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)

DEFENDANT HUDSON NEWS DISTRIBUTORS L.L.C's MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

Defendant Hudson News Distributors L.L.C. ("Hudson") submits this Memorandum in Opposition to Anderson News, L.L.C. and Anderson Services, L.L.C.'s (together "Anderson") Motion for Reconsideration of the Court's August 2, 2010 Opinion & Order, *Anderson News, L.L.C v. American Media, Inc.*, No. 09-cv-2227 (PAC), 2010 U.S. Dist. LEXIS 77718 (S.D.N.Y. Aug. 2, 2010) (hereinafter "Opinion" or "Op."), which dismissed the Complaint with prejudice.[1]

[1] Hudson hereby incorporates by reference the arguments opposing Anderson's Motion for Reconsideration set forth in the Joint Memorandum of Law ("Joint Mem.") submitted by Defendants American Media, Inc. ("AMI"), Bauer Publishing Co., LP ("Bauer"), Hachette Filipacchi Media, U.S. ("Hachette"), Rodale, Inc. ("Rodale"), Curtis Circulation Company ("Curtis"), Kable Distribution Services Inc. ("Kable"), and Distribution Service Inc. ("DSI").

I. INTRODUCTION

Anderson's Motion for Reconsideration is an unremarkable attempt to claim a "second bite of the apple" and reargue matters already considered fully and definitively by the Court. In its 21-page Opinion, the Court correctly identified several independently dispositive grounds for its holding that "Anderson's antitrust allegations do not meet Twombly's plausibility standard," (Op. at *17) and that there is "no conceivable role for Hudson in the alleged conspiracy." *Id.* at *38. The Motion makes no serious effort to identify – as it must – overlooked "controlling decisions or factual matters" that might reasonably alter these conclusions. *Banco de Seguros Del Estado v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 427, 428 (S.D.N.Y. 2002). For that reason alone, Anderson's request that the Court further expend scarce judicial resources and reconsider its decision must be denied as to Hudson. The Court did not fail to consider pertinent factual allegations or points of law in granting Hudson's Motion to Dismiss with prejudice. Moreover, the insufficiency of Anderson's Proposed Amended Complaint ("PAC") only serves to confirm the Court's judgment that repleading cannot cure the Complaint's deficiencies.

II. RECONSIDERATION IS INAPPROPRIATE WHERE – AS HERE – ANDERSON FAILS TO DEMONSTRATE THAT THE COURT OVERLOOKED CONTROLLING FACTS OR LAW

Fed. R. Civ. P. 59(e) and Local Rule 6.3 set an exacting standard for reconsideration, which will "generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusions reached by the court." *Sampson v. Robinson*, Nos. 07 Civ. 6890, 07 Civ. 5867, 2008 WL 4779079, at *1 (S.D.N.Y. Oct. 31, 2008) (Crotty, J.). It is impermissible to use a motion for reconsideration "as a vehicle to advance new theories a party failed to articulate in arguing the underlying motion." *Bishop v. Henry Modell & Co.*, No. 08-cv-7541 (NRB), 2010

WL 1685958, at *2 (S.D.N.Y. Apr. 15, 2010); *see also Caribbean Trading & Fid Corp. v. Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir. 1991) (a motion for reconsideration is not an opportunity to "advance new facts, issues or arguments not previously presented to the Court"). The bar is set high because "[r]econsideration of a previous order by the Court is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scare judicial resources." *De Oliveira v. Bessemeer Trust Co.*, No. 09-cv-0713 (PKC), 2010 WL 2541230 (S.D.N.Y. June 14, 2010) (internal citations omitted).

Anderson cannot satisfy this standard.[2] Plainly, its Motion "is essentially one of reargument, and not reconsideration." *Commerce Funding Corp. v. Comprehensive Habilitation Servs.*, 233 F.R.D. 355, 363 (S.D.N.Y. 2005) (denying Rule 59(e) motion). Anderson asserts that the Court's alleged failing arises from "overlook[ing] the [Complaint's] factual allegations that Hudson . . . played a critical role" in the conspiracy (Mot. at 7), but then Anderson simply repeats in conclusory form the allegations already expressly considered by the Court.

First, Anderson seems to suggest that the Court overlooked allegations that Hudson and The News Group "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." Mot. at 7. Curiously, Anderson offers no citation to these allegations, which it claims the Court somehow missed. *Id.* What Anderson does offer is simply a one-sentence summary of Anderson's overall theory of the conspiracy, which the Court plainly considered and

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[2] Nor does Anderson make a direct attempt to do so as to Hudson. Anderson's critique of the Court's treatment of Hudson (Mot. at 7-8) challenges the Court's conclusion that permitting amendment with respect to Hudson would be futile. Mot. at 7.

rejected as implausible – particularly with respect to Hudson's alleged role. *See* Op. at *17-18 ("It is implausible that magazine publishers would conspire to deny retailers access to their own products. Collusion to destroy Anderson and non-party Source – the ultimate goal of the alleged conspiracy – is facially implausible"); *id.* at *43-44 ("there is no conceivable role for Hudson in the alleged conspiracy").

Anderson also argues that the Court overlooked its claim that Hudson was "at the heart of the conspiratorial meetings" because Hudson allegedly hosted a meeting attended by some of the co-defendants on January 29, 2009. The Court did not overlook this allegation (*see* Op. at *12, *19-20 n.9, *35); rather, the Court rightly concluded the allegation was insufficient to support a federal antitrust claim. *See id.* at *20 n.9 (the alleged meetings were "insufficient to plausibly suggest a prior agreement among Defendants."). Because Anderson does not identify any overlooked factual matters implicating Hudson News in the alleged conspiracy, the Motion for Reconsideration must be denied. *See Davidson v. Scully*, 172 F. Supp. 2d 458, 461 (S.D.N.Y. 2001) (denying a motion for reconsideration because plaintiff failed to point to factual matters or legal decisions that the court overlooked).

III. RECONSIDERATION OF THE COURT'S DENIAL OF LEAVE TO AMEND ALSO MERITS REJECTION

The Court denied leave to amend the Complaint, explaining that "[t]he incurability of Anderson's antitrust allegations . . . is especially true as to . . . Hudson," and "[a]mending the Complaint's allegations as to Hudson would [] be futile because there is no conceivable role for Hudson in the alleged conspiracy: as a wholesaler, Hudson could not cut off Anderson's magazine supply; and Anderson has withdrawn its allegation that Hudson has taken over

Anderson's retail distribution business." Op. at *43-44. Anderson nonetheless asserts that "the Court erred in not considering the additional factual allegations offered by Anderson."[3] Mot. at 8. Of course Anderson cannot move for reconsideration based on allegations in the PAC that were not previously put before the Court. *See* Joint Mem. at 2-3. In any event, even if the PAC could be considered,[4] its "new" factual allegations cannot cure the pleading inadequacies against Hudson.

The PAC has at least one advantage over the original Complaint – it is longer. Those extra words, however, do not move Anderson any closer to articulating a cognizable claim against Hudson, or any of the other defendants. Instead, the PAC is plagued by the same deficiencies as Anderson's original Complaint. Namely, the PAC continues to describe an economically implausible conspiracy (*see* Joint Mem. at 8), and the proposed amendments do not add any facts from which the Court could infer that Hudson conspired to "eliminate[e] Anderson as a magazine wholesaler." PAC ¶8. As before, most of the PAC's allegations depicting the claimed anti-Anderson scheme place Hudson outside the conspiracy, as an odd-

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[3] Anderson's suggestion that its absurd introduction of the Source complaint as some sort of supplemental pleading at oral argument occurred "with no objection from defendants" is silliness. The Court rightly rejected Anderson's stunt before any defendant had an opportunity to comment. With the Court's common sense rejection of Anderson's attempt to flout well-established pleading rules, there was no need for the defendants to waste the Court's time by joining a battle Anderson had already lost.

[4] A request to permit amendment through the PAC plainly would be impermissible at this stage. *See Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 244-245 (2d Cir. 1991) ("once judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed.R.Civ.P. 59(e) or 60(b). . . . Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint.").

man-out competitor of Anderson's who would be impacted by, but had no ability to effect, a boycott of Anderson.[5]

The notably small set of new allegations in the PAC related to Hudson would do nothing to alter this conclusion. For example, Anderson introduces the assertion that at some unspecified time in 2008, "the president and CEO of Hudson, telephoned Anderson's CEO [] and reported that Robert Castardi ('Castardi'), the president of Curtis, had told him, in words or in substance, that Castardi was going 'to get back' at Anderson and that 'Anderson was done' because Curtis would find a way to put Anderson out of business." PAC ¶47. This helps Anderson not a whit. First, it is unclear how this alleged communication from *sometime in 2008* ties to a conspiracy that was allegedly conceived and carried out during a two-week window *in January 2009*. *See* Mot. at 4 n.5. Even if the timing were remotely relevant, the substance of the alleged conversation in no way suggests that Hudson (or anyone else) entered into an agreement to "eliminate" Anderson. PAC ¶45. This "new" allegation reports that a Hudson representative passed along word of Mr. Castardi's frustration with Anderson to Anderson, the purported focus of Mr. Castardi's displeasure. A unilateral comment from Curtis relayed to Anderson in 2008 does not even hint at the possibility of a conspiracy.

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[5] *See, e.g.*, PAC ¶75 ("the publishers and their national distributors, acting in concert, agreed in advance to terminate their relationships with Anderson at the same time and also agreed to divide the Anderson business among the two remaining and favored wholesalers"); ¶44 ("Because defendants [i.e., the publishers and national distributors] arranged for their two remaining wholesalers to be allocated separate geographic markets that did not overlap, retailers were compelled to accept the selected, preferred wholesalers and were deprived of competition in that market."); *see also* Mot. at 2 (after boycotting Anderson, alleged publisher conspirators could "allocate to the two remaining and compliant defendant wholesalers" responsibility for retail accounts); *id*. at 3 (publishers and national distributors "indisputably wield tremendous influence and control over Hudson and News Group").

Nor can Anderson revive its claim by offering to plead a small amount of additional information concerning a meeting already rejected as insufficient to support its claim. With no explanation as to why Anderson chose to hold out in sharing before now, the PAC reveals the names of *some* of the alleged January 29, 2009 meeting participants. *See* PAC ¶63. But of course the Court had already assumed for the purposes of the Motion to Dismiss that Hudson News hosted a meeting at its headquarters that was attended by certain employees of its co-defendants. *See* Op. at 6, 9 n.9, 15. The Court nonetheless found that the meeting allegation was "insufficient to plausibly suggest a prior agreement among Defendants." *See* Op. at 9 n.9; *see also 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."). Adding the names of some of the alleged individual meeting participants should not alter the Court's conclusion. It of course adds nothing with respect to the purpose and substance of the meeting. Notably, Anderson continues to refuse to say who from Hudson actually attended. Inclusion of some names of individuals at a meeting, without more, certainly does not begin to "nudge [the] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Other strikingly minor additional allegations similarly highlight the thinness – rather than the plausibility – of Anderson's (proposed) new pleading. For instance, Anderson attempts to flesh out its employee poaching claim by alleging that Hudson "flew one of Anderson's key employees to its headquarters in New Jersey in an attempt to convince him to leave Anderson." PAC ¶78. In ruling on the Motion to Dismiss, however, the Court found that the poaching allegation was "plainly insufficient to plausibly allege an antitrust claim as to Hudson." Op. at

*38. One Anderson employee flying on an airplane to a job interview fails to establish a plausible basis for inferring Hudson conspired with the co-defendants to put Anderson out of business. In truth, it tends to minimize the scope of the original allegations, making clear that this allegation relates to only one (among thousands) of Anderson employees. Choosing to interview a failing competitor's employee is unsurprising, unremarkable and certainly consistent with "lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009).

Other new allegations are similarly puzzling. Without the most basic elaboration as to the relevance of the allegation, the PAC asserts that "Hudson has already imposed price increases [on magazine retailers] in Pennsylvania." PAC ¶82.[6] Without more, this establishes nothing other than that somewhere in Pennsylvania some prices Hudson charges increased. Anderson of course purportedly withdrew its allegation that Hudson took some of Anderson's former retail accounts.[7] Op. at *38. Certainly this allegation cannot be the basis for inferring conspiracy.

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[6] In this connection, it bears noting that allegations Anderson continues to cite to argue that the "the conspiracy was effective," (Mot. at 7-8) frequently simply illustrate why "[t]here is no conceivable role for Hudson in the alleged conspiracy." Op. at 38. For example, Anderson explains that, "after Anderson was eliminated [by the alleged denial of supply from publishers and national distributors, not Hudson], News Group [which is not Hudson] took over the Anderson business and distribution assets, and the prices charged to retailers previously serviced by Anderson [retailer accounts that, by letter to the Court on June 9, 2010, Anderson says were not acquired by Hudson nor subject to an agreement that Hudson would acquire them] were immediately and dramatically increased." Mot. at 8.

[7] This highlights an important point. Anderson's apparent dedicated fixation on forcing Hudson, its former rival, to expend considerable resources defending a meritless claim has led Anderson down a path of material contradictions in its representations to the Court. For example, Anderson appears to free-style with the truth, observing that, "*[a]s*

[Footnote continued on next page]

The flimsiness of the "new" allegations in the PAC confirms that the "defects in Anderson's Complaint are not curable" and that "[a]mending the Complaint's allegations as to Hudson would [] be futile . . . ." Op. at *43.

IV. CONCLUSION

For each of the foregoing reasons, Hudson News respectfully submits that the Court should deny Anderson's Motion for Reconsideration.

[Footnote continued from previous page]

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." Mot. at 8 (emphasis added). Anderson offers no citation in support of its statement. This is because there is no such allegation as to Hudson. Indeed the PAC suggests that the defendants intended to allocate Source's business to both Hudson and The News Group, not just to Hudson. PAC ¶96. Anderson is up to other games as well. For example, the PAC proposes to return the full allegations in paragraph 89 of the Complaint to the case in PAC paragraph 109. Paragraph 89 suggested that defendants' alleged conspiratorial conduct caused Anderson's customers to terminate their relationship with Anderson and turn to The News Group and Hudson for supply. Cmplt. ¶89. In response to Hudson's informal inquiries with counsel for Anderson, Anderson represented to the Court on June 9, 2010 that "the allegation that Hudson and News Group entered into agreements to serve Anderson's former retailer-customers is applicable only to News Group" and required withdrawal of the allegation in paragraphs 59 and 89. June 9, 2010 Letter at 2. Yet, in open contradiction to its prior representations and its current theory articulated in its brief, paragraph 89 returns (as paragraph 109) without substantive change. And if there is any doubt that Anderson intends to backtrack on its June 9, 2010 undertakings, paragraph 94 of the PAC leaves little doubt. It asserts that the News Group "agree[d] with Hudson to allocate among themselves, and to provide distribution services to, the Anderson retailers." PAC ¶95.

Dated: September 2, 2010
New York, New York

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