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)

REPLY MEMORANDUM OF LAW IN FURTHER 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)

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Preliminary Statement

This motion presents a simple legal issue: whether Anderson has pled sufficient facts against Time and TWR to state a claim that is "plausible on its face". Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). As is set forth in Time and TWR's opening brief ("Mem."), the resolution of this issue is equally simple: Anderson's Section 1 claim must be dismissed because the factual allegations against Time and TWR are weaker than the allegations held insufficient in Twombly. Claiming that "the factual allegations in [Anderson's] complaint are not even remotely similar to those in the complaint dismissed in Twombly", Anderson refuses to address the specifics of the Twombly complaint. (Opp. at 5.) Thus, Anderson fails to provide any meaningful reason why Twombly does not control here. Instead of attempting to distinguish Twombly, Anderson repeatedly relies on Starr v. Sony BMG Music Entertainment, No. 08-5637-cv, 2010 U.S. App. LEXIS 768 (2d Cir. Jan. 13, 2010), petition for rehearing and rehearing en banc filed (Jan. 27, 2010). However, Starr: (1) clarifies that Anderson's complaint is riddled with conclusory allegations not entitled to an assumption of truth; (2) highlights how far short the few factual allegations within Anderson's complaint fall from stating a "plausible" claim to relief; and (3) demonstrates that the context in which Anderson's Section 1 claim arises is not one that is suggestive of conspiracy. Accordingly, both the Supreme Court's decision in Twombly and the Second Circuit's decision in Starr require dismissal of Anderson's Section 1 claim.

Argument

I. STARR MAKES CLEAR THAT MOST OF THE ALLEGATIONS IN ANDERSON'S COMPLAINT SHOULD BE DISREGARDED.

Our opening brief pointed out that Anderson's assertions that it was the victim of "collusion", "concerted activity", "illegal activity", a "group boycott", an "anti-competitive

scheme", "coordinated action", "conspiracy", and the like, do nothing to move Anderson's complaint into the realm of plausibility. (Mem. at 10.) Starr shows that Time and TWR have been too conservative in their assessment of which of Anderson's allegations are not entitled to the assumption of truth. Starr explicitly rejected, as "obviously conclusory", the plaintiffs' assertion that "[a]fter services other than [the defendant record labels'] joint ventures began to distribute defendants' Internet Music, defendants 'agreed' to a wholesale price floor of about 70 cents per song." Starr, 2010 U.S. App. LEXIS 768, at *7 & n.2. That allegation by the Starr plaintiffs did not merely aver that the defendant record labels had engaged in a "conspiracy" or a "scheme"; rather, it set forth a specific example of how those record labels had unlawfully conspired to fix the terms pursuant to which their music would be sold over the internet. See id. at *2. Thus, as Starr makes clear, courts must also disregard conclusory assertions disguised as allegations of fact.

Accordingly, this Court should disregard not only those portions of the complaint we previously highlighted (Mem. at 10-17), but also allegations such as:

> "The defendants' scheme was a reaction to growing requests by retailers, for larger discounts on magazines and the implementation of scan-based trading." (Compl. ¶ 35);
>
> The "defendants saw Anderson's proposed fee as nothing short of an opportunity to eliminate Anderson as a wholesaler" (id. ¶ 44) and used it as "the pretext for effecting a massive conspiracy" (id. ¶ 46); and
>
> "Only through such collusive action could defendants eliminate competition from Anderson and replace Anderson with one of the two remaining wholesalers, whom the publishers and wholesalers would be able to control and who . . . would force upon retailers . . . the costs of the publisher-imposed inefficiencies." (Id. ¶ 62.)

Indeed, every sentence contained within the complaint's "Preliminary Statement" (id. ¶¶ 1-7)—with the exception of Anderson's announcement that it was ceasing business operations on February 7, 2009 (id. ¶ 5)—as well as the entirety of numerous other paragraphs within the

complaint (see id. ¶¶ 36, 44, 46, 48, 58, 79, 81), amount to conclusions that should be disregarded under Twombly and Starr.

II. THE FEW FACTUAL ALLEGATIONS IN ANDERSON'S COMPLAINT ARE WEAKER THAN THOSE IN THE TWOMBLY AND STARR COMPLAINTS.

Anderson's opposition relies on five allegations: (A) defendants engaged in parallel conduct by cutting off magazine supply to Anderson; (B) defendants attended meetings in late January and early February of 2009; (C) representatives of defendants made certain inculpatory statements; (D) defendants have substantial market power; and (E) each defendant engaged in behavior that would be contrary to its self-interest in the absence of collusion. (See Opp. at 15-21, 23-26.) As previously discussed (Mem. at 8-17), Anderson's allegations are weaker than the allegations that the Supreme Court dismissed in Twombly, and, as is demonstrated below, they fall far short of those allegations the Second Circuit upheld in Starr.

A. The Alleged Parallel Conduct Does Not Suggest Collusion.

Ignoring the substantial differences in the defendants' responses to Anderson's announced surcharge (Mem. at 14), Anderson rests its parallel conduct allegation on the repeated assertion that defendants acted "at the same time", "in late January and the first two days of February", "within days of each other", "cutting off Anderson—at the same time—within days of each other", "within a compressed period in late January and early February", and "cut off supply to Anderson at the same time". (Opp. at 7, 15, 16, 19.) However, Anderson's February 1 ultimatum—delivered publicly on January 14—advised all publishers that Anderson would cut them off unless they agreed to Anderson's terms before January 31. (Compl. ¶¶ 39, 42; Lynaugh Decl. Ex. B[1] at 4.)[2] In addition, this single allegation of supposed parallel conduct pales in

[1] Citations to "Lynaugh Decl. Ex. ___" refer to exhibits attached to the Declaration of Margaret E. Lynaugh submitted with Time and TWR's opening memorandum. Citations to

comparison to the at least ten distinct forms of parallel conduct alleged against the defendant baby Bells in Twombly (see Consol. Am. Class Action Compl. ("Twombly Am. Compl.") ¶ 47 (Lynaugh Decl. Ex. D)), and the seven separate instances of parallel action enumerated in Starr. See Starr, 2010 U.S. App. LEXIS 768, at *18-19.

B. The Alleged Meetings Do Not Render the Complaint Plausible.

In Starr, the plaintiffs alleged not only that the defendant record labels met, but that they formed joint ventures to serve as vehicles through which they could meet and conspire. (See Second Consol. Am. Compl. ("Starr SCAC") ¶¶ 67, 78, 87, 98 (Supp. Lynaugh Decl. Ex. A).) Plaintiffs also alleged that the defendants had openly discussed adopting a variable online pricing scheme and conferred regarding "how to put Napster out of business" while attending trade association meetings. (See id. ¶ 131.) Despite these allegations, however, the Court of Appeals did not rely at all on any alleged meetings in reaching its decision and instead pointed to thirteen other allegations. See Starr, 2010 U.S. App. LEXIS 768, at *18-23. Thus, Starr indicates that allegations of meetings—such as Anderson's allegation of meetings among the

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"Supp. Lynaugh Decl. Ex. ___" refer to exhibits attached to the Supplemental Declaration of Margaret E. Lynaugh submitted herewith.

[2] This Court may consider the transcript of Charles Anderson's interview with the The New Single Copy. Not only does Anderson's complaint explicitly discuss the interview, but the surcharge and the shifting of scan-based trading costs announced in the interview are central to Anderson's antitrust claims. See Compl. ¶¶ 42, 44, 46; see also Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) (a court may consider statements or documents incorporated into the complaint by reference, as well as documents whose "terms and effect" a complaint "relies heavily upon"). In citing Sira v. Morton, 380 F.3d 57 (2d Cir. 2004) (Opp. at 29 n.20), Anderson neglects to mention that the Court of Appeals actually admitted for consideration two documents referred to and relied upon by the Sira complaint and one document not even cited in the complaint. See Sira, 380 F.3d at 67. Anderson's citation to In re Bausch & Lomb, Inc. Sec. Litig., No. 01-CV-6190 (CJS), 2003 U.S. Dist. LEXIS 24062 (W.D.N.Y. Mar. 28, 2003), is similarly unavailing; the complaint in that case did not even refer to the excluded dictionary passage or conference call. Id. at *51-53.

defendants in late January and early February of 2009 (Compl. ¶ 55)—are of little value when assessing whether a Section 1 claim survives a motion to dismiss under Twombly.[3]

C. The Alleged Statements Do Not Suggest Collusion.

Anderson posits a conspiracy based on: (1) the alleged statement by Mr. Castardi that Curtis was "going to have to go with whatever Rich [Jacobsen, CEO of defendant TWR] does"; (2) the allegation that when "Mr. Anderson asked Jacobsen about what Castardi had told him[,] Jacobsen did not deny that he and Castardi were acting collectively"; and (3) Jacobsen's alleged statement to Source of "Exactly—we now control this space". (Opp. at 9, 19; see Compl. ¶ 56)

Curtis's statement that it was "going to have to go with whatever" TWR does plainly suggests there was no agreement to boycott Anderson and Source because Curtis did not know what TWR would do and was waiting to see and follow, and TWR's alleged "Exactly—we now control this space" is so vague that it cannot reasonably be interpreted to imply anything about any concerted action. (See Mem. at 13.) Although Anderson argues that Time and TWR cannot provide their own "post hoc alternative interpretations" of these alleged statements (Opp. at 19-20), it is Anderson that cannot require that the Court indulge in unreasonable post hoc inferences in order to sustain its complaint. See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994) ("[n]or is [plaintiff's] complaint rescued by the principle that in deciding a Rule 12(b)(6) motion all reasonable inferences must be drawn in [plaintiff's] favor"

[3] Anderson claims Starr "explicitly rejected any requirement that a Section 1 plaintiff 'mention a specific time, place or person involved in each conspiracy allegation'". (Opp. at 18.) However, what Starr actually says is that because "the claim of agreement rests on the parallel conduct described in the complaint", the plaintiffs need not plead meeting details with specificity. Starr, 2010 U.S. App. LEXIS 768, at *25. Here, the purportedly parallel conduct is purely of Anderson's own creation; if Anderson wishes to rely on the meetings to evidence an agreement, under Starr and Twombly it must plead with specificity.

because "conclusions of law or unwarranted deductions of fact are not admitted") (emphasis added); Rivoli v. Gannett Co., 327 F. Supp. 2d 233, (W.D.N.Y. 2004) (when deciding a motion to dismiss a court "is not obligated to draw unreasonable inferences in plaintiff's favor"). Anderson cannot reasonably ask this Court to infer that Curtis's alleged statement is inculpatory when on its face it is plainly exculpatory, and cannot reasonably ask this Court conclude that TWR's alleged statement implies anything at all about an agreement. Additionally, Anderson's alleged "indication" of conspiracy—Mr. Jacobsen's silence in reaction to Mr. Anderson telling him that Curtis was going to follow whatever TWR did—indicates nothing and is a conclusion disguised as a fact that, as detailed in Part I, must not be credited.

Examination of the Starr complaint reveals how anemic Anderson's allegations are. The plaintiffs in Starr alleged that the CEO of one defendant expressed that its joint venture with other defendants "determine[s] the price" of internet music "because we are concerned that the continuing devaluation of music will proceed unabated unless we do something about it" (Starr SCAC ¶ 86), and that other defendants openly discussed the adoption of a "variable online price scheme" (id. ¶ 131). The Starr complaint also pleads that the CEO of one defendant preferred "secret side letters" because "there are legal/antitrust reasons why it would be bad idea to have MFN clauses in any, or certainly all, of these agreements". (Id. ¶ 95.) The gravamen of the Starr complaint is that the electronic distribution of music created huge cost savings, which should have resulted in lower prices, but did not. The gravamen of Anderson's complaint is that publishers refused to pay Anderson tens of millions of dollars and turned to others who would do the same job more cheaply.

D. Alleged Market Power Does Not Render the Complaint Plausible.

Anderson argues that the alleged parallel conduct by defendants is "highly suggestive of a prior agreement" because, as in Starr, the defendants here allegedly control 80%

of the market. (Opp. at 20-21.) That argument is decisively undercut, however, by the fact that the Supreme Court held that the Twombly complaint must be dismissed despite plaintiffs' allegation that the baby Bells accounted for "as much as ninety percent or more" of the market for local telephone services. (Twombly Am. Compl. ¶ 48.)

E. Time and TWR Did Not Act Contrary to Their Self-Interests.

Anderson argues that "where as here, plaintiffs have alleged behavior that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals, a complaint states a claim under Twombly". (Opp. at 24 (internal quotation marks omitted).) As an initial matter, Time and TWR had a self-interest in avoiding Anderson's demands, which would have cost them millions of dollars annually.[4] Moreover, Anderson's theory that Time and TWR's refusal of its demands would be contrary to their self-interest is not an allegation of fact, but a tortured conclusion whose necessary consequence is that no matter how onerous Anderson's demands, Time and TWR would have to accede or collude. As explained previously (Mem. at 15-16), under Anderson's theory, Time or TWR could never cease using Anderson's services without engaging in collusion. Anderson responds that this argument is "fatally flawed" because "[t]o the extent that Anderson's prices or services . . . were not competitive, one of its competitors . . . could have expanded into Anderson's markets and taken away Anderson's business by charging lower prices or providing better services". (Opp. at 26 n.18.) That, however, is exactly what happened. Anderson's surcharge made its prices no longer

[4] Although Anderson claims the actions of CMG are irrelevant because it was not a conspirator (Opp. at 16 n.8), CMG also rejected Anderson's surcharge (Compl. ¶ 43), powerfully demonstrating the self-interest of all national distributors and publishers in refusing Anderson's demands.

competitive. As a result, other wholesalers expanded and took away Anderson's business. That process happened quickly because of Anderson's February 1, 2009 deadline.

Additionally, Twombly itself demonstrates that allegations that defendants have acted contrary to their self-interest do not necessarily render a complaint plausible. The Court held that the Twombly complaint should be dismissed even though it alleged that the baby Bells had acted contrary to their own interests by failing to pursue customers in territories controlled by other baby Bells, inaction that "would be anomalous in the absence of an agreement . . . not to compete". Twombly Am. Compl. ¶¶ 40-41; see Twombly, 550 U.S. at 567-70.

III. IN CONTEXT, ANDERSON'S ALLEGATIONS DO NOT SUGGEST CONSPIRACY.

Starr, quoting Twombly, makes clear that "allegations of parallel conduct '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'". Starr, 2010 U.S. App. LEXIS 768, at *15; see also id. at *36 (Newman, J., concurring). Using common sense and judicial experience[5] to examine the plaintiffs' allegations in light of the history of AT&T's divestiture led the Court to conclude that:

> [The parallel conduct of the baby Bells] was not suggestive of conspiracy, not if history teaches anything. . . . In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The [baby Bells] were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

Twombly, 550 U.S. at 567-68.

[5] "Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

In contrast, the Second Circuit examined the allegations in Starr against a context in which the record companies had indisputably formed joint ventures. See Starr, 2010 U.S. App. LEXIS 768, at *3-4. Thus, the question was: given the existence of joint venture agreements, have plaintiffs plausibly alleged that the agreements produced or facilitated anticompetitive effects? In that context, the allegations of: a confessed need to put a stop to the "continuing devaluation of music" (Starr SCAC ¶ 86); the existence of an incomprehensibly high and uniform pricing scheme (id. ¶¶ 77, 98-100, 103); deceptive tactics to hide portions of agreements (id. ¶¶ 90-97); and pending investigations by the New York State Attorney General and the U.S. Department of Justice (id. ¶¶ 106-08), were held sufficient. See Starr, 2010 U.S. App. LEXIS 768, at *33.

Here, the question is not (as in Starr) whether existing agreements encompassed unlawful conduct, but rather (as in Twombly) whether Time and TWR entered into any agreements in the first place. On January 14, 2009, Anderson (and later Source) publicly announced that effective February 1, 2009, it would cease distributing magazines whose publishers had not acceded in writing to its 7-cent-per-copy and scan-based trading[6] demands. (Compl. ¶¶ 39, 42, 50; Lynaugh Decl. Ex. B at 2-4.) Hudson and The News Group (and ultimately Source), however, remained willing to distribute magazines without imposing a 7-cent fee or shifting the costs associated with scan-based trading. Thus, the simple fact is that in January of 2009, Anderson announced that it was increasing prices and that move was not

[6] Anderson's complaint makes clear that any dispute among wholesalers and publishers regarding scan-based trading was about money: who would bear the cost of inventory lost due to shrinkage when retailers used scanners. (See Compl. ¶ 34.) Indeed, Mr. Anderson did not complain that publishers were stymieing the spread of scanners, but rather that Anderson would henceforth: "no longer participate in the investment in scan-based trading". (Lynaugh Decl. Ex. B at 2.)

followed by all of its competitors. Faced with the prospect of paying millions of dollars in extra fees, Time, TWR, and most of the others did what basic economics dictates they would do—they shifted to a lower-cost wholesaler to deliver their product. Thus, just as was the case in Twombly, common sense says that "there is no reason to infer [here] that [defendants] had agreed among themselves to do what was only natural anyway." Twombly, 550 U.S. at 566.

Conclusion

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

February 2, 2010

Respectfully submitted,

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