UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF TIME INC. AND TIME/WARNER RETAIL SALES & MARKETING, INC. TO DISMISS THE COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Rowan D. Wilson
Margaret E. Lynaugh

CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

December 14, 2009

Attorneys for Defendants
Time Inc. and Time/Warner Retail Sales & Marketing, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Defendants Time Inc. ("Time") and Time/Warner Retail Sales & Marketing, Inc. ("TWR") submit this memorandum of law in support of their motion to dismiss in its entirety the complaint filed by Plaintiffs Anderson News, L.L.C. and Anderson Services, L.L.C. (collectively "Anderson"), pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief can be granted.

Preliminary Statement

In January 2009, Anderson and Source Interlink Distribution L.L.C. ("Source"), who controlled 58% of the magazine wholesale business in the United States, announced in rapid succession that starting February 1, 2009, each would impose an unprecedented fee of 7 cents per copy on all magazines Anderson or Source purchased from magazine publishers, whether those magazines were ultimately sold or returned to publishers for full credit. That fee would have cost publishers tens of millions of dollars annually. Anderson repeatedly confirmed that it would not distribute any publisher's magazines unless that publisher signed Anderson's form agreement accepting the 7-cent-per-copy fee. Anderson also announced that it would require publishers to bear the cost of approximately $70 million of magazine inventory that Anderson had already purchased from publishers. Anderson stated that it had been losing money for a decade, and without the 7-cent fee it would voluntarily choose to cease doing business.

Unsurprisingly, Time, other TWR clients, and many other publishers refused Anderson's demands and moved their business to wholesalers who did not charge the 7-cent fee (including, ultimately, Source). Simply put, Anderson demanded a substantial price cut, said it would cease doing business with publishers if it did not receive the price cut, and went out of business when publishers were able to reach agreements with wholesalers who offered less onerous terms.

Anderson is now attempting to turn its chronically failing business and disastrously poor business decisions into a viable antitrust claim, with a few other claims tagged on at the end. However, Anderson has failed to plead — and cannot plead — sufficient factual matter "to state a claim to relief that is plausible on its face". Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).[1]

"Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief'", especially when the alleged actions are "more likely explained by lawful, unchoreographed free-market behavior". Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 1950 (2009) (quoting Twombly, 550 U.S. at 557). Here, most of the facts pleaded by Anderson are inconsistent with the existence of a conspiracy, and the balance are "merely consistent", and do not state a plausible claim. Anderson's failure is readily apparent when comparing its complaint to the complaint in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Not only are Anderson's factual allegations against Time and TWR (and, indeed, against all of the defendants) weaker than those set forth in Twombly, but the alleged actions of Time and TWR were clearly the natural, economically prudent reactions to Anderson's announced per-copy surcharge.

[1] Time and TWR have moved to dismiss the complaint in its entirety, and rely on the arguments raised by the other defendants concerning Anderson's state law claims. In brief, Anderson's civil conspiracy and tortious interference claims rest on exactly the same allegations as its antitrust claim and fail for the same reasons. As to Anderson's defamation claim, there is no allegation that Time or TWR made any defamatory statement.

Statement of Facts[2]

Time is the largest magazine publisher in the United States. (Compl. ¶ 12.) Time is the parent of magazine distributor TWR and is one of TWR's publisher clients. (Id. ¶¶ 12, 17.) TWR manages the relationship between its publisher clients and wholesalers, provides marketing and accounting services to those publishers, and guarantees the wholesalers' payments to those publishers. (Id. ¶ 27.)

Anderson was the second-largest wholesaler in the United States. (Id. ¶ 19.) Four major wholesalers controlled 90% of the magazine wholesale business. (See id. ¶ 30.) Between them, Anderson and Source accounted for 58% of the alleged wholesale market (id.); in certain parts of the country, Source and Anderson were the only wholesalers (id. ¶ 50), and in certain other places, "Anderson was the only viable wholesaler" (id. ¶ 60), that is, a monopolist.

Although Anderson and other wholesalers buy their magazines from publishers (id. ¶ 30), in mid-January 2009, Anderson declared that effective February 1, 2009, all publishers would be required to pay Anderson seven cents for every copy of every magazine Anderson received from them (id. ¶¶ 39, 42). Anderson also announced an additional condition: it would refuse to carry magazines of any publisher that did not immediately agree to absorb the entire inventory cost of magazines that Anderson had purchased (the "scan-based trading demand"). (Id. ¶ 39.)

On January 12 and 13, 2009, Anderson's CEO, Charles Anderson, advised Anderson's largest publisher clients, including Time, of Anderson's "decision to impose [a] $.07 per copy surcharge". (Id. ¶ 41.) Anderson delivered that ultimatum orally and by presenting

[2] The facts alleged in the complaint are assumed to be true for the purposes of this motion to dismiss only.

Time with a form cover letter and agreement containing Anderson's demands.[3] (See id.; Anderson's January 14, 2009 Letter Announcing the Surcharge at 1 (Ex. A)[4].)

"The next day, January 14, 2009, [Charles] Anderson had a call-in interview with the representative of an industry publication, The New Single Copy, during which he publicly announced the surcharge and explained the industry constraints compelling that measure". (Compl. ¶ 42.) Mr. Anderson stated that "effective February the first, we are adding a magazine distribution charge of $.07 a copy to all copies distributed by the company after such date", and added that Anderson would "no longer participate in the investment in scan-based trading".[5] (Transcript of Charles Anderson's January 14, 2009, Interview with The New Single Copy at 2 (Ex. B).)

Mr. Anderson further stated that "this business is not profitable and has not been for a very long time . . . . [O]ver the last ten years those profits have eroded to nothing and into significant losses. . . . We believe that three of the four major wholesalers are losing money." (Id. at 2.) When asked by the interviewer, "Seven cents a copy, is that a negotiable figure?", Mr.

---

[3] When determining the sufficiency of a plaintiffs pleading under Rule 12(b)(6), a court "may consider those facts alleged in the complaint, as well as 'documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit'". Patane v. Clark, 508 F.3d 106, 112 (2d Cir. 2007) (quoting Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000)). A court may also consider documents "incorporated into the complaint by reference" and "public records" such as a complaint filed in state court. Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, 369 F.3d 212, 217 (2d Cir. 2004). Consideration of Anderson's January 14, 2009, letter announcing the surcharge is appropriate because the letter was in Anderson's possession and relied on in bringing suit. (See Compl. ¶¶ 39, 41-42.)

[4] Citations to "Ex. ___" refer to exhibits attached to the Declaration of Margaret E. Lynaugh submitted herewith.

[5] Consideration of the transcript of Charles Anderson's January 14, 2009, interview with The New Single Copy is appropriate because the interview is explicitly referenced and discussed in Anderson's complaint. (Compl. ¶ 42, see supra note 4.)

Anderson replied, "if we negotiate the rate then it would not be fair, so the answer is we really believe that the $.07 number is the number". (Id. at 3.) Mr. Anderson further explained that the cost of the scan-based demand to publishers would be $70 million. (See id. at 2, 4.)

Mr. Anderson made absolutely clear that without a signed agreement accepting both the 7-cent fee and the scan-based demand, Anderson would not distribute a 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.)

When asked how Time and the other major publishers had reacted to Anderson's demand, Mr. Anderson said the publishers "did not react"; that they were "professional business people, and I thought they handled it as well as could be expected". (Id. at 5.) However, Mr. Anderson did state that Anderson had been in discussions with Comag Marketing Group LLC ("CMG") and its owners, Hearst and Conde Nast, and that they had proposed a 3% price reduction. (Id. at 2.) Mr. Anderson also admitted that Time had offered a 2% price reduction, but Anderson had rejected that and insisted on the 7-cent fee or a 3.5% reduction. (Id.) When

asked whether in "the current overall publishing environment, depressed ad sales as well as stressed circulation economics for most publishers . . . your request for very substantial publishing financial commitments, is this a good time for it?", Mr. Anderson answered, "Of course it's not, but now is the time that we have to do this." (Id. at 6-7.)

Finally, when pressed on whether, "in the event of significant levels of non-cooperation, is it a possibility that Anderson News would leave the magazine distribution business?", Mr. Anderson responded, "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.)

A few days later, the largest wholesaler in the country, Source, announced that it was imposing an identical 7-cent-per-copy surcharge on all publishers. (See Compl. ¶ 50.) Thus, less than two weeks before the February 1, 2009, deadline, Time and TWR found themselves in the position of either acceding to the demands of the two largest wholesalers in the nation, who comprised 58% of the wholesale business, or attempting to secure alternative means of distribution for those magazines.

Although there is no allegation that Time, TWR, or any of the defendants knew this, Anderson had reached a different agreement with CMG (id. ¶ 43), one that did not include the 7-cent fee, which assured Anderson supply of all titles distributed by CMG, including those of its owners, Hearst and Conde Nast (see Ex. B at 2), the second and third largest magazine publishers in the country.[6]

[6] Anderson has pleaded that the "relevant product market for the purposes of this action is the national market for the wholesale distribution of single-issue magazines". (Compl. ¶ 69.) If, as is pleaded, magazines are widgets, Anderson could have avoided any alleged boycott simply by purchasing additional magazines from CMG and, therefore, lacks standing to bring its

"During and after the week of January 21, 2009", Anderson was told that Time would not agree to the 7-cent surcharge. (See Compl. ¶ 49.) As of January 30, 2009, Anderson had reached no agreement with Time or TWR. (See id. ¶ 52.) On January 31, 2009, Mr. Anderson met with a representative of TWR, and alleges he was led "to believe that TWR and Anderson had an agreement for an increase in the discount to Anderson of the magazines' cover prices of 2.00% for all Time weeklies, or 2.75% for all People weeklies, and an agreement TWR and Anderson would have a call on Monday, February 2, to discuss scan-based trading". (Id. ¶ 53.) Anderson agreed to pay TWR $13 million owed by Anderson to TWR after the February 2 call (id. ¶ 53)[7]; the February 2 call was "apparently cordial" (id. ¶ 54); but after receiving the $13 million payment, TWR "informed Anderson in words or substance 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'" (id.).

True to its word, commencing February 1, 2009, Anderson did not distribute any magazines shipped to it by publishers who had not agreed to the 7-cent fee and scan-based trading demand. Instead, as Mr. Anderson had threatened two weeks earlier, having failed to receive universal capitulation to its demands, Anderson simply decided to close up shop rather than continuing its decade-long money-losing business.

---

antitrust claim. On a more practical level, other than in completely conclusory assertions, Anderson alleges no facts suggesting that, if it sold CMG magazines to retailers and other wholesalers sold Time and/or other magazines to retailers, that model would not have been viable just as, for example, every retailer deals with separate wholesalers and distributors for different brands of various product categories, such as soft drinks, bread, milk, cereal, paper products, frozen foods, etc.

[7] Anderson has filed schedules in federal bankruptcy court in the district of Delaware showing that, even after the $13 million payment, it owes TWR in excess of $52 million. (See Decl. of John Campbell, Exhibit B, Schedule F at 1, In re Anderson News, LLC, No. 09-10695 (CSS) (Bankr. D. Del. Oct. 7, 2009) (Ex. C).)

Argument

I. ANDERSON HAS FAILED TO STATE A CLAIM AGAINST TIME AND TWR UNDER SECTION 1 OF THE SHERMAN ACT

Here, as in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the "crucial question" is "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express'". Id. at 553 (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)) (alteration in original) (internal quotation mark omitted).

A. The Allegations in the Twombly Complaint

In Twombly, the plaintiffs brought claims under Section 1 of the Sherman Act against "baby Bell" companies for "enter[ing] into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by . . . agreeing not to compete with one another and to stifle attempts by others to compete with them". (Consolidated Am. Class Action Compl. ("Am. Compl.") ¶ 4 (Ex. D).) The complaint identified profitable business opportunities that the baby Bells had foregone in territories controlled by other baby Bells[8] — decisions that would be wholly "anomalous in the absence of an agreement . . . not to compete" — and pointed out that before the case was filed one defendant served "a grand total of six residential lines" in another defendant's territory. (Id. ¶¶ 39, 40, 41.) The complaint identified numerous common practices implemented by the baby Bells to keep new competitors from entering their territories, and asserted several specific "compelling common motivations" for them to undertake "a course of concerted conduct

[8] For example, defendant Verizon Communications, Inc. chose not to serve the state of Connecticut, a territory already served by defendant SBC Communications, Inc., even though Verizon served all of the surrounding states. (See Am. Compl. ¶ 40.)

calculated to prevent" the entry of new competitors into each of their allocated territories. (Id. ¶¶ 47, 50.) The plaintiffs alleged that the baby Bells communicated with each other "though a myriad of organizations", and that the CEO of one defendant was quoted in a Chicago Tribune article as saying that competing in another baby Bell's territory "might be a good way to turn a quick dollar but that doesn't make it right", a statement allegedly demonstrating the existence of an agreement not to compete. (Id. at ¶¶ 42, 44, 46.)

The Court in Twombly determined that those allegations were insufficient to state a claim. Twombly, 550 U.S. at 570. To survive dismissal a complaint must contain "enough facts to state a claim to relief that is plausible on its face". Id. In the context of Section 1, that includes pleading "enough factual matter (taken as true) to suggest that an agreement was made". Id. at 556. Analyzing the complaint under that standard, the Court summarily dismissed the plaintiffs' allegations of an agreement among defendants as "mere[] legal conclusions", and explained that the "nub of the complaint" was plaintiffs' allegations of parallel behavior[9] by the defendant phone carriers. Id. at 564-65. As a result, the sufficiency of the plaintiffs' pleading "turn[ed] on the suggestions raised [by defendants' alleged conduct] when viewed in light of common economic experience". Id. at 565. Ultimately, the Court concluded that "nothing in the complaint intimates that [defendants' actions were] anything more than the natural, unilateral reaction of each [defendant] intent on keeping its regional [market] dominance" and that "there is no reason to infer that [defendants] agreed among themselves to do what was only natural anyway". Id. at 566. Subsequently, in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), the Court

[9] Parallel business behavior and even "conscious parallelism" — "a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions'" — does not itself violate antitrust laws. Twombly, 550 U.S. at 553-54 (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)) (alteration in original).

further explained its holding in Twombly, stating that the baby Bells' alleged conduct "did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior". Id. at 1950.

B. Because the Allegations in the Twombly Complaint are Stronger than Anderson's Allegations Against Time and TWR, Anderson's Complaint Must Be Dismissed

In at least thirty separate paragraphs of its complaint, Anderson conclusorily alleges that it was the victim of "collusion", "concerted activity", "illegal activity", a "group boycott", an "anti-competitive scheme", "coordinated action", "conspiracy", and the like. (Compl. ¶¶ 1-7, 36-37, 46-48, 50-51, 58-60, 62-64, 66-67, 69, 72-73, 75-76, 79-81.) Those allegations do nothing whatsoever to satisfy the Twombly/Iqbal standard by moving the complaint into the realm of plausibility. See Twombly, 550 U.S. at 570; Iqbal, 129 S. Ct. at 1949.

The complaint contains very little in the way of factual assertions concerning TWR and contains almost no factual allegations against Time. Several of Anderson's assertions strongly suggest that Time and TWR acted differently and independently from the other defendants: for example, whereas publishers generally were noncommittal when confronted with Anderson's demands, Time and CMG responded by making a substantial counterproposal. Likewise, the allegation that Mr. Jacobsen of TWR told Anderson that "as long as I'm at TWR or Ann Moore is at Time, we will never, ever do business with Source again" suggests that Time and TWR had decided on their course without regard to what anyone else might do. (Compl. ¶ 52.)

Putting aside the factual allegations that actually undercut the plausibility of Anderson's complaint, Anderson's remaining allegations are wholly insufficient to render its complaint plausible as to Time or TWR. There are five such allegations: (1) "defendants . . .

held numerous meetings"; (2) defendant Curtis's alleged statement that Curtis was "going to have to go with whatever" TWR did; (3) TWR's alleged statement: "Exactly — we now control this space"; (4) the hypothesis that defendants' conduct must have been the result of an agreement because independent action would have been suicidal; and (5) TWR's alleged reneging on its agreement with Anderson after being paid. (Id. ¶¶ 49, 53-55, 56, 60.) Viewed through the lens of the Twombly complaint, it is clear that these allegations fail to move the complaint into the realm of plausibility.

1. The Allegations Concerning Meetings Do Not Suggest Collusion.

Anderson's allegation that defendants engaged in "numerous meetings during which they discussed dividing the U.S. distribution territory into two regions — one controlled by Hudson and the other controlled by News Group" (Id. ¶55) is entirely conclusory, and "furnishes no clue as to which of the [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place". Twombly, 550 U.S. at 565 n.10. As to the meeting Anderson alleges took place sometime in January 2009 (in other words, sometime during the entire lifetime of the alleged conspiracy), Anderson fails to identify any of the individual employees who attended, fails to provide any description of what transpired at the meeting, and fails to allege that any agreement was reached. Indeed, Anderson does not even allege that Time was involved. These vague accusations cannot be saved by Anderson's statement that Curtis, Hudson, TWR, and The News Group were in attendance any more than Twombly's complaint could be saved by its allegation of recurring communications among all of the baby Bells at trade organizations.

2. The Alleged Statements Concerning TWR and Curtis Do Not Render the Complaint Plausible.

In Twombly, the Court held that the statement of the CEO of a baby Bell that his company could profit by competing with other baby Bells but would not do so because it was "not right", even when coupled with several years of history in which all the baby Bells failed to compete with each other, did not suffice to bring the complaint into the realm of plausibility. The statements alleged here are far weaker than the allegations in Twombly. The alleged statement by Mr. Castardi, President and Chief Operating Officer of Curtis, that he was "going to have to go with whatever Rich [Jacobsen, CEO of defendant TWR] does" (Compl. ¶ 49), says nothing about Time and actually suggests lawful parallel conduct, inasmuch as it indicates that Curtis did not know what TWR would do and was waiting to see and follow. Mr. Jacobsen's alleged reaction to Mr. Castardi's statement — he "did not deny it, but indicated that he realized that Anderson knew that there had been collusion" — is utterly conclusory. (Id. ¶ 52.) Anderson alleges no detail as to how this supposed "indication" was made. If Jacobsen had actually made any culpable statement, Anderson would surely have included that statement in its complaint. Instead, Anderson pleads that Jacobsen (i) "indicated" that (ii) Jacobsen "realized" that (iii) Anderson "knew" that (iv) there had been "collusion" between unspecified persons — all this in reaction to a statement in which Anderson told TWR that Curtis had decided to do whatever TWR did.[10]

[10] Indeed, once Anderson told TWR that Curtis, the largest national distributor, was going to do whatever TWR did, Anderson enabled TWR to act unilaterally knowing that it would not be alone, thus undermining Anderson's entire argument that "unilateral action would make no economic sense because . . . [TWR's] magazines would not be distributed to retailers in the areas where Anderson was the only viable wholesaler". (Compl. ¶ 60.) In other words, by informing TWR on January 31 — when Anderson admits it had no agreement for TWR product — that Curtis was planning to do whatever TWR did, Anderson itself obviated the alleged need for any concerted activity and assured TWR could act with the expectation that Curtis would follow.

3. The Alleged Statement Concerning Source Does Not Render the Complaint Plausible.

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, then launched into a parade of horribles, to which Mr. Jacobsen responded "Exactly — we now control this space." (Id. ¶ 56.) That statement does nothing to move the complaint into the realm of plausibility, and is so vague as to be meaningless. First, even on its face, the "we" refers to TWR, not to any conspiracy involving competitors. But even if the "we" referred to the combination of TWR and Time, under Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 777 (1984), those companies — a parent and a wholly owned subsidiary — cannot violate Section 1 by conspiring with each other. Finally, "we now control this space" suggests nothing more than that, as between TWR and Source, "we" not "you" control this space because "you" are no longer receiving our magazines. This statement is far more anemic than the statement found insufficient in Twombly, and does not plausibly suggest any concerted action.

4. Anderson's Theory of the Economic Implausibility of Independent Action Does Not Render the Complaint Plausible.

Whereas the Twombly complaint alleged at least ten distinct forms of parallel conduct in which the defendants had engaged over a lengthy time period, Anderson has alleged a single parallel act — the alleged "boycott" of Anderson and Source. Here, even more clearly than in Twombly, the parallel conduct alleged by Anderson is "not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior". Iqbal, 129 S. Ct. at 1950.

Thus, the only factual allegation in the complaint that might colorably amount to facilitation of coordinated action was undertaken by Anderson itself.

First, the conduct alleged is not even parallel. CMG — allegedly not a part of the conspiracy — rejected the 7-cent demand, but offered a 3% discount. (See Ex. B at 2; Compl. ¶ 43.) Time also rejected the 7-cent demand, but offered a 2% discount. (See Ex. B at 2.) There are no allegations about what TWR offered on behalf of any other publishers. Curtis allegedly encouraged Anderson to restore its profitability by raising its prices to retailers after Source exited the business. (Compl. ¶ 50.) Kable allegedly offered that, in certain areas of the country, Kable would provide magazines to Anderson on an exclusive basis, to help Anderson become profitable.[11] (Id.) Thus the only common element — by alleged conspirators and nonconspirators alike — was the rejection of Anderson's demand. The responses to Anderson's ultimatum were entirely varied, not parallel.

Second, the 7-cent surcharge and scan-based trading demand represented tens of millions of dollars of additional costs for Time and other publishers, at a concededly bad time for the magazine industry. The normal, unchoreographed free-market behavior when suppliers are faced with distributors who will no longer distribute their products on acceptable terms is to look for other distributors. Here, according to the complaint, there were only two others of any appreciable size, and both were admittedly willing to distribute magazines without either the 7-cent fee or the scan-based trading demand. Indeed, Mr. Anderson publicly explained that one purpose of sticking to the 7-cent surcharge was to permit publishers to determine whether, even with the 7-cent fee, Anderson was "a low-cost operator". (Ex. B at 4.) Anderson proved not to be. Publishers switching to lower-cost providers — Hudson and The News Group — is the

[11] Anderson characterizes Kable's offer as "blatantly unlawful market allocation". (Compl. ¶ 50.) However, it is not unlawful for a supplier to grant exclusive territories. 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"); Elecs. Comm'ns Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 243-46 (2d Cir. 1997).

"obvious alternative explanation" that defeats Anderson's assertion that parallel behavior must have been collusive. Iqbal, 129 S. Ct. at 1951 (quoting Twombly, 550 U.S. at 567).

Third, the explanation Anderson offers as to why the alleged parallel conduct was collusive is implausible on its face. In January of 2009, four wholesalers controlled ninety percent of the single-copy magazine wholesale market. (Compl. ¶ 30.) Reducing the number of wholesalers from four to two would have been completely contrary to Time and TWR's interests. The best wholesale market for publishers is one in which there are numerous available options for distribution of magazines to retailers. Reducing the number of wholesalers by even one, let alone two, would provide the remaining wholesalers with significantly increased leverage over publishers and national distributors — in Anderson's own words: "a 'monopolistic wholesaler' with the power to dominate the market". (Id. ¶ 63.) The idea that Time and TWR would desire to subject themselves to a more highly concentrated market is not merely implausible, it is incredible. The allegation that publishers and distributors "would be able to control" the two remaining wholesalers (id. ¶ 62) is utterly conclusory, speculative, and untenable.

Fourth, Anderson points out that when Curtis had previously attempted to rid itself of Anderson, Wal-Mart refused to carry Curtis's magazines, and thereby forced Curtis to capitulate and continue to sell magazines to Anderson. (Id. ¶ 45.) From that incident, Anderson concludes that the publishers 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". (Id. ¶ 60.) Not only do those allegations strongly suggest that Curtis independently wanted to cease doing business with Anderson, but Anderson's explanation proves far too much. Under Anderson's theory, all publishers and national distributors had no choice but to continue doing

business with Anderson (and the other three large wholesalers) in perpetuity, because any attempt would either be unsuccessful or would constitute a violation of Section 1. Anderson's allegation is merely a naked conclusion, unsupported by factual allegations or even common sense.[12]

5. Anderson's Allegations Concerning TWR's Alleged Dishonoring of its Commitment Do Not Render the Complaint Plausible.

Anderson pleads that, at Wal-Mart's instigation, Mr. Anderson went to New York on January 31, 2009, "to try again to convince Rich Jacobsen of TWR to reach an agreement". (Id. ¶ 52.) The complaint alleges that "Mr. Anderson was led by Jacobsen to believe that TWR and Anderson had an agreement for an increase in the discount" for Time's weekly magazines and "an agreement that TWR and Anderson would have a call on Monday, February 2, to discuss scan-based trading", that the February 2 call was "apparently cordial", and that Anderson therefore paid TWR $13 million dollars on February 2, 2009. (See id. ¶¶ 53-54.) From this, Anderson concludes that TWR "never had any intention of honoring its commitment to continue to work with Anderson". (Id. ¶ 55.) Here again, the facts alleged, even if true, suggest nothing more than TWR's independent motive to obtain at least a partial payment of monies owed by

[12] In Twombly, the Court found that the complaint made "its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one [new competitor] in a [defendant's] territory 'would have revealed the degree to which competitive entry by [new competitors] would have been successful in the other territories'". Twombly, 550 U.S. at 566. Anderson similarly alleges that defendants were motivated to act in concert because unilateral action would have come without "assurances that the infrastructure necessary to distribute magazines in areas served by Anderson would be developed". (Compl. ¶ 60.) However, just as with the defendants in Twombly, each publisher defendant here needed "no joint encouragement" to seek alternate wholesalers for its magazines, and each wholesaler defendant needed "no joint encouragement" to decide to enter those territories previously controlled by Anderson given the new needs of publishers and distributors. See Twombly, 550 U.S. at 556-57.

promising to discuss matters in the future,[13] and have nothing to do with Time. As in Twombly, these allegations state nothing more than the "natural, unilateral reaction" of TWR to a debtor who owed it a huge amount of money: appear "cordial" and try to get paid.

* * *

In sum, the allegations in Anderson's complaint fall short of the allegations contained in the Twombly complaint. All the factual allegations are fully and plausibly explained by "lawful, unchoreographed free-market behavior", and lend no plausibility to Anderson's alternative, conjectural though oft-repeated conspiracy theory.

[13] The "agreement" (Compl. ¶53) or "commitment" (id. ¶ 55) allegedly made by TWR on February 2 would have been completely unenforceable. See James A. Haggerty Lumber & Mill Work, Inc. v. Thompson Starrett Const. Co., 256 N.Y.S.2d 1011 (App. Div. 1965) (a promise by a seller to renegotiate prices in exchange for partial payment of money owed is unenforceable for lack of consideration because the partial payment was "an act which defendant was in any event obligated to perform"); see also United States ex rel. Excavation Concrete & Masonry Corp. v. A.C.S. Sys. Assocs., Inc., No. 00 Civ. 4448 (CM), 2001 U.S. Dist. LEXIS 5213, at *8-9 (S.D.N.Y. Apr. 6, 2001) ("where a party refuses to perform obligations that are within the scope of [a] contract, an agreement to pay that party additional compensation to complete the work is void for lack of consideration").

Conclusion

For the reasons set forth above, Time and TWR respectfully request that the Court dismiss Anderson's complaint in its entirety.

December 14, 2009

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by /s/ Rowan D. Wilson
Rowan D. Wilson
Margaret E. Lynaugh

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
rwilson@cravath.com
mlynaugh@cravath.com

Attorneys for Defendants Time Inc. and Time/Warner Retail Sales & Marketing, Inc.