

No. 401-00376-2016

<b>LE-VEL BRANDS LLC,</b>	§	<b>IN THE DISTRICT COURT</b>
<i>Plaintiff,</i>	§	
	§	
<b>v.</b>	§	<b>OF COLLIN COUNTY, TEXAS</b>
	§	
<b>BRIAN C. MACFARLAND,</b>	§	
<i>Defendant.</i>	§	<b>_____ JUDICIAL DISTRICT</b>

**PLAINTIFF’S ORIGINAL PETITION**

Plaintiff Le-Vel Brands LLC (“Le-Vel”) files this Original Petition against Defendant Brian C. MacFarland, and alleges as follows:

**I. PRELIMINARY STATEMENT**

Simply put, Defendant MacFarland is in the business of disparaging direct sales and network marketing companies, which he refers to as MLMs. Through his website, [www.lazymanandmoney.com](http://www.lazymanandmoney.com), MacFarland has published the blanket statement that “[i]t sounds dangerous to say that every MLM is a scam. However, I have looked at and written about dozens now, there hasn’t been one that has been **CLOSE** to being legitimate.”

MacFarland’s business model is to post articles juxtaposing the name of a well-known network marketing company with the word “scam” in order to drive internet traffic to his website, where he generates profit through advertisements and links to other companies with which he has a financial relationship.

It is not surprising that, as someone who makes a living disparaging companies, MacFarland has already been down this legal road before, when he attacked another network

marketing company called LifeVantage, which sued him for defamation in his former domicile of San Mateo County, California (cause CIV-521137). In that suit, after MacFarland lost an interlocutory appeal (*LifeVantage Corp. v. MacFarland*, No. A-141057, 2015 WL 4506287 (Cal. Ct. App. July 24, 2015)), LifeVantage secured an agreed judgment against MacFarland requiring him to remove his comments pertaining to LifeVantage from his website and to refrain from making statements about LifeVantage in the future.

Le-Vel is not a fraud, a scam, or an illegal pyramid scheme. Nevertheless, when Le-Vel asked MacFarland to remove his defamatory article, he not only refused, but he continued to post new defamatory statements about Le-Vel. Therefore, Le-Vel seeks to recover damages for MacFarland's malicious defamation and disparagement, and seeks a permanent injunction requiring MacFarland to remove his defamatory publications.

## **II. DISCOVERY-CONTROL PLAN**

1. Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4.

## **III. RELIEF**

2. Plaintiff seeks monetary relief over \$1,000,000 and a permanent injunction requiring Defendant to remove his defamatory and disparaging publications.

## **IV. PARTIES**

3. Plaintiff Le-Vel Brands LLC is a Texas limited liability company with its principal place of business in Collin County.

4. Defendant Brian C. MacFarland is an individual residing in Newport County, Rhode Island, and he may be served with process at his home or home office at

The Texas Secretary of State is an agent for service on

Defendant because Defendant engages in business in Texas, does not maintain a regular place of business in Texas or a designated agent for service of process, and this proceeding, to which Defendant is a party, arises out of his business done in Texas.

## V. VENUE

5. Venue is proper in this Court under Tex. Civ. Prac. & Rem. Code § 15.017 because it is a suit for damages for libel, and Plaintiff resided in Collin County at the time of the accrual of the cause of action.

## VI. FACTS

### Le-Vel's Business

6. In 2012, Le-Vel began manufacturing, marketing, and selling innovative nutritional supplements to health and fitness conscious individuals.

7. Under its THRIVE brand, Le-Vel sells nutritional supplement capsules, patches and shake mixes. These products use a unique combination of vitamins, minerals, plant extracts, anti-oxidants, enzymes, pro-biotics, and amino acids to augment healthy lifestyles.

8. Because Le-Vel's products are dietary supplements, Le-Vel consistently states that its products are not intended to cure or prevent any disease.

9. Le-Vel markets and distributes its products through a network of individual Promoters.

10. Le-Vel publishes its Promoter rewards plan publicly on its website at <https://media.le-vel.com/Documents/RewardsPlan.pdf>. A review of this compensation plan shows that it emphasizes retail sales of valuable and effective products. Le-Vel charges no fees or upfront costs to enroll as a Promoter, and is highly focused on increasing sales to customers.

Promoters also specifically agree that they will actively work to establish and maintain a customer base and engage in retail sales.

11. Moreover, Le-Vel promulgates and enforces detailed policies and procedures to ensure that statements regarding its products are accurate and compliant with FDA and FTC guidelines and regulations, and that its Promoters do not make medical or drug claims in association with Le-Vel's products. These policies also emphasize that Le-Vel's success depends on retail sales to the ultimate consumer, and therefore prohibit product stockpiling, or purchasing products solely in an attempt to qualify for advancement in the compensation plan. In fact, Le-Vel's policies also require that, to qualify for commissions, at least 70% of Promoters' sales are to retail customers.

#### **MacFarland and Lazy Man and Money**

12. On or around October 5, 2006, MacFarland created his website Lazy Man and Money, located at <http://www.lazymanandmoney.com> (the "Website"), on which he began publishing his own articles.

13. The Website is a fully interactive Website used for transacting business over the internet, on which MacFarland exchanges files and information with his visitors, and through which MacFarland serves his visitors with advertisements and links from which he receives money. The Website allows users to leave comments, email articles, share articles on social media, email MacFarland, and receive emails from MacFarland. MacFarland offers his users status as a "Lazy Man VIP," where the user provides an email address in exchange for informational emails from MacFarland.

14. MacFarland claims that his Website has had over 4 million visitors, whose locations he can identify, and he estimates that those visitors come from "every country."

15. MacFarland is very active in reading and responding to the comments left by his Website's over 4 million visitors. MacFarland posts comments to his articles and other user comments under the moniker "Lazy Man."

16. The Terms and Conditions on MacFarland's Website state that:

User-generated content (such as comments) are subject to editing by Lazy Man and Money. This editing can include, but is not limited to, changing or omitting URLs, fixing and correcting grammar and/or spelling, and even editing the name of the commenter (usually restricted to cases where a commenter includes their website's tagline in their name). User-generated content may be deleted by Lazy Man and Money. This is usually done in, but limited to, cases where the content is deemed inappropriate or irrelevant to the topic. ...

By generating content, the user grants license to the blog owner to use, modify, delete, sell, etc. all content.

17. MacFarland knowingly and repeatedly collects electronic files called log files from his 4 million visitors, and states that he uses the data contained in those files, which includes "your IP (internet protocol) address, your ISP (internet service provider, such as AOL or Shaw Cable), the browser you used to visit our site (such as Internet Explorer or Firefox), the time you visited our site and which pages you visited throughout our site."

18. MacFarland also notes that he has "a financial relationship with the companies mentioned on [the Website]," and that the Website uses "third-party advertising companies to serve ads and collect information when users visit our site."

19. In the over nine years that MacFarland has been running his Website, he has made continuous and systematic contacts with Texas and its residents. Of the "over 4 million" visitors to his Website, whose locations MacFarland can identify, hundreds if not thousands are likely Texas residents. On the face of the Website alone, at least twelve separate users can be identified as Texas residents through the content of their comments.

20. In November 2009, MacFarland specifically reached out to Texas residents from his Website, offering to “trade personal finance links for your Dallas information,” and providing links, among advertisements, to the Texas residents. At least two Texas residents provided the solicited “Dallas information,” and MacFarland responded to both. MacFarland then travelled to Texas, visiting Dallas, Fort Worth, and Longview.

21. Through his Website, MacFarland continuously and systematically communicates with, shares information with, and serves advertisements to Texas residents.

22. Since 2008, MacFarland has been writing about various multi-level marketing companies (“MLMs”) on his Website.

23. MacFarland holds himself out on the Website as “somewhat of an expert on MLM/pyramid scheme fraud.”

24. MacFarland uses all of this to further his business model of using the name of a well-known network marketing company next to the word “scam” in order to drive internet traffic to the Website for the profit he generates through advertisements and links to other companies, about which he states on his Website “...we have a financial relationship with the companies mentioned on this site.” MacFarland has posted at least 25 such articles.

25. On or around June 26, 2015, MacFarland created the blog post “Is Le-vel Thrive a Scam?” on the Website, specifically at [www.lazymanandmoney.com/le-vel-thrive-scam](http://www.lazymanandmoney.com/le-vel-thrive-scam) (the “Article”).

26. Le-Vel became aware of the Article and its defamatory statements on or about January 5, 2016.

27. In boilerplate at the beginning of the Article, MacFarland promises readers “a special gift” towards the end, but provides a link to skip the Article entirely and to proceed

directly to his commercial push (through links), which he offers “[w]hether you found what you were looking for or not.”

28. In the Article, including Lazy Man’s comments, MacFarland makes, either directly or through implication, false statements or assertions that Le-Vel:

- a. incentivizes its Promoters to make misrepresentations;
- b. is violating FTC guidelines and regulations;
- c. is illegally violating FDA marketing restrictions;
- d. is an illegal pyramid scheme;
- e. is a scam;
- f. is not a legitimate business;
- g. supports Promoters who do not perform any function other than pyramid scheme recruiting;
- h. sets up its Promoters for failure as “a [m]athematical [c]ertainty”;
- i. is a “Pay to Play scheme”;
- j. is overcharging people by fifty times, for hundreds of dollars per year;
- k. sells snake oil;
- l. sells THRIVE patches that are placebos with no ingredients; and
- m. sells THRIVE M supplements that are incomplete multivitamins.

29. MacFarland also groups Le-Vel with all MLM companies, therefore implicating Le-Vel in the following statements from his article “Is Every MLM a Scam?”:

- a. “It sounds dangerous to say that every MLM is a scam. However, I have looked at and written about dozens now, there hasn’t been one that has been

**CLOSE** to being legitimate. Is every person in prison guilty of a crime? I can't be certain for sure, but at some point the pattern is unmistakable.”

b. “...these very high ranking people at MLMs are running illegal pyramid schemes.”

c. “I am against [direct selling/network marketing companies], but only because there is obvious fraud and the lack of active regulatory body (yes I'm looking at you FTC) has created an environment where deception is rewarded and legitimacy is severely punished.”

30. As of the date of the filing of this Petition, there were 180 comments posted on the Article.

31. The Article has had significant circulation in Texas, and was received and read by Texas residents. MacFarland aimed the Article about a Texas company at Texas, knowing that the effects of the Article would be felt in Texas. The Article concerns the Texas activities of a Texas company, specifically claiming that Le-Vel is conducting an illegal pyramid scheme, scamming and overcharging customers, violating FTC and FDA regulations, and selling ineffective products, all in Texas.

32. The Article impugns the reputation, ethics, and professionalism of a Texas company, and the brunt of the harm and injury caused by the Article is suffered in Texas.

33. Further, the sources that MacFarland relied upon for the Article, such as Le-Vel's website, and the Le-Vel Rewards Plan (which MacFarland calls the compensation plan, and to which he links, via Le-Vel's website), are located in Texas.

34. On January 18, 2016, Le-Vel sent MacFarland a letter notifying him of the defamatory nature of the Article, and demanding that he retract the statements by removing the



Article by January 25, 2016. MacFarland acknowledged his receipt of the letter on the same day. However, not only did MacFarland refuse to retract or remove his Article, but he continued to post new defamatory statements about Le-Vel after receiving the letter.

35. On January 26, 2016, Le-Vel served on MacFarland, through his attorneys, a second letter, specifically referencing Texas Civil Practice and Remedies Code Section 73.055. The letter notified him of the defamatory nature of the Article, and demanded that he retract the defamatory statements. The letter also identified Le-Vel as the maker of the request, stated with particularity the false and defamatory statements contained in the Article, which identifies the time and place of their publication, and alleged the defamatory meaning of the statements, which is evident from the express language of the publication. This letter was signed by Le-Vel's authorized attorneys.

## **VII. COUNT 1 – DEFAMATION**

36. Plaintiff incorporates paragraphs 1-35 as if fully set forth here.

37. MacFarland published numerous written statements to the public on the internet, asserting as fact that Le-Vel: incentivizes its Promoters to make misrepresentations; is violating FTC guidelines and regulations; is illegally violating FDA marketing restrictions; is an illegal pyramid scheme; is a scam; is not a legitimate business; supports Promoters who do not perform any function other than pyramid scheme recruiting; sets up its Promoters for failure as “a [m]athematical [c]ertainty”; is a “Pay to Play scheme”; is overcharging people by fifty times, for hundreds of dollars per year; sells snake oil; sells THRIVE patches that are placebos with no ingredients; and sells THRIVE M supplements that are incomplete multivitamins.

38. Defendant's statements referred to Le-Vel and its products by name.

39. Defendant's statements were defamatory per se because they injured Plaintiff in Plaintiff's business reputation. Defamation per se entitles Plaintiff to a presumption of general damages.

40. Defendant's statements were false because Le-Vel does not incentivize its Promoters to make misrepresentations; is not violating FTC guidelines and regulations; is not violating FDA marketing restrictions; is not an illegal pyramid scheme; is not a scam; is a legitimate business; does not permit Promoters to perform no function other than pyramid scheme recruiting; does not set up its Promoters for failure as a mathematical certainty; is not a pay to play scheme; is not overcharging people by fifty times, for hundreds of dollars per year; does not sell snake oil; sells THRIVE patches that are not placebos, but contain plant extracts, and co-enzymes; and sells THRIVE M supplements that are not incomplete multivitamins.

41. In making the false statements, Defendant was acting with actual malice, because he knew the statements were false when he made them, or at least entertained serious doubt as to the truth of the statements. For instance: Le-Vel's Rewards Plan, showing that Le-Vel is not an illegal pyramid scheme, is publicly available online; Le-Vel publicly lists the ingredients in all of its THRIVE products, showing that they are not placebos with no ingredients; and nowhere in Le-Vel's sales or marketing material, which Defendant reviewed, does Le-Vel claim to sell a multivitamin.

42. Defendant's malice entitles Plaintiff to exemplary damages under Texas Civil Practice & Remedies Code section 41.003(a).

43. Alternatively, Defendant was negligent in making the defamatory statements, in that he knew or should have known that the defamatory statements were false, and the content of

the statements would warn a reasonably prudent person of their defamatory potential. This is especially true for MacFarland in light of his experience in the California suit.

44. Defendant's false statements caused injury to Plaintiff.

### **VIII. COUNT 2 – BUSINESS DISPARAGEMENT**

45. Plaintiff incorporates paragraphs 1-44 as if fully set forth here.

46. Defendant published disparaging words about Plaintiff's economic business interests. Specifically, Defendant stated to the public on the internet that that Le-Vel: incentivizes its Promoters to make misrepresentations; is violating FTC guidelines and regulations; is illegally violating FDA marketing restrictions; is an illegal pyramid scheme; is a scam; is not a legitimate business; supports Promoters who do not perform any function other than pyramid scheme recruiting; sets up its Promoters for failure as "a [m]athematical [c]ertainty"; is a "Pay to Play scheme"; is overcharging people by fifty times, for hundreds of dollars per year; sells snake oil; sells THRIVE patches that are placebos with no ingredients; and sells THRIVE M supplements that are incomplete multivitamins.

47. Defendant's statements are disparaging in that Defendant intended that they cast doubt on the quality of Plaintiff's products, Plaintiff's financial position, and the character of Plaintiff's business.

48. Defendant's statements were false because Le-Vel does not incentivize its Promoters to make misrepresentations; is not violating FTC guidelines and regulations; is not violating FDA marketing restrictions; is not an illegal pyramid scheme; is not a scam; is a legitimate business; does not permit Promoters to perform no function other than pyramid scheme recruiting; does not set up its Promoters for failure as a mathematical certainty; is not a pay to play scheme; is not overcharging people by fifty times, for hundreds of dollars per year;

does not sell snake oil; sells THRIVE patches that are not placebos, but contains plant extracts and co-enzymes; and sells THRIVE M supplements that are not incomplete multivitamins.

49. In making the false statements, Defendant was acting with actual malice. Defendant: knew that the statements were false when he made them, or at least acted with reckless disregard as to the truth of the statements in that he entertained serious doubt as to the truth of the statements; was acting with ill will; and intended to interfere with Plaintiff's economic interests. Defendant's malice entitles Plaintiff to exemplary damages under Texas Civil Practice & Remedies Code section 41.003(a).

50. Defendant published his statements without privilege.

51. Defendant's publication caused pecuniary loss to Plaintiff.

#### **IX. EQUITABLE RELIEF**

52. Plaintiff incorporates paragraphs 1-51 as if fully set forth here.

53. Plaintiff seeks, after trial and an adjudication of the defamatory nature of Defendant's statements, a permanent injunction requiring Defendant to permanently remove his defamatory publications from his Website and any other medium.

54. Plaintiff is entitled to the relief demanded on its defamation and business disparagement claims, and that relief requires that Defendant be required to permanently remove his defamatory publications from his Website and any other medium.

55. The harm to Plaintiff is imminent. Defendant is currently and continuously publishing defamatory and disparaging statements concerning Plaintiff.

56. There is no adequate remedy at law to protect Plaintiff from the irreparable injury that will occur to it if Defendant is allowed to continue publishing defamatory and disparaging statements concerning Plaintiff. If Defendant is permitted to continue publishing defamatory and

disparaging statements concerning Plaintiff, it would irreparably harm Plaintiff's business interests, in an amount that cannot be measured by any certain pecuniary standard.

#### **X. CONDITIONS PRECEDENT**

57. All conditions precedent to Plaintiff's claims for relief have been performed or have occurred.

#### **XI. JURY DEMAND**

58. Plaintiff requests a jury to all triable issues.

#### **XII. PRAYER**

59. For these reasons, Plaintiff asks that the Court issue citation for Defendant to appear and answer, and that Plaintiff be awarded a judgment against Defendant for:

- a) Actual damages, general and special;
- b) Exemplary damages under Texas Civil Practice & Remedies Code section 41.003(a);
- c) A permanent injunction requiring Defendant to permanently remove his defamatory publications from his Website and any other medium;
- d) Prejudgment interest;
- e) Post-judgment interest;
- f) Costs; and
- g) All other relief to which Plaintiff is entitled.

Respectfully submitted,

**LACKEY HERSHMAN, LLP**

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