publication with "actual malice"; (5) alternatively, publication with negligence or common law malice; (6) proximate causation; and/or (7) damages, including special damages.

B. Breach of Contract

There is no evidence of the following with respect to the breach of contract claim: (1) a valid, enforceable contract; (2) a breach of any alleged contract; and/or (3) damages.

C. Negligence

There is no evidence of the following with respect to the negligence claim: (1) a duty owed to AC by the BBB; (2) breach of the duty; (3) proximate causation; and/or (4) damages.

D. Tortious Interference with Existing and Prospective Contracts

There is no evidence of the following with respect to the tortious interference claims: (1) willful and intentional acts of interference by the BBB; (2) an independent tortious act; (3) specific identifiable contracts allegedly interfered with; and/or (4) damages.

E. There is no evidence of the requisite level of fault to support recovery of punitive damages under any cause of action alleged.

III. GROUNDS FOR SUMMARY JUDGMENT UNDER RULE 166(a)(c)

A. Defamation and Business Disparagement

The BBB moves for summary judgment on the following separate and independent grounds because there are no genuine issues of material fact with respect to AC's defamation and business disparagement causes of action:

1) The Complained of Statements are literally true or substantially true, thus negating an essential element of AC's cause of action.

2) The Second Complained of Statement is not of and concerning AC and, therefore, not defamatory of AC, thus negating an essential element of AC's cause of action.

3) The First and Second Complained of Statements are not capable of a defamatory meaning, thus negating an essential element of AC's cause of action.

4) The Second, Third, Fourth, Fifth and Seventh Complained of Statements are non-actionable opinions, thus negating an essential element of AC's cause of action.

5) The Complained of Statements are protected by common law and statutory qualified privileges.

6) The Complained of Statements were not published with constitutional actual malice, the required level of fault for a public figure, thus negating an essential element of AC's cause of action.

7) Alternatively, as to the defamation cause of action, the Complained of Statements were not published with negligence, thus negating an essential element of AC's cause of action.

8) Alternatively, as to the business disparagement causes of action, the Complained of Statements were not published with common law malice, thus negating an essential element of AC's cause of action.

B. Breach of Contract, Negligence and Tortious Interference

The BBB moves for summary judgment on these causes of action because they are based on the same Complained of Statements as the defamation and business disparagement causes of action and, therefore, fail as a matter of law for the same reasons the defamation and business disparagement causes of action fail.

C. Additional Grounds as to Breach of Contract

The BBB moves for summary judgment on the following separate and independent grounds because there are no genuine issues of material fact with respect to AC's breach of contract cause of action: 1) there is no contract as a matter of law; 2) there is no breach of contract as a matter of law; 3) AC cannot recover damages for lost business reputation under its causes of action for breach of contract as a matter of law; and 4) AC cannot recover exemplary damages on its breach as contract claim as a matter of law.

D. Additional Grounds as to Negligence

The BBB moves for summary judgment on the following separate and independent grounds because there are no genuine issues of material fact with respect to AC's negligence cause of action: 1) the BBB did not owe a legal duty to AC, thus negating an essential element of

AC's cause of action; and 2) the BBB did not breach any legal duty to AC, thus negating an essential element of AC's cause of action.

E. Additional Grounds as to Tortious Interference with Contracts

The BBB moves for summary judgment on the following separate and independent grounds because there are no genuine issues of material fact with respect to AC's tortious interference with contract causes of action: 1) the Complained of Statements do not constitute an independent tortious act, thus negating an essential element of the causes of action; and 2) the BBB did not interfere with or have actual knowledge of any specific contracts at the time the Complained of Statements were published and did not intend to interfere with any actual or prospective economic relationship, thus negating an essential element of the causes of action.

F. Additional Grounds as to all Causes of Action

AC cannot recover exemplary damages as a matter of law because the summary judgment evidence negates actual malice.

IV. STATEMENT OF FACTS[1]

A. The Parties.

1. The BBB. The BBB, an independent, non-profit corporation founded in the 1920s, promotes ethical business practices in marketplace transactions through voluntary self-regulation. (Ex. A, p. 253; Ex. A3, A14). Its services include publication to the general public of consumer alerts and tips, newsletters, reports on businesses, complaint processing, dispute resolution and advertising review. (Burgess aff. ¶ 3). Membership in the BBB is by invitation only. (Ex. A13). Members must meet and maintain the BBB's membership standards, which require, among other things, truth and honesty in advertising and selling practices. (Ex. A3, A15). The BBB reports on both members and non-members. (Ex. A14). The BBB currently

[1] An index of exhibits in support of the motion is attached.

posts reports on between 10,000 and 50,000 businesses. (Ex. A, p.42). As a matter of policy, however, the BBB does not recommend any company, service or product. (Ex. A, p. 60). The reports which are not guaranteed as to accuracy, are provided solely to assist consumers in exercising their own best judgment. (Ex. A, p. 196; Ex. B60-65).

2. AC. AC was founded in June of 2003 by Timothy Darnell. (Ex. B, p. 6). AC says its product is "powerful information that bridges the gap between your current financial status and where you truly desire to be." (Ex. B1, p. 10). This "powerful information" is delivered in a two day conference, referred to as the "Millionaire Mindset Conference," held twice a year where "attendees absorb real-life stories, lessons, strategies and advice from bona-fide millionaires." *Id.* The subject matter of the conference, AC says, is "appropriate only for someone serious about earning a SIX or SEVEN DIGIT INCOME in the next 18 months or less." *Id.* (emphasis in original). The cost of the two day conference is $9,995.00. (Ex. B1, p. 15). AC also offers ancillary products such as CDs and DVDs, but those items are not at all a focus of the business. (Ex. B, pp. 82-83).

B. The AC Income Opportunity.

AC offers an "income producing system" which, it says, provides "common people" the ability to earn "$7,000.00 Over & Over & Over Again." (Ex. B4, pp. 1-2). AC tells recruits that the "income producing system" is designed so that they may earn "Tens of Thousands of Dollars QUICKLY" and make millions of dollars in a "MATTER OF A FEW MONTHS!" (Ex. B2; Ex. B4, p. 6) (emphasis in original). Six figure incomes and greater are held out as "realistic" annual earnings for everyone. (Ex. B2, B4). In fact, "Making Millionaires is what [AC] is all about." (Ex. B2, p. 3). AC promises recruits they can earn these huge incomes part-time (10-15 hours/week) without selling anything or even talking to anybody. (Ex. B, p. 115; Ex. E56-58). According to the interest form, only those interested in making $100,000, $200,000,

$500,000, or $1,000,000 in a year's time should apply for AC's income opportunity.[2] (Ex. B, 24). An AC representative simply "turns [the system] on and receives the money." (Ex. E52). It is, according to AC, "absolutely predictable!" (Ex. E52).

1. AC Focuses on Recruitment of Representatives, not Retail Sales of the Conference to Non-Participants in the Income Opportunity.

AC admits that it focuses on promoting its income opportunity, primarily through the internet. (Ex. B, p. 73). Almost all AC representatives maintain a "personalized marketing website," through which they recruit additional representatives. (Ex. B1, p. 11). Consistent with AC's description of a representative as a "professional inviter," the primary purpose of the websites is to invite recruits (i.e., persons looking for an income opportunity) to fill out an interest form to initiate the "3 Simple Steps." (Ex. B, pp. 72-73; Ex. B1, p. 6).

The "3 Simple Steps" are an online recruiting tool designed to explain the income opportunity to a recruit without the recruiting representative having to explain it. (Ex. B1, pp. 6-7). In Step 1, a recruit reads online the Getting Started E-Package ("GSEP"). Then, in Step 2, the recruit reviews the AC compensation plan. Next, in Step 3, the recruit participates in a "$7,000.00 Call." (Ex. B1, pp. 6-7). In the compensation presentation (Step 2), recruits are told the importance of attendance at weekly training sessions because such sessions explain:

> . . .how we attract people to come into our business and start those incredible multiplications of two in the matrix and reverse margin.

(Ex. B15). There is little, if any, focus on selling the conference to consumers who are not interested in the income opportunity. Rather, the focus is on exposing the income opportunity to thousands of people on a weekly basis. (Ex. B1, pp. 6-8; Ex. B20).

Until June 2006, more than six months after AC filed this suit, AC had no requirements that any of its products be sold at retail to non-participants in the income opportunity. (Ex. B, p.

---

[2] The interest form also suggests earnings of "$160,000 within six weeks EVERY SIX WEEKS!" (Ex. B24).

71). In fact, according to AC, no selling is involved in the income opportunity. (Ex. B, p. 115; Ex. G56-59). The GSEP (step 1) emphasizes that "most of [AC's] training focuses on how to accomplish exposure of your business to thousands of people on a weekly basis." (Ex. B1, p. 6). Indeed, AC teaches its representatives that if a recruit asks "what is your product?" that recruit is "not a prospect." (Ex. F1). The mission of an AC representative is to enroll, i.e., to recruit, "five EMPs [Extraordinary Marketing Professionals] over the next year" to be MMC-IV mentors. (Ex. F2). AC representatives are taught different approaches to recruiting such as: "I promote a unique income opportunity called Advantage Conferences and target individuals via the Internet who are serious about becoming millionaires." (Ex. F3). Productivity at AC, therefore, "is the direct result of how many people you have exposed the AC opportunity to. Expose this opportunity to big numbers – you will receive big numbers." (Ex. E50). As a result of this focus on recruiting, since January, 2005, no retail sales of the conferences have been made to persons not participating in the income opportunity. (Ex. B, p. 71).

2. AC's Compensation Plan Rewards Recruitment of Representatives, not Retail Sales of the Conference to Non-Participants in the Income Opportunity.

To be eligible to earn $7,000.00 commissions, an AC representative must be a "pro-rep IV," also known as an "MMC-IV." To qualify as a "pro-rep IV," a representative must make three "qualifying sales" of the conference, at the price of $9,995.00 each, one of which "qualifying sales" can be the representative's own $9,995.00 "purchase." The first three "qualifying sales," along with the commissions generated thereby, are passed up or paid to the representative's upline "pro-rep IV." (Ex. B16). Once a representative pays $9,995.00 and recruits two others who also pay $9,995.00, the representative qualifies as a "pro-rep IV" and is eligible to earn a $7,000.00 commission on his or her next recruitment at $9,995.00. (Ex. B16,

E49).[3]

After a representative qualifies as a pro-rep IV, the next recruit is entered into the pro-rep's own "pay register" to start the "Power of Two." (Ex. B2; B16). The "Power of Two" refers to the multiplication of recruits by two in a pro-rep's pay register. The pay register includes anyone personally recruited by the pro-rep and the first two they recruit, *ad infinitum*. (Ex. B1, p. 9). For example, when a qualified pro-rep IV recruits another representative to pay $9,995.00 for the conference, the pro-rep IV earns $7,000.00. When that new representative recruits two more people to pay $9,995.00, the pro-rep IV receives $14,000.00. When those two each recruit two to pay $9,995.00, the pro-rep IV receives $28,000.00 (4 x $7,000.00) and so on. Using geometrical progressions, AC demonstrates to recruits how they can quickly amass hundreds of thousands of dollars with "infinite depth" through this recruitment system. (Ex. B2; E49). According to the GSEP, by recruiting only "35 total people" to participate in the income opportunity, one can earn a total profit of $245,000.00. (Ex. B1, p. 9). This recruiting can continue "infinitely! 1, 2, 4, 8, 16, 32, 64 etc. all multiplied by $7,000.00 EACH!" (Ex. B1, p. 9). AC entices recruits with the prospect of earning over $1,000,000.00 in just 28 weeks as a result of the "Miraculous Power of 2." (Ex. B2).

Although AC claims a recruit can qualify as a "pro-rep IV" by paying the application fee of $59.95 and "selling" three conferences to others for $9,995.00 (instead of a self purchase plus two), no one qualifies in this fashion. (Ex. B, pp. 65-66; Ex. C, p.77). Mr. Darnell has not "seen a single person who hasn't committed to the full conference make any money at all" because of an "unwritten 'law,' unceasingly at work," that one must purchase the conference to succeed in the AC income opportunity. (Ex. E53). AC questions a representative's commitment to building the business if the conference is not purchased. (Ex. B, p. 65; Ex. E53). Indeed, the

[3] Based on AC's own data, as of June 1, 2006, less than 8% of all representatives are qualified to earn $7,000.00 commissions. (Ex. F4). A much lower percentage has actually earned a $7,000.00 commission.

compensation plan is designed to provide enormous incentive for representatives to make the initial upfront purchase of $9,995.00. Because a representative's own conference "purchase" counts as one of the three "qualifying sales," he/she has to recruit only two more new representatives to qualify for pro-rep IV status and thus become eligible for the promised lucrative rewards.[4] (Ex. B16; Ex. E49). Moreover, without the purchase, a representative's third "sale" is also "passed up" to the upline pro-rep and the representative forfeits not only the $7,000.00 commission but also the "organizational growth" of that third leg which, according to AC, is worth potentially hundreds of thousands of dollars. (Ex. E53). Thus, AC exerts tremendous psychological and economic pressure on a new representative to make the large initial purchase to qualify to earn the huge commissions which AC says are "absolutely predictable!," "TOTALLY REALISTIC" and "next to impossible to fail." (Ex. E52; Ex. F8). Accordingly, AC itself describes the failure to purchase the conference as "business suicide." (Ex. E53).

C. AC's Membership Application to the BBB Raised Concerns about AC's Business Model.

In September 2005, AC applied for membership to the BBB. (Ex. A13). In response to the application, the BBB reviewed AC's website including the GSEP to learn more about AC's business. (Ex. A33, p. 3). The website raised concerns about AC's business model and the truthfulness of AC's advertising. Specifically, the BBB questioned AC's use of certain trademarks and copyrights found on its website, its earning representations and whether AC was primarily engaged in promoting a pyramid scheme. (Ex. A33, pp. 2-3). These issues were discussed with Mr. Darnell on October 21, 2005, and October 25, 2005. (Ex. A, pp. 136-37; Ex. A8, A33). The BBB denied AC's application for membership. (Ex. A, p. 84).

---

[4] For added incentive to purchase the full conference, AC includes in the purchase price the personalized marketing website, which costs $495.00. "Realistically," a representative is required to make this purchase to succeed in the income opportunity. (Ex. B1, p. 11).

D. AC's Company Report on the BBB Website.[5]

As part of its services, the BBB publishes reports on member and non-member companies alike. (Burgess aff. ¶ 4). The public may access a report on a particular company by going to the BBB's home page on the internet, clicking on the banner labeled "company reports" and then inputting as a search term the company name or phone number. (Burgess aff. ¶ 5). In this way, only those persons who are interested in accessing a report on a particular company actually see it. (Burgess aff. ¶ 5).

On October 25, 2005, the BBB's report on AC stated under the Company Management section:

> Mr. Darnell, president of Advantage Conferences, is identified in the Bureau records as the president of All Star Entrepreneurs. On October 21, 2005, Mr. Darnell stated to the Better Business Bureau that All Star Entrepreneurs is out of business.

(Ex. B60). No other substantive information was provided at that time.

After reviewing the AC website and speaking with Mr. Darnell, the BBB posted the following additional information in the report on October 27, 2005 under "Nature of Business:"

> This company [AC] states on its website that it offers business training, motivational materials and conferences regarding an income opportunity. However, the bureau has evidence that the company primarily engages in promoting a pyramid scheme.

Under the "Customer Experience" section, the October 27 report read:

> Based on BBB files this company has an unsatisfactory record with the Bureau due to its failure to modify, substantiate or discontinue advertising, concerning copyright and trademark protection claims, earnings, and evidence that the company primarily engages in promoting a pyramid scheme.

Under the "Company Advertising" section, the report provided more detail:

---

[5] The BBB reports cover a three year reporting period and are provided solely to assist a consumer in exercising his or her best judgment. (Ex. B60-65).

> On October 21, 2005 and October 25, 2005, the Bureau contacted the company regarding its advertised claims that the "Millionaire Mindset Conference Income Producing System" is trademarked and copyrighted, as stated on their website on October 21, 2005. Mr. Tim Darnell, president of Advantage Conferences stated to the Bureau that "Millionaire Mindset Conference Income Producing System" is not trademarked or copyrighted. The Bureau asked that the company's website be modified to remove that text.
>
> On October 25, 2005, the Bureau contacted the company to substantiate earnings claims made on its website. On October 25, 2005 the company advertised "the Income Producing System Specifically Designed to Provide Uncommon Incomes for Common People $7,000.00 Over and Over and Over Again." The Bureau asked for the names of 10 individuals who earned the stated amount.
>
> On October 25, 2005, the Bureau contacted the company with evidence that it was primarily promoting a pyramid scheme thru its website when Bureau staff reviewed the site www.advantageconferences.com on October 25, 2005. The Bureau asked for a statement from the company as to why it is not conducting a pyramid scheme.
>
> The Bureau is awaiting the company's reply.

(Ex. B62).

On November 1, 2005, AC provided a response to the BBB's inquiry. (Ex. A17). In its letter, AC stated it had removed certain trademark and copyright symbols from its advertising; provided the names of ten individuals it claimed were making "$7,000.00 Over & Over Again;" and explained why, in its opinion, it was not engaged in conducting a pyramid scheme.

When the BBB checked the AC website on November 3, 2005, not all the requested changes had been made. (Burgess aff. ¶ 7). On November 3, 2005, the report read under the "Company Advertising" section:

> In October 2005, the Bureau contacted the company regarding the use on its Web site of the term "copyright" and the "trademark" symbol with the name "Millionaire Mindset Conference Income Producing System." The company acknowledged that "Millionaire Mindset Conference Income Producing System" is not trademarked or copyrighted, and agreed to modify those

> claims on its Web site. As of November 3, 2005, some portions of the company's Web site continue to use those claims.
>
> In October 2005, the Bureau asked the company for substantiation of the earnings claims made on its Web site, for example, "$7,000.00 Over and Over and Over Again." The company has provided information, which the BBB is reviewing.
>
> In October of 2005, the Bureau questioned the company as to whether its marketing program is a pyramid. The company has provided information which the BBB is reviewing.

(Ex. B63).

On November 4, 2005, the BBB staff confirmed the changes had been made. (Burgess aff. ¶ 8). The "Customer Experience" section reported:

> Based on BBB files, this company previously had an unsatisfactory record with the Bureau due to failure to discontinue advertising claims. Specifically, on portions of its Web site the company used the term "copyright" and the symbol for "trademark" with the name "Millionaire Mindset Conference Income Producing System." However, the company stated the name was in fact not copyrighted or trademarked. The company has recently modified its claims. On November 4, 2005 Bureau staff reviewed the site and confirmed the change had been made.

(Ex. B64).

Before the BBB could complete its investigation, AC filed this suit. (Ex. A, pp. 174-175). The BBB then turned its investigation over to its attorneys and the discovery process. (Ex. A, pp. 174-175). Since November 4, 2005, the report on AC has read, in pertinent part:

Nature of Business:

> This company states on its Web site that it offers conferences, motivational materials and an income opportunity.

Customer Experience:

> Based on BBB files, this company previously had an unsatisfactory record with the Bureau due to failure to discontinue advertising claims. Specifically, on portions of its Web site the company used the term "copyright"

and the symbol for "trademark" with the name "Millionaire Mindset Conference Income Producing System." However, the company stated the name was in fact not copyrighted or trademarked. The company has recently modified its claims. On November 4, 2005 Bureau staff review the site and confirmed the change had been made.

Company Management:

Tim Darnell, president of Advantage Conferences, is identified in Bureau records as the president of All Star Entrepreneur, LLC, 1513 Home Park Dr., Allen, TX, which is out of business. A separate report is available on All Star Entrepreneur, LLC.

Company Advertising:

In October, 2005, the Bureau contacted the company regarding the use on its Web site of the term "copyright" and the "trademark" symbol with the name "Millionaire Mindset Conference Income Producing System." The company acknowledged that "Millionaire Mindset Conference Income Producing System" is not trademarked or copyrighted, and agreed to modify those claims on its Web site.

In October, 2005, the Bureau asked the company for substantiation of the earnings claims made on its Web site, for example, "$7,000.00 Over and Over and Over Again." The company has provided information, which the BBB is reviewing.

In October, 2005, the Bureau questioned the company as to whether its marketing program is a pyramid. The company has provided information which the BBB is reviewing.

As a matter of policy the Better Business Bureau does not endorse any product service or company . BBB reports generally cover a three-year reporting period, and are provided solely to assist you in exercising your own best judgment.

(Ex. B64). (italics in original).

E. The Complained of Statements

AC complains of the following statements (the "Complained of Statements") made by the BBB:

The First Complained of Statement:

> This company states on its website that it offers business training, motivational materials and conferences regarding an income opportunity.

The Second Complained of Statement:

> Mr. Darnell, president of Advantage Conferences, is identified in the Bureau records as the president of All Star Entrepreneurs. On October 21, 2005, Mr. Darnell stated to the Better Business Bureau that All Star Entrepreneurs is out of business.

The Third Complained of Statement:

> Based on BBB files this company has an unsatisfactory record with the Bureau due to its failure to modify, substantiate or discontinue advertising, concerning copyright and trademark claims, earnings claims. . . .

The Fourth Complained of Statement:

> Based on BBB files, this company previously had an unsatisfactory record with the Bureau due to failure to discontinue advertising claims. Specifically, on portions of its Web site the company used the term "copyright" and the symbol for "trademark" with the name "Millionaire Mindset Conference Income Producing System." However, the company stated the name was in fact not copyrighted or trademarked. The company has recently modified its claims. On November 4, 2005 Bureau staff reviewed the site and confirmed the change had been made.

The Fifth Complained of Statement:

> ...the bureau has evidence that the company primarily engages in promoting a pyramid scheme.

The Sixth Complained of Statement:

> On October 25, 2005, the Bureau contacted the company with evidence that it was primarily promoting a pyramid scheme thru its website when Bureau staff reviewed the site www.advantageconferences.com on October 25, 2005. The Bureau asked for a statement from the

> company as to why it is not conducting a pyramid scheme.

The Seventh Complained of Statement:

> In October of 2005, the Bureau questioned the company as to whether its marketing program is a pyramid. The company has provided information which the BBB is reviewing.

V. SUMMARY JUDGMENT STANDARD

Under Tex. R. Civ. P. 166a(c), summary judgment is proper when the defendant negates at least one element of the plaintiff's theory of recovery or pleads and conclusively establishes each element of an affirmative defense. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). Thus, a defendant need only negate one element of a cause of action to obtain summary judgment on that claim. *Id.*

VI. ARGUMENT

A. Defamation and Business Disparagement.

Under Tex. R. Civ. Pro. 166a(c), there is no genuine issue of material fact on the following essential elements of AC's defamation and business disparagement claims:[6] (1) the Complained of Statements were substantially true when made; (2) certain Complained of Statements are not "of and concerning" AC; (3) the Complained of Statements are not reasonably capable of defamatory meaning; (4) the Complained of Statements are non-actionable statements of opinion; and/or (5) the Complained of Statements were not made with the requisite level of fault, whether actual malice, malice or negligence. In addition, the summary judgment evidence conclusively establishes that the Complained of Statements are

---

[6] *See WFAA-TV v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) ("To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement.")

protected by common law and statutory qualified privileges.

1. The First Complained of Statement

AC first complains about the following statement which appeared in its company profile from October 27, 2005 to November 3, 2005:

> This company states on its website that it offers business training, motivational materials and conferences regarding an income opportunity.

The BBB is entitled to summary judgment on AC's defamation and business disparagement causes of action as to the First Complained of Statement because, as a matter of law, the statement is *not* false, i.e., it is literally true or substantially true as a matter of law. The truth or falsity of a defamation defendant's statement is determined by using the "substantial truth" test. *Masson v. New Yorker Mag.*, 501 U.S. 496, 516-17 (1991); *McIlvain v. Jacobs*, 794 S.W.2d 14, 15-16 (Tex. 1990). If the facts underlying the gist of the statement are true or undisputed, the court "can disregard any variance with respect to items of secondary importance." *McIlvain*, 794 S.W.2d at 16; *Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467 (Tex.App.–Dallas 1994, writ denied). Thus, "truth does not require proof that the alleged libelous statement is literally true in every detail; substantial truth is sufficient." *Downer v. Amalgamated Meatcutters and Butcher Workmen of N. Am.*, 550 S.W.2d 744, 747 (Tex.Civ.App.–Dallas 1977, writ ref'd n.r.e.). A statement is "substantially true" if it is not more damaging to the plaintiffs' reputation than an absolutely truthful statement would have been. *McIlvain*, 794 S.W. 2d at 16.

(a) The First Complained of Statement Is Substantially True.

AC complains that the First Complained of Statement is false because the conferences are not "regarding an income opportunity." (Ex. B, p. 162). AC's position is refuted by AC's own documents. AC's business is all about "making millionaires." (Ex. B2, p. 3). According to the GSEP, the conferences train representatives to "think like a millionaire." (Ex. B1). The GSEP

expressly states that the subject matter of the conference is only appropriate for someone serious about earning a six figure income in the next eighteen months or less—income levels that AC advertises can be achieved with its income opportunity. (Ex B1, p. 10). Mr. Darnell notified AC representatives that it is "business suicide" for a representative not to attend the conference. (Ex. E53). Indeed, AC referred to its income opportunity as the "Millionaire Mindset Conference Income Producing System." (Ex. B4). The statement, that AC's training, motivational materials, and conferences are "regarding an income opportunity," is substantially – indeed, literally – true.

(b) The First Complained of Statement is Not Reasonably Capable of a Defamatory Meaning.

A threshold question in a defamation action is whether a complained of statement is reasonably capable of defamatory meaning. *Musser v. Smith Protective Servs.*, 723 S.W.2d 653, 654-55 (Tex. 1987). A statement is defamatory only if the words tend to injure a person's reputation by exposing the person to public hatred, contempt, ridicule, or financial injury or to impeach a person's honesty, integrity or virtue. Tex. Civ. Prac. & Rem. Code Ann. § 73.001; *Austin v. Inet Technologies, Inc.*, 118 S.W.3d 491, 496 (Tex.App.–Dallas 2003, no pet.). Whether a statement is capable of defamatory meaning is a question of law for the court. *Musser*, 723 S.W.2d at 654.

AC bears the burden of establishing that the language complained of is reasonably capable of a defamatory meaning. *Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 878 (5th Cir.), *cert. denied*, 502 U.S. 866 (1991). This burden can only be discharged by demonstrating, objectively, that others would reasonably understand the words in a defamatory sense—AC's own opinions are irrelevant. *Id.*; *see also Patton v. United Parcel Serv., Inc.*, 910 F. Supp. 1250, 1272 (S.D. Tex. 1995) (noting that "a plaintiff's opinion of the statements [alleged to be defamatory] has no bearing on whether they were defamatory"). Indeed, a statement may be false, abusive, unpleasant, and objectionable without being defamatory. *San Antonio Express*

News v. Dracos, 922 S.W.2d 242, 248 (Tex.App.–San Antonio 1996, no writ); *Rawlins v. McKee*, 327 S.W.2d 633, 635 (Tex.Civ.App.–Texarkana 1959, writ ref'd n.r.e.). It is inconceivable that a person of ordinary intelligence could reasonably conclude that offering "business training, motivational materials, and conferences regarding an income opportunity" is an activity that subjects one to public hatred, ridicule, contempt or financial injury. The First Complained of Statement is truthful and not defamatory and the BBB is entitled to summary judgment with respect to that statement.

2. The Second Complained of Statement

AC complains of the following paragraph under Company Management:

> Mr. Darnell, president of Advantage Conferences, is identified in the Bureau records as the president of All Star Entrepreneurs. On October 21, 2005, Mr. Darnell stated to the Better Business Bureau that All-Star Entrepreneurs is out of business. A separate report is available on All-Star Entrepreneurs, LLC.

(a) The Second Complained of Statement is Substantially True.

It is undisputed that Mr. Darnell was identified in the BBB records as president of All-Star. (Ex. A32). AC has no facts to refute this; indeed, All-Star's application for membership with the BBB so identifies Mr. Darnell and All-Star never requested a change. (Ex. B, p. 151; Burgess aff. ¶ 10). This sentence is, therefore, true.

AC says the second sentence is false because Mr. Darnell testified he told the BBB that he "thought" All-Star "might be" out of business, not that it actually was out of business. (Ex. B, p. 148).[7] All-Star, in fact, was out of business. All-Star filed for Chapter 7 bankruptcy in May, 2004. (Ex. F5). In its voluntary petition, All-Star estimated that no funds would be available for distribution to creditors. (Ex. F5). The trustee was discharged on September 1, 2004. (Ex. F5). A Chapter 7 bankruptcy involves a complete dissolution of the business entity. 3 *Norton*

[7] On the other hand, Mr. Burgess testified, and his contemporaneous notes reflect, that Mr. Darnell told him All-Star is out of business. (Ex. A, p. 219; A33).

Bankruptcy Law and Practice 2d 74.2 (2004)("In most instances, a Chapter 7 case would involve a complete dissolution of the business entity..."). As a result of a Chpater 7 liquidation, the corporation "becomes defunct." See *In the Matter of Federal Insulation Devel. Corp.*, 14 B.R. 362(S. D. Ohio 1981); see also, *In re Zamost*, 7 B.R. 859 (S. D. Cal. 1980). The Complained of Statement, therefore, is true – by virtue of the Chapter 7 bankruptcy proceeding, All-Star was out of business. Whether Mr. Darnell was or was not correctly quoted is of secondary importance – indeed, of no importance at all. *McIvain*, 794 S.W.2d at 16.

AC also contends the statement is false because, according to AC, the statement implies Mr. Darnell was the president of All-Star when All-Star went out of business. (Ex. B, p. 156). The report, however, did not say that; it only said, correctly, that he was identified as All-Star's president in the BBB's records (which records consist of information given to the BBB by All-Star). (Ex. B60-65).

(b) The Second Complained of Statement is Not Of and Concerning AC.

AC must also establish that the Complained of Statements referred to AC or AC's economic interests, not to some other person or entity. *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 429 (Tex. 2000) (defamation); *Forbes, Inc. v. Granada Biosciences*, 124 S.W.3d 167, 170 (Tex. 2003); *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987) (business disparagement). The unambiguous language of the Second Complained of Statement negates this essential element of AC's case. The statement is not of and concerning AC. The first sentence refers to Mr. Darnell and his affiliation with All-Star. The second sentence refers to All-Star and is not of and concerning AC. Whether the statement refers to AC is one for the court and should be resolved against AC. *Newspaper, Inc. v. Matthews*, 339 S.W.2d 890, 893 (Tex. 1960).

(c) The Second Complained of Statement is Not Reasonably Capable of a Defamatory Meaning.

Even assuming, for the sake of argument, that the Second Complained of Statement is of

and concerning AC, the statement is not actionable because it is not reasonably capable of a defamatory meaning. There is nothing odious or disgraceful about going out of business – it happens frequently.[8] Moreover, there are a myriad of reasons why All-Star might have gone out of business, none more probable than the others. See, e.g., *Qureshi v. St. Barnabas Hospital Center,* 430 F. Supp 2d 279, 287 (S.D. N.Y. 2006) (holding no defamatory meaning attributable to a general remark that medical resident left for "personal reasons," which may be grounded on numerous considerations). The general statement that All-Star was out of business is no more damaging, indeed, less so, than an absolutely true and specific statement (that All-Star had filed Chapter 7 bankruptcy) would have been. *McIlvain,* 794 S.W. 2d at 16.

(d) The Second Complained of Statement is a Non-Actionable Opinion.

A defamatory statement made about a plaintiff must be a false statement of fact, rather than a comment or opinion. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974); *Howell v. Hecht*, 821 S.W.2d 627, 631 (Tex.App.–Dallas 1991, writ denied). ("An essential element of a cause of action is that the alleged defamatory statement be a statement of fact rather than an opinion."). Whether a particular assertion is an expression of opinion or a defamatory statement of fact is a question of law for the court. *See Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). Mr. Darnell testified that he was defamed by the Second Complained of Statement because the statement suggests he is "not a good businessman." (Ex. B, p. 158). Apart from the fact that AC, not Mr. Darnell, is plaintiff, a statement that one is "not a good businessman," cannot support a defamation claim because it is an expression of opinion. *See Columbia Valley Reg. Med. Ctr. v. Bannert,* 112 S.W.3d 193, 199 (Tex. App. – Corpus Christi, 2003, no pet.) (director of nursing was not "performing at a level [her supervisor] expects"); *ABC, Inc. v. Gill,* 6 S.W.3d 19, 29 (Tex. App. – San Antonio 1999, pet. den.) (taxpayers "got screwed"); *Brewer v.*

[8] There are many examples of prominent CEO's who have been executives of companies that went out of business, including Ted Turner, Walt Disney and Lee Iacocca. (Ex. B, pp. 159-160).

Capital Cities/ABC, Inc., 986 S.W.2d 636, 642 (Tex. App. – Fort Worth 1998, no pet.) (most likely excuse for patient neglect was nursing home owner's "profiteering"); *Dale & Mayfield L.L.P. v. Molzan*, 974 S.W.2d 821, 822-823 (Tex. App. – Houston [14th Dist.] 1998, pet. den.) (law firm guilty of "lawsuit abuse"); all of which were held to be non-actionable opinions as a matter of law.

3. The Third Complained of Statement

AC next complains that the BBB's report stated:

> Based on BBB files this company has an unsatisfactory record with the Bureau due to its failure to modify, substantiate or discontinue advertising, concerning copyright and trademark claims, claims regarding earnings...

(a) The Third Complained of Statement Is True or Substantially True.

The BBB routinely reviews advertising to ensure it is truthful and non-deceptive. (Burgess aff. ¶ 6). If a company fails to modify, substantiate or discontinue advertising claims that are challenged by the BBB, the company may receive an unsatisfactory record. (Burgess aff. ¶ 6). The Third Complained of Statement is true because, as the statement says, AC received an unsatisfactory record due to the failure to modify, substantiate or discontinue certain advertising claims concerning trademarks and earnings claims.

(i) AC's Failure to Substantiate Trademark Claims.

Beginning in January, 2005, AC advertised:

> "Our exclusive, cutting edge, trademarked Marketing Method, called the Millionaire Mindset Conference Income Producing System™ that locates thousands of highly interested candidates...."

(Ex. B, pp. 166-167; Ex. B4). On October 21, 2005, Mr. Darnell advised the BBB that the phrase was not trademarked or copyrighted. (Ex. A, pp. 136-137; Ex. A8). In fact, AC had not sought trademark protection—and concedes it is not going to seek trademark protection—for that

phrase. (Ex. B, p. 31). The BBB determined this unsubstantiated advertising constituted a false and misleading advertising claim. (Ex. A, pp. 136-137). AC acknowledged the advertising claims were incorrect and agreed to stop making such claims. (Ex. A17). Thus, as the Third Complained of Statement says, AC did not substantiate its advertising claim that "Millionaire Mindset Conference Income Producing System" was protected by trademark.

Further, AC also advertised the following:

> **"FEDERALLY PROTECTED COMP PLAN –** Added to this incomparable product is our Trademarked Compensation *structure* that was purposely designed and structured to pay you Huge Commissions, both at the front end and the back end."

(Ex. B5) (italics added). AC's 1-800 number script used for the "$7,000.00 Call" emphasizes to recruits "...our *compensation plan, federally trademarked by Advantage Conferences*, with the main premise being that the common, average, not necessarily experienced Rep can make $7,000 Over & Over & Over Again." (Ex. B6). (emphasis added). The intent of this advertising claim was to inform recruits that the *structure* of AC's compensation plan was protected by a federal trademark. (Ex. B, pp. 94-95). This, of course, was an attempt to reassure recruits that the business model itself had government approval and, therefore, was legal. A trademark, however, is a distinctive mark, symbol, or emblem used by a producer or manufacturer to identify his goods from those of others. *Educational Development Corp. v. Economy Co.*, 552 F.2d 26 (10th Cir. 1977); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3:1 (2005). A plan, structure or design cannot be protected by trademark. AC admits that advertising the structure of the plan as "trademarked" was incorrect. (Ex. B, p. 90). Thus, just as the Third Complained of Statement says, AC's advertising claims that its "compensation plan" and its "marketing method" were somehow protected by federal trademark law were never substantiated.

(ii) AC's Failure to Substantiate Earnings Claims.

The earnings claims made by AC in its advertising likewise were not substantiated. AC advertised that a recruit may simply and easily earn $7,000.00 "every few days" and make "Tens of Thousands of Dollars QUICKLY." (Ex. A35; Ex. E52).[9] AC's advertising repeatedly suggests earnings of six figures or greater within a year are realistic. (Ex. B24). The BBB asked AC to substantiate these earnings claims by providing the names of ten individuals earning "$7,000.00 Over & Over & Over Again" as advertised. (Ex. A14). AC provided ten names, but not all ten of the individuals had actually earned the stated amount at that time. (Ex. A, p. 156, 168; Ex. B, pp. 175-176).

Further, certain AC representatives (primarily Jack Weinzierl), repeatedly give the same income testimonial. (Ex. F9). These earnings claims, however, are atypical.[10] The use of atypical earnings data in advertising is misleading without specific disclosure that the representation is atypical. *In re: Amrep Corp.*, 102 F.T.C. 1362, 1652 (1983). 16 C.F.R. § 255.2(a) reads:

> An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's

---

[9] Ex. E52 states: "The answer and truth is that "$7,000.00 Over & Over & Over Again is not only possible, it is absolutely predictable....Our system is simply ingenious. You are simply the one who turns it on and receives the money."

[10] AC claims the average "earnings" (not net profit) per representative as of June 1, 2006 is only $3,056.65. (Ex. F4). The BBB submits that even this number is inflated but accepts it for purposes of this motion only.

> experience to what consumers may generally expect to achieve.

In *National Dynamics*, the court stated:

> If a truthful testimonial represents a performance that has been achieved by only one or a handful of purchasers out of thousands, it is likely to convey a misleading impression even in the presence of a disclosure that it is a "better than average result."

See National Dynamics Corp., 82 F.T.C. 488, *aff'd in part and remanded in part*, 492 F.2d 1333, 1335 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974) reconsideration, 85 F.T.C. 1052, 1053-54 (1975).

At the time the Third Complained of Statements were made, many of AC's marketing pieces contained no disclaimer whatsoever. (Ex. E56-58; Ex. B2, 4). [11] Thus, AC did not substantiate its earnings claims when challenged by the BBB.

4. The Fourth Complained of Statement

Beginning November 4, 2005, the BBB's report on AC stated the following:

> Based on BBB files, this company previously had an unsatisfactory record with the Bureau due to failure to discontinue advertising claims. Specifically, on portions of its Web site the company used the term "copyright" and the symbol for "trademark" with the name "Millionaire Mindset Conference Income Producing System." However, the company stated the name was in fact not copyrighted or trademarked. The company has recently modified its claims. On November 4, 2005 Bureau staff reviewed the site and confirmed the change had been made.

(a) The Fourth Complained of Statement is Substantially True.

It is undisputed that AC used trademark symbols on portions of its website in connection with the name "Millionaire Mindset Conference Income Producing System" from January 2005 through October 2005. (Ex. B, pp. 166-167). In October 2005, AC stated to the BBB that its

---

[11] AC did not require a disclaimer until January 2006. (Ex. F7). AC's current disclaimer is buried in fine print and does not clearly and conspicuously disclose the generally expected performance. (Ex. E55, F8).

trademark claims were incorrect. After being challenged by the BBB, AC stopped making those claims. (Ex. A17; Ex. B, p. 85). On November 4, 2005, the BBB staff confirmed AC's compliance. (Burgess aff. ¶ 8). AC's report on the BBB website then read AC "previously had an unsatisfactory record. . ." (Ex. B64). This statement is true; AC's record with the BBB had been unsatisfactory and, as of November 4, 2005, AC's record was "previously unsatisfactory."

(b) The Fourth Complained of Statement is Not Capable of a Defamatory Meaning.

The Fourth Complained of Statement is not reasonably capable of a defamatory meaning. An average reader of ordinary intelligence would understand this to mean that AC complied with the BBB's request to discontinue the challenged advertising claims regarding trademarks and, therefore, its record was no longer unsatisfactory. It is difficult to imagine how compliance with the BBB's request could be understood in a derogatory manner.

5. The Fifth Complained of Statement

AC next complains of the statement that:

> ..."bureau has evidence that [AC] primarily engages in promoting a pyramid scheme."

(a) The Fifth Complained of Statement is Substantially True.

The distinction between a legitimate network or multi-level marketing company and a pyramid scheme can sometimes be difficult to ascertain. Unscrupulous pyramid operators have devised ways to disguise pyramid schemes by offering legitimate products and services for sale under the pretense of engaging in retail activity. See e.g., *F.T.C. v. Equinox International Corp.*, WL1425373 (D. Nev. 1999). In pyramid schemes, however, distributors are recruiters first and rarely, if ever, focus on retailing to the general public. A pyramid scheme is characterized by the payment by participants of money in return for which they receive (1) the right to sell the product and (2) the right to receive, in return for recruiting other participants into the program, rewards which are unrelated to the sale of the product to ultimate users. *F.T.C. v. Koscot*

Interplanetary, Inc., 86 F.T.C. 1106 (1975); *In the Matter of Amway, Inc.*, 93 F.T.C. 618, n. 106 (1979). "Ultimate users" means consumers who are not participants in the program. *Webster v. Omnitrition International Inc.*, 79 F.3d 776, 781-782 (9th Cir. 1996). *Omnitrition* has been cited with approval by Texas courts. *See, e.g., Gould v. Lowrance*, 1998 WL 526489 (Tex. App–Amarillo 1998, pet. dism'd w.o.j.).

A pyramid scheme can be identified when the primary emphasis is on recruiting new representatives into the program rather than selling products at retail to non-participants. *Omnitrition*, 79 F.3d at 782. If a program's structure tends to induce participants to focus on the recruitment side of the business at the expense of retail marketing efforts, making it unlikely that meaningful opportunities for retail sales will occur, then it is a pyramid scheme *on its face. Id.* at 782 (citing *In re Koscot Interplanetary, Inc.*, 86 F.T.C. at 1181). (emphasis added). Thus, where product sales are driven by enrolling people, the "mere structure of the scheme suggests [a program's] focus was in promoting *the program* rather than selling *the products.*" *Id.* The *Omnitrition* court found there "was evidence" that Omnitrition was engaged in promoting a pyramid scheme because product sale were driven by enrolling people into the program.

This description of a pyramid scheme is set out in official publications of the F.T.C., the Texas attorney general and the Direct Selling Association ("DSA"). As the DSA explains:

> "to look like a multi-level marketing company, a pyramid scheme takes on a line of products and claims to be in business of selling them to consumers. *However, little or no effort is made to actually market the products.*"

(Ex. F9). (italics added). The DSA warns consumers to "STAY AWAY!" from any multi-level marketing plan if "NO (OR NOT MANY)" products are sold to consumers. (Ex. F9, p.4). (emphasis in original). In a prepared statement issued by the F.T.C., its general counsel said the following about pyramid schemes:

> Pyramid schemes now come in so many forms that they may be difficult to recognize immediately. However, they all share one overriding characteristic. They promise consumers or investors large profits based primarily on recruiting others to join their program, not based on profits from any real investment or real sale of goods to the public.
>
> Some schemes may purport to sell a product, but they often simply use the product to hide their pyramid structure. There are two tell-tale signs that a product is simply being used to disguise a pyramid scheme: inventory loading and a lack of retail sales... A lack of retail sales is also a red flag that a pyramid exists. Many pyramid schemes will claim that their product is selling like hotcakes. *However, on close examination, the sales occur only between people inside the pyramid structure or to new recruits joining the structure, not to consumers out in the general public.*

(Ex. F10). (italics added). Another F.T.C. publication, which the BBB reviewed prior to posting the report on AC, states: "However, many multilevel marketing plans are actually pyramids. If they offer a product or service, it's only to make the program look legitimate. And if any sales are made, they're made generally only to new distributors, not to the public at large." (Ex. A22). Further, the F.T.C. warns against any plan that promises income from the growth of a downline. (Ex. F12). Gregg Abbott, the attorney general of Texas, says the following about pyramid schemes:

> In pyramids, commissions are based on the number of distributors recruited, not on the items you sell. *Most of the product sales are made to these distributors, not to consumers in general*....for an MLM plan to be legal, commissions must come from the retail sale of a product and not from recruitment of people to the sales team.

(Ex. F11). (italics added).

Applying these principles here, there is, unquestionably, evidence that AC was primarily engaged in promoting a pyramid scheme. An AC representative pays money for the opportunity to earn a commission by introducing others to participate in the program rather than from the sale of a product to an ultimate user, i.e., a non-participant in the income opportunity. (Ex. B, p. 71; Ex. E49). AC promises recruits the ability to make millions of dollars from the "Power of Two." (Ex. B2). The promise of wealth through the "Power of Two" encourages participants to focus on recruitment rather than retail sales. Indeed, Mr. Darnell testified, AC's focus is on recruitment of others into the program. (Ex. B, p. 73). Consistent with that focus, the role of an AC representative is to be a "professional inviter," with the concept being to introduce as many people as possible to go through the online recruiting process, i.e. the "3 Simple Steps." (Ex. B, pp. 72-73). AC explains:

> ● "all as a result of qualifying and then personally sponsoring just ONE person into Advantage Conferences. AND each and every single person that you sponsor into Advantage Conferences creates the same income potential. EVERY SINGLE PERSON! There is no way to predict how much sponsoring any one individual person could be worth!! Perhaps hundreds of thousands of dollars!!!

(Ex. E51).

> ● Once you qualify, you will be eligible to mentor and earn qualifying commissions from other reps. This allows you to generate very substantial long term income for helping the company build their rep force.

(Ex. E58). AC promises income from "infinite depth," i.e., a downline, as a result of the "Power of Two." (Ex. B2, E49). In the GSEP, AC says the recruiting can continue "infinitely 1, 2, 4, 8,

16, 32, 64, etc."[12] Conversely, if a pro-rep sells the conference at retail to non-participants in the income opportunity, a downline is never established and the pro-rep achieves no additional compensation from making that sale. The advertised earnings from the "Power of Two," i.e., "Tens of thousands of dollars QUICKLY," millions in a "MATTER OF A FEW MONTHS," and "$160,000 within six weeks EVERY SIX WEEKS!," are only possible if the downline recruiting continues. (Ex. B2, B4,B24).

Unlike Amway,[13] whose compensation plan stressed that retail selling was essential, AC had no requirements whatsoever that a representative make any retail sales of the conference -- or any other product -- to non- participants. (Ex. B, p. 71). AC provides little, if any, training on how to sell the conference at retail to consumers who are not interested in the income opportunity. Indeed, AC emphasizes to recruits, that no selling is involved. (Ex. B, p.115; Ex. E56-59). Representatives are taught that if a recruit asks "What is the product," then that recruit "is not a prospect." (Ex. F1). Why would an AC representative sell the conferences at retail, i.e. to someone not interested in the income opportunity when such sale would not lead to the organizational growth promised by the "The Power of Two?" The expectation of astronomical income from the growth of a downline provides all the inducement needed for a representative to ignore retail sales. Not surprisingly, there has not been a single retail sale of the conference thus far, i.e., every attendee of the conference has been an AC representative interested in the income opportunity of large commission income from the Power of Two. (Ex. B, p.71; Ex. D, pp. 15-16). As in *Omnitrition*, the product sales—i.e., the conference—are driven entirely by the

---

[12] AC removed that language from the GSEP after it was challenged by the BBB. In fact, some AC representatives now use a different compensation presentation to eliminate references to "endless depth," which led people to conclude AC was a pyramid. (Ex. F13).

[13] In *In re the Matter of Amway*, 93 F.T.C. 618 (1979), the F.T.C. found Amway was not engaged in promoting a pyramid scheme because Amway commissions were not paid "unless products were sold to consumers" who were not distributors. 93 F.T.C. at n. 75; see also *Omnitrition* at 783. Thus, one key to avoid being a pyramid is to have safeguards that tie recruitment bonuses to actual retail sales outside of the network. AC did not have any such safeguards.

recruitment process.[14] Not only did the BBB have "evidence" that AC is primarily engaged in promoting a pyramid scheme but that evidence is overwhelming.[15]

Any claim by AC that commissions are paid only on "sales" of the conference is nothing more than form over substance. These sales occur only inside the pyramid. The purchase of the conference is virtually a pre-requisite to getting what the AC rep actually wants: the ability to earn "$7,000.00 Over and Over and Over Again" from recruiting others.[16] AC reinforces this requirement by telling representatives it is "business suicide" not to purchase the conference. (Ex. E53). To further exert pressure on a representative to purchase the conference, AC employs psychological tactics aimed at creating fear in a representative's mind that he will lose a huge income stream from "organizational growth" by giving up the third leg up to the upline pro-rep. (Ex. E53). This "organizational growth" refers, of course, to any future representatives that the third rep recruits. (Ex. B16; E49). Playing upon greed and fear of losing a good deal is a common psychological tactic employed by pyramid schemes. (Ex. F9, p.2).

(b) The Fifth Complained of Statement is a Non-Actionable Opinion.

Alternatively, the Fifth Complained of Statement is a matter of opinion. In response to this question: "Would you agree with me that people can have different opinions as to whether a company is or is not primarily engaged in operating a pyramid scheme?" Mr. Darnell answered in his deposition: "Yes, I would agree with that, Yes." (Ex. B, p. 193). The BBB's opinion was

---

[14] AC alleges there are other products for sale such as CDs and DVDs. However, Mr. Darnell testified these other products are "very ancillary" and no one makes "$7,000.00 Over & Over & Over Again" by selling such products. (Ex. B, p. 83; Ex. B12). These products are "not a focus at all for AC." (Ex. B, p. 87).

[15] Mr. Darnell has been involved in numerous multi-level marketing companies, e.g., NuSkin Enterprises, Sational Safety Associates, Amway Corp., Global Prosperity Group, Tru-Dynamics International, Inc., Liberty League International, LLC, and All-Star Entrepreneurs, LLC. (Ex. B, pp. 10-11, 14-15, 23-25, 238-243). AC's business and compensation plan is similar to Liberty League. (Ex. B, pp. 239-243). The Arizona Attorney General sued Liberty League alleging it was engaged in promoting a pyramid scheme. (Ex. F 23).

[16] AC claims one may participate and become qualified to earn $7,000.00 commissions by paying only the $59.95 application fee and selling three conferences. However, no one has ever done so and probably no one ever will. (Ex. B, pp. 65-66; Ex. E53).

based, in part, on AC's own description of its income opportunity contained on page 9 of the GSEP that an AC representative earns "$7,000.00 Over & Over & Over Again" by enrolling others in the program, i.e., the "Power of Two." (Ex. A14; Ex. B1, p. 9). A person reading the BBB's report on AC would understand the opinion was based on the description of AC's business model described on the AC website. (Ex. B62). Clearly, as the Fifth Complained of Statement says, the BBB "had evidence" that AC "primarily" engages in promoting a pyramid scheme, but, at a minimum, that statement is a matter subject to debate and not capable of being proven true or false and, as shown by the authorities at pp. 18-19 of this Motion.

6. The Sixth Complained of Statement

AC complains that the BBB stated:

> On October 25, 2005, the Bureau contacted the company with evidence that it was primarily promoting a pyramid scheme thru its website when Bureau staff reviewed the site www.advantageconferences.com on October 25, 2005. The Bureau asked for a statement from the company as to why it is not conducting a pyramid scheme.

(a) The Sixth Complained of Statement is Substantially True.

Mr. Darnell admits the Sixth Complained of Statement is true. He testified in his deposition:

Q: Now, with regard to that paragraph under Company Advertising (referring to the Sixth Complained of Statement), those statements are true, isn't that correct:

A: That's what the Bureau did, that's correct.

Q: It is true that the Bureau contacted you with evidence that, in its opinion, believed showed Advantage Conferences was primarily promoting a pyramid scheme through its website?

A: That is correct.

Q: All right. And then they [the BBB] asked you for a statement from the company as to why it is not conducting a pyramid scheme, correct?

A: That's correct, uh-huh.

(Ex. B, pp. 179-180). It is, therefore, undisputed that this statement is true.

7. The Seventh Complained of Statement

As of November 4, 2005, the BBB's report read that the BBB:

> "In October, 2005, the bureau questioned the company as to whether its marketing program is a pyramid. The company has provided information which the BBB is reviewing."

(a) The Seventh Complained of Statement is Substantially True.

Mr. Darnell admits that Mr. Burgess presented him with evidence that, in the BBB's opinion, indicated AC was promoting a pyramid scheme. (Ex. B, p. 179). He further admits that he was asked to respond as to why AC was not a pyramid scheme. (Ex. B, pp. 179-180). It is, therefore, undisputed that the BBB questioned AC about whether it was a pyramid and that AC provided information which the BBB was reviewing. AC concedes this statement is true. (Ex. B, pp. 223-224). Moreover, taken as a whole, an average reader of ordinary intelligence would understand from the Seventh Complained of Statement that the BBB raised questions about AC's business model and was investigating that issue but had not reached a conclusion. The gist of the report – that the BBB questioned AC about whether its marketing plan is a pyramid and was reviewing the information -- is substantially true.

8. None of the Complained of Statements Were Published with Constitutional Actual Malice as a Matter of Law.

BBB is entitled to summary judgment on AC's defamation and business disparagement causes of action because the Complained of Statements were not published with constitutional "actual malice" as a matter of law. The constitutional "actual malice" standard applies in this case for several reasons: (1) qualified privileges, whether common-law, constitutional, or statutory, all preclude liability as a matter of law; and (2) AC is a public figure as a matter of law.

(a) The Complained of Statements are Protected by Common-law, Constitutional, and Statutory Qualified Privileges Which May Only be Defeated by Proving Actual Malice.

Qualified privileges come in three forms, common-law, constitutional, and statutory, all of which apply to defeat AC's causes of action based on the Complained of Statements. Whether a qualified privilege exists is a question of law for the court. *East Tex. Med. Ctr. Cancer Inst. v. Anderson*, 991 S.W.2d 55, 60 (Tex.App.–Tyler 1998, pet. denied). Qualified privileges "arise out of the occasion upon which the false statement is published." *Hurlbut*, 749 S.W.2d at 768; *San Antonio Credit Un. v. O'Connor*, 115 S.W.3d 82, 99 (Tex.App.–San Antonio 2003, pet. denied).

i) The Common Interest Privilege

To be entitled to a common-law common interest privilege (sometimes referred to as a qualified or conditional privilege), the defendant's statement must (1) concern a subject matter that is of sufficient interest to the author, or be in reference to a duty the author owes; (2) be communicated to another party having a corresponding interest or duty; and (3) be made without malice. *San Antonio Credit Un.*, 115 S.W.3d at 99.

Texas courts liberally interpret the first element. *See Lomas Bank USA v. Flatow*, 880 S.W.3d 52, 54 (Tex.App.–San Antonio 1994, writ denied) (privilege protects "any subject matter in which the author has an interest, or with reference to which he has a duty to perform to another person having a corresponding interest or duty"). Protectable interests generally include the author's self-interest, the interests of others, business interests, and the public interest. PROSSER & KEETON ON TORTS §115 (5th ed. 1984). Texas courts, moreover, have interpreted "malice" in the context of a common-law qualified privilege to be constitutional "actual malice." *Randall's Food Mkts. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *Associated Telephone Directory Publishers, Inc. v. Better Business Bureau of Austin, Inc.*, 710 S.W.2d 190, 192 (Tex.App.—Corpus Christi 1986, writ denied) (same). Consequently, there must be proof that a statement was motivated by actual malice at the time of the publication to defeat the common law qualified privilege. *Id.*

The courts, including Texas, have extended a common law qualified privilege to better

business bureaus Texas. *Id.* at 192. A New York court applied the common interest privilege to a New York Better Business Bureau in *Elite Funding Corp. v. Mid-Hudson Better Business Bureau*, 629 N.Y.S.2d 611 (N. Y. Sup. Ct. 1995). There, the Mid-Hudson BBB gave the plaintiff an "unsatisfactory" rating in its report for failing to respond to customer complaints. The plaintiff sued, claiming the "unsatisfactory" rating was defamatory. *Id.* at 612. The court granted summary judgment in favor of the Mid-Hudson BBB, holding that the plaintiff's causes of action were precluded because the Mid-Hudson BBB's communications to the public were protected by "...a qualified 'common interest' privilege." *Id.* at 613-614. Likewise, in *Audition Division, LTD. v. Better Business Bureau of Metropolitan Chicago, Inc.*, 458 N.E.2d 115, 120 (Ill. App. 1983), the Illinois court applied the common law common interest privilege to affirm a summary judgment in favor of the Chicago BBB on the plaintiff's libel claim.

Here, the summary judgment evidence conclusively establishes that the common-interest privilege bars AC's causes of action as a matter of law. First, the BBB had an interest in the subject matter of the Complained of Statements, i.e., the protection of consumers from misleading advertising, consumer fraud and pyramid schemes. These are, unquestionably, matters of interest to the public. Raising such issues is entirely consistent with the BBB's function and purpose. The BBB routinely alerts consumers about possible deceptive advertising and fraudulent schemes. (Burgess aff., Exs. 1-3). This case is no exception. Thus, the first element is easily satisfied. The second element is also satisfied because the Complained of Statements were communicated only to other persons having a corresponding interest – namely, persons who visited the BBB's website to gain information about AC. (Burgess aff. ¶ 5). Finally, the third element is met because, as set out at pp. 40-41, infra, the BBB did not make the Complained of Statements with actual malice.

ii) Constitutional Fair Comment Privilege

A constitutional fair comment privilege under the First Amendment to the U.S.

Constitution and Art. I sec. 8 of the Texas Constitution also applies to defeat liability in this case. A Louisiana court applied the constitutional fair comment privilege pursuant to the First Amendment to preclude a defamation claim in *Economy Carpets Mfrs. & Distributors, Inc. v. Better Business Bureau of the Baton Rouge Area, Inc.*, 361 So.2d 234, 242 (La. App. 1978). In that case, the Baton Rouge BBB published a bulletin after the plaintiff failed to verify its advertising claims. *Id.* at 244. In reaching its holding, the court held that the plaintiff had failed to overcome the onerous burden of proving actual malice and that the BBB's allegedly defamatory statements were a matter of public concern. *Id.* at 241-42. Similarly, in the *Elite Funding* decision, discussed pp. 33-34, *supra,* directly above, the New York court also applied a constitutional fair comment privilege to a better business bureau, holding that the Mid-Hudson BBB's communications were absolutely protected by that privilege. 629 N.Y.S.2d at 615.

iii) The Statutory Privilege

Furthermore, a statutory privilege also applies to defeat AC's claims based on the Complained of Statements. TEX. CIV. P. & REM. CODE § 73.002(a), (b)(2). This privilege applies to bar causes of action based on publication of information on matters for public concern for general information. The BBB publishes information on matters of public concern for general information. It is undisputed that whether a company engages in promoting a pyramid scheme is a matter of public concern. (Ex. B, pp. 199-200; Ex. E, pp. 19-21). The Complained of Statements constitute a reasonable and fair comment on matters of public concern; therefore, the privilege applies.

(b) AC is a Public Figure.

Apart from the applicability of he foregoing privileges, the actual malice standard of fault also applies to AC's defamation and business disparagement claims because AC is a public

figure.[17] *WFAA TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *Bentley v. Bunton*, 94 S.W.3d 561, 596 (Tex. 2002). Whether a party is a public figure is a question of constitutional law for the court to decide. *McLemore*, 978 S.W.2d at 571; (citing *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987)). Texas applies a three-part test for determining whether a person is a limited purpose public figure. *Id.* (citing *Trotter*, 818 F.2d at 433). Under this test, a plaintiff is a public figure if: (1) the controversy at issue is public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff has more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy. *Id.* (citing *Trotter*, 818 F.2d at 433).

i) There is a Public Controversy Involving Pyramid Schemes.

The scope of the controversy under the first prong of the test is not limited to the plaintiff's actions alone; rather, the plaintiff can be involved in a larger issue that provides the necessary public controversy. *Id.* at 572.

There is a public controversy here, both in the sense that people are discussing the issue of whether AC engages in promoting a pyramid scheme and that people other than AC and the BBB—i.e., consumers—are likely to feel the impact of the resolution of the issue.

It is undisputed that there is a public controversy over whether the network or multi-level marketing industry in general promote pyramid schemes. (Ex. B, p. 199; Ex. E, pp. 20-21). This public controversy has long been recognized by members of the media as well as by federal and state government officials. Prominent news organizations, including ABC, NBC, CBS, and other electronic media have broadcast stories on pyramid promotional schemes and the impact on consumers. (Ex. B, p. 200). As recently as April 2006, ABC broadcast a story on pyramid

[17] The "actual malice" standard applies in business disparagement cases as well. See *Forbes, Inc. v. Granada Biosciences*, 125 S.W.3d 167 (Tex. 2003).

schemes stating that "thousands of people have lost millions of dollars." (Ex. F14). The F.T.C. initiated proposed rulemaking to require businesses promoting income opportunities to make certain required disclosures to address "widespread fraud in the sale of business opportunities."[18] According to the F.T.C., from January, 1997 through December, 2005, consumers lodged 17,858 complaints against pyramid schemes, reporting an alleged aggregate injury level of over $46 million. *Fed. Reg.* Vol. 71, no. 70, 19057. The F.T.C. recognizes that modern technology has vastly multiplied the potential for pyramid schemes to harm citizens. Fed. Reg. Vol. 71, no. 70, 19061 ("pyramid fraud has gone high tech...flooding the Internet.").

With the growth of the Internet came a corresponding increase in the investigation and prosecution of pyramid promotional schemes. For years, the F.T.C. has posted information on pyramid schemes on its website.[19] (Ex. F12). Similarly, the Texas Attorney General's website posts a message from Attorney General Abbott entitled "Beware of Pyramid Schemes." (Ex. F11). Since 1990, the F.T.C. has prosecuted 20 cases against pyramid schemes. Fed. Reg. Vol. 71, no. 70, p. 19060. In Texas, the Attorney General's Office recently filed suit against BioPerformance, Inc., an Irving, Texas-based company, because the AG had reason to believe that BioPerformance was engaged in a pyramid promotional scheme, stating that the suit was brought in the "public interest." (Ex. F15, p. 4).

The growth of internet pyramid schemes has spawned non-traditional media coverage of the issue such as consumer-protection websites. One such website, called www.mlm-thetruth.com, is maintained by the Consumer Awareness Institute which is run by Dr. Jon Taylor, a defendant in this lawsuit. (Ex. E, pp. 18-19). It receives between 120,000 and 160,000 hits per month. (Ex. E, pp. 82-83). Internet bulletin boards such as *ScamsTalk.com*,

[18] According to the F.T.C., many sellers of business opportunities avoid disclosure requirements under the Franchise Rule by requiring an application fee less than the minimum investment ($500) applicable to franchises. Fed. Reg. Vol. 71, no. 70, 19057. AC's application fee of $59.95 avoids the disclosure requirements.

Scam.Com and *Work-at-HomeForum.com* contain forums for discussions of MLM and pyramid scams. (Ex. F16-18). The pyramid topic is one of the most frequently visited forums on these message boards. For example, the *Scam.com* "MLM/pyramid scam" topic has received in excess of 100,000 views. (Ex. F18).

These consumer-related websites and bulletin boards contain specific postings regarding AC and whether AC engages in promoting a pyramid scheme. (Ex. B, pp. 203-206; Ex. B68; Ex. E47). Discussions about AC have occurred on several different *Scam.com* threads—three of the threads are dedicated exclusively to AC.[20] Currently, there are 43 pages of discussion on the "Advantage Conferences/Tim Darnell" thread. (Ex. F19). Indeed, the issue of whether AC is or is not engaged in promoting a pyramid scheme was first raised by AC itself in January, 2005, in its marketing materials. (Ex. B, pp. 197-198). In early October 2005, prior to the BBB's report, *mlmthetruth.com* identified AC as meeting the criteria for a pyramid scheme. (Ex. E, p. 89; Ex. E47). Dr. Taylor learned of AC from a consumer inquiry. (Ex. E, pp. 22-23). The issue was also raised on *ScamsTalk.com* prior to the BBB report. (Ex. F16). Finally, before the BBB report was posted, AC's recruits frequently questioned AC representatives on this issue. (Ex. B, p. 199; Ex. C, p.74). It cannot be disputed that people are discussing the issue of whether AC is a pyramid scheme.

ii) AC has more than a Trivial Role or Tangential Role in the Controversy.

AC has more than a trivial or tangential role in this controversy. AC markets its business opportunity to the public and declares to the public that it is not a pyramid scheme. (Ex. B, pp. 198-199; Ex. B3, B4). AC, therefore, voluntarily injected itself into the controversy for the limited purpose of comment on its income opportunity. See e.g. *Brueggemeyer v. ABC,* 684 F.Supp. 452, 455, 458 (N.D. Tex. 1988) (holding businessman engaging in "controversial sales

[20] These threads are identified as "Advantage Conferences/Tim Darnell;" "Watch out for 7K Advantage/Jack Weinzierl is an EVIL Rat! Liar and Scammer;" and "Advantage Conferences/is it legal?" (Ex. B68; F20). Another thread contains an extensive discussion about AC. (Ex. F21).

opportunity to counteract any alleged false statements made about it. See *Gill v. ABC, 6* S.W.3d 19 (Tex. App.—San Antonio 1999, writ denied). In this regard, AC maintains a website on which it may disseminate whatever information it wishes. AC has at least 300 representatives, many of whom, if not all, maintain their own websites to promote AC. AC representatives issue press releases and maintain blogs. (Ex. B, p.216; Ex. C, pp. 34-35, 56; Ex. F22). AC distributes marketing materials to its representatives which can be posted on the websites. AC also accesses traditional channels of communication such as radio and magazines. (Ex. C, pp. 30 31, 34-35). AC spent in excess of $50,000 in advertising expenses in 2005. (Ex. D33, p. 51-52). AC has the ability to retain, and has retained, public relations consultants. (Ex. B, pp. 255-257). Thus, AC has regular and continued access to the channels of effective communication.

iii) The Alleged Defamation is Germane to AC's Participation in the Controversy.

The alleged defamation is germane to AC's participation in the controversy. In this regard, AC complains, among other things, that the BBB's statement that it had "evidence that AC primarily engages in promoting a pyramid" is defamatory. The Complained of Statemetns are clearly germane to AC's participation in the public controversy concerning pyramid schemes.

(c) The Actual Malice Standard.

As used in the defamation context, actual malice is different from traditional common-law malice; it does not include ill will, spite or evil motive. *Casso v. Brand,* 776 S.W.2d 551, 558 (Tex. 1989). "Actual malice" means that the statement was made with knowledge that it is false or with reckless disregard of its truth or falsity. *Carr v. Brasher,* 776 S.W.2d 567, 571 (Tex. 1989). "Reckless disregard," in turn, requires proof that the publisher "in fact entertained serious doubts as to the truth of his publication." *Brand,* 776 S.W.2d at 558. Reckless disregard is a subjective standard focusing on the defendant's state of mind. *Bentley v. Bunton,* 94 S.W.3d 561, 591 (Tex. 2002).

The actual malice element presents an exceedingly high hurdle for a libel plaintiff to overcome. This point is effectively illustrated in *El Paso Times, Inc. v. Trexler*, 447 S.W.2d 403 (Tex. 1969). In the *Trexler* case, the defendant newspaper had published a letter to the editor which could be construed as accusing the plaintiff of treason. As evidence of actual malice, the plaintiff relied on the testimony of the newspaper employee, who testified among other things, that he had seen no information that would lead him to believe that the plaintiff was guilty of treason and that neither he nor any other employee of the newspaper had made any investigation to determine the truth or falsity of the letter. The Texas Supreme Court concluded:

> We think, as a matter of law, that the evidence does not show actual malice as defined in the *New York Times* case. Failure to investigate the truth or falsity of a statement before it is published has been held insufficient to show actual malice. Negligence or failure to act as a reasonably prudent man is likewise insufficient.
>
> * * * *
>
> In light of these U.S. Supreme Court opinions, we hold that the publication was not libelous because there is no evidence that defendant published Loukes' letter "with knowledge that it was false or with reckless disregard of whether it was false or not."

447 S.W.2d at 406-07.

(d) The Summary Judgment Evidence Conclusively Negates Constitutional "Actual Malice" as a Matter of Law.

The summary judgment evidence conclusively negates "actual malice" as a matter of law. Mr. Burgess, the BBB's chief operating officer who was responsible for the content of the AC report, states unequivocally that: 1) he believed the Complained of Statements to be true at the time they were published; and 2) that he entertained no doubt, serious or otherwise, as to the truth of the Complained of Statements. (Burgess aff. ¶ 11). Moreover, Mr. Burgess had no desire to harm or interfere with AC's economic interests. (Burgess aff. ¶ 12-13). The statements in the

BBB report were made solely for consumers to consider in exercising their best judgment. (Ex. A, p. 196). Mr. Burgess followed BBB guidelines in preparing the report. (Burgess aff. ¶ 10). This is conclusive evidence of the absence of actual malice and, thus, AC cannot establish this critical element of its defamation claim as a matter of law. See *Howell v. Hecht*, 821 S.W.2d 627 (Tex. App.—Dallas 1991, writ denied). Further, Mr. Burgess testifies unequivocally in his affidavit, that prior to posting the report dated October 27, 2005, he reviewed information on the websites of the Texas attorney general and the F.T.C. concerning pyramid promotional schemes and interpreted the information he reviewed on AC's website to meet the definition of a pyramid scheme. (Burgess aff. 10; Ex. A14). As shown above, the statement that the BBB had evidence that AC was primarily engaged in promoting a pyramid scheme is true. However, even if the court finds the statements are not true, at most, Mr. Burgess understandably misinterpreted ambiguous facts, which falls far short of actual malice as a matter of law. *Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847 (Tex. 2005). Therefore, because the BBB's evidence conclusively negates actual malice on the BBB's part, summary judgment is appropriate on AC's defamation and business disparagement causes of action as a matter of law.

9. Alternatively, the Complained of Statements Were Not Published with Negligence as a Matter of Law.

In the unlikely event AC is deemed to be a private figure, and the qualified privileges do not apply, the summary judgment evidence demonstrates that the BBB was not negligent in publishing the Complained of Statements. Negligence on the part of the BBB is an essential element of AC's defamation claim. *Foster v. Laredo Newspapers*, 541 S.W.2d 809, 819-20 (Tex. 1976). In a libel case, negligence means that the publisher either knew or had reason to know the allegedly defamatory statements were false. *Id.* In this case, the summary judgment evidence, detailed above, conclusively establishes that the Complained of Statements were true at the time they were published. As the evidence further establishes, Mr. Burgess did not know the statements were false and had no reason to know the statements were false when they were

made.

10. Alternatively, the Complained of Statements Were Not Published With Malice as a Matter of Law.

A cause of action for business disparagement requires proof of malice even if the plaintiff is not a public figure. *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). Under *Hurlbut*, a defendant in a business disparagement being sued by a non-public figure plaintiff acts "with malice" when it (1) knows the statement in question is false, (2) recklessly disregards the fact that the statement is false, (3) acts with ill will, or (4) intends to interfere in the plaintiff's economic interests. 749 S.W.2d at 766. For the purposes of a business disparagement claim, "malice" is a term referring to a publisher's state of mind at the time the alleged disparaging statements are made. *Granada Biosciences v. Forbes, Inc.*, 49 S.W.3d 610, 617 (Tex.App–Houston [14th Dist.] 2001), *rev'd on other grounds*, 124 S.W.3d 167 (Tex. 2003).

The summary judgment evidence conclusively negates the malice fault requirement. As outlined above, the BBB believed the Complained of Statements to be true at the time they were made and did not know them to be false or recklessly disregard the fact that the statements were false. (Burgess aff. ¶ 11). The evidence conclusively establishes the BBB did not act with any spite or ill will toward AC and the BBB did not intend to interfere with AC's economic interests. (Burgess aff. ¶ 12). The BBB's motivation in publishing the report was solely to fulfill its organizational purpose of providing information to consumers, so that consumers may exercise their best judgment. (Burgess aff. ¶ 13). For these reasons, AC cannot establish this essential element of its business disparagement causes of action as a matter of law.

B. Because the Defamation and Business Disparagement Causes of Action Fail as a Matter of Law, All of AC's Other Causes of Action Also Fail.

Based on the same allegations of defamation and disparagement, AC also asserts additional causes of action for breach on contract, negligence, tortious interference with existing contracts and tortious interference with prospective business relations. Because AC's

defamation and business disparagement claims fail as a matter of law, AC's other causes of action based on the same allegations fail as a matter of law. *See Evans v. Dolcefino*, 986 S.W.2d 69, 79 (Tex.App.—Houston [1st Dist.] 1999) (holding that negligence, gross negligence and tortious interference claims grounded on the same speech underlying a libel claim failed as a matter of law along with the libel claim), *disapproved of in part on other grounds, Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000). To hold otherwise would permit AC to circumvent the constitutional defenses to defamation by pleading torts that do not require proof of falsity and actual malice. *Id.* Each of AC's other attempted causes of action is also based entirely on the same facts as the defamation claim—that the BBB published the Complained of Statements. There are no acts or omissions complained of other than the publication of the Complained of Statements. (Ex. B, p. 232-233; 236-37). AC cannot creatively plead tort-based claims to circumvent the constitutional protections afforded a defendant in a defamation action. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988); *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863 n.3 (S.D. Tex. 1988). Thus, because AC's non-defamation claims are indistinguishable from its defamation claim, they must also fail as a matter of law. *KTRK Television v. Felder*, 950 S.W.2d 100, 108 (Tex.App.–Houston [14th Dist.] 1997, no writ) (non-defamation claims grounded on the same facts as defamation claim also fail when defamation claim fails).

C. AC's Breach of Contract Claim Fails as a Matter of Law.

a) The BBB and AC Never Entered Into a Contract.

To prove an action for breach of contract, a plaintiff must establish the defendant breached a valid and enforceable contract. *Aguilar v. Seagal*, 167 S.W.3d 443, 450 (Tex.App.—Houston [14th Dist.] 2005, no pet.). Here, however, the BBB and AC never entered into a valid and enforceable contract. AC admits there is no contract between it and the BBB. (Ex. B, pp. 228-229; 232). The BBB membership application expressly states that an applicant does not

become a member until it has been formally voted into membership by the BBB's membership committee. (Ex. B73). The BBB responded to AC's application by informing AC that it would need additional information before its membership committee voted on AC's membership application. By letter dated October 19, 2005, AC was also advised that it was not a member until accepted. (Ex. B74). The BBB's membership committee ultimately denied AC's membership application. (Ex A, p. 84). Therefore, the BBB never offered a contract to AC and no contract was ever entered. (Ex. B, pp. 229; 232).

b) AC Cannot Recover Damages for Lost Business Reputation Under its Breach of Contract Cause of Action as a Matter of Law.

Even assuming for the sake of argument that there was a valid and enforceable contract that the BBB breached, under Texas law, AC may not recover damages for loss of business reputation on its breach of contract claim. *Rubalcaba v. Pacific/Atlantic Crop Exch.*, 952 S.W.2d 552, 559 (Tex.App.—El Paso 1997, no writ); *Nelson v. Data Terminal Sys.*, 762 S.W.2d 744, 748 (Tex.App.—San Antonio 1988, writ denied).

c) AC Cannot Recover Exemplary Damages on its Breach of Contract Cause of Action as a Matter of Law.

AC seeks exemplary damages for all causes of action asserted. It is well established, however, that exemplary damages may not be recovered on a breach of contract claim as a matter of law. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).

D. The BBB did not Owe a Duty to AC as a Matter of Law and Did Not Breach any Duty to AC.

To prove its negligence cause of action under Texas law, AC must first establish that the BBB owed it a legal duty. *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). AC cannot recover on its negligence claim here because the BBB did not owe any legal duty to AC and did not breach any duty to AC. AC does not complain of any act or omission of the BBB apart from the Complained of Statements. (Ex. B, pp. 236-237). Thus, AC's negligence claim fails as a matter of law.

E. AC Cannot Recover on its Tortious Interference Causes of Action as Matter of Law.

a) There Is No Independent Tortious or Unlawful Conduct on Which to Base a Tortious Interference Claim as a Matter of Law.

A cause of action for tortious interference with prospective contractual relationships requires that the alleged conduct be independently tortious or unlawful. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001). This means the plaintiff must show the defendant's conduct violated some other recognized tort duty. *Id.* In this case, the Complained of Statements are not actionable under either libel or business disparagement causes of action or any other cause of action for the reasons set forth above. Therefore, there is no independent tortious or unlawful conduct by the BBB to support a tortious interference cause of action as a matter of law.

b) The BBB did not Intend to Interfere with any Actual or Prospective Relationship.

In addition, to maintain a tortious interference with prospective contractual relationship cause of action, AC must have direct evidence that the BBB intended to interfere with a prospective contractual or business relationship. *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993); *Larson v. Family Violence & Sexual Assault*, 64 S.W.3d 506 (Tex.App.—Corpus Christi 2001, no pet.). In this regard, AC must show the BBB had actual knowledge of the prospective contractual or business relationships and intended to interfere with those relationships. *Texas Oil Co. v. Tenneco Inc.*, 917 S.W.2d 826, 834 (Tex.App.—Houston [14th Dist.] 1994), *rev'd in part on other grounds sub nom. Morgan Stanley & Co. v. Texas Oil Co.*, 958 S.W.2d 178 (Tex. 1997). Simply put, if the defendant did not have actual knowledge of the prospective contract or business relations, its interference cannot be intentional. *Id.*

Here, the evidence conclusively demonstrates that the BBB did not intend to harm AC or interfere with AC's economic interests. (Burgess aff. ¶ 12-13). Rather, the publication of the Complained of Statements on the website was done in the exercise of the BBB's own rights to

publish information for consumers to consider. Therefore, the summary judgment evidence conclusively negates this element of AC's tortious interference cause of action.

F. AC Cannot Recover Exemplary Damages as a Matter of Law.

Because AC cannot recover on its substantive claims for the reasons set forth above, it likewise cannot recover on the claim for exemplary damages. Second, the BBB's summary judgment evidence conclusively establishes that it did not act with the requisite intent to allow for an award of exemplary damages as a matter of law.

VIII. REQUEST FOR RELIEF

WHEREFORE, the BBB respectfully requests that this Motion be set for hearing and that upon hearing, the Court grant this Motion in its entirety and enter a take nothing judgment in favor of the BBB against AC and award the BBB its costs of court plus all other relief to which it may be entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.

901 Main Street, Suite 6000
Dallas, Texas 75202
Telephone: (214) 953-6000
Telecopier: (214) 953-5822

By: _____
Charles L. Babcock
State Bar No. 01479500
David C. Myers
State Bar No. 14759400

ATTORNEYS FOR DEFENDANT
BETTER BUSINESS BUREAU OF
METROPOLITAN DALLAS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record for Plaintiff via certified mail, return receipt requested on this 21st day of August, 2006:

Via Certified Mail/RRR

Jason Charles Ciarochi
Ciarochi and Associates, PLLC
One Hickory Centre
1800 Valley View Lane, Suite 130
Dallas, Texas 75234

David C. Myers