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 REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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Defendant Hachette Filipacchi Media U.S., Inc. ("Hachette") submits this Reply Memorandum in further support of its motion to dismiss the complaint. Hachette fully joins in and incorporates the joint Reply Brief submitted on behalf of Bauer Publishing and multiple other defendants, but submits this separate Reply Memorandum to address the complete absence of allegations about Hachette.

PRELIMINARY STATEMENT

Anderson's Opposition Memorandum ("Opp'n") confirms what was obvious from the face of the complaint—Anderson does not have even an arguable basis for a claim against Hachette. The Opposition Memorandum, like the complaint, is devoid of any non-conclusory mention of Hachette, stating only that along with the other defendants, Hachette "refused to accept the surcharge." (Opp'n at 22.) And Anderson makes no attempt to respond to any of the arguments Hachette made in its separate opening Memorandum of Law. Even if the complaint could survive as to any defendant—and it cannot, for the reasons stated in the joint briefing—it fails to state a claim against Hachette.

ARGUMENT

The Complaint Fails To State Any Claim Against Hachette.

As Hachette demonstrated in its opening Memorandum of Law, Anderson's complaint includes no non-conclusory factual allegations about Hachette's purported role in the alleged conspiracy. There are no allegations that Hachette communicated with any other defendant about a decision to "cut off" Anderson, or that Hachette (as opposed to its distributor) was responsible for, concurred in, or was even aware of any decisions regarding whether to ship magazines to particular wholesalers. Given that the complaint does not contain *any* non-conclusory factual matter about Hachette, it plainly does not contain "enough factual matter"

about Hachette "to suggest that an agreement was made" under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Unable to point to non-conclusory factual allegations about Hachette, Anderson attempts to conflate the alleged actions of several defendants into an undifferentiated composite: "defendants." (*See* Opp'n at 21-23.) But these generalized allegations cannot suffice to properly allege that Hachette "joined in the conspiracy and played some role in it." (Opp'n at 21.) Contrary to Anderson's bald assertion (Opp'n at 22), the complaint contains no allegation that Hachette engaged in negotiations with Anderson, or that it participated in any meetings or other communications with other publishers, distributors, or wholesalers. The only allegation purporting to tie Hachette to the alleged conspiracy is the wholly conclusory assertion that "national distributor defendants Curtis, Kable, and TWR, and publisher defendant AMI, Bauer, Hachette, Rodale, and Time—acting in concert—cut off Anderson from its supply of magazines." (Compl. ¶ 47.) And such conclusory allegations are of no weight—they are "not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). That single allegation therefore falls woefully short of establishing a plausible factual basis to infer Hachette's participation in the alleged conspiracy. *See Twombly*, 550 U.S. at 556.

Nor are any of the so-called "plus factors" that Anderson claims distinguish this case from the pleading dismissed in *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007) (*see* Opp'n at 14 n.6), alleged to involve Hachette. There is no allegation that Hachette participated in any meetings, that it made any inculpatory statements, that it would be against Hachette's economic self-interest to reject a sudden and drastic price increase and seek alternative channels of distribution, or even that Hachette (as opposed to its distributor) made any decision about whether to continue shipping to Anderson. Generic allegations that the

"defendants" did something cannot 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 (ellipsis omitted).

Indeed, Anderson devotes a single footnote (Opp'n 22 n.14) to addressing the arguments of defendants DSI, Rodale, and Hudson that the complaint did not contain sufficient specific allegations about their conduct in the alleged conspiracy, but tellingly makes no mention of Hachette. The reason for this omission is simple: 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.

Moreover, tacitly recognizing that it has not alleged sufficient factual matter about Rodale's participation in the alleged conspiracy, Anderson seeks leave to amend its complaint to add allegations about Rodale. But the complaint contains no more specific allegations about Hachette than about Rodale. (*Compare* Compl. ¶ 10, Compl. ¶ 11, Compl. ¶ 14, Compl. ¶ 27, Compl. ¶ 47, Compl. ¶ 49, Compl. ¶ 74.) And Anderson makes no attempt to identify any additional factual material that it could allege about Hachette's conduct or purported role in the alleged conspiracy. Thus, even assuming that the complaint could survive against some defendant—and it cannot—it should be dismissed with prejudice as to Hachette. *See Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131-32 (2d Cir. 1993); *see also Elec. Comm'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").

CONCLUSION

For the foregoing reasons, and the reasons stated in the defendants' joint briefing, Anderson's complaint should be dismissed with prejudice.

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