DISSENTING OPINION OF COMMISSIONER MARY L. AZCUENAGA

As described in the opinion of the majority, the conduct at issue in this case carries a patina of unlawfulness that few could disregard.

Restraints on advertising long have been suspect under the law. Those who would practice such restraints have been pressed increasingly to justify their conduct, and rightly so. But the gloss applied by the majority to the evidence in this case, although mesmerizing, proves chimerical on examination, like the glow of a firefly that captivates us for a time but does not withstand the hard light of day. Certainly there is evidence in the record on which to base suspicion, but it is exceedingly meager and falls short of establishing liability when viewed in context with other evidence and the law. I cannot join my colleagues in finding liability on this record. Also, I cannot join my colleagues in overruling *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988)("Mass. Board").

Although I do not join the Commission in overruling Mass. Board, I have analyzed the case using the same traditional analysis as the majority, and there is much in the majority's opinion with which I agree. I concur in the conclusion that the Commission has jurisdiction over the California Dental Association ("CDA"). In addition, I agree that a categorical and complete ban on price advertising, imposed by a trade or professional association, would be *per se* unlawful and that before condemning an association's restrictions on nonprice advertising under Section 5 of the FTC Act, the Commission should perform a rule of reason analysis. Finally, I agree that the CDA has not made out a state action defense.

Despite these areas of agreement, I must dissent. In reviewing the record, the Commission has not come to grips with the true nature and extent of CDA's restrictions on advertising. The facts are hotly contested by the parties. CDA insists that it prohibits only false and misleading advertising, as defined by the state law of California, and attributes incidents of excessive restraints to local dental societies that were not named in the complaint. Complaint counsel argue that CDA bans a wide range of useful and informative advertising that would not be considered deceptive under Section 5 of the FTC Act.

The theory of liability is that CDA enforced facially legitimate rules against false and deceptive advertising in such a way as to limit truthful advertising. Such a finding should rest on evidence of a pattern of enforcement decisions. I question whether the evidence cited in the Commission opinion supports finding such a pattern. This is particularly true given the strong indications in the record that

CDA's enforcement did not have the sweeping impact suggested by the majority.

With respect to restraints on price advertising, I question whether CDA in fact imposed such a clear ban as to bring its conduct within the *per se* rule, and the prudent course would be to remand for additional findings of fact. Restraints on price advertising that do not constitute such a ban, such as disclosure requirements that may have some informational benefit to consumers and impose some burden on advertisers, also may be unlawful[1] but should be addressed under the rule of reason. The effect of restraints on nonprice advertising on the price and output of the advertised product may be more attenuated and also should be addressed under the rule of reason. The evidence that CDA imposed restraints on nonprice advertising by its members is weak, but even assuming such conduct occurred, the analysis of the majority does not support a holding of liability.

I disagree with the conclusion of the majority that CDA has market power. In presenting their case, complaint counsel relied on a theory of virtual *per se* illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects. CDA did introduce economic evidence that it has no market power, and the Administrative Law Judge agreed. The majority reverses, entering a *de novo* finding of market power. Slip Op. at 32. Some persuasive evidence of market power is essential to a finding of liability under the rule of reason. The evidence of market power here is so sparse and superficial as to be virtually nonexistent. Imposing liability on this record for restraints on nonprice advertising is functionally equivalent to condemning them under the *per se* rule.

I disagree with the conclusion of the majority that entry into the California dental market is difficult. The majority's analysis of the evidence on entry seems highly inconsistent with the Commission's usual analysis and, absent explanation, appears to suggest that the Commission has significantly relaxed its standard for establishing that entry is difficult. A quick look analysis based on a limited record has much to recommend it, but only if that record is held to the same standards of analysis as in a more extensive review. No

[1] "Restrictions on price advertising are unlawful because they are aimed at 'affecting the market price.'" *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 606 (1988) quoting *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961).

anticompetitive effects having been shown, the complaint should be dismissed with respect to the conduct judged under the rule of reason.

I.

The opinion of the majority implicitly overrules the method of analysis set forth in *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 602-04 (1988). Whatever the reason for failing to use the word "overrule," it will be clear to any reasonable lawyer that that is what the majority has done. Instead of adhering to Mass. Board, the Commission endorses the traditional dichotomy between *per se* and rule of reason analysis. Slip Op. at 16.

It will be unfortunate if the Commission's decision signals a return to the analysis of old in which the significance of competitive effects and efficiencies was sometimes obscured by efforts to fit conduct in either the *per se* or rule of reason pigeonhole. In 1988, when the Commission decided Mass. Board, Supreme Court decisions had opened the door to an antitrust analysis that focuses more on competitive effects and efficiencies than on labels.[2] Mass. Board was a considered attempt to further that trend. Because there have been few opportunities for the Commission to explain Mass. Board in the context of a fully developed record, no body of precedent implementing its focus on competitive effects and efficiencies has evolved.[3]

The analytical framework set forth in Mass. Board, properly applied, has much to recommend it. This case presents an excellent opportunity to clarify and build on Mass. Board.[4] One particularly disappointing aspect of the opinion of the majority is the absence of a satisfactory discussion of efficiencies, the omission of which would have been more glaring if the Commission had used a Mass. Board

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[2] *See NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

[3] Perhaps not surprisingly, Mass. Board, a precedent-setting case in terms of the Commission's analytical approach, created a number of analytical difficulties that were left for resolution in future cases. *See, e.g.*, Azcuenaga, "Market Power as a Screen in Evaluating Horizontal Restraints," 60 Antitrust L.J. 935, 939 (1992).

[4] The Administrative Law Judge misapplied the Mass. Board analysis in his Initial Decision, and the opinion has been widely misconstrued elsewhere.

analysis.[5] The decision of the majority to cast Mass. Board aside before exploring its potential is cavalier and premature and sends the wrong signal about the importance of careful economic analysis, particularly the consideration of efficiencies.[6]

II.

At this point in an administrative proceeding, the nature and extent of CDA's restrictions on advertising should be well defined and substantiated, but they remain remarkably murky in this case. One difficulty in reviewing the record is that complaint counsel evidently assumed that actions by local dental societies are attributable to CDA, although the complaint did not name the local dental societies and the record does not establish that the local societies acted under the direction and control of CDA. Although complaint counsel submitted numerous exhibits relating to enforcement over a period of many years, most of those exhibits relate to enforcement by local dental societies, not by CDA. Some of the exhibits, which go back to the early 1980's, apparently do not reflect current or even recent CDA practice. Tr. 851. The majority seems to agree with CDA's argument that it cannot be condemned on the basis of acts by local societies without some evidence linking CDA to the challenged conduct.

The majority does not adopt the findings of fact in the Initial Decision and, disclaiming reliance on those findings, relies instead on its "independent review of the record." Slip Op. at 10 n.6.[7] The majority characterizes the CDA's actions, but despite its independent

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[5] One source of confusion under Mass. Board is that the term "efficiencies" as used in that opinion and in antitrust analysis generally encompasses much more than simple savings in terms of dollars and cents. In the antitrust lexicon, "efficiencies" includes valid business justifications such as explanations of why a particular product or service could not be brought to market absent the conduct that is subject to examination, the need to differentiate a product, or other circumstances consistent with a procompetitive rationale.

[6] Although I do not join Commissioner Starek's separate opinion, his discussion of the virtues of the analytical approach in Mass. Board over that employed by the majority has a good deal of merit.

[7] On appeal, the Commission conducts a *de novo* review. 16 CFR 3.54(a)("Upon appeal from or review of an initial decision, the Commission * * * will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."); The Coca Cola Bottling Co. of the Southwest, 5 Trade Reg. Rep. (CCH) ¶ 23,681 at 23,405 (FTC 1994)("Our review of this matter is *de novo*.").

review, offers little in the way of findings of fact to resolve important disagreements between the parties.[8]

The opinion of the majority fails to reconcile, or otherwise dispose of, conflicting evidence on a number of significant issues. A fundamental question is whether and to what extent CDA has restricted advertising by California dentists. On this record, it is difficult to find that CDA's restrictions adversely affected dentists who want to advertise or that the restrictions caused anticompetitive effects. Although CDA discouraged specific advertisements (usually advertisements that violated state statutes or regulations defining and prohibiting deception), there is no empirical evidence in the record that CDA members advertise less frequently than dentists in California who are not members of CDA or that dentists in California advertise less than dentists in other states.

In fact, the preponderance of the evidence suggests that some advertising by dentists is flourishing in California. CDA, in a very graphic demonstration, filed a one and one-half inch thick appendix of telephone yellow pages advertising by California dentists. Mr. Christensen, a witness called by complaint counsel, who owns an advertising agency in Corte Madera, California, testified about his fifteen years of experience specializing in advertising and marketing by dentists. Tr. 545, 571. He said that most incidents of advertising restrictions by CDA occurred in the early 1980's. Tr. 609. Mr. Christensen testified that since 1988, he had heard of only one or two letters from dental societies regarding advertising. Tr. 616-17. His "Manual," which is furnished to clients of his advertising agency to apprise them of his approach to marketing and advertising by dentists, advises that a dentist can say what he wants as long as it is not false or misleading. Tr. 616-17; RX 72 at 111. Another of complaint counsel's witnesses testified about building a dental practice with a marketing campaign that was the "[m]ost aggressive

[8] To rebut this dissent, the majority offers note 6 at page 10, a footnote of impressive length, that cites CDA actions relating to sixty-two dentists. On examination, the examples cited fail to match the promise of rebuttal presaged by the length of the note. Thirty-eight of the sixty-two examples support a finding of the majority with which I agree, *i.e.*, "[t]he record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners." *See* text accompanying note 16, *infra*. Eleven examples of claims related to fees are not inconsistent with my view that the broad characterizations of the majority regarding restraints on fees cannot stand in light of probative, conflicting evidence. *See* note 15, *infra*. Seven more examples of superiority claims based on sterilization practices fail to answer the fundamental question I have raised whether this particular interpretation may be justified. *See* note 23 and accompanying text, *infra*. The same can be said for four examples of CDA actions based on a theory of unjustified expectations. *See* note 21, *infra*. Other examples cited in note 6 are discussed in the text of the majority opinion and in the text of this dissent.

I've ever seen," while remaining an active member of CDA. Tr. 790, 765-66. On balance, given the absence of evidence showing a reduction in advertising, the record suggests that CDA has not deterred dentists in California from advertising.

I cannot join the majority's expansive characterizations of CDA's actions. *See* Slip Op. at 17. With respect to price and discount advertising, the majority draws unqualified conclusions regarding the "effective prohibition of advertising," the "silencing effect" of CDA and the imposition of a broad ban on price advertising. Slip Op. at 17-19. With respect to nonprice claims, the majority draws broad conclusions that the nonprice advertising proscribed by CDA is vast and that CDA effectively bans all quality claims. Slip Op. at 25. As discussed below, I believe that these characterizations overstate the evidence.

1. Alleged Restraints on Price Advertising

I agree with the majority that a private conspiracy to prohibit price advertising is *per se* unlawful. Under the *per se* rule, the first and ultimate question in deciding liability is whether CDA in fact prohibits price advertising. CDA has no rule or other explicit prohibition against price advertising.

It is possible, however, that the association in effect prohibits price advertising by the manner in which it interprets and enforces facially legitimate rules. Does CDA do so? The evidence is conflicting. CDA officials testified that its standard for evaluating advertisements is whether the advertisement is false or misleading, but a few CDA actions cited by the majority, particularly letters by CDA's membership application review committee, are not easily reconciled with the testimony. On balance, I question whether the record provides a sufficient basis to find that CDA prohibits price advertising.

Members of CDA must agree to abide by the association's constitution, bylaws and Code of Ethics. Slip Op. at 3. Section 10 of CDA's Code of Ethics provides:

> Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not

misrepresent their training and competence in any way that would be false or misleading in any material respect. (CX-1484-Z-49.)

On its face, Section 10 of the CDA Code seems unobjectionable,[9] and the majority fails to identify specific language in Section 10 that explicitly or implicitly prohibits truthful advertising.

The majority also refers to several CDA advisory opinions. Advisory opinions are not part of the Code of Ethics, and a dentist does not necessarily subscribe to the advice by joining CDA, although he or she agrees to abide by the official rulings of the organization.[10] The only prohibition in the CDA's ethical code is against false and misleading advertising. The difficult question is whether CDA in effect prohibited price advertising.

Advisory Opinions 2(b), 2(d), 3 and 4 are singled out by the majority for particular attention.[11] Slip Op. at 17. The majority neither analyzes the specific language of these advisory opinions nor holds them unlawful on their face.[12] These CDA advisory opinions appear to derive from and not extend beyond the scope of the California state law of deception. Section 651 of the California Business and Professions Code prohibits the dissemination of false

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[9] The first and third sentences of Section 10 merely prohibit false and misleading advertising. The second sentence relating to "the esteem of the public" is somewhat ambiguous, but the CDA enforcement actions cited in the opinion of the majority do not rely on this sentence.

[10] The preamble to the Code of Ethics states:

The CDA Judicial Council may, from time to time, issue advisory opinions setting forth the council's interpretations of the principles set forth in this Code. Such advisory opinions are 'advisory' only and are not binding interpretations and do not become a part of this Code, but they may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws.(CX-1484-Z-47.)

[11] They provide:

2. A statement or claim is false or misleading in any material respect when it:

(b) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

. . .

(d) Relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors; . . .

3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.

4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity--for example, "low fees"--must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity. (CX-1484-Z-49-50).

[12] Section III(A)(2) of the order requires CDA to remove Advisory Opinions 2(c), 2(d), 3, 4, and 8. Opinion 2(c) states that a statement is misleading when it "is intended or is likely to create false or unjustified expectations of favorable results and/or costs."

or misleading information by health care professionals, including dentists.[13]

The language of the CDA advisory opinions is very close, but not identical, to that of the statutes. Opinion 2(b) defines as false and misleading a statement that "[i]s likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts," and Section 651(b)(2) of the statute covers a statement that "[i]s likely to mislead or deceive because of a failure to disclose material facts." Opinion 2(d) defines as false and misleading a statement that "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors," and Section 651(b)(4) includes a statement that "[r]elates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors."

Opinion 3 provides that price advertisements "shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import." Section 651(c) provides that price advertising "shall be exact, without the use of phrases as 'as low as,' 'and up,' 'lowest prices' or words or phrases of similar import," and also that "[t]he price for each product or service shall be clearly identifiable."

Advisory Opinion 4 provides "[a]ny advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity. The burden

[13] The statute, which was amended in 1992, with the changes effective January 1, 1993, provides, in part:

(b) A false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which does any of the following:

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) Is intended or is likely to create false or unjustified expectations of favorable results.

(4) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors . . . .

(c) Any price advertisement shall be exact, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import. Any advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison. Price advertising shall not be fraudulent, deceitful, or misleading, including statements or advertisements of bait, discount, premiums, gifts, or any statements of a similar nature. In connection with price advertising, the price for each product or service shall be clearly identifiable. The price advertised for products shall include charges for any related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise. (1 Deering's Business and Professions Code Annotated of the State of California Section 651 (1995 Supp.).)

shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity." Section 651(c) provides that "[a]ny advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison."

The close parallel between the CDA advisory opinions and the statute strongly suggests that the association simply followed the California statutory definition of false and misleading advertising by health professionals. A side-by-side comparison of the language does not suggest that CDA extended or attempted to extend the coverage of the statute.

The substantiation and disclosure requirements in Section 651(b) and (c) of the California statute reflect a concern about misleading advertisements making price comparisons. By issuing guides relating to deceptive price comparisons, the Commission has indicated that the concern is legitimate and that disclosure and substantiation rules are an appropriate way to address the concern. 16 CFR 233. For example, the Commission requires:

". . .whenever a 'free,' '2-for-1,' 'half price sale,' '1-cent sale,' '50% off,' or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset." (16 CFR 233.4(c).)

The majority suggests that although the CDA rules on their face may seem "innocuous," CDA enforced the rules in an anticompetitive fashion, Slip Op. at 17, citing a handful of CDA actions to support this conclusion. Some of the CDA actions appear questionable, but the incidents cited are too limited in number to show a pattern of enforcement sufficient to establish a CDA policy to prohibit price advertising. One of the most questionable CDA actions is Exhibit CX-118, which is a 1993 letter from CDA's Membership Application Review Committee (MARS) to the Tri-County Dental Society, recommending denial of membership to Dr. Buckwalter, because he advertised "Reasonable Fees Quoted in Advance," "No Cost to You," and "Major Savings." Although the MARS letter cited and ostensibly relied on Section 651 of the California Code, no clear parallel to the statute is apparent.

The majority also cites an April 1988 MARS letter that appears to prohibit claims that fees are "reasonable," CX-301, but the majority acknowledges that CDA abandoned this position in 1991. CX 1223-D; Tr. 1453 (Dr. Nakashima).[14] In summary, there is conflicting evidence about claims of "reasonable" or "affordable" fees, but this is hardly a persuasive showing of a pattern of conduct that effectively prohibited fee advertising.[15]

The record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners.[16] The objective of a disclosure requirement is to place more information in the hands of consumers. A disclosure requirement is not a prohibition on price advertising, although required disclosures may in some circumstances be so extensive and burdensome that price advertising is effectively prohibited. Although the majority hypothesizes about the burden of the state Board's regulation, a witness with broad experience in advertising by California dentists, called by complaint counsel, testified that the disclosure rules did not burden price advertising. Tr. 628, 648-50.

The majority quotes the disclosure requirements as they appear in the 1988 "Advertising Guidelines" issued by the CDA, but without

[14] Some local dental societies may not have gotten word of the 1991 action. *See* CX-391 (October 19, 1993, letter from the Tri-County Dental Society); CX-778 (May 27, 1993, letter from the Tri-County Dental Society). Abandonment does not moot the case, but it may be relevant in assessing whether the evidence establishes a pattern of conduct.

[15] In footnote 6 at page 10, the majority cites thirteen additional CDA letters related to price advertising. Ten of the letters relate to claims that fees are "affordable." CX-335 (Dr. Dubin 1991); CX-32 (Dr. Bales 1991); CX514 (Dr. Stygar 1991); CX-866 (Dr. Rosenson); CX-50 (Dr. Jung 1990); CX-602 (Dr. Leizerovitz 1991); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-957 (Dr. Skinner 1992); and CX-949 (Dr. Singhal 1990). One relates to the use of the word "reasonable." CX-1042 (Dr. Bales 1991). It certainly would be questionable for an association to prohibit all such claims, but the evidence is conflicting, and CDA may prohibit only unsubstantiated claims. A number of CDA ethics officials testified that CDA's Code prohibits only unsubstantiated claims. Tr. 865-66 (Dr. Abrahams testified that the claim is "meaningless" and does not violate the Code of Ethics and is "so prevalent that we would spend a lot of time enforcing it . . . ."); Tr. 1347 (Dr. Kinney testified that claims of reasonable or affordable prices are acceptable if verifiable); Tr.1479 (Dr. Nakashima testified that such a claim is acceptable "if it can be substantiated"); Tr. 1574 (Dr. Cowan); Tr. 1044-45 (Dr. Lee testified that a claim of reasonable or affordable fees is acceptable if verifiable).

[16] Footnote 6 at page 10 of the majority opinion provides additional examples. CX-18 (Dr. Asher 1993); CX-444 (Dr. Hiatt 1993); CX-387 (Dr. Ghadimi 1992); CX-366 (Dr. Foroosh 1993); CX-333 (Dr. Dorotheo 1993); CX-126 (Dr. Butt 1991); CX-51 (Dr. Beheshti 1991); CX-49 (Dr. Beheshti 1990); CX-27 (Dr. Azarmi 1993); CX-4 (Dr. Aguilera 1990); CX-297 (Dr. Davtian 1991); CX-258 (Dr. Daher); CX-248 (Dr. Crowley); CX-206 (Dr. Choi 1992); CX-151 (Dr. Casteen 1993); CX-516 (Dr.Kachele); CX-514 (Dr. Stygar 1991); CX-497 (Dr. Johnston 1993); CX-474 (Dr. Jeffs 1990); CX-602 (Dr. Leizerovitz 1991); CX-557 (Dr. Kita 1992); CX-668 (Dr. Massa 1992); CX-661 (Dr. Mardirossian 1990); CX-646 (Dr. Maiden 1992); CX-830 (Dr. Paulsen 1990); CX-828 (Dr.Patel 1990); CX-780 (Dr. Norzagaray 1992); CX-775 (Dr. Nicholl 1993); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-745 (Dr. Moran 1991); CX-1000 (Dr. Stuki 1992); CX-957 (Dr. Skinner 1992); CX-913 (Dr.Schleuniger 1992); CX-865 (Dr. Rosenkranz 1993); CX-856 (Dr. Rocha 1993); CX-855 (Dr. Rocha 1993); CX-843 (Dr. Ramalingam 1993).

identifying the source of the disclosure requirement. CX-1262. Slip Op. at 17. The disclosure requirements were promulgated by the California Board of Dental Examiners, not CDA. Preceding the disclosure requirements quoted by the majority, CDA's Advertising Guidelines make this clear by stating that "the Rules and Regulations of the State Board of Dental Examiners require you to list all of the following in your advertisement(s)" and then listing the disclosures quoted at page 17 of the majority opinion. CX-1262-I. The CDA Advertising Guidelines appear accurately to recite Section 1051 of the rules of the California Board of Dental Examiners. 16 Barclays California Code of Regulations 1051, RX-136-E.

The majority concludes that the disclosures required by the California Board of Dental Examiners stifle discount advertising. The disclosures required by the Board include the nondiscounted fee, the discount in dollars or percentage terms, the duration of the discount offer, and the group that qualifies for the discount, plus any other conditions or restrictions on the offer. CX-1262-I.

The record shows that, as a practical matter, these disclosure requirements do not preclude discount advertising. For example, the Advertising Guidelines illustrate the disclosures required for a discount on a cleaning: "$10 off (regularly $25.00) Good through June 1, 1985." CX-1262-I. The disclosures in this illustration do not make the offer unmanageable or ineffective and, indeed, the majority does not articulate a concern about such discount advertising. Rather, the majority is concerned about the possibility that a dentist might want to advertise an across-the-board discount on fees for many or all services. Slip Op. at 18.

The majority relies on the testimony of Dr. Barry Kinney, a member of CDA's Judicial Council, to infer that CDA might require an advertising dentist to include disclosures that would fill two pages in a telephone book. Slip Op. at 18, quoting Tr. 1372. Dr. Kinney testified that if a dentist wanted to offer an across-the-board discount, then "you would have to be a little flexible" and not require disclosure of every fee. Slip Op. at 19, quoting Tr. 1373. Indeed, Dr. Kinney indicated that CDA interpreted the California Board of Dentistry rules to avoid oppressive disclosure requirements. He said that in the event of an across-the-board discount advertisement, the CDA Judicial Council would verify that the dentist was, in fact, doing what he advertised and that "I don't think that we would hold

somebody to these restrictions if in fact they were going to do across-the-board advertising." Tr. 1375.

It is unclear whether CDA has adopted Dr. Kinney's flexible view. The majority finds that CDA insisted on a "full panoply of disclosures," citing several exhibits. For example, Exhibit CX-206-A, a September 3, 1992, letter from CDA's MARS to the San Gabriel Valley Dental Society, recommends denial of a dentist's membership application because her advertisement, "20% off New Patients with this Ad," violated Section 1051 of the rules of the Board of Dental Examiners "by failing to list the dollar amount of the nondiscounted fee for each service."[17] This 1992 letter seems inconsistent with the flexible view of Dr. Kinney. The majority also cites a 1991 instance in which the MARS committee recommended that a dentist be admitted but counseled about advertising a "10% senior citizen discount" without disclosing the nondiscounted fee and the duration of the offer. CX-585-A. Given the testimony of two CDA officials that advertising senior citizen discount would be acceptable, Tr. 872, 1351, it is unclear whether the association's view has changed since 1991. Overall, the evidence appears to be conflicting on the manner in which CDA approaches this Board rule.

The record does not establish that the disclosures required under Section 1051 and derivatively by CDA constituted a prohibition of discount advertising. Indeed, complaint counsel's own witness seriously undercut the theory that CDA's enforcement of Section 1051 of the Board rules suppressed discount advertising. Although Mr. Christensen, whose experience in the market is described above, said in response to hypothetical questions by complaint counsel that excessive disclosures might reduce the effectiveness of a discount advertisement, Tr. 598-600, he testified on cross-examination that as a matter of marketing strategy, his agency recommends that specific discount advertisements be directed to a limited number of people for a limited time and that the ads show the usual and customary charge from which the discount is taken. Tr. 625-26, 648. The disclosures recommended by Mr. Christensen's advertising agency appear to coincide with the disclosures required by the California Board, but his reason for the recommendation was based on the marketplace not the rule. He recommends disclosure because "[w]e don't want to

[17] The record contains little explanation of the factual background or the reasons for the conclusion in the MARS letter. It is unclear whether the 20% discount was for all dental work needed by new patients or just for the initial consultation.

mislead anyone." Tr. 628. Mr. Christensen also recommended against advertisements of across-the-board discounts because an across-the-board discount might be construed as a price reduction, and an insurance company might reduce the "usual and customary rate" to the lower rate for the purposes of reimbursement. Tr. 629.

Mr. Cristensen testified that "there is no burden whatsoever" in disclosing the UCR charges (usual and customary rate), an expiration date and the discounted offer price in an advertisement. Tr. 628, 648-50. Mr. Christensen also offered explanations of the relative scarcity of across-the-board discount advertisements in the yellow pages or elsewhere. As to the yellow pages, he said that PacBell generally does not allow across-the-board discount advertisements. Tr. 645. With respect to the marketplace in general, he said that across-the-board discounts "won't work as a marketing tool." Tr. 645. In his opinion, such advertisements are ineffective and would disappear from the marketplace on their own. *Id.* Mr. Christensen said that the one situation in which across-the-board advertisements appear to be effective is for senior citizen discounts. Tr. 651. In that situation, he recommends that his clients include a statement saying to call for details regarding the offer. *Id.* Dr. Kinney testified that senior citizen discount advertisements are acceptable. Tr. 1351. *See also* Tr. 872 (Dr. Abrahams). In fact, according to Dr. Kinney, the CDA sponsored a "Senior Dent" program that offered a 15 percent discount to seniors. *Id.*

I cannot join the opinion of the majority insofar as it concludes that CDA effectively prohibited price advertising for dental services. Rather than extracting sweeping conclusions from the conflicting evidence and testimony, I would remand for findings of fact regarding the restrictions on price advertising imposed by CDA (not local societies). I would require specific findings on whether the disclosure requirements are, in effect, a prohibition on price advertising. If the disclosure requirements impose no real burden on price advertising, as Mr. Christensen testified, I would be unlikely to find that they constitute a prohibition on price advertising. To the extent CDA does not effectively prohibit price advertising, an analysis under the rule of reason should address benefits to consumers, if any, of its requirements for price advertising and the extent to which the disclosures impose a burden on advertisers. Additional factual findings on these issues would be helpful in that analysis.

Under the *per se* rule, all we need find for liability to attach is that the conduct occurred. On this record, I cannot reach that threshold and ultimate finding of fact. The *per se* rule is a harsh rule. The Commission would be well advised not only to exercise caution in extending the rule to new forms of conduct, but also to exercise a high degree of care to apply the rule only when the subject conduct has been well established to have occurred.

2. Alleged Restraints on Nonprice Advertising

With respect to restrictions on nonprice advertising, I agree with the majority that CDA's actions must be evaluated under the rule of reason, which requires a showing of anticompetitive effects. Applying the rule of reason, I find no liability, even assuming that CDA does restrain nonprice advertising. An analysis of the evidence, however, puts even that assumption in question.

The basic CDA prohibition on nonprice as on price advertising is against false and misleading advertising, and again CDA relies on California statutes to define what is false and misleading. Although a pattern of enforcement actions might demonstrate that an association has twisted a legitimate rule to anticompetitive purposes, the examples cited by the majority are not sufficient to show such a pattern.

The majority asserts that CDA proscribes a "vast" range of nonprice advertising, Slip Op. at 25, but does not support this conclusion with a vast array of evidence. As we saw earlier, the restriction on advertising appears to be Section 10 of the CDA Code of Ethics, which on its face prohibits only false and deceptive advertising. The issue is whether CDA applied the facially valid rule in such a way as to stifle truthful and nondeceptive advertising.

Testimony by CDA officials is consistent with the goal of discouraging deception.[18] According to Dr. Kinney, a member of the CDA Judicial Council, the council "look[s] at the total ad, and attempt[s] to determine whether the ad in its entirety would be misleading to a prudent person or not." Tr. 1335, 1339. In doing so, he said: "We rely on the state's Dental Practice Act, the Business & Professions Code to help us determine whether or not the ad is misleading in any material respect." *Id.* A second CDA official, Dr.

[18] Their testimony also is consistent with the Commission's policy on deception. *See* Commission Policy Statement on Deception, *Cliffdale Associates, Inc.*, 103 FTC 110 (1984)(Appendix, at 176).

Nakashima, provided a similar account of CDA's enforcement standards. He also said that CDA's Judicial Council "look[s] at the whole ad in its entirety" to make a determination whether it is "false and misleading in any material respect." Tr. 1444. He also said that the organization relies on state law for guidance in determining whether an ad is false or misleading and confirmed that Section 1051 of the California Code of Regulations and Sections 651 and 1680 of the California Business and Professions Code were the state laws on which it relied. Tr. 1447.

It is not clear how the majority reconciles this testimony with its conclusion that "[t]he nonprice advertising CDA proscribes is vast." Slip Op. at 25. Before leaping to such a conclusion, the Commission should make at least minimal findings of fact regarding the scope of the advertising prohibitions imposed by CDA (as distinguished from the component societies, which were not charged in the complaint, and with appropriate reference to the basis in state law for any such restrictions).

The majority cites Advisory Opinion 8 to Section 10 of CDA's Code of Ethics, which provides:

> Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.[19] (Emphasis added.) (CX 1484-Z-49.)

The majority does not parse the language of the advisory opinion, but asserts that "[i]n practice, CDA prohibits all quality claims." Slip Op. at 25. It cites a 1992 letter from MARS to the Orange County Dental Society, in which the committee recommended denial of an application for membership in part because of the use of the words "quality dentistry." CX 387-C. As with many of the letters from MARS regarding an application, the factual background is not fully explained. For example, it is unclear whether the dentist in question had an opportunity to provide information to substantiate the claim.[20] If the dentist was given the opportunity to substantiate the claims but was unable to do so, the action might be seen in a different light. Unexplained, this decision is subject to serious question.

[19] Section 1052 of the Regulations issued by the California Board of Dental Examiners provides: Any advertisement must be capable of substantiation, particularly that the services offered are actually delivered and at the fees advertised. RX 136-E.

[20] The reference to "quality dentistry" is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not. CX-387-B.

The majority cites two other MARS letters discussing the definition of falsity in Advisory Opinion 2(c) of the CDA Code and Section 651(b)(3) of the California Code (defining as false a statement that "[i]s intended or is likely to create false or unjustified expectations of favorable results"). RX-138A. In a 1992 letter to the Southern Alameda County Dental Society, MARS stated that the advertising claim that "[w]e are dedicated to maintaining the highest quality of endodontic care . . . ." appeared to be inconsistent with Section 2(c). CX-1083-C. Similarly, in a letter to the San Francisco Dental Society, MARS said that the claims "improved results with the latest techniques" and "latest in cosmetic dentistry" were inconsistent with 2(c) and unverifiable. CX-306-C. [21] It is not clear whether the dentists in question were given the opportunity to substantiate the claims. For example, the claim of "improved results with the latest techniques" might be proved with statistical evidence. If such a claim were made by a dentist without such evidence, the advertisement might well be deceptive. Unexplained, these two letters are open to serious question.[22]

The majority also concludes that CDA suppresses claims of superiority or guarantees. Slip Op. at 26. The majority does not address the role of the state legislature of California in prohibiting such claims. Slip Op. at 26. Section 1680(i) of the California Code defines "unprofessional conduct" by a person holding a dental license to include the following:

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[21] In footnote 6 at page 10, the majority cites four other CDA actions based on this provision, all of which raise the same substantiation questions. Indeed, one of the letters is much like a Commission deceptive advertising decision, and it demonstrates that preventing unsubstantiated, indeed, in this case, false claims was precisely CDA's concern. Exhibit CX-478, cited by the majority, reflects a decision of the CDA Judicial Council that the claim "laser dentistry is revolutionizing dental care" was false because "laser dentistry is not revolutionary" and created unjustified expectations. *See also* CX-932(claim of "the latest techniques"); CX-115(claim of "lots of" experience); CX-963(claim of "highest infection control standards").

[22] In footnote 25 at page 36, the majority suggests that my interest in further factual inquiry is misplaced, citing six examples to show that "MARS was not concerned with any surrounding circumstances" when it wrote to the individuals. The record as a whole contains enough evidence of CDA's concern with surrounding circumstances to justify further factual inquiry. I do not quarrel with the evidence the majority cites, only with their failure to weigh explanatory and probative conflicting testimony and with their failure to consider the possible benefits of CDA's conduct. I have identified a number of such instances, observing, for example, in the discussion below that an implied claim of more effective sterilization may be deceptive. *See, e.g.*, CX-394 (claim of "highest standards in sterilization"); CX-780 (claim of "modern sterilization"); and CX-557 (claim that "we guarantee all dental work for 1 year"). Common sense and the Commission's policy regarding deceptive advertising provide a basis for anticipating that these particular interpretations may prove to be justified. Because such claims account for a significant number of CDA enforcement actions, further inquiry would not be out of line. Indeed, it appears to be the more responsible course of action.

The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. This subdivision shall not prohibit advertising permitted by subdivision (h) of Section 651.

CDA has interpreted this statutory ban on claims of professional superiority to prohibit advertising implying that a dentist practices superior sterilization practices. *See* CX-671-A (claim that "all of our handpieces (drills) are individually autoclaved for each and every patient" said to violate Section 1680); CX-43-B (claim of "state-of-art sterilization" said to violate Section 1680).[23] Enforcement of a prohibition against truthful superiority claims certainly can pose competitive dangers, because comparison among competitors is well recognized as a useful function of advertising.[24] It is possible, perhaps even likely, that these CDA letters crossed the line, but it would be useful to explore the issue somewhat further before condemning CDA.

For example, a claim that a dentist sterilizes drills for each patient may be literally true, but it also may imply a claimed distinction from other dentists (*i.e.*, other dentists do not do so).[25] If all dentists routinely sterilize their drills between patients, as one might hope, such an implied claim might be deceptive. Similarly, the "state of the art sterilization" claim might be read to imply that other dentists use ineffective or less effective sterilization techniques, and that may not be true.[26] A review of some of the Commission's own deceptive advertising cases reveals that these interpretations are not far-fetched.[27] It might be useful to explore the issues in greater depth.

[23] In footnote 6 at page 10, the majority note a number of additional claims of the same sort. *See* CX-394 (Dr. Go, 1993); CX-360 (Foroosh 1986); CX-43 (Dr. Baron 1993);CX-780 (Dr. Norzagaray 1992); CX-718 (Mickiewicz and Rye, 1992); CX-1026 (Dr. Tracy 1992); CX-605 (Dr. Lerian 1993).

[24] *See* FTC Statement of Policy in Regard to Comparative Advertising, FTC News Summary No. 38 (August 3,1979)("Comparative advertising encourages product improvement and innovation, and can lead to lower price in the marketplace.").

[25] The Commission has held that truthful statements regarding the attributes of a product or the nature of services may convey implied claims. *See* Commission Policy Statement on Deception, *Cliffdale Associates, Inc.*, 103 FTC 110 (1984) (Appendix, at 176).

[26] Similar interpretations appear in Commission cases. For example, the Commission has alleged that implied superiority claims were made for hearing aids that were advertised as incorporating technological advances. *United States v. Dahlberg*, Civ. No. 4-94-CV-165 (D. Minn. Nov. 14, 1995) (consent decree); *United States v. Beltone Electronics Corporation*, Civ. No. 94-C-7561 (N.D. Ill. Dec. 21, 1994) (consent decree).

[27] The Commission has found or alleged in a variety of contexts that express and truthful claims have conveyed implied claims of superiority and that some of these implied claims were deceptive. *See e.g., Kraft, Inc.*, 114 FTC 40, 121, 128-32 (1991), *aff'd sub nom., Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992); *Bristol-Myers Co.*, 102 FTC 21, 328-48 (1983), *aff'd sub nom., Bristol-Myers Co. v. FTC*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *see also, e.g., United States v. Egglands Best, Inc.*, (E.D. Pa. Mar. 12, 1996)(consent decree); Archer-Daniels-Midland, Docket C-3492 (Apr. 20, 1994) (final decision and order).

Section 1680(l) of the California Code defines unprofessional conduct by dentists to include the following:

> The advertising to guarantee any dental service, or to perform any dental operation painlessly. This subdivision shall not prohibit advertising permitted by Section 651.[28]

CDA has enforced this statutory prohibition against guarantees. *See* CX-668-C and CX-557-C (claim that "we guarantee all dental work for 1 year" said to violate Section 1680(l)); CX-497-C (claim of "crowns and bridges that last" said to imply guarantee in violation of Section 1680(l)). The claim that "[w]e guarantee all dental work for 1 year" appears to violate Section 1680(l) of the Dental Practice Act, which defines "unprofessional conduct" to include "the advertising to guarantee any dental service." CX-668. It is not clear whether the claim was a money-back offer if the dental work failed within one year, which might be true, or whether the claim was that all dental work will be perfect for at least one year, which seems unlikely. If the claim is limited to a money-back offer, then prohibiting such advertising may be anticompetitive. The majority does not discuss whether there might be a reason to require disclosure of the nature or terms of the guarantee.

The majority suggests that CDA has restricted advertising claims such as an offer of "gentle" care, although its restriction may be less sweeping than those of local societies. CDA witnesses said that CDA does not restrict claims such as "gentle" dentistry. Tr. 1343-46 (Dr. Kinney, member of CDA Judicial Council). Indeed, in 1993, CDA advised the local societies that the state Board regarded "gentle" as acceptable advertising. Tr. 1466 (Mr. Nakashima); RX-56. Because local societies were not charged in the complaint and because their conduct cannot be attributed to CDA, the reliance by the Administrative Law Judge and by the majority on those actions is misplaced.

Finally, the majority finds that in 1984, CDA adopted a resolution that "solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A. My initial reaction to the CDA resolution

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[28] Someone more flippant than I might suggest that prohibiting claims of painless dental operation is clearly justified because such claims are so obviously deceptive. To its credit, the majority does not challenge this provision.

is to question whether it expresses a point of view over which the majority really wants to quibble.[29] Second, in adopting the resolution, CDA cited and relied on Section 51520 of the California Education Code, which prohibits teachers or others from soliciting contributions from school children for organizations not under the school's control.[30] Perhaps CDA has enforced the resolution in a manner that is overly broad, but the evidence to that effect is also thin.

After considering the evidence, I cannot join the majority's broad characterizations of CDA's actions. CDA's Code of Ethics on its face prohibits only false and deceptive advertising, and the case turns on how CDA has applied this legitimate principle. In evaluating CDA's actions, I would explore more fully the benefits to consumers, if any, of each of CDA's requirements and weigh the countervailing burden on advertisers. In turn, I do not offer a blanket endorsement of CDA's actions, the competitive effects of which merit examination, but rather suggest that the analysis of those actions should be based on a recognition that prevention of deceptive advertising may benefit consumers.

III.

CDA's restrictions on advertising appear to be parallel to and no broader than restrictions imposed by the California legislature by statute. The majority does not compare CDA's actions to the state code nor does it suggest that CDA attempted to expand the statutory definitions. Instead, the majority suggests that because CDA did not "seriously attempt" to ascertain the California Board of Dentistry's interpretation of the "proper scope of state law," CDA lacks a basis for understanding state law and cannot claim that CDA is "furthering the State's current policy choice." Slip Op. at 46. To the extent that a statute or regulation is clear on its face, concern about dubious or incorrect interpretations seems misplaced. The majority does not identify any lack of clarity in the state law, nor can I. Any suggestion

[29] Even assuming the resolution refers only to solicitation of dental business, to join the majority's implicit endorsement of such behavior would not be a decision I would like to explain to my mother.

[30] Section 51520 provides:

During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises by teachers or others to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities, [excluding charitable organizations approved by the school board] . . . .

that CDA acted inconsistently with the state laws also is unsupported. CDA frequently relied on the plain language of state statutes and regulations in its enforcement actions, and CDA officials testified that the association modified its code of ethics to maintain consistency with state law.[31]

The majority speculates that the Board may not be enforcing its rules because of concern about a 1989 memorandum prepared by a supervising attorney in the Legal Services Unit of the California Department of Consumer Affairs and discusses that memorandum at considerable length. Slip Op. at 43-44. This inference is highly questionable given that the California state legislature amended Section 651 of the California Code (quoted in part in footnote 4 above) in 1990 and again in 1992. If the legislators had wanted to adopt the contents of the memorandum, they had the opportunity and apparently did not choose to do so.

The majority's speculation that the Board of Dental Examiners has decided not to enforce its regulations is undercut by evidence from the Board itself. Specifically, in 1992, the state Board prohibited the use of the word "gentle" in advertising, RX-54-A, until the CDA persuaded it that such advertising was appropriate. RX-55. In acknowledging the change to CDA, the state Board of Dental Examiners attached a document summarizing its enforcement position on several issues, revised as of March 8, 1993. RX-56A,B. That 1993 summary does not support the view of the majority that the 1989 memorandum caused the Board of Dental Examiners to refrain from enforcement. In addition, Dr. Nakashima testified that he called Dr. Yuen, the president of the California State Board of Dental Examiners, the night before his testimony and confirmed that the Board considers its rules to be valid and enforceable, but that it operates under tight budgetary constraints. Tr. 1468-69. Of course, this is hearsay, but no objection was made to Dr. Nakashima's testimony, which appears on point and probative. Nor did complaint counsel introduce testimony or other evidence contradicting the hearsay.

I agree with the majority that CDA is not protected by the state action doctrine. Quite apart from the state action doctrine, however, a factual question arises that deserves at least to be addressed regarding what effect CDA actions, as distinct from state law, had on competition in the market for dental services. The majority states

[31] According to the testimony of Dr. Abrahams, who served on CDA's Judicial Council, the CDA amended its code of ethics frequently to keep it consistent with the state dental practice act. Tr. 851.

that in the absence of state enforcement of state statutes, it was "CDA, not California, that tampered with the workings of the market for dental services." Slip Op. at 46.[32]

The record, however, does not establish that CDA, as opposed to the state of California, influenced the advertising of dentists. Some dentists who advertised were told by CDA that their advertisements violated state law. The record simply does not reflect whether those dentists changed their advertising and, if so, whether it was because they did not want to offend CDA or because they did not want to violate state law.

State laws may have had an *in terrorem* effect even in the absence of vigorous state enforcement. Section 652 of the California Code provides that violations are punishable by revocation of the violator's professional license by the relevant licensing board, and Section 652.5 provides that any violation is a misdemeanor and is punishable by "imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the imprisonment and fine." 1 Deerings California Code Section 652.5 (1995 Supp.). A 1994 amendment makes clear that punishment can include both imprisonment and fine, which suggests that this was not some long forgotten law. *Id.*

Respect for the law and a willingness to conduct oneself in accordance with the law can be powerful incentives regardless of the resources devoted to law enforcement. In the absence of evidence regarding the relative impact of state law versus CDA, it seems questionable to infer that dentists feared the CDA instead of the state of California.

Arguably, the majority could find liability under Section 5 of the FTC Act based on conclusions that the California law has anticompetitive effects and that CDA has encouraged compliance with California law, without finding that CDA's conduct alone had anticompetitive effects. The majority has not so held or even suggested such a theory of liability. In view of the absence in the record of evidence showing adverse effects on competition, I do not address the merits of such a theory either.

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[32] The Commission cites *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S.Ct. 66 (1994). In that case, the court found that the only anticompetitive injuries resulted from government action and hence that a private party could not be held liable. That factual conclusion on causation of injury does nothing to establish that CDA was the source of the advertising restriction here. The second case the Commission cites, *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612 (6th Cir. 1982), held that the actions of a state dental board were protected by the state action doctrine. Again, that holding provides little insight into the resolution of this case.

IV.

Even assuming that the preponderance of the evidence establishes that CDA engaged in each and every variation of an advertising restraint analyzed under the rule of reason and that each such restraint is unjustified, I still would dissent from the opinion of the majority because of the even greater weaknesses in the remaining elements of the case. The Commission reverses the finding of the Administrative Law Judge that CDA has no market power and concludes instead that CDA has market power. The fundamental difficulty with this conclusion is that it is not supported by evidence. Complaint counsel made no effort to try the case on a rule of reason theory and did not introduce testimony or documents to establish the elements of a rule of reason case. To put the matter in perspective, complaint counsel proposed 949 findings of fact and conclusions of law with respect to this proceeding, but they proposed only one finding, Proposed Finding 570, relating to market power.[33] The Administrative Law Judge correctly rejected this proposed finding. I agree with the finding of the Administrative Law Judge that CDA lacks market power.[34]

Complaint counsel's Proposed Finding 570 ("CDA has market power") is based entirely on the testimony of Dr. Knox, CDA's expert economist. According to Proposed Finding 570, because CDA members as a group face a downward sloping demand curve for dental services and assuming hypothetically that CDA members act together, they could exercise some degree of market power.[35] Complaint counsel's hypothetical does not suffice to rebut Dr. Knox's economic testimony that CDA's enforcement of its Code of Ethics "has no impact on competition in any dental market in California." Tr. 1633.

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[33] Complaint counsel's Proposed Findings 540 to 578 purport to set forth complaint counsel's full economic analysis of the case.

[34] The conclusion of the Administrative Law Judge that CDA lacks market power rests on the finding that there are no barriers to entry. ID at 76. The Administrative Law Judge also concluded that complaint counsel failed to introduce evidence sufficient to show that CDA members could act together to raise prices or reduce output and failed to introduce evidence of relevant geographic markets. ID at 76.

[35] Dr. Knox testified that market power is the ability to raise prices above the competitive level. Tr. 1689. He suggested that with a downward sloping demand curve, by definition, a group of suppliers with market power could raise prices above a competitive level. Tr. 1690. Complaint counsel elicited from him the statement that dentists individually and collectively face a downward sloping demand curve. Tr. 1691. In response to a hypothetical question by complaint counsel, he said that assuming that CDA members collectively raised the price of their services, the total quantity of services provided by CDA members would decline. Tr. 1694.

The ALJ found that dental patients are relatively price sensitive because patients pay for their own care, and most dental care is not urgent. IDF 321. To demonstrate that CDA members profitably could impose a price increase, it would be necessary to show that other dentists could not increase their output and that new dentists could not enter in sufficient numbers to defeat such a price increase. Complaint counsel made no such showing, and the proposed finding was correctly rejected.

To establish market power, relevant antitrust product and geographic markets must be identified. Respondent's expert economist, Dr. Knox, testified that dental services could constitute a relevant product market. Tr. 1689. The majority adopts the dental services product market and defines dental services as those services provided by dentists licensed under the California Code. Slip Op. at 31. I agree that the relevant product market appears to be the provision of dental services.

The record provides relatively little information on the relevant geographic market(s) for dental services in California. Some evidence suggests that the relevant geographic markets are local. Respondent's expert, Dr. Knox, testified that in his opinion, the entire state is not a market and that the relevant markets are smaller than the state. Tr. 1642. Mr. Christensen, whose experience in the California dental advertising market is discussed above, said that a single dental practice draws from the closest 20,000 or 30,000 households. Tr. 655. In his view, people do not travel far to visit a dentist. Tr. 637.

Although the record suggests that the relevant geographic markets are smaller than the state, no specific geographic markets were urged by complaint counsel, and none is adopted or discussed in the majority opinion. The record evidence suggests that individual dentists draw most of their patients from the area immediately surrounding their offices, but that does not conclusively establish the size of the relevant geographic markets. For example, in urban areas, the practice areas of some dentists may overlap with those of other dentists, which in turn overlap with still others. In this fashion, small competitive zones may be linked into a larger geographic market. These geographic market issues, however, were not developed in the record.

The majority says that over 90 percent of the dentists "in at least one region" are members of CDA, citing CX-1433. Slip Op. at 31. Let us consider this single piece of evidence about a single possible

geographic market. Exhibit CX-1433 is a letter not from CDA but rather from the executive secretary of the Mid-Peninsula Dental Society, which includes the California cities of Menlo Park, Palo Alto, Portola Valley, Los Altos and Mountain View. The letter, which appears to be a form letter with which to send out membership applications, says nothing about whether the dentists in the region compete with one another. Nothing in the record establishes the author's expertise in defining competitive markets, and nothing in the letter suggests that the area covered by the Mid-Peninsula Dental Society is a relevant antitrust market. In sum, although dental services appears to be a product market, there is no basis in the record for defining any geographic area as a relevant market. Complaint counsel's failure to prove a relevant antitrust market alone is sufficient to dispose of the allegations of market power.[36] *See* Adventist Health System/West, 5 Trade Reg. Rep. (CCH) ¶ 23, 591 (April 1, 1994); *Capital Imaging Associates v. Mohawk Valley Medical Ass'n*, 996 F.2d 537, 547 (2d Cir.), *cert. denied*, 114 S.Ct. 388 (1993)(defining local radiology market in rule of reason analysis).

The majority concludes that "where there are significant barriers to entry," market share alone may be relied on as an indicator of market power. Slip Op. at 31. Since no geographic markets have been defined, it is not possible to develop any market share data or other pertinent concentration statistics. Nonetheless, I agree with the general proposition that the presence or absence of impediments or barriers to entry is important to, and may be dispositive of, the competitive analysis. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990); *United States v. Waste Management, Inc.*, 743 F.2d 976, 983 (2d Cir. 1984); *United States v. Gillette Co.*, 828 F. Supp. 78 (D.D.C. 1993).

Dr. Knox, the respondent's economic expert, testified that the basis for his opinion that CDA's enforcement activities have no impact on competition in any dental market in California is that "CDA cannot erect any barrier to entry to any dental market in the state of California." Tr. 1633-34. He said that in his view, the only barrier to entry in this market is the need to acquire a license issued by the California Board of Dental Examiners. Tr. 1634. In his

[36] It is even more elementary that once a market has been established, some conduct affecting competition in that market must be identified before liability can attach. Even assuming that the evidence is sufficient to show that the area served by the Mid-Peninsula Dental Society is a relevant geographic market, none of the alleged restraints on nonprice advertising discussed in the opinion of the majority (Slip Op. at 25-27) was directed to dentists in this area.

opinion, the facts that a dentist must attend dental school to sit for the exam or that he or she must acquire or lease an office and equipment do not amount to entry barriers. Tr. 1636-40.[37] The Administrative Law Judge adopted Dr. Knox's view that there are no barriers to entry in the provision of dental services in California.[38] ID at 76.

The majority concludes that entry into the California dental market is difficult. Slip Op. at 32. The majority finds that "it can take 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt." Slip Op. at 32. Contrary to the inference drawn by the majority, these findings suggest that entry into a California dental services market is possible because lenders are ready, willing and able to extend the credit needed to enter.[39]

A dentist who enters the market has an impact on competition when he or she starts serving patients, not when current expenses are met and not when debt has been amortized. Indeed, if the majority intends to set a new standard to this effect for evaluating the difficulty of entry, we can expect some radical changes in enforcement. Nor does a dentist need to open a separate practice to enter the market. A new graduate from dental school who works as an associate in an established practice contributes to the output of dental services and has entered the relevant market.

The majority cites the testimony of three dentists (Dr. Harder, Dr. Miley, and Dr. Hamann) to support its finding that entry is difficult. Slip Op. at 32. Dr. Richard Harder, a witness called by complaint counsel, said that the first step in establishing a new practice is to identify a suitable area in which to practice and that an entrant then needs to lease or buy equipment. Tr. 297-98. He said that a dental equipment supplier "was helpful in teaching me some of the ropes" and that the cost to equip an office was $15,000. Tr. 297-99. He estimated that it takes at least 18 months to break even. Tr. 300. Dr. John Miley, another witness called by complaint counsel, thought

[37] A dentist opening a practice must buy equipment, and Dr. Hamann pointed out that it is possible to equip an operatory with used equipment for as little as $2500. A dental school graduate with access to significant capital, such as Dr. Hamann, may purchase two established practices at the start of a career, but nothing in the record suggests that every graduate needs to take that high-cost approach to entry. Used equipment or rental equipment is available. Office space can be leased.

[38] The majority criticizes the Administrative Law Judge for his finding that there are no "insurmountable" barriers to entry in dental services. Slip Op. at 31-32. Although the rhetorical flourish of the Administrative Law Judge is an overstatement of the elements necessary for liability, the Initial Decision does not appear to state or rely on a novel entry standard. Rather, it appears appropriately to focus on whether CDA dentists profitably could raise prices without attracting new entry.

[39] The record contains testimony that it is less expensive to enter the dental services market than to buy a franchise hamburger restaurant. Tr. 1234-35.

that entry was difficult because in his opinion the state was "over supplied with dentists." Tr. 329. He said that many young dentists graduate from school with debts of $50,000 to $100,000 and that it costs an additional $50,000 to $75,000 to establish a practice. Tr. 330-331. A third witness called by complaint counsel, Dr. Hamann, testified that he and his wife borrowed $400,000 for her to acquire two established dental practices and to provide the "working capital" to operate them. Tr. 760. He testified that he acquired used dental equipment to furnish six operatories for the practice, at a cost of $2500 to $4000 per operatory (although new equipment might cost $15,000 to $20,000 per operatory). Tr. 761.

Drs. Harder, Miley and Hamann all testified that they (or in Dr. Hamann's case, his wife) successfully entered the California dental services market. Their experiences suggest that entry is not difficult. None of the three witnesses provided even one anecdote about a licensed dentist who wanted to practice in California but was deterred by the difficulty of entry.

Dr. Hamann's testimony indicates that entry is not only possible, but also that it can be highly lucrative. Dr. Hamann is a physician who managed the practice for his wife, Dr. Hamann, who is a dentist. After purchasing two dental practices for about $400,000, they undertook an "aggressive" marketing program. Tr. 806. Although Dr. Hamann did not use price or comparative advertising in her practice, her husband said that her marketing campaign was the "[m]ost aggressive I've ever seen." Tr. 790. The Hamanns sold the practice after eight years, by which time it was earning $1,500,000 per year in gross revenues. Tr. 808. Dr. Hamann testified that after the fifth and sixth year, his wife was earning from $300,000 to $500,000 in profits after paying him $100,000 per year to manage the practice. Tr. 808. It should be observed that this marketing success story apparently was achieved well within the bounds of CDA's rules. Dr. Hamann was an active member of the CDA and the Tri-County Dental Society and served as a delegate to the CDA. Tr. 765-66.

Dr. Harder graduated from dental school in 1979 and worked as an associate dentist for Dr. Senise in Glendora, California. Tr. 245. Because of the long commute, he left that practice in 1981 to establish his own practice in Laguna Hills. Tr. 247. In 1986, he stopped practicing in Laguna Hills and opened an office in Irvine, California. Tr. 250. Dr. Harder's success in opening and subsequently

moving a practice provides evidence that the cost of opening an office is not a barrier to entry.

Dr. Miley's concern was that students graduate from dental school with debts. That alone does not prevent entry. If anything, the availability of credit to dental students suggests that a steady flow of new entrants into the profession will continue. Dr. Miley's testimony that California is oversupplied with dentists supports the conclusion that the cost of education has not choked off the flow of potential entrants. If anything, it supports the view that entry is easy. No doubt, entry into the dental services market takes talent, hard work and perserverance. But that is not the kind of difficulty cognizable in an antitrust analysis.

The majority suggests that there is "little doubt" that CDA can enforce its rules because advertising is observable and because dentists place a high value on CDA membership. Slip Op. at 30. The majority states that there is no need to "quantify this benefit econometrically," because when faced with the choice of membership or advertising, dentists "overwhelmingly chose the former." Slip Op. at 30.

Econometrics is not necessary to establish anticompetitive effects; simple evidence would do. The majority's rhetoric glosses over the absence of evidence concerning the actual competitive effect of CDA's activities. The phrasing of the choice as one between membership and advertising assumes, without supporting evidence, that dentists in California, including members of CDA, do not advertise. It further assumes, again without benefit of evidence, that the cause of any reluctance to advertise is CDA. The testimony of Dr. Hamann that his wife undertook the "most aggressive" marketing campaign that he had ever seen, while remaining a member in good standing of CDA, and the testimony of Mr. Christensen about advertising by clients of his advertising agency raise a question whether dentists do face a choice between advertising and membership. The hypothesis that some or even many dentists do not advertise, even if true, does not establish a link between lack of advertising and membership in CDA.[40]

[40] The majority responds to my questioning on this point with more citations to CDA documents. *See* Slip Op. 30 n.21. Even if a dentist agrees to comply with a letter suggesting that an advertisement violates state law, the CDA documents do not show what motivated the change of heart. For that, we must look to documents or testimony from the dentist. The majority cites one such letter. Exhibit CX-480 is a letter from Dr. Jenkins agreeing to change an advertisement that the CDA Judicial Council found to be misleading, stating his disagreement with that position. The letter does not illuminate why he decided to comply.

CDA membership is not essential to a successful dental practice in California. CDA offers benefits to its members, but those benefits are readily available from other sources. The Initial Decision identifies CDA's two annual scientific sessions as the "most visible and tangible membership benefit." IDF 101. These sessions are a convenient way for dentists to satisfy their state-imposed continuing education requirement. IDF 105. CDA members attend for free; nonmembers must pay a registration fee to attend. IDF 104. Continuing education also is available from other sources. Tr. 803. CDA members receive CDA publications at a lower subscription rate than nonmembers. IDF. 107.

CDA lobbies the California legislature. IDF 70-85. To the extent that CDA lobbies the state successfully on behalf of dentists, the benefits apparently would flow to members and nonmembers alike. Some other benefits of CDA membership include a marketing program to enhance the image of CDA and dentists, a program promoting direct reimbursement instead of insurance company plans, twice-a-year seminars on the non-clinical aspects of dental practice, and a peer review program as an alternative to litigation to resolve customer complaints. IDF 106, 89, 92, 98.

CDA operates several for-profit subsidiaries. One subsidiary offers professional liability insurance to CDA members. IDF 109. Another for-profit subsidiary is an insurance broker for CDA members and offers CDA members a revolving line of credit, financing for dental office equipment, discounts on long distance telephone rates, a VISA gold card and so forth. IDF 117. Dr. Martin Craven, a past president of CDA, testified that the primary benefit of association membership was social, not financial. Tr. 1400. He testified that other insurance companies offer professional malpractice insurance at lower rates than CDA's subsidiary. Tr. 1401.

It is one thing to conclude that CDA offers its members some benefits (presumably no one joins unless value is perceived), but it is quite another to conclude that CDA membership is so valuable that the association has a "stranglehold on the profession," as the majority suggests. Slip Op. at 30. The benefits that CDA offers to its members are significant enough to persuade them to pay their dues and perhaps to participate in the association's activities. None of the benefits offered by CDA appears to be uniquely available from the association, and none appears to be essential to the successful

practice of dentistry. One telling point about the commercial importance of CDA membership is how infrequently it is used in dentists' advertisements. The CDA filed a one and one-half inch thick appendix of dentists' ads in the yellow pages, very few of which announce CDA membership.

The evidence does not support the conclusion that CDA can control the price and output of dental services in California. The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. Almost certainly, the state of California is not a relevant geographic market for dental services. But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to exercise market power, and the evidence suggests that entry is, in fact, easy.

The weakness of the majority's anticompetitive effects story is reflected in the majority's final observation that it is "implausible at best" that dentists would move to California to advertise. Slip Op. at 32. If CDA has successfully restrained competition in California by limiting advertising, why would not the usual economic incentives of the free market work in this market? If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to attract patients? The Commission finds it "implausible at best" that this would happen. A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.

The opinion of the majority has troubling implications that go well beyond this case. The first of these is its use of the *per se* rule. There is good reason to apply the *per se* rule more sparingly than the majority has in this case. Although I would apply the *per se* rule to prohibitions on price advertising, I would evaluate under the rule of reason disclosure and substantiation requirements for price as well as nonprice advertising to ascertain whether those requirements are reasonable efforts to cure deception. The majority's failure seriously to attend to the possible justifications for CDA's requirements may operate to the detriment of consumers. As recognized in the analytical approach embodied in the Commission's late opinion in

Mass. Board, consideration of efficiencies is vital to good antitrust analysis. The *per se* rule, which dispenses with consideration of efficiencies, should be circumscribed accordingly.

Even assuming that CDA's advertising policies are broader or more burdensome than necessary to prevent deceptive advertising, the majority's rule of reason analysis is troubling. The startling failure to identify a geographic market before finding liability is one cause for concern. The majority's treatment of the entry issue is another. The case can be disposed of on ease of entry alone. Not only is the evidence offered to suggest barriers to entry minute, but more importantly, the analysis the majority employs implicitly suggests the adoption of a new standard for evaluating barriers to entry. Unless the analysis of entry in this case is treated as an aberration, we reasonably can assume that the majority would find barriers to entry in almost any market we might imagine. It seems unlikely that the majority would apply the same loose test to barriers to entry in all cases, including merger cases under Section 7 of the Clayton Act, but only time will tell.

I dissent.