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

Defendants.

09-CIV-2227 PAC

JOINT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

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The named defendants[1] jointly file this Memorandum of Law in Opposition to the motion of the plaintiffs Anderson News, L.L.C. ("Anderson News") and Anderson Services, L.L.C. (collectively with Anderson News, "Anderson" or "plaintiffs"), pursuant to Fed. R. Civ. P. Rule 59(e) and S.D.N.Y./E.D.N.Y. Local Civil Rule ("L.R.") 6.3 for reconsideration of the August 2, 2010 Opinion and Order, *Anderson News, L.L.C. v. American Media, Inc.*, 2010 U.S. Dist. LEXIS 77718 (S.D.N.Y. Aug. 2, 2010) (the "Opinion"). As directed in the Opinion, judgment dismissing the Complaint with prejudice was entered on August 2, 2010 (Docket #90) (the "Judgment").

As detailed in the balance of this memorandum, there is no reason for this Court to reconsider its Opinion, set aside its Judgment and grant Anderson leave to file an amended complaint:

> **First**, the motion neither addresses nor meets the requirements for reconsideration – a showing that the Court "overlooked" an issue of fact or law; instead, Anderson simply disagrees with the Court's decision, impermissibly rearguing matters properly decided (*infra*, Point I);
>
> **Second**, Anderson's request for leave to amend made in a footnote in its brief in response to defendants' motion to dismiss was properly denied (*infra*, Point II); and
>
> **Third**, the additional allegations that Anderson seeks leave to add to the Complaint do not address, much less remedy, the fundamental and incurable flaws identified by the Court (*infra*, Point III).

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[1] The defendants that are signatories to this Memorandum of Law are magazine publishers American Media, Inc. ("AMI"), Bauer Publishing Co., LP ("Bauer"), Hachette Filipaccchi Media, U.S. ("Hachette") and Rodale, Inc. ("Rodale"), magazine distribution and service companies Curtis Circulation Company ("Curtis") and Kable Distribution Services, Inc. ("Kable") and media and marketing services company Distribution Services, Inc. ("DSI"). Magazine wholesaler Hudson News Distributors LLC ("Hudson"), publisher Time Inc. ("Time") and national distributor Time Warner Retail Sales & Marketing, Inc. ("TWR") are submitting separate briefs that address arguments specific to them. All emphasis is added unless otherwise noted. "Pls.' Mem." refers to the plaintiffs' August 16, 2010 Memorandum of Law in support of their motion for reconsideration. "PAC" refers to the Proposed Amended Complaint annexed to Pls.' Mem. "Complaint" or "Compl." refers to the original Complaint in this action, dated March 10, 2009.

ARGUMENT

I. RECONSIDERATION IS NOT AVAILABLE WHERE THERE IS NO SHOWING THAT THE COURT "OVERLOOKED" CONTROLLING FACTS OR LAW.

A motion under Fed. R. Civ. P. Rule 59(e) or L.R 6.3 must be denied "unless the moving party can point to controlling decisions or data that the court *overlooked* — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Sampson v. Robinson*, Nos. 07 Civ. 6890, 07 Civ. 5867, 2008 WL 4779079, at *1 (S.D.N.Y. Oct. 31, 2008) (Crotty, J.). In fact, the Second Circuit recently held that a motion made under Rule 59(e) that included a proposed amended pleading could only be granted to correct "a clear error of law or to prevent manifest injustice." *In re: Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 120 (2d Cir. 2010). A corollary to that principle is that reconsideration "should not be granted where the moving party seeks solely to relitigate an issue already decided." *Seinfeld v. Worldcom, Inc.*, 06-Civ. 13274, 2007 U.S. Dist. LEXIS 39164, at *3 (S.D.N.Y. May 31, 2007), *aff'd*, 283 F. App'x 876 (2d Cir. 2008). Further, a party "may not advance new facts, issues or arguments not previously presented to the court" and "may not treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's rulings." *Id.* at *3-4 (internal quotation marks omitted). As courts have made clear, the "strict" standard imposed on the moving party has been established in order to "dissuade repetitive arguments on issues that have already been considered fully by the Court." *Ruiz v. Comm'r of the Dep't of Transp. of the City of New York*, 687 F.Supp. 888, 890 (S.D.N.Y. 1988), *aff'd*, 858 F.2d 898 (2d Cir.1988).

Anderson makes no effort to show that it has met this strict standard and identify law or alleged facts that the Court overlooked; rather, it merely argues that the Court made the wrong decision on the record before it. Anderson impermissibly rehashes contentions that the Court has

already rejected: (1) it relies heavily — again — on the same decision it cited in opposing the motion to dismiss (*Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999)) (Pls.' Mem. at 2); (2) it argues — again — that a conspiracy to reduce the number of wholesalers, increasing the market power of the remaining wholesalers, is plausible (*id.*); (3) it disputes — again — the Court's consideration of a public interview of its principal and a Delaware Court decision (*id.* at 4-7); and (4) it denies — again — that it instigated the events at issue by unilaterally adopting the surcharge in mid-January 2009 (*id.* at 4-5). Similarly, Anderson's disagreement with the Court's interpretation of *In re: Travel Agent Commission Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009), plainly is not a ground for reconsideration (*see id.* at 3, n.3). Finally, Anderson cannot breath life into its claim by its belated, post-judgment filing of the PAC, which includes allegations plucked from a prior lawsuit filed by Anderson's lawyers on behalf of nonparty Source Interlink Distribution Services, L.L.C. ("Source") (S.D.N.Y. 09 Civ. 1152) (the "Source Action") (*id.* at 4-5, 8-9). Those allegations do not change the fundamental implausibility of the purported conspiracy, and, for the most part, were already presented to the Court at oral argument on the motion to dismiss.

II. ANDERSON'S UNTIMELY FOOTNOTE RESERVATION OF A RIGHT TO AMEND WAS PROPERLY DENIED.

Defendants first identified the infirmities of Anderson's Complaint in a letter to the Court on March 30, 2009 seeking a pre-motion conference for permission to file a motion to dismiss the Complaint. The motion to dismiss the Complaint was not filed until December 14, 2009, six months later. No explanation has been offered for Anderson's failure to seek to replead during this six month period. Nor does Anderson identify any new purported fact not known to it prior to December 14, 2009. In fact, many of its "new allegations" concern Source and were part of a pleading that was publicly-filed in *April 2009* in the Source Action by the same lawyers who

drafted the Anderson Complaint (09-Cv-1152, Docket # 60). Anderson, without identifying any allegations it sought to add, belatedly and in a footnote in its opposition to defendants' motion to dismiss, purported to reserve the right to amend its Complaint if the motion to dismiss were granted. The Court specifically addressed and rejected this "request" to replead in the Opinion (at *42-44), and rightly so.

A Rule 59(e) motion including a proposed amended pleading can only be granted to correct "a clear error of law or to prevent manifest injustice." *In re: Assicurazioni Generali, S.P.A.*, 592 F.3d at 120. Moreover where, as here, a plaintiff "had the opportunity to amend the complaint earlier but waited until after judgment, the court may exercise its discretion more exactingly." *Id.* (internal quotation marks omitted). As the Second Circuit has explained, where plaintiffs informally requested leave to amend in their motion papers and did not submit proposed amendments or otherwise indicate how they would correct any deficiencies in the complaint, "it was within the district court's discretion to dismiss the Complaint with prejudice." *Rosner v. Star Gas Partners, L.P.*, 344 F. App'x 642, 645 (2d Cir. 2009). "[A] busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990) (quoting *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967)).

In a recent decision, reconsideration of a dismissal and leave to replead were denied where, as here, plaintiffs (1) had several opportunities to amend their complaint including upon receipt of defendants' letter of intent to file a motion to dismiss and upon service of defendants' motion; and (2) made their "purported request for leave to amend" in a footnote[2] in their opposition to the motion to dismiss. *In re: Crude Oil Commodity Litig.*, 2007 U.S. Dist. LEXIS

[2] The court also noted that "[a]rguments which appear in footnotes are generally deemed to have been waived." *Id.* at *9.

66208, at *13-15. The court specifically found that plaintiffs had failed to request leave to amend in a "procedurally sound manner," *id.* at *9-10, and that denial of the plaintiffs' request was "particularly apt here given the procedural history of this case, which provided plaintiffs with numerous opportunities to amend as well as full notice of the deficiencies in their Consolidated Amended Complaint." *Id.* at *13-14; *see also Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 244-45 (2d Cir. 1991) ("the liberal amendment policy of Rule 15(a) [cannot] be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation."). Plaintiffs' untimely request to amend should be denied.

III. THE INSUFFICIENCY OF THE PROPOSED AMENDED COMPLAINT CONFIRMS THE COURT'S HOLDING THAT REPLEADING CANNOT CURE THE FATAL DEFECTS IN ANDERSON'S CLAIMS.

Even if Anderson had timely sought to amend the allegations in the Complaint, the PAC only confirms that this Court properly found "[t]he defects in Anderson's Complaint are not curable." Opinion at *43. As the Supreme Court has observed, leave to amend should be denied where the amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *accord Dluhus v. Floating & Abandoned Vessel, Known as "New York,"* 162 F.3d 63, 69 (2d Cir. 1998); *In re: Crude Oil Commodity Litig.*, 06 Civ. 6677, 2007 U.S. Dist. LEXIS 66208, at *11 (S.D.N.Y. Sept. 7, 2007).

The PAC, like the Complaint, relying on conclusory allegations, pleads nothing more than defendants' natural commercial reactions to a common economic stimulus. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565-69 (2007), makes clear that a claim of conspiracy based on parallel conduct should be dismissed if "common economic experience" or the facts as alleged in the complaint show that independent self-interest is an "obvious alternative explanation" for defendants' common behavior. *See also RxUSA Wholesale Inc. v. Alcon Labs.*, No. 09-4406-cv,

slip op. at 3 (2d Cir. Aug. 30, 2010) (summary order holding that Sherman Act Section 1 claim fails because "the alleged parallel activities . . . in light of common economic experience, could just as well be independent action" (internal quotation marks omitted)). The Court's Opinion ably applied that "common economic experience" to reject Plaintiffs' economically implausible claim. The new allegations do not make the claims any more plausible.

First, ignoring Charles Anderson's unambiguous public announcement of a non-negotiable surcharge, the PAC characterizes the demand as a "temporary, stop-gap measure" which "would not be irrevocable" and was open to negotiation. (PAC ¶¶ 49-53.) Even accepting this as true, glaringly absent from the PAC is any allegation that Charles Anderson or any representative of Anderson ever attempted to negotiate with Bauer, AMI, Rodale, Hachette, Curtis or Kable or that Anderson expressed any interest in negotiating with them. Moreover, even "negotiable" demands require a response. Regardless of whether Anderson had any unexpressed willingness to negotiate, Anderson publicly announced that the surcharge was a take-it-or-leave-it ultimatum, and it was an economic stimulus felt in common by all the defendants.[3] That they responded to Anderson's ultimatum differently from how Anderson hoped does not, as the Court recognized (Opinion at *11, *18), support an inference of antitrust conspiracy. *Cf. Twombly*, 550 U.S. at 556 n.4.

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[3] Of course, it is irrelevant (and would later be inadmissible in a trial) if in fact Mr. Anderson had an unexpressed understanding that the demanded surcharge was temporary, revocable, and negotiable and somehow the industry was supposed to know this (Pls.' Mem. at 4). Moreover, the Court was correct to take judicial notice of Mr. Anderson's statements in *The New Single Copy* interview — which was incorporated by reference into the Complaint, *see Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004). Opinion at *8-9. In that interview Mr. Anderson emphasized, without qualification, that the surcharge was a take-it-or-leave-it demand. (Decl. of Daniel N. Anziska, Esq. in Supp. of Defs.' Mot. to Dismiss the Compl. (Docket # 59), Ex. B at p. 3 ("[W]e really believe that the $.07 cent number is the number.")). Anderson has never denied that the interview was accurate and continues to cite it in the PAC. (PAC ¶ 52.)

Second, the PAC does not include any allegations that alter the fact that, as the Court explained, defendants' varied responses to Anderson's unilateral demand — including discussing alternatives — undermine even Plaintiffs' theory of parallel conduct. Opinion at *18-19. Indeed, the allegations in the PAC again show that defendants' reactions, although ultimately the same, were not truly parallel, which the Court found "compounds the implausibility of Anderson's antitrust claim." Opinion at *18. While Anderson conclusorily asserts common and collusive behavior (Pls.' Mem. at 5), the PAC's allegations are to the contrary. The PAC continues to allege that Bauer, AMI, and Time held cordial meetings with Anderson and responded amicably to the surcharge (PAC ¶ 51); TWR agreed to a discount off the cover prices of its magazines (*id.* ¶ 65); Kable offered Anderson exclusivity in certain territories if Anderson dropped the surcharge (*id.* ¶ 58); and Curtis informed Anderson it would like to resolve the issue, but would have to wait to see what TWR did (*id.* ¶ 70). Although it is contesting the propriety of this Court having taken judicial notice of the Delaware Chancery Court decision requiring that Anderson News let AMI recover the magazines it had shipped to Anderson News that Anderson News failed to send to retailers, the PAC also concedes — and, indeed, Anderson has never contested — that AMI continued to deliver magazines to Anderson until early February when Anderson closed its doors.[4] (*Id.* ¶ 66.)

Third, the PAC's allegations do not address the Court's conclusion that there was no suggestion that defendants reached an agreement prior to engaging in allegedly parallel, but clearly unilateral, conduct in response to the common stimulus of the surcharge demand. Opinion at *19-34. Allegations concerning an "earlier" report by consultants to one of the

[4] Anderson's implausible allegation that AMI's magazines were shipped in late January and could not be diverted because they were "in the pipeline" (PAC ¶ 66) is discussed *infra* page 13.

defendants, and a report of "unilateral" actions of another defendant, do not plausibly suggest any agreement among the defendants prior to January 14, 2009. (PAC ¶¶ 45-47.)

Fourth, the allegations in the PAC do nothing to change the underlying economic implausibility of the claimed conspiracy to eliminate Anderson and Source. The Opinion articulated the clear proposition that publishers and national distributors have an economic self-interest in more — not fewer — wholesalers, Opinion at *17-18, because the very same market share that would allow wholesalers to shift costs downstream to retailers also would allow them to shift costs upstream to publishers and national distributors. The PAC, using more words, clings to Anderson's original, illogical explanation for defendants' actions. Like the Complaint, the PAC provides no plausible reason why granting two wholesalers a duopoly would provide a "powerful incentive to engage in ... [the alleged] conspiracy." (Pls.' Mem. at 2.) Regurgitating an argument this Court correctly declined to accept in its Opinion, Anderson posits that because the defendants "collectively control 80% of single copy magazines," they, like the defendant in *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999), "wield tremendous influence and control over Hudson and News Group." (Pls.' Mem. at 3). To the contrary, it is evident that Hudson and the News Group, as the only two wholesalers remaining, would have been in control. Moreover, there is no allegation in either the Complaint or the PAC that the conspiracy continued beyond early February 2009[5] or that there was any supposed agreement about ongoing control over the two remaining wholesalers after the conspiracy ended, and no hint of how any purported agreement was enforceable against wholesalers, distributors or publishers which might wish to defect.

[5] Indeed, in attempting to argue that discovery in this case would be limited, Anderson concedes that the alleged conspiracy was short lived (Pls.' Mem. at 4, n.5).

Fifth, the Opinion specifically discussed the "factual" allegations as to each defendant, to the extent there were any, and then properly determined that Anderson failed to "plausibly state how each defendant was involved in the alleged conspiracy." Opinion at *16, *34-38. The PAC adds some new allegations about communications and "meetings," but the allegations do not support an inference of collusion on their own terms, let alone when viewed in the context of Anderson's announced surcharge which necessitated reactions. (PAC ¶¶ 55-63.) Moreover, as the Court noted, general allegations that "defendants" participated in meetings are insufficient to plausibly suggest collusion. Opinion at *19 n.9.[6] A review of the allegations against each of the defendants makes clear the failings of the PAC.

- **Curtis** – In large part, the PAC restates or repackages the allegations of the Complaint, and none of the PAC's "new" allegations concerning distributor Curtis plausibly suggest the existence of a conspiracy. For example, Anderson now alleges that Curtis President Robert Castardi told Hudson CEO James Cohen that he, Castardi, was going "to get back" at Anderson and that "Anderson was done." (*Id.* ¶ 47.) Whatever such an alleged comment might suggest about Mr. Castardi's unilateral reaction to Anderson, if anything, it says nothing about *concerted* action among the defendants. Nor does it change the underlying implausibility of the alleged conspiracy.[7]

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[6] Anderson's allegations also are often internally contradictory. Anderson, for example, alleges that to achieve their goal, "defendants needed to eliminate Anderson and Source, and to grant the remaining [two] wholesalers . . . exclusivity in the respective geographic regions serviced by the disfavored wholesalers." (PAC ¶ 76.) But Anderson acknowledges that Source, which has the largest alleged market share, *continued* to distribute magazines for the publishers and distributors (*id.* ¶ 8), which means that the defendants could not have achieved their alleged goal. Anderson also alleges that Kable offered exclusivity in certain territories *to Anderson*, not to Hudson or News Group, if Anderson would retract the proposed surcharge (*id.* ¶ 58), confirming that there was no underlying common scheme to boycott Anderson.

[7] Similarly, the minor details added to allegations concerning meetings among certain defendant employees (PAC ¶ 56 (concerning a January 18, 2009 meeting between Kable CEO Michael

Anderson also gains nothing by alleging that Curtis' Castardi supposedly stated that he knew, as of January 31, 2009, "with '100% certainty,' that TWR, Bauer and AMI would refuse to supply product to Source — even though, by this time, Source had publicly rescinded its surcharge proposal." (*Id.* ¶ 71.) First, the allegation does not suggest collusion regarding Anderson, which is not even mentioned. Second, it was widely reported days *before* Castardi's alleged statement on January 31, 2009 that Time and Bauer had decided not to ship to Source.[8] *See, e.g.*, *Time Inc. Stands Up to Wholesaler*, Media Week, Jan. 27, 2009, http://www.mediaweek .com/mw/content_display/news/magazines-newspapers/e3idb2c398ada1252b7af18fb3f8b5ed1f8 (discussing Time's insistence that it would "find alternate distribution for all 24 of its U.S. titles") (a courtesy copy is attached hereto); Lucia Moses, *Comag Sticking With Its Wholesalers for Now*, Media Week, Jan. 30, 2009, http://www.mediaweek.com/mw/content_display/esearch/ e3i3b5ee64b200b60e197bde3cbbb7a63e2 (noting Bauer's "plan to use other wholesalers") (a courtesy copy is attached hereto). Thus, the allegation does not suggest that Castardi had some conspiratorial agreement with Time or Bauer, but rather that he had read the newspapers. Third, Curtis was AMI's national distributor (PAC ¶ 17), and so by January 31 it had to know to whom magazines were being sent the next day.

- **Bauer** – As in the Complaint, there are no factual allegations in the PAC about publisher Bauer's alleged participation in a preexisting conspiracy or when it supposedly terminated Anderson. Anderson repeats the same two allegations about Bauer that the Court

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Dulac and Curtis' Castardi); *id.*¶ 63 (January 29, 2009 meeting among Curtis' Dennis Porti, TWR, Hudson, and News Group)), do nothing to make the conspiracy more plausible. The allegations that the meetings were conspiratorial still are conclusory.

[8] This allegation regarding Source's alleged "termination" should not be confused with the scant allegations about *Anderson*. As previously noted, AMI continued to ship Anderson magazines in February 2009 until Anderson ceased operations, and Anderson has not alleged that Bauer ever terminated it.

already properly rejected as failing to plausibly support that Bauer was involved in a conspiracy, *i.e.*: (1) on January 12 or 13, 2009, Charles Anderson met with Hubert Boehle, President and CEO of Bauer, to inform him "of Anderson's decision to impose the $.07 per copy surcharge," that the meeting was "cordial" and that Bauer "appeared — at least on the surface — to respond amicably" (PAC ¶ 51; Compl. ¶ 41); and (2) national distributor Kable was somehow "acting" on behalf of its client Bauer (PAC ¶ 56; *see also* Compl. ¶ 49). Opinion at *9, *37 ("Anderson attempts to implicate the publisher defendants in the conspiracy through their relationship with the national distributor Defendants (Compl. ¶ 49) . . . [t]he Complaint's allegation of an agency relationship, however, is conclusory.").

The only two "new" allegations that even mention Bauer concern nonparty Source and do not even reference Anderson. First, Anderson repeats a contention made in the Source Action that a Bauer executive had an email exchange with someone employed by another publisher in which it was suggested that "Source won't be around much longer." (PAC ¶ 61.) At most, this allegation shows that it was the opinion of someone at Bauer that Source's gambit to assess the surcharge did not bode well for it. It is unclear how this suggests a conspiracy to exclude Source, let alone Anderson. Second, Anderson repeats an allegation from the Source Action that the president of Curtis stated on January 31, 2009 that he knew "with 100% certainty" that TWR, Bauer and AMI would not supply product to Source. (*Id.* ¶ 71.) As discussed, this does not suggest collusion regarding Source, let alone Anderson, which is not even mentioned. It shows at most that Curtis was legitimately reporting what was already widely known throughout the industry.

- **Hachette** – The PAC still alleges no role for publisher Hachette in the purported conspiracy. Indeed, like the Complaint, it barely mentions Hachette. Strikingly absent from the

PAC is any allegation that Hachette engaged in any negotiations with Anderson, participated in any meetings, or even communicated with the other defendants. The only "new" allegations about Hachette are: (1) the slightly revised, but still wholly conclusory, assertion that its national distributor, Curtis, "represents and acts on behalf of" Hachette (PAC ¶ 56), and (2) that Hachette received an email from Curtis informing Hachette that "effective immediately, Curtis is suspending all further shipments of magazines to all Anco [*i.e.*, Anderson] wholesaler operations" (*id.* ¶ 66) — an allegation that *confirms* Hachette's lack of any role in the (allegedly conspiratorial) decision. As Hachette explained in its separate memorandum of law and reply on the motion to dismiss the Complaint — and as the Court recognized in its Opinion (Opinion at *37) — these allegations are woefully insufficient to establish that Hachette authorized Curtis to act as its agent in entering into any conspiratorial agreement on Hachette's behalf. The fact that Hachette's national distributor notified Hachette (after it made its decision) that it would no longer ship magazines to Anderson cannot support an inference that Hachette was a party to any hypothetical preexisting agreement.

- **DSI** – The PAC continues to allege that DSI is a merchandiser. (PAC ¶ 20.) DSI thus could not boycott any wholesalers and is not alleged to have been affected by the Anderson surcharge. *See* Opinion at *36. The PAC alleges that the purported conspiracy "would require concerted action among the publishers, national distributors and Hudson and News Group." (PAC ¶ 48.) The omission of DSI speaks volumes.

The two "new" allegations concerning DSI add nothing. First, the PAC alleges that DSI circulated to a customer (AMI) non-confidential industry information (emails that Comag had sent to retailers) that it obtained from another customer (Rodale). (*Id.* ¶ 60.) But this is exactly what would be expected of a merchandising company like DSI. The fact that information

forwarded included an editorial comment about Comag's CEO is irrelevant. Second, the Plaintiffs allege that a DSI representative attended a January 29 meeting at Hudson's offices where "collusive activity" was "discussed and planned." (*Id.* ¶ 63.) These allegations are precisely the kind of bald, conclusory assertions this Court held insufficient plausibly to suggest collusion. Opinion at *19 n.9.

- **AMI** – AMI's president is still alleged to have had a cordial meeting with Charles Anderson. (PAC ¶ 51.) The chief "new" allegation concerning publisher AMI is that it cut off supplying magazines to Anderson soon after January 29, 2009. (*Id.* ¶ 66.)[9] Plaintiffs acknowledge, however, that AMI delivered magazines to Anderson's warehouses in early February. (*Id.*) Moreover, Plaintiffs allege that Anderson suspended its business on February 7, 2009 — mere days, if not hours, after receiving AMI's magazines. (*Id.* ¶ 86.) Anderson rationalizes that the shipments were actually made in late January and could not be diverted because they were "in the pipeline" (*Id.* ¶ 66), but it fails to explain how it could be that AMI's magazines could be shipped in January from the printer and not reach Anderson for a week, or how it could be that the shipments could not be stopped if the purported conspiracy began as much as two weeks before the shipments purportedly occurred.

- **Kable** – The allegations concerning Kable's alleged communications with other national distributors (PAC ¶¶ 56, 57, 59, 62) are entirely conclusory. For example, it is claimed that Kable communicated with TWR "to catch up on a few . . . [International Periodical

[9] The plaintiffs also allege that the president of AMI forwarded the email from DSI containing non-confidential industry information to AMI's consultant, a former DSI employee. (PAC ¶ 60.) The plaintiffs baldly assert that the consultant "was one of the conduits through which the conspiracy was effectuated," *id.*, but the plaintiffs do not allege that the consultant conveyed this or any other information. Indeed, the consultant is not mentioned again in the PAC. Forwarding market information to a party's own consultant is not evidence of a conspiracy.

Distributors Association] items," an association that Anderson (again conclusorily) asserts to be the "type" of organization used by competitors to mask anticompetitive communications. (*Id.* ¶ 57.) That conclusion, however, is not tenable and does nothing to support the conspiracy claim; such a communication is not even suspicious. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 n.12 (2007) (trade association membership does not support inference of conspiracy). Kable also is claimed to have tried but failed to induce Comag to join the purported conspiracy. (PAC ¶ 59.) The allegation that Kable offered exclusivity in certain territories to Anderson if Anderson would retract the surcharge (*id.* ¶ 58), which was also made in the Complaint (Compl. ¶ 50), is not only inconsistent with Anderson's allegations that Kable participated in a conspiracy to put Anderson out of business, but squarely contradicts that allegation.

- **Rodale** – Rodale is now alleged to have passed along non-confidential market information to its merchandiser DSI, which included an editorial comment on Comag's CEO (PAC ¶ 60). Rodale also is alleged to have complained to Bauer about Comag. (*Id.* ¶ 61.) Neither of those actions evidence a conspiratorial agreement.

- **Time/TWR** – Time still is alleged to have agreed to a price concession and then reneged on the deal. Anderson's allegation that Time and TWR told Anderson that they "have decided to consolidate the channel" and "eliminate[e] Anderson and Source" as their wholesalers (*id.* ¶ 68) is substantively no different from the statements (that TWR and Time had decided to "change the channel" and that "they were going to have to use two wholesalers") that this Court already recognized as insufficient. Opinion at *35.

- **Hudson** – While it is alleged that "Hudson was at the heart of the conspiratorial meetings" (PAC ¶ 63), the allegations about Hudson's participation in those meetings are all conclusory.

In sum, Anderson's proposed amended complaint does nothing to address the fundamental flaws in the Complaint that this Court has dismissed.

CONCLUSION

For the foregoing reasons Anderson's motion for reconsideration, to set aside the Judgment and for leave to file an amended complaint is devoid of merit and should be denied. Indeed, Anderson's complete disregard of the requirements of Rule 59 can only be interpreted as a recognition by Anderson that its motion is completely meritless and that the only purpose of the motion is to include a proposed amended complaint in the record on appeal.

Dated: September 2, 2010
New York, New York

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09-4406-cv
RxUSA Wholesale, Inc. v. Alcon Laboratories, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of August, two thousand ten.

Present:

ROBERT A. KATZMANN,
PETER W. HALL,
Circuit Judges.[*]

RXUSA WHOLESALE INC.,

Plaintiff-Appellant,

v. No. 09-4406-cv

ALCON LABORATORIES, *et al.*,

Defendants-Appellees.

For Plaintiff-Appellant: MICHAEL L. LEVINE, Levine & Associates, P.C., Scarsdale, NY

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[*] The Honorable Paul G. Gardephe, originally a member of the panel, recused himself from consideration of this matter. The remaining members of the panel, who are in agreement, have decided the case pursuant to 2d Cir. IOP E(b).

For Defendants-Appellees:

ROBERT A. MILNE (Martin M. Toto, Bryan D. Gant, *on the brief*), White & Case LLP, New York, NY** *for Manufacturer Appellees.*

MARK A. ROBERTSON, Fulbright & Jaworski L.L.P., New York, NY *for Wholesaler Appellees.*

TERRENCE J. CONNOLY (Joseph M. Salama, *on the brief*), Latham & Watkins LLP, New York, NY *for McKesson Corporation.*

Appeal from the United States District Court for the Eastern District of New York (Hurley, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED.**

Plaintiff-appellant RxUSA, Inc. appeals from a judgment entered September 24, 2009 (Hurley, *J.*), granting defendants-appellants' motion to dismiss. RxUSA is a secondary wholesaler of pharmaceutical products and alleges that by refusing to sell pharmaceutical products to it the Manufacturer and Authorized Wholesaler defendants violated Sections 1 and 2 of the Sherman Act. On appeal, RxUSA argues that the district court incorrectly dismissed RxUSA's claims under the Sherman Act, and abused its discretion in denying RxUSA leave to amend its complaint. We assume the parties' familiarity with the facts and procedural history of this case.

Largely for the reasons stated by the district court in its comprehensive opinion, we affirm. RxUSA's Section 1 claim against the Manufacturers fails because RxUSA's assertion of

** Because of the large number of law firms and attorneys representing defendants in this case, the full list of attorneys and law firms is not listed here. A comprehensive list of all parties and attorneys involved in this litigation can be found on the public docket for this case.

an agreement among the Manufacturers is entirely conclusory and RxUSA does not place its allegations of parallel conduct in a context that suggests a prior agreement. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). The only evidence RxUSA points to as suggesting a prior agreement is RxUSA's contention that the reason several of the Manufacturers gave for refusing to sell to RxUSA—that they had adequate distribution networks—was a lie. The mere fact that RxUSA could not obtain all of the pharmaceuticals that it desired to sell, however, does not demonstrate that the Manufacturers did not have adequate distribution networks. Likewise, RxUSA's Section 1 claim against the Authorized Wholesalers fails because RxUSA's allegation of an agreement is entirely conclusory, and the alleged parallel activities of the Authorized Wholesalers, "when viewed in light of common economic experience," could "just as well be independent action." *Id.* at 556-57. As competitors of RxUSA in the wholesale pharmaceutical products market, each Authorized Wholesaler faced independent incentives not to sell to RxUSA.

RxUSA's Section 2 claims also fail for the reasons stated by the district court. A refusal to deal with competitors does not constitute anticompetitive conduct in violation of Section 2 except in limited circumstances not present here with respect to either the Manufacturers or Authorized Wholesalers. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-09 (2004). RxUSA's Section 2 claims against the Authorized Wholesalers and defendant McKesson fail for the additional reason that RxUSA has not alleged that any individual Authorized Wholesaler has a monopoly, *see H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989), and its allegations of a "shared monopoly" under Section 2 merely repeat its failed arguments under Section 1, *see FLM Collision Parts,*

Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976). Further, to the extent that such a claim is viable, RxUSA's essential facilities claim fails against the Manufacturers, at the very least because RxUSA is able to obtain pharmaceutical products from other sources, albeit at a higher price.

Finally, the district court did not abuse its discretion in denying RxUSA leave to amend its complaint. *See Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 242 (2d Cir. 2007). RxUSA did not seek leave to amend its complaint in the district court, *see Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1132 (2d Cir. 1994) ("[W]e do not deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought."), and we conclude that any amendment would be futile, *see, e.g.*, *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008) (concluding that where a plaintiff's proffered amendments would not affect the Court's analysis, amending the complaint would be futile). We have reviewed RxUSA's remaining arguments and conclude that they lack merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

Time Inc. Stands Up to Wholesaler

Publisher says it won't pay 7-cent fee

Jan 27, 2009

Time Inc. has balked at the 7-cents-per-copy fee Source Interlink Distribution is demanding that publishers pay to truck magazines to the nation's retailers, saying it would find alternate distribution for all 24 of its U.S. titles.

A source close to the situation said Time Inc. informed Source Jan. 27 that the publisher would not provide Source with any copies of next week's Time, People, Sports Illustrated and its other weeklies.

Publishers and their distributors have been in nail-biting meetings for the past several days with wholesalers, who informed them that they needed the additional fees on top of existing incentive programs to stay solvent.

Source joined Anderson News Co., which together represent an estimated 50 percent of the nation's magazine retail sales, in demanding the fees, effective Feb. 1.

Meanwhile, an Anderson rep affirmed its plans to stick to its Feb. 1 deadline, contradicting a report in the New York Post Jan. 23 saying the wholesaler would delay the price hikes for issues that go on sale next week.

The rep, Patrick Bowman, vp, category management for Anderson, also asserted that "quite a few" publishers had already agreed to the fee.

"Discussions are ongoing with all the publishers," Bowman said. "It's sort of nonstop. Where it winds up, no one knows."

Anderson also distributed a four-page statement to clear up what it said were misconceptions about its fee plan. Among other things, Anderson said the 7-cent fee would cost the industry $152 million, not the $1 billion reported by the Post, and disputed the notion that its competitors could absorb its business if it went under.

So far, the only magazines that are said to have agreed to the wholesalers' proposed fees are the enthusiast titles that Source Interlink Co.s, parent of Source Interlink Distribution, bought from Primedia Inc. in 2007.

The wholesalers' timing couldn't be worse for publishers, with soft single-copy sales making it already challenging for magazines to meet the rate bases they guarantee to advertisers. Time Inc. risks the loss of millions of single-copy sales if it doesn't find alternate distribution or agree to the fee demand.

As the No. 1 U.S. magazine publisher, Time Inc.'s handling of the dispute will be watched closely by other publishers and could embolden other publishers to follow suit.

Time Inc. hasn't determined whether it will use rival wholesalers or other companies to replace Source and how it will respond to Anderson's fee demand, the source said. But close observers of the industry have said it's highly doubtful magazines could replace a major wholesaler's place in the distribution chain, pointing out that competing wholesalers would face the same financial challenges that led Source and Anderson to demand the 7-cent fee.

http://www.mediaweek.com/mw/content_display/news/magazines-newspapers/e3idb2c398ada1252b7af18fb3f8b5ed1f8

MEDIAWEEK.COM

Comag Sticking With Its Wholesalers for Now

The wholesalers earlier in January demanded that publishers pony up 7 cents per copy delivered, effective Feb. 1

Jan 30, 2009

-By Lucia Moses

In the latest round in the showdown between magazine distributors and their wholesalers, Comag Marketing Group, which distributes magazines for Condé Nast, Hearst Magazines, Wenner Media, OK! and others, said it would continue supplying product to wholesalers Anderson News Co. and Source Interlink Cos.

The wholesalers, which represent an estimated 50 percent of the nation's retail magazine sales, earlier in January demanded that publishers pony up 7-cent-per-copy delivered, effective Feb. 1.

The fees could pile more than $150 million in annual costs on a magazine industry already hurting from big ad revenue and single-copy sales falloffs. A disruption in distribution would risk publishers newsstand sales and their ability to meet their rate base guarantees.

Time Inc. and Bauer Publishing balked at the proposed fees and plan to use other wholesalers, presumably The News Group and Hudson News, which have not asked for higher fees, to get their weeklies to retailers next week.

But Comag said it got an extension of an undetermined amount of time from the wholesalers to hold off on their fee demand and continue working under their prior financial arrangement.

Other publishing companies are said to be rallying behind first-mover and No. 1 U.S. magazine publisher Time Inc.

The two wholesalers said they needed the money to shore up their struggling businesses.

Talks between magazines' distributors and wholesalers were expected to continue through the weekend and into next week. Said one industry executive close to the situation: "There's a lot of emotion in the marketplace."

Links referenced within this article

-By Lucia Moses
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