Marc E. Kasowitz (mkasowitz@kasowitz.com)
Daniel R. Benson (dbenson@kasowitz.com)
Hector Torres (htorres@kasowitz.com)
Maria Gorecki (mgorecki@kasowitz.com)

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Tel.: (212) 506-1700
Fax: (212) 506-1800

Attorneys for Plaintiffs Anderson News, L.L.C.
and Anderson Services, L.L.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiffs Anderson News, L.L.C. and Anderson Services, L.L.C. (together, "Anderson") submit this memorandum of law in opposition to the defendants' motions, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint.[1]

PRELIMINARY STATEMENT

In this antitrust action, magazine wholesaler Anderson asserts Sherman Act Section 1 and common law claims against defendants -- five magazine publishers and three magazine distributors, which collectively control the sale of approximately 80% of magazines sold in the United States, as well as two magazine wholesalers and a magazine marketer -- arising from their collusive anti-competitive scheme to jointly agree to refuse to pay a surcharge proposed by Anderson and cut off Anderson's supply of magazines.[2] As alleged in the complaint, defendants targeted Anderson and another magazine wholesaler because they sought to reduce gross inefficiencies in magazine distribution methods and to shift more of the increasing costs of distribution from wholesalers, retailers and retail customers to the publishers. Defendants' scheme succeeded in their goal of driving Anderson out of business and reallocating Anderson's business to compliant (and co-conspiring) wholesalers.

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[1] Submitted herewith in opposition to the motions is the declaration of Maria Gorecki, dated January 19, 2009 ("Gorecki Decl."). A copy of the complaint ("Compl.") is annexed as Exhibit A to the Gorecki Decl.

[2] The defendant publishers are American Media, Inc. ("AMI"), Bauer Publishing Co., L.P. ("Bauer"), Hachette Filipacchi Media, U.S. ("Hachette"), Rodale, Inc. ("Rodale") and Time Inc. ("Time"). The defendant distributors are Curtis Circulation Company ("Curtis"), Kable Distribution Services, Inc. ("Kable") and Time Warner Retail Sales & Marketing, Inc. ("TWR"). The defendant wholesaler is Hudson News Distributors, L.L.C. ("Hudson"). Another wholesaler, The News Group, L.P. ("News Group"), originally was named as a defendant, but the claims against it were dismissed pursuant to an agreement with Anderson. The defendant marketer is Distribution Services, Inc. ("DSI"), an affiliate of AMI.

Defendants AMI, Bauer, Curtis, DSI, Hachette, Hudson, Kable and Rodale filed a joint memorandum of law ("Joint Mem.") in support of their motions. Defendants DSI, Hachette and Hudson each also filed a separate memorandum (respectively, "DSI Mem.," "Hachette Mem." and "Hudson Mem."). Defendants TWR and Time filed a separate memorandum ("Time Mem."), although they "rely on the arguments raised by the other defendants concerning Anderson's state law claims." (Time Mem. at 2 n.1.)

Defendants' motions to dismiss the Sherman Act claim are premised upon a mischaracterization of the allegations in the complaint, application of an erroneous legal standard, impermissible reliance on purported evidence outside the complaint and the demonstrably erroneous contention that the alleged collusive conduct was not "economically plausible." Indeed, that defendants' arguments entirely miss the mark entirely is only confirmed by the Second Circuit's decision last week in *Starr v. Sony BMG Music Entertainment*, No. 08-cv-5637, 2010 U.S. App. LEXIS 768 (2d Cir. Jan. 13, 2010).

Anderson plainly has stated a Section 1 claim here. It has alleged that defendants conspired to boycott Anderson in restraint of trade, and that, as a result, Anderson's business was destroyed. Anderson's factual allegations are more than sufficient "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("*Twombly*"). Contrary to defendants, there can be no question that the factual allegations in the complaint "'raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Starr*, 2010 U.S. App. LEXIS 768, at *12-13 (citation omitted). Those allegations -- which concern defendants' parallel conduct, inter-firm communications immediately preceding that conduct, conduct that would be contrary to defendants' economic self-interest absent collusion, motive, opportunity and the structure of the industry -- unquestionably cross the "line between possibility and plausibility of 'entitle[ment] to relief.'" *Twombly*, 550 U.S. at 557 (citation omitted).

First, defendants' contention that the complaint does not allege parallel conduct is meritless. Anderson, which had been in the magazine wholesaler business since 1917, clearly has alleged that, after Anderson proposed a surcharge to meet the increasing costs of magazine

distribution, defendants: communicated with one another in formulating an unprecedented coordinated response to Anderson's proposed surcharge; acted uniformly and consistently in carrying out that common response; entered into an agreement to cut off approximately 80% of Anderson's supply; and acted pursuant to that agreement and thereby destroyed Anderson's business. (Compl. ¶¶ 46-47, 58, 62-64.)

Defendants cannot escape from the complaint's specific allegations concerning, among other things: their unnatural parallel conduct and inter-competitor meetings and communications immediately preceding their implementation of their scheme (Compl. ¶¶ 55); their agreement to act in concert during the precise time that defendant-competitors ostensibly were acting independently (*id.* at ¶¶ 46-47, 58, 62); and inculpatory admissions by high-ranking executives of certain of the defendants (*id.* at ¶¶ 49-50, 52). As to the latter, the complaint alleges, among other things, that: (a) the president of Curtis, Robert Castardi ("Castardi"), expressly stated that he would "have to go with whatever Rich [Jacobsen, CEO of TWR] does" (*id.* at ¶ 49); (b) in a meeting with Charles Anderson, the CEO of Anderson, Jacobsen indicated that he realized that Mr. Anderson knew there had been collusion (*id.* at ¶ 52); and (c) Castardi and the president of Kable initially solicited Anderson itself to join defendants' conspiracy to force another wholesaler, Source Interlink Distribution, L.L.C. ("Source"), out of business (*id.* at ¶ 50).

Second, there is no merit to defendants' contention that the complaint "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." (Joint Mem. at 2.) Even assuming *arguendo* that such facts were essential to asserting a Section 1 claim -- and they are not -- the complaint specifically and in detail alleges that: the conspiracy commenced in January 2009 (Compl. ¶ 47); the conspirators were defendants AMI, Bauer, Curtis, DSI, Hachette, Hudson,

Kable, Rodale, Time, TWR and News Group (*id.* at ¶¶ 47, 55, 60); defendants carried out the conspiracy through meetings and communications, including a critical late-January 2009 meeting at Hudson's headquarters involving competitors TWR, Curtis, Hudson and News Group (*id.* at ¶ 55); the purpose of the conspiracy was to develop a common response to Anderson's proposed surcharge that would eliminate Anderson as a wholesaler and allocate all of Anderson's business to the two remaining wholesalers over whom the publishers would be able to exercise substantial influence (*id.* at ¶ 58); and the conspiracy ended once defendants accomplished their objective -- eliminating Anderson and enabling Hudson and News Group to acquire the Anderson assets and infrastructure (*id.* at ¶¶ 66-68).

Third, defendants, mischaracterizing the factual allegations of the complaint, mistakenly contend that Anderson has not alleged an economically plausible conspiracy. The complaint alleges a conspiracy that is not only economically plausible, but indeed, highly compelling: the objective of the collusion was to eliminate the only two wholesalers -- Anderson and its competitor, Source -- that had advocated electronic tracking of magazines (*i.e.*, scan-based trading ("SBT")) to reduce the tremendous cost of magazine distribution inefficiencies borne by the wholesalers, and sought to transfer all or part of the increasing costs of magazine distribution to the publishers -- in the form of a per-copy $.07 surcharge -- rather than to the retailers and their customers, the consumers. Moreover, unless all or virtually all of the publishers and distributors had agreed in advance to cut off Anderson, it would have been contrary to any single publisher's economic self-interest to do so, because Anderson was the principal magazine wholesaler in a number of important markets. Thus, if an isolated publisher or distributor independently refused to do business with Anderson, that publisher or distributor likely would not be able to find a replacement in those key markets, because other wholesalers would have

had no economic incentive to distribute in those markets the magazines of only a single publisher.

Not only was the conspiracy economically plausible, it was economically effective. As alleged in the complaint, defendants Hudson and News Group -- the two wholesalers that did not support SBT and similar measures -- immediately upon taking over Anderson's retail customers, began increasing the prices to those retailers of magazines they sold.

Fourth, the complaint also clearly states common law claims. Anderson alleges that the defendants joined and participated in a civil conspiracy and engaged in unlawful conduct in furtherance of that conspiracy, including a group boycott of Anderson, and that defendants' wrongful conduct interfered with or resulted in the termination of Anderson's relationships and contracts with its retail customers. Those allegations are more than sufficient to state common law claims under applicable state law.

In short, contrary to defendants' contention, the factual allegations in the complaint are not even remotely similar to those in the complaint dismissed in *Twombly*. There, the Supreme Court underscored that, unlike here, the complaint, which alleged "unspecified violations" by "unspecified persons" spanning a 7-year period, did not "set forth a single fact in a context that suggests an agreement" to collude. 550 U.S. at 560. The specific factual allegations in the complaint here surpass by far the *Twombly* requirement that Anderson plead a "plausible antitrust conspiracy," and it is beyond any reasonable dispute that Anderson has provided defendants more than adequate notice of its claims against them. As in *Starr*, *supra*, all of the motions to dismiss should be denied.

STATEMENT OF FACTS[3]

A. Anderson and the Single-Copy Magazine Distribution Market

Anderson was a wholesaler of magazines to leading mass-merchandise retailers, bookstore chains, grocery stores and other retail outlets throughout the United States (with the exception of certain areas in the Mid Atlantic, New England, Southern California, Alaska, Michigan and North Dakota). (Compl. ¶¶ 19-20, 37.) In many of these key geographic markets, Anderson and its competitor, Source Interlink Distribution, L.L.C. ("Source"), were the principal wholesalers distributing magazines to retailers. (*Id.* at ¶ 73.)

Like the other wholesalers in the "single-copy" magazine market, before January 2009 Anderson purchased magazines from defendant publishers and distributed them to retailers throughout the geographic regions in which Anderson operated. (Compl. ¶ 29.) The publishers are represented by national distributors, who provide marketing and accounting services and guarantee the wholesaler's payment obligations to the publisher. (*Id.* at ¶ 27.) The defendant publishers and distributors control approximately 80% of the nation's magazine titles. (*Id.* at ¶¶ 58, 64-65.) Anderson and its predecessors have done business with the defendant national distributors since their formation. (*Id.* at ¶ 37.)

The single-copy magazine distribution system is grossly inefficient as a result of practices imposed by the publishers. (Compl. ¶¶ 31-32.) The publishers and national distributors, among other things, ship excessive copies of magazines and large numbers of unprofitable magazine titles, forcing wholesalers, such as Anderson and Source, to absorb the costs of collecting, tabulating and destroying unsold copies. (*Id.*)

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[3] The facts are based on the allegations set forth in Anderson's complaint. As is well-settled, on a motion to dismiss under Rule 12(b)(6), the Court "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Lafaro v. N.Y. Cardiothoracic Group, PLLC*, 570 F.3d 471, 475 (2d Cir. 2009) (citations and internal quotations omitted) (reversing dismissal of Section 1 claim).

Anderson and its competitor, Source, supported measures proposed by retailers to reduce costs and address the inefficiencies in the system, including SBT. (Compl. ¶ 33-35.) Publishers and their national distributors opposed those measures. (*Id.*) Anderson's support of those measures had led to at least one prior, albeit unsuccessful, attempt by Curtis to cut off Anderson's magazine supply in 2008, when Curtis informed Wal-Mart, Anderson's largest customer, that Curtis would no longer supply magazines to Anderson. (*Id.* at ¶ 45.) Wal-Mart, however, continued to support Anderson as its wholesaler. As a result, Curtis, which at that time had acted unilaterally, and faced the unacceptable risk that its magazines would no longer be carried by Wal-Mart in the regions serviced by Anderson, was forced to reverse course and resumed supplying magazines to Anderson. (*Id.*)

In the face of the refusal by the publishers and distributors to modify their continuing practice of forcing excessive copies of their magazines into the distribution chain -- a practice that was enormously inefficient and led to skyrocketing costs for Anderson (Compl. ¶¶ 31-32) -- Anderson proposed a $.07 per-copy surcharge (*id.* at ¶¶ 31-34, 40), and indicated a willingness to work with publishers and distributors in modifying the surcharge (*id.* at ¶¶ 43, 51-53). While the surcharge was a response to costs created by the defendants (*id.* at ¶¶ 39-40), the defendants -- acting in concert and at the same time -- decided to use the proposed surcharge as a purported justification to cut off supply of magazines to Anderson and force it out of business. (*Id.* at ¶¶ 39-44, 46.)

B. <u>The Conspiracy to Force Anderson out of Business</u>

In late January 2009, major publisher defendants -- AMI, Bauer, Hachette, Rodale and Time -- entered into a conspiracy together with their national distributors -- Curtis, Kable and TWR -- and agreed to cut off Anderson and Source from the life blood of their business -- the

supply of the nation's most popular magazines. In support of the conspiracy, the defendants -- ostensible competitors -- held a series of meetings in January 2009, immediately after Anderson made its surcharge proposal, and had communications during which they agreed that they would act in concert, that they each would reject any proposed surcharge from Anderson, and that they would then use that decision as a pretext for cutting off Anderson's magazine supply from those publishers. (Compl. ¶ 55.) Throughout the latter part of January and the early days of February, the defendants and their co-conspirators held meetings, including a late-January meeting at Hudson's headquarters in North Bergen, New Jersey, during which they agreed, among other things, to divide the U.S. distribution territory into two regions -- one controlled by Hudson and the other controlled by News Group. (*Id.*) Subsequently, the defendants, acting in concert, cut off Anderson from their magazines. (*id.* at ¶ 47.)

The goal of the conspiratorial agreement, as noted, was to eliminate wholesalers Anderson and Source, so that defendants could allocate their regional markets to the two principal remaining wholesalers, Hudson and News Group. Through this market allocation, defendants would be able to exert substantial control over the wholesale market, and Hudson and News Group could use their improperly-obtained market power to shift to retailers and consumers -- and away from publishers -- the entire financial burden resulting from worsening market conditions and publisher-imposed inefficiencies in the distribution system. (Compl. ¶¶ 4, 58.) At the same time, because the publishers and distributors, acting in concert, controlled approximately 80% of the nation's supply of magazines, they were confident that, collectively, they would be able to control Hudson and News Group, the two remaining wholesalers, and ensure that price increases necessary to support the distribution system were borne by the retailers -- and, ultimately, the consumers -- and not the defendants. (*Id.* at ¶¶ 36, 58-59, 64.)

C. Defendants' Admissions Concerning the Conspiracy

On or about January 21, 2009, Castardi, acting on behalf of national distributor Curtis as well as all the publishers represented by Curtis (including AMI, Hachette and Rodale), informed Anderson's Chief Executive Officer Charles Anderson, in words or substance, that "I [Castardi] don't want a problem. I would like to get this worked out. But I'm going to have to go with whatever Rich [Jacobsen, CEO of TWR] does." (Compl. ¶ 49.) At a meeting with Jacobsen of TWR on Saturday, January 31, 2009, Mr. Anderson asked Jacobsen about what Castardi had told him. Jacobsen did not deny that he and Castardi were acting collectively, indicating that he realized that Mr. Anderson knew there was collusion. (*Id.* at ¶ 52.) Jacobsen also corroborated the goal of the conspiracy during a meeting with Source's CEO Greg Mays at a February 2 dinner meeting in New York, confirming that, when Anderson and Source were eliminated from the marketplace, Jacobsen and his co-conspirators would "now control this space," refusing to implement SBT and forcing retailers -- rather than publishers and distributors -- to absorb all the costs of the inefficient distribution system forced on the market by the defendants. (*Id.* at ¶ 56.) Similarly, in an e-mail to its publisher-clients, Curtis admitted that the destruction of Source and Anderson will create a "monopolistic wholesaler" with the power to dominate the market. (*Id.* at ¶ 63.)

Indeed, defendants initially invited Anderson itself to join the conspiracy. Castardi of Curtis told Mr. Charles Anderson that "you need to let Source go out first," because, in certain markets, Anderson and Source were the only wholesalers and, once Source was excluded from the market and its business destroyed, Anderson could, according to Castardi, use its regional market power to "get all your [Anderson's] profits from the retailers." (Compl. ¶ 50.) Michael Duloc, President and CEO of Kable, advanced a similar idea, and discussed with Frank Stockard,

President of Anderson News, offering Anderson exclusivity in certain territories in exchange for Anderson dropping the surcharge. (*Id.*) According to Duloc, Anderson could obtain the profits it desired by using its exclusivity arrangement to increase the prices it charged to retailers. (*Id.*)

D. Defendants Succeed in Destroying Anderson

Shortly after the boycott began, on February 7, 2009, Anderson was forced to cease operations and to sell much of its operations, including its trucking fleet, distribution equipment and distribution centers, to News Group at fire-sale prices. (Compl. ¶¶ 5, 64-68.) As a result, many of Anderson's retailer customers were forced to purchase magazines from News Group, Hudson or other wholesalers to replace the products that previously they received from Anderson. (*Id.* at ¶ 59.) Upon signing agreements with those retailers, Hudson and News Group demanded higher rates for "[a]bout 80%" of the new business. (*Id.*) With the elimination of Anderson, Hudson and News Group successfully extracted higher prices from retailers and avoided reducing the profits of the publishers and distributors.

E. The Source Action

On February 9, 2009, Source commenced an action in this Court against the defendants in this action, alleging violations of Section 1 of the Sherman Act. *See Source Interlink Distribution, L.L.C., v. Am. Media, Inc.*, No. 09 Civ. 1152 (PAC) (the "Source action"). The allegations in the Source complaint are substantially similar to the allegations in the Anderson complaint.

At a hearing in the Source action on February 11, 2009, this Court, referring to, among other things, the "well pleaded allegations" in the Source complaint, granted a TRO ordering the defendants to continue supplying magazines to Source, pending a hearing on Source's request for a preliminary injunction. After obtaining preliminary discovery from the defendants, Source

settled with defendants Time and TWR and filed an amended complaint. Shortly thereafter, Source settled with all but two of the remaining defendants.

ARGUMENT

I.

THE COMPLAINT STATES A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

To state a claim for relief under Section 1 of the Sherman Act (15 U.S.C. § 1), a plaintiff must plead that the defendants engaged in a "'contract, combination . . ., or conspiracy, in restraint of trade or commerce.'" *Twombly*, 550 U.S. at 548 (quoting 15 U.S.C. § 1). The complaint clearly states a claim under Section 1.

A. Governing Pleading Standard

Fed. R. Civ. P. 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Twombly*, the Supreme Court held that a Section 1 antitrust complaint, to withstand dismissal, "does not need detailed factual allegations," but allegations sufficient "to raise a right to relief above the speculative level," and "enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. at 555-56. The Supreme Court underscored that requiring "*plausible grounds* to infer an agreement does *not* impose a probability requirement at the pleading stage," but "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* (emphasis added); *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'") (citing *Twombly*, 550 U.S. at 555).

On January 13, 2010, the Second Circuit decided *Starr v. Sony BMG Music Entertainment*, 2010 U.S. App. LEXIS 768 (2d Cir. Jan. 13, 2010) ("*Starr*"), reversing a decision

heavily relied upon by defendants (*see* Joint Mem. at 14 n.10, 17, 24-25), *sub. nom.*, *In re Digital Music Antitrust Litigation*, 592 F. Supp. 2d 435, 442 (S.D.N.Y. 2008). The Second Circuit reversed the district court's dismissal of Section 1 claims, finding that, under *Twombly*, the plaintiffs' "allegations, taken together, place the [defendants'] parallel conduct '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 *20 (quoting *Twombly*, 550 U.S. at 557).

In *Starr*, the Second Circuit expressly rejected defendants' argument -- identical to defendants' argument here (Joint Mem. at 14) -- that Section 1 plaintiffs must plead facts that "'tend[] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.'" *Starr*, 2010 U.S. App. LEXIS 768, at *24. This proposition, the court held, "is incorrect," for "[w]hile, for purposes of a summary judgment motion, a Section 1 plaintiff must offer evidence that 'tend[s] to rule out the possibility that the defendants were acting independently,' to survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only allege 'enough factual matter (taken as true) to suggest that an agreement was made.'" *Id.* at *14 (quoting *Twombly*, 550 U.S. at 556).[4]

[4] Moreover, the complaint's allegations must be viewed as a whole. *Starr*, 2010 U.S. App. LEXIS 768, at *8. Thus, "[w]hen considering an antitrust complaint, the allegations cannot be compartmentalized and considered in isolation as if they were separate lawsuits, thereby overlooking the conspiracy claim itself. *Twombly* did not change this principle." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27 (D.D.C. 2008) (internal quotations and citations omitted); *see also Standard Iron Works v. Arcelormittal*, 639 F. Supp. 2d 877, 902 (N.D. Ill. 2009) ("Defendants' attempt to parse the complaint and argue that none of the allegations (*i.e.*, quoted public statements, parallel capacity decisions, trade association and industry meetings) support a plausible inference of conspiracy -- is contrary to the Supreme Court's admonition that '[t]he character and effect of a conspiracy are *not* to be judged by dismembering it and viewing its separate parts.'") (emphasis added) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)); *In re Aftermarket Filters Antitrust Litig.*, No. 08 C 4883, MDL Docket No. 1957, 2009 U.S. Dist. LEXIS 104114, at *20 (N.D. Ill. Nov. 5, 2009) ("[D]efendants may not 'cherry pick' specific allegations in the complaint that might be insufficient standing alone. Nothing in *Twombly* or any other case has diminished the application of these general standards to a § 1 Sherman Act claim.") (citation omitted); *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) ("While viewing each of these factual allegations in isolation may lead one to the conclusion drawn by the defendants, *i.e.*, that there is a legitimate business justification for each of the acts, a view of the complaint as a whole . . . does support a plausible inference of a conspiracy or agreement made illegal under § 1 of the Sherman Act.").

Thus, *Starr* and other post-*Twombly* courts have upheld Section 1 antitrust complaints containing:

(i) allegations of parallel conduct, *see Starr*, 2010 U.S. App. LEXIS 768, at *18-19;

(ii) "[a]llegations of specific [inter-competitor] meetings that occur 'on the heels' of defendants' parallel conduct," *In re Potash Antitrust Litig.*, No. 08 C 6910, MDL No. 1996, 2009 U.S. Dist. LEXIS 102623, at *72 (N.D. Ill. Nov. 3, 2009); *see also Ross v. Bank of Am., N.A. (In re Currency Conversion Fee Antitrust Litig.)*, MDL No. 1409 M 21-95,05 Civ. 7116 (WHP), 2009 U.S. Dist. LEXIS 6747, at *11 (S.D.N.Y. Jan. 21, 2009) ("Plaintiffs allege a number of meetings between the Defendants, American Express, and Discover, including the times and purposes of those meetings, the specific product of the conspiracy, and the anticompetitive effect. These allegations are sufficient to raise Plaintiffs' claims above the merely speculative level.");

(iii) allegations that one or more of the defendants made inculpatory statements, *see Starr*, 2010 U.S. App. LEXIS 768, at *21-22 (finding that statement by defendant's executive "suggests that [defendants' joint venture] was formed expressly as an effort to stop the 'continuing devaluation of music'");

(iv) allegations that the conspiring defendants had significant market power, *see id.* at *20-21 (defendants controlled 80% of internet music);

(v) "behavior that would plausibly contravene each defendant's self-interest 'in the absence of similar behavior by rivals,'" *id.* at *21 (citation omitted); and/or

(vi) allegations of "a marked change in defendants' behavior in the market around the time the conspiracy allegedly started," *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D. Cal. 2007).

As shown below, the complaint here contains *all* of these types of allegations, and under *Twombly* and *Starr*, defendants' motions to dismiss must be denied.[5]

B. Anderson Has Pled Facts That Plausibly Suggest an Illegal Agreement Under the Sherman Act

The complaint contains specific factual allegations regarding the actions of the defendants -- including, among other things, meetings in aid of the conspiracy, statements by defendants that are indicative of a conspiracy and parallel conduct -- all in a context that is highly suggestive of an illegal agreement to cut off Anderson's supply at the end of January 2009. (*See supra* at pp. 7-10.) These facts clearly raise Anderson's claims well beyond any "speculative level."[6]

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[5] Defendants' citation (Joint Mem. at 10-11 n.8) to an as-yet-unpublished article concerning the rate at which complaints are dismissed in federal courts is irrelevant. Anderson's complaint is to be judged based on the allegations it has made in *this* action, not on statistics regarding *other* actions -- which themselves indicate that antitrust actions are upheld under Rule 12(b)(6), at least in part, at least half of the time, even after *Twombly*. (*Id.*)

[6] *In re Elevator Antitrust Litigation*, 502 F.3d 47, 51 (2d Cir. 2007) ("*Elevator Antitrust*"), and the other similar cases relied on by defendants (Joint Mem. at 14 n.10; DSI Mem. at 3; Hachette Mem. at 4; Hudson Mem. at 6-9), are inapposite because in none of those cases did the plaintiffs allege -- as Anderson has here -- unnatural parallel conduct by the conspirators, conduct economically contrary to each conspirator's self-interest, at least one meeting among the defendants to divide the market, inculpatory statements by multiple members of the conspiracy, and a host of other factually specific facts and statements highly suggestive of collusion. In *Elevator Antitrust*, for example, the plaintiff's allegations of an agreement were conclusory, "without any specification" and consisted of "nothing more than a list of theoretical possibilities." *Id*. at 50. Moreover, the alleged parallel conduct, which involved similarities in contract language, pricing and equipment design was -- unlike here -- consistent with competitive conduct. None of the "plus factors" -- factors courts have traditionally used in determining whether parallel conduct evidences agreement -- alleged here by Anderson was alleged by the *Elevator Antitrust* plaintiffs. *See also Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 577 (S.D.N.Y. 2007) (solely alleging parallel conduct without more) (Joint Mem. at 14 n.10); *Temple v. Circuit City Stores, Inc.*, Nos. 06 CV 5303 (JG), 06 CV 5304 (JG), 2007 U.S. Dist. LEXIS 70747, at *23-24 (E.D.N.Y. Sept. 25, 2007) (same) (Joint Mem. at 14 n.10, 16); *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, No. 06-CV-3447 (DRH)(AKT), 2009 U.S. Dist. LEXIS 87932, at *28-29 (E.D.N.Y. Sept. 24, 2009) (same) (Joint Mem. at 14 n.10, 16).

1. The Complaint Alleges Parallel Conduct by Defendants

The complaint clearly alleges parallel conduct by defendants. Each of the publisher and distributor defendants cut off supply to Anderson in late January and the first two days of February 2009 (Compl. ¶¶ 47, 54), and their actions, taken within days of each other and shortly after meetings and communications among defendants, unquestionably support an inference of conspiracy. *See Starr*, 2010 U.S. App. LEXIS 768, at *22-23 (simultaneous price increase in May 2005 supported inference of conspiracy); *In re Graphics Processing Units*, 540 F. Supp. 2d at 1095-96 (complaint's allegations of "a marked change in defendants' behavior in the market around the time the conspiracy allegedly started" stated claim under *Twombly*).[7]

Defendants argue that their responses to Anderson's $.07 proposal varied. (Joint Mem. at 16, 19-22.) However, as alleged in the complaint, defendants followed the same course of action -- cutting off Anderson -- at the same time -- within days of each other. (Compl. ¶ 47.). Moreover, as also alleged in the complaint, defendants' so-called disparate responses were pretextual and designed merely to extract payments from Anderson before it was forced out of business. (*Id.* ¶ 53.) Defendants' reliance (Joint Mem. at 16) on *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, No. 06-CV-3447 (DRH)(AKT), 2009 U.S. Dist. LEXIS 87932 (S.D.N.Y. Sep. 24, 2009), is wholly misplaced. There, the defendants allegedly cut off the plaintiff on dates "rang[ing] from 2000 to 2006," and then "denied or ignored requests [to supply Plaintiff] sent by [Plaintiff] over a six-month period," thereby "confirming the independent, non-parallel decisions

[7] While defendants rely (Joint Mem. at 14 n.10) upon *In re Graphics Processing Units*, 527 F. Supp. 2d 1011, 1022 (N.D. Cal. 2007), where the court dismissed plaintiffs' Section 1 claims, defendants ignore the fact that that court subsequently held, in connection with plaintiffs' amended complaint, that plaintiffs properly stated a claim under *Twombly* and denied defendants' motion to dismiss. *In re Graphics Processing Units*, 540 F. Supp. 2d at 1095-96.

they previously had made." *Id.* at *50 (citations omitted). Here, defendants' actions took place within a compressed period in late January and early February. *See supra* at pp. 7-10.[8]

In purported support of their motions, defendants cite the Magistrate's Report and Recommendations in *In re Air Cargo Shipping Services Antitrust Litigation*, No. MD 06-1775 (JG) (VVP), 2008 U.S. Dist. LEXIS 107882 (E.D.N.Y. Sep. 26, 2008) ("*Air Cargo I*") (Joint Mem. at 18 n.13; DSI Mem. at 4), which recommended dismissal of the plaintiffs' Section 1 claims. However, defendants neglect the fact that the judge *rejected* that recommendation in a written decision that was published on August 21, 2009, *before* defendants' filed their motions. Instead, the court held that the complaint properly alleged claims under Section 1 of the Sherman Act and *denied* defendants' Rule 12(b)(6) motion to dismiss. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP, 2009 U.S. Dist. LEXIS 97365, at *63 (E.D.N.Y. Aug. 21, 2009) ("*Air Cargo II*"). Moreover, in *Air Cargo*, the complaint's generalized allegations -- which expressly were held by the court to be sufficient under *Twombly*

[8] Defendants also argue, based on a purported finding in the Delaware Chancery Court, that their conduct varied because AMI supposedly continued to ship magazines to Anderson. (Joint Mem. at 6, 20, 22.) Even if true, AMI cannot dispute that -- in concert and collusion with the other defendants -- it refused to pay Anderson's proposed surcharge. Moreover, that purported fact may not be considered on this motion to dismiss because it is not found in the complaint or in any document incorporated by reference in the complaint. It is well-established that, "'[i]n considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.'" *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (citation omitted). That this "fact" is found in a decision by the Delaware Chancery Court in an action involving Anderson does not change the analysis. Judicial notice (governed by Federal Rule of Evidence 201) may be taken only of the fact that a decision was made by a prior court, not of the particular findings made by that court. *See Staehr*, 547 F.3d at 425 (Joint Mem. at 11) (court may take judicial notice of fact that filing contained information "without regard to the truth of their contents"); *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A.*, 146 F.3d 66, 70 (2d Cir. 1998) ("Facts adjudicated in a prior case do not meet either test of indisputability contained in [Federal Rule of Evidence] 201(b) [regarding judicial notice]: they are not usually common knowledge, nor are they derived from an unimpeachable source," and therefore may not be the subject of judicial notice); *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (reversing judgment based on judicial notice of facts adjudicated by bankruptcy). Here, defendants improperly seek to have this Court take judicial notice of the *truth* of a finding by the Delaware Chancery Court in an order directing Anderson to assist AMI in recovering its magazines from Anderson's warehouses. (Joint Mem. 6.)

As for defendants' reference (Joint Mem. at 7, 22) to the actions of non-party COMAG Marketing Group LLC ("CMG"), because the complaint does not allege that CMG was a participant in the conspiracy, its conduct -- like that of any other non-conspirator -- is irrelevant.

-- were substantially *less* specific than those in the complaint here. In *Air Cargo*, plaintiffs alleged only the existence of "'multiple meetings, communications, and agreements,' '[s]ecret meetings,' [] 'at the highest levels,' in 'various venues, including Europe, the United States, South America and Asia,'" and stated that "the defendants 'met, communicated and jointly agreed'" in restraint of trade. *Air Cargo I*, 2008 U.S. Dist. LEXIS 107882, at *77-79 (describing plaintiffs' allegations "in substantially the same level of detail as in the Complaint"). The court concluded "that th[ose] allegations . . . establish plausible grounds to infer an agreement among the defendants to artificially inflate the prices of airfreight shipping services and give sufficient notice of the claims against them." *Air Cargo II*, 2009 U.S. Dist. LEXIS 97365, at *63.[9]

2. The Complaint Alleges That Defendants Met in Aid of the Conspiracy

Anderson also has alleged that the defendants attended meetings in late January and early February in furtherance of the conspiracy, including a meeting among Curtis, TWR, Hudson and News Group in late January at Hudson's headquarters in New Jersey. (Compl. ¶ 55.) At those meetings, defendants agreed to refuse to pay the proposed surcharge and to allocate the markets served by Anderson to News Group and Hudson, once defendants successfully forced Anderson out of business. (*Id.*)

Contrary to defendants' contention (Joint Mem. at 8), those allegations are neither "vague" not "speculative." The allegations set forth detailed facts concerning the location and timing of the meetings, the identity of the competitors who participated in the meetings and the

[9] In denying defendants' motion to dismiss in *Air Cargo*, the court thus implicitly rejected the defendants' argument, that had been accepted by the Magistrate Judge, that (1) the complaint in Air Cargo was implausible because the complaint there alleged, in general terms, that "that all thirty defendants, which range from airlines with enormous fleets and broad reach to the national airlines of tiny countries, gathered or otherwise communicated simultaneously, and thereby agreed to implement identical measures in unrelated markets all over the world," and that (2) "[t]he Complaint does not identify with any specificity how each defendant joined the conspiracy, or what circumstances provided the opportunity to do so." *See Air Cargo I*, 2008 U.S. Dist. LEXIS 107882, at *82-84, 87.

purpose of the meetings (Compl. ¶ 55) -- all of which is entirely consistent with the precise events that subsequently unfolded in accordance with the conspiracy.

The contention (Time Mem. at 11) that the complaint is somehow deficient because it does not allege what transpired at the meetings of the conspirators, which "individual employees" attended, or that "any agreement was reached," is legally and factually meritless. First, as the case law establishes, Anderson is under no obligation to detail precisely what transpired at the meetings among the conspirators. Indeed, in *Starr*, the Second Circuit explicitly rejected any requirement that a Section 1 plaintiff "mention a specific time, place or person involved in each conspiracy allegation." *Starr*, 2010 U.S. App. LEXIS 768, at *25. The courts recognize that, due to the self-concealing nature of anti-competitive, conspiratorial meetings, it is rare for any party, particularly before discovery, to have access to direct evidence of the precise exchanges at those meetings. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d at 33-34 ("Plaintiffs further allege that the fall 2003 AAR meetings actually produced the alleged restraint of trade . . . and that defendants attended and dominated these meetings. Short of being in the boardroom at the meeting, it is hard for the Court to imagine how plaintiffs could more fulsomely allege that defendants entered into an agreement at the AAR meetings."). "[D]irect allegations of conspiracy are not always possible given the secret nature of conspiracies. *Nor are direct allegations necessary*." *In re Graphics Processing Units*, 540 F. Supp. 2d at 1095 (emphasis added) (citation omitted); *see also Worldhomecenter.com, Inc. v. Thermasol, Ltd.*, No. 05 Civ. 3298, 2006 U.S. Dist. LEXIS 46323, at *10 (E.D.N.Y. July 10, 2006) ("the Court does not expect [the plaintiff] to plead the details of secret conspiratorial conversations prior to discovery").

The argument (Time Mem. at 11) that the complaint "fails to allege that any agreement was reached" is likewise meritless. The complaint clearly alleges that the defendants entered into a conspiracy and agreed to cut off supply to Anderson. (*See, e.g.*, Compl. ¶ 62 ("[T]he publishers and their national distributors agreed in advance and acted in concert to cut off supply to Anderson at the same time and to replace Anderson with the two remaining wholesalers").)

3. The Complaint Alleges That Defendants Made Statements That Are Suggestive of a Conspiracy

The complaint also alleges that defendants made statements in the presence of Anderson or Source executives that clearly are suggestive of a conspiracy. Here, as alleged in the complaint, the CEOs of Curtis and TWR acknowledged that they were acting together (Compl. ¶¶ 49, 52); the CEOs of Curtis and Kable offered Anderson entry into the conspiracy (*Id.* at ¶ 50); Time's CEO confirmed to Source's CEO that the goal of the publishers and distributors' actions was to "control th[e] space" by eliminating SBT and forcing reduced margins down to the retailers rather than up to the publishers (*id.* at ¶ 56); and Curtis told its publisher-clients that the destruction of Anderson and Source would create a "monopolistic wholesaler" with the power to dominate the market (*id.* at ¶ 63). *See Starr*, 2010 U.S. App. LEXIS 768, at *22 (finding that statement by one of the defendant's executives "suggests that [one of the joint ventures] was formed expressly as an effort to stop the 'continuing devaluation of music'").

Defendants cannot avoid denial of their motions by offering their own supposedly innocuous interpretations of their statements or meetings. (*E.g.*, Joint Mem. at 7-8.) Their *post hoc* alternative interpretations of Anderson's allegations clearly contravene the well-established principle, unchanged by *Twombly*, that the Court "'must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light

most favorable to plaintiff, and construe the complaint liberally.'"[10] *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007) (citation omitted); *see Starr*, 2010 U.S. App. LEXIS 768, at *2 ("non-conclusory factual allegations . . . must [be] accept[ed] as true"); *Lafaro*, 570 F.3d at 475.[11] Thus, while defendants may attempt to assert that "more innocent inferences can be drawn from the statements that Plaintiffs contend infer an agreement . . . , it is not Plaintiffs' burden to allege facts that cannot be squared with the possibility of unilateral action." *Standard Iron Works*, 639 F. Supp. 2d at 895.[12]

4. The Complaint's Allegations Are Highly Suggestive of an Agreement

The parallel conduct of the defendants here thus is, at a minimum, highly suggestive of a prior agreement. *See Twombly*, 550 U.S. at 555. This is especially so in light of the defendants' collective control of approximately 80% of the magazine titles sold in the United States (Compl.

[10] Defendants' alternative interpretations of the complaint's allegations also are improper to the extent that they rely on facts not alleged in the complaint -- such as defendants' repeated assertion (Joint Mem. at 4, 18; Time Mem. at 7 n.7) that Anderson owed the defendants $120 million in receivables. *See supra* at n. 8. Even assuming *arguendo* that this statement were true and ripe for consideration here, which it is not, it does not diminish Anderson's claims of conspiracy. Clearly, defendants believed that gaining control of the multi-billion-dollar single-copy magazine market (Compl. ¶ 58) was more valuable to them than any receivables owed to them by Anderson. Moreover, Anderson certainly disputes the amount of those receivables.

[11] Defendants, relying on the standard for *summary judgment*, also argue that "*Twombly* implemented at the pleading stage the Supreme Court's mandate . . . that the 'range of permissible inference from ambiguous evidence' is limited." (Joint Mem. at 12.) Defendants are wrong. *Twombly* simply held that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. As the *Starr* court noted, "'[t]he Supreme Court did *not* hold that the same standard applies to a complaint and a discovery record . . . . The "plausibly suggesting" threshold for a conspiracy complaint remains considerably less than the 'tends to rule out the possibility' standard for summary judgment."'" *Starr*, 2010 U.S. App. LEXIS 768, at *24-25 (quoting 2 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* § 307d1 (3d ed. 2007)) (emphasis in original); *see also In re Flash Memory Antitrust Litig.*, No: C 07-0086 SBA, 2009 U.S. Dist. LEXIS 38941, at *41-42 (N.D. Cal. Mar. 31, 2009) (in denying motion to dismiss Section 1 claims, distinguishing pre-*Twombly* decision that "involved a motion for summary judgment, not a motion to dismiss, where Plaintiffs' allegations must be taken as true.""); *E.I. Dupont De Nemours & Co. v. Kolon Indus.*, No. 3:09cv58, 2009 U.S. Dist. LEXIS 76795, at *37 (E.D. Va. Aug. 27, 2009) ("[T]he Court in *Twombly* did not elevate the pleading standard applicable to a motion to dismiss to something akin to the standard which applies at the summary judgment stage.").

[12] Thus, even where defendants argue that they "were merely uniformly following a valid alternative business strategy, Plaintiffs are not required 'to exclude every plausible interpretation of the facts that does not support their theory of liability.' At this stage, Plaintiffs need only assert 'plausible grounds to infer' that an illegal agreement was made." *In re Potash Antitrust Litig.*, 2009 U.S. Dist. LEXIS 102623, at *76 (citing *Hackman v. Dickerson Realtors*, 595 F. Supp. 2d 875, 879 (N.D. Ill. 2009) (defendant's argument that plaintiff must *exclude* possibility of independent action "is unavailing because [it] turns the applicable standard on its head")).

¶¶ 58, 64-65). In *Starr*, the Second Circuit expressly held that plaintiffs' allegation that "defendants control over 80% of Digital Music sold to end purchasers in the United States," when viewed together with the complaint's other allegations, placed the defendant's parallel conduct in "'a context that raises a suggestion of a preceding agreement.'" *Starr*, 2010 U.S. App. LEXIS 768, at *20-21 (citing *Twombly*, 550 U.S. at 557). As the court noted, "'[e]mpirical studies considering many industries have suggested that noncompetitive pricing [that may be the result of price coordination] is likely to appear when the four leading firms account for some 50 to 80 percent of the market.'" *Id.* at *21 (quoting 7 Areeda and Hovenkamp, *Antitrust Law* ¶ 1431a) (alterations in opinion).

C. The Complaint Identifies Each Defendant's Role in the Conspiracy

Nor is there any merit to defendants' contention that the complaint lacks sufficient individualized allegations against each of the defendants. (Joint Mem. at 18-22; Hachette Mem. at 1-4; DSI Mem. at 3-4.) As noted, the Second Circuit explicitly rejected any requirement that a Section 1 plaintiff "mention a specific time, place or person involved in each conspiracy allegation." *Starr*, 2010 U.S. App. LEXIS 768, at *25. Moreover, it is well settled that "[a]ntitrust conspiracy allegations need not be detailed defendant by defendant. Rather, an antitrust complaint should be viewed as a whole, and the plaintiff must allege that each individual defendant joined the conspiracy and played some role in it." *In re OSB Antitrust Litigation*, 2007 U.S. Dist. LEXIS 56573, at *13-14) (citations omitted).[13]

[13] Defendants also err in arguing that *Twombly* "obligates plaintiffs to advise each defendant of when it allegedly joined the conspiracy and what it purportedly did" (Joint Mem. at 18), because the case cited for this proposition -- the Magistrate Judge's recommendation in *Air Cargo I* -- was rejected by the court. *See Air Cargo II*, 2009 U.S. Dist. LEXIS 97365, at *63 (declining to adopt recommendations to dismiss Section 1 claims). In any event, the complaint would meet this requirement even if it applied, because Anderson details the roles of the defendants in the conspiracy and makes clear that the conspiracy began in mid-to-late January (*i.e.*, a two-week period). *See supra* at pp. 7-10. And even the Magistrate Judge in *Air Cargo I* noted that "plaintiffs are not required to plead every detail of every meeting or communication, secret or otherwise, that took place between the

The complaint includes allegations that each defendant was a member of the conspiracy and played a role in it. The complaint, among other things, alleges that the publisher and national distributor defendants, including Hachette and Rodale and with the assistance of DSI,[14] refused to accept the surcharge (Compl. ¶ 47), that they engaged in negotiations with Anderson for the purpose of extracting payments from Anderson (*id.* at ¶¶ 52-54), that they conspired with each other in doing so through meetings and other collusive communications (*id.* at ¶¶ 47, 55), and that they conspired with Hudson and News Group for the latter to step into Anderson's former territories on the condition that they raise prices charged to retailers, not publishers (*id.* at ¶¶ 55, 59). Because it alleges "that each individual defendant joined the conspiracy and played some role in it," *In re OSB Antitrust Litig.*, Master File No. 06-826, 2007 U.S. Dist. LEXIS 56573, at *13 (E.D. Pa. Aug. 3, 2007) (citations omitted), the complaint states a claim against all of the defendants.

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defendants, nor must they allege in great detail each defendant's role in the conspiracy. Nor do they need to allege an overt act by each defendant." *Air Cargo I*, 2008 U.S. Dist. LEXIS 107882, at *83. Contrary to defendants' argument, the Second Circuit in *Elevator Antitrust* did *not* state that a complaint that fails to identify "'any activities by [the] particular defendant[s]' amounts to 'nothing more than a list of theoretical possibilities" (Joint Mem. at 18 (quoting *Elevator Antitrust*, 502 F.3d at 50-51) (alterations in defendants' brief)). Instead, the court stated that this was the case where the complaint fails to specify "any particular activities by *any* particular defendant." *Elevator Antitrust*, 502 F.3d at 50-51. Defendants also cite no authority in support of their argument that the complaint must detail when the conspiracy *ended*. (Joint Mem. at 18-19.) In any event, here, of course, the conspiracy ended for all purposes relevant here when the defendants succeeded in driving Anderson out of business. (Compl. ¶¶ 64-66.)

[14] DSI's argument that it is not plausible to infer from the complaint's allegations that it "would or could be a part of such a conspiracy" (DSI Mem. at 4-5) is without merit. DSI, like the national distributors (whose costs and revenues are also not directly impacted by distribution costs), clearly feared that if the publishers accepted the surcharge, they would balance the increased cost by reducing the amount they paid DSI. Moreover, DSI is a subsidiary of AMI and its interests, therefore, are significantly aligned with those of AMI. The complaint also contains sufficient allegations that Rodale was a member of the conspiracy. However, to the extent the Court finds that additional allegations are necessary to state a claim against Rodale, Anderson should be allowed to amend the complaint to include allegations that, among other things, Rodale monitored the conduct of other members of the industry to determine if they posed a threat to the conspiracy. Hudson's arguments that the complaint does not contain sufficient allegations as to its participation in the conspiracy fail in light of the fact that Hudson hosted one of the key conspiratorial meetings at its headquarters. (Compl. ¶ 55.) Moreover, the participation and agreement of Hudson and News Group were critical for the success of the conspiracy: absent pre-existing agreements with Hudson and News Group that they would distribute the Anderson and Source magazines, the scheme never could have been successfully implemented.

In *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 580 F. Supp. 2d 896 (N.D. Ca. 2008), certain defendants argued that, "even if Plaintiffs' overall allegations are sufficient to survive a motion to dismiss, the complaint should be dismissed because Plaintiffs have failed to allege how each individual Defendant participated in the alleged conspiracy." *Id.* at 903. The court rejected that argument: "Defendants' arguments fail because they rely upon the standard for a motion for summary judgment. Although Plaintiffs will need to provide evidence of each Defendants' participation in any conspiracy, they now only need to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy." *Id.*

The complaint here, which contains significantly more specific factual allegations than the complaints in *Air Cargo II* and *SRAM*, clearly sets forth actionable claims under *Twombly* against each of the defendants.

D. The Conspiracy Is Economically Plausible

The complaint clearly sets forth the plausible -- indeed, compelling -- economic motives that drove the concerted action among the defendant co-conspirators. Anderson and Source were the only two wholesalers who were advocating SBT and seeking to shift to the publishers -- rather than the retailers -- the increased costs resulting from publisher-imposed inefficiencies in the distribution system. Elimination of Anderson and Source meant that the defendant publishers and distributors would use wholesalers Hudson and News Group, neither of which advocated SBT and each of which had agreed to transfer any increased costs to the retailers (and consumers) instead of the publishers.[15] Indeed, as alleged in the complaint (¶ 59), this is

[15] Defendants make a series of legal and factual arguments that, even assuming *arguendo* that they were valid, are entirely irrelevant. Those include the contention that (i) businesses may choose with whom they wish to deal (Joint Mem. at 15), (ii) their conduct was a reaction to Anderson's surcharge (*id.* at 15-16, 23-24), (iii) defendants had a right to attempt to pass on costs to the retailers (*id.* at 16), and (iv) it is not unlawful to grant suppliers exclusive territories (Time Mem. at 14 n.11). While any individual defendant might have had the right *unilaterally* to reject the surcharge and cut off supply to Anderson, colluding with its competitors to avoid the

precisely what occurred, as Hudson and News Group raised prices after they began to service Anderson's retailers.

Moreover, where as here, "plaintiffs have alleged behavior that would plausibly contravene each defendant's self-interest 'in the absence of similar behavior by rivals,'" a complaint states a claim under *Twombly*. *Starr*, 2010 U.S. App. LEXIS 768, at *32 (quoting Areeda and Hovenkamp, *Antitrust Law* ¶ 1415a). The *Starr* defendants -- like defendants here (*e.g.*, Joint Mem. at 4, 16; Time Mem. at 2) -- argued that "the conduct alleged in the complaint 'would be entirely consistent with independent, though parallel, action.'" *Starr*, 2010 U.S. App. LEXIS 768, at *32. The Second Circuit concluded that the complaint sufficiently alleged that "it would not be in each individual defendant's self-interest to sell Internet Music at prices, and with [use restrictions], that were so unpopular as to ensure that 'nobody in their right mind' would want to purchase the music, unless the defendant's rivals were doing the same." *Id.*

Here, as the complaint makes clear, it was contrary to any publisher's *individual* economic self-interest to cut off supply to two of the largest wholesalers in the United States, each of which served many important markets in which other wholesalers had little or no presence. (Compl. ¶¶ 58-62.) Thus, if any particular publisher or distributor defendant had acted unilaterally to cut off Anderson and/or Source -- and none of its competitors had joined in its decision -- that defendant would have suffered substantial losses because the end result would be that its magazines would not be distributed in key markets served by Anderson and Source, while its competitors' magazines would still be found on store shelves in those markets. Cutting off

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surcharge was clearly unlawful. Just as in price-fixing or bid-rigging cases, a plaintiff may "disrupt[] the status quo" (Joint Mem. at 14) by seeking a reduction in price, and the defendants are free to unilaterally reject that price reduction. However, where the defendants act in concert to thwart the proposed price reduction, they have violated the Sherman Act. Group boycotts are "conspiracies in restraint of trade" and are generally *per se* illegal under the Sherman Act. *See, e.g., Dresses for Less, Inc. v. CIT Group/Commercial Servs.*, No. 01 Civ. 2669 (WHP), 2002 U.S. Dist. LEXIS 18338, at *20 (S.D.N.Y. Sept. 30, 2002) (upholding group boycott claim).

Anderson or Source would only be in a publisher's or distributor's self-interest if it already had a pre-existing agreement with its competitors that they *all* would cut off Anderson and Source, and if they had pre-existing agreements in place for the two remaining wholesalers (Hudson and News Group) to distribute the magazines of all those publishers. That the parallel actions taken by defendants were contrary to their individual economic self-interest is highly indicative of conspiracy. As in *Starr*, the complaint's allegations "suggest[] that some form of agreement among defendants would have been needed to render [their conduct] profitable." *Starr*, 2010 U.S. App. LEXIS 768, at *21 (citing *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-361 (3d Cir. 2004) ("Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market.")).[16]

Interborough News Co. v. Curtis Publishing Co., 225 F.2d 289 (2d Cir. 1955), a case upon which defendants rely (Joint Mem. at 13, 15; Hudson Mem. at 9), actually confirms that unilateral conduct by the defendants in declining to pay the proposed surcharge and cutting off supply to Source would have been contrary to their economic self-interest absent collusion.[17] There, a magazine wholesaler asserted Section 1 and Section 2 claims against Curtis and a number of publishers and competing wholesalers. *Interborough News Co.*, 225 F.2d at 290-91.

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[16] *See also, e.g.*, *In re Potash Antitrust Litig.*, 2009 U.S. Dist. LEXIS 102623, at *70 ("[A]llegations which demonstrate that defendants acted against self-interest enhance the plausibility of the conspiracy."); *Standard Iron Works*, 639 F. Supp. 2d at 896 ("Giving up . . . profit[] at least plausibly infers that Defendants agreed to do so."); Areeda & Hovenkamp, *Antitrust Law* at ¶ 1434c1 (where defendants' actions "would be against self-interest unless rivals act the same but where individual action would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such agreement, . . . common action would imply a traditional agreement.").

[17] *Interborough* demonstrates that the defendants' motions should be denied for an additional reason. There, the distributor (Curtis) subsidized thirteen new wholesalers, which proceeded to compete with Interborough, the plaintiff wholesaler. 225 F.2d at 292. The trial judge found no evidence of any conspiracy because the different defendants responded in significantly different ways over an extended period of time to the presence of the new wholesaler competitors. *Id.* at 293. Here, by contrast, the defendants reacted to the Anderson and Source surcharges in a strikingly uniform manner within the same compressed time frame.

The court explained that "[f]or a considerable period the thirteen new competing wholesalers were paid large sums of money by way of subsidy by Curtis, *as the Curtis business alone was far from sufficient to enable them to operate profitably [in the 'Greater New York Area']*." *Id.* at 291 (emphasis added). If the business of a distributor such as Curtis (representing numerous publishers) would have been insufficient to enable a wholesaler to operate profitably, *a fortiori*, it would be inconceivable that the business of a single publisher -- *i.e.*, any single publisher defendant here -- would justify entry by a wholesaler such as Hudson or News Group into one of the major regions served by Anderson. Again, absent an express or even tacit pre-existing agreement among the defendant publishers and distributors that they would cut off Anderson and shift all their business to Hudson and News Group, it would have been against the economic self-interest of any single publisher or national distributor (acting unilaterally) to cut off Anderson entirely.

This is confirmed also by Curtis's failed unilateral attempt in 2008 to cut off supply to Anderson. (Compl. ¶¶ 45, 60-62.) That attempt failed precisely because, among other reasons, an individual distributor like Curtis lacked the ability to force retailers to choose a competing wholesaler when other publishers and national distributors continued to rely on Anderson's services. Faced with the risk of lost sales and reduced advertising revenue, as well as the fact that the absence of its publishers' magazines from store shelves gave its competitors TWR, Kable and others, as well as their publisher-clients, a comparative advantage, Curtis was forced to end its earlier initiated attempt to cut off Anderson.[18]

[18] Time's argument that "[u]nder Anderson's theory, all publishers and national distributors had no choice but to continue doing business with Anderson . . . in perpetuity" (Time Mem. at 15-16) is fatally flawed. To the extent that Anderson's prices or services, whether before or after the surcharge, were not competitive, one of its competitors -- such as Hudson, News Group or Source -- could have expanded into Anderson's markets and taken away Anderson's business by charging lower prices or providing better services. However, instead of allowing the forces of the market to work and truly test whether Anderson's surcharge was competitive -- *i.e.*, instead of making

Also completely without merit is defendants' contention that it would be economically implausible for the publishers and distributors "to conspire to eliminate two of the four resources for wholesale distribution services" because it would "increas[e] the power of the remaining two wholesalers to demand substantial concessions from the publishers and distributors[.]" (Joint Mem. at 17.) This argument ignores the enormous power of the defendant publishers and national distributors, who, acting in concert, control approximately 80% of the supply of magazines. (Compl. ¶ 64.) In view of that power, the publishers had absolutely no reason to fear that News Group and Hudson would demand any "substantial" or unreasonable concessions. Indeed here, as alleged in the complaint (*id.* at ¶¶ 58-59), one of the principal objects of the conspiracy was to enable Hudson News and News Group, among other things, to use their market power in their respective regions, to demand and obtain price increases from retailers. As alleged in the complaint, defendants were successful in implementing their conspiracy because, after the elimination of Anderson, approximately 80% of Anderson's former retailer-clients, which were compelled to seek service from Hudson and News Group, have been forced to pay substantially higher rates, as high as 12% or more over what they paid Anderson. (*Id.* at ¶ 59.)

Defendants also argue (Joint Mem. at 17-18) that it is implausible for the publishers to conspire to deny retailers access to the suppliers' products because reducing the output of magazines is inconsistent with the incentives of the publishers. Defendants' argument is belied by their own conduct in this Court. Until the Court issued the TRO in the *Source* action, there *was* a disruption in Source's business. That did not stop all of the defendants from opposing that TRO. In any event, the defendants were fully aware that, in the short term, there would be a

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their own unilateral decisions with the hope that Hudson or News Group, also acting independently, would compete for Anderson's market share by charging less than Anderson -- the defendants conspired with each other to ensure that Anderson would be forced out of the market.

disruption -- and therefore a reduction -- in the supply of product to the retailers as a result of their boycott. As alleged in the complaint (¶ 58), the defendants, however, because of their coordinated conduct, also intended and expected that Anderson and Source quickly would be forced to sell their business to Hudson and News Group, who would then rapidly resume the supply of product to the retailers that had been serviced by Anderson. Indeed, this is exactly what happened: as alleged in the complaint (¶ 59), News Group purchased Anderson's distribution facilities at fire-sale prices and rapidly took Anderson's place as distributor for the publisher-defendants' magazines, charging the retailers higher prices when it did so.

An argument virtually identical to defendants' "economic implausibility" argument was expressly rejected in *Full Draw Products v. Easton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999), on grounds that are fully applicable here. There, the plaintiff, the promoter of an archery trade show, alleged that certain archery manufacturers and distributors conspired with each other and the promoter of a rival show to boycott the plaintiff's show and drive the plaintiff out of business in favor of the rival promoter. *Id.* at 747. The defendants argued, among other things, that the conspiracy was implausible, asking "why the defendants would conspire to destroy one of their two sources of suppliers of exhibition space ([plaintiff]), leaving them with only one supplier ([defendant])." *Id.* at 751. The Tenth Circuit determined that "that question [was] answered by the second amended complaint, which allege[d] that defendants controlled or influenced [the defendant promoter] and, if [the defendant promoter] were the only supplier of archery trade show distribution space, defendants could ensure that the shows would be favorable to their interests." *Id.* Thus, the court concluded, "[a] group boycott such as this, by large customers to destroy one producer of trade show services in favor of another over which it had influence and could obtain advantage at the expense of other consumers, states a violation of the Sherman

Act." *Id.* at 753. Likewise here, as alleged in the complaint (¶ 36), the publisher and distributor defendants, which collectively controlled approximately 80% of all magazines, would be able to exercise enormous control or influence over Hudson and News Group, willing participants in the conspiracy who stood to stood to gain substantially from the elimination of their principal competitors. (*Id.* at ¶ 55.) *Full Draw*, therefore, compels the rejection of defendants' argument that the alleged conspiracy is implausible.[19]

In short, defendants' conspiracy clearly was economically plausible, and defendants' contention to the contrary is entirely without any factual or legal basis. [20]

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[19] Nor is there any merit to the contention that the complaint's "allegation that publishers and distributors 'would be able to control' the two remaining wholesalers" is "conclusory, speculative, and untenable." (Time Mem. at 15). First, there is nothing conclusory, speculative or untenable about the enormous collective market power of the defendant publishers and national distributors. Second, this argument *itself* is "utterly conclusory" and ignores the fundamental, controlling principle that all well-pleaded allegations in the complaint must be accepted as true, and all inferences drawn in the light most favorable to Anderson.

[20] Defendants also impermissibly go entirely outside of the complaint and attempt impermissibly to introduce their own alleged facts in support of their motions. Defendants attempt to rely on an unverified transcript of an interview with Charles Anderson, arguing that comments allegedly made during that interview provide the defendants with a rationale for unilaterally cutting off Anderson. (*See* Joint Mem. at 2, 3, 4, 6, 8-10, 23-24; Time Mem. at 1, 4-6, 14.) That interview provides no such rationale. Even if this Court were to consider the transcript for the purposes for which defendants seek to admit it (which it should not) -- such as that it purportedly demonstrates that Anderson was prepared to exit the business should the defendants not agree to the surcharge (Joint Mem. at 4, 6) -- such evidence is irrelevant. As demonstrated *supra* n. 16, defendants were free to unilaterally decline to accept Anderson's proposed surcharge, their collusive action ran afoul of Section 1 of the Sherman Act. Moreover, since Anderson had expressed a willingness to negotiate with publishers and distributors (Compl. ¶¶ 43, 51-53), it is clear that any such statements by Mr. Anderson were negotiation tactics as much as anything else. *See Lafaro*, 570 F.3d at 475 (plaintiff is entitled to have inferences drawn in its favor). But, in any event, defendants may not rely on that interview. Anderson generally refers to that interview in a single sentence in the complaint. (¶ 42 ("[On] January 14, 2009, Mr. Anderson had a call-in interview with the representative of an industry publication, *The New Single Copy*, during which he publicly announced the surcharge and explained the industry constraints compelling that measure.").) That single, isolated reference does not signify that the entire purported transcript is incorporated into the complaint by reference or that the transcript is "integral" to the complaint. *See Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) ("Limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint"). Moreover, while it is true that "[w]hen determining the sufficiency of a plaintiff's pleading under Rule 12(b)(6), a court 'may consider those facts alleged in the complaint, as well as documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit'" (Time Mem. at 4 n.3 (citations and internal quotations omitted)), courts have clarified that "the term 'rely,' in this context, means that 'the complaint relies heavily upon [the document's] terms and effect, which renders the document integral to the complaint.'" *In re Bausch & Lomb, Inc. Sec. Litig.*, No. 01-CV-6190 (CJS), 2003 U.S. Dist. LEXIS 24062, at *54 (W.D.N.Y. 2003) (granting motion to strike transcript of conference call) (citation omitted).

II.

THE COMPLAINT STATES COMMON-LAW CLAIMS[21]

Anderson clearly has stated common law claims under the laws of Delaware (where both plaintiffs are incorporated), New York (where much of the illegal conduct took place) and Tennessee (where plaintiffs' headquarters were located.[22]

First, the complaint states a claim for civil conspiracy (Compl. ¶¶ 97-101). *See Miller v. Greystone Bus. Credit II, L.L.C. (In re USA Detergents, Inc.)*, 418 B.R. 533, 547 (Bankr. D. Del. Oct. 16, 2009) (elements of such a claim are: "(1) a confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damages"); *Willingham v. NovaStar Mortg., Inc.*, No. 04-CV-2391, 2006 U.S. Dist. LEXIS 97149, at *51 (W.D. Tenn. Feb. 7, 2006) ("civil conspiracy [is] a 'combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means'") (quotation omitted); *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 463 (S.D.N.Y. 2009) (Crotty, J.) ("to state a proper claim for conspiracy to [commit a tort] the plaintiff must allege both a primary tort and also show the four elements of a conspiracy: '(1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement;

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[21] Anderson agrees to the dismissal of its defamation claim without prejudice to its reasserting the claim.

[22] In opposing Anderson's common-law claims, defendants assume that New York law applies. However, in cases involving tort claims, New York courts apply the laws of the jurisdiction with the "greatest interest in the dispute," and rely "almost exclusively" on the locus of the tort (*i.e.*, where the injury was felt) and the domicile of the parties (*i.e.*, the principal place of business for corporations) in determining where the greatest interest lies. *Renaissance Cosmetics, Inc. v. Dev. Specialists Inc.*, 277 B.R. 5, 14-15 (S.D.N.Y. 2002). Here, both plaintiffs are Delaware companies (Compl. ¶¶ 19-20), one of which is currently the subject of a bankruptcy proceeding in a Delaware bankruptcy court (*id.* at ¶ 68), and, as such, plaintiffs have "'felt' [their] injury [*i.e.*, the destruction of their business] in Delaware." *Renaissance Cosmetics*, 277 B.R. at 15. Further, eight of the ten remaining defendants are Delaware entities. (Compl. ¶¶ 8-12, 14-17, 21). Because Delaware has the greatest interest in this dispute, Delaware law likely applies to Anderson's common law claims. In any event, the complaint states common law claims under the law of all of these states.

(3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury.'") (citation omitted).

Anderson has pleaded all of these elements, including that the defendants (i) acted in concert (Compl. ¶¶ 2, 47, 52, 60, 98), (ii) intentionally engaged in unlawful acts and torts in furtherance of the conspiracy (*id.* at ¶¶ 3, 5, 36, 47-48, 55-58, 62, 72, 87, 99-100), and (iii) caused damage to Anderson (*id.* at ¶¶ 1, 5, 64-68, 89, 101).

Second, the complaint states a claim for tortious interference with business relations. (Compl. ¶¶ 82-90.) Under Delaware law, such a claim is stated where the plaintiff alleges the "existence of a valid business relation . . . or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted." *Ethypharm S.A. v. Abbott Labs.*, 598 F. Supp. 2d 611, 619 (D. Del. 2009) (citation omitted); *see also Denuke Contr. Servs. v. EnergX, LLC*, No. 3:07-CV-114, 2007 U.S. Dist. LEXIS 64391, at *11-12 (E.D. Tenn. Aug. 30, 2007); *Momentive Performance Materials USA, Inc. v. AstroCosmos Metallurgical, Inc.*, No. 1:07-CV-567 (FJS/DRH), 2009 U.S. Dist. LEXIS 45941, at *13 (N.D.N.Y June 1, 2009).

The complaint alleges that (i) Anderson had relationships with retailers in the single-copy magazine industry (Compl. ¶¶ 27-30, 37-38, 83); (ii) defendants were aware of Anderson's relationship with the retailers (*id.* at ¶¶ 41, 45, 50, 61, 85); (iii) defendants intentionally and collusively refused to supply magazines to Anderson, preventing Anderson from complying with its contractual obligation to the retailers and causing retailers to end their relationships with Anderson (*id.* at ¶¶ 47-48, 54-58, 62, 64, 66-67, 87-88); and (iv) Anderson was damaged by the termination of its business relations with the retailers (*id.* at ¶¶ 1, 2, 5, 64-68, 89).

Third, the complaint states a claim for tortious interference with contract. (Compl. ¶¶ 82-90.) The elements of the claim are: "(1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury." *Ethypharm*, 598 F. Supp. 2d at 619; *see also Denuke*, 2007 U.S. Dist. LEXIS 64391, at *6-7; *Momentive Performance Materials USA, Inc.*, 2009 U.S. Dist. LEXIS 45941, at *12.

Anderson has alleged (i) the existence of contracts with retailers to deliver magazines to them (Compl. ¶ 84); (ii) defendants' awareness of those contracts (*id.* at ¶¶ 41, 50, 61, 85); (iii) defendants, acting in concert, cut off approximately 80% of Anderson's magazine supply, causing Anderson to breach those contracts (*id.* at ¶¶ 47-48, 54-56, 58, 62, 64, 66, 87-88); (iv) defendants' conduct was unlawful, without any legitimate justification and malicious (*id.* at ¶¶ 46, 58, 60, 87); and (v) defendants' conduct caused Anderson substantial injury (*id.* at ¶¶ 1, 2, 5, 64-68, 89).

CONCLUSION[23]

For the foregoing reasons, Anderson respectfully requests that defendants' motions be denied.

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Respectfully Submitted,

KASOWITZ, BENSON, TORRES &
FRIEDMAN LLP

By: /s/ Marc E. Kasowitz
Marc E. Kasowitz (mkasowitz@kasowitz.com)
Daniel R. Benson (dbenson@kasowitz.com)
Hector Torres (htorres@kasowitz.com)
Maria Gorecki (mgorecki@kasowitz.com)

1633 Broadway
New York, New York 10019
Tel.: (212) 506-1700
Fax: (212) 506-1800

Attorneys for Plaintiffs Anderson News, L.L.C.
and Anderson Services, L.L.C.

[23] If the Court were to determine that the complaint does not state a claim, Anderson respectfully requests leave to amend. *See Oliver Sch. v. Foley*, 930 F.2d 248, 253 (2d Cir. 1991) ("[W]hen a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint. . . . Where the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course.") (quotations and citations omitted); *MRM Sec. Sys. v. Citibank, N.A.*, No. 96 Civ. 3721 (KMW), 1997 U.S. Dist. LEXIS 5360, at *15 (S.D.N.Y. Apr. 23, 1997) ("[C]ourts should generally refrain from dismissing an action without granting the plaintiff at least one opportunity to amend its complaint.").