UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDERSON NEWS, L.L.C., and ANDERSON SERVICES, L.L.C.,	:	
Plaintiffs,	:	09 CIV. 2227 (PAC)
- against -	:	
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.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OF THE COURT'S AUGUST 2, 2010 ORDER DISMISSING THE COMPLAINT WITH PREJUDICE AND DENYING PLAINTIFFS LEAVE TO AMEND

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Plaintiffs Anderson News, L.L.C. and Anderson Services, L.L.C. (together, "Anderson") submit this memorandum in support of their motion, pursuant to Fed. R. Civ. P. 59(e) and Local Civil Rule 6.3, for an order, on reconsideration of this Court's August 2, 2010 Opinion and Order (the "Opinion" or "Op.") granting defendants' motions to dismiss and denying leave to amend the complaint (the "Complaint"), (a) vacating the August 2, 2010 judgment and (b) denying the motions to dismiss or, at a minimum, granting Anderson leave to file its proposed amended complaint (the "Proposed Amended Complaint" or "PAC").[1]

ARGUMENT

Anderson respectfully submits that the Court's Opinion made critical factual errors, drew unjustified inferences and overlooked material facts and controlling law.[2]

1. Anderson's conspiracy allegations are plausible

The Court erred in its principal ground for dismissing the complaint and denying leave to amend -- its conclusion that defendants' antitrust conspiracy to eliminate Anderson and Source was not plausible because "publishers and national distributors have an economic self-interest in more wholesalers, not fewer; more wholesalers yields greater competition, which is good for suppliers." (Op. at 8.) There is, in fact, no basis for concluding (or assuming), as the Court did, that, in every case, more wholesalers are better for suppliers than fewer, regardless of the structure, dynamics, economics and history of the distribution system.

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[1] A copy of the PAC is annexed hereto as Exhibit A. The relevant facts are set forth in the original complaint (the "Complaint"), the second amended complaint in *Source Interlink Distribution, L.L.C., et al. v. American Media, Inc., et al.*, No. 09-Civ.-1152 (S.D.N.Y.) (the "Source SAC") and in the PAC.

[2] Reconsideration is appropriate where a movant presents "factual matters or controlling decisions [that] the court overlooked that might materially have influenced its earlier decision ... [or that] demonstrate the need to correct a clear error or prevent manifest injustice." Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995); Sanluis Devs. L.L.C. v. CCP Sanluis L.L.C., 556 F. Supp. 2d 329, 332 (S.D.N.Y. 2008) (granting reconsideration).

Here, the Complaint -- and the Proposed Amended Complaint, in even more detail -- alleges and explains why the defendants had a very powerful incentive to engage in their conspiracy. Defendants' goal was to control the single-copy magazine distribution system -- including, among other things, so as to shift the increasing cost burdens in the distribution system to retailers and consumers, and away from the defendant publishers and their national distributors. The most effective, if not only, way for the publishers to do so was to collusively (a) avoid individualized and competitive negotiations over the proposed surcharges with Anderson and Source, (b) boycott Anderson and Source and thereby eliminate those wholesalers that had been seeking to negotiate pricing and had been promoting retailer-friendly measures such as scan-based trading, and (c) to allocate to the two remaining and compliant defendant wholesalers exclusive control over respective shares of the former Anderson and Source business. Among other things, the detailed allegations of defendants' intensive meetings and communications in the days leading up to their common decision to flatly reject the surcharge and cut off Anderson and Source confirm that the defendants themselves viewed their conspiracy as plausible (PAC ¶¶ 55-63). Indeed, the goal of the conspiracy was fully achieved with respect to Anderson: Anderson was eliminated and its business destroyed; the Anderson business and distribution assets were taken over at fire-sale prices by New Group; and the defendants then immediately raised prices to Anderson's retailers. (Complaint ¶¶ 64-68, 75; PAC ¶¶ 82, 87, 95.) The goal was on the verge of being achieved, and would have been achieved, with respect to Source had this Court not issued its TRO barring the very same conspiracy.

Certainly, these allegations preclude a finding that "more wholesalers" necessarily and always "is good for suppliers." See, e.g., Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 751 (10th Cir. 1999) (denying motion to dismiss antitrust complaint which alleged that the

defendants "controlled or influenced" the remaining supplier). Here, as in Full Draw Products, the defendant publishers and national distributors, which collectively control 80% of single-copy magazines, indisputably wield tremendous influence and control over Hudson and News Group. (Complaint ¶¶ 64; PAC ¶¶ 35, 40.)[3]

Anderson respectfully submits that the original Complaint, as filed, met the pleading and plausibility standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and its progeny, and defendants' motions should have been denied. Under Twombly and the law of this Circuit, the Court should have taken "all well-pled factual allegations as true and draw[n] all reasonable inferences in the plaintiff's favor to decide whether [Anderson] has pled a plausible claim for relief." Spagnola v. Chubb Corp., 574 F.3d 64, 67 (2d Cir. 2009) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). At a minimum, Anderson should have been granted leave to amend -- leave which, under Fed. R. Civ. P. 15(a)(2), is to be "freely" granted, as "justice so requires."[4] The Proposed Amended Complaint unquestionably cures any deficiencies the Court may have found, and manifest injustice would result from the dismissal of Anderson's claims. A very real

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[3] In re Travel Agent Commissions Antitrust Litigation, 583 F.3d 896 (6th Cir. 2009), relied on by the Court in rejecting Anderson's argument that unilateral action by the defendants was implausible (Op. at 12-14), is inapposite. The prior unilateral attempts by the Travel Agent defendants occurred more than 20 years before the alleged conspiracy -- during which the "marketplace [had] changed fundamentally." 583 F.3d at 908. By contrast, Curtis's unilateral boycott attempt (Complaint ¶ 45; PAC ¶ 46) failed in 2008, and little, if anything, had changed when, less than a year later, defendants succeeded in destroying Anderson. Second, the Travel Agent plaintiffs sued after opting out of a class action in which defendants were granted summary judgment, and the Sixth Circuit held that "'[o]nly the gravest reasons should lead [a] court in [an] opt-out suit to come to a conclusion that departs from that in the class suit.'" Id. at 909 n.8 (citation omitted). Here, the only prior related decision was this Court's February 11, 2009 TRO compelling the same defendant publishers and national distributors to continue to supply Source. Moreover, the Court's reliance on Travel Agent was based on its finding that Anderson's proposed surcharge was a non-negotiable ultimatum. (Op. at 13.) As shown infra, that is not so.

[4] "[W]hen a motion to dismiss is granted, 'the usual practice is to grant leave to amend the complaint.'" Ronzani v. Sanofi S.A., 899 F.2d 195, 198 (2d Cir. 1990) (abuse of discretion to dismiss amended complaint without granting leave to amend) (citing 2A Moore & Lucas, Moore's Federal Practice ¶¶ 12, 14 at 12-99 (2d ed. 1989)); see also Panther Partners Inc. v. Ikanos Communs., Inc., 347 Fed. Appx. 617, 620 (2d Cir. 2009) (reversing district court's denial of reconsideration of its decision denying leave to amend on futility grounds); Yu v. State St. Corp., No. 08 Civ. 8235 (RJH), 2010 U.S. Dist. LEXIS 70931, at *9-15 (S.D.N.Y. July 14, 2010) (on reconsideration, permitting plaintiff to replead where proposed amended complaint cured deficiencies).

wrong was committed when the defendants affirmatively agreed among themselves to collusively reject Anderson's proposed surcharge, boycott Anderson and drive it out of business. Anderson is entitled to proceed with discovery to prove defendants' liability -- the kind of discovery that was conducted in the Source case before it was settled -- and establish its damages and to have a jury hear its claims.[5]

2. The proposed Anderson surcharge was not a non-negotiable ultimatum

A central underpinning of the Court's Opinion was its conclusion that Anderson presented the surcharge as a "non-negotiable take-it-or-leave-it" demand (Op. at 4) and as an "ultimatum." (Id. at 10-11.) That conclusion, however, is mistaken and overlooks the fact, recognized in another part of the Court's Opinion (id. at 5), that neither Anderson nor defendants treated it as such and that Anderson was entirely flexible and willing to compromise -- as reflected by, among other things, the discussions between Anderson and the defendants (id. at 9), the agreement that Anderson thought it had negotiated with TWR and Time, and the agreement it did reach with Comag -- the publisher that refused to join the conspiracy, continued to supply Anderson and was therefore deemed "dangerous" by the defendants. (PAC ¶ 60.)[6]

This entirely undermines the Court's conclusion that because the proposed surcharge was an "ultimatum," the uniform and virtually simultaneous rejection by all defendant publishers and national distributors of Anderson's proposed surcharge "was unchoreographed behavior [and] a

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[5] As the Court noted during oral argument (Tr. 5:21-24), discovery in this case, unlike in Twombly, would be substantially more limited because the conspiratorial conduct occurred within the space of two weeks.

[6] The Court's conclusion that the surcharge was an ultimatum was based principally on the Court's judicial notice of an interview of Mr. Anderson (Op. at 4.) However, judicial notice of the interview was not appropriate. See Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004), cited by the Court (Op. at 11 n.10) ("Limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint."). But, in any event, the actual conduct of Anderson -- and defendants -- after the date of that interview demonstrated that everyone clearly understood that Mr. Anderson's statement was at most a negotiating position and that the surcharge was negotiable.

common response to a common stimulus." (Op. at 11.) That conclusion also is flatly inconsistent with the extensive and specific factual allegations set forth in the Complaint and amplified in the PAC and, in particular, with the inferences that must be drawn in favor of Anderson from those allegations. That conclusion is also flatly inconsistent with the factual allegations of collusive misconduct set forth in the Complaint and amplified in the PAC. The PAC identifies numerous meetings and e-mails between and among the publisher competitors and their co-conspirators during the two weeks immediately after Anderson (and then Source) had proposed a $.07 per copy surcharge, and alleges that all of the defendant publishers and national distributors -- pursuant to a coordinated and collusive plan -- uniformly rejected the surcharge for the precise purpose of cutting Anderson off from its supply of magazines and, within days, driving it out of business. (PAC ¶¶ 66-69; see also Complaint ¶¶ 47, 64-68.) That concerted and collusive conduct was highly extraordinary, particularly in view of the fact that two of the co-conspirators, TWR and Time, had led Anderson to believe that it had reached an agreement with Anderson to resolve the surcharge issue, and that all of the defendant publishers and national distributors had a long history of resolving disputes concerning increased costs. (PAC ¶¶ 66-69.)[7]

3. AMI did not continue to ship magazines to Anderson

Similarly unwarranted was this Court's conclusion that the "incurability" of Anderson's antitrust allegations was "especially true as to AMI," because AMI supposedly "continued to ship magazines to Anderson and thus did not participate in the boycott of Anderson, the heart of this action." (Op. at 20.) That is not true in any relevant sense. The only magazines that AMI

[7] The Court also erroneously accorded inferences to defendants, rather than Anderson, in finding that certain inculpatory statements by defendants' executives (Complaint ¶¶ 49, 50, 52, 54) were not suggestive of conspiracy and in simply accepting defendants' interpretation of those statements. (Op. 16-17.)

"continued" to ship were those monthly magazines already in the pipeline before defendants agreed upon their boycott. (Tr. 46:7-14; PAC ¶ 66.) Otherwise, AMI followed through on its agreement with the other conspirators to cut Anderson off from its magazines -- an agreement reflected in a January 29, 2009 email from Curtis, AMI's national distributor, to AMI and Curtis's other publisher clients, informing them that, "effective immediately, Curtis is suspending all further shipments of magazines to all Anco [i.e., Anderson] wholesaler operations." (PAC ¶ 66.) Curtis clients AMI and Hachette cut off Anderson soon afterward, and followed through on Curtis's declaration and cut off their supply of magazines to Anderson. (PAC ¶ 66.)

The Court erroneously relied on collateral estoppel in taking judicial notice of a temporary restraining notice (the "Delaware TRO") issued by the Delaware Chancery Court, purportedly "finding that AMI [had] continued to ship magazines to Anderson in February 2009, after the alleged boycott occurred." (Op. at 6 n.6, 17.) However, the Delaware TRO in fact made no such finding; it required only that Anderson return to AMI certain magazines. Moreover, the Delaware TRO related at most only to magazines already in the pipeline and had no relevance to AMI's participation in the boycott -- a boycott both it and its agent, Curtis, confirmed. (PAC ¶ 66.)

Moreover, the Court overlooked that collateral estoppel otherwise cannot apply here. Under Delaware law,[8] "'[t]he test for applying collateral estoppel requires that (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment.'" Messick v. Star Enter., 655 A.2d 1209, 1211 (Del. 1995) (citation omitted). Here,

[8] "A federal court must apply the collateral estoppel rules of the state that rendered a prior judgment on the same issues currently before the court." Lafleur v. Whitman, 300 F.3d 256, 271 (2d Cir. 2002).

none of those requirements is satisfied. The only fact "essential" to the Delaware TRO was that Anderson was in possession of magazines that allegedly belonged to AMI. The date that Anderson allegedly came into the possession of those magazines -- whether in February 2009, January 2009 or even earlier -- was not at issue in the Delaware proceeding. Nor was it ever discussed anywhere in the Delaware TRO, a one-page decision that contains no substantive legal or factual analysis. As a result, a finding that AMI continued to ship in February 2009 -- let alone a finding that AMI did not participate in the boycott -- was not essential to the order, was not actually litigated, and was never actually determined by the Delaware TRO. Moreover, the Delaware TRO was not a "valid and final judgment." Delaware law is clear that temporary restraining orders do not give rise to preclusive effect. Thomas & Agnes Carvel Found. v. Carvel, 2008 Del. Ch. LEXIS 142, at *18 (Del. Ch. Sept. 30, 2008), aff'd, 970 A.2d 256 (Del. 2009).[9]

4. Hudson was integral to the conspiracy

The Court also erroneously concluded that "[a]mending the allegations as to Hudson would be futile because there is no conceivable role for Hudson in the alleged conspiracy, and Anderson has withdrawn its allegations that Hudson has taken over Anderson's retail distribution business." (Op. at 21.) That conclusion, however, overlooks the factual allegations that Hudson, along with News Group, played a critical role: those two wholesalers agreed -- with the other defendants -- to allocate the business of Anderson and Source, in return for their agreement (a) to pass along to the retailers -- and away from the publishers -- increased costs in the distribution system and (b) to continue not to promote scan-based trading. As alleged, the conspiracy was

[9] The sole case cited by the Court on collateral estoppel -- Jacobs v. Law Offices of Leonard N. Flamm, 2005 WL 1844642 (S.D.N.Y. 2005) (Op. 6 n.6), cited by the defendants for the first time in reply -- is wholly inapposite. There, the court -- applying Massachusetts preclusion law -- found that an issue was entitled to collateral estoppel effect where (unlike here) it was essential to the case, and was set forth in the state court's findings of fact in what was "clearly a final judgment on the merits for the purposes of collateral estoppel analysis." Id. at *4.

effective -- after Anderson was eliminated, News Group took over the Anderson business and distribution assets, and the prices charged to retailers previously serviced by Anderson were immediately and dramatically increased. (Complaint ¶ 75; PAC ¶¶ 83, 95.)

Moreover, Hudson was at the heart of the conspiratorial meetings. Hudson hosted a crucial January 29, 2009 after-hours meeting among a number of the conspirators, including TWR, Curtis and News Group, at Hudson's offices in North Bergen, New Jersey, in furtherance of the conspiracy and defendants' market allocation. (Complaint ¶ 55; PAC ¶ 63.) Hudson's integral role in the conspiracy is not diminished in any way by Anderson's withdrawal of "its allegation that Hudson has taken over Anderson's retail distribution business." (Op. at 21.) As alleged, the defendants had agreed to a market allocation under which the Anderson business would be taken over by News Group, and the Source business would be taken over by Hudson.

5. The Court overlooked Anderson's additional factual allegations

In denying Anderson's request for leave to amend as futile (Op. at 20-21), the Court erred in not considering the additional factual allegations offered by Anderson -- many of which were reviewed by Anderson's counsel, and contained in a summary submitted to the Court, at oral argument (Tr. 39:5-10; 51:15-52:1) and are contained in the Source SAC.[10] Those allegations

[10] After Anderson served its brief in opposition to defendants' motions and before oral argument in this action, Anderson provided the Court a copy of Hinds County v. Wachovia Bank N.A., No. 08 Civ. 2516, 2010 U.S. Dist. LEXIS 33270 (S.D.N.Y. Mar. 25, 2010), holding that it was appropriate to rely on the allegations of another related complaint in determining whether the complaint at issue survived a motion to dismiss based on Twombly. During oral argument, Anderson requested -- with no objection from defendants -- that the Court take judicial notice of the allegations in the Source SAC, which involved the same antitrust conspiracy at issue here. (Tr. 49:23-51:3.) In its Opinion, the Court declined to take judicial notice of the Source SAC, stating that "courts will take judicial notice only of the existence of other publicly-filed court documents, not of their contents," and that because "Anderson filed its Complaint after Source filed its Amended Complaint," it was "too late for Anderson ... to buttress its pleadings" by asking the Court to take judicial notice of the Source SAC. (Op. 18-19.) In fact, the Source complaint at issue was filed after Anderson filed its Complaint. Moreover, Anderson does not ask the Court to take judicial notice of the truth of the Source allegations, but only that the allegations were made and are equally applicable here. (Op. at 18-19.) The Court evidently overlooked Hinds County and the other substantial authority confirming that such judicial notice is appropriate. See Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th Cir. 1980); In re Packaged Ice Antitrust Litig., No. 08-MD-01952, 2010 U.S. Dist. LEXIS 65549, at *27 n.2

include the details of numerous meetings and communications among and between the defendants immediately after the announcements and the surcharges by Anderson and Source, and the allegations that, during those meeting and communications, defendants agreed to a coordinated and common response to the proposed surcharge, and defendants then acted, in concert, pursuant to their agreement, by uniformly, and at virtually the same time, cutting off the supply of magazines to both Anderson and Source, even though Source publicly had rescinded the proposed surcharge and had obtained commitments from defendants that they would continue to supply their magazines to Source, and even though Anderson had shown and defendants knew that its proposed surcharge was negotiable. (PAC ¶¶ 4, 53, 64-66.)

CONCLUSION

Based on the foregoing reasons, Anderson respectfully requests that its motion for reconsideration be granted, the judgment entered on August 2, 2010 be vacated, and Anderson be granted leave to file an amended complaint substantially in the form of the PAC attached hereto as Exhibit A. After the Court allows the PAC to be filed, Anderson respectfully submits that a discovery conference should be held promptly to enable discovery to proceed on such basis as the Court may determine to be appropriate.

(E.D. Mich. July 1, 2010) (citing Hinds County); In re Comverse Tech., Inc. Sec. Litig., 543 F. Supp. 2d 134, 144 (E.D.N.Y. 2008); In re Huffy Corp. Secs. Litig., 577 F. Supp. 2d 968, 981 (S.D. Ohio 2008); Taylor v. Philip Morris, Inc., No. C 03-0758 MMC, 2003 U.S. Dist. LEXIS 18803, at *3-4 (N.D. Cal. Oct. 20, 2003).

Dated: August 16, 2010
New York, New York

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