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 OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S AUGUST 2, 2010, ORDER DISMISSING THE COMPLAINT WITH PREJUDICE AND DENYING PLAINTIFFS LEAVE TO AMEND

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September 2, 2010

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Defendants Time Inc. ("Time") and Time/Warner Retail Sales & Marketing, Inc. ("TWR") submit this Memorandum in Opposition to Plaintiffs' Motion for Reconsideration ("Mot.") of the Court's August 2, 2010, Order Dismissing the Complaint with Prejudice and Denying Plaintiffs Leave to Amend.

Preliminary Statement

Observing that "the ultimate goal of [Anderson's] alleged conspiracy—is facially implausible" (Op. at 8), that "the context of [Anderson's] alleged antitrust conspiracy . . . belies the viability of Anderson's antitrust claim" (Op. at 20), and suggesting that the allegations in the complaint make clear that the only party Anderson has to blame for its cessation of business is Anderson itself (see Op. at 12, 15), the Court concluded in its August 2, 2010, Opinion and Order ("Op.") that "[t]he defects in Anderson's Complaint are not curable" and dismissed all claims in their entirety with prejudice. (Op. at 20.) Despite the clarity of the Court's decision—and still trying to conceal that its own actions were the sole source of its demise—Anderson has moved for reconsideration. Anderson has failed, however, to cite any controlling law or material facts overlooked by the Court. Indeed, Anderson's proposed amended complaint ("PAC") definitively confirms that the Court was correct in its determination that Anderson's pleading is irremediably defective.

Argument

I. ANDERSON HAS FAILED TO SET FORTH ANY PROPER GROUND FOR RECONSIDERATION.

Anderson points to no controlling law or material facts overlooked by the Court that would justify granting its motion for reconsideration. See Patterson v. United States, No. 04 Civ. 3170 (WHP), 2006 U.S. Dist. LEXIS 50732, at *3 (S.D.N.Y. July 26, 2006) (explaining that "[a] motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e) is evaluated under the

same standard as a motion for reconsideration under Local Civil Rule 6.3" and that reconsideration "will generally 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" (internal quotation marks omitted)); Siino v. Bd. of Trs. of N.Y. City Teachers' Ret. Sys., No. 08 Civ. 4529 (PKC), 2009 U.S. Dist. LEXIS 26386, at *1 (S.D.N.Y. Mar. 13, 2009), aff'd, No. 09-1684-cv, 2010 U.S. App. LEXIS 8567 (2d Cir. Apr. 26, 2010) (same); see also Local Civil Rule 6.3 ("There shall be served with the notice of motion [for reconsideration] a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked.").

Although Anderson suggests several "errors" that the Court made in reaching its decision, each one of those "errors" is not something the Court overlooked, but something the Court considered and properly rejected. First, the Court's determination that publishers and national distributors have an economic self-interest in more wholesalers as opposed to fewer was grounded in both the allegation in the complaint that the alleged conspiracy would create "a 'monopolistic wholesaler' with the power to dominate the market" and the Court's own common sense (Op. at 8; Compl. ¶¶ 63, 76), an approach endorsed by the Supreme Court. (See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").) Second, Anderson cannot fault the Court's description of Anderson's 7-cent surcharge as a "non-negotiable, take-it-or-leave it demand" or as an "ultimatum" (Op. at 4, 11 & n.10, 13, 14), given that the Court's language is based on Mr.

Anderson's own statements[1] (see Lynaugh Decl. Ex. B, at 4).[2] Third, the Court's reading of various statements alleged to have been made by defendants as either overly vague or as benign commentary was entirely appropriate under Second Circuit law. 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" because "conclusions of law or unwarranted deductions of fact are not admitted" (emphasis added)). Fourth, the Court's unwillingness to take judicial notice of and assume the truth of the allegations contained in the Source Second Amended Complaint, a wholly separate civil action, is simply beyond reproach, and Anderson has cited no controlling law to the contrary.

II. ANDERSON'S PROPOSED AMENDED COMPLAINT CONFIRMS THAT THE COURT CORRECTLY DISMISSED ANDERSON'S CLAIMS WITH PREJUDICE.

Setting aside Anderson's failure to meet the standard for reconsideration, the primary bent of Anderson's motion is that it should be granted reconsideration so it may now move to replead. The proposed amended complaint Anderson has submitted alongside its motion, however, confirms that the Court was correct in its assessment that granting leave to replead would be futile—the defects in Anderson's complaint are not curable. See Burch v.

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[1] Although Anderson contests the propriety of the Court's consideration of the transcript of Charlie Anderson's January 14, 2009, interview with The New Single Copy, such consideration has been approved of by the Supreme Court. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 568 n.13 (2007) ("the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint").

[2] Citations to "Lynaugh Decl. Ex. ___" refer to exhibits attached to the Declaration of Margaret E. Lynaugh submitted with Time and TWR's Motion to Dismiss. Citations to Supp. Lynaugh Decl. Ex. ___" refer to exhibits attached to the Supplemental Declaration of Margaret E. Lynaugh submitted with Time and TWR's Reply Memorandum in Support of their Motion to Dismiss.

Pioneer Credit Recovery, 551 F.3d 122, 126 (2d Cir. 2008) ("motions to amend should generally be denied in instances of futility"). In fact, just as the Court predicted, Anderson's revised pleading (A) "improves" on the former pleading by (1) adding more conclusory allegations that are not entitled to the assumption of truth; (2) embellishing and tweaking pre-existing allegations in ways that are both incredible and of no assistance to Anderson's cause; and (3) throwing into the mix a handful of new facts that render Anderson's claims even less plausible; and (B) still rests on a theory that is implausible on its face.

A. The New Allegations In Anderson's Proposed Amended Complaint Do Nothing To Advance its Claims.

Anderson's proposed amended complaint adds nothing of consequence. The vast majority of the new allegations are conclusions that are not entitled to the assumption of truth; other allegations are meaninglessly reformulated allegations from Anderson's original complaint. The few new facts that Anderson has included render its claims even less plausible than they previously were.

1. The Vast Majority of the New Allegations in the Proposed Amended Complaint are Entirely Conclusory.

Anderson's primary revision is to nearly double the volume of conclusory allegations in its pleadings, despite this Court's clear admonition that such conclusory statements are not entitled to any presumption of truth. (Op. at 16.) Whereas the original complaint contained approximately thirty separate paragraphs in which Anderson alleged it was the victim of "collusion", "concerted activity", "illegal activity", a "group boycott", an "anti-competitive scheme", "coordinated activity", "conspiracy" and the like, the proposed amended complaint contains nearly fifty such paragraphs. (Time/TWR Mot. to Dismiss at 10; PAC ¶¶ 1-10, 22, 26, 40, 44-46, 48, 53, 55-56, 58-63, 66-68, 70, 72, 75-77, 80, 82-87, 89, 93, 95-96, 98-101.) For no

purpose other than lengthening its complaint, Anderson seeks to add wholly conclusory allegations such as:

> "Defendants undertook their conspiracy—which succeeded in destroying Anderson—in a collusive effort to avoid individualized and competitive negotiations . . . ." (PAC ¶ 2);
>
> "[D]efendants illegally colluded in agreeing upon and implementing a coordinated response to the surcharge, cutting off Anderson (and Source) from their supply of magazines . . . ." (PAC ¶ 3);
>
> "Defendants responded to Anderson's proposed temporary surcharge with illegal, collusive actions . . . ." (PAC ¶ 4);
>
> "[T]he defendants were stealing Anderson customers, poaching its employees, spreading negative rumors about its financial condition, and coercing Anderson into selling distribution facilities . . . ." (PAC ¶ 6);
>
> "The goal of defendants' conspiracy in 2009 was to accomplish just such illegal exclusive wholesalers through a collusive agreement among the defendants, which included unlawful market allocation." (PAC ¶ 45);
>
> "[T]he major publishers and national distributors engaged in an intense series of inter-competitor communications that resulted in an agreement to formulate a coordinated response to the Anderson and Source proposals designed to force those two wholesalers out of business." (PAC ¶ 55); and
>
> "To eliminate Anderson—and thus to eliminate competition in the market for the distribution of single-copy magazines—the conspirators cut off the life blood of Anderson's business . . . ." (PAC ¶ 76)

Once again, as matter of law, not a single one of these conclusory allegations does anything to advance Anderson's claims. See Iqbal, 129 S. Ct. at 1949-50; Twombly, 550 U.S. at 555; Starr v. Sony BMG Music Entm't, 592 F.3d 314, 319 & n.2 (2d Cir. 2010).

2. Other Allegations in the Proposed Amended Complaint Have Been Changed Meaninglessly.

In several instances in its proposed amended complaint, Anderson has merely tweaked or embellished its original allegations. These recycled allegations are either wholly incredible or do nothing to render Anderson's claims plausible. There are four such allegations in the proposed amended complaint that are relevant to Time or TWR: (1) that Anderson's

announced surcharge was negotiable (PAC ¶¶ 4, 51, 64); (2) that when informed by Mr. Anderson that Bob Castardi had said he was going to have to go with what TWR does, Rich "Jacobsen did not deny it, but instead crossed his arms, nodded in agreement and smiled" (PAC ¶ 70); (3) that TWR participated in a January 29, 2009, meeting at Hudson's offices (PAC ¶ 63); and (4) that Anderson had an agreement with TWR for a discount on Time and People weeklies (PAC ¶ 65).

(a) The Announcement of Anderson's Surcharge

Anderson's refusal to distribute magazines after January 31, 2009, for publishers who did not agree to its 7-cent per copy distribution fee and inventory shift demands doomed its complaint. Now, Anderson attempts to rewrite history by alleging that its demands were "negotiable", "not a non-negotiable mandate", and "not . . . irrevocable". (PAC ¶¶ 4, 51, 53, 64.)

First, the allegations are directly contradicted by the terms of the January 14, 2009, form cover letter and agreement Anderson presented to publishers (Lynaugh Decl. Ex. A), as well as Mr. Anderson's own words as set forth in the transcript of his January 14, 2009, interview with The New Single Copy in which "he publicly announced the surcharge" (PAC ¶ 52). The interview was not something that took Mr. Anderson by surprise, but something he himself requested as a way to inform smaller publishers about Anderson's February 1 ultimatum. (See PAC ¶ 52; Lynaugh Decl. Ex. B, at 1.) During that interview, when asked, "Seven cents a copy, is that a negotiable figure?", Mr. Anderson explicitly replied that it was not: "if we negotiate the rate then it would not be fair, so the answer is we really believe that the $.07 cent number is the number". (Lynaugh Decl. Ex. B, at 3.) As the interview continued, Mr. Anderson made absolutely clear that without a signed agreement accepting both the 7-cent fee and the scan-based trading 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.)

Anderson's statements could not be clearer: Anderson's demands were non-negotiable, and if a publisher did not agree to them, Anderson would not deliver the publisher's magazines. In the case of such a conflict between a pleading and a properly considered document, the contents of the document control. See Matusovsky v. Merrill Lynch, 186 F. Supp. 2d 397, 400 (S.D.N.Y. 2002) ("If a plaintiff's allegations are contradicted by [documents attached to the complaint as exhibits, incorporated by reference, or documents integral to or explicitly referenced in the pleadings], those allegations are insufficient to defeat a motion to dismiss."); Rapoport v. Asia Elecs. Holding Co., 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) ("If [documents relied on in the pleadings] contradict the allegations of the amended complaint, the documents control and this court need not accept as true the allegations of the amended complaint.").

Second, Anderson's supposed secret intent to negotiate its demands is utterly irrelevant to the plausibility of its complaint. Anderson told publishers and distributors precisely

the opposite. Regardless of Anderson's intentions, the only reasonable conclusion for a publisher or distributor to draw after hearing Mr. Anderson's statements was that the 7-cent fee and scan-based trading demands were a take-it or take-your-business-elsewhere ultimatum. Anderson's assertion in the proposed amended complaint that it considered its demands to be "negotiable" comes approximately one year and eight months too late. Indeed, Anderson's attempt to recast its ultimatum as "negotiable" does not sit well with other allegations in its complaint, such as its allegation that publishers had no choice but to accept its demands, or its implication that because Wal-Mart had previously assisted Anderson in disciplining Curtis, Wal-Mart (or another substantial retail outlet) would use its considerable weight to ensure acceptance of Anderson's ultimatum. (PAC ¶ 46, 72, 74; Compl. ¶ 51.)

Third, Anderson is incorrect that the allegations in the complaint regarding (1) discussions between Anderson and the defendants, (2) the agreement Anderson reached with Comag Marketing Group ("CMG"), and (3) the agreement Anderson thought it had negotiated with TWR, indicate that "Anderson was entirely flexible and willing to compromise". (Mot. at 4.)

As an initial matter, the discussions Anderson alleges it had with various defendants, Time included, on January 12 and 13 in no way suggest that Anderson's demands were negotiable: as set forth in Anderson's original complaint, these meetings were merely to "inform[] . . . publishers of Anderson's decision to impose the $0.07 per copy surcharge". (Compl. ¶ 41.) At those meetings, Anderson delivered its ultimatum along with form contracts to be signed by publishers and national distributors accepting Anderson's demands. (Lynaugh Decl. Ex. A.) The proposed amended complaint does not allege that, at the January 12 and 13 meetings, Anderson said its demands were negotiable. Instead, it conclusorily asserts that the

meetings "clearly constituted merely the initial stages of the negotiating process", even though the meetings were followed one day later by Mr. Anderson's clear proclamation to the industry that publishers yield or take their magazines elsewhere. (PAC ¶ 51; Lynaugh Decl. Ex. B, at 3-4.)

With respect to the agreement Anderson alleges it reached with CMG, with the exception of the conclusory allegation in Anderson's preliminary statement that "defendants knew . . . Comag Marketing Group LLC . . . reached agreements with Anderson and Source" (PAC ¶ 4), there is no indication anywhere in the proposed amended complaint that Time or TWR were aware of any such agreement, or that even if they were aware they would have had any reason to know that CMG had agreed to terms other than what Anderson had demanded. Accordingly, any understanding Anderson reached with CMG could not have signaled Time or TWR that Anderson was willing to negotiate.

As to the allegations regarding an agreement Mr. Anderson "thought he had reached" with TWR, the most these allegations set forth is that on Saturday, January 31, 2009—one day after the last business day before Anderson's self-imposed February 1 deadline—Anderson was willing to negotiate. (PAC ¶¶ 65, 68.) As Ann Moore, CEO of Time, stated, this was the kind of negotiation that should have happened "two weeks ago" (PAC ¶ 68). One cannot infer any conspiracy from the allegation that Time took Anderson's ultimatum seriously and was unwilling to reverse course when, allegedly, Time and Anderson had reached agreement on one of Anderson's two demands but not the other (see infra Part A(2)(d)).

(b) Rich Jacobsen's Alleged "Indicat[ion]"

In its March 10, 2009, complaint, Anderson asked the Court to infer TWR's culpability based on the allegation that "when Mr. Anderson told Jacobsen what Castardi had told him—that '[Castardi's] going whatever way you [Jacobsen] go, and I [Mr. Castardi] have to

go with you'—Jacobsen did not deny it, but indicated that he realized that Anderson knew that there had been collusion." (Compl. ¶ 52.) Now, Anderson proposes to amend its complaint to allege that "Jacobsen did not deny it, but instead crossed his arms, nodded in agreement and smiled". (PAC ¶ 70.) All this amendment does, however, is confirm that Mr. Jacobsen did not actually make any culpable statement in response to Mr. Anderson's comment. By changing "indication" to crossed arms, a nod, and a smile, Anderson would have this Court do exactly what it refused to do: "infer a conspiracy" based on "silence" (Op. at 16).

(c) The Alleged Meeting at Hudson's Offices

Similarly, Anderson's alterations to its March 10, 2009, allegation of a meeting among defendants Curtis, Hudson, TWR, and News Group (Compl. ¶ 55; PAC ¶ 63) show that Anderson has no idea who was involved in this alleged meeting or what was discussed. Anderson's original complaint alleged that Hudson attended the meeting; the proposed complaint instead alleges that Hudson was "at the heart" of the meeting, though there is no specific allegation that anyone from Hudson attended. (Compare Compl. ¶ 55, with PAC ¶ 63.) Conversely, defendant DSI —a competitor to no one (PAC ¶ 20 (describing DSI as a "marketing agent"); June 15, 2010, Tr. 32:10-20, 70:4-18)—has suddenly been added to the guest list (Compare Compl. ¶ 55, with PAC ¶ 63). Additionally, Anderson has made no progress on stating with any specificity what was discussed during the alleged meeting, relying instead on the entirely conclusory assertion that defendants "discussed and planned their collusive activity, including their market allocation agreement". (PAC ¶ 63.)

Furthermore, under Twombly and Starr, this allegation of a meeting does nothing to advance Anderson's claims. Taken together, Twombly and Starr stand for the proposition that when evaluating allegations of meetings or communications among purportedly conspiring defendants, what matters is not whether a plaintiff has alleged that meetings occurred, but

whether a plaintiff has alleged factual matter sufficient to show that what occurred at any meetings was unlawful. In Twombly, there was no doubt that the defendant Baby Bells had met and communicated (Lynaugh Decl. Ex. D ¶ 46), but the Court still found plaintiffs' allegations to be insufficient. Underlying the Court's decision was plaintiffs' failure to set forth factual matter plausibly suggesting that the defendant Baby Bells had engaged in unlawful activity, either inside or outside of the alleged meetings. Conversely, although the plaintiffs in Starr pointed to numerous meetings among defendants through both joint ventures and trade associations (Supp. Lynaugh Decl. Ex. A ¶¶ 67, 78, 87, 98, 131), in reaching its decision to uphold the complaint the Court of Appeals paid no heed to those allegations. Instead, the Court of Appeals relied on "non-conclusory factual allegations" containing "specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants". See Starr, 592 F.3d at 323-24. In this case, however, the only specific facts alleged show a series of disparate responses to a common stimulus initiated by Anderson.

(d) The Alleged Agreement with TWR for a Discount on Time and People Weeklies

Anderson's reformulation of the allegations in its March 10, 2009, complaint that TWR led it to believe on January 31, 2009, that Anderson and TWR had a deal for an increase of 2% in the discount off the cover price for all Time weeklies and 2.75% for all People weeklies does nothing to render its claims plausible. (PAC ¶ 65.) Anderson does not allege that it had reached an agreement, but instead that on January 31, 2009, it belatedly accepted the offer Time had made before Anderson issued its ultimatum (id.; see Lynaugh Decl. Ex. B, at 2), although it still had not budged on its scan-based inventory shift demand. The complaint and proposed amended complaint both aver that Anderson had reached no agreement with regard to the

inventory shift demand,[3] but merely an agreement "to discuss".[4] (PAC ¶ 65; Compl. ¶ 53.) Additionally, Anderson's expansion of its allegations to assert that TWR (and other unnamed defendants) similarly "induce[d] Source to make payments on their accounts by engaging in negotiations without ever intending to continue supplying magazines" (PAC ¶ 69), is in no way suggestive of a conspiracy, and the identical argument with regard to Anderson has already been raised, briefed, and rejected (Time/TWR Mot. to Dismiss at 16-17; Pls.' Opp'n to Defs.' Mots. to Dismiss at 15, 22). As explained in Time and TWR's Motion to Dismiss, that behavior is nothing more than TWR's "natural, unilateral reaction" to debtors who owed it an enormous amount of money: appear nice and try to get paid. (Time/TWR Mot. to Dismiss at 17.)

3. The Handful of Genuinely New Allegations Against TWR and Time Does Nothing to Render Anderson's Claims Plausible.

Only one wholly new allegation implicating Time and three new allegations implicating TWR have been added to the complaint: (1) an allegation of a communication on January 22, 2009, between Kable and TWR regarding "IPDA type items" (PAC ¶ 57); (2) an

[3] In fact, the proposed amended complaint makes clear that Anderson is not even certain of the terms discussed. Although the original complaint contemplates a discount of "2.00% for all Time weeklies, or 2.75% for all *People* weeklies" (Compl ¶ 53 (emphasis added)), the proposed amended complaint contemplates a discount of "2.00% . . . for all *Time* weeklies, and 2.75% for all *People* weeklies" (PAC ¶ 65 (emphasis added)).

[4] Taking the allegations in the proposed amended complaint in their best light, Anderson's supposed "agreement" (itself a conclusion) regarding the price of Time and People weeklies is unenforceable. As Anderson well knows, during complex business negotiations involving millions of dollars, there is no enforceable agreement until the terms of the deal are reduced to writing. See N.Y. U.C.C. LAW § 2-201 (Consol. 2010) ("a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought"); N.J. STAT. ANN. § 12A:2-201 (2010) (same). In fact, Anderson's own uncertainty about whether Mr. Anderson and Mr. Jacobsen had actually reached an agreement is explicitly expressed later in the proposed amended complaint when Anderson references the agreement Mr. Anderson "thought he had reached". (PAC ¶ 68 (emphasis added).)

allegation of certain statements made by Ann Moore on February 2, 2009 (PAC ¶ 68); (3) an allegation that on January 31, 2009, Bob Castardi of Curtis "knew, with '100% certainty,' that TWR, Bauer and AMI would refuse to supply product to Source" (PAC ¶ 71); and (4) an allegation that, on January 25, 2009, Kable and TWR scheduled a breakfast meeting for January 29, 2009 (PAC ¶ 62).

(a) Most of Anderson's New Factual Allegations Are Exculpatory.

The first three of Anderson's four new allegations undercut the plausibility of Anderson's conspiracy theory. The only reasonable way to read Kable's communication to TWR that it would like to "catch up on a few" "IPDA type items" (PAC ¶ 57) is that Kable wanted to catch up with TWR on a few IPDA type items. Anderson's attempt to cast a cloud of suspicion over that meeting by stating that the IPDA is "precisely the type of trade organization that has been used perennially by competitors to attempt to mask their illegal, anticompetitive communications" (id.) is a wholly conclusory legal argument entitled to no assumption of truth. Furthermore, unless every trade association is in fact a vehicle for anticompetitive action, the proposed complaint lacks any allegation from which the Court could infer that the IPDA ever facilitated such actions, much less that this particular meeting was to facilitate a boycott.

The alleged statements made by Ann Moore to Charlie Anderson on February 2, 2009, that she "wished we had had this conversation two weeks ago" and that Jimmy Pattison, the owner of News Group "was a nice person and maybe would buy some of Anderson's assets" are similarly exculpatory.[5] (PAC ¶ 68.) The only reasonable interpretation of these statements is

[5] Anderson's additional allegations that Ms. Moore stated during the same conversation that "we have decided to consolidate the channel" and that "we are moving forward and eliminating Anderson and Source" (PAC ¶ 68) are no different from the allegations already rejected by the Court that Rich Jacobsen informed Anderson that "TWR and Time executives had decided 'to

that Ms. Moore wished Anderson had not taken a hard line until it was too late because Anderson's ultimatum had forced Time to make other arrangements. As before, Anderson's theory rests on the premise that, faced with a take-it-or-leave-it ultimatum, any publisher deciding to leave it and secure alternative distribution must have been part of a conspiracy. Any alleged statements that Ms. Moore may have made about Anderson selling assets to News Group suggest nothing about an agreement among any of the defendants, but merely constitute a few words of business advice.

Anderson also newly alleges that on January 31, 2009, a Source executive was advised by Bob Castardi of Curtis that Castardi "knew, with '100% certainty,' that TWR, Bauer and AMI would refuse to supply product to Source". (PAC ¶ 71.) On its face, what this statement shows is that while Castardi may have known what three publishers and distributors had decided to do, he did not know what course of action the other defendants—Curtis, Kable, Hachette, Rodale, DSI, and Time—had decided upon, disproving Anderson's theory of an industry-wide conspiracy. Indeed, that Castardi may have known on January 31, 2009, what three publishers/distributors had decided to do with respect to Anderson's and Source's[6] demands suggests only that those defendants had already determined how they would proceed.

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change the channel,' that 'they were going to have to use two wholesalers,' and that 'that was the way it was going to be.'" (Compl. ¶ 54; see Op. at 16.)

[6] In its proposed amended complaint, Anderson sets forth the new theory that the defendants must have colluded because they did not reverse course and decide to supply Source with magazines after Source rescinded its 7-cent surcharge. (PAC ¶¶ 71, 80.) Even if Source did rescind its 7-cent surcharge in time for publishers and distributors to renege on the alternate arrangements they each had been making for their magazines, Source's decision to impose a 7-cent fee in mid-January 2009 signaled to publishers and distributors that Source needed or desired to raise prices. Thus, as a matter of common business sense, why would publishers and distributors continue to work with Source over other wholesalers who had given no indication that they had any plans to impose a price increase or were otherwise in financial straits?

Collusion or no collusion, at some point before the February 1, 2009, deadline, publishers and distributors were going to have to decide whether to send their magazines to Anderson and Source and, at some point approaching that deadline, those decisions were going to become commonly-known information. In fact, Anderson's proposed amended complaint makes clear that the decisions being made in the industry by publishers and distributors were no secret: on January 30, 2009, Wal-Mart—not an alleged member of the conspiracy—knew that TWR had no intention of continuing to use Anderson's services, demonstrated by the fact that Wal-Mart sent Mr. Anderson to New Jersey in a belated effort to try to work something out. (PAC ¶ 65.) Thus, by the complaint's own terms, both alleged conspirators and non-conspirators alike were aware of the decisions being made by the various publishers and distributors. Therefore, Anderson's allegation regarding Bob Castardi's "knowledge" does nothing to improve on the implausibility of its conspiracy theory.

(b) The Remaining New Allegation Does Nothing To Help Anderson Plausibly State a Claim to Relief.

Anderson newly alleges that, on January 25, 2009, the presidents of "TWR and Kable scheduled a breakfast meeting for Thursday, January 29, 2009 to discuss the conspiracy". (PAC ¶ 62.) At best, that allegation asserts only that TWR and Kable "scheduled" a breakfast meeting. The allegation that the purpose was "to discuss the conspiracy" is wholly conclusory. (Id.) Indeed, Anderson has quite carefully failed to allege that the meeting ever occurred. Additionally, and perhaps most importantly, as discussed supra Part A(2)(c), a bald allegation of a meeting among competitors such as this does nothing to advance an antitrust plaintiff's cause.

B. Anderson's Proposed Amended Complaint Is Still Grounded in a Conspiracy Theory that Is Implausible on its Face.

In its August 2, 2010, decision, the Court highlighted several reasons why the conspiracy Anderson alleges is fundamentally implausible. (Op. at 8-9.) All of those failings persist in Anderson's proposed amended complaint.

1. It Is Still the Case that Anderson Announced the Imposition of a 7-Cent Surcharge in January of 2009.

Anderson's proposed amended complaint does not alter the crucial event underlying Anderson's claims: Anderson's announcement in mid-January 2009 that, as of February 1, 2009, it would cease distributing magazines for publishers who had not agreed in writing to pay a 7-cent-per-copy surcharge and assume the cost of scan-based inventory held by Anderson and its retail customers. (Compl ¶¶ 39, 41-42; PAC ¶¶ 49, 51-52.) Therefore, just as Anderson's original claims must be viewed "through the lens of the Surcharge" (Op. at 20), its proposed amended complaint must also be viewed through that lens. Just as the existence of the surcharge "belie[d] the viability of Anderson's antitrust claim", the existence of that same surcharge continues to belie the viability of the antitrust claim in Anderson's revised pleading. (Id.)[7]

2. It Is Still the Case that the Defendants Responded in Varied Ways to Anderson's Imposition of a 7-Cent Surcharge.

As before, Anderson asks the Court to infer a conspiracy based on the defendants' alleged parallel reactions to Anderson's announcement of its surcharge and scan-based trading demands. Defendants' alleged reactions to Anderson's announced surcharge in the revised pleading, however, are still just as varied as they were in the original complaint: Time, AMI,

[7] As the Court found in its August 2, 2010, opinion, Anderson's remaining state law claims fall with its antitrust claim. (See Op. at 19, 20.)

Bauer, and (now, newly) Hearst—not an alleged conspirator—had cordial meetings with Anderson and responded amicably (PAC ¶ 51); CMG—another company allegedly not part of the conspiracy—did not accept the 7-cent fee,[8] but worked with Anderson to reach a mutually-acceptable resolution of the issue (PAC ¶ 53); TWR allegedly offered a 2% increase in the discount off the cover price for all Time weeklies and 2.75% for all People weeklies (PAC ¶ 65); Kable allegedly offered Anderson exclusivity in certain areas of the country in exchange for Anderson retracting the 7-cent surcharge (PAC ¶ 58); Curtis allegedly encouraged Anderson to obtain profits by raising prices to retailers after Source left the business (PAC ¶ 58); and, new to the proposed amended complaint, when contacted by Mr. Anderson on February 2, one day after Anderson's February 1 deadline, Time expressed regret that Anderson had not reached out to talk sooner (PAC ¶ 49, 68). Accordingly, Anderson's claims of concerted action in the amended complaint are just as implausible as they were in the original complaint: the only common conduct alleged is the rejection of Anderson's price increase—a decision reached by alleged conspirators and non-conspirators alike. Anderson's argument was fully considered and rejected by the Court, and there is no basis to reconsider it.

3. It Is Still Not Plausible that Publishers and National Distributors Would Conspire To Reduce the Sales of Their Magazines.

Anderson's proposed amended complaint continues to allege that the ultimate result of the alleged conspiracy was to reduce magazine sales (see PAC ¶ 93)— an assertion the

[8] In the proposed amended complaint Anderson has attempted to obscure the fact that, just like all of the alleged conspirators, non-conspirator CMG rejected Anderson's 7-cent surcharge. Although the March 10, 2009, complaint states that "CMG did not agree to the proposed surcharge and proposed to Anderson a modified arrangement" (Compl. ¶ 43), the proposed amended complaint attempts to bury that allegation, saying: "Anderson had commenced to work with [CMG] . . . toward a mutually-acceptable resolution of the issue". (PAC ¶ 53.) The translation is clear: CMG rejected the 7-cent fee.

Court cited as rendering Anderson's posited conspiracy wholly "implausible" (Op. at 8). In fact, added to Anderson's amended pleading are allegations highlighting how costly a reduction in sales would be to magazine publishers and distributors: "publishers are especially sensitive to interruptions in the distribution of their magazines" because even just a "disruption" can cause a publisher not only to lose sales but also to face "a significant drop in advertising revenue". (PAC ¶ 73.) It is implausible that publishers and distributors would conspire not only to deny retailers access to their products (as alleged in Anderson's original complaint) but also to "significant[ly]" decrease their advertising revenue (as is now alleged in the proposed amended complaint).

4. It Is Still Not Plausible that Publishers and National Distributors Would Conspire to Eliminate Two of the Four Largest Magazine Wholesalers.

In the proposed amended complaint, Anderson has attempted to obscure the basic economic truth that the alleged goal of the conspiracy—the elimination of two of the four largest magazine wholesalers—is facially implausible (Op. at 8; see supra Part I) through the introduction of the idea that publishers and distributors sought to restore a system of "regional exclusivity" in magazine wholesaling (e.g., PAC ¶ 44).[9] Taken in its best light, Anderson's

[9] In making this argument, Anderson cites to "the commencement of an antitrust investigation by the United States Department of Justice" in 1995. (PAC ¶ 37.) Some of the decisions upon which Anderson heavily relied in opposing Time and TWR's Motion to Dismiss refer to criminal investigations, pleas, or convictions of defendants and alleged co-conspirators. (See, e.g., Starr, 592 F.3d at 319, 324.) Anderson has presumably added this allegation of a DOJ investigation into the proposed amended complaint in order to make those cases relevant. However, the alleged investigation took place fourteen years before the inception of the conspiracy Anderson posits. Moreover, the targets of that investigation were not publishers or national distributors, but wholesalers. See http://www.justice.gov/atr/cases/f206100/206186.htm (2003 plea agreement of New York Periodical Distributors, who conspired with another wholesaler); http://www.justice.gov/atr/cases/f4300/4347.htm (motion for protective order filed by the United States in 2000, in which the Government states that it wishes to preserve the secrecy of its "ongoing grand jury investigation into whether magazine wholesalers have engaged in illegal collusive conspiracies"); http://www.justice.gov/atr/cases/f218400/218410.htm (plea agreement of two wholesalers, Rack Shop and Island Periodicals, for conspiracy to allocate territories for magazine distribution in Texas, Puerto Rico, and the U.S. Virgin Islands);

revamped theory appears to be that because publishers and national distributors were happy when there were several hundred wholesalers who each operated in small regions, publishers and national distributors would be happy having only two wholesalers, each with a geographic monopoly. (PAC ¶¶ 35, 44.) There are three problems with this theory. First, satisfaction with several hundred wholesalers with exclusive territories implies nothing about satisfaction with only two wholesalers with exclusive territories. Second, the proposed amended complaint alleges that the four wholesalers remaining after the "substantial consolidation" of the industry (PAC ¶ 37) also had geographic monopolies[10] and implies that publishers and national distributors therefore had to capitulate to whatever Anderson (or Source, or the News Group, or Hudson) demanded (PAC ¶ 72)—hardly a happy situation, which would be even worse were only two left standing.[11] Third, this Court has already rejected Anderson's theory: "Publishers and national distributors have an economic self-interest in more wholesalers, not fewer; more wholesalers yields greater competition, which is good for suppliers." (Op. at 8.) That conclusion is unaffected whether or not the wholesalers have regional monopolies. Imagine how

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http://www.justice.gov/atr/cases/f204700/204714.pdf (2003 plea agreement of Empire State News Corporation, for conspiring with another wholesaler to allocate territories for magazine distribution in Western New York);
http://www.justice.gov/atr/public/press_releases/1998/1776.pdf (1998 DOJ press release announcing guilty plea of C&S News, a Texas magazine wholesaler).

[10] Specifically, the proposed amended complaint alleges that in certain areas of the country Anderson was "the only viable wholesaler" and that "in many instances [Anderson and Source] were or are the only wholesale distributors operating in numerous geographic regions". (PAC ¶¶ 72, 93.)

[11] This raises the interrelated point that the proposed amended complaint still rests on Anderson's peculiar view of the world, highlighted in the Court's August 2, 2010, Opinion, that the defendants' only options in the face of Anderson's 7-cent surcharge and scan-based trading demand were to accede or collude. (Op. at 11-12; PAC ¶ 72.) Although that proposition is itself incredible, what defies belief is that magazine publishers and distributors would desire to extend this "accede or collude" conundrum across the country by going from four wholesalers to two.

much better for publishers it would have been had Anderson issued its ultimatum as one of several hundred wholesalers rather than one of four; and how much worse it would have been had Anderson been the only wholesaler in the country.[12]

[12] To buttress this theory, Anderson vaguely posits that at some "earlier" time "consultants" retained by Time "concluded that one option for enhancing the 'stability' of the single-copy magazine distribution market" was "to establish exclusive 'regional franchises' for wholesaling", but noted there would be "legal challenges". (PAC ¶ 45.) Even if at some point in time some unknown consultant offered that suggestion, it is beyond farfetched to infer that the distaste for legal challenges to exclusive regional franchises (which are presumptively lawful, see Time/TWR Mot. to Dismiss at 14 n.11) means that Time would instead conclude there was less legal risk in participating in a group boycott.

Conclusion

For the reasons set forth above, Time and TWR respectfully request that the Court deny Anderson's Motion for Reconsideration in its entirety.

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Respectfully submitted,

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