

10-4591

**In the United States Court of Appeals
for the Second Circuit**

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

v.

AMERICAN MEDIA, INC., BAUER PUBLISHING CO., LP., CURTIS CIRCULATION
COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA, U.S.,
HUDSON NEWS DISTRIBUTORS LLC, KABLE DISTRIBUTION SERVICES, INC., THE
NEWS GROUP, LP, RODALE, INC., TIME INC., TIME/WARNER RETAIL SALES &
MARKETING, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(Case No. 09-cv-2227 (PAC))

**BRIEF FOR DEFENDANT-APPELLEE
HUDSON NEWS DISTRIBUTORS L.L.C. IN
SUPPORT OF THE DISTRICT COURT'S JUDGMENT**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and to enable this Court to evaluate possible disqualification or recusal, Defendant-Appellee Hudson News Distributors LLC submits the following statement identifying its parent corporations and any publicly held corporation owning 10% or more of its stock:

Hudson News Distributors LLC is a privately held New Jersey limited liability company. The corporate parent for Hudson News Distributors is Hudson Media, Inc., a New Jersey corporation, which is privately held. Hudson News Distributors LLC has no publicly held corporate parents, affiliates, and/or subsidiaries.

April 18, 2011

/s/ D. Jarrett Arp
D. Jarrett Arp

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STATEMENT OF ISSUE PRESENTED

Did the District Court properly determine that plaintiffs failed to allege a conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and, in turn, violations of state tortious interference and civil conspiracy laws, against defendant Hudson News Distributors L.L.C. (“Hudson News”)?

STATEMENT OF FACTS

Hudson News is the odd man out. It stands alone as the only *defendant* that is a wholesale magazine distributor. Wholesale distributors are responsible for “ship[ping] the magazines to retailers” and “picking up, tabulating and destroying copies of magazines that remain unsold.” (Compl. ¶¶ 29-30 (AA24).)

Plaintiffs-appellants, Anderson News, L.L.C. and Anderson Services, L.L.C. (collectively, “Anderson”), were also magazine wholesale distributors. According to the Complaint, Anderson commanded 27% of the market (*id.* ¶ 30 (AA24)) when, in February 2009, it was “forced to shut down its national distribution system,” (*id.* ¶ 5 (AA19).) On March 2, 2009, certain creditors of Anderson filed an involuntary petition against Anderson in United States Bankruptcy Court for the District of Delaware. (*Id.* ¶ 68 (AA36).) This lawsuit followed.

As described in greater detail elsewhere,¹ the thrust of Anderson’s Complaint is that major magazine publishers, their national distributors, and two of Anderson’s wholesaler competitors engaged in “collusive conduct” (*id.* ¶ 63 (AA34)) and “act[ed] in concert” to “cut off Anderson from its supply of magazines” (*id.* ¶ 47 (AA29)) in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and state common law. According to the Complaint, it was this purported “coordinated boycott” (*id.* ¶ 5 (AA19)) that forced Anderson to suspend its business operations in February 2009. (*Id.* ¶ 66 (AA35).)

Anderson claims that conspiracy can be inferred from allegations of parallel conduct by the publisher and national distributor defendants – a group that does not include *wholesaler* Hudson News. (*Id.* ¶ 47 (AA29) (“[I]n late January, 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”).) Nonetheless, the Complaint charges that the

¹ To avoid burdening the Court with needlessly duplicative submissions, Hudson News incorporates by reference the description of Anderson’s conspiracy theory and the history of the case contained in the briefs filed by Defendants-Appellees Time Inc. and Time/Warner Retail Sales & Marketing, Inc. (collectively referred to as “Time”) and Bauer Publishing Co., LP (“Bauer”). *See generally*, Time Br. at 1-11; Bauer Br. at 2-9. Hudson News’ recitation of the facts will be limited to the allegations in the Complaint and in the Proposed Amended Complaint that are specific to Hudson News.

“indisputable goal” of the alleged conspiracy was to “destroy Anderson’s business and that of another wholesaler, non-party Source Interlink Distribution . . . so that defendants – through Hudson and News Group, the two remaining wholesalers – could monopolize the wholesale market and use that monopoly power to shift to retailers and consumers – and away from publishers – the entire financial burden resulting from worsening market conditions and publisher-induced inefficiencies in the magazine distribution system.” (*Id.* ¶ 4 (AA19).)

What, precisely, was the role of Anderson’s fellow wholesaler, Hudson News, in this conspiracy? The Complaint is stingy with details, but makes the following assertions related to Hudson News’ conduct:

- “defendants Curtis and Hudson met with their respective competitors, TWR and News Group, in January 2009 at Hudson’s offices in North Bergen, New Jersey” (*id.* ¶ 55(AA32)); and
- the “wholesaler defendants” – presumably a category that includes Hudson News – “poach[ed] Anderson’s employees” (*id.* ¶ 57(AA32).)

Anderson purported to withdraw and clarify other allegations relating to Hudson News. For example, in explaining the alleged role of Anderson’s wholesale distributor competitors in the conspiracy, the Complaint alleged that “Hudson and News Group, which have begun to serve retailers previously served by Anderson, have demanded and obtained from them reduced discounts for

approximately 80% of the new business.” (*Id.* ¶ 59 (AA33).) Shortly before oral argument on Defendants’ Motions to Dismiss, however, Anderson withdrew these allegations with respect to Hudson. (June 9, 2010 Ltr. at 2 (SA164) (“[T]he allegation that Hudson and News Group entered into agreements to serve Anderson’s former retailer-customers is applicable only to News Group.”).)

In the same letter to the District Court, Anderson “clarif[ied]” other allegations related to Hudson News. (Appellants’ Br. at 26 n.6.) The Complaint alleged that the conspirators contemplated that “Anderson would be forced to sell at a ‘fire sale’ its business infrastructure . . . to its wholesaler competitors, Hudson and News Group.” (Compl. ¶ 58 (AA33).) But Anderson later conceded that the Complaint contained no allegation that Hudson News purchased Anderson’s assets at fire-sale prices. (June 9, 2010 Ltr. at 2 (SA164).) Rather, the Complaint “alleges that only defendant News Group did, in fact, buy [Anderson] assets at ‘fire-sale’ prices.” (*Id.*)

The District Court dismissed the Complaint against all defendants with prejudice, concluding that Anderson’s antitrust allegations do not meet the plausibility standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In its opinion, the District Court noted in particular the paucity of allegations against Hudson News, concluding there was “*no conceivable role for Hudson in the alleged conspiracy.*” (Op. at 18 (AA63) (emphasis added).) The Court observed

that, as a competitor wholesaler, Hudson News was “uniquely situated.” (*Id.*) Hudson News, unlike other defendants, did not sell magazines to Anderson and, thus, “could not cut off Anderson’s magazine supply.” (*Id.*) The District Court further indicated that Hudson News’ alleged poaching of several Anderson employees “is plainly insufficient to plausibly allege an antitrust claim as to Hudson.” (*Id.*) It also concluded that allegations relating to the purported meeting at Hudson News’ North Bergen, New Jersey offices were “conclusory” (*id.* at 15 (AA60)) and “insufficient to plausibly suggest a prior agreement among Defendants” (*id.* at 9 n.9 (AA54)).

The Court denied leave to amend the Complaint, explaining that “[t]he incurability of Anderson’s antitrust allegations . . . is especially true as to . . . Hudson,” and “[a]mending the Complaint’s allegations as to Hudson would . . . be futile because there is no conceivable role for Hudson in the alleged conspiracy: as a wholesaler, Hudson could not cut off Anderson’s magazine supply; and Anderson has withdrawn its allegation that Hudson has taken over Anderson’s retail distribution business.” (*Id.* at 20-21 (AA65-66).)

Anderson filed a motion for reconsideration, attaching as an exhibit a Proposed Amended Complaint (the “PAC”). The PAC does little to illuminate Anderson’s allegations against Hudson News. There are only three potentially relevant proposed additions:

- Sometime in 2008 – the year before the conspiracy was allegedly conceived and hatched – Hudson News’ CEO telephoned the CEO of Anderson to warn him that the president of Curtis was going to find a way to put Anderson out of business. (PAC ¶ 47 (AA83).)
- “Hudson was at the heart of the conspiratorial meetings.” (*Id.* ¶ 63 (AA88).)
- Hudson News flew one of Anderson’s key employees to its headquarters in New Jersey. (*Id.* ¶ 78 (AA94).)

The District Court denied the motion, concluding that “[t]here is no basis for reconsideration” and, with respect to the PAC, that “[t]he addition of numerous conclusory allegations does not cure the deficiencies of the Complaint” (Order at 4 (AA110).)

SUMMARY OF ARGUMENT

The District Court properly concluded that Anderson did not state a claim against Hudson News under Section 1 of the Sherman Act for the reasons set forth in the briefs filed by Time and Bauer, which Hudson News joins and incorporates by reference herein.² Hudson News writes separately to underscore that it has “no

² Hudson News also joins, and incorporates by reference herein, the arguments in the separate brief filed by Defendant American Media, Inc. (“AMI”), establishing that Anderson has not adequately pled the state law claims (AMI

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conceivable role . . . in the alleged conspiracy” – under either the allegations in the Complaint or the PAC.³ (Op. at 18 (AA63).)

Anderson’s allegations addressing Hudson News’ involvement in the claimed conspiracy boil down to “nothing more than . . . legal conclusion[s] ‘masquerading’ as . . . factual allegation[s].” *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 896 (2011). Contrary to its “new” argument – raised for the first time on appeal – “there are no allegations of *direct evidence* of a conspiracy” contained in Anderson’s complaint. (Op. at 10 (AA55) (emphasis added).) The only “direct” evidence that Anderson offers against Hudson News is a single conclusory allegation that Hudson’s North Bergen office was the site of a meeting attended by certain Defendants. No Hudson News representative is identified as having been present. Because the Federal Rules do not “unlock the doors of discovery for a

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Br. at Point II) and the arguments in Time’s brief establishing that the district court did not abuse its discretion in denying Anderson’s motion under Fed. R. Civ. P. 59(e) (Time Br. at § II).

- ³ Anderson’s prominent reliance on the PAC highlights the Complaint’s deficiency. Anderson does not seriously attempt to defend the sufficiency of its Complaint, which the District Court dismissed with prejudice. Indeed the citations in Anderson’s brief tell the true story. Its arguments are overwhelmingly dependent on citations to the PAC, which was not the pleading before the District Court. In any event, the allegations in the PAC are insufficient to state a plausible claim.

plaintiff armed with nothing more than conclusions,” this does not suffice to state a claim under Section 1 of the Sherman Act. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

Furthermore, there is no plausible role for Hudson News in Anderson’s already implausible conspiracy. Under the Supreme Court’s decisions in *Twombly* and *Iqbal*, the “sparse parallel conduct allegations” (Op. 15 (AA60)) in Anderson’s Complaint cannot suffice to state a Section 1 claim. This is particularly true with respect to Hudson News. As a fellow wholesaler and competitor of Anderson, Hudson News is not in the business of supplying Anderson with magazines. Thus, Hudson News could not cut off Anderson’s access to magazines. In addition, Anderson has made clear that Hudson is not alleged to have replaced Anderson at any customer after Anderson left the market. Although named as a defendant, Hudson has no plausible role in Anderson’s conspiracy.

Thus it is not at all surprising that the Complaint is devoid of a single allegation that would provide a plausible basis for inferring Hudson News’ participation in a conspiracy to “eliminate Anderson” by “cut[ting] off . . . 80% of its magazine supply.” (Compl. ¶ 58 (AA33).) The few passing references to Hudson News in the Complaint consist of nothing more than conclusory statements and vague references to lawful conduct wholly consistent with Hudson News’ independent economic self interest. For those reasons, the District Court correctly

found that the allegations against Hudson News fall far short of establishing the requisite “plausible grounds to infer an agreement” to restrain trade. *Twombly*, 550 U.S. at 556.

ARGUMENT

I. Standard of Review

This Court reviews a District Court’s grant of a motion to dismiss under Rule 12(b)(6) *de novo*. *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 28 (2d Cir. 2006). “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 129 S. Ct. at 1950. To withstand a motion to dismiss, Anderson’s original complaint must plead sufficient facts which, when accepted as true, state a claim that is plausible on its face. *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (citing *Twombly*, 550 U.S. at 570. As this Court has observed, “[w]hile *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to ‘nudge [plaintiffs’] claims across the line from *conceivable to plausible*.’” *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (per curiam) (alteration in original) (quoting *Twombly*, 550 U.S. at 570) (emphasis added).

II. The January 2009 Meeting Allegation Is Not A “Direct Allegation” Of Conspiracy, Nor Does It Provide A Basis For Inferring A Conspiracy

On appeal, Anderson claims for the first time that certain allegations in the Complaint and the PAC “allege[] *directly* that the defendants reached an agreement

to take concerted action to restrain trade.”⁴ (Appellants’ Br. at 32-33 (emphasis added).) With respect to Hudson News, Anderson identifies only one such “direct allegation[] of conspiracy” – the claim in paragraph 63 of the PAC that “[o]n or about January 29, 2009,” key employees of certain defendants “met at Hudson’s offices in North Bergen, New Jersey” “to discuss[] and plan[] their collusive activity, including their market allocation agreement.” (*Id.* at 36.) Anderson claims that this allegation requires “no inferences to determine that particular defendants met on particular days in particular places and reached particular agreements to restrain trade.” (*Id.*) In other words, Anderson asserts that this lone allegation suffices to state a claim that Hudson News entered into an agreement in violation of Section 1 of the Sherman Act. (*Id.* at 28 (“Anderson’s direct allegations of conspiracy suffice to state a claim under Section 1”).)

Anderson is wrong. The allegation regarding the January 2009 meeting is not a *direct allegation of conspiracy*. This Court has explained that direct evidence is akin to a “smoking gun.” *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001). Examples of direct allegations of agreement in a Section 1 context are a “document or conversation *explicitly manifesting the existence of the agreement in*

⁴ For the reasons described in the briefs filed by Defendants Time and Bauer, Anderson has waived this argument. *See* Time Br. at I.A; Bauer Br. at 37-38.

question – evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010) (emphasis added) (internal quotation marks omitted).

Nothing in paragraph 63 of the PAC comes close to *explicitly manifesting* Hudson News’ agreement to take concerted action against Anderson. First, Anderson alleges in wholly conclusory terms that “Hudson was at the heart of the conspiratorial meetings.” (PAC ¶ 63 (AA88).) Allegations lacking any factual support, like this, are not entitled to a presumption of truth under *Twombly* and *Iqbal*. *See Iqbal*, 129 S. Ct. at 1949 (“the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions”); *Twombly*, 550 U.S. at 555 (courts are “not bound to accept as true a legal conclusion couched as a factual allegation”). Notably, although the allegation speaks of “meetings” – only one meeting with a purported connection to Hudson News is mentioned in the Complaint and in the PAC. This underscores the obvious: the allegation is nothing more than “an unadorned, the-defendant-unlawfully-harmed-me-accusation” and is “disentitle[d] to the presumption of truth.” *Iqbal*, 129 S. Ct. 1951. The allegation is not direct evidence that Hudson entered into an agreement in violation of Section 1 of the Sherman Act.

Second, the paragraph goes on to allege that “key employees of certain defendants . . . including Dennis Porti of Curtis and Michael Cvrlje of TWR, met at Hudson News’ offices in North Bergen, New Jersey. David Parry of News Group – a competitor of Hudson News – and John Rafferty of DSI, also were present at that January 29 meeting at Hudson’s offices.” Astoundingly, Anderson does *not* allege that anyone from Hudson News attended the January 2009 meeting. In this regard, the PAC retreats from the Complaint’s already non-specific claim that “defendants Curtis *and* Hudson met with their respective competitors, TWR and News Group, in January 2009 at Hudson’s offices in North Bergen, New Jersey.”⁵ (Compl. ¶ 55 (AA32) (emphasis added).) Because it is unclear whether a Hudson News representative is even alleged to have participated in the meeting, the allegation obviously fails to provide direct evidence that Hudson News entered into an illicit agreement at that meeting.

⁵ It bears noting that the amendment striking the assertion that Hudson News participated in the meeting came after Hudson News urged Anderson to “‘re-evaluate’ certain factual allegations against Hudson contained in the complaint,” including the allegation that Hudson News “hosted a conspiratorial meeting.” (June 9, 2010 Ltr. at 1 (SA163).) Needless to say, if Anderson possessed enough information to name in the PAC not only the companies represented at the alleged meeting, but also the specific individuals representing them, one would think it could have also named the alleged Hudson News representative. Instead, it backs away from at least any literal affirmative claim that Hudson was represented at all.

Finally, the PAC alleges that “[a]t this and the other meetings among the defendants, they discussed and planned their collusive activity, including their market allocation agreement with respect to the Anderson and Source business and customers.” (PAC ¶ 63 (AA88).) This is nothing more than a “naked assertion” of agreement, *Twombly*, 550 U.S. at 557, and falls far short from providing the sort of direct allegation that Anderson suggests. *See Iqbal*, 129 S. Ct. at 1949 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). In essence, this claim is identical to the conclusory allegation in the Complaint rejected by the District Court as “insufficient to plausibly suggest a prior agreement among Defendants.”⁶ (Op. at 9 n.9 (AA54).)

The meeting allegation is not a direct allegation of agreement and, for the foregoing reasons, it also cannot provide a basis for inferring a conspiracy. Allegations that certain Defendants participated in meetings, conversations, and

⁶ A letter amendment to the PAC retracts some of the specificity that Anderson had inserted to burnish its meeting allegation. The Complaint had alleged the meeting took place “in January 2009.” (Compl. ¶ 55 (AA31-32).) The PAC then claimed the meeting took place on January 29, 2009. (PAC ¶ 63 (AA88).) Then, in a subsequent letter to the District Court, Anderson hedged, admitting it does not really know when the alleged meeting occurred. (*See* Oct. 8, 2010 Ltr. at 2 (SA244) (letter in response to Anderson’s October 4, 2010 Ltr.) (meeting took place “on or about January 29, 2009.”).)

communications does not provide “enough factual matter (taken as true) to suggest that an agreement was made.” *Twombly*, 550 U.S. at 556; *see also In re Elevator Antitrust Litig.*, 502 F.3d at 50-51 & n.5 (affirming dismissal of conspiracy claim where plaintiff alleged, in conclusory terms, that defendants participated in meetings in furtherance of the conspiracy); *see also In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 910-11 (6th Cir. 2009) (holding conclusory allegations of meetings among competitors were insufficient to state a claim under Section 1 because “a mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement . . .”). The mere allegation that there was a meeting at Hudson News’ North Bergen facility does not support an inference of illegal collusion.

III. Anderson’s Other Allegations Against Hudson News Do Not “Bespeak Unlawful Agreement”

Anderson’s brief does not make any serious effort to argue that the other conclusory allegations in either the Complaint or the PAC provide a sufficient factual basis from which one could “nudge[]” the claims against Hudson News “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. In large part, the allegations in the Complaint and PAC rest on the theory that “defendants engaged in consciously parallel conduct – cutting off supplies of magazines to Anderson.” (Appellants’ Br. at 41.) Of course it is wholly implausible that Hudson News – a rival wholesaler, not a supplier to Anderson –

could have made and/or implemented any decision to refuse shipment of magazines to Anderson. Thus, not surprisingly, the section of Anderson's brief dedicated to summarizing the factual allegations that "also support an inference that the defendants conspired" is largely silent as to Hudson News. (*Id.* at 41-53 (capitalization altered).)

The closest Hudson News comes to the fray is Anderson's unremarkable suggestion that Hudson News was a potential beneficiary of the national distributor and publisher defendants' purported (but implausible) agreement to put Anderson out of business. (*See* Appellants' Br. at 45 ("Defendants would have been at risk of losing sales if they did not arrange, in advance, to have substitute wholesalers available – hence the inclusion of both News Group and Hudson in the alleged conspiracy" and "there was an additional reason for *distributors* to agree to a common allocation of business between the two remaining wholesalers") (emphasis added).) But these are not fact allegations suggestive of illicit agreement by Hudson News. They point to incentives for publisher and national distributor Defendants to replace one wholesaler with another. Replacing one distributor with another is not, as a general matter, cause for concern or actionable under the antitrust laws. *See, e.g., Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1118 (2009) ("businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing");

Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914) (“A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.”); *Tri-Gen Inc. v. Int’l Union of Operating Eng’rs, Local 150*, 433 F.3d 1024, 1031 (7th Cir. 2006) (although plaintiff “plainly suffer[s] a loss” as a result of being terminated, the “[t]ransfer of business from one company to another, . . . without an accompanying effect on competition,” does not state an antitrust violation).

This takes us to another significant failing of the Complaint and the PAC: They do “not plausibly suggest an illicit accord” as to Hudson News because the allegations in the Complaint and PAC are “not only compatible with, but indeed . . . more likely explained by, lawful, unchoreographed free-market behavior.” *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 567); *see also Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 327 (2d Cir. 2010), *cert denied*, 131 S. Ct. 901 (2011) (“allegations of parallel conduct that could ‘just as well be independent action’ are not sufficient to state a claim”) (quoting *Twombly*, 550 U.S. at 557); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d at 909 (“the plausibility of plaintiffs’ conspiracy claim is inversely correlated to the magnitude of defendants’ economic self interest . . .”). The remaining few allegations against Hudson News

– if accepted as true – are either irrelevant or reflect economically rational action.⁷

As such, they provide no basis for inferring conspiracy.

First, as the District Court concluded, the allegation that Hudson News poached Anderson employees (Compl. ¶ 57 (AA32)) is “plainly insufficient to plausibly allege an antitrust claim as to Hudson” News. (Op. at 18 (AA63).) Additional gloss introduced in the PAC – that Hudson News “flew one of Anderson’s key employees to its headquarters in New Jersey in an attempt to convince him to leave Anderson” (PAC ¶ 78 (AA94)) – fails to establish a plausible basis for inferring Hudson News conspired with co-defendants to put Anderson out of business. Instead, the allegation is consistent with “lawful, unchoreographed free-market behavior.”⁸ *Iqbal*, 129 S. Ct. at 1950.

⁷ Anderson seems to concede that Hudson News has obvious economic incentives to best its competitors and/or benefit from Anderson’s self-inflicted wounds. (See Appellants’ Br. at 26 (“Hudson stood to profit” if Anderson and Source were driven out of business); *id.* at 55 (eliminating “two of [Hudson’s] fiercest competitors” would allow Hudson “to enjoy an exclusive territory and to charge higher prices”).) That Hudson or any other wholesaler would be willing to replace a departed competitor and thereby grow its business is unsurprising. Yet, of course, Anderson has withdrawn any allegation that Hudson did, in fact, assume responsibility for servicing former Anderson customers. (See June 9, 2010 Ltr. at 2 (SA164).)

⁸ Indeed, the flip side of Anderson’s allegations – “no-poach” agreements between competitors – have been found to be anticompetitive and even subject to recent enforcement action under Section 1 of the Sherman Act. See, e.g., Competitive Impact Statement, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-

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Second, there is another inconsequential allegation found in the PAC’s claim that Hudson News “imposed price increases [on magazine retailers] in Pennsylvania.” (PAC ¶ 82 (AA96).) This indicates nothing other than somewhere in Pennsylvania some prices Hudson News charged increased. It is particularly meaningless given Anderson’s withdrawal of the allegation that Hudson News took over some of Anderson’s former retail accounts.⁹ (June 9, 2010 Ltr. at 2 (SA164).)

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01629 (D.D.C. Sept. 24, 2010), *available at* <http://www.justice.gov/atr/cases/f262600/262650.htm> (“The effect of these [no-poaching] agreements was to reduce Defendants’ competition for highly skilled technical employees (‘high tech employees’), diminish potential employment opportunities for those same employees, and interfere in the proper functioning of the price-setting mechanism that would otherwise have prevailed. Defendants’ agreements are naked restraints of trade and violate Section 1 of the Sherman Act, 15 U.S.C. § 1.”).

- ⁹ On this subject, a further accounting is necessary. Tucked away in a footnote, Anderson makes the counterfactual statement that, in its June 9, 2010 letter to the District Court, it “intended only to clarify that Hudson had not purchased Anderson assets; it never withdrew the allegation that the defendants intended to reward Hudson and News Group for their roles in the conspiracy by allocating Anderson’s and Source’s prior businesses to Hudson and News Group.” (Appellants’ Br. at 26 n.6.) That claim is misleading in several respects. First, although the letter does attempt to “clarify” that the Complaint did not allege Hudson News purchased Anderson’s assets at “fire sale” prices, that was not its only purpose. The letter also explicitly withdrew any allegation that Hudson News took over any of Anderson’s accounts after it went out of business. To quote, “because the allegation that Hudson and News Group entered into agreements to serve Anderson’s former retailer-customers is

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Third, Anderson’s suggests that “Hudson and News Group were rewarded for their agreement to support the conspiracy [because] each now has a virtual monopoly in its respective territory.” (Appellants’ Br. at 17.) But that is neither an accurate interpretation of the Complaint nor a basis for inferring conspiracy.¹⁰ (As noted, Anderson indicated it withdrew its claim that Hudson News took over

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applicable only to News Group, Anderson hereby withdraws that allegation from the second sentence of paragraph 59, and from paragraph 89 of the complaint as to Hudson.” (June 9, 2010 Ltr. at 2 (SA164) (footnote omitted).) Anderson also fails to mention that, although it represented to the District Court that it withdrew these allegations against Hudson News, they reemerged in the PAC. (PAC ¶ 109 (AA103) (“As a result of defendants’ conduct, Anderson’s retail customers have terminated their retail supply and retail service agreements and their business relationships with Anderson, and have obtained or sought to obtain magazine product from alternative sources, principally News Group and defendant Hudson.”).) No matter. Even if accepted as true, this allegation does nothing more than indicate that Hudson News entered into agreements with former Anderson customers (who presumably were in need of a magazine distributor); it does not create a factual predicate for inferring conspiracy.

¹⁰ Anderson’s phrasing here is curious. Is the allegation that Hudson News agreed to “support the conspiracy,” *i.e.*, agree to supply magazines to retailers previously serviced by its competitors? Or did Hudson News enter into an agreement to “destroy Anderson’s business”? At one moment Hudson is playing a lead role in the conspiracy (*see* PAC ¶ 63 (AA88) (“Hudson was at the heart of the conspiratorial meetings”)); the next it is a secondary player – a “compliant” wholesaler (*see* PAC ¶ 44 (AA82) (publishers and national distributors “divid[ed] the Anderson and Source business among the two remaining, compliant wholesalers”)) that took actions that “support[ed]” someone else’s conspiracy. With Hudson as an unnatural bolt-on to its already strained conspiracy allegations, Anderson struggles to keep its story straight.

Anderson's retail accounts. The Complaint and PAC further make clear that Source survived the conspiracy and presumably retained its retail accounts. (Compl. ¶ 76 (AA39); PAC ¶ 96 (AA100-01).) Thus, it is an unanswered mystery as to how Hudson News was "rewarded" for its alleged participation in the conspiracy.¹¹ Of course, even if the Complaint did allege that Hudson News pursued opportunities to expand its wholesale operations in response to changing market conditions, that economically rational conduct could not be the basis for inferring conspiracy. *See Twombly*, 550 U.S. at 566 ("there is no reason to infer that the [defendants] had agreed among themselves to do what was only natural anyway.").¹²

The allegations in Anderson's Complaint and PAC regarding Hudson News are insufficient to meet the plausibility standard outlined by the Supreme Court in *Twombly*. As such, Hudson News respectfully submits that this Court should

¹¹ This assertion in Anderson's brief also stands in tension with the Complaint's allegation that Hudson News "stand[s] to acquire monopolistic market power." (Compl. ¶ 76 (AA39).)

¹² Anderson's brief makes no mention of the proposed new allegation of a conversation between the CEO of Hudson News and the CEO of Anderson that took place *sometime in 2008*. (PAC ¶ 47 (AA82).) That is little surprise, given that, on its face, it bears no relevance to an alleged conspiracy that was allegedly conceived and carried out during January 2009.

affirm the District Court's grant of Hudson News' Motion to Dismiss the Original Complaint.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the District Court's judgments in their entirety.

/s/ D. Jarrett Arp

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the accompanying Brief for Defendants-Appellee Hudson News Distributors L.L.C. contains 4,900 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief was prepared in proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2003) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

April 18, 2011

/s/ D. Jarrett Arp
D. Jarrett Arp