

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

RICHARD A. BORGNER, D.D.S., ET AL.,	:	CASE NO.: 4:99CV211 WS
	:	JUDGE STAFFORD
Plaintiffs,	:	
	:	
vs.	:	PLAINTIFFS= MOTION FOR
	:	SUMMARY JUDGMENT
ROBERT G. BROOKS, M.D., IN HIS	:	
OFFICIAL CAPACITY AS	:	
SECRETARY, DEPARTMENT	:	
OF HEALTH, ET AL.,	:	
	:	
Defendants.	:	

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Plaintiffs Richard A. Borgner, D.D.S. and the American Academy of Implant Dentistry, by and through counsel, respectfully move this Court for summary judgment in their favor for the reasons set forth in the attached Memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

The Plaintiffs Richard A. Borgner, D.D.S. (“Dr. Borgner”) and The American Academy of Implant Dentistry (“the AAID”) seek a determination of the constitutionality of Florida Statute § 466.0282 (amended 1999) (hereinafter referred to as “Section 466.0282”). Dr. Borgner is a resident of the State of Florida and a Florida licensed dentist practicing general dentistry in St. Petersburg, Florida. He is a member of the Plaintiff AAID, a Fellow of the AAID, and a Diplomate of the AAID’s certifying board, the American Board of Oral Implantology/Implant Dentistry (“the ABOI/ID”). Dr. Borgner advertises his membership status with, and credentials earned in, the Plaintiff AAID. (See Affidavit of Dr. Borgner, attached hereto as Exhibit A).

The Plaintiff AAID is a national dental organization whose member dentists, upon satisfying certain experiential, educational and testing requirements, may earn credentials issued by the AAID and its certifying board, the ABOI/ID, in the field of implant dentistry. The AAID is acting in this matter on its own behalf and in a representative capacity on behalf of its approximately 172 dentist-members who are engaged in the practice of dentistry in the State of Florida and who are affected by Section 466.0282. Members of the AAID have earned credentials issued by the AAID (“Fellow” and/or “Associate Fellow”) and/or credentials issued by the ABOI/ID (“Diplomate”). The affected Florida members of the AAID wish to exercise their First Amendment right to truthfully announce to the public their credentials awarded by the AAID and/or the

ABOI/ID. (See Affidavit of J. Vincent Shuck, Executive Director of Plaintiff AAID, attached as Exhibit B.)

A primary purpose, goal and objective of the Plaintiff AAID is the enhancement of the dental professional's knowledge, skill and expertise in the field of implant dentistry. Consistent with that purpose, the AAID encourages and supports its members' attainment of "credentialed" status in the AAID through satisfactory completion of certain educational, experiential and testing requirements, and further encourages the attainment of "Diplomate" status from the ABOI/ID. To date, less than 200 dentists in the United States have been certified as "Diplomate, ABOI/ID." The AAID further encourages its members to inform the public of their AAID membership and earned credentials in order to provide the public with valuable information which can help dental consumers to make informed decisions in selecting a dentist to provide implant dental services.

The one hundred seventy-two (172) Florida licensed dentists/members of the AAID are all affected by the statute at issue and each could rightfully assert these claims on his or her own. Accordingly, the AAID is a proper Plaintiff in this matter, either standing on its own behalf and/or representing the interests of all of its Florida members. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975). See also Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343-45 (1977); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

Dr. Borgner and the other AAID members are licensed dentists who practice in the State of Florida. They have in the past, with the approval of this Court, and the State of Florida, advertised their membership in the AAID. Dr. Borgner and other dentists continue to advertise their membership in the AAID (Borgner Affidavit, Exhibit A). This Court has previously determined that advertising membership in the AAID is truthful, is not misleading and gives the public valuable information to help it make informed decisions when seeking dental treatment. See Borgner v. Cook, 33 F. Supp. 1327 (N.D. Fl. 1998) (hereinafter referred to as “Borgner I”) (copy attached as Exhibit C). The Florida Dental Board and the states of Oklahoma and Tennessee have also determined that advertising membership in the AAID is truthful, is not misleading and gives the public valuable information. (See Exhibit D (1994 Order of the Board of Dentistry, BOD #94-01DS), Exhibit E (Jacobs v. Board of Governors of Registered Dentists of the State of Oklahoma, No. 79,315 (Ok. App. Ct. August 10, 1993)) and Exhibit F (State of Tennessee Board of Dentistry Declaratory Order, dated September 22, 1994). The recently amended Section 466.0282 absolutely prohibits Dr. Borgner and other members of the AAID from truthfully advertising their credentials.

This Court held, only months ago, that advertising membership in, and certification by, the AAID is commercial speech that is protected by the First Amendment. (See Exhibit C, Borgner I decision.) This commercial speech is truthful, is not misleading and is informative to the public.

It has been less than a year since this Court’s decision in Borgner I. Now, the Legislature, in response to the lobbying efforts of the Florida Dental Association

(“FDA”), is again infringing on the Plaintiffs’ First Amendment rights. (See ADA News, Vol. 30, No. 16, Sept. 6, 1999, “Florida faces second lawsuit challenging specialty advertising” (hereinafter “ADA News article”), a copy of which is attached as Exhibit G, discussing the FDA’s lobbying efforts). Not only did the FDA lobby for these new restrictions, but the FDA and the ADA are both funding the defense of this litigation. (See Exhibit G, ADA News article; Today’s FDA, Vol. 11, No. 7, July 1999, “Specialty-advertising statute challenged” (hereinafter “FDA Article 1”), a copy of which is attached as Exhibit H (“[t]he FDA is evaluating the complaint to determine the best way to defend the statute”); Today’s FDA, Vol. 11, No. 8, Aug. 1999, “FDA urges defense of specialty-advertising statute” (hereinafter “FDA Article 2”), a copy of which is attached as Exhibit I (“[t]he FDA has already retained special legal counsel to represent **its interests** in the law suit” (emphasis added)).

The newly revised statute, like the prior provision, is an absolute bar to a professional=s truthful advertising of membership in, or credentials obtained from, any accrediting organization, unless those credentials are obtained in a specialty area of dental practice recognized by the American Dental Association (“ADA”) or unless the accrediting organization meets the very strict added requirements set forth in Section 466.0282 for recognition by the Florida Board of Dentistry (“the Board”) as a bona fide organization.

At first glance, the new Section 466.0282 may appear to allow dentists to advertise their credentials obtained in areas of dentistry not recognized by the ADA as “specialty” areas. However, a close reading of the new law shows that this is not the

case. If the dentist's credentials are from, or his membership is in, an accrediting organization *not* recognized as a specialty by the ADA, the accrediting organization must meet very strict, very specific conditions so that it may obtain recognition by the Board as a bona fide accrediting organization. See Fla. Stat. § 466.0282 (amended 1999). These strict criteria include the following:

- (a) Successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is:
 - 1. Beyond the dental degree;
 - 2. At the graduate or postgraduate level; and
 - 3. Of at least 12 months in duration.
- (b) Prior didactic training and clinical experience in the specific area of dentistry which is greater than that of other dentists.
- (c) Successful completion of oral and written examinations based on psychometric principles.

Id. at (2). To achieve recognition by the Board, an accrediting organization is entirely dependent on the graduate or postgraduate programs offered at the university-based dental schools. In most areas of dental practice not recognized as ADA specialties, these criteria *cannot* be met. No “formal, full-time advanced education program” exists that is “affiliated with or sponsored by a university-based dental school and is . . . beyond the dental degree[,] at the graduate or postgraduate level[,] and of at least 12 months in duration.” (See Exhibit B, Affidavit of J. Vincent Shuck.)

Although it may appear that the statute provides an alternative means by which a dentist may advertise his or her membership in, and/or credentials earned from, the AAID or the ABOI/ID simply by adding a “disclaimer” to the advertisement, this is not the case. Section 466.0282 provides **no means** by which a dentist can advertise his or her

membership in, and/or credentials earned from, the AAID, or the ABOI/ID, **UNLESS** the AAID and the ABOI/ID can meet the criteria listed above, **EVEN IF** the “disclaimer” appears in the ad. If the dentist includes the lengthy and burdensome “disclaimer” in his or her advertisement, he/she may only announce a “practice emphasis” in an area of dentistry not recognized by the ADA as a specialty area. However, if the dentist wishes to acknowledge or otherwise reference an organization that officially recognizes the non-specialty area of dentistry, the dentist must **also** include a second “disclaimer.” The dentist may still not inform the public that he/she is a member in the AAID or that he/she has earned any credentials from the AAID or the ABOI/ID, as illustrated below:

[A] dentist who lacks membership in or certification, diplomate status, or other similar credentials from an accrediting organization approved as bona fide by either the American Dental Association or the board **may announce a practice emphasis in any other area of dental practice if the dentist incorporate in capital letters or some other means clearly distinguishable from the rest of the announcement, solicitation, or advertisement the following statement:** “. . . (NAME OF ANNOUNCED AREA OF DENTAL PRACTICE) . . . IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.” If such an area of dental practice is officially recognized by an organization that the dentist desires to acknowledge or otherwise reference in the dentist’s announcement, solicitation, or advertisement, the same announcement, solicitation, or advertisement shall *also* state prominently: “. . . (NAME OF REFERENCED ORGANIZATION) . . . IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.”

Id. at (3) (emphasis added).

Section 466.0282(4) specifically states that “[t]he Legislature also finds that this process for the recognition of dental specialties and other bona fide areas of dental

practice is the least restrictive means available to ensure that consumers are not misled about a dentist’s unique credentials.” *Id.* at (4). However, **in considering this very issue**, this Court in Borgner I, stated as follows:

Like the defendants in *Peel*, *Ibanez*, and *Parker*, the defendants in this case bear a heavy burden to justify the complete ban placed on certain aspects of commercial speech, specifically on the advertisement of a dental practitioner’s membership in AAID and credentials awarded by AAID and ABOI/ID. In shouldering their burden, the defendants may not rely on speculation and conjecture but must produce specific evidence to demonstrate that the harms they recite are real and substantial and that the ban “directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.” *Ibanez*, 129 L. Ed. 2d at 126. Plaintiffs suggest—and the court agrees—that, given their burden, the defendants have not produced sufficient evidence to survive Plaintiffs’ motion for summary judgment.

Borgner I, 33 F. Supp. at 1331. In reviewing the “evidence” presented by the Defendants, this Court noted as follows:

The defendants next suggest that, unlike the state respondents in *Peel* and *Ibanez*, the state defendants in this case have produced “anecdotal” evidence to support their argument that members of the public would be confused if Borgner were permitted to advertise his membership in, and credentialing by, non-ADA-approved organizations. This “anecdotal” evidence consists of the affidavits of (1) Robert T. Ferris, D.D.S., a diplomate of the American Board of Periodontology, . . . and (2) H. Fred Varn, a past Executive Director of the Florida Board of Dentistry.

As a past Executive Director of the Florida Board of Dentistry, Mr. Varn states in his affidavit that “it is his opinion and belief that a substantial portion of the consumers of dental services in Florida believe” The defendants admit, however, that they have no empirical evidence to support Mr. Varn’s opinion.

As a dental practitioner whose practice is limited to the ADA-approved specialty of periodontics, Dr. Ferris states in his affidavit that “it is my opinion that confusion exists among dental consumers concerning the relation between legitimate dental specialties and other

dental areas” Again, the defendants have not come forward with any empirical evidence to support Dr. Ferris’s opinion. **They have produced not one bit of anecdotal evidence concerning Dr. Borgner’s patients or potential patients, not one report of a complaint or inquiry about his services or his advertisements, not one report of any person’s being deceived, misled, or confused by any dentist’s AAID or ABOI/ID certifications, and not one document or study to support the proposition that dental consumers have been misled by any credential issued by any dental accrediting organization in any area of dentistry not recognized by the ADA as a specialty area of dentistry.**

Id. at 1332 (emphasis added).

The defendants have fallen woefully short of convincing this court that dental consumers will be misled if Borgner is permitted to advertise both his membership in AAID as well as his credentialed status with AAID and ABOI/ID. While the defendants support their assertions with little more than speculation and conjecture about the possibility of deception in hypothetical cases, **they provide no specific evidence that suggests, much less demonstrates, that Borgner’s advertisement will create the danger of deception they claim to fear.**

Id. (emphasis added).

Both the Senate and the House of Representatives referenced this Court’s decision in Borgner I. The Substantive Analysis report of the House of Representatives Committee on Health Care Licensing and Regulation quotes the following excerpt directly from the Borgner I decision:

In [Borgner I], the past Executive Director of the Florida Board of Dentistry stated in his affidavit that:

It is his opinion and belief that a substantial portion of the consumers of dental services in Florida believe that dentists who hold themselves out to the public as “specialists,” as being “board certified,” or as limiting their practice to a particular type of practice have in fact obtained specialty certification from the State of Florida or a specialty organization approved by the State of Florida.

The court stated that, “While the defendants support their assertions with little more than speculation and conjecture about the possibility of deception in hypothetical cases, they provide no specific evidence that suggests, much less demonstrates, that Borgner’s advertisement will create the danger of deception they claim to fear.” With that, the Senior United State District Judge ruled that “Section 466.0282 is DECLARED unconstitutional to the extent it prohibits Borgner from advertising his membership in AAID and his credentialed status in AAID and ABOI/ID, and the defendants are ENJOINED from enforcing section 466.0282 against Borgner. . . .”

House of Representatives Committee on Health Care Licensing and Regulation Analysis,
p. 2 (a copy is attached as Exhibit J).

The Senate reports the following:

In 1998, a Florida licensed dentist and the American Academy of Implant Dentistry asked the federal court to declare s. 466.0282, F.S., unconstitutional and to enjoin the Agency for Health Care Administration and the Florida Board of Dentistry from enforcing the section. On July 16, 1998, the United States District Court for the Northern District of Florida, in an action for declaratory and injunctive relief, granted the plaintiff-dentist’s motion for summary judgment and declared s. 466.0282, F.S., unconstitutional as a violation of the commercial speech rights, protected under the First Amendment to the United States Constitutional, of Florida dentists who wish to advertise membership in, or specialty recognition by, an accrediting organization that is not recognized or accredited by the American Dental Association. [cite omitted]

Senate Staff Analysis and Economic Impact Statement, p. 2 (copy attached as Exhibit K).

The House and Senate were aware that this Court held that former Section 466.0282 was unconstitutional “to the extent that it prohibits Borgner from advertising his membership in AAID and his credentialed status in AAID and ABOI/ID” Yet, in spite of this Court’s finding that the Board presented **no** evidence to justify the complete ban placed on certain aspects of commercial speech, specifically on the advertisement of a dental practitioner’s membership in AAID and credentials awarded by

AAID and ABOI/ID, and in spite of this Court's finding that the Board presented only speculation and conjecture in support of its restriction on dental advertising, the Legislature has amended Section 466.0282 to prohibit the Plaintiffs and similarly-situated dentists from truthfully advertising their membership in, and credentials obtained from, the AAID and ABOI/ID. In blatant disregard for this Court, the Legislature, in response to the lobbying efforts of the FDA, promulgated the advertising restrictions found in the ADA's Code of Ethics, which has the identical effect as the previous language – it prohibits Dr. Borgner from advertising his membership in, and credentials earned from, the AAID and ABOI/ID.

Clearly, the Board does not have the public's best interests in mind. The public cannot possibly benefit from a **lack** of information about a dentist's experience, training and education, all of which are illustrated by the credentials he has earned from national dental organizations such as the AAID and the ABOI/ID. Section 466.0282 absolutely prohibits a dentist from advertising **any** credentials, regardless of the education, training, clinical experience and testing requirements of the credentialing organization, except under the following limited circumstances stated above (see text at page ____ supra).

Pursuant to Section 466.0282, the Board openly and formally defers to the ADA to determine whether or not a dentist may lawfully advertise credentials he has earned in dentistry. The State of Florida has effectively enacted the ADA's Code of Professional

Ethics’ advertising restrictions as law by passing amended Section 466.0282.¹ In other words, the Board has no mechanism for evaluating a dental organization’s credentials, so it defers to the ADA for an evaluation of the credentials. However, the ADA has no mechanism for evaluating a dental organization’s credentials unless they are from one of its recognized “specialty” boards. In fact, as illustrated in Section II below, the ADA simply blindly and blatantly prohibits its members from advertising **any** credentials other than those of its “specialty” boards, without conducting any study or evaluation of the dental organization or the requirements a dentist must meet before he or she can earn the credential the organization awards. (See Section II infra).

The promulgation of this new statutory provision does not alter the Plaintiffs’ situation prior to this Court’s decision in Borgner I. Indeed, Section 466.0282 is identical in its effect on the Plaintiffs as the former Section 466.0282, which this Court found unconstitutional in Borgner I, in that it absolutely bans the advertising of all of the credentials earned from the AAID and the ABOI/ID and, as such, is also a violation of the Plaintiffs’ constitutional rights under the First and Fourteenth Amendments. In light of this Court’s decision in Borgner I and because no genuine issues of material facts are in dispute, the Plaintiffs are entitled to judgment as a matter of law, as will be shown below.

¹ See The ADA’s Principles of Ethics and Code of Professional Conduct, Advisory Opinion 5.I.1. General Practitioner Announcement of Credentials, attached as Exhibit L (hereinafter “ADA Advisory Opinion 5.I.1”).

II. DEFENDANTS' DEFERRAL TO THE ADA

Numerous dental organizations issue credentials in areas of dentistry that are not recognized by the ADA as specialty areas of dental practice, including implant dentistry, cosmetic dentistry, oral and maxillofacial radiology, dental anesthesiology, forensic dentistry, general dentistry, orofacial pain and oral medicine. (Defendant Board of Dentistry's Response to Request for Admissions (hereinafter "Board's Response to RADs"), #1; Defendant Department of Health's Response to Request for Admissions (hereinafter "DOH's Response to RADs"), #1). The Defendants do not have a mechanism for evaluating the credentials awarded to dentists by any credentialing organization, or they would not need to defer to the ADA to evaluate a dentist's credentials. (See Fla. Stat. § 466.0282).

However, the ADA has no mechanism for evaluating credentials awarded to dentists by any credentialing organization that is not an ADA-recognized specialty. (Nix Depo., pp. 63-64) (The transcript of the Deposition of Judith Nix, Director of the ADA's Council on Dental Education since 1993, taken in Borgner I, has been filed in the present case in its entirety, including all Exhibits.). In fact, the ADA has **no** process or mechanism by which it evaluates any credential issued by any dental organization in any area of dentistry which is not an ADA recognized specialty area of dentistry, including areas such as implant dentistry, dental radiology, dental anesthesiology, general dentistry, hospital dentistry, or oral medicine, to name only a few. (Nix Depo., pp. 41-42). Nor does the ADA have any mechanism whereby it monitors the development of educational

programs, standards or research by non-specialty groups (such as the Plaintiff AAID). (Nix Depo., pp. 63-64).

A. The ADA Structure

The twelve-member Council on Dental Education of the ADA, for which Ms. Nix serves as Director, oversees policies related to dental education, oversees the ADA recognized dental specialties= certifying boards, and is responsible for the recognition of dental specialties process. (Nix Depo., p. 14). All members of the Council on Dental Education are active, life, or retired members of the ADA. (Nix Depo., pp. 14-20). The primary function of the ADA's Commission on Dental Accreditation (which shares the same office space and staff with the Council on Dental Education) is to establish the accreditation standards for predoctoral dental education programs leading to the D.D.S. or D.M.D. degrees. (Nix Depo. p. 17). The twelve members of the Council on Dental Education, who determine whether or not an area of dental practice meets the criteria for recognition as a "specialty," also serve simultaneously as twelve of the twenty-one member Commission on Dental Accreditation. (Nix Depo., p. 20).

A dentist=s membership in the ADA is voluntary. However, membership in the local, state and ADA is Atripartite,≡ i.e., in order to become a member of one=s local dental society, a dentist must also become a member of the affiliated state and national organizations, and vice versa. Each local dental society is termed the Acomponent≡ society and each respective state organization, such as the Florida Dental Association ("the FDA"), is termed the Aconstituent,≡ all of which are affiliated with one national

organization, the ADA. (Nix Depo., p. 22). A dentist cannot choose to only belong to one, and not the other two, or two and not the third. Therefore, in order for Dr. Borgner to belong to his local dental association, he must be a member of the FDA and the ADA. (Affidavit of Dr. Borgner, attached as Exhibit A).

As can be easily seen from the inherent nature of this structure, the relationship between each state dental association and the ADA is inextricably interwoven. Consequently, the ADA often successfully extends its reach into state legislatures. This is graphically demonstrated by the Florida Dental Association's admission in Borgner v. Cook, that it lobbied for the passage of the advertising restrictions enacted in Florida, and by the ADA's pledge of \$50,000 to support the Florida Dental Association's legal efforts against the plaintiffs in that case. (See attached Exhibit M, Memorandum in Support of Intervention, filed in Borgner I).

After this Court struck down Section 466.0282 as unconstitutional, the FDA renewed its lobbying efforts in its attempt to prohibit Dr. Borgner and similarly situated Florida dentists from advertising their membership in, and credentials earned from, the AAID and the ABOI/ID. (See Exhibit G, ADA News article). Now both the ADA and the FDA are funding the defense of this lawsuit. (See Exhibit H, FDA Article 1, and Exhibit I, FDA Article 2). The FDA specifically refers to "**our defense.**" The ADA states that "[t]he FDA is supporting the defendants . . . and the ADA, in turn, in assisting the FDA's efforts." ADA News article, attached as Exhibit G. The ADA Executive Board has also agreed to match the FDA's litigation funds. ADA Executive Director's Update, dated Aug. 20, 1999, a copy of which is attached as Exhibit N. The ADA's and

the FDA's interest in this litigation is in protecting the "turf" of its specialists. (See Section II.B. at pp. _____ infra).

B. The ADA's Policy Prohibiting Advertising of Non-Specialty Credentials

The ADA opposes the recognition or advertising of any credential in any "non-specialty" area of dentistry. However, as early as 1957, the ADA passed several resolutions which encouraged the various groups representing areas of dental practice not recognized as specialties by the ADA to establish study groups, societies and academies to permit dentists interested in those areas to extend their knowledge and experience. Over ten years ago, the Council on Dental Education and Council on Ethics, By-laws and Judicial Affairs of the American Dental Association noted that several dental organizations in non-specialty areas of dentistry had developed Acertifying boards≡ to credential dentists in their areas of special interest, including the Plaintiff AAID, the Academy of General Dentistry (AGD), American Academy of Dental Radiology (AADR), the American Academy of Oral Medicine (AAOM), the American Academy of Operative Dentistry (AAOD), the American Association of Hospital Dentists (AAHD), and the American Academy of Dental Anesthesiology (AADA). (See Nix Depo. Exhibit C, 1987 Annual Reports and Resolutions, p. 107).

Thus, similar to the Plaintiff AAID, with its certifying Board, the ABOI/ID, several of these national dental organizations sponsor their own Anon ADA recognized≡ national certifying boards to certify dentists in their respective non-specialty areas of dental practice through the issuance of Adiplomate≡ certificates. The terms Adiplomate≡

and Aboard certified≡ are commonly used and understood to be interchangeable. (Nix Depo., pp. 64-66). (See also Tennessee Declaratory Order, Conclusions of Law, attached as Exhibit F, wherein the terms ADiplomate≡ or ABoard Certified,≡ ABOI/I were authorized for advertisement to the public).

During this same time period, a segment of the dental profession, including the Academy of General Dentistry (which also has a Acertifying board≡), initiated discussions encouraging the ADA to develop its own structure, apart from the Aspecialty recognition process,≡ for recognizing the various Anon-specialty≡ organizations, their respective areas of interest, and the credentials issued by those respective organizations.

As the ADA=s documents reflect:

In recent years, the Association has been under considerable pressure to explore mechanisms that could be implemented to encourage and recognize professional achievement in the non-specialty areas of dental practice without confusing such achievement with specialization. While not all areas of dentistry satisfy the ADA House of Delegates= approved criteria for specialty recognition, there may be benefits to the public and profession when dentists develop and advance areas of interest in non-specialty disciplines through education, practice and research.

(Nix Depo. Exhibit EE, IV. "Purpose of the Study Group on Credentialing in Non-Specialty Areas of Practice, Nov. 1986-1," p. 1).

In 1986, in response to this Aconsiderable pressure,≡ the ADA initiated a study on credentialing in non-specialty areas of practice, commenced through the AStudy Group On Credentialing in Non-Specialty Areas of Practice.≡ This group concluded that Aan acknowledgment process in non-specialty interest areas is possible and desirable.≡ (Nix Depo., Exhibit V, p. 3). The Study Group also concluded that Aan acknowledgment

program is of interest to association members, and would help to further advance the art and science of dentistry.≡ (Nix Depo. Exhibit V, p. 4). The Study Group developed proposed criteria and procedures for the acknowledgment of credentialing committees in non-specialty areas of dental practice and recommended that such be approved in principle and sent for information and comment to the 1987 ADA House of Delegates. (Nix Depo. Exhibit V, p. 4).

Nonetheless, before the study could be completed, a resolution was introduced at the 1987 ADA Annual Session (Resolution 81) by the Fifth Trustee District² proposing that further development of the proposed criteria and procedures for acknowledgment of credentialing committees in nonspecialty interest areas be suspended.≡ That Resolution was passed by the ADA House of Delegates. (Nix Depo. Exhibit JJ, Resolution 81H-1987).

The Background≡ of this resolution, suspending the development of an ADA recognition process for non-specialty credentials, delineated the following reasons for opposing the acknowledgment of credentialing committees in nonspecialty interest areas≡:

1. It will increase consumer confusion and bewilderment.³

² The Fifth Trustee District is composed of the states of Florida, Alabama, Georgia, and Mississippi.

³ Note that Counsel for the ADA acknowledged in the Nix deposition on pages 8 and 9, referencing page 7, paragraphs 3 and 4 of the Notice of Deposition and Request for Production of Documents for Judy Nix, that the ADA had no documents, studies or reports which conclude or substantiate that dental consumers rely on recognition by the ADA as proof that an area of dentistry is recognized as a legitimate dental specialty by

2. **It will increase fragmentation of the ADA.**
3. It will result in a proliferation of special interest groups or increased emphasis on the existing nonspecialty interest groups.
4. **It will result in an increase in advertising by the profession.**
5. It will increase divisiveness among the generalists by creating a Asuper≡ generalist.
6. **It will dilute the ADA position with regard to recognition of specialty areas in the profession.**
7. **It will weaken the eight specialties currently recognized by the ADA and by the public.** (See footnote 3).
8. **It will encumber the ADA=s dialogue with the Federal Trade Commission and weaken the concept of limitation of practice in individual state dental practice acts.**

(Nix Depo. Exhibit B, 1987 Resolutions, page 350-351) (emphasis added).

These eight, unsupported conclusions were the ostensible reasons for the termination of any ADA process that would evaluate and recognize Anon-specialty≡ credentials. Interestingly, after being directed to terminate its study, a final AInformational Report on Proposed Criteria and Procedures For Acknowledgment of Credentialing Committees in Non-Specialty Interest Areas by The Council on Dental Education and The Council on Ethics, Bylaws and Judicial Affairs≡ was compiled, which revealingly concluded:

Of the 628 questionnaires sent out, a total of 298 responses was received from individuals, organizations and agencies. The responses received reflected a great diversity of opinion on the subject of acknowledgment in non-specialty interest areas. The one exception to this diversity was the unanimous opposition to the proposal from the recognized specialties.

other dentists, or any documents, reports or data which substantiate that consumers have been misled by any non-ADA recognized credential.

(Nix Depo. Exhibit BB, Dec. 1987-5, p. 5) (emphasis added).

The unanimous opposition from the existing recognized specialty groups to the recognition of credentials in non-specialty areas can be more readily understood in light of the fact that one of the ADA criteria for specialty recognition is that the organization seeking specialty status that the scope of the [proposed] specialty shall not be readily coincident with or readily subsumed within the scope of other recognized specialties. (Nix Depo. Exhibit M, pp. 82-83). On this point, although the Council on Dental Education of the ADA determined that “[k]nowledge of high-level skills in the areas listed . . . supports the [Plaintiff]’s contention that existing specialty programs offer only limited experience in all aspects of oral implantology,” the Council also stated that “[t]he Council on Dental Education has always supported an interpretation of this criterion that allows segments of one specialty’s scope [i.e., implant dentistry] to be subsumed within the scope of other recognized specialties such that the entire scope is accommodated.” (Nix Depo. Exhibit M, p. 83).

In other words, under the interpretation of this criterion, if the Council on Dental Education of the ADA believes that a proposed new specialty area of dental practice can be subsumed, either into one or a combination of, existing specialty areas of dental practice, the area seeking specialty status does not qualify for specialty recognition. In view of this process, the motivation behind the unanimous opposition from the existing specialties to the establishment of new specialties is obvious. The specialists are protecting their own “turf.” This “turf protection” is readily apparent in a

letter sent to the Commonwealth of Kentucky by a dentist expressing his concern that periodontists may be performing procedures he believes are more within the realm of specialists in oral and maxillofacial surgery. (Letter dated June 9, 1999 from Robert S. Clark, D.M.D., President, Kentucky Society of Oral and Maxillofacial Surgeons, to Gary Muncie, Executive Director of the Kentucky Board of Dentistry, attached as Exhibit O). Obviously, the “turf wars” exist even between/among the ADA specialties. If the development of specialties in medicine had been constrained by such arbitrary criteria and similarly controlled by the American Medical Association, a multitude of medical specialties would not exist because most of them could have been determined to be assumed by an existing specialty or specialties!

Recognizing the ADA's fifty-year control of the specialty recognition process and its repeated refusal to recognize implant dentistry as a specialty, in 1993 the Plaintiff AAID attempted to resurrect the issue of formal ADA recognition of credentials in non-specialty areas of dental practice and submitted Resolution 122 to the ADA House of Delegates. This Resolution encouraged the ADA to identify and develop an appropriate process or mechanism to acknowledge and recognize an individual dentist's credentials in special nonrecognized specialty areas of dentistry. The Background of that Resolution acknowledged the various national dental organizations that credential dentists in non-specialty areas of practice and further stated:

The educational efforts and credentialing processes involved with these boards represent a system of peer examination offering the profession and the public important information about dentists' education and training. Yet dentists who have successfully completed these nonrecognized

educational and credentialing programs cannot ethically announce these professional efforts due to ADA policy. And, at present, specialty recognition is the only mechanism for establishing an ADA recognized credentialing process. As stated in its Requirements for Recognition of Dental Specialties and National Certifying Boards for Dental Specialists (Trans. 1983:527), the American Dental Association recognizes that the public and profession benefit substantially when nonspecialty groups develop and advance areas of interest through education, practice and research. Still, a formal mechanism or procedure to acknowledge the contributions of such groups and encourage their endeavors has not been authorized. This lack of an ADA-sanctioned credentialing process causes confusion about the role of these certifying boards and breeds fragmentation among the profession.

Not surprisingly, this Resolution was summarily defeated by the House of Delegates. (Nix Depo., pp. 45-46, referencing Depo. Exhibit F).

The evolution of the Plaintiff AAID and the various other national dental organizations representing non-specialty areas of dentistry and the impetus for developing their own certification mechanisms are illustrated by the fact that multiple areas of dental practice receive little attention in dental school. For example, although it is undisputed that implant dentistry has existed and evolved for over forty-five years, until July 1, 1997 accredited dental schools were not even required to provide their students with any training in implant dentistry prior to graduation. (Nix Depo., pp. 46-54; Nix Depo. Exhibit H: 1993 Annual Reports and Resolutions, pp. 95-96, A Teaching of Oral Implants in the Predoctoral Curriculum; Nix Depo. Exhibit I: 1994 Annual Reports and Resolutions, pp. 72-73, A Teaching of Oral Implants in the Predoctoral Curriculum; Nix Depo. Exhibit J: 1995 Supplement to Annual Reports and Resolutions, pp. 286-293,

Commission on Dental Accreditation, A Proposed Revisions of Accreditation Standards for Dental Education Programs≡).

The ADA Commission on Dental Accreditation defines three “levels of skill” in its dental accreditation standards as follows:

Proficient: The level of skill beyond competency. It is that level of skill acquired through advanced training or the level of skill attained when a particular activity is accomplished with repeated quality and a more efficient utilization of time.

Competent: The level of skill displaying special ability or knowledge derived from training and experience.

Exposed: The level of skill attained by observation of or participation in a particular activity.

ADA Commission on Dental Accreditation Standards, _____.

As reflected in Exhibits H, I and J of the Nix Deposition, the accreditation standards for dental schools require, at best, a Acompetency≡ level of skill, in only certain dental procedures, in only certain areas of dental practice. (Nix Depo., pp. 52-53) With respect to implant dentistry, even after July 1, 1997, the only accreditation requirement for a dental school has been that the undergraduate dental students be Acompetent in **identifying the indications** for dental implant placement and restoration.≡ There is no requirement that dental school students actually place even one dental implant, much less be Acompetent≡ in placing dental implants. (Nix Depo. Exhibit J, p. 288; p. 291, 2-49:d) (emphasis added).

It is clear from the foregoing that a dentist can graduate from dental school and receive a D.D.S. or D.M.D. degree without having received any education or clinical

training in placing dental implants because the accreditation standards established by the Commission on Dental Accreditation for predoctoral dental education do not require such. In fact, after reviewing all of the relevant exhibits, it is very clear that the vast majority of dental school graduates have barely, if at all, been exposed to the field of implant dentistry while in dental school. The need and importance of organizations such as the Plaintiff AAID, which represent Anon ADA specialty≡ areas of dentistry, to promote education and training and to develop certifying credentials in their respective areas of dentistry is obvious.

However, since the ADA has no mechanism for evaluating or recognizing the credentials issued by any Anon-specialty dental organization such as the Plaintiff AAID, the ADA does not know how the credentials at issue are obtained, the level of knowledge and skill required to attain such credentials, or the actual level of expertise reflected by such credentials. Ms. Nix acknowledged that the Plaintiffs' credentials in dental implantology may in fact reflect Aa proficiency or Acompetency level of skill and an in-depth level of knowledge relative to placing and/or restoring dental implants, however she "doesn't know." (Nix Depo., pp. 75-76). Although the ADA has recognized that the field of Aimplant dentistry requires unique knowledge and skills beyond those commonly possessed by general practitioners, (Nix Depo., p. 60, referring to Exhibit M, p. 83), the ADA neither recognizes implant dentistry as a specialty area of dental practice nor does it evaluate the credentials issued in implant dentistry by the Plaintiff AAID or the ABOI/ID. (Nix Depo., pp. 41-42).

The Council on Dental Education of the American Dental Association has acknowledged that Aimplant dentistry requires unique knowledge and skills beyond those commonly possessed by general practitioners. (Nix Depo. Exhibit M, pp. 82-83). The fact alone that someone is a Ageneral dentist provides no information to the public or other dental professionals about that dentist's education, skill or experience in dental implantology. (Nix Depo., pp. 72-73). Ms. Nix candidly admitted that she would want an implant placed in her own mouth by a dentist who at least possessed a competency level of skill in the placement of implants. (Nix Depo., pp. 76-77). She also recognized that the fact alone that someone was a Ageneral dentist would tell her nothing about that dentist's level of skill relative to dental implants. (Nix Depo., pp. 72-73). She further

candidly acknowledged that, in spite of her own experience with the ADA, she does not know how a dental consumer might be able to ascertain whether or not a dentist was competent or proficient in placing dental implants. (Nix Depo., p. 76). But curiously, Ms. Nix had **no opinion** as to whether or not the public would benefit by having access to information that Aconfirmed the competency or proficiency level of skill in placing dental implants≡! (Nix Depo., p. 76)

As can be seen from the foregoing, the ADA has no mechanism by which it recognizes, evaluates, or acknowledges credentials issued by multiple national dental organizations, including the Plaintiff AAID. The Plaintiffs do not claim that the ADA has any obligation or duty to evaluate or acknowledge any credentials. However, the State of Florida, in the statutory provision at issue, has broadly prohibited the advertising of the Plaintiffs credentials, in addition to a host of other credentials in other Anon specialty≡ areas of dental practice, without even evaluating any such credential or the potential benefit the public would realize by receiving the information conveyed by these credentials. The statute ostensibly defers these determinations to the ADA, but this deferral is illusory because the ADA makes no such determinations.

In fact, the ADA itself broadly, and blindly, prohibits the advertising to the public of **all** credentials in any Anon-ADA recognized≡ specialty area of dentistry, through its Code of Professional Conduct, without any evaluation or analysis of any prohibited credential! (See attached Exhibit K, ADA Principles of Ethics and Code of Professional Conduct, § 5.F; Advertising, Advisory Opinion § 5.F.4; § 5.H.; Advisory Opinion § 5.H.1, as published at www.ada.org). The ADA, as a trade association, may not be constrained by the interpretations of the Supreme Court of the United States relative to a

professional=s commercial free speech rights under the First Amendment. However, this situation makes the Florida Legislature=s complete deferral to the ADA on this issue even more constitutionally problematic.

The ADA’s encouragement for state dental boards to totally rely on the ADA’s policy and Code of Professional Ethics, the FDA’s lobbying efforts in the state Legislature, and the ADA’s and FDA’s funding provided for the defense of this litigation are blatant attempts by a private trade association to transform its own policies into state law, infringing on the First Amendment rights of the Plaintiffs and other similarly situated dentists and dental organizations. This statutory scheme is patently offensive to the commercial free speech guarantees of the First Amendment.

C. The ADA “Specialty Recognition” Process

After reviewing this section, the Court will readily understand why, in spite of the generally recognized advancements in the entire field of dentistry in the past 35-40 years, it is not surprising that the last area of dental practice to be Arecognized≡ as a Aspecialty≡ by the ADA was Endodontics (Root Canal) in 1963. Prior to Endodontics, the area of dental practice last Arecognized≡ by the ADA was in 1959, and the remaining areas were recognized prior to 1952. (Nix Depo., pp. 26-27).⁴

It is already clear that the statute at issue effectively conditions First Amendment rights on the potentially self serving processes, controls and politics of a private trade association. The ADA, by vote of its House of Delegates comprised of over four hundred

⁴ The current ADA recognized specialty areas of practice are Orthodontics and Dental Facial Orthopedics (Braces), Oral and Maxillofacial Surgery, Pediatric Dentistry, Periodontics (Gum and Bone Surrounding the Teeth), Public Health Dentistry, Endodontics (Root Canal), Prosthodontics, (Dentures; crown and bridges, etc.), and Oral Pathology. (_____).

member dentists from each of the fifty states, military services and several predoctoral dental students, ultimately decides if an organization representing a particular area of dental practice, and seeking to be deemed a specialty area of dental practice, has proven that it has met the criteria for obtaining specialty recognition, which criteria are also established by the ADA House of Delegates. The requisite amount of proof required for each criterion, as can be seen from a review of the relevant Exhibits, is in the unbridled, sole discretion of the Council on Dental Education. (Nix Depo., pp. 61-62).

Even if the Council on Dental Education (which is specifically charged with the responsibility of determining whether or not the specialty recognition criteria have been met by a dental organization) decides that the criteria have been met, its decision and recommendations are subject to reversal by vote of the House of Delegates which convenes once a year. (Nix Depo., pp. 34-38). To illustrate the constitutionally infirm conditions imposed by the statutory provision at issue, one only has to look at the description by Ms. Nix of the recent specialty recognition processes of the ADA.

In 1995, the Council on Dental Education recommended that a new specialty area of dental practice be recognized in **dental anesthesiology**. This area of practice is sponsored by the American Society of Dentist Anesthesiologists (ASDA), just as the Plaintiff sponsors the implant dentistry area of dental practice. (As noted above, ASDA also has a certifying board that is not recognized by the ADA.) However, the recognition of this area of dental practice as a specialty was rejected by the ADA House

of Delegates when it voted on the recommendation in the fall of 1995. (Nix Depo., p. 32).⁵

Similarly, at the annual meeting of the ADA in 1996, the House of Delegates again voted on another recommendation from its Council on Dental Education that another area of dental practice be recognized as a dental specialty by the ADA, **dental radiology**. This area of practice is sponsored by the American Academy of Oral and Maxillofacial Radiology (AAOMR), again just as the Plaintiff AAID sponsors the implant dentistry area of dental practice. As noted above, the AAOMR also has a certifying board that is not recognized by the ADA. The recognition of this area of dental practice as a specialty by the ADA was initially approved by a vote of the House of Delegates. However, within twenty-four hours of that vote, the House reconsidered and voted again, reversing itself and referring the matter back to the Council on Dental Education, which had already recommended that dental radiology be recognized as a new specialty area of dental practice! (Nix Depo., pp. 34-37).

The Plaintiff AAID is a national dental organization, founded in 1951, dedicated to the advancement of the art and science of oral implantology/implant dentistry. The Council on Dental Education of the ADA has determined that,

in the Council's judgment, the AAID is a nationally-recognized organization in the field of implant dentistry. Its *Journal* serves as a

⁵ It is noteworthy that one Oklahoma dentist advertised her Aspecialty status in dental anesthesia, based upon receiving Aboard certification from the certifying board of the American Academy of Dental Anesthesiology. The Oklahoma Dental Board disciplined her for advertising a Anon ADA recognized specialty. The Oklahoma Court of Appeals reversed that decision, concisely concluding that the relevant state statute prohibiting such advertising was in contravention of the First Amendment. Jacobs v. Board of Governors of Registered Dentists of the State of Oklahoma, No. 79,315 (Ok. App. Ct. August 10, 1993) (attached as Exhibit E).

primary publication vehicle for important research in implantology. The AAID=s members have been actively promoting training for dentists in implant dentistry at the predoctoral, advanced and continuing education levels.

(Nix Depo. Exhibit M, 1993 Annual Reports and Resolutions of the ADA, pp. 81-86: Council on Dental Education of the ADA, Report on The American Academy of Implant Dentistry=s (AAID) Application for Recognition of Implant Dentistry as a Dental Specialty; Nix Depo., pp. 57-60).

The Council further concluded that the membership of the Plaintiff AAID Areflects the special area of dental practice, and [the AAID] is recognized by the profession at large for its contribution to the art and science of the discipline= and that Athe membership of the AAID is reflective of this area of dental practice and recognized by dentists interested in implant dentistry.= (Nix Depo. Exhibit M, 1993 Annual Reports and Resolutions of the ADA, pp. 81-86: Council on Dental Education of the ADA, Report on The American Academy of Implant Dentistry=s (AAID) Application for Recognition of Implant Dentistry as a Dental Specialty; Nix Depo., pp. 57-60). In spite of these comments and reports, the ADA has structured its advertising restrictions in its Code of Professional Conduct to absolutely prohibit a dentist from advertising credentials he has earned from the AAID or the ABOI/ID. In direct contravention of the Plaintiffs' and similarly situated Florida dentists' First Amendment rights, the Legislature has enacted, nearly verbatim, the advertising restrictions of the ADA and the Board admittedly simply defers to the ADA.

The statutory provision at issue prohibits the Plaintiff Borgner from truthfully advertising the credentials he has earned from the AAID and the ABOI/ID solely because the area of implant dentistry either has not been recognized as a specialty area of practice

by the ADA, through the process portrayed above, or because no “formal, full-time advanced education program” in implant dentistry exists that is affiliated with or sponsored by a university-based dental school” that is “1. [b]eyond the dental degree; 2. [a]t the graduate or postgraduate level; and 3. [o]f at least 12 months in duration.” (See Exhibit B, Affidavit of Vincent Shuck). Even though the Plaintiff’s credentials might, in reality, represent the highest level of skill attainable in the area of implant dentistry, he is prohibited from providing this inherently valuable information to the public! To condition a dental professional’s First Amendment right to advertise credentials earned in a non-ADA recognized specialty area of dental practice on the ADA’s political, self-serving, and antiquated specialty recognition process or on a trade association’s “Code of Ethics” is repugnant to the constitutional guarantees of free commercial speech.

The ADA’s specialty recognition process is patently suspect for reasons which include a potential restraint of trade, conflicts of interest and obvious self interest among existing specialty groups, absence of governmental oversight, absence of accountability to any outside entity, and a complete lack of objective documentation or data to justify its actions. Nonetheless, as a private trade association, it may be free to do as it wishes. However, for the State to condition the Plaintiffs’ First Amendment rights on the arbitrary, capricious and potentially self-serving actions of a private trade association is constitutionally infirm.

III. ARGUMENT

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. Pro. 56(c). See also Bland v. Madison County, Florida, 895 F. Supp. 1515, 1522 (N.D. Fla. 1995). Summary judgment is not a disfavored procedural shortcut, but rather, is designed “to secure the just, speedy and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

Initially, the moving party has the burden of informing the court of the basis for its motion for summary judgment. Id. at 323; Bland, 895 F. Supp. at 1522. Where the nonmoving party will bear the burden of proof at trial, the moving party may properly rely on the pleadings, depositions, answers to interrogatories and admissions on file to support its motion for summary judgment. Id. at 324. Thereafter, the burden shifts to the nonmoving party to “go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, ‘designate’ specific facts showing that there is a genuine issue for trial.” Id.; Fed. R. Civ. Pro. 56(e); Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (1993), reh’g denied, 16 F.3d 1233 (11th Cir. 1994).

The nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). See also Samples v. City of Atlanta, 846 F.2d 1328, 1331 (11th Cir. 1988); Bland, 895 F. Supp. at 1522. “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no issue of

material fact.”” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). In other words, if the nonmoving party’s response to a summary judgment motion is simply a statement of conclusory allegations, the court must enter summary judgment in favor of the movant. Morris v. Ross, 663 F.2d 1032, 1034 (11th Cir. 1981), cert. denied, 456 U.S. 1010, 102 S. Ct. 2303 (1982); Bland, 895 F. Supp. at 1522.

B. Violation of Plaintiffs’ First Amendment Rights

When the regulation of professional advertising is challenged, the courts use a four-part test, developed by the United States Supreme Court, to determine whether the regulation violates the First Amendment’s commercial speech protections: (1) is the expression protected by the First Amendment, i.e. the expression, at a minimum, must concern a lawful activity and not be misleading; (2) is the asserted governmental interest substantial; (3) does it directly advance the governmental interest asserted; and, (4) is it Anot more extensive than is necessary to serve that interest?≅6 Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York, 447 U.S. 557, 566 (1980). See also Shapero v. Kentucky Bar Association, 486 U.S. 466, 472 (1987); Strang v. Satz, 884 F. Supp. 504, 508 n.2 (S.D. Fla. 1995).

The United States Supreme Court has held that Acommercial speech,≅ speech that proposes a commercial transaction, is afforded the protection of the First Amendment, as applied to the states through the Fourteenth Amendment of the United States Constitution. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). “The Fourteenth Amendment, by incorporating the First

6 The United States Supreme Court modified the fourth prong of the Central Hudson test in Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 480, 109 S. Ct. 3028 (1989). The inquiry is whether the restriction is “narrowly tailored to serve the governmental interest.”

Amendment and applying it to the states, precludes state and local governments from ‘abridging the freedom of speech.’” Nordyke v. Santa Clara County, 110 F.3d 707, 709 (9th Cir. 1997).

Advertising by a dentist is commercial speech that is protected by the First Amendment. Parker v. Kentucky, 818 F.2d 504 (6th Cir. 1987). As with other forms of protected speech, states may enact reasonable time, place and manner restrictions upon commercial speech. States may also prohibit advertising which is false, misleading or deceptive or which proposes an illegal transaction.≡ Id. at 772; Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985). See also Abramson v. Gonzalez, 949 F.2d 1567, 1574 (11th Cir. 1992); Jacobs v. Board of Governors of Registered Dentists of the State of Oklahoma, No. 79,315 (Ok. App. Ct. August 10, 1993) (attached as Exhibit E).

The Supreme Court in Virginia State Board of Pharmacy stated that advertising which is potentially misleading, particularly with respect to the rendering of professional services such as law and medicine, could possibly be subject to some form of regulation.≡ Virginia State Board of Pharmacy, 425 U.S. at 773, n.25. However, the Court later noted that with regard to advertising that is potentially misleading, the preferred remedy is **more** disclosure rather than less.≡ Bates v. State Bar of Arizona, 433 U.S. 350, 375 (1977) (emphasis added). Favoring disclosure to the public of more information rather than an outright ban on the particular advertising, the Court stated that, in doing so, the general public’s interest in receiving information was better protected, as was the advertiser’s right to communicate. Id. at 375.

When enacting laws regulating commercial speech through time, place and manner restrictions, a state must demonstrate that its restriction directly and materially advances a substantial state interest and it must show that the regulation is no more extensive than necessary to meet that interest. In re R.M.J., 455 U.S. 191, 203 (1982) (Rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible). See also Central Hudson Gas & Electric, 447 U.S. at 564-566 (a complete ban on promotional advertising by an electric utility is unconstitutional); Abramson v. Gonzalez, 949 F.2d 1567, 1574 (11th Cir. 1992) (to restrict commercial speech, the government “must demonstrate that there is a reasonable fit between the legislature’s ends and the narrowly tailored means chosen to accomplish those ends”).

The rule is well established that A[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 (1983). See also Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989). The state must prove not only that the harms it seeks to protect against are real, but also that the proposed restrictions will actually materially alleviate those harms. Edenfield v. Fane, 507 U.S. 761, 771 (1993). See also Zauderer, 471 U.S. at 648-49; Bolger, 463 U.S. at 73; In re R.M.J., 455 U.S. at 205-206; Central Hudson Gas & Electric, 447 U.S. at 569. Mere speculation, under the guise of Apotentially misleading, will not suffice. Edenfield, 507 U.S. at 770-71.

The United States Supreme Court held in Ibanez v. Florida Dep’t of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136, 142 (1994), that letters designating a professional’s credentials qualify as Acommercial speech. As such, a

state may only ban the use of these designations if they are Afalse, deceptive or misleading.≡ Id. See also Zauderer, 471 U.S. at 683; In re R.M.J., 455 U.S. at 203 (“[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment≡). The Florida Board of Accountancy rule at issue in Ibanez was similar to the statutory provision and regulation at issue in this case. The Ibanez Court struck down the rule because it flatly banned Aa form of recognition by any entity other than the Board≡ Ibanez, 512 U.S. at 147, n.11.

The Court in Ibanez stated that as long as the plaintiff held a currently active license as a certified public accountant, it could not understand “how consumers can be misled by [the plaintiff’s] truthful representation to that effect.” Ibanez, 512 U.S. at 144. Nor did the Court believe that use of the term “certified” would mislead the consumer into inferring the state’s approval and recognition of her status in light of its decision in Peel v. Attorney Registration & Disciplinary Comm’n of Illinois, 496 U.S. 91, 110 S. Ct. 2281 (1990). In Peel, the Court had held that an attorney’s designation “Certified Civil Trial Specialist By the National Board of Trial Advocacy” was neither actually nor inherently misleading because the National Board of Trial Advocacy (“NBTA”) was a bona fide organization. Ibanez, 512 U.S. at 145; Peel, 496 U.S. at 111. The Court in Peel noted that the Board’s “concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.” Id.

In Ibanez, the Court rejected the argument that use of the designations “CPA” and “CFP” was “potentially misleading” on the ground that the state failed to demonstrate that the harms were real and that the restriction would alleviate those harms “to a material

degree.” Ibanez, 512 U.S. at 148-149 (citing Edenfield, 507 U.S. at 171). The Court held that “[t]o approve the Board’s reprimand of Ibanez would be to risk toleration of commercial speech restraints ‘in the service of . . . objectives that could not themselves justify a burden on commercial expression.’” Id. at 149 (quoting Edenfield, 507 U.S. at 767). “We have **never** sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here.” Id. at 146 (emphasis added).

The Ibanez Court also held that the Board’s required disclaimer was unduly burdensome and offended the First Amendment.⁷ Id. (See text at pp. infra for a discussion of disclaimers). Furthermore, because of the educational and testing requirements which must be met to become a Certified Financial Planner (or, likewise, a Certified Public Accountant), the case did not fall within the caveat of Peel concerning credentials awarded by organizations which did not evaluate a candidate’s fitness. Id. at 148. Hence, the Court said that the Board had offered no evidence supporting its position which would allow restricting the communication of truthful commercial speech. Id. Without evidence of actual harm to the public and a showing that the restriction on commercial speech will alleviate that harm to a material degree, a state cannot ban, or even restrict, a professional’s use of designations or certification obtained from a bona fide organization.

⁷ The Tennessee Supreme Court upheld a disclaimer requirement for general dentists who advertise orthodontics. J. Lee Douglas, D.D.S. v. State of Tennessee, 921 S.W.2d 180 (Tenn. 1996). However, the court indicated that its conclusion would have been different had the board “enacted a rule completing preventing general dentists from advertising a specialty branch.” Id. at 187.

In Nordyke v. Santa Clara County, the Ninth Circuit Court of Appeals upheld a preliminary injunction enjoining Santa Clara County from enforcing an addendum to a lease which prohibited the “sale” or “offering for sale . . . firearms or ammunition,” stating that

to justify its commercial speech restriction, the County possibly would have to provide a detailed study to substantiate the intuitions of Board members that led to adoption of the policy, just as the Florida Bar produced a detailed study to justify its restrictions on lawyer advertising and solicitation.

Nordyke, 110 F.3d at 713 (citing Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371 (1995)).

If speech is not false, deceptive or misleading, the state may restrict it only upon Ashowing that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.≡ Ibanez, 512 U.S. at 142. See also Central Hudson Gas & Electric, 447 U.S. at 564-566; In re R.M.J., 455 U.S. at 203. In other words, the state of Florida must show that the harms it proposes to protect against are real and that the restriction will actually alleviate those harms to a significant degree - Amere speculation or conjecture≡ are insufficient grounds for imposing restrictions on commercial speech. Ibanez, 512 U.S. at 143. See also Edenfield, 507 U.S. at 767.

Truthful information regarding a dentist=s certification and particular areas of expertise facilitate the public=s access to dental services. Jacobs, No. 79,315 (Ok. App. Ct. Aug. 10, 1993) (attached as Exhibit E). The Plaintiffs= credentials at issue in this case have been completely banned by the State of Florida under the provisions of Section 466.0282. The State may not completely ban commercial speech which is not actually or

inherently misleading. Peel v. Attorney Registration and Disciplinary Commission, 496 U.S. 91, 111 (1990).

The challenged Florida statute constitutes an absolute bar to a dental professional=s truthful advertising of credentials obtained from any accrediting organization, unless those credentials are obtained in a specialty area of dental practice recognized by the American Dental Association (“ADA”.) The language of Section 466.0282, which prohibits a dentist from advertising credentials he has earned from organizations other than the eight ADA-recognized specialty boards, constitutes an absolute ban on protected free speech, is inconsistent with the First Amendment of the United States Constitution, and is contrary to law, as set forth by the United States Supreme Court, the Eleventh Circuit Court of Appeals, this Court and other courts nationwide.

The Board stands ready to enforce Section 466.0282 against the Plaintiff Dr. Borgner and other Florida members of the Plaintiff AAID, yet the Board does not evaluate the AAID or the credentials it awards. (_____). Instead, the Board relies entirely upon the ADA’s recognition of “specialty” areas of dentistry. (Section 466.0282; _____) Ironically, the ADA has no mechanism for evaluating any credential issued by a dental organization in an area of dentistry that is not an ADA “recognized” specialty area. (Nix Depo., pp. 63-64). Nor does the ADA have any mechanism for monitoring the non-specialty groups’ development of educational programs, standards or research. (_____) Through its Code of Professional Conduct, however, the ADA broadly and blindly prohibits the advertising of any credential earned in an area of

dentistry other than an ADA-recognized specialty area, without conducting any evaluation or analysis of the credential. (See Exhibit L, ADA Advisory Opinion 5.I.1).

The Defendants are state actors and must always act to protect the freedoms granted by the United States Constitution. Under both federal and Florida law, the Defendants must provide evidence that their restriction on commercial speech is justified. The Defendants can produce no such evidence. They could not produce any evidence in Borgner I and they cannot produce any evidence now. (DISCOVERY RESPONSES ----- DISCUSS STUDY PRODUCED IN RESPONSE TO DOCUMENT REQUESTS-----)

The statute at issue blindly blocks the general public's access to truthful and accurate commercial information that the First Amendment is designed to protect. The credentials at issue are bona fide and are neither actually nor inherently misleading, as already determined by the Defendant Florida Board of Dentistry in BOD #94-01DS (see Exhibit D) and, more recently, by this Court, in Borgner I (see Exhibit C). The Defendants could not produce any evidence in Borgner I to support the proposition that the credentials are misleading or even potentially misleading to the public. In Borgner I, this Court held that the Florida statutory provision which prohibited the Plaintiff "from advertising his membership in AAID and his credentialed status in AAID and ABOI/ID" was unconstitutional! Yet, in spite of this Court's decision, or because of it, the Legislature has recently enacted the same outright ban, using slightly different language.

This Court found in Borgner I that, although the defendants attempted to distinguish a dentist's credentials from those of a trial lawyer or financial planner, as litigated in Peel, 496 U.S. 91, and Ibanez, 512 U.S. 136, "[r]ecord support for the

defendants' conclusory statement, however, is nonexistent." Borgner, 33 F Supp. 3d at 1331-1332. The Borgner I Court noted that

[t]he defendants have cited no studies and have produce no evidence to support their suggestion that consumers of dental services – as opposed to consumers of legal and financial planning services – are more likely to be misled by secondary level certifications. Nor have they explained why, in considering the difference between consumers, they compare the “average lay” dental consumers to the “sophisticated” consumer of legal or financial planning services.

Id. This Court discussed the “anecdotal” evidence presented by the defendant dental board, and stated that “[t]he defendants admit, however, that they have no empirical evidence to support [the] opinions.” Id. at 1332.

This Court also found that the defendants

produced not one bit of anecdotal evidence concerning [the plaintiff's] patients or potential patients, not one report of a complaint or inquiry about his services or his advertisements, not one report of any person's being deceived, misled, or confused by any dentist's AAID or ABOI/ID certifications, and not one document or study to support the proportion that dental consumers have been misled by any credential issued by any dental accrediting organization in any area of dentistry not recognized by the ADA as a specialty area of dentistry.

Id. This Court concluded that

[t]he defendants have fallen woefully short of convincing this court that dental consumers will be misled if [the plaintiff] is permitted to advertise both his membership in AAID as well as his credentialed status with AAID and ABOI/ID. While the defendants support their assertions with little more than speculation and conjecture about the possibility of deception in hypothetical cases, they provide no specific evidence that suggests, much less demonstrates, that [the plaintiff's] advertisement will create the danger of deception they claim to fear. Given a record devoid of the type of evidence needed for the defendants to survive constitutional review and to successfully rebut the presumption favoring disclosure over concealment, the court finds that the Plaintiffs are entitled to summary judgment.

Id. at 1333 (emphasis added).

The Defendants still have no evidence to support the outright ban on advertising the credentials earned from the AAID and/or the ABOI/ID. Instead, they rely entirely on the ADA to determine what credentials a dentist may advertise. Since the defendants in Borgner I, with the assistance of the ADA and its state constituent, the FDA, could produce no evidence supporting the state's absolute ban on the advertising of the Plaintiffs' credentials earned from the AAID and its certifying board, the ABOI/ID, neither can the Defendants in this case produce any evidence supporting its absolute ban on advertising the Plaintiffs' credentials.

When a State seeks to ban commercial speech that is not actually or inherently misleading or deceptive, the State must prove that (1) the harms that it seeks to rectify by the regulation are real, not purely hypothetical; and (2) that the regulation directly and materially advances the State's interest in preventing the specific type of deception at hand. Edenfield, 507 U.S. at 771. In fact, like the restrictions struck down in Edenfield and in Borgner I, the statutory provision at issue constitutes an absolute ban on advertising of credentials with nothing more to support the ban than the policy of deferring to the ADA. Without evidence of actual harm to the public and evidence that the restriction on commercial speech will alleviate that harm to a material degree, the state cannot ban, or even restrict, a professional's use of a credential or certification obtained from a bona fide organization, without violating that dentist's constitutional right to freedom of speech. See, e.g., [ADD CASE CITES FROM ABOVE]

The Defendants have the burden of proving that Florida's new restrictions on a dentist's commercial speech are justified; that the harms they seek to protect are real and substantial; that the restrictions will actually, directly and materially alleviate those

harms; and that the restrictions are narrowly tailored to serve that governmental interest. See Central Hudson, 447 U.S. at 566. The Defendants cannot meet this burden. On the contrary, the Board of Dentistry of the State of Florida and this Court have previously determined that the Plaintiff AAID and the certifying Board it sponsors, ABOI/ID, are Abona fide organizations that credential dentists in the area of implant dentistry,[≡] and that the credentials at issue could lawfully be advertised to the public. (See Exhibits D & C, respectively.)

With blatant disregard for the Board's prior finding and this Court's prior decision, the trade associations have successfully lobbied for advertising restrictions that prohibit a dentist from advertising membership in the AAID and/or credentials earned from the AAID and/or the ABOI/ID. Consistent with the rationale of the above case law, the AAID and the ABOI/ID only grant credentials on the basis of experience, education and examinations. (Exhibit B, Affidavit of Vincent Shuck). No dentist can obtain a credential from either the AAID or the ABOI/ID by simply paying a fee or even by merely claiming to possess knowledge and experience in the field of implant dentistry. (Exhibit B, Affidavit of Vincent Shuck).

Like the certifying board in Ibanez, the AAID and ABOI/ID awards credentials only after an applicant meets objectively verifiable requirements established by a national board of standards; the information is truthful; and the Defendants cannot produce any evidence that the credentials at issue have actually misled the public. Defendants also cannot demonstrate that the public would infer state-sanctioned credentials. The designation, ADiplomate (or Board Certified), American Board of Oral Implantology/Implant Dentistry,[≡] clearly indicates the organization from which the

credential is bestowed. Likewise, AFellow≅ and AAssociate Fellow≅ of the American Academy of Implant Dentistry also expressly indicate the organization from which the credentials emanate. See, e.g., Peel, [ADD CASE CITES FROM ABOVE]

The Defendants bear the burden of justifying the restrictions the state has placed on commercial speech. Edenfield, 507 U.S. at 770. For the Defendants to prevail, they must demonstrate that the link between Section 466.0282 and the Board’s asserted governmental interest is an AImmediate connection≅ or a Adirect link.≅ Central Hudson, 447 U.S. at 569. A Atenuous≅ or Aspeculative≅ link is insufficient to meet this burden. Id. In short, Athe regulation may not be sustained if it provides only ineffective or remote support for the government=s purpose.≅ Id. at 574. Even if the Defendants could establish, which they cannot, that the statute directly advances governmental interests, the statute is clearly not Anarrowly tailored≅ to serve those state interests. The Defendants cannot show that a Amore limited speech regulation would be ineffective.≅ Central Hudson, 447 U.S. at 571. See also Ibanez, 512 U.S. at 148-149.

Admittedly, the Supreme Court has been more tolerant of regulations mandating disclosure requirements than it has been on regulations that impose a total ban on speech. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985). However, state-imposed disclaimer requirements on commercial speech are *not immune* from constitutional constraints. Disclaimers that are “unjustified” or “unduly burdensome” may violate the First Amendment. Id. at 651.

For example, the United States Supreme Court, in Ibanez, held the state’s disclaimer requirement unconstitutional. Ibanez, 512 U.S. at 145. The plaintiff, who held a currently active license as a Certified Public Accountant, also wanted to place the

initials “C.F.P.” (Certified Financial Planner) after her name. The department’s regulation required a disclaimer listing the “recognizing agency’s” educational, experience and testing requirements for certification and stating that “the recognizing agency is not affiliated with or sanctioned by the state or federal government.” Id. at 145-146 [footnote omitted]. Based on the state’s failure to present any evidence showing that the C.F.P. designation was even potentially misleading and also based on the fact that the disclaimer “effectively rules out notation of the ‘specialist’ designation on a business card or letterhead, or in a yellow pages listing,” the Court held the regulation unconstitutional. Id.

The new statutory provision at issue herein is nearly on point with the Court's decision in Ibanez. The disclaimer required by Section 466.0282 is “unduly burdensome” and cannot meet constitutional scrutiny. See Id. Furthermore, the “disclaimers” in Section 466.0282 are merely a smokescreen. Dr. Borgner and other members of the AAID cannot advertise their membership in the AAID, nor can they advertise the credentials they have earned from the AAID or the ABOI/ID, **even with a disclaimer.**

Under 466.0282, if Dr. Borgner wishes to advertise that his practice is limited to an area of dentistry that has not been named a specialty area by the ADA (implant dentistry), or is an area of dentistry (such as the Plaintiffs') which is not represented by an "bona fide accrediting organization" **approved by the Board**, he must include in his announcement, solicitation or advertisement, "*in capital letters and clearly distinguishable from the rest of the announcement,*" the following sentence:

(NAME OF ANNOUNCED AREA OF DENTAL PRACTICE) . . . IS
NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN

DENTAL ASSOCIATION OR THE FLORIDA BOARD OF
DENTISTRY.

In addition to this lengthy and inherently confusing statement, if the dentist wishes to include in his advertisement or announcement that implant dentistry is sponsored by the AAID and its certifying board, the ABOI/ID, for instance, he must *also* include in his announcement, for each organization/board, *in capital letters and clearly distinguishable from the rest of the announcement*, the following sentence:

(NAME OF REFERENCED ORGANIZATION) . . . IS NOT
RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING
ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR
THE FLORIDA BOARD OF DENTISTRY.

Under Section 466.0282(4), a dentist cannot even include the area of dentistry in his announcement or advertisement *without the above disclaimer*.

In other words, if Dr. Borgner includes the first disclaimer in his advertisements or on his business cards, he may simply state that he limits his practice to a non-specialty area of dentistry, e.g., implant dentistry. If Dr. Borgner includes the second disclaimer in his advertisements or on his business cards, he may also state that implant dentistry is “sponsored by” the AAID. He may also state that implant dentistry is sponsored by the certifying board of the AAID, the ABOI/ID, if he includes yet another disclaimer for that entity. However, Dr. Borgner cannot, even with both disclaimers, truthfully inform the public that he is a member of the AAID or that he has earned certain credentials from the AAID and from the ABOI/ID. This was the precise reason this Court struck down the previous version of Section 466.0282. Nothing in the revised Section 466.0282 has changed as it affects Dr. Borgner or other similarly situated members of the AAID.

Furthermore, the disclaimers are unnecessary and are an overly burdensome and onerous. If Dr. Borgner wishes to truthfully inform the public that he limits his practice to implant dentistry and that implant dentistry is sponsored by the AAID and the ABOI/ID, **even without stating that he is a member of the AAID or that he has earned credentials from both the AAID and the ABOI/ID**, his advertisement, and even his business card, would look like the following:

RICHARD A. BORGNER, D.D.S.
2299 9TH AVENUE NORTH, #1-E
ST. PETERSBURG, FLORIDA 33713
Telephone: _____

Office Hours:
M-F _____
Saturday _____

Practice Limited to Implant Dentistry
Implant Dentistry is sponsored by
The American Academy of Implant Dentistry
and its certifying board, The American Board of
Oral Implantology/Implant Dentistry

IMPLANT DENTISTRY IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

THE AMERICAN ACADEMY OF IMPLANT DENTISTRY IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

THE AMERICAN BOARD OF ORAL IMPLANTOLOGY/IMPLANT DENTISTRY (ABOI/ID) IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.

Obviously, the disclaimers will not fit on a business card, on a dentist's letterhead or in a yellow pages listing. They are first and foremost "unjustified" and, secondly, "unduly burdensome." See Ibanez, 512 U.S. at 146. Not only are the disclaimers "unjustified" and "unduly burdensome," but they are inherently misleading and will likely cause confusion for the consuming public.

The rule is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 (1983). See also Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989). The state must prove not only that the harms it seeks to protect against are real, but also that the proposed restrictions will actually materially alleviate those harms. Edenfield, 507 U.S. at 761 (1993). See also Zauderer, 471 U.S. at 648-49; Bolger, 463 U.S. at 73; In re R.M.J., 455 U.S. at 205-206; Central Hudson, 447 U.S. at 569. Mere speculation, under the guise of "potentially misleading," will not suffice. Edenfield, 507 U.S. at 770; Ibanez, 114 S. Ct. at 2088. This Court in Borgner I has already found that the State cannot meet this burden. See text at pages _____ supra. Even the House of Representatives Committee has admitted that the Defendants evidence of the "harms" the statute was enacted to protect was merely speculation and conjecture. See House of Representatives Committee on Health Care Licensing and Regulation Analysis, p. 2, quoted on page ___ supra.

In the absence of evidence showing that the public will likely be misled by the advertising of the Plaintiffs' membership in, and credentials from, the AAID and ABOI/ID, the state cannot ban, or even restrict, the Plaintiffs' First Amendment rights.

The Legislature's purpose in amending Section 466.0282 is merely pretextual. It passed the legislation as a result of the lobbying efforts of the Florida Dental Association. The FDA's real concern, and hence the Legislature's purpose, is protecting ADA specialty areas of practice and the "turf" of dentists who are specialists in those ADA-recognized specialty areas. Pretextual governmental interests cannot justify the amended statute. Cf. Edenfield, 507 U.S. at 765. The Defendants have presented no evidence of false or misleading advertising, no evidence supporting their claim that the public would be misled by advertising membership in, or credentials from, the AAID or ABOI/ID, and, thus, no evidence to justify the amended rule. See Borgner I, 33 F.2d at 1333.

If the purpose were not pretextual, the state must still demonstrate that the rule "directly advances the stated governmental interest, and is no broader than reasonably necessary to serve that interest." Edenfield, 507 U.S. at 767. The Defendants have already failed to meet that burden.

Without any evidence of actual harm to the public and the showing that the restriction on commercial speech will alleviate that harm to a material degree, a state cannot ban, or even restrict, a professional's use of the designation of a certification obtained from a bona fide organization without violating his constitutional right to freedom of speech. The Florida Legislature has admitted that the Board has no evidence of actual harm to the public and, thus, certainly cannot show that the restriction on commercial speech will alleviate that harm to a material degree. Therefore, the Legislature cannot ban, or even restrict, a dentist's use of the designation of a certification obtained from a bona fide organization. Furthermore, even if it could restrict such advertising, it cannot do so by requiring the dentist to include in his announcement

or advertisement the unjustified and unduly burdensome disclaimers found in Section 466.0282(3), without violating the dentist's constitutional right to freedom of speech. Nor can the State require unjustified and unduly burdensome disclaimers, which still do not allow a dentist to truthfully inform the public of his membership in, and credentials earned from, the AAID and the ABOI/ID. Including disclaimers in the statute does not transform an otherwise unconstitutional statutory provision into a constitutional one. On the contrary, the disclaimers themselves, as they are required in Section 466.0282, are an unconstitutional infringement on the First Amendment rights of Dr. Borgner and similarly situated members of the AAID.

As demonstrated above, the Defendants can produce no studies, polls, surveys or data that would support an absolute ban against a dentist truthfully advertising bona fide credentials earned from non-specialty dental organizations. Consequently, the Defendants have restricted Plaintiffs commercial speech in violation of the First Amendment of the Constitution. Based upon the pleadings, discovery and affidavits discussed above, no genuine issue as to any material fact exists and the Plaintiffs are entitled to judgment as a matter of law.

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs have demonstrated that no genuine issue of material fact remains in dispute in this case and that the Plaintiffs are entitled to judgment as a matter of law.

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CERTIFICATE OF SERVICE

I certify that a copy of the Plaintiffs' Motion for Summary Judgment has been served upon

by ordinary U.S. mail, postage prepaid, on _____, 1999.

Marilyn J. Marshall