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

ILAN ABRAHAM, et al.,

Plaintiffs,

v.

ENTREPRENEUR MEDIA, INC.,

Defendant.

(ECF Case)
 Case No. 09-2096

District Judge Joanna Seybert

Magistrate Judge Michael Orenstein

**DEFENDANT ENTREPRENEUR MEDIA, INC.'S REPLY AND OPPOSITION TO
 PLAINTIFFS' AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION TO
 DISMISS AND REQUEST FOR CONTINUANCE UNDER
FEDERAL RULE OF CIVIL PROCEDURE 56(F)**

Defendant, Entrepreneur Media, Inc. (“Entrepreneur”), submits this Reply in response and opposition to Plaintiffs’ Affirmation in Opposition to Defendant’s Motion to Dismiss and Request for Continuance Under Rule 56(f) (D.I. 8) (“Plaintiffs’ Affirmation”). As detailed in Entrepreneur’s 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) (D.I. 5) (the “Entrepreneur Brief”), the contents of which are incorporated herein, Plaintiffs have failed to state a claim upon which relief can be granted and Plaintiffs’ Affirmation to the Entrepreneur Brief does not, and cannot as a matter of law, cure any of the deficiencies of Plaintiffs’ Verified Complaint (D.I. 1, Ex. A) (the “Complaint”). Thus, for the reasons set forth in the Entrepreneur Brief and points addressed herein, this Court should grant Defendant’s Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), dismissing the Complaint with prejudice, and deny Plaintiffs’ Request for Continuance.

I. INTRODUCTION

Nowhere in Plaintiffs’ Affirmation is there any legal analysis of the duty of care Defendant Entrepreneur owed to Plaintiffs in support of this action. However, to establish gross negligence, or even simple negligence, a plaintiff must first demonstrate that a defendant owes the plaintiff a duty of care.

Under New York law and in the interest of public policy, a publisher, such as Entrepreneur cannot be held 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, 178-80 (2d Cir. 1989). As detailed below, Plaintiffs’ Affirmation ignores this legal precedent and erroneously seeks to create issues that are irrelevant to the disposition of this Motion.

II. ARGUMENT

A. **The Complaint fails to state any cause of action and, even accepting the material facts alleged in the Complaint as true and drawing all reasonable inferences in the Plaintiffs' favor, the Complaint does not create a remote suspicion of a legally cognizable right of action as a matter of law.**

Plaintiffs' assertion that Defendant improperly disputes facts is without merit. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, one or more counts of a complaint is appropriately dismissed when the plaintiff fails to submit a complaint that "contain[s] something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004)). A "blanket assertion of entitlement to relief," as pled, is insufficient to defeat a motion under Rule 12(b)(6). *Id.* at 1965 n.3. Indeed, Plaintiffs make exactly this type of empty blanket assertion in both the Complaint and Plaintiffs' Affirmation and additionally assert, albeit disingenuously, that the Entrepreneur Brief improperly disputes issues of fact.

As stated in Section III.A of the Entrepreneur Brief:

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).

Thus, nowhere in its moving papers does Entrepreneur raise any factual issue, and Plaintiffs' argument to the contrary is disingenuous.

Furthermore, nowhere in Plaintiffs' Affirmation is there a discussion of the law governing publisher liability in New York. As discussed in the Entrepreneur Brief, in New York, publishers are under no duty of care to ensure the accuracy of published information. *Jaillet*, 115 Misc. at 384; *First Equity Corp. of Fla.*, 869 F.2d at 178-79. Plaintiffs offer neither

authority nor argument to contradict this principle of law and public policy. Rather than addressing the merits of the Entrepreneur Brief, Plaintiffs hide behind procedural smokescreens and delays.¹

Accordingly, assuming the material facts alleged in the Complaint are accepted as true and all reasonable inferences are drawn in the Plaintiffs' favor, not a single fact offered by the Plaintiffs in the Complaint support any action under theories of negligence or gross negligence. Thus, the Complaint is ripe for dismissal and should be dismissed with prejudice because not only have Plaintiffs failed to factually state any cause of action, but New York law recognizes no such cause of action under the instant circumstances.

B. Plaintiffs' request for a continuance is inappropriate and defective.

Plaintiffs inaccurately attempt to characterize Entrepreneur's pending Rule 12(b)(6) motion as a motion for summary judgment under Rule 56. Summary judgment relates to facts outside of the pleadings and the disputability of those facts. Based on this mischaracterization, Plaintiffs then argue, albeit erroneously, that before this Court rules on Entrepreneur's motion, they are entitled to a continuance to conduct discovery relating to the facts in this lawsuit. However, Entrepreneur has not moved for summary judgment under Rule 56, has not presented matters beyond the scope of the pleadings for consideration, and has placed no factual issue in dispute.

While Entrepreneur strongly disputes the factual allegations of gross negligence in the Complaint, it accepts those facts as true for purposes of its Rule 12 motion only. Thus, Entrepreneur's Rule 12 motion raises only one issue, namely, whether Plaintiffs can obtain any relief under applicable law, based on the facts alleged in the Complaint. Under New York law,

¹ Of particular note, Plaintiffs have not only failed to submit a timely opposition on the order of months, but has failed to meet not one, but two of this Court's deadlines.

the answer is no. As cited above, that law very clearly and unequivocally exempts publishers from liability even for inaccurate, non-defamatory, negligent misstatements. Thus, Plaintiffs' motion for a continuance in response to Entrepreneur's Rule 12 motion is misplaced and procedurally improper, and for those reasons, should be denied by this Court.

Also, assuming *arguendo*, that this motion should be treated as a Rule 56 motion (which it is not), Plaintiffs' request for a continuance under Rule 56 is also defective. Rule 56(e)(2) provides:

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response **must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial.** If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed. R. Civ. P. 56(e)(2) (emphasis added).

Rule 56(f) further provides:

If a party opposing the motion shows **by affidavit** that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order.

Fed. R. Civ. P. 56(f) (emphasis added).

Plaintiffs have not submitted any affidavits as required by Rule 56(e). Alternatively, Plaintiffs have failed to show by affidavit any reason why they cannot present facts essential to justify their opposition as required by Rule 56(f). In light of these defects, a continuance to

permit Plaintiffs to conduct discovery is neither appropriate nor necessary. Accordingly, this Court should deny Plaintiffs' request for a continuance under Rule 56(f).

III. CONCLUSION

In light of the foregoing, Defendant Entrepreneur Media, Inc. respectfully requests that this Court deny Plaintiffs' Request for Continuance and dismiss the Complaint with prejudice.

Respectfully submitted,

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*Attorneys for Defendant,
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Dated: New York, New York
August 3, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, the foregoing Defendant Entrepreneur Media, Inc.'s Reply And Opposition To Plaintiffs' Affirmation In Opposition To Defendant's Motion To Dismiss And Request For Continuance Under Federal Rule Of Civil Procedure 56(F) 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:

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Dated: August 3, 2009

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