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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 DIE-MENSION CORPORATION,
7 individually and on behalf of all others
8 similarly situated,

9 Plaintiff,

10 v.

11 DUN & BRADSTREET CREDIBILITY
12 CORPORATION, et al.,

13 Defendants.

C14-855 TSZ

ORDER

14 THIS MATTER comes before the Court on a motion to dismiss brought by
15 defendant Dun & Bradstreet Credibility Corporation (“DBCC”), docket no. 93. Having
16 reviewed all papers filed in support of, and in opposition to, DBCC’s motion, the Court
17 enters the following order.

18 **Background**

19 Plaintiff Die-Mension Corporation brings this action on behalf of itself and a class
20 of all entities in Ohio that purchased DBCC’s product known as CreditBuilder, which is
21 an Internet-based system for credit self-monitoring. DBCC acquired CreditBuilder from
22 defendants Dun & Bradstreet Corporation and Dun & Bradstreet, Inc. (collectively,
23 “D&B”), along with licenses to use the “Dun & Bradstreet” name, brand, logo, and trade
dress. D&B collects financial information and issues credit reports, scores, and ratings

1 on businesses, which are used by the government, as well as private companies, to make
2 contracting and other commercial decisions. In connection with credit information, D&B
3 uses the Data Universal Number System (“DUNS”), pursuant to which businesses are
4 assigned unique identifiers.

5 According to plaintiff, when businesses contact D&B concerning any problem
6 with their credit reports, they are “uniformly and seamlessly routed to a DBCC sales
7 representative who tries to sell them CreditBuilder, rather than attempt to fix the
8 problem.” 2d Am. Compl. at ¶ 21 (docket no. 91). Plaintiff does not allege, however,
9 that it was solicited in this manner. Instead, plaintiff indicates that, on two occasions,
10 D&B advised DBCC of a score change, and that, both times, DBCC attempted via form
11 letter to sell CreditBuilder to plaintiff. *See id.* at ¶¶ 42, 43, 53, & 54. Plaintiff contends
12 that, because D&B “seeded” its credit report with false information,¹ plaintiff “believed it
13 had no choice” but to purchase CreditBuilder for \$39.99 per month for one year. *Id.* at
14 ¶¶ 54-55.

15 Plaintiff states that it was confused by various representations made by DBCC and
16 would not have bought CreditBuilder but for these representations. *See id.* at ¶¶ 53 & 57.
17 Plaintiff alleges that DBCC holds itself out as D&B and holds CreditBuilder out as a
18 D&B-affiliated product. *Id.* at ¶ 53. The form solicitation letter DBCC sent to plaintiff
19 in February 2012 bore the “Dun & Bradstreet” logo and “was addressed to [plaintiff] by
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21 ¹ Plaintiff concedes that DBCC was not advised by D&B of any actions taken by D&B to inflate the
22 number of credit inquiries about a business, which would negatively impact its credit rating. *See* 2d Am.
23 Compl. at ¶¶ 6, 38, 47-49, & 51 (docket no. 91).

1 its DUNS number.” *Id.* at ¶ 53. DBCC also uses marketing materials that bear D&B’s
2 logo, refers to D&B’s databases as “*our*” databases, describes credit reporting functions
3 performed by D&B as something “we” do, and indicates that “companies are coming to
4 *us*” (as opposed to D&B) for credit reports. *Id.* at ¶¶ 25-27 (emphasis in original).
5 Moreover, DBCC’s and D&B’s web addresses are similar, namely “www.dandb.com”
6 and “www.dnb.com,” respectively. *Id.* at ¶ 20.

7 Plaintiff accuses DBCC of representing that CreditBuilder was “the solution to
8 false entries” on plaintiff’s credit report, and indicates that it would not have purchased
9 the product but for such representation. *Id.* at ¶ 58; *compare id.* at ¶ 53 (stating that
10 DBCC’s form letter “offered CreditBuilder as the solution to ‘positively impact
11 [plaintiff’s] scores and ratings.’”). Plaintiff asserts that, in April 2012, despite its
12 purchase of CreditBuilder, a false item appeared on its credit report, namely an unpaid
13 bill in the amount of \$2,500, and that both its Supplier Evaluation Risk (“SER”) rating
14 and its Financial Stress score worsened even though no material change in the manner in
15 which plaintiff conducted business had occurred. *Id.* at ¶¶ 59-60. Plaintiff has brought
16 two claims against DBCC, namely violation of Ohio’s Deceptive Trade Practice Act
17 (“ODTPA”) and negligent misrepresentation. DBCC has moved pursuant to Federal
18 Rule of Civil Procedure 12(b)(6) to dismiss both claims.

19 **Discussion**

20 **A. Standard for Motion to Dismiss**

21 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
22 provide detailed factual allegations, it must offer “more than labels and conclusions” and
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1 contain more than a “formulaic recitation of the elements of a cause of action.” Bell Atl.
2 Corp. v. Twombly, 550 U.S. 544, 555 (2007). The complaint must indicate more than
3 mere speculation of a right to relief. Id. When a complaint fails to adequately state a
4 claim, such deficiency should be “exposed at the point of minimum expenditure of time
5 and money by the parties and the court.” Id. at 558. A complaint may be lacking for one
6 of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a
7 cognizable legal claim. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th
8 Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the
9 plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s favor. Usher v.
10 City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is
11 whether the facts in the complaint sufficiently state a “plausible” ground for relief.
12 Twombly, 550 U.S. at 570. If the Court considers matters outside the complaint, it must
13 convert the motion into one for summary judgment. Fed. R. Civ. P. 12(d). If the Court
14 dismisses the complaint or portions thereof, it must consider whether to grant leave to
15 amend. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

16 **B. Ohio Deceptive Trade Practices Act**

17 The ODTPA enumerates several deceptive trade practices, including passing off
18 one’s goods or services as those of another, causing a likelihood of confusion as to the
19 source of one’s goods or services or as to one’s affiliation, connection, or association
20 with another, and representing that one’s goods or services have characteristics, uses, or
21 benefits they do not have or that one has a status, affiliation, or connection one does not
22 have. Ohio Rev. Code § 4165.02(A)(1)-(3)&(7). The ODTPA authorizes a civil action
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1 for actual damages by a “person who is injured by a person who commits a deceptive
2 trade practice.” Ohio Rev. Code § 4165.03(A)(2). The term “person” is defined as “an
3 individual, corporation, . . . , or any other legal or commercial entity.” Ohio Rev. Code
4 § 4165.01(D). A plaintiff in an action under § 4165.03 need not prove that the parties are
5 competitors. Ohio Rev. Code § 4165.02(B).

6 Ohio courts have repeatedly analogized the ODTPA to the federal Lanham Act,
7 and they apply to the ODTPA the same analysis used by federal courts under the Lanham
8 Act. *See Bedford Auto Dealers Ass’n v. Mercedes Benz of N. Olmsted*, 2012 WL 760626
9 at *3 (Ohio Ct. App. Mar. 8, 2012); *Dawson v. Blockbuster, Inc.*, 2006 WL 1061769 at
10 *3 (Ohio Ct. App. Mar. 16, 2006); *Corrova v. Tatman*, 844 N.E.2d 366, 369 (Ohio Ct.
11 App. 2005); *Chandler & Assocs., Inc. v. Am.’s Healthcare Alliance, Inc.*, 709 N.E.2d
12 190, 195 (Ohio Ct. App. 1997); *Yocono’s Rest., Inc. v. Yocono*, 651 N.E.2d 1347, 1350-
13 51 (Ohio Ct. App. 1994); *Cesare v. Work*, 520 N.E.2d 586, 590 (Ohio Ct. App. 1987);
14 *Blankenship v. CFMOTO Powersports, Inc.*, 944 N.E.2d 769, 776 (Clermont Cnty., Ohio
15 Ct. Common Pleas 2011). Like the ODTPA, the Lanham Act allows “any person who
16 believes that he or she is likely to be damaged” by one of the enumerated acts to
17 commence litigation. *See* 15 U.S.C. § 1125(a)(1). The United States Supreme Court
18 recently announced new standards for determining who may sue under the Lanham Act,
19 *see Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), and
20 the Court must undertake an analysis of whether and how *Lexmark* might influence the
21 Ohio Supreme Court in construing the ODTPA.

1 The Lexmark Court adopted a two-pronged test for assessing whether Congress
2 authorized suit under the Lanham Act. Under the first “zone-of-interests” inquiry, to
3 proceed under the Lanham Act, a plaintiff “must allege an injury to a commercial interest
4 in reputation or sales.” See 134 S. Ct. at 1389-90. According to Lexmark, the zone of
5 interests protected by the Lanham Act does not include an injury suffered as a result of
6 being misled or hoodwinked into purchasing a disappointing or inferior product. Id. at
7 1390. The second proximate-cause standard asks whether the alleged harm has “a
8 sufficiently close connection to the conduct the statute prohibits,” and ordinarily requires
9 that an economic or reputational injury flow directly from the unlawful conduct at issue.
10 Id. at 1390-91. In employing this methodology, the Lexmark Court eschewed any bright-
11 line or categorical approach, indicating that a rule prohibiting suits by non-competitors
12 would “read too much” into the term “unfair competition.” Id. at 1392.

13 Prior to the Lexmark decision, a number of circuits had held that consumers were
14 barred from bringing suit under the Lanham Act. See Made in the USA Found. v. Phillips
15 Foods, Inc., 365 F.3d 278 (4th Cir. 2004); Barrus v. Sylvania, 55 F.3d 468 (9th Cir.
16 1995); Serbin v. Ziebart Int’l Corp., 11 F.3d 1163 (3d Cir. 1993); Colligan v. Activities
17 Club of N.Y., Ltd., 442 F.2d 686 (2d Cir. 1971). Ohio courts had relied on these earlier
18 federal decisions to conclude that, because the ODTPA is interpreted consistently with
19 the Lanham Act, consumers may not pursue claims under the ODTPA. See Hamilton v.
20 Ball, 7 N.E.3d 1241, 1253 (Ohio Ct. App. 2014); Dawson, 2006 WL 1061769 at *4;
21 Blankenship, 944 N.E.2d at 777-78. The Ohio Supreme Court, however, has not yet
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1 addressed the issue.² The Court would normally treat both Hamilton and Dawson, which
2 were issued by appellate courts in Ohio, as “authoritative” given the absence of any
3 showing that the Ohio Supreme Court would decide the matter differently, see Holbrook
4 v. La.-Pac. Corp., 533 Fed. App’x 493, 497 (6th Cir. 2013), but those cases predate
5 Lexmark, which altered the Lanham Act landscape.

6 Subsequent to Lexmark, but without citing to the United States Supreme Court’s
7 decision, a judge in the Southern District of Ohio concluded that consumers have
8 standing to bring actions under the ODTPA, reasoning that an individual is explicitly
9 included within the meaning of a “person who is injured” and entitled to commence suit.

10 See Schumacher v. State Auto. Mut. Ins. Co., 47 F. Supp. 3d 618, 632 (S.D. Ohio 2014).

11 Although the same conclusion was drawn in Bower v. Int’l Bus. Machs., Inc., 495 F.

12 Supp. 2d 837 (S.D. Ohio 2007) (a case decided without the benefit of Lexmark), all other
13 federal courts in Ohio that have addressed the matter have reached the opposite result.

14 See Smith v. Smith & Nephew, Inc., 5 F. Supp. 3d 930 (S.D. Ohio 2014); Phillips v. Philip

15 Morris Cos., 290 F.R.D. 476 (N.D. Ohio 2013); Gascho v. Global Fitness Holdings,

16 LLC, 863 F. Supp. 2d 677 (S.D. Ohio 2012); Robins v. Global Fitness Holdings, LLC,

17 838 F. Supp. 2d 631 (N.D. Ohio 2012); see also Holbrook, 533 Fed. App’x at 497-98.

18 These latter cases are more consistent with the holding in Lexmark, which recognizes

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21 ² In McKinney v. Bayer Corp., 744 F. Supp. 2d 733 (N.D. Ohio 2010), the judge indicated that she would
22 certify the question to the Ohio Supreme Court, id. at 752, but the plaintiff voluntarily dismissed his
23 ODTPA claim before any certification issued, see Robins v. Global Fitness Holdings, LLC, 838 F. Supp.
2d 631, 649 n.3 (N.D. Ohio 2012); see also Schumacher v. State Auto. Mut. Ins. Co., 47 F. Supp. 3d 618,
630 n.16 (S.D. Ohio 2014).

1 that, although consumers are not categorically precluded from bringing suit, their
2 interests are not usually of the type protected by the Lanham Act. See 134 S. Ct. at 1390.

3 Plaintiff attempts to distinguish the ODTPA from the Lanham Act on the ground
4 that the ODTPA explicitly disclaims any requirement of competition between the parties.
5 The Lexmark Court, however, made clear that non-competitors are not barred from
6 pursuing actions under the Lanham Act if they meet the zone-of-interests and proximate-
7 cause standards. See id. at 1394. Given the similarities between the federal and state
8 statutes, the Court is persuaded that the Ohio Supreme Court would adopt the two-part
9 standard articulated in Lexmark in deciding who may pursue a claim under the ODTPA.³

10 In this case, although plaintiff qualifies as a “person” under the ODTPA (as well
11 as the Lanham Act), it does not allege the type of injury for which the statute provides
12 redress. Plaintiff does not allege that either the representations by DBCC that induced it
13 to buy CreditBuilder or its purchase or use of the product harmed its reputation or
14 diminished its sales. Any allegations of reputational injury and/or lost sales resulting
15 from inaccurate credit ratings relate solely to the claims directed at D&B. Plaintiff’s
16 ODTPA claim against DBCC focuses on CreditBuilder’s failure to live up to its billing as
17 the “solution” to fix plaintiff’s credit scores. Lexmark teaches that such claim would not
18 be under the aegis of the Lanham Act, see 134 S. Ct. at 1390, and the Court concludes the

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20 ³ Indeed, in analyzing whether a party has standing in another context, the Ohio Supreme Court has
21 applied the “zone of interests” test, which the Lexmark Court reiterated from Ass’n of Data Processing
22 Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). See State ex rel. Dayton Newspapers, Inc. v. Phillips,
351 N.E.2d 127, 129 (Ohio 1976). The Ohio appellate courts have followed suit. See Fair Housing
Advocates Ass’n, Inc. v. Chance, 2008 WL 2229530 at *1 (Ohio Ct. App. June 2, 2008); Save the Lake v.
City of Hillsboro, 815 N.E.2d 706, 708 (Ohio Ct. App. 2004).

1 Ohio Supreme Court would hold that such claim is also beyond the reach of the ODTPA.
2 Whether plaintiff can make the requisite allegations to state a claim under the ODTPA
3 remains to be seen, but in the meanwhile, as to the ODTPA claim, DBCC’s Rule 12(b)(6)
4 motion is GRANTED, and Count I of the Second Amended Complaint, docket no. 91 at
5 ¶¶ 70–74, is DISMISSED, without prejudice, and with leave to file a motion to amend.

6 **C. Negligent Misrepresentation**

7 Ohio courts define negligent misrepresentation as occurring when one supplies
8 false information for the guidance of others in their business transactions. *See McMullian*
9 *v. Borean*, 857 N.E.2d 180, 185 (Ohio Ct. App. 2006); *Federated Mgmt. Co. v. Coopers*
10 *& Lybrand*, 738 N.E.2d 842, 863 (Ohio Ct. App. 2000); *Leal v. Holtvogt*, 702 N.E.2d
11 1246, 1253 (Ohio Ct. App. 1998). A claim for negligent misrepresentation “does not lie
12 for omissions,” but instead must be premised on “some affirmative false statement.”
13 *McMullian*, 857 N.E.2d at 185; *Leal*, 702 N.E.2d at 1253. To prevail on a claim of
14 negligent misrepresentation, a plaintiff must also prove that the defendant failed to
15 exercise reasonable care or competence in obtaining or communicating the information at
16 issue. *Leal*, 702 N.E.2d at 1253; *see also Federated Mgmt.*, 738 N.E.2d at 863.

17 In Count II of the Second Amended Complaint, plaintiff lists fourteen (14) alleged
18 misrepresentations by DBCC, which fall into three groups: (i) statements touting the
19 benefits of CreditBuilder; 2d Am. Compl. at ¶¶ 76(b), (i), & (l)–(n) (docket no. 91);
20 (ii) statements blurring the distinction between DBCC and D&B, including those using
21 the plural pronouns “we,” “our,” and “us” to describe DBCC’s business; *see id.* at
22 ¶¶ 76(a) & (c); and (iii) statements about a business’s credit profile; *id.* at ¶¶ 76(d)–(h) &
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1 (j)–(k). With respect to the first category, plaintiff’s allegations that DBCC touted
2 CreditBuilder as the “solution” to its credit woes, or as something that would “help”
3 plaintiff and provide a “meaningful process for disputing negative trade experiences,”
4 recount mere puffery and, absent more specificity, are not actionable.⁴ See Phillips v.
5 State Farm Fire & Cas. Co., 1993 WL 386291 at *3 (Ohio Ct. App. Sep. 27, 1993)
6 (“Under Ohio law, in order to establish fraud or misrepresentation, there has to be a
7 representation concerning a present or past fact.”); see also Davis v. Byers Volvo, 2012
8 WL 691757 (Ohio Ct. App. Feb. 24, 2012) (holding that puffery is not actionable under
9 Ohio’s Consumer Sales Practices Act).

10 As to any confusion about the relationship between DBCC and D&B, plaintiff’s
11 pleading lacks the specificity required to state a plausible claim. Plaintiff does not
12 indicate when, in what context, or to whom DBCC made the statements at issue.
13 Moreover, plaintiff has not even alleged that DBCC failed to exercise reasonable care or
14 competence in making such representations. Finally, with regard to statements about a
15 business’s credit profile, including those concerning the number of “unique” inquiries
16 being made, some of which were duplicates or D&B’s own inquiries, and those
17 indicating that DBCC had accurate, up-to-date information, when it did not, plaintiff’s
18 negligent misrepresentation claim is belied by its acknowledgement that DBCC was not
19 advised by D&B about any “padding” of the inquiries. See supra note 1. Thus, with

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21 ⁴ To the extent plaintiff’s negligent misrepresentation claim is grounded on a theory that DBCC should
22 have disclosed methods for addressing the problems on plaintiff’s credit report other than purchasing
23 CreditBuilder, see 2d Am. Compl. at ¶ 58 (docket no. 91), it is based on an omission and is not cognizable
under Ohio law.

1 respect to plaintiff's negligent misrepresentation claim, DBCC's Rule 12(b)(6) motion is
2 GRANTED, and Count II of the Second Amended Complaint, docket no. 91 at ¶¶ 75-78,
3 is DISMISSED, without prejudice, and with leave to file a motion to amend.

4 **Conclusion**

5 For the foregoing reasons, the Court ORDERS:

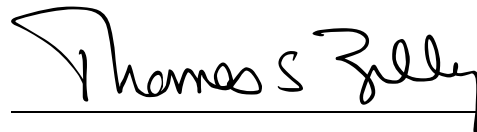
6 (1) DBCC's motion to dismiss, docket no. 93, is GRANTED;

7 (2) Counts I and II of the Second Amended Complaint, docket no. 91, are
8 DISMISSED, without prejudice, and with leave to file a motion to amend; any such
9 motion shall include a redlined version of a proposed third amended complaint and shall
10 be filed within thirty-five (35) days of the date of this Order; and

11 (3) The Clerk is DIRECTED to send a copy of this Order to all counsel of
12 record.

13 IT IS SO ORDERED.

14 Dated this 9th day of September, 2015.

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17 Thomas S. Zilly
18 United States District Judge
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