

Order requiring a San Jose, Calif., manufacturer of brassieres, girdles, swimwear, wigs and lingerie, among other things to cease using an open-ended, multi-level (pyramid) marketing plan to recruit distributors for its products; misrepresenting the earnings and profits a distributor may expect to make; maintaining resale prices; and restricting distributors as to whom they may sell their merchandise.

Appearances

For the Commission: *Jerome Steiner and Ralph Stone.*

For the respondents: *Rosenberg & Wiseman, San Jose, Calif.*

* Petition for review filed Oct. 11, 1974, C.A. 2nd.

Complaint

84 F.T.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. Section 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ger-Ro-Mar, Inc., a corporation, d/b/a Symbra'ette, and Carl G. Simonsen, individually and as President of Ger-Ro-Mar, Inc., more particularly described and referred to hereinafter as Respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Ger-Ro-Mar, Inc. (hereinafter sometimes referred to as Ger-Ro-Mar or Symbra'ette) is a corporation organized in 1963, and is existing and doing business under and by virtue of the laws of the State of California. Respondent Ger-Ro-Mar maintains its home office and principal place of business at 460 Meridian Avenue, San Jose, Calif.

Respondent Carl G. Simonsen is an individual and is President and a director of Ger-Ro-Mar. Respondent Simonsen founded Ger-Ro-Mar, instituted the Ger-Ro-Mar marketing program and distribution policies, and has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of Ger-Ro-Mar. His office address is the same as that of Ger-Ro-Mar.

Symbra'ette is a name registered and copyrighted to Ger-Ro-Mar, under which said respondent sometimes does business, under which many of its products are sold, under which the activities hereinafter more fully described are sometimes known, and under which hereinafter the acts and practices of Ger-Ro-Mar may be set forth.

PAR. 2. Ger-Ro-Mar is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, and distribution of brassieres, girdles, swim-wear, wigs and lingerie to the public under the "Symbra'ette" marketing system, and is inducing, and has induced, persons to invest substantial sums of money in its multilevel marketing program as hereinafter more fully described. Ger-Ro-Mar's sales to distributors have grown from \$36,832.91 in 1965 to \$2,054,250.62 in 1969.

PAR. 3. In the course and conduct of its business, Ger-Ro-Mar now causes, and for some time last past has caused, its products, when sold, to be shipped from its principal place of business in Calif. to purchasers thereof located in various States of the United States, and, in the course of establishing and maintaining its multilevel marketing program, has transmitted and caused to be transmitted contracts, promotional mate-

rial, and various business papers to persons located in various States in the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that actual and potential competition has been lessened, hampered, restricted, and restrained by reason of practices hereinafter alleged, Ger-Ro-Mar's distributors and dealers, in the course and conduct of their business in distributing, offering for sale, and selling of Symbra'ette products, are in substantial competition in commerce with one another, and Ger-Ro-Mar and its distributors are in substantial competition in commerce with other firms or persons engaged in the manufacture or distribution of similar products.

PAR. 5. Ger-Ro-Mar has formulated a distribution system involving distributors at wholesale and retail levels, and has published its marketing plan or distribution policies which are set forth in Symbra'ette's price lists, discount schedules, marketing manuals, sales bulletins, order forms, pamphlets, and other materials and literature. To effectuate and carry out the aforesaid distribution system, policies, or plan, Ger-Ro-Mar and its distributors have entered into certain contracts, agreements, combinations, or common understandings hereafter more fully described.

PAR. 6. The Symbra'ette marketing plan is a distribution network which allows a potential distributor to enter at any one of three levels, i.e., "Key Distributor," "Senior Key," or "Supervisor," and eventually qualify at a fourth and fifth level, that of district manager and regional manager. One enters into the Symbra'ette distribution system by investing a sum of money for the purchase of merchandise from Symbra'ette or its distributors. All distributors, except for the Key Distributors (hereinafter sometimes referred to as Keys), buy directly from Symbra'ette. A distributor's gross profit is the difference between the price or prices he pays for Symbra'ette products and the price at which he sells them, plus overrides on sales made by those people he has recruited to sell, and overrides on sales made by recruits' recruits *ad infinitum*.

a. Key Distributor-Key Distributors purchase their products for resale at 35 percent off the retail list price, known by Symbra'ette as the retail purchase volume (or R.P.V.). A Key must purchase his goods from his sponsor. Monthly minimum purchases of \$100 in terms of retail list price are required, as well as an initial investment of \$300 (retail list price) worth of merchandise.

b. Senior Key—Senior Keys purchase their needs directly from Symbra'ette at 40 percent off the retail list price for sale to Keys or the

general public. There is no limit to the number of distributors who may be recruited, nor is there a limit as to the size of any distributor's organization. A Senior Key's organization includes all persons whom he supplies with products. A Senior Key receives no override, but earns a 5 percent profit on sales to his Key Distributors.

Individuals who desire to start as Senior Keys must purchase an initial inventory of \$1,000 in terms of retail list prices, and must maintain a monthly purchase volume of \$500 (retail list price) worth of merchandise.

c. Supervisor—Supervisors purchase their products for resale at 45 percent off the retail list price, and purchase from Symbra'ette. A Supervisor's organization includes all persons whom he supplies with products, whom he recruits, or upon whose purchases he receives an override.

An individual who desires to start as a Supervisor is required to purchase an initial inventory valued at \$3,000, and his organization must maintain a monthly inventory purchase volume of \$1,500. A Supervisor earns a 5 percent override on purchases made by his Senior Keys and a 10 percent profit on purchases made by his Key Distributors. He also receives a 2 percent override on purchases made by his directly recruited Supervisor's group.

d. District Manager—A District Manager purchases products from Symbra'ette at a 50 percent discount from suggested resale price.

A District Manager's personal group includes his directly sponsored Supervisors' entire groups, and his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

A District Manager and his organization must initially purchase a dollar volume of \$7,500 inventory for one month and must maintain a monthly purchase volume of \$3,000. One cannot "begin" as a District Manager, but, rather, must "work" his way to this position, by having recruited at least 5 people who reach Senior Key or Supervisor positions in his organization.

A District Manager earns a 15 percent profit on purchases of his Keys, 10 percent override on purchases of his Senior Keys, 5 percent override on his Supervisors' purchases, 3 percent override on the purchases of his directly sponsored District Manager's sales group, and 1 percent on the purchases of indirectly sponsored District Manager's personal group. He also earns a cash car allowance of \$150 on R.P.V. of \$7,500 per month of his personal group.

e. Regional Manager:

The highest level one can reach in Symbra'ette is that of a Regional

Manager. A Regional Manager buys his products at a 55 percent discount from Symbra'ette.

The personal group of a Regional Manager includes his directly sponsored District Managers' entire groups, his directly sponsored Supervisors' entire groups, his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

A District Manager's personal group R.P.V. must reach \$25,000 in one month in order to entitle that District Manager to ascend to the position of Regional Manager. Thereafter, a monthly minimum R.P.V. of \$12,500 is required.

A Regional Manager earns a 20 percent profit on purchases of his Keys, a 15 percent override of his Senior Keys' purchases, a 10 percent override on his Supervisors' purchases, a 5 percent override on his directly sponsored District Managers' purchases, 1 percent on his indirectly sponsored District Managers' purchases, 3 percent on his directly sponsored Regional Manager's personal group purchases and 1 percent on his indirect Regional Manager's personal group purchases. He also earns a \$200 cash car allowance on \$17,500 monthly personal group R.P.V.

PAR. 7. Pursuant to and in furtherance and effectuation of the aforesaid agreements and planned common courses of action, Ger-Ro-Mar has:

(A) required all distributors to adhere to the Symbra'ette marketing plan, and all distributors have actually or impliedly agreed to abide by all rules and regulations established by Symbra'ette in furtherance of the marketing plan, and to abide by all amendments or changes.

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

(C) entered into contracts, agreements, combinations, or understandings with each of its distributors whereby said distributors are restricted as to their suppliers and customers. More specifically:

1) Distributors agree to purchase merchandise only from respondent or, in the case of a Key Distributor, only from his sponsor, *i.e.*, the distributor who introduced him to Symbra'ette;

2) Distributors agree to restrict the retail sales and display of Symbra'ette products through authorized retail channels, *i.e.*, direct home sales, home service routes, exclusive boutiques or similar establishments where custom fitting is done, and establishments where no competitive line is sold. Commercial retail markets are not authorized.

3) Distributors agree that each customer belongs to the distributor who originally acquired that customer.

COUNT I

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

PAR. 8. The allegations of Paragraphs One through Seven are incorporated by reference as if fully set forth verbatim.

PAR. 9. Ger-Ro-Mar's merchandising program is in the nature of a lottery. A lottery involves three elements. These are: 1) a prize, 2) according to chance, and 3) for a consideration.

Open-ended multilevel marketing plans offer as a prize the profits, commissions and/or overrides accruing to the recruiter on sales made to the distributors whom he recruits, sales made to their recruits, etc.

Mathematical laws of geometric progression require that saturation must ultimately occur. The chance aspect of openended, multilevel marketing programs is that the "prizes" are dependent upon factors outside of the control of individual participants, such as the number of prior participants in the program, the time at which an individual enters the program, the degree of market saturation which has already occurred when an individual enters the program and the prospects of that individual's recruits of continuing the recruiting chain.

The consideration is the money paid to Ger-Ro-Mar by distributors for the purchase of products for resale.

Sales methods involving the use of lottery devices in the sale and distribution of merchandise to the public are in contravention of the established public policy of the United States, are to the prejudice of the public, and constitute unfair acts and practices within the intent and meaning of the Federal Trade Commission Act. Respondents' open-ended multilevel marketing plan is in the nature of a lottery, and therefore constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

COUNT II

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

PAR. 10. The allegations of Paragraphs One through Seven are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 11. Ger-Ro-Mar's open-ended multilevel marketing program holds out to prospective distributors the lure of making large sums of money, through a virtually endless chain of recruiting additional participants and from various commissions, overrides or other compensation

on the sales and/or further recruiting activities of their own recruited distributors or distributors in their organizations.

The operation of the program contemplates geometrical increases in the number of distributors to insure participants the earnings represented and impliedly realizable from the program. However, because the over-all number of potential participants remains relatively constant, the participants may be, and in a substantial number of instances will be, unable to find additional investors in a given community or geographical area by the time they enter respondents' merchandising program. This comes about because the recruiting of participants who came into the program at an earlier stage may have already exhausted the number of prospective participants.

Respondents represent in their promotional material that each distributor can recruit five persons per month. Based upon a geometrical progression of five additional recruits per month per distributor, the number of additional participants in each distributor's organization at each monthly stage of growth would increase at such a rate that at the end of twelve months (giving effect to the continuing process of recruitment as contemplated under respondents' marketing plan) there would be an aggregate in excess of 244,000,000 participants in the marketing organization.

Ger-Ro-Mar's recruitment program must ultimately collapse when the number of potentially available distributors which can be recruited to serve a particular area is exhausted, and/or the distributors theretofore recruited have so saturated the area with distributors as to render it virtually impossible to recruit any more. Consequently, while participants entering the program early may realize profits through recruiting, those coming in at later stages will find recruiting more difficult and ultimately impossible, resulting in the diminishment or lack of profits, based on recruiting, of the later entrants.

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

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COUNT III

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

PAR. 12. The allegations of Paragraphs One through Seven are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 13. In the course and conduct of its business, and for the purposes of inducing the participation by others in its marketing program and the sale of its merchandise, by and through statements and oral representations, and by means of brochures and other written material, Ger-Ro-Mar and its representatives represent, and have represented, directly or by implication, that:

1. It is not difficult for participants to ascend to a higher level of distribution within the marketing chain so as to increase their chances of recouping their investments and of earning the represented profits.

2. All participants in the marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings.

3. The marketing program is commercially feasible for all participants, and the supply of available entrants and investors is virtually inexhaustible.

PAR. 14. In truth and in fact,

1. It is difficult for participants to ascend to a higher level of distribution within the marketing chain so as to increase their chances of recouping their investments and of earning the profits represented by respondents in their promotional and other materials.

2. All participants in respondents' marketing program do not have the potentiality and reasonable expectancy of receiving large profits or earnings.

3. Respondents' marketing program is not commercially feasible for all participants, and, by the very nature of the said marketing plan as herein described, the supply of available entrants and investors must ultimately be exhausted.

Therefore, the statements and representations as set forth in Paragraphs Twelve and Thirteen have been, and are, false, misleading and deceptive, and constitute unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT IV

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

PAR. 15. The allegations of Paragraphs One through Seven are incorporated by reference in Count IV as if fully set forth verbatim.

PAR. 16. The acts, practices, and methods of competition engaged in, followed, pursued, or adopted by respondents, and the combinations, conspiracies, agreements, or common understandings entered into or reached between and among the respondents and others not parties hereto are unfair methods of competition and are to the prejudice of the public because of their dangerous tendency toward, and the actual practice of, fixing, maintaining, or otherwise controlling the prices at which the Symbra'ette products are resold, in both the wholesale and retail markets, and fixing, maintaining, or otherwise controlling the various fees, bonuses, rebates, or overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors.

Said acts, practices, and methods of competition constitute an unreasonable restraint of trade and an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT V

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

PAR. 17. The allegations of Paragraphs One through Seven are incorporated by reference in Count V as if fully set forth verbatim.

PAR. 18. The acts, practices, and methods of competition engaged in, followed, pursued, or adopted by respondents, and the combinations, conspiracies, agreements, or common understandings entered into or reached between and among the respondents and their distributors hereto constitute unfair methods of competition in that they result in, or have a dangerous tendency toward restricting the customers to whom the Symbra'ette distributors may resell their products; restricting the source of supply from which distributors may purchase their products; and restricting their distributors to reselling their products through specified retail channels.

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

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW
JUDGE

OCTOBER 11, 1973

PRELIMINARY STATEMENT

The complaint in this matter charged respondents with unfair and deceptive acts and practices, and unfair methods of competition, in the

promotion of their Symbra'ette marketing program. In essence, the complaint alleged that the Symbra'ette marketing program constituted an open-ended, multi-level (pyramidal) scheme which unfairly and deceptively induced members of the public to invest substantial amounts of money for distributorships. According to the complaint, the Symbra'ette marketing program consisted of a distribution network allowing a prospect to enter at any one of three levels, Key Distributor, Senior Key, or Supervisor, and eventually, as represented by respondents, to qualify at a fourth and fifth level, District Manager and Regional Manager. A prospective distributor entered the Symbra'ette system by purchasing an inventory of Symbra'ette products consisting of bras, girdles, lingerie, swimwear or wigs. The level at which a prospect entered was determined by the size of the initial inventory purchased. Upon entrance into the program, according to the complaint, a distributor could recruit any number of additional distributors, and the large earnings in the form of commissions, overrides, and other compensation, held out by respondents as available to each participant, depended on recruiting by the participant of additional distributors, recruiting by such additional distributors, and by their recruits *ad infinitum*. It was alleged that the size of the commissions, overrides, and other compensation, represented as flowing to a Symbra'ette distributor as a result of sales to and by such distributor's recruits, his recruits' recruits, and so on, was based on the level at which he entered the Symbra'ette distributional system, or had reached once enrolled.

Respondents' Symbra'ette marketing program was challenged in several counts. Count I of the complaint charged that the program involved the elements of prize, consideration and chance, and that it was in the nature of a lottery and was unfair within the intent and meaning of the Federal Trade Commission Act. Count II alleged that the Symbra'ette program held out to members of the public the lure of making large sums of money through commissions, overrides, and other compensation, based on endless recruitment of additional participants which was essentially impossible, and that the program was therefore unfair and deceptive. Count III alleged that respondents in promoting the Symbra'ette program utilized false, misleading, and deceptive representations that it was not difficult for participants to ascend to higher levels of distribution within the system, that all participants had the reasonable expectancy of receiving large profits and earnings, and that the program was commercially feasible for all entrants because the supply of available prospects and investors was relatively inexhaustible.

Count IV and Count V related to different aspects of the program. Count IV charged that respondents unlawfully combined, conspired,

and agreed with their distributors to fix, maintain and control the prices at which Symbra'ette products were resold, and to fix, maintain and control the various fees, bonuses, rebates and overrides required to be paid by one distributor to another distributor or class of distributors. Count V alleged that respondents unlawfully combined, conspired, and agreed with their distributors to restrict the customers to whom Symbra'ette distributors could resell their products, and the sources of supply from which distributors could purchase Symbra'ette products.

Respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen filed an answer on Feb. 16, 1972, denying the foregoing allegations and asking that the complaint be dismissed. Both sides conducted discovery, and ultimately stipulated most of the facts. On Feb. 1, 1973, the case was reassigned to the undersigned due to the illness of the original administrative law judge. An order to report progress was issued to both sides on Feb. 2, 1973, and a pretrial conference was convened on Mar. 1, 1973. Hearings on the merits were completed on June 19, 1973. The record was closed for the reception of evidence on June 27, 1973, and briefing was concluded on Aug. 20, 1973.

This matter is now before the undersigned for final consideration of the complaint, answer, evidence, and the proposed findings of fact, conclusions, and memoranda filed by counsel for the respondents and complaint counsel. Consideration has been given to all the foregoing material filed by both sides. All proposed findings of fact and conclusions not specifically found or concluded are rejected, and the undersigned, having considered the entire record herein, makes the following findings of fact and conclusions, and issues the following order:

FINDINGS OF FACT

Respondents

Respondent Ger-Ro-Mar, Inc., organized in 1963, is a California corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc.

Respondent Ger-Ro-Mar, Inc., formerly maintained its home office and principal place of business at 460 Meridian Avenue, San Jose, Calif., and presently maintains its home office and principal place of business at 23 Janis Way, Scotts Valley, Calif.

2. Respondent Carl G. Simonsen, an individual is president and a director of Symbra'ette, Inc. Respondent Simonsen founded Symbra'ette, instituted the Symbra'ette marketing program and distribution policies, and has been and is responsible for establishing, supervising, directing and controlling the business activities and practices of Sym-

bra'ette. His business address is the same as that of Symbra'ette.

3. Symbra'ette is a name registered to Symbra'ette, Inc., under which the activities of respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen are conducted. (Hereinafter, unless otherwise indicated, the activities, acts, and practices of respondents Ger-Ro-Mar, Inc., Carl G. Simonsen and Symbra'ette, Inc., will be referred to collectively as "Symbra'ette").

4. Symbra'ette is now, and for some time has been, engaged in the advertising, offering for sale, sale, and distribution of brassieres, girdles, lingerie, swimwear and wigs to the public, through the Symbra'ette marketing program. Symbra'ette sales to distributors grew rapidly from \$36,832 in 1965 to \$2,054,250 in 1969, but in 1972 fell to \$1,195,465.

5. In the course and conduct of its business, Symbra'ette now causes, and for some time has caused, its products, when sold, to be shipped from its principal place of business in Calif. to purchasers thereof located in various States of the United States and, in the course of establishing and maintaining its marketing program, has transmitted and caused to be transmitted, contracts, promotional material, and business papers to persons located in various States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. Symbra'ette and its distributors are in substantial competition in commerce with other firms and persons engaged in the manufacture or distribution of similar products.

(For all of the foregoing see Stipulation, CX 92).

The Symbra'ette Marketing Program

7. The Symbra'ette marketing program utilized five distributional levels, Key Distributors, Senior Keys, Supervisors, District Managers and Regional Managers. These distributors were sometimes referred to collectively in the Symbra'ette program as "Consultants." A prospect was allowed to "buy-in" at any one of three levels, Key Distributor, Senior Key, or Supervisor.

The program represented that District Manager and Regional Manager could be reached by promotion from within if sufficient success were achieved by the entrant in building his "organization" or "personal group" of distributors, and in reaching and maintaining the required retail purchase volume levels (R.P.V.).

One entered the Symbra'ette system by purchasing merchandise from Symbra'ette or one of its distributors. All distributors except Key Distributors bought directly from Symbra'ette.

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Initial Decision

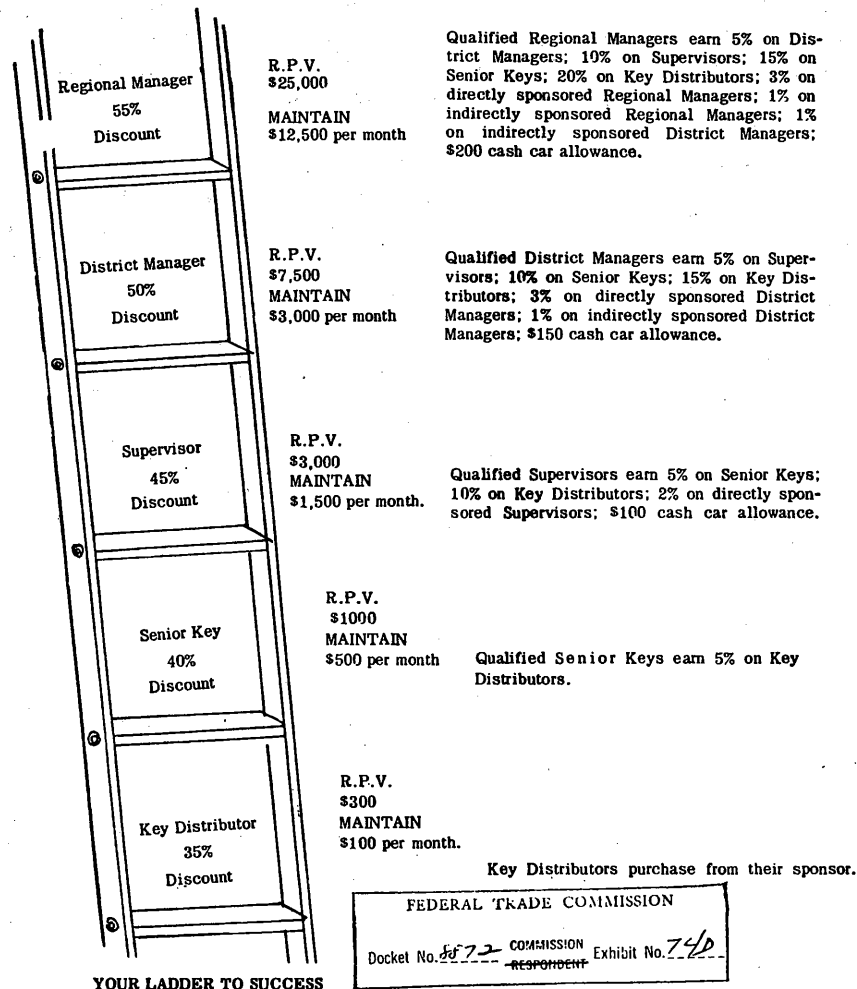
A Key Distributor's profit was the difference between the prices he paid his sponsor for Symbra'ette products and the prices at which he sold them. The profit of a distributor above the Key Distributor level was the difference between the prices he paid for Symbra'ette products and the prices at which he sold them to Key Distributors he recruited or to the public, and commissions, overrides, and other compensation on the purchase volume of those Consultants directly sponsored by the distributor (CX 1, 74-75, and 92).

The Symbra'ette marketing program is illustrated by the attached reproduced page from the Symbra'ette "Sales Manual" which was distributed and utilized in promoting the program by respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen (CX 74).

Initial Decision

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THE SYMBRA'ETTE MARKETING PROGRAM



YOUR LADDER TO SUCCESS

The Symbra'ette Marketing Program is designed so that the ambitious person can start small or as large as he desires. Consultants can rapidly work into higher income brackets, or those who would like to enter business on a large scale may buy in as a Supervisor.

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8. *Key Distributor*—A prospect could start association with Symbra'ette at this level by purchasing an inventory of \$300 at list price from a sponsor. This required an investment after discount of about \$215 (CX 75Z13). Key Distributors were not permitted to purchase directly from Symbra'ette but, as stated, were required to buy from their sponsors. A Key Distributor bought from his sponsor at 35 percent discount from the Symbra'ette retail list price, and resold at the Symbra'ette established list price. Maintenance of a monthly purchase volume of \$100 in terms of Symbra'ette retail list prices was required.

Purchases of all Symbra'ette distributors were accumulated on a monthly basis and were referred to in the Symbra'ette program as "Retail Purchase Volume" (R.P.V.) (CX 74F, 75S). The basic discount accorded to each classification of distributor was computed from the "Retail Purchase Volume."

A Key Distributor could engage in unlimited recruiting and could advance to the level of Senior Key if his retail purchase volume and that of his recruits amounted to \$1,000 in one calendar month (CX 1, 74G).

9. *Senior Key*—A person could start as a Senior Key by purchasing an inventory of \$1,000 of Symbra'ette products from a sponsor at a 40 percent discount from the Symbra'ette list price (CX 1, 74-75). With literature and sales aids an investment of about \$700 was required (CX 75Z13). A person could also become a Senior Key by advancing to that level from Key Distributor by sponsoring other Key Distributors and with such a "personal group" reaching a monthly retail purchase volume of \$1,000. Subsequent maintenance of a monthly purchase volume of \$500 in terms of Symbra'ette retail list prices was required of a Senior Key and his organization. Senior Keys could recruit additional distributors on an unlimited basis, and a Senior Key's "organization" or "personal group" included all persons whom he supplied with products. A Senior Key received a 40 percent profit on personal sales, a five percent profit on purchases made by directly recruited Key Distributors, and one percent profit on purchases made by directly recruited Senior Keys and their organizations (CX 92(5)).

10. *Supervisor*—A prospect desiring to start in the Symbra'ette system as a Supervisor was required to purchase an initial inventory of \$3,000 in terms of Symbra'ette retail list prices. Such inventory was purchased at 45 percent off the retail list price, and with literature, sales aids and supplies required an investment of about \$1,950 (CX 75Z12). Thereafter, Supervisors had to maintain a monthly retail purchase volume of \$1,500. Within the Symbra'ette organization a distributor who had at least one (1) directly recruited Senior Key, and two (2) directly

recruited Key Distributors could become a Supervisor if such distributors and their recruits as a group attained a monthly retail purchase volume of \$3,000. A Supervisor could recruit an unlimited number of distributors. A Supervisor's "organization" or "personal group" consisted of his directly sponsored Senior Keys and their entire groups, and his directly sponsored Key Distributors and their entire groups. A Supervisor earned 45 percent profit on personal sales, a five percent override on purchases made by his Senior Keys, and a 10 percent profit on purchases made by his Key Distributors. He also received a two percent override on purchases made by his directly recruited Supervisors and their personal groups, and was eligible to qualify for a car allowance if his organization's retail purchase volume was large enough (CX 1, 74-75, 92).

11. *District Manager*—A District Manager purchased products from Symbra'ette at a 50 percent discount from list price. A District Manager could recruit an unlimited number of distributors. A District Manager's "personal group" included his directly sponsored Supervisor's entire groups, his directly sponsored Senior Keys' entire groups, and directly sponsored Keys. To advance to the District Manager level a Supervisor had to have an organization reaching a retail purchase volume of \$7,500 for one month, and maintenance thereafter of a monthly purchase volume of \$3,000. One could not begin as a District Manager but had to work one's way to this position by recruiting at least five people at the Senior Key or Supervisor level or who had reached that level (CX 1G), and who together with their personal groups reached and maintained the foregoing monthly retail purchase volumes.

A District Manager earned 50 percent profit on personal sales, a 15 percent profit on sales to his Keys, 10 percent override on purchases of his Senior Keys, five percent override on his Supervisors' purchases, three percent override on the purchases of his directly sponsored District Managers' personal groups, and one percent override on the purchases of indirectly sponsored District Managers' personal groups. He also earned a cash car allowance of \$150 if his personal group maintained a retail purchase volume of \$7,500 per month (CX 74M).

12. *Regional Manager*—The highest level one could reach under the Symbra'ette program was that of Regional Manager. A Regional Manager bought his products at a 55 percent discount from Symbra'ette. A Regional Manager could recruit an unlimited number of distributors. The personal group of a Regional Manager included his directly sponsored District Managers' entire groups, his directly sponsored Supervisors' entire groups, his directly sponsored Senior Keys' entire groups, and his directly sponsored Key Distributors. A District Manager's

personal group had to include at least three (3) "qualified direct District Managers" and two (2) "qualified indirect District Managers" (CX 1G), and had to attain a retail purchase volume of \$25,000 in one calendar month in order to entitle such District Manager to ascend to the position of Regional Manager. Thereafter, a monthly minimum retail purchase volume of \$12,500 was required to remain at this level of the program.

A Regional Manager earned 55 percent profit on personal sales, a 20 percent profit on purchases of his Keys, a 15 percent override on his Senior Keys' purchases, a 10 percent override on his Supervisors' purchases, a five percent override on his directly sponsored District Managers' purchases, and three percent override on his directly sponsored Regional Managers' personal group's purchases, a one percent override on indirect Regional Managers, and a one percent override on indirect District Managers. He also earned a \$200 cash car allowance if a \$17,500 monthly retail purchase volume was maintained by his personal group.

Promotion of the Symbra'ette Program to the Public

13. Respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen promoted the Symbra'ette marketing program to the public in a variety of ways including use of promotional literature and a film designed to assist recruiting (CX 74, 75 and 82), and by media advertising (CX 2A and B) and direct mail solicitation for the same purpose (CX 1). Substantial success was achieved. As noted, sales volume grew from a relatively minor figure in 1965 to over \$2,054,000 in 1969, the year before the Commission's investigation commenced.

(a) *Symbra'ette's Promotional Literature*

(1) *The Flip Chart*

14. The statements and representations of respondents holding out to prospects the lure of earning large sums of money by investing in a Symbra'ette distributorship, and obtaining thereby the right to build a personal organization through the unlimited recruiting of additional distributors, and by such recruiting to obtain the large commissions, overrides, and other compensation held out as flowing from such a personal organization, are illustrated by a promotional aid known in the Symbra'ette organization as the "Flip Chart" (CX 75), by the "Sales Manual" distributed by respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen (CX 74), and by the pamphlet "Your Opportunity with Symbra'ette" used in direct mail advertising (CX 1).

16. The "Flip Chart" set out to prospective recruits the terms, structure and form of the Symbra'ette program. The five level "pyramid" distribution system, the requirements, represented opportunities, activities, and earnings of "Key Distributors," "Senior Keys," "Supervisors," "District Managers" and "Regional Managers" were described. The unlimited recruiting of distributors, and the Symbra'ette system of compensation were also pictured. The "Flip Chart" represented to prospective distributors the large amounts of money available through the Symbra'ette program based on a system of commissions, discounts, overrides, and other compensation, geared to an ever-widening circle of new recruits to be obtained by each new distributor, by their recruits, and by their recruits' recruits, etc., in building each distributor's personal organization. The following are taken directly from the "Flip Chart":

YOUR PURCHASES *PLUS* THE PURCHASES OF THOSE YOU SPONSOR ARE ACCUMULATED TO TOTAL YOUR OWN PURCHASE VOLUME IN A GIVEN MONTH (CX 75T).

WHEN YOU DO THE ABOVE JOB AND INTRODUCE ONLY ONE NEW KEY
DISTRIBUTOR IN A MONTH *** YOU QUALIFY AS A SENIOR KEY SO NOW
LET'S LOOK AT YOU AS A *** SENIOR KEY (CX 75X).

* * * * *

* * * * *

YOU AS A SENIOR KEY

KEY KEY

KEY KEY

YOU
SENIOR
KEY
40%

KEY KEY

KEY KEY

You [BUY DIRECT FROM COMPANY
[CAN RECRUIT YOUR OWN ORGANIZATION
[EARN 40% PROFIT
[ARE A WHOLESALER (SELL TO KEYS)
[EARN 5% PROFIT ON SALES TO KEYS
[HAVE A TREMENDOUS GROWTH OPPORTUNITY (CX 75Y).

* * * * *

WHEN YOU [as a Senior Key] SELL \$1,000 R.P.V. AND HAVE ONLY 5-KEYS
BUYING THEIR PRODUCT FROM YOU

YOU WILL EARN

YOU SELL	\$1,000 × 40% = \$400
5-KEYS X \$700	\$3,500 × 5% = \$175
	PER MONTH \$575
	(CX 75Z).

* * * * *

AS YOUR ORGANIZATION GROWS *** SO DOES YOUR INCOME

YOUR R.P.V. IS NOW MORE THAN THE \$3,000 A MONTH NEEDED TO ATTAIN
THE SUPERVISOR LEVEL

(CX 75Z1).

* * * * *

WHAT DOES A SUPERVISOR MEAN IN \$?

YOU [45% PROFIT ON PERSONAL SALES
EARN [10% PROFIT ON SALES TO KEYS
[5% OVERRIDE ON SENIOR KEYS
[2% OVERRIDE ON DIRECT SUPERVISORS

YOU ARE ELIGIBLE TO QUALIFY FOR CAR ALLOWANCE

(CX 75Z2).

* * * * *

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A SMALL ORGANIZATION LIKE THIS
CAN GIVE YOU [Supervisor] THE FOLLOWING INCOME * * *

5-SENIOR KEYS	$\times 1000$ RPV	$= 5000 \times 5\%$	$= \$250$
SALES TO KEYS		$2000 \times 10\%$	$= \$200$
CAR ALLOWANCE			$= \$100$
PERSONAL SALES		$1000 \times 45\%$	$= \$450$
			<u>$= \\$1000$</u>
			PER MONTH

THIS VOLUME WOULD GIVE YOU MORE THAN THE NECESSARY 7,500
R.P.V. TO QUALIFY FOR DISTRICT MGR.

(CX 75Z3).

* * * * *

DISTRICT MANAGERS

EARN [50% DISCOUNT ON R.P.V.
[15% ON SALES TO KEY DISTRIBUTORS
[10% OVERRIDE ON DIRECT SENIOR KEYS
[5% OVERRIDE ON COMBINED TOTAL R.P.V.
[OF SUPERVISORS AND THEIR SENIOR KEYS

EARN [3% OVERRIDE ON DIRECT DISTRICT MGRS.
[1% OVERRIDE ON INDIRECT DISTRICT MGRS.

D.M. CAN EARN \$150 PER MONTH CASH CAR ALLOWANCE

(CX 75Z4).

* * * * *

SYMBRA'ETTE DISTRICT MANAGER ORGANIZATION

	R.P.V.
DIRECT DM VOLUME	$50,000 \times 3\% = \$1,500.00$
INDIRECT DM VOLUME	$20,000 \times 1\% = 200.00$
SUPERVISOR	$27,000 \times 5\% = 1,350.00$
DIRECT SENIOR KEYS	$12,000 \times 10\% = 1,200.00$
WHOLESALE TO KEYS	$2,000 \times 15\% = 300.00$
CASH CAR ALLOWANCE	<u>150.00</u>
	<u>$\\$4,700.00$</u>
\$4,700	\$56,400
PER MONTH	PER YEAR

(CX 75Z5).

* * * * *

REGIONAL MANAGERS

[55% DISCOUNT OF R.P.V.
 [22% ON SALES TO KEYS
 EARN [15% OVERRIDE ON DIRECT SENIOR KEYS
 [10% OVERRIDE ON DIRECT SUPERVISORS
 [5% OVERRIDE ON DIRECT DISTRICT MGRS.

 [3% OVERRIDE ON DIRECT REGIONAL MGRS.
 [1% OVERRIDE ON INDIRECT REGIONAL MGRS.
 EARN [1% OVERRIDE ON INDIRECT DISTRICT MGRS.
 [\$200 MONTHLY CASH CAR ALLOWANCE (CX 75Z8).
 * * * * *

SYMBRA'ETTE REGIONAL MANAGER ORGANIZATION

	R.P.V.
DIRECT DISTRICT MGR. VOLUME	\$50,000 × 5% = \$2,500
INDIRECT DISTRICT MGR. VOLUME	20,000 × 1% = 200
SUPERVISOR VOLUME	20,000 × 10% = 2,000
DIRECT SENIOR KEYS	10,000 × 15% = 1,500
WHOLESALES TO KEYS	2,000 × 20% = 400
1-DIRECT REGIONAL MGR. VOLUME	15,000 × 3% = 450
IN-DIRECT REGIONAL MGR. VOLUME	30,000 × 1% = 300
CASH CAR ALLOWANCE	200
\$7,550 PER MO. \$90,600 PER YR. (CX 75Z9).	<u>\$7,550</u>

* * * * *

YOU HAVE SEEN HOW YOU MAY START AS A KEY DISTRIBUTOR & GROW
TO BE A * * * REGIONAL MANAGER

YOU MAY START YOUR SYMBRA'ETTE BUSINESS IN ANY BRACKET YOU
DESIRE

SUPERVISOR • SENIOR KEY • KEY DISTRIBUTOR (CX 75Z11).

* * * * *

TOP LEVEL UNDER THE COMPANY IS THE REGIONAL MANAGER
(ANYONE CAN ACHIEVE THIS LEVEL) (CX 75R).

* * * * *

17. Each Symbra'ette distributor started his association with Symbra'ette by completing an application from his sponsor and purchasing a Symbra'ette inventory in the bracket he desired to work in (CX 75Z15).

(2) *The Sales Manual and Direct Mail Brochure*

18. The "Sales Manual" (CX 74) reiterated many of the statements and representations set out in the "Flip Chart." The "Sales Manual," like the "Flip Chart," clearly discloses that mounting the ladder of success

within the Symbra'ette organization from "Key Distributor," to "Senior Key," to "Supervisor," and then to "District Manager" and "Regional Manager," and receiving the commissions, overrides, and other compensation held out, depended upon each new distributor building a personal organization by recruiting other new distributors, who in turn had to build their own "personal groups" by sponsoring their own new recruits in an ever-widening chain. Commissions, overrides, and other compensation, were represented as growing ever larger in this manner (CX 74). Thus, the "Sales Manual" urged:

RECRUIT * * *

YOU can't make it to the top ALONE * * *

The opportunity with the Symbra'ette bra and other Symbra'ette products is as challenging in many respects as mountain climbing. A person gets to the top through the cooperative efforts of those in his group. The one at the top in turn helps those with him to boost themselves to a higher plateau. The line that holds them together is the line of sponsorship * * *

There are potential recruits everywhere! (CX 74L).

The direct mail brochure (CX 1) contained statements and representations similar to those in the "Sales Manual," and also set out many of the details of the Symbra'ette program found in the "Flip Chart."

(b) *Testimony of Former Symbra'ette Distributor*

19. A former Symbra'ette distributor testified in this proceeding describing the system in practice, as follows

Q. How did you first learn about Symbra'ette?

A. A person that I had been previously acquainted with, by the name of Jerry Vinett, called me from Nashville, Tennessee.

Q. During that phone conversation, what did Mr. Vinett say to you and what did you say to him?

A. Well, Mr. Vinett told me that * * * they had a product where their method of operation was that you would recruit people and you would train people to recruit * * * Well, you would just grow and grow and grow * * * (Tr. 47).

* * * * *

A. * * * And then, he [Mr. Vinett] took blank paper just like a tablet, and tried to emphasize the method of recruiting to where he'd say, put a circle at the top, which would indicate my wife and I, and then drawing lines off—like five lines off of that circle to indicate five of our recruits, and then drew lines off of our recruits and drew circles to indicate our recruits, recruits, and then, drew lines off of our recruits, recruits, and drew five circles to indicate our recruits, recruits, recruits, and then, he ran out of paper (Tr. 53).

* * * * *

Q. Were both of you active in the Symbra'ette program?

A. Yes.

Q. How did that work?

A. Well, my first efforts were finding some recruits. At the same time, Yvonne did some selling and had some parties. And she made an effort to get recruits at her parties. And I spent all my time recruiting (Tr. 59).

With respect to commissions and overrides based on an ever-widening organization, this witness testified:

A. * * * Then he [Mr. Vinett] went ahead to explain the overrides that he would gain by—off our recruits * * * [H]e indicated that if we bought in at a higher level * * * this would qualify us to draw more money off of our recruits, as we recruited them. And it would also allow us to draw more and more off of the recruits that they recruited (Tr. 53-54).

* * * * *

Q. You also described or used the term "buy-in" and clarified it a little bit. When you paid \$742, at the time you signed the contract, what did you understand you had purchased for that \$742?

A. My personal understanding was that I had purchased the privilege of recruiting people and being paid override on these people. I realized that there was some inventory and supplies involved and, of course, you needed this inventory and supplies to show to people to recruit people (Tr. 99).

* * * * *

Respondents Held Out to All Prospects The Opportunity of Large Earnings From A Symbra'ette Distributorship

20. The theme running throughout respondents' promotional literature is that great profits were available to each and every investor in a Symbra'ette distributorship. Thus, in the "Flip Chart," as just set out, prospective distributors were told that the top distributor level under the program is the Regional Manager and that "ANYONE CAN ACHIEVE THIS LEVEL" (CX 75R). Shortly thereafter the "Flip Chart" informs prospects that a Regional Manager's organization produces an income of "\$7,550 Per Mo." and "\$90,600 Per Yr." (CX 75Z9). At the lower level of "Senior Key," requiring an initial investment of about \$700, each and every prospect was led to believe that a monthly income of \$575 could be obtained. The pamphlet "Your Opportunity with Symbra'ette" (CX-1) advised prospects that the program offered to people "from all walks of life" "regardless of who you are, where you are from, or what you are now doing" the opportunity:

* * * to earn middle to upper five figure annual incomes, working full time (CX 1C).

Prospects were advised that the ambitious person:

* * * can start small or as large as he desires. Consultants can rapidly work into higher income brackets, or those who would like to enter business on a large scale may buy in as a Supervisor (CX 1E).

Respondents advertised in periodicals seeking investors in a Symbra'ette distributorship stating "YOUR MARKET HALF THE POPULATION," "YOUR PROFIT PROGRAM UNIQUE IN THE INDUSTRY," and representing:

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*** Once you establish your Symbra'ette distributorship, it almost grows by itself ***
The potential is astronomical—and the surface has barely been scratched. You can still get
in on the ground floor***

***You can start as small or big as you wish—and grow from there, *expanding your sales
organization and collecting automatic overrides on all the sales made by consultants
under you* *** (CX 2B) (Emphasis added).

The "Sales Manual" used in recruiting represented:

The Symbra'ette sales programs offers more than just security for you and your family.
It offers, independence, a promising future, a retirement plan and an income substantial
enough so that you can afford the luxuries, as well as the essentials of life. ***

We know of many who have achieved this goal within a year. Their success story can be
yours too!! (CX 74B).

Key Distributors were represented as making \$220 to \$317 a month,
Senior Keys \$575 per month, as just noted, Supervisors \$1,000 per
month, District Managers \$4,700 per month, and Regional Managers, as
also noted, \$7,550 per month (CX 75).

Testimonials in the *Symbra'ette News* emphasized the large sums to
be earned:

June 2, 1972

Dear Mr. Simonsen:

*** Mr. Simonsen, our satisfaction and happiness has not come only because of the
fabulous income that we now receive as Regional Director, *** Symbra'ette has enriched
our lives in a material way by giving us a long dreamed about swimming pool, a new
Pontiac station wagon, a new pick-up truck for camping, a newer and lovelier home, a new
serviceable office and we could go on and on ***

Forever gratefully and respectfully yours,

Edith Gustin (RX 10).

* * * * *

KILLER KERNS: (Juanita Kerns)

Says to all new recruits, "Dreams come true in '72!"

Started at zero, January 4, 1971, one year later has \$1,200 in bra inventory, a new mobile
home and a new car.***

Aims for a showing every night and a recruiting opportunity every day. *** (RX 10).

Advertisements in periodicals likewise lured prospects with the rep-
resentation of large earnings:

You too can open a world of new financial opportunity as a Symbra'ette Consultant, part
or full time. *** offering qualified consultants up to 60% discount, plus a cash car
allowance up to \$250 monthly (CX 2A).

21. Advancement from Key Distributor, or other level at which a
participant "bought-in" to the Symbra'ette program, up the ladder of
the Symbra'ette "pyramidal" organization, and achievement of the
earnings of such higher distributional level, was represented by respon-

dents as a reasonable expectation, feasible and possible for each and every recruit (CX 1, 75-75, prior findings).

Geometric Progression

22. The achievement of the large earnings, and the advancement of *all* participants in the Symbra'ette program to higher levels, represented by respondents as expectable, feasible and possible for all, could only be accomplished by the building of personal organizations by all participants through recruiting of new distributors, by recruiting by such new recruits, and by their recruits, *ad infinitum*. Thus, for example, to achieve the \$575 per month held out by the Symbra'ette program, a Senior Key had to recruit into his organization a sufficient number of Key Distributors, suggested by the "Flip Chart" as five (5) or more (CX 75Y and Z), so that the group as a whole would attain a combined monthly retail purchase volume (R.P.V.) of \$4,500 of Symbra'ette products producing the foregoing income. Each Key Distributor recruited, in turn had to recruit one or more additional Key Distributors to advance to Senior Key (CX 75X). Also, to advance to Senior Key a Key Distributor's "personal group" had to have a retail purchase volume (R.P.V.) of Symbra'ette products of \$1,000 in one calendar month (CX 74G), and had to maintain \$500 per month to remain in that category. A Supervisor, to achieve the \$1,000 per month earnings represented, had to recruit in addition to his personally sponsored Key Distributors an organization of Senior Keys, also suggested by the "Flip Chart" as five (5) or more (CX 75Z3), each of which, as just stated, had to recruit his own organization of Key Distributors to achieve the earnings represented and to advance in his turn to Supervisor and higher. The same recruiting factors applied to District Managers and Regional Distributors.

23. The Symbra'ette marketing program thus contemplated and required for each and every participant to achieve the earnings and benefits represented, an ever increasing group of distributors in accordance with the principles of geometric progression.

24. By geometric progression, if an organization were to increase monthly using a function of five (5) as a continuous function, or even a function of two (2) continuously (see Dr. Wassenaar, Tr. 279), at the end of a relatively modest period of time there would be total saturation of the market. In fact, recruits to such an organization theoretically would soon equal the adult population of the nation as a whole.

25. Unlimited, geometrical increases in the number of recruits into the Symbra'ette marketing program constituted an impossibility. Achievement of the large earnings and advancement held out by re-

spondents to all participants entering the program by recruiting their own "organizations" or "personal groups" in accordance with the Symbra'ette marketing plan, and obtaining commissions, overrides and other compensation represented, was impractical and impossible for each and every such recruit, or even for any substantial proportion of them. The great earnings and advancement held out by respondents to all prospective participants in the Symbra'ette program was therefore false, misleading and deceptive.

Chance

26. Uncertainty or chance was at the core of the Symbra'ette marketing plan insofar as the plan held out to prospective participants the promise of large earnings by way of commissions, overrides, and other compensation on sales by a prospective participant's recruits, by the recruits of those recruits, and so on. The continuation of the recruiting chain obviously was wholly beyond the control of any participant in the Symbra'ette program. The success of a Symbra'ette distributor's recruits in obtaining their recruits, and of those recruits in obtaining other recruits, etc., producing large earnings for the original distributor in the form of commissions, overrides, and other compensation, was entirely a "gamble" for any particular Symbra'ette participant.

Vertical Price Fixing

27. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors ("Consultants") whereby all distributors upon becoming participants in the Symbra'ette program agree to maintain the resale prices established by the respondents. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors whereby all distributors upon becoming participants in the Symbra'ette program agree on the fees, bonuses, discounts, rebates and overrides required to be paid by one distributor or class of distributors to another distributor or class of distributors. Each distributor agreement signed by respondents and each individual distributor involved contained the following provision (CX 11-22):

As a condition of this agreement, I agree to purchase and sell Symbra'ette products according to the procedure set forth in the Sales Manual and referred to in the Rules and Regulations. Said Rules and Regulations are an integral part of this agreement and by this reference are incorporated herein, and I agree to abide by any and all of the terms and conditions set forth therein, and any amendments thereto.

The "Sales Manual" which all distributors and respondents thus agreed and understood would be abided by in making sales, and with which all distributors were required by respondents to abide by in making sales, provided (CX 74P):

*** you buy Symbra'ette products at wholesale prices—to be sold through personal sales direct to the public at suggested retail prices. ***

The Symbra'ette suggested resale prices are contained in the forms for ordering Symbra'ette products (CX 24-46).

Customer Restrictions

28. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors whereby all distributors upon becoming participants in the Symbra'ette program agree not to compete for each others' customers. Respondents and their distributors have agreed that each customer belongs to the distributor who originally acquired that customer. The "Sales Manual" which, as stated, all distributors agreed to follow, provided (CX 74N):

A retail customer belongs to the Consultant who obtains the order. A consultant retains his customers as long as he continues to service them properly.

Purchase Restrictions

29. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors which required all Key Distributors upon becoming participants in the Symbra'ette program to purchase merchandise only from their sponsors, and which prevented, restricted and prohibited Key Distributors from purchasing from a Symbra'ette distributor other than their sponsor. This restriction is illustrated by an announcement by respondents in their Symbra'ette News:

We are receiving orders from Key Consultants who seem to have the impression that they may order direct from the Company. The ordering policy is that Keys must order through their sponsors.

Please ensure that all new recruits be instructed accordingly (RX 12).

The "Sales Manual," "Flip Chart," and pamphlet "Your Opportunity with Symbra'ette," all likewise provided that "Key Distributors purchase their products from their sponsor" (CX 74D). The Sales Manual further provided:

If a Consultant prefers to be transferred to another Sponsor for more convenience, he must have the approval of his Sponsor and his District Manager and Regional Manager, and a letter to that effect must be presented to the Home Office for approval.

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Retail Outlet Restrictions

30. Respondents have entered into contracts, agreements, combinations, and understandings with their Symbra'ette distributors which require all distributors to restrict the retail sales and the display of Symbra'ette products only through authorized retail channels, *i.e.*, direct home sales, home service routes, exclusive boutiques or similar establishments where custom fitting is done, and establishments where custom fitting is done, and establishments where no competitive line is sold. Sales to commercial retail markets are not authorized. The "Sales Manual" which, as stated, all Symbra'ette distributors and respondents agreed and understood would be followed in making sales, and which all distributors were required by respondents to follow in making sales, provided (CX 74P):

Symbra'ette products are not to be sold in retail stores. Only exclusive boutiques or similar establishments where custom fitting is done, and no competitive line is sold can be considered as acceptable.

Discussion

The Symbra'ette marketing plan had a dual nature. It was an open-ended, multi-level (pyramidal) plan, and it also had a "direct selling" aspect. A distributor could make a profit on direct sales to consumers. However, as has been made clear in the findings set out hitherto, the large earnings held out by the Symbra'ette system, directly and by implication, to potential investors in a Symbra'ette distributorship required the development by every prospect of his own "organization" or "personal group" made up of his recruits, and their recruits, etc. It is this aspect of the Symbra'ette program with which the complaint is concerned. Respondents often confuse these two aspects in their briefs, treating the complaint at times as involving an attack on the "direct selling" phase of the Symbra'ette program. It was stipulated that "[t]here is no contention that any deception, fraud, unethical practice, misrepresentation, or improper conduct is present in the presentation of the [Symbra'ette] products or their prices to consumers" (CX 92(7)). Nothing herein will put respondents "out of business" insofar as their direct selling activities are concerned, and respondents suggestions on this score are misplaced (see Brief After Trial, pp. 6 and 39).

The assertion that the Commission's complaint is arbitrary and capricious because there are competitors selling brassieres, girdles, swimwear and lingerie under similar marketing and sales programs, who have not been challenged, wholly lacks merit. It is well established that the Commission does not have to proceed against every firm violating

the law as a condition for proceeding against one. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958); *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967).

Respondents contend that many Symbra'ette distributors profited from the program and "received a good deal." From this respondents argue that to preclude persons who want to engage in "small business" from entering the program would be contrary to the public interest, and that the proper course of administrative conduct is to eliminate "abuse and misconduct" (Brief After Trial, p. 4). The elimination of "abuse and misconduct" is precisely the purpose of the order issued in this decision. As stated, nothing in it interferes with the lawful "direct selling" aspects of the Symbra'ette program.

The fact that some distributors found "direct selling" of Symbra'ette products a good deal, if true, and that some may have made money through recruiting and from sales of those recruits, and their recruits, etc., does not expunge the unfairness and deception inherent in the open-ended, multi-level (pyramidal) nature of the Symbra'ette program. A distinction must be made between achievement of substantial earnings and advancement in the Symbra'ette organization by an individual distributor, and the realization of the success and earnings held out by the respondents to *all* participants who were recruited. As the complaint alleged in Paragraph 11, if each new participant in the Symbra'ette system fulfilled the program set out in the "Flip Chart" and "Sales Manual" and succeeded in recruiting five new participants each month, and each of those new recruits succeeded in recruiting five recruits of their own, and so on, the number of distributors in the program would quickly number many millions, as already emphasized. Indeed, growth by a factor of two would produce the same result, only requiring a somewhat longer period.

The fact that enormous numbers of distributors were never actually recruited does not dissipate the deceptive nature of the program. For it is obvious, on the one hand, that the number of distributors must increase geometrically for the plan to provide each and every prospect with an "organization" or "personal group" yielding the returns represented and, on the other, that sustaining such a growth rate for any significant period is utterly impossible because of a lack of potential distributors, *i.e.*, most or all of them would have been recruited. In short, the essence of the Symbra'ette program, aside from its direct-selling aspects, was inherently misleading and deceptive.

The holding out of great earnings from the open-ended, multi-level (pyramidal) Symbra'ette program, which was presented as a legitimate

business enterprise, but which in reality was based on a chain of recruiting which was impossible, not only had the capacity to induce prospects unfairly and deceptively to invest substantial sums of money, but to cause them to make a commitment of their labor, time and energy. The latter could well have been one of the most insidious facets of respondents false, misleading, and deceptive representations.

Respondents insist that condemnation of their program on the ground that it required continuous "geometrical" recruiting, which was impossible, is erroneous because it is purely theoretical and conjectural, and bears no relation to reality (Brief After Trial, pp. 19-20, 27-28, 30-32; Reply Brief, pp. 5, 20-22). The fact that the program did not work in practice as designed and no saturation of distributors occurred does not mean that the program must or should be held lawful. It is undeniable that the Symbra'ette program in fact had as its cornerstone, "geometric" recruiting. As already pointed out, to achieve the represented earnings and to advance up the distributional level *required* recruiting of an "organization" or "personal group" by *every* participant (CX 1, 74-75). The very system of commissions and overrides contemplated recruiting. Yet, as reiterated, continuous expansion of Symbra'ette distributors was impossible. The program, in short, in its very nature and design contemplated and required an impossibility. The program was accordingly unfair and deceptive. Breaking of the chain of recruiting for reasons other than saturation and unavailability of recruits, and the fact that Symbra'ette distributors never numbered more than 3,635, does not negate this conclusion. Failure of geometric expansion of distributors to occur indicates only the difficulty of endless recruiting. Difficulty in carrying out an inherently deceptive and impossible program does not render that program lawful.

The Lottery Count

Count I of the complaint alleges that the Symbra'ette program was in the nature of a lottery and therefore violated Section 5 of the Federal Trade Commission Act. A lottery has traditionally involved three elements, consideration, chance, and a prize. *J.C. Martin Corp. v. Federal Trade Commission*, 242 F.2d 530 (7th Cir. 1957). In the Symbra'ette program the foregoing three elements would seem to be present. The money paid to respondents by the prospect for an inventory of Symbra'ette products for resale, which carried with it the right to recruit his own "organization" or "personal group" of distributors constituted "consideration." The commissions, overrides, and other compensation represented to each prospect as obtainable through the Symbra'ette marketing program from sales by the prospect's recruits, by their

recruits, etc., constituted the "prize." The "chance" consisted of uncertainty generated by the unknown position of the prospect in the chain of recruiting at the time he joined the program, the effect of that position on the possibility of achieving the great earnings held out by the program and, especially, of uncertainty as to the success of the prospect's recruits in recruiting additional recruits, and of those recruits' success in recruiting yet other recruits, and so on.

Respondents maintain that the Symbra'ette program does not constitute a lottery because the elements of "consideration" and "chance" are both lacking. According to respondents, "consideration" is lacking because a participant's payment under the program is "only for the purchase of merchandise and goods," and there is no "finder fee," "franchise fee," or the like (Brief After Trial, pp. 11-17; Reply Brief, p. 3). Put another way, respondents maintain that a participant does not pay a "consideration" for the right to recruit others, but pays only for an inventory of Symbra'ette products. In the opinion of the undersigned, this is a specious argument. The fact that there was no separate "finder fee," or "franchise fee," does not negate the existence of "consideration." Participants paid from about \$215 to \$1,950 to respondents to become "Key Distributors," "Senior Keys," or "Supervisors," and for this they received an inventory of Symbra'ette products and became distributors with the rights and privileges flowing therefrom, including the right to build their own organizations by recruiting. The payment to Symbra'ette clearly constitutes "consideration." These payments, moreover, contrary to respondents' assertions, were substantial.

As to "chance," respondents argue that uncertainty marks many business endeavors, and that "chance" must dominate over skill for this element to be present in a legal sense. This has been the subject of a prior finding, and is discussed later in this section. Undertainty or "chance" was at the core of the Symbra'ette program in its non-direct selling aspects, and the element of "chance" in legal contemplation clearly was present in the program. The fact that classic lottery trappings, i.e., punch boards, raffle techniques, etc., were not present has, of course, no bearing on the essential legal nature of the Symbra'ette program.

Almost 70 years ago, the Supreme Court in *Public Clearing House v. Coyne*, 194 U.S. 497 (1904), considered a scheme which was not significantly different in its basic principles from the recruiting aspects of the Symbra'ette program. In that case a "League of Equity" was organized which sought members, holding out large returns for a small investment and for work in inducing others to join. Each person who became a member paid three dollars as an enrollment fee, and agreed to pay one

dollar a month for sixty months or five years. Each enrollee agreed to recruit others into the program. In this manner a fund or pool of money was created. In consideration of payments and recruiting of new members, each participant at a certain point in time was to receive a *pro rata* share of the fund or pool accumulated by the League in accordance with a formula based on its rate of growth. On these facts the Court stated (194 U.S. at 502):

* * * the realization of any amount whatever by the new members is conditioned absolutely upon the constant acquisition of other new members and the new payments to be made by such new members. And what amount the members or cooperators will realize, as is stated by the league literature, depends entirely upon the ratio of growth of the league.

The Supreme Court concluded that the success of the scheme depended entirely upon the constant increase in the number of subscribers, that no one could predict what such growth would be, and that the resulting uncertainty generated deprived the scheme of the character of a legitimate business enterprise. The Court decided that the scheme was, in effect, a lottery, and that "chance" in application to the scheme meant (194 U.S. at 512):

* * * 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.

The Court noted that "no scheme of investment which must ultimately and inevitably result in failure can be called a legitimate business enterprise" (194 U.S. at 515).

The same rationale is fully applicable to the Symbra'ette marketing plan, and more recent cases have applied similar reasoning. A lottery was found to exist by the Court of Appeals for the Tenth Circuit in a referral sales scheme involving concepts analogous to those in the Symbra'ette program. *Zebelman v. United States*, 339 F.2d 484 (10th Cir. 1964). In that case the purchaser of an automobile was promised \$100 each time a person whose name he submitted also bought an automobile. The original purchaser likewise was promised \$50 for each person whose name was submitted by the new participant he had referred, and who purchased an automobile. Holding that chance constituted an integral part of the scheme rendering it a "lottery," the court stated (339 F.2d at 486):

* * * the original purchaser has no control over the payment or receipt of the \$50 since it is the person whose name he submits that 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 statute that is all that is needed. Thus, the third element is alleged and we must conclude that the indictment is legally sufficient to charge an offense under the statute.

In *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967), a somewhat similar scheme involving chain recruiting of new purchasers was involved. In this plan a water softener costing, if paid for in installments, about \$829 was demonstrated to a householder and his wife. If they were interested they were told that the softener not only could be obtained at no cost to themselves, but also that they would have an opportunity to earn a profit. They were to achieve this goal by supplying names of potential purchasers of the softener. For each such person whose name was supplied, and who bought a softener, the original purchasers would receive \$40. No limit was placed on the number of referrals that the original purchaser could supply. The original purchaser was to receive an additional \$40 for every referral who purchased a softener whose name was supplied by the referrals the original purchaser made. As in the case of the Symbra'ette marketing plan, achievement of the goal represented thus depended on endless referrals, *i.e.*, recruiting. The Court of Appeals found this plan to be essentially fraudulent noting that one of its vices consisted of its "demonstrable impossibility." 380 F.2d at 672. See also *Fabian v. United States*, 358 F. 2d 187 (8th Cir. 1966).

Litigation arising in state courts has similarly condemned selling plans offering benefits geared to chain referrals or recruiting by a participant, by his recruits, and by their recruits, etc. In *People of the State of Michigan ex rel. Kelly v. Koscot Interplanetary, Inc.*, 195 N.W. 2d 43 (Mich. 1972), a distribution plan was involved which sought to create a network of 40,000 distributors throughout the United States, the "per capita" limit for any given community being one distributor for every 4,000 people. Substantial commissions were paid to distributors who brought in new distributors. "Single level" distributors sponsored prospects who in turn could sponsor other prospects so long as distributorships were available. "Dual Level" distributors recruited and supervised subdistributors called "Supervisors" who purchased from the sponsoring distributor at 45 percent off retail list. A "Supervisor" could ascend to the distributor level if sponsored by a distributor, and was approved by Koscot, provided he first replaced himself with another "Supervisor." The Michigan Court of Appeals agreed that this plan was analogous to a chain letter, "identical to the devices of referral selling," and that it constituted a "lottery" prohibited by Michigan statute. The court found all three elements of consideration, chance, and prize to be present, noting as to "chance" (195 N.W. 2d at 54):

* * * 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

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supervisorship; "A" makes money from both "B" and "C", with "C" being outside "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.

In considering the matter the Michigan Court of Appeals analyzed a number of similar distribution and marketing schemes utilized over the years. In *Twentieth Century Company v. Quilling*, 110 N.W. 174 (Wisc. 1907), the owner of a patented "pole and thill coupling" (for buggies and carriages) devised a scheme by which he sold to participants the exclusive right to market his device in a given county, with the right to sell to others exclusive territorial rights in other counties, with those purchasers having the right to sell exclusive county rights to still others, "and so on without limit." Finding the project not a legitimate business enterprise, the Wisconsin court noted that it "contemplates an endless chain of purchasers, or, rather, a series of constantly multiplying endless chains" containing the possibility of large gains to the original promoters and early purchasers, but "losses to later purchasers, increasing in number with the greater success of the scheme." The Supreme Court of Wisconsin denounced the plan as "contrary to public policy and void." In *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160 (Wash. 1965), radio intercoms and fire alarm systems were sold at inflated prices, purchasers receiving the privilege to refer potential customers to the seller, who promised to pay \$100 for each sale to a prospect whose name was submitted, and \$200 for each 15 names submitted to whom the seller made a presentation. Even though the sales scheme did not involve payments on sales to referrals of referrals, the plan was nevertheless condemned by the Washington Supreme Court as a lottery and contrary to public policy. The Court observed that purchasers of the intercoms and fire alarms, in hoping to recoup their investment from referrals, took the "chance" that the referrals might not be interested, that the salesman might not adequately make his presentation, that the referral might already have been referred by someone else, that the market might be saturated, and that the salesman might not even contact the referral. The Court concluded that chance was an integral part of the plan, but noted that "the measure was not the quantitative proportion of skill and chance in viewing the scheme as a whole." The Court found the principle to be the same as in chain-letter schemes.

M. Lippincott Mortgage Investment Co. v. Childress, 204 So.2d 919 (D.C. of Appeal Fla. 1967), involved a plan very similar to that of the foregoing case except that commissions were to be paid to purchasers on sales made to referrals of referrals submitted by the purchaser.

Purchasers were led to believe that "big money" would be made on sales to referrals of referrals because of their large number creating a potential yield of \$7,800 in commissions to the original purchaser. The Court found the plan a plain violation of the Florida statute prohibiting chain selling schemes, pyramid clubs, and the like. The Florida Court noted that the sale had been induced by representations that the promissory note signed by an original purchaser should be of "no concern" to him because purchasers could expect commissions which would more than pay the note in full, and because they would become part of a group which "would increase through a chain process of new members securing other new members and thereby advancing themselves in the group where they in turn would receive commissions" (204 So.2d at 923).

There is no question, and persuasive authority has established, that a "pyramid" marketing or selling plan wherein the earnings accruing to any participant are dependent, as in the Symbra'ette program, upon recruiting of new recruits, on the recruiting by those recruits of still other recruits, etc., constitutes a "lottery" in legal contemplation. The Symbra'ette program was a lottery notwithstanding the absence of classic indicia thereof. The returns to any particular participant were beyond his control, and were determined by chance. Chance was an integral and inherent part of the program.

The fact that the program had a dual aspect, as stated, in that Symbra'ette distributors might engage in direct selling, making a profit on the difference in the price they paid for Symbra'ette products and the price at which they sold those products to the consuming public, in no way alters this conclusion. The circumstance that a program has a legitimate aspect does not render such a program lawful if conjoined with it there is an unlawful aspect. Nor does the fact that the success of a participant in obtaining new recruits, and building his "organization" or "personal group," was dependent in some measure on his skill in proselyting and training change the nature of the program. Notwithstanding such factors, the returns ultimately realized from the sales of recruits, and of their recruits, etc., if any, were completely beyond a participant's control. Chance permeated the entire operation insofar as the non-direct selling aspects of the program were involved.

Lottery methods of merchandising have long been held to violate Section 5 of the Federal Trade Commission Act, *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304 (1933), and such have come to be viewed essentially as *per se* violations. See, e.g., *Gellman v. Federal Trade Commission*, 290 F.2d 666 (8th Cir. 1961); *Dandy Products, Inc. v. Federal Trade Commission*, 332 F.2d 985 (7th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965); *Peerless Products, Inc. v. Federal Trade Commis-*

sion, 284 F.2d 825 (7th Cir. 1960), *cert. denied*, 365 U.S. 844 (1961); *Wren Sales Company, Inc. v. Federal Trade Commission*, 296 F.2d 456 (7th Cir. 1961). Considered as a "lottery" comparable to the foregoing cases, the Symbra'ette program would fall within a category of *per se* violations. Regardless of whether or not it should be so considered, the undersigned has not based this decision on any *per se* rationale, but on a careful consideration of the non-direct selling aspects of the Symbra'ette program, and there is no doubt that the open-ended, multi-level (pyramidal) aspects were unfair and deceptive. In its potentiality for unfair exploitation and oppression of the public the Symbra'ette program is quite different from, and far worse than, punch-boards, pull-tabs, or raffle type merchandising practices. It bears in this respect little or no resemblance to the practices involved, for example, in *Marco Sales Company v. Federal Trade Commission*, 453 F.2d 1 (2nd Cir. 1971), in which the Court of Appeals reversed and remanded a cease and desist order enjoining the sale of trinkets, etc., by means of a punch-board. In reversing *Marco*, the Second Circuit was of the view that the Commission had not adequately articulated why it had totally prohibited the punch-board sale of small items, but had allowed supermarkets and oil companies to utilize contests governed by chance in food sales and gasoline retailing. The court in *Marco*, however, did not rule that distribution of goods by lottery was lawful.

The sale of dolls, stuffed dogs, etc., by means of punch-boards obviously bears no resemblance to respondents' program. Respondents' Symbra'ette marketing plan induces, and has the tendency and capacity to induce, prospects to invest substantial amounts of money, as well as valuable time, effort, energy, and hope, in a scheme the results of which are determined by chance, in which success is impossible for all, if not most, and in which the chance or gambling element is concealed and the program is deceptively promoted as a legitimate business opportunity. The amounts of money invested by the public in the Symbra'ette marketing plan, it may be added, were "substantial," contrary to respondents' assertion (Reply Brief, p. 3), and the undersigned specifically so finds.

The Symbra'ette open-ended, multi-level (pyramidal) marketing program, presented deceptively as a legitimate business opportunity, was inherently unfair, exploitive, and oppressive. It is clear from the provisions of the program, and its promotional literature, that it was aimed at persons hoping to go in business "for themselves," and at persons of possibly limited means seeking a way of supplementing their incomes. The program was cleverly designed to make "buying in" at the higher levels of Senior Key or Supervisor seemingly attractive, and the oppor-

tunity to achieve the high earnings held out by the "Flip Chart" deceptively plausible. The Symbra'ette program not only caused, or had the capacity to cause, participants to invest their money in the hope of realizing the income held out by respondents as available, when such realization was an impossibility for all recruits, but caused, or had the capacity to cause, them to recruit others including friends, relatives and acquaintances to invest money in a program inherently unfair and deceptive. Beyond that, the Symbra'ette program deprived, or had the capacity to deprive, participants of their time, energy and efforts which they otherwise could have devoted to legitimate enterprises not unfair to them.

A "pyramidal" marketing program such as respondents' "in the nature of a lottery," was described by the Iowa Supreme Court in *State of Iowa ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 628 (Iowa, 1971):

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 payments from Koscot for each such referral.

The Iowa Supreme Court found this program infected with fraud holding that although the term "fraudulent conduct" in the Iowa statute was not subject to precise definition, it did include referral or "pyramid" sales schemes. The Court determined that in outlawing merchandising programs with rebates "contingent upon procurement of prospective customers by the purchaser," i.e., programs in the nature of a lottery, the legislative purpose was to brand all pyramiding referral merchandise sales schemes as a "cancerous vice" against which the public should be protected and for that reason suppressed, 191 N.W.2d at 632. And in *State by Lefkowitz v. ITM, Incorporated*, 275 N.Y.S.2d 303 (1966) an endless chain selling transaction was determined to be so permeated with chance as to constitute a lottery, and was condemned on the ground that such a program had to fail as a matter of economic feasibility and mathematical certainty. Noting that this was the "quicksand" nature of such transactions the Court remarked that (275 N.Y.S. at 315):

* * * promoters must be charged with knowledge of the fraud inherent in [them].

See also with respect to sales and referral schemes based like the Symbra'ette program on "geometrically" expanding referrals or recruiting with chance ("lottery") at their core. *HM Distributors of Milwaukee, Inc. v. Dept. of Agriculture of State of Wisconsin*, 198 N.W.2d 598 (1972); *Commonwealth v. Allen*, 404 S.W.2d 464 (Ky. 1966); *Kent v. City of*

Chicago, 22 N.E.2d 799 (Ill. 1939); *New v. Tribond Sales Corp.*, 19 F.2d 671 (D.C. Court of Appeals 1927); and cases involving use of such schemes in an earlier day: *McNamara v. Gargett*, 36 N.W. 218, 22-21 (Mich. 1888); *Schnmueckle v. Waters*, 25 N.E. 281 (Ind. 1890); *Merrill v. Packer*, 45 N.W. 1076 (Iowa 1890); *Hubbard v. Freiburger*, 94 N.W. 727 (Mich. 1903). A number of states have prohibited pyramid selling and referral schemes. *Minnesota*, Minn. Stat. Anno. (1966), §325.79, Subd. 2; *Wisconsin*, Wisc. Stat. Anno. (1973), 422, 416; *Iowa*, Code (1971) §713.24 (2b); *California*, Anno. Cal. Code (1970), Penal Code §327.

This proceeding involves practices clearly not comparable in any way with merchandising by punch-boards, or the like. Rather, there is involved a "pyramidal" program masquerading as a legitimate opportunity, attractive to people looking for a way to make a living or who need money, the returns from which, to the extent derived from non-direct selling, are governed basically by chance and beyond the control of participants. Such a "pyramidal" program is inherently unfair to those investing resources and time in it. The Symbra'ette program, as already stated, had the capacity to bilk gullible or uncritical members of the public out of substantial sums of money, and out of their time, energy and efforts. Respondents' suggestion that no one was injured, damaged or deceived is rejected. Beyond that, however, the Symbra'ette marketing plan unquestionably had the capacity and tendency to injure, damage or deceive, and that is sufficient. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Goodman v. Federal Trade Commission*, 244 F.2d 584 (9th Cir. 1957); *Montgomery Ward & Co., Inc. v. Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). Although the program never attained great size, it did grow rapidly, apparently until Commission intervention, and \$2,054,250 of volume in 1969 is by no means insignificant.

The Symbra'ette Representations Were Misleading and Unfair

Count II and Count III of the complaint raise issues similar to those already discussed. Count II of the complaint charged that the Symbra'ette program involved "geometric" growth which was impossible, and therefore was unfair and deceptive. This aspect has been dwelt on at some length. It should be pointed out, however, that the nature of open-ended, multi-level (pyramidal) sales schemes, as in referral or chain-letter schemes, results in early entrants having a greater chance of achieving some success than later entrants. New entrants into the Symbra'ette program were deceived in two respects. They were falsely led to believe (1) that the earnings and advancement held out by the

program was possible for *every* new entrant, and (2) that the chances of achieving success were the same for all entrants. Later entrants, however, had a lesser chance of success if the program were carried out as designed because of prior recruitment by earlier entrants, yet made the same investment as earlier entrants. The greater the degree of success achieved by earlier recruits the less the chances of subsequent recruits. The fundamental deception alleged in Count II, and proved by the very terms of the program, however, lay in the fact that the Symbra'ette program held out to all participants financial gains impossible for all.

Some comment should be made with respect to the contention of respondents that the Symbra'ette marketing plan emphasized *sales* of Symbra'ette products rather than *recruiting* (Brief After Trial, p. 21; Reply Brief, p. 4). There can be no doubt, however, that recruiting was a major element of the Symbra'ette program. Respondents' *Symbra'ette News* illustrates the emphasis on the practice of unlimited recruiting in the Symbra'ette system:

RECRUIT-A-THON REPORT

The list of Consultants [Distributors] earning points toward the prizes they have elected to win is really starting to grow by leaps and bounds. * * * (CX 8C).

* * * * *

ANOTHER SYMBRA'ETTE "EVERYONE CAN WIN" PROMOTION !!!!

The only competition you have in this July-August recruiting promotion is yourself. You can earn \$50 or up to \$1,000 during this six week period, by recruiting new consultants into your group—and don't overlook the fact that you will continue to earn on your consultants as long as each of you remains in the Symbra'ette business, so you win both ways. * * * RECRUIT!!!! (CX 10C).

* * * * *

FROM THE PRESIDENT'S DESK

Dear Consultant,

* * * I would remind you that the Seminar recruiting contest, with its rich rewards, is now in full swing. This is a three month contest. * * *

Sincerely,
Carl G. Simonsen

(RX 12; see also RX 9).

* * * * *

WEEKLY OPPORTUNITY MEETING here at our office! We have reserved MONDAY NIGHTS (by appointment) to talk to your potential recruits and show the 20-min. film. Make a habit of always being here with a guest. Let us help you build your organization! (RX 91).

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The Sales Manual in describing the functions of "Supervisor" stated: Supervisors not only recruit constantly, * * * but continue to function as retailers * * * (CX 74H).

As to District Managers the Sales Manual stated:

Basically, your role is that of recruiter, trainer and motivator. * * * (CX 74I).

Symbra'ette News continuously exhorted distributors to recruit (CX 7-10). Distributors in March 1970 were told:

THIS TINY AD PRODUCES RESULTS FOR JUNE DALTON

Help Wanted—Female

FIVE ladies wanted who would like to work part-time making full-time pay. * * * (CX 8A).

Letters were emphasized with a "recruiting" theme:

DO YOU HAVE TIME TO RECRUIT?

On our way home from Dayton, we stopped off in Louisville, Kentucky just long enough to recruit 'SymbraEtte by Dot and Shirley'. * * * (CX 8F)

Lillian, Adeline * * *, Judy * * * and myself made a trip to the New York area to recruit * * * (CX 9F).

LATEST "RECRUIT-A-THON" LIST

* * * Every recruit they've signed is worth *points* in the forthcoming drawing.

You say *you're* recruiting? But you don't see your name on this list. Better check up and make sure that you sent the Home Office *full details* on your recruits * * *

Get out there now and RECRUIT! (CX 9F).

GRAND PRIZE 1970 CADILLAC COUPE de VILLE
in SYMBRA-ETTE Recruit-athon (CX 9 H)

Can you see yourself now embraced by a magnificent Mink Coat? It can be yours if you get out there *now* and recruit, Recruit, RECRUIT. (CX 9H)

Recruiting is surely one of the best ways Symbra'ette Consultants have of sharing their happiness. (CX 10 B).

If you are a *head hunter* and merely go about *signing* people up and failing to train them, you are not operating by the SymbraEtte Creed * * *

Help your new people get started * * * and when they are ready to start recruiting help them with this also (CX 8B).

She [a recruit] knew that the only way to reach her high goals was to *build an organization of good consultants* who had the ambition to advance in the Symbra'ette Company (CX 9F) (Emphasis added).

Count III charges that respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen, represented to all potential Symbra'ette participants that it was not difficult for participants in the Symbra'ette program to ascend to higher levels of distribution increasing their earnings in accordance

with the representations made by respondents, that every participant had the reasonable expectancy of large profits or earnings, and that the Symbra'ette program was commercially feasible for all recruits.

The record herein establishes that these representations were made, and that all were false, misleading, and deceptive. It is difficult for entrants at the Key Distributor, Senior Key, and Supervisor levels to ascend to ever higher levels of distribution, and impossible for every, or even most, entrants at the foregoing levels to do so. All participants in the Symbra'ette program do not have the reasonable expectancy of building "organizations" or "personal groups" producing the large profits or earnings represented by respondents, and the Symbra'ette "pyramid" program is not commercially feasible for all participants.

Restraints of Trade

With respect to the allegations of vertical price fixing contained in Count IV of the complaint, Symbra'ette distributors by contract agreed to adhere to the rules and regulations set out in the "Sales Manual" (CX 11-22, 74, 87). Respondents in this manner fixed the prices at which its distributors could resell Symbra'ette products. It is elementary that vertical price fixing outside the limits of fair trade is unlawful and constitutes a *per se* violation of Section 5 of the Federal Trade Commission Act. *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S. 441 (1922); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Lenox, Incorporated v. Federal Trade Commission*, 417 F.2d 126 (2d Cir. 1969). The existence of vertical price fixing agreements is sufficient for a violation. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944). The Symbra'ette program with its system of discounts and overrides inherently contemplated that all distributors would resell Symbra'ette products at the prices fixed by respondents, and in effect controlled the resale prices of Symbra'ette distributors. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

Symbra'ette, as alleged in Count V, restricted distributors from selling to the customers of other distributors, prevented distributors from buying Symbra'ette products from each other, except for Key Distributors who were required to purchase from their sponsors and no others, and prohibited distributors from reselling Symbra'ette products to retail stores "except exclusive boutiques" where "no competitive line is sold" (CX 11-22, 74, 87). Such restrictions are plainly unlawful where respondents have sold their Symbra'ette products to distributors and

have parted with dominion over them. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court there stated (388 U.S. at 379):

Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it * * *. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.

Restrictions on disposition of Symbra'ette products after distributors had bought them were part of respondents' resale price maintenance agreements, and as such must be considered as part of a total package of unlawful restraints. *United States v. Sealy, Inc.*, 388 U.S. 350, 357 (1966).

Revisions in Symbra'ette Program after Complaint

On April 1, 1972, about five months after the complaint issued respondents revised their Symbra'ette program in some respects (CX 92(3) and (4)). The program as it existed prior to complaint and until the foregoing date, and the program as revised, have been interwoven to some extent in respondents' "Brief After Trial" and "Reply Brief." This initial decision, however, has been concerned exclusively with the Symbra'ette marketing plan as it was being utilized at the time the Commission issued its complaint, and for some years prior thereto.

Among other revisions, respondents have changed the program to provide that the cost of the initial inventory of Symbra'ette products to be purchased by participants is refundable within 90 days at the "sole election of the purchaser," and that the number of active "Consultants" is "limited to 1/10 of one percent of the population of each state taken respectively."

It is by no means clear that these revisions remove the objectionable features of the program. See *People of the State of Michigan ex rel. Kelley v. Koscot Interplanetary, Inc.*, *supra*. In any case, revision of the program after complaint in no way inhibits the entry of a cease and desist order. *Coro, Inc.*, 63 F.T.C. 1164, 1178-1201 (1963), *modified and aff'd*, *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954; *Goodman v. Federal Trade Commission*, *supra*; *Skylark Originals, Inc.*, CCH Trade Reg. Rep. 1970-73 Transfer Binder ¶19,946 (Order of March 9, 1973).

The Order

The order entered herein is intended to remedy the unfair and deceptive aspects of respondents' open-ended, multi-level (pyramidal) Sym-

bra'ette marketing plan and to prevent their resumption in similar or related forms, but to permit respondents to continue all lawful direct selling aspects of their business. The order would also prohibit continuation of the unreasonable trade restraints challenged in Counts IV and V of the complaint and found to have existed.

CONCLUSIONS

1. The Federal Trade Commission has, and has had, jurisdiction over respondents, and the acts and practices charged in the complaint, and involved herein, took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents, as demonstrated in the findings of fact and discussion set out earlier herein, engaged in false, misleading and deceptive acts and practices, and utilized unfair methods of competition in the offering for sale, sale and distribution of their Symbra'ette products, and in the promotion and operation of the Symbra'ette marketing program.

3. Such false, misleading and deceptive acts and practices, and unfair methods of competition, had the tendency and capacity for and were to the prejudice and injury of the public and of respondents' competitors, and constituted violations of Section 5 of the Federal Trade Commission Act.

4. As a consequence of the foregoing, and of the findings of fact and discussion set out earlier herein, the following order should be entered:

ORDER

It is ordered, that respondent Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc., and officers thereof, and respondent Carl G. Simonsen, individually and as an officer of said corporation, or corporations, and respondents' agents, representatives, employees, successors, and assigns, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of brassieres, girdles, lingerie, wigs, or of any other products, or of distributorships or franchises, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering, operating, or participating in, directly or indirectly, any open-ended, multi-level (pyramidal) marketing or sales plan or program wherein the financial gains to participants are dependent in any manner or to any degree upon the continued recruitment of other participants.

2. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants are, or are represented to be, based in any manner or to any degree upon the recruiting of other participants who obtain the right under the plan or program to recruit yet other participants.

3. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants depend in any manner or to any extent, expressly or impliedly, on the number of participants increasing in a geometrical progression, whether infinite or not.

4. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program which is in the nature of a lottery.

5. Offering, presenting, or promoting, directly or indirectly, any marketing or sales plan or program as a legitimate business opportunity when the financial gains to participants therefrom are in fact dependent on chance and substantially beyond the control of participants so as to prevent them from significantly affecting, by application of effort, skill, or judgment, the amount of financial gains achieved.

6. Offering to pay, paying, or authorizing payment of any override, commission, cross-commission, discount, bonus, rebate, dividend, or other consideration to any participant in any marketing or sales plan or program in connection with the sale of any products or services unless such participant performs a bona fide and essential supervisory, distributive, selling, or soliciting function in the marketing of such products to the consumer.

7. Representing, directly or by implication, or by use of hypothetical examples or representations of past earnings of participants, that participants in any marketing or sales plan or program, will earn or receive, or have the reasonable expectancy of earning or receiving, any stated or gross or net amounts, unless, in fact, a majority of participants in the community or geographic area in which such representations are made, have achieved the stated or gross or net amounts represented, and the representations accurately reflect typical and average earnings of such participants from the marketing or sales plan or program, under circumstances similar to those under which the participant, or prospective participant, to whom the representations are made, plans to operate.

8. Misrepresenting in any manner, directly or by implication, or placing in the hands of others the means or instrumentalities for

misrepresenting, the financial gains reasonably achievable by participants in any marketing or sales plan or program, or the commercial feasibility thereof.

9. Recruiting or accepting a prospective participant in any marketing or sales plan or program, without first disclosing to such prospect in writing the number of other participants in the community or geographic area in which such prospect plans to operate, and the typical and average earnings achieved by such other participants from the marketing or sales plan or program, under circumstances similar to those under which the prospective participant plans to operate.

10. Fixing, establishing, or maintaining, directly, or indirectly, the prices at which any products may be resold by any dealer, distributor, or participant, and offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program, or entering into, maintaining, or promoting any contract, agreement, understanding, marketing system or course of conduct, which may have the effect of fixing, establishing or maintaining the prices at which any products may be resold, except that in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

11. Requiring any dealer, distributor, or participant to refrain from selling products which he has purchased to any specified person, class of persons, business, or class of businesses, and offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program, or entering into, maintaining, or promoting any contract, agreement, understanding, marketing system, or course of conduct, which may have the effect of causing any dealer, distributor, or participant to refrain from selling products which he has purchased to any specified person, class of persons, business, or class of businesses.

12. Publishing, providing, or distributing directly or indirectly, for a period of three (3) years after this order becomes final, any resale price list, or order form, report form, sales manual, or promotional or instructional material, which lists resale prices or sample resale prices, except that in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

It is further ordered, That respondents deliver a copy of this order to all present and future dealers, distributors, or participants in any marketing or sales plan or program, or who are engaged in the sale of respondents' products or services, and to secure from each a signed statement acknowledging receipt of this order.

Opinion of the Commission

84 F.T.C.

It is further ordered, That the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or corporation, or any other change which may affect compliance obligations arising out of this order.

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

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

The complaint in this matter was issued on Nov. 24, 1971, charging respondents with unfair and deceptive acts and practices, and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) in connection with the promotion and operation of their Symbra'ette marketing program. In particular, it was alleged that respondents' open-ended, multi-level marketing program was (1) in the nature of a lottery, and (2) that their use of it was unfair and deceptive. It was further alleged that respondents had made specific misrepresentations in the sale of their products to distributors. Additionally, the complaint charged vertical price-fixing and unlawful customer restrictions. Following hearings, the administrative law judge issued an initial decision dated Oct. 11, 1973, finding respondents in violation of all counts of the complaint. Respondents have appealed.

BACKGROUND

Corporate respondent manufactures brassieres, girdles, lingerie, swimwear and wigs, and engages in the advertising, sale, and distribution of these to the public through the Symbra'ette marketing program. Individual respondent Simonsen is president and director of Symbra'ette, its founder and creator of its distribution policies. He has been responsible for establishing, supervising, directing and controlling the business activities and practices of Symbra'ette. (I.D. 7 p. 106 herein).¹

¹ Initial decision, Finding 7. This form of abbreviation will be used throughout. Other abbreviations used herein:

Tr.—Transcript of Hearings
CX—Complaint Counsel's Exhibit

(cont'd)

The facts concerning the organization of the Symbra'ette marketing plan are not basically in dispute. Respondents challenge occasional characterizations of these facts sprinkled by the administrative law judge throughout his findings, but the principal details of the system were subject to stipulation at trial.

Respondents, through their multi-level marketing program, seek to enlist the services of men and women throughout the country to sell their products at wholesale and retail, requiring distributors to buy an inventory of varying size before they may participate in the program. A potential distributor (also called a "consultant") may enter at one of three levels, ("Key Distributor," "Senior Key," or "Supervisor"), and eventually work up to a fourth and fifth level (District Manager and Regional Manager). Entry into the program is effected by means of a nonrefundable² purchase of merchandise from the company or one of its distributors. All distributors except the lowest, Keys, purchase directly from the company. A Key distributor purchases from his sponsor. Initial purchase requirements for entry into the program are stated in terms of "Retail Purchase Volume" (RPV), *i.e.*, the volume of merchandise expressed in terms of its suggested retail price. The initial purchase requirement for entry into the program is \$300 in RPV for a Key, which at the allowed discount of 35 percent amounts to an initial purchase requirement of around \$215.³

The initial RPV required for a Senior Key is \$1,000, which at the allowed discount of 40 percent, and including literature, and sales aids entails an initial purchase of around \$700. (I.D. 9 p. 109 herein) The initial purchase required of a Supervisor is around \$1,950, resulting from a \$3,000 RPV requirement at a 45 percent discount, plus sales aids. (I.D. 10 p. 109 herein)

(*cont'd*)

RX—Respondents' Exhibit

RB—Respondents' Appeal Brief

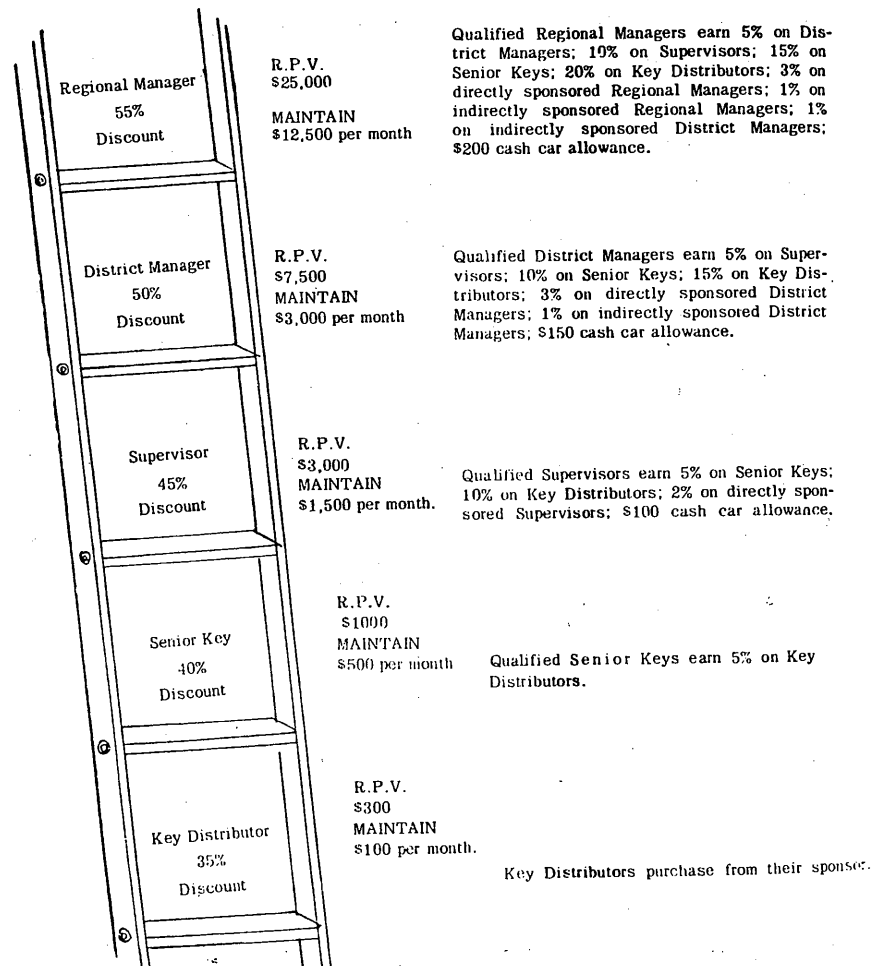
CB—Complaint Counsel's Answering Brief on Appeal

Respondents' counsel challenges various findings of fact by the administrative law judge relating to respondent Simonsen's role, alleging that "Carl G. Simonsen does not act as an individual with respect to the Symbra'ette marketing program, but only serves in the capacity of a corporate officer of Symbra'ette, Inc." (RB 47) Whatever the significance of this distinction, it is evident from the uncontested findings of fact regarding Simonsen's role in the organization, that he exercised sufficient control and influence over the corporation and its challenged practices to require the imposition of an order on him individually co-extensive with that imposed on the corporate respondent in order to eliminate the illegal practices. (I.D. 2 p. 105 herein; CX 92, Stipulation 1) See *General Transmissions Corp.* 73 F.T.C. 399, 431-32 (1968), *aff'd*, 406 F.2d 227 (7th Cir.); *cert. denied*, 395 U.S. 936 (1969); *Fred Meyer, Inc.* 63 F.T.C. 1 (1966), *aff'd*, 359 F.2d 351, 368 (7th Cir.); *cert. denied*, *granted as to another issue*, 386 U.S. 907-08 (1967).

² Subsequent to the institution of the Commission's complaint respondents modified their system to permit refunds if requested within a fixed period of time, and to limit the number of consultants allowed in any one state. The system described in this opinion is that existing at the time of the complaint.

³ This amount also included a charge for literature and sales aids. (I.D. 8 p. 109 herein) Respondents' counsel at oral argument stated that the initial investment at the lowest levels was around \$150. While the precise figure is immaterial, respondents' own promotional materials state the figure to be \$215 as cited by the law judge. (CX 75Z13)

THE SYMBRA'ETTE MARKETING PROGRAM



YOUR LADDER TO SUCCESS

The Symbra'ette Marketing Program is designed so that the ambitious person can start small or as large as he desires. Consultants can rapidly work into higher income brackets, or those who would like to enter business on a large scale may buy in as a Supervisor.

10/1/70

A Key Distributor may engage in unlimited recruiting of other distributors, and advance to the level of Senior Key if the Key's retail purchase volume and that of the Key's recruits amount to \$1,000 in one calendar month. (I.D. 8 p. 109 herein) Similarly, Senior Keys and Supervisors may rise to higher levels by achieving the requisite Retail Purchase Volume, through a combination of their own retail sales, and those of their "personal group" (various recruits and recruits' recruits; see I.D. 9-10 p. 109 herein; CX 1).

A Key Distributor's profit is the difference between the prices paid the Key's sponsor for products, and the prices at which the Key resells. The profit for consultants at higher levels in the program consists of the margin on the consultant's own retail sales, the margin on sales of merchandise at wholesale to Keys recruited directly by the consultant, and various commissions, overrides, and other compensation related to the purchase volume of directly and indirectly sponsored consultants. (I.D. 7 p. 106 herein; CX 1, 74)⁴

To induce individuals to become consultants, respondents distributed various promotional materials which recited the details of the marketing system, and illustrated how, both by building a large personal group of salespeople via recruitment, and by selling at retail, an individual could earn large sums of money, ranging in the illustrations up to \$56,400 per year for District Managers and \$90,600 yearly for Regional Managers. (I.D. 14-21 pp. 111-118 herein) Of the Regional Manager position, respondents' promotional "flip chart" promised "ANYONE CAN ACHIEVE THIS LEVEL." (I.D. 20 p. 117 herein; CX 75R) And, as the administrative law judge concluded:

Advancement from Key Distributor, or other level at which a participant "bought-in" to the Symbra'ette program, up the ladder of the Symbra'ette "pyramidal" organization, and achievement of the earnings of such higher distributional level, was represented by respondents as a reasonable expectation, feasible and possible for each and every recruit (CX 1, 74-75, prior findings)." (I.D. 21 p. 118 herein)⁵

Individuals were induced by these promotional materials and the prospect of earning large amounts of money via retailing and recruiting activities, to purchase the requisite volume of Symbra'ette products for the level at which they wished to enter.⁶

⁴ Profits of Regional and District Managers were derived in part from overrides on the purchase volumes of certain indirectly sponsored consultants. I.D. 7, p. 5 p. 106 herein, is thus slightly incomplete in stating only that profits were derived from compensation based on purchase volume of directly sponsored consultants. (CX 1, 74). It must be noted that since the purchase volume of any consultant above the "Key" level is based in part on the purchase volume of Keys recruited by the consultant (who buy from said consultant), the overrides on purchase volume of one's "direct" distributors may also be a function of the purchase volume of one or more levels of indirect recruits.

⁵ These representations were made in some cases directly by respondents to recruits, in other cases indirectly, via the provision by respondents of promotional materials and guidance to consultants who were encouraged to use them in securing new recruits, and so forth.

⁶ Respondents quarrel at various points in their brief with the administrative law judge's characterization of this process as "buying into" a distributorship or "investing in" a distributorship. (RB 17, 47) Respondents' position is that since participants paid at the same rate for their initial inventory or product as they did for reorders, there was nothing left over that could be considered "consideration" for the right to recruit. This contention is not well taken. The entire thrust of respondents' promotion was to induce people to join by offering them both the opportunity to retail, and the chance to build an organization via recruitment. Unless people totally ignored the promises of recruiting opportunities, they were clearly induced in some measure to make their initial purchase of inventory by the opportunity to own a "distributorship." While common sense and the Commission's own expertise alone are sufficient grounds to find that the initial inventory purchase was a payment both for inventory and the promised right to recruit, complaint counsel's own witness also testified to the fact that he was chiefly attracted by the recruiting aspect of the program as it was presented to him through the use of respondents' promotional materials. (I.D. 19 p. 116 herein; Tr. 53-56, 99)

COUNTS II AND III

Count II of the complaint challenged the Symbra'ette Marketing Program as unfair and deceptive on the grounds that:

the realization of financial gains [for some participants] is often predicated upon the exploitation of others who have been induced to participate therein, and who have virtually no chance of receiving the kind of return on their investment implicit in said merchandising program.

Count III of the complaint alleged that respondents had made certain express or implied misrepresentations in the course of merchandising their program. The administrative law judge concluded that:

The Symbra'ette open-ended, multi-level (pyramidal) marketing program, presented deceptively as a legitimate business opportunity, was inherently unfair, exploitive, and oppressive. * * * The Symbra'ette program not only caused, or had the capacity to cause, participants to invest their money in the hope of realizing the income held out by respondents as available, when such realization was an impossibility for all recruits, but caused, or had the capacity to cause, them to recruit others, including friends, relatives, and acquaintances to invest money in a program inherently unfair and deceptive. (I.D. p. 35 p. 130 herein)

and later:

* * * The Symbra'ette program, as already stated, had the capacity to bilk gullible or uncritical members of the public out of substantial sums of money, and out of their time, energy and efforts. Respondents' suggestion that no one was injured, damaged or deceived is rejected. Beyond that, however, the Symbra'ette marketing plan unquestionably had the capacity and tendency to injure, damage or deceive, and that is sufficient * * * (citations omitted). (I.D. p. 37 p. 132 herein)

Much has been made in the briefs and arguments of counsel about the administrative law judge's purported holding that the Symbra'ette Marketing Plan was "inherently" or "*per se*" deceptive and unfair. A somewhat less provocative formulation of this position, set forth alternatively by the judge, is simply that the challenged program had the substantial tendency, capacity, and potential to mislead, a conclusion with which we entirely agree, and one which compels prohibition of the offending practices. See *Sterling Drug Co. v. Federal Trade Commission*, 317 F. 2d 669, 674 (2d Cir. 1963); *Goodman v. Federal Trade Commission*, 244 F. 2d 584, 604 (9th Cir. 1957); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

In representing their plan, respondents held out to individuals the possibility of making large sums of money through a combination of retail selling of merchandise and recruitment of others, who would themselves engage in retail selling and still more recruitment, *ad infini-*

tum. Recruits were furnished with copies of Symbra'ette promotional materials, and encouraged to recruit others by making the same representations to them as had been made by the company, with the right to recruit and the promise of profits from recruiting and the efforts of one's recruits in this fashion being passed on without limitation or end.

It seems to us clear beyond peradventure that operation of such a plan creates the overwhelming likelihood of deception. It may transpire that those who enter the program initially (at the top of the pyramid) are not deceived, in that they are able to achieve the volume of recruitment, and their recruits are able to achieve the volume of sales, which are represented as being a reasonable possibility. Nonetheless, since the linchpin of the system is that those at the beginning will be able to succeed by promising others the ostensibly lucrative right to build their own network of recruits, and so on without end, there arises a substantial likelihood that at some point the representation that the plan affords a reasonable business opportunity will be made to individuals to whom it will appear plausible, but for whom it will be blatantly untrue, by virtue of the fact that the universe of potential recruits (which is much, much smaller than the universe of potential consumers) has been effectively exhausted. The person who makes the sales pitch which actually deceives may well not be the perpetrator of the scheme, just as the originator of a chain letter may never correspond directly with those who become its eventual victims. But the deception and unfairness are not, thereby, any less the responsibility of the one who initiates the process. [Cf. *Twentieth Century Co. v. Quilling*, 139 Wisc. 318, 110 N.W. 173, 176 (1906)].

Respondents argue that there was no showing made at trial that any individuals were actually deceived by the Symbra'ette Plan in operation. They contend that the theoretical saturation portrayed by complaint counsel and the administrative law judge was never achieved, since respondents' distributors never totalled more than 3,635, and have declined from that high. The number of distributors acquired by respondents proves nothing one way or the other. It may be that respondents never attracted more distributors because the market for their distributors was in effect no larger than several thousands, and that as the number of distributors approached 4,000, distributors began to discover that contrary to the promises in the promotional materials, there was little or no money to be made by further recruitment or retail sales. That the number of respondents' distributors has diminished since institution of the complaint is also not inconsistent with the view that

many came to discover that the Symbra'ette Plan was not, as represented, a reasonable business opportunity for them.⁷

Respondents contend that far from causing deception, the system has merely reached a "stable equilibrium," in which *mirabile dictu* no one is deceived and everyone's expectations are vindicated. It is clear that if all, or even many participants entered the Symbra'ette Program with the expectation that they would earn profits by building their own sales organizations in the fashion represented by respondents, the point would soon be reached at which those expectations were disappointed. On the other hand, it is obviously possible to imagine, as a logical if not practical possibility, that an open-ended, multi-level plan of the sort involved here will develop a "stable equilibrium," in which, through no design of the initiators, no one is injured. In respondents' view, this has resulted here because some individuals enter with diminished expectations (borne in part of skeptical evaluation of the marketing plan), while others, though hoping to reap the rewards represented, subsequently conclude that they do not wish to exert the effort required, and so leave before discovering that their effort would not be repaid. The constant attrition of certain distributors and the diminished expectations of others, may make it possible for a smaller number of individuals who believe the representations and exert the requisite effort, to realize in fact the results implied by the presentation of the plan as a reasonable business opportunity for anyone.⁸

The mere possibility, however, that a potentially deceptive scheme, with substantial capacity to deceive and to injure, may in fact fail to injure, can be no defense of its institution. The appeal of the Symbra'ette Marketing System is at root the same as that of the chain letter and similar devices which courts and legislatures have recognized since time immemorial constitute a threat to the public welfare. The danger of open-ended, multi-level sales schemes, and their considerable potential deceptiveness, lies in the seeming universal feasibility of a money-making mechanism which is in fact not universally feasible at all. Any

⁷ It is interesting to note that respondents' high number of distributors, 3,635, was achieved in 1972, in which same year, respondents' sales volume was \$1,195,465. (I.D. 4 p. 106 herein) Assuming that this entire volume represented products sold to consultants at the maximum allowable discount of 55 percent (reserved for Regional Managers only) then the total profit made by all distributors of respondent on that volume would have amounted to \$1,461,114.50 (55/45 x \$1,195,465), assuming all inventory was resold at suggested resale prices. This amount is equivalent to barely in excess of \$400 annual profit for each of the distributors enrolled with respondents, a far cry from the amounts represented as realistic by respondents for even the lowliest Keys.

⁸ Of course, it should be noted that those individuals who make this dream world "stable equilibrium" possible by leaving the program without exerting the requisite effort to succeed, have still been deceived, because they have been led erroneously to think that they could have succeeded with effort, although they eventually choose not to act on the deceitful premise. And they may also have lost their investment, though respondents would claim this was so because they did not exert the effort required to recoup it.

plan which holds out the opportunity to make money, by means of recruiting others, with that right to recruit being passed on as an inducement for those others to join, and being passable by them *ad infinitum* contains this intolerable potential to deceive, quite apart from whatever particular representations may be made in promoting the plan. Any plan involving such unlimited recruitment, with passing-on of the right to recruit *ad infinitum*, which extracts a valuable consideration from individuals in return for the opportunity to participate in it, threatens severe injury, since at some point the likelihood must arise that participants will be unable to recoup their investment of time and money by means of such recruitment. The Symbra'ette Marketing plan fits these criteria. To say that it is "inherently deceptive or injurious" is to say no more than this.

One can imagine, of course, some elaborate scheme of disclosures which could eliminate the potential deceptiveness of the scheme. If, through some feat of technology, every potential recruit might be apprised in appropriately apocalyptic terms that he or she might end up "holding the bag," the potential deception would be eliminated. But merely to state this theoretical possibility is to demonstrate its unreality. While respondents might be made to give all potential recruits with whom they dealt a detailed "prospectus" informing them of all the risks and current statistics, they could hardly assure that the same information would be passed on by all those in the chain of recruitment. Though we recognize that some elaborate system of disclosure might be devised to remedy the inherent deceptiveness of an open-ended, pyramidal marketing plan, it would surprise us to encounter such a system in the real world, and we do not regard its theoretical possibility as a significant qualification to the principle that marketing plans of the sort here involved run afoul of Section 5.

Respondents also argue that their program is to be distinguished from the traditional "chain letter" or "pyramid" scheme in that returns to distributors are ultimately dependent on retail sales to consumers, whether by the distributors themselves or their various recruits. In the first place, this contention is not correct, since overrides and commissions in the marketing plan are based on the *purchase volume* of one's recruits. Because recruits must pay from \$215 to \$1,900 for initial inventories (\$300 to \$3,000 RPV) their recruiters do, in fact, receive some compensation based simply upon the fact of recruiting, whether or not any product is ever resold to customers.

In addition, we do not believe that even when this aspect of the plan is eliminated (as it shortly will be) the potential for deception is also expunged. Respondents are still in the position of holding out to any and

all who will purchase products from them, the realistic opportunity to recoup the investment by recruiting salespeople who themselves recruit, *ad infinitum*. Somewhere along the line it is certain that the plan will not prove to be a reasonable business opportunity for those to whom respondents indiscriminately allow it to be represented as such. We do not think that Section 5 requires that we wait until a plan with such patent capacity for deception blossoms into full-fledged fraud before we prohibit it.

COUNT III

The complaint further alleged that respondents had made several particular misrepresentations, those being that:

- (1) it is not difficult for participants to ascend to a higher level within the marketing chain so as to increase their chances of recouping their investments and of earning the represented profits;
- (2) all participants in the marketing program have the potentiality and reasonable expectancy of receiving large profits or earnings; and
- (3) the marketing program is commercially feasible for all participants, and the supply of available entrants and investors is virtually inexhaustible.

The administrative law judge properly concluded that the challenged representations were conveyed by respondents' promotional literature. (I.D. 21, 14-16, 18-20 pp. 118, 111-112, 115-117 herein) The Flip Chart (CX 75), which respondents recommended be utilized in all recruiting ventures, illustrated how, through continuous recruitment, anyone could rise from level to level in the Symbra'ette Plan, steadily earning higher levels of income, until the plateau of Regional Manager was attained. "Anyone Can Achieve This Level," assures the Flip Chart. Throughout, no indication is given that achievement of projected income levels might in any way depend on factors other than the individual's own willingness to achieve them.⁹

Respondents argue that even if the challenged misrepresentations may be shown to have been made, there is no evidence of record to

⁹ Respondents' reference to *Rodale Press, Inc. v. Federal Trade Commission*, 407 F.2d 1252 (D.C. Cir. 1968) is incomplete. (RB 14-15) The court stated in *Rodale* that "[i]n view of the absence of absolute terms like 'all' or 'any' (underlined words deleted from respondents' characterization) and the presence of the qualifying language quoted above" the Commission could not read "all" or "any" into certain challenged representations (p. 1255). Respondents here, of course, did expressly represent that *anyone* could attain the highest level in their program, and they did not qualify this in any meaningful way. More importantly, the two cases are not really comparable. In *Rodale* the Commission read the term "all" or "any" into certain written representations such as "answers health problems." Here, the representation of "all" or "any" results from respondents' making the same glowing promises of reasonably possible success to *all prospective recruits*, without acknowledging that success cannot be reasonably possible even for all participants willing to put forth the requisite effort.

demonstrate their untruth. It is clear, however, from an analysis of respondents' marketing plan, that all participants in it could not possibly succeed according to the representations made, and that it could not operate for all, or even a large percentage of participants, in the manner portrayed in the promotional materials. This conclusion is not inconsistent with the conclusion that the Symbra'ette marketing plan, and specific representations made to promote it, were deceptive. Undoubtedly, many men and women of reasonable intelligence and analytic ability would be able to sit down and reason out the quicksand nature of respondents' scheme. Others, however, will be blinded by the seeming plausibility of the pyramid mechanism, and neglect the careful analysis that would dictate caution, while some may be unable to discover with any amount of care that the Flip Chart is a snare and a delusion. We are obliged to protect the latter no less than the former.

ORDER PROVISIONS

The Commission has devoted considerable attention to the matter of appropriate order language with respect to the open-ended multi-level marketing program, and solicited the views of both parties in supplemental briefs subsequent to oral argument. We are mindful of the point raised by respondents, that operation of a legitimate, non-deceptive direct selling business organization may well require some element of recruiting by independent contractors, at least where the organization lacks the capital to hire middle-level distributional personnel. At the same time, it is imperative to eliminate the abuses of recruitment found in this case—the deceptive lure of profits tied to continuous recruitment which inevitably gives rise to the illusion that success is available without constant concern for product sales to consumers. We have endeavored in drafting our order to prevent respondents from inducing individuals to distribute respondents' products on the basis of false premises, while leaving respondents flexibility to offer individuals a legitimate business opportunity in a nondeceptive manner.

Paragraphs 1 through 8 of the order relate to Counts II and III of the complaint. Paragraphs 4-8 prohibit various specific misrepresentations made by respondents (Count III). Misrepresentation of potential earnings is a particularly grave abuse and must be strictly curbed. We believe that Paragraphs 4 and 5 (slightly amended from the administrative law judge's proposal) are suited to this purpose and, as amended, are not unreasonably vague. We have added Paragraph 6 requiring respondents to maintain documentation to substantiate any earnings claims they may make. Although not contained in the notice order, this

housekeeping provision is fully justified by the nature of the case. The Commission cannot effectively monitor compliance with a provision banning misrepresentations of earnings potential unless respondents are required to maintain the requisite substantiation.

Paragraph 7 is a softened version of the administrative law judge's proposed Paragraph 9. Respondents object that the judge's paragraph is impossible to comply with. We agree it would present formidable difficulties, particularly with respect to the requirement of areawide earnings figures. This is precisely why, as noted earlier, disclosure requirements alone are insufficient to remedy the abuses of open-ended pyramidal distribution systems. We do believe that the record in this case fully justifies a requirement that respondents furnish prospective distributors some indication of the number of distributors already operating within a given marketing area, at least in those instances in which a distributor is asked to make an investment in inventory. A man or woman who is induced to pay hundreds of dollars for merchandise on the premise that there is a vast untapped market for the product (at wholesale or retail) surely has the right to know how many other people are trying to reach the same market with the very same brand product. Respondents may escape the bite of Paragraph 8 by not requiring an initial investment on the part of their distributors. We believe this is a reasonable compromise between legitimate business interests and the necessity to prevent recurrence of past deceptions.

Paragraph 8 prohibits the representation that the supply of potential participants in respondents' program is virtually inexhaustible. Respondents would qualify this prohibition by the phrase "unless the number of active participants in the respondents' marketing program is less than 1/10 of 1 percent of the population of the state of the United States in which the representation is made." We specifically reject this approach. It is clear from the record that respondents have no idea whatsoever how many distributors of their product can survive in a given market area. There is no reason to think that a given market area can support even 1/50 of 1 percent of its residents as Symbra'ette distributors, let alone 1/10 of 1 percent, and respondents should not print promotional material which suggests that the supply of prospective recruits is virtually inexhaustible without some idea of what that means in terms of market realities.

Paragraph 3 is adapted from respondents' supplemental submission. It requires that respondents refund the purchase price of any initial inventory purchase by a distributor who so requests within 30 days. This corresponds to respondents' own amended post-complaint practice.

The refund provision should help remedy any injury done to distributors who enter the program as a result of deception.

Paragraphs 1-2 respond to Count II of the complaint. It is clear that merely prohibiting particular misrepresentations, and requiring commercially feasible disclosures is insufficient to cure the deceptive potential of the marketing program. Some alteration of the program itself is necessary.

Paragraph 1 of the order prohibits respondents from operating a marketing program in which an individual *pays a valuable consideration* in return for the right to earn compensation for the mere act of recruiting other participants, *irrespective of such recruits' sales to consumers*. This paragraph is designed to ensure that any compensation received by a participant for recruiting activities will be based strictly on product sales of recruits, and not on the inventory purchases of recruits. Without such a prohibition, participants may be induced to purchase inventory from respondents with the promise that they may recoup their investment (at least in part) by inducing others to purchase inventory and by offering them the prospect of making back their investment in the same way. If respondents wish to operate a program in which participants must make initial purchases of inventory (or sales aids) whether they can sell or not, respondents may hire employees to locate such participants, or they may even pay commissions to non-employee representatives to find such participants. They may not, however, induce those representatives to buy inventory from them (or pay other consideration) in return for the right to recoup the investment in whole or in part by finding other inventory buyers.

Order Paragraph 2 is addressed to the problem of unlimited recruitment. Even if so-called "headhunting" is eliminated (by Paragraph 1) and a distributor's profits in the system are related solely to the *retail sales* of successive generations of recruits, the possibility of deception remains, because, as noted earlier, the individual may be induced to buy inventory on the mistaken assumption that he or she can delegate the retailing function to later generations of recruits, each of which may enlist for similar mistaken reasons.

We have modified Paragraph 2 from the version proposed by the administrative law judge so as to allow establishment via participant recruitment of a three-tiered system of distribution, with compensation at the top level based (if desired) on performance of the lower two, provided, however, that those at the lowest level may not perform recruiting functions for a period of at least one year following their entry into any merchandising program. This should permit respondents reasonable flexibility in building a distributional network, while ensur-

ing that the system must be presented to potential participants in a way which makes clear that their profits will depend directly on their own efforts in retailing to consumers or in building a retail organization. We recognize that upgrading within a legitimate business organization of participants at the lowest level is important; for that reason the third generation of recruits is allowed to engage in recruiting functions after one year. At the same time, it is necessary to create a substantial interruption in the chain of recruitment to avoid the inherently deceptive lure of the pyramid mechanism. We believe that Paragraph 2 will prevent abuses of the recruitment lure, and achieve the requisite "fencing in," while leaving respondents appropriate latitude to develop a participant generated vertical distribution network in a nondeceptive manner.

LOTTERY

The Symbra'ette Marketing Plan was also attacked in the complaint (Count I) and condemned by the administrative law judge as being in the nature of a lottery, and therefore illegal. (I.D. pp. 27-37 pp. 124-132 herein) The elements of a lottery are (1) prize; (2) consideration; and (3) chance. It is clear that respondents promised a "prize," large earnings, to be made in part via one's own retail sales, and in part via recruitment. It is also clear that a valuable consideration was extracted for the right to seek the recruiting prize, in the form of the substantial inventory purchase required for entry at various levels of the plan. (See n. 6 *supra*) Our difficulty in concluding that the plan is unlawfully in the nature of a lottery lies in evaluating the third element, chance.

Complaint counsel and the administrative law judge argue that the system must be condemned because "chance predominates." The initial understanding of a lottery embodied schemes in which attainment of the prize depended, in essence, almost *entirely* on chance, *e.g.*, pull tabs, punchboards, coupon drawings and the like. Subsequently courts applying anti-lottery laws have expanded the notion of "lottery" to embody schemes which are merely "permeated by chance" or in which "chance predominates." [Cf. *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160 (Wash., 1965)].

Decisions condemning so-called "referral selling" methods as lotteries have concentrated on the fact that one's rewards under such schemes would depend not only on one's own efforts in recruiting, but on the uncontrollable efforts of one's recruits and one's recruits' recruits, *ad infinitum*, a set-up deemed to appeal impermissibly (though obviously not exclusively) to the gambling instinct. *Zebelman v. United States*, 339 F. 2d 484 (10th Cir. 1964). Some courts, confronted with *deceptive* modes

of selling, but armed only with anti-lottery laws to attack them, have risen to the challenge though in less than jurisprudentially satisfying fashion by criticizing the schemes harshly for *disguising* the element of chance and the risks to participants, but then holding them illegal because of the mere presence of a measure of chance. [Cf. *State by Lefkowitz v. ITM, Inc.*, 275 N.Y.S. 2d 303].

The Federal Trade Commission Act, fortunately, does not require such indirection. It forbids outright acts and practices which are deceptive or potentially so, and for that reason condemns the Symbra'ette Marketing Plan, as noted hereinabove. We are left, then, with the somewhat academic question of whether or not the plan is also bad because it is in the nature of a lottery.

To be sure, success in the Symbra'ette Marketing Program involves a large element of chance. Those who enter with the expectation of earning large sums via recruitment are obviously at the mercy of their place in the chain, as well as at the mercy of members of the organization they might recruit. Success in the program may also involve a large element of skill, both at selling product and in recruiting and training a sales organization.¹⁰

We have difficulty distinguishing, however, in principled fashion between the concededly large element of chance involved here, and that inherent in numerous legitimate business endeavors. Consider, for instance, the real estate investor who happened to purchase a plot of swampland in 1900 in what is now called Miami Beach. Admittedly the investor may have shown shrewd judgment in evaluating the potential value of such land in the future. But the same investor also gambled very heavily on the actions of many individuals never met, and over whom the investor had no control, in undertaking development activities which led to appreciation of the investor's land. Is the sale of investment real estate thus an enterprise in which "chance predominates"? Is the sale of corporate stock an undertaking in which chance predominates? The lucky souls who years ago purchased shares of International Business Machines at a few dollars each (before numerous splits) may have shown good judgment in evaluating the future demand for computers, but to a very large extent as well they gambled on the ability of top management to build (or "recruit") and maintain an organization which could exploit that demand.

Underlying Section 5's prohibition of lotteries is the consideration

¹⁰ We are aware as complaint counsel point out, that the system whose status as a lottery is being evaluated is only that part of the Symbra'ette plan involving recruiting. Even considering the recruiting aspect alone, however, it clearly involves both luck and skill.

deeply rooted in public policy that it is unfair for a private party to appeal solely to the consumer's gambling instincts for the purpose of selling products and making a profit. The long-standing rule that lotteries are *per se* illegal under Section 5, *per se* unfair acts and practices or methods of competition is thus adequate in dealing with schemes dependent entirely upon chance, appealing to little more than an individual's gambling instincts. But it is dangerous to extend mechanically the concept of lottery to encompass activities with elements of legitimate enterprise to them, without returning at the same time to the underlying issue: "Is it unfair or exploitive, leaving deception aside, to use a scheme involving this much chance to part man from money?" This question we find impossible to answer on the record before us, in part precisely because deception was not left aside, and indeed could not be. The evil of the Symbra'ette marketing system to which complaint counsel principally object is that it disguises the large element of risk involved. People are induced to pay money by the lure of a realistic business opportunity, and not by the lure of a roulette wheel. Given adequate disclosure of the risks involved (which as noted before we believe is probably impossible for schemes of this sort), would the remaining lure resemble more closely that of investment real estate or a crap game? We see no point in attempting an answer to this hypothetical question on the record before us.¹¹

Complaint counsel themselves appear to recognize the superfluity of those order provisions relating to lotteries, and in their supplemental comments on the order provisions in this case, requested by the Commission at oral argument, they have suggested those provisions be deleted. We believe that the abuses involved in the Symbra'ette Marketing system are adequately curbed by order language responding to Counts II and III of the complaint, and we shall therefore vacate those portions of the initial decision pertaining to the lottery count and delete similar portions of the proposed order.

PRICE FIXING AND CUSTOMER RESTRICTIONS

Count IV of the complaint alleged vertical price-fixing, at the wholesale and retail levels, and Count V alleged that various customer restrictions had been imposed by respondents on their distributors.

With respect to the allegations of price fixing, the recitation in

¹¹ It should be emphasized that our unresolved doubts concerning the "lotteryness" of plans of the sort involved here extend only to Section 5 of the Federal Trade Commission Act. The definition of "lottery" under state statutes often differs, and some state legislatures have expressly declared that certain pyramidal selling schemes are lotteries [*e.g.* Fla. Stat. Ann. §849.091 (Supp. 1972); Tenn. Code Ann. §39-2017 (Supp. 1971)].

Finding 27 of the initial decision is sufficient to establish the violation. The consultant's contract signed by respondents' distributors specified that the distributor would sell Symbra'ette products in accordance with the procedure set forth in the Sales Manual, and further specified that:

Violations of the aforementioned ethical standards and itemized rules or sound business practices shall be considered just cause for the termination of all contractual arrangements between Ger-Ro-Mar, Inc. and the violator. (CX 13, 14, 15-22)

The Sales Manual stated:

*** you buy Symbra'ette products at wholesale prices—to be sold through personal sales direct to the public at suggested retail prices.* * *(CX 74P)

The effect of these provisions was to create an agreement to fix prices, and such an agreement is illegal *per se*.¹² Whether or not respondents ever sought to enforce their agreements is immaterial. The danger of contracts and agreements to fix prices, even if technically unenforceable, is that one of the parties will feel obligated to adhere to the contractual language. Here, especially, that danger was considerable, since the parties to these agreements were generally not established business people with legal counsel who might be expected to realize the illegality of vertical price-fixing. Although respondents did delete the offending price-fixing language from their distributor's manual subsequent to institution of the Commission's investigation (RX 1), such belated abandonment is no defense. [See *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523, 531 (5th Cir. 1963)]. We shall retain in essence the administrative law judge's proposed order (our Par. 9) on price-fixing, for the purpose of prohibiting any recurrence in the future of illegal practices shown to have existed in the past.

We shall, however, amend Paragraph 12 of the administrative law judge's order, which would prohibit for three years the mention in any literature, order forms, and the like sent to distributors, of "suggested retail prices," except in Fair Trade States. This remedy has been applied in some vertical price-fixing cases, but by no means all. Its purpose has been to eliminate the residual effects of a long past history of coercive price-fixing, the reason being that in such cases it would be insufficient merely to prohibit overt coercion but permit continuation of the use of suggested price lists with a coercive connotation. It is, of course, under normal circumstances, legal for a manufacturer to *suggest* a resale price to a distributor. Where, as here, the distributors are constantly chang-

¹² In the *Matter of Chock Full O'Nuts Corp., Inc.*, Docket No. 8884, Slip Op. pp. 8-9 (October 2, 1973) [83 F.T.C. 575].

ing and frequently have little or no business experience, there may even be a positive value in permitting dissemination of suggested price information, provided it is clear that advice given is merely a suggestion.¹³

Here, we find that the objectionable practices have indeed been abandoned, albeit belatedly, and while an order is clearly required to prevent any recurrence, we do not believe that the further relief of a temporary prohibition on the mention of suggested retail prices, clearly denominated as such, is necessary.

In an effort to strike a balance between the competing considerations involved, we shall amend Paragraph 12 of the law judge's order to permit the mention of suggested resale prices provided it is noted on any form or list where such occur that they are merely suggestions and not obligatory. (Par. 10 of Final Order.)

CUSTOMER RESTRICTIONS

The allegations of Count V of the complaint deal in essence with customer restrictions. We find no reason to disturb Findings 28, 29 and 30 of the initial decision, which indicate that respondents did contract with their distributors so as to limit the parties to whom the distributors could resell their products. The restrictions included (1) prohibition of sale by one distributor to a retail customer of another; (2) prohibition of sale by one distributor to a sub-distributor of another; (3) prohibition of sale by one distributor to retail outlets, except for "exclusive boutiques" doing custom-fitting and not selling a competitive line of products.

Respondents contend that they never enforced the above illegal contractual requirements, and that they no longer include such requirements in their contract package. These contentions cannot constitute a defense for the same reasons noted in the discussion of price-fixing, *supra*.

Respondents also argue in the alternative that the restrictions were not shown to be anticompetitive. It is well established, however, that a manufacturer may not restrict the class of customers to whom his independent distributor may resell goods purchased from the manufacturer. See *Arnold, Schwinn & Co. v. United States*, 388 U.S. 365, 382 (1967). Such customer restrictions are illegal *per se*. The only clearly-established exception to this rule pertains to restrictions imposed for

¹³ Those cases in which resale price lists were prohibited for a period of years have generally involved dealers in established relationships with a distributor. An unusual remedy was required to disturb long-established patterns of behavior, and, on the other hand, the positive value of price advice for the dealer was considerably less. See *Adolph Coors Co.*, Docket No. 8845 (July 24, 1973) [83 F.T.C. 32], *aff'd*, No. 73-1567 (10th Cir. 1974); *Lenox, Inc.* 73 F.T.C. 578 (1968), *aff'd*, 417 F.2d 126 (2d Cir. 1969).

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reasons of safety, which are not operative here. [*E.g.*, *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970), *cert. denied*, 400 U.S. 831 (1970)].

We shall, therefore, retain the administrative law judge's proposed order with respect to resale restrictions, although we have slightly reworded it. (Par. 11)

MISCELLANEOUS ALLEGATIONS

Respondents allege that the Commission in proceeding against them has acted arbitrarily. They cite a stipulation entered into with complaint counsel which says that there are "competitors of Symbra'ette selling brassieres, girdles, swimwear and lingerie under similar marketing and sales programs." [CX 92(7).] As of the date of the stipulation the Commission had instituted no formal proceedings against any of these competitors on the issues raised by the complaint in this matter.

Respondents recognize that a Commission proceeding to remedy violations of law is not invalidated merely because simultaneous action is not taken against others engaging in the same or similar practices. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958). While it is certainly true, as respondents argue citing the *Universal-Rundle* case,¹⁴ that the Commission does not have "unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry," it is absurd to contend that this will in any way be the result here. Nothing in the order entered in this matter will prohibit respondents from continuing to sell their products at retail, or from continuing to recruit sales personnel to sell such products. We doubt that respondents mean to contend seriously that only by means of continued deception is it possible for them to induce others to distribute their product for them and to compete in their line of business.

Moreover, while the Commission is not bound to proceed simultaneously against all perpetrators of an identical violation, it should be noted that the Commission has instituted numerous cases challenging the use of open-ended multi-level distribution systems [*e.g.*, *Holiday Magic, Inc.*, Docket No. 8834 p. 748 herein; *Koscot Interplanetary, Inc.*, Docket No. 8888; *Bestline Products Corp.*, Docket No. C-1986 (1971) [79 F.T.C. 107]; *International Safe-T-Trac, Inc.*, Docket No. C-1826 and C-1827 (1970) [79 F.T.C. 318]; *Devour Chemical Corp.*, Docket No. C-2294 (1972) [81 F.T.C. 551]]. As regards direct competitors of respondents, the exhibits cited by them to amplify the stipulation and to support their

¹⁴ *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967).

contention that the Commission has acted arbitrarily (RB 9; RX 138-145, 201, 202), reveal nothing to suggest that any of respondents' direct competitors allegedly engaging in the same practices has engaged in them on the same scale or for as long as respondents. Indeed, certain of these competitors appear to be fledgling imitators of respondents. (RX 138) The Commission will, as always, welcome any further information which respondents can provide regarding the allegedly unlawful acts and practices of their competitors, including evidence of their magnitude and duration, which might enable the Commission to determine whether further action is necessary or appropriate. That there has been any abuse of discretion in the institution of the present proceedings, however, is a contention for which there is utterly no support in the record, and which must be rejected.

We similarly reject respondents' contention that this proceeding is not in the public interest (RB 5-8). The determination that pursuit of this matter is in the public interest was duly made by the Commission at the time the complaint was issued, as prescribed by statute, and the claim that the matter lacks public interest is not one which may be interposed now as a defense to allegations of law violation. In any event, the evidence reveals that respondents' practices have the potential and capacity to deceive, and thereby they possess the capacity and potential to cause the loss of not inconsiderable sums of money by individuals who may rely on them to their detriment. It is no less in the public interest to eliminate and prevent the recurrence of such practices now than it was when the complaint was issued. While corporate respondent is not a giant of American industry, its sales volume is by no means inconsequential. The order issued in this case will not deprive aspiring citizens of legitimate opportunities to sell brassieres, girdles, lingerie, swimwear, or wigs. It will merely require that respondents undertake to attract distributors of their products in a manner that is not likely to deceive.

For the foregoing reasons, and to the extent indicated herein, respondents' appeal is denied. An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents' counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having denied, in larger part, and granted, in lesser part, the appeal;

It is ordered, That the following Findings of Fact, "Discussion," and Conclusions of Law of the administrative law judge are adopted as

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Findings of Fact, "Discussion," and Conclusions of Law of the Commission:

"Preliminary Statement" (pp. 1-3); Findings of Fact 1-25 and 27-30; pp. 25-27 *sub nom.* "Discussion;" p. 35 (last two paragraphs); p. 37 (last paragraph) through p. 44; Conclusions 1-4.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order be, and it hereby is, entered:

ORDER

It is ordered, That respondent Ger-Ro-Mar, Inc., a corporation doing business as Symbra'ette, whose corporate name is now Symbra'ette, Inc., and officers thereof, and respondent Carl G. Simonsen, individually and as an officer of said corporation, or corporations, and respondents' agents, representatives, employees, successors, and assigns, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of brassieres, girdles, lingerie, wigs, or of any other products, or of distributorships or franchises, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein a participant gives a valuable consideration in return for the opportunity to receive compensation for inducing other persons to become participants in the plan or program; *Provided*, That "compensation" as used in this paragraph only does not mean any payment based on actually consummated sales of goods or services to persons who are not participants in the plan or program, and who do not purchase goods or services in order to participate in the plan or program.

2. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants are, or are represented to be, based in any manner or to any degree upon their recruiting of other participants who obtain the right under the plan or program to recruit yet other participants, whose function during their first year in the plan or program includes, in any respect whatsoever, the recruitment of participants.

3. Operating any marketing or sales plan or program unless respondents agree to and notify participants that they will promptly repurchase all or any part of any initial order of merchan-

dise made by any participant, upon written request of the participant mailed within 30 days (or a greater period of time if respondents elect) of the receipt of the initial order by the participant, at the price actually paid by the participant for the merchandise; *Provided, however*, That respondents may insist that prior to making repurchase, the merchandise be returned to respondents' place of business, postage or shipping prepaid, in a resaleable condition, said merchandise to be shipped within 30 days (or a greater period of time if respondents elect) of the date on which written request for repurchase is received.

4. Representing, directly or by implication, or by use of hypothetical examples or representations of past earnings of participants, that participants in any marketing or sales program will earn or receive, or have the reasonable expectancy of earning or receiving, any stated gross or net amounts, unless in fact, a majority of participants in the community or geographic area in which such representations are made, have achieved the stated gross or net amounts represented, and the representations accurately reflect the amount of time required by such participants to achieve such gross or net amounts.

5. Misrepresenting in any manner, directly or by implication, or placing in the hands of others the means or instrumentalities for misrepresenting, the financial gains reasonably achievable by participants in any marketing or sales plan or program, of the commercial feasibility thereof.

6. Failing to maintain adequate records (a) which disclose the facts upon which any claims of the type discussed in Paragraphs 4 and 5 of this order are based; and (b) from which the validity of any claim of the type discussed in Paragraphs 4 and 5 of this order can be determined.

7. Requiring that an individual pay a valuable consideration in return for the right to participate in any marketing or sales program, without first disclosing to such prospective participant in writing the number of other participants in the marketing area in which such prospect plans to operate.

8. Representing that the supply of available participants in respondents' marketing program is inexhaustible or virtually inexhaustible.

9. Entering into, maintaining or enforcing any contract, agreement, combination, understanding, or course of conduct which has as its purpose or effect to require any individual to resell at any particular price a product which he or she has purchased, *Provided*,

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That in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

10. Publishing or distributing, directly or indirectly, any resale price list, product price list, order form, report form, promotional material or any other document which employs resale prices for commodities sold by respondents without stating clearly and conspicuously in conjunction therewith the following:

The resale prices quoted herein
are suggested prices only.

Provided, That in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

11. Entering into, maintaining, or enforcing any contract, agreement, combination, understanding, or course of conduct which has as its purpose or effect to require any individual to refrain from reselling products which he or she has purchased, to any specified person, class of persons, business, or class of businesses.

It is further ordered, That respondents deliver a copy of this order to all present and future dealers, distributors, or participants in any marketing or sales plan or program they operate, or who are engaged in the sale of respondents' products or services, and secure from each a signed statement acknowledging receipt of this order.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or corporation, or any other change which may affect compliance obligations arising out of this order.

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

It is further ordered, That each of the respondents herein and their successors and assigns shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with all of the provisions of this order.

Commissioner Nye not participating.

IN THE MATTER OF

GAC CORPORATION, ET AL.

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

Docket C-2523. Complaint, July 23, 1974—Decision, July 23, 1974

Consent order requiring a Miami, Fla., land developer and two of its subsidiaries, among other things to cease using false, misleading, deceptive and unfair practices in connection with the sale of land and to cease misrepresenting the qualities, characteristics or state of present or planned development of their land; misrepresenting the nature and purpose of events or activities used to solicit land sales; misrepresenting endorsements or connections with agencies of the U.S. Government; and misrepresenting the legal significance of signing a contract. The order further provides comprehensive consumer protection to future purchasers, including mandatory affirmative disclosures and a cooling-off period; benefits to past purchasers which could cost the company more than \$17 million; and relief from the contractual provision under which defaulting purchasers forfeit all payments previously made to GAC under the contract (liquidated damages). The order requires GAC to offer to many purchasers of lots in two of its subdivisions, an option to exchange them for property in other GAC subdivisions; and undertake a redevelopment program for Golden Gate Estates subdivision in particular. The order further requires GAC to clearly disclose in contracts the uncertainty of the future value of land, the difficulty of reselling it and other material factors, and suggest the purchaser consult a qualified professional; and allow the purchaser a ten calendar day cooling-off period within which to cancel the contract with full refund rights.

Appearances

For the Commission: *Eugene Kaplan* and *Jeffrey Tureck*.

For the respondents: *Earl W. Kintner* and *Daniel C. Smith*, *Arent, Fox, Kintner, Plotkin & Kahn*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that GAC Corporation, a corporation, and its wholly-owned subsidiary corporation, GAC Properties, Inc., (formerly Gulf American Corporation), a corporation, and GAC Properties, Inc.'s, wholly-owned subsidiary, GAC Properties, Inc. of Arizona, (formerly Gulf American Corporation of Arizona), a corporation, and their subsidiaries, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public