summary disposition claiming that the Board has not acted as a combination or conspiracy and for partial summary disposition claiming that adoption of regulations in November, 1985, moots this proceeding concerning those regulations that respondent had changed. After oral argument the motion was denied on February 10, 1986.

Adjudicative hearings commenced in Boston, Massachusetts on February 10, 1986. On February 27, 1986 the Board moved to dismiss based on *Fisher v. City of Berkeley,* 106 S.Ct. 1045 (decided February 26, 1986). Counsel for the parties filed briefs and oral argument was heard, and the motion was denied on March 27, 1986.

On March 27, 1986, the record was closed. [3]

I. Findings of Fact

A. The Respondent

1. Massachusetts Board of Registration in Optometry

1. The respondent Board is a state agency that regulates the practice of optometry in Massachusetts. (F 2–13; Stip.).[1]

2. The Board is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts. Mass. Gen. Laws Ann. ch. 13, §§ 16–18, ch. 112, § 61 and ch. 112, §§ 66–73B (Complaint ¶1; Answer ¶1; CX 16A to C; CX 17; and CX 18A to S).

3. The Board consists of five members, four of whom are optometrists and the fifth is a public member. (Complaint ¶2; Answer ¶2; CX–16–A). The public member of the Board has not participated in

[1] "F" means finding; "Stip." means stipulated (see addendum to respondent's proposed findings); "CX" means Commission exhibit; "RX" means respondent's exhibit; "TR" means transcript. References to the transcript are usually by the name of the witness followed by the page number.

any Board activities since December, 1982. (CX 81A; CX 90B; CX 242 at 18–19).

4. While on the Board, optometrist members continue to provide optometric services for a fee. (Complaint ¶2; Answer ¶2). The compensation for serving on the Board is five hundred seventy-five dollars per year, plus necessary travel expenses for carrying out the business of the Board. (CX 16C; Stip.).

5. All Board decisions are by a majority vote of its members. (CX 242 at 20). The Board members choose a chairman and secretary by majority vote. (*Id.*). The chairman and secretary serve for one year terms. (CX 16C). The responsibilities of the chairman include interpretation of Massachusetts statutes and Board regulations governing the practice of optometry. (DiGregorio 630–631).

6. Dr. DiGregorio was chairman from 1977 to 1981 (DiGregorio 630); Dr. Wagner chaired the Board from 1981 to 1982 (CX 69A); Dr. Exford chaired the Board from 1982 to 1983 (Exford 449); and Dr. Rapoport succeeded Dr. Exford and is the current chairman (CX 89A; CX 94A; Rapoport 515). At all times relevant to the complaint, the secretary has been an optometrist: Dr. Exford was secretary from 1977 to 1982 (Exford 449); Dr. Rapoport was secretary from 1982 to 1983 (CX 79A); Dr. Lamont was secretary from September, 1983, to September, 1985 (CX–242 at 16); and Dr. Oliver is the current secretary. (RX 27A) (Stip.). [4]

7. The practice of optometry in Massachusetts is governed by statutes enacted by the legislature and by regulations promulgated by the Board. (Stip.).

8. Massachusetts statutes define the practice of optometry. Mass. Gen. Laws Ann. ch. 112, § 66. (CX 18A). Massachusetts statutes require that anyone who practices optometry be licensed by the Board. Mass. Gen. Laws Ann. ch. 112, § 68. (CX 18E, 18F; CX 2B).

9. The Board is authorized by Mass. Gen. Laws Ann. ch. 112, § 67, to promulgate rules and regulations governing the practice of optometry. (CX 18C). Optometrists who engage in the practice of optometry in Massachusetts are required to comply with regulations promulgated by the Board. (CX 2B).

10. The Board is authorized by Mass. Gen. Laws Ann. ch. 112, § 61 and § 71 to revoke or suspend the license of any optometrist for professional actions that constitute unprofessional conduct, gross misconduct or incompetence, and malpractice. (CX 17; CX 18K). The Board is authorized to take the same actions for violations of any rule or regulation promulgated by the Board (CX 17; CX 18K). Under Mass. Gen. Laws Ann. ch. 112, § 72A, the Board may seek criminal sanctions including fines and imprisonment for violations of its rules and regulations. (CX 17; CX 18M; Stip.). The Board holds hearings to

determine the technical competence of optometrists who may be seeing too many patients. (CX 61–62).

11. Massachusetts law limits the authority of the Board to restrict truthful advertising. (CX 17). Section 61 of Mass. Gen. Laws Ann., ch. 112, provides that:

> [e]xcept as otherwise provided in this chapter, no such board [of registration] shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers the effect of which would restrain or lessen competition.

In promulgating Section 61, the Massachusetts Legislature declared that:

> any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy. [5]

12. The only restriction on truthful advertising by optometrists is Mass. Gen. Laws Ann. ch. 112, § 73A (CX 18P):

> Persons may advertise the sale price of eyeglasses, contact lenses or eyeglass frames provided they shall not include in any newspaper, radio, display sign or other advertisements any statement of a character tending to deceive or mislead the public, or any statement which in any way misrepresents any material or service or credit terms, or, any statement containing the words "free examination of eyes," "free advice," "free consultation," "consultation without obligation," or any other words or phrases of similar import which convey the impression that eyes are examined free. Any advertisement offering contact lenses, eyeglasses, or eyeglass frames at a fixed price shall include a statement which indicates that said price does not include eye examination and professional services. Such statement shall indicate whether said price includes lens and, if so, the type of lens, single vision, bi-focal or tri-focal and the strength thereof, low, medium or high.

13. The Board is not supervised by any other branch of Massachusetts state government. (CX 5U). While the Board falls within the Division of Registration and the Executive Office of Consumer Affairs, these offices have only advisory power. (*Id.*) (Stip.).

2. Board Procedures

a. Enforcement of Regulations

14. After receipt of a complaint, the Board writes a letter or places a telephone call to the subject of the complaint. (CX 242 at 66; F 118, 127–29).

15. If the complaint is not resolved, the optometrist is invited to attend an informal conference. (CX 242 at 66–67) (Stip.).

16. Complaints that are not resolved informally are resolved at a

formal hearing at which witnesses are sworn and testimony is transcribed. (*Id.* at 67) (Stip.). [6]

17. Most complaints are resolved informally. (CX 241 at 57; Exford 467–68) (Stip.).

18. None of the enforcement actions involving discount or affiliation advertising on this record has involved a formal hearing. (F 116–32, Stip.).

b. Interpretation of Regulations

19. The Board has interpreted Massachusetts statutes and regulations. (DiGregorio 631–37, 651–52; CX 67B). The Board does not distribute interpretations of its regulations to optometrists in Massachusetts. (Rapoport 529–30).

20. The Board has issued no interpretations regarding its current regulations. (Rapoport 538; CX 246 at 30–33) (Stip.).

3. The Optometrist Members of the Board

21. The optometrist members of the Board do not advertise, participate in referral relationships with opticians or optical establishments, or offer discounts. (F 22–33).

22. Haskell I. Rapoport, O.D., has been a member of the Board from about October 1980 to the present. (CX 5A); Rapoport 514–15). While on the Board, Dr. Rapoport's primary source of income has been the private practice of optometry as a solo practitioner. (Rapoport 515–16) (Stip.).

23. Dr. Rapoport has not advertised except by permitting his name to be used in professional listings in high school programs and through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). He acquires patients by word-of-mouth referrals. (Rapoport 517). He does not offer discounts to obtain patients. (*Id.* at 518) (Stip.).

24. Alton W. Lamont, O.D., has been a member of the Board from about November, 1981, to the present. (CX 5A–B). While on the Board, Dr. Lamont's primary source of income has been his practice of optometry as a solo practitioner. (CX 242 at 6–8) (Stip.).

25. Dr. Lamont has not advertised other than through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). He relies on word-of-mouth referrals to attract patients. (CX 242 at 9–10). Dr. Lamont does not offer discounts. (*Id.* at 10–11) (Stip.). He competes with chain optical establishments as well as other optometrists. (CX 242 at 13–14; Feldman 375).

26. Jon Volovick, O.D., has been a member of the Board from about November, 1983, to the present. (CX 5B). While on the Board, Dr.

Volovick's primary source of income has been his [7] practice of optometry as a solo practitioner. (CX 241 at 7–10) (Stip.).

27. Dr. Volovick has not advertised other than through office signs and listings in the Yellow Pages in which he has listed only his name, address and telephone number. (CX 5E). Dr. Volovick does not offer discounts. (CX 241 at 16–17) (Stip.).

28. Frederick J. Wagner, O.D., was a member of the Board from 1959 to July, 1985. (CX 240 at 4–5; CX 5B) (Stip.).

29. Dr. Wagner has never advertised except to list his name in the Yellow Pages. (CX 240 at 40–41). Dr. Wagner relies on word-of-mouth referrals to attract patients. (CX 240 at 41–42). He has never offered discounts to customers. (CX 240 at 41) (Stip.).

30. Dr. Joan Exford, O.D., who is also sometimes referred by her married name, Dr. Korb (Exford 448–49), was a member of the Board from about May, 1976, through December, 1983. (CX 5B). Dr. Exford does not advertise to obtain new patients. (Exford 470) (Stip.).

31. Dr. Leonard DiGregorio, O.D., was a member of the Board from 1966 to 1981. (DiGregorio 629–30). During Dr. DiGregorio's term on the Board, the practice of optometry was his primary source of income. (*Id.*).

32. Dr. DiGregorio has never engaged in paid advertising (*id.* at 643–44), nor has he ever offered discounts to attract patients. (*Id.* at 643). However, Dr. DiGregorio has participated in various community activities to "let people know what you do." (*Id.* at 644). Dr. DiGregorio also relies on word-of-mouth referrals to attract patients. (*Id.* at 643).

33. Paul Oliver, O.D., has been a member of the Board from July, 1985, to the present. (CX 101A). Dr. Oliver is in a solo practice. Dr. Oliver does not advertise. (CX 5B) (Stip.).

34. Board members believe that advertising, offering discounts, or affiliating in referral arrangements with optical establishments is inconsistent with optometry's status as a learned profession. (F 35–40, 83).

35. The Board considers the practice of optometry to be a learned profession. (CX 261 at 34; Volovick 662, 670).

36. The Board has distinguished the practice of optometry from the practice of opticianry on the ground that "[o]pticianry is a trade and not a profession." (CX 261 at 35) (Stip.).

37. The optometrists on the Board do not advertise. (F 23, 25, 27, 29–30, 32–33) (Stip.). [8]

38. The Board considers discount advertising between optometrists and non-optometrists to be inherently deceptive. (CX 7B).

39. The Board considers advertising affiliations between optome-

trists and non-optometrists ("affiliation advertising") to be inherently deceptive. (CX 7D).

40. The optometrists on the Board do not offer discounts to attract patients. (F 23, 25, 27, 29, 30, 32) (Stip.).

B. The Market

1. Types of Practice

41. Three professional groups provide eyecare: ophthalmologists, optometrists, and opticians. (F 42–54) (Stip.).

42. An ophthalmologist is a physician who has served a residency in ophthalmology. (Exford 508). An ophthalmologist examines eyes and prescribes eyeglasses and contact lenses, but primarily treats the eye for diseases and performs surgery. (*Id.* at 508; Collinson 362). Ophthalmologists are regulated by the Massachusetts Board of Registration in Medicine. (Exford 499–500). Ophthalmologists are permitted to advertise discounts and affiliations with non-ophthalmologists. (CX 327Z at 24) (Stip.).

43. Optometrists are authorized to diagnose, by any means except drugs, deficiencies in the human eye and prescribe corrective lenses. They may not diagnose or treat eye diseases. Mass. Gen. Laws Ann. ch. 112, § 66. (CX 18A). In addition to prescribing lenses, optometrists sell and fit glasses and contact lenses. (CX 261 at 36; *See e.g.,* DiGregorio 628–29). Optometrists attend a college of optometry and must pass an examination administered by the Board. (Exford 508; CX 18E).

44. Opticians are authorized to prepare and sell eyeglasses and contact lenses based upon prescriptions from an optometrist or ophthalmologist. Mass. Gen. Laws Ann. ch. 112, § 73C. (CX 18S, 18T). In this respect, opticians are analogous to a pharmacist who fills drug prescriptions. (Convissar 207). They may not prescribe lenses or diagnose or treat eye diseases or deficiencies. (CX 18S; 18T).

45. Opticians are regulated by the Massachusetts Board of Registration for Dispensing Opticians. Mass. Gen. Laws Ann. ch. 112, § 73D. (CX 18U; Collinson 362–63). No person can engage in the practice of opticianry unless the person has a license granted by the Board of Registration for Dispensing Opticians. Mass. Gen. Laws Ann. ch. 112, § 73D. (CX 18U) (Stip.). [**9**]

46. Opticians receive their training either by participating in a three year apprenticeship or by attending opticianry school. (Collinson 363; Kahn 549) (Stip.).

47. The Board of Registration of Dispensing Opticians has never received a deceptive advertising complaint against a chain. (Collinson at 365) (Stip.).

48. Opticians and optometrists may work together or in affiliation, but the optometrist must practice in a "separate premises" from the optician. Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

49. A "separate premises" for this purpose is defined by Massachusetts law as "any room, suite of rooms or an area which optometry is practiced shall be considered separate premises if it has a separate and direct entrance from the street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building." Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

50. The optometrist may not share, directly or indirectly, with an optician "any fees received in connection with said practice of optometry." Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18R).

51. A Pearle Vision Center is a chain of retail stores each with an optical dispensary selling optical goods and with an adjacent optometrist's office. (Kahn 553, 554). There is a separate entrance into the optometrist's office from the outside, as well as a sliding glass door between the optometrist's office and the Pearle Vision Center. (*Id.* at 555). The office space is subleased by Pearle to an optometrist. (*Id.* at 554). The lease arrangement constitutes the only financial arrangement between the optometrist and Pearle. (*Id.* at 556).

52. Pearle exercises no control over the optometrist. (Kahn 556). The rent paid by the optometrist is not based on the number of patients the optometrist sees. (*Id.* at 558). Patients pay the optometrist directly for the examination and the optometrist owns the patients' records. (*Id.*).

53. Massachusetts law requires that optometrists display their license in a conspicuous place and provide each patient with a memorandum of sale with the optometrist's name, address, and license numbers. Mass. Gen. Laws Ann. ch. 112, § 70. (CX 18I, 18J).

54. The relationship between Pearle and the optometrists with whom it affiliates is similar to the relationship between other chains optical establishments and optometrists. (Convissar 209–11; Rymeski 238–40, 242–43; Feldman 381–87). **[10]**

2. Size of Market

55. As of September 10, 1985, there were 1894 optometrists holding a valid license to practice optometry in Massachusetts and, of these, 1355 were in active practice. (CX 5F). More than $100 million is spent on eyecare annually in Massachusetts. (Complaint ¶9; Answer ¶9) (Stip.).

3. Interstate Commerce

56. The Board's actions to prohibit truthful advertising by optometrists have a substantial effect on interstate commerce. (F 57–59).

57. The practice of optometry by licensed optometrists in the Commonwealth of Massachusetts is in interstate commerce. (CX 8) (Stip.).

58. The Board, through its restrictions on truthful advertising, has inhibited the ability of interstate optical firms affiliated with Massachusetts optometrists to compete in the market for optical goods and services in Massachusetts. (F 74–76, 78–79). The Board has prevented interstate firms such as American Vision Centers, Sterling Optical, Eye World, and Pearle Vision from engaging in affiliation advertising. (F 74–76, 141–42, 145–46). The Board has discouraged Massachusetts optometrists from advertising their affiliation with Eye World. (F 146). American Vision Centers, which has plans to expand its operations in seven of the nine states in which it operates, is not expanding its operations in Massachusetts because of the Board's restriction on affiliation advertising. (F 79).

59. The restrictions imposed by the Board on price and non-price advertising are likely to raise the price of and restrict access to optometric goods and services in the Commonwealth of Massachusetts, which are in interstate commerce. (F 57–58, 62).

4. Advertising and Competition

60. Advertising lowers out-of-pocket and search costs to consumers. (Kwoka 695–98). The total cost to consumers of purchasing a good or service includes: the price, which is the out-of-pocket cost paid directly to the seller, and the search cost to obtain information necessary to make a buying decision, including the time and expense of travel. (Kwoka 695–96) (Stip.).

61. Advertising is a form of competition like price competition. (Kwoka 698). Advertising may benefit sellers by attracting customers, by facilitating seller's entry into a market or by making possible the expansion of goods and service sold by the seller. (*Id.*). [11]

62. Restrictions on advertising in the market for optometrist goods and services raise prices and total cost to consumers without affecting quality. (Kwoka 712).

63. Dr. Kwoka is one of four authors of the "Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry," also known as the "B.E. Study," which was published in 1980. (CX 318; Kwoka 711–13, 751–52) (Stip.).

64. The B.E. Study examined the contention that advertising has detrimental effects on quality of professional services. (Kwoka 712).

65. The B.E. Study confirms the economic prediction that advertis-

ing has the effect of lowering the total cost of optometric goods and services. (Kwoka 722–24, 729–30; CX 319–20).

66. The B.E. Study shows that advertising did not lead to any significant deterioration in quality. (Kwoka 735–36, 748–49). The B.E. Study shows that, on average, less thorough eye examinations tend to be given by advertising optometrists than by nonadvertising optometrists. (CX 318 at 13; Kwoka 386–89). However, in markets where advertising is allowed, 55% of the optometrists do not advertise and a higher percentage of all optometrists give high quality examinations than in markets where advertising is prohibited. (CX 318 at 13–14).

67. Dr. Edelstein, a licensed optometrist in Massachusetts, advertises primarily through direct mail coupons that offer a $20.00 discount on the fee for a complete pair of prescription eyeglasses. (Edelstein 283–84).

68. Since Dr. Edelstein began advertising discounts, his practice has grown. (*Id.* at 286–87). Dr. Edelstein saw two patients per week when he first began to practice. He now sees over 100 patients per week. (*Id.* at 288–89). The annual income of Dr. Edelstein's practice greatly increased. (*Id.* at 286–87).

69. Without volume, Dr. Edelstein could not provide the services which he now makes available. (*Id.* at 287–88). Dr. Edelstein has over 1000 contact lenses in stock and 30,000 eyeglasses. (*Id.* at 275–76).

70. As a result of his discount advertising, Dr. Edelstein expanded the geographical area that he serves. Dr. Edelstein draws patients from Burlington and Lexington, Massachusetts, towns from which Dr. Volovick draws patients, and Newton, a town from which Dr. Lamont draws his patients. (*Id.* at 292–93; Volovick 660–61; CX 242 at 8–9).

71. Dr. Edelstein surveys competing optometrists to determine their prices. (Edelstein 279–80). Advertising [12] optometrists generally charge between $30.00 and $50.00 whereas non-advertising optometrists generally charge between $60.00 and $80.00. (*Id.* at 282).

72. His advertising made patients aware of his lower prices. (Edelstein 305–06, 289–91, 308–09).

73. Dr. Morton Ross, an optometrist, discontinued truthfully advertising discounts after being instructed to do so by the Board. (CX 29 at 10–11, ex. P) (Stip.).

74. Optical establishments compete by enabling consumers to purchase eyeglasses at the same location where they obtain their eye-examination. (Feldman 377–78). This is sometimes referred to as "one stop shopping." (*Id.*) (Stip.).

75. Pearle Vision Centers, which had not engaged in affiliation advertising because it was against Board regulations, changed its

policy 18 months ago. (Kahn 577–79). The number of patients coming to Pearle Vision Centers has increased significantly since Pearle began to advertise the availability of optometrists' services. (*Id.* at 581).

76. Consumers want to know about the availability of an optometrist and 80–99% of consumers purchase eyewear where they get their examination. (Kahn 582; Volovick 664). The increase in the number of patients coming to Pearle was the result of affiliation advertising. (*Id.* at 586–90; Rymeski 241).

77. Prices are lower for eye-examinations and for optical goods in states where advertising is permitted than they are in Massachusetts. (Convissar 218–26).

78. Optometrists affiliated with American Vision Centers charge less for eye-examinations in states where affiliation advertising is permitted. (*Id.* at 218–23):

States Restricting Affiliation Advertising	Eye Exams[2]	Daily Contacts	Extended Contacts
Texas	$35	$75	$100
Massachusetts	$30–40	$50–60	$80–100[13]

States Permitting Affiliation Advertising	Eye Exams	Daily Contacts	Extended Contacts
New York	$12–15	$35	$50
Illinois	$12–15	–	–
Missouri	$20	$35	$50
Pennsylvania[3]	$20	$35	$50

79. American Vision is planning to expand its operation in every state in which it operates, except Texas and Massachusetts, where it will not because of advertising restrictions. (Convissar 223–24).

C. The Board and Truthful Advertising

1. Prior to Bates

80. Prior to the Supreme Court decision in *Bates v. Arizona State Bar,* 433 U.S. 350 (1977), Rule 9 of the Board's regulations prohibited all advertising by optometrists. (DiGregorio 637–39).

2. The Board and Bates

81. In 1977, the Board became aware that the Supreme Court in *Bates* had struck down restrictions on truthful advertising. (DiGregorio 641–43). By 1979, the Board still limited "permissible advertis-

[2] Eye-examinations are conducted only by optometrists. (*Id.* at 221).

[3] The arrangement between American Vision and optometrists in Pennsylvania is similar to Massachusetts since the optometrists are independent of American Vision. (*Id.* at 221).

ing" to information provided by professional cards, telephone directories, and announcements regarding office openings, closings or changes of location. (CX 13I).

82. The Board prohibited affiliation advertising between optometrists and opticians in regulations that took effect on July 1, 1979. Section 3.08 of the Board's regulations prohibited any optometrists from allowing "the use of his name or professional ability by an optical establishment for the financial gain of such establishment." (CX 13H) (Stip.).

83. The Board prohibited advertising of discounts by optometrists in regulations that took effect on July 1, 1979. Section 3.12 of the Board's regulations prohibited any optometrist from "discriminating directly or indirectly in his professional services." (CX 13I). The Board interpreted Section 3.12 to prohibit offering or advertising discounts by optometrists. (CX 29 at 4, 6; CX 261 at 10–11). [14]

3. Criticism By the Office of Consumer Affairs

84. In 1981, the Massachusetts Executive Office of Consumer Affairs ("EOCA") criticized the Board's restrictions on truthful advertising as restraining trade and as contrary to the Supreme Court decision in *Bates*. (F 85–87).

85. The EOCA is a cabinet office whose area of responsibility includes the Board of Registration in Optometry. (Pollock 131, CX 19A to 19D; CX 20A). Although the Board is under the EOCA for organizational purposes, the EOCA does not have the authority to require the Board to modify its regulations. (CX 5U; CX 261 at 32).

86. By letter dated March 30, 1981, Eileen Schell, the Secretary of the EOCA, informed the Board that it should delete Section 3.08 because it constituted a restraint of trade and suggested that the Board delete advertising restrictions that were contrary to *Bates*. (CX 22A-B).

87. On May 13, 1981, Ruth Pollock, General Counsel to EOCA, notified the Board that several regulations including Sections 3.08 and 3.12 were unduly restrictive in light of *Bates*. (Pollock 140–43).

4. Criticism By the State Auditor

88. The Massachusetts Department of the State Auditor ("State Auditor") criticized the Board's restrictions on truthful advertising. (F 89–99).

89. The Department of the State Auditor is a state agency whose responsibility includes auditing state agencies to verify information contained in financial reports and to ensure that the state agencies are operating in accordance with state law. (Gallagher 157–60).

90. In 1982, the State Auditor conducted an audit of 15 of the 28

Boards of Registration in Massachusetts, including respondent, "to determine whether these boards have acted in the consumer's interest when administering the laws and regulations that they are required to enforce." (CX–261 at 1; Gallagher 160).

91. Frank Gallagher, the auditor from the Department of the State Auditor with primary responsibility for the audit of the Board, concluded after an initial review that many of the Board's regulations were contrary to the consumer interest. (Gallagher 166–70). These regulations included Sections 3.08 and 3.12. (*Id.* at 169–70). **[15]**

92. On June 29, 1983, the State Auditor submitted a draft copy of its report to the Board for comment. (CX 261 at 4). In the draft report, the State Auditor criticized numerous regulations promulgated by the Board, including Sections 3.08 and 3.12. (CX 261 at 34–36).

93. On August 22, 1983, the Board responded by letter to the draft report. (CX 261 at 34–38). The Board stated that Section 3.12 had been eliminated from revised regulations that the Board was preparing. (CX 261 at 36). The Board also objected "to time spent on matters which have become obsolete." (CX 261 at 37). The Board did not inform the State Auditor that its revised regulations, which the Board did not adopt until October, 1984, contained an explicit ban on discount advertising. (Exford 494–96) (Stip.).

94. The Board informed the State Auditor that it intended to retain Section 3.08 as Section 5.06. (CX 261 at 36). The Board stated that its ban on affiliation advertising was justified for the same reasons that justified restrictions on the ability of optometrists to affiliate with non-optometrists. (*Id.* at 14, 36). The Board asserted that restrictions on affiliation were necessary to protect consumers from "mercantile practices" which would result in "undue influence" on optometrists to prescribe unnecessary eyewear and result in lower quality eyecare by setting limits on the nature of an optometrist's practice or the time spent with a patient. (CX 261 at 34–36).

95. After receipt of comments, the State Auditor published a final report. (CX 261, Gallagher 193–94).

96. The State Auditor stated that Section 3.08 "had been implemented to prevent opticians and optometrists from forming business relationships." (CX 261 at 9). The State Auditor concluded that Section 3.08 was "unreasonable" and noted that the EOCA had recommended that "this restriction be discontinued because it unfairly restricts trade." (*Id.*).

97. The State Auditor concluded that the Board's concerns about mercantile practice did not justify retaining Section 3.08 in the Board's revised regulations, stating:

optometrists are expected to perform their function in a manner that provides profes-

sional care to the consumer. The board already assures this standard through its regulation on minimum vision analysis procedures and through its consumer complaint process. We believe that existing professional standards offer sufficient assurances [16] of an optometrist's conduct, regardless of whom the optometrist's employer might be.

(*Id.* at 14). The State Auditor recommended that the Board reevaluate Section 3.08. (*Id.* at 15).

98. The State Auditor stated the Board had used Section 3.12 not to protect consumers from higher prices, but to restrain optometrists from offering reduced fees to certain consumer groups, such as senior citizens and company employees. (CX 261 at 10–11). The State Auditor concluded that (*id.*):

this regulation, does not benefit the consumer because it prevents optometrists from offering their consumers discounts.

99. The State Auditor reiterated the recommendation of the Executive Office of Consumer Affairs that, as a result of the *Bates* decision, " '[a]dvertising can be in any form as long as it is not deceptive or misleading.' " (CX 261 at 13). The State Auditor recommended that the Board (*id.*):

Modify or eliminate its regulations on advertising restrictions. This action should reflect EOCA's recommendation to eliminate advertising restrictions since such restrictions are contrary to a U.S. Supreme Court ruling on professional advertising in general.

5. 1984 Regulations

100. The Board adopted regulations on October 18, 1984 that contained explicit bans on truthful advertising that in some aspect were more restrictive than the Board's previous regulations. (F 101–03; CX 2D).

101. The Board retained its restriction on affiliation advertising in its 1984 regulations. (CX 14S). Section 5.07(3) of the Board's 1984 regulations states:

An optometrist shall not permit or authorize the use of his name or professional ability and services by an optical establishment or business. An optometrist shall not permit or authorize establishment or [*sic*] authorize an [17] optical establishment or business to advertise, publicize or imply the availability of his optometric services, (either on or off the premises).

102. The Board added an explicit restriction on discount advertising in its 1984 regulations. (CX 14T). Section 5.11(1)(f) of the Board's 1984 regulations declares "[a]dvertising which offers gratuitous services,

rebates, discounts, refunds or otherwise, with the purpose of increasing the number of private patients" to be contrary to the public interest. (*Id.*). Section 5.11(1)(f) expanded the Board's ban on discount advertising, which under Section 3.12 had been limited to optometric services, to include optical goods. (CX 13I; CX 14T).

103. The Board added two other explicit restrictions on truthful advertising. (CX 14T). Section 5.11(1)(d) declared "advertising which uses testimonials" to be contrary to the public interest. (*Id.*). Section 5.11(1)(a) prohibited advertising that appeared to be "sensational" or "flamboyant." (*Id.*).

6. Federal Trade Commission Investigation

104. The Board became aware of the Federal Trade Commission's investigation in February, 1985. (CX 98B at 3; Rapoport 540–41) (Stip.).

7. Proposed 1985 Regulations

105. On June 27, 1985, the Board published a notice of proposed changes in its regulations in the Massachusetts Register. (CX 5X) (Stip.).

8. Federal Trade Commission Complaint

106. On July 8, 1985, the Federal Trade Commission issued a complaint challenging the Board's restrictions on truthful advertising. (Complaint ¶12, ¶13).

9. EOCA and the Proposed Changes

107. On July 28, 1985, Paula Gold, Secretary of Consumer Affairs and Business Regulation, testified before the Board concerning the Board's proposed changes that had been published on June 27. (CX 21A; CX 102A) (Stip.).

108. Ms. Gold criticized the Board's proposal to retain its restriction on affiliation advertising. (CX 21D-E). [18]

109. Ms. Gold stated that "there is no need for the Board to repeat—or expand" Section 73A's ban on free eye-examinations. (CX 21C).

10. November, 1985 Regulations

110. On November 7, 1985, the Board promulgated revised regulations. (CX 15A) (Stip.).

111. In its November, 1985, regulations, the Board continued to prohibit affiliation advertising. (CX 15A). Section 5.07(3) of the Board's 1985 regulations states that an optometrist "shall not permit or authorize the use of his name, professional ability or services by any person or establishment not duly authorized to practice optome-

try." (*Id.*) In addition, the Board imposed a requirement that "[u]nauthorized advertising or publicizing of a licensee's availability to perform eye-examinations or other professional services shall be immediately reported to the Board by the licensee." (*Id.*) (Stip.).

112. The Board's November, 1985, revised regulations deleted Section 5.11(1)(f), which banned discount advertising, Section 5.11(1)(d), which banned advertising that used testimonials, and Section 5.11(1)(a), which banned advertising that appeared to be "sensational" or "flamboyant." (CX 15B) (Stip.).

113. The revised regulations added Section 5.11(1)(b), which declares as not in the public interest "advertising which offers gratuitous services in violation of Mass. Gen. Laws Ann. ch. 112, § 73A" and Section 5.11(1)(c) "advertising which is not in accordance with applicable law, including, but not limited to, Mass. Gen. Laws Ann. ch. 112, § 73A . . . ." (CX 15B).

114. The revised regulations added Section 5.11(6), which states "[w]hen offering discount fees for services or materials usual and customary fees must be substantiated." (CX 15B) (Stip.).

115. The Board's amended regulations have not been distributed to optometrists in Massachusetts. (Rapoport 538; CX 325).

D. Restraint of Truthful Advertising

1. Discount Advertising

116. From 1981 to October, 1984, the Board interpreted Section 3.12 of its regulations, which prohibited any optometrist from "discriminating directly or indirectly in his professional services," to prohibit truthful advertising by optometrists of [**19**] discounts. (F 118–23). From October, 1984, to November, 1985, Section 5.11(1)(f) of the Board's regulations prohibited "advertising which offers gratuitous services, rebates, discounts, refunds or otherwise, with the purpose of increasing the number of patients." (F 124–32).

117. The Board enforced its regulations against ten optometrists who were truthfully advertising discounts for optometric goods or services. (CX–29 at 1–15; Edelstein 300–01). The Board instructed each optometrist to stop advertising. In no case did the Board have any information that the optometrist was not providing the discounts as advertised. (*Id.*).

118. In 1980 or 1981, Dr. Rapoport sent a letter to Dr. Michael Edelstein, stating that advertising that offered a $15.00 discount off the regular price of eyeglasses in the Boston Globe was illegal and instructing Dr. Edelstein to discontinue the advertisement. (Edelstein 300). Dr. Edelstein provided the discounts as advertised. (*Id.* at 300). When Dr. Edelstein asked Dr. Rapoport for an explanation as to why

the advertisement was illegal, Dr. Rapoport stated that the advertisement "discriminated" against anyone who did not have a coupon. (*Id.* at 300–01).

119. In October, 1981, the Board informed Dr. Dana Ricker that by advertising discounts to senior citizens, Dr. Ricker had violated Section 3.12. (CX 29 at 6–7). The Board instructed Dr. Ricker to discontinue advertising discounts. (*Id.*). Dr. Ricker complied with the Board's instruction. (*Id.*) (Stip.).

120. In December, 1981, the Board instructed Dr. Sheldon Strauss that by advertising 15% discounts on optometric goods, he had violated Section 3.12 and instructed Dr. Strauss to discontinue his advertising. (CX 29 at 4). Dr. Strauss complied with the Board's instruction. (*Id.*) (Stip.).

121. In September, 1984, Dr. Robert Golden, an optometrist, complained to the Board that Dr. Ronald Cline was advertising the availability of discounts to senior citizens and a 10% discount on a complete pair of glasses to patients who presented a copy of Dr. Cline's advertisement. (CX 29 at 13–15, ex. V). On September 26, 1984, the Board invited Dr. Cline to attend "an informal conference regarding your type of advertising." (CX 29, ex. W) (Stip.).

122. At an informal conference held on October 10, 1984, the Board informed Dr. Cline that his advertising violated Board regulations and instructed him to discontinue his advertising. (CX 29 at 14). Dr. Cline complied with the Board's instruction. (*Id.*) (Stip.). **[20]**

123. On May 22, 1984, Dr. Carmine Guida, Executive Director of the Massachusetts Society of Optometrists,[4] sent a letter to the Board with a coupon advertisement from Dr. Sheldon Strauss that offered "$20.00 off on a complete pair of glasses." (CX 29 at 5, ex. E, F). Dr. Guida's letter asked whether Dr. Strauss' coupon was "a proper form of advertising." (CX 29, ex. E). After the Board became aware that Dr. Strauss was distributing discount coupons, it informed him that his advertising violated Section 3.12 of the Board's regulations. (CX 29 at 5) (Stip.).

124. On October 3, 1984, the Board sent a letter to Dr. Strauss informing him that the discount coupons violated the Board's rules on advertising. (CX 29 at 5, ex. G). Dr. Strauss provided the discounts as advertised. (CX 29 at 5). On November 14, 1984, Dr. Strauss attended a meeting with the Board at which the Board informed him that Section 5.11(1)(f) prohibited advertising that offered discounts. (*Id.* at 6) (Stip.).

125. In October, 1984, after Dr. Monte Levin distributed coupons

[4] The Massachusetts Society of Optometrists (MSO) is a voluntary association of licensed optometrists. (Volovick 655). As of February 27, 1986, there were 658 members, about half of the optometrists in the state. (CX 325; CX 5F).

redeemable for $10.00 off the price of prescription eyewear, the Board informed him that advertising the availability of discounts through use of coupons violated Section 5.11(1)(f) of the Board's regulations. (CX 29 at 3). He agreed to stop. (CX 29, ex. D) (Stip.).

126. Professional Practice Builders is an advertising agency that does business with optical establishments. (Convissar 214–15). In November, 1984, the Board informed Professional Practice Builders that it was a violation of Section 5.11(1)(f) of the Board's regulations for optometrists to advertise discounts. (CX 29 at 2) (Stip.).

127. On November 26, 1984, the Board informed Dr. Morton Ross that by advertising a $25.00 discount on optometric services and optical goods, he was in violation of "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] . . . 'Advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29, ex. N). Section 5.11 is, in fact, a regulation promulgated by the Board rather than a Massachusetts statute. (Rapoport 533–34). Dr. Ross notified the Board by letter that he intended to comply with the Board's regulations. (CX 29, ex. O). **[21]**

128. On December 7, 1984, the Board informed Dr. James Freedman that his use of discount coupons violated "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] 'advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29 at 11, ex. Q1–2, ex. R). Dr. Freedman discontinued advertising discounts. (CX 29 at 12, ex. S).

129. On December 7, 1984, the Board notified Dr. Thomas Anzaldi that his use of discount coupons violated "Massachusetts General Law C. 112 S. 67 section 5.11 that [states] 'advertising which is not in the public interest include . . . advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients.' " (CX 29 at 13, ex. U). Dr. Anzaldi notified the Board that he would discontinue advertising discounts. (CX 29 at 13).

130. In February, 1985, the Board informed Dr. Jacob Bailen that advertising the availability of discounts to senior citizens violated Section 5.11(1)(f) of the Board regulations. (CX 29 at 2) (Stip.).

131. On May 1, 1985, the Board instructed its attorney and one of the investigators to compile lists of discount advertisers and to send letters to them. (CX 100B). The Board stated that "they will be asked to appear before the Board. If subsequent violations occur, criminal charges will be brought against them." (*Id.*).

132. In May 22, 1985, the Board mailed a "Notice of Informal Conference" concerning a violation of Section 5.11(1)(f) to Dr. Michael Edelstein. (CX 29 at 9, ex. L). The informal conference concerned discount coupons that Dr. Edelstein had distributed in Newton, the location of Dr. Lamont's practice. (Edelstein 302). At an "informal conference," held on June 12, 1985, the Board informed Dr. Edelstein that his use of discount coupons violated Section 5.11(1)(f) of the Board's regulations and instructed Dr. Edelstein to discontinue advertising the availability of discounts. (CX 29 at 9).

133. No evidence was introduced to show that the Board ever charged any optometrist with false or deceptive advertising.

2. Affiliation Advertising

134. In October, 1980, the Board informed Dr. Hong Ming Cheng that, by permitting Mass Optical Centers to advertise the availability of his services, he had violated Section 3.08 of the Board's regulations. The Board also notified Mass Optical Centers. (CX 29 at 22–23) (Stip.). [22]

135. Dr. Cheng agreed to instruct Mass Optical to remove the sign advertising the availability of his services and Mass Optical discontinued the advertising. (CX 29 at 23; CX 56) (Stip.).

136. After becoming aware, in October 1980, that A Touch of Glass had advertised the availability of the services of Dr. Kenneth Levine, the Board instructed Dr. Levine that it was a violation of Section 3.08 for Dr. Levine to permit A Touch of Glass to advertise his services. (CX 29 at 25–26). Dr. Levine instructed A Touch of Glass not to advertise the availability of his services. (*Id.* at 26) (Stip.).

137. In May, 1981, the Board instructed Dr. Michael McCarty that it was a violation of Section 3.08 for Dr. McCarty to permit Eye-Deal Vision Centers to advertise the availability of his services. (CX 29 at 36–37). Dr. McCarty instructed Eye-Deal Vision Centers to discontinue advertising the availability of his services and Eye-Deal discontinued the advertising. (*Id.* at 37) (Stip.).

138. After becoming aware, in September 1981, that Optical World had advertised the availability of the services of Dr. John Getter, the Board informed both Dr. Getter and Optical World that such advertising was illegal. Dr. Getter instructed Optical World to stop advertising the availability of his services and Optical World discontinued the advertising. (CX 29 at 30–31) (Stip.).

139. In July of 1982, the Board informed Dr. Leon Litman that the advertisement by an optician of Dr. Litman's services was false and fraudulent. (CX 29 at 33–34). Dr. Litman instructed the optician to stop advertising the availability of his services and the optician did so. (*Id.* at 34) (Stip.).

140. In August of 1982, the Board informed Dr. Charles McKervey too that it was a violation of the Board's regulations to permit Eye World to advertise the availability of his services. (CX 29 at 35–36). At the time of doing so, that Board had no information that any patient of Dr. McKervey's had complained that the advertisement by Eye World of Dr. McKervey's services was deceptive or misleading. (*Id.*) (Stip.).

141. In December 1982, the Board informed Dr. Stanley Glick that it was a violation of Section 3.08 for him to permit Eye World to advertise the availability of his services. (CX 29 at 38–39). Dr. Glick instructed Eye World to stop advertising the availability of his services and Eye World discontinued the advertising. (*Id.* at 38) (Stip.). **[23]**

142. After the Board became aware, in late December, 1982, that Sterling Optical had advertised the services of Dr. William Killilea, the Board informed Dr. Killilea that it was a violation of Section 3.08 for Sterling Optical to advertise the availability of Dr. Killilea's services. (CX 29 at 24–25). Both the Board and Dr. Killilea instructed Sterling Optical to stop advertising the availability of his services and Sterling Optical discontinued the advertisement. (*Id.* at 24–25) (Stip.).

143. On May 25, 1984, the Massachusetts Society of Optometrists wrote a letter to the Board complaining that Stoneham Optical was advertising the availability of the services of an optometrist. (CX 29 at 31–32, ex. 7). The Board informed Stoneham Optical that it was a violation of Board regulations and state law for Stoneham Optical to advertise the availability of eye-examinations. (*Id.*). Stoneham Optical discontinued advertising the availability of eye-examinations. (*Id.* at 32). At the time that the Board contacted Stoneham Optical, the Board had no information that indicated eye-examinations were being conducted by someone who was not an optometrist. (*Id.* at 32–33).

144. After the Board became aware, on or about June 13, 1984, that Opticians III had advertised the availability of the services of Dr. Gerald Fruitkin, the Board informed Dr. Fruitkin that it was a violation of Board regulations for him to permit Opticians III to advertise the availability of his services. (CX 29 at 28–29). Dr. Fruitkin instructed Opticians III to stop advertising the availability of his services. (*Id.* at 29) (Stip.).

145. After the Board became aware, in January, 1985, that American Vision Center was advertising the availability of optometrists' services, the Board contacted five optometrists whose services had been advertised by American Vision Centers. (CX 29 at 15–22). The Board informed the five optometrists, Dr. Christopher Joseph, Dr. Curtis Frank, Dr. Leon Fishlyn, Dr. Richard Jasiak, and Dr. Peter

Bridges that, by permitting American Vision Center to advertise the availability of their services, they were violating section 5.07(3) of the Board's regulations. (*Id.* at 15, 17–18, 20–21). Each of the optometrists instructed American Vision Center to stop advertising the availability of his services and American Vision Centers discontinued the advertising. (*Id.* at 16–21, ex. DD) (Stip.).

146. On January 9, 1985, the Board became aware that Eye World had advertised the availability of the services of Dr. Kendrik Krosschell. (CX 29 at 27). The Board informed Dr. Krosschell that it was a violation of Section 5.07(3) for him to permit Eye World to advertise the availability of its services. Dr. Krosschell instructed Eye World to stop advertising the [**24**] availability of his services and Eye World discontinued the advertising. (*Id.*).

3. Source of Complaints

147. The records of the Board contain no complaints from the general public about discount or affiliation advertising. (F 148; CX 27; CX 28).

148. The complaints about discount or affiliation advertising have come only from optometrists or from their professional association, The Massachusetts Society of Optometrists. (Edelstein 312–13; CX 111; CX 115; CX 123A; CX 124; CX 125; CX 130; CX 134; CX 136; CX 140; CX 147; CX 150; CX 153A; CX 155A; CX 157; CX 159–60; CX 163A; CX 174; CX 180; CX 184; CX 187; CX 190; CX 192–93; CX 196–97; CX 201–02; CX 206; CX 208–09; CX 211; CX 213; CX 216A; CX 217A; CX 219A).

4. Free Goods

149. Along with a general ban on deceptive advertising by optometrists, Mass. Gen. Laws Ann. ch. 112, § 73A prohibits advertisements that contain "any statement containing the words 'free examination of eyes'; 'free advice'; 'free consultation'; 'consultation without obligation' or any other words or phrases of similar import which convey the impression that the eyes are examined for free." (CX 18P). Section 73A does not prohibit the advertising of free optometric goods, such as contact lenses. (*Id.*).

150. The Board relied on Section 73A as a basis for banning truthful advertising by an optometrist of free goods with a purchase of eyeglasses. (CX 29 at 7–8, ex. H–1, H–2, I, J). In September 1984, the Board informed Dr. Harvey Leavitt that advertising the availability of free goods with the purchase of eyeglasses violated Mass. Gen Laws Ann. ch. 112, § 73A and instructed Dr. Leavitt to discontinue advertising the free goods. Dr. Leavitt complied with the Board's instructions and discontinued his advertising. At the time of instructing Dr. Lea-

vitt to discontinue advertising free contact lenses, the Board had no information that indicated that Dr. Leavitt was not providing free contact lenses as advertised. In fact, Dr. Leavitt was providing free contact lenses as he had advertised. (*Id.*).

5. Appearance of Fee Splitting

151. Section 73B permits optometrists and opticians to affiliate as long as certain conditions are met. (F 48–50). Dr. William Killilea, an optometrist who leased space from Sterling Optical, maintained an office located next to a Sterling Optical store in the Worchester Center Mall. (Rymeski 238–39). Dr. **[25]** Killilea's office complied with the requirements of § 73B. There was a separate entrance to the mall corridor and there was no sharing of fees. (*Id.* at 239, 242).

152. Sterling Optical advertised the availability of Dr. Killilea's services in an advertisement that offered a contact lens package for $88, including a $40 fee for an eye-examination paid directly to Dr. Killilea. (CX 223B; Rymeski 241–42).

153. On February 1, 1983, the Board informed Dr. Killilea that the Sterling Optical advertisement violated Board Regulation 246 C.M.R. 3.08 and that an optometrist may not "appear to" share or split fees with a non-optometrist. (CX 225). No Board regulations prohibited the "appearance of fee-splitting." (CX 13).

154. In response to the Board's allegations of violations of its rules and regulations, Sterling Optical eliminated all mention of Dr. Killilea in its advertisements. (Rymeski 246–47).

6. Connecting Door

155. Section 73B states that an optometrist may locate an office adjacent to that of an optical establishment if the optometrist's office has "a separate entrance and direct entrance from the street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building." (CX 18R).

156. The Board has interpreted Section 73B to prohibit a connecting door between an optometrist's office and an optical establishment. (CX 40B; CX 99A; Rapoport 537–38; DiGregorio 636). The Massachusetts Attorney General notified the Board in 1981 that it would not represent the Board in disciplinary hearings attempting to enforce its interpretation of Section 73B. (CX 71B).

7. Optical Establishments

157. The Board has no jurisdiction over optical establishments. (CX 5P). However, the Board has notified optical establishments that it is

illegal for them to advertise the availability of an optometrist. (F 134, 138, 142–43).

158. The Board also interpreted its regulations to prohibit an optician who is in the employment of an optometrist to advertise on his own, even though no regulation in effect at the time prohibited such advertising. (CX 70A).

159. The Board informed Dr. Krosschell in February, 1985 that he may not include the Eye World logo in his advertisements [**26**] even though no regulation in effect at the time prohibited the use of such a logo by an optometrist. (CX 29 at 27; CX 13).

E. Justifications

1. Discount Advertising

160. The Board has stated with respect to its prohibition on discount advertising that, "Board regulations which had prohibited such advertising represented an implicit regulatory judgment that such advertising was inherently 'deceptive.' " (CX 7B).

161. There is no evidence that optometrists in Massachusetts have falsely or deceptively advertised the availability of discounts. (F 133, 147). There is no documentary evidence of consumer complaints of deceptive advertising of discounts. (F 147). There is no record of any Board investigation or enforcement action concerning an optometrist who deceptively advertised discounts. (F 133).

162. Board enforcement actions were directed at optometrists who, in fact, provide discounts as advertised. (F 117). These actions were in response to complaints from other optometrists. (F 148).

163. The Board has statutory authority to prohibit false or deceptive advertising by optometrists. (CX 18K).

2. Affiliation Advertising

164. Independent optometrists are subject to pressure to over-prescribe as are optometrists who affiliate with non-optometrists. (CX 242 at 42–44).

165. Advertising has the effect of lowering the cost of optometric goods and services without any detrimental effect on quality. (F 65–66). The Board offered several exhibits concerning commercial practice in the market for optometry as "legislative facts" the Board "could have considered." (TR 892–95; RX 5; RX 14–15). These documents were not offered for the truth of the assertions contained therein. (TR 892–95). They add little support to respondent's position. In addition, the Nathan Report (RX 5) is unreliable due to methodological flaws in the preparation of the report. (CX 334–35).

166. The Board has the authority to discipline optometrists who

provide inadequate levels of eye care quality. Mass. Gen. Laws. Ann. ch. 112, § 71. (CX 18K; F 10, 97). The Board did not allege inadequate care against any of the optometrists against whom [27] it enforced its restrictions prohibiting affiliation advertising. (F 134–46).

167. The Board enforced its ban on truthful affiliation advertising against optometrists who were engaged in relationships with optical establishments that complied with Section 73B. (F 151–54; CX 56, CX 29 at 22–23).

168. The Board received no complaints from consumers about confusing or deceptive affiliation advertising. (F 147). The Board has enforced its ban on joint advertising in response to complaints from optometrists rather than from consumers. (F 148).

169. Every optometrist must display a license in a conspicuous place and provide each patient with a memorandum of sale that sets forth the optometrist's name, address, and license number. Mass. Gen. Laws Ann. ch. 112, § 70. (CX 18I-J).

170. The Board enforced its ban on affiliation advertising against optometrists who were providing eye examinations as advertised. (F 140, 143).

F. Effects

171. The Board's prohibitions on truthful advertising have restrained competition in the provision of optometric services and optical goods in Massachusetts. (F 172–78).

172. The Board has prevented optometrists from disseminating truthful information concerning the availability of discounts. (F 116–33). The Board's prohibitions on advertising discounts have prevented optometrists from competing on the basis of price by preventing them from informing consumers of the availability of lower prices in the form of discounts. In addition, the Board's prohibitions on discount advertising have prevented optometrists from competing on the basis of service by restricting the ability of optometrists to develop high volume practices that could provide consumers with a greater range of choice in selecting eye care services. (*Id.;* F 68–69).

173. The Board has prevented optometrists from disseminating truthful information concerning affiliations with optical establishments. (F 134–46). The Board's prohibitions on affiliation advertising prevent optometrists from competing on the basis of the convenient service and lower prices that can be realized through affiliations with optical establishments by preventing optometrists from publicizing their affiliations to consumers. (*Id.;* F 74, 77).

174. By prohibiting affiliation advertising, the Board has restricted the ability of optical establishments to compete on the [28] basis of convenient service by preventing optical establishments from adver-

tising the availability of the services of an optometrist and reduced the incentive for optical establishments to affiliate with optometrists in Massachusetts. (F 79, 134–46).

175. By prohibiting affiliation advertising, the Board has restricted the ability of optometrists to enter into lawful affiliations with optical establishments by reducing incentives for optical establishments to enter into the Massachusetts market. (F 79).

176. The Board has deprived consumers of the benefits of price and service competition among optometrists by preventing optometrists from advertising discounts and affiliations with optical establishments and by insulating traditional optometrists from competition in the form of advertising. (F 60–61, 72, 116–46).

177. The Board's prohibitions on truthful advertising are likely to cause higher prices for optometric services and optical goods in Massachusetts. (F 60–65, 71, 77–79).

178. The Board's prohibitions on truthful advertising are likely to cause consumers to pay higher prices for optometric goods and to delay or forgo purchases of needed optometric services or optical goods. (F 65).

G. Relief

1. Affiliation Advertising

179. The Board continues to ban all forms of affiliation advertising without regard to the truth or falsity of the advertising. (F 111).

2. Discount Advertising

180. The Board has not repudiated its judgment that discount advertising is inherently deceptive. (F 160).

181. The Board took action to amend its regulations four months after being notified of the Commission's investigation and a few days before the complaint was issued. (F 104–06). Four months after the complaint was issued, the Board adopted regulations that repealed its previous explicit ban. (F 106, 110). The Board's amended regulations do not eliminate restrictions on truthful advertising of discounts. (F 113). The Board's November 1985 regulations add a requirement that optometrists substantiate usual and customary fees when advertising discounts. (F 114). **[29]**

182. In addition, the Board adopted another regulation that specifically bans advertising that offers gratuitous services in violation of Section 73A. (F 113). The Board has relied on Section 73A to ban advertising of free goods. (F 149–50).

183. Fifteen days before publishing its proposal to amend its regulations on June 27, 1985, the Board told an optometrist that advertising

the availability of discounts was illegal and instructed him to discontinue his advertising. (F 132).

3. Danger of Continuing Effects

184. Although some optometrists have not understood its advertising prohibitions (CX 29, ex. D, ex. P, ex. Z, ex. BB), the Board has provided no guidance as to the meaning of the provisions that were added in the November 1985 regulations. (F 20).

185. The Board has not disseminated its revised regulations to optometrists in Massachusetts. (F 115).

186. From at least 1981 to November 1985, optometrists in Massachusetts learned of the Board's ban on discount advertising. (F 118–25, 127–32).

4. Danger of Recurrence

187. The Board has continued to prohibit truthful advertising after being aware of: the Supreme Court decision in *Bates*, the Massachusetts statute prohibiting it from restricting truthful advertising, and the criticism of the EOCA and the State Auditor. (F 11, 81, 84, 88, 101–03, 108–14, 117, 134–46).

II. Conclusions of Law

188. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

a. The respondent is a "person" within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

b. The challenged acts and practices of respondent 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).

189. Respondent has acted as a combination or conspiracy of its members to restrain competition among optometrists in the Commonwealth of Massachusetts by: **[30]**

a. Restricting or prohibiting truthful advertising by optometrists.

b. Prohibiting optometrists from truthfully advertising discounts from their usual prices or fees.

c. Prohibiting optometrists from permitting optical establishments or other persons or entities not licensed to practice optometry to truthfully advertise the optometrists' names or the availability of their services.

d. Prohibiting optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

190. The combination or conspiracy, and the acts and practices

committed in furtherance thereof, have eliminated, restricted, restrained, foreclosed, and frustrated competition among optometrists, and have caused injury to the public.

191. The combination or conspiracy, and the acts and practices committed in furtherance thereof, constitute unfair methods of competition, and unfair acts or practices in or affecting commerce, and are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

192. The order entered in this proceeding is necessary to remedy the violations of law committed by respondent and to protect the public now and in the future.

III. Analysis

More than $100 million is spent on eyecare annually in Massachusetts. This case involves a branch of that market—almost two thousand optometrists licensed in Massachusetts by the respondent Board, a state agency. (F 55).

Traditionally, an optometrist has worked alone or in a small office, relying on word-of-mouth referrals from former patients and shunning growth through commercial practices such as price competition and advertising. In recent years the crumbling barriers to professional commercialization as well as the booming industry for retailing eyecare products through chain stores and franchised operations, featuring heavy advertising, lower prices and greater service, have pressured optometrists to compete more vigorously. The Board, controlled by its optometrist members, has attempted to slow this change. [31]

To preserve the traditional practice, the Board has passed and enforced a series of rules banning: advertising of price discounts, advertising of a lawful affiliation between the optometrist and a retail optical store, as well as testimonials and sensational or flamboyant advertising. The Board argues that the traditional practice results in higher quality eyecare. While this is disputed, there is little doubt that the Board's policy has meant higher prices for optical goods and services in the Commonwealth of Massachusetts.

This case questions whether the Board's policy is truly the political decision of a disinterested state agency taken in the interest of the public health and safety, considering the fact that it is controlled by practicing optometrists who benefit financially from this trade restraint.

A. Combination or Conspiracy

The complaint here attacks respondent's "combination or conspiracy." These terms are derived from the Sherman Act which prohibits

every "contract, combination . . . or conspiracy in restraint of trade." (15 U.S.C. 1). The gist of these terms is "whether or not there is a collaborative element present." *Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F.Supp. 945, 951 (S.D. Tex. 1972).[5] Complaint counsel must, therefore, establish concerted activity which deprives the market of the "independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984). The concerted activity must be among "two or more separate entities." *Fisher v. City of Berkeley,* 106 S.Ct. 1045, 1049 (1986).

Fisher involved a municipal rent control ordinance. The rent ceilings established by the ordinance were enforced by the Berkeley Rent Stabilization Board. Landlords subject to the ordinance alleged that it violated the Sherman Act, being a combination between the government and the landlords, as well as a horizontal combination among the landlords, in restraint of trade. *Id.* at 1049. The Supreme Court held that a restraint imposed unilaterally by a government agency does not become concerted action within the [**32**] meaning of the Sherman Act because it has a coercive effect upon parties who must obey the law, and that merely because the competing landlords must comply with the ordinance is not enough to establish a conspiracy among them. *Id.* at 1049–50. In the absence of concerted action there was no Section 1 Sherman Act violation.

Complaint counsel—recognizing the holding of *Fisher*—no longer rely on their theory of conspiracy between the Massachusetts Board of Optometry and the optometrists it regulates.[6] Complaint counsel argue, however, that *Fisher* does not answer the remaining question of whether the Board members by themselves can conspire to violate the antitrust laws.

There is nothing in the *Fisher* opinion to show that the Berkeley Rent Stabilization Board was controlled by competing landlords, or that the Rent Board members were alleged to have conspired among themselves.[7] Thus, the question remains whether the respondent members of a state agency can be held to have conspired by themselves in violation of the antitrust laws.[8]

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[5] It has been suggested that the terms are synonymous. *Id.* at 950, n. 1. Since there is a presumption against the use of redundant words in a statute, *FTC v. Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975), the terms probably have slightly different meanings. It may be that an unlawful "combination" can be established by evidence falling somewhat short of that necessary to establish an unlawful "conspiracy." Oppenheim, Federal Antitrust Laws, p. 178 n. 1 (3rd Ed. 1968).

[6] Complaint counsel's brief dated March 12, 1986 at p. 4, n. 1.

[7] *Fisher* is also distinguished in that the ordinance alleged to be anticompetitive was enacted by populate initiative, a highly unlikely means of conspiracy.

[8] *Goldfarb* does not control this issue. There, the conspiracy was by the Fairfax County Bar Association, a voluntary association of lawyers. Enforcement was by the State Bar, an administrative agency of the state, 421 U.S. at 776: "The State Bar . . . joined in what is essentially a private anticompetitive activity . . . ." 421 U.S. at 792.

Respondent argues that the Board acts as a unit, citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). That case held a parent corporation incapable of conspiring with its wholly-owned subsidiary. The Court reasoned that "the officers of a single firm are not separate actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." 467 U.S. at 769. The Court stressed that concerted activity "inherently is fraught with anticompetitive risk," because "[it] deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands," while coordination within a single firm may be necessary for the enterprise to compete effectively. 467 U.S. at 768–69. Thus the issue is whether the optometrists on the Board are "separate actors pursuing separate economic interests" and "independent centers of decisionmaking," capable of conspiring together. [33]

This issue of conspiracy is one of fact.[9] And, while there is a presumption of honesty and integrity in the conduct of public officials,[10] less evidence will be necessary to shift the burden of proceeding where a state regulatory board is controlled by members of a profession and the board regulates commercial practices of that profession, since the board members' pecuniary interest may be stronger than their duty to the public in deciding such issues.[11]

The evidence in this case shows that the Board is composed of four optometrists and one public member. (F 3). Board decisions are made by majority vote. (F 5). The Board's decisions are controlled by its four optometrist members.[12] (F 3–6). The optometrists serving on the Board continue to engage in the private practice of optometry during their tenure on the Board. (F 4). The Board members are not public employees, and receive only reimbursement for necessary expenses and a minimal honorarium. (F 4).

The Board's optometrist members do not advertise or affiliate with opticians or "commercial" retailers. (F 21). They do not offer discounts. (F 40). They believe that advertising, offering discounts, or affiliating with optical establishments are inconsistent with optometry's status as a learned profession. (F 34). The Board's restrictions on truthful advertising benefit the Board's optometrist members by in-

[9] Substance should prevail over form in determining whether conduct is unilateral action by a single entity or concerted behavior by persons with an independent personal stake. *Copperweld Corp.*, 467 U.S. at 768; *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967).

[10] *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713, 1720 (1985); *Federal Prescription Service v. American Pharmaceutical Ass'n*, 663 F.2d 253, 264 (D.C. Cir. 1981); *American Optometric Ass'n v. FTC*, 626 F.2d 896, 913 (D.C. Cir. 1980).

[11] In *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973), the Court held that a state board composed of optometrists in private practice was constitutionally disqualified from conducting hearings looking toward the revocation of plaintiff's license to practice optometry because the revocation would possibly rebound to the personal benefit of members of the board.

[12] The public member has not participated in any of the Board's activities since December 1982. (F 3).

sulating them from competition. [34] (F 21, 34, 70, 72, 79). They have an individual, personal stake in competitive conditions in the market they regulate.[13]

The optometrist members of the Board are individuals capable of conspiring together. Each optometrist on the Board is principally engaged in the private practice of optometry in the market that the Board regulates. The regulations at issue in this case, which the Board optometrist members have combined to pass and enforce, have adversely affected chain optical establishments, as well as other optometrists, competing with Board members. (F 25, 70, 79, 132). Furthermore, in the absence of those regulations, the Board optometrists would compete with each other by individually deciding whether to advertise.

The members of the Board have not pooled their capital and do not share the risk of loss or opportunity for profit. The Board members have separate economic identities, and thus engage in a combination when they act together on the Board. *Arizona v. Maricopa,* 457 U.S. 332, 356–57 (1982). Substance should prevail over form in determining whether conduct is unilateral action by a single entity or concerted behavior. *Copperweld,* 467 U.S. at 771–74. The optometrists on the Board do not lose these separate identities by being Board members. The issue is decided by "the identity of the persons who act, rather than the label of their hats." *United States v. Sealy, Inc.,* 388 U.S. 350, 353 (1967).[14]

Respondent has, therefore, engaged in a combination and conspiracy as alleged in the complaint.

B. Unfair Methods of Competition

Respondent has banned advertising of discount prices by optometrists and of optometric services offered by retail optical stores. Since all of the challenged restrictions are the product [35] of a "combination or conspiracy," if they are unreasonably anticompetitive respondent has violated Section 1 of the Sherman Act and thereby Section 5 of the Federal Trade Commission Act.[15]

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[13] Optometrists on the Board are independent centers of decisionmaking because they have an "independent personal stake." *Copperweld,* 467 U.S. at 769–70 n. 15. In *Greenville Publishing Co. v. the Daily Reflector,* 496 F.2d 391, 399–400 (4th Cir. 1974) a corporation was held to have conspired with the president of the corporation because he had "an independent personal stake in achieving the corporation's illegal objective."

[14] In *Sealy,* the Court found that thirty independent licensees used their joint ownership of their licensor corporation to effect a horizontal conspiracy to allocate sales territories and fix prices in violation of Section 1 of the Sherman Act. The fact that the single licensor corporation was the "instrumentality of the licensees' " agreement did not obscure the fact that independent competitors had combined. 388 U.S. at 352–54.

[15] Violations of the Sherman Act are violations of Section 5 of the FTC Act. *FTC v. Cement Institute,* 333 U.S. 683, 690–92 (1948).

1. Restrictions on Advertising

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), held that restraints on advertising of professional services violate the First Amendment. Soon thereafter, in 1978, the Massachusetts Legislature adopted legislation requiring its boards regulating professions to comply with *Bates.* The Legislature declared that any regulations adopted by state agencies limiting "competitive advertising relating to the sale price of consumer goods or services" were "void as against public policy." Mass. Gen. Ann. Laws, ch. 112, § 61. (F 11).

In 1979, the Board's regulations still limited "permissible advertising" to information provided by professional cards, telephone directories, and announcements regarding office openings, closings or changes of location. (F 81). Its regulations also prohibited optometrists from permitting the use of their "name or professional ability" by retail sellers of optical goods (§ 3.08), and barred "discrimination" in fees for professional services (§ 3.12). (F 82, 83). The Board construed "discrimination" as being the advertising of discounts or the offering of discounts. (F 83, 118–20).

In 1981, the Massachusetts Executive Office of Consumer Affairs advised the Board that several of its regulations were anticompetitive and contrary to the *Bates* decision. (F 84–87). In May 1981, the General Counsel of EOCA told the Board that its anticompetitive regulations would make the Board vulnerable to an antitrust suit. (F 87). Respondent continued to enforce its advertising prohibitions. (F 119–20).

In 1982, the Massachusetts Department of the State Auditor reviewed the regulations of respondent. The State Auditor concluded that the Board was improperly restraining advertising and competition. (F 92–99).

The Board did revise some of its regulations following this criticism. The revised regulations adopted in October 1984, however, were in some respects more anticompetitive than the prior regulations. (F 100–03). The restraint on discount advertising was expanded to cover goods as well as services. (F 102, 149–50). The Board retained its ban on affiliation advertising. (F 101). The Board added a ban on testimonials and sensational or [**36**] flamboyant advertising. (F 103). The Board's enforcement of the 1984 regulations was vigorous and effective. (F 116–17).

The Board knew of the Federal Trade Commission's investigation in February 1985. (F 104). In May 1985 the Board considered criminal prosecution of optometrists advertising discounts. (F 131). On June 27, 1985, eight years to the day since *Bates* and eleven days prior to the

issuance of the complaint in this case, the Board proposed new regulations, which became effective in November 1985. (F 105–06, 110–14).

These revisions eliminated some bans on truthful advertising, including the ban on discount advertising, but retained others, including the ban on advertising of an affiliation between an optometrist and a retail optical establishment, despite renewed criticism from the EOCA about this provision. (F 107–09, 111–12).

2. Advertising as Competition

Advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates,* 433 U.S. at 364; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976); *American Medical Ass'n,* 94 FTC 701, 1005 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 445 U.S. 676 (1982). (F 60–66). Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. "[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." 94 FTC at 1005.

Just as the advertising ban in the *American Medical Ass'n* case was inherently anticompetitive so too are the Board's restraints. The Board has imposed total bans on general categories of advertising. As the Commission stated in discussing the order it issued in the *American Medical Ass'n* case, "[a]cross-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect." 94 FTC at 1030.

While this case parallels *American Medical Ass'n,* it presents an important additional factor. The advertising restraints at issue in this case have the force of law. Optometrists who violate the Board's commands may lose their professional license, and thereby their livelihood. The Board's restraint on discount price advertising is especially pernicious. By informing the public, price advertising places pressure on sellers to reduce prices, and instills cost consciousness in providers of services. *American Medical Ass'n* at 1005, 1011.

Banning advertisements of discounts impedes entry by new optometrists that depend on a high volume of patients. (F 68–69). Discounts also attract patients during times of low demand. (F 61, 68). A prohibition on discount advertisements obstructs such efforts to promote efficient use of resources. By preventing [**37**] optometrists from informing consumers that discounts are available, the Board eliminates a form of price competition. (F 72, 77, 80). *American Medical Ass'n,* 94 FTC at 1005. Advertising of discounts benefits both buyers and sellers and improves the functioning of the market. (F 60–62, 65). Consumers respond to discount advertising, enabling the optometrist

to maintain a larger inventory of lenses and to employ economies of scale, keeping prices low while offering consumers greater choice. (F 68–70).

Massachusetts statutes and regulations permit optometrists to affiliate with a retail optical store, so long as certain conditions are met. The optometrist must, for example, practice on "separate premises" from the optician, which may include an office next door with a separate public entrance. Mass. Gen. Laws Ann. ch. 112, § 73B. (CX 18–R). The Board, however, tried to prevent retail optical stores from informing the public of these lawful affiliations and of the availability of the optometrist's services. (F 82, 101, 111, 134–46).

A ban on truthful advertising of an affiliation between an optometrist and a retail optical store makes entry by retail optical chains more difficult. (F 79). Many consumers prefer the convenience of "one-stop shopping" available when retail optical chains affiliate with optometrists. (F 74, 76). Large optical establishments achieve economies of scale that enable them to offer lower prices. (F 60). They compete successfully by advertising availability of the optometrist. (F 76). Respondent's ban on affiliation advertising has posed a barrier to entry by optical establishments into Massachusetts. (F 79). Prices are lower in states where affiliation advertising is permitted. (F 78).

The Board's ban on the use of testimonials and sensational or flamboyant advertising is also anticompetitive and injures consumers. (F 103). Testimonials may convey useful information. Like the use of illustrations, these advertising methods attract the attention of the audience to the advertising message. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 105 S.Ct. 2265 (1985).

3. *Per Se* Doctrine

The Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma,* 104 S.Ct. 2948, 2962 (1984) explained the *per se* doctrine:

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product [38] of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. . . . [T]he criterion to be used in judging the validity of a restraint on trade is its impact on competition. (Citations omitted.)

The *per se* presumption may be used if a restraint is facially anticompetitive, and it has no redeeming virtue. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19–20 (1979).

The likelihood that horizontal price restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular indus-

try. *NCCA,* 104 S.Ct. at 2960, n. 21. Agreements among competitors to limit discounts are illegal *per se. Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 648–50 (1980). While the Supreme Court has been slow to condemn rules adopted by professional associations as presumptively unreasonable,[16] if the rule plainly affects price the *per se* presumption will be used. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348–49 (1982); *Goldfarb v. Virginia State Bar,* 421 F.2d 773, 782 (1975). Restrictions on price advertising are *per se* unlawful because they are aimed at "affecting the market price." *United States v. Gasoline Retailers Ass'n,* 285 F.2d 688, 691 (7th Cir. 1961). A restraint on price competition imposed by a state board like respondent has been held to be *per se* unlawful. *United States v. Texas State Board of Public Accountancy,* 464 F.Supp. 400, 402–03 (W.D. Tex. 1978), *aff'd* as modified, 592 F.2d 919 (5th Cir.), *cert. denied,* 444 U.S. 925 (1979).[17]

The Board informed the State Auditor that its ban on discount advertising was intended to prevent optometrists from charging certain persons higher than usual fees. A horizontal agreement to fix maximum prices is *per se* unlawful. *Maricopa,* 457 U.S. at 348. Moreover, the State Auditor found that: "Contrary to this stated intent, however, the board has invoked the regulation to restrain optometrists from offering reduced **[39]** fees to certain consumer groups, such as senior citizens and company employees." (CX 261 at 10; F 83).

The Board has prohibited the advertising of discounts on optical goods or services by optometrists. (F 83, 102). The Board has enforced this ban. (F 117–19, 123, 126–27). This conduct is therefore illegal *per se.*

There is not, however, similar precedent holding that banning affiliation advertising, testimonials, and sensational or flamboyant advertising is a *per se* violation of the antitrust laws. Judicial inexperience counsels against extending the reach of *per se* rules. *NCAA,* 104 S.Ct. at 2960, n. 21. This conduct should therefore be judged under the rule of reason.

4. Rule of Reason Doctrine

The test of legality under the rule of reason is whether the restraint imposed merely regulates and perhaps thereby promotes competition or whether it may suppress or even destroy competition. *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918). "[T]here is often no bright line separating *per se* from Rule of Reason analysis," *NCAA,* 104 S.Ct. at 2962, n. 26 (1984), and a restraint may be held unlawful under the rule of reason without an elaborate market anal-

[16] *FTC v. Indiana Fed. of Dentists,* 54 L.W. 4531, 4534 (decided June 2, 1986).

[17] The theory of the conspiracy finding of the district court in *Texas State Board of Accountancy* has been overruled by *Fisher,* 106 S.Ct. at 1049–50.

ysis, *American Medical Ass'n,* 94 FTC at 1004–1006. If the restraint causes anticompetitive effects, respondent has a heavy burden to demonstrate the existence of a procompetitive justification. *NCAA,* 104 S.Ct. at 2967. "Absent some countervailing procompetitive virtue —such as, for example, the creation of efficiencies in the operation of a market . . . such an agreement limiting customer choice by impeding the 'ordinary give and take of the market place' . . . cannot be sustained under the Rule of Reason." *FTC v. Indiana Fed. Dentist,* 54 L.W. at 4535. Where there is no plausible procompetitive justification for restrictive conduct the rule of reason can be applied "in the twinkling of an eye." *NCAA,* 104 S.Ct. at 2965 n. 39. A procompetitive justification must be reasonably necessary and narrowly tailored to achieve the procompetitive goal. *American Medical Ass'n,* 94 FTC at 1009–10.

Although the Board's conduct banning the advertising of discounts has been held subject to the *per se* rule, *supra,* in order to promote litigation efficiency it will also be analyzed under the rule of reason. *General Leaseway, Inc. v. Nat'l Truck Leasing Corp.,* 744 F.2d 588, 596 (7th Cir. 1984).

The Board's regulations have restrained Massachusetts optometrists from providing consumers with truthful information about the prices and services they offer. Optometrists were stopped from advertising discount prices. (F 119–20, 122, 125, 127–29). The Board stopped retail optical stores from informing [**40**] the public of their lawful affiliation with an optometrist and of the availability of the optometrist's services. (F 135–39, 141–46). Respondent's restraints have had an actual anticompetitive effect in the marketplace. (F 171).

At trial, respondent did not offer or prove a procompetitive justification for its restraints on discount advertising.[18] The only defense respondent offered related to its ban on affiliation advertising, arguing that it is designed to reduce the risk of harm to the public from unrestrained competition in optometry.

Respondent argues that affiliation may cause optometrists to provide lower quality care,[19] either because a lay person may interfere

[18] Respondent argued in its pretrial brief that its restraints on advertising may prevent increased concentration in the retail optical industry and that this amounts to a procompetitive justification. Increased concentration in a market, however, does not necessarily result in anticompetitive behavior between the remaining competitors. The BE study found prices lower on the average in non-restrictive cities where large chain stores and advertising optometrists enjoyed a large percentage of the market. (CX 318 at 4). The BE study found a greater number of optometrists giving higher quality examinations in non-restrictive cities. (CX 318 at 13). Further, optometrists compete with ophthalmologists and opticians to provide eye care services and goods to the public. Respondent failed to prove that the increase in market share by large chain stores would necessarily result in anticompetitive behavior.

[19] While arguing that the Board's reasons for adopting the ban were irrelevant, respondent offered newspaper and magazine articles and an economic report to show what the Board could have relied on in passing the rule banning affiliation advertising. This rationalization lacked materiality. (F 165). Furthermore, even though comity requires respect for the Board's action, it is likely that the Board had a responsibility to explain the rationale and factual basis for its rule. *Cf., Bowen v. American Hospital Ass'n,* 54 L.W. 4579, 4583–84 (decided June 9, 1986).

with the optometrist's independent professional judgment, or because the "commercial motivation" of the [41] optometrist may lessen professional standards.[20] Respondent can uphold professional standards and prevent shoddy work by optometrists by enforcing its disciplinary regulations. (F 9–10). *Bates,* 433 U.S. at 378. And the view that professions are "above" trade is an anachronism. *Bates,* 433 U.S. at 368–72.

The Board argues that advertising of discounts and affiliation advertising may be inherently deceptive. In this case, there is no proof that the prohibited advertising has deceived the public. Preventing deception cannot justify a total ban on truthful advertising. *Bates,* 433 U.S. at 372–75; *American Medical Ass'n* at 1009–10.

Respondent argues that its affiliation advertising ban prevents consumers from being misled into believing that they are getting a better deal at a large chain store when in fact they might only receive a better price but inferior eye care. This ban is an overbroad[21] suppression of truthful commercial speech. *Bates,* 433 U.S. at 376–77. The Board can stop shoddy work directly without broadly prohibiting advertising competition. (F 10).

Respondent made no attempt to justify its bans on testimonials and sensational or flamboyant advertising. Bans on testimonials or undignified advertising are overbroad. "[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it." *Zauderer,* 105 S.Ct. at 2280; *In re R.M.J.,* 455 U.S. 191 (1982); *American Medical Ass'n,* 94 FTC at 1023–24.

The Board has market power.[22] The Board's disciplinary powers give it the ability to impose sanctions on any optometrist [42] who fails to obey its rules and regulations. (F 10). The Board can impose its restraints on the market for optometric goods and services throughout Massachusetts. (F 7). Under the rule of reason, respondent's conduct is anticompetitive and therefore unlawful under Section 5.

C. Unfair Acts and Practices

The benefit of truthful advertising to consumers is well recognized, *Virginia Pharmacy Board,* 425 U.S. at 765:

[20] Respondent cites *Friedman v. Rogers,* 440 U.S. 1 (1979). There, the Court upheld the Texas Legislature's ban on the use of trade names because the legislature had found that there was a "considerable history in Texas of deception and abuse worked upon the consuming public through use of trade names." *In re R.M.J.,* 455 U.S. 191, 202 (1982). There is no evidence here, however, of deception of the public through affiliation advertising.

[21] "[T]he States may not place absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.,* 455 U.S. at 203.

[22] Because of the proof of actual detrimental effects and the lack of competitive justification for respondent's practices, there was no need for detailed market analysis in this case. *FTC v. Indiana Fed. of Dentists,* 54 L.W. at 4535.

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Restraints on advertising are unfair under Section 5. *American Medical Ass'n,* 94 FTC at 1010–11.

The Commission has held that acts or practices that injure consumers are unfair where the injury is substantial, and is not offset by consumer or competitive benefits, and where consumers could not reasonably have avoided it. *International Harvester,* 104 FTC 949, 1061 (1984). Respondent's advertising restrictions cause Massachusetts consumers to pay higher prices for optometric goods and services. (F 60–66). These restrictions also force consumers to spend additional time and money in order to obtain information about optometric goods and services. (F 60, 67–68, 75–76, 116–17). An increase in the price and in the cost of obtaining information about those goods is a substantial injury to consumers. (F 55).

Respondent's restrictions on the advertising of truthful, nondeceptive information provide no benefits to consumers that outweigh the consumer injury caused by those restrictions. Respondent has offered no credible evidence of any concrete [43] benefit caused by its advertising restrictions.[23] The Supreme Court has noted that "we view as dubious any justification [for advertising restrictions] that is based on the benefits of public ignorance."[24] *Bates,* 433 U.S. at 375.

The consumer injury caused by respondent's advertising restrictions can not reasonably be avoided. Respondent's advertising restrictions apply to all licensed optometrists practicing in Massachusetts.[25] Respondent's advertising restrictions are unfair acts and practices in violation of Section 5.

D. State Action Defense

Parker v. Brown, 317 U.S. 341, 344–45 (1943) held that the Sherman Act was not intended to apply to certain state action. Respondent argues that because it is a state agency it is entitled to the state

[23] In *Bates,* the Court noted that "[r]estraints on advertising . . . are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Bates,* 433 U.S. at 378.

[24] The Supreme Court has called restrictions on advertising "highly paternalistic." The Court noted that the preferred alternative is "to assume that this information is not in itself harmful, that people will perceive their best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board,* 425 U.S. at 770.

[25] Massachusetts law authorizes respondent to discipline optometrists and also provides for criminal penalties for violating respondent's regulations. (F 10).

agency exemption. Not every act by a state agency, however, is an exempt act.

To be exempt, the agency's acts must be clearly authorized and supervised by the sovereign state. *Hoover v. Ronwin,* 466 U.S. 558, 568–69 (1984). A state agency acting without clear direction by a sovereign state authority does not gain the exemption. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 790–91 (1975).

In *Goldfarb,* the Court found the Virginia State Bar to be a "state agency by law" engaged in an unauthorized restraint of trade by promulgating a minimum fee schedule and, in considering whether the Bar had *Parker* immunity, the Court ruled that: "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to [**44**] foster anticompetitive practices for the benefit of its members."[26] 421 U.S. at 791. In subsequent opinions, the Supreme Court has reaffirmed its holding in *Goldfarb* that state agencies are not sovereign entities entitled to automatic state action immunity.[27]

A state agency, simply by reason of its status as such, does not, therefore, qualify as the state acting in its sovereign capacity. Action by a state agency may, however, reflect state policy to displace competition with regulation. Such action will not violate the federal antitrust laws provided an "adequate state mandate for anticompetitive activities" exists. *City of Lafayette,* 435 U.S. at 415. This mandate exists when it is found [**45**] "that the legislature contemplated the kind of action complained of." *Id.*[28]

To determine whether the independent acts of the Board as a non-sovereign state representative should be imputed to the Common-

[26] The Virginia State Bar was a state agency for the purpose of issuing ethical opinions, one of which contained the anticompetitive fee schedule. *See* 421 U.S. at 776, n. 2.

[27] A plurality of the Court stated in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) (opinion of Brennan, J.), that "[p]lainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws." In *Southern Motor Carriers Rate Conference, Inc. v. United States,* 105 S. Ct. 1721 (1985), the Court cited with approval the statement in *City of Lafayette* that " '*Goldfarb* . . . made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign.' " *Id.* at 1729, *quoting City of Lafayette,* 435 U.S. at 410 (opinion of Brennan, J). In *Southern Motor Carriers,* the Court stated that while the public service commissions of four states permitted collective rate-making by private common carriers, these state agencies, "[a]cting alone . . . could not immunize private anticompetitive conduct." 105 S.Ct. at 1730. Only the state legislatures, as sovereign bodies, could do so. The collective rate-making was found to be immune only because it was "clearly sanctioned by the legislatures." *Id.*

[28] *Hoover v. Ronwin,* 466 U.S. 558 (1984) is an example of a case where Parker immunity applied because the acts complained of were those of the state supreme court directing and controlling a state agency, the bar examination committee. There the Arizona Supreme Court gave the state bar committee discretion in compiling and grading bar exams but retained strict supervisory power and ultimate full authority over its actions; the court rules specified the subjects tested and the qualifications of applicants; the grading system created by the committee had to be approved by the court; the committee authority was limited to recommendations and the court itself made final decisions to grant or deny applications for admissions; and aggrieved applicants were authorized to file petitions for reconsideration directly to the court—the denial of an applicant was the act of the Supreme Court and was immune under *Parker,* 466 U.S. at 572–73. The Court note that: "Our attention has not been drawn to any trade or . . . profession [other than law] in which the licensing of its members is determined directly by the sovereign itself—here the State Supreme Court." 466 U.S. at 581, n. 34.

wealth of Massachusetts, facts must be analyzed under the standard of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[29]

In order to satisfy the requirements of *Midcal,* respondent must first establish that its restraints on truthful advertising by optometrists were imposed pursuant to a clearly articulated and affirmatively expressed state policy. *Midcal,* 445 U.S. at 105. It is not enough to show that the state's position was one [**46**] of "mere neutrality" concerning truthful advertising. *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 55 (1982).

In the Massachusetts statutes cited by respondent there appears to be no mandate or authorization to perform the acts alleged in the complaint in this case. The Massachusetts legislature has not mandated that the Board prohibit optometrists from truthfully advertising discounts from their usual prices and fees. In fact, the state legislature has specifically directed to the contrary in Mass. Gen. Laws Ann. ch. 112, § 61 (F 11):

> Except as otherwise provided in this chapter, no such board [of registration] shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers the effect of which would restrain trade or lessen competition.[30]

This mandate by the legislature is similar to the facts in *Goldfarb* where the Bar promulgated an ethical opinion containing a minimum fee schedule that violated the ethical code provision adopted by the Virginia Supreme Court, which "explicitly directed lawyers not 'to be controlled' by fee schedules." *Goldfarb v. Virginia State Bar,* 421 U.S. at 789. The Court denied state immunity for the state agency's unauthorized restraint of trade.

The Commonwealth of Massachusetts has not articulated a policy prohibiting truthful advertising but has stated a policy favoring truthful advertising by professions regulated by state boards of registration. Furthermore, since no evidence was adduced on the issue, respondent also has failed to meet the second test of *Midcal,* that its

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[29] A state agency must meet the *Midcal* test to gain *Parker* immunity. *Hoover v. Ronwin,* 466 U.S. at 568–69; *Deak-Perera Hawaii, Inc. v. Dept. of Transportation, State of Hawaii,* 553 F.Supp. 976, 981, 985–89 (D. Hawaii 1983), *aff'd,* 745 F.2d 1281 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 1756 (1985); *Gambrel v. Ky. Board of Dentistry,* 689 F.2d 612, 618–20 (6th Cir. 1982), *cert. denied,* 459 U.S. 1208 (1983); *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272, 275 (9th Cir. 1982); *United States v. Texas State Board of Public Accountancy,* 464 F.Supp. 400 (W.D. Texas 1978), *aff'd per curiam,* 592 F.2d 919 (5th Cir.), *rehearing denied,* 595 F.2d 1221, *cert. denied,* 444 U.S. 925 (1979).

[30] The only restrictions on advertising "otherwise provided" by Massachusetts law are prohibitions on deceptive or misleading advertising and on claims that eyes are examined free. Mass. Gen. Laws Ann. ch. 112, § 73A. (CX 18P-Q).

conduct is actively supervised by [47] the state.[31] Respondent therefore does not qualify for state action immunity.

E. Not a Person Defense

Respondent argues that because it is a state agency it is not a "person" within the meaning of Section 5 of the Federal Trade Commission Act. The case law, however, shows to the contrary.

State and county hospitals are persons within the meaning of the Robinson-Patman Act. *Jefferson County Pharm. Assn. v. Abbott Labs.*, 460 U.S. 150, 155–56 (1983). As agents of the state, local governments have been held to be persons within the meaning of the Sherman Act and the Clayton Act as amended by the Robinson-Patman Act. *City of Lafayette*, 435 U.S. at 394–97.[32] Terms in Federal Trade Commission Act, the Sherman Act, and Clayton Act should be construed together. *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277–78 (1975).[33]

Furthermore, the Commission has expressed the opinion that a state is a "person" within the meaning of Section 5(b) of the Federal Trade Commission Act. *Indiana Federation of Dentists*, 93 FTC 321, n. 1 (1979) (interlocutory order). And a state board [48] has been held to be such a person. *Rhode Island Board of Accountancy*, FTC Docket No. 9181, Order of February 12, 1985 (M. Brown, A.L.J.).

Respondent is, therefore, a person within the meaning of the Federal Trade Commission Act.

F. Mootness

The Commission complaint, issued in July 1985, cited four kinds of advertising that were banned by the Board. On November 7, 1985, the Board repealed three: the bans on sensational and flamboyant advertising, and testimonials, and the advertisement of discounts. (F 112). The revision added two more, banning advertising that offers gratuitous services,[34] and requiring that optometrists offering discounts

[31] In *Town of Hallie v. City of Eau Claire*, 105 S.Ct. 1713 (1985), the Court held that a municipality may qualify for state action immunity without showing active state supervision because municipalities are an arm of the state and may be presumed to act in the public interest, whereas private parties must show active state supervision because they may be presumed to act primary in their own interest. When the actor is a state agency the Court indicated—but did not decide—that "it is likely" that state supervision would also not be required. *Id.* at 1720, n. 10. Where the state agency is composed of industry members regulating the industry, however, there apparently must be proof of active supervision by the state for the state action doctrine to apply. *See Hoover v. Ronwin*, 466 U.S. at 569, where the degree to which the state supreme court supervised the committee on bar examinations, a state agency, was relevant to the state action analysis.

[32] The Court relied on the presumption against implied exclusions from coverage to the antitrust laws. *Id.* at 398.

[33] A transgression of the Sherman Act or the Clayton Act violates the Federal Trade Commission Act. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 609 (1953).

[34] Section 5.11(1)(b) now prohibits "[a]dvertising which offers gratuitous services, in violation of Mass. Gen. Laws Ann. ch. 112, § 73A." (F 113). The statute provision cited in this regulation only bans offers of free eye examinations in connection with advertisements for eyeglasses and contact lenses. Another regulation, § 5.11(1)(c), bans advertising that violates § 73A. (F 113). Section 5.11(1)(b) therefore may mean that any advertising of gratuitous services is a violation of Section 73A. In the past the Board has used Section 73A to suppress advertisement of free goods

(footnote cont'd)

must substantiate their usual and customary fees. (F 113–14). The fourth regulation cited in the complaint, prohibiting optometrists from allowing a retail optical establishment to advertise their names or the availability of their services, was essentially unchanged. (F 111).

The Board published on June 27, 1985, the proposal to eliminate some of its regulations that ban truthful advertising. (F 105). This action occurred eleven days before the complaint was issued in this case, and months after the Board learned that it might be sued by the FTC. (F 104, 106). By reasonable inference, [**49**] the proposal was caused, at least in part, by the Board's awareness of the Commission's investigation.[35]

The Board enforced its regulations against discount advertising until June 1985, just prior to issuance of the complaint. (F 123–32, 183). The respondent has restrained truthful advertising well after it should have known that its conduct was illegal. (F 187).

The Board has never disavowed its position that advertisements offering discounts are inherently deceptive. (F 180).[36] Optometrists have been confused about what the Board's regulations meant and what sort of advertising would be permitted. (F 184). The Board has no advisory opinions that provide guidance to optometrists. (F 20).

Respondent argues that there is no reasonable expectation that the wrong will be repeated and the case has become moot. This was discussed in *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953):

> [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . *e.g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal [**50**] as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

Since a violation has been proved, the burden of showing mootness is on respondent, while complaint counsel have the burden of showing

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or non-examination services. (F. 149–50). The Board adopted a regulation in October 1984 that banned advertising discounts as to both goods and services, whereas its prior regulation had only addressed discounted prices for services. (F 102). Consequently, the new regulation may prohibit the advertising of free services beyond that prohibited by statute, including free follow-up care or eyeglass adjustments.

[35] There is nothing in the record to show that the June 27, 1985 proposal was not based on the Commission's investigation. Respondent's proposed finding No. 64 incorrectly cites Dr. Rapoport's testimony to that effect. He was testifying about why the Board tabled its investigation of one case of discount advertising—not why the Board proposed to change its regulations in June 1985, including the proposed deletion of its rule banning discount advertising. (TR 540–41).

[36] Mootness requires such an announcement. *American Medical Ass'n v. FTC*, 638 F.2d 433, 451 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

that there exists a cognizable chance of recurrent violation necessitating injunctive relief. *SCM Corp. v. FTC*, 565 F.2d 807, 812, 813 (2d Cir. 1977), 612 F.2d 707, *cert. denied*, 449 U.S. 821 (1980). The violation here was egregious. The Board's intent was to prevent optometrists from offering reduced fees to certain consumer groups. The Board continued the unlawful practice for years after it had knowledge that the rules and conduct were illegal and probably unconstitutional. The Board partially discontinued the regulations only after being apprised of the FTC investigation. This evidence shows a "cognizable danger" of repetition by the Board. *TRW, Inc. v. FTC*, 647 F.2d 942, 953–54 (9th Cir. 1981).

IV. Remedy

The type of order that is necessary to cope with the unfair practices found should be clear and precise. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). All roads to the prohibited goal should be closed so that the order may not be by-passed with impunity. *FTC v. National Lead Co.*, 352 U.S. 429, 431 (1957). The order here is designed to prevent a recurrence of the illegal conduct by prohibiting the Board from imposing restraints on truthful advertising, while permitting the Board to carry out its legitimate functions, prohibiting false or deceptive advertising and enforcing statutory restrictions on advertising.[37]

The evidence shows that the Board prohibited the advertising of discounts. (F 83, 102). The Board enforced its prohibition at "informal conferences" at which offending optometrists were warned to cease such conduct, (F 121–22, 124–25, 132). The Board also instructed optometrists and an advertising agency that advertising discounts for optometric services was illegal, unprofessional, or otherwise improper. (F 118–20, 123, 125–30). Paragraph II A prohibits acts by the Board to prevent the advertising of discounts. Paragraph II A also prohibits the [51] Board from restricting the offering of discounts.[38] It does not prevent the Board from prohibiting false advertising of discounts.[39]

The Board is prohibited by paragraph II B from restraints on "affiliation advertising." The Board has adopted regulations prohibiting such advertising (F 82, 101, 111), has enforced the prohibition, and has declared affiliation advertising to be improper or illegal (F 134–46, 151–54, 157).

Paragraph II C involves testimonials in advertising, and advertis-

[37] *American Medical Ass'n*, 94 FTC at 1040, *modified*, 99 FTC 440, *modified*, 100 FTC 572 (1982).

[38] The Board's intent has been to prohibit the offering of discounts. (F 83).

[39] The order does not challenge the Board's application of 246 C.M.R. § 5.11(6), which requires substantiation of "usual and customary fees" when offering discount fees. Substantiation appears appropriate to assure that advertised discounts are not false or deceptive.

ing that the Board believes is sensational or flamboyant. From October 1984 to November 1985, the Board had rules prohibiting such advertising. (F 103).

Paragraph II D of the order prohibits the Board from using any other person or organization to take action prohibited by the order.

Part III of the order provides for petitioning of the legislature for statutory changes affecting matters covered by the order.

Part IV of the order imposes affirmative obligations on the Board. The Commission's authority to issue orders requiring a respondent to make affirmative disclosures, including sending notices to affected parties, is well-established.[40]

Paragraph IV A of the order requires the Board to notify optometrists in Massachusetts of the entry of an order against the Board by mailing a copy of the final order, and an announcement summarizing the order, to all optometrists currently licensed in Massachusetts, to all current applicants for a license in Massachusetts and applicants during a period of five [**52**] years after entry of a final order, and to the Massachusetts Optometric Association.

The Board has been enforcing its prohibitions of truthful advertising in Massachusetts for several years, and has informed optometrists that such advertising is illegal and improper. (F 187). The notice is designed to inform optometrists in Massachusetts of the order. The order allows the Board one year to include the notice and order in its regular mailings for annual license renewal, thus avoiding the cost and burden of a separate mailing. The order gives the Board sixty days to send a single notice to the state optometric association and subsequent applicants.

Complaint counsel proposed an order requiring the Board to repeal 246 C.M.R. § 5.07(3), which prohibits optometrists from permitting or participating in affiliation advertising by non-optometrists. This case was not tried on the theory that the rule is preempted by Section 5 of the FTC Act. *See Fisher,* 106 S.Ct. at 1048. That theory requires a different, higher standard of proof. *Rice v. Norman Williams Co.,* 458 U.S. 654, 659–61 (1982). The rule, therefore, should not be abrogated. *United States v. Texas State Board of Public Accountancy,* 592 F.2d 919 (5th Cir.), *cert. denied,* 444 U.S. 925 (1979).

Paragraphs IV B-C are reporting and recordkeeping provisions to assure compliance with the order.

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[40] *American Medical Ass'n,* 94 FTC at 1039–40; *Southwest Sunsites, Inc. v. FTC,* 785 F.2d 1431, 1439 (9th Cir. 1986); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied,* 106 S.Ct. 1167 (1986); *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 756–62 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978); *Heater v. FTC,* 503 F.2d 321, 323 n. 7 (9th Cir. 1974).

ORDER

I.

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

A. "*Board*" shall mean the Massachusetts Board of Registration in Optometry, its officers, members, committees, representatives, agents, employees, and successors.

B. "*Discounted price*" shall mean a price that is less than the price the person or organization usually charges for the good or service.

C. "*Disciplinary action*" shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice optometry in [53] Massachusetts, or the imposition of a reprimand, fine, probation, or other penalty or condition; or

2. the initiation of an administrative, criminal, or civil proceeding.

D. "*Optical good*" shall mean any commodity for the aid or correction of visual or ocular anomalies of the human eyes, such as lenses, contact lenses, spectacles, eyeglasses, eyeglass frames, and appliances.

E. "*Optometric service*" shall mean any service that a person duly registered and licensed to practice optometry under Mass. Gen. Laws Ann. ch. 112, §§ 66 *et seq.* is authorized to provide pursuant to those statutory provisions.

F. "*Price advertising*" shall mean advertising the price of any optometric service or optical good.

II.

It is ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any rule, regulation, policy, disciplinary action or other conduct:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising or offering a discounted price for optometric service or optical goods;

B. Prohibiting, restricting, impeding, or discouraging the advertising or publishing of the name of an optometrist or the availability of an optometrist's services by a person or organization not licensed to practice optometry;

C. Prohibiting, restricting, impeding, or discouraging any other

advertising that uses testimonials or advertising that the Board believes is sensational or flamboyant;

D. Inducing, urging, encouraging, or assisting any optometrist or organization to take any of the actions prohibited by this part.

Nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the [**54**] meaning of Massachusetts General Laws, Chapter 112, Sections 71 and 73A, or that the Board reasonably believes to otherwise violate Massachusetts statutes.

III.

It is further ordered, That this order shall not be construed to prevent the Board from engaging in activity protected under the First Amendment to the United States Constitution to petition for legislation concerning the practice of optometry.

IV.

It is further ordered, That the Board shall:

A. Distribute by mail a copy of this order, and executed Appendix:

1. to each person licensed to practice optometry in Massachusetts within one (1) year after the date this order becomes final;

2. within thirty (30) days after this order becomes final, to each person whose application to practice optometry in Massachusetts is pending, and to each person who applies for five (5) years thereafter, within sixty (60) days after the filing of the application; and

3. to the Massachusetts Optometric Association, within sixty (60) days after the date this order becomes final;

B. Within one hundred twenty (120) days after the date that this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner in which the Board has complied with this order;

C. For a period of five (5) years after the date that this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and [**55**] copying, all documents and records containing any reference to any matter covered by this order; [**56**]

APPENDIX

The Federal Trade Commission has issued an order against the Massachusetts Board of Registration in Optometry. This order provides that the Board may not prohibit or restrict:

1. offering, or truthful advertising that offers, discounted fees for goods and services provided by optometrists;
2. truthful advertising of an optometrist's name and the availability of his or her services by retail sellers of optical goods or other persons not licensed to practice optometry;
3. advertising that uses testimonials or that the Board believes is sensational or flamboyant.

The order does not affect the Board's authority to prohibit advertising that is fraudulent, false, deceptive, or misleading, or advertising that otherwise violates Massachusetts statutes.

In conformity with the Federal Trade Commission's order, you are advised that the prohibition on advertising gratuitous services contained in 246 C.M.R. § 5.11(1)(b) does not prohibit all advertising of gratuitous services. It only applies to those advertisements of gratuitous services prohibited by Massachusetts law, specifically Mass Gen. Laws Ann. ch. 112, § 73A. This statute prohibits "in any newspaper, radio, display sign or other advertisements . . . any statement containing the words 'free examination of eyes,' 'free advice,' 'free consultation,' 'consultation without obligation,' or any other words or phrases of similar import which convey the impression that eyes are examined free." The Board's rule is no broader than that statutory prohibition.

Pursuant to 246 C.M.R. § 5.11(6), the Board may require reasonable substantiation of a licensee's usual fees for services or goods, for the purpose of preventing the false, deceptive, or misleading advertisement of discounted fees by a licensee.

For more specific information, you should refer to the order itself, a copy of which is enclosed.

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Chairman
Massachusetts Board of Registration
in Optometry