UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Anderson News, L.L.C. and Anderson Services, L.L.C. Plaintiffs, v. American Media, Inc. et al., Defendants.	:	09 CIV. 2227 (PAC)

REPLY IN SUPPORT OF DEFENDANT HUDSON NEWS DISTRIBUTORS L.L.C.'s MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Defendant Hudson News Distributors L.L.C. ("Hudson") submits this Reply in further support of its Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and in response to Anderson News, L.L.C. and Anderson Services, L.L.C.'s (collectively referred to as "Anderson") Opposition to Defendants' Motion to Dismiss.

I. PRELIMINARY STATEMENT

Hudson is the lonely defendant. Hudson, unlike all other defendants, was a competitor of Anderson's and not its supplier. If the Complaint's fact allegations are to be believed (as they must for the limited purpose of this motion), Hudson at all times had obvious, independent reasons for accepting opportunities to grow its business in the face of Anderson's demise. Indeed Hudson's undeniable independent interest in growing its business is simply the flip side

of the same coin that motivates Anderson's lawsuit. Anderson is upset that it lost retail accounts and the trust of its suppliers after it attempted to raise the price it charged to its suppliers; Hudson was pleased to add retail accounts and vindicate the trust and faith of its suppliers.

Thus it is not at all surprising to find that, given Hudson's role as a competitor (not a supplier) of the plaintiff, the Complaint is devoid of a single allegation that would provide a plausible basis for inferring *Hudson's* participation in a conspiracy to "eliminate Anderson" by "cut[ting] off . . . 80% of its magazine supply." Cmplt. ¶ 58 (emphasis added). Hudson could not "cut off" Anderson. The Complaint's and the Opposition's efforts to merge defendants through collective terminology does not change this fact. Anderson makes much of the Second Circuit's recent decision in *Starr v. Sony BMG Music Entertainment*, No. 08-cv-5637, 2010 U.S. App. LEXIS 768 (2d Cir. Jan. 13, 2010), but that case helps it not a whit with respect to stating a claim against *Hudson*. Rather, it confirms, consistent with *Twombly*, that in order to survive a motion to dismiss, a Section 1 complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Starr*, slip. op. at 8-9.

Labels and conclusions, however, are the only real recourse when one attempts artificially to bolt-on a rival in a lawsuit premised on the actions of one's suppliers. Nevertheless Anderson must state a claim with respect to each and every defendant, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008) (plaintiff must "make allegations that plausibly suggest that *each* [d]efendant participated in the alleged conspiracy"); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 556 F. Supp. 825, 888 (D.D.C. 1982) ("a defendant that has not engaged in an unlawful conspiracy, and has committed no acts in themselves violative of the Sherman Act, could [not] be found guilty of antitrust violations on

some theory that the acts have 'synergistic effects' that convert lawful conduct into violations of law."). Anderson's allegations specific to this defendant – *Hudson News* – are as thin as they are spare. Indeed they consist of nothing more than conclusory statements and vague references to conduct that Anderson would itself defend without apology were the shoe on the other foot and it was the defendant. What the Complaint ascribes to Hudson is conduct wholly consistent with Hudson's independent self-interest; that is, conduct that could "just as well be independent action." *Twombly*, 550 U.S. at 557; *Starr*, slip. op. at 19. This is not enough under the pleading standard outlined by the Supreme Court in *Twombly* and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), and reaffirmed by the Second Circuit in *Starr*.

II.
ARGUMENT

A. Anderson Has Not Alleged "Enough Factual Matter" To Suggest Hudson Entered Into An Unlawful Agreement

Anderson's half-hearted persistence in asserting it has stated a claim against Hudson manifests only briefly in its opposition brief. Anderson devotes a portion of one footnote on page 22 of its Opposition to make its brief, two-pronged response to Hudson's Motion To Dismiss: First, it claims that "Hudson's arguments [in support of dismissal] fail in light of the fact that Hudson hosted one of the key conspiratorial meetings at its headquarters." Opp. 22 n.14. Second, it assumes Hudson is properly named as a defendant because "the participation and agreement of Hudson and the News Group were critical for the success of the conspiracy." *Id.*

Neither of these points overcomes the deficiencies in the Complaint set forth in detail in Hudson's opening memorandum. First, the actual fact *allegations* in the Complaint related to this alleged "conspiratorial meeting" are thin. The Complaint says only that "Curtis and Hudson

met with their respective competitors, TWR and News Group, in January 2009 at Hudson's offices in North Bergen, New Jersey." Cmplt. ¶55. That is all. Assuming, as one must for the purposes of a 12(b)(6) motion, that this allegation is true, the claim does not provide a basis for inferring illegal collusion; "opportunity, without more, is not a plausible basis to suggest conspiracy." *In re Cal. Title Ins. Antitrust Litig.*, 2009 U.S. Dist. LEXIS 103407, *14 (N.D. Cal. 2009); *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 & n.5 (2d Cir. 2007); *All Star Carts & Vehicles, Inc. v. BFI Can. Income Fund*, 596 F. Supp. 2d 630, 640 (E.D.N.Y. 2009) ("Defendants are stated to have reached agreement during [] meetings as to their anticompetitive practices. These allegations are nothing more than a recitation of the terms of agreement and conspiracy, and nothing more. Such allegations do not state facts sufficient to 'nudge [plaintiffs'] claims across the line from conceivable to plausible'") (internal citations omitted).

Anderson's Opposition suggests that Section 1 allegations similar to those in its Complaint have survived Rule 12(b)(6) motions. *See* Opp. 13-14. Here again, Anderson paints with a broad brush. With respect to at least Hudson News, that statement rings false. Anderson has not identified one post-*Twombly* case where a court has allowed a Section 1 plaintiff to proceed based on allegations as spare, vague and tenuous as those asserted against Hudson and reviewed in footnote 14 of the Opposition. Hudson's Memorandum makes clear (and Anderson's Opposition does not refute the fact) that the only claims asserted against Hudson News in the Complaint are as follows: (1) Hudson News attended the above-discussed meeting (Cmplt. ¶55); (2) Hudson supplied magazines to Anderson's former customers at reduced discount rates (*id.* ¶¶59, 72); and (3) the undifferentiated "wholesaler" defendants hired Anderson's employees and purchased Anderson's assets (*id.* ¶¶57-58). Even when construed in the most generous light and in context with Anderson's other allegations, Anderson's Complaint

does not allege "*specific facts* sufficient to plausibly suggest that [Hudson News's conduct] was the result of an agreement . . . ."[1] *Starr*, slip op. at 12 (emphasis added). Indeed, as to the argument in Hudson's Memorandum addressing the conduct alleged in (2) and (3) above (see Mem. 10-13), Anderson offers no direct response and thus concedes that the Complaint's allegations concerning supplying former customers, hiring former Anderson employees and purchasing Anderson assets are insufficient to state a claim. *See* Opp. 22 n.14.[2]

Tellingly, in summarizing its theory of conspiracy, Anderson does not even make reference to Hudson News. Anderson writes that "[i]n late January 2009, major *publisher defendants* – AMI, Bauer, Hachette, Rodale and Time – entered into a conspiracy together with

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[1] Anderson states that during the alleged January meeting, the publisher and national distributor defendants "conspired with Hudson and News Group for the latter to step into Anderson's former territories *on the condition* that they raise prices charged to retailers, not publishers." Opp. 22. In support of this proposition, it cites to paragraphs 55 and 59 of the Complaint. Nothing in either of those paragraphs (or anywhere else in the Complaint) suggests that Hudson agreed to raise prices to retailers (and not publishers) in exchange for magazine distribution rights. *See also* Opp. 23 and 27 (making, without citation, similar claims that are not included in the Complaint). Anderson's efforts to use its Opposition as a platform for amplifying and expanding the allegations in its Complaint should be rejected. *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 163 (D.D.C. 2004) ("Nor will the Court permit plaintiffs to supplement the bare and insufficient allegations in their complaint with additional assertions from their brief. It is 'axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.'") (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984)); *see also Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991) ("In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint . . . .").

[2] With respect to these allegations, it bears noting that Anderson has no excuse for its failure to allege facts that are direct and specific as to Hudson. For example, Anderson alleges that Hudson and News Group purchased Anderson assets pursuant to the alleged conspiracy (Cmplt. ¶¶ 58, 67), but it does not share with the Court or the parties what assets Hudson purchased or why their acquisition advanced an anticompetitive scheme. Presumably Anderson, which sold the assets, knows what assets it contends Hudson purchased. Anderson has elected not to share that information.

their *national distributors* – Curtis, Kable and TWR – and agreed to cut off Anderson and Source from the life blood of their business . . . ." Opp. 7-8 (emphasis added). Whether that conspiracy is properly alleged or not, it does not include Hudson News. Why then is Hudson News – a competitor of, not a supplier to, Anderson – added as a defendant? Because, Anderson casually surmises, Hudson's "participation and agreement [was] critical for the success of the [publisher/national distributor] conspiracy . . . ." Opp. 22 n. 14. The basis for this conclusion goes unstated. The important point, of course, is that this is a conclusion, not a fact allegation.[3] Such assertions are the very sort of "conclusory allegation[s] of agreement" that "d[o] not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557. Under the *Iqbal* framework

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[3] Anderson's Opposition suggests that any alleged agreement between Hudson News and the national distributors / publishers was separate and distinct from the alleged agreement to cut off the supply of magazines to Anderson, which is the basis for Anderson's Section 1 claim. *See* Opp. 24-25. Anderson states that "[c]utting off Anderson or Source would only be in a publisher's or distributor's self-interest if it already had a pre-existing agreement with its competitors that they all would cut off Anderson and Source, and if they had pre-existing agreements in place for the two remaining wholesalers (Hudson and News Group) to distribute the magazines of all those publishers." *Id.* (emphasis added). The latter types of agreements, that reflect a decision by a publisher or national distributor to replace one wholesaler with another are, as a general matter, not actionable under the antitrust laws. *See e.g.*, *Pac. Bell. Tel. Co. v. Linkline Commc'n., Inc.*, 129 S. Ct. 1109, 1118 (2009) ("businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing"); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614 (1914) ("A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.").

This language in Anderson's Opposition is notable for another reason – it suggests, through the use of plural "agreements," that the publishers and national distributors had separate distribution arrangements with the News Group, on the one hand, and Hudson News, on the other. Through this language, Anderson concedes that Hudson did not enter into any agreements with its horizontal competitor, the News Group.

described in Hudson's Memorandum (*see* Mem. 6), such conclusory allegations are not even entitled to a presumption of truth. *See Iqbal*, 129 S.Ct. at 1951.

B. *Starr* Confirms that Allegations of Economically Rational Conduct Are Not Sufficient to State a Section 1 Claim

In *Starr*, the Second Circuit reminded that "[u]nder *Twombly*, allegations of parallel conduct that could 'just as well be independent action' are not sufficient to state a claim." *Starr*, slip op. at 19 (quoting *Twombly*, 550 U.S. at 557). The *Starr* Court concluded that plaintiffs had successfully stated a claim against defendants because, in part, they "alleged behavior that would plausibly contravene each defendant's self-interest 'in the absence of similar behavior by rivals.'" *Id.* at 19 (internal citations omitted). Anderson rests on this language. Opp. 14 n.6 (claiming Anderson's allegations are similar to those upheld in *Starr* because the complaint alleges "unnatural parallel conduct" that is "economically contrary to each conspirator's self-interest").

Here, again, one must examine each defendant separately. *SRAM*, 580 F. Supp. 2d at 904; *S. Pac. Commc'ns Co.*, 556 F. Supp. at 888. And this puts the lie to Anderson's reliance upon *Starr* with respect to its claim against Hudson. The reason is simple. It is plain as day that it would make sense for *Hudson News* to engage in the "alleged behavior" – that is, to grow its business and seize the opportunity to replace a bankrupt rival – regardless of whether other rivals engaged in similar behavior. Indeed, Hudson's self-interest (*i.e.*, expanding its business and allegedly replacing Anderson) would be maximized, not "plausibly contravene[d]," (*Starr*, slip op. at 19) if other rivals did not engage in similar behavior (*i.e.*, did not expand their business and did not seek to replace Anderson).

Notably, Anderson remains silent as to any allegations or arguments specific to Hudson in this regard, recognizing no doubt that such an assertion as to Hudson would turn logic and

basic economic incentives on their heads. Indeed Anderson's assertions against Hudson (and the undifferentiated "wholesaler defendants"), including the claim that Hudson entered into distribution agreements with former Anderson customers and implemented price increases, suggest that Hudson News took economically rational action to expand its wholesale operations in response to Anderson's exit. *See* Mem. 10, 12-13. Nothing in Anderson's Complaint plausibly suggests that such conduct was anything more than a "natural, unilateral reaction." *Twombly*, 550 U.S. at 566. And Anderson does not squarely counter this point (*see* Mem. 12-13) in its Opposition. To the contrary, it admits that expansion of Hudson's customer base would be economically desirable. *See* Opp. 29 (Hudson "stood to gain substantially" from Anderson's and Source's departure from the market).[4] The economic incentive to step up and replace Anderson and Source holds true even "in the absence of similar behavior by rivals," *Starr*, slip op. at 19 (internal citations omitted), and thus "fails to bespeak unlawful agreement." *Twombly*, 550 U.S. at 556.

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[4] The notion of drawing benefit from pain suffered by rivals may just as much explain Anderson's lawsuit as Hudson's alleged expansion of its business following Anderson's bankruptcy. Indeed it bears noting that it is no secret that competitors sometimes make strategic use of the antitrust laws. *See, e.g.*, William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 252 (1985) ("The runner-up firm [often] finds itself with the opportunity to claim that almost any successful program by a rival is 'anticompetitive' and that it constitutes monopolization. Antitrust, whose objective is the preservation of competition, by its very nature lends itself to a means to undermine competition."). Here, the customers themselves -- the retailers -- have not joined in Anderson's antitrust claims. In such circumstances, "[c]ourts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition." *Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987); *see also Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989) ("competitors' theories of [antitrust] injury . . . deserve particularly intense scrutiny").

C. Anderson Must Make Specific and Individualized Allegations Against Hudson News in Order to State a Section 1 Claim

With no apparent sense of irony, Anderson argues that there is no "merit to *defendants'* contention that the complaint lacks sufficient individualized allegations against each of the defendants." Opp. 21 (emphasis added). True to the pattern of its pleading, Anderson fails to address Hudson's specific arguments as to the allegations related to Hudson. *See* Opp. 21-23.

This returns one to the well-worn, but baseline, requirement that if a plaintiff elects to sue a defendant, it must be prepared to state allegations that are specific to that defendant. Anderson "cannot escape [its] burden of alleging that *each* defendant participated in or agreed to join the conspiracy by using the term 'defendants' to apply to numerous parties without any specific allegations." *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 163 (D.D.C. 2004) (emphasis added). Nonetheless, Anderson attempts to do exactly that – seeking to wrap Hudson News into the alleged conspiracy through the loose use of the collective terms "defendants" and "wholesaler defendants." *See* Mem. 9-12.

The cases cited in support of Anderson's claim that its Complaint "sets forth actionable claims under *Twombly* against each of the defendants" are distinguishable. Opp. 23. In *SRAM*, 580 F. Supp. 2d 896 (N.D. Cal. 2008), for example, the Court indicated that, under *Twombly*, a plaintiff must "make allegations that plausibly suggest that *each* [d]efendant participated in the alleged conspiracy." *Id.* at 904 (emphasis added). The allegations in *SRAM*, the allegations were much more specific than those leveled against Hudson: "plaintiffs alleged facts regarding particular communications between the defendants, including public statements regarding pricing as well as allegations that the defendants communicated with one another about pricing by telephone calls, e-mails and instant messages." *In re Cal. Title Ins.*, 2009 U.S. Dist. LEXIS 103407, at *15 (distinguishing *SRAM*).

Anderson has not made anything close to comparable allegations against Hudson. The only allegation of possible relevance is the claim that a meeting occurred in January 2009 at Hudson's North Bergen offices. Cmplt. ¶55. On this alone Anderson's claim against Hudson rests. Even if accepted as true, the substance of the meeting and the content of the alleged communications are left undescribed. One alleged meeting, involving only a subset of the alleged players, and no insight as to what was discussed. This cannot satisfy the burden to state a claim that "plausibly suggest[s] that [Hudson News] participated in the alleged conspiracy" to eliminate Anderson from the magazine industry.[5] *SRAM*, 580 F. Supp. 2d at 904.

III.
CONCLUSION

For reasons fully explored in Hudson's Memorandum, a single allegation that Hudson participated in one meeting with some of its co-defendants (Mem. 8-9), combined with the allegation that Hudson engaged in normal competitive conduct in response to changing market conditions (Mem. 10-11), and the claims that the "wholesaler defendants" "poach[ed] Anderson's employees" (Cmplt. ¶57) and purchased Anderson's assets (Cmplt. ¶58) – are woefully vague and do not allege *any* specific conduct on the part of Hudson. Mem. 11-12. Thus, for the foregoing reasons, Hudson News respectfully requests that this Court enter an Order dismissing the Complaint with prejudice.

Dated: February 2, 2010
New York, New York

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[5] For the reasons described in Hudson's Motion to Dismiss (Mem. 13-15), Anderson has not stated any state law claims against Hudson.

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