and that respondent secure from each such person and agency a signed statement acknowledging receipt of said order.

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

*It is further ordered*, That the respondent shall, within sixty days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

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IN THE MATTER OF

## TRAILER COACH ASSOCIATION, ET AL.

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

*Docket C-2572. Complaint, Oct. 8, 1974—Decision, Oct. 8, 1974*

Consent order requiring an Anaheim, Calif., trade association representing manufacturers, component suppliers, and dealers of mobile homes and recreational vehicles, among other things to cease making representations as to energy use or energy-saving characteristics of their recreational vehicles or as to the supply or availability of gasoline without having a reasonable basis for such claim.

### *Appearances*

For the Commission: *Gregory L. Colvin.*

For the respondents: *James P. Watson, Voegelin & Barton*, Los Angeles, Calif.

### COMPLAINT

The Federal Trade Commission, having reason to believe that Trailer Coach Association, a corporation, and Louis C. Bell, individually and as president of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Trailer Coach Association is a trade association organized, existing and doing business as a nonprofit corporation under the laws of the State of California, with its office and principal place of business at 3855 East La Palma Avenue, Anaheim, Calif.

Louis C. Bell is the president of Trailer Coach Association. He formulates, directs and controls the policies, acts and practices of said corporation, including those hereinafter set forth. His business address is the same as that of Trailer Coach Association.

PAR. 2. The corporate respondent was organized and is maintained for the purpose of promoting, fostering and advancing the interests of its members, who consist of manufacturers, component suppliers, and dealers of mobile homes and recreational vehicles, including but not limited to travel trailers, motor homes, van conversions, truck campers and camping trailers. Respondents have been and are now engaged in a wide range of activities of mutual interest and pecuniary benefit to the members of the corporate respondent, including the dissemination of advertising material designed to promote the sale of recreational vehicles. Allegations stated below in the present tense include the past tense.

PAR. 3. The corporate respondent maintains offices in California and Oregon, and its members are located primarily in eleven western States of the United States. In the course of their business, respondents cause various documents, monies, communications and promotional materials to be transmitted to and from the corporate respondent's offices, its members' offices, retail sellers of recreational vehicles, and other business entities located in many different States of the United States. Furthermore, respondents advertise and cause the dissemination of advertisements in media of interstate circulation. Respondents maintain a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of their business, respondents disseminate and cause to be disseminated numerous representations concerning energy saving and energy use characteristics of ownership and operation of recreational vehicles. Typical and illustrative of these respresentations, but not all inclusive thereof, are the representations which appear in the following newpaper advertisement disseminated by respondents beginning in July 1973: [See p. 715 herein.]

PAR. 5. Through the use of such advertisements, and others not specifically set out herein, respondents have represented, directly or by implication, that:

A. Any family on vacation in a recreational vehicle will save close to eighty percent of the energy the family would use while living at home during the same period of time:

1. Regardless whether the computation of energy consumption is made separately for electricity, natural gas, or for the aggregate total of all forms of energy consumed, including gasoline;


TURN OFF YOUR HOUSE...TURN ON TO..
RVCATIONING
Here's a way to solve the energy crisis: TAKE AN RVCATION.
It's a fun-filled fact . . . when you're enjoying RVCATIONING you're saving energy.
That's right, it only half the families in the United States would take a motor home, van conversion, travel trailer, truck camper or camping trailer and go to a campground or camping resort for two weeks a year our worries would be over.
FACT: Most families have two or more cars. Leave them home and drive only one vehicle on your RVcation, the average American family drives 300 miles per week with its two cars. The average RVcation is spent only about 300 miles from home. And with the 1972 anti-pollution equipment, there is little difference in gasoline consumption between a '73 sedan and a medium-sized motor home or a car towing an average trailer.
FACT: The average daily use of electric power in a campground is only 3 kilowatt hours compared to 23 kilowatt hours for the average house.
FACT: a recreation vehicle uses about half a therm of L-P gas per day, against 4 therms of natural gas used by the average household.
The power consumed by an average family in daily living at home is substantial. Every hour spent in a recreation vehicle saves bundles of energy. RVCATIONING means family fun, enjoying the great outdoors, seeing our beautiful country and saving valuable energy.
So for an exciting energy saving experience, turn off your house and turn on to RVCATIONING
SAVE ENERGY up to 80%
TCA
VISIT YOUR NEAREST
TRAILER COACH ASSOCIATION MEMBER DEALER

2. Regardless of the size and type of recreational vehicle and the nature and extent of its accessory equipment;

3. Regardless of the season, duration, and number of miles traveled on the vacation;

4. Regardless of the region of the United States in which the family lives and/or vacations; and

5. Regardless whether or not the family operates its recreational vehicle, home, automobiles, and other energy-consuming possessions in the family's customary or usual manner.

B. With the anti-pollution equipment on 1973 cars, there is little difference in fuel economy between a 1973 sedan, a medium-sized motor home, and a car towing an average travel trailer.

C. For most families, there is not significant difference in the fuel economy of the vehicles they operate while living at home compared to the fuel economy of driving or towing an average recreational vehicle.

D. Most families on vacation in a recreational vehicle do not drive any more miles in such vehicle than the total number of miles they drive while living at home, following their customary or usual driving habits, for the same period of time.

E. Most families on vacation in a recreational vehicle use less gasoline, or no more gasoline, than they would use while living at home, following their customary or usual driving habits, for the same period of time.

F. At the time the representations were disseminated, gasoline was readily available throughout the country.

G. An increase in the proportion of families taking recreational vehicle vacations will actually conserve energy, including gasoline, and will assure the continued availability of gasoline and other forms of energy.

H. If only half the families in the United States would take a motor home, van conversion, travel trailer, truck camper or camping trailer and go to a campground or camping resort for two weeks each year, the nation's energy worries would be over.

PAR. 6. At the time the representations set forth in Paragraph Five were made, respondents had no reasonable basis from which to conclude that such representations were true.

Therefore, the advertisements and representations referred to in Paragraphs Four and Five were and are deceptive and unfair.

PAR. 7. Respondents' use of the aforesaid deceptive and unfair advertisements and representations has the capacity and tendency to induce members of the public to rely thereon and to purchase substantial quantities of recreational vehicles.

PAR. 8. Respondents' aforesaid acts and practices are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have 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 days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Trailer Coach Association is a trade association organized, existing and doing business as a nonprofit corporation under the laws of the State of California with its office and principal place of business located at 3855 East La Palma Avenue, Anaheim, Calif.

Respondent Louis C. Bell is president of Trailer Coach Association. He formulates, directs and controls the policies, acts and practices of said corporation and his business address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

*It is ordered*, That respondent Trailer Coach Association, a corporation, its successors and assigns, and its officers, and Louis C. Bell, individually and as president of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of recreational vehicles, including but not limited to travel trailers, motor homes, van conversions, truck campers and camping trailers, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any representation, directly or by implication, as to energy use or energy saving characteristics or ownership or operation of any recreational vehicle or vehicles, or as to the supply or availability of gasoline or any other form of energy; unless, at the time the representation is made, respondents have a reasonable basis for such representation, consisting of tests or surveys

a. based on reliable data and adhering to generally accepted statistical principles,

b. which shall fully and completely substantiate the representation, and

c. the results and methodology of which, together with the original data collected, are available for public inspection and condensed in a report written in terms understandable to the average consumer, at each of respondents' offices.

2. Making any representation, directly or by implication, as to energy use or energy saving characteristics of ownership or operation of any recreational vehicle or vehicles; unless respondents clearly and conspicuously disclose, in immediate conjunction with the representation:

a. The specific forms of energy referred to, unless the representation applies to total consumption of all forms of energy by the consumer or family.

b. The particular type and size of recreational vehicle to which the representation applies, and the nature and extent of accessory equipment, unless it applies to all types and sizes of such vehicles regardless of accessory equipment installed.

c. The particular locations and conditions of use, including but not limited to the season, duration, and number of miles traveled, to which the representation applies, unless it applies

to all conditions of use and to all locations and regions in the United States.

d. The specific manner of operation of the recreational vehicle, home, automobiles, and other energy-consuming possessions to which the representation applies, unless it applies to the customary or usual manner of operation of all such possessions by the average consumer or family.

*It is further ordered*, That respondents forthwith deliver, to all persons and firms which respondents know or have reason to know may engage in dissemination of representations originated or distributed by respondents since June 1, 1973, as to energy use or energy saving characteristics of ownership or operation of recreational vehicles, or as to the supply or availability of gasoline or any other form of energy, a notice containing the following information, without mitigation:

1. The energy-related representations contained in the referenced advertising have been the subject of an investigation by the Federal Trade Commission, which has resulted in the entry of a consent order directing that distribution of the referenced advertisments be restricted.

2. At the time the energy-related representations were made, Trailer Coach Association did not have adequate substantiation to support such representations.

3. Trailer Coach Association has been ordered by the Federal Trade Commission to cease and desist from making energy claims related to recreational vehicles unless Trailer Coach Association can support such claims with reliable and statistically valid tests or surveys.

4. None of the energy-related representations originated or distributed by Trailer Coach Assoication since June 1, 1973, and no materials containing such representations, are to be further disseminated to the public or others until such time as respondents certify in writing to such person or firm that Trailer Coach Association is in possession of the substantiation required by this order.

5. Further dissemination by the person or firm of such representations without the certification required above may constitute a violation of the Federal Trade Commission Act by the person or firm itself.

*It is further ordered*, That respondents shall maintain complete records relative to the manner and form of their compliance with this order, and shall retain each record for three years after such record is made. Such records shall include all advertising, promotional material, the basis for all applicable advertising claims, correspondence with

persons who formulate or place advertising, and other pertinent documents.

*It is further ordered*, That respondents promptly distribute a copy of this order to each operating division, to all present and future personnel of respondents engaged in the preparation, creation or placing of advertising, and to all present and future agencies engaged in the preparation, creation or placing of advertising on behalf of respondents; and that respondents secure from each such person and agency a signed statement acknowledging receipt of said order.

*It is further ordered*, That respondents notify the Commission at least thirty 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 this order.

*It is further ordered*, That the individual respondent named herein promptly notify the Commission if he discontinues his present business or employment and if he affiliates with another business or employment related to the promotion, sale or distribution of recreational vehicles. Such notice shall include his current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

*It is further ordered*, That respondents shall, within sixty days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

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## IN THE MATTER OF

## RECREATIONAL VEHICLE INSTITUTE, INC., ET AL.

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

*Docket C-2573. Complaint, Oct. 8, 1974 — Decision, Oct. 8, 1974*

Consent order requiring a Des Plaines, Ill., trade association representing manufacturers, component suppliers, and dealers of mobile homes and recreational vehicles, among other things to cease making representations as to energy use or energy-saving characteristics of their recreational vehicles or as to the supply or availability of gasoline without having a reasonable basis for such claim.

### *Appearances*

For the Commission: *Gregory L. Colvin.*

For the respondents: *David J. Humphreys, Paulson & Humphreys,* Wash., D. C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Recreational Vehicle Institute, Inc., a corporation, and F. Michael Radigan, individually and as national director of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Recreational Vehicle Institute, Inc. is a trade association organized, existing and doing business as a not-for-profit corporation under the laws of the State of Indiana, with its office and principal place of business at 2720 Des Plaines Avenue, Des Plaines, Ill.

F. Michael Radigan is the national director of Recreational Vehicle Institute, Inc. He formulates, directs and controls the policies, acts and practices of said corporation, including those hereinafter set forth. His business address is the same as that of Recreational Vehicle Institute, Inc.

PAR. 2. The corporate respondent was organized and is maintained for the purpose of promoting, fostering and advancing the interests of its members, who consist of component suppliers and manufacturers of recreational vehicles, including but not limited to travel trailers, motor homes, truck campers and camping trailers. Respondents have been and are now engaged in a wide range of activities of mutual interest and pecuniary benefit to the members of the corporate respondent, including the dissemination of advertising materials designed to promote the sale of recreational vehicles. Allegations stated below in the present tense include the past tense.

PAR. 3. The corporate respondent maintains offices in Illinois, California, and the District of Columbia, and its members are located in many different States of the United States. In the course of their business, respondents cause various documents, monies, communications and promotional materials to be transmitted to and from the corporate respondent's offices, its members' offices, retail sellers of recreational vehicles, and other business entities located in virtually all States of the United States. Furthermore, respondents advertise and cause the dissemination of advertisements in media of interstate circulation and broadcast. Respondents maintain a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of their business, respondents disseminate and cause to be disseminated numerous representations concerning energy

saving and energy use characteristics of ownership and operation of recreational vehicles. Typical and illustrative of these representations, but not all inclusive thereof, are the following:

A. In advertisements broadcast over CBS and NBC radio networks beginning in June 1973:

Save electricity, gas and oil. Take a fun-filled family *RVcation* in a travel trailer, motor home, truck camper or camping trailer. Your recreational vehicle can be your comfortable, convenient home-on-wheels. And you use less than one fourth the energy you normally use at home.* * *

B. In an advertisement published in one regional and five national magazines in February and March 1974:

While enjoying an RVcation, you're helping conserve energy! It's a fact* * * RV users consume less electricity, less natural gas, less everything than they do at home.

C. In an advertising kit distributed beginning in June 1973 to over 15,000 recreational vehicle dealers and others for local use, containing the radio script quoted above and other materials:

1. A suggested "Short Talk for Use at Service Clubs, Chamber of Commerce Meetings, Business Clubs, etc." which includes the following representations:

If only 50% of the families in the U.S.A. would do this one thing this year, the entire natural energy crisis would be over. There would be no shortage of electricity, no shortage of natural gas. There would be no need to worry about whether or not you will have fuel oil for your home's heating system this winter. Every gasoline station would have plenty of gas.* * *

Now here's a way to solve the energy crisis. Take an RVcation! That's right, if only half the families in the United States would take a motor home, travel trailer, truck camper or camping trailer and go to a campground or camping resort for two weeks our worries would be over.

2. A leaflet for distribution to consumers, portions of which are shown below: [See pp. 723-724 herein.]

PAR. 5. Through the use of such advertisements, and others not specifically set out herein, respondents have represented, directly or by implication, that:

A. Any family on vacation in a recreational vehicle will use less than one-fourth of the energy the family would use while living at home during the same period of time:

1. Regardless whether the computation of energy consumption is made separately for electricity, natural gas, or for the aggregate total of all forms of energy consumed, including gasoline;


SAVE ENERGY
up to 80%!
TURN OFF
YOUR HOUSE
TURN ON
TO RVcationing
IN A
TRAVEL TRAILER
TRUCK CAMPER
CAMPING TRAILER
OR MOTOR HOME
FEDERAL TRADE COMMISSION
742-3189
COMMISSION
INVESTIGATIONAL
RECREATIONAL VEHICLE INSTITUTE
SERVING THE INDUSTRY
RECREATIONAL VEHICLE INSTITUTE
O'Hare Office Center North / 2720 Des Plaines Ave. / Des Plaines, Ill. 60018

If my family takes a two-week vacation in a motor home, travel trailer, truck camper or camping trailer, we will be saving energy? How can that be?

Here's how: the average American household uses around 23 kilowatthours of electricity and 3.57 therms of natural gas each day. When your family goes on a *RVcation* to a campground or camping resort, your recreational vehicle uses only about 5 kilowatthours of electric power and less than half a therm of L-P gas per day. So you see, you can help your country through the energy crisis and enjoy family fun at the same time.

But it's gasoline we're really short of, isn't it?

There is a shortage of about one to three percent of refined gasoline, but the shortage is ten to fifteen percent in all types of energy – electric power, natural gas, oil products and coal.

But what has caused these shortages all of a sudden?

The shortages are not as sudden as you may think. Warning signs appeared some time ago, but were largely ignored. The shortage of all energy-producing elements is a result of many different causes. A few are: the ecology movement (which has retarded progress in the generation of electricity by atomic means), bans on the use of coal (which is in plentiful supply), governmental price controls which have made it unprofitable to explore and produce energy (as in the case of natural gas), and above all, the tremendous increase in the use of all forms of energy necessary to produce the standard of living expected by the American public.

But how has the government allowed this situation to develop?

Bureaucracy has a lot to do with it. In the Federal Government there are 64 separate departments and agencies with power to regulate energy production, distribution and use. Most of these have regulated the particular products that are their special responsibility with little or no regard for the effects of their actions on the entire energy picture. The result? A hodgepodge of rules and regulations that have slowed down the production of coal, gas, oil, petroleum and electric power to the point where we now have severe problems to correct before the balance between needs and production can be fully restored.

How long will this take?

Experts from industry and government met recently in Washington to consider this and decided it would take until about 1985 at the present rate to completely restore this balance.

But how do shortages of electricity and natural gas affect gasoline?

All power sources are inter-related. For years we looked to atomic energy to meet the ever-growing demand for electricity. But fear of ecological pollution has retarded the development of atomic generation. Without atomic energy as a source of heat to produce electricity, other heat sources had to be tapped – natural gas, which is clean-burning and provides high heat production. But government price controls have made it so unprofitable to explore, find, produce and sell that no company that expects to stay in business can do so. Coal, once used extensively and still capable of answering the need, is almost a dirty word today. That leaves fuel oil, and the more oil used to generate electric power, the less will be available for refining into gasoline.

Then my family really could help the total energy situation by taking an RVcation at a campground or camping resort. But isn't it true that driving a motor home or towing a travel trailer uses up a great deal more gasoline than a car?

With the anti-pollution equipment on 1975 cars there is little difference in fuel use between a 73 sedan and a medium-sized motor home or car towing an average sized trailer. But don't forget, when you take your family away in your recreational vehicle you are using only one auto. Most home-owning families have two or more cars that total around 300 miles per week. On the other hand, most RVcations are spent no farther than 300 miles from home, so the difference in gasoline consumption is slight.

Then all the time we are camping in our RV we are saving on total energy consumption?

Exactly. You are saving close to 80% over the amount of energy your family normally consumes at home. You also save a great deal of water – another important resource.

2. Regardless of the size and type of recreational vehicle and the nature and extent of its accessory equipment;

3. Regardless of the season, duration, and number of miles traveled on the vacation;

4. Regardless of the region of the United States in which the family lives and/or vacations; and

5. Regardless whether or not the family operates its recreational vehicle, home, automobiles, and other energy-consuming possessions in the family's customary or usual manner.

B. Any family on vacation in a recreational vehicle will save close to eighty percent of the energy the family would use while living at home during the same period of time, regardless of the factors enumerated in Subparagraph A, above.

C. With the anti-pollution equipment on 1973 cars, there is little difference in fuel economy between a 1973 sedan, a medium-sized motor home, and a car towing an average travel trailer.

D. For most families, there is no significant difference in the fuel economy of the vehicles they operate while living at home compared to the fuel economy of driving or towing an average recreational vehicle.

E. Most families on vacation in a recreational vehicle do not drive any more miles in such vehicle than the total number of miles they drive while living at home, following their customary or usual driving habits, for the same period of time.

F. Most families on vacation in a recreational vehicle use less gasoline, or no more gasoline, than they would use while living at home, following their customary or usual driving habits, for the same period of time.

G. At the time the representations were disseminated, there was a shortage of only one to three percent of refined gasoline.

H. An increase in the proportion of families taking recreational vehicle vacations will alleviate shortages of energy, including gasoline.

I. If only half the families in the United States would take a motor home, travel trailer, truck camper or camping trailer and go to a campground or camping resort for two weeks each year, there would be no shortage of electricity, natural gas, home heating oil or gasoline, and the entire natural energy crisis would be over.

PAR. 6. At the time the representations set forth in Paragraph Five were made, respondents had no reasonable basis from which to conclude that such representations were true.

Therefore, the advertisements and representations referred to in Paragraphs Four and Five were and are deceptive and unfair.

PAR. 7. Respondents' use of the aforesaid deceptive and unfair advertisements and representations has the capacity and tendency to induce members of the public to rely thereon and to purchase substantial quantities of recreational vehicles.

PAR. 8. Respondents' aforesaid acts and practices are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all 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 respondents 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 respondents have 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 days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Recreational Vehicle Institute, Inc. is a trade association organized, existing and doing business as a not-for-profit corporation under the laws of the State of Indiana, with its office and principal place of business located at 2720 Des Plaines Avenue, Des Plaines, Ill.

Respondent F. Michael Radigan is the national director of Recreational Vehicle Institute, Inc. He formulates, directs and controls the policies, acts and practices of said corporation and his business address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

*It is ordered*, That respondent Recreational Vehicle Institute, Inc., a corporation, its successors and assigns, and its officers, and F. Michael Radigan, individually and as national director of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of recreational vehicles, including but not limited to travel trailers, motor homes, truck campers and camping trailers, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any representation, directly or by implication, as to energy use or energy saving characteristics of ownership or operation of any recreational vehicle or vehicles, or as to the supply or availability of gasoline or any other form of energy; unless, at the time the representation is made, respondents have a reasonable basis for such representation, consisting of tests or surveys

a. based on reliable data and adhering to generally accepted statistical principles,

b. which shall fully and completely substantiate the representation, and

c. the results and methodology of which, together with the original data collected, are available for public inspection in comprehensive written form, in terms understandable to, the average consumer, at each of respondents' offices.

2. Making any representation, directly or by implication, as to energy use or energy saving characteristics or ownership or operation of any recreational vehicle or vehicles; unless respondents clearly and conspicuously disclose, in immediate conjunction with the representation:

a. The specific forms of energy referred to, unless the representation applies to total consumption of all forms of energy by the consumer or family.

b. The particular type and size of recreational vehicle to which the representation applies, and the nature and extent of accessory equipment, unless it applies to all types and sizes of such vehicles regardless of accessory equipment installed.

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c. The particular locations and conditions of use, including but not limited to the season, duration, and number of miles traveled, to which the representation applies, unless it applies to all conditions of use and to all locations and regions in the United States.

d. The specific manner of operation of the recreational vehicle, home, automobiles, and other energy-consuming possessions to which the representation applies, unless it applies to the customary or usual manner of operation of all such possessions by the average consumer or family.

*It is further ordered*, That respondents forthwith deliver, to all persons and firms which respondents know or have reason to know may engage in dissemination of representations originated or distributed by respondents since May 1, 1973, as to energy use or energy saving characteristics of ownership or operation of recreational vehicles, or as to the supply or availability of gasoline or any other form of energy, a notice containing the following information, without mitigation:

1. At the time these energy-related representations were made, Recreational Vehicle Institute, Inc. did not have adequate substantiation to support such representations.

2. Recreational Vehicle Institute, Inc. has been ordered by the Federal Trade Commission to cease and desist from making energy claims related to recreational vehicles unless Recreational Vehicle Institute, Inc. can support such claims with reliable and statistically valid tests or surveys.

3. None of the energy-related representations originated or distributed by Recreational Vehicle Institute, Inc. since May 1, 1973, and no materials containing such representations, are to be further disseminated to the public or others until such time as respondents certify in writing to such person or firm that Recreational Vehicle Institute, Inc. is in possession of the substantiation required by this order.

4. Further dissemination by the person or firm of such representations without the certification required above may constitute a violation of the Federal Trade Commission Act by the person or firm itself.

*It is further ordered*, That respondents shall maintain complete records relative to the manner and form of their compliance with this order, and shall retain each record for three years after such record is made. Such records shall include all advertising, promotional material, the basis for all applicable advertising claims, correspondence with

persons who formulate or place advertising, and other pertinent documents.

*It is further ordered*, That respondents promptly distribute a copy of this order to each operating division, to all present and future personnel of respondents engaged in the preparation, creation or placing of advertising, and to all present and future agencies engaged in the preparation, creation or placing of advertising on behalf of respondents; and that respondents secure from each such person and agency a signed statement acknowledging receipt of said order.

*It is further ordered*, That respondents notify the Commission at least thirty 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 corporation which may affect compliance obligations arising out of this order.

*It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and of his affiliation with a new business or employment, in the event of such discontinuance or affiliation. Such notice shall include his current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

*It is further ordered*, That respondents shall, within sixty days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

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## IN THE MATTER OF

## FORD MOTOR COMPANY

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

*Docket C-2582. Complaint, Oct. 8, 1974 - Decision, Oct. 8, 1974* *

Consent order requiring a Dearborn, Mich., manufacturer of automobiles, among other things to cease using deceptive demonstrations and making unsubstantiated claims concerning structural strength, quietness or performance of motor vehicles.

### *Appearances*

For the Commission: *William S. Busker* and *Thomas J. Donegan.*

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*Petition for review filed January 15, 1975, C. A. 6th.

For the respondent: *Robert L. Wald, Wald, Harkrader & Ross*, Wash., D. C.

## 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 Ford Motor Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating the charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint, "commerce" means commerce as defined in the Federal Trade Commission Act.

PAR. 2. Respondent Ford Motor Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at The American Road, Dearborn, Mich.

PAR. 3. Respondent Ford Motor Company is now and for some time last past has been engaged in the manufacture, advertising, offering for sale, sale and distribution of certain motor vehicles, including but not limited to those models of automobiles designated by said respondent as the "Ford LTD" and the "Ford Galaxie."

PAR. 4. In the course and conduct of its aforesaid business, respondent Ford Motor Company causes the said motor vehicles, when sold, to be transported from its places of business located in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent Ford Motor Company maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce. The volume of business in such commerce has been and is substantial.

PAR. 5. In the course and conduct of its said business, respondent Ford Motor Company has disseminated and caused the dissemination of advertisements concerning the aforementioned Ford LTD and Ford Galaxie automobiles in commerce by means of advertisements printed in magazines and newpapers and advertisements transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to

induce, directly or indirectly, the purchase of said Ford LTD and Ford Galaxie automobiles.

PAR. 6. Among the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are those contained within the following sixty-second television advertisement entitled "Ford Lift," identified by the symbol FMFD 1036:

The commercial opens with a beauty shot of the 1971 Ford LTD. The announcer states, "The 1971 Ford LTD. One of the quietest Fords we've ever built. But to build a quiet car, you've got to build it strong." Four workmen apply blowtorches to the front doors of the car and rip off the doors, revealing the steel guard rails. The announcer explains, "For example, we put strong steel Guard Rails behind the doors. Like highway guard rails. Just how strong are they. Watch. We're going to lift the entire car* * *more than two tons* * *by the Guard Rails alone. Let's go." The camera pulls back showing a Ford guard rail framed by a highway guard rail. The workmen then attach steel chains to either end of the Ford guard rails, and the car is lifted vertically by a crane. The workmen watch with awe and admiration. The announcer continues, "Steel Guard Rails. They're strong and durable* * * Like the rest of the car. Like our new body frame design. And our rugged suspension system. Take a quiet break in the '71 LTD or the new Galaxie. They're built strong to last longer." While the announcer is speaking, the LTD is pictured in the background suspended in the air by the crane, with a beauty shot of a 1971 Galaxie in the foreground. The commercial ends with the statement that "Ford gives you better ideas."

PAR. 7. Through the use of the advertisement set forth in Paragraph Six, and others similar thereto not specifically set out herein, respondent has represented, directly or by implication, without qualification, that the steel guard rails in the side doors of the Ford LTD and Ford Galaxie automobiles are as strong as a typical highway guard rail.

PAR. 8. In truth and in fact, the steel guard rails in the side doors of the Ford LTD and Ford Galaxie automobiles are not as strong as a typical highway guard rail in that, among other reasons, they do not have the same lateral strength as a typical highway guard rail.

Therefore, the aforesaid statements and representations and demonstrations used in conjunction therewith, as set forth in Paragraphs Six and Seven above were, and are, false, misleading and deceptive.

PAR. 9. Through the use of the demonstration in the advertisement set forth in Paragraph Six and others similar thereto not specifically set out herein, and the statements and representations used in connection therewith, respondent has represented directly or by implication that such demonstration is competent and reliable evidence which proves the

lateral strength of the steel guard rails in the side doors of the Ford LTD and Ford Galaxie automobiles.

PAR. 10. In truth and in fact, the aforesaid demonstration, including the statements and representations used in connection therewith, is not competent and reliable evidence which proves the lateral strength of the steel guard rail in the side doors of the Ford LTD and Ford Galaxie automobiles.

Therefore, the aforesaid demonstration, including the statements and representations used in connection therewith, as set forth in Paragraphs Six and Nine above, is false, misleading and deceptive.

PAR. 11. Typical also of the statements and representations in said advertisements disseminated as aforesaid, but not all inclusive thereof, are those contained within the following advertisements:

A. A full page print advertisement which is divided into two sections. The upper half begins with a banner headline proclaiming "At 60 mph a 1973 Ford rode quieter than an airborne glider." Below the headline are two photographs, side-by-side, one of the outside of a glider in flight, the other of a sound level meter registering 82 decibels. Beneath these photographs runs the caption: "July 27, 1972, Lake Elsinore, California: At 60 mph, the sound level inside the glider registers a quiet 82 decibels, in tests supervised by General Radio Company."

Below this caption are two more photographs placed side-by-side, one of a Ford LTD traveling at 60 mph, the other of a sound level meter registering 65 decibels. The caption under these photographs reads, "In the same test, the sound level meter inside the Ford LTD traveling at 60 mph registers an even quieter 65 decibels."

The lower half of the advertisement contains a large illustration of the Ford LTD as well as the following text: "Independently supervised tests proved it. The 1973 Ford LTD actually rode quieter than an engineless glider. You'd expect a car that runs that quiet to be well-made in every sense of the word. And so it is* * *Quiet is the sound of a well-made car."

B. A television commercial entitled Ford LTD "Glider." The advertisement opens with various shots of a Ford LTD automobile and a glider on a runway. The announcer states, "The new '73 Ford LTD. Can an LTD be as quiet as a glider? Nobody has to convince you how quiet a glider is. Airborne! With no engine at all! Can an LTD be as quiet as a glider? (At this point the picture shows a sound level meter in the LTD.) "To find out we put a sound level meter in a new LTD to measure its quiet. Quiet is the sound of a well-made car." (The glider is depicted in flight.) "We also put a meter in the glider. And let General Radio

Company* * *real sticklers for accuracy* * *monitor. (The picture shows the sound meter in the glider.) "Let's test the noise level in the glider first. 82 decibels." (The words "82 decibels and 60 mph. Sound reading certified by General Radio Company" are superimposed on the picture. Then the picture shifts to a running shot of the LTD.) "Now the Ford LTD - Look at that meter at 60 mph - only 65 decibels." (The picture shows the interior of the car and the noise level meter. A split screen then shows both meters simultaneously. Then it returns to a running shot of the LTD.) The announcer concludes "Believe it or not this Ford LTD is quieter than the glider! Quiet is the sound of a well-made car. The new '73 Ford LTD. See it at your Ford Dealer's now." (The LTD is shown with the glider being pulled by an airplane.)

PAR. 12. Through the use of the advertisements set forth in Paragraph Eleven, and others similar thereto not specifically set out herein, respondent has represented, directly or by implication, that the sound level inside an airborne glider is "quiet," and that a sound level meter reading of 82 decibels is "quiet."

PAR. 13. In truth and in fact, the sound level inside an airborne glider is not "quiet" and a sound level meter reading of 82 decibels is not "quiet." Respondent has thereby established a misleading standard of quietness to which it compared the quietness of the 1973 Ford LTD and which it offered as competent and reliable evidence to prove that the Ford LTD is a quiet car and a well-made car.

Therefore, the aforesaid statements and representations and demonstrations used in conjunction therewith, as set forth in Paragraphs Eleven and Twelve above were and are false, misleading and deceptive.

PAR. 14. Moreover, at the time the respondent made the representations as alleged in Paragraph Twelve, there existed no reasonable basis for making those representations.

PAR. 15. The making of representations as alleged in Paragraph Fourteen constituted, and now constitutes, unfair or deceptive acts or practices in commerce.

PAR. 16. Through the use of the demonstration set forth in Paragraph Eleven and others similar thereto not specifically set out herein, and the statements and representations used in connection therewith, respondent has represented, directly or by implication, that such demonstration is competent and reliable evidence which proves that a Ford LTD is a quiet car and a well-made car.

PAR. 17. In truth and in fact, the aforesaid demonstration, including the statements and representations used in connection therewith, is not competent and reliable evidence which proves that a Ford LTD is a quiet car and a well-made car.

Therefore, the aforesaid demonstration, including the statements and representations used in connection therewith, as set forth in Paragraphs Eleven, Twelve, and Sixteen above, is false, misleading and deceptive.

PAR. 18. The use by respondent of the aforesaid false, misleading, and deceptive statements, representations and demonstrations, including the misleading statements and representations made in connection with said demonstrations, has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of said Ford LTD and Ford Galaxie automobiles manufactured by respondent Ford Motor Company, by reason of said erroneous and mistaken belief.

PAR. 19. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in commerce with corporations, firms and individuals in the sale of motor vehicles of the same general kind and nature as those sold by respondent.

PAR. 20. The aforesaid acts and practices of respondent, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

## DECISION AND ORDER

The Federal Trade Commission having issued its proposed complaint on February 6, 1973 charging the respondent named in the caption with violation of the Federal Trade Commission Act, and the respondent having further been furnished with a draft of a revised 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 the respondent with the same and additional violations 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 aforesaid draft of 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 set forth in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and

having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having accepted same, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Ford Motor Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its executive office and principal place of business located at the American Road, Dearborn, Mich.

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, Ford Motor Company, its successors and assigns, its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of the Ford LTD automobile, the Ford Galaxie automobile or any other motor vehicle marketed by the Ford Division, do forthwith cease and desist from:

(a) Unfairly or deceptively advertising any such product by presenting evidence, including tests, experiments, or demonstrations, or the results thereof, that appears or purports to be evidence of the structural strength, quietness or performance of such product, that is material to inducing the sale of such product, but which is not competent or reliable evidence to prove such fact or product feature.

(b) Making any statements or representations directly or by implication, concerning the structural strength, quietness or performance of the said products or any part thereof, unless there exists a reasonable basis for such statements or representations; *Provided*, That such a reasonable basis shall consist of competent and reliable scientific tests or other competent and reliable objective materials, including competent and reliable opinions of scientific, engineering or other experts who are qualified by professional training and experience to render competent judgments in such matters.

*It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to its operating divisions involved in the advertising, promotion, distribution, or sale of the Ford LTD automobile, the Ford Galaxie automobile or any other motor vehicle marketed by the Ford Division.

*It is further ordered*, That respondent shall notify the Commission at least thirty (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.

*It is further ordered*, That respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

Commissioner Thompson dissenting.

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IN THE MATTER OF

## J. WALTER THOMPSON COMPANY

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

*Docket C-2595. Complaint, Oct. 8, 1974 - Decision, Oct. 8, 1974.* *

Consent order requiring a New York City advertising agency, among other things to cease using deceptive demonstrations and making unsubstantiated claims concerning structural strength, quietness or performance of motor vehicles.

### *Appearances*

For the Commission: *William S. Busker* and *Thomas J. Donegan.*
For the respondent: *Hugh P. Connell*, N.Y., N.Y.

### 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 J. Walter Thompson Company, a corporation, hereinafter referred to as respondent, has violated

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*Petition for review was filed January 15, 1975, C.A. 6th.

the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating the charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint, "commerce" means commerce as defined in the Federal Trade Commission Act.

PAR. 2. Respondent J. Walter Thompson Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and place of business located at 420 Lexington Avenue, New York, N. Y.

PAR. 3. Respondent J. Walter Thompson Company is now and for some time last past has been engaged in the advertising and promotion of certain motor vehicles, including but not limited to those models of automobiles designated by Ford Division, Ford Motor Company as the "Ford LTD" and the "Ford Galaxie."

PAR. 4. In the course and conduct of its aforesaid business, respondent J. Walter Thompson Company causes the said advertising materials to be transported from its places of business located in various States of the United States to various media located in various other States of the United States and in the District of Columbia. Respondent J. Walter Thompson Company maintains, and at all times mentioned herein has maintained, a substantial course of trade in said advertising in commerce. The volume of business in such commerce has been and is substantial.

PAR. 5. In the course and conduct of its said business, respondent J. Walter Thompson Company has disseminated and caused the dissemination of advertisements concerning the aforementioned Ford LTD and Ford Galaxie automobiles in commerce by means of advertisements printed in magazines and newspapers and advertisements transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Ford LTD and Ford Galaxie automobiles.

PAR. 6. Among the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are those contained within the following sixty-second television advertisement entitled "Ford Lift," identified by the symbol FMFD 1036:

The commercial opens with a beauty shot of the 1971 Ford LTD. The announcer states, "The 1971 Ford LTD. One of the quietest Fords we've ever built. But to build a quiet car, you've got to build it strong." Four workmen apply blowtorches to the front doors of the car and rip off the

doors, revealing the steel guard rails. The announcer explains, "For example, we put strong steel Guard Rails behind the doors. Like highway guard rails. Just how strong are they? Watch. We're going to lift the entire car* * *more than two tons* * *by the Guard Rails alone. Let's go." The camera pulls back showing a Ford guard rail framed by a highway guard rail. The workmen then attach steel chains to either end of the Ford guard rails, and the car is lifted vertically by a crane. The workmen watch with awe and admiration. The announcer continues, "Steel Guard Rails. They're strong and durable* * *Like the rest of the car. Like our new body frame design. And our rugged suspension system. Take a quiet break in the '71 LTD or the new Galaxie. They're built strong to last longer." While the announcer is speaking, the LTD is pictured in the background suspended in the air by the crane, with a beauty shot of a 1971 Galaxie in the foreground. The commercial ends with the statement that "Ford gives you better ideas."

PAR. 7. Through the use of the advertisement set forth in Paragraph Six, and others similar thereto not specifically set out herein, respondent has represented, directly or by implication, without qualification, that the steel guard rails in the side doors of the Ford LTD and Ford Galaxie automobiles are as strong as a typical highway guard rail.

PAR. 8. In truth and in fact, the steel guard rails in the side doors of the Ford LTD and Ford Galaxie automobiles are not as strong as a typical highway guard rail in that, among other reasons, they do not have the same lateral strength as a typical highway guard rail.

Therefore, the aforesaid statements and representations and demonstrations used in conjunction therewith, as set forth in Paragraphs Six and Seven above were, and are, false, misleading and deceptive.

PAR. 9. Through the use of the demonstration in the advertisement set forth in Paragraph Six and others similar thereto not specifically set out herein, and the statements and representations used in connection therewith, respondent has represented directly or by implication that such demonstration is competent and reliable evidence which proves the lateral strength of the steel guard rails in the side doors of the Ford LTD and Ford Galaxie automobiles.

Therefore, the aforesaid demonstration, including the statements and representations used in connection therewith, as set forth in Paragraphs Six and Nine above, is false, misleading and deceptive.

PAR. 11. Typical also of the statements and representations in said advertisements disseminated as aforesaid, but not all inclusive thereof, are those contained within the following advertisements:

A. A full page print advertisement which is divided into two sections. The upper half begins with a banner headline proclaiming "At 60 mph a

1973 Ford rode quieter than an airborne glider." Below the headline are two photographs, side-by-side, one of the outside of a glider in flight, the other of a sound level meter registering 82 decibels. Beneath these photographs runs the caption: "July 27, 1972, Lake Elsinore, California: At 60 mph, the sound level inside the glider registers a quiet 82 decibels, in tests supervised by General Radio Company."

Below this caption are two more photographs placed side-by-side, one of a Ford LTD traveling at 60 mph, the other of a sound level meter registering 65 decibels. The caption under these photographs reads, "In the same test, the sound level meter inside the Ford LTD traveling at 60 mph registers an even quieter 65 decibels."

The lower half of the advertisement contains a large illustration of the Ford LTD as well as the following text: "Independently supervised tests proved it. The 1973 Ford LTD actually rode quieter than an engineless glider. You'd expect a car that runs that quiet to be well-made in every sense of the word. And so it is * * *Quiet is the sound of a well-made car."

B. A television commercial entitled Ford LTD "Glider." The advertisement opens with various shots of a Ford LTD automobile and a glider on a runway. The announcer states, "The new '73 Ford LTD. Can an LTD be as quiet as a glider? Nobody has to convince you how quiet a glider is. Airborne! With no engine at all! Can an LTD be as quiet as a glider? (At this point the picture shows a sound level meter in the LTD.) "To find out we put a sound level meter in a new LTD to measure its quiet. Quiet is the sound of a well-made car." (The glider is depicted in flight.) "We also put a meter in the glider. And let General Radio Company* * *real sticklers for accuracy* * *monitor." (The picture shows the sound meter in the glider.) "Let's test the noise level in the glider first. 82 decibels." (The words "82 decibels and 60 mph. Sound reading certified by General Radio Company" are superimposed on the picture. Then the picture shifts to a running shot of the LTD.) "Now the Ford LTD - Look at that meter at 60 mph - only 65 decibels." (The picture shows the interior of the car and the noise level meter. A split screen then shows both meters simultaneously. Then it returns to a running shot of the LTD.) The announcer concludes "Believe it or not this Ford LTD is quieter than the glider! Quiet is the sound of a well-made car. The new '73 Ford LTD. See it at your Ford Dealer's now." (The LTD is shown with the glider being pulled by an airplane.

PAR. 12. Through the use of the advertisements set forth in Paragraph Eleven, and others similar thereto not specifically set out herein, respondent has represented, directly or by implication, that the sound

level inside an airborne glider is "quiet," and that a sound level meter reading of 82 decibels is "quiet."

PAR. 13. In truth and in fact, the sound level inside an airborne glider is not "quiet" and a sound level meter reading of 82 decibels is not "quiet." Respondent has thereby established a misleading standard of quietness to which it compared the quietness of the 1973 Ford LTD and which it offered as competent and reliable evidence to prove that the Ford LTD is a quiet car and a well-made car.

Therefore, the aforesaid statements and representations and demonstrations used in conjunction therewith, as set forth in Paragraphs Eleven and Twelve above were and are false, misleading and deceptive.

PAR. 14. Moreover, at the time the respondent made the representations as alleged in Paragraph Twelve, there existed no reasonable basis for making those representations.

PAR. 15. The making of representations as alleged in Paragraph Fourteen constituted, and now constitutes, unfair or deceptive acts or practices in commerce.

PAR. 16. Through the use of the demonstration set forth in Paragraph Eleven and others similar thereto not specifically set out herein, and the statements and representations used in connection therewith, respondent has represented, directly or by implication, that such demonstration is competent and reliable evidence which proves the a Ford LTD is a quiet car and a well-made car.

PAR. 17. In truth and in fact, the aforesaid demonstration, including the statements and representations used in connection therewith, is not competent and reliable evidence which proves that a Ford LTD is a quiet car and a well-made car.

Therefore, the aforesaid demonstration, including the statements and representations used in connection therewith, as set forth in Paragraphs Eleven, Twelve, and Sixteen above, is false, misleading and deceptive.

PAR. 18. The use by respondent of the aforesaid false, misleading, and deceptive statements, representations and demonstrations, including the misleading statements and representations made in connection with said demonstrations, has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of said Ford LTD and Ford Galaxie automobiles advertised by respondent J. Walter Thompson Company, by reason of said erroneous and mistaken belief.

PAR. 19. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in commerce with corporations, firms, and individuals in the

advertising of motor vehicles of the same general kind and nature as those sold by Ford Motor Company.

PAR. 20. The aforesaid acts and practices of respondent, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having issued its proposed complaint on February 6, 1973 charging the respondent named in the caption with violation of the Federal Trade Commission Act, and the respondent having further been furnished with a draft of a revised 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 the respondent with the same and additional violations 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 respondent that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having accepted same, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. J. Walter Thompson Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its executive office and principal place of business located at 420 Lexington Avenue, New York, N. Y.

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, J. Walter Thompson Company, its successors and assigns, its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising or offering for sale or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of the Ford LTD automobile, the Ford Galaxie automobile or any other motor vehicle, do forthwith cease and desist from:

(a) Unfairly or deceptively advertising any such product by presenting evidence, including tests, experiments, or demonstrations, or the results thereof, that appears or purports to be evidence of the structural strength, quietness or performance of such product, that is material to inducing the sale of such product, but which is not competent or reliable evidence to prove such fact or product feature.

(b) Making any statements or representations, directly or by implication, concerning the structural strength, quietness or performance of the said product or any part thereof, unless there exists a reasonable basis for such statements or representations, *Provided*, That such reasonable basis shall consist of competent and reliable scientific tests or other competent and reliable objective materials, including competent and reliable opinions of scientific, engineering or other experts who are qualified by professional training and experience to render competent judgments in such matters.

*It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to its operating divisions involved in the advertising or promotion of the Ford LTD automobile, the Ford Galaxie automobile or any other motor vehicle marketed by the Ford Division, Ford Motor Company.

*It is further ordered*, That respondent shall notify the Commission at least thirty (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.

*It is further ordered*, That respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

Commissioner Thompson dissenting.

IN THE MATTER OF

# SHARP ELECTRONICS CORPORATION

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

*Docket C-2574. Complaint, Oct. 9, 1974 — Decision, Oct. 9, 1974*

Consent order requiring a Paramus, N.J., distributor of consumer and business electronic products, among other things to cease imposing territorial, customer and other anticompetitive restrictions on its dealers.

## *Appearances*

For the Commission: *Gordon Youngwood.*

For the respondent: *Peter A. Dankin, Wonder, Murase, White & Briger*, New York, N.Y.

## 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 Sharp Electronics Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sharp Electronics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondent maintains its home office and principal place of business at Paramus, N. J.

PAR. 2. Respondent is a distributor of consumer and business electronic products. In the past three years Sharp has sold various consumer electronic products such as black and white, and color television receivers, radios, tape recorders, microwave ovens, and the like. Business electronic products sold by Sharp during this time have consisted exclusively of Sharp brand electronic desk calculators.

Respondent's electronic calculators and other electronic equipment are manufactured by its parent corporation, Sharp Corporation of Aben-Ku, Asaka, Japan.

Sales of electronic calculators by respondent are substantial. Respondent is one of the largest sellers of electronic calculators in the United States.

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PAR. 3. In the course and conduct of its business of manufacturing and distributing electronic calculating machines, respondent ships such products from New Jersey, its principal place of business, to independent franchised dealers located in various other States throughout the United States who sell the products to consumers. There is now and has been for several years past, a constant, substantial and increasing flow of such products in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that actual and potential competition has been lessened, hampered, restricted, and restrained by reason of the practices hereinafter alleged, respondent has been and is now in substantial competition in commerce with other firms engaged in the manufacture or distribution of electronic calculators.

PAR. 5. In the course and conduct of its business as above described, and beginning at least as early as 1968, respondent has engaged and is now engaged in certain acts and practices whose effect has been to foster, promote, maintain and support its policies of restricting dealer competition in the United States in the marketing, sale and distribution of electronic calculators.

Among these acts and practices, but not limited thereto, have been the following:

A. Directing, encouraging, threatening, warning, and/or otherwise prohibiting its dealers from selling Sharp electronic calculators outside of their allotted territories.

B. Imposing or attempting to impose limitations or restrictions, by threats, warnings, or other devices, as to the persons or classes of persons to whom its dealers may sell Sharp electronic calculators.

C. Requiring its dealers, without option, to agree to the establishment, for the period of time during the warranty, of a mandatory fixed schedule for the division of profit earned in the sale of an electronic calculator between the selling dealer and a dealer in whose territory the calculator is to be used and serviced with the effect of limiting, allocating and restricting the territory in which electronic calculators may be sold by its dealers.

PAR. 6. These aforesaid acts and practices as alleged, are prejudicial and injurious to the public; have a tendency to hinder, restrict, restrain and prevent competition and have actually hindered, restricted, restrained and prevented competition; and constitute unfair acts or practices and unfair methods of competition in commerce within the meaning and intent of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

## DECISION AND ORDER

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

The respondents 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 respondents 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 respondents have 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, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sharp Electronics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 10 Keystone Place, Paramus, N. J.

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

I

*It is ordered*, That respondent Sharp Electronics Corporation, and its officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the advertising, merchandising, offering for sale and sale or distribution of electronic calculators, in commerce, as "commerce" is defined in the

Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

1. Imposing or attempting to impose any limitations or restrictions respecting the territories in which electronic calculators may be sold by its dealers.

2. Attempting to enter into, entering into, continuing, maintaining, or enforcing any contract, combination, understanding or agreement to limit, allocate, or restrict the territory in which electronic calculators may be sold by its dealers.

3. Imposing or attempting to impose any limitations or restrictions respecting any contract, combination, understanding or agreement to limit, allocate or restrict the person or class of persons to whom electronic calculators may be sold by its dealers.

4. Attempting to enter into, entering into, continuing, maintaining, or enforcing any contract, combination, understanding or agreement to limit, allocate or restrict the person or class of persons to whom electronic calculators may be sold by its dealers.

5. Requiring or attempting to require for a period of five years from the date of this order that its dealers without option, enter into any contract, combination, understanding or agreement establishing for the period of time during the warranty a mandatory fixed schedule for the division of any profit earned in the sale of an electronic calculator between the selling dealer and a dealer in whose territory the calculator is to be used and serviced.

6. Requiring or attempting to require for years subsequent to the period of five years from the date of this order that its dealers without option, enter into any contract, combination, understanding or agreement where such mandatory fixed schedule has the effect of limiting, allocating or restricting the territory in which electronic calculators may be sold by its dealers.

*Provided*, That nothing in this order shall prohibit respondent from:

(a) Engaging in any activity specifically rendered lawful by subsequent legislation enacted by the Congress of the United States or any rules or regulations promulgated pursuant to such legislation.

(b) Designating geographical areas within which a dealer may agree to devote his best efforts to the sale of electronic calculators (hereinafter "area of primary responsibility") as a condition of becoming a dealer or maintaining a dealership, provided that such dealers are told that said area is not exclusive and does not place a territorial restriction upon the sale of such equipment.

(c) Requiring or attempting to require as a condition of maintaining a dealership any dealer to undertake or cause others to undertake obligations of installation and warranty in connection with the use of any electronic calculators sold, leased or rented by such dealer or for which a dealer has accepted compensation for installation or warranty.

(d) Making available a program for use at the option of a dealer which provides, or contains provisions which provide, in all instances in which the selling dealer chooses not to undertake the obligations of installation or warranty, for a stated fixed schedule for the division of any profit between the selling dealer and a dealer in whose territory the calculator is to be used and serviced.

(e) Requiring, as a condition of maintaining a dealership, compliance with any program described in Paragraph (d) voluntarily accepted by such dealer.

II

*It is further ordered*, That respondent shall within sixty (60) days after service upon it of this order serve upon all of its franchised dealers a copy of this order along with a copy of the attached letter (Attachment A) on respondent's official company stationery and signed by the president of respondent.

III

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

IV

*It is further ordered*, That respondent notify the Federal Trade Commission at least thirty (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 of dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

*It is further ordered*, That respondent 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.

ATTACHMENT A
(Official Sharp Stationery)
(Date)

Dear _____:

The Federal Trade Commission has entered into a Consent Order with Sharp Electronics Corporation which, among other things, prohibits Sharp Electronics Corporation from imposing or attempting to impose any limitations or restrictions respecting the territories in which, or class of persons to whom dealers may sell electronic calculators. Dealers are permitted to sell outside the confines of their assigned territories and to sell to any person or class of persons to whom they wish.

The Order prohibits as well, for a period of five years, any mandatory fixed schedule for the division of profit in the sale of electronic calculators between the selling dealer and the dealer in whose territory the calculator is to be used and serviced. For the period of time beyond five years, the Order prohibits mandatory fixed schedules with the effect of limiting, allocating or restricting the territory in which electronic calculators may be sold by its dealers.

A copy of the Order is attached for your information.

Very truly yours,

President,
Sharp Electronics Corporation.

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IN THE MATTER OF

## HOLIDAY MAGIC, INC., ET AL.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT

*Docket 8834. Complaint, Jan. 18, 1971 — Decision, Oct. 15, 1974**

Order requiring a San Rafael, Calif., distributor of cosmetics, toiletries, cleaning products and associated items, among other things to cease engaging in illegal price fixing and price discrimination and imposing selling, purchasing and territorial restrictions on its distributors. Further, respondent is required to cease using its open-ended, multilevel marketing plan which the Commission found to be deceptive. Respondent is also ordered to make refunds to requesting distributors of monies unlawfully obtained in the event it ceases to be in compliance with an order of the District Court for the Northern District of California pertaining to repayment of funds to distributors.

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*Petitions for review filed on Jan. 3, 1975 by Holiday Magic, Inc. and by Sam Olivo on Jan., 7, 1975, C.A. 9th.

*Appearances*

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron.*
For the respondents: *Alvin H. Goldstein, Jr., Tuckman, Goldstein & Philips,* San Francisco, Calif. *Stein, Mitchell & Mezines,* Wash., D. C.

## COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C., Section 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that the parties listed in the caption hereof and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and Section 2(a) of the Clayton Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Holiday Magic, Inc. is a corporation organized on or about Oct. 14, 1964, and is existing and doing business under and by virtue of the laws of the State of California. Respondent Holiday Magic, Inc. maintains its home office and principal place of business at 616 Canal Street, San Rafael, Calif.

PAR. 2. Respondent William Penn Patrick is chairman of the board of directors of said corporation, and was also its first president. Mr. Patrick was the founder of Holiday Magic, Inc. and together with others instituted the Holiday Magic marketing plan and distribution policies. Respondent William Penn Patrick, together with others, has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent Holiday Magic. Mr. Patrick's office address is the same as that of said corporation.

In addition, respondent William Penn Patrick was formerly engaged in other marketing activities in commerce in a system of distribution involving applications and contracts, sales manuals and marketing plans, price lists and other literature similar to the present activities of respondent Holiday Magic, as alleged herein.

Respondent Fred Pape was president of corporate respondent Holiday Magic, Inc. Together with others, respondent Fred Pape was re-

*By order of the Commission issued Aug. 29, 1974, the complaint in this matter was amended to substitute Sam Olivo, Executor of the Estate of William Penn Patrick, for deceased respondent Patrick for the purpose of effecting restitution of such funds as are in the estate of decedent Patrick and are subject to any order of restitution entered in these proceedings. See p. 347 herein.

sponsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent Holiday Magic. Mr. Pape's office address is 1790 E. Plum Lane, Reno, Nev.

Respondent Janet Gillespie was administrative vice president and a director of Holiday Magic, Inc. Together with others, respondent Janet Gillespie was responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent Holiday Magic. Mrs. Gillespie's office address is 1790 E. Plum Lane, Reno, Nev.

PAR. 3. Respondents are engaged in the purchase, distribution, offering for sale and sale of cosmetics, toiletries, cleaning products and associated items which are marketed under the names Holiday Magic and Home Magic, to distributors located throughout the United States. The total monthly volume of sales of such products, using the retail list prices of said products has been in excess of 5 million dollars. Since distributors purchase at discount off list prices, actual sales are approximately 45 percent of this figure. In its short history the company has registered phenomenal growth. Comparable monthly figures are $16,000 for Dec. 1964, its first month of operation, $520,000 for July 1965, $1,500,000 for June 1966, $2,000,000 in Aug. 1966, and $1,700,000 in Feb. 1969.

PAR. 4. In the course and conduct of its business of distributing Holiday Magic and Home Magic products, the respondents ship or cause such products to be shipped from the state in which they are warehoused to distributors located in various other States throughout the United States who engage in resale to other distributors and to members of the general public. There is now and has been for several years last past a constant, substantial, and increasing flow of such products in "commerce" as that term is defined in the Federal Trade Commission Act and in the Clayton Act.

PAR. 5. Except to the extent that actual and potential competition has been lessened, hampered, restricted and restrained by reason of the practices hereinafter alleged, respondents' distributors and dealers, in the course and conduct of their business in distributing, offering for sale, and selling of Holiday Magic and Home Magic products are in substantial competition in commerce with one another, and corporate respondent and their distributors are in substantial competition in commerce with other firms or persons engaged in the manufacture or distribution of similar products.

PAR. 6. Respondents have formulated a distribution system involving distributors at wholesale and retail levels and they have published their marketing plan or distribution policies which are set forth in respon-

dents' price lists, discount schedules, marketing manuals, sales bulletins, order forms, pamphlets and other materials and literature. To effectuate and carry out the aforesaid distribution system, policies or plan, respondents, together with their distributors, have entered into certain contracts, agreements, combinations or common understandings pursuant to the universal acceptance by the distributors of said marketing plan and have adopted, placed in effect and carried out, by various methods and means, the marketing plan to hinder, frustrate, restrain, suppress and eliminate competition in the offering for sale, distribution and sale of cosmetics, toiletries, cleaning materials and associated products.

PAR. 7. Corporate respondent's marketing plan is a distribution network which allows a potential distributor to enter at any one of three levels, *i.e.*, Holiday Girl, Organizer and Master, and may eventually qualify at a fourth level, that of General. All distributors are independent contractors and except for the Holiday Girls who sell primarily at retail through party plans and door-to-door methods, are permitted to, and do, sell or attempt to sell at both wholesale and retail. The distributors' gross profit is the difference between the price or prices at which he purchases Holiday Magic products and the price or prices at which he resells them.

a. *Holiday Girls and Organizers.*

All Holiday Girls and Organizers buy their products at 30 percent off the retail list price. At the end of the calendar month, they receive from their sponsoring distributor who sold them these products, *i.e.*, a General, Master or Organizer, a refund varying from zero to 25 percent off list based upon the monthly volume purchased. Once a distributor purchases a volume of $5,000 ($6,666.66 as of Sept. 30, 1969) in terms of retail list price in any one calendar month, he remains at the 25 percent refund level, is thereafter classified as a Master and can buy directly from respondent Holiday Magic or his General at 55 percent off retail list price.

b. *Master.*

Master distributors may purchase their needs either from Holiday Magic, Inc., directly or through a General. There is no effective limit as to the number of distributors that may be recruited, nor is there a limit as to the size of any distributor's organization. A distributor's organization includes all persons whom he supplies with products either directly or indirectly, or upon whose purchases he receives an override.

Individuals who desire to start as Masters must purchase an inventory valued at $5,000 ($6,666.66 as of Sept. 30, 1969) retail list price. The actual cost is at 55 percent off. An additional charge of $250 for certain

sales aids has also been an initial requirement. A Holiday Girl who recruits a Master will receive a Finder's Fee of $100 from her General distributor. Any Organizer recruiting a Master will receive a Finder's Fee of $100 plus a continuing override of 2 percent of all his purchases, based upon retail list price. Any organizer recruiting another Organizer who eventually qualifies for the Master position receives the same 2 percent override without the Finder's Fee. Masters recruited into the Holiday Magic program are denoted "Work-in" or "Buy-in."

c. *General.*

General distributors purchase their product needs, as well as the needs of distributors in their organization, from respondent Holiday Magic, Inc. The General has the most advantageous discount, purchasing from respondent company at 65 percent off the retail list price.

All Holiday Girls, Organizers and Masters are part of a particular General's organization, and he receives an additional 10 percent override from respondent Holiday Magic, Inc. on all purchases from Masters in his organization. As an additional override, respondent Holiday Magic pays 1 percent of the retail list price purchase value to the old General of a Master who has been elevated to the General position. It is paid monthly, and is based on the purchases of the new General, and all of this General's organization.

A Master is eligible for the position of General only after he has completed the following:

1. He must introduce at least one other Master to his own General - denoted a Replacement Master because the Master qualifying for the position of General will be taking all of his organization with him as his permanent organization when he becomes a General.

2. He must pay a Release Fee of $2500 ($3,000 as of Sept. 30, 1969) to his old General because the old General will have sustained a loss of the 10 percent override of the departing organization.

3. He must pay for, and complete, a course of instruction.

d. *General's Council.*

A General's Council is a voluntary association of General and Master distributors formed in a given geographical area, usually the metropolitan area of a city, to share in the costs of retailing, business training, recruiting, and joint participation in any Holiday Magic activity of mutual interest. The amount of the dues is fixed at the discretion of the council members but respondent Holiday Magic requires all Masters and Generals to pay the same amount.

The Senior General of the council is the position of an executive representing the body of local distributors. It is his function to act as liaison between the company and all local distributors. As compensation

for his services, the Senior General receives a 1 percent override from Holiday Magic on all business produced by all distributors in his council.

Among the services performed by the Senior General is the reporting of various sales data to the respondent company for members of the council. This information is supplied to the Senior General by the various distributors. Some of the items reported upon at the specific request of respondent Holiday Magic may include the individual sales slips of the Holiday Girls.

Three of the General's Council's activities are the coordination and allocation of routes to be assigned to individual Holiday Girl distributors, the allocation of leads supplied by respondent Holiday Magic, Inc., and the holding of Opportunity Meetings.

e. *Opportunity Meeting.*

It is at the Opportunity Meetings conducted by the General's Council that additional distributors are recruited into the Holiday Magic program. These meetings are held throughout the United States, and have been attended by as many as hundreds of persons at a time. Both the script of the meeting and the film shown thereat concentrate upon the unlimited potential of money to be made in recruiting other distributors in a chain of distributors.

PAR. 8. Pursuant to, and in furtherance and effectuation of the aforesaid agreements and planned common course of action, respondents have done and performed and are doing and performing the following:

(1) Respondent Holiday Magic, Inc., its agents and officials, have advised all distributors that failure to adhere to the marketing plan is the basis for cancellation of their distributorship, and all distributors have actually or impliedly agreed to abide by all rules and regulations established by Holiday Magic in furtherance of the marketing plan, and to all subsequent changes.

(2) Respondent Holiday Magic, Inc. has entered into contracts, agreements, combinations or understandings with each of its distributors whereby said distributors agree to maintain the resale prices established and set forth by the company, notwithstanding that some of such distributors are located in states which do not have fair trade laws.

(3) Respondent Holiday Magic, Inc. has entered into contracts, agreements, combinations or understandings with each of its distributors whereby said distributors agree to maintain the discounts, overrides, rebates, bonus schedules, Finder's Fees and Release Fees, as established and set forth by the company.

(4) Respondent Holiday Magic, Inc. has entered into contracts, agreements, combinations or understandings with each of its distributors

whereby said distributors are restricted as to whom they may purchase their products from, and to whom they may resell them. More specifically:

(a) The distributor agrees to purchase merchandise only from respondent company, or from his Sponsor, *i.e.*, the distributor who introduced him to Holiday Magic, Inc.

(b) The sponsoring distributor agrees not to buy back any merchandise from his distributors.

(c) The distributor agrees not to make any consignment of the merchandise to any person, except in certain cases.

(d) The distributor agrees to restrict the retail sales and display of cosmetics to authorized retail markets, *i.e.*, home service routes, beauty salons, wig shops, beauty schools, barber shops, health food stores, women's specialty stores, men's specialty stores, Holiday Magic retail salons, and temporary booths. No other commercial retail markets are authorized.

(5) Respondent Holiday Magic, Inc., in the course and conduct of its business in commerce, has been and now is discriminating in price, directly or indirectly, between different purchasers of its Holiday Magic products of like grade and quality by selling said products at higher prices to some purchasers than it sells said products to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher prices. More specifically:

(a) For several years last past respondent has priced its line of products in terms of list prices. One class of respondent's customers purchases at said list prices less a discount of 65 percent while the other class of customers purchase at list prices less a discount of 55 percent. Various members of each class of customers compete with each other and with various members of each of the other classes. Said 10 percent differential is actually a net cost discount of 22.2 percent in favor of the favored class of customers.

(b) A 1 percent commission on the list price value of the monthly sales volume of a new General is paid by respondent Holiday Magic to the old General of a Master who has been promoted to the General position. It is paid monthly and is based upon the purchases of the new General's Master distributors in his organization.

(c) For several years last past, respondent Holiday Magic, Inc. has entered into an agreement with each of its distributors whereby said distributors agree to maintain the discounts, rebates, and overrides when selling to, and purchasing from, one another. Said discounts result in price discrimination. More specifically:

1. A 2 percent commission on the list price value of the monthly sales volume of a new Master is paid by the General distributor to any Master or Organizer who recruits and sponsors said new Master distributor who may be either a "Buy-in" or "Work-in." This is a continuing monthly payment and is paid to the day that either the new Master or the Sponsor becomes a General distributor.

2. Other discounts are based upon a sliding scale of volume. More specifically:

i. Organizer distributors purchase their products at 30 percent off list price and receive an additional bonus of up to 25 percent off list price based upon monthly sales volume, while Master distributors purchase at 55 percent off list price. Said zero to 25 percent differential is actually a net cost discount in the range of zero to 35.7 percent in favor of the Master. Various members of each class compete with each other.

ii. Organizer distributors purchase their products at 30 percent off list price and receive an additional bonus of up to 25 percent off list price based upon monthly sales volume, while General distributors purchase at 65 percent off list price. Said 10 percent to 35 percent differential is actually a net cost discount in the range of 22.3 percent to 50 percent in favor of the General. Various members of each class compete with each other.

iii. Organizer and Holiday Girl distributors purchase their products at 30 percent off list price and receive an additional bonus of up to 25 percent off list price based upon monthly sales volume. Said zero to 25 percent differential is actually a net cost discount in the range of zero to 35 percent in favor of the favored distributors. Various members of each class of customers compete with each other and with various members of each of the other classes.

(6) Respondent Holiday Magic, Inc. has instituted various rules and regulations designed to further the objectives of its marketing plan, such rules and regulations being contrary to the competitive interests of the independent distributors directly affected by them, and unreasonable in their overall support of and impact upon the entirety of the Holiday Magic Marketing plan and distribution practices. More specifically:

(a) The distributor is prohibited from using advertising that is either not supplied by respondent corporation, or not approved by respondent in advance.

(b) The distributor must agree not to transfer to another organization without a prior release from all distributors above him in the marketing chain. Such transfers are discouraged by respondent Holiday Magic.

1. A 2 percent commission on the list price value of the monthly sales volume of a new Master is paid by the General distributor to any Master or Organizer who recruits and sponsors said new Master distributor who may be either a "Buy-in" or "Work-in." This is a continuing monthly payment and is paid to the day that either the new Master or the Sponsor becomes a General distributor.

2. Other discounts are based upon a sliding scale of volume. More specifically:

i. Organizer distributors purchase their products at 30 percent off list price and receive an additional bonus of up to 25 percent off list price based upon monthly sales volume, while Master distributors purchase at 55 percent off list price. Said zero to 25 percent differential is actually a net cost discount in the range of zero to 35.7 percent in favor of the Master. Various members of each class compete with each other.

ii. Organizer distributors purchase their products at 30 percent off list price and receive an additional bonus of up to 25 percent off list price based upon monthly sales volume, while General distributors purchase at 65 percent off list price. Said 10 percent to 35 percent differential is actually a net cost discount in the range of 22.3 percent to 50 percent in favor of the General. Various members of each class compete with each other.

iii. Organizer and Holiday Girl distributors purchase their products at 30 percent off list price and receive an additional bonus of up to 25 percent off list price based upon monthly sales volume. Said zero to 25 percent differential is actually a net cost discount in the range of zero to 35 percent in favor of the favored distributors. Various members of each class of customers compete with each other and with various members of each of the other classes.

(6) Respondent Holiday Magic, Inc. has instituted various rules and regulations designed to further the objectives of its marketing plan, such rules and regulations being contrary to the competitive interests of the independent distributors directly affected by them, and unreasonable in their overall support of and impact upon the entirety of the Holiday Magic Marketing plan and distribution practices. More specifically:

(a) The distributor is prohibited from using advertising that is either not supplied by respondent corporation, or not approved by respondent in advance.

(b) The distributor must agree not to transfer to another organization without a prior release from all distributors above him in the marketing chain. Such transfers are discouraged by respondent Holiday Magic.

(c) In the event a partnership-distributorship dissolves, the departing partner is required to revert back to his original Sponsor.

(d) In the event a General Distributorship dissolves, the principal or partner who is departing, should he continue with Holiday Magic, must requalify as a new Master Distributor under his original Sponsor, create a Replacement Master, and pay a $2500 Release Fee ($3,000 as of Sept. 30, 1969) to qualify for the General position again.

(e) The addition of partners to an existing General or Master distributorship or the sale of a General or Master distributorship must meet the same retail list price value purchase requirement as do Work-in Masters.

(f) A distributor may only own or have a financial interest in one Holiday Magic distributorship at a time, and may not simultaneously be a part of two separate distributorships.

(g) The distributor must agree not to enter into any agreement with a distributor in another Holiday Magic organization to make a division of profits, assets, or new recruits in violation of the marketing plan.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended, by respondents.

PAR. 9. The allegations of Paragraphs One through Eight are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 10. Respondents' multilevel marketing program holds out to prospective distributors the lure of making large sums of money through a virtually endless chain of recruiting additional participants, from various fees, commissions, overrides or other compensation on the sales and/or further recruiting activities of their own recruited distributors, or distributors in their organizations.

The operation of the program contemplates geometrical increases in the number of distributors to insure participants the earnings represented and implicitly realizable from the program. However, because the overall number of potential participants remains relatively constant, the participants may be, and in a substantial number of instances will be, unable to find additional investors in a given community or geographical area by the time they enter respondents' merchandising program. This comes about because the recruiting of participants who came into the program at an earlier stage may have already exhausted the number of prospective participants. Based upon a geometrical progression of five additions per month per distributor, as demonstrated by respondents or their representatives at their Opportunity Meetings, the number of additional participants in their organizations at each monthly stage of growth would increase at such a rate that at the end of seven months,

and giving effect to the continuing process of recruitment as contemplated under respondents' marketing plan, there would be an aggregate in excess of 97,000 participants in each distributor's organization. Thus, as to each of the individual participants therein, respondents' recruitment program must of necessity ultimately collapse when the number of potentially available distributors which can be recruited to serve a particular area is exhausted and/or the number of distributors theretofore recruited has so saturated the area with distributors as to render it virtually impossible to recruit any more.

Although some participants in respondents' multilevel merchandising program may realize a profit through recruitment, all participants do not have the potentiality of receiving equivalent sums of money, either through recruitment or compensation arising out of the retail sales of respondents' products, and the greater the number of distributors previously recruited, the lower the chances for such success. Some participants in the program receive little or no return on their investment.

For the foregoing reasons, respondents' multilevel merchandising program is operated in such a manner that the realization of financial gains is often predicated upon the exploitation of others who have been induced to participate therein, and who have virtually no chance of receiving the kind of return on their investment implicit in said merchandising program. Therefore, the use by respondents of the above-described multilevel merchandising program in connection with the sale of their merchandise was and is false, misleading and deceptive, and was and is an unfair act and practice within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

## COUNT II

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by respondents.

PAR. 11. The allegations of Paragraphs One through Ten are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. Respondents' merchandising program is in the nature of a lottery in that participants are induced to invest substantial sums of money on the possibility that by the activities and efforts of others, over whom they need exercise little or no control, they will receive substantial financial gains. The realization of such gains need not depend upon the skill and effort of the individual participants, but instead may result from predominant elements of chance, such as the number of prior participants in the program, the ability of their own recruits to recruit other distributors, and the ability of their own recruits to either sell

merchandise or recruit other persons who may be successful in selling merchandise.

The use by respondents of their multilevel program, which is in the nature of a lottery, is contrary to the established public policy of the United States, is false, misleading and deceptive, and was and is an unfair act and practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT III

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by respondents.

PAR. 13. The allegations of Paragraphs One through Fourteen are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 14. In the course and conduct of their business, and for the purpose of inducing the participation by others in their marketing program and for selling their merchandise, by and through statements and oral representations, and by means of brochures and other written material, respondents or their representatives represent, and have represented, directly or by implication, that:

1. Through "want ads" in classified advertising sections of newspapers, employment is being offered.

2. It is not difficult for distributors to recruit and retain persons who will invest or participate in the program as distributors and/or as sales personnel.

3. Respondents' products will be or are advertised widely and substantially in the community or geographic area in which such representations are made.

4. Participants in respondents' marketing program have the reasonable expectancy of receiving large profits or earnings.

PAR. 15. In truth and in fact:

1. Respondents, their representatives and distributors are, for the most part, not offering employment through the use of "want ads," but use said advertisements instead to obtain leads to prospective investors in their marketing program.

2. It is difficult, and becomes increasingly more difficult, under respondents' geometrically expanding multilevel marketing system, to recruit and retain persons who will invest in respondents' program as distributors and/or as sales personnel.

3. Respondents do not advertise their products to the extent that they or their representatives represent.

4. Most participants in respondents' multilevel marketing program do

not have a reasonable expectancy of receiving large profits or financial gains.

Therefore, the above-described representations are false, misleading and deceptive, and are unfair acts or practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT IV

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by respondents.

PAR. 16. The allegations of Paragraphs One through Eight are incorporated by reference in Count IV as if fully set forth verbatim.

PAR. 17. The acts, practices, and methods of competition engaged in, followed, pursued or adopted by respondents, and the combination, conspiracy, agreement or common understanding entered into or reached between and among the respondents or others not parties hereto are unfair methods of competition and to the prejudice of the public because of their dangerous tendency to, and the actual practice of, fixing, maintaining or otherwise controlling the prices at which the Holiday Magic products are resold, in both the wholesale and retail markets; and fixing, maintaining or otherwise controlling the various fees, bonuses, rebates or overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors.

Said acts, practices and methods of competition, and the adverse competitive effects resulting therefrom, constitute an unreasonable restraint of trade and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT V

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by respondents.

PAR. 18. The allegations of Paragraphs One through Eight are incorporated by reference in Count V as if fully set forth verbatim.

PAR. 19. The acts, practices, and methods of competition engaged in, followed, pursued or adopted by respondents, and the combination, conspiracy, agreement or common understanding entered into or reached between and among the respondents or others not parties hereto are unfair methods of competition and to the prejudice of the public because of their dangerous tendency to, and the actual practice of, restricting the customers as to whom the Holiday Magic distributors may resell their products to; restricting their distributors as to whom they may purchase their products from; restricting their distributors to reselling their products in certain kinds of retail outlets only; restricting

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the advertising rights of distributors; and restricting distributors as to the financial and marketing arrangements which they may chose to enter into with buisnesses or individuals of their own choosing.

Said acts, practices, and methods of competition, and the adverse competitive effects resulting therefrom, constitute an unreasonable restraint of trade and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT VI

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by respondents.

PAR. 20. The allegations of Paragraphs One through Eight are incorporated by reference in Count VI as if fully set forth verbatim.

PAR. 21. The acts, practices, and methods of competition engaged in, followed, pursued or adopted by respondents, and the combination, conspiracy, agreement or common understanding entered into or reached between and among the respondents or others not parties hereto are unfair methods of competition and to the prejudice of the public because of the practice of allocating the territories in which various Holiday Magic distributors may resell their products.

Said acts, practices, and methods of competition, and the adverse competitive effects resulting therefrom, constitute an unreasonable restraint of trade and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT VII

Alleging violation of Section 2(a) of the Clayton Act, as amended, by respondents.

PAR. 22. The allegations of Paragraphs One through Seven and subparagraph (5) of Paragraph Eight are incorporated by reference in Count VII as if fully set forth verbatim.

PAR. 23. The difference in net cost between a General's purchases and a Master's purchases results in a substantial discrimination in the net price for products sold to non-favored direct and indirect Master distributor purchasers by respondent Holiday Magic.

In addition, various acts and practices of respondent Holiday Magic have resulted in further discriminations in the net price for products sold to other Holiday Magic distributors, who are indirect purchasers, and who are in compeitition with other direct and indirect purchasers of Holiday Magic cosmetic products.

In addition, the various fees, overrides, bonuses or other payments have resulted in discriminations among Holiday Magic's various direct

and indirect purchasing distributors who are in competition with one another. These monies are direct and indirect payments by respondent Holiday Magic, and in effect are discriminations in the net price of Holiday Magic products to these various distributors.

The effect of respondent Holiday Magic's discrimination in net prices as alleged herein may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which its favored purchasers are engaged, or to injure, destroy or prevent competition between the favored and non-favored purchasers or with customers of either of them.

The aforesaid acts and practices of respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

## INITIAL DECISION* BY EDGAR A. BUTTLE, ADMINISTRATIVE LAW JUDGE

### MAY 31, 1974

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See Errata Sheet pp. 1075-1078, herein.

## THE PROCEEDINGS

A complaint was issued herein on Jan. 18, 1971, generally charging violations of Section 5 of the Federal Trade Commission Act and Section 2(a) of the Clayton Act, as amended, involving unfair trade practices based on operating a marketing plan in the nature of a lottery, price discrimination, marketing and price control, deception and misrepresentations. After joinder of issue by the filing of an answer which essentially denied the allegations, four prehearing conferences were held as follows: Apr. 2, 1971, May 24, 1971, Aug. 10, 1971, and Oct. 8, 1971. Hearings were commenced on Nov. 1, 1971 and ended on Feb. 15, 1973, for a total of 75 hearing days. Intervening recesses were allowed for purposes of discovery and other justifiable reasons. Hearings were conducted in the following cities: San Francisco, Calif., Detroit, Mich., Chicago, Ill., Miami, Fla., New York, N.Y., and Wash., D.C. There are 10,708 pages of hearing transcript; 855 Commission exhibits and approximately 100 respondents' exhibits. Eighty-six witnesses testified for complaint counsel and approximately 140 witnesses testified for respondents. The record was reopened and closed on Mar. 28, 1973, to receive evidence not available heretofore, for which complaint counsel had previously made provision on the record.

## THE COMPLAINT

Argument developed during the course of the hearings with regard to the interpretation of certain allegations of the complaint. Briefly stated, however, a reasonable construction thereof in entire context is clearly outlined as follows:

### Count I

Allegedly respondents' multilevel marketing program holds out to prospective distributors the lure of making large sums of money through a virtually endless chain of recruiting additional participants, from various fees, commissions, overrides or other compensation on the sales and/or further recruiting activities of their own recruited distributors, or distributors in their organizations.

As also alleged although some participants in respondents' multilevel merchandising program may realize a profit through recruitment, all participants do not have the potentiality of receiving equivalent sums of money, either through recruitment or compensation arising out of the retail sales of respondents' products, and the greater the number of distributors previously recruited, the lower the chances for such success. Some participants in the program receive little or no return on their investment.

As further alleged for the foregoing reasons, respondents' multilevel merchandising program is operated in such a manner that the realization of financial gains is often predicated upon the exploitation of others who have been induced to participate therein, and who have virtually no chance of receiving the kind of return on their investment implicit in said merchandising program.

## Count II

Allegedly the use by respondents of their multilevel unlimited distributor recruitment program of chance upon participant investment without the need for the exercise of business control thereafter or product marketing skill to acquire profit, if any, is in the nature of a lottery, is contrary to the established public policy of the United States, is false, misleading and deceptive, and was and is an unfair act and practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.[1]

## Count III

Allegedly for the purpose of inducing the participation by others in their marketing program and for selling their merchandise, by and through statements and oral representations, and by means of brochures and other written material, respondents or their representatives misrepresent, and have misrepresented, directly or by implication, that:

1. The offering of employment through the use of want ads to obtain leads to prospective investors in the marketing program.

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[1] Complaint counsel during the course of the hearing seemed to take the position that any contravention of public policy would *per se* be a violation of Section 5 of the Federal Trade Commission Act as an unfair act and practice and an act of unfair competition. If public policy is contravened this does not mean *per se* that there is a violation of the Federal Trade Commission Act unless the public policy involved specifically relates to those matters over which the Federal Trade Commission would have jurisdiction under the Federal Trade Commission Act. The charges here, however, as enunciated by the complaint, do suggest that the public policy referred to involves deception in the sense that the plan as alleged is conducive to inducing participants to erroneously believe they will receive substantial financial gains not dependent on their efforts. Furthermore, Count II specifically indicates that the nature of the lottery "is contrary to the public policy of the United States, is false, misleading and deceptive." This phraseology suggests it is inherent deception that is violative of public policy and is therefore within the purview of the Federal Trade Commission Act.

2. It is not difficult for distributors to recruit and retain persons who will invest or participate in the program as distributors and/or sales personnel.

3. Respondents' products will be or are advertised widely.

4. Participants in respondents' multilevel marketing program can reasonably expect to receive large profits or financial gains. (Count III refers to "Most participants" but in context with complaint allegations in other Counts which are incorporated by reference omitting the word "most" it would appear it cannot reasonably be construed quantitatively.)[1a]

## Count IV

Allegedly fixing, maintaining or otherwise controlling the prices at which the Holiday Magic products are resold, in both the wholesale and retail markets; and fixing, maintaining or otherwise controlling the various fees, bonuses, rebates or overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors constitute an unreasonable restraint of trade.

## Count V

Allegedly restricting their distributors to reselling their products in certain kinds of retail outlets only; restricting the advertising rights of distributors; and restricting distributors as to the financial and marketing arrangements which they may choose to enter into with businesses or individuals of their own choosing constitute an unreasonable restraint of trade.

## Count VI

Allegedly allocating the territories in which various Holiday Magic distributors may resell their products constitutes an unreasonable restraint of trade.

## Count VII

Alleged violation of Section 2(a) of the Clayton Act, based on the following:

1. The difference in net cost between a General's purchases and a Master's purchases results in a substantial discrimination in the net

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[1a] Complaint counsel however contends the evidence actually establishes, as set forth in the findings, that "most participants" must have been deceived because of the inherency of the deception and otherwise. (See also the conclusions.)

price for products sold to non-favored direct and indirect Master distributor purchasers by respondent Holiday Magic.

2. Further discriminations in the net price for products sold to other Holiday Magic distributors, who are indirect purchasers, and who are in competition with other direct and indirect purchasers of Holiday Magic cosmetic products.

3. In addition, the various fees, overrides, bonuses or other payments have resulted in discriminations among Holiday Magic's various direct and indirect purchasing distributors who are in competition with one another.

The administrative law judge has carefully considered the proposed findings of fact, and conclusions supplemented by briefs, submitted by complaint counsel and counsel for respondents. The following findings and conclusions if not herein adopted either in the form proposed or in substance are rejected as not supported by the record or as involving immaterial matters. The findings of fact are categorically arranged to reflect the complete *modus operandi* of the corporate respondent's business and participation therein rather than categorically as related to particular counts of the complaint since this would result in an unreasonable number of repetitive findings. The conclusions, however, relate the evidenced facts as alleged to the specific counts of the complaint with cited law applicable thereto. Adoption of any of respondents' proposed findings of fact verbatim or otherwise has been difficult since they are essentially argumentative or proposed conclusions of fact as distinguished from findings as to evidentiary facts. On the other hand complaint counsel in submitting proposed findings has relied essentially upon specific and accurate although lengthy documentary excerpts with some transcript citations. Some of this evidence is somewhat remotely material, but it is responsive to respondent counsel's justifiable demand that all relevant facts related to the Holiday Magic plan should be considered and evaluated in view of the seriousness of the many charges. The following numerous evidentiary findings and extensive conclusions therefrom are therefore necessarily rendered with this in view.[2]

## FINDINGS OF FACT

### I. Scienter Re Investigation

1. The record reflects that respondent Holiday Magic, Inc. was first made aware of the Federal Trade Commission investigation in July,

[2] The abbreviations used in this decision are as follows: RX—Respondents' Exhibit; CX—Commission Exhibit; Tr.—Transcript of Record.

1967 (Tr. 9341, 9701). Obviously this may have some bearing on evidentiary evaluation and issue of relief.

## II. Jurisdiction of the Commission

2. Respondents are engaged in the purchase, distribution, offering for sale and sale of cosmetics, toiletries, cleaning products and associated items which are marketed under the names Holiday Magic and Home Magic, to distributors located throughout the United States (Answer, p. 3).

3. In the course and conduct of their business of distributing Holiday Magic and Home Magic products, the respondents ship or cause such products to be shipped from the state in which they are warehoused to distributors located in various other States throughout the United States who engage in resale to other distributors and to members of the general public (Answer, p. 3). There is now and has been for several years last past a constant, substantial, and increasing flow of such products in "commerce" as that term is defined in the Federal Trade Commission Act and in the Clayton Act (Answer, p. 3).

4. Holiday Magic, Inc. is in substantial competition in commerce with other firms or persons engaged in the manufacture or distribution of cosmetics, toiletries and cleaning products (Answer, p. 3).

5. The vast majority of the products distributed by respondents are cosmetics; of Holiday Magic, Inc.'s total sales, 88 percent or more have been of cosmetics (RX 16).

## III. Cosmetic Industry

6. The gross dollar amount of retail cosmetics sales in the country as of 1970 was estimated at approximately 4.5 billion dollars (Baumgarten-Tr. 9483).

7. Approximately 25 percent of the sales of cosmetics at retail is described as the direct door-to-door market (Baumgarten-Tr. 9884).

8. Although the record does not reflect the total number of cosmetic firms principally engaged in door-to-door marketing (see Tr. 9486, 6116), the record shows that the largest cosmetic firm is Avon Cosmetics (Baumgarten-Tr. 9485; Sherman-Tr. 6137, 6117), which has approximately 47 percent of the door-to-door cosmetics market (Baumgarten-Tr. 9487) or approximately 12 percent of the total market in cosmetics.

9. Although Avon's advertising expenditures do not appear in the record, Avon engages in national television advertising (Baumgarten-Tr. 9493) and Avon engages in a substantial amount of advertising (Baumgarten-Tr. 9487). Door-to-door selling itself is not considered to

be advertising (Baumgarten-Tr. 9491). Avon has been in business for between 70 and 100 years (Tr. 9502, 6117).

10. Another door-to-door cosmetic firm is "Varda," which was established in 1969 (Baumgarten-Tr. 9486-88). Varda's retail sales to consumers totaled approximately 25 million dollars in 1970 (Baumgarten-Tr. 9486). Varda's marketing plan is more similar to that of Avon than it is to the marketing plan of Holiday Magic, Inc. (Baumgarten-Tr. 9488).

11. The Avon sales representatives are assigned routes. Otherwise the controls are minimal and there are no inventory requirements (Baumgarten-Tr. 9489).

12. The wholesale market for cosmetics today is what may be termed a buyer's market; that is, a wholesaler is in a position to take his pick of the lines he chooses to carry (Sherman-Tr. 6138). Competition in the cosmetics industry is "fierce" (Baumgarten-Tr. 6574).

## IV. Respondents

### *A. Respondent Holiday Magic, Inc.*

13. Respondent Holiday Magic, Inc. is a corporation organized on or about Oct. 14, 1964, and is existing and doing business under and by virtue of the laws of the State of California (Answer, p. 2). Respondent Holiday Magic, Inc. maintains its home office and principal place of business at 616 Canal Street, San Rafael, Calif. (Answer, p. 2).

14. To date, Holiday Magic, Inc. has reincorporated as a Nevada corporation, although it continues to maintain its principal place of business at 616 Canal Street, San Rafael, Calif. Marketing Enterprises, Inc. owns 100 percent of the stock of Holiday Magic, Inc. and U.S. Universal, Inc. owns Holiday Magic, Inc. Respondent William Penn Patrick is on the board of directors of U.S. Universal (Coultas-Tr. 9720-21).

15. A rented three bedroom home was Holiday Magic's first location, at San Jose, Calif. (CX 89B, CX 90C). In June 1965, Holiday Magic, Inc. moved to its San Rafael quarters (CX 90C).

16. Prior to Sept. 1968, Holiday Magic, Inc. purchased its cosmetics products from Synergistic Industries, Inc. but thereafter from a broad field of cosmetics manufacturers (CX 37A). At present, Holiday Magic, Inc. buys approximately 50 percent of its products from Commercia USA, a sister corporation (Coultas-Tr. 9685).

17. Holiday Magic, Inc. is a closely held corporation which employed approximately 90 persons in Apr. 1967 (CX 21E). Holiday Magic, Inc. sold to its distributors FOB San Rafael, Calif. as of Apr. 1967 (CX 21E). More recently, Holiday Magic, Inc. has utilized major distribution centers in N. J. and Ga. (Physical Exhibit A; Tr. 9792-93).

18. Holiday Magic, Inc.'s sales.

Monthly "sales volume" figures for Holiday Magic, Inc. are $16,254.34 for Dec. 1964, its first month of operation; $520,658.10 for July 1965; $1,524,203.30 for June 1966; and $2,050,641.26 for Aug. 1966 (CX 15C).

Holiday Magic, Inc.'s "cosmetic sales" for its fiscal year ending Sept. 1965 were $2,773,155; for Sept. 1966, $11,080,223; for Sept. 1967, $30,369,813; for Sept. 1968, $12,587,627; for Sept. 1969, $19,518,939; for Sept. 1970, $13,453,288; and for fiscal year ending Sept. 1971, $11,063,624 (RX 16).

Holiday Magic Inc.'s Home Magic sales for the fiscal years ending Sept. 1970 and Sept. 1971 were $1,881,542 and $673,746, respectively (RX 16).

The "cosmetic sales" and "sales volume" figures are in terms of the retail list prices of the said products sold to distributors (RX 16; Lipska-Tr. 9255, 9212; Pangerl-Tr. 10291).

19. Sales volume is not retail sales, and Holiday Magic, Inc. keeps no records with respect to the amount of products that actually are sold to consumers at retail (Tr. 9631, 9633, 9635, 9767-68, 5667).

20. The "success" of the Holiday Magic program has been based upon the Marketing Plan.

(a) CX 78Z4 and CX 79Z4 - "With our marketing plan we could be 75 percent as effective with another commodity."

(b) CX 2B - Wand - Because of the marketing plan, Holiday Magic could have experienced the same rapid growth with any product, or product of low quality.

(c) CX 78Z45, CX 79Z42 - "Because of its sound marketing plan, Holiday Magic could have experienced nearly the same rapid growth and success with a mediocre product."

After having completed the marketing plan, William Penn Patrick searched for a consumer product that would fit the plan (Physical Exhibit A; Tr. 7984-85).

*B. Respondent William Penn Patrick*

21. Respondent William Penn Patrick is chairman of the board of directors of Respondent Holiday Magic, Inc. and was its first president (Answer, p. 2). Respondent William Penn Patrick was the founder of respondent Holiday Magic, Inc., and together with others instituted the Holiday Magic marketing plan and distribution policies (Answer, p. 2).

22. Respondent William Penn Patrick was chairman of the board of directors of respondent Holiday Magic, Inc. until very recently (Coultas-Tr. 9655); Mr. Patrick first held the position of president of Holiday Magic, Inc. in the winter of 1965, but relinquished this post to respondent Fred Pape in 1967 (Coultas-Tr. 9654).

23. Mr. Patrick has described Holiday Magic, Inc. as his "brain child"

and "first love" (CX P318A, B) and is the man responsible for developing the Holiday Magic marketing program singlehandedly (CX 61A, CX 90C).

24. At first, Mr. Patrick gave all the Holiday Magic Opportunity Meetings (CX 5G-Wand-12/65; see also Physical Exhibit A; Tr. 6874).

25. Respondent William Penn Patrick, together with others, has been responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent Holiday Magic (Answer, p. 2).

(a) The board of directors directed the policy of Holiday Magic, Inc. (Coultas-Tr. 9657).

(b) It was the responsibility of the board of directors to terminate distributors for violating rules and regulations of Holiday Magic, Inc. (CX 79Z89-90, CX 78Z86-87).

(c) The president and the officers supervised the day-to-day activities of Holiday Magic, Inc. (Coultas-Tr. 9657).

26. Respondent William Penn Patrick, together with others, continues to be responsible for establishing, supervising, directing and controlling the business activities and practices of Holiday Magic, Inc. (Coultas-Tr. 9720-21).

*C. Respondent Fred Pape*

27. Respondent Fred Pape formerly was president of respondent Holiday Magic, Inc. (Answer, p. 2). Mr. Pape became president of Holiday Magic, Inc. in 1967 (Coultas-Tr. 9654) and retained the post through sometime in 1968 (Coultas-Tr. 9655).

28. Respondent Fred Pape was the first Master Distributor in Holiday Magic, Inc., and made $186,000 his first year in the business (CX 85P-Mark Evans notes which were approved by Pape; Tr. 939-40).

29. Mr. Pape's office address at the time of the filing of the complaint was 1790 E. Plum Lane, Reno, Nev. (Answer, p. 2).

30. Together with others, respondent Fred Pape was responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent Holiday Magic.

(a) "As William Penn Patrick stumped the State of California in his bid for the gubernatorial nomination, Fred Pape took the reins of 'the fastest growing corporation in the nation' and raised Holiday Magic to even greater heights" (CX 184OL).

(b) According to former president Ben Gay, Fred Pape (and Janet Gillespie) ran the business when Patrick was running for nomination (Gay-Tr. 9931-32).

31. President and officers supervised the day-to-day activities of Holiday Magic, Inc. (Coultas-Tr. 9657).

32. When Fred Pape was president, his job was that of chief executive officer. He carried out the policies that has been established in the board meetings by the board and Mr. Patrick. He played the role of a company president (Coultas-Tr. 9659).

*D. Respondent Janet Gillespie*

33. Respondent Janet Gillespie formerly was administrative vice president and a director of respondent Holiday Magic, Inc. (Answer, pp. 2-3).

34. Janet Gillespie was the first Organizer Distributor in Holiday Magic, Inc. (Gillespie-Tr. 9279; CX 5G). She became a member of the board of directors of Holiday Magic, Inc. in 1965 (Gillespie-Tr. 9286), was named vice president-administration in Aug. 1965 (Gillespie-Tr. 9283; CX 1F) and was international vice president as late as Nov. 1968 (CX 142C).

35. Janet Gillespie has been described as a member of the "corporate team" as well as a charter member of Holiday Magic (CX 6H-Wand-Jan. 1966).

36. Together with others, respondent Janet Gillespie was responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent Holiday Magic.

(a) Board of directors directed the policy of Holiday Magic, Inc. (Coultas-Tr. 9657).

(b) Responsibility of board of directors to terminate distributors for violating rules and regulations of Holiday Magic, Inc. (CX 78Z86-87; CX 79Z89-90; Gay-Tr. 9928).

37. Presidents and officers supervised the day-to-day activities of Holiday Magic, Inc. (Coultas-Tr. 9657). Sherman Coultas, Holiday Magic's director of legal services (Tr. 9653) also testified that he had worked with Janet Gillespie daily and that she was involved "in the overall facets of the business" (Tr. 9658). "She did just about anything that had to be done insofar as running the business and coordinating the activities of secretaries and clerks and administrative people."

## V. Holiday Magic Publications

38. Respondents have formulated a distribution system involving distributors at wholesale and retail levels and they have published their marketing plan or distribution policies which are set forth in respondents' price lists, discount schedules, marketing manuals, sales bulletins, order forms, pamphlets and other materials and literature (Answer, p. 3).

*A. Holiday Magic Wands*

39. Holiday Magic Wands appear in the record as CX 1 through CX

68. The Wands are in the format of a newspaper, and are published monthly by Holiday Magic, Inc., for distribution throughout the United States (CX 1A, CX 70Z-92).

40. The Holiday Magic Wand is designed as a valuable recruiting tool by Holiday Magic, Inc. for its distributors (See CX 1B, CX 1C, CX 6C, CX 7H, CX 12F, CX 17G, CX 18F, CX 27F, CX 79Z-92; Gillespie-Tr. 9356-57). A so-called "Permanent Wand" which is undated appears in the record as CX 64A-H. The permanent Wand is used for recruiting purposes, and is sent to Holiday Magic Councils and handed out to prospective distributors (CX 155F; Alexander-Tr. 5623).

41. The Wands are mailed by Holiday Magic, Inc. directly to Master and General Distributors (CX 1802C, CX 1800Z10-Z11; Gillespie-Tr. 9291) and were also sent out indirectly to Organizers and Holiday Girls through a policy of distributing twenty copies of the Wand to Masters and Generals and "urging" their distribution to Organizers and Holiday Girls in their organizations (Gillespie-Tr. 9343-44, 9292; 9350; CX 1601, CX 532, CX 1800Z11) as well as to use for recruiting purposes (CX 533).

42. Holiday Magic has also at times distributed the Wands directly to Holiday Girls (CX 136H-Family News-5/31/68). The Holiday Girl Demonstration Kits also each contain one copy of the Wand (Gillespie-Tr. 9350).

43. Holiday Magic, Inc. describes the value of the Wands as follows:

> What a wonderful training and recruiting tool the Wand is! It should always be carried and used for "prospecting", explaining the progress and history of Holiday Magic, and "closing the sale." "After all Joe, look at all these people and their wonderful success. Now, why not you, too?" The Magic Wand can be the greatest recruiting tool you have if you will only use it. Each month you receive your complimentary copies. * * * "With all this in mind, the Master or General who does not take full advantage of this newspaper is losing more than he will ever know" (CX 79Z92).

And again:

> And don't forget that the Holiday Magic Wand is one of our best Direct Approach aids, it will always excite a potential prospect's curiosity to the point of wanting to attend one of the business opportunity meetings. (CX 1840Z60-Z61).

44. Early issues of the Wand also contained a "Solution Box" column, designed to instruct distributors in the intricacies of the Holiday Magic Marketing Plan. At CX 8F-Wand-3/66:

> All distributors who have any question regarding any phase of Holiday Magic should write the company. The authoritative answer to your question will appear in this column. This is YOUR column, so please use it to broaden your knowledge.

*B. Holiday Magic Family News*

45. Like the Wands, the Family News publications are designed to keep distributors up to date on the material covered therein (CX 28A).

Family News appear in the record as CX 118-124, CX 127-CX 168, CX 170-172.

46. The Family News is distributed to employees and distributors of Holiday Magic, Inc. throughout the United States (Ruggles-Tr. 601).

*C. Holiday Magic Bulletins*

47. Holiday Magic, Inc. also utilizes a bulletin format to disseminate information to its distributors in the field. The bulletins are normally addressed to all Master and General Distributors (see CX 672, CX 665, CX 663, CX 630A-B, CX 609, CX 549). On occasion bulletins will be sent to "All Distributors" (see CX 473). Information Bulletins that are sent to Masters and Generals only are intended, with "discretion," to be relayed to Holiday Girls as well (CX 78Z-9).

48. Distributors are advised to place all bulletins received from Holiday Magic in a binder, as they will need to refer to them from time to time (CX 1800Z12).

*D. Manuals*

49. Holiday Magic Manuals appear in the record at CX 76-116, CX 1800, CX 1842, CX 1840, CX 1841; and elsewhere.

These manuals are published regularly by Holiday Magic, Inc. and deal with a variety of subjects, from the holding of Opportunity Meetings and the training of Master and General Distributors in the art of recruiting (CX 78, 79, CX 1840, CX 1841, 1842, CX 90, 96, 97, 98, 99) to the techniques for selling cosmetics (CX 91, 92, 107, 108) and the establishment of a cosmetic wholesale-retail business (CX 106).

50. Although only one or two manuals are given to all distributors at no cost to them (Gillespie-Tr. 9347), it can be assumed that every Distributor at whatever level is cognizant and aware of what is in the manuals (Gillespie-9348, 9359).

51. The purpose of the manuals is to provide Masters and Generals with procedures and techniques to enable them to build and sustain an effective Holiday Magic program (CX 1800D-Masters' and Generals' Manual).

52. Distributors are told to "Know and practice anything written in this manual and you will achieve every objective that you might set for yourself" (CX 1800R).

53. Distributors are advised that almost any question that they can conceive of regarding the Holiday Magic program will be answered by the written material provided by Holiday Magic (CX 1800Z13, CX 78Z101, CX 70Z101).

54. Manuals are available to prospects as well as distributors, who may read them over before joining Holiday Magic (see Tr. 2980).

55. The purpose of [the Masters' and Generals'] manual is to provide Masters and Generals with procedures and techniques which will save time, experimentation, and expensive errors. Holiday Magic, Inc. expects each Master and General to be thoroughly knowledgeable in the methods used to build and sustain an effective Holiday Magic Cosmetic Program. (CX 78F, CX 79F Masters' and Generals' manuals appear in the record as CX 78A-Z103, CX 79A-Z103, CX 1800.)

## VI. The Marketing Plan Generally

56. Corporate respondent's marketing plan is a distribution network which allows a potential distributor to enter at any one of three levels, *i.e.*, Holiday Girl, Organizer and Master, and may eventually qualify at a fourth level, that of General (Answer, p. 3). "Distributor" refers to all levels in the Holiday Magic marketing plan (Gillespie-Tr. 9364) and refers to any wholesaler or retailer of Holiday Magic products (CX 104M).

57. The distributors' gross profit is the difference between the price or prices at which he purchases Holiday Magic products and the price or prices at which he resells them (Answer, p. 3).

58. All Distributors are independent contractors (Answer, p. 4).

59. Every position in Holiday Magic requires a different level of investment (Guard-Tr. 10404; CX 1842, CX 90P-S).

## VII. Holiday Magic Distributors

### A. *Holiday Girl Distributor*

60. Holiday Girls are required to invest $39 worth of product and sales aids in order to qualify for that position (CX 78Z48, CX 79Z45, CX 1842R, CX 90P) or purchase a "mini-kit" for $11.99 (CX 90P).

61. Holiday Girls may be recruited and sponsored into Holiday Magic either by an Organizer, Master or General Distributor (CX 90P, CX 90Q; Tr. 2432, 2540, 3344; see also CX 90S).

62. Holiday Girls buy their product needs from their "Sponsor" who would be either a General Distributor, Master Distributor, or Organizer Distributor (CX 78Z48, CX 79Z45; Tr. 9032-33, 3314, 2519, 2678, 5216, 2452, 2604).

63. Holiday Girls purchase their products at a 30 percent discount off of list retail list price (CX 78Z48, CX 79Z45, CX 2065B, CX 2065D, CX 2080A, B, C; CX 2081A, B, C; CX 2083, CX 2084A, B; CX 2086, CX 2091A, CX 2093A, CX 2096A, CX 2099A, B; CX 2100, CX 2106, CX 2108A, CX 2112A-C).

See also Part XIX.

64. At the end of each calendar month, Holiday Girls receive a cash refund bonus from their sponsors based upon total retail volume ordered during that calendar month. The amount of the refund bonus is computed according to the following Refund Bonus Schedule:

| VOLUME | PERCENT OF REFUND | RETAIL PERCENT |
|---|---|---|
| 0—$ 99 | 0 | 30 |
| 100— 600 | 5 | 35 |
| 601— 900 | 10 | 40 |
| 901— 1,200 | 11 | 41 |
| 1,201— 1,500 | 12 | 42 |
| 1,501— 1,800 | 13 | 43 |
| 1,801— 2,100 | 14 | 44 |
| 2,101— 2,400 | 15 | 45 |
| 2,401— 2,700 | 16 | 46 |
| 2,701— 3,000 | 17 | 47 |
| 3,001— 3,300 | 18 | 48 |
| 3,301— 3,600 | 19 | 49 |
| 3,601— 3,900 | 20 | 50 |
| 3,901— 4,200 | 21 | 51 |
| 4,201— 4,500 | 22 | 52 |
| 4,501— 4,800 | 23 | 53 |
| 4,801— 4,999 | 24 | 54 |
| 5,000 | 25 | 55 |

(CX 78Z48, CX 79Z46, CX 77F, CX 649, CX 78Z33, CX 27A; see also Part XIX.)

65. There is a substantial turnover of distributors at the Holiday Girl level (Christie-Tr. 5992; Dempsey-Tr. 6035; Habuary-Tr. 6082; Coultas-Tr. 9680, 9752).

66. Holiday Girls on the average are active from four to six weeks.

(a) Holiday Girls and Avon ladies do essentially the same kinds of work (Baumgarten-Tr. 9500). Avon has an exceedingly high turnover rate (Coultas-Tr. 9764) estimated to be as high as 1400 percent in the course of one year (Davis-Tr. 6272).

(b) Dorothy Sovereign, who was with the Avon company for 7- 1/2 years (Tr. 8688) as Avon's top selling Avon lady (Tr. 8710) as well as Holiday Magic's top retailer (Tr. 8707-8710) and who herself recruited approximately 100 Holiday Girls since she has been with the company, testified that Holiday Girls, on the average, last six weeks (Tr. 8695, 8701) about the same as Avon ladies (Tr. 8696).

67. Holiday Girls purchase cosmetics products for their personal use as well as for resale (Coultas-Tr. 9756, Semling-Tr. 5875).

68. It can be reasonably presumed that the address of the Holiday Girl indicates the central area from which the Holiday Girl is doing business (see Tr. 4625, 7928).

69. Holiday Girls are retailers only under the Holiday Magic marketing plan and do not sell or attempt to sell at wholesale (CX 79Z98, CX 78Z65).

See CX 90U - Once your prospect enrolls [as a Holiday Girl] try to upgrade him to the Organizer level. (Put an "X" on Organizer position.) Kid him (with caution) by such comments as "Of course you're not going to trot down the street with that Holiday Girl kit in your hand. Don't you really think that you ought to be an Organizer so you can sponsor other businessmen like yourself into the program right away?"

B. *Organizer Distributor*

70. Organizer Distributors were required to invest approximately $130.41 for one of every item in the Holiday Magic line (CX 1842R, CX 90P, CX 79Z98). As of approximately July 31, 1970, the required investment for the Organizer Distributor position jumped to $299, for which the new Organizer received a Holiday Magic one-pack of products, a Mini-Kit; a ten cassette library of recorded messages from motivational sales people, a one year subscription to "Perception" magazine and a two day course taught by Instructor Generals (CX 165H - Family News - 7/31/70).

71. Organizers may sponsor other Organizers into the business, who in turn may sponsor other organizers into the business *ad infinitum* (CX 1842Y, CX 79Z29, CX 85S, CX 86B, CX 104N, CX 90P).

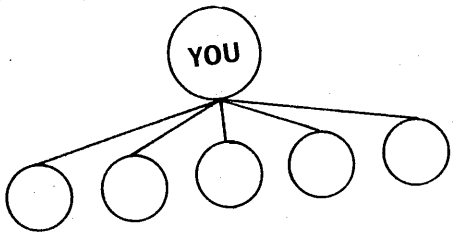
72. Organizer or Holiday Girls sponsored by other Organizer must buy their products from the sponsoring organizer (CX 79Z29, CX 104N, CX 70Z99).

73. The Organizer serves as a sub-wholesaler and "apprentice Master," functions in the selection of personnel, hires, trains, and supervises Holiday Girls and other Organizers (CX 104N, CX 1802R, CX 90P, CX 79Z99).

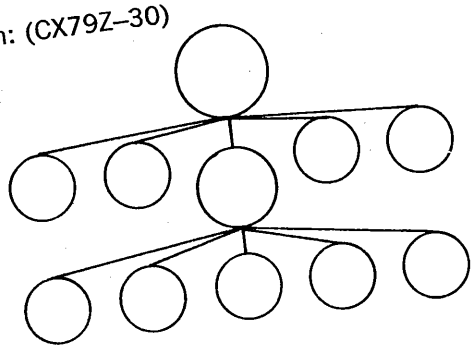
74. There is no maximum number of other Organizer distributors that another Organizer may bring into the Holiday Magic program (Tr. 3702).

(a) The Holiday Magic Opportunity Meeting presentation shows a diagram of Organizers each having recruited five other organizers per month, in explaining the Holiday Magic opportunity. The diagrams look as follows:

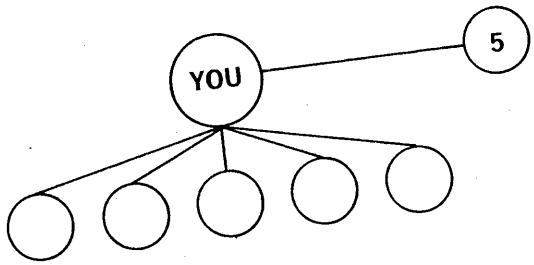
a) First month: (CX79Z–29)



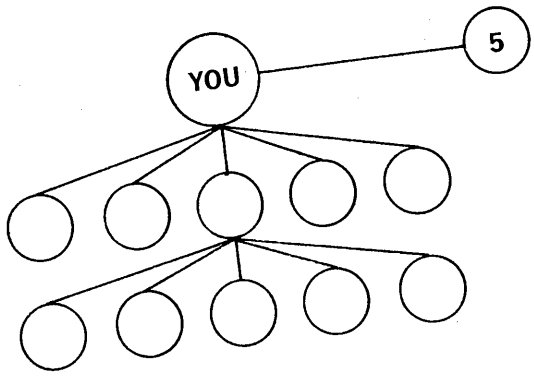

b) Second month: (CX79Z–30)



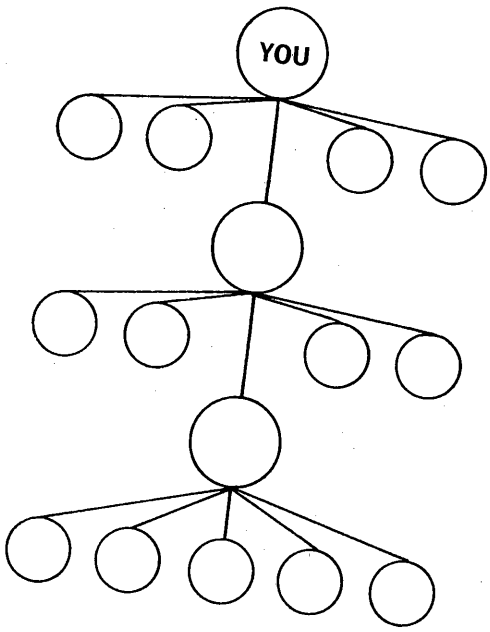
plus (CX79Z–31)



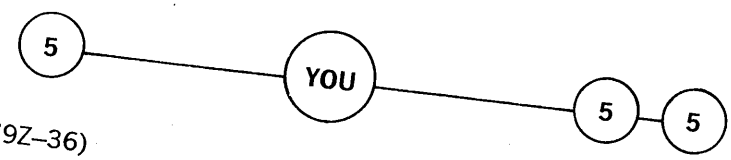

or (CX79Z–36)



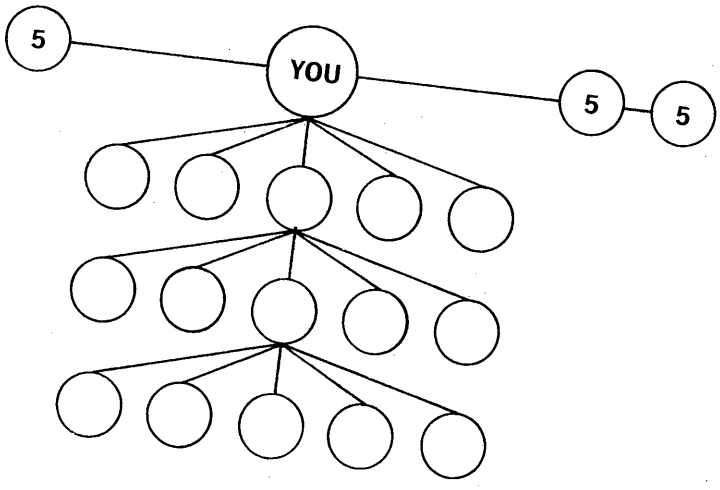
c) Third month: (CX79Z–30)



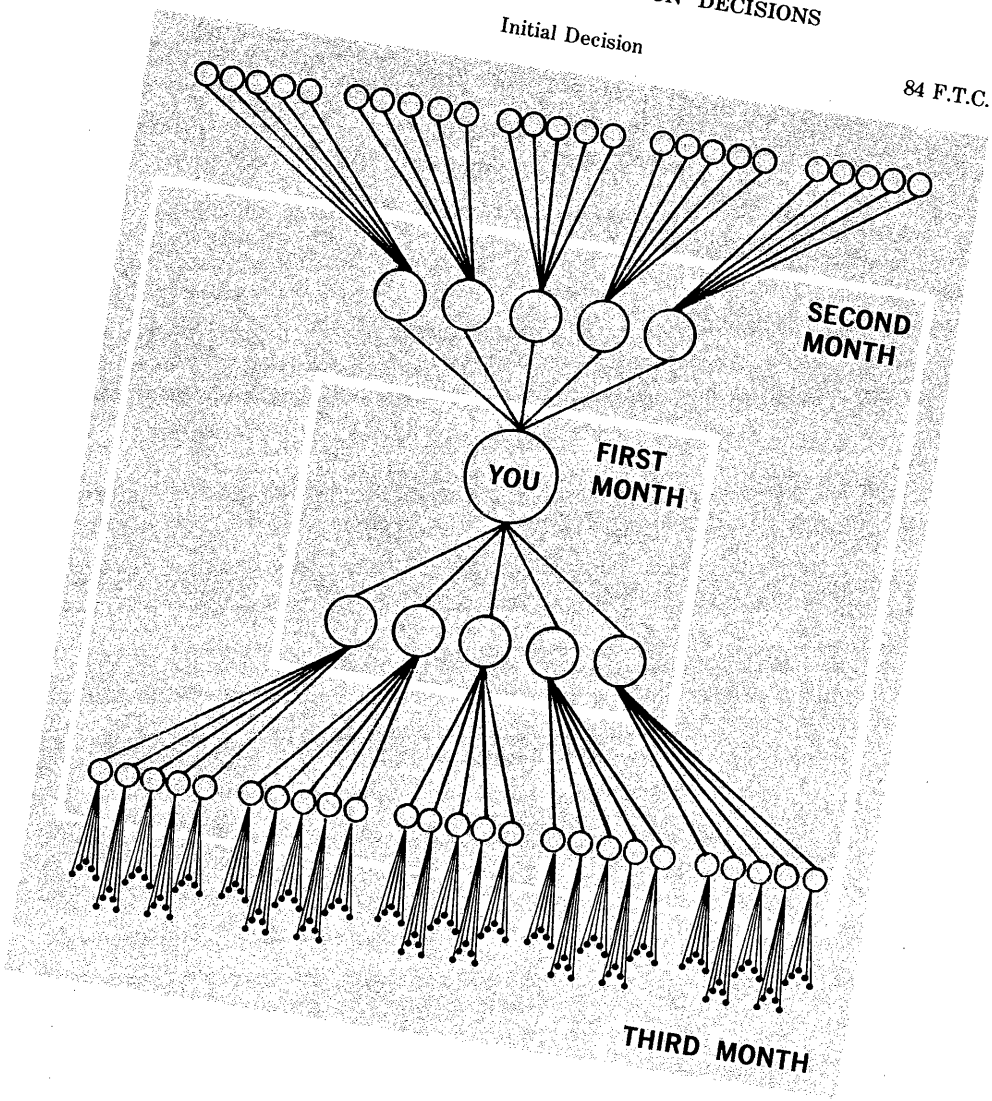

plus




or: (CX79Z–36)



(b) Since the Opportunity Meeting script supposes that the Organizer Distributors will each on the average "reproduce themselves five times" (CX 79Z31) an accurate pictorial of the opportunity meeting presentation with respect to the Holiday Magic marketing plan would look as follows after three months only:


SECOND MONTH
YOU
FIRST MONTH
THIRD MONTH

75. An Organizer Distributor buys and sells Holiday Magic products at the same 30 percent discount from list price, and is entitled to the refund as appears in the Refund Bonus Schedule, based upon cumulative monthly purchases in each calendar month (CX 77F, CX 649, CX 78Z48, CX79Z46, CX 78Z33, CX 104C, CX 105C).

See CX 4C-Wand: 11/65 - Solution Box Column:

Question: How do I explain to an Organizer why he doesn't get a bigger percentage in his monthly refund schedule?

Answer: If an Organizer, who is actually a Sub-Wholesaler, buys a Distributor Kit and a One-Pack, he has purchased $120.40 plus applicable taxes in his area. Thus, if his Holiday Girl sells any amount over $100, this means a 35% on our volume schedule. Obviously, then, the Organizer cannot have any overrride since they are both in the 35% area.

* * *

76. An Organizer Distributor may "earn" his way to the position of Master Distributor through creating $5,000 retail volume in one calendar month (CX 1842S, CX 79Z100). This is known as the "Work-In Master" (CX 79Z100, CX 79Z95; Rule 23).

The Organizer will thereby receive credit for the total volume created, either through sales of product to Holiday Girls or to other Organizers (CX 1842T, CX 86B, CX 1840Z69, CX 90Q).

77. Examples given by Holiday Magic for work-in Masters are seventeen girls working part-time averaging three hundred dollars a month totaling $5100 or by sponsoring six sub-organizers into the wholesale end of the business who would purchase six one-packs each during a calendar month (presumably to recruit five others in turn and distribute a one-pack to each (CX 1842T, CX 1840Z72, CX 90Q).

78. Approximately 25 percent of the Organizers recruited will become Masters if "properly trained" in the first 10 days in Holiday Magic (CX 1840Z48, CX 85B; see Part XII 4(a) ).

79. Organizer Distributors sell or attempt to sell at retail as well as at wholesale to other Organizer Distributor or Holiday Girls whom they sponsored into the Holiday Magic program (CX 79Z98, CX 79Z99; Tr. 5181, 5176, 5478, 2437, 2679, 5025, 5478, 7873).

C. *Master Distributor*

80. A Master Distributor can attain his position either as a "Buy-in" a "Work-in" or combination "Buy-in/Work-in" (CX 79H, CX 784).

(a) *Buy-in Master*

1. A buy-in Master may be introduced to Holiday Magic, Inc. by General Distributor, a Master Distributor, an Organizer Distributor a Holiday Girl Distributor (CX 79H, CX 78H).

2. A buy-in Master is a person who becomes a Master Distributor

a lump sum capital investment for Holiday Magic products and sales aids (CX 79Z98, CX 79H; Tr. 2542).

3. The cost of the Master Distributorship has fluctuated from $2500 to $4500 (Tr. 9574, 9591-92, 2542).

(b) *Work-in Master*

1. A Distributor may become a "work-in" Master by purchasing for resale from his sponsor the required volume, which has varied from $5,000 to $7,777.77 at the retail list price value (CX 79H, CX 79Z 100, Tr. 9606).

2. See Part VII B7.

(c) *Work-in/Buy-in Master*

A distributor may become a "Work-in/Buy-in" Master by selling a portion of the required volume through his organization and purchasing from his sponsor or from Holiday Magic, Inc. the balance in one lump sum, which can be done in any one day of the month (CX 79H, CX 78H; Tr. 7183).

81. Master Distributors buy their Holiday Magic products at a discount of 55 percent off of retail list price (CX 79Z31, CX 70Z46, CX 78Z49).

82. Master Distributors buy directly from Holiday Magic, Inc.

(a) At CX 70Z31 - "As a Master Distributor you buy directly from Holiday Magic."
(b) CX 78T - A General Distributor "can work wholesale or retail or both as he desires. Does not supply his Masters with product." A Master Distributor "Buys product directly from factory to supply his Organizers and Holiday Girls."
(c) Stipulation of respondents' counsel at Tr. 2621-23):

Q. Mr. Izzard, I show you a document marked CX 439 for identification and ask if you will be able to identify this, please.

(The document referred to was marked CX 439 for identification).

A. Yes, sir, this is a bulletin, one of many dozens I received as a master distributor from the company in San Rafael, California. This one pertains to new warehouses available.

MR. CAMERON: Your Honor, I would like to offer this into evidence at this time.

MR. WOLFSON: Objected to on the grounds that that couldn't possibly have any robative value to the issues involved in this case.

HEARING EXAMINER BUTTLE: What is the purpose?

MR. CAMERON: Your Honor, we have this under our price discrimination category in allocation, and this will show where masters and generals purchased their product, and how the chain of distribution.

IR. WOLFSON: What difference can it possibly make where they purchased it?

EARING EXAMINER BUTTLE: You say this will show where the masters and als purchased their product?

. WOLFSON: It doesn't even show that.

. CAMERON: Your Honor, it is part of the mosaic of the marketing operation.

WOLFSON: Now, that is not original, Judge.

RING EXAMINER BUTTLE: No; I wish I'd never used the word.

Well, now the reason you are giving me is no reason for my receiving it, so what else do you have to say?

MR. CAMERON: Your Honor, I think it is important, especially in our price discrimination allegation in the complaint, to show where distributors purchased their product from.

HEARING EXAMINER BUTTLE: Well, they'll stipulate with you that the distributors purchased their product from Holiday Magic, won't they? Now, that is what you said you wanted to introduce it for, isn't it?

MR. CAMERON: Well, I'd like to—O.K.

HEARING EXAMINER BUTTLE: I guess so. All right.

MR. WOLFSON: He gave up.

HEARING EXAMINER BUTTLE: They will stipulate with you that masters and generals purchased their product from Holiday Magic; am I correct?

MR. WOLFSON: Yes, Judge, they gave up, they said they are going to withdraw it anyway, Mr. Brownman.

HEARING EXAMINER BUTTLE: Mr. Mitchell do you stipulate to that?

MR. MITCHELL: Sure, Your Honor.

MR. CAMERON: I'll take it back.

HEARING EXAMINER BUTTLE: That doesn't even prove it.

MR. WOLFSON: That is right.

(The documents referred to, heretofore marked for identification CX 439, was withdrawn).

(d) CX 106C - "Only Master and General Distributor's orders should be submitted to Holiday Magic. All other distributors purchase through their sponsor."

(e) Testimony of former Administrative Vice President and Director Gillespie - "[Holiday Magic adopted a numerical cross file for Masters and Generals but not for Holiday Girls] Because Holiday Magic did business with the Masters and Generals" (Tr. 9369); [O]bviously Masters and Generals normally purchased from the company* * *]" (Tr. 9415, 9419).

(f) See also Part XLV 1.

83. Master Distributors sell or attempt to sell at retail as well as at wholesale to Organizers or Holiday Girls whom they sponsored into the Holiday Magic Program (CX 79Z99; Tr. 3077, 3458, 2452, 2604, 4187).

D. *General Distributor*

84. In order for a person to become a General Distributor, he must fulfill three qualifications:

(a) He must first be a Master Distributor (CX 1842U, CX 1840Z75, CX 90R).

(b) Submit a certified check for $2500 to Holiday Magic, Inc.—which is called a General's release fee—and will be held in escrow until the third requirement is met (CX 1842U-V, CX 1840Z75-76, CX 78M, CX 90R).

The "release fee" has ranged from $2500 to $3000 to $4500, and has also been denoted by respondents as a "contract settlement sum" and a "general's performance fund" (Tr. 2534-35, 9530, 9918-19; CX 2000).

(c) He must "recreate himself" by bringing in a replacement Master to his sponsoring General Distributor, before the sponsoring General Distributor will release him from Master Distributor to become a General Distributor (CX 1842V, CX 1840Z76, CX 78M, CX 90R-S).

(d) Formerly a fourth requirement was that the Master Distributor attend Instructor General class (IG) as a prerequisite to becoming a General (CX 1842U, CX 1840Z74, CX 90R). The requirement is now moot since Instructor General school is a requirement to become a Master Distributor as of Apr. 30, 1970 (CX 159F - Family News - 4/10/70).

85. As a practical matter, Holiday Magic, Inc. recognizes only two requirements for a Generalship position - the release fee and the replacement Master.

(a) At CX 1842Z2 -

Now, that newly created master distributor will want to become a general distributor to earn the kind of money a General does! But, [in] order for a master distributor to become a General Distributor, there are two major qualifications that must be completed. The first is to post a $2500 dollar General release fee with the factory, and the second is to bring in a replacement master to your sponsoring General before he will release you to become a General Distributor!

(b) See also -

1. Witness Davis was congratulated by Holiday Magic on having become a General Distributor only twelve days after having been congratulated for becoming a Master Distributor (CX 1391, 1393; Tr. 1358).

2. When Crosby was congratulated by Holiday Magic, Inc. on becoming a Master Distributor and the same day was congratulated by Holiday Magic, Inc. on becoming a General Distributor (CX 1349, CX 1350). Note that Crosby's "Application" to become a General is dated 9/23/69, whereas the letter informing him of his Master status (and General status) was dated 9/24/69.

3. Other examples of Masters becoming Generals very quickly are: (CX 35F (2 weeks); CX 3D (10 days); CX 45G (2 weeks); CX 35C (7 days); Tr. 2067 (4-5 weeks); Tr. 3136 (3 days); Tr. 5311 (week or two); Tr. 4060-61 (next day).

4. See CX 18A; Gay-Tr. 9956.

86. General Distributors purchase Holiday Magic products directly from Holiday Magic, Inc. at a discount of 54 percent off of retail list price (Answer, p. 4; CX 104M; see also VIIC3).

87. General Distributors sell or attempt to sell at retail as well as at wholesale to Organizer Distributors and Holiday Girl Distributors whom they sponsored into the Holiday Magic Program (Tr. 4553, 7838-39, 5140, 2525, 2518, 2479).

E. *Replacement Masters*

88. The strength of the Holiday Magic Marketing Plan, as Holiday Magic describes it, lies in the replacement master requirement.

CX 1842V - This means he must bring in a replacement Master Distributor to you, his sponsoring General Distributor, before you will release him from Master Distributor to become a General Distributor.

Herein lies the strength of the Holiday Magic marketing plan - Why Holiday Magic has grown so rapidly because he must always replace himself with a working indian before he can become a chief. Your number of Masters will never decrease—you will only grow in the number of Generals you have.

This replacement Master was brought into the sponsoring General Distributor which just caused another $5,000 in retail product to be purchased from the factory * * *

## VIII. Holiday Magic Distributors Statistics—Numbers and Geographic Areas

89. As of approximately Feb. 26, 1969, Holiday Magic Records indicate that 9252 persons had become Master Distributors throughout the country, of which 2940 became Generals. The Record further reflects that as of approximately Dec. 31, 1968, (only two months earlier) there had been a total of 43,713 Organizer Distributors and 41,918 Holiday Girl Distributors (CX 457A).

90. Inasmuch as Organizer, Master and General Distributors are all qualified to sponsor and recruit Holiday Girls into the Holiday Magic program, on the average, persons in their lifetime as *Holiday Magic* distributors actually recruited and sponsored less than one Holiday Girl each (CX 457A).

91. It can also be found that since 2940 persons became General distributors, an equal number were at one point in the program Replacement Masters (CX 457A).

92. A breakdown of Organizers and Holiday Girls by state reveals the following, as of 1/29/69:

| | | |
|---|---|---|
| (a) | *California* | 6849 Organizers, 5252 Holiday Girls |
| (b) | *Illinois* | 3613 Organizers, 2822 Holiday Girls |
| (c) | *Michigan* | 2174 Organizers, 1778 Holiday Girls |
| (d) | *New York* | 7232 Organizers, 4796 Holiday Girls |
| (e) | *Florida* | 1589 Organizers, 2212 Holiday Girls |

(CX 457A, B, C)

93. As of approximately Apr. 26, 1972, approximately 504 Masters had been recruited in the State of Florida, of whom 219 had become Generals and 285 remained as Masters (CX 2081A-Z21).

| | | | |
|---|---|---|---|
| Okeechobee — | Population (1970) | 3,715 | (RX 153) |
| | Masters and Generals | 11 | |
| | Masters Recruited | 2 | |
| | Generals Recruited | 9 | (CX 2081) |
| Fort Pierce | Population (1970) | 29,721 | (RX 153) |
| | Masters and Generals | 34 | |
| | Masters Recruited | 13 | |
| | Generals Recruited | 21 | (CX 2081) |

*Fort Pierce* - Of the 34 Masters and Generals, 32 were recruited in calendar year 1966 as Masters (another one was recruited on 12/31/65!) and 23 of the 34 were recruited as Masters and Generals in just the first six months of 1966 (CX 2081A-Z21).

*Okeechobee* - Of the total of 11 Masters and Generals all were recruited as Masters and Generals during a five month period from May to Sept. 1966 (CX 2081A-Z21).

94. As of approximately Nov. 1970, Holiday Magic had on record for the State of Illinois approximately 1918 Masters of whom 511 were able to qualify as General Distributors (CX 200A-Z177; Tr. 4738).

Of these Masters and Generals, the following can be gleaned in conjunction with Census figures in the record as RX 156 -

| | | | |
|---|---|---|---|
| (a) | *Skokie* | Population (1970) | 68,627 |
| | | Masters | 27 |
| | | Generals | 14 |
| (b) | *Des Plaines* | Population (1970) | 57,239 |
| | | Masters | 27 |
| | | Generals | 19 |
| (c) | *Park Ridge* | Population (1970) | 42,466 |
| | | Masters | 12 |
| | | Generals | 7 |
| (d) | *Niles* | Population (1970) | 31,432 |
| | | Masters | 8 |
| | | Generals | 6 |
| (e) | *Lincolnwood* | Population (1970) | 12,929 |
| | | Masters | 6 |
| | | Generals | 7 |
| (f) | *Mt. Prospect* | Population (1970) | 34,995 |
| | | Masters | 22 |
| | | Generals | 3 |
| (g) | *McHenry* | Population (1970) | 6,772 |
| | | Masters | 3 |
| | | Generals | 1 |

95. Through a process of addition, one can find that since Master Distributor numbering started on a sequential basis throughout the country as of May 1969 (Tr. 9989; CX 2081 Z12) with ID #20001, and that by the end of Apr. 1970, ID #022972 had been reached (CX 2081 Z16); therefore:

(a) 14 more Masters were recruited from Mt. Prospect during the period May 1969 through Apr. 1970; a total of 9 persons had already been recruited as Masters and Generals as of May 1969.

(b) Seven more Masters and three more Generals were first brought into the program in Skokie during the period May 1967 through Apr. 1970; a total of 31 persons had already been recruited as Masters and Generals as of May 1969.

(c) 14 more Masters and six more Generals were first brought into the program in Des Plaines during the period May 1969 through Apr. 1970; a total of 26 persons had already been recruited as Masters and Generals as of May 1969.

96. Chicago Metropolitan Area:

Approximately 1000 Masters and 600 Generals have been recruited in the Chicago metropolitan area, which for purposes of this finding is defined as including all of Cook County and DuPage County only. The population of these combined counties is approximately 6,000,000 people (RX 156; CX 200A-Z177).

As of approximately Dec. 1969, Holiday Magic figures indicate that a total of approximately 809 Masters and Generals had been recruited in the State of Michigan (Tr. 3892; CX 357B-Z52).

A comparison with Census figures for 1970 shows the following (RX 155):

| | | | |
|---|---|---|---|
| (a) | Ann Arbor | Population | 99,797 |
| | Masters and Generals | | 24 |
| (b) | Battle Creek | Population | 38,931 |
| | Masters and Generals | | 10 |
| (c) | Grand Rapids | Population | 197,649 |
| | Masters and Generals | | 26 |
| (d) | Jackson | Population | 45,484 |
| | Masters and Generals | | 16 |
| (e) | Lansing | Population | 131,546 |
| | Masters and Generals | | 14 |
| (f) | Pontiac | Population | 85,279 |
| | Masters and Generals | | 18 |
| (g) | Ypsilanti | Population | 29,538 |
| | Masters and Generals | | 15 |
| (h) | Detroit, Metropolitan Area: | | |
| | | Population | Approximately 4 million |
| | Masters and Generals | | 529 |

97. As of approximately Jan. 1971, there were approximately 25,000 Masters and Generals that had been recruited in the country.

(a) This information was relayed to former Holiday Magic President Ben Gay III when he was in charge of Holiday Magic, Ltd. in Canada, by Harold Combs, the man in charge of the Customer Service Department (Tr. 8999-9900, 9984).

This information is possibly more reliable than the testimony of Sherman Coultas, who testified that since the beginning, 20,000 Masters and Generals had been recruited—"probably" (TR. 9759).

98. As of approximately the end of 1972, 168,000 Holiday Girls and Organizers had been recruited into the Holiday Magic program (TR. 9762).

Although this information was also testified to by Mr. Coultas, it is considered more reliable than his estimate of the numbers of Masters and Generals since he at first stated he didn't know what the figure was and only after being shown a document was he able to "refresh his recollection." (TR. 9762).

99. The ratio of Holiday Girls to Organizers, Masters and Generals is approximately 4 to 5 and the ratio of Holiday Girls to Organizers is less than 1 to 1 (CX 457A). The ratio of Masters to Generals is approximately 2 to 1 (CX 457A).

100. Holiday Magic, Inc. does not know and keeps no records of the number of Masters and Generals that are actively pursuing their business.

(a) George Platsis, Assistant Attorney General, State of Michigan testified that he asked Holiday Magic, Inc. for a list of active and inactive distributors. Holiday Magic's response, in Dec. 1969, was that they have no way of knowing who is active and who is inactive (TR. 3892). The list of Masters and Generals supplied appears in the record as CX 357B-Z52 (TR. 3890, 3894).

(b) Sherman Coultas, Holiday Magic's Director of legal service, testified that Holiday Magic, Inc. has no records of turnover of Masters and Generals (TR. 9760).

(c) The only method Holiday Magic uses to determine which distributors are active and which are inactive, is to record as "active" those distributors who reordered product from Holiday Magic in the preceding six month period (Coultas TR. 9699). However, a study of the lists in question testified to by Mr. Coultas (RX 159, RX 160 and R X 161) indicates that Distributors are considered active if they ordered in the previous 12-month period—not six month period (see RX 159, RX 160, and RX 161; TR. 9699).

(This is an unreliable yardstick, since Distributors can be active and not have reordered from Holiday Magic, or can be purchasing for personal use only and not be active as a Distributor.)

(d) Another method of determining the number of active Masters and Generals today is to assume that active Masters and Generals belong to the CRS distribution centers. Testimony appears in the Record that 95 percent of "active" people belong to CRS (TR. 9629-Pangerl) and that there are 2700 members of CRS (TR. 5881-Semling). From this it can be determined that there are 2,842 active Masters and Generals throughout the country today.

101. Distributors whom Holiday Magic, Inc. considers to be "inactive" continue to receive bulletins and Wands from Holiday Magic, Inc. (Coultas - TR. 9699; Coultas - TR. 9743-44).

102. Holiday Magic, Inc. has a policy of not providing its distributors with the number of previously recruited Distributors in the geographic or market area in which the Distribuors do business or are recruited and Distributors who seek such information are denied it. See following:

(a) CX 1881 - Wand - Solution Box - Jan. 1967:

Question: Can the company provide me with a list of Master and General Distributors in our area so we can participate in joint projects?

Answer: The company does not compile lists of distributors by area, but suggests that this data could be obtained through the council in your area. A list of councils can be obtained by writing the company.

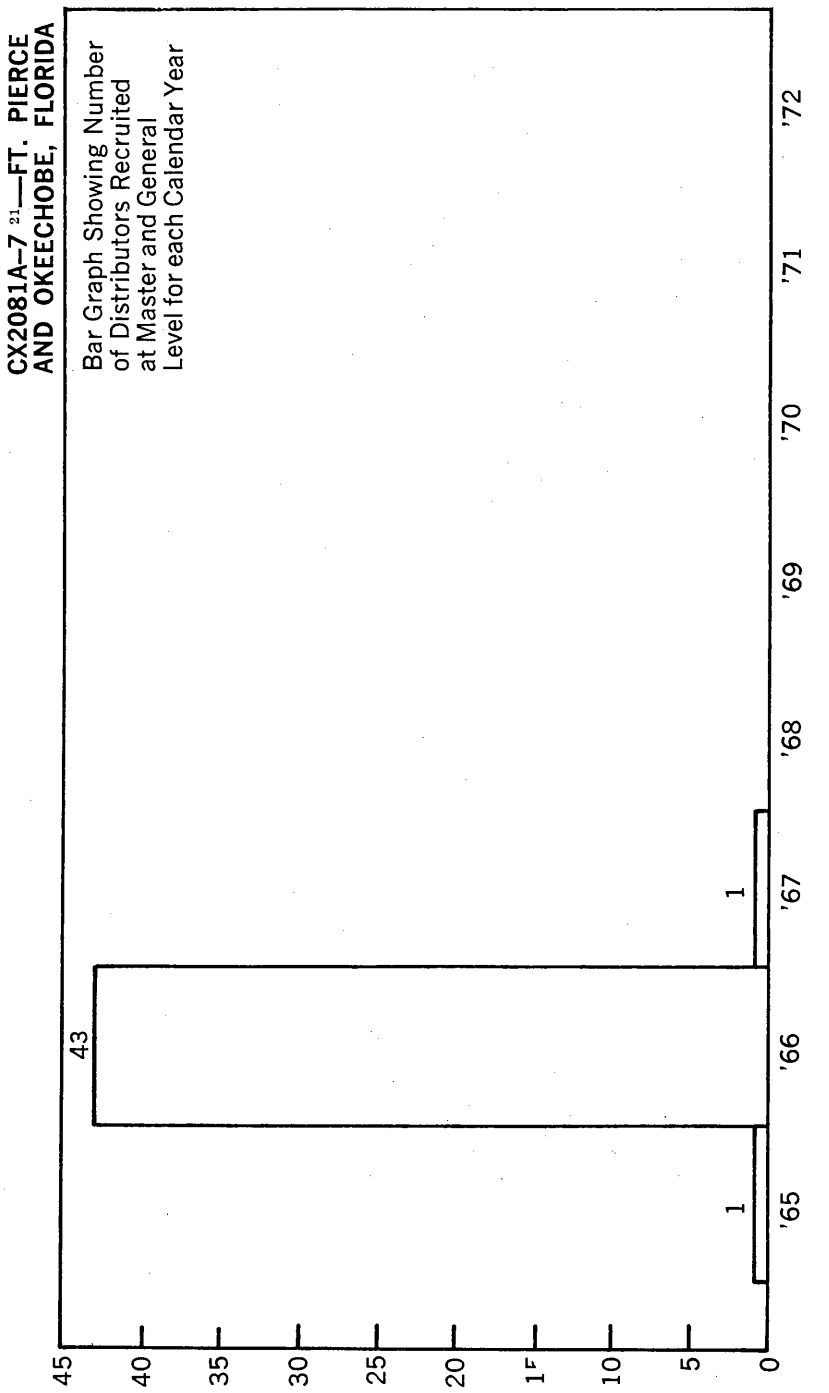
Question: In the December issue of "The Wand," we read that "Holiday Magic" now has 50,000 distributors. We find this almost as incredible as the monthly sales volume. Are these figures accurate?

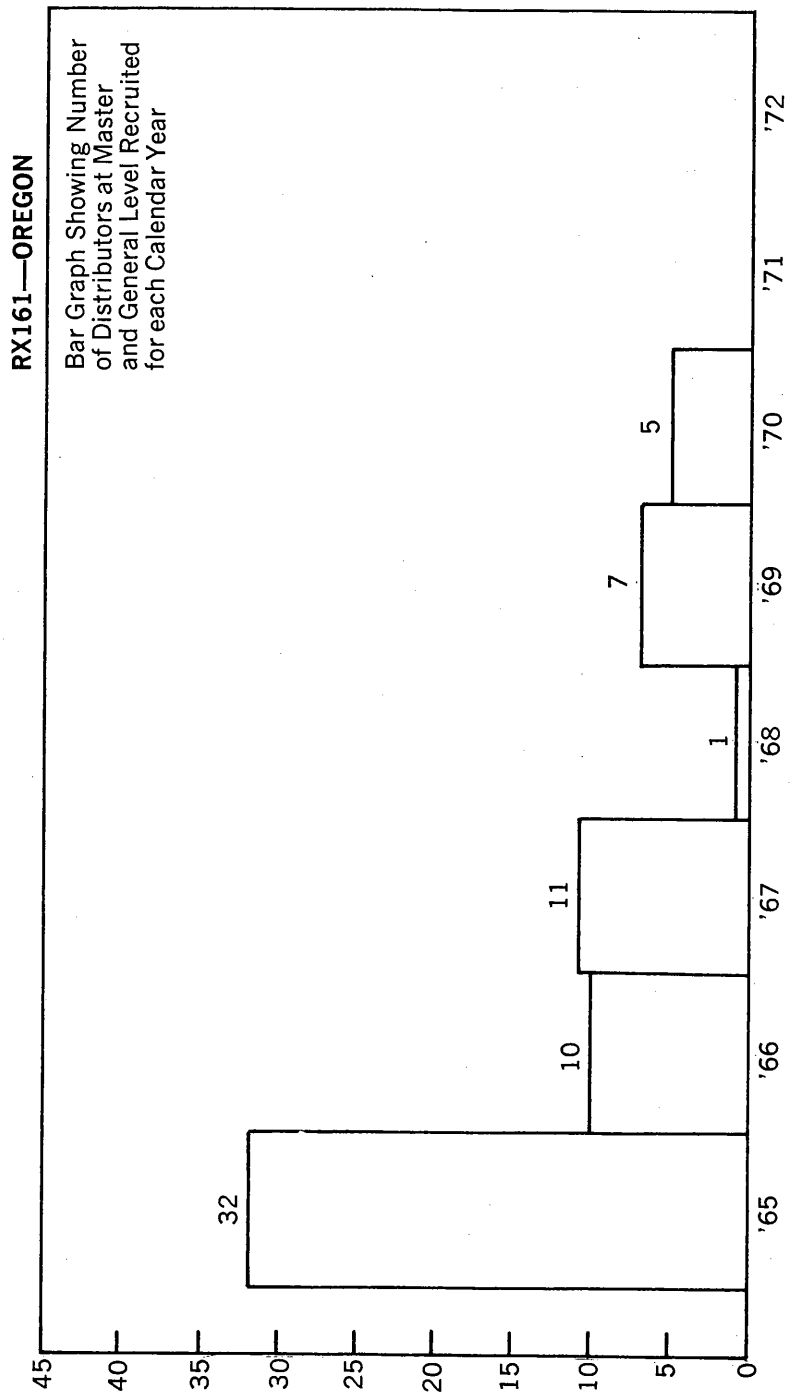
Answer: The sales figure is indeed accurate. However, the number of Distributors was a misprint. After some deliberation, we have decided to keep the actual figure as to the number of distributors a well-guarded secret.

(b) TR. 9066-67 - At first denied because not in Distributor's interest—then given to Council only when mailing initiated to get membership back up.

(c) Gay - TR. 9970.

103. Attached hereto are bar graphs picturing the Master and General Distributors recruited in the geographic areas noted by calendar year.


CX2081A-7 [21]—FT. PIERCE AND OKEECHOBE, FLORIDA
Bar Graph Showing Number of Distributors Recruited at Master and General Level for each Calendar Year
45
40
35
30
25
20
15
10
5
0
1
43
1
'65
'66
'67
'68
'69
'70
'71
'72

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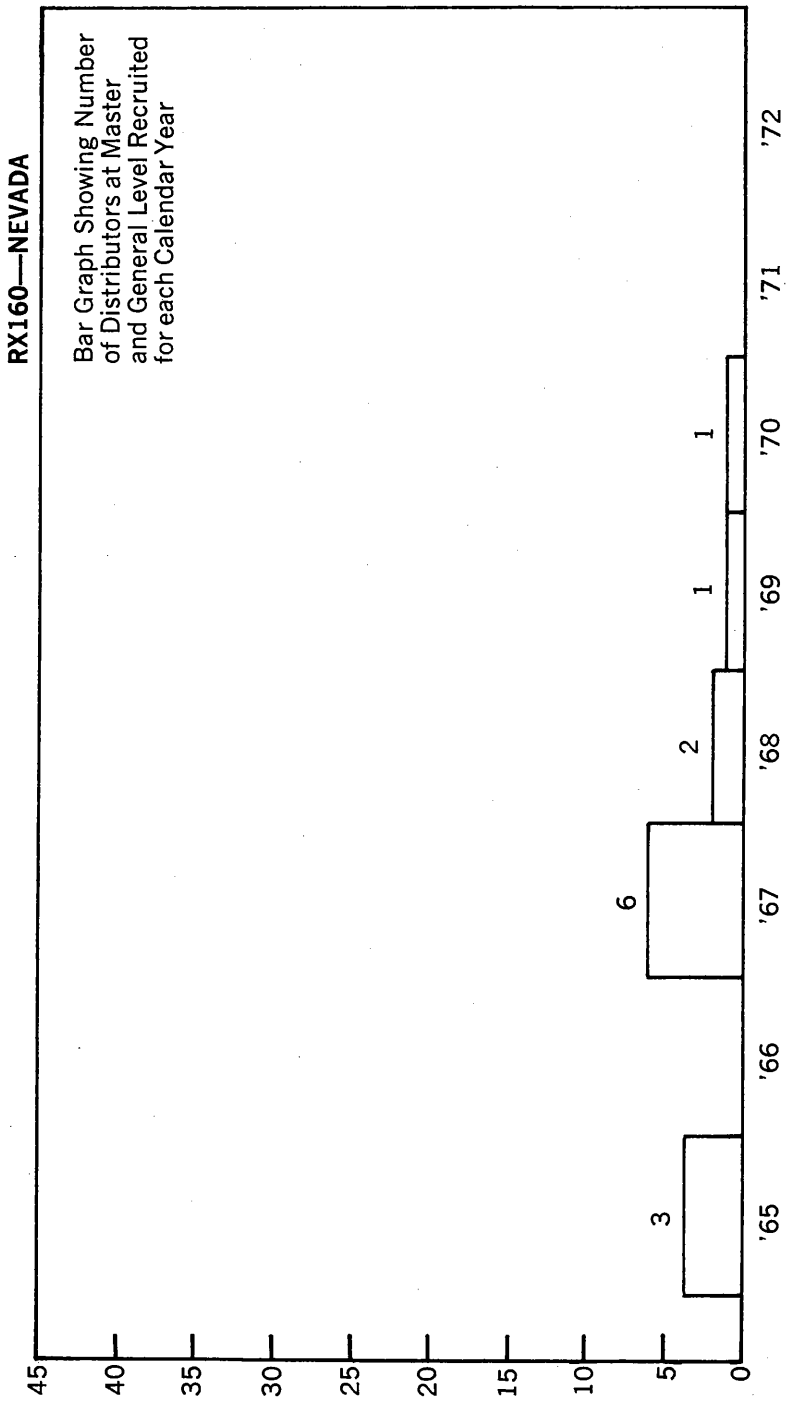
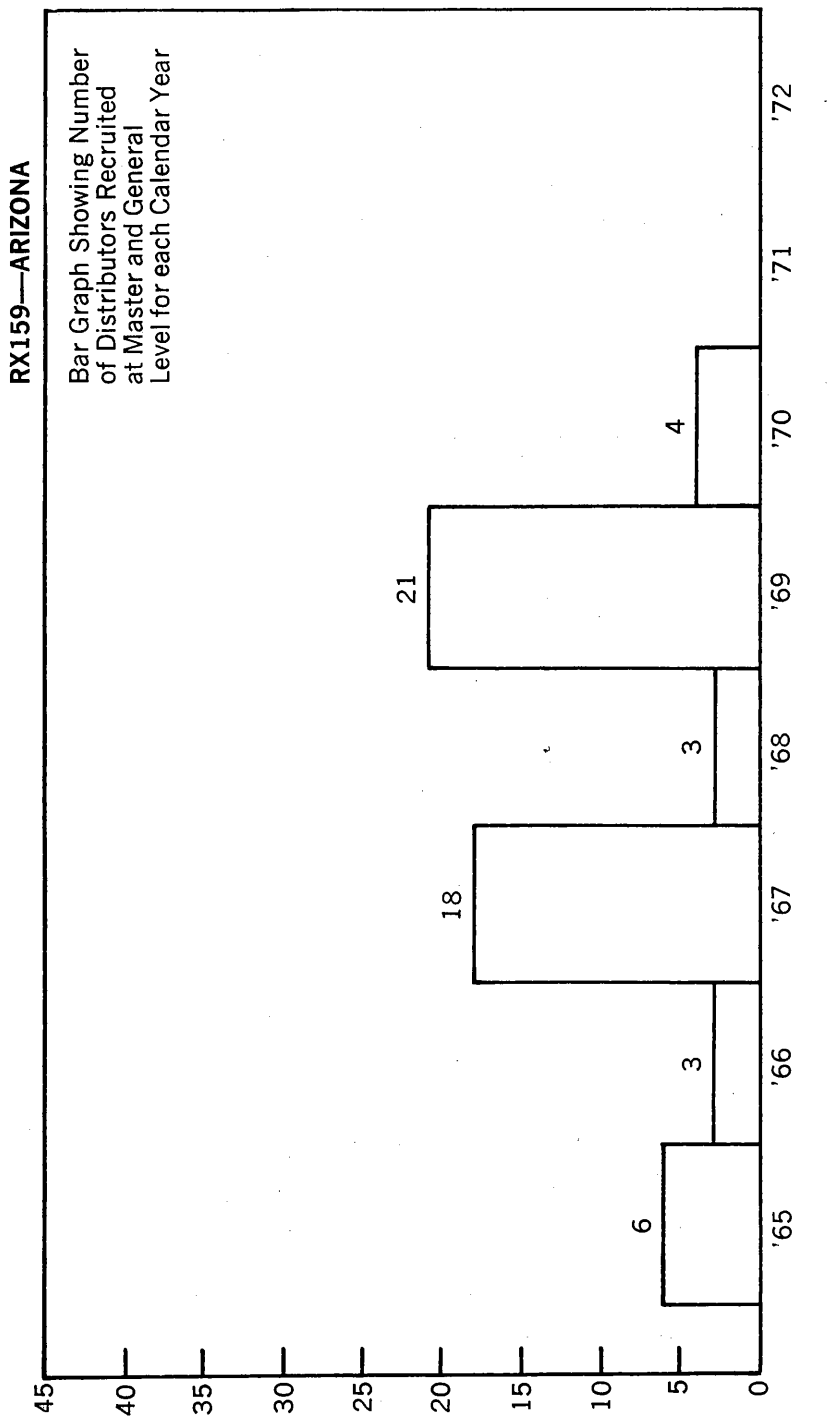
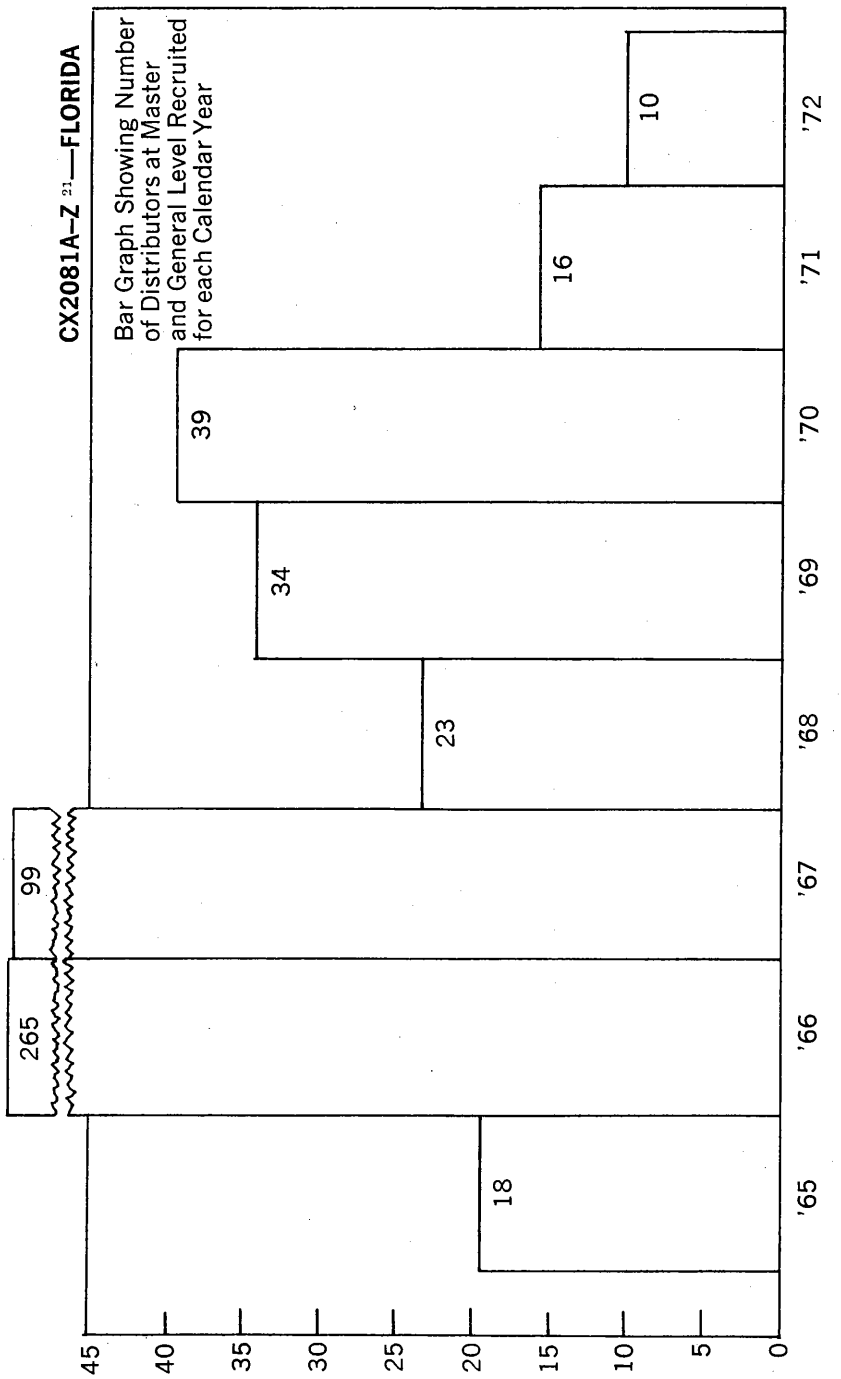

RX160—NEVADA
Bar Graph Showing Number of Distributors at Master and General Level Recruited for each Calendar Year
45
40
35
30
25
20
15
10
5
0
3
6
2
1
1
'65
'66
'67
'68
'69
'70
'71
'72


RX159—ARIZONA
Bar Graph Showing Number of Distributors Recruited at Master and General Level for each Calendar Year
45
40
35
30
25
20
15
10
5
0
6
3
18
3
21
4
'65
'66
'67
'68
'69
'70
'71
'72


CX2081A-Z [21]—FLORIDA
Bar Graph Showing Number of Distributors at Master and General Level Recruited for each Calendar Year
265
99
18
23
34
39
16
10
'65
'66
'67
'68
'69
'70
'71
'72
45
40
35
30
25
20
15
10
5
0

## IX. Release Fee - Procedures

104. When the release fee money comes into Holiday Magic, Inc. it is deposited in the Holiday Magic accounts, and when a Master Distributor qualifies for the General position by finding a replacement Master, the money is sent out to the old General. Holiday Magic maintains a record of the fees that are thereby sent out (Alexander - TR. 5540).

105. The release fee sum rose from $2500 to $3000 approximately six weeks after the buy-in requirement for the Master Order went from $2500 to $3000 (Alexander - TR. 5559-60); and the buy-in requirement and release fee are both up to $4500 (CX 2069D; TR. 9574; CX 2000).

106. The Master Distributor who pays the release fee to become a General Distributor receives no additional product or inventory therefor. What he does receive is the right to purchase merchandise from Holiday Magic at a 65 percent discount off of list price rather than 55 percent, and receiving the release fee money from other Master Distributors who become Generals (STIPULATION OF RESPONDENTS AT TR. 2475-76) as well as to be entitled to obtain the 10 percent and 1 percent overrides available only to General Distributors (CX 79M; CX 90P; TR. 1090; 1228-1229; 1314-1315; 4843-4844; 4935; 4945-4946; 5199; 6058; 6061; 1232).

107. The release fee is paid automatically and without question when a replacement Master is introduced to Holiday Magic, Inc. by the Master desiring to become a General.

CX 90R-S - When this replacement Master is brought into the business, an additional $5,000 in retail product is purchased from Holiday Magic and you, with your 10% override, would be paid another $5,000 in cash. But since the rules require you to pay out $200 in cash as a finder's fee to whomever brought in this Master, you net only $300, on replacement Masters. However, the moment that the replacement Master is officially recorded by the company, the $2,500 cash, being held in escrow, is released to you, the sponsoring General Distributor. Thus, you have earned a total of $3,300 cash each time you sponsor a new General Distributor.

## X. Inventory Requirement and Draw Account

108. Persons who wish to start out in the Holiday Magic program as Master Distributors must purchase an "inventory" of cosmetics valued at between $5,000 and $7,777.77 (CX 77K; CX 90P; TR. 9603).

109. Persons who are work-in/buy-in Masters must purchase an "inventory" to qualify for the Master position equal to the difference between the Master calendar month purchase requirement of from $5,000 to $7,777.77 and the amount actually sold to his Organizers, Holiday Girls or retail customers during that same month (CX 78H; CX 79H).

110. Persons who are "Work-in" Masters have no initial inventory requirement since all merchandise purchased from Holiday Magic during the Calendar month in which they are to qualify as Master Distributors are resold to Organizers, Holiday Girls or retail customers (CX 90Q; CX 1842S-T).

111. The new Master Distributor who qualifies either as a buy-in or work-in/buy-in may either receive the merchandise ordered from Holiday Magic, Inc. or a credit for same which he may draw upon as he desires (CX 77K; Ruggles-TR. 651; CX 379).

112. The draw account exists for Master Distributors and General Distributors (Gillespie -TR. 9440).

113. The draw account device was initiated by Holiday Magic, Inc. in 1965 (Gillespie - TR. 9441).

114. Some distributors take their entire draw balance on their first order. Some take half, and some take just a small amount (Lipska - TR. 10410).

115. If a Master Distributor becomes a General with a portion of his initial purchase requirement still on a draw account, he continues to order at the 55 percent discount until the draw balance is zero, even though he is already a General Distributor (CX 1415).

116. Other than the draw account and buy-in or work-in/buy-in requirements, there are no inventory requirements for Master Distributors and there are no inventory requirements for General Distributors imposed by Holiday Magic, Inc. (see CX 1302A, B; CX 90R-S; CX 78M-O; except when new partners are taken into the business - See Part XXV).

117. An inventory requirement of the CRS Distribution Center which Master and General Distributors may utilize is $4,000 in retail value of product for Masters and Generals (see Part XXX).

## XI. Finder's Fee

118. Holiday Magic, Inc. requires its General Distributors to pay a finder's fee of $100 to any Holiday Girl, Organizer or Master distributor who sponsors a "Buy-in" Master Distributor (CX 79Z97, Rule 31); CX 79Z98; CX 78P; CX 79P; CX 78H; CX 104M; CX 78Z100 (Rule 31); CX 81Z52 (Rule 31); CX 82Z52 (Rule 31);CX 83Z52 (Rule 31);CX 104L (Rule 31); CX 105H (Rule 30); CX 404D (Rule 30); at CX 78P and CX 79P:

> This fee of $100 is a special bonus paid by the General * * * to the person who introduces a new "Buy-In" Master Distributor to him.
>
> It is paid only once and is paid on or before the fifth of the month. * * * Masters, Organizers and Holiday Girls may receive this special bonus for bringing in a Master Distributor at this initial level of commitment. It is only paid on persons who originally

sign in as Master Distributor and is never paid on "Work-in" Masters, who have previously executed an application and agreement as an Organizer or Holiday Girl.

119. In order to receive a finder's fee, the person must have been in the Holiday Magic business either as a Holiday Girl, Organizer or Master Distributor, "which means they would have had to buy a kit to get started with" or "the minimum inventory" for an Organizer or "the Master's inventory." (Pangerl -TR. 9542).

120. The finder's fee payment is a requirement of Holiday Magic, Inc. It must be paid by the General Distributor. General Distributors have been terminated by Holiday Magic, Inc. for failure to pay the said fee (Gillespie - TR. 9364; CX 658B; CX 686G-J; CX 655; CX 659; TR. 6952).

121. A Master Distributor who sponsors another Master Distributor into Holiday Magic, Inc. and who obtains the $100 finder's fee may also use this "Buy-In" Master as a replacement Master to enable him to become a General Distributor (CX 1840Z59).

## XII. The 2 Percent Override

122. Holiday Magic, Inc. requires its General Distributors to pay a sum of money to Organizers and Master Distributors equal to 2 percent of the retail list price value of products purchased by any Master Distributors, the Organizer Distributors or Master Distributors sponsored into the Holiday Magic program. The Organizer Distributors sponsored into the Holiday Magic program. The Organizer Distributor or Master Distributor receiving a finder's fee continues to be entitled to receive this 2 percent override until such time as the recruited Buy-In Master or the sponsoring distributor becomes a General Distributor (CX 78Z100 (Rule 31); CX 79Z97 (Rule 31); CX 81Z52 (Rule 31); CX 82Z52 (Rule 31); CX 83Z52 (Rule 31); CX 104L (Rule 31); CX 105H (Rule 30); CX404D (Rule 30); CX 78P; CX 79P; CX 77K).

123. The 2 percent override could amount to a considerable sum each month.

At CX 78Z52:

> Suppose that after you have been with the Company for several months you have caused to develop among your directs, five Master Distributors. You will receive 2% from each of their volumes. This 2% could amount to a considerable sum each month.

124. The 2 percent override is required to be paid by the General on or before the fifth day of the following month (CX 78H; CX 79H; CX 78P).

125. Distributors who receive the 2 percent override are not required to sell product to the Masters doing the purchasing from Holiday Magic, Inc. and do not service them in any other way:

(a) at Cx 79Z31:

Now, let's look at the next 30 days in the business—your third month.

Each one of these people will do the same thing that Mary has done and for the very same reason—they will reproduce themselves five times. And now that that has happened, you have reproduced yourself five times.

Each one of your original five people is now moving the same volume that you moved last month—$9,000. And now we have a bit of a problem.

If you will look back on that chart, [Refund Bonus Schedule] you will find that they are earning 55% and you are at 55% and there is nothing left over. You are not making anything.

Well, there was one thing that I didn't tell you about this plateau that you reached when you went above $5000 in volume.

At that time you became a *Master Distributor.* As a Master Distributor you buy *directly* from Holiday Magic, You receive as their sponsor an override. In this case that override is 2%.

2% of $9000 is $180.00. You have five people doing that and that's a total of $900.00.

So, in your third month you have earned a total of $900.00 from your first five people. Again, all the new people in the business this month were sponsored by someone you sponsored in a prior month. As yet you haven't done anything.

(b) At Physical Exhibit B, TR. 9807:

At this point, you may desire to consider the possiblity of working full time in your Holiday Magic cosmetic business. By the end of your third month with Holiday Magic, you will be pleased to discover that your first five outlets have reached the volume of $9,000 each and, as you have done, they, too, become Master Distributors. At this point, they begin to purchase directly from the company.

Although you are no longer required to service them with product and they no longer need your service or your help, you begin to receive 2 percent of their volume. Two percent of $9,000 is $180 times five, which equals $900. This 2 percent is a perpetual override for you each and every month so long as you both remain a part of the Holiday Magic organization or until either of you or they become General Distributors.

Your total profit for the third month is calculated as follows: You receive $900 as an override from your first five outlets without lifting a finger.

126. The 2 percent override is an absolute requirement of Holiday Magic, Inc. It must be paid by the General Distributor. General Distributors have been terminated by Holiday Magic, Inc. for failure to pay the said money.

See CX 658A, B, where in Holiday Magic, Inc. terminated a Distributor for failure to pay a 2 percent override:

As you know, the payment of this 2% override is a definite requirement of our marketing plan and no deviations will be allowed.

## XIII. The Ten Percent Override

127. General Distributors receive directly from Holiday Magic, Inc. a monthly payment equal to 10 percent of the retail list price value of products purchased by Master Distributors (*CX 790; Physical Exhibit B-TR. 9808; CX 152B; CX 104N; CX 78M; CX 79M; CX 1842U*).

128. Along with the 10 percent override, the General Distributor receives a copy of the Master Distributor's official monthly purchase record (CX 790; CX 780; CX 2053A-M; CX 2054A-L; TR. 5223-5227).

129. General Distributors also receive directly from Holiday Magic, Inc. a payment equal to 10 percent of the purchase volume of Master Distributors recruited by themselves or by Organizers or Holiday Girls to whom they sell, directly or indirectly:

CX90R:

For just a moment, put yourself in the position of a General Distributor working at 65%. Each time you create a new Master Distributor you receive a cash override of 10% of the total retail value of the merchandise which must be purchased from the company to establish that Master Distributor. Ten percent of $5,000 will earn you $500 cash.

When this replacement Master is brought into the business, an additional $5,000 in retail product is purchased from Holiday Magic and you, with your 10% override, would be paid another $500 in cash. But since the rules require you to pay out $200 in cash as a finder's fee *to whomever brought in this Master*, you net only $300 on replacement Masters.

130. All Master Distributors are assigned to a General Distributor who receives the 10 percent override on the Master Distributor's purchases. (CX 200AZ-177).

131. There are, however, General Distributors who have no Master Distributors assigned to them and over whom they collect a 10 percent override.

(a) Since there are more Masters than Generals this is inevitable. See Part VIII.

(b) Specific Examples at TR. 4055-4069; TR. 1335-1409; TR. 1485-1625; TR. 1694-1822; TR. 4814; TR. 6947).

132. Replacement Masters are included in the group of Master Distributors who are assigned to a General Distributor who receives a 10 percent override on their purchases.

(a) This follows from XIII 3.

(b) For specific examples, See: TR. 9560, 9571).

(c) CX 1842V; CX 90R-S).

133. Replacement Masters of replacement Masters are included in the group of Master Distributors who are assigned to a General Distributor who receives a 10 percent override on their purchases.

(a) This follows from XIII 3.

(b) For specific examples, see: TR. 9560; 9571-72).

(c) At CX 1842: WHOLESALE ENROLLMENT-For just a moment * * *, put yourself in the position of a General Distributor working at 65%. Each time you create a new Master Distributor you receive 10% of the total retail volume that must change hands. Ten percent of *$5,000* has just earned you $500.00 cash!

This newly created Master Distributor that you have just enrolled will want to become a General Distributor like you so that he may earn the kind of money that you are earning here. * * *

* * * *This means he must bring in a replacement Master Distributor to you,* his Sponsoring General Distributor, before you will release him from Master Distributor to become a General Distributor.

*Herein* - lies the strength of the Holiday Magic marketing plan - why Holiday Magic has grown so rapidly because he must always replace himself with a working indian before he can become a chief. *Your number of Masters will never decrease*—you will only grow in number of Generals you have.

This replacement Master was brought into the sponsoring General Distributor which just caused another $5,000 in retail product to be purchased from the factory and you, with your 10% override, have just been paid another $500.00 in cash. [Emphasis added]

134. Holiday Girls and Organizers who become Master Distributors, who are not themselves replacement Masters, are included in the group of Master Distributors upon which the General Distributor in whose buying organization they had been, gets the 10 percent override (CX 90T).

135. Holiday Girls and Organizers who were in the buying organization of a Master Distributor upon which a General Distributor receives a 10 percent override, when becoming Masters themselves will also produce the 10 percent override for the General Distributor, unless the first Master became a General Distributor himself prior to the movement to Master. A Master Distributor takes his entire Organization with him when he moves into the General position (Wolfson Stipulation; TR. 4938; CX 90Z5).

136. *Procedure for Paying 10 Percent override*

(a) As soon as the Master order comes into Holiday Magic, Inc. checks are cut for the General's override. It is a routine office procedure. (Alexander TR. 5530-31.)

(b) There is an obligation on the part of Holiday Magic, Inc. to pay this Commission [override] the minute a Recruiter [general] takes a check from a Recruitee [New Master]. (Stipulation of Attorney Wolfson - TR. 5659; Alexander - TR. 5699.)

(c) Holiday Magic, Inc. asks for no reports requires no reports, and receives no reports with respect to the payment of the 10 percent override in connection with "services" performed. (Alexander - TR. 5531; TR. 5537-38; 5539.)

(d) However, many reports are received that General Distributors perform *no* services; the response from Holiday Magic, Inc. is that all purchases are final (Ruggles - TR. 555-556.)

See also Tr. 5351, 5350, 1842-44, 1589-90, 1679, 1546; CX 134-2A, B, CX 1380, CX 1411, CX 1353, CX 1382A-B:

(e) General Distributors who in fact perform no services receive the 10 percent override. (Tr. 2046-47, 8852, 9072-75, 6978, 7016, 7110, 6320-21, 6344, 6978, 8962.)

(f) Holiday Magic President Al Pangerl testified that a Master of his went to California when he was the top producing General in the country, residing in New York, but continued to receive the 10 percent override because "he knew what it was all about as a Master." (Tr. 9649.)

137. General Distributors can live anywhere in the country and receive the 10 percent override on other Master Distributors living anywhere else in the country.

See Tr. 9649, 103391, 5349, 8852, 9118.

## XIV. The One Percent Override

138. General Distributors receive directly from Holiday Magic, Inc. a monthly payment equal to 1% of the retail list price value of products purchased by other General Distributors, and by Master Distributors over whom the second General Distributor is receiving a 10 percent override (CX 79M, CX 790, CX 2053A-M, CX 2054A-L, CX 90-P; Tr. 5223-5227).

At CX 790 -

> This [1%] override is paid by Holiday Magic to the old General of a Master who has been promoted to the General position. It is paid monthly by the Main Office and is based on the purchases of the new General, plus the purchases of all of this new General's Master Distributors.

139. All General Distributors are assigned to another General Distributor who receives the 1 percent override (CX 200A-Z177).

140. There are, however, General Distributors who have no General Distributors assigned to them, and therefore they collect no 1 percent override.

(Since there are Generals without Masters, there are no Masters to become Generals (XIII 4).)

141. Since replacement Masters and replacement Masters of replacement Masters may be assigned to a General over whom a 10 percent override is obtained, replacement Masters and replacement Masters of replacement Masters, upon becoming Generals, are assigned to that same General who now receives a 1 percent override instead of the 10 percent override.

(a) See XIII5, 6.

(b) See Tr. 6057, Testimony of Corporate Official Dempsey that Jim Hean was a replacement Master in his organization—sponsored by a man Dempsey brought in the business—and Dempsey received a 1

percent override in 1966 on Jim Hean's $300,000 volume, amounting to $3,000.

(c) See Tr. 6483.

142. The General receiving a 1 percent override on the purchase volume of another General is not required to have any business relationship with the second General, has no business relationship with the second General, and performs no services for either the second General or Holiday Magic, Inc. To this effect are the following sources:

(a) Stipulation of Attorney Wolfson at Tr. 4613: "This man as a General doesn't have to have any business relationship with the General from whom he receives the one percent. That's a contract-settlement sum, Judge. He's not supposed to supervise the old General."

(b) Instructor General and former National Field Director Christie, at Tr. 5955 - "A General Distributor should be able to run the business on his own."

Mr. Christie continues to receive overrides from his New York Distributor although no longer there (Tr. 5979).

(c) Tr. 6991-6992 of Respondent's witness Kobayaski; a General Distributor from California since 1965:

Q. Who was the General before you in your organization?
A. General before me, Keoshi Hagashi.
Q. Where is he?
A. He travels all over.
Q. When was the last time you saw him?
A. I haven't seen him recently.
Q. Well, when was the last time that you saw him?
A. I saw him last year. Last year I saw him once.
Q. Let's take the calendar year 1971. How often did you see him in 1971?
A. I didn't see him. What for?

(d) Testimony of Holiday Magic president Al Pangerl at Tr. 9556-57:

Q. * * *Were you assigned another sponsoring General after [Mr. Birni] left [Holiday Magic]?
A. Yes.
Q. Who was he?
A. Tony Rubio.
Q. So Mr. Rubio had been Mr. Birni's sponsoring General?
A. Yes.
Q. Where did this Rubio conduct his business?
A. In California.
Q. Did you have any business relationship with this man?
A. No.
Q. As far as you know he received one percent override on all of your business?
A. Yes.

And at Tr. 9621:

Q. I ask you if Tony Rubio's profit from his business, namely the one percent he received from your volume, was determined by the effort that he, Mr. Rubio, put into the business.

A. If he was working with me then the answer to that would be "yes."

Q. And if the answer to that was that he was not working with you, the answer would be "no"?

A. The answer would be "no."

Q. And he was not working with you?

A. No. I saw him on occasion when I was in California and he called me. I knew more than he did, so he couldn't help me much.

Mr. Pangerls' Sponsoring General received 1 percent of $400,000 - (Tr. 9557).

(e) A distributorship and the 1 percent override is inheritable, and in effect [Aug. 1967] is included in the estate of the deceased distributor (CX 25G-Wand, Solution Box - 867).

(f) See also Tr. 9601-02, 6072, 6481, 6482, 9420, 9647, 7158-60.

General Distributors can live anywhere in the country and receive the 1 percent override on other General Distributors living anywhere else in the country (Tr. 9621, 5349, 8963, 8199, 8352, 8685).

## XV. Distributor Contracts

143. The Holiday Magic Contract or "Application and Agreement" is entered into by all three entering levels of distributors—Holiday Girls, Organizers and Masters (Ruggles-Tr. 667; Pangerl-Tr. 9514; Tr. 1929).

144. Contract forms appear in the record at CX 403, CX 402; CX 1925; CX 1880-A, C; CX 1887).

145. All Holiday Magic rules and regulations either appear on the document itself, or the contract embraces all the rules and regulations of Holiday Magic, Inc. (Pangerl-Tr. 9514; CX 404; Wolfson-Tr. 5658, stipulation); or are specifically referred to in the face of the contract as being an integral part of the contract as set forth in the Holiday Magic Sales Manuals, and distributors agree to abide by all rules and regulations of Holiday Magic, Inc. (CX 403).

146. Holiday Magic, Inc. maintains in its files a copy of contracts entered into with all levels of distributors (Tr. 9368; CX 405) and requires that this be done. See also the following sources:

(a) At CX 405, bulletin from Holiday Magic, Inc. to all Masters and General Distributors.

Company policy dictates that a distributor to be recognized by the company as an authorized distributor, his application and agreement must be on file in this office.

You Master and General Distributors * * * should forward to this office any such applications you may now be holding.

(b) CX 78Z98, Rule 17, CX 79Z94, CX 81Z48, CX82Z48, CX 83Z48:

For a person to have status with the company as an authorized Distributor, the Company must have in its records an Application and Agreement form signed by the Distributor.

147. The Holiday Magic rules and regulations apply to all four levels of distributor, i.e., Holiday Girls, Organizers, Masters and Generals, except to the exten t that a rule may relate to a specific distributor level only (Gillespie-Tr. 9357-9364).

148. In 1967, Holiday Magic, Inc. paid out $2,721,092.19 in overrides to General Distributors (Tr. 9251) or approximately 9 percent of the company's gross sales at retail list price value. Since 1 percent of all the gross sales at retail list price value is payable to General Distributors, it can be determined that for 1967, $303,698.13 went to Generals on the 1 percent override, and the remainder, or $2,417,394 was based upon the 10 percent override, or purchases of Masters. Approximately 12 1/2 percent of the total override payments is based upon the 1 percent override.

149. The override payments for the years ending Sept. 1968, 1970, and 1971 can be determined in the same manner. Nine percent of the total of the figures appearing in RX 16 is the override payment to all Generals, and 12 1/2 percent of that figure is the 1 percent override payment; 87 1/2 percent is the 10 percent override payment.

150. For the fiscal year ending Sept. 1970, Holiday Magic's gross sales at retail list price value was $15,334,830 (RX 16). Nine percent of this figure, or approximately $1,380,000 was the override payment, of which $172,500 was a payment on the 1 percent override and $1,207,500 on the 10 percent override.

151. For the month of June 1970, twenty-nine Holiday Magic General Distributors earned over $2,000 in overrides, for July 1970, 58 Holiday Magic General Distributors earned at least $2,000 in overrides, and in Aug. 1970, $2,000 or more in override checks were mailed out by Holiday Magic, Inc. to 61 General Distributors, some of whom received as much as $13,000 (CX 61D-E; CX 60F).

No applications for Organizers and Holiday Girls are refused (Coultas-Tr. 9762).

## XVI. New Master Distributor - Procedures

152. Applications come into the customer service department, accompanied by a certified check made out to Holiday Magic, Inc. (Ruggles-Tr. 653; Alexander-Tr. 5512, 5560).

153. Holiday Magic, Inc. requires that only cashier's checks or certified checks should be sent with the Master order—as well as with all orders (Tr. 1512; Tr. 5654; CX 28B; CX 155H; CX 79Z93 (Rules 7) ).

154. A distributor who received the check couldn't cash it since it was made out to Holiday Magic, Inc. and even cash has been refused by recruiting distributors (Tr. 1512).

155. The reason for the certified check policy is that no one could stop payment on the check once it was turned over to the recruiting distributor (Alexander-Tr. 5654).

156. Once the check was in the Holiday Magic office, it was deposited (Alexander-Tr. 5652).

157. The new Master Distributor was then automatically assigned a number, the contract was time stamped, and a distributor file was set up (Ruggles-Tr. 653-654; Alexander-Tr. 5512).

158. New Master Distributor "Applications" never reached anyone in Holiday Magic, Inc. at the executive level (Alexander-Tr. 5313; Gay-Tr. 956).

159. Money is the only "qualification" to become a distributor in Holiday Magic.

(a) This follows from XVII-174.

(b) Witness Jane Alexander, former Executive Secretary to William Penn Patrick, related a story of how she pleaded with Patrick in 1968 or 1969 to refund the money to a boy who had borrowed money from his mother to become a Master, but had been drafted in the interim before the product inventory was shipped.

Patrick asked if product was sent, Mrs. Alexander said "no" and Patrick replied "Make sure it gets out of warehouse tonight." (Tr. 5653, 5697, 5652).

(c) It is Holiday Magic, Inc. policy not to issue refunds on new Master orders (Alexander-Tr. 5652; CX 466D; CX 79Z93 (Rule 5) ).

(d) At CX 78Z7 and CX 79Z7:

> When a Distributor deliberately holds people back, the result is, at best, undesirable. The untrained and/or unthinking Distributor who discourages a "work-in" Master or "Qualifying" Master from entering into the program until the Distributor is "ready" will find that this type of greed will ultimately hinder and stop his own growth.

## XVII. Inflexibility of Marketing Plan

160. Distributors at all levels, *i.e.*, Holiday Girls, Organizers, Masters and Generals are required to abide by all rules and regulations of Holiday Magic, Inc., as well as all procedure contained in other company publications such as bulletins and sales manuals (CX 105H, Rule 1; CX

77L, Rule 1; CX 78Z96, Rule 1; CX 79Z93, Rule 1; CX 105H, Rule 1; CX 104H-K; CX 81Z48-51; CX 82Z48-51; Gillespie-Tr. 9357-9364).

161. Distributors at all levels, *i.e.*, Holiday Girls, Organizers, Masters and Generals agree to abide by all rules and regulations of Holiday Magic, Inc. (CX 105H, Rule 1; CX 77L, Rule 1; CX 78Z96, Rule 1; CX 79Z93, Rule 1; CX 105H, Rule 1; CX 403A, B, Rule 1).

162. Violation of any Holiday Magic rule or regulation subjects the offending distributor to termination by Holiday Magic, Inc. (CX 78K; CX 104D; CX 105D; CX 77L; Rule 13; CX 78Z9, Rule 25; CX 79Z95; Rule 25; CX 81Z48; Rule 25; CX 82Z48; Rule 25; CX 104H-K, Rule 25; CX 105H, Rule 25; Tr. 5604).

163. Holiday Magic, Inc. has terminated various distributors at all levels for violating certain of its rules, regulations and policies (CX 457A; CX 656A-B; CX 657A-B; CX 658A-B; CX 659; CX 688A-C; CX 689).

164. Termination of any individual in Holiday Magic, Inc. is the responsibility of the Holiday Magic board of directors (CX 78Z86-89; CX 79Z89-90; CX 78Z9, Rule 25; CX 105H, Rule 25).

165. Other statements by corporate officials emphasizing the inflexibility of the Holiday Magic marketing plan are the following:

(a) Statement by John Hart, board of directors vice chairman, at CX 15C - Wand - October 1966:

> It's always amazing, and heartening to observe the rapid rise of members of our family of distributors.
>
> However, this relation is tinged with disappointment when we note some of our most successful distributors showing evidence that they feel the marketing plan—which has been highly instrumental in their success—is a flexible process.
>
> My friends, such is not the case!
>
> The Marketing process is a rigid plan, evolved after exhausting research, back-breaking experience, detailed analysis and brilliant planning.
>
> The basic strength of the marketing plan lies in its rigidity!
>
> You can find that which we all are seeking only by strict adherence to this most unique plan.

(b) Respondent Jan Gillespie, Holiday Magic administrative vice president and member of the board of directors advised Distributors to "memorize" all rules and regulations (CX E - Wand - Jan. 1967).

(c) At CX 27C-Wand-Oct. 1967 -"[H]aving the right to buy and sell the Holiday Magic cosmetics is conditioned on your adhering to the company trade rules and practices."

(d) At CX 679, letter from respondent and then executive vice president of Holiday Magic, Inc., Fred Pape, dated 1/19/67.

> There is absolutely no justification for tampering with any of our rules and regulations.

(e) Stipulation of respondents' counsel that distributors are subject to dismissal for violation of rules and regulations (Tr. 5604).

## XVIII. Termination - Procedures

166. In late 1969, witness Jackie Ruggles testified that respondent William Penn Patrick told her that it was her job to see to it that the Holiday Magic marketing plan was followed by distributors, and that she was to use the Holiday Magic rules and regulations as a guide (Ruggles-Tr. 673-674, 674-676; CX 79; CX 112; CX 113; CX 114; Alexander-Tr. 5496; Ruggles-Tr. 584-588).

167. Mrs. Ruggles would receive letters from Master Distributors and General Distributors concerning alleged violation of the marketing plan. She would research the matter—and point out to the offending distributor what rules were violated. The distributor in violation of the rules had ten days to respond to a letter asking him if he was in violation of the rules as alleged (Ruggles-Tr. 522, 564, 571).

168. If no response was received from the offending distributor, Mrs. Ruggles would turn the matter over to Mr. Gay, then vice president and later president of Holiday Magic, Inc. (Ruggles-Tr. 564).

169. It was the job of Mrs. Jane Alexander to contact the distributor if he was unhappy with the clarification or interpretation given to him by Mrs. Ruggles. Mrs. Alexander would also have Mr. Patrick talk to the distributor at times (Alexander-Tr. 5496).

170. In connection with her responsibilities, Mrs. Ruggles would read the Holiday Magic Wands, Bulletins and Family News as well as the manuals to keep informed (Ruggles-Tr. 590-591, 594-597).

171. Holiday Magic, Inc. utilizes its General Distributors as an instrumentality in reporting instances of violation of the rules and regulations to Holiday Magic, Inc. and recommedation of termination:

At CX 79Z89-90 and CX 79Z86-87:

TERMINATION OF A DISTRIBUTOR

To begin with, let us understand very clearly that the only person or persons who may effect the final termination of any individual in Holiday Magic is the Board of Directors of Holiday Magic.

However, anyone may recommend to his General that termination procedures be initiated against any other individual for due cause. The General Distributor is obligated to commence such action based on the written statement of person or persons who make the initial request for cause.

Upon receipt of this request, the company will send an official letter to the party in question stating the accusations and violations and offering a hearing on the matter if return comment and request for consideration is given within ten days. Should no reply be forthcoming, the Distributor will automatically be sent his letter of termination.

See also CX 645C; Tr. 5338-39; Tr. 390; CX 686A.

## XIX. Vertical Price Fixing - Wholesale Sales

172. Holiday Magic, Inc., in its rules and regulations, requires that all distributors adhere to the refund bonus schedule in reselling products to Organizers and Holiday Girls (CX 78Z96, Rule 14; CX 79Z93, Rule 14; CX 81Z48, Rule 14; CX 82Z48, Rule 14; CX 83Z48, Rule 14, CX 104H, Rule 14; CX 1051, Rule 12; CX 403B, Rule 12; CX 77L, Rule 2; CX 108K, Rule 14).

(a) Rule 14, which appeared in the manuals at least through Jan. 1969, reads:

> Distributor agrees to pay the cash refunds based on sales volume produced during the month (per refund bonus schedule) to his distributors as soon as possible after the end of the month and no later that the fifth day of the succeeding month.

(b) The Jan. 1969 version of the old Rule 14, as Rule 12, reads: CX 105H, Rule 12 (Jan. 1969):

> Distributor agrees to pay cash bonuses on sales volume produced during the month (per bonus schedule) to his directs no later than the fifth day of the succeeding month.

173. The Holiday Magic Wands and Family News continually make reference to the requirements of all distributors at all levels to adhere to the discount schedule.

(a) CX 4C - Wand - Solution Box - Nov. 1965:

> Question: How do I explain to an Organizer why he doesn't get a bigger percentage in his monthly refund schedule?
>
> Answer: If an Organizer, who is actually a Sub-Wholesaler, buys a Distributor Kit and a One Pack, he has purchased $120.40 plus applicable taxes in his area. Thus, if his Holiday Girl sells any amount over $100, this means a 35% on our volume schedule. Obviously, then, the Organizer cannot have any override since they are both in the 35% area * * *

(b) CX 10H - Wand - May 1966 - Solution Box:

> Question: It is encouraging to observe that Holiday Magic has terminated several distributors who failed to comply with the company marketing plan. However, we are concerned for fear Holiday Magic could take action on short notice to modify its present marketing system. Does the distributor have any assurance that this will not happen?
>
> Answer: Holiday Magic is working for the day when it will become a household word and is thereby committed to continue its present course of retailing. There is no intention of modifying the discount rates, bonus structure or marketing plan. Besides, why change a successful formula?

(c) CX 12F - Wand - July 1966 - Solution Box:

> Question: Some of us are confused about the discount in price on products. Could you clarify this?
>
> Answer: The discount with respect to cosmetics is fixed according to the marketing plan; *i.e.*, 65%, 55% or 30% with refund according to the distributor's position * * *

(d) CX 27A - Wand - October 1967:

Depending on the amount of her cosmetics sales, the Holiday Girl may receive a bonus. For example, if she sells an average of $1000 worth of cosmetics per month, she would receive an 11% bonus. Added to her 30% commission, she would earn a total of $410 commissions for the month.

(e) See also CX 150B; CX 46A; CX 27A; CX 153H.

174. The Holiday Magic bulletins also clearly require Master and General Distributors to sell at specified discounts to Organizers and Holiday Girls.

See Bulletin #4 from respondent Patrick dated Oct. 1965, identified at Tr. 1233, 1262:

TO ALL MASTERS AND GENERAL DISTRIBUTORS * * *
CLARIFICATION OF POLICY:

There has been some question as to whether or not a Beauty Salon or Health Food Stores can start with an original percentage of 40% off retail.

Beauty Salons and Health Food Stores, and all other outlets, must conform fully to the Marketing Plan. If the Beauty Salon is below the level of Master Distributor, they must purchase at 30% discount during the month and be paid a refund based upon their volume.

HOLIDAY MAGIC has no deal. There is but *one Marketing plan.*

175. The Holiday Magic sales manuals also require all distributors to adhere to the discount schedule and refund discount schedule in selling to Organizers and Holiday Girls.

(a) CX 79Z87:

One of the most serious offenses a Distributor can be guilty of is not paying refunds by the fifth of the month for the preceding month's business volume. When this offense is committed and is proven, termination occurs immediately. The procedure for paying refunds due is as follows:

Sponsor of the terminated individual may elect to pay the refund and become the new Sponsor of the directs of the individual who was terminated. Should this sponsor be unable to do so within five (5) days after the 5th, the Master of the organization may elect to do so, thereby filling the vacant position. The Master may elect to fill this position with another person of his choice at a price mutually satisfactory. The old Sponsor of the terminated person is still entitled to the volume flow without interruption. Should the Master fail to accept the responsibility, his General may do so. Should the General fail, the Corporation will.

ALL REFUNDS WILL BE PAID. This is a Corporate Guarantee.

(b) CX 104C and CX 105C (Jan. 1969):

Secondly, in the case of a "Work-in" Master, his Master must pay the 25% Refund Bonus on his purchase volume to date on the day that the new Master decides to purchase the remaining volume that makes up to $5,000 or on the day on which he reaches total purchases of $5,000. He is not allowed to wait until the 5th of the following month for his refund.

For this would defeat the whole program of "Work-in" Master Distributors.

(c) CX 78Z33:

Here is how your profit is figured. Everyone earns a basic profit of 30% at least. Then, they receive extra bonuses, based on their monthly volume * * *

(d) CX 78Z61; CX 79Z58; CX 104D; CX 105D (Jan. 1969):

These are the steps that *must* be taken:

* * * * * * *

3. That same day, Joe must pay Mary a 25% Refund Bonus on all the product she purchased directly from him that month ($3,500 × 25% = $875.00). This means that Mary is still ahead $200.00 ($875 refund minus $675 cosmetics cost = $200.00).

4. Mary now computes the overrides which she will owe her organization the first of April. Five percent of $500 each means that she must pay at least $175.00 in bonuses (probably more, since they still have 10 days to go.) [Emphasis in original].

(e) CX 78Z8, CX 79Z8:

* * * She is shown *how* she can make no less than 30% in the future by entering into the program with her own kit.

(f) See also CX 76Z2; CX 76Z4; CX 76Z5; CX 76Z12; CX 76Z28; CX 77G; CX 107E; CX 108E; CX 109C.

176. The price fixing requirement on wholesale sales applies to Organizers as well as Masters and Generals. See CX 78Z2 and CX 79Z1.

177. Distributors are threatened with termination for failure to pay refunds according to the refund bonus schedule.

(a) CX 78Z90; CX 79Z87:

One of the most serious offenses a Distributor can be guilty of is not paying refunds by the fifth of the month for the preceding month's business volume. When the offense is committed and is proven, termination occurs immediately * * *

(b) See Sections XVII and XVIII.

178. Witness testimony relative to refunds and manual adherence:

(a) *Charles Madden.* Witness Charles Madden, appointed senior general of the Kansas City Council by Holiday Magic, Inc. and senior general of the month for Holiday Magic, Inc., testified that he was instructed by the manuals (CX 79) to follow the refund schedule as it appeared on CX 649 (Tr. 5332, 5325, 5323, 5321, 5324). Mr. Madden stated that in Kansas City the manual (CX 79) was followed implicitly at the Holiday Magic Distributors councils (Tr. 5330).

(b) *Witness Arrowood.* Witness, who was Holiday Magic's vice president of training and education (Tr. 6155, 6168) and Holiday Magic senior trainer general (Tr. 6166) through 1971 (Tr. 6171), and who was also in charge of all Council Training (Tr. 6168) testified for respondents that

Holiday Girls and Organizers buy at the same prices and that there is "never any deviation." (Tr. 6176).

(c) *John Wells.* Mr. Wells, a General Distributor who resides in Nevada (Tr. 993), stated that he sold to his Holiday Girls at 30 percent discount off list price "to stay in good standing with Holiday Magic" (Tr. 1024). The manual he followed is CX 1469 (Tr. 1013-1016).

(d) *Thriftone Jones.* Mr. Jones, a Master Distributor (Tr. 5388), who does business in Wash., D.C., testified that he follows the refund discount schedule (CX 649) "to the letter" (Tr. 5391) for fear of losing his distributorship (Tr. 5390).

(e) *Charles C. Spellers.* Mr. Spellers, a Master Distributor (Tr. 5403) who engaged in his business activities in Washington, D.C. (Tr. 5389), testified that he followed the refund discount schedule of CX 649 (Tr. 5408-5410) and that this document was given to him by Holiday Magic Instructor General McKelvey (Tr. 5408-09), who told him in Instructor General class as well as privately (Tr. 5406-5409) in the Spring of 1968 (Tr. 5408), to follow the discounts (Tr. 5409) lest Holiday Magic, Inc. take action against him (Tr. 5407).

(f) *Lester Small.* Mr. Small, a Master Distributor until late 1968 (Tr. 5378, 5382) who engaged in his business activities in Wash., D.C. (Tr. 5382), testified that he sold to his Organizer and Holiday Girls at the "prescribed discount" as described in CX 649 (Tr. 5385).

(g) *Judy Hurd.* Witness Hurd, a Master Distributor (Tr. 5358) who engaged in her business activities in Kansas City, Kan. (Tr. 5357, 5358, 5361), testified that she followed the rules in CX 81 (Tr. 5361). She followed the refund schedule of CX 649 (Tr. 5362) and sold to her Holiday Girls at 30 percent discount (Tr. 5361).

(h) *Edith Janz.* Witness Janz, a General Distributor (Tr. 5343) who engaged in business activities in Wichita, Kan. (Tr. 5343), testified that she followed the refund bonus schedule of CX 649 (Tr. 5348-49) and sold Holiday Magic products to her Holiday Girls at 30 percent discount (Tr. 5348) for fear of being terminated by the company (Tr. 5346).

## XX. Vertical Price Fixing - Retail Sales

179. Holiday Magic, Inc. entered into agreements with its distributors, and its rules and regulations require that all distributors adhere to the retail list prices of the Holiday Magic products in reselling products to the consuming public.

(a) CX79Z93, Rule 3; CX 81Z48, Rule 3; CX 82Z48, Rule 3:

Distributor agrees to purchase merchandise only from the Company or his Sponsor in

accordance with the Holiday Magic marketing plan and to sell merchandise only at those prices established by the Company.

(b) After Oct. 1967 Rule 3 as appearing in manuals in the record at CX 104H, was apparently changed to read as follows;

Distributor agrees to purchase merchandise only from the company or his Sponsor in accordance with the marketing plan and to sell merchandise only at those prices established by the company, in accordance with Fair Trade Statutes in those states having Fair Trade Laws.

Then in the same manual, Rule 8 reads as follows:

Distributor agrees to be responsible for the delivery of product and obtaining of the price from his or her customers.

And again in the same manual at Rule 14:

Distributor agrees to pay the cash refunds based on sales volume produced during the month (per refund bonus schedule) to his directs as soon as possible after the end of the month and no later than the fifth day of the succeeding month.

Also in the same manual at CX 104"0":

UNAUTHORIZED OUTLETS
Drug stores, * * * discount stores * * * are unauthorized outlets.

Also in the same Manual at CX 104C:

* * *must pay the 25% rebate * * *

And at CX 104D:

* * *Joe must pay Mary a 25% Refund * * *
* * * she must pay at least $175.00 in bonuses * * *

Also in the same manual at CX 104G:

ALL REFUNDS WILL BE PAID. This is a Corporate Guarantee.

(c) Even though the Holiday Magic rule change on its face relates only to the fixing of prices in Fair Trade States and is silent on the rule in non-fair trade states, there is considerable doubt that this rule was other than pro forma.
(1) At CX 645C, a letter from Holiday Magic National field director on Holiday Magic stationery, dated Mar. 8, 1968, indicates the old rule was not rescinded at all!

Dear Mr. Winge:
We are in receipt of a letter enclosing an advertisement allegedly placed by you in the Decatur Dekalb News which is in violation of rule number three in the Master's and General's Manual which states:
Distributor agrees to purchase merchandise only from the company or his Sponsor in accordance with the Holiday Magic marketing plan and to sell merchandise only at those prices established by the Company.