PILLSBURY WINTHROP SHAW PITTMAN LLP
1540 Broadway
New York, NY 10036-4039
(212) 858-1000
David G. Keyko
Eric Fishman
Kenneth A. Newby

Attorneys for Defendants
American Media, Inc. and
Distribution Services, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDERSON NEWS, L.L.C. and ANDERSON SEVICES, L.L.C.,

Plaintiffs,

- against -

AMERICAN MEDIA, INC., BAUER PUBLISHING CO., L.P., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA U.S., INC., HUDSON NEWS DISTRIBUTORS LLC, KABLE DISTRIBUTION SERVICES, INC., THE NEWS GROUP, L.P., RODALE, INC., TIME INC., and TIME/WARNER RETAIL SALES & MARKETING, INC.,

Defendants.

09-CIV-2227

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DISTRIBUTION SERVICES, INC.'S MOTION TO DISMISS THE COMPLAINT

Table of Contents

TABLE OF AUTHORITIES

CASES

U.S. CODE & RULES

Defendant Distribution Services, Inc. ("DSI"), respectfully submits this Memorandum of Law in Support of Its Motion to Dismiss the Complaint filed by Plaintiffs Anderson News, L.L.C. and Anderson Services, L.L.C. (collectively "Anderson"). DSI joins in the joint memorandum of law, and makes this supplemental submission to address issues unique to it because of its status as an in-store merchandiser of publications.

INTRODUCTION

DSI, unlike each of the other parties in this case, is neither a publisher, a distributor nor a wholesaler. It is a marketing company. The purported "parallel conduct" at the heart of this action – although not actually parallel and insufficient to give rise to a plausible inference of a conspiracy – does not even have application to DSI. Because DSI does not use wholesalers, it cannot boycott them. Nor is it alleged to have done so; indeed, it is not asserted to have done anything at all. In Anderson's 29-page Complaint, DSI is mentioned but twice – it is simply said to be a subsidiary of American Media, Inc. ("AMI") and to provide marketing services. Because of the complete absence of any facts to support the claim that DSI conspired to restrain trade, that claim is insufficient as a matter of law.

Anderson's state law claims suffer from the same lack of facts. A single allegation that all of the defendants spread false rumors about Anderson's financial condition forms the entire predicate for Anderson's defamation claim. What did DSI actually say, why was the statement false, when was it said and to whom was it addressed? None of this is alleged. In the absence of these basic allegations, the pleading fails to state a defamation claim.

The other two state law counts – tortious interference and conspiracy – suffer not only from the same want of factual detail; they fail as a matter of law. To state a claim for tortious interference with contract, DSI must be said to have caused contracts with third-parties to be breached. Here, there is no such allegation and thus no claim is stated. As for the conspiracy

count, no such cause of action exists under New York law where, as here, no underlying tort has been alleged.

The unstated premise for the claims against DSI is that, if a claim is stated against AMI, a claim is stated against DSI by virtue of being an AMI subsidiary. No court has ever so held.[1] What is more, for the reasons stated in defendants' joint memorandum of law, no claim has been stated against AMI. Like the other defendants, AMI is being sued for boycotting Anderson (even though AMI continued to ship magazines to Anderson even after Anderson's deadline for accepting the surcharge in writing expired). Declining to accept an enormous, unilateral price increase is rational conduct consistent with the laws of supply and demand. In any event, claims against AMI cannot be visited upon DSI merely by virtue of its corporate affiliation. DSI itself must be said to have done something, but the Complaint fails to allege what that something is.

ARGUMENT

THE COMPLAINT AGAINST DSI SHOULD BE DISMISSED

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation and citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *only* specific allegation in the Complaint regarding DSI is that it is a subsidiary of AMI that provides sales and marketing

[1] Indeed, just the opposite is the case. As a subsidiary of AMI, DSI is not capable of conspiring with AMI to violate Section 1 of the Sherman Act. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770-71 (1984) (parent corporation and its wholly owned subsidiary were not legally capable of conspiring with each other under section 1 of the Sherman Act).

services to publishers. Complaint ¶¶ 16, 28.[2] This is plainly insufficient as a matter of law to state claims for antitrust, tortious interference, defamation or conspiracy.

A. The Complaint Fails to State an Antitrust Claim Against DSI

Plaintiffs assert that DSI has engaged "in a conspiracy in unreasonable restraint of trade in violation of section 1 of the Sherman Act (15 U.S.C. § 1 (2009)) and section 4 of the Clayton Act (15 U.S.C. § 15 (2009))." Complaint ¶ 78 (Count I). In the context of such claims, a complaint has facial plausibility only if it has "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (holding complaint failed to state antitrust claim based upon allegations of parallel business conduct and bare assertion of conspiracy). *Twombly* teaches that a "conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 557.

Examples of "conclusory allegations" include unadorned assertions that parties "[p]articipated in meetings . . . to discuss pricing and market divisions," that they "[a]greed to fix prices" or "[c]ollectively took actions to drive . . . companies out of business." *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 & n.5 (2d Cir. 2007) (dismissing deficient antitrust complaint). A list of conspiratorial acts "in entirely general terms without any specification of any particular activities by any particular defendant . . . is nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatsoever." *Id.* (quoting district court).

To go beyond theoretical possibilities, a plaintiff asserting a Section 1 claim must set forth facts "that plausibly suggest that *each Defendant* participated in the alleged conspiracy." *Hinds County, Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009) (internal

[2] The Complaint is attached as Exhibit "A" to the Declaration of Daniel N. Anziska filed in support of Defendants' Joint Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Other exhibits referenced to herein are likewise annexed to the Anziska Declaration.

quotation and citation omitted) (emphasis added) (dismissing antitrust conspiracy claims against defendants about whom no specific allegations were made); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 06-MD-1775 (JG), 2008 WL 5958061, at **6-8 (E.D.N.Y. Sept. 26, 2008) (dismissing antitrust complaint where complaint "does not identify with any specificity how each defendant joined the conspiracy, or what circumstances provided the opportunity to do so").

The claim against DSI fails to meet these pleading standards and must be dismissed. There are no factual allegations that suggest DSI did anything, let alone conspired to restrain trade. The Complaint references DSI exactly twice: Paragraph 16 says that DSI is a "subsidiary of defendant AMI and a provider of marketing services to publishers." Paragraph 28 says that DSI "provides sales and marketing services to publishers." Apart from these two sentences, nothing is said about the company. It is not alleged to be a publisher, distributor or wholesaler, not alleged to have gained from the purported boycott or to have lost, not alleged to have had a position on "scan-based trading" or a stake in maintaining so-called "publisher-induced inefficiencies." It is not said to have disparaged Anderson or to have interfered with its contracts.

Paragraph 47 is illustrative. It says that "in late January, national distributor defendants Curtis, Kable and TWR, and publisher defendants AMI, Bauer, Hachette, Rodale and Time – acting in concert – cut off Anderson from its supply of magazines." Where is DSI in all of this? It is obviously impossible to draw a plausible inference that DSI engaged in an illegal conspiracy based upon nothing.

These are deficiencies, moreover, that cannot be fixed. The Complaint says that there was a conspiracy "to monopolize the United States wholesale magazine distribution market." Complaint ¶ 2. We are told that this conspiracy purportedly was carried out by "magazine

publishers, their national distributors and two wholesalers" through an "unlawful coordinated boycott of Anderson." *Id.* at ¶¶ 2-5. It is not plausible to infer that DSI would or could be part of such a conspiracy. Unlike each of the other defendants, DSI is not alleged to buy, sell or distribute magazines; DSI is a marketer. As such, DSI is indifferent to the costs of distribution (because it does not bear them); it is without ability to participate in a boycott of a wholesaler (because it does not use wholesalers); and it is, in any event, without reason to participate in such a boycott, even if it could. There is no plausible claim here against DSI and, given the nature of the conspiracy alleged, none that could be asserted.

B. The Complaint Fails to State a Defamation Claim

The Complaint's conclusory allegations of defamation (Count III) fail to state a claim. "To state claim for defamation under New York law, Plaintiff must establish: (1) that a defamatory statement of fact was made concerning [Plaintiff]; (2) that the defendant published that statement to a third party; (3) that the statement was false; (4) that there exists some degree of fault; (5) and that there are special damages or that the statement is defamatory per se, i.e., it disparaged the plaintiff in the way of his or her office, profession or trade." *Ello v. Singh*, 531 F. Supp. 2d 552, 575 (S.D.N.Y. 2007) (internal citation and quotation omitted) (dismissing defamation claims).

In alleging such a claim, plaintiffs must plead "facts that provide an adequate identification of the purported communication, and an indication of who made the communication, when it was made and to whom it was communicated." *Continental Fin. Co. v. Ledwith*, No. 08 Civ. 7272 (PAC), 2009 WL 1748875, at *7 (S.D.N.Y. June 22, 2009) (internal citation and quotation omitted). Where a pleading fails to allege that a defendant actually "uttered any defamatory comments," it self-evidently fails under *Iqbal* and *Twombly*. *Stevens v. New York*, No. 09 Civ. 5237 (CM), 2009 WL 4277234, at *6 (S.D.N.Y. Nov. 23, 2009)

(dismissing defamation claim). In *Continental*, this Court concluded that the defamation claim must be dismissed because the complaint failed "to allege any specific facts regarding who made [the allegedly defamatory] statements, when they were made, or to whom they were communicated." 2009 WL 1748875, at *7.

So too here, the defamation claim against DSI contains virtually no facts. As an initial matter, it does not allege that DSI itself actually uttered anything defamatory. In fact, the Complaint does not say who made the remarks about which Anderson complains. Treating every defendant as if one, it simply says that "defendants" (all eleven?) spread rumors about Anderson's poor financial condition. Complaint ¶ 48. What is more, the pleading does not say to whom the remarks were made. Nor does it say when they were made. These omissions in themselves are lethal to this pleading.

There is another critical omission: the Complaint does not give rise to a plausible inference that the alleged defamatory remarks were false. To the extent there are allegations about Anderson's financial condition or plans to continue in business without the surcharge, those allegations are entirely consistent with the purported defamatory statements that Anderson was in poor financial health and might exit the market. The Complaint asserts, for instance, that Anderson was operating under "onerous and unnecessary costs" associated with the distribution of magazines (*id.* at ¶ 31), that it had to raise its prices as part of its "efforts to remain competitive" (*id.* at ¶ 37) (topic heading), that the surcharge was needed to make the "distribution system less burdensome" (*id.* at ¶ 39), and that "industry constraints [were] *compelling* that measure" (*id.* at ¶ 42). In announcing the surcharge, Charles Anderson said that "this business is not profitable and has not been for a very long time" and that wholesalers'

"profits have eroded to nothing and into significant losses." Ex. B, p. 2.[3] Only three weeks after the publishers refused to pay the surcharge, Anderson announced on February 7, 2009 that "it had no recourse but to cease normal business activities effective immediately." Complaint ¶5. These allegations appear to be entirely consistent with allegedly negative statements (whatever they might actually have been) about Anderson's financial condition.

In sum, the pleading fails to state what defamatory remarks were made by DSI, when they were made, to whom they were made, or why they were false. Each of these omissions alone is enough to cause this claim to fail.

C. The Complaint Fails to State a Tortious Interference Claim

The "Second Claim" of the Complaint appears to assert two tortious interference claims: (i) tortious interference with advantageous business relations, and (ii) tortious interference with contract. *See* Complaint ¶¶ 82-90. Once again, neither is adequately pled.

1. The Claim for Tortious Interference with Advantageous Business Relations Fails

"In New York, for Plaintiff to state a claim for tortious interference with advantageous business relations, it must allege that: '(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means, and (4) the defendant's interference caused injury to the relationship." *MMC Energy, Inc. v. Miller*, No. 08 Civ. 4353 (DAB), 2009 WL 2981914, at *7 (S.D.N.Y. Sept. 14, 2009).

[3] As this announcement is specifically referenced in the pleading at Paragraph 42, the Court may consider it on a motion to dismiss. *See Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 122 (2d Cir. 2005) ("In determining the adequacy of the complaint, the court may consider any written instrument attached to the complaint as an exhibit or incorporated in the complaint by reference, as well as documents upon which the complaint relies and which are integral to the complaint.").

Anderson premises its tortious interference claim upon its antitrust and defamation causes of action: Defendants (again, unspecified ones) allegedly interfered with Anderson's economic relations by: (i) making "false statements regarding Anderson's financial status and continued existence as a magazine wholesaler" and (ii) boycotting "the distribution of single-issue magazines to Anderson without a legitimate business justification with the intent of harming its business." Complaint ¶¶ 86-87. Because Anderson fails adequately to allege that DSI made defamatory remarks or participated in a boycott (as discussed above), it necessarily fails to state a claim premised upon such tortious conduct. *See MMC Energy*, 2009 WL 2981914, at *8 (dismissing claim for tortious interference with advantageous business relations where complaint did not allege that the defendant's "statements were criminal, otherwise independently tortious, or for the sole purpose of inflicting intentional harm on plaintiffs.").

What is more, Anderson does not even allege that any defamatory statements by DSI actually "caused injury" to its economic relationships. The Complaint says that "the loss of 80% of the nation's magazines titles" caused Anderson to lose Wal-Mart as a customer, and that without "80% of its product to distribute," Anderson "began to hemorrhage money" and "had no choice but to suspend its magazine wholesale business on February 7, 2009." Complaint ¶¶ 64-66. Nothing is said in the Complaint about any false statements causing any retailers to do anything. As such, even if the Complaint actually set forth a defamation claim, that tort could not support Anderson's separate claim for tortious interference with economic relations.

2. *The Claim for Tortious Interference With Contract Fails*

In New York, to state a claim for tortious interference with contract, a pleading must allege "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5)

damages resulting therefrom." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401-02 (2d Cir. 2006) (internal citation and quotations omitted). A complaint containing only "vague and conclusory" allegations of tortious interference with contract must be dismissed. *Schuckman Realty, Inc. v. Marines Midland Bank*, N.A., 244 A.D.2d 400, 401, 664 N.Y.S.2d 73, 75 (App. Div. 1997).

Here, this claim fails not only for the reasons discussed above (the absence of tortious conduct or causation), but also because Anderson fails to identify any contracts that were actually breached. "Intentional procurement of a breach is an essential element of the tort of interference with contractual relations." *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 828 (2d Cir. 1990); *see also Continental*, 2009 WL 1748875, at **6-7 (dismissing tortious interference with contract claim because plaintiff fails to plead "most critically, the actual breach of the contract by a third party"). The Complaint says that "Anderson's retail customers have terminated their retail supply and retail services agreements" (Complaint ¶ 89), but no where says that they breached. If there is no breach, there is no claim for tortious interference.

D. The Cause of Action for Common Law Conspiracy Must Be Dismissed Because It Does Not Exist Under New York law

Anderson's final claim for civil conspiracy must be dismissed as a matter of law because it does not exist. *See* Complaint ¶¶ 97-101. In *Kirch v. Liberty Media Corp.*, the Second Circuit observed that "New York does not recognize an independent tort of conspiracy." 449 F.3d at 401; *accord Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) ("[A] mere conspiracy to commit a [tort] is never of itself a cause of action."); *Waggoner v. Caruso*, 886 N.Y.S.2d 368, 372 (App. Div. 2009) (same). Since plaintiff in *Kirch* failed to state causes of action for either of the torts underlying the alleged conspiracy, defamation or tortious interference with prospective economic advantage, the court concluded "it necessarily fail[ed] to

state an actionable claim for civil conspiracy. The district court thus properly dismissed all of [plaintiff's] claims." *Kirch*, 449 F.3d at 401.

Similarly, here, because the Complaint fails to state causes of action for tortious interference and defamation, the cause of action for civil conspiracy must be dismissed. "A conspiracy claim 'cannot stand alone' and must be dismissed if the underlying independent tort has not been adequately pleaded." *Gladstone Bus. Loan, LLC v. Randa Corp.*, No. 09 Civ. 4255(LMM), 2009 WL 2524608, at *6 (S.D.N.Y. Aug. 17, 2009) (quoting Romano v. Romano, 2 A.D.3d 430, 432 (N.Y. App. Div. 2003)).

CONCLUSION

For the reasons stated above, the complaint against Defendant Distribution Services, Inc. should be dismissed in its entirety.

Dated: December 14, 2009
New York, New York

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: /s/ David Keyko

David G. Keyko
Eric Fishman
Kenneth A. Newby
1540 Broadway
New York, NY 10036-4039
(212) 858-1000

Attorneys for Defendant Distribution Services, Inc.