

**Response to Barry Minkow Rebuttal to
Open Rebuttal to the
Fraud Discovery Institute Report on
Usana Health Sciences**

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Introduction:

This is my rebuttal to Barry Minkow's rebuttal to my rebuttal to his Usana report. Clear?

To view my original Open Rebuttal go to:

<http://www.marketwaveinc.com/articles/FDI-Rebuttal-R1.pdf>

I strongly suspect that Mr. Minkow's initial response was hastily produced (thus his brevity and lack of substance) to lessen the impact of my rebuttal. However, I also suspect that his team of anti-MLM "experts" are now pouring over every word of my rebuttal in preparation for a much more substantial response. There are still far too many questions posed by my rebuttal to leave unanswered.

In fact, Barry, I did a quick tally of the individual, refutable points made in my rebuttal and categorized them as either major or minor. Minors were incidental to the main issue, but nonetheless debatable. Major's were key issue points where a response (if there is one) is imperative.

There were 49 minor points. You responded to three of them.

There were 76 major points. You responded to only three of them as well.

What's even more revealing is that your rebuttal to the three minor points¹ make up over *one-third* of your entire response!²

Your response to the three major points³ does make up 40% of your letter, but you only addressed 4% of the points I rebutted!

In fact, a good portion of your response is made up of nothing more that a reiteration of your original accusations, and a defense of your own credibility (one-fourth of your letter). Another 17% is devoted to challenging my motives and expertise (Vis-à-vis "If you can't reduce the credibility of your opposition's point, reduce the credibility of your opposition').

So while there is not much here to respond to, and what is there is surprisingly weak, I'll carry on.

Response:

You simply repeat your original claim that Dr. Denis Waitley "...does not appear to possess his PhD in Human Behavior despite a March 27th, 2007 8-K filed with the SEC saying he did."

¹ The FCC refund letter, class action law suits against Usana, and my objectivity.

² 624 words of the 1,731 that make up the body of your response letter (36%).

³ The retail sales, "75% savings" and Medical Advisory Board issues.

However, you make this claim only because you can find no evidence of it. This, of course, does not mean it didn't happen, it just means you can't find it. In fact, the institution where Dr. Waitley received his Doctorate, La Jolla University, is no longer in business.⁴ Although the University was very likely unaccredited, Dr. Waitley asserts that he did take classes for two years and did a dissertation, and many people attended his graduation ceremony. All school records were transferred to another location and archived. Dr. Waitley is getting together affidavits and trying to locate other evidence to validate this claim.

I accused you of being petty and desperate in the lengths you seem to be going to in an effort to dig up dirt on anything related to Usana. Then in your response you sarcastically⁵ introduce a new claim that Usana "now confers degrees to its executives" because Yale says Dr. Tim Wood has a degree in Forestry "but by golly Usana says it's Biology, so Biology it is." Why is it so difficult to accept that this could be an innocent error or miscommunication? Do you actually believe that even a single Usana investor, ever, gave any weight at all to the fact that a single scientist employed by Usana (not a member of their Medical Advisory Board) had a degree in Biology rather than Forestry? Do you seriously believe that Usana somehow felt their standing on Wall Street would be materially enhanced by knowingly misstating his degree (especially when, as you know, how easy it is for the public to verify)? Furthermore, Dr. Wood's Ph.D. was in "Environmental Science and Forestry" (although I can see how just taking "forestry" out of context can make it appear less substantial). Here is his full response:

"I received a Ph.D. diploma from Yale University. My dissertation was entitled 'Biological and Chemical Control of Phosphorus Cycling in a Northern Hardwood Forest'. The area of technical study is termed biogeochemistry which is a field of biology. Clearly my work involved elements of plant biology, plant nutrition, soil chemistry, soil microbiology and geochemistry. But my principal focus in this work (both in research and education) was in biology. Because few people outside of the natural sciences know what 'biogeochemistry' is, I have generally referred to my Ph.D. degree as being in the field of biology."

He's a legitimate scientist who obviously has an expertise in health and nutrition – and biology. By frivolously attacking Usana on this minor and obviously innocent point you've provided even more evidence to back up my original assertion.

You again claim the entire Usana Medical Advisory Board is promoted by Usana as "independent". Instead of responding to any of the specific points I offered to counter this you only throw out a footnote leading to a couple of "Independent Distributor" web sites (nothing from Usana) where one board member, Dr. Ray Strand, has a testimonial displayed below others who are independent. Even if this guilt-by-association (guilt-by-proximity-on-the-page) were a valid argument, do you know when Dr. Strand provided this testimonial? Are you *certain* he didn't advocate Usana's products first, then become an Associate? Or are you just wishing really hard that isn't the case? And why, if these two distributors were really listing those testimonials which were "independent" do they also list "Well Known Associates" under the same title? But even if Dr. Strand *wasn't* independent...

I have to stop here for a moment.

You have accused a \$300 million international company with over 150,000 distributors worldwide (not to mention over 800 paid employees), with a market capitalization of almost

⁴ There are online references to this University dating as far back as 1981 and as recently as 1999, so it clearly did exist at one time.

⁵ I admit I'm the pot and you're the kettle in this case.

three-quarters of a *billion* dollars, of being an illegal pyramid and filing fraudulent financials with the Securities & Exchange Commission. You spent months to produce an 86 page exposé on them and I spent weeks to create a point-by-point, 28 page rebuttal to every major issue you presented – and I’m now having to play *dueling mind reader* with you over what one member of their advisory board was thinking when he gave a short testimonial, probably years ago. The irony and hypocrisy of your assertion that Usana is guilty of using evasion and “distraction” tactics is prodigious.

So where were we?

But even if Dr. Strand *wasn’t* independent, this still offers utterly no evidence at all that his testimonial wasn’t sincere, his genuine expertise wasn’t utilized in developing Usana products, or that *Usana corporate* holds out their medical board to be independent. And surely when choosing an example to refute my rebuttal on this point you picked the very best one, yes?

Again, instead of countering my specific rebuttal points you simply restate the basis for the rebuttal that “no less than seven different law firms filed suits in federal court all citing our original report as the basis for their suit.” Well, I’m glad you had me look into this issue further, because I did, in deed, make a mistake. Only *two* law firms have filed a class action law suit against Usana! Dig deeper, Barry, and you’ll see from the other law firm’s press releases that they are only announcing the first two firms law suits, then essentially advertising for class members to represent.⁶ And those two suits are almost carbon copies of each other. As for the two firms that have filed – of course they did! This is SOP⁷ for law firms that deal in securities law. Many cases didn’t even have class members when they were first filed, all the suits will eventually be consolidated into one, and it’s extremely unlikely that this action will be pursued until the SEC “inquiry” and Usana’s libel case against you has concluded. And you surely know all this is true, yet you declare it as if to suggest that the number of these suits has any bearing on their validity (frankly I’m surprised there are *only* two) or in any way gives credence to your report.

Next you spend a very disproportionate amount of space on what you call my “most embarrassing and glaring error”. The irony continues to mount.

First, you’ve taken my “MLMs are well respected...” comment completely and deliberately out of context, not once, but twice. Because of a biased media⁸ and a small but vocal club of anti-MLM zealots (of which you have officially been inducted) MLM certainly is not always well respected. But my comment was that they were well respected “for their generous refund policies”. To that point, which you conveniently ignored, the Federal Chamber of Commerce has a 21 day 100% money back guarantee on their benefits packages, which they claim existed in 2004. When I said there were likely two possibilities – that your client either didn’t qualify for a refund, or the “FCC” wasn’t a legitimate MLM company – I was wrong! There was a third possibility that I hadn’t considered. *That the “FCC” wasn’t an MLM company at all!*

After scouring every page of their web site and not finding even an indirect insinuation of a multilevel system of compensation, I decided to call the Federal Chamber of Commerce. I was told that, yes, they do have an “affiliate” program where one can earn a small commission on the resale of their under-\$50 annual, under-\$10 monthly, benefits package, but “we are not

⁶ They have 30 days, and the clock started ticking the day the first suit was filed.

⁷ Standard Operating Procedure.

⁸ The mainstream media primarily exists on advertising dollars and the MLM industry historically does little advertising in the mainstream media. It is primarily a word-of-mouth business. Therefore, the mainstream media has a financial motive to discredit MLM.

network marketing". To make sure there were no semantic issues I restated my question to include "multilevel" and again was told no, that's not what they are. So, Barry, this explains why I, an MLM expert, didn't know about an MLM company called "FCC".

But let's say they are. Perhaps, like Mary Kay Cosmetics, Melaleuca, and a few other companies, the "FCC" is an MLM company but, for whatever reason, just doesn't want to admit it. Well, the Federal Chamber of Commerce isn't just borrowing the name from the real Chamber of Commerce – they *are* the Chamber of Commerce! The *National* Chamber of Commerce! Who not only doesn't seem to have any problem with MLM, they have embraced it! If the Federal Chamber of Commerce really is endorsing classic multilevel marketing in their own sales program this will provide a huge boost in credibility to the industry. I hope they *are* an MLM program! You're right, Barry. I *do* owe you a Thank You!

Next you devote too much attention to reducing my credibility and increasing yours (which I'll address in a moment) but when you return to addressing the actual issues you begin a somewhat ambiguous tangent related to the average 4-week sales volume per rep, which you calculate to be \$89.00. Of course this has nothing even remotely to do with any of the several pages of specific counter points I made regarding the retail sales issue, but I will indulge you.

Once again you have based your calculation on all distributors, not just those that did anything. It's not uncommon in MLM for new distributors to enroll with a \$20-\$40 distributor kit and never even place an initial product order. You're counting these people. At least one-third of Usana distributors, if they are typical of the industry, will place one initial order for inventory and never be heard from again. You're counting them, too. Then when you factor in the heavy retailers who move hundreds, perhaps even thousands, per month in product⁹ these do-little distributors (the majority) skew the average downward (by the way, isn't this a data manipulation technique you and Jon Taylor accused us of using, only in reverse?).

But once again, let's go ahead and use your number. So you claim that since this \$89 per distributor/customer average won't even cover one HealthPak 100 product, this is evidence that there is "little to no retail sales" in Usana.

I also believe that many families in America have three or more children. But since the average U.S. household has only 2.3 children, based on your logic, "little or no" homes in the U.S. have 3 or more children.¹⁰

Rather than looking at tortured data or hypotheticals, let's focus on facts. Usana had over 80,000 Preferred Customers at the end of 2006 who were buying the product only for the value of the product. Usana sold over \$52,000,000¹¹ in product to those *customers* who were not Associates doing the business. And this doesn't even count products resold by Associates at retail, customers who enrolled as Associates for the benefits I've already described, or those Associates who are now only customers but still look like Associates on the books.

I asked in my rebuttal: If the vast majority of Usana's \$374 million in product sales last year were to people who neither wanted nor resold any of it, and they could all easily return it for a 90-100% refund after they "failed" – why didn't they?

⁹ The record for a single month's *retail* volume in my previous MLM venture was just over \$4,500. In my current program it's just under \$10,000.

¹⁰ There are eleven million such households.

¹¹ Regarding your footnote #10: I clearly described the \$13.33 million in Preferred Customer sales as being based on 3rd Quarter, 2006 10-Q data, and the \$52,386,600 figure as being for the entire year.

It wasn't a rhetorical question, Barry.

Although you offered no response at all to this most critical point, I must ask you again: If the MLM business model is as "untenable" as you claims, because of inevitable market saturation, which both you and Jon Taylor claim has *already occurred*, then why hasn't it caused the demise, or even disruption, of even a single MLM company? Ever?

That also wasn't a rhetorical question.

Nor was this one: You said you'll give back your puts if Usana will give back the millions they received from their distributors. If Usana is found innocent, will you give back the millions your report has cost Usana investors?

Here's some more that you ignored:

Why did you claim the TenX bar only had 2.6 times the antioxidant power of grape juice when you knew you weren't comparing equal amounts of the product? Why did you claim the Health Pak 100™ contained no N-Acetylcysteine when the lab's test wasn't designed to detect this ingredient?

Why did you claim that the FTC requires a certain amount of sales be to non-distributors when not only do they not have such a requirement, they have specifically stated "In fact, the amount of internal consumption in any multi-level compensation business does not determine whether or not the FTC will consider the plan a pyramid scheme."?

Why did you claim a Usana distributorship "requires" an initial product purchase when the sales to others can be applied to the commission qualifications, and the purchase of inventory is optional? Why did you claim that commissions are paid on distributor "fees" when they are not?

Why did you claim Dave Wentz was Usana's CEO when he is not? Why did you claim Dave Wentz signed the 10-Q when it was signed by Myron Wentz?

Why didn't you disclose in your YouTube video that the Bishop's originally joined Usana as Preferred Customers? Why didn't you ask them why they didn't return their thousands of dollars in products to Usana for a 90% refund? If the Bishops were "doomed to fail" before they even joined, then why are there other successful Usana distributors around the Kansas City area?

Your response to the "75% savings" issue is a glaringly transparent dodge. You claimed Usana promoted a 75% savings to the purchasers of the products. You hit them on this point repeatedly and with force. You devoted an entire YouTube video to this claim. I pointed out your misinterpretation of Usana's literature, explained their actual meaning, and provided the evidence in black and white (well, blue and white in this case). I then asserted that nowhere does Usana make the statement, in their literature, on their web site, in their CDs or DVD, *nowhere*, do they make the claim that this elimination of the middleman will result in a 75% cost savings to the end product user. Rather than twist the argument away from the point (and to the separate "3% make 70%" issue), why not prove me wrong? Show us where Usana makes this claim that you've been repetitively expounding on for weeks!

They never said it, Barry. Your YouTube video is a major faux pas. It's too bad you couldn't have deleted it as quickly as the responses to it that reference my rebuttal seem to get deleted.

Although it was designed as a distraction from the above issue, you did ask me a non-rhetorical question, so I will provide an answer. You stated, "If what you are saying is correct, then I would expect the financial information disclosed by Usana to include something to the effect that distributors receive 'a generous percentage of the profits'... where exactly is the money going?" You then assume this 75% cost savings to Usana, rather than going to distributors in the form of commission as I suggested, is instead going to Usana corporate to "repurchase shares of Usana stock". Except for one thing: Usana *does* disclose "something to the effect" that distributors receive "a generous percentage of the profits". They disclose that they paid them over \$146 million dollars last year! They paid them over 39% of their total gross sales!

I'd love to respond to your other rebuttals to the 119 remaining individual points I made in my Rebuttal Report, including the 73 major points still unanswered, but except for the personal comments you made, we're done. At least for now. I'm sure your colleagues will soon be coming to your rescue.

Personal Issues:

You challenged my motives and referred to me as "objective" enclosed in quotes. I thoroughly searched every word of my Rebuttal Report and can't find where I made such a claim, or even used that word in any context. Can you please point out where you are quoting me from? Because if I did say that, I certainly want to correct this error – because *of course I'm not objective!* I've made an honest living at this business for over 17 years, and although not with Usana, your rationale for them being an illegal operation could easily be applied to any MLM company, including mine! But that doesn't mean what I've presented is any less accurate or valid, it just means you have one more method to reduce the credibility of your opposition rather than your opposition's point.

As to my credibility, I think my Curriculum Vita¹² speaks for itself. I've been certified by a court of law, in jury trials, as an "expert" in network marketing. But specifically to your challenge: Looking back over the numerous exposés I've published since 1990 I count a total of 15¹³, so you beat me by two. No, I've never went undercover for the FBI, but I have received six death threats along the way. I served on behalf of the plaintiff in three separate cases against Equinox which was, in my opinion, a cult. I left a company and warned others away from it whose owner and CEO claimed to be backed by the Mafia of a certain country (all 14 investors did have names common to that country). In one case I was asked by the Fresno District Attorney to assist in the prosecution of an elderly couple who was promoting a pyramid scheme called Marathon¹⁴. I refused (how many generations out do you stop being the perpetrator and become the victim?) and asked to be called again when they found the originator of the scheme.

I could go on, but enough of this self-aggrandizing distraction. All stereotypical male metaphors aside, this isn't about whose exposé list is the longest. It's about your Usana Report, and my rebuttal to it. Let's focus on the issues at hand.

¹² Pretentious way of saying "my resumé", which can be found at <http://www.marketwaveinc.com/aboutlen.htm>.

¹³ Auto Ecology, Martin Assoc., American Gold Eagle, Pacesetters Vitalizer, Washington Power Digest, Marathon, EuroRound, Patriot Network, Platinum Associates, Gold Unlimited, Share the Magic, GasUp USA, Streamline, BigSmart, The Tax People, and Equinox.

¹⁴ He had read my exposé of the scheme.

Barry, I never said you were not a good investigator, nor did I attempt to discredit your past fraud exposing victories. In fact, I said, "To his credit... Minkow and his FDI have exposed (or assisted in exposing) a number of bona fide fraudulent operations. Seventeen of them by his count." I sincerely commend you for this. I, too, have spent a great deal of time, energy, and expense on exposing frauds and scams within this particular industry. I would even go so far as to say that we probably have more in common than either of us would like to admit at this point. But I also said your past successes, which you do deserve thanks for, was all "before this egregious misstep". My challenges with your investigative skills were entirely and directly related to your Usana investigation. I "called you out" on your Usana Report, and nothing more. But, holy cow, did you blow it on this one!

Your magnifying glass has been cracked and stained by those you have aligned yourself with in this case. As I'm sure you can appreciate, you are a reflection of the company you keep. You have been deceived and misled by the twisted, irrational, views of a small number of anti-MLM zealots who likely saw you as their Trojan Horse – as a way to get their anti-MLM attack, for the first time, inside the walls of a federal regulatory agency. You provided their discredited, anti-MLM propaganda with the skin of credibility.

Most people who reject MLM are either those who had a bad personal experience with it, or in most cases have had no personal experience with it at all. The latter has been *told* that MLM is bad, usually by someone else who either tried it and failed, or also had never personally been involved in MLM. In other words, their negative opinion about MLM is not their own. It's *someone else's* opinion that they've chosen to adopt. When discussing MLM with skeptical prospects I suggest that neither source should be given much credibility. I strongly encourage them to "not let other people do your thinking for you... make your own decision, based on your own evaluation."

I strongly encourage you, Barry, to do the same.

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