

but must await completion of steps by Kennecott to develop an appropriate divestiture plan for submission to the Commission.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

On May 23, 1974, Kennecott Copper Corporation (hereinafter Kennecott) filed a "Petition to Reopen the Proceedings on the Question of Relief," pursuant to Section 3.72 of the Commission's Rules of Practice, including therein a request for oral argument on the petition, and submitted at the same time a request for oral discussion. Kennecott has subsequently filed various supplemental submissions relevant to its petition. The Bureau of Competition has replied, by answer of June 20, 1974, opposing the petition. Oral argument upon the petition was held on July 10, 1974. The Commission has considered the arguments of petitioner, and does not believe that adequate grounds have been shown to warrant reopening these proceedings for the purpose of considering the issue of relief. The issue of appropriate relief was considered by the Commission at the time it issued its original decision, and its order has been affirmed by the United States Court of Appeals [467 F. 2d 67], and certiorari denied by the Supreme Court [416 U.S. 963 (1974)]. Alleged changed conditions of fact and law described by petitioner are not such as to warrant reopening of these proceedings.

Accordingly, *It is ordered*, That the "Petition to Reopen the Proceedings on the Question of Relief" be, and it hereby is, denied.

Commissioners Thompson and Nye dissenting.

IN THE MATTER OF

GER-RO-MAR, INC., TRADING AS SYMBRA'ETTE, ET AL.

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

*Docket 8872. Complaint, Nov. 24, 1971—Decision, July 23, 1974\**

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

*Appearances*

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

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

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

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## COMPLAINT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e. Regional Manager:

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

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

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

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

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

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

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

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

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

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

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

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

## COUNT I

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

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

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

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

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

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

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

## COUNT II

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

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

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

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

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

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

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

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

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## COUNT III

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

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

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

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

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

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

PAR. 14. In truth and in fact,

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

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

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

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

## COUNT IV

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

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

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

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

#### COUNT V

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

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

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

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

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW  
JUDGE

OCTOBER 11, 1973

#### PRELIMINARY STATEMENT

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

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

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

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

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

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

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

#### FINDINGS OF FACT

##### Respondents

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

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

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

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

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

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

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

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

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

#### The Symbra'ette Marketing Program

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

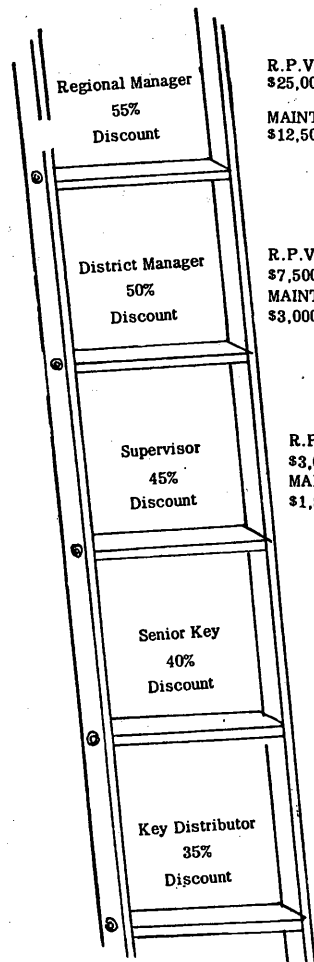
The program represented that District Manager and Regional Manager could be reached by promotion from within if sufficient success were achieved by the entrant in building his "organization" or "personal group" of distributors, and in reaching and maintaining the required retail purchase volume levels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

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

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

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

THE SYMBRA'ETTE MARKETING PROGRAM



R.P.V.  
\$25,000  
MAINTAIN  
\$12,500 per month

Qualified Regional Managers earn 5% on District Managers; 10% on Supervisors; 15% on Senior Keys; 20% on Key Distributors; 3% on directly sponsored Regional Managers; 1% on indirectly sponsored Regional Managers; 1% on indirectly sponsored District Managers; \$200 cash car allowance.

R.P.V.  
\$7,500  
MAINTAIN  
\$3,000 per month

Qualified District Managers earn 5% on Supervisors; 10% on Senior Keys; 15% on Key Distributors; 3% on directly sponsored District Managers; 1% on indirectly sponsored District Managers; \$150 cash car allowance.

R.P.V.  
\$3,000  
MAINTAIN  
\$1,500 per month.

Qualified Supervisors earn 5% on Senior Keys; 10% on Key Distributors; 2% on directly sponsored Supervisors; \$100 cash car allowance.

R.P.V.  
\$1000  
MAINTAIN  
\$500 per month

Qualified Senior Keys earn 5% on Key Distributors.

R.P.V.  
\$300  
MAINTAIN  
\$100 per month.

Key Distributors purchase from their sponsor.

FEDERAL TRADE COMMISSION  
Docket No. 84-72 COMMISSION Exhibit No. 74D  
-respondent-

YOUR LADDER TO SUCCESS

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

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

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

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

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

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

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

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

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

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

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

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

#### Promotion of the Symbra'ette Program to the Public

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

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

###### (1) *The Flip Chart*

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

15. The "Flip Chart" (CX 75) was published by respondents Ger-Ro-Mar, Inc., and Carl G. Simonsen, and was used to recruit Symbra'ette distributors by describing and representing its program to them (CX 92(14); Meredith, Tr. 61-65; Sanford, Tr. 204). The "Flip Chart" makes representations of great earnings to prospective participants which, however, could only be realized by every participant through an ever expanding number of new distributors.

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

SYMBRA'ETTE USES THE SPONSOR SYSTEM TO BUILD SALES  
ORGANIZATIONS  
*IT WORKS LIKE THIS*

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

\*            \*            \*            \*            \*            \*            \*

You

Mary    Sue    Jane

Ann    Beth

Sally   Mary   Dorie & Ed   Jean & Joe

\*            \*            \*            \*            \*            \*            \*

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

\*            \*            \*            \*            \*            \*            \*

\* \* \* \* \*

YOU AS A SENIOR KEY

KEY KEY

KEY KEY

YOU  
SENIOR  
KEY  
40%

KEY KEY

KEY KEY

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

\* \* \* \* \*

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

YOU WILL EARN

YOU SELL	\$1,000 × 40% = \$400
5-KEYS X \$700	\$3,500 × 5% = \$175
	PER MONTH \$575

(CX 75Z).

\* \* \* \* \*

AS YOUR ORGANIZATION GROWS \* \* \* SO DOES YOUR INCOME

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

(CX 75Z1).

\* \* \* \* \*

WHAT DOES A SUPERVISOR MEAN IN \$?

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

YOU ARE ELIGIBLE TO QUALIFY FOR CAR ALLOWANCE

(CX 75Z2).

\* \* \* \* \*

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

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

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

(CX 75Z3).

\* \* \* \* \*

## DISTRICT MANAGERS

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

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

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

(CX 75Z4).

\* \* \* \* \*

## SYMBRA'ETTE DISTRICT MANAGER ORGANIZATION

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

(CX 75Z5).

\* \* \* \* \*

REGIONAL MANAGERS

- [ 55% DISCOUNT OF R.P.V.
  - [ 22% ON SALES TO KEYS
  - EARN [ 15% OVERRIDE ON DIRECT SENIOR KEYS
  - [ 10% OVERRIDE ON DIRECT SUPERVISORS
  - [ 5% OVERRIDE ON DIRECT DISTRICT MGRS.
  
  - [ 3% OVERRIDE ON DIRECT REGIONAL MGRS.
  - [ 1% OVERRIDE ON INDIRECT REGIONAL MGRS.
  - EARN [ 1% OVERRIDE ON INDIRECT DISTRICT MGRS.
  - [ \$200 MONTHLY CASH CAR ALLOWANCE (CX 75Z8).
- \* \* \* \* \*

SYMBRA'ETTE REGIONAL MANAGER ORGANIZATION

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

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

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

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

RECRUIT \* \* \*

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

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

Q. How did that work?

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

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

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

\* \* \* \* \*

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

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

\* \* \* \* \*

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

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

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

Prospects were advised that the ambitious person:

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

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

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

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

The "Sales Manual" used in recruiting represented:

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

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

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

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

June 2, 1972

Dear Mr. Simonsen:

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

Forever gratefully and respectfully yours,

Edith Gustin (RX 10).

\* \* \* \* \*

KILLER KERNS: (Juanita Kerns)

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

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

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

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

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

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

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

### Geometric Progression

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

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

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

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

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

#### Chance

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

#### Vertical Price Fixing

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

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

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

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

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

#### Customer Restrictions

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

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

#### Purchase Restrictions

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

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

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

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

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

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## Retail Outlet Restrictions

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

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

## Discussion

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

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

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

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

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

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

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

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

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

#### The Lottery Count

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

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

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

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

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

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

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

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

\* \* \* something that befalls, as the result of unknown or unconsidered forces; the issue of uncertain conditions; an event not calculated upon; an unexpected occurrence; a happening; accident, fortuity, casualty.

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

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

\* \* \* the original purchaser has no control over the payment or receipt of the \$50 since it is the person whose name he submits that must locate another buyer. Insofar as the original purchaser is concerned, the procuring of this buyer is dependent, at least in part, upon chance and by the terms of the statute that is all that is needed. Thus, the third element is alleged and we must conclude that the indictment is legally sufficient to charge an offense under the statute.

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

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

\* \* \* if "A", a distributor, brings "B", a prospect, to a meeting and "B" purchases a supervisorship, and "B" in turn brings "C" to another meeting, and "C" purchases a

