10-4591 cv

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., L.P., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCI 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 TIME INC. AND TIME/WARNER RETAIL SALES & MARKETING, INC.

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April 18, 2011

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendants-Appellees Time Inc. ("Time") and Time/Warner Retail Sales & Marketing, Inc. ("TWR") certifies the following: Time is the indirect parent corporation of TWR, and Time Warner Inc., a publicly traded company, is the parent corporation of Time. No publicly traded company has a 10% or greater stock ownership in Time Warner Inc.

April 18, 2011

s/ Rowan D. Wilson
Rowan D. Wilson

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. 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 defendants Time Inc. ("Time") and Time/Warner Retail Sales & Marketing, Inc. ("TWR")?

2. Did the district court properly refuse to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e)?

STATEMENT OF THE FACTS[1]

Time is the largest publisher of magazines in the United States, producing such titles as *Time*, *People*, *Entertainment Weekly*, and *Sports Illustrated*. (Compl. ¶ 12 (AA21).) TWR is a national distributor of magazines. (*Id*. ¶ 17 (AA22).) TWR services its client-publishers by: managing their relationships with wholesalers; guaranteeing payments owed by wholesalers; and providing marketing and accounting services. (*Id*. ¶¶ 13, 27 (AA21, 23-24).) TWR's list of clients includes its parent company, Time. (*Id*. ¶ 17 (AA22).)

[1] The facts drawn from the allegations contained in Anderson's complaint and proposed amended complaint are assumed to be true only for the purpose of this appeal.

Until February 2009, Anderson News, L.L.C., together with its affiliate, Anderson Services, L.L.C., (collectively, "Anderson") was the second largest magazine wholesaler in the United States, controlling 27% of the market. (*Id*. ¶¶ 19, 30 (AA22, 24).) The largest wholesaler, Source Interlink Distribution, L.L.C. ("Source"), held a 31% share. (*Id*. ¶ 30 (AA24).) Anderson and Source "were or are the only wholesaler distributors operating in a [sic] numerous geographic regions". (*Id*. ¶ 73 (AA38); *see* ¶ 50 (AA30).) In some parts of the country, "Anderson was the only viable wholesaler"—that is, a monopolist. (*Id*. ¶ 60 (AA33).)

A. Anderson Announces Its Demands.

On January 12 and 13, 2009, Anderson's CEO, Charles Anderson, "flew to New York and met with some of Anderson's largest publisher clients" to personally inform them "of Anderson's decision to impose [a] $.07 per copy surcharge" on each copy of a magazine Anderson received, effective February 1, 2009. (*Id*. ¶ 39, 41 (AA26-27).) Mr. Anderson additionally informed publishers that Anderson would be shifting to them "the carrying costs of [Anderson's] inventory in retail chains where [Anderson] had negotiated scan-based trading terms". (*See id*.) Mr. Anderson personally met with the CEOs of Time, Hearst, AMI, Bauer, and non-party Kappa, none of whom agreed to the terms demanded by Anderson. (Docket No. 67-3, Ex. B ("Interview Tr.") at 4-6 (SA36-38).)

The next day, January 14, 2009, Mr. Anderson communicated his company's fee imposition to the whole magazine publishing industry, via a call-in interview with John Harrington of trade publication *The New Single Copy*.[2] (Compl. ¶ 42 (AA27).) Mr. Anderson used the interview to make four points clear.

First, Anderson was shifting $70 million of inventory costs to publishers, even though that inventory had already been purchased by Anderson.

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[2] The district court properly considered Mr. Anderson's interview with *The New Single Copy* in assessing defendants' motions to dismiss.

First, Anderson's complaint expressly discusses Mr. Anderson's interview with *The New Single Copy* (Compl. ¶ 42 (AA27)), and the content of that interview forms the basis for Anderson's entire conspiracy theory—that "the defendants seized on Anderson's $.07 surcharge . . . as the pretext for effecting a massive conspiracy to destroy Anderson" (*id.* ¶ 46 (AA28)). Therefore, Mr. Anderson's interview is appropriately treated as part of Anderson's complaint. *See Patane v. Clark*, 508 F.3d 106, 111 n.2, 112 (2d Cir. 2007) (when evaluating a 12(b)(6) motion, a court may consider "documents that the plaintiffs either possessed or knew about and upon which they relied in bringing suit" and treat them as part of a plaintiff's complaint (internal quotation marks omitted)); *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide*, 369 F.3d 212, 217 (2d Cir. 2004) (on a 12(b)(6) motion, a court may consider "the facts and allegations that are contained in the complaint and in any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits").

Second, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 n.13 (2007), makes clear that a district court is "entitled to take notice of the full contents of the published articles referenced in the complaint". Accordingly, the district court did not abuse its discretion in taking such notice here. *See Staehr v. Hartford Fin. Servs. Gr., Inc.*, 547 F.3d 406, 424 (2d Cir. 2008) ("We review the District Court's determination of whether to take judicial notice of facts for abuse of discretion.").

(Interview Tr. at 2, 4 (SA34, 36).) In essence, Anderson was demanding that publishers extend it a $70 million interest-free unsecured line of credit.

Second, the seven-cent fee was non-negotiable. When asked, "Seven cents a copy, is that a negotiable figure?", Mr. Anderson responded: "Being negotiable, if we negotiate the rate then it would not be fair, so the answer is we really believe that the $.07 cent number is the number." (*Id*. at 3 (SA35).) When Mr. Harrington later pointed out that "over the past decade plus . . . Anderson News ha[d] introduced several programs requiring significant levels of publisher support and commitment" and had, in the end, "either negotiated them or just put them aside", and inquired, "Why should publishers think that this is different this time, that February first is the deadline that's really gonna change the way the terms of the business [sic]?" (*id*. at 8 (SA40)), Mr. Anderson confirmed that this time he would not negotiate: "We're just at the point now that this must be done, and so I just want everyone comfortable with this. We're convicted with this. We believe it's the right thing to do. Not the right thing, it has to be done so that the system continues . . . ." (*id*. at 9 (SA41)).

Third, unless a publisher signed an agreement accepting both the seven-cent fee and inventory-cost shift, as of February 1, 2009, Anderson would refuse to distribute the publisher's magazines:

> *John Harrington*: If a publisher does not agree to these terms, what actions are you gonna take and when?

> *Charlie Anderson*: Well, what we've said is that it's time to decide if we have - if we are a low-cost operator. We still believe that we are, and so we put it in line of February first and we're asking participating publisher[s] to sign a form agreeing to do that so that we can continue distributing their magazines in the same manner we've done in the past.
>
> *John Harrington*: And if they haven't signed that form as of February first you will refuse to distribute them?
>
> *Charlie Anderson*: Yes, that's correct.
>
> *John Harrington*: Okay. And you are gonna be requiring signed agreements?
>
> *Charlie Anderson*: Yes.

(*Id*. at 4 (SA36).) Toward the end of the interview, Mr. Harrington again confirmed:

> *John Harrington*: Okay. And once again, if you do not have signed agreements from the particular publisher by February first agreeing to these terms, at that point Anderson News will not distribute their magazine. That's correct?
>
> *Charlie Anderson*: Yes John.

(*Id*. at 10 (SA42).)

Fourth, Anderson's business had been failing for a long time, and Anderson would leave the business if its demands were not met. Mr. Anderson explained:

> [T]his business is not profitable and has not been for a very long time. In fact, nobody - no one from the Anderson family has taken anything out of the magazine and book company, Anderson News Company, in over ten years. . . . You know,

> wholesalers were generally very profitable in years past, but over the last ten years those profits have eroded to nothing and into significant losses.

(*Id*. at 2 (SA34).) As a result, if publishers rejected Anderson's demands, Anderson would shut down: "The last thing we want to do is exit this business, but we - why should we continue to lose money in a business that doesn't have - you know, give us any returns?" (*Id*. at 7 (SA39).)

B. Wholesaler Reaction to Anderson's Announcement.

Five days later, Source announced that it would follow Anderson's lead and impose the same seven-cent fee, also effective February 1, 2009. (Compl. ¶ 50 (AA30); *see also* Docket No. 92-1, Ex. A ("PAC") ¶ 54 (AA85).) Thus, the two largest magazine wholesalers in the country, accounting for 58% of single-copy sales of magazines (Compl. ¶ 30 (AA24)), announced that, as of February 1, they would refuse to distribute magazines whose publishers did not pay a seven-cent-per-copy fee.

However, no other magazine wholesalers—the two largest of which were Hudson (11% market share) and News Group (21% market share)—followed suit. (*Id.*) Anderson has not alleged that any other wholesaler sought new terms—not a seven-cent fee, an inventory cost-shift, or anything else—from magazine publishers.

C. Time and TWR React to Anderson's Demands.

Even before Anderson delivered its ultimatum, Time had offered Anderson a reduction in the price of its magazines by two percentage points of the cover price. (Interview Tr. at 2 (SA34).) Anderson rejected that offer and demanded its seven-cent fee, which was approximately equivalent to 3.5 points. (*Id*.) By the last week of January 2009, neither Time nor TWR had acquiesced to Anderson's terms. (*See*, *e.g.*, Compl. ¶ 52 (AA31).)

Just before Anderson's deadline, on Friday, January 30, 2009, Wal-Mart asked Anderson to try to reach an agreement with TWR. (*Id.*). As a result, on Saturday, January 31, 2009, Mr. Anderson met with Rich Jacobsen, CEO of TWR. (*Id*.)

Allegedly, by the end of the meeting, Mr. Anderson was "led" to believe that he "had an agreement for an increase in the discount to Anderson" for Time magazines. (*Id*. ¶ 53 (AA31).) Anderson acknowledges, however, that it reached no agreement with TWR with respect to its inventory pushback demand. (*See id*.) Anderson also alleges that "Mr. Anderson agreed to make a $13 million payment to TWR on Monday, February 2, after [a] call" on scan-based trading.[3]

[3] By its own calculations, Anderson owes TWR approximately $50 million for magazines it purchased before February 1, 2009. (*See* Statement of Financial Affairs, Amended Schedule F at 1, *In re Anderson News, L.L.C.*, No. 09-10695 (CSS) (Bankr. D. Del. Mar. 31, 2011), Doc. No. 743 (Anderson owes TWR over

(Compl. ¶ 53.) However, Anderson does not allege that the parties discussed any schedule for the resumption of delivery of Time magazines to Anderson, and does not even mention any discussion about magazines published by TWR's numerous other clients, much less any agreement as to those other clients' magazines.

On Monday, February 2, 2009, Anderson and TWR discussed scan-based trading as planned; although Anderson alleges the call was "cordial", it does not allege that it reached any agreement with Time or TWR regarding shifting Anderson's scan-based inventory cost. (Compl. ¶ 54 (AA31).) Additionally, despite Anderson's "agreement" to pay $13 million to TWR "after the call" (Compl. ¶ 53 (AA31)), Anderson made no payment. (*See* PAC ¶ 69 (AA90-91) (Time and TWR "*attempt[ed]* to induce Anderson to make payments"); Compl. ¶¶ 53-54 (AA31) (no allegation that $13 million payment was actually made); PAC ¶¶ 65-69 (AA89-91) (same); Statement of Financial Affairs, Schedule 3(b), at 26, *In re Anderson News, L.L.C.*, No. 09-10695 (CSS) (Bankr. D. Del. Mar. 24, 2010), Doc. No. 271-1 (final payment made to TWR before bankruptcy was December 30, 2008).) A "few hours" later, Mr. Jacobsen allegedly "informed Anderson in words or substance that TWR and Time executives had decided 'to change the

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$41 million); Docket No. 67-5, Ex. C, Schedule F at 1 (SA48) (Anderson owes TWR in excess of $52 million).)

channel,' that 'they were going to have to use two wholesalers,' and that 'that was the way it was going to be'". (Compl. ¶ 54 (AA31).)

D. Alleged Conspirators and Non-Conspirators Alike Refused to Give In to Anderson's Demands.

Time and TWR were not the only ones who refused to give in to Anderson's demands: Neither Anderson's complaint nor its proposed amended complaint sets forth a single publisher or national distributor—alleged conspirator or non-conspirator—who agreed to pay the seven-cent fee or absorb Anderson's inventory costs. In fact, Anderson admits that the one concededly non-conspiring national distributor discussed in its pleadings, Comag Marketing Group LLC ("Comag"), rejected Anderson's terms.[4] (*Id*. ¶ 43 (AA28); PAC ¶ 4 (AA70).)

E. Anderson Exits the Magazine Wholesale Business, Leaving Behind Millions of Dollars of Unpaid Debt.

Commencing the first week of February 2009, Anderson did not distribute any magazines shipped to it by publishers who had not agreed to its ultimatum. (*See* PAC ¶¶ 85-86 (AA97); Docket No. 75-3, Ex. D (SA144-60) (complaint filed in Delaware Chancery Court by Hachette and AMI requesting a

[4] Anderson cites paragraph 43 of its complaint for the proposition that "Comag accepted the surcharge on a provisional basis". (Anderson Br. at 9-10.) Paragraph 43 pleads the opposite: "CMG *did not* agree to the proposed surcharge and proposed to Anderson a modified arrangement". (Compl. ¶ 43 (AA28) (emphasis added).)

TRO to allow them to reclaim magazines shipped to Anderson that Anderson did not deliver); Docket No. 75-4, Ex. E (SA162) (order granting Hachette and AMI's requested TRO).) Instead, as Mr. Anderson had threatened, Anderson decided not to "continue to lose money in a business that doesn't . . . give us any returns". (Interview Tr. at 7 (SA39).) Although Anderson alleges it "began to hemorrhage money, at a rate of between millions of dollars per week [sic]" (Compl. ¶ 65 (AA35)), Anderson shut its doors on February 7, only six days after its announced deadline. (*Id.* ¶ 66 (AA35).)

Meanwhile, Source filed a complaint in federal court on February 9, 2009 (*see* Complaint, *Source Interlink Distribution, L.L.C. v. American Media, Inc.*, No. 09-cv-01152-PAC (S.D.N.Y. Feb. 2, 2009), Doc. No. 1), obtained a TRO preserving the status quo on February 12 (*see* Temporary Restraining Order, *Source Interlink Distribution*, No. 09-cv-01152-PAC (Feb. 12, 2009), Doc. No. 22), and, having previously rescinded its seven-cent demand (*see* PAC ¶ 71 (AA91)), dismissed its claims against Time and TWR on February 20 after reaching a commercial agreement (*see* Stipulation of Partial Dismissal, *Source Interlink Distribution*, No. 09-cv-01152-PAC (Feb. 20, 2009), Doc. No. 34). Subsequently, Source reached agreements with other magazine publishers. (*See, e.g.*, PAC ¶¶ 8, 26 (AA71-72, 76).) Anderson does not allege that it sought a TRO to attempt to stay in business, even after learning that Source had obtained a TRO,

or that after the Source TRO issued, Anderson asked any publisher or national distributor whether Anderson could also receive magazines. After Time and Source reached a supply agreement on February 20, Anderson did not contact Time, TWR, or any other publisher or national distributor to attempt to obtain magazines.

F. Proceedings in This Lawsuit.

In the wake of its shutdown, Anderson left behind hundreds of creditors and hundreds of millions of dollars of unpaid debt, most of which was owed to publishers and national distributors. (*See, e.g.*, Docket No. 67-4, Ex. C, Schedule F (SA48-60).) On March 2, 2009, four creditors (all non-parties to this action), filed an involuntary petition against Anderson News in United States Bankruptcy Court for the District of Delaware. (Compl. ¶ 68 (AA36); Chapter 7 Involuntary Petition, *In re Anderson News, L.L.C.*, No. 09-10695 (CSS) (Bankr. D. Del. Mar. 2, 2009), Doc. No. 1.) On March 10, 2009, Source's lawyers, Kasowitz, Benson, Torres and Friedman LLP ("Kasowitz"), now representing Anderson, filed this lawsuit. The Anderson complaint copied much of the Source complaint verbatim, but, unlike the Source lawsuit, sought no relief aimed at restoring Anderson's business. (*Compare* Compl. (AA17-45), *with* Complaint, *Source Interlink Distribution*, No. 09-cv-01152-PAC (Feb. 2, 2009), Doc. No. 1.) As defendants, Anderson named nearly the same companies as Source: five magazine

publishers—American Media, Inc. ("AMI"), Bauer Publishing Co., L.P. ("Bauer"), Hachette Filipacci Media, U.S. ("Hachette"), Rodale, Inc. ("Rodale")[5], and Time Inc.—three magazine distributors—Curtis Circulation Company ("Curtis"), Kable Distribution Services, Inc. ("Kable"), and TWR—two magazine wholesalers—Hudson News Distributors LLC ("Hudson") and The News Group, LP ("News Group")—and one provider of magazine marketing services—Distribution Services, Inc. ("DSI"). Anderson designated its lawsuit as related to the Source litigation (*see* Civil Cover Sheet (SA1)), and Judge Crotty accepted it as a related case (*see* Docket Entry dated Mar. 18, 2009 (AA5)).

Two weeks before Anderson sued, the remaining defendants in the Source litigation moved, on February 24, 2009, to dismiss the complaint on the ground that it failed to meet the pleading requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). (*See, e.g.*, Mem. L. in Supp. of Mot. to Dismiss at 6-14, *Source Interlink Distribution*, No. 09-cv-01152-PAC (Feb. 24, 2009), Doc. No. 39.) Rather than responding, Kasowitz, on behalf of Source, requested permission to amend Source's complaint, to which the Court consented. (*See* Docket Entry dated Mar. 31, 2009 (AA7) ("Mar. 31, 2009, Hr'g Tr.") at 4:18-24 (SA13).) Kasowitz filed Source's Second Amended Complaint on April 10, 2009.

[5] Rodale was not named as a defendant in the Source complaint.

(*See* Second Amended Complaint, *Source Interlink Distribution*, No. 09-cv-01152-PAC (Apr. 10, 2009), Doc. No. 60.)

On March 30, 2009, pursuant to Judge Crotty's Individual Rule of Practice 3.D, counsel for Hachette and for Bauer each wrote the court to seek permission to move to dismiss the Anderson complaint on the same grounds raised in the motion to dismiss the pre-amendment Source complaint. (*See* Letter from Meir Feder to the Court dated Mar. 30, 2009 (SA9); Letter from Barry Brett to the Court dated Mar. 30, 2009 (SA6-8).) Nevertheless, Kasowitz did not amend the Anderson complaint, which it could have done as of right any time during the next eight months.

On December 14, 2009, defendants formally moved to dismiss Anderson's complaint. After briefing on the motion to dismiss was completed, Anderson still did not move to amend its complaint.

On June 15, 2010, the district court heard argument on the motions to dismiss. In responding to the defendants' arguments that the complaint failed to meet *Twombly*'s standard, Anderson's counsel pointed to several allegations not contained in Anderson's complaint, but taken from the Second Amended Complaint in the Source lawsuit, filed more than a year earlier. (Docket No. 88 ("Mot. to Dismiss Hr'g Tr.") at 51-60 (SA215-24).) When the court asked: "Wait a minute. I'm going to find that your complaint is adequate based on the Source

complaint?", Anderson's counsel responded: "We think you can take judicial notice of the Source complaint." (*Id.* at 52 (SA216).) After the court stated that it could not take judicial notice of the allegations in a different complaint, the following colloquy occurred:

> THE COURT: Why aren't these allegations in this complaint?
>
> MR. KASOWITZ: Well, your Honor --
>
> THE COURT: When did you come up with this chart?
>
> MR. KASOWITZ: Very late last night, your Honor, extremely --
>
> THE COURT: None of this argument is in your papers?
>
> MR. KASOWITZ: That's correct, your Honor. There is not, in our papers, argument with respect to these allegations, that is correct.
>
> THE COURT: OK.
>
> MR. KASOWITZ: And perhaps the best thing for us to do would be to amend our complaint to include these allegations, which we're prepared to do. We think that the complaint, frankly, survives based on the allegations that are in it right now. We think it can stand squarely on those allegations.

(*Id.* at 54:21-55:11 (SA218-19).) Although admitting that the allegations were neither in the complaint nor the moving papers, and telling the court that the "best thing . . . to do" would be to amend the complaint, Anderson chose not to do so, but instead stood on the allegations as they were. In the six weeks between argument and decision, Anderson made no attempt to amend its complaint.

On August 2, 2010, after explaining why Anderson's allegations did not plausibly suggest conspiracy (*see* Op. at 8-18 (AA53-63)), and that the complaint itself makes clear that the only party Anderson has to blame for its exit from the magazine industry is Anderson itself (*see id*. at 12, 15 (AA57, AA60)), the district court held that "Anderson's Complaint fails to meet the plausibility standard of *Bell Atl. Corp. v. Twombly* . . . and its progeny" (*id*. at 2 (AA47)) and dismissed Anderson's claims in their entirety and with prejudice. The Clerk of the Court entered final judgment against Anderson and closed the case. (*See* Docket No. 90 (SA239).)

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 (1) denying defendants' motions to dismiss, or (2) granting Anderson leave to file the proposed amended complaint attached to its motion. (*See* Pls.' Mem. L. in Supp. of Mot. for Reconsideration, *Anderson News, L.L.C. v. American Media, Inc.*, No. 09-cv-2227 (PAC) (S.D.N.Y. Aug. 16, 2010), Doc. No. 92.)

On October 25, 2010, the district court denied Anderson's motion for reconsideration. The court noted that reconsideration "is an extraordinary remedy" whose standard "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data the court overlooked".

(Docket No. 98 ("Recon. Order"), at 2 (AA108) (quoting *Hinds County, Miss. v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 407 (S.D.N.Y. 2010) and *Shrader v. CSX Transp.*, 70 F.3d 255, 257 (2d Cir. 1995)).) The court then examined each possible basis for reconsideration. It found that Anderson "does not allege any 'intervening change in controlling law' or 'availability of new evidence,' and does not suggest that the Court's ruling will cause 'manifest injustice.'" (*Id.* (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).) Instead, the court observed that Anderson was merely trying to "relitigate an issue that [had] already [been] decided" (*id.* (quoting *Shrader*, 70 F.3d at 257) (internal quotation marks omitted)), which therefore provided "no basis for reconsideration" (*id.* at 4 (AA110)). The district court also considered the contents of the proposed amended complaint and found that it added numerous conclusory allegations, which did not cure the deficiencies described in the court's opinion dismissing Anderson's original complaint. (*Id.*) This appeal followed.

SUMMARY OF THE ARGUMENT

Under *Twombly*:

> Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a *context* that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

550 U.S. at 556-57 (emphasis added). In *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), the Supreme Court reiterated: "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Anderson asserts that appellees made a "collective decision to cut off Anderson's supply of magazines". (Anderson Br. at 29.) That allegation, however, must be evaluated against the context of "Anderson's unilateral Surcharge". (Op. at 10 (AA55).) In January of 2009, Anderson announced that in two weeks' time it would cease to distribute any magazines unless publishers agreed in writing to Anderson's terms, and would exit the business if its demands were not met in full. Although Anderson's proposed amended complaint conclusorily alleges that its demands were negotiable, it pleads no facts suggesting any actual negotiation or voluntary attempts at negotiation. Instead, failing to achieve full capitulation to its demands, Anderson made good on its promise to

shut down its business just days after its self-created February 1 deadline, allowing any magazines in its possession to rot in its warehouses.

In the district court, Anderson extensively argued that this case was similar to *Starr v. Sony BMG Music Entm't*, 592 F.3d 314 (2d Cir. 2010), in which this Court reversed the dismissal of a complaint. However, as detailed by the district court, the factual allegations here, read in the pertinent context, are nothing like those in *Starr*. Indeed, on appeal, Anderson no longer even compares its claims to *Starr*. Instead, Anderson contends that it has pled "direct evidence" of conspiracy, or (if not) that a conspiracy may plausibly be inferred from its allegations regarding: (1) parallel conduct among defendants; (2) statements by defendants; (3) meetings among defendants; and (4) the economic impossibility of unilateral action.[6]

As the district court noted, Anderson's complaint contains "no allegations of direct evidence of a conspiracy" (Op. at 10 (AA55)), and Anderson's counsel never once mentioned "direct" allegations in the district court. Until now, Anderson has argued only that its allegations support the *inference* of an

[6] As to Anderson's state law claims for tortious interference and civil conspiracy, the district court properly found that those claims fall with Anderson's Section 1 claim (Op. at 19-20 (AA64-65)), which Anderson does not dispute (*see* Anderson Br. at 57-58). Because Anderson has not adequately pled a Section 1 claim, the Court properly dismissed Anderson's state law claims.

agreement. (*See*, *e.g.*, Mot. to Dismiss Hr'g Tr. at 40:1-2 (SA204) ("plausible grounds to infer an agreement"), 47:2-48:7 (SA212) (arguing that parallel conduct plus certain facts allowed inference of conspiracy), 49:7-14 (SA213) (arguing that alleged meetings entitle Anderson to an "inference drawn" that an agreement was reached), 50:22-51:3 (SA214-15) (arguing that alleged statements about the destruction of Anderson "supports overwhelmingly an inference" of conspiracy).)

With respect to the inference of a conspiracy from parallel conduct, Anderson's allegations reveal "dramatic differences among the Defendants' reactions [that] undermine Anderson's theory of conscious parallel conduct." (Op. at 9 (AA54).) Indeed, even were defendants' conduct parallel, Anderson's allegations do not articulate any "further circumstance pointing toward a meeting of the minds". *Twombly*, 550 U.S. at 558. In particular, Anderson has alleged no statements or meetings suggesting that Time or TWR reached any meeting of the minds with other defendants as to the provision of magazines to Anderson, and Anderson's final allegation—that "no individual distributor or publisher could risk losing retail sales unless it had assurances that its competitors would follow suit" (Anderson Br. at 30)—does not suggest otherwise. As the district court noted, "Anderson's argument is really that the Defendants had to agree to its demands; otherwise the Defendants would be in violation of the antitrust law." (Op. at 11 (AA56).)

On appeal, Anderson does not defend its original complaint, but instead melds allegations from that complaint and its proposed amended complaint. In so doing, Anderson tacitly admits that its original complaint was insufficient, and also sidesteps the requirements for reconsideration set forth in Federal Rule of Civil Procedure 59(e) and Local Rule 6.3. As the district court correctly found, however, Anderson did not meet those requirements. Thus, quite apart from the proposed amended complaint's legal insufficiency, the district court properly denied Anderson's motion for reconsideration, which was a necessary prerequisite for granting Anderson's post-judgment motion to amend.

STANDARD OF REVIEW

This Court "review[s] de novo [a] district court's decision to grant a motion to dismiss". *Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009) (en banc). In so doing, the Court "accept[s] as true the factual allegations of the complaint, and construe[s] all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff". (*Id*.) The Court must not, however, give any effect to "legal conclusions couched as factual allegations", *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007), or make any "unwarranted deductions" of fact, *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994).

"A district court's denial of a party's motion to alter or amend judgment under Rule 59(e) is . . . reviewed for an abuse of discretion." *Empresa Cubana del Tabaco v. Culbro Corp.*, 541 F.3d 476, 478 (2d Cir. 2008) (quoting *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004)), (internal quotation marks omitted). A district court's denial of leave to amend a complaint is also reviewed for abuse of discretion, unless the basis for the denial was a question of law, in which case review is *de novo*. *See Sheldon v. PHH Corp.*, 135 F.3d 848, 851-82 (2d Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED ANDERSON'S COMPLAINT WITH PREJUDICE.

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Because "[t]he crucial question" in a Section 1 case is "whether the challenged conduct stem[s] from independent decision or from an agreement", stating a plausible Section 1 claim requires a complaint that sets forth "enough factual matter (taken as true) to suggest that an agreement was made". *Id.* at 553, 556 (quoting *Theater Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)) (internal quotation marks omitted) (alterations in original). "The need at the pleading stage for allegations plausibly suggesting . . . agreement" requires a

pleading with "heft"; allegations that are "merely consistent with" agreement will not suffice. *Id.* at 557.

A. Anderson's Distinction Between "Direct" and "Indirect" Allegations Does Not Salvage Its Complaint.

Anderson argues that "'[p]lausibility' comes into play [only] when a complaint asks the court to accept inferential allegations" (Anderson Br. at 38), and that its allegations are "direct", not inferential (*see id.* at 32-41). Anderson is wrong on both counts.

First, *Iqbal* makes clear that *Twombly*'s holding is not limited to the sufficiency of pleading in Section 1 cases, but applies to all pleadings. *Iqbal* further holds that a court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth". *Iqbal*, 129 S. Ct. at 1950. Then, if any "well-pleaded factual allegations" remain, the court "should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief". *Id.* There is no need to distinguish between "direct" and "indirect" allegations of a conspiracy. Under *Iqbal*, the question is simply whether the nonconclusory allegations in the complaint, individually or as a whole, plausibly give rise to an entitlement to relief.[7]

[7] Anderson's argument that "when a complaint provides enough details regarding [a] conspiracy that '[a] defendant wishing to prepare an answer . . . would know what to answer' . . . such allegations are enough" (Anderson Br. at 34

Anderson designates three allegations against TWR (none against Time) as "direct": that TWR and Kable scheduled a breakfast meeting "to discuss the conspiracy"; that TWR and several others met "to discuss[] and plan[] their collusive activity, including their market allocation agreement"; and that Mr. Jacobsen nodded and smiled. (Anderson Br. at 35-36 (alterations in original) (internal quotation marks omitted).) These purportedly "direct" allegations are akin to allegations rejected as wholly conclusory in *Iqbal* and other controlling cases. In *Iqbal*, the Supreme Court rejected as "conclusory and not entitled to be assumed true" the like allegations that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [*Iqbal*]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin'", and that Ashcroft was the "principal architect" of that policy and Mueller was "instrumental" in adopting it. *Iqbal*, 129 S. Ct. at 1951 (second alteration in original). Likewise, in *Starr*, the plaintiffs alleged that the "defendants 'agreed' to a wholesale price floor of about 70 cents per song". *Starr*,

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(quoting *Twombly*, 550 U.S. 565 n.10)), is wrong. *Twombly*'s footnote 10 merely stands for the proposition that, although *Twombly* abrogated the "no set of facts" pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), it left intact the "fair notice" requirement of Rule 8. *See Twombly*, 550 U.S. at 561. That a complaint must still provide "fair notice" does not negate the requirement of pleading "enough facts to state a claim to relief that is plausible on its face". *Twombly*, 550 U.S. at 570; *see Iqbal*, 129 S. Ct. at 1949.

592 F.3d at 319. This Court emphasized: "The allegation that defendants agreed to this price floor is obviously conclusory, and is not accepted as true." *Id.* at 319 n.2. Similarly, in *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007) (per curiam), this Court again rejected "conclusory allegations of agreement" stated "in entirely general terms without any specification".

Second, Anderson's own cases demonstrate that Anderson has made no nonconclusory "direct" allegations of any agreement. "[D]irect evidence . . . usually take[s] the form of an admission by an employee of one of the conspirators, that officials of defendants had met and agreed explicitly on terms of a conspiracy." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010). For example, in *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010), the complaint alleged that defendant Highmark had acknowledged that refinancing the plaintiff "was a good idea", but it would not do so because defendant UPMC "would retaliate against it for violating their agreement—an agreement that Highmark admitted was 'probably illegal'". The complaint alleged that other specific admissions of the existence of the agreement had been made to representatives of the plaintiff by the defendants, so that the court concluded the direct allegations of an agreement were sufficient. *Id.* Similarly, the court in *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010) (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112,

118 (2d Cir. 1999)), described "direct evidence of a conspiracy" as "a 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.'" Likewise, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002), refers to the "largely, if not entirely superfluous[,] distinction between direct and circumstantial evidence. The former is evidence tantamount to an acknowledgment of guilt; the latter is everything else *including* ambiguous statements." The treatise cited by Anderson (*see* Anderson Br. at 33) states that an "agreement can sometimes be proved by direct evidence—for example, the testimony of the participants or documents referring to an exchange of commitments". 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410c (3d ed. 2010).

As discussed below, *see infra* pages 26-54, none of the non-conclusory allegations in Anderson's pleadings rise to the definitions of "direct" set forth in these cases. Instead, what Anderson really seeks to do is infer the existence of an agreement from vague descriptions of conduct and statements made by appellees.

Third, Anderson did not once advance any "direct" evidence argument in the district court. Instead, Anderson's opposition to defendants' motions to dismiss repeatedly emphasized that its allegations were "highly suggestive of an

illegal agreement" or "indicative of a conspiracy and parallel conduct". (Opp'n to Mot. to Dismiss, *Anderson News, L.L.C. v. American Media, Inc.*, No. 09-cv-2227 (PAC), at 14 (S.D.N.Y. Jan. 19, 2010), Doc. No. 72.)[8] Likewise, Anderson's motion for reconsideration does not even mention "direct" allegations of conspiracy.

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

In asking this Court to infer a conspiracy, Anderson relies on four types of allegations: (1) parallel conduct among defendants; (2) statements by defendants; (3) meetings among defendants; and (4) the economic impossibility of independent action by any defendant. Those allegations do not plausibly state a claim under Section 1. Additionally, Anderson's proposed amended complaint

[8] *See also* Opp'n to Mot. to Dismiss at 2 (Anderson's allegations "are more than sufficient 'to raise a reasonable expectation that discovery will reveal evidence of illegal agreement'"), 14 n.6 (Anderson's allegation of "factually specific facts and statements highly suggestive of collusion"), 15 ("The complaint clearly alleges parallel conduct by defendants."), 18 (explaining absence of direct allegations of conspiracy in Anderson's complaint because "direct allegations of conspiracy are not always possible because of the secret nature of conspiracies. *Nor are direct allegations necessary.*"), 19 (arguing that defendants' statements "clearly are suggestive of a conspiracy"), 20 ("The parallel conduct of the defendants here . . . is . . . highly suggestive of a prior agreement."), 25 (allegations that defendants' parallel actions that were "contrary to their individual economic self-interest is highly indicative of conspiracy"); *see also* Mot. to Dismiss Hr'g Tr. at 40 (SA204) (Anderson argues the complaint provides "plausible grounds to infer an agreement"), 49 (SA213) (asking court to draw inference of agreement from allegations that meetings were close in time).

confirms that the district court properly dismissed Anderson's original complaint with prejudice.[9]

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

Anderson argues that in response to its ultimatum, "each of the defendants . . . moved in lockstep to end Anderson's supply of magazines", suggesting an unlawful agreement. (Anderson Br. at 44.) Anderson's argument is flawed for two reasons: (1) Anderson's factual allegations reveal that defendants did not move in "lockstep", but responded in diverse ways; and (2) the two types of similar conduct alleged do not suggest conspiracy.

a. Defendants' Actions in Early 2009 Were Diverse.

As the district court properly concluded (Op. at 8-9 (AA53-54)), Anderson alleged that defendants had widely differing responses to Anderson's ultimatum: AMI continued to ship magazines to Anderson (*see* AMI Br. at section I.B.1.a), asserting that Anderson was contractually obligated to distribute AMI's magazines on preexisting terms (*see* Docket No. 75-3, Ex. D ¶¶ 9-11, 27-32

[9] As Anderson admits, when the district court dismissed Anderson's complaint with prejudice, Anderson "had not previously amended its complaint or formally moved for leave to do so". (Anderson Br. at 3.) Nevertheless, because even the allegations in Anderson's proposed amended complaint are insufficient to state a plausible claim (as the district court properly found, *see* Recon. Order at 4 (AA110)), we address the allegations of the proposed amended complaint as if Anderson had actually filed it.

(SA147-48, SA151) (complaint filed in Delaware Chancery Court by Hachette and AMI asserting breach of contract claim against Anderson for failure to sell or distribute magazines); Kable attempted to negotiate with Anderson by offering exclusivity in certain areas of the country in exchange for Anderson retracting the surcharge (Compl. ¶ 50 (AA30)); Curtis allegedly encouraged Anderson to remain in business and improve its profitability by taking over Source's retail accounts (Compl. ¶ 50 (AA30))[10]; and Time attempted to strike a deal with Anderson by offering Anderson a lower price (*see* Interview Tr. at 2 (SA34); Compl. ¶ 53 (AA31)). Those varied responses to Anderson's surcharge are hardly the actions of co-conspirators moving "in lockstep" to drive Anderson out of business.

Although Anderson asserts that "[t]here is no inconsistency between the defendants agreeing, on the one hand, that they would cut Anderson off if it maintained its surcharge and, on the other hand, attempting to obtain concessions from Anderson" (Anderson Br. at 49), in making this argument Anderson appears to have forgotten its own theory of its case. Anderson's complaint is premised on the idea that defendants together seized on "Anderson's proposed fee . . . as an opportunity to eliminate Anderson as a wholesaler" (Compl. ¶ 44 (AA28); *see*

[10] Although Anderson alleges Curtis's suggestion and Kable's attempt at negotiation amount to an invitation to join the conspiracy (Anderson Br. at 36-37), that allegation is utterly incoherent. On their face, those allegations reflect diverse unilateral action, not conspiracy.

PAC ¶ 48 (AA83)), not that defendants agreed to cut Anderson off from its supply of magazines only if Anderson refused to compromise on different terms with each defendant. Indeed, Anderson's proposed amended complaint insinuates that defendant Curtis was on a mission to "find a way to put Anderson out of business". (PAC ¶ 47 (AA83).) Accordingly, Anderson's factual allegations about the defendants' varied responses are entirely incompatible with its theory of the objectives of the alleged conspiracy: defendants who conspire to drive a company out of business do not separately bargain for ways to keep that company afloat.

b. The Only Two Forms of Conduct Common to Defendants Are Not Suggestive of Conspiracy.

Anderson alleges only two common actions among defendants: (1) rejection of Anderson's ultimatum, and (2) cessation of defendants' (other than AMI's) shipments of magazines to Anderson during the first week of February 2009. The first is probative of nothing: both alleged conspirators and non-conspirators alike rejected Anderson's surcharge. (Compl. ¶ 43 (AA28).) The second also is probative of nothing because it is the natural consequence of Anderson's announcement that as of February 1 it would cease to distribute the magazines of publishers who had not agreed in writing to its demands. That the defendants ceased shipping magazines to Anderson during the first week of February 2009 suggests nothing about collusion; defendants' decisions were merely "a common response" to the "common stimulus" of Anderson's refusal to

handle their magazines without a signed agreement accepting Anderson's terms.[11] (Op. at 11 (AA56) (citing *Twombly*, 550 U.S. at 556 n.4).)

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

Anderson ascribes two primary errors to the district court's treatment of its allegations regarding its ultimatum and defendants' parallel responses: (1) the district court improperly characterized Anderson's surcharge as "non-negotiable" (Anderson Br. at 9-10, 24, 49-51), and (2) the district court improperly required Anderson to plead facts "tend[ing] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior" (Anderson Br. at 50). Anderson is incorrect on both fronts.

[11] Anderson's hypothesis, "that the defendants were able to effectuate a dramatic change in longstanding patterns of distribution, on an industry-wide basis and practically overnight, strongly supports an inference of advance coordination" (Anderson Br. at 44) is incredible. Appellees certainly made no arrangements for alternative distribution until after Anderson delivered its ultimatum. (*See* Interview Tr. at 5, 7 (SA37, SA39); Mot. to Dismiss Hr'g Tr. 40:13-41:3 (no conspiracy alleged until after Anderson announced its demands).) The timetable for changes to the magazine industry in early 2009 has nothing to do with defendants, and everything to do with Anderson's own February 1, 2009, deadline. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010), cited by Anderson, is not to the contrary. Although *Text Messaging* observes that sudden and simultaneous price increases in the face of steeply falling costs may support an inference of advance agreement, *id.* at 628, it does not involve a two-week ultimatum issued by a buyer with market power. Here, the only parties that made unprovoked and anomalous simultaneous price changes were Anderson and Source. (*See* Compl. ¶¶ 41, 42, 50 (AA27, AA30).)

i. The District Court Properly Viewed Anderson's Demands as "Non-negotiable".

Mr. Anderson repeatedly and publicly insisted that Anderson's seven-cent fee and inventory cost shift were non-negotiable and that Anderson would refuse to deliver the magazines of any publisher who would not submit to them. (*See supra* pages 4-5.) Despite the clarity of Mr. Anderson's words, Anderson argues that two allegations in the complaint—Anderson's agreement with Comag and Anderson's January 31 meeting with TWR—indicate that Anderson's "fee proposal" was, in fact, negotiable. (Anderson Br. at 9-10.) That conclusion is unsupported and irrelevant.

First, with respect to Anderson's allegation that Comag "did not agree to the proposed surcharge" but "proposed to Anderson a modified arrangement" (Compl. ¶ 43 (AA28)), the complaint does not allege that any defendant was aware that Anderson and Comag had reached an agreement. The proposed amended complaint alleges that defendants knew Anderson and Comag had reached agreement (PAC ¶ 4 (AA70)), but it does not allege that any defendant knew that the agreement was on terms different from what Anderson demanded. Accordingly, any understanding Anderson reached with Comag could not have signaled Time or TWR that Anderson was willing to back down from its demands, and the complaint does not allege any attempt by Anderson to negotiate with Time or TWR until January 31.

Second, with respect to the partial agreement Mr. Anderson allegedly reached with TWR (*see* Compl. ¶¶ 52-53 (AA31)), the absolute most those allegations set forth is that: (1) on Saturday, January 31, 2009—the last day Anderson would handle Time's magazines without a written agreement—Anderson was forced by Wal-Mart to negotiate with Time; (2) Anderson and TWR never reached any agreement on the inventory pushback demand; (3) Anderson promised to pay TWR $13 million it owed for previous magazine product; and (4) Anderson reneged on that promise. *See supra* pages 7-8. Indeed, Time had earlier tried to negotiate with Anderson, offering an additional two percent off of cover price, but Anderson instead insisted on the seven-cent fee and $70 million inventory pushback. (*See* Interview Tr. at 2 (SA34).) Time had every reason to believe that its magazines, if shipped to Anderson, would sit in Anderson's warehouses undistributed (as AMI's magazines in fact did).

Third, Anderson's complaint alleges that Kable and Curtis proposed different, alternative strategies for Anderson to remain in business without a surcharge or inventory cost-shift. (Compl. ¶¶ 50 (AA30).) Anderson rejected those proposals, and does not allege that it made any counteroffer. Those allegations undermine any inference that defendants knew Anderson would negotiate.

Fourth, Anderson's recent, conclusory allegations that it had the secret intent to negotiate are irrelevant.[12] Regardless of Anderson's intentions, the only reasonable conclusion for a publisher or distributor to draw from Anderson's conduct during January 2009 was that the seven-cent fee and inventory cost-shift demands were non-negotiable.

ii. The District Court Did Not Require Anderson to Plead Facts Tending to Exclude the Possibility of Independent Self-Interested Conduct.

Contrary to Anderson's assertions (*see* Anderson Br. at 50), the district court did not require Anderson to plead facts tending to exclude the possibility of independent self-interested conduct.[13] Instead, the district court examined the central allegation in Anderson's complaint—that defendants (other

[12] Anderson's proposed amended complaint contains several allegations asserting things like: defendants "well know[] the proposed surcharge . . . was negotiable" (PAC ¶ 4 (AA70)); "These meetings -- which clearly constituted merely the initial stages of the negotiating process . . . ." (*id.* ¶ 51(AA84)); and Anderson began to hear "common objections in response to [the] proposed surcharge, which the defendants knew was negotiable." (*id.* ¶ 64 (AA88)). Those allegations as to defendants' knowledge are entirely conclusory and not entitled to the assumption of truth. *See Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1951. Additionally, even those conclusory allegations are limited to the seven-cent surcharge, and do not reach the $70 million inventory pushback.

[13] The district court understood that "[a]t the pleading stage . . . an antitrust complaint does not have to tend to rule out the possibility that the defendants were acting independently." (Op. at 7 (AA52) (citing *Starr*, 592 F.3d at 321).)

than AMI) stopped shipping magazines to Anderson shortly before February 1, 2009—and determined that, in context, the behavior did not suggest the existence of a conspiracy because it was "in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market". (Op. at 10 (AA55).) Turning to the remaining allegations in Anderson's complaint, the district court (correctly) found, as detailed below, that they failed plausibly to suggest the existence of any conspiracy.[14] (*See* Op. at 9-18 (AA54-63).)

2. Anderson's Allegations of Statements by Defendants Do Not Plausibly Suggest Conspiracy.

Although Anderson attributes great significance to the fact that its pleadings contain "statements by named conspirators" (Anderson Br. at 41), not one of those statements plausibly suggests Time or TWR's involvement in a conspiracy.

[14] The district court did not "refuse to 'assume the veracity' of plaintiffs' allegations because it consider[ed] them 'implausible'". (Anderson Br. at 38.) Instead, the district court simply observed that Anderson's nonconclusory allegations did not suggest that defendants' decisions to reject Anderson's ultimatum and switch to wholesalers not seeking price concessions was anything but a natural, competitive response.

a. The Alleged Statements Involving TWR in Anderson's Complaint Do Not Plausibly Suggest Conspiracy.

Anderson's complaint contains no allegations of statements made involving Time and only three allegations of statements made involving TWR: (1) defendant Curtis's alleged statement that Curtis was "going to have to go with whatever" TWR did (Compl. ¶ 49 (AA29)); (2) statements that allegedly amounted to an agreement between Anderson and TWR (Compl ¶¶ 52-55 (AA31-32)); and (3) Mr. Jacobsen's alleged statement to Source: "Exactly -- we now control this space" (Compl. ¶ 56 (AA32)).

i. Curtis's Statement that Curtis Planned to Follow TWR.

Anderson alleges that on or about January 21, 2009, Bob Castardi, President and CEO of Curtis, told Mr. Anderson, "in words or substance" that he didn't "want a problem. [He] would like to get this worked out. But [he would] have to go with whatever Rich [Jacobsen . . .] does." (Compl ¶ 49 (AA29).) That statement is exculpatory: Mr. Castardi didn't know what Mr. Jacobsen was going to do, but was waiting to see and follow "whatever" decision Mr. Jacobsen made.[15]

[15] Contrary to Anderson's suggestion (Anderson Br. at 42-43), there is nothing unlawful about conscious parallelism. *See Twombly*, 550 U.S. at 553-54 ("Even 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recognize[e] their shared economic interests and their interdependence with

Indeed, Anderson's allegation that Curtis's prior attempt to act first resulted in dismal failure (*see* Compl. ¶ 45 (AA28)) renders Mr. Castardi's alleged statement completely innocuous.

Mr. Jacobsen's purported response when told by Mr. Anderson about Mr. Castardi's statement, that he "did not deny it, but indicated that he realized that Anderson knew that there had been collusion" (Compl. ¶ 52 (AA31)), although anointed by Anderson as a "direct" allegation of conspiracy (Anderson Br. at 35), is utterly conclusory, pleading not that Mr. Jacobsen made any culpable statement but that he (i) "indicated" that (ii) he "realized" that (iii) Anderson "knew" that (iv) there had been "collusion" between unspecified persons. Anderson's brief in the district court made clear that Mr. Jacobsen's act of "indication" was silence. (*See* Opp'n to Mot. to Dismiss at 9.) As the district court observed, it would be entirely improper to use that allegation to infer a conspiracy based on Mr. Jacobsen's alleged silence. (Op. at 16 (AA61).)

Anderson's proposed amended complaint changes the allegation, pleading that Mr. Jacobsen "did not deny it, but instead crossed his arms, nodded in agreement and smiled". (PAC ¶ 70 (AA91).) Anderson's alteration of its original allegation proves only two things. *First*, Mr. Jacobsen *did not* make any

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respect to price and output decisions' is 'not in itself unlawful.'") (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

verbal statements in response to Mr. Anderson. *Second*, Mr. Anderson's body language did not "indicate" anything—if courts were to infer collusion (never mind a "realization" that another party "knew" that there had been "collusion") from someone nodding along and smiling during the course of a conversation—as almost everyone who is actually paying attention to what someone else is saying does—then our jails would be bursting at their seams with confessed conspirators.[16] Indeed, Anderson's allegation that Mr. Anderson himself told TWR that Curtis would do whatever TWR did undermines the foundation of

[16] *Re/Max Int'l Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), cited by Anderson, is not to the contrary. In *Re/Max*, a former employee of one of the defendant real estate brokerages testified that in response to his inquiry regarding whether there had been an antitrust violation, the CEO of his defendant-company informed him of the existence of a conspiracy by stating "'that there was no need to worry because someone would have to prove' he [(the CEO)] spoke to . . . the principal shareholder of" the alleged co-conspirator, and "lean[ing] forward, smil[ing] and [saying] 'of course we didn't". *Id.* at 1011. Thus the alleged co-conspirators made verbal statements accompanied by clear gestures intended to mean something. The *Re/Max* court expressly stated that, on its own, the CEO's "act of leaning forward and smiling have no incriminatory meaning". *Id.* Here, Mr. Jacobsen made no verbal response, and the allegation that his nodding was "in agreement" is utterly conclusory mind-reading.

The same is true for *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965). Although the *Esco* court observed in dicta that "[a] knowing wink can mean more than words", the example *Esco* gives of such a "knowing wink"—a statement made by one competitor to others that "I won't fix prices with any of you, but . . . I am going to . . . put the price of my gadget at X dollars; now you all do what you want"—demonstrates that in order to even conceivably be of significance the "knowing wink" must to be sufficiently clear to take on a meaning. *Id.* at 1007.

Anderson's argument that unilateral action would constitute economic suicide: Anderson has pleaded that it facilitated lawful parallel action.

Accordingly, neither Mr. Castardi's statement nor Mr. Jacobsen's alleged reaction to that statement—as formulated in either the complaint or the proposed amended complaint—plausibly suggests that Time or TWR reached any agreement not to deal with Anderson.

ii. Statements that Allegedly Amounted to an Agreement Between Anderson and TWR.

Anderson alleges that on January 31, 2009, at Wal-Mart's urging, Anderson met with TWR to try to reach an agreement. (Compl. ¶ 52 (AA31).) By the end of the meeting Mr. Anderson believed that he had "an agreement for an increase in the discount to Anderson",[17] and also "to discuss scan-based trading" on Monday, February 2, 2009, in return for which, after the scan-based trading call, Anderson would make a $13 million payment to TWR". (*Id.* ¶ 53 (AA31); *see* PAC ¶ 65 (AA89).) On February 2, TWR and Anderson had a "cordial call" regarding scan-based trading, but Anderson did not make the $13 million payment. *See supra* page 8. According to Anderson, a few hours later Mr. Jacobsen

[17] Anderson is unsure of the purported agreement's terms: *compare* "2.00% for all Time weeklies, or 2.75% for all *People* weeklies" (Compl ¶ 53 (AA31) (emphasis added)), *with* "an increase of 2.00% in the discount . . . for all *Time* weeklies, and 2.75% for all *People* weeklies" (PAC ¶ 65 (AA89) (emphasis added)).

informed Mr. Anderson that "TWR and Time executives had decided 'to change the channel,' that 'they were going to have to use two wholesalers,' and that 'that was the way it was going to be.'" (Compl. ¶ 54 (AA31).)

Those allegations are facially exculpatory: TWR negotiating with Anderson is inconsistent with TWR joining a boycott to eliminate Anderson from the magazine industry. Even the conclusory allegation that Time and TWR were "stringing Anderson along with sham negotiations to attempt to induce Anderson to make payments before it was cut off" (PAC ¶69 (AA89-90)), pleads a legitimate, independent business motive (attempt to collect a pre-existing debt), not any fact suggesting conspiracy. Indeed, the gist of Anderson's allegations is: (1) Wal-Mart knew TWR had decided to discontinue using Anderson, and urged Anderson to negotiate instead of standing on its ultimatum; (2) Anderson began negotiations, and promised to pay $13 million following Monday's "cordial call"; (3) TWR "attempted" to get—but never received—the $13 million from Anderson; and (4) TWR discontinued further negotiations. Anderson's allegation that "TWR never had any intention of honoring its commitment to continue to work with Anderson" (Compl. ¶ 55 (AA31)) is wholly conclusory, and also does not suggest any agreement among defendants.

iii. Rich Jacobsen's Statement: "Exactly -- we now control this space".

Anderson alleges that on February 2, 2009, when "Jacobsen told Mays that TWR would not be supplying any magazines to Source", Mr. Mays, Source's CEO, launched into a parade of horribles, to which Mr. Jacobsen allegedly responded: "Exactly--we now control this space." (Compl. ¶ 56 (AA32).) That alleged statement is so vague as to be entirely meaningless. Indeed, if the statement means anything at all, as the district court observed, it amounts to a "bald statement[] describing the state of the magazine industry" (Op. at 16 (AA61)), and does not suggest the existence of any conspiracy.

b. The New Allegations of Statements Involving Time or TWR in Anderson's Proposed Amended Complaint Do Not Plausibly Suggest Agreement.

Anderson's proposed amended complaint contains only one new statement that implicates TWR and one new statement that implicates Time. Neither plausibly suggests conspiracy.

i. Bob Castardi's Alleged Statement that He Knew with "100% certainty" what TWR, Bauer, and AMI Would Do.

Anderson alleges that on January 31, 2009, Bob Castardi of Curtis told a Source executive that he knew "with '100% certainty,' that TWR, Bauer and AMI would refuse to supply product to Source". (PAC ¶ 71 (AA91).) That statement does not even remotely suggest a conspiracy. January 31, 2009, was the

last day Anderson would distribute magazines without a signed agreement accepting its demands. Those rejecting Anderson's demands had to make alternative arrangements with printers, replacement wholesalers, and retailers in advance, none of which were secret. Anderson itself alleges that on January 30, 2009, Wal-Mart knew that TWR had decided to cease using Anderson. (*Id.* ¶ 65 (AA89).) Anderson also alleges that on January 29, Curtis sent an e-mail to its publisher clients, stating: "effective immediately, Curtis is suspending all further shipments of magazines" to Anderson. (*Id.* ¶ 66 (AA89).) Likewise, Anderson alleges that Comag notified its publisher clients of its decision to continue using Anderson and Source, a decision that Rodale, DSI and AMI learned of. (*Id.* ¶ 60 (AA87-88).) Anderson further alleges that TWR told Anderson that Time and TWR would "never, ever do business with Source again." (*Id.* ¶ 23 (AA75).) In sum, the complaint establishes that everyone in the industry—alleged conspirators and non-conspirators alike—were aware of the decisions being made by the various publishers and distributors. Thus, Mr. Castardi's alleged statement on January 31 does not plausibly suggest anything about conspiracy.[18]

[18] Additionally, Castardi's alleged statement undermines Anderson's claim of an industry-wide conspiracy because it suggests that Castardi did not know what course of action the other defendants—Kable, Hachette, Rodale, DSI, and Time—had decided upon.

ii. Alleged Statements by Ann Moore.

The alleged statements made by Time's CEO Ann Moore to Mr. Anderson on February 2, 2009, that she "wished we had had this conversation two weeks ago" and that Jimmy Pattison, the owner of News Group "was a nice person and maybe would buy some of Anderson's assets" are exculpatory: they suggest that Time wanted to negotiate with Anderson, but that Anderson had approached Time too late. (PAC ¶ 68 (AA90).) Anderson's assertion that "two weeks ago" specifies when Time entered a conspiracy (Anderson Br. at 54) is ridiculous. Anderson admits that it stuck to its ultimatum until forced to negotiate by Wal-Mart on January 30. (PAC ¶ 65 (AA89).) Ms. Moore merely expressed her regret that Anderson had been unwilling to negotiate with Time when it first announced its demands "two weeks ago". Likewise, Ms. Moore's alleged statements that Time had "decided to consolidate the channel" or "mov[e] forward and eliminat[e] Anderson and Source" (*id.* ¶ 68 (AA90)) suggest nothing about concerted action, but merely reiterate that Time had by then made arrangements with other wholesalers. In response to Mr. Anderson's plea that Time's decision would destroy Anderson, Ms. Moore's alleged response, that another wholesaler might buy Anderson's assets and employ its personnel (*id.*), is not the least bit suggestive of any conspiracy. Indeed, if Anderson were really going out of business, an

orderly sale to someone who wanted to preserve Anderson's workforce and facilities would have reduced the disruption to consumers as well as publishers.

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

Anderson repeatedly emphasizes its allegations regarding meetings among defendants, going so far as to call several of them "direct" evidence of a conspiracy. (Anderson Br. at 35-36, 53, 54-55.) First, under *Twombly* and *Starr* mere allegations of meetings among alleged conspirators do not have the significance Anderson attributes to them. Second, Anderson's allegations of meetings lack sufficient "heft" plausibly to suggest Time's or TWR's involvement in a conspiracy, never mind to constitute a "direct" allegation of conspiracy.

a. Under *Starr* and *Twombly*, Bare Allegations of Meetings Are Not Probative of Conspiracy.

Anderson's allegations that certain defendants met does not advance the plausibility of its Section 1 claim. The Sherman Act does not prohibit competitors from meeting; it prohibits them from entering into agreements in restraint of trade. *Twombly* and *Starr* make clear that when evaluating allegations of meetings or communications among purportedly conspiring defendants, what matters is not whether a plaintiff has alleged that meetings *occurred*, but whether a plaintiff has alleged factual matter sufficient to show that *what occurred* at any alleged meetings was unlawful. For example, in *Twombly* there was no doubt that

the defendant Baby Bells met and communicated (*see* Docket No. 67-7, Ex. D ("Twombly Compl.") ¶ 46 (SA75)), but the Court still found plaintiffs' allegations deficient, *see Twombly*, 550 U.S. at 570. Underlying the Court's decision was plaintiffs' failure to set forth factual matter plausibly suggesting that the defendant Baby Bells had engaged in unlawful activity, either inside or outside of the alleged meetings. Likewise, although the plaintiffs in *Starr* pointed to numerous meetings among defendants through both joint ventures and trade associations (Docket No. 75-2, Ex. C ¶¶ 67, 78, 87, 98, 131 (SA113, SA116, SA119, SA121, SA129)), in reaching its decision to uphold the complaint this Court discounted those allegations, instead focusing on other allegations demonstrating that defendants had, in fact, engaged in an unlawful price-fixing scheme, whether conceived at the alleged meetings or elsewhere. *See Starr*, 592 F.3d at 323-24.

b. The Alleged Meetings Involving Time or TWR Do Not Plausibly Suggest Their Involvement in a Conspiracy.

Anderson's complaint contains only two allegations of meetings involving Time or TWR. Neither plausibly suggests conspiracy.

i. The "Numerous Meetings" Allegation.

Anderson alleges that "throughout the latter part of January and the early days of February, defendants -- ostensibly each others' competitors -- held numerous meetings during which they discussed dividing the U.S. distribution

territory into two regions". (Compl. ¶ 55 (AA31-32).) That allegation is entirely conclusory and therefore does nothing to render Anderson's claim of a conspiracy plausible. *See In re Elevator Antitrust Litig.*, 502 F.3d at 51 n.5 (dismissing as conclusory plaintiffs' assertion that defendants "[p]articipated in meetings in the United States and Europe to discuss pricing and market divisions").

ii. The January 2009 Meeting Allegation.

Anderson alleges that "in furtherance of their conspiracy to cut off supply to Anderson and Source, 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". (Compl. ¶ 55 (AA31-32).) In other words, a subset of defendants (not including Time) met at some point in January 2009—that is, at some point during the entire duration of the alleged conspiracy—for some unknown reason. As the district court concluded, that allegation does not suggest an agreement among defendants. (*See* Op. at 9 n.9 (AA54).)

Indeed, Anderson's alterations to this allegation confirm that Anderson has no idea who was involved in the supposed meeting, when it occurred, or what was discussed. Although Anderson's original complaint alleges that Hudson attended the meeting, the proposed amended complaint instead states that Hudson was "at the heart" of the meeting, omitting any specific allegation that anyone from Hudson was present. (*Compare* Compl. ¶ 55 (AA31-32), *with* PAC

¶ 63 (AA88).) Conversely, defendant DSI—a competitor to no one (PAC ¶ 20 (AA74) (describing DSI as a provider of marketing services); Mot. to Dismiss Hr'g Tr. at 32:10-20, 70:4-18 (SA196, SA234))—has suddenly been added to the guest list (*compare* Compl. ¶ 55 (AA31-32), *with* PAC ¶ 63 (AA88)). Whereas Anderson's proposed amended complaint included a date for the meeting—January 29, 2009—Anderson subsequently backtracked, qualifying the allegation to read "on *or about* January 29, 2009"—in other words back to sometime during January 2009. (Docket No. 100 ("Letter Dated Oct. 4, 2010") at 1 (AA114).) Finally, and most importantly, Anderson is still unable to allege any fact about the substance of the alleged meeting, relying instead on the entirely conclusory assertion that defendants "discussed and planned their collusive activity, including their market allocation agreement". (PAC ¶ 63 (AA88).)

iii. The Two New Allegations of Meetings Involving TWR Contained in the Proposed Amended Complaint.

(1) Kable's Communication with TWR Regarding the IPDA.

Anderson's proposed amended complaint alleges that on January 22, 2009, Kable communicated with TWR to "'catch up on a few' . . . 'IPDA type items'", which supposedly suggests a conspiracy because the IPDA "is precisely the type of trade organization that has been used perennially by competitors to attempt to mask their illegal, anti-competitive communications". (PAC ¶ 57

(AA86).) However, allegations regarding trade associations are not inherently suspicious, *see Twombly*, 550 U.S. at 567 n.12, and, other than asserting that IPDA is the same "type" of trade association that unspecified others have used to mask illegality, the allegation provides no basis to conclude IPDA was or is a vehicle for any unlawful conduct. Moreover, the allegation appears to be purposefully vague, failing to specify the form of the communication, the contents of the communication, or the persons involved. Indeed, Anderson does not even plead that TWR responded to Kable's purported "communication" or that the communication was not in fact about IPDA matters.

(2) The Alleged Scheduling of a Breakfast Meeting Involving Kable and TWR.

Anderson alleges that on January 25, 2009, the presidents of "TWR and Kable scheduled a breakfast meeting for Thursday, January 29, 2009, to discuss the conspiracy". (PAC ¶ 62 (AA88).) Anderson has quite carefully avoided pleading that any breakfast meeting ever actually occurred. Anderson's additional assertion that the purpose of the meeting was "to discuss the conspiracy" (*id.*) is, once again, wholly conclusory and not entitled to any presumption of truth.

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

In an attempt to shoehorn its complaint into the framework of *Starr*, Anderson argues that defendants must have conspired because "it would not be

economically feasible for a single distributor or publisher unilaterally to cut off supply to a major wholesaler". (PAC ¶ 72 (AA92).) Thus, Anderson argues, defendants must have conspired because "[a]bsent such coordination and agreement, the single publisher faced the unacceptable risk that its product would not be distributed to retailers in the areas where Anderson was the only viable wholesaler." (*Id.*; *see also* Anderson Br. at 43 ("Had any individual publisher or distributor refused to deal with Anderson, it would risk losing distribution to retail outlets served by Anderson—as Curtis learned when it threatened to cut Anderson off in 2008.").) However, Anderson's allegations about economic self-interest provide no plausible basis to infer that Time or TWR were involved in any conspiracy.

a. The Allegations in Anderson's Complaint Do Not Plausibly Suggest Time or TWR Conspired.

First, Anderson's theory proves far too much. Under Anderson's hypothesis, no magazine publisher or distributor could ever cease doing business with Anderson absent collusion, whether Anderson's demand had been seven cents per copy or seven dollars per copy. With that sort of power, Anderson surely would not have been losing money for a decade. (*See* Interview Tr. at 2 (SA34).) As the district court summarized: "Anderson's argument is really that the Defendants had to agree to its demands; otherwise the Defendants would be in violation of the antitrust law." (Op. at 11 (AA56).) The district court carefully

explained why Anderson's allegations were weaker than those in *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009), in which the Sixth Circuit found a very similar complaint insufficient to raise an inference of a conspiracy.[19] (Op. at 12-14 (AA57-59).)

Second, even if Wal-Mart may have been willing to lose Curtis's magazines in order to maintain its relationship with Anderson, that allegation has no bearing on whether Wal-Mart would have been willing to lose Time or TWR's titles. That Wal-Mart was willing to live without, for example, *Woman's Day*, *Car & Driver*, and *Newsweek* on its shelves (*see* Compl. ¶ 14 (AA21)), does not mean that Wal-Mart would stick with Anderson and lose the titles of "the largest magazine publisher in the United States . . . including *Time*, *People*, *Entertainment*

[19] Anderson fails to distinguish *Travel Agent*. *First*, Anderson asserts that the complaint in *Travel Agent* lacked "any direct allegations of conspiracy" and included "only bald assertions that defendants reached an 'agreement,' along with 'legal conclusion[s] masquerading as . . . factual allegation[s].'" (Anderson Br. at 52.) The same is true of Anderson's complaint. *Second*, Anderson notes that the airlines' prior unsuccessful attempts to cut commissions were 15-20 years before the challenged activity, when the market structure was different, whereas Curtis's prior unsuccessful attempt was two years prior. *Id.* at 52-53. However, as the district court recognized, "In *Travel Agent*, unlike here, the airlines were not faced with a Surcharge ultimatum. . . . Here, by contrast, Anderson changed the status quo by demanding that the industry agree to the Surcharge." (Op. at 13-14 (AA58-59).) *Third*, Anderson contrasts the "tight chronology" with the alleged seven-year conspiracy alleged in *Travel Agent* (Anderson Br. at 53), but again, the "tight chronology" was Anderson's own creation: "Anderson created a common economic stimulus, impelling an immediate market reaction." (Op. at 14 (AA59).)

Weekly, *Sports Illustrated*, *Essence*, *Fortune*, *Golf*, *In Style*, *Money*, *People en Espanol*, *Real Simple*, *Sports Illustrated for Kids*, *This Old House*, *Coastal Living*, *Cooking Light*, *Health*, *Southern Accents*, *Business 2.0* and *Southern Living*". (PAC ¶ 11 (AA72-73).) In fact, Anderson's allegation that Wal-Mart told Anderson to work out a deal with Time—and not any of the other magazine publishers or distributors—demonstrates Wal-Mart's recognition that Time was different from Curtis. (*See* Compl. ¶ 52 (AA31).)

Third, Anderson's complaint makes clear that it was not in publishers' or distributors' interests to collude to drive Anderson or Source from the magazine wholesale business. As the district court observed, common economic sense dictates that "[p]ublishers and national distributors have an economic self-interest in more wholesalers, not fewer; more wholesalers yields greater competition, which is good for suppliers. Destroying Anderson and Source would reduce the publishers' wholesale outlets from four to two and would give Hudson and News Group, the two remaining major wholesalers, 90% of the market share." (Op. at 8 (AA53).)

The complaint demonstrates that Anderson went out of business not because of any illicit economic motivation, but because Anderson proved to be an inefficient high-cost provider of services. Mr. Anderson announced his seven-cent surcharge and inventory cost-shift to the industry, saying those new terms were

non-negotiable because Anderson had been losing money for a decade, and such measures were necessary for Anderson to "continue as a viable cost effective method of distributing magazines". (Interview Tr. at 2 (SA34).) Mr. Anderson explained to the industry that even with the seven-cent fee and inventory pushback, he thought that Anderson would "still be . . . the least costly way to get magazines to market", but that he had "told this to the presidents of the [publishing] companies I met with, if you can distribute magazines in a less expensive way, you have an obligation to do that". (*Id.* at 7 (SA39).)

Anderson's pleading alleges that Source never sought an inventory pushback, and rescinded its seven-cent demand shortly before February 1. (*See* PAC ¶ 71 (AA91).) Anderson's complaint contains no allegation that Hudson or News Group, or any other wholesaler, demanded any improvement on their preexisting price or inventory terms. Consequently, according to Anderson's own complaint, distribution through every other wholesaler was less expensive than acquiescence to Anderson's demands, and Time, TWR and other publishers and national distributors had not just an independent economic self-interest, but an "obligation", to employ alternatives to Anderson.[20]

[20] Anderson's argument that "[d]efendants would have been at risk of losing sales if they did not arrange, in advance, to have substitute wholesalers available" and that "[i]f defendants had not agreed among themselves, one would have expected a chaotic shake-out before any new distribution pattern emerged"

b. The Allegations in Anderson's Proposed Amended Complaint Do Not Plausibly Suggest Time or TWR Conspired.

Anderson's proposed amended complaint introduces the idea that publishers and distributors sought to restore a system of "regional exclusivity" in magazine wholesaling.[21] (*See*, *e.g.*, PAC ¶ 44 (AA81-82).) Anderson alleges that

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(Anderson Br. at 45), is contradicted by the facts alleged in the complaint itself, which make clear that in February 2009 the shake-out in the magazine industry was chaotic and that defendants did lose sales (*see* Compl. ¶ 72 (AA37) (Anderson's exit from the magazine industry has "directly and substantially reduce[ed] the ability of retailers to obtain . . . magazines"); PAC ¶ 93 (AA99-100) (as a result of Anderson's exit "wholesale distributors were temporarily unavailable to serve retailers in those areas . . . for a significant period of time the retailers' customers had access to fewer magazines as well")).

[21] Anderson alleges that in 1995, the Department of Justice investigated publishers and national distributors for establishing exclusive geographic territories for wholesalers. (PAC ¶ 37 (AA78-79).) That investigation commenced fourteen years before Anderson's alleged conspiracy. Moreover, Anderson has completely mischaracterized that investigation; the targets of that investigation were not publishers or national distributors, but wholesalers. *See* http://www.justice.gov/atr/cases/f4300/4347.htm (United States seeks protective order to preserve the secrecy of its "ongoing grand jury investigation into whether *magazine wholesalers* have engaged in illegal collusive conspiracies") (emphasis added); http://www.justice.gov/atr/cases/f206100/206186.htm (plea agreement of New York Periodical Distributors, who conspired with another wholesaler); http://www.justice.gov/atr/cases/f218400/218410.htm (plea agreement of two wholesalers for conspiracy to allocate territories for magazine distribution in Texas, Puerto Rico, and the U.S. Virgin Islands); http://www.justice.gov/atr/cases/f204700/204714.pdf (plea agreement of Empire State News Corporation, for conspiring with another wholesaler to allocate territories in New York); http://www.justice.gov/atr/public/press_releases/1998/1776.pdf (DOJ press release announcing guilty plea of C&S News, a Texas magazine wholesaler).

publishers and national distributors preferred the good-old days when there were several hundred wholesalers with exclusive territories.[22] (*See* PAC ¶¶ 35, 44 (AA78, AA81-82).) Anderson also alleges that by 2008, Source, Anderson, News Group, and Hudson "had substantially all of the market for single-copy magazine distribution" (PAC ¶ 37 (AA78-79)) and in some areas of the country "Anderson was the only viable wholesaler". (PAC ¶ 72 (AA92).) The allegation that publishers and national distributors preferred having hundreds of wholesalers to just four who had geographic monopolies in some places establishes the proposition articulated by the district court in rejecting Anderson's theory: "Publishers and national distributors have an economic self-interest in more wholesalers, not fewer". (Op. at 8 (AA53).) Indeed, Anderson's allegation that publishers had no choice but to deal with it because of its size and regional monopolies directly contradicts Anderson's argument that publishers and national distributors had an economic incentive to destroy it and Source. Imagine how

[22] Anderson vaguely posits that at some "earlier" time "consultants" retained by Time "concluded that one option for enhancing the 'stability' of the single-copy magazine distribution market" was "to establish exclusive 'regional franchises' for wholesaling", but noted there would be "legal challenges". (PAC ¶ 45 (AA82).) It is backwards to infer that Time would decide to participate in a group boycott rather than enter into exclusive regional franchises, which are presumptively lawful. *See E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 30 (2d Cir. 2006) (noting that "exclusive distributorship arrangements are presumptively legal").

much better for publishers it would have been had Anderson issued its ultimatum as one of several hundred wholesalers rather than one of four, and how much worse it would have been had Anderson been the only wholesaler in the country.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING ANDERSON'S RULE 59 MOTION.

Anderson did not formally move to amend its complaint until after the district court entered judgment. (*See* Anderson Br. at 3.) "A party seeking to file an amended complaint post-judgment must first have the judgment vacated or set aside pursuant to Fed. R. Civ. P. 59(e) or 60(b)." *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008); *see Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991) (Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint.").

Here, Anderson did not meet the conditions necessary for granting reconsideration:

> '[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.' *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934, 12 L. Ed. 2d 298, 84 S. Ct. 1338 (1964). The major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.' 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790.

Virgin Atl. Airways, Ltd., 956 F.2d at 1255; *see Munafo*, 381 F.3d at 105. Anderson did "not allege any 'intervening change in controlling law' or 'availability of new evidence,' and does not suggest that the Court's ruling will cause 'manifest injustice.'" (Recon. Order at 2 (AA108).) On appeal, Anderson does not argue that it satisfied any of those factors.

Anderson's motion for reconsideration was an attempt to relitigate issues, including: the sufficiency of the allegations under *Twombly* and *Iqbal*; the economic plausibility of the alleged conspiracy; the appropriateness of considering Mr. Anderson's interview; the import of the Delaware litigation brought by AMI; whether Hudson had a plausible role in the alleged conspiracy; and whether the court was required to take judicial notice of certain allegations in the Source complaint, and treat them as if they were in the Anderson complaint. (*See* Pls.' Mem. L. in Supp. of Mot. for Reconsideration, *Anderson News, L.L.C. v. American Media., Inc.*, No. 09-cv-2227 (PAC) (S.D.N.Y. Aug. 16, 2010), Doc. No. 92.) Anderson pressed each of those arguments in opposing the motions to dismiss. As the district court held, "a motion for reconsideration 'should not be granted where the moving party seeks solely to relitigate an issue that is already decided'". (Recon. Order at 2 (AA108) (quoting *Shrader*, 70 F.3d at 257.)

Anderson argues that review should be *de novo* "because the only reason that the district court gave for denying plaintiffs leave to amend was that the

proffered amended complaint, like the original, failed to state a claim. *See Starr*, 592 F.3d at 321". (Anderson Br. at 31.) That assertion is unjustified.

First, the district court did not rest its denial of reconsideration on the insufficiency of the proposed amended complaint. Instead, the court's decision rests on Anderson's failure to meet the legal standard for reconsideration: Anderson could show no change in controlling law, no previously unavailable evidence, no manifest injustice, and no clear error of law. After taking several pages to demonstrate that Anderson was merely attempting to reargue matters it had previously argued, the court held: "There is no basis for reconsideration. Accordingly, extended discussion regarding Anderson's defendant-specific arguments is unnecessary." (Recon. Order. at 4 (AA110).) Only after that extended discussion did the district court state that the proposed amended complaint remained deficient. (*See id.*)

Second, *Starr* and the other cases on which Anderson relies (Anderson Br. at 31-32) undermine its position. In *Starr*, *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229 (2d Cir. 2007), and *Platten v. HG Bermuda Exempted Ltd.*, 437 F.3d 118 (1st Cir. 2006), the plaintiffs moved to amend their complaints *before* the court had entered judgment against them, so that the grant of a motion for reconsideration was not a prerequisite to considering the motions for leave to amend in those cases.

What *Starr*, *Kassner* and *Platten* demonstrate is that Anderson should have moved to amend its complaint sometime before August 2, 2010. Its decision not to do so until after its complaint was dismissed is inexcusable, and Anderson can articulate no justification sufficient to show that the district court abused its discretion in concluding that Anderson had not met the standard for reconsideration. As set forth above: (1) in March 2009, defendants advised Anderson's counsel that they would move against Anderson's complaint on the same grounds as they had moved against the Source complaint; (2) in April 2009, Anderson's counsel amended the near-identical Source complaint rather than oppose the defendant's motion to dismiss; (3) between April and December 2009, Anderson's counsel chose not to amend Anderson's complaint, though it could have done so as of right; (4) between December 2009 and June 2010, when faced with the defendants' motions to dismiss, Anderson's counsel chose to stand on Anderson's original complaint instead of moving to amend, even though it had made the opposite decision in the Source litigation; (5) at oral argument in June 2010, Anderson's counsel arrived armed with certain allegations from the Source complaint and asked the court to take judicial notice of them, a tactic Anderson does not attempt to justify on appeal; (6) also at oral argument, Anderson admitted that its opposition papers contained no argument based on those allegations, volunteered that "perhaps the best thing for us to do would be to amend our

complaint", but then never formally moved to do so; and (7) in the six weeks between oral argument and dismissal, Anderson did not to seek leave to amend. (*See supra* pages 11-16.)

This Court should not permit Anderson to make a poor series of tactical decisions, waste the time and resources of the district court and parties, lose the gamble it took, and then get a do-over, in contravention of the standards governing reconsideration and Rule 59.

CONCLUSION

For the foregoing reasons, Time and TWR respectfully request that this Court affirm the judgment of the district court.

April 18, 2011

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify under penalty of perjury that the foregoing Brief for Defendants-Appellees Time Inc. and Time/Warner Retail Sales & Marketing, Inc. contains 13,716 words, as calculated by the Microsoft Word 2002 word processing system, and therefore complies with Rule 32(a)(7)(B)(i).

April 18, 2011

s/ Rowan D. Wilson
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