# 10-4591-cv

## United States Court of Appeals

*for the*

## Second Circuit

ANDERSON NEWS, L.L.C., LLOYD T. WHITAKER, as the Assignee under an Assignment for the Benefit of Creditors for ANDERSON SERVICES, L.L.C.,

*Plaintiffs-Appellants,*

– v. –

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

*Defendants-Appellees.*

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

# BRIEF FOR DEFENDANTS-APPELLEES AMERICAN MEDIA, INC. AND DISTRIBUTION SERVICES, INC.

DAVID G. KEYKO
PILLSBURY WINTHROP SHAW PITTMAN LLP
*Attorneys for Defendants-Appellees American Media, Inc. and Distribution Services, Inc.*
1540 Broadway
New York, New York 10036
(212) 858-1000

# CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for American Media, Inc. ("AMI") and Distribution Services, Inc. ("DSI") certifies that AMI is a nongovernmental corporate party that is privately held and has no parent corporation and no publicly held corporation owning 10% or more of its stock. DSI is wholly-owned indirectly by AMI and is a nongovernmental corporate party.

April 18, 2011

s/ David G. Keyko

David G. Keyko

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly determine that plaintiffs failed to state a claim for violation of 15 U.S.C. § 1 against AMI and DSI?

2. Did the district court properly determine that plaintiffs failed to state claims for tortious interference and conspiracy under common law against all defendants?

## PRELIMINARY STATEMENT

Defendants-Appellees AMI and DSI incorporate by reference the detailed factual summary, recitation of the history of this litigation, and arguments for affirming the district court set forth in the briefs of Time Inc. and Time/Warner Retail Sales & Marketing, Inc. (together, "Time") and Bauer Publishing Co., L.P. ("Bauer"). AMI and DSI submit this separate brief to address (i) the particular antitrust allegations against them and (ii) the claims against all defendants for tortious interference and civil conspiracy under New York common law.

## STATEMENT OF FACTS[1]

Plaintiffs-Appellants Anderson News L.L.C. ("Anderson News") and Anderson Services L.L.C. (together, "Anderson") comprised the second largest magazine wholesaler in the United States, at least until February 2009 when they

[1] Unless otherwise stated, the facts are based on allegations set forth in the Complaint (Docket No. 1) and Proposed Amended Complaint ("PAC") (Docket No. 92 Ex. A), and AMI and DSI have accepted the allegations only for purposes of this appeal.

went out of business. Compl. ¶¶ 19, 66 (Appendix of Plaintiffs-Appellants ("AA") 22, 35). As a wholesaler, Anderson bought magazines from publishers for 50 to 60 percent of the cover price and then sold and shipped them to retailers for 70 to 80 percent of the cover price. Compl. ¶¶ 29-30 (AA24). Anderson also was responsible for picking up unsold magazines from retailers and tabulating and destroying them, often by selling them as scrap. Compl. ¶ 30 (AA24); *see also* Docket No. 67 Ex. B ("Interview Tr.") (Supplemental Appendix of Defendants-Appellees ("SA") 35) (noting Anderson's $6 million loss in scrap paper income). AMI was one of the publishers from which Anderson bought magazines, along with defendants-appellees Bauer, Hachette Filipacchi Media, U.S. ("Hachette"), Rodale Inc. ("Rodale"), and Time Inc. Compl. ¶¶ 8-12 (AA20-21).

Publishers retain national distributors to manage their relationships with wholesalers, to provide marketing and accounting services, and sometimes to guarantee the wholesaler's payment obligations to the publisher. Compl. ¶¶ 13, 27 (AA21, 23-24). Defendant-Appellee Curtis Circulation Company ("Curtis") served as AMI's national distributor. Compl. ¶ 14 (AA21). Other national distributors servicing the defendant publishers include defendants-appellees Kable Distribution Services, Inc. ("Kable"), Time/Warner Retail Sales & Marketing, Inc. ("TWR"), Compl. ¶¶ 15, 17 (AA21, 22), and non-party Comag Marketing Group LLC ("Comag"), Compl. ¶ 28 (AA24).

DSI, a subsidiary of AMI, provided sales and marketing services to publishers, including AMI, Bauer, Hachette, and Rodale. Compl. ¶ 16, 28 (AA22, 24). It is not alleged to have had any business dealings with Anderson.

**A. Anderson Announces a Substantial Price Increase**

On January 14, 2009 Charles Anderson, the CEO of Anderson, used a call-in interview with an industry publication, *The New Single Copy*, to announce publicly that Anderson was imposing a distribution surcharge and passing on inventory costs to publishers (collectively, the "Surcharge/Inventory Charge") in order to return to profitability. Compl. ¶ 39, 42 (AA26-27). First, Anderson announced a $.07 surcharge on publishers for all the magazine copies it received. Compl. ¶ 39 (AA26-27). This actually amounted to approximately $.35 per magazine sold for many publications because, for nearly half of newsstand magazine titles, only one in five magazines that wholesalers handle is actually sold by a retailer. *See* PAC ¶ 41 (AA80). Second, Anderson announced that it was shifting to publishers the carrying cost of inventory in retail chains where Anderson had negotiated scan-based trading terms[2] — costs which amounted to $70 million. Compl. ¶ 39 (AA26-27); Interview Tr. (SA34, 36). Anderson demanded that all the publishers sign a written agreement to pay the Surcharge/Inventory Charge for all magazines

[2] Scan-based trading is the automatic reporting of sales by retailers through electronic checkout scanners. Retailers then dispose of the unsold inventory. Compl. ¶ 33 (AA25). This system results in the loss of about 5% of magazine sales because of scanner error. Compl. ¶ 34 (AA25).

distributed on or after February 1, 2009. Compl. ¶ 39 (AA26-27); Interview Tr. (SA36). Mr. Anderson made clear that Anderson would otherwise refuse to distribute a publisher's magazines if it did not have a signed agreement by that date. Interview Tr. (SA36). In the interview, Mr. Anderson made clear that the Surcharge/Inventory Charge was not negotiable. Interview Tr. (SA35-36, 42). Mr. Anderson explained that Anderson's business was not profitable, that the price increase was necessary for Anderson to remain viable, and that if publishers did not accept the price increase Anderson would exit the business. Interview Tr. (SA34, 39).

Mr. Anderson personally informed AMI and certain other publishers of the Surcharge/Inventory Charge in advance of the public announcement during meetings on January 12 and 13, 2009. Compl. ¶ 41 (AA27). At these "cordial" meetings, the publishers "appeared — at least on the surface — to respond amicably." *Id*. No representative at Anderson is alleged to have had any contact with AMI about the Surcharge/Inventory Charge subsequent to the public announcement on January 14 or to have told AMI at any time that the Surcharge/Inventory Charge was negotiable. Anderson also does not allege that it told AMI's distributor, Curtis, that the Surcharge/Inventory Charge was negotiable or that it made any attempt to negotiate the Surcharge/Inventory Charge on AMI with Curtis.

Anderson is not alleged to have had any contact with DSI regarding the Surcharge/Inventory Charge.

**B. AMI Does Not Accept the Surcharge/Inventory Charge**

After Anderson announced the Surcharge/Inventory Charge, nonparty Source, also a magazine wholesaler, announced that it too would impose an identical surcharge. Compl. ¶¶ 23, 50 (AA23, 30). The two national wholesaler defendants Hudson News Distributors LLC ("Hudson") and The News Group, LP ("News Group"), Compl. ¶¶ 21, 22 (AA22, 23), are not claimed to have followed Anderson and sought a surcharge or inventory charge. Source is alleged to have withdrawn its surcharge demand at some point in January. PAC ¶ 71 (AA91).

Neither AMI nor any other publisher, whether named as a defendant in this litigation or not, is alleged to have agreed to the Surcharge/Inventory Charge. In the case of AMI, Anderson was under contract to distribute its magazines. Docket No. 75, Ex. D at 8 (SA151). Thus, as far as AMI was concerned, the Surcharge/Inventory Charge could not be applied to it.

The national distributors are alleged to have had varied responses to the price increase announcement. Compl. ¶¶ 49-55 (AA29-32). Curtis, allegedly acting on behalf of its clients (including AMI), is said to have told Mr. Anderson they "would like to get this worked out" but would "have to go with whatever [TWR] does." Compl. ¶ 49 (AA29). Kable is said to have discussed offering

Anderson exclusivity in certain areas in exchange for Anderson dropping the surcharge, but Anderson refused. Compl. ¶ 50 (AA30). TWR is said to have offered to increase the discount to Anderson off the cover prices for all Time or *People* weeklies in return for Anderson making a $13 million payment to TWR. Compl. ¶ 53 (AA31). No national distributor is alleged to have agreed to the Surcharge/Inventory Charge. Compl. ¶ 43 (AA28).

### C. Anderson Exits the Business Without Distributing AMI's Magazines

Anderson alleges that as of February 1, Time, Bauer, Hachette and Rodale cut Anderson off. Anderson concedes that AMI continued to send monthly magazines to Anderson after January 31, but asserts that the magazines were already "in the pipeline." PAC ¶ 66 (AA89-90). Only Comag is said to have reached some other arrangement with Anderson. Compl. ¶¶ 43, 51 (AA28, 30); PAC ¶ 59 (AA87). Anderson closed its doors on February 7, six days after purportedly being cut off, allegedly because it began to "hemorrhage money" during those six days. Compl. ¶¶ 65, 66 (AA35). Unlike Source, it never withdrew its demand for the surcharge (or the inventory charge), nor did it seek an injunction to require the publishers to continue to send it magazines — even after Source obtained such relief to maintain the status quo. PAC ¶ 96 (AA100-101).[3]

[3] The district court made clear that the temporary restraining order did not constitute a judgment on the merits. Docket No. 88 (Mot. to Dismiss Hr'g Tr.) at 50:10-17 (SA214).

At the time Anderson closed, it was holding AMI magazines because AMI continued to ship its publications to Anderson after February 1. (*See generally infra* Section D discussing the Porche Affidavit.) AMI sued Anderson in Delaware Chancery Court and obtained a TRO requiring Anderson to turn over to AMI the magazines shipped in February. Docket No. 75 Exs. D & E (SA144-62).

On March 2, certain Anderson creditors (not allegedly the defendants) filed an involuntary bankruptcy petition against Anderson News. Compl. ¶ 68 (AA36).

**D. Proceedings Below**

On March 10, 2009, Anderson filed this lawsuit. The Complaint alleged that "in 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." Compl. ¶ 47 (AA29).[4] DSI is conspicuously absent from this list of purported wrongdoers.

[4] On April 17, 2009 defendants AMI, DSI, Curtis, Bauer, Hachette, Rodale, and Hudson (together, the "Movants") moved to disqualify counsel for Anderson, Kasowitz, Benson, Torres & Friedman LLP ("KBTF"), which also represented Source in a prior, similar antitrust lawsuit involving most of the same defendants. Docket No. 45 (Am. Mem. of Law in Supp. of Mot. to Disqualify) at 1. Movants argued that KBTF's representation of both Source and Anderson created conflicts of interest requiring disqualification. *Id*. In addition to the grounds filed under seal, Movants argued that KBTF could not avoid using confidential information obtained through its representation of Source in advising Anderson, violating its duties of confidentiality in the Source case. In particular, KBTF was privy to confidential settlement discussions between Source and the defendants and the terms of confidential settlement agreements that resulted. *Id*. at 1-2. Moreover, the interests of Source and Anderson were in conflict, because Source benefitted from Anderson's demise and could be subject to a claim for contribution should any of the defendants in the Anderson case be found liable. *Id*. at 2. In an attempt to insinuate that discovery will yield evidence helpful to its cause, Anderson mischaracterizes the motion (through selective quotation and ellipses) as being concerned only

On December 14, 2009, all defendants[5] moved to dismiss the Complaint for failure to state a claim. Docket Nos. 58-69 (AA10-11). AMI and DSI argued that the Complaint alleged virtually no facts regarding them and what little Anderson did allege did not support an inference that they joined a conspiracy to restrain trade. Docket Nos. 60 & 62.

On August 2, 2010, the district court agreed, noting that AMI did not participate in the boycott and that the allegations were "manifestly inadequate to implicate DSI." Docket No. 89 ("Op.") at 17, 20 (AA62, 65). The court dismissed Anderson's claims in their entirety and with prejudice. *Id.*[6]

Two weeks later, Anderson moved pursuant to Federal Rule of Civil Procedure 59(e) and Local Civil Rule 6.3 for an order vacating the August 2, 2010, judgment and either (i) denying defendants' motions to dismiss, or (ii) granting Anderson leave to file the PAC attached to its memorandum of law. Docket Nos. 91 & 92.

The PAC proposed a few revisions and additions to the Complaint relating to AMI and DSI. While Anderson alleged in the Complaint that AMI joined a

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with the use of confidential documents produced by defendants to Source. Judge Crotty denied the motion. Docket Entry dated November 3, 2009 (AA9).

[5] On March 12, 2009, two days after it filed the complaint, Anderson voluntarily dismissed its claims against defendant News Group. *See* Brief for Plaintiffs-Appellants Anderson News, L.L.C. and Anderson Services, L.L.C. ("Anderson Br.") at 2.

[6] In its opposition to defendants' motions to dismiss, Anderson stipulated to the voluntary dismissal of its state-law defamation claims against all defendants. *See* Anderson Br. at 2.

boycott "in late January," it alleged in the PAC that AMI cut off Anderson soon after "the morning of January 29, 2009." PAC ¶ 66 (AA89). Anderson also alleged in the PAC that while it received certain AMI magazines in February, those magazines were shipped by the printer in January and could not be diverted. *Id.* As discussed below, it later backtracked from these allegations. In addition, what was alleged in the Complaint to be a meeting on January 12 or 13, 2009 to inform AMI of the price increase was now alleged in the PAC to be "merely the initial stages of the negotiating process." PAC ¶ 51 (AA84). In the Complaint Curtis, Hudson, TWR and News were alleged to have met "in furtherance of their conspiracy" at Hudson's offices "in January 2009," while in the PAC Anderson alleged the meeting took place on January 29, 2009 and that John Rafferty of DSI also attended. Compl. ¶ 55 (AA31-32); PAC ¶ 63 (AA88). Anderson later modified this allegation too.

Anderson also added a new allegation in the PAC that DSI received market information, which on its face was non-confidential, from one customer, Rodale, and circulated that information to another customer, AMI. PAC ¶ 60 (AA87-88). AMI, in turn, is alleged to have circulated that information to a marketing consultant who used to work for DSI. *Id.*

Anderson added two allegations relating to Curtis. Curtis, alleged to represent and act on behalf of AMI, is said to have met with Kable on January 18,

2009 "to plan their collusive action." PAC ¶ 56 (AA86). The president of Curtis also is alleged to have told Source on January 31, 2009 that he knew with "100% certainty" that Time, Bauer and AMI would not ship magazines to Source. PAC ¶ 71 (AA91). Of course, Curtis, as AMI's distributor, had to know AMI's distribution plans for the next day. Moreover, Time's and Bauer's decisions not to use Source were widely known, *see* PAC ¶ 65 (AA89) (indicating that Wal-Mart knew of Time's refusal to pay the Surcharge/Inventory Charge), and had been reported in the media days before, *Time Inc. Stands Up to Wholesaler*, Media Week, Jan. 27, 2009 (SA240) (discussing Time's insistence that it would "find alternate distribution for all 24 of its U.S. titles"); *Comag Sticking With Its Wholesalers for Now*, Media Week, Jan. 30, 2009 (noting Time's and Bauer's "plan to use other wholesalers") (SA241).

Anderson sought to make other revisions to the Complaint, including revisions to its theory of the case. For example, in the Complaint the alleged conspiracy was said to be a reaction to Anderson's support of retailers' requests for scan-based trading, while in the PAC the alleged aim was to control the single-copy magazine distribution system (the sale of magazines by retailers to non-subscribers). *Compare* Compl. ¶ 35 (AA25) *with* PAC ¶¶ 44, 55 (AA81-82, 85-86). In the Complaint, there was no mention of the Surcharge/Inventory Charge being negotiable, while in the PAC Anderson claims the defendants knew it was

negotiable. *Compare* Compl. ¶ 41 (AA27) *with* PAC ¶¶ 51, 64 (AA84, 88). In the Complaint, Hudson is alleged to have been present at a single meeting, but in the PAC Hudson is alleged to be "at the heart of the conspiratorial meetings," but it is not alleged that a Hudson representative actually attended any meeting. *Compare* Compl. ¶ 55 (AA31-32) *with* PAC ¶ 63 (AA88). Finally, Anderson initially admitted that Comag, too, did not accept the Surcharge/Inventory Charge, then sought to obscure this fact in the PAC by alleging only that it had started to work with Comag on a resolution. *Compare* Compl. ¶ 43 (AA28) *with* PAC ¶ 53 (AA85). The transformation was completed in Anderson's brief to this Court, where they argue — erroneously citing the PAC — that "Comag accepted the surcharge on a provisional basis." Anderson Br. at 9-10.

In response to the allegation in the PAC that AMI stopped shipping magazines to Anderson in January, counsel for Anderson and the district court were provided an affidavit from Michael Porche, the president of DSI, stating that shipping records provided to Anderson proved that AMI continued to ship magazines from the printer on February 3, 2009 and that AMI was able to stop shipments until the shipments left the printer. Docket No. 101 Ex. C ("Porche Affidavit") at ¶ 6 (SA254). Counsel for Anderson and the district court also were provided an affidavit from Mr. Rafferty stating that the allegation he attended a meeting at Hudson's offices on January 29, 2009 was patently false. Docket No.

101 Ex. B ("Rafferty Affidavit") at ¶ 3 (SA251). Mr. Rafferty explained that he had emergency open-heart surgery on January 22, 2009 and was released from the hospital on January 28, 2009. *Id*. at ¶¶ 5-6 (SA251). He remained at home recovering on January 29, 2009 and was not permitted by his doctors to return to work until March 2, 2009. *Id*. at ¶¶ 7-8 (SA251). In addition, the Porche Affidavit stated that no DSI representative attended the alleged meeting. Porche Aff. at ¶¶ 3-4 (SA254).[7]

The Porche and Rafferty Affidavits and shipping records were submitted to the district court on October 8, 2010 for consideration in deciding the motion for reconsideration and leave to amend. Docket Nos. 101, 102.[8] Anderson did not submit any evidence to the district court in rebuttal. Instead, in a letter dated October 4, 2010, Anderson acknowledged that it lacked a factual basis for certain of its allegations concerning AMI and DSI. Torres Ltr. (AA114-15). It informed the district court that it no longer alleged that AMI stopped shipping magazines in

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[7] To rebut the allegation that AMI's primary source of revenue was advertising, PAC ¶¶ 41, 73 (AA80-81, 92), AMI also provided to counsel for Anderson and submitted to the district court excerpts from the December 31, 2008 10-Q for American Media Operations, Inc., stating that less than 40% of total operating revenues were from advertising. In its October 4, 2010 letter Anderson informed the district court that it now alleged only that a "substantial" — but not the "primary" — source of publishers' revenue came from advertising. Docket No. 100 ("Torres Ltr.") (AA114). Anderson's theory that the publishers' goal was to sell as many magazines as possible to maintain advertising revenue, even if the publishers' revenue from the sale was less than the cost of printing and distribution, is untrue for AMI. *See* PAC ¶ 41 (AA80-81).

[8] The Porche and Rafferty Affidavits and shipping records were properly before the district court to evidence the basis for Anderson's retraction of allegations in the PAC and in connection with the court's consideration of Anderson's motion to vacate the judgment under Rule 59(e). *See* Docket Entry Nos. 101 & 102.

January, and that it now alleged the meeting at Hudson's office took place merely "on or about January 29, 2009." *Id.*

On October 25, 2010, the district court denied Anderson's motion for reconsideration, holding that Anderson had failed to make any showing sufficient to meet Rule 59(e)'s requirements. Docket No. 98 ("Recons. Order"), at 4 (AA110). The district court also noted that the proposed amended complaint added conclusory allegations, which did not cure the deficiencies described in the court's opinion dismissing the Complaint. *Id.* This appeal followed.

## SUMMARY OF ARGUMENT

The standard of review and the standard applicable to motions to dismiss an antitrust claim set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny is detailed in the briefs of Time and Bauer and will not be repeated by AMI and DSI.

This argument is divided into three parts.

First, AMI and DSI address Anderson's new argument that it has alleged sufficient "direct evidence" of a conspiratorial agreement to withstand a motion to dismiss. Anderson does not even mention any direct evidence that it has alleged concerning AMI and the one allegation concerning DSI that Anderson has cited is not direct evidence of an agreement. *See infra* Point I.A.

Second, Anderson's alternative argument that it has made sufficient allegations as to AMI and DSI to create an inference that they participated in a conspiracy also does not withstand scrutiny. *See infra* Point I.B. AMI did not engage in parallel conduct with the other defendants, and DSI is not alleged to have even done business with Anderson. AMI is not alleged to have attended any meetings with the other defendants. Furthermore, it was in AMI's independent economic interest not to pay the Surcharge/Inventory Charge. DSI's purported attendance at a single meeting of uncertain date, even if accepted in the face of unrebutted evidence to the contrary, is conclusory and supports no inference. The few communications Anderson has alleged that purportedly relate to AMI and/or DSI are not suspicious and are not evidence that either participated in a conspiracy.

Third, the state law claims of tortious interference, whether it is considered to be a claim for tortious interference with contract (*see infra* Point II.A) or tortious interference with business relations (*see infra* Point II.B), and common law conspiracy (*see infra* Point II.C) are facially deficient because Anderson has failed to allege all the requisite elements.

# ARGUMENT

## POINT I: THE DISTRICT COURT PROPERLY DISMISSED THE ANTITRUST CLAIMS AGAINST AMI AND DSI

### A. Anderson's Distinction Between "Direct" and "Indirect" Evidence is Erroneous

Anderson raises the argument for the first time in its opposition brief that it has adequately pled "direct allegations" of an agreement to restrain trade. Anderson Br. at 32-37. There are several glaring problems with this argument. First, Anderson cites to no evidence of AMI actions in its discussions of the purported direct evidence. Second, the one piece of purported direct evidence concerning DSI to which it cites is not "direct evidence" of an agreement. Direct evidence is "smoking gun evidence," *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001), that is, "an admission," *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002), or other "document or conversation explicitly manifesting the existence of the agreement in 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) (internal quotation marks omitted). The allegation that a bed-ridden DSI employee purportedly attended a meeting at Hudson (Anderson Br. at 36) is not direct evidence: it is not a smoking gun, an admission, or an explicit agreement. Third, Anderson has waived the argument because it failed to make it in district court. *See* Time Br. Section I(A); Bauer Br. Section IV.

## B. Anderson's Nonconclusory Allegations Are Insufficient to Permit the Plausible Inference of a Conspiracy

Anderson argues in the alternative that it has made indirect allegations sufficient to create an inference of conspiracy. Anderson points to its allegations that AMI, DSI, and other defendants engaged in (1) conscious parallel conduct, (2) "suspicious communications," and (3) meetings, and (4) that it would not be in the defendants' independent economic interest to cut off Anderson. Anderson Br. at 41. A review of the few allegations concerning AMI and DSI, however, reveals the allegations to be contradictory and conclusory, and, as the district court found, insufficient to create an inference that AMI or DSI participated in a conspiracy.

### 1. Anderson's Allegations of Parallel Conduct Do Not Plausibly Suggest Conspiracy

#### a. Anderson Fails to Allege that AMI Engaged in a Boycott

The factual basis for Anderson's main allegation against AMI, that it participated in an illegal boycott, has completely unraveled. Anderson first alleged that AMI cut off Anderson some time "in late January." Compl. ¶ 47 (AA29). Anderson then revised this bald allegation in the PAC, stating that AMI cut off magazines soon after January 29, 2009. PAC ¶ 66 (AA89-90). Anderson had to acknowledge, however, that AMI continued to deliver magazines to Anderson's warehouses in February, after the date the purported boycott of Anderson began. *Id.*

In response to the Porche Affidavit, stating that shipping records proved that AMI continued to ship magazines to Anderson on February 3, 2009, counsel for Anderson informed the district court that it no longer alleged that AMI stopped shipping magazines in January. Torres Ltr. (AA115). Anderson did not submit any evidence to the district court to contradict the Porche Affidavit.

Anderson does not challenge the fact that AMI sued Anderson and obtained a court order requiring Anderson News to turn over AMI magazines that Anderson had failed to distribute. Moreover, Anderson's criticism of the district court for taking judicial notice of the TRO issued by the Delaware Chancery Court is moot: Anderson has admitted that "AMI continued to ship magazines to Anderson in February 2009." Op. at 17 (AA62).[9] Based upon the revised allegation alone, to say nothing of the uncontested Porche Affidavit, it is clear AMI continued to ship magazines to Anderson during the time that the others were purportedly boycotting Anderson. AMI continued to ship magazines that Anderson received within days if not hours of Anderson shutting its doors. *See* PAC ¶¶ 49, 86 (AA84, 97); Torres Ltr. (AA115). In any event, Anderson's allegation that AMI joined a boycott of

[9] Anderson argues that "the only magazines AMI shipped after the defendants agreed to destroy Anderson were those that were 'already "in the pipeline" from the magazine printers and could not be diverted.'" Anderson Br. at 56. Leaving aside the merits of this new "pipeline" argument, Anderson's revision to the allegation makes clear that it no longer alleges the magazines entered the pipeline in January. *See* Torres Ltr. (AA115).

Anderson is merely a conclusion — and inconsistent with its own allegations — not entitled to an assumption of truth.

Finally, as noted by the district court, the alleged conduct by the defendants was anything but parallel. Op. at 5 (AA50). Each defendant is alleged to have behaved differently. *See* Time Br. Section I(B)(1).

**b. Anderson Fails to Allege that DSI Engaged in a Boycott**

The second paragraph of the Complaint, which summarizes Anderson's claims, states that "magazine publishers, their national distributors and two wholesalers — have conspired to purge . . . Anderson from the magazine industry." Compl. ¶ 2 (AA18). DSI, however, is neither a publisher, a national distributor nor a wholesaler. It is not alleged to be a player in the wholesaling of magazines, because it is a marketing company. Compl. ¶¶ 16, 28 (AA22; AA24); PAC ¶¶ 20, 31 (AA74, 77). Because DSI does not use wholesalers, it cannot boycott them. Nor is it alleged to have done so. *E.g.*, Compl. ¶ 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."); PAC ¶¶ 66, 67, 69 (AA89-91). It is impossible to draw any inference from the absence of an allegation that DSI joined in a boycott.

### c. The District Court's Treatment of Anderson's Allegations Was Not Error

Anderson argues the district court refused to draw an inference from allegations of defendants' parallel conduct because the court found, contrary to the allegations, that the defendants were responding to the common stimulus of a non-negotiable take-it-or-leave-it ultimatum. Anderson Br. at 48-51. To the contrary, the district court was entirely correct in recognizing that the Surcharge/Inventory Charge was presented to AMI and other defendants as non-negotiable.

In the Complaint, AMI's president is said to have had a cordial meeting with Mr. Anderson on January 12 or 13, 2009 during which he "appeared – at least on the surface – to respond amicably" to "Anderson's decision to impose the $.07 per copy surcharge." Compl. ¶ 41 (AA27); PAC ¶ 51 (AA84).[10] The PAC, however, recharacterizes this meeting as "merely the initial stages of the negotiating process." PAC ¶ 51 (AA84). There are no allegations that Anderson had any additional communications with AMI concerning the Surcharge/Inventory Charge. As far as AMI was concerned, the "negotiating process" began and ended with a cordial meeting at which nothing was negotiated or agreed. Indeed, while Anderson denies the distribution surcharge was a non-negotiable mandate, nowhere is Mr. Anderson alleged to have informed AMI (or its distributor, Curtis)

[10] Indeed, far from suggesting collusion, if anything this response undermines the allegation that AMI was looking for an opportunity to eliminate Anderson all along. *See* Compl. ¶¶ 33-36, 44 (AA25-26, 28); PAC ¶¶ 39-45, 48 (AA79-83).

that it was negotiable. *See* PAC ¶¶ 49, 51, 53 (AA83-85).[11] The only allegation as to what Anderson said about negotiability is that Mr. Anderson publicly announced the Surcharge/Inventory Charge and the rationale for it in a call-in interview the day *after* he met with AMI. It is undisputed that during the interview, Mr. Anderson repeatedly made clear that the Surcharge/Inventory Charge was not negotiable.[12] Because Anderson is not alleged to have had any communication with AMI after the announcement, there are no allegations that he ever told AMI that his public statements were merely a bluff. Mr. Anderson is alleged only to have been willing to implement alternatives, not to have told AMI that he was willing to implement alternatives. *Compare* Anderson Br. at 9 *with* PAC ¶ 53 (AA85). Contrary to Anderson's argument in its brief to this Court, while Anderson is alleged to have made clear to publishers that "their agreement to this temporary measure would not be irrevocable," neither the Complaint nor the PAC alleged that Mr. Anderson told AMI that he was willing to accept a different, less

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[11] In addition, the PAC alleges only that the distribution surcharge was negotiable. PAC ¶¶ 51, 53 (AA84-85). Anderson does not allege that the shift of $70 million in carrying costs was negotiable.

[12] Consideration of Mr. Anderson's *The New Single Copy* interview is proper because it was incorporated by reference into the Complaint and again into the PAC, and because Anderson had notice of the interview and relied upon it in bringing its claim. Compl. ¶ 42 (AA27); PAC ¶ 52 (AA85). *See, e.g.*, *Twombly*, 550 U.S. at 568 n.13; *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991). In addition, as Anderson concedes, judicial notice is proper of the fact that press coverage contained certain information, *i.e.*, the fact that in the interview Mr. Anderson denied that the surcharge was negotiable. *Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 425 (2d Cir. 2008); *LC Capital Partners LP v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 155 (2d Cir. 2003); Anderson Br. at 51. *See also* Time Br. note 2.

onerous measure. *Compare* Anderson Br. at 9-10 *with* PAC ¶ 53 (AA85). Mr. Anderson's unexpressed hopes for negotiation are completely irrelevant and inadmissible. *See* Time Br. Section I(B)(1)(c)(i); Bauer Br. Section III.

Indeed, Mr. Anderson's alleged willingness to negotiate is surprising, because it undermines Anderson's theory of the market. According to Anderson's theory, AMI and the other publishers must have engaged in a conspiracy because they could not risk unilaterally terminating their relationship with Anderson. Anderson argues that a unilateral termination would have meant that the publishers' magazines would not be delivered to market. PAC ¶ 72 (AA92). Anderson then concludes that termination "would make no economic sense." *Id*. But if publishers had no choice but to do business with Anderson, what leverage would they have had to negotiate with Anderson? Conversely, by alleging Mr. Anderson's willingness to negotiate, Anderson admits that it feared losing the publishers' business because Anderson knew the Surcharge/Inventory Charge did not make economic sense for the publishers. In fact, Anderson's claims are hopelessly inconsistent. If Anderson knew that the publishers could not resist a price increase, why had it suffered through ten years of losses before announcing the Surcharge/Inventory Charge? Why did Anderson feel any need to make the Surcharge/Inventory Charge temporary? Why was the Surcharge/Inventory Charge a stop-gap measure only large enough to "offset some of the increasing

publisher-induced costs," PAC ¶ 3 (AA70), and not a permanent change offsetting all of these costs?

Ultimately, Mr. Anderson's willingness to negotiate is secondary. Anderson sought to impose a price increase and AMI had to react. The district court did not require Anderson to allege facts tending to exclude alternative explanations for the defendants' conduct, as Anderson argues. Anderson Br. at 49-51. Rather, the district court properly held that Anderson failed to allege parallel conduct "in a context that raises a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557; Op. at 10-11 (AA55-56).

**2. Anderson's Allegations of Statements by Defendants Do Not Plausibly Suggest Conspiracy that Included AMI and DSI**

Anderson argues that the PAC "alleges, in words or substance, specific conspiratorial statements attributable to each defendant. *See, e.g.*, PAC ¶¶ 56-59, 62, 66, 70, 71 (AA86-91)." Anderson Br. at 53. None of the paragraphs cited even mention DSI. In fact, neither the Complaint nor PAC contain a single specific statement attributed to AMI or DSI. *E.g.*, PAC ¶¶ 56-63, 67, 68, 70, 71 (AA86-88, 90-91). The four "suspicious communications" that Anderson argues purportedly implicate AMI and/or DSI do nothing of the kind.

*First*, the president of Curtis, allegedly acting on behalf of AMI and other Curtis clients, is claimed to have told Mr. Anderson on or about January 21, 2009: "I would like to get this worked out" but was "going to have to go with whatever

Rich [Jacobsen, CEO of defendant TWR] does." Compl. ¶ 49 (AA29); PAC ¶ 70 (AA91). This alleged comment, however, does not purport to have been made on behalf of, or authorized by, AMI. The allegation that Curtis was acting on behalf of AMI is wholly conclusory. Indeed, Anderson alleges elsewhere that it dealt with AMI directly about the price increase. Compl. ¶ 41 (AA27); PAC ¶ 51 (AA84). The mere fact that Curtis served as AMI's national distributor, PAC ¶ 17 (AA74), does not suggest that Curtis and AMI agreed to restrain trade. Moreover, the comment does not even support the inference of an agreement between Curtis and TWR because it indicates that the president of Curtis did not know what TWR was going to do and was waiting to see if the market would accept Anderson's price increase. *See* Time Br. Section I(B)(2)(a)(i); Curtis Br.

*Second*, Anderson alleges that DSI circulated to a customer (AMI) market information (from emails that Comag had sent to retailers) that it received from another customer (Rodale). PAC ¶ 60 (AA87-88). Comag's communications with retailers were not alleged to be confidential and it is obvious that they were not. Collecting and providing market information to customers is exactly what would be expected of a marketing company like DSI. The forwarded email says nothing, explicitly or implicitly, about an agreement. Anderson seeks to draw a conspiratorial inference from Rodale's editorial remark describing Comag's CEO

as dangerous,[13] but such an ambiguous comment does not suggest collusion. Neither does it suggest that Rodale was taking any action or inviting others to do so.

*Third*, Anderson alleges that the president of AMI forwarded that email containing non-confidential market information to a marketing consultant, Michael Roscoe, who used to work at DSI. PAC ¶ 60 (AA87-88). There is nothing suspicious in AMI communicating with its own marketing consultants about the market, and the email says nothing about an agreement. Indeed, if anything the email shows that Rodale and AMI were not communicating with each other. Anderson seeks to draw an inference from the allegation that the email was forward to Mr. Roscoe who "was one of the conduits through which the conspiracy was effectuated." *Id*. But, Anderson offers no specific allegations to support this naked assertion. Indeed, Mr. Roscoe is not mentioned again in the PAC. Such allegations are mere conclusions and are not entitled to an assumption of truth. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009) (disregarding the allegation that the Attorney General was "the principal architect" of an illegal policy and the F.B.I. Director "instrumental" in its execution as conclusory and not entitled to be assumed true).

[13] In its brief, Anderson inaccurately describes the email as being a complaint that Comag's decision to continue doing business with Anderson was "dangerous." Anderson Br. at 55. The email, after describing Comag's correspondence with its retail customers, merely states that Comag's CEO was "dangerous." PAC ¶ 60 (AA87).

*Finally*, the president of Curtis is alleged to have stated that he knew, as of January 31, 2009, "with '100% certainty,' that TWR, Bauer and AMI would refuse to supply product to Source — even though, by this time, Source had publicly rescinded its surcharge proposal." PAC ¶ 71 (AA91). However, the allegation does not suggest collusion regarding Anderson, which is not even mentioned. Moreover, the allegation does not suggest collusion relating to Source. Curtis obviously had to know what its customer AMI was doing the next day – February 1. Anderson does not argue otherwise. *See* Anderson Br. at 14 (arguing only that it was suspicious that Curtis knew Bauer's and TWR's plans). In addition, Anderson alleges the market knew what was happening and it was widely reported days *before* the alleged statement that Time and Bauer had decided not to ship to Source. *See, e.g.*, PAC ¶ 65 (AA89); *Time Inc. Stands Up to Wholesaler*, Media Week, Jan. 27, 2009 (SA240); *Comag Sticking With Its Wholesalers for Now*, Media Week, Jan. 30, 2009 (SA241).[14]

### 3. Anderson's Allegations of Meetings by Defendants Do Not Plausibly Suggest Conspiracy

Significantly, Anderson does not allege that AMI attended any conspiratorial meetings. *E.g.*, PAC ¶¶ 56-63 (AA86-88).

Anderson's only allegation about a meeting somehow involving AMI is contained in the PAC. Anderson asserts that the presidents of Curtis and Kable

[14] This Court may take judicial notice of the fact of this press coverage. *See supra* note 12.

"attended a meeting on Sunday, January 18, 2009 to plan their collusive action," and that Curtis "represented" AMI. PAC ¶ 56 (AA86). Anderson alleges no specifics to support the conclusion that Curtis was acting on direction from AMI, much less that AMI was even aware of the meeting. Furthermore, Anderson alleges no specifics as to what was discussed, much less what was agreed. The allegation of meetings that this Court rejected as conclusory in *In re Elevator Antitrust Litigation*, 502 F.3d 47, 50-51 & n.5 (2d Cir. 2007), at least alleged the defendants participated in the meetings. *See* Curtis Br. Here, Anderson has not even alleged AMI did that.

The Complaint has no allegations about DSI's activities at all. In the PAC, Anderson alleges that a DSI employee, John Rafferty, attended a meeting "on January 29, 2009" at Hudson's offices where the attendees "discussed and planned their collusive activity." PAC ¶ 63 (AA88).

In response to the Rafferty Affidavit, detailing Mr. Rafferty's hospital and homebound recovery following open heart surgery during the time in question, Anderson acknowledged that it lacked a factual basis for the allegation. It informed the district court that it was rescheduling the alleged meeting to some time "on or about January 29, 2009." Torres Ltr. (AA114). Anderson did not submit any evidence to the district court to contradict the Rafferty Affidavit, or explain how Mr. Rafferty could have attended in light of his medical condition.

Even assuming the truth of the latest vague version of the allegation, the naked assertion that the meeting involved "collusive activity" is precisely the kind of conclusory allegation courts have held insufficient to support a claim. *See, e.g.*, *In re Elevator Antitrust Litig.*, 502 F.3d at 50-51 & n.5 (disregarding conclusory allegation that defendants participated in meetings "to discuss pricing and market divisions" and dismissing antitrust complaint). Moreover, as a marketer, it is not remarkable that DSI would be involved in meetings with various parties in the magazine business, including distributors of magazines DSI marketed.

**4. Anderson's Allegations that Defendants Acted Contrary to Their Economic Self-Interest Do Not Plausibly Suggest a Conspiracy**

Anderson alleges that it was not in AMI's or any other defendants' independent economic interest to terminate Anderson. Anderson Br. at 43-44. Of course, DSI did not have business with Anderson and so had no economic interest in whether publishers did business with Anderson. The PAC now concedes that AMI continued to ship Anderson magazines after February 1, 2009, although it did not agree to the Surcharge/Inventory Charge. As noted, AMI had a contract with Anderson. Docket No. 75, Ex. D at 8 (SA151).

In fact, the allegations actually show that it was in no publisher's economic interest to pay the Surcharge/Inventory Charge and stay with Anderson. The issue is not, as Anderson alleges, whether it was in AMI's independent interest to risk trying to find an alternate wholesaler in 2008 market conditions rather than stay

with Anderson on 2008 terms. *See* PAC ¶¶ 72-74 (AA92-93) (discussing Curtis's purported experience in 2008). The real issue, which Anderson does not address, is whether it was in AMI's independent interest to reject the substantial Surcharge/Inventory Charge. That AMI and the other publishers did not accept Anderson's demand shows that the economic risk of not being able to do business with Anderson was less than the cost of paying the Surcharge/Inventory Charge. *See* PAC ¶ 71 (AA91) (noting that Source rescinded its surcharge proposal). Indeed, no distributor or publisher inside or outside the claimed conspiracy is alleged to have agreed to pay the Surcharge/Inventory Charge.[15] *See* Time Br. Section I(B)(4).

In sum, Anderson has failed to allege direct or indirect evidence that AMI or DSI participated in a conspiracy. Anderson has not alleged that AMI or DSI engaged in parallel conduct and has not made any non-conclusory allegations that AMI or DSI made inculpatory statements or attended meetings. The alleged statements by others are hardly suspicious, much less suggestive that AMI or DSI

[15] Anderson argues that Comag's decision to continue shipping it magazines supports the inference that it was contrary to the independent interest of any individual defendant to leave Anderson. Anderson Br. at 48 n.8. Anderson alleges that Comag "did not agree to the proposed surcharge," Compl. ¶ 43 (AA28), but "reached agreements with Anderson and Source and continued to supply them with magazines," PAC ¶ 4 (AA70). Without knowing the terms of Comag's agreement with Anderson, however, and without any allegation that Anderson offered similar terms to others, it is impossible to draw any inference from this allegation other than that the price increase was untenable.

joined a conspiracy. The court below was entirely correct in its determination that Anderson did not, and could not, state a claim against either AMI or DSI.

## POINT II: THE DISTRICT COURT PROPERLY DISMISSED THE COMMON LAW CLAIMS AGAINST ALL DEFENDANTS

In addition to its cause of action for unlawful restraint of trade in violation of the Sherman Act, Anderson purported to assert common law causes of action for defamation, tortious interference and civil conspiracy. It withdrew the defamation claim in response to the defendants' motion to dismiss, Anderson Br. at 2, and Judge Crotty properly found that Anderson failed to allege either of the other two common law claims. *First*, as the court below recognized, Anderson's pleadings in the Complaint "obscure the nature of its tortious interference claim." Op. at 19 n.12 (AA64). Anderson, however, does not state a claim for either tortious interference with contract or tortious interference with business relations. *See* Compl. ¶¶ 82-90 (AA41-42); PAC ¶¶ 102-110 (AA102-03). *Second*, as the court below correctly held, Anderson's common law conspiracy claim must be dismissed because Anderson failed to allege any independent tort. Op. at 20 (AA65).

### A. The Cause of Action for Tortious Interference With Contract Fails

In New York,[16] a tortious interference with contract claim has five elements. The third is: "the defendant's intentional procurement of the third-party's breach of the contract without justification." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006) (internal citation and quotations omitted). As the court below correctly held, and which Anderson does not dispute in its appellate brief, Anderson failed to allege the procurement of a third-party breach of contract. Op. at 19 n.12 (AA64). The Complaint states that "Anderson's retail customers have terminated their retail supply and retail services agreements," Compl. ¶ 89 (AA42); PAC ¶ 109 (AA103), but nowhere alleges that they breached. The allegation that third parties cancelled their contracts does not fulfill the requirement that a breach of contract must have occurred. *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614, 620-24 (1996); *accord Kirch*, 449 F.3d at 402 (holding that plaintiffs failed to state a claim where complaint did not allege actual breach); *M.J. & K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488, 490 (2d Dep't 1995) (dismissing tortious interference claims because plaintiffs' "mere contentions that third parties cancelled contracts with them . . . w[ere] insufficient to state a cause of action for tortious interference with contractual relations").

[16] Anderson argued below that Delaware law likely applied to the common law claims. As Anderson admitted, however, Delaware and New York law are identical on the relevant legal principles governing these claims. Op. at 19 n.11 (AA64). Where there is no actual conflict of laws, this Court may apply New York law. *I.B.M. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004).

The tortious interference with contract claim fails for a second reason: Anderson fails to allege that defendants acted without justification. Indeed, the Complaint alleges that defendants had many reasons not to want to do business with Anderson: Anderson had unilaterally imposed a substantial surcharge and shifted inventory costs to AMI and the other publishers and was pushing for scan-based trading, which the Complaint asserts was an anathema to the defendants. Compl. ¶¶ 33-34, 39 (AA25-27); PAC ¶¶ 42-43, 49 (AA81, 83-84).

## B. The Cause of Action for Tortious Interference with Business Relations Fails

To state a claim for tortious interference with business relations under New York law, as this Court has recognized, the tortious conduct must be aimed at causing a third party not to enter into a relationship with the plaintiff. *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 768 (2d Cir. 1995)).[17] Anderson, however, alleges that the defendants boycotted "the distribution of single-issue magazines *to Anderson*" and left *Anderson* unable to supply magazines to the retailers. Compl. ¶¶ 64, 87 (AA35, 41); PAC ¶¶ 84, 107 (AA96-97, 103)

[17] Anderson, citing *Carvel Corp. v. Noonan*, 350 F.3d 6 (2d Cir. 2003), argues that it adequately stated a claim. Anderson Br. at 57. In the *Carvel* opinion, this Court certified two questions to the New York Court of Appeals regarding the proper standard for a tortious interference claim under New York law in the context of a franchise relationship. *Carvel*, 350 F.3d at 23, 26-27. It was the New York Court of Appeals' opinion in response that is of real relevance here. In holding that the plaintiff-franchisees failed to state a claim for tortious interference with business relations, the Court of Appeals held that the claim "is ill-founded because the economic pressure that must be shown is not, as the franchisees assume, pressure on the franchisees, but on the franchisees' customers." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 192 (2004).

(emphasis added). Anderson fails to allege that the defendants contacted retailers and pressured them not to do business with Anderson. Consequently, Anderson does not state a cognizable claim for tortious interference with business relations.[18]

The claim fails for a second reason. A claim for tortious interference with a business relationship has four elements, the third of which is: "the defendant acted solely out of malice, or used dishonest, unfair, or improper means." *Kirch*, 449 F.3d at 400. The Complaint, however, alleges that the defendants did not act solely with the intent of injuring Anderson. The Complaint asserts that the defendants' "ultimate . . . goal" was economic self-interest — to "rais[e] the prices paid by magazine retailers, and forc[e] those retailers to abandon their efforts to introduce efficiencies into the market." Compl. ¶ 6 (AA19); PAC ¶ 9 (AA72).[19] Anderson also fails to allege the alternative requirement: the defendants' conduct "amount[s] to a crime or an independent tort." *Carvel*, 3 N.Y.3d at 190 (citations omitted) (holding that plaintiffs failed to state a claim where they failed to allege an underlying crime or tort, and defendant allegedly acted with an intent "to reverse a period of business declines and make itself more profitable"). Anderson premises its tortious interference claim upon its antitrust cause of action. Compl.

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[18] The district court did not address this argument in its decision dismissing this claim. This Court, however, may "affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987).

[19] See also Compl. ¶¶ 60-62 (AA33-34); PAC ¶¶ 72-75 (AA92-93), where Anderson premises Defendants' alleged collusion on their acting in their economic self-interest.

¶ 87 (AA41); PAC ¶ 107 (AA103). Because Anderson fails to allege that defendants violated antitrust laws, it necessarily fails to state a claim premised upon such conduct.

### C. The Cause of Action for Common Law Conspiracy Fails

New York law does not recognize an independent tort for civil conspiracy. *Kirch*, 449 F.3d at 401; *accord Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986) ("[A] mere conspiracy to commit a [tort] is never of itself a cause of action." (internal quotation marks omitted)). As this Court held in *Kirch*, 449 F.3d at 401, where a complaint fails to state a cause of action for the tort underlying the alleged conspiracy, "it necessarily fails to state an actionable claim for civil conspiracy." *Accord Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 57 (1999) (affirming dismissal of conspiracy cause of action where plaintiffs failed to allege the underlying, independent tort of fraud). Because the Complaint fails to state a cause of action for tortious interference, as discussed above, the cause of action for conspiracy must be dismissed as well.[20]

[20] An alleged violation of Section 1 of the Sherman Act is not relevant to the cause of action for civil conspiracy because a Sherman Act violation is not a tort. Anderson cites no authority to the contrary. Moreover, a Section 1 Sherman Act is a conspiracy claim. New York common law does not afford a cause of action for a conspiracy to enter into a conspiracy.

## CONCLUSION

AMI and DSI respectfully request that the Court affirm the decisions below dismissing the complaint with prejudice and denying the motion to vacate the judgment.

Dated: New York, New York
April 18, 2011

PILLSBURY WINTHROP
SHAW PITTMAN LLP

By: s/ David G. Keyko
David G. Keyko

1540 Broadway
New York, New York 10036-4039
(212) 858-1000

*Attorneys for Defendants-Appellees American Media, Inc. and Distribution Services, Inc.*

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s/ David G. Keyko
David G. Keyko

PILLSBURY WINTHROP
SHAW PITTMAN LLP
1540 Broadway
New York, New York 10036-4039
(212) 858-1000

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**Job # 235793**

**SERVICE LIST:**

**Marc Rowin**
**Thomas P. Lynch**
**Lynch, Rowin LLP**
**630 Third Avenue**
**New York, New York 10017**
**(212) 682-4001**
**mrowin@lynchrowin.com**

***Attorneys for Plaintiff-Appellant Anderson Services, L.L.C. (and Lloyd T. Whitaker, as the Assignee for Anderson Services, L.L.C.)***

**Marc E. Kasowitz**
**Kasowitz, Benson, Torres & Friedman, LLP**
**1501 Broadway, 12th Floor**
**New York, New York 10036**
**(212) 506-1710**
**mkasowitz@kasowitz.com**

**Michael K. Kellogg**
**Aaron M. Panner**
**Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.**
**1615 M Street, N.W., Suite 400**
**Washington, DC 20036**
**(202) 326-7900**
**mkellogg@khhte.com**

***Attorneys for Plaintiff-Appellant Anderson News, L.L.C.***

**Isaac M. Bayda**
**McElroy, Deutsch, Mulvaney & Carpenter, LLP**
**Wall Street Plaza**
**88 Pine Street, 24th Floor**
**New York, New York 10005**
**(212) 483-9490**
**ibayda@mdmc-law.com**

***Attorney for Defendant Kable Distribution Services, Inc.***

**John M. Hadlock**
**Winston & Strawn LLP**
**200 Park Avenue**
**New York, New York 10166-4193**
**(212) 474-1000**
**jhadlock@winston.com**

***Attorney for Defendant-Appellee Rodale, Inc.***

**Rowan D. Wilson**
**Cravath, Swaine & Moore LLP**
**825 Eighth Avenue**
**New York, New York 10019**
**(212) 474-1000**
**rwilson@cravath.com**

***Attorney for Defendant-Appelleess Time Inc. and Time Warner Retail Sales & Marketing, Inc.***

**Barry J. Brett**
**Troutman Sanders LLP**
**405 Lexington Avenue**
**New York, New York 10174**
**(212) 704-6216**
**Barry.brett@troutmansanders.com**

**Attorney for Defendant-Appellee Bauer Publishing Co., L.P.**

**Joseph F. Donley**
**Dechert LLP**
**1095 Avenue of the Americas**
**New York, New York 10036-6767**
**(212) 891-9524**
**Joseph.donley@dechert.com**

***Attorney for Defendant-Appellee Curtis Circulation Company***

**Meir Feder**
**Jones Day**
**222 East 41st Street**
**New York, New York 10017**
**(212) 326-3939**

***Attorney for Defendant-Appellee Hachette Filipacchi Media, U.S.***

**Daniel W. Nelson**
**Gibson, Dunn & Crutcher LLP**
**1050 Connecticut Avenue, N.W.**
**Washington, DC 20036-5306**
**(202) 887-3687**
**dnelson@gibsondunn.com**

***Attorney for Defendant-Appellee Hudson News Distributors LLC***