

**CAUSE NO. CC-10-07369-A**

<b>HEATHER DOBROTT,</b>	§	
<b>Plaintiff</b>	§	<b>COUNTY COURT AT LAW NO.</b>
<b>v.</b>	§	<b>1</b>
	§	
<b>TIMOTHY SPENCER</b>	§	
<b>DARNELL,</b>	§	<b>DALLAS COUNTY, TEXAS</b>
<b>Defendant</b>	§	
	§	
	§	

**REQUEST FOR ADMISSIONS**

Plaintiff, Heather Dobrott, requests that Defendant, Timothy Darnell, admit or deny the following statements of fact. If objection is made, please state the reason for the objection. Please specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

1. You authored the posts on [www.heatherdobrott.com](http://www.heatherdobrott.com).
2. You had someone author the posts on [www.heatherdobrott.com](http://www.heatherdobrott.com) on your behalf.
3. You paid for [www.heatherdobrott.com](http://www.heatherdobrott.com) to be hosted on servers owned by Theplanet.com.
4. Someone paid the hosting fees to Theplanet.com on your behalf or at your request.
5. You bought the domain name heatherdobrott.com from namecheap.com
6. Someone else purchased the domain name heatherdobrott.com on your behalf or at your request.
7. You paid for the hosting fees for [www.heatherdobrott.com](http://www.heatherdobrott.com) at Rackco.com.
8. Someone else paid for the hosting fees at rackco.com on your behalf or at your request.

9. You own and author all the posts on [www.timdarnell.org](http://www.timdarnell.org).
10. The post Reputation Management Solution on [timdarnell.org](http://timdarnell.org) refers to me.
11. I am the only individual that you personally litigated against in the past 6 years.
12. Jack Weinzierl told you he was renting his home and you published that fact on [www.heatherdobrott.com](http://www.heatherdobrott.com) before it was made public.
13. You sued me in Dallas District court for defamation, trade libel, tortious interference, negligence, and invasion of privacy and lost in Summary Judgment.
14. Your suit against me in District court requested an injunction and that was denied.
15. Your company Advantage Conferences sued the Dallas Better Business for defamation, tortious interference, and libel seeking 25 million in damages and lost in Summary Judgment.
16. The Better Business Bureau questioned whether you were running an illegal pyramid scheme.
17. The Better Business Bureau garnished Advantage Conferences account in 2007 as the judge ordered Advantage Conferences to pay all their costs of court.
18. Advantage Conferences still owes the Better Business Bureau over \$100,000.00 to satisfy that judgment and fully repay the BBB's costs of court.
19. You used pictures from my husband's Facebook account on [www.heatherdobrott.com](http://www.heatherdobrott.com).
20. You posted under Frank Thomas' name on [www.heatherdobrott.com](http://www.heatherdobrott.com) without his permission.
21. Exhibit A is a true and correct copy of the Summary Judgment Order from Darnell vs. Dobrott.
22. Exhibit B is a true and correct copy of the Summary Judgment Motion from Darnell vs. Dobrott.

23. Exhibit C is a true and correct copy of the Summary Judgment Order from Advantage Conferences vs. The Better Business Bureau of Metropolitan Dallas.
24. Exhibit D is a true and correct copy of the Summary Judgment Motion from Advantage Conferences vs. The Better Business Bureau of Metropolitan Dallas.
25. You requested that all postings about yourself, Cottonwood Creek Baptist Church, Central Christian Church of Frisco, Jack Weinzierl and Advantage Conferences be removed from Scam.com.
26. You requested that all postings about yourself, Cottonwood Creek Baptist Church, Central Christian Church of Frisco, Jack Weinzierl and Advantage Conferences be removed from Scribd.com.
27. You had another party request the removal of Scam.com posting on your behalf.
28. You had another party request the removal of postings from Scribd.com on your behalf.
29. You are responsible for all the statements in Exhibit E that were made in 2007 as you testified in court in June 2008.
30. You never reported any of the alleged stalking and death threats to the local police or any other authorities.
31. You had never seen me and could not identify me before we met in court in June 2008.
32. You agreed in June 2008 that you had "no idea" if I had been close to your house.
33. You said no under oath in January 2009 when asked if I had been face-to-face with your children, your wife or anybody in your family.
34. You admitted in January 2009 I hadn't sat in front of your house.
35. You said I went to Allen High School before you accused me of stalking.
36. You admitted that you didn't know what I looked like until June 2008.
37. You stated that I had bragged about going to Jack Weinzierl's house.

38. You claimed I physically followed you and Jack Weinzierl on multiple occasions.
39. You wrote in October 2007 in Exhibit F that I was "literally stalking" your home and that of your top rep Jack Weinzierl.
40. You claimed to have an iron clad case against me.
41. You claimed that Satan was attacking Advantage Conferences.
42. You accused me of threatening your church with a lawsuit.
43. You answered under oath at your January 2009 deposition when asked, "she's never threatened any physical harm to anybody" with "not that I know of."
44. Your original petition in your frivolous losing suit against me filed on June 2008 states, "Defendant's (Heather Dobrott's) obsession with Plaintiff led Defendant to make many threats to Plaintiff and his family, including threats to confront Plaintiff's minor daughters at their schools..."
45. You never filed any paperwork with the IRS to register Treasures for the Kingdom as a 501 ( c ) 3.
46. You testified in June 2008 that Treasures for the Kingdom was not legally a 501 ( c ) 3.
47. You stated under oath at your January 2009 deposition that you filed the appropriate papers for Treasures for the Kingdom to be 501 ( c ) 3.
48. Treasures for the Kingdom is not listed by the IRS as a 501 ( c ) 3 charity.
49. Treasures for the Kingdom is not listed by Central Christian Church or its parent organization on their list with the IRS.
50. You testified in June 2008 that Treasures for the Kingdom is was a tax exempt entity in Texas.
51. Treasures for the Kingdom is in fact a taxable entity in Texas that is not in good standing and is in forfeiture.

52. You did not sign the corporate papers filed with the State of Texas to change Treasures for the Kingdom to an integrated auxiliary under Central Christian Church of Frisco (or Fresco as the actual documents read.)
53. You did not have permission from Cottonwood Creek Baptist Church to use their name or list Treasures for the Kingdom under them as their integrated auxiliary.
54. You did not have permission from Central Christian Church to use their name or list Treasures for the Kingdom under them as their integrated auxiliary.
55. Central Christian Church of Frisco has not supported Treasures for the Kingdom with internal church funds.
56. You have claimed integrated auxiliaries of a church do not need the church's permission to incorporate under them.
57. No reputation management companies were willing to help you.
58. You were awarded no damages in your personal suit against me.
59. You were removed from leading the prison ministry in Collin County.
60. You were removed from teaching Sunday School at Cottonwood Creek Baptist Church.
61. You were removed as President of the Collin County North Gideons International.
62. You were not able in that litigation from June 2008 – until the judgment became final in 2009 – to produce a single false statement made by me.
63. You had no capitalization to start Advantage Conferences in 2003.
64. You stiffed the website designers hired in 2003 \$12,000.00 for the work on [www.advantageconferences.com](http://www.advantageconferences.com).
65. You used the Advantage Conferences account to pay numerous personal expenses including, but not limited to jewelry, garage repair, air conditioning repair, graduation gifts, meals out, country club memberships etc. as shown in Exhibit F.

66. The expenses listed in item 65 were not reimbursed by your personal funds.
67. The items listed in item 65 were not shown as income on your tax returns.
68. Advantage Conferences was in the red in 2007 and you asked Phil Orr for \$30,000.00 to keep it afloat.
69. You sold your car in 2007 to pay for a conference.
70. Jack Weinzierl matched donations to Treasures for the Kingdom Foundation.
71. Advantage Conferences could not have been classified as a multi-million dollar business.
72. The parent company Portfolio Marketing Group could not have been classified as a multi-million dollar business.
73. You abandoned the service mark Advantage Conferences on June 19, 2007.
74. Advantage Conferences had no retail sales as of January 2006.
75. Advantage Conferences had 1 retail sale under mitigating circumstances as of June 2008.
76. You referred to All Star Entrepreneur as your own company.
77. You stated All Star Entrepreneur was the same thing as Advantage Conferences – educational conferences.
78. The compensation plans of Advantage conferences and All Star Entrepreneur were similar – reverse margin.
79. All Star Entrepreneur and Advantage Conferences offered the identically titled Millionaire Mindset Conferences.
80. You stated that Glenn Green did not pay the hotel debt he was required to as a condition of him being made a partner in All Star Entrepreneur.

81. Your company All Star Entrepreneur did not pay Glenn Green for marketing services he provided to them.
82. You stated that collusion and embezzlement plagued All Star Entrepreneur and that Claudia Cawley and Glenn Green made off with \$400,000.00.
83. You did not report that alleged embezzlement to the police, district attorney, or any authority or file a civil suit to recover the money.
84. As of January 2006 you stated you had received only 1 complaint.
85. That complaint mentioned in item 84 was from a Robert Gandley.
86. You told Robert Gandley he had to have his complaint with the Better Business Bureau of Dallas removed in order to get a refund.
87. You stated that "as our business at AC matures that will be – by far the greatest number of attendees will be non reps."
88. You stated, "Our strategy for the first year (2005) was to populate with as many reps as we possibly could..."
89. You described AC as "a more doable, realistic, ethical income opportunity."
90. You stated, "It is \$59.95 to become a rep with Advantage Conferences, sole criteria."
91. You stated your goal in 2006 was to have 4 attendees to every rep in the conference audience by 2007.
92. You stated that no governmental agency has reviewed and approved your business model.
93. Scott Wilson from the Texas Attorney General's office spoke to you and asked that you refund Zena Karelin.

94. You stated in your Summary Judgment response in the suit filed against you by Zena Karelin that there has not been so much as a warning or mention of any problems by the Attorney General's office to Defendant (yourself.)
95. You stated that you spoke with the head of the Pyramid Division of the Texas Attorney General's office.
96. The head of the Pyramid Division threatened to arrest you if you were a pyramid.
97. You have records to prove this contact with the Pyramid Division took place.
98. You stated under oath the head of the Pyramid Division called you back 18 hours later and said, "There's no way on this planet you are anything close to a pyramid."
99. You reiterated that again in your Summary Judgment motion in 2009 to say "regarding the pyramid question, company has received a full review and scrutiny from the Texas Attorney General's office, in particular the Texas Attorney General Pyramid Division, which upon full investigation gave the Company a clean bill of health."
100. You stated under oath in January 2006 in response to the question "has any regulatory agency, governmental regulatory agency reviewed your business model and approved it?," "that I don't know of any agencies that do that. Every time I have contacted them proactively they tell me they don't do that....The answer is no.
101. Advantage Conferences grossed 1.67 million in 2005.
102. The original Power of Two from 2005 showed earnings projections of \$1,323,000.00.
103. You removed the earnings projections from the Power of Two in 2006 because they were "problematic."
104. The original interest form asked people to check what amount they serious about earning from \$100,000.00 - \$1,000,000.00.



105. You published "Solid Company in Business since 1998 whose Principal has been involved in some aspect of Conference production for 20 plus years" meaning Advantage Conferences was really just another name for and the subsidiary of Portfolio Marketing Group.
106. Advantage Conferences incorporated in Texas in June of 2003.
107. You stated folks had the, "Ability to Make Tens of Thousands of Dollars QUICKLY" with Advantage Conferences.
108. You stated sales at Advantage Conferences were closed by professionals.
109. You stated, "I can show you a simple and easy method for creating significant cash flow (\$7,000 a month, a week, and eventually every few days and more)."
110. You stated that being helpful with marketing tips can be used against you.
111. You claimed that Advantage Conferences had "stilted growth" due to the postings on the Better Business Bureau site.
112. You have e-mails that contain the link to the Better Business Bureau site that say, "Tim Darnell is a crook. He is a criminal. I'm getting out of here."
113. You claimed to have lost millions of dollars due to the Better Business Bureau postings.
114. The Better Business Bureau gave Advantage Conferences an unfavorable rating because it questioned whether the company was operating a pyramid scheme.
115. You agreed in your January 2009 deposition that the Better Business Bureau got a Summary Judgment as a matter of law because the court determined there were not any fact issues that would warrant a judgment in your favor.
116. You claimed Advantage Conferences case against the Better Business Bureau was iron-clad.
117. You further stated about that case with the Better Business Bureau "More importantly, God is absolutely in control, and we will prevail (as plaintiffs).

118. You also stated that “when you work and breathe for God, the outcome is assured. Our victory is a foregone conclusion, and we enter the rest of the battle with enthusiasm and sustained, unwavering belief” referring to Advantage Conferences losing case against the Better Business Bureau.
119. You published, “Training for your Advantage Conferences business is professional and extensive. The reason we accent this aspect of the business due to our vision and purpose - to help you create your own professional, multi-million dollar marketing company where you are the CEO.”
120. No rep or even you yourself created a multi-million dollar company.
121. You stated bringing in more people is the choice of the majority of people for their entrepreneurial activity under oath.
122. You stated that there was no selling involved in the income opportunity with Advantage Conferences under oath.
123. You stated there is an advantage to being in on the ground floor under oath.
124. You claimed to be a millionaire in 2006 by some definitions under oath.
125. From 1999 – 2005 you did not file a tax return.
126. You filed Affidavits from 1999 -2005 and did not pay your personal or business taxes.
127. The IRS responded to your Affidavit(s) in 2007 and you and your wife did not read it.
128. You renounced your United States citizenship by Affidavit in Dallas County Court.
129. You also stated in that same document that you were not a resident of Texas and that your home address is a non-resident address.
130. Other area non-citizens including your mother-in-law wrote Affidavits in support of your non-citizenship.
131. You denied that your finances were “not doing well” in June 2008.

132. You agreed under oath that the Summary Judgment Motion being granted in all respects meant you didn't have any grounds for suing the Better Business Bureau for using the term pyramid scheme on their website.
133. Advantage Conferences had only 100 reps in 2008.
134. You stated under oath that going from 300 to 100 reps in two years is a fluctuation and not a lack of growth.
135. The McKinney police responded to a complaint about you threatening fellow church members by telling you to quit threatening people.
136. You testified under oath that your father had never been involved in business.
137. Dr. David Darnell is 1% owner of Portfolio Marketing Group in existence since 1998 and the parent company of Advantage Conferences.
138. You suggested reps were paying the \$59.95 to get business deductions.
139. Educational conferences and related expenses are tax deductible without having to join the company offering such an event.
140. The \$59.95 is the fee to become a rep and join the money making aspect of Advantage Conferences.
141. In your deposition on January 12, 2009 you stated that you did not think you would retract or change what you said in previous depositions.
142. You have stated that you were not a part of the All Star Entrepreneur bankruptcy proceedings.
143. You made a claim for \$7,686.62 on the All Star Entrepreneur bankruptcy.
144. You, at your home address, were listed as the registered agent and 33% owner of All Star Entrepreneur in the bankruptcy filing.

145. You as Portfolio Marketing Group at your home address in Allen, TX were listed as the registered agent for All Star Entrepreneur in its bankruptcy filing.
146. You came out of All Star Entrepreneur with no income and financed Advantage Conferences on credit cards in 2003.
147. You had to borrow toilet paper and toiletries from your neighbors during this time period.
148. In 2005 you had \$200,000.00 in credit card debt.
149. You distributed hundreds of thousands of copies of Slay Your Giant electronically.
150. You said that reps will not make any money in a year under oath.
151. You requested a permanent injunction against me that would require me to remove all of my posts about you and your companies and bar me from further posting and were denied by Judge Carl Ginsberg.
152. You claimed in your losing case against me that I encouraged third parties to take actions against you that were illicit or harmful.
153. You tried to have me barred from communicating about you to anyone by any form of communication and that was dissolved at the first hearing in your frivolous filing against me.
154. You had me ordered not to dispose of any evidence.
155. You yourself have disposed of evidence vital to this case.
156. You stated under oath that Zena Karelin flew to Dallas to discuss my plans to litigate against you with a ticket I provided to her even though in reality it never happened and you were aware she could not fly for medical reasons.
157. That lawsuit filed in Collin County Texas was filed by attorney Tom Foster on Zena's behalf and only issues related to her getting a refund and damages were alleged in a suit that you were well aware it would never have resulted in even a penny of financial gain for me.

158. You claimed under oath in 2009 that all the sales at Advantage Conferences are retail sales even though not one single sale was made to a customer outside the pay plan in the years 2003 – 2007.
159. You claimed under oath in 2009 that Advantage Conferences does not need a single new representative to create sales.
160. Advantage Conferences enticed recruits by publishing they had the “prospect of earning over \$1,000,000.00 in just 28 weeks as a result of the ‘Miraculous Power of 2.’”
161. In fact no rep ever earned over 1 million dollars with Advantage Conferences.
162. Only 3 reps had earnings of over \$100,000.00 during their time in Advantage Conferences.
163. Over 98% of the reps did not recoup their costs of conference purchase and related business expenses and actually become profitable.
164. You claimed a rep that is committed will be successful.
165. You teach people to think in terms of bigger dollar amounts.
166. You claimed under oath that membership in the Better Business Bureau is of very little importance and an insignificant detail.
167. Despite that membership being so insignificant Advantage Conferences sued the Better Business Bureau and demanded 25 million dollars when the membership application was denied and they questioned whether Advantage Conferences was indeed an illegal pyramid scheme.
168. You instructed representatives to be resourceful in funding their businesses including to pay with credit cards, refinance their homes, take out loans, use college or retirement savings etc.
169. You falsely claimed I told conference speakers they would be sued if they spoke at an Advantage Conferences event.

170. You stated under oath that you “stand by the statements that these commissions were / are possible, realistic and were made by multiple individuals – who didn’t quit their business. The System was powerfully constructed, Representative-friendly, and effective.”

171. Though the system was according to you powerfully constructed and realistic for representatives to make money, you changed the compensation plan in early 2008.

172. Though you lost your suit against me which included all of my internet postings on Scam.com and many more sites on March 17<sup>th</sup> 2009, you continued to accuse me in numerous court documents, filings, and on numerous internet sites of libel, defamation, slander and damage to your business after that Judgment became final.

173. Zena Karelin and other reps were instructed to write testimonials.

174. You keep offering to produce hundreds and hundreds or 35 pounds of my posts as evidence to any judge or person possible even though those posts have already been the subject of litigation which you lost in a take nothing judgment in my favor and denial of any kind of injunction whatsoever.

175. You accuse me under oath of making “almost daily assaults on so many people.”

176. You claim to be a law abiding citizen even though you refused to pay taxes from 1999 – 2005.

177. You claim under oath in 2009 that I stopped hundreds of representatives from doing business and was the cause of the massive failure rate. That business disparagement claim was another allegation in your losing lawsuit and the court has ruled in my favor on that issue already.

178. You replace the term truthful with negative when discussing my postings.
179. You claim the outcomes in Advantage Conferences losing suit against the Better Business Bureau and your frivolous harassment suit against me are being distorted by me.
180. You claimed Judy Sterling was due no money from the Hidden Treasures insurance sales when she was in fact due tens of thousands of dollars. She didn't get paid because the policies you wrote were bogus and the insurance wouldn't underwrite stranger owned policies that would be resold.
181. You claim to be a personal friend of your pastor John Mark Caton, but the church has steadfastly refused to get involved in your stranger owned life insurance, Treasures for the Kingdom charity and your Advantage Conferences Fundraising Advantage program that boasts exactly zero sales.
182. You falsely claimed I stated under oath that I used faulty research to wage smear campaigns as a consumer advocate even though in reality I said and do no such thing.
183. You did not refund the subscription amount or publish the book to replace the Givers Magazine subscriptions that were prepaid.
184. You encouraged Vincent Wright to file bogus police reports to harass me and my family.
185. One of the reasons Treasures for the Kingdom was set up to generate publicity for Advantage Conferences by getting the local TV and other media out.
186. The media coverage never happened as you could not afford to pay Kaaydah Schatten for her services as a publicist and she did not make any press releases or notify the media.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Heather A. Dobrott", is written over a solid black horizontal line.

Heather Dobrott  
Plaintiff Pro se  
2518 Suncrest Dr.  
Garland, TX 75044-7032  
(972) 496-3649

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of this document was served on Defendant in accordance with Texas Rule of Civil Procedure 21 on this 29th day of July, 2011.



**A**

CAUSE NO. 08-06317

TIM DARNELL,

Plaintiff

v.

HEATHER DOBROTT,

Defendant

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IN THE 193rd JUDICIAL DISTRICT COURT

DALLAS COUNTY, TEXAS

**ORDER**

Upon consideration of Defendant's Motion for Summary Judgment, the pleadings of the respective parties, and the summary judgment evidence on file, this Court is of the opinion that Defendant is entitled to judgment as a matter of law on all of Plaintiff's causes of action.

IT IS THEREFORE ORDERED that Plaintiff Tim Darnell shall recover NOTHING against Defendant Heather Dobrott by this suit.

Signed this 17<sup>th</sup> day of March, 2009.



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JUDGE CARL GINSBERG

**ORDER**

**B**

CAUSE NO. 08-06317

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TIM DARNELL,

Plaintiff

v.

HEATHER DOBROTT,

Defendant

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IN THE 193rd JUDICIAL DISTRICT COURT  
DALLAS COUNTY, TEXAS

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

JAMES H. MOODY III  
State Bar No. 03820050

MATTHEW J. KITA  
State Bar No. 24050883

QUILLING SELANDER CUMMISKEY & LOWNDS, P.C.  
2001 Bryan Street, Suite 1800  
Dallas, Texas 75201  
(214) 871-2100 (phone) / (214) 871-2111 (fax)

**ATTORNEYS FOR DEFENDANT**

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## I. SUMMARY

Plaintiff is the founder, President, and CEO of “Advantage Conferences,” a company that does business throughout the United States and all over the world. According to Plaintiff, Advantage Conferences grossed more than a million dollars in only its second year of operation. Accordingly, when the Better Business Bureau of Greater Dallas accused Plaintiff of operating an illegal pyramid scheme, Plaintiff captured the attention of newspapers and internet “bloggers” across the country, many of whom began to investigate Plaintiff’s background and Advantage Conferences’ business model. One such “blogger” is the Defendant in this case, Heather Dobrott.

As part of an ongoing effort to mitigate the effect of his critics, Plaintiff began to publicly attack Defendant and others who were critical of him using the vast publicity resources he developed with Advantage Conferences. By this action, Plaintiff asks this Court to assist him in preventing Defendant from engaging in the public debate. Although this Court refused his request for injunctive relief on First Amendment grounds, he now seeks to silence Defendant by claiming that she owes him damages under theories of defamation, business disparagement, tortious interference, and invasion of privacy.

The First Amendment, however, bars Plaintiff’s claims for damages. As a matter of law, Plaintiff is a limited-purpose public figure and therefore, Plaintiff has the burden to show that Defendant’s allegedly-actionable statements were both false *and* published with actual malice. In the eight months that this case has been pending, Plaintiff has not produced evidence of a single statement that satisfies this standard. Nor has Plaintiff identified any damages that could be causally connected to Defendant’s conduct. In the absence of same, Defendant is entitled to summary judgment on all of Plaintiff’s causes of action.

## II. UNDISPUTED MATERIAL FACTS

In June 2003, Plaintiff founded “Advantage Conferences, LLC,”<sup>1</sup> and currently serves as its CEO and President, as well as its sole officer and director.<sup>2</sup> According to Plaintiff, Advantage Conferences provided “Christian-based”<sup>3</sup> “mentoring for entrepreneurs”<sup>4</sup> by hosting seminars where relatively-unknown “middle-class millionaires” educated attendees on “very profound principles that most people are not aware of.”<sup>5</sup> The cost of attending a two-day Advantage Conferences seminar was \$9,995.<sup>6</sup>

Plaintiff explained in his deposition that a network of nearly four hundred “Representatives” expanded his business across the United States and throughout the world.<sup>7</sup> Plaintiff testified that Advantage Conferences’ Representatives were paid in accordance with a compensation scheme that he invented.<sup>8</sup> In sum, a person could “qualify” as a Representative by selling three \$9,995 admission tickets to the above-referenced seminars.<sup>9</sup> After selling three tickets, the newly-qualified Representative would earn a \$7,000 commission on his or her own sales *and* on the first two sales of each Representative he or she recruited.<sup>10</sup> Although they were not required to pay to attend the conferences themselves, Plaintiff strongly encouraged potential Representatives to do so because (a) purchasing their own ticket counted towards one of the three required sales necessary to “qualify”; and (b) it provided a “cash incentive” for them to

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<sup>1</sup> Ex. A, p. 45, ll. 1–3.

<sup>2</sup> Ex. B, p. 2, Resp. to Interrog. No. 2; Ex. C, p. 26, ll. 13–17.

<sup>3</sup> Ex. C, p. 56, ll. 14–15.

<sup>4</sup> Ex. A, p. 45, ll. 6–8.

<sup>5</sup> Ex. C, p. 16, ll. 17–25; p. 17, ll. 1–4.

<sup>6</sup> Ex. C, p. 50, ll. 4–6.

<sup>7</sup> Ex. A, p. 85, ll. 15–19 (discussing the number of AC Representatives); p. 87, ll. 14–23 (discussing the geographic reach of Advantage Conferences).

<sup>8</sup> Ex. C, p. 35, ll. 18–25; p. 36, ll. 1–25; p. 37, ll. 1–10.

<sup>9</sup> Ex. C, p. 51, ll. 21–25.

<sup>10</sup> Ex. C, p. 51, ll. 15–20.

recruit new Representatives.<sup>11</sup> Only two years after it was founded, Plaintiff claimed that Advantage Conferences grossed \$1,500,000 in sales.<sup>12</sup>

In 2005, the Better Business Bureau of Greater Dallas determined that Plaintiff was primarily engaged in promoting a pyramid scheme and accordingly, gave Advantage Conferences a negative review on its website.<sup>13</sup> In response, Plaintiff filed suit against the BBB on Advantage Conference's behalf in a Dallas County District Court.<sup>14</sup> While the lawsuit was pending, Plaintiff used Advantage Conferences' web site and AC Representatives to promote and distribute a book that he authored entitled *Slay Your Giant*.<sup>15</sup> Therein, Plaintiff alluded to his lawsuit against the BBB, claiming that "an agency...falsely and erroneously made statements about my company...somewhat tarnish[ing] my company and me personally."<sup>16</sup> According to Plaintiff, hundreds of thousands of copies of *Slay Your Giant* have been distributed to date.<sup>17</sup>

Around the time that Plaintiff initiated his suit against the BBB, the website *scam.com* began hosting a forum which featured a discussion on Plaintiff's business acumen and the legitimacy of Advantage Conferences' business model.<sup>18</sup> Reports of certain Representatives' success also caught the attention of the *St. Petersburg Times*.<sup>19</sup> In July 2006, the *Times* published an article entitled, "He Talks, They Buy, and the Money Rolls In." Although the author referenced Advantage Conference's pending dispute with the BBB, he also noted that at least one AC Representative had "earned more than \$250,000 in eight months."<sup>20</sup>

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<sup>11</sup> Ex. C, p. 54, ll. 15-18.

<sup>12</sup> Ex. A, p. 50, ll. 8-16.

<sup>13</sup> Ex. A, p. 60, ll. 11-15.

<sup>14</sup> Ex. A, p. 60, ll. 11-15.

<sup>15</sup> Ex. A-2, p. 77, ll. 23-25, p. 78, ll. 1-24; p. 80, ll. 7-13.

<sup>16</sup> Ex. A-3, p. 113.

<sup>17</sup> Ex. A, p. 78, ll. 5-8.

<sup>18</sup> Advantage Conferences BS (Merged), Post 1, <http://www.scam.com/showthread.php?t=13128> (Nov. 13, 2005) (last visited Feb. 22, 2009).

<sup>19</sup> Ex. A-2.

<sup>20</sup> Ex. A-2, p. 2.

Other publications were not nearly as complimentary, however. A week after the article in the *St. Petersburg Times* was published, the *Broward-Palm Beach New Times* published a piece that was sarcastically titled “Jesus Saves,” in which the author chided Advantage Conferences as a “Jesus Christ-endorsed pyramid scheme.”<sup>21</sup> The article also noted that Plaintiff was formerly associated with a business that had been recently fined \$115,000 by Arizona’s attorney general for “tricking consumers,” and commented that that Advantage Conferences’ suit against the BBB was still “under way.”<sup>22</sup> The day after it was published, a contributor to the *scam.com* message board posted the text of the article, along with a link to the *Broward-Palm Beach New Times*’s website.<sup>23</sup>

In October 2006, Judge Mary Murphy not only granted summary judgment in the BBB’s favor, she also ordered Advantage Conferences to pay the BBB’s attorneys’ fees.<sup>24</sup> This decision prompted *Houston Press* reporter Craig Malisow to contact Plaintiff.<sup>25</sup> According to Plaintiff, he and Malisow had an hour-long phone interview.<sup>26</sup> Shortly thereafter, the *Houston Press* published an article by Malisow entitled, “Millionaire Mindsetters: No Skeptics Need Apply to this Get-Rich-Quick Proposition.”<sup>27</sup> In addition to detailing the successful arguments that the BBB presented to the court in support of its assertion that Plaintiff’s “compensation plan” constituted a pyramid scheme, it also detailed Plaintiff’s prior business dealings with similarly-structured companies and individuals with criminal histories.<sup>28</sup>

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<sup>21</sup> Ex. A-4, p. 2.

<sup>22</sup> Ex. A-4, p. 1–2.

<sup>23</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=226775&postcount=1631> (July 28, 2006) (last visited Feb. 22, 2009).

<sup>24</sup> Ex. D.

<sup>25</sup> Ex. A, p. 104, *ll.* 9–22.

<sup>26</sup> Ex. A, p. 104, *ll.* 23–24.

<sup>27</sup> Ex. A-5.

<sup>28</sup> Ex. A-5, pp. 1–10.



The *Houston Press* article also noted the great deal of discussion that Plaintiff, Advantage Conferences, and the BBB lawsuit had generated on *scam.com*.<sup>29</sup> As with the article that appeared in the *Broward-Palm Beach New Times*, the text of Malisow's article was uploaded onto *scam.com* on the day it was published.<sup>30</sup> This prompted additional commentary from both those who opposed Darnell and Advantage Conferences as well as from those who supported them. For example, a contributor who posted under the username "aboveandbeyond" noted:

Craig is a very good writer and I should know because I'm a writer. I appreciate true talent....I mean it helps to know that I would have never discovered any of these facts out on my own.<sup>31</sup>

Another blogger, using the moniker "wishyouknew," voiced agreement:

Craig, your article is greatness, it made my day and is a wonderful read. It validates everything I have said for the last year. And boy I thought I did a investigation on [Plaintiff]. I only new 1/10 of the dirt on him.<sup>32</sup>

Other readers, however, were not convinced. "ShiningLight" stated:

[I]f you do any homework, you will see the quality or lack thereof of that Houston paper and that article....The author, who does not even deserve to be named here uses the "f" word in his anti-networking, anti-Christian article....There are a lot of scams in the marketplace, and this is not one of them.<sup>33</sup>

[T]he BBB was the defendant on that case and as you all should know, the defendant is innocent until proven otherwise. I guess the case was not proveable there, even though many believe the BBB was mistaken.<sup>34</sup>

This thread on *scam.com* even drew the attention of Jack Weinzierl, Plaintiff's most successful Representative,<sup>35</sup> who also posted a response under his own name:

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<sup>29</sup> Ex. A-5. p. 5.

<sup>30</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=299288&postcount=1985> (Dec. 14, 2006) (last viewed Feb. 22, 2009).

<sup>31</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=299288&postcount=1997> (Dec. 15, 2006) (last viewed Feb. 22, 2009).

<sup>32</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=299288&postcount=1993> (Dec. 15, 2006) (last viewed Feb. 22, 2009).

<sup>33</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=322935&postcount=2051> (Jan. 26, 2007) (last viewed Feb. 22, 2009).

<sup>34</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=323062&postcount=2060> (Jan. 27, 2007) (last viewed Feb. 22, 2009).

If you believe the writer in Houston did a good job in his article, well, you have the right to think that....I encourage you to look at the source, just like you would at *scam.com*. Find out the caliber and style of reporting done by this source....Any person with any degree of intelligence would see through either of these gutter venues immediately....If you choose to proclaim your faith in Jesus in a public forum like your business, you'll see what happens.<sup>36</sup>

In fall 2007, Plaintiff learned that a contributor to *scam.com* who published her comments under the username "soapboxmom," was actually a woman named Heather Dobrott, the Defendant in this case.<sup>37</sup> To negate the effect that he believed the posts on *scam.com* by Defendant and others were having on Advantage Conference's business,<sup>38</sup> Plaintiff sent an e-mail to the "eight to nine thousand individuals" on Advantage Conferences' e-mail distribution list.<sup>39</sup> In the e-mail, Plaintiff identified Defendant by name and described her as an "attacker" who has "literally and physically stalked me."<sup>40</sup> He claimed that Defendant was motivated to post to *scam.com* because "it brings her an apparently needed sense of importance, and functionally raises the particular blog and website higher in the search engine rankings."<sup>41</sup> In a subsequent message on Advantage Conferences' web site, Plaintiff accused Defendant of making "outlandish assertions with obviously very little understanding about our business, our industry, our products, and especially about me personally."<sup>42</sup> He further claimed that "[Defendant's] smug, know-it-all comments have always been, not only incorrect, but also so biased that most easily see through her misdirected agenda."<sup>43</sup>

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<sup>35</sup> Ex. A, p. 65, ll. 16-18.

<sup>36</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=323500&postcount=2074> (Jan. 28, 2007) (last viewed Feb. 22, 2009).

<sup>37</sup> Ex. A, p. 116, ll. 21-25; p. 117, ll. 1-3.

<sup>38</sup> Ex. A, p. 134, ll. 6-23.

<sup>39</sup> Ex. A, p. 127, ll. 3-8.

<sup>40</sup> Ex. A-7.

<sup>41</sup> Ex. A-7.

<sup>42</sup> Ex. A-8.

<sup>43</sup> Ex. A-8.

Plaintiff filed this lawsuit on June 16, 2008 seeking unspecified damages and an injunction to prevent Defendant from publishing additional statements about Defendant or Advantage Conferences.<sup>44</sup> To support this request, Plaintiff attached several of Defendant's postings from *scam.com* to an affidavit.<sup>45</sup> Noting that "prior restraints on speech are presumptively unconstitutional," this Court denied Plaintiff's application for injunctive relief.<sup>46</sup>

This case is currently set for trial on May 26, 2009 and the discovery period ends on April 6, 2009. Plaintiff has yet to designate any experts, notwithstanding the fact that his expert designation deadline was February 9, 2009. When asked to identify the specific allegedly-defamatory statements on which he based his claims, Plaintiff responded, "The affidavit in support of Plaintiff's Application for Temporary Restraining Order provides Defendant with notice of the offending remarks and their effects" and generally referred Defendant to "all statements made by Defendant that reference Plaintiff."<sup>47</sup> Moreover, when asked to disclose the legal theories and factual bases that support his claims, Plaintiff merely reiterated the statements in his request for injunctive relief, which this Court already denied.<sup>48</sup> Finally, the only damages he discloses are unidentified future costs "to remove all of the internet postings regarding Plaintiff" and general damages for "invasion of privacy."<sup>49</sup>

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<sup>44</sup> See Pl's Orig. Pet. & App. for Injunctive Relief.

<sup>45</sup> See Pl's Orig. Pet. & App. for Injunctive Relief, Exs. A-P.

<sup>46</sup> Ex. E, p. 76, ll. 9-17.

<sup>47</sup> Ex. B, p. 5, Resp. to Interrog. No. 6.

<sup>48</sup> See Ex. F.

<sup>49</sup> Ex. F, p. 6.

### **III. ARGUMENTS & AUTHORITIES**

Defendant is entitled to summary judgment on both traditional and no-evidence grounds. Under the standards promulgated by both the Supreme Court of the United States and the Supreme Court of Texas, Plaintiff is a “limited-purpose public figure” as a matter of law because there are no genuine issues of material fact in dispute with regard to each of the elements of that standard.<sup>50</sup> Accordingly, to prevail on each of the causes of action he alleges, Plaintiff has the burden to prove that Defendant made a false statement of fact with actual malice. Because an adequate time for discovery has elapsed and Plaintiff can shown no evidence of this essential element, this Court should issue a summary judgment in Defendant’s favor on all of Plaintiff’s claims.<sup>51</sup>

#### **A. Defendant is Entitled to Summary Judgment on Plaintiff’s Claim for Defamation.**

To maintain a defamation cause of action, Plaintiff must prove that 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 figure or negligence, if the plaintiff was a private individual.<sup>52</sup> This Court, therefore, must first determine whether Plaintiff qualifies as a “public figure” for purposes of this suit.

##### **1. Plaintiff Is a Limited-Purpose Public Figure.**

Plaintiff’s attempt to recover damages for Defendant’s allegedly-defamatory statements warrants special scrutiny under the First Amendment because of his role in the present dispute. Although Plaintiff does not have “such pervasive fame or notoriety” that would render him a

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<sup>50</sup> See TEX. R. CIV. P. 166a(c) (when the summary judgment evidence reflects that there is no genuine issue as to any material fact, the moving party is entitled to a judgment in its favor as a matter of law).

<sup>51</sup> See TEX. R. CIV. P. 166a(i) (the Court must grant a motion for summary judgment if, after adequate time for discovery, the party with the burden of proof has no evidence of one or more essential elements of a claim or defense).

<sup>52</sup> WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

public figure “for all purposes and in all contexts,” Texas courts apply the following test to determine whether a plaintiff is a “limited-purpose public figure” for this particular controversy:

1. Is the controversy at issue public, both in the sense that people are discussing it and that people other than the immediate participants in the controversy are likely to feel the impact of its resolution?
2. Does the plaintiff have more than a trivial or tangential role in the controversy?
3. Is the alleged defamation germane to the plaintiff’s participation in the controversy?<sup>53</sup>

Here, the undisputed facts establish that this classification is properly applied to Plaintiff.

The controversy in this case involves the legitimacy of the attacks on Plaintiff’s professional reputation and the legality of the compensation scheme which allegedly brought millions of dollars of revenue to Plaintiff’s company. These issues have been discussed at length, in two proceedings before a Dallas County District Court,<sup>54</sup> in at least three separate newspapers from three different cities in two states,<sup>55</sup> and on internet forums that are specifically designated for debate about Plaintiff and Advantage Conferences.<sup>56</sup> Moreover, Plaintiff admits that as many as four hundred people served as Representatives, all of whom have a “cash incentive” to learn whether they invested in an illegal pyramid scheme. Accordingly, the first element of the limited-purpose public figure test is established by the undisputed facts.

With regard to the second element, Texas courts find that a plaintiff has “more than a trivial or tangential role in the controversy” if he (1) actually sought publicity surrounding the controversy; (2) had access to the media; and (3) voluntarily engaged in activities that necessarily involved the risk of increased exposure and increased injury to reputation.<sup>57</sup> Here,

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<sup>53</sup> *McLemore*, 978 S.W.2d at 571.

<sup>54</sup> *See generally*, Exs. A, C, D, E.

<sup>55</sup> *See generally*, Exs. A-2; A-4; A-5.

<sup>56</sup> *See generally*, Advantage Conferences BS (Merged), Post 1, <http://www.scam.com/showthread.php?t=13128> (last visited Feb. 22, 2009).

<sup>57</sup> *McLemore*, 978 S.W.2d at 572–73.

Plaintiff clearly sought publicity by filing lawsuits against those who disagreed with him,<sup>58</sup> by discussing the merits of his claims against the BBB in his book,<sup>59</sup> and by publicly attacking Defendant in e-mails and on Advantage Conferences' website.<sup>60</sup> In his deposition, Plaintiff explained his reasoning for this course of conduct:

DEFENDANT'S COUNSEL: [Y]ou were hoping...to negate...any negatives that were flowing from the efforts of [Defendant], correct?

PLAINTIFF: Yes.

DEFENDANT'S COUNSEL: And in that respect, by negating those negatives, you were hoping to further the business of Advantage Conferences?

PLAINTIFF: Save it, yes.

DEFENDANT'S COUNSEL: Okay. And also to the extent that anybody was not a [Representative] but was looking at becoming a [Representative], to basically put y'all's side of the story on the Internet so they would have ready access to it?

PLAINTIFF: Yes.

DEFENDANT'S COUNSEL: Okay. So that as they go about making their decision as to whether to participate, they won't just have a one-sided view of what's going on?

PLAINTIFF: Correct.<sup>61</sup>

Plaintiff's access to the media is undisputed; in fact, he admits that his book was distributed to "hundreds of thousands" of readers,<sup>62</sup> that his e-mails to Dobrott reached between "eight and nine thousand" recipients,<sup>63</sup> and that he was contacted by and afforded an hour-long interview with a *Houston Press* reporter prior to the publication of its article about him and Advantage Conferences.<sup>64</sup> Plaintiff cannot reasonably dispute that he was able to distribute his version of events through means not ordinarily available to the typical private individual.

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<sup>58</sup> See Pl's Orig. Pet. & App. for Injunctive Relief; Ex. A, p. 60, ll. 11-15; see generally Ex. C.

<sup>59</sup> Ex. A-3, p. 113.

<sup>60</sup> Ex. A-7, pp. 4-5, 7; Ex. 8, pp. 1-3.

<sup>61</sup> Ex. A, p. 134, ll. 7-23.

<sup>62</sup> Ex. A, p. 78, ll. 5-8.

<sup>63</sup> Ex. A, p. 127, ll. 3-8.

<sup>64</sup> Ex. A, p. 104, ll. 9-24.

Third, Defendant's alleged defamation is entirely germane to Plaintiff's participation in the controversy. According to his pleadings, Plaintiff complains that "when searched on the internet, [his name] is immediately affiliated with one of Defendant's postings on several websites."<sup>65</sup> By Plaintiff's own admission, however, the statements at issue in this case are those attached to his affidavit in support of his request for injunctive relief.<sup>66</sup> All of those statements were posted on the website *scam.com* in a forum specifically devoted to Advantage Conferences.<sup>67</sup> As Plaintiff is CEO, President, sole officer, and sole director of Advantage Conferences, the statements of which Plaintiff complains are directly related to Plaintiff's participation in the controversy.<sup>68</sup> Finally, as noted above, Plaintiff used Advantage Conferences' resources to respond to Defendant by attacking her reputation in a public forum, even though he knew that his participation would further prolong the already-existing debate:

DEFENDANT'S COUNSEL: [W]ould you agree with me that someone in your position who made the decision to identify Ms. Dobrott and to start making communications with third parties about the propriety of what she's doing, that it would be reasonable to expect that she would respond to those?

PLAINTIFF: Sure. Yes.

\* \* \*

DEFENDANT'S COUNSEL: [Y]ou recognized that instead of just going away, one possibility was that she would continue to post and respond?

PLAINTIFF: Yes.<sup>69</sup>

As the Texas Supreme Court recently noted, "By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition in the marketplace."<sup>70</sup> Given Plaintiff's active

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<sup>65</sup> Pl's Orig. Pet. & App. for Injunctive Relief, p. 3 ¶ 11.

<sup>66</sup> Ex. B, p. 5, Resp. to Interrog. No. 6.

<sup>67</sup> See Pl's Orig. Pet. & App. for Injunctive Relief, Exs. A-P.

<sup>68</sup> Ex. B, p. 2, Resp. to Interrog. No. 2; Ex. C, p. 26, ll. 13-17.

<sup>69</sup> Ex. A, p. 142, ll. 21-25; p. 143, ll. 1-2, 9-12.

<sup>70</sup> *McLemore*, 978 S.W.2d at 573 (citing *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996)).

participation in the present controversy despite his awareness of the risks of his conduct, the undisputed evidence establishes the third element of this inquiry as well.

In sum, the undisputed evidence confirms that Plaintiff “acted voluntarily to invite public attention and scrutiny on several occasions and in several different ways during the course of the public debate.”<sup>71</sup> Because there are no genuine issues of material fact in dispute with regard to each of the elements of this standard, this Court should find that Plaintiff is a “limited-purpose public figure” as a matter of law.

**2. Plaintiff Has No Evidence To Support Essential Elements of His Defamation Claim.**

As noted above, under federal and Texas law, if a plaintiff is properly categorized as a limited-purpose public figure, he cannot recover for defamation unless he can prove that the defendant published a defamatory falsehood with actual malice.<sup>72</sup> To date, Plaintiff has not even produced evidence of a single defamatory falsehood by Defendant, let alone a statement that would meet the federal Constitutional standard of “actual malice.” Because an adequate time for discovery has elapsed and Plaintiff can shown no evidence of these essential elements, this Court should issue a summary judgment in Defendant’s favor on Plaintiff’s defamation claim.

**B. Plaintiff Has No Evidence to Support His Business Disparagement Claim.**

The Texas Supreme Court has noted that a business disparagement claim is similar to a claim for defamation, except that it places more stringent requirements on Plaintiff in three important respects—falsity of the statement, fault of the defendant, and proof of damage.<sup>73</sup> Regardless of whether a plaintiff is a public or private figure, he or she must establish that the defendant published non-privileged false and disparaging information about it with actual malice

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<sup>71</sup> See *McLemore*, 978 S.W.2d at 573.

<sup>72</sup> *McLemore*, 978 S.W.2d 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

<sup>73</sup> *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987).



and he must also plead and prove special damages.<sup>74</sup> Even assuming—without conceding—that as an individual, Plaintiff has standing to pursue a business disparagement claim on behalf of a limited liability company that is not a party to this suit, Plaintiff has no evidence of a single false statement that was made with actual malice. Moreover, Plaintiff's discovery responses do not identify any special damages, nor an expert witness who could reasonably connect the harm Plaintiff allegedly suffered to Defendant's alleged conduct.<sup>75</sup> Accordingly Plaintiff has no evidence to support essential elements of a business disparagement claim. Therefore, Defendant is entitled to summary judgment on this cause of action as well.

**C. Plaintiff's Other Causes of Action Fail As a Matter of Law.**

In his pleadings, Plaintiff also pleads causes of action for negligence, tortious interference with existing contract, tortious interference with prospective contract, and invasion of privacy.<sup>76</sup> Both the United States and Texas Supreme Courts have held, however, that the same protections which the First Amendment affords defendants from libel claims also protect them from non-libel claims that are based on the same alleged defamatory publications.<sup>77</sup> Here, Plaintiff, does not identify any conduct on Defendant's part other than making the allegedly-false statements that form the basis of his defamation and business disparagement causes of action. As discussed above, Plaintiff has no evidence to support essential elements on either of these claims. Because these causes of action fail as a matter of law, Defendant is also entitled to summary judgment on all of Plaintiff's remaining claims.

**IV. CONCLUSION**

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<sup>74</sup> *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170–71 (Tex. 2001).

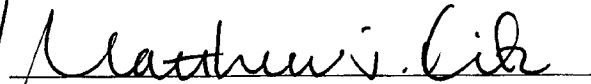
<sup>75</sup> Ex. F, pp. 6, 7, Resp. to Req. for Disclosure (d) and (f).

<sup>76</sup> Pl's Orig. Pet. & App. For Injunctive Relief, pp. 5–6.

<sup>77</sup> *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 942 (Tex. 1988).

The substance of Plaintiff's claims is reflected in the minimal evidence that he has presented to this Court. Having failed to convince this Court that he is entitled to injunctive relief against Plaintiff, he has allowed this suit to linger in hopes that the inconvenience of defending it would persuade Defendant to voluntarily refrain from participating in a public debate. As Plaintiff should have realized after his previous attempts to engage Defendant in public, she has no interest in sacrificing her First Amendment rights for his or Advantage Conferences' benefit. Because Plaintiff has not produced any evidence to support his claims, Defendant is entitled to summary judgment.

Respectfully submitted,



JAMES H. MOODY III  
State Bar No. 03820050

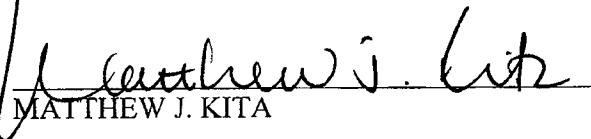
MATTHEW J. KITA  
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**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

The undersigned certifies that copy of this document was served on Plaintiff's counsel of record in accordance with Texas Rule of Civil Procedure 21a on February 24, 2008.

  
MATTHEW J. KITA

**C**

369A 382

CAUSE NO. 05-11461

ADVANTAGE CONFERENCES, LLC,

PLAINTIFF,

VS.

BETTER BUSINESS BUREAU OF  
METROPOLITAN DALLAS, INC.  
AND JON TAYLOR,

DEFENDANTS.

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IN THE DISTRICT COURT

14<sup>TH</sup> JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

**ORDER GRANTING SUMMARY JUDGMENT**

On this 25th day of September, 2006, came on for hearing Defendant Better Business Bureau of Metropolitan Dallas, Inc.'s Motion for Summary Judgment ("Motion") filed on August 21, 2006. The Court, having reviewed the Motion, Plaintiff's Response to the Motion, Defendant's Reply, and all timely filed pleadings, and all competent, timely filed summary judgment evidence, and having heard the arguments of counsel, is of the opinion that the Motion should be GRANTED in all respects.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Better Business Bureau of Metropolitan Dallas, Inc.'s Motion for Summary Judgment filed on August 21, 2006 is hereby GRANTED in all respects.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Advantage Conferences, LLC take nothing from Defendant Better Business Bureau of Metropolitan Dallas, Inc. by reason of its action and that Defendant Better Business Bureau of Metropolitan Dallas, Inc. recover from Plaintiff its costs of court, for which let execution issue.

All relief as between Advantage Conferences, LLC and Better Business Bureau of Metropolitan Dallas, Inc. not expressly granted herein is denied. *This order is interlocutory.*

Signed this 12 day of October, 2006.



Judge Presiding

It is now ordered that Court stand adjourned on

10-13-06 morning at nine (9) o'clock.

ORDER GRANTING SUMMARY JUDGMENT - PAGE 1 Court met pursuant to adjournment and there were those present as of yesterday.

**D**

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<sup>1</sup>**

**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

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<sup>1</sup> An index of exhibits in support of the motion is attached.





**CAUSE NO. CC-10-07369-A**

**HEATHER DOBROTT,**

**Plaintiff**

**v.**

**TIMOTHY SPENCER**

**DARNELL,**

**Defendant**

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**COUNTY COURT AT LAW NO.**

**1**

**DALLAS COUNTY, TEXAS**

**REQUEST FOR ADMISSIONS**

Plaintiff, Heather Dobrott, requests that Defendant, Timothy Darnell, admit or deny the following statements of fact. If objection is made, please state the reason for the objection. Please specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

1. You authored the posts on [www.heatherdobrott.com](http://www.heatherdobrott.com).
2. You had someone author the posts on [www.heatherdobrott.com](http://www.heatherdobrott.com) on your behalf.
3. You paid for [www.heatherdobrott.com](http://www.heatherdobrott.com) to be hosted on servers owned by Theplanet.com.
4. Someone paid the hosting fees to Theplanet.com on your behalf or at your request.
5. You bought the domain name heatherdobrott.com from namecheap.com
6. Someone else purchased the domain name heatherdobrott.com on your behalf or at your request.
7. You paid for the hosting fees for [www.heatherdobrott.com](http://www.heatherdobrott.com) at Rackco.com.
8. Someone else paid for the hosting fees at rackco.com on your behalf or at your request.

9. You own and author all the posts on [www.timdarnell.org](http://www.timdarnell.org).
10. The post Reputation Management Solution on [timdarnell.org](http://timdarnell.org) refers to me.
11. I am the only individual that you personally litigated against in the past 6 years.
12. Jack Weinzierl told you he was renting his home and you published that fact on [www.heatherdobrott.com](http://www.heatherdobrott.com) before it was made public.
13. You sued me in Dallas District court for defamation, trade libel, tortious interference, negligence, and invasion of privacy and lost in Summary Judgment.
14. Your suit against me in District court requested an injunction and that was denied.
15. Your company Advantage Conferences sued the Dallas Better Business for defamation, tortious interference, and libel seeking 25 million in damages and lost in Summary Judgment.
16. The Better Business Bureau questioned whether you were running an illegal pyramid scheme.
17. The Better Business Bureau garnished Advantage Conferences account in 2007 as the judge ordered Advantage Conferences to pay all their costs of court.
18. Advantage Conferences still owes the Better Business Bureau over \$100,000.00 to satisfy that judgment and fully repay the BBB's costs of court.
19. You used pictures from my husband's Facebook account on [www.heatherdobrott.com](http://www.heatherdobrott.com).
20. You posted under Frank Thomas' name on [www.heatherdobrott.com](http://www.heatherdobrott.com) without his permission.
21. Exhibit A is a true and correct copy of the Summary Judgment Order from Darnell vs. Dobrott.
22. Exhibit B is a true and correct copy of the Summary Judgment Motion from Darnell vs. Dobrott.

23. Exhibit C is a true and correct copy of the Summary Judgment Order from Advantage Conferences vs. The Better Business Bureau of Metropolitan Dallas.
24. Exhibit D is a true and correct copy of the Summary Judgment Motion from Advantage Conferences vs. The Better Business Bureau of Metropolitan Dallas.
25. You requested that all postings about yourself, Cottonwood Creek Baptist Church, Central Christian Church of Frisco, Jack Weinzierl and Advantage Conferences be removed from Scam.com.
26. You requested that all postings about yourself, Cottonwood Creek Baptist Church, Central Christian Church of Frisco, Jack Weinzierl and Advantage Conferences be removed from Scribd.com.
27. You had another party request the removal of Scam.com posting on your behalf.
28. You had another party request the removal of postings from Scribd.com on your behalf.
29. You are responsible for all the statements in Exhibit E that were made in 2007 as you testified in court in June 2008.
30. You never reported any of the alleged stalking and death threats to the local police or any other authorities.
31. You had never seen me and could not identify me before we met in court in June 2008.
32. You agreed in June 2008 that you had "no idea" if I had been close to your house.
33. You said no under oath in January 2009 when asked if I had been face-to-face with your children, your wife or anybody in your family.
34. You admitted in January 2009 I hadn't sat in front of your house.
35. You said I went to Allen High School before you accused me of stalking.
36. You admitted that you didn't know what I looked like until June 2008.
37. You stated that I had bragged about going to Jack Weinzierl's house.

38. You claimed I physically followed you and Jack Weinzierl on multiple occasions.
39. You wrote in October 2007 in Exhibit F that I was "literally stalking" your home and that of your top rep Jack Weinzierl.
40. You claimed to have an iron clad case against me.
41. You claimed that Satan was attacking Advantage Conferences.
42. You accused me of threatening your church with a lawsuit.
43. You answered under oath at your January 2009 deposition when asked, "she's never threatened any physical harm to anybody" with "not that I know of."
44. Your original petition in your frivolous losing suit against me filed on June 2008 states, "Defendant's (Heather Dobrott's) obsession with Plaintiff led Defendant to make many threats to Plaintiff and his family, including threats to confront Plaintiff's minor daughters at their schools..."
45. You never filed any paperwork with the IRS to register Treasures for the Kingdom as a 501 ( c ) 3.
46. You testified in June 2008 that Treasures for the Kingdom was not legally a 501 ( c ) 3.
47. You stated under oath at your January 2009 deposition that you filed the appropriate papers for Treasures for the Kingdom to be 501 ( c ) 3.
48. Treasures for the Kingdom is not listed by the IRS as a 501 ( c ) 3 charity.
49. Treasures for the Kingdom is not listed by Central Christian Church or its parent organization on their list with the IRS.
50. You testified in June 2008 that Treasures for the Kingdom is was a tax exempt entity in Texas.
51. Treasures for the Kingdom is in fact a taxable entity in Texas that is not in good standing and is in forfeiture.

52. You did not sign the corporate papers filed with the State of Texas to change Treasures for the Kingdom to an integrated auxiliary under Central Christian Church of Frisco (or Fresco as the actual documents read.)
53. You did not have permission from Cottonwood Creek Baptist Church to use their name or list Treasures for the Kingdom under them as their integrated auxiliary.
54. You did not have permission from Central Christian Church to use their name or list Treasures for the Kingdom under them as their integrated auxiliary.
55. Central Christian Church of Frisco has not supported Treasures for the Kingdom with internal church funds.
56. You have claimed integrated auxiliaries of a church do not need the church's permission to incorporate under them.
57. No reputation management companies were willing to help you.
58. You were awarded no damages in your personal suit against me.
59. You were removed from leading the prison ministry in Collin County.
60. You were removed from teaching Sunday School at Cottonwood Creek Baptist Church.
61. You were removed as President of the Collin County North Gideons International.
62. You were not able in that litigation from June 2008 – until the judgment became final in 2009 – to produce a single false statement made by me.
63. You had no capitalization to start Advantage Conferences in 2003.
64. You stiffed the website designers hired in 2003 \$12,000.00 for the work on [www.advantageconferences.com](http://www.advantageconferences.com).
65. You used the Advantage Conferences account to pay numerous personal expenses including, but not limited to jewelry, garage repair, air conditioning repair, graduation gifts, meals out, country club memberships etc. as shown in Exhibit F.

66. The expenses listed in item 65 were not reimbursed by your personal funds.
67. The items listed in item 65 were not shown as income on your tax returns.
68. Advantage Conferences was in the red in 2007 and you asked Phil Orr for \$30,000.00 to keep it afloat.
69. You sold your car in 2007 to pay for a conference.
70. Jack Weinzierl matched donations to Treasures for the Kingdom Foundation.
71. Advantage Conferences could not have been classified as a multi-million dollar business.
72. The parent company Portfolio Marketing Group could not have been classified as a multi-million dollar business.
73. You abandoned the service mark Advantage Conferences on June 19, 2007.
74. Advantage Conferences had no retail sales as of January 2006.
75. Advantage Conferences had 1 retail sale under mitigating circumstances as of June 2008.
76. You referred to All Star Entrepreneur as your own company.
77. You stated All Star Entrepreneur was the same thing as Advantage Conferences – educational conferences.
78. The compensation plans of Advantage conferences and All Star Entrepreneur were similar – reverse margin.
79. All Star Entrepreneur and Advantage Conferences offered the identically titled Millionaire Mindset Conferences.
80. You stated that Glenn Green did not pay the hotel debt he was required to as a condition of him being made a partner in All Star Entrepreneur.

81. Your company All Star Entrepreneur did not pay Glenn Green for marketing services he provided to them.
82. You stated that collusion and embezzlement plagued All Star Entrepreneur and that Claudia Cawley and Glenn Green made off with \$400,000.00.
83. You did not report that alleged embezzlement to the police, district attorney, or any authority or file a civil suit to recover the money.
84. As of January 2006 you stated you had received only 1 complaint.
85. That complaint mentioned in item 84 was from a Robert Gandley.
86. You told Robert Gandley he had to have his complaint with the Better Business Bureau of Dallas removed in order to get a refund.
87. You stated that “as our business at AC matures that will be – by far the greatest number of attendees will be non reps.”
88. You stated, “Our strategy for the first year (2005) was to populate with as many reps as we possibly could...”
89. You described AC as “a more doable, realistic, ethical income opportunity.”
90. You stated, “It is \$59.95 to become a rep with Advantage Conferences, sole criteria.”
91. You stated your goal in 2006 was to have 4 attendees to every rep in the conference audience by 2007.
92. You stated that no governmental agency has reviewed and approved your business model.
93. Scott Wilson from the Texas Attorney General’s office spoke to you and asked that you refund Zena Karelin.



94. You stated in your Summary Judgment response in the suit filed against you by Zena Karelin that there has not been so much as a warning or mention of any problems by the Attorney General's office to Defendant (yourself.)
95. You stated that you spoke with the head of the Pyramid Division of the Texas Attorney General's office.
96. The head of the Pyramid Division threatened to arrest you if you were a pyramid.
97. You have records to prove this contact with the Pyramid Division took place.
98. You stated under oath the head of the Pyramid Division called you back 18 hours later and said, "There's no way on this planet you are anything close to a pyramid."
99. You reiterated that again in your Summary Judgment motion in 2009 to say "regarding the pyramid question, company has received a full review and scrutiny from the Texas Attorney General's office, in particular the Texas Attorney General Pyramid Division, which upon full investigation gave the Company a clean bill of health."
100. You stated under oath in January 2006 in response to the question "has any regulatory agency, governmental regulatory agency reviewed your business model and approved it?," "that I don't know of any agencies that do that. Every time I have contacted them proactively they tell me they don't do that....The answer is no.
101. Advantage Conferences grossed 1.67 million in 2005.
102. The original Power of Two from 2005 showed earnings projections of \$1,323,000.00.
103. You removed the earnings projections from the Power of Two in 2006 because they were "problematic."
104. The original interest form asked people to check what amount they serious about earning from \$100,000.00 - \$1,000,000.00.

105. You published "Solid Company in Business since 1998 whose Principal has been involved in some aspect of Conference production for 20 plus years" meaning Advantage Conferences was really just another name for and the subsidiary of Portfolio Marketing Group.
106. Advantage Conferences incorporated in Texas in June of 2003.
107. You stated folks had the, "Ability to Make Tens of Thousands of Dollars QUICKLY" with Advantage Conferences.
108. You stated sales at Advantage Conferences were closed by professionals.
109. You stated, "I can show you a simple and easy method for creating significant cash flow (\$7,000 a month, a week, and eventually every few days and more)."
110. You stated that being helpful with marketing tips can be used against you.
111. You claimed that Advantage Conferences had "stilted growth" due to the postings on the Better Business Bureau site.
112. You have e-mails that contain the link to the Better Business Bureau site that say, "Tim Darnell is a crook. He is a criminal. I'm getting out of here."
113. You claimed to have lost millions of dollars due to the Better Business Bureau postings.
114. The Better Business Bureau gave Advantage Conferences an unfavorable rating because it questioned whether the company was operating a pyramid scheme.
115. You agreed in your January 2009 deposition that the Better Business Bureau got a Summary Judgment as a matter of law because the court determined there were not any fact issues that would warrant a judgment in your favor.
116. You claimed Advantage Conferences case against the Better Business Bureau was iron-clad.
117. You further stated about that case with the Better Business Bureau "More importantly, God is absolutely in control, and we will prevail (as plaintiffs).

118. You also stated that “when you work and breathe for God, the outcome is assured. Our victory is a foregone conclusion, and we enter the rest of the battle with enthusiasm and sustained, unwavering belief” referring to Advantage Conferences losing case against the Better Business Bureau.
119. You published, “Training for your Advantage Conferences business is professional and extensive. The reason we accent this aspect of the business due to our vision and purpose - to help you create your own professional, multi-million dollar marketing company where you are the CEO.”
120. No rep or even you yourself created a multi-million dollar company.
121. You stated bringing in more people is the choice of the majority of people for their entrepreneurial activity under oath.
122. You stated that there was no selling involved in the income opportunity with Advantage Conferences under oath.
123. You stated there is an advantage to being in on the ground floor under oath.
124. You claimed to be a millionaire in 2006 by some definitions under oath.
125. From 1999 – 2005 you did not file a tax return.
126. You filed Affidavits from 1999 -2005 and did not pay your personal or business taxes.
127. The IRS responded to your Affidavit(s) in 2007 and you and your wife did not read it.
128. You renounced your United States citizenship by Affidavit in Dallas County Court.
129. You also stated in that same document that you were not a resident of Texas and that your home address is a non-resident address.
130. Other area non-citizens including your mother-in-law wrote Affidavits in support of your non-citizenship.
131. You denied that your finances were “not doing well” in June 2008.



132. You agreed under oath that the Summary Judgment Motion being granted in all respects meant you didn't have any grounds for suing the Better Business Bureau for using the term pyramid scheme on their website.
133. Advantage Conferences had only 100 reps in 2008.
134. You stated under oath that going from 300 to 100 reps in two years is a fluctuation and not a lack of growth.
135. The McKinney police responded to a complaint about you threatening fellow church members by telling you to quit threatening people.
136. You testified under oath that your father had never been involved in business.
137. Dr. David Darnell is 1% owner of Portfolio Marketing Group in existence since 1998 and the parent company of Advantage Conferences.
138. You suggested reps were paying the \$59.95 to get business deductions.
139. Educational conferences and related expenses are tax deductible without having to join the company offering such an event.
140. The \$59.95 is the fee to become a rep and join the money making aspect of Advantage Conferences.
141. In your deposition on January 12, 2009 you stated that you did not think you would retract or change what you said in previous depositions.
142. You have stated that you were not a part of the All Star Entrepreneur bankruptcy proceedings.
143. You made a claim for \$7,686.62 on the All Star Entrepreneur bankruptcy.
144. You, at your home address, were listed as the registered agent and 33% owner of All Star Entrepreneur in the bankruptcy filing.

145. You as Portfolio Marketing Group at your home address in Allen, TX were listed as the registered agent for All Star Entrepreneur in its bankruptcy filing.
146. You came out of All Star Entrepreneur with no income and financed Advantage Conferences on credit cards in 2003.
147. You had to borrow toilet paper and toiletries from your neighbors during this time period.
148. In 2005 you had \$200,000.00 in credit card debt.
149. You distributed hundreds of thousands of copies of Slay Your Giant electronically.
150. You said that reps will not make any money in a year under oath.
151. You requested a permanent injunction against me that would require me to remove all of my posts about you and your companies and bar me from further posting and were denied by Judge Carl Ginsberg.
152. You claimed in your losing case against me that I encouraged third parties to take actions against you that were illicit or harmful.
153. You tried to have me barred from communicating about you to anyone by any form of communication and that was dissolved at the first hearing in your frivolous filing against me.
154. You had me ordered not to dispose of any evidence.
155. You yourself have disposed of evidence vital to this case.
156. You stated under oath that Zena Karelin flew to Dallas to discuss my plans to litigate against you with a ticket I provided to her even though in reality it never happened and you were aware she could not fly for medical reasons.
157. That lawsuit filed in Collin County Texas was filed by attorney Tom Foster on Zena's behalf and only issues related to her getting a refund and damages were alleged in a suit that you were well aware it would never have resulted in even a penny of financial gain for me.

158. You claimed under oath in 2009 that all the sales at Advantage Conferences are retail sales even though not one single sale was made to a customer outside the pay plan in the years 2003 – 2007.
159. You claimed under oath in 2009 that Advantage Conferences does not need a single new representative to create sales.
160. Advantage Conferences enticed recruits by publishing they had the “prospect of earning over \$1,000,000.00 in just 28 weeks as a result of the ‘Miraculous Power of 2.’”
161. In fact no rep ever earned over 1 million dollars with Advantage Conferences.
162. Only 3 reps had earnings of over \$100,000.00 during their time in Advantage Conferences.
163. Over 98% of the reps did not recoup their costs of conference purchase and related business expenses and actually become profitable.
164. You claimed a rep that is committed will be successful.
165. You teach people to think in terms of bigger dollar amounts.
166. You claimed under oath that membership in the Better Business Bureau is of very little importance and an insignificant detail.
167. Despite that membership being so insignificant Advantage Conferences sued the Better Business Bureau and demanded 25 million dollars when the membership application was denied and they questioned whether Advantage Conferences was indeed an illegal pyramid scheme.
168. You instructed representatives to be resourceful in funding their businesses including to pay with credit cards, refinance their homes, take out loans, use college or retirement savings etc.
169. You falsely claimed I told conference speakers they would be sued if they spoke at an Advantage Conferences event.

170. You stated under oath that you “stand by the statements that these commissions were / are possible, realistic and were made by multiple individuals – who didn’t quit their business. The System was powerfully constructed, Representative-friendly, and effective.”

171. Though the system was according to you powerfully constructed and realistic for representatives to make money, you changed the compensation plan in early 2008.

172. Though you lost your suit against me which included all of my internet postings on Scam.com and many more sites on March 17<sup>th</sup> 2009, you continued to accuse me in numerous court documents, filings, and on numerous internet sites of libel, defamation, slander and damage to your business after that Judgment became final.

173. Zena Karelin and other reps were instructed to write testimonials.

174. You keep offering to produce hundreds and hundreds or 35 pounds of my posts as evidence to any judge or person possible even though those posts have already been the subject of litigation which you lost in a take nothing judgment in my favor and denial of any kind of injunction whatsoever.

175. You accuse me under oath of making “almost daily assaults on so many people.”

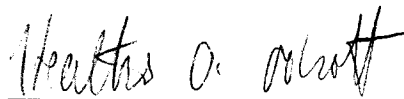
176. You claim to be a law abiding citizen even though you refused to pay taxes from 1999 – 2005.

177. You claim under oath in 2009 that I stopped hundreds of representatives from doing business and was the cause of the massive failure rate. That business disparagement claim was another allegation in your losing lawsuit and the court has ruled in my favor on that issue already.



178. You replace the term truthful with negative when discussing my postings.
179. You claim the outcomes in Advantage Conferences losing suit against the Better Business Bureau and your frivolous harassment suit against me are being distorted by me.
180. You claimed Judy Sterling was due no money from the Hidden Treasures insurance sales when she was in fact due tens of thousands of dollars. She didn't get paid because the policies you wrote were bogus and the insurance wouldn't underwrite stranger owned policies that would be resold.
181. You claim to be a personal friend of your pastor John Mark Caton, but the church has steadfastly refused to get involved in your stranger owned life insurance, Treasures for the Kingdom charity and your Advantage Conferences Fundraising Advantage program that boasts exactly zero sales.
182. You falsely claimed I stated under oath that I used faulty research to wage smear campaigns as a consumer advocate even though in reality I said and do no such thing.
183. You did not refund the subscription amount or publish the book to replace the Givers Magazine subscriptions that were prepaid.
184. You encouraged Vincent Wright to file bogus police reports to harass me and my family.
185. One of the reasons Treasures for the Kingdom was set up to generate publicity for Advantage Conferences by getting the local TV and other media out.
186. The media coverage never happened as you could not afford to pay Kaaydah Schatten for her services as a publicist and she did not make any press releases or notify the media.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Heather A. Dobrott", is written over a solid black horizontal line.

Heather Dobrott  
Plaintiff Pro se  
2518 Suncrest Dr.  
Garland, TX 75044-7032  
(972) 496-3649

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of this document was served on Defendant in accordance with Texas Rule of Civil Procedure 21 on this 29th day of July, 2011.

**A**

CAUSE NO. 08-06317

TIM DARNELL,

Plaintiff

v.

HEATHER DOBROTT,

Defendant

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IN THE 193rd JUDICIAL DISTRICT COURT

DALLAS COUNTY, TEXAS

**ORDER**

Upon consideration of Defendant's Motion for Summary Judgment, the pleadings of the respective parties, and the summary judgment evidence on file, this Court is of the opinion that Defendant is entitled to judgment as a matter of law on all of Plaintiff's causes of action.

IT IS THEREFORE ORDERED that Plaintiff Tim Darnell shall recover NOTHING against Defendant Heather Dobrott by this suit.

Signed this 17<sup>th</sup> day of March, 2009.



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JUDGE CARL GINSBERG

**ORDER**

**B**

CAUSE NO. 08-06317

FILED

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TIM DARNELL,

Plaintiff

v.

HEATHER DOBROTT,

Defendant

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IN THE 193rd JUDICIAL DISTRICT COURT

DALLAS COUNTY, TEXAS

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

JAMES H. MOODY III

State Bar No. 03820050

MATTHEW J. KITA

State Bar No. 24050883

QUILLING SELANDER CUMMISKEY & LOWNDS, P.C.

2001 Bryan Street, Suite 1800

Dallas, Texas 75201

(214) 871-2100 (phone) / (214) 871-2111 (fax)

**ATTORNEYS FOR DEFENDANT**

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## I. SUMMARY

Plaintiff is the founder, President, and CEO of "Advantage Conferences," a company that does business throughout the United States and all over the world. According to Plaintiff, Advantage Conferences grossed more than a million dollars in only its second year of operation. Accordingly, when the Better Business Bureau of Greater Dallas accused Plaintiff of operating an illegal pyramid scheme, Plaintiff captured the attention of newspapers and internet "bloggers" across the country, many of whom began to investigate Plaintiff's background and Advantage Conferences' business model. One such "blogger" is the Defendant in this case, Heather Dobrott.

As part of an ongoing effort to mitigate the effect of his critics, Plaintiff began to publicly attack Defendant and others who were critical of him using the vast publicity resources he developed with Advantage Conferences. By this action, Plaintiff asks this Court to assist him in preventing Defendant from engaging in the public debate. Although this Court refused his request for injunctive relief on First Amendment grounds, he now seeks to silence Defendant by claiming that she owes him damages under theories of defamation, business disparagement, tortious interference, and invasion of privacy.

The First Amendment, however, bars Plaintiff's claims for damages. As a matter of law, Plaintiff is a limited-purpose public figure and therefore, Plaintiff has the burden to show that Defendant's allegedly-actionable statements were both false *and* published with actual malice. In the eight months that this case has been pending, Plaintiff has not produced evidence of a single statement that satisfies this standard. Nor has Plaintiff identified any damages that could be causally connected to Defendant's conduct. In the absence of same, Defendant is entitled to summary judgment on all of Plaintiff's causes of action.

## II. UNDISPUTED MATERIAL FACTS

In June 2003, Plaintiff founded “Advantage Conferences, LLC,”<sup>1</sup> and currently serves as its CEO and President, as well as its sole officer and director.<sup>2</sup> According to Plaintiff, Advantage Conferences provided “Christian-based”<sup>3</sup> “mentoring for entrepreneurs”<sup>4</sup> by hosting seminars where relatively-unknown “middle-class millionaires” educated attendees on “very profound principles that most people are not aware of.”<sup>5</sup> The cost of attending a two-day Advantage Conferences seminar was \$9,995.<sup>6</sup>

Plaintiff explained in his deposition that a network of nearly four hundred “Representatives” expanded his business across the United States and throughout the world.<sup>7</sup> Plaintiff testified that Advantage Conferences’ Representatives were paid in accordance with a compensation scheme that he invented.<sup>8</sup> In sum, a person could “qualify” as a Representative by selling three \$9,995 admission tickets to the above-referenced seminars.<sup>9</sup> After selling three tickets, the newly-qualified Representative would earn a \$7,000 commission on his or her own sales *and* on the first two sales of each Representative he or she recruited.<sup>10</sup> Although they were not required to pay to attend the conferences themselves, Plaintiff strongly encouraged potential Representatives to do so because (a) purchasing their own ticket counted towards one of the three required sales necessary to “qualify”; and (b) it provided a “cash incentive” for them to

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<sup>1</sup> Ex. A, p. 45, ll. 1–3.

<sup>2</sup> Ex. B, p. 2, Resp. to Interrog. No. 2; Ex. C, p. 26, ll. 13–17.

<sup>3</sup> Ex. C, p. 56, ll. 14–15.

<sup>4</sup> Ex. A, p. 45, ll. 6–8.

<sup>5</sup> Ex. C, p. 16, ll. 17–25; p. 17, ll. 1–4.

<sup>6</sup> Ex. C, p. 50, ll. 4–6.

<sup>7</sup> Ex. A, p. 85, ll. 15–19 (discussing the number of AC Representatives); p. 87, ll. 14–23 (discussing the geographic reach of Advantage Conferences).

<sup>8</sup> Ex. C, p. 35, ll. 18–25; p. 36, ll. 1–25; p. 37, ll. 1–10.

<sup>9</sup> Ex. C, p. 51, ll. 21–25.

<sup>10</sup> Ex. C, p. 51, ll. 15–20.



recruit new Representatives.<sup>11</sup> Only two years after it was founded, Plaintiff claimed that Advantage Conferences grossed \$1,500,000 in sales.<sup>12</sup>

In 2005, the Better Business Bureau of Greater Dallas determined that Plaintiff was primarily engaged in promoting a pyramid scheme and accordingly, gave Advantage Conferences a negative review on its website.<sup>13</sup> In response, Plaintiff filed suit against the BBB on Advantage Conference's behalf in a Dallas County District Court.<sup>14</sup> While the lawsuit was pending, Plaintiff used Advantage Conferences' web site and AC Representatives to promote and distribute a book that he authored entitled *Slay Your Giant*.<sup>15</sup> Therein, Plaintiff alluded to his lawsuit against the BBB, claiming that "an agency...falsely and erroneously made statements about my company...somewhat tarnish[ing] my company and me personally."<sup>16</sup> According to Plaintiff, hundreds of thousands of copies of *Slay Your Giant* have been distributed to date.<sup>17</sup>

Around the time that Plaintiff initiated his suit against the BBB, the website *scam.com* began hosting a forum which featured a discussion on Plaintiff's business acumen and the legitimacy of Advantage Conferences' business model.<sup>18</sup> Reports of certain Representatives' success also caught the attention of the *St. Petersburg Times*.<sup>19</sup> In July 2006, the *Times* published an article entitled, "He Talks, They Buy, and the Money Rolls In." Although the author referenced Advantage Conference's pending dispute with the BBB, he also noted that at least one AC Representative had "earned more than \$250,000 in eight months."<sup>20</sup>

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<sup>11</sup> Ex. C, p. 54, ll. 15-18.

<sup>12</sup> Ex. A, p. 50, ll. 8-16.

<sup>13</sup> Ex. A, p. 60, ll. 11-15.

<sup>14</sup> Ex. A, p. 60, ll. 11-15.

<sup>15</sup> Ex. A-2, p. 77, ll. 23-25, p. 78, ll. 1-24; p. 80, ll. 7-13.

<sup>16</sup> Ex. A-3, p. 113.

<sup>17</sup> Ex. A, p. 78, ll. 5-8.

<sup>18</sup> Advantage Conferences BS (Merged), Post 1, <http://www.scam.com/showthread.php?t=13128> (Nov. 13, 2005) (last visited Feb. 22, 2009).

<sup>19</sup> Ex. A-2.

<sup>20</sup> Ex. A-2, p. 2.

The *Houston Press* article also noted the great deal of discussion that Plaintiff, Advantage Conferences, and the BBB lawsuit had generated on *scam.com*.<sup>29</sup> As with the article that appeared in the *Broward-Palm Beach New Times*, the text of Malisow's article was uploaded onto *scam.com* on the day it was published.<sup>30</sup> This prompted additional commentary from both those who opposed Darnell and Advantage Conferences as well as from those who supported them. For example, a contributor who posted under the username "aboveandbeyond" noted:

Craig is a very good writer and I should know because I'm a writer. I appreciate true talent....I mean it helps to know that I would have never discovered any of these facts out on my own.<sup>31</sup>

Another blogger, using the moniker "wishyouknew," voiced agreement:

Craig, your article is greatness, it made my day and is a wonderful read. It validates everything I have said for the last year. And boy I thought I did a investigation on [Plaintiff]. I only new 1/10 of the dirt on him.<sup>32</sup>

Other readers, however, were not convinced. "ShiningLight" stated:

[I]f you do any homework, you will see the quality or lack thereof of that Houston paper and that article....The author, who does not even deserve to be named here uses the "f" word in his anti-networking, anti-Christian article....There are a lot of scams in the marketplace, and this is not one of them.<sup>33</sup>

[T]he BBB was the defendant on that case and as you all should know, the defendant is innocent until proven otherwise. I guess the case was not proveable there, even though many believe the BBB was mistaken.<sup>34</sup>

This thread on *scam.com* even drew the attention of Jack Weinzierl, Plaintiff's most successful Representative,<sup>35</sup> who also posted a response under his own name:

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<sup>29</sup> Ex. A-5, p. 5.

<sup>30</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=299288&postcount=1985> (Dec. 14, 2006) (last viewed Feb. 22, 2009).

<sup>31</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=299288&postcount=1997> (Dec. 15, 2006) (last viewed Feb. 22, 2009).

<sup>32</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=299288&postcount=1993> (Dec. 15, 2006) (last viewed Feb. 22, 2009).

<sup>33</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=322935&postcount=2051> (Jan. 26, 2007) (last viewed Feb. 22, 2009).

<sup>34</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=323062&postcount=2060> (Jan. 27, 2007) (last viewed Feb. 22, 2009).

If you believe the writer in Houston did a good job in his article, well, you have the right to think that....I encourage you to look at the source, just like you would at *scam.com*. Find out the caliber and style of reporting done by this source....Any person with any degree of intelligence would see through either of these gutter venues immediately....If you choose to proclaim your faith in Jesus in a public forum like your business, you'll see what happens.<sup>36</sup>

In fall 2007, Plaintiff learned that a contributor to *scam.com* who published her comments under the username "soapboxmom," was actually a woman named Heather Dobrott, the Defendant in this case.<sup>37</sup> To negate the effect that he believed the posts on *scam.com* by Defendant and others were having on Advantage Conference's business,<sup>38</sup> Plaintiff sent an e-mail to the "eight to nine thousand individuals" on Advantage Conferences' e-mail distribution list.<sup>39</sup> In the e-mail, Plaintiff identified Defendant by name and described her as an "attacker" who has "literally and physically stalked me."<sup>40</sup> He claimed that Defendant was motivated to post to *scam.com* because "it brings her an apparently needed sense of importance, and functionally raises the particular blog and website higher in the search engine rankings."<sup>41</sup> In a subsequent message on Advantage Conferences' web site, Plaintiff accused Defendant of making "outlandish assertions with obviously very little understanding about our business, our industry, our products, and especially about me personally."<sup>42</sup> He further claimed that "[Defendant's] smug, know-it-all comments have always been, not only incorrect, but also so biased that most easily see through her misdirected agenda."<sup>43</sup>

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<sup>35</sup> Ex. A, p. 65, ll. 16–18.

<sup>36</sup> Advantage Conferences BS (Merged), <http://www.scam.com/showpost.php?p=323500&postcount=2074> (Jan. 28, 2007) (last viewed Feb. 22, 2009).

<sup>37</sup> Ex. A, p. 116, ll. 21–25; p. 117, ll. 1–3.

<sup>38</sup> Ex. A, p. 134, ll. 6–23.

<sup>39</sup> Ex. A, p. 127, ll. 3–8.

<sup>40</sup> Ex. A-7.

<sup>41</sup> Ex. A-7.

<sup>42</sup> Ex. A-8.

<sup>43</sup> Ex. A-8.

Plaintiff filed this lawsuit on June 16, 2008 seeking unspecified damages and an injunction to prevent Defendant from publishing additional statements about Defendant or Advantage Conferences.<sup>44</sup> To support this request, Plaintiff attached several of Defendant's postings from *scam.com* to an affidavit.<sup>45</sup> Noting that "prior restraints on speech are presumptively unconstitutional," this Court denied Plaintiff's application for injunctive relief.<sup>46</sup>

This case is currently set for trial on May 26, 2009 and the discovery period ends on April 6, 2009. Plaintiff has yet to designate any experts, notwithstanding the fact that his expert designation deadline was February 9, 2009. When asked to identify the specific allegedly-defamatory statements on which he based his claims, Plaintiff responded, "The affidavit in support of Plaintiff's Application for Temporary Restraining Order provides Defendant with notice of the offending remarks and their effects" and generally referred Defendant to "all statements made by Defendant that reference Plaintiff."<sup>47</sup> Moreover, when asked to disclose the legal theories and factual bases that support his claims, Plaintiff merely reiterated the statements in his request for injunctive relief, which this Court already denied.<sup>48</sup> Finally, the only damages he discloses are unidentified future costs "to remove all of the internet postings regarding Plaintiff" and general damages for "invasion of privacy."<sup>49</sup>

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<sup>44</sup> See Pl's Orig. Pet. & App. for Injunctive Relief.

<sup>45</sup> See Pl's Orig. Pet. & App. for Injunctive Relief, Exs. A-P.

<sup>46</sup> Ex. E, p. 76, ll. 9-17.

<sup>47</sup> Ex. B, p. 5, Resp. to Interrog. No. 6.

<sup>48</sup> See Ex. F.

<sup>49</sup> Ex. F, p. 6.

### **III. ARGUMENTS & AUTHORITIES**

Defendant is entitled to summary judgment on both traditional and no-evidence grounds. Under the standards promulgated by both the Supreme Court of the United States and the Supreme Court of Texas, Plaintiff is a “limited-purpose public figure” as a matter of law because there are no genuine issues of material fact in dispute with regard to each of the elements of that standard.<sup>50</sup> Accordingly, to prevail on each of the causes of action he alleges, Plaintiff has the burden to prove that Defendant made a false statement of fact with actual malice. Because an adequate time for discovery has elapsed and Plaintiff can shown no evidence of this essential element, this Court should issue a summary judgment in Defendant’s favor on all of Plaintiff’s claims.<sup>51</sup>

#### **A. Defendant is Entitled to Summary Judgment on Plaintiff’s Claim for Defamation.**

To maintain a defamation cause of action, Plaintiff must prove that 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 figure or negligence, if the plaintiff was a private individual.<sup>52</sup> This Court, therefore, must first determine whether Plaintiff qualifies as a “public figure” for purposes of this suit.

##### **1. Plaintiff Is a Limited-Purpose Public Figure.**

Plaintiff’s attempt to recover damages for Defendant’s allegedly-defamatory statements warrants special scrutiny under the First Amendment because of his role in the present dispute. Although Plaintiff does not have “such pervasive fame or notoriety” that would render him a

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<sup>50</sup> See TEX. R. CIV. P. 166a(c) (when the summary judgment evidence reflects that there is no genuine issue as to any material fact, the moving party is entitled to a judgment in its favor as a matter of law).

<sup>51</sup> See TEX. R. CIV. P. 166a(i) (the Court must grant a motion for summary judgment if, after adequate time for discovery, the party with the burden of proof has no evidence of one or more essential elements of a claim or defense).

<sup>52</sup> WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

public figure “for all purposes and in all contexts,” Texas courts apply the following test to determine whether a plaintiff is a “limited-purpose public figure” for this particular controversy:

1. Is the controversy at issue public, both in the sense that people are discussing it and that people other than the immediate participants in the controversy are likely to feel the impact of its resolution?
2. Does the plaintiff have more than a trivial or tangential role in the controversy?
3. Is the alleged defamation germane to the plaintiff’s participation in the controversy?<sup>53</sup>

Here, the undisputed facts establish that this classification is properly applied to Plaintiff.

The controversy in this case involves the legitimacy of the attacks on Plaintiff’s professional reputation and the legality of the compensation scheme which allegedly brought millions of dollars of revenue to Plaintiff’s company. These issues have been discussed at length, in two proceedings before a Dallas County District Court,<sup>54</sup> in at least three separate newspapers from three different cities in two states,<sup>55</sup> and on internet forums that are specifically designated for debate about Plaintiff and Advantage Conferences.<sup>56</sup> Moreover, Plaintiff admits that as many as four hundred people served as Representatives, all of whom have a “cash incentive” to learn whether they invested in an illegal pyramid scheme. Accordingly, the first element of the limited-purpose public figure test is established by the undisputed facts.

With regard to the second element, Texas courts find that a plaintiff has “more than a trivial or tangential role in the controversy” if he (1) actually sought publicity surrounding the controversy; (2) had access to the media; and (3) voluntarily engaged in activities that necessarily involved the risk of increased exposure and increased injury to reputation.<sup>57</sup> Here,

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<sup>53</sup> *McLemore*, 978 S.W.2d at 571.

<sup>54</sup> *See generally*, Exs. A, C, D, E.

<sup>55</sup> *See generally*, Exs. A-2; A-4; A-5.

<sup>56</sup> *See generally*, Advantage Conferences BS (Merged), Post 1, <http://www.scam.com/showthread.php?t=13128> (last visited Feb. 22, 2009).

<sup>57</sup> *McLemore*, 978 S.W.2d at 572–73.

Plaintiff clearly sought publicity by filing lawsuits against those who disagreed with him,<sup>58</sup> by discussing the merits of his claims against the BBB in his book,<sup>59</sup> and by publicly attacking Defendant in e-mails and on Advantage Conferences' website.<sup>60</sup> In his deposition, Plaintiff explained his reasoning for this course of conduct:

DEFENDANT'S COUNSEL: [Y]ou were hoping...to negate...any negatives that were flowing from the efforts of [Defendant], correct?

PLAINTIFF: Yes.

DEFENDANT'S COUNSEL: And in that respect, by negating those negatives, you were hoping to further the business of Advantage Conferences?

PLAINTIFF: Save it, yes.

DEFENDANT'S COUNSEL: Okay. And also to the extent that anybody was not a [Representative] but was looking at becoming a [Representative], to basically put y'all's side of the story on the Internet so they would have ready access to it?

PLAINTIFF: Yes.

DEFENDANT'S COUNSEL: Okay. So that as they go about making their decision as to whether to participate, they won't just have a one-sided view of what's going on?

PLAINTIFF: Correct.<sup>61</sup>

Plaintiff's access to the media is undisputed; in fact, he admits that his book was distributed to "hundreds of thousands" of readers,<sup>62</sup> that his e-mails to Dobrott reached between "eight and nine thousand" recipients,<sup>63</sup> and that he was contacted by and afforded an hour-long interview with a *Houston Press* reporter prior to the publication of its article about him and Advantage Conferences.<sup>64</sup> Plaintiff cannot reasonably dispute that he was able to distribute his version of events through means not ordinarily available to the typical private individual.

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<sup>58</sup> See Pl's Orig. Pet. & App. for Injunctive Relief; Ex. A, p. 60, ll. 11-15; see generally Ex. C.

<sup>59</sup> Ex. A-3, p. 113.

<sup>60</sup> Ex. A-7, pp. 4-5, 7; Ex. 8, pp. 1-3.

<sup>61</sup> Ex. A, p. 134, ll. 7-23.

<sup>62</sup> Ex. A, p. 78, ll. 5-8.

<sup>63</sup> Ex. A, p. 127, ll. 3-8.

<sup>64</sup> Ex. A, p. 104, ll. 9-24.

Third, Defendant's alleged defamation is entirely germane to Plaintiff's participation in the controversy. According to his pleadings, Plaintiff complains that "when searched on the internet, [his name] is immediately affiliated with one of Defendant's postings on several websites."<sup>65</sup> By Plaintiff's own admission, however, the statements at issue in this case are those attached to his affidavit in support of his request for injunctive relief.<sup>66</sup> All of those statements were posted on the website *scam.com* in a forum specifically devoted to Advantage Conferences.<sup>67</sup> As Plaintiff is CEO, President, sole officer, and sole director of Advantage Conferences, the statements of which Plaintiff complains are directly related to Plaintiff's participation in the controversy.<sup>68</sup> Finally, as noted above, Plaintiff used Advantage Conferences' resources to respond to Defendant by attacking her reputation in a public forum, even though he knew that his participation would further prolong the already-existing debate:

DEFENDANT'S COUNSEL: [W]ould you agree with me that someone in your position who made the decision to identify Ms. Dobrott and to start making communications with third parties about the propriety of what she's doing, that it would be reasonable to expect that she would respond to those?

PLAINTIFF: Sure. Yes.

\* \* \*

DEFENDANT'S COUNSEL: [Y]ou recognized that instead of just going away, one possibility was that she would continue to post and respond?

PLAINTIFF: Yes.<sup>69</sup>

As the Texas Supreme Court recently noted, "By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition in the marketplace."<sup>70</sup> Given Plaintiff's active

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<sup>65</sup> Pl's Orig. Pet. & App. for Injunctive Relief, p. 3 ¶ 11.

<sup>66</sup> Ex. B, p. 5, Resp. to Interrog. No. 6.

<sup>67</sup> See Pl's Orig. Pet. & App. for Injunctive Relief, Exs. A-P.

<sup>68</sup> Ex. B, p. 2, Resp. to Interrog. No. 2; Ex. C, p. 26, ll. 13-17.

<sup>69</sup> Ex. A, p. 142, ll. 21-25; p. 143, ll. 1-2, 9-12.

<sup>70</sup> *McLemore*, 978 S.W.2d at 573 (citing *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996)).



participation in the present controversy despite his awareness of the risks of his conduct, the undisputed evidence establishes the third element of this inquiry as well.

In sum, the undisputed evidence confirms that Plaintiff “acted voluntarily to invite public attention and scrutiny on several occasions and in several different ways during the course of the public debate.”<sup>71</sup> Because there are no genuine issues of material fact in dispute with regard to each of the elements of this standard, this Court should find that Plaintiff is a “limited-purpose public figure” as a matter of law.

**2. Plaintiff Has No Evidence To Support Essential Elements of His Defamation Claim.**

As noted above, under federal and Texas law, if a plaintiff is properly categorized as a limited-purpose public figure, he cannot recover for defamation unless he can prove that the defendant published a defamatory falsehood with actual malice.<sup>72</sup> To date, Plaintiff has not even produced evidence of a single defamatory falsehood by Defendant, let alone a statement that would meet the federal Constitutional standard of “actual malice.” Because an adequate time for discovery has elapsed and Plaintiff can shown no evidence of these essential elements, this Court should issue a summary judgment in Defendant’s favor on Plaintiff’s defamation claim.

**B. Plaintiff Has No Evidence to Support His Business Disparagement Claim.**

The Texas Supreme Court has noted that a business disparagement claim is similar to a claim for defamation, except that it places more stringent requirements on Plaintiff in three important respects—falsity of the statement, fault of the defendant, and proof of damage.<sup>73</sup> Regardless of whether a plaintiff is a public or private figure, he or she must establish that the defendant published non-privileged false and disparaging information about it with actual malice

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<sup>71</sup> See *McLemore*, 978 S.W.2d at 573.

<sup>72</sup> *McLemore*, 978 S.W.2d 571 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

<sup>73</sup> *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987).

and he must also plead and prove special damages.<sup>74</sup> Even assuming—without conceding—that as an individual, Plaintiff has standing to pursue a business disparagement claim on behalf of a limited liability company that is not a party to this suit, Plaintiff has no evidence of a single false statement that was made with actual malice. Moreover, Plaintiff's discovery responses do not identify any special damages, nor an expert witness who could reasonably connect the harm Plaintiff allegedly suffered to Defendant's alleged conduct.<sup>75</sup> Accordingly Plaintiff has no evidence to support essential elements of a business disparagement claim. Therefore, Defendant is entitled to summary judgment on this cause of action as well.

**C. Plaintiff's Other Causes of Action Fail As a Matter of Law.**

In his pleadings, Plaintiff also pleads causes of action for negligence, tortious interference with existing contract, tortious interference with prospective contract, and invasion of privacy.<sup>76</sup> Both the United States and Texas Supreme Courts have held, however, that the same protections which the First Amendment affords defendants from libel claims also protect them from non-libel claims that are based on the same alleged defamatory publications.<sup>77</sup> Here, Plaintiff, does not identify any conduct on Defendant's part other than making the allegedly-false statements that form the basis of his defamation and business disparagement causes of action. As discussed above, Plaintiff has no evidence to support essential elements on either of these claims. Because these causes of action fail as a matter of law, Defendant is also entitled to summary judgment on all of Plaintiff's remaining claims.

**IV. CONCLUSION**

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<sup>74</sup> *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170–71 (Tex. 2001).

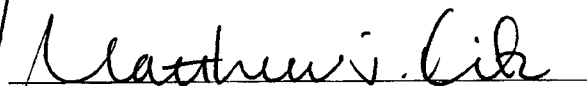
<sup>75</sup> Ex. F, pp. 6, 7, Resp. to Req. for Disclosure (d) and (f).

<sup>76</sup> Pl's Orig. Pet. & App. For Injunctive Relief, pp. 5–6.

<sup>77</sup> *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 942 (Tex. 1988).

The substance of Plaintiff's claims is reflected in the minimal evidence that he has presented to this Court. Having failed to convince this Court that he is entitled to injunctive relief against Plaintiff, he has allowed this suit to linger in hopes that the inconvenience of defending it would persuade Defendant to voluntarily refrain from participating in a public debate. As Plaintiff should have realized after his previous attempts to engage Defendant in public, she has no interest in sacrificing her First Amendment rights for his or Advantage Conferences' benefit. Because Plaintiff has not produced any evidence to support his claims, Defendant is entitled to summary judgment.

Respectfully submitted,



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State Bar No. 03820050

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**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

The undersigned certifies that copy of this document was served on Plaintiff's counsel of record in accordance with Texas Rule of Civil Procedure 21a on February 24, 2008.



MATTHEW J. KITA

**C**

369A 382

CAUSE NO. 05-11461

ADVANTAGE CONFERENCES, LLC,

PLAINTIFF,

VS.

BETTER BUSINESS BUREAU OF  
METROPOLITAN DALLAS, INC.  
AND JON TAYLOR,

DEFENDANTS.

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IN THE DISTRICT COURT

14<sup>TH</sup> JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

**ORDER GRANTING SUMMARY JUDGMENT**

On this 25th day of September, 2006, came on for hearing Defendant Better Business Bureau of Metropolitan Dallas, Inc.'s Motion for Summary Judgment ("Motion") filed on August 21, 2006. The Court, having reviewed the Motion, Plaintiff's Response to the Motion, Defendant's Reply, and all timely filed pleadings, and all competent, timely filed summary judgment evidence, and having heard the arguments of counsel, is of the opinion that the Motion should be GRANTED in all respects.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Better Business Bureau of Metropolitan Dallas, Inc.'s Motion for Summary Judgment filed on August 21, 2006 is hereby GRANTED in all respects.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Advantage Conferences, LLC take nothing from Defendant Better Business Bureau of Metropolitan Dallas, Inc. by reason of its action and that Defendant Better Business Bureau of Metropolitan Dallas, Inc. recover from Plaintiff its costs of court, for which let execution issue.

All relief as between Advantage Conferences, LLC and Better Business Bureau of Metropolitan Dallas, Inc. not expressly granted herein is denied. *This order is interlocutory.*

Signed this 12 day of October, 2006.



*Mary Murphy*  
Judge Presiding

It is now ordered that Court stand adjourned on 10-13-06 morning at nine (9) o'clock.

ORDER GRANTING SUMMARY JUDGMENT - PAGE 1 Court met pursuant to adjournment and there were those present as of yesterday.

**D**

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



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.<sup>2</sup> (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.

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<sup>2</sup> 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

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).<sup>3</sup>

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

<sup>3</sup> 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.<sup>4</sup> (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).

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<sup>4</sup> 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.<sup>5</sup>**

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:

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<sup>5</sup> 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](http://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](http://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:<sup>6</sup> (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

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<sup>6</sup> 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).<sup>7</sup> 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*

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<sup>7</sup> 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 Chapter 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.<sup>8</sup> 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.*

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<sup>8</sup> 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 [14<sup>th</sup> 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."

- Trademark  
"Reverse Margin"

(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 (10<sup>th</sup> 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).<sup>9</sup> 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.<sup>10</sup> 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

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<sup>9</sup> 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."

<sup>10</sup> 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).<sup>11</sup> 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

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<sup>11</sup> 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 (9<sup>th</sup> 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.”<sup>12</sup> 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,<sup>13</sup> 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

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<sup>12</sup> 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).

<sup>13</sup> 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.<sup>14</sup> Not only did the BBB have “evidence” that AC is primarily engaged in promoting a pyramid scheme but that evidence is overwhelming.<sup>15</sup>

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.<sup>16</sup> 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

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<sup>14</sup> 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).

<sup>15</sup> 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).

<sup>16</sup> 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.

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## **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 (5<sup>th</sup> 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 the foregoing privileges, the actual malice standard of fault also applies to AC's defamation and business disparagement claims because AC is a public

figure.<sup>17</sup> *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 (5<sup>th</sup> 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

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<sup>17</sup> 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."<sup>18</sup> 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.<sup>19</sup> (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](http://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](http://ScamsTalk.com),

<sup>18</sup> 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.<sup>20</sup> 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

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<sup>20</sup> 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 [14<sup>th</sup> 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 [1<sup>st</sup> 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 [14<sup>th</sup> 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 [14<sup>th</sup> 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 [14<sup>th</sup> 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,

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**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 21<sup>st</sup> day of August, 2006:

**Via Certified Mail/RRR**

Jason Charles Ciarochi  
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Dallas, Texas 75234

  
\_\_\_\_\_  
David C. Myers

**E**

## **Report from the AC November 2007 Conference:**

Quote:

Tim told \*\* that you stalk him, sit outside his house all hours of the night and watch his family, and that you have made death threats. He told \*\* that the speakers who backed out did so because you personally threatened them. He also told \*\* that they were planning to sue you and they had a iron-clad case against you and that Satan is attacking AC.

## **From Footsteps of Folly (Faith):**

Quote:

...Say the name of Jesus in the marketplace. Do it consistently and watch the demons of hell come out from under the bogs and out of their comfortable cesspools, spewing hideous, wretched venom. Funny thing about those demons – they always prefer to work under the cover of darkness. They're great at espionage and covert, cowardly hit and run tactics. But, boy, do they hate the light.

We've encountered many of those demons on the Internet. They can hurl their lies and hate-filled accusations, saying virtually anything they want about True Believers, their number one targets, because they can denunciate and attempt to destroy with very little fear of reprisal. Virtually all choose to remain anonymous for fear of being exposed! They'll also resort to other methods, like making phone calls to try to malign and destroy a Believer's character, business, and reputation, the content of those messages and calls always being jaded, twisted, and oftentimes, malicious lies...

On the Internet, lies are the essence and substance of the attacks. In my case, one such attacker, a Scambuster, has literally and physically stalked me and my top Representative, Jack Weinzierl, for over two years now....She's made defaming my name and character, including several of our top business associates, a career path. I'm still mystified by her hatred and obsession, but it is indeed the reality we've experienced....

This woman has physically followed us on multiple occasions, taken pictures of our homes, taken pictures of our vehicles (why – I have no idea), our families, and most noticeably, posted negative filth about my character and every move I've ever made in our Christ-centered business - all on a regular basis....

Stalking (I naively thought that just occurred on television)

Organized Attacks (misery loves company – get others involved in the hate fest).....

Death Threats – oh, yeah, lot's of bravado on the Internet!

**From Tim's first Opposition page:**

Quote:

....She has literally stalked me and our top Representatives...

**From Tim's e-mail to his reps October 2007:**

Quote:

...actually included her literal stalking of our homes, my attendance at recreational events, and our public conference events,

**From Tim's latest AC Opposition page:**

Quote:

...posting pictures of our top Rep's homes and cars she “stealthfully” snapped at our events and at their home...yes, but also stalking.



**F**

Tim Darnell Draws	2/9/2006	6000
	4/6/2005	5000
	4/29/2006	5000
	6/1/2006	3000
	6/19/2006	2000
	6/30/2006	2000
	7/13/2006	2000
	7/25/2008	5000
	8/16/2006	2000
	9/5/2006	3000
	9/11/2006	4000
	9/22/2006	5000
	10/13/2006	2000
	10/31/2006	5000
	11/15/2006	3000
	12/1/2006	3000
	12/7/2006	2000
	12/16/2006	1000
	12/21/2000	2000
	12/29/2006	1000
		63000

11/20/2005 Geico Insurance	750.20
11/26/2005 Haverty's	1923.49
12/27/2005 Jared the Galleria	2693.21
11/26/2005 Sears	270.61
Geico Insurance	154.00
Toll Tag	

2006	80
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8033	garage door repair	481.71
8105	Expedia void? Spring break ski trip family = 1	2097.6
8110	Allen Dental Center	373
8203	Dr. Bradley Dean (dental implant?)	4982.99
8229	Income Tax Return 2003 Timothy & Catherine Darnell	1493
8230	Income Tax Return 2004 Timothy & Catherine Darnell	1520



8231	Income Tax Extension 2005	10000
8370	Commercial Liability & Umbrella Policies	1518
8385	Eldorado Country Club / Tim membership	783
8386	Christine Hagen graduation gift	25
8387	Timmy Darnell graduation gift	100
8388	Colby D. Smith graduation gift	50
8583	Carpet Mills America deposit	4000
8608	carpet Mills America	500
8597	air conditioner repair	206
8649	upstairs AC	115
8641	Cottonwood Creek Baptist Church	7000
8695	Farmers Insurance	783
8795	Farmers Insurance	273.71
		36302.01