UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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CASES

In response to Anderson's Opposition Brief ("Opp."), the defendants that submitted the Joint Moving Brief ("JMB") submit this Reply Brief in further support of their motion to dismiss Anderson's Complaint for failure to state a claim.[1]

PRELIMINARY STATEMENT

Anderson's rhetoric and hyperbole cannot hide facts which establish that its allegations of "conspiracy" are conclusory, simply make no sense, and do not meet the plausibility standard.

- In mid-January 2009, when Anderson and Source sought to impose a prohibitive cost increase on publishers, effective February 1, Anderson precipitated reactions by each defendant that would inevitably be quick and virtually contemporaneous;

- each defendant's reaction -- seeking alternatives to the price increase -- was a natural business reaction that would be expected absent collusion;

- although parallel conduct alone would not be enough to state a claim here, defendants' alleged reactions to the mid-January announcement were not parallel, but rather each defendant responded differently, including one defendant that allegedly waited to see what another would do;

- the single "meeting" alleged did not involve all alleged conspirators and there is nothing to support the conclusion that the "meeting" was in furtherance of a conspiracy;

- even if defendants had market power as alleged by Anderson, it would be absurd for them to diminish that power by reducing their wholesaler outlets from four to two; and

- the sole motive alleged to support the inference for this reflexive conspiracy, Anderson's advocacy of SBT, is not plausible. Anderson concedes that SBT was proposed by the retailers and not it; Anderson's and Source's advocacy for and implementation of SBT long preceded the alleged conspiracy, yet they received the majority of the publishers' business until the surcharge increase announcement; the alleged conspiracy purportedly began shortly after the Anderson surcharge announcement and not the beginning of Anderson's advocacy for SBT; defendants resumed business with Source after it rescinded its price increase, although Source did not change its position on SBT; and it would be easier for two than four wholesalers to impose price increases on the publishers, including increases to cover the costs of SBT.

[1] The abbreviations used in this brief are the same as those in the JMB. This brief does not address Anderson's state law claims, which should be dismissed for the reasons set forth in the JMB and DSI's moving and reply briefs.

Stripped of its conclusory labels, the Complaint provides no facts or motive to either: (i) support an inference that defendants' refusals to accept Anderson's large price increase were the product of a conspiracy; or (ii) impose the coercive burdens, risks and costs of antitrust litigation on defendants in the face of *Twombly*'s admonitions.

ARGUMENT

A. *Starr* Confirms That Anderson's Implausible "Conspiracy" Should Be Dismissed.

Anderson's reliance on *Starr v. Sony BMG Music Entertainment*, 2010 U.S. App. LEXIS 768 (2d Cir. 2010) (Opp., *passim*), is misplaced.[2] In fact, *Starr* reconfirms the continued vitality of key holdings in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), which mandate dismissal of the Complaint. *Starr* holds, *inter alia*, that: (1) the Court should ignore conclusions masquerading as factual allegations; (2) factual allegations of conspiracy must be "plausible" and suggest a "preceding agreement"; and (3) while "highly unusual" parallel behavior by competitors may suggest conspiracy, their "natural reaction" to "common stimuli" does not. 2010 U.S. App. LEXIS 768, at **7, 12, 15-17.

Starr also did not disturb the practice of considering unilateral business explanations as part of the motion to dismiss analysis, as engaged in by the Supreme Court in *Twombly* and this Circuit in *In re Elevator Antitrust Litig*, 502 F.3d 47, 51-52 (2d Cir. 2007). Indeed, *Starr* quotes the portion of *Twombly* that addressed "natural" business explanations for the challenged conduct which rendered the alleged conspiracy implausible. 2010 U.S. App. LEXIS 768, at *17.

Moreover, the detailed allegations emphasized by the Second Circuit in *Starr* highlight how far Anderson's Complaint falls from one that adequately alleges an antitrust claim. The *Starr* complaint (Ex. C, Anziska Reply Dec.) set forth in detail a conspiracy that was predicated

[2] We acknowledge that the Second Circuit rejected some of the District Court's pronouncements on the burdens imposed on an antitrust plaintiff's pleading. *See* JMB II.B.

on parallel conduct by the defendants and other actions that were "highly unusual" market behavior, *i.e.*, joint ventures to sell music directly to consumers over the Internet for a large fee with restrictions limiting the right to download and transfer music. In *Starr* it was alleged that: (i) "none of the defendants dramatically reduced their prices for Internet music . . . despite the fact that all defendants experienced dramatic cost reductions. . ."; (ii) "when defendants began to sell Internet music through entities they did not own or control, they maintained the same unreasonably high prices as the joint venture"; (iii) "defendants used MFNs in their licenses that had the effect of guaranteeing that the licensor who signed the MFN received terms no less favorable than terms offered to other licensors"; (iv) they "used the MFNs to enforce a wholesale price floor . . ."; (v) all defendants refused to do business with the number two Internet music retailer that charged a lower price; and (vi) "defendants raised wholesale prices" despite reductions in costs due to technological advances. The Court also focused on additional allegations suggesting a preceding agreement among defendants: (i) one commentator said that "nobody in their right mind would want to use" defendants' product; (ii) the CEO of one defendant suggested that one of the joint ventures "was formed expressly as an effort to stop the continuing devaluation of music"; (iii) defendants attempted to hide the MFNs to avoid antitrust scrutiny; and (iv) the conduct was the subject of three separate government investigations.

Unlike the complaint in *Starr*, Anderson has not pled facts suggesting a "preceding agreement" or "unnatural" parallel behavior; to the contrary, Anderson has alleged non-parallel rational behavior in reaction to "common stimuli" -- Anderson's non-negotiable surcharge of $.07 per magazine shipped ($.21 per magazine sold) plus $70 million of inventory costs that it required each publisher and distributor to accept in writing within days or be cut-off by

Anderson (JMB at 2; Time Moving Br. at 5).[3] Just as the *Twombly* defendants "naturally" responded to a negative stimulus by pursuing similar but predictable policies to protect their business interests, defendants here "naturally" responded to Anderson's non-negotiable surcharge by refusing to pay it and pursuing alternative distribution arrangements (JMB at 8-9).

B. Anderson Has Failed to Allege Facts Supporting its Conclusions of Conspiracy.

While Anderson claims it has alleged "parallel conduct," "inter-competitor meetings" and "communications" preceding a "scheme," an "agreement to act in concert," "inculpatory admissions by high-ranking executives" of certain defendants and "conduct contrary to defendants' economic self-interest absent collusion" (Opp. at 2-5), unlike the *Starr* plaintiffs, it has not alleged any facts supporting these naked conclusions.

•Throughout the pleading, Anderson uses the word "defendants," in an effort to mask its failure to allege what each defendant purportedly did (Comp. ¶¶47, 55), but such general allegations do not satisfy its pleading requirements (JMB II.D).[4] While Anderson claims that it alleges specific facts about all or most defendants, it only cites "specific" allegations about three of the ten defendants, Curtis, TWR and Kable (Opp. at 2-3, 19). Anderson has not alleged a single fact about publishers Rodale and Hachette or marketing company DSI. The only facts

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[3] Even though Anderson alleges that it "announced the surcharge" and "explained the industry constraints compelling that measure" through an interview by its CEO Charles Anderson (Comp. ¶42), it now contends that the interview should be ignored on this motion (Opp. at 29 n. 20). Anderson cites inapplicable authority (*In re Bausch & Lomb Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 24062 (W.D.N.Y. 2003)) where, unlike here, the interview was not incorporated by reference in the pleading and the plaintiff challenged the authenticity of the transcript. This interview, however, is specifically referred to and integral to the Complaint and its veracity is not challenged. Nor is it disputed that defendants' alleged responses to Anderson's imposed surcharge are at issue and, as such, the interview announcement about the surcharge is at the very core of the pleading. The interview therefore is appropriately considered on a motion to dismiss. *See Int'l Audiotext Network, Inc. v. Am. Tel. & Telegraph Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (considering, on motion to dismiss antitrust claims, contract between defendant and third party to which complaint referred and authenticity of which neither party challenged); *Condit v. Dunne*, 317 F. Supp. 2d 344, 357 (S.D.N.Y. 2004) (considering, on motion to dismiss, the full text of interview transcripts that were basis of plaintiff's claims but which plaintiff quoted only selectively in the complaint).

[4] Apparently recognizing its failure to plead the necessary specifics about many of these defendants, Anderson buries in footnotes a request to amend the Complaint (Opp. at 22 n. 14; 33 n. 23). This request should be denied for the reasons set forth in DSI's reply brief.

alleged about publishers AMI and Bauer are that each had a separate cordial business meeting with Anderson in mid-January, hardly indicative of conspiracy. There are no factual allegations that these defendants spoke with other defendants either before or during the "conspiracy," coordinated their responses to Anderson, or "cut off" or stopped doing business with Anderson before it shut its doors in early February. In fact, it is clear that AMI continued to ship magazines to Anderson after the alleged boycott (JMB at 6).[5]

•While Anderson claims that it asserted a "parallel" response by defendants to its imposition of the surcharge (Opp. at 2, 15), its factual allegations belie this claim. The only common element is that they each reacted, as compelled by Anderson's time-sensitive mandate. Anderson has alleged that the substance of each defendant's reaction differed.[6] Anderson now recasts its allegations, claiming that all defendants misled Anderson during negotiations over the surcharge in order to collect outstanding receivables (Opp. at 22). The Complaint in fact alleges that a single defendant (TWR) engaged in such conduct (Comp. ¶¶52-54).[7]

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[5] Anderson claims (Opp. at 16 n. 8) that the Court may not consider the Delaware Chancery Court's finding that AMI continued to ship magazines to Anderson after the surcharge, but rather only the fact that a prior proceeding occurred. Where, as here, the adversely affected party was involved in the prior proceedings, the doctrine of collateral estoppel applies and "a court may take judicial notice" of findings from those proceedings. *Jacobs v. Law Offices of Leonard N. Flamm*, 2005 WL 1844642, at *3 (S.D.N.Y. 2005) (granting motion to dismiss and taking judicial notice of finding from prior proceeding that involved same parties, which finding contradicted plaintiff's statements in later proceeding). Were the rule otherwise, a party could never move to dismiss based on res judicata. *See Dewitt v. One Beacon Ins. Co.*, 2009 U.S. App. LEXIS 5435, at *2 (2d Cir. 2009) (affirming dismissal of claims subject to res judicata). Here, Anderson and AMI were parties to the Delaware proceeding. (Exs. D-E, Anziska Reply Dec.). The authorities cited by Anderson are inapplicable because, in each, the party adversely affected by judicial notice of the prior court findings was not party to the prior proceeding.

[6] As the JMB explains, (i) the largest distributor (Curtis), having been unsuccessful in a past effort to obtain alternative distribution, waited to see how TWR reacted to the surcharge; (ii) another distributor (Kable) allegedly tried to reach an accommodation with Anderson to avoid the surcharge; (iii) another (CMG) allegedly came close to an agreement on a modification of the surcharge; (iv) a fourth (TWR) allegedly induced Anderson to believe there was an agreement on a modified surcharge so that it could be paid for outstanding receivables; and (v) a publisher (AMI) continued to ship magazines to Anderson until it closed its doors (JMB at 22).

[7] Anderson's cited price-fixing cases predicated on parallel conduct are distinguishable from the facts alleged here. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27 (D.D.C. 2008) (class alleged a program instigated by railroads at specific trade association meetings to remove fuel from the existing cost escalation index and to instead impose a new uniform fuel surcharge which was complicated and novel to earn excessive profits); *In*

•Anderson claims that in paragraph 55 of the Complaint, it supports its conclusion that "defendants" engaged in inter-competitor conspiratorial "meetings" and "communications" (Opp. at 3, 17-18). It does not. That paragraph merely states that "defendants" attended unidentified "meetings" and refers to a single "meeting" among two distributors (Curtis and TWR) and wholesalers (Hudson and TNG) at some point in January. Anderson fails to allege what was said or what was the result of that "meeting." *See* JMB at 8.

•Anderson claims that it has alleged "an agreement to act in concert during the precise time that defendant-competitors were ostensibly acting independently" (Opp. at 3). The paragraphs cited, however, merely recite conclusions: paragraph 46 of the Complaint simply concludes that "such concerted action is exactly what happened..."; paragraph 47 baldly alleges that "in late January," all defendants, "acting in concert," "cut off Anderson..."; paragraph 58 is a similarly conclusory allegation that the "goal of the conspiracy was to ensure that publishers and national distributors gained control over ... the channel..."; and paragraph 62 concludes that the structure of the industry compelled retailers to accept new wholesalers.

•Anderson asserts that as in *Starr*, it has alleged "inculpatory admissions by high-ranking executives of certain of the defendants" (Opp. at 3, 9, 19). A review of these "admissions" reveals that they are not "inculpatory," and, in fact, actually undercut an inference of conspiracy. Anderson claims it is damning that the president of Curtis said he "would like to get this worked out," but that Curtis was waiting to see what industry leader TWR did. Such conduct, however, is perfectly legitimate behavior, especially considering the substantial credit risk that Curtis would face if TWR terminated its relationship with the already financially-shaky Anderson (JMB

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re Southeastern Milk Antitrust Litig., 555 F. Supp. 2d 934 (E.D. Tenn. 2008) (milk bottlers engaged in parallel conduct to allegedly fix prices for milk and foreclose independent milk bottlers from competition); *In re Potash Antitrust Litig.*, 2009 U.S. Dist. LEXIS 102623 (N.D. Ill. 2009) (potash producers engaged in parallel supply restrictions and price increases); *In re Air Cargo Shipping Services Antitrust Litig.*, 2009 U.S. Dist. LEXIS 97365 (E.D.N.Y. 2009) (numerous airlines admitted to engaging in criminal price fixing of air cargo shipping services).

at 7). Indeed, the fact that it was watching and waiting is inconsistent with having a pre-existing conspiratorial agreement. Anderson also attempts to infer collusion from the silence of Richard Jacobson of TWR after Anderson allegedly advised Jacobson that Curtis was waiting to see what TWR did. Anderson's assertion that Curtis was considering engaging in perfectly permissible parallel conduct, however, required no response. In fact, this alleged "admission" negates an inference of conspiracy because Anderson's coordinator role explains any parallel behavior.

•Anderson's allegations that Curtis and Kable made "inculpatory admissions" when allegedly attempting to entice Anderson to join the "conspiracy" (Opp. at 9) are actually inconsistent with a conspiracy against Anderson. Tellingly, Anderson misdescribes its allegations about the "admissions." The Complaint states that to avoid the price increase: (i) Curtis suggested to Anderson that it allow Source to go out of business and then achieve a monopoly position and charge more to retailers (Comp. ¶49); and (ii) Kable suggested that Anderson enter into exclusive agreements in certain regions in order to extract additional profits from retailers (Comp. ¶50). These divergent proposals only suggest unilateral attempts to find a way to allow each distributor's clients to continue to use Anderson and avoid a significant price increase.[8]

•To avoid the obvious conclusion that the actions it has alleged were the natural, independent reaction to a common event, Anderson argues that "if any particular publisher or distributor defendant had acted unilaterally to cut off Anderson . . . and none of its competitors had joined in its decision[,] that defendant would have suffered substantial losses because . . . its magazines would not be distributed in the key markets served by Anderson . . . ." (Opp. at 24). It thus is

[8] The other alleged "admissions" (Opp. at 9, 19) also do not support an inference of conspiracy. An alleged statement by Jacobson to nonparty Source that TWR supported eliminating SBT and pushing costs down to the retailers does not suggest collusion, but merely suggests that TWR believed that publishers and distributors resisted SBT to avoid the loss of legitimate revenues (JMB at 8). Moreover, an email by Curtis warning retailers that, because of Anderson's and Source's aggressive behavior, there may only be two remaining wholesalers in the marketplace is simply a warning by a distributor to end-users of possible increased pricing power by wholesalers.

Anderson's position that the defendants had only two choices: accede to the imposition of millions of dollars in additional costs or collectively boycott Anderson. This contention is not tenable and was long ago rejected by the Second Circuit, which held that a similar migration by publishers within the magazine distribution network does not suggest an antitrust conspiracy. *See Interborough News Co. v. Curtis Publ'g Co.*, 225 F.2d 289 (2d Cir. 1955) (JMB at 15-16).[9]

The Sixth Circuit also rejected a similar argument by airline ticket brokers alleging a conspiracy by airlines to reduce, cap, and eventually eliminate the payment of base commissions in order to drive them out of business. *See In re Travel Agent Comm. Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009). The brokers alleged that, absent collusion, it would have been contrary to each individual airline's self-interest to cut or eliminate commissions and risk losing significant profits to its competitors. *Id.* at 907-908. The Sixth Circuit affirmed dismissal of the complaint on a Rule 12(b)(6) motion, making several observations applicable to Anderson's claim: (i) several prior unsuccessful efforts by individual airlines to cut commissions did not support an inference of collusion; (ii) each defendant could have made a cost-benefit analysis of the financial impact of payment of current commissions by market participants as opposed to the business lost if others did not follow its lead; (iii) the decision was reversible: "it was simple . . . for a leader airline to innovate and then wait and see . . . [and] if the industry did not follow, [it] could simply retract and cut"; and (iv) "if we follow plaintiffs' argument to its logical end, it is difficult to imagine a scenario where a commission cut could ever occur without collusion." *Id.*

Here, similarly: (i) Curtis's prior unsuccessful effort to switch from Anderson does not support an inference of conspiracy; (ii) each defendant plausibly could have engaged in a cost-benefit analysis and decided not to pay Anderson millions; and (iii) if, as claimed by Anderson,

[9] Anderson's efforts to distinguish *Interborough* are unpersuasive because the defendants here are also alleged to have engaged in diverse, non-parallel conduct and it rejects the same inference of conspiracy asserted here.

the surcharge imposition was a negotiation tactic (Opp. at 29), then a publisher or distributor could have decided not to ship Anderson magazines in February and then reversed its decision later if it was unable to find alternatives to Anderson's distribution network.[10]

C. Anderson's Proffered Rationale for the Conspiracy Lacks "Plausibility."

Anderson's claim that publishers and distributors had a "compelling motive" to boycott Anderson and Source because of their advocacy of SBT (Opp. at 23) is implausible because: (i) SBT allegedly was sought by retailers, and Anderson's demise would not stop retailers' implementation of SBT; (ii) the conspiracy allegedly started only after Anderson's surcharge announcement, but Anderson and others had long been advocating SBT, the use of which was prevalent among retailers; (iii) defendant publishers and distributors resumed dealing with Source after its rescission of the surcharge, despite its SBT advocacy; (iv) the two remaining non-"boycotted" wholesalers (TNG and Hudson) would be in a better position to implement SBT than Anderson was as the result of their increased market power; and (v) Anderson claims that it was "invited" to join the conspiracy despite its advocacy of SBT (JMB at 3; Opp. at 9-10). The absence of a plausible motive to conspire strongly militates against an inference of conspiracy.

Anderson also claims that the boycott is plausible because defendant publishers and distributors control 80% of magazine content and they could therefore collectively "control" Hudson and TNG (Opp. at 27). But, such purported control would exist with or without a conspiracy and it could best be maintained by fragmenting the wholesale "market," not

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[10] *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999) (Opp. at 28-29), is inapposite. There, archery manufacturers and distributors allegedly conspired with their archery industry trade association to boycott a trade show promoter that refused to pay a greater percentage of its show revenues to the trade association or sell its show to the association. Applying the pre-*Twombly* standard, the Court found that the defendants instigated the events and had economic incentives to destroy the show, including establishing a new show in which they had an interest and favoring themselves over competitors. Here, it was Anderson that initiated the events, the defendant publishers and distributors have no financial interest in the two remaining wholesalers (Hudson and TNG), and there was no rational reason for them to boycott one of their few outlets for distribution.

consolidating it. Similarly, Anderson's conjecture that defendants were willing to forego short term sales in exchange for long-term control over distribution (Opp. at 27-28) ignores: (i) the postulated market power of the two remaining wholesalers; (ii) Anderson's admission that the publishers were suffering from depressed sales and advertising revenues in January 2009 (Ex. B, pp. 6-7); and (iii) the legitimate economic justification for avoiding many millions in surcharge fees. Finally, the conclusion that $120 million owed by Anderson to defendants in receivables did not motivate them to keep Anderson in business (Opp. at 20 n. 10) defies logic and ignores the current proceedings in the Delaware Bankruptcy Court.[11]

CONCLUSION

Defendants respectfully request that this Court dismiss the Complaint with prejudice.

Dated: February 2, 2010

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[11] Anderson claims that, at the Source TRO hearing, the Court found that the more specific allegations in Source's complaint were well-pleaded (Opp. at 10). In granting the TRO, however, the Court focused on the potential irreparable harm to Source if defendants no longer supplied it with magazines and not the conspiracy allegations. In fact, the Court permitted defendants to move to dismiss Source's complaint for failure to plead a conspiracy.

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