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American Media, Inc. and
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDERSON NEWS, L.L.C. and ANDERSON SERVICES, 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 PAC

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

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CASES

Defendant Distribution Services, Inc. ("DSI"), respectfully submits this Reply Memorandum of Law in Further Support of its Motion to Dismiss the Complaint.[1] DSI joins in the Joint Defendants' Reply Memorandum, and makes this supplemental submission to address issues unique to it.

PRELIMINARY STATEMENT

In an attempt to sustain its antitrust claim against DSI, Anderson cites to allegations in the Complaint about DSI – but those allegations simply do not exist. No doubt aware of this, Anderson next speculates that, even though the Complaint does not say so, DSI must have participated in the alleged conspiracy because it feared losing business in the event its customers (the publishers) were to incur increased distribution costs. Such reasoning, if taken to its logical conclusion, could be used to justify the assertion of an antitrust claim against *any* entity that transacts business with the publishers. Needless to say, no court has ever found such facile speculation sufficient to state an antitrust claim.

Equally wanting is Anderson's argument that DSI must have participated in a conspiracy because its parent company, AMI, supposedly did. Not only is this "guilt-by-association" theory deficient as a matter of law, it assumes erroneously that a viable claim has been stated against AMI. As shown in the Joint Defendants' Reply Memorandum, individual decisions of market participants to reject a steep price increase – a natural response to an occurrence that all participants had to address – do not suggest a collusive boycott. Just the opposite, it would have

[1] All capitalized terms are defined in DSI's Memorandum of Law In Support of its Motion to Dismiss dated December 14, 2009 ("DSI Mem." or "DSI's Memorandum"). Anderson's Memorandum of Law in Opposition to Defendants' Motion to Dismiss is referred to as "Pf. Mem." or "Plaintiff's Memorandum." The Memorandum of Law in Support of Motion to Dismiss the Plaintiffs' Complaint by Defendants American Media, Inc., Bauer Publishing Co., LP, Curtis Circulation Company, Distribution Services, Inc., Hachette Filipacchi Media, U.S., Kable Distribution Services, Inc., and Rodale, Inc. is referred to as "Joint Mem." or "Joint Defendants' Memorandum." The Reply Memorandum of Law in Support of Motion to Dismiss the Plaintiffs' Complaint by Defendants American Media, Inc., Bauer Publishing Co., LP, Curtis Circulation Company, Distribution Services, Inc., Hachette Filipacchi Media, U.S., Kable Distribution Services, Inc., and Rodale, Inc. is referred to as "Joint Reply Mem." or "Joint Defendants' Reply Memorandum." All emphasis is added unless otherwise noted.

been fundamentally against the interests of the publisher and distributor defendants to put Anderson out of business, thereby, in the words of the Complaint, "substantially reducing the output of magazines" and potentially creating a "monopolistic wholesaler with the power to dominate the market." That AMI shipped its magazines to Anderson weeks after the announced surcharge – a fact as to which the Court may take judicial notice – shows Anderson's claims of collusion to be implausible. In short, there are no sins of the parent to visit on the subsidiary.

As for Anderson's common law claims, Anderson concedes the obvious – it has not stated a defamation claim – and has withdrawn the claim. The tortious interference claim fails because Anderson does not allege that DSI (or any of the defendants) caused Anderson's retail customers to breach their contracts with Anderson. Anderson's argument that the alleged boycott caused Anderson itself to breach does not cure this defect. The law is clear that the breach must be by the third-party retailers. Finally, Anderson's conspiracy claim fails because none of the predicate torts – defamation or tortious interference – themselves state a claim. This Complaint, accordingly, should be dismissed.

ARGUMENT

A. Anderson Fails to State an Antitrust Claim Against DSI

In its moving papers, DSI showed that the Complaint fails to contain a single allegation about DSI's participation in the alleged boycott. DSI Mem. at 4. In opposition, Anderson contends that this is not so: "[T]he complaint identifies each defendant's role in the conspiracy" (Pf. Mem. at 21, argument heading) and "alleges that the publisher and national distributor defendants . . . **with the assistance of DSI**, refused to accept the surcharge" and engaged in other conduct supposedly consistent with collusion. Pf. Mem. at 22 (citing Cmplt. ¶¶47, 52-54, 55, 59).

None of the Complaint paragraphs to which Anderson cites, however, even mentions

DSI. *See* Cmplt. ¶47 (referring to defendants Curtis, Kable, TWR, AMI, Bauer, Hachette, Rodale and Time – but not DSI), ¶¶52-54 (referring to TWR CEO Rich Jacobsen – but not DSI), ¶55 (referring to defendants TWR, News Group, Curtis and Hudson – but not DSI); ¶59 (referring to defendants Hudson and News Group – but not DSI). Anderson's contention that the complaint alleges that DSI gave "assistance" to its alleged co-conspirators is just not true.

Apart from fictitious citations, Anderson's only other argument for why the antitrust claim against DSI should survive is conjecture – which also is not pled in the Complaint – about how the alleged conspiracy might have served DSI's economic interests. According to Anderson, DSI "clearly feared that if the publishers accepted the surcharge, they would balance the increased cost by reducing the amount they paid DSI." Pf. Mem. 22 n. 14. Nothing in the Complaint, however, suggests that DSI had such a fear, or that the publishers planned to reduce their marketing expenditures if Anderson remained in business. If such armchair conjecture were sufficient to give rise to a plausible inference of participation in a conspiracy, then Anderson could also assert antitrust claims against the suppliers of paper and ink to the publishers, the employees and stockholders of the publishers, and the lenders, landlords and lawyers of the publishers – for each of these constituencies also may have suffered if publisher costs increased.

Anderson's "just say anything" approach to DSI's motion culminates in its assertion that DSI must have participated in the conspiracy because DSI's economic interests "are significantly aligned with those of AMI." *Id.* Needless to say, no case has ever held that an antitrust claim can be asserted against a company merely because it is guilty of being an affiliate, and Anderson cites no authority for this proposition.

More fundamentally, even if Anderson could visit every supposed wrong of AMI on DSI,

there are simply no wrongs to visit. Anderson asserts that the refusal of defendants to pay a price increase implies collusion. There, of course, are innumerable reasons why defendants would have made individual decisions to reject Anderson's steep surcharge, even if it meant a short-term loss of circulation. Rejecting a price increase may be dictated by simple economics (weighing the benefits of continued distribution against the added costs of delivery), or negotiating tactics (rejecting an aggressive first offer out of hand), or an assessment of wholesaler alternatives (waiting to see if a competitor fills the void). Because any defendant could have later elected to pay the surcharge, if necessary, and resume relations with Anderson (as Curtis did when it purportedly stopped doing business for a brief period of time with Anderson in 2008, Cmplt. ¶ 60), the only thing unnatural here would have been immediate capitulation to the large surcharge Anderson was demanding.

Given that the rejection of the surcharge by defendants reflects natural "independent responses to common stimuli," it falls to Anderson to allege other facts suggestive of collusion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007); *Starr v. Sony BMG Music Entm't*, 2010 U.S. App. LEXIS 768, *11-*15 (2d Cir. Jan. 13, 2010). As shown in the Joint Defendants' Reply Memorandum, those facts have not been alleged. Indeed, AMI actually continued to ship magazines to Anderson in February of 2009 – weeks after the announced surcharge and the supposed collusive boycott went into effect – until Anderson closed its doors. *See American Media, Inc. v. Anderson News, L.L.C.*, Index No.: 4369-VCL (permitting AMI to retrieve from Anderson magazines shipped between February 4 and 6).[2] Thus, even if AMI's conduct could somehow be imputed to DSI, there is simply nothing to impute. The antitrust claim against DSI should be dismissed.

[2] The Court may take judicial notice of this fact since Anderson was party to the proceeding in which AMI successfully recovered its February-shipped magazines. *See* Joint Reply Mem. at 5, n.5.

B. Anderson Fails to State a Tortious Interference Claim

Because Anderson has abandoned its defamation cause of action (Pf. Mem. at 30, n.21), the only conduct alleged to give rise to the tortious interference claim is the purported boycott itself. *See* Cmplt. ¶¶ 86-86 (predicating tortious interference claim on alleged defamation and boycott). If, therefore, the Court holds that Anderson has failed to state an antitrust claim, then the tortious interference claim against DSI (and the other defendants) must fall as well. *See MMC Energy, Inc. v. Miller*, No. 08 Civ. 4353 (DAB), 2009 WL 2981914 (S.D.N.Y. Sept. 14, 2009).[3]

More fundamentally, Anderson's tortious interference with contract count fails because it does not allege that which is at the heart of any such claim: a breach of contract by a third party resulting from the alleged tortious conduct. Anderson argues that it has satisfied this element of the claim because DSI (and the other defendants) "caus[ed] *Anderson* to breach those contracts." Pf. Mem. at 32. This argument, however, focuses on the wrong party. To state a claim for tortious interference with contract, a complaint must allege "defendant's intentional procurement of *the third-party's* breach of the contract." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996); *see also Cont'l. Fin. Co. v. Ledwith*, No. 08 CIV 7272 (PAC), 2009 WL 1748875, at *6 (S.D.N.Y. June 22, 2009) (Crotty J.) (stating that "actual breach of the contract by a third party" is "most critical[]" element of tortious interference claim).[4] If Anderson could not fulfill its own contractual obligations as a result of DSI's alleged participation in a boycott,

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[3] Anderson's choice of law argument is of no moment. As Anderson acknowledges (Pf. Mem. at 30 n. 22), Delaware, New York and Tennessee law are identical on the relevant legal principles governing the state law claims. "If no conflict is found between the law of the forum and any other jurisdiction whose law is invoked, then the Court should apply the law of the forum." *Alitalia Linee Aeree Italiane, S.P.A. v. Airline Tariff Publ'g. Co.*, 580 F. Supp. 2d 285, 290 (S.D.N.Y. 2008).

[4] Anderson fails to cite a single authority in which a claim for tortious interference was premised on the plaintiff's breach. *See Ethypharm*, 598 F. Supp. 2d at 619-20 (alleging third party breach); *Denuke*, 2007 U.S. Dist. LEXIS 64391, at *8 (same); *Momentive*, 2009 U.S. Dist. LEXIS 45941, at *13 (same).

that is, at most, consequential damage from the boycott, not a separate tort.

Anderson's tortious interference claim also fails because the Complaint does not allege any actual breach. *NBT Bancorp, Inc. v. Fleet/Norstar Fin. Gr., Inc.*, 87 N.Y.2d 614, 620-21 (1996) (noting that "breach of contract has repeatedly been listed among the elements of a claim for tortious interference with contractual relations"). To the contrary, the Complaint only says that "Anderson's retail customers have *terminated* their retail supply and retail service agreements and their business relationships with Anderson." Cmplt. ¶ 89 (emphasis added). When a party exercises its right to terminate a contract, it does not commit a breach. *See M.J. & K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488, 490 (2d Dep't 1995) (dismissing tortious interference claims because plaintiffs' "mere contentions that third parties cancelled contracts with them . . . w[ere] insufficient to state a cause of action for tortious interference with contractual relations"); *Ariba, Inc. v. Elec. Data Sys. Corp.*, No. Civ. A. 02C-06-083(JRJ), 2003 WL 943249, at *5 (Del. Super. Ct. Mar. 7, 2003) (dismissing tortious interference claim based on third party's termination of contract because Delaware law requires allegation of breach and termination is not breach).

Indeed, in every case cited by Anderson in which the tortious interference claim survived a dismissal motion, the plaintiff alleged a breach of contract, not a mere termination. *See Ethypharm S.A. France v. Abbott Labs.*, 598 F. Supp. 2d 611, 619-20 (D. Del. 2009) (alleging that defendant caused breach of covenant of good faith and fair dealing); *Denuke Contracting Servs., Inc. v. EnergX, LLC*, No. 3:07-CV-114, 2007 U.S. Dist. LEXIS 64391, at *8 (E.D. Tenn. Aug. 30, 2007) (alleging that defendant caused breach of contract); *Momentive Performance Materials USA, Inc. v. AstroCosmos Metallurgical, Inc.*, No. 1:07-CV-567 (FJS/DRH), 2009 U.S. Dist. LEXIS 45941, at *13 (N.D.N.Y. June 1, 2009) (same).

In sum, in the absence of any allegations that DSI or the other defendants caused retailers to breach their contracts with Anderson, the tortious interference count should be dismissed.

C. Anderson Fails to State a Civil Conspiracy Claim

Anderson concedes that commission of an underlying tort or unlawful act is a necessary element of a claim for civil conspiracy. *See* Pf. Mem. at 30-31 (listing "primary tort" or "unlawful act" as essential element of civil conspiracy claim and citing *Miller v. Greystone Bus. Credit II, L.L.C. (In re USA Detergents, Inc.)*, 418 B.R. 533, 547 (Bankr. D. Del. 2009) and *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 463 (S.D.N.Y. 2009) (Crotty J.)). Because Anderson has failed to allege a cause of action for tortious interference and has abandoned its defamation claim, this claim, too, should be dismissed.

D. Anderson's Request to Amend the Complaint Should Be Denied

Anderson requests leave to amend the Complaint in the event of dismissal. Pf. Mem. at 33, n. 23. A request to amend should be denied if "the [moving party] is unable to demonstrate that he would be able to amend his [pleading] in a manner which would survive dismissal." *Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999); *see also Azurite Corp. v. AMster & Co.*, 52 F.3d 15, 19 (2d Cir. 1995) (affirming denial of leave to amend because amendment would be futile); *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods.*, No. 96 Civ. 1565 (RPP), 1996 WL 455011, at *6 (S.D.N.Y. Aug. 13, 1996) (denying request for leave to amend Section 1 Sherman Act claim because plaintiff had "not advised the Court of any facts which make it likely that it can plead a valid antitrust cause of action"), *aff'd*, 129 F.3d 240 (2d Cir. 1997); *Arbitron Co. v. Tropicana Prod. Sales, Inc.*, No. 91 Civ. 3697 (PKL), 1993 WL 138965, at *8 (S.D.N.Y. Apr. 28, 1993) (denying leave to amend counterclaims to add Sherman Act cause of action absent proffer of additional facts that stated claim).

There is no reason to permit amendment here. Anderson has not identified any additional factual material that might rectify the deficiencies in the Complaint. Before this motion to dismiss was filed, as the result of Defendants' challenges to the sufficiency of the Source complaint, Anderson and its counsel (which also was counsel for Source) were fully aware of defendants' view of the deficiencies in Anderson's claims. Anderson thus had ample opportunity to include in the Complaint originally or by way of amendment all facts it believed necessary to defeat Defendants' motion to dismiss before the motion was filed. What is more, as argued in Defendants' Joint Reply Memorandum, this case is founded upon a legally deficient theory: no court has ever held that an illegal boycott can be inferred simply from the refusal of market participants to pay a significant price increase. No amount of re-pleading can fix that fatal flaw.

CONCLUSION

Based on the foregoing, Defendant DSI respectfully requests that the Court dismiss the Complaint.

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New York, New York

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