MarketWave Rebuttal to Robert FitzPatrick's Usana Analysis

By Len Clements © 2007

Introduction:

When Barry Minkow, founder of the Fraud Discover Institute (FDI), was unable to provide a cogent and effective response to my rebuttals to his Usana Report I expected he would eventually have to call in the cavalry. The first to come to his rescue was Robert FitzPatrick.

Mr. Fitzpatrick, having failed in all previous efforts to convince state and federal regulators that all MLM companies are "product based pyramid schemes"[1], has this time chosen a different angle. He now packages his Usana denouncement within the ominous sounding category of "corporate identity theft." Of course, there is no actual identity theft going on here, at least in the way the common worry inducing buzz-word suggests. In fact, there's really nothing at all new or original in FitzPatrick's latest Usana attack piece. The inference of "identity theft" is likely used here simply because it's a hot topic today that invokes considerable concern. It is also ironic considering the felonious efforts of others apparently associated with his Pyramid Scheme Alert (PSA) who are attempting to extract information from Usana's brokerage and bank by stealing the identity of Usana CFO Gil Fuller.[2]

Rebuttal:

FitzPatrick blunders twice within the very first paragraph of his 19 page report. First he claims the FDI report produced by Minkow was 500 pages, then goes on to claim there have been "numerous" class action law suits filed against Usana as a result of the FDI report. While it is at least arguable as to whether the over 400 pages of addendums to Minkow's 86 page report should be counted (especially considering several of them have absolutely nothing to do with Usana), there is little semantic room to play with when turning the *two* virtually identical class action law suits files against Usana[3] into "several" law suits.[4] But, of course, "500" and "several" does help bolster the illusion of substance.

He blunders again in much the same way in only his second footnote. First FitzPatrick suggests that one of the "charges" by *The Wall Street Journal* was that only 37% of Usana's associates had *ever* earned a commission, and among those who had the large majority didn't earn enough to cover what they had to "purchase or refer"[5] to qualify for commissions. Besides the arguable fact that *The Wall Street Journal* made no such charge, it only reported

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[1] A term coined by his associate Jon Taylor, a board member of FitzPatrick's Pyramid Scheme Alert organization.

[2] Usana's bank was contacted by someone claiming to be Gil Fuller who was told of a $2 million line of credit available to Usana (but never applied for or used). A few days later Tracy Coenen, a PSA board member, contacted Usana to inquire about their "unreported" $2 million debt. More recently, a brokerage firm used by Usana was also contacted by someone claiming to be Gil Fuller asking for detailed information regarding recent trades by insiders. The next day a person claiming only to be a "Usana employee" posted detailed trade information, including Usana account numbers, in Usana's financial board on Yahoo (Yahoo has since removed these posts).

[3] As of the date Fitzpatrick's report was published.

[4] There were seven press releases by separate law firms at that time, but five of them were only announcing the suits filed by the other two.

[5] Note the deliberate substitution of "refer" for "sell".

the charges made by Barry Minkow (there's a subtle but meaningful distinction), this data only applied to 2006, not "ever". Nit-picky? Perhaps. But read on.

FitzPatrick then claims it was reported by *The Wall Street Journal* that the FTC requires at least 63% of an MLM company's sales be "retail" (to non-distributors), and that only 14% of Usana's revenue came from non-Associate customers. Again, *The Wall Street Journal* made no such claim, nor, I suspect, would they – considering the FTC has never made any such claim. The WSJ simply parroted Minkow's report, where he most likely parroted FitzPatrick! I suggest this only because FitzPatrick is one of the very few anti-MLM zealots left who still cling to this fictitious belief that the FTC applies a certain retail threshold[6] to their determination of an MLM program's legality. He does, in spite of the fact the FTC has responded to the Direct Selling Association's inquiry into this matter with a clear and specific denial of such a requirement. Also, FitzPatrick is one of a small group that has refused to accept any other possible means for Usana products to be retailed other than to the 14% that have enrolled as "Preferred Customers". FitzPatrick believes that no distributor *ever* sells product out of their own inventory (although this contradicts other anti-MLM zealots who profess that many products must be resold to friends, or on eBay, below cost – but resold nonetheless), or only intended to purchase products but enrolled as a distributor to receive rep related benefits, or first enrolled as a distributor but now only intends to be a product customer (in Usana there is no reason for them to change their status to Preferred Customer). None of any of this happens at all, according to Robert FitzPatrick.

On page 5 FitzPatrick concludes a list of bullet points, one of which asserts that "40% of the wholesale price of Usana products is transferred from the new recruits to earlier ones". Technically, he's right. But they also transfer that 40% commission portion from old recruits to older ones – all of which were, at one time, *new recruits!* He goes on to say (again only repeating the same claims made in the Minkow report) that "70% of all payments goes to the top 3% of the sales chain, which, along with the other factors, causes nearly all others to lose money." This completely ignores the obvious fact that 100% of those 3% were all "new recruits" within the bottom 97% at one time.

Occasionally *Occam's Razor* will be ironically invoked by members of the anti-MLM crowd. This maxim suggests that the simplest, most obvious explanation is the most likely to be true. For example, every state and federal regulatory agency in the United states, and over 60 foreign countries, for the last quarter-century, has considered MLM to be perfectly legitimate, legal business model not because it spends millions to hire really great lobbyists, or government regulators are just too ineffectual, as FitzPatrick has suggested in his earlier works, but rather because – it is a perfectly legitimate, legal business model.

Another example would be that 3% of Usana distributors earn 70% of the commission paid because 3% did a lot more work, a lot better, and for a much longer period of time, than the other 97%.

FitzPatrick shoots another bullet point through his foot with his claim that newly enrolled distributors are urged to "make a large upfront investment" for a "mythical entity" called a "business center". Technically, he's wrong. All distributors get a position in the hierarchy, for free, immediately upon acceptance of their application. Then, like any direct sales program, you qualify for higher commissions by meeting higher quotas. Contrary to FitzPatrick's claim that this position "has no equity value" and "does not convey any new rights" other than higher incomes, MLM distributorships can amass huge equity value (and be sold for tens-of-thousands of dollars), and this distributor position conveys the right to purchase products at

[6] I've heard it is 50%, this 63%, and often times 70%.

Associate prices, participate in product promotions and contests, resell products, enroll others, earn bonuses and commissions, and access a variety of tools and trainings.

His final bullet misses it's target by a light year. FitzPatrick naively believes that "the great majority of all (an MLM's) distributors must always be positioned at the bottom where no profit is possible." First of all, the notion that MLM downlines are really pyramid shaped, with the greatest number of participants always at the bottom level, is ignorant even for a rookie distributor, let alone a "multilevel marketing expert" as FitzPatrick has been deemed by Barry Minkow. As was thoroughly explained in my original Rebuttal Report, and my earlier rebuttals to FitzPatrick's material[7], both of which FitzPatrick surely has read by now, MLM downlines are more diamond shaped as far as number of people on each level. If the actual tree is plotted out it invariably resembles the *roots* of a tree, and nothing at all like a pyramid. Most organization that extends over 100 levels deep can easily accommodate a new enrollee somewhere within the first ten levels. Even the more controlled and structured binary formation *never* produces a completely filled, pyramid-looking matrix.

I'm only dwelling on this relatively minor issue because it goes to both FitzPatrick's motives and tenuous grasp of the subject matter. To validate the claims I have just made involves little more than a quick perusal of a couple of downline genealogy reports, and a dash of common sense (obviously a downline doesn't have 256 people on level 8, and not a single one has enrolled anyone, then instantaneously they all recruit 2 people and create the 512 people on the 9th level). But Robert FitzPatrick is clearly an intelligent, rationally thinking person, so I have no choice but to believe he is being disingenuous in his portrayal of how MLM downlines are formed. He *must* know that the great majority of distributors are *not* "always at the bottom", at least hierarchically.

When Minkow, Taylor and Fitzpatrick try to diminish the credibility of Usana's $803 "average income" figure (for 2005) they are quick to point out that averages can be deceiving and this is not a true representation of what most distributors earn each year. After all, there are those 3% at the top who are earning very large incomes and they are skewing the overall average. Like taking a few poverty level earners and factoring in the income of Bill Gates[8] to generate an "average income" of over a million dollars a year. Ah, but when the same math trick works in his favor, FitzPatrick is quick to use it.

For example, based on Usana's sales to Associates (excluding Preferred Customers) of $321.8 million in '05 and their reported 153,000 "active" distributors[9], the average amount of products purchased for the year was $2,100. FitzPatrick then points out that, based on Usana's 25% suggested retail markup, each rep would have averaged just $700 per year, or $13 per week, in retail profit. This is generously assuming *all* products are resold at full retail. Of course, this also assumes that all 153,000 distributors even *tried* to retail all of their products, which is absurd. As FitzPatrick is fully aware, most distributors purchase the products for their own use, and being the "MLM expert" that he is, he should also know that at least one-third of all new MLM distributors never even attempt to sell a single product, nor do they even try to enroll others. Or, perhaps they ask a single digit number of friends and family, who say no thanks, and drop out. In other words, using FitzPatrick's own logic, the reality is that there are a few who move very large amounts of sales volume, and a vast majority who do little or none. Indeed, how can there be 3% earning 70% of the pay out and at the same time they are all equally producing $2,100 in product orders and making $700 a

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[7] In my "Anti-MLM Zealots" series located in my articles library at: http://www.marketwaveinc.com/articles.asp.

[8] Who Minkow uses in his actual example.

[9] 10-K for the year 2006.

year in sales? FitzPatrick's "averages" are just as misleading, for the exact same reasons, as he claimed Usana's average annual income figure was.

He takes this absurd argument even further in his next point by asserting the 59,000 Usana distributors in the U.S. each only have 1,900 households to market to[10]. Considering this, he then rhetorically asks "When would the size of Usana's sales force officially reach saturation?" That's a *great question!* And one I've been asking anti-MLM zealots for years. In fact, not only has Usana clearly not reached the point of saturation, what about Nu Skin, Mannatech, Reliv, Agel, XanGo and Tahitian Noni, who are all going after this same supposed 1,900 households each Usana rep is left with, and *all* have had record growth the last several years! And this isn't counting the other 2,000+ MLM companies in the U.S., most of which market personal and health care products. Think about it. If even Usana alone were considered, and each Associate really did have no more than 1,900 households to now market to, they would have reached saturation years ago. Yet they have had a string of 17 consecutive record quarters in total Associates (in the U.S.). Now throw in just Mannatech's 350,000 U.S. distributors[11] and reps for each of these two companies now have only 225 households to market to. But Mannatech has grown six straight years and is 13 years old. Yet, in spite of this glaring, overwhelming, irrefutable evidence that his logic is not just faulty, but utterly absurd, FitzPatrick continues to pursue this mathematical gambit to show inevitable market saturation.

The reality is, 153,000 Usana reps don't have 1,900 households to market to because 153,000 Usana reps don't market.[12] Only a small percentage do, and an even smaller percentage do for more than a year – which is why a small percentage succeed.

Next FitzPatrick claims "Usana's brand name is mostly unknown" as a reason why "There is no retail sales potential." McDonalds hamburgers were a brand name that was, at one time, "mostly unknown". But I suggest that they did, in fact, have "retail sales potential."

Another reason why the Usana products have "no retail sales potential" is that the "constant enrollment of more and more resellers dilutes and damages the retail sales opportunity for existing ones." This, of course, applies to literally *every* industry with "resellers". The opening of more and more Starbucks franchises should cause the same "damage" to the others, but it doesn't. Technically, FitzPatrick is merely repeating the same argument. This dilution and damage can only occur if true market saturation is reached, but… I'm *not* going to keep repeating the same rebuttal.

Here's a point made by FitzPatrick under the "no retail sales potential" heading where I can appreciate his lack of understanding. Most grizzled veterans of MLM don't consider this. FitzPatrick points out that it is standard in non-MLM direct selling opportunities to provide a 50% gross profit on a sale (buy an item for $30 and resell it for $60). Usana, like most MLM programs, has a suggested retail mark up of 25%. However, that's all this is – a *suggestion*. It's an arbitrary number chosen by the company.[13] But since distributors don't like dealing with paying sales taxes to all the required states, MLM companies universally handle this tedious, burdensome task for them, as does Usana. However, since it's impossible to know what products will be gifted, sampled, personally consumed, or resold (and at what price), the

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[10] Since there are 113,146,000 households in the United States.

[11] 2006 10-K.

[12] Remember, "active" only means they purchased at least one product in the last three months.

[13] If Usana were to fix the price at a certain amount it would be appropriately called "price fixing". That's illegal, so naturally, in his effort to now assist Minkow in throwing everything at Usana but the kitchen sink, FitzPatrick even accuses Usana of this crime (which will be dealt with later in this report).

company charges sales tax to the rep based on the suggested retail price. Otherwise, if a product with a suggested retail price of $12.50 is sold to a rep for $10.00 wholesale, and the company charges the rep tax based on this $10.00 amount they actually paid, then the product is resold for *any* amount greater than $10.00, the rep is now responsible for paying the profit they made on the sales tax to their state. If distributors are not charged sales tax based on the suggested retail, and even *one* product it retailed for more than their distributor cost, the distributor owes their state money. So, of course, distributors and their families who enjoy most or all of their products themselves are usually more than happy to pay an extra few dollars in sales taxes to have this responsibility of tax tracking and payment shifted to the company. Here's the point of all this: If an MLM company were to "suggest" the more standard 50% mark up rather than a 25% mark up, it could very likely cause many distributors to make *less* money, not more! Not only would this unnecessarily force the distributor to pay even more in sales taxes, but it would significantly *increase* the prices on products that FitzPatrick and Minkow have boldly and repeatedly exclaimed are already grossly overpriced. And remember, Usana's decision to *not* double their mark up to the standard 50% (that is, *not* raise their retail prices) is a reason FitzPatrick sites *for* their being "no retail sales potential". Isn't this backwards logic?

I understand that Fitzpatrick's point is that this lower profit margin reduces the incentive to retail. Not only does he ignore the fact that such retailed product counts towards the distributor's monthly sales volume quota (about $116) which creates a strong incentive to retail, he specifically states that such an incentive doesn't even exist! He devotes another bullet point to his claim that "To gain payments tied to recruiting, each Usana distributor must personally purchase a quota of goods each month… according to the Wall Street Journal." No single line in all of Robert FitzPatrick's entire contribution to the FDI attack on Usana epitomizes more or better his desire to *knowingly* fabricate anti-Usana material, but safely cover himself when exposed. No, I'm not a mind reader, and I'm not saying I have proof that he's outright lying, but I find it *extremely* hard to accept that Robert Fitzpatrick doesn't know that "each Usana distributor <u>must</u> personally purchase" (emphasis mine) their monthly quota is not true. Novice Usana Associates their first day in the business usually know sales to others count. He can state his opinion that the retailing option to meet this quota would be very difficult due to the product pricing, but that's clearly not what he said. His statement denies the option even exists. He also refers to "payments tied to recruiting" to create the illusion that Usana reps are compensated directly for recruiting (thus an illegal pyramid). Usana, like all legitimate MLM companies, provides no direct compensation for the act of recruiting. You could literally sponsor one million Associates into your Usana downline and not earn one penny – unless someone buys a product. If challenged on this I suspect FitzPatrick would say he was only referring to the fact that most commissionable products are only purchased by distributors. That may be what he meant, but that's obviously not what he wanted the reader to take from the comment. Or, he could blow the final circuit breaker that separates him from responsibility for these completely inaccurate and misleading comments by reminding us that it was, after all, what "The Wall Street Journal" said, not him. Never mind the fact TWSJ was only relaying information found in Minkow's report, and much of the information in Minkow's report came from Robert FitzPatrick.

As I discussed in my original Rebuttal Report, the PSA, and most specifically Robert FitzPatrick and Jon Taylor, have never had much success being taken seriously by federal regulators. They've urged the FTC before to consider their "they're all illegal pyramids" position and to "please investigate them" (I'm paraphrasing), with no success. So this time they're piggybacking their anti-MLM propaganda onto the back of Barry Minkow, and packaging it in the veneer of *The Wall Street Journal*. FitzPatrick has recently sent a letter to the FTC (separate from his own Usana report) requesting that they open an investigation of Usana based on "publicized evidence". He then recites a few key points found in Minkow's report as "according to *The Wall Street Journal*" – which, again, essentially reported on what was in Minkow's report, which primarily came from the PSA and FitzPatrick. He then exploits this circular illogic further by directs the FTC to Minkow's report as if this is somehow evidence supporting *The Wall Street Journal's* findings. Then he points out that Usana is "under investigation" by the SEC. But then, that's only how he words it on the PSA web site read by the general public. To the more astute and semantically demanding Chairman of the FTC he correctly refers to it as only an "informal inquiry". Next, FitzPatrick does something in his FTC letter that is very odd. It's almost as if he's repeated the same set of unsubstantiated, and often untrue, anti-MLM/anti-Usana claims so many times that he has forgotten here who he is making such claims to. FitzPatrick states that *The Wall Street Journal* staff "applied Usana's sales and financial data in a test used by the Federal Trade Commission in previous prosecutions to determine if a multi-level marketing company is a direct selling company or a pyramid scheme. It found that 63% of all Usana sales to distributors would need to be retailed to consumers for Usana to pass the test of legality." He then reminds the FTC that only 14% of "reported sales" are made on a retail basis. All other sales "go only to distributors." Here's the odd part. He describes the aforementioned FTC retail percentage test in his letter *to the FTC!* The same FTC that not only does *not* have such a legality formula it applies to direct sales companies, but the same FTC that has specifically stated it *does not* base it's legal evaluation on the percentage of sales made to non-distributors![14] The same FTC who's own economist, Peter Vander Nat, is quoted in the *same* Wall Street Journal article as saying "If (distributors) are buying because they want to use a company's products, those sales can count as retail".

The rest of the letter to the FTC is simply the crib notes version of FitzPatrick's Usana Analysis being rebutted here. Let's get back to it.

Within the context that Usana reps are "not more knowledgeable" in regards to health and nutrition, FitzPatrick claims that between 50-70% of all Usana reps quit, and stop buying the product, within their first year, and that this is "hardly time enough to become knowledgeable". I could go another full page on what, exactly, constitutes "knowledgeable", how with enough effort people can become extremely knowledgeable on various subject within a year, and how if a Usana rep gained *any* amount of knowledge about health and nutrition they would likely know far more than the clerk at the grocery store. But don't worry. I won't. I think the weakness of the point speaks for itself. But I do want to comment on FitzPatrick's addendum to this point where he claims there is no "formal training" in Usana, and there is "no training period." To save time, just Google "Usana" and "training", and you will fully appreciate how blundering this claim is.

I should also point out how well this claim supports my previous assertions regarding the primary reason so many Usana (or MLM) distributors fail. If one year is not enough time to gain a lot of knowledge about the benefits of the products, wouldn't it also not be enough time to become knowledgeable about the compensation system and how to properly build a business? In this case I completely agree with Robert FitzPatrick. If a Usana distributor was in and out of the business in under a year, they definitely didn't give themselves enough time.

He then defends my point even more by stating, "A sales force in which nearly 70% quit within a year might be characterized as transient, unstable or incompetent before the term 'entrepreneurial' would be thought of." *Exactly!* And the much smaller percentage that are loyal, stable, and competent are those at the top of Usana's income earnings chart. Of course, he can't leave it at that (the distributor's own actions or inactions being the cause of their failure) so he has to throw in the additional verbs "misled" and "victimized". Misled to be

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[14] In a letter to the DSA in response to this specific question. See: http://www.marketwaveinc.com/FTC_Letter.pdf

transient (jumping from one MLM program to another)? Victimized by their own instability or incompetence?

As I described in the Robert FitzPatrick section of my "Anti-MLM Zealots" series[15], Mr. FitzPatrick has a penchant for forgetting pertinent facts when it suits his case. For example, he claims the Usana sales channel "is in fact Usana's end users." He then states "Usana has virtually no other customers." Well, except for those *eighty thousand* Preferred Customers!

Several years ago I was coaching a Little League team (true story) and it was the last game of the season. We were losing by ten runs and had only won 3 of 15 games that season. Our curly haired little 5 year old bat boy, Benny, tugged on my right pants leg. I looked down, and with an expression of absolute confidence, he looked up at me and said, "Ya' know coach, not counting all the games we lost, we were *underfeated!*"

It was impeccable logic. Kind of like, not counting all the tens-of-thousands of Usana customers, Usana has virtually no customers!

FitzPatrick can find ways to turn the most remarkable positives into shady looking negatives. If anyone else in any other industry were to develop a marketing strategy where they could achieve rapid growth, with an unknown brand, with no advertising, and premium pricing, it would be considered ingenious. But FitzPatrick suggests a marketing system that produces such phenomenal benefits not only shouldn't be praised and emulated, it "ought to be a red flag". He then reminds us that Equinox, which was shut down by the FTC for being an illegal pyramid (thus is now every anti-MLM zealot's go-to company), also experienced fast growth, so there you go. Usana must be the same as Equinox. In reality, the primary reason the FTC declared Equinox an illegal pyramid[16] was because new reps would routinely "buy in" for $5,000 to $20,000 in product, and sometimes for as much as $120,000! This practice of "front loading" new recruits, who were merely meeting "group" sales quotas out of their own pocket to achieve higher ranks in the pay plan, has long since become taboo in the U.S. MLM industry with only a small minority of renegade companies still practicing it. Usana, like the vast majority of MLM programs today, have no such incentive in their pay plan to behoove front loading, and strictly forbid it. Equinox was an aberration, and nothing at all like Usana.

An example of where FitzPatrick, Jon Taylor, and Barry Minkow should really get together and compare notes before writing their Usana smear pieces is when FitzPatrick claims that there are "scores" of MLM companies also selling health products, and that "most of them have also shown this strange pattern of rapid growth." He's right. And many are experiencing this rapid growth many years after their launch. Of course, this completely contradicts Minkow's and Taylor's allegation that the U.S. has *already* reached market saturation.

FitzPatrick retreads the same claim made by Minkow that Usana reps quit "in droves" and are left with unsold inventory that they have no way to recoup. Except, they do. Usana offers a 100% refund within the first 30 days, and 90% for one year. This includes sales aids. Contrary to the myth being propagated on internet message boards, Usana does not routinely reformulate products to make them ineligible for return.[17] So the same question I posed to Minkow is now open to Mr. FitzPatrick: If all of these products, what would be millions of dollars worth, are not being consumed or resold, and are just stacking up in the garages of failed Usana reps all over the country – *why don't they return them!?*[18]

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[15] http://www.marketwaveinc.com/zealots01.asp

[16] I served as an MLM expert witness in three separate civil cases where Equinox was the defendant.

[17] Usana reformulated one product in 2006, and even that product was still eligible for return up to 90 days after the reformulation was announced.

[18] The percentage of all Usana's products being returned for a refund over the last three years averages 1.7%.

Occam's Razor might also suggest that the reason there are not, at least based on Minkow and his gang's numbers, hundreds of thousands of ex-Usana distributors roaming around this country today bad-mouthing Usana and telling everyone how hellish their experience was – is because it wasn't. Make's sense, doesn't it? Most got in, didn't have much initial success, and just harmlessly walked away. They realized it just wasn't for them, and got on with their lives. But oh no, not in Robert FitzPatrick's world. This is a land full of folks who had to be *convinced* by "Usana" (who ever that specifically would be) that they just weren't very good at it. They were induced into believing they had a lack of passion for the business when it really was there, or they didn't put in enough effort when they really did. They were brainwashed into believing, as far fetched as this may be, their failure was actually their own fault. In this strange, upside down world of green skies and blue forests, Usana makes an asserted effort to "shame" these hundreds of thousands of "victims" into not warning their friends and families about this pride-sucking, money-devouring monster (okay, now I'm embellishing – but not that much!). Of course, in the real world, the vast majority of those who failed after their short MLM experience could not possibly care less about it. They and their family consumed their extra inventory (or, God forbid, sent it back for a refund), and then they just got over it. Yes, a very few, as is true with any type of business endeavor, do sometimes get carried away with MLM. After making a series of very poor, but totally voluntary business decisions (I assure you, no one ever held a gun to anyone's head and forced them to by $20,000 worth of Equinox products), they do get seriously burned. And yes, some suffer emotionally from their experience as well. Certainly they do, and I'm not unsympathetic to their challenges. But these extremely rare exceptions, as much as anti-MLM zealots love to exploit them, are not the rule.

Robert FitzPatrick may very well be an expert on "pyramid schemes." I have no reason to challenge his credentials as such. But he is often referred to as a "multilevel marketing" expert as well. There are countless reasons to challenge this title. After all, how can one be an expert in something they have no personal experience in? FitzPatrick does, however, have pyramid scheme experience.[19] Much of his commentary related to legitimate MLM companies today is related to the MLM industry of yesterday. Or yesteryear. Well, yesterdecade, actually (yestercentury, technically). Or, in many cases, it's pure fantasy. It's nothing more than theories and assumptions that are manifested purely to degrade MLM. Like his "too ashamed to complain" invention. Anyone with even a modicum of actual in-the-trenches experience would know how silly that sounds. Or, comments like this one: "When momentum slows, the top recruiters will quickly look for a new opportunity where they can 'get in early'". Assuming "top recruiters" are those who are the most successful, and earn the most income (those top 3% in Usana), this imaginary scenario is nonsensical on it's face. Let's forget the true "top" earners (those who earn six-digit monthly incomes), and imagine that momentum is now slowing and you're check it topping out right at about, say, $10,000 per month. All you have to do now is meet your $116 per month quota, sit back, and enjoy your $9,884, totally residual, net profit – that, due to waning momentum, never goes up another penny (or, heck, even slowly draws down over the next few months or years). Would you really quit, and go look for a risky "ground floor" start-up so you can start all over from square one? Of course not. What makes this assertion even more unlikely is how pervasive the awareness is today within MLM circles of the high failure rate among start up MLM companies. Many prospects today specifically *avoid* start ups!

What FitzPatrick is actually referring to are what's called MLM Gypsies, opper-hoppers, 49ers (due to the gold rush type of migration into start-up opportunities) or, most commonly, "MLM Junkies". This faction of MLM participants are *never* the "top recruiters", or top anything for that matter.

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[19] He participated in the "Infinity Game" and the "Airplane Game", classic pyramid scheme often associated with New Age philosophy that was most popular in the 1970s and '80s.

Robert FitzPatrick, Jon Taylor, Tracy Coenen (a forensic accountant) and others have been trying to find new ways of making MLM companies look illegal for years. It's curious that when Barry Minkow's Usana report was challenged, and he was unable to offer an effective counter-response, FitzPatrick suddenly comes up with, for the very first time, "price fixing" as another form of illegal activity perpetrated by MLM companies (FitzPatrick accuses only Usana here, but his reasoning applies to virtually all MLM operations). In all the research this group performed in compiling Minkow's Usana report, and all the years of digging for dirt to bury all of MLM with, it's odd how they all missing this one – until now.

Perhaps it's because MLM is the antithesis of price fixing, and to accuse MLMs of such a practice runs the risk of losing all credibility in every other area they've attacked. *Perhaps it's because Barry Minkow may be in serious legal trouble, his "experts" might be implicated, there are no large rocks to throw, all the pebbles have already been flicked, so they now have to throw every last possible grain of sand at Usana hoping against hope that maybe just one will get lodged in the eye of a federal regulator and blind him or her to the obvious folly of this smear campaign!*

[deep breath]

Usana Associates, indeed *all* MLM distributors, can sell their products for what ever price they choose to sell them for. There are no restrictions, no exceptions. Ever. Period.

FitzPatrick next tries to debunk the specific type of multilevel pay plan used by Usana, called a "Binary" plan. Basically, the binary limits the number of distributors you may enroll on your first level to two, unlike the more common "breakaway"[20] or "unilevel"[21] plans that strongly behoove placing *everyone* you enroll on your first level. In a binary, if you enroll a third person they must go in one of the two open positions of someone in your downline. FitzPatrick claims that, like a chain letter, "each new member does not know where he/she is on the chain" and that "the last one who joins is below hundreds of thousands of others, but is offered the chance to be at the top of a potentially huge chain of hundreds of thousands of others who join later." He goes on to say that, as in all chain letters, the "Binary Compensation Plan pays the great majority of all the money to those at the top of the chain."

Where do I begin?

First, the concept behind the binary structure is to cause groups of distributors to work in *partnership* with each other who otherwise would have been cross-line *competitors*. For example, if you enrolled seven people into a breakaway or unilevel plan you would have seven competitors to each other across your first level. These same seven people structured into a binary could have one, then two below them, with each of them having two below them. In other words, three of the seven would already have sales volume in their downline and be earning at least some commissions, where they would not be if the plan were not a binary (note that I said "could" – the larger the downline, the less likely it will form this perfect triangular structure). This structure also creates more camaraderie, mutual assistance and synergy within the group (since more members are working together rather than against each other). This all is a *good* thing. This type of pay structure *reduces* the types of financial challenges expressed by FitzPatrick, Minkow, et al.

Secondly, the "last one" is rarely below "hundreds of thousands of others", but let's forgive Mr. FitzPatrick's hyperbole (and give him the benefit of the doubt that that's what it is). But

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20 Quixtar (Amway), Herbalife, Nu Skin and Shaklee are examples.

21 XanGo, Freelife, Tahitian Noni, and New Vision are examples.

then to say that the new rep is offered a chance to be above "hundreds of thousands of others" who order products only "as a means to get rich" is simply not how the game is being played in today's MLM arena. Most prospects today scoff at such a promise, and most distributors know they will. While there were, in fact, many companies parading million dollar earners across the stage to receive the keys to their new Porsche back in the 80s and early 90s, that was the pre-Equinox era. Today, although such hype certainly still exists to some degree, more and more companies are having "Fire Your Boss" or "Exit the Rat Race" celebrations where newly exited reps are paraded across the stage to smash their alarm clocks with a sledge hammer![22] It's generally understood today that the vast majority of MLM prospects and participants are primarily looking for a comfortable living income out of their MLM venture. In fact, 86% of over 7,000 participants surveyed[23] claimed they just wanted to quit their job and enjoy the time freedom offered by MLM. They wanted to sleep in later, take a day off whenever they wanted, spend more time with their family, and so on. It was actually unusual for material items or great wealth to be mentioned.[24] When asked to quantify this "comfortable living income" it averaged $8,236 per month ($6,000 was the median response). Considering the earnings-per-distributor ratio in a consumable product MLM program ranges from $3.50 to as high as $6.00[25] (depending in part on the pay plan, but mostly on the amount of sales volume flowing through it), it would typically take a downline of between 2,300 to as few as 1,300 active distributors to achieve this lifestyle. I'm not suggesting this is easy, or likely – just a whole lot easier and much more likely than having a downline of "hundreds of thousands".

Finally, you don't have to be "at the top of the chain" to be included among those who the "great majority of all the money" is paid to. I've been actively involved in, and have thoroughly studied and designed, binary plans over most of the time they've existed[26], and I've seen many examples of lower level distributors earning more, in some cases much more, that upper level distributors. What FitzPatrick describes would be true in a perfect world, where the downline formed a perfect pyramidal hierarchy. It's not a perfect world.

Keep in mind that of the numerous individual points made by FitzPatrick in his 19 page report, I'm just focusing on the most poignant, and the most fallacious – and the contradictions and outright errors are the most egregious in his final two pages.

Throughout the material submitted in support of Minkow's report, FitzPatrick repeatedly asserts those who are "the last to join" are:

- "Doomed-by-design"
- "inevitable failures"
- among the "Doomed bottom levels"
- oblivious to their "doomed plight"
- "positioned at the bottom where they are doomed to financial loss"
- "among those in the bottom levels… who inevitably must lose…"
- "positioned at the bottom where no profit is possible"
- "Almost none of the new recruits can actually get to the top. They must fail."

Besides the obvious, logical fact that virtually all of the most successful distributors throughout MLM history, or all distributors for that matter, were at one time "the last to join"

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22 Seriously (Protective goggles are complementary).

23 MarketWave study, 1991 to present.

24 As their "primary" goal. Of course many may wish to continue on to larger incomes.

25 MarketWave study 1995-1999.

26 The first binary plan was introduced in 1989.

and "at the bottom" (in the sense that they had no downline), which I've already covered ad nauseam, I can make no better case against this assertion that FitzPatrick makes against himself on page 17. Here is where FitzPatrick, having already tossed the kitchen sink at Usana, plays the "lottery" card[27]. He claims that it is often pointed out at opportunity meetings that "each person could benefit immensely from the luck of recruiting another hot recruiter." He's right, I suppose, if you consider the scout "lucky" who discovered Willie Mays. Or the director who hired a stagehand named Clint Eastwood. Or the band who replaced their drummer with Ringo Starr. Or the investor who bought shares in a little start up company called MicroSoft. Or the voter who cast his ballot for Abraham Lincoln. Why is spotting talent and recognizing potential applicable to every imaginable endeavor in life – except network marketing? Only in this business, according to Robert FitzPatrick, is finding someone who has excellent skills and strong potential completely based on luck. While it could be considered lucky to sponsor someone who sponsors someone who creates a large sales organization, that's one of the greatest beauties of this business! If you don't have the time, talent, tenacity, or legal tender to adequately pursue your business, find someone who does. Sponsoring them essentially makes them your business partner, and you share in their success. MLM *does* level the playing field.

But I digress. Please read on.

FitzPatrick exclaims "Just one hot Downliner could push you to the upper positions where the larger numbers increase the odds of the downline self-generating without any effort on your part. You could hit the jackpot!" Slanted semantics aside, he's right. You could very well enroll a talented networker who's success could propel you to success as well. But, couldn't this happen to *all* those who came in at end of the chain, at the bottom of the pyramid, who were "doomed to financial loss", and "inevitably… must fail"? What FitzPatrick described could absolutely happen to those "at the bottom", or anyone, anywhere in the structure, at any time. Furthermore, what if Sue was one of your two first level positions, and she built a downline 100 levels deep (she's the "hot downliner" FitzPatrick just described), then you sponsored Brian in your other front line position. Wouldn't Brain be the "last one in" – and be 99 levels *up* from the person at the bottom of Sue's downline? And wouldn't most of those at the top of Sue's downline (who, herself, might be many levels down from the top person in the company), who were also "at the bottom" and "the last one in" when Sue first enrolled them, also make out pretty well in this (Fitzpatrick's) scenario? And where did all these people under Sue come from? What happened to Minkow's and Taylor's already present market saturation?

FitzPatrick fumbled the ball again when he states that Usana has "no end users of any financial consequence", and of those that are "Preferred Customers" he claims "many of these may be only family members of distributors who agree to make a purchase in order to assist their friend or relative in meeting their monthly quota" because, according to FitzPatrick, "Preferred Customer purchases can be credited towards the distributor's monthly quota." First of all, I'm not sure Wall Street would consider $52.4 million in sales to Preferred Customers to be of no "financial consequence." Secondly, Preferred Customer purchases *do not* count towards a distributor's monthly quota, nor have they ever (only retail customer orders do). So FitzPatrick's rationalization for this $52.4 million in sales to non-distributors is completely wrong, leaving only one other likely explanation – they *actually wanted the products!*

FitzPatrick then reverts back to another common tactic, that of making up negative assumptions and stating them as facts. He claims "Perhaps the simplest evidence that products do not drive Usana sales is the lack of ongoing product purchases by past

[27] This is possibly due to a "luck factor" being a component of many state's anti-gambling and lottery laws.

distributors. Most quit purchasing goods *totally and forever* once they leave the flawed pay plan" (emphasis original). FitzPatrick failed to explain where he found the "evidence" for this. Yes, most people who purchase *any* goods and then stop purchasing them usually do so totally and forever (otherwise, they didn't stop purchasing them). But how, I wonder, does FitzPatrick know how many of those who are still purchasing Usana products have discontinued their recruiting efforts and are only continuing to purchase for the benefits of the products? Considering the large number of reps who are ordering but who have no downline, the actual "evidence", although certainly inconclusive, would at least suggest exactly the *opposite* of what FitzPatrick has suggested.

To conclude his report, FitzPatrick revisits the inevitable saturation myth again. He reiterates that Usana "must find new territory where saturation will also be reached… the scheme must keep moving." So I again will reiterate, if this is true, why has Usana opened 13 foreign markets when not only have none of them reached saturation yet, Usana hasn't even come close to reaching saturation in the United States?! They've had 17 record quarters in net Associates (and sales) all *after* they were in business for *ten years* (have I mentioned that?).

Since "irony" seems to be the glue that holds all of Barry Minkow's anti-Usana support materials together, it would seem fitting that FitzPatrick would conclude his report with the statement "Time and truth" are the "enemy in any market area."

That was actually going to be *my* closing line!

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