

## IN THE MATTER OF

MASSACHUSETTS BOARD OF  
REGISTRATION IN OPTOMETRYFINAL 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.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

*Respondent*

1. Respondent Massachusetts Board of Registration in Optometry (hereinafter "the Board") is organized, exists, and transacts business under the laws of the Commonwealth of Massachusetts (Mass. Gen. Laws Ann. ch. 13 §§16 *et seq.* and ch. 112 §§66 *et seq.*), with its principal office at 100 Cambridge Street, Boston, MA. The Board is subject to the Commission's jurisdiction under the Federal Trade Commission Act.

2. The Board is composed of four optometrists and one public member, as provided in Mass. Gen. Laws Ann. ch. 13 §16.

3. While serving their membership terms, optometrist members of the Board may, and do, continue to engage in the business of providing

optometric services for a fee. Compensation for serving on the Board is limited to five hundred seventy-five dollars per year plus necessary traveling expenses for carrying out the business of the Board, and is paid out of fees collected by the Board. [2]

4. The Governor of the Commonwealth of Massachusetts appoints the four optometrist members and the public member of the Board.

5. The Board is the sole licensing authority for optometrists in Massachusetts. It is unlawful for an individual to practice or to offer to practice optometry in Massachusetts unless he or she holds a current license to practice issued by the Board.

6. The Board is authorized by Massachusetts law, Mass. Gen. Laws Ann. ch. 112 §71, to take disciplinary action against any licensee who engages in unprofessional conduct, fraud, deceit or misrepresentation in practice or in advertising, or who violates any rule or regulation promulgated by the Board pursuant to Mass. Gen. Laws Ann. ch. 112 §67. Disciplinary action by the Board may include the suspension or revocation of a license, or other limitations or restrictions on a licensee.

7. Board actions pertaining to optometrists in the Commonwealth of Massachusetts are decided by the four optometrist Board members, each of whose principal occupation is the private practice of optometry, and the public member.

#### *Trade and Commerce*

8. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, optometrists in Massachusetts compete with each other and with optometrists serving on the Board.

9. There are more than 1300 optometrists practicing in Massachusetts. More than \$100 million are spent on eye care annually in Massachusetts by Massachusetts residents, governmental entities, and private third-party payers.

10. In the conduct of their businesses, optometrists in Massachusetts receive and treat patients from other states, receive substantial sums of money that flow across state lines from the federal government and from private insurers for rendering eye care services, purchase and use supplies and equipment that are shipped across state lines, and engage in business with optical establishments that conduct business throughout the United States. The acts and practices described below are in interstate commerce, or affect the interstate activities of optometrists in Massachusetts and third parties who pay for eye services, and are in or affect commerce within the meaning of Sections 4 and 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 44 and 45(a)(1). [3]

*State Regulation of Optometry*

11. With the exception of a statute barring claims that eyes are examined for free, the Commonwealth of Massachusetts does not, by statute or otherwise, ban or have any policy of banning truthful discount advertising by optometrists, truthful advertising about the goods and services that optometrists offer, or any other truthful advertising by optometrists.

*Board Conduct*

12. The Board has restrained competition among optometrists in Massachusetts by combining or conspiring with its members or others, or by acting as a combination of its members or others, to unreasonably restrict truthful advertising by optometrists. In particular:

a. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from truthfully advertising discounts from their usual prices and fees;

b. Since at least January 1981, the Board has combined or conspired to prohibit optometrists from permitting optical establishments or other commercial practices to truthfully advertise the optometrists' names or the availability of their services; and

c. Since at least October 1984, the Board has combined or conspired to prohibit optometrists from making use of truthful advertising that contains testimonials or that is "sensational" or "flamboyant."

13. The Board has engaged in various acts or practices in furtherance of this combination or conspiracy, including, among other things, the following:

a. Since at least January 1981, the Board has prohibited advertising by optometrists of discounts from their usual prices and fees, without regard to the truth or falsity of such advertising, on the purported ground that such advertising violates Board regulations and a Massachusetts statute that bars the use of words or phrases that convey the impression that eyes are examined for free (Mass. Gen. Laws Ann. ch. 112 §73A); [4]

b. Since at least January 1981, the Board has prohibited optometrists from permitting optical establishments and other commercial practices to advertise the optometrists' names or professional abilities, without regard to the truth or falsity of such advertising;

c. Since at least January 1981, the Board has coerced and intimidated optometrists into not advertising discounts from their usual prices and fees and into not permitting optical establishments or other commercial practices to advertise their names or the availability of their

services, by using one or more of the following practices: (i) sending investigators to interrogate them and inform them that such practices were improper; (ii) demanding their attendance at informal meetings at which the Board instructed them to cease such conduct because it violated Board regulations and state law; (iii) threatening to bring disciplinary action against them unless they ceased such conduct; and (iv) bringing disciplinary action against them for engaging in such conduct;

d. In October 1984, the Board promulgated and implemented regulations that prohibit advertising by optometrists that offers gratuitous services, rebates, discounts, refunds, or otherwise for the purpose of increasing the number of private patients, without regard to the truth or falsity of the advertising;

e. In October 1984, the Board promulgated and implemented regulations that prohibit advertising that contains testimonials or that is "sensational" or "flamboyant"; and

f. In October 1984, the Board promulgated and implemented regulations that prohibit optometrists from permitting or authorizing optical establishments or businesses to advertise or publicize the optometrists' names or the availability of their services. [5]

#### *Effects*

14. The effects of the combination or conspiracy and the acts or practices described above are and have been to restrain competition unreasonably and injure consumers in the following ways, among others:

a. Consumers are being deprived of truthful information about optometrists' services, prices, and fees, such as information about optometrists' offering of discounts to the elderly or others;

b. Consumers are being deprived of the benefits of vigorous price and service competition among optometrists;

c. Consumers are being deprived of truthful information about the availability and convenient location of optometrists' services, such as information that optometrists are located adjacent to optical establishments;

d. Optometrists are being prevented from disseminating truthful information about their prices and fees, and are being prevented from permitting optical establishments and other commercial practices to truthfully advertise or publicize their names or the availability of their services; and

e. Some consumers have paid higher prices for optometric services, some consumers have delayed or forgone needed optometric services, and some consumers have bought optometric services that are less

desirable to them than the services they would have purchased in the absence of the combination, conspiracy, acts, and practices.

*Violation*

15. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy and these acts or practices are continuing and will continue unless the Commission enters appropriate relief against the Board.

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.).<sup>1</sup>

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

<sup>1</sup> "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 <sup>2</sup>	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 <sup>3</sup>	\$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-

<sup>2</sup> Eye-examinations are conducted only by optometrists. (*Id.* at 221).

<sup>3</sup> 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,<sup>4</sup> 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

<sup>4</sup>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. Kendrick Krossschell. (CX 29 at 27). The Board informed Dr. Krossschell that it was a violation of Section 5.07(3) for him to permit Eye World to advertise the availability of its services. Dr. Krossschell 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 Worcester 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

