UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDERSON NEWS, L.L.C., and ANDERSON SERVICES, L.L.C.,	:	
Plaintiffs,	:	09 CIV. 2227 (PAC)
- 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.	:	

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR RECONSIDERATION

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Plaintiff Anderson submits this reply memorandum in further support of its motion for reconsideration and in response to the memorandum filed by Time ("Time Mem."), the memorandum filed by Hudson ("Hudson Mem.") and the joint memorandum submitted by the seven defendants ("Joint Mem.") in opposition to the motion.[1]

Preliminary Statement

Defendants do not and cannot refute Anderson's showing that the Opinion should be reconsidered and, at a minimum, Anderson should be granted leave to amend. Instead, defendants rely, as did the Opinion, on factual inferences and assumptions -- such as the contentions that more, rather than fewer, wholesalers are *always* in the publishers' interests (Op. 8; Joint Mem. 8; Time Mem. 2), that defendants' supposedly differing responses to the proposed surcharge necessarily mean they did not collude (Joint Mem. 7; Time Mem. 16-17) and that Anderson was the "sole source of its demise" (Time Mem. 1). However, defendants and the Opinion overlook controlling law that those inferences and assumptions -- drawn, as they are, uniformly in favor of defendants and against Anderson -- are impermissible on a motion to dismiss. This is no less the case when assessing plausibility on a motion to dismiss (Anderson Mem. 3, citing *Spagnola v. Chubb Corp.*, 574 F.3d 64, 67 (2d Cir. 2009) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))). Likewise groundless is the procedural argument (by the very defendants that filed their joint memorandum late) that Anderson failed to timely request leave to amend (Joint Mem. 3-5). Among other things, Anderson did timely request leave, and that argument is based on cases involving, unlike here, requests for leave to amend made after, not before, the decision dismissing the complaint.

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[1] Except as otherwise defined herein, capitalized terms used herein have the meanings assigned to them in Anderson's initial memorandum in support of the motion ("Anderson Mem.") and the PAC.

ARGUMENT

I. Defendants Do Not Refute Anderson's Showing That Reconsideration Is Mandated

In its initial memorandum, Anderson identified critical facts, inferences and law that were overlooked in the Court's Opinion and that mandate reconsideration. First, defendants' argument and the Court's conclusion that defendants' antitrust conspiracy to eliminate Anderson and Source as wholesalers was not plausible was premised upon the wholly unsupported assumption that the publishers' economic interest *always* will be promoted by more, rather than fewer, wholesalers, irrespective of the structure and dynamics of the distribution system. (Joint Mem 8; Time Mem. 2.) However, as shown (Anderson Mem. 1-3), Anderson's factual allegations concerning the single-copy magazine market at issue are contrary to that assumption. Anderson has alleged that: (a) defendants had a powerful incentive to control the distribution system -- namely, to continue to shift the increasing cost burden to retailers and away from the defendant publishers and national distributors; (b) to achieve that goal, the defendants sought to drive Anderson and Source out of the market and allocate their business to the two defendant wholesalers that -- unlike Source and Anderson -- shared that goal; and (c) the defendant publishers, through their control of 80% of single-copy magazines, effectively controlled the two would-be remaining wholesalers. (Compl. ¶¶ 4, 55, 56, 58-59, 62, 64, 76.)[2]

Defendants' contention (and the Court's conclusion) that these allegations do not describe a plausible antitrust conspiracy is plainly incorrect. Indeed, where, as here, it is alleged that the publishers *control* the remaining wholesalers, it is certainly plausible -- if not likely -- that the publishers would want *fewer* wholesalers. *Full Draw Productions v. Eaton Sports, Inc.*, 182 F.3d 745 (10th Cir. 1999), is squarely on point and confirms the plausibility of Anderson's

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[2] *See infra* at 9-10 for a discussion of the allegations of the PAC that lend even further support to the plausibility of the publishers' desire for fewer wholesalers.

claim. There, in reversing the dismissal of an antitrust claim by an archery trade show promoter alleging that archery manufacturers and distributors boycotted its show, the Tenth Circuit stated:

> Defendants [contend] that "plaintiff's theory makes no economic sense because the parties harmed by the alleged violation would be the Defendants' [sic] themselves" as buyers of exhibition space, and "Defendants would . . . not subject themselves to market power or an unreasonable restraint on competition." In essence, this argument asks why the defendants would conspire to destroy one of their two sources of suppliers of exhibition space [], leaving them with only one supplier []. Of course, that question is answered by the second amended complaint, which alleges that defendants controlled or influenced [the remaining supplier] and, if [it] were the only supplier of archery trade show distribution space, defendants could ensure that the shows would be favorable to their interests.

Id. at 751.

Accordingly, the dismissal of Anderson's claims was not, as Time claims (at 2), the inevitable product of "common sense." The Supreme Court, in the very sentence in *Iqbal* in which it "endorsed" the use of "common sense" (Time Mem. 2), added that determining whether a complaint states a plausible claim is a "context-specific task." *Iqbal*, 129 S. Ct. at 1950. Here, in this specific context, as in *Full Draw Products*, it is at least as plausible to infer that the defendants thought that fewer wholesalers -- *i.e.*, compliant ones they could control -- were more in their self-interest.

Defendants also argue, as the Court concluded, that their initial differing responses to Anderson's proposed surcharge, during the two weeks before they all cut Anderson off, demonstrate -- conclusively and as a matter of law -- that they did not collude. (Joint Mem. 7; Time Mem. 16-17; Op. 9.) However, there is no basis for this conclusion on this record. Instead, one of at least three things -- *i.e.*, possible inferences -- are true: (i) defendants decided to collude before that two-week period, but pretended to negotiate with (or otherwise respond to) Anderson during that period until they could implement their conspiracy by cutting Anderson off at the end of the period; or (ii) defendants agreed to collude during the two-week period; or (iii)

defendants and the Court are correct that they did not collude at all. If anything, Anderson's detailed allegations of the defendants' highly unusual meetings, statements and other conduct -- in addition to their ultimate common response itself -- makes the third possibility the least likely. But, in any event, it is only a possibility and therefore cannot serve as a basis for dismissal.

Moreover, defendants' argument that Anderson was the "sole source of its demise" (Time Mem. 1) rests, as does the Opinion, on the contention that the Anderson surcharge was a "non-negotiable, take-it-or-leave-it demand" and an "ultimatum." (Op. 4, 11; Joint Mem. 6; Time Mem. 2.) That contention, however, is belied by, among other things, factual allegations expressly referenced by the Court in a separate section of its Opinion (at 9) and the inferences to which Anderson is entitled. Those facts demonstrate that neither the defendants nor Anderson treated the surcharge as an ultimatum, as Anderson's conduct after the interview with Mr. Anderson in *The New Single Copy* -- and defendants' conduct -- demonstrate. That conduct includes: the agreement Anderson negotiated with Comag -- which defendants knew (and complained) about at the time; the agreement that Anderson believed it had negotiated with TWR and Time; and Anderson's discussions with AMI, Bauer, Curtis and Kable. The defendants contend that "Mr. Anderson emphasized without qualification, that the surcharge was a take-it-or-leave-it demand." (Joint Mem. 6 n.3.) As sole support for that contention, defendants cite Mr. Anderson's statement that "[W]e really believe that the $.07 cent number is the number." *Id.* On its face, that statement -- about what Anderson "believed[d]" was the "right number" -- is very far, to say the least, from an unqualified demand as a matter of law, and, at a minimum, Anderson is entitled to make that argument to a jury. However, even more important than what Mr. Anderson said when he announced the surcharge is what he and his company *did* in the two weeks that followed -- namely, they successfully negotiated with Comag and

attempted to negotiate with the defendants. (PAC ¶¶ 4, 51, 53, 65.) The only plausible inference -- to which Anderson should have been entitled -- is that Mr. Anderson's statements in the interview were at most an initial negotiating position, and defendants knew it.[3]

II. Anderson Should Have Been Granted Leave to File an Amended Complaint

The defendants (other than Time and TWR) claim that Anderson should be denied leave to file an amended complaint because it supposedly requested leave belatedly. That is not so. Anderson first requested leave to amend in its memorandum in opposition to defendants' motions to dismiss (at 22 n.14, 33 n.23). Anderson also requested leave to amend -- to include specified allegations from the Source SAC -- during oral argument.[4] (Tr. 55:7-9, 60:8-10.) Both requests were timely and properly made, and should have been granted.[5]

Moreover, even if the Complaint were deemed insufficient, the PAC clearly cures any purported deficiencies. Among other things, the PAC provides further details: (i) demonstrating

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[3] Hudson claims that the PAC re-asserts allegations that Anderson had withdrawn, by alleging, among other things, that "News Group 'agree[d] with Hudson to allocate among themselves, and to provide distribution services to, the Anderson retailers.'" (Hudson Mem. at 8-9 n.7 (quoting PAC ¶ 96).) While Anderson no longer alleges that Hudson took over any business as a result of the defendants' conspiracy, this is only because the conspiracy was only partially successful. Had Source not obtained a TRO that ultimately led all of the defendants to settle and resume shipping magazines to Source, Hudson would have taken over a significant portion of Source's business -- and then raised prices to Source's customers, as happened to Anderson customers. (PAC ¶ 96.) That Source was successful in frustrating that part of the defendants' illegal boycott that sought to drive Source out of business, does not excuse Hudson's illegal conduct with respect to Anderson.

[4] Hudson addresses defendants' failure to object to Anderson's request at oral argument, supported by recent caselaw, that the Court take judicial notice of the Source SAC, by claiming that the Court "rejected Anderson's [request] before any defendant had an opportunity to comment." (Hudson Mem. 5 n.3.) That is not so. The Court did not make a decision on the request until it issued the Opinion.

[5] The cases on which defendants rely (Joint Mem. 3-5) are inapposite. In those cases, unlike here, the plaintiff waited until after the court's decision to identify the basis for the proposed amendment or failed to provide such a basis at all. *See Weiss v. Assicurazioni Generali, S.p.A,* 592 F.3d 113 (2d Cir. 2010) (plaintiffs failed to move to amend until after judgment); *Nat'l Petrochem. Co. v. The M/T Stolt Sheaf,* 930 F.2d 240 (2d Cir. 1991) (motion to amend submitted after summary judgment granted); *State Trading Corp. v. Assuranceforeningen Skuld,* 921 F.2d 409, 418 (2d Cir. 1990) (plaintiff "waited until judgment was entered"); *see also Rosner v. Star Gas Partners, L.P.*, 344 Fed. Appx. 642 (2d Cir. 2009) (Joint Mem. at 4) (plaintiffs did not "indicate how they would correct any deficiencies in the Complaint"); *In re Crude Oil Commodity Litig.*, No. 06 Civ. 6677 (NRB), 2007 U.S. Dist. LEXIS 66208, at *11 (S.D.N.Y. Sept. 7, 2007) (Joint Mem. at 4-5) (plaintiff failed to give court "any indication as to what information or allegations they would add to their complaint were leave to amend granted."). Here, Anderson informed the Court prior to the issuance of the Opinion exactly which allegations it wished to add to its proposed amended complaint and listed them in a visual aid provided to the Court and defense counsel. (Tr. 55:7-9, 60:8-10.)

that the proposed surcharge was negotiable; (ii) bolstering the Complaint's already robust factual allegations of conspiratorial meetings and activity; and (iii) setting forth the history of the single-copy magazine distribution system, underscoring defendants' incentive to engage in the conspiracy and reduce the number of wholesalers (*see infra* at 9-10).

Defendants conclusorily argue that the additional allegations are conclusory. (Joint Mem. 10 n.7, 12-14; Time Mem. 4-5.) In fact, the PAC adds specific and detailed allegations, including, among others, that: the presidents of Curtis and Kable had a meeting on January 18, 2009 (PAC ¶ 56); the president of Kable e-mailed the president of TWR requesting a call on January 22, 2009, and the two scheduled a breakfast for January 29, 2009 (PAC ¶¶ 57, 62); the president of Kable contacted and attempted to solicit the president of national distributor Comag to join defendants' conspiracy (PAC ¶ 59); a senior executive at Rodale e-mailed the president of DSI on January 29, 2009 to warn the other members of the conspiracy that Comag was going to "continue to SHIP!" to both Anderson and Source, and that the president of Comag was "dangerous" (PAC ¶ 60); the president of Curtis told a Source executive that, on January 31, 2009, he knew with "100% certainty" that TWR, Bauer and AMI would refuse to supply product to Source (PAC ¶ 71); and the president of Bauer told a senior executive of Bauer's competitor, Rodale, that Comag's decision to continue shipping "[d]oesn't matter," as "[S]ource won't be around much longer" (PAC ¶ 61). In addition, the PAC includes factual allegations concerning the meeting of conspirators hosted by Hudson, including details as to: (a) the date of the meeting, (b) the time of the meeting (after-hours), (c) the identity of all but one of the participants, all of whom are senior executives of defendants TWR, Curtis, DSI, Hudson and non-party News Group, and (d) the purpose of the meeting -- namely, the allocation of Anderson's and Source's territories among Hudson and News Group. (PAC ¶ 63.)

To the extent defendants argue that Anderson does not have even more details, that is because the defendants operated behind closed doors. *See In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1095 (N.D. Cal. 2007) ("direct allegations of conspiracy are not always possible given the secret nature of conspiracies. *Nor are direct allegations necessary.*") (emphasis added) (citing *Oltz v. St. Peter's Comty. Hosp.*, 861 F.2d 1440, 1450-51 (9th Cir. 1998) (noting that direct evidence of concerted action in violation of antitrust laws is rare)). Indeed, as one court stated, "[s]hort of being in the boardroom at the meeting, it is hard for the Court to imagine how plaintiffs could more fulsomely allege that defendants entered into an agreement at the [] meeting[]." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 33-34 (D.D.C. 2008). *See also In re Urethane Antitrust Litig.*, 683 F. Supp. 2d 1214, 1233 (D. Kan. 2010) ("[P]laintiffs have now alleged various meetings and communications . . . involving specific participants . . . , and occurring in specific locations. Contrary to defendants' argument, plaintiffs are not required to allege every detail for every meeting or communication occurring during the relevant time period. . . . The applicable standard is not whether any unanswered questions remain about the alleged meetings and communications during the time period, as defendants seem to suggest.").

Defendants' other response to the allegations of the PAC is to argue that the Court should continue, contrary to the law (*supra* at 1), to accept their interpretations of Anderson's allegations over Anderson's. (Time Mem. 9-10, 12-15; Joint Mem. 6-15.) For example, the PAC alleges that Richard Alleger, a senior executive at defendant Rodale, in an e-mail circulated to competitors, described Mike Sullivan, the president of Comag, as "dangerous" for agreeing to continue to ship magazines to Anderson and Source. (PAC ¶ 60.) Defendants dismiss this as "irrelevant" "editorial comment about Comag's CEO." (Joint Mem. 14.) However, at a

minimum, Anderson is entitled to the inference that what the e-mail meant, and indeed said, was that by continuing to ship magazines to Anderson and Source, Comag was a danger to defendants' conspiracy. Indeed, there is no other credible explanation, and defendants offer none.

Likewise meritless is Time's statement that "[t]he 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." (Time Mem. 13.) Time's "argument" that the "*only*" reasonable interpretation of the e-mail from defendant Kable -- which requests a call with its competitor TWR only days after Anderson announced its proposed surcharge and only days before the defendants all cut off Anderson's supply of magazines -- is simply an *ipse dixit* statement of what Time would like the Court to infer. In fact, that Kable chose not to describe the subject of the call with more specificity than "IPDA type items" suggests, particularly in this context, that the real subject of the call was a joint response to Anderson's surcharge. This reasonable inference can and must be drawn in Anderson's favor on the motions to dismiss.

Defendants also attempt to discount Anderson's allegation (PAC ¶ 71) that, as of January 31, 2009, Mr. Castardi stated that he knew with "100% certainty" that Bauer and Time would not be shipping magazines to Source, by claiming that all it shows is that "he had read the newspapers." (Joint Mem. 10.) According to defendants, therefore, Mr. Castardi "knows" -- "with 100% certainty" -- everything he reads in the newspapers. At a minimum, Anderson is entitled to a different inference, particularly given that the allegation is that Mr. Castardi told a Source executive that he "knows with 100% certainty" that three publishers were cutting Source off -- even though Source already had rescinded its proposed surcharge (PAC ¶ 71).

Moreover, defendants do not refute the PAC's additional allegations that explain fully what the defendants stood to gain by reducing the number of wholesalers in the market. Among other things, the PAC sets forth the historical distribution system that existed prior to 1995, in which magazine wholesalers had exclusive regional monopolies. Because their monopolies were granted and controlled by the publishers and national distributors, the wholesalers used their regional market power to charge monopoly prices to the retailers, rather than to demand lower prices from the publishers and national distributors. (PAC ¶¶ 35-36.) Indeed, in an article in the *Antitrust Bulletin*, two economists noted that under this distribution system, the "wholesalers [we]re granted their monopoly power by national distributors," who in turn extracted "concessions" from the wholesalers, "frequently [in] the form of agreement by the wholesaler to accept both fast selling and slow selling titles." Russell Buchan and John J. Siegfried, "An Economic Evaluation of the Magazine Distribution Industry," 23 *Antitrust Bulletin*, 19, 24 (Spring 1978) (attached hereto as Ex. A). When this system collapsed in 1995 in the face of antitrust investigations by the Department of Justice, the publishers and national distributors lost the ability to control wholesalers through their ability to grant exclusive regional markets. (PAC ¶¶ 37-39.)

It is against this background -- and in this unique industry -- that the defendants' conspiracy took shape. Anderson and Source had sought to restore profitability by seeking higher prices from the publishers, and had sided with the retailers' attempts to resist the defendants' inefficient practices. (PAC ¶ 44.) It was clear to the defendants that the only way to retain these practices and higher prices was to work together to eliminate Anderson and Source and restore a modern version of the prior distribution system. (*Id.*)[6] As the conspiracy

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[6] Although Time argues (Time Mem. at 19) that Anderson and Source already operated in exclusive territories, this is incorrect and misses the point. In most areas, Anderson competed directly with other wholesalers

progressed, Curtis and Kable made last-ditch efforts to see if Anderson would participate in a three-wholesaler model, in which three wholesalers (rather than two) would have exclusive regional market power with which to raise prices charged, and reduce services offered, to retailers. (*Id.* at ¶ 58.) When Anderson refused to participate (*id.*), the defendants carried out their original conspiratorial plan, eliminating Anderson from the market (*id.* at ¶¶ 84-88) and ensuring that the remaining two wholesalers would raise prices to the retailers (*id.* at ¶ 82).

CONCLUSION

Based on the foregoing reasons, Anderson respectfully requests that its motion for reconsideration be granted, the judgment entered on August 2, 2010 be vacated, and Anderson be granted leave to file an amended complaint substantially in the form of the PAC.

Dated: September 13, 2010
New York, New York

Respectfully submitted,

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-- such as Source or News Group. Nationwide chains such as Wal-Mart operated in both Anderson's exclusive and non-exclusive regions -- and were able to use their market power in regions where Anderson faced stiff competition to restrict Anderson's ability to raise prices in the few regions where Anderson operated alone. Thus, in order to prevent such nationwide chains such as Wal-Mart, Kroger and Safeway from using their geographical leverage to prevent higher prices, the defendants needed a market in which the wholesalers' territories did not overlap.

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