UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDERSON NEWS, L.L.C. and ANDERSON SERVICES, L.L.C.,	:	
Plaintiffs,	:	
-against-	:	09 CIV. 2227 (PAC)
AMERICAN MEDIA, INC., BAUER PUBLISHING CO., LP., 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. and TIME/WARNER RETAIL SALES & MARKETING, INC.,	:	
Defendants.	:	

DEFENDANT HACHETTE FILIPACCHI MEDIA U.S., INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Hachette Filipacchi Media U.S., Inc. ("Hachette") submits this Memorandum in support of the its motion to dismiss the plaintiffs Anderson News, L.L.C., and Anderson Services, L.L.C.'s (collectively "Anderson") complaint. Hachette fully joins in and incorporates the joint Memorandum of Law in support of the motion to dismiss submitted on behalf of multiple defendants, but submits this separate Memorandum to address issues specific to Hachette.

PRELIMINARY STATEMENT

Hachette submits this separate Memorandum of Law to highlight the complete absence of non-conclusory factual allegations about Hachette's conduct or purported role in the alleged conspiracy. The conclusory assertions that it "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 complaint could survive as to any defendant—and it cannot—it 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 complaint alleges no role for Hachette in the alleged conspiracy. The sum total of the factual allegations about Hachette in the complaint are that Hachette publishes magazines (Compl. ¶¶ 10, 27), that its distributor is Curtis (Compl. ¶ 16), and that it uses DSI for marketing services (Compl. ¶ 16). 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*.

(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. Nor does it allege that Hachette (as opposed to its distributor) was responsible for making decisions on whether to ship Hachette magazines to Anderson. Indeed, the complaint does not even allege that Hachette actually stopped shipping 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—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."

(Compl. ¶ 49 (alterations in original).) The complaint does not, however, allege that Curtis was in any way authorized to enter a conspiracy on Hachette's behalf or that Hachette was even aware of 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 depend 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.

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

The complaint makes no other allegations mentioning Hachette. Nonetheless, the plaintiffs claim that Hachette conspired with the other defendants to eliminate competition in the market for wholesale distribution of single-issue magazines (Claim 1), tortiously interfered with

Anderson's business relationships and contracts (Claim 2), defamed Anderson (Claim 3), and conspired to "destroy" Anderson (Claim 4).

ARGUMENT

The Complaint Fails To State Any Claim Against Hachette.

The Supreme Court made it clear in *Twombly* and *Iqbal* 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 Atlantic 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, moreover, are not factual matter, and are to be disregarded, *Iqbal*, 129 S. Ct. at 1949-50, and both federal and state law claims must satisfy this pleading standard.

Here, there is no allegation that any officer or employee of Hachette had any contact with any other defendant, let alone joined a conspiracy regarding Anderson. The complaint does not even allege that Hachette stopped shipping magazines to Anderson or that it was responsible for, concurred in, or even aware of, any decision regarding shipments.

Needless to say, the complaint's generic references to "defendants" cannot substitute for non-conclusory factual allegations about Hachette. For example, in paragraph 48, Anderson alleges that "[a]t the same time that all the *defendants* had cut Anderson off and *defendants* were spreading those false rumors, *defendants* were seeking to acquire Anderson's distribution

facilities and *defendants* were poaching Anderson's employees," (Compl. ¶ 48 (emphasis added)), even though (1) not all the defendants ever supplied Anderson with magazines, (2) only The News Group is alleged to have made any statements (which the complaint does not identify) about Anderson, (3) the publisher defendants, like Hachette, would have little use for Anderson's distribution facilities, and (4) only The News Group is alleged to have attempted to hire any of Anderson's employees. In this context, allegations that "defendants" did something are insufficient 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)); *see In re Elevator Antitrust Litigation*, 502 F.3d 47, 50-51 (2d Cir. 2007) (per curiam) (conclusory allegations of agreement at some unidentified point do not suffice to state an antitrust claim without adequate allegations of actual facts tending to show illegality).

This complete failure to allege any conduct by Hachette is fatal to all of Anderson's claims against Hachette.

CONCLUSION

For the foregoing reasons, and the reasons stated in the defendants' joint Memorandum of Law, Anderson's complaint should be dismissed.

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