

DSA PARTNER AWARD APPLICATION

Foley & Lardner, LLP

Foley & Lardner LLP (“Foley”) is a national law firm with over 1100 lawyers in, 25 offices, including 22 in the United States. We are not new to the direct selling industry. Foley (including its predecessor firm Gardere Wynne Sewell) has been a supporter of the direct selling industry for over 40 years; as counselor to direct selling companies and through its participation as a supplier member of the Direct Selling Association (the “DSA”).

Throughout the years, Foley has advised direct sellers on a multitude of legal issues, from drafting legal documents, to addressing federal and state regulatory and compliance matters, to counseling on independent contractor, employment, tax, intellectual property, advertising and FDA matters, responding to State Attorneys General and FTC investigations, and litigating cases. Our 30 year old Mexico City office has counseled direct sellers as they have expanded to Mexico, Central, and South America. Our Brussels and Tokyo offices have also provided services to direct selling companies.

Foley has been an active supplier member of the Direct Selling Association for many years. In 1992, it assisted the DSA in preparing its *amicus curiae* brief in the case of *Wisconsin Department of Revenue v. William Wrigley, Jr. Company*, which was heard before the United States Supreme Court. Our attorneys have participated in DSA seminars and panels and have served on numerous committees and task forces of the DSA, including the Lawyer’s Council and Governmental Relations Committee, working side by side with member companies to address the challenges that face the industry.

However, no more important example can be given as to Foley’s commitment to its clients and the direct selling industry than in our recent successful representation of Neora in its seven-year investigative, legislative and litigation battle against the Federal Trade Commission (the “FTC”).

Neora & Foley Win Historic Case Against FTC

On September 28, 2023, leading direct selling company Neora, its founder Jeff Olson, and Foley & Lardner’s State Attorneys General/FTC Practice won a complete victory following a federal court trial in Dallas, Texas. The court denied the FTC’s requested relief on all five (5) of its claims: pyramid, income, product, agency, and means & instrumentalities claims. This is the first time that a direct selling company has ever defeated the FTC’s pyramid scheme claims in a court trial. It is also the first significant victory of its kind since Amway’s 1979 administrative law defeat of the FTC.

The win is huge not only for Neora and Olson, but also for the entire direct selling industry which consists of over 1,000 companies in the U.S. alone. As summarized by the Direct Selling Association in its amicus brief, had the FTC been successful in pursuing its new and vague “overemphasis on recruiting” test, it would have had “a profound impact on the state of the law and negatively impact[ed] operations of a sizeable portion of the United States economy.”

Ed Burbach, Chair of Foley’s Government Solutions Practice Group & Co-Chair of Foley’s State Attorneys General/FTC practice lead the Foley team throughout the battle. Burbach previously served as Texas Attorney General for Litigation (the State of Texas’ lead civil litigator). Burbach commented: “We at Foley are very proud of our interdisciplinary team drawn from each Firm Sector”. He attributed the win to the excellent testimony of Neora executives Jeff Olson, Deborah Heisz, Amber Olson, and Sandra Davis, the support of Neora General Counsel Gail Lane, and the top-notch Foley team which consisted of over 25 Foley practitioners across the country.

Starting with a 3-year FTC investigation handled by Foley’s Austin and D.C. offices, Foley’s Frank Pasquesi (Chicago) and Jon Israel (New York) then provided local team leadership while litigation was pending in Chicago and Trenton. After successfully transferring the lawsuit to Dallas, the Foley trial team consisted of Burbach (Austin), former Texas Assistant Attorney General Rob Johnson (Austin) and leading Dallas trial lawyers Craig Florence and Michelle Ku. Excellent strategy, briefing, and trial support was also provided by Jay Varon (D.C.), former General Counsel to the Texas Secretary of State John Sepehri (Austin), Stephanie McPhail (Dallas) and Nita Overton (Dallas). Dr. Walter Vandaele (BRG Group-D.C.), Dr. Anne Coughlan (Northwestern University), and Dr. Mindy Kurzer (University of Minnesota-St. Paul) provided the winning expert testimony.

Foley tried the case in October 2022 before Federal District Judge Barbara Lynn (former Chief Judge of the Northern District of Texas who was appointed to the bench by President Clinton). Judge Lynn’s reasoned 56 page opinion could not have been more clear in its total rejection of all of the FTC’s claims. The opinion establishes a business path for companies to follow as they navigate the current uncertain regulatory landscape.

1. Primarily Generated From Test is the test for Pyramid Scheme:

The Court started off by rejecting the FTC’s attempts to run away from the “primarily generated from test”; the very test which the FTC had long recognized--at least until Neora. The court wrote:

In January of 2004, the FTC issued an Advisory Opinion. *The critical question for the FTC is whether the revenues that primarily support the commissions paid to all participants are generated from purchases of goods and services that are not simply incidental to the purchase of the right to participate in a money-making venture.* (emphasis added).

A multi-level compensation system funded primarily by such non-incidental revenues does not depend on continual recruitment of new participants, and therefore, does not guarantee financial failure for the majority of participants. In contrast, a multi-level compensation system funded primarily by payments made for the right to participate in the venture is an illegal pyramid scheme.

2. Rejection of the FTC’s “over emphasis on recruiting” test & Dr. Stacie Bosley

The Court then utterly rejected the FTC’s proposed “over emphasis on recruiting” test supported by the testimony of the FTC’s expert behavioral economist, Dr. Stacie Bosley of Hamline University (located in St. Paul, Minnesota). The Court referred to her testimony as consisting of “rigid theoretical assumptions” not “born out of reality”, “unsupported by the evidence”, and “slavish”.

3. Agency Claim

The Court then rejected the FTC’s agency claim as being “insufficient”:

4. Claim Against Jeff Olson

The Court utterly rejected the FTC’s claim against Jeff Olson as being based upon “no evidence”:

5. Income Claim

The Court was highly critical of the FTC's income claims. In rejecting them, it also noted the confusion which the FTC has created with regard to its ever-changing informal, non-binding "Guidance" of what constitutes an improper income claim which it described as consisting of vague "signals and suggestions" without formal rulemaking. The Court then took the time to write a lengthy summary praising Neora's "rigorous" and "robust" compliance program.

6. EHT Product Claims

The Court then summarily rejected the FTC's EHT product claims as consisting of "no evidence". The court wrote:

Moreover, the FTC does not point to anything objectionable in Neora's current materials regarding EHT, including the packaging, messaging, or training to BPs on appropriate product claims.

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. *AMG Cap. Mgmt.*, 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.

7. Means & Instrumentalities Claim.

In thoroughly rejecting the FTC's final claim, "Means & Instrumentalities", the Court again wrote favorably of Neora:

C. Means and Instrumentalities Claim

Overall, the evidence at trial does not establish that Defendants provided BPs with the means and instrumentalities to deceive consumers. On the contrary, the record reflects a concerted and consistent effort for Defendants to inform and train BPs with the tools and knowledge to sell Neora products without making misleading income or product statements, and to find and correct missteps as they happened. Accordingly, the Court finds no violation of § 5 of the FTC on a means and instrumentalities theory.

8. Court's Conclusion

The Court summarized its complete rejection of all of the FTC's claims in the final paragraph of its Findings of Fact and Conclusions of Law:

IV. CONCLUSION

For the foregoing reasons, the Court **ORDERS** that all of Plaintiff Federal Trade Commission's requests for relief in this case, including its request for injunctive relief, are **DENIED**. Judgment for Defendants Neora, LLC and Jeffrey Olson is **GRANTED**. The Court will issue a separate Final Judgment.

We at Foley value our firm's long-standing relationship with the DSA and look forward to continuing to work together to face the issues confronting the industry. Thank you for your consideration.

Summary of Why Foley & Lardner, LLP deserves the DSA Partnership Award

Foley & Lardner (and its predecessor firms) have been a DSA supplier for decades. However, this past year was certainly the pinnacle of Foley's representation of DSA members.

On September 28, 2023, after a more than 7-year battle (3 years of investigation and 4 years of litigation) handled by Foley & Lardner's FTC Practice, a complete victory was obtained for leading direct selling company Neora, its founder Jeff Olson, following a two week federal court trial in Dallas, Texas. The court denied the FTC's requested relief on all 5 of its claims: pyramid, income, product, agency, and means & instrumentalities claims. This is the first time that a direct selling company has ever defeated the FTC's pyramid scheme claims in a court trial. It is also the first significant victory of its kind since Amway's 1979 administrative law defeat of the FTC.

As summarized by the Direct Selling Association in its amicus brief, had the FTC been successful in pursuing its new and vague "overemphasis on recruiting" test, it would have had "a profound impact on the state of the law and negatively impact[ed] operations of a sizeable portion of the United States economy."

Am Law named the lead Foley trial partners as "Litigators of the Week" in the U.S.

<https://www.law.com/radar/card/litigators-of-the-week-foley-fends-off-ftcs-pyramid-scheme-claims-for-neora-407-21643/>



FOLEY & LARDNER LLP

Nomination: Kim Drabik, Plexus Worldwide

Ed Burbach, a consummate legal professional from Foley & Lardner Law Firm, has been an instrumental partner in fostering the success with Plexus Worldwide through his exceptional legal expertise and unwavering commitment. As we recognize the importance of partnerships in the direct selling industry, it is our honor to nominate Ed Burbach for the DSA Partnership Award.

Throughout his partnership with Plexus Worldwide, Ed Burbach has demonstrated unparalleled dedication and support, playing a pivotal role in navigating complex legal landscapes, ensuring compliance, and safeguarding the interests of both the company and its Brand Ambassadors. His proactive approach and meticulous attention to detail have been instrumental in driving Plexus's success and facilitating positive relationships within the industry.

Ed's contributions extend far beyond routine legal counsel; he is a strategic partner who consistently goes above and beyond to understand Plexus's unique challenges and objectives. Ed's insights have been invaluable in helping Plexus navigate legal complexities while staying true to its mission of providing health and wellness solutions to its customers.

One of the key areas where Ed has made a significant impact is in ensuring Plexus's compliance with regulatory requirements and navigating the FTC. With the direct selling industry subject to a myriad of regulations, Ed's expertise has been crucial in guiding Plexus through the intricacies of various legal frameworks. His proactive approach has not only mitigated risks but has also instilled confidence among Plexus's stakeholders, reinforcing the company's commitment to ethical business practices.

Ed has demystified legal complexities, enabling Plexus's stakeholders to focus on building their businesses while staying compliant with regulations.

Beyond his professional contributions, Ed Burbach embodies the values of integrity, collaboration, and service that are at the core of Plexus Worldwide's culture. His approachable demeanor, willingness to listen, and genuine concern for the well-being of Plexus and its stakeholders have earned him the respect and admiration of everyone he interacts with.

In addition to his role at Foley Law Firm, and winning a landmark case against the FTC, Ed has been an active participant in industry associations, further demonstrating his commitment to advancing the direct selling industry as a whole. His insights and thought leadership have contributed to shaping industry best practices and fostering a more supportive and compliant environment for companies like Plexus Worldwide.

In recognition of his outstanding contributions, unwavering dedication, and exemplary partnership, we believe Ed Burbach is truly deserving of the DSA Partnership Award. His impact on Plexus Worldwide's success and the broader direct selling community is immeasurable, and we are honored to have him as a valued member of our team.



FOLEY & LARDNER LLP

Nomination: Erin K. Barta, Mannatech

As general counsel for Mannatech, I engage Jane Fergason of Foley's Dallas office. Jane has been a valuable resource to me over the years—especially when I was new to direct selling and had a huge learning curve. Jane and her colleagues at Foley provide excellent service and take into consideration the practical needs of the business when providing legal guidance. The guidance is straightforward and easily communicated to my business counterparts. Even as outside counsel, I find that Jane understands the dynamic of in-house counsel and the need to find a legally compliant resolution that satisfies the needs of the business. She is a valuable partner in finding creative resolutions to difficult situations—especially in this current regulatory climate. This past year, she helped me work through a unique transaction where I was able to help our sales team meet their needs while also maintaining a legally compliant structure. Her support was invaluable. Jane Fergason and her colleagues Foley are more than well-deserving recipients of the DSA Partnership Award.

Nomination: Randall Popelka, Herbalife

Observed F&L team as they successfully navigated a ground breaking legal activity which has impacts across our industry.

Nomination: Allison E. Levy, Mary Kay Inc.

I am reaching out regarding my recommendation for the legal team at Foley Lardner to be considered for the supplier award.

Their expertise, customer service approach and deep understanding of the challenges and sensitivities of direct selling make them a great legal resource.

We highly recommend them!