

DECLARATION OF GERALD P. NEHRA, ESQ.

In re the matter of the ASD Case: 1:08-cv-01345

I live and practice law in Muskegon, Michigan. I have practiced law for 38 years, being admitted to practice in Michigan, New York, and Colorado, and before the Federal Courts. From 1971 to 1979, I held the positions of Attorney, Staff Attorney, Senior Attorney, and Regional Counsel for International Business Machines Corporation. From 1979 through 1982, I was Vice President and General Counsel of Church & Dwight, also known as the Arm & Hammer Company. Since 1982, my law practice has been exclusively with or for direct selling companies. From 1982 to 1991, I served as the Director of the Legal Division and Corporate Secretary for the Amway Corporation. Since 1992, in my private law practice, I have provided legal counsel to over 500 direct selling companies.

I serve on the Government Relations Committee and the Lawyers Council of the Direct Selling Association (DSA) and am a Board Member of the Multi-Level Marketing International Association (MLMIA). I have given over 100 lectures and presentations on various legal issues of direct selling companies, in forums sponsored by the DSA, the MLMIA, the Network Marketing Business Journal, the MLM Symposium, and my own client companies. My writings include numerous articles of in-depth analysis of direct selling, multilevel marketing, business opportunity, pyramid, and Ponzi issues. I have been an expert witness in cases involving direct sellers, including *Herbalife v. McCormack*, settled; *Dunda v. Mary Kay*, Cause No. 06-11432, District Court, Dallas County, on appeal; *FTC v. Trek Alliance*, FTC Matter No. 012 3096, settled; and *International Galleries Inc. v. LaRaza*, USDC, Chicago, IL, settled. My resume, which contains an extensive list of publications, is Attachment A.

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EXPERT REPORT OF GERALD P. NEHRA, ESQ.

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EXHIBIT C

I have been retained to provide an objective expert opinion and to prepare and submit a declaration which summarizes my professional expert opinion. In order to make this declaration and to prepare to testify as an expert in this case, I have reviewed the following documents:


- a) ASD Terms of Service
- b) ASD Legality Statement
- c) New Member Success Video, featuring Andy Bowdoin and Robert Garner
- d) ASD Customer Service Training Manual
- e) Over 1000 e-mails from ASD members
- f) The Complaint filed in this action

I have also interviewed in person, and at length, the following persons:

- a) Andy Bowdoin, the Founder and President of ASD
- b) Juan Fernandez, the COO of ASD
- c) Don Peterson, the Compliance Officer of ASD

MY OPINIONS IN RESPONSE TO THE ALLEGATION THAT THE ASD BUSINESS MODEL IS AN ILLEGAL PONZI SCHEME

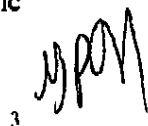
1. It is not. The elements of a Ponzi scheme include the promise of a "return on investment" to induce the participant to put money into the program. A second element is the lack of any underlying product or service or asset sufficient to sustain the promised payouts, and a third element is the necessity of a continuing flow of new investors/participants to fund the payouts.



2. The first difference from a Ponzi scheme in the ASD business model is the lack of any promised return. The company repeatedly disavowed any continuing obligation and, moreover, stated that the rebate program could be cancelled at any time. The second difference is the presence of a real, viable, marketable service, namely internet advertising. And third, new participants are not needed to keep everything afloat. These three differences are examined in more detail below.

3. The Complaint uses investment and return on investment language, but the Company never used such language. The Complaint repeatedly speaks of promises, but the Ponzi-like promises were never made by the Company. The operative contractual language in the ASD Terms of Service is devoid of any of the promises alleged in the Complaint. The Complaint says "ASD must generate new revenues of a quarter of a billion dollars in the four months after June 2006 to keep its promises to its membership." But this allegation begs the question, "What promises?" The company made no such promises. Without such promises, the ASD business model is not a Ponzi scheme.

4. The service being sold to ASD customers is internet advertising. Although references to Google and Yahoo may be obvious, such references are not as meaningful as the thousands of testimonials by ASD advertisers that the advertising worked the way advertising is supposed to work. The advertising customers purchased the ASD ad packages for their intended purpose of increased views of their web sites, and thus increased business volume. And the advertising worked—over and over again, it worked. The advertisers paid for and received what they paid for. This is a feature absent from Ponzi schemes. I have been advised that ASD's law firm has received over 3000 emails as of August 15, 2008, and that over 52% discuss the



advantages of ASD internet advertising and approximately 41% discuss, in general, support for ASD. Of the over 3000 emails received, I have been provided with 1,027 to review.

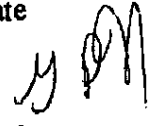
5. The third critical difference is whether new participants are needed to keep the venture afloat. They are not. The customers of the ASD business venture are the advertisers, and the income opportunity seekers of the ASD business venture are the members, who can participate at four levels. All advertisers can participate as free or paying members. All members are offered the referral program and the rebate program, but are not required to participate. The members are offered a referral program, which pays them commissions for selling ad packages to advertising customers. It is important to note that a personal ad package purchase is not required to be eligible to receive commissions, as a legally structured multilevel direct selling business model cannot require a product purchase as a condition of participation in multilevel compensation.

6. The rebate program is for members who have purchased an ad package, but the purchase can be as low as \$10. To equate this business model to an early direct selling model, as I will develop more fully later in this declaration, the advertising packages are like the vacuum cleaners, and the members receiving commissions and rebates are like the vacuum cleaner salesmen. A decision to not bring in more salesmen (income opportunity seekers) will stop or severely limit growth, but it will not kill the business. The business is about internet advertising, and even without new advertisers, the existing advertisers, by merely renewing their ad packages because they have produced results, will keep the business going. Advertising is consumable and renewable. Again, this is evidence the business model is not a Ponzi scheme.

7. The ASD business model is a legitimate multilevel direct selling business model. Such a business model was "legalized," in a sense, in the case of *IN THE MATTER OF AMWAY CORPORATION, INC. ET AL*, 93 F.T.C. 618, (1979.) The elements of the legal direct selling business model are:

- a) A product or service being sold to the consuming public;
- b) A distribution channel choice of independent contractor representatives, selling away from fixed business establishments; and
- c) A two-part compensation plan that rewards the representative for generating business volume and gives the representative an incentive to introduce more representatives by rewarding them, not for recruiting the second representative, but on the business volume generated by the second representative.

8. The ASD business model begins with a service sold to the consuming public—internet advertising, called ad packages. The ASD channel of distribution choice is independent contractor representatives, called members. The first level of compensation in the referral program is a three percent up to ten percent commission on what the advertiser/customer pays for the ad package. To give the member an incentive to introduce a new member, a second level commission is offered, up to five percent. In keeping with the legal direct selling business model, there are no commissions paid on the administration fee charged to be an ASD member. To pay such a commission is known as an illegal headhunting fee. The highest level fee to enter the ASD income opportunity is \$100, well below the thresholds of Federal and state business opportunity statutes. And there is no contractual requirement to remain a member for six months or any time period, as the right to cancel with written notice begins immediately. The rebate



program has no multilevel elements and serves two purposes: It creates viewers of the advertised sites and allows members who are also advertisers to recoup some of their advertising costs.

9. The government, in the complaint in this lawsuit, alleges that most of the ASD participants were not interested in actual advertising. My understanding, after viewing web pages and over a thousand e-mails from members, is that there was significant actual advertising of a very wide variety of products and services, and members were pleased with the increased traffic to their web sites and the resultant increases in business volume. The consumption and use for the intended purpose of the products and services of a direct selling company is a critical element of a legal direct selling company and also is completely inconsistent with the allegation of an illegal Ponzi.

10. It is fair to ask, if this business model is not an illegal Ponzi scheme, what is it? It is a legally structured, direct selling business model with multilevel compensation. The product/service is internet advertising. The distribution channel choice is independent contractor representatives. And the compensation plan rewards only the persons who bring the advertising business volume to the company.

VERIFICATION

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on:

8-15-08

Gerald P. Nehra

Gerald P. Nehra

VITA of GERALD P. NEHRA

ADMITTED IN: Michigan, 1970; New York, 1972; and Colorado, 1992.
Federal Courts in Michigan, 1970; and New York, 1972.
Sixth Circuit Court of Appeals, 1976.

CAREER EXPERIENCE:

- Private practice attorney, specifically focused on direct sales and multi-level marketing issues, August 1992 to date. Representative clients include Amsoil, Ardyss, Bing Han, Dove Chocolate, Eniva, Essentially Yours, Financial Destination, Gano Excel, Isagenix, Life Plus, Orovo, Pinnacle Communications, Wachters' Organic Sea Products, and ViSalus Sciences.
- Vice President - Legal and Human Resources, The Fuller Brush Company, November 1991 to August 1992 when, at my request, I became independent outside counsel for the company.
- Director - Legal Division, Amway Corporation. Began in September of 1982 as Deputy Chief Attorney and became head of the Legal Division in 1984, continuing through October 1991. Added responsibilities included Assistant Secretary in 1984, Profit Sharing Trustee in 1986, and Corporate Secretary in 1991.
- Vice President, General Counsel, Church & Dwight Co. Inc. (The Arm & Hammer Company), 1979-1982.
- Attorney, Staff Attorney, Senior Attorney, and Regional Counsel, International Business Machines (IBM) Corporation, 1971-1979, at locations in Armonk, New York, Owego, New York, and Franklin Lakes, New Jersey.
- Sales Representative and Systems Engineer, IBM, Dearborn, Michigan, assigned to the Ford Motor Company account, May 1967 to June 1971.

EXPERT WITNESS CREDENTIALS:

Have counseled and testified on many legal issues of direct selling, including comprehensive evaluations of business plans, and whether they meet the legal standards established in the landmark FTC v. Amway case and cases which followed. Have analyzed in detail the differences and legal significance of plan design, controlled by the company, and plan implementation, where distributor conduct is often the challenge. Gave testimony on direct selling legal issues in Herbalife v. McCormack, Dunda v. Mary Kay, Florida v. P.R.S.I., FTC v. Trek Alliance, and International Galleries Inc. v. LaRaza.

MULTI-LEVEL SPECIFICS:

- Handled the legal and personnel issues for conversion of the single-level direct sales organization to a multi-level system at Fuller Brush. Issues included

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marketing plan legal review and necessary modification, sales force transition and conversion, literature review, sales training rules and ethics enforcement, advertising guidelines, product line selection and pricing, and creation of a distributor advisory board.

- Negotiated multi-level compliance issues, including Consent Orders and Assurances of Voluntary Compliance, with the Attorney General Offices in numerous states, including Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, and Wisconsin.
- Took immediate corrective action with a high ranking distributor for practices that put an entire program in jeopardy in the state of Florida.
- Meet and speak regularly with corporate officers and top distributors to evaluate progress of programs, listen to recommendations for adjustments and discuss and advise on future plans.
- Processed through to completion more than 350 trademark applications for numerous clients.

WHILE AT AMWAY:

- Directed the corporate legal function, including counsel to senior management and subsidiaries. Hired and managed outside counsel, and advised on legal issues associated with corporate operating and corporate planning decisions.
- As Corporate Secretary, attended to all matters of corporate governance and corporate structure for the parent corporation and over 70 subsidiaries.
- Negotiated with the FTC, FDA, CPSC, and other agencies regarding Amway's products and services and Sales Plan positioning. Reviewed and modified labels and literature to comply with regulatory requirements.
- Managed the patent function and over 4000 trademark registrations in over 31 countries.
- Built an in-house litigation capability by hiring and supervising two litigators and three paralegals, significantly reducing outside counsel expenses. Actively managed counsel outside Michigan and second-chaired two distributor related litigations, a two week trial to a successful jury verdict and a three day non-jury trial to favorable disposition.
- Advised Amway's Nutrilite Products Inc. subsidiary on food supplement product positioning, claims platforms, literature, and avoidance of drug claims.
- Resolved a serious challenge with Dominican Republic Customs regarding duty valuation on imports through personal negotiation and the creation of a sales and warehousing subsidiary in-country.
- Managed the government affairs function, including monitoring legislation and lobbying pending bills at the state and federal level.

- Implemented and administered the Conciliation and Enforcement Procedures for distributor to distributor and distributor to corporation disputes.
- Resolved favorably civil and criminal charges brought against the company and a distributor by the Canadian Government for claims made in sales literature.

TEACHING/LECTURES:

- Presented the Legal Issues segment at each New Amway Direct Distributor Seminar.
- Frequent guest speaker on direct selling legal issues at seminars and forums, averaging over 10 per year for the last 10 years, at events hosted by clients and industry associations.

PUBLICATIONS:

Antitrust Law Developments, *ABA Press, 1975, (Contributor)*

Legal Issues of Side-Line Businesses, *Amway, 1985*

"Give Your M/L/M 'The Test'" *Emerald Coast News, 1992*

"Amway Case from the Price Fixing Prospective," *www.mlatty.com website*

"Pyramid or Ponzi" *M/L/M Insider Newsletter, 1995, updated version re-published in Network Marketing Business Journal, August, 2008*

"Trademark Use Guidelines," *Mlatty.com, Newsletter Volume 8*

"The Intrinsic Value Position Paper" *M/L/M Insider Newsletter, February, 1998*

"Don't-Even Think About It," *Mlatty.com, Newsletter Volume 18*

"Who are the PARTICIPANTS," *www.mlatty.com website*

"What is Direct Selling PRIMARILY About?" *Direct Selling Today, October, 1998*

"RAMBLINGS OF A TIRED LAWYER," *Mlatty.com, Newsletter Volume 19*

"How Confidential are Names and Addresses?" *Direct Sales Journal, October, 2000*

"Prohibited Activity," *www.mlatty.com website*

"Business Opportunity – What do the Words Mean?" *www.mlatty.com website*

"Are Two-Tier Affiliate Programs Multi-level Marketing," *www.mlatty.com website*

"The ABC's of M/L/M 2000," *www.mlatty.com website*

"Looking Past the Paper," *www.mlmatty.com website*

"Paperless Signup," *www.mlmatty.com website*

"The Thinkin' Needs Fixin'" *Network Marketing Business Journal, October 2003*

"Are They Worth It?" *Network Marketing Business Journal, October 2004*

"Coupons, Vouchers, Gift Certificates, and Down Payments," *My NetBrief, October 2004*

"PONZI, THE PERSON," *Network Marketing Business Journal, December 2004, and re-published in Network Marketing Business Journal, September 2008*

"BUILD IT BIG – 101 INSIDER TIPS from TOP DIRECT SELLING EXPERTS," *Dearborn Trade Press, 2004 (Contributor)*

"THE MICHIGAN SINGLE BUSINESS TAX – M/L/Ms BEWARE," *Network Marketing Business Journal, February 2005*

"Another Look at Commissions on Sales Aids" *Network Marketing Business Journal, July 2005*

"About AGENTS" *Network Marketing Business Journal, August 2005*

"Database Confidentiality" *Network Marketing News, September 2005.*

"What is M/L/M? – My Biased View" *Network Marketing Business Journal, January 2006*

"Gifting Programs - - Stay Away!" *Network Marketing Business Journal, March 2006*

"Business Volume – Its Critical Importance" *Network Marketing Business Journal, April 2006*

"FTC – What Were You Thinking?" *Network Marketing Business Journal, August 2006, and filed with the Federal Trade Commission*

"Company Names as Trademarks" *Network Marketing Business Journal, October 2006*

"Where to Incorporate" *Network Marketing Business Journal, July 2007*

"The Michigan Business Tax 'Super-Sized'" *Network Marketing Business Journal, February 2008*

"Louisiana – It's Different Down There" *Network Marketing Business Journal, June 2008*

EDUCATION:

J.D. 1970, Michigan State University College of Law, (formerly Detroit College of Law) top 15 percent.

B.I.E. 1962, Kettering University, Flint Michigan (formerly General Motors Institute)

PROFESSIONAL AFFILIATIONS:

A.B.A., and State and Federal Bars in Michigan, New York, and Colorado.

Professional Association for Network Marketing.

Direct Selling Association (DSA-US), Supplier Member.

DSA, Lawyers Council and Government Relations Committee.

Direct Sellers Association Canada, Associate Member.

Multi-Level Marketing International Association, Board Member.

Direct Selling Women's Alliance, Support Member.

Distributor Rights Association, Support Member.