IN THE MATTER OF

COLLEGE FOOTBALL ASSOCIATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9242. Complaint, Sept. 5, 1990 -- Final Order, June 16, 1994

This final order dismisses the complaint which alleged that the College Football Association (CFA) and Capital Cities/ABC, Inc. illegally restrained competition through agreements which gave ABC exclusive rights to televise certain college football games. The final order to dismiss was due to the Commission's lack of jurisdiction over CFA, citing its not-for-profit nature. Dismissal was also determined to be in the public interest.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondents: *Michael Sibarinm, Winston & Strawn*, Washington, D.C. *Clyde A. Muchmore, Crowe & Dunlevy*, Oklahoma City, OK. *A. Douglas Melamed, James Carr, Randolph D. Moss* and *David P. Donovan*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (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 respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

RESPONDENTS

PARAGRAPH 1. Respondent College Football Association ("CFA") is an unincorporated association with its principal place of business at 6668 Gunpark Drive, Boulder, Colorado.

PAR. 2. CFA is an organization whose members include many of the nation's major college-football-playing institutions, and which,

among other things, negotiates and administers the sale of certain college football television rights for its participating members.

PAR. 3. For the year ending December 31, 1989, CFA generated revenue of approximately $33.75 million from the sale of college football telecast rights.

PAR. 4. Respondent Capital Cities/ABC, Inc. ("Capital Cities") is a corporation organized and existing under the laws of the State of New York with its principal executive offices at 77 West 66th Street, New York, New York.

PAR. 5. Capital Cities is principally engaged in television and radio broadcasting. ABC Television Network, one of the three major over-the-air television networks, is wholly owned by Capital Cities, which also owns 80% of ESPN, a cable sports programming service.

PAR. 6. For the year ending December 31, 1989, Capital Cities had net revenue of $4.96 billion.

JURISDICTION

PAR. 7. Each of the respondents maintains, and has maintained, a substantial course of business, including the acts or practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

ANTICOMPETITIVE ACTS OR PRACTICES

PAR. 8. Respondent College Football Association, through agreement with and among its members pursuant to which its members have agreed not to compete with each other and the association, has entered into telecast rights agreements with telecasters that restrict competition in the marketing of college football telecasts.

PAR. 9. Respondent CFA and respondent Capital Cities (or entities owned or controlled by Capital Cities) have entered agreements which give Capital Cities exclusive telecast rights to certain college football games and which otherwise restrict competition in the marketing of college football telecasts.

ANTICOMPETITIVE EFFECTS

PAR. 10. By engaging in the acts or practices described in paragraphs eight and nine of this complaint, respondents have

unreasonably restrained competition in the following ways, among others:

(a) Competition among schools in the marketing of college football telecast has been hindered, restrained, foreclosed and frustrated;

(b) Competition among telecasters of college football games has been hindered, restrained, foreclosed and frustrated; and

(c) Consumers have been deprived of the selection of college football games that would have otherwise been televised in a competitive environment.

PAR. 11. The acts or practices of respondents described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

Commisioner Azcuenaga dissenting.*

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
JULY 29, 1991

On this date my orders dismissing the respondents were filed. By Rule 3.24(a)(2) and Rule 3.51(a), the opinions supporting those orders shall be the Initial Decision in this case, wherein, as a matter of law,

The complaint must be dismissed, without prejudice. Order re Motions to Dismiss, Coca-Cola Company of the Southwest, et al., Docket 9215, filed October 25, 1988.

ORDER DISMISSING COLLEGE FOOTBALL ASSOCIATION

I. JURISDICTION OVER CFA

A. *Prologue*

* Commissioner Owen concurs in the issuance of the complaint, except to the extent that it alleges that contractual provisions governing the minimum and maximum number of appearances of a particular member school or conference violate Section 5 of the Federal Trade Commission Act.

College Football Association ("CFA") moves for summary decision[1] for lack of jurisdiction, asserting that it is organized as a nonprofit association and is not "organized to carry on business for its own profit or that of its members." 15 U.S.C. 44.

Complaint counsel advance four theories for upholding jurisdiction: (1) CFA carries on business for the profit of its members, (2) the majority of its members are state agencies subject to jurisdiction, (3) CFA operates a business and not a charity, and (4) CFA members seek profits through their telecast activities.

B. *The Statute*

The starting point in determining the scope of the Commission's jurisdiction must be the language of the statute itself. *United States v. Turkette*, 452 U.S. 576, 580 (1981).[2]

Section 5(a)(2) of the Act empowers the Commission "to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce." 15 U.S.C. 45 (a)(2) (1988). Section 4 of the Act defines the term "corporations" as used in the Act to include an association that is "organized to carry on business for its own profit or that of its members."[3] 15 U.S.C. 44 (1988). Thus, under the Act, the Commission has jurisdiction over the CFA only if it is organized "for its own profit or that of its members."

Traditionally, organizations do not "carry on business for . . . profit" unless they are organized to distribute dividends or other benefits in the nature of dividends to their members or shareholders.[4] Comment, "Piercing the Nonprofit Corporate Veil," 66 Marq. L. Rev. 134, 136 (1982). Moreover, an organization does not operate for

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[1] If the Commission lacks jurisdiction it cannot render a summary decision but must dismiss the action without prejudice. Factual disputes may be resolved in doing so. *Cf., Prakash v. American University*, 727 F.2d 1174, 1182 (D.C.Cir . 1984); *Narios Corp. v. Nat'l Maritime Union of America*, 236 F. Supp. 657, 659 (E.D. Pa. 1964), *aff'd*, 359 F.2d 853 (3rd Cir.), *cert. denied*, 385 U.S. 900 (1966).

[2] "The Federal Trade Commission is a creation of Congress, not a creation of judges, contemporary notions of what is wise policy. . . . The question to be answered is 'not what the [Commission] thinks it should do but what Congress has said it can do.'" *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

[3] The provision does not exempt nonprofit associations from operation of the antitrust laws; nonprofit associations are subject to suit in federal court under the Sherman and Clayton Acts. The provision, rather, limits the Commission's jurisdiction over nonprofit organizations. Complaint counsel bear the burden of "'affirmatively'" establishing that jurisdiction exists. *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986).

[4] The author further explained: "That does not mean that [a nonprofit corporation] is prohibited from earning a profit. Rather, it is only the distribution of those earnings as dividends that is prohibited." (Emphasis added.) 66 Marq. L. Rev. at 136.

profit because it distributes benefits to other nonprofit organizations. The test is whether "any excess of revenue over expenses resulting from the operation . . . is distributed to any private person or company as a profit." *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F.2d 212, 216 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967) (interpreting the "not operated for profit" language in Robinson-Patman Act).

A corporation is subject to Commission jurisdiction if it directly[5] or indirectly[6] pursues profits for itself or its members. The issue is not whether CFA and its members are participating in "commercial"[7] rather than "charitable"[8] activities. CFA admits it conducts commercial activities.[9] And complaint counsel have much evidence of the commercial nature of college football as practiced by CFA's members. A nonprofit organization, however, does not jeopardize its status by selling or buying property. A nonprofit organization may obtain revenues in excess of expenses. Receipt of income in excesses of expenses, making an organization capable of self-perpetuation or expansion, is not "profit" within meaning of Section 4. *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1016 (8th Cir. 1969). Nor does an organization's nonprofit status depend upon the source of its revenues. The test instead is whether the organization's funds are properly used for recognized public

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[5] *Ohio Christian College*, 80 FTC 815 (1972), involved an ostensibly nonprofit corporation that directly pursued profits for the individual respondent.

[6] Cases finding jurisdiction over trade associations that indirectly pursued profits for the private persons or for-profit companies that were their members include *American Medical Ass'n*, 94 FTC 701, 926 (1976), enforced as modified, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982); *Michigan State Medical Soc'y*, 101 FTC 191 (1983); *National Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) ("NCEN was organized for the profit of the egg industry"); *Nat'l Harness Mfgrs' Assn. v. FTC*, 268 F. 705, 706-10 (6th Cir. 1920) ("persons and concerns engaged in selling at wholesale harness and saddlery goods.")

[7] That was the issue in *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) where the NCAA unsuccessfully asserted "that it is outside the ambit of the antitrust laws." *Id.* at 1148. In Hennessey the question was whether the NCAA was engaged in "commercial" activity, since NCAA argued that the Sherman Act was intended for the business world, and not for noncommercial aspects of activities which are educational. *Id.* at 1148. The CFA does not assert an exemption from the antitrust laws.

[8] "Charity" is only one of many recognized nonprofit activities under the federal income tax, 26 U.S.C. 501(c)(3), or under general law of nonprofit organizations, including educational, athletic, political, religious, social, and others. B.R. Hopkins, The Law of Tax Exempt Organizations (5th Ed. 1987) at p. 55; 19 Fletcher Cyc. Corp. Section 2:21 at p. 28.

[9] "Business" can be carried on by nonprofit or for-profit organizations. 1 Fletcher Cyc. Corp. Section 68.05 at p. 920. Section 4 of the FTC Act assumes that an organization beyond the Commission's jurisdiction may conduct business activity; the statute neutrally refers to an association organized to "carry on business." The distinguishing factor is whether it does so "for its own profit or that of its members."

purposes, rather than distributed to private persons or for-profit companies.

C. *Jurisdictional Theories*

1. Commercial activity theory

Complaint counsel argue that a nonprofit corporation is subject to the Commission's jurisdiction if it "is essentially a commercial enterprise." They rely on *American Medical Ass'n v. FTC*, 638 F.2d 443, 448 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) ("AMA"). But that case concerned whether individual, profit-seeking doctors obtained pecuniary benefits through the activities of their professional association.[10]

Complaint counsel also blend the jurisdictional requirement that respondent's activities affect commerce (Section 5) with the separate jurisdictional requirement that respondent must be organized for profit (Section 4). The Commission's enforcement power extends only to organizations engaged in conduct "in or affecting commerce." 15 U.S.C. 45(a)(2) (1988). Similarly, Section 1 of the Sherman Act applies only to contracts, combinations, and conspiracies "in restraint of trade or commerce." 15 U.S.C. 1 (1988). Complaint counsel argue that their test, "whether an organization is a commercial enterprise," is the same as whether an organization is "engaged in commerce" under Section 1 of the Sherman Act. Opposition at 13, n.11.[11] They rely on *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) and *NCAA v. Board of Regents of Oklahoma University.*, 468 U.S. 85 (1984). Both cases considered whether the conduct in question constituted "trade or commerce" under the Sherman Act. Neither case addressed the separate "for profit" requirement of the FTC Act.

All parties agree that the controlling case on this jurisdictional issue is *Community Blood Bank of Kansas City v. FTC*, 405 F.2d 1011 (8th Cir. 1969), where the nonprofit corporation, Community Blood Bank, competed against two for-profit blood banks for the same customers. The Commission found that "Community and the

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[10] The pecuniary benefit went to AMA members who were "engaged in the profit motivated private practice of medicine. . ." 94 FTC at 926.

[11] This would read the "for profit" requirement of Section 4 out of the Act. Yet, Congress undoubtedly intended the Section 4 requirement to have independent meaning. *United States v. Menasche*, 348 U.S. 528, 538 (1955).

hospitals perform their functions in much the same manner as commercial entities[12] such as the commercial blood bank and 'for-profit' hospitals, and receive compensation for goods supplied and services rendered." 70 FTC at 909. The Community Blood Bank employed "method[s] [that] had the practical effect of insuring that hospitals [with two exceptions] would use only blood supplied through Community." *Id.* at 824. Nevertheless, the Eighth Circuit held that the Commission did not have jurisdiction, and it expressly ruled that the fact that Community and the for-profit blood banks functioned in the same manner and competed against each other was irrelevant. 405 F.2d at 1019.

The court held that the fact "'that Community Blood Bank conducts its affairs in a businesslike fashion and makes profits on the sale of blood . . . is certainly of no relevance here.'" 405 F.2d at 1019 (quoting Commissioner Elman's dissenting opinion). The court ruled that the commercial source of the income was immaterial, explaining:

> A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation, and not distributed to members or shareholders, it surely does not cease to be a nonprofit corporation merely because it has income, or keeps its books and records . . . in much the same manner as commercial enterprises.

Id. at 1019-1020.[13]

The "commercial activity" test also finds no support in *Iowa State University of Science and Technology v. United States*, 500 F.2d 508 (Ct.Cl. 1974). In that case, the court held that a commercial television station owned by a state university constituted an "unrelated

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[12] In *Community Blood Bank*, "both the Area Hospital Association and Community were organized to carry on business in the broadest sense;" "[t]hey had permanent paid staff [and] a place of business"; they "kept records and files, collected dues, or fees"; and Community "bought supplies for the processing of blood [and] maintained an elaborate laboratory and storage facilities." 70 FTC at 863-864. Community's contracts with the hospitals were "couched in terms of . . . commercial transaction[s]"; "Community paid donors $15 per unit" while charging "the hospital a $25 responsibility fee and a $9 processing fee, or $34"; "Community . . . actually secured a gross profit on several of its operations"; and "the return on its entire operation was sufficiently in excess of total expenses so that it was able to repay some of the loans which were made to it at the time of its organization." *Id.* at 764-765, 836, 864.

[13] After the Community Blood Bank case was decided, the Commission sought to amend Section 4 of the Act. Congress rejected the proposed amendment. H.R. Rep. No. 95-339, 95th Cong., 1st Sess. 120 (1976).

business" within the meaning of Section 511 of the Internal Revenue Code. The court explained:

> Income accruing to an educational institution exempt from taxation under Internal Revenue Code Section 501(c)(3) is taxable if the income is generated by the operation of an unrelated trade or business. To be taxable, the activity in question must be (1) a trade or business, (2) regularly carried on, and (3) not substantially related, other than through the production of income, to the purpose for which the institution was granted exemption under Section 501. Treas. Reg. Section 1.513-1(a)(2).

Id. at 516. Section 511, and the court's holding in Iowa State University, however, bear no relation to the question whether the Commission may assert jurisdiction over the CFA.

College football television revenues are not unrelated business income under Section 511 and the Iowa State University case. Internal Revenue Service rulings hold that the CFA's sale of college football telecast rights does not constitute an "unrelated business."[14]

Complaint counsel argue that the Iowa State University case establishes that it is the "source" of the funds received, and not their "destination," that determines whether the Commission has jurisdiction over an association under Section 4 of the FTC Act.[15] The "source" of the income standard that was applied in the Iowa State University case is tied directly to the language that Congress used in creating the unrelated business tax,[16] and has nothing to do with the

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[14] Revenue rulings relied upon by the CFA stress that "[t]he broadcasting of the organization's . . . regulated athletic events promotes the various amateur sports, fosters widespread public interest in the benefits of its nationwide amateur athletic program, and encourages public participation." Rev. Rul. 89-295, 1980-2 C.B. 194, 195.

[15] Before 1951 the Internal Revenue Code exempted from income tax corporations organized and operated exclusively for charitable purposes, and some courts held that colleges could obtain exempt income by owning for-profit corporations, engaged solely in business, the profit from which went exclusively to the nonprofit college, because it was the use of the income which indicated the nonprofit purpose, *e.g.*, *C.F. Mueller Co. v. Comm. of Internal Revenue*, 190 F.2d 120 (3rd Cir. 1951) (New York University Law School obtained exempt income from a company making and selling spaghetti.) Noticing the loss of tax and the impact on for-profit companies by such tax exempt competitors, Congress then imposed a new tax on the institutions' "unrelated business taxable income." Kaplan, Intercollegiate Athletics and the Unrelated Business Income Tax, 80 Columbia L.R. 1430, 1432-34 (1980). The new statute shifted the focus from the use of the income, *C.F. Mueller Co.*, 190 F.2d at 121, to the method of procuring the funds. *Iowa State University,* 500 F.2d at 518-19. Thereafter, the "source" of the income was the important consideration in determining the exemption. . . ." *Id.*

[16] Some courts used the source of income test to tax such commercial organizations even before the feeder exclusion was added by the Revenue Act of 1950, *e.g.*, *University Hill Foundation v. C.I.R.*, 446 F.2d 701, 703-04 (9th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). The unrelated business income amendment eliminated any doubt.

FTC Act. The Internal Revenue Code defines "unrelated business taxable income" to mean "the gross income derived by any organization from any unrelated trade or business." 26 U.S.C. 512(a)(1) (1988). (Emphasis Added.) Section 4 of the FTC Act, in contrast, asks whether the association "is organized to carry on business for its own profit or that of its members."[17] 15 U.S.C. 44 (1988). And, as shown above, an association is "organized to carry on business for . . . profit" only if it can distribute the excess of revenue over expenses to shareholders or other private interests. The cases decided under Section 4 hold that the relevant test is "how [the organization] disposed of [its] profits." *Ohio Christian College*, 80 FTC at 848; *Community Blood Bank*, 405 F.2d at 1019.

Commercial activity by CFA or its members does not constitute carrying on business for profit under the statute.

2. State school theory

Complaint counsel argue that the Commission has jurisdiction over the CFA because many of its members are state instrumentalities -- and thus "persons" -- which receive pecuniary benefits from the CFA. They argue that cases like *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), and *City of Minneapolis*, 105 FTC 304 (1985), show that the Commission has jurisdiction over state agencies as 'persons' acting in a proprietary capacity. They do not allege that the state schools distribute any part of the telecast funds to individuals or firms who seek monetary gain. Rather, they concede that the "state schools act in the public interest and do not distribute revenue to shareholders. . ." Opposition at 27.

Complaint counsel argue that action against the CFA is more efficient than action against CFA's members. Opposition at 24-25. Jurisdiction, however, is a question of adjudicative power, not of convenience. *Finley v. United States*, 490 U.S. 545 (1989). Nor does the AMA case support the argument. In AMA a trade association was subject to the Commission's jurisdiction because it operates to generate profits for private, profit seeking members. 94 FTC at 983. Here, the television revenues go, not for the profit of its members, but

[17] A literal reading of the statute would seem to mean that Commission jurisdiction is based solely on a nonprofit association's organizational purpose, and not its operation. It is uncontested that CFA is organized as a nonprofit association.

through CFA to the members to be used for tax exempt public purposes of education and amateur athletics.

Moreover, the Eighth Circuit in Community Blood Bank held that the Commission lacked jurisdiction over the Kansas City Area Hospital Association because the Association -- like the CFA -- was not organized for profit. The court reached that result, even though 12 of the Association's members were "instrumentalities of federal, state, county, or local governments," 70 FTC at 767.[18]

3. Piercing the corporate veil

Complaint counsel argue that "the CFA is not truly a charitable enterprise," and they maintain that they seek "to pierce the nonprofit veil of the enterprise." They also promise to pierce the corporate veil of the state schools and show that their football programs are businesses. Tr. 109.[19]

These arguments are essentially the same as the commercial activity theory. But even if it were alleged that profits are being dispersed to profit seeking entities,[20] respondents have credibly asserted the lack of such evidence (findings 7 and 10, *infra*), and complaint counsel have offered no evidence in support. This action cannot continue based on possibility. In this situation, a party opposing a motion for summary judgment "must come forward with concrete evidence indicating the existence of a genuine issue of material fact," *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 1495 (D.C. Dir. 1984), and cannot rest on "conclusory allegations," *De Leon v. St. Joseph Hosp., Inc.*, 871 F.2d 1229, 1236 (4th Cir), *cert. denied*, 110 S. Ct. 87 (1989).

D. *CFA's Nonprofit Purposes*

Federal tax law recognizes several proper nonprofit purposes, including, charitable, educational, scientific, religious, literary, and

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[18] Here, CFA's 66 member colleges include three federal, 14 private and 49 state institutions. Appendix to CFA's Motion for Summary Judgment, March 19, 1991.

[19] Even if they could prove that college football is a commercial enterprise, the jurisdictional test is whether the revenues are going to private individuals directly or as dividends.

[20] Complaint counsel argue that some coaches receive high salaries. In order to show that the CFA schools are operating their football programs "for profit" within the meaning of Section 4 of the FTC Act, complaint counsel would have to show, that their athletic programs are actually run by the coaches in order to generate profits for themselves -- paid out as dividends disguised as phony salaries. Complaint counsel do not allege, however, that any private person or for-profit company is receiving such disguised "profits" from the CFA or the colleges.

promoting amateur sports competition. 26 U.S.C. 501(c)(3). CFA promotes both amateur sports competition and education.

1. Amateur athletic competition

College football and television exposure of college football have nonprofit purposes. In 1976, Congress amended Section 501(c)(3) to include as a proper nonprofit purpose "fostering national or international amateur sports competition." P.L. 94-455, Section 1313, 1976 U.S. Code Cong. & Ad. News (90 Stat.) Vol. 1, p. 1730. Inclusion of amateur sports competition within Section 501(c)(3) rendered pursuit of this purpose -- by itself -- a sufficient basis upon which to confer nonprofit, tax exempt status. 26 CFR 1.501(c)(3)-1(d)(1)(iii).

CFA, through its television contracts and other programs fosters intercollegiate football and that in itself is a proper nonprofit purpose.[21]

2. Educational purpose

CFA promotes educational purposes. Congress and the IRS have already determined that athletics has value to education and that football television has value to athletics.

The Senate and House Committee Reports constituting the legislative history of the "unrelated income" tax laws state:

> Athletic activities of schools are substantially related to their educational functions. For example, a university would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students from other schools.

S. Rep. No. 2375, 81st Cong., 2nd Sess. (1950) at 29; H. Rep. No. 2319, 8lst Cong., 2nd Sess. (1950) at 37.

Internal Revenue Rulings state that an athletic organization's sale of telecasting rights of an athletic event is not an unrelated trade or business under IRC Section 513 (the unrelated business income statute), and that a university's television contracts, whether through an athletic association or otherwise, are related to its exempt purpose

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[21] CFA's organizational documents show that its purpose fosters national amateur sports competition (App. Tab 4, p.1, Art. II). Complaint counsel apparently concede this point. "([S]tate schools act in the public interest and do not distribute revenue. . . .") Opposition Brief at p. 27.

within the meaning of Section 513. *See* the Revenue Rulings attached as Exhibits "B," "C," and "D" to CFA's Supplemental Brief, Rev. Rul. 80-296, 80-295, and 80-294, respectively. In Private Letter Rulings, the IRS scrutinized whether a large university which was a member of a national athletic association realized unrelated income from the sale, by the athletic association, of the telecasting rights for the university's football games.[22] The IRS explained some of the purposes served by public exposure of a football game:

> For example, an audience for a game may contribute importantly to the education of the student-athlete in the development of his/her physical and inner strength and to the education of the student body and the community-at-large in heightening interests in and knowledge about the participating schools. In regard to the student-athlete, the knowledge that an event is being observed heightens its significance, which raises the levels of both competitive effort and enjoyment. Attending the game enhances student interest in education generally and in the institution because such interest is whetted by exposure to a school's athletic activities. Moreover, the games (and the opportunity to observe them) foster those feelings of identification, loyalty, and participation typical of a well-rounded educational experience.[23]

95 IRS Letter Rulings, CCH Reports 7851002, Dec. 26, 1978.

The CFA's television rights to college football games, with the proceeds going to the schools to help support their athletic programs,[24] have a nonprofit educational purpose.

3. CFA's nonprofit status

In determining whether an organization is carrying on business for "profit," the Commission and the courts defer to an IRS determination that the organization qualifies as tax exempt under Section 501(c)(3). The reason for this respect is in *American Medical Ass'n*,

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[22] IRS Private Letter Rulings 7851002, 7851005, and 7851006, 95 IRS Letter Rulings, CCH Reports, Dec. 26, 1978.

[23] While private letter rulings do not have precedential value, the rationale makes sense, and the Revenue Rulings attached to CFA's Supplemental Brief, which incorporate the same holdings, represent the official position of the Internal Revenue Service. 26 CFR 601, Section 601.601. They are entitled to "great deference." *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1411-12 (2d Cir. 1985).

[24] Football television revenues on the average comprise one-fifth of one percent of a university's total expenditures, and about 5% of a university athletic department's expenditures Exhibit A to CFA's Reply filed May 17, 1991. CFA does not pay the television revenues directly to any athletic department of its members. It remits the revenues to the college or university, or for some institutions, to the regional athletic conference of which the member is a participant, which then distributes the revenues to the conference's members, CFA Submission of July 25, 1991.

94 FTC 701, 989-990 (1979), where the Commission distinguished Community Blood Bank. The Commission explained that the respondents' inability to quality under Section 501(c)(3) set them apart from the KCAHA. The Commission stated that failure to qualify under Section 501(c)(3) did not lead inexorably to the conclusion that there was jurisdiction:

> Of course, failure to qualify as tax exempt under Section 501(c)(3) does not by itself necessarily mean that a respondent is within the reach of Section 4 of the FTC Act, since, as we have discussed supra, the pecuniary benefit of its activities to its members must constitute a substantial part of its activities under Section 4.

94 FTC at 990 and n.17. Thus, while an IRS determination that an organization does not qualify as tax exempt under Section 501(c)(3) necessitates further inquiry under the Commission's "substantiality" test, an IRS determination "that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded." 94 FTC at 990.[25]

4. Distribution of funds to nonprofit members

The money CFA pays to its members does not represent a distribution of profits. A distribution of funds by one nonprofit organization to another nonprofit organization is permitted, *National Foundation v. United States*, 13 Cl.Ct. 486, 492 (Cl.Ct. 1987). Since CFA's members are nonprofit organizations, CFA may distribute revenues to them without losing its own nonprofit status.

II. FINDINGS OF FACT

Complaint counsel have failed to raise disputed issues of fact that could support a finding of jurisdiction. All of the facts placed in issue by complaint counsel concern whether the CFA is involved in

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[25] The importance of tax exempt status in determining whether an organization is nonprofit is also reflected in other cases. In *Ohio Christian College*, 80 FTC 815, 848 (1972), in taking jurisdiction over an educational corporation the Commission relied upon a similar case where the IRS "found that because of the lax financial dealings with the founders of the school, it was not in fact an exempt corporation." 80 FTC at 848. In Community Blood Bank, the court found that the corporations were organized under Missouri's not-for-profit corporation law, that 43 of 45 of the corporate respondents, members were also organized under nonprofit corporation laws or were instrumentalities of federal, state, county or local governments, and that: "All satisfied the requirements of the federal law entitling them to exemption from federal income tax liability." 405 F.2d at 1020, n.16.

"commercial" activity.[26] However, this question bears no relevance to the jurisdictional test set out in the Federal Trade Commission Act. The factual disputes alleged by complaint counsel are, as a matter of law, not material to the jurisdictional issue.

CFA's motion for summary decision is supported by evidence demonstrating that neither it nor its members operate for profit.[27] The facts relating to the lack of subject matter jurisdiction in this case are genuinely undisputed, or are immaterial to the issue. Specifically, there is no genuine dispute that:

(1) CFA is organized and operated as a nonprofit association;[28]

(2) CFA's tax exempt status under Section 501(c)(3) has been recognized by the IRS. Admitted, Opposition Brief filed Apr. 22, 1991 at p. 31, paragraph 2;

(3) CFA's directors and officers are not paid, and CFA's staff, including its executive director, are paid salaries to compensate for services rendered;[29]

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[26] An order on March 28, 1991, directed that complaint counsel set forth "a statement of facts as to which, it is contended, there exists a genuine issue necessary to be litigated." Order re Summary Decision Motions. Complaint counsel replied that the "CFA's organizational objectives include acting in the economic interests of the big-time football programs of its members," that the "CFA . . . is essentially a commercial enterprise," that the "CFA has at least one paid official," that "most of the members with [the] CFA are state instrumentalities," that "[t]elevision football is the major CFA function," that CFA members use revenues received from the CFA "to enhance the athletic programs of [the] CFA members," and that "Mr. Neinas does not explain [in his affidavit) the destination of . . . $2,955,500 that [the] CFA received from its television contracts." Opposition at 31-33. Even if true, these allegations would not support jurisdiction.

[27] CFA provided additional support in a Supplemental Brief, with accompanying exhibits, filed on April 5, 1991. Appendix A to that Brief demonstrates that the CFA does not retain net earnings from year-to-year and does not distribute earnings to any individual or for-profit organization. The appendices to CFA's Motion for Summary Decision show that no member of the CFA is a for-profit organization.

[28] Neinas Tr. (Tab 2) attached to Appendix to CFA's Motion for Summary Decision, at 7-8; Tab 3 paragraphs 2 and 3; Tab 4, p. 1 Art. II.

Money from the sale of television rights is used to sustain college football programs and promote amateur athletic competition, a recognized public purpose for nonprofit status. Complaint counsel rely on the affidavit of a professor at Indiana University who asserts that CFA is a commercial enterprise. The affidavit does not raise a factual dispute. CFA agrees that the sale of its members' television rights is a business activity. That, however, is not relevant to the question of whether the activity is carried on for profit.

[29] Tab 73, Neinas Aff'd., paragraph 2. Complaint counsel asserts that the payment of a salary to CFA's Executive Director, Charles M. Neinas, is the payment of revenues to "officer." Opposition Brief at p. 8, n.7. The officers of the CFA are described in its Articles of Association, Tab. 4. p. 4, Art. V, paragraph 4. They consist of a chairman and a secretary/treasurer, neither of whom is paid a salary. Tab. 73, Neinas Affid., paragraph 2. Mr. Neinas is employed as executive director of the CFA, not as an officer. *Id.*, paragraphs 1 and 2. Moreover, there is no prohibition of a nonprofit organization paying reasonable compensation for services rendered by an officer. *E.g.*, 1 Fletcher Cyc. Corp. Section 68.05 at p.919. CFA's articles accordingly permit such payments. Tab 4, P.6, Art. IX, paragraph 1. What is prohibited is net earnings inuring to private interests.

(4) CFA's audited financial statements show that the proportion of cumulative television revenues used to pay salaries and employee benefits has been a fraction of 1%;[30]

(5) CFA's members all are organized under applicable nonprofit laws or as state or federal instrumentalities;[31]

(6) Television football has become a major function of CFA, enhancing the quality of its members football programs and sustaining viewer interest in such programs; [32]

(7) The television revenues earned by the sale of CFA's members, football telecasting rights are used by the institutions for their proper non-profit purposes, including sustaining their athletic programs;[33]

(8) CFA negotiates and signs the television contracts, receives the revenues, and makes payments to the membership. All CFA members receive "participation pool" payments and those which are actually televised receive appearance or rights fees. (Admitted, Opposition Response Brief, p. 33, paragraph 8.);

(9) CFA is obligated to pay the rights fees within 90 days after a game has been played, and makes the participation payments in June following the football season in which the games are played, investing the funds in the interim in conservative investments. (Admitted, Opposition Response Brief, p. 33, paragraph 9.);

(10) The earnings on investments of television revenues are used to pay CFA's administrative expenses for the television plan; CFA attempts to pay all of the television revenues to its members and is largely successful in doing so; and[34]

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[30] The salaries and benefits are included in the audited financial statements, CFA's Supplemental Brief, Ex. A, within the itemization column for "expenses."

[31] It is undisputed that all of CFA's members are tax exempt. As to whether CFA's members are nonprofit, the dispute is not factual (complaint counsel's Opposition, filed Apr. 22, 1991 at pp. 31-32, paragraph 5). The state institutions are promoting the same public interests as the private ones, and many have obtained Section 501(c)(3) status, solely as a convenience. *See* IRS letters under Tabs 29, 32, 34, 40, 43, 51, 59, 60, 61, 63, 64 and 70. Donations to the state institutions for their public purpose functions are deductible as "charitable contribution" under IRC Section 170(c). *See* IRS letters under Tabs 24, 25, 27, 29, 30, 32, 34, 36, 37, 56, 58, 64, and 65.

[32] Tab 2, Neinas Tr. at 25-29, 32, 175-79, 216-17; Ex. K to complaint counsel's Opposition, at p. 215.

[33] Tab 2, Neinas Tr. at 214-15. Television revenues enhance the educational programs of CFA members as well as their amateur athletic competitors, regardless of their commercial source, *supra*.

[34] Neinas Tr. at 182-83. CFA has distributed 98% of the revenues remaining after production costs for its previous contracts with CBS and ESPN. Tab 73, Neinas Aff'd., paragraph 4. The remaining 2% is held in escrow until CFA's final expenses are determined; none of the net revenues are retained by the CFA. Tab 73, Neinas Aff'd., paragraph 4.

(11) Of the revenues obtained under the television contracts, CFA retains only that portion of gross revenues necessary to pay its administrative expenses relating to administration of the television plan and contracts.[35]

What quarrels exist or are purported to exist with respect to these basic facts are not material to resolution of the jurisdictional issue.

III. CONCLUSIONS OF LAW

1. Section 5(a)(2) of the FTC Act limits the jurisdiction of the Commission to "persons, partnerships, or corporations," 15 U.S.C. 45(a)(2).

2. Section 4 of the FTC Act defines "corporation" for purposes of Section 5(a)(2) to include an association "which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44.

3. CFA is organized and operated as a nonprofit association under 26 U.S.C. 501(c)(3), Internal Revenue Code ("IRC"). CFA's tax-exempt status under IRC Section 501(c)(3) has been recognized by the Internal Revenue Service ("IRS").

4. A nonprofit organization is exempt under Section 4 and Section 5 of the FTC Act unless the organization is only ostensibly organized not-for-profit, and is actually used as a vehicle to obtain profit. *Community Blood Bank of Kansas City Area, Inc. v. FTC,* 405 F.2d 1011, 1017 (8th Cir. 1969). *Cf. FTC v. National Commission on Egg Nutrition,* 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied,* 426 U.S. 919, 49 L.Ed.2d 372 (1976).

5. "Profit" within the meaning of Section 4 of the FTC Act does not include the use by a nonprofit organization of net revenues for its own self-perpetuation or expansion. *Community Blood Bank*, 405 F.2d at 1016.

6. A determination by the IRS, that a respondent organized and operated for purposes recognized as conferring nonprofitstatus under Section 501(c)(3) should not be disregarded. *American Medical Ass'n, et al.,* 94 FTC 701, 989-990 (1979), *aff'd sub. nom., American Medical Ass'n v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676, 71 L.Ed.2d 546 (1982).

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[35] Tab 73, Neinas Aff'd., paragraphs 3-5; Tab 2, Neinas Tr. at 182-83.