

Complaint

90 F.T.C.

IN THE MATTER OF

ZAYRE CORP.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2908. Complaint, Oct. 27, 1977 — Decision, Oct. 27, 1977*

This consent order, among other things, requires a Framingham, Mass. operator of a discount department store chain to cease failing to have, in each store covered by advertisements, all advertised items available for sale at or below advertised price, in reasonably sufficient quantities to meet anticipated demands; to conspicuously post advertisements and prescribed notices at store entrances and checkout counters; maintain business records for a three-year period; and institute a surveillance program to ensure that its stores' business practices conform to the terms of this order.

Appearances

For the Commission: *Harold F. Moody.*

For the respondent: *Newton A. Lane, Nathanson & Rudofsky,*
Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Zayre Corp., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Zayre Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with an office and principal place of business located at 770 Cochituate Road, Framingham, Massachusetts.

PAR. 2. Respondent and its subsidiary corporations are now, and for some time last past have been engaged in the operation of a chain of retail discount department stores. There are presently approximately 250 department stores in respondent's chain, located throughout most states east of the Mississippi River. Its volume of business has

been and is substantial. In the operation of its retail discount department stores, respondent offers to its customers an extensive line of clothing, hard goods and other general merchandise. Many of said products offered for sale and sold are purchased from a large number of independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid clothing, hard goods and other general merchandise to be shipped and distributed from the aforesaid sources of supply either directly to its retail stores or to its distribution centers and thereafter to its retail stores, many of which are located in various states other than the state of origination, distribution or storage of said products. In the further course and conduct of its business respondent transmits contracts, business correspondence, monies and other documents from its stores, offices and divisions located in various states to others of its stores, offices and divisions located in other states. In the further course and conduct of its business respondent disseminates advertisements in newspapers of interstate circulation and in broadcast media, which broadcasts are received in states other than those of origination. Respondent maintains and at all times mentioned herein has maintained substantial business in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent disseminates and causes to be disseminated certain advertisements. In said advertisements respondent makes certain statements and representations with respect to the terms and conditions under which various items of merchandise will be sold to members of the public. The terms and conditions include descriptions or depictions of items of merchandise, their prices, time periods and geographical areas.

PAR. 5. By disseminating or causing to be disseminated in various areas of the United States served by respondent's retail stores such advertisements, respondent has represented, directly or by implication, that in those stores covered by such advertisements, during the effective period of the advertised offers, the items listed or depicted in such advertisements would be readily available for sale to customers, and readily and conspicuously, available for sale at or below the advertised price; and by failing to have had, in every instance, each of the advertised items readily available for sale to customers and readily and conspicuously available for sale at or below the advertised price, said representations as referred to herein were false,

misleading and deceptive, and respondent has engaged in unfair acts and practices.

PAR. 6. In the course and conduct of its business and at all times referred to herein, respondent has been and now is in substantial competition in or affecting commerce, with corporations, partnerships, firms and individuals in the purchase, sale and distribution of clothing, hard goods and general merchandise.

PAR. 7. The use by respondent of the aforesaid unfair and false, misleading and deceptive representations, acts and practices has had the capacity and tendency to mislead members of the purchasing public, and to induce such persons to go to respondent's stores and to purchase from respondent items other than the advertised items and the advertised products at prices in excess of those advertised.

PAR. 8. The aforesaid acts and practices of respondent as herein alleged were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair and deceptive acts and practices in or affecting commerce, and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, 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 the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Zayre Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with a principal office located at 770 Cochituate Road, Framingham, Massachusetts.

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

It is ordered, That respondent Zayre Corp., its successors and assigns, and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from representing in any advertisement, by any means, that any product is available for sale to the public at its Zayre department stores at any price unless:

1. Each advertised item is readily available for sale to the public in the selling area of each store covered by the advertisement at or below the advertised price; and

2. Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with a price which is at or below the advertised price;

provided, however,

(a) An item shall be deemed readily available for sale to the public, although not in the selling area of each store covered by the advertisement, if a clear and conspicuous notice is posted in the area where the item is regularly displayed stating that the item is in stock or, in the case of an item which is customarily delivered, in the warehouse customarily servicing said store, and may be obtained upon request, and said item is furnished on request;

(b) An item shall not be deemed unavailable if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that: (i) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand but were "sold out," or the advertised items were advertised with a limit on the available quantity thereof in each store and said items were delivered to the stores in the advertised quantities but were "sold out," or (ii) the advertised items were ordered but not delivered

due to circumstances beyond respondent's reasonable control, and that, upon knowledge of such nondelivery, respondent acted immediately to contact the media to revise the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item and, if revision of the advertisement was not reasonably possible, respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price. Respondent may immediately offer to a disappointed customer another item or items of equal or better value at a reduced price which is at or below the advertised price, which the customer may elect to accept in lieu of a "rain check."

Respondent shall be deemed to have shown, although not limited to such a showing, that it delivered an item to a store in quantities sufficient to meet "reasonably anticipated demand," for the purposes of this order, in a particular advertisement period if it maintains records showing that it had available that item in its stores during that advertisement period in quantities equal to or greater than the quantities of that item sold by its stores during the last preceding comparable advertisement period.

The phrase, "quantities of that item sold by its stores during the . . . advertisement period," means the sum of the number of units in the closing inventory of the stores after closing hours on the night before the first day of the advertisement period, *plus* the number of units delivered to the stores during the advertisement period, *plus* the number of "rain checks" issued for that item during the advertisement period, and *minus* the number of units in the closing inventory of the stores after closing hours on the last day of the advertisement period.

The phrase, "last preceding comparable advertisement period" means, for a particular item, the last preceding advertisement period (during which the item was advertised) that is most comparable to the particular advertisement period, considering the time of the year, the week of the month, weather conditions, the nature of the item, the amount of the price reduction, the location of the advertisement for the item with reference to the advertisement as a whole, the type size of the advertisement for the item, the availability of a coupon, the location of the product within the stores, and any other relevant factors affecting a customer's buying habits.

If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by

this proviso were in the possession of respondent showing (i) or (ii), *unless* clear and convincing evidence establishes the contrary.

(c) If any advertisement includes two or more stores, a product shall not be deemed unavailable or mispriced if such advertisement contains a specific exemption with respect to said product and identifies each store in which the product is not available.

(d) If any advertised item is placed for sale in a large stack, pyramid or other special display containing a great number of such items, all of the items need not be individually marked at or below the advertised price, if the items not marked individually at or below the advertised price are so situated that it would be difficult or impossible for a customer to select an unmarked item.

(e) An advertised item which is usually and customarily individually marked with a price, need not be marked with the advertised price but may remain marked at its regular price if both (i) a conspicuous sign at the site of the display of such item clearly discloses that the item is, "as advertised" or "on sale" or words of similar import as appropriate, clearly discloses the advertised price, and clearly states that the cashiers know the sale price; and (ii) the cashiers do in fact have a written list containing such sale price, have been instructed to charge the sale price for said item, and do in fact charge the customer the sale price.

It is further ordered, That for a period of two (2) years from the date this order becomes final, during the effective period of each advertisement which represents that any product is available at respondent's department stores, respondent shall post conspicuously (a) at or near each doorway affording entrance to the public a copy of the advertisement and, (b) at or near each door affording entrance to the public and at or near the place where customers pay for merchandise, a notice stating that:

It is our policy to have all items advertised readily available for sale at or below the advertised price. If any advertised item that you wish to purchase is unavailable, except where quantity limitations are indicated in the advertisement, we will offer you a rain check which will enable you to purchase the item, or an item of comparable or better value, at or below the advertised price in the near future. We may immediately offer you a similar product of equal or better value which you may purchase at or below the advertised price, but you may choose a rain check if you wish.

If you have any questions, please speak to the store manager or customer service manager.

It is further ordered, That for a period of two (2) years from the date this order becomes final respondent shall cause the following statement to be clearly and conspicuously set forth in each written

advertisement which represents that items are available for sale at a stated price at any of its department stores.

It is our policy to have each of these advertised items readily available for sale at or below the advertised price in each Zayre store, except as specifically noted in this ad.

It is further ordered, That:

(1) Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organizations down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities as to individual department stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

(2) Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its department stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

(3) Respondent shall, for a period of three (3) years subsequent to the date of this order:

(a) Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

(b) Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

(c) Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

(4) Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates on which this order becomes final file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

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 or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent, which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent herein shall within sixty

(60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Interlocutory Order

90 F.T.C.

IN THE MATTER OF

THE RAYMOND LEE ORGANIZATION, INC., ET AL.

Docket 9045. Interlocutory Order, Oct. 31, 1977

Denial of respondents' request for reconsideration of prior denial of extension to file answer to motion for leave to file amicus brief.

ORDER DENYING RESPONDENTS' REQUEST FOR
RECONSIDERATION OF ORDER DENYING REQUEST FOR AN
EXTENSION OF TIME FOR FILING AN ANSWER

By letter received October 18, 1977, Mr. Malcolm I. Lewin, attorney representing The Raymond Lee Organization, Inc. and Raymond Lee; requested the Commission grant an extension of time for filing an answer in opposition to a motion for leave to file a brief of an amicus curiae.

The Commission, assuming arguendo that respondents had a right to file an answer under Rule 3.52(h), denied respondents' motion noting that the specified time within which the answer should have been forthcoming had expired.

Now, attorneys for respondents, by letter received October 25, 1977, request that the Commission reconsider its order denying their request for an extension of time.

Not addressing the question whether the respondents have a right to answer, the Commission finds no reason to reconsider the above order.

Moreover, the Commission, in its discretion, reading respondents' answer finds nothing therein to change its decision granting amici leave to file a brief. Respondents' major concern is that amici will introduce factual material not contained in the record of this proceeding. This fear is groundless, however, as the Commission undoubtedly would strike those portions of the brief which attempt to introduce new evidence about the case. Accordingly,

It is ordered, That said motion be, and it hereby is, denied.