HAGENS BERMAN

T 206.623.7292 F 206.623.0594

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 EIGHTH AVENUE, SUITE 3300
SEATTLE, WA 98101
www.hbsslaw.com
Direct (206) 268-9320
steve@hbsslaw.com

April 5, 2012

Via ECF and Hand Delivery

The Honorable Denise L. Cote
United States District Court Judge
Southern District of New York
500 Pearl St., Room 1610
New York, NY 10007-1312

Re: *In re: Electronic Books Antitrust Litig.*,
No. 11-md-02293-DLC

Dear Judge Cote:

Plaintiffs respectfully notify the Court of recent supplemental authority. On April 3, 2012, the Second Circuit decided *Anderson News v. Am. Media*.[1] This decision was published three days after Plaintiffs filed their Opposition to Defendants' Motions to Dismiss in the above-entitled case. The Second Circuit in *Anderson* reversed the district court's decision, a case on which Defendants heavily rely.[2]

Three guiding principles clearly emerge from *Anderson*. Each reinforces Plaintiffs' arguments.

First, the Second Circuit noted the lack of factual context suggesting a preceding agreement in *Twombly*[3] was "vastly different" than the plaintiff's allegations in *Anderson*.[4] In *Anderson*, the plaintiff alleged defendants coordinated a uniform response

1 2012 U.S. App. LEXIS 6715 (2d Cir. Apr. 3, 2012). *See* Attachment A.

2 *See* Apple Inc.'s Memorandum of Law in Support of Motion to Dismiss the Consolidated Amended Class Action Complaint, Mar. 2, 2012, ECF No. 74 at 7, 17; Memorandum of Law in Support of Publisher Defendants' Motion to Dismiss the Consolidated Amended Class Action Complaint, Mar. 2, 2012, ECF No. 89 at 19-26.

3 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

4 *Compare Anderson*, 2012 U.S. App. LEXIS 6715, at *58 ("Anderson's proposed amended complaint in the present case is vastly different from the complaint at issue in *Twombly*") *with* Plaintiffs' Consolidated Opposition to Defendants' Motion to Dismiss ("Pls.' Opp."), Mar. 30, 2012, ECF No. 113 at 10 ("Unlike *Twombly* where the plaintiffs sought to infer a conspiracy from a failure to change long-standing practices, here Plaintiffs allege ***complex and historically unprecedented changes in pricing structure, made at the very same time by multiple competitors*** – precisely what the *Twombly* Court recognized would raise an inference of conspiracy.").

(refusal to deal) after the plaintiff-wholesaler announced a proposed surcharge on the upstream defendant magazine publishers.[5]

The Second Circuit distinguished *Twombly*'*s* conclusory allegations from the allegations in *Anderson*, which included: (1) defendants invited plaintiff to drop the proposed surcharge in exchange for exclusive territorial rights, and plaintiff refused;[6] (2) defendants understood joint action was necessary because no single defendant could unilaterally cut-off distribution through plaintiff, who had twenty-seven percent market share, without harming its economic self-interest;[7] and (3) soon after plaintiff refused defendants' invitation to solve the industry problem, defendants coordinated their refusal to enter into distribution agreements with plaintiff on the proposed terms and cut off distribution through plaintiff.[8]

Importantly, the Second Circuit found that the district court incorrectly characterized these types of factual allegations as merely conclusory assertions, from which inferences in plaintiff's favor could not be drawn.[9]

Second, the Court emphasized that the correct analytical approach under *Twombly* does not have a court choose between the plausibility of competing inferences.[10] This would improperly transform a motion-to-dismiss analysis into a factual determination.[11]

The district court in *Anderson* adopted inferences in defendants' favor, concluding it was in each defendant's economic self-interest, when faced with a potential surcharge by the plaintiff-wholesaler, to reject plaintiff's proposed terms.[12] Moreover, the district

---

5 *Compare Anderson*, 2012 U.S. App. LEXIS 6715, at *58-*59 *with* Pls.' Opp. at 13-18 (describing three stages of Defendants' coordinated response, including "windowing" the release of new titles, the coordinated adoption of the agency model and price increases, and the coordinated restraint of eBook sales to other e-retailers).

6 *Compare Anderson*, 2012 U.S. App. LEXIS 6715, at *11-*12 *with* Pls.' Opp. at 14 (Amazon refused request by Arnaud Nourry, CEO of Defendant Hachette, for Amazon to increase eBook prices to solve the "industry" problem, citing ¶¶ 100-101 of the Consolidated Amended Complaint).

7 *Compare Anderson*, 2012 U.S. App. LEXIS 6715, at *13 *with* Pls.' Opp. at 17 (describing how coordinated activity was necessary because no one publisher Defendant could cut-off distribution to Amazon who controlled seventy-five to eighty-five percent eBook share).

8 *Compare Anderson*, 2012 U.S. App. LEXIS 6715, at *15 *with* Pls.' Opp. at 34-35 (detailing Defendants' simultaneous refusal to sell to Amazon and BooksOnBoard other than through the agency model).

9 *Anderson*, 2012 U.S. App. LEXIS 6715, at *65. *See also id.* at *66 (noting the district court erred in its finding that on a motion to dismiss factual inferences are not entitled to be taken as true).

10 *Compare id.* at *52 (emphasizing that "[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion") *with* Pls.' Opp. at 37 ("Plaintiffs clearly do not have to disprove Defendants' alternative inferences at the pleading stage").

11 *See, e.g.*, *Anderson*, 2012 U.S. App. LEXIS 6715, at *69.

12 *Id.* at *23.

court concluded that the publisher defendants' reactions to the proposed surcharge initially varied, which further undermined the plausibility of plaintiff's allegations that defendants agreed to a uniform response.[13]

The Second Circuit recognized that it was indeed "possible" each defendant acted separately in deciding to stop selling magazines to plaintiff. "But on a Rule 12(b)(6) motion it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives."[14] The relevant inquiry is whether the plaintiff has offered a plausible interpretation of the conduct which supports the claims. And the court underscored that while defendants ***may*** have responded independently to a common stimuli, the existence of this possibility at the pleading stage does not "provide antitrust immunity to [defendants] who get together and agree that they will boycott" selling to a firm.[15]

Third, the Second Circuit made clear that, for pleading purposes, the plaintiff is entitled to plausible interpretations of facts that are arguably ambiguous. For example, discussing the statement by one defendant that "*we* now control this space," the Second Circuit found that the lower court erred by adopting an innocuous interpretation – the statement was "merely describing the state of the industry." Instead, the pronoun "we" plausibly referred to the other defendants.[16]

In sum, the Second Circuit's recent analysis in *Anderson* is consistent with, and indeed strongly supports, Plaintiffs' Consolidated Opposition to Defendants' Motions to Dismiss.

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/ Steve W. Berman

Steve W. Berman
Attorney

Cc: All counsel of record (by ECF)

---

[13] *Id.* at *23-*23; *See also* Pls.' Opp. at 20-21 n.47.

[14] *Id.* at *67.

[15] *Id.* at *75.

[16] *Id.* at *79. *Compare* Pl. Opp. at 24 (CEO of Defendant-publisher Hachette Livre privately met with Amazon Executive and conveyed that Amazon's pricing was a big problem for "the industry," and the problem could be solved for "the industry" if Amazon would agree to raise prices by a dollar or two).