

IN THE MATTER OF
ZAYRE CORPORATION

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

Docket C-2908. Decision, Oct. 27, 1977—Modifying Order, Oct. 8, 1980

This order reopens the proceeding and modifies the order issued against the firm on October 27, 1977, 42 FR 60138, 90 F.T.C. 329, in connection with the availability and pricing of advertised specials. In conformity with the modification allowed on April 9, 1980 to the order issued against Pay'N Pak Stores, Inc., Docket C-2780, the order requires only a limited disclosure of availability where closeout merchandise is involved (merchandise whose entire inventory is being disposed of at a reduced price and which is not planned to be restocked).

ORDER REOPENING THE PROCEEDING AND MODIFYING DECISION
AND ORDER

On October 27, 1977, the Commission issued a Decision and Order against Zayre Corp. in connection with the availability and pricing of advertised specials. The Order includes a provision to prevent Zayre from representing in its advertisements that merchandise is available at its stores at any price unless each advertised item is readily available for sale at or below the advertised price and that each advertised item is properly marked. There are certain exceptions to the availability and pricing requirements of the Order.

On July 18, 1980, Zayre Corp. petitioned the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, as amended on May 28, 1980, and Section 2.51 of the Commission's Organization, Procedures and Rules of Practice, 16 C.F.R. 2.51, to reopen the proceeding for the limited purpose of modifying the consent order in conformity with the modification allowed on April 9, 1980, to the Order issued against *Pay'N Pak Stores, Inc.*, Docket C-2780, dealing with "closeout" merchandise. On August 15, 1980, Zayre filed supplemental papers with respect to its petition.

"Closeout" merchandise was defined in the modified Pay'N Pak order as merchandise whose entire inventory is being disposed of at a reduced price and which is not planned to be restocked. Zayre's proposal embodies the same definition. It would, as the Pay'N Pak order, require only a limited disclosure of availability where closeout merchandise is involved.

After due consideration, the Commission believes that the public interest will be served by modifying the Zayre Corp. Decision and

Modifying Order

96 F.T.C.

Order to allow a general availability limitation on "closeout" merchandise.

It is ordered, That the proceeding is reopened.

It is further ordered, That the Zayre Corp. Decision and Order issued on October 27, 1977, is modified as follows:

The following paragraph is to be inserted after the first subparagraph in Section 2(b) of the Order which concludes with the words "rain check.":

For closeout items, in instances where an advertisement is for more than one store, the quantity limitation will be deemed to be complied with by disclosures that the items are closeout items and that the 'quantities are limited to stock on hand'. Closeout designation is only appropriate for items where Zayre both is disposing of the entire inventory of an item at a reduced price and is not planning on restocking the item.

IN THE MATTER OF
KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Oct. 9, 1980

ORDER DENYING IN PART MOTION TO DISMISS AND DIRECTING THE
FILING OF A REPORT AND OF SUBSEQUENT BRIEFS

In its Order of July 31, 1980, the Commission deferred ruling on one portion of the motion of General Foods Corporation ("General Foods") dated April 3, 1980, for dismissal of the complaint in this matter.¹ In this portion of its motion General Foods contends that the Commission has deprived it of due process of law "by impermissibly intermingling its prosecutorial, administrative and judicial functions to the point where the prosecution formulated the course which the Commission then followed." Motion at 2. In the alternative, General Foods seeks a full evidentiary hearing into the matters raised in its motion.

General Foods contends that dismissal of the complaint is required because of the "improper and prejudicial" participation of former chief administrative law judge Daniel Hanscom and of officials of the Bureau of Competition "in determining Judge Hinkes' status." Memorandum of General Foods Corporation (1) In Support of its Motion to Dismiss the Complaint, and (2) In Response to the Federal Trade Commission Order of March 4, 1980 ("Memorandum") at 38. In our order of July 31, we noted that this contention had not previously been raised, and before addressing it we determined to augment the record by obtaining affidavits from those who appeared best able to provide evidence relevant to the negotiation process with Judge Hinkes and the role of Bureau of Competition officials in that process. In compliance with our order, Messrs. Daniel C. Schwartz, Peter Brickfield, Barry R. Rubin, John F. Dugan and Barry Kefauver have filed affidavits.² Having reviewed these affidavits, Mr. Kefauver's affidavit of December 13, 1979, Judge Hanscom's affidavit of December 5, 1979, and certain additional material, discussed in Part II of this order, we have determined (1) to deny the reserved portion of General Foods' motion of April 3, 1979, insofar as it relates to the activities of Judge Hanscom; (2) to defer disposition of that portion of the motion insofar as it relates to the activities of officials of the Bureau of Competition; (3) to direct the Bureau of Competition to file the report specified in Part II of this order; and (4) to direct the parties to file their views on the need for additional factfinding.

¹ The motion was in other respects denied in our order of July 31.

² By memorandum of August 21, 1980, Mr. Rubin corrected typographical errors in his affidavit.