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'Aspire To Abide By' Advertising Laws Crucial For Direct Seller's Defense Against FTC Complaint

by [Malcolm Spicer](#)

In other finding at odds with previous court decisions, federal judge says direct seller Neora doesn't have an "agency relationship" to its independent sales representatives and isn't responsible for ad claims they post.

A Texas dietary supplement and beauty product direct seller's current compliance with Federal Trade Commission advertising regulations obviate any need to impose penalties for violations the agency alleged in previous ad claims, a federal judge says.

Evidence presented during a bench trial of the FTC's complaint for permanent injunction established that the direct seller, Neora Inc., and its management "aspire to abide by the law regarding permissible income claims, and in the absence of clear guidelines on what the law is, have revisited and revised their practices over time," wrote Judge Barbara Lynn in a US District Court for North Texas ruling.

In another finding at odds with previous court decisions, Lynn says Neora doesn't have an "agency relationship" to its independent sales representatives – "brand partners" (BPs) – and isn't responsible for ad claims they post.

Judge Lynn's [ruling](#) published on 28 September also delivered a set-back to the FTC's enforcement on allegations of a direct seller, or multi-level marketer, using pyramid schemes making sales representatives dependent on recruiting additional associates rather than on sales for their income (*see related story*).

Lynn, the senior judge in the district after being appointed by former President Clinton in 1999, gave Neora credit for improving its compliance practices since the FTC apparently found alleged violations in its income and product claims.

“The fact that the FTC relies primarily on older examples of alleged misrepresentations is significant,” she wrote.

The judge also explained that “although proof of past violations can be relevant to whether” a firm has or would 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” claims.

The FTC, Lynn stated, “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.”

Referencing a 2008 decision in the North Texas District, she found the FTC didn’t establish Neora and its management “are violating or are about to violate” Sec. 5(a) of the FTC Act “by making deceptive income claims, and the Cornerstone Wealth factors do not justify issuing an injunction based on [Neora’s] past violations of the law.

The “passage of time, coupled with [Neora’s] recognition of and explanation for the prior infractions and associated changes to Neora’s practices – namely, lack of FTC guidance on permissible income statements, and prompt adjustments to Neora’s practices when ‘tea leaves’ from the FTC materialize – renders any [pre-2019] misrepresentations largely irrelevant when assessing whether Neora is currently violating the Act,” Lynn added.

Product claims the FTC referenced in its complaint included that its EHT and Neora EHT brand supplements, named for the eicosanoyl-5-hydroxytryptamide active ingredient licensed from Signum Biosciences Inc., prevent, reduce the risk of or treat chronic traumatic encephalopathy, concussions, Alzheimer’s disease or Parkinson’s disease.

Signum also was targeted in the FTC’s [complaint](#) against Neora filed in 2019, but settled with agency that year and agreed not to make baseless claims about EHT or other supplements and to provide evidence for the commission’s enforcement against Neora. (Also see “[Direct Seller Neora Pushes Back On FTC Pyramid Scheme, False Claims Complaint](#)” - HBW Insight, 4 Nov, 2019.)



JUDGE BARBARA LYNN FOUND “INSUFFICIENT EVIDENCE OF AN AGENCY RELATIONSHIP ... TO HOLD [NEORA] RESPONSIBLE FOR ANY REPRESENTATIONS [ITS SALES ASSOCIATES] ARE ALLEGED TO HAVE MADE.” *Source: Source: Department of Justice*

The agency also contended Neora violated Sec. 5(a) of the FTC Act (15 USC Sec. 45) and Sec. 12 (15 USC Sec. 52) by making claims misrepresenting that the effectiveness of EHT or Neora EHT has been scientifically established.

The judge rejected the FTC's allegations of Neora BPs using violative claims, saying the agency "has not established that [the firm is] liable for BPs' misrepresentations."

And when the developers of the EHT active ingredient "made improper efficacy claims" at two Neora BP conferences in 2015, Judge Lynn credited the firm for preventive and responsive actions.

The ruling states that "prior to the conferences, [Neora] instructed the [EHT developers] not to make medical claims on stage" and after the events "responded with appropriate compliance messaging regarding appropriate statements to make about EHT after the fact, and took steps to avoid such statements happening again."

Those steps included preventing the EHT developers "from making any other live presentations sponsored by Neora."

A judge's dismissal of previous violations due to current compliance, as Lynn did in this ruling, isn't typical of the FTC's litigation alleging false and deceptive advertising.

"The judge did credit the company for its current compliance," said advertising law attorney John Villafranco.

"This is a rare loss for the FTC in cases where they have alleged illegal pyramiding activity," Villafranco, a partner at Kelly Drye & Warren LLP in Washington, told HBW Insight.

'Agency Relationship Question Of Fact'

Lynn dismissed the foundation of the FTC's argument that Dallas-based Neora has agency over its BPs.

Direct Seller's Data Counters FTC's Pyramid Scheme Complaint Based On 'Assumption' About Sales

By [Malcolm Spicer](#)

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Ruling in Texas federal court on FTC complaint against Neora could serve as instructions for agency on how not to prosecute pyramid scheme allegations and for direct sellers about operating businesses so regulators find no hint of sales associates' compensation plans based more on recruiting additional participants than on selling products.

[Read the full article here](#)

“The FTC argues that BPs should be considered [Neora’s] agents as a matter of law. However, the existence of an agency relationship is a question of fact,” she wrote.

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.” – Judge Lynn

Referencing FTC regulations, Lynn explained that determining if a firm has agency over its sales associates partly depends on whether “a reasonable third party would believe the agent had authority to do a particular act” in a belief “traceable to a manifestation of the principal, are questions of fact.”

Additionally, FTC regulations allow that statements by an agent alone do not create apparent authority unless the agent’s conduct has been directed by the principal, according to the ruling.

“The Court concludes that there is insufficient evidence of an agency relationship between BPs and [Neora] – whether actual or apparent agency – to hold [it] responsible for any representations Neora’s BPs are alleged to have made,” Lynn wrote.

She rejected FTC attorneys’ argument that Neora controls its BPs by approving applications, disciplining and terminating them, prohibiting them from selling competing products and restricting them to using approved marketing materials.

Evidence was presented during the trial a year ago in Dallas, Lynn wrote, “that Neora does not control and has no right to control how much BPs work (if at all), how much they spend on their pursuit of the business opportunity, or how they exercise their choice of work activities.”

“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.”

‘Rigorous Compliance’ Gets Noticed

Villafranco, who wrote about the ruling in a Kelley Drye blog post on 29 September, considers Judge Lynn’s findings on Neora’s agency “really fascinating.”

He said the FTC, as it has maintained in previous



JOHN VILAFRANCO: "IT'S GOOD NEWS FOR AN INDUSTRY THAT HAS DONE A LOT IN RECENT YEARS TO PROMOTE GOOD OR BEST PRACTICES IN THE AREA OF COMPLIANCE AND SELF-REGULATION OF INCOME CLAIMS."

Source: Kelley Drye & Warren

pyramid scheme litigations against direct sellers, argued that "if someone is in the field, who is an agent, or a distributor, and they're making false income claims, the FTC would contend that on an agency theory, the company is liable."

"The judge just didn't buy that. She just wasn't convinced that the line between distributor and company had been crossed," he said.

Also substantial in the ruling was that Lynn noted the FTC failed to provide evidence customers understood Neora brand partners were agents of Neora as well as that Neora's defense included comprehensive information about its compliance program.

"She also credited efforts made by Neora in recent years to bolster its compliance efforts consistent with guidance from the FTC and guidance from industry, self-regulators like the Direct Selling Self-Regulation

Counsel, in order to prevent their brand partners from making false income claims," Villafranco said.

As Lynn wrote in the ruling: "the record reflects a concerted and consistent effort for [Neora] 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."

Villafranco pointed out the ruling not only acknowledged Neora was careful not to guarantee any specific level of income, but that it had "taken steps to ensure that its BPs were not making lavish lifestyle claims." He added that the judge "also noted that Neora was careful to qualify its claims, through its income disclosure statement and other means, so BPs understood the income they might earn would vary."

"The judge noted how the FTC, in its own guidance, has acknowledged that it's an absolute impossibility for any direct seller to monitor 100% of the claims that are being made in the field by distributors. All of this contributed to the judge's conclusion that the FTC did not establish that the company had made false and deceptive income and product claims," he said.

"It's good news for an industry that has done a lot in recent years to promote best practices in the area of compliance and self-regulation of income claims."