

# Coercive Techniques in Business Opportunity Cults

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## I. Introduction

Multi-level marketing (MLM) has been controversial since its origins in the 1950's.<sup>1</sup> The vast majority of participants in MLM organizations lose money.<sup>2</sup> Given the dismal financial results, why do people continue to join MLM firms? And once they have joined, why do they stay involved as long as they do?

Early in my career I worked in a law firm that specialized in representing franchisees and distributors in traditional distribution systems. I left that firm in the early 1990's and developed a practice representing plaintiffs in class actions in cases involving securities fraud, antitrust, and consumer protection. A small but significant part of my class action work has included suing MLM companies on behalf of MLM distributors who lost money. From the beginning it became clear to me that MLM was unlike

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<sup>1</sup> For more information on the history of MLM, see Keep, W. and P. Vander Nat, *Multilevel Marketing and Pyramid Schemes in the United States: An Historical Analysis*, Journal of Historical Research in Marketing, Vol. 6, Issue 2 (2014).

<sup>2</sup> See generally, Fitzpatrick, Robert L., Craig, Bruce and Brooks, Douglas M., *The Pyramid Scheme Industry: Examining Some Legal and Economic Aspects of Multi-Level Marketing*, available at <https://seekingalpha.com/article/2093383-the-pyramid-scheme-industry-examining-some-legal-and-economic-aspects-of-multi-level-marketing>

any of the franchise or other distribution systems with which I was familiar. One universal fact was that the vast majority of MLM distributors lose money, and eventually drop out, while a tiny percentage are paid huge sums. Even if they aren't pyramid schemes, they sure look like it. While I cannot say that every MLM is a pyramid scheme, I can say that every one of the hundreds that I have looked at shares the characteristic of massive losses by distributors at the lower and mid-levels of the organization, and substantial earnings only at the very highest levels.

I initially thought the problem with MLM must be lack of disclosure. In contrast to MLM opportunities, persons who are considering purchasing a franchise are entitled to receive a detailed disclosure statement before they pay any money to the franchisor. This pre-sale disclosure statement is required by a regulation of the U.S. Federal Trade Commission (FTC),<sup>3</sup> as well as state laws in fourteen states.<sup>4</sup> But the FTC Franchise Rule and state franchise laws do not apply to opportunities where the required payments within the first six months of operation are less than a certain amount, generally around \$500. MLM firms usually do not “require” payments at

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<sup>3</sup> See 16 CFR §436, available at [https://www.ecfr.gov/cgi-bin/text-idx?SID=e37d3cd088c6b4724a389338f9c3e141&mc=true&tpl=/ecfrbrowse/Title16/16cfr436\\_main\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?SID=e37d3cd088c6b4724a389338f9c3e141&mc=true&tpl=/ecfrbrowse/Title16/16cfr436_main_02.tpl)

<sup>4</sup> See *Franchising 101, Key Issues in the Law of Franchising*, Business Law Today, Vol. 19, No. 4 (2010), available at <https://apps.americanbar.org/buslaw/blt/2010-03-04/grueneberg-solish.shtml>

all, except for an initial starter kit which is usually priced well below \$500. I put “require” in quotes because, as I explain below, in order to effectively participate in the opportunity MLM distributors are urged to purchase much more than the initial started kit.

Beginning around 1995 I and other consumer advocates began urging the FTC to adopt a regulation that would require MLM firms to make pre-sale disclosures to prospective distributors, similar to the way the FTC’s Franchise Rule requires pre-sale disclosures to prospective franchisees. Ultimately our efforts were unsuccessful. In 2012 the FTC adopted a Business Opportunity Rule that requires pre-sale disclosures to business opportunities that are not franchises (like rack sales, vending machines and work at home schemes) but most types of MLM plans were exempted.<sup>5</sup> In my view the MLM exemption was entirely unjustified and was the result of intense lobbying by MLM firms as well as the Direct Selling Association (DSA), whose membership is almost entirely comprised of MLM firms.

We continue to advocate for a pre-sale disclosure rule that would cover MLM. But experience suggests that a disclosure rule will not solve the problem. Although not required to do so, some MLM firms do provide some disclosure concerning the commission earnings of their distributors.

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<sup>5</sup> See 16 CFR §437, available at <https://www.ecfr.gov/cgi-bin/text-idx?SID=3f1cfb798ab3750d607bbcc3bc0c1677&mc=true&node=pt16.1.437&rgn=div5>

While these disclosures are typically presented in ways which overstate the potential for income, and omit crucial data concerning such matters as distributor expenses and attrition rates, they generally portray an opportunity which provides substantial incomes to only a very small percentage of MLM distributors, and little or no income for most participants. These disclosures do not appear to have had much effect on the ability of MLM firms to recruit new participants.

The questionable efficacy of presale disclosures now has empirical support. Economist Stacie Bosley conducted a study of the effect of MLM income disclosures on consumers. Professor Bosley found that such disclosures did not significantly discourage interest in the business opportunity, although it did somewhat reduce earnings expectations.<sup>6</sup>

MLM firms not only have limited risk in providing some earnings disclosures, but may also receive some benefits. Providing presale disclosures may give MLM firms a defense to claims of fraud or deception, in that distributors who receive such disclosures before joining the organization may not be able to credibly argue that they were defrauded when their income expectations are not met. In addition, the existence of a disclosure rule might have the unintended consequence of legitimizing an

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<sup>6</sup> Bosley, S., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing* (unpublished; pending publication in *Economic Inquiry*).

opportunity which should probably be prohibited entirely. Potential recruits who are provided with a disclosure statement that refers to an FTC requirement may believe that this amounts to an endorsement by the FTC.

The questionable efficacy of pre-sale disclosures suggests that something other than simple fraud or deception is at work in the MLM recruitment process. I suggest – and I am not the first - that the widespread use of coercive persuasion techniques similar to those employed by cults is at least partially to blame.

I do not know when MLM was first associated with the word “cult,” but it was early on in the history of the industry. Phil Kerns’ 1982 book, *Fake It Til You Make It!*, refers to allegations that Amway was a cult.<sup>7</sup> And in 1985, a former Amway distributor, Stephen Butterfield, published a book called “Amway the Cult of Free Enterprise”.<sup>8</sup>

How could a business opportunity be a cult? According to its proponents, MLM is merely a form of direct selling, in which distributors can earn money both by selling products to consumers as well as recruiting more distributors and earning commissions when they and their recruits sell products. But Kerns’ and Butterfield’s experiences in Amway included mass meetings with enthusiastic distributors giving standing ovations to high

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<sup>7</sup> Kerns, Phil, *Fake It Til You Make It!* (Victory Press 1982)

<sup>8</sup> Butterfield, Stephen, *Amway The Cult of Free Enterprise* (South End Press 1985).

level Amway speakers, mysterious terminology, relentless focus on recruitment, positive thinking, the avoidance of any questioning of Amway or its high level distributors, and the tendency for Amway distributors to dedicate more and more of their time and energy to the organization, often at the expense of their relationships with friends and family, despite the lack of financial success. All of these factors are consistent with at least the popular perception of what a cult is.

Other former Amway distributors have reported similar experiences, and added revealing details. In *Amway Motivational Organizations: Behind the Smoke and Mirrors*, the author documented how high level Amway distributors were making substantial profits selling recruitment training methods and materials to lower level distributors, in some cases more than they were earning through Amway.<sup>9</sup> In *Merchants of Deception*, Eric Scheibeler related his experience of rising through the ranks of Amway up to the level of Emerald Distributor, preaching the Amway message of prosperity, recruiting a downline of 2,000 distributors, while his actual

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<sup>9</sup> Carter, Ruth, *Amway Motivational Organizations: Behind the Smoke and Mirrors* (Backstreet Publishing 1999). Kerns, *supra*, also addresses this issue. It has been revealed that Carter was a pseudonym for Susanna Perkins, a former Amway distributor. The author of this paper defended Ms. Perkins *pro bono* in a lawsuit filed against her by a high level Amway distributor.

earnings were so inadequate that he was forced to declare bankruptcy.<sup>10</sup>

Both Carter and Scheibeler analyze the cultic behavior of Amway distributors; Scheibeler was counseled by Steve Hassan who has also addressed the issue of cultic behavior in MLM organizations.<sup>11</sup> A broader look at the MLM industry, including consideration of many of the cultic elements, *False Profits: Seeking Financial and Spiritual Deliverance in Multi-Level Marketing and Pyramid Schemes*, was published in 1997.<sup>12</sup>

While I have represented anti-cult advocates who were sued by cults, I am not an expert on cults, psychology or any other relevant field. My hope is that this paper will assist professionals and academics who do have expertise in cults to evaluate the impact of MLM recruitment practices on participants.

I outline below some of the elements of the typical MLM recruitment process, with examples taken from the experiences of former MLM distributors, documentaries and MLM training videos. I begin with some background on the MLM industry and pyramid schemes, continue with a description of what I believe are the key elements of the MLM recruitment

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<sup>10</sup> Scheibeler, Eric, Merchants of Deception, (ebook 2004), available at <https://archive.org/details/MerchantsOfDeception/page/n1> (last checked 6/22/19). Scheibeler originally published his book under the pseudonym John Jacobs.

<sup>11</sup> Hassan, Steven, Combatting Cult Mind Control (Park Street Press 1988) at 40.

<sup>12</sup> Fitzpatrick, Robert L., and Joyce K. Reynolds, False Profits: Seeking Financial and Spiritual Deliverance in Multi-Level Marketing and Pyramid Schemes (Herald Press 1997).

pitch, and close with a summary of the current legal remedies available in the U.S. for MLM victims, which I conclude are not adequate to address the problems of MLM.

## **II. Distinguishing Direct Selling, MLM and Pyramid Schemes**

Before proceeding to the topic of MLM recruitment techniques, it is necessary to give some background and to define and distinguish the terms “direct selling,” “multi-level marketing” and “pyramid schemes.” The following discussion is only a summary; those interested in a complete history, or a more thorough legal analysis, will have to refer to some of the authorities referenced in this paper.

### **A. What is direct selling?**

Direct selling is person-to-person selling away from a fixed retail location.<sup>13</sup> The salesman is generally considered to be a self-employed, independent contractor, who is compensated based on the volume of sales to consumers. As described by Arthur Leff in *Swindling and Selling*, it is a difficult business:

... door-to-door is a tough selling scene. Since you are not, like a storekeeper, necessarily dealing with people who, by showing up at your shop, indicate that they are interested in buying, you hit an

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<sup>13</sup> <https://www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing>

enormous number of totally “dead” prospects. And since you are going to *them*, you expend a huge amount of time and labor (i.e., money) reaching the very few “live” ones you do find. Thus you must make a very large profit per sale to make any money at all; but the higher you set your price, the stronger the customer resistance.<sup>14</sup>

Leff also explained one key aspect of a direct selling system, which is the fundamental conflict between the manufacturer and the salesmen concerning how many salesmen there should be:

From the manufacturer’s point of view, all that counts is gross sales. Whether he reaches a million a year with ten salesmen or a hundred concerns him little, so long as he reaches it at the same sales cost and can continue to do so. But as to the number of salesmen used, the salesmen and the manufacturer are in conflict. For assuming a finite market (hardly an unrealistic assumption), each salesman is a competitor of every other, and thus strongly interested in minimizing the sales force. That is, not only will each seller fight for a larger split of whatever returns there are on his sales, but he will also fight for a restriction upon the number of people trying to get those sales.<sup>15</sup>

Leff oversimplifies this conflict a bit. Most manufacturers recognize that a healthy distribution system must offer distributors a reasonable opportunity to succeed, which means that there can’t be so many distributors that they cannibalize each others’ sales. Likewise, most distributors recognize that they benefit from the activities of other distributors, including by increasing brand recognition, by lowering prices due to the manufacturer’s increased volume, or by increasing pooled advertising contributions or similar factors.

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<sup>14</sup> See Leff, Arthur, Swindling and Selling (Macmillan 1976), at 89-90.

<sup>15</sup> Leff, *supra*, at 103-104.

But the basic point – that distributors want there to be limits on the total number of distributors – and would prefer exclusive sales territories - is important when contrasting direct selling with MLM.

### **B. What is Multi-Level Marketing?**

In a multi-level marketing system, the distributors acquire the right to both sell the manufacturer's products and the right to recruit additional distributors, who will themselves have the right to both sell the products and recruit still more distributors, and so on. The key attraction for MLM distributors is that they can qualify to earn commissions based on the sales volume generated by their recruits, and the distributors recruited by their recruits, and so on. Leff describes the MLM system as follows:

But what if the deal is this: as a distributor you can sell the goods to consumers, *and* you can also sell the right to sell the goods to other sellers, who in turn also get *both* these rights, *ad infinitum*. ... If you talk five friends into each recruiting five friends of theirs, and each of those persuades but five more, there will then be one hundred and fifty-five people working for you. ... If you get some rake-off on all of the business *they* do, your earnings are no longer limited by the amount of time and labor you can expend on selling goods. More importantly, neither are your recruits' earnings limited by their labor, for they can do the same thing you are doing. You can, that is get them into the plan at bargain prices for the same reason you were initially willing to join.<sup>16</sup>

Accordingly, the MLM model reverses the natural inclination of distributors to want to limit the total number of distributors. MLM distributors are

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<sup>16</sup> Leff, *supra*, at 104.

trained and motivated to enthusiastically recruit more and more distributors, despite the fact that every new distributor is a competitor. MLM firms do not grant exclusive territories and there is no limit on the number of distributors.

In the United States, traditional direct selling has almost disappeared; 96% of the companies that call themselves “direct sellers” are in fact following the MLM model.<sup>17</sup>

### **C. What is a Pyramid Scheme?**

The definition of pyramid scheme in the context of product distribution has evolved in a series of cases brought by the Federal Trade Commission against MLM firms beginning in the 1970’s. The most frequently quoted definition is from *Koscot*, in which the FTC stated that:

Such schemes are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users.<sup>18</sup>

In *Webster v. Omnitrition*, the Ninth Circuit held that the second element of the *Koscot* test – recruitment with rewards unrelated to product sales - is the

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<sup>17</sup> Bosley, *supra*.

<sup>18</sup> *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1180 (1975), *aff’d mem. sub nom.*, *Turner v. FTC*, 580 F.2d 701 (D.C. Cir. 1978).

*sine qua non* of a pyramid scheme.<sup>19</sup> In *FTC v. Burnlounge*, the Ninth Circuit clarified that the rewards do not have to be “completely” unrelated to retail sales; an MLM is a pyramid if the rewards are paid “primarily” for recruiting.<sup>20</sup> MLM proponents often make statements to the effect that “we aren’t a pyramid scheme because we are selling a real product.” But the sale of a product is a red herring; the occurrence of some retail sales does not preclude the finding that an MLM is a pyramid scheme.

There is considerable controversy over whether “ultimate users” can include MLM distributors who are supposedly purchasing for their own use. In *Omnitrition* the Ninth Circuit appeared to hold that participants in the MLM plan cannot be considered “ultimate users”. In *Burnlounge*, however, the Ninth Circuit backed off this position. The problem of considering MLM participants to be ultimate users – what the MLM industry refers to as “self-consumption” – is that in order to assess whether an MLM is a pyramid scheme it is necessary to determine whether the distributor’s purchase is motivated by a bona fide desire to consume or use the products, or whether the purchase is motivated by the desire to qualify

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<sup>19</sup> *Webster v. Omnitrition*, 79 F.3d 776 (9<sup>th</sup> Cir. 1996). The author was counsel for the plaintiffs in *Omnitrition*.

<sup>20</sup> *Burnlounge, supra*, 753 F.3d at 885-86.

for rewards under the MLM compensation plan. As explained by Edith Ramirez, the former Chairwoman of the FTC:

Simply put, products sold by a legitimate MLM should be principally sold to consumers who are not pursuing a business opportunity. For good reason, the law has always taken a skeptical view of paying compensation to someone based on the presumed “internal consumption” or “personal consumption” of recruits who are pursuing a business opportunity. When a product is tied to a business opportunity, experience teaches that the people buying it may well be motivated by reasons other than actual product demand.<sup>21</sup>

The fact that MLM distributors may have mixed motives for purchasing products complicates the determination of whether a given MLM plan is a pyramid scheme. It requires the FTC (or private plaintiff) to undertake a lengthy, time-consuming and expensive investigation into the actual purchases and sales of products by the MLM’s distributors. Such investigations are made more burdensome due to the fact that MLM firms typically do not collect records of their distributors’ retail sales.

The complexities inherent in assessing the motivations of MLM distributors in purchasing products reached its acme in the FTC’s recent settlement with Herbalife. The FTC’s complaint alleged that Herbalife distributors “experience difficulty in selling product to customers outside the

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<sup>21</sup> Keynote Remarks of FTC Chairwoman Ramirez, Direct Selling Association Business & Policy Conference, Washington, DC (October 25, 2016), page 6, available at [https://www.ftc.gov/system/files/documents/public\\_statements/993473/ramirez\\_-\\_dsa\\_speech\\_10-25-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/993473/ramirez_-_dsa_speech_10-25-16.pdf) (hereinafter “Keynote Remarks”).

network,” while Herbalife’s “compensation structure puts pressure on Distributors to purchase large quantities of product in order to qualify for greater wholesale discounts and recruiting-based rewards.”<sup>22</sup> The FTC then alleged that Herbalife distributors disposed of excess products by giving or throwing it away, or by gradually consuming it themselves.<sup>23</sup> Significantly, the complaint alleged that “[s]uch self-consumption is not driven by genuine demand for the product, but is the easiest and most convenient way for a Distributor to get some benefit from product that the Distributor would not have bought absent his or her participation in the business opportunity.”<sup>24</sup> In the consent order, which also imposed \$200 million in restitution and a seven-year monitoring regime by an independent compliance monitor, Herbalife was required to implement a comprehensive set of changes to its compensation plan, including retail sales verification and record-keeping, much of which was designed to preclude the payment of rewards to

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<sup>22</sup> *FTC v. Herbalife*, Complaint for Permanent Injunction and Other Equitable Relief, ¶72, available at <https://www.ftc.gov/system/files/documents/cases/160715herbalifecmpt.pdf> (hereinafter Herbalife Complaint).

<sup>23</sup> Herbalife Complaint, ¶74.

<sup>24</sup> Herbalife Complaint, ¶74.

distributors based on purchases by other distributors unless those purchases were undoubtedly motivated by bona fide retail demand.<sup>25</sup>

### **III. The Common Elements of the MLM Recruitment Process**

This section identifies ten features of MLM recruitment which are common to the MLM systems I have studied. I have utilized a variety of sources, including books by former MLM distributors, documentaries, and MLM training videos. The sources range from books published in the 1980's through documentaries and videos recorded within the past few months, and from a number of different MLM firms. The same themes have been repeated, with little or no variation, from MLM to MLM, for decades.

#### **A. The Curiosity Approach**

The MLM experience is mired in deception from the very beginning, including the initial contact with a prospective MLM distributor. MLM recruiters are trained to misrepresent the purpose of the contact, or the nature of the opportunity – or both. Very often the recruiter will at least hint at the potential for vast financial rewards, without disclosing that those rewards are experienced by only a tiny fraction of participants, or that the recruiter

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<sup>25</sup> See generally, Keynote Remarks, pages 7-10. The consent order in *FTC v. Herbalife International of America, Inc.* is available at <https://www.ftc.gov/system/files/documents/cases/160715herbalife-stip.pdf>

herself has not experienced those rewards. This is where the infamous MLM phrase “Fake it ‘til you make it” first comes into play. How can you attract someone to this lucrative opportunity unless you have been conspicuously rewarded with luche?

The recruiter may initiate the contact by asking the prospect for assistance with something,<sup>26</sup> or by asking the prospect for their opinion on the company’s products.<sup>27</sup> Amway distributors are taught the “FORM” method, under which the prospect is engaged with questions about their family, occupation, recreation or money.<sup>28</sup> The purpose of these contacts is to engage the prospect in a brief dialogue which will result in their agreeing to come to a meeting.

In their initial approach to the prospect, recruiters are trained to refrain from disclosing the name of the company or that it involves multi-level marketing or even selling. “I was very clearly coached to make certain not to use the words “Amway,” “products” or “selling” in the phone calls to friends.”<sup>29</sup> As described by Ruth Carter, video and audio tapes used for prospecting were “generic” and did not mention “Amway” or “selling.”<sup>30</sup>

Prospects are told as little as possible and guided into reserving any

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<sup>26</sup> Carter, *supra*, 106-107.

<sup>27</sup> Fitzpatrick, 126.

<sup>28</sup> Carter, 106; Butterfield, 61.

<sup>29</sup> Scheibeler, 15.

<sup>30</sup> Carter, 37.

questions until they attend a meeting with the recruiter and their upline.

Carter reports that “her sponsors told her to do everything that she could to delay it until she could get me to a meeting.”<sup>31</sup> “Over and over again, speakers on tapes and at Seminars & Rallies, Introductory Seminars, and major functions drum into distributors’ minds the phrase ‘Never mention *Amway, Products or Selling* when you are talking to a prospect.’”<sup>32</sup> (Carter, 108) Instead, MLM trainers advise that the opportunity be described in vague terms; e.g. “[a]re you interested in some extra money?”, or as a “retirement plan.”<sup>33</sup>

Even at the follow-up meeting, where the business plan is presented, the recruiter or presenter waits until close to the end before mentioning the name of the company. “The word *Amway* was spoken only once in the two-hour presentation.”<sup>34</sup> “As a new recruit, I invite you – a relative, friend, an acquaintance – to my home for an evening. But I won’t mention Amway – not when I contact you; or when I invite you to the meeting; or even when the meeting starts. Instead, my objective is to get you all to look at the ‘business opportunity’ without disclosing what it is.”<sup>35</sup> Butterfield explains

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<sup>31</sup> Carter, 13.

<sup>32</sup> Carter, 108.

<sup>33</sup> Schreiter, Tom, Big Al Tells All: The Recruiting System (Sponsoring Magic) (Kaas Publishing, 1985).

<sup>34</sup> Scheibeler, 10.

<sup>35</sup> Carter, 107.

that “[n]o one should hear or guess the word “Amway” until the Plan-man unfolds his poster at the end.”<sup>36</sup>

The curiosity approach in MLM recruiting persists to this day. A recent BBC documentary noted that MLM pitches are often portrayed as job opportunities but “very few of them say what the job really is.”<sup>37</sup> For example, a recruiter may be soliciting for Nu Skin, “but sellers almost never reveal that in their posts.”

A recent instructional video, available on Youtube, warns new distributors that “[w]e don’t want our prospects asking a bunch of questions on the phone.”<sup>38</sup> The video provides the following script: “Hey Joe, what’s going on – this is Tanya – I’m in a big rush – I don’t have a lot of time – I’m about to hop into a meeting – do you have a quick minute .... Now the elements to that are: be in a hurry – alright – because Joe might ask me a bunch of questions that you’re not prepared to answer ... you want Joe to get to the presentation, because the presentation is going to answer all the questions.” The instructor emphasizes that “[t]he best professionals in

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<sup>36</sup> Butterfield, 46.

<sup>37</sup> Shaw, Jennifer, producer, *Secrets of the MLM Millionaires – Ellie Undercover* (BBC Current Affairs 2019) (hereinafter “Secrets”). The author assisted Ms. Shaw with background research during the preparation of this documentary.

<sup>38</sup> Tanya, Aliza, *MLM Training – Master the Invite with this Script* <https://www.youtube.com/watch?v=XN8dGhL8tgI> (accessed 5/23/19) (hereinafter “Aliza”).

network marketing, even though we could explain everything, we don't; for many good reasons.”

Similarly, in an instructional video on “Attraction Marketing”, the trainer urges participants to refrain from identifying their company or their products in order to attract potential leads.<sup>39</sup>

These lessons are among the first things taught to new distributors who are learning how to recruit. Lest the new inductee show some reluctance to deceive the friends, family members and acquaintances whom they will be recruiting, the trainer has a ready answer: If the prospect has heard bad things about the company, or about MLM, they might turn down the invitation and thereby lose out on a great opportunity. By withholding the name of the company, or the fact that it involves MLM, the recruiter is actually doing the prospect a favor: “We were instructed not to tell people any details on the phone, in order to *protect them from having their own inaccurate preconceptions cost them their entire future.*”<sup>40</sup>

Why the mystery? Why the deception? What are the “good reasons” why MLM recruiters don't explain everything? In the case of older, more widely known MLMs, like Amway or Nu Skin, the recruiter may want to

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<sup>39</sup> Torres, Lisa, *How to do 'Facebook Recruiting' Using Attraction Marketing*, available at <https://www.youtube.com/watch?v=EpkfRLl3z3s> (accessed 5/23/19).

<sup>40</sup> Scheibeler, 53.

avoid any negative connotations associated with the company. MLM in general has a negative image, so recruiters may want to avoid that label. And most people don't like the idea of selling, or don't consider themselves to be good salespeople. In addition, refraining from identifying the opportunity prevents the prospect from doing any independent research or thinking. The prospect will go to their first meeting knowing little more than their recruiter (usually a friend or family member) is very enthused about an exciting new opportunity. All they know is that the recruiter has found a mysterious, almost magical, solution to whatever their financial woes might be, and they want to share it with the prospect.

### **B. Meetings, Testimonials and the Great Leader**

Omnipresent in the MLM world are meetings – ranging from weekly or monthly meetings in living rooms to annual ‘extravaganzas’ held in resort hotels. The meetings follow “a planned, orchestrated format, a kind of drama-pageant observed and duplicated strictly in widely separated functions from Nova Scotia to Florida.”<sup>41</sup> New prospects who are attending their first meetings are targets of “love bombing,”<sup>42</sup> and relentlessly positive distributors will gush about the good fortune that led the prospect to this opportunity.

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<sup>41</sup> Butterfield, 38.

<sup>42</sup> Carter, 16.

The meetings are not merely held to recruit new prospects. More importantly, they serve to motivate existing distributors to continue the endless grind of recruiting. “To be successful in this business you need big belief ... which you’ll get and you’ll grow as you come to event after event after event.”<sup>43</sup>

Butterfield describes Amway meetings that would last from early afternoon to late at night, up to 12 hours with no breaks. As to breaks, one speaker said “[i]f I answer the call of nature during a Seminar I might miss the very thing that will enable me to go Crown.”<sup>44</sup> Carter reports similar experiences: “Those distributors who are winners and ‘serious’ stay glued to their seats throughout the entire function. After all, if you get up and walk around, or leave early, you might miss the one important statement that can propel you to Diamond!”<sup>45</sup> The Secrets documentary includes footage of several such meetings, indicating that the meeting remains an essential element of the MLM experience.

The main events at MLM functions are the rags to riches testimonials by high ranking distributors. “The Personal Story is a product of duplication, a consciously arranged narrative, always similar from Rally to

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<sup>43</sup> Secrets.

<sup>44</sup> Butterfield, 23.

<sup>45</sup> Carter, 56.

Rally and place to place, always leading to the main theme: Amway saves. There is hope with soap. You can do it too.”<sup>46</sup>

The salvation offered at these meetings is not merely financial; distributors are being given the chance to make the world a better place. For instance, in a meeting taped by the Secrets documentary, a speaker states that prior to this opportunity he felt that he was “not destined to do anything special.” At another meeting the speaker instructs attendees to raise their phones and turn on the flashlight – every light represents “a woman who has the potential to change someone else’s life.” Each speaker builds up anticipation for the next, even higher level speaker, leading to a crescendo when the leader or founder of the company is introduced. “They genuinely see the CEO as this massive, like, godly person.”<sup>47</sup>

To be selected to go on the stage is a great honor, reserved for distributors who have achieved certain milestone levels of recruitment or purchase volume. At the lower levels, the honor may simply be to be on the stage with a group of other similarly qualified distributors, but not permitted to speak. At a higher level the distributor may be permitted to make a brief, positive statement about the company. But only at the very highest level will the distributor be invited to give their full story, including their

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<sup>46</sup> Butterfield, 42.

<sup>47</sup> Secrets.

miserable life before they were introduced to the opportunity, their faltering first experiences in the company before they followed the recruitment system promoted by their upline, and then their magical ascent to unimaginable success. Here again, there is likely to be much faking it without really making it. Scheibeler, for example, who achieved the Emerald level in the Amway system, and had a 2,000 member downline, was a featured speaker at many Amway events despite being deeply in debt.

### **C. What are Your Dreams and Fears?**

Early on in the recruitment process the MLM recruiter will ask about the prospect's dreams and fears. The focus on dreams, rather than the nuts and bolts of the business opportunity, is an essential feature of the MLM pitch. Carter reports that the "Dream Session" is typically the longest part of the initial presentation; "This is where the speaker talks to the prospects about goals and then discusses some common 'hot buttons.'"<sup>48</sup> Scheibeler reports a similar experience: "Somewhat to our surprise, Kerry and Chris did not want to talk much about Amway at all. Instead, they helped us focus on creating a list of our dreams and goals. Sure we wanted to be debt free, have a nice home in a safe neighborhood, drive newer and safer cars, vacation, help our parents, and be together; what did that have to do with

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<sup>48</sup> Carter, 111.

how this business worked?”<sup>49</sup> According to Butterfield, “[a]t every Seminar, distributors are urged to write down their personal goals. We were supposed to cut out pictures and tape them to the refrigerator door. Leaders are taught to become familiar with the goals of their people. My Direct asked to see my written list and came to my house to check the refrigerator.”<sup>50</sup>

Once the recruiter and their upline identifies the dreams of the prospect, they have a powerful weapon. “It will be the objective of the upline Directs, in their association with a potential leader, to find out his “hot button”, that is, his particular needs and greeds. If he likes cars, they take him to a Mercedes or Porsche dealer and have him test-drive the most expensive models. If he likes homes, they take him on tours through wealthy neighborhoods. If he wants to escape his nine-to-five job, they might visit him at two in the morning and invite him to a pool-side party; they suddenly look at their watches and exclaim ‘Oh no! We forgot! You’ve got a job!’”<sup>51</sup>

The emphasis on dreaming remains a crucial element in the MLM recruitment and retention machine today. As a recruiter named Tayla Blue

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<sup>49</sup> Scheibeler, 11.

<sup>50</sup> Butterfield, 88.

<sup>51</sup> Butterfield, 30.

explains in the Secrets documentary: “It’s all about finding people’s weak points. .... And that sounds really horrible ... but finding people’s weak points you know ... If someone’s put on their social media ‘Oh I absolutely love to have this coat but I just haven’t got enough money for it yet’. There’s a clue, that’s a weak point ... well I can see that person’s not got enough money. ... Or if someone’s talking about them not having enough time to spend with their children, That’s like ‘Oh, I can give you a bit more time because I can give you this business opportunity.’”

The importance of the “dream session” is also revealed when, after a few months, the distributor shows signs of flagging enthusiasm. By this point the distributor will have experienced rejection from many of their prospects, constant demands on time and energy for attending meetings and training sessions, tension from disapproving friends and family, and tiny commission checks which do not come close to recouping their investment in inventory and “tools”. As explained in a recent instructional video, this is the time for the upline distributor to “[r]emind you of what you said and go ‘were you serious about you said you wanted more time with your family?’”<sup>52</sup> Goaded by a combination of guilt and shame, the distributor’s easiest course of action may be to stay with the program just a few more

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<sup>52</sup> Kidd, Darin, *How I Recruited 10 People in 10 Days in My Network Marketing Business*, available at <https://www.youtube.com/watch?v=KL2HjMUP7gA>

months. Thus, the dream session is not only a recruitment tool but a retention tool.

#### **D. MLM is the Answer!**

Whatever the prospects' dreams and fears might be, MLM is the answer. Financial troubles will be a thing of the past. "We don't have to do the full time 9-5 any more."<sup>53</sup> Butterfield explains that "[a]s a distributor, I am in possession of secret knowledge which the prospect will not realize until the appropriate moment ... the key to salvation, the means of making Dreams come true ..."<sup>54</sup> In fact, not only will joining the MLM company provide the specific remedy for whatever financial issue is identified by the prospect, it will also provide a means for the prospect to change the world for the better. "Being in The Business was not only a great financial opportunity but also a means by which you could improve every aspect of your life."<sup>55</sup> Distributors are told that they are on a "global mission."<sup>56</sup> This is not just a product distributorship; "[n]etwork marketing is the single-handedly best thing you can ever do for your children;" "You will become limitless!"<sup>57</sup>

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<sup>53</sup> Secrets.

<sup>54</sup> Butterfield, 65-66.

<sup>55</sup> Scheibeler, 32.

<sup>56</sup> Secrets.

<sup>57</sup> Secrets.

A recent documentary recorded former LuLaRoe distributors reporting ostensibly positive experiences, such as:

Lularoe made me feel so good about me. It boosted my self confidence.

I feel like I found my place again.

Instantly I had this huge network of women who wanted nothing but the best for me. They became like sisters. Every single time anything good happened I had an entire brigade of women behind me that were like ‘go you’. And I was like ‘yes’ and it felt amazing.

You felt like the best person ever. You felt like a celebrity.

Lularoe became more than just a company. It became a lifestyle.

Lularoe’s founder Deanne Stidham stated “And you choose to be lifted by one another. And everything is up in a place where you can make your life better.”<sup>58</sup>

The intended effect of this message is to strengthen commitment to the organization; that is, to increase retention and continued purchases by the distributors who will feel that if they drop out they are not only losing the financial investments they have made, but also abandoning the promise of a better life for themselves and everyone they know. “But Amway recruiters do not just want your money. They want your whole life.”<sup>59</sup>

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<sup>58</sup> Chiu, Maria and Janet Upadhye, producers, *Why Women Are Quitting Their Side Hustle* (Vice Distribution LLC 2019) (hereinafter “Side Hustle”).

<sup>59</sup> Butterfield, 57.

### **E. Recruiting is the Answer!**

As discussed above, the primary distinction between pyramid schemes and “legitimate” MLMs is whether the focus of the company is on retailing products or recruiting additional distributors. While a scientific survey has not been done, the experiences documented in the books and films referenced above demonstrate an overwhelming focus on recruitment. For instance, in the Secrets documentary, an MLM trainer says “R ... T ... A ... Recruiting is the answer” and “You will not become a six or seven figure earner if you don’t build a team. You can’t do that just on selling.”

Another MLM trainer recorded in the Secrets documentary, Tayla Blue, explains very candidly “I’m going to be doing some training on recruiting this evening ... So a lot of people get confused with this business ... because it is a beauty business they think they’ve got to sell products ... But actually this is a recruitment business.”

A former Younique employee explained: “The makeup is not what Younique is marketing. They’re marketing a lifestyle. They’re marketing a dream. They’re marketing a support group. So the majority of the promotions we put on are focused on recruitment.”<sup>60</sup> Similarly, a LuLaRoe

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<sup>60</sup> Secrets.

distributor said “they really pushed recruiting. . . . If it’s a warm body, take’em.”<sup>61</sup>

#### **F. Follow the Plan – and Duplicate!**

All MLM programs have some version of a plan by which new distributors are trained and guided to become part of the recruitment process. These plans vary in their details, but most contain each of the elements outlined in this paper. The plans are usually quite specific and cover every detail of the process, from compiling the list of prospects, making the initial solicitation, inviting the prospect to a meeting, closing the deal, training the new distributor in the plan, and motivating the new distributor to follow through, thereby duplicating the process with their list of prospects. The importance of “duplication” is emphasized at every meeting. “The instruction regarding the necessity for exact duplication had been quite clear.”<sup>62</sup> Distributors are cautioned against deviating from the plan in any detail: “The only way to become a winner is through this plan.”<sup>63</sup>

In many MLM organizations, these plans are developed and marketed by high level distributors, and the sale of the plans becomes an additional profit center for the upline distributors. In Amway these systems are

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<sup>61</sup> Side Hustle.

<sup>62</sup> Scheibeler, 23.

<sup>63</sup> Carter, 119.

referred to as “Amway motivational organizations.” Kerns, Scheibeler and Carter describe how they work in detail, and explain how top Amway distributors earn much of their income from selling the “tools” (books and tapes) to their downlines, and requiring their downlines to purchase tickets for the frequent meetings and events where the systems are marketed along with Amway. Butterfield notes that distributors were expected to “[b]uy tapes and listen to them every day”<sup>64</sup>

In Herbalife the plans, referred to as “lead generation systems”, were developed and sold by its high level distributors to their downline distributors, under such names as “Newest Way to Wealth,” “Financial Success Systems,” and “Vertical Skip Marketing.”<sup>65</sup> Herbalife shut down most of these systems during the course of the FTC investigation.<sup>66</sup>

Following these plans demands a substantial commitment of time and money. Scheibeler reports that “[o]ur schedule was one of unending training sessions, seminars, product fairs, promotional trips, open meetings, house meetings, and follow ups.”<sup>67</sup> A Nu Skin distributor stated that “It’s 24

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<sup>64</sup> Butterfield, 26.

<sup>65</sup> See <https://www.factsaboutherbalife.com/the-facts/the-perpetrators/doran-andry/index.html> and <https://www.factsaboutherbalife.com/the-facts/the-perpetrators/paul-michaels/index.html>

<sup>66</sup> See <https://seekingalpha.com/article/1269591-one-of-herbalifes-greatest-risks>

<sup>67</sup> Scheibeler, 56.

hours a day. You eat, sleep and breathe it.”<sup>68</sup> A LuLaRoe distributor reports that she was “live streaming on facebook 2 to 4 hours a day” and another states that she was “doing all the things they told her to be successful including buying a lot of Lularoe.”<sup>69</sup>

In some systems, Amway being a prime example, following the plan extends to guidelines into how distributors dress and conduct themselves in public. Butterfield states that distributors were taught the importance of “dressing for success” and that “dress expectations come from the top down;” there was public humiliation for non-conformers.<sup>70</sup> Butterfield also explains that Amway distributors are told to consult with their upline before making any major decisions; “Before you buy a house, check it out with your upline.”<sup>71</sup> In LuLaRoe, a distributor reported that she and other distributors received substantial pressure to undergo weight reduction surgery; “[y]ou have to look a certain way. You have to be a certain way”<sup>72</sup>

### **G. MLM Language and Proverbs**

MLM has its own language, somewhat mystifying for prospects and non-MLMers, where normal words have abnormal meanings, and abnormal words are coined for concepts that have no parallel in the non-MLM world.

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<sup>68</sup> Secrets.

<sup>69</sup> Side Hustle.

<sup>70</sup> Butterfield, 24.

<sup>71</sup> Butterfield, 26.

<sup>72</sup> Side Hustle.

To begin with, participants may avoid the term “multilevel marketing,” which may have a bad reputation, in favor of more innocuous terms like “network marketing,” “referral marketing” or “direct selling.” The new distributor will have to learn terms like “downline” (the group of distributors you recruited, plus the distributors they recruited, and so on down the chain), “upline” (the distributor who recruited you, plus the distributor who recruited your recruiter, and so on up the chain) are not found in any other line of business, and “cross-line” (other distributors in your company, but not in your upline or downline); the complex web of these relationships is considered a “genealogy.” The word “recruiting” may be abandoned in favor of a more innocuous term like “sponsoring;” “selling” may be replaced with “sharing.” There are special terms for each level of the compensation plan. New distributors may start their recruitment activities with their “warm market” (friends and family members) and then expand to their “cold market” (acquaintances or persons contacted through some lead generation system).

In the Amway system, the phrase “drawing circles” or “spinning circles” refers to the process of showing the Amway sales and marketing

plan.<sup>73</sup> “Stinkin’ Thinkin’” refers to any thought or statement that is negative about Amway.<sup>74</sup>

Additional obscure terms are used in MLM compensation plans. In some plans inventory purchases by distributors are considered “personal volume,” while purchases by their downline count towards their “group volume,” unless the downline distributor has reached a certain level in the plan, in which case they “breakaway” and their volume no longer counts toward their upline’s group volume, although it will generate commissions (or bonuses, or whatever other term may be used) for the upline, provided that they maintain the requisite inventory purchase “qualifications” for their level. In “matrix” plans the number of “frontline” distributors is limited, such that any additional recruits “spill-over” and are added to your second line or below. When a distributor fails to purchase sufficient volume to meet their qualifications, the commissions that would have been paid to them are instead paid to their next upline distributor who does meet their qualifications, a process called “rolling up” or “compassion.”

In addition to a new terminology, MLM firms have developed a series of pat answers to common questions or objections. A distributor who

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<sup>73</sup> Carter, 162, 169. Carter provides a useful glossary of MLM terms.

<sup>74</sup> Carter, 169.

resists buying the requisite amount of inventory will be told that “You got to be a product of the product.”<sup>75</sup> In the Amway system,

When a distributor asks his upline why he needs tools, he will be told one of a number of variations on a theme:

Well, if you were a carpenter, you wouldn’t think of going to work without your hammer, saw, screwdriver, etc. The tapes and books are your tools for building a successful Amway business

Tools are optional, but so is success.

Every trade has its own tools.

If you want to become successful, you have to learn how successful people think. The tapes and books will help you do that.

Tools will help you grow as a person.

The tools will increase your sponsoring rate.<sup>76</sup>

Scheibeler reports that “[w]hen we questioned about the apparent pyramid nature of the business, we were advised ‘no one makes more money off your business than you.’ Kerry later informed us, ‘This is a legal requirement that keeps this business from being an illegal pyramid.’”<sup>77</sup>

Other sayings include “If a guy lost his shirt in Amway, it must have been a pretty cheap shirt.”<sup>78</sup>

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<sup>75</sup> Secrets.

<sup>76</sup> Carter, 43.

<sup>77</sup> Scheibeler, 12.

<sup>78</sup> Scheibeler, 46.

A favorite topic of MLM recruiters is the foolishness of working for someone else, that is, having a job. Typical sayings include “If you have a J.O.B., you may be Just Over Broke”<sup>79</sup> or “J.O.B., Journey of the Broke.”<sup>80</sup>

Overcoming objections is a common theme of MLM training sessions. Scheibeler was taught that “[o]bjections are positive signs of interest. Here are three proven ways to handle them: Using the feel, felt found method. ‘I know how you feel. I felt the same way, but this is what I found.’”<sup>81</sup>

Another version of this exchange is explained in a recent MLM training video: “If the prospect says “I don’t have the money for this” or “I don’t have the time,” the recruiter should begin their response by agreeing “of course,” followed up by “that’s why I’m talking about this opportunity with you – don’t you think this is something you should consider?”<sup>82</sup>

#### **H. Avoid the Dream Stealers!**

One constant refrain in the MLM message is to “avoid the dream stealers,” that is, friends and family who question the validity of the opportunity. MLM trainers generally caution distributors against engaging on these questions. Rather, the distributor should simply avoid these negative people. “If your friends disapprove of Amway, do not associate

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<sup>79</sup> Scheibeler, 51.

<sup>80</sup> Fitzpatrick, 120.

<sup>81</sup> Scheibeler, 28.

<sup>82</sup> Morris, Matt, *2 Simple Words to Overcome Objections in Network Marketing*, available at <https://www.youtube.com/watch?v=fGEwYVsSWZ8>

with them.”<sup>83</sup> “My brother saw us as negative influences and negative influences need to be cut out of your life.”<sup>84</sup> The advice to cut off contact with doubters is given a self-help veneer; these people are bad for you. “Avoid negative people, for they are the greatest destroyers of self-confidence and self esteem. Surround yourself with people who bring out the best in you.”<sup>85</sup> Another MLM trainer advises that “my friends were so negative about it to the point that it drove me mad. So I distanced myself from them for a good year or two ... Limit the time you spend these kind of people.”<sup>86</sup> A former MLM distributor stated that “they do training where basically what they tell you is if someone doesn’t support you then you get rid of them. It doesn’t matter if it’s your mom, your brother, your sister, your husband, your friend ... You don’t need that in your life.”<sup>87</sup> “You tell the people you love they’re in a pyramid scheme and they go ‘no I’m not. You’re just a hater.’”<sup>88</sup>

Avoiding the dream stealers is essential to maintain the positive attitude that good MLM distributors must cultivate in themselves. “Even more important than never speaking negative words was the policy of never

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<sup>83</sup> Butterfield, 27.

<sup>84</sup> Secrets.

<sup>85</sup> Secrets.

<sup>86</sup> Secrets.

<sup>87</sup> Secrets.

<sup>88</sup> Side Hustle.

thinking negative thoughts. ... In light of this, it was vital to avoid negative thoughts, negative people, and negative counsel.”<sup>89</sup>

The insulation from negative influences includes instructions on what a distributor should and should not read. “Before you read a book, find out if it’s on their recommended list.”<sup>90</sup> “It’s vital to read the right books. Therefore, you must stop reading the “wrong” books. The only books you should read are those you purchase through the system.”<sup>91</sup> “I read what my sponsor tells me to read.”<sup>92</sup>

### **I. Follow the Star! - Celebrity Endorsers**

The big meeting has to have a star. Sometimes the star is the founder of the company. Sometimes it is one of the top distributors. But frequently as the MLM company grows it will invest in celebrity speakers and endorsers. These celebrities may be athletes, actors, politicians or motivational gurus. To cite just a few examples, the soccer star Cristiano Ronaldo, reputed to be one of the wealthiest athletes in the world, has a lucrative endorsement deal with the MLM Herbalife.<sup>93</sup> Prior to his election, President Trump was a paid endorser of ACN, an MLM based in North

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<sup>89</sup> Scheibeler, 45.

<sup>90</sup> Butterfield, 26.

<sup>91</sup> Carter, 59.

<sup>92</sup> Butterfield, 29.

<sup>93</sup> See <https://www.cnbc.com/2019/01/22/soccer-star-cristiano-ronaldo-fined-over-20-million-for-tax-fraud.html>

Carolina.<sup>94</sup> The People Helping People Agency, an MLM selling life insurance and other financial products, retained former president George W. Bush, basketball star Kobe Bryant, and prominent right-wing psychologist Jordan Peterson to speak at its upcoming annual conference.<sup>95</sup>

### **J. It's Your Own Fault if you Fail**

One constant in the MLM recruitment pitch is the message that if you fail, its your own fault. “Anyone who was not happy with his or her income was advised to get a mirror and look directly at the person responsible.”<sup>96</sup> If you fail it is because you didn’t follow the plan correctly, or because you did not maintain a sufficient level of belief. Among other things, it is essential that you stick with the plan long enough to give it a chance to work. MLM recruiters and trainers are fond of the saying “winners never quit and quitters never win.”<sup>97</sup> “They say ‘if you leave that you failed – how dare you – you could have made it – you don’t know because you quit.’”<sup>98</sup>

That a distributor’s failure must be their own fault is part of the ideology of MLM: “Poverty is the fault of the poor; there is no excuse for

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<sup>94</sup> See <https://www.businessinsider.com/trump-acn-multilevel-marketing-company-endorsement-payments-2018-10>

<sup>95</sup> See <https://www.thedailybeast.com/george-w-bush-kobe-bryant-jordan-peterson-promote-shady-multilevel-marketing-company-php-agency?ref=scroll>

<sup>96</sup> Scheibeler, 56.

<sup>97</sup> Butterfield, 27.

<sup>98</sup> Secrets.

failure; only losers complain and criticize.”<sup>99</sup> “If you are blaming your lack of success on something external that you can’t control, you lose control – don’t be a victim – be a boss!”<sup>100</sup> One of the co-founders of LuLaRoe, Mark Stidham, was recorded as saying “I’ve heard some whining lately about ‘my inventory is stale.’ No! You’re stale! Your customers are stale! Get out and find new customers!”<sup>101</sup>

Ironically, some of the MLM messaging explicitly refers to mind control:

If your business isn’t going well it is probably because of the way you’re thinking

90% of what we do is mindset

It’s all about programming ourselves with the right attitude.<sup>102</sup>

The repeated message gets heard – many failed MLM distributors attribute their lack of success to their own failure to work hard enough or effectively enough: “I used to think maybe I’m not putting enough time in ... you convince yourself that maybe you’re doing something wrong ... maybe you’re not trying hard enough.”<sup>103</sup>

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<sup>99</sup> Butterfield, 27.

<sup>100</sup> Secrets.

<sup>101</sup> Side Hustle.

<sup>102</sup> Secrets.

<sup>103</sup> Secrets.

## **IV. Summary of Legal Remedies for MLM Victims**

### **A. Federal Laws**

In the United States, the Federal Trade Commission (FTC) has the primary role in protecting consumers from unfair and deceptive practices by MLM companies. Typically, in enforcement actions against MLM firms the FTC will allege both that the company is operating a pyramid scheme – an inherently deceptive practice - and that it is making deceptive earnings claims.

The FTC also has the authority to promulgate trade regulations, such as the Franchise and Business Opportunity Rules discussed above. When it decided to exempt MLM offerings from the Business Opportunity Rule the FTC stated that it would continue to bring enforcement actions against MLM firms on a case-by-case basis. The FTC has also taken the position that there are “legitimate” MLM plans that can be distinguished from pyramid schemes. Unfortunately, the FTC’s case-by-case enforcement policy and its concession that some MLM plans are legitimate has the practical effect of legitimizing most MLM firms. Since the FTC does not have the inclination or resources to investigate every MLM firm, any firm that is not subject to an investigation can claim that the absence of any FTC investigation means that it is not a pyramid scheme.

The FTC has a very broad mandate, covering the gamut of consumer protection and antitrust issues, and is subject to the political whims of budgets and shifting enforcement priorities. We do not expect much action against MLM under the current administration.

Another federal agency, the Securities and Exchange Commission (SEC) can also prosecute MLM companies based on a line of precedents holding that investments in a pyramid scheme are considered to be investment contract securities. In *Omnitrition* the Ninth Circuit held that the FTC and SEC definitions of “pyramid scheme” are essentially identical.

The practical distinction for victims is that lawsuits under the FTC Act may only be brought by the FTC, while the federal securities laws permit both private actions by individuals as well as public enforcement actions by the SEC.

There are also some federal criminal claims which can be utilized by the Department of Justice to prosecute MLM firms, including mail fraud, wire fraud, and the Federal Racketeer Influenced and Corrupt Organizations (RICO) statute. The RICO statute provides for private actions by victims. To my knowledge the DOJ has never prosecuted an MLM firm under the RICO statute, but there have been a number of private RICO actions by MLM victims.

## **B. State Laws**

In addition to the federal remedies, there are a variety of state laws that potentially affect MLM companies, including laws prohibiting pyramid schemes or endless chain schemes, as well as consumer protection laws (generally modeled after the FTC Act). These laws vary in their definitions of pyramid scheme and the remedies, including whether individuals have a private right of action. In particular, the Direct Selling Association has successfully lobbied a number of state legislatures to amend their anti-pyramid laws in a manner which protects existing MLM practices.

State enforcement agencies are typically understaffed and underfunded, and may be reluctant to take on a large MLM, particularly one with political connections. Occasionally a group of states will pool their resources and prosecute an MLM, as happened with Fortune Hi Tech Marketing, which was subject to a joint enforcement action by the states of Kentucky, Illinois and Illinois, and the FTC.

## **C. Class Actions and Arbitration Clauses**

The above-referenced legal claims generally only recognize the financial damages suffered by MLM victims, and those damages generally range from a few thousands of dollars to perhaps a few tens of thousands. These losses are significant to the people who suffered them, but generally

are not sufficient to justify litigation. Accordingly, most cases by MLM victims are filed as class actions. The class action is a procedural device under which one or more representative plaintiffs may sue on behalf of a class of similarly situated victims in one lawsuit, thereby making it feasible for a contingency fee attorney to undertake the litigation. In order to bring a case as a class action the plaintiffs must establish that the class is sufficiently numerous to justify class treatment, that the class representative(s) are typical members of the class, and will adequately represent the class, and that there are common issues of fact or law which predominate over individual issues.<sup>104</sup> The Court must certify that the proposed class meets all of these requirements before the case can proceed to the merits as a class action. Defendants generally will fight very aggressively against class certification, since denial of certification typically represents the death knell of the lawsuit.

Due to the significant risk posed by class actions by victims, MLM firms have increasingly adopted contractual provisions in their distributor agreements which require MLM distributors to arbitrate any claims they have against the company, and which preclude distributors from bringing

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<sup>104</sup> There are other types of class actions, including claims for certain types of injunctive relief, but they are unlikely to be utilized in class actions by MLM distributors.

class actions. While some of these clauses have been successfully challenged, the trend of decisions by the U.S. Supreme Court is to enforce them.

Class actions are not a satisfactory solution to the pyramid scheme problem. Most class actions settle for money damages, with the settlement limited to an amount of money that the MLM firm can pay without seriously impeding its operations as a going concern. The settlement might include an agreement by the MLM firm to change some of its practices, but there is little incentive by either the plaintiffs or the MLM company to undertake any changes that will have a real impact.

Finally, class actions are most effective, and most likely to be certified, where the claims are for financial losses that can be determined on a formulaic basis. Claims for personal injuries, or for emotional distress, like injuries suffered by victims of a cult, are unlikely to be certified. Claims for undue influence not suitable for class treatment, since individual facts concerning the details of the recruitment, the susceptibility of the victim and the injuries suffered will predominate over any common issues.

## V. Conclusion

While pre-sale disclosures would be helpful for prospective MLM distributors, they will not solve the pyramid scheme problem. The MLM

recruitment process has been fine-tuned through decades of practice and experience. Pre-sale disclosures might dissuade some prospects, and might lower earnings expectations, but MLM firms will still succeed in recruiting new targets, the vast majority of whom will lose their investments. Existing legal remedies are inadequate. It may be that better consumer education may provide a more immediate and effective approach. I hope this paper will stimulate discussion and more academic analysis of the methods for addressing the problem of pyramid schemes.

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**Summary:** Mr. Brooks is a lawyer based in Brookline, Massachusetts. Over the past 30 years Mr. Brooks has litigated a wide variety of civil cases nationwide, including matters involving franchising, dealerships and product distribution, as well as securities, antitrust and consumer protection class actions.

**Experience with Multi-Level Marketing Schemes:** Mr. Brooks has substantial experience representing the victims of fraudulent and deceptive multi-level marketing (“MLM”) schemes. He has represented MLM distributors in putative and certified class actions in state and federal courts, as well as consumer advocates and whistleblowers, and is frequently consulted by consumer advocates, the media and other attorneys concerning MLM issues.

Mr. Brooks has worked pro bono for a number of non-profit organizations involved in the effort to educate and protect consumers from deceptive and fraudulent MLM schemes, including Pyramid Scheme Alert ([www.pyramidschemealert.org](http://www.pyramidschemealert.org)), the Consumer Awareness Institute ([www.MLM-thetruth.com](http://www.MLM-thetruth.com)), Quackwatch ([www.quackwatch.com](http://www.quackwatch.com) and [www.mlmwatch.org](http://www.mlmwatch.org)), MLM Survivor ([www.mlmsurvivor.com](http://www.mlmsurvivor.com)), and the Cult Education Institute ([www.culteducation.com](http://www.culteducation.com)).

Since 1995 Mr. Brooks has participated in rule-making proceedings by the Federal Trade Commission concerning its business opportunity rule in which he has argued for disclosure and conduct regulation of the MLM industry.

**Admissions:** Mr. Brooks is a member of the bar of the Commonwealth of Massachusetts, the U.S. District Court for the District of Massachusetts, and the U.S. Courts of Appeals for the First and Third Circuits. He has been admitted *pro hac vice* in many state and federal courts across the country.

**Bar Associations and Speaking Engagements:** Mr. Brooks is a member of the American and Massachusetts Bar Associations and a member of the Forum on Franchising of the American Bar Association. Mr. Brooks was a speaker at the 1995 Annual Forum on Franchising of the American Bar Association, where he delivered a paper entitled "Survey Evidence - Use of Collected Data in Encroachment Cases" and has been a speaker at conventions of the American Association of Franchisees and Dealers and the American Franchisee Association. He has been a speaker at several consumer protection conferences held by the Capitol Forum in Washington, D.C., and at the Program in Psychiatry and the Law (PIPATL) at the Mass. Mental Health Center.

**Media:** Mr. Brooks is frequently consulted and interviewed by journalists concerning MLM and pyramid schemes. He was featured in the documentary *Betting on Zero*.

## **Representative Decisions Involving MLM or Cults:**

*Webster v. Omnitrition International, Inc.*, 79 F.3d 776, 782 (9th Cir. 1996), *cert. den.* 519 U.S. 865 (1996). Mr. Brooks was class counsel in one of the most significant cases involving MLM, in which the United States Court of Appeals for the Ninth Circuit held that a MLM firm could not avoid being characterized as a pyramid scheme simply by having rules against inventory loading and requiring retail sales; it has to actually enforce rules which ensure that distributors retail products to persons who are not themselves part of the sales force.

*Capone v. Nu Skin Canada, Inc.*, Case No. 93-C-2855 (D. Utah). Mr. Brooks represented a class of Nu Skin Canada MLM distributors alleging claims for fraud and pyramid scheme violations and won rulings that Canadian distributors could sue under the federal securities laws, and that such claims should be certified for class action treatment.

*Rhodes v. Consumers' Buyline, Inc.*, 668 F.Supp. 368 (D. Mass. 1993). In a case involving victims of a "buying club" which sold memberships through a MLM system, Mr. Brooks successfully argued that securities claims should be upheld and that an arbitration clause in the MLM distributor contract should not be enforced because it violated the public policy of the State of New York. The founder of Consumers' Buyline, Keith Ranieri, later became the leader of NXIVM.

*Jacobs v. Herbalife International, Inc.*, Case No. CV 02-01431 (C.D. Cal.). Mr. Brooks obtained \$6 million class settlement for distributors who suffered losses after participating in a Herbalife "lead generation system."

*Minton v. Herbalife International, Inc.*, Case No. BC 338305 (Cal. Super. Ct., Los Angeles Cty). Mr. Brooks obtained \$1.75 million class settlement for distributors victimized by two Herbalife lead generation systems.

*NXIVM Corp. v. Ross Institute*, 364 F.3d 471 (2<sup>nd</sup> Cir. 2004). Mr. Brooks successfully opposed efforts to obtain a preliminary injunction against Dr. Paul Martin and anti-cult activist Rick Ross in a lawsuit alleging Copyright and Lanham Act violations, including NXIVM's appeal to the Second Circuit and petition for certiorari to the Supreme Court. Mr. Brooks represented the defendants *pro bono*.

*Gentle Wind Project v. Garvey*, 2005 WL 40064 (D.Me. January 10, 2005). Mr. Brooks successfully obtained dismissal of claims by alleged cult against operator of cult information web site; Mr. Brooks represented the defendant *pro bono*.

*Deimler v. Scheibeler, et al*, No. 2003 CV 1405 CV (Dauphin County Court of Common Pleas, Pennsylvania). Mr. Brooks successfully defended the operator of the [www.mlmsurvivor.com](http://www.mlmsurvivor.com) web site against claims of defamation by a high level Amway distributor. Mr. Brooks represented the defendant *pro bono*.