

Modifying Order

116 F.T.C.

IN THE MATTER OF

CLINIQUE LABORATORIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3027. Consent Order, July 23, 1980--Modifying Order, February 8, 1993*

This order reopens the proceeding and modifies a 1980 consent order (96 FTC 51) by deleting a provision that restricts the respondent's ability to prescribe to dealers the prices at which they should advertise their products, in connection with cooperative advertising and promotional programs. The Commission concluded that reopening the order and deleting the provision of paragraph III(2) is in the public interest.

ORDER GRANTING PETITION TO REOPEN AND MODIFY ORDER

Clinique Laboratories, Inc. ("Clinique") has filed a Petition To Reopen Proceeding And Modify Consent Order ("Petition") in Docket No. C-3027, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) ("FTC Act"), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 ("Rules"). Clinique asks the Commission to reopen and modify the consent order issued by the Commission on July 23, 1980, 96 FTC 51 ("order"). Specifically, Clinique requests that the Commission delete paragraph III(2) of the order, which prohibits Clinique from suggesting to its dealers the prices to be included in any advertising, mailer, or promotional material unless Clinique informs the dealers, in writing, that they may change the prices Clinique has suggested. 96 FTC at 56.¹ In support of its petition, Clinique argues that the modification is warranted by changed conditions of law and by the public interest. Clinique's petition was placed on the public record

¹ In the alternative, Clinique asks that the Commission modify paragraph III(2) of the order "to exclude cooperative advertising and promotion from its reach." Public Record ("PR") p. 4. The Public Record includes Clinique's petition, supporting affidavits and other materials.

for thirty days, pursuant to Section 2.51 of the Commissions Rules. No public comments were received. For the reasons discussed below, the Commission has determined that Clinique has not shown that changed conditions of law or fact require reopening the order, but that Clinique has demonstrated that it is in the public interest to reopen and modify the order by deleting paragraph III(2).

I. The Complaint And Order

The complaint in this case alleged that Clinique violated Section 5 of the FTC Act, 15 U.S.C. 45, by engaging, in combination with some of its dealers, in courses of action “to fix and maintain certain specified uniform prices at which products will be resold.” 96 FTC at 53. Paragraph I of the order prohibits Clinique, its successors and assigns, from engaging in any of nine specified acts and practices related to vertical price fixing.² 96 FTC at 55.

Paragraph II(3) of the order also prohibits Clinique from suggesting or recommending to any dealer any resale price on any list or order form, or in any catalog or stock control book, unless it “conspicuously state[s]” on each page that “THE RETAIL PRICES QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE COMPLETELY FREE TO DETERMINE YOUR OWN RETAIL PRICES.”

Subparagraph III(2) of the order, prohibits Clinique from suggesting . . . any resale price to any dealer for use or inclusion in

² Specifically, Clinique is prohibited from (1) fixing the resale prices at which any dealer may advertise, promote, offer for sale or sell any product; (2) requesting or requiring any dealer to adopt or adhere to any resale price; (3) requesting or requiring dealers to report dealers who deviate from any resale price; (4) requesting or requiring that dealers refrain from or discontinue selling or advertising any product at any resale price; (5) hindering the lawful use of Clinique's name or trademarks in connection with the sale or advertising of any product at any resale price; (6) conducting surveillance programs “to fix, maintain, control or enforce” resale prices; (7) terminating any dealer because of the resale price at which the dealer has sold or advertised any product; (8) threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting the right of any dealer to participate in any cooperative advertising program, because of the resale price at which the dealer advertises or sells any product, or proposes to sell or advertise any product; and (9) making any payment to any dealer because of the resale price at which any other dealer has sold or advertised any product. 96 FTC at 55.

any advertising, mailer or promotional material which said dealer intends to disseminate to consumers, unless [Clinique], in connection with each advertising, mailer or promotional material makes a written request to said dealer to review said advertising, mailer or promotional material for its resale price(s), and discloses therein in a clear and conspicuous manner the following:

CLINIQUE DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL]. YOU MAY CHANGE THE PRICES WE HAVE SUGGESTED.

96 FTC at 56.

II. Clinique's Petition

Clinique asks the Commission to delete paragraph III(2) of the order. Clinique argues that the relief it is seeking is required by "changes in the law on cooperative advertising," PR, p. 4, and by the public interest. PR, pp. 9-11. Clinique asserts that under decisions of the Supreme Court and of the Commission since entry of the order in 1980, price-restrictive cooperative advertising programs are to be governed by the rule of reason and are no longer considered per se violations of the law. Clinique further argues that the restriction it asks the Commission to delete is inconsistent with the state of the law.³

³ In support of its Petition, Clinique cites the following Commission decisions involving, among other things, price-restrictive cooperative advertising issues: *The Advertising Checking Bureau*, 109 FTC 146 (1987); *The Magnavox Company*, 55 Fed. Reg. 12,898 (1990); and *U.S. Pioneer Electronics Corp.*, 5 Trade Reg. Rep. (CCH) paragraph 23, 172 (1992). Clinique also cites the court decisions in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *In re Nissan Antitrust Litigation*, 577 F. 2d 910 (5th Cir. 1978) *cert. denied*, 439 U.S. 1072 (1979); and *Jack Walters & Sons Corp. v. Morton Buildings, Inc.*, 737 F. 2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

In addition, Clinique cites the Commission's 1987 statement concluding, among other things, that "price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful." *Withdrawal Of 1980 Policy Statement Regarding Price Restrictions In Cooperative Advertising Programs*, reprinted in 6 Trade Reg. Rep. (CCH) paragraph 39, 057 (announced May 21, 1987).

Clinique asserts that the requested modification is needed “to allow Clinique to compete on a level playing field, and is in the public interest.” PR, p. 9. According to Clinique, the paragraph III(2) constraint on price-restrictive cooperative advertising impairs interbrand competition: “By ‘free-riding’ on a coordinated, multi-dealer cooperative advertising or promotional campaign to highlight price differences among dealers of the same brand, dealers who insert their own prices can destroy Clinique’s ability to mount effective cooperative campaigns.” PR, p. 42. Clinique states that its competitors are not subject to similar prohibitions and that they are “free to organize regional or national cooperative advertising and promotional campaigns that promote their brands without creating confusion or distraction over which dealer is running the ads or distributing the materials exhibiting the lowest prices.” PR, p. 43.⁴ This ability “to run a coordinated campaign,” according to Clinique, confers a “distinct [competitive] advantage” on its competitors, and the “public interest would be better served by modifying the order to permit Clinique to introduce the same kinds of cooperative advertising and promotional programs that its competitors are permitted to employ.” PR pp. 10-11, 43.

III. Standards For Reopening And Modification

Section 5(b) of the FTC Act, 15 U.S.C. 45 (b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make

⁴ According to Clinique, its obligation under the order to afford its dealers an opportunity to modify each cooperative advertising and promotional program, among other things, (i) hinders its ability to implement such programs in a manner it believes best responds to rapidly changing market conditions, and (ii) prevents Clinique from taking advantage of seasonal marketing opportunities in a timely manner. PR, pp. 51-54.

continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5 (b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.⁵ If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether the modification is required and, if so, the nature and extent of the modification. The

⁵ The Commission properly may decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders.⁶

IV. Clinique Has Failed To Demonstrate Changed Conditions Of Law Or Fact That Require Reopening Of The Order

The provision that Clinique seeks to have set aside is part of the order's overall prohibition on resale price maintenance ("RPM"). Nothing in the complaint or order suggests that the provision was included because the prohibited conduct itself, absent RPM, was deemed *per se* unlawful. Of course, RPM agreements remain *per se* unlawful. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Supreme Court recognized that non-price vertical restraints are not inherently anticompetitive and must be judged under the rule of reason. The Court replaced the *per se* test for non-price vertical customer restraints outside RPM with a rule of reason test, but the Court did not change the *per se* rule for non-price vertical restraints that are part of an RPM scheme.⁷ Clinique has failed to show that the conduct in which it wishes to engage has become lawful if part of RPM. Because paragraph III(2) of the order prohibits conduct that is unlawful if engaged in as part of RPM, and because Sylvania did not change the law as to such conduct, Clinique has failed to show a change in the law.

Clinique has similarly not made the necessary showing that changed conditions of fact require the Commission to reopen and modify the order. Although Clinique alleges that the United States cosmetics, fragrances, soaps and related accessories market today

⁶ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

⁷ See *Beltone Electronics Corporation*, 100 FTC 68 (1982) (applying GTE Sylvania to non-price vertical restraints).

appears to be competitive, there is no evidence that this represents a change from conditions existing at the time the Commission issued the order.

V. Clinique Has Shown Public Interest Considerations That Warrant Reopening And Modifying The Order

Clinique has shown that the public interest warrants reopening and modifying the order to delete paragraph III(2). Paragraph III(2) prohibits conduct that by itself may not be unlawful, and this prohibition is no longer necessary to ensure Clinique's compliance with the law.⁸ Moreover, Clinique has shown that it is being injured in competing with other firms that are free to and do engage in price-restrictive cooperative advertising and promotional programs. So long as Clinique continues to be prohibited by the core provisions of paragraph I of the order from engaging in RPM, the broader prohibition of paragraph III(2) now imposes costs that outweigh its continuing benefit. *See generally Lenox, Inc.*, Order Granting in Part and Denying in Part Request To Reopen and Set Aside Order, 111 FTC 612 (1989).

Clinique has shown that its ability to compete is adversely affected by the restriction in paragraph III(2) concerning price-restrictive cooperative advertising and promotional programs. PR, pp. 50-54. Clinique affirms by affidavit that many of its competitors currently use price-restrictive cooperative advertising and promotional programs with respect to cosmetic product lines that are directly competitive with the Clinique line. The order requirement that Clinique afford each of its dealers the opportunity to modify each advertising or promotional program to feature the dealer's individual pricing strategy imposes financial and other costs on

⁸ Paragraph III(2) of the order is in the nature of "fencing in" relief. Fencing in provisions in orders restrict otherwise lawful conduct, to prevent repetition of the violation or to mitigate the effects of prior unlawful conduct.

Clinique that its competitors do not incur. PR, pp. 40-43, 45-47, 50-54. In light of the use by Clinique's competitors of advertising and promotional programs that Clinique cannot unconditionally offer and use, Clinique has made a threshold showing that the order is causing competitive injury. Deleting paragraph III(2) from the order may allow Clinique to compete more effectively, to the benefit of consumers of Clinique's cosmetic products.

The reasons in favor of modifying the order by deleting paragraph III(2) outweigh the reasons not to modify the order. In 1990, the Commission reopened and modified the Magnavox order to delete similar provisions relating to restrictions on cooperative advertising allowances.⁹ On April 8, 1992, the Commission reopened and modified the Pioneer order to delete, among other provisions, a prohibition relating to cooperative advertising restrictions.¹⁰ In making these decisions, the Commission followed the reasoning in its 1987 decision to vacate the order in *The Advertising Checking Bureau, Inc.*, 93 FTC 4 (1979), which had prohibited the respondent from auditing cooperative advertising programs that required dealers to advertise at a specified price, or not to advertise at discount prices, as a condition for receiving advertising allowances or credits. In support of its determination to set aside *The Advertising Checking Bureau, Inc.* order, the Commission relied on the Supreme Court's decisions in *GTE Sylvania* and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), noting, among other things, that those decisions make it clear that the rule of reason should be applied in determining whether non-price vertical restraints unreasonably restrain

⁹ The Commission, among other things, deleted paragraph I(H) from the Magnavox order, which prohibited the respondent from "[t]hreatening to withhold or withholding earned cooperative advertising credits from dealers for the reason that they advertise its products at retail prices other than established or suggested retail prices." *The Magnavox Company*, 78 FTC 1183, 1189 (1971).

¹⁰ Paragraph I(6) of the Pioneer order prohibited Pioneer from "[t]hreatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved." *U.S. Pioneer Electronics Corp.*, 86 FTC 1002, 1006 (1975).

competition and violate the antitrust laws. In a vertical setting, the *per se* rule applies only to agreements to fix resale prices that prevent the dealer from making independent pricing decisions. See *Monsanto*, 465 U.S. at 764. *The Advertising Checking Bureau, Inc.*, 109 FTC 146, 147 (1987).¹¹ The Commission also noted that “[t]he fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful.” *Id.*

With respect to price restrictive cooperative advertising programs specifically, the Commission held that such programs “would not by themselves constitute agreements to fix resale prices.” *Id.* Moreover, the Commission recognized that price restrictive cooperative advertising programs are in fact “likely to be procompetitive...in most cases...by... channeling the retailer’s advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial.... This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition.” *Id.* See also *Withdrawal Of 1980 Policy Statement Regarding Price Restrictions In Cooperative Advertising Programs*, reprinted in 6 Trade Reg. Rep. (CCH) paragraph 39,057 (announced May 21, 1987). This change in Commission policy is consistent with recent court decisions.¹²

The approach followed by the Commission when it set aside the order in *The Advertising Checking Bureau, Inc.*, adopted its new cooperative advertising policy, and modified the orders in *Magnavox* and *Pioneer*, is applicable to Clinique’s request that the Commission delete paragraph III(2) of the order. This “fencing-in” provision prohibits price restrictions that Clinique might want to impose on its dealers in connection with its cooperative advertising

¹¹ Of course, *Sylvania* did not change the *per se* rule against RPM, the conduct that the orders in *Magnavox*, *Pioneer* and *Clinique* were intended to prohibit.

¹² See, *In re Nissan Antitrust Litigation*, 577 F. 2d 910 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979).

and promotional programs. Such restrictions may not necessarily be part of an illegal RPM scheme and have been recognized as reasonable in many circumstances. Of course, any cooperative advertising program implemented by Clinique as part of an RPM scheme would be *per se* unlawful and would violate the order even if modified as Clinique requests.

Clinique believes that at least one remaining order provision might be construed to prohibit Clinique from engaging in otherwise lawful price-restrictive cooperative advertising programs.¹³ Although Clinique does not expressly argue the point, it appears that Clinique is concerned that setting aside paragraph III(2) may not afford Clinique the relief it seeks unless the order makes clear that Clinique is permitted to engage in such conduct. PR, pp. 2-4. In light of the specific prohibition of paragraph III(2), the words “the resale price at which said dealer...proposes to...advertise any product,” 96 FTC at 55, in paragraph I(8) of the order may refer to the dealer’s own advertising, that is, advertising for which the dealer alone pays. These words, however, also may be construed to mean the prices at which the dealer proposes to advertise in Clinique’s cooperative advertising program. The Commission, therefore, would not construe paragraph I(8) and the remaining cooperative advertising and promotional programs that included conditions as to the prices at which its dealers offered Clinique’s products under the programs, so long as such programs are not part of a resale price maintenance scheme.

VI. Conclusion

The Commission has determined that Clinique has made a satisfactory showing that reopening the order and deleting paragraph

¹³ See paragraph I(8). 96 FTC at 55. Clinique does not ask the Commission to delete or modify this provision.

III(2) is in the public interest. Clinique has adequately demonstrated that the modification it seeks would enable Clinique to use what it considers the most efficient and cost effective cooperative advertising and promotional programs and put Clinique on an equal basis with its competitors. The modified order will continue to prohibit resale price maintenance.

Accordingly, *it is ordered*, that this matter be reopened and the Commission's order in Docket No. C-3027 be, and it hereby is, modified, as of the effective date of this order, by setting aside paragraph III(2).

IN THE MATTER OF

HAROLD A. HONICKMAN, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9233. Consent Order, July 25, 1991--Modifying Order, March 2, 1993*

This order reopens the proceeding and modifies the 1991 consent order (114 FTC 427) by allowing the respondents and the Brooklyn Beverage Acquisition Corp. to acquire non-carbonated soft drink assets without prior Commission approval. The Commission concluded that modifying the order was warranted to eliminate unintended coverage.

ORDER REOPENING AND MODIFYING ORDER

On November 16, 1992, the Federal Trade Commission ("Commission") issued an Order to Show Cause why the proceeding in Docket No. 9233 should not be reopened to modify paragraph II of the order. By letter dated December 4, 1992, the respondents responded to the November 16, 1992, Order to Show Cause, stating, among other things, that they do not object to the proposed modification. The respondents reiterated their lack of objection to the proposed modification in a letter dated February 16, 1993.

Complaint counsel responded to the November 16 order by filing a Motion Requesting Federal Trade Commission to Issue Order Reopening and Modifying Order Issued July 25, 1991 on December 23, 1992. Complaint counsel recommends that the Commission reopen and modify paragraph II of the order. A letter dated December 11, 1992, from Brooks Beverage Management, Inc. ("Brooks"), attached to complaint counsel's motion, urges "the Commission to view beverage products such as Hawaiian Punch and Perrier the same as CSDs for purposes of industry competitive analysis." Brooks states, however, that it is "not in a position to recommend to the Commission what its position on the Honickman consent order should be."