UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN SCHERILLO,	:	Civil Action No. 10-829 (KSH)(PS) Consolidated Action
Plaintiff,	:	
vs.	:	Hon. Katharine S. Hayden Senior United States District Judge
DUN & BRADSTREET, INC.,	:	
Defendant.	:	Motion Returnable: December 6, 2010
----------	:	Oral Argument Requested
RICHARD A. RACIOPPI, JR.,	:	(Electronically Filed Document)
Plaintiff,	:	
vs.	:	
DUN & BRADSTREET, INC.,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW OF DEFENDANT DUN & BRADSTREET, INC. IN FURTHER SUPPORT OF ITS MOTIONS FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

By failing to respond to defendant Dun & Bradstreet, Inc.'s ("D&B") Statements of Undisputed Material Facts, and by setting forth no credible evidence to the contrary, plaintiffs have conceded that: (i) they accepted and are bound by the Terms and Conditions on D&B's Small Business Solutions' ("SBS") website, including the disclaimer and limitation of liability clauses contained therein; (ii) there were numerous other factors influencing plaintiffs' decisions to invest and/or reinvest in Agape, including the promise of high returns with little or no risk, that were far more significant than anything in the D&B Plus Report; and (iii) there are no issues of material fact to preclude summary judgment. Based on these concessions, the Court is left with three issues to decide -- whether D&B was obligated to perform a criminal background check in connection with its provision of credit information in the Plus Report, whether D&B's decision not to perform such a check or failure to include such information in the Plus Report constituted gross negligence and whether D&B was the proximate cause of plaintiffs' losses. In order to survive summary judgment, plaintiffs must prove that *all* three issues should be decided in their favor. Based on the undisputed facts, they cannot prove even one.

D&B never assumed any duty or obligation to perform a criminal background check on the principals of Agape. On the contrary, the Plus Report

states that D&B only provides "background information" on a company's principals and criminal proceedings relating to the company itself. "Background information" does not include a full criminal history. Nor can "evidence of bankruptcy, fraud or criminal proceedings in the history of this business or its management" be reasonably interpreted to include conduct that pre-dates the formation of the company. Even if it could, D&B's decision not to perform a full criminal background check on Agape's CEO, Nicholas Cosmo, in connection with the Agape Plus Report did not rise to the level of gross negligence. The information in the Plus Report was compiled in accordance with D&B's guidelines, and plaintiffs can point to no inaccuracies in the Plus Report, nor can they point to any facts showing that D&B had knowledge of Cosmo's 1999 conviction. Under the circumstances, D&B exercised due care and diligence with respect to the preparation of the Plus Report and, therefore, cannot be found negligent, let alone grossly negligent.

Moreover, plaintiffs have failed to establish causation. In their opposition, plaintiffs simply ignore the numerous other factors upon which they based their decisions to invest or reinvest in Agape, including the high rate of return offered by Agape, the perceived safety of their investments, Agape's strong payment history and the representations made to them by their friends and Agape representatives. These facts are undisputed and plaintiffs' reliance conceded. On the other hand,

other than self-serving statements, plaintiffs put forth no evidence showing that D&B actually caused their losses. Because plaintiffs cannot establish a duty on the part of D&B, breach or causation, plaintiffs cannot sustain their claims of gross negligence and negligent misrepresentation as a matter of law.

ARGUMENT

I. THERE ARE NO MATERIAL FACTS IN DISPUTE

Plaintiffs failed to submit a responsive statement of material facts and counterstatement of material facts in response to D&B's moving papers. Pursuant to the local rules, "any material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion." L. Civ. R. 56.1; *see Hill v. Algor*, 85 F. Supp. 2d 391, 408 n. 26 (D.N.J. 2000) ("[F]acts submitted in the statement of material facts which remain uncontested by the opposing party are deemed admitted.") Therefore, the Court should deem all of the facts contained in D&B's statements of undisputed material facts admitted. [1] *See, e.g., Keybank v. Rico*, 2010 U.S. Dist. LEXIS 53197, at *7 (D.N.J. June 1, 2010) (where defendant failed to file response to 56.1 statement, "all of the facts presented in the Plaintiff's 56.1

[1] Although D&B is submitting one reply brief, it should be emphasized that these are two separate motions with two different sets of facts. Further, unless otherwise indicated, D&B will utilize the terms and references as previously defined in its initial briefs. D&B will differentiate the *Scherillo* and *Racioppi* moving papers by preceding the reference with either "*Sch.*" or "*Rac.*," respectively.

Statement shall be deemed admitted").[2] There are therefore no material facts in dispute and this case is ripe for summary judgment.

II. D&B DID NOT AGREE TO PERFORM A CRIMINAL BACKGROUND CHECK AS PART OF THE PLUS REPORT

Contrary to plaintiffs' assertions, D&B never represented to plaintiffs that it was performing a criminal background check on the principals of Agape. There are essentially four statements by D&B in the record that describe the information relating to a company's management that is contained in a Plus Report:

1. "Evidence of bankruptcy, fraud, or criminal proceedings in the history of this business or its management." (Plus Report at 1, *Sch. & Rac. Tercha Decl*., Exh. B);

2. "Detailed information on the history of a company, including background information on the management team and key principals, and information on related companies" (*Id*. at 5);

3. "Look into the business background of a company's owners" (D&B Website as of Nov. 7, 2010, *Declaration of Eliot Bloom*, Exh. C); and

[2] Throughout plaintiffs' brief, plaintiffs make numerous reference to "facts" for which plaintiffs provide no evidentiary support. *See, e.g.*, Plaintiffs' Opposition Brief ("Opp. Br.") at 5 ("Plaintiffs reasonably believed "NO" to mean that, in connection with Agape, 'or its management', there had been no prior bankruptcy, fraud, or criminal proceeding."); Opp. Br. at 18 ("Mr. Racioppi, for the purpose of deciding whether to invest in Agape, purposely sought out Defendant to utilize its services and to place substantial and critical weight on the outcome of Defendant's report on the risk associated with an Agape Investment.") Such statements of "fact," which lack any citation to the record, should be disregarded. *United States v. All Right*, 2009 U.S. Dist. LEXIS 93086, at *29-35 (D.N.J. Oct. 5, 2009), *aff'd*, 2010 U.S. App. LEXIS 17262 (noting that "[i]t is well-established that a plaintiff may not survive a motion for summary judgment by relying solely on unsupported factual assertions," and not crediting plaintiff's unsupported factual statements.)

4. "Gain insight into a company's management team with detailed information on a company's officers." (Plus Report Order Form, *Sch. & Rac. Tercha Decl.*, Exh. A).

Notably, none of these four references use the terms "criminal history" or "criminal background." The first refers to criminal proceedings in the "history of this business;" the second refers to information on the "history of a company," including "background information" on management; the third refers to the "business background" of the company's owners; and the fourth refers to "detailed information" on a company's officers.

In their opposition papers, plaintiffs attempt to twist these four references to impose a duty on D&B to perform criminal background checks on a company's principals where none otherwise exists. Plaintiffs go so far as to entirely misquote the language of the Plus Report, stating, without citation, that D&B represented that the Plus Report "will contain an investigation of the 'criminal history of the business or its management.'" (*See* Opp. Br. at 6.) As referenced above, D&B never used the phrase "criminal history" in its materials, and plaintiff does not cite any document in the record to support this made-up quotation. There is simply no textual support for plaintiffs' claim that D&B was under some duty or obligation to perform a criminal background check with respect to Agape's management.

Further, plaintiffs attempt to conflate the phrases "background information" with "criminal background" or "criminal history." The phrase "background

information" in this context should be interpreted to mean a basic overview of the management and principals of a company, which is exactly the type of information provided by D&B in the Report. (*See* Plus Report at 5, *Sch. & Rac. Tercha Decl.*, Exh. B (noting that Nick Cosmo was the President and owner of 100% of the capital stock of Agape, and has been active in the company since 2000)). The suggestion that "background information" necessarily includes a "criminal history" stretches these phrases beyond their plain meaning to say the least.

Moreover, as detailed in the Tercha Declaration, the Plus Report category providing "[e]vidence of bankruptcy, fraud, or criminal proceedings in the history of this business or its management" pertains to criminal acts in connection with the management of the subject company. (*Sch. & Rac. Tercha Decl.*, ¶ 13.) Based on this plain language, a reasonable person would not equate "criminal proceedings in the history of this business or its management" with a "criminal history" of the principals. In light of these statements, it is difficult to see how plaintiffs could think they were purchasing a criminal background check as part of the Plus Report, which is to simply provide credit information on a company. (*See id.*, Exhs. A & B.)

Even if the Court finds that D&B somehow represented it was performing a criminal background check in the Plus Report, under the circumstances, D&B's

failure to do so would, at most, constitute a contractual breach, not gross negligence.

III. THERE IS NO EVIDENCE OF GROSS NEGLIGENCE

The actions of D&B do not rise to the level of negligence, let alone gross negligence.[3] New Jersey courts have set forth various definitions for gross negligence, all of which emphasize a complete absence of due care. *See, e.g., Marangos v. Flarion Techs., Inc.*, 2007 U.S. Dist. LEXIS 31865, at *38 (D.N.J. May 1, 2007) (defining gross negligence as "an extreme departure from the ordinary standard of care")(internal citations omitted*); Stelluti v. Casapenn Enters., LLC*, 408 N.J. Super. 435, 457 (App. Div. 2009), *aff'd*, 203 N.J. 286 (2010) (observing that degrees of negligence have largely been abandoned in New Jersey, but noting that gross negligence continues to denote the "upper reaches of

[3] As set forth in the initial briefs, courts in New Jersey regularly enforce exculpatory clauses against claims of negligence. The issue of whether such clauses will bar claims of gross negligence is somewhat unsettled, as there are contradictory holdings. *Compare Morgan Home Fashions, Inc. v. UTI, United States, Inc.*, 2004 U.S. Dist. LEXIS 13412, at *11 (D.N.J. Feb. 9, 2004) (noting that exculpatory clause will not bar claim of gross negligence) *with St. Paul Fire & Marine Ins. Co. v. Wells Fargo Alarm Servs*., 1995 U.S. Dist. LEXIS 6749, at *13 (D.N.J. May 9, 1995) (holding exculpatory clause covers gross negligence, but not willful and wanton conduct). *Stelluti*, the recent pronouncement on the subject by the Supreme Court of New Jersey, indicates that "reckless or gross negligence" will not be covered by such a clause, but equates this conduct with intentional or dangerous acts. *Stelluti v. Casapenn Enters., LLC*, 203 N.J. 286, 311-12 (2010). Regardless of the exact terminology, it is apparent that D&B's conduct here does not rise to the level of negligence required under New Jersey law in order for plaintiffs to escape the terms of the exculpatory clause to which they agreed.

negligent conduct"); *Banks v. Korman Assocs*., 218 N.J. Super. 370, 373 (App. Div. 1987) ("an indifference to consequences")(internal citations omitted); N.J. Model Jury Instructions, § 5.2 Gross Negligence (2009)("Gross negligence is the want or absence of, failure to exercise slight care or diligence.")(internal citations omitted).

Courts in New Jersey have not hesitated to grant summary judgment in the absence of evidence showing gross negligence. *See, e.g., Marangos,* 2007 U.S. Dist. LEXIS at *38 (granting summary judgment motion against claim of gross negligence); *Player v. Motiva Enters. LLC*, 2006 U.S. Dist. LEXIS 2288, at *31-40 (D.N.J. Jan. 20, 2006) (granting defendant's summary judgment motion on gross negligence claims); *Morgan Home Fashions, Inc. v. UTI, United States, Inc.*, 2004 U.S. Dist. LEXIS 13412, at *26-27 (D.N.J. Feb. 9, 2004) (granting summary judgment against claims of gross negligence, and enforcing limitation of liability clause).

Plaintiffs' sole argument in support of their gross negligence claim is that D&B should have conducted a criminal background check with respect to Cosmo. Under the circumstances, D&B's decision not to do so can hardly be equated with "an extreme departure from the ordinary standard of care." D&B never agreed to perform a criminal background check on the principals of Agape (*see Sch. & Rac. Tercha Decl*., ¶ 13); instead, plaintiffs are trying to impose this duty, which is

wholly unsupported by the record (*see* Section II, *supra*). D&B fulfilled its contractual obligations by looking for such conduct to the extent it was associated with the business in some way. (*Sch. & Rac. Tercha Decl*. at ¶ 11.) D&B's belief was reasonable in light of the language in the Plus Report and order form, neither of which mention an obligation to perform a criminal background check. (*See id*., ¶ 13, Exhs. A & B.)

Moreover, even if D&B's materials could be reasonably read to encompass a criminal background check, D&B's failure to perform such a check does not signify the total absence of due care required to prove gross negligence, particularly when plaintiffs have pointed to no other omissions or mistakes in the Plus Report. At most, D&B's conduct would constitute simple negligence, and plaintiffs' claims would be barred or limited by the disclaimer and limitations of liability clauses in the Terms and Conditions.

That D&B acted with due care is confirmed by the testimony of Lisa Tercha, D&B's Leader, North American DUNSRight Operations. As Ms. Tercha explains, D&B maintains certain guidelines for its automated searches of the news records, which dictate the information gathered by D&B. (*Id*., ¶¶ 9-11.) These searches are not set to search for or capture information that relates solely to a company's principals, nor are these searches designed to look for information on a company that takes place prior to its inception. (*Id*., ¶¶ 7 & 10.) Instead, they are set so as to

find certain information when the principal's name and the company appear together. (*Id.*)

D&B's policies and guidelines with respect to these searches are entirely reasonable. The purpose of the Plus Report, and of D&B's business generally, is to provide information *on companies* to allow customers to make decisions with respect to credit risk. (*Id*. ¶¶ 2 & 3, Exhs. A & B.) Because the focus of the report is the company itself, D&B does not search for information relating to a company's principals prior to the inception of the company or that is unrelated to its business. For D&B to provide information regarding every single criminal arrest, charge, or formal criminal proceeding of a company's principals, whether it be a petit offense or a felony, and the dispositions related to same, would prove an undertaking far beyond the scope and purview of the Plus Report. D&B followed its guidelines with respect to the Plus Report for Agape, and there is no evidence indicating that D&B had any knowledge of the Cosmo conviction at the time it prepared the Report. (*Id*., ¶¶ 15 & 17.)

This case is therefore almost identical to *Baumann* (discussed in D&B's initial briefs), in which the Court found the defendant was not negligent for failing to search for outstanding judgments of a company for which the defendant was to provide credit information to plaintiff. *See Baumann v. Bradstreet Co*., 238 A.D. 617, 618-19 (N.Y. App. Div. 1933). The court emphasized that such a search was

not part of the defendant's policies and that there was no specific agreement or representation by the defendant that a search for judgments had been performed. *Id*. Like *Baumann*, it is not part of D&B's policies to perform a criminal background check on a company's principals, nor was there a specific representation by D&B that a criminal background would be performed in connection with the Plus Report.

IV. D&B DID NOT CAUSE PLAINTIFFS' LOSSES

As set forth in D&B's initial moving papers, there were a host of other factors that contributed to plaintiffs' decision to invest or reinvest in Agape that had nothing to do with the Plus Report. Plaintiffs simply ignore this overwhelming evidence, including, most notably, the representations made by Agape as to the extraordinary rate of return and security of the investments, to suggest that the Plus Report was the proximate cause of their investment decisions.

For example, as to Scherillo, they ignore:

- The representations made by Agape to Scherillo, including the oral and written statements that his money was "99% secured" (*Sch. Statement of Undisputed Material Facts*, ¶¶ 25-27, 30-34, & 45);
- The fact that Scherillo was supposedly earning 8% on his money every 2-3 months (or approximately 48% annually) and that Scherillo was happy with those returns (*Id*., ¶¶ 33, 44 & 48);
- Scherillo's admission that these high returns were a "significant" factor in his decision to invest and reinvest in Agape (*Id*., ¶¶ 17, 35 & 48);

- Scherillo's numerous conversations with Ferraiolo, both before and after his initial investment, who spoke very favorably about investing in Agape and indicated that he had been paid (*Id*., ¶¶ 8-13, 35, 46-48);
- The Agape spreadsheet showing Scherillo that he could double his $50,000 investment in a period of 16-18 months (*Id*., ¶¶ 15-17);
- Scherillo's visits to the Agape offices, which appeared to be legitimate (*Id*., ¶¶ 23-24, 53); and
- Scherillo's belief that Agape was a low risk investment because everyone had been getting paid (*Id*., ¶ 37).

Moreover, Scherillo freely stated that "[t]he overall [fact] that everybody was getting paid on time in the last nine years was more important to me than anything."[4] (*Sch. Pearlson Decl.*, Exh. B, Sch. Tr. II at 19:6-9.) By Scherillo's own admission, the Plus Report was clearly not the most significant factor in his decision to invest in Agape or the proximate cause of his losses.

Plaintiffs also conveniently ignore Racioppi's testimony showing the numerous other factors that influenced his decision to invest in Agape. Thus, plaintiffs ignore:

- Racioppi's numerous discussions with business acquaintances and Agape representatives, in which Racioppi was told of investors making 9-14% returns in 60-72 days, and his conversations with lawyer Mark Goldman, who advised Racioppi of the supposed legitimacy of Agape's lending practices (*Rac. Statement of Undisputed Material Facts*, ¶¶ 1-17, 22-24, & 30-31);

[4] Contrary to Scherillo's assertions, this statement was hardly taken out of context; instead, it was part of a discussion of the various facts influencing his decision to invest in Agape, in which Scherillo readily admitted that the fact that everyone was getting paid over the past nine years was the most important factor in his decision.

- Racioppi's reliance upon Agape's written and oral representations that his principal was only 1% at risk, with 99% secured by asset liens, and that he could pull his money out at any time (*Id*., ¶¶ 17, 24-25, 32-33, & 49);
- Racioppi's receipt of several interest payments from Agape and Agape Merchant, and his earning of interest through Profile Holdings (*Id*., ¶¶ 36, 58, & 62-63);
- Racioppi's due diligence on Agape through his internet searches and inquiry with the Better Business Bureau (*Id*., ¶¶ 26, 29, & 50);
- Racioppi's "test" of Agape, whereby Racioppi withdrew his original investment plus full interest and deposited same, which showed Racioppi that Agape was, in fact, legitimate and gave Racioppi further confidence in Agape (*Id*., ¶¶ 38-41);
- Racioppi's visit to Agape, in which he saw "shoe boxes of checks going out the door to clients" (*Id*., ¶ 52); and
- Racioppi's attraction to and happiness with the "significant" rate of return offered by Agape, and his perception that investors were all getting paid by Agape (*Id*., ¶¶ 21, 37, 45, & 46-47).

Notably, plaintiffs also ignore the fact that Racioppi only purchased a Plus Report in connection with his initial Agape investment and did not purchase another D&B report in connection with his eighteen (18) subsequent contracts with Agape. (*Id*., ¶ 54.) All of the above facts are amply supported by the record and undisputed.

In order to escape summary judgment, plaintiffs repeatedly mischaracterize testimony. For example, plaintiffs argue that "Mr. Scherillo clearly stated that he only relied on Defendant's report" in connection with his reinvestment in Agape. (*See* Opp. Br. at 14.) That is not true. Scherillo testified that he spoke with his

wife and Ferraiolo again prior to his reinvestment, and that he did not perform any additional "due diligence" except for these conversations. "Due diligence" and "reliance" mean two very different things. While Scherillo may not have performed any additional *due diligence* beyond these two conversations, he testified regarding several other factors that he *relied upon* in connection with the reinvestment, including his happiness with the high returns on his initial investment and Ferraiolo's statements that he would invest as much as he possibly could in Agape and that he had "absolutely" been receiving his returns from Agape. (*Sch. Pearlson Decl.*, Exh. A, Sch. Tr. I at 65:20-66:23, Exh. B, Sch. Tr. II at 39:12-17). Based on Agape's representations, Scherillo also believed that his reinvestment was 99% secured and that his money was only one percent at risk. (*Id.*, Exh. B, Sch. Tr. II at 40:19-41:17.) Tellingly, when asked why he invested all of his additional cash into Agape in September 2008, Scherillo did not testify that it was because of the Plus Report; instead, he responded, "I don't know. I just -- I was trying to make a few dollars." (*Id.*, Sch. Tr. II at 39:5-11).

Further, as to Racioppi, the evidence submitted consists solely of self-serving quotations in which Racioppi attempts to place the blame on D&B for his losses. Given the evidence cited above (and in the moving briefs), these self-serving statements cannot create a genuine issue of material fact as to proximate

cause.[5] *See Wasielewski v. Sands Hotel & Casino*, 2005 U.S. Dist. LEXIS 8438, at *10-12 (D.N.J. May 10, 2005) (granting defendants' motion for summary judgment in negligence case because plaintiff's self-serving testimony regarding causation did not raise an issue of material fact). Because a reasonable jury cannot find that the Plus Report was the proximate cause of plaintiffs' losses, summary judgment should be granted.

CONCLUSION

For the foregoing reasons, D&B's motion for summary judgment should be granted, and the complaint dismissed in its entirety.

Respectfully submitted,

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Dated: November 19, 2010

[5] It should also be noted D&B never represented to plaintiffs that the Plus Report should serve as the sole basis for their investment decision. To the contrary, paragraph 1 of the Terms and Conditions expressly warned plaintiffs against using the Plus Report in such a manner, stating that "You may [] use [the report] *solely as one factor* in your credit, insurance, marketing or other business decisions . . . ." *(Sch. & Rac. Pearlson Decl*., Exh. L) (emphasis added.) Thus, D&B did not recommend, and in fact cautioned plaintiffs against, using the information in the Plus Report as the sole basis for any investment decision.