UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDERSON NEWS, L.L.C. and ANDERSON SERVICES, L.L.C.,	:	09 CIV. 2227 (PAC)
Plaintiffs,	:	
-against-	:	
AMERICAN MEDIA, INC., BAUER PUBLISHING CO., LP, CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA, U.S., HUDSON NEWS COMPANY, KABLE DISTRIBUTION SERVICES, INC., RODALE, INC., THE NEWS GROUP, LP, TIME INC. and TIME/WARNER RETAIL SALES & MARKETING, INC.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE PLAINTIFFS' COMPLAINT BY DEFENDANTS AMERICAN MEDIA, INC., BAUER PUBLISHING CO., LP, CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA, U.S., KABLE DISTRIBUTION SERVICES, INC., AND RODALE, INC.

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OTHER AUTHORITIES

The named defendants[1] submit this Memorandum of Law in support of their motion pursuant to FED.R.CIV.P. Rule 12 (b)(6) to dismiss the Complaint of Anderson News, L.L.C. and Anderson Services, L.L.C. (collectively "Anderson") for failure to state a claim.[2]

PRELIMINARY STATEMENT

Anderson proposes to infer a conspiracy involving the publishers of magazines to destroy two of the four wholesalers that the publishers need in order to distribute their magazines to retailers. The target of this purported conspiracy were the two largest wholesalers, Anderson and Source Interlink Distribution, LLC ("Source") which, in January 2009, had an alleged combined share of 58% of the proposed market. Anderson's allegations center on certain defendants' reactions after it and Source, within days of one another, advised publishers and distributors they would be imposing a $.07 per magazine surcharge for every magazine delivered effective February 1, 2009.

Such a "conspiracy" is implausible on its face. The publishers and the distributors did not have any incentive to eliminate the two largest wholesalers. The Complaint implicitly recognizes this; it alleges that the purported conspiracy reduced the output of magazines and denied retailers access to magazines in "numerous geographic regions" across the country (Comp. ¶¶73-74). None of the defendants have an incentive to do this, individually or

[1] The defendants that are signatories to this Memorandum of Law are magazine publishers American Media, Inc. ("AMI"), Bauer Publishing Co., LP ("Bauer"), Hachette Filipaccchi Media, U.S. ("Hachette") and Rodale, Inc. ("Rodale"), magazine distribution and service companies Curtis Circulation Company ("Curtis") and Kable Distribution Services, Inc. ("Kable") and media and marketing services company Distribution Services, Inc. ("DSI"). Magazine wholesaler Hudson News Distributors LLC ("Hudson") is submitting a separate brief that addresses specific arguments germane to it but also joins this brief. Hachette and DSI are similarly filing supplemental briefs that address their unique facts. Defendants Time Inc. ("Time") and Time Warner Retail Sales & Marketing, Inc. ("TWR") are separately moving to dismiss the Complaint. Magazine wholesaler The News Group, LP ("TNG") was originally named a defendant but was dismissed as a result of an agreement reached with Anderson in connection with purchasing certain of its assets. All emphasis is added unless otherwise noted.

[2] The Complaint is attached as Exhibit "A" to the accompanying Declaration of Daniel N. Anziska ("Anziska Dec.").

collectively. Publishers and distributors are in the business of increasing magazine distribution, not decreasing it.

While Anderson conclusorily claims that it was "cut off" by the defendant publishers and distributors from 80% of the magazines it distributed (Comp. ¶64), there are no allegations establishing that any defendant actually terminated its relationship with Anderson. In fact, it was Anderson that told defendants that it would not accept their magazines, compelling them to scramble to make alternative distribution arrangements with wholesalers or risk losing substantial sales. Charles Anderson, the CEO of Anderson, publicly proclaimed that Anderson was imposing a non-negotiable surcharge of $0.07 per magazine shipped plus inventory costs (Anziska Dec., Ex. B, p. 3[3]; Comp. ¶41) and that each publisher and distributor that wanted to continue to have access to Anderson's wholesale services in February would be required to sign an agreement consenting to the surcharge (Ex. B, pp. 4, 10). To the extent that Anderson was "cut off" from defendants' magazines, it was through its own actions.

The allegations confirm that this case is not about a conspiracy to destroy Anderson. It is about each defendant's separate decision not to accept Anderson's non-negotiable surcharge. Anderson seeks a baseless inference of conspiracy from the allegations that defendants did not each acquiesce to the surcharge, even though the Complaint reflects that each defendant: (1) had independent business reasons to resist it; and (2) in fact, reacted in different ways.

The Complaint is not only dependent on implausible inferences, it also lacks the requisite specificity as to when the "conspiracy" began, who were the conspirators, when each defendant joined, how the conspiracy functioned, and when it ended. The description of the "conspiracy" (Comp., Section D) is devoid of specific allegations regarding the conduct of the publisher

[3] Because Anderson refers to this interview in its pleading (Comp. ¶42), it is incorporated by reference and the full text of the interview (Ex. B) can be considered on this Rule 12 (b)(6) motion (*infra*, Point I).

defendants and the scant "facts" set forth about the distributor defendants actually undercut an inference of conspiracy. Each defendant is alleged to have reacted differently in the three weeks following the surcharge announcement before Anderson closed. One distributor appeared amenable to an agreement with Anderson, another advised that it likely would react to what the industry leader did, another suggested that Anderson enter into exclusive agreements instead of imposing the surcharge, and another allegedly misled Anderson into believing that Anderson's discount would be increased, inducing Anderson to pay certain outstanding receivables, and then the distributor reneged after receiving payment. Anderson's conspiracy claim relies on this series of disparate, unrelated events that it instigated by imposing a significant price increase -- none of which suggests any meeting or agreement.

Anderson's attempt to save its claim by alleging that the "conspiracy" to destroy Anderson was motivated by a resistance to "scan-based trading" ("SBT") (Comp. ¶¶39-40) is a red herring. All of the actions alleged by Anderson occurred after its announcement of the surcharge in January 2009. Anderson and others had been advocating for SBT before January 2009 and, as of that date, SBT was being used by many retailers (Ex. B, pp. 2, 10 (Charles Anderson said that SBT represented 45% of Anderson's business and confirmed that "scan-based trading is here. It has been for a while.")). In addition, the defendant publishers and distributors have resumed dealing with Source after its rescission of the surcharge despite its continued advocacy of SBT. Moreover, if SBT is beneficial to wholesalers, then the alleged boycott makes no sense because the two remaining non-"boycotted" wholesalers -- TNG and Hudson -- would have implemented the program once they had market power. In any event, if, as alleged (Comp. ¶35), SBT is something that retailers want, Anderson's elimination will not prevent SBT's implementation.

The Complaint also contains the general allegation that unidentified "conspirators" spread "false" rumors of Anderson's financial woes. There can be no dispute, however, that on the day it announced its price increase, Charles Anderson publicly claimed that Anderson was prepared to exit the business if publishers did not accept the non-negotiable surcharge (Ex. B, p. 8) ("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 have you know, give us any returns?"). By early February, Anderson followed through on his threat and ceased operations, and Anderson and related entities are presently the subject of an involuntary Chapter 7 bankruptcy proceeding in the Delaware Bankruptcy Court (Index No.: 09-10695-CSS) (Comp. ¶68) where many of these defendants are seeking to recover $120 million Anderson admittedly has failed to pay them for magazines Anderson sold.[4]

The standard of review and pleading requirements established in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), set a high bar (Point I). Anderson has failed to meet this "heightened" pleading burden in that:

(i.) the Complaint fails to allege facts that negate independent reasons for the conduct from which Anderson proposes to infer a conspiracy -- rather the pleading makes it explicit that Anderson forced defendants to accept a price increase or consider alternative sources of distribution (Point II.A);

(ii.) the conduct alleged is not only as consistent with unilateral business conduct as with conspiracy, it is in all respects conduct that one would expect rational businesses to engage in without an agreement (Point II.B);

(iii.) a conspiracy by publishers and distributors to drive the two largest wholesalers out of business and cut down their choice of wholesalers from four to two and render Anderson unable to pay its huge debts does not make economic sense (Point II.C);

[4] The Court may take judicial notice of the fact that this action was filed immediately after the commencement of a Chapter 7 involuntary bankruptcy proceeding against Anderson which it has sought to dismiss (*infra*, Point I).

(iv.) Anderson has not alleged the necessary specifics of the "conspiracy," such as when it formed, who were the participants, how it functioned and when it ended (Point II.D);

(v.) The allegations that Anderson and Source were the dominant wholesalers until they announced the exorbitant price increase in January, and the different responses by each defendant to the announcements, does not move the Complaint "over the line" of plausibility (Point II.D);

(vi.) Anderson's imposition of the surcharge and its decision not to accept magazines absent signed consent to the surcharge precludes an inference of conspiracy (Point II.E); and

(vii.) Anderson's common law causes of action fail to state claims (Point III).

FACTUAL ALLEGATIONS[5]

Defendants AMI, Bauer, Hachette, Rodale and Time are publishers of weekly and monthly single-issue magazines (Comp. ¶¶8-12). They ship magazines to wholesalers, which in turn sell them to newsstands, individual stores and chains like Wal-Mart and Kroger (*id.* ¶29). Publishers also employ the services of national distributors such as defendants Kable, Curtis, TWR and non-party Comag Marketing Group LLC ("CMG") "to broker and manage the publishers' relationships with their wholesalers, provide marketing and accounting services . . . and guarant[y] the wholesaler's payment obligation to the publisher" (*id.* ¶27).

As of January 2009, there were four national wholesalers distributing single-issue magazines: Hudson, TNG, Anderson and Source (*id.* ¶18). Source allegedly controlled about 31% of the wholesale business nationwide and Anderson had about a 27% share (*id.* ¶30).

In meetings with publishers and distributors on January 12 and 13, and publicly on January 14, 2009, Anderson announced it was: (i) imposing a mandatory $.07 surcharge for each

[5] For purposes of this motion, the defendants recite and do not negate the factual allegations of the Complaint, but do not waive any argument with respect to the veracity of any such allegation, or accept the conclusions in the Complaint.

copy of every magazine received from the defendant publishers, and that the surcharge would be effective as of February 1[6]; and (ii) passing on inventory costs for retailers that had adopted SBT (Comp. ¶39; Ex. B, pp. 2, 4, 9-10). While the Complaint claims that the surcharge was a temporary "stop gap measure" (Comp. ¶39), in his announcement, Charles Anderson claimed that his company was not making sufficient revenues and that the price increase was a necessary step to keep it in business (Ex. B, pp. 2-3). On January 19, Source followed Anderson in lockstep and demanded the same across-the-board $.07 per copy "fee" for all copies received after February 1 (Comp. ¶50). There is no allegation that Hudson or TNG raised their prices to publishers.

Significantly, Anderson has not made any specific factual allegations regarding Rodale, Hachette and DSI and the only allegations regarding Bauer, AMI and Time is that each had a separate cordial meeting with Anderson in mid-January at which Anderson announced the surcharge (*id.* ¶41), hardly indicative of concerted action. The Complaint glaringly ignores that at least one publisher continued to ship magazines to Anderson. In a Delaware Chancery Court proceeding filed against plaintiff Anderson News in February 2009, the Court found that publisher defendant AMI, having continued to ship magazines to Anderson in February 2009, after the alleged boycott, was entitled to a TRO directing Anderson to help it recover its magazines from Anderson's warehouses that Anderson declined to distribute. *See American Media, Inc. v. Anderson News, L.L.C.*, Index No.: 4369-VCL.[7]

The Complaint in fact confirms that defendants took different actions during the

[6] Because Anderson asserts that only 34%-35% of magazines it delivers are sold by retailers (Ex. B, p. 8), the surcharge was effectively a $0.21 per magazine surcharge.

[7] As discussed below (*infra*, Point I), the Court can take judicial notice of the Order in that case.

"conspiracy." According to Anderson, a week after its January 14 announcement, distributor Curtis, which had previously unilaterally attempted to stop shipping to Anderson in 2008 (Comp. ¶45), advised Anderson that it "would like to get this worked out," but that it was holding off on a decision until it saw what industry leader TWR did (*id*. ¶49). Rather than act in concert with TWR, Curtis was waiting to see, and possibly follow, what a competitor did -- conduct that, if true, is perfectly legitimate parallel behavior. Indeed, it is unsurprising that Curtis would wait to see how others in the industry would react, and be guided accordingly in its own reaction, given the allegations that Curtis was adversely affected by its prior efforts to seek alternatives to Anderson's services. Anderson also alleges that Curtis supported Anderson increasing its market share by taking business away from Source (*id*. ¶50), which is further inconsistent with a conspiracy to boycott Anderson.

Anderson alleges that, in the latter part of January and early February, other distributors reacted differently to the proposed surcharge: defendant Kable suggested that Anderson drop the surcharge and instead use exclusivity agreements to obtain profits it wanted (*id*. ¶50); nonparty CMG rejected the surcharge but appeared amenable to a "modified" agreement with Anderson to continue to provide wholesale services (*id*. ¶51); and defendant TWR agreed in late January to increase the discount it was giving Anderson for Time weeklies, but allegedly reneged on that agreement after it received payment of outstanding receivables from Anderson (*id*. ¶¶52-54).

To the extent that Anderson's allegations regarding Curtis's and other distributors' alleged agency relationship with the publishers (*id*. ¶¶49-50) are meant as an inference that the distributors somehow bound them to an alleged conspiracy, this is a conclusion, not a fact, that is entitled to no deference on this motion. It is also untrue. As discussed above, AMI clearly did not follow the alleged lead of its distributor Curtis.

The other alleged "proof" cited by Anderson amounts to nothing more than speculation and conclusions that are not entitled to any deference by the Court. According to Anderson:

> •TWR's CEO stated in response to a comment by a Source employee that TWR and unspecified "others" were eliminating "scan-based trading" and pushing costs down to the retailers: "Exactly – we now control this space" (Comp. ¶56). This is not an indicia of collusion, but merely suggests that a single distributor believed that publishers and distributors resisted SBT to avoid "shrinkage," the loss of legitimate sales and advertising revenues.
>
> •There were "numerous" meetings in "late January and early February" between unidentified defendants, including a "meeting" involving distributors Curtis and TWR and wholesalers TNG and Hudson about the wholesalers' providing services (*id.* ¶55). This vague, speculative allegation is not credited on a Rule 12(b)(6) motion; nor does it suggest collusion. At most, it suggests that certain distributors were arranging for alternative wholesalers to supply magazines to retailers in the event that their publisher clients did not accede to Anderson's exorbitant surcharge, *i.e.*, they were lawfully and responsibly doing their jobs as distributors by arranging distribution for their clients' products and protecting themselves from their guaranty of wholesalers' payment obligations to publishers.
>
> •Non-party TNG allegedly "poached" employees from Anderson (*id.* ¶57). This does not suggest collusion and, even if true, only shows that TNG was trying to take advantage of a disastrous business decision by Anderson to raise prices to publishers.

Not only does the Complaint lack necessary specifics about the purported conspiracy, but the Complaint contains allegations that illustrate why it would have been in each alleged co-conspirator's independent self-interest to react as it did to events in the marketplace. Anderson describes its efforts in January 2009 to impose a price increase to take effect on February 1 that was soon matched by Source. This was aggressive behavior by the two largest wholesalers with 58% share of the alleged market and would have significantly raised publishers' costs. Charles Anderson publicly claimed that the surcharge was non-negotiable and that publishers could not ship their February magazines to Anderson unless they first consented to the surcharge in writing. He was well aware that the publishers were already suffering from depressed sales and

advertising revenues (Ex. B, pp. 6-7). It was, therefore, entirely rational for each publisher individually not to accede to the February 1 price increase and to explore alternative distribution arrangements with the other wholesalers, Hudson and TNG, which had not imposed a surcharge. The publishers were not obligated to accept an exorbitant price increase and each was individually incentivized to avoid paying millions more to wholesalers. The suggestion that such reasonable economic behavior was "the pretext for effecting a massive conspiracy to destroy Anderson" (Comp. ¶46) defies logic and is neither plausible nor entitled to any deference.

As the alleged motive of the conspiracy, Anderson points to its advocacy of SBT, but the Complaint articulates clear reasons why it was in each publisher's and distributor's individual self-interest to resist SBT. First, SBT incentivizes publishers to keep the volume of magazines they print to a minimum, whether or not this will depress sales, because publishers would be surcharged for excess, unsold magazines (*id*. ¶40; Ex. B, p. 4). Second, Anderson concedes that SBT would cause publishers not to be paid or receive credit for legitimate magazine sales because of machine error, *i.e.*, "shrinkage," estimated to be approximately 5% of all sales (Comp. ¶34). Because the rates which publishers can charge advertisers are based on magazine circulation, if SBT were adopted, publishers would suffer decreased advertising revenue in addition to sales revenue. Third, Anderson contends that if SBT is not implemented, wholesalers "would force reduced margins down to the retailers rather than to the publishers" (*id.* ¶56), which would save money for each publisher. Thus, even if resistance to SBT motivated a defendant's action, that does not in any way suggest a conspiracy.

Finally, the Complaint describes the financial challenges Anderson confronted (*id*. ¶38). Indeed, Charles Anderson publicly acknowledged his company's precarious financial condition. Because of Anderson's admitted financial difficulties and Charles Anderson's statements about

his company's lack of commitment to remaining in the market, publishers and distributors had reason to be wary of continuing to supply Anderson with magazines. This was of particular concern to distributors that had "guarantee[d] the wholesaler's payment obligation to the publisher" (Comp. ¶27). No decision as to whether to continue to do business with Anderson was ever necessary because, once publishers or distributors separately decided not to accede to Anderson's surcharge demand, Anderson promptly ceased operations as it had predicted.

LEGAL ARGUMENT

I. THE GENERAL PLEADING STANDARD

In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the U.S. Supreme Court recently mandated a two-pronged test for District Courts to evaluate a pleading: (1) identify those pleadings that are mere conclusions, because those are not entitled to an assumption of truth; and (2) determine whether the well-pleaded factual allegations plausibly give rise to an entitlement of relief. *Iqbal* made clear that the Supreme Court's "heightened" pleading standard espoused in *Twombly* was not of limited application or significance.

Thus, to survive dismissal, a plaintiff: (1) may not rely on "bald contentions, unsupported characterizations, and legal conclusions," *Garber v. Legg Mason, Inc.*, 537 F. Supp.2d 597, 610 (S.D.N.Y. 2008), *aff'd*, 2009 U.S. App. LEXIS 21404 (2d Cir. 2009), and (2) must provide the grounds upon which its claim rests through factual allegations sufficient "to raise a right to relief above the speculative level," *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *i.e.*, if the plaintiff "ha[s] not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed," *Twombly*, 550 U.S. at 570.[8]

[8] The dramatic impact of *Twombly* and *Iqbal* has already been empirically shown. A recent study found that courts in the Second Circuit granted 52% of Rule 12(b)(6) motions in their entirety in the period preceding *Twombly*, 63% of such motions after *Twombly*, and 66% of such motions after *Iqbal*. The study also reviewed motion to dismiss decisions addressing antitrust claims in all federal circuits between 2005 and 2009 and found that 50% were granted in their entirety, 43% received a partial dismissal of claims, and only 7% percent were denied in their entirety. *See*

In deciding a motion to dismiss, a court may consider the pleadings, documents incorporated into the complaint by reference and matters subject to judicial notice, *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide*, 369 F.3d 212, 217 (2d Cir. 2004), which includes other court proceedings and the pleadings, motion papers and orders filed therein, and published materials, *Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (judicial notice is appropriate "of the fact that press coverage, prior lawsuits, or regulatory filings contained certain information, without regard to the truth of their contents"); *Foster v. Phillips*, 03-CV-3629, 2005 U.S. Dist. LEXIS 26823, at *10 (S.D.N.Y. Nov. 3, 2005) ("a court may take judicial notice of documents filed in other courts without converting a motion to dismiss into one for summary judgment under Rule 56").

II. THE COMPLAINT DOES NOT MEET THE PLAUSIBILITY STANDARD OF *TWOMBLY* AND *IQBAL*

A. *Twombly*'s "Heightened" Pleading Standard For A Section 1 Claim Requires A Plaintiff To Negate Independent Action And Non-Conspiratorial Explanations Before A Conspiracy Can Be Inferred

A plaintiff seeking to state a claim for a violation of Section 1 of the Sherman Act must plead facts that would do more than merely support an inference that the defendants entered an agreement to restrain trade; facts showing nothing more than parallel conduct are insufficient. *Twombly*, 550 U.S. at 554. The plaintiff must allege facts that tend to exclude the possibility of independent action. The *Twombly* facts and analysis are instructive here.

The *Twombly* complaint asserted that: (1) four regional telephone companies had conspired to prevent competitive entry into their respective local markets to inflate local telephone and internet charges; (2) defendants had engaged in parallel conduct designed to

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Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, American University Law Review forthcoming, accessed at http://ssrn.com/abstract=1487764.

sabotage competing phone companies; (3) this parallel conduct had a "compelling common motivation," *i.e.*, the elimination of competition in local telephone markets in order to prop up prices; and (4) defendants' agreement not to compete could be inferred from their failure to pursue "attractive business opportunities" in contiguous markets, notwithstanding an acknowledgement from one of the defendant's CEO's that such competition "might be a good way to turn a quick dollar." *Twombly*, 550 U.S. at 551.

The Supreme Court held that the complaint failed to state a valid Section 1 claim and that "when allegations of parallel conduct are set out in order to make a §1 claim, they 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 action." *Id.* at 557. The Court found that while allegations of conscious parallelism -- the "common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions" -- may be "consistent with conspiracy," they are insufficient because they are "just as much in line with a wide swath of rational and competitive strategy unilaterally prompted by common perceptions of the market." *Id.* at 553-554.[9]

Twombly implemented at the pleading stage the Supreme Court's mandate in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), that the "range of permissible inference from ambiguous evidence" is limited. Specifically, a plaintiff, like Anderson, attempting to infer a conspiracy under Section 1, must allege facts that tend to exclude the possibility that the alleged conspirators acted independently. In *Twombly*, the plaintiff did not allege a "plausible"

[9] In *Twombly*, the Supreme Court "retired" the oft-cited language in its fifty year-old decision, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

conspiracy because it failed to address independent reasons for the alleged concerted action: (1) the regional telephone companies' resistance could have been a "natural, unilateral reaction of each [regional company] intent on keeping its regional dominance" without the need for an agreement to exclude; and (2) the regional telephone companies' failure to enter one another's traditional region could have been nothing more than the continuing of a tradition by "former Government-sanctioned monopolists" to sit tight, "expecting their neighbors to do the same thing." 550 U.S. at 548, 566. In *Interborough News Co. v. Curtis Publishing Co.*, 225 F.2d 289 (2d Cir. 1955), the Second Circuit affirmed dismissal of a Sherman Act claim. The trial court had found no conspiracy among nine publishers and distributors to boycott a wholesaler and transfer business to new wholesalers established by one of the defendants. That defendant "had a legal right to break away from a wholesaler whose service it considered unsatisfactory and to set up and encourage by subsidy new competing wholesalers" and the other defendants transferred business to such new wholesalers "due to the inexorable forces of competition rather than as a result of any illegal conspiracy or concert of action." 225 F.2d at 293.

Twombly was motivated in part by the expense of antitrust discovery: "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery . . . ." *Twombly*, 550 U.S. at 559.

In *In re Elevator Antitrust Litig*, 502 F.3d 47 (2d Cir. 2007), the Second Circuit applied *Twombly* in affirming the dismissal of a complaint alleging that the defendant elevator companies conspired to fix prices in violation of Section 1 for the sale and maintenance of elevators. The Second Circuit held that the complaint failed because "conclusory allegations of

agreement at some unidentified point do not supply facts adequate to show illegality" and the "similarities" were "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 51.[10]

B. Anderson Has Not Pleaded Facts Tending To Exclude Independent Conduct

Anderson has not pled any facts tending to exclude the possibility of independent action or showing that there were no plausible independent reasons for the conduct from which it would infer conspiracy. Indeed, the face of the Complaint negates the proposed inference of a "preceding agreement" or "conspiracy." The Complaint confirms that Anderson disrupted the status quo by attempting to extract money from publishers, after which every publisher and distributor had independent business reasons for resisting the surcharge.

According to the Complaint, Anderson and Source, while ostensibly campaigning for SBT and holding 58% of the wholesale business, faced no threats of a boycott as of "late January" 2009 (Comp. ¶47). All of the alleged improper actions followed the nearly simultaneous announcements by Anderson and Source of substantial increases of the costs to publishers -- increases not proposed by their competitors, TNG and Hudson. Anderson also announced that its ability or willingness to continue in business was uncertain, a prophecy

[10] *See also Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 578 (S.D.N.Y. 2007) (dismissing a Section 1 counterclaim on the ground that there was no factual allegation plausibly establishing that the record companies' conduct was anything other than independent decision-making by each defendant not to deal with the counter-plaintiff's music downloading network); *Temple v. Circuit City Stores, Inc.*, 06-CV-5303, 2007 U.S. Dist. LEXIS 70747, at **23-25 (E.D.N.Y. Sept. 25, 2007) (holding that allegations that merchants who had settled an antitrust class action with Visa and MasterCard had conspired to "pass on" such credit card companies' interchange fees to customers to "protect [their] own profits" did not satisfy *Twombly*'s pleading requirements because "such passing-on could be due to an independent economic decision by the defendants"); *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 445 (S.D.N.Y. 2008) (dismissing Section 1 claim and holding that inference of concerted action by record companies to inflate prices of compact discs was implausible) *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 06-CV-3447, 2009 U.S. Dist. LEXIS 87932, at **50-51 (E.D.N.Y. Sept. 24, 2009) (dismissing Section 1 claim where the alleged concerted action "could just as well be the product of independent action"); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1022 (N.D. Cal. 2007) (dismissing a Section 1 claim and holding that the allegedly similar release dates and price points for graphic processing units set after trade shows attended by the alleged conspirators were equally consistent with rational competitive behavior as with conspiracy).

confirmed by its cessation of business operations in early February and its involuntary bankruptcy proceeding in March. As demonstrated below (*infra*, Point II.D), there are essentially no allegations regarding the publishers and the scant allegations regarding the distributors show that their reactions differed dramatically.

The fact that a publisher or distributor rejected a unilateral price increase imposed by a wholesaler in its vertical distribution network does not raise an antitrust issue because, as recently reconfirmed by the Supreme Court, "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109, 1118 (2009), citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). At most, it is precisely the type of parallel conduct, plausibly motivated by independent business interests (to avoid cost increases), that the Supreme Court found insufficient to state a claim in *Twombly*.

Moreover, having decided not to accept the price increase, it was clearly permissible for a publisher or distributor to take Anderson at its word and make alternative distribution arrangements to minimize disruption of the distribution of magazines to retailers. A conspiracy does not exist merely because multiple publishers and distributors switch wholesalers where it is "of the utmost consequence to each of the national distributors [and publishers] that its magazines . . . should reach the 'outlets' in timely fashion and that proper accounts and checkups be made and other miscellaneous services rendered." *Interbourgh*, 225 F.2d at 292. *Interbourgh* belies Anderson's conclusory assertion that the decision by any publisher not to accept the surcharge without an agreement by the other publishers to do the same would have been contrary to its economic self-interest (Comp. ¶60). Here, as in *Interborough*, an agreement cannot

plausibly be inferred from publishers' and distributors' allegedly parallel responses to Anderson's unilateral price increase.

Even Anderson's posited motive for conspiracy does not imply an agreement or tend to rule out independent conduct. It would have been in each publisher's individual self-interest to resist SBT because, if adopted, it is alleged that SBT would have caused publishers to: (1) face increased costs, (2) lose significant magazine sales revenues, and (3) lose advertising revenues. Efforts by publishers and distributors to resist additional costs or to pass along costs to others are perfectly consistent with independent, self-interested conduct. *See Temple v. Circuit City Stores, Inc*., 06-CV-5303, 2007 U.S. Dist. LEXIS 70747, at **23-25 (E.D.N.Y. Sept. 25, 2007) (holding that allegations that merchants had conspired to "pass on" fees to customers to "protect [their] own profits" did not satisfy *Twombly*'s pleading requirements because "such passing-on could be due to an independent economic decision by the defendants").

Anderson's declaration of the surcharge and acknowledgement of financial problems and its lack of commitment to stay in business called into question Anderson's creditworthiness and viability as a wholesaler. The distributors in particular had an additional compelling unilateral business reason to be wary of relying on Anderson because they are alleged to be responsible for "guaranteeing the wholesaler's payment obligation to the publisher" (Comp. ¶27).

Finally, as discussed below (*infra*, Point II.D), the reactions of the publishers and distributors to the surcharge announcement varied dramatically, which is inconsistent with parallel conduct (which is itself lawful), let alone with unlawful concerted action. *See RxUSA Wholesale*, 06-CV-3447, 2009 U.S. Dist. LEXIS 87932, at **49-51 (E.D.N.Y. Sept. 24, 2009) (rejecting effort to infer concerted action where the alleged conspirators' responses to plaintiff's solicitations were varied).

C. The Alleged Conspiracy Is Economically Implausible

An agreement cannot be inferred from the allegations that each publisher and distributor had a common economic incentive to stop doing business with Anderson because the economic theory advanced by Anderson to support its conspiracy allegations makes no sense. *See In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 445 (S.D.N.Y. 2008) (in dismissing Section 1 claim that lacked economic coherence, the Court held that the "Plaintiff's conclusion that the imposition of price and use restrictions was against Defendants' economic self-interest is implausible and, likewise, cannot support an inference of agreement").

Anderson alleges that, as a result of the alleged boycott, "News Group and Hudson stand to acquire monopolistic market power" (Comp. ¶76), and concedes that the distributors and publishers could only have replaced Anderson or Source with TNG and Hudson because of "high barriers to entry" for the alleged magazine wholesale distribution market (*id.* ¶71). Such a "conspiracy" simply does not make sense. Why would publishers and distributors conspire to eliminate two of the four resources for wholesale distribution services, thereby increasing the power of the remaining two wholesalers to demand substantial concessions from the publishers and distributors?

Likewise, it is economically implausible, as Anderson contends, that suppliers, who profit from the sales of magazines, would conspire with each other to deny retailers access to the suppliers' products and thereby diminish the suppliers' sales.[11] Publishers and distributors have

[11] *See* Comp. ¶72 (alleging that defendants alleged conduct will "directly and substantially reduc[e] the output of magazines and directly and substantially reduc[e] the ability of retailers to obtain those magazines") and ¶73 (alleging that because Anderson and Source "distributed over 50 percent of all U.S. single copy magazines, and in many instances were or are the only wholesale distributors operating in numerous geographic regions" there are now areas where "wholesale distributors are unavailable to serve retailers in those areas – and those retailers have been denied access to defendants' magazines . . .").

no incentive to decrease sales of magazines. To the contrary, single-copy sales increases add to sales revenues and permit advertising rate increases because rates are based on circulation size.

Further, a conspiracy to drive Anderson out of business does not make sense because, in or about late January 2009, the defendants collectively had approximately $120 million in receivables due and owing from Anderson.[12] Anderson's cessation of operations decreased the likelihood that the defendants would be able to collect these receivables.

D. Anderson Has Failed To Allege Essential Elements Of The Conspiracy And The Factual Allegations Are Inconsistent With Concerted Action

Twombly not only requires that the pleading have sufficient factual allegations to move the claim "across the line" into plausibility, but also obligates plaintiffs to advise each defendant of when it allegedly joined the conspiracy and what it purportedly did. A Section 1 pleading that generally states that the defendants were party to a conspiracy but that fails to identify "any activities by [the] particular defendant[s]" amounts to "nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatever." *In re Elevator Antitrust Litig*, 502 F.3d at 50-51.[13]

The Complaint falls abysmally short of that mandate. It is devoid of any allegations as to when and how each defendant joined the conspiracy to be inferred. It is unclear as to when a

[12] In the bankruptcy proceeding, Anderson has filed schedules setting forth its debts at the time of the bankruptcy filing on March 2, 2009. Those schedules reveal that it owed approximately $120 million to defendant publishers and distributors on that date.

[13] *See also In re Air Cargo Shipping Services Antitrust Litig.*, 06-MD-1775, 2008 U.S. Dist. LEXIS 107882, at **83-84 (E.D.N.Y. Sept. 26, 2008) (in dismissing an antitrust complaint, the Court articulated the requirement that each defendant's entry into the conspiracy must be specified); *Hinds County, Miss. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499 (S.D.N.Y. 2009) (dismissing Section 1 claims against defendants where there were no specific factual allegations as to their participation in the alleged conspiracy); *In re California Title Ins. Antitrust Litig.*, C 08-01341, 2009 U.S. Dist. LEXIS 43323, at **19-20 (N.D. Cal. May 21, 2009) (dismissing complaint where plaintiffs generally alleged that the defendants met to discuss fixing title insurance prices but failed to aver facts "about where or when those meetings took place, or whether the [d]efendants communicated with one another in advance of or after the meetings").

"conspiracy" began or ended; *i.e.*, if the conspiracy formed in late January and Anderson decided to leave the business in early February, how long did it last for? It is clear that not all defendants stopped doing business with Anderson. There are no factual allegations supporting a conclusion that the distributors were authorized to enter into a conspiracy on behalf of the publishers. The few facts alleged are inconsistent with the formation of a conspiracy; the allegations show diverse actions by defendants.

Anderson conjectures that at some point in "late January" 2009, "national distributor defendants Curtis, Kable and TWR, and publisher defendants AMI, Bauer, Hachette, Rodale and Time – acting in concert – cut off Anderson from its supply of magazines . . ." and conspired to drive it out of business (Comp. ¶47). Anderson's description of its interactions with defendants in January and early February 2009 reveals that each defendant acted separately and differently during the brief period that this ostensible conspiracy was formed and existed. These differences undermine Anderson's claim of concerted action and further highlight defendants' lack of economic motivation to reduce their choice of wholesalers.

•**Bauer and Time** – Anderson alleges that on January 12 and/or 13, 2009, Charles Anderson met separately with Hubert Boehle, President and CEO of publisher Bauer, and Anne Moore, CEO of publisher Time, to inform each "of Anderson's decision to impose the $.07 per copy surcharge," that the meetings were "cordial" and that each publisher "appeared -- at least on the surface -- to respond amicably" (*id*. ¶ 41). There are no factual allegations about Bauer's or Time's alleged participation in a preexisting conspiracy or when each supposedly terminated Anderson, but Anderson posits that at some unspecified time each followed the lead of their distributors.

•**AMI** - Anderson alleges that on January 12 or 13, 2009, Charles Anderson met with David Pecker, President of publisher AMI, to inform him "of Anderson's decision to impose the $.07

per copy surcharge," that the meeting was "cordial" and that AMI "appeared -- at least on the surface -- to respond amicably" (Comp. ¶41). Anderson conclusorily alleges that AMI followed the lead of its distributor, Curtis (*id.* ¶49), and "boycotted" Anderson (*id.* ¶47).

But, as discussed above, it is not subject to dispute that judicial proceedings establish that AMI continued to ship magazines to Anderson in February 2009 -- after the alleged "boycott" had commenced. The wholly conclusory allegations that it followed the lead of Curtis, "boycotted" Anderson and was party to a conspiracy are not only implausible; they are demonstrably false.

•**Hachette** - As set forth in detail in its separate Memorandum of Law, there are no specific allegations regarding publisher Hachette, but it is conclusorily alleged that it followed the lead of its distributor, Curtis (Comp. ¶49).

•**Rodale –** There are no specific allegations regarding publisher Rodale, but it is conclusorily alleged (Comp. ¶49) that it followed the lead of its distributor, Curtis.

•**DSI** – As set forth in greater detail in its separate Memorandum of Law, there are no specific allegations regarding media and marketing services company DSI.

•**Hudson** – As set forth in greater detail in its separate Memorandum of Law, the Complaint does not contain a single allegation that could give rise to an inference that Hudson entered an agreement to "purge" Anderson from the magazine industry (Comp. ¶2). Anderson alleges only that Hudson: (1) attended one meeting with another wholesaler and two national distributors (*id.* ¶55), (2) hired Anderson's former employees (*id.* ¶57) and (3) began to supply magazines to Anderson's former customers at reduced discount rates (*id.* ¶72). These allegations fall far short of stating a claim against Hudson that is plausible on its face as required by *Twombly*.

•**Curtis –** In 2008, Curtis, "the nation's largest magazine distributor by volume," allegedly "unilaterally attempted to cut off Anderson's supply of magazines" by telling Wal-Mart that Curtis would no longer supply magazines to Anderson (Comp. ¶45). That effort was allegedly ineffective and not supported by Wal-Mart (*id*. ¶45). It is further alleged that on January 21, 2009, Anderson met with the President and CEO of Curtis to discuss the recently announced surcharge and was advised by Curtis that it "would like to get this worked out," but that Curtis was holding off on a decision until it saw what industry leader TWR did (*id*. ¶49). Anderson also alleges that in "late January" 2009, Curtis advised Anderson that Anderson could achieve its profit goals by waiting for Source to go out of business and charging retailers more (*id*. ¶50).

These allegations are inconsistent with those concerning other alleged conspirators and even in isolation do not support an inference of concerted action. Waiting to see what a competitor does is perfectly legitimate behavior, especially considering the substantial credit risk that Curtis would face if TWR terminated its relationship with the already financially-shaky Anderson. Even if Curtis copied TWR, this allegation negates an inference of conspiracy. Similarly, the allegation that Curtis supported Anderson increasing its market share by taking business away from a competitor (Source) is inconsistent with a conspiracy to boycott Anderson.

•**Kable –** Anderson claims that the president of Kable called the president of Anderson on an unidentified date and "discussed the idea of offering Anderson exclusivity in certain territories in exchange for Anderson dropping the surcharge," that Anderson rejected such a proposal and that Kable refused to accede to the surcharge (Comp. ¶50). Even if such a proposal constituted an "unlawful market allocation" -- a baseless assertion -- the allegations amount to a unilateral effort by Kable to resolve the surcharge issue and continue to use Anderson. The allegation that Kable offered an exclusive distribution arrangement so that Anderson could obtain the profits it

desired renders implausible the conclusory assertion that Kable participated in a conspiracy to destroy Anderson's business.

•**CMG** – Anderson claims that nonparty CMG refused to accept the surcharge but that it worked with Anderson on a "mutually acceptable resolution of the issue" (Comp. ¶ 51).

•**TWR** – Anderson alleges that it met with TWR at least once prior to January 21 to discuss the surcharge (Comp. ¶ 49); at the behest of retailer Wal-Mart, it met again with TWR on January 31 at which time it thought it "had an agreement for an increase in the discount to Anderson" for certain Time magazines (*id*. ¶¶ 52-53); on February 2, after it thought it had an agreement, Anderson paid TWR $13 million in outstanding receivables (*id*. ¶ 53); and later that day, TWR allegedly reneged on the purported January 31 agreement and advised Anderson that it would no longer supply it with Time magazines (*id*. ¶ 54). At most, these allegations suggest that TWR was concerned about its Anderson receivables and changed its position once TWR received payment of an outstanding receivable.

In sum: (i) the largest distributor (Curtis), having been unsuccessful in a past effort to obtain alternative distribution, waited to see how TWR reacted to the surcharge; (ii) another distributor (Kable) allegedly tried to reach an accommodation with Anderson in which it would eschew the surcharge; (iii) another (CMG) allegedly came close to an agreement on a modification of the surcharge; (iv) a fourth (TWR) allegedly induced Anderson to believe there was an agreement on a modified surcharge so that it could be paid for outstanding receivables; and (v) a publisher (AMI) continued to ship magazines to Anderson after the alleged "boycott." Taken together, Anderson's allegations do not establish that the publishers and distributors were acting in unison or pursuant to a common plan or scheme.

Further, the alleged comment by a TWR representative that it now "controls this space" (Comp. ¶56) does not support an inference of conspiracy. A terse statement by a distributor that alleged efforts to resist SBT had succeeded does not suggest collusion.

Finally, Anderson's effort to assign collective guilt to the defendant publishers and distributors based on their alleged involvement in unidentified "meetings" and "discussions" to boycott Anderson are mere conclusions that are not entitled to any deference on a Rule 12(b)(6) motion. As Judge Wexler recently held in dismissing a Section 1 claim, allegations of conspiracy that are general in nature and allude to nothing more than participation by "defendants" in "meetings, conversations and communications" are subject to dismissal. *All Star Carts & Vehicles, Inc. v. BFI Can. Income Fund*, 596 F. Supp. 2d 630, 641 (E.D.N.Y. 2009).

E. Anderson's Own Conduct Precludes An Inference Of Conspiracy

Anderson asserts that in order to "increase the overall efficiency of the magazine distribution industry" (Comp. ¶40), it announced a non-negotiable surcharge as of February 1. Not surprisingly, publishers, potential victims of the surcharge, have a different view of the motivation and effect of this significant price increase. There is no allegation that any publisher or distributor was contractually or otherwise required to accept this unilaterally-imposed price increase. Nor is there an allegation that each terminated Anderson. All that is alleged is that certain distributors either refused the surcharge or attempted to reach other accommodations with Anderson before it announced that it was ceasing operations in early February. The different reaction by each defendant is more plausibly, and at least equally plausibly, the result of its individual hostility to the demanded increase, rather than the result of a conspiracy.

Thus, while Anderson conclusorily claims that it was the victim of a "group boycott" and was "cut off" from defendants' magazines, it has not alleged any facts supporting such a contention. Charles Anderson announced in mid-January that because his company was

struggling financially and he did not like the economic forecast for the magazine distribution business, he planned to exit the industry unless publishers and distributors agreed to his imposed price increase. When Anderson, not surprisingly, was met with resistance from some already stretched publishers and distributors that did not want to pay Anderson millions of additional dollars for services, Anderson made good on his promise and ceased operations. It was Anderson's decision to draw a line in the sand and to refuse to accept magazine shipments absent consent from the publisher to the surcharge. Anderson's decision to exit the business and sell its assets was a direct result of its self-described poor financial condition and its view of the marketplace and its revenues. This precludes an inference of a plausible conspiracy to boycott Anderson. *See Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1495 (8th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993) (holding that there can be no antitrust claim where a company's decline was caused by many factors that preceded the alleged anticompetitive conduct).[14]

III. ANDERSON'S DEFAMATION, CIVIL CONSPIRACY AND TORTIOUS INTERFERENCE COUNTS FAIL TO STATE CLAIMS[15]

Anderson's common law conspiracy claim (Count IV) fails to state a claim because, under New York law, "[a] mere conspiracy to commit a [tort] is never of itself a cause of action." *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). Anderson's tortious interference (Count II) and civil conspiracy claims fail because they are predicated upon the same alleged flawed boycott allegations that underlies Anderson's antitrust claim. *See In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d at 447-52 (dismissing state law claims premised

[14] Because of the strength and clarity of the legal authorities addressing the implausibility of the conspiracy alleged, we have not addressed other possible grounds for dismissing the Section 1 claim including the failure to allege antitrust injury, lack of standing, and the failure to plead a relevant geographic market (Anderson treats the relevant market as both national and local in nature) (*See* Comp. ¶¶60, 69, 73). Objections to the claim on all such grounds and others are reserved.

[15] The basis for dismissal of these claims is discussed in greater length in the separate submission by DSI.

upon an alleged conspiracy where such allegations were insufficient to state a Sherman Act claim under *Twombly*).

The defamation claim (Count III) must be dismissed because of the failure to specify the defamatory remarks, the maker of such remarks, and to whom they were made. *See Ello v. Singh*, 531 F. Supp.2d 552, 575 (S.D.N.Y. 2007) (a defamation "pleading is only sufficient if it adequately identifies the purported communication, and an indication of who made the statement, when it was made, and to whom it was communicated"). The claim also fails because even had a defendant stated that Anderson was in financial trouble or might not continue to exist as a magazine wholesaler, such statements were true and therefore could not be defamatory. *See Jenkins v. Powell Savory Corp.*, 13 A.D.2d 739 (1st Dep't 1961). Charles Anderson publicly made these admissions in January and the Chapter 7 proceeding was filed in March.

CONCLUSION

For each of the foregoing reasons, we respectfully request that this Court enter an Order dismissing the Complaint with prejudice.

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