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 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 (No. 09-cv-2227 (PAC))

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS ANDERSON NEWS, L.L.C. AND LLOYD T. WHITAKER, AS ASSIGNEE FOR ANDERSON SERVICES, L.L.C.

MARC ROWIN
THOMAS P. LYNCH
LYNCH ROWIN LLP
630 Third Avenue
New York, NY 10017
(212) 682-4001
mrowin@lynchrowin.com

Counsel for Lloyd T. Whitaker, as Assignee for Anderson Services, L.L.C.

MICHAEL K. KELLOGG
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
mkellogg@khhte.com

Counsel for Anderson News, L.L.C.

May 16, 2011

(additional counsel listed on inside cover)

MARC E. KASOWITZ
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1710
mkasowitz@kasowitz.com

Counsel for Anderson News, L.L.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER MATERIAL

INTRODUCTION

The complaint alleges that defendants agreed to cut off Anderson's supply of magazines. No defendant disputes that such an agreement would violate Section 1. Instead, defendants, first, argue that the allegations are wholly conclusory and hence insufficient to state a claim, and, second, they ask the Court to accept, as the district court did below, an alternative version of events that they contend is much more plausible: *viz.*, that each of the defendants acted unilaterally in response to a non-negotiable demand – a "substantial error in judgment" – made by Anderson. Op. at 12 (AA57). Neither tack should succeed.

The complaint names specific individuals who met at specific places and times and agreed in those meetings collectively to cut off Anderson's supply of magazines and divert them instead to two other, more compliant wholesalers. Defendants can – in discovery, on summary judgment, and at trial – dispute the truth of those allegations; but the allegations cannot possibly be dismissed as "conclusory." The direct allegations in the complaint bear no resemblance to the sort of allegations – that unidentified individuals agreed (for example) to a price increase at some unidentified time – which courts have properly treated as mere conclusions. Defendants' suggestion that only explicit confessions by co-conspirators qualify as direct allegations has no precedent to support it and

ignores the requirement that well-pleaded factual allegations must be accepted as true.

Similarly, allegations that defendants acted in parallel, discarding long-established distribution patterns and coordinating a transfer of business to new wholesalers, cannot be treated as innocuous simply because the conduct occurred after Anderson proposed to raise prices for its services or because defendants dispute whether their conduct was truly "parallel." The district court refused to draw plausible inferences in favor of plaintiffs, while accepting defendants' self-serving interpretation of the events alleged, and took as true facts not alleged in and contrary to the complaint. *Iqbal* and *Twombly* do not authorize district courts to dismiss a complaint based on the court's own off-the-cuff conclusion that "it is plausible that each of the . . . Defendants [acted] unilaterally." Op. at 13 (AA58). Defendants' factual claims are matters for summary judgment and trial – not for a motion to dismiss, where plaintiffs bear no *evidentiary* burden. This Court should reverse.

ARGUMENT

I. ANDERSON STATED A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

A plaintiff may state a Section 1 claim by alleging the agreement directly or by alleging parallel conduct and "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *accord Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Anderson's complaint satisfies both standards.

A. The Complaint Directly Alleges That Defendants Conspired

Twombly and *Iqbal* left untouched the principle that "[i]f a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled." *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010). "*Twombly* observed that a direct allegation of conspiracy . . . would say who conspired, at what time, to do what." *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (citing *Twombly*, 550 U.S. at 556 n.10). By alleging specific conspiratorial meetings and incriminating actions and statements involving named individuals, Anderson made the type of direct allegations that, taken as true, state a claim for relief. *See* Pls. Br. 32-41.

1. Iqbal *Did Not Authorize District Courts To Disregard Factual Allegations Because They Are "Implausible"*

Time argues (at 22) that, after *Iqbal*, "[t]here is no need to distinguish between 'direct' and 'indirect' allegations of a conspiracy," because the sole question is whether a complaint's allegations "plausibly give rise to an entitlement to relief," *Iqbal*, 129 S. Ct. at 1950. But while a court may weigh the plausibility of a legal conclusion that a complaint seeks to draw from well-pleaded facts, a court may not weigh the plausibility of the underlying facts themselves.

Iqbal did not alter the settled rule that a complaint's allegations must be accepted as true at the motion-to-dismiss stage any more than *Twombly* did. *See id.* at 1949 (recognizing that "for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true"); *Twombly*, 550 U.S. at 556 ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.") (internal quotation marks omitted; alteration in original). That is why *Iqbal* distinguished "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth" from "well-pleaded factual allegations." 129 S. Ct. at 1950.

When an antitrust plaintiff alleges (for example) that the defendants conspired to raise prices without providing further factual specificity, a court may treat that assertion as a legal conclusion that is not (without more) a "'sufficient basis for a complaint.'" *Twombly*, 550 U.S. at 557 (quoting *DM Research, Inc. v.*

College of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999)). That is why, in cases where no conspiracy is directly alleged, a court must make a judgment about whether the facts that are alleged support a plausible inference of conspiracy, *i.e.*, whether the legal conclusion is adequately supported by well-pleaded facts. But when a complaint alleges that Smith and Jones agreed at a November 2007 meeting at the Des Moines Holiday Inn to raise the price of flaxseed to $2.00 a pound – or that Porti, Cvrlje, Perry, and Rafferty met at Hudson's offices in North Bergen on or about January 29, 2009, to discuss their market-allocation agreement, *see* Proposed Am. Compl. ("PAC") ¶ 63 (AA88) – no more is required to allege a violation of Section 1.

Twombly recognized the distinction. *See* 550 U.S. at 564 (distinguishing "independent allegation[s] of actual agreement" from "descriptions of parallel conduct"). Other courts of appeals have noted that *Twombly* embraced the distinction between direct and inferential allegations and that *Iqbal* did not change the law in this regard. *See In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 323-24 (3d Cir. 2010) (reading *Twombly* to embrace the distinction); *West Penn*, 627 F.3d at 99-100 (same). And the leading antitrust treatise likewise confirms that, where a complaint alleges an agreement with appropriate specificity, no more is required to state a claim. *See* 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 307d1, at 119 (3d ed. 2007) ("Areeda"); *id.* at 121

("specific factual allegations of [a] 'meeting of the minds'" are sufficient to state a conspiracy claim).

Sound considerations of policy explain the importance of separating direct allegations from mere conclusions. Factual specificity in pleading helps to ensure reasonably focused discovery: here, for example, both sides are in agreement that the relevant meetings and communications took place in a "brief, two-week window" at the end of January 2009. Curtis Br. 5. In *Twombly*, "determining whether some illegal agreement may have taken place between unspecified persons at different . . . multi-billion dollar corporation[s] with legions of management level employees[ ] at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking." 550 U.S. at 560 n.6. Here, particularly given that defendants had begun litigating these same claims – settling antitrust claims brought by Source after producing documents in that litigation – the burden of allowing Anderson's complaint to proceed will be relatively minor.

2. Plaintiffs' Allegations Are Not "Conclusory"

Contrary to defendants' arguments, plaintiffs' allegations – unlike the allegations of unlawful conduct disregarded in *Twombly* and *Iqbal* – cannot be dismissed as mere legal conclusions. The complaint directly alleges conspiratorial meetings between specific individuals on specific days and in specific places. *See* PAC ¶ 56 (AA86) (Mr. Castardi of Curtis and Mr. Duloc of Kable met on January

18th to discuss their conspiracy); *id.* ¶ 62 (AA88) (Mr. Jacobsen of TWR and Mr. Duloc of Kable arranged to meet over breakfast on January 29th to discuss their conspiracy); *id.* ¶ 63 (AA88) (Mr. Porti of Curtis, Mr. Cvrlje of TWR, Mr. Perry of News Group, and Mr. Rafferty of DSI met at Hudson's offices on or about January 29th to discuss their conspiracy). The complaint alleges that both Mr. Castardi and Mr. Jacobsen indicated to Mr. Anderson that they had agreed to a boycott. Compl. ¶¶ 49, 52 (AA29, 31); PAC ¶ 70 (AA91).[1] Both Mr. Castardi and Mr. Duloc invited Anderson to join the conspiracy, and Mr. Duloc invited Comag to do so. *See* PAC ¶¶ 58, 59 (AA86-87). Those allegations, taken as true, provide the required factual specificity to satisfy Rule 8's standards. Without eavesdropping on defendants' meetings and conversations, and without having the opportunity to depose those who participated in them, Anderson could not possibly plead more.[2]

---

[1] Time argues (at 37) that if such incriminating, non-verbal communications were credited at the motion-to-dismiss stage, soon our "jails" would be "bursting at their seams with confessed conspirators." Hyperbole notwithstanding, the argument betrays defendants' misunderstanding of the issue presented. The question is not what *evidence* would be sufficient to establish proof beyond a reasonable doubt at a criminal trial. The question is whether the complaint's allegations, taken as true, justify the (here, circumscribed) expense of discovery.

[2] *See, e.g.*, *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) ("[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); 2 Areeda ¶ 307d, at 99 (even after *Twombly*, "pleading standards can and should vary depending on whether the relevant information is public or private" because defendants "can, if guilty, be expected to suppress the evidence as much as possible").

No such allegations were present in *Twombly*. Plaintiffs there alleged a conspiracy between unnamed individuals and unnamed "persons, firms, corporations and associations, not named in this Complaint, [who] have participated in the violations alleged herein and have performed acts and made statements in furtherance thereof." *Twombly* Compl. ¶ 16 (SA65). The *Twombly* plaintiffs alleged that the defendants and the unnamed individuals or firms conspired, "[b]eginning at least as early as February 6, 1996, and continuing to [April 2003], . . . to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another." *Id.* ¶ 64 (SA83). The *Twombly* complaint did not specify who conspired with whom, when (over the course of the seven-year period) they conspired, where and how they effected their conspiracy, or what its terms were. As the Court held, "[i]f the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among [defendants] would have given the notice required by Rule 8." 550 U.S. at 565 n.10; *see id.* at 565 n.11 (holding that the complaint failed to "directly allege illegal agreement").

Nor are Anderson's direct allegations "akin to allegations rejected as wholly conclusory in *Iqbal*." Time Br. 23. The complaint in *Iqbal* asserted that the

Attorney General and other government officials decided to subject the plaintiff to "harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" 129 S. Ct. at 1951 (alteration in original). The Court found the critical allegation – *i.e.*, that defendants acted with discriminatory motive – to be unsupported by any well-pleaded facts; the Court therefore concluded that the "allegations are conclusory and not entitled to be assumed true." *Id.* The Court emphasized, however, that it disregarded those allegations not because they were "extravagantly fanciful" but because of their "conclusory nature." *Id.*

Defendants also suggest that nothing short of "specific admissions" from co-conspirators constitute "nonconclusory 'direct' allegations of any agreement." Time Br. 24-25. But defendants confuse what constitutes direct *evidence* of an agreement with what constitutes a direct *allegation* of agreement.[3] A plaintiff may directly plead that defendants agreed at a particular place and time to a particular unlawful course of action; such allegations are direct and therefore sufficient, without more, to state a claim. Anderson has done so. Plaintiffs might then *prove*

[3] Thus, defendants' reliance on *Insurance Brokerage* is misplaced. *See* Time Br. 24-25; Bauer Br. 41; AMI Br. 15; Hudson Br. 10-11. The *Insurance Brokerage* court noted in dicta that, "[o]n appeals from *summary judgment*," after the plaintiff has had an opportunity to adduce evidence in support of its allegations, "direct evidence of a conspiracy [includes material] such as a document or conversation explicitly manifesting the existence of the agreement in question." 618 F.3d at 324 n.23 (emphasis added). That does not address what constitutes a direct *allegation* of agreement at the motion-to-dismiss stage.

their case through direct evidence – the admission of a conspirator, or a document embodying an unlawful contract – or circumstantial (and therefore indirect) evidence – which includes practically everything else. *See Insurance Brokerage*, 618 F.3d at 324-25 & n.24; *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661-63 (7th Cir. 2002).[4] At this stage, Anderson does not need to plead *any* evidence of conspiracy. Its allegation that specific individuals agreed at specific times and places to a specific course of conduct is all that is required.

3. Anderson Did Not Waive The Argument That Its Direct Allegations Of Conspiracy Stated A Claim

Anderson's arguments regarding the sufficiency of the complaint's direct allegations cannot be ignored based on the argument that it did not press them before the district court. *Cf.* Bauer Br. 38; Curtis Br. 6-7. Anderson argued below that its "complaint contains specific factual allegations regarding . . . meetings in aid of the conspiracy [and] statements by defendants that are indicative of a conspiracy." Dkt. No. 72, at 14; *see also id.* at 7-10. Anderson made clear that those direct allegations are independent of and in addition to inferential allegations of "parallel conduct" and "plus factors." *Id.* at 14 & n.6. The district court

[4] If a jury credited evidence supporting the complaint's allegations, that would constitute direct evidence of conspiracy. *See, e.g., Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765 (1984) (threat by supplier constituted "*direct* evidence of agreements to maintain prices"); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1011 (6th Cir. 1999) (CEO's "act of leaning forward and smiling" while saying "of course we [two competitors] didn't" speak about fixing prices).

responded to these arguments by expressly (and incorrectly) rejecting the sufficiency of Anderson's "allegations of direct evidence of a conspiracy." Op. at 9 & n.9 (AA54).[5]

In any event, waiver applies to issues, not arguments. *See, e.g.*, *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 307 (2d Cir. 1996) (distinguishing new *issues* from new arguments: "[A]rguments made on appeal need not be identical to those made below if they involve only questions of law and additional findings of fact are not required.") (internal quotation marks omitted). The parties joined issue below on whether Anderson stated a Section 1 claim; there is no bar to Anderson offering additional legal arguments to demonstrate that its complaint passes muster. The independent sufficiency of Anderson's direct allegations of conspiracy is a purely legal question that does not require additional findings of fact, and it is properly before this Court.[6]

---

[5] Furthermore, in arguing that the district court erred in denying leave to amend, Anderson stressed that the proposed amended complaint included additional direct allegations of agreement. *See* Dkt. No. 92, at 8-9; Dkt. No. 97, at 6.

[6] In *Katel LLC v. AT&T Corp.*, 607 F.3d 60 (2d Cir. 2010), appellant offered an entirely new basis for the claim that the district court erred in failing to reopen discovery; this Court declined to consider the new claim of error because it was both inconsistent with representations made to the district court and based on new facts.

B. The Complaint's Well-Pleaded Factual Allegations Also Support An Inference That Defendants Conspired

Anderson's complaint also states a Section 1 claim by alleging parallel conduct and attendant circumstances that "are suggestive enough to render a § 1 conspiracy plausible." *Twombly*, 550 U.S. at 556; *see Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010). As alleged in the complaint, defendants knew (given Curtis's experience) that unilateral action would be risky and ineffective, and that coordination was needed to ensure that a new distribution plan could be put in place quickly. Despite initial indications that individual defendants were open to negotiating a resolution to the dispute, defendants later told Anderson that they would maintain a united front, and they did, cutting off Anderson's supply of magazines over a period of just a few days. *See* Pls. Br. 41-53. Anderson never refused to accept magazines from defendants; rather, it was defendants that, all together, cut off Anderson's supply. Those allegations render the claim of collective action "plausible" and warrant discovery that "may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (Posner, J.).

Defendants argue for a different version of events. Pointing the Court to various articles in the trade press, they insist (contrary to Anderson's allegations) that Anderson's demands were a non-negotiable ultimatum; that each defendant

independently decided to reject that demand and to set up alternative distribution; that there were divergences in defendants' conduct; that defendants' various statements are susceptible to more favorable interpretations; and that allegations regarding specific meetings can be disregarded (as before) as merely conclusory.

Defendants' arguments may be appropriate for trial (and perhaps summary judgment), but not for a motion to dismiss. This Court made clear in *Starr* that an antitrust plaintiff bears no burden to exclude non-conspiratorial explanations for parallel conduct. Defendants' insistence that plaintiffs' allegations are as consistent with unilateral conduct as with conspiracy – wrong on its own terms – is beside the point at this stage. "'[T]he Supreme Court did *not* hold that the same standard applies to a complaint and a discovery record. . . . The "plausibly suggesting" threshold for a conspiracy complaint remains considerably less than the "tends to rule out the possibility" standard for summary judgment.'" *Starr*, 592 F.3d at 325 (quoting 2 Areeda ¶ 307d1, at 118) (alterations in original).

To be sure, where there are allegations of parallel conduct that could "'just as well be independent action,'" *id.* at 327 (quoting *Twombly*, 550 U.S. at 557), that is not enough to state a claim because parallel conduct is not, in itself, unlawful. As *Starr* makes clear, however, that does not mean that once a complaint crosses the threshold of plausibility, defendants can drag it back to the other side of the line by spinning a more attractive explanation for the alleged

conduct. So long as there is a sufficient factual basis to render allegations of an unlawful agreement plausible, a district court cannot decide that a complaint should be dismissed based on a judgment that "there [are] discernable and compelling alternative business explanations for conduct which those plaintiffs alleged to be parallel and therefore conspiratorial." Bauer Br. 26.[7]

None of defendants' cases is to the contrary. In each, the existence of an alternative explanation for parallel conduct made factual allegations supporting the conspiracy conclusion necessary; it did not provide a basis for disregarding such factual allegations. *See Iqbal*, 129 S. Ct. at 1951-52; *Twombly*, 550 U.S. at 566-68; *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 908-09 (6th Cir. 2009); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007).

1. The Argument That Defendants Reacted Independently To Anderson's Demands Identifies A Dispute Of Fact, Not A Basis For Dismissal

Defendants argue that their decision to destroy Anderson was prompted by Mr. Anderson's "non-negotiable" "ultimatum" regarding a $0.07 per-copy surcharge in an interview in *The New Single Copy*. In defendants' view, Mr. Anderson's statements were tantamount to "a public unambiguous statement . . .

[7] This Court reversed a similar approach in *Starr*. The district court found that defendants' alleged parallel conduct reflected unilateral responses to "widespread unauthorized music downloading." *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d 435, 445 (S.D.N.Y. 2008). This Court found it unnecessary even to evaluate the strength of that alternative explanation, because the allegations were sufficient to make the claim of conspiracy plausible.

that any company that did not promptly sign the form of agreement demanded would be *cut off* by Anderson, which was prepared to leave the business" if its demand for "an enormous cost increase" was not met. Bauer Br. 24. That argument provides no basis for dismissal, because it contradicts the complaint's allegations, relies on alleged facts that are not properly before the Court, and – even if taken as true – does not justify defendants' coordinated response.

First, the version of events that defendants put forth (and which the district court accepted below) is simply not what is alleged in the complaint: the complaint contradicts the claim that Anderson would rather "leave the business" than negotiate. Bauer Br. 24; *see, e.g.*, PAC ¶ 4 (AA70) ("As defendants well know, the proposed surcharge itself was negotiable."); *id.* ¶ 51 (AA84) ("The proposed temporary surcharge was not a non-negotiable mandate imposed by Anderson."); *id.* ¶ 64 (AA88) (similar); *id.* ¶ 65 (AA89) (the parties, in fact, reached a negotiated agreement regarding the terms of the proposed surcharge); *id.* ¶ 68 (AA90) (during the parties' negotiations, "Mr. Anderson protested that [defendants'] action[s] would destroy Anderson and result in the loss of thousands of jobs").[8] Defendants' pervasive reliance on assertions of fact that are contrary to

[8] Even defendants appear to concede that Anderson continued to negotiate alternative arrangements, including after the date of *The New Single Copy* interview. *Compare, e.g.*, Time Br. 17, 33 (arguing that Anderson's complaint "pleads no facts suggesting any actual negotiation" and that the negotiability of Anderson's proposed surcharge was only part of Anderson's "secret intent"), *with*

the facts alleged in the complaint demonstrates that there is no legitimate basis for arguing that the allegations that *are* found in the complaint fail to state a claim.[9]

Second, defendants cannot dispute the complaint's allegations by relying on an interview that appeared in a trade publication; such materials are not subject to the court's consideration at all on a motion to dismiss. *See Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) ("Limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint."). Anderson's complaint notes that Mr. Anderson participated in a call-in interview with *The New Single Copy*, *see* PAC ¶ 52 (AA85), but it does not quote from or otherwise rely on that interview for any purpose. Moreover, even if this Court could consider the interview, it could not read the reporter's words to trump the complaint's allegations or to infer

---

id. at 28, 31, 39 (recognizing that Anderson and Time actually negotiated the terms of Anderson's proposed surcharge); *compare* Bauer Br. 35 (arguing that Anderson's allegation regarding the negotiability of the surcharge is not "candid"), *with id.* at 44 (noting that Anderson and Bauer conducted "civilized" and "cordial" negotiations over the surcharge).

[9] The complaint's factual allegations also undermine defendants' characterization of Anderson's proposed surcharge. While defendants allege that $0.07 per magazine is "an enormous cost increase," Bauer Br. 24, "a huge price increase," *id.* at 28, and a "whopping" cost increase, *id.* at 9, neither the district court nor this one has any basis for crediting those characterizations. Indeed, given that defendants' initial responses to Anderson's "temporary, stop-gap" proposal were "cordial" and "amicabl[e]," PAC ¶¶ 49, 51 (AA84), the most natural inference is that Anderson's proposed surcharge was not so "massive," Bauer Br. 1, that it alone would spur defendants to restructure the nationwide magazine-distribution industry.

"a non-negotiable take-it-or-leave-it ultimatum." AMI Br. 19; *see, e.g.*, *Garber v. Legg Mason, Inc.*, 347 F. App'x 665, 669 (2d Cir. 2009) (summary order) (holding that, even where a court may take judicial notice of "the *fact* that press coverage . . . contained certain information," it must do so "without regard to the truth of the[ ] contents") (internal quotation marks omitted); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (district court erred when it "assumed the existence of facts that favor defendants based on evidence outside plaintiffs' pleadings, [and] took judicial notice of the truth of disputed factual matters").[10]

Finally, whatever the nature of Anderson's demands, they would not justify defendants' decision to agree on a response to those demands. *See, e.g.*, *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 410-11 (5th Cir. 2007) (defendants are free to reject plaintiff's proposal to lease the domain name "tunica.com," but evidence that defendants *agreed* to reject that proposal precludes summary judgment on plaintiff's Sherman Act claim); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990) (similar); *Twombly*, 550 U.S. at 556 n.4 (the law permits "*independent* responses to common stimuli") (emphasis

[10] Defendants also rely on the purported fact that other industry participants reacted to Anderson's proposed surcharge in the same way. But the complaint's only allegation concerning a non-conspirator is that "Comag refused to join in an illegal conspiracy and instead continued to ship its magazines to Anderson." PAC ¶ 59 (AA87). That allegation strongly undercuts defendants' insistence that their responses to Anderson's proposal were somehow inevitable. And there are no allegations with respect to what other publishers did or would have been willing to do; there is no unfavorable inference to be drawn from that.

added; internal quotation marks omitted). The complaint alleges – both directly and inferentially – that defendants agreed to switch their distribution from Anderson to other wholesalers. It is irrelevant whether their conspiracy was spurred by Anderson's perceived demands.

2. Defendants' Assertions That Their Conduct Was Not Truly Parallel Contradict The Complaint

The complaint alleges that all of the publisher and distributor defendants terminated Anderson between January 29th and February 2nd. That closely coordinated conduct is – as certain defendants concede (*see* Time Br. 29) – parallel conduct that (even without more) would provide "admissible circumstantial evidence from which the fact finder may infer agreement," *Starr*, 592 F.3d at 321 (internal quotation marks omitted). Defendants argue (echoing the district court) that divergent conduct during the critical time period undermines the claim that their conduct was properly characterized as parallel. Those arguments, too, rely on disregarding the well-pleaded allegations of the complaint or seek to impose an *evidentiary* burden that has no place at this stage in the litigation.

Bauer, for example, includes in its brief (at 7-18) a summary-judgment-styled "COUNTERSTATEMENT OF THE FACTS," drawn in part from press accounts and other materials outside the complaint, to argue that defendants' responses to Anderson's proposed surcharge were "disjointed and divergent." Br. 13. Kable asserts (at 2-3) that it was "powerless" to make decisions regarding

Anderson's proposed surcharge, and that the complaint's contrary allegations are "preposterous." AMI claims that its "Porche Affidavit . . . *proved* that AMI continued to ship magazines to Anderson" until February 3rd. Br. 17 (emphasis added). (Why the one-day difference matters is not clear.) And defendants criticize Anderson for "not submit[ting] any evidence to the district court in rebuttal" of defendants' allegations or to support the complaint's contrary allegations. AMI Br. 12; *see also id.* at 17.[11]

At this stage of the litigation, however, Anderson's well-pleaded complaint is all the "evidence" it needs. *See Twombly*, 550 U.S. at 556. This Court "construe[s] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Okoi v. El Al Israel Airlines*, 378 F. App'x 9, 11 (2d Cir. 2010) (summary order) (internal quotation marks omitted). The complaint alleges that defendants acted in parallel in cutting off Anderson and that they were conscious of their parallelism. *See* PAC ¶¶ 64-71 (AA88-91). Defendants cannot avoid those allegations by denying them.

[11] Defendants' emphasis on alleged differences in negotiating strategy among the various defendants is not in tension with the allegation that defendants had agreed to a boycott. It is always possible that defendants continued to explore other options while implementing their unlawful agreement; exploring multiple alternatives is part of business.

Moreover, there is no dispute that defendants' parallel actions succeeded in driving Anderson out of business; the only question is whether defendants acted on a prior agreement (as alleged) or whether (as defendants assert) they acted unilaterally. In that regard, defendants' success in restructuring the nationwide magazine-distribution industry almost overnight is highly suggestive of their advance agreement. *See, e.g.*, *Text Messaging*, 630 F.3d at 628 (such "complex and historically unprecedented changes" in the industry support inference of conspiracy) (internal quotation marks omitted).[12] In a matter of days, defendants eliminated Anderson (previously the second-largest magazine wholesaler in the country), reallocated millions of dollars of business involving tens of thousands of retail outlets across the country, restructured an industry, and raised their prices and profits in the process. *See id.* ¶¶ 22, 46, 72-73, 95 (AA75, 82-83, 92, 100). Moreover, defendants persisted in their boycott of Source even *after* Source rescinded its surcharge proposal, reinforcing the inference that the boycott was part of a joint plan to restructure the industry, not just a stop-gap reaction to a price

[12] Time attempts (at 30 n.11) to distinguish *Text Messaging* on the ground that the price increases in that case were not "[ ]provoked" by "a two-week ultimatum issued by a buyer with market power." But Anderson did not issue an "ultimatum"; there is no allegation that it had "market power" in any relevant sense; and, in any event, it is irrelevant whether defendants' conspiracy was "[ ]provoked." *See Tunica*, 496 F.3d at 410-11; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951) (defendant co-conspirators are liable under Sherman Act, even when they entered conspiracy in response to perceived conspiracy between plaintiffs).

increase. *See id.* ¶ 71 (AA91). Only a court order could induce defendants to change course. *Cf.* Kable Br. 3 (claiming that the conclusion is "ineluctable" that Anderson could have broken the boycott merely by capitulating on the proposed surcharge). "To be sure, even that parallelism might result from mere coincidence, just as it is conceivable that an ape with a typewriter might produce a Shakespeare sonnet through mere chance. Nevertheless, the law does not insist on absolute certainty and rightfully disregards such low-order possibilities." 6 Areeda ¶ 1425a, at 182 (3d ed. 2010); *cf.* Time Br. 30 n.11 (arguing that defendants could unilaterally remake a century-old industry "practically overnight" and that the complaint's contrary allegations are "incredible").

C. The Complaint's Well-Pleaded Factual Allegations Implicate Each Defendant Individually

The complaint's direct and inferential allegations implicate each of the defendants in the alleged conspiracy. "[O]nce a conspiracy is shown, only slight evidence is needed to link another defendant with it." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 257 (2d Cir. 1987) (internal quotation marks omitted); *see also United States v. Wilkinson*, 754 F.2d 1427, 1436 (2d Cir. 1985) (Mansfield, J.). That lower evidentiary burden is reflected in pleading standards as well.[13]

[13] *See, e.g.*, *Hinds County v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 395 (S.D.N.Y. 2010) (denying individual defendant's motion to dismiss, even though the complaint alleged only that other defendants gave the individual defendant an "opportunity" to participate in the conspiracy).

Anderson made direct allegations of specific conspiratorial meetings, documents, and statements involving TWR, Curtis (including on behalf of AMI), Kable, Hudson, and DSI; as to all of these (save TWR, which does not bother even to make the argument), any individual challenge depends on challenging the veracity of those allegations.[14] That, of course, is not permitted on a motion to dismiss.[15]

As for Time, Bauer, Rodale, and Hachette, the complaint alleges both parallel conduct and "further factual enhancement[s]" that create a plausible

[14] *See, e.g.*, Kable Br. 2 (direct allegations against Kable should be rejected because it was "powerless" to conspire); *id.* at 3 (direct allegations against Kable are "preposterous"); AMI Br. 11 (direct allegations against Mr. Rafferty and DSI are "patently false"); *id.* at 26 (direct allegations against Mr. Rafferty and DSI should be rejected because "Anderson did not submit any evidence to the district court" to support them); Hudson Br. 11 (direct allegations of time, place, and circumstances surrounding "conspiratorial meetings" should be rejected because "only one meeting with a purported connection to Hudson News is mentioned in the Complaint and in the PAC"); Curtis Br. 10 & n.4 (direct allegation regarding Mr. Castardi's agreement with TWR is not "consistent with . . . reality"); *id.* at 10 n.5 (direct allegation that Curtis conspired "on behalf of" its publishers should be rejected because Curtis did not have "the authority to bind its publisher clients to pay the Surcharge absent . . . authorization").

[15] Defendants also argue that the Court should draw inferences in defendants' favor with respect to facially incriminating statements. For example, Mr. Castardi (Curtis) told Anderson that "'I'm going to have to go with whatever Rich [Jacobsen, CEO of defendant TWR] does,'" PAC ¶ 70 (AA91); that statement suggests that Mr. Castardi agreed with Mr. Jacobsen to maintain a united front "whatever" TWR chose to do. While Time and Curtis suggest that Mr. Castardi's statement reveals that Curtis "didn't know what Mr. Jacobsen was going to do," Time Br. 35; *see also* Curtis Br. 11, nothing about the statement favors that interpretation, and, at this stage, plaintiffs are entitled to the benefit of any reasonable inference.

inference that they conspired to boycott Anderson. *See* Pls. Br. 54. Time's contrary argument relies largely on disputing the significance of statements of Time's CEO; Time argues that her statement that she wished she had spoken with Mr. Anderson "two weeks ago" is more apt to have a been a reference to Mr. Anderson's interview in *The New Single Copy*, not to any conspiratorial agreement Time reached with other defendants. But the inferences to be drawn from an admittedly ambiguous statement are a matter for the finder of fact; for now, all inferences must favor Anderson. *See Okoi*, 378 F. App'x at 11.

Bauer and Rodale argue that the inference that their conversations concerning a non-compliant distributor reflect their participation in a conspiracy is "conjecture." Bauer Br. 44; *see also* Rodale Br. 6-7. To the contrary: allegations that two ostensible competitors were discussing the impact of a third party's continued willingness to supply a wholesaler support the claim that those parties were jointly boycotting that wholesaler. That is more than sufficient to defeat arguments that they have not been adequately alleged to be part of a conspiracy that has otherwise been adequately pleaded.[16] Despite Hachette's focus on allegations concerning its own conduct, the allegation that its distributor was acting on its behalf and with its authorization is sufficient to justify further proceedings

[16] Bauer sponsors a different interpretation of these conversations, *see* Br. 44-45, but Bauer cannot defeat the complaint against it by putting a positive "spin" on allegations that fairly support a different interpretation.

against it. *Cf. Vigilant Ins. Co. v. C&F Brokerage Servs.*, 751 F. Supp. 436, 437-38 (S.D.N.Y. 1990) (fraud claim properly pleaded against one defendant is sufficient to withstand motion to dismiss by another defendant that allegedly authorized the actions of the first).

D. The Allegations Of The Proposed Amended Complaint Are Properly Before The Court

Defendants argue that the Court need not consider the allegations of the proposed amended complaint because the district court acted within its discretion to deny Anderson leave to amend and then to deny Anderson's motion for reconsideration. *See* Time Br. 56; Kable Br. 5-9; Curtis Br. 7 n.3; Hudson Br. 6 n.2. That argument is incorrect.

First, the sole basis that the district court gave for denying plaintiffs leave to amend – both in its initial opinion and when denying Anderson's motion for reconsideration – was that amendment would be futile. *See* Op. at 20 (AA65) (the "defects in Anderson's Complaint are not curable"); Order at 4 (AA110) (the "addition of numerous conclusory allegations does not cure the deficiencies of the Complaint"). The determination that amendment would be futile is a legal conclusion that this Court reviews *de novo* – including at the stage of a motion for reconsideration. *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 242 (2d Cir. 2007); *Panther Partners Inc. v. Ikanos Communications, Inc.*, 347 F. App'x 617, 621 (2d Cir. 2009) (summary order) (where the district court bases its denial of

reconsideration and its denial of leave to amend "on a legal interpretation, such as for futility, a reviewing court conducts a *de novo* review"). Because the allegations of the proposed amended complaint stated a claim, the court's refusal to permit the amendment on the grounds of futility was legal error.

Second, any possible alternative basis for denying leave to amend (and reconsideration) is beside the point here, because the district court did not rely on any such ground. Time argues (at 57-58) that Anderson could have amended at an earlier time and that a district court could have found that its delay justified denial of leave to amend and/or reconsideration. Accepting that premise solely for the sake of argument, Time is wrong nevertheless because the district court did *not* find that there was any basis for denying either leave to amend or reconsideration of that decision *other than* the purported inadequacy of the complaint's allegations. Because the district court did not exercise any (possible) discretion to deny plaintiffs leave to file a legally adequate complaint, the Court cannot affirm on that ground. *See, e.g.*, *Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003).

Third, even if the district court had denied Anderson the opportunity to amend because it came too late, that decision would be an abuse of discretion. "It is the usual practice upon granting a motion to dismiss to allow leave to replead." *Pavone v. Puglisi*, 353 F. App'x 622, 626 (2d Cir. 2009) (summary order) (internal quotation marks omitted); *see also, e.g.*, *Hayden v. County of Nassau*, 180 F.3d 42,

53 (2d Cir. 1999); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). There was no reason for Anderson to believe that the usual practice would not be followed in this case. Anderson had never previously amended the complaint. The district court had set no deadline for amendment. Anderson had indicated that it would, if the motion to dismiss were granted, seek to address any deficiencies identified in the district court's opinion without any indication from the district court that such an amendment would not be allowed. It is commonplace for plaintiffs to amend complaints in response to district courts' decisions to grant a motion to dismiss – precisely because additional allegations or clarification of existing allegations may address perceived deficiencies. Defendants cite no case in which a district court has properly denied a plaintiff the opportunity to add allegations amplifying existing claims in circumstances like these.[17]

[17] In *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113, 120 (2d Cir. 2010), plaintiffs sought leave to add a new claim after judgment even though they had "contemplated" adding the claim "at least three years" earlier and offered no reason for failing to do so. In *Rosner v. Star Gas Partners, L.P.*, 344 F. App'x 642, 645 (2d Cir. 2009) (summary order), the district court offered plaintiffs the opportunity to amend after defendants described the basis for dismissal, and plaintiffs declined; plaintiffs never proffered an amended complaint or gave any indication of how they would correct deficiencies. In *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991), the plaintiff sought leave to file an amended complaint withdrawing a critical admission despite "abundant[ ] support[ ]" for the admission in the record. And in *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990), the plaintiff deliberately declined to plead reliance on foreign law (despite

II. THE DISTRICT COURT'S DISMISSAL OF ANDERSON'S STATE-LAW CLAIMS STANDS ON NO INDEPENDENT GROUND AND SHOULD ALSO BE REVERSED

The district court dismissed Anderson's state-law claims because, in its view, Anderson "fail[ed] to plausibly claim an antitrust violation," Op. at 19 (AA64). As explained above, the district court's premise was erroneous, and, therefore, Anderson's state-law claims also should be reinstated.

AMI raises alternative bases for affirmance. This Court should not reach those issues now, however, because they were not considered or decided below. "[W]here the appellate court . . . vacates an aspect of the lower court's decision, making dispositive a question not addressed below, the usual course is to remand." *Universal Church v. Geltzer*, 463 F.3d 218, 229 (2d Cir. 2006).

In all events, the allegations of the complaint state a claim. With regard to Anderson's claim of tortious interference with contract, the claim that Anderson failed to allege a breach by third parties is incorrect: Anderson clearly states that its retail customers "terminated their retail supply and retail service agreements," PAC ¶ 109 (AA103); viewing this allegation favorably to Anderson, this allegation supports the inference that the termination breached the customers' contractual obligations. *See, e.g.*, *Streit v. Bushnell*, 424 F. Supp. 2d 633, 643 (S.D.N.Y. 2006). And defendants' conduct was plainly not justified if carried out in violation

---

the risk of dismissal under domestic law) until after judgment in an attempt to preserve its choice of forum.

of the antitrust laws. As for Anderson's claim for tortious interference with business relations: there is no obligation that interference occur through direct contact with the third party rather than by taking actions that (indirectly) cause the third party to terminate the relationship; defendants' unlawful boycott of Anderson plainly constitutes "wrongful means." And because these allegations are sufficient, the claim for common-law conspiracy is likewise properly pleaded.

CONCLUSION

For the foregoing reasons, this Court should (1) reverse the judgment of dismissal and (2) remand to the district court with instructions to allow Anderson to file its proposed amended complaint.

Respectfully submitted,

/s/ *Thomas P. Lynch*
MARC ROWIN
THOMAS P. LYNCH
LYNCH ROWIN LLP
630 Third Avenue
New York, NY 10017
(212) 682-4001

Counsel for Lloyd T. Whitaker, as Assignee for Anderson Services, L.L.C.

/s/ *Michael K. Kellogg*
MICHAEL K. KELLOGG
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
mkellogg@khhte.com

MARC E. KASOWITZ
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1710
mkasowitz@kasowitz.com

Counsel for Anderson News, L.L.C.

May 16, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 6,979 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare this brief.

/s/ *Michael K. Kellogg*
Michael K. Kellogg
Counsel for Plaintiff-Appellant
Anderson News, L.L.C.

May 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of May 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that the participants in the case listed below are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Michael K. Kellogg*
Michael K. Kellogg

American Media, Inc. and Distribution Services, Inc.

David G. Keyko
PILLSBURY WINTHROP SHAW PITTMAN LLP
1540 Broadway
New York, NY 10036
(212) 858-1000
david.keyko@pillsburylaw.com

Bauer Publishing Co., L.P.

Barry J. Brett
Daniel N. Anziska
TROUTMAN SANDERS LLP
405 Lexington Avenue
New York, NY 10174
(212) 704-6009
barry.brett@troutmansanders.com
daniel.anziska@troutmansanders.com

Hachette Filipacchi Media, U.S.

Meir Feder
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Hudson News Distributors LLC

David J. Arp
Cynthia E. Richman
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8678
jarp@gibsondunn.com
crichman@gibsondunn.com

Curtis Circulation Company

George G. Gordon
Joseph F. Donley
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036-6797
(212) 649-8724
george.gordon@dechert.com
joseph.donley@dechert.com

Rodale, Inc.

John M. Hadlock
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
(212) 294-2679
jhadlock@winston.com

Kable Distribution Services, Inc.

I. Michael Bayda
Jay A. Katz
McELROY, DEUTSCH,
MULVANEY & CARPENTER,
LLP
Wall Street Plaza
88 Pine Street, 24th Floor
New York, NY 10005
(212) 483-9490
ibayda@mdmc-law.com
jkatz@mdmc-law.com

Time Inc. and Time Warner Retail Sales & Marketing, Inc.

Rowan D. Wilson
Margaret E. Lynaugh
CRAVATH, SWAINE & MOORE
LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
rwilson@cravath.com
mlynaugh@cravath.com