

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

FEDERAL TRADE COMMISSION,

level marketing business. Compl. (ECF No. 1) ¶¶ 1, 4. Shortly after filing the Complaint, the FTC settled with Signum Biosciences, Inc. and Signum Nutralogics (collectively, “Signum”), which stipulated to a permanent injunction prohibiting them from making misleading statements regarding the health benefits of eicosanoyl-5-hydroxytryptamide (“EHT”). Accordingly, the two

Neora sells beauty and wellness products in the categories of skin care, hair care, wellness, and weight management through independent distributors called “Brand Partners” or “BPs.”² Once enrolled with Neora, a BP is entitled to a product discount, as well as the opportunity to sell Neora’s products, and recruit, train, and mentor other “downline” BPs.³ The ability of BPs to sell Neora’s products to consumers is also referred to by the parties as the “business opportunity.” In contrast to BPs, “Preferred Customers” or “PCs” and “retail customers” or are customers who purchase Neora products and do not participate in Neora’s business opportunity.⁴ A Retail Customer pays full retail price for Neora’s products; in contrast, a PC can buy product at a discounted price, either at a slightly reduced “one-time” price, or at a more substantial discount if the PC signs up for a monthly recurring delivery, referred to as a “SmartShop Order,” or “SSO.”⁵ In addition, there are incentive programs available to PCs for product discounts on future purchases.⁶

1. BP Enrollment

To enroll as a BP, an applicant must fill out the Independent Brand Partner Application and Agreement (the “Agreement”), pay a fee, and identify his or her “Sponsor,” the BP who

² ECF No. 297 at 7; Ex. 1445; Tr. 5-B (ECF No. 322) at 60–68. Specifically, Neora’s products consists of skincare, including the Age IQ line and Neora’s bestselling product, the Age IQ Night Cream; “wellness” products, including EHT Brain Formula, Youth Factor Complete

introduced the applicant to Neora.⁷ The minimum amount an applicant must pay to participate in the business opportunity is a one-time fee of \$20 to purchase an “Enrollment Kit,” which contains various training, marketing, and other business tools to “help share Neora’s products and grow your business.”⁸ Applicants may also elect to purchase a “Product Pack,” through which prospective BPs can purchase Neora products in various bundles, ranging in price from \$199 to \$1000. The Agreement states that Product Packs are “exclusive to new Brand Partners at up to 50% retail prices,” and the applicant “can select one pack, multiple packs, or no packs—this is your business, your way!”⁹ In completing the Agreement, the applicant agrees to be bound by the Neora Terms and Conditions, Policies and Procedures Manual (“P&Ps”), Spam Policy, and Brand Partner Compensation Plan.¹⁰

⁷ Ex. 1050 (“2021 Agreement”); Tr. 4-A at 74. The record contains additional older versions of the Brand Partner Application and Agreement form. Exs. 663, 687, 1137, 1341. The Court will rely primarily on the 2021 version

2. Policies and Procedures

The P&Ps sets forth rules, regulations, policies, and procedures with which BPs must comply. Section One of the P&Ps, “Brand Partner Status,” explains that the only requirements to becoming a BP are the completion of the Agreement and purchase of a “Brand Partner Launch Kit,” the Enrollment Kit; no other purchases are required.¹¹ Section 1.11 of the P&Ps describe the status of BPs as independent contractors as follows:

A Brand Partner is an Independent Contractor. A Brand Partner is not a franchisee, joint venture partner, business partner, employee, or agent of Neora, and Brand Partner is prohibited from stating or implying, either orally or in writing, otherwise. A Brand Partner has no authority to bind Neora to any obligation. Neora is not responsible for payment or co-payment of any employee benefits. A Brand Partner is fully responsible for their own liability, health, disability, and workmen’s compensation insurance. Brand Partner sets Brand Partner’s own hours and determines how to conduct Brand Partner’s business, subject to the Agreement and the Procedures & Policy M (t)-2 (y,02 Tc -0.1k11.8he)4 (uhd[mo.7 -1 (a)T.004 T0T)T.004 T0TecT w 25

Section 9 of the P&Ps contains policies governing the purchase and sale of products, including, , a restriction on stockpiling, including for the purpose of qualifying for additional compensation¹⁵; the “70% Rule,” requiring that to qualify for commissions or bonuses, a BP must certify that he or she “has sold to non-Brand Partner consumers or used at least 70% of all products previously purchased”¹⁶; the “Retail Sales Rule,” requiring that BPs must make sales to non-BP customers to maintain active BP status¹⁷; a prohibition on the use of e-commerce sales platforms, such as Amazon or eBay, to sell products¹⁸; and rules relating to PCs, including a requirement that PCs must personally opt-in to recurring orders, and disciplinary action, including termination, may result if a BP submits a PC order without the customer’s consent.¹⁹ The P&Ps state that no product purchase is required for an applicant to become a BP, “although purchases or sales of products may be required to advance in the Compensaay

the Compensation Plan or potential income that BPs may expect to make by participating in the business opportunity, as follows:

3.04 Income Claims.

Brand Partner shall truthfully and fairly describe and present the Compensation Plan. Brand Partner shall not guarantee or estimate compensation, draws, expenses or deductions attributable to the business prospects. No income projections, including those based solely on mathematical projections or “ideal projections” of Neora Compensation Plan may be made to prospective Brand Partners. Brand Partners shall not represent Brand Partner (i)-1(a)4 (3(ip)2 (a))-2 (l)4 (p)-10 (r)3 (oj)-2 (e-2 (l)-2 (owbe)]T

approved promotional and advertising materials may be used to advertise or promote a BP's business, or sell products or services of Neora in any print or electronic media, including on the Internet, and BPs are required to remove any non-compliant profiles and/or websites immediately; failure to follow these social media guidelines may result in disciplinary actions, including termination.²²

A BP may be suspended or terminated for violating the terms of the Agreement, the P&Ps, the Compensation Plan, and other documents produced by Neora.²³ A BP who voluntarily terminates his or her business relationship with Neora has the right "to return forsotheo re 42ath N2 (

Under the Compensation Plan, eligibility for certain commissions and bonuses is evaluated through consideration of product “volume.” “Volume” refers to “[t]he value assigned to a product that is used to determine a Brand Partner’s rank qualifications in the Compensation Plan (Qualifying Volume or QV), or to determine the amount of commissions being paid on a

Bonus,” which a BP is eligible to earn within his or her first sixty days; if BP enrolls two new BPs and three new PCs, each with at least 80 QV, the BP is entitled to a bonus of \$50.²⁹ With one exception,³⁰ the remainder of the rewards and bonuses described in the Compensation Plan may be earned at any time during a BP’s tenure, and each will be described in turn.

a. Rewards for Selling

The Compensation describes five types of “rewards,” or income opportunities, that BPs may earn in connection with selling Neora products. First, BPs can earn a retail profit by selling Neora products either in person or through the BP’s personalized Neora website. If someone buys product through the BP’s retail website, the BP earns the difference between the price paid by the customer and the BP one-time price for that item, as listed in the Neora Product Price List.³¹ BPs may also sell Neora products at retail value from the BP’s own personal inventory, and earn the difference between the price the BP paid and the suggested retail price.³²

Order Bonus (“FOB”) for each new, personally enrolled PC who purchases product in their enrollment order; the BP may earn up to 20% of the PC’s first order.³⁴ Fourth, the BP may earn a Personal PC Bonus (“PPC”) depending on the number of PCs the BP has enrolled or maintained for a given month, with a minimum of at least three personally enrolled PCs to receive any rewards or bonuses.³⁵ And fifth, the BP may earn the Team PC Bonus based on

c. Rewards for Team Building

The Compensation Plan describes several “Rewards for Team Building,” which are based, in part, on a BP’s downline “team” of BPs,

income that can be earned through the Neora business opportunity.⁶⁰ The Field Compliance

individual goals, expectations, skill, effort, and time commitment as well as market forces beyond the Brand Partner'

The Compliance Department uses a program named FieldWatch, an Internet-wide monitoring service that constantly searches the Internet, including social media sites such as Facebook and Twitter, for terms relating to Neora’s products and brand.⁷¹ FieldWatch will identify potential violations for the Compliance Department to review; if a violation is discovered, FieldWatch will send at least two notices to the BP, including by text message, requesting that the violation be removed.⁷² If the BP fails to remove the violative claim after the second notice, the violation is escalated and flagged “Neora Review,” which will result in the Compliance Department personally reaching out to the BP and the BP’s upline to resolve the violation, and delete the improper claim.⁷³ In addition to FieldWatch, the Compliance Department will do manual Internet searches to try to find and resolve violations.⁷⁴ The record contains numerous examples of the Compliance Department communicating with BPs to address noncompliant posts and representations since at least 2013.⁷⁵ Neora also tracks repeat offenders; although Neora typically gives a BP an opportunity to correct noncompliant behavior, a BP is eligible for suspension or termination for repeated violations of the P&Ps.⁷⁶

⁷¹ Tr. 3-B at 53–55, 92–94. The terms are updated and revisited for new events and depending on current events, such as the COVID-19 Pandemic. Tr. 4-A at 24–25.

⁷² Tr. 3-B at 54–55.

⁷³ Tr. 3-B at 56; Ex. 1102, 1104, 1121, 1127 (templates for communications sent to BPs by the Compliance Department to address income and product claims). For example, testimony was given indicating that a BP was contacted to stop calling Olson “The Millionaire Maker.” Tr. 3-B at 83.

⁷⁴ Tr. 3-B at 142.

⁷⁵ Tr. 3-B at 56–61; Tr. 4-A at 21–22; , Exs. 15, 17, 22, 1383–84, 1389–90, 1451–62, 1466–68. Neora’s Compliance Officer testified that, for the July to September quarter of 2020, 633 products claims were resolved and 111 income claims were resolved. Tr. 3-B at 61.

⁷⁶ Tr. 3-B at 64–65; 2021 P&Ps §§ 4.02–.03.

B. Neora in Practice

Neora currently has approximately 30,000 to 35,000 active BPs.⁷⁷ The number of active BPs has remained relatively stable since 2018.⁷⁸ As of trial, Neora has approximately 163,000 PCs.⁷⁹ Over the life of the company, there have been approximately 400,000 BPs and 1.7 million PCs.⁸⁰ Evidence was presented indicating that median tenure for BPs and PCs may be approximately 8 months and 2 months, respectively.⁸¹

⁷⁷ Ex. 1463 (“From January 2021 - December 2021, Neora had 34,408 Active US Brand Partners.”); Tr. 4-A at 52 (“Q. How many Brand Partners does Neora have in the United States? A. Around 35,000.”); Tr. 4-B at 7 (“THE COURT: How many Brand Partners did you have in 2020? THE WITNESS: Approximately 35,000.”); Tr. 5-A at 27 (“[T]he number of Brand Partners, for example, 2021, there was 31,000 . . . Brand Partners”); Demonstrative Ex. 1440F at 4 (In 2021, “Total BPs w/ Product Purchase” is 31,460).

⁷⁸ Tr. 5-A at 29–30, 85; Tr. 1-B at 64; Demonstrative Ex. 1440F at 4; Ex. 622 at 2. If a BP has no activity in their account for 6 months, , has not bought product or made a sale, Neora will terminate the account in accordance with the BPs.

BPs join the Neora business opportunity for a variety of reasons, including: love of Neora products,⁸² the ability to earn free product through the 3UR Free program,⁸³ product discounts,⁸⁴ personal development,⁸⁵ and additional income.⁸⁶ In April 2022, current and former BPs were surveyed by a third party to understand why BPs joined Neora.⁸⁷ The results indicated that, among current BPs, the top reason for being a BP is to get discounts on product, either by getting a discount on products for personal use, or to earn free product.⁸⁸ In addition, a 2015 BP experience study asked BPs to identify the single reason that best represents why BPs decided to join Nerium; in descending order of response rate, the responses were: extra income, belief in Nerium, entrepreneurial, potential to earn, free product, primary income, and other.⁸⁹

BPs who enroll only for access to product discounts are occasionally referred to as “savings seekers.”⁹⁰ Because of the discount, if a BP buys only the \$20 Enrollment Kit and then

⁸² Tr. 5-B at 32–33.

⁸³ , Tr. 4-A at 62–63 (“I’ve talked to people who joined just to get the free product, meaning they joined because they wanted to get 3UR Free because they enjoyed our products and they saw it as an opportunity to potentially not have to pay for the product.”).

⁸⁴ , Tr. 4-A at 63 (“Other Brand Partners join just to get the product, the product at a discount.”); Tr. 5-B at 71 (discussing how BPs have access to special sets and discounts only available to BPs); Tr. 3-A at 106–07.

⁸⁵ , Tr. 4-A at 63 (“Some of them join because they, you know, they like the personal development aspects of our -- of our business or our company.”).

⁸⁶ , Ex. 673 at 33 (2015 BP Experience Baseline Study) (“New BPs look to Nerium to solve income needs.”).

⁸⁷ Ex. 1147 (“LRW Survey”) at 1; Ex. 1142–46 (LRW Survey data). Although the FTC objected to the admissibility of the LRW survey under Federal Rule of Evidence 703 and hearsay grounds, the Court admitted the survey “for what it is worth.” Tr. 4-B at 147–49. The survey invited all former and current Neora BPs to participate, with the exception of former Neora BPs who were terminated for cause, and current and former BPs who had not opted in to email communications from Neora. There were 361 total respondents to the 2022 Survey: 235 current BPs and 126 former BPs. LRW Survey at 1.

⁸⁸ LRW Survey at 2–3.

⁸⁹ Ex. 673. Only a PowerPoint summary of the 2015 study was available at trial, and the underlying data was not presented; Amber Rourke, Chief Sales & Marketix.nr car B12.1 (f)1.8 200.64 Tm(1020)188see, Cr4.2 (r)1.6 (w)0.9 (e)4.2 (r)1.6 (B)10.

buys \$300 worth of Neora products, the BP has saved about \$30 in product discounts, enough to recoup the cost of the Enrollment Kit.⁹¹ In addition, some BPs are prior PCs, who convert to BPs to access the bigger discount available to BPs.⁹² In 2021, 3,298 PCs switched to be a BP, representing 30% of all newly enrolled BPs that year.⁹³

Consistently, over 90% of Neora's revenues come from product sales; the remaining 10% of revenues come from sales of starter enrollment Product Packs to BPs and upgrades, and non-product sales.⁹⁴ An estimated less than 1% of Neora's product sales are made to Retail Customers.⁹⁵ The majority of Neora's product sales—somewhere between 75 and 80% of sales—are made to PCs.⁹⁶ Sales to PCs are considered ultimate end-user sales, purchased for personal use without the intent to resell to anyone else.⁹⁷ The data indicates that, as a percentage of total product sales, sales to PCs have been increasing and sales to BPs have been decreasing since 2017.⁹⁸

Approximately 19 to 25% of non-enrollment product sales are made to BPs.⁹⁹ For 2021, using PC purchases as a guide, it can be estimated that 65% of BPs' purchases are for personal use; under that same model, 90% of total product sales in 2021—including BPs, PCs, and retail customers—can be estimated to be for personal use.¹⁰⁰ Approximately 70% of Neora BPs do not sell product or build an organization through recruitment.¹⁰¹ From February 2019

If you have anything posted on social media that does not follow these guidelines, please remove them immediately.

Anyone not following these guidelines will experience immediate disciplinary consequences.

Ex. 1141.

The email linked a document providing approved messaging for Signum Biosciences, SIG-1273, and EHT, including instructions that BPs should not say that EHT “Cures sports repetitive trauma, Cures Alzheimer’s disease, Cures Parkinson’s disease, [or] Treats ADD, OCD or any other disease.”¹¹¹

Max Stock spoke again during the September 12, 2015, Get Real Conference, and was joined by his father, Dr. Stock. During their presentation, Dr. Stock referenced CTE, Alzheimer’s disease, and Parkinson’s disease, and stated that EHT was shown to be “beneficial” in model systems used to study neurodegenerative disease, including for Parkinson’s disease.¹¹²

III. CONCLUSIONS OF LAW

Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). Under § 13(b) of the FTC Act, “after proper proof, the court may issue a permanent injunction” against “any person, partnership, or corpor-0.004 Tc 0.004 Tw [pM35.-10 (e)

providing BPs with the means and instrumentalities to violate the FTC Act. Pursuant to § 13(b) of the FTC Act, the FTC seeks injunctive relief as necessary to prevent consumer injury and violations of the FTC Act. The Court will address each Count in turn.

A. Count 1: Pyramid Scheme

“The operation of a pyramid scheme constitutes an unfair or deceptive act or practice in or affecting commerce for the purposes of § 5(a).” *Neora, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014). The FTC maintains that Neora is actively violating or is about to violate § 5 of the FTC Act by operating an illegal pyramid scheme, and asks the Court to enjoin Neora from operating as a multi-level marketing company.

1. Legal Standard

In *FTC v. Amway*, 86 F.T.C. 1106, 1975 WL 173318 (1975), the Federal Trade Commission established the *Amway* test for determining what constitutes a pyramid scheme:

Such schemes are characterized by the payment by participants of money to the company in return for we or (h)y (n r)3 (e)7 (c)4 (e)2 (i)-2jEMC /P (ym)-1ttem3 -4-1 (c)4 (he)(c)ct cro(u

Unlike other courts, the Fifth Circuit has never expressly adopted the _____ test to determine the existence of a pyramid scheme. _____, 79 F.3d at 781 (“We adopt the _____ standard here”). Instead, the Fifth Circuit has acknowledged the two-part test only twice, in a pair of recent, related decisions.¹¹³ _____, 805 F.3d 145, 153–54 (5th Cir. 2015) (_____) (citing _____, 79 F.3d at 781–82), _____, 838 F.3d 629 (5th Cir. 2016) (en banc) (_____).

In _____, the Fifth Circuit panel vacated the district court’s decision certifying a class action for victims of an alleged pyramid scheme, brought under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–68. 805 F.3d at 158–59. The panel held that decertification was apSd(y a)40.004 Tc 0.004 Tw 65b2 (f)3 (on)-10 us3 (d on ot i)-2 (r)3 (. on ot plTw

In reaching this conclusion, the majority admitted that “[n]o clear line separates illegal pyramid schemes from legitimate multilevel marketing programs.” at 639 (quoting ., 177 F.3d 472, 475 (6th Cir. 1999)); , 838 F.3d at 653–54 (Jones, J., dissenting) (criticizing the majority for not providing additional guidance as to the meaning of “illegal pyramid scheme” beyond the definition). It did, however, discuss the FTC’s test, while providing some additional observations:

By definition, a pyramid scheme operates by taking money from downline recruits . . . who will never recoup their payments, and funneling the money to those at the top of the pyramid. Such schemes depend on “there [being] Peters . . . to rob for the purpose of paying Paul.” Those who lose money in a pyramid scheme necessarily do so “by reason of” the fraud because the fraud is necessary to temporarily sustain the scheme, and ultimately causes the scheme’s collapse. And, those who profit from a fraudulent pyramid scheme make money only by virtue of the participation of downline investors . . . who lose money.

, 838 F.3d at 640.

Moreover, the majority observed that “[w]hether a multi-level marketing program is

“[p]roduct that is purchased and consumed by participants to satisfy their own genuine product demand—as distinct from all product purchased by participants that is not resold—is not in itself indicative of a problematic MLM compensation structure,” and instead the analysis “involves a comprehensive analysis of a variety of factors.” at 2. In doing so, the FTC affirmed its prior 2004 Advisory Opinion, noting that “when evaluating the issue of participants’ internal consumption, the FTC staff is likely to consider, among other factors, both (i) whether features of the MLM’s compensation structure incentivize or encourage participants to purchase product for reasons other than satisfying genuine demand; and (ii) information bearing on whether purchases were in fact made to satisfy personal demand to consume the product.” at 2–3.

2. Analysis

The first element of the test, whether BPs pay money in exchange for the right to sell a product, is clearly met here; to enroll as a Neora BP and receive the right to sell Neora’s products, one must pay a minimum of \$20 for an Enrollment Kit. Accordingly, the Court’s discussion will focus on the second element of the test—whether Neora BPs receive rewards for recruiting other participants, unrelated to the sale of product to ultimate users—interpreted through the lens the Fifth Circuit’s guidance in and , and other relevant authority.

The Court begins with the Compensation Plan. The first four rewards or bonuses described in the Compensation Plan—Retail Sales, Personal Sales Commissions, PC First Order Bonus, and Personal PC Bonus—are based entirely on sales to PCs, and thus are unproblematic for purposes; the parties agree that PCs are considered ultimate end users, who purchase Neora product for personal use without the intent to resell. Likewise, the 3UR Free program requires only that the BP has at least three PCs with a minimum volume to earn the reward of

¹¹⁴ Tr. 1-A at 60, 99; Tr. 1-B at 22 (“I find that [Neora] are operating as a pyramid scheme. The rewards are locked

Dr. Bosley further testified, based on review of operational data, that the vast majority of participants will lose money; she found 96% of the approximately 400,000 BPs that have been part of Neora have lost money.¹¹⁵

Dr. Bosley testified that the FTC provided her with two legal assumptions for her work in this case, both taken from the Ninth Circuit's decision in *Amway*: first, that an ultimate user is limited to a person who would have purchased the product even if not for the business opportunity; and second, that rewards don't have to be completely unrelated to ultimate user sales in order for something to be a pyramid scheme, *Amway*, that the existence of some sales to ultimate users for consumption does not prevent the plan from being an illegal pyramid scheme.¹¹⁶ Dr. Bosley also relied on her own third, uniform assumption: that BPs mainly purchase product in pursuit of the business opportunity, and thus none of BPs' purchases for personal consumption qualify as sales to an ultimate end user.

Regarding the first issue—that Dr. Bosley’s third assumption that BP purchases are not end user sales is unsupported by the evidence—the Court will use the BP First Order Bonus as an example. For this bonus, if a newly enrolled BP purchases product at enrollment, a percentage of that product purchase amount is paid to both the enrolling BP and the enrolling BP’s upline. For purposes, the relevant inquiry is whether this reward is “unrelated to the sale of the product to [an] ultimate user[],” , whether the purchaser of the product (here, the newly enrolled BP) is an ultimate user. 1975 WL 173318, at *60. Under Dr. Bosley’s assumption, the newly enrolled BP is assumed to be an ultimate user; instead, the purchase is assumed to be for the business opportunity and not for personal consumption. Put differently, the FTC asks the Court to simply assume that an element of the test is met.

However, the Court finds that Dr. Bosley’s assumption is not supported by the evidence. At trial, Defendants presented evidence that some BPs enroll without ever intending to pursue the business opportunity, and are instead savings seekers, looking to take advantage of the biggest product discounts that are available only to BPs. Defendants provided the LRW Survey, which reported that—for the admittedly small number of BPs who responded—the top reason for being a BP is to get discounts on product, either by getting a discount on products for personal use, or to earn free product. Evidence was also pry ge-3 (P)-4 (i)-2 (s)- .J-14.88 -2 (b)-3 2 (,)4-2 (-3 (P))4 (l)3

evidence suggests that a newly enrolled BP may be joining to pursue the business opportunity (as Dr. Bosley assumes), or may, for example, be joining as a savings seeker, to purchase Neora products for his or her own personal consumption with no intention of reselling the product.

The distinction is material. For the purposes of the analysis in this case, the only relevant sales are purchases by BPs; sales to PCs and retail customers qualify as sales to ultimate users. Thus, the question of whether Neora is operating as a pyramid scheme hinges on whether sales to BPs are sales to ultimate users, and the FTC simply assumes that they are not. The Court by no means suggests that Defendants' evidence is sufficient to predict or speak on the motivations of BPs purchasing product from Neora; it is, however, sufficient to rebut Dr. Bosley's assumption that no BPs purchase product for personal consumption.

The FTC asks the Court to follow the district court's decision in , which found that there was "no way to unbundle the [distributors'] intent to consume Vemma products as ultimate users from their desire to remain qualified for bonuses," and adopted an assumption, also from Dr. Bosley, similar to the one presented here.

, No. CV-15-01578-PHX-JJT, 2015 WL 11118111, at *4 (D. Ariz. Sept. 18, 2015) ("In all likelihood, Affiliates' purchases of Vemma products are incidental to the right to qualify for and obtain bonuses."). The district court further observed that a participant's "intent in purchasing Vemma products must be viewed in light of Vemma's program design as well as its training and marketing materials."

The Court agrees with this general premise, but concludes it would be error to disregard or discount other relevant evidence as to BPs' intent in purchasing Neora product, including their own self-reported motivations for being a BP through the LRW survey, anecdotal reports from Neora employees regarding "savings seekers" and BPs motivated by product discounts, and

motivations that can be inferred from the behavior of PCs converting to BPs and their associated spending habits. This evidence potentially lacks the statistical rigor necessary to speak confidently as to the purchase motivations for all, or even a majority, of Neora BPs, but besides Dr. Bosley's assumption that all BP purchases are in pursuit of the business opportunity, the FTC provide no tangible evidence to the contrary. The failure to provide such evidence is contrary to the FTC's own 2018 guidance, which observed that, when considering the issue of multi-level marketing participants' internal consumption, the FTC is likely to consider "information bearing on whether purchases were in fact made to satisfy personal demand to consume the product."

2018 FTC Guidance at 2–3.

Moreover, the Court notes that there is evidence the FTC could have provided, but did not, which could have supported its position. For example, the court in *Neora* observed that "evidence that distributors purchase and consume product for the purpose of qualifying for recruitment incentives is evidence of a pyramid scheme." 2015 WL 11118111, at *3. The FTC speculated that Neora BPs *could* be making such purchases, but provided no evidence to suggest that is the case for the majority of BPs so as to support Dr. Bosley's assumption.¹¹⁹ Instead, the FTC provided no evidence from actual BPs or parlevel

The FTC criticizes as unreliable Defendants’ evidence that BPs enroll for access to discounts or to earn free product, particularly the LRW Survey. But the FTC makes no attempt of its own to unbundle BPs’ intent to consume Neora products as ultimate users from their motivation to participate in the business opportunity. The Court finds that there is a particularly compelling reason to do so here, given the evidence that there exists a legitimate and substantial consumer demand for Neora’s products, namely the fact that the vast majority of Neora’s product sales—between 75 to 80% of sales—are to PCs, who purchase Neora’s products with no incentives tethered to the Compensation Plan.

The magnitude of sales of Neora’s products to non-BP consumers distinguishes this case from two cases relied on by the FTC, _____ and the Ninth Circuit’s decision in _____. In _____, the “great majority of Vemma product sales”—in one year, 86% of sales—were to participants in the company’s business opportunity. 2015 WL 11118111, at *2–3. Here, the numbers are reversed; roughly 80% of sales are undisputedly to end users, while the remainder—roughly 20% of sales—are to BPs.

Similarly, the Ninth Circuit in _____ emphasized the “sharp difference” in purchasing patterns between distributors and non-distributors as supporting evidence that the distributors in that case were motivated by rewards for recruitment, as opposed to product sales. 753 F.3d at 884–85. There, distributors—called “Moguls”—maintained eligibility for cash rewards through sales of packages, and data showed that Moguls bought packages at much higher rates than non-Moguls. _____ at 885 (“If package purchases were driven by the value of the merchandise included in the packages rather than by the opportunity to earn cash rewards, one would expect to see comparable numbers of Moguls and non-Moguls buying the same

structure in making her assumption; she did not interview any Neora BPs or conduct any surveys. Tr. 6-B (ECF No. 324) at 89–90.

packages.”). That is not the case here, where sales of Neora’s product are primarily to PCs. In addition, once the company in stopped offering the ability to earn cash rewards, revenues plummeted, decreasing from approximately \$475,000 to \$11,000 from June to August of the same year; the Ninth Circuit found that the “dramatic decline in revenue . . . provides

product to ultimate users, , purchases by BPs in pursuit of the business opportunity, either to resell or to maintain eligibility for rewards. Using PC purchases as a basis for comparison, Dr. Vandaele estimated that 90% of total product sales and 65% of BPs' purchases in 2021 were for personal consumption, , ultimate user sales. Thus, under Dr. Vandaele's calculations, of sales to BPs in 2021—consisting of 19% of Neora's total product sales—only approximately 35% constitute non-ultimate user sales that implicate the second factor.

In its FTC's 2004 Advisory Opinion, the FTC acknowledged that internal product consumption by participants in a multi-level marketing business is not dispositive of whether the plan is a pyramid scheme; instead, the FTC stated that the "critical question" is whether revenues paying the commission to participants are generated from purchases of product "that are not simply incidental" to the purchase of the right to participate. 2004 FTC Advisory Op. at 1. Here, no evidence was provided indicating that rewards or bonuses to BPs paid under the Compensation Plan are funded primarily by payments made by BPs for the right to participate in the venture, , by the \$20 Enrollment Kit fee paid to enroll as a BP, or starter Product Pack purchases by BPs in pursuit of the business opportunity. Nor did the FTC provide evidence suggesting that Neora is funded primarily by those payments. ("[A] multi-level compensation system by payments made for the right to participate in the venture is an illegal pyramid scheme." (emphasis added)). As such, this is not the case where "[a]bsent sufficient sales of goods and services, the profits . . . hinge on nothing more than recruitment of new participants (i.e., fee payers) into the system." at 2. On the contrary, the evidence established that the vast majority of Neora's revenues come from sal(es)-5[d o

users, suggesting there sufficient sales of goods such that Neora’s profits do not hinge on the recruitment of new participants.¹²⁴

The magnitude of sales to PCs goes to the second fundamental issue with the FTC’s pyramid scheme theory, namely that it disregards the evidence that ultimate user sales are necessarily funding and driving the majority of rewards earned by BPs. Under the Compensation Plan, a BP earns no rewards or bonuses absent purchases by BPs or PCs in his or her downline, and because purchases by PCs constitute approximately 80% of Neora’s sales, it is a reasonable inference, supported by the evidence, that those ultimate user sales are the primary source of sales that contribute to reward eligibility.¹²⁵ Put differently, because there are a significant number of legitimate paying customers outside of the Compensation Plan’s incentives, the business does not depend on there being Peters to rob for the purpose of paying Paul, and there are not profits simply “by virtue of the participation of downline investors . . . who lose money.” , 838 F.3d at 640.

In addition, although many of the rewards in the Compensation Plan are “locked behind” a wall that requires recruitment to unlock, many of those bonuses can—and the evidence suggests, do—rely at least partially on PC purchases. For instance, for August 2022, of the BPs who qualified for commissions (and thus were participating in the business opportunity), 8% had

¹²⁴ , Tr. 5-A at 21–22, 28–29. In addition, the 2004 FTC Advisory Opinion’s discussion distinguishing illegal pyramid schemes from legitimate buyers clubs is also relevant in light of the evidence that some Neora BPs enroll in order to access larger product discounts or earn free product through 3UR Free and qualifying PC purchases. 2004 FTC Advisory Op. at 2 (distinguishing legitimate buyers’ clubs from pyramid schemes because “the purchase of goods and services is not merely incidental to the right to participate in a money-making venture, but rather the very reason participants join the program”). The Advisory Opinion further explains that a buyers’ club “confers the right to purchase goods and services at a discount,” and if “organized as a multi-level reward system, the purchase of goods and services by one’s downline could defray the cost of one’s own purchases.” . So too in Neora; the purchase

9PCs, 5 to 6% of them had at least 6 PCs, and 32% of them received the 3UR Free bonus, which requires at least three PCs.¹²⁶ In addition, each of the BP ranks contains a personal volume requirement that must be met to achieve that rank, but that requirement may be met solely through sales to PCs.¹²⁷ Similarly, Dr. Vandaele calculated that in 2021, of the BPs who received commissions, 76% of them qualified as “active” with PC volume alone.¹²⁸ Thus, although eligibility for those rewards is predicated on recruitment, it is simplistic to say that those rewards are wholly “unrelated” to ultimate user sales in practice, particularly here where PC sales vastly outnumber purchases made by BPs in pursuit of the business opportunity.

, 344 F. Supp. 2d 739, 745 (D. Utah 2004) (“[T]he fact that the right to receive a commission originates from sponsorship does not necessarily mean that all subsequent commissions are based primarily on recruitment.”). Instead, the consumer demand for Neora’s products, as evidenced by the high percentage of revenue from PC purchases, indicates that Neora is largely pay6 (es)-5 (6eW1 (g)- (e r)-1 (em)-1a0 (r)-1 l)]TJ0 Tc 0 17.93.47 0 Td(ons)-1 (a

end the pyramid scheme inquiry with a reading of the Compensation Plan and an evaluation of whether it is theoretically possible for a BP to earn recruitment-based rewards without individually making a single sale to an ultimate user. The Court refuses to slavishly look only to the Compensation Plan in isolation, with blinders on to the actual operational data and internal structure of Neora's bu

how to advance within it, recruitment of new BPs is not overemphasized in such a way so as to suggest that it is the business's primary focus.¹³⁰

In sum, the Court concludes that the FTC has not established the second element of the test. As a result, Neora is not operating as an illegal pyramid scheme, and accordingly, Defendants are not violating § 5 of the FTC Act on this basis.

B. Counts 2–4: Income and Product Claims

The FTC argues that Defendants are violating § 5(a) of the FTC Act by making deceptive representations that Neora BPs are likely to earn a substantial income

pursuit of the business opportunity, or how they exercise their choice of work activities.¹³¹

Indeed, the Court finds that the fact BPs may elect to completely forgo the business opportunity and not participate at all is significant; Neora has no ability to enforce performance, let alone mandate how and when BPs conduct sales. Thus, although Neora provides guidelines and instructions to BPs on how to conduct their businesses in a legally compliant manner, it cannot control whether, how, or when BPs choose to conduct business, weighing against a finding of control. ., 643 F. Supp. 2d 883, 889

(S.D. Tex. 2008) (“[T]he right of control . . . includes the power and to dictate the means and details of the agent’s work to accomplish ththt (nu)TJ(p)-10 (27 (ai)-6()Tjai)-6()Tjai (h/6(l)-6 (c

on attorney argument for support of this position, and as a result, there is not sufficient evidence in the record from which the Court could conclude what BPs' believe about BPs' authority vis-à-vis Neora, and whether that belief is based solely on the statements or conduct of BPs, or if it is traceable to a manifestation of Neora. § 2.03. For Defendant Olson individually, the record is particularly thin; there is no evidence indicating that a customer would reasonably believe that any given Neora BP has the apparent authority to bind Olson personally, either individually or in his capacity as CEO, let alone any manifestation by him traceable to that belief.

The record contains numerous examples of statements by BPs—in the form of video trainings and social media posts—but as statements by the purported agents, this evidence alone cannot support a finding of apparent agency. Moreover, the fact that BPs sold Neora product does not qualify as a manifestation of Neora's intent. § 3.03 (“The fact that one party performs a service that facilitates the other's business does not constitute such a manifestation.”).

And although the FTC points to numerous cases finding an agency relationship in circumstances partially resembling these, the issue is a question of fact, and the FTC cannot sidestep its evidentiary burden simply by asking the Court to follow other cases. Moreover, as discussed, Neora permits its BPs considerable flexibility in conducting their businesses, if they choose to do so at all; the record does not contain sufficient evidence suggesting that all BPs conduct their business in similar enough ways

For the foregoing reasons, the Court concludes that the FTC has not carried its burden in establishing that Neora BPs acted with actual or apparent authority on behalf of Neora, and thus has not shown that BPs are not Neora's agents. As a result, the Court

representations about potential business income are both misleading and material, and thus violate § 5.

The Court agrees with the FTC that some of its examples of income-based statements by Neora are problematic and misleading as to the amount of money typically earned by a Neora BP, and lack any curative disclaimers or qualifiers. However, in arguing that Defendants are making misleading income statements, the FTC primarily relies on evidence that is, in the Court's view, somewhat stale in light of other evidence reflective of Neora's recent operational practices. Such evidence includes exhibits that reflect the Nerium brand, and thus predate the 2019 rebranding to Neora,¹³⁶ or reference discontinued programs or rewards.¹³⁷

The FTC does point to examples of alleged misrepresentations made by Defendants from 2019 and 2020, including two marketing videos, including one named "Better with Neora," Olson's book, a 2020 "Jumpstart Roadshow" training presentation for BPs, and a 2019 Neora blog post on the "Million Dollar Club" of top earners. In contrast to the earlier examples, however, statements regarding earning potential in these marketing videos are accompanied by a prominent disclaimer

The fact that the FTC relies primarily on older examples of alleged misrepresentations is significant. Earlier in this case, the Court observed that “allegations of past conduct can give rise to a reasonable inference of current or future violations, either in conjunction with other circumstances or where the past violations are extensive.” _____, 552 F. Supp. 3d 628, 637 (N.D. Tex. 2021). In addition, the Court recognized the following factors to consider when deciding whether to issue an injunction based on past violations of the law:

[T]he egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.

_____ at 637–38 (quoting _____, 549 F. Supp. 2d 811, 816 (N.D. Tex. 2008)).

Thus, although proof of past violations can be relevant to whether an actor “is violating, or is about to violate” the FTC Act, for purposes of awarding injunctive relief, the probative value of these older Neora statements decreases in light of other evidence presented at trial indicating that Neora has updated and revised its policies regarding permissible income and income-related representations in its messaging. For example, Neora employees testified that Neora no longer describes BPs earning full-time income, and avoids using dollar amounts or terms such as “millionaires’ club,” “financial freedom,” “residual” or “dream” income, or “dream lifestyle.”¹³⁹ Instead, Neora now advertises earnings potential through the business opportunity as “modest supplemental income,” and consistently uses income disclaimers on its materials.¹⁴⁰ Since 2016, Neora has stopped using oversized checks to recognize high-earning

¹³⁹ Tr. 4-B at 18–20; Tr. 6-A at 36.

¹⁴⁰ Tr. 3-A at 32, 83; Tr. 4-B at 15–16, 19–20; Ex. 1462 at 2 (Field Compliance Guide).

BPs, and has stopped using testimonials, lifestyle claims, and success stories, including those promulgated in the _____ magazines.¹⁴¹

Moreover, Neora employees and Olson testified that these changes were adopted to align Neora's practices to signals and suggestions from the FTC regarding permissible and impermissible income claims, and to conform with guid2 (c)63 -19 55.85 Td[(B)-3 (P)-4 (s)-1 (, a)4 (nd)er

“The Millionaire Maker” in his

book, but the net impression of the cited passage

evaluated under the same “net impression” standard applicable to Count 2.

, 777 F.3d 478, 490 (D.C. Cir. 2015).

The FTC contends that Defendants claim EHT is scientifically proven to prevent and treat concussions, CTE, Alzheimer’s disease, and Parkinson’s disease. As evidence of recent violations, the FTC relies exclusively on statements posted on social media by Neora BPs, associating EHT with CTE, Alzheimer’s, and other diseases.¹⁴⁴ However, as discussed, the FTC has not established that Defendants are liable for BPs’ misrepresentations.

The FTC’s remaining evidence consists of misrepresentations made by Signum in connection with the ME Sports product, including on the ME Sports website, and the Stocks’ problematic statements at the April and September 2015 Get Real Conferences. However, none of the ME Sports materials have been used since 2015, no one at Nerium helped or contributed to the ME Sports websites or marketing materials, and the FTC concedes that the Stocks are not Defendants’ agents.¹⁴⁵ Admittedly, the Stocks made improper efficacy claims at the April and September 2015 Get Real Conferences, but the evidence presented at trial indicates that, prior to the conferences

In sum, the FTC seeks an order preventing Defendants from claiming that their products cure, treat, or prevent human disease. There is no evidence before the Court that Defendants are currently making such claims, or are likely to do so in the future. ., 141 S. Ct. at 1348 (§ 13(b) “focuses upon relief that is prospective, not retrospective”). Accordingly, the FTC’s request for an injunction on these grounds is denied.

C. Means and Instrumentalities Claim

The FTC asserts that the defendants violated sections 5(a) and 12 of the Act through furnishing consumers with the “means and instrumentalities” to mislead others—namely, by disseminating materials misrepresenting: (a) BPs’ ability to earn substantial income from participating in Neora’s business opportunity (Count II); or (b) the efficacy and scientific basis of EHT and/or Neora EHT (Counts III and IV).

“Those who pudy ~~AMCID~~ 4 itc ea defh of

misrepresent the efficacy or scientific basis for statements made in connection with EHT. The FTC identifies problematic with the EHT Brain Formula a packaging, marketing, product guides brochures created by Neora, nor the product discloses that Neora trains its sales representatives on social media posts when discussing wellness products accordingly, Defendants provided BPs with the “means and instrumentalities to deceive consumers about EHT.

So too for the earnings potential of Neora’s business as with E the P&P provided clear guardrails regarding permissible income statements that BPs must abide by or face discipline and termination, and Defendants provided training, guides approved marketing, disclosure statements and used language to BPs —

BPs to use such materials in pursuing their business likewise does not violate § 5. Regarding the JumpStart Roadshow presentation, testimony was provided that this presentation was an internal training for already-enrolled BPs hoping to expand their teams.

SO ORDERED.

September 28, 2023.



Handwritten signature of Barbara M. Lynn in cursive script.

~~BARBARA(MOG5LX)NQ2MRBB02 Tc 0.102 T[(U)-9-1 YNYNY~~