

BBB NATIONAL PROGRAMS
The Direct Selling Self-Regulatory Council

Case Number: 24-2020 – NGO Inquiry – Le-Vel Brands LLC

COMPANY DESCRIPTION

Le-Vel Brands LLC (“Le-Vel” or the “Company”) is a multi-level direct selling company that was founded in 2012 and sells health and wellness products. The Company’s products include dietary supplements containing vitamins, minerals, plant extracts, antioxidants, enzymes, probiotics, and amino acids.

BASIS OF INQUIRY

The Direct Selling Self-Regulatory Council (“DSSRC”) is a national advertising self-regulation program administered by BBB National Programs, Inc. Pursuant to section D(II) of DSSRC’s Policies & Procedures, DSSRC may commence an inquiry regarding the marketing disseminated by a direct selling company and/or its salesforce where the subject claims were referred to DSSRC by the Administrator of the Direct Selling Association’s Code of Ethics, through media reports, or identified by other parties. Here, a nonprofit, non-governmental organization (NGO) dedicated to protecting consumers¹ identified to DSSRC certain product and income claims for Le-Vel.

Below are representative samples of the types of claims that formed the basis for this inquiry.

1. Health-Related Product Claims

The representative core health-related product claims that formed the basis of this inquiry are set forth below.

- “Do you struggle with any of these issues?

- Headaches.
- Struggling to lose weight.
- Thyroid issues.
- Anxiety.
- Depression.
- Skin issues like psoriasis, eczema & acne.
- Digestive problems.
- Sugar cravings.
- Low energy level.

If your answer is, HECK YES! I soooo feel you. I was right there with you.”

¹ See Tina.org for additional information.

- “Well...Monday I came home from an amazing best friend cruise that my roommate ended up having the flu...then the rest of the week we’ve been to the vet to get the dogs shots and meds for poor cypress for his allergies...the dr twice for one child that has Flu A and the other with a cough but thank God no flu...but still no leaving the house so had to miss soccer 🏈😞 We missed Jason Aldean but were able to gift our tickets to friends that deserved a date night .. so right now friends .. we cheers to the THRIVE EXPERIENCE bc without it I doubt we would have avoided the flu, the cough or the chaos!! #fluA #notusetho #thrivegoturback”
- “I LOVE THRIVE...for those of you who don’t know I am diabetic and was diagnosed 8 years ago. For 8 years my sugar levels have been out of whack even on meds, my fasting blood when id wake up in the mornings was never under 250 sometimes as high as 350...since I started thrive 1 month ago my sugar levels have improved so much. For 3 weeks now my levels ranged from 115 to 130 even in the evenings it is still stable. My energy level has increased, my sugar cravings are gone (soda free for 3 ½ weeks), I feel absolutely amazing and I’ve lost 10 lbs. Its not a diet it’s a lifestyle change. So come people what are you waiting for THRIVE WITH ME!”

2. Earnings Claims

The NGO also called DSSRC’s attention to a number of earnings claims being disseminated by the Company which it believed were atypical. Such earnings claims allegedly conveyed the financial gains consumers will achieve by becoming promoters as well as that the Company’s promoters can, among other things, become millionaires, get out of debt, go on extravagant vacations, and drive luxury cars. The representative claims that formed the basis of this inquiry are set forth below.

- Video depicting promoters on vacation holding “millionaire” signs
- “Over 100 Thriving Millionaires awarded”
- “I don’t even know how to begin writing this. Today at noon I officially hit the millionaire’s club, making me the youngest person in company history to earn a million dollars in commissions 😭

Just over two years ago I joined this company completely broken, broke & lost with no idea how to pull myself out of the hole I was in. What I didn’t know is that god had a plan and purpose for my ☐ YES ☐ and he was about to show just mighty and powerful his love truly is.

Today isn’t monumental because I want to hold the title of being a millionaire; it’s because of what that million dollars represents.”



- “I was cleaning out my office today and found the very first dream board I made when I started my business two years ago. These were those far out dreams that I N E V E R thought would be possible in this lifetime

He was away in the oil field for 14 days straight

I had 3+ maxed out credit cards

Over 70k in combined debt

Zero income to my name

Zero savings

All I wanted was to be able to breathe and feel like I could contribute to our life.

Within 5 months every single item on this bboard was crossed off 🥹”

IDENTIFICATION OF ISSUES

1(A). Health-Related Product Claims

According to the NGO, Le-Vel, directly and through its promoters, has been using – and continues to use – unsubstantiated, and therefore deceptive, health-related and disease-treatment claims to market its flagship product line of supplements, shakes, and patches, known collectively as the Thrive experience.

In addition to the representative health-related claims identified above, the NGO stated that it has compiled more than 50 additional examples of what it claimed are unsubstantiated health and disease-treatment claims made about Thrive products, such as being able to treat, cure, or alleviate the symptoms of a number of health-related conditions including, among other, anxiety, breast cancer, blood pressure, depression, thyroid issues, the flu, multiple sclerosis, psoriasis, eczema, and diabetes.

1(B). Alleged COVID-19 Claims

After the commencement of this inquiry, the NGO brought to DSSRC's attention additional health-related claims being disseminated on behalf of Le-Vel which the NGO argued inaccurately implied that the Company's Thrive products can help treat and/or prevent COVID-19 by improving an individual's immune system. Specifically, the NGO pointed to a YouTube video released by the Company that discussed the Company's Thrive products as recharging the immune system. In this YouTube video, the statement the Thrive patch is "designed to help recharge the immune system" appears several times and is interspersed over illustrations of a human body's functioning immune system and depictions of men and women wearing the Thrive patch while they sleep. According to the NGO, the subject YouTube video was released "at a time when the only illness anyone anywhere is talking about is the coronavirus" while communicating that Le-Vel products recharge the immune system. According to the NGO, "immune boosting claims made in the context of the coronavirus are not structure/function claims, but rather implied disease treatment and prevention claims, requiring substantiation and FDA approval."

The NGO also flagged a Le-Vel promoter's social media post stating the Company's products would "kick covid19's ass."

2. Earnings Claims

In addition to the earnings claims set forth above in the Basis of Inquiry, the NGO alleged that it had compiled over 100 additional atypical and unsubstantiated earnings claims that are or have been disseminated in the marketplace by Le-Vel and/or its promoters.

With respect to earnings claims being disseminated by or on behalf of the Company, the NGO argued that Le-Vel and its promoters are using atypical, and unsubstantiated income claims regarding the financial success consumers will achieve by becoming Company promoters. More specifically, the NGO alleged that Le-Vel and its promoters advertise that Le-Vel's promoters can become millionaires, get out of debt, go on extravagant vacations, and drive luxury cars.

The NGO also asserted that such unqualified earnings claims are not only disseminated by the Company's promoters but also made directly by the Company itself. For example, the NGO cited to a February 2020 video published on the Company's YouTube channel, in which the Company's co-CEOs discuss the benefits of the Company and its compensation program while the following images of Le-Vel promoters holding "millionaire" signs are shown on the screen:



Le-Vel's Jason Camper & Paul Gravette

2,718 views • Feb 10, 2020

103 1 SHARE SAVE ...



Le-Vel's Jason Camper & Paul Gravette

2,718 views • Feb 10, 2020

103 1 SHARE SAVE ...

Similarly, the NGO alleged that similar messages are being disseminated by Company promoters on social media and pointed to a social media post in which a Le-Vel promoter touted her achievement of obtaining the Company's "Millionaire Award."

The NGO alleged that the such social media posts are typical of the 140 examples of Thrive marketing materials that the NGO compiled and that the internet is "littered" with these types of income claims being disseminated on behalf of Le-Vel.

In response to Le-Vel's written response to this inquiry, the NGO stated that while it appreciated Le-Vel's compliance program and the efforts made to date to eradicate

deceptive marketing, a plethora of deceptive earnings claims have been in circulation for years and, it argued, continue during the pendency of this inquiry.²

According to the NGO, one reason for this allegedly frequent noncompliance is that the Company either does not understand – or is ignoring – Federal Trade Commission (“FTC”) law as it pertains to consumer testimonials used in marketing and the requirement that they depict results that are “representative of what consumers will generally achieve.”³ The NGO noted that such legal requirements are neither laid out in the company’s Promoter Agreement nor in any of the other materials provided by the Company. Further, the NGO characterized Le-Vel as taking the position that advertising atypical claims is appropriate so long as they are truthful, which is contrary to the law.

Specifically, according to the NGO, Le-Vel claims that it can advertise an auto bonus provided to less than one quarter of promoters having at least one active team member (i.e., less than one quarter of some percentage of Le-Vel promoters) without issue. The NGO further asserted that there can be no dispute that if less than one quarter of promoters is the sum total achieving a certain bonus, then that bonus is not typical or generally achievable, which according to the NGO means that it is a deceptive marketing claim pursuant to FTC law.

In addition, the NGO claimed that Le-Vel takes the position that it may advertise VIP bonuses and vacations achieved by “thousands” of promoters without providing any information regarding how many promoters achieve the advertised bonuses – i.e., how typical these bonuses and perks are.

Similarly, with respect to the Company’s “Millionaire Award,” the NGO characterized Le-Vel as taking the position that it can advertise that some of its promoters have earned \$1 million in commissions without disclosing the likelihood of achieving this result.⁴

In response to Le-Vel’s assertion that several posts identified by the NGO “appear to make no claims related to Le-Vel” and cites to four examples from the NGO’s database, the NGO maintained that each of the income claims was unquestionably made by a Le-Vel promoter and that the words “Le-Vel” or “Thrive” need not be included in each claim for it to be attributable to the company in keeping with the FTC’s longstanding practice of

² The NGO removed one claim in its own Thrive Health Claims database from a promoter that markets a Thrive product that is not associated with Le-vel.

³ See FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR 255.2.

⁴ The NGO also stated that it made two attempts at contacting the company to obtain its income disclosure statement, which it alleges is not published, but that Le-vel has not agreed to provide such information. DSSRC notes that there is not a per se requirement that a direct selling company possess an income disclosure statement. Specifically, § 10 of the FTC’s Business Guidance Concerning Multi-Level Marketing states “As stated in the Business Opportunity Rule’s Statement of Basis and Purpose, the Commission crafted the Rule to avoid broadly sweeping in MLMs. It did so by tailoring the definition of business opportunity to exclude certain types of business assistance common to MLMs. 76 Fed. Reg. 76816, 76824 (Dec. 8, 2011). It is important to note, however, that the Rule does not explicitly exempt MLMs from coverage. As with any other business entity, the determination whether an MLM would be a business opportunity to which the Rule applies would have to be made on a case-by-case basis.”

examining “the entire mosaic, rather than each tile separately” when reviewing advertising.⁵

In short, the NGO argued that simply addressing the items the NGO identified is not a sufficient remedy and that Le-Vel needs to fully understand and accept the law as it pertains to its marketing and the Company’s promoters in order for any guidelines or compliance program to be effective.

COMPANY’S POSITION

Background

Le-Vel stated that it has millions of customers for its health and wellness products including its dietary supplements. As a direct-sales company, Le-Vel maintained that it has devoted considerable resources to assuring that its distribution model and marketing are fully compliant with FTC guidelines for multilevel marketing (“MLM”) programs. The Company stated that each of its promoters’ earnings are based on actual sales, not recruiting commissions. The Company further maintained that there is no sign-up fee for customers or promoters, and there is never any fee outside of the cost to purchase and ship products. The Company informed DSSRC that its product is shipped directly to end consumers, and there is no re-selling, which, when combined with the Company’s strict inventory policies, precludes inventory loading. Le-Vel stated that its promoters have no purchase requirement to earn and receive commissions. The Company stated that it also has a 30-day return policy and that the rate of repeat purchases by consumers confirms that consumers are happy with the product and there is a substantial market for the Company’s products. Le-Vel argued that over 60% of revenue is generated from customer sales, that is, sales to individuals who are not involved in the compensation plan and cannot receive commissions.

The Company maintained that its focus on compliance is reflected in a series of policies, standard operating procedures, and training materials designed to avoid potentially problematic claims. Specifically, Le-Vel stated that it has made good-faith efforts to implement and enforce its policies by searching for non-compliant media posts, issuing compliance notices to promoters who have violated company policies, and, if necessary, suspending or terminating promoters who continue to be in violation of the Company’s guidelines.

In addition, Le-Vel stated that its compliance department is run by a Chief Compliance Officer who reports directly to the President of the Company. The compliance department consists of 11 employees who constantly monitor the activities of promoters to assure compliance with Le-Vel’s policies and provide ongoing training to ensure promoters are fully aware of how to be compliant and act accordingly. Le-Vel also informed DSSRC that it employs a third-party reputation management service to search social media posts and report possible infractions. The Company contended that because

⁵ See FTC Policy Statement of Deception, https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

of its careful and proactive training, the majority of Le-Vel's promoters understand and comply with company policies. The Company noted that it regularly issues notices identifying potential violations. In fact, the Company stated that it has issued between 78 and 123 letters per month flagging non-compliant posts by promoters. Le-Vel argued that these letters typically result in quick compliance, but that its compliance department does continue to monitor problematic posts and sends monthly follow-up letters to promoters if corrective steps are not taken. Ultimately, a promoter may be suspended from the program if their posts remain problematic and are not remedied. Le-Vel stated that in recent months, approximately 6 promoters per month have been suspended, or permanently terminated. Le-Vel also stated that the number of promoters who are terminated is less than those that are suspended but that the Company will terminate promoters where necessary.

1(A). Health-Related Product Claims

Le-Vel argued that it takes a conservative approach to health-related claims and that the Company gives new promoters specific instructions on how to avoid improper health claims, including claims about treatment or prevention of disease, and provides guidance on permitted statements.⁶ In the specific area of weight loss, the Company maintained that its policy strictly conforms to the FTC "Red Flags" guidance and prohibits claims "that indicate a large amount of weight loss in a short period of time or statements specifically excluding diet and exercise during the weight loss process," and, in particular, claims of weight loss over 2 pounds per week.

As a general matter, the Company stated that it has restricted permitted health and wellness claims to very soft claims that are widely accepted and recognized for the vitamin and nutrient ingredients in its products.

The Company stated that its review of the posts identified by the NGO with respect to health-related and disease treatment claims indicate that 19 of the identified posts were either removed or could not be found by the Company for other reasons. The Company also stated that one of its promoters appeared to have self-corrected her social media post without even receiving a compliance notice from Le-Vel. In addition, the Company stated that, prior to the commencement of DSSRC's inquiry, seven of the identified social media posts were voluntarily removed or unpublished following the Company's issuance of compliance notices to the promoters who authored those posts. For example, a "Thyroid Disorder YouTube" video was removed after Le-Vel issued a compliance notice in May of 2016.⁷ Similarly, Le-Vel stated that an "ADHD, Diabetes Pinterest" page was taken down in 2017 after Le-Vel sent a compliance notice in June of the same year.⁸ Le-Vel maintained that both letters identified the problematic language in the posts and reminded the promoters in question that they are prohibited from making medical or drug-related claims. In addition, Le-Vel stated that at least one post ("Anxiety YouTube") does not relate to Le-Vel at all, and yet another

⁶ In this regard, the Company provided DSSRC with a copy of its Training Guide, Medical/Drug Claims.

⁷ The Company also provided DSSRC with a copy of its Compliance Letter to this promoter.

⁸ The Company provided DSSRC with a copy of its Compliance Letter to this promoter as well.

("Diabetes_Twitter") is maintained by a commercial Twitter account that is not owned or controlled by Le-Vel or any of the Company's promoters. The Company also pointed out that one of the identified posts relates to Le-Vel's breast cancer awareness PINK DFT fundraising campaign and did not contain any health-related claims relating to Le-Vel products.

Le-Vel agreed that 28 of the remaining social media posts identified by the NGO violate the Company's guidelines and stated that compliance action had been taken to remove or revise all of such posts.⁹ The Company further stated that it will continue to take appropriate action pursuant to its compliance policies and procedures. While Le-Vel stated that it did not believe every aspect of each identified post was necessarily objectionable, it recognized that a number of the posts contained certain health-related claims that may not be consistent with the Company's policies. The Company reiterated that it takes a very conservative approach to these matters in a concerted effort to avoid any consumer misunderstanding. Thus, and in accordance with its policies, Le-Vel stated that it had contacted the promoters who are still with the Company and instructed them to remove or revise improper aspects of the posts. As of April 6, 2020, the Company stated that 21 of the 28 posts that Le-Vel agreed violated the Company's guidelines were removed or revised. The Company further stated that it would continue its compliance efforts with respect to the seven remaining posts and that it would take graduated enforcement actions if corrective actions are not taken, including suspension and termination of promoters' accounts. Le-Vel stated that it suspended the accounts of 5 promoters who have failed to revise or remove the posts at issue.

1(B). Alleged COVID-19 Claims

With respect to the alleged COVID-19 claims identified by the NGO during the pendency of this inquiry, Le-Vel stated that it is incredibly mindful of the rapidly evolving pandemic and the health and safety of consumers. Since the current health crisis began, Le-Vel stated that it has strongly warned promoters both in writing and verbally not to make express or implied claims referencing COVID-19, the coronavirus, or the current pandemic. Indeed, the Company provided DSSRC with an April 24, 2020 "Compliance Update" to promoters that states:

It is important to understand that our work-at-home opportunity, in addition to the health benefits of our products, can in no way be associated with COVID-19, coronavirus, the global pandemic, etc. Accordingly, please refrain from making any type of post or video that mentions our company or products and the coronavirus, COVID-19, pandemic, or any other term or phrase related to the coronavirus.

Le-Vel also provided DSSRC with a document entitled "Compliance Update: DFT RECHARGE" dated March 30, 2020 which states "[I]t is important that we do not state or imply—in any way—that our products help to prevent or treat any type of cold, flu, or virus. This, of course, includes the Coronavirus/Covid-19." The Company noted that

⁹ The Company also noted that three of these 28 posts were authored by a promoter who resigned in 2018 and is no longer affiliated with Le-vel's program.

this prohibition is an extension of its existing policies prohibiting disease treatment claims.¹⁰

Le-Vel agreed that the social media post with references to COVID-19 was inappropriate and violated the Company's policies and guidelines regarding disease treatment claims, as well as the specific prohibition on claims related to the coronavirus and/or COVID-19. The Company stated that within 30 minutes of learning of the non-compliant post, its Compliance Team sent a notice to the promoter, directing her to take down the post. Le-Vel provided DSSRC with a copy of the Company's Compliance Letter dated April 29, 2020. Le-Vel further argued that it has been proactive in issuing compliance notices and following up with promoters who have made prohibited health-related or business opportunity claims related to COVID-19 and provided DSSRC with examples of such communications. The Company reiterated that its compliance staff will continue to follow up with the promoter responsible for the post and take progressive enforcement action if the promoter does not take corrective steps to come into compliance with its policies, including suspension and/or termination of the promoter's account.¹¹

Regarding Le-Vel's DFT Recharge product, the Company maintained that it does not market that product for the treatment or prevention of COVID-19 and that Le-Vel instructs promoters not to "state or imply that DFT Recharge, or any other of our products, prevents, treats, cures, or helps with the Coronavirus/Covid-19." Conversely with respect to the video regarding Le-Vel's DFT Recharge product, the Company argued that representations that Le-Vel's products support the immune system are well-accepted structure-function claims that are in compliance with the Company's guidelines and federal law.¹² Le-Vel argued that it has long made such claims with respect to products containing vitamins, minerals, and other ingredients that are understood to have that effect on the immune system. Indeed, the Company argued that such claims are pervasive in the marketplace for a range of wellness products, and that it would represent a dramatic and unwarranted shift to impose new restrictions on such claims.

2. Earnings Claims

The Company argued that it also takes a conservative approach to earnings claims. Le-Vel stated that specific individual earnings may not be used in marketing

¹⁰ See, e.g., Le-vel Policies and Procedures, Section 2.20 (last rev. November 1, 2017): ("Le-vel's products are not intended to help, treat, cure, mitigate, or diagnose any type of disease or disorder. Promoters understand that they will not say directly or indirectly that any Le-vel product is FDA approved, or discuss or suggest that any diagnosis, evaluation, prognosis, description, treatment, therapy, or management or remedy of illness, ailment or disease can be improved by consumption or application of Le-vel products. Promoters understand that Le-vel products are not offered, intended or considered as medicinal treatment of any disorder or disease, either mental or physical.").

¹¹ The social media post in question has since been removed.

¹² 65 Fed. Reg. 1,000, 1,029 (2000) ("An intact immune system has several functions. In addition to their role in the defense against pathogens, certain components of the immune system, namely white blood cells, have other important functions. For example, white blood cells play an essential role in the phagocytosis and disposal of aging red blood cells or otherwise damaged cells. A statement of support for the immune system, by itself, conveys no specific reference to disease treatment or prevention. The claim that vitamin A is necessary to maintaining a healthy immune response does not imply that a specific disease or class of diseases will be prevented.").

material and promoters may not make statements that are likely to mislead consumers or prospective promoters. As an initial matter, the Company stated that its review of the earnings claims identified by the NGO found that three of the identified posts were either removed or could not be found for other reasons. Further, the Company maintained that several posts identified by the NGO appeared to make no claims related to Le-Vel at all. Of the remaining identified earnings claims, Le-Vel agreed that 67 of those claims violated the Company's policies and/or made prohibited earnings claims or references. Le-Vel stated that these types of claims are not consistent with the Company's guidelines and that it has taken swift compliance action to ensure that such posts would be removed or revised. The Company stated that it removed a significant number of these claims and that its compliance staff would continue to follow up to ensure compliance with Le-Vel's policies.

Le-Vel also stated that the problematic posts containing earnings claims were concentrated among a small number of promoters (15) and that the small number of promoters will enable the Company's staff to focus more attention on these promoters, review their posts and any patterns of potentially problematic behavior, and provide further education on the Company's policies and procedures. Thus, Le-Vel maintained there was no indication of widespread promoter non-compliance with its policies or applicable law and, further, that the Company has been able to focus its attention on promoters who present more compliance issues for the Company. When potential violations of the Company's guidelines have been identified, Le-Vel stated that it has acted quickly to remediate the issue, as evidenced by its various actions and the number of social media posts that have since been removed or revised.

Le-Vel rejected the NGO's assertion that the Company takes "the position that advertising atypical claims is appropriate so long as they are truthful." The Company maintained that it has never taken this position and that it in fact goes to great lengths in its training to make sure that promoters understand the law on this point.¹³ Indeed, Le-Vel stated that the Company's policy prohibits specific earnings claims for this reason and that the Company's policies and promoter training emphasize to promoters that individual claims are not permitted solely because they are true as to that individual. In this regard, Le-Vel maintained that its guidelines and training reflect and reinforce current federal law.

Le-Vel did argue, however, that several categories of the posts identified by the NGO should not be considered problematic or deceptive. For example, many of the social media posts identified by the NGO reference auto bonuses, VIP bonuses, or earned trips or getaways. The Company stated that these rewards are readily achievable by promoters.

¹³ The Company cited to its "Compliance Education and Strategy" Training Video which states "The problem is, just because it's true doesn't mean that we can say that to the world. And why is that? It's because we're selling a product behind that story. And so the FTC is concerned about us telling a story that could possibly mislead somebody to believe that our products can do for them exactly what it's done for you. So that's why we just have to be careful." The Company also cited to its "Compliance Training Opportunity" Email Template ("Making income earnings claims, even if true, is against our policies.").

Specifically, Le-Vel argued that it provides qualifying promoters with auto bonus payments of up to \$800 per month towards a car payment as opposed to an actual car purchased for the promoter by Le-Vel. The Company also offers a tiered bonus for achieving certain requirements within the promoter's first 14 days in the program (i.e., VIP bonuses). Le-Vel also stated that it rewards qualifying promoters with all-inclusive getaway trips. Le-Vel stated that in March 2020, 23.7% of promoters with at least one active team member qualified for the auto bonus. Similarly, Le-Vel stated that, as of April 2020, 87,957 promoters achieved a VIP bonus since April 2013. Likewise, the Company maintained that over 1,000 promoters qualified for Le-Vel's last getaway trip, and Le-Vel has had over 15,000 individuals qualify for getaway trips in the past 5 years. The Company stated that, while it will remind its promoters to describe the auto bonus accurately and not claim that the Company has given them a free car, it maintained statements regarding such programs are otherwise accurate and reasonable.

Le-Vel also maintained that the NGO has mischaracterized and taken out of context the video of Le-Vel's "Millionaire Award" ceremony, in which Le-Vel celebrates promoters who have earned \$1 million in lifetime commissions. Le-Vel submitted that these are not traditional earnings claims but rather the "Millionaire Award" ceremony is a ceremony at which top performers are recognized which it argued is a universal practice for sales organizations. Le-Vel maintained that the videos and other related company statements about the Millionaire Award make explicit that the promoters featured are a select group as to whom the Company is rightly proud.¹⁴ Le-Vel also noted that the segment featuring the Millionaire Award ceremony appears for only a few seconds in the nearly five-minute YouTube video, which it argued raised a question of whether and how many promoters have seen the segment.

Le-Vel also stated that, in some instances, promoters may refer to their or their teams' total sales volumes although individual or group commissions are not mentioned. Total sales statistics are another routinely disclosed statistic for sales organizations and do not pose any deception concerns according to Le-Vel. In fact, the Company argued that such information confirms its observation that there is a legitimate demand for Le-Vel's products and that the Company is making substantial actual sales.

¹⁴ <https://www.facebook.com/JasonCamperCEO/photos/we-now-have-41-Le-vel-millionaires-brand-promoters-who-have-earned-1-million-dol/2032109570350908/> ("We now have 41 Le-vel Millionaires (Brand Promoters who have earned 1 million dollars in lifetime commissions from selling the fastest growing health and wellness program in the world - The Thrive 8 Week Experience). It's funny, we never set out to help people "become a millionaire" we just wanted to bring to market the most innovative, unique and technology based nutritional products ever seen. Turns out, there's a lot of demand in the market place for what the Thrive Experience does. We'll always be a product based and product first company, however, it's incredible to see this too. Here's to those people in Le-vel and outside of Le-vel, that chase what they want in life hard enough and long enough to see their goals come true. I know my goals didn't come easy, it was 17 plus years of what I thought was mostly failure mixed with a little success. Looking back, those failures were the learning ground, the boot camp if you will, to make Le-vel / Thrive what it is today - with the help of the Lord Almighty and my fabulous business partner @paul_gravette, of course. Congratulations to the Le-vel Millionaires of today and the army of the ones to come, cheers.

#thankfulthursday #1millionaires #werejustgettingstarted"

Le-Vel argued that there is another reason it is confident that promoters in its program are not at risk for loss of money or other harm: Le-Vel does not require any payments or fees to sign up for or participate in the Company's program, and Le-Vel's auto bonus, VIP bonuses, travel benefits, and Millionaire Award all can be earned without any out-of-pocket expenditures by the Company's promoters. This, the Company maintained, eliminates a crucial factor driving enforcement by the FTC and other authorities with respect to income claims: the concern that lavish lifestyle claims could entice consumers to make large initial payments to get into a program and continue to make large payments, when in fact most participants in such programs do not earn back their initial and continuing investments. Because Le-Vel does not require such payments, it maintains that the Company's program does not threaten the types of harm about which regulators are legitimately concerned: heavy losses by a substantial portion of the participant population. While the Company's position is that the claims permitted by Le-Vel's policies are fair and accurate, Le-Vel nonetheless stated that it believes that consumers cannot be harmed by joining the program because they will not lose money by such participation.

Specifically, Le-Vel maintained that a fundamental legal flaw in the NGO's analysis is to lump award and bonus claims indiscriminately together in the broader category of income claims and treat them as if they are all the same. According to Le-Vel, once these claims are properly categorized, it is not at all apparent that the type of disclosure the NGO advocates here would be appropriate. Rather, Le-Vel argued that the frequency of such awards is not typically disclosed by direct-sales or multi-level marketing companies. The Company further maintained that as is the case for all advertising, the interpretation of specific marketing material is context and fact-specific, and not all claims are interpreted in the same way by consumers. Partly because of this diverse universe of potential claims, Le-Vel argued that direct-sales marketers are not required to "calculate a precise mathematical average for the expected results among all potential [promoters] in all situations." See Statement, David C. Vladeck, Fmr. Dir., Bureau of Consumer Protection, Fed. Trade Comm'n, A Look Forward with the FTC: Advertising and Marketing Enforcement Challenges (Feb. 3, 2010).¹⁵ Le-Vel further maintained that the FTC's Endorsement Guides expressly acknowledge that the "representativeness" inquiry ask whether a claim represents what consumers could generally expect to achieve "in the depicted circumstances," in "actual, albeit variable conditions of use." 16 C.F.R. §255.2(b).

According to Le-Vel, approaching awards claims from this starting point makes apparent that discussion of a provision in a compensation plan, like the Le-Vel Rewards Plan, that a participant may be given an award or bonus for reaching a specified level of sales is obviously a different kind of claim than predicting what a typical consumer may expect for future earnings, or weight loss, or some other target that may land anywhere within a broad range of outcomes. According to the Company, reasonable prospective promoters understand that there are specific requirements that must be met for these awards because of the clearly-posted qualification criteria for these awards and bonuses

¹⁵ https://www.ftc.gov/sites/default/files/documents/public_statements/look-forward-ftc-advertising-and-marketing-enforcement-challenges/100203eraspeech.pdf

and the nature of the direct-selling business.¹⁶ Le-Vel argued that the NGO's inflexible application of the FTC's Endorsement Guides' disclosure standards completely ignored the nuances and context-sensitive nature of the subject.¹⁷

Regarding the NGO's contention that Le-Vel has advertised its "Millionaire Award" without disclosing the likelihood of a promoter reaching this level, Le-Vel argued that it does make very clear that only a small number and percentage of promoters get this recognition.¹⁸ The Company argued that thousands of new promoters sign up in a typical month and that there can be no question in the minds of prospective promoters that this award is achieved by only a small group of top performers over the total span of years that they participate in the program. Nonetheless, the Company stated that it will go to even greater lengths on its website to ensure that there is never any doubt that the "Millionaire Award" is an exceptional achievement.

Dispute Regarding the NGO's Characterization of Le-Vel's Compliance

Le-Vel rejected the NGO's overall characterization of its marketing message; specifically, that there is a vast sea of problematic posts from the Company's promoters and that the Company has done little about them. Le-Vel maintained that such characterization is categorically untrue. Specifically, the Company argued that the NGO had evidently been collecting posts for a long period of time but failed to correct and update its own database when posts were taken down, corrected, or shown to be compliant.

In particular, the NGO claimed that as of April 15, 2020, 80% of the income claims and nearly 40% of the health claims it identified in this inquiry were still in publication. Le-Vel characterized this assertion as "wildly inaccurate." In addition to the many posts that Le-Vel did not even believe to be non-compliant, the Company argued that the NGO ignored in its calculations those posts where the non-compliant claim had been edited or removed in order to bring the post into compliance with the Company's policies and applicable law, as well as other posts that do not relate to Le-Vel at all. Le-Vel submitted that with respect to the health claims the NGO identified, nearly 45% of the posts were removed prior to March 11, 2020, the date of the NGO's original letter to the DSSRC. Le-Vel further stated that prior to April 15¹⁹, a further 40% of the posts had been either

¹⁶ In this regard, the Company cited to the "Guides Concerning the Use of Endorsements and Testimonials in Advertising," 73 Fed. Reg. 72,374, 72,378–79 (2008) ("[I]f an advertisement for a casino features a \$100,000 slot machine winner, consumers likely understand from the nature of gambling that the winner's experience is not generally representative of those who use the casino's slot machines.").

¹⁷ The Company further stated that it takes comfort in the statistics that confirm that the promoters who post about these rewards are not outliers, and that such rewards are generally achievable among promoters who engage in sales (beyond purchases for personal consumption). Le-vel stated that significant numbers of promoters earn these benefits, that there is no systemic impediment to qualifying for these rewards, and the benefits are therefore real and not illusory.

¹⁸ Supra Note 14; Le-vel Back Office Resources, (noting that "[t]he Millionaire Award is the most prestigious award a Promoter can earn" and that "100 Promoters have become Le-vel Millionaires").

¹⁹ This is the date on which the NGO claimed that 80% of the earnings claims and 40% of the health-related claims it had identified in this inquiry remained online.

removed or revised in compliance with Le-Vel's guidelines and federal law.²⁰ Thus, Le-Vel rejected the NGO's claim that 40% of the health-related claims identified by the NGO have not been addressed and this does not even account for the posts that required no edits or removal. With respect to the income claims identified, Le-Vel stated that two posts had been removed before the inquiry was commenced and, prior to April 15, over 50% of the posts cited by the NGO had been removed or revised (arguing that this percentage of posts edited or removed does not include the substantial number of posts that required no action). Consequently, Le-Vel maintained that the NGO's claim of 80% of earnings claims remaining online as of April 15, 2020 was flatly inaccurate. The Company further maintained that the NGO pointing DSSRC to posts that were already out of circulation (or that were unobjectionable for other reasons) demonstrates that its analysis is outdated and indicates a lack of care and attention to this matter and that the NGO is relying on misleading and inaccurate claim statistics.²¹

Le-Vel disputed the NGO's argument that Le-Vel's compliance program is seemingly too robust, proactive, and conservative in nature due to the number of compliance notices the Company sends to promoters. The Company stated that the DSSRC has made clear that maintenance of a robust and proactive compliance program is commendable and indeed necessary, not a negative sign. See dōTERRA Int'l LLC, DSSRC Case No. 17-2020 at 13–14 (Apr. 3, 2020) (explaining that the company "provided DSSRC with specific information regarding its proactive monitoring process of supervising and assuring that distributors are compliant with company policies regarding claim dissemination and that it has sufficient procedures in place to respond to any actions by distributors that are potentially in violation of applicable laws and regulations". Le-Vel noted that the company had been responsive when unauthorized health and product claims have been brought to its attention. Furthermore, Le-Vel informed DSSRC that over 1,000 individuals sign up to become Le-Vel promoters every week. Thus, Le-Vel argued that the number of letters the Company sends per month thus represents a tiny proportion of the total number of Company promoters.

Le-Vel argued that the NGO's evident expectation that non-compliant claims, or even borderline and questionable claims, be removed immediately is unreasonable, unrealistic, and not the position previously taken by the DSSRC. Le-Vel also reiterated that it takes a very conservative approach to compliance matters and argued that this means that some promoters might receive notices about posts that a regulator might find unobjectionable, but which Le-Vel thought it would be best to remove or revise in an abundance of caution. In addition, Le-Vel stated that a majority of the Company's notices are sent to promoters in the very early stages of their participation in the program. The

²⁰ As support for its position, the Company submitted to DSSRC a chart of information on the removal or revision of posts identified by the NGO which it argued demonstrated that virtually every post was either removed or revised as requested by Le-vel's compliance department within a day of the promoter being contacted.

²¹ The Company noted that it was particularly concerned about the NGO's approach to this inquiry when it learned that NGO recently posted an article on its website repeating these claims, without considering the Company's response. The Company submitted that the public posting of this article, while this inquiry was ongoing was inappropriate and inconsistent with the DSSRC self-regulatory process.

Company argued that this approach not only serves as protective compliance, but also as a training exercise in which posts that are defensible but potentially problematic still lead to compliance notices and allows the Company to further train and educate newer promoters directly.

Le-Vel noted that it does not have the ability to remove promoters' claims on social media, but instead must ask and encourage promoters to remove and revise their posts. This process can take some time as Le-Vel reaches out to the promoter and the Company and the promoter engage in a dialogue about the non-compliant claim and how to bring the post into compliance with company guidelines. For those posts made by entities that are not related to or controlled by Le-Vel, or by promoters who have resigned or have been terminated from the program, it is possible such posts may remain online if the entities and former promoters are not reachable or are unwilling to remove or revise the posts. The Company contended that the NGO's arguments ignore the reality that Le-Vel will not be able to unilaterally remove such claims from the public domain. Nevertheless, consistent with DSSRC guidance, Le-Vel stated that it uses its best efforts to contact with these entities and former promoters to compel them to bring down or edit their posts, making multiple attempts when necessary.²²

ANALYSIS AND RECOMMENDATION

1(A). Health-Related Product Claims

As discussed above, Le-Vel argued that it takes a conservative approach to health-related claims, and that its own policies limit permissible claims to "soft" claims and prohibit Le-Vel's promoters from making aggressive health-related or disease treatment claims.

DSSRC acknowledges that the Company addressed the representative health-related claims identified in DSSRC's opening letter to the Company. With respect to the 53 other health-related claims that formed the basis of this inquiry, DSSRC acknowledges and appreciates the Company's efforts to have 7 of the identified health-related posts removed from circulation prior to the commencement of this inquiry. DSSRC also appreciates the Company providing DSSRC with an overview of its compliance process ranging from issuance of compliance letters to suspension or termination of a promoter's account in some cases.²³

Le-Vel conceded that another 28 health-related claims identified in this inquiry were against the Company's policies and it took action to have such claims removed

²² See dōTERRA Int'l LLC, DSSRC Case No. 17-2020 at 13–14 (noting that "[r]emoving unauthorized content that was communicated by inactive distributors or by individuals who had no previous relationship with dōTERRA was, not surprisingly, more of a challenge," and acknowledging the company's "good faith efforts" to remove such posts); Global Domains Int'l, DSSRC Case No. 15-2020 (Mar. 23, 2020) ("acknowledg[ing] and appreciat[ing] the Company's efforts to have claims made by inactive distributors removed from circulation").

²³ As DSSRC has previously stated with respect to earnings claims, "Direct selling companies should engage in effective training, monitoring, and enforcement procedures to provide reasonable assurance that claims made by salesforce members are truthful and non-misleading." DSSRC Guidance on Earnings Claims for the Direct Selling Industry ("Earnings Guidance"), § 4.

resulting in the removal of 21 of the 28 claims. DSSRC acknowledges these voluntary steps which DSSRC found to be necessary and appropriate. DSSRC recommends that, to the extent Le-Vel has not already been able to address the seven additional claims, it uses bona fide good faith efforts to have such claims removed or significantly modified.²⁴

With respect to the parties' dispute regarding the Company's response to claims raised in this inquiry, DSSRC notes that the vast majority of the health-related claims identified in this inquiry have been removed from circulation and acknowledges Le-Vel's commitment to continue to pursue and remedy any non-compliant claims. DSSRC also recommends that Le-Vel engage in effective training and monitoring of its promoters and use appropriate enforcement procedures to provide reasonable assurance that claims made by salesforce members are truthful and non-misleading; in particular, that the Company's promoters refrain from making aggressive health-related and/or disease treatment or prevention claims.²⁵

1(B). Alleged COVID-19 Claims

DSSRC has previously urged all direct selling companies and their salesforces to ensure all claims made about health-related products are accurate and to be especially mindful of expressly claiming or implying that their products can treat, alleviate, or cure the symptoms of COVID-19, prevent symptoms of COVID-19, boost or improve immune function to prevent COVID-19, or eliminate all traces of COVID-19. While unprecedented research efforts are taking place on a global scale, according to the World Health Organization, there are no current cures or direct treatments for the novel coronavirus. In the United States, the Centers for Disease Control and Prevention and the Food and Drug Administration ("FDA") have both stated that there are no approved vaccines, drugs, or investigational products currently available to treat or prevent COVID-19.

DSSRC acknowledged and appreciated the Company's proactive steps to warn its promoters not to make express or implied claims referencing COVID-19, the coronavirus, or the current pandemic. DSSRC also acknowledged and appreciated the Company's compliance updates that it provided to DSSRC making clear that any such claims regarding the current health crisis are prohibited by the Company and that such

²⁴ Le-vel noted in this inquiry that it can difficult for a direct selling company to have claims removed from circulation when such claims were disseminated by a promoter who is no longer active. DSSRC acknowledges that a direct selling company may not be able to require a former or inactive promoter to remove a claim. In that instance, DSSRC nonetheless recommends that the direct selling company make a bona fide good faith effort to have the improper claim removed including a written request to remove improper claims made by promoters that have since become inactive. In addition, if the social media platform where the subject post was made provides a mechanism for reporting trademark or copyright violations, DSSRC recommends that the direct selling company promptly utilize such mechanism and seek removal of the subject claims and posts. If the subject claim occurred on a website or platform without a reporting mechanism, DSSRC recommends that in addition to contacting the former promoter in writing as described above, the Company contact the website or platform in writing and request removal of the subject claim or post. Young Living Essential Oils, LLC, Case No. 13-2020.

²⁵ DSSRC encourages direct selling companies to engage in robust monitoring of its salesforce and does not believe that a certain volume of compliance actions will be proof that a direct selling company is not engaging in appropriate training and monitoring of its salesforce members especially when a direct selling company may have hundreds or thousands of new salesforce members enrolling each month.

prohibition is an extension of Le-Vel's existing policies prohibiting disease treatment claims.

With respect to the social media post identified by the NGO, DSSRC acknowledged Le-Vel's prompt actions to seek removal of the post referencing COVID-19 and confirmed that the post was removed. DSSRC determined that removal of such post was necessary and appropriate.

DFT: Recharge YouTube Video

With respect to the 58 second YouTube Video "DFT: Recharge" disseminated by Le-Vel, the NGO argued that because the video was released "at a time when the only illness anyone anywhere is talking about is the coronavirus" -- claims that the Company's products recharge the immune system are immune boosting claims made in the context of the coronavirus and that they are therefore not structure/function claims, but rather implied disease treatment and prevention claims, requiring substantiation and FDA approval. By contrast, and as discussed more fully in the Company's Position portion of this decision, the Company argued that general claims that Le-Vel's products support the immune system are well-accepted structure-function claims in compliance with federal law.

An advertiser is responsible for all reasonable interpretations of its claims, not simply the messages the advertiser intended to convey.²⁶ In the absence of extrinsic evidence regarding a claim's net impression to a reasonable consumer such as a consumer perception survey, self-regulatory precedent makes clear that DSSRC will step into the shoes of the consumer to determine the reasonable takeaway from the subject claim. In doing so, DSSRC will examine the totality or overall net impression created by the claim as a whole, not merely words or phrases standing alone, taking into consideration both the words and the visual images."²⁷ DSSRC determined that although the video makes general claims that the product is designed to help recharge the immune system, it contains no reference to COVID-19, the current pandemic, or the product's ability to help the human body fight off any specific health condition, disease, germ or virus. Nor does the video contain even a slight reference to the current public health situation (e.g. "now more than ever..." or "in these uncertain times..."). Accordingly, DSSRC concluded that the DFT: Recharge YouTube video would not be reasonably interpreted by consumers as meaning the Company's products can help treat or prevent COVID-19.

²⁶ Rubbermaid, Inc. (FreshWorks Produce Saver Containers), Report #6102, *NAD/CARU Case Reports* (August 2017); Verizon Communications, Inc. (Google Pixel Phone), Report #6086, *NAD/CARU Case Reports* (May 2016); Philips Oral Healthcare, LLC (Sonicare FlexCare PlatinumToothbrushes), Report #6073, *NAD/CARU Case Reports* (April 2017); Philips Oral Healthcare, LLC (Sonicare Electric Toothbrushes), Report #5963, *NAD/CARU Case Reports* (June 2016); ANTECH Diagnostics, Inc. (AccuPlex4 Diagnostic Screening Test), NAD Case #5732 (07/01/14); Unilever United States, Inc. (Degree Ultra Clear Antiperspirant), Report #4560, *NAD/CARU Case Reports* (September 2006).

²⁷ See, Philips Oral Healthcare, LLC (Sonicare FlexCare PlatinumToothbrushes), Report #6073, *NAD/CARU Case Reports* (April 2017); The Clorox Company (Glad Tall Kitchen Drawstring Bags), Report #5951, *NAD/CARU Case Reports* (May 2016); The Procter & Gamble Company (Swiffer Dust & Shine Furniture Spray with Febreze Freshness), Report #5141, *NAD/CARU Case Reports* (February 2010).

2. Earnings Claims

While Le-Vel stated that its review of the earnings claims identified in this inquiry indicated that three of the identified posts were either removed or could not be found for other reasons and that several posts identified appeared to make no claims related to Le-Vel at all, the Company agreed that 67 of the posts violated the Company's policies and that a number of the identified posts made prohibited specific earnings claims or references. Le-Vel stated that these types of claims are not consistent with the Company's guidelines and that it undertook swift compliance action to ensure that such posts would be removed or revised. The Company stated that it had a significant number of these claims removed and that its compliance staff would continue to follow up to ensure compliance with Le-Vel's policies. DSSRC determined that such actions are necessary and appropriate. DSSRC also recommends that that Le-Vel engage in effective training and monitoring of its promoters and use appropriate enforcement procedures to provide reasonable assurance that earnings claims made by its promoters are substantiated, contain appropriate disclosures and are not misleading.

Auto Bonuses and Other Incentives for Promoters

For purposes of a DSSRC inquiry, an earnings claim is any claim, express or implied, that conveys that salesforce members may earn or have earned company-sponsored incentives, including representations that suggest that the ability to make lifestyle purchases – such as homes, vehicles, vacations – that are related to income earned from direct selling.²⁸

As noted in the FTC's 2018 Business Guidance Concerning Multi-level Marketing, an MLM's compensation structure may give its participants incentives to make representations about the business opportunity to current or prospective participants. As a consequence, an MLM should (i) direct its participants not to make false, misleading, or unsubstantiated representations and (ii) monitor its participants so they don't make false, misleading, or unsubstantiated representations.²⁹

A number of social media posts identified in this inquiry reference auto bonuses, VIP bonuses, or earned trips or getaways. Although Le-Vel maintained that these rewards

²⁸ See Earnings Guidance, Section 2(B).

²⁹ FTC Business Guidance Concerning Multi-level Marketing, section 13, sixth bullet point. As discussed above, DSSRC notes that Le-vel argued its business model distinguishes it from other multi-level marketers and that as a result its promoters in its program are not at risk for loss of money or other harm which its argues is a crucial factor driving enforcement by the FTC and other authorities with respect to income claims. While that may be true, a potential recruit may nonetheless suffer harm if the recruit is induced to spend time pursuing the business opportunity to achieve a certain level of financial success or incentive reward if such success or reward is not generally achievable by the typical program participant. Regardless, business model questions and related issues regarding promoter purchasing requirements, refund policies, inventory loading and the like are beyond the jurisdictional purview of DSSRC which is limited to addressing "earnings claims (including lifestyle representations) and product (including services) claims made by direct selling companies and their salesforce members to ensure the accuracy and adequate substantiation of those claims." DSSRC Policies and Procedures, I(A).

are “readily achievable by promoters,” DSSRC remained concerned that incentives such as a car bonus or incentive trip reward would not be generally expected or achievable by the typical Le-Vel promoter and, as such, a disclosure of generally expected performance would be necessary.³⁰

More specifically, the Company informed DSSRC that it provides qualifying promoters with auto bonus payments of up to \$800 per month towards a car payment and that in March 2020, 23.7% of promoters with at least one active team member qualified for the auto bonus. Thus, although the auto bonus may be “readily achievable,” it cannot be considered typical or generally expected if over 75% of a certain subset of the Company’s promoters (those with one active team member) do not receive the incentive. Accordingly, DSSRC recommends that any advertising materials (e.g., social media posts) disseminated by Le-Vel or its promoters regarding the auto bonus be accompanied by a clear and conspicuous disclosure indicating the percentage of active Company promoters who have achieved the award.

In addition, DSSRC noted that while Le-Vel’s data which indicated that 87,957 promoters achieved a VIP bonus since April 2013 is helpful, it should not conflate details of other types of bonus or incentives within a disclosure that is used to qualify a claim that pertains specifically to auto bonuses. Similarly, DSSRC’s recommendation to include a disclosure of generally expected results to social media posts referencing an auto bonus should be similarly implemented to qualify all claims made by the Company or its promoters that reference Company incentives or bonuses such as getaway trips and VIP Bonuses if they would otherwise not be typically expected by potential Le-Vel promoters.³¹

Millionaire Award

As noted above, the NGO cited to a February 2020 video published on the Company’s YouTube channel, in which Le-Vel’s executives discuss the benefits of the Company, including its compensation program, while at one point in the video images of Le-Vel promoters holding “millionaire” signs are shown on the screen. Le-Vel argued that the video of Le-Vel’s “Millionaire Award” ceremony, in which the Company recognizes promoters who have earned \$1 million in lifetime commissions, was taken out of context and that videos and other related company statements make explicit that the promoters recognized are a select group of exceptionally performing promoters. The Company also noted that the video of the ceremony appears for only a few seconds in the nearly five-

³⁰ According to section 255.2 (b) of Guides Concerning the Use of Endorsements and Testimonials in Advertising, an advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser’s experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser’s experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances.

³¹ Aloette Cosmetics, Case No. 12-2020 (“The same principles that apply to testimonial earnings claims hold true with respect to claims regarding the ability of salesforce members to earn incentive trip.”)

minute YouTube video, much of which does not discuss the earnings opportunity associated with being a Le-Vel promoter.

With respect to the video showing some Le-Vel promoters holding signs stating “Millionaire,” DSSRC notes that its Earnings Guidance states that:

When evaluating express and implied messages from an earnings claim, DSSRC will review the totality of the claim including its words, images, and context in order to determine the “net impression” or the takeaway message conveyed to the audience. The relevant audience to consider is that of a reasonable consumer when the claim is made to a general audience, such as by posting the claim on public social media or the internet. The relevant audience may be more limited, for example, when the claim is made to a specifically targeted group or at a particular event. For example, if a claim is made at an event limited to the top 1% of salesforce members, the relevant inquiry is the net impression of a reasonable top 1% salesforce member.

Here, the images of salesforce members holding signs that state “Millionaire” were taken at a live event and, thus, the relevant audience at that live event may have been more limited than that of a reasonable consumer if, for example, the audience at such event was comprised of top Le-Vel promoters. Nonetheless, as shown in the video, albeit briefly, the “Millionaire” signs are presented in an unqualified context and, since the video depicting a portion of the live event was disseminated on the internet, “[t]he relevant audience to consider is that of a reasonable consumer... .” While DSSRC acknowledges that Le-Vel committed to improve its disclosures to clarify that the “Millionaire Award” is an exceptional achievement, DSSRC recommends that the Company remove the “Millionaire” images from the video.³²

The NGO also cited to a social media post that it argued conveyed misleading messages regarding a promoter’s achieving the Company’s Millionaire Award:

³² Consistent with the FTC Guide Concerning the Use of Endorsements and Testimonials in Advertising, DSSRC would typically recommend that, if the Company does not have substantiation that the experience of the individuals depicted is representative of what consumers will generally achieve, then the Company should remove the “Millionaire” images from the videos or, alternatively, modify them to “clearly and conspicuously disclose the generally expected performance in the depicted circumstances” at the time the claim is made i.e., what percentage of Le-vel promoters earn the depicted status.³² 16 CFR §255.2. Here, however, given that the “Millionaire” image appears only briefly in the video, DSSRC does not believe that a clear and conspicuous disclosure could be made to clarify both that the award is achievable only by a select number of exceptionally performing promoters and that the term “millionaire” in this context refers to promoters who have earned over a million dollars in commissions cumulatively in their time as promoters for Le-vel.



As discussed above with respect to the “Millionaire Award” video, the statement that accompanies the photo “Today at noon I officially hit the millionaires club” is presented in an unqualified context with no disclosure of generally expected results.³³ Accordingly, with respect to that specific claim in text that the promoter “hit the millionaires club,” DSSRC would typically recommend that such claim, and any similar claims that may be disseminated in the marketplace, be discontinued or significantly modified to clearly and conspicuously disclose the generally expected performance in the depicted circumstances.

This particular social media post, however, is potentially problematic for yet another reason. Specifically, the photo which is central to the social media post contains an image of the promoter alongside large balloons spelling out “1,000,000” and the word “millionaire.” It is axiomatic that an advertiser has the burden to support all reasonable interpretations of its claims and not simply the messages it intended to convey. The Procter & Gamble Company (Pampers Easy Ups), Report #6045, NAD/CARU Case Reports (January 2017); Substantiation Policy Statement, appended to Thompson Medical Co., 104 F.T.C. 648 (1984). While the intended message may have been that the promoter in question is stating that she cumulatively earned a million dollars in commissions in her entire time as a promoter, yet another reasonable interpretation of the photo could also be that being a promoter for Le-Vel allowed her to become a “millionaire” or a person whose wealth amounts to a million or more dollars or who is or

³³ DSSRC also notes that there is no disclosure as to how likely it is that a promoter could achieve this in just over two years.

has become wealthy.³⁴ Accordingly, DSSRC recommends that this claim, and similar claims presented in this context, be discontinued.

CONCLUSION

DSSRC acknowledged and appreciated the voluntary steps Le-Vel undertook to have aggressive health-related claims removed from circulation which DSSRC found to be necessary and appropriate. DSSRC recommends that, to the extent Le-Vel has not already been able to address the additional health-related claims, that it use bona fide good faith efforts to have such claims removed or significantly modified. DSSRC also recommends that Le-Vel engage in effective training and monitoring of its promoters and use appropriate enforcement procedures to provide reasonable assurance that claims made by salesforce members are truthful and non-misleading; in particular, that the Company's promoters refrain from making strong health-related and/or disease treatment or prevention claims.

With respect to any express or implied product performance claims that Le-Vel products may treat, cure, or prevent COVID-19, DSSRC acknowledged and appreciated the Company's proactive steps to warn its promoters not to make express or implied claims referencing COVID-19 or the current pandemic. DSSRC also acknowledged and appreciated the Company's compliance updates that it provided to DSSRC making clear that any such claims regarding the current health crisis are prohibited by the Company and that such prohibition is an extension of Le-Vel's existing policies prohibiting disease treatment claims. As to the specific social media post identified by the NGO, DSSRC acknowledged Le-Vel's prompt actions to have the social media post referencing COVID-19 removed and determined that removal of such post was necessary and appropriate.

As to Le-Vel's DFT: Recharge YouTube video, DSSRC determined that although the video makes general claims that the product is designed to help recharge the immune system, it contains no reference to COVID-19, the current health crisis, or the product's ability to help the human body fight off any specific health condition. Accordingly, DSSRC concluded that the DFT: Recharge YouTube video would not be reasonably interpreted by consumers as meaning the Company's products can help treat or prevent COVID-19.

DSSRC acknowledged and appreciated that a significant number of the earnings claims at issue in the inquiry were removed as well as the Company's commitment that its compliance staff would continue to follow up to ensure compliance with Le-Vel's policies. DSSRC determined that such actions are necessary and appropriate. DSSRC also recommends that that Le-Vel engage in effective training and monitoring of its promoters and use appropriate enforcement procedures to provide reasonable assurance that earnings claims made by its promoters are substantiated, contain appropriate disclosures and are not misleading.

³⁴

<https://www.dictionary.com/browse/millionaire>

With respect to auto bonus and other incentive programs for Le-Vel promoters, DSSRC recommends that any advertising materials (e.g., social media posts) disseminated by Le-Vel or its promoters regarding the auto bonus be accompanied by a clear and conspicuous disclosure indicating the percentage of active Company promoters who have achieved the award if it would otherwise not be typically expected by potential Le-Vel promoters.

Finally, while the Company celebrating and recognizing its top promoters who have achieved the Company's Millionaire Award may be appropriate at, for example, a live event with a select audience, DSSRC recommends that the Company remove the "Millionaire" images from the video at issue in this inquiry and that was disseminated on the internet and discontinue any similar claims disseminated to a general audience. DSSRC also encourages the Company to reinforce with its promoters that any representations made at events with a select audience or on a platform limited to Le-Vel's top sales leaders should not be repurposed and/or disseminated in a different context or platform or to a different audience. Likewise, DSSRC recommends that the Le-Vel promoter's social media post regarding the Millionaire Award, and any similar claims, be discontinued.

DSSRC will continue to monitor the messages disseminated by the Company's promoters on social media and will take prompt and necessary steps to initiate a compliance inquiry should it identify an ongoing proliferation of unsupported product or income claims disseminated by Le-Vel and/or Le-Vel promoters.

COMPANY STATEMENT

Le-Vel respects the self-regulatory process and appreciates the time and attention the DSSRC has devoted to this matter. Le-Vel appreciates the DSSRC's acknowledgment of the robustness and effectiveness of the Company's compliance program, as well as the DSSRC's recognition that—at the time of the initial complaint—many of the materials cited by the Complainant had already been taken down, were in the process of coming down, or were not problematic for various reasons. Although Le-Vel understands that business model questions are beyond the jurisdiction of the DSSRC, see note 29 above, Le-Vel nevertheless stresses that promoters in its program are not at risk for loss of money or other harm, as (1) Le-Vel does not require any upfront or continuing payments or fees to sign up for, participate in, or receive commissions through the Company's program; (2) Le-Vel ships product directly to the end consumer as opposed to utilizing a reselling model; and (3) Le-Vel enjoys strong direct consumer demand for its products wholly outside the promoter system. Le-Vel will be guided by the DSSRC recommendations in its ongoing marketing programs.

(Case No. 24-2020 HJS, closed on 08/31/2020)
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