IN THE MATTER OF

MOBIL OIL CORPORATION

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

Docket C-3415. Complaint, Feb. l, 1993--Decision, Feb. l, 1993

This consent order prohibits, among other things, a Virginia-based manufacturer and seller of plastic bags from making unsubstantiated degradability and environmental benefit claims.

Appearances

For the Commission: *Michael Dershowitz* and *Mary Koelbel Engle.*

For the respondent: *Judith Oldham* and *John Williams, Collier, Shannon & Scott*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Mobil Oil Corporation, a corporation, has violated the provisions 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, alleges:

PARAGRAPH 1. Respondent Mobil Oil Corporation is a New York corporation with its office and principal place of business located at 3225 Gallows Road, Fairfax, Virginia.

PAR. 2. Respondent has manufactured, advertised, offered for sale, sold, and distributed plastic trash bags to the public under such trade names as Hefty, Kordite, and Baggies. Respondent has also manufactured, advertised, offered for sale, sold, and distributed plastic grocery store bags to grocery stores and supermarkets under

the brand names Marketote and Minitote and under the stores' private labels.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials, including package labeling, for plastic trash and grocery store bags, including, but not necessarily limited to, the attached Exhibits A, B, and C.

The aforesaid package labeling (Exhibit A) contains the following statements:

DEGRADABLE

[Hefty Degradable Bags] contain a special ingredient that promotes their breakdown after exposure to elements like sun, wind, and rain.

This ingredient promotes degradation without harming the environment.

Once the elements have triggered the process, these bags will continue to break down into harmless particles even after they are buried in a landfill.

...you don't have to worry that [Hefty Bags] will degrade sitting on your shelf or at the curb. These bags have been specially formulated so they're only activated by exposure to the elements.

Hefty Degradable Bags -- a step in our commitment to a better environment.

Hefty Helps!

The aforesaid grocery store bag labeling contains the following statements:

THIS BAG

* Degrades in sunlight * Landfill safe

* Non-toxic when incinerated * No ground water contamination

* Recyclable

PAR. 5. Through the statements referred to in paragraph four in both package labeling and grocery store bag labeling, and others in labeling not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Compared to other plastic bags, respondent's plastic bags offer a significant environmental benefit when consumers dispose of them as trash; and

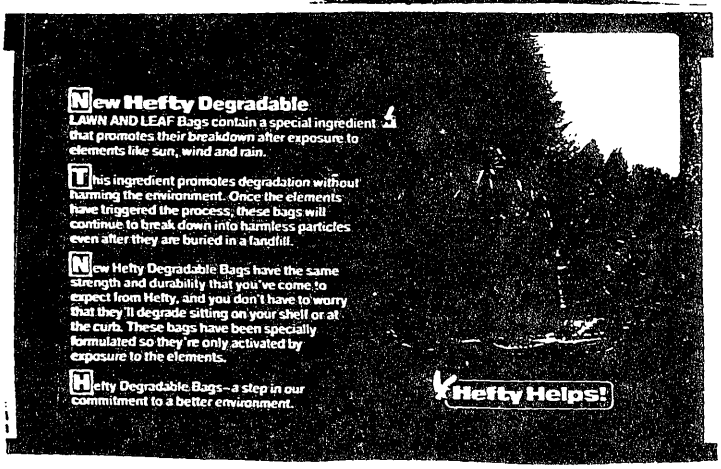
2. Respondent's plastic bags will completely break down, decompose, and return to nature in a reasonably short period of time after consumers dispose of them as trash.

PAR. 6. Through the statements and representations referred to in paragraphs four and five, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made such representations, respondent possessed and relied upon a reasonable basis for such representations.

PAR. 7. In truth and in fact, at the time respondent made such representations, respondent did not possess and rely upon a reasonable basis for such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

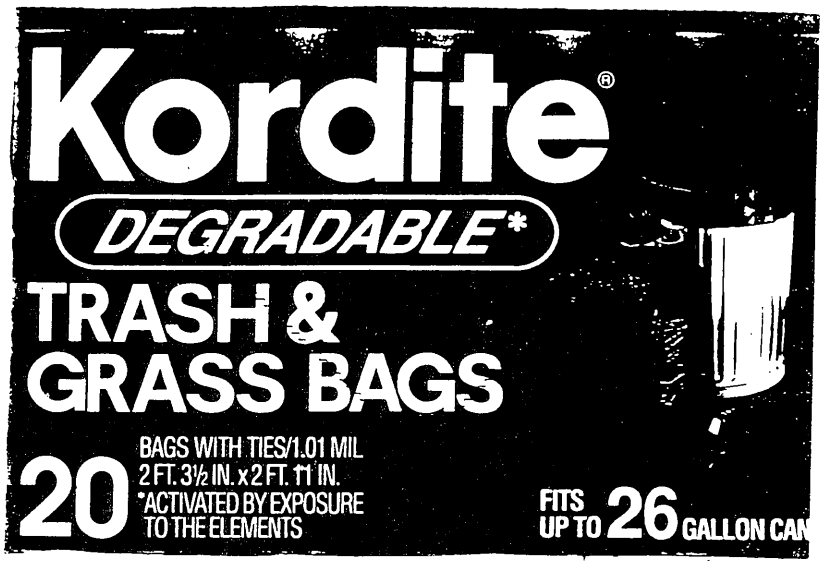
EXHIBIT A



BACK PANEL

EXHIBIT B

FRONT PANEL:



BOTTOM PANEL:

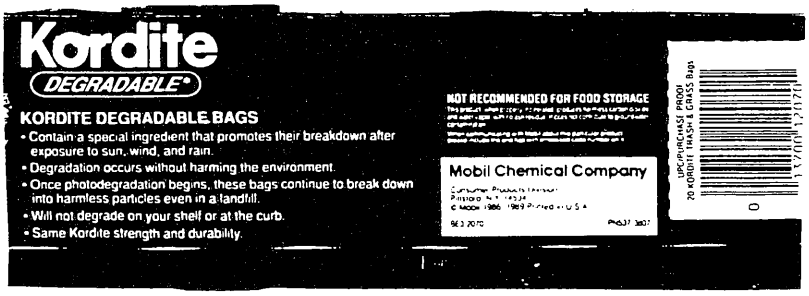


EXHIBIT C

BAGGIES®
DEGRADABLE*
TRASH
BAGS

- Contain a special ingredient that promotes their breakdown after exposure to sun, wind, and rain.
- Degradation occurs without harming the environment.
- Once degradation begins, these bags continue to break down into harmless particles even in a landfill.
- Will not degrade on your shelf or at the curb.
- Same Baggies strength and durability.

Mobil Chemical Company

Consumer Products Division, Pittsford, New York, 14534

547-2287 BE5-4012

UNIQUE VALUE!

- Strength plus convenience
- Baggies unique dispenser opening keeps bags ready for use.
- Convenient, durable, puncture resistant and tough Baggies. A real value.

Baggies bags also available in other sizes.

LARGE TRASH
Up to 33 gallons

TALL KITCHEN
Up to 13 gallons

CAUTION:
PLASTIC BAGS CAN CAUSE SUFFOCATION
PLEASE KEEP THIS PRODUCT AND ALL PLASTIC BAGS OUT OF THE REACH OF CHILDREN. DO NOT PERMIT CHILDREN TO PLAY WITH THEM AND DO NOT USE THEM IN CRIBS, PLAYPENS OR CARRIAGES.

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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, 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 complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by 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 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Mobil Oil Corporation is a Delaware corporation with its office and principal place of business at 3225 Gallows Road, Fairfax, Virginia.

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

DEFINITION

For purposes of this order, the following definition shall apply:

"*Mobil plastic bag*" means any plastic grocery bag, or any plastic "disposer" bag, including but not limited to trash bags, lawn bags, and kitchen bags, that is offered for sale, sold, or distributed to the public by respondent, its successors and assigns, under the "Hefty," "Kordite," or "Baggies" brand name or any other brand name of respondent, its successors and assigns; and also means any such plastic bag sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

I.

A. *It is ordered*, That respondent Mobil Oil Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any Mobil plastic bag, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by words, depictions, or symbols:

(1) That any such plastic bag is "degradable," "biodegradable," or "photodegradable"; or

(2) Through the use of "degradable," "biodegradable," "photodegradable," or any other substantially similar term or expression, that the degradability of any such plastic bag offers any environmental benefits when disposed of as trash in a sanitary landfill, unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for such representation,

consisting of competent and reliable scientific evidence that substantiates such representation. To the extent such evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies, or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, and using procedures generally accepted in the profession to yield accurate and reliable results.

B. *Provided, however*, respondent will not be in violation of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of plastic grocery bags, if it prints a diamond-shaped symbol on such bags in compliance with Florida state law, and/or truthfully states that such bag "Complies with Florida law."

C. *Provided, further*, respondent will not be in violation of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of plastic bags, if it truthfully represents that its plastic bags are designed to degrade or break down, and become part of usable compost, along with the bag's contents, when disposed of in programs that collect yard or other waste for composting (that is, the accelerated breakdown of waste into soil-conditioning material), provided that the labeling of such bags and any advertising referring to the degradability of such bags discloses clearly, prominently, and in close proximity to such representation:

(1)(a) That such bags are not designed to degrade in landfills, or

(1)(b) In those states in which composting facilities are required for yard waste, that composting bags are only designed to degrade in such composting facilities; and further discloses (2)(a) that yard waste composting programs may not be available in the consumer's area, or

(2)(b) The approximate percentage of the U.S. population having access to yard waste composting programs.

For purposes of this provision, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such representation if there is a clear and conspicuous cross- reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the package. If such representation appears in more than one place on a package, it shall be sufficient if the above-required disclosures appear only on the principal display panel of the package, as "principal display panel" is defined in the Fair Packaging and Labeling Act, 15 U.S.C. 1459(f) (1988).

If the advertising and labeling of respondent's plastic bags otherwise comply with subpart A of part I of this order, respondent will not be in violation of this order if it does not make the disclosures in this proviso (subpart C).

II.

It is further ordered, That respondent Mobil Oil Corporation, a corporation, its successors and assigns, and its officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising or labeling of any Mobil plastic bag, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the terms "safe for the environment," "no harm to the environment," "no injury to the environment," "no risk to the environment," "friendly to the environment," or any rearrangement of such terms, *e.g.*, "environmentally safe," "environmentally harmless," "environmentally risk-free" or "environmentally friendly," unless: (1) respondent discloses clearly, prominently, and in close proximity thereto with reasonable specificity what is meant by such term, and (2) at the time of making such representation, respondent possesses and relies upon a reasonable basis, consisting of competent and reliable scientific evidence that substantiates such representation.

To the extent such evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies, or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, and using procedures generally accepted in the profession to yield accurate and reliable results. For purposes of this provision, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such terms if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the package.

III.

Nothing in this order shall prevent respondent from using any of the terms cited in parts I and II, or similar terms or expressions, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising or labeling.

IV.

It is further ordered, That for three (3) years from the date that the representations to which they pertain are last disseminated, respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any representation covered by this order; and

B. All test reports, studies, surveys, or other materials in its possession or control that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation.

V.

It is further ordered, That respondent shall distribute a copy of this order within sixty (60) days after service of this order upon it to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation of labeling and advertising and placement of newspaper, periodical, broadcast, and cable advertisements covered by this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a 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 under this order.

VII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Owen dissenting as to the "specificity" requirement.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN

As in other degradability cases,[1] the consent order in this matter requires Mobil to provide specificity with respect to certain claimed general environmental benefits. According to the Notice to Aid

[1] *First Brands, Inc.*, C-3358 (Final Order Issued Jan. 3, 1992); *American Enviro Products, Inc.*, C-3376 (Final Order Issued Mar. 18, 1992).

Public Comment, the purpose of the provision is to "ensure compliance" with the order. In Archer Daniels Midland, File No. 902-3283, the Commission for the first time in its recent series of degradability cases accepted for comment an order that did not include the specificity requirement. If Archer Daniels Midland is a harbinger that the Commission intends to pursue a future policy of not mandating "specificity" in cases of this nature, I would prefer to have modified the order against Mobil to delete the specificity requirement prior to making the order final.

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

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[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

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[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]

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[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

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[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

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[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

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[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

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[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.