

Complaint

IN THE MATTER OF

NATIONAL ACADEMY OF ARBITRATORS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4070; File No. 0110242

Complaint, January 13, 2003--Decision, January 13, 2003

This consent order, among other things, prohibits the Respondent National Academy of Arbitrators – an honorary association for labor-management arbitrators (who hear and decide disputes between labor unions and employers), with approximately 600 members, many of whom arbitrate labor-management disputes for a fee – from maintaining or enforcing any policy, ethics rule, interpretation or guideline that impedes or restricts arbitrators from engaging in advertising truthful information about their services, including the prices, terms and conditions of sale of their services. The order also prohibits the respondent from maintaining or enforcing any policy, ethics rule, interpretation or guideline against solicitation of arbitration work. In addition, the order requires the respondent to remove the provisions that are inconsistent with the order from its Code of Professional Responsibility for Arbitrators of Labor-Management Disputes; from its Advisory Opinions; from any policy statement or guideline; and from its website, and to publish a copy of the order and complaint in its newsletter and on its Web site.

Participants

For the Commission: *L. Barry Costilo, Harry Schwirck, Richard B. Dagen, Russell Porter, and Louis Silvia, Jr.*

For the Respondent: *Veronica Kayne, Wilmer, Cutler, and Pickering.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the National Academy of Arbitrators (“Respondent NAA” or “NAA”), a corporation, has violated and is violating the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the

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Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

PARAGRAPH ONE: Respondent National Academy of Arbitrators, is a corporation organized and existing under the laws

of the State of Michigan, with its principal office and place of business at Suite 600-A, 1121 Boyce Road, Pittsburgh, Pennsylvania 15241.

PARAGRAPH TWO: Respondent NAA is a national professional association of Arbitrators of labor-management disputes. NAA has approximately 600 members, many of whom arbitrate labor-management disputes for a fee.

PARAGRAPH THREE: The general business practices of Respondent NAA and its members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

PARAGRAPH FOUR: Respondent NAA engages, among its various activities, in substantial economic activities for the benefit of its members. At all times relevant to this Complaint, NAA is and has been organized in part for the profit of its members, and is therefore a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH FIVE: Except to the extent that competition has been restrained as herein alleged, many of NAA's members have been and are now in competition among themselves and with other Arbitrators of labor-management disputes.

PARAGRAPH SIX: Respondent NAA, acting as a combination of its members, and in agreement with at least some of its

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members, has acted to restrain competition by restricting advertising and solicitation by its members.

PARAGRAPH SEVEN: The combination and agreement alleged in Paragraph Six consists of Respondent NAA adopting and maintaining provisions in its *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* and *Formal Advisory Opinions* that restrain Arbitrators from engaging in truthful, non-deceptive advertising and solicitation, regardless of whether such advertising or solicitation compromises or appears to compromise Arbitrators' impartiality.

PARAGRAPH EIGHT: The acts or practices described in Paragraphs Six and Seven restrain competition unreasonably and injure consumers by depriving consumers of Arbitrators' services for labor-management disputes of truthful, non-deceptive information and of the benefits of free and open competition among Arbitrators.

PARAGRAPH NINE: The combination, agreement, acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, agreement, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of January, 2003, issues its Complaint against Respondent NAA.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the National Academy of Arbitrators (“NAA”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered comments received from an interested party pursuant to Section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent National Academy of Arbitrators, is a corporation organized and existing under the laws of the State of

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Michigan with its principal office and place of business at Suite 600-A, 1121 Boyce Road, Pittsburgh, Pennsylvania 15241.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED, that for the purposes of this Order, the following definitions shall apply:

- A. "Respondent" or "NAA" means the National Academy of Arbitrators, its officers, Executive Committee, Board of Governors, directors, committees, foundations, regions, representatives, agents, employees, successors and assigns;
- B. "Arbitrator" means someone who engages in arbitrating labor-management disputes;
- C. "Regulating" means (1) adopting, maintaining or enforcing any rule, regulation, interpretation, ethics ruling, policy or guideline; (2) taking, threatening to take or suggesting formal or informal disciplinary action; or (3) conducting formal or informal investigations or inquiries.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in or in connection with Respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from:

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- A. Regulating, restricting, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of Arbitrators' services, or of information about Arbitrators' services that are offered

for sale or made available by Arbitrators or by any organization with which Arbitrators are affiliated;

- B. Regulating, restricting, impeding, declaring unethical, interfering with, or advising against solicitation of arbitration work, through advertising or other means, by any Arbitrator or by any organization with which Arbitrators are affiliated.

PROVIDED THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethics guidelines governing the conduct of its members with respect to representations that Respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, and

PROVIDED FURTHER THAT nothing contained in this Part shall prohibit Respondent from formulating, adopting, disseminating to its members and enforcing reasonable ethics guidelines governing conduct that Respondent reasonably believes would compromise or appear to compromise the impartiality of Arbitrators. Such guidelines shall not prevent Arbitrators from disseminating or transmitting truthful information about themselves through brochures and letters, among other means; provided further, however, that in the event that the NAA determines that the dissemination or transmission of such material may create an appearance of partiality, the NAA may promulgate reasonable guidelines that require, in a manner that is not unduly burdensome, that such material and information be disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

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III.

IT IS FURTHER ORDERED that Respondent shall:

- A. From the date this Order becomes final, not enforce any parts of NAA's Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, NAA's Advisory Opinions, or any NAA policy statement or guideline that is inconsistent with Paragraph II of this Order, and, within ninety (90) days after this Order becomes final, publish in a prominent position on NAA's website and in the next issue of *The Chronicle*, or any successor publications, an announcement that states: "NAA will not enforce Code of Professional Responsibility provisions and Advisory Opinions relating to advertising or solicitation that do not comply with FTC Consent Order."
- B. Within ninety (90) days after the date on which this Order becomes final, remove from NAA's Advisory Opinions or any NAA policy statement or guideline (including but not limited to those appearing on the NAA website) any statement that is inconsistent with Paragraph II of this Order.
- C. Within ninety (90) days after the date on which this Order becomes final, publish on NAA's website and in the next issue of *The Chronicle*, or in any successor publications, a copy of the Order and Complaint under the heading "NAA promises changes to the Code of Professional Responsibility and will not enforce challenged provisions" with such prominence as is accorded feature articles and announcements that are regularly published on the website and *The Chronicle*. For at least one (1) year after this Order becomes final, retain a copy of the Complaint and Order on NAA's website with a link placed in a prominent position on NAA's homepage entitled "NAA Consent Order with the FTC regarding advertising and solicitation."

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- D. By the close of NAA's next Annual Meeting, but not later than July 10, 2003, remove any provision in NAA's Code of Professional Responsibility for Arbitrators of Labor-Management Disputes that is inconsistent with this Order.
- E. Within ninety (90) days after the close of NAA's next annual meeting, but not later than September 7, 2003, publish and maintain the changes required by Paragraph III D on NAA's website, in *The Chronicle*, or any successor publication, and in any other place NAA publishes its Code of Professional Responsibility.

IV.

IT IS FURTHER ORDERED that Respondent shall file written reports within ninety (90) days after the date on which this Order became final, every sixty (60) days thereafter until the requirements set forth in Paragraph III of this Order have been met, and annually thereafter for five (5) years on the anniversary of the date on which this Order became final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which it has complied and is complying with the Order. Such reports should include in detail, but not be limited to, any action taken in connection with the activities covered by Paragraph II of this Order.

V.

IT IS FURTHER ORDERED that for a period of five (5) years after the date this Order is entered, Respondent shall maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Paragraph II of this Order, including but not limited to any enforcement, advisory opinions, advice or interpretations relating to advertising or solicitation.

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VI.

IT IS FURTHER ORDERED that, Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation or association, the creation or dissolution of subsidiaries or any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to any rule-making, advice or interpretations relating to advertising or solicitation.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on January 13, 2023.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from the National Academy of Arbitrators (“NAA”). NAA has its principal place of business in Pittsburgh, Pennsylvania.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and decide whether it should withdraw from the agreement or make final the agreement's proposed order.

NAA is an honorary association for labor-management arbitrators. Labor-management arbitrators hear and decide disputes between labor unions and employers. The complaint alleges that NAA engages in substantial activities for the economic benefit of its members. The complaint further alleges that NAA has approximately 600 members, many of whom arbitrate labor-management disputes for a fee.

The complaint charges that NAA has violated Section 5 of the Federal Trade Commission Act by acting as a combination of its members and in agreement with some of its members to restrain competition by restricting advertising and solicitation by its members. The complaint alleges that in furtherance of the combination and agreement NAA has adopted and maintained a *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* and *Formal Advisory Opinions* that restrain arbitrators from engaging in truthful, non-deceptive advertising and solicitation, regardless of whether such advertising or solicitation compromises or appears to compromise the impartiality of Arbitrators. The *Code of Professional Responsibility* states:

Analysis

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.

In addition to prohibiting solicitation, the previous version of the *Code* prohibited virtually all advertising. The advertising restriction was recently amended to restrict only false and misleading advertising. However, NAA's *Formal Advisory Opinions*, which serve as official interpretations of the *Code*, often do not draw a distinction between advertising and solicitation and continue to restrict members from distributing truthful information. For example, Opinion 14 deems an arbitrator's unsolicited mailing to *both* labor and management representatives that contains truthful biographical information to be a violation of NAA's ethics provisions on advertising and solicitation. Opinion 16 concludes that it is unethical solicitation and advertising for an arbitrator to send out announcements of the change of address of his office, which include his resume (including the fact that he is a lawyer) and state his fee schedule. Opinion 18 declares it unethical for an arbitrator to "distribute his business cards, except on request, to potential clients." And Opinion 19 holds that an arbitrator who gives potential clients ball point pens to inform them of his change of address runs afoul of the proscriptions on advertising and solicitation. Given these *Formal Advisory Opinions*, the narrowing of the advertising restrictions in the *Code* to false and misleading advertising does not eliminate competitive concerns.

The complaint alleges that the above acts and practices constitute unfair methods of competition which have restrained competition unreasonably. It further alleges that the effects of the acts and practices are to injure consumers by depriving consumers of the services of labor-management arbitrators of the benefits of truthful, non-deceptive information and of free and open competition among arbitrators.

Analysis

NAA has signed a consent agreement containing the proposed consent order. The proposed consent order would prohibit NAA from maintaining or enforcing any policy, ethics rule, interpretation or guideline that impedes or restricts arbitrators from engaging in advertising truthful information about their services, including the prices, terms and conditions of sale of their services. The proposed consent order would also prohibit NAA from maintaining or enforcing any policy, ethics rule, interpretation or guideline against solicitation of arbitration work. 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.

To ensure and monitor compliance, the consent order provides, among other things, that within certain time frames NAA shall remove the provisions that are inconsistent with the order from NAA's Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, NAA's Advisory Opinions, any NAA policy statement or guideline and NAA's website. The order requires NAA to publish a copy of the order and complaint in its newsletter. It further provides that the order and complaint shall be published on the NAA web site, with a link placed in a prominent position on the web site's home page. The proposed consent order also contains other provisions to monitor compliance.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

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IN THE MATTER OF

**THE NATIONAL RESEARCH CENTER FOR COLLEGE
AND UNIVERSITY ADMISSIONS, INC., ET AL.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4071; File No. 0223005

Complaint, January 3, 2003--Decision, January 3, 2003

This consent order addresses representations by Respondent The National Research Center for College and University Admissions, Inc. – a student survey company that supplies student data to colleges and universities and other entities for recruitment and marketing purposes, and that distributes a survey to high school teachers and guidance counselors with the request that they have their students complete the survey – and its officer, Respondent, Don M. Munce, about how detailed, personal information collected from high school students through a survey would be used. The order, among other things, prohibits the respondents – in connection with the collection of personally identifiable information from an individual – from misrepresenting (1) how such information is collected or will be used or disclosed, or (2) how the collection of such information is funded. The order also prohibits the respondents – in connection with the collection of personally identifiable information from students for any “noneducational-related marketing purpose” – from using or disclosing such information unless they disclose (1) the existence and nature of such noneducational-related marketing purpose, and (2) the types or categories of any entities to which the information will be disclosed. In addition, the order prohibits the respondents from using or disclosing for any noneducational-related marketing purpose any personally identifiable information that was collected through surveys distributed prior to the date of service of the order.

Participants

For the Commission: *Laura Mazzarella, Gregory A. Ashe,
Jessica L. Rich, and Joel Winston.*

For the Respondents: *Joan Z. Bernstein, and Dana Rosenfeld,
Bryan Cave LLP.*