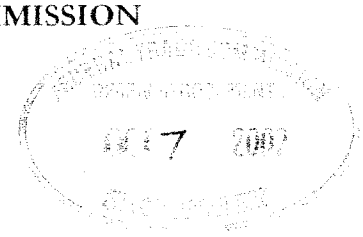
UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION



In the Matter of)

)

American Institute for) File No. 011-0244

Conservation of Historic)

and Artistic Works,)

)

a corporation.)

)

Comments of Citizens for Voluntary Trade to the Proposed Consent Order

Pursuant to the September 10, 2002, request for public comments on the proposed Consent Order with the American Institute for Conservation of Historic and Artistic Works ("AIC"), Citizens for Voluntary Trade submits the following comments.1

Summary

AIC is a professional association of approximately 3,100 conservation professionals. Since 1967, AIC's membership has maintained a voluntary professional ethics code. This code consists of the *AIC Code of Ethics and Guidelines for Practice* and the accompanying *Commentaries to the Guidelines for Practice*. This consent order deals with two sentences in the commentaries. According to paragraph seven of the FTC's Complaint, the commentaries state "the consistent undercutting of local or regional market rates should be understood to be an unprofessional practice." The commentaries also state "when damage to the cultural property is imminent, and funding is limited, a conservation professional may work at reduced fees or *pro bono*."

The FTC alleges these two statements, taken alone and without context, violate Section 5 of the Federal Trade Commission Act.2 The proposed order directs AIC to remove the two challenged clauses from their commentaries and publicly disclaim the position they state.3

As a matter of law, neither the FTC's complaint nor the remedies in the proposed order are justifiable. The FTC should never have brought this case. The Commission never states any basis to obtain relief under Section 5. The FTC also disregarded the Supreme Court's mandate in *California Dental Association v. FTC*4 to apply a "rule of reason" test. Instead, the FTC used a *per se* standard forbidden by the Supreme Court in

cases like this one. Applying the correct legal standard, AIC's ethics code posed no threat to competition. The challenged commentaries are not a price-fixing agreement, but rather a statement of the organization's opinion. The FTC, in essence, is punishing a private membership association for holding a viewpoint contrary to the Commission's. Such government suppression of free speech is not permitted under the First Amendment.

In addition, we believe that the price guidelines in the AIC commentaries enhanced competition, because they helped to build a "brand name" for premium conservation services. Like brand names in other industries, AIC's endorsement of member conservators raises the quality of services provided to the consumer, while allowing conservators to charge a premium for their work. The FTC's narrow, one-dimensional competition model failed to consider these benefits.

Finally, this consent agreement sets a dangerous precedent. Not only is this case a waste of taxpayer funds and FTC resources, but the Commission effectively granted itself the right to regulate the internal policies and opinions of private membership organizations. There is no justification in the Constitution or law for this violation of individual rights.

For all this reasons, the consent agreement is not in the public interest, and the proposed order and complaint against AIC should be dismissed with all deliberate speed.

Comments

I. The FTC's allegations do not justify the proposed remedies as a matter of law.

Although the proposed order resulted from a consent agreement, that does not, in our judgment, absolve the FTC of its obligation to present a legally justifiable case against AIC. Indeed, the fact the FTC presented a complaint with the proposed order indicates the Commission's acceptance of this duty. Had AIC not settled, the FTC would have proceeded to administrative trial based on its complaint. Therefore, it is appropriate to analyze the complaint's sustainability under the law.

After reviewing the complaint, it's clear that the FTC has no case. The complaint presents no allegations that would justify the relief granted in the consent order. If it is not foreseeable that the FTC would win at trial, than it is impossible to argue the public interest is served in obtaining unwarranted relief via settlement. AIC's acceptance of the consent order does not, in our minds, validate a fatally defective complaint.

a. Section 5 does not prohibit AIC's actions.

The FTC relies solely on Section 5 of the FTC Act in the complaint. The section states, in relevant part, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

Neither Congress nor the FTC explicitly defines "unfair" in the context of Section 5. Congress made a vague pronouncement, and left the FTC and the courts to discover a rationale behind Section 5. The FTC, for its part, takes an *ad hoc* approach to designating "unfair" conduct, appearing to know it when it sees it. In this case, for example, there is no standing FTC rule or policy that AIC's ethics code violated. The FTC does not explicitly prohibit private associations from adopting ethical codes, nor does the Commission specify what types of provisions may be included in such codes. Thus, AIC had no prior knowledge that the challenged provisions violated Section 5. Indeed, no reasonable person could have anticipated the FTC's complaint in this matter, since there are no clear and concise guidelines for groups like AIC to follow in

drafting ethical codes.

Interpreting Section 5 literally, it's clear that AIC's ethical code is not covered by the statute. The challenged provisions do not constitute a "method of competition" or an "unfair or deceptive" practice. The first provision states, "the consistent undercutting of local or regional market rates should be understood to be an unprofessional practice." The second provision offers the caveat, "when damage to the cultural property is imminent, and funding is limited, a conservation professional may work at reduced fees or *pro bono*."

Taken together, these provisions do not constitute a "method of competition," according to the plain meaning of the term. A "method" is a specialized procedure. Arguably, the provisions might meet this threshold, given the modifying caveat of the second statement. But if this is a method, it is not one designed to regulate "competition" among conservators. The statements do not direct any conservator to take a specific action with regard to price, nor do they explicitly prohibit a particular act. For instance, the statements do not say, "a conservator must charge no less than $100 per hour." That would be a "method of competition." What we have here is little more than the AIC's expression of a general pricing philosophy. It's an opinion. The first statement is deliberately vague so that, presumably, it would not be interpreted as a literal mandate. The second statement is less vague, but it is still no more than an opinion. It says a conservator "may" take a particular action if his judgment supports it. There is no mandate or standing direction. The second statement merely confirms the idea that every "rule" has exceptions; no manmade principle is universally applicable. The AIC was simply trying to avoid the very trap the FTC has fallen into-assuming that every situation has a single, inflexible answer.

Since the statements are not a "method of competition," the FTC must alternatively prove they constituted an "unfair or deceptive" practice. The Commission cannot do so. There is obviously no deception here. AIC's ethical code has been public knowledge for more than 35 years. Any interested individual can access the documents through AIC's website.[5] Nothing was concluded in secret, and it is not reasonable to assume consumers were unaware of AIC's beliefs on pricing.

This leaves only the nebulous "unfair" descriptor. Since the FTC fails to supply a valid definition, we are compelled to rely on the dictionary. One definition of unfair is "not equitable or honest"; an alternative is "not impartial or according to the rules."[6] AIC's actions meet neither definition. In the context of a membership association, the goal of any rule or policy is to ensure equitable treatment *of its members*. AIC is not obligated to consider the interests of non-members except as required by superior law (and, as we've established, there is no express law forbidding the challenged statements.) By this standard, the statements are not "unfair." The FTC presented no evidence or allegations to suggest the challenged statements were not equitable to all AIC members. Nor is there any evidence that the policy is dishonest; the statements appear to be a truthful reflection of the members' beliefs. Indeed, it is the FTC that is forcing AIC to adopt a position contrary to their beliefs, making the resulting policy "deceptive" and "unfair." Finally, the ethics code was adopted in accordance with AIC's bylaws, making the secondary "not impartial or according to the rules" definition also inapplicable.

Since the FTC has failed to prove any element of a Section 5 violation, it lacked legal foundation to pursue its complaint in good faith, making the resulting consent agreement a fraudulent act inconsistent with the public interest. On this ground alone, the proposed order should be withdrawn.

b. The use of a *per se* rule in this case contradicts the Supreme Court's mandate in *California Dental Association v. FTC.*

Even assuming the FTC had grounds to allege a Section 5 violation, the Commission applied an insufficient legal standard in assessing AIC's conduct. Without directly admitting it, the FTC used a *per se* rule to

determine AIC's alleged violation. The United States Supreme Court, however, made it clear to the FTC quite recently that cases such as these are governed by a "rule of reason" standard.

The FTC is no doubt familiar with *California Dental Association v. FTC*. In that case, the FTC conducted an administrative trial against a private membership association, CDA, over provisions in that group's ethical code. The Commission used a *per se* rule to find that CDA engaged in unfair competition under Section 5. Both the Ninth Circuit and the Supreme Court concluded that the *per se* rule was inappropriate. But while a divided Ninth Circuit panel affirmed the FTC's decision after applying a "quick-look" rule of reason test7, the Supreme Court reversed and remanded for further consideration under a more robust rule of reason analysis.

Briefly stated, the rule of reason requires the FTC to determine whether challenged conduct is, on balance, pro- or anti-competitive. The *per se* rule, by contrast, only requires the FTC to establish that the conduct occurred. Given the vast conceptual chasm between the two tests, it is essential the FTC apply the correct test. In AIC' case, the FTC incorrectly decided to go with the *per se* rule. At an absolute minimum, the Commission was obligated under *California Dental* to use some variant of the rule of reason analysis.8

In *California Dental*, the FTC's use of the *per se* rule was rejected by two FTC commissioners, the Ninth Circuit, and the Supreme Court. The judicial consensus is clear that the FTC may use a *per se* rule in only limited circumstances. In the Ninth Circuit's first ruling in *California Dental*, the majority noted:

> "per se analysis has only applied to price fixing, output limitations, horizontal market divisions, tying, and group boycotts@The Supreme Court, and this court, have been unwilling to expand the categories of conduct subject to the per se prohibitions@This is especially true where the economic impact of the restraint is not immediately obvious and where the restraint is a rule adopted by a professional organization."9

Nothing in the complaint accuses AIC of behavior that falls into any of the five categories listed above. AIC's ethics code does not fix prices, limit output, divide the marketplace, improperly tie, or provide for any group boycott. At best, the challenged provisions might constitute an extremely vague price-fixing arrangement, but the complaint alleges no facts to support that conclusively. In the absence of evidence, it is not "immediately obvious" that there was any "economic impact" of AIC's ethics code in the marketplace. Therefore, the *per se* rule cannot legally apply to this case.

The Supreme Court did not, regrettably, set a very clear "rule of reason" test for these cases. However, the *California Dental* court required the FTC consider the "circumstances, details, and logic of a restraint" in analyzing challenged actions.10 The FTC did none of those things in this case. No attempt of any kind is made, in the complaint or supporting documents, to provide a context for AIC's ethics code. Indeed, the FTC takes two sentences from a lengthy document and cites them completely out-of-context for the express purpose of providing a pretext for a Section 5 prosecution. The FTC created a self-fulfilling prophecy: taken without context, any business behavior or action is "unfair" or "anticompetitive" from at least one person's subjective viewpoint. We believe that *California Dental* commands the FTC to base its decisions in objective law. The Commission must clearly identify a factual basis for its actions, and then prove its allegations without arbitrarily and capriciously excluding facts and laws that interfere with the FTC's desire to mount a successful prosecution. In this case, the FTC failed to do that.

c. Under the "rule of reason" standard, AIC's conduct was not illegal.

Had the FTC (or an appellate court) reviewed the complaint's allegations under the appropriate "rule of reason" test, the only logical conclusion would be a finding in AIC's favor. The FTC's case simply cannot survive even minimal rational scrutiny. The context of AIC's ethics code does not support the FTC's interpretation of the facts or its ultimate conclusions.

Paragraph six of the complaint states that AIC "acted to restrain price competition among conservation professionals by restricting its members from offering conservation professional services at discounted fees or for free." The only evidence of this alleged conspiracy is the existence of the two challenged provisions in the ethics code. The FTC alleges no overt act or conduct on the part of AIC that would prove an active conspiracy to fix prices or restrain trade.

In order to accept the FTC's interpretation, you would have to conclude that AIC is principally organized to raise the prices charged by its members. In other words, you would have to find AIC is a cartel, guild, or union. The ethics code doesn't prove that. The ethics code is a voluntary agreement made by independent professionals seeking to improve the overall quality of their vocation. Nothing in the ethics code suggests AIC exists to engage in monopoly pricing or engage in other coercive conduct.

The ethics code deals with professional standards of conduct. The terminology is broad and relies on the judgment of individual conservators for its understanding. It is clear, from an outsider's reading, that AIC intended to state the general principles of its membership. AIC did not, in our judgment, intend to dictate how the conservation profession was to operate on an individual, day-to-day basis. Such goals are beyond the scope of an ethics code, and would require more precise statements or policy, not to mention a clear method for implementing such policies. If the intent of AIC had been to fix prices, it is illogical to assume they would have used such a vague and imprecise method. It could be argued that the ethics code was part of a more elaborate conspiracy, but the FTC never alleges that. They allege that the ethics code itself is the conspiracy. But that reading is inconsistent with even a cursory examination of the document as a whole.

The first challenged statement says "the consistent undercutting of local or regional market rates should be understood to be an unprofessional practice." This begs the question: what is the consequence of engaging in an "unprofessional practice." According to AIC's bylaws, a member who is found guilty of "unethical conduct" under the organization's due process is subject to sanctions "necessary to protect the integrity of AIC".11 Violating this particular section of the ethics code does not automatically constitute grounds for expulsion.

There is no coercive penalty for violating the ethics code. Members are not subject to death, imprisonment, or restriction of their ability to work as a professional conservator. The worst consequence of unethical conduct, it appear, is that an individual can no longer claim affiliation with AIC professionally. That hardly seems unreasonable; after all, a membership organization has the right to disassociate itself from an individual who disagrees with the group's principles. Such discrimination is at the heart of the freedom to associate with others, a right guaranteed by the First Amendment.

AIC's ethics code is not a price-fixing agreement. It is, rather, a statement of organizational principles. As we noted above, it's an *opinion*. AIC is stating what they believe to be, based on their experience and judgment, the best means for conservators to promote and expand their profession. This is the goal of all professional organizations. For the FTC to punish AIC for expressing their principles is not just inconsistent with law; it violates the very *principles* that are the foundation of the United States Constitution. The FTC wants to punish AIC for expressing its opinion on a particular subject. Since the FTC holds a contrary opinion, it has used its coercive power to prevent AIC from expressing its views. **The FTC is not protecting competition; it is suppressing dissent**. This is naked tyranny, and it is absolutely, unequivocally not in the public interest.

II. AIC's actions benefited competition.

Another casualty of the FTC's reckless allegations is any attempt to determine whether AIC's ethics code actually *benefits* competition and consumer choice. We strongly believe that provisions such as those challenged by the FTC enhance competition. If the FTC looked beyond its illogical fixation on price, it would recognize and understand the value of AIC's code of conduct in helping to provide a superior level of service to consumers.

Consider why conservators likely joined (and formed) AIC in the first place. Given that AIC charges membership dues, we can assume that members expect, and receive, something of value in return for their investment. By the FTC's own definition, AIC is a corporation that provides benefits to its members, so this point is not disputed.12 The question, then, is what are the actual benefit enjoyed by individual AIC members.

A key benefit of belonging to a professional organization, we believe, is the ability to become more profitable as an individual. In other words, conservators expect their AIC membership to enhance their customer base, professional reputation, and their ability to charge a premium for services. AIC isn't just an organization, after all, but a brand name to those seeking professional conservation services. AIC maintains an ethics code for the express purpose of asserting a particular standard of quality for the conservation profession. The ethics code is just as much about advertising as it is industry regulation; informed consumers know that AIC member adhere to a particular set of standards designed to enhance the quality of the services rendered. This provides a tangible benefit for the conservator and for the consumer. The FTC obviously never considered this.

To offer another example of the value of professional brands, consider the American Automobile Association (AAA.) A benefit of AAA membership is price discounts at certain motels bearing a AAA sign. From the FTC's perspective, this is a good thing because it results in a lower consumer price. But not all consumers benefit. After all, non-AAA members do not receive the discount. And because AAA has certified a given motel as meeting its quality standards, the motel can now charge a higher price to everyone, and then offer the discount to AAA members. Thus, AAA has created a premium level of customer service, while allowing producers to charge higher prices. Competition is preserved, and everyone benefits.

The AAA example demonstrates how brands create consumer value. Brands are not just a byproduct of advertising, but a key source of consumer information. Consumers purchase Coca-Cola because they know the brand guarantees a safe, consistently high-quality product. There's little chance of Coca-Cola putting out a product they know to be inferior, dangerous, or unsafe, because such actions would destroy the value of their brand, and ultimately the company's profitability. One effect of such brand destruction would be Coca-Cola's inability to charge a premium price for their product (which they do when compared to generic-brand colas.)

AIC members provide a service, rather than a product, but the branding principle is the same. Membership in AIC allows individual conservators to advertise their association with the group in soliciting customers. Like buying a Coke, hiring an AIC conservator is an assurance of a premium level of quality. Most customers, we presume, are willing to pay a "premium price" for these services. Certainly, the FTC presented no evidence that would suggest otherwise. The Commission has a long history of ignoring actual consumer demands, and instead substituting the FTC's judgment for the marketplace's. This approach may stroke the egos of the Bureau of Competition's lawyers, but it does not accurately reflect the public interest.

The challenged provisions do appear to serve the purpose of discouraging brand dilution. AIC has a legitimate interest in preserving the value of its brand name. To simply permit any AIC-sanctioned

conservator to offer services at greatly reduced or no charge, as the FTC wants, would undercut the brand's value. It would remove a key feature of the brand without offering the customer any added quality assurance in return. It would also undermine AIC's right to maintain voluntary ethical standards for the conservation profession. Any particular provision of AIC's ethics code could be declared, without context, to be illegal under Section 5. There would be nothing to stop the FTC from prosecuting AIC in the future over other provisions that subjectively offend the Commission's particular sense of how AIC should conduct its affairs. Indeed, the simple fear of future action serves as a prior restraint on AIC, since they will take unnecessary caution in acting from this point forward. Having been burned once by the FTC, AIC will be reluctant to anger the Commission in the future. This vicious cycle cannot be permitted to operate. It is not in the interest of AIC, the FTC, or the public.

III. The consent agreement sets a dangerous precedent.

Finally, there is an acute danger that this consent order, if it stands, will set a dangerous precedent. Above we noted that by signing this consent agreement, AIC effectively surrendered the ability to govern its own affairs. Armed with this precedent, we fear the FTC will be encouraged to go after other innocent professional organizations over vague provisions in their ethical codes. Most professional associations maintain an ethics code like AIC's, and many have provisions identical in scope and effect to the ones challenged here. There is no doubt, in our minds, that the FTC has only begun to wage war against voluntary professional associations.

It would be illogical not to infer a connection between the FTC's defeat in *California Dental* and this action against AIC. Three years ago, the FTC faced a well-financed, principled opponent that would not back down against the Commission's bullying, and the result was a thorough ass-whooping of the FTC by the United States Supreme Court. In seeking to recover from that embarrassment, the current Commission (under a different chairman, we note) has decided to pursue smaller organizations that lack the resources or ability to fight back in court. Given that *California Dental* spent three years going from the FTC through the appellate courts, it's certainly understandable that AIC wanted to settle this matter quickly. The FTC knew that, and presumably targeted AIC for that very reason. It's as if the FTC is the University of Florida scheduling a game against Wofford. The Commission is trying to pad its schedule with soft wins; not to get to the Orange Bowl, of course, but to create the illusion that the FTC is actively protecting the public interest. And with enough soft wins, the FTC may gain enough confidence to resume targeting the larger targets like the California Dental Association. But as Florida coach Ron Zook might advise, you don't follow a loss to Florida State by having your team cheat against Wofford. The FTC can't use a fraudulent prosecution to atone for its courtroom defeats.

There is also a frightening brand of bureaucratic imperialism emerging from this case, albeit one the Supreme Court regrettably endorsed. AIC is a membership association, not a business corporation in the traditional, for-profit sense. While members derive pecuniary benefits from their participation in AIC, the organization itself is not engaged in marketplace competition. AIC does not actually provide any conservation services. Nor is it in direct competition with individual conservators. Therefore, we question the FTC's decision to assert jurisdiction over AIC in the first place. As a dissenting judge noted in the Ninth Circuit's first *California Dental* opinion, "non-profit membership organizations have no place in the commercial world of the F.T.C."[13]

We recognize that the Supreme Court unanimously rejected this argument in *California Dental*. Nevertheless, we maintain the FTC Act was never applicable to nonprofit membership groups, or any group not directly engaged in competition. AIC exists to benefit its members, not to provide outside consumers with any particular service. Although the *California Dental* court upheld the FTC's jurisdiction over such groups, the FTC would be well advised to cease harassing such organizations. These groups provide an invaluable

forum for the free exchange of ideas among people with common interests, and the FTC's naked interference with their operations can only serve to stagnate the competitive marketplace and chill the free expression of individuals.

In the end, it is remarkable that the FTC even bothered to bring this prosecution. Even if AIC was guilty of the atrocities alleged, it's difficult to justify the government's expenditure of resources to obtain this outcome. In practical terms, the consent agreement simply requires AIC to remove two sentences from its ethics code. What did the FTC spend to get AIC to do that? Even if it's just a few thousand dollars, we believe that money would have been better spent on any of a thousand other objectives.

Conclusion

The FTC's case against AIC is defective in every aspect. The complaint does not allege any conduct that would objectively violate Section 5 of the FTC Act. Indeed, the FTC never alleged much conduct at all; instead the Commission relied on a pair of sentences-expressing an opinion-to justify this consent agreement. In doing so, the FTC demonstrates a reckless disregard for the First Amendment, the United States Constitution, and simple logic. Nothing in the proposed order will enhance consumer protection. By stripping AIC of a useful tool to maintain its brand identity, consumers will likely receive a less consistent quality of conservation services in the future. The FTC may be the winner, but competition is a big loser.

Citizens for Voluntary Trade respectfully asks the FTC to, for once, look at all the facts of a case, and not just those that are convenient to the Government's short-term interests. No reasonable person could read AIC's ethics code and reach the FTC's conclusion. The Supreme Court, under *California Dental*, would not have, because they would require a "rule of reason" analysis. And nothing about the FTC's allegations here are reasonable.

The public interest neither requested nor required the FTC's decision to rewrite a private organization's statement of principles. For the reasons stated above, the consent agreement should be withdrawn, and the complaint against AIC dismissed with prejudice.

Respectfully Submitted,

Citizens for Voluntary Trade

S.M. Oliva

David Mecklenburg

Roger Blakelock

2000 F Street, N.W., Suite 315

Washington, DC 20006

Telephone: (202) 223-0071

Facsimile: (760) 418-9010

E-mail: info@voluntarytrade.org

Dated: October 7, 2002

1 Citizens for Voluntary Trade is an nonprofit association organized under District of Columbia law.

2 15 U.S.C. ' 45.

3 Decision and Order, III (A).

4 526 U.S. 756 (1999).

5 <http://aic.stanford.edu>

6 The Reader's Digest Oxford Complete Wordfinder 1671 (1996).

7 *See* California Dental Association v. FTC, 128 F.3d 720 (9th Cir. 1997).

8 *See* 526 U.S. at 760 ("where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the Court of Appeals performed.")

9 128 F.3d at 727.

10 526 U.S. at 781.

11 AIC Bylaws, ' II-12.

12 *See* Complaint at paragraph 2.

13 128 F.3d at 730 (Real, J., dissenting).