

necessary to discuss in detail a major part of all the evidence indicative of Holiday Magic's complete *modus operandi* with extensive precise quotation of the corporate respondents' publications including manuals and directives as well as other media.

The issues involving an evaluation of whether or not the entire plan *per se* violates public policy as related to fair trade practice under Section 5 of the Federal Trade Commission Act and whether or not the plan is conducive to and in fact involves Robinson-Patman violations under Section 2(a) of the Clayton Act, also requires extensive recitation of the evidentiary facts and discussion in order to avoid inept consideration. In the foregoing connection to assure credibility and accuracy of the findings, documentary excerpts have been quoted rather extensively to avoid any possible out of context misinterpretation of the findings themselves. To have otherwise abbreviated summarily would have only enhanced unwarranted and time consuming interpretive argument hereafter over what the relevant and material evidence accurately is in resolving the enumerable issues. Therefore careful and exhaustive consideration of every facet of the evidentiary findings, conclusions and order has been given to the thorough and able although unabbreviated proposals and argument of complaint counsel and respondent counsel. The excellent charts prepared by complaint counsel's staff reflecting profit margins, sales summaries as well as areas of competition, also vividly substantiate the findings and conclusions justifying the entry of the order hereinafter set forth.

ORDER

I.

It is ordered, That respondent Holiday Magic, Inc., a corporation, its officers, agents, representatives, employees, successors and assigns, and respondent William Penn Patrick, individually and as chairman of the board of directors of Holiday Magic, Inc., respondent Fred Pape, individually, and respondent Janet Gillespie, individually, 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 goods or commodities in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, shall forthwith cease and desist from:

1. Entering into, maintaining, promoting, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor of such goods or commodities to do or perform or attempt to do or perform any of the following acts, practices, or things:

(a) Fix, establish, or maintain the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold.

(b) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which fixes, establishes, or maintains the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold.

(c) Requiring or coercing any person to refrain from selling his merchandise in any quantity to or through any specified person, class of persons, business, class of business or retail outlet of his choosing.

(d) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct or requiring, inducing, coercing or entering into any agreement with any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business, class of business, or retail outlet of his choosing.

(e) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct requiring, inducing, or coercing any distributor to refrain from selling any merchandise in any geographic area; *Provided, however,* That nothing contained herein shall prevent respondent corporation, acting alone and not in conjunction with other distributors, from assigning routes to individual distributors as areas of primary responsibility.

(f) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which discriminates, directly or indirectly, in the net price of any merchandise of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale or distribution of such merchandise with the purchaser paying the higher price.

(g) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which prevents the distributor from selling his merchandise to another under terms and conditions which they may mutually agree to.

(h) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which prevents the distributor from entering into business or financial arrangements with persons of their own choosing, and under terms and conditions mutually acceptable to the distributors and said third persons.

3. Discriminating, directly or indirectly, in the net price of any merchandise of like grade and quality by selling to any purchaser at net prices less favorable than the net prices upon which such products are sold to any other purchaser who competes in the resale of any such products with the purchaser who is afforded less favorable terms and conditions of sale or with a customer of the purchaser afforded the less favorable terms and conditions of sale.

4. Discriminating, directly or indirectly, in the terms or conditions of sale of any merchandise of like grade and quality by selling to any purchaser upon terms or conditions of sale less favorable than the terms or conditions of sale upon which such products are sold to any other purchaser who competes in the resale of any such products with the purchaser who is afforded less favorable terms and conditions of sale or with a customer of the purchaser afforded the less favorable terms and conditions of sale.

5. Classifying distributors who are in competition or potential competition with one another into different categories, where such categorization is based upon the amount of inventory initially purchased, the amount of inventory purchased during any specified period of time, or any monies invested.

6. Preventing distributors from operating their business in any lawful manner they choose to, including but not limited to:

(a) individual owning or having a financial interest in more than one distributorship;

(b) an individual incorporating his distributorship or taking on additional partners without the necessity of each individual separately purchasing additional inventories or qualifying as a separate distributor;

(c) a distributorship selling the business to another individual or potential distributor;

(d) distributors entering into consignment arrangements;

(e) requiring departing partners of a partnership-distributorship to requalify in any manner to continue to do business with respondents.

7. Adopting, encouraging, participating in, coercing or otherwise promoting any plan or common course of conduct whereby distributors in competition with one another allocate or are allocated sales territories.

8. Engaging, either as part of any contract, agreements, understandings, or courses of conduct with any distributor or dealer of any goods or commodities, or individually and unilaterally, in the practice of:

(a) Publishing or distributing, directly or indirectly, any resale price, product price list, order form, report form, or promotional material which employs resale prices for goods or commodities for a period of three (3) years. Thereafter, no such list or material shall be employed without stating clearly and visibly in conjunction therewith the following statement:

The prices quoted herein are suggested prices only. Distributors are free to determine for themselves their own resale prices.

(b) Publishing or distributing, directly or indirectly, any discount, rebate, commission, override, or other bonus to be paid by one distributor or class of distributors to any other distributors or class of distributors, suggested or otherwise.

(c) Entering into, maintaining, enforcing, or threatening to enforce any contracts, agreements, rights, or privileges pursuant to or claimed by virtue of the Miller-Tydings Act, as amended, the McGuire Act, or any other similar legislation, for a period of three (3) years from the effective date of this order.

9. Paying or granting anything of value to any dealer, distributor, or participant in respondents' merchandising program, directly or indirectly, except for services actually rendered to respondents in connection with the sale or purchase of goods, wares, or merchandise; *Provided*, That the solicitation, sponsorship, training or upgrading of other participants shall not fall within the meaning of services rendered in connection with the sale or purchase of goods, wares, or merchandise described herein.

10. Requiring any distributor or dealer or other participant in any merchandising programs to obtain the prior approval of respondents for any product advertising promotion, or proposed product advertising or promotion, unless the selling prices and selling outlets are required to be deleted from same prior to submission.

II.

It is further ordered, That the aforesaid respondents and their officers, agents, representatives, employees, successors and assigns, in

connection with the advertising, offering for sale or sale of products, franchisees or distributorships, or with the seeking to induce or inducing the participation of persons, firms or corporations therefor, in connection with any marketing program or any other kind of merchandising, marketing or sales promotion program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, from:

1. Operating or participating in the operation or suggested operation of any program or plan wherein participants may join in a process of geometrical expansion of other participants at the same functional or horizontal levels or other "endless chain" scheme.

2. Operating or participating in the operation or suggested operation of any program or plan wherein participants engage in a program or plan involving referral selling.

3. Operating or participating in the operation or suggested operation of any program or plan wherein the financial gains to the participants are or may be dependent in any manner and to any degree upon the recruitment of other participants.

4. Offering to pay or paying, or authorizing, suggesting or requiring the payment of any commissions, fees, release fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration or thing of value to any participant in respondents' marketing program or other kind of merchandising, marketing or sales promotion program, for the solicitation, recruitment, referral, upgrading or training of other participants or potential participants therein.

5. Operating or participating in the operation or suggested operation of any program or plan which is in the nature of a lottery, gift enterprise or gaming device.

6. Requiring, suggesting, using or participating in any multi-level marketing program or pyramid marketing program or any other kind of merchandising, marketing or sales promotion program, directly, or indirectly:

- (a) Wherein any compensation, profits or other thing of value inuring to participants therein are or may be dependent, in whole or in part, upon the element of chance dominating over the skill and judgment of the participants.

- (b) Wherein no amount of judgment or skill exercised by the participant has any appreciable effect upon any or all compensation, profits or other things of value which the participant may receive or be entitled to receive.

- (c) Wherein the participant is without that degree of control over the operation of such plan as to enable him to substan-

tially affect the amount of any or all compensation, profits or other things of value which the participant may receive or be entitled to receive.

(d) Wherein a participant pays a valuable consideration for the chance or right to receive compensation for introducing or recruiting one or more additional persons into participation or for the chance to receive compensation when a person introduced by the participant introduces a new participant.

(e) Whereby a participant gives or agrees to give a valuable consideration for the chance to receive something of value for inducing one or more additional persons to give a valuable consideration in order to participate in the plan or operation, or for the chance to receive something of value when a person induced by the participant induces a new participant to give such valuable consideration including such plans known as chain referrals, pyramid sales, or multi-level sales distributorships.

7. Requiring or suggesting that prospective participants or participants in any merchandise, marketing or sales promotion programs purchase product or pay any other consideration, either to respondents or to any other person, other than payment for the actual cost of reasonably necessary sales materials, as determined by the purchaser, in order to participate in any manner therein.

III.

It is further ordered, That the aforesaid respondents and their officers, agents, representatives, employees, successors and assigns, in connection with the advertising, offering for sale or sale of products, franchisees or distributorships, or with the seeking to induce or inducing the participation of persons, firms or corporations therefor, in connection with any marketing program or any other kind of merchandising, marketing or sales promotion program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, from:

1. Representing, directly or by implication, or by use of hypothetical examples that participants in any marketing program, or any other kind of merchandising, marketing or sales promotion program, will earn or receive, or have the potential or reasonable expectancy of earning or receiving, any stated or gross or net amount, or representing in any manner the past earnings of participants, unless in fact the earnings represented are those of a substantial number of participants in the community or geographic area in which such representations are made, accurately reflect the

average earnings of all active and inactive participants under circumstances similar to those of the participant or prospective participant to whom the representation is made, and actually resulted from predominant elements of skill and judgment rather than chance.

2. Representing, directly or by implication, or by use of hypothetical examples, that a gross income is a net income, salary, earning or profit figure.

3. Misrepresenting the facility of recruiting or retaining participants in any merchandising, marketing or sales promotion programs, as distributors or sales personnel.

4. Representing, directly or by implication, that any participant in any merchandising, marketing or sales promotion programs can attain financial success.

5. Misrepresenting the supply or availability of potential participants or customers in any merchandising, marketing or sales promotion programs in any given community or geographical area.

6. Failing to clearly disclose to each prospective participant in any merchandising, marketing or sales promotion programs, the total number of participants at the various levels or positions, whether active or not, in the county, state, and geographical market area in which prospective participants reside.

7. Representing that persons can expect to remain active in business for any length of time; or representing, in any manner, the longevity or tenure of past or existing persons unless in fact the periods of time represented are those for which the average and mean number of all persons who pursued their business operation at all.

8. Selling, or offering distributorship, in any manner, without disclosing clearly and conspicuously in writing at or before the time of the first oral sales presentation, or in the event no oral sales presentation is made, at least seven (7) days prior to the execution of a franchise application, agreement or contract:

(i) the median and mean gross earnings of all active and inactive franchisees or distributors in any program by all persons in the most recent calendar year preceding the year in which such sale or offer is made;

(ii) the total number active and inactive franchisees or distributorships nationwide;

(iii) the total number of active and inactive franchisees or distributors recruited in the state and county in which the prospect resides, since the company has been in existence;

(iv) the total number of franchisees or distributors in sub-

paragraph (ii) above who had profits during the most recent calendar year in the following dollar amounts:

- a. \$1,000 or less
- b. over \$1,000 but not over \$5,000
- c. over \$5,000 but not over \$10,000
- d. over \$10,000 but not over \$20,000
- e. over \$20,000

(v) the turnover rate of sales personnel of products or of the personnel of franchisees or distributors of respondents' products.

(vi) the average dollar volume of monthly sales generated by sales personnel of products or the sales personnel of franchisees or distributors of respondents' products.

(vii) the nature and total amount of the expenses which a distributor, businessman or franchisee can reasonably anticipate in his business activities.

(viii) the names and current address of each of the distributors or franchisees recruited in the county in the most recent calendar year preceding the year in which such sale or offer is made;

(ix) a financial statement reflecting respondents' assets and liabilities (stating separately fixed assets and liquid assets) for the most recent calendar year;

Provided, however, That in the event respondents operated or used any corporate or trade name for a period of less than five years, the disclosures called for in this paragraph shall reflect the operations of the last preceding business entity used by respondents to sell and administer distributorships, or franchises.

9. Misrepresenting the reasonably necessary and anticipated costs of doing business to prospective distributors, dealers, sales personnel or franchisees.

10. Misrepresenting that once a man understands the business, he will not or cannot fail.

11. Misrepresenting that any business operation, merchandising or sales promotion plan can be the key to a person's financial future and security, or the answer to a person's financial dreams.

12. That a business operation, merchandising or sales promotion plan is a once in a lifetime opportunity.

13. Misrepresenting the amount or degree of the consuming public's acceptance of any products or representing that the public receives any products with great enthusiasm or that repeat busi-

ness is high without making available at the same time market studies which in fact substantiate the representations.

14. Misrepresenting that it is not difficult to obtain a lifelong income in connection with any merchandising, marketing or sales promotion programs.

15. Misrepresenting that any merchandising, marketing or sales promotion program are sound, profitable and distinguished.

16. Representing that a person who knows respondents' merchandising, marketing or sales promotion programs cannot fail.

17. Representing that persons who fail in respondents' merchandising, marketing or sales promotion programs are either lazy, stupid or greedy.

18. Misrepresenting the relationship between profits and income at one functional level of business to any other functional level of that or any other business.

19. Misrepresenting that the wholesale sales actually reflect retail sales or consumer demand for products.

20. Using or encouraging the use of advertisements which offer or suggest employment when the purpose of such advertisement is to obtain non-employee participants in any merchandising, marketing or sales promotion program; or misrepresenting, in any manner, the kind of character of the position or job opportunity offered to prospective applicants.

21. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons who will invest or participate in any marketing program or any other kind of merchandising marketing or sales promotion program, either as distributors, franchisees, wholesalers or sales personnel, or that there is a very large number of prospective distributors or sales persons from which to choose.

22. Representing, directly or by implication, that products will be or are advertised either locally or nationally, or in the geographic area in which such representations are made, without clearly revealing the manner, mode, extent and amount of the advertising.

23. Selling, or offering franchises of distributorships, in any manner, without furnishing to each prospective purchaser at least seven (7) days reasonably prior to the execution of a franchise application or agreement, a copy of the Federal Trade Commission Consumer Bulletin No. 4, "ADVICE FOR PERSONS WHO ARE CONSIDERING AN INVESTMENT IN A FRANCHISE BUSINESS."

24. Representing that respondents have applications pending for a particular area; or that any person must act immediately to be considered for a franchise or distributorship, or that he must act immediately to take advantage of a special deal, sale or event or misrepresenting, in any manner, the nature and extent of interest of others in any particular franchise or distributorship.

25. Representing that persons risk losing little or nothing in investing in a franchise or distributorship.

26. Misrepresenting that franchises or distributorships increase in value over the years.

27. Using any payment check or other materials which purport to represent the satisfaction or success of franchises or distributorships.

28. Misrepresenting the earnings potential of franchises or distributors, prospective franchisees or prospective distributors.

IV.

It is further ordered, That respondents, their successors and assigns, incident to selling their franchises or distributorships:

1. Inform orally all persons to whom solicitations are made and provide in writing in all applications and contracts in at least ten-point bold type that the application or contract may be cancelled for any reason by notification to respondents in writing within seven (7) days from the date of execution.

2. Refund immediately all monies to all persons who have requested cancellation of the application or contract within seven (7) days from the execution thereof.

V.

It is further ordered, That corporate respondent and William Penn Patrick, their successors and assigns:

1. Within thirty (30) days from the effective date of this order, compile a list which shall name each distributor from whom monies were obtained directly or indirectly, or in trust, during the period from and including Oct. 1, 1964, to the effective date of this order, state the last known address of each such distributor and specify all fees and payments for products paid by each such distributor to Holiday Magic, Inc. or to William Penn Patrick, or to their successors and assigns, directly or indirectly, or to or through any parent or subsidiary corporation, in connection with any activities engaged in which violate the Commission's order in the instant matter.

VI.

It is further ordered, That corporate respondent and William Penn Patrick, their successors and assigns, within thirty (30) days after this order becomes final, shall make an offer to any participant of a refund of all sums of money to which the participant is entitled under this order, and within sixty (60) days after the aforesaid respondents, their successors and assigns, receive notification of the acceptance of such offer of refund from such participant shall pay all sums of money to which the participant is entitled under this order.

1. For the purposes of this order, the term "participant" shall mean any person who invested money to participate, in any manner, in marketing programs of respondents, their successors and assigns.

2. For the purposes of this order, the term "refund" means all sums of money paid by a participant to respondents, or their successors and assigns, directly to or through a trust, parent or subsidiary corporation, less:

(a) any amount of money paid by respondents or their successors and assigns to participants, including any refund either made voluntarily or pursuant to court order, and

(b) the price paid for any products purchased by participant that participant does not return (a participant requesting refund pursuant to this order who has product either credited to him in an account, or in his actual possession, shall be entitled to refund for such products on the basis of the price paid by participant for the products; *Provided, however,* That any of said products in participant's actual possession for which he requests refund under this order must be delivered to one of the warehouses of respondents or their successors and assigns before refund is payable to participant), plus

(c) interest at the rate of 6 percent per annum on the amount to be refunded to participant from the date participant entered into respondents' program to the date notification of the right to refund is received by participant.

3. For the purposes of this order, the term "offer" means a notification by certified mail, return receipt requested, to each participant with the following information and none other:

(a) On the front of the envelope, together with the name and address of the participant and the name and address of the sender, the following legend in 16-point, bold-face type: "IMPORTANT: REFUND NOTICE".

(b) On the letter, in 12-point, bold-face type, the following language:

IMPORTANT NOTICE

By order of the Federal Trade Commission, all persons who invested money to participate, in any manner, in [name of company] are hereby offered a refund of all sums of money so paid, less (1) any amount of money paid by [name of company] to you, including any refund either made voluntarily or pursuant to court order, and (2) the price paid for any products purchased by you that you do not return to [name of company] (a participant requesting refund pursuant to this order who has [name of company] product either credited to him in an account, or in his actual possession, shall be entitled to refund for such products on the basis of the price paid by participant for the products; provided, however, that any of said products in participant's actual possession for which he requests refund under this order must be delivered to one of [name of company] warehouses before refund is payable to participant), plus interest at the rate of 6 percent per annum on the amount to be refunded to you, from the date you entered into [name of company] program to the date this notification of the right to refund is received by you.

If you accept this offer, then (1) send a letter to [name and address of company] within 60 days of receipt of this notification stating the amount and basis of your claim and (2) send any product in your possession to a [name of company] warehouse or, (3) in the event product is credited in an account with [name of company], a statement that upon receiving a refund, you relinquish any rights to such account.

Within 60 days after the receipt of the said information, you will receive all sums of money to which you are entitled under the formula set forth above.

Provided, however,

(c) If respondents or their successors and assigns claim they do not have adequate funds to comply with this order provision, they may within sixty (60) days of the effective date of this order petition the Commission to reopen the proceedings to consider the claim. The petition shall set forth the list of distributors or franchisees to whom refunds are due under this order and the sum of money each such distributor or franchisee is to receive in accordance with this order, a notarized statement of all assets and liabilities together with the assets and liabilities of all corporations in which the individual is an officer or stockholder.

Upon receipt of this petition and any response thereto which complaint counsel wishes to make, the Commission will assign an administrative law judge for the purpose of making findings and recommendations with respect to the claim. The administrative law judge shall furnish petitioner with the Commission's Statement of Financial Status (F.T.C. Operating Manual, Chapter 6, Illustration 20, Paragraph 6.19), shall require its prompt execution and may conduct such interrogations of the petitioner or require the production of such documents as he

deems necessary in order to make findings and recommendations as to any modification of this order which may be warranted on the issues raised by petitioner's claim. The findings and recommendations will be reported to the Commission for a final determination.

(d) If any dispute arises as to the compliance with the refund provision of this order which cannot be satisfactorily resolved by the parties, notice shall be given to respondents or to their successors and assigns of the extent to which they are regarded not to be in compliance and the facts respecting such alleged noncompliance. Within thirty (30) days after the receipt of such notice of noncompliance, they may petition the Commission for a hearing on such noncompliance or for a modification of the order provision giving rise to the disputed compliance or for such other relief as he believes is warranted and the Commission may set the matter down for hearing before itself or before an administrative law judge or shall either grant or deny such petition by order formally entered in the same manner and form as if it were an original order of this Commission.

VII.

It is further ordered, That respondents and their successors and assigns shall maintain adequate records, to be furnished upon request by the Federal Trade Commission, which disclose the manner and dates members and franchisees or distributorships entitled to refunds under this order have received refunds or the reasons such members or franchisees have not received refunds.

VIII.

It is further ordered, That the respondents and their successors and assigns shall forthwith deliver a copy of this order to cease and desist to all past, present and future salesmen and franchisees, distributors or other persons engaged in the sale of franchises, distributorships, products, or services, and secure from each such salesman, franchisee or person a signed statement acknowledging receipt of said order.

IX.

It is further ordered, That respondent corporation and its successors and assigns shall forthwith distribute a copy of this order to each of its operating divisions and respondent William Penn Patrick furnish a copy of this order to each corporation or business entity in which he has any interest directly or indirectly.

X.

It is further ordered, That the 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 a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

XI.

It is further ordered, That each of the respondents herein and their successors and assigns shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with all of the provisions of this order. The report which corporate respondent, William Penn Patrick and their successors and assigns shall file within sixty (60) days after service upon them of this order shall include the lists they are to compile in accordance with subsection (a) of the provision of this order requiring them to refund certain monies.

Thereafter, within two hundred ten (210) days after service upon them of this order, they shall again file with the Commission a second report in writing, setting forth in detail the manner and form in which they have complied with this refund order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

The complaint in this matter was issued on Jan. 18, 1971, charging respondents with numerous violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) and Section 2(a) of the Clayton Act (15 U.S.C. §13(a)).

Among the unfair and deceptive acts and practices alleged were (1) operation of a multi-level open-ended (pyramid) type distributional scheme which had the capacity to deceive and was also in the nature of a lottery; (2) making of various specific misrepresentations to participants in the program, including use of misleading "want ads" purporting to offer employment, misrepresentation of the ease with which participants could recruit other participants, misrepresentation of the extent to which respondents' products would be advertised by the parent organization, and misrepresentation of profit expectations.

Among the unfair methods of competition charged were (1) price fixing; (2) division of territories; (3) imposition of assorted restrictions on resale rights of distributors; and (4) price discrimination.

After protracted hearings, the administrative law judge rendered a lengthy initial decision on May 31, 1973, finding respondents in violation on all counts of the complaint. The administrative law judge recommended a detailed cease and desist order, including provisions requiring restitution on the part of the corporate respondent and individual respondent Patrick.

On June 9, 1973, respondent Patrick perished in the crash of his private airplane.

Surviving respondents have appealed from a large portion of the initial decision.

On appeal, respondents challenge in general the validity of the initial decision, arguing that the administrative law judge borrowed heavily and verbatim from findings proposed by complaint counsel. In raising this point, respondents mistake the significance of the *Coors* and *Grand Caillou* cases which they cite in attacking the judge's findings.¹ These cases do not hold that it is impermissible *per se* for the administrative law judge to use findings proposed by either side, or that it is necessarily inconsistent with the required exercise of independent judgment and evaluation of the record for the judge to do so. To the contrary, while in both *Coors* and *Grand Caillou* the judge did adopt most of the proposals of one side, the other side on appeal subsequently pointed out the precise respects in which the initial decision was therefore incorrect, or in which it overlooked evidence germane to the charges in the complaint, and the Commission's own review of the record bore out those specific attacks on the initial decision.

With the exception of those findings of fact pertaining to the Clayton Act charge, respondents' brief is noticeably lacking in specific examples of findings of fact in the initial decision which are alleged to be incorrect, and similarly lacking in specific examples of excluded evidence which might compel legal conclusions contrary to those reached by Judge Buttle. Under such circumstances, we cannot take seriously an attack on the initial decision to the extent it is based on the barebones contention that the findings of one side are adopted verbatim. Moreover, our own review indicates that, while occasionally repetitive, and by no means a paragon of succinctness, the law judge's findings of fact are supported by the record, and, with the exceptions noted, *inter alia*, we adopt them as our own, and have relied upon them in our disposition of the appeal. We have taken greater issue with parts of the law judge's legal analysis, as have respondents, though again we have concluded it is correct with

¹ *In the Matter of Adolph Coors Company*, Docket No. 8845 (July 24, 1973) [83 F.T.C. 32], slip op. p. 4; *aff'd* No. 73-1567 (10th Cir. 1974); *In the Matter of Grand Caillon*, 65 F.T.C. 799, 806-07, 814-15 (1964).

respect to most counts of the complaint. Finally, we have made substantial revisions in the order proposed by the administrative law judge, for reasons noted in the text.

I. BACKGROUND—THE HOLIDAY MAGIC MARKETING SYSTEM

Holiday Magic, Inc., was founded in 1964 by William Penn Patrick. Individual respondent Fred Pape was president of Holiday Magic and the company's first Master Distributor, and respondent Janet Gillespie was vice-president, a member of the board of directors, and the first Organizer Distributor.

Holiday Magic, through its multi-level marketing program, purports to enlist the services of men and women throughout the country to sell its products (primarily cosmetics, and some toiletries and home care products) at wholesale and retail. In order to enter the program, participants must purchase inventories of varying sizes, and having entered they may earn money by reselling the product they have purchased, and by recruiting others to participate in the program, as set forth below.

An individual may enter the marketing program at one of three levels,² Holiday Girl, Organizer, and Master Distributor, and persons at each of these levels may attain the fourth and "highest" level of General Distributor. Entry at each of the three levels requires a different monetary investment. Purchase requirements have varied with time, but the figures cited in the initial decision are \$11.99 for Holiday Girls,³ \$130.41 for Organizers,⁴ and \$2,500 to \$4,500 for Masters. (I.D. 80) The Master's investment pays for an inventory of cosmetics and sales aids. Individuals may also work up to the Master level by achieving the requisite volume of retail sales, either by themselves or through the efforts of themselves and others recruited by them. Entry into General status requires payment of a "release fee," described at greater length hereinafter, which has ranged in amount from \$2,500 to \$4,500, payable by certified check to Holiday Magic. (I.D. 84)

² The system described herein in the present tense is generally that which existed at times prior to the complaint in this matter, except where indicated. Certain of the excesses of the program have been moderated in the face of challenge by various government agencies and private litigants.

³ This amount would purchase a "mini-kit." An alternative would be purchase of \$39 of product and sales aids (I.D. 60)

The following abbreviations will be used throughout:

I.D. - Initial Decision (Finding No.)

I.D. p. - Initial Decision (Page No.)

CX - Complaint Counsel's Exhibit (No.)

RX - Respondents' Exhibit (No.)

Tr. - Transcript (Page No.)

RB - Respondents' Appeal Brief to the Commission (Page No.)

CB - Complaint Counsel's Answer Brief on Appeal to the Commission (Page No.)

⁴ This amount was later raised to \$299, for which the Organizer received a "one-pack" of all Holiday Magic products, a mini-kit, a ten cassette library of recorded inspirational messages, a year's subscription to "Perception" Magazine, and a two-day course in selling. (I.D. 70)