CDA offers many similar benefits and bills itself as an organization that "represent[s] dentists in all matters that affect the profession," CX 1546-A; IDF 63, and that "offers far more services to its members than any other state [dental] association," CX 1544; IDF 67. For instance, CDA engages in lobbying activities that have been repeatedly described by CDA's president as saving members significant amounts of money, IDF 72, 74, provides practice management seminars, IDF 92, marketing and public relations services, IDF 86-88, and, through for-profit subsidiaries, offers its members professional liability insurance, business and personal insurance, and financial services, IDF 109-18. Indeed, the last time CDA made a comprehensive accounting of the allocation of its resources, only 7 percent was spent on "[s]ervices to the [p]ublic," while 65 percent funded "[d]irect [m]ember [s]ervices," 20 percent was used for "[a]ssociation [a]dministration & [i]ndirect [m]ember [s]ervices," and 8 percent went to defray the costs of "[m]embership [m]aintenance." CX 1448-C; IDF 69. In sum, without questioning whether CDA engages in activities that benefit the public, we agree with the ALJ that the services CDA provides to its members satisfy the jurisdictional threshold of the Act. *See* ID at 69-71.

IV. CONSPIRACY

CDA next challenges the legal and factual basis of the ALJ's finding that it conspired or combined with its members and component societies to restrict unreasonably the dissemination of information and thereby restrain competition. First, CDA argues that it is legally incapable of conspiring with its members or its component societies, because they form a single economic unit much like a corporation and its wholly owned subsidiary, which generally cannot conspire with one another. Brief for respondent 68-69 (citing *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984)). Second, it maintains that there exists no requisite, conspiratorial unity of purpose among the component societies or between CDA and its components to restrict advertising or restrain competition, and that each component has instead prohibited what it independently perceived to be false and misleading advertising. *Id.* at 47-53. We disagree with both assertions.

Section 1 of the Sherman Act does not reach the unilateral acts of a single firm, but only restraints of trade achieved by "'contract,

combination . . . or conspiracy' between separate entities." *Copperweld*, 467 U.S. at 768 (emphasis in original).[5] In Copperweld, the Court considered whether a parent company and its wholly owned subsidiary could provide the requisite plurality of actors under Section 1, and it held that they could not:

> "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for Section 1 scrutiny." *Id.* at 771.

In other words, where a group of persons or corporations do not pursue independent economic motives, they are viewed as a single economic entity, akin to a firm and its executives, and are thus deemed incapable of entering into a conspiracy within the meaning of Section 1. This principle is inapposite here, however.

Unlike firms that are acquired by a parent corporation, dentists do not shed their economic identities as competitors in the dental services market upon joining the association. Thus, in contrast to the strategies of a single firm, or a parent and its wholly owned subsidiary, CDA's policies and decisions regarding the market activities of its member dentists embody a continuing agreement among competitors. Indeed, were we to conclude otherwise, a cartel would evade liability under Section 1 simply by organizing itself as a trade association.

Quite properly, then, professional associations are "routinely treated as continuing conspiracies of their members," as Professor Areeda has pointed out. VII Phillip E. Areeda, Antitrust Law ¶ 1477, p. 343 (1986); *see Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (citing same). For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), the Court declared a professional association's ethics rule prohibiting competitive bidding by its members to be in violation of Section 1, noting in passing that "[i]n this case we are presented with

[5] Although the FTC has no independent authority to enforce the Sherman Act, its authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. *See, e.g., FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). While the reach of Section 5 is broader than that of the Sherman Act, we need not lay out the precise scope of Section 5 in this case because, as we indicate below, *see infra* Section V, the instant practice makes out a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

an agreement among competitors." Similarly, in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986), the Supreme Court found that there was "no serious dispute" that members of the respondent organization had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies. And in one of its more explicit statements on the subject, the Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984) ("*NCAA*"), expressly rejected a single entity defense when it examined a rule promulgated by an association composed of institutions who were otherwise competitors in the market for "television revenues, . . . fans and athletes," noting that "[b]y participating in an association which prevents member institutions from competing against each other . . . member institutions have created a horizontal restraint." As we said in *Michigan State Medical Society*, 101 FTC at 286 (citations omitted), "[t]here is ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws."

We also reject CDA's factual contention that complaint counsel has failed to prove that the alleged conspirators shared "'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" Brief for respondent at 48 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). *See also Monsanto Co. v. Spray-Rite Serv. Corp*, 465 U.S. 752, 764 (1984). CDA clearly promulgated the Code of Ethics, which, as noted in AMA, by itself "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." *AMA*, 94 FTC at 998 n.33. As part of their application to CDA, members expressly pledge to abide by the Code of Ethics as interpreted by the association's authorized officers. *See* CX 1258-E. And the Judicial Council (together with its Membership Application Review Subcommittee) interprets and enforces the Code of Ethics. IDF 14, 157. Therefore, despite CDA's attempt to portray the resulting restrictions as the product of independent, and often inconsistent, activities on the part of CDA and each component society, there is ample evidence in the record that the restrictions at the heart of this case were promulgated and enforced directly by, or at the direction of, CDA itself.

CDA's Code of Ethics and accompanying Advertising Guidelines require that all price advertising be exact and that discount advertising list the regular fee for each discounted service, the percentage of the discount, the length of time that the discount will be available, verifiable fees, and the specific groups who are eligible for the discount as well as any other limitation. CX 1484-Z-49 to 50; CX 1262-I. In enforcing these provisions, CDA has routinely cited members for using phrases such as "low," "reasonable," or "inexpensive" fees, *see, e.g.*, CX 301-B & -D; CX 118 B, and for failing to include the regular fees for each service covered by across-the-board senior citizen discounts, or coupon discounts for new customers, *see, e.g.*, CX 843-B, CX 585-A. *See* generally IDF 168-82.

CDA restricts nonprice advertising as well. *See* generally IDF 183-216, 294-317. CDA forbids "[a]dvertising claims as to the quality of services," CX 1484-Z-50, which include claims such as "quality dentistry," *see, e.g.*, CX 1083-A; CX 387-C, prohibits dentists from advertising that their services are superior to those of their competitors, *see, e.g.*, CX 671-A; CX 43-B; CX 1026-A, bans the advertising of guarantees, *see, e.g.*, CX 668-C; CX 557-C; CX 497-C, and has, on occasion, imposed burdens on dentists who have advertised their efforts to alleviate patient anxiety, *see* CX 70-A. Finally, CDA prohibits dentists from including information about their practice on forms distributed in connection with public or private school screenings. *See, e.g.*, CX 1115-A; CX 1167-A.[6]

[6] Although the Initial Decision, IDF 168-216, 294-317, relies on statements and enforcement activities by both CDA and its local component societies, our independent review of the record reveals that CDA was specifically involved in numerous enforcement actions so as to make the challenged restraints its own, rather than only unrelated incidents of restrictions by local components. We do not address CDA's specific concerns regarding the ALJ's reliance on complaint counsel's summary document CX 1659, since our own review of the record does not rely on the challenged document.

Since 1990 alone, there have been scores of cases in which CDA actively participated in the enforcement of the various restrictions identified in the text. To name a few examples, in recent years CDA was consulted, issued an opinion, or required that action be taken with regard to the advertising of Dr. Hansa Asher (senior citizen discount, CX 18 A, CX 18 B (1993)), Dr. Walter Rosenkranz (new customer special, CX 865 E, CX 865 C (1993)), Dr. Noel Dorotheo (senior citizen discount, CX 333 F, CX 333 A (1993)), Dr. Joseph Foroosh (representations of superiority, CX 360 A (1986); discounts, CX 366 A (1993); state of the art dentistry, CX 66 A (1993)), Dr. John Baron (superiority claim, CX 43 B (1993)), Dr. Coulter Crowley (new patient discount, CX 248 B (1993)), Dr. Richard Casteen (senior citizen discount, CX 151 B (1993)), Dr. Henry Lerian (affordable costs, superiority claims, CX 605 A (1993)), Drs. Angelique and Katherine Skoulas (infection control standards, CX 963 A (1993)), Dr. Kumar Ramalingam (discount, CX 843 A (1993)), Dr. Russell Coser (pleasant dentistry, CX 232 (1993)), Dr. Gerald Brown (experience, CX 115 A (1993)), Dr. Darral Hiatt (discount, CX 444 A (1993)), Dr. Mark Rocha (discount, CX 855 A, CX 856 (1993)), Dr. Cheryl Johnston (experience, guarantees and discounts, CX 497 A-D (1993)), Dr. Brent Maiden (senior citizen discount, CX 646 C (1992)), Dr. Corey Nicholl (discounts, CX 775 A (1993)), Dr. Steven Williams (superiority and quality of care, CX 1083 A (1992)), Dr. Edward Norzagaray (superiority and senior discount, CX 780 A,

We conclude that the policies adopted and enforced by CDA evidence a horizontal restraint among its members, and therefore constitute an agreement among competitors. We turn, then, to the legality of this agreement.

V. LEGALITY OF RESTRAINTS ON TRADE

Before we examine the specific restrictions on various types of advertising imposed by CDA, it will be useful to say a few words about the role of advertising in a competitive system. Truthful and nondeceptive advertising serves the important function of informing the consumer about "who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy*

CX 780 B (1992)), Dr. Roxanne Schleuniger (seniors discounts, CX 913 A (1992)), Dr. Eugene Kita (discounts for cash patients, guarantees, CX 557 B, CX 557 C (1992)), Dr. Gregory Skinner (senior citizen discount, affordable dentistry, and caring dentistry, CX 957 B, CX 957 C, CX 957 D-E (1992)), Dr. Phillip Jenkins (gentle, comfortable and affordable dentistry, CX 478 A (1992)), Dr. Howard Moy (discounts and affordable prices, CX 755 A, CX 755 B (1992)), Dr. Parto Ghadimi (discount for all new patients, sterilized environment, quality of care, CX 387 A, CX 387 C (1992)), Dr. Donald Reid (superiority, CX 848 C (1991)), Mickiewicz & Rye Dental Group (claim of superiority, CX 718 B (1992)), Dr. James Tracy (superiority claim, CX 1026 A (1992)), Drs. Grant and Randall Stucki (senior discount, guarantee, CX 1000 C (1992)), Dr. Christopher Go (superiority claim, CX 394 B (1993)), Dr. Leslie Latner (discount, experience, superiority, CX 583 (1991)), Dr. Farida Butt (discounts, experience, CX 126 A (1991)), Dr. Pargev Davtian (senior citizen discounts, CX 297 B (1991)), Dr. Nazameddin Beheshti (senior citizens discount, CX 49 A (1990); discounts, CX 51 A (1991)), Dr. Jack Dubin (affordable dentistry, CX 335 A (1991)), Dr. Gerald VanderAhe (endorsement and low prices, CX 1042 A, CX 1042 B (1991)), Dr. Thomas Bales (affordable financing, CX 32 A (1991)), Dr. Sean Moran (offer of discount, CX 745 D, E (1991)), Dr. Paige Jeffs (discount, special offer, CX 474 A-B (1990)), Dr. Michael Leizerovitz (quality for less, offers of discounts, special offer for x-rays, CX 602 A, CX 602 C, CX 602 D (1991)), Drs. William Kachele & Andrew Stygar (affordable dentistry, discounts, CX 514 A, CX 516 A, CX 516 C (1991)), Dr. Jack Rosenson (affordable dentistry, fair fees, representations of superiority, CX 866 A, CX 866 C (1991)), Dr. Indravadan Patel (discount, CX 828 D (1990)), Dr. Tarsem Singhal (affordable prices, CX 949 C (1990)), Dr. Daniel Tucker (reasonable fees, CX 1032 A (1990)), Dr. Greg Mardirossian (seniors discount, discount, CX 661 A (1990)), Dr. Mark A. Aguilera (expertise claims, discount, CX 4 A, B, C, (1990)), Dr. Leland Jung (affordable prices, CX 501 B (1990)), and Dr. Joseph Paulsen (low fees, CX 830, CX 830 G (1990)). *See* generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

A cross-section of CDA's involvement is provided by its actions with respect to the advertising of Dr. Kent Buckwalter (reasonable fees, and major savings, CX 118 B (1993)), Dr. Soodabeh Azarmi (coupon discount, CX 27 F (1993)), Dr. Dexter Massa (discounts and guarantee, CX 668 B, CX 668 C (1992)), Dr. Tony Daher (discount, CX 258 C (1993)), Dr. Christine Choi (percentage discount for new patients, CX 206 A (1992)), Valley Presbyterian Hospital (superiority, CX 354 (1992)), Dr. Trang Nguyen (discount, affordable price, CX 772 A, CX 772 C (1992)), and Dr. Eric Debbane (quality, low cost, CX 306 A, CX 306 C (1990)). *Id.* Beyond these numerous incidents, which establish CDA's involvement in the conspiracy to restrict members' advertising, there are hundreds of related enforcement actions by the local component societies, which exacerbates the impact of the restraints on competition. *See id.*

Contrary to the charge made in Commissioner Azcuenaga's dissent, then, our decision in this case does not rest on "a handful" of questionable actions, *see, e.g.*, *post*, at 12, but on ample evidence of pervasive CDA enforcement. CDA stood knee deep in actions restraining the advertising of its members, and the examples noted here and in the text are intended to serve only as illustrations of that practice.

v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). *See* generally, *AMA*, 94 FTC at 1005. By apprising consumers of the "availability, nature, and prices of products and services," such advertising "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors. *See* generally, R. McAuliffe, Advertising, Competition, and Public Policy (1987); P. Nelson, Advertising as Information, 82 Journal of Pol. Econ. 729 (1974); J. Langenfeld and J. Morris, Analyzing Agreements among Competitors, 1991 Antitrust Bulletin 651, 667 and n.21; C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation 29-36 (Bureau of Economics: Federal Trade Commission 1990).

Restrictions on truthful and nondeceptive price advertising, on the other hand, "increase the difficulty of discovering the lowest cost seller of acceptable ability[,] . . . [reduce] the incentive to price competitively," and "serv[e] to perpetuate the market position of established [market participants]." *Bates*, 433 U.S. at 377-78. *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377). As a result, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates*, 433 U.S. at 377. The importance of advertising, however, attaches not only to price information, but to all material aspects of the transaction. As the Court has indicated, "all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Professional Engineers*, 435 U.S. at 695.

Restrictions on broad categories of truthful and nondeceptive advertising, therefore, do place restraints on trade, and our cases have recognized as much. For example, we held in AMA that "[g]iven the integral function of advertising and other forms of solicitation to the workings of competition in our society" the AMA's complete ban on advertising or solicitation "has, by its very essence, significant adverse effects on competition among [its] members," and that "the nature or character of these restrictions is sufficient alone to establish

their anticompetitive quality." 94 FTC at 1005. Subsequently, in *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 605 (1988), we found that "[r]estraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects." Further, we determined that the services at issue in that case were cheaper in states that permitted certain advertising than in states that did not. *Id.* at 606 (citation omitted); *see also id.* at 563 (Initial Decision). And we have entered into a number of consent agreements with associations on the theory that consumers are harmed by restrictions on advertising of the price, quality, or convenience of professional services. *See, e.g., Association of Independent Dentists,* 100 FTC 518 (1982); *Oklahoma Optometric Ass'n*, 106 FTC 556 (1985); *American Inst. of Certified Public Accountants*, 113 FTC 698 (1990). Since it is apparent from the record that advertising is important to consumers of dental services and plays a significant role in the market for dental services, IDF 265-67, 321, the general proposition regarding the importance of advertising to competition carries over to the instant situation.

Restraints on trade have been held unlawful under Section 1 of the Sherman Act either when they fall within the class of restraints that have been held to be unreasonable *per se*, or when they are found to be unreasonable after a case-specific application of the rule of reason. Other "restraints" have been upheld because they enhance competition or create no significant anticompetitive effect. In each situation, however, the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition. *See NCAA*, 468 U.S. at 104; *Professional Engineers*, 435 U.S. at 691.

Under the rule of reason, a challenged practice is examined in light of all the facts relevant to the particular case at hand. A court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis's classic formulation remains the touchstone for this rule-of-reason analysis:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint,

the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectional regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

This enquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. *See Indiana Federation of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10, 109 n.39.

A *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances. As the Court said in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Per se* categories of unlawful economic activities, in other words, consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues. The general conclusion that they are illegal without further analysis of the particular circumstances under which they arise in a given case is thereby justified. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). Examples of such practices are horizontal price fixing, *see United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), territorial divisions among competitors, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and certain group boycotts, *see, e.g., Northwest Wholesale Stationers, supra. See also Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

When an activity falls into a *per se* category, the individual agreement or practice at issue is thought beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered. For example, the "reasonableness" of a fixed price will not excuse the attendant interference with the free flow of

competition. *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified* 175 U.S. 211 (1899); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). *See also Superior Court Trial Lawyers*, 493 U.S. at 421 ("We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants.") Nor will a court listen to the argument that the parties lacked the necessary market power to render the agreement effectual. *Superior Court Trial Lawyers*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224 n.59. The *per se* approach, therefore, condemns certain agreements even in those rare instances in which they may have proved reasonable or harmless under an extended, individualized rule-of-reason analysis, but this occasional injustice is outweighed by the rule's promotion of administrative and judicial economy and its creation of clear guidelines for market actors. *Maricopa*, 457 U.S. at 344 & n.16, 351 (citation omitted).

It is true that there is a converging of the *per se* category (including possible adjustments under the decision in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979)) and a full blown rule of reason (which can take place expeditiously under a "quick look" approach) so that at times the two antitrust approaches do not differ significantly. Phillip E. Areeda, VII Antitrust Law ¶ 1508, p.408 (1986). Although there have been some oblique suggestions in Supreme Court cases that perhaps the categories had merged, the Court later returned to distinguishing between *per se* and rule of reason categories. *See, e.g., FTC v. Superior Court Trial Lawyers, supra; Palmer v. B.R.G. of Georgia*, 498 U.S. 46 (1990) (*per curiam*).[7] We believe these separate categories continue to serve valid enforcement purposes and, in any event, authoritative Supreme Court decisions continue to recognize the distinction. We therefore turn to a discussion of the particular restraints imposed by CDA and consider the proper antitrust treatment that is to be accorded to each.

[7] Commissioner Starek notes in his concurrence that Massachusetts Board of Optometry "set out a 'structure for evaluating horizontal restraints' that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, 'more useful than the traditional use of the *per se* or rule of reason labels.'" Post, at 2-3 (quoting *Massachusetts Board of Optometry*, 110 FTC at 603-604). Useful or not, however, we believe that it is for the Supreme Court to say whether its traditional analysis is to be abandoned. As recent cases indicate, the Court has not done so.

A. Per Se Illegality -- Restraints on Price Advertising

Although it is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws, *see e.g.*, *Maricopa*, 457 U.S. at 344-48; *Trenton Potteries*, 273 U.S. at 397, the price-related restrictions in this case differ from the classic price fixing conspiracy in that the agreement between CDA and its members burdens only members' advertising, as opposed to prohibiting specific sales transactions. That, however, does not save the restrictions from *per se* condemnation. CDA's restrictions on advertising "low" or "reasonable" fees, and its extensive disclosure requirement for discount advertising, effectively preclude its members from making low fee or across-the-board discount claims regardless of their truthfulness. Such a ban on significant forms of price competition is illegal *per se* regardless of the manner in which it is achieved. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

1. Effective Prohibition of Advertising

Section 10 of CDA's Code of Ethics prohibits advertising that is "false or misleading in any material respect," which, in turn, is defined to include any statement that is "likely to mislead because in context it makes only a partial disclosure of relevant facts" or "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors." CDA Code of Ethics, Section 10, Adv. Ops. 2(b) and (d); CX 1484-Z-49. Further Advisory Opinions provide:

> "3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.
>
> "4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity." *Id.*, Adv. Ops. 3 and 4; CX 1484-Z-49 to Z-50.

CDA has also separately issued detailed Advertising Guidelines, which purport to permit the advertising of "[d]iscounts on regular

fees," CX 1262-D, but explain that any advertisement for discounted dental services must "list all of the following":

(1) "[t]he dollar amount of the nondiscounted fee,"
(2) "[e]ither the dollar amount of the discount fee or the percentage of the discount for the specific service,"
(3) "[t]he length of time, if any, that the discount will be offered,"
(4) "[v]erifiable fees", and
(5) "[s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." CX-1262-I (emphasis in original).

Although this may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts.

The silencing effect of CDA's enforcement of the restrictions on advertising of low fees is evident from the record. For example, respondent recommended denial of membership to one dentist because he advertised, among other things, references to "cost that is reasonable," "affordable, quality dental care," "making teeth cleaning . . . inexpensive," and "very reasonable rates," which were objectionable because "fee advertising must be exact." *See* CX 301-B to D. Although CDA ostensibly changed course in 1991 (based on a rediscovered decision of the Judicial Council in 1978 which had approved use of the phrase "reasonable fees"), this alleged retraction does not appear to have been communicated to CDA's components nor did it terminate CDA's practice of citing members for use of that term. *See* IDF 255-57; CX 391; CX 778. Thus, on November 4, 1993, CDA recommended denial of membership to a dentist because, among other things, his employer's advertising included the offers "reasonable fees quoted in advance" and "major savings," and in respondent's view "the above referenced phrases are misleading and would cause an ordinarily prudent person to misunderstand or be deceived." CX 118-B. As occurred frequently in CDA's enforcement actions, the citation gives no indication that the conclusion regarding the misleading nature of the phrases was based upon an allegation that the advertising claim was false or that the advertising dentist

lacked a reasonable basis for the fee representations made. *See also* T. 361-78 (Dr. Miley).[8]

CDA's discount disclosure standards turns out to have been equally prohibitive. The Supreme Court's warning that "'[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive,'" *Morales*, 504 U.S. at 388 (quoting letter from FTC to Christopher Ames, Deputy Attorney General of California, dated Mar. 11, 1988), applies in this case. As even a member of CDA's Judicial Council, Dr. Kinney, acknowledged at trial, across-the-board discount advertising in literal compliance with the requirements "would probably take two pages in the telephone book" and "[n]obody is going to really advertise in that fashion." T. 1372. Although dentists can comply with the disclosure requirement when advertising a discount for a small number of services, the record bears out the conclusion that dentists do not advertise across-the-board discounts that include a complete itemization of the regular fee for each discounted service. *See, e.g.*, Appendix to Brief for Respondent; IDF 179. Dr. Kinney purported to agree that "if they are offering a discount to senior citizens and this is an across the board discount for everything ... you would have to be a little flexible and ... not ... require that ... every single fee [be listed]," T. 1373, but CDA did not ever compromise its demand for full compliance with the panoply of disclosures. For example, it recommended denial of membership to one dentist because she advertised, among other things, "20% off new patients with this ad" without including the dollar amount of the nondiscounted fee for each service. *See* CX 206-A; T. 1063-65. Another was advised that his advertisement of "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94/ not good with any other offer" was unacceptable since it did not include the customary fee. CX 843-44. A third was admonished for having offered a "10% senior citizen discount" without the disclosures required by respondent. *See* CX 585-A, 586-E, 588-B.

Thus, regardless of the formal codification of its policy, CDA in fact imposed a broad ban on these forms of price advertising by its members.

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[8] *See* FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 648, 839 (1984), (appended to *Thompson Medical Co., Inc.*) (advertisers must have "a reasonable basis for advertising claims before they are disseminated"). *Cf. infra* note 25.

2. *Per Se* Illegality

This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful *per se*. That it does so by the indirect means of suppressing advertising does not change that result. Nor is it of consequence that we are faced with a restriction among professionals.

Conspiracies to eliminate price competition come in various forms. For example, in Socony-Vacuum, *supra*, the Supreme Court struck down as *per se* unlawful an agreement among competing oil companies to purchase large amounts of gasoline on the spot market and store it for later sale in an effort to stabilize prices. In *United States v. General Motors Corp.*, 384 U.S. 127, 145-47 (1966), the Court examined concerted activity aimed at preventing discounters from doing business with car dealers and found this practice also to be a *per se* violation of the Sherman Act. And *Catalano*, 446 U.S. 643, held that an agreement among wholesalers to eliminate short-term credit formerly granted to retailers made out a *per se* violation as well. More recently, in *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the Seventh Circuit held an association of marine dealers to have engaged in a *per se* violation of the Act when it refused to admit a dealer to its annual boat show because of that dealer's publicized policy to "meet or beat" competitors' prices at the shows. And in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), another case invoking *per se* analysis, the Seventh Circuit held that an agreement among competitors not to advertise in specified territories was tantamount to an outright allocation of markets and thus illegal *per se*. "To fit under the *per se* rule," the court reasoned, "an agreement need not foreclose all possible avenues of competition." *Id.* at 827. The restrictions on advertising sufficed to bring the agreement under the rule.

Indeed, in AMA, we had already noted that "restraints on the advertising of prices have previously been considered *per se* illegal by some courts." 94 FTC at 1003 (citing *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961), and *United States v. House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,517 (S.D. Fla. 1965)). In the cited Seventh Circuit decision, the court had reviewed a horizontal agreement among gasoline retailers to refrain from advertising or giving premiums, and from advertising the price

of their product in locations other than the gasoline pumps, and the court declared this conspiracy to be a *per se* violation of the Sherman Act. 285 F.2d at 691. Although the agreement was thus coupled with outright price maintenance, the conspiracy in restraint of advertising was no less singled out for *per se* condemnation. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), is also instructive. In that case, the Court held that Parke Davis had gone beyond the limits of permissible vertical arrangements by enlisting wholesalers in a conspiracy to deny its products to retailers who sold below the suggested minimum retail price. This conspiracy, which had a distinctive horizontal flavor, was illegal under the Sherman Act. *Id.* at 45-46. Important for our purposes is that the Court went on to address how Parke Davis had similarly brokered a horizontal agreement among retailers to suspend advertising of discounts, concluding that these actions were directed at creating a *per se* unlawful agreement to eliminate price competition. *Id.* at 46-47. Applying Parke Davis, the District Court in Seagram expressly held that horizontal "[a]greements by retailers . . . to discontinue advertising . . . are tantamount to agreements not to compete and constitute *per se* violations . . . of Section 1 of the Sherman Act." 1965 Trade Cas. (CCH) ¶ 71,517 at p.81,275. Finally, the Seventh Circuit confirmed the view that a prohibition on advertising discounts "is functionally a price restriction," *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 724 (7th Cir. 1986), and refrained from applying the *per se* rule only because, as the court noted in a subsequent appeal in that case, "the *per se* rule against this practice does not apply when the vendor is an agent," 889 F.2d 751, 752 (1989), *cert. denied*, 495 U.S. 919 (1990).[9]

Horizontal agreements suppressing broad categories of truthful and nondeceptive price advertising, then, effectively suspend a significant form of price competition. Indeed, such an agreement to eliminate price advertising can be more threatening to competition than a ban on discount sales, since, as Judge Easterbrook noted in Illinois Corporate Travel, a "no-advertising rule . . . is easily enforceable because advertising of discounts is observable." 806 F.2d at 727.

[9] In a case in which automobile dealers conspired to oppose invoice advertising (which is advertising the price as a fixed percentage or sum above the dealer's invoice), the Justice Department recently reached the conclusion that "an agreement by a trade association or its members not to engage in certain types of advertising is a *per se* violation of the antitrust laws." Competitive Impact Statement regarding proposed Final Judgment in *United States v. National Automobile Dealers Ass'n*, Civ. Action No. 95-1804 (D.D.C. filed Sep. 20, 1995) at 6, reprinted in 60 Fed. Reg. 51,491, 51,498 (Oct. 2, 1995).

The professional context of this restraint does not lead to a different conclusion. In AMA, we ultimately refrained from classifying the price advertising restraints as *per se* illegal largely due to our hesitation to speak categorically about restrictions by professional associations, which at the time had "not previously been subject to extensive scrutiny under the antitrust laws." 94 FTC at 1003. *See also White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these arrangements emerge to . . . decide whether they . . . should be classified as *per se* violations."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975) ("It would be unrealistic to view the practice of professions as interchangeable with other business activities."). The Supreme Court had just decided Professional Engineers under a truncated analysis, but without expressly declaring that it was subjecting the association's prohibition against competitive bidding to *per se* treatment. Since then, however, it has become clear that the Court in that case did essentially apply a *per se* rule to the agreement. *See Catalano*, 446 U.S. 643; *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 471 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992); *Michigan State Medical Society*, 101 FTC at 290.[10] And both the Commission and the courts have in the interim gained considerable exposure to anticompetitive activities by professional associations.[11]

[10] Although in Professional Engineers the Supreme Court did not expressly identify the approach it used as *per se*, this now appears to have been merely a matter of terminology, rather than analytical significance. The Court's opinion in Professional Engineers placed both the abbreviated, categorical approach as well as the individualized, contextual examination under the umbrella label "rule of reason." *See* 435 U.S. at 691-692. It explained that the first applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal *per se*,'" whereas the second encompasses "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692. It then termed the ban on competitive bidding "illegal on its face," noting that "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* Finally, it noted: "Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position." *Id.* at 696.

Since that case, the Court has returned to applying the label "rule of reason" to the second approach only, as a means to distinguish it from the *per se* category. Although the Court has at times quoted from Professional Engineers as though the case had applied the individualized rule of reason, *see, e.g., Indiana Federation of Dentists*, 476 U.S. at 459, the Court has elsewhere indicated that the approach it used in *Professional Engineers* was indeed what we generally would term *per se*, *see Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). We use the term "rule of reason" when speaking about the individualized analysis, in contradistinction to the categorical, *per se* approach.

[11] *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990); *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988); *Michigan*

To be sure, the "'public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'" *Maricopa*, 457 U.S. at 348-49 (quoting *Goldfarb*, 421 U.S. at 788 n.17). By the same token, however, in cases involving agreements not "premised on public service or ethical norms," the Supreme Court has repeatedly applied the *per se* rule. *Id.* at 349. *Cf. Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983) ("an agreement to fix prices will not escape *per se* treatment simply because it is entered into by professionals and accompanied by ethical protestations [, whereas] . . . a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment"), *cert. denied*, 467 U.S. 1210 (1984). Recently, for example, in Superior Court Trial Lawyers, the Court had no trouble deciding that *per se* treatment was called for when lawyers entered into a horizontal agreement to fix prices, the professional context notwithstanding. 493 U.S. 411. Furthermore, our own decision in Michigan State Medical Society, which purportedly refrained from applying the *per se* rule, nonetheless noted that the *per se* standard can apply in the professional setting even where the conspiracy does not set specific prices or fees. 101 FTC at 290. And in Massachusetts Board of Optometry we found that even in the context of professional rules, restraints on truthful advertising "are inherently likely to produce anticompetitive effects," and that a ban on discount advertising for professional services impedes new entry and the efficient use of resources by eliminating a form of price competition. 110 FTC at 605. In that case, we summarily condemned the price advertising restraints. *Id.* at 607.[12] We therefore believe it to be well grounded in this experience and in precedent to strip CDA's price advertising restrictions of their professional garb and declare them *per se* unlawful as naked restraints on price competition.

The examination of a practice, however, does not inevitably come to rest after it has been identified as falling into the category of *per*

State Medical Society, 101 FTC 191 (1983); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued Dec. 16, 1992); *American Inst. of Certified Public Accountants*, 113 FTC 698 (1990) (consent); *Oklahoma Optometric Ass'n*, 106 FTC 556 (1985) (consent); *Association of Independent Dentists*, 100 FTC 518 (1982) (consent).

[12] *Cf. Detroit Auto Dealers*, 955 F.2d at 470-71 ("We believe that the inherently suspect conclusion arises from a *per se* approach by the Commission . . .").

se unlawful bans on price competition. Under *Broadcast Music*, 441 U.S. 1, and *NCAA*, 468 U.S. 85, respondent might attempt to argue that its practice is a restraint on price competition "in only a literal sense." *Maricopa*, 457 U.S. at 355. Arguments that might carry weight under *Broadcast Music*'s characterization approach, however, have not been advanced here.[13] Respondent urges only in the most general sense that its restrictions are procompetitive in that they are intended to protect consumers from unfair and deceptive advertising. But respondent has entirely failed to explain why it is unfair or deceptive to advertise an across-the-board discount without disclosure on the face of the advertisement of the regular fee of each service covered by the discount, or how consumers are harmed by an advertisement that announces with a reasonable basis for its truthfulness (let alone truthfully) that the prices charged are low as compared to other providers in the area.

CDA's restraints on price advertising are thus illegal *per se*. In the course of discussing the nonprice advertising restraints under the rule of reason in the next section, however, we will also reexamine the restraints on price advertising under that more elaborate analysis, but solely as a means of demonstrating that, assuming *arguendo* the restraints had escaped censure under the *per se* approach, they would nonetheless have been condemned under the rule of reason.

B. *Rule of Reason -- Restraints on Price & Non-Price Advertising*

Unlike price advertising restraints, which have in one form or another received ample consideration by the courts and fit squarely within the Sherman Act's core prohibition against the collusive suspension of price competition, CDA's restrictions on nonprice advertising are entitled to an examination under the rule of reason. With regard to these restraints, we cannot say with equal confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession, or that "the practice facially appears

[13] We agree with Commissioner Starek that it would be a grave error to chart a course on which "potential competitive benefits of agreements restricting price advertising need never trouble the Commission again." Post, at 2. The *per se* rule as articulated in recent cases by the Supreme Court and as applied by the Commission today, however, runs no such risk. To the contrary, we have been open to arguments that might carry weight under *Broadcast Music*, but CDA has simply failed to assert the requisite competitive benefits that might save it from *per se* condemnation. Commissioner Starek certainly is not suggesting that significant, pro-competitive benefits have been overlooked in this case. The view that the Commission's reasoning foreshadows summary condemnation for a vast array of future cases, *see, e.g.*, Post at 2, 7, therefore, overstates our conclusion here. Only cases involving equivalent conduct will be accorded similar treatment in the future.

to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music*, 441 U.S. at 19-20. Thus, mindful of the Court's general reluctance to adopt a *per se* approach in reviewing codes of conduct of professional associations, and heeding the Court's admonition not to expand the *per se* category "until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged," *Maricopa*, 457 U.S. at 349 n.19, we refrain from extending *per se* treatment to the restrictions on nonprice advertising and apply the default, rule-of-reason analysis instead.[14]

The Supreme Court has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. *See, e.g.*, *NCAA*, 468 U.S. 103-110. As will be seen, here, application of the rule of reason is simple and short. The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion, and, in any event, CDA clearly had sufficient power to inflict competitive harm.

1. The Likely Anticompetitive Effects of the Restraints

Although the ALJ did not examine the effects of CDA's rules in as much detail as he might have, the record demonstrates that each of the restraints, not only those on price advertising, has anticompetitive effects. The nonprice advertising CDA proscribes is vast. In addition to making general prohibitions against false or deceptive advertising, CDA forbids quality claims. Advisory Opinion 8 to Section 10 of CDA's Code of Ethics urges against quality claims:

"Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading." CX 1484-Z-50.[15]

In practice, CDA prohibits all quality claims. For example, CDA recommended denial of membership to one dentist because her advertising included the phrase "quality dentistry," which CDA maintained was not susceptible of verification, CX 387-C,

[14] We do not decide, however, whether, as a general matter, restrictions on nonprice advertising will always escape condemnation under the *per se* rule of illegality.

[15] *Cf.* CDA Code of Ethics, Section 10, CX 1484-Z-49 (prohibiting advertising that is "false or misleading in any material respect").

recommended denial of membership to another because he included in his advertising the phrase "we are dedicated to maintaining the highest quality of endodontic care," which CDA cited as being unverifiable, CX 1083-C, and initially denied membership to yet another dentist because his advertisement of "improved results with the latest techniques" and "latest in cosmetic dentistry," was allegedly likely to create false or unjustified expectations of favorable results as to the quality of service and was not subject to verification, CX-306.

Furthermore, albeit without coextensive written regulations, CDA suppresses claims of superiority and the issuance of guarantees.[16] For example, in 1993, when a dentist reapplied for membership, CDA recommended that he be counseled regarding his advertising because of a representation of superiority, *i.e.*, the claim that "all of our handpieces (drills) are individually autoclaved for each and every patient." *See* CX 671-A. CDA also routinely cited applicants or members for implying superiority by use of the phrase "state of art," as in one dentist's advertisement of "state-of-art sterilization," CX 43-B. *See also, e.g.*, CX 1026-A ("state of the art dental services"); CX 394-B ("highest standards in sterilization"). In 1992, CDA found an advertisement containing the phrase "we can provide the uncompromised standards of excellence you demand" to be an impermissible representation of superiority. CX 354. With respect to guarantees, CDA prohibited such claims as "we guarantee all dental work for 1 year," CX 668-C; CX 557-C, or "crowns and bridges that last," CX 497-C.

CDA has also, on occasion, imposed special burdens on dentists claiming that they offer "gentle" care, CX 70-A, although its activities on that score appear to be less sweeping in recent years than those of CDA's component societies. *See* IDF 208-15. And finally, CDA passed a resolution in 1984 (to which the organization still adheres today), providing:

"[I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A.[17]

[16] CDA does have a provision that may be read to address superiority claims, *i.e.* Section 22 of its Code of Ethics which provides that "[t]he dentist has the further obligation of not holding out as exclusive any agent, method or technique." CX 1484-Z-53. CDA's enforcement record, however, reveals a complete prohibition of superiority claims.

[17] *Cf.* CDA Code of Ethics, Section 10, CX 1484-Z-49 ("In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public.").

In the course of enforcing that policy statement, CDA informed a component in 1993 that when dentists participate in school screenings and include their name and address on the screening document sent home to the parents, such activity "can be construed to be a form of [prohibited] solicitation . . . ." CX 1167-A.

In addition to the findings in earlier cases regarding the anticompetitive effects of broad restrictions on the truthful and nondeceptive advertising of a service, *see, supra*, discussion at the beginning of Part V, in this case there is substantial evidence that the restrictions imposed by CDA prevented the dissemination of information important to consumers and the advertising of aspects of a dental practice that form a significant basis of competition among California's dentists. For example, the ALJ found that information not only about price of service, but also about quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist. IDF 265-67. He also credited the testimony of the owner of an advertising agency that specializes in serving dental practices, who testified that advertising the comfort of services will "absolutely" bring in more patients, and that, conversely, restraints on advertising of the quality or discount of dental services would decrease the number of patients a dentist could attract. IDF 265. In one case, the elimination of the phrase "gentle dentistry in a caring environment" meant sacrificing an advertisement that had attracted 300 new patients within six months. IDF 286. The ALJ also found that the prohibition on distributing identifying information during school screenings resulted in a loss of potential customers. IDF 302.[18]

The importance to consumers of advertising of various characteristics of dental services is confirmed by other witnesses as well. For example, Dr. Richard Harder, who closely monitored the results of his various advertising techniques, testified that generic advertising without comparative quality or price claims was rather ineffective, attracting only 15-20 new patients a month, but that a subsequent campaign based on advertising a special fee for new patients, as well as a dedication to quality of service and family dentistry, brought in between 75 and 100 new patients a month.

[18] The manner in which CDA impairs new entry of competitors is particularly well illustrated by price advertising restraints, such as citations for advertising "Grand Opening Special $5 exam x-ray, $15 polishing and 40% off dental treatment," CX 828-D, "as a get acquainted offer, an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only $5 (applies to all members of your family)," CX 657, and "we guarantee all dental work for 1 year," CX 668-C.

After being contacted by the local society and threatened with discipline, Dr. Harder eliminated all references to quality and family, which contributed to an observed reduction in the number of new patients coming into his practice. T. 262-74. Dr. John Miley's practice experienced a similar surge in new customers through advertising that included references to the quality and superiority of his services, as well as to the fact that he offered discounts and low prices. T. 316-457; CX 723.

As is therefore evident from the record, the restraints hamper dentists in their ability to attract patients to their practice and thereby are likely to reduce output. More important for our purposes, the restrictions thus deprive consumers of information they value and of healthy competition for their patronage. Even without quantifying the increase in price or reduction in output occasioned by these restraints, we find the anticompetitive nature of these restraints to be plain. *See AMA*, 94 FTC at 1006.

2. Market Power

Although the ALJ found that the suppression of advertising "has injured those consumers who rely on advertising to choose dentists," he spelled out a second conclusion, rather in tension with the first, that CDA lacked market power. ID at 76. The ALJ concluded that complaint counsel had failed to establish the relevant product and geographic markets, and decided, on the ground that there was no "insurmountable obstacle to entry" into the dental market, that "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." ID at 76. We reject that conclusion.

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined.[19] We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed. Here, in contrast, the ALJ found, and we agree, that the suppression of advertising "has injured those consumers who rely on

[19] The Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. *See NCAA*, 468 U.S. at 109-10; *Indiana Federation of Dentists*, 476 U.S. at 461.

advertising to choose dentists" (the record indicates that significant numbers of such consumers indeed exist), and none of the practices can rely for support on a valid efficiency justification. To the extent that market power is relevant, it suffices that the association has the power to withhold from consumers the relevant information that they seek.[20] And as we shall explain presently in further detail, CDA has the ability to identify violators of the agreement and the necessary market power to enforce this ban over sufficiently large segments of the market to deprive consumers of valuable information.

When examining the market power of an association's restriction on members who are the primary economic actors, we confront two closely related questions. First, whether viewed as a question of market power or of the existence of an agreement, we must determine whether the association has the ability successfully to impose the restriction on its members. If the association is unable to gain its members' adherence to the rule such that the market continues to function as it had before, the restraint will become an irrelevant formality of little concern to antitrust regulators. If, however, the association is able to induce its current members to follow the rule, and is not reduced significantly by attrition, we must turn to the second question, which asks whether the association has the necessary power to cause harm to consumers by imposing the rule on its members. For if alternative sources for the service offered by the association's members are so prevalent as to permit consumers easily to switch to providers who are unfettered by the rule, even a well-enforced restraint should cause no harm to the efficient functioning of the market. Members will simply lose business, nonmembers' business will surge, and the market will eventually cure itself. If, on the other hand, consumers' abilities to turn elsewhere are limited, the association is in a position to harm consumers by adopting restrictive rules. This turns out to be the case here.

[20] In *Indiana Federation of Dentists*, 476 U.S. at 459, the Court examined "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," and concluded:

"'While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' National Society of Professional Engineers, *supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' National Society of Professional Engineers, *supra*, at 692, cannot be sustained under the Rule of Reason."

There is little doubt that CDA has the ability to police, and entice its members to adhere to, the restrictions on advertising. Unlike an individual sales transaction, advertising is a public, conspicuous event that is easily monitored. *Cf. Illinois Corporate Travel*, 806 F.2d at 727 (finding no-advertising rule "easily enforceable" because advertising "is observable"). Many components review the Yellow Pages phone listings at the behest of CDA, IDF 146, and CDA investigates complaints about dentists' advertising. There is no evidence in the record of rampant advertising that has failed to come to CDA's attention. Next, it is clear that dentists place a high value on the benefits of membership in CDA, whether because of its insurance and educational programs or the reputational advantage that membership may confer. IDF 268-74; *see also, e.g.*, T. 376-92. We need not quantify this benefit econometrically, since in this case the record speaks for itself. When faced with a choice between membership and advertising, dentists overwhelmingly choose the former. Several component Ethics Committee officials testified that their members were in perfect or near-perfect compliance with the advertising code and that they knew of not a single instance in which a member dentist had refused to modify or discontinue the challenged advertising. IDF 275-86. Numerous applicants had, of course, already changed their advertising in order to gain admission to CDA in the first place. *See, e.g.*, CX 670-71, CX 365-66, CX 249.[21] Moreover, this stranglehold on the profession extends well beyond actual members to include employers, employees, and business referral services of members, since these are equally prohibited by CDA from engaging in advertising that violates CDA's Code of Ethics (whenever such advertising indirectly benefits the member). IDF 287-93; *see* CX 1358-B.

[21] Quite contrary to Commissioner Azcuenaga's suggestion that "it seems questionable to infer that dentists feared the CDA instead of the state of California," Post, at 27, the record bears out just that. For example, Dr. Jenkins' capitulation when he "disagree[d] with [CDA's] findings" but decided to "disagree agreeably" and promise that "[t]he statements in question will no longer be used in any mailings from this office," CX 480, evidences that it was this dentist's desire to become a member of CDA, not a concern about state law, that drove him to comply with CDA's Code of Ethics. Similarly, Dr. Foroosh's seven-year battle for admission to CDA, CX 360-366, was clearly motivated by a desire to gain admission to the Association, not to seek continual guidance from CDA about state law. *See also* CX 302-398 (Dr. Eric Debbane, gaining membership with fourth application). Indeed, two dentists who had apparently cleared their advertisement with the Board of Dental Examiners, nonetheless eliminated all references to "uncompromised standards or outstanding success rates" after they were contacted by respondent and informed that respondent is a separate entity from the Board. CX 355, 357, 358. The record thus contains ample confirmation of the importance of membership and its power to compel the alteration of dentists' advertising practices. *See also, e.g.*, IDF 285 (disagreement with CDA's conclusion but promise to cure advertising); IDF 268-274 (members' statements regarding value of membership).

Here, this kind of power goes hand in glove with the second, that is the ability successfully to withhold information from consumers. Without much theoretical analysis, it can be readily concluded from the record, common sense, and the California Business and Professions Code that the services offered by licensed dentists have few close substitutes and that the market for such services is a local one. *See* Cal. Bus. & Prof. Code Sections 1625-1626 (defining dental services that can be performed only by licensed dentists); T. 637 & 655 (Christensen) (testifying that dental market is local); *see also Indiana Federation of Dentists*, 476 U.S. at 461 (noting that "markets for dental services tend to be relatively localized"). Even respondent's expert witness agreed that the provision of dental services "could be" a relevant product market, *see* T. 1689 (Prof. Knox), and his view on the relevant geographic market was that California consists of numerous markets, each "smaller than the [entire] State," since "dental services are bought and sold . . . in a more disaggregated market," T. 1642 (Prof. Knox). CDA commands more than a substantial share of these markets. Around 75 percent of the practicing dentists in California belong to CDA, IDF 2, and, according to one component society, the figure exceeds 90 % in at least one region, CX 1433. Given CDA's success in enforcing its rules, and the extended reach of its prohibition to various associates of member dentists, we can only assume that even these numbers understate CDA's real market share.

While market share alone might not always be a sufficient indicator of market power, it may nonetheless be relied upon at least where there are significant barriers to entry. For example, in *Michigan State Medical Society*, 101 FTC at 292 n.29, we explained that "there is little need for an elaborate market definition analysis in this case, since MSMS' members account for roughly 80% of the physicians in Michigan." We concluded in that case that, as a result, "no matter how the relevant product or geographic markets might be characterized, the potential impact of the agreements in question is substantial." *Id.* The Seventh Circuit has similarly indicated that reliance on market share can be appropriate, and is "especially so where there are barriers to entry and no substitutes from the consumer's perspective." *Wilk v. American Medical Ass'n*, 895 F.2d 352, 360 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990) (citation omitted). In addition to the absence of substitutes, however, in the present case there are entry barriers as well.

Barriers to entry figure prominently in California's market for dental services. As an initial matter, we note that it has never been held, as the ALJ appears to believe, that barriers to entry are cognizable in antitrust analysis only when they are "insurmountable," ID at 76, or, as respondent's expert witness thought, only if they are created by the association accused of engaging in anticompetitive practices, IDF 322. And we disagree with respondent's expert witness that costs incurred to enter the market are irrelevant whenever similar costs were borne by current market participants when they first entered the market. *See* T. 1636-1640.[22]

In our view, the record bears out the conclusion that entry into the California dental market is difficult. In addition to facing the substantial educational requirements, which according to one witness leave students coming out of dental school with between $50,000 and $100,000 of debt, a dentist who seeks to establish a practice must either lease or purchase the necessary space and equipment and hire appropriate personnel, or must purchase an existing practice (the costs of which according to one witness range between $75,000 and $100,000). After setting up the practice, and provided a dentist is able to attract a sufficient clientele, it can take from 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt. *See* IDF 329-31; T. 297-300 (Dr. Harder); T. 329-31 (Dr. Miley); T. 756-64 (Dr. Hamann). Thus, new entry into the dental profession in California is difficult. And given these startup costs, a good deal of which even an active dentist who seeks to relocate to California would face, the idea that fully licensed dentists from other states would move in significant numbers to California to take advantage of the opportunity to advertise in competition with members of CDA is implausible at best.

Even easy entry at the level of opening a dental practice would not necessarily mean that the Association could not exercise market power. If the Association membership confers a real economic benefit that cannot be easily replicated, then exclusion from the Association may impose a real economic cost on potential entrants. Here, CDA membership entails significant benefits for the dentist as demonstrated by the fact that no one gives up membership in order

[22] A combination of these three beliefs led the ALJ to credit the testimony by respondent's expert witness that CDA's activities had "no impact on competition in any market in the State of California." IDF 322, 326. As indicated in the text, we reject that conclusion.

to gain the freedom to advertise -- including those inclined to advertise but directed not to by CDA.

We therefore conclude that CDA possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services.

3. Efficiencies

As the third step in our quick look, we examine the efficiency justifications proffered by respondent together with any others that might be raised in support of CDA's restraints on advertising. Respondent contends that insofar as its advertising restraints are not harmless, they are procompetitive because CDA challenges only advertising that is false or misleading. Although the prevention of false and misleading advertising is indeed a laudable purpose, the record will not support the claim that CDA's actions are limited to advancing that goal.

Under Section 5 of the FTC Act, an advertisement is deceptive "if it is likely to mislead consumers acting reasonably under the circumstances in a material respect." *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (citation omitted); *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435-36 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *Thompson Medical Co.*, 104 FTC 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). A practice is not considered "unfair" under the Act unless it engenders substantial consumer injury that is not reasonably avoidable by the consumer and not outweighed by countervailing benefits to consumers or competition. *See* FTC Act Amendments of 1994, Section 9, 108 Stat. 1691, 1695, to be codified at 15 U.S.C. 45; Letter from FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), reprinted in Appendix to *International Harvester Co.*, 104 FTC 1070 (1984). Without a significant additional proffer, which CDA has not made, the types of advertising claims categorically prohibited by CDA's stated policies and enforcement efforts could not reasonably be thought to be either deceptive or unfair under Section 5.

First, CDA prohibits even truthful offers of discounts by dentists unless the advertisement states the regular price of the discounted service. Where the discount applies to numerous services (for

example, a senior citizens discount on all services), the practical effect of this requirement has been to forbid the advertising entirely. However, the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive. The offer of a discount can, of course, be misleading if the advertiser selectively inflates the price from which the discount is computed or offers "discounts" to everyone from a fictitious "regular" price. *See, e.g., Encyclopedia Britannica, Inc.*, 100 FTC 500, 505 (1982) (order modifying consent order); *Diener's, Inc.*, 81 FTC 945, 976-78, 980-81 (1972), *modified*, 494 F.2d 1132 (D.C. Cir. 1974); *Paul Bruseloff*, 82 FTC 1090, 1095-96 (1973) (consent). But there is no suggestion here that CDA merely prohibited discount claims by dentists found individually to have engaged in such chicanery, or that CDA had evidence of significant abuse of discount claims that might provide support for a prophylactic ban. Instead, CDA effectively prohibited across-the-board discount offers, whether truthful or not. No purported policy of preventing deception can justify that approach.[23]

Similarly, the law of deception does not prohibit broadly all representations that a seller's prices are "low" or a "bargain" in relation to others, and certainly not where the representations are accurate or can be substantiated. *See Tashof v. FTC,* 437 F.2d 707, 710-11 (D.C. Cir. 1970) (comparing discount offers to prevailing prices). Once again, CDA's policy is to condemn categorically all representations regarding "low" or "affordable" prices, without any enquiry as to how those terms might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim.

CDA's condemnation of guarantees is likewise overbroad. While a guarantee of a specified medical outcome may well be misleading, a truthful promise to refund money (or to honor scheduled appointments) is certainly not. Commission guidelines identify the obligations of those who advertise guarantees. *See* Guides for the Advertising of Warranties and Guarantees, 16 CFR Part 239 (1985). Barring some information that an advertiser has misrepresented or

[23] CDA suggests that its approach to discount advertising may be justified by reference to the Supreme Court's stated preference for "more disclosure, not less" in dealing with the regulation of deceptive speech under the First Amendment. Brief for respondent 37-38 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). But the Court has expressed its preference for affirmative disclosures only as an alternative to prohibiting otherwise deceptive speech. Moreover, where, as here, speech is truthful and not misleading, the Supreme Court has shown great skepticism towards disclosure mandates that so burden the speech as to preclude it. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992).

failed to honor a guarantee, such advertising cannot presumptively be condemned as deceptive.

In the same vein, CDA's broad prohibition on claims relating to the absolute or comparative quality of service finds no support in the law governing deception. Some general claims of quality, of course, are so recognizably statements of personal opinion that no substantiation is either possible or expected by reasonable consumers. Such "mere puffing" deceives no one and has never been subject to regulation. *See* Federal Trade Commission Policy Statement on Deception, 103 FTC 174, 181 (1984) (appended to *Cliffdale Associates*); *Bristol-Myers Co.*, 102 FTC 21, 321 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Pfizer, Inc.*, 81 FTC 23, 64 (1972).

Respondent refers to the Supreme Court's suggestion in *Bates*, 433 U.S. at 383-84, that "'advertising claims as to the quality of [legal] services . . . are not susceptible of measurement or verification; accordingly such claims may be so likely to be misleading as to warrant restriction.'" Brief for respondent 44 (quoting Bates, *supra*). We do not understand this language, however, to justify broad categorical prohibitions on quality claims of all sorts, without some effort to determine their accuracy or effect upon consumers. As the Court has more recently observed:

> "Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985)).

Insofar as claims of absolute or comparative professional quality (including claims made to alleviate patient anxiety) do implicate objective standards for which consumers would reasonably expect an advertiser to have proof, they may, of course, be proscribed upon a showing that particular claims are false or unsubstantiated. In our view, the requisite showing requires proof that specified claims are untrue or that advertisers lack "a reasonable basis for advertising claims before they are disseminated." FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 648, 839 (1983) (appended to *Thompson Medical Co., Inc.*). Likewise, even assuming *arguendo* that claims of quality and efficacy may so readily be

equated with claims of superiority as many of CDA's interpretations appear to suggest, *see* IDF 194-204, the Commission "evaluates comparative advertising in the same manner as it evaluates all other advertising techniques," and "industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate." Statement in Regard to Comparative Advertising, 16 CFR 14.15(c)(2).

Departing from its deception rationale, CDA seeks to justify its prohibition against dentists' provision of identifying information in school screening programs as a means of preventing exploitation of youthful consumers. This defense is inapt. While efforts to exploit youthful consumers and other particularly vulnerable groups have been challenged and condemned as deceptive and unfair in a variety of contexts,[24] that rationale is misplaced here, given that the only apparent commercial effect of furnishing the prohibited identifying information to children could be to provide their parents with the means of contacting the dentist.

We do not mean to deny that advertising that would otherwise be permissible might be harmful in the context of promoting dental services. *See, e.g., AMA*, 94 FTC at 1026 ("[W]hat may be false and deceptive for doctors may be permissible for sellers of other products and services. Harmless puffery for a household product may be deceptive in a medical context."); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993) (prohibiting NASW from restricting advertising and solicitation, except insofar as it adopts reasonable principles regarding, *inter alia*, solicitation of testimonial endorsements from current psychotherapy patients); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992) (same). The advertising that a service is "painless," for example, may be inherently deceptive and harmful when used by a practicing dentist, whereas a similar claim by, say, an institution offering evening courses toward completion of a college diploma probably would not. But CDA has offered no convincing argument, let alone evidence, that consumers of dental services have been, or

[24] *See, e.g., ITT Continental Baking Co., Inc.*, 83 FTC 865, 872 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976) (finding advertisements tended to exploit emotional concerns of parents for children); *In re Travel King, Inc.*, 86 FTC 715, 774 (1975) (holding deceptive the sale of "psychic surgery" to terminally ill patients); *Phillip Morris, Inc.*, 82 FTC 16 (1973) (consent) (prohibiting distribution of unsolicited razor blades); *H.W. Kirchner*, 63 FTC 1282, 1290 (1963) ("If, however, advertising is aimed at a specially susceptible group of people (*e.g.* children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.").

are likely to be, harmed by the broad categories of advertising it restricts. *See* ID at 74-75. Indeed, as far as we can tell, advertising complaints typically came from fellow dentists, not from disappointed patients. *See, e.g.*, T. 849 (Dr. Abrahams), T. 926 (Dr. Yee).

We thus see no basis in this case for concluding that the advertising swept aside by CDA with broad strokes is categorically false, deceptive, or unfair.[25]

4. Rule of Reason -- Conclusion

As our quick look under the rule of reason reveals, the advertising restrictions are likely to have anticompetitive effects, CDA has the necessary market power to harm competition by adopting the restraints, and there are no countervailing efficiencies or other business justifications that would justify the imposition of this kind

[25] In the light of CDA's practice, therefore, Commissioner Azcuenaga's insistence on further illumination of the "factual background" of "many of the letters" reprimanding dentists for their advertising is simply misplaced. *See, e.g.*, Post, at 19. The citations discussed in the text do not provide further detail regarding the surrounding circumstances of the reprimand because the factual background against which the advertising claim was made was generally of little concern to CDA when it admonished the dentist involved.

For example, MARS was not concerned with any surrounding factual circumstances when it noted that "use of the words 'Affordable Prices,' is an inexact reference to fees, and therefore, violates . . . the CDA Code and Dental Practice Act," CX 772-A (1991), that "by using the phrase 'High Standards in Sterilization,' [dentists] are advertising in violation [of state law and the CDA Code of Ethics for] advertising the performance of services in a superior manner," CX 394-B (1993), that a dentist "should avoid any statements that imply superiority in any future advertisements published on his behalf," CX 780-A (1992) (emphasis added), that "the phrase ['We Guarantee All Dental Work For 1 Year] is a guarantee of dental services and, therefore, violates [state law and may subject the advertising dentist to disciplinary action by the association]," CX 557-C (1992), that "use of the phrase '10% Senior Citizen Discount,' violates [state law and CDA's Code of Ethics] by failing to list the dollar amount of the nondiscounted fee for each service, and inform the public of the length of time, if any, the discount will be honored," CX 585-A-B (1991), or that an advertisement, "'Call our office before December 31, 1992 and our gift to you and your family will be a Complete Consultation, Exam and X-rays (if needed) ... [for only] a $1.00 charge to you and your entire family with this coupon,'" violated state law and CDA's Code of Ethics because it "fails to list the dollar amount of the non-discounted fee for each service," CX 444-A-B (1993). *See* generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

Furthermore, contrary to the suggestion by the dissent, it is immaterial that any given CDA censure was, perhaps, only one among a series of criticisms CDA issued with regard to that particular dentist. *Cf.* Post, at note 20 ("The reference to 'quality dentistry' is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not.") (discussing CX 387-B); *see also, e.g., Id.*, at note 21 (discussing CX 478 and noting Judicial Council's objection to dentist's claim that laser surgery is revolutionary, while neglecting to note that dentist was also discouraged from advertising "gentle, comfortable and affordable" dentistry). The point of our reference to one of the restrictions that are at the heart of this case is that such advertising was held incompatible with membership in CDA. That message, regardless of whether it was coupled with citations for other (truly deceptive, unsubstantiated, false, or unfair) advertising as well, was clearly conveyed by CDA in each letter discussed in this opinion and in numerous others in the record.

of ban on broad categories of truthful and nondeceptive advertising. In short, CDA's advertising restrictions are unreasonable, make out a violation of Section 1 of the Sherman Act, and therefore violate Section 5 of the FTC Act. *See supra* note 5.

The result reached herein is not inconsistent with our earlier decisions in *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), and *Detroit Auto Dealers Ass'n, Inc.*, 111 FTC 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992), which our holding today does not disturb.[26] In Massachusetts Board of Optometry we viewed the law of horizontal restraints after NCAA and Broadcast Music as presenting a series of questions, beginning with whether the restraint is "inherently suspect," that is, "the practice [is of] the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'" and, if so, whether the agreement is supported by a plausible and valid efficiency justification. *See* 110 FTC at 604. In that case we found the various advertising bans on discount advertising, affiliation advertising, use of testimonials, and sensational or flamboyant advertising to be inherently suspect, without a plausible efficiency justification, and, therefore, unlawful. *Id.* at 606-08. Following the same analytical steps in Detroit Auto Dealers, we likened an agreement among automobile dealers to limit showroom hours to a restriction on a form of output, found it inherently suspect and without a plausible efficiency justification, and thus declared it unlawful. 111 FTC at 494-99.

If the instant case had been analyzed under the framework of those cases, we would have reached the same conclusion as we do here since, following Massachusetts Board of Optometry, we would find the restraints inherently suspect and without plausible or valid efficiency justification. Conversely, Massachusetts Board of Optometry and Detroit Auto Dealers would have arrived at the same result, had they been analyzed under the more traditional rule of reason/*per se* approach we employ here, since the restrictions in those cases either would have been found *per se* unlawful, such as the ban on discount advertising in Massachusetts Board of Optometry, or

[26] With respect to Commissioner Azcuenaga's assertion that the majority opinion overrules the earlier Commission opinion in *Massachusetts Board of Optometry, see,* Post, at 1, 37, it is true that the majority recognizes the existence of *per se* and rule-of-reason categories -- an approach to antitrust analysis that may have been blurred in the earlier decision. As to the remaining analysis in Massachusetts Board of Optometry, the assertion that we directly or indirectly overrule that decision is not correct.

would have otherwise been shown to be unlawful under the rule of reason. A quick look at Massachusetts Board of Optometry, for example, would have demonstrated that the Board commanded sufficient market power since optometrists could not practice in the State without its approval, 110 FTC at 605, that restraints, such as those on affiliation advertising, were likely to have an anticompetitive effect (and had, in part, a proven effect of raising prices), *id.* at 605-06, and that there was no efficiency or other legitimate business justification for the practice, *id.* at 606-08. In Detroit Auto Dealers, in turn, the Sixth Circuit indeed rejected the Commission's use of the "inherently suspect" approach on the grounds that it appeared to "aris[e] from a *per se* approach," 955 F.2d at 471, but affirmed the Commission's decision nonetheless after satisfying itself that the agreement had actual or potential anticompetitive effects, that the automobile dealers possessed market power, and that there was no valid justification for the practice, see 955 F.2d at 469-72. In this case, then, we have simply applied what we repeatedly recognized as the more "traditional antitrust analysis," *Massachusetts Board of Optometry*, 110 FTC at 604 n.12, which does "not lead to different results" in the cases discussed, *Detroit Auto Dealers*, 111 FTC at 494 n.18.

VI. STATE LAW DEFENSE

Finally, we turn to CDA's argument that its actions are lawful due to the existence of similar restrictions imposed on advertising by the State of California. Ordinarily, a private party may properly invoke the "state action" defense only if first, the State has clearly articulated a policy to permit the allegedly anticompetitive practice, and second, the State is actively supervising the conduct at issue. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 631 (1992) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). CDA loses under this and any other offered version of a defense based on state law.

CDA originally raised an affirmative defense that "[t]o the extent [the] restrictions alleged . . . [in] the complaint [amount to] conduct which is prohibited by state law, such restrictions are lawful," and CDA expressly disavowed that this contention amounted to assertion of a traditional "state action" defense. *See* Order Striking Affirmative

Defense at 1; Opposition to Motion to Strike Affirmative Defense at 3-4; Answer at 12. Presumably, and wisely we think, it declined to raise the traditional state action defense because CDA could present no argument that its activities were even remotely authorized or supervised by the State. CDA maintained, instead, that antitrust law should yield since California Business and Professions Code Sections 17,200 and 17,204 "authorize CDA to file a private right of action to prohibit violations of the Code,"[27] and more generally, "no anticompetitive effect results if an association's code of ethics incorporates state law, and one who violates state law is deemed to have violated the association's code of ethics." Opposition to Motion at 4. The ALJ struck the defense since, in the ALJ's view, it amounted in substance to a state action defense, which, as a facial matter, was unavailing in this case.

CDA has not entirely abandoned its attempt to find shelter under state law, maintaining this time around:

> "CDA reasonably believes that its interpretation of the Code of Ethics deters fraudulent advertising and advertising which is false or misleading in a material respect. The fact that during the relevant time period the State of California has also regulated advertising along the same lines as CDA in order to protect consumers from advertising that is false or misleading in a material respect further confirms the reasonableness of CDA's belief." Brief for respondent 38.

This argument is less than clear but, indulging respondent for the moment, we will break it down into the following formulations, which at one point or another during the course of this litigation have been advanced by CDA: (1) CDA's actions are immune under the state action doctrine; (2) CDA has a defense under the antitrust laws because its prohibitions are the result of good faith reliance on parallel strictures of California law; (3) CDA's actions are efficient or otherwise reasonable since it is following state law; and (4) CDA's restrictions cannot harm competition because state law already imposes identical (or substantially similar) burdens on advertising for dental services.

Both the California Code and the regulations promulgated by the State Board of Dental examiners do, on their face, impose restrictions

[27] Section 17,200 of the California Business and Professions Code simply defines the term "unfair competition," and Section 17,204 provides that actions for injunctions under that chapter may be prosecuted by, among others, "any person acting for the interest of itself, its members or of the general public." There is no intimation that the statute authorizes prosecutions for unlawful actions before private tribunals.

on advertising. *See* Cal. Bus. & Prof. Code Sections 651, 1680 (1994); Cal. Educ. Code Section 51,520; 16 Cal. Code of Reg. Sections 1050-1053 (1993). Some of these, such as, for example, the Board's regulation regarding discount advertising, mirror the restriction imposed by CDA.[28] Others, as, for example, the State's prohibitions on soliciting public school children, or on making superiority and guarantee claims, are clearly narrower in scope than CDA's policy.[29] CDA's defense, however, is inapt in either case.

The first version of CDA's state action defense comes up strikingly short on the grounds that the law never contemplated

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[28] Title 16, Section 1051 of the California Code of Regulations, promulgated by the Board of Dental Examiners, provides:

"An advertisement of a discount must:
(a) List the dollar amount of the non-discounted fee for the service; and
(b) List either the dollar amount of the discount fee or the percentage of the discount for the specific service; and
(c) Inform the public of length of time, if any, the discount will be honored; and
(d) List verifiable fees pursuant to Section 651 of the Code; and
(e) Identify specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." 16 Cal. Code of Reg. Section 1051.

Although the ALJ appears to have concluded that the Board rescinded its elaborate disclosure requirement around 1985, IDF 237 (citing CX 1622), we are less convinced that the undated document on which the ALJ relied was issued in 1985. In light of the document's summary of Section 1680 of the California Business and Professions Code, we surmise instead that it dates from sometime between 1974 and 1978, and, since it appears that in 1975 the Board had not yet promulgated regulations regarding discount advertising, the document cited by the ALJ could just as well represent an articulation of the Board's view prior to promulgation of the more extensive disclosure standards. If that is indeed the case the document is simply superseded by Section 1051 of the Board's regulations.

In any event, we do not express an opinion on the potential conflict between Section 1051 of the regulations and subsection 651(i) of the California Business Code, which provides a counterbalance to demands for specificity:

"A board or committee shall not, by regulation, unreasonably prevent truthful, nondeceptive price or otherwise lawful forms of advertising of services or commodities, by either outright prohibition or imposition of onerous disclosure requirements."

[29] California Education Code Section 51,520 does not prohibit all distribution of identifying information to public and private students, but more narrowly provides:

"During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises . . . to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities [with certain exceptions not relevant here]."

Similarly, Section 1680 of the California Business and Professions Code appears on its face to cover some of what CDA prohibits, but it does not prohibit all quality claims, instead defining "unprofessional" conduct to include in relevant part:

"(i) The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. . . .

. . . .

"(l) The advertising to guarantee any dental service, . . . This subdivision shall not prohibit advertising permitted by Section 651."

private enforcement of its standards and that the State does not supervise CDA's enforcement of advertising restrictions. Respondent admitted that it is neither an agent of the State, nor authorized to interpret or enforce state laws on behalf of the State, Answer at 12, and our own review of the law finds no hint that CDA or any private association should be permitted to interpret or enforce these laws on its own. *Cf. Parker*, 317 U.S. at 350. But even mere authorization would not be enough, since, as the Court emphasized in Parker, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citation omitted). Without active supervision of the enforcement, there can be "no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101-02 (1988). *See also Ticor*, 504 U.S. at 637-640; *Indiana Federation of Dentists*, 476 U.S. at 465; *Bates*, 433 U.S. at 359-63; *American Medical Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).[30] Here, there is absolutely no evidence of active state supervision of CDA's disciplinary actions or of the content of its substantive advertising restrictions. CDA's ethical review of applicants' and members' advertising is thus entirely insulated from state supervision, and thus beyond any traditional state action immunity to the antitrust laws.

This case epitomizes the danger of imputing to the State a policy choice when its implementation is not being actively supervised by the State itself. In 1985, and apparently again in 1988, a Deputy Attorney General of California addressed a memorandum to the Board of Dental Examiners, advising it of recent Supreme Court decisions in the First Amendment area and asking the Board to ensure that enforcement of the law be consistent with the Constitution. *See* CX 1425; CX 1621-A. In response, the Legal Services Unit of the Department of Consumer Affairs[31] prepared a discussion paper analyzing the constitutionality and wisdom of limits placed on dentists' advertising. CX 1621.[32] The paper concludes, among other

[30] The question of state action immunity, decided in *American Medical Association v. United States*, by the Court of Appeals, was apparently not raised in the Supreme Court. *See* 317 U.S. at 527-28.

[31] The Board of Dental Examiners is part of the Department of Consumer Affairs. *See* Cal. Bus. and Prof. Code Section 101.

[32] As indicated in the memorandum, it addresses these issues in the context of the Board's investigation of CDA's own advertising practices. Thus, the memorandum also provides the only documented instance in which the Board initiated enforcement of the laws. We do not know whether this enforcement action was abandoned after issuance of the discussion paper.

things, that recent United States Supreme Court decisions "probably invalidate the present California statutes and regulations prohibiting dentists from advertising 'superiority,'" since "[l]ike price and other facts of importance to the consumer, [truthful and nondeceptive] expressions regarding the quality of the advertiser's services are protected by the First Amendment." CX 1621-D. *See also* CX 1621-z-2. The paper also recognizes that to be consistent with the First Amendment, a State ought not to prohibit dentists from making claims that amount to "puffery," CX 1621-E, advertising that their prices are "very reasonable," CX 1621-V, or promoting their services by truthful and nondeceptive guarantees, CX 1621-z-4. Ultimately, it recommends:

> "The statutes and regulations that limit advertising by dentists should probably be amended to eliminate patent conflicts with the federal constitutional provisions. At present, except in the telephone yellow pages, there seems to be relatively little advertising by dentists. . . . It is possible that the California statutes and regulations have made the risk of truthful and non-deceptive advertising too great for most dentists to freely tell the public about the services they provide and the prices they charge. It is also possible that the relative absence of dental advertising has harmed these segments of the public who do not use dental services because they are not conscious of their availability or cost. In any event, any California statutes and regulations that patently conflict with the federal Constitution should be repealed or amended so as to eliminate any disparity between the two sources of law." CX 1621-E. *See also* CX 1621-z-13 to z-15.

To be sure, the discussion paper cannot supersede codified law, and, conversely, its relevance is not limited to the sections that signal a retreat from the written code.[33] But the document provides a rather dramatic indication of the perils of private enforcement in the absence of active state supervision. Behind the scenes, officials were reexamining the legality and wisdom of the previously charted course. This might even explain the lack of enforcement. Holding that CDA's restrictions are shielded by the state action doctrine in this case would amount to imposing a continued policy choice upon the State when it has rarely, if ever, pursued it actively.[34]

Beyond the traditional state action defense, antitrust law does not, to our knowledge, recognize a "good faith" defense for a private

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[33] Indeed the document took the position that the disclosure requirements for discount advertising were consistent with recent Supreme Court decisions. *See* CX 1621-z-7.

[34] Due to the lack of Board enforcement, state judicial review has been limited as well. *See Ticor*, 504 U.S. at 638-39 ("[b]ecause of the state agencies' limited role and participation, state judicial review was likewise limited").

conspiracy formed to enforce state law. It might be unobjectionable if CDA were to exclude members who had been found by the state Board to have violated the state statute or Board rules. That is not what CDA did. Instead, CDA appointed itself as an extra-judicial administrator of the law. We have long rejected the argument that "Congress intended for federal antitrust laws to give way when private parties, by conduct that would otherwise violate the antitrust laws, take it upon themselves to enforce their interpretation of the provisions of any state law." *Indiana Federation of Dentists*, 101 FTC 57, 181 (1983), *rev'd on other grounds*, 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986). As we indicated in that case, "[n]o Supreme Court decision articulating the state action doctrine can be read to endorse such an interpretation of congressional intent." *Id.* at 181-82.

In the 1942 case involving the AMA, for example, the Justice Department challenged the association's attempt to prevent physicians from affiliating with a prepaid health plan. The Court of Appeals rejected the AMA's argument that its conduct was not in violation of the antitrust laws because such affiliations were illegal:

"Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. . . . Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands." *American Medical Ass'n*, 130 F.2d at 249.

In *Indiana Federation of Dentists*, the Supreme Court was even more explicit. The state law appeared to prevent the lay screening of dental x-rays by lay employees of insurers, and the Court held that, even assuming the association's boycott was consonant with the state law, it was not protected:

"That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. *See Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the state. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy

of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation." 476 U.S. at 465.

In short, absent active state supervision, private enforcement by CDA cannot be protected from antitrust challenge.

Even entertaining the theoretical viability of the weaker claim that the state law furnishes corroboration for CDA's belief that its practice is pro-competitive, such an argument fails on the facts of this case. Although CDA urges that it enforced what it reasonably perceived to be state law, it does not point to a single instance in which the State enforced its advertising proscriptions against a dentist. To the contrary, CDA was acutely aware that the Board had virtually abandoned its advertising regulations; indeed, CDA perceived itself as filling an enforcement void. *See* IDF 231-33. Moreover, CDA did not seriously attempt to ascertain the Board's views of the proper scope of state law. *See, e.g.*, T. 1034, 1046 (Dr. Lee); T. 1537 (Dr. Nakashima); *see* generally, IDF 241-42. As a result, CDA lacks any real basis for understanding the true extent of the restrictions imposed by the State and cannot realistically claim that it is furthering the State's current policy choice.

Finally, and for much the same reason, we reject the argument that respondent's advertising restrictions were harmless because of the existence of similar, or even identical, state laws. Given the absence of state enforcement, it was CDA, not California, that tampered with the workings of the market for dental services. *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S. Ct. 66 (1994), illustrates the point. In *Sessions*, the defendant had caused a private standard setting association to change its model fire code so as to disapprove of plaintiff's method of renovating leaking storage tanks for hazardous fluids. As a result, many fire officials refused to issue the necessary permit for plaintiff to perform its services. The court ruled for defendant on the theory that the harm was not caused by defendant's anticompetitive activity, but by the refusal of the fire officials to issue the permits, that is, by valid governmental action. The Ninth Circuit found:

"[Plaintiff] has never proved that it sustained injuries from anything other than the actions of municipal authorities. . . . [Plaintiff] has not shown that any potential . . . customer in jurisdictions that were not enforcing the . . . [model fire code] decided not to engage [plaintiff]'s services because of the [association]'s adoption

of [the provision in dispute]. Nor has [plaintiff] adduced any evidence that [defendant]'s actions caused independent marketplace harm in jurisdictions that continued to permit [the procedure offered by plaintiff]. . . . The injuries for which [plaintiff] seeks recovery flowed directly from government action." 17 F.3d at 299.

CDA would not be protected even by this broad view of the state action shield. For in our case, in contrast to Sessions, California apparently did not independently enforce the written law, and certainly was not alleged to have done so with regard to any of the individual dentists censured by CDA. In other words, here the sole source of enforcement was CDA, not the State. The anticompetitive harm is thus not the result of government action, but that of the private conspiracy alone.

Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982), further illuminates how the instant case differs from one in which dentists are merely following the law as authoritatively and actively interpreted and enforced by state authorities. In Gambrel, consumers filed an action against the Kentucky Board of Dentistry, the Kentucky Dental Association, and individual dentists alleging a conspiracy to withhold denture prescriptions from patients with the result that patients were precluded from shopping around to find the least expensive means of filling the order. Respondent Board of Dentistry argued that state law prohibited dentists from handing work orders over to patients. The court found that the Board's view was the right interpretation of state law and that the dentists were compelled by state law to deliver work orders directly to dental technicians. *Id.* at 619. In explaining that this policy was actively supervised by the State, the court noted:

"First, the policy emanates directly from the language of a state statute and not from any agreements by private individuals . . . . Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against plaintiff Gambrel and others has been one of the impelling reasons for the commencement of this action." 689 F.2d at 620.

CDA has done more than transcribe applicable state law into its Code of Ethics and urge its members to respect the law. First, the state law upon which it relied was, to its knowledge, not being actively enforced by state authorities, and second, CDA was itself

actively policing its version of state law. We are aware of no antitrust exemption that would shield such activity.

VII. FINAL ORDER

An order prohibiting respondent from continuing to restrict truthful and nondeceptive advertising and, in particular, from further enforcing its current unreasonable restraints is necessary and in the public interest. The order we impose is similar to those entered in other cases in which we had found unlawful interference with advertising by professional associations, but crafted to reflect the respondent's particular circumstances. *See, e.g., Massachusetts Board of Optometry*, 110 FTC at 632-35; *American Dental Ass'n*, 100 FTC 448, 449-53 (1982); *AMA*, 94 FTC at 1036-41. We believe this remedy to have a "reasonable relation to the unlawful practices found to exist," and therefore to be within our authority to impose. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

Our order that respondent cease and desist from interfering with such truthful and nondeceptive advertising, order Part II, leaves respondent free to act against member advertising that it reasonably believes would be false or misleading within the meaning of Section 5 of the Federal Trade Commission Act, and against its members' uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence. The order also leaves respondent free to encourage its members to obey state law and to discipline members who have been reprimanded, disciplined, or sentenced by any court or any state authority of competent jurisdiction.[35]

Respondent must, however, cease and desist from the unlawful suppression of advertising, and from urging others to engage in such actions, order Part II, as well as eliminate unlawful provisions from any policy statement and terminate affiliation with components that would continue to engage in behavior that would be contrary to the order if engaged in by respondent, order Part III. The disaffiliation provision, particularly with its grace period to permit continued

[35] The ALJ's order prohibited CDA from restricting representations that do not contribute to the public esteem of the profession. *See* ID at 81 (Order at II.A.8). Our order omits that provision. Although CDA cited the goal of protecting the public esteem of the profession in prohibiting dentists from distributing certain information during school screenings, *see, e.g.*, CX 1115-A, we find that our order adequately addresses CDA's unlawful activity and refrain from including the broader provision at this time. Of course, to the extent that respondent were to use this as an excuse to reinstitute any of the practices that we have found to violate Section 5, such actions would violate the order.

affiliation with components that will discontinue practices that, if engaged in by the respondent, would be unlawful, Part III.B., reflects the approach of the Commission order issued in *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992). Part III.A.1, which contained an erroneous reference to Section 21 of CDA's Code of Ethics, has been changed to reflect the proper section of CDA's code (Section 22) that deals with claims of exclusivity.

To publicize its change in long-held policy, respondent must inform current members of this action and the resulting change in policy. Order Part IV.A. Notification requirements have long been recognized as falling within our remedial authority. *See, e.g., Massachusetts Board of Optometry*, 110 FTC at 619. Respondent asks that we not require it to distribute its Journal via first class mail. We see no reason to do so, and neither does complaint counsel. Accordingly, we have amended Judge Parker's order on this point to reflect unambiguously that we require only the complaint, order, and announcement, as well as any documents revised pursuant to Part III.A, but not the CDA Journal itself, to be distributed via first class mail. Respondent also objects to the requirement that it distribute the complaint on the grounds that complaint counsel failed to prove all the allegations therein. Since we find that complaint counsel has proved all the allegations in the complaint, respondent's objection on this point is denied.

Because respondent's restraints have been successfully imposed over an extended period of time dating back well over a decade, we find it necessary and reasonable to include further remedial provisions aimed at reversing the suppression of advertising (and, thereby, of competition) respondent has achieved over the years. Respondent must therefore inform persons, who are currently subject to disciplinary order or suspended from membership by reason of their or their employers' advertising or solicitation practices, of the complaint and order in the required manner, reconsider the disciplinary or other proceeding, and inform the person of its decision upon reconsideration. Part IV.B. Respondent has asked that we extend the time under Parts IV.B.2 and IV.B.3 to one hundred and twenty days, due to the alleged difficulty of locating and reviewing relevant old files. Although complaint counsel correctly notes that respondent's arguments regarding its need for time are rather conclusory, we do not see the public interest compromised in this

case by permitting respondent to conduct the review and final notification of this group of persons within one hundred and twenty days, provided the persons described in Part IV.B (*i.e.* those who are currently subject to discipline or suspension due to their advertising or solicitation practices) are notified and informed in the manner described in Part IV.B.1 within thirty days.

Next, respondent is to distribute similar information, including an application form for membership, to those whose membership over the last ten years was not approved or was discontinued as a result of CDA's objections to advertising or solicitation practices. Respondent is to review any application for membership received in response and inform persons of their acceptance or of the reasons for denial of their application. Part IV.C. Respondent has asked that we strike this provision, arguing that "applications are received, processed, and stored at the component level and the components are not respondents in this action; moreover, complete records covering a ten year period may not exist." Brief for respondent 82. In reviewing the record in this case, we have found significant cooperation between respondent and its component societies in the course of hundreds of disciplinary proceedings, leading us to believe that respondent can count on the usual and customary cooperation of its affiliated components in this matter. Finally, respondent has not even alleged, let alone provided any evidence, that complete records covering the last ten years do not, in fact, exist. We therefore see no reason, at this time, to alter Judge Parker's order on this point.

Respondent must also distribute certain information to every new applicant for the next five years, Part IV.D, keep, and file with the FTC, records of each action taken with respect to the advertising of the sale of dental services for three years, Part V, establish an internal compliance procedure for the next five years to ensure that the order is complied with at all levels of the organization and file progress reports at specified times, Part VI.A-C, maintain and make available for inspection records of specified actions relevant to this order, Part VI.D., and notify the FTC of specified organizational changes, Part VI.E. These record-keeping provisions are essential given respondent's continued assertion that the unreasonable restraints were imposed only in an effort to suppress untruthful or deceptive advertising, or such advertising that would cause unreasonable, unavoidable harm to consumers. In order to permit proper review of respondent's actions in the future, particularly in light of the safe

harbor carved out by the order, the record-keeping and reporting requirements are, in our view, reasonable and reflect similar requirements imposed in other cases. *See, e.g., American Psychological Ass'n*, 57 Fed. Reg. at 46,030; *Medical Staff of Memorial Medical Center*, 110 FTC 541, 547 (1988); *Tarrant County Medical Society*, 110 FTC 119, 123 (1987).

Finally, we have added to Judge Parker's order a sunset provision reflecting the Commission's recently adopted policy in that regard. Federal Trade Commission, Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 42,481 (Aug. 16, 1995).

VIII. CONCLUSION

The California Dental Association has declared itself the arbiter of good advertising by member dentists and, in so doing, has restrained competition among its members in violation of Section 5 of the FTC Act. Without impugning CDA's general efforts to serve the public, we find that the Association's core activities provide its members sufficient pecuniary benefits to bring it squarely within our jurisdiction. We find further that CDA is at the hub of an agreement among its members to restrict competition in the market for dental services, and it is legally quite capable of serving that role. The combination has suppressed advertising of the prices, quality, and availability of dental services in California, thereby impairing the dissemination of information that is important to consumers and forms a basis of rivalry among competing service providers. The attack on price competition, long recognized as the lifeblood of a free economy, is inexcusable in principle and must be categorically condemned even in the professional setting before us here. The restrictions on advertising of the quality and availability of professional services, on the other hand, are entitled to a quick look under an individualized examination of the competitive benefits and burdens they entail. Since CDA's restraints fall far short of being justified even under this approach, however, we find that they are unlawful as well.

DISSENTING OPINION OF COMMISSIONER MARY L. AZCUENAGA

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

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

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

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

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

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

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

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

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

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

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

I.

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

1. Alleged Restraints on Price Advertising

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

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

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

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

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

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

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

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

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

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

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

[11] They provide:

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

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Alleged Restraints on Nonprice Advertising

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

[30] Section 51520 provides:

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

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

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I dissent.

OPINION OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's determination that respondent California Dental Association ("respondent" or "CDA") has violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45, by promulgating and enforcing restrictions on truthful, nondeceptive advertising by its members. I concur as well in the Commission's findings that (1) CDA is subject to FTC jurisdiction; (2) CDA's adoption and enforcement of its policies restricting advertising by its members constitutes an agreement among competitors; (3) CDA's "state law" defense must be rejected; and (4) the order appended to the majority opinion provides an appropriate remedy for respondent's unlawful acts. Despite my conclusion that CDA's restrictions on both price and non-price advertising unreasonably restrain trade, I cannot join in the majority's startling decision to extend *per se* treatment to all agreements among competitors to restrain truthful, nondeceptive price advertising. Finally, what the majority styles as its "quick look" rule of reason approach to CDA's restraints on both price and non-price advertising[1]

[1] Slip op. at 32.

contains unnecessary and potentially confusing departures from the analytical structure set forth in *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988) ("Mass. Board").

Instead of applying the framework established in Mass. Board for the systematic review of all horizontal restraints, the majority applies to CDA's price advertising restrictions a *per se* analysis, somewhat euphemistically labeling it "traditional."[2] Although the Supreme Court and the Commission have generally moved away from summary *per se* condemnation of horizontal restraints without some consideration of potentially relevant rule of reason factors,[3] my colleagues today breathe new life into the rigid and often overinclusive application of the *per se* rule. Mass. Board analysis, which faithfully synthesizes and applies the Court's post-BMI horizontal restraints jurisprudence, has been bypassed and marginalized so that even the most truncated consideration of relevant market conditions and potential competitive benefits of agreements restricting price advertising need never trouble the Commission again.

As the majority acknowledges, had it followed a horizontal restraints analysis based on Mass. Board, the result in the present case would have been the same: CDA's advertising restrictions would have been condemned as unreasonable restraints of trade without an elaborate "full" rule of reason inquiry.[4] That result, however, would not have entailed the diminution in the relative clarity and coherence of FTC horizontal restraints analysis that we may surely expect to follow from the majority's reasoning in this case.

I.

The majority's decision not to rely on Mass. Board analysis in this case is puzzling. In Mass. Board, the Commission condemned a state optometry board's regulations restricting several types of truthful,

[2] *Id.* at 39 (citing *Mass. Board*, 110 FTC at 604 n.12).

[3] *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA*"); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) ("BMI"); *cf. Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*") (establishing the primacy of economic effects in the analysis of non-price vertical restraints).

[4] It is well established that the rule of reason may be expeditiously applied in appropriate cases. *See* generally *NCAA*, 468 U.S. at 109-10 n.39 ("the rule of reason can sometimes be applied in the twinkling of an eye" (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981))).

nondeceptive advertising, including the advertising of price discounts.[5] The factual and legal issues analyzed in that matter are therefore similar to those now before the Commission. Moreover, in Mass. Board the Commission set out a "structure for evaluating horizontal restraints" that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, "more useful than the traditional use of the *per se* or rule of reason labels."[6] Nevertheless, the majority sidesteps Mass. Board analysis in favor of the *per se* and rule of reason "labels" it found wanting not that many years ago.

Presented with a challenge to a trade association's promulgation and enforcement of restrictions on price advertising among the association's members, the majority first selects a serviceable *per se* category: "[I]t is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws."[7] The majority finds that CDA's restrictions amount to the prohibition of truthful and nondeceptive price advertising[8] and equates that behavior with "a naked attempt to eliminate price competition."[9] The opinion's classification of the restraints imposed by CDA effectively brings the horizontal restraints analysis to an end. Rather than inquire into the actual competitive effect of CDA's advertising restrictions, the core of the majority's *per se* analysis reviews in general the evils associated with restraints on price advertising[10] and leads to the authoritative conclusion that "CDA's restraints on price advertising are thus illegal *per se*."[11] Thus is born a new category of *per se* unlawful restraints.

The opinion then proceeds to demonstrate that the same price advertising restrictions would have been condemned under the rule of reason.[12] Although I presume that this demonstration is for the

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[5] 110 FTC at 604-07. Although the horizontal restraints at issue in Mass. Board were promulgated by a state board, the Commission found the state action doctrine inapplicable because the Commonwealth of Massachusetts had not clearly articulated a policy to displace competition with state regulation. *Id.* at 614. The Commission condemned the challenged advertising restrictions under Section 5 of the FTC Act because they met Sherman Act Section 1's definition of a "contract, combination . . . , or conspiracy, in restraint of trade . . ." *Id.* at 606-08, 610-11.

[6] *Id.* at 603-04.

[7] Slip op. at 16.

[8] *Id.* at 17-19.

[9] *Id.* at 19.

[10] *Id.* at 19-23.

[11] *Id.* at 24.

[12] *Id.* at 24-38.

benefit of benighted adherents of the Mass. Board approach,[13] the exercise in fact tends to vindicate the use of Mass. Board in the first place.

II.

The majority should have applied Mass. Board analysis in the present case not simply because it is apposite, but also because it -- and not the reinvigoration of the *per se* rule -- is consistent with the broad outlines of the past two decades of Supreme Court antitrust jurisprudence. The Commission's opinion in Mass. Board developed from a line of cases in which the Supreme Court sent the clear message that the analysis of a particular restraint of trade should be based on an understanding of the restraint's effect on competition. In cases including *BMI*, *NCAA*, and *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*"), the Court signaled its dissatisfaction with the use of rigid, outcome-determinative categories.[14]

As the majority correctly notes, for purposes of determining the legality of a restraint under Section 1 of the Sherman Act, "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition."[15] The rule of reason is the "prevailing standard" for assessing the effect on competition of most restraints.[16] Moreover, the Supreme Court has stated in the clearest possible terms that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[17] The rule of reason approach prevails because whenever antitrust analysis is too far

[13] Whatever support a literal reading of one isolated sentence in *Mass. Board*, 110 FTC at 607, lends to the majority's statement that the Commission "summarily condemned the price advertising restraints" at issue in that case, slip op. at 23, I cannot agree with my colleagues' conclusion that CDA's price advertising restrictions can therefore be declared *per se* illegal. The Commission did not reach its conclusion in Mass. Board by mechanically applying a *per se* rule to the Board's restrictions; rather, it proceeded through the truncated rule of reason approach set out earlier in that opinion. Mass. Board's "summary" condemnation thus included an assessment of whether the restrictions were inherently suspect and an examination of efficiency justifications. 110 FTC at 606-07.

[14] Just as BMI, NCAA, and IFD indicated the need for economic depth in the treatment of horizontal restraints of trade, so the earlier decision in GTE Sylvania, *supra*, announced the Supreme Court's abandonment of its rigid *per se* treatment of non-price vertical restraints. GTE Sylvania, BMI, and succeeding cases demonstrate the evolution of the Court's approach away from bright-line categories and toward the application of sophisticated economic inquiry.

[15] Slip op. at 14 (citing *NCAA*, 468 U.S. at 104; *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1982)).

[16] *GTE Sylvania*, 433 U.S. at 49.

[17] *Id.* at 58-59.

removed from an inquiry into actual effects upon actual markets, the risks of overdeterrence rise dramatically. For this reason, *per se* rules are to be applied with the utmost circumspection.

As noted earlier, over the past two decades the Supreme Court has steadily diminished the scope of *per se* analysis in antitrust jurisprudence.[18] This evolution reflects the Court's increasing disposition to ground determinations of antitrust "harm" on actual effects on competition. The Commission's truncated rule of reason analysis in Mass. Board is quite consistent with that trend. Whatever the restraint, under Mass. Board there is at least some inquiry into its likely economic effect and into whether a plausible efficiency might merit a fuller weighing of the restraint's procompetitive benefits against its anticompetitive consequences.[19]

There is no basis for concluding that the Supreme Court has swerved from the path charted in BMI and NCAA of requiring analysis -- even the "truncated" variety -- rather than the use of categories.[20]

III.

The majority opinion asserts that "[a] *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances."[21] Then, quoting from *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), the majority states that "'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable'"[22] -- *i.e.*, it has declared the restraint *per se* unlawful.

[18] *See, e.g.*, Northwest Wholesale Stationers (rule of reason inquiry appropriate for some group boycott claims); NCAA (rule of reason analysis applied to agreement among competing college football teams to fix prices for all television broadcasts of their games); BMI (rule of reason analysis for agreement among thousands of competing songwriters to contract with a single entity to fix prices for performance rights to their songs); GTE Sylvania (rule of reason analysis to be applied to all vertical non-price restraints in the absence of market power).

[19] *Mass. Board*, 110 FTC at 604.

[20] My reluctance to apply a *per se* approach to respondent's restrictions on price advertising is only heightened by the Supreme Court's "general reluctance" -- recognized by the majority, slip op. at 24 -- to apply a *per se* approach to codes of conduct of professional associations. *See, e.g., IFD*, 476 U.S. at 458; *United States v. Brown Univ.*, 5 F.3d 658, 671 (3d Cir. 1993).

[21] Slip op. at 15.

[22] *Id.* Maricopa is a textbook example of why structured case-by-case analysis is usually preferable to a *per se* rule. As one distinguished commentator put it:

The courts have repeatedly invoked the *per se* label without the faintest comprehension of the commercial functionality of the practice they were condemning. One need only go back as far as the

But on what foundation rests the majority's conviction that CDA's restrictions on price advertising belong in the narrow group of practices that can be declared illegal without at least an initial inquiry into their reasonableness? If "*[p]er se* categories of unlawful economic activities . . . consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues,"[23] how can the majority be confident that it has properly placed CDA's restraints on price advertising in such a category? Doesn't *per se* condemnation of CDA's price advertising restrictions sidestep the need to answer "the ultimate question" raised by each restraint of trade, *viz.*, "whether the challenged restraint hinders, enhances, or has no significant effect on competition"?[24]

If a determination of *per se* illegality means that a restraint has "almost invariably untoward effects . . . across economic actors and circumstances,"[25] then presumably one consequence of today's ruling is that the Commission will feel no obligation to perform an analysis of particular market circumstances before condemning other restrictions on truthful, nondeceptive price advertising in a wide array of future cases. One court of appeals has observed that the Supreme Court has been more hesitant to apply a *per se* rejection to competitive restraints imposed in contexts where the economic impact of such practices is neither immediately apparent nor one with which the Court has dealt previously.[26] Thus, I question whether the Commission should establish a rule in future cases that restraints on truthful, nondeceptive price advertising -- even in markets to which the Commission has had no prior exposure -- are "beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the

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Maricopa County case . . . . As this case demonstrates, if *per se* condemnation is made before understanding is achieved, understanding may never be achieved; the legal classification precludes the development of a trial record that would elucidate the challenged practice.

William F. Baxter, The Viability of Vertical Restraints Doctrine, 75 Calif. L. Rev. 933, 936 (1987) (citation omitted).

Although Maricopa involved unreasonable restraints of trade, its broad application of the *per se* rule to physician agreements regarding price has frustrated an informed reexamination of provider combinations in an era of burgeoning managed care. It has been persuasively suggested that Maricopa's unnecessarily broad *per se* rhetoric has contributed to the current overdeterrence of many potentially efficient combinations of health care providers. *See, e.g.*, Clark C. Havighurst, Are the Antitrust Agencies Overregulating Physician Networks?, 8 Loy. Consumer L. Rep. (forthcoming 1996).

[23] Slip op. at 15.

[24] *Id.* at 14.

[25] *Id.* at 15.

[26] *United States v. Brown Univ.*, 5 F.3d at 671.

practice, will generally not be considered."[27] If CDA's restrictions on price advertising are unlawful -- as they have appropriately been held to be -- it is not because some of them fit into a "category." Rather, it is because a properly framed competition analysis, however truncated, shows that they -- together with CDA's restraints on non-price advertising -- lessen competition.

IV.

The majority also treats CDA's restraints on price and non-price advertising under a dubious variant of the "truncated" rule of reason.[28] Instead of asking the structured series of questions posed by Mass. Board[29] -- a set of questions that lends itself flexibly to the appraisal of horizontal restraints -- the majority imports into its analysis issues that may or may not be relevant under a properly conducted Mass. Board approach.

The flexibility afforded by the Mass. Board framework serves, among other goals, the ends of judicial economy. In certain cases, evidence sufficient to support the condemnation of a horizontal restraint may fall short of what would have appeared in the record of a "full" rule of reason trial. For example, if the challenged restraint "appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'"[30] and if there is no plausible efficiency justification for the practice, then a finding of illegality is appropriate even if market power (and other elements of "the full balancing test of the rule of reason"[31]) have not been established. On the other hand, in cases in which the restraint's likely anticompetitive effect is not apparent, or in which a proffered efficiency justification deserves a detailed examination, the full rule of reason approach -- including scrutiny of market power in many cases -- is necessary.

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[27] Slip op. at 15. Cases such as BMI and, for that matter, the case in which the Supreme Court set forth the classic articulation of the rule of reason -- *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) -- illustrate the Court's longstanding reluctance to condemn uncritically arrangements that on their face more closely resemble "naked" price-fixing than do CDA's price advertising restrictions. *See also* cases cited *supra* note 18.

[28] Slip op. at 24-39.

[29] 110 FTC at 604.

[30] *Id.* (quoting *BMI*, 441 U.S. at 20).

[31] *Mass. Board*, 110 FTC at 604.

Nevertheless -- and despite language to the contrary in the opinion[32] -- the approach that the majority uses in place of Mass. Board makes a fairly elaborate assessment of market power a key element of its "quick look" approach. Although the Administrative Law Judge's anomalous determination with respect to market power[33] may have impelled the majority to discuss the issue at length, I am concerned that the majority opinion may be read to imply that an assessment of market power is a necessary part of the truncated rule of reason approach.

Let me be clear that I am by no means saying that the issue of market power should never play a role in truncated rule of reason analysis of horizontal restraints. Frequently the answers to the initial questions in the Mass. Board sequence will show that evaluation of market power is required. But in some cases those answers -- that the challenged restraint is likely to restrict competition, and that it lacks a plausible efficiency rationale -- will indicate that a restraint can be fairly condemned without a potentially elaborate and expensive inquiry into market power.

V.

It is only fair to note that Mass. Board is not without its faults and its critics. But if the majority considers Mass. Board beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in Mass. Board analysis that might be remedied, why not apply Mass. Board in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?

As I stated at the outset, the problem with the majority's decision today is not the result. It is the reasoning that tends to determine the lasting significance of an opinion. The majority's reasoning, which amounts to a return to the conclusory labeling that the Commission sought to supplant in Mass. Board, is likely to cause confusion in future cases. How will the majority's analysis in *CDA* apply in the next price-related advertising case? Will the Commission summarily condemn any restraint hampering price-related advertising, or only those restraints that effectively prohibit price-related advertising? Without some type of rule of reason inquiry, how will we know

[32] Slip op. at 25 ("The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion . . .").

[33] Initial Decision at 76.

whether restrictions on price advertising "effectively prohibit" price advertising in a given case? Will the Commission use today's newly-minted *per se* rule alone or in combination with the backup rule of reason analysis it employs in the present case? Or, since the majority has not seen fit to overrule or modify Mass. Board in any way, can we expect to see the Commission apply Mass. Board analysis in the future, notwithstanding today's opinion? Unfortunately, all of these are now open questions.

FINAL ORDER

The Commission has heard this matter on the appeal of respondent California Dental Association from the Initial Decision, and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to affirm the Initial Decision, and to issue this Final Order. Accordingly, the Commission enters the following order.

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. *"Respondent"* or *"CDA"* means the California Dental Association, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors and assigns.

B. *"Component societies"* means those dental societies or dental associations defined as component societies in the June 1986 edition of CDA's Bylaws. In the event that CDA's Bylaws are amended to denominate component societies differently or to define or describe a new category of dental societies or associations that replace or are substantially similar to the component societies defined in the June 1986 edition of CDA's Bylaws, "component societies" means those dental societies or dental associations as well.

C. *"Person"* means any natural person, corporation, partnership, unincorporated association, or other entity.

D. *"Restricting"* includes taking any action against a dentist based on the advertising practices of the dentist's employer.

II.

It is further ordered, That respondent, directly or indirectly, or through any corporate or other device, in or in connection with its activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated, including, but not limited to, advertising or publishing:

1. Superiority claims;
2. Comparative claims;
3. Quality claims;
4. Subjective claims and puffery;
5. Prices, including discounted prices;
6. Promises to refund money to dissatisfied customers;
7. Claims that include the use of adjectives or superlatives to describe any offered service; and
8. Exclusive methods or techniques.

B. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means, including, but not limited to, the distribution of business cards and forms containing a dentist's name, business address, or telephone number in connection with dental screenings of children at public and private schools.

C. For a period of ten (10) years after the date this order becomes final, inducing, requesting, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate Part II.A. or II.B. of this order.

Provided, however, that nothing contained in this order shall prohibit respondent from formulating, adopting, disseminating to its component societies and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

Provided further, that nothing in this order shall prohibit respondent from encouraging its members to obey state law or from disciplining any member as a result of that member's reprimand, discipline, or sentence by any court or any state authority of competent jurisdiction.

III.

It is further ordered, That respondent shall:

A. Within sixty (60) days after the date this order becomes final, remove from respondent's Code of Ethics and from its Bylaws and any other policy statement or guideline of respondent, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part II of this order, including but not limited to:

1. Sections 10 and 22 of respondent's Code of Ethics; and
2. Advisory Opinions 2(c), 2(d), 3, 4, and 8 to Section 10 of respondent's Code of Ethics.

B. Terminate for a period of one (1) year respondent's affiliation with any component society within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said component society has, after the date this order becomes final, engaged in any act or practice that if committed by respondent would be prohibited by Part II of this order; unless prior to the expiration of the one hundred twenty (120) day period, said component society informs respondent by a verified written statement of an officer of the society that the component society has eliminated and will not reimpose the restraint(s) in question, and respondent has no grounds to believe otherwise.

IV.

It is further ordered, That respondent shall:

A. Within ninety (90) days after the date this order becomes final, publish in the "journal of the California Dental Association" ("CDA Journal"), or any successor publication, with such prominence and in the same size type as feature articles are regularly published in the "CDA Journal," or any successor publication, and with customary form and scope of distribution of the "CDA Journal," or any successor publication, and separately distribute by first class mail to each of its component societies and to each of its members:

1. This order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order; and
2. Any documents revised pursuant to Part III.A. of this order.

B. For each person who, because of the advertising or solicitation practices of the person or the person's employer, currently is subject to a CDA disciplinary order, or currently is suspended from membership in CDA:

1. Within thirty (30) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix B to this order;
2. Within one hundred and twenty (120) days after the date this order becomes final, (a) review the person's file, and (b) determine whether the suspension or disciplinary order is consistent with Part II of this order; and
3. Within one hundred and twenty (120) days after the date this order becomes final, send by first class mail a letter notifying the person whether CDA has lifted the suspension and or vacated the disciplinary order, and, if not, detailing the reasons for maintaining the suspension or retaining the disciplinary order.

C. For each person currently not a member of CDA who, because of the advertising or solicitation practices of the person, or of the person's employer:

1. Has been expelled from CDA during the ten (10) year period preceding the date this order becomes final; or

2. Has been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final; or

3. Was contacted by CDA, or any CDA component, during the ten (10) year period preceding the date this order becomes final, and who subsequently resigned from CDA;

Take the following steps:

Within one hundred and twenty (120) days after this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, an announcement in the form shown in Appendix C to this order, and an application form for membership in CDA; and

Within forty-five (45) days after the date an application from such person for membership is received, (i) review the application, and (ii) send by first class mail a letter notifying the person whether membership has been granted, and, if not, detailing the reasons for the denial.

D. For five (5) years after the date this order becomes final, distribute by first class mail a copy of this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order to each person who applies for membership in CDA within thirty (30) days after CDA receives an application from such person.

V.

It is further ordered, That respondent shall:

A. For a period of three (3) years after the date this order becomes final, create and maintain a written record in each instance in which respondent or one of its component societies takes action with respect to advertising for the sale of dental services. The record required by this paragraph shall, at a minimum, clearly specify the particular representation that is alleged to be false or deceptive, and the basis for concluding that the particular advertisement is false or deceptive

within the meaning of Section 5 of the Federal Trade Commission Act.

B. Within six (6) months after the date that this order becomes final, and every six (6) months thereafter for a period of three (3) years, file with the Federal Trade Commission, Bureau of Competition, Division of Compliance, copies of each and every record created pursuant to Part V.A. of this order.

VI.

It is further ordered, That respondent shall:

A. Establish, within sixty (60) days after the date this order becomes final, and maintain for a period of five (5) years thereafter, a compliance program to aid in ensuring that respondent and its component societies act in conformance with the requirements of Parts II through V of this order. Said compliance program shall include, at a minimum:

1. Establishing a compliance officer or committee that shall supervise review of the activities of respondent and its component societies with respect to advertising; and

2. Establishing procedures to ensure that respondent receives written notice of all action, whether formal or informal, taken by respondent's component societies with respect to advertising.

B. Within one hundred and twenty (120) days after the date this order becomes final, file with the Federal Trade Commission a verified report in writing setting forth in detail the manner and form in which respondent has complied and is complying with this order.

C. Within one (1) year after the date this order becomes final, annually thereafter for a period of five (5) years, and at such other times as the Federal Trade Commission may by written notice to respondent request, file a verified report in writing with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order, and setting forth in detail any action taken in connection with the activities covered by this order, including, but not limited to, any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral

communications, and all disciplinary actions taken with respect to advertising or solicitation.

D. For a period of five (5) years after the date this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II, III, IV, and V of this order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

VII.

It is further ordered, That this order will terminate twenty (20) years from the date it becomes final, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later;

Provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate

between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Azcuenaga dissenting.