

MIAMI-DADE COUNTY AREA

Masters	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
William H. Muff 8400 S.W. 44th St., Miami (Tr. 2430) Master 6/29/66-8/3/66 (Tr. 2474, CX 1845)	Had 7-8 organizers and HGs selling in S.W. Dade County and in Hialeah (Tr. 3450).	
Juanita Eversole 2500 South Miami Ave. (Tr. 3258) Master 2/18/67-4/19/67 (CX 1880A, CX 1880C)		Retailed from store called Cosmopolitan Cosmetics, 2417 Biscayne Blvd., Miami (Tr. 3314).
Generals		
Juanita Eversole 2500 S. Miami Ave., Miami (Tr. 3258) General 4/19/67-10/69 CX 1880I, CX 1880Q (Tr. 3300)	Recruited 10 HGs (Tr. 3288). They lived in Goulds, S.W. 185th Ter., N.W. 15th St. and one near 2417 Biscayne Blvd., Miami (Tr. 3313).	Sold from her store, Cosmopolitan Cosmetics, 2417 Biscayne Blvd., Miami (Tr. 3314).
William Muff 8400 S.W. 44th St., Miami (Tr. 2430) General 8/3/66-5/67 (Tr. 2474, 2488)	Had HGs and organizers selling in Coral Gables, S.W. Miami and in Hialeah (Tr. 2477).	
Muriel Egizi Continental Associates, Inc., 2185 N.E. 123rd St., N. Miami (CX 1845-D). General 2/67 at least until 7/68 (Tr. 2515, CX 2068)	Had 6-12 HGs and organizers in N. Miami (Tr. 2517-2518). Had a Master (Esther Sproat) operating in Miami (Tr. 2518). Had an organizer operating in Miami (Tr. 2518).	Retailed from a store in North Miami from 6/67-4/68 (approx.) (Tr. 2518-2519). Advertised in Miami newspapers (Tr. 2521).
Everett Dudley 254 E. 5th St., Hialeah, Florida (Tr. 3335) General 8/66-end of 67 (Tr. 3340, Tr. 3361)	HG's and organizers in N.W. Dade County (Tr. 3366). 1 HG in N.E. section of Dade County (Tr. 3366).	Retailed in Hialeah (Tr. 3366).

MIAMI-DADE COUNTY AREA

Generals	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Joseph Rothman 7855 S.W. 1st St., Miami, Florida; 370 N.W. 27th Ave., Miami, Florida; (Tr. 2883) General 9/66-3/67 (Tr. 2887, Tr. 2892, CX 1871)	Had 8-10 HGs (Tr. 2888). Most sold in S.W. Dade County (Tr. 2891).	
Ruth Braddock 7801 S.W. 134th St., Miami, Florida (Tr. 3136) General 1/67-1/68 approx. (Tr. 3136, Tr. 3152)	1 organizer operated in S. Miami, Cutler Ridge, and elsewhere in Dade County (Tr. 3147, 3149). Another organizer operated in S.W. Miami (Tr. 3144), one HG operated in N.W. Miami (Tr. 3147), and one HG sold near S.W. 134th St. (Tr. 3144).	Retailed in S.W. Miami in Palmetto area (Tr. 3151).
Naomi Fawbush 9120 S.W. 177 Terr., Miami (Tr. 2669) General 2/67-1969, 1970 approx. (Tr. 2738, 2762)	Had 16 HGs and 9 organizers (Tr. 2744). Had HGs operating in Miami (Tr. 2752). Had an organizer (a beauty shop) operating in Homestead, Florida (Tr. 2757).	
Fred Frank 1711 S.W. 2nd Ct. Miami (Tr. 2536) General 7/66 at least to 11/71 (Tr. 2540, Tr. 2546, Tr. 2591)	Had 40-50 HGs (Tr. 2552). His HGs operated all over Miami (Tr. 2550). Advertised in newspapers for HGs in Dade and Broward counties (Tr. 2578, 2579).	Has a retail store at 2231 Coral Way, Miami selling HM products from 7/66- 7/67 (Tr. 2556, 2560- 62). Has a Health Food store on N.W. 7th St. Miami after 7/67 selling HM products (Tr. 2596, 2562).
Marie Yanaros 7340 S.W. 150 Ter., Miami (Tr. 2998) General 8/66-mid 1967 (Tr. 2998)	Recruited 2 HGs and 4 organizers (Tr. 3000). Her HGs sold in S.W. Miami (Tr. 3002). Had organizers selling in S.W. Miami (Tr. 3033). S.W. Miami includes the area from the Bay to past Cutler Ridge (Tr. 3045).	Retailed in S.W. Miami (Tr. 3004).

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Generals	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Vincent J. Fechtel Dixie Distributors, 6920 S.W. 124th St., Miami, (CX 1844). General 11/66-6/67 (Tr. 2305, Tr. 2309)	Had 100 HGs selling throughout Dade County (Tr. 2310, 2313). Had 25 organizers (Tr. 2312). Sought organizers throughout United States (Tr. 2325). Dade County includes City of Miami Hialeah, Coral Gables, etc. (Tr. 2357).	Sold from booths in Miami Beach (Tr. 2325.) Retailed door- to-door in Dade County (Tr. 2358).

Charts for Masters and Generals, separately indicating where they conducted their wholesale and retail activities in the Milwaukee Metropolitan area, their addresses, the periods of time that they were active as Masters and Generals, and the number of Holiday Girls and Organizers that they had selling in their organization during the period 3/70-1/18/71, are as follows:

METROPOLITAN MILWAUKEE AREA

Masters	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Carolyn Prah 3649 S. 96th St., Milwaukee, Wisc. (Tr. 5476) Master 10/70-mid 1/71 (Tr. 5476, 5478)	Operated in S.W. Milwaukee (Tr. 5478). Recruited 4-5 HGs (Tr. 5480). Her HGs sold in south side of Milwaukee (Tr. 5481).	Operated in S.W. Milwaukee (Tr. 5478). Retailed in S.W. Milwaukee and downtown Milwaukee (Tr. 5480)
Kenneth L. Belton Kenneth Belton, Ent., 8912 W. Howard Ave., Milwaukee, Wisc. (CX 2028-B). Milwaukee Council, 633 W. Wis- consin Ave. Milwaukee (Tr. 4967, 4681); Master 3/70-4/70 (Tr. 4954)	Had HGs operating in West Wisconsin and surrounding communities as West Ellis, Milwaukee County, Brookfield, Wauwatosa and Fox Point (Tr. 4955- 56). They operated within a radius of 10 miles from center of Milwaukee (Tr. 4955-56).	

METROPOLITAN MILWAUKEE AREA

Masters	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Sharon Fischer 3645 S. 60th St., Milwaukee (Tr. 4994) Master 7/30/70-2/71 (Tr. 4996)	Operated her business in Milwaukee (Tr. 4997). Most sold in S.W. Milwaukee, which is 10-15 miles from center of Milwaukee (Tr. 4997- 4998).	Operated her business in Milwaukee (Tr. 4996).
Ferdinand Feiss 7479 N. Chadwick Rd., Glendale, Wisc. (Tr. 8509) Glendale is a N.E. suburb of Milwaukee and is 12 miles from center of Milwaukee (Tr. 8509) Master 11/70-8/71	Builds his distributorship (Tr. 8515).	Retails (Tr. 8516).
Earl Saffold 3174 N. 11 St., Milwaukee, Wisc. (Tr. 8325) Master 10/70-12/70 approx. (Tr. 8325-26, 8333)	Recruited HGs (Tr. 8334).	Retails (Tr. 8334).
Richard Andert 4857 N. 104th St., Milwaukee (CX 1998-A; Tr. 4695) Master 4/1/70-7/70 (Tr. 4682)	Had HGs and organizers, who were located within 40 miles of Milwaukee and over the entire Milwaukee area (Tr. 4698).	Had a retail store selling HM products. This store was located in the Bay shore shopping center and about 20- 25 miles outside Milwaukee (Tr. 4695).
Christine Janssen N. Farwell St., Milwaukee (Tr. 5095) Master 5/70-1/71 (Tr. 5099)	Recruited a HG and 2 organizers. (Tr. 5096-5097). Her HGs sold in north side of Milwaukee (Tr. 5097). Her organizers sold in north side of Milwaukee (Tr. 5098). Had 2 masters, who operated in N.W. Milwaukee (Tr. 5098).	Retailed in north side of Milwaukee (Tr. 5097).

Initial Decision

84 F.T.C.

METROPOLITAN MILWAUKEE AREA

Generals	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Barry Toepfer 5273 3rd St., Milwaukee (Tr. 4974) General 5/21/70 at least until 12/70 (Tr. 4975, 4993)	Operated his business in Milwaukee (Tr. 4991). Recruited organizers or HGs (Tr. 4979). Recruited 5 masters (Tr. 4980).	
Nancy Boehlein Brookfield, Wisconsin (Tr. 5019, 5021) General 11/69 at least until 12/70 (Tr. 5022; CX 3032Z42)	Recruited 30 HGs (Tr. 5039). Had one HG on the east side of Milwaukee (Tr. 5043). Had another HG in the Waukesha area (Tr. 5058). Had an organizer or HG in Glendale (CX 2034, Tr. 5066). Had HGs between a 2 mile to 5 mile radius from Milwaukee (Tr. 5028, 5029, 5052).	Retailed within a 2 mile radius of Brookfield (Tr. 5026, 5038). Had a retail customer in Elm Grove (CX 2043, Tr. 5065).
Robert Lipscomb Menomonee Falls, Wisc. (Tr. 4807) General 5/6/69 at least until 1/72 (Tr. 4808).	Had 30-40 HGs and organizers (Tr. 4809-10). All but 5 resided in Metropolitan Milwaukee area (Tr. 4810). His HGs in Metropolitan Milwaukee area lived in Milwaukee county, Waukesha county, Washington county and Wausau county. The radius from Milwaukee is about 20 miles. (Tr. 4811).	
Kenneth Belton Kenneth Belton Ent., 8912 W. Howard Ave., Milwaukee, Wisc. (CX 2028-B) General 4/70-1/18/71 (Tr. 4954, 4955)	Had HGs operating in West Wisconsin and surrounding communities as West Ellis, Milwaukee County, Brookfield, Wauwatosa and Fox Point, (Tr. 4955-4956). They operated in a radius of 10 miles from center of Milwaukee (Tr. 4956). Advertised for HGs in Milwaukee area (Tr. 4967).	Retailed in Milwaukee door-to-door (Tr. 4969).
Dale A. Schmidt 929 N. Astor, Regency House, Milwaukee, Wisc. (Tr. 5193) General 11/15/68-1/71 (Tr. 5199, 5222)	Sold to HGs and organizers within a 50 mile radius of Milwaukee (Tr. 5215, 5217). Recruited one master, Oscar Platken (Tr. 5222, 5226). The HGs basically reside in lower Wisconsin (Tr. 5216).	

METROPOLITAN MILWAUKEE AREA

Generals	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Jerry Cedebaum 4343 N. 87th St., Milwaukee (Tr. 4829) General 11/69 at least until 12/70 (Tr. 4830, CX 2009A)	Recruited HGs and organizers (Tr. 4833). Recruited 4 masters (Tr. 4832-33).	
Richard Andert 4857 N. 104th St., Milwaukee (CX 1998-A; Tr. 4695). General 7/70-beyond 1/18/71 (Tr. 4682, 4683)	Had HGs, organizers and masters from the entire metropolitan Milwaukee area. This area had a radius of about 40 miles (Tr. 4697-4698; CX 1997B, CX 1998B, CX 1999B and CX 2000B. Was Senior General in Milwaukee from 1/71-6/1/71 (Tr. 4683) at the time he became Senior General, there were 60-70 members of the council (Tr. 4732).	Had a retail store for HM products in Bay Shore shopping center about 20-25 miles outside Milwaukee (Tr. 4695).
Organizers		
Joan Maiorano 3940 South Logan St., Milwaukee (Tr. 5168) Organizer 4/70-9/70 (Tr. 5175).	Operated her business in south Milwaukee and Cudahy (Tr. 5176). Had HGs selling in south Milwaukee, Milwaukee, St. Francis, West Allis, Cudahy (Tr. 5180, CX 2082). Some of her HGs sold out of witness's beauty shop located in S. Packard St. in St. Francis, Milwaukee (Tr. 5180).	Operated her business in south Milwaukee and Cudahy (Tr. 5176). Retailed from beauty shop in St. Francis, Milwaukee (Tr. 5181). Retailed outside of the shop in south Milwaukee (Tr. 5181)

Charts for Masters and Generals, separately, indicating where they conducted their wholesale and retail activities in the Chicago Metropolitan area, their addresses, the periods of time that they were active as Masters and Generals, and the numbers of Holiday Girls and Organizers that they had selling in their organizations during the period 6/68 to 12/70, are as follows:

Initial Decision

84 F.T.C.

CHICAGO METROPOLITAN AREA

Masters	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Margaret Hines 7235 S. Rhodes Chicago (Tr. 5111) Master mid-1968-late 1968 (Tr. 5112)	Had HGs and Organizers in south side of Chicago (Tr. 5116, 5114).	Retailled in her neighborhood in Chicago (Tr. 5114).
Albert Dobrenik 275 Englewood Rd. Hoffman Estates Master 5/69-11/28/69 (CX 2094)	Recruited HGs in the north and northwest suburbs of Chicago (Tr. 4535).	
Howard Aldridge 322 Ridge Ave. Elmhurst, Illinois (Tr. 4308) Master 5/69-2/6/70 (Tr. 4309; CX 2110)	Recruited 2 Organizers and 2 HGs. (Tr. 4310). His HGs and Organizers sold in Chicago (CX 1932A). Looked for prospects all over the Chicagoland area (Tr. 4310).	
James Vanadia 8608 West Carmen Chicago (Tr. 4371) Master 1/69-1/70 (Tr. 4371, 4393)	Conducted his business in Chicago, Park Ridge and Des Plaines (Tr. 4372). Recruited HGs and Organizers (Tr. 4372). Sold to HGs in Chicago (CX 1961) and in Norridge and to an Organizer in Norridge (Tr. 4382).	Conducted his business in Chicago, Park Ridge and Des Plaines (Tr. 4372). Wife retailled in Norridge (Tr. 4389).
Hal Faktor 4135 Armitage Ave. Chicago (Tr. 4186) Master 6/68-3/69 (Tr. 4187, 4202)	Sold to HGs and Organizers (Tr. 4187). Had 5 Organizers and 2 HGs (CX 1929). At least one Organizer lived in Chicago (CX 1929D). One HG sold in north side of Chicago (Tr. 4194).	
Bernadette Cylkowski 12412 S. Carpenter Calumet Park, Illinois (Tr. 7947) Master 1/69-9/70 (Tr. 7955, 7959)	Has HGs and Organizers operating in Clarendon Hills, Calumet Park and in Chicago (Tr. 7972, 7974).	Started retailing in 1/70 (Tr. 7956). Retailled in Flossmoor Chicago, Clarendon Hills, Calumet Park, Homewood, Crestwood, and Hazel-Crest (Tr. 7973)

CHICAGO METROPOLITAN AREA

Masters	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Evelyn Bosan 7944 S. Michigan Ave. Chicago (Tr. 7977) Master 4/69-9/69 (Tr. 7980, 7982- 7983, 7984)	Had HGs and Organizers in Chicago (Tr. 7983).	Retailed all over Chicago (Tr. 7986).
Donald R. Finn 861 Magnolia Circle, Lombard, Illinois (Tr. 8582) Master 6/69-at least until 9/72 (Tr. 8583)	Has HGs in Chicago (Tr. 8586). Has HG's and Organizers selling in Lombard, Villa Park, Wheaton, North Lake and Elmhurst (Tr. 8595). Also has HGs in Maywood, Melrose Park and Forest Park (Tr. 8595-8596). Operates his business out of his home (Tr. 8597).	Retailed in Lombard, Villa Park, Wheaton, North Lake and Elmhurst (Tr. 8594).
Kenneth Butkus 4411 North Newcastle, Harwood Heights, Illinois (Tr. 8661) Master 4/70-6/71 (Tr. 8669)		
Patsy Shumaker 3642 Russell Ave. Waukegan, Illinois (Tr. 4207) Master 7/68-1/71 (Tr. 4208, 4295)	Conducted her business in Waukegan area (Tr. 4209) and in Zion (Tr. 4291). Recruited 6-7 Organizers (Tr. 4292). Had HGs in Waukegan and Zion (Tr. 4291). Recruited HGs within a radius of 5-10 miles of Waukegan (Tr. 4292). Had an indirect HG in north Chicago (CX 1949Z-5).	Retailed in Waukegan, Lake Bluff, Mt. Prospect, Des Plaines, Alsip, Markham, Libertyville, Park City, Illinois (CX 2101A). Had a store selling HM products in Waukegan (Tr. 4238-39). Had the store since 11/70 (Tr. 4294). Sold from a Fair in Gray's Lake, Illinois (Tr. 4264).

CHICAGO METROPOLITAN AREA

Masters	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Norma Wegner 128 E. Hickory St. Lombard, Illinois (Tr. 4073) Master 2/14/69-12/69 (CX 1919N; CX 2085)	Had an Organizer selling in Lombard, Villa Park and Elmhurst. Another Organizer sold in south side Chicago (Tr. 4096). Had two HGs selling in Hebron, Illinois, and ten HGs selling in Metropolitan Chicago (Tr. 4096).	Retailled in Hebron, Ringwood, Alden, Harvard, Woodstock, Richmond, McHenry, Greenwood, Mt. Prospect, and Des Plaines (CX 2087A-B).
Rose Catanese 10121 Hartford Court, Schiller Park, (Tr. 4141) Master 2/69-5/69 (Tr. 4142)	Recruited 1 HG and 5 Organizers (Tr. 4143). Her Organizers sold in Chicago and its suburbs (Tr. 4164-4165).	Retailled in Chicago, Brookfield, Des Plaines, Schiller Park, Newland, Bellwood, Westchester, and Elmhurst (CX 2104).
Generals		
Howard Aldridge 322 Ridge Ave. Elmhurst, Illinois (Tr. 4308) General 2/6/70 to the present (CX 2110; CX 4311)	Had HGs and Organizers selling in Elmhurst, Hanover Park, Streamwood and in Chicago (CX 1932). Advertised for HGs in Elmhurst Press.	
Rose Catanese 10121 Hartford Court, Schiller Park, Illinois (Tr. 4141) General 5/69-12/70 (Tr. 4142, 4166)	Had Organizers selling in Chicago area and in the Chicago suburbs (Tr. 4164-4165).	Retailled in Broadview, Elmhurst, Westchester, Elmwood Park, Chicago, Des Plaines, Milford, Oak Park, Melrose Park, Clarendon Hills, Franklin Park, Willow Springs, North Lake, Stone Park, Willowbridge, Barrington, Evanston, Harwood Heights, Dixon, Forest Park, Hillside, and River Forest (CX 2104A-D)

CHICAGO METROPOLITAN AREA

Generals	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Eleanor Justen North River Rd. McHenry, Illinois (Tr. 4492) General 2/68-to the present (Tr. 4495)	Had HGs in Chicago, Mt. Prospect, and Crystal Lake (Tr. 4496). Had Masters and indirect HGs in McHenry County and in Chicago and its suburbs (Tr. 4495).	Retailled in Streamwood, McHenry and Chicago through seminars (Tr. 4520).
James Bong 19 W. 175 17th Pl. Lombard, Illinois (Tr. 4635) General 4/69-10/70 (Tr. 4636; CX 1993S)	Operated his business from his home in Lombard (Tr. 4638). Had HGs and Organizers in North Riverside, Villa Park, North Lake, Waukegan, Hillside and in Chicago (Tr. 4638). Sold to retail stores in Villa Park and North Lake (Tr. 4643). Looked for HGs within a 50 mile radius of Chicago (Tr. 4658). Recruited 7 Masters and had one general (Tr. 4646-4648). Recruited 10-12 HGs and Organizers (Tr. 4645).	Operated his business from his home in Lombard (Tr. 4638). Retailled in North Lake and in Addison (Tr. 4639).
Shameron Mally 1727 Pheasant Trail Mt. Prospect, Illinois (Tr. 5235) General 7/4/67-7/70 (Tr. 5236; CX 2012M)	Recruited HGs and Organizers within a 50 mile radius of Chicago (Tr. 5238). Had about 50 HGs and Organizers in 1970 (CX 2011I). Had an HG selling in Lake Bluff, Lake Forest, Prairie View, Highland Park, Gray's Lake, Northbrook, Glenview, Deerfield, Algonquin, Long Grove, Chicago, Mundelein, Arlenylin, Wildwood, Lake Villa and Arlington Heights in 1-3/70 (CX 2091B-D). Sold to three retail outlets within 50 miles north of Chicago, of which one was in Highland (Tr. 5255-5256).	Retailled all over the Chicago area (Tr. 5254)
Albert Dobrenik 275 Englewood Rd. Hoffman Estates General 9/69-at least until 12/70 (Tr. 4535; CX 1982K)	Recruited HGs and Organizers in north and northwest suburbs of Chicago and in Chicago (Tr. 5436). His HGs sold in Des Plaines, Mt. Prospect, Chicago, Park Ridge, St. Charles, Rolling Meadows, Arlington Heights between 6-8/70. Sold to an Organizer in Mundelein (Tr. 4554). Had an HG and an Organizer in Hoffman Estates (Tr. 4582). Witness also operated in Schaumburg (Tr. 4616).	Wife retailled in Mt. Prospect, Hoffman Estates, Glenn Lake, Highlands and Chicago from 7/69 to 11/70 (CX 2095A). His wife also retailled in Barrington Hills, Hilldale, Winter Knolls and in Streamwood from 9/70-11/70 (CX 2095B).

CHICAGO METROPOLITAN AREA

Generals	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Margaret Hines 7235 S. Rhodes Chicago (Tr. 5111) General late 1969-at least until 1/72 (Tr. 5112, 5111)	Brought in 34 HGs and Organizers, of which half are directs (Tr. 5115). Recruited HGs and Organizers in south side of Chicago (Tr. 5116). Had one Organizer in west side of Chicago. Recruited Organizers and HGs within a 6 mile radius of where witness lives (Tr. 5116-5117).	Retailed in her neighborhood in Chicago (Tr. 5114, 5140).
Rose Amado 8974 Western, Des Plaines (Tr. 7738) General 9/67-at least until 9/72 (Tr. 7774, 7770)	Had 25 Masters, of which 18 became Generals (Tr. 7741). 15 of these Generals are inside the Chicago area (Tr. 7742). Had 20-25 HGs in April-May 1969 (Tr. 7777). Had HGs working in Skokie, Niles, Glenview, Des Plaines, Morton Grove, Chicago, Arlington Heights, and Park Forest (Tr. 7779).	
Pauline Fajmon Nuttall Rd. Riverside, Illinois (Tr. 7804) General 7/1/69-at least until 9/72 (Tr. 7808-7809, 7823)	Has HGs operating in Chicago and on the north and south side of Chicago (Tr. 7837-7838). Has HGs in Riverside, Berkeley, Lyons, Hillside and Oak Park (Tr. 7838). Has 15 Masters operating in Chicago and the surrounding suburbs (Tr. 7839-7840).	Has customers in Riverside and Mortor Grove (Tr. 7837, 7838). Retails in the same areas as her HGs (Tr. 7838-7839), which are Riverside, Berkeley, Lyons, Hillside and Oak Park.
Bernadette Cylkowski 12412 S. Carpenter Calumet Park, Illinois (Tr. 7947) General 9/70-at least until 9/72 (Tr. 7959)	Had HGs and Organizers operating in Clarendon Hills and had others scattered inside Chicago (Tr. 7952). Had HGs operating in Calumet Park (Tr. 7974).	Retailed in Flossmoor, Chicago, Clarendon Hills, Calumet Park, Crestwood, Homewood and Hazel Crest (Tr. 7973).

CHICAGO METROPOLITAN AREA

Generals	Wholesale (Sales to Holiday Girls, Organizers and Retail Stores)	Retail
Evelyn Bosan 7944 S. Michigan Ave. Chicago, Illinois (Tr. 7977) General 9/69-at least until 9/72 (Tr. 7984-7985)	Had HGs and Organizers living in Chicago (Tr. 7985-7986).	Retailed all over the City of Chicago (Tr. 7986).
Paul Hess Elk Grove Village, Illinois (Tr. 7990-7991) General 7/69-4/71 (Tr. 7997, 7999)	Has HGs and Organizers in the Greater Chicago area which includes the suburbs (Tr. 8011).	He and his wife retail in Chicago and the suburbs (Tr. 7993, 7994, 8011).
John Burnley 6838 S. Clyde South Chicago (Tr. 8109) General 5/69 (approx.)-at least until 9/72 (Tr. 8110, 8120)	Operated in Chicago (Tr. 8118). Had HGs and Organizers picking up product at CRS in Chicago (Tr. 8118-8119).	
Clarese Berliner 5733 N. Sheridan Rd. Chicago, Illinois (Tr. 8601) General 7/68-at least until 9/72 (Tr. 8606, 8649)	Almost 100% of her business is in Chicago and within a radius of perhaps six square miles (Tr. 8650). Had HGs in Mundelein (Tr. 8614). Between 20-30 Masters came into her organization in 1969. Has HGs and Organizers throughout the Chicago metropolitan area. Most of her people are operating in the north or northwest sections of Chicago (Tr. 8651-8652). Has HGs and Organizers in Glencoe and two in Highland Park (Tr. 8653). Has beauty shops in her organization (Tr. 8650).	Had about 200-300 retail customers in 8 or 9/68 (Tr. 8610-8611). Almost 100% of her business is in Chicago and within a radius of perhaps 6 square miles (Tr. 8659).

450. Holiday Magic, Inc., sells the same products contemporaneously to Master and General distributors who are engaged in their business activities in the same market areas. (For contemporaneous sales - see charts immediately following Finding number 451).

Miami - (same products)

Masters - CX 2066 (Porst), CX 2067 (Muff), CX 2069A-B (Eversole), CX 2065A (Sutliff), CX 2063B (Izzard), Tr. 299 (Yanaros)
 Generals - CX 2064B (Braddock), CX 2069A-B (Eversole), Tr. 3363 (Dudley), Tr. 2305 (Fechtel), Tr. 2580 (Frank)

Chicago - (same products)

Masters - CX 2105 (Faktor), CX 2085 (Wegner), CX 2092 (Vanadia), CX 2098 (Shumaker), CX 2110 (Aldridge), CX 2072B (Justen), CX 2107 (Bong), CX 2102 (Catanese), CX 2094 (Dobrenik)
 Generals - CX 2072B (Justen), CX 2110 (Aldridge), CX 2088, CX 2089B, CX 2090B (Mally), CX 2102 (Catanese), CX 2107 (Bong), CX 2094 (Dobrenik)

Milwaukee - (same products)

Masters - CX 2075B (Cederbaum), CX 2071B (Prah), CX 2077 (Boehlein)
 Generals - CX 2078B (Boehlein), CX 2114-2115 (Schmidt), CX 2119C-D (Andert)

451. Organizer-Joan Maiorano purchased at a 30 percent discount products that were the same as those purchased from Holiday Magic by Masters and Generals in Milwaukee (CX 2081A-C). She purchased these products indirectly from Holiday Magic through her sponsoring General's account at C.D.C. in Milwaukee. (See Sections VIIA and XXVI under Price Discrimination for indirect purchaser), CX 2081A, Tr. 5175, 5022. This witness retailed Holiday Magic products in the Milwaukee area in St. Francis and south side of Milwaukee (Tr. 5180, 5181). She also wholesaled Holiday Magic products through her Holiday Girls and Organizers in south side of Milwaukee, Cudahy and in St. Francis (Tr. 5180). She was active in both the wholesale and retail sale of Holiday Magic products in the period 4/70 to 10/70 (CX 2081A). Her expenses in selling Holiday Magic products were similar to those of Masters and Generals selling Holiday Magic products in the Milwaukee areas (Tr. 5182).

MIAMI-DADE COUNTY AREA

Charts for selected Masters and Generals indicating a minimum of their dollar amount of purchases from Holiday Magic, Inc. while they were active as Masters and Generals in the Miami-Dade County area during the period 6/66 to 1/68.

The following Masters purchased at a minimum the dollar amounts of Holiday Magic products indicated below at Holiday Magic retail value from Holiday Magic at 55 percent discount:

Masters	Amount	Date Purchased
Juanita Eversole	\$5,001.03	2/18/67 (CX 2089A)
William Izzard	\$8,132.16	7/1/66-1/12/67 (CX 2063A)
Helen Sutliff	\$6,100.	9/66-9/28/67 (Tr. 3460, 3458, 3441)
Charles Porst	\$2,326.96	11/14/66-4/12/67 (CX 1873B, CX 1874)
Chamour, Inc.	\$3,496.53* \$1,003.47** \$5,000.00	6/29/66 (CX 1845)
Myrna Sedler	\$5,000.00***	12/66 (Tr. 2801)
Mrs. Stanley Pierce	\$5,000.00***	10/66 (Tr. 2258)
Thomas Q. Sharpe	\$5,000.00***	5/66 (Tr. 3204, 3213, 3220)
Marie Yanaros	\$5,000.00***	5/66 (Tr. 2999)

*Witness' buy-in portion (Tr. 2439).

**Witness' work-in portion. For information on work-in/buy-in master, see Part VIII-sub. C.

***An individual may become either a "work-in" master or a "work-in/buy-in" master by purchasing \$5,000 of Holiday Magic products at Holiday Magic retail value in any one given month at a 55 percent discount. He may also become a "buy-in" master by purchasing \$5,000 of Holiday Magic products at a 55 percent discount. (See CX 79H, CX 79A-Z98; Tr. 2542, 2999, 9574, 9591-9592; see also Part VII, subsection C).

MIAMI-DADE COUNTY AREA

The following Generals purchased at a minimum the dollar amounts of Holiday Magic products indicated below at Holiday Magic retail value from Holiday Magic at a 65 percent discount during the period 6/66-1/68.

Generals	Amount	Date Purchased
Ruth Braddock	\$642.82 (CX 2064A)	2/27/67-12/30/67 (CX 2064A)
Juanita Eversole	\$2,408.72 (CX 2069A)	9/67-10/23/69 (CX 2069A)
William Muff	\$95.00 (Tr. 2474, 2479)	8/3/66-5/67 (Tr. 2474, 2488)
Everett Dudley	undetermined amount of product (Tr. 3362)	8/66-end of 67 (Tr. 3340, 3361)
Joseph Rothman	undetermined amount of product (Tr. 2914)	9/66-3/67 (Tr. 2887, 2892)
Fred Frank	substantial but undetermined amount of product (Tr. 2580; CX 1858A-Z18)	7/66-at least until November 1971 (Tr. 2540, 2546, 2591)
Vincent Fechtel	undetermined amount of product (Tr. 2307, 2314)	1/67-6/67 (Tr. 2305, 2309)

CHICAGO METROPOLITAN AREA

Charts for selected Masters and Generals indicating a minimum of their dollar amount of purchases from Holiday Magic, Inc. while they were active as Masters and Generals in the Chicago Metropolitan area during the period 6/68-12/70 are hereinafter set forth and explained.

The following Masters purchased at a minimum the amounts of Holiday Magic product indicated below at Holiday Magic retail value from Holiday Magic at 55 percent discount:

Masters	Amount	Date Purchased
Hal Faktor	\$5,407.62 (CX 2105)	7/1/68-1/10/69 (CX 2105)
Albert Dobrenik	\$5,223.69 (CX 2094)	6/25/69-11/28/69 (CX 2094)
Norma Wegner	\$5,143.59 (CX 2085)	2/14/69-6/24/69 (CX 2085)
James Vanadia	\$4,819.92 (CX 2092)	1/2/69-11/10/69 (CX 2092)
Howard Alridge	\$6,948.87 (CX 2110)	4/30/69-2/6/70 (CX 2110)
Patsy Shumaker	\$4,440.30 (CX 2098)	1/26/71-9/21/70 (CX 2098)
Margaret Hines	\$5,000.00* (Tr. 5112)	Mid 1968 (Tr. 5112)
Bernadette Cylkowski	\$5,000.00* (Tr. 7955)	1/69 (Tr. 7955)
Evelyn Bosan	\$5,000.00* (Tr. 7982-7983)	4/69 (Tr. 7982-7983)
Donald Finn	At least \$5,000.00* (Tr. 8583, 8589)	6/69-at least until October 1972 (Tr. 8583, 8589)
Kenneth Butkus	\$5,000.00* (Tr. 8669)	4/70 (Tr. 8669)
Rose Catanese	\$5,241.78 (CX 2102)	2/28/69-4/7/69 (CX 2102)

*An individual may become either a "work-in" master or a "work-in/buy-in" master by purchasing \$5,000 of Holiday Magic product at Holiday Magic retail value in any one given month at a 55 percent discount. He may also become a "buy-in" master by purchasing \$5,000 of Holiday Magic product at a 55 percent discount. (See CX 79H, CX 79A-Z98; Tr. 2542, 2999, 9574, 9591-9592; see also Part VII, subsection C).

CHICAGO METROPOLITAN AREA

The following Generals purchased at a minimum the amounts of Holiday Magic product indicated below at Holiday Magic retail value from Holiday Magic at a 65 percent discount during the period 6/68-12/70:

Generals	Amount	Date Purchased
Howard Aldridge	\$777.24 (CX 2110)	4/29/70-10/23/70 (CX 2110)
Rose Catanese	\$190.80 (CX 2102)	5/27/69 (CX 2102)
Eleanor Justen	\$9,351.16 (CX 2072A)	9/23/68-12/1/69 (CX 2072A)
James Bong	\$337.68 (CX 2107)	5/26/69 (CX 2107)
Shameron Mally	\$17,747.09 (CX 2088, CX 2089A, 2090A)	7/69-6/1/70 (CX 2089A, 2088)
Albert Dobrenik	\$483.76 (CX 2094)	12/11/69-11/3/70 (CX 2094)
Margaret Hines	undetermined amount (tr. 5140)	late 1969-at least until 2/72 (Tr. 5111-5112)
Rose Amado	undetermined amount (Tr. 7773)	9/67-at least until 9/72 (Tr. 7770, 7774)
Pauline Fajmon	undetermined amount (Tr. 7840-7841, 7842-7843)	5/69-at least until 9/72 (Tr. 7808-7809, 7823)
John Burnley	undetermined amount (Tr. 8116)	5/69-at least until 9/72 (Tr. 8109, 8120)

MILWAUKEE METROPOLITAN AREA

Charts for selected Masters and Generals indicating a minimum of their dollar amount of purchases from Holiday Magic, Inc. while they were active as Masters and Generals in the Milwaukee Metropolitan area during the period 3/70-1/18/71 are hereinafter set forth and explained.

The following Masters purchased at a minimum the amounts of Holiday Magic product indicated below at Holiday Magic retail value from Holiday Magic at a 55 percent discount:

Masters	Amount	Date Purchased
Carolyn Prah	\$4,650 (CX 2070)	10/23/70-1/5/71 (CX 2070; Tr. 5476, 5478)
Kenneth Belton	\$5,000* (Tr. 4954)	3/70 (Tr. 4954)
Sharon Fischer	At least \$5,000* (CX 2022; Tr. 4996)	7/70-2/71 (CX 2022; Tr. 4996)

Initial Decision

84 F.T.C.

Masters	Amount	Date Purchased
Ferdinand Feiss	At least \$5,000 (Tr. 8514)	11/70-8/71 (Tr. 8514)
Earl Saffold	\$5,000* (Tr. 8325-8326)	10/70 (Tr. 8325-8326)
Richard Andert	\$5,000* (Tr. 4682)	4/1/70 (Tr. 4682)
Christine Janssen	\$5,000* (Tr. 5096)	5/70 (Tr. 5096)

*An individual may become either a "work-in" master or a "work-in/buy-in" master by purchasing \$5,000 of Holiday Magic product at Holiday Magic retail value in any one given month at a 55 percent discount. He may also become a "buy-in" master by purchasing \$5,000 of Holiday Magic product at a 55 percent discount (see CX 79H, CX 79A-298; Tr. 2542, 2889, 9574, 9591-9592; see also Part VII, subsection C).

MILWAUKEE METROPOLITAN AREA

The following Generals purchased at a minimum the amounts of Holiday Magic product indicated below at Holiday Magic retail value from Holiday Magic at a 65 percent discount during the period 3/70-1/18/71:

Generals	Amount	Date Purchased
Nancy Boehlein	\$1,971.32 (CX 2078A, 2079A-B)	11/4/69-12/23/70 (CX 2078A, CX 2079A-B)
Dale A. Schmidt	\$9,363.48 (CX 2114, CX 2115)	1/8/69-6/2/70 (CX 2114, CX 2115)
Richard Andert	\$5,204.28 (CX 2119A-B)	9/12/70 (CX 2119A-B)

452. Master Distributors have the same or similar expenses as do General Distributors in connection with their Holiday Magic distributorships.

Miami—Expenses which both Masters and Generals have in common in the Miami-Dade County area are telephone, advertising, automobile, council dues, bank charges, travel expenses, freight, sales aids, taxes and licenses, and office supplies as shown by their profit and loss statements.

Masters - CX 1902A-B (Sutliff); CX 1847 (Muff); CX 1875A (Porst); CX 1890 (Sharpe).

Generals - CX 1847 (Muff); CX 1856C (Frank); CX 1892C (Dudley).

Chicago—Expenses which both Masters and Generals have in common in the Chicago Metropolitan area are office supplies, telephone, advertising, auto, refunds to Holiday Girls and Organizers, council dues, freight, bank charges, training, and sales aids as shown by their profit and loss statements.

Masters - CX 1973A (Vandervelde); CX 1926A (Catanese); CX 1988 (Dobrenik); CX 1921 (Wegner); CX 1951A-C (Shumaker); CX 1930B (Faktor); CX 1934A (Aldridge).

Generals - CX 1926B (Catanese); CX 1994B (Bong); CX 1989A (Dobrenik); CX 1934B (Aldridge).

Milwaukee - Expenses which both Masters and Generals have in common in the Milwaukee Metropolitan area are office supplies, telephone, advertising and promotion, refunds to Holiday Girls and Organizers, council dues, CRS or CDC dues, bank charges, travel expenses, freight, sales aids, auto, entertainment and training as shown by their profit and loss statements.

Masters - CX 2014 (Toepfer); CX 2022 (Fischer); CX 2062 (Prah).

Generals - CX 2028B (Belton); CX 2014 (Toepfer); CX 2005 (Lipscomb); CX 2007 (Cederbaum); CX 2002B (Andert).

453. The Holiday Magic wholesale and retail cosmetic business is one which is characterized by low profit margins for Masters and General Distributors.

See individual charts immediately following for Miami, Chicago and Milwaukee. On each chart, low or negative profit margins are shown for Masters and Generals from whom profit and loss statements were taken. On the bottom of each of the three charts is a table indicating when Distributor was active as a Master and as a General.

Holiday Magic—D. 8834
A Tabulation of Profit and Loss Statements Taken From Federal Tax Returns of Individuals
Trading in Holiday Magic Products in the Miami Area

Exhibit No.	Schedule C Form 1040 Federal Tax Return	Period Covered	Gross Receipts	Cost of Sales	% of Cost of Sales to		Gross Profit	% of Gross Profit to		Operating Expenses	% of Operating Expenses to		Net Profit or (Loss)	% of Net Profit or (Loss) to Gross Receipts
					Gross Receipts	Cost of Sales		Gross Receipts	Gross Receipts		Gross Receipts	Gross Receipts		
CX 1893-A	Everett Dudley, Inc.	1966	\$12,338.64	\$3,962.36	32.1%	\$8,376.28	67.9%	\$7,707.01	62.5%	\$ 669.27	5.4%	(1,854.29)	(287.8)	
CX 1894-A	Everett Dudley, Inc.	1967	644.20	1,565.53	143.0	(920.32)	(142.9)	943.97	146.5	(\$ 746.15)	(269.9%)	(\$ 1,684.96)	(27.5%)	
CX 1890	Thomas Q. & Virginia Sharpe	1966	\$ 276.43	\$ 464.98	168.2%	(188.55)	(68.2%)	\$ 557.60	201.71%	(483.20)	(284.9)	(\$ 655.20)	(104.1)	
CX 1875-A	Charles Forst	1967	\$ 6,128.78	\$ 4,855.25	79.2%	\$ 1,273.53	20.8%	\$ 2,958.49	48.3%	(483.20)	(284.9)	(\$ 655.20)	(104.1)	
CX 1876-A	Charles Forst	1968	629.36	358.00	56.9	271.36	43.1	926.56	147.2	(483.20)	(284.9)	(\$ 655.20)	(104.1)	
CX 1877-A	Charles Forst	1969	169.60	652.80	384.9	(483.20)	(284.9)	1	-	(483.20)	(284.9)	(\$ 655.20)	(104.1)	
CX 1856-A	Frederick R. Frank	1966	\$ 4,648.38	\$ 3,025.47	65.1%	\$ 1,622.91	34.9%	\$ 7,980.23	171.7%	(\$ 6,157.32)	(132.5%)	(\$ 3,476.18)	(123.3)	
CX 1857-A	Frederick R. Frank	1967	2,818.88	1,256.90	44.6	1,561.98	55.4	5,098.75	180.9	(3,476.18)	(123.3)	(\$ 559.97)	(28.6%)	
CX 1847	William H. Muff	1966	\$ 4,022.58	\$ 2,900.03	72.1%	\$ 1,122.55	27.9%	\$ 3,291.81	81.8%	(\$ 125.25)	26.6	(\$ 559.97)	(28.6%)	
CX 1847	William H. Muff	1967	470.97	271.68	57.7	199.29	42.3	74.50	15.8	(125.25)	(28.6%)	(\$ 559.97)	(28.6%)	
CX 1902-A	Gerald & Helen Sutliff	5/1966	\$ 1,958.91	\$ 2,097.52	107.1%	(\$ 138.61)	(7.1%)	\$ 421.36	21.5%	(\$ 559.97)	(28.6%)	(\$ 559.97)	(28.6%)	
CX 1902-B	Gerald & Helen Sutliff	6/1967	746.39	755.78	101.3	(9.39)	(1.3)	456.56	61.2	(465.95)	(62.4)	(\$ 559.97)	(28.6%)	

Dates of Various Holiday Magic Positions			
Name	Organizer	Master	General
Everett Dudley, Inc.	March 1966	July 1966	August 1966
Thomas Q. & Virginia Sharpe	-	May 1966	-
Charles Forst	-	October 1966	-
Frederick R. Frank	-	June 1966	July 1966
William H. Muff	May 1966	June 1966	August 1966
Gerald & Helen Sutliff	Sept. 1966	October 1966	-

1 Statement on tax return schedule C-1 states, "No longer active in business. Variance in inventory due to spoilage."
 2 Includes \$60.59 override commission.
 3 Includes \$4.63 other income.
 4 Includes \$46 other income.
 5 Business started August 1966. Figures are for 5 month period.
 6 Includes sales taxes collected.
 7 Includes \$2,500.00 general release fee.

Holiday Magic—D. 8834
A Tabulation of Profit and Loss Statements Taken From Federal Tax Returns of Individuals
Trading in Holiday Magic Products in the Chicago Area

Exhibit No.	Schedule C Form 1040 Federal Tax Return	Period Covered	Gross Receipts	Cost of Sales	% of Cost of Sales to		Gross Profit	% of Gross Profit to		Operating Expenses	% of Operating Expenses to		Net Profit or (Loss)	% of Net Profit or (Loss) to	
					Gross Receipts	Gross Receipts		Gross Receipts	Gross Receipts		Gross Receipts	Gross Receipts		Gross Receipts	Gross Receipts
CX 1926-A	Rose D. Catanese	1969	\$ 2,806.00	\$ 2,334.00	83.2%	\$ 472.00	16.8%	\$ 2,831.00	93.8%	\$ 2,860.00	93.8%	(\$ 2,159.00)	(76.9%)		
CX 1926-B	Rose D. Catanese	1970	548.00	373.00	68.1	175.00	31.9	2,860.00	521.9	2,860.00	521.9	(2,685.00)	(490.0)		
CX 1930-A	Harold J. & Dorothea Faktor	1968	\$ 813.43	\$ 1,108.70	136.3%	(\$ 295.27)	(36.3%)	\$ 1,214.14	149.3%	\$ 1,214.14	149.3%	(\$ 1,509.41)	(185.5%)		
CX 1930-B	Harold J. & Dorothea Faktor	1969	62.00	1,628.00	262.6	(1,566.00)	(252.6)	184.00	296.8	184.00	296.8	(1,750.00)	(282.3)		
CX 1934-A	Howard A. Aldrich	1969	\$ 985.34	\$ 879.35	89.2%	\$ 105.99	10.8%	\$ 2,017.08	204.7%	\$ 2,017.08	204.7%	3(\$ 1,707.84)	(173.3%)		
CX 1934-B	Howard A. Aldrich	1970	1,227.38	848.70	68.1	378.68	30.9	1,743.02	142.0	1,743.02	142.0	4(\$ 1,640.31)	(52.2)		
CX 1951-A	George A. & Patsy M. Schumacher	1968	\$ 1,698.48	\$ 964.55	56.8%	\$ 733.93	43.2%	\$ 1,210.67	71.3%	\$ 1,210.67	71.3%	(\$ 476.76)	(26.1%)		
CX 1951-B	George A. & Patsy M. Schumacher	1969	233.80	160.04	68.5	73.76	31.5	96.07	41.1	96.07	41.1	(22.31)	(9.5)		
CX 1951-C	George A. & Patsy M. Schumacher	1970	2,098.36	1,897.68	90.4	200.58	9.6	264.74	12.6	264.74	12.6	(64.16)	(3.1)		
CX 1975-A	John R. Vanderveide	1968	\$ 962.34	\$ 1,792.68	186.3%	(\$ 830.34)	(86.3%)	\$ 1,394.81	144.9%	\$ 1,394.81	144.9%	(\$ 2,225.15)	(231.2%)		
CX 1973-A	John R. Vanderveide	1969	383.00	702.33	183.4	(319.33)	(83.4)	1,915.86	500.2	1,915.86	500.2	(1,596.53)	(416.8)		
CX 1972-A	John R. Vanderveide	1970	1,247.53	1,570.21	125.9	(322.68)	(25.9)	2,176.06	174.4	2,176.06	174.4	(2,498.74)	(200.3)		
CX 1988	Albert R. & Phyllis Dobrenick	1969	\$ 1,052.30	\$ 657.79	62.5%	\$ 394.51	37.5%	\$ 1,401.42	133.2%	\$ 1,401.42	133.2%	(\$ 1,006.91)	(95.7%)		
CX 1989-A	Albert R. & Phyllis Dobrenick	1970	1,004.96	653.22	65.0	351.74	35.0	2,104.24	209.4	2,104.24	209.4	(1,752.50)	(174.4)		
CX 1994-A	James Bong	1969	\$ 4,654.38	\$ 4,349.77	93.5%	\$ 304.61	6.5%	\$ 3,777.63	81.2%	\$ 3,777.63	81.2%	(\$ 3,473.02)	(74.6%)		
CX 1994-B	James Bong	1970	614.63	5(355.87)	(57.9)	970.50	157.9	1,645.16	267.7	1,645.16	267.7	(674.66)	(109.8)		
CX 1921	Walter & Norma Wegner	1969	\$ 2,348.62	\$ 1,501.73	63.9%	\$ 847.09	36.1%	\$ 1,893.49	72.1%	\$ 1,893.49	72.1%	(\$ 846.40)	(36.0%)		

¹ Schedule C-1 shows \$2,500.00 included in this item and states investment in business to become larger distributor. Business discontinued as of 7-1-70.

² Includes sales taxes collected.

³ Includes other income and commissions of \$203.25.

⁴ Includes other income and commissions of \$724.03.

⁵ Inventory at close was larger than opening inventory plus additions. However, tax return shows this as deductions. We have corrected to show as an addition to Gross Profit and Net Profit.

Dates of Various Holiday Magic Positions

Name	Organizer	Master	General
Rose D. Catanese	Nov. 1968	Feb. 1969	May 1969
Harold J. & Dorothea Faktor		June 1968	
George A. & Patsy M. Schumacher	March 1968	July 1968	Aug. 1969
John R. Vanderveide	Oct. 1968	July 1968	
Albert R. & Phyllis Dobrenick	April 1969	Oct. 1968	Sept. 1969
James Bong	Dec. 1968	March 1969	April 1969
Walter & Norma Wegner	March 1969	March 1969	

Holiday Magic, Inc.—D. 8834
A Tabulation of Profit and Loss Statements Taken From Federal Tax Returns of Individuals
Trading in Holiday Magic Products in the Milwaukee Area

Exhibit No.	Schedule C Form 1040 Federal Tax Return	Period Covered	Gross Receipts	Cost of Sales	% of Cost of Sales to Gross Receipts	Gross Profit	% of Gross Profit to Gross Receipts	Operating Expenses	% of Operating Expenses to Gross Receipts	Net Profit or (Loss)	% of Net Profit or (Loss) to Gross Receipts
CX 2002-B	Richard S. & Elizabeth Andert	1970	\$ 2,591.13	\$1,048.54	40.5%	\$ 1,542.59	59.5%	\$7,283.95	281.1%	(\$5,741.36)	(221.6%)
CX 2005	Robert P. Lipscomb	1969	\$ 2,687.64	\$1,730.04	64.4%	\$ 957.60	35.6%	\$6,964.59	259.1%	(\$6,006.99)	(223.5%)
CX 2006-A	Robert P. Lipscomb	1970	1,043.32	647.51	62.1	395.81	37.9	6,237.96	597.9	(5,842.15)	(560.0)
CX 2007	Gary Cedarbaum	1970	\$ 5,635.48	\$ -	-	\$ 5,635.48	100.0%	\$5,962.58	105.8%	(\$ 327.10)	(5.8%)
CX 2014	Barry B. Toepfer	1969	\$5,855.00	\$1,129.00	19.3%	\$ 4,726.00	80.7%	\$3,230.00	55.2%	\$1,496.00	25.6%
CX 2022	Sharon Fischer	1970	\$ 2,427.00	\$ 537.00	22.1%	\$ 1,890.00	77.9%	\$1,990.00	82.0%	(\$ 100.00)	(4.1%)
CX 2027-B	William T. Benson III	1969	\$ 81.98	\$ 36.89	45.0%	\$ 45.09	55.0%	\$ 238.00	290.3%	(\$ 192.91)	(235.3%)
CX 2027-A	William T. Benson III	1970	9,892.10	2,413.63	24.4	7,478.47	75.6	9,879.00	99.9	(2,400.53)	(24.3)
CX 2028-B	Kenneth Belton Jr.	1971	\$15,381.41	\$3,249.41	21.1%	\$12,132.00	78.9%	\$6,765.91	44.0%	\$5,366.09	34.9%
CX 2057	Betty Gillard	1970	\$ 3,106.45	\$1,772.52	57.1%	\$ 1,333.93	42.9%	\$3,894.41	125.4%	(\$2,560.51)	(82.4%)
CX 2062	Carolyn Prah	1970	\$ 773.00	\$ 361.00	46.7%	\$ 412.00	53.3%	\$1,059.00	137.0%	(\$ 647.00)	(83.7%)

¹ Includes commissions of \$4,050.36.
² Includes commissions of \$500.00

Dates of Various Holiday Magic Positions

Name	Organizer	Master	General
Richard S. & Elizabeth Andert		April 1970	July 1970
Robert P. Lipscomb		Dec. 1968	May 1969
Gary Cedarbaum	April 1969	Oct. 1969	Nov. 1969
Barry B. Toepfer	Sept. 1969	Sept. 1969	May 1970
Sharon Fischer	July 1970	July 1970	
William T. Benson III	April 1969	Aug. 1969	Oct. 1970
Kenneth Belton, Jr.	March 1970	March 1970	April 1970
Betty Gillard	Feb. 1970	Nov. 1970	Nov. 1970
Carolyn Prah	July 1970	Oct. 1970	

454. Holiday Magic Master and General Distributors for the most part sell their products to their Holiday Girls and Organizers at 30 percent discount from list price. (See VIIA, B; Tr. 2452, 2753, 2804, 2919, 3311).

455. Since Master Distributors pay 45 percent of the list price for the products they buy from Holiday Magic, and sell at 70 percent of the same list price at wholesale to their Holiday Girls and Organizers, their gross income on the wholesale sale of Holiday Magic products, before expenses, is 25 percent of list price.

(70 percent received less 45 percent paid equals 25 percent gross income.)

456. Since General Distributors pay 35 percent of the list price for the products they buy from Holiday Magic, and sell at the same 70 percent discount to Organizers and Holiday Girls at wholesale, their gross income on the wholesale sale of Holiday Magic products, before expenses, is 35 percent of list price.

(70 percent received less 35 percent paid equals 35 percent gross income.)

457. Since General Distributors enjoy a 35 percent of list price gross income on the wholesale sale of cosmetics and Master Distributors have only a 25 percent gross income on their wholesale sales of cosmetics, Generals as a practical matter have a 40 percent greater gross income than do their Master Distributor counterparts, on equivalent volumes of merchandise sold at wholesale.

(35% - 25% = 10 difference; $\frac{10\%}{25\%} = 40\%$)

458. The 22.2 percent discount at which Holiday Magic sells to its General Distributors is not available to Master Distributors (Tr. 2529, 2308, 2579, 2745, 2911).

459. Master Distributors may qualify for the General's discount and General position only by meeting the conditions of paying a release fee of from \$2,500 to \$4,500 and by recruiting and sponsoring a potential competitor as a Replacement Master (see VII D).

460. No cost justification defense was interposed or offered by respondents with respect to the favored buying status of the General Distributor.

461. The 10 percent override payment by Holiday Magic, Inc. to those General Distributors who recruited or sponsored Master Distributors, or who were given Replacement Master Distributors, is a payment to the General Distributor of the extent to which the non-favored Master Distributor is disfavored by his own direct purchaser, and thereby compounds the price discrimination to Master Distributors. The 10

percent override is thereby inexorably linked to the sale of products to non-favored customers (see Part XIII).

462. The 10 percent override payment to General Distributors is an indirect price discrimination in the "net" price of products sold to Masters and Generals (see Part XIII).

463. There is no cost justification or other evidence sufficient to establish that the said overrides were for services incident thereto.

464. (a) Respondents do not know which distributors are active and which are inactive (Tr. 3892). At best, they can ascertain the date of last purchase of product from Holiday Magic (Tr. 9699, 9742) or what its turnover is (Coultas-Tr. 9760).

(b) No reports are filed or required to be filed either by Masters or Generals in connection with any services allegedly performed (Alexander-Tr. 9633, 5666-67), nor do records of any kind exist to reflect the number of hours worked by a distributor (Alexander-Tr. 5666) or a distributor's sales on down through his organization (Alexander-Tr. 5667).

(c) Respondents take no action when informed that General Distributors are not in contact with Master Distributors over whom they received the 10 percent override (see Part XLII).

(See testimony of Mary Guard at Tr. 10478-10487.)

(d) General Distributors who have no Master Distributors over whom they can enjoy an override get favored purchasing status as a General (Lipscomb-Tr. 4814).

(e) Masters and Generals receive the same business training from Holiday Magic, Inc. (see XXVII and XXVIII).

(f) It is the "sponsor" who is responsible for the training of the new distributor—whether the sponsor be a General, Master or Organizer (CX 104B, M-O). For this reason, Organizers also attend Instructor General School (CX 137A, CX 163B, CX 156B, CX 49H, CX 65C, CX 146G, CX 165H, CX 505B, CX 36D.)

465. General Distributors receiving the 10 percent override are as follows: CX 2076, CX 2116, CX 2117, CX 2074, CX 2109, CX 2113.

466. Holiday Magic Distributors at all levels, *i.e.*, General, Master, Organizer and Holiday Girl, retail products directly to the consumer: CX 91Z82 (Instructor Manual):

I am sure that some of you ladies and gentlemen here longest may be Organizers, Masters and even General Distributors. However, remember that everyone in Holiday Magic retails product and must learn from the viewpoint of a Holiday Girl.

CX 91Z89: "Holiday Girl" Definition:

Any lady that sells Holiday Magic cosmetics. She could be a Retailer, Organizer, Master or General Distributor. She could be selling on routes, beauty salons or seminars. She could be full time or part time.

CX 40C - Wand - 12/68:

Approximately 50% of all Holiday Magic distributors are men and they might be more comfortable selling home care products than cosmetics.

CX 152N - Family News - 10/17/69:

We'd like all Holiday Girls to become General Distributors so that they can receive a 65% commission on every sale and buy their own cosmetics wholesale. And - each time you advance a Holiday Girl to the General position, you earn at least \$4,099. Think about it!

467. Holiday Girls and Organizers purchase their products directly from their Masters or Generals, but are indirect purchasers of Holiday Magic, Inc. with a purchasing price of 30 percent discount off retail price; see VII A; also Tr. 2435, 2450.

468. Since Masters and Generals buy the same products from Holiday Magic, Inc., and since Organizers and Holiday Girls must obtain their products directly from Masters and Generals, Holiday Girls and Organizers purchase the same products indirectly from Holiday Magic, Inc. from the Masters and Generals from whom they buy directly.

Milwaukee - CX 2081B-C (Macorano), CX 2078A-B (Boehlein's sales to Holiday Girls or Organizers)

For illustration of where Masters and Generals sold at wholesale to Holiday Girls, Organizers and retail outlets and at retail, in the Miami, Chicago and Milwaukee areas, see the attached maps. For each area, there are three maps. One entitled "Wholesale," a second entitled "Retail" and a third entitled "Residences/Places of Business."

The map entitled "Wholesale" shows where the Holiday Girls, Organizers and retail outlets of Masters and Generals sold. The map entitled "Retail" shows where the Masters and Generals themselves retailed directly to the consumer. The third map entitled "Residences/Places of Business" shows where the Masters and Generals lived and/or had their places of business, from which they conducted their Holiday Magic activities. The Miami area maps are designated A-1, A-2, and A-3, the Chicago area maps are designated B-1, B-2 and B-3 and the Milwaukee area maps are designated C-1, C-2 and C-3. A-1, B-1, and C-1 are the "Wholesale maps" for the Miami, Chicago and Milwaukee areas, respectively; A-2, B-2, and C-2 are the "Retail" maps for the Miami, Chicago and Milwaukee areas, respectively; and A-3, B-3 and C-3 are the "Residences/Places of Businesses" for the Miami, Chicago and Milwaukee areas, respectively.

For each market area, by comparing the map entitled "Wholesale" with the map entitled "Retail," it can be seen that Holiday Girls and Organizers retail in the same areas as do Masters and Generals. For example, for Miami, compare map "A-1" with map "A-2."

On each map there is a table which lists the Masters and Generals and the time periods in which each actively pursued his distributorship, either as a Master or as a General. Immediately opposite the name of each Master and General is a symbol, such as G-1, G-2, etc., for each General and M-1, M-2, etc., for each Master. These symbols appear again in the specific geographic areas in which a particular Master or General conducted his Holiday Magic sales activities. Radial arcs and lines engulfing entire areas also designate the geographic areas of business conduct of the distributors so designated.

The geographic area charts also show the specific areas in which Masters and Generals conducted their wholesale and retail activities.

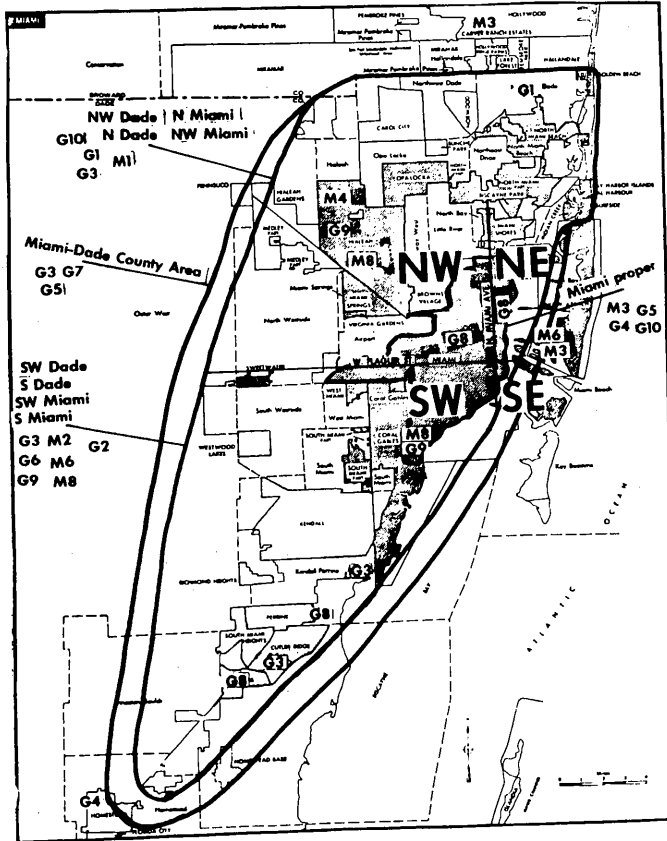
On the Milwaukee maps (C-1, C-2 and C-3), the wholesale and retail activities of Organizer Joan Mariano (O-1) depict in similar fashion her wholesale and retail sales activities.

MIAMI - DADE COUNTY AREA WHOLESALE

FLORIDA

Urbanized Areas

TIME PERIOD MAY 1966 - JULY 1968



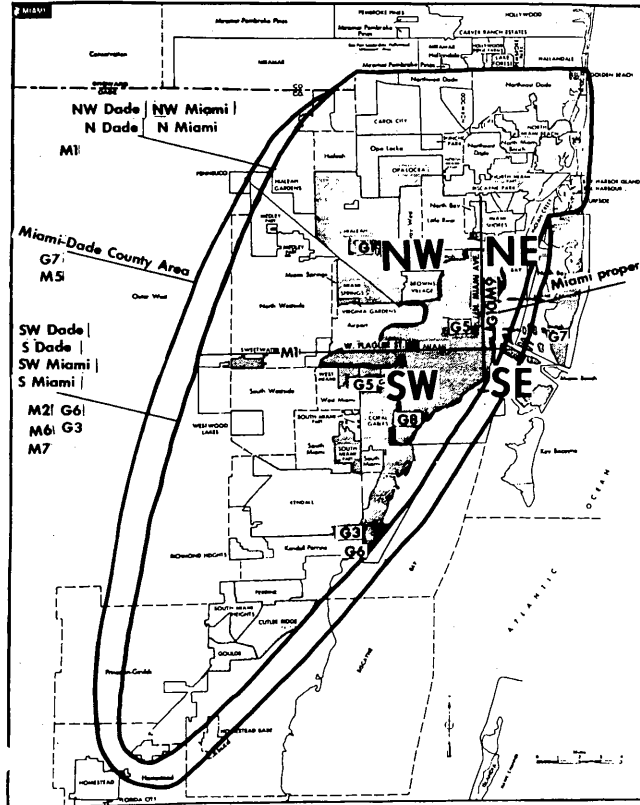
- GENERALS**
- EVERETT DUBBLEY G-1 (8/64 - END OF 67)
 - JOSEPH ROTTMAN G-2 (9/66 - 3/67)
 - RUTH BRADDOCK G-3 (1/67 - 1/68 APPROX.)
 - WADSWORTH G-4 (3/67 - 1968, 1970 APPROX.)
 - FRED FRANK G-5 (7/66 - AT LEAST UNTIL 1/71)
 - MARIE VANARDES G-6 (8/66 - MID 1967)
 - VINCENT J. FRICHEL G-7 (1/66 - 6/67)
 - JUANITA EVERSOLE G-8 (4/1967 - 10/68)
 - WILLIAM MUFF G-9 (8/56 - 5/67)
 - MURIEL EGZIZ G-10 (1/67 - AT LEAST UNTIL 7/68)
- MASTERS**
- CHARLES FORST M-1 (10/66 - 1968)
 - MYRNA SEGLER M-2 (12/66 - 5/67)
 - WILLIAM IZZARD M-3 (6/66 - 1/68)
 - MRS. STANLEY PIERCE M-4 (10/66 - 5/67)
 - THOMAS G. SHARPE, JR. M-5 (8/66 - 1/68)
 - HELEN SUTLIFF M-6 (10/66 - AT LEAST TO 3/67)
 - WILLIAM H. MUFF M-8 (6/7/66 - 8/7/66)

MIAMI - DADE COUNTY AREA RETAIL

FLORIDA

Urbanized Areas

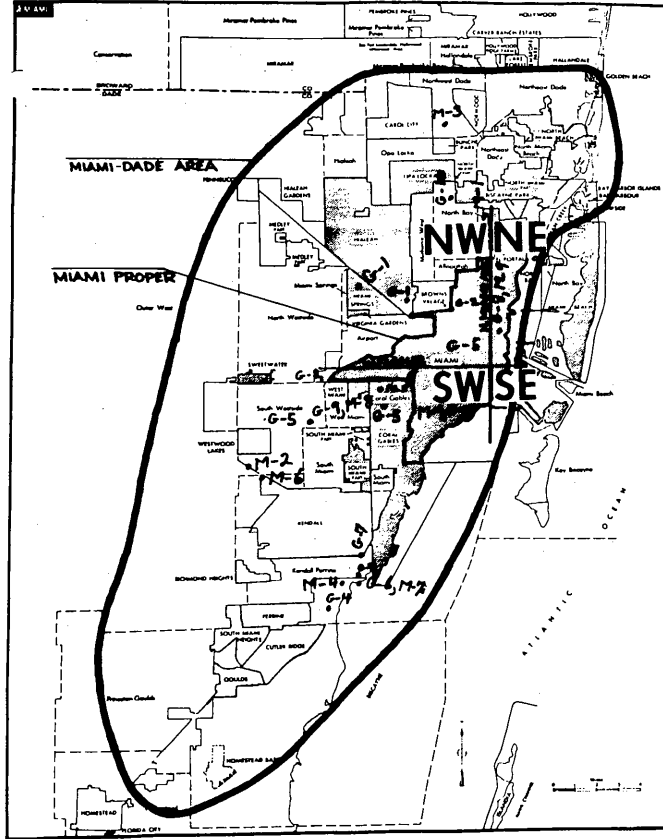
TIME PERIOD MAY 1966 - JULY 1968



- GENERAL**
- EVERETT DUDLEY G-1 (8/66 - END OF 67)
 - RUTH BEA DODGE G-2 (1/67 - 1/68 APPEAL)
 - FREDRANK G-3 (7/66 - AT LEAST UNTIL 11/71)
 - MARIE YANAROS G-6 (8/66 - MID 1967)
 - VINCENT J. FRECHTEL G-7 (1/66 - 4/67)
 - JUANITA EVERSOLE G-8 (4/19/67 - 10/68)
 - MURIEL BOIXI G-10 (2/67 - AT LEAST UNTIL 7/68)
- MASTERS**
- CHARLES FORST M-1 (10/66 - 1966)
 - MYRNA SEDLER M-2 (11/66 - 5/67)
 - THOMAS & SHARPE, JR. M-6 (5/66 - 1968)
 - HELEN SUTLIFF M-6 (10/66 - AT LEAST TO 5/67)
 - MARIE YANAROS M-7 (5/66 - 9/66)
 - JUANITA EVERSOLE M-9 (2/18/67 - 4/19/67)

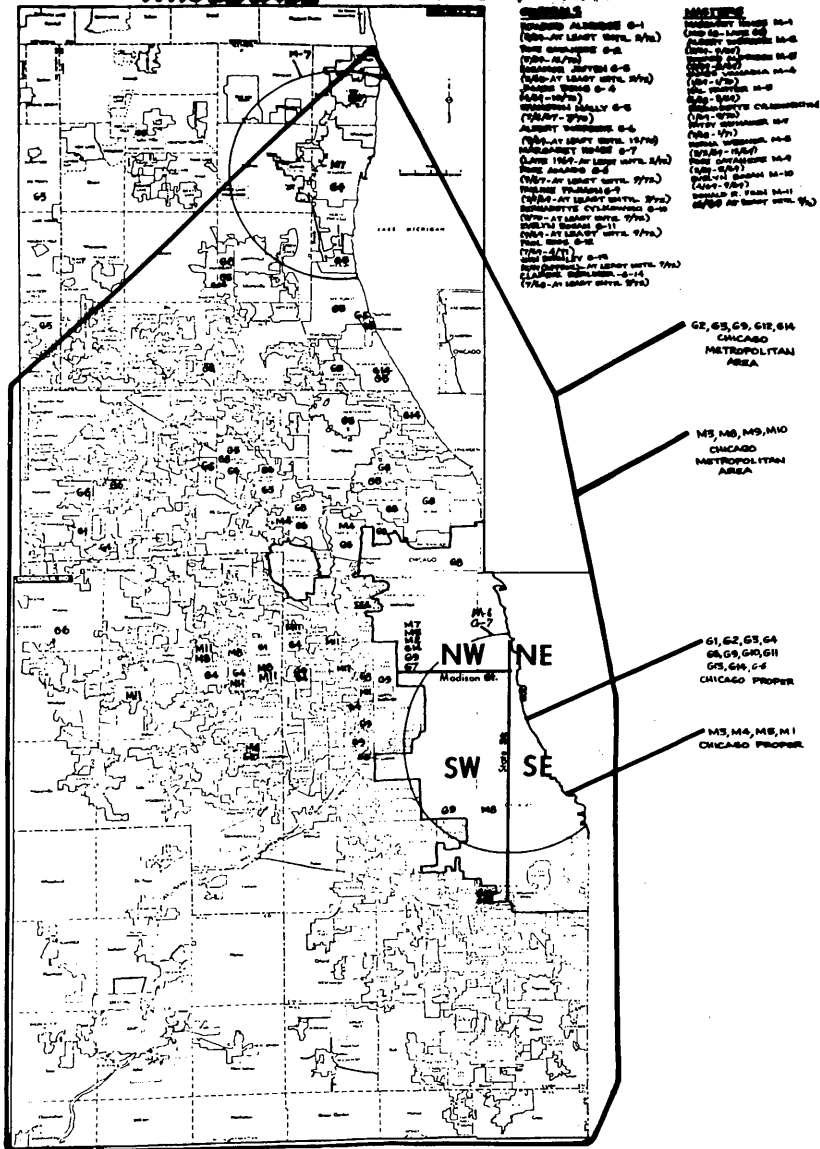
MIAMI-DADE COUNTY AREA

FLORIDA
 Urbanized Areas
RESIDENCES/PLACES OF BUSINESS
TIME PERIOD - 5/66-7/68



- MINERALS**
- EVERETT DUDLEY G-1 (8/66 - END OF 67)
 - JOSEPH ROTHMAN G-2 (5/66 - 5/67)
 - RUTH BRADDOCK G-3 (1/67 - 1/68 APPROX.)
 - NAOMI FAWBUSH G-4 (5/67 - 1969, 1970 APPROX.)
 - FRED FEARN G-5 (7/64 - AT LEAST UNTIL 11/71)
 - MARIE VANARAS G-6 (5/66 - MID 1967)
 - VINCENT J. FREITEL G-7 (1/66 - 4/67)
 - JUANITA EVERSOLE G-8 (4/19/67 - 10/68)
 - WILLIAM HUFF G-9 (8/3/66 - 5/67)
 - MURIEL EGIZI G-10 (1/67 - AT LEAST UNTIL 7/68)
- MASTERS**
- CHARLES ROSEY M-1 (10/68 - 1968)
 - MYRNA SEDLER M-2 (11/66 - 6/67)
 - WILLIAM TIZARD M-3 (6/66 - 1/68)
 - MRS. STANLEY PIERCE M-4 (10/66 - 6/67)
 - THOMAS B. SHARPE, JR. M-5 (5/66 - 1966)
 - HELEN SUTLIF M-6 (10/66 - AT LEAST TO 5/67)
 - MARIE VANARAS M-7 (5/66 - 8/66)
 - WILLIAM H. HUFF M-8 (6/25/66 - 8/1/66)
 - JUANITA EVERSOLE M-9 (1/19/67 - 4/19/67)

WHOLESALE TIME PERIOD 6/28/70



- GENERAL**
 CHICAGO ALLEGED 0-1
 (1967-JULY 1970)
 TIME PERIOD 0-2
 (1967-JULY 1970)
 TIME PERIOD 0-3
 (1967-JULY 1970)
 TIME PERIOD 0-4
 (1967-JULY 1970)
 TIME PERIOD 0-5
 (1967-JULY 1970)
 TIME PERIOD 0-6
 (1967-JULY 1970)
 TIME PERIOD 0-7
 (1967-JULY 1970)
 TIME PERIOD 0-8
 (1967-JULY 1970)
 TIME PERIOD 0-9
 (1967-JULY 1970)
 TIME PERIOD 0-10
 (1967-JULY 1970)
 TIME PERIOD 0-11
 (1967-JULY 1970)
 TIME PERIOD 0-12
 (1967-JULY 1970)
 TIME PERIOD 0-13
 (1967-JULY 1970)
 TIME PERIOD 0-14
 (1967-JULY 1970)
 TIME PERIOD 0-15
 (1967-JULY 1970)

- G2, G3, G9, G10, G14
 CHICAGO
 METROPOLITAN
 AREA
- M3, M4, M9, M10
 CHICAGO
 METROPOLITAN
 AREA
- G1, G2, G3, G4
 G5, G9, G10, G11
 G13, G14, G-5
 CHICAGO PROPER
- M3, M4, M5, M1
 CHICAGO PROPER

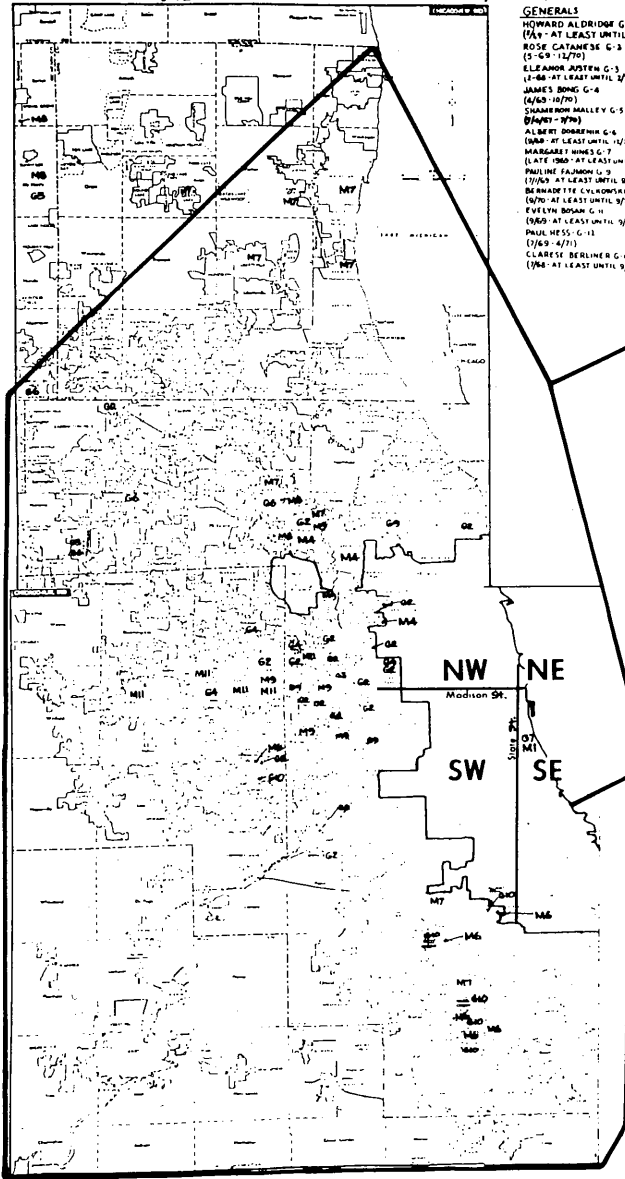
ILLINOIS CHICAGO METROPOLITAN AREA

B-2

Urbanized Areas

RETAIL

TIME PERIOD - 6/68-12/70

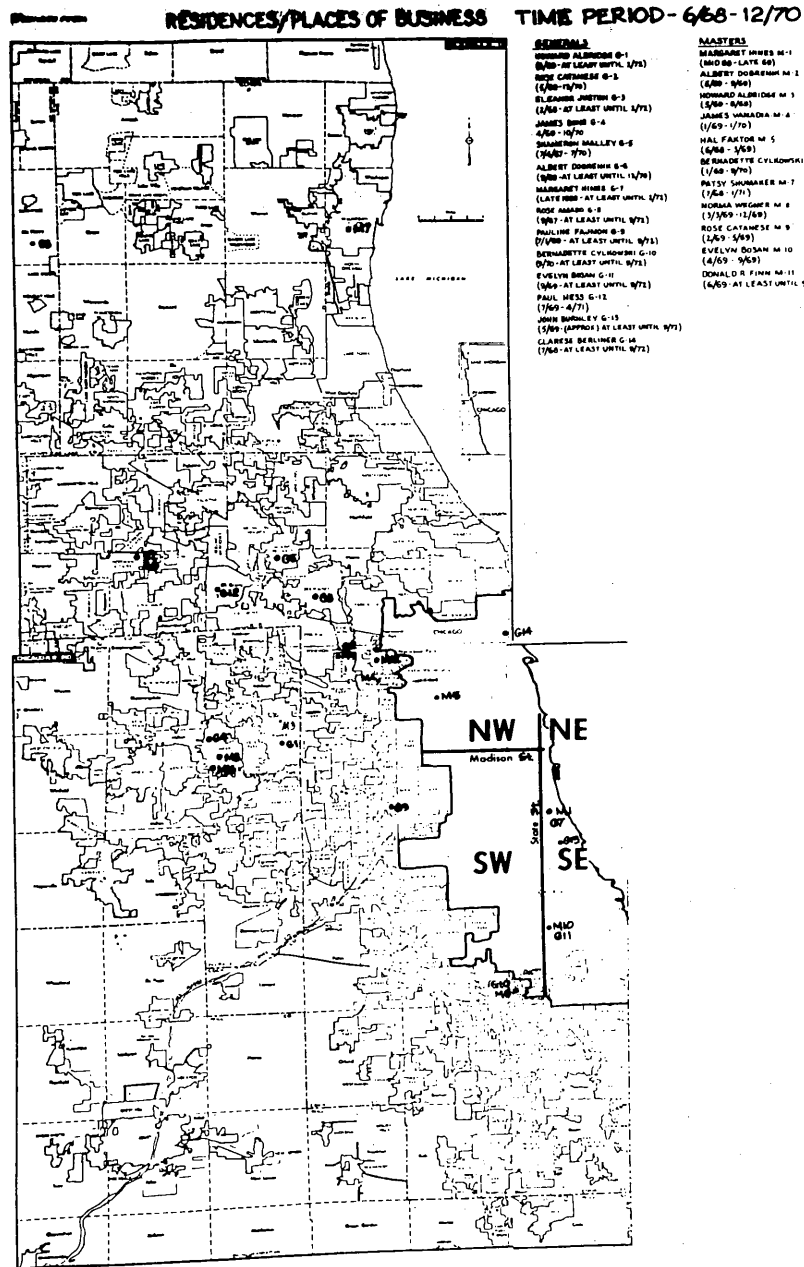


- GENERALS**
- HOWARD ALDRIDGE G-1 (1/49 - AT LEAST UNTIL 2/72)
 - ROSE CATANESE G-2 (5 '69 - 12/70)
 - ELEANOR ASTEN G-3 (1-68 - AT LEAST UNTIL 2/72)
 - JAMES BONE G-4 (4/65 - 10/70)
 - SHARON MALLEY G-5 (5/69 - 7/70)
 - ALBERT BOBENHA G-6 (8/69 - AT LEAST UNTIL 12/70)
 - MARGARET HINES G-7 (LATE 1960 - AT LEAST UNTIL 1/72)
 - PAULINE TALMON G-8 (1/68 - AT LEAST UNTIL 9/71)
 - BEATRICE CYLWORSKI G-9 (6/70 - AT LEAST UNTIL 9/71)
 - EVELYN BOSAN G-11 (8/69 - AT LEAST UNTIL 9/71)
 - PAUL HESS G-12 (7/69 - 4/71)
 - CLARESE BERLINER G-14 (7/64 - AT LEAST UNTIL 9/71)

- MASTERS**
- MARGARET HINES M-1 (1968 - LATE 68)
 - JAMES HARADA M-2 (1/68 - 1/70)
 - BEATRICE CYLWORSKI M-3 (1/69 9/70)
 - PATLY HONNAPER M-7 (7/68 1/71)
 - NORMA WEGNER M-8 (1/59 - 1/69)
 - BOYD CATANESE M-9 (F.A. 7/69)

G5, G2 CHICAGO METROPOLITAN AREA

G2, G3, G4, G7 G10, G11, G14 M1, M2, M10, M11 CHICAGO PROPER



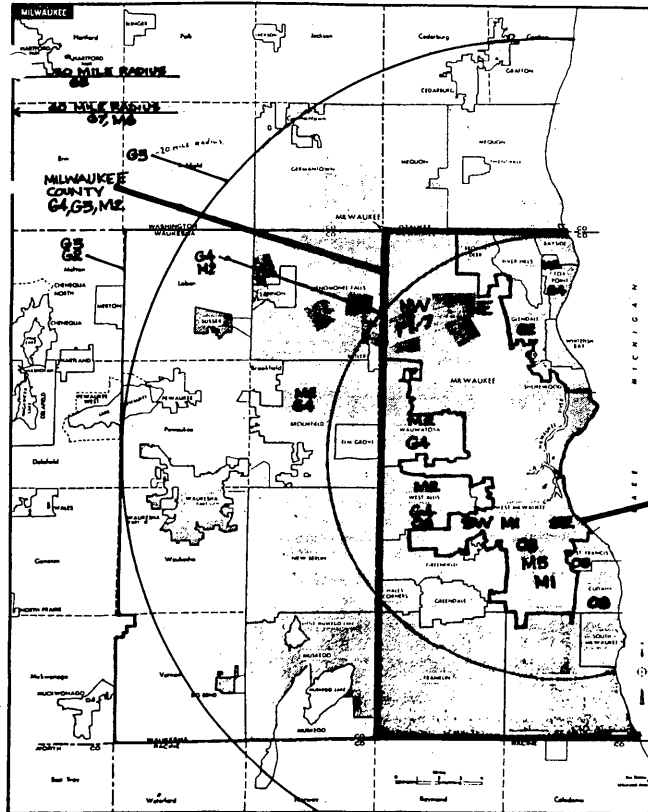
MILWAUKEE METROPOLITAN AREA WHOLESALE

C-1

WISCONSIN

Urbanized Areas

TIME PERIOD - 3/70-1/18/71



- GENERALS**
 DARYL TOFFNER G-1
 (5/31/70 - AT LEAST UNTIL 12/70)
 NANCY BOEMELIN G-2
 (1/81 - AT LEAST UNTIL 12/70)
 ROBERT L. RICHMOND G-3
 (5/24/70 - AT LEAST UNTIL 1/72)
 ROSEMARY BARTON G-4
 (4/70 - 1/8/71)
 DALE A. SCHMIDT G-5
 (1/16/70 - 1/71)
 JERRY CEBESBAUM G-6
 (1/16/70 - AT LEAST UNTIL 12/70)
 RICHARD ANDERT G-7
 (7/70 - BEYOND 1/18/71)
- MASTERS**
 CAROLYN PRAH M-1
 (10/70 - MID 1/71)
 EDITH L. DALTON M-2
 (8/70 - 4/70)
 SHARON FISHER M-3
 (7/70/70 - 2-71)
 FERDINAND FEISS M-4
 (1/70 - 8/71)
 EARL BAFFOLD M-5
 (19/70 - 12/70)
 RICHARD ANDERT M-6
 (4/1/70 - 7/70)
 CHRISTINE JANSSEN M-7
 (5/70 - 1/71)
- ORGANIZER**
 JOAN MATRANO O-8
 (4/70 - 9/70)

G1, G2, O8
MILWAUKEE
PROPER

Initial Decision

84 F.T.C.

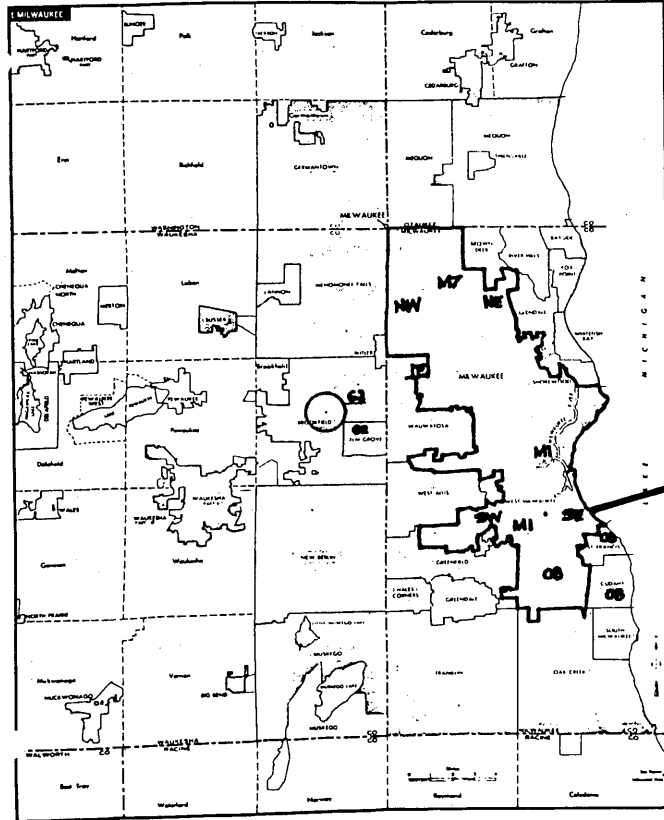
MILWAUKEE METROPOLITAN AREA RETAIL

C-2

WISCONSIN

Urbanized Areas

TIME PERIOD-3/70-1/18/71



- GENERALS**
 NANCY BOEHLIN G-2
 (11/69 - AT LEAST UNTIL 1/70)
 KENNETH BELTON G-4
 (6/70 - 1/18/71)
 RICHARD ANDERT G-7
 (3/70 - BEYOND 1/18/71)
- MASTERS**
 CAROLINE FRAM M-1
 (10/70 - MID 1/71)
 SHARON FISCHER M-3
 (1/30/70 - 2/71)
 RICHARD ANDERT M-4
 (4/1/70 - 7/70)
 CHRISTINE JANSSEN M-7
 (5/70 - 1/71)
- ORGANIZER**
 JOAN NAJDRANO O-8
 (4/70 - 9/70)

MILWAUKEE PROPER
G4, M3

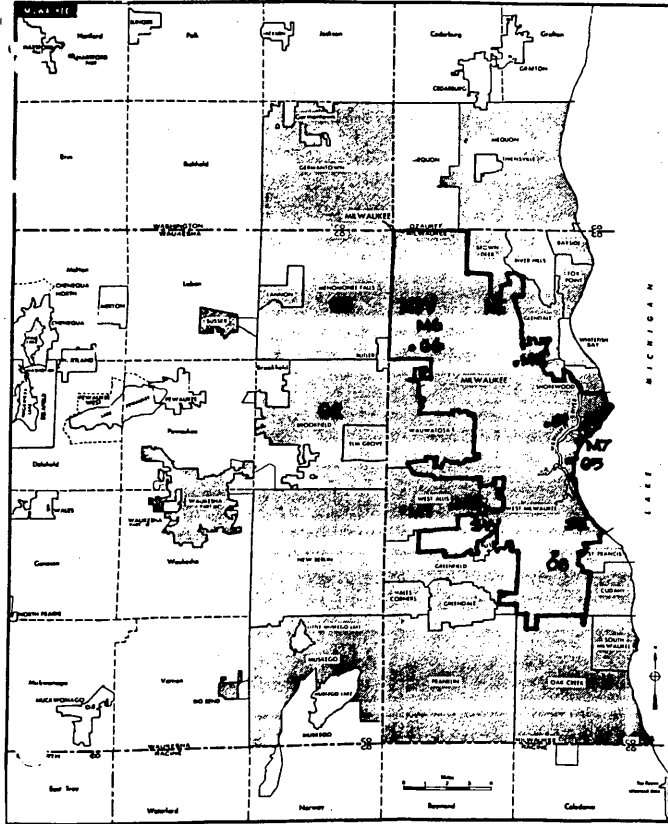
MILWAUKEE METROPOLITAN AREA RESIDENCES/PLACES OF BUSINESS

C-3

WISCONSIN

Urbanized Areas

TIME PERIOD-3/70-1/18/71



GENERALS
 BARRY TOEFFER G-1
 (5/2/70-AT LEAST UNTIL 12/70)
 MARCY BOHELEN G-2
 (1/18/70-AT LEAST UNTIL 12/70)
 ROBERT LIPSCOMB G-3
 (5/2/69-AT LEAST UNTIL 1/71)
 DALE A. SCHMIDT G-5
 (1/18/70-1/71)
 JERRY GEDEBAUM G-6
 (1/18/70-AT LEAST UNTIL 12/70)
 KENNETH DELTON G-4
 (4/70-1/18/71)

MASTERS
 CAROLYN PRAN M-1
 (10/70-MID 71)
 SHARON FISCHER M-3
 (7/29/70-2/71)
 EARL SAFFOLD M-5
 (10/70-12/70)
 RICHARD ANDERT M-6
 (4/1/70-7/70)
 CHRISTINE JANSSEN M-7
 (5/70-1/71)

ORGANIZER
 JOANI MAIORANO O-8
 (4/70-9/70)

XLVII. Holiday Magic's Lack of Information

469. Holiday Magic, Inc. claims it does not know what the turnover ratio is of its Holiday Girls (Coultas-Tr. 9758).

470. Holiday Magic, Inc. does not know if it has a greater or lesser turnover than the Avon Company (Coultas-Tr. 9759).

471. Holiday Magic, Inc. has no record of the turnover of its Master Distributors and General Distributors (Coultas-Tr. 8760).

472. Al Pangerl, president of Holiday Magic, Inc., and the number one producer for three years, never heard of a single Master Distributor who earned \$72,000 a year, as represented to be reasonable in the Opportunity Meeting scripts (Pangerl-Tr. 9613).

473. Al Pangerl, president of Holiday Magic, Inc., and the number one producer for three years, never heard of a single General Distributor, including himself, who made \$49,000 a year by attending one Opportunity Meeting a month, represented as being reasonable in the Holiday Magic Opportunity Meetings (Pangerl-Tr. 9615).

474. General Distributors do not report to Holiday Magic, Inc. on the inventory of product that actually reaches the consumer (Pangerl-Tr. 9633).

475. Holiday Magic, Inc. never informed its distributors at what levels sales had to be or in what amounts consumer purchases should be in relation to purchases (Pangerl-Tr. 9635).

476. Holiday Magic's secretary and comptroller doesn't know the relation of inventory to deposits on future sales of Holiday Magic (Lipska-Tr. 10410).

477. Holiday Magic, Inc. doesn't know the effect of the advertising that they do (Lipska-Tr. 10396).

478. Holiday Magic, Inc. has no way of determining whether Generals are working with the Masters over whom they receive the 10 percent override (Guard-Tr. 10478-10487; Alexander-Tr. 5530-5531).

479. Holiday Magic, Inc. doesn't know what percentage of its business is to Master Distributors and what percentage of its business is to General Distributors (Lipska-Tr. 9257).

480. Holiday Magic, Inc. and its vice president of sales do not know how many active Holiday Girls or Masters there are in the country (Habuary-Tr. 6106).

481. Holiday Magic, Inc. doesn't know what percentage of its override payments are at the 10 percent and the 1 percent levels (Tr. 9258).

482. Holiday Magic, Inc. doesn't know and keeps no records of the retail sales of its products at the consumer level (Tr. 10281-10282, 10396).

XLVIII. Holiday Magic's Program in Operation—Examples of
Exploitation and Deception

483. Hereinafter set forth are excerpts of the testimony of four distributor witnesses with regard to the specific methods used to induce participation in the Holiday Magic program. Regardless of whether the approach is uniformly typical in every instance, the entire operation of the program as heretofore found is conducive to this approach of exploitation and deception for which respondents cannot avoid direct or indirect responsibility.

Marvin McKinnon (Tr. 4055-4069):

So I walked in there and I sat down. This man bounced up on the stage and he started to talk about how to introduce yourself to people, and in introducing you into the program, and how to make money.

*** So anyway, he spoke for a long time, like an hour and a half or so and then they had a break and the second half was a different man.

*** And then this guy he gave all the ways of making the money. The first guy gave a talk about the company, and the second guy gave the spiel on making the money. Then I was enlightened as to what I was seeing. I was seeing a cosmetic company and how to make money.

*** On the way home, naturally, I just couldn't help saying, "Jesus, it looks unreal. How can it be possible? Gee, if a guy could just make half that. It really looks easy."

*** We went back to the meeting with four other guys. We bounced into the room and we hit the lights and on comes this movie about this man Patrick, and the success, it is there for you, and gee, it was unbelievable.

So then they got this guy up there, Tony Milano, he grabs a piece of chalk, he goes bouncing up on the stage, he says, "Now, I am going to show you how to make money." He gets up there and puts a bunch of circles up there. He says, "This is you," and he looks right at me.

*** I peddled milk up and down the streets with him. He said this is my bag, he is talking right to me. After he gets done I see where I can make a hundred thousand dollars a year. I see Tony, he must be making it to give up his milk route.

*** After the meeting was over, you know, I just admired that guy. I walked up to him out in the hall. I said, "Tony, I didn't think you could do it. How did you learn all of that?" He says, "It just comes to you naturally after you learn it." I said, "Boy, I'd like to be able to do that." He says, "You can."

*** so he says, "Are you going to come into the program?" I said, "If it is anything what it looks like, how can I stay away?" I said, "Jeez, it looks great."

*** I said, "Yes, I am going to come into the program." He says, "Come in under me." I said, "I am going to be in a bind here. Ethically, to be real couth about it, I should come in under the guy that brought me down." He said, "Well, do what you want. I can do you a hell of a lot more good than he can do you. I have been in it for four years."

*** I gave him the 2,500 bucks and the next day I get a phone call. He said, "Mac, how would you like to be a general distributor?" So I am naive about this whole program. All I can see is a whole lot of money. So he says to me, "How would you like to be a general distributor?" I said, "Jeez, Tony, I didn't think you thought that much of me," because I knew if you got to be a general you had it made. He said, "Yes, all you got to do is bring in another 2,500 bucks." I said, "Jeez, how in the hell am I going to do it?" He said, "Don't

Initial Decision

84 F.T.C.

worry about that. You will get your money back in a short while." I said, "Oh, boy, I don't know how I can cut that." "Get the 2,500 bucks, come down, I will make you a general."

Q. Did you give the second 2,500 to Tony Milano?

A. Right.

Q. Did you become a general distributor?

A. Right then and there. I was a general. As far as I was concerned, I was a general.

He went downstairs, he punched out my name on a little round HM bag. I got it at home yet. I paid 5,000 bucks for that baby, made out of plastic.

Ronald McCauley (Tr. 3896-3981):

When he approached me, he asked me how I was doing. I told him I was doing fine. He said he had a great opportunity and would like me to come to an opportunity meeting where I could make fabulous sums of money in a wholesale franchise business, and I told him that I am not interested in a franchise business at the time.

So the following weekend he approached me again and said that the company he was affiliated with, Holiday Magic, it's a chemical company, and they deal in wholesale distributorships in cosmetics.

*** I went to the Holiday Magic council, *** in Southland, Michigan. I went to the basement of the Chrysler Financial Building where they had set up an opportunity room, and they had a cosmetic room and a cafeteria, and on the second floor they had the council offices. When I went to the opportunity meeting, there was a lot of commotion around the door to get into the room and a large table where you had to register. Then after you registered you were asked to go into the room. I went into the room where I would estimate there was maybe 200, 300 people there.

There were Holiday Magic banners which were hung from the walls and a picture of William Penn Patrick *** [The banners said] Holiday Magic Cosmetics and welcome to Holiday Magic. These were also displayed in the opportunity room.

I was inside the room, and I was seated along with Tom Henderson at my side. The room was quite crowded, and people were standing. At the time I didn't know the gentleman, but it turned out to be Lance Manning, who was assistant to Paul Schultz, the director of the council, got up and asked "Will all generals and masters leave the room so we have enough seats for our guests?" The generals and masters got up and left the room, and then Lance got up again and said, "Would all organizers please leave the room for seats for our guests?" At this time Tom Henderson said, "You have to excuse me. It's like this all the time. I have to leave. Stay seated. When the opportunity meeting is over, I will come back." I remained seated, and shortly after a woman got up 23, 24 years of age. Her name was Kathy, I don't know her last name. She was one of the local [Master] distributors at the council.

She used an attention getter like "Hi, everybody." "Hi, my name is Kathy. I am with Holiday Magic. What you are about to see tonight is two films, one entitled 'The Holiday Magic Story' and the other one is a film on the opportunity of coming into Holiday Magic." So she got off the podium, the lights went out, and the film started.

After the two films were over, she then got up and introduced a gentleman by the name of Tony Milano, referred to as the poor milkman. He had a milk route, went to Holiday Magic, and became very successful in his attempts with Holiday Magic.

So he started his chalk talk on basics, the different financial levels that you could buy into this Holiday Magic and the different ways of recruiting people, like a Holiday Girl, organizer, or bringing other masters in, then becoming a general, promoting masters to generals, and your overriding commissions at the time.

* * * * *

After Tony Milano finished his talk, he said "Thank you very much. At this time I will turn you over to your sponsors." The door flew open, and they all came running into the room.

* * * * *

I had to literally chase Tom Henderson around for about three weeks just to get my [organizer] one-pack.

Then after I got my one pack, he proceeded to ask me about becoming a master distributor. I told him that I could do it by getting loans and that, but presently I want to work as an organizer to get my training, supposedly. So he sent me to these classes, business training they called it, which was exactly the same things as the film. It was a manual put out, step by step, on exactly what this film was about, the four positions of Holiday Magic, the financial levels.

* * * * *

[a week later] we went back into the council in the basement again, * * * We sat in at the opportunity meeting and related what we learned over the week-end to the film and the different closing techniques that the people were using in the room at that time.

* * * * *

As I stated before, we talked about the four levels of Holiday Magic and the monies that were involved, how to make a diagram properly, to use the closeout techniques, prices bold circle marks.

* * * * *

The diagram is four levels of Holiday Magic starting with the Holiday Girl, organizer—

* * * * *

The technique of using a cloud-type of line around the cost of the diagram had a psychological effect on the person so it was told to me by Dale Manor and Paul Schultz, that it has a tendency to draw away from the diagram and thus remove the cost away from the person's mind where he will stay at the bold marks on the paper.

* * * * *

Then in March, a date unknown, I did, in fact, meet the Sales Acceleration team, Terry McVey, Kathy Francis, Larry Halt, and Bill Dempsey.

* * * * *

Kathy Francis came in, she talked to me. She said, "Ron, I understand that you want to become a Master." I said, "Yes." She said "I know you will be very pleased, that you can do the job. The two other fellows that you will meet are highly successful. They are very dynamic, and you will enjoy the group."

Kathy took me into another room, which was on the second floor of the Chrysler Financial Building, the council itself, which Larry Halt was in there. He told me to sit down, and the door was shut behind me so Larry and I were in there by ourselves.

We proceeded to discuss the reason, first of all, why do I want to become a master distributor. "Because," I told him, "I was not making great sums of money at an organizer level, and I wanted to become a master where I could make large sums of money."

* * * * *

Mr. Halt said, "I don't think you have got the guts to do it," quote, unquote, and I said, "I believe I can do it." I asked him, "What makes you think that I can't? He said, "If I tell you to walk through this wall, would you do it?" I said, "Why should I?" He said because I done it, and for that reason you should do it.

So he said, "If I tell you its good, you will do it?" I said, "All right, if this is the conclusion

Initial Decision

84 F.T.C.

you drew from it," because I felt that he knew what he was talking about, and I didn't have any knowledge of exactly what the Sales Acceleration team was about. All I know is I had to pay attention.

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Then he smiled, and he said, "Fine, let's go see Bill Dempsey."

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I walked in and he said, "Sit down" rather roughly. So I sat down.

* * * He said, "You know, you have got to keep the image of Holiday Magic up." I said, "I will do my best to keep the image of Holiday Magic up." He said, "You have got to be enthusiastic at all times." I said, "I will be enthusiastic at all times." He said, "The way you dress, the car you drive, all reflect on Holiday Magic." I said, "In what way do you mean?" He said, "The suits that you wear, exactly, the suit you are wearing here. Yes, look at the suit you wear valued against what I wear." I said, "Yes, well, what's wrong with this here?" He said, "It's just not the image of Holiday Magic," the suit that I was wearing. He said, "What type of car are you driving?" I said, "Well, I am driving a 1968 Bellaire, Chevrolet Bellaire." He sort of made an expression with his face as if to say, is that all, or it's pretty cheap. He said, "What type of car would you like to own?" I said, "I would like to own a new 1969 Corvette, of course." He said, "Why don't you go out and get one? With Holiday Magic, with all the dough you make, you will be able to own any car that you want whether it be a Cadillac or a Corvette."

He said, "Will you get that \$2500?" I said, "Yes, I will get the \$2,500 to become a Master." He took two large stamps on his desk, one said "accepted" and one said "rejected." He took the "accepted" one and stamped this paper. Then I was asked to leave the room.

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I went to Manufacturers Bank. They wouldn't give me the loan because I had the other outstanding loan when I went organizer.

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I will get the money within two or three days and have it over to you." They said, "Make sure it is payable to Holiday Magic, Inc., in a cashier's check."

The question that was posed to me [by Dale Manor] is now that you became a master, how soon do you think you could get your \$2,500 to go general. My reply was, "As soon as I pay off my debts."

* * * * *

He stated that I could go out by asking my parents to mortgage their home, cash in my life insurance policies, sell cars, sell my car, dispose of any other properties that I may own, going out and getting, contacting so many people, getting additional money from them. These were the avenues that he suggested.

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My response was, again, I feel that I will not, I cannot do this until I pay off the debts that I already owe.

* * * * *

Bill Dempsey and Fred Pape used the large sums of money approach as a closing technique, as an example [in teaching how to close prospects].

This is what they said. Carry large dollar bills in your pockets, hundreds, fifties, and when you approach somebody, let's say, on the street and you know them, you would take out your wallet, like so (indicating), and you would have the money, say, in your wallet with the large bills showing, and your business cards like so (indicating), so it was readily

available. He would pull out his business cards and hand it to him and say, "I am in the franchise business. Why don't you give me a call?" By using this, it is an attention getter, to quote what they said.

* * * * *

The other one is stopping your car in a, on the road and really blocking traffic, as they would say, you see somebody on the curb, again an attention getter, have them get into the car or something. Getting a tape deck put into your car and put a sales orientation tape in it. As you drive to the council meeting, you play this and the person would hear it.

This is what they were talking about and how to overcome objections or boomerang the question back or the suggestive nodding of the head.

I told them that I couldn't even pay for the debts incurred now to become a master, let alone get another \$2,500 to go general. They posed that old question, "if your life depended on a \$5,000 operation, would you, in fact, get this \$5,000?" I said, "Yes." They said, "Then, believe me, your future depends on this. You go out and get the \$2,500 to go general."

I met with them one week later. They gave me an alternative of one week or I would be out of Holiday Magic.

Jane McCrory (Tr. 1080-1136):

During the month of August, 1965 opportunity meetings were being presented at the Eugene Hotel * * * There was a large blackboard. There was a canned speech of the opportunity meeting presented. There was a film presented. There was an opportunity to use the make-up. And then there was a coffee time when we could sit about a table * * * and * * * ask additional questions.

* * * All four positions of the Holiday Magic organization were presented. A Holiday Girl was told and explained. That was the lowest position of Holiday Magic. The Holiday Girl paid \$31 for her kit at that time and would earn a thirty per cent commission for selling the cosmetic.

* * * The next position was the Organizer, that cost \$60 and the Organizer had the right to hire Holiday Girls to work under him. If he had a good Holiday Girl and she was able to sell a lot of cosmetics, he, of course, got a percentage of that.

The next line was the mastership and a master could hire both organizers and Holiday Girls. The master also had a right to buy directly from the company at a 55 percent discount.

We all wanted to become a general, then we could buy the cosmetics at a 65% discount. The general, of course, bought directly from the company, and they, in turn, got new masters, new organizers, and new Holiday Girls. And the way that a person could make money was by bringing in new masters and new generals, this was the way. And to become a general, you had to replace yourself as a master, you had to bring in a new master before you could become a general.

This was the way I had hoped to become a wealthy woman. I never wanted to retail cosmetics. I hoped that I could hire enough organizers and other people under me that there would be enough turnover in the cosmetic business that I would never have to retail it.

* * * In order to become a General, one had already, one was already a master, they had already put \$2,500 into the company. When they wished to become a general, they had to obtain another master to replace themselves. They had to put in an additional \$2,500.

* * * * *

Q. How did you expect to make money?

A. Because of bringing in other masters and creating a line for myself * * * You got a cut from everyone, you see, that was underneath your own line * * * And those above me got a cut from everyone who was under me also, so the top person was just always getting money.

* * * I met Mr. Bailey several times * * * One thing in particular that I remember that he did, there was a large group attending this opportunity meeting * * * and I had taken several people, and after Mr. Bailey got up and told what a wonderful opportunity Holiday Magic was he pulled out a huge roll of currency out of his pants' pocket and ended his speech this way, walking down the aisle and stating, * * * "If you people are contented to make an average salary such as you are now when you can make money like this," and then showing this huge roll of bills, "why, then be that satisfied, but for me, I want to make this kind of money." So it was certainly, and I've never forgotten that, and I thought, well, that's just about, well, what he was trying to say, well, you're peons, and look at me, I am such a big person. I thought it was disgusting and out of order and it was just one more little thing that I disliked about Holiday Magic to have executives of that type that would do such a trick.

* * * the cosmetic is very good, but the program was what interested me. They had the idea that you could make money off of other people's efforts, which at the time was very interesting. To me now it is very morally wrong to make money in this way. I am ashamed that I ever even thought of it in the first place or would allow myself to do it, but at the time I would admit that I was as guilty of it as anybody else. I thought it was a wonderful opportunity to make a lot of money for myself, and I'd never do it again.

George Shephard (Tr. 1905-1950):

We had two or three meetings and created a lot of interest in Eugene immediately, and Fred was there and gave, Fred Pape was there and gave opportunity meetings, gave two or three, as I remember, the first week. He came back to San Francisco and went back the following week, I believe it was, when we became general distributors, and we had two people who were going to master at that time. And the way the program works, you have to replace yourself to be a general distributor, and then the next one either goes to the general or your general and keeps him. And I don't remember what the percentages were, but it is beneficial to go general if you are going to have an organization of any size.

* * * We brought Pearson in, the number one reason was to give opportunity meetings, because I was associated in other business with him. The way it wound up was that Pat would do the training after we signed them up. Dave would give the opportunity meeting, and I would work on signing him up. The only opportunity meetings I ever gave was when I went out of town or was by myself, or was put in a position where I had to give an opportunity meeting.

* * * We had opportunity meetings in Eugene, and we had, through the direction of Mr. Pape, set up offices and opportunity meetings at that Eugene hotel, and that's where we did all of our training and our recruiting, our organizing, everything was done at the Eugene Hotel. We had offices on the second floor, and we held all of our meetings in the meeting rooms downstairs.

The people in the organization, on a whole, were not successful in the program, and I could not go out and look these people in the eye and keep trying to work with them because there were many problems. They were not as successful as they thought they were going to be, and we had lots of problems in Eugene with organizers and Holiday Girls because of the size of our organization, and we just had a lot of problems in our office.

Well, the first problem that came up immediately, and we kind of ironed that out, but it became more of a problem when outsiders would come into the territory, and I mean outsiders like if someone, say, in Seattle came down and signed someone up in Eugene, and we were not aware of it, then, first of all, we had problems immediately with the beauty shops * * *

Say we had probably fifteen people at our first meeting, and by the end of the week when we gave meetings, during the week, that first week, say, we had twenty-five or thirty people in the organization, and they were all out calling on the twenty-five or thirty beauty shops, and we got complaints and calls from this, and so we ironed this problem out right away and we deleted that from our program, except they still read it in the book, but we had other problems.

* * * A good example would be that a person by the name of Hackett from San Francisco signed up some of his relatives up in Eugene, and they went out and called on these beauty shops, like it says you can, and then again these beauty shops called us and said, "look, we told you not to call on us anymore," not that some of them weren't already taking the product, they just got tired of all the different salesmen coming in, and then towards the end we had at one time about a hundred and forty-five organizers, because there was that many at a training meeting that we had at the Eugene Hotel, and we had a population of I think around 75,000 at that time, and we had problems recruiting because of the amount of people. They would see this amount of people, and I think this is the reason people like my brother went to Montreal, and Dave Shulda, for instance, another example on that, Dave Shulda and Dick Tarlton, they would not master until they got all of their affairs in shape, so they would go to Hartford, Connecticut.

Q. You mentioned you had 145 organizers. Do you know where these organizers were operating?

A. Well, most of them were in the Eugene area. It was a training meeting that we had in Eugene. I say organizers, that's the people that were at that particular training session, it could be some master distributors there, general distributors and organizers. There were no Holiday girls there, as such.

* * * * *

I was their general distributor, and I knew how much they were buying, so I knew that they couldn't make a living at it, and so many people are unable to recruit, well, some people can recruit and some can't, but they looked at our organization, which was big, and they thought we were very successful because of the way we portrayed it, which after a while they thought was deceiving and all of these things together just made it a bad situation for me to go out and talk to somebody, because a lot of them were my friends.

We set up our offices in the hotel, and we put on every air that we could of being successful, which wasn't necessary, because we were signing a lot of people and we were rotating a lot of money, you see. And other people just were not capable, I only knew, at that time, three or four other people in Holiday Magic that had an organization that was turning that kind of money, but yet you portrayed the idea that this was possible, which it is possible.

* * * * *

Well, in six months, from March 1st to October 31st, our gross sales or gross income was \$52,000. The net on that figure was sixty, and so what I am saying is we turned a lot of money, but it didn't stick because of rent at the hotel that was almost eighteen hundred dollars, for our offices alone, not including the rooms downstairs.

HEARING EXAMINER BUTTLE: How many people did you have in your organization?

THE WITNESS: About 45 masters and eight or nine generals. I am not real sure.

CONCLUSIONS

I. Evidentiary and Legal Evaluation of the Inherent Nature of the Marketing Plan under Counts I and II.

The evidence established by complaint counsel and in accordance with the findings herein, indicates conclusively that initially and thereafter the respondent Holiday Magic's program emotionally impressed and lured a substantial number of unsuspecting participants into believing that efforts at unlimited recruiting of distributors horizontally as well as vertically without regard to product market flow to the consumer level consistent with the number of distributorships would afford bountiful wealth if they were sufficiently inspired, motivated and explicitly adhered to the tenets of the program prescribed by Holiday Magic.

It was true that some participants, particularly after the lure was moderated in a slight degree, subsequent to Federal Trade Commission investigation, entered the program less ambitiously either full or part time and were satisfied with a profit return of less dimensions than appears to have been presented. Nevertheless, this does not justify a marketing device similar to a lottery inherently deceptive regardless of the satisfaction of some participants with the representations and their results in the program participation. Such satisfaction is not an issue. In fact Holiday Magic's unconscionable program of motivation appears to have been geared to emotionally stimulate and deceive many participants into believing they must acquire a mental attitude of unquestioned adherence and satisfaction with the so-called marketing plan. Some, as a result thereof without apparent justification, testified they were satisfied with their results in relation to the effort they expended. Others recognized the deception because of their admitted failure and testified to the contrary. It is apparent, therefore, that what such witnesses testified to is less significant probatively than a reasonable interpretation of every facet of the entire plan in operation and representations made in its furtherance as documented. This is perhaps a laborious method of evidentiary evaluation. Of the most importance, however, is what the plan is and not how witnesses have characterized it. For example some complaint counsel witnesses conclude the plan to be a "head hunting" rather than a marketing device and respondents' experts conclude the program is a "valid marketing plan." Neither conclusion is particularly enlightening in resolving the issue of the plan's precise nature or the inherency of any deception.

Respondents advocate Holiday Magic is similar to all American business structures in recruiting lower level personnel consistent with sales,

the higher levels receiving a larger gross than those at lower levels. The argument overlooks evidence that distributor recruitment both horizontally and vertically was virtually limitless and unrelated to sales or product market flow at the consumer level. This is established conclusively because representatives of Holiday Magic had no information as to what the product market flow was to the consumer level after seven years of operation. Unlimited recruitment horizontally and vertically without attempting to devise a realistic ratio between distributorship recruitment and movement of the product into the hands of consumers, suggests that regardless of some product market flow and the good quality of the product the latter is an incidental device to give plausibility to an endless chain of recruitment and pyramiding of distributorships in the nature of a lottery. Training courses also afforded the same deceptive plausibility to plan under which profit through recruitment exceeded profit through direct sales. In other words a good product, some sales thereof and training courses, devoted essentially to product application, motivation, emotional selling with a view to enticing participants to climb the distributorship ladder of success through the medium of greater recruitment profits is merely a subtle device to obscure the real purpose of the plan to make large amounts of money through pyramiding recruitments in the nature of a lottery contrary to any reasonable standards of fair trade practice devoid of inherent deception and exploitation.

The inherent unfairness of such schemes in contravention of public policy has been described by the Wisconsin Supreme Court in *Twentieth Century Company v. Quilling*, 130 Wisc. 318, 110 N.W. 173, (1906), at p. 176.

We are unable to regard such a project as a legitimate business enterprise. How large would be the number of purchasers who would be induced by the prospect of large returns for little labor to join the scheme it is impossible to say or even speculate. Each purchaser would be desirous to get back at least as much as he had invested. In order to do this, the first purchaser under the most favorable circumstances would have to sell rights aggregating \$1,000, the second purchaser would have to sell rights aggregating \$2,000, and thus the necessity of finding victims would increase in geometrical progression until the purchasers who are in the tenth place from the original purchaser must, in order merely to reimburse themselves, find others who would pay more than half a million dollars. Of course, it is not likely that the scheme would last so long as this, but however long it lasts, it will infallibly leave a greater or less crowd of dupes at the end with no opportunity to recoup their losses because the bubble had at last burst. It contemplates an endless chain of purchasers, or rather, a series of constantly multiplying endless chains, with nothing but fading rainbows as the reward of those who are unfortunate enough to become purchasers the moment before the collapse of the scheme. While contemplating large gains to the original promoters and early purchasers, it necessarily contemplates losses to the later purchasers; losses increasing in number with the greater success of the scheme.

The Holiday Magic scheme shares exactly the same rationale as the scheme in *Quilling*: In Holiday Magic, we have seen that a participant at the General level had invested at least \$2500 in order to become a Master and another \$2500 as a release fee to become a General. By recruiting his first Master, he gets \$500 of the buy-in as a 10 percent override, and when this Master goes General he gets the release fee of \$2500 back. He now also has a replacement Master to get to go General, which if he does, will produce a second \$2500 release fee to him or a full return on his investment, merely by recruiting two Generals.

If each purchaser sought only to get his money back by recruitment and nothing more—if he limited himself to only two Generals, the plan would work as described in *Quilling*. Each General recruited at lower levels would find that a multitude of two would have to be recruited at each succeeding level—a geometric progression with “two” as the multiplier.

In *HM Distributors of Milwaukee, Inc. v. Dept. of Agriculture*, 198 N.W. 2d 598 (1972) the same Supreme Court of Wisconsin stated, in litigation challenging the Wisconsin Rule prohibiting “chain distributor schemes,” brought by Holiday Magic’s Council, that:

The trial court in the case held: “Schemes which can cause the loss of money and the victimization of third persons clearly fall within the term ‘unfair trade practices’ * * * The authority granted to the Department to regulate ‘unfair trade practices’ was properly exercised within its statutory authority.” We agree, and, as a postscript, repeat what this court, many years ago, [in *Quilling*] had to say about the chain letter idea used as a trade practice:

* * * the real arrangement was a joint scheme to make money by selling similar nominal territorial rights to others who should also, become parties to rights to still others, and so on. * * *

* * * it will infallibly leave a greater or less crowd of dupes at the end with no opportunity to recoup their losses because the bubble has at last burst. It contemplates an endless chain of purchasers. * * *

Such an enterprise we regard as contrary to public policy and void. * * *

Thus, regardless of disclosure, an endless chain scheme necessarily contemplates exploitation of others and violates elemental considerations of fairness.⁶

In *State of New York v. ITM, Inc.*, 275 N.Y.S. 2d 303, (1966), the New York State Supreme Court [trial court] had before it a marketing plan like Holiday Magic in that commissions were paid whenever prospects would enroll. The Court said at p. 315:

⁶ See also *McNamara v. Gargett*, 36 N.W. 218; *Davis v. Sealey*, 38 N.W. 901 (Mich.); *Merril v. Packer*, 45 N.W. 1076 (Iowa); *Schnuckle v. Waters*, 125 Ind. 265, 25 N.E. 281; *Shirley v. Ulsh*, 2 Ohio Cir. Ct. Rep. 401; *Hubbard v. Freiburger*, 94 N.W. 727 (Mich.); *Bonisteel v. Saylor*, 17 Ont. App. 505; *Commonwealth v. Allen*; 404 S.W. 2d 464 (Ky., 1966); *State of New York v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S. 2d 303 (1966); *Sherwood & Roberts-Yukima, Inc. v. Leach*, 67 Wash. 2d 630, 409 P. 2d 160 (1965).

* * * somewhere along the line, the plan had to fail as a matter of economic feasibility and mathematical certainty. No matter the junction at which this was reached, the number of latest participants would grossly exceed the sum of the participants of all prior rounds. It is patent that by far the greater number of participants could earn no commissions.

This is the vice and quicksand nature of "endless-chain" transactions. And it is so apparent that the promoters must be charged with knowledge of the fraud inherent in it.

The very scheme itself bears evidence upon its face that it is a fraud and a snare, and yet so cunningly devised that, in the hands of a sharp, shrewd, and designing man, hundreds of the unwary have been defrauded; and the courts should set their seal of condemnation upon it, and pronounce it, as it is, a contract void on the ground of public policy.

While the futility of the "endless-chain" plan is obvious to the promoters, it is not apparent to the consumer participant. That enrollment within the first four rounds can earn commissions is entirely possible and credible.

Taking the Holiday marketing plan as it has been represented by respondent to prospective distributors at its Opportunity Meeting procedures and how it does work in theory, not as a misrepresentation of the plan but as an accurate description of how the plan can and does operate, we have the following situation: Each distributor recruited into the Marketing scheme as an Organizer in turn recruits five other distributors each month, and so on. This is nothing less than a representation of a geometric progression of five.⁷ Respondents have drawn it in their manuals for a three month period. It appears elsewhere herein in the findings. By extending the operation to a twelve month period, we are faced with the following:

Starting point:	"you"
First Month:	You + 5
Second Month:	You + 25 + 5
Third Month:	You + 125 + 25 + 5
Fourth Month:	You + 625 + 25 + 5
Fifth Month:	You + 3125 + 625 + 25 + 5
Sixth Month:	You + 15,625 + 3125 + 625 + 25 + 5
Seventh Month:	You + 78,125 + 15,625 + 3125 + 625 + 25 + 5
Eighth Month:	You + 390,625 + 78,125 + 15,625 + 3125 + 625 + 25 + 5
Ninth Month:	You + 1,953,125 + 390,625 + 78,125 + 15,625 + 3125 + 625 + 25 + 5
Tenth Month:	You + 9,765,625 + 1,953,125 + 390,625 + 78,125 + 15,625 + 3125 + 625 + 25 + 5
Eleventh Month:	You + 48,828,125 + 9,765,625 + 1,953,125 + 390,625 + 78,125 + 15,625 + 3125 + 625 + 25 + 5
Twelfth Month:	You + 244,140,625 + 48,828,125 + 9,765,625 + 1,953,125 + 390,625 + 78,125 + 15,625 + 3125 + 625 + 25 + 5

⁷ Actually, it is more than a geometric progression—it is a continuing series of geometric progressions. Since the way the plan is described, the participants continue to start new geometric progressions of five each of the ensuing months as well.

The distributors recruited as Organizers in the Opportunity Meeting presentation do not remain Organizers for as the plan and the script and all the witnesses pointed out, Organizers who successfully recruited the five Distributors who in turn recruited the twenty-five Distributors had long since become work-in Masters *automatically* and only by virtue of the sale or organizer kits to the new organizers. Therefore, the numbers charted on the above reference are actually Masters and not Organizers, and as such do not buy product from one another. The plan truly depicts geometrical increases at horizontal levels, even for Organizers. But even if they do not automatically become Masters by recruiting Organizers the record shows that one Organizer in four does become a Master.

Although the Holiday Magic Opportunity Meeting presentation of its marketing scheme stops at three months, it is clear that the plan itself doesn't, for someone had to bring another person in previously. A trace of the distributors at the Master and General level only from the State of Illinois should quickly dispell any arguments that the plan stops or is intended to stop after three months.

The replacement master situation in becoming a General is equally bad, for if we limit the recruitment of a General Distributor to just two Generals, the amount necessary to get their investment back, would require a geometrical progression of 2, which will produce the number of 4,096 Generals at the twelfth month and a grand total of 7,931 at the end of twelve months, and multiples of two thereafter each month, the same ratio as described in *Quilling*. One factor, of course, as described in *Quilling* is the amount of the investment required, and for the Master level it is \$4500, so that there is a resulting total of \$9,000 per General Distributor, or \$66,519,000 after one year from "just" two Distributors per General (not even two per month).

In *Fabian v. United States*, 358 F.2d 187 (8th Cir. 1966), involving mail fraud prosecution, the Court dealt with a referral selling plan of stereo equipment which it described as follows at pp. 189-190:

Each stereo purchaser would receive an "Owner's Dividend Certificate" which provided that \$15.00 would be paid for the name of each prospective customer (subject to credit qualifications), who agreed to a sales demonstration, regardless of whether a sale resulted. In addition, the prospective customer would receive \$5.00 merely for listening to the sales presentation which was not contingent upon the purchase of a set. Customers were informed that they could earn a set by referring twenty-six names, which could be submitted over a two year period. Most purchasers understood that there was no limit to the number of names they were allowed to refer, so that all referrals over twenty-six would result in profit. The referral plan was represented as a substitute for expensive advertising and a means of introducing the product to the community. Also, customers were told that the sets would later be sold through a retail outlet * * *.

The Court observed in a footnote to its statement that there was evidence that the method of selling was intended as a short term

introductory approach only, preliminary to establishing a retail outlet. The Court states at p. 194:

The referral plan cannot succeed even if used for only a short time unless at some point customers subsequent to the first one are not allowed to earn the set. As the Government brought out at the trial, once the plan is set in motion, the referrals spiral due to the principle of geometric progression. If each person who purchases a set can earn it by referring names, no profit will be made; hence, no funds would be available to satisfy referral commitments. The only method of halting the progression is to withhold the referral privilege for customers who were obtained by referral.

This is the simple solution to the problem involving plans capable of expansion by geometric progression. They can be stopped by not permitting the recruits to in turn do the recruiting (or referring). It is not the recruiting that makes this a scheme which can increase geometrically—it is recruiting coupled with a passing on of the right to recruit or permitting unlimited geometrical progression or an unlimited universe.

Blachly v. United States, 380 F.2d 665, 5th Cir. (1967), involved another prosecution for violation of the mail fraud statute. The Court pointed out that the plan involved a scheme to defraud even though there may be no specific misrepresentations. "All that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension [citations omitted]." The Court applied these precepts to the plan and found that as conceived by the parties and as represented to the purchasers, the plan could not possibly work.

With regard to the plan, the Court stated at p. 672:

Representations, both oral and written, were made to prospective purchasers, that the water softener could be acquired by them with "no cash investment," that through commissions that would be earned by the purchaser as a result of the unlimited referral sales, both original and secondary, it would "pay for itself" and perhaps make an additional profit. This was a key inducement to the purchaser to submit as many referred names as possible since in theory at least, this would increase his referral commission earnings to achieve the maximum return. Yet only in theory is the scheme the least bit sound. Its operation could achieve success only in a theoretical unlimited universe. The mail fraud statute—and inescapably Judges, * * * —must deal with the practicalities of the outside business and social world. As a practical matter, the inherent and patent impossibility of such a plan working is plain. [footnote omitted] Its impossibility is manifested by the amazing letterspread potential achieved with each successive step in the referral sequence. The number of references spiral in a geometric progression* so that, as pointed

*Footnote in original:

"The illustrative calculations set forth in the Government's brief are not challenged.

"By way of a simple illustration, if the first fifteen recipients of the opening wedge, that is, the initial letter in turn each sent out or mailed fifteen letters the number of such letters put in circulation would reach 225. On the second step, the number increases to 3,375, and on the fifth step to the somewhat astounding total of 11,390,625. * * * The mathematical certainty that the "referral" plan of merchandising is inevitably doomed to failure is obvious. To this the Government adds by way of argument, "Such is the natural vice and structure of quicksand found present in all "endless chain" transactions."

From an analysis of the record, the Government's use of 15 as the base seems ultra conservative. Some purchasers provided as many as 100 references, majority around 50 or 60."

out by the Government, "In a small city such as Morgan City, in which the defendants operated, not to mention the smaller towns and villages, the saturation point of prospective purchasers of the water softeners would quickly be reached. Relatively few sales of the water softeners would be made and few commissions would indeed be earned by the victims of the scheme." [Footnote omitted]

In a nutshell, the vice of this referral scheme was two fold. The first was the strong representation, most frequently expressed and always implied, that from the referral commissions the purchaser would not have to pay for the machine being bought and might even make a profit. The second was the demonstrable impossibility of the first being achieved. [footnote omitted] Referral selling schemes like this have been uniformly condemned by the Courts.* Contrary to Blachly's assertions, whether any of the victims of the scheme suffered a material loss is immaterial, for success of the scheme is not essential to completion of the offense. [citations omitted] Thus, although the burden is on the Government to establish the essential elements of the offense, * * * this does not entail or require proving that the victims of the scheme were actually defrauded or that they suffered damage or pecuniary loss. * * *

Besides the inherent impossibility of the Plan, the method used in its execution also serves to condemn this scheme. * * *

The record in the matter at bar is replete with instances of Distributors successful and not successful—bringing scores of persons to Opportunity Meetings, and approaching hundreds more. The multiplier of 15 was found a valid device in *Blachly* because this was an "ultra conservative" figure of the number of references—not of the number of participants. It is reasonable therefore, as the *Quilling* Court pointed out, that:

Any contract which contemplates or necessarily involves the defrauding or victimizing of third persons as its ultimate result must be *contra bonos mores*.

The Supreme Court of the United States approved enjoining such situations in *Public Clearing House v. Coyne*, 194 U.S. 497, 24 S.Ct. 789 (1903) at 796, when it did not even consider it necessary to enter into the details of the plan before it where, as here, success depended upon a constantly increasing number of participants. The Court stated that such schemes are doomed to failure, and added "Indeed, we think that no scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise."

In *State ex rel Turner v. Koscot Interplanetary, Inc.*, 191 N.W. 2d 624 (1971), the Supreme Court of the State of Iowa upheld the constitution-

*Footnote in original:

"In a very similar case involving the referral selling of stereo sets the 8th Circuit had this to say:

"The referral plan cannot succeed even if used for only a short time unless at some point customers subsequent to the first one are not allowed to earn the set. As the Government brought out at the trial, once the plan is set in motion the referrals spiral due to the principle of geometric progression. If each person who purchases a set can earn it by referring names, no profit will be made; hence, no funds would be available to satisfy referral commitments. The only method of halting the progression is to withhold the referral privilege for customers who were obtained by referral."

* * *

ality of its statute outlawing pyramid sales plans and referral selling, such as is employed by Holiday Magic, Inc. in a most emphatic denunciation.

The Court first described the plan that it was confronted with at pp. 627-628 as follows:

An examination of the Koscot program discloses it is fundamentally a sugar coated merchandise sales plan.

A "beauty advisor" initially pays \$10 and for this receives her "starter kit" of Koscot products to be refurbished as required. Any person buying in as a "supervisor" remits \$2000 for which he receives \$1500 worth of cosmetics and \$500 hair fashions, retail value. A distributor pays \$5000 for which an opening Koscot inventory is supplied.

Those buying in at each of the above three levels are, of course, expected to sell Koscot products to others.

As a merchandise sales inducement, Koscot promotes a "get rich quick" position scheme. Under this arrangement defendants have been and are selling merchandise and positions to many residents in Iowa.

Product sales and the selling of positions are effected via use of the aforesaid "multi-level-distributorship-supervisor pyramid sales techniques" through which individuals considering position purchases are induced to buy upon the assurance that once "bought in" they will have the right to bring or refer other prospective merchandise-position buyers to the company and receive payment from Koscot for each such referral.

Product and position sales are advanced through the use of what defendants term "Golden Opportunity Meetings" where local distributors present the Koscot sales and distributorship-supervisor program to individuals who have evidenced an interest in buying a merchandising job. The presentation procedure used at these meetings ordinarily follows quite closely that contained in the sales pitches set forth in Koscot's publication, identified as "The Distributor's Training Manual."

Sales presentations are there usually made to prospective customers brought by other individuals who have already purchased, either as a "supervisor" or "distributor", because they have been orally promised payment, as aforesaid, for each like position sold on referral. Koscot strongly recommends all presentations at local "Golden Opportunity Meetings" be in accord with the written procedures contained in the manual.

Under the sales program employed by defendants every new supervisor or distributor must be referred or sponsored by an existing position holder. When a prospect referred to Koscot later buys in, the referring party is promised a portion of the amount paid by such purchasing party. Newly obtained supervisors and distributors are required to initially pay \$2000 and \$5000 respectively.

More specifically, as best we can determine, the reimbursement to a supervisor referring another individual, who in turn buys a supervisor post, is \$500 out of the new member's \$2000 purchase price. Payment to a distributor who refers another buying individual into Koscot as a supervisor is \$500 out of the new member's \$2000 payment, plus a ten percent override commission, making a total of \$700 to be received by a distributor for securing an additional supervisor. When a distributor has sponsored a supervisor into the company and the new supervisor later purchases a distributor's position for an additional \$3000, the fee then paid to the referring distributor is \$1950. Since a supervisor must replace himself before buying up to a distributorship, the referring party will receive an additional \$200 whenever the sponsored supervisor finds a replacement.

There are other intricate referral payment incentives involved but the foregoing will instantly suffice.

In brief, the sales pitch employed by defendants discloses, individuals are induced to buy into their program through use of the foregoing presentation, with an attendant glowing assurance that the prospect can easily earn \$34,000 each year merely by obtaining other Koscot merchandise and position purchasers.

The written contract between Koscot and those who buy does not, as aforesaid, include any part of the promised payment for securing additional supervisors or distributors.

When an individual buys in as supervisor or distributor he must make payment by certified or bank check payable and always delivered to Koscot. All remittances to referring position holders, *supra*, are made from Koscot's Florida offices.

Merely by substituting Koscot for Holiday Magic, Beauty Advisor for Holiday Girl, Supervisor for Master, Distributor for General, and Golden Opportunity Meeting for Opportunity Meeting and except for the dollar differences, one is instantly presented with similarity to the Holiday Magic plan.

The Court continued at pp. 630-632:

Although the term "fraudulent conduct" is not subject to a precise definition, it does include "referral" or "pyramid" sales arrangements by which people are induced to buy upon the representation they can reduce or recover their purchase price, or earn untold profits by referring other buying prospects to the seller. [citations omitted]

* * * * *

Despite the thinly veiled cloak of respectability with which Koscot has attempted to clothe its pyramidal merchandise sales promotion scheme, the badge of fraud clearly shows through.

* * * * *

[T]he Act, in effect, makes such sales unlawful, *per se* regardless of any contract terms between seller and buyer.

* * * * *

Unquestionably the legislature thereby intended to protect the public against unscrupulous and deceptive merchandise selling practices. More specifically the legislative purpose was to, among other things, brand all pyramiding referral merchandise sales schemes as a cancerous vice against which the public should be protected and for that reason suppressed.

A *per se* approach based on inherent deception to pyramid selling such as that engaged in by Holiday Magic, Inc. has been adopted by a number of states, among them the following:

Minnesota.

Minnesota Laws of 1971, §325.79, Subd. 2(2)(a) provides:

With respect to any sale or lease, it shall be illegal for any seller or lessor to operate or attempt to operate any plans or operations for the disposal or distribution of property or franchise or both whereby a participant gives or agrees to give a valuable consideration for the chance to receive something of value for inducing one or more additional persons to give a valuable consideration in order to participate in the plan or operation, or for the

chance to receive something of value when a person induced by the participant induces a new participant to give such valuable consideration including such plans known as chain referrals, pyramid sales, or multi-level sales distributorships.

California.

Penal Code §327:

Every person who contrives, prepares, sets up, proposes, or operates any endless chain is guilty of a misdemeanor. As used in this section, an "endless chain" means any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant. Compensation, as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme.

Wisconsin.

Chapter Ag. 122: CHAIN DISTRIBUTOR SCHEMES:

Ag. 122.01. *Unfair trade practice.* The promotional use of a chain distributor scheme in connection with the solicitation of business investment from members of the public is an unfair trade practice under section 100. Wis. Stats. When so used the scheme serves as a lure to improvident and uneconomical investment. Many small investors lack commercial expertise and anticipate unrealistic profits through use of the chance to further perpetuate a chain of distributors, without regard to actual market conditions affecting further distribution and sale of the property purchased by them or its market acceptance by final users or consumers. Substantial economic losses to participating distributors have occurred and will inevitably occur by reason of their reliance on perpetuation of the chain distributor scheme as a source of profit.

Ag. 122.02. *Definitions.* (1) "Chain distributor scheme" is a sales device whereby a person, upon a condition that he make an investment, is granted a license or right to recruit for profit one or more additional persons who are also granted such license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted such license or right upon such condition. A limitation as to the number of persons who may participate, or the presence of additional conditions affecting eligibility for the above license or right to recruit or the receipt of profits therefrom, does not change the identity of the scheme as a chain distributor scheme.

(2) "Investment" is any acquisition, for a consideration other than personal services, of personal property, tangible or intangible, for profit or business purposes, and includes, without limitation, franchises, business opportunities and services. It does not include real estate, securities registered under chapter 551, Wis. Stats., or sales demonstration equipment and materials furnished at cost for use in making sales and not for resale.

(3) "Person" includes partnerships, corporations and associations.

Ag. 122.03. *Prohibition.* No person shall promote, offer or grant participation in a chain distributor scheme.

Ag. 122.04. *Statutory exemption.* This chapter does not apply to banks, savings and loan associations, insurance companies and public utilities to the extent exempted from department regulations under section 93.01(13), Wis. Stats.

Effective April 1, 1970.

*Virginia.**Title 59.1**Chapter 4*

§ 59.1-67.1. Pyramid promotional schemes; misdemeanor; definitions.—

Every person who contrives, prepares, sets up, operates, advertises or promotes any pyramid promotional scheme shall be guilty of a misdemeanor.

For the purpose of this section:

(a) 'Pyramid promotional scheme' means any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program;

(b) 'Compensation' does not mean payment based on sales of goods or services to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme; and

(c) 'Promoter' shall mean inducing one or more other persons to become a participant (1970, c. 750).

§ 59.1-67.2. Same; contracts void.—

All contracts and agreements, now existing or hereafter formed, whereof the whole or any part of the consideration is given for the right to participate in pyramid promotional scheme programs, are against public policy, void and unenforceable. (1970, c. 750.1)

§ 59.1-67.3. Same; injunction—

Any Commonwealth's attorney may petition a court of competent jurisdiction to enjoin the further prosecution of any pyramid promotional scheme as defined in § 59.1-67.1, and to appoint receivers to secure and distribute in an equitable manner any assets received by any participant as a result of such scheme, any such distribution to effect reimbursement, to the extent possible, for uncompensated payments made to become a participant in the scheme. The procedure in any such suit shall be similar to the procedure in other suits for equitable relief, except that no bond shall be required upon the granting of either a temporary or permanent injunction therein. Any person who organizes an endless chain scheme and, either directly or through an agent, promotes such scheme within the Commonwealth shall be deemed subject to the personal jurisdiction of such court of competent jurisdiction under chapter 4.1 (§ 8-81.1 et seq.) of Title 8, and shall be liable for reasonable costs and attorney's fees in such suit. (1970, c. 450).

Iowa.

Section 713.24 (2b), 1971 Code:

The advertisement for sale, lease or rent, or the actual sale, lease, or rental of any merchandise at a price or with a rebate or payment or other consideration to the purchaser which is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales, leases, or rentals to persons suggested by the purchaser, is declared to be an unlawful practice rendering any obligation incurred by the buyer in connection therewith, completely void and a nullity. The rights and obligations of any contract relating to such contingent price, rebate, or payment shall be interdependent and inservable from the rights and obligations relating to the sale, lease, or rental.

There is nothing profound or unique in the concept of an inherently fraudulent practice, and the Federal Trade Commission in an advisory opinion in 1967 recognized this. The public record states only that:

The Manufacturer proposed to appoint as independent distributors such persons as would buy the requisite amount of inventory. Initial sales to such distributors would be at 33 1/3% off the manufacturer's suggested prices for his products. Incentive bonuses, computed at from 5% to 60% of the value of their purchases, increasing as the value of purchases increased, would be paid from time to time to the distributors. Distributors would be encouraged to recruit additional distributors who would also make a capital investment in inventory. A recruiting distributor would be given a 10% to 12% override on the dollar volume of purchases of any distributor whom he had recruited.

On these given facts, the recruiting distributor makes money eventually on persons that he has recruited, unlike Holiday Magic, where the Distributor makes money on persons he recruited as well as the persons recruited by persons that he in turn recruited, *ad infinitum*.

The Commission was of the view that the plan aforesaid would violate Section 5:

The marketing plan is not primarily designed as an offer to knowledgeable businessmen, competent to weigh and evaluate commercial risks. It is designed, rather, to appeal to uninformed members of the general public, unaware of and unadvised of the true nature of the risks run—persons with limited capital who are led to part with that capital by promise and hopes which are seldom, if ever, fulfilled. A particular vice of the plan is that part which provides override bonuses for recruited distributors. Implicit in such an arrangement is the promise, rarely if ever kept, that the recruiting distributor can, without himself working, profit greatly from the work of others.

The Commission also stated with respect to price discrimination that:

because of the nature of the plan it was almost inevitable that very wide differences in prices would be charged customers, some of whom would, by reasonable assumption, be competitive with others. These differences would be so great that the anticompetitive effects made unlawful by the amended Clayton Act would almost certainly follow. (Advisory Opinion No. 155.) [72 F.T.C. 1057.]

The authority of the Commission to prevent lottery methods of merchandising in interstate commerce is well established. In addition to direct action against such practices, the Commission can also prohibit the distribution in interstate commerce of punchboards and other devices intended to aid and encourage merchandising by gambling and has done so under the finding of "lottery," as *per se* unlawful. *Modernistic Candies, Inc., et al. v. FTC*, 145 F.2d 454 (7th Cir., 1944); *Deer, et al. v. FTC*, 152 F.2d 65 (2nd Cir., 1945); *Chas. A. Brewer and Sons v. FTC*, 158 F.2d 74 (6th Cir., 1946); *FTC v. R. F. Keppel & Bros., Inc.*, 291 U.S. (1934).

Normally, and in the earlier interpretations of a "lottery," violation of Section 5 of the Federal Trade Commission Act by means of lottery methods of merchandising depended upon proof of the elements of consideration, chance and prize. If any of these three elements was lacking, the plan was not considered a "lottery," and the action would fail. Cf. *United States v. Rosenblum*, 121 F. 180 (2nd Cir., 1903). It

appears, however, that the courts are now permitting the Commission to extend its jurisdiction over methods of merchandising in which all of the above three elements of the classical definition of a lottery may not be present. Under this judicial extension of what has been declared to be the public policy of the United States against marketing goods by taking advantage of the consumer's propensity to take a chance, * * * a device calculated to appeal to gambling instincts may be a violation of Section 5 even though technically not a lottery. *Gerson v. FTC*, 325 F.2d 93 (7th Cir., 1963); *J. C. Martin Corp. v. FTC*, 346 F.2d 147 (3rd Cir., 1965); *Bear Sales Co.*, Docket No. 8627 (1965) [68 F.T.C. 37].

Accordingly, the marketing plan of Holiday Magic must be interpreted to be a violation of Section 5 as a device calculated to appeal to the gambling instinct or prospective businessmen (customers). Whether it is merchandising by the classical lottery situation, or through a more sophisticated appeal to the gambling instincts in man, which this Complaint terms in the nature of a lottery, such merchandising is still subject to the same deceptive standards which the courts have heretofore declared to be illegal.⁸ There has been no recognition by the Commission or the courts of any change in the moral climate of the business community in this respect. *Dandy Products Inc. v. FTC*, 332 F.2d 985 (7th Cir., 1964) *cert. denied*, 379 U.S. 961 (1965); *Bear Sales Co.*, Docket No. 8627 (1965) [*supra*].

Even in *Marco Sales Corp. v. FTC*, 453 F.2d 1 (2d Cir., 1971) in which the Court remanded a lottery case to the Commission for explanation as to why the case was proceeded against by cease and desist order when the Commission at the same time seemed to be regulating games of chance, at least in the retail grocery and gasoline industries, the Court understood and commented that the basic proposition of a lottery as being unlawful is supported by all Courts of Appeal, and that such decisions are largely the business of the Federal Trade Commission.

It was concerned, however, because it seemed the punchboard situation in *Marco*, costing only 39 cents, was not materially different from games of chance, which are not lotteries because the element of consideration is absent.

⁸The Commission has issued advisory opinions disapproving of gaming devices, which could not be classified as lotteries in the technical sense. In *Opinion No. 46*, wherein it was contended that one of the three essential elements of a lottery, namely consideration, was missing from the plan, the Commission advised that it did not need to decide the question of whether or not consideration would exist, so that the proposal could be held to constitute a technical lottery, for it was still of the view that the plan would involve an illegal effort to sell or dispose of merchandise by means of a chance or gaming device. * * * [L]otteries are not the only method by which the public's gambling instinct may be aroused, for other methods are comprehended within the general concept of merchandising by gambling."

And in *Opinion No. 78*, "The mere fact that each participant receives a thing of value for his contribution does not negate the existence of a lottery nor change the plan's essential nature as an appeal to the public's gambling instincts. Clearly, the participants in this drawing would be motivated by the chance of receiving something of more value than the amount they contributed. Hence, the nature of the appeal is unmistakable." (See also *Opinion No. 86*.)

The three elements of a lottery; prize, consideration and chance are present in the case at bar. Nothing more is needed, and all three elements constitute a lottery.

A. *Prize*

The prizes in the Holiday Magic plan are the overrides and commission, discounts, finders fees, release fees and refunds which Distributors receive from other Distributors and from the company. The prize, however determined, is there. If based upon legitimate business effort and not lot or luck, the element of "chance" will fail.

B. *Consideration*

Consideration is present in the amount of money paid in by the various levels of Distributors initially, and as part of the plan continually, whether for product or otherwise.

C. *Chance*

The element of chance is present in abundance in the Holiday Magic scheme. It is the lure of an uncertain prize over which the participant has little or no control that essentially attracts the consideration for the involvement in the Holiday Magic marketing plan and its monetary prizes, rather than the opportunity to enter into a business of distribution of cosmetics. We have seen respondents' expert witness on motivation draw a distinction between marketing factors in the Holiday Magic scheme for a prospective Distributor, and the prospective salesman in other fields.

The circumstances that the superficial attributes of classic lottery schemes, *e.g.*, pull tabs, punchboards, drawings, etc., are not present should not serve as a distraction from fundamentals. One of the earliest cases concerning the type of selling activities which constitute an unlawful lottery was *Public Clearing House v. Coyne*, 194 U.S. 497 (1904). In that case defendant was a fiscal agent for an organization in which each member, on joining, paid a \$300 enrollment fee and agreed to pay \$1 per month for five years and to cooperate by inducing others to become members. Under the plan the member was to receive a pro rata share of the total amount realized from all enrollments at the date he was entitled to a realization (less 10 percent which was to be retained by the defendant) based upon a table of growth rates. For example, if the fund grew at the rate of 15 to 1 the total realization of the member at the end of five years would be at the same rate of increase, *i.e.*, he would receive \$900 for his \$60 paid in; if the growth rate was 10 to 1, he would receive his money back less 10 percent. Thus, the amount of money paid to a member was dependent upon the payments of new members recruited as well as upon the payments of members who would drop out before the end of five years and whose money would remain in the fund.

Implicit in the scheme was its pyramid nature since a member could not expect to break even unless the number of new members expanded beyond the number of old members. As membership telescoped away from an old member, his control and participation in the recruiting process waned. In these circumstances, the Supreme Court found that chance permeated the entire plan since the amount of return depends so largely, and indeed almost wholly, upon conditions which the member is unable to control. The plan was, therefore, held to be a lottery.

The Supreme Court in *Coyne* decided that the key to chance in the lottery need not be that which is normally thought of as a lottery, at p. 512:

That they were not engaged in conducting a lottery in the sense in which that word is ordinarily used is entirely clear, since this involves fixed prizes and the allotment of the prizes to the holder of numbered tickets which are drawn from a box. In such case the word lot or chance attaches only to the name or number of the ticket drawn, and not to the amount of the prize, but the statute covers any scheme for the distribution of money by lot or chance, * * * as defined by Webster, is meant "something that befalls, as the result of unknown or unconsidered forces; the issue of uncertain conditions; an event not calculated upon; an unexpected occurrence; a happening; accident, fortuity, casualty."

And the Supreme Court held:

We do not consider it necessary to enter into the details of the plan, which is a somewhat complicated one, and the success of which obviously depended upon constantly and rapidly increasing the number of subscribers or cooperators. The only money paid in was a small enrollment fee of three dollars and a monthly payment of one dollar for five years. The return to the subscribing member, which is called a realization, is not only uncertain in its amount, but depends largely upon the number of new members each subscriber is able to secure, as well as the number of members which his cooperators are able to secure. The return to members who have been able to secure a large number of other members, and to pay their own monthly dues, may be very large in comparison with the amount paid in, but the amount of such return depends so largely, and indeed almost wholly, upon conditions which the member is unable to control, that we think it fulfills all the conditions of a distribution of money by chance.

Holiday Magic's plan works the same way. The General Distributor gets a return in the recruiting activities of his Masters, their replacements and their replacements recruiting activities, *ad infinitum*. The return is not limited to profit from the sale of products. Overrides and release fees are the prizes inherent in Holiday Magic's lottery.

For example, if General "A" recruits Master "B" and "B" wants to become a General, he recruits Master "C," and Master "C" recruits Master "D," etc. each time one of these becomes a General, General A gets the release fee of \$2500 to \$4500.

Not only does General A get the release fee every time the Master who brought in a replacement Master goes General, but he gets override

of 10 percent on their purchases as Masters, and 1 percent on their purchases as Generals, as well as 1 percent on the purchases of other Masters in the old replacement Masters organization.

The rationale of *Coyne* was the basis for a decision by the Tenth Circuit in *Zebelman v. United States*, 339 F.2d 484 (10th Cir. 1964). In that case, upon purchasing an automobile, the buyer could become an "automobile owner representative." The purchaser could then submit by letter to defendant Zebelman the names of persons whom the original purchaser considered to be prospective buyers and who might be induced or persuaded to become participants. For each one of the persons whose name was submitted, and who purchased an auto and became a participant, the defendant was to pay the original purchaser \$100 in cash. Defendant was also to pay the original purchaser \$50 in cash for each person whose name was submitted by the new participant and who purchased an auto and became a participant himself. The court said:

It may be conceded that the original purchaser has control over the payment of the \$100 since, to get it, he must submit the name of a person who will purchase an automobile and become a participant in the scheme. Because he can control this phase of the scheme, the receipt of the \$100 is not dependent upon chance. But as the original purchaser has no control over the payment of receipt of the \$50 since it is the person whose name he submits who must locate another buyer. Insofar as the original purchaser is concerned, the procuring of this buyer is dependent, at least in part, upon chance and by the terms of the [mail lottery] statute that is all that is needed." 339 F.2d at 486.

The most common type of two-level referral plan is the situation in which the seller offers to pay the buyer an additional sum of money for each sale made to the second level of prospective customers. Not only does the buyer take all the chances under the first level of the plan, but assuming the second level is reached, the original buyer must rely upon blind chance with respect to the number of names referred to the seller and/or the number of sales that result from such referrals. At that point he most likely has no knowledge as to who, if anyone, is being referred and thus any remaining influence over his ultimate earnings is nonexistent. Such a two-level referral plan was held to be lottery in violation of the mail fraud statute (18 U.S.C. §1302) in *Zebelman*.

The Holiday Magic Scheme easily fits the mold of a two-level referral plan. General "A" recruits Master "B" and Master "B" becomes a General and gives "B" to "A" so that when "C" becomes a General, he pockets a release fee plus the accumulated 10 percent override. The two-level referral continues when "D," who was recruited by "C" becomes a General.

A fortiori, a third or fourth level referral selling scheme, which is also part of the Holiday Magic marketing plan, is indefensible.

In *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 F.2d 160 Wash., (1965) appliances were sold at inflated prices, but the purchaser received the privilege of referring potential customers to the seller. The seller promised to pay \$100 for each sale to a prospect whose name was submitted to whom the seller's salesman made a presentation. The purchaser was also to send a card to each prospect he selected, stating "a friend will call about a fabulous program," but did not describe the program. The Washington State lottery statute prohibited lotteries defined as:

*** a scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name ***

And the court held that the scheme did indeed constitute a lottery:

Assuming that respondents in fact used skill or judgment in selecting the referrals, the trial court properly held that chance permeates the entire scheme. The court found that [those responding] took a chance that the referrals might not be interested; that the salesman might not adequately make his presentation; that the referral might have already been referred by someone else; that the market might be saturated; and that the salesman might not even contact the referral. In addition, the trial court noted that [those responding] have no control over the general operation after they gave the names of referrals. In fact, respondents were told not to contact the referrals before *** salesman made his presentation, and respondents were told to emphasize the moneymaking program in case the referrals contacted them.

It is inherent in referral selling that purchasers such as respondents be without control. Sooner or later, the market, unknowingly to the purchasers, will become saturated. This principle is the same as in the chain letter scheme. The case at hand is a classic example.

This decision was cited as persuasive in *Commonwealth v. Allen*, 404 S.W. 2d 464 (Ky. 1966). The scheme was almost identical to the one in *Leach*, and the Kentucky lottery statute was likewise almost identical to Washington's.

Two months after the *Allen* decision, a New York State Supreme Court, decided *State by Lefkowitz v. ITM, Inc.*, 275 N.Y.S. 2d 303, involving a scheme virtually identical to those in *Leach* and *Allen*. In holding that the scheme constituted a lottery under New York law (virtually identical to the Washington statute), the court cited *Leach*, *supra*, and *Public Clearing House v. Coyne, supra*. The New York court made clear what is found objectionable about the scheme in its discussion of the fraud aspects of the case:

Depending on the size of the sales force available to respondents, and the territory available to them, somewhere along the line, the plan had to fail as a matter of economic feasibility and mathematical certainty. No matter the junction at which this was reached, the number of latest participants would grossly exceed the sum of the participants of all prior rounds. It is patent that by far the greater number of participants could earn no commissions.

748

Initial Decision

This is the vice and quicksand nature of "endless chain" transaction * * *. [emphasis added]

Respondents in the case at bar have promulgated a scheme which has all the earmarks of a lottery, as exemplified by the above cited cases. Potential customers are lured to "opportunity meetings" by the promise of vast profits. The manner in which these profits are to be made is left unspecified until the potential customer is actually present at the "opportunity meeting." Then a pitchman delivers a carefully designed presentation, prepared by Holiday Magic, Inc. If a customer buys in at any level, he or she is urged to obtain other prospects, is given financial rewards for bringing others into the organization and the Distributor who recruited the man receives additional rewards on the latter's recruitment.

At the level of General, which a customer may reach by paying a consideration of from \$5,000 to \$9,000, the participant receives a financial prize for every Master introduced by a Master under his sponsorship. Thus the question as to whether or not a General will make a profit from the recruiting, sponsorship or "closing" of new Masters is not within the control of the individual General, but is a product of chance. Often his own recruits are recruited and closed by the corporation.

No participant at any level can accurately assess the degree of saturation of a given geographic area, either for products or distributorships. Yet it is obvious that a given area can only produce a finite amount of capital funds with which to purchase products or distributorships.

The question of who recoups outlays of capital funds, who receives more than the original investment, and who loses all or part of the original investment is decided by the chance considerations and not simply the judgment and skill of the participant.

To have a chance of success, a participant must have two skills: (1) The ability to persuade people to buy Holiday Magic products and sign Holiday Magic marketing contracts; and (2) The ability to select solvent people who are able to effectively exercise, or can be trained to effectively exercise skills (1) and (2). Even a person who possesses these skills to an extraordinary degree can and will fail if the market to which he has access is eventually saturated, or if through unlimited progression the persons he brings in do not possess the skill of recruiting or finding others who possess the recruiting skill, and he has no way of determining whether it is saturated when he becomes a participant. The Holiday Magic marketing plan is thus "permeated with chance" and is in the nature of a lottery.

The evils of endless chain selling schemes have long been recognized.

In *Twentieth Century Co. v. Quilling*, 130 Wisc. 318, 110 N.W. 174 (1906), which involved a scheme in which territorial rights to sell a product were sold to persons who would in turn sell similar territorial rights to others, and so on *ad infinitum*, the court observed at p. 176 that the endless chain mechanism " * * * necessarily involved the defrauding or victimizing of third parties as its ultimate result * * * " and declared it to be contrary to public policy. A similar scheme was held to be a lottery in *Kent v. City of Chicago*, 301 Ill. App. 312, 22 N.E. 2d 799 (1939), where the court announced at p. 801:

* * * the controlling fact in the determination of whether a given scheme or business is a lottery is determined by the nature of the appeal which the business makes to secure the patronage of its customers. If the controlling inducement is the lure of an uncertain prize, then the business is a lottery.

Examination of the Holiday Magic Opportunity Meeting scripts, six enrollments, and Opportunity Meeting movies is convincing that the nature of the appeal in Holiday Magic is that money is to be made on the efforts of others - in recruitment and/or in product selling which disguises unlimited recruiting as the real medium for extensive profit until over-saturation itself destroys the so-called marketing plan contrary to the usual manner in which a legitimate business usually expands where there is a ratio consistency between the number of distributorships and product market flow to the consumer.

Chain referral schemes which differ from the scheme described in the *Quilling* case only in that additional participants are recruited by the scheme's sponsors instead of by the participants, have also been held to be lotteries. *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160 (Wash. 1965); *Commonwealth v. Allen*, 404 S.W. 2d 464 (Ky. 1966); also cf. *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967).

The central point in any endless chain is the mathematical certainty of the exhaustion of new participants. Thus each new participant's success is " * * * depend[ent] largely upon contingencies beyond his control", *i.e.*, the extent in which the chain as progressed in a given locality. *New v. Tribon Sales Corp.*, 19 F.2d 671 (D.C. Cir. 1927). Furthermore, limitations on the maximum number of participants " * * * does not cure the evil." *Florida Discount Centers, Inc. v. Antinori*, 226 So. 2d 693, 695 (Fla. App. 2d 1969), *cert. discharged*, 232 So. 2d 17 (Fla. 1970).

Holiday Magic's marketing scheme constitutes a lottery not only because it operates as an endless chain scheme but also because success of a participant under this scheme is dependent upon the efforts of parties not under his control. As in the endless chain scheme, the three elements necessary to a lottery are also present here. The elements of consideration and prize therein are identical to those discussed as part

of the endless chain scheme. However, the elements of chance differ from those in the endless chain scheme. These elements of chance are as follows:

(1) The reliance upon the efforts of the participants in opportunity meetings to persuade prospective investors to invest in the program or through the use of the opportunity meeting procedure at which place either corporate team members or special persons with black certificates give the opportunity meetings, and IG's and corporate team people help to "close" the prospects.

(2) The 10 percent override received on persons who are replacement Masters, or who were recruited by other persons, and over which the General receives an override, often for little or no contact with such individual and without regard to how far down the chain the Master was recruited. The Continent may separate the two, the General does not sell to the Master, yet he gets his 10 percent monthly.

(3) The 1 percent overrides on Generals who were either replacement Masters or Masters at one time over which the General got a 10 percent override, but recruited by another. When this Master becomes a General, the 1 percent override is paid not only on the purchases of this new General, but on the purchases of the Masters of their new General as well.

(4) The release fee on a replacement Master going General is paid by someone other than the person directly recruited by the old General. The chain of replacement Masters which we have seen inevitably produces a chain of release fees at more and more unlimited levels.

In *Lippincott Mortgage Investment Co. v. Childress*, 204 So. 2d 919, 920-921, 923 (Fla. D.C.A. 1967), the court described the following plan:

Universal Marketing Research, hereinafter referred to as Universal, was engaged in the promotion and sale of central vacuum cleaning systems for use in private homes. In January of 1966 one Prichett, a friend of appellees, approached them and asked if they were interested in making some money. After receiving a positive response from appellees, Prichett stated that he would send somebody out to talk to them about the proposition. Several nights later they were visited in their home by two representatives of Universal who explained the program sponsored by their company designed to sell their product and to earn money for the purchasers. Under the plan appellees would agree to purchase for installation in their home a central vacuum cleaning unit for a total cost of approximately \$750.00 cash, or \$975.00 if bought on time payment plan. To evidence this indebtedness appellees would give their promissory note in return for which they would be employed as representatives of Universal under a commission agreement, the earnings from which would pay for the vacuum cleaning units and in addition yield appellees and indeterminate amount of money. Under these commission agreement appellees would furnish Universal the names of sixteen of their homeowners friends considered to be prime prospects for purchasing the vacuum cleaning unit. For each unit sold by Universal to the prospects furnished by appellees, the latter would be paid the sum of \$50.00. It was

represented that sales to such prospective purchasers would yield commissions sufficient in amount to pay in full the promissory note representing the purchase price of the unit sold to appellees. In addition, each prospect submitted by appellees would be offered the same proposal offered appellees, and each would be requested to furnish Universal the names of sixteen of their friends who might be good prospects for purchasing a vacuum cleaning unit. For each person referred by appellees' prospects to whom a unit was sold, appellees would be paid an additional sum of \$50.00. It was from commissions to be earned by the sale of units to the persons referred by appellees' prospects that the big money would be made. The prospective purchasers on this second level of the plan would theoretically number one hundred fifty-six and represent a potential yield of \$7,800.00 in commissions to appellees. Appellees would agree to contact their friends whose names they would submit to Universal and interest them in the idea of participating in a plan to make money, and not to discuss the plan with them in detail until after Universal's representatives had had an opportunity of making a demonstration to them of the plan in its entirety.

As an outgrowth of the foregoing meeting between appellees and the representatives of Universal, appellees agreed to purchase a vacuum cleaning unit and signed a promissory note in the amount of \$972.00 payable to Universal in thirty-six monthly installments. This note represented the purchase price of the unit which was later installed in appellees' home, and the note was subsequently assigned to appellant. At the time of executing the foregoing promissory note, appellees also signed a commission agreement containing in substance the terms and provisions hereinabove related. In the discharge of their obligation appellees furnished to Universal the names of sixteen of their friends whom they considered would be interested in purchasing the vacuum cleaning unit, and subsequently received from Universal commissions in the total sum of \$200.00. Upon failure or refusal of appellees to make any of the monthly payments called for in their promissory note, this suit was instituted.

* * * * *

[I]t is our conclusion that the plan or scheme devised by Universal and used in the promotion and sale of its vacuum cleaning units * * * constitutes a lottery. The motivating factor which induced appellees to enter into the business arrangement with Universal was not a desire to purchase a vacuum cleaning unit, but to be paid a lot of money in return for a minimum expenditure of time or effort. The purchase of the cleaning unit was incidental to the overriding motive on the part of appellees to earn money by way of commissions on sales to be made by Universal.

And in *People ex rel. Kelly v. Koscot Interplanetary, Inc.*, 195 N.W. 2d 43 (1972), a case which very clearly parallels the instant matter (see description of Koscot's marketing plan at pp. 44-51), the Michigan Court of Appeals found the plan to be a lottery, citing with approval *Lefkowitz v. ITM*, and stated at p. 54 (citing an earlier Michigan case) that:

A lottery may be defined to be any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine.

* * * * *

Our statute does not justify a court * * * in deciding a thing is not a lottery simply because there can be no loss, when there may be considerable contingent gain, or because

it lacks some element of a lottery according to some particular dictionary definition, when it has all the other elements, with all the pernicious tendencies which the state is seeking to prevent.

* * * * *

The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented, and the courts will tolerate no evasions for the continuance of the mischief.

The Court continued at pp. 54-55:

In the case before us, the elements of consideration and prize are clearly present. Consideration is present in that a participant in the Koscot plan must pay a sum of money for the privilege of joining the marketing plan. Prize is present in that the participant hopes to receive a return higher than his investment by bringing prospects to a Golden Opportunity meeting whereby the defendant may be able to sign one or more prospects into the organization, thereby allowing the participant to earn commissions on those over whom he exercises no control. When one invites and brings a prospect to a Golden Opportunity meeting he is relying on the ability and efforts of the operators of that meeting, representing defendant, to persuade the prospect to join. This contingency satisfies the element of chance. For example, if "A", a distributor, brings "B", a prospect, to a meeting and "B" purchases a supervisorship, and "B" in turn brings "C" to another meeting, and "C" purchases a supervisorship; "A" makes money from both "B" and "C", with "C" being outside of "A's" knowledge and control. This constitutes chance dominating over skill.

In many instances there is virtually no contact maintained after a person is sold a franchise by defendant. He can move anywhere in the country and yet the person who recruited him will receive profits from whatever he does.

If "X" in Florida recruited "Y" in Michigan, "X" would receive a commission on any sales of recruitees brought in by "Y", regardless of where "Y" locates. There would be no contact between "X" in Florida and the new recruitees of "Y".

Defendant in the case at hand has promulgated a scheme which has all the earmarks of a lottery. The population limitation of one distributor for each 7000 of population is clearly a fiction since saturation of the market will inevitably occur.

The evidence shows that sales to ultimate consumers in Michigan were very small, and most of the sales by defendant in Michigan were sales of inventory to distributors and supervisors. This indicates the main thrust in defendant's scheme is not to sell product to the ultimate consumer, but rather to sell franchises through the referral plan.

The combined number of distributorships and supervisorships sold in Michigan to date is over 300. Assuming those presently holding franchises recruit, on an average, one prospect who buys a new franchise, that will total approximately one-half of the franchises available in Michigan under defendant's plan. If these franchisees also bring in, on an average, one prospect who purchases a franchise, we have reached the saturation point for franchises in Michigan. These last 600 franchisees will be precluded from participating in the referral plan. The defendant is in a position to know this, but that information is not so obvious to the new recruitees.

And at p. 58:

And in view of the foregoing cases, we conclude that the plan devised and used by Koscot for the sale of cosmetics products, constitutes referral selling and a lottery, which is prohibited by our statute, *supra*.

It is evident from defendant's policy statement that its scheme is to generate the income of money to the company through the sale of distributorships and supervisorships through a referral plan. These distributorships and supervisors are general in nature and do not grant an exclusive right to sell in any designated geographical area to the purchaser.

We can see that if a distributor sells another distributorship or supervisorship he receives a rebate called a commission in the form of a percentage of the cost of the new distributorship or supervisorship. The emphasis of this plan is placed by the company on the ability of distributors and supervisors to recruit others into the plan.

While the company supplies a training program for the new franchisees, even at these meetings the major emphasis is placed upon recruiting new distributors and supervisors. Each distributor and supervisor is permitted and recommended to bring prospects to a meeting from anywhere in the state, including his own area, to be sold a franchise by the defendant.

It seems clear that if Koscot's plan was to sell the product to the ultimate consumer the distributors would not be urged to solicit prospects that will necessarily be in direct competition with themselves. Again, the emphasis is placed on recruiting new distributors and inventory loading, not on sale of product to ultimate consumers.

The essential distinctions between the Holiday Magic marketing plan and the pure lottery, referral, or endless chain scheme would appear to be that the distributor, ostensibly, is purchasing an inventory for his money, which reflects an investment in a business enterprise rather than the consideration paid merely for the chance of greater rewards. This argument is usually coupled with the added plea that all businesses have the right to increase their sales and size in this manner.

This is true - but only in part. Any unlimited right to recruit other distributors is necessarily limited by the recruiting distributor's ability to sell his products to his recruitees, which products must ultimately reach the consuming public, and still make a profit. There are no such limitations in Holiday Magic, for a recruiting distributor can recruit someone whom he need not sell to, and still reap the benefits of overrides, refunds and release fees, *ad infinitum*.

Public policy decrees the Holiday Magic inherently deceptive marketing plan to be a *per se* violation of the Federal Trade Commission Act under Section 5 thereof.

In summary, the marketing plan as conceived and operated by the corporate respondent and its officers or agents was conducive to the pyramid recruiting of distributors not only vertically but horizontally to the exclusion of stimulating product market flow to consumers at a ratio consistent with such recruitment within a reasonable time after the distributorships were initially organized. The limitations of the plan as a valid marketing instrumentality is demonstrated conclusively by the failure to maintain an absence of interest in maintaining a complete and consolidated record of consumer sales as the only information upon

which consistent distributor recruitment could be effectively formulated. No limitations of recruitment were or could be considered in the absence of a complaint of over saturation by a distributor and there is no evidence of Holiday Magic's disposition under these circumstances or an effort on their part to reconstruct the plan based on such complaints.

II. Count III - Charges of Misrepresentation

Count Three of the complaint alleges that Holiday Magic, Inc. has represented, by and through statements and oral representations, directly or by implication, or through its representatives, that it is not difficult for distributors to recruit and retain persons who will invest or participate in the Holiday Magic program either as distributors or sales personnel.

The record is replete with such representations on the part of Holiday Magic, Inc. through its opportunity meeting procedures and through the representations of money-hungry distributors.

The opportunity meetings describe situations where distributors are said to be able to recruit on the average of five new organizers a month, and that on a part time basis General distributors are supposed to be able to recruit one new General a month or one a week. It is also represented to prospects at the opportunity meetings that anyone who wants to can recruit two Holiday Girls a week to sell the cosmetics, and have 100 Girls at the end of the year, or more if he chooses to duplicate his efforts in several cities.

Count Three alleges that, in truth and in fact, it is difficult, and becomes increasingly more difficult under the geometrically expanding Holiday Magic marketing system, to recruit and retain persons who will invest in the program as distributors and as sales personnel.

In this respect, the record is again replete with instances of distributors not being able to accomplish what is represented to them at the opportunity meeting procedures and otherwise. The testimony of the witnesses who were unable to recruit the distributors and Holiday Girl in the numbers represented, and the statistical evidence of less than one Holiday Girl recruited per distributor establish the misrepresentations. Ft. Pierce, Miami and Eugene reflect that the geometrically increasing number of distributors inhibited recruiting.

Also included in this allegation is the misrepresentation that there is no turn over problem. Holiday Magic, Inc. at its opportunity meeting has failed to divulge to distributors that there is an incredibly high turn-over of Holiday Girls, telling them instead that they can make \$108,000 a year by recruiting two Holiday Girls a week and leaving them to

believe instead that they can be expected to remain active for at least a year as portrayed in their examples, and thereafter deliberately choosing to represent that the turnover problem is one of Holiday Girls becoming Masters and Generals rather than dropping out of the program!

Count Three of the complaint further alleges that Holiday Magic, Inc. has represented, by and through statements and oral representations, directly or by implication, or through its representatives, that participants in Holiday Magic's marketing program have a reasonable expectancy of receiving large profits or earnings.

This allegation includes the following, of which there is ample evidence in the record:

- (a) Actual representations as to earnings potential which are false, misleading and deceptive;
- (b) Guarantees of income;
- (c) Failure to disclose information concerning reasonably anticipated costs of doing business.

Taking them in turn, the record establishes that Holiday Magic, Inc. has represented through its opportunity meeting procedure that distributors may reasonably expect to earn large sums of money in the program, even on a part time basis. Virtually all distributors receive these representations through the opportunity meeting procedures.

Representations changed over the years in the various opportunity meeting scripts and six enrollment scripts, but never in substantial substance did the representations change. Indeed the opportunity meeting scripts employed throughout continue to represent that Master Distributors can earn \$72,000 a year and Generals \$108,000 a year in the wholesale end of the business. The only difference between the new improved version of the representations and their older counterparts is that Holiday Magic, Inc. states that the examples are hypothetical, and that only the top achievers earn \$108,000. However, anyone who reads the entirety of these scripts will quickly perceive that the imprinted message is the same as it has always been: Make your fortune in Holiday Magic, make it quickly, and make it by recruiting an unlimited number of participants. Even Al Pangerl, the top producer, came nowhere close to making the \$108,000 as represented. His gross income on wholesale sales, as the number one producer was not \$108,000, but about \$5,000 only. The rest he got by headhunting. And still no Masters earned \$72,000.

One subject that merits discussion is the fact that Count III of the complaint alleges that "most" participants do not have a reasonable expectancy of receiving large profits. The question, of course, is not

whether the word "most" should have been pleaded, or need have been pleaded, but rather, since it was pleaded, is it a defect in the allegation in question, or is it merely an additional burden which complaint counsel have to overcome. Reasonable construction of the entire complaint which in each count incorporates by reference all allegations of the complaint suggests the word "most" cannot be interpreted quantitatively.

Nevertheless it is abundantly clear from the record and findings that most General Distributors indeed would not have a reasonable chance of earning one million dollars a year on a pyramiding basis as represented, or \$500,000 a year, or \$108,000 a year, or \$72,000 a year as a Master, or any of the other misrepresented earnings potential, and that most Holiday Girls do not have a reasonable chance of having a gross volume of \$900 a month or even \$300 a month.

Since the total number of Masters, Generals, Organizers and Holiday Girls appears in the record, as of a date certain, simple arithmetic provides ample evidence as found that the Distributors cannot make the kind of money that Holiday Magic represents can and will be made in wholesaling and retailing Holiday Magic product.

It is mathematically impossible for most distributors to have made anywhere near this kind of money from Holiday Magic's sales. Consider the representations of \$108,000 for General Distributors based upon 100 Holiday Girls doing \$300 a month on the average, and \$72,000 for Masters under the same circumstances when the record reflects that of a total of over 9,000 Masters in the program since the inception of Holiday Magic as of early 1969, only 48,000 Holiday Girls had been recruited overall. With a turnover of one Holiday Girl every six weeks or so, and an average sales volume of between \$75 and \$140 when they do work, there is no way a Master or General Distributor, on the average, is even going to break even in the program.

The only way that *most* can expect to earn a gross income of \$108,000 in their wholesale cosmetics business is for the average of all Generals to be at the very least \$54,000 a year and \$36,000 a year for Masters, who are represented to be able to earn \$72,000 a year.⁹ Here the Masters and Generals in their average lifetimes with Holiday Magic had purchases on the average of about \$8,000. To sell to a Holiday Girl at 30 percent and to buy at 35 percent or 45 percent means that the gross income, which is what the \$108,000 and \$72,000 figures represent would have to be, on the average, for Masters and Generals, between \$2,000 and \$2,900 on the average, in their lifetimes.

⁹ In order for at least half to earn \$108,000, the lowest possible figure for an average would be if the other half (minus one) were producing nothing, thereby producing a minimum figure of \$54,000 a year for Generals on the average, for most generals to be earning \$108,000 a year in wholesale income.

Thus, the figures depicted by Holiday Magic, at best and assuming that all of its products reach the consumer, are for Masters at least 18 times below average for the average requirement for Masters, and 36 times below the Holiday Magic representation of \$72,000.

Respondent Holiday Magic, Inc. through its opportunity meeting procedures portrays to prospective Distributors earnings representations which at the very least are 36 times the average wholesale sales of Masters and 43 times the average wholesale sales of Generals, in their lifetime as Distributors, reflected on a per annum basis, assuming that all of respondents' products sold to its Masters and Generals reaches the consumer.

Although there has been slight moderation in the post investigation approach and representations, they have not been essentially material.

Exemplifying this are the following:

(a) See CX 100B, Opportunity Meeting procedures dated October, 1967.

CX 100E and other exhibits reflect the following representations:

*** I have seen people earn 5, 10, 15, and even 20,000 per month. This is a tremendous amount of money.

*** Now as you will recall, we assume that the people [in the film] did \$300 each. Because you have sponsored the, 5 x \$300 would give you a volume of \$1500. That is a total volume they would have purchased from you your first 30 days ***. That's what you would have earned your first 30 days in the business.

*** Let's *** see just exactly what you would have done to earn this money. You would have invited five people to a meeting just like this one tonight. We would have presented the opportunity to your people for you and after the meeting, we would have thoroughly answered all their questions.

We would have helped you sponsor them into the business. For that, you would have made \$120.

CX 100F:

For that reason, we had Mary do the same thing that you did last month, train and sponsor five new people in the business.

CX 100G:

So, in your third month you would have earned a total of \$900 from your first five people. Again, all the new people in the business this month would be sponsored by someone whom you recruited and trained in a prior month.

CX 100H:

Again, we're talking of an assumed average of five people.

*** One of our top Distributors sponsored 137 people his first 30 days in the business *** Granted, these are exceptional people but it illustrates the potential for profit even if you were to cut their results in half.

*** Obviously, the way to prevent this from happening is not to stop with five people. Recruit as many as you can.

CX 100I:

*** Let me share this with you. I presently am making more money than I ever have before. If I can do it, what can you do?

*** Is there anyone in the room that doesn't think that he can sponsor two girls a week working at it full time. No one? Wonderful!

Let's assume that you are now sponsoring two girls a week and at the end of the one year of hard work you have sponsored 104 girls ***. Assume they do no more than \$300 in volume.

*** Now, if you did recruit 100 girls, you would automatically be a Master Distributor at 55% ***. It's a great deal of money, isn't it? That's \$72,000 a year. Now we won't pretend this is what the average distributor earns. But it gives you an idea of what can be done with your abilities.

CX 100J:

*** That, ladies and gentlemen, is \$108,000 a year, which is quite a salary! And there aren't too many earning it. But it shows you how the marketing plan can work, depending upon your ability, your willingness to work hard and your selling skill.

*** But if you totally committed yourself to working with your people and giving them everything in the world they need to get the job done—give them all the training they need—the motivation—the supervision—give them of yourself, work with them—you would then accomplish what our top achievers have indeed obtained and you could earn \$9,000 a month.

(b) See six enrollments, from IG Manual dated Jan. 1970; at CX 90Z6:

When this replacement Master Distributor is brought into the business, an additional \$6,666 in retail product is purchased from Holiday Magic and you, with your 10% commission, would be paid another \$666 in cash. But since the rules require you to pay \$233 in commissions to the new General Distributor who brought in this Master Distributor you net only \$433, on replacement Master Distributors. However, the moment that the replacement Master Distributor is officially recorded by the company, the cash, being held in escrow, is released to you the sponsoring General Distributor. The new General Distributor in effect has just purchased part of your sales organization. Thus, you have earned a total of \$4,099 cash each time you are successful in training and motivating an eligible Master Distributor to become a new General Distributor.

What would happen if you did this once each month for the next year? You would have earned \$49,188 at the end of 12 months and you would still have twelve Master Distributors with which to work. If you did this only once each month—and that's all you did, just train successful salesmen—you might only be working part time. Under ideal circumstances, this could mean attending only one Opportunity Meeting per month, to which you would bring a qualified prospect—one who would have the ability and want to earn that kind of money also. And there are distributors who are earning this kind of money right now!

Now, when we talk about \$49,188 on a part time basis, we aren't talking of the average distributor. We're talking about a real motivator—a person with ambition, drive, skill and selling ability who's able to teach others those same skills. Maybe you're one of them. [Footnotes omitted]

(c) Physical Exhibit B was used throughout Holiday Magic's history, at least through 1969 (Tr. 5600) and nothing in the record shows they were ever stopped.

Holiday Magic has made or has caused to be made false representations as to the amount of earnings that one can achieve, effort involved in recruitment of other Distributors, the extent of its advertising and that employment is offered when in fact an investment in a distributorship is sought.

The evidence in the record shows that these representations were made to numbers of Distributors Holiday Magic sought to upgrade to prospective distributors, in connection with the interstate sale of goods, and that the representations were false, misleading and deceptive. It is not necessary to show actual deception, it is sufficient to show that the misrepresentation has a capacity to mislead, (*Goodman v. F.T.C.* 1957 Trade Cases 68,690, p. 72, 811-812) *Vacu-Matic Carburetor Co. v. F.T.C.* C.C.A.-7, (1946) 4 S & D 576, 580. Moreover, what is represented can be literally true and still be misleading and in violation of Section 5 of the FTC Act. *Rhodes Pharmacal Co. v. F.T.C.* 208 F.2d 382, 387 (1953). See also *Donaldson v. Read Magazine*, 333 U.S. 178. For specific misrepresentation cases on earnings see Federal Trade Commission 1967 Trade Cases 68,690 at pp. 805, 806 and 808-809.

Misrepresentations similar to those made by respondents in connection with the placement of ads for employment in the "help wanted" columns of newspapers is treated in *Cannon v. F.T.C.* (CA D.C. 1961) 1961 Trade Cases 70,133, 295 F.2d 546;

Courts have long held that where the respondent has put the means for consummating a fraud into the hands of another, that the respondent is liable for the consequences thereof.

In *F.T.C. v. Winsted Hosiery* 258 U.S. 483, 42 S. Ct. 384 (1922) at 386 the respondent sold falsely labeled underwear to its dealers. Despite the fact that dealers may have been aware of the falsity and were not deceived, the Court felt that because consumers were not aware of the falsity they would buy respondents' products. The court stated: "a person is a wrongdoer who so furnishes another (respondents' dealers) with the means of consummating a fraud has long been a part of the law of unfair competition."

In a case where the respondent sold a chocolate flavored drug preparation in clearly labeled bottles but where the drug was identical to a competing but more expensive drug and thereby causing some druggists to substitute respondent's drug for the more expensive competing drug in sales to consumers, the court found the respondent liable and held that: "the wrong was in designedly enabling the dealers to palm off the preparation as that of the respondent. One who induces another to commit a fraud and furnishes the means of consummating it is equally

guilty and liable for the injury." *William R. Warner & Co. v. Eli Lilly & Co.* 265 U.S. 526 (1924) at pp. 530-531. This language was cited in *C. Howard Hunt Pen Co. v. F.T.C.* 1952 Trade Cases 67,286 at p. 67, 533. The holding in *F.T.C. v. Winsted Hosiery Co.* and *Warner & Co. v. Lilly & Co.* was cited in *Associated Laboratories v. F.T.C.* 1944 Trade Cases 57,258 at p. 57, 405. The Court of Appeals held that "The author of false, misleading and deceptive advertising may not furnish customers with the means of misleading the public and thereby insulate himself against responsibility for its deception."

Holiday Magic in the case at bar has not only made the false, misleading and deceptive representations directly, through its corporate team activities, but by providing its Distributors with the manuals, movies, Opportunity Meeting scripts, six enrollments scripts, closing techniques and the marketing plan itself. It cannot be heard to maintain its innocence over the activities of independent contractors.

In fact, in the matter at bar, Holiday Magic is legally responsible for the representations of its independent contractor Distributors because they were ordered to assume the role before the public as representatives of Holiday Magic, and Holiday Magic by its other activities ratified and adopted the activities of its Distributors in their recruiting activities.

In *Goodman v. F.T.C.* 1957 Trade Cases 68,690 at pp. 72, 801-72, 804, the Court of App. held that an individual engaged in the sale of a home study course in reweaving was responsible for misrepresentations made by his salesmen, even though the individual designated his salesmen as independent contractors.

The court stated that "when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain in the power of any agency to which the Congress has entrusted the regulation of a business activity or the enforcement of standards it has established."

The court indicated that regardless of how the salesmen were described in their contracts, "as far as the public was concerned, they were his authorized agents and acted not only within the apparent but also within the actual scope of their authority, and the Commission was right in holding him responsible for their acts."

In *Consumer Sales Corp. v. F.T.C.* 1952 Trade Cases 67,316 at p. 67,745 where the respondents appealed from a Commission order prohibiting them from using deceptive practices to promote sales. The Commission found that by furnishing salesmen with order forms falsely representing that they were making a special offer and by permitting

the salesmen to request purchasers to collect box tops, the respondents actively encouraged and participated in making such false representations.

The petitioners had contended that they were not responsible for the misrepresentations by the salesmen as they were independent contractors.

The Court of Appeals stated that since the Commission found that the petitioners "actively encouraged and participated in making" the false representations is amply supported by the evidence, it is unnecessary to consider whether or not the salesmen's relation to the petitioners was that of independent contractors.

And in *Consumer Home Equipment Co. v. F.T.C.* 1948-1949 Trade Cases 62,202 at p. 62,208, it had been found that the petitioners had through their salesmen made use of a sales plan employing false representations and fraudulent schemes. On appeal, the court found that the petitioners had knowledge of the false representations and fraudulent schemes utilized by its salesmen. The numerous letters concerning these transactions (the misrepresentations and fraudulent schemes) received by better business bureaus in Detroit and Toledo, and the petitioners' answers thereto, are evidence that petitioners must have had knowledge of these unfair and deceptive practices.

At bar Holiday Magic clothed its Distributor with the real and apparent authority to represent the company in the recruitment of other Distributors.

Distributors are provided with Holiday Magic contract forms to sign up prospects, they are authorized to accept certified checks made out to Holiday Magic, Inc. only. They represent the company nominally in that Holiday Magic is committed to shipping merchandise to anyone brought into the program the moment the check is turned over to the recruiter. Holiday Magic even requires its banners and pictures of Patrick to be present at the opportunity meetings to give the appearance of a "Holiday Magic Opportunity Meeting."

The Opportunity Meeting scripts, which the company requires to be given "on script" make constant and continual references to the distributors as company representatives.

However, there are other equally valid reasons for holding Holiday Magic responsible for the deceptions, misrepresentations and false statements of the distributor in their recruiting activities:

1. The company has a policy of accepting all contracts sent in to it, thereby ratifying all false statements and misrepresentations made in order to get the Distributor into the program. Money will not be refunded regardless of the representations. The company therefore

puts itself in a position where it is estopped from denying responsibility for the representations of those persons it sends out to recruit on their mutual behalf. This policy is clearly evident in the cases cited in the findings involving John Woloshyn and Rick Spranzo. Not only did Holiday Magic repeatedly accept distributorships from persons who were misled by these persons, after being put on notice of their activities again and again, but when they were finally terminated, it was for something as innocuous as placing unapproved ads in a Texas newspaper!

2. The company's policy of accepting only certified or cashier's checks—coupled with the no refund policy, amplifies the above. It suggests fear of a Distributor's change of heart and stop-payment order on a check which it will not permit with its present policies. This policy alone is evidence of the finality of the recruitment and "acceptance" by the home office of the moment money changes hands.

3. Holiday Magic's East Coast representative in the person of Bill Dempsey (of Sales Acceleration fame) flatly tells Master and General Distributors at a corporate team gathering in the presence of the company president, Fred Pape and the company national field director, Mark Evans (in Feb. 1968) that when they seek to "close" a prospect, they are to consider that the prospect "has money in his wallet, and whatever method that I can use to get my money back out of his wallet, that was perfectly all right." He added that "when the dust cleared, the only thing that counted was who had the money" and he then flashed three or four \$100 bills stating that he had the money.

Holiday Magic, Inc. is unquestionably legally responsible for the deceptions and misrepresentations of its Distributors because it has made Distributors their agents in fact with respect to recruiting activities.

Distributors are agents of Holiday Magic, Inc., with respect to representations involved in the recruitment of distributorships, or in instruction to other Distributors. In connection with the operation of the marketing plan, and for this reason alone Holiday Magic, Inc. is liable for and bound by the statements of these agents with respect to matters with which the agent was either authorized or apparently authorized.

A Distributor who is an independent contractor may be an agent simultaneous with his status as independent contractor.

The Restatement of Agency makes it perfectly clear that an independent contractor and an agent may exist simultaneously. Section 2(3) reads:

An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with

respect to his physical conduct in the performance of the undertaking. He may or may not be an agent. Restatement, Agency 2d § 2(3).

The comment in the Restatement further clarifies this point:

The word "servant" is used in contrast with "independent contractor." The latter term includes all persons who contract to do something for another but who are not servants in doing the work undertaken. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal. Restatement, Agency 2d § 2(3); comment b.

The comment goes on to point out that a broker is an independent contractor and an agent, and his principal is bound by the broker's unauthorized contracts and representation, but not liable to third persons for tangible harm resulting from unauthorized physical conduct within the scope of the employment, as the principal would be for similar conduct by a servant.

The Restatement of Agency makes it clear again:

One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor. Restatement, Agency 2d § 14(n).

The comment in Section 14(n) is further revealing:

"[I]ndependent contractor" is a term which is antithetical to the word "servant" although not to the word "agent." * * * Colloquial use of the term excludes independent contractor from the category of agent as a similar use in the transaction which they undertake they act for the benefit of another and subject to his control. Restatement, Agency 2d § 14(n) comment a.

Some cases which hold the view that a person may be both an independent contractor and an agent are *Hoffman & Morton Co. v. American Inc. Co.*, 35 Ill. App. 2d 97, 181 N.E.2d 821 (1962); *Dempster Bros., Inc. v. United States Fidelity & Guaranty Co.*, 54 Tenn. App. 65, 388 S.W.2d 153 (1965); *Wade v. Traxler Gravel Co.*, 100 So. 2d 103, 232 Miss. 592 (1958); *Ackert v. Ausman*, 29 Misc. 2d 962, 218 N.Y.S.2d 822 (1961), *aff'd.* 20 App. Div. 2d 850, 247 N.Y.S. 2d 999 (1964); *Derrick v. Drolson Co.*, 244 Minn. 144, 69 N.W. 2d 124 (1955); *Hoffman & Morton Co. v. American Ins. Co.*, 35 Ill. App. 2d 97, 181 N.E. 2d 821 (1962); *Commonwealth v. Minds Coal Mining Corp.*, 360 Pa. 7, 60 A.2d 14 (1948); *Witaszek v. Drees*, 280 N.Y.S. 592, 155 Misc. 838 (1935); and *Texas Co. v. Mills*, 171 Miss. 231, 156 So. 866 (1934).

The cases and the restatement are generally of the view that the relationship of a principal to an agent may be of two types—employment (servant) or independent contractor. And with respect to the independent contractor, the relationship with the principal may be either for a specific result only, with no control whatever, or in the

employment by a principal of an agent to act in a selling capacity, in which case the principal is responsible for misrepresentations but not the physical acts (unless said physical acts were specifically directed).

III. Count IV - Charges of Price Fixing

Respondents offered evidence only that showed that after the investigation started they changed their price fixing rule to state that they were fixing prices in fair trade states. Nothing was changed with respect to nonfair trade states, and the practice of fixing prices throughout the country never changed, as the evidence amply demonstrates. (See also Parts XIX and XX of Findings.)

Respondent Holiday Magic, Inc. fixes the prices at which its distributors may resell their products both at wholesale and at retail. Vertical price fixing at both levels has long been held to be unlawful by the courts. *U.S. v. McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S. Ct. 937, 100 L. Ed. 1209 (1956); *U.S. v. Parke Davis & Co.*, 360 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960); *U.S. v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920). Vertical price fixing arrangements are also *per se* violative of the Federal Trade Commission Act. See *The Roberts Co., et al.*, 56 F.T.C. 1569 (1960), and *Lenox v. F.T.C.* 417 F.2d 126.

The rebates and overrides required by Holiday Magic to be paid by its distributors to other Distributors, requiring such rebates at prescribed amounts is an indirect method setting the wholesale price at which the products may be sold to the Holiday Girls or organizers. Indirect, vertical methods of achieving resale price levels are also condemned by the courts. See *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129.

IV. Count V - Charges of Restrictions

A. Customer Restrictions

The Holiday Magic customer restrictions appear in the Findings in Part XXII. They may be summarized as follows:

1. Master and General Distributors may sell at wholesale only to Organizers and Holiday Girls that they sponsored into the business.
2. Distributors may not recruit other Holiday Magic Distributors who have already been sponsored into the business.
3. Distributors are to refrain from selling at the retail level to customers who are being serviced by other Holiday Magic Distributors.

Customer restrictions are unlawful, particularly as here where such restrictions support a plan of resale price maintenance. See *U.S. v. Bausch Lomb Co.*, 321 U.S. 707, 724; 64 S. Ct. 805, 88 L. Ed. 1024 (1944);

U.S. v. Sealy, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 1249 (1967); and *U.S. v. Arnold, Schwinn*, 388 U.S. 350, 87 S. Ct. 1856, 18 L. Ed. 2d 1239 (1967).

B. Retail Outlet Restrictions

Holiday Magic requires that all Distributors refrain from selling or placing Holiday Magic merchandise in such retail outlets as drug stores, department or variety chain stores, grocery stores or discount stores. Evidence of this restriction appears in Part XXIII of the Findings.

C. Advertising Restrictions

Holiday Magic, Inc. requires that all Distributors must obtain prior company approval for the advertising or promotion of Holiday Magic products. (See Part XXIV of Findings.)

Under the circumstances of the price fixing and retail outlet restrictions of Holiday Magic, Inc., these advertising restrictions must be deemed a phase of the entire control of operations.

D. Purchase Restrictions

Holiday Magic, Inc. imposes restrictions upon its Distributors in respect to their source of Holiday Magic products by requiring that:

1. Holiday Girls and Organizers purchase the Holiday Magic merchandise only from their sponsoring Distributors.
2. All Distributors must refrain from buying back merchandise from those Distributors to whom they may have sold.
3. Distributors must obtain prior approval from all other Distributors above them in the marketing chain before a transfer into the organization of another Distributor will be allowed.

E. Private Arrangements Restrictions

Holiday Magic requires that all of its Distributors refrain from entering into reasonable business undertaking of their choice by:

1. Requiring that in the event a partnership-distributorship dissolves, the departing partner must revert back to his original sponsor.
2. Requiring that in the event a General distributorship in partnership dissolves, the principal or partner who is departing must requalify as a new Master Distributor under his original sponsor, create a replacement Master, and pay the release fee to qualify for the General position again.
3. Requiring that all Master and General Distributors in adding on partners to their distributorships, or in selling a Master or General distributorship, must in those circumstances meet the same retail list price value purchase requirements as do "work-in" Masters.

4. Requiring that Distributors may have a financial interest in one Holiday Magic distributorship at a time, and may not simultaneously be a part of two separate distributorships.

5. Requiring that Distributors must not 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.

6. Distributors must not make a consignment of the Holiday Magic merchandise to any person.

These restrictions appear in the Findings of complaint counsel at Part XXV.

According to the "Rule of Reason" as set forth in *Board of Trade of the City of Chicago v. U.S.*, 246 U.S. 321, 38 S. Ct. 242, 62 L. Ed. 683 (1918), one must examine the effect of the particular restriction on competition and weigh the purpose, nature and probable effect, among other factors, of the restriction in determining whether or not it is unreasonable.

See also *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L.Ed. 619, where the Rule of Reason was adopted, and *The White Motor Co. v. U.S.*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 738, where the Rule of Reason was reaffirmed.

The restrictions herein have only two purposes which are to (1) generate further master inventory purchases from Holiday Magic, Inc. without regard to the needs of the distributor, and (2) to maintain the pricing, override and pyramid structure of the marketing plan.

Under these circumstances, they are anticompetitive.

V. Count VI - Charges of Territorial Allocations

Absent either horizontal agreements or price fixing, the Supreme Court has held territorial and customer restrictions imposed by a respondent supplier on its independent Distributors, where the supplier has parted with title and risk in the sale of the products, to be a *per se* violation of the antitrust laws. *U.S. v. Arnold Schwinn & Co.*, *supra*. Customer and territorial restrictions by themselves have also been found to be in violation of Section 5 of the Federal Trade Commission Act. *In the Matter of [International] Staple & Machine Company, Inc.*, Docket No. 8083, Sept. 21, 1961 [sic: Nov. 7, 1961, 59 F.T.C. 1080].

At bar we have the situation of the council, which is controlled by Holiday Magic, in the position of at least purportedly establishing routes for Holiday Girls. Territorial restrictions are unlawful where such restrictions support a plan to maintain resale prices. The evidence

suggests that in some instances the allocations are very effectively present and in others not. See VI.

VI. Count VII - Charges of Price Discrimination

A. Price Differential Between Masters and Generals

Master Distributors purchase Holiday Magic products at a discount of 55 percent of retail value.

General Distributors purchase these same products at a discount of 65 percent.

Although offhand these two different discounts appear to show a difference of only 10 percent, further examination discloses a greater difference.

From the point of view of the disfavored Master, this 10 percent represents 22.2 percent of his cost factor of 45 percent.

Example

General list price	\$100.00
Less discount	65.00
Cost	\$ 35.00
Master list price	\$100.00
Less discount	55.00
Cost	\$ 45.00
Generals discount	\$ 65.00
Masters discount	55.00
Difference	\$ 10.00 ÷ Masters Cost \$45.00 = 22.2%

Although the difference between discounts may only be 10 percent, the important factor is how this 10 percent relates to the Master's net cost.

The differential in terms of gross profits is even more significant. The Master pays \$45 for each \$100 of sales and the General pays \$35 for each \$100 of sales to retail customers. Therefore, the Master makes a gross profit of \$55 and the General a gross profit of \$65 on equivalent sales. The percentage increment that the General makes over the Master is 10/55 or approximately 18 percent greater gross profits.

At the wholesale level, and assuming the average Holiday Girl or Organizer purchases at least \$100 per month, they are at a 35 percent of list discount. The Master, on \$100 worth of retail list price purchases, pays \$45 to Holiday Magic and sells it for \$65 to his Holiday Girl, for a gross profit of \$20. The General, however, who paid \$35 for the same

goods, sells it for the same \$65 for a gross profit of \$30. Therefore, the General's gross profits for wholesale sales are 50 percent greater than the Master's gross profits for wholesale sales.

B. Master Distributors and General Distributors are at the Same Functional Level of Distribution

It is established that the classification of customers for discount purposes must not be arbitrary; it cannot be used as a means of discriminating in price between buyers who are actually in competition with one another. Therefore, mere labels or recitations to the contrary should be disregarded where the classification of customers by a seller does not follow real functional differences.

The record in this case is replete with evidence that Masters and Generals performed the same functions. Not only has General Distributor after General Distributor called by both sides stated that they did the same things as General Distributors that they did as Master Distributors, but a comparison of the actual activities and functions engaged in shows no distinctions at all in distributive functions or services. (The differences are in the collection of release fees and overrides.)

Holiday Magic Masters and Generals are wholesalers of Holiday Magic products, and virtually all testified that they sold at retail as well (to a greater or lesser degree). Council membership was necessary for these Distributors to get their Holiday Girls trained, and Masters and Generals paid the same council dues for these purposes. And with the functions performed by the CDC or CRS operations with respect to warehousing, the same can be said. Both Masters and Generals utilized the Distributor warehousing operations, at which they paid the same dues for the same inventory balances. Generals therefore did not even have inventory on hand greater than any Master who was also a member of the CRS or CDC, and Generals, in fact, have no inventory requirement at all, whereas Masters, at least as "buy-ins," must purchase an initial inventory. In this situation the Master probably has greater functions to perform than a General. 95 percent of all active Distributors at the Master and General levels were members of the CRS operation.

A look at the expenses of the various Masters and Generals reflect that they are at the same functional levels. Different functions would necessarily entail different levels of expenses.

Even the schooling of Masters and Generals is the same, and manuals which Holiday Magic sells to its Distributors to tell them how to run their businesses never distinguish between the functions performed by the two artificially and arbitrarily created groups.

To understand the marketing plan is to understand the reason for the creation of the favored class of Generals in the first place. The release fees are paid for the obscure privilege of moving up to General. If Generals bought at the same price as do Masters there would be no "level" to move up to!

Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensatory discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer, and it should not exceed the cost of that part of the function which he actually performs on that part of the goods for which he performs it. (*F.T.C. v. Doubleday*, 52 F.T.C. 169 (1955).) The seller must be able to justify the discount to the buyer by reference to the savings to the seller in having the operation assumed by the buyer. The mere possibility of greater cost is not sufficient.

With respect to the merchandise sold to the Generals at a 65 percent discount off list, Generals will in turn sell some of this to Organizers, Holiday Girls or at retail. This merchandise will not flow to the Master Distributor, who will likewise sell merchandise (which he purchases at a discount off list of 55 percent) to Organizers, Holiday Girls or retail customers, perhaps after a period of warehousing as well.

No distributive functions were performed by the General on the goods sold by the General to his retail customers.

C. Like Grade and Quality

In order for a finding of a Robinson-Patman Act violation it is necessary to establish that the goods sold were of "like grade and quality." Complaint counsel has shown through witness testimony, product brochures and order forms that Holiday Magic sold only one grade and quality of goods, and only one line of products, and that all goods sold by it were of "like grade and quality." Holiday Magic's products consisted of a single "line" because all of them were listed on the same standard order forms, and all distributors were free to and encouraged to purchase all items listed.

The courts have long held that goods need not be individually identical but need merely be part of the same line in order to be considered of "like grade and quality."

The leading case is *Moog Industries, Inc. v. F.T.C.*, 238 F.2d 43 (8th Cir., 1956); *aff'd* on other grounds, 335 U.S. 411 (1958). Moog discriminated in price between purchasers of three lines of automobile parts, leaf springs, coil action parts and piston rings. The evidence did not

prove that competing favored and nonfavored customers purchased absolutely identical items within these three product lines, *i.e.*, leaf springs, coil action parts, or piston rings designed for automobiles of the same make, model, and year. The court ruled that the Commission need not prove that *Moog* had sold identical or interchangeable parts within each of the three product lines to the two classes of purchasers, but merely to prove sales to the two classes of purchasers of each of the product lines as a whole.

The court ruled in *Moog* that the "like grade and quality requirement" was designed to isolate those sales "sufficiently comparable for price regulation by the statute." *Moog, supra*, 238 F.2d at 50. The court held that because *Moog* sold the items in lines, and because the discriminatory rebate that effectuated the price difference was paid upon all the items in the line, the Commission could find an illegal price discrimination despite the absence of proof that competitors had sold identical items within a line.

The *Moog* principle was further enunciated by the Commission in *In The Matter of Continental Baking Co.*, 63 F.T.C. 2071 (1963), stating:

The Court in the *Moog* case said in effect that when *Moog* made no attempt to govern or determine whether or not certain customers bought certain items of a line, the Commission did not have the burden of becoming immersed in the small details of matching items bought by competing customers to prove a fact, the disproof of which by *Moog* would have been sheer happenstance. 63 F.T.C. 2109.

D. "Contemporaneous Sales"

A lessening of competition can be found when sales or purchases by the favored and nonfavored customers occurred within a reasonable period of time - up to 3 1/2 months apart. *Fred Meyer, Inc. v. F.T.C.*, 359 F.2d 351, 357 (9th Cir. 1966); *cert. denied*, 386 U.S. 908 (1967). Hence, separation of sales or purchases to the two customers in point of time does not exclude the transactions from being held to be anticompetitive especially in instances where the product involved is a standardized item widely and frequently sold in the area during the years involved. In *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916, 920, and 921 (5th Cir. 1962) the court allowed a suit for damages arising from alleged discrimination despite the fact that the last sale to the nonfavored customer occurred before the favored customer made any purchases.

There is ample evidence to show the contemporaneous sales in the case at bar. But, since Holiday Magic's policy is one of selling at stipulated discounts—and always has been, there should be no real question in this respect.

E. Holiday Girl and Organizer Distributors who do not Purchase Directly from Holiday Magic are Indirect Purchasers within the Meaning of the Robinson-Patman Act.

Both Master and General Distributors purchase their merchandise directly from Holiday Magic, Inc., (See Findings, Part XLV) while Organizers and Holiday Girls purchase through their Sponsor, and are "indirect purchasers" from Holiday Magic, Inc., within the meaning of the Robinson-Patman Act, as the Commission has defined this concept through the years. (See Findings, Parts XV, and XXVI.)

The two elements of control and contact normally cited as prerequisite to a finding of an indirect purchaser are abundantly present in the instant matter. Indeed, a greater degree of control and contact by a company over its distributors is difficult to imagine.

From the very inception of the relationship at the company controlled opportunity meetings, to the training programs, rigid rules and regulations restraining the freedom of the distributors in pricing and customers limitations, the termination of those who violate the rules, the entering into contracts between distributor and company, etc., the company maintains strict controls and numerous contacts with the distributors.

The sale by Masters or Generals to Organizers and Holiday Girls is quite literally controlled by Holiday Magic. Organizers and Holiday Girls can only buy from the Master or General sponsoring them, and then only at the prices stipulated by Holiday Magic according to the refund bonus schedule.

In *Purolator Products, Inc. v. F.T.C.*, 352 F.2d 874, (1965), cert. denied, 389 U.S. 1045, 88 S. Ct. 758 where the respondent sold at discriminatory prices to wholesalers with whom jobbers (the alleged indirect purchasers) completed with in sales to dealers, the Court held that where "a seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical, economic purposes dealing directly with the seller." The Court further stated that "if the seller controls the sale, he is responsible for the discrimination in the sale price * * *."

In the *Purolator* case, the Commission found sufficient control to apply the indirect purchaser doctrine where the facts showed that (1) Purolator had at one time reserved to itself the legal right to control sales and (2) Purolator wrote and supplied the wholesaler-jobber agreements and (3) utilized suggested resale prices lists. See also *In the Matter of Champion Spark Plug Co.*, 50 F.T.C. 30, (1953) at pp. 43-45

where the Commission applied the indirect purchaser doctrine upon finding elements of control similar to those above. In its opinion, the Commission stated "The terms and conditions of sales to such Franchise accounts were fixed by Champion. The degree of control exercised by respondent over sales to such Franchise accounts was such that such sales were in all essential respects sales by respondent, these indirect accounts are considered by the Commission to be purchasers within the meaning of the Clayton Act, as amended."

F. Discrimination by Holiday Magic, Inc. With Respect to Sales to Holiday Girls

Holiday Girls purchase from Masters and Generals in the same manner as do the Organizers, but resell only at the consumer level. Organizers resell to Holiday Girls as well as to consumers.

In selling at retail to the ultimate consumers, Holiday Girls, depending upon their volume for the month, buy at either a 30 or 35 percent discount, compared to 55 percent discount for Masters and 65 percent discount for Generals, who certainly perform no additional function with respect to their own retail sales.

It is well established that when a buyer performs both wholesale and retail functions, as in the case of Masters and Generals at bar, the seller must be careful to distinguish between the two in his pricing policies if he chooses to engage in price differentiation between competing customers. Holiday Magic has not done so. This is perhaps one reason why turnover is so great at the Holiday Girl level.

G. Discrimination by Holiday Magic, Inc. with Respect to Sales to Organizers

Except to the extent that Organizers do not purchase their products directly from the company, they are in the same position that a Master would be in attempting to compete with a favored General - only the Organizer is in a position even lower than the Master in terms of discount.

Compared with the Master, who purchases at 55 percent off list price, the Organizer will purchase at anywhere from 30 percent to 55 percent off list price according to Holiday Magic's refund bonus schedule. Thus, the Organizer's maximum disfavored buying percentage vis-a-vis the General is 35/70 or a 50 percent discount. For every \$70 the Organizer spends on his products, the General spends only \$35. Similarly, the Organizer may purchase up to as much as a 100 percent markup in price.

There are of course, some functional distinctions between the Generals and Masters and their Organizers, but only to the extent that the Master or General sells his products to the organizer rather than

directly at retail himself. However, the volume discount arrangement, which is cumulative on a monthly basis, indicates the frailty of the argument that the difference in price to Organizers is functionally justifiable. The more an Organizer buys, the less disfavored he becomes, and the more disfavored the Master becomes with respect to the General since with very substantial sales by a Master to an Organizer, the Organizer's volume discount will approach 55 percent, which will create a situation where the Master is not being reimbursed for his functions at all. Therefore, all discriminations along the way show that the price differential is not based upon functional distinctions. The more the Master performs in the way of function, the lower is his profit on those sales. The CRS usage fee alone will absorb most of his gross profit, since the Master must pay 5 percent of retail value to CRS on Organizer purchases. When the Organizer reaches the discount of 46 percent, the Master loses money. This is not a recognition of function, but a total disregard thereof.

H. Competitive Injury

It is well established that substantial difference in prices charged to competing customers are sufficient to base a finding that such difference in prices, in and of themselves, may tend to substantially lessen competition at the secondary level. *E. Edelmann & Co. v. F.T.C.*, 239 F.2d 152, 154 and 155 (7th Cir. 1956); *cert. denied*, 355 U.S. 941 (1956); *rehearing denied*, 356 U.S. 905 (1957). Especially so as this is true in situations such as we have here where profit margins are so extremely low.

The difference in price charged by Holiday Magic to Generals and Masters is of such magnitude as to warrant a finding that it is "reasonably possible," as well as "reasonably probable," that such price difference may tend to substantially lessen competition between the favored and nonfavored customers. (See *F.T.C. v. Morton Salt*, 334 U.S. 37 (1948); *E. Edelmann & Co.*, *supra*, at 154.)

The Supreme Court's decision in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948) should be ample precedent for the complaint alleging unlawful price discrimination in the instant matter.

The importance of the *Morton Salt* decision is that the Commission's finding that the effect of the quantity discount on the salt carloads may be substantially to lessen competition was proven sufficiently by the showing that said discounts resulted in price differentials between competing purchasers sufficient in amount to influence the resale price of salt. Furthermore, the Court added that the showing of "substantial"

differentials in price to competitors is in itself, sufficient to justify a conclusion (of the Commission) that injury to competition was adequately supported.

When the facts of *Morton Salt* are compared with those of Holiday Magic, the substantial discounts of salt pale in comparison to the discounts in Holiday Magic.

The Morton salt prices per case were as follows:

less-than-carload	\$1.60
carload	1.50
5,000 cases in 12 mos.	1.40
50,000 cases in 12 mos.	1.35

These figures reveal that the minimum discount is .10/1.60 or 6.2 percent. The other two discounts are .20/1.60 and .25/1.60, or 12.5 percent and 15.6 percent, respectively. These figures, it must be remembered, are further affected by the realization that salt is a small item in most wholesale and retail businesses, and that less than 1/10th of 1 percent of Morton's total salt business failed to get the benefit of the carload lot discount.

Holiday Magic's discounts are not only substantially greater than the substantial discounts in the Morton salt plan, but also account for the major or entire business of its retailers and wholesalers, and all sales by the company produce the discount via the rebate system.

In *Muller Co. v. F.T.C.*, 323 F.2D 44, (7th Cir. (1963); *cert. denied*, 377 U.S. 923 (1964), the court sustained the Commission's finding of the requisite competitive injury based solely on the substantiality of a price difference of precisely 10 percent between the favored and nonfavored customers.¹⁰

The Courts have repeatedly held that evidence of specific or actual adverse effects on competing purchasers need not be shown. The best exposition of this is found in *Moog Industries, Inc. v. F.T.C.*, *supra*, wherein the court held:

The Commission was not required to show that petitioner's rebate system has, in fact, adversely affected competition. The language—in the "effect" clause of the statute—is "*may be substantially to lessen competition * * **" (Italics supplied.)

The Supreme Court has repeatedly held that Section 2(a) of the Act does not require a finding that the discriminations in price have in fact had an adverse effect on competition. *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726, 738, 742; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356, 357. It has also held that "The statute is designed to reach such discriminations 'in their incipience' before the harm to competition is effected. It is enough that they 'may have the prescribed effect.'" *Corn Products case*, 324 U.S. at 738.

¹⁰ As noted, however, the distinction in price in Holiday Magic are greater than 10 percent.

For more recent expressions of this proposition, see *Monroe Auto Equipment Co. v. F.T.C.*, 347 F.2d 401, 404 (7th Cir. 1965); *cert. denied* 382 U.S. 1009 (1966). There, the court upheld the Commission's finding of the requisite anticompetitive effects based solely on the fact that the price discriminations were "far in excess of the average net profit usually earned by automotive parts jobbers."

The courts have further held that the lack of price competition between favored and nonfavored customers is no barrier to a finding of a lessening of competition through secondary line discrimination. *Foremost Dairies, Inc. v. F.T.C.*, 348 F.2d 674 (1965); *cert. denied* 382 U.S. 759; *Standard Motor Products, Inc. v. F.T.C.*, 265 F.2d 674, 676 (2d Cir. 1959), *cert. denied* 361 U.S. 826 (1959). Indeed the courts found a lessening of competition even in instances in which resale prices were rigidly adhered to by both favored and nonfavored customers. See *National Dairy Products v. F.T.C.*, 395 F.2d 517, *cert. denied*, 393 U.S. 977 (1968); *Edelmann, supra*.

And courts have upheld a finding of a lessening of competition despite testimony to the contrary from nonfavored customers. See *Foremost Dairies, Inc., supra*; *Moog Industries, supra*, 238 F.2d at 50 and 51; *Whitaker Cable Corp., supra*, 239 F.2d at 255; *E. Edelmann & Co., supra*, 239 F.2d at 155. The requisite finding of anticompetitive injury has been upheld even in the extreme case where some nonfavored customers prospered more than some favored customers. *Standard Motor Products, supra*, 265 F.2d at 676.

Because of the substantiality of the discounts, and the nature and amount of the expenses which both Master Distributors and General Distributors must endure in order to remain in business, the likelihood is great that the General with his favored status is far more likely to remain a viable competitor longer—even in situations where he is suffering losses such as we have seen exist at bar, if he can plow his added income back into the business in order to get it off the ground and achieve a sounder operation in the long run—without the release fees and overrides to distract him.

I. Low Profit Margins

The expenses of Masters and Generals are many, and varied. For example, advertising, office space, warehouse room, samples, sales aids, auto, telephone, shipping, training, recruiting, council and distribution center, and other expenses all eat away at a distributor's gross profits. Their expenses, of course, highlight the injury to various Distributors.

The record also amply demonstrates the low and often negative profit margins in this business. The tabulation of the various profit levels have

been shown on the three charts covering Milwaukee, Miami and Chicago, for Distributors from whom profit and loss statements were obtainable.

In order to make a profit, sales must be higher than cost of sales. However, in many cases the gross profit margin is so low that a reasonable profit could not be anticipated because of the other operating expenses, at the volume of business that was available to each individual.

As an example, Sharon Fisher traded in the Milwaukee area, showed gross receipts of \$2,427 as a Master Distributor, which yielded a gross profit of \$1,890. However, the other operating expenses heretofore mentioned amounted to \$1,990, which resulted in a net operating loss of \$100. If Sharon Fisher had been a General (which she finally did become) her gross profit margin would have been substantial enough for her to have absorbed the heavy operating expenses and still show a profit rather than a loss. Sharon Fisher's gross receipts do not reflect additional income that would be available to a General only such as the overrides and release fees.

Of those few distributors such as Belton, Toepfer, and Benson who do show large profits as a percentage of gross sales, the record reflects that in every case this was a result of the release fees and overrides which preoccupied their time. No Master Distributors have overrides and release fees available to them, and so no Masters are in the position of having substantial gross profits as a percentage of gross sales.

J. "Availability" of Lower Prices

Holiday Magic could of course defend the sales plan as being "available" to all distributors, and therefore a defense to a Section 2(a) proceeding.

Although the availability concept does not specifically appear in Section 2(a), the availability requirements for promotional payments on proportionally equal terms under Section 2(d) of the Robinson-Patman Act, has enabled the availability concept to work its way into Section 2(a). (See "*The Status of 'Availability' under Section 2(a) of the Robinson-Patman Act*" by Ira M. Millstein, Vol. 42 Number 3, New York University Law Review, May 1967.)

As applied to Holiday Magic, the argument fails both with regard to the quantity discounts offered Holiday Girls and Organizers, and the discrimination between the purchases of the Masters and the Generals who buy without regard to quantity discounts.

Dealing first with the Master-General differential, it is clear that the concept of availability cannot apply. The Master distributor does not

purchase his products under a discriminatory price, the argument goes, because he may some day qualify for the General Distributor position.

This position lacks support both in law and in reason. It is unreasonable because it is so obviously contrary to the very purpose of the Robinson-Patman Act which is "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). To simply argue that some day the small can become big and thereby be in a position to share in the discrimination and competitive advantage would be folly.

In the *Dayco Corp.* case, Trade Reg. Rep. (Transfer Binder 1963-1965) ¶17039, at 22140 (1964), the Commission was faced with the argument that because lower prices would be available to individuals who could form buying groups of their own, "lower prices were available." The Commission stated that "lower prices are not 'available' where a purchaser must alter his purchasing status before he can receive them." *Id.* at 22140.

The "availability" argument with respect to a volume discount arrangement, is more sophisticated. The argument is that, in a schedule of quantity discounts offered to all customers even if not cost justified, a price is not discriminatory where the highest bracket is within the purchasing range of the average small purchaser. The availability concept thereby assumes the disruption of the nexus between the price discrimination and any potential injury.¹¹

As indicated above, the *Dayco* case suggests that the Commission indicated it might reject an availability defense if the customer is required to take any action whatsoever beyond his ordinary purchasing routine. The Commission's declaration in its entirety is to the point, at p. 22140.

Lower prices are not "available" where a purchaser must alter his purchasing status before he can receive them. Patently, a lower price is not "available" to a merchant who must, in order to qualify, purchase more goods within a given time period.

If the disfavored customer had to undergo a change in his status or incur a substantial expenditure to receive the favored discount, the discount is not "available" to all and therefore there is competitive injury. *In the Matter of Alhambra Motor Parts*, 57 F.T.C. (1007 (1960)) the Commission found that members of a buying group induced discriminatory discounts since such discounts weren't available to other

¹¹The volume discount purchase situation is somewhat more easily justified than a cumulative discount. In the *Holiday Magic* plan the volume discounts are cumulative.

jobbers. Subsequent to the entering of an order forbidding such discrimination, the Commission accepted a compliance report which provided for the continuation of the buying group and its receipt of discounts provided essentially that anyone could join the group without paying any charge.¹²

The Commission also examined the question of an availability defense in *United Fruit Company, et al.*, Dkt. No. 8795, Jan. 12, 1973 [82 F.T.C. 53]. It held that mere theoretical availability was insufficient to constitute a defense to a price discrimination charge. It characterized as a "meaningless gesture" an offer to sell at the favored terms that would require the disfavored customers to construct new distribution facilities.

An examination of the factual background of this case shows that the extra discount granted General Distributors clearly was not "available" to Master Distributors. Masters could not simply avail themselves of the added discount by changing their purchasing habits, as would be true in the case of an extra discount given on a monthly order. Instead these Masters would have had to more than double their initial investment plus recruit a competitor!

It therefore becomes clear that the discount at which General Distributors buy their Holiday Magic products are not "available" at all to Master Distributors, to Organizers or to Holiday Girls. With respect to sales at the retail level, for which the Holiday Girls and Organizers compete, these lower level Distributors would have to pay approximately \$9,000 today, plus recruit a Master Distributor in order to have the 65 percent discount available to them.

K. No Cost Justification

If no function is performed by the General which is compensated by the seller in the form of an additional discount, it can only be justified if such differentials make only due allowance for differences in the cost of manufacture, sale or delivery, and if such cost differences are those resulting from the differing methods or quantities in which the goods are sold or delivered to the Master and General Distributors.

No differences in the cost of manufacture, sale or delivery on the part of Holiday Magic were even raised by respondents in their defense case that would seek to justify such price discrimination. If anything, the

¹²The Ninth Circuit, initially set aside the Commission's Order for reasons not relevant herein (See *Alhambra Motor Parts v. F.T.C.*, 309 F.2d (9th Cir. 1962). The circuit court subsequently affirmed the relevant portions of said order as well as the aforesaid compliance report by its unreported order in *Alhambra Motor Parts v. F.T.C.* No. 20, 764, issued Dec. 1, 1967.

record indicates that it may be cheaper for Holiday Magic to sell to Masters than to Generals for the simple reason that the bulk of Master orders appear to be the initial inventories, whereas the General never has to order products in the quantities of the initial Master inventory.

The one argument which has been made is that Generals perform services for Holiday Magic in training and motivating Masters, which Holiday Magic would have performed but for its performance by the Generals and the price structures reflect "compensation" for their services rendered.

Not only are such "services" fictitious, but there is no way that a discount to a General Distributor on his purchases for resale to the General's customers in any way is connected to the alleged training and motivation of a Master Distributor, to whom he does not sell.

Certainly a General with gross sales of \$10,000 per month performing a given amount of work in training a Master for Holiday Magic should not be compensated 10 times less than another General (or the same General in another month) having gross sales of \$100. There is simply no connection between the Generals' own purchases and the "services" to a Master. If anything, it is an inverse proposition. The more the General purchases, the more likely he is to dwell on his own business activities, yet he will receive far more by way of discounts from Holiday Magic.

It is conceptually impossible to base a payment for services rendered on proportion to the success of the person performing the service in unrelated business activities (his own).

But most importantly, the record establishes that it is Holiday Magic, Inc., through its Instructor General and Trainer General programs that does all the training for the Masters, and for which the Masters have to pay. The record is replete with instances in which no services were performed by a General, and nothing was ever done, except that Holiday Magic would tell the Master Distributor that he's in business for himself and that he should be able to handle all of his own problems; or perhaps join a council in his area.

No cost justification study of any kind was evidenced. The burden is on respondents to present one. They haven't shown that it is less costly to sell to General Distributors than to Master distributors.

In *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, at pp. 43, 45, 48, the Supreme Court held that in supporting a cost justification defense it must be shown that the difference in price must be based upon actual cost differences, to the seller with the burden of showing a cost justification upon the one shown to have discriminated in prices.

L. The 10 Percent Override

The 10 percent override should not be confused with the differential in price between Masters and Generals since the General will receive an additional 10 percent of the list price purchase value of Master Distributors in his organization. This means that after the basic discriminations are taken care of, the General receives a compounded 10 percent payment, which makes the discrimination, in net effect, much greater.

The 10 percent override is directly related to the purchase of products by the Master - the nonfavored customer. Every time he purchases products from Holiday Magic, Inc., the extent of his nonfavored status is given to the General. It is, in effect, a compound discrimination in "net" price.

Discriminatory rebates are as much a discrimination in "net" price as are discriminations *ab initio*. In a "net" basis there is no difference, and that is all there is to the statutory requirement.

There is absolutely no relation between the amount received by way of overrides to a General and the time, effort or money spent on an alleged training program. It is conceptually impossible to pay an override of 10 percent for supposed services rendered, on the purchases of a Master Distributor allegedly receiving aid since such payment must be based upon savings to Holiday Magic, and the company would run up a greater expense in training a less successful Master than a more successful Master, yet the General who "trains" the unsuccessful Master gets little or nothing for his efforts. In reality, training is performed by the so-called Instructor Generals and Trainer Generals, who are paid for their services by the individuals who actually receive the training.

Such training as there is is provided by councils and the IG and TG program, both of which are supported by dues or payments from Masters and Generals.

M. Customer Restrictions and Price Discriminations

If anything, Holiday Magic's customer restrictions upon its Distributors highlight the inherent competition existing between and among them. If there were no competition, there would be no need to make it appear restrictions were being imposed on selling to one another's customers. At any rate, customer restrictions do not inhibit potential competition.

Even the assignment of territorial routes without consistent enforcement does not insulate Distributors from competition as an inducement to participation. In order to obtain a route and keep a route, a minimum of \$300 a month in volume had to be obtained and maintained. Since this

was often (and usually) not the case, the routes were changing hands often. The product competition and competition in obtaining product routes is undeniable in the presence of fluctuating territorial overlapping adjustments to keep pace with Holiday Girl turnover.

All this, of course, indicates that with or without customer limitations or exclusive routes for Holiday Girls (which is all the complaint alleges with respect to routes) Distributors are in potential competition. There is no need to show that Distributors are in competition by selling to the same customer. The absurdity of this approach would lead to the illogical conclusion that Distributors selling high priced items, or once in a lifetime items, are not in competition because the same customer does not buy from both Distributors.

N. Adherence to Holiday Magic So-Called Marketing Plan Is Inherently Price Discriminatory

If the mandatory plan is adhered to as evidenced, the discounts allowed at different levels of distributorships must not only be conducive to price discrimination but actually price discriminatory as reflected by the foregoing Findings and Conclusions in the absence of respondent affirmative proof to the contrary.

VII. Summary of Conclusions

1. The Federal Trade Commission has jurisdiction over respondents and over this proceeding.

2. Respondent Holiday Magic, Inc. is engaged "in commerce" within the intent and meaning of Section 5 of the Federal Trade Commission Act, and is engaged in the interstate sale of its Holiday Magic products within the intent and meaning of Section 2 of the Clayton Act, as amended.

Respondent William Penn Patrick is the founder of Holiday Magic, Inc. has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of Holiday Magic, Inc.

The entire unconscionable scheme which respondents have engaged in was the sole creation of respondent Patrick, and the corporate respondent was simply the means he created to carry out this scheme.

It is respondent Patrick whose future conduct must be the concern of the Commission and it is Patrick's conduct which the relief must be designed to effectively restrain if future law violations are to be prevented.

Respondent Fred Pape was responsible, along with others, for estab-

lishing, supervising, directing, controlling and participating in the business activities of respondent Holiday Magic, Inc.

There is public interest in issuing a cease and desist order against Mr. Pape in his individual capacity in order to prohibit future business activities of a similar nature on Pape's part.

Respondent Janet Gillespie was responsible, along with others, for establishing, supervising, directing, controlling and participating in the business activities of respondent Holiday Magic, Inc.

There is public interest in issuing a cease and desist order against Gillespie in her individual capacity in order to prohibit future business activities of a similar nature on Gillespie's part.

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

Corporate respondent is in substantial competition with other firms or persons engaged in the manufacture or distribution of cosmetic and home care products.

Respondents 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 and home care products.

Respondents have entered into contracts, agreements, combinations or understandings with each of its Distributors whereby said Distributors agree and are required to maintain the resale prices at wholesale and retail levels, as established and set forth by the company, notwithstanding that some of such Distributors are located in states which do not have fair trade laws.

Respondents have entered into contracts, agreements, combinations or understandings with each of its Distributors whereby said Distributors agree and are required to maintain the discounts, overrides, rebates, bonus schedules, and finder's fees, as established and set forth by the company, notwithstanding that some of such distributors are located in states which do not have fair trade laws.

Respondents have entered into contracts, agreements, combinations or understandings with each of its Distributors whereby said Distribu-

tors are restricted as to whom they may purchase their cosmetics and home care products from, and to whom they may resell them, by:

(a) requiring Holiday Girls and Organizers to purchase only from their sponsoring distributors;

(b) prohibiting its Distributors from buying back merchandise already sold to other distributors in the distribution line;

(c) restricting the Distributors from transferring into the organization of any other Distributor of their choice, from whom they may choose to deal with and purchase product.

The practice of restricting the Distributors to purchasing Holiday Magic products only from the specified source constitutes an unreasonable restraint of trade and an unfair method of competition.

Respondents have engaged in the practice of restricting their Distributors as to the customers to whom they may resell their Holiday Magic products by:

(a) Requiring that Masters, Generals and Organizers sell at wholesale only to Organizers and Holiday Girls whom they have sponsored into the Holiday Magic program;

(b) Prohibiting Distributors from recruiting or sponsoring other Distributors who have already been sponsored into the Holiday Magic program;

(c) Prohibiting Distributors from selling at retail to consumers or retail customers who are currently being serviced by other Holiday Magic Distributors.

The practice of restricting the Distributors from selling their Holiday Magic products to specified persons or classes constitutes an unreasonable restraint of trade and an unfair method of competition.

Respondents have engaged in the practice of restricting the retail outlets in which Holiday Magic products Distributors may sell or offer for sale Holiday Magic products by prohibiting Holiday Magic Distributors from placing Holiday Magic products in drug stores, department or variety chain stores, grocery stores or discount stores. The practice of restricting the retail outlets in which or from which Holiday Magic Distributors may offer their Holiday Magic products for sale constitutes an unreasonable restraint of trade and an unfair method of competition.

Respondents have engaged in the practice of requiring its Distributors to obtain the prior approval of Holiday Magic, Inc. prior to the advertising or promotion of Holiday Magic products by the Distributors.

The practice of requiring the Holiday Magic Distributors to submit all forms of advertising for the Holiday Magic product to the respondent for approval prior to the advertisement of same constitutes an unreasonable restraint of trade and an unfair method of competition.

Respondents enter into agreements with their Distributors and restrict and delimit their Holiday Magic Distributors from engaging in their business activities free of arbitrary and undue interference by corporate respondent in that Holiday Magic, Inc. requires:

(a) that in the event a partnership distributorship dissolves, the departing partner is required to revert back to his original sponsor;

(b) that in the event a General distributorship partnership dissolves, the departing partner must requalify as a new Master Distributor under his original sponsor, create a replacement Master and pay a release fee to qualify for the General position again;

(c) that the addition of partners to an existing Master or General distributorship or the sale of a General or Master distributorship must meet the same retail list price value purchase requirement as do Master Distributors;

(d) that distributors may only have a financial interest in one Holiday Magic distributorship at a time;

(e) that Distributors must not enter into any agreement with any other Distributor to make a division of profits, assets or new recruits in violation of the marketing plan;

(f) that Distributors must not make a consignment of the Holiday Magic merchandise to any person.

The restrictions and limitations that Holiday Magic places upon its distributors constitute unreasonable restraints of trade and unfair methods of competition.

Respondents and their representatives have engaged in the practice of allocating exclusive sales territories to Holiday Girls in connection with the sales of Holiday Magic products to retail customers in certain areas.

The allocation of territories to Holiday Girls, and the manner in which such territories were allocated, constitute unreasonable restraints of trade and unfair methods of competition.

Master Distributors and General Distributors are at the same functional level of distribution in connection with wholesale sales.

Master Distributors, General Distributors and Holiday Girls are at the same functional level of distribution in connection with direct retail sales to the consuming public.

Master Distributors and General Distributors in the same geographic market area - including the city and suburban area in which they reside and do business are in actual and potential competition with one another in connection with the wholesale sale and distribution of Holiday Magic products. Master Distributors, General Distributors and Holiday Girls engaging in retail sales activities in the same geographic area are in

actual and potential competition with one another in connection with retail sales of Holiday Magic products.

Respondent Holiday Magic, Inc., is discriminating in price by selling to Master Distributors at a substantially lower price than it sells to General Distributors.

Holiday Girl Distributors and Organizer Distributors are indirect purchasers of Holiday Magic, Inc.

Holiday Magic, Inc. is discriminating in price indirectly by selling to Organizers and Holiday Girls indirectly at substantially lower prices than it sells to other Organizers, Masters and Generals.

The effects of such price discrimination may be to substantially lessen competition or tend to create a monopoly.

The operation of respondents' merchandising program contemplates geometrical increases in the number of distributors to insure participants the earnings represented and implicitly realizable from the program.

Respondents' marketing program holds out to prospective Distributors the lure of making large sums of money through a virtually endless chain of recruiting additional participants to whom products need not be sold, or who are at the same functional level as the recruiter.

Participants may be, and in substantial numbers of cases were and will continue to be, unable to find additional investors or participants in a given community or geographical area by the time that they enter the merchandising program.

As to each of the individual participants in respondents' merchandising program, 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' merchandising program may realize a profit through recruitment, all participants do not have the potentiality of receiving equivalent sums of money through the recruitment process, and the greater the number of Distributors previously recruited, the lower the actual chances for such success.

Respondents' 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 implicitly realizable and represented as realizable in the said merchandising program.

Participants in respondents' merchandising program are induced to invest substantial sums of money on the possibility that the activities and efforts of others, over whom they need exercise little or no control, they will receive substantial financial gains.

The realization of substantial financial gains in respondents' merchandising program 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.

Respondents' merchandising program is in the nature of a lottery because it is a gaming device, gift enterprise or lottery scheme.

The marketing plan is not primarily designed as an offer to knowledgeable businessmen, competent to weigh and evaluate commercial risks. It is designed rather to appeal to uninformed members of the general public, unaware of and unadvised of, the true nature of the risks run--persons with limited capital who are led to part with that capital by promise and hopes which are seldom, if ever, fulfilled.

Implicit in the arrangement of the Holiday Magic marketing plan is the promise, rarely if ever kept, that the recruiting Distributor can, without himself working, profit greatly from the work of others.

Respondents have represented to prospective participants, directly and indirectly, that it is not difficult to recruit and retain persons who will invest or participate in the Holiday Magic merchandising program.

It is difficult, and becomes increasingly more difficult under respondents' geometrically increasing program to recruit and retain persons who will invest in respondents' program.

Respondents have represented to prospective participants that Holiday Magic products will be or are advertised widely and substantially in the community or geographic area in which such representations are made.

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

Respondents have represented to prospective Distributors, directly or indirectly, that employment is being offered.

Respondents, their representatives and Distributors do not offer employment in connection with the Holiday Magic marketing program, but instead use advertisements indicating employment is offered to obtain leads to prospective investors in their marketing program.

Respondents have represented to prospective participants, directly and indirectly, that participants in the Holiday Magic marketing pro-

gram have the reasonable expectancy of receiving large profits or earnings.

Most participants in respondents' marketing program do not in fact have a reasonable expectancy of receiving the large profits or financial gains represented, and most participants in respondents' marketing program do not and have not received the earnings and income represented as reasonably attainable.

Respondents have perpetuated a scheme fraught with misrepresentations from which they try to insulate themselves by using devious contractual language and so-called "hypothetical" examples of earnings potential not clearly understood or understandable by persons exposed to this scheme.

Respondents have calculated the program to enrich only themselves at the expense of innocent would-be small businessmen, lured into it by "get-rich-quick" promises. Respondents even require that these new Distributors pay for their own training programs and sales manuals, which are of dubious value.

Because of the nature of the Master Distributors' inventory loading and the incredibly large numbers of such Master and General Distributors who bought inventories of cosmetics in order to participate in respondents' merchandising program or marketing scheme, the inventories in many situations are largely worthless to persons who are unable to sell the same at wholesale or at retail.

VIII. Nature of the Order as Related to Restitutive Relief

An order which merely prohibited respondents from engaging in similar frauds in the future would have no real effect on preventing respondents from devising another illegal business venture.

The Commission in its most recent expression of its powers to order restitution in *Universal Credit Acceptance Corporation, et al.*, Docket No. 8821, issued Feb. 16, 1973 [82 F.T.C. 570], stated the broad powers it has in this respect as follows:

The Courts have made it abundantly clear that the Commission is duty bound to devise an appropriate and reasonable remedy to cure violations found to exist and to prevent their recurrence. The central purpose of relief is "to prevent violations of the Act, the threat of which is indicated by past conduct of the petitioners." *Feitler v. F.T.C.*, 201 F.2d 790, 794 (9th Cir.), *cert. denied*, 346 U.S. 814 (1953).

Moreover, the Commission through its order "cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, that its order may not be by-passed with impunity." *F.T.C. v. Ruberoid*, 343 U.S. 470, 473 (1952); *F.T.C. v. National Lead Co.*, 352 U.S. 419, 431 (1957). Once a violation is found the Commission must "frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in [the] future * * *."

F.T.C. v. Colgate Palmolive Co., 380 U.S. 374, 395 (1965); *Atlantic Rfg. Co. v. F.T.C.*, 381 U.S. 357, 367 (1965); *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360, 364 (1962). Through these orders the Commission is required "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress. * * *" *Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411, 413 (1958). We conclude, therefore, that restitutionary relief is essential in this case in order to redress the competitive balance disrupted by respondents' fraudulent program and prevent repetition of these practices in the future.

And as to the liability of individual respondents for restitutionary relief:

Respondents argue that respondent Heater should not be subject to the refund provisions in the order because he received no income from the marketing and operation of the program, and alternatively, that he should be excused from the refund provisions on humanitarian grounds. Neither contention has any merit. The Law Judge found that respondent Heater was the essential author and promoter of the illegal credit card program. He created the corporations through which the program was implemented. He was the sole stockholder of the corporations which were active during the relevant period, served as president of both International and Universal for most of the relevant period and was found by the Law Judge to have had primary responsibility for establishing, supervising, directing and controlling all of the acts and practices of these corporate respondents. He was in fact the alter ego of these corporate respondents which had no real existence separate from him.

The Law Judge's finding that Heater dominated every aspect of the program is fully supported by the record. All member and franchisee complaints were ultimately brought to his attention and were answered in accordance with his directions. He took an active role in the preparation of the program's promotional material and prepared material was submitted for his approval. Additionally, he often acted as an instructor for the franchisees. His influence in the origination and implementation of this fraudulent scheme was all pervasive. [Footnotes and citations omitted]

Restitutive relief under the Commission's concept aforesaid is justified in the case at bar:

(a) The obtaining by respondents of the illegally obtained money from investors is a violation of Section 5 of the Federal Trade Commission Act, and therefore the retention and failure to refund same is a continuing violation of Section 5.

(b) There is no need to plead in the complaint that the retention and failure to refund that which has been illegally obtained is a violation of Section 5 since the complaint alleges the taking of the money as a violation. If the taking is unlawful, then the retention is automatically unlawful.

(c) Respondents were formally put on notice of complaint counsel's intentions to seek restitutive relief the first day of trial on November 1, 1971 (See Tr. 68-70) although not provided for in the proposed order attached to the complaint which in any event is not binding on the Commission or administrative law judge unless misleading. Adequate and timely notice by complaint counsel on the record with regard to

seeking restitutive relief clearly meets all requirements of due process necessitating the elimination of surprise.

(d) Adequate relief on the false, misleading and deceptive practice allegations require restitutive relief.

(e) Adequate relief in the anticompetitive aspects of this matter - including the anticompetitive nature of the false, misleading and deceptive matters, requires restitutive relief.

(f) Restitutive relief is proper not only with respect to Mr. Patrick and Holiday Magic in connection with Holiday Magic activities, but also against Mr. Patrick in connection with all aspects of the order since he is legally responsible in his individual capacity.

Because he is legally responsible in his individual capacity, by continuing to refuse to refund money from other operators of the same ilk as Holiday Magic (if any) he engages in a continuing violation of the provisions of the order.

Restitution is therefore appropriate with respect to all activities of Mr. Patrick which violate the order.

The record reflects a recent change in the control of Holiday Magic, Inc. in that Holiday Magic is now a subsidiary of Marketing Associates, Inc. which in turn is a subsidiary of U. S. Universal, Inc. Thus, corporate control and responsibility over the acts and practices of Holiday Magic would extend to these two corporations as well as any other agents, successors or assigns within the organization of the corporate structure.

Since these corporations have not been made parties to the complaint an order specifically directed to them would be improper. However this cannot effect the impact of the order which is directed to the agents, representatives, successors and assigns of Holiday Magic, Inc. regardless of who they are now or eventually may turn out to be (*i.e.*, Marketing Associates Inc., U. S. Universal Inc. or any other entity). All parties have been placed on notice to this effect pursuant to the proposed order annexed to the complaint.

In concluding it might be well to point out that unfortunately in this particular and exceptionally protracted case it has been impossible to render findings and conclusions with more brevity in the presence of the volume of evidence involved reflective of Holiday Magic's entire plan and details of the operation thereof as related to seven different charges or counts, each of which is premised upon a different legal theory involving deception, lottery, price fixing, price discrimination, Holiday Magic control over independent contractors indicative of agency relationship under certain circumstances and condonation of certain independent contractor malpractices from which adoption may be reasonably imputed. In fairness to the parties it has also been