UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of NATIONAL ACADEMY OF ARBITRATORS, a corporation.	)	File No. 011-0242

Comments of Citizens for Voluntary Trade to the Proposed Consent Order

On December 3, 2002, the Federal Trade Commission announced a proposed consent order in their case against the National Academy of Arbitrators ("NAA"). Citizens for Voluntary Trade ("CVT"), a nonprofit association, file the following comments in opposition to the proposed order.

Introductory Statement

This is the second case brought by the FTC this year against a private membership association. Like the previous case against the American Institute for Conservation of Historic and Artistic Works ("AIC")[1], the case against NAA revolves around two sentences in an ethics code. The FTC considers even the most innocuous provisions of such codes a breeding ground for *potentially* anticompetitive conduct. But the FTC can't show any *actual* harm resulting from these ethics codes; furthermore, the Commission appears to not even understand the intentions behind the challenged clauses. Instead, the FTC took these sentences drastically out of context—indeed, arguing that context was completely unnecessary. The result is this proposed consent order, a document that does nothing to further any identifiable "public interest" while expanding the FTC's self-proclaimed power to regulate the internal affairs of private organizations not directly engaged in interstate commerce.

Jurisdiction

At the outset, CVT objects to the FTC's claiming jurisdiction over NAA. Although the proposed order asserts NAA is a "corporation" under Section 4 of the FTC Act[2], the plain meaning of the statute, the nature of NAA's operations and the Supreme Court's mandate in *California Dental Association v. FTC*[3] all conspire to defeat jurisdiction

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[1] FTC File No. 011-0244.
[2] 15 U.S.C. § 44.
[3] 526 U.S. 756 (1999).

here. Hence, NAA's concession in the consent order is insufficient to establish jurisdiction as a matter of law.[4]

NAA is a nonprofit corporation organized under Michigan law. They are exempt from federal income tax under 26 U.S.C. § 501. The Internal Revenue Code directly conflicts with the FTC Act to the extent the Commission and the Supreme Court erroneously interpreted the laws to find that a nonprofit corporation under the former can be deemed for-profit under the latter. The FTC's position is that any corporation, regardless of nonprofit purpose or tax-exempt status, is subject to the FTC's jurisdiction under 15 U.S.C. § 44 if the organization provides pecuniary benefits to its members. The Supreme Court agreed to some extent in *California Dental*, holding that many nonprofit organizations are subject to FTC jurisdiction, but that not all are. The Court declined to state a limit, however, leading to the FTC's present efforts to effectively erase the distinction altogether.

The facts of this case are easily distinguished from *California Dental*. The California Dental Association (CDA) operated numerous for-profit entities directly intended to enhance the profitability of member dentists. Also, CDA is composed of dental professionals. The NAA, in contrast, operates no such for-profit subsidiaries, and its membership is not exclusively engaged in arbitration services. Indeed, NAA's members do not rely on arbitration for their principal source of income. Many NAA members are academics employed by universities. Others are attorneys with distinguished private practices.

While arbitration is not exactly a hobby, the NAA is more akin to an association of specialized enthusiasts than to a professional practice group like the CDA. Labor-management arbitration is not, contrary to the FTC's inference, a vast independent marketplace. The NAA only has about 600 members. They are not a cartel or an exclusionary body. They cannot prevent non-members from arbitrating a dispute. Indeed, the whole point of arbitration is that the neutral is someone selected by the parties without outside interference; if parties wish to select a non-NAA arbitrator, there is nothing the academy can do about it.[5]

The mere fact that NAA maintains an ethics code does not give the FTC jurisdiction. The Commission appears to consider a code like NAA's a "method of competition" subject to FTC Act scrutiny. But that's simply not the case. An ethics code is not an agreement among competitors designed to restrain competition, but to enhance it. In this sense, the clear *intent* of NAA's ethics code was to improve the marketplace both for consumers and service providers. This context is completely absent from the FTC's analysis.

Nonprofit associations routinely adopt voluntary codes which, while they might affect commercial matters, are not in and of themselves contractual arrangements that constitute actual commerce. As the American Society of Association Executives explained in their *amicus* brief in *California Dental*:

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[4] That NAA declined to fight the FTC on jurisdiction is suspicious, especially considering NAA counsel Veronica Kayne is a former FTC assistant director in the Bureau of Competition. CVT questions whether respondent counsel's loyalty is to her client's interests or her former employer. Certainly, an expansion of the FTC's jurisdiction would also mean additional future business for her private antitrust practice.

[5] The NAA's rules clearly state that they do not recommend or appoint arbitrators; that function is generally left to bodies such as the American Arbitration Association and the Federal Mediation and Conciliation Service.

> Another quasi-governmental role that is commonly undertaken in this country by nonprofits is setting standards. For example, the American Red Cross sets standards for the safe handling of blood products. Governments often rely on privately promulgated standards as the bases for codes they enact. The American Bar Association's Model Rules of Professional Conduct is an example well known to the legal profession. Most local building codes are based on standards developed by nonprofits. The Financial Accounting Standards Board promulgates Generally Accepted Accounting Principles (GAAP) which standardizes accounting so that companies, shareholders, or government can understand the assumptions and levels of review underlying accounting documents and establishes the analysis necessary to portray the financials of an enterprise under scrutiny. Other nonprofits serve similar functions less formally by providing the public with information with which to make evaluations. For example, the American Institute of Philanthropy provides potential donors with ratings, opinions and other information on financial and managerial practices of a wide variety of charities.

The FTC's jurisdictional theory is totally incompatible with the standard-setting function of nonprofit organizations. Under the Commission's reasoning, all ethics codes are—*by definition*—agreements in restraint of trade subject to prosecution under the FTC Act. Congress could not have reasonably intended the FTC to exercise that kind of broad-based power over a useful and vital part of American society.

This leads us back to the *California Dental* problem of just where to draw the line. Like the Supreme Court, CVT remains unsure where the actual line is. But just as the Court was clear that CDA was on the FTC's side of the line, here we're convinced that NAA is not. NAA is an honorary society of part-time arbitrators, not a professional guild exercising monopoly control over the marketplace. The average person can easily make that distinction, yet the FTC is unwilling to.

Finally, there seems to be some bureaucratic toe-stepping in this case. NAA's ethics code, after all, does not exist in a vacuum. The code is promulgated in direct consultation with two other organization: the American Arbitration Association and the Federal Mediation and Conciliation Service. The FMCS is a government agency, charged by Congress with promoting voluntary dispute resolution.[6] FMCS has long been aware of, and specifically endorses, NAA's ethics code. In fact, FMCS recommends and appoints arbitrators based on the NAA provisions. While no law specifically forbids the FTC to act against a nonprofit association tied to another United States agency, the FTC should at least give some weight to the fact that FMCS has known about the NAA rules for years, yet has never seen fit to object to the provisions challenged by the FTC. At the

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[6] *See* 29 U.S.C. § 172, et seq.

very least, the FTC should consider the possibility that FMCS officials know more about the arbitration marketplace than they do.

The Complaint

Even if jurisdiction could be established, the FTC's complaint fails to state an adequate basis to obtain any relief. The Commission's only argument is that two sentences in NAA's ethics code constitute an unfair anticompetitive act. The sentences read as follows:

> "An arbitrator must not solicit arbitration assignments. Solicitation, as prohibited by this section, includes the making of requests for arbitration work through personal contacts with individual parties, orally or in writing."[7]

The FTC has derived a federal case from this provision, expending resources to obtain a consent order requiring NAA to remove these offending words. But what exactly is the context here? The FTC offers none, because they're not interested in context. Under Commission policy, such restraints on advertising are considered *per se* illegal. But under *California Dental,* the FTC is not permitted to make that assertion anymore. The Court, and later the Ninth Circuit on remand, told the FTC they unless a provision is facially anticompetitive, the Commission must make some effort to place things in context. Since the NAA ethics rule is not obviously illegal to anyone (as few voluntary ethical codes would be), it is necessary to figure out why NAA considers this policy necessary and proper.

The simplest explanation is that since arbitrators act as neutrals in disputes, solicitation of assignments might compromise an arbitrator's impartiality. An arbitrator presumably comes into a conflict with no direct knowledge of the situation (aside from his own expertise in the labor-management field) and thus no bias exists or is perceived to exist. It is reasonable to conclude that solicitation of assignments might alter these perceptions. Hence, the NAA rule is reasonably designed to ensure a high quality of service *to the customer* by ensuring an arbitrator's essential qualification—his neutrality—is not compromised.

In response, the FTC claims consumers are unjustly denied the benefits of advertising. It's unclear what those benefits are. Labor-management arbitration is not a consumer product, but a specialized service sought by a small, easily defined audience. Information about the background, qualifications, and specialized skilled of an arbitrator are readily available from numerous sources, including the NAA and the FMCS. Consumers have never been denied access to truthful, non-deceptive information about arbitrators. The NAA code only discusses the means by which information can be provided in a manner that doesn't compromise the fundamental service being rendered. This cannot be considered a violation of the FTC Act, since the "method" at issue is designed to maximize consumer benefits while preserving professional integrity.

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[7] The NAA Code of Professional Responsibility § 1-3.

Furthermore, the specific examples of consumer harm cited by the FTC in their analysis (though not the complaint itself) demonstrate the trivial nature of this action. The FTC cites four specific advisory opinions as support for their belief that the solicitation ban is an "unfair method of competition." A contextual review of these opinions, however, fails to uncover any substantial evidence of illegal activity.

In Formal Advisory Opinion 14, the NAA states: "An arbitrator is ordinarily required to give a biographical sketch to appointing agencies. He (or she) may also give this biography to any labor or management representative who requests it. These actions, however, are significantly different from sending unsolicited letters and biographical data to those who employ arbitrators." The opinion was a response to an NAA member's decision to send an unsolicited mailing to labor and management representatives. This mailing highlighted the arbitrator's membership and positions within NAA, and served the obvious function of soliciting future business. Given these circumstances, the NAA's advisory opinion was a reasonable act designed to maintain the integrity of both the ethics code and the organization's reputation. After all, NAA specifically states they do not recommend or appoint arbitrators for assignments. The member's mailing in this instance gave the exact opposite impression—that he should be given assignments as a result of his NAA "endorsement."

Another opinion cited by the FTC, Advisory Opinion 18, is taken completely out of context. The FTC says: "Opinion 18 declares it unethical for an arbitrator to 'distribute his business cards, except on request, to potential clients.'" Actually, Opinion 18 deals with a wide range of questions arising from the solicitation rule. Fourteen specific activities are covered by the opinion. In fact, the opinion describes 10 ethical means of arbitrator promotion, such as including one's name in arbitrator directories, purchased listings in phone books, and identifying one's NAA affiliation in professional publications. The specific provision the FTC refers to states that it is a violation of the code to distribute business cards unsolicited to advocates and potential clients. It does not, however, prevent an arbitrator from advertising his services to the public generally. The intent is to prevent specific solicitation of assignments.

One can argue that the NAA enforces their code quite literally. But that should not serve as a liability. After all, why maintain an ethics code if you don't intent to follow it? All evidence suggests that NAA not only takes their code seriously, but that they exhibit great pride in maintaining such a high level of professional standards. The FTC's actions in this case not only damage these standards, but send a message to other professional associations that emphasizing ethics is a potentially illegal action. At a time when Americans are grasping with recent corporate ethical scandals, such a message could be very damaging.

The Remedy

The consent order requires NAA to remove the solicitation from their ethics code, and to not maintain or enforce any future provisions that might—horror of horrors—restrict solicitation of arbitration work. At the same time, the FTC has also imposed the following nonsensical condition:

> The order permits NAA to adopt and promulgate reasonable ethics guidelines governing the conduct of its

> members with respect to representations that NAA reasonably believes would be false or deceptive or governing conduct that NAA reasonably believes would compromise or appear to compromise the impartiality of arbitrators.

This is an outright lie. The *current* provision of the ethics code provides for just this, and it got the NAA banished to the FTC's doghouse. The FTC either has no intention of honoring this provision, or they're tacitly admitting their case was a sham from the start. Either way, it's hard to fathom how the NAA can protect the impartiality of arbitrators without running afoul of this consent order.

It must be noted that the consent order doesn't just restrict conduct; it changes the entire nature of the NAA's relationship to the arbitration services marketplace. Allowing arbitrators to solicit assignments goes against more than 50 years of NAA policy, a policy that the United States Government—through the FMCS—has accepted and applied. Such a radical shift in the government's position requires far more consideration and explanation than is offered by the FTC in their complaint and analysis.

Furthermore, the FTC's intrusion into a private association's affairs is simply offensive. Individuals have the right to peaceably associate for lawful, voluntary purposes. NAA is not required to justify its existence or practices to the FTC, or to any other federal agency that decides to seeks to manufacture business for themselves. The First Amendment not only guarantees the right of association, it also guarantees freedom of speech. NAA's ethics code is, at its core, a statement of opinion with respect to the membership's beliefs on ethical matters. The FTC, through this consent order, explicitly forbids such expression when it runs afoul of the FTC's *preferences* in certain subjects. When you get right down to it, this case isn't about protecting competition, but silencing dissent from FTC doctrine. It's tyranny in its most naked form, and this fact should not be lost upon anyone.

Conclusion

Ultimately, CVT believes that NAA is not the FTC's real target. NAA was simply a convenient means by which the FTC could circumvent *California Dental*, and restore the Commission's original intent of regulating *all* nonprofit organizations in every sector of American culture. The FTC has never recognized any constitutional, statutory, or judicial limit on its jurisdiction or authority. And to date, nobody in a position of oversight has shown any inclination to give the FTC any such limits. The Commission is literally a spoiled toddler free to cry, whine, and scream until it gets its way in every matter it demands attention on. NAA was simply today's toy of preference.

This case sets a precedent that is highly damaging to the fabric of American society. Nonprofit organizations are the foundation of America's tradition of self-governance. These groups enable us, as a people, to enact standards and rules outside the formal, force-based mechanisms of the government. Nonprofit groups are dynamic in their character, allowing for specialized expertise and trial-and-error to control outcomes. NAA's ethics code was not pulled out of thin air, but resulted from decades of careful consideration, debate, revision, and application. The FTC's brief history in

prosecuting this matter does not come close to matching NAA's knowledge of this marketplace and what regulations most benefit it. The FTC assumes—as federal agencies often do—that there is only one best way to accomplish a task, and that the government is the best arbiter of that way.

There is an especially revolting irony to this case, in that the FTC is directly interfering with the prerogative of another federal agency, the FMCS. That agency is an example of government acting in a responsible capacity, by providing for alternative dispute resolution at the request of labor representatives and business management. FMCS furthers the principles of voluntary trade and self-government embodied by the United States Constitution. The FTC, in stark contrast, stands for the arbitrary and capricious exercise of force against innocent individuals.

The FTC Act was never designed to be used in this manner. Granted, the Commission's mandate is recklessly vague—to prevent "unfair methods of competition"—but even without objective guidelines, FTC officials need to exercise some semblance of reason. They have not done that in this case. Instead, the FTC took two sentences deliberately out of context, and twisted them around until they could string together a case.

The FTC can identify no legitimate public interest to justify this consent order. For the reasons set forth above, entry of the order should be rejected, and the complaint against NAA dismissed with prejudice.

Respectfully Submitted,
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