Steven B. Pokotilow (spokotilow@stroock.com)
Richard Eskew (reskew@stroock.com)
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038-4982
Tel: (212) 806-5400
Fax: (212) 806-6006
Attorneys for Defendant
Entrepreneur Media Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ILAN ABRAHAM, et al.,

Plaintiff,

v.

ENTREPRENEUR MEDIA, INC.,

Defendant.

(ECF Case)
Case No. 09-2096

District Judge Joanna Seybert

Magistrate Judge Michael Orenstein

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ENTREPRENEUR MEDIA, INC.'S MOTION TO DISMISS ALL COUNTS OF THE COMPLAINT UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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Defendant, Entrepreneur Media, Inc. ("Entrepreneur"), respectfully moves for dismissal of the only Cause of Action, for gross negligence, alleged in the Verified Complaint filed April 9, 2009 (the "Complaint") by Plaintiffs, Ilan Abraham, et al. (collectively "Plaintiffs"), under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Entrepreneur also requests oral argument before this Court on the instant matter.

I. INTRODUCTION

Plaintiffs' Complaint should be dismissed because Plaintiffs fail to, and are unable to, allege the elements of a common law cause of action for gross negligence. To establish gross negligence, or even simple negligence, a plaintiff must first demonstrate that a defendant owes the plaintiff a duty of care. Entrepreneur, a publisher of a business oriented magazine, is under no duty to provide information with care to its readers. The law in New York is well established that a publisher, such as Entrepreneur, is not liable for non-defamatory negligent misstatements. *Jaillet v. Cashman*, 115 Misc. 383, 384 (N.Y. Sup.Ct. 1921); *First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 869 F.2d 175, 178 (2d Cir. 1989). The case law also establishes that this rule remains unchanged where the published information relates to a particular sub-industry, such as financial information. *Id*. Thus, Plaintiffs' bare allegations that Defendant should have "exercised reasonable care to Plaintiffs" or "conducted itself with due diligence" simply cannot be sustained.

For the aforementioned reasons, and as further detailed below, Entrepreneur respectfully requests the Court to dismiss the First Cause of Action alleged in the Complaint. Entrepreneur further requests that such dismissal be ordered with prejudice as it is clear from the nature of the facts alleged by Plaintiffs and the established law that amendment of the Complaint will not

remedy its substantive shortcomings. This Motion is based on the Complaint and the information incorporated by reference therein.

II. ALLEGATIONS OF THE COMPLAINT

The present action is brought by eighty-seven individuals and an entity who claim to have invested in Agape World Inc. ("Agape"), relying upon data published in Entrepreneur's publication, "Entrepreneur" magazine, on or before May 2008. Complaint ¶¶ 1, 18.

The Complaint cites to, and incorporates by reference, a list entitled "Hot 100 at a Glance [sic]," which appears in the May 2008 issue of "Entrepreneur" magazine (the "Magazine"). Complaint ¶¶ 4-5. The "Hot 100 at a Glance" lists the names of one hundred companies determined to be a "top fast-growth business" based on data provided by a third party, CentrisPoint. *Hot 100 at a Glance*, ENTREPRENEUR, May 2008, at 68-80. Agape was one of the one hundred companies included on this list. Complaint ¶ 5; *Hot 100 at a Glance*, ENTREPRENEUR, May 2008, at 73-80.

Plaintiffs allege that they received copies of the May 2008 issue of the Magazine from Agape personnel and chose to invest in Agape, believing it to be a sound investment. Complaint ¶ 8. Plaintiffs claim this belief was based on Agape's inclusion in the Magazine's "Hot 100 at a Glance" list. Complaint ¶ 8. However, after the arrest of Agape's Chief Executive Officer, Nicholas Cosmo, it came to light that Agape allegedly ran a Ponzi scheme, in furtherance of which, Agape distributed false and misleading information regarding the state of the company. Complaint ¶¶ 7, 11.

Plaintiffs purport to hold Entrepreneur liable for their financial losses resulting from their independent decision to invest in Agape. Complaint ¶¶ 1, 8, 12. The Plaintiffs set forth a naked and unsupported allegation that Entrepreneur had reason to know that Agape would use its

inclusion in the "Hot 100 at a Glance" list to solicit investment and that investors would rely on the information provided in the Magazine in making investment decisions. Complaint ¶ 6.

Plaintiffs also allege that Entrepreneur failed to disclose to readers how it obtained information on Agape and that the accused information was uncorroborated. Complaint ¶ 10. However, printed on the first page of the "Hot 100 at a Glance" list in question, is a statement that the "Hot 100 at a Glance" list is based on CentrisPoint's database and discloses to readers that CentrisPoint is a third party "provider of economic and business data, research, and information." *Hot 100 at a Glance*, ENTREPRENEUR, May 2008, at 68.

Plaintiffs' further allege that Entrepreneur failed to visit Agape's headquarters, meet with its principals, or inspect its books. Complaint ¶ 6. Rather, Plaintiffs claim that Entrepreneur relied on information provided by Agape in "drawing its conclusion and making its recommendation," ignoring the informative, rather than advisory, nature of the "Hot 100 at a Glance" list. Complaint ¶ 6. Plaintiffs aver that Entrepreneur has a "duty to exercise reasonable care to Plaintiffs" to confirm the accuracy of the information received from Agape. Complaint ¶ 14. Moreover, Plaintiffs contend that Entrepreneur's failure to exercise such care constitutes gross negligence, which was the actual and proximate cause of the Plaintiffs' financial losses. Complaint ¶¶ 20-22.

III. ARGUMENT

A. Rule 12(b)(6) Motion to Dismiss Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal of one or more counts of a complaint is proper when the plaintiff fails to state a claim upon which relief may be granted. In determining whether dismissal is appropriate, the Court must "accept as true the material facts alleged in the complaint and draw all reasonable inferences in [plaintiff's] favor." *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004).

However, the plaintiff must show entitlement to relief, "rather than a blanket assertion of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 n.3 (2007). Thus, "[t]he pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* at 1965 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1216, pp. 235-36 (3d ed. 2004)). As such, a plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

In analyzing the sufficiency of a complaint, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. *Lava Trading Inc. v. Hartford Fire Insurance Co.*, 326 F. Supp.2d 434, 438 (S.D.N.Y. 2004). It is appropriate that the failure to express a "plausible entitlement to relief" "be exposed at the point of minimum expenditure of time and money by the parties and the Court." *Bell Atlantic*, 127 S.Ct. at 1967.

B. Plaintiffs Fail To State A Cause Of Action And Cannot Maintain Any Cause Of Action Under The Facts Of The Case At Bar.

1. Legal Standards

The crux of Plaintiffs' allegations are that Entrepreneur breached a duty to Plaintiffs by publishing allegedly inaccurate information about Agape and that Entrepreneur's "conduct was so reckless and careless that it evinced a complete disregard for the rights and interest of Plaintiffs." Complaint ¶ 17. Each of these allegations is unsupported and insufficient to demonstrate that Plaintiffs are entitled to relief as a matter of law under theories sounding either in gross negligence or even simple negligence.

To establish a prima facie case of either negligence or gross negligence, there must be some duty owed by the defendant to the plaintiff that is alleged to have been breached by the defendant. *M+J Savitt, Inc. v. Savitt*, 2009 WL 691278 at *12 (S.D.N.Y. 2009) (citing *American*

Telephone and Telegraph Co. v. City of New York, 83 F.3d 549, 556 (2d Cir. 1996)). Where no duty exists or the alleged acts cannot constitute a failure to exercise due care, neither gross negligence nor simple negligence can lie as a matter of law.[1] *Id.*

New York law establishes, as a matter of public policy, that a publisher is under no duty of care to its readers to ensure the accuracy of published information. Furthermore, and as detailed below, the courts have determined that it is the duty of the reader to evaluate and verify the reliability of such information. *See, e.g.*, *First Equity Corp. of Fla.*, 869 F.2d at 180.

2. Plaintiffs' cause of action cannot lie because Entrepreneur does not owe Plaintiffs a duty of care in connection with its publication of the "Hot 100 at a Glance" list under New York law.

First, the New York courts have consistently dismissed claims where investors, purporting to have relied upon inaccurate published financial or business information, brought suit against the publisher of that information seeking to hold the publisher liable for losses incurred due to the investors' unfavorable investment decisions. *Jaillet v. Cashman*, 115 Misc. 383; *First Equity Corp. of Fla.*, 869 F.2d 175; *Demuth Dev. Corp. v. Merck & Co.*, Inc., 432 F.Supp. 990 (E.D.N.Y. 1977). A publisher has no duty to ensure the accuracy or truth of published statements "unless it constitutes a breach of contract[,] obligation[,] or trust, or amounts to a deceit, libel, or slander." *Jaillet*, 115 Misc. at 384; *First Equity Corp. of Fla.*, 869 F.2d at 179. Underlying the rationale of these cases is the recognition that absent a breach of the public trust or deceit, libel, or slander, the general public that purchases or reads these publications does not enjoy the type of close relationship with the publishers that would give rise

[1] Gross negligence is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing." *M+J Savitt, Inc.*, 2009 WL 691278 at *12. "Under New York law, 'a mistake or series of mistakes alone, without a showing of recklessness, is insufficient for a finding of gross negligence.' " *In re Enron Corp.*, 292 B.R. 752, 768 (S.D.N.Y. 2003). Though Plaintiffs allege that Entrepreneur's conduct "was so reckless and careless that it evinced a complete disregard for the rights and interest of Plaintiffs," those allegations are conclusory and without any factual support. *See* Section III.B.4 *infra*. Furthermore, the absence of a duty of care owed to Plaintiffs, as detailed herein, is fatal to Plaintiffs' claim.

to a duty of care as to the accuracy or completeness of the published information. Thus, the courts have held that the general public, including paid subscribers, are not in a relationship of privity, as required for liability to attach in such situations. *First Equity Corp. of Fla.*, 869 F.2d at 179 (determining that "[a] subscriber is not significantly different from other purchasers of a publication merely because he pays for it on a more or less regular basis.").

This rule established in *Jaillet*, immunizing disseminators of financial or business information from tort liability for non-defamatory negligent misstatements, has been followed in other jurisdictions. *See*, *e.g.*, *Gale v. Value Line, Inc.*, 640 F.Supp. 967 (D. R.I. 1986) (publisher of Value Line not liable to subscriber who purchased warrants in reliance on incomplete summary of warrant terms); *Gutter v. Dow Jones, Inc.*, 22 Ohio St.3d 286 (Sup. Ct. Oh. 1986) (publisher of Wall Street Journal not liable to subscriber for non-defamatory negligent misrepresentation relied on by reader in choosing securities investment); *Reynolds v. Murphy*, 188 S.W.3d 252 (Ct. App. Tx. 2006) (publisher of investment newsletter containing information of a general nature that was offered to the general public not liable for financial losses incurred by subscriber who followed the publisher's investment advice).

The facts of the instant case are similar to those of *Jaillet* and *First Equity Corp. of Fla*. In *Jaillet*, an investor sold stocks in reliance on an inaccurate report provided by a subscription news ticker service and suffered financial loss as a result. *Jaillet*, 115 Misc. at 384. The investor thereafter brought suit against the ticker service. *Id*. The Court dismissed the complaint holding the "law does not attempt to impose liability for [false statements or misstatements] unless it constitutes a breach of contract[,] obligation[,] or trust, or amounts to a deceit, libel, or slander." *Id.* To hold otherwise would lead to undesirable public policy as the ticker service, and indeed all publishers, would be exposed to claims by the entire public. *Id*.

In *First Equity Corp. of Fla.*, the Second Circuit confirmed that the *Jaillet* rule precluding publisher liability for non-defamatory negligent statements likewise applies to publishers whose publications focus on a specialized sub-industry, such as publishers of financial or business information, who offer paid subscriptions to the general public. There, investors brought suit against a publisher of investment newsletters directed at investors and investment professionals who had mistakenly stated that a particular security could be redeemed for its principal plus accrued interest when in fact, there was no provision for the redemption of accrued interest. *First Equity Corp. of Fla.*, 869 F.2d at 177. The Court found for the defendant, holding that publishers are not liable for negligent inaccurate statements made to an "indeterminate class of persons who, presently or in the future, might . . .rel[y] [on those statements]." *Id*. at 179.

In reaching its conclusion, the Second Circuit looked to New York law pertaining to accountant liability for non-defamatory negligent misrepresentations for guidance. *Id*. (citing *Ultramares Corp. v. Touche*, 255 N.Y. 170 (N.Y. Ct. App. 1931)). In *Ultramares*, the New York Court of Appeals has held that even accountants who were retained to certify a balance sheet reflecting a particular company's financial health were not liable for misrepresentations to a creditor who relied on the accountants' certifications in making loans to the company. *Ultramares Corp.*, 255 N.Y. at 174-76. In so holding, the Court affirmed the principle that:

> **negligent words are not actionable** unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all.

Id. at 185; *see also Demuth Dev. Corp.*, 432 F.Supp. 990, 993 (publisher of an encyclopedia of chemicals and drugs not liable for misrepresenting the toxicity of a drug employed by plaintiff in

the manufacture of its product, even though the publisher expected its readers to rely and act upon its publication as a source of accurate information).

The Second Circuit additionally pointed out that the users of published information may easily protect themselves from misstatements or inaccuracies by performing their own due diligence. *First Equity Corp. of Fla.*, 869 F.2d at 180. Because the user is in the best position to weigh the danger of relying on a publication and the costs of verifying the published information, "the user should bear the risk of failing to verify the accuracy of [published information] in the absence of proof of a knowing misstatement. *Id*.

The instant case presents a similar factual situation as in *Jaillet* and *First Equity Corp. of Fla*. Here, Plaintiffs, investors, claim to have relied on Entrepreneur's "Hot 100 at a Glance" list in choosing to invest in Agape and have alleged that Entrepreneur is liable for Plaintiffs' financial losses resulting from Agape's alleged Ponzi scheme. Moreover, as in *Jaillet* and *First Equity Corp. of Fla.*, Plaintiffs have no relationship with Entrepreneur to suggest that Entrepreneur owed Plaintiffs a duty, as required to maintain Plaintiffs' cause of action. To the contrary, as discussed *supra*, the *Jaillet* rule and case law have established that a publisher, even those who maintain a paid subscription service, such as Entrepreneur, owes its readers no duty to ensure the accuracy of its publications, and thus, cannot incur liability for an allegedly inaccurate statement. The absence of such a duty is fatal to Plaintiffs' claim. *M+J Savitt, Inc.*, 2009 WL 691278 at *12.

Where the instant case differs from *Jaillet* and *First Equity Corp. of Fla*., the facts of the instant case show even more glaringly the fatality of Plaintiffs' claims. Whereas *Jaillet* involved news ticker information bearing on stock dividends and *First Equity Corp. of Fla*. involved a description of a financial instrument, each of which could be expected to be important

information in making an investment decision, the information at issue here is mere data about the high level growth of a number of small businesses directed principally at other entrepreneurs and is neither designed nor intended for potential investors. On this point, the reasoning of *First Equity Corp. of Fla.* is dispositive.

Moreover, as the Second Circuit recognized in *First Equity Corp. of Fla.*, investors such as Plaintiffs are in best position to weigh the dangers of relying on information published in a magazine against the cost of conducting their own due diligence (e.g., of Agape's books and records). Thus, the Plaintiffs, not Entrepreneur, properly bear the risk of failing to verify any information provided by CentrisPoint or Agape. Accordingly, as New York law precludes any suit based on the foregoing set of facts, the First and only Cause of Action in the Complaint should be dismissed.

3. The Allegations Set Forth in the Complaint are barred by the First Amendment.

In *First Equity Corp. of Fla.*, the Second Circuit elected to discuss the Complaint on tort law grounds and elected not to address the First Amendment issues, which were also before the Court. 869 F.2d at 178-79. Specifically, Judge Mukasey held that the First Amendment requires a Plaintiff to establish that the false publication was published with either "actual knowledge of its falsity or with reckless disregard of its truth or falsity" and that "there must be sufficient evidence to permit the conclusion that the Defendant in fact entertained serious doubts as to the truth of his publication." *First Equity Corp. of Fla.*, 690 F. Supp. 256, 259 (S.D.N.Y. 1998). There is no such allegation stated in the Complaint, nor could Plaintiffs state such facts without taking serious liberty with its Rule 11 obligations to Entrepreneur and to the Court. Additionally, Plaintiffs' Complaint fails to recite sufficient facts as a basis to overcome the high

barrier required by First Amendment principles, and for this additional reason, the single Cause of Action of the Complaint fails to state claim upon which relief may be granted.

4. Plaintiffs' allegations, as a matter of law, are insufficient to establish that Entrepreneur acted with reckless disregard for the rights of others.

Finally, Plaintiffs' Complaint should be dismissed because Entrepreneur's inclusion of Agape in its May 2008 "Hot 100 at a Glance" list, when considered in a light most favorable to Plaintiffs, may not be characterized as grossly negligent. The "Hot 100 at a Glance" was offered as informative material to a general audience of readers and neither draws any conclusions nor makes any recommendations to its readers, as to the financial suitability of an investment in any of the listed companies. In fact, the list solely reflects the names, websites, and nominal start-up and sales information regarding the selected companies. For instance, the sole reference to Agape in the "Hot 100 at a Glance" list recites:

> 73. Agape World Inc.
> NICHOLAS COSMO
> Bridge loan lender
> Hauppauge, NY
> agapeworldinc.net
> **Began:** August 1999 w/1 employee; 35 employees projected by 2009
> **Initial investment:** $1 million from friends/family
> **2003 sales:** $2 million
> **2007 sales:** $10 million
> **Turned a profit:** 2002
> **First million:** 2003
> **Best advice:** There is no gray area in business.

This brief reference only includes Agape's contact information and data provided by CentrisPoint --a third party. Such statements do not constitute business or investment advice by Entrepreneur and cannot on its face serve as a factual basis for a gross negligence action.

Accordingly, Plaintiffs' conclusory allegations and unwarranted inferences of gross negligence cannot sustain a case. Hence, the instant Motion to Dismiss should be granted.

IV. CONCLUSION

In light of the foregoing, Defendant Entrepreneur Media, Inc. respectfully requests that the Court dismiss the First and only Cause of Action, and hence the Complaint, with prejudice.

Respectfully submitted,

By: *s/Steven B. Pokotilow*
Steven B. Pokotilow

STROOCK & STROOCK & LAVAN LLP
Steven B. Pokotilow
(spokotilow@stroock.com)
Richard Eskew
(reskew@stroock.com)
180 Maiden Lane
New York, NY 10038-4982
Telephone: 212-806-5400
Facsimile: 212-806-6006

Attorneys for Defendant,
Entrepreneur Media, Inc.

Dated: New York, New York

May 21, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, the foregoing was caused to be electronically filed with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered participants.

In addition, the undersigned hereby certifies that the true and correct copy of the foregoing were caused to be served via overnight courier on this upon the following party:

ELIOT F. BLOOM, ESQ.
Attorney for Plaintiffs
114 Old Country Road, Suite 308
Mineola, New York 11501
(516) 739-5300

Dated: May 21, 2009

By: *s/ Steven B. Pokotilow*
Steven B. Pokotilow

STROOCK & STROOCK & LAVAN LLP
Steven B. Pokotilow
(spokotilow@stroock.com)
Richard Eskew
(reskew@stroock.com)
180 Maiden Lane
New York, NY 10038-4982
Telephone: 212-806-5400
Facsimile: 212-806-6006

Attorneys for Defendant,
Entrepreneur Media, Inc.