

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

NATIONAL FIRE HOSE CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket C-2935. Consent Order, Nov. 1, 1978—Set Aside Order, Jan. 6, 1987

The Federal Trade Commission has set aside a 1978 consent order with National Fire Hose Corp. (92 F.T.C. 660), thus removing restrictions on the company's relations with its distributors.

ORDER REOPENING AND SETTING ASIDE ORDER

ISSUED ON NOVEMBER 1, 1978

On September 5, 1986, respondents National Fire Hose Corporation, Raymond L. Pepp and Dudley H. Pepp ("National") filed their Petition To Reopen Proceeding and To Set Aside Consent Order ("Petition"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, requesting that the Commission set aside or modify the order in Docket No. C-2935, issued on November 1, 1978. The order, among other things, prohibits the respondents from restricting or limiting the territory in which a distributor may sell National's products. The Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. One comment was received.

The complaint in this case alleged that National, the leading domestic manufacturer and seller of fire hose, had, by imposing territorial restrictions on its distributors of municipal fire hose, restricted competition among distributors of National's products and foreclosed the entry of new distributors into competition with National's distributors. The order prohibits National from restricting the territories in which its distributors may sell National products, from restricting the customers to which a distributor may sell and from communicating with any distributor about the establishment of new distributor-

ships.¹

In the Petition, National asserts that the prohibitions of the order hinder National from developing an effective and efficient distribution program and that, as a result, the order has placed National at a competitive disadvantage in the municipal fire hose market. National notes that none of its competitors is currently subject to the restrictions imposed on National by the order. National claims that setting aside the order would enable National to become a more effective interbrand competitor, because National would be able to foster the promotional and sales development efforts of its local distributors. National's local distributors presently are reluctant to undertake such efforts, because they risk losing business to distant National distributors who exploit the market created through the efforts of National's local distributors.

Based on the information provided by National and other available information, the Commission has concluded that National has failed to make a satisfactory showing of changed conditions of fact or law that require reopening. The Commission has determined, however, that the public interest warrants reopening the proceeding in Docket No. C-2935 and setting aside the order. National's inability under the order to impose otherwise lawful territorial restrictions on its fire hose distributors may impede National's ability to compete by lessening the efficiency of National's distribution system and by discouraging distributors from offering and promoting National's products. In addition, purchasers of National's municipal fire hose may have difficulty obtaining post-sale services and training from distributors that have lost sales due to "free riding" by other distributors and, therefore, may be exposed to increased risk of injury. As a result, National may be exposed to personal injury claims.

The impediments to effective competition resulting from the order outweigh any reasons to retain the order. There do not appear to be any significant impediments to entry into either the manufacture or distribution of fire hose, and, in fact, significant entry has occurred since the order in this case was entered. An absolute prohibition upon the use of territorial restrictions by National appears to be no longer necessary under the facts presented, because National's use of exclusive territorial arrangements with its distributors is unlikely to foreclose competitors from distributional outlets.

The legality of distributional restraints, such as territorial restrictions, standing alone or coupled with exclusive distribution arrangements, must be determined on a case by case basis under applicable legal standards. Under the particular circumstances of this case, the

¹ The order prohibits National from imposing territorial restrictions on its distributors. The order does not bar National from entering into exclusive distributorship agreements with its distributors.

1

Set Aside Order

likely impediment to National's ability to compete outweighs any need to retain the order, and it is therefore in the public interest to set aside the order in this case.

Accordingly, *it is ordered* that the order of November 1, 1978, in this matter be, and it hereby is, set aside.

Commissioner Bailey was recorded as voting in the negative.

IN THE MATTER OF

GLENDINNING COMPANIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 8824. Consent Order, Oct. 26, 1976—Modifying Order, Jan. 13, 1987

The Federal Trade Commission has modified a 1976 consent order with respondent (88 F.T.C. 656) by lifting a prohibition against running skill contests that are not based on "matters of established provable fact." Provisions in the original consent order that required skill contests to be based on reference materials that are available in the typical public library and disclosure of the reference books containing the answers were replaced in the modified order with new provisions requiring that correct answers be ascertainable from "authoritative reference works" and that contestants be informed of that fact.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On September 15, 1986, Glendinning Associates, Inc. (Petitioner), successor to the respondent under the order, Glendinning Companies, Inc., filed a request to reopen and modify the consent order issued by the Commission on October 26, 1976, in Docket No. 8824. (88 F.T.C. 656.)

The request to reopen and modify the consent order was placed on the public record on October 9, 1986, and a press release concerning the petition was issued on the same date. A notice of 30-day period for public comments on the petition was published in the *Federal Register* on October 24, 1986 [51 FR 37741 (1986)]. The public comment period ended on November 10, 1986, and no comments were filed. The deadline for the Commission to rule on Petitioner's request was January 13, 1987.

Petitioner is engaged in the manufacture, promotion, sale, and distribution of promotional games used to induce the sale of consumer products. Paragraph 1 of the order relates to all promotional games, contests and sweepstakes in which a prize is offered. Paragraph 2 relates only to skill contests. Petitioner asserts that the public interest requires that the Commission replace Paragraph 2 with a new Paragraph 2.

Paragraph 2 now orders Petitioner to cease and desist from:

2. Engaging in, promoting the use of, or participating in the development or operation of any skill contest, unless:

Modifying Order

- a. The skill contest is based solely on matters of established, provable fact.
- b. The factual subject matter is obtainable from readily available reference materials, *e.g.*, those available in the typical public library.
- c. Contest materials and advertising disclose clearly and conspicuously that a substantial degree of skill is involved and also the specific reference works on which the answers are based (*e.g.*, a specific dictionary, encyclopedia, atlas, or historical work), and contest rules and directions clearly provide all necessary information for the contestant to participate successfully.
- d. Questions and answers with complete supporting data as outlined in Paragraphs (a) and (b) and complete judging procedures are filed with an independent organization prior to promotion implementation.
- e. The correct answers and a list of winners is made available to participants upon request and filed with an independent organization within 60 days of the close of judging of the competition.
- f. Respondent or its designee maintains for at least two years after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

Petitioner argues that the unintended effect of the order is to preclude it from conducting any skill contest except those based on "established provable fact." Therefore, Petitioner contends that it is forbidden by the order from conducting other skill contests such as those involving "checker problems, chess problems, crossword puzzles, photography or drawing contests, poetry contests and contests awarding prizes for the best jingle, slogan, product name, letter, or essay."

Petitioner argues further that subparagraph b. of Paragraph 2 prevents it from conducting a current events or contemporary history quiz dealing with recent events because the answers to such quizzes may not be readily available in published reference materials in the typical public library. A trivia quiz may also be questionable, according to Petitioner, because the typical public library "may not have reference materials concerning sports data, motion picture lore, or data on operas, Broadway shows, radio and television shows, their stars and plots."

Petitioner asserts that the requirement in subparagraph c. of Paragraph 2 that contest materials and advertising disclose the specific reference works on which answers are based, "(*e.g.*, a specific dictionary, encyclopedia, atlas or historical work)," reduces a skill contest to a research project. Under such conditions, Petitioner argues, almost every contestant could become a winner by looking up the answers in the reference books. Therefore, according to Petitioner, large prizes could not be offered and there would be no incentive to participate if nominal prizes were offered.

Petitioner's proposed Paragraph 2 restructures order Paragraph 2 so that the requirements that apply to all skill contests are set forth

in new subparagraphs (a) and (b) and those requirements that apply only to skill contests based on fact are listed separately under new subparagraph (c). The Commission considers this modification to be in the public interest because it would permit Petitioner to conduct games of skill that are not based on fact, while preserving the essential requirements of the order. For games of skill based on fact, the modification would eliminate the requirement in subparagraph b. that the factual subject matter be "obtainable from readily available reference materials, e.g., those available in the typical public library." This modification is, in the view of the Commission, in the public interest as it would permit Petitioner to conduct skill contests based on recent events and trivia quizzes that may not be found in reference materials that are readily available in the typical public library. Furthermore, not all answers to a contest need come from a single reference source. However, the answers must be ascertainable from "authoritative reference works."

Petitioner's proposed Paragraph 2 would also eliminate the requirement in subparagraph c. that the specific reference works where answers may be found be disclosed. This modification serves the public interest as it would enable Petitioner to stimulate interest in its contests by offering large prizes. As Petitioner points out in its petition, anyone could win under the order by merely going to the stated reference books and looking up the answers. Therefore, large prizes could not be offered.

Petitioner has not demonstrated a change of law or fact to support its request that the order be reopened and modified as requested, in accordance with Section 5(b) of the Federal Trade Commission Act. However, the facts presented by Petitioner have persuaded the Commission that the public interest requires that the order be reopened and modified as requested.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on October 26, 1976, and modified on February 24, 1981, is hereby further modified to read as follows:

ORDER

It is ordered, That respondent Glendinning Companies, Inc., a corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of Coca-Cola, Tab, or any food or other product, or in connection with the sale or distribution of "Big Name Bingo," or any other promotional game, contest, sweepstake or similar device which involves or offers the awarding of a prize or anything of value to participants therein,

by any means, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Engaging in, promoting the use of, or participating in any such promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

(a) All of the requirements, terms and conditions for participating therein and for entitlement of such prizes are clearly and conspicuously set forth in each advertisement or notice which purports to explain or illustrate the operation of, manner of participation in, or the basis for or prospects of becoming entitled to or receiving a prize in connection with, any such contest or promotional game.

(b) All such prizes are in fact awarded to all participants therein whose entries conform to the stated requirements, terms and conditions for entitlement to and receipt of such prizes.

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in such connection therewith, full and adequate records which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative.

2. Engaging in, promoting the use of, or participating in the development or operation of any skill contest, unless:

(a) Contest materials and advertising disclose clearly and conspicuously that a substantial degree of skill is involved and, contest rules and directions clearly provide all necessary information for the contestant to participate successfully.

(b) Respondent or its designee maintains for at least two years after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

(c) In any skill contest based on fact: (1) each correct answer or solution is ascertainable from authoritative reference works; (2) the contest materials and advertising disclose, clearly and conspicuously in addition to the disclosures required by Paragraph 2(a), that the answers are ascertainable from authoritative reference works; (3) questions and answers with complete supporting data and complete judging procedures are filed with an independent organization prior to promotion implementation; and (4) the correct answers and a list

of winners is made available to participants upon request and filed with an independent organization within 60 days of the closing of judging of the competition.

For purposes of this order a *skill contest* is defined as any promotional contest or device in which the award of a prize or anything of value to the participants is determined on the basis of the winning answers or solutions submitted by participants through the exercise of a substantial degree of skill in determining the winning answers or solutions to the questions or problems which are the subject of the contest or device.

In the event that the Commission promulgates a final trade regulation rule concerned with skill contests, then such trade regulation rule shall completely supersede and replace Paragraph 2 and such trade regulation rule shall become part of this order.

It is further ordered, That the terms of this order shall not apply to a promotional game, contest or device conducted by or under the direction of a governmental instrumentality, or where the respondent neither knew nor had reason to know of failure to comply with the terms of this order.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

