10-4591-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANDERSON NEWS, L.L.C., LLOYD T. WHITAKER, as the Assignee under an Assignment for the Benefit of Creditors for ANDERSON SERVICES, L.L.C.,

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

Appeal From the United States District Court
For the Southern District of New York (Crotty, *J.*)

BRIEF FOR DEFENDANT-APPELLEE
HACHETTE FILIPACCHI MEDIA U.S., INC.

Meir Feder
D. Theodore Rave
JONES DAY
222 East 41st Street
New York, NY 10017
Telephone: (212) 326-3939

Counsel for Defendant-Appellee
Hachette Filipacchi Media U.S., Inc.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney certifies that Defendant-Appellee Hachette Filipacchi Media U.S., Inc. is 100% owned by Lagardere North America, Inc, a Delaware corporation, which is 100% owned by Hachette S.A., which is, in turn, 100% owned by Lagardere SCA. The latter two companies are French companies.

April 18, 2011

JONES DAY

By /s/ Meir Feder

Meir Feder
D. Theodore Rave
JONES DAY
222 East 41st Street
New York, NY 10017
Telephone (212) 326-3939

Counsel for Defendant-Appellee Hachette Filipacchi Media U.S., Inc.

TABLE OF CONTENTS

Page

RULE 26.1 CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
STATEMENT OF THE ISSUES PRESENTED 1
PRELIMINARY STATEMENT 1
STATEMENT OF FACTS 2
SUMMARY OF ARGUMENT 4
STANDARD OF REVIEW 4
ARGUMENT 4
I. ANDERSON HAS FAILED TO STATE ANY CLAIM AGAINST HACHETTE 4
CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 4, 5, 7

ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,
493 F.3d 87 (2d Cir. 2007) 5

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) ..... *passim*

In re Elevator Antitrust Litig.,
502 F.3d 47 (2d Cir. 2007) (per curiam) 7

STATUTES

15 U.S.C. § 1 ..... 1, 5

STATEMENT OF THE ISSUES PRESENTED

1. Whether Plaintiffs-Appellants Anderson News, L.L.C., and Lloyd T. Whitaker, as the Assignee under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C. (collectively "Anderson") failed to state a claim of Sherman Act § 1 conspiracy against Hachette Filipacchi Media U.S., Inc. ("Hachette"), where the complaint is devoid of any non-conclusory factual allegations about Hachette's conduct or purported role in the alleged conspiracy.

PRELIMINARY STATEMENT

Hachette joins in and adopts the arguments made in the briefs for Time Inc. and Time/Warner Retail Sales & Marketing, Inc., and for Bauer Publishing Co., LP.

Hachette submits this separate brief to highlight the complete absence of any non-conclusory factual allegations about Hachette's conduct or purported role in the alleged conspiracy. The conclusory assertions that Hachette "cut off" Anderson and that its distributor acted on its behalf fall woefully short of forming a cognizable factual basis for Anderson's claims. Even if the district court erred in dismissing the complaint as to any defendant—and it did not—Anderson cannot possibly state a claim against Hachette under the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

STATEMENT OF FACTS

The sum total of the factual allegations about Hachette in Anderson's complaint are that Hachette publishes magazines, *AA 20, 23 (Compl. ¶¶ 10, 27)*, that its distributor is Curtis, *AA 21 (Compl. ¶ 14)*, and that it uses DSI for marketing services, *AA 22 (Compl. ¶ 16)*.[1] In its twenty-nine pages, the complaint only mentions Hachette three more times, all in completely conclusory fashion.

First, Anderson alleges:

> Thus 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—including the most popular titles, like *People* and *Sports Illustrated*.

AA 29 (Compl. ¶ 47). But the complaint does not anywhere allege that Hachette had any communication with other defendants—or any basis on which such communication could be inferred—about a decision to "cut off" Anderson. Indeed, it does not even allege that Hachette was responsible for making decisions as to whether to ship Hachette magazines to Anderson.

Second, Anderson alleges:

> On or about January 21, 2009, after talking with representatives of TWR and Kable, Mr. Anderson spoke with Bob Castardi, President and Chief Operating Officer of defendant Curtis. Castardi, acting on behalf of Curtis as well as all the publishers represented by Curtis—

[1] "*AA*" refers to the Appendix of Plaintiffs-Appellants Anderson News, L.L.C. and Anderson Services, L.L.C. "Br." refers to Anderson's opening brief on appeal.

> including publisher defendants AMI, Hachette, and Rodale—told Mr. Anderson, in words or substance, that "I [Castardi] don't want a problem. I would like to get this worked out. But I'm going to have to go with whatever Rich [Jacobsen, CEO of defendant TWR] does."

AA 29 (Compl. ¶ 49 (alterations in original)). It does not, however, allege that Curtis was authorized to enter a conspiracy on Hachette's behalf or that Hachette was even aware of or had any involvement in Curtis's decision-making process or interaction with Anderson.

Third, Anderson alleges that:

> Moreover, as a direct result of Anderson leaving the market, many of the smaller publishers who depended on Anderson for regular nationwide distribution, may be forced to shut down. These smaller publishers could not survive the disruption in sales that Anderson's collapse caused. This permanently reduced the choices available to retailers and their customers, and correspondingly benefited the remaining large publishers in the marketplace—including defendants AMI, Bauer, Hachette, Rodale, and Time.

AA 38 (Compl. ¶ 74). This, again, alleges no conduct—let alone wrongful conduct—by Hachette.

The complaint makes no other allegations mentioning Hachette.

Anderson's proposed amended complaint adds nothing of substance. Like the original complaint, it barely mentions Hachette. The only "new" allegations about Hachette are: (1) the slightly revised, but still wholly conclusory, assertion that its national distributor, Curtis, "represents and acts on behalf of" Hachette, *AA 86 (PAC ¶ 56)*, and (2) that on January 29, 2009, Hachette received an email from

Curtis informing it that "effective immediately, Curtis is suspending all further shipments of magazines to all Anco [*i.e.*, Anderson] wholesaler operations," *AA 89 (PAC ¶ 66)*. Like the original complaint, the proposed amended complaint lacks any allegation that Hachette engaged in any negotiations with Anderson, participated in any meetings, or communicated with the other defendants.

SUMMARY OF ARGUMENT

Neither the complaint nor the proposed amended complaint contains any non-conclusory allegation about Hachette's participation in the purported conspiracy. Even if the district court erred in dismissing the complaint as to any defendant—and it did not for the reasons set forth in the Time and Bauer briefs—Anderson cannot possibly state a claim against Hachette.

STANDARD OF REVIEW

Hachette adopts the standard of review in the Time and Bauer briefs.

ARGUMENT

I. ANDERSON HAS FAILED TO STATE ANY CLAIM AGAINST HACHETTE

Twombly and *Iqbal* make clear that a plaintiff cannot simply recite the elements of a cause of action and leave it to the Court to hypothesize a set of facts under which the plaintiff might be entitled to relief. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560-62

(2007). Instead, "[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). In particular, stating a claim of "contract, combination, . . . , or conspiracy, in restraint of trade" under § 1 of the Sherman Act, 15 U.S.C. § 1, "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Conclusory allegations are not factual matter, and are to be disregarded. *Iqbal*, 129 S. Ct. at 1949-50.

A. Anderson argues (for the first time on appeal) that the Court need not consider the "plausibility" of the alleged conspiracy because Anderson made "direct allegations" that the defendants reached an illegal agreement. *See* Br. 38-40. This argument fails for all the reasons stated in the Time and Bauer briefs. But, even taking this argument at face value, none of the allegations that Anderson claims are "direct" (*i.e.*, allegations of "specific meetings, documents, and statements by the participants alleging (among other things) who agreed with whom, when they agree, and where they agreed," Br. 35) involve, or in any way implicate, Hachette. *See* Br. 35-37.

B. Nor are there any non-conclusory factual allegations—in either the complaint or the proposed amended complaint—from which a court could

plausibly infer that Hachette joined a conspiracy. There are no allegations that any officer or employee of Hachette participated in any meetings or communicated with any other publisher, distributor, or wholesaler about a decision to "cut off" Anderson. There are no allegations that anyone from Hachette engaged in negotiations with Anderson or made any inculpatory statements—or, indeed, any statements at all. Nor are there any allegations that Hachette was responsible for, concurred in, or was even aware of any decisions regarding whether to ship magazines to particular wholesalers. Given that Anderson's pleadings do not contain *any* non-conclusory factual matter about Hachette, they plainly do not contain "enough factual matter" about Hachette "to suggest that an agreement was made" under *Twombly*, 550 U.S at 556.

Needless to say, the complaint's generic references to "defendants," *see, e.g.*, *AA 29 (Compl. ¶ 48)*, cannot substitute for non-conclusory factual allegations about Hachette and do not suffice to give Hachette "fair notice of what the claim[s against it are] and the grounds upon which [they] rest." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The only allegation in Anderson's original complaint purporting to tie Hachette to the alleged conspiracy is the wholly conclusory assertion that "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." *AA 29 (Compl. ¶ 47)*. Such a conclusory allegation is of no weight—it is "not entitled to the assumption of truth," *Iqbal*, 129 S. Ct. at 1950—and thus falls woefully short of establishing a plausible factual basis to infer Hachette's participation in the alleged conspiracy. *Twombly*, 550 U.S. at 556; *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007) (per curiam) (conclusory allegations of agreement at some unidentified point insufficient without adequate allegations of actual facts tending to show illegality).

Anderson attempts an even more tenuous theory in its proposed amended complaint, suggesting that Curtis "act[ed] in concert with the other defendants" pursuant to the conspiracy "on behalf of . . . Hachette" to cut off Anderson from its supply of magazines *AA 89 (PAC ¶ 66)*. But, as the district court correctly recognized, *AA 62-63*, Anderson alleges no basis to conclude that Hachette authorized Curtis to act as its agent in entering into any alleged conspiratorial agreement on Hachette's behalf (nor, for that matter, does it sufficiently allege that Curtis entered into any such alleged agreement at all). And the fact that Hachette's national distributor notified Hachette by email (after it made its decision) that it would no longer ship magazines to Anderson, *AA 89 (PAC ¶ 66)*, cannot support an inference that Hachette was a party to any hypothetical preexisting agreement. Indeed, it confirms that Hachette had no role in the (allegedly conspiratorial) decision.

Apparently recognizing the need for some non-conclusory factual allegations to tie each defendant to the conspiracy, Anderson devotes a section of its brief to the argument that "The Complaint's Well-Pleaded Factual Allegations Implicate Each Of The Defendants Individually." Br. 53-57. In this section, Anderson asserts that, as to several publishers including Hachette, "the complaint alleges that each engaged in consciously parallel conduct in cutting off Anderson . . . *in addition to 'further factual enhancement[s]'* that suggest that each publisher agreed to destroy Anderson." Br. 54 (emphasis added). But the brief goes on to mention not even a single purported factual allegation concerning Hachette. *See* Br. 54. Nor could it have, given the utter absence of any such allegations in the complaint. In short, Anderson's brief confirms what was obvious from the face of the complaint and the proposed amended complaint: Anderson has not made, and cannot make, sufficient factual allegations about Hachette "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

CONCLUSION

Anderson's complete failure to allege any conduct by Hachette is fatal to all of its claims against Hachette. The district court's judgment should be affirmed.

Dated: April 18, 2011

/s/ Meir Feder

Meir Feder
D. Theodore Rave
JONES DAY
222 East 41st Street
New York, NY 10017
Telephone (212) 326-3939

Counsel for Defendant-Appellee
Hachette Filipacchi Media U.S., Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1794 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

Dated: April 18, 2011

/s/ Meir Feder

Meir Feder
D. Theodore Rave
JONES DAY
222 East 41st Street
New York, NY 10017
Telephone (212) 326-3939

Counsel for Defendant-Appellee
Hachette Filipacchi Media U.S., Inc.