

# BurnLounge Appeal Decision Will Impact MLM Industry and Financial Markets

MLMLegal.com Releases Comprehensive Analysis on Landmark Case on Pyramid Guidance and the Role of "Personal Use" in Pyramid Analysis

PORTLAND, OR--(June 26, 2014) -

[Click](#) for the full article analysis and actual BurnLounge case at [BurnLounge Appeal Decision: Guidance on Pyramid v. Legitimate MLM and the Role of Personal Use in Pyramid Analysis](#)

## ***Excerpt of the BurnLounge Analysis Article:***

On June 2, 2014, in the case of *FTC v. BurnLounge*, the U.S. Court of Appeals for the Ninth Circuit issued a seminal decision, affirming a lower court finding that the BurnLounge MLM (multilevel marketing) program was an illegal pyramid scheme, in violation of section 5(a) of the Federal Trade Commission (FTC) Act, a decision that will dramatically impact the landscape of direct selling to provide guidance on two fundamental legal issues:

- (1) What activity constitutes a "pyramid scheme?"
- (2) What is the role of "personal use" (by distributors) in pyramid case analysis?

Stakeholders: "We Won!!" Proxy Wars...

Victory has 100 fathers and defeat is an orphan. - John Kennedy (1961)

As with any inconclusive war, the stakeholders offered immediate statements of victory or vindication.

That is, other than BurnLounge. BurnLounge lost, and a permanent injunction was affirmed.

However, *BurnLounge* was a proxy war on the tests for "pyramid" and the role of "personal use" in pyramid analysis, among the interested parties, short sellers of publicly traded direct selling companies, publicly traded direct selling companies, industry spokespersons such as the DSA, the FTC, MLM critics, etc.

Each, in turn, issued press releases or statements claiming victory and validation of their respective positions.

The *BurnLounge* decision offered guidance for all stakeholders and a clear message for "going forward."

To Short Sellers:

Rethink your criticism of direct selling companies. Distributors' personal use is a legitimate end destination for product sales. Criticism of personal use is not a valid criticism. So long as distributor purchases are *not merely incidental to the business opportunity*, such purchases in reasonable amounts for personal use, coupled with rewards for one's own purchases, as well as use by non-distributors and other distributors is as legitimate as a sale to a non-distributor customer, and is not a basis for a pyramid.

To the FTC:

Congratulations, you won this case on the facts presented. However, since the *Omnitrition* case (1996), you have been arguing the wrong legal standard on personal use for more than 15 years, albeit a slight diversion in a 2004 FTC Advisory Opinion that recognized legitimacy of personal use. The court pointed out: "The FTC counters that 'internal sales to other Moguls cannot be sales to ultimate users consistent with Koscot.'" The court proceeded to roundly reject this contention noting that this argument is not "supported by the case law." And so the message to the FTC is that personal use criticism will not be accepted in the future and the FTC should look back to its 2004 Advisory Opinion position.

To the Industry:

Accept your victory on recognition of personal use as a legitimate destination for product and representative of "sales to ultimate users." However, "get your act together," and adopt "best practices" methods and rules that promote product use over mere recruiting. The presence of personal use is not "a free ticket out of trouble." It will be viewed as part of a legitimate MLM, but it is only one factor for the case by case fact based analysis of the "economic reality" of an entire program in which the acid test will be that the *predominant and primary motivation* of distributor purchases is for personal use or resale and not merely to qualify for rewards in the program by personal purchases and recruitment of others to do the same.

Major Impact of the *BurnLounge* Case

**The *BurnLounge* decision will become a guiding legal precedent in the direct selling field and will become known for several significant legal signals, including the following:**

(1) The operative facts of the *BurnLounge* program made it a pyramid scheme, primarily because of forced purchase of product to qualify for MLM recruiting rewards followed by recruitment of others to do the same.

(2) The court ended a multi-decade legal debate on "personal use," in which it recognized that "personal use" of product/service by distributors as a legitimate end destination for product/service in which distributors are accepted as "ultimate users" under a long line of cases

that differentiates pyramid v. legitimate direct selling based on an analysis of whether or not program rewards are "unrelated to sales to ultimate users."

(3) The court established a going forward pyramid test that is fact-driven, and which balances whether distributor payments and commissions are driven by recruitment, on the one hand, or sales to ultimate users on the other hand, i.e., are distributor product/service purchases incidental to the business opportunity?

With respect to going forward, the following factors tend to be key in determining whether a program is driven by product sales to ultimate users vs. a program that is driven by recruitment in which distributors pay money or make purchases for the primary purpose of qualifying for rewards in the MLM opportunity.

**Bottom Line Question:**

***When distributors pay money or "buy": What do they pay and why do they pay it?***

1. No inventory loading
2. Industry standard one year buy back policy
3. Substantial evidence of and mandate for retailing
4. Focus on product sales to customers and to distributors for use as ultimate users vs. recruiting
5. No mandated purchases beyond initial "at cost" sales kit.

(4) The court's decision provides common ground that would allow the FTC and the direct selling industry to reconcile on an acceptable standard to both interests based on principles enunciated by the FTC in a 2004 Advisory Memorandum to the Direct Selling Association. The door is now open to "codifying" such a standard. A new standard would call out the legitimacy of personal use, but would also demand that MLM programs emphasize product sales to "ultimate users," either retail customers or distributors for actual personal use as opposed recruitment, i.e., distributor purchasing that is primarily for qualification in the program with follow up recruitment for others to do the same.

View the entire article at: <http://mlmlegal.com/Burnlounge%20Appeal.html>

The pivotal issue of "personal use" will be thoroughly covered in the next [Starting and Running the Successful MLM Company Conference](#) taking place October 2014.

The conference will be held October 23rd and 24th, 2014, which is quickly approaching!

For more than 27 years, leading industry experts have educated the executives of starting and existing MLM, direct selling, network marketing, and party plan companies on how to structure their compensation plans, legalize their companies, recruit key employees and top-ranking distributors, develop business models, generate leads, fund their business, establish their website and technology platforms, better understand the direct selling industry, and so much more.

The next [MLM Startup Conference](#) takes place held October 23rd & 24th, 2014 in Las Vegas. View the conference flyer page at <http://www.mlmllegal.com/srs2.html> to learn more.

This is the *original* MLM Startup Conference -- responsible for launching many industry-leading companies -- perfected over the course of a quarter of a century to ensure the highest quality of information, the most knowledgeable experts, and the most practical advice from qualified experts.

Over the course of two days, attendees will hear from scores of industry experts, and if they choose, can sign up to meet with the speakers for individual one-on-one time. A full list of speakers and their biographies/credentials can be found at <http://www.mlmllegal.com/bio.html>.

Each attendee will receive a FREE copy of the *Starting and Running the Successful MLM Company Manual*.

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The next MLM conference will be held October 2014 in Las Vegas (keep a look out for the February and May conferences as well). Each day will begin at 9:00AM and end at 4:00PM, with the one-on-one time ending at 7:00PM. For more information visit: <http://www.mlmllegal.com/srs2.html> or call 800-231-2162/503-226-6600. Registrations are taken by phone and questions are always welcome.

Visit our website to find out how to receive two free tickets to the event by participating in our October 2014 *Innovation Campaign*: <http://www.mlmlattorney.com/innovationcampaign.html>.

Presented by one of the most trusted individuals in direct selling and MLM, Jeffrey Babener, Editor of [www.mlmllegal.com](http://www.mlmllegal.com).

**About Attorney Jeffrey Babener:** Conference Host and Chairman, Editor of [www.mlmllegal.com](http://www.mlmllegal.com), as well as a leading direct selling attorney in the United States - With over 30 years of experience as a direct selling attorney, Jeffrey Babener has advised leading companies in the MLM/Direct Selling industry, ranging from Avon to Nikken, to Herbalife, to Melaleuca, to USANA, and to Excel Communications, plus many more. He's been published in national magazines such as *Money, Inc., Atlantic Monthly, Entrepreneur* magazine, *Direct Selling News, Direct Sales Journal, Success* magazine, *Money Maker's Monthly*. He's authored several books, including his most popular *Network Marketing: What you should know*. Mr. Babener has chaired more than 65 national conferences on direct selling. He has served on the Lawyers Council and Government Relations Committees of the Direct Selling Association, and as general counsel to the Multilevel Marketing International Association. He is a graduate of the University of Southern California, where he was an editor of the USC Law Review, subsequently serving as a law clerk in the U.S. District Court for the Central District of California. He is an active member of the state bar of Oregon and California.

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