

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.).¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In promulgating Section 61, the Massachusetts Legislature declared that:

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

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

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

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

2. Board Procedures

a. Enforcement of Regulations

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

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

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

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

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

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

b. Interpretation of Regulations

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

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

3. The Optometrist Members of the Board

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39. The Board considers advertising affiliations between optome-

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

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

B. The Market

1. Types of Practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Size of Market

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

3. Interstate Commerce

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

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

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

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

4. Advertising and Competition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

States Restricting Affiliation Advertising	Eye Exams ²	Daily Contacts	Extended Contacts
Texas	\$35	\$75	\$100
Massachusetts	\$30-40	\$50-60	\$80-100[13]
States Permitting Affiliation Advertising	Eye Exams	Daily Contacts	Extended Contacts
New York	\$12-15	\$35	\$50
Illinois	\$12-15	-	-
Missouri	\$20	\$35	\$50
Pennsylvania ³	\$20	\$35	\$50

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

C. The Board and Truthful Advertising

1. Prior to Bates

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

2. The Board and Bates

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

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

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

