

In the Matter of Amway Corp.

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In the Matter of Amway Corp.

Case: In the Matter of Amway Corp. (1979)

Subject Category: Pyramid, Marketing

Agency Involved: FTC

Court: FTC Administrative Hearing

Case Synopsis: The FTC claimed that Amway Corp. was an illegal pyramid scheme and had conspired to illegally fix prices and reduce competition among distributors.

Legal Issue: Is Amway an illegal pyramid scheme and does its marketing program illegally restrict competition and fix prices?

Court Ruling: The FTC affirmed the Administrative Law Judge's opinion that Amway was not a illegal Pyramid, but found that Amway did restrict prices and make misrepresentations about the earnings potential of new distributors. Amway was not an illegal pyramid scheme because it did not offer a headhunting fee, made product sales a precondition to receiving recruitment performance bonuses, bought back excessive inventory, and required products to be sold to consumers. The Commission specifically found that Amway's rules requiring 70% of a distributor's orders be sold to ultimate consumers and that each distributor sell to 10 different consumers in a given period tended to show that it was not a pyramid. The Commission did find that Amway unlawfully restricted the prices at which

independent distributors could sell products and misrepresented the potential earnings of distributors. The Commission ordered Amway to cease requiring minimum prices and associated practices and to cease representing earnings potentials to prospective distributors.

Practical Importance to Business of MLM/Direct Sales/Direct Selling/Network Marketing/Party Plan/Multilevel Marketing: The procedures followed by Amway, and blessed by the FTC in this case, have been widely copied to prevent accusations of operating a pyramid scheme. Further cases have stressed the requirement that the anti-pyramid rules of an individual company must actually be effective in carrying out the program's goals, and not just given lip service.

In the Matter of Amway Corp., 93 FTC 618 (1979) : The FTC affirmed the Administrative Law Judge's opinion that Amway was not a illegal Pyramid, but found that Amway did restrict prices and make misrepresentations about the earnings potential of new distributors. Amway was not an illegal pyramid scheme because it did not offer a headhunting fee, made product sales a precondition to receiving recruitment performance bonuses, bought back excessive inventory, and required products to be sold to consumers. The Commission specifically found that Amway's rules requiring 70% of a distributor's orders be sold to ultimate consumers and that each distributor sell to 10 different consumers in a given period tended to show that it was not a pyramid. The Commission did find that Amway unlawfully restricted the prices at which independent distributors could sell products and misrepresented the potential earnings of distributors. The Commission ordered Amway to cease requiring minimum prices and associated practices and to cease representing earnings potentials to prospective distributors.

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93 F.T.C. 618

IN THE MATTER OF

AMWAY CORPORATION, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9023.

Complaint, March 25, 1975

Final Order, May 8, 1979

This order, among things, requires two Michigan corporations engaged in the doortodoor marketing of various household products, and two corporate officers, to cease allocating customers among their distributors; fixing wholesale and retail prices for their products; taking retaliatory action against recalcitrants; and disseminating pricelisting data which fail to advise that price adherence is not obligatory. Respondents are additionally prohibited from misrepresenting potential earnings and other relevants to prospective distributors.

Appearances

For the Commission: Joseph S. Brownman, D. Stuart Cameron, Mary Lou Steptoe, B. Milele Archibald and Michael Goldenberg.

For the respondents: Lee Loevinger, Philip C. Larson and Robert J. Kenney, Jr., Hogan & Hartson, Washington, D.C. and John E. Stephen, Ada, Mich.

COMPLAINT

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

PARAGRAPH 1. Respondent Amway Corporation, Inc. is a corporation organized on or about September 6, 1949, under the name JaRi Corporation, Inc. Its name was formally changed to Amway Corporation in November 1963. On or about January 1, 1964, Amway Sales Corporation, Amway Services Corporation and Amway Manufacturing Corporation, all of which were Michigan corporations, were merged into Amway Corporation, Inc. Respondent corporation maintains its home office and principal place of business at 7575 East Fulton Rd., Ada, Michigan. [2]

PAR. 2. Respondent Amway Distributors Association of the United States is an association of Amway distributors and dealers, which maintains its home office and principal place of business at 7575 East Fulton Rd., Ada, Michigan. Among the functions and duties of the Amway distributors Association are to make recommendations to respondent corporation with respect to the standing, termination or suspension of individual distributors or dealers, and to recommend changes or other action on various restrictions upon distributors or dealers.

PAR. 3. Respondent Jay Van Andel is Chairman of the Board of Directors of respondent corporation, and was one of its founders. Together with others, respondent Van Andel instituted the Amway marketing plan and distribution policies, and has been and continues to be responsible for establishing,

supervising, directing and controlling the business activities and practices of corporate respondent. Mr. Van Andel's office address is the same as that of respondent corporation.

PAR. 4. Respondent Richard M. DeVos is President of respondent corporation, and was one of its founders. Together with others, respondent DeVos instituted the Amway marketing plan and distribution policies, and has been and continues to be responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent. Mr. DeVos' office address is the same as that of respondent corporation.

PAR. 5. Respondent corporation is engaged in the manufacture, distribution, offering for sale and sale of more than 150 kinds of homecare, carcare and personalcare products, as well as vitamins and food supplements, under its own labels and trademarks, to distributors and dealers located throughout the United States. In addition, respondent corporation sells over 300 products manufactured by and bearing the name and label of other manufacturers. These products are of a wide variety including clothing, household appliances, furnishings, tools, luggage, watches, cameras and other items. Sales of products by the respondent corporation is more than \$150,000,000 at retail levels, and over 200,000 persons are actively engaged in the resale of Amway products throughout the United States. [3]

PAR. 6. In the course and conduct of its business of manufacturing and distributing its products, respondent corporation ships or causes such products to be shipped from the state in which they are manufactured and warehoused to distributors or dealers located in various other States throughout the United States. These distributors in turn resell to other distributors, dealers or to members of the general public. There is now and has been for several years last past a constant, substantial, and increasing flow of such products in or affecting 'commerce' as that term is defined in the Federal Trade Commission Act.

PAR. 7. Except to the extent that actual and potential competition has been lessened, hampered, restricted and restrained by reason of the practices hereinafter alleged, respondent corporation's distributors and dealers, in the course and conduct of their business of distributing, offering for sale, and selling their products are in substantial actual competition or potential competition in commerce with one another, and corporate respondent is in substantial actual or potential competition in commerce with other persons or firms engaged in the manufacture, sale and distribution of similar merchandise.

PAR. 8. Respondents have formulated a distribution system which has been published in various manuals, bulletins, pamphlets and other literature and material. To effectuate and carry out the policies of this distribution system, corporate respondent has entered into contracts, agreements, combinations or common understandings with its distributors and dealers; and has adopted, placed into effect, enforced and carried out, by various methods and means, said distribution system, which hinders, frustrates, restrains, suppresses and eliminates competition in the offering for sale, distribution and sale of its various products.

PAR. 9. Distributors and dealers of respondent corporation are independent contractors who sell or attempt to sell at retail to members of the consuming public, and at wholesale to other distributors and dealers recruited and/or sponsored into their respective sales organizations. Except for 'Direct Distributors,' distributors or dealers generally purchase their product needs directly from their sponsors. [4]

Distributors buying directly from respondent corporation are denoted 'Direct Distributors,' of which there are approximately fifteen hundred (1500) throughout the United States. Other distributors or dealers may purchase directly from Amway Corporation after meeting certain conditions.

In concert and combination with their network of distributors and dealers, respondents police, enforce and carry out the various rules, regulations and policies, including those alleged hereinafter as unfair methods of competition and unfair or deceptive acts or practices.

COUNT I

Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 10. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, and the combination, conspiracy, agreement or common understanding entered into or reached between and among the respondents, respondent corporation's distributors or dealers, or others not parties hereto tend to, and do, fix, maintain, control or tamper with the resale prices at which respondent corporation's products are or may be sold.

PAR. 11. For example, distributors and dealers have entered into contracts, agreements, combinations or understandings with respondents, or have been and continue to be required and coerced by respondents to sell to other distributors or dealers at other wholesale levels of distribution at the same prices which they paid for their products from other distributors or dealers or from respondent Amway Corporation. Distributors or dealers must thereafter rely upon the implementation of and adherence to respondents' purchase volume refund schedule for wholesale profits.

Under this purchase volume refund plan, refunds are paid by respondent Amway Corporation to its direct buying 'Direct Distributors' on a monthly basis at the rate of 25% of the monthly dollar volume of purchases figured at the retail price. These sponsoring distributors, in turn, pay rebates to their wholesale customers of from 0 to 25%, based upon their own monthly dollar volume of purchases, and so on, to all wholesale levels of distribution. [5]

PAR. 12. By way of further example, distributors and dealers have also agreed to sell to church, service, civic or charitable selling organizations at specified prices, and to in turn request these organizations to adhere to these same retail prices when selling to the ultimate consumer. Thereafter the distributor or dealer will pay the selling organization a sum of money which will become its gross income on the aforesaid sales.

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

COUNT II

Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 13. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, and the combination, conspiracy, agreements or common understandings entered into or reached between and among the respondents, respondent corporation's distributors or dealers, or others not parties hereto tend to, and do, restrict the customers to whom respondent corporation's distributors or dealers may resell their products; restrict distributors and dealers as to the source of their product needs; restrict the retail outlets through which distributors and dealers may resell their products; and allocate retail customers between and among the various distributors or dealers.

PAR. 14. Distributors and dealers have entered into contracts, agreements, combinations or understandings with respondents, or have been and continue to be required and coerced by respondents to adhere to practices whereby absent prior approval to the contrary, purchases of product needs must be made either directly from respondent corporation or from the distributor or dealer who recruited and/or [6] sponsored the wouldbe purchasing distributor or dealer. Distributors and dealers may not resell their products at wholesale except to those other distributors or dealers they had recruited and/or sponsored, and who are recognized as such by respondents. Distributors or dealers who drop out of the program are replaced in the chain of distribution by other distributors or dealers to whom the former had previously been selling.

PAR. 15. Distributors and dealers have also entered into contracts, agreements, combinations or understandings with respondents, or have been and continue to be required and coerced by respondents to refrain from selling from or through any business office, retail store, military store, ship's store, service station, barber shop, beauty salon, show booth, fair or the like, and to refrain from selling to proprietors of such establishments for resale at the retail level.

PAR. 16. Distributors and dealers have also entered into contracts, agreements, combinations or understandings with respondents, or have been required and coerced by respondents to refrain from soliciting the business of retail customers and commercial accounts of other distributors or dealers.

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

COUNT III

Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 17. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, and the combination, conspiracy, agreements or common understandings entered into or reached between and among the respondents, respondent corporation's distributors or dealers, or others not parties hereto tend to, and do, restrict the advertising and promotional activities in which distributors and dealers may or would otherwise engage. [7]

PAR. 18. Distributors and dealers have entered into contracts, agreements, combinations or understandings with respondents, or have been required and coerced by respondents to refrain from engaging in or limiting advertising activities as follows:

1. Distributors and dealers may not display literature or merchandise in the locations from which retail sales activities are prohibited.
2. 'Direct Distributors' only may display the 'Amway' tradename, trademarks or logos on the exterior of their places of business; provided that in addition thereto the place of business is a commercial type building, the place of business is an exclusively Amway business, no displays appear in any show windows, a view from the outside looking in is obscured, and 'Wholesale Only' must appear on the door leading in.
3. Distributors and dealers other than 'Direct Distributors' must obtain the permission of the Direct Distributors from whose chain of distribution they purchase merchandise before the Amway logo may be displayed on business vehicles.
4. 'Direct Distributors,' with prior permission, may advertise in the 'white pages' of the telephone directory under the 'Amway' tradename, whereas other distributors or dealers may not.
5. Distributors and dealers may not utilize display ads in 'yellow pages' telephone directories wherein it is indicated that the distributor or dealer deals in Amway merchandise.
6. Distributors and dealers may not set up displays at fairs, home shows or other special events unless they do so in concert, and under the direction of a 'Direct Distributor.' [8]
7. 'Direct Distributors' only may utilize roadside advertising.
8. Distributors and dealers other than 'Direct Distributors' may not advertise in newspapers, magazines or on the radio or television.
9. Distributors and dealers may only place recruiting ads which do not mention the name 'Amway.'
10. Distributors and dealers may not advertise specific Amway products in the media.

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

COUNT IV

Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 19. By and through the use of written or oral representations, respondents or their representatives represent and have represented, directly or by implication that:

1. Substantial income or profit as a result of wholesale or retail sales activities from 'multiplication,' 'duplication' or geometrical increases in the number of distributors at lower functional levels of distribution is likely.

2. Substantial income or profit as a result of wholesale or retail sales activities from unlimited recruiting activities or endless chain recruiting activities is likely. [9]

PAR. 20. In truth and in fact the distributors and dealers are not long likely to recruit other distributors in multiplication, duplication, geometrically increasing, unlimited or endless chain fashion, or to profit from sales to other distributors at lower functional levels in geometrically increasing, unlimited, or endless chain fashion because:

(a) The participants may be, and in a substantial number of instances will be, unable to find additional participants, by the time they enter respondents' marketing program. As to each of the individual participants, recruitment of additional participants must of necessity ultimately collapse when the number of persons theretofore recruited has so saturated the area with distributors or dealers as to render it virtually impossible to recruit others.

(b) Profits resulting from respondents' recruitment program must of necessity ultimately collapse when the number of potentially available persons who can be recruited to serve a particular area is exhausted. The greater the number of distributors or dealers previously recruited, the lower the chances of a profitable distributorship or dealership operation.

(c) Regardless of the number of distributors or dealers previously recruited to serve in a particular market area, profits and therefore recruitment must of necessity ultimately collapse when distributors or dealers at lower functional levels of distribution are unable to operate their wholesale businesses at a profit by selling to lower functional levels at prices greater than paid for. The greater the number of levels of distribution, the more inefficient the distribution system becomes, and the less profitable it is likely to be at the lower levels. [10]

For the foregoing reasons and others, respondents' representations that substantial income or profit may be predicated through multiplication, duplication, and geometrical, unlimited or endless chain

increases in the number of distributors or dealers recruited, either at the same or lower functional levels of distribution, in connection with the manufacture, sale and distribution of their merchandise, was and is false, misleading and deceptive, and was and is an unfair method of competition and an unfair act and practice within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT V

Paragraphs One through Nine and Paragraphs Nineteen and Twenty are incorporated by reference herein as if fully set forth verbatim.

PAR. 21. In the course and conduct of their business, and for the purpose of inducing the purchase of their products and the participation of persons as dealers or distributors of respondents' products, the respondents and their representatives or agents have made and are continuing to make oral and written statements and representations to distributors, dealers and prospective participants regarding the sale of their merchandise, the profitability of a dealership or distributorship and the recruitment of still additional participants. Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following (with emphasis omitted):

1. Sponsoring is profitable, regardless of whether you do it on a limited basis as a parttime distributor, or 'allout' as fulltime distributor.
2. Sponsoring is easy! Recruiting new Amway Distributors is not difficult, just as selling Amway products is not difficult. . . . When you have learned to sponsor one, then you simply repeat the process and sponsor two. . . . From that point on, it is just simple multiplication!
3. . . . [T]here is no known limit to how big your business can grow when you sponsor other distributors, who in turn sell products and sponsor still other distributors.
4. With the proven Amway Opportunity success will be yours . . . act now. . . .
5. To build a big business you, plus your 10 distributorseach sponsoring 4 people (total 51 distributors) with everyone selling one hour per day you will earn . . . your total monthly profit \$1,368.00. Excellent income for one hour per day. [11]
6. To build a larger business . . . you simply sponsor 10 distributors who work . . . one hour per day . . . You will earn . . . Your total monthly profit . . . \$264.00. Great income for one hour per day.
7. By working just one hour per day and making 2 average sales of \$4.00 PV each, . . . your total monthly profit . . . \$52.80. Good extra income for one hour per day.'
8. How much can I earn? As much as you desire.

9. Amway six year plan for financial independence. Step 1 become a direct distributor . . . Step 2 develop one direct distributor per year . . . Annual income after 6 years \$24,300.00.

10. Assuming that you become a Direct Distributor within a year's time and that you develop a Direct Distributor each year for the next five years, at the end of six years you can be earning in Direct Distributor bonuses \$225 x 5, or a total of \$1,125 a month. . . . The \$1,069 a month which you receive on your personal group and the 3% refund bonuses of \$1,125 on the 5 Direct Distributors whom you personally sponsor will amount to \$2,194 a month or a total of \$26,328 a year. This is gross income for managing a business of your own. This can be your six year plan for financial independence.

11. You can realize the achievement of your dreams through the Amway Opportunity. The Amway Opportunity is broad enough for you to achieve whatever your goal is.

12. An Amway pattern for success . . . duplicate yourself. You sponsor 1 distributor each month . . . each of your personally sponsored distributors sponsor 1 distributor each month up to 6 . . . at the end of one year. . . . Your personal group would consist of 64 distributors.

13. To build a still bigger business. . . . You, plus your 6 distributors each sponsoring 4 people (total 31 distributors) with everyone selling \$5.00 PV per day . . . you will earn . . . your total monthly income. . . . \$408. Excellent income for only a few hours per day.

14. With Amway, you start earning money right away with no large inventory investment.

15. The market potential for Amway products is spectacular.

16. Let's say that six of your personally sponsored distributors sponsor four distributors each, and that everyone makes a sale a day. . . . [12]

17. Let's say you have sponsored six distributors. . . . Your distributor organization can look like this:

Your Sponsor

1

You \$200 (Retailing)

1

A \$300

B \$100

C \$150

D \$50

E \$200

F \$100

Your total group PV \$1,100.00

Total monthly gross income \$157.50

As your business continues to grow and as you train and motivate your personally sponsored distributors to retail and to duplicate themselves by sponsoring new distributors, here is how your total PV and income can increase:

Your Sponsor

1

You \$200 (Retailing)

1

Dist A and his group \$600

Dist B and his group \$300

Dist C and his group \$200

Dist D and his group \$250

Dist E and his group \$300

Dist F and his group \$400

Your total group PV \$2,250.00

Total monthly gross income: \$270.00

At this point, your business has started to bring you good returns. Although you should have sponsored additional distributors in the meantime, for the purposes of simplification, we will show only six distributors personally sponsored by you. Your parttime business can expand rapidly from parttime business can expand rapidly from this point onward. month can now look like this:

Your Sponsor

1

You \$200 (Retailing)

1

Dist A and his group \$1,000

Dist B and his group \$1,500

Dist C and his group \$800

Dist D and his group \$500

Dist E and his group \$300

Dist F and his group \$800

Your total group PV \$5,100.00

Total monthly gross income \$594.00

[13] 18. The income picture! Let's take a look at your income picture for the month. . . . Immediate income on your personal sales of \$200. . . . \$60. Income on refund: . . . \$114. Total earnings \$174.

If you save \$174 a month for six months, you'd have a total of \$1,044 toward a Caribbean or a South Seas vacation. . . . So for example, five of your distributors sponsor four distributors who each sell \$200 for the month. Now the total of your group has grown to 26, and your monthly purchase volume is \$5,200. . . . However, your earnings picture for the month can now look like this: Immediate income on your personal sales \$60. Refund income . . . \$492. Total earnings \$552. Thus, you now have an attractive parttime income, and yet this is just the beginning.

PAR. 22. By and through the use of the above quoted statements and representations, as well as other oral and written statements and representations as found in various promotional materials not expressly set out herein, respondents and their representatives or agents represent, and have represented, directly or by implication, to distributors, dealers and prospective participants, that:

1. It is easy for distributors or dealers to recruit and/or retain persons to participate in the program as distributors, dealers or sales personnel.

2. Distributors or dealers in the program can anticipate receiving or will receive substantial profits or earnings.

PAR. 23. In truth and in fact:

1. It is not as easy as respondents represent for distributors or dealers to recruit and/or retain as distributors, dealers or sales personnel persons who will participate in the sales program.
2. Distributors or dealers in the sales program do not receive nor are likely to receive the substantial profits or earnings that respondents represent that they will receive or are likely to receive. [14]

PAR. 24. The following statements constitute material facts with respect to the making of claims or representations regarding the potential for recruitment of prospective distributors or dealers and/or the profitability of a distributorship or dealership:

1. There is a substantial turnover or dropout rate of distributors, dealers, wholesale and retail sales personnel, and a constant recruitment effort must be made simply to maintain a constant number of subdistributors, subdealers, or sales personnel.
2. There are substantial business expenses associated with an active Amway distributorship or dealership.

PAR. 25. The statements and representations contained in Paragraph Twenty One, along with other statements and representations not expressly referred to therein, contain claims regarding the potential for recruitment of prospective distributors, dealers or sales personnel and the profitability of a distributorship or dealership; but fail to disclose the material facts set forth in Paragraph TwentyFour.

The dissemination by respondents of the aforesaid statements and representations, and others, has had, and continues to have, the capacity and tendency to mislead distributors, dealers and prospective participants into the erroneous and mistaken belief that:

1. There is no substantial turnover of distributors, dealers or sales personnel.
2. The turnover of distributors, dealers or sales personnel is not as substantial as they would otherwise have been led to believe.
3. There are no substantial business expenses incurred by distributors or dealers.
4. The business expenses of distributors or dealers are not as substantial as they would otherwise have been led to believe. [15]

PAR. 26. For all of the foregoing reasons, and others, respondents' statements and representations as set forth in Paragraph TwentyOne, as well as others not expressly referred to therein, in connection with

the manufacture, sale and distribution of their merchandise, are false, misleading and deceptive, and were and are unfair methods of competition and unfair or deceptive acts or practices within the intent and meaning of Section 5 of the Federal Trade Commission Act, amended.

INITIAL DECISION BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

JUNE 23, 1978

PRELIMINARY STATEMENT

By a Federal Trade Commission complaint issued on March 25, 1975, respondents Amway Corporation ('Amway'), Amway Distributors Association of the United States ('ADA'), Jay Van Andel and Richard M. DeVos are charged in five counts with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. [2]

Respondent Amway is a corporation organized less than twenty years ago by respondents Van Andel and DeVos. Amway manufactures, distributes and sells with its own trademarks over 150 products, including primarily cleaning and personal care products, and food supplements. While Amway started with soap and other cleaning products, it now sells a wide variety of low cost consumer products, including catalog sales of over 300 products manufactured by and bearing the names of other manufacturers, such as clothing, household appliances, furnishings, tools, luggage, watches and cameras. Amway sells such products through more than 300,000 independent distributors throughout the country. These distributors engage in direct, house-to-house sales to consumers, with total sales amounting to over \$200 million in fiscal 1976. The distributors also seek new distributors to build a sales organization. As an incentive to the distributors' sales, Amway offers, inter alia, volume discounts based on the total sales of a distributor's sales organization, ranging from 3% on monthly sales over \$100 to 25% on sales of about \$8,500 and over. Once the distributors reach the top discount bracket, they become 'Direct Distributors,' receiving such benefits as dealing directly with Amway (rather than through the distributors which sponsored them), and voting membership in the distributors' association, ADA.

The ADA is an association of about 2,500 Amway Direct Distributors, acting as a consultant to Amway on proposed changes in basic sales policies of Amway and as a board of arbitration in disputes between and among distributors and as an appeal board with respect to action by Amway which may affect the rights of distributors.

Amway has a distribution plan published in various manuals, bulletins, pamphlets and other literature and material. This plan, known as the Amway Sales and Marketing Plan, imposes certain limitations upon the distributors' resale of products purchased from Amway and upon the method of recruiting new distributors. The complaint in this case attacks these limitations. Count I of the complaint alleges that respondents engage in resale price maintenance. [3] Count II alleges that respondents allocate customers among distributors and restrict the distributors' source of supply as well as the retail outlets

through which they may resell. Count III alleges that respondents restrict the distributors' advertising. Count IV alleges that respondents misrepresent that substantial income may be obtained from geometrical increases in the number of distributors in the chain recruiting operation of the Amway distribution plan. Count V alleges that respondents misrepresent the profitability of a distributorship and the potential for recruiting new distributors and fail to disclose the substantial business expense involved and the high turnover of distributors.

By an answer filed on August 28, 1975, respondents admitted in part and denied in part the various allegations of the complaint. Respondents moved to dismiss the complaint on the grounds that: (1) evidence was improperly obtained by the staff during the course of the precomplaint investigation, and (2) respondents were not afforded an opportunity to negotiate a settlement prior to the issuance of the complaint. The motion was certified to the Commission by an order dated September 16, 1975; the motion was denied. By an order dated April 12, 1976, I was substituted as administrative law judge because of the heavy workload of the former administrative law judge. An active motion practice ensued, with some thirty contested pretrial orders being issued on a number of procedural question. [FN1] [4]

Discovery was extensive, involving depositions, interrogatories, requests for admission, and pretrial subpoenas. Counsel filed lists of witnesses and narrative statements of their proposed testimony and exchanged documents to be offered in evidence. The parties filed written statements of relevancy and opposition concerning the offer of hundreds of proposed Commission exhibits. Complaint counsel filed an extensive pretrial statement and proposed findings. The parties filed pretrial briefs.

Hearings started May 16, 1977. The casein chief ended on June 7, 1977. The defense started June 28, 1977, and concluded on July 29, 1977. Complaint counsel had a rebuttal case on October 4, 1977. About 150 witnesses testified and the record consists of almost seven thousand pages of transcript and over one thousand exhibits.

Since the last witness testified, the parties have resumed the motion practice, with about thirty additional posttrial contested motions. One of the contested issues involved twentythree tape recordings received as exhibits during the trial on condition that transcripts be prepared and offered as exhibits. The parties were long at issue over the content of the transcripts of the tapes. The transcripts, when completed, made a pile 'two or three feet high.' Six full transcripts and seventeen partial transcripts of the tape recordings eventually were offered and received as exhibits. [FN2] [5]

The posttrial briefs and proposed findings amounted to about 1600 pages. Oral argument was heard on June 6, 1978.

The findings of fact include references to the principal supporting evidence in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CXCommission's Exhibit, followed by number of exhibit being referenced.

RXRespondents' Exhibit, followed by number of exhibit being referenced.

Tr.Transcript, preceded by name of the witness, followed by the page number.

CPFProposed Finding submitted by Complaint Counsel.

CBComplaint Counsel's Brief.

CRBComplaint Counsel's Reply Brief.

RPFRespondents' Proposed Findings.

RBRespondents' Brief. [6]

FINDINGS OF FACT

Respondents

1. Respondent Amway Corporation (Amway) is a corporation organized and existing under the laws of the State of Michigan, with its home office and principal place of business at 7575 East Fulton Rd., Ada, Michigan. (Answer, p. 5)
2. Amway currently manufactures and sells more than 150 kinds of home care, car care and personal care products, as well as vitamins and food supplements, all of which are sold under its own labels and trademarks. (Answer, p. 4)
3. The products which Amway sells to its distributors may be grouped into seven major categories as follows: home care and cleaning products; personal care products (such as cosmetics); food supplements; cookware and cutlery; commercial and agricultural products; catalog sales (a wide variety of products); and safety products (such as smoke detectors and fire extinguishers). Soap and detergents account for 41.2% of Amway's 1974 sales; polishes and sanitation goods 20%; and toilet preparations 6.5%. (RX 405)
4. Through its Personal Shoppers Catalog, Amway sells over 300 products manufactured by and bearing the name of other manufacturers. These products include clothes, household appliances, furnishings, tools, luggage, watches, and cameras. (CX 640)
5. Amway distributes its products in the United States through direct selling by authorized independent distributors, which in 1977 numbered approximately 360,000. (RX 383) [7]

6. Amway's dollar volume in sales to distributors in fiscal 1976 was approximately \$169 million in the United States and \$205 million worldwide. (RX 448; RX 431; Halliday, Tr. 6103, 610516)
7. Respondents Jay Van Andel and Richard M. DeVos are cofounders and, together with their wives, are principal owners of Amway. (Van Andel, Tr. 1672, 1781)
8. Mr. Van Andel is Chairman of the Board of Amway. (Van Andel, Tr. 1671)
9. Mr. DeVos is President of Amway. (Complaint, P4; Answer, p. 4)
10. Amway's Board of Directors consists of Mr. Van Andel, Mr. DeVos, and William J. Halliday, Jr. (Van Andel, Tr. 178182)
11. Respondent Amway Distributors Association of the United States (ADA) is a trade association of Amway distributors organized and existing as a nonprofit corporation under Michigan Law. (Halliday, Tr. 609192, 617173) ADA maintains its home office and principal place of business at 7575 East Fulton Road, Ada, Michigan. (Complaint, P2; Answer)
12. Each new Amway distributor may choose to become a member of the ADA. (Halliday, Tr. 619596)
13. An Amway distributor who, through sales volume and other requirements, becomes a 'Direct Distributor' may qualify as a voting member of the ADA. (Halliday, Tr. 619697) [8]
14. There currently are about 2500 voting members of the ADA. (Halliday, Tr. 655556)
15. Voting members of the ADA elect nine members of the elevenmember ADA Board of Directors and Amway appoints two members. Mr. Van Andel and Mr. DeVos represent Amway on the Board. (Halliday Tr. 6194)
16. The ADA Board performs three principal functions: (a) it acts as a representative of the distributor association; (b) it acts as an advisory board to Amway; and (c) it acts as an arbitration board in disputes between distributors or between Amway and a distributor. (Halliday, Tr. 617583)

Organization History

17. Mr. Van Andel and Mr. DeVos have been involved in direct selling since 1949, beginning as distributors of Nutrilite food supplements, through a corporation they organized for this purpose the JaRi Corporation. (Van Andel, Tr. 167273, 1676, 190810)
18. Direct selling is the distribution of products and related services to consumers in their homes through person to person selling. (Van Andel, Tr. 169192; Granfield, Tr. 291718)

19. In 1959, Mr. Van Andel and Mr. DeVos and other distributors had trouble with their supplies of food supplements, Nutrilite Products Company, Inc., and Mytinger & Castleberry, Inc. A small group of distributors was appointed, with Mr. Van Andel as the chairman, to try to work out an arrangement with the suppliers. The negotiations culminated in an offer by one of the suppliers to Mr. Van Andel to become president of the company. Mr. Van Andel and Mr. DeVos concluded that the inherent problems were with the people who owned those companies and that those problems would continue regardless of who managed them. Mr. Van Andel refused the offer. (Van Andel, Tr. 167273) [9]

20. Mr. Van Andel and Mr. DeVos decided that their suppliers were in great danger of collapsing and that they should go into the business themselves, producing their own products and selling them through the JaRi sales organization which had more than 2000 distributors as members. (Van Andel, Tr. 1674; 1679; Hansen, Tr. 3302; CX 904)

21. Mr. Van Andel and Mr. DeVos then put together an organization of distributors called the American Way Association, the name of which was later changed to the Amway Distributors Association. The primary purpose of this organization was to allow Mr. Van Andel and Mr. DeVos to communicate with their Nutrilite distributors in the JaRi organization and to hold the business together until Mr. Van Andel and Mr. DeVos could develop their own manufacturing operation. (Van Andel, Tr. 167475)

22. Mr. Van Andel and Mr. DeVos had to be very careful in changing their distributor organization, with its allegiance to Nutrilite food supplement products. Since the distributors were independent, they might quit. It was therefore necessary for Mr. Van Andel and Mr. DeVos to have these distributors concur in their plans to set up a product distribution and manufacturing operation; and they discussed the type of products they intended to produce with the distributors' association. (Van Andel, Tr. 167476) Many of the distributors in the organization of Mr. Van Andel and Mr. DeVos joined the American Way Association, and began distributing products sold to them by Amway as well as Nutrilite products. In 1972, Amway acquired 51% of Nutrilite. (Van Andel, Tr. 167980, 168485)

23. Mr. Van Andel and Mr. DeVos decided to look for products which were readily consumable, relatively lowpriced, different from those found in retail stores, and which would lead to repeat sales. They chose soap and detergents because they felt it would be the easiest market to train distributors to sell in. With that type of product, it is a matter of which one to use rather than whether to use it at all. (Halliday, Tr. 6541; Van Andel, Tr. 168081) [10]

24. At about the same time that the American Way Association was formed, Mr. Van Andel and Mr. DeVos began distributing through the JaRi organization a liquid detergent called 'Frisk' which they renamed 'LOC' (liquid organic compound) and which is still one of the principal Amway products. This product was manufactured by Eckle Company, a small supplier in Detroit, Michigan, and it was one of the only biodegradable liquid detergents available at that time. Mr. Van Andel and Mr. DeVos, through JaRi Corporation, acquired the company, moved the assets to Ada, Michigan, and changed its name to Amway Manufacturing Company. A few months later they introduced SA8, a biodegradable powder detergent. (Van Andel, Tr. 167378; Halliday, Tr. 6153, 6541)

25. In November 1959, Mr. Van Andel and Mr. DeVos organized Amway Sales Corporation and Amway Services Corporation. (Van Andel, Tr. 1677) In November 1963 the name of JaRi Corporation, Inc., was changed to Amway Corporation; and on January 1, 1964, Amway Sales Corporation, Amway Service Corporation, and Amway Manufacturing Corporation were merged into Amway. (Answer, p. 3)

Amway Distribution System

Amway Distributors

26. The Amway Sales and Marketing Plan is designed to move products manufactured by or for Amway through a network of distributors to retail customers. (Halliday, Tr. 6198) Amway imposes several restraints upon distributors as part of this system. The restraints, which are the subject of this litigation, are found in Amway's 'Code of Ethics and Rules of Conduct.' (RX 331, pp. 13B through 25B) The Amway system of recruiting, sponsoring and selling basically is the same as the Nutrilite system which began operating in 1946. (Van Andel, Tr. 1702, 190508) [11]

27. The Amway Sales and Marketing plan involves person to person retail selling. Amway distributors are urged to sell at retail to persons they know or are referred to, rather than going from door to door. (Van Andel, Tr. 1757 58)

28. In the Amway Sales and Marketing Plan, products are sold by Amway distributors, all of whom are independent contractors. (Halliday, Tr. 626162)

29. All new Amway distributors enter the business with the same rights and obligations. (Halliday, Tr. 6208; Lemier, Tr. 21011)

30. Each Amway distributor has the right to sell Amway products to consumers and to sponsor new Amway distributors and to sell products to his sponsored distributors. (Van Andel, Tr. 1708)

31. Any Amway distributor may become a 'Direct Distributor' by qualifying on the basis of sales volume. The principal requirement for qualification as a Direct Distributor is that the distributor must have a sales volume of about \$8500 per month. (RX 331, p. 8D)

32. Amway sells its products to Direct Distributors, who sell Amway products to consumers and to their sponsored distributors for resale. (S. Bryant, Tr. 403334) Other distributors normally buy from their sponsor. (RX 331, p. 1 E) Those distributors ('Warehouse Order Distributors'), living more than 25 miles from their source of supply or doing a large volume, are authorized to buy directly from Amway. (RX 331, p. 1E) [12]

33. In order to become a duly authorized Amway distributor, a person must (a) be sponsored by an Amway distributor, and (b) file an application with Amway for the right to sell Amway products. (Van Andel, Tr. 169697; RX 331, p. 14 B)

34. A new Amway distributor is not required to buy inventory. The distributor need only buy a \$15.60 'Sales Kit' containing product information and sales aids and literature. (RX 331, p. 15B; Halliday, Tr. 6615)
35. A new distributor may also purchase an optional 'Product Kit' for \$25.65, containing sample Amway products for demonstration use. (Halliday, Tr. 6126, 6588; RX, 433)
36. Neither Amway nor sponsoring distributors make a profit on the Sales Kits. (Van Andel, Tr. 1863, 1937; Max, Tr. 5996; Garmon, Tr. 3515)
37. A distributor who decides to leave the business may receive a refund on the price of the Sales Kit and Product Kit. (Halliday, Tr. 6615)
38. Most new Amway distributors have had no selling or business experience. (CX 1000K; Van Andel, Tr. 1695)
39. The vast majority of Amway distributors, including Direct Distributors, conduct the Amway business on a parttime basis, and have another fulltime occupation. (Halliday, Tr. 6235; RX 329) [13]
40. Anyone who has become an Amway distributor prior to August 31 of any year or who has continued his distributorship for that year must renew his distributorship authorization for the next year by December 31. (Halliday, Tr. 6484)
41. The number of active distributors since 1972 has remained relatively constant, fluctuating around 300,000, climbing in 1977 to about 360,000. (RX 383)
42. The average annual turnover of Amway distributors is about 50%. The turnover rate for Amway distributors during their first year is almost 75% and thereafter about 25% a year. (CX 909; RX 383)
43. Currently about half of all Amway distributors were sponsored by a Direct Distributor or by a distributor sponsored by a Direct Distributor. More than 70% were within three positions of a Direct Distributor and 99% were within seven positions. (RX 423)
44. If distributors leave Amway, any distributors whom they may have sponsored move up the line of sponsorship to the next qualified distributor. (RX 331, p. 17B)
45. In order to receive the benefits of sponsoring, Amway distributors must train their sponsored distributors and stock inventory to supply them. (RX 331, pp. 17B to 18B)
46. The distributors sponsored by an Amway distributor become members of that distributor's 'personal group.' The sponsored distributors may then sponsor other distributors, thereby forming their own personal groups and enlarging the personal group of the first sponsoring distributor. (CS 1096, p. 2B) [14]

47. When distributors qualify as Direct Distributors, they 'break off' from the personal group of their sponsor, thereafter dealing directly with Amway. (RX 331, p. 8B)

48. The Amway Sales and Marketing Plan provides communication with distributors through literature published by Amway and by meetings. About 10 or 15 times a year sales rallies consisting of several thousand distributors are held around the country, to which any distributor in the area is invited. An afternoon meeting for high volume distributors only (with no guests allowed) is followed by an evening sales rally for all distributors and their guests. (Van Andel, Tr. 176163) These evening sales rallies involve presentation of sales awards with impromptu speeches by the recipients and motivational speeches by other successful distributors and celebrities. 'Amway officials are present to offer helpful advice to both new and experienced distributors alike.' (Id.; CX 62Z4243) Area meetings are produced independently by Direct Distributors for their groups or for a combination of Direct Distributor groups. They provide information and inspiration for the distributors. (CX 62Z43)

49. About five thousand distributoroperated meetings are held each week. These local meetings help sponsors 'build enthusiasm within their group through weekly meetings in their homes or offices for the purpose of training, movivating and sponsoring.' (CX 62Z43)

Compensation

50. Amway distributors earn income from retail sales through the 'basic discount' (the difference between the price paid by the distributor for the product and the price charged by the distributor at retail). A distributor does not make money directly by selling products to his sponsored distributors 'because he sells them for the same price he paid for them; the distributor cost.' (RX 331, p. 3B) Instead, distributors receive a [15] 'performance bonus' which is paid by Amway through sponsoring distributors and is based on the distributor's total monthly sales volume. The 'Basic Discount' and 'Performance Bonus' are defined as (RX 331, p. 4B):

Basic Discount: When you personally sell Amway products you earn income in two ways . . . the first of these is your 'basic discount.' You buy products from your sponsor at the wholesale price, and sell them to customers at retail. The basic discount on most homesize products is 35%, with some at 15% or 25%. That percentage is your immediate incomeyour 'basic discount'which you get as soon as you are paid by your customers. Most distributors average 30% of Business Volume as income.

Performance Bonus: The second way you earn income is through your monthly Performance Bonus on Amway products you purchase for resale. In addition to your immediate basic discount, you earn a Performance Bonus each month based on total Point Value and BV of all products purchased by you during the month. This is a percentage Bonus which varies from 3% to 25% depending on you total monthly Point Value, according to the schedule below.

PERFORMANCE

BONUS SCHEDULE

Performance Bonuses are paid in addition to the basic discount, which averages 30%.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

FN* Total monthly PV includes both personal PV and PV of others you sponsor.

51. The performance bonus schedule was previously based on monthly dollar purchase volume. (CX 61, p. 4B) In 1975, in order to adjust for inflation, each product was assigned a 'point value' which remains constant regardless of changes in the price of the product. (CX 680A)

52. Each Amway product is also assigned a dollar value for the purpose of calculating 'business volume' ('BV'), corresponding approximately to the suggested resale price of the product, less a warehouse charge. (RX 331, p. 4 B)

53. The performance bonus system provides an incentive to sponsoring distributors to provide training, motivation and supply to sponsored distributors, since they receive income based on the accumulated total sales of all of the distributors in their personal group. (Van Andel, Tr. 186364) This payment has been termed 'overwrite,' 'bonus,' and 'refund,' and since 1975 'performance bonus.' (CPF 199) It corresponds to the compensation paid by manufacturers to wholesalers. (Cady, Tr. 577678)

54. Under the Amway Sales and Marketing Plan it is the Direct Distributors' duty to see that performance bonuses, which they receive monthly from Amway, are promptly distributed to sponsored distributors and redistributed in that month to all distributors in the Direct Distributor's personal organizations who earned the performance bonus. (RX 331, p. 19B) Amway enforces its refund policy. (CPF 204) The ADA arbitrates disputes concerning the refund policy. (CPF 205) [17]

Sponsoring

55. The sponsoring distributors earn income on the basis of the total sales volume of their personal distributor group, as well as their own personal retail sales. (RX 331, p. 5B) Sponsoring distributors must supply and train distributors they sponsor. (RX 331, p. 17B)

56. Distributors are urged to sponsor new distributors in order to 'earn on what others sell' (RX 331, p. 5B), but the Amway Sales and Marketing Plan stresses that combined retail selling and sponsoring are equally essential to the distributor's success. (RX 331, p. 1B)

57. About 25% of Amway distributors sponsor new distributors. (RX 415; Van Andel, Tr. 1828; Max, Tr. 6023)

58. Recruiting distributors occurs primarily at an 'Opportunity Meeting' which each distributor is urged to hold at least once a week. (CX 68D) Amway encourages that recruiting be done individually rather

than at mass meetings. (CX 638H) Recruiting new distributors through the presentation of the Amway Sales and Marketing Plan involves (1) introducing the company and products, (2) appealing to the financial goals of the prospective distributors, and (3) explaining the compensation of a distributor through retail and wholesale sales. (RX 331, Section D)

59. The Amway Career Manual for distributors explains how to recruit distributors by appealing to the financial goals of prospects. (RX 331, pp. 1 D to 3D). The suggested presentation provides that the distributor should: [18]

Announce to your guests that you would like to tell them about an exciting opportunity to be in business for themselves and to develop an income of as much as \$1,000 per month. Explain that it is an opportunity that grows as they share it with others.

Ask if they are as successful as they would like to be. If not, would they be interested in a chance to realize their dreams through a business of their own that they can build on a part time basis and, with such a modest initial expenditure? An opportunity does exist that will give them such a chance.

[The distributor is then advised to give a short history of the company and to describe some of the products and sales literature.]

What does all this mean to you? It means you can become a part of a dynamic growing organization. It means that this opportunity can mean the realization of your dreams.

(Ask questions to find out what the goals and dreams of each prospective distributor may be.)

What are some of your dreams?

Do you want a new car, a new house, college education for your children?

Do you want retirement income that will afford you a comfortable standard of living?

What income do you want six years from now?

Are you willing to work hard to get this?

How much extra money per month do you need for that new car? [19]

\$100 a month or more?

What kind would you like a Chevrolet, Pontiac, Oldsmobile?

How much money per month do you need for that new house?

What kind of home do you want a three-bedroom ranch with a price tag of \$35,000-\$40,000?

How much will you need for monthly payments \$250, \$300 a month?

How much will it take to send the youngsters through college \$2,500 to \$3,000 a year for each youngster?

If you could earn an extra \$250 a month, you would have an additional \$3,000 a year. This might be sufficient to send one youngster through one year of college.

How much would you like as a continuing income \$1,000 a month?

Would you work for your goal?

Would you be interested if I could show you a way you can make your dreams come true?

Would you be interested in a way to achieve this on a part-time basis?

What would you be willing to give up to get this?

You can realize the achievement of your dreams through the Amway Sales and Marketing Plan. It is broad enough for you to achieve whatever your goal is. First of all, you start like everyone else you are sponsored by another Amway distributor. You are in business for yourself, but not by yourself. You buy Amway products at wholesale from your sponsor, and you sell them at retail to your customers. (Emphasis in original.) [20]

60. The Amway Career Manual for distributors explains the nature of retail and wholesale compensation provided in the Amway Sales and Marketing Plan. (RX 331, pp. 5B through 7B): [21]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

61. Amway distributorships are not for sale and sponsoring distributors receive no profit from the act of sponsoring. It is only after the sponsored distributor begins to buy products that the sponsoring distributor will receive income. (S. Bryant, Tr. 4063)

Direct Distributors

62. A distributor may qualify as a Direct Distributor with at least 8,500 BV in a single month (assuming a point value of at least 7500 points), and with a personal group point value of at least 7500 points or

more for the following two consecutive months, with a gross profit of at least \$800 for each of the three consecutive months. (RX 331, p. 8D)

63. A Direct Distributor becomes eligible for voting membership in the Amway Distributors Association and qualifies for the 3% Direct Distributor Bonus, and Sales Training Bonus, and the Profit Sharing Bonus. (RX 331, pp. 8 and 9B)

64. Direct Distributors receive 3% of the personal group Business Volume of the Direct Distributors whom they sponsor. At that level both the sponsoring and the sponsored distributors are in the same performance bonus bracket²⁵%. Therefore, in order to provide the sponsoring distributor with an incentive to continue to motivate and train such a sponsored distributor, the extra 3% Direct Distributor Bonus is provided. To receive the 3% bonus, distributors must be qualified Direct Distributors, by having a qualifying personal group Business Volume excluding the Business Volume of Direct Distributors whom they have sponsored. (RX 331, pp. 8B to 9B) If the sponsor of the Direct Distributor does not qualify, then the 3% bonus goes to the next upline sponsor who meets the requirements. (S. Bryant, Tr. 406768) [25]

65. Amway pays a sales training bonus to Direct Distributors who sponsor three Direct Distributors for any six months in a year. (RX 331, p. 9B)

66. Amway has each year paid a 'profit sharing distribution' in the form of debenture bonds to all voting members of the Amway Distributors Association. (RX 331, p. 9B; Halliday, Tr. 621213)

67. Amway supplies, trains and compensates Director Distributors. (Van Andel, Tr. 1710, 1850)

68. Direct Distributors supply, train and compensate distributors. They maintain a stock of merchandise and literature, have regular office hours, train distributors through sales meetings and advice, and enforce the Amway Rules of Conduct, including the requirement that monthly performance bonuses be distributed to all distributors in their organization. (RX 331, p. 19B)

69. Direct Distributors are required to requalify annually on the basis of their sales volume. (RX 331, p. 19B)

70. The number of Amway Direct Distributors in the United States has grown from about 3000 in 1972 to about 4000 in 1977. (Van Andel, Tr. 169596; CX 896) About half of the Direct Distributors started with Amway in the last five years. (RX 434)

71. Distributors who fail to requalify as Direct Distributors generally continue as distributors. Between 1960 and 1976, 3070 Direct Distributors failed to requalify as Direct Distributors, and at the end of that period 75% were still Amway distributors. (RX 434) [26]

Pyramid Rules

72. Amway, the Direct Distributor or the sponsoring distributor will buy back any unused marketable products from a distributor whose inventory is not moving or who wishes to leave the business. (RX 331, p. 17B to 18B; CX 847; CX 1076) The buyback rule has been in existence since Amway started. (CX 1041 J) Amway enforces the buyback rule. (CX 847; Brown, Tr. 501213; Bortnem, Tr. 686, 690; Soukup, Tr. 913)

73. To ensure that distributors do not attempt to secure the performance bonus solely on the basis of purchases, Amway requires that, to receive a performance bonus, distributors must resell at least 70% of the products they have purchased each month. (RX 331, pp. 16B to 17B) The 70% rule has been in existence since the beginning of Amway. (S. Bryant, Tr. 4086) Amway enforces the 70% rule. (Lemier, Tr. 19293; S. Bryant, Tr. 405659; Halliday, Tr. 6497)

74. Amway's 'tencustomer' rule provides that distributors may not receive a performance bonus unless they prove a sale to each of ten different retail customers during each month. (RX 331, pp. 1B and 17B) The Direct Distributors have the primary responsibility for enforcing the tencustomer rule in their own group. (S. Bryant, Tr. 406162) The tencustomer rule was started by Amway about 1970. Prior to that, there was a 25 sales rule which required the distributor to make 25 retail sales a month without regard to the number of customers. (S. Bryant, Tr. 408586) The tencustomer rule is enforced by Amway and the Direct Distributors. (CX 823; Case, Tr. 341415; Medina, Tr. 4197; Zizic, Tr. 413843; Lincecum, Tr. 1266)

75. The buyback rule, the 70% rule, and the tencustomer rule encourage retail sales to consumers. (Van Andel, Tr. 19992000, 2010; Halliday, Tr. 623133; Lemier, Tr. 176; Cady, Tr. 579597) [27]

Operation of the ADA

76. The voting members of the ADA meet once a year for a one day meeting. They election the Board members of the ADA and receive reports concerning the Amway business. (Halliday, Tr. 617475)

77. The ADA Board meets four times a year, usually for two days at a time. (Bass, Tr. 42)

78. Amway uses the ADA Board to receive recommendations concerning the business. Amway presents proposals for changes of rules to the Board for information and advice, and for reaction from the field. (Halliday, Tr. 6612 13)

79. Amway consults with the Amway Distributors Association, through the Board of Directors, in setting up discount and refund schedules, bonuses, and retail prices. (CX 22B) In its 1975 annual report to the state of its incorporation, the ADA reported that its purpose was (CX 3A): 'To act as a trade ass'n for the purpose of setting policies with the company from whom purchases are made and the pricing of all products sold direct to the consumers.' (Also see CX 4AB for 1971 report.) The Board of the ADA has in fact consulted with Amway about retail prices, e.g., discussing in 1973 price cutting on a cookware promotion. (CX 376B)

80. The ADA Board also acts as a board of arbitration in disputes among distributors and as an appeal board when Amway has terminated or disciplined a distributor. The ADA Board conducts formal hearings through a hearing committee of three members. Participants may attend the hearing in person and may be represented by an attorney. The hearing committee receives witness testimony and other evidence, and a transcript of the hearing is made if a participant requests it. The committee then makes a recommendation to the Board. The Board considers about 5 or 6 cases each time it meets and in about 20% of the cases the Board disagrees with Amway. Amway always has acceded to the Board's decision. (RPF 243, 244) [28]

Vertical Restrictions

CrossGroup Selling Rule

81. Amway distributors agree to sell at wholesale only to distributors they have sponsored, and to buy only from their sponsor. This restriction is known as the 'crossgroup selling rule': 'Rule 3. No distributor shall engage in crossgroup selling. A distributor in one line of sponsorship must buy all of his Amway products and literature supplies from or through his supplier.' (RX 331, p. 15B)

82. The crossgroup selling rule provides Amway distributors with an incentive to recruit distributors and to train and motivate them to sell Amway products, since the sponsoring distributor receives income on the sponsored distributors' sales volume. (Patty, Tr. 311113; Halliday, Tr. 623739; Van Andel, Tr. 1751) Effective sponsoring distributors keep inventory of Amway products, hold sales meetings, run contests and conduct other promotional and training activities. (RPF 159)

83. Amway distributors may transfer from one sponsor to another after being terminated or remaining inactive for six months. Amway also approves about 100 transfers of distributorships a year for other reasons. (RX 331, pp. 18B and 19B; Halliday, Tr. 650709)

84. A distributor must train and supply his sponsored distributor. If they are in different geographic locations, however, the sponsor may arrange, through his Direct Distributor, to have the sponsored distributor trained and supplied by a Direct Distributor living in the sponsored distributor's area. (RX 331, p. 17B) In these private servicing arrangements, the two Direct Distributors determine the compensation for this service. (Van Andel, Tr. 173941) [29]

Retail Store Rule

85. Amway distributors agree not to sell in retail stores (RX 331, p. 16B):

RULE 6. No distributor shall permit Amway products to be sold or displayed in retail stores, RX's ships or military stores; nor shall he permit any product displays to appear in such locations, even if the products themselves are not for sale. No Amway literature shall be displayed in retail establishments.

A distributor who works in or owns a retail store must operate his or her Amway business separate and apart from the retail store. Such distributors must secure customers and deliver products to them in the same manner as Amway distributors who have no connection with a store. Other types of retail establishments, which are not technically stores, such as barber shops, beauty shops, etc., likewise may not be used to display Amway products.

86. Amway prohibits distributors from setting up displays or booths at fairs, home shows, or other similar special events. (RX 331, p. 23B)

87. Amway restricts its distributors in their sales of Amway products in fundraising drives carried on by churches, and other civic or charitable organizations, limiting the manner and time of the sales and the products to be sold. (RX 331, p. 15B; CX 277MN)

88. The retail store rule gives an incentive to Amway distributors to provide services to consumers. Amway distributors go to the consumer's home, demonstrate and explain the products, help with cleaning problems 'on site,' and deliver the products to the consumer's home at the customer's convenience. These services are typically unavailable from a retail store. (Schroeder, Tr. 535556; Bryant, Tr. 4396; Ahlliday, Tr. 624043; Max, Tr. 589394) [30]

89. In the absence of massive advertising to create demand, sales of Amway products in retail store would fail. Retail stores might be willing to stock Amway products in the short run because of existing demand created by personal direct selling by Amway distributors. (Cady, Tr. 578586) Distributors would quit or switch their attention from consumers to stores. (Cady, Tr. 5786) Demand would therefore slow and when demand slows down there is no longer shelf space available in the store. (Van Andel, Tr. 1810-12) If Amway were to sell through retail stores, 'They would destroy their direct selling capability.' (Diassi, Tr. 553738)

CustomerProtection Rule

90. The Amway Sales and Marketing Plan formerly had a 'customer protection rule,' providing that, upon making a sale to a retail customer, a distributor established an exclusive right to resell to that customer for a specified period of time. (CX 60Z5)

RULE 1. A distributor who completes a sale to a retail customer and registers such sale thereby establishes the exclusive right for a period of the next 30 days to resell that customer.

An Amway distributor, upon completing a sale to a retail customer, thereby establishes the exclusive right to resell Amway products to that customer, provided he has 'registered' such sale by sending a copy of the sales receipt to his Direct Distributor or to such sponsor as the Direct Distributor may designate. The distributor must sell the retail customer an Amway product and register that customer each 30 days in order to retain his exclusive right on a continuous basis.

In the case of a commercial account, a distributor may retain an exclusive right to his customer in the same manner except that the exclusive right shall be effective for a period of 90 days. [31]

If the 30 or 90day exclusive period is permitted to expire because of a failure to make and register a sale, then the next distributor to complete a sale and register the customer thereby establishes a new exclusive right period during which such exclusive right shall remain in effect in accordance with the terms outlined above.

Whenever a distributor approaches a new prospective customer, he shall ask whether that prospective customer is presently being sold regularly by an Amway distributor. If the customer is being sold regularly, then the distributor shall make no further attempt to sell that customer, but shall refer the customer to his or her regular distributor. (Emphasis in original.)

This rule was carried over to Amway from the Nutrilite sales plan. (Van Andel, Tr. 204748)

91. The Amway Sales and Marketing Plan formerly provided that a distributor had an exclusive right to sponsor his own customer as a distributor. (CX 60Z 5)

92. In January 1972, effective March 1, 1972, Amway abolished the 'customer protection' rule and the rule giving a distributor the exclusive right to sponsor his customer as a distributor. (CX 284; CX 293)

93. Amway continues to support the principle of the customer protection rule. In June of 1974, Mr. Halliday, one of the three top officials at Amway, spoke at a New Direct Distributors' meeting. He pointed out that, while legal, it was unethical to 'go in cutting out another Amway distributor' by taking his commercial account: '[S]ometimes there's asomething above and beyond the law that you have to think about in terms of ethics.' (CX 1041i) [32]

Advertising Regulation

94. Only Amway Direct Distributors are permitted to display the Amway name on the exterior of their distributor office, and that office must be for wholesale only. (RX 331, p. 20B)

95. Amway controls the display of the Amway name and logo on distributors' business vehicles by approving their use only if the distributor meets specific instructions involving the display of the Amway trademark, trade name, logo, design or symbol, and the condition of the vehicle. (RX 331, p. 21B)

96. Amway restricts the use by distributors of the Amway name in telephone directories. For example, only Direct Distributors may appear under the Amway or Nutrilite names in the white pages. Other Amway distributors are allowed to use the designation 'Amway Distributor' in the white pages, as long as they are listed under their surname. (RX 331, pp. 21B22B) In the yellow pages, upon prior written approval by Amway, a distributor may list under three specified categories, ('cleaning products,' 'cosmetics,' and/or 'vitamins') using the designation 'Amway Home Products Distributors.' (RX 331, p. 22B)

97. Only upon prior Amway written approval, may distributors use outdoor advertising on billboards or signs. (RX 331, p. 23B)

98. Amway distributors may not use the Amway trade name or logo on checks except to describe themselves as Amway distributors. (RX 331, p. 23B) [33]

99. Direct Distributors may contract for local advertising of Amway products on radio, television, or in newspapers only by using advertising mats and scripts obtained from Amway. (RX 331, p. 23B)

100. If Amway distributors use the Amway name in classified recruiting advertisements, the advertisements must follow the exact, wordforword copy of one of seventeen formats provided by Amway. For example: 'Local Amway Distributor is helping many persons earn money working two to four hours a day. We can help you. For interview, call ____.' (RX 331, p. 24B)

101. All Amway printed materials is copyrighted and may not be reproduced by distributors without permission. (RX 331, p. 24B)

102. Amway restricts the advertising of its distributors in order to keep a consistent market position, among other reasons. (Cady, Tr. 5815)

103. People inexperienced in direct sales tend to overestimate the effectiveness of advertising which may increase their expenses and hasten their exit from the market. (Cady, Tr. 581315) The Amway direct sales system is based on the plan that personal contact is more effective than advertising in selling Amway products and recruiting distributors. (Van Andel, Tr. 185758)

104. By its regulation of distributors' advertising, Amway attempts to assure that its marketing plan is explained and represented by experienced distributors. (Halliday, Tr. 624446; CX 960) [35]

105. With the high turnover rate typical of direct sales organizations, Amway attempts to control the distributors' advertising in order to avoid the negative impact on consumers responding to ads placed by distributors who have gone out of business. (Halliday, Tr. 624446; Cady, Tr. 581216)

106. Amway uses and has registered 125 trademarks and servicemarks. (RX 336)

107. Amway has controlled the use of its trademarks, servicemarks, and trade names in order to prevent misrepresentations by some distributors. One distributor in Alton, Illinois, ran recruiting ads implying that he was offering employment. A similar incident occurred in New York City. Amway terminated both distributors. (Halliday, Tr. 624649) Some Amway distributors in Kansas City falsely represented that Amway cookware was the same as cookware costing twice as much. Amway took disciplinary action against the distributors. (Halliday, Tr. 625354) A distributor in Arkansas produced cassette tapes and literature which misrepresented the Amway Sales and Marketing Plan and Amway products. Amway brought suit and injunctive relief was obtained prohibiting the production and distribution of the materials. (Halliday, Tr. 625456) Several distributors in Minnesota produced their own literature

advertising several Amway cleaning products including a germicide. The literature did not give the proper instructions. Relying on the brochure, a distributor recommended to the owner of a goat farm that the product could be used to sanitize a goat before milking. The literature failed to give proper instructions, and the goatman applied the germicide at full strength and burned several goats severely. Amway located and destroyed all copies of the unauthorized literature. (Halliday, Tr. 625051) [35]

108. Amway also controls the use of its trademarks, servicemarks and trade names to avoid possible liability for the contents of advertising by the distributors. (Van Andel, Tr. 2055) Improper use of its logo on vehicles operated by distributors might imply an employment relationship attaching liability in the event those vehicles are involved in an accident. (Halliday, Tr. 625253)

Price Fixing

109. Amway has fixed the prices at which its products are to be sold to distributors and to consumers. One of the 'Rules of Conduct' of the Amway Sales Plan published in 1963 was that (CX 53Z31):

No distributor shall sell products sold under the Amway label for less than the specified retail price, when making sales to persons who are not distributors, except where commercial discounts are authorized to be given. No distributor shall give a greater discount than that authorized in the appropriate Amway Product Sales Manual.

Those who signed the application to become Amway distributors at that time agreed to comply with those distributor requirements and 'to observe the spirit as well as the letter of the Code of Ethics and Rules of Conduct of Amway Distributors.' (CX 53Z62) Amway had 30,000 distributors in 1963. (CX 53H)

110. Amway fixed the charge for freight to be collected by the distributors. In 1963, Amway sold its products to distributors FOB regional warehouse. Amway provided that, since the Direct Distributor picked up the products from the warehouse and incurred freight costs in delivering the products to the ordering distributor. '[The Direct Distributor] may assess a freight charge of 1% of [purchase volume] of each invoice to [36] help offset some of this cost. Each sponsor is authorized to pass this charge down the line' (CX 53Z37 38) In a few areas that were long distances from the nearest warehouse, Amway's policy was that 'it is permissible to add certain additional freight costs to the retail prices, and to increase retail prices.' (CX 53Z40)

111. Amway still indicates the price that distributors are to charge at wholesale. The 1963 Amway Sales Plan explained wholesale prices (the prices paid in sales from one distributor to another) (CX 53Z15):

When a sponsor buys Amway products from his sponsor or Direct Distributor, and resells them to a distributor whom he sponsors, he both buys and sells at the basic discount. Thus products sold between distributors are always sold at the same price, with no profit made on the immediate transaction. The profit is made later on the refund percentage . . .

(See also CX 88E1968) The 1975 Amway Career Manual for distributors explained wholesale prices (RX 331, p. 3B):

In Amway, a sponsor does not succeed unless his sponsored distributors succeed. He cannot make money by simply selling products to his sponsored distributors because he sells them for the same price he paid for them: the distributor cost. Instead he makes money on the Performance Bonuses they generate on their Business Volume, which in turn is based on their retail sales. . . . [37]

112. Respondents have fixed the prices at which its products may be sold through fund raising drives.

(a) In the Career Manual for Amway distributors published in 1968, Amway specified the products that distributors could sell through fundraising drives by schools, churches and clubs, and stated that the distributor should (CX 57 Z152):

See that standard retail prices are observed. Do not permit cutrate selling. Cutrate selling during a fund-raising campaign could hurt your own regular selling of these items.

Also see CX 54Z128for 1965.)

(b) In the Rules of Conduct published November 1, 1969, Amway stated that the Amway FundRaising Plan was that (CX 277'N'):

The selling organization will buy the products from the distributor at retail and will sell them at retail. Selling organizations will be requested to adhere to the suggested retail prices.

The Amway Plan also specified that (ibid.): 'The distributor will pay the selling organization a profit of not more than the difference between the retail price and the distributor cost' (Emphasis in original.) This part of the rule fixing the amount to be paid to the selling organization by the distributor was recommended by the ADA. (CX 338B)

(c) The current Amway Rule of Conduct for fundraising drives specifies the six products which may be sold and states that (RX 331, p. 15B):

Members of the selling organization will only take orders for the products. Such orders will be turned over to the sponsoring distributor, and he, or distributors in his organization, will deliver the products to the customer and collect the purchase price. [38]

113. The 1965 price list for distributors specified the 'retail' price for Amway products. (CX 587) The 1970 price lists specified the the 'retail prices (for sales tax purposes).' (CX 593; CX 615) Amway price lists since 1972 have specified 'suggested retail for sales tax' (CX 5971972; CX 620 1973), or 'retail sales comp. base' (CX 5981973; CX 6051976). The current order form states that the price of the Amway products is 'suggested retail.' (RX 456 RX 460)

114. Amway has a policy of advising distributors not to sell Amway products at discount to commercial accounts. Amway sells training and motivational cassette tapes to distributors for use at sales meetings. Among the 'proven ideas from successful distributors' spoken on the tapes is the advice not to grant discounts (CX 1031I Transcript of tape sold in 1976, CX 605M):

(Don Munford speaking) So, so anyway, he says, 'Don, dy you, what kind of a deal do you give? If we order 50 barrels from you, what type of a deal do you give?' They have the same philosophy as Amway. Whether if you buy one case or a thousand cases, it's all the same price. There's no deals. That's what I told him. We don't have any deals. It's all the same price. If it's worth \$95 a drum, then 50 drums is still worth \$95. I, I'm just telling you this, don't give deals. I don't, it's just not worth it, it's just not worth it. (applause) But anyway, he gave me a blanket order for 50 barrels.

Commercial sales are where price competition among Amway Distributors is most likely to occur. (Halliday, CX 1040K; CX 485) [39]

115. Amway threatens termination of the distributorship to discourage retail price cutting. In Dallas, Texas, in 1971, Mr. DeVos talked to Direct Distributors and was asked what could be done about price cutting by distributors (CX 1037EG):

[Question:] Are you as Amway going to do anything to distributors who are selling products at wholesale to retail customers? [DeVos:] If you have a distributor who is selling Amway products at wholesale to a customer, our action has got to be first of all to get a complaint on it and find out who the distributor is that's doing it. Our next move has got to be to work on his removal, but this isn't an easy problem, because if this person wishes to sell to anybody on the street at whatever price he wants to, you're getting into some touchy areas on price fixing. Now the only thing you can point out is that sooner or later the distributor is going to go broke because you can't go on selling the product at what you paid for it and survive in the business. . . .

Mr. DeVos gave the Direct Distributors further advice on how to talk to the price cutting distributor. After warning the Direct Distributors that price fixing is a serious matter 'that the federal people and the FTC watch like a hawk' (CX 1037G):

[Y]ou do a sales job on the guy and pointing out that if he's going to continue that he's going to destroy his own business, he's gonna work at a non profit situation, he'll ultimately not be able to recruit distributors, because they can't make any money and what he's doing is destroying himself, and therefore in most cases where you have it happen it disappears quite rapidly.

[40] 116. Amway combines with distributors who report price cutting and with Direct Distributors so that pressure may be applied to stop distributors who are retailing Amway products at less than the suggested price. In a tape recording of a new Direct Distributor seminar conducted in 1971, by Mr. Halliday, an official of Amway, and one of the three members of the Board of Directors of the company,

told the distributors that, in the event that another distributor sells products at a reduced price, they should approach that distributor's Direct Distributor (CX 1040J):

[Question:] We have had some people who would, uh, sell products at a reduced price, for example, last week we had a fair booth and, um, I knew some of this was going on, once in a while people would come up and I'd just ask them, I'd say, 'Say, what, uh, what are you selling shoe spray for in your area?' And, some of the prices that I got were, uh, very staggering to the imagination. What can we do about this?

[Halliday:] Well, again, I think the only thing you can do about it as an individual is to go to talk to the Direct Distributor of that organization, explain to him what he's doing, as far as the image of all Amway distributors, uh, the fact that they're confusing customersthe potential customers, that the reason that the priceyou have to get that retail price is if you're rendering the service that you're rendering that's the only way that you're going to be adequately compensated for it. You're gonna have to work with him on an informal basis. As far as our being able to write him and saying 'You can't do it.' we cannot.

[41] See also the testimony of Lawrence Lemier, an Amway Area Coordinator until October of 1973, who had handled complaints from distributors. Occasionally, a distributor would complain that some other distributor was selling products at less than retail price to retail customers. Mr. Lemier would tell both the Direct Distributor of the complaining distributor and the Direct Distributor of the price cutter that (Lemier, Tr. 179):

[T]here was not much Amway could do in a case like that. We couldn't control prices, but I would let them know that studies were made and that products at the retail, the suggested retail price, those were fair prices to the retail customer and a fair margin of profit to the distributor.

117. This record contains examples of the success of Amway's policy of combination and communication to stop price cutting. In 1972, Lorraine Cooke, an Amway distributor from Gun Lake, Michigan, distributed flyers featuring Amway products at below suggested retail prices. Other distributors reported this to Amway and Lorraine Cooke received the following letter dated June 8, 1972, from Ann Penrose, an Amway Administrative Legal Assistant (CX 831AC):

Amway Corporation will not tolerate the use of the Amway name, logo, or its products in any manner in privately developed promotional literature. We, therefore, must instruct you to immediately cease and desist the dissemination of both flyers and to destroy any remaining quantities which you may have in your possession.

One of your flyers also indicates that you are apparently selling Amway products at a price below Amway's suggested retail prices in a 'package special.' [42]

As you will note from the SA13 Wholesale Price List, Amway publishes a suggested retail price list for sales tax purposes. Amway, however, cannot impose a fixed price schedule upon its distributors. Under the Amway Sales and Marketing Plan, each Amway distributor is an independent businessman who purchases products from Amway for cash. Title to these products actually passes from the company to the distributor (and later from distributor to distributor or from distributor to retail customer) under a purchase and sales agreement. At each sale, title passes to the buyer immediately upon purchase. Thus, in essence, each buyer has latitude in determining what price he will charge for the product when he subsequently sells the same.

There are certain built in features about the Amway Sales and Marketing Plan which tend to discourage unreasonable and unrealistic price variances. Perhaps the most important of these is that any price reduction results in less net income to the distributor. The product line manufactured by Amway Corporation is relatively stable, with several new products being added each year, and several products being removed from the line. Generally speaking, the product line remains essentially constant, particularly compared with some other direct selling companies, such as Avon, which have a calculated policy of conducting 'sales' every several weeks in order to generate consumer interest and which ties into their constantly changing line of products and packaging.

A policy of 'sales' is not consistent with a stable product line, since customers would become confused concerning why there would be a 'sale' one month and not during the next. They would lose confidence in the stability of the distributor with whom they are dealing, at least from the standpoint of individual pricing policies. [43]

Then, again, the Amway products, because of their concentrated nature, and the manner in which they perform, compete effectively with other products designed substantially for the same purpose and which are available in retail stores. Because of our advantageous competitive position, the practice of 'sales' is not, and would not be, of a similar benefit, or would not produce the same results in increasing volume, as is expected by a grocer or supermarket when it embarks upon the same practice.

We are usually able to point out to a distributor that it is to his financial advantage to maximize his profits by selling Amway products at the suggested retail price for sales tax purposes. Because of certain intricacies of federal law, and those of some states, it is not possible for Amway Corporation to dictate to independent Amway distributors the prices at which they should sell an Amway product. It has never been necessary for Amway to take any position such as that for the reason that the vast majority of Amway distributors, which means almost 100% of all Amway distributors, are aware of the principal stated in this letter and are thus more than content to realize the greatest maximum profit on their sales of Amway products. Therefore, we would certainly discourage any such 'sale.'

Lorraine Cooke wrote back to Ann Penrose, stating that she had 'complied with all your demands' (CX 1008):

I have always through the course of my lifetime and in my experience as a Girl Scout Leader preached and tried to practice Fair Play. . . . I cannot tell you how dreadful this has been to me. I am a new distributor- this has been a good lesson to me . . . and needless to say, I have CAREFULLY reread my manual and now understand them (sic) more fully. [44]

If I have hurt anyone, in my ambitions to get started in the Amway world, please advise how I may further correct my mistakes. They were certainly . . . not intended to hurt, please believe me. [FN3]

Steven A. Bryant, Amway's Chief Attorney, wrote to Mrs. Cooke shortly afterward, when another distributor alleged that Mrs. Cooke had told customers that the area in which she sold was her 'territory.' Mr. Bryant warned that because of the complaints [including the price cutting episode] concerning her, Mrs. Cooke was in danger of losing her distributorship. He sent a carbon copy of his letter to Mrs. Cooke's sponsors, requesting that they 'educate this distributor as she was causing considerable disturbance in the field.' (CX 1017)

118. Amway warns against writing letters to distributors concerning price cutting, to prevent the Federal Trade Commission from obtaining them. (DeVos, CX 1037G, I)

119. Amway's policy is that distributors who advertise Amway products at discount in the newspaper can have their distributorships terminated. (DeVos, CX 1037I)

120. One of Amway's Rules of Conduct requires distributors to buy back from a sponsored distributor who is leaving the business any marketable products, literature or sales aids, with a 5% discount for handling. (RX 331, pp. 17B to 17C) If the distributors do not buy back the products or promotional material, Amway will. (CX 406C) [45] There are two reasons for the buyback policy: (1) to prevent inventory loading, and (2) to avoid discount sales by distributors who may choose to leave the business. (CX 406D)

121. An example of the execution of the buyback rule to stop price cutting involved Russell Bortnem, an airplane pilot who had been an Amway distributor for five years. He had sponsored 20 to 30 distributors and had between 75 and 100 in his organization. (Tr. 684) Since his sponsor had moved away, he was authorized to buy directly from Amway and service his distributors from the inventory he kept. He built up too much inventory and Amway would not buy back certain products which had been discontinued or the size of which had been changed. Russell Bortnem and three other distributors placed an ad in the Fort Lauderdale newspaper on October 26, 1975, advertising Amway products 'Below Wholesale! 'Our loss, your gain!' Mr. Bortnem testified (Tr. 689):

Q. You placed the ad approximately in October, '75, October 26, '75?

A. Yes. I think it ran probably three days throughout a week or a week and a half period.

Q. Did you receive any response from that ad, you personally?

A. Yes. We sold quite a few things but also most of the response was from other direct distributors in the Fort Lauderdale area.

Q. What did direct distributors respond?

A. They were threatening us that, 'You can't do this and we are going the [sic] report you to Amway,' and everything. . . .

[46] In a few days he received a call from an Amway employee who asked him to remove the ad from the paper and who agreed to buy the inventory. (CX 1049, CX 1050) Mr. Bortnem had indicated previously that he would resign his Amway distributorship if that was what was required to be able to return the Amway products (RX 10). The buyback agreement prepared by Amway provided that in return for the reimbursement, Mr. Bortnem agreed to relinquish his Amway distributorship. (CX 1050)

122. Amway urges distributors to buy back products even if the products are no longer marketable so that they will not be sold at discount. (Halliday, CX 1040N, CX 1042DE)

123. Amway instructs its distributors that when Amway products are in the possession of shipping companies, salvage stores or freight recovery stores, which acquired the products by paying off insurance claims on damaged freight, the distributor should repurchase the products or notify Amway so that Amway can repurchase them. The reason for this policy is to prevent salvage stores from discounting the products. (CPF 227)

124. Amway collects retail sales taxes at the time of sale to Amway Direct Distributors and pays the state governments. This system was started at the request of state taxing authorities. (Van Andel, Tr. 178283; Fisher, Tr. 320104) Amway refunds the prepaid sales tax to distributors who request refunds because the products were not sold at the suggested retail price. (Van Andel, Tr. 1817; RX 328) Part of these refunds undoubtedly go to distributors who have consumed the products rather than having resold them. (Van Andel, Tr. 1994) [47]

125. On commercial sales, the distributor can buy the products from Amway and resell to the commercial account, or the distributor can request that Amway finance the sale. If the distributor cannot afford to buy the products, he can send the order to Amway, and if Amway decides the commercial account has a satisfactory credit rating the products will be shipped directly to the customer; Amway will bill the customer and when payment is received the distributor will receive compensation less 3% for this billing and service. Until at least 1972, the Amway instructions for commercial sales to be financed by Amway instructed the distributor to: '3. Indicate price quoted and whether to be shipped prepaid or collect. If freight collect, price quoted should be PV. If freight prepaid, price quoted should be suggested retail' (CX 61Z60) [FN4] Amway does not currently specify that the purchase price should include freight collect or prepaid. (RX 331, pp. 8E to 9E)

126. Amway distributors take title, dominion and risk of loss over Amway products, except for commercial sales where the distributors ask Amway to provide credit. (CX 831)

127. The vast majority of Amway distributors do not cut the retail price for Amway products. (CX 831BC) The number of reports annually received by Amway of price cutting by distributors is usually less than a dozen. (Halliday, CX 1040H; DeVos, CX 1037D) [48]

Misrepresentations and Failure To Disclose

128. Amway instructs its distributors to make 'only such claims as are sanctioned in official Amway literature.' (RX 331, p. 14B) Amway disciplines, by termination or censure, distributors who misrepresent the Amway Sales and Marketing Plan. (Halliday, Tr. 626265, 648897; Van Andel, Tr. 1847)

129. Amway literature emphasizes that retail selling is an essential part of the Amway Sales and Marketing Plan and that a distributor cannot succeed merely by sponsoring new distributors. (RX 331, pp. 5A 8D through 10D)

130. Amway emphasizes that hard work is necessary to succeed as a distributor. Amway tells the distributor:

You have to work to build your business. You have to do the succeeding yourself. Not us. Not your sponsor. Not your group. You. All we can do is urge you on, support your efforts, ship the products, send the Performance Bonuses.

(RX 331, p. 5A; see also pp. 3A, 8D, 9D; DeVos, CX 1045G1970; Van Andel, CX 999J; CX 85X)

131. Amway literature currently states that distributors should not 'quote dollar incomes on specific individuals even though you may want to use their stories about the homes in which they live, the cars they drive, or the airplanes they fly.' (RX 331, p. 9D) [49]

132. Amway representatives have stated specific dollar incomes which may be possible to achieve as an Amway distributor. For example, Mr. DeVos attended an Amway rally in Mobile, Alabama, on February 8, 1973, and in a sales inspirational speech stated that the distributors have 'unlimited income potential' because how much they made depended on how much they sold and that:

. . . [Y]ou can start out by trying to make \$50 and when you start climbing and working with the plan you can make \$100,000 in the same plan. (CX 1007N)

And, he said:

You ought to open up your mind right now to thinking in terms of making \$100,000 a year because you can do it and you ought to think way. (applause) Listen That won't happen tomorrow, and it won't happen the next day. But if [you] were to work at any other job you've got 40 years ahead of you. And

there are going to be people in this room and in this country who by the time they are 40 starting even part time building gradually, they're going to arrive at a point where they are going to have that kind of income only because you dared think about it. (CX 1007O)

This statement, in context, meant that only some hard workers would achieve this level of success. It was directed to the 'young people in their twenties' in the audience. The story preceding it was of a distributor who was finally able to buy her children a new pair of shoes for school. And Mr. Devos said 'there aren't many hundred thousand dollar deals in real estate either.' (CX 1007H) [50]

133. Some Amway distributors do make substantial gross incomes from their Amway business. In fiscal 1971, there were 291 Amway distributors who had a purchase volume of \$100,000 or more. About 11% of the Direct Distributors in the years 1972-74 did that well. A few sell \$300,000 or more. About 28% of the Direct Distributors have an annual purchase volume of \$50,000 or more. (CX 917AB) In 1974, about 39% of the Direct Distributors received performance bonuses of \$10,000 or more. (CX 918AB) Well balanced distributors, according to Amway, keep about one-half of the performance bonus. (RX 401, p. 10) In 1974, about twenty distributors received 3% Direct Distributor bonuses of more than \$20,000, ten received more than \$30,000, three received more than \$40,000 and one got \$56,178.92. (CPF 524) (See RX 401, p. 10.)

134. Until 1973, Amway explained to new distributors the potential income from retail selling by the representation that (CX 85T): 'By making just one average sale of \$5.00 per day, you can sell \$100.00 worth of products a month.' Later Amway increased the distributors' potential 'average gross income' to \$200 a month. (RX 331, p. 3D):

You can make retail sales that will average \$200 BV every month by making 'Two sales a day, the Amway Way!' On your \$200 in BV, you receive an immediate income of about 30% or \$60. (You buy Amway products from your sponsor at varying discounts from 15% to 35%; this averages out at about 30%.) The term 'Business Volume' (or BV for short) is used to describe the amount of products that you purchase from your sponsor for your personal customer needs, your own use, and that of the distributors whom you personally sponsor.

You also receive a second income, or a Performance Bonus on Your Business Volume (BV), when you have a monthly Point Value of at least 100 points. On \$200 BV, your Performance Bonus is 3%, or \$6, provided you have Point Value of at least 100 points that month. This means your gross income for the month is \$66a good parttime income for making two sales a day, the Amway way. [51]

ON YOUR \$200 IN BV

YOUR AVERAGE GROSS

INCOME IS

\$60.000

YOU ALSO RECEIVE A

PERFORMANCE BONUS OF 3% OF \$200 BV

OR

\$6.00

TOTAL GROSS INCOME

FROM YOUR OWN RETAIL

BUSINESS IS

\$66.00

135. Amway instructs its distributors to explain the potential income to be made by sponsoring by 'drawing circles.' These diagrams are based on Amway's representations that a distributor's potential 'average gross income' is a particular amount. Until 1973, Amway used \$100 for the amount. (CX 61Z31 to Z35) By 1975, Amway had increased that amount to \$200 BV (RX 331, p. 5D through 7D): [52]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

[55] Amway distributors use this technique in recruiting new distributors. (Yager, CX 1040U; Trozera, CX 1031E; Cliett, Tr. 375859) In 1977, Amway raised the basic amount to be used in the circles to \$250. (RX 401, pp. 78)

136. In speaking to a new Direct Distributors meeting in June of 1974, Mr. Van Andel explained the reasons for specifying a particular sum to represent the amount of the distributors' sales in the circles drawn to show the plan (CX 1041T):

What is my personal opinion with regard to the \$200 circles versus the \$100 circles? Well, we think that the \$200 circle concept raises the, the vision of people, and we have found through experience, as you have I'm sure, that people tend to do that which you ask them to do. If you had \$50 circles, they'd probably do \$50. If you have a hundred they do a hundred, and if you do \$200 they probably do \$200. Now, there's a limit to that, and, er, you know, you can follow that through and say let's make 'em \$5,000 circleswell, it doesn't quite work out that way. But I think the general consensus, and we discussed this widely with Direct Distributors, Diamond Direct Distributors, with the ADA Board, was that the \$100 figure was too low. And that by raising it to \$200, it would result in a general upgrading of the potential of a great many distributors, which would be good for them and good for you. And that's, I think, about the way it's worked out for most people. . . .

137. The average monthly BV of Amway distributors in fiscal 196970 was about \$20 a month. In fiscal 197374 the average BV for each distributor was about \$33 a month. (CX 517F, Z95) Much of this amount is consumed by the distributors themselves rather than resold. The distributors obtain Amway products with about a 30% discount off the retail price. Many of them consume large amounts of the products every month. (Cook\$75, Tr. 4742; Marshall\$35 to \$45, Tr. 4761; Woodworth\$60, Tr. 4787; Wespinter-\$75 to \$100, Tr. 4884; Rivett\$60, Tr. 4971; Nieman\$75 to \$100, Tr. 5081; Hendrickson\$150, Tr. 5181; Gregory\$40, Tr. 5209; Williams, \$125\$150, Tr. 5325; Evans[56] \$70 \$80, Tr. 530001; Wakeman\$30\$40, Tr. 5446; Burgess\$25\$40, Tr. 5460; DeJean\$30\$40, Tr. 5501; Wong\$80\$100, Tr. 5650; Wolfe\$100, Tr. 5664)

138. Amway instructs new distributors to recruit additional distributors by the following method. After making a list of friends, relatives and neighbors, the new distributor is instructed (RX 331, p. 1D):

Give these friends, relatives and neighbors the benefit of a full presentation of the Amway Sales and Marketing Plan. Don't try to explain over the phone. Encourage them to attend the meeting by telling them that this is an opportunity to be in business for themselves on a part time basis with no investment in inventory necessary. Tell them they may build a business earning as much as \$1000 or more a month. Mention that you have started your own independent business on a part time basis and that you would like to tell them about it.

Amway distributors use this technique in recruiting new distributors. (Dirksen, Tr. 423; Holdridge, Tr. 743, 819; Bernard, Tr. 136465, 137677; Johnson, Tr. 1439; Rovena, Tr. 163334; Blinko, CX 1041Y; Johnson, CX 1115B; Williams, CX 990Z30; Eldridge, CX 999V)

139. Amway recruiting literature used in 1964 stated that: 'Sponsoring is easy!' The 29 page single spaced manual continued, however, to outline to method used in sponsoring, referring to several other Amway manuals, and concluding: 'After your first reading this manual may seem a bit confusing to you. If (sic) may seem like there are a tremendous number of things to remember and learn. Don't try to remember all the details now. Start with the first step' (CX 89) (1964) More recent recruiting literature is even more detailed. (CX 91) (1975) [57]

140. Amway literature explaining the Sales and Marketing Plan cautions that distributors incur expenses in the operation of the distributorship, such as automobile, telephone, stationery, literature, utility and other operating expenses. (CX 88, p. 10, RX 401, p. 10, CX 87, CX 62Z18, CX 60Z19, CX 61 Z18, CX 91H, CX 1096, pp. 2H and 3H, CX 793, p. 10) Distributors are also told at meetings to watch expenses. (DeVos, CX 1045B)

141. Amway has warned its distributors that it is realistic to expect a new distributor to drop out in only one week. (CPF 505) In 1970, Mr. DeVos told new Direct Distributors that 'about half the people who sign up the first time sign up the second year.' (CX 1045B) Amway teaches its distributors to expect newly sponsored distributors to quit the business and to be prepared for the let down. (CX 1000W) [58]

Pyramid Sales

142. 'Pyramid' sales plans involve compensation for recruiting regardless of consumer sales. In such schemes, participants receive rewards for recruiting in the form of 'headhunting fees' or commissions on mandatory inventory purchases by the recruits known as 'inventory loading.' (Van Andel, Tr. 1820 21; Patty, Tr. 3147, 309192; Cady, Tr. 577879)

143. 'Pyramid' sales plans based on inventory loading or headhunting fees create an incentive for recruiting rather than selling products to consumers. This potentially results in the number of recruits outgrowing the market for products being sold to consumers. (Granfield, Tr. 299697)

144. The Amway Sales and Marketing Plan provides incentives for sponsoring which are based on sales of products to consumers. (Van Andel, Tr. 182324; Granfield, Tr. 295152; Patty, Tr. 309295; Cady, Tr. 577981; Max, Tr. 5995 97) It is not a pyramid sales plan.

145. Amway's buyback rule deters inventory loading by sponsoring distributors. (Van Andel, Tr. 1999-2000; Halliday, Tr. 623132; S. Bryant, Tr. 406263)

\$146. Amway's 70% rule deters inventory loading by sponsoring distributors. (Cady, Tr. 579597; Halliday, Tr. 6231; Lemier, Tr. 176)

147. Amway's ten customer rule deters inventory loading by sponsoring distributors. (Max, Tr. 599697) [59]

Saturation

148. Distributors have come into the Amway business in the United States as follows (RX 381):

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Each Amway distributor who wants to continue as an authorized Amway distributor (except those recruited after August 31 of that year) must notify Amway. At the end of the calendar year the files are cleared of the names of distributors who elected not to continue. The number of distributors at the beginning of the year therefore is close to the number of active distributors. (Halliday, Tr. 648387) The turnover rate for all Amway distributors (including international) is as follows (RX 383):

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149. Amway distributors from various parts of the country gave credible testimony that they have found that in recent years it has become easier to sponsor new distributors. (HansenGrand Rapids, Michigan, Tr. 327172; CliettFairfax Station, Va., Tr. 3747; ZizicTimonium, Timonium, Maryland, Tr. 411314; Hunt-Holly Pond, Alabama, Tr. 4412; WespinterPortage, Michigan, Tr. 488384; EvansWray, Colorado, Tr. 5263-64; LambMissoula, Montana, Tr. 5607; CasePhoenix, Arizona, Tr. 340102) [60]

150. The Amway Sales and Marketing Plan, not being a 'pyramid' plan, has not led to any significant difficulty in recruiting new distributors.

a. Some witnesses, called in support of the complaint, testified to their difficulty in sponsoring new distributors in their areas of the country. Other evidence, however shows that the opportunity to sponsor new Amway distributors has continued in those areas:

Baton Rouge, Louisiana The new distributors increased from 332 in 1975 to 547 in 1976. (RX 372) The population increased 45,000 from 1970 to 1976. (RX 354)

Charlotte, North Carolina The new distributors increased from 688 in 1975 to 1014 in 1976. (RX 375) The population increased 65,000 from 1970 to 1976. (RX 357)

Conway, South Carolina The time period for which there was testimony about difficulty in sponsoring (1973-1976) shows a slight drop in new distributors in 1973 from 326 to 307 in 1976; the total number of distributors increased from 536 in 1973 to 678 in 1976. (RX 376) The population increased 22,000 from 1970 to 1976. (RX 358)

Florida counties Although the total number of distributors has declined from 1971 through 1976, there have been an average of over 2,000 new distributors added each year during this time. (CX 898A, RX 378, RX 379, RX 380) The population has increased 620,000 from 1970 to 1976. (RX 36163)

Dallas/Ft. Worth, Texas Although there was a 64% decrease in the number of new distributors recruited from 1971 to 1973, the number increased by 56% from 1973 to 1976. (RX 377) The population increased 175,000 from 1970 to 1976. (RX 359) [61]

Kalamazoo, Michigan The population increased 13,000 from 1970 to 1976 (RX 355) and there were an average of 775 new distributors in each year from 1972 to 1976. (RX 373)

b. Other witnesses whom I heard and find credible were called by respondents and testified that in several of these areas they had no difficulty sponsoring new distributors during the relevant time. (Rivett Baton Rouge, Tr. 494344; Gregory Dallas/Ft. Worth, Tr. 520001; Wespinter Kalamazoo, Tr. 488284; Brown Florida counties, Tr. 49975001)

151. It is relatively unlikely that the available supply of potential Amway distributors will be exhausted in any particular area. It is predominantly a parttime activity. The population of the country continues to grow. Former Amway distributors sometimes come back in the business. (Max, Tr. 595052; RX 381) Twentyfive percent of the population move every year. (Van Andel, Tr. 182930, 1916) Only onefourth of all Amway distributors engage in sponsoring (Van Andel, Tr. 182830), and there has been no decline in the percentage of Amway distributors who sponsor over the last five or six years. (Max, Tr. 595859, 596569; RX 415) Amway's sales trend has shown almost uninterrupted growth (RX 448) in each state as well as nationally. (RX 432) Average monthly income for Amway distributors has been increasing. (Cady,

Tr. 5818) Average sales per distributor have been increasing. (Max, Tr. 596569) There has been an increase in the number of Direct Distributors. (CX 896)

152. Amway has had a rule against distributors misrepresenting the Amway Sales and Marketing Plan as involving only sponsoring. Amway enforces this rule by terminating distributorships or by censure, impounding bonuses and reorientation. (Halliday, Tr. 648897) [62]

Direct Selling

153. Direct selling companies distribute their products through independent salespersons who sell to consumers person to person on a commission basis, typically demonstrating the effectiveness of the products in the homes or places of business of the customers. Some direct selling companies are 'multi level,' with independent distributors acting as wholesalers as well as retailers. Others are integrated down to the wholesale level, with only the retail sales to consumers being made by independent salespersons. (Van Andel, Tr. 169195; Granfield, Tr. 291718)

154. There are in the United States more than 2000 companies engaged in direct selling. (Van Andel, Tr. 1812, 169395; RX 403) There are about 30 to 40 major direct selling companies in the United States. (Patty, Tr. 3067) Direct selling industry sales annually amount to between ten and fifteen billion dollars, about one or two percent of all retail sales. (Patty, Tr. 3068) This does not include companies selling such products as insurance, real estate, milk or newspapers. (Ibid.) Direct selling companies hire about two million people. (Patty, Tr. 3069) Avon is the largest direct selling company with annual sales of \$1.25 billion. (Van Andel, Tr. 1693) Many direct selling companies have been acquired by large companies not previously engaged in direct selling. Some of these acquired companies include Tupperware, Electrolux and Fuller Brush. (Patty, Tr. 3146)

155. Direct selling often starts with the salesperson calling on friends and relatives but to build a business eventually requires calling on strangers. (Patty, Tr. 3088) Doortodoor selling is direct selling by knocking on strangers' doors, although the term has a broader definition meaning direct selling of all types. Amway advises its distributors to sell to friends, relatives, neighbors or persons referred by a customer. This gives the distributor an introduction to the prospect. (Van Andel, Tr. 175758) [63]

156. Direct selling companies usually sell high quality products, in order to recruit salespersons and to induce homeowners to allow sales persons into the privacy of their homes. The products typically are high priced items such as encyclopedias and vacuum cleaners (where the salesperson can make up for demonstrating lost sales through the high price of products sold) or low priced, frequently purchased items where the salesperson is trying to develop a regular clientele. (Patty, Tr. 308081) Some companies sell an expensive high quality line of products through direct sales and a different inexpensive line through retail stores. (Patty, Tr. 3102) One encyclopedia company (World Book) tried selling through a department store but found very few people would pay for the books without personal selling and demonstration afforded by direct selling. (Patty, Tr. 310203)

157. Direct selling provides convenience for consumers who have to travel long distances to shop or who may be confined to their homes by age or health or a number of small children. It provides product demonstration not available in retail stores. Direct selling also provides supplemental income for many people working parttime. (Patty, Tr. 307577) It also allows the salespersons to be their own bosses. (Patty, Tr. 3090)

158. Direct selling can provide a manufacturer with distribution of a new product without heavy media advertising and promotion costs. (Granfield, Tr. 294445; Patty, Tr. 306975)

159. Selling through independent distributors avoids fixed costs incurred by selling through employees, such as social security, unemployment compensation and employment salaries. (Granfield, Tr. 2932) [64]

160. Successful direct selling usually requires:

(a) Dependable, quality products, (Granfield, Tr. 2950; Patty, Tr. 3083) A quality product makes it easier to recruit distributors. (Cady, Tr. 576566);

(b) Moneyback guarantee. (Granfield, Tr. 2950) An unconditional guarantee helps recruit distributors by assuring them of the quality of the product and encourages consumers to try a new product. (Cady, Tr. 576970);

(c) Ability to recruit, retain, train, and motivate a sales force. (Granfield, Tr. 293841; Cady, Tr. 577374; Patty, Tr. 3081).

161. Direct selling provides a channel of distribution for a relatively small or new company which has new, good products but does not have the financial resources to sell in traditional retail stores, with the high advertising and other expenditures entailed by that method. Lack of financial strength in such circumstances leads to the small innovative company being acquired by larger companies. (Patty, Tr. 3074)

162. Annual turnover of salespersons for companies engaged in direct selling of lower priced products averages about 100%. (Granfield, Tr. 294243; Patty, Tr. 3106) A direct selling company with less than a 60% turnover rate is doing a relatively good job of recruiting and retaining salespeople. (Patty, Tr. 3106-07)

163. Amway's annual turnover rate has usually been in the 50% to 60% range. (RX 383) [65]

164. Because of the relatively high rate of turnover among salespersons, direct selling companies continually recruit new salespersons. (Patty, Tr. 310304; Cady, Tr. 5778) Recruiting is essential to a direct selling company. (Patty, Tr. 3103)

165. Some direct selling companies use employees to do most of the recruiting of new salespersons. Independent contractors do the selling, and may be paid a small reward for referring a new recruit. Avon, Electrolux and greeting card companies use this system in the United States, although overseas Avon and Fuller Brush use the same system of recruiting as Amway. (Patty, Tr. 3153; Van Anandel, Tr. 1695, 1889; Granfield, Tr. 295960)

166. Amway pays about 60% of its sales dollar to distributors in payment for the distribution of Amway products. (Halliday, Tr. 621314) Distributors for other direct selling companies do not get paid any more money, if they get as much. (Halliday, Tr. 619193)

167. 'Multilevel direct selling' refers to a firm which has a number of levels of supervision, which involve independent contractors who are not employees of the company. They are compensated on the basis of margin rather than a commission or salary. Several direct selling companies are multilevel, including most encyclopedia companies. (Patty, Tr. 313032; Van Anandel, Tr. 169495)

168. Some multilevel direct selling companies have engaged in 'pyramid selling,' involving 'inventory loading' and 'headhunting' fees. These companies have a large inventory requirement for a new distributor, and reward distributors for bringing into the business a new distributor. The result emphasizes recruiting of new distributors rather than selling the products to consumers. Typically, these pyramid companies require new recruits to buy \$2000 to \$5000 in inventory, with as much as half of that amount going to the recruiting distributor. (Patty, Tr. 309192) [66]

Amway's Product Markets

169. Amway started in the business of manufacturing and distributing soap and detergents, and this still is its primary activity. (Van Anandel, Tr. 168081) Soap and detergents accounted for more than 40% of Amway's 1974 sales; polishes and sanitation goods accounted for 20%; and toilet preparations accounted for about 7%. (RX 405) Amway's 1974 sales of soap and detergents amounted to \$57.9 million, accounting for 1.7% of the total sales of soap and detergents in this country. (RX 404; RX 406)

170. The market for soap and detergents in the United States includes laundry detergent, dishwashing detergent (either of which may be liquid or powder), bar soap, and a small volume of speciality products such as laundry aids and scouring cleansers. (Diassi, Tr. 5517, 5558)

171. The manufacturing and distribution of soap and detergents is highly concentrated, with the largest firm, Procter & Gamble Company, accounting for half the sales. Procter & Gamble, ColgatePalmolive Company and Lever Brothers account for 82% of industry sales. The fourth largest firm, Purex Corporation, has 4% of sales. (RX 407; Diassi, Tr. 551617; Robbins, Tr. 6744) Market shares in the laundry detergent industry, in pounds produced in 1973 and 1975 were (CX 561G):

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Amway's leading product, SA8 Plus, accounted for .78% of this market. (CX 561 F)

172. The personal care products market is also concentrated. The largest firm, Procter & Gamble, has 24% of total sales. The next three, Lever Brothers, ColgatePalmolive and Gillette, account for 25%. (RX 408)

173. Procter & Gamble Company has been in the soap business since 1837 and had 1976 sales of about \$6.5 billion. ColgatePalmolive Company started in the soap business in 1864 and had 1976 sales of about \$3.5 billion. Unilever Ltd., known as 'Lever Brothers' in the United States, started in the soap business in 1894 and had 1976 sales of 8.7 billion pounds sterling. (RPF 50) Two other companies manufacture and distribute some of their brands of soap and detergents nationally, Purex Corporation and Church and Dwight Company (using the 'Arm & Hammer' label). (Robbins, Tr. 671819; Diassi, Tr. 557172) [68]

174. Private label soap and detergents are manufactured by a few relatively small companies and are sold by retail stores under their own brand names. Total national private label sales amount to about 5% of the detergent market. (Diassi, Tr. 551920, 5548)

175. The three largest manufacturers in the soap and detergents industry spent over a half a billion dollars in advertising and sales promotion in 1975. (RX 41013) Procter & Gamble, the nation's largest advertiser, spent over \$360 million in product promotion in 1975. (RX 413) Amway spent less than a million dollars in that year for institutional (nonproduct) advertising. (Teska, Tr. 275152; RX 413)

176. Most Amway products are of the kind sold through chain food stores. (Cady, Tr. 5758) Over 95% of the retail sales of soap and detergents in this country is by grocery stores. (Diassi, Tr. 5576; Cady, Tr. 5758) Obtaining retail shelf space is critical for successful entry into the soap and detergents market. (Cox, Tr. 3819) Retail grocery stores are reluctant to add a new product unless it promises to sell quickly. (Diassi, Tr. 5535) The successful marketing of a national brand of detergent through retail stores requires that the product be available in almost every retail outlet where detergents are sold. (Diassi, Tr. 552526) Retail grocery chain stores are becoming increasingly concentrated. (RX 449, pp. 911)

177. Attempted new entry into the soap and detergents market has faced substantial increased promotional and advertising spending by Procter & Gamble. (Max, Tr. 593032; Robbins, Tr. 672830; Dunlap, Tr. 6683) Procter & Gamble also counters attempted introduction of a new brand of detergent with introduction of its own new brand. (Robbins, Tr. 673132; Cox, Tr. 385455) By producing many brands, Procter & Gamble has succeeded in occupying a great deal of grocery shelf space. (Cox, Tr. 3819) [69]

178. The three largest manufacturers of soap and detergents at first resisted the demand for non-phosphate detergents during the early 1970's, brought about by concern with the environmental impact of phosphate detergents. (RX 353) Several companies attempted to make and sell a nonphosphate detergent. (Cox, Tr. 380607) Armour & Company, established in 1863 with 1976 sales of \$2.7 billion, and an established firm in the bar soap industry, attempted to enter the laundry detergent market with a

concentrated nonphosphate product called 'Triumph.' Despite considerable promotion, the attempt was a failure. (Diassi, Tr. 552730) Church & Dwight ('Arm & Hammer') entered the market with a non-phosphate laundry detergent and gained about 4% of the market and was the only successful entrant with a nonphosphate detergent. Church & Dwight is one hundred years old and was already in grocery stores with an established brand of washing soda and baking soda. (Diassi, Tr. 557173) Following this entry, and following ecology legislation by several state and local governments, the major soap companies started selling nonphosphate detergents. (Diassi, Tr. 5570)

179. Purex Corporation started manufacturing household bleach in 1927. Purex started manufacturing dishwashing detergent in 1947 and laundry detergent in 1952. Since then, Purex has been able to sell several of its soap and detergent products nationally, using established trademarks gained through acquisition ('Old Dutch Cleanser,' 'Brillo,' 'Sweetheart' soap), some national advertising, its own sales force, and prices about 20% below those of the major soap and detergent companies. (Robbins, Tr. 6696, et seq.)

180. Los Angeles Soap Company has been marketing soap through retail stores for 116 years, and has been using the 'White King' tradename since the turn of the century. It sells regionally in 18 western states, where it has 2% of the market, and prices low enough to allow the grocer to double and sometimes triple the profit he would make selling national brands. (Dunlap, Tr. 664042, 665354, 6670) In the early 1960's, Los Angeles Soap Company tried to enter the eastern market with a plant at Framingham, Massachusetts. The expansion failed and the plant was sold as scrap. (Dunlap, Tr. 667172) [70]

181. Except for the nonphosphate detergents, there has been virtually no new successful entry in the national market for sales of soap and detergents through retail stores in the last thirty years. (Cox, Tr. 3799, 3805; Diassi, Tr. 552333; 557172; Granfield, Tr. 293637; Dunlap, Tr. 667072, 667677) The market has been increasing at a rate of about 4% a year since 1954. (Cox, Tr. 3807)

182. Amway's laundry detergent sells at retail for slightly more per use than the detergents of the major soap and detergents companies, and slightly less if Amway's large size product is purchased. (Max, Tr. 603845) On a cost per use basis, in 1967, SA8 was less than 3 cents and Tide was about 7 cents. At this time, SA8 use direction was 5/32 cup per washload and Tide was 1.75 cup. The cost per use drew close in 1968 when the use direction was changed: SA8 1/4 cup and Tide 1.25 cup. In 1972, Tide again changed its use direction to 1 cup per washload, in response to 'phosphate down the drain' legislation. (CX 561 Z1112) Since then SA8 has cost about 1 cent to 2 cents per use more than Tide and the other leading laundry detergents. Sold in the large size (100 lbs.), however, SA8 has a lower per use cost than any laundry detergent. (CX 561Z14) In 1973, Amway introduced SA8 Plus, selling at retail for about the same as SA8, but apparently superior in cleaning power to either SA8 or Tide. (CX 561Z, Z3 to Z4) And, unlike detergent purchased at the grocery store, Amway's products are delivered to the consumer's home. (Max, Tr. 6045)

Amway Is a Substantial Industrial Company

183. Amway's United States sales have grown from \$4.3 million in 1963 to \$169.1 million in 1976. Worldwide sales of Amway products in 1976 amounted to about \$205 million. (RX 431, RX 448) [71]

184. Amway employed over 1,500 persons in 1976 at its plant in Ada, Michigan, with an annual payroll of \$19 million. The plant represents a capital investment of \$56 million. In 1976, Amway paid over \$60 million to its distributors, over \$41 million for raw materials, and \$11 million to third parties for transportation of Amway products. (RPF 248)

185. All but a few of the regularline products sold under the Amway name are manufactured by Amway or its subsidiary, Nutrilite Products, Inc. (Van Andel, Tr. 1805) Amway's plant and equipment are modern and efficient. (RX 68 to RX 277) Amway follows recognized industry standards of good manufacturing practice. (RPF 90) It has a substantial research and development operation and expends generally as much per sales dollar as larger competitors in the personal care products field. (RPF 86)

186. Amway's products have very high consumer acceptance. A market study in the record shows that of 37 brands of laundry detergent, Amway's product, with only a very small market share and no national advertising, was third in brand loyalty. (Cady, Tr. 5823) Amway's dishwashing liquid soap led all 16 brands surveyed in consumer acceptance. (Cady, Tr. 581922) In each of the markets for automatic dishwasher detergents, detergents for fine clothing, bleaches, rug cleaners, and laundry additives, Amway's products were second in brand loyalty. (Cady, Tr. 5822) Professor Cady, a marketing specialist from the Harvard Graduate School of Business Administration, testified that (Tr. 5823):

What this means overall is that consumers are obviously well served by the products that Amway supplies them with. In fact, they are so well-served, in the face of a large number of available substitutes, they purchase Amway products to a degree which is almost unknown to other brands in the market.

[72] Amway has achieved this consumer acceptance for its products while having no more than 1.7% of any market in which it competes (RX 406) and while spending a total of about two million dollars for advertising and sales promotion for the years 1972 through 1975, while its top five competitors were spending about 2.3 billion dollars for that purpose. (RX 410 to RX 413)

187. Amway, through its distributors, provides services to consumers not readily available when products are purchased at a retail store. Amway has a 100% moneyback guarantee which permits a customer who is not satisfied with an Amway product to return it with the choice of replacement, repair, credit, or refund of full purchase price (RPF 93, 94, 98) Distributors provide the service of home or commercial delivery at the time convenient to the customer, including weekends and evenings. (RPF 98(a)) Amway distributors demonstrate and explain product use. (RPF 98(b) and (c)) Distributors perform water hardness tests and recommend the use of a dishwashing detergent for hard or soft water. (RPF 98(d)) Amway and its distributors provide advice for safe product use. (RPF 98(e), 98(i)) Distributors leave sample products with customers for trial use before purchase. (RPF 98(f)) Distributors install Amway products when necessary, such as smoke detectors, and deliver to the laundry room 100 1b. and 85 1b. boxes of detergent. (RPF 98(m)) [73]

DISCUSSION

The following discussion is intended to summarize and supplement the foregoing findings of fact and to present conclusions of law derived from the facts as found.

Summary

Amway was founded in 1959 by Jay Van Andel and Richard M. DeVos, who continue as its principal executives and stockholders. Prior to that time, they sold Nutrilite food supplements doortodoor and headed a large group of distributors. They began having supply problems and started looking for different products to sell. They looked for readily consumable, lowpriced, repeat sale products which would be different than those found in retail stores.

Mr. Van Andel and Mr. DeVos started distributing a liquid biodegradable detergent [FN5] which they named 'LOC.' A few months later, they acquired the small manufacturer of LOC, moved the assets to Ada, Michigan, and started manufacturing their own products under the Amway label. Amway's second product, also biodegradable, was a powder laundry detergent, SA8. Amway continued to introduce new products and now manufactures and sells more than 150, but its main product market continues to be soap and detergents, accounting for more than 40% of sales. [74]

Amway's principal products are of the kind that are sold in chain food stores. These markets are dominated by a few large manufacturers, of which the largest is Procter & Gamble. Procter & Gamble sells about half of all of the soap and detergents sold in this country, and onefourth of the personal care products. The three largest firms in the soap and detergents market sell over 80% of total market sales and this dominance existed prior to Amway's origin. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 57273 (1967). Entry into this market has been blocked for thirty years by the major soap companies by product differentiation achieved through advertising, by retaliatory pricing and promotions, and by brand proliferation. [FN6]

Amway entered the market with biodegradable detergents. Mr. Halliday, an officer of Amway, was asked (Tr. 6154):

Q. At the time of introduction of LOC and SA8 by Amway, do you know whether other detergents were then biogradeable [sic]?

A. I know that none of the detergents marketed by the big three soapers were or did contain biodegradeable ingredients at that time.

Q. How long afterward did the detergent industry essentially go biodegradeable?

A. It was up to 10 years afterwards. [FN7]

[75] Amway marketed its products by selling directly to consumers in their homes through a large number of salespeople. These independent distributors find the customer, and explain, demonstrate and deliver the products. Most of them work parttime. Three out of four quit after the first year. [FN8]

Some promoters posing as direct selling companies have rewarded recruiting itself in 'pyramid' plans, involving 'headhunting' and 'inventory loading.' Recruits earn money by securing further recruits, and there are few product sales to consumers. In order to recruit an effective sales force, Amway encourages its distributors to sponsor new distributors. This is not, however, a pyramid plan. In the Amway system, the incentive to recruit comes from the commission distributors receive on product sales by sponsored distributors in their organizations. But, by several rules, Amway requires that commissions are not paid unless the products are sold to consumers. Distributors must each sell to ten retail customers every month; the distributors must certify that 70% of the products purchased by them during the month have been resold; and inventory loading is further deterred by a rule requiring distributors to buy back the inventory of any of their sponsored distributors leaving the business.

Amway has successfully entered the soap and detergents market because its distributors sell directly to consumers in their homes or businesses, rather than through retail grocery stores. Amway has achieved this method of distribution through several restraints on its distributors, including the retail store rule, the crossgroup selling rule, and regulation of its distributors' advertising. These are reasonable vertical restraints. However, respondents went too far in controlling intrabrand competition while promoting interbrand competition. In addition to the beneficial restraints, respondents also stopped Amway distributors from competing among themselves for customers and fixed the prices at which Amway products are sold among distributors and to consumers. [76]

Distributor Restraints Are Vertically Imposed

The theory of the complaint anchors on the alleged horizontal nature of restrictions imposed on Amway distributors. Complaint counsel argue that the Amway Distributors Association is:

[R]un by a clique of the most successful Amway Distributors. It exists for the sole purpose of protecting the interests of the successful from the hoards of competitors and newcomers who enter the distribution stream daily. Its mission is protection and its clout is termination. The Association is the root cause of all of the Section 5 violations, including the very existence of the Amway Sales and Marketing Plan. (CB, p. 3)

Complaint counsel state that about 35 Nutrilite distributors, including Mr. Van Andel and Mr. DeVos, decided collectively (1) that they needed a product, found one called 'Frisk,' and (2) that the 'Marketing Plan' with its restrictions should be imposed on distributors. The uncontradicted testimony of Mr. Van Andel tells a different story. He testified that the Nutrilite distributors started having problems with their suppliers in 1959. (Van Andel, Tr. 1673 76):

At that time, in order to attempt to bring this intramural fight to a conclusion and arbitrated, if you wish, a small group of distributors were appointed, of which I became the chairman, to try to work with both companies and try to work out an arrangement that would bring peace and tranquility back. [77]

The arrangement to do this was not entirely successful. I met many times with the principals of both companies and this arrangement culminated in an offer by one of the companies to me to become president of their company. Mr. DeVos and I discussed this in some detail and we realized that the inherent problems were not being solved because it appeared to us the inherent problems were with the people who owned those companies and that those problems would continue regardless of who managed them.

It appeared to us therefore the NutraLite [sic] structure, the companies behind the NutraLite distributing organization were in great danger of collapsing, that the time and effort they were putting into fighting amongst themselves instead of competing in marketplace would eventually destroy the company. Therefore it appeared to us if we were going to survive in business, if we were going to be able to continue and have some return on our 10 years of effort, it would be best if we would go into business ourselves, producing our own products and selling them through our own sales organization and controlling the entire distribution and manufacturing operation.

This then necessitated a very careful change in the distributor organization that we had built, which had been very strongly built with an allegiance to NutraLite food supplement as a product to sell. The NutraLite organization as well as the Amway organization is built entirely of volunteers, people who voluntarily are distributors and it is very important if you are going to go into a different direction that the volunteers follow. They don't have to. They could all quit. [78]

So it was very necessary for us, we felt, to get their concurrence that our plans were good ones and that they would continue with us.

In order to do this, we felt we had to communicate with them very closely, and that at that time we put together a structure which I think you are familiar with, called Amway Distributor Association.

The association at that time was called the American Way Association; its name was changed later.

Its primary purpose was to attempt to communicate and hold together what business we had until we could shift gears and develop our own manufacturing operation, develop our own products and continue on.

This was basically the genesis of the Amway Corporation and we began with one or two products and continued on until where we are today.

Q. Did the American Way Association, when it was formed, have any particular products to distribute through the organizations of its members?

A. The American Way Association was never developed to be a product distributing structure. Rather it was in the nature of an association of independent contract or [sic] business people whereby they would have a means of formalized communication with Mr. DeVos and myself who proposed to set up the product distribution and manufacturing operation.

We developed a system whereby a board of directors of the association could be elected, a system whereby we could meet with them from time to time and discuss our plans and communicate with them and hopefully get them to agree to continue with us. [79]

Q. Did the association or did the association members determine a particular product that would be distributed through its organizations?

A. The association members were polled by us and asked by us if they were interested in having us supply certain products.

Q. 'Us,' meaning yourself, Mr. DeVos?

A. By 'us' I should say, Amway Corporation, Mr. DeVos and myself and the company that we built behind that.

Two of the 35 former Nutrilite distributors who became Amway distributors were called as witnesses. Walter Bass, the first president of the ADA, acknowledged that Mr. Van Andel and Mr. DeVos created Amway. He was asked about the formation of Amway and the ADA. (Bass, Tr. 7071):

Q. Were Richard DeVos and J. Andel [sic] some of the key people involved?

A. They were the key people.

Q. They were more key than any other persons, that is what you are saying?

A. It was their idea.

Q. Were they doing business under the name JaRi Corporation?

A. Yes.

Q. For what reason, if you know, did these key people, yourself included, get together to form this association?

A. We foresaw some problems in the NutraLite organization that alarmed us and rather than to allow it [sic] to just go out of existence, the idea of Amway was developed.

[80] Mr. Bass could name only 6 of the 35 Nutrilite distributors who allegedly started Amway. (Bass, Tr. 6869) Bernice Hansen, also one of the 35 Nutrilite distributors who became Amway distributors, was called. She too identified Mr. Van Andel and Mr. DeVos as the persons who 'started Amway.' (Hansen, Tr. 3301 02)

The impetus for the restrictions imposed on distributors in this case clearly came from above. Mr. Van Andel and Mr. DeVos started Amway, not the 35 Nutrilite distributors. Mr. Van Andel and Mr. DeVos used the association of distributors to communicate and control the distribution of the products they were to make, but the thrust to build the Amway organization as it now stands came from those two individuals, not from a committee. (Findings 1925)

Here the dealers do not control the manufacturer, as in *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972) and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). Nor did the dealers here prevail upon the manufacturer to impose the restrictions. *United States v. General Motors Corp.*, 384 U.S. 127 (1966). Mr. Van Andel and Mr. DeVos initiated and orchestrated the scheme, and notwithstanding the willing participation of the distributors, Amway is the dominant partner. *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 474 n.5 (1977).

When Amway was created, Mr. Van Andel and Mr. DeVos, through the JaRi Corporation, were distributors as well as manufacturers. (CX 53J) But in replacing the previous suppliers in the Nutrilite organization, and adopting the distribution system from that organization, they were acting essentially alone. [FN9] The restraints are not, therefore, 'primarily "horizontal."' *The CocaCola Company*, Dkt. 8855, Commission Opinion p. 8 (Decided April 7, 1978). [81] '[O]nly by ignoring the essential relationships which exist' between Amway and the distributors might it be concluded that the restraints are horizontal. (Ibid.)

Horizontal Cooperation by ADA

Complaint counsel argue that respondents are engaged in an unlawful group boycott because the ADA is the 'final arbiter of disputes and interpretations of the Code of Ethics and Rules of Conduct.' (CB, p. 5)

The Amway Distributors Association of the United States is a voluntary association of independent Amway distributors. (Findings 1112) Voting membership in this trade association is open to qualified Direct Distributors. (Finding 13) Voting members may attend annual meetings to receive reports concerning Amway and elect ADA Board members. (Finding 76)

The ADA Board meets four times a year. Amway seeks advice from the ADA Board concerning any changes in Amway rules. (Finding 78) Rather than an agreement among equals, this aspect of the ADA is a means by which Amway controls the distribution of its products through independent salespersons by convincing them not coercing them to accept changes in the Amway Sales and Marketing Plan. Mr. Halliday testified that (Tr. 661213): [82]

As a matter of policy, Amway Corporation presents the proposals for changes of rules to the board for educational purposes, instructional purposes, for feedback from the board as representative of the distributor organization as to the kind of reaction to the change, as to the timeliness of implementing the rule changes; it is an opportunity to sell the board so that they and their distributors in their organizations will enthusiastically support the notion of moving ahead in that direction. Again, we are talking about a group of volunteers.

You just don't say tomorrow we are going to propose a new rule and bang this is the rule, or tomorrow we are going to change a rule and bang this is the rule. What we try to do is to present it to the board and the distributor organization [so] that when the date of implementation occurs, which we determine, that it is accepted with full enthusiasm and that people move ahead voluntarily, then, to act in accordance with those changes.

The ADA Board of Directors also acts as an arbitration panel for disputes in which Amway decides to discipline a distributor for a rule violation. If Amway decides not to impose sanctions for a violation of a rule, the ADA has no authority to recommend the sanction. (Van Andel, Tr. 183839) If Amway does impose a sanction, the distributor may bring the matter before the ADA Board. (Finding 80) Amway has bound itself by the decision of the Board on these arbitration cases. (Halliday, Tr. 6180)

Group boycotts are per se unlawful. In *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941), a group of 'original designers' agreed to refuse to sell their creations to retailers who had been selling copies of original designs. [83] The purpose of the agreement was to prevent style piracy, and the Court held that it was an unlawful group boycott and upheld the Commission's refusal to hear evidence on the reasonableness of the methods pursued by the combination. The issue involving the ADA, then, is whether the selfregulation is an unlawful group boycott like the *Fashion Originators'* case or whether it is pro competitive.

Selfregulation by an industry has been allowed by the courts where:

(1) There is a legislative mandate for selfregulation. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

(2) The collective action

(a) is intended to accomplish an end consistent with the policy justifying selfregulation

(b) is reasonably related to that goal, and

(c) is no more extensive than necessary.

Denver Rockets v. AllPro Management, Inc., 325 F. Supp. 1049, 1064 (C.D. Cal. 1971).

(3) The association provides procedural safeguards which assure that the restraints are not arbitrary and which furnish a basis for judicial review. *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008, 1018 (S.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir.); *Villani v. NYSE*, 348 F. Supp. 1185 (S.D.N.Y. 1972).

The main purpose of the selfregulation by the respondents meets this test. (Findings 22, 78 and 80) [84]

'In an industry which necessarily requires some interdependence and cooperation, the per se rule should not be applied indiscriminately.' *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652 (5th Cir. 1977). In the direct selling of soap and detergents, 'a few rules are essential to survival.' (*Ibid.*) Participation by the ADA as an arbitration panel does not by itself, without consideration of the specific rules involved, amount to a naked restraint of trade. An analysis of each rule alleged to violate the law is necessary to understand fully whether it is anticompetitive.

Discontinuance and Remote Evidence

Respondents argue generally that a substantial number of the exhibits relied on by complaint counsel are dated six years or more before the issuance of the complaint, and specifically that the customer protection rule, alleged to be evidence of retail price fixing, was dropped by Amway at the beginning of 1972.

Respondents rely primarily on *New Standard Pub. Co. v. FTC*, 194 F.2d 181 (4th Cir. 1952). In that case, the Commission issued an order six years after the last evidence was taken and the circuit court reversed and remanded. The court did not hold that the case was moot, but sent it back for more recent evidence. Respondents also rely on *OregonWashington Plywood Co. v. FTC*, F.2d 48 (9th Cir. 1952). That case involved two groups which allegedly conspired to commit trade restraints. The respondents admitted the restraints had occurred up until seven years before the complaint issued and denied any further violation after that time. Complaint counsel did not put on any evidence, and the Commission issued an order based on the pleadings, relying upon a rule that a conspiracy once shown to exist is presumed to continue until abandonment is shown. The circuit court reversed, holding that the answers to the complaint denying the conspiracy put the matter in issue [85] and since complaint counsel did not put on any evidence and there was no such presumption, the complaint should have been dismissed. The court also held that there was nothing to show that the discontinued practices would be resumed and that discontinued practices do not provide a basis for an order.

The two issues here involve (1) the alleged discontinuance as a defense, and (2) the age of the evidence.

The case law is clear that discontinuance of an illegal practice does not of itself render inappropriate the entry of a cease and desist order. *Oregon Washington Plywood Co. v. FTC*, 194 F.2d at 5051:

The propriety of such an order in any particular case must depend on a consideration of all the surrounding facts and circumstances; and where the activities charged have been discontinued, the

elements of time, volition and general attitude of the respondents in respect of the cessation are necessarily factors of prime importance. Parties who have abandoned their challenged practices only after proceedings are brought against them are in no position to complain of a cease and desist order. In such a case the discontinuance can hardly be thought voluntary.

And the cases have clearly held that discontinuance after the investigation has begun will not be held voluntary. *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 87 (D.C. Cir. 1963); *Cotherman v. FTC*, 417 F.2d 587, 59495 (5th Cir. 1969); *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965). Here, Amway officially discontinued the customer protection rule in 1972 (although Amway has continued to urge distributors that such competition is 'unethical'). (Findings 9093) [86] Mr. DeVos told Direct Distributors in Dallas in 1971 the reason that the customer protection rule was going to have to go (DeVos, CX 1037E):

And I must be very frank with you I think that the rule will have to go and it'll have to go probably in the not too far distant future. And the reason it'll have to go is that I don't think we can live with it any longer, I don't think we are consistent in our philosophy and I don't think the governmental people are going to look at it favorably. They've already looked at it and they say that's a restraint of trade type thing, you see. [FN10]

The record shows that Amway knew of the Federal Trade Commission investigation in this case before January of 1970. (CX 345E) The discontinuance of the customer protection rule by Amway was not the kind of abandonment of an illegal practice which gives assurance that it will not be repeated in the future. *Holiday Magic, Inc.*, 84 F.T.C. 748, 1050 (1974).

Some of the evidence relating to price fixing and customer restraints in this case goes back to the 1960's. Such evidence is relevant to show a continuing effort to fix prices and restrain competition. See *FTC v. Cement Institute*, 333 U.S. 683, 70305 (1948), where the Court held that the Commission had properly regarded evidence as far back as 1902 in the price fixing case. And in *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 275 (6th Cir. 1970) the respondent had argued that the evidence was cold and stale, but the court upheld the Commission's order, stating that the fact that the evidence may be old does not mean that an order issued upon it is vitiated. The court held that where an illegal trade practice is capable of being perpetuated or resumed, it may be presumed that the customer protection rule was 'to prevent cut throat competition' between distributors. (Halliday, CX 486) [FN14] [89] Amway officially discontinued the rule only after Federal Trade Commission investigators looked at it and said it was a restraint of trade. (DeVos, CX 1037E) Amway continues to support the principle of the customer protection rule by calling such competition 'unethical.' (Finding 93) One of the distributors testified to the effect of the customer protection rule in her organization. Mrs. Joan Spradley was asked by some of the distributors in her group if they could discount retail prices. She said 'no.' Mr. Spradley testified that (Tr. 1340):

It was our understanding that the retail price was a set thing, and that we did not compete with one another for customers. In other words, we understood when an Amway distributor made a contact, for

instance, if I came to you and sold you Amway products, then you became my customer and under our ethics, another Amway distributor would not go and try to sell to you or undercut my price or anything like that. I would sell to you at the retail price and they would leave you alone and go get their own customers.

The customer protection rule has been used to support and continue the unlawful price fixing found herein and must be prohibited. 'A practice which lessens price competition touches the core of the free enterprise system.' *The Coca Cola Company, et al.*, FTC Dkt. 8855 (Final Order dated April 7, 1978), at p. 89.

Amway threatens to terminate the distributorship of distributors who cut the retail price of Amway products. (Findings, 115, 117, 119) And where the price cutting distributor is not buying directly from Amway, the threat is made in combination with Direct Distributors. (Findings 115, 117) Amway also encourages Direct Distributors to do a 'sales job' on price cutting distributors, pointing out the recklessness of this conduct (Finding 115), and Amway urges that this should be done through a combination of Direct Distributors. (Finding 116) [90]

Amway distributors promote the policy of discouraging price cutting through their combined efforts with Amway. Price cutters are quickly reproached by other distributors, and it is not long until Amway applies pressure directly and through Direct Distributors to stop the 'disturbance in the field.' (Findings 117, 121) Many Amway distributors are inexperienced in business (Van Andel, Tr. 181415) and it does not take much pressure to stop price cutting. They quickly comply with the demands of Amway and other distributors to stop cutting retail prices. (Finding 117) *Holiday Magic, Inc.*, 84 F.T.C. 748, 1049 (1974). While only a few distributors were actually coerced on this record (Findings 117, 121), price fixing agreements are unlawful per se regardless of enforcement. *Holiday Magic, Inc.*, 84 F.T.C. 748, 1049 (1974). And where the unlawful intent to fix prices is coupled with a single instance of coercion, even the Sherman Act will be violated. *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 48082, 485 (D.D.C. 1977). Here, the action by Amway in combination with Direct Distributors and other distributors to achieve uniform prices for Amway products would probably violate the Sherman Act, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 4546 (1960), and clearly violates Section 5 of the Federal Trade Commission Act which was intended by Congress to stop such conduct before it amounts to 'full blown' violations of the Sherman Act. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 32022 (1966)

Amway quickly admonishes distributors who advertise Amway products at discount prices. (Findings 117, 119, 121) For example, Roger Laverty, an Amway distributor from Pompano Beach, Florida, had prepared sales literature using the Amway trademark, featuring price comparisons on Amway and competing products. An Amway Administrative Legal Assistant wrote to Laverty stating Amway's view of the law (CX 989B): '[C]ost comparisons themselves are now strictly 'taboo,' are not used by Amway and should not be used by Amway distributors.' On the contrary, however, the law protects price competition by truthful advertising. See *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31, 44 (N.D. Cal. 1953), citing *Prestonettes, Inc. v. Coty*, 264 U.S., 359, 368 (1924) (Mr. Justice Holmes): [91]

A trade mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. . . . When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo.

Amway completes its control of retail prices by extending the buyback rule beyond its legitimate purpose to prevent inventory loading. Amway urges its distributors not to allow freight damaged Amway products to reach the hands of salvage stores or if they do to put them up before consumers can get to them. (Findings 122, 123)

According to the Amway Career Manual published in 1968, the Board of Directors of the association 'meets at least three times a year to act on approval of product classifications for distribution under the Amway name, sales policies, pricing policies, discount and refund schedules' (CX 59J) The record does not show that this policy has been discontinued. In fact, the ADA has consulted with Amway in setting retail prices and has recommended changes and agreed with Amway on retail pricing policy. (Findings 79, 112(b))

Generally, a manufacturer who sells through independent wholesalers and retailers would prefer the lowest retail price possible, since that usually means increased sales and higher manufacturer revenues. *Continental T.V., Inc. v. GTC Sylvania, Inc.*, 433 U.S. 36, 56 n.24 (1977). Here, however, Amway's self-interest in preventing price cutting was indicated by Mr. Van Andel who reported in 1970 that a market test of Amway catalog products proved that the same products sold for a higher price led to 50% more sales, since the direct selling [92] distributors worked harder to obtain the higher margin. (CX 638 H) Since the higher price encourages distributors to do more selling, Amway does not sponsor special sales by granting extra discounts, and Amway sets the retail price of its catalog goods 'competitive with the average department store level without the specials.' (Ibid.) [FN15]

The number of reports of distributors cutting the retail price of Amway products usually is something less than a dozen. (Halliday, CX 1040H; DeVos, CX 1037D). The 'methods' employed by Amway and its distributors are 'as effective as agreements in producing the result that 'all who would deal in the company's products are constrained to sell at the suggested prices.'" *United States v. Parke, Davis & Co.*, 362 U.S. 29, 42 (1960) (quoting *FTC v. BeechNut Packing Co.*, 257 U.S. 441, 455 (1922)).

Empirical studies show that resale price maintenance does raise retail prices above what they would otherwise be. Hearings on S.408 before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 94th Cong., 1st Sess., p. 174 (1975). Such evidence led Congress to repeal the MillerTydings and McGuire Acts, which permitted states to enact 'fair trade' laws authorizing sellers to establish resale prices for branded commodities. 15 U.S.C. 1, 45 (effective March 11, 1976). 'Price is the 'central nervous [93] system of the economy.'" *Nat'l. Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 1978 1 Trade Cases P61,990 at 74,225 (decided April 25, 1978). Respondents regularly treat the subject of resale prices, however, in a cavalier and informal manner. [FN16] 'Price is too critical, too

sensitive a control to allow it to be used even in an informal manner to restrain competition.' *United States v. Container Corp. of America*, 393 U.S. 333, 338 (1969). [94]

Counts II and III of the Complaint

Count II of the complaint alleges that respondents unlawfully allocate the Amway distributors' customers and source of supply. This allegation deals primarily with two rules of the Amway Sales and Marketing Plan: (1) the retail store rule requiring distributors not to allow Amway products to be sold through retail stores (Finding 85), and (2) the crossgroup selling rule requiring distributors to sell Amway products only to distributors they have recruited and to buy Amway products only from their sponsor. (Finding 81) [FN17]

Count III of the complaint alleges that Amway restricts the advertising and promotional activities of the distributors. This allegation deals with the detailed regulation of its distributors' advertising. (Findings 94108)

These rules are vertical in nature. Vertical customer allocations and requirements contracts are not the kind of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958). The vertical restrictions here must be analyzed under the rule of reason. *Continental T. V., Inc., v. GTE Sylvania, Inc.*, 537 F.2d 980 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977). [95] The Sylvania case involved location restrictions imposed on dealers by a small manufacturer competing in an oligopolistic market. 537 F.2d at 1001. The Court held that some vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain marketing efficiencies in the distribution of its products. Among these 'redeeming virtues,' the Court found that established manufacturers may use them to induce retailers to provide services necessary to the efficient marketing of the products and that new manufacturers may use them to induce competent and aggressive retailers to do the work necessary to distribute products unknown to consumers. 433 U.S. at p. 55. The Court overruled the vertical per se rule stated in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and, while not foreclosing the possibility that particular applications of vertical restrictions might justify per se prohibitions, the Court clearly held that departure from the rule of reason standard must be based upon demonstrable economic effect rather than as in Schwinn upon formalistic line drawing. 433 U.S. at 59. No such economic effect has been proved here and the restrictions should not be treated under the per se rule.

Complaint counsel argue that: 'Restrictions such as these should not be individually analyzed, for they work their toll on competition collectively.' (CRB, p. 37) Nothing in the record compels the conclusion, however, that the restrictive provisions were employed in combination in an effort to eliminate or restrain competition to the detriment of consumers. *SnapOnTools Corp. v. FTC*, 321 F.2d 825, 830 (7th Cir. 1963):

Except for the fact that the provisions are all found in one document, there is no evidence, let alone substantial, to show that these provisions were designed to be, or were employed as a unitary device to foster practices violative of Section 5 of the Act. (Emphasis by court.)

[96] Each restraint therefore must be analyzed individually to determine whether the preponderance of the evidence shows the prohibited purpose or effect.

The Amway Sales and Marketing Plan has involved wholesale and retail price fixing. If other restrictive practices were 'ancillary' to this price fixing, or 'part of a scheme involving price fixing,' the result would be a per se violation of law. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967); *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963). [FN18] Here, however, no such finding can be made on this record. Here, the price fixing is ancillary and incidental to the other vertical restraints, to which respondents have spent most of their efforts. The other vertical restraints should therefore be judged independently from the price fixing. *United States v. Sealy, Inc.*, 388 U.S. 350, 35152 (1967); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967); *White Motor Co. v. United States*, 372 U.S. 253, 260, 263 (1963). [97]

Applying the rule of reason standard to vertically imposed territorial restraints, the Commission in *The CocaCola Company, et al.*, FTC Dkt. 8855 (Final Order dated April 7, 1978) [91 F.T.C. 517], held that the vertical restraints involving nonrefillable bottles were of broader scope than reasonably necessary [FN19] to achieve marketing efficiencies by inducing capital investment, local advertising and promotional and service activities by the supplier's customers; and that intrabrand competition would be likely to invigorate price competition. The restrictions as to sales of the soft drinks in refillable bottles were, however, held reasonable because of practical marketing difficulties and consumer benefits associated with that product.

On this record, Amway's crossgroup and retail store rules and its regulation of advertising, are reasonable and have provided entry to a marketplace [FN20] which would not otherwise have been available. (Dunlap, Tr. 667677) While this defense may not be a 'perpetual license to operate in restraint of trade,' *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), respondents' control of the distributors' marketing practices is no broader than necessary to achieve the main purpose of direct selling in an oligopolistic market. [FN21] [98] Furthermore, the restrictions here are not an 'industrywide practice' [FN22] involving a 'dominant brand' by an 'established giant in the industry.' (*CocaCola Co.*, supra, at pp. 35, 47 and 51)

The Retail Store Rule

The Amway Sales and Marketing Plan requires that Amway products be sold directly to consumers and not through retail stores. [FN23] (Finding 85) Based upon evidence adduced through expert witnesses, Amway executives and numerous Amway distributors, it is apparent that the rule has preserved Amway's direct selling organization and consumer demand, and provided an incentive to distributors to furnish services to consumers.

Marketing experts gave credible testimony in this proceeding that if Amway products were sold in retail stores, distributors would lose interest in calling on consumers' homes, demonstrating and explaining products to create a demand which could be satisfied perhaps at a lower price at a retail store. (Finding 89) Without a demand for the products, retail stores would soon lose interest in Amway products. Amway would then be faced with the necessity of creating demand in the traditional way of advertising expenditures and [99] otherwise doing battle in the retail grocery stores, in a hostile oligopolistic marketplace. (Findings 171181) Vertical restrictions on intrabrand competition may be used to allow a company to compete in an oligopolistic market. *Sylvania, supra*. [FN24]

The retail store rule gives Amway distributors an incentive to provide services to consumers and to create a consumer demand which would dissipate if Amway products were sold in retail stores. Amway distributors demonstrate and explain Amway products and deliver to the consumer's home. These services are typically unavailable from retail stores. (Finding 88) Because some Amway products are more concentrated than products sold in retail stores, demonstration and explanation are essential to consumer demand. (Diassi, Tr. 5529; Schroeder, Tr. 535556)

Vertical restraints which induce retailers to engage in promotional activities and to provide services help stir interbrand competition and should be encouraged. *Sylvania, supra*; *SnapOn Tools, supra*, 321 F.2d at 82829. The retail store rule is such a vertical restraint and is lawful under the rule of reason. [100]

CrossGroup Selling Rule

The crossgroup selling rule requires Amway distributors to buy Amway products only through their sponsor. (Finding 81) The distributors, in effect, promise to buy their 'requirements' of Amway products from one supplier. There has been no showing on this record of any probable immediate or future market pre-emption which might substantially lessen competition. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961).

The crossgroup selling rule also provides that distributors shall sell at wholesale only to their sponsored distributors. This aspect of the rule has the same economic justification as the retail store rule. [FN25]

The crossgroup selling rule is the basis for the Amway Sales and Marketing Plan. It provides the structure by which products, information and compensation flow from Amway to the Direct Distributors and down to the distributors engaged in making the retail sale. It provides lines of communication and responsibility insuring that distributors are properly trained and motivated and that consumers receive services provided under the Amway system of distribution. (Finding 82) Used in conjunction with the performance bonus system, the crossgroup selling rule gives sponsoring distributors an incentive to recruit, train, motivate and supply other distributors in order to gain a reward based on the sponsored distributors' sales volume. If sponsored distributors could buy Amway products from someone other than their sponsor, that incentive would not exist. The crossgroup selling rule thus provides an alternative to payment of a 'headhunting' fee as an incentive for recruiting. (Patty, Tr. 311113) [101]

Amway's Market Concept

Amway's marketing image was summarized well by one of respondents' expert witnesses (Diassi, Tr. 554243):

I would think that it is based a great deal on the form of the product, that is, it is a concentrated product for the consumer. It is one that she has to use very little of per washload and therefore economical to use. I think that they have built in one other feeling for it and that is the idea that it is delivered directly to the home. There is a service portion that is built into the, into that product itself.

I think to a certain degree that there is some exclusivity built into it, too, that you can only buy it from an Amway distributor. It is not a product that everyone can get ahold of, although I am sure Amway would like to have everyone buy the product. But I think those are the ingredients that go into it. It is a very high quality sophisticated product that almost requires somebody to tell you how to use it as opposed to something that is in a supermarket that you just go out and kind of dump into the machine.

The concept of which market a company like Amway wants to compete in has been protected by the courts which have upheld rules, more restrictive than those involved here, because they were necessary to maintain that concept. In *Evans v. S.S. Kresge Co.*, 544 F.2d 1184 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977), a department store chain licensed the use of the KMart service trademark and a 'one stop shopping' concept to various independent food stores. The resulting retail outlet was comprised of the independent food store and the chain department store under one roof with one KMart sign appearing outside. The department store chain was interested in drawing on customers marking frequent food purchases [102] at the grocery stores. In order to retain its reputation and market concept for high volume and low prices, Kresge required the grocery stores, inter alia, to agree to set prices on their non-food items (2%5% of their volume) at prices no higher than the prices charged by the department store for the same items. The Third Circuit Court of Appeals upheld the summary judgment for Kresge, holding that there was no violation of the Sherman Act (544 F.2d at 1193):

[T]he challenged restraint enabled Kresge to add a food component to its discount operation without causing customer confusion or threatening the low price 'KMart' discounting image upon which the success of KMart (including K Mart Food) would depend. Therefore, far from attempting to stifle competition, the restraints had as their purpose the stimulation of business and efficiency for both the department store and the supermarket: they (the restraints) would assure that the overall operation would compete effectively in both the discount and food markets visavis other department store and food discounters. The restraints thus serve a legitimate business purpose.

The trademark licensor's market concept was also upheld in *Weight Watchers of the Rocky Mountain Region, Inc. v. Weight Watchers Int'l, Inc.*, 19762 Trade Cas. s 61, 157 (E.D.N.Y. 1976). There, Weight Watchers International had licensed its trademarks and system of weight control to over 100 independent franchisees. The franchise agreement prohibited the franchise from offering 'front loading' or 'prepayment' plans whereby the members were asked to prepay their fees for weight control classes

to be held in the future in return for which they received discounts and some meeting without charge. Weight Watchers International prohibited prepayment plans because other weight loss clubs had engaged in fraudulent practices in connection with such arrangements. The plaintiff franchisee [103] nevertheless required prepayment, arguing that it put pressure on members to attend weight classes. Weight Watchers International argued that its marketing concept was that no commitment by the member was central to its weight plan. The court held that the rule was consistent with the antitrust laws and that the franchisee had interfered with the defendant's central marketing concept (at p. 70, 226): '[Weight Watchers International's] limitation on price policy is . . . an integral part of its method. Any modification of it might do serious damage to the good will of International.'

The market concept by which Amway has, in less than 20 years, successfully added a new competitive presence to the oligopolistic soap and detergents market, among others, depends on the vertical restraints imposed on the distributors such as the retail store rule and the crossgroup selling rule. Any modification of these rules might well do serious damage to this marketing concept and Amway's good will.

Trademark and Servicemark Protection

Amway argues that it has established several rules, including the retail store rule and those regulation distributors' advertising, in order to protect its goodwill and trademarks and servicemarks.

The owner of a mark must prevent third parties from misusing a mark or will be deemed to have abandoned it. *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959). [FN26] [104] This means that a trademark owner has the right to supervise to some extent the quality of goods and services offered by licensees under that mark. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), cert. denied, 405 U.S. 43; *Denison Mattress Factory v. SpringAir Co.*, 308 F.2d 403, 409 (5th Cir. 1962). It does not mean, however, that merely because restrictive provisions are part of a trademark licensing arrangement those provisions are immunized from the antitrust laws, where their central purpose is to restrain trade. *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951). Specifically, a manufacturer cannot maintain resale prices under the theory that discount prices will interfere with trademark rights. *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31, 44 (N.D. Cal. 1953). Protection of the goodwill embodied in a trademark may, however, justify an otherwise invalid trade restraint such as a tying arrangement. *Susser v. Carvel Corp.*, 332 F.2d 505, 512 (2d Cir. 1964). And the worth of the trademark will be assessed in determining the reasonableness of requirements contracts, *Denison Mattress Factory v. SpringAir Co.*, supra, at p. 410, and customer limitations, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 n.4 (1968).

It is apparent, therefore, that the protection of Amway's trademarks and servicemarks carry weight in the determination of the legality of the vertical restraints it has imposed on the distributors.

Amway meticulously regulates advertising by its distributors. (Findings 94 108) Except for Amway's control of price advertising, supra, this control of advertising has adequate legal support. Amway has an

'affirmative duty to itself and to the public to invoke some kind of control and restraint' in order to guard against misuse of its marks. *Denison Mattress Factory v. SpringAir Co.*, supra, at p. 409. The trademark licensor may properly regulate advertising or promotional materials in connection with the licensing of trademarks. [105] *Weight Watchers of the Rocky Mountain Region, Inc. v. Weight Watchers Int'l, Inc.*, 19762 Trade Cas. P 61,157, at p. 70,225 Trade Cas. P61,157, at p. 70,225 right to regulate its distributors' advertising to stop infringement of its marks by unauthorized publication in sales literature. *Amway Corp. v. International Sales Aids, Inc.*, 187 U.S.P.Q. 15, 2122 (E.D. Ark. 1974).

Complaint counsel raise as a collateral issue the validity of three servicemarks. (CRB, p. 64) They argue that Amway distributors do not in fact perform services not normally connected with the sale of a particular type of product, and that a servicemark should not have been issued. Amway distributors do, however, perform valuable services for their sponsored distributors. (Finding 82) And Amway distributors provide valuable services to consumers, demonstrating and explaining products and delivering the products to the customer's home or place of business. (Finding 88)

Complaint counsel further attach the validity of the servicemarks, alleging 'something highly improper' (CRB, p. 71 footnote) in an affidavit filed in support of the application for the servicemarks. Although complaint counsel do not cite the record in this regard, they apparently refer to an error made in the application which referred to 'trademark' rather than 'servicemark.' (Price, Tr. 2881) The context of the entire application shows that it involves a request for protection for a trademark for services.

Complaint counsel also argue that the application filed in support of the mark stated that it was for 'doortodoor retail merchandising engaged in by the distributors,' whereas respondents have discouraged 'doortodoor' selling. (CRB, p. 72) The term 'doortodoor' selling has a generic sense meaning 'direct selling' as opposed to selling to retail stores. Amway advises its distributors to try to get an introduction from a neighbor, customer or friend before knocking on someone's door, although doorto-door canvassing is used by Amway distributors and it is 'optional with them.' (Van Andel, Tr. 175758) [106]

Counts IV and V of the Complaint

Counts IV and V of the complaint allege that respondents' system of distribution is unfair and involves misrepresentations concerning the nature of the system and the income distributors may gain from recruiting and fails to disclose distributors' substantial expenses and turnover.

Pyramid

Complaint counsel argue that the Amway Sales and Marketing Plan is inherently unlawful because it is 'a scheme to pyramid distributors upon ever increasing numbers of other distributors.' They argue that the Amway Plan, even without actual proof of economic failure, is 'doomed to failure' and contains an 'intolerable potential to deceive.' (CB, p. 32)

This rule of per se illegality for pyramid plans has not yet been accepted by the courts. GerRoMar, Inc., 84 F.T.C. 95 (1974), rev'd in part, GerRoMar, Inc. v. FTC, 518 F.2d 33, 37 (2d Cir. 1975); United States v. Bestline Products Corp., 412 F. Supp. 754, 777 (N.D. Cal. 1976). The Commission defined such unlawful 'entrepreneurial chains' in Koscot Interplanetary, Inc., 86 F.T.C. 1106, 1180 (1975):

Such schemes are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell the product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users. In general such recruitment is facilitated by promising all participants the same 'lucrative' rights to recruit. (Emphasis in original.)

[107] Participants in the Koscot marketing plan paid an initial amount up to \$5,000 to the company for inventory and the right to recruit others. The distributors who recruited others received \$2,650 of the recruit's \$5,000 payment. 86 F.T.C. at 1179. The only way a Koscot distributor could get the payment back was to recruit more distributors. 86 F.T.C. at 1131. Koscot and its distributors were primarily in the business of selling distributorships. 86 F.T.C. at 1140.

Participants in the GerRoMar, Inc. marketing plan bought nonreturnable inventory for up to \$1,950. 84 F.T.C. at 10810. Recruiters received compensation based on the fact of recruiting regardless of whether products were sold to the consumers. 84 F.T.C. at 148.

The pyramid marketing program in Holiday Magic, Inc., 84 F.T.C. 748 (1974) required distributors to buy in at various levels for up to \$4,500. At the highest level, distributors received \$2,500 of the \$4,500 for recruiting another distributor at the same level. 84 F.T.C. at 1032. The inventory purchased in this manner was nonreturnable and the company paid little attention to consumers. 84 F.T.C. at 1035.

There is little doubt that a pyramid distribution scheme should now be condemned even without the demonstration of its economic consequences. The Commission has studied the effects of such 'entrepreneurial chains' and seen the damage they do and a per se rule should be used. Koscot Interplanetary, Inc., 86 F.T.C. 1106, 118082 (1975). Such a rule would be based on demonstrated economic effect in these cases, rather than formalistic line drawing. Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977). In such cases, the fact that some retail sales occur does not mitigate the unlawful nature of the method of recruiting. GerRoMar, Inc., 84 F.T.C. 95, 14849 (1974), rev'd on other grounds, 518 F.2d 33 (2d Cir. 1975). Here, however, the Amway system does not involve an 'investment' in inventory by a new distributor. (Finding 61) A kit of sales literature costing only \$15.60 is the only requisite. (Finding 34) And that amount will be returned if the distributor decides to leave Amway. (Finding 37) [108]

The Amway system is based on retail sales to consumers. (Findings 7275, 144) Respondents have avoided the abuses of pyramid schemes by (1) not having a 'headhunting' fee; (2) making product sales a precondition to receiving the performance bonus; (3) buying back excessive inventory; and (4) requiring that products be sold to consumers. (Patty, Tr. 309294). Amway's buyback, 70% and ten customer rules

deter unlawful inventory loading. (Findings 14547) [FN27] Amway is not in business to sell distributorships and is not a pyramid distribution scheme. (Findings 14244)

Saturation

The complaint alleges that distributors are not long likely to recruit other distributors because 'recruitment of additional participants must of necessity ultimately collapse when the number of persons theretofore recruited has so saturated the area with distributors or dealers as to render it virtually impossible to recruit others.' (Complaint, p. 9)

The term 'saturation' as used in the complaint and by complaint counsel is one of the legitimate proofs in a case involving a pyramid distribution scheme. *Koscot*, 86 F.T.C. at 1135; *Holiday Magic*, 84 F.T.C. at 979; *GerRoMar*, 84 F.T.C. at 119. Since Amway is not such a pyramid, the concept is immaterial here. [109]

Irrespective of the materiality of the concept, the facts in this record do not show that Amway distributors in any market were unable to recruit new distributors or to sell Amway products because of any inherent defect in the Amway Sales and Marketing Plan. [FN28] Products are consumed or wear out. (Patty, Tr. 3110) The population of the country continues to grow and to move about. Only one in four Amway distributors engage in recruiting, and there has been no decline in that percentage in recent years. The sales trend for Amway has shown almost uninterrupted growth. (Finding 151) The markets for Amway products and distributors, in short, are not static.

The preponderance of the evidence in the record does not support the allegation of 'saturation.' (Findings (Findings 14852) From my observation of the demeanor, inconsistencies and uncertainties in the testimony of the witnesses called in support of the complaint in this regard, I believe the reason for their failure was more accurately described by a marketing expert who testified about this subject (Patty, Tr. 3109): 'I think generally speaking when a salesman tells you that a market is saturated, he has become discouraged for some reason, usually he is simply not making the sale effort that is required.' [110]

Misrepresentations and Failure to Disclose

The complaint alleges that respondents falsely represent that it is easy to recruit distributors and that distributors will receive substantial earnings. The complaint also alleges that respondents fail to disclose that there is substantial turnover among Amway distributors, and that substantial expenses are incurred in the business of being an Amway distributor. (Complaint, pp. 1314) Misrepresenting to potential salespersons the nature of the position offered and the amount of compensation that will be received violates the Federal Trade Commission Act. *Encyclopedia Britannica, Inc.*, 87 F.T.C. 421, 488 (Initial Decision adopted by the Commission 1976).

Misrepresentations

The complaint alleges that respondents unlawfully represent that sponsoring is easy and profitable. (Complaint, pp. 10, 13) While words such as 'easy' and 'profitable' are relative, they can be the basis for a proper charge of unlawful misrepresentation. *Tashof v. FTC*, 437 F.2d 707, 712 (D.C. Cir. 1970); *Goodman v. FTC*, 244 F.2d 584, 597 (9th Cir. 1957); *Steelco Stainless Steel, Inc. v. FTC*, 187 F.2d 693, 697 (7th Cir. 1951); contra, *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946). The facts, however, show that no unlawful misrepresentation has occurred.

Amway has represented that: 'Sponsoring is easy!' Such isolated statements are found in detailed literature about the Amway Sales and Marketing Plan which must be read in context in assessing the nature of the statement. (Finding 139) Furthermore, Amway lets distributors know that the Amway Sales and Marketing Plan involves work. (Finding 130) In the introduction to the Career Manual for Amway Distributors, Mr. DeVos tells new distributors [111] that they are getting into the business on the 'ground floor,' starting 'at the bottom,' and that the Amway plan is an opportunity for all 'who are willing to pay the price for success' and that the 'person who thinks he can get big without working has no place here.' (RX 331, p. 3A)

In support of the allegation complaint counsel have proposed only the finding that three out of four distributors do not recruit. (CPF 525) This has little to do with the ease of recruiting because there has been no showing that all distributors are interested in recruiting rather than retail selling. Moreover, complaint counsel seem to admit that Amway has had no trouble recruiting distributors. (CB, p. 10). [FN29]

There is no doubt that the Amway Sales and Marketing Plan is designed to catch the interest of a prospective recruit by appealing to material interests. (Findings 59, 138) One approach is the 'dream' sheet. Prospects are asked to describe their goals and dreams such as 'a new car, a new home, college education for your children.' They are, however, also asked: 'Are you willing to work hard to get this?' (Finding 59) [FN30] [112]

Amway literature and speeches made at rallies by Amway representatives describe luxuries that may be available to Amway distributors. (DeVos, CX 1000Z3; Findings 59, 131) Guides for presenting the sales and marketing plan instruct the distributor to tell prospects (CX 190J):

For you the Amway Sales and Marketing Plan can mean the kind of life you've always dreamed of living, a new car, a new home, security . . . the things you want most out of life can be yours! Amway can be the means by which you achieve those things you've always dreamed of, but never thought you could afford. Amway can offer you an opportunity for true independence. Freedom from time clocks and freedom to travel when you want to. . . . [F]reedom from allowing someone else to decide your financial progress. (Emphasis is original.)

But the Amway plan also makes clear the idea that work will be involved, and that the material rewards to be gained will directly depend on the amount and quality of work done. (Finding 130) Complaint

counsel argue that appealing to financial and material goals of salespersons is 'emotionally exploitative.' No applicable precedent was cited or found that would hold such conduct unfair. [113]

Amway literature urges recruiters not to 'quote dollar incomes on specific individuals even though you may want to use their stories about the homes in which they live, the cars they drive, or the airplanes they fly.' (Finding 131) [FN31] Amway officers and other representatives have, however, orally stated specific dollar incomes which are attributed to Amway distributors. (Finding 132) These statements are typically made in mass sales rallies which are primarily for persons who are already Amway distributors. (Finding 48; CX 57Z118) The context of the sales talk is inspirational and it is to a knowledgeable crowd already aware of the details of the Amway Sales and Marketing Plan, [FN32] and in this motivational context the statements are obviously meant and understood to be feasible goals and not guaranteed average income for the listeners. [FN33] [114]

Amway recommends that distributors explain the Sales and Marketing Plan by using specific dollar amounts representing hypothetical retail and wholesale sales. (Findings 60, 134, 135) This method explains visually how to receive income by recruiting new distributors. It is frequently referred to as 'drawing the circles' (CX 116I) and shows expanding organizations of distributors in four or five examples, culminating in a hypothetical organization showing the sponsoring distributor receiving hundreds of dollars in monthly gross income. The diagrams start with a specific amount for the sponsoring distributor's hypothetical retail sales. From 1973 until 1977 this amount was \$200 B.V. [FN34] Until recently Amway's circle diagrams showed the sponsored distributors' hypothetical sales also as \$200 B.V. In 1977 recruiting literature, Amway changed these to more realistic varying amounts. (RX 401, pp. 79)

The circle diagrams have been qualified in the Amway literature to show that the illustration is hypothetical. (CX 162G):

For example, let's say you begin by sponsoring six new distributors. Just to illustrate the way the Amway Sales Plan operates, and not to suggest that there is any predictable level that any individual will ordinarily achieve, let us assume that each of the six sells an order a day . . . \$5 a day . . . \$100 per month . . . though actual sales will vary. . . .

NOTE: Volume figures and earnings shown in this session are meant for example only. In actuality, distributors may show a variety of different volumes and earnings. Growth of an Amway group is not likely to work out in just this way. [FN35] (Emphasis in original.)

[115] The average Amway distributor sells far less than \$200 a month. (Finding 137) The vast majority of Amway distributors are in the business parttime. Only one in four sponsors other distributors, and many apparently are distributors in order to buy Amway products at about a 30% discount which they consume. (Finding 137) For a dollar figure representing average sales by distributors engaged in active retailing of Amway products, however, the \$200 is reasonable. (Cliett, Tr. 3759; Bryan, Tr. 4521)

Mr. Van Andel's reason for using the \$200 figure is to act as a goal to motivate the distributors' sales. (Finding 136) [FN36] One of complaint counsel's [116] witnesses, Jack Wayne Hearne, a former Amway distributor, testified that he understood the \$200 figure was a goal, not an average (Tr. 63233):

Q. I believe you said that at the first meeting [the prospective distributors] were told that part of the plan was that everyone should try to sell \$200 worth of products a month, that is correct?

A. Yes, and I asked why, and [the Amway distributor] said this is the basic thing that we work for. You are not required. If you do fine, if you don't fine, whatever. That was the goal you kind of worked toward.

The Amway literature stresses that retail selling is essential, and that sponsoring new distributors brings the responsibilities of training, motivating and supplying. The literature also warns the distributor never to give the impression that a business can be built only by sponsoring new distributors and not to quote dollar incomes by specific distributors or otherwise to imply that the plan is for anyone 'who is unwilling to work hard.' (RX 331, pp. 8D, 9 D) In this context, it is clear that drawing the circles to show the Amway plan is not an attempt to deceive prospects into believing that such earnings are 'typical' for Amway distributors, *Goodman v. FTC*, 244 F.2d 584, 59596 (9th Cir. 1957), or that distributors 'will obtain' the amount specified. *Tractor Training Service v. FTC*, 227 F.2d 420, 425 (9th Cir. 1955), affirming, 50 F.T.C. 762, 769, 774.

For the same reason, there is no law violation in Amway's use of the \$1000 figure as the earnings of a business which a distributor 'may build.' (Finding 138) There is no doubt that some Amway distributors earn that amount. (Finding 133) [117] It is used to entice prospects to an opportunity meeting where the details of the Amway Sales and Marketing Plan can be explained. In the context of the plan, it is clear that the amount is not meant to represent the average or typical earnings of an Amway distributor. [FN37]

Amway is not a 'modern day version of the chain letter.' *Holiday Magic, Inc.*, 84 F.T.C. 748, 1035 (1974) The Amway system does not create the potential for massive deception present in a pyramid distribution scheme which relies primarily on the profits to be made from recruiting new distributors rather than from ultimate sales to consumers. (Id. at 1036) Unlike the pyramid companies, Amway and its distributors do not make money unless products are sold to consumers. The inherent potential for deception is not present in the Amway plan. In the full context of the plan, it does not have an unlawful capacity to deceive. [118]

Failure to Disclose

Respondents have not misrepresented the potential expenses incurred in running an Amway distributorship. Amway literature describes normal business expenses involved in conducting a distributorship, even assuming the distributors were not already aware of the existence of such expenses. (Finding 140)

The complaint also alleges that Amway has failed to disclose that there is a substantial turnover of persons recruited as Amway distributors.

Amway experienced a decline in the number of distributors recruited into its system starting about 1971. This lasted for a few years and was caused primarily by bad publicity concerning pyramid distribution companies. (CX 519 G, U) In recent years, the total number of Amway distributors has been increasing gradually and the rate of turnover has been falling. (Finding 148)

Direct selling companies typically have a high turnover among their independent salespersons. (Finding 162) [FN38] The rate of turnover among Amway distributors has been lower than average among direct selling companies. (Findings 148, 162, 163) Furthermore, Amway warns its distributors that newly sponsored distributors can be expected to leave the business. (Finding 141) [119]

CONCLUSIONS

The Amway Sales and Marketing Plan is not a pyramid plan. In less than 20 years, the respondents have built a substantial manufacturing company and an efficient distribution system, which has brought new products into the market, notably into the highly oligopolistic soap and detergents market. Consumers are benefited by this new source of supply, and have responded by remarkable brand loyalty to Amway products. (Finding 186) The vertical restraints by which Amway has achieved this entry avoiding conventional retailing through grocery stores by direct selling are reasonable. Respondents' restraints on price competition, however, must be prohibited.

I therefore conclude that:

1. The Federal Trade Commission has jurisdiction over respondents and the subject matter of this proceeding.
2. This proceeding is in the public interest.
3. Respondents have agreed, combined and conspired with each other and Amway distributors to fix resale prices for Amway products, on sales between Amway distributors and to consumers, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.
4. The attached order to cease and desist against respondents is appropriate, supported by the findings of fact, reasonably related to the offenses found, and necessary for the protection of the public interest.
5. The record does not support the allegations of Counts II, III, IV and V. Accordingly, those counts must be dismissed. [120]

Remedy

The order in this case should prohibit respondents in the future from controlling the prices charged for Amway products in sales between distributors and to consumers. And since the customer protection rule had that purpose and effect, the order must cover allocation of retail consumers.

As long as they obey the other rules herein found to be reasonable, distributors should have the right to advertise and sell Amway products, which they have purchased, at whatever price they wish. [FN39] '[W]here consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising.' Bates v. State of Arizona, 433 U.S. 350, 19772 Trade Cases, P61,573, at p. 72,330. [121]

ORDER

I

It is ordered, That respondents Amway Corporation and Amway Distributors Association of the United States, their officers, agents, representatives, employees, successors and assigns, and respondents Jay Van Andel and Richard M. DeVos, individually, and their agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale or distribution of any product, whether by combination, agreement, conspiracy or coercion, shall forthwith cease and desist from:

1. Fixing the price at which any distributor may advertise, promote, offer for sale or sell any product at retail.
2. Fixing the price at which any distributor may sell any product to any other distributor.
3. Requesting or obtaining any assurance to comply with, continuing, enforcing, or announcing any contract, agreement, [122] understanding, or arrangement with any distributor or prospective distributor which fixes the price at which any product is sold or advertised by such distributor or prospective distributor.
4. Threatening to withhold or withholding bonus payments or profit sharing payments from any distributor because of the price at which said distributor advertises or sells any product.
5. Requiring or requesting distributors to report the price at which products are resold, or to report the identity of any other distributor because of the retail price at which such distributor is advertising or selling any product; or acting on any reports or information about such retail prices by threatening, intimidating, coercing, terminating or contacting in any way the said distributor because of those reports or information. [123]
6. Terminating or taking any other action to prevent or limit the sale of any product by any distributor because of the retail price at which the distributor is advertising or selling any product, whether or not in conjunction with any of the Amway trademarks or servicemarks.

7. Publishing or distributing, directly or indirectly any wholesale or retail price list, order form, promotional material or any other document which employs resale prices for products sold by respondents without stating clearly and conspicuously in conjunction therewith the following: 'The prices stated herein are suggested prices only. Distributors are not obligated in any way to adhere to any suggested prices. Distributors may determine for themselves the prices at which their product may be sold to other distributors or to consumers.'

8. Allocating retail customers of distributors. [124]

II

Nothing in this order shall affect:

1. Respondents' rights in law and equity respecting the protection of respondents' trademarks or servicemarks in conjunction with the offer for sale or advertising of any product.
2. Respondents' rights to enforce the rules of the Amway Sales and Marketing Plan found reasonable in this decision.

III

It is further ordered, That respondent Amway Corporation, or its officers, agents, representatives, employees, successors or assigns, shall:

1. Within thirty (30) days from the effective date of this order, deliver a copy of this order to cease and desist to all present Amway Direct Distributors and distributors. From each Direct Distributor, a signed statement acknowledging receipt of this order shall also be obtained. [125]
2. Deliver a copy of this order to all future Amway distributors on the date of their participation.
3. Within thirty (30) days of the effective date of this order, make written offers of distributorships of equivalent value to the distributorship of any distributor who was terminated or suspended solely for the violation of rules, or policies which contravene any of the provisions of this order.

IV

It is further ordered, That respondents and their successors and assigns notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporations or in the Amway Sales and Marketing Plan which may affect compliance obligations arising out of the order. [126]

V

It is further ordered, That the individual respondents promptly notify the Commission of any change of their present business relationship or employment. Such notice shall include respondents' business address and a statement as to the nature of change of business or employment as well as a description of their duties and responsibilities.

VI

It is further ordered, That the respondents herein shall within sixty (60) days from the effective date 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 this order.

OPINION OF THE COMMISSION

BY PITOFSKY, Commissioner:

I. Introduction

In March 1975 the Federal Trade Commission issued a complaint charging respondents Amway Corporation ('Amway'), Amway Distributors Association ('ADA'), Jay VanAndel (Chairman of the Board of Amway and one of its two principal owners), and Richard M. DeVos (President of Amway and the other principal owner), with various violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged violations involve the distribution network that has been built up to market the consumer products Amway manufactures. [2]

After extensive discovery, hearings began in May 1977 and were concluded in October 1977. In an Initial Decision rendered June 23, 1978, the presiding administrative law judge (the 'ALJ') found that FTC counsel supporting the complaint ('complaint counsel') had established that respondents had engaged in illegal resale price maintenance, but had failed to establish that respondents had committed other violations of Section 5. We affirm the ALJ's decision with respect to resale price maintenance and, in addition, find that respondents have made false and misleading earnings claims in attempting to recruit persons to serve as distributors of Amway products. We also agree with the conclusion reached in the Initial Decision, that complaint counsel have failed to prove the other allegations made against Amway of unfair methods of competition and unfair or deceptive acts and practices. Specifically, we have determined that the Amway Sales and Marketing Plan is not an illegal 'pyramid scheme'; that the non-pricerelated rules Amway has imposed on the distributors of its products, to control the way the products flow to consumers, do not constitute unreasonable restraints of trade or unfair methods of competition; and that, with the exception of certain earnings claims, respondents have not made false, misleading, or deceptive claims about Amway's business or the opportunities it presents to a person who becomes a part of it.

Amway has a highly unusual distribution system, and therefore a fairly extended description of Amway's business and marketing techniques is necessary as a prologue to the application of the relevant legal principles.

A. The Nature of Amway's Business

Amway was formed in 1959 by VanAndel and DeVos. It manufactures over 150 products, most of which are cleaning and personal care products. Soaps and detergents constitute 41 percent of sales; polishes, sanitation goods, and other cleaners 20 percent; toilet preparations 6.5 percent; pharmaceutical preparations 6 percent; and a variety of other consumer goods account for the rest. Amway's total sales topped \$200 million in 1976, but Amway is still a small competitor compared to the giants that dominate the market in which it operates. The three largest firms in the soap and detergent market—Procter & Gamble, Lever Bros., and ColgatePalmolive—account for over 80 percent of the total sales in that market. Procter & Gamble alone has about half these sales; in addition, it has about one-fourth of the total sales of personal care products. There are formidable barriers to entry into the market in which Amway operates; generally, a new competitor cannot enter at all unless it has very large amounts of money to spend on [3] advertising and promotion. [FN1] Amway skirted these near-insurmountable barriers and interjected a vigorous new competitive presence into this highly concentrated market by developing what is known as a 'direct selling' distribution network.

B. Amway's Direct Selling Operation

Amway's products are the type usually sold in retail stores, especially in supermarkets. But Amway has totally avoided traditional retail outlets. [FN2] It retails its products directly to consumers on a 'house-to-house' basis, using a sales force of about 360,000 independent distributors. Actually, Amway describes its retail marketing program as 'person-to-person', since it encourages its distributors to seek out regular, repeat customers whom the distributors may service on an ongoing basis.

The advantages claimed for a direct selling operation include home delivery, explanation and demonstration of product characteristics and use, explanation of product guarantees, and other similar services. Amway has shown that these advantages can be considerable, as it has grown from sales of \$4.3 million in 1963 to sales of over \$200 million in 1976. One of the reasons for this rapid growth is that Amway's products have very high consumer acceptance. A marketing specialist called to testify at the hearings stated that Amway's laundry detergent, which has a very small market share and no national advertising, ranks third out of thirty-seven brands in brand loyalty. Other Amway products, including its automatic dishwasher detergent, detergent for fine clothing, bleach, rug cleaner, and laundry additives, each rank second in brand loyalty. Amway's liquid dishwashing soap led all sixteen brands surveyed in brand loyalty. [4]

C. Amway's Multilevel Distributor System

Each of the 360,000 Amway distributors is an independent businessperson. These distributors are governed in their relations with each other, with Amway, and, to some extent, with consumers, by the Amway Sales and Marketing Plan (the 'Amway Plan'). [FN3] Under the Amway Plan, a select few distributors known as Direct Distributors [FN4] purchase products at wholesale directly from Amway and resell the products both at retail to consumers and at wholesale to the distributors they personally 'sponsored' (that is, the distributors they recruited). Each secondlevel distributor resells the products both at retail to consumers and at wholesale to the distributors he personally sponsored. The thirdlevel distributors perform the same two functions. This multilevel wholesaling network ends with those distributors who have not sponsored any new distributors, and who make purchases from their sponsors solely for their own use or for resale to consumers. Thus there is beneath each Direct Distributor a 'field' of distributors, each of whom receives products which have flowed through each level between himself and the Direct Distributor. [FN5] Amway directs that these [5] products, regardless of how many levels they pass through, are to be sold between distributors at the same prices the Direct Distributor paid for them. [FN6]

All distributors are encouraged to make retail sales and to sponsor new distributors who will themselves make retail sales; distributors earn money for successfully engaging in either of these activities. The way a distributor makes money on a retail sale is simple. Each time he makes such a sale, he keeps the difference between the retail price at which he sold the product and the wholesale price at which he bought it. The way a distributor earns money from sponsoring new distributors is more difficult to understand and requires a more lengthy explanation.

Under the Amway Plan, each distributor is eligible to receive a monthly 'Performance Bonus' which is based on the total amount of Amway products he purchased that month for resale, both to consumers and to his sponsored distributors. This Bonus is basically a volumebased refund. The exact amount of the Bonus to be paid to a particular distributor is determined as follows. Each Amway product is assigned a 'Point Value' (roughly corresponding to its wholesale cost) and a 'retail value' (based on Amway's 'suggested retail price' for that product). At the end of each month, a distributor adds up separately the total Point Value and the total retail value (referred to as his 'Business Volume') for all the products he purchased that month from his sponsor (or, in the case of a Direct Distributor, from Amway). He then computes the actual amount of his Performance Bonus by referring to the following 'Performance Bonus Schedule,' published by Amway:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

[6] The Performance Bonuses are paid, in the first instance, by Amway to the Direct Distributors. Each Direct Distributor figures his Point Value and Business Volume for the monthboth of which will include all the purchases he made from Amway to supply his own retail customers and to filter wholesale supplies down through the levels beneath him in his field or sponsorshipand is paid by Amway whatever percentage of his Business Volume he is entitled to. Each Direct Distributor is then responsible for paying out Performance Bonuses, from the amount he received from Amway, to the secondlevel distributors he sponsored.

The Direct Distributor usually will pay out less than he received from Amway, because these secondlevel distributors will each have a lower Point Value than he has, and they will therefore receive a lower percentage of their respective Business Volume amounts. For example, if five secondlevel distributors had each purchased a large enough volume of products in a month to be entitled to a 15 percent Performance Bonus, their Direct Distributor in supplying their product needs as well as his own would have purchased enough products from Amway to be entitled to a 25 percent Performance Bonus. The Direct Distributor would therefore be paid 25 cents by Amway on each dollar of his Business Volume, but he would only pay out 15 cents to his secondlevel distributors on each dollar of their respective Business Volumes. So the Direct Distributor would net a 25 cents Bonus on each dollar of Business Volume representing retail sales made by him to consumers, and a 10 cents Bonus on each dollar of Business Volume representing wholesale sales made by him to his sponsored distributors.

Each secondlevel distributor is then responsible for paying out Performance Bonuses, from the amount the Direct Distributor pays to him, to the thirdlevel distributors he sponsored. The secondlevel distributors will make money on the Business Volume generated by their sponsored distributors in the same way the Direct Distributors made money on the Business Volume generated by the secondlevel distributors; and so on, down through the successive levels of distributors.

This distribution hierarchy is not static, however, as any regular distributor, regardless of how many levels he may be below his Direct Distributor, may himself become a Direct Distributor by reaching a specified, high volume of purchases three months in a row. [FN7] When a regular distributor [7] qualifies as a Direct Distributor, he breaks out of the field of sponsorship he was in up to that time and begins to make his wholesale purchases directly from Amway. When a new Direct Distributor breaks out of his old position like this, he takes with him all those distributors he sponsored, all the distributors those persons sponsored, etc. [FN8]

D. Amway Distributors Association

The ADA is a trade association of Amway distributors. [FN9] Every Amway distributor is entitled to join the ADA, but only Direct Distributors may qualify as voting members. The voting members of the ADA meet once a year for a oneday meeting at which they elect nine of the eleven directors on the ADA Board. The other two directors VanAndel and DeVos are appointed by Amway. The Board performs three principal functions: it acts as a representative of the distributor association; it acts as an advisory board to Amway; and it acts as an arbitration board in disputes between distributors, or between Amway and a distributor.

II. The Alleged Violations

Complaint counsel have charged respondents with violations which fall into three categories. First, it is alleged that the Amway Sales and Marketing Plan is inherently deceptive, as it holds out the promise of 'substantial income . . . as a result of . . . sales activities from . . . endless chain recruiting activities'; this is essentially a way of saying that the Amway Plan is an illegal pyramid scheme. Second, it is alleged that

various restrictions governing the sales, recruiting, and advertising activities of Amway distributors constitute unreasonable restraints of trade. Finally, respondents are charged with misrepresenting the profitability of a distributorship and the potential for recruiting and keeping new distributors. These charges will be taken up and discussed in order. [8]

A. Allegations That the Amway Plan Is a Pyramid Scheme

Complaint counsel argue that respondents have represented to prospective distributors that under the Amway Plan a distributor is likely to earn substantial income through a process of 'multiplication' or 'duplication', by recruiting others into the program who will themselves engage in recruiting, etc. Complaint counsel characterize the Amway Plan as 'a scheme to pyramid by geometric growth layers of distributors.' They state that 'the Plan, by itself, is false, misleading and deceptive', because it leads to distributor saturation that is, to such heavy concentration of Amway distributors that there is no one left to be recruited. The ALJ found that the record does not support these charges, and we agree.

The Commission had described the essential features of an illegal pyramid scheme:

Such schemes are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users. . . . As is apparent, the presence of this second element, recruitment with rewards unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay a valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed. *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1180 (1975) (emphasis added), *aff'd mem.*, sub nom. *Turner v. FTC* 580 F.2d 701 (D.C. Cir. 1978).

See also *In re GerRoMar*, 84 F.T.C. 95 (1974), *aff'd in part, rev'd in part sub nom. GerRoMar v. F.T.C.*, 518 F.2d 33 (2d Cir. 1975); *In re Holiday Magic, Inc.*, 84 F.T.C. 748 (1974). The Amway Plan does not contain the essential features described above, and therefore it is not a scheme which is inherently false, misleading, or deceptive.

The *Koscot*, *GerRoMar*, and *Holiday Magic* cases all involved 'marketing' plans which required a person seeking to become a distributor to pay a large sum of money, either as an entry fee (usually called a 'headhunting' fee) or for the purchase of a large amount of nonreturnable inventory (a practice known as 'inventory loading'). In exchange, the new distributor obtained the right to recruit others who would themselves have to pay a large sum of money some of which would go to the recruiting distributor to join the organization. [9]

By contrast, a person is not required to pay a headhunting fee or buy a large amount of inventory to become an Amway distributor. The only purchase a new distributor is required to make is a \$15.60 Sales Kit, which contains Amway literature and sales aids; no profit is made in the sale of this Kit, and the purchase price may be refunded if the distributor decides to leave the business. Initial Decision, p. 12,

Findings 3437. Thus a sponsoring distributor receives nothing from the mere act of sponsoring. It is only when the newly recruited distributor begins to make wholesale purchases from his sponsor and sales to consumers, that the sponsor begins to earn money from his recruit's efforts. And Amway has prevented inventory loading at this point with its 'buyback rule,' which states that a sponsoring distributor shall '[p]urchase back from any of his personally sponsored distributors leaving the business, upon his request, any unused, currently marketable products. . . .' By this rule, a sponsoring distributor is inhibited from pushing unrealistically large amounts of inventory onto his sponsored distributors in order to increase his Point Value and Business Volume, and thereby increase his Bonus.

Two other Amway rules serve to prevent inventory loading and encourage the sale of Amway products to consumers. The '70 percent rule' provides that '[e]very distributor must sell at wholesale and/or retail at least 70% of the total amount of products he bought during a given month in order to receive the Performance Bonus due on all products bought' This rule prevents the accumulation of inventory at any level. The '10 customer' rule states that '[i]n order to obtain the right to earn Performance Bonuses on the volume of products sold by him to his sponsored distributors during a given month, a sponsoring distributor must make not less than one sale at retail to each of ten different customers that month and produce proof of such sales to his sponsor and Direct Distributor.' This rule makes retail selling an essential part of being a distributor.

The ALJ found that the buyback rule, the 70 percent rule, and the ten customer rule are enforced, and that they serve to prevent inventory loading and encourage retailing. Initial Decision, p. 26, Findings 72-75, and p. 58, Findings 14547. Given these facts, the Amway plan is significantly different from the pyramid plans condemned in Koscot, GerRoMar, and Holiday Magic. Specifically, the Amway Plan is not a plan where participants purchase the right to earn profits by recruiting other participants, who themselves are interested in recruitment fees rather than the sale of products. [10]

B. Distributor Restrictions

1. Direct PriceRelated Restrictions

The ALJ found that Amway engaged in illegal resale price maintenance at both the wholesale and retail levels. Respondents argue before us that Amway merely suggests retail and wholesale prices. They argue there is no evidence in the record of current explicit agreements between Amway and its distributors, or of Amway enforcing its suggested prices through coercion of its distributors. What evidence of such conduct there is, they say, relates to acts and practices long since discontinued; and since there is no cognizable danger of a recurrence of these acts, they continue, an order prohibiting such acts is unwarranted. We reject respondent's arguments regarding Amway's wholesale and retail pricing practices, and affirm the ALJ's finding that Amway has engaged in illegal resale price maintenance.

As will be discussed below, evidence in the record conclusively demonstrates that Amway entered into explicit agreements with its distributors, in the past, regarding wholesale and retail pricing. And though

Amway has discontinued the use of explicit agreements with respect to retail pricing, it still has explicit agreements with its distributors regarding wholesale pricing. Such explicit agreements to maintain resale prices are, of course, illegal per se. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); cf. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951). After it discontinued the use of explicit agreements regarding retail pricing, Amway started out merely suggesting a retail price; but it then engaged in acts which secured adherence to its plan and thereby produced a 'combination' or implied agreement, which had a direct and substantial effect on retail prices. *United States v. Parke Davis Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *In re Holiday Magic, Inc.*, 84 F.T.C. 748 (1974). Finally, Amway required its distributors to agree to certain other rules regulating the distribution and advertising of its products, which serve to bolster and effectuate its retail price maintenance scheme.

As to the practices it has relied on in the retail pricing area since it discontinued the use of explicit agreements, Amway seeks to rely on the Colgate doctrine. In *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), the Supreme Court said: [11]

[T]he [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

This language was interpreted to mean, as respondents state, in their Appeal Brief, at 12, that 'a manufacturer [may] suggest resale prices for its products and independently . . . decline to do business with persons who resell the products at prices other than those suggested by the manufacturer.' But cases decided since Colgate make it clear that the quoted language from that case was intended to create an exceedingly narrow exception. For example, in *United States v. ParkeDavis*, supra, the Supreme Court said:

An unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. 362 U.S. at 43.

Eight years later, in *Albrecht v. Herald Co.*, supra, the Supreme Court raised the suspicions of many that Colgate was a dead letter when it stated that the Colgate exception might be exceeded if the sole evidence of a combination or conspiracy was that wholesalers and retailers, against whom a price maintenance plan was directed and enforced, had acquiesced in the plan. 390 U.S. at 150 n.6.

As will be developed in detail below, the evidence in this case establishes that Amway, in its efforts to secure adherence to its retail pricing plan, went far beyond the type of conduct that even a liberal reading of Colgate would allow. Specifically, Amway enlisted its distributors in a program designed to insure adherence to its stated pricing plan, and it structured certain of its Rules of Conduct so as to

inhibit any kind of retail price competition among its distributors. Viewed against the background of the explicit agreements which Amway entered into in earlier years, these actions amply support a finding of illegal resale price maintenance. [12]

a. Wholesale Prices

Amway has illegally sought, and still seeks, to maintain its wholesale pricing policy through explicit agreement with its distributors. In a chapter of the 1975 Maway Career Manual [FN10] titled 'The Amway Sales and Marketing Plan', Amway states: '[A distributor] cannot make money by simply selling products to his sponsored distributors because he sells them for the same price he paid for them: the distributor cost. [FN11]

Amway then converts this statement into a contractual provision by requiring a person seeking to become an Amway distributor to sign an application form which contains the following language:

I agree to comply with the Amway Sales and Marketing Plan as set forth in official Amway Literature and manuals and to observe the spirit as well as the letters of the Amway Code of Ethics and Rules of Conduct . . . I understand that my distributorship may be revoked if I fail to comply with the above provisions. [FN12]

[13] These explicit agreements are illegal per se. [FN13] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, supra.

In addition, the 'Distributor Order Form' (called an 'SA1'), which is published and circulated by Amway, instructs distributors to 'consult the SA 13' for prices; an SA13 is an Amway Wholesale Price List. Similarly, the 1975 Career Manual instructs distributors as follows: 'Place your own order with your sponsor using the SA1 Order Form. Use the Wholesale Price List to compute . . . Distributor Cost . . . for all items you have listed on the SA 1.' Nowhere on any of these documents does it state that Amway's listed wholesale prices are 'suggested' or 'optional'.

b. Retail Prices

In the retail pricing area, Amway originally used explicit agreements to prevent distributors from selling at less than Amway's specified retail price. In the 1963 Amway Sales Plan, the Rules of Conduct included the following rule: 'No distributor shall sell products sold under the Amway label for less than the specified retail price . . .'. Also included in this manual was a copy of the application a prospective distributor must fill out; each applicant was required to sign on the application underneath the following pledge; 'I agree to observe the spirit as well as the letter of the Code of Ethics and Rules of Conduct of Amway Distributors.' [14]

Respondents claim that the rule requiring adherence to Amway's retail prices was abolished in 1969. But as the ALJ pointed out, the record does not show that Amway has ever clearly told its distributors that

they are free to set their own prices on retail sales to consumers. [FN14] Initial Decision, p. 87 n.12. Rather, it has signaled in several ways that it continues to regard fixed resale prices as being in everyone's mutual interest. [FN15]

Evidence presented at the hearing indicates that Amway has continued its efforts to secure compliance with its retail pricing policy long after it deleted the inculpatory language from its Rules of Conduct; in so doing, it has stepped well outside the protective parameters of Colgate. Specifically, it has invited its distributors to participate in a general scheme to detect and deter price cutting. For example, in a 1971 speech to a meeting of Direct Distributors, [FN16] DeVos was asked several questions by persons in the audience about what could be done with price cutters. He stated: [15]

If you have a distributor who is selling Amway products at wholesale to a customer, our action has got to be first of all to get a complaint on it and find out who the distributor is that's doing it. Our next move has got to be to work on his removal, but this isn't an easy problem, because if this person wishes to sell to anybody on the street at whatever price he wants to, you're getting into some touchy areas on price-fixing. . . . Now you can try all the devious things you want to, to prevent this indiscriminate guy from price cutting . . . [Y]ou can go ahead and delay shipments to him, you can berate him, you can lecture him. . . . Say [to him], 'if you want to play price cutting game with your customers just let me know who they are because I make 25% and I'll go in and cut you right off, See, if its price cutting you want I'll show you how to play the game. Because I've got more money to play with than you have, haven't I" [FN17]

He went on in the same speech to caution the Direct Distributors to 'guard against anything that's dog eat dog.' He warned them that 'price fixing is one of the things that the federal people and the FTC watch like a hawk,' and advised them to talk to price cutters but not to write to them, because 'when the FTC grabs that letter they'll say you're . . . price fixing.' To say the least, the tactics recommended in this speech 'go beyond mere announcement of [a] policy and [a] simple refusal to deal,' and constitute 'other means which effect adherence to [specified] resale prices.' *United States v. ParkeDavis & Co.*, *supra*, 362 U.S. at 44.

Similarly, Mr. Halliday Amway's Executive Vice President and one of its three directors told a meeting of Direct Distributors that if they learned of a distributor cutting prices, they should go to talk to that person's Direct Distributor and seek to persuade the price cutter to [16] stop. He added: 'You're gonna have to work with him on an informal basis. As far as our being able to write him and saying 'You can't do it,' we cannot.' This sounds far more like the invitation to acquiesce which the Supreme Court found unacceptable in *ParkeDavis* than the unilateral refusal to deal which might have some remaining vitality under *Colgate*. [FN18]

Amway has taken additional steps, beyond counseling Direct Distributors on how to deal with price cutters, to insure that price competition among distributors is thwarted. The clearest example of Amway's additional efforts to support its general price maintenance scheme is the 'customer protection rule.' This rule, which was included as one of the Rules of Conduct up until 1972, provides that each time an Amway distributor makes a sale to a retail customer, he obtains an exclusive right to resell to that

customer for a thirty day period; if the distributor does make another sale to the customer within that period, he extends his exclusive right for another thirty days.

The ALJ found that the purpose and effect of the customer protection rule was to prevent price competition. Initial Decision, p. 89. This finding is supported by the obvious effect of the rule, and by Amway Vice President Halliday's statement that the purpose of the rule is 'to prevent cutthroat competition' between distributors. Initial Decision, p. 88.

Respondents point to the fact that this rule was deleted from the Rules of Conduct in 1972; they claim this is evidence of discontinuance. However, in a speech to a meeting of Direct Distributors in 1974, Halliday reminded his listeners that the Golden Rule is the first rule in the Amway Code of Ethics [FN19] and then stated: [17]

To what extent do you want to go in cutting out another Amway distributor? You have the absolute right to do it the law says . . . there is no protection of customer under those circumstances. But you see, sometimes there's a something above and beyond the law that you have to think about in terms of ethics.

Also, in the 'KnowHow Success Course', a training booklet used through 1974, sponsors are taught to test their recruits' knowledge of Amway policy with a quiz, which contains the following two questions (with their respective 'right' answers):

9. Before you complete a sale to a new customer, is it important to ask if that customer is presently being serviced by another Amway distributor? YES or NO.

YES

10. As long as one distributor maintains exclusive right to resell a customer, no other Amway Distributor may sponsor that customer. TRUE or FALSE.

TRUE

These statements, coming as they did on top of an explicit rule in the recent past, undercut any argument of discontinuance.

In addition, Amway has tailored some of its otherwise reasonable Rules of Conduct to detect and prevent retail price cutting among distributors. An example is the ten customer rule (discussed at page 9, supra), which provides that a distributor must produce proof of retail sales to at least ten customers each month before he can receive his Performance Bonus. This rule has the reasonable purpose and effect of tying compensation to the retail sale of products. But it also serves as a detection device with regard to price cutting, because the 'proof' a distributor must produce is a copy of the retail sales slip, which, by another rule, must 'state the price charged'. This aspect of the ten customer rule also has an

obvious in terrorem effect on distributors who might be inclined to sell at less than Amway's 'suggested' retail price. [18]

Two other rules currently included in the Rules of Conduct have had the effect of 'shoring up' Amway's retail price fixing scheme. The buyback rule (discussed at page 9, *supra*) provides that a sponsoring distributor must buy back any products he sold to a sponsored distributor who has decided to go out of business. A 1973 Amway Legal Bulletin explained that one of the reasons for this rule is to insure that a distributor who is leaving the business does not 'attempt to sell the products at a discount.' See Initial Decision, pp. 4446, Findings 12023. The 'fundraising rule' provides that a distributor may sell certain Amway products in fundraising drives held by church, service, civic or charitable organizations 'provided such sales are made in accordance with the Amway FundRaising Plan.' Under this plan (as it is described in the 1975 Career Manual), the selling organization only takes orders for the products; the orders are then turned over to an Amway distributor, who delivers the products, collects the purchase price, and pays an agreed-upon profit to the selling organization. Amway argues that the reason an Amway distributor is sent to deliver the product and pick up the purchase price is to allow the distributor to initiate contact with the purchaser. This argument might be convincing were it not for the history of this rule. The 1968 Amway Career Manual which was distributed at a time when the charitable organization took sole responsibility for delivering the product and collecting the purchase price gave the following advice to distributors supplying a fundraising organization: 'See that standard retail prices are observed. Do not permit cut-rate selling. Cut-rate selling during a fundraising campaign could hurt your own regular selling of these items.'

We do not say that the ten customer rule, the buyback rule, and the fund raising rule are illegal in their entirety in this case. We do say that certain aspects of these rules, discussed above, as implemented herewith the plain purpose and effect of assisting in a program of illegal resale price maintenance are illegal under Section 5 in that they contribute to a resale price maintenance program, cf. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 69293 (1978), and also that they are evidence of a purpose on the part of Amway to maintain an overall price maintenance program. [FN20] Initial Decision, p. 37, Finding 112. [19]

In a further effort to deter price competition, Amway has sought to prevent its distributors from advertising prices for Amway products. [FN21] Initial Decision, pp. 4345, Findings 117, 119, 121. It has done this by converting a series of restrictive advertising rules contained in its Rules of Conduct into contractual provisions, [FN22] and by terminating, or threatening to terminate, distributors who advertise Amway products at discount prices. [FN23] Besides contributing to Amway's overall scheme to control resale prices, this elimination of price advertising is a *per se* violation of Section 5. See, *United States v. Gasoline Retailers Assn., Inc.*, 285 F.2d 688, 691 (7th Cir. 1961); *United States v. The House of Seagram*, 1965 Trade Cases (CCH) P71,517, p. 81,275 (S.D. Fla. 1965); cf. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 69293 (1978). Moreover, this restriction on price advertising is evidence, along with the other price-related rules and practices discussed already, of Amway's intent to eliminate price competition in the retail sale of Amway products.

Finally, there is an additional, slightly different reason why Amway's retail pricing policy is illegal. This is not a situation, like Colgate, where a manufacturer is imposing its retail pricing policy on a corps of resistant, or even neutral, wholesalers and retailers. Rather, there is evidence that the ADA Board of Directors which is the representative of Amway's distributors agrees in advance with Amway on what the retail price of particular products is going to be. See Initial Decision, p. 27, Finding 79. In its NonProfit Corporation Annual Report filed with the state of Michigan in 1975, the ADA stated that the 'Purpose of the Corporation' was: 'To act as a trade association for the purpose of setting policies with the company from whom purchases are made and the pricing of all products sold direct to the consumer' (emphasis added). Respondents have attempted to characterize this language as 'inaccurate boilerplate'. We find this characterization unpersuasive. [20]

c. Respondents' Claims That Price Competition Does Exist

Respondents argue that distributors do, in fact, demonstrate considerable independence and flexibility in wholesale and retail pricing. And several distributors (mostly Direct Distributors) who testified at the hearings were asked whether they were required by Amway to resell Amway products at a certain price, and answered 'No'. In addition, some of these distributors testified that they occasionally do sell for less than 'suggested' retail or wholesale. However, as the ALJ observed, it is not surprising that out of group of 360,000 distributors, a few could be found who do 'discount'. Initial Decision, p. 88 n.13. The ALJ still found that the record showed that the vast majority of Amway distributors do not cut the retail price of Amway products. Initial Decision, p. 47, Finding 127. We agree with this finding.

Respondents also claim that substantial retail discounting is evidenced by the retail sales tax refunds Amway pays out to distributors. Amway collects retail sales tax, based on its suggested retail prices, from the Direct Distributors at the time it sells products to them wholesale; this is done at the request of state taxing authorities. See Initial Decision, p. 46, Finding 124. This sales tax is passed along in each wholesale sale of products, and is ultimately recouped at the time a product is sold at retail. Respondents point to the fact that a distributor may apply for a refund of some or all of this amount if he sells a product at less than Amway's suggested retail price. And in fact, respondents state, a large amount of money is refunded each month from Amway's sales tax collections. But complaint counsel point out that there are many reasons why a distributor could be entitled to a refund of some or all of the retail sales tax he paid, including: sales across state lines with different tax structures, sales to tax exempt organizations, and, most importantly, distributor home consumption. [FN24] Indeed, this 'requestforrefund' policy could itself be ancillary to Amway's price maintenance plan if it were used as a means of learning which distributors have made sales at less than 'suggested' retail. [21]

We conclude on the record that Amway has illegally sought to enforce its resale price policies, and, judging by market effects, has enforced them successfully throughout most of its distributor network. [FN25]

2. Other Challenged Distribution Restrictions

Complaint counsel also allege that two other Amway rules and restrictions the 'crossgroup selling rule' and the 'retail store rule' violate Section 5 as unreasonable restraints of trade. The prohibition on cross-group selling, sanctified in Amway's Rules of Conduct, provides that a distributor must buy all his products from his sponsor; by implication, a distributor may not sell Amway products to a person sponsored by someone else. The retail store rule also one of the Rules of Conduct provides that no distributor shall permit Amway products to be sold or displayed in 'retail stores' or 'other types of retail establishments, which are not technically stores, such as barber shops, beauty shops, etc.'

Complaint counsel have characterized these restrictions as per se violations of Section 5, either as part of a plan to maintain prices, or as market division schemes horizontally imposed. We reject both these contentions. As to the price fixing charge, we have already found that Amway has entered into a series of express agreements and/or implied combinations with its distributors fixing wholesale and retail prices. There is no evidence on this record that the retail store rule or the crossgroup selling rule were adopted to implement those vertical price fixing agreements, or that they contributed to that effect. If Amway's direct efforts at resale price maintenance are eliminated as they should be through the order imposed heretere is no reason to believe resale price maintenance would persist as a result of these two rules. [22]

If the restraints embodied in the crossgroup selling and retail store rules were horizontally agreed to or induced, rather than vertically imposed by Amway on its distributors, the agreements would probably be illegal per se as horizontal divisions of market. See *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.*, 175 U.S. 211 (1899). Complaint Counsel claim that the ADA was formed before Amway, and that therefore the ADA must have been the source of all distributor restrictions. We do not find this approach conclusive on this question. Furthermore, the ALJ found that VanAndel and DeVos formed the ADA, at a time when they were distributing another manufacturer's products through a direct selling organization, in anticipation of starting their own manufacturing company. Initial Decision, pp. 810, Findings 1725. Complaint counsel established that there is a constant dialogue between Amway and the ADA Board regarding the nature and consequences of the Amway Plan. But it does not follow that Amway is obligated to adopt, or does adopt, the recommendations or requests of the ADA Board when Amway is otherwise inclined to take different action or to take no action at all. It is likely that the dialogue exists primarily for the purpose of making the distributors especially the Direct Distributors, who are linchpins in the Amway Plan feel that they are an important part of the Amway organization and that their views and opinions are highly regarded. See Initial Decision, pp. 8182. Complaint counsel also point to the fact that VanAndel and DeVos, the two principal owners of Amway, are themselves the joint heads of a Direct Distributor organization. However, other than stating in their Appeal Brief, at 43, that the two men have 'one of the largest Amway Direct Distributorships in the country,' complaint counsel have provided no information or evidence on this point. All in all, we feel there is not sufficient evidence to support a finding that the Amway Rules of Conduct are not 'essentially' vertical. Therefore they will be analyzed individually under the rule of reason. Cf. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36(1977).

The crossgroup selling rule, which applies only to distributors' wholesaling functions, was found by the ALJ to be 'the basis for the Amway Sales and Marketing Plan':

It provides the structure by which products, information and compensation flow from Amway to the Direct Distributors and down to the distributors engaged in making the retail sale. It provides lines of communication and responsibility insuring that distributors are properly trained and [23] motivated and that consumers receive services provided under the Amway system of distribution. Used in conjunction with the performance bonus system, the crossgroup selling rule gives sponsoring distributors an incentive to recruit, train, motivate and supply other distributors in order to gain a reward based on the sponsored distributors' sales volume. If sponsored distributors could buy Amway products from someone other than their sponsor, that incentive would not exist. Initial Decision, p. 100 (citations omitted).

We endorse this finding and conclude that the vertically imposed crossgroup selling rule is reasonably ancillary to compensation, efficient distribution, and training. Given the large number of existing and potential distributors of Amway products, Amway's small size compared to its major competitors, and the direct relationship between the limitation on crossgroup selling and the achievement of efficiencies within Amway's unique distribution system, we agree with the ALJ that the restriction is reasonable. *Continental T.V. Inc. v. GTE Sylvania*, supra.

The ALJ found that the retail store rule preserves Amway's directselling operation and consumer demand for Amway products, and provides an incentive to distributors to furnish special services to consumers:

Marketing experts gave credible testimony in this proceeding that if Amway products were sold in retail stores, distributors would lose interest in calling on consumers' homes, demonstrating and explaining products to create a demand which could be satisfied perhaps at a lower price at a retail store. Without a demand for the products, retail stores would soon lose interest in Amway products. Amway would then be faced with the necessity of creating demand in the traditional way of advertising expenditures and otherwise doing battle in the retail grocery stores, in a hostile oligopolistic marketplace. . . . The retail store rule gives Amway distributors an incentive to provide services to consumers and to create a consumer demand which would dissipate if Amway products were sold in retail stores. Amway distributors demonstrate and explain Amway products [24] and deliver to the consumer's home. These services are typically unavailable sold in retail stores, demonstration and products are more concentrated than products sold in retail stores. Because some Amway explanation are essential to consumer demand. Initial Decision, pp. 9899 (citations omitted).

We endorse this finding as well. Since neither Amway nor any of its distributors can sell through retail outlets, this is not an instance where existing competition between different distributors or classes of distributors is being curtailed. Given Amway's small size (compared to its competitors), the plausible business reasons for the restrictions (relating mainly to Amway's ability to recruit distributors and induce them to provide special services), the absence of evidence that retail stores are excluded

principally because of a belief that they would be price cutters, and the armies of distributors seeking to sell Amway products to all who wish to purchase them we agree that complaint counsel has failed to show that this restriction is unreasonable.

3. Advertising Restrictions

Amway exercises a strong control over advertising by its distributors. It has placed especially severe restrictions on product advertising. One of the Rules of Conduct states: 'No Amway distributor may produce or procure, from any source other than Amway, any literature relating to the Amway Sales and Marketing Plan or any Amway product.' Thus the first rule on product advertising is that Amway has total control over what is actually said. Amway insists this restriction is necessary to protect its 125 registered trademarks and servicemarks, and to insure that its products are intelligently and consistently described.

Another rule provides that only Direct Distributors may advertise on radio, television, or in newspapers, and then only if they use ad mats and scripts obtained from Amway. Thus a distributor who is not a Direct Distributor may not advertise Amway products by any means other than hand or mail delivery of Amway sales aids and promotional materials. Amway claims it is reasonable to deny regular distributors the right to advertise products on radio, television, and in newspapers, because most distributors are inexperienced in business and tend to overestimate the effectiveness of advertising; if they were turned loose to advertise as much [25] and by whatever means they chose, many of them would unjustifiably increase their expenses to the point where they were driven from the market. In addition, respondents say, there is rapid turnover among distributors, and it would have a negative impact on Amway's image if consumers responded to ads placed by distributors who had since gone out of business.

The ALJ found these restrictions reasonable. Initial Decision, pp. 10405. We concur in this finding, except that we find one aspect of Amway's restrictions on product advertising unnecessarily restrictive and ancillary to Amway's price maintenance scheme. Specifically, none of the Amway-designed sales aids, promotional literature, ad mats, or ad scripts provides a place for the advertising distributor to list his own retail price for the products advertised. And since no distributor may advertise Amway products other than by using the advertising materials designed and distributed by Amway, it follows that price advertising is effectively prohibited. To protect its servicemarks and trademarks, Amway may in reasonable ways that are not anticompetitive prescribe the means by which distributors advertise products and the words they use; but Amway may not foreclose distributors from advertising product prices. *United States v. Gasoline Retailers Asso., Inc.*, 285 F.2d 688, 691, (7th Cir. 1961); *United States v. The House of Seagram*, 1965 Trade Cases (CCH) P71,517, p. 81,275 (S.D. Fla. 1965); cf. *National Society of Professional Engineers v. United States*, 435 U.S. 679(1978).

Amway also restricts the use by distributors of the Amway name and logo on the exteriors of wholesale offices and automobiles, on checks, and in telephone directories. It restricts outdoor advertising on billboards or signs, and allows distributors to use the Amway name in classified recruiting advertisements only if the ads follow word-for-word one of seventeen formats provided by Amway.

Finally, all Amway printed material is copyrighted and may not be reproduced by distributors without permission. The ALJ found these reasonable. See Initial Decision, pp. 3235, Findings 94108, and pp. 104-05. We question whether some of these restrictions are reasonably related to Amway's legitimate business needs; but we agree that complaint counsel have offered no plausible evidence from which we might conclude that the purpose or effect of these various restrictions is anticompetitive.[26]

C. Misrepresentations

Respondents were charged in the complaint with making false, misleading, and deceptive statements concerning the profitability of a distributorship. Specifically, complaint counsel claim respondents have affirmatively misrepresented distributors' earnings and recruiting potential, and have omitted material facts about business expenses and turnover among recruited distributors. Together, it is charged, these misrepresentations and omissions have the capacity to deceive distributors and potential distributors.

The different kinds of alleged misrepresentations involved are discussed in detail in the Initial Decision at pages 1723 and 4857. Most come from the 1975 edition of the Amway Career Manual, from the section advising a wouldbe sponsor on how to go about recruiting a new distributor. The method employed consists of explaining the Amway plan and appealing to the financial goals of the recruit. The ALJ found that, viewed in context, none of the statements challenged constitutes an illegal misrepresentation. Initial Decision, pp. 11018. With the exception of those statements which make unrealistic earnings or sales claims, we affirm this finding.

The 'nonearnings' claims made by Amway which generally consist of vague references to the achievement of one's dreams, having everything one always wanted, etc. are phrased in terms of 'opportunity' or 'possibility' or 'chance'; and they are surrounded by warnings that hard work is required. We believe that these claims are primarily inspirational and motivational; to the extent that they dangle the likelihood of financial security and material success before the potential distributor, they constitute vague 'puffs' which few people, if any, would take literally; and in any event, they are accompanied by appropriate qualifiers.

The same cannot be said, though, for certain statements and claims which contain references to specific dollar amounts which distributors are likely to earn. For example, in the 1975 Career Manual, Amway advises recruiting distributors to announce to persons they are trying to recruit that Amway offers an opportunity to 'develop an income of as much as \$1,000 per month.' Amway also advises recruiting distributors to ask questions like the following:

How much money per month do you need for that new car? \$100 a month or more?

What kind of home do you want a threebedroom ranch with a price tag of \$35,000 \$40,000? [27]

How much will it take to send the youngsters through college \$2,500 to \$3,000 a year for each youngster? If you could earn an extra \$250 a month, you would have an additional \$3,000 a year. This might be sufficient to send one youngster through one year of college.

How much would you like as a continuing income \$100 a month?

But not all of Amway's recommended recruiting claims are so generalized. At one point in the Career Manual it states: 'If you make 'two sales a day . . . the Amway way' on each of 20 days per month, your retail sales can easily amount to \$200.00 per month even though you work less than an hour per day.' The Manual uses this \$200 figure again when it instructs a recruiting distributor on how to 'draw the circles' a device used to explain the way a distributor earns a Performance Bonus off the purchases made from him by the distributors he has sponsored. He is advised to state: 'Let's say, for example, that you sponsor six distributors and that each one of these distributors starts his own retail business selling \$200 a month.' He then draws a big circle, representing the sponsor, and six smaller circles, each of which represents a sponsored distributor. The figure \$200 is written into each of these six smaller circles to indicate that each sponsored distributor has a Business Volume of \$200 per month. The recruiting distributor then does a series of calculations showing the Performance Bonus the sponsor will earn as a result of having six sponsored distributors with individual monthly Business Volumes of \$200. In the example of this diagram included in the Career Manual, the following language is placed above the circles: 'For discussion purposes, let's round out the numbers to \$200.00. I'm sure you realize that some will do much less and some more. But, if they make two sales a day, they should sell at least \$200 (at BV) per month.' But in spite of this prominent disclaimer, the impression is created that \$200 is a typical or average monthly Business Volume. [FN26] [28]

In fact, the record shows that in 1969 the average monthly Business Volume of Amway distributors, was about \$20, and in 1973 it was about \$33. [FN27] Initial Decision, pp. 5556, Finding 137. And while some Direct Distributors do have annual Business Volumes in the thousands of dollars, they are less than 1 percent of Amway's 360,000 distributors. Initial Decision, p. 50, Finding 133. Thus the claims of incomes of \$100 to \$1,000 per month and the use of the \$200 figure in such a way as to imply that it is a typical monthly retail sales figure, constitute misstatements of the amount of money a distributor is likely to earn. The \$200 Business Volume figure overstates the true average Business Volume by more than 500 percent. [FN28] And the often unqualified claims regarding actual income are even more removed from reality, at least as reality exists for the vast majority of Amway distributors.

The Commission previously addressed issues concerning unrepresentative earnings claims in *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *aff'd in part and rev'd. in part*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974). In *National Dynamics*, respondents were manufacturers of a battery additive which they marketed through 12,000 distributors. In attempting to recruit new distributors, respondents made generalized earnings claims like, 'You can earn \$12,000 a year. . . .', and 'What do you want to make of your life? . . . An income of \$15,000 to \$50,000 per year?' They also quoted the following earnings for named individuals: '\$1,554 one week', '\$148 one day', '\$2,316.96 one week', '\$1,028 one month'. The Commission opinion noted that of the 12,000 [29] distributors selling for

respondents in 1969, not more than sixty, or onehalf of 1 percent of the total number of distributors, made profits in excess of \$10,000. Id. at 563. Based on this fact, the Commission found the generalized earnings claims to be misleading and deceptive because they 'far exceed[ed] the earnings normally received by dealers.' Id. at 565. The specific earnings claims for named individuals were also found to be misleading and deceptive because they had 'the capacity and tendency to lead members of the public to believe that a substantial number of distributors will regularly earn such amounts.' Id. at 564.

Amway's specific earnings and sales claims are similar to the claims in National Dynamics: [FN29] they far exceed the amounts normally received by distributors, and, in their cumulative impact, they have the capacity and tendency to lead potential distributors to believe that a substantial number of distributors really do receive such amounts. Therefore, they constitute illegal misrepresentations under Section 5. [FN30]

Finally, the ALJ found, contrary to complaint counsel's charges, that Amway has not misrepresented distributors' recruiting potential, and that it has not failed to disclose that distributors incur expenses in operating their distributorship, or that there has been a high rate of turnover among newly recruited distributors. See Initial Decision, p. 57, Findings 14041. We affirm this finding. [30]

III. Procedural Issues

Respondents claim that numerous procedural errors and irregularities occurred, to their prejudice, during this proceeding and the investigation which preceded it. First, they claim that no cease and desist order can be entered against them because part or all of the evidence supporting the complaint may have been acquired by unlawful means. Respondents moved to dismiss the complaint on the same grounds in April 1975. The Commission denied that motion but stated that its ruling was without prejudice to any attempts by respondents to move the ALJ to suppress evidence they claim was improperly obtained. The ALJ thereafter took steps to monitor the source of witnesses and exhibits complaint counsel proposed to call or introduce at the hearings. We find, upon review, that the steps taken by the ALJ were adequate and effective.

Next, respondents claim they were prejudiced by the ALJ's denial of their request for discovery from the files in ColgatePalmolive, et al., Commission File No. 7410048 (relating to a nonpublic FTC investigation). Respondents argue that the discovery sought from that file relates to entry barriers and concentration in the soap and detergent industry, and that it could provide proof of the reasonableness of the vertical restrictions in the Amway Plan. We reject respondents' argument that they were entitled to discovery from this file and affirm the ALJ's order denying discovery. [FN31]

Respondents further state that a series of procedural errors and irregularities are set forth in a motion to dismiss read into the record on the first day of trial. Though that motion was denied by the ALJ in a June 15, 1978 Order, respondents state that they continue to assert the positions set forth in the motion. Without describing the alleged errors and irregularities, they add: 'The bases for those positions

are set forth in respondents' motion and do not require repetition here.' We have considered the motion set forth in the transcript, and we affirm the ALJ's decision to deny. [31]

Finally, respondents assert that the transcript of testimony given at the hearings is full of errors, and that the record must either be reopened to allow correction of these errors or the complaint must be dismissed. Respondents filed a veritable blizzard of papers on this matter with the ALJ, who issued more than ten Orders in response. A brief description of the events leading to respondents' objection is appropriate.

Soon after the hearings ended, respondents objected to about 2000 pages of the transcript, claiming they contained errors. Complaint counsel objected to additional pages, and the parties filed with the ALJ a stipulation of corrections involving over 2000 pages of the transcript. In Orders issued on December 6 and December 30, 1977, and January 6, 1978, the ALJ noted that almost all these stipulated changes involved typographical or spelling errors, and ordered the parties to specify the errors affecting substance. This was to insure compliance with Section 3.44(b) of the FTC Rules of Practice, which says that '[c]orrections of the official transcript may be made only when they involve errors affecting substance' After considerable maneuvering by the parties with respect to what constitutes an error of substance, the ALJ issued an order on January 24, 1978 stating:

Respondents submit that there should be changes made on almost 2000 pages of the transcript in this case Respondents argue that errors in spelling of some of the key words in the transcript must be corrected for the purpose of accuracy in their computer retrieval system. This is a convincing argument. I therefore hold that the pages of the transcript enclosed with this order shall be corrected by the official reporter pursuant to Rule 3.44(b).

By letter of March 13, 1978, the official reporter responded, stating that all the requested changes had been made and characterizing them as 'errors in spelling' and 'changes in grammar or syntax, post-hearing selections of synonyms deemed more appropriate, expressions of parentheticals in the form of commas, and in some instances complete changes in the sentence structure which reflects the desire of witnesses, after the fact, to communicate their thoughts in clearer fashion.' [32]

Still not satisfied, respondents moved, during an oral argument on the merits of the case, to dismiss the complaint on the grounds that not all the ordered corrections had been accomplished. [FN32] In reply, complaint counsel informed the ALJ that they had learned from the official reporter that no one had arranged to have the transcript put into computer readable form such that it could be utilized in a computerized information retrieval service. This led the ALJ to remark, in his June 15, 1978 Order denying the motion to dismiss, that the 2000 pages previously ordered corrected 'need not, therefore, have been retyped pursuant to Rule 3.44(b).' The ALJ continued: '[R]espondents have not been able to point to one proposed finding which might be affected by any of the errors in the transcript they allege.' The ALJ noted that the parties were in agreement as to every correction ordered, and therefore instructed complaint counsel to have the stipulation of changes which consists of hand corrected copies of the transcript pages in question inserted in the record. Complaint counsel did so, and the handmarked

pages are included in the record as 'ALJ Exhibit A'. We interpret the ALJ's statement above that none of the remaining 'errors' affects any proposed finding to mean that none of those errors affect substance. Therefore, no further corrections of the record need be made (if, indeed, any ever did need to be made).

IV. Conclusions

We conclude that respondents have agreed and combined with each other and/or with Amway distributors to fix the resale prices of Amway products, at both the wholesale and retail levels, in violation of Section 5 of the Federal Trade Commission Act. Respondents have also made earnings and sales claims which have the capacity to deceive the potential distributors to whom they have been made; this too, is in violation of Section 5. We have decided that it is appropriate and necessary to order respondents to cease and desist from these violations, and from certain offenses reasonably related to them.

The Commission has also concluded that complaint counsel have failed to establish that respondents have engaged in the other alleged violations of Section 5. Therefore those charges against respondents are dismissed.

FINAL ORDER

This matter having been heard by the Commission upon the crossappeals of respondents and complaint 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 determined to affirm in part and reverse in part the Initial Decision:

It is ordered, That the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with the accompanying Opinion.

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 to Cease and Desist be, and it hereby is entered: [2]

I

It is ordered, That respondents Amway Corporation and Amway Distributors Association, and their officers, agents, employees, representatives, members, successors and assigns, and respondents Jay VanAndel and Richard M. DeVos, individually, and their agents, employees, and representatives, directly or indirectly through any corporate or other device, in connection with the offering for sale, sale, or distribution of cleaning or personal care products, or any other products or goods in commerce, as 'commerce' is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Fixing, establishing, or maintaining, or attempting to fix, establish, or maintain, the price at which any distributor sells or offers for sale any product at wholesale or retail.

2. Stating that distributors are required to, or do, charge a particular price in wholesale or retail sales of any product.

3. Entering into any contract, agreement, understanding, or arrangement with any distributor which fixes, establishes, or maintains the price at which that distributor sells or offers for sale any product as wholesale or retail.

4. Taking any action, or counseling any distributor to take any action, designed to detect the price at which any distributor sells or offers for sale any product at wholesale or retail, including but not limited to: requiring distributors, in proving that they made retail sales to ten different persons in a month, to disclose the price at which they made such sales; directing or requesting any distributor to report to his Direct Distributor, to Amway, or to any other person or entity, knowledge he or she has of another distributor selling products at a price different from Amway's suggested wholesale or retail price; or allowing the price information submitted by any distributor seeking a full or partial refund of amounts paid by him or her for state retail sales tax, to be seen by any person other than those responsible for paying out such refunds, or to be used for any purpose other than paying out such refunds.

Provided, however, it shall not be a violation of this order for Amway to receive information about the price a distributor charged in a particular retail sale if such information is received by Amway solely as a result of such [3] sale being one of the following types: (1) a sale wherein the purchaser used a bank credit card in making the purchase; (2) a sale of catalog merchandise wherein the purchaser paid by personal check payable to Amway; or (3) a sale to a commercial account wherein Amway financed the purchase.

5. Taking any action, or counseling any distributor to take any action, designed to deter distributors from selling or offering for sale products at a price different from Amway's suggested wholesale or retail prices, including but not limited to: addressing communications regarding price to any individual distributor, rather than to distributors as a class; delaying, or threatening to delay, the shipment of products to any distributor; withholding, or threatening to withhold, any distributor's Performance Bonus, if such distributor is otherwise entitled to such Bonus; underselling, or threatening to undersell, any distributor in retaliation for such distributor having sold or offered to sell products at a price different from Amway's suggested wholesale or retail prices.

6. Preventing or discouraging, or attempting to prevent or discourage, any distributor from selling or offering for sale products at retail to any person or entity, on the grounds that such person or entity is the customer of another distributor.

7. Requiring a distributor who is terminating his relationship with Amway to sell his remaining products back to Amway or to another distributor; provided, however, it shall not be a violation of this order to

give a distributor who is terminating his relationship with Amway the opportunity to sell his remaining products back to Amway or another distributor.

8. Preventing, or attempting to prevent, a fund raising organization from selling or offering for sale products at a price different from Amway's suggested retail price.

9. Preventing, or attempting to prevent, distributors from advertising the prices at which they are selling or offering for sale products, including but not limited to, failing to include a place for distributors to disclose price in any existing or future sales aids, promotional literature, advertising mats, advertising scripts, etc., used by distributors in advertising Amway products. [4]

10. Publishing or distributing, directly or indirectly, any wholesale or retail price list, order form, promotional material, or any other document which lists resale prices for products without stating clearly and conspicuously thereon: 'The prices stated here are suggested prices only. Distributors are not obligated to charge these prices. Each distributor is entitled to determine independently the prices at which products may be sold to other distributors or to consumers.'

II

It is further ordered, That the aforesaid respondents and their officers, agents, employees, representatives, members, successors, and assigns, directly or indirectly, in connection with inducing or seeking to induce the participation of any person in any distribution, sales, or marketing plan, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting in any manner the past, present, or future profits, earnings, or sales from such participation.

2. Representing, by implication, by use of hypothetical examples, or otherwise, that distributors earn or achieve from such participation any stated amount of profits, earnings, or sales in excess of the average profits, earnings, or sales of all distributors in any recent year respondents may select, unless in conjunction therewith such average profits, earnings, or sales is clearly and conspicuously disclosed, or the percent of all distributors who actually achieved such stated profits, earnings, or sales in such year is clearly and conspicuously disclosed.

III

It is further ordered, That respondent Amway Corporation or its officers, agents, representatives, employees, successors or assigns shall, within thirty (30) days from the effective date of this order, deliver a copy of this order to all persons who are currently Amway distributors.

IV

It is further ordered, That respondents and their successors and assigns notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporations or in the Amway Sales and Marketing Plan which may affect compliance obligations arising out of the order. [5]

V

It is further ordered, That the respondents herein shall within sixty (60) days from the effective date 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 this order.

FN1 Many of respondents' allegations of procedural misconduct were repeated by respondents' counsel on the first day of the trial and are the subject of an additional order, recently entered herein, denying respondents' motion to dismiss.

FN2 Another reason for the delay in closing the record involved the condition of the record. Numerous exhibits were lost or misplaced. At least sixty exhibits had to be replaced with substitutes. The transcript of testimony had numerous errors. Almost all of the changes were stipulated by the parties. The reporter is submitting corrected pages of the transcript during the time that this decision is being prepared, too late for reference herein. Eleven orders were entered concerning this subject, e.g., orders dated March 16, 1978, and June 15, 1978 (denying motion to dismiss of June 6, 1978).

FN3 See also Holdridge, Tr. 78182 and CX 833 for a similar episode.

FN4 'PV' meant purchase volume. (CX 61T) (See CX 615C.) Since 1975 this has been called 'BV' or 'business volume.' (Finding 52) (See CX 605F) The name was changed to avoid confusion with 'point value' added in that year. (Finding 51)

FN5 Synthetic detergents have largely replaced soap for laundry and dishwashing purposes in the last 30 years, being chemically different and much more effective. (Diassi, Tr. 557374) 'Biodegradable' means that the ingredients of the detergent are broken down by natural biological action, helping to eliminate foaming problems in lakes and streams. (Halliday, Tr. 6095, 6154)

FN6 to some extent the effect of these practices on consumers has been mitigated by the growing concentration and power of food chains and their tendency of using soap and detergents as loss leaders. (Diassi, Tr. 5534; Finding 176)

FN7 In typical oligopolistic conduct, the major soap companies were slow to react to public demand for nonphosphate detergents in the early 1970's, allowing successful entry by at least one manufacturer selling through food stores. (Finding 178)

FN8 Amway's turnover rate among distributors is better than most direct selling companies. (Findings 148, 162163)

FN9 There is some evidence that one of the distributors suggested to Mr. Van Andel and Mr. DeVos that the product 'Frisk' be distributed. (Halliday, Tr. 6541) The preponderance of the evidence, however, supports the finding that the genesis of Amway was vertically imposed. Cf. Sandura Company v. FTC, 339 F.2d 847, 85758 (6th Cir. 1964).

FN10 Stopping a practice after a visit by government investigators does not show permanent abandonment. United States v. Parke, Davis & Co., 362 U.S. 29, 4748 (1960).#e have been continued, [87] and an order may issue to prevent it, even upon a showing that it was been discontinued or abandoned. [FN11] Here, Amway had an explicit policy of retail price fixing in the middle 1960's, and, until 1972, a written policy of preventing distributors from competing with each other. This evidence raised a presumption that these policies have continued or could be resumed.

Count I Price Fixing

The Rules of Conduct of the Amway Sales Plan published in 1963 required that distributors sell Amway products to consumers at the specified resale price. (Finding 109) It also provided that no unauthorized discount be given on sales to other distributors, and fixed the resale charge for freight. (Finding 109 111) The record does not show when Amway stopped using this sales manual or whether distributors were ever clearly notified that it does not express Amway's policy. [FN12] Such resale price maintenance is per se unlawful. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). [88]

The Career Manual for Amway distributors published in 1968 specified that distributors should not cut the retail price in fundraising drives. The fund raising drive policy was changed in 1969, upon the recommendation of the ADA, so that the retail sales now are made by the distributor rather than by the fundraising organization. (Finding 112) By implication at least, this change was made with the intent to control resale prices. While the policy requiring the distributor rather than the fundraising organization to make the retail sales might be reasonable in itself, when coupled with unlawful intent it became an unreasonable restraint of trade. United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948).

While much of the evidence of price fixing agreements is relatively old, it raises a presumption of continuity which respondents have not rebutted. [FN13] After express contracts were no longer used, the other vertical restraints on advertising, selection of customers and source of supply controlled price competition. The customer protection rule alone stopped all competition for a retail customer for 30 days after a distributor made a sale to that customer. (Finding 90) The purpose of

FN11 The Court in P.F. Collier specifically declined to follow Bearings, Inc., 64 F.T.C. 373 (1964), relied on by respondents. 427 F.2d at 275 n. 13.

FN12 On retail sales, Amway's price lists obliquely refer to 'suggested retail for sales tax' or 'retail sales tax computation base.' (Finding 113) The record does not show that Amway has ever clearly told its distributors that they are free to set their own prices on sales to other distributors or to consumers.

FN13 *Holiday Magic, Inc.*, 84 F.T.C. 748, 1050 (1974). Amway was able to produce distributors who do use prices competitively to obtain wholesale and retail sales. (RPF 223229) Considering the number of distributors who sell Amway products, this is not surprising. Furthermore, evidence of price competition conflicts with statements of Amway officers who say that very little price cutting occurs. (Finding 127)

FN14 An Amway market study in 1970 warned that lifting the customer protection rule could lead to 'excessive price cutting' by distributors. (CX 522Z215)

FN15 In 1968, an Amway employee reported that retail prices on Amway products 'are in most instances appreciably higher than comparable items in conventional retail outlets.' (CX 558B) Customer complaints about high product prices (CX 700J) may have changed Amway's pricing policy. In 1970, retail prices set for most Amway catalog products were set below the prices for comparable items sold in department stores but above prices charged by discount stores. (CX 522Z 176 to 177)

FN16 Mr. DeVos' advice to Direct Distributors on how to handle price cutting distributors exhibits a lack of formality inconsistent with the sensitive nature of the subject. He incoherently mixes warnings of price fixings with advice to terminate the distributor or to badger, threaten and otherwise 'do a sales job on the guy' because 'you gotta guard against anything that's dog eat dog.' (CX 1037E to I)

FN17 The customer protection rule has been considered a part of the unlawful price fixing combination, *supra*, pp. 8889.

FN18 In those cases, price fixing allegations in the complaints 'accompanied' the allegations of other vertical restraints, but the Court did not rely on that fact in deciding whether the *per se* rule should be used. The test is not whether price fixing allegations 'accompany' allegations of other vertical restraints but whether the main purpose and effect of all of the vertical restraints show a justifiable business reason, or whether they are mainly directed at fixing prices for which there is no acceptable economic basis. (*Ibid.*) The Commission referred to, but did not develop, this issue in the letter explaining the acceptance of a consent in *Performance Sailcraft Inc.*, File 771 0027 [C. 2922] (Commission action dated May 2, 1978) [91 F.T.C. 869].

FN19 While the courts have split on adopting this part of the ancillary restraints doctrine (see dissenting opinion of Commission Clanton in *ColaCola*, *supra*, at pp. 1112), it was relied on in part of *Schwinn*, not reversed by *Sylvania*. The Court held that where *Schwinn* retained indicia of ownership it could, under the rule of reason, confine sales to franchised retailers for the reason, *inter alia*, that the restraint 'was justified by, and went no further than required by, competitive pressures.' 388 U.S. at 382. (Emphasis added).

FN20 While Amway sells a variety of products, its main business is still 'selling soap.' (RX 331, p. 4A)

FN21 Unlike some other direct selling companies, Amway does not prohibit distributors from selling competing products. (RX 331, p. 15B; Bortnem W.T. Raleigh, Tr. 69799; Cooke Avon Lady, Tr. 73536; Laverty Fuller Brush, W.T. Raleigh, Tr. 83839). And, unlike Avon, the largest direct selling company, Amway does not assign sales territories to its distributors. (Cooke Avon, Tr. 735; Halliday, Tr. 619293)

FN22 Direct selling companies generally do not, however, sell their products through retail stores. (Patty, Tr. 30993103)

FN23 Amway also prohibits distributors from selling or displaying Amway merchandise at flea markets and similar events (Finding 86) and regulates their sales through fundraising drives. (Finding 87). The rationale for these restrictions is the same as the retail store rule and they have the same economic impact as that rule.

FN24 Sylvania's market share was 5%, 433 U.S. 4647 n.12, almost triple Amway's 1.7% of the soap and detergents market. (RX 406, RX 407)

FN25 Amway also restricts distributors from selling non-Amway products of Amway distributors they have not sponsored. (RX 331, p. 15B) The business reason for this restriction is to prevent a 'conflict of interest.' (Van Andel, Tr. 1896) The record does not show the market impact, if any, of this provision.

FN26 The rights of servicemark owners in this respect are the same as owners of trademarks. Pro. Golfers Ass'n v. Bankers Life & Cas. Co., 514 F.2d 665, 668 (5th Cir. 1975)

FN27 While the ten customer rule has a reasonable basis in preventing an unlawful pyramid, the distributors' monthly reports showing such sales need not specify the prices at which the sales were made. Such a requirement could be used to monitor unlawful resale price fixing.

FN28 According to a market study conducted in 1973, only 4% of the distributors who did not renew their distributorship left because there were too many other Amway distributors in their area. (CX 521E)

FN29 They argue that Amway has too many distributors and that Amway has 'saturated' the market for distributors.

FN30 Complaint counsel object to the 'curiosity approach' that distributors have used when attempting to interest recruits. This involves getting the prospect to attend a meeting by a statement such as 'we're in the business of helping professional people . . . start their own business,' without mentioning the name 'Amway.' (Williams, CX 1116ST) At the meeting the full details of the Amway Sales and Marketing Plan are then explained. This approach was used primarily in the early 1970's because of the adverse publicity about pyramid plans unconnected with Amway. (CX 519Z49)

Amway distributors are not required to seek new distributors only by first announcing to prospects that they want to take their leisure hours away in a sales job. One distributor said that if this approach is used and ' . . . you're talking to the guy that just came home from a factory maybe after ten hours, and is perspiring and looking at you and saying, 'Lady, you are one big dingaling if you think I'm gonna go out and do some more work after that.'" (Blinco, CX 1041Z3)

FN31 Specific examples of amounts paid to Amway distributors are well qualified in the literature to show that they are maximum amounts, not average. (RX 401, p. 10)

FN32 Amway urges that recruiting be done individually rather than at mass meetings. (CX 638H)

FN33 For example, while urging distributors to open their minds to thinking in terms of making \$100,000 a year, Mr. DeVos predicted that 'there are going to be some people in the room' who were going to have that kind of income. (Finding 132) (Emphasis added.) This statement does not indicate that the average distributor can expect to make that amount. Examples cited in complaint counsel's proposed findings, when put in context, similarly show that the speakers are offering the specific amounts as goals not as representations of average incomes. (See the text surrounding the dollar amounts referred to in CPF 457, for example CX 990Z, CX 992H, CX 992J.)

FN34 Before 1973 it was \$100; in 1977 it was raised to \$250. (Finding 134; RX 401, pp. 79).

FN35 And distributors were warned: 'In reality, some of your distributors will probably sell more than \$200 P.V. while others may sell less; but just to make it easy to understand, we'll stick to the figure of \$200 P.V. for purposes of this example.' (CX 190G; CX 201G)

And Amway literature advises that: 'As with retailing, depending on their own goals, initiative, and available time, and the retail sales of those they sponsor will vary.' (CX 205G; CX 208F)

FN36 The audience at opportunity meetings includes persons who are already distributors as well as prospective distributors. (CX 204G) The 'drawing circles' technique is used to teach these distributors the wholesale side of the Amway Sales and Marketing Plan and to set goals for these distributors, as well as to introduce prospective distributors to the plan.

FN37 In any event, prospective Amway distributors do not believe that they will make \$1000 a month. On the application form for an Amway distributor, the applicants are asked to state their expected earnings. About 90% expect to earn less than \$10,000 a year. About 75% expect less than \$5,000, and more than half expect less than \$2,000 a year. (CX 516U)

FN38 Compare, SnapOnTools Corp. v. FTC, 321 F.2d 825, 829 (7th Cir. 1963). Of 900 dealers of industrial tools, SnapOn had a turnover of from 350 to 700 in one and onehalf years.

FN39 Mr. Price, Amway's trademark attorney, testified that distributors can properly advertise that they are selling Amway products. (Tr. 290001)

FN1 The three soap and detergent manufacturers mentioned above spent over \$500 million in advertising and sales promotion in 1975. (Compare Amway's \$200 million in sales.) Procter & Gamble alone the largest advertiser in the United States spent over \$360 million in product promotion in 1975. Amway, by contrast, spent less than \$1 million for advertising in 1975. Initial Decision, p. 68, Finding 175.

FN2 Amway actually has a rule (in what is known as its 'Rules of Conduct') which states that no Amway distributor shall permit Amway products to be distributed through any retail outlet. This rule, known as the 'retail store rule,' is discussed in greater detail at pages 2123, *infra*.

FN3 Generally speaking, the Amway Plan is a highly structured organizational outline, developed by VanAndel and DeVos to control the manner in which Amway products move through the distributor network to consumers. It is based on the 'Code of Ethics and Rules of Conduct for Amway Distributors.' The Amway Plan and the Code of Ethics and Rules of Conduct are set out in a manual, which Amway republishes every two to five years. The 1975 edition of the manual, which was current at the time of the hearings and is therefore frequently referred to herein, is called the Amway Career Manual; some earlier editions, also referred to herein, were called the Amway Sales Plan.

FN4 There were approximately 4000 Direct Distributors in 1977.

FN5 Apparently some Direct Distributors have lines of sponsorship which are twenty to twentyfive levels deep. But as of February 1977, approximately one half of all Amway distributors either had a Direct Distributor as their sponsor or were sponsored by a distributor who had a Direct Distributor as his sponsor. Over 70 percent of all distributors were in the first three positions; over 85 percent were in the first four positions; over 93 percent were in the first five positions; and roughly 99 percent were in the first seven positions.

FN6 This restriction on wholesale pricing is discussed in greater detail at pages 1213, *infra*.

FN7 See Initial Decision, p. 24, Finding 62, for a more exact statement of what is required.

FN8 When a newly qualified Direct Distributor who is by definition a very high volume performer breaks out of his old place, it represents a great loss to the 'old' Direct Distributor who previously funneled products to him. The old Direct Distributor is compensated by Amway for this loss by an additional monthly Performance Bonus consisting of 3 percent of the Business Volume of the new Direct Distributor.

FN9 See Initial Decision, pp. 810, Findings 1725, for a discussion of the history and origins of the ADA, and its relationship with Amway.

FN10 See footnote 3 at page 4, *supra*, for a description of the Amway Career Manual.

FN11 Though worded differently at different times, the message has been the same down through the years. The 1963 Amway Sales Plan said: '[P]roducts sold between distributors are always sold at the same price, with no profit made on the immediate transaction. The profit is made later on the refund percentage.' The 1968 Career Manual stated: 'You sell Amway products to the distributor you sponsor at the same [price] at which you buy from your sponsor, and as which he buys from his sponsor.'

FN12 In the Career Manual itself, on the page facing the page containing the statement above about selling at distributor cost, Amway states:

'[T]here is . . . a binding contractual arrangement between Amway and its distributors, and that contractual arrangement is spelled out in detail not in a single printed document, but in a group of documents. Amway has always considered itself bound by a contract consisting of the following: . . . the Career Manual. . . .'

FN13 As noted at page 5, *supra*, Amway does indicate in a 'Performance Bouns Schedule' the percentage of a distributor's monthly Business Volume that he is to receive as a Bonus from his sponsor. If there were an agreement between Amway and its distributors at various levels that the distributors would adhere to this Schedule in paying out Performance Bonuses to the distributors they sponsored, it arguably would be an agreement with a substantial and direct effect on wholesale prices and would be illegal *per se*. Cf. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). But there is no evidence that Amway or its distributors regard the Schedule as binding with respect to specific percentages. There is also no evidence that Amway enforces adherence to the percentages set out in the Schedule, nor even that most distributors do in fact adhere to those percentages. Findings 54 and 68 of the Initial Decision, at pp. 16, 25, indicate only that Amway enforces its rule that the Performance Bonuses it pays out to the Direct Distributors must be filtered through the distributor network, but not that the percentages Amway sets out are binding.

FN14 Maway sends to distributors retail price lists for Amway products. The 1965 price list referred to the prices thereon as 'retail'. The 1970 price list used the phrase 'retail prices (for sales tax purposes)'. The current price list states that the prices listed are 'suggested retail'.

FN15 In a 1970 copy of 'The Amway Amagram' (a newspaperlike publication sent by Amway to its distributors), an article contained statements made by VanAndel to a meeting of Direct Distributors. He told them that Amway had conducted a test, in which it had divided the country into half, with prices set at normal levels in one half and at very high levels in the other half. He continued:

'We wanted to see how much difference price would make in our marketing system. Actually, the sales volume per distriubtor in the higher price area was considerably higher than that in the other. I don't mean just 5% or 10%, I think it was over 50%. We concluded that higher price encouraged distributors to do more selling so he could make extra profit.'

FN16 This speech, along with several others, was taperecorded live; the tapes of these speeches were admitted as evidence at the hearings.

FN17 During this speech DeVos also said in regard to price cutting: 'I can't do much about it. And I don't think you can do much about it.' He added: '[Y]ou don't stand a legal chance of doing anything about it. . . . I can't take any action on it without endangering everybody in a federal restraint of trade activity.' But these statements, essentially recognizing the dangerous legal problems that can arise from resale price maintenance and recommending caution in efforts at coercion, do not offset the clear meaning and effect of the other statements quoted above.

FN18 Respondents rely heavily on *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977), for the proposition that where an explicit agreement is abandoned and is succeeded by strong recommendations of resale price maintenance, those recommendations do not constitute a 'combination' in the absence of evidence of special coercion. But *Knutson* is not applicable here because Amway has gone far beyond 'recommending': it has induced other distributors to assist in its program of detecting and deterring price cutting, and it has attempted to extract agreement and acquiescence from its distributors. See Initial Decision, pp. 39, 4144, Findings 115, 117.

FN19 This literally is true, as the first provision of the Code reads: 'I will make the 'Golden Rule' my basic principal of doing business. I will always endeavor to 'do unto others as I would have them do unto me.'"

FN20 The portions of the Final Order relating to rules (Order Paragraphs I.4, I.7, and I.8) are aimed solely at preventing their use in connection with the maintenance of retail prices; the Order does not otherwise disturb their operation.

FN21 See pages 2324, *infra*, for a detailed discussion of the advertising restrictions Amway has imposed on its distributors.

FN22 See page 12, *supra*, for a discussion of how Amway converts the Rules of Conduct into a contract between Amway and each distributor.

FN23 See Initial Decision, pp. 4146, Findings 117, 119, 121, and p. 90. Also. Amway advises its distributors, in the Career Manual, that when a distributor violates one of the Rules of Conduct his Direct Distributor 'may take such corrective action as he deems necessary, even terminating the violator's distributorship.'

FN24 The ALJ found that home consumption of Amway products by distributors accounts for a significant amount of Amway's sales. See Initial Decision, pp. 5556, Finding 137.

FN25 Where a finding of resale price maintenance has been made, we routinely include in the order a provision prohibiting the use of suggested prices for some time after entry of the order. But in this case there are highly unusual circumstances which make the use of suggested resale prices not anti

competitive. Specifically, Amway has an unusual distribution system which relies on the sales efforts of hundreds of thousands of distributors, many of whom distribute Amway products parttime and are inexperienced in business matters generally. It is not unreasonable under these circumstances to give distributors some guidance in setting prices on the 150 products they try to sell.

FN26 'What impression is made by a given practice is a question of fact for the Commission to determine' *Benrus Watch Co. v. FTC*, 352 F.2d 313, 318 (8th Cir. 1965), cert. denied, 384 U.S. 939 (1966); accord *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 342 (7th Cir.), cert. denied, 364 U.S. 883 (1960); *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956), cert. denied, 352 U.S. 1025 (1957).

FN27 We note that this figure is not 'retail sales', but Business Volume that is, the retail value of the products purchased for resale to consumers and sponsored distributors, and for distributor home consumption, which was stated before, constitutes a large portion of all sales of Amway products. See Initial Decision, pp. 5556, Finding 137.

FN28 In a speech given to Direct Distributors in 1974, DeVos stated that the reason for using a figure as large as \$200 is to raise distributors' 'vision' of their own potential. See Initial Decision, p. 55, Finding 136. But this does not change the fact that the \$200 figure overstates the true average Business Volume amount; and a statement need not be intended to deceive in order to have the capacity to deceive.

FN29 It should be noted, though, that Amway has not advertised specific earnings of named individuals. In fact, the 1975 Amway Career Manual states: 'Don't quote dollar incomes on specific individuals even though you may want to use their stories about the homes in which they live, the cars they drive, or the airplanes they fly.'

FN30 We note here that complaint counsel have attacked earnings claims made to potential distributors and to persons who already were Amway distributors. We restrict our finding of a violation to those earnings misrepresentations made to potential distributors. We believe that experienced distributors can be expected to be aware of the opportunities, or lack of opportunities, open to them under the Amway Plan. Statements of the kind discussed in the Initial Decision, at p. 49, Finding 132, when made to persons who already are distributors, can be considered 'inspirational' in nature.

FN31 We note that all of the vertical restrictions challenged have been found to be reasonable, except as they were ancillary to Amway's illegal resale price maintenance plan. We also note that these findings were based on our view that the product markets in which Amway competes are indeed concentrated, and that Amway's presence has had some procompetitive consequences.

FN32 Respondent assert on appeal that ordered corrections have still not been made on 350 pages, and that there are 35 'garbled or omitted portions of the transcript'.

FTC

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