10-4591 cv

In the United States Court of Appeals for the Second Circuit

ANDERSON NEWS, L.L.C., LLOYD T. WHITAKER, AS THE ASSIGNEE UNDER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS FOR ANDERSON SERVICES, L.L.C.,

Plaintiffs-Appellants,

– v. –

AMERICAN MEDIA, INC., BAUER PUBLISHING CO., L.P., 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., & TIME/WARNER RETAIL SALES & MARKETING, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE CURTIS CIRCULATION COMPANY

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendant-Appellee Curtis Circulation Company ("Curtis") certifies that Curtis is 100% owned by Hachette Distribution, Inc., a wholly-owned subsidiary of Lagardere North America, Inc., a Delaware corporation, which is a wholly-owned subsidiary of Hachette SA, a French company, which is 100% owned by Lagardere SCA, a French company.

April 18, 2011

/s/ George G. Gordon
George G. Gordon

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did Plaintiffs-Appellants waive their new argument, raised for the first time on appeal, that the Complaint purportedly contains allegations of direct evidence sufficient to state a Sherman Act conspiracy claim?

2. Did the district court properly determine that Plaintiffs' allegations fail to state a claim that Curtis Circulation Company ("Curtis") participated in a Sherman Act conspiracy where Curtis is merely alleged to have refused, on behalf of its publisher clients, to accept Plaintiffs' effort to impose a substantial Surcharge and where none of the non-conclusory allegations regarding Curtis suggest that it participated in a conspiracy?

3. Did the district court properly dismiss the state law claims for tortious interference, defamation, and civil conspiracy?

4. Did the district court properly refuse to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e)?

STATEMENT OF FACTS[1]

Curtis adopts the Statement of Facts in the Brief for Defendants-Appellees Time Inc. and Time/Warner Retail Sales & Marketing, Inc. ("Time Br.") and the Brief for Defendant-Appellee Bauer Publishing Co., L.P. ("Bauer Br."). Curtis submits this separate Statement of Facts regarding the allegations specifically relating to Curtis.

Anderson News, L.L.C., and its affiliate, Anderson Services, L.L.C., (collectively, "Anderson") assert various claims concerning the publication and sales in the United States of single-copy magazines – *i.e.*, sales of magazines in retail outlets rather than to consumers who subscribe with magazine publishers. Compl. ¶¶ 27, 29 (AA23-24). Publishers produce the magazines and set the cover prices for single-copy sales. *Id.* ¶ 27 (AA23-24). To facilitate those sales, each publisher retains a national distributor, like Curtis, which manages the publisher's relationship with wholesalers and provides marketing and accounting services. *Id.* Publishers, not Curtis, ship single-copy magazines to the wholesalers, who purchase the magazines from publishers at 50% to 60% of the cover price and sell to retailers at 70% to 80% of the cover price. *Id.* ¶¶ 29-30 (AA24).

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[1] The facts are drawn from the allegations contained in Anderson's Complaint and Proposed Amended Complaint ("PAC") and are assumed to be true only for the purpose of this appeal.

Curtis is a national distributor for publishers – including Hachette, Rodale, AMI, and numerous non-Defendants like Forbes, Newsweek, and US News & World Report. *Id.* ¶ 14 (AA21). Curtis interacts with Anderson and other wholesalers on behalf of individual publisher clients. *Id.* ¶ 27 (AA23-24).

Anderson's claims against Curtis are based entirely on Curtis' alleged reaction to Anderson's January 14, 2009 announcement that it was having significant financial struggles, that it was imposing a $.07 per magazine surcharge ("Surcharge"), that it was shifting $70 million of inventory costs to publishers, and that it would refuse to circulate magazines for publishers and distributors who did not agree to pay the Surcharge by February 1, 2009. *See id.* ¶¶ 41-42 (AA27); *New Single Copy* Interview Tr. (SA33-43). Anderson announced that it planned to exit the business if publishers and distributors declined Anderson's demand for a $.07 Surcharge. *See id.* at 7 (SA39) (Anderson CEO Charles Anderson lamenting, "The last thing we want to do is exit this business, but we – why should we continue to lose money in a business that doesn't . . . give us any returns?").

Five days later, Source Interlink Distribution, L.L.C. ("Source"), another large wholesaler, announced that it would follow Anderson's lead and impose the same $.07 per magazine surcharge, also effective February 1, 2009. Compl. ¶ 50 (AA30); *see also* PAC ¶ 54 (AA85). There is no allegation that the other two

wholesalers – Hudson News Distributors LLC ("Hudson") and The News Group, L.P. ("News Group") – announced any surcharge.

In the original Complaint, Anderson alleges that Curtis refused to accept the Surcharge on behalf of its publisher clients. Compl. ¶ 43 (AA28). In addition, in the PAC (but not the Complaint), Anderson alleges that, on January 29, 2009, Curtis notified its publisher clients that it would, based on Anderson's ultimatum, be forced to find alternative distribution. PAC ¶ 66 (AA89). Anderson does not allege that any of Curtis' individual publisher clients had consented to the Surcharge or had otherwise provided Curtis with direction to accept it on their behalf.

As explained more fully below, none of Anderson's allegations suggest that Curtis' alleged refusal to accept the new Surcharge on behalf of its publisher clients was anything more than a natural reaction to Anderson's surprise announcement. There is nothing unlawful about saying "no" to such a substantial Surcharge. Indeed, Anderson's allegations regarding Curtis are inconsistent with a theory that Curtis conspired with the other Defendants to drive Anderson from business.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Anderson's claims for the reasons set forth in the Time Brief and the Bauer Brief – each of which Curtis joins.[2] Curtis submits this brief to address the few allegations specific to Curtis – allegations which not only fail to suggest that Curtis conspired with any other Defendant, but also directly contradict the theory that Curtis did so. For example, Anderson's allegations regarding Curtis' prior alleged effort in 2008 to terminate Anderson's supply from Curtis' publisher clients (when Curtis was able to reverse course and resume supply to Anderson) undermine entirely Anderson's theory that Curtis and the other Defendants had only two options: accept the Surcharge or conspire to resist it. The allegations regarding 2008 demonstrate that if – as alleged – Curtis refused to accept Anderson's Surcharge on behalf of its publisher clients in 2009 but others accepted it, Curtis could have reversed course "immediately" if necessary. Thus, contrary to Anderson's allegations, there was little risk in acting unilaterally.

Moreover, if anything, the remaining allegations regarding Curtis' conduct in the brief, two-week window after Anderson's announcement of a substantial price increase show that Curtis was unaware of how others in the industry were

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[2] Curtis also joins the Point II of the Brief for Defendants-Appellees American Media, Inc. and Distribution Services, Inc., explaining that the district court properly dismissed the common law claims against all Defendants.

going to react and actually suggested to Anderson a strategy for staying in business.

For all of these reasons, the district court's dismissal of Anderson's claims should be affirmed.

STANDARD OF REVIEW

Curtis adopts the Standard of Review in the Time Brief. Time Br. at 20-21.

ARGUMENT

The few allegations pertaining specifically to Curtis not only fail to suggest that it conspired with any other Defendant but also contradict Anderson's theory. This is particularly true given that, as explained more fully in the Time and Bauer Briefs, Anderson's argument suffers from three fundamental flaws.

First, Anderson's sole argument to the district court was that the Complaint's circumstantial evidence allegations satisfied *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). Anderson now argues on appeal, for the first time, that it has "directly alleged" evidence of a conspiracy. Anderson has waived this argument. *See Katel Ltd. Liability Co. v. AT&T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010). Moreover, neither the Complaint nor the belatedly-submitted PAC contains the type of allegations – *i.e.*, express admissions of conspiracy or a

smoking gun document – that constitute direct evidence of a conspiracy. *See* Op. at 9 (AA54).[3]

Second, Anderson's non-conclusory allegations do not reasonably suggest that Curtis, or any other Defendant, conspired to drive Anderson out of business. Anderson gave publishers approximately two weeks to decide whether or not they would agree to the Anderson Surcharge, and Anderson planned to "exit the business" if the Surcharge was not accepted. The allegation that Curtis refused to accept Anderson's Surcharge on behalf of its publisher clients does not suggest that it conspired to drive Anderson out of business, but rather that it acted "in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *See* Op. at 10 (AA55) (quoting *Twombly*, 550 U.S. at 556). As the Supreme Court explained in *Twombly*, "there is no reason to infer that [defendants] agreed among themselves to do what was only natural anyway" – *i.e.*, to say "no" to a substantial Surcharge. *Twombly*, 550 U.S. at 566; *see also Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 322 (2d Cir.

[3] Curtis adopts Time's argument that Anderson – which never moved to file an amended complaint prior to the district court's judgment – failed to satisfy the requirements for reconsideration under Federal Rule of Civil Procedure 59(e) and Local Rule 6.3 and thus that the district court properly denied Anderson's motion for reconsideration, which was a necessary prerequisite for granting Anderson's post-judgment motion to amend. Regardless, the belatedly-submitted PAC does not sufficiently state a Sherman Act claim. *See* Time Br. at 20, 54-58.

2010) ("allegations of parallel conduct 'must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent conduct'") (quoting *Twombly*, 550 U.S. at 557); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 909 (6th Cir. 2009). In addition, as the district court explained, Anderson's allegations demonstrate that each Defendant came to its decision regarding the Surcharge in very different ways. *See* Op. at 8-9 (AA53-54); Time Br. at 27-29.

Third, the alleged conspiracy is economically implausible on its face. As the district court observed, "The ultimate goal of [Anderson's] alleged conspiracy was to eliminate both Anderson and non-party Source, two of the four largest magazine wholesalers. This goal is not plausible. Publishers and national distributors have an economic self-interest in more wholesalers, not fewer." Op. at 8 (AA53) (citing Compl. ¶¶ 4, 58, 72, 76); *see also* Time Br. at 50-53.

In addition, the specific allegations concerning Curtis are inconsistent with Anderson's claims. For example, Anderson suggests Curtis learned from a prior supply dispute with Anderson in 2008 that it could not "terminate" Anderson absent an agreement with others in the industry. Anderson's allegations, however, demonstrate that the lesson from this prior incident was exactly the opposite. Anderson alleges that, in 2008, Curtis' alleged effort to terminate Anderson's supply from Curtis' publisher clients was unsuccessful because Wal-Mart

supported Anderson. However, Anderson also alleges that Curtis' response in that situation was simple: it "immediately reversed course and resumed supply." Compl. ¶ 45 (AA28). In January 2009, when Curtis allegedly refused to accept Anderson's $.07 Surcharge on behalf of its publisher clients, if others in the industry had accepted the Surcharge, Curtis would have had the same, simple option as it had in 2008: "immediately reverse[] course."

This situation is virtually identical to *In re Travel Agent Antitrust Commission Antitrust Litigation*, in which the Sixth Circuit rejected the very same argument Anderson makes here – that the Defendants' alleged conduct required a conspiracy because of the purported risk of acting unilaterally. In *Travel Agent,* plaintiffs argued that no airline could have cut travel agent commissions without a conspiracy because it would risk losing business, and plaintiffs pointed to situations in which airlines had been compelled to reverse commission cuts when others did not follow. 583 F.3d at 908. The court, however, held that this prior industry history did not support the charge of conspiracy, but merely demonstrated that "[i]f the industry did not follow [a commission cut], the leader airline could simply retract the cut." *Id.* Here, likewise, if – as alleged – Curtis refused to accept the Surcharge on behalf of its publisher clients and others agreed to pay it,

Curtis could have "immediately" reversed its decision, if necessary.[4] Moreover, as *Travel Agent* observed, "if we follow [Anderson's] argument to its logical end," no publisher or national distributor could ever say no to any type of surcharge, fee or other action by Anderson without a conspiracy. *Id.*

The remaining allegations regarding Curtis similarly fail to suggest that it participated in any conspiracy and are inconsistent with such a claim.[5] For example, Anderson alleges that, on January 21, 2009, Curtis President and CEO Robert Castardi told Anderson CEO Charles Anderson that he "would like to get this worked out," but that he was going to "have to go with ***whatever*** [TWR] does." Compl. ¶ 49 (AA29) (emphasis added).[6] This alleged statement does not

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[4] This is not in conflict with Mr. Castardi's alleged statement that Curtis was "going to have to go with whatever [TWR] does." Compl. ¶ 49 (AA29). As discussed below, that alleged statement is simply consistent with the reality, acknowledged in the Complaint, that retailers do not want to deal with more than one wholesaler and, therefore, the ultimate success of the Surcharge would depend on whether or not critical publishers and distributors, such as the Time entities, accepted it. *Id.* ¶ 61 (AA34). But it does not suggest that there was any risk associated with rejecting the Surcharge in the absence of a conspiracy because, if others did not reject it, Curtis could simply reverse course – just as it did in 2008.

[5] Also, missing entirely from Anderson's pleadings is an allegation that a single individual publisher client authorized Curtis to accept the Surcharge on its behalf or that Curtis had the authority to bind its publisher clients to pay the Surcharge absent such authorization.

[6] On appeal, Anderson represents that the Complaint "alleges that the CEOs of Curtis and TWR communicated to the CEO of Anderson that they had agreed to maintain a common front against Anderson." Br. of Appellants at

suggest that Castardi knew what TWR was going to do. To the contrary, if anything, Mr. Castardi's alleged statement demonstrates uncertainty regarding TWR's response.

Moreover, this alleged statement is easily explained by Anderson's allegation that large retailers generally obtain all of their magazines from a single wholesaler. *Id.* ¶ 61 (AA34). Accepting that allegation as true, Curtis would not have had the option of working with Anderson if Anderson stopped distributing other major publishers' titles. Nor would Curtis have been able to arrange for an alternative wholesaler if major publishers stuck with Anderson. Thus, it does not suggest anything nefarious if Mr. Castardi stated, as alleged, that – as a practical matter – Curtis would "have to go with" whatever the largest publisher in the industry decided to do. *See* Time Br. at 49-50 (discussing importance of TWR's line of titles to retailers like Wal-Mart) (citing PAC ¶ 11 (AA72-73)). Recognizing that the ultimate response to a common industry stimulus may depend on how another reacts reflects – at most – the potential for perfectly legitimate parallel behavior. *See Twombly*, 550 U.S. at 553-54*; Travel Agent*, 583 F.3d at 908.

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29 (citing Compl. ¶¶ 49, 52 (AA29, AA31); PAC ¶ 70 (AA91)). The Complaint alleges no such thing. Mr. Castardi is merely alleged to have told Mr. Anderson that Curtis would follow what TWR did. Compl. ¶ 49 (AA29). Ten days later, when Mr. Anderson recounted to TWR's Mr. Jacobsen what Castardi had supposedly said, Jacobson allegedly "nodded and smiled." Compl. ¶ 52 (AA31); PAC ¶ 70 (AA91). These allegations hardly constitute Curtis and TWR telling Anderson that they "had agreed to maintain a common front against Anderson." Br. of Appellants at 29.

Consistent with Curtis' stated desire to "get this worked out," Anderson also alleges that, in late January 2009, Mr. Castardi suggested to Mr. Anderson that he give up on the Surcharge, "let Source go out first," and then take advantage of the opportunity to increase Anderson's market share. *See* Br. of Appellants at 13-14 (citing PAC ¶ 58 (AA86-87)). This allegation suggests that Mr. Castardi provided advice to Anderson regarding a strategy *to stay in business.* Such advice is inconsistent with the claim that Curtis was conspiring to drive Anderson from the marketplace.

Anderson's allegation that, on January 31, 2009, Mr. Castardi told an unnamed Source executive that he knew with "100% certainty" that TWR, Bauer, and AMI would refuse to supply Source is not to the contrary. PAC ¶ 71 (AA91). The allegation has nothing to do with Anderson, which is not even mentioned, and suggests nothing about a conspiracy to drive it from business. Moreover, Anderson itself alleges that it was widely known in the industry by January 31 how different publishers and distributors were reacting to the Surcharge. *See* Time Br. at 40-41.[7] And it would hardly be unusual that Curtis might be aware of AMI's

[7] Press reports prior to January are consistent with this allegation. *See Time Inc. Stands Up to Wholesaler*, Media Week (Jan. 27, 2009) (SA240) (discussing Time's insistence that it would "find alternate distribution for all 24 of its U.S. titles"); Lucia Moses, *Comag Sticking With Its Wholesalers for Now*, Media Week (Jan. 30, 2009) (SA241) (noting Bauer's "plan to use other wholesalers").

plans given that Curtis is AMI's national distributor. Compl. ¶ 14 (AA21).[8] Indeed, the publishers' and national distributors' plans could not plausibly have been a secret in the industry as of January 31, only one day prior to Anderson's deadline. Any publisher or distributor intending to reject Anderson's Surcharge ultimatum before the February 1 deadline would have had to notify retailers and to make arrangements for alternative means of supply ahead of time.

[8] The PAC's allegations that Castardi met with Kable's Michael Duloc on Sunday, January 18 "to plan their collusive action," *see* PAC ¶ 56 (AA86), and that Mr. Porti of Curtis was present at a meeting with certain Defendants at Hudson on January 29 to "discuss[] and plan[] their collusive activity," *id.* ¶ 63 (AA88), add nothing of substance to support Anderson's conspiracy claim. The allegations regarding the subject matters of these alleged meetings are conclusory and need not be accepted as true for purposes of a motion to dismiss. *See Twombly*, 550 U.S. at 556-57 (explaining that an allegation is "conclusory" if it "does not supply facts adequate to show illegality"). Moreover, according to the Complaint and PAC, by the time of the Hudson meeting, Curtis had already announced to publishers its intention to suspend further shipments to Anderson. PAC ¶ 66 (AA89).

CONCLUSION

For the foregoing reasons, Curtis respectfully requests that this Court affirm the decision of the district court.

April 18, 2011

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(C)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify under penalty of perjury that the foregoing Brief for Defendant-Appellee Curtis Circulation Company contains 3,008 words, as calculated by the Microsoft Word 2002 word processing system, and therefore complies with Rule 32(a)(7)(B)(i).

April 18, 2011

/s/ George G. Gordon
George G. Gordon