APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Second Circuit, *Anderson News, L.L.C., et al. v. American Media, Inc., et al.*, Nos. 15-2714-cv(L) et al. (July 19, 2018) 1a

Judgment of the United States Court of Appeals for the Second Circuit, *Anderson News, L.L.C., et al. v. American Media, Inc., et al.*, Nos. 15-2714-cv(L) et al. (July 19, 2018) 58a

Opinion and Order of the United States District Court for the Southern District of New York, *Anderson News, L.L.C., et al. v. American Media, Inc., et al.*, No. 09 Civ. 2227(PAC) (Aug. 20, 2015) 60a

Opinion and Order of the United States District Court for the Southern District of New York, *Anderson News, L.L.C., et al. v. American Media, Inc., et al.*, No. 09 Civ. 2227(PAC) (Aug. 20, 2015) 120a

Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (Oct. 5, 2018) 130a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 15-2714-cv(L), 15-2889-cv(XAP),
15-2894-cv(XAP), 15-2903-cv(XAP)

ANDERSON NEWS, L.L.C.,
Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

LLOYD T. WHITAKER, AS THE ASSIGNEE UNDER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS FOR ANDERSON SERVICES, L.L.C.,
Plaintiff-Appellant,

v.

AMERICAN MEDIA, INC., TIME INC., HEARST COMMUNICATIONS, INC.,
Defendants-Counter-Claimants-Appellees-Cross-Appellants,

BAUER PUBLISHING CO., LP., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA, U.S., INC., KABLE DISTRIBUTION SERVICES, INC., RODALE, INC., TIME WARNER RETAIL SALES & MARKETING, INC.,
Defendants-Appellees,

HUDSON NEWS DISTRIBUTORS LLC, THE NEWS GROUP, LP,
Defendants,
v.
CHARLES ANDERSON, JR.,
Counter-Defendant-Cross-Appellee.

[Argued: December 2, 2016
Decided: July 19, 2018]

Before: Livingston, Chin, and Carney, Circuit Judges.

Susan L. Carney, Circuit Judge:

Plaintiffs-appellants Anderson News, L.L.C., and Anderson Services, L.L.C., (together, "Anderson") appeal from an award of summary judgment to defendants on Anderson's allegation that, in early 2009, defendants conspired to boycott Anderson and drive it out of business, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. At the time, Anderson provided wholesaler services to the single-copy magazine industry, in which magazines are published and sold individually to consumers (in contrast to sales by subscription). As a wholesaler, Anderson was responsible for collecting single-copy magazines from publishers, delivering those magazines to retailers, accounting for the number of magazines sold, and recycling unsold magazines.

In an effort to decrease the financial burden imposed on it by publishers' practice of shipping many more magazines than are sold, in mid-January 2009 Anderson announced that it would begin charging publishers a delivery surcharge of $0.07 per magazine shipped, and called for agreement to the surcharge before February 2009 "to ensure future distribution." J.A. 1450.[1] Defendants-appellees, a group of publishers and their distributors (which provide marketing and logistics services to the

[1] Citations to "J.A." refer to the parties' Deferred Joint Appendix. Citations to "C.A." refer to the parties' Deferred Confidential Joint Appendix, which has been filed under seal.

publishers), refused to pay the proposed surcharge and found wholesalers other than Anderson to deliver their magazines. Anderson sued the publishers and distributors, alleging a conspiracy in violation of antitrust laws to boycott Anderson and making various related state law claims. Some defendants counterclaimed, alleging that Anderson's proposed surcharge was itself the result of an unlawful conspiracy to raise prices.

The District Court granted summary judgment to defendants on Anderson's antitrust and state law claims, and to Anderson on the counterclaims. Anderson now argues that the District Court ignored or too heavily discounted much of the evidence that Anderson presented in support of its claims, and maintains that it has offered sufficient evidence from which a jury could reasonably conclude that defendants entered into an unlawful agreement to refuse to deal with Anderson and to drive it out of business. Reviewing the evidence in light of the totality of the circumstances and under the *Matsushita* "tends to exclude" standard, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), we conclude that the District Court correctly ruled that Anderson has failed to offer sufficient evidence that defendants entered into the alleged unlawful agreement to survive defendants' motions for summary judgment. We further decide that the District Court was correct in ruling that defendants did not suffer an antitrust injury and thus lacked antitrust standing to pursue the stated counterclaims. We therefore AFFIRM the District Court's judgments.

BACKGROUND

I. Factual background

The following statement of facts is drawn from the District Court's thorough recitation, supplemented by the parties' statements of undisputed fact under Federal Rule of Civil Procedure 56.1 and primary documents such as emails and other correspondence that are contained in the record. Although significant changes have doubtless since transpired, we describe relevant facts in this industry as they stood in 2008-2009, when the events in question occurred, as reflected by the record evidence.

In the United States, in 2009, publishers primarily sold magazines in two ways: by subscription and by single-copy purchase at a newsstand, supermarket, or another retailer. The single-copy magazine industry, which is our focus in this case, had long operated through four distinct levels of enterprise:

First, publishers created and produced magazines. Defendants Time Inc. ("Time"), American Media, Inc. ("AMI"), Bauer Publishing Co., LP. ("Bauer"), Rodale, Inc. ("Rodale"), and Hachette Filipacchi Media, U.S., Inc. ("Hachette") published a variety of magazines ranging from familiar titles like *People* and *Star* to more obscure titles like *Yikes!* and *Twist*. As of 2008, just before the events at issue here took place, sales of defendants' magazines constituted 42% of the U.S. single-copy market.

Second, distributors provided a variety of services, including marketing and billing services, to publishers. In 2008, four major distributors operated in the United States: defendants Time/Warner Retail Sales & Marketing, Inc. ("TWR"), Curtis Circulation Company ("Curtis"), Kable Distribution Services, Inc. ("Kable"), and non-defendant Comag. TWR

represented only Time; Kable represented Bauer; Curtis represented Rodale, AMI, and Hachette; and defendant Distribution Services, Inc. ("DSI"), a wholly owned subsidiary of AMI, provided consulting and marketing services to AMI, Bauer, Rodale, and Hachette. Together, TWR, Curtis, and Kable served as national distributors for 75% of the single-copy magazine market in 2008.

Third, wholesalers served as middlemen between publishers and retailers. Wholesalers received magazines from publishers, delivered magazines to retailers, and set up in-store displays of those magazines for retailers. Once the magazines reached their "off-sale" date (that is, they were no longer current), wholesalers retrieved and disposed of the unsold magazines. In 2008, the U.S. market was occupied by four major wholesalers: Anderson News, Source Interlink Distribution, L.L.C. ("Source"), The News Group, LP ("TNG"), and Hudson News Distributors LLC ("Hudson"). As of late 2008, these wholesalers together distributed 93% of magazines in the single-copy market, and Anderson News served as wholesaler for approximately 30% of all single-copy magazines distributed in the United States.

As an ancillary matter, many wholesalers used logistics affiliates to coordinate the wholesalers' delivery and disposal services. Anderson Services was Anderson News's logistics affiliate. Many wholesalers also engaged delivery services to deliver magazines to retailers. Anderson Services and TNG's logistics affiliate shared ownership of two such services: ProLogix Distribution Services (East), LLC ("ProLogix East") and ProLogix Distribution Services (West), LLC ("ProLogix West").

At the fourth distinct level, retailers sold magazines to customers. During the relevant period, key retailers in the nation included Wal-Mart Stores, Inc. ("Wal-Mart") and The Kroger Co. ("Kroger"). To reduce their logistical costs, retailers generally demanded that all of their retail outlets be serviced by a single wholesaler.

Before the early 2000s, single-copy magazines moved through each level of the industry as follows: Publishers sold magazines to wholesalers at a certain discount from the cover price. Wholesalers in turn sold magazines to retailers at a slightly lower discount, and retailers sold to consumers at the cover price. Wholesalers collected unsold magazines and refunded retailers for them. Publishers then refunded wholesalers for unsold magazines. As the District Court recognized, even with a buy-back guarantee, publishers had an incentive to and therefore did sell wholesalers more magazines in the first instance than are likely to be bought, to prevent retailers from experiencing a shortfall and thereby missing out on potential sales. This overselling practice imposed a burden on wholesalers, which then had to retrieve and account for the unsold magazines.

In the early 2000s, retailers implemented a new accounting and payment method called scan-based trading. In this method, retailers obtain magazines from wholesalers on a consignment basis. They then track sales precisely by using bar codes, and they do not pay wholesalers for magazines until the magazines are actually sold to consumers. This eases the wholesalers' burden of tracking the numbers of unsold magazines at retail outlets. It also, however, forces wholesalers to bear related inventory costs—the cost of magazines sitting on the shelves—because

wholesalers must purchase magazines from publishers up front and receive no payment from retailers for those magazines until they are sold.

In January 2009, in an attempt to shift these costs further up the supply chain to publishers, and after some years of debate in the industry on related practices, Anderson—which enjoyed a 30% market share of the wholesaler business—decided to announce that publishers would from that time on be required to assume the inventory costs and pay a surcharge of $0.07 on each magazine that Anderson delivered to retailers on their behalf (the "Program"). Anderson had in the past tried to shift these costs to publishers, but without success: the publishers had resisted its efforts. Given these prior failures, Anderson formulated a new strategy to force publishers to accept the surcharge. This strategy had two parts: First, Anderson obtained commitments from Wal-Mart and Kroger, the two biggest single-copy magazine retailers, to refuse to accept shipments from wholesalers other than Anderson during Anderson's short-fuse negotiations with the publishers. Second, Anderson Services planned to use its ownership share in one of its logistics affiliates, ProLogix East, to pressure publishers by suspending delivery services for all publishers' magazines to retailers within ProLogix East's delivery areas until recalcitrant publishers gave in and agreed to pay the surcharge. These combined actions, Anderson reasoned, would move publishers by depriving them of single-copy magazine income until they and Anderson reached an accord.

Anderson launched its plan in mid-January 2009. On January 12 and 13, Charles Anderson, Jr., the owner of Anderson News and manager of Anderson Services, met privately with a number of publishers,

including defendants Time, AMI, and Bauer, and outlined his proposed cost-shifting measures and the $0.07 surcharge. On January 14, Mr. Anderson publicly announced the Program in a conference call hosted by a magazine-industry publication. During the conference call, Mr. Anderson explained his reasons for implementing the Program as stemming in part from how "over the last 10 years [Anderson's] profits have eroded to nothing and into significant losses . . . so we think that the time has come to make some significant changes so that we can continue as a viable, cost effective method of distributing magazines." J.A. 919. When asked whether the publishers' acceptance of the Program would result in a "financially sound magazine distribution channel," though, Mr. Anderson was unable to provide any reassurances about his company's viability: "I can't tell you what the future holds as no one can with unemployment going the way it is. With the factors that we've got today, I'm just not going to predict it." *Id.* at 931. Mr. Anderson was also challenged about the timing of his Program, given the "distress[ed] situation of publishing" and the public announcement made the previous day that "advertising pages for the last quarter of the year fell by 17%, 11% for the whole year . . . ." *Id.* at 926-27. He was asked, "[I]s your request for very substantial publishing financial commitment, is this a good time for it?" *Id.* Mr. Anderson responded, "I am fully cognizant of what is going on in the industry. . . . We know how difficult it is. It's not that we want to do anything like this, is the timing good? Of course not. But now is the time that we have to do this." *Id.* Moreover, Mr. Anderson seemed to suggest that the $0.07 per copy surcharge was not a negotiable figure, noting, "[I]f we negotiated the rate then it would not be fair

so the answer is we really believe that the 7 cent number is the number." *Id.* at 922. Mr. Anderson then confirmed that if publishers did not agree to the Program, Anderson would refuse to ship magazines for those publishers as of February 1. *Id.* at 922-23. And finally, he noted the possibility that Anderson might exit the business if not enough publishers signed on to his Program: "[W]hy should we continue to lose money in a business that doesn't . . . give us any return?" *Id.* at 927-28.

On the heels of the announcement, the president of Anderson News, Frank Stockard, wrote to publishers giving them a deadline of January 23 to agree to the proposed surcharge "to ensure future distribution" in February and, implicitly, thereafter. J.A. 1450. Concurrently with Anderson's announcements, by letter dated January 19, Source (a wholesaler in competition with Anderson) wrote to at least several publishers announcing that it, too, would impose a $0.07 surcharge on each magazine it distributed. These announcements followed several phone calls between Mr. Anderson and Source President James Gillis in December 2008 and January 2009.

Anderson's announcement sparked a flurry of communications between and among defendants and between defendants and non-parties, as described in detail by the District Court. *See Anderson News, L.L.C. v. American Media, Inc. (Anderson III)*, 123 F.Supp.3d 478, 492-94, 504-08 (S.D.N.Y. 2015). Emails, telephone records, and testimony introduced by Anderson reflect that during the short period between Anderson's announcement and the February 1 deadline that it declared, defendant publishers and defendant distributors discussed the proposed surcharge and their planned responses in various

settings: defendants discussed it internally; defendant publishers discussed it with their affiliated distributors; defendants discussed it with non-defendant wholesalers and retailers; and defendants discussed it with their direct competitors. Anderson conceded at oral argument before the District Court that "many communications between [distributors and their publisher-clients] were not simply permissible, but necessary—it was critical for Publisher Defendants to communicate with their distributors regarding their responses to the Anderson proposal, and for the Distributor Defendants to discuss the proposal with their publisher clients." *Id.* at 492.

During the short time period between Anderson's January 14 announcement and the February 1 deadline, the defendants' actions varied. When Mr. Anderson described his individual meetings with certain defendants to inform them of the Program on January 12 and 13, Mr. Anderson observed that in contrast to his meetings with Time, AMI, and Hachette, which were "open" and "there was good dialogue," Bauer's immediate reaction was "[N]o, we're not going to do it, absolutely not. And it was firm, it was very, very firm . . . . [I]t was not open dialogue." J.A. 172-73. On January 26, Anderson sent another letter to address "common misconceptions" regarding its Program. In that letter, Anderson asked publishers to respond by January 28, and emphasized that, although "Anderson has made proposals like this in the past," it was not "bluffing" with the current proposal now that "Anderson [had been] forced to take urgent action on its own." C.A. 300. Thus, as the February 1 deadline approached, many other defendants attempted to negotiate with Anderson: Curtis CEO Robert Castardi reached out

to Anderson News President Frank Stockard at least a few times, noting in an email, "I have been asking for discussions with [Anderson] for the past week; to no avail." J.A. 640, 793, 795, 801. An internal email between Stockard and Mr. Anderson noted that Castardi was "trying to help." *Id.* at 795. The record also suggests that Kable expressed willingness to negotiate with Anderson. *Id.* at 131, 1567. Time and TWR seemed to come closest to an agreement with Anderson: On January 27, 2009, TWR requested a deadline extension while offering to provide a two-point discount on Time magazines. That same day, Mr. Anderson rejected Time's proposed deal. Notably, two days after rejecting Time/TWR's request for an extension, Anderson entered into an arrangement similar to that proposed by Time with another publisher, Comag.

By February 1, Hachette and Rodale agreed to pay the proposed surcharge on certain titles for the month of February, and Curtis continued to facilitate shipments on behalf of Hachette and Rodale after the February 1 deadline. AMI continued to ship some of its monthly magazines for February on uncertain terms (although it made alternative arrangements for its other magazines). Time, Hachette, and Bauer ended up rejecting Anderson's proposed surcharge and made alternative shipping arrangements for their magazines in February: they each would ship through TNG instead of Anderson. No defendant agreed before the February 1 deadline to pay the surcharge on a long-term basis. The defendants were not alone in making this decision: Ultimately, 1,484 of 1,570 publishers, or approximately 95% of all publishers nationwide, had not agreed to Anderson's terms as of February 1, 2009.

In the face of this general reaction, immediately after February 1, Anderson implemented what it called its "going dark" strategy—conveying an ultimatum, in a last-ditch effort to convince the publishers to accept the surcharge. It reaffirmed that key retailers Wal-Mart and Kroger would not accept magazines from wholesalers other than Anderson in February and on Saturday, February 7, it announced by press release that on Monday, February 9, its affiliate ProLogix East would halt magazine deliveries to retailers, including deliveries for major wholesaler TNG.

In response, a TNG subsidiary brought suit in the United States District Court for the District of Delaware, seeking a temporary restraining order that would require ProLogix East to deliver TNG's magazines to retailers pending adjudication of its claims against Anderson. On February 9, 2009, the court issued the requested order. According to Mr. Anderson, the issuance of this temporary restraining order meant "game over" for Anderson News. J.A. 225. Soon after, in March 2009, Anderson ceased doing business altogether and began bankruptcy proceedings.

II. Procedural history

On March 10, 2009, Anderson News and Anderson Services filed a complaint in the United States District Court for the Southern District of New York, naming AMI, Bauer, Curtis, DSI, Hachette, Kable, Rodale, Time, and TWR as defendants. They alleged: first, an unlawful group boycott of Anderson in violation of the Sherman Act, 15 U.S.C. § 1; second,

tortious interference with business relationships and contracts; and third, civil conspiracy.[2]

Defendants successfully moved under Rule 12(b)(6) to dismiss the complaint. *Anderson News, L.L.C. v. American Media, Inc. (Anderson I)*, 732 F.Supp.2d 389 (S.D.N.Y. 2010). The District Court concluded that the complaint failed to state a claim because it was "implausible that magazine publishers would conspire to deny retailers access to their own products" and "completely plausible" that their respective decisions to use other wholesalers were "unchoreographed behavior, a common response to a common stimulus." *Id.* at 397-99. The District Court also dismissed Anderson's state law claims, ruling that by failing adequately to plead an antitrust violation, the complaint also failed to state a claim for tortious interference and civil conspiracy. Further finding that "[t]he context of the alleged antitrust conspiracy —the Surcharge that Anderson tried to impose on the industry to Anderson's advantage and the disadvantage of everyone else—belies the viability of Anderson's antitrust claim," the District Court denied Anderson leave to replead. *Id.* at 405.

Anderson appealed, and in 2012 we vacated the District Court's dismissal and remanded for further proceedings, ruling that Anderson should have been permitted to file an amended complaint. *Anderson News, L.L.C. v. American Media, Inc. (Anderson II)*, 680 F.3d 162 (2d Cir. 2012). We decided that the allegations made in Anderson's proposed amended

---

[2] Anderson's initial complaint also included TNG and Hudson as defendants. Anderson voluntarily dismissed its claims against TNG within days of filing the complaint. Over four years later, in December 2013, it settled its claims against Hudson and voluntarily dismissed its claims against that defendant.

complaint were "sufficient to suggest that the cessation of shipments to Anderson resulted not from isolated parent-subsidiary agreements but rather from a lattice-work of horizontal and vertical agreements to boycott Anderson." *Id.* at 189. Although "presentation of a common economic offer may well lend itself to innocuous, independent, parallel responses," we explained, "it does not provide antitrust immunity to respondents who get together and agree that they will boycott the offeror." *Id.* at 192. We also rejected the District Court's conclusion that, at the motion-to-dismiss stage, the alleged conspiracy was not plausible because it would not be in the defendant publishers' self-interest. We ruled that defendants might plausibly see some benefit from such a conspiracy: the complaint's allegations made it possible that "the publishers and distributors would feel comfortable dealing with just two wholesalers," especially if, as alleged, those wholesalers were also members of the alleged conspiracy. *Id.* at 193-94.

On remand, in September 2012, Anderson filed an amended complaint and the parties proceeded to discovery. After two years of discovery, defendants moved for summary judgment and Anderson cross-moved for summary judgment on counterclaims filed by AMI, Hearst Communications, Inc. ("Hearst") (as successor to Hachette), and Time, in which those defendants charged Anderson with engaging in an illegal price-fixing conspiracy and unlawfully inducing retailers to boycott non-compliant publishers.

In August 2015, the District Court granted summary judgment for defendants. *Anderson III*, 123 F.Supp.3d at 512. On what had become a robust factual record, the District Court reiterated its earlier view that Anderson's allegations were not plausible

and that it was Anderson's "own ill-conceived and badly executed plan [that] led to its downfall." *Id.* at 486. The District Court observed that, despite extensive discovery, Anderson had not presented any direct evidence that defendants agreed to boycott Anderson. *Id.* at 485. Particularly on such an implausible claim, Anderson had failed to offer the "strong direct or circumstantial evidence" required to survive summary judgment, the District Court ruled. *Id.* at 508 (citation omitted).

In conjunction with its merits decision, the District Court issued a separate opinion and order in which it granted in part defendants' motion to exclude some of the testimony offered by one of Anderson's experts, Dr. Leslie Marx. *Anderson News, L.L.C. v. American Media, Inc. (Anderson IV)*, No. 09 Civ. 2227, 2015 WL 5003528 (S.D.N.Y. Aug. 20, 2015). As relevant to the present appeal, the District Court excluded Dr. Marx's testimony in which she averred "that it was in each [d]efendant's independent economic self-interest to continue to supply Anderson News with magazines," *id.* at *3, because, in its view, the testimony did not contain "any actual analysis regarding [d]efendants' financial incentives to continue supplying Anderson News with magazines," *id.* at *4, and was based solely on Dr. Marx's interpretation of defendants' statements.

On AMI, Hearst, and Time's counterclaims, the District Court granted summary judgment to Anderson. Defendants argued that Anderson and Source's proposed surcharge was the result of an illegal price-fixing agreement between the two wholesalers that was injurious to defendants. *Anderson III*, 123 F.Supp.3d at 511. The District Court rejected defendants' arguments, concluding that even if Anderson

and Source had so conspired, AMI, Hearst, and Time lacked antitrust standing to press the complaint because they had "not suffered damages of the type the antitrust laws were intended to prevent." *Id.* at 512 (internal quotation marks omitted).

Anderson's timely appeal followed, as did the cross-appeal filed by AMI, Hearst, and Time.

DISCUSSION

We review the District Court's grants of summary judgment *de novo*, and "will affirm only if, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inference in its favor, . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *In re Publ'n Paper Antitrust Litig. (Publ'n Paper)*, 690 F.3d 51, 61 (2d Cir. 2012) (internal quotation marks and citation omitted).

I. Sherman Act claim

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is . . . illegal." 15 U.S.C. § 1. To prove a Section 1 claim, a plaintiff must present evidence of "a combination or some form of concerted action between at least two legally distinct economic entities" in the form of "a conscious commitment to a common scheme designed to achieve an unlawful objective." *United States v. Apple, Inc.*, 791 F.3d 290, 313, 315 (2d Cir. 2015) (internal quotation marks omitted). Once it has sufficiently demonstrated the existence of an agreement, the plaintiff must then establish that the agreement's objective was an "unreasonable restraint of trade either per se or under the rule of reason." *Capital Imaging Assocs., P.C. v. Mohawk*

Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993). "Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade." *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 232 (2d Cir. 1999).

All parties on appeal accept that the group boycott alleged (to decline to deal with Anderson and thereby reduce wholesaler competition by putting Anderson out of business) would be illegal. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). At issue here, then, is whether Anderson has presented sufficient evidence for a jury reasonably to conclude that defendants shared a "conscious commitment" to such an agreement. *Apple*, 791 F.3d at 315; *see also Anderson II*, 680 F.3d at 183 ("Circumstances must reveal 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.' " (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984))). Anderson claims that defendants ceased doing business with Anderson under an agreement aimed at driving Anderson out of business and reducing competition in the wholesaler market. Defendants counter that they each ceased doing business with Anderson because they each did not want to pay the proposed "above-market" price resulting from the surcharge. Anderson must therefore make the "threshold showing" that a reasonable jury could find that defendants' conduct—concurrently refusing to pay the surcharge and ceasing to do business with Anderson—was the result of an agreement intended to reduce competition in the wholesaler market,

rather than defendants' independent decisions. *AD/SAT*, 181 F.3d at 233.

In the field of antitrust law, "summary judgment serves a vital function"—it "avoid[s] wasteful trials and prevent[s] lengthy litigation that may have a chilling effect on pro-competitive market forces." *Publ'n Paper*, 690 F.3d at 61. "[S]ummary judgment is not a substitute for a trial," and so if "the evidence admits of competing permissible inferences with regard to whether a plaintiff is entitled to relief," summary judgment should be denied. *Id.* Although we review the evidence of an alleged conspiracy in the light most favorable to the non-moving party (here, Anderson), "antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To permit an inference of conspiracy based on ambiguous evidence—that is, "evidence that is equally consistent with independent conduct as with illegal conspiracy," *Apple*, 791 F.3d at 315—would "deter or penalize perfectly legitimate" and procompetitive conduct. *Monsanto*, 465 U.S. at 763, 104 S.Ct. 1464; *see also Matsushita*, 475 U.S. at 593, 106 S.Ct. 1348.

Accordingly, to raise a genuine issue of material fact as to an antitrust conspiracy, the plaintiff must present direct or circumstantial evidence that "tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348 (internal quotation marks omitted). This "[does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct"; rather, the evidence need be sufficient only "to allow a reasonable fact finder to infer that the conspiratorial explanation is more

likely than not." *Publ'n Paper*, 690 F.3d at 63 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 14.03(b), at 14-25 (4th ed. 2011) (Areeda & Hovenkamp, *Fundamentals*)). Thus, if the evidence is in equipoise, then summary judgment must be granted against the plaintiff: "The question is not . . . whether the plaintiff's inferences are so far-fetched that a trier of fact should not be allowed to consider them, but whether the evidence, though not far-fetched, sufficed to me[e]t the plaintiff's burden of proof." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 308, at 156-57 (4th ed. 2011) (Areeda & Hovenkamp, *Antitrust Law*) (internal quotation marks and citation omitted).

Anderson claims that on January 15, 2009, the defendants entered into an illegal agreement with each other to drive Anderson out of business and to reduce competition in the wholesaler market. *See* Areeda & Hovenkamp, *Antitrust Law*, ¶ 1409, at 64 (noting that to avoid confusion when considering the validity of an antitrust conspiracy claim, we must "ask precisely, 'Who was in agreement with whom and about what?' "). Defendants counter that, after attempting to negotiate the terms of the Program, evaluating how much the Program would cost, gathering industry information, and considering alternative wholesaler options, they each independently rejected the terms of Anderson's Program in favor of hiring an alternative, lower-cost wholesaler. Anderson must therefore present sufficient evidence to show that a reasonable jury could determine that defendants' rejection of Anderson's Program *more likely than not* occurred as a result of an illegal agreement among defendants, rather than due to each

defendant's independent business decision to seek a lower cost alternative. If, however, we determine that "the proffered evidence is equally consistent with competition and collusion, then no fact issue of collusion is established," and we must rule in favor of defendants. *Id.* ¶ 308, at 170-71.

A. The alleged agreement

Before considering the evidence Anderson offers to support its allegation that defendants' conduct was the result of an unlawful agreement rather than independent action, we pause to examine the nature of the alleged agreement itself. We do so because, as we explained in *Publication Paper*, the quality of the evidence required to satisfy *Matsushita*'s "tends to exclude" standard varies with the economic "plausibility" of the alleged agreement:

> [W]here a plaintiff's theory of recovery is implausible, it takes strong direct or circumstantial evidence to satisfy *Matsushita*'s tends to exclude standard. By contrast, broader inferences are permitted, and the tends to exclude standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive.

Publ'n Paper, 690 F.3d at 63 (internal quotation marks and citations omitted; italics added); Areeda & Hovenkamp, *Antitrust Law*, ¶ 308, at 170-71 ("[G]iven evidence must [not] be treated precisely the same way in all cases . . . . [T]he 'range of permissible conclusions' that a fact finder might draw becomes larger as the alleged conspiracy becomes more economically plausible." (quoting *Matsushita*, 475 U.S. at 596-97, 106 S.Ct. 1348)). Accordingly, where context reveals that the alleged agreement is one that "simply

makes no economic sense," the plaintiff "must come forward with more persuasive evidence to support its claim than would otherwise be necessary." *AD/SAT*, 181 F.3d at 235 (internal quotations marks and alterations omitted).

In its amended complaint, Anderson alleged that defendants entered into an "anti-competitive and collusive scheme . . . to destroy" Anderson. J.A. 66. Anderson's asserted rationale for the scheme was that defendants aimed "to avoid individualized and competitive negotiations" with Anderson over the proposed surcharge and to "increase their control over the wholesaler single-copy magazine distribution market." *Id.* With this increased control of distribution, Anderson argued, defendants could "ensure that the increasing costs of magazine distribution were covered by retailers instead of publishers." *Id.* at 78.

At first glance, this rationale appears to make "no economic sense." *AD/SAT*, 181 F.3d at 235 (quoting *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348). Publishers rely on wholesalers to deliver their magazines to retailers. Reducing competition in the wholesaler market appears to increase the market power of the remaining wholesalers, and therefore seems likely to embolden those remaining to charge higher prices to all their commercial partners—publishers included—and not just to retailers. On just this reasoning, in fact, the District Court has twice rejected Anderson's theory as not plausible, concluding that defendants would have nothing to gain from Anderson's demise. *See Anderson I*, 732 F.Supp.2d at 397 ("Publishers and national distributors have an economic self-interest in more wholesalers, not fewer; more wholesalers yields greater competition, which is good for

suppliers."); *Anderson III*, 123 F.Supp.3d at 501 ("[The] evidence strongly suggests that Defendants wanted more, rather than fewer, wholesalers in the single-copy market, because more wholesalers meant more competition for both retailers' and publishers' business—resulting in more favorable terms for Defendants.").

Anderson's theory that defendants could benefit from Anderson's demise is not completely indefensible, however. The near-term goal of the alleged conspiracy would be relatively easy to accomplish: given the description Anderson gave of its poor financial health in the January 2009 conference call, it was likely that defendants needed to deprive Anderson of magazines for only a short while to secure its demise. In addition, theoretically, the longer-term goal of the alleged conspiracy—reduced competition in the wholesaler market—could have benefited defendants. We suggested as much in our decision vacating the District Court's dismissal of Anderson's claim, where we noted that publishers and distributors might benefit from reduced competition in the wholesaler market if the remaining wholesalers chose to "increase their profits by raising prices to retailers [only]," rather than by "increas[ing] charges to the publishers." *Anderson II*, 680 F.3d at 194.

But on summary judgment, evidence of key facts that would support this theory have not materialized. Notably absent is evidence supporting Anderson's allegation that wholesalers Hudson and TNG were involved in defendants' alleged conspiracy. Although we previously observed at the pleading stage that the alleged conspiracy could be plausible, we emphasized in that opinion the significance of that allegation, and Anderson has now voluntarily

dismissed its claims against the wholesalers. *Id.* at 193-94.[3] Thus, the primary evidence now offered in support of Anderson's theory that reduced wholesaler competition would benefit defendants is an expert analysis prepared by an economist, Dr. Leslie Marx. But Dr. Marx's analysis not only fails to demonstrate how defendants would benefit, it also seems to suggest that defendants would ultimately be harmed by reduced wholesaler competition.

First, Dr. Marx's report recognizes that reduced competition in the wholesaler market would result in higher prices, but opines that wholesalers would raise prices only to retailers. She explains that the economic literature on "multi-sided markets"—markets with middlemen or "platforms," such as wholesalers in the single-copy magazine market—suggests that it is "possible that an increase in the market power of platforms leads to higher prices on one side of the market, while having a much smaller impact on prices on the other side." C.A. 1874. She further explains that the side most likely to bear higher prices is the side that "always chooses to do business with only one platform," *id.* at 1874-75—here, the large retailers, which historically have had a practice of preferring an exclusive relationship with a single wholesaler. Dr. Marx also offers some evidence suggesting that retailers may have paid higher prices for magazines after Anderson's exit

---

[3] We note further that our observation in requiring that Anderson be allowed to amend its complaint was not determinative of the conspiracy's ultimate "plausibility," because "[a]t the pleading stage . . . the complaint need not offer a plausible reason for the defendants' conspiracy but 'merely needs to allege that they did indeed conspire and give some factual allegations that would support such a claim.'" Areeda & Hovenkamp, *Antitrust Law*, ¶ 308, at 174 n.101.

from the market, *see id.* at 1945, and states that national distributors had, in the past, "preferred to have magazines wholesaled by a single firm in a given location," *id.* at 1877-78.

In light of the multi-sided market theory presented in Dr. Marx's report, we cannot dismiss Anderson's theory of possible benefit to the publishers as "ridiculous," as the District Court concluded. *Anderson III*, 123 F.Supp.3d at 508. But even assuming that reduced wholesaler competition would result in higher prices for retailers only, Dr. Marx offers no evidence suggesting that publishers would (or did) in fact experience net benefits as a result. Such a theory is sufficiently speculative to make the alleged conspiracy economically implausible. Whether any benefits of the alleged conspiracy would accrue to defendants under Dr. Marx's theory seems to depend entirely on the wholesalers' benevolence: even if the wholesalers remaining after Anderson's demise would demand higher prices from retailers, Dr. Marx offers no basis for concluding that they would necessarily pass along the fruits of their increased margin to publishers, or refrain from demanding more up the chain from publishers as well.

Second, Dr. Marx's report actually acknowledges that reducing wholesaler competition was risky for the publishers because "the remaining wholesalers . . . might eventually seek to extract more money from publishers as well as retailers." C.A. 1873-74. In fact, even Dr. Marx's assertion that the defendants could achieve some benefit by avoiding the "full cost" of Anderson's Program is explicitly qualified by the observation that the defendants might need to "make some concessions to wholesalers that remained." *Id.* at 1873. Such concessions could, of course, include

the very same higher-cost terms required by Anderson's Program.

Finally, even if we credit Dr. Marx's assumption of wholesaler benevolence, her report also explains how higher prices for retailers would *harm* publishers by reducing the sales of single-copy magazines as a whole. She observes that some retailers have completely stopped selling single-copy magazines, and predicts that other retailers would likely "reallocate shelf space to other alternative products." C.A. 1964. Any such reduction in retailer sales of single-copy magazines would translate directly into reduced sales for publishers, too. In fact, while trying to convince publishers to sign on to its Program, Anderson itself observed that

> [r]educed competition will hurt publishers and retailers alike. When competition is eliminated without regulatory oversight all parties lose. Competition is the driving force to innovation and efficiency. Without competition, retailers and publishers risk their existing discounts and the category will lose its relevancy to retailers. Display space will be lost to competing consumer products.

Id. at 299 (Anderson's January 26, 2009 letter to publishers). We are attentive to the legal principle that the "weight [to] be assigned to competing permissible inferences remains within the province of the fact-finder at a trial." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987). But "some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible." *Id.*

Dr. Marx's report thus presents evidence suggesting only that reducing competition in the wholesaler

market could result in higher prices for retailers; it does not show that reducing competition would in any way benefit or has already benefited defendant publishers.

In *AD/SAT, Division of Skylight, Inc. v. Associated Press*, we encountered at summary judgment and rejected a claim that was similarly speculative. 181 F.3d 216, 235 (2d Cir. 1999). There, plaintiff AD/SAT claimed that defendants, newspapers affiliated with the Associated Press ("AP"), engaged in a group boycott against AD/SAT, an advertising broker for newspapers, to benefit a subsidiary of AP that provided the same services; the defendants desired to do so, allegedly, because the newspapers were dues-paying members of AP. *Id.* AD/SAT theorized that the newspapers would enjoy lower AP dues if the AP subsidiary succeeded in its service business. *Id.* In light of the minimal economic benefit that AP members would realize under the scenario, we reasoned that "the factual context of each defendant's decision to terminate, or attempt to terminate, its relationship with AD/SAT strongly suggests that the newspaper defendants had no rational economic motive to join the alleged conspiracies." *Id.*

Here, as in *AD/SAT*, even accepting Dr. Marx's theory as possible, the benefit (or, perhaps, harm) that might accrue to defendants from reducing competition among wholesalers strikes us as sufficiently speculative that businesses in defendants' position would have no rational economic motive to join a conspiracy to drive Anderson out of business. We are not persuaded that some "hope" that reduced competition in the wholesaler market might eventually work in defendants' favor "can be said to be a rational motive for joining the conspirac[y] alleged in this case."

Id. at 235; *see*, *e.g.*, *Eichman v. Fotomat Corp.*, 880 F.2d 149, 161-62 (9th Cir. 1989) (finding implausible a conspiracy between Fotomat and processors to drive franchisees out of business because franchisees generated sales for processors); *see also infra* section I.B.i (discussing unlikely motive to conspire). The kind of broad inferences Anderson urges upon us and that would be permitted if the conspiracy were economically sensible are not appropriate here. *See Publ'n Paper*, 690 F.3d at 63. As we have highlighted, carefully circumscribing the range of inferences permissible in the antitrust context is especially important where, as here, the challenged conduct—moving business away from a higher cost provider—"often is the very essence of competition." *Matsushita*, 475 U.S. at 594, 106 S.Ct. 1348. "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* Under these circumstances, Anderson must "come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Id.* at 587, 106 S.Ct. 1348. Such evidence must "tend[] to exclude the possibility that the defendants acted independently." *AD/SAT*, 181 F.3d at 233. We turn to examining the available evidence.

B. Evidence of agreement

Given our conclusion that the alleged agreement was implausible, we consider whether the evidence presented is nonetheless sufficient to provide a basis for a reasonable jury to find it more likely than not that defendants ceased doing business with Anderson as a result of a "common scheme designed to achieve an unlawful objective." *Apple*, 791 F.3d at 315. Here, their objective would be to reduce

competition in the wholesaler market by driving Anderson out of business. The evidence must tend to exclude the possibility that defendants acted independently and declined to pay the surcharge simply for economic reasons.

The conduct complained of here—refusing to accede to the terms of Anderson's Program on a long-term basis by February 1, 2009—is in our view equally consistent with both a conspiratorial explanation and an independent-action explanation. As we noted in *Anderson II*, a business entity "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Anderson II*, 680 F.3d at 183 (quoting *Monsanto*, 465 U.S. at 761, 104 S.Ct. 1464) (emphasis omitted). Anderson was not willing, as defendants point out, "to do business with [them] on the same terms as the plaintiff's competitors." Time & Hearst Br. 45. Anderson's proposed surcharge thus provides a legitimate and compelling explanation for each defendant to refuse to deal with Anderson. *See AD/SAT*, 181 F.3d at 240 (concluding that availability of "more cost-effective" providers is a "valid business reason[]" for terminating relationship); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 279, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) ("Obviously it would not have been evidence of conspiracy if Cities refused to deal with Waldron because the price at which he proposed to sell oil was in excess of that at which oil could be obtained from others.").

Given Anderson's declared financial instability, and the tight deadline imposed by the terms of Anderson's Program, each defendant also had a legitimate business reason to constantly monitor competitors' behavior to determine Anderson's ongoing viability as part of its own independent assessment

of whether to accede to the Program's terms. *See*, *e.g.*, *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 879 (7th Cir. 2015) ("We can, . . . without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it . . . ."); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1048 (2d Cir. 1976) ("Given the legitimate function of [creditworthiness] data [of customers, to protect sellers from risk exposure], it is not a violation of [Sherman Act §] 1 to exchange such information, provided that any action taken in reliance upon it is the result of each firm's independent judgment, and not of agreement."). And the retailers' past preference for maintaining an exclusive relationship with a single wholesaler provides a legitimate reason for defendants' lobbying efforts to persuade each other and also retailers—which Anderson had already pressured to hold firm in their earlier practice—to consider dealing with an alternative wholesaler. *See Interborough News Co. v. Curtis Publ'g Co.*, 225 F.2d 289, 293 (2d Cir. 1955) (concluding that encouraging other business to "patronize" a new wholesaler was lawful).

Anderson's failure to offer competitive terms does not, however, immunize defendants from antitrust liability, as we have earlier said. *Anderson II*, 680 F.3d at 192. If Anderson presents evidence that sufficiently tends to exclude the legitimate explanations and tends to prove that defendants entered into an agreement to reduce competition in the wholesaler market by driving Anderson out of business, defendants could still be liable for a Sherman Act

violation. *See Apple*, 791 F.3d at 313-15; *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348.

Absent direct evidence of conspiracy, such as an admission by one of the defendants, antitrust plaintiffs must rely on circumstantial evidence to support their conspiracy claims. *See Apple*, 791 F.3d at 315 (discussing examples of direct or "circumstantial facts supporting the inference that a conspiracy existed" (quoting *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013)) (emphasis omitted)). One powerful form of circumstantial evidence is parallel action—proof that defendants took identical actions within a time period suggestive of prearrangement. But "[p]arallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Id.* at 315 (internal quotation marks omitted). Accordingly, when defendants' parallel behavior forms the basis for a Sherman Act claim, "a plaintiff must show additional circumstances"—so-called "plus factors"—which, "when viewed in conjunction with the parallel conduct, would permit a factfinder to infer a conspiracy." *Publ'n Paper*, 690 F.3d at 62. These circumstances may include traditional evidence of conspiracy: statements permitting an inference that the defendants entered into an agreement. They may also include evidence of other circumstances giving rise to a less direct inference of conspiracy, such as "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Apple*, 791 F.3d at 315.

In challenging the District Court's grant of summary judgment to defendants on its claims, Anderson relies on three types of evidence that it presents as reflecting an unlawful agreement: defendants' parallel conduct, as evidenced by their allegedly simultaneous cessation of business with Anderson; certain of defendants' contemporaneous statements, which Anderson argues provides "strong evidence of a collusive scheme"; and evidence of other "plus factors" suggesting that conditions conducive to collusion existed in the single-copy magazine market. After evaluating the evidence of defendants' conduct, statements, and plus factors as a whole, we conclude that Anderson has not offered "sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *Publ'n Paper*, 690 F.3d at 63; *see also Apple, Inc.*, 791 F.3d at 315. The evidence is thus not sufficient for Anderson to survive a motion for summary judgment. *See Publ'n Paper*, 690 F.3d at 63.

i. Ambiguous conduct and communications

We consider the first two forms of evidence together: defendants' conduct and communications must be evaluated in context and with the "overall picture" in mind. Areeda & Hovenkamp, *Antitrust Law*, ¶ 308, at 171; *Apple, Inc.*, 791 F.3d at 315 ("[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (quoting *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962))). After evaluating the evidence against each defendant to consider the question of "who was in agreement with whom and about what" and at what point in time, the picture that emerges is too murky for us to

conclude that evidence is anything other than ambiguous. *See* Areeda & Hovenkamp, *Antitrust Law*, ¶ 1409, at 64. A jury could permissibly infer two conclusions from the evidence in this case: (1) an illegal agreement to boycott Anderson; or (2) legal, independent business decisions to reject Anderson's higher cost Program in favor of lower cost alternatives. A jury's choice between these two equally likely explanations for defendants' conduct, one legal and one illegal, would "amount to mere speculation." *See*, *e.g.*, *Apex Oil*, 822 F.2d at 258 (concluding as to one defendant that "inferring the existence of a conspiracy from the remaining conversations would amount to mere speculation").

Anderson's theory is that all of the defendants (publishers and distributors alike) were in agreement with each other to put Anderson out of business and create a two-wholesaler system, and that they made this agreement on January 15, 2009.[4] Anderson

---

[4] Anderson asserts that the district court erred in observing that "Anderson cannot say when the alleged conspiracy started." *See* Appellants' Br. 47-48 n.12 (quoting *Anderson News III*, 123 F.Supp.3d at 486) ("[T]he evidence indicates the defendants reached agreement by January 15—the day that Parker reported that 'no one will ag[r]ee' to Anderson's proposal."); *see also* Appellants' Reply Br. 46 (the "jury could conclude that the conspiracy was fully formed by January 15"). But Anderson shifts away from the January 15 date when it is convenient—for example, it argues that Time/TWR and Kable did not make their final decisions until February 1, *id.* at 38, 39, and that Bauer did not make its final decision until January 31, *id.* at 44-45. These inconsistencies highlight the fundamental ambiguity of the record before us. Since February 1 was Anderson's threatened shipment cutoff date, the fact that defendants tended to make their decisions around that date just as likely reflected a legitimate reaction to Anderson's Program as it was evidence of collusive behavior.

then argues that the evidence of defendants' parallel conduct and their allegedly incriminating communications allow us to infer that the defendants entered into this agreement. We find this argument unconvincing.

First, defendants' conduct was not, in fact, parallel. At the motion to dismiss stage, we observed that Anderson's "key parallel conduct allegation was that all of the publisher and distributor defendants ceased doing business with Anderson . . . within a span of three business days . . . ." *Anderson II*, 680 F.3d at 191 (emphasis and internal quotation marks omitted). But the evidence presented at summary judgment undercuts that allegation and suggests that (1) defendants' responses to Anderson's Program were not uniform, and (2) the tight timeframe for those responses—between January 12-14 and February 1—was of Anderson's own making, not the result of an unlawful agreement. The defendants each reacted in different ways to Anderson's Program: Many defendants (Time/TWR, Kable, AMI) undertook independent efforts to negotiate with Anderson. Some defendants (AMI, Hachette, Curtis, Rodale) even agreed to temporarily pay the surcharge required by Anderson and to distribute magazines through Anderson for the month of February. That these varying courses of action occurred undermines Anderson's assertion that defendants' "parallel" conduct supports an inference of a conspiracy to drive Anderson out of business.

Next, considering defendants' communications in the context of their nonparallel conduct, defendants' actions are at least equally consistent with legitimate, independent, and procompetitive action to reject Anderson's Program by seeking alternative wholesalers

that could offer better terms, as with conspiratorial action. Because Anderson gave publishers only two weeks to consider the Program, it was reasonable (and probably prudent) for industry players to gather information about how the market would react and to plan for the possibility that negotiations with Anderson would be unsuccessful and Anderson would follow through on its threat to cut off distribution. In line with this reasoning, courts have rejected arguments that an antitrust claim can survive summary judgment based on evidence that defendants monitored competitors' behavior, *In re Text Messaging Antitrust Litig.*, 782 F.3d at 879, engaged in conscious parallelism, *Apex Oil Co.*, 822 F.2d at 252, attempted to persuade others to switch to an alternative wholesaler, *Interborough News Co.*, 225 F.2d at 293, or communicated extensively with a distributor, *Monsanto Co.*, 465 U.S. at 762, 104 S.Ct. 1464.

Finally, we consider the factual context of each defendant's actions and communications during the short timeframe between Anderson's announcements of its Program from January 12 to 14, and Anderson's implementation of its "going dark" strategy, cutting off its magazine deliveries after February 1, 2009. *See AD/SAT*, 181 F.3d at 234 ("[W]e require a factual showing that each defendant conspired in violation of the antitrust laws, and have not adopted a 'walking conspiracy' theory in place of such a showing."). On this record, Anderson has failed to present sufficient evidence to show that it was more likely than not that defendants agreed on January 15 to put Anderson out of business and reduce wholesaler competition. *Publ'n Paper*, 690 F.3d at 63. We discuss below samples of the evidence adduced.

1) Time/TWR

Evidence in the record as it relates to Time/TWR can be interpreted as either supporting or refuting the inference of an illegal conspiracy. Anderson highlights third party testimony against Time/TWR, but much of that testimony is ambiguous. For example, David Rustad, the President of Qrius Concepts (which handled sales for the retailer Kroger), testified that TWR President Richard Jacobsen told him that "no publishers were going to support the 7-cent surcharge" and that "they were going to teach [Anderson] a lesson." J.A. 2087, 2089. However, Rustad's testimony also points the other way: Rustad testified as well that Jacobsen articulated legitimate business reasons for why no one would support the charge because Anderson's "demands were unrealistic . . . . [T]hey had given Anderson News previous concessions already, and . . . there[] [was] no way they could give additional concessions to Anderson News . . . ." *Id.* at 2089.

Rustad further acknowledged that everyone in the industry, including Kroger, was "trying to dig into" the question of which publishers would acquiesce to the Program "because there was a little bit of contradictory information" and Kroger was "trying to understand what [it was] going to do as well in the event [Anderson] went out of business." *Id.* at 2087-88. This is consistent with legitimate industry monitoring behavior and, therefore, is not evidence (much less persuasive evidence) of conspiracy. *See*, *e.g.*, *In re Text Messaging Antitrust Litig.*, 782 F.3d at 879 ("We can . . . , without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior . . . ."); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 126

(3d Cir. 1999) ("Gathering competitors' price information can be consistent with independent competitive behavior.").

Other evidence in the record also tends to contradict Anderson's theory that Time/TWR agreed with the other defendants to boycott Anderson. For example, on January 27, 2009, TWR sent a letter to Anderson asking for "a short period of time during which we could negotiate terms on which Anderson News Company could continue to serve as wholesaler for Time Inc. publications." J.A. 1966. TWR noted that it was "so interested in attempting to reach an agreement with you that instead of proposing a standstill, we are proposing a standstill in which we are providing you with an additional two points of discount on Time Inc. weekly magazines. We hope that you value our relationship sufficiently to allow us a brief period of time to work out a mutually beneficial agreement." *Id.* That same day, Time CEO Ann Moore called Mr. Anderson's brother, Clyde Anderson, to make sure Time's request would not "fall through the cracks," and in the hopes that Clyde Anderson could "save the day." C.A. 1453. After Anderson rejected TWR's proposal, TWR sent a letter to Anderson advising that TWR would no longer ship Time publications to Anderson "[i]n view of [its] unwillingness to suspend the new fee structure . . . even for a short period of time to allow us to attempt to work out a long-term distribution agreement . . . ." J.A. 1467.

Anderson argues that TWR's failed proposal represents a mere "contingency plan in the event the agreement [to boycott] collapsed." Appellants' Reply Br. 48. But it seems at least equally likely that Time/TWR was genuinely interested in continuing its

relationship with Anderson when it made this final counterproposal on January 27, 2009—twelve days after (as Anderson alleges) Time/TWR agreed with the other defendants to boycott Anderson.

2) Curtis

The evidence presented against Curtis is similarly ambiguous. For example, Source President James Gillis testified that Curtis CEO Bob Castardi told him, "If Rick [Jacobsen, of TWR] says right, I go right. If he says left, I go left. We're in lockstep. We're doing this together." J.A. 1359. Mr. Anderson also testified that Castardi told him, "Rich [Jacobsen, of TWR] and I are working together on this." *Id.* at 251. Castardi himself testified, however, that Curtis was compelled by economic realities—not necessarily a conspiratorial agreement—to follow Time/TWR. Given Time/TWR's significance in the single-issue magazine copy market, Castardi concluded that its decision alone not to ship to Anderson would put Anderson out of business, rendering Anderson "not . . . a viable place for [Curtis] to send [its] product." C.A. 160; *see also Joseph E. Seagram & Sons v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71, 80 (9th Cir. 1969) ("A supplier who becomes dissatisfied with an existing distributor . . . has a legitimate interest in seeing that any new distributor to which it might turn would be viable. Manufacturers' or suppliers' decisions about the distribution of their products are not made in a vacuu[m]." (internal quotation marks omitted)).

Curtis also presented evidence that tends to exclude the possibility that it joined a conspiracy to boycott Anderson on January 15. Emails indicate that Castardi attempted to negotiate with Anderson at least a few times during the period from January

21 to 26, noting that "I have been asking for discussions with [Mr. Anderson] for the past week; to no avail . . . . As I said in the [Jan. 21] meeting, the vast majority of our clients have adamantly decline[d] you[r] offer without any influence from Curtis." J.A. 640; *see also id.* at 793, 795, 801. An internal email between Anderson News President Frank Stockard and Mr. Anderson noted that Castardi "[s]aid he is trying to help." *Id.* at 795. Mr. Anderson did not respond to Castardi's email. *Id.* at 292.

In addition to expressing interest in negotiating with Anderson, Curtis helped facilitate shipments for those of its client publishers, including Rodale and Hachette, that were willing to pay Anderson's $0.07 surcharge for the month of February. Curtis's willingness to facilitate some shipments to Anderson even after the cutoff date of February 1 cuts against Anderson's theory that Curtis entered an unlawful agreement with the other defendants on January 15 with the goal of putting Anderson out of business.

3) Kable

Anderson criticizes Kable for statements that, it contends, demonstrate Kable's involvement in a conspiracy. Such statements arise primarily out of Kable's communications that share information with its competitors, such as an email to Bauer Vice President Richard Parker relating that Kable's clients were "cutting of[f] Source and [Anderson]." C.A. 2854. As discussed above, this sort of information-sharing can be legitimate monitoring behavior. For example, Anderson makes much of Kable CEO Michael Duloc's reference in a January 16, 2009 email to "[t]he plan" involving "Bauer (and AMI)." *See* Appellants' Reply Br. 39; C.A. 2798. But Duloc's email is hardly a smoking gun. Duloc responded to

an email asking about other publishers' plans to pay the $0.07 surcharge by explaining that "[t]he plan for Bauer (and AMI) is to[] not pay but ship. Let Anderson be the one to not deliver and then explain to retailers as opposed to publishers looking like the bad guy by not shipping." C.A. 2798. The reference to "the plan," viewed in context, seems to mean each publisher's independent plan, rather than a conspiracy among all of the defendants; it is discussed in the context of monitoring other industry players' behavior to determine how to calibrate Kable's actions. Furthermore, the "plan" as articulated here is to proceed with shipments to Anderson while ignoring the surcharge imposed by Anderson's Program, which is not consistent with Anderson's theory that the defendants agreed among themselves on January 15 that they would halt business with Anderson.

Internal emails at Kable also confirm that on January 14—the day before Kable is alleged to have entered an illegal agreement to boycott Anderson—Duloc specifically instructed an employee not to advise publisher-clients to reject Anderson's Program, expressing concern about a debt of $10 million owed by Anderson to Kable. Other evidence—including emails between Duloc and Anderson News President Stockard—suggests that Kable attempted to negotiate with Anderson on January 28, which is in tension with the theory that Kable had agreed to boycott Anderson on January 15. And, finally, as late as January 31, Duloc left open the possibility that it might stick with Anderson if Time changed course.

4) AMI/DSI

Anderson argues that communications between distributor DSI and its publisher-clients (AMI,

Bauer, Rodale, and Hachette) constitute evidence of a conspiracy. We find these communications, too, ambiguous at best, however.

In an email to AMI CEO David Pecker, DSI President Mike Porche noted that Bauer "believes we should start simultaneously using our collective resources and influence to direct business towards [TNG-Wholesaler]." C.A. 1778. In the same email, Porche informed Pecker that Bauer agreed that a "strategy . . . of first offering to test reducing costs for wholesalers by eliminating a large portion of their one way freight and return processing costs"—a test that, in the end, did not happen—"makes sense." *Id.* Porche acknowledged that, if the cost-reduction plan did not work, "we have little option other than to develop our own cooperative distribution system." *Id.* This email is ambiguous at best: it demonstrates that, far from agreeing to a boycott with the goal of driving Anderson out of business, defendants had considered a plan to help make Anderson's business viable. Their concurrent consideration of how they might deal with preparing for the worst-case scenario of having to develop a backup wholesaler is not precluded by antitrust law.

Moreover, the evidence of coordination to which Anderson points is equally consistent with lawful activities. For example, DSI prepared a "Script for Wal-Mart" and persuaded two of its publisher-clients, AMI and Bauer, to place their own phone calls to the retailer. C.A. 2722. Although the similarities between AMI and Bauer's phone calls with Wal-Mart could suggest that they were acting to further a conspiracy, the use of a script is as consistent with a legitimate business activity—ensuring continued access to a major retailer if they switched

to a new wholesaler—as with an alleged unlawful boycott. That DSI as a distributor aided AMI and Bauer in their communications with Wal-Mart is hardly convincing evidence that these parties also entered into a separate agreement with the goal of putting Anderson out of business.

As late as January 26, DSI documented in an email between Porche and consultant Mike Roscoe how industry players still remained uncertain about whether to accept Anderson's Program. Porche observed that "Curtis and Bauer both think not shipping Anderson is a mistake" and that he himself had also "gone back and forth" on the decision. C.A. 1788. At the end of the email, Porche also observed that "nobody knows what is going to happen, what I expect to see assuming Bauer and AMI ship is that Anderson will ship some product and not ship others[,] making examples of certain publishers. That is not going to go over very well for the publisher not distributed . . . ." *Id.* This observation illustrates why industry monitoring was required: each defendant had to independently determine the right business decision *for it*, based on what was happening in the industry overall. *See In re Text Messaging Antitrust Litig.*, 782 F.3d at 879.

Similarly, the "man in bauerland" exchange cited by Anderson is consistent with efforts by AMI, DSI, and Bauer to secure a new wholesaler. On January 30, 2009, Rodale Vice President Richard Alleger emailed DSI executive Jay Wysong, asking, "Our man in bauerland still solid?" C.A. 1795. Wysong responded, "He's solid alright." *Id.* The next day, Wysong told publisher-client Bauer's Vice President, Richard Parker, "This will all work out if we can keep everyone together." C.A. 2761. To be sure,

these statements could suggest that DSI's publisher-clients were checking in to make sure that everyone was following through on an illegal agreement to boycott Anderson. But the statements are equally consistent with legitimate efforts to monitor Bauer's response to the Anderson Program in order to determine the likelihood that distributor DSI would need to switch to another wholesaler and secure retailers' approval for that wholesaler.

Perhaps most tellingly, even after the cutoff date of February 1, three of DSI's four clients (AMI, Hachette, and Rodale) ultimately continued making some shipments and paying the requested surcharge to Anderson. This fact cuts deeply against Anderson's theory that AMI/DSI agreed to boycott Anderson on January 15. Although Anderson might have been dissatisfied with a mere one-month commitment to pay the surcharge (as illustrated by its argument that "a one-time payment for the magazines Anderson already possessed is far from 'exactly what Anderson News asked,'" Appellants' Reply Br. 43), DSI/AMI, Hachette, and Rodale's willingness to make *any* surcharge payments is powerfully at odds with their alleged conspiratorial intent of putting Anderson out of business.

5) Hachette

The evidence against Hachette is also ambiguous. For example, in a January 20, 2009 internal email to a Hachette employee, a Hachette Vice President noted that Hachette was "in constant touch with Curtis, DSI, and other publishers . . . . [T]his will come down to who blinks first[,] publishers or ANCO." C.A. 2794. These statements are as consistent with legitimate assessment of industry conditions and monitoring of competitors as with an illegal antitrust

conspiracy, however. Moreover, in that same email, the Hachette executive described his plan to "see when potentially each magazine's March issues may be at risk" and "estimate [] the newsstand sales at risk" based on forthcoming updates from other publishers. *Id.* This suggests that, five days after the alleged January 15, 2009 agreement date, Hachette executives were uncertain about their competitors' plans.

More importantly, as discussed above, Hachette ultimately continued making some shipments and paying the requested surcharge to Anderson even after the cutoff date of February 1. This fact severely undermines Anderson's theory that Hachette agreed to boycott Anderson on January 15.

6) Bauer

Anderson points to several "incriminating communications" from Bauer. Appellants' Reply Br. 44. Like those discussed above, the communications it cites are ambiguous at best and do not "tend[] to exclude the possibility that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348. For example:

- After meeting with AMI and DSI on January 14, Bauer Vice President Richard Parker wrote a January 15, 2009 email to President Hubert Boehle, stating that Pecker (from AMI) was "with us," along with Ann Moore (from Time). C.A. 2737. "[A]s a matter of fact[,] no one will ag[r]ee," he noted. *Id.* Anderson, surprisingly, identifies this as the point when all of the defendants agreed to boycott Anderson. But the statement that Pecker and Moore are "with us" could either refer to an illegal conspiracy to boycott or an innocent observation that, based

on the latest industry information, AMI and Time had also independently decided to reject the Anderson Program. In fact, that same day, Boehle also sent another internal email observing that "right now none of the major publishers seem responsive to Anderson's offensive. I hope it will stay that way, but I am skeptical . . . ." C.A. 2743. This suggests that his initial email about AMI and Time's plans reflected an observation, not a declaration of common intent.

- Boehle emailed Parker on January 25, noting that the Wal-Mart response "doesn't sound encouraging. Are the other publishers holding the line?" C.A. 2754. The import of the phrase "holding the line" is uncertain: on one hand, it could suggest conformity with an illegal agreement to boycott Anderson, but, on the other hand, it could be no more than an informal reference to Bauer's industry monitoring (and its related, reasonable hope that publishers would independently decide not to pay Anderson's surcharge). The context of the email provides support for the latter inference: Parker was having trouble contacting Wal-Mart and explained that Bauer "need[ed] direction from Wal-Mart for distribution beyond February 1, 2009." *Id.* at 2755. Bauer's monitoring of other industry players was necessary for it to determine whether and how to arrange an alternative distribution plan for Wal-Mart.
- Rodale Vice President Richard Alleger emailed Parker to note that Comag announced a tentative understanding with Source, and Parker responded, "Doesn't matter source won't be around much longer. Talk in the AM." C.A. 2758.

> This is consistent with legitimate activities: namely, monitoring industry movement and predicting how the volatile wholesaler situation would likely unfold to aid Bauer's own independent decision-making.

Bauer, moreover, was the only one among DSI's four clients that decided *not* to continue shipping (and, thus, not to pay the Anderson surcharge after February 1). Mr. Anderson also described Bauer's initial reaction as early as January 13 to be "very, very firm," noting that, in comparison to other publishers which engaged in "good dialogue" with Anderson, there was "not open dialogue" in the Anderson-Bauer meeting. J.A. 173. Bauer's actions seem, at the very least, to be equally consistent with a business strategy not to negotiate with Anderson after it made its surcharge demand as with a January 15 agreement with DSI, AMI, Hachette, and Rodale to boycott Anderson, and the fact that the others, unlike Bauer, seemed at least to consider negotiating with Anderson for ongoing deliveries after February 1 suggests that Bauer did, in fact, act alone.

7) Rodale

Rodale's communications, placed in context, are similarly ambiguous. In an internal email dated January 27 regarding "Wholesaler Updates," Rodale Vice President Richard Alleger observed that "[t]he situation remains very fluid." C.A. 2807. Although Alleger observed that "we all need 'People' magazine to lead the charge," *id.*, that statement could as easily be interpreted as an observation about People's market power as an implicit admission of collusion. Alleger's stated uncertainty about what would happen also suggests that, as late as January 27,

Rodale had not reached any agreement with the other Defendants to boycott Anderson.

Moreover, as discussed above, Rodale ultimately instructed Curtis to pay the surcharge for February 2009 and continued making shipments to Anderson even after the cutoff date of February 1. These undisputed facts cut against Anderson's theory that Rodale agreed to boycott Anderson on January 15.

* * *

Based on the above analysis and our review of the record, we conclude that the evidence against each defendant is at best (from Anderson's perspective) in equipoise on the question of whether defendants conspired: What Anderson offers as evidence of the conspiracy could just as easily be characterized as evidence of competition. Without more, such an ambiguous record is insufficient to withstand the scrutiny required by the Supreme Court in *Matsushita*, particularly when, as here, the alleged conspiracy makes little economic sense. We then look at the record with regard to evidence of the remaining "plus factors."

ii. Inconclusive plus factors

As noted earlier, because the basis of Anderson's conspiracy claim is defendants' parallel behavior, Anderson must show evidence of plus factors such as "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Apple*, 791 F.3d at 315 (quoting *Mayor & City Council of Baltimore, Md.*, 709 F.3d at 136). Anderson's arguments regarding the import of certain other plus factors, which it claims bolster

an inference of unlawful conspiracy, suffer from two weaknesses. First, as discussed above, we see a factual flaw: defendants did not in fact engage in parallel conduct. Without "parallel acts" to be reviewed "in conjunction with" the circumstantial evidence, *Apple*, 791 F.3d at 315 (quoting *Apex*, 822 F.2d at 253), evidence supporting the presence of certain plus factors in the single-copy magazine industry can provide little support for a finding of unlawful conspiracy. Second, even were we to view defendants' responses to the surcharge announcement as suspect parallel conduct, the evidence supporting the presence of certain plus factors—the assertions that defendants had a common motive to conspire and that defendants' conduct in declining to pay the surcharge contravened their individual self-interest, as well as the presence of increased interfirm communications in the relevant period—is also too malleable to fairly support an inference of conspiracy.

To begin, we note that the defendants had an unlikely motive to conspire, given our conclusion that the alleged conspiracy is economically implausible. A weak motive to conspire does not "save defendants who have clearly, though foolishly conspired," Areeda & Hovenkamp, *Antitrust Law*, ¶ 308, at 173-74. But "[a]s a practical matter . . . a conspiracy's 'objective rationality' or motive is a necessary condition for inferring conspiracy from the usual array of evidence, which is usually circumstantial." *Id.* at 174. Also, "[m]otive to conspire tends to be negated [1] when a defendant shows that the alleged agreement would harm the alleged conspirators; or [2] when the defendant shows a 'plausible and justifiable reason for its conduct that is consistent with proper business practice.' " *Id.* at 175-76. Here, both motive-negating

factors are present. First, as discussed above, the conspiracy seems implausible because it is likely to harm the defendants by allowing wholesalers to charge higher prices, and because, even if wholesalers charged retailers higher prices instead, that would result in a reduction of magazine sales, which would further harm the defendants. Second, it made perfect business sense for the defendants to constantly monitor industry conditions during the short-term period given by Anderson to consider its ultimatum, before ultimately deciding to independently reject Anderson's higher-cost proposal in favor of lower-cost alternatives.

After considering whether defendants had a common motive to conspire, we look again at the evidence that Anderson offers to support its assertion that the defendants' conduct was against their individual economic self-interest. Anderson again relies on Dr. Marx's report, which the District Court excluded on this point, concluding that her opinions "merely recite what is on the face of documents produced during discovery." *Anderson VI*, 2015 WL 5003528, at *4 (internal quotation marks and alterations omitted). We agree with the District Court's decision to exclude those portions of Dr. Marx's opinion that merely interpret defendants' statements. Other portions of her report contain some relevant information, however. For example, her supplemental report provides a chart comparing the sales of *People* and *US Weekly* at Source-serviced retailers in the relevant period, and showing that *US Weekly* sales increased briefly when *People* was not available in February 2009, just after the events at issue here. This temporary spurt provides at least some support for Anderson's assertion that each individual defen-

dant might have had something to gain—at least briefly—from being one of the few magazines shipped by Anderson in February. Accordingly, to the extent the District Court excluded this portion of her opinion, we conclude that the District Court exceeded the permissible bounds of its discretion. We therefore consider this evidence as part of our *de novo* review of the record.

Having done so, however, we think that it accomplishes little. To show that some defendants could have enjoyed short-term gains by continuing to ship through Anderson in the month of February hardly establishes that it would be in defendants' long-term interest to accede to the proposed terms and ship to Anderson. Absent evidence regarding the long-term costs or benefits of acceding to the proposed surcharge and continuing to ship to Anderson, the inferential gap between the evidence presented to the conclusion that refusing to ship was against defendants' economic interests is simply too great. Because Anderson has not offered any evidence to bridge that gap, we decide that the evidence offered in this regard is inconclusive.

In addition, the inference that can reasonably be drawn from the increased level of interfirm communications during the two-week period between Anderson's announcement (January 14) and the deadline to accept the terms of the Program (February 1) amounts to little. Anderson argues that the "pattern and frequency" of communication between competing publishers and distributors during this period "supports an inference of conspiracy." Appellants' Br. 39. Anderson relies again on the views of Dr. Marx, who presents a chart depicting a "nearly ten-fold increase (by duration) in inter-defendant

communications" during this period. *Id.* at 40 (citing C.A. 2258). Even if we take these statistics at face value as significant, what exactly they signify eludes us. Although, unlike the District Court, we cannot dismiss these calls altogether as necessarily innocent, in this context their frequency does not weigh heavily in support of an inference of unlawful conspiracy. Even when viewed in conjunction with the evidence showing that a few defendants may have attempted to conceal some communications, that there were increased communications during a compressed period created, in effect, by Anderson itself, is as consistent with permissible activities, such as monitoring competitors' responses to Anderson's proposed surcharge, *see In re Text Messaging Antitrust Litig.*, 782 F.3d at 879, and creating contingency plans in case Anderson refused to rescind its surcharge, *see Interborough*, 225 F.2d at 293, as it is with an unlawful conspiracy to put Anderson out of business. Furthermore, as already discussed in subsection (i) above, each defendant's internal and interfirm communications, when properly viewed in the setting of each defendant's conduct and industry conditions, equally support inferences of competition and conspiracy.

Having considered the totality of the circumstances and the evidence offered by Anderson in support of its allegations, we conclude that a factfinder could not reasonably infer that the conspiratorial explanation is more likely than not. Although some of the evidence discussed above is suggestive of an agreement, when considered in light of the fact that the benefits of alleged conspiracy are at best speculative and the mass of evidence equally compatible with independent action, the evidence does not sufficiently

"tend to exclude" the possibility that defendants acted permissibly. Accordingly, we affirm the District Court's grant of summary judgment to defendants on Anderson's Sherman Act claims.

II. State law claims

Anderson also appeals the District Court's grant of summary judgment to defendants on its New York state law claims for tortious interference with business relations and with contract and civil conspiracy. Regarding the tortious interference claim, the District Court concluded that "[t]o the extent [Anderson] breached [its] contracts with retailers, the evidence indicates that it was Anderson's actions, not [d]efendants' actions, that caused Anderson to breach these contracts." *Anderson III*, 123 F.Supp.3d at 510. As to the civil conspiracy claim, the District Court noted that New York "does not recognize an independent tort of conspiracy" and concluded that, because Anderson has not provided evidence of "an otherwise actionable tort" here—the tortious interference claim—its civil conspiracy claim failed as a matter of law. *Id.* at 510-11 (quoting *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006); *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 503 N.E.2d 102 (1986)).

Anderson argues that we should reinstate its state law claims because the District Court "rejected the tortious-interference claim based solely on its predicate antitrust holding," which Anderson argues was incorrect. Appellants' Br. 59. Because we conclude that Anderson's Sherman Act claim fails, and because Anderson has abandoned on appeal any other challenge to the substance of the District Court's

grant of summary judgment on the state law claims,[5] we affirm.

III. Counterclaims

Defendants AMI, Hearst, and Time (collectively, "counterclaim-plaintiffs") filed counterclaims against Anderson News and Charles Anderson, Jr., alleging that Anderson engaged in an illegal price-fixing conspiracy with Source and, in support of that conspiracy, "induced" certain retailers (that is, Kroger and Wal-Mart) to "threaten[] to boycott publishers that attempted to switch to competing wholesalers." C.A. 39-40. The counterclaim-plaintiffs allege that they suffered "tens of millions of dollars" in damages from lost sales as a result of Anderson's "going dark" strategy and because of "ongoing delivery disruptions" in the aftermath of Anderson's exit; they also incurred costs to develop "alternate distribution routes" after Anderson's demise. C.A. 38-39.

The District Court granted summary judgment to Anderson on these counterclaims, concluding that they failed as a matter of law because the counterclaim-plaintiffs had not suffered damages "of the type the antitrust laws were intended to prevent" and thus lacked antitrust standing. *Anderson III*, 123 F.Supp.3d at 512 (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013)).

---

[5] Anderson argued before the District Court that its tortious interference with contract claim could be "predicated on a plaintiff's breach of its contract with a third-party where, as here, the defendants' actions prevented the contract from being performed." J.A. 1596 (internal citations omitted). Anderson also argued that it had grounds for a tortious interference with business relations claim in defendants' disparaging comments to retailers, which, it argues, persuaded retailers to terminate their relationships with Anderson. Anderson has abandoned these claims on appeal and we do not address them further.

We agree that counterclaim-plaintiffs lack antitrust standing.

Section 4 of the Clayton Act provides a treble-damages remedy to "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. Despite the statute's broad language and broad remedial purpose, *see Blue Shield of Va. v. McCready*, 457 U.S. 465, 472-73, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), the Supreme Court has explained that "Congress did not intend the antitrust laws to provide for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (internal quotation marks omitted). The law therefore limits recovery to plaintiffs who can demonstrate that they experienced an "injury of the type the antitrust laws were intended to prevent" and that "flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). A plaintiff suffers an antitrust injury only if it "is adversely affected by an *anticompetitive* aspect of the defendant's conduct." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (emphasis in original).

The District Court concluded that the injuries the counterclaim-plaintiffs alleged that they suffered—including "lost profits from sales that they would have made, but for Anderson's 'going dark' strategy" and "costs associated with making alternative arrangements to replace Anderson News and Source" —do not " 'flow[] from that which makes' " Anderson's

acts unlawful.[6] *Anderson III*, 123 F.Supp.3d at 511-12. We agree. The counterclaim-plaintiffs' injuries are unrelated to the anticompetitive aspects of the two conspiracies alleged.

First, the counterclaim-plaintiffs' lost profits and withheld payments are the result of Anderson's individual conduct, not the conspiracies that Anderson is claimed to have conducted with Source. Although Anderson's conduct with Kroger and Wal-Mart, as the counterclaim-plaintiffs describe it, might reasonably be questioned, and the resulting injuries might be recoverable in some other type of action, those injuries do not arise from any sort of increase in prices or reduction in the freedom of the marketplace, and are not the type of injuries the antitrust laws were intended to prevent.

Second, the costs associated with securing an alternative wholesaler do not result from the anticompetitive aspect of either the price-fixing claim or the alleged group boycott. Selecting among competing wholesalers and ultimately switching to a lower-cost wholesaler reflects the essence of competition, even if making such a switch turns out to be costly.

---

[6] The counterclaim-plaintiffs correctly note that the District Court held that they lacked antitrust standing for another reason, too: it concluded that the counterclaim-plaintiffs would have suffered the same injuries even if Anderson had been acting alone. This basis for summary judgment was not, they argue, raised before the District Court by the parties and, therefore, could not permissibly serve as the basis for granting summary judgment since the counterclaim-plaintiffs had no notice of the ground and no opportunity to respond. Fed. R. Civ. P. 56(f). Because we agree with the District Court that the counterclaim-plaintiffs' injuries do not flow from that which makes Anderson's alleged acts unlawful, we need not address this argument.

In an effort to avoid this straightforward conclusion, the counterclaim-plaintiffs argue that Anderson's "going dark" strategy was an "integral aspect" of its conspiracy to raise prices and to force the publishers to accept the surcharge, and that, therefore, the injuries suffered as a result of that strategy "flowed directly from the anticompetitive scheme put in place by Mr. Anderson and Anderson News." Time & Hearst Br. 71-72. The counterclaim-plaintiffs rely on *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), to support this claim, but their comparison to *McCready* is unavailing. In *McCready*, a putative class alleged that Blue Shield of Virginia, an insurance company, conspired with an organization of psychiatrists to boycott clinical psychologists and reduce competition in the general psychotherapy market by refusing to reimburse subscribers for visits to psychologists. *Id.* at 469-70, 102 S.Ct. 2540. The lead plaintiff visited a psychologist and was denied reimbursement by her insurer. *Id.* at 475, 102 S.Ct. 2540. Although the alleged conspiracy's object was to reduce competition in the psychotherapy market and the lead plaintiff's injury did not result from reduced competition, the Supreme Court held that her injuries were still "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market" and therefore constituted an antitrust injury, because denial of reimbursement was the very mechanism by which the boycott operated. *Id.* at 484, 102 S.Ct. 2540.

Here, by contrast, Anderson's "going dark" strategy was not the mechanism by which the alleged price-fixing conspiracy operated. It was, instead, one of Anderson's many levers to force publishers to accept

the surcharge. Although these actions and the attendant injuries were certainly related to the alleged conspiracy, it is not enough that the injury "be causally linked to the asserted violation." *Gatt Commc'ns*, 711 F.3d at 76 (internal quotation marks omitted). Because the counterclaim-plaintiffs' injuries resulted from an action related to, but not "inextricably intertwined with," Anderson's alleged conspiracies, they have not suffered an antitrust injury. *See id.* at 76-77 (holding that "mere termination" of a dealership agreement, alleged to be in furtherance of bid-rigging scheme, was not antitrust injury flowing from that which made the bid-rigging scheme unlawful).

Accordingly, we conclude that the counterclaim-plaintiffs lack antitrust standing to pursue the stated counterclaims. We therefore affirm the District Court's grant of summary judgment to Anderson in this regard.

CONCLUSION

In sum, the evidence presented by Anderson, while perhaps consistent with an unlawful conspiracy among defendants, does not sufficiently "tend[] to exclude" other interpretations of the events that took place in the single-copy magazine industry during several hectic weeks in January 2009. When it introduced the Program, Anderson sought to significantly change the state of the market by suddenly seeking to impose a surcharge and setting an immediate deadline for publishers to take it or leave it. It is not surprising that defendants quickly rejected the proposal in favor of switching to existing wholesalers without surcharges, refusing to accept the terms of Anderson's new business model. No reasonable jury could find on this record that the defendants entered into "a conscious commitment to a common scheme

designed to achieve an unlawful objective." *Apple*, 791 F.3d at 315.

For this reason and those discussed above, we **AFFIRM** the District Court's judgments.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of August, two thousand and eighteen.

Before: Debra Ann Livingston,
Denny Chin,
Susan L. Carney,
Circuit Judges.

Nos. 15-2714-cv(L), 15-2889-cv(XAP),
15-2894-cv(XAP), 15-2903-cv(XAP)

ANDERSON NEWS, L.L.C.,
Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

LLOYD T. WHITAKER, AS THE ASSIGNEE UNDER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS FOR ANDERSON SERVICES, L.L.C.,
Plaintiff-Appellant,

v.

AMERICAN MEDIA, INC., TIME INC., HEARST COMMUNICATIONS, INC.,
Defendants-Counter-Claimants-Appellees-Cross-Appellants,

BAUER PUBLISHING CO., LP., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA, U.S., INC., KABLE DISTRIBUTION

SERVICES, INC., RODALE, INC., TIME WARNER RETAIL SALES & MARKETING, INC.,
Defendants-Appellees,

HUDSON NEWS DISTRIBUTORS LLC,
THE NEWS GROUP, LP,
Defendants,

v.

CHARLES ANDERSON, JR.,
Counter-Defendant-Cross-Appellee.

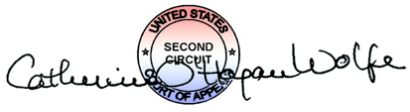
[Filed: August 6, 2018]

JUDGMENT

The appeals in the above captioned case from a judgment of the United States District Court for the Southern District of New York were argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgments of the district court are AFFIRMED *nunc pro tunc* to July 19th, 2018.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 09 Civ. 2227(PAC)

ANDERSON NEWS, L.L.C. AND LLOYD WHITAKER, AS THE ASSIGNEE UNDER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS FOR ANDERSON SERVICES, L.L.C.,
Plaintiffs,

v.

AMERICAN MEDIA, INC., BAUER PUBLISHING CO., L.P., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA U.S., INC., HEARST COMMUNICATIONS, INC., HUDSON NEWS DISTRIBUTORS LLC, KABLE DISTRIBUTION SERVICES, INC., RODALE, INC., TIME INC., AND TIME/WARNER RETAIL SALES & MARKETING, INC.,
Defendants.

AMERICAN MEDIA, INC., HEARST COMMUNICATIONS, INC., AND TIME INC.,
Counterclaim-Plaintiffs,

v.

ANDERSON NEWS, L.L.C. AND CHARLES ANDERSON, JR.,
Counterclaim-Defendants.

[Signed Aug. 20, 2015]

OPINION & ORDER

PAUL A. CROTTY, District Judge:

If there were ever an antitrust case of the pot calling the kettle black, this is it. In mid-January 2009, Anderson News, which had been losing money for years, unilaterally decided to raise its prices and shift its inventory costs to publishers and distributors in the single-copy magazine market. The publishers were given two weeks to fall in line with Anderson News' new price and cost regime, "or else."[1] If the publishers and distributors did not acquiesce to the price increase and to transferring inventory expenses by then, Anderson would not accept their single-copy magazines for distribution as of February 1, 2009. Anderson also threatened to exit the business if publishers and distributors did not accept the price increase and inventory expense shift.

Not surprisingly, the target audience saw nothing in Anderson's proposal other than higher prices and greater costs. They rejected the plan, and did so almost immediately. Indeed, only 86 of 1,570 publishers accepted the proposal. Other wholesalers did not raise their fees, nor did they seek to shift inventory expenses. The publishers and distributors chose to do business with the wholesalers that offered lower prices and did not seek to increase inventory costs.

But Anderson was not finished with its plan, which it had been preparing for some months prior to the mid-January, 2009 announcement to the publishers

---

[1] Anderson argues that its January statements were "invitations to negotiate" or a "proposal," not demands or ultimatums. The outcome of this action does not depend on how past conduct is labelled, but rather, on the conduct and behavior itself.

and distributors. It had talked to two large retailers concerning the plan, and had an agreement with these retailers that they would not shift their business to other wholesalers. In other words, the publishers and distributors would have to deal with Anderson, if they wanted their magazines displayed at these large retailers. Anderson also attempted to take advantage of its controlling position in ProLogix East[2] by refusing to open its warehouse and make deliveries for Anderson News' competitor, The News Group. Anderson's threat to stop deliveries was enjoined by a federal court in the District of Delaware. When Anderson received notice of the District Court's Order, it chose to go out of business.

After an extended period of discovery, Anderson has searched but not found any direct evidence of a conspiracy to drive Anderson out of business. In fact, Defendants had a financial interest in Anderson's continued viability, because at the time it left the market, Anderson owed the Defendants substantial sums for magazines it had received on credit.

The Amended Complaint alleged a meeting between Anderson's competitors Hudson News and The News Group, as well as distributors Curtis Circulation, Time/Warner Retail, and Distribution Services, Inc.; that alleged meeting played a large role in the Second Circuit's decision on appeal from this Court's dismissal of the Complaint. Discovery has now revealed that the assertion that such a meeting occurred is dubious at best.

---

[2] ProLogix East was a joint venture between Anderson Services and the logistics affiliate of Anderson's competitor The News Group. ProLogix East provided magazine delivery services to retailers in the southeast United States.

Instead, Anderson shifts gears and points to a series of meetings and communications from which it infers that a conspiracy existed and caused Anderson's demise. Anderson conceded at argument, however, that many of the conversations and meetings were entirely legal. Certainly, meetings between publishers and their distributors were perfectly appropriate. Moreover, any inference supporting a conspiracy must be weighed against an inference of independent action by each of the defendants. This is particularly so when, even after extensive discovery, Anderson cannot say when the alleged conspiracy started. It is clear that some publishers rejected Anderson's proposal—immediately upon hearing it from Anderson. They knew the proposal was uneconomic, would increase their costs, and force them to pick up the wholesalers' inventory costs. Rejection of the proposal before the alleged conspiracy commenced is very strong evidence of independent action.

Anderson's claim of injury from a concerted refusal to deal, which forced it out of the business, must be rejected. It is clear its own ill-conceived and badly executed plan led to its downfall. The antitrust laws do not compel any entity to accept a price increase, or assume the burden of a significant cost. This is especially so where there were other wholesalers available who offered lower prices and less expensive terms for handling inventory.

Background

Plaintiffs Anderson News, L.L.C. and Anderson Services, L.L.C. filed a Complaint on March 10, 2009, against Defendants American Media, Inc. ("AMI"), Bauer Publishing Co., LP ("Bauer"), Curtis Circulation Company ("Curtis"), Distribution Services, Inc. ("DSI"),

Hachette Filipacchi Media, U.S., Inc. ("Hachette"), Hudson News Distributors LLC ("Hudson News"), Kable Distribution Services, Inc. ("Kable"), Rodale, Inc. ("Rodale"), The News Group, LP ("TNG"), Time Inc. ("Time"), and Time/Warner Retail Sales & Marketing, Inc. ("TWR"). The claims against TNG were voluntarily dismissed on March 12, 2009; the remaining Defendants moved to dismiss the Complaint on December 14, 2009. On August 2, 2010, this Court granted the motions, and dismissed the Complaint with prejudice. The Court denied Plaintiffs' motion for reconsideration, and for leave to file an amended complaint. On appeal, the Second Circuit vacated the Court's dismissal, holding that Plaintiffs should have been permitted to file an amended complaint. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 194 (2d Cir. 2012). Plaintiffs filed their Amended Complaint on September 7, 2012.[3] The claims against Hudson News were voluntarily dismissed, pursuant to a settlement, on December 19, 2013.

I. Single-Copy Magazine Industry

In the United States, magazines are sold in two ways: by subscription and through "single-copy" purchases. Single-copy distribution includes sales from newsstands, supermarkets, and other retailers.

---

[3] In April 2009, Anderson Services executed an Assignment for the Benefit of Creditors that named Lloyd Whitaker as the Assignee. Whitaker was certified as Assignee for the Benefit of Creditors in May 2009, and replaced Anderson Services as a named Plaintiff in the Amended Complaint. Am. Compl. ¶ 23.

In addition, Hearst Communications, Inc. ("Hearst") was named as a Defendant in the Amended Complaint, as successor-in-interest to Hachette. *Id.* ¶ 14.

Time ¶¶ 1, 21.[4] The single-copy magazine industry has four levels: publishers, distributors, wholesalers, and retailers. *Id.* ¶ 1.

Publishers create and produce magazines; they earn revenue through a combination of subscription sales, single-copy sales, and advertising revenue. *Id.* ¶ 3. Publishers also determine "cover prices" for their titles—the price at which the title will be sold to consumers. *Id.* ¶ 9.

National distributors perform a variety of services for publishers, including marketing, arranging for distribution and shipment of magazines to wholesalers, billing wholesalers, and collecting payments. *Id.* ¶ 5. Some distributors also assume credit risks for wholesalers' payments to publishers. *See* Curtis ¶ 412. Distributors generally do not purchase or sell magazines, but instead earn revenue from fees or commissions paid by publishers. Time ¶¶ 5-8.

Wholesalers purchase magazines from publishers at a discount to the cover price, and then sell them to retailers at a smaller discount. *Id.* ¶¶ 17-18. Wholesalers (or the third-party servicers they employ) deliver the magazines to retailers, stock them on retailers' shelves, and retrieve magazines that remain unsold after their "off-sale" date. *Id.* ¶ 19. In 2009, the four largest wholesalers in the United States were Anderson News, TNG, Hudson News, and Source Interlink Distribution ("Source"). *Id.*

---

[4] References to Defendants' Rule 56.1 Statements in Support of their Motions for Summary Judgment appear as "[Defendant] ¶ __." Plaintiffs' responses to Defendants' Rule 56.1 Statements are cited as "Anderson Resp. ([Defendant]) ¶ __." References to Plaintiffs' "Additional Genuine Issues of Material Fact" appear as "Anderson Opp. ([Defendant]) ¶ __."

¶ 15. TNG and Hudson News are no longer defendants and Source was never a defendant.

Retailers sell magazines to consumers. *Id.* ¶ 21. Retailers include stores such as Wal-Mart, Kroger grocery stores, and Barnes & Noble, as well as airport retailers and newsstands. *Id.* Retailers determine which magazines to purchase for sale in their stores. *Id.* ¶ 22. Moreover, to reduce logistical costs, retailers generally permit distribution of magazines from only one wholesaler at each retail outlet. Anderson Opp. (Curtis) ¶ 18.

II. Parties

a. Plaintiffs

In 2009, Plaintiff Anderson News was a magazine wholesaler. Time ¶ 26. Frank Stockard was its President, and Charles Anderson, Jr. was the Chief Executive Officer and largest shareholder of Anderson Media Corporation, the ultimate parent company of Anderson News. *Id.* ¶¶ 28, 29, 30, 32. Anderson News ceased operations on February 9, 2009, and in March 2009, certain of its creditors filed an involuntary bankruptcy petition. *Id.* ¶ 138; Am. Compl. ¶ 88.

Prior to its bankruptcy, Anderson News contracted with Anderson Services, its distribution and logistics affiliate, to provide delivery, shelving, and pickup services at retail locations. Time ¶ 27. Anderson Services executed an Assignment for the Benefit of Creditors in 2009, and in May 2009 Plaintiff Lloyd Whitaker was certified as the assignee for the benefit of its creditors. Def. (Whitaker) ¶¶ 247-48.

b. Defendants

Defendants are publishers and national distributors of single-copy magazines.

i. Publisher Defendants

- *Time*: Time publishes titles which include *People*, *Time*, *Sports Illustrated*, and *InStyle* magazines. In 2008, Time publications represented 16% of the national single-copy magazine market. Anderson Opp. (Curtis) ¶ 5; Am. Compl. ¶ 11.
- *AMI*: AMI's titles include *National Enquirer* and *Star* magazines. In 2008, its magazines made up 10% of the single-copy magazine market. Anderson Opp. (Curtis) ¶ 5.
- *Bauer*: Bauer publishes titles such as *In Touch* and *Life & Style*, and in 2008 represented 12% of the single-copy market. *Id.*; Bauer ¶ 601.
- *Rodale*: Rodale publishes magazines, such as *Men's Health*, *Women's Health*, and *Bicycling*, which in 2008 made up 2% of the single-copy market. Anderson Opp. (Curtis) ¶ 5; Rodale ¶ 702.
- *Hachette*: In 2008, Hachette published magazines including *Elle* and *Woman's Day*, which represented 2% of the single-copy market. Anderson Opp. (Curtis) ¶ 5.

ii. Distributor Defendants

In 2009, each of the Distributor Defendants represented one or more Publisher Defendants, as well as other non-party publishers.[5]

---

[5] Although they are referred to as "distributors," these Defendants did not physically distribute magazines to retailers. Time ¶ 6. Rather, they worked on behalf of publishers to arrange for distribution of publishers' magazines, and provided the various other services set forth on pp. 486-87, *supra*.

- *TWR*: TWR represented Time. Time ¶ 10.
- *Curtis*: Curtis represented Rodale, AMI, and Hachette. *Id.* ¶ 11.
- *Kable*: Kable represented Bauer. *Id.* ¶ 12.
- *DSI*: DSI represented AMI, Rodale, Hachette, and Bauer. *Id.* ¶ 13. DSI is a merchandising services company that in 2009 performed some of the services performed by the other distributors, but focused primarily on marketing. *Id.*

III. Scan-Based Trading

Under the traditional single-copy magazine model, wholesalers purchase magazines from publishers and sell them, in bulk, to retailers. *Id.* ¶¶ 17-18. Wholesalers, or their third-party servicers, deliver the magazines to retailers, who display the magazines until their off-sale dates. *Id.* ¶ 19. Once the magazines' off-sale date passes, wholesalers collect the unsold magazines from each retailer, count them, and prepare a "return affidavit" listing the number unsold. Anderson Opp. (Curtis) ¶ 24. Using the return affidavit, wholesalers refund retailers for each unsold magazine, so that retailers pay only for magazines that are not listed on the return affidavit. Publishers, in turn, refund money to wholesalers for the unsold magazines. *Id.* ¶ 20. As a result, wholesalers earn revenue only from magazines that are actually sold to consumers.

Publishers generally invest significant resources in creating content for their magazines; but the cost of actually printing each issue is relatively small. *Id.* ¶ 22. This encourages publishers to print more copies of each magazine than will likely sell, a practice referred to as "stuffing the channel." *Id.* at ¶¶ 22-23. Channel stuffing benefits publishers because the

profit from each additional magazine sold outweighs its printing cost. Yet it imposes burdens on wholesalers, who pay for the extra copies and expend additional resources retrieving unsold magazines from retailers, manually counting them, and preparing return affidavits, all without earning revenue from these unsold copies. *Id.* at ¶ 24.

During the mid-to-late 2000s, retailers required their wholesalers to implement scan-based trading ("SBT") as an alternative to the traditional single-copy model. SBT permits retailers to track magazines using bar codes that are electronically scanned during checkout. *Id.* ¶ 35. As with the traditional model, wholesalers purchase magazines from publishers at a percentage of the cover price. But unlike the traditional model, wholesalers do not then sell the magazines to retailers. Instead, retailers enter into consignment relationships with wholesalers, meaning that retailers purchase magazines from wholesalers only after the magazines have been scanned, and sold to consumers. *Id.* ¶ 36.

One benefit of implementing SBT is that retailers can electronically track the number of magazines sold, so wholesalers no longer need to manually count unsold copies or prepare return affidavits. *Id.* ¶ 38. SBT also streamlines the process for dropping off and picking up magazines from retailers. *Id.*

But the major detriment of SBT to wholesalers is that they bear the costs of buying magazines from the publishers, but are not compensated until the retailer records a sale. Thus the wholesalers bear the cost of carrying magazines as inventory.[6] The

---

[6] There are other cost shifts associated with SBT as well. The term "shrink" refers to the difference between the number

inventory costs of SBT are significant. In January 2009, Anderson News had "over $70 million invested in inventories from four major customers." Time ¶ 77. Anderson's January plan would relieve it of these costs and force the publishers and distributors to absorb them. Bankruptcy enabled Anderson to avoid the inventory expenses it was attempting to shed.

IV. ProLogix East

In 2005, Anderson Services entered into a joint venture with News Group Distribution Services ("NGDS"), the logistics affiliate of TNG, to create two distribution services: ProLogix Distribution Services (East), LLC ("ProLogix East") and ProLogix Distribution Services (West), LLC ("ProLogix West"). *Id.* ¶ 36. Anderson Services owned 64.5% of ProLogix East, and NGDS owned 35.5%. NGDS owned 64.5% of ProLogix West, and Anderson Services owned 35.5%. *Id.* ¶¶ 36-37.

ProLogix East and ProLogix West contracted with Anderson News and TNG to provide magazine delivery services to retailers.[7] *Id.* ¶ 39. ProLogix East serviced retailers in the southeastern United States, while ProLogix West serviced those in western states. *Id.* The geographical areas where Anderson

---

of magazines actually sold and the number that are stolen or improperly scanned at the register. *Id.* ¶ 37. Under the traditional method, retailers bear the cost of shrink because wholesalers refund them only for the "unsold" magazines that wholesalers physically retrieve from stores. The SBT method permits retailers to shift the costs of "shrink" to wholesalers, because retailers purchase from wholesalers only those magazines that are scanned as sold—which do not include stolen or improperly scanned magazines. Time ¶ 59; Anderson Opp. (Curtis) ¶ 37.

[7] ProLogix East and West also provided various logistics services for other clients. *Id.* ¶¶ 40-41.

News and TNG distributed magazines overlapped—more than 80% of the retail value of Anderson News' magazines went to retailers in zip codes that were also served by TNG. *Id.* ¶ 44. Indeed, ProLogix East and ProLogix West delivered Anderson News' and TNG's magazines using the same trucks, routes, and drivers. *Id.* ¶ 42.

V. Anderson's Price Increase and Inventory Cost Shift Proposal

a. Preparation of the Anderson Proposal

Beginning in 2003, Anderson News made numerous attempts to increase the prices it charged publishers, or to shift certain costs onto publishers and distributors. In 2003, Anderson News sought to impose a surcharge of seven cents per magazine distributed in metropolitan markets, and four cents per magazine in other markets. *Id.* ¶ 62; *see id.*, Ex. 5 (C. Anderson Dep.) at 203. No other magazine wholesaler instituted a similar surcharge, and no publishers agreed to Anderson's proposal. *Id.*, Ex. 5 at 204. In 2004, Anderson again sought to impose a per-magazine surcharge, this time eight cents per magazine in metropolitan markets. Again, no other wholesaler instituted a similar surcharge, and no publishers agreed to the proposal. *Id.*, Ex. 5 at 206-07. In 2005, Anderson sought to charge publishers a fuel surcharge for the delivery of single-copy magazines, based on the weight of the copies distributed and returned. *Id.*, Ex. 5 at 211. Faced with pushback from publishers, Anderson withdrew its proposed fuel surcharge. *Id.*, Ex. 5 at 215-16. Finally, in 2007, Anderson News announced that it would deduct from its payments to national distributors the cost of SBT inventory. *Id.*, Ex. 5 at 217. No other wholesaler proposed such a deduction, and publishers and

distributors did not agree to this proposal either. *Id.*, Ex. 5 at 217-18. Anderson ultimately "backed down" from this proposal as well. *Id.*, Ex. 5 at 219.

Having tried for years to raise delivery rates and shift inventory costs, without success, Anderson knew it needed a game changer, if it were to succeed. Prior to announcing the January 2009 seven-cent surcharge and inventory cost shift proposal, therefore, Anderson formulated a new strategy: "going dark," to be implemented if publishers rejected the proposal—as they had in the past. *Id.* ¶ 63.

The "going dark" strategy sought to capitalize on Anderson Services' joint venture with NGDS, ProLogix East. Charles Anderson thought that, as a manager of Anderson Services, the majority owner of ProLogix East, he could temporarily suspend ProLogix East's operations without prior notice or consultation with his co-owner. Anderson Resp. (Time) ¶ 64. Since ProLogix East used the same trucks and drivers to deliver Anderson News' magazines as it did to deliver TNG's, rendering ProLogix East non-operational would enable Anderson News to cut off delivery of both Anderson News' and TNG's magazines to retailers throughout the Southeast. Time ¶ 128.

Charles Anderson believed that the "going dark" strategy would force publishers to agree to the Anderson price increase and cost shift proposal for two reasons. First, neither Anderson News' nor TNG's magazines would be delivered until ProLogix East reopened, so publishers would be deprived of income from both wholesalers until they reached an agreement with Anderson News. Second, shutting down ProLogix East would prevent publishers from simply shifting their business from Anderson News

to TNG. *Id.* Disabling ProLogix East was critical; otherwise TNG would have been an attractive option to publishers because TNG did not seek either a price increase or an inventory cost shift. Further, publishers could avoid distribution- and logistics-related disruptions in service by switching from Anderson News to TNG, since ProLogix East used the same trucks and routes for both TNG and Anderson News. Shutting down ProLogix East would thus punish the publishers by making it more difficult to establish alternative methods of distribution.

As another phase of the "going dark" strategy, Charles Anderson prevailed on Wal-Mart and Kroger to refuse to accept magazines from other wholesalers at their Anderson-serviced locations during the "dark" period. *Id.* ¶ 65. Both Wal-Mart and Kroger agreed that, if Anderson implemented the strategy, they would not accept magazines from other wholesalers for at least fourteen days. *Id.* It is clear that Anderson was trying to isolate the publishers from other wholesalers, while at the same time preserving Anderson's unique relationship with two of the largest retailers.

b. Charles Anderson Announces the Proposal

On January 12 and 13, 2009, Charles Anderson and Frank Stockard of Anderson News held a series of meetings with a number of publishers, including executives from Time, AMI, and Bauer. Charles Anderson stated that Anderson News planned to impose a seven-cent-per-copy surcharge for each magazine it distributed, as well as an inventory cost shift from the wholesalers to the publishers based on the SBT method. *Id.* ¶ 68. Charles Anderson said he needed both to be "viable"; if publishers refused, Anderson might have to leave the business. *Id.* ¶¶ 69-70, 74.

On January 14, 2009, Charles Anderson participated in an interview with John Harrington, publisher of the industry newsletter *The New Single Copy*. *Id.* ¶ 71. The interview was conducted via a conference call, with over 300 industry participants dialing in. *Id.* ¶¶ 71-72. During the call, Charles Anderson stated that "over the last 10 years," Anderson News' profits had "eroded to nothing and into significant losses." *Id.* ¶ 76. He explained that "effective February 1," Anderson News was "adding a magazine distribution charge of 7 cents a copy to all copies distributed by the company." *Id.* ¶ 77. Charles Anderson also stated that Anderson News would "no longer participate in the investment" in SBT. He explained that Anderson News had "over $70 million invested in inventories from four major customers," and that it "should be only fair for the manufacturer or publisher to bear this cost." *Id.* Harrington asked if seven cents per copy was a "negotiable figure"; Charles Anderson responded: "[W]e think it's fair . . . . [I]f we negotiated the rate then it would not be fair so the answer is that we really believe that the 7 cent number is the number."[8] *Id.* ¶ 78.

---

[8] Anderson insists that Charles Anderson's announcement of the surcharge was an invitation to negotiate, rather than a unilateral demand, even going so far as to hire an expert to testify that Anderson intended the price increase and inventory cost shift to be negotiable. *See* Subramanian Report ¶ 105. Not only is the proposed expert testimony impermissible under Fed.R.Evid. 702, *see* Order Granting in Part and Denying in Part Defendants' Motions to Exclude Expert Testimony, but it is also unnecessary, because the full transcript of Charles Anderson's telephone conference with John Harrington is available. There is no doubt regarding what Charles Anderson said or how he explained the price increase, inventory cost shift, and the effective date. In any case, it is ultimately irrelevant whether Charles Anderson's words are labelled as a "demand"

Harrington also asked Charles Anderson, "[I]n the event of significant levels of noncooperation, is it a possibility that Anderson News would leave the magazine distribution business?"; Charles Anderson responded, "The last thing we want to do is exit this business. But we—why should we continue to lose money in a business that doesn't . . . give us any return?" *Id.* ¶ 80. Charles Anderson reiterated that the deadline for publishers to agree to the Anderson price increase and inventory cost shift was February 1, 2009, and stated that Anderson News would refuse to distribute magazines for publishers who did not agree to the price increase and cost shift by that date. *Id.* ¶ 79.

Also on January 14, 2009, Anderson News sent a letter to publishers, which stated:

> Effective February 1, 2009, Anderson News, LLC will add a $0.07 per copy distribution fee in addition to any current terms and conditions received by your company. The fee will be applied to all copies distributed February 1, 2009 and forward. In addition, Anderson News, LLC will pass the inventory carrying cost on all SBT accounts back to the publisher. Please agree to issue a credit for the $0.07 fee and a deduction for the inventory carrying cost to ensure future distribution.

Id. ¶ 83. The letter directed publishers to "[p]lease execute the enclosed letter [assenting to Anderson's terms] . . . no later than Friday, January 23, 2009." *Id.*

On January 19, 2009, Source, a competitor wholesaler to Anderson News, announced via letter that it

---

or a "proposal"; what matters is Anderson's conduct following the announcement of the surcharge and cost shift.

was also seeking a similar price increase of seven cents per copy for magazine distribution, also effective February 1, 2009. *Id.* ¶ 89. Besides Source, no other wholesaler, who distributed magazines throughout the geographical area covered by Anderson News, announced a surcharge. *Id.* ¶ 92. Neither Source, nor any other wholesaler, announced a SBT inventory cost shift, as did Anderson. *Id.* ¶ 94; Anderson Resp. (Time) ¶ 89.

c. Defendants React to the Anderson Proposal

Following Charles Anderson's announcement, some Defendant Publishers responded directly to Anderson News. Others discussed the proposal with their distributors, who communicated with Anderson News on their behalf; still others communicated with Anderson News both directly and through their distributors. Finally, publishers and distributors talked and emailed with one another concerning the Anderson News surcharge and inventory cost proposal.

Plaintiff's counsel concedes that many communications between Defendants were not simply permissible, but necessary—it was critical for Publisher Defendants to communicate with their distributors regarding their responses to the Anderson proposal, and for Distributor Defendants to discuss the proposal with their publisher clients. *See* Dkt. No. 445 (Oral Argument Transcript) at 37 ("National distributors can talk to their publishers for whom they work. No problem there.").

i. Bauer and Kable

Hubert Boehle and Richard Parker, Bauer's CEO and Senior Vice President, immediately rejected the Anderson price increase and inventory cost shift during their initial meeting with Charles Anderson and Stockard on January 13, 2009. Bauer ¶¶ 622-23.

On January 28, 2009, the CEO of Kable emailed Stockard that Kable's client Bauer could not afford the $0.07 fee. Kable ¶ 508; *id.*, Ex. 13. The email explained that "if there are other alternatives, [Kable is] willing to listen and share with [Kable's] clients, but if it is only the $0.07 fee," then Kable had "no other choice" but to cease distribution to Anderson News. *Id.* Bauer had an economic interest in keeping Anderson in business, as Anderson owed it $16.66 million.[9] Bauer ¶ 619. Any hope of repayment was realistic only if Anderson stayed in business.

ii. Time and TWR

On January 21, 2009, Richard Jacobsen, CEO of TWR, met with Charles Anderson and Stockard to further discuss the Anderson price increase and inventory cost shift. Time ¶ 105. At the meeting, Jacobsen offered to increase Anderson News' discount on certain weekly publications by two percentage points, and reiterated "the need to reduce [TWR's] receivables exposure." That is, Anderson had to pay Time/TWR to earn that discount. The parties did not reach an agreement. *Id.* at ¶ 106.

On January 25, Jacobsen proposed that Anderson News and TWR maintain the current status quo for a 30-day negotiating period; Anderson rejected that offer too. *Id.* ¶ 108. Two days later, on January 27, Jacobsen, on behalf of Time, sent Anderson News a letter proposing a 30-day negotiation period, in which the parties would attempt to reach an agreement regarding, *inter alia*, the per-copy magazine surcharge and the proposed inventory cost shift. *Id.* ¶¶ 109-10.

---

[9] Anderson disputes that it owed Bauer $16.66 million, but does not dispute that it owed Bauer money at the time it went bankrupt. *See* Anderson Resp. (Bauer) ¶ 619.

The letter offered Anderson News an additional 2 percentage points of discount on certain Time magazines. In return, TWR requested that Anderson News not impose the per-copy surcharge during the 30-day period, and that Anderson News not shift its inventory expenses, but rather pay its January 2009 invoice of $11,336,614. *Id.* ¶ 110; *id.*, Ex. 88. Anderson News rejected this offer as well. *Id.* ¶ 115. The next day, January 28, Jacobsen informed Anderson News via letter that TWR would no longer provide Anderson News with Time publications. *Id.* ¶ 116.

At his deposition, Charles Anderson stated that he and Jacobsen had participated in yet another round of negotiations on January 31, 2009. Anderson Opp. (Time) ¶ 15. During those negotiations, Jacobsen is said to have improved the terms of his January 27, 2009 letter by offering Anderson a 2.75 percentage point increase in the discount on *People*, Time's most popular publication, and a two percentage point discount increase on Time's other magazines. *Id.* Charles Anderson said he accepted those terms, and he and Jacobsen shook hands to confirm the deal. *Id.* On February 2, 2009, however, Charles Anderson spoke with Ann Moore, CEO of Time, who informed him that Time would no longer supply Anderson with magazines. *Id.* ¶¶ 21-22.

iii. AMI, Rodale, Hachette, and Curtis

Richard Alleger, Rodale's Senior Vice President of Retail, first learned of the Anderson surcharge and inventory cost shift from the January 14, 2009 conference call.[10] Rodale ¶ 709. He immediately

[10] The evidence indicates that, although Alleger had heard rumors regarding Anderson's proposed surcharge and inventory cost shift by January 13, he did not formally learn of Anderson's terms until the January 14 call. Anderson Opp. (Rodale) ¶ 60.

computed the costs that Rodale would incur by paying the seven-cent per magazine surcharge, and determined that Rodale could not afford it. *Id.* at ¶ 711. That day, Alleger informed Rodale's distributor Curtis that Rodale would not pay. *Id.* at ¶ 712.

Charles Anderson testified that, on January 17, 2009, he spoke via telephone with Robert Castardi, Curtis' President, about the per copy surcharge. Anderson Opp. (Rodale) ¶ 145. Castardi told Charles Anderson that he was "working together with" Jacobsen of TWR, and that "whatever [Jacobsen] decided, [Curtis] was going along with." *Id.* Subsequently, on January 21, 2009, Castardi met with Charles Anderson on behalf of Curtis' publisher clients, who included Defendants Hachette, Rodale, and AMI. Curtis ¶ 428. The parties did not reach an agreement regarding the magazine surcharge; instead, Charles Anderson reiterated that February 1, 2009 was a firm deadline for publishers to agree to it. *Id.* AMI sent a letter to Stockard that day rejecting the surcharge and inventory cost shift. Anderson Opp. (Rodale) ¶ 97.

Following January 21, 2009, Castardi called Stockard on January 22 and 23, and asked to speak with Charles Anderson to discuss the surcharge and cost shift, but Charles Anderson never returned Castardi's calls. Curtis ¶ 430. On January 26, Castardi emailed another Anderson News executive, explaining that he had been "asking for discussions with [Charles Anderson] for the past week; to no avail." *Id.* ¶ 432. The email noted that "the vast majority of our clients have adamantly decline[d] you[r] offer without any influence from Curtis." Castardi invited the executive to "feel free to call" him, and to "[l]et [him] know if anything ha[d]

changed." *Id.* Again, Anderson News did not respond. *Id.* Castardi called Stockard again on January 27 to request that Stockard set up a call with Charles Anderson; Charles Anderson never returned that call either. *Id.* ¶ 433. Finally, on January 29, Curtis announced that it would seek alternative distribution methods for its publisher clients.[11] *Id.* ¶ 440.

According to Charles Anderson, on January 31, during negotiations with Jacobsen, Jacobsen asked Charles Anderson about the status of his negotiations with Curtis. Charles Anderson replied that Castardi had said that Castardi and Jacobsen were "working together." Jacobsen folded his arms and nodded in the affirmative. Anderson Opp. (Curtis) ¶ 158.

d. Anderson Implements "Going Dark" Plan

After February 1, Anderson advised its two largest retailers (Wal-Mart and Kroger) that it was not receiving magazines from its publishers. Both retailers affirmed their agreement to not take magazines from wholesalers other than Anderson at their Anderson-serviced locations. Time ¶ 123. On Saturday, February 7, 2009, after Anderson's price increase proposal was rejected by almost every publisher, including all Defendants, Anderson implemented the next phase of its "going dark" plan. Anderson News announced via press release that it had "suspended normal

---

[11] At oral argument, counsel for Defendants asserted that Hachette agreed to Anderson's seven-cent per magazine price increase. Dkt. No. 445, at 57-59. The evidence indicates, however, that at most, Hachette agreed to pay the price increase on a "short-term" basis. *See* Fritzler Decl., Exs. 97, 98. In fact, on January 30, 2009, Hachette sent Anderson News a letter stating that it would not accept either the seven-cent surcharge or the SBT inventory cost shift. Davis Decl., Ex. 515.

business activities effective immediately." *Id.* ¶ 125. That day, Bo Castle, President of Anderson Services, informed Anderson News and NGDS that ProLogix East would "stop production and deliveries immediately," and that its employees would "be notified not to report to work on Monday, February 9, 2009." *Id.* ¶ 126. Charles Anderson was aware that, at the time he ordered ProLogix East to shut down, a supply of TNG's magazines was locked in ProLogix East's warehouses and there was no way for anyone from TNG or ProLogix East to access it. *Id.* ¶ 127.

TNG and NGDS objected to the shutdown of ProLogix East. *Id.* ¶ 130. On Sunday, February 8, 2009, Glen Clark, President of TNG and a manager of ProLogix East, wrote to Charles Anderson and Castle, asserting that Clark had not been informed of the shutdown in advance, and that the decision was made "without a meeting of, or any discussions of, the full Management Committee of the Company." *Id.* ¶ 131. Clark sought a special meeting of ProLogix East's management committee, but Castle refused, stating: "We are not prepared to meet at this time." *Id.* ¶¶ 131-32.

On Monday, February 9, 2009, Great Atlantic News, TNG's subsidiary, filed suit in the U.S. District Court for the District of Delaware, seeking a temporary restraining order ("TRO") requiring ProLogix East to continue distributing TNG's magazines to retailers. *Id.* ¶ 133. On February 9, the District Court granted the TRO, forcing ProLogix East to reopen and resume distributing TNG's magazines.[12] *Id.* ¶ 134. Charles Anderson testified that

---

[12] The Delaware Court issued the TRO orally on February 9, 2009, and the written Order was entered on February 10, 2009. Oral Arg. Tr. at 62.

the TRO "forc[ing] us to open back up, in my opinion, . . . was game over," and that it "opened the floodgates up." *Id.* ¶ 135. Following the Order, Anderson News "became quickly insolvent." *Id.*

Immediately upon the issuance of the TRO on February 9, 2009, Charles Anderson decided to permanently close Anderson News. At that time, Anderson News had not liquidated any assets or terminated any employees. *Id.* ¶¶ 137-38. That day, Charles Anderson called "key retailers" and explained that, "because of this temporary restraining order, we're going to have to liquidate the company or sell what we can as quickly as we can." *Id.* ¶ 139. Anderson News never retracted the price increase and inventory cost shift; it did not offer to distribute magazines on pre-January 12, 2009 terms; nor did Anderson News seek legal intervention requiring publishers to continue to supply it with magazines.

DEFENDANTS' SUMMARY JUDGMENT MOTIONS

I. Legal Standards

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). If the "burden of proof at trial would fall on the nonmoving party," however, it is "ordinarily . . . sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009) (citation omitted). If the movant does so, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact . . . in order to avoid summary judgment." *Id.* The nonmoving party may not "rest on allegations

in the pleadings," but must "point to specific evidence in the record" to meet its burden. *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir. 2006).

A factual dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In considering whether such a dispute exists, a court examines all evidence in the light most favorable to the nonmoving party. *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). The "mere existence of *some* alleged fact dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Liberty Lobby*, 477 U.S. at 247-48, 106 S.Ct. 2505. Rather, there must "be no *genuine* issue of *material* fact." *Id.* Summary judgment is "particularly favored" in antitrust cases "because of the concern that protracted litigation will chill pro-competitive market forces." *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002).

a. Sherman Act

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To prove an antitrust violation, a plaintiff must show: (1) "a combination or some form of concerted action between at least two legally distinct economic entities," and (2) an "unreasonable restraint of trade either *per se* or under the rule of reason." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

i. Concerted Action

To prove a conspiracy, a plaintiff must "present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a

conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (citation omitted). The Sherman Act, however, does not prohibit independent action; rather, the "[c]ircumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* (citation omitted).

If the evidence of an unlawful agreement is "ambiguous," "antitrust law limits the range of permissible inferences" that may be drawn from defendants' conduct. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* To survive a motion for summary judgment, a plaintiff "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* (citation omitted).

The "range of inferences that may be drawn" from a plaintiff's evidence "depends on the plausibility of the plaintiff's theory." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012). If a plaintiff's "theory of recovery is implausible," then "strong direct or circumstantial evidence" is necessary to "satisfy *Matsushita*'s 'tends to exclude' standard." *Id.* (citation omitted). In contrast, if the conspiracy is "economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive," the standard is "more easily satisfied." *Id.* (citation omitted). Plaintiffs need not "disprove all noncon-

spiratorial explanations for the defendants' conduct"; instead, plaintiffs must present "sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *Id.* (citation omitted).

ii. Unreasonable Restraint of Trade

Despite its broad language, Section 1 prohibits only "unreasonable" restraints on trade. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007). "Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade." *AD/SAT v. Associated Press*, 181 F.3d 216, 232 (2d Cir. 1999).

Some agreements are illegal *per se*, in that they "are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006) (citation omitted). Other agreements are outlawed under the rule of reason. In those cases, "plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an *actual* adverse effect on competition as a whole in the relevant market." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (citation omitted).

In determining whether conduct is unlawful *per se* or under the rule of reason, courts distinguish between "horizontal" agreements, which "involve coordination 'between competitors at the same level of a market structure,' " and "vertical" agreements, which "are created between parties 'at different levels of a market structure.' " *United States v. Apple, Inc.*, 791 F.3d 290, 313 (2d Cir. 2015) (quoting *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162,

182 (2d Cir. 2012)). Horizontal agreements are, "with limited exceptions, *per se* unlawful." *Id.* In particular, horizontal agreements to "allocate territories in order to minimize competition" are *per se* unlawful, even if there are no allegations of horizontal price-fixing. *Anderson News, L.L.C.*, 680 F.3d at 182-83 (citation omitted). Similarly, "certain concerted refusals to deal or group boycotts" have long been held to be violations of Section 1 of the Sherman Act because they are "likely to restrict competition without any offsetting efficiency gains." *Id.* at 183 (citation omitted); *see Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

Vertical agreements, on the other hand, are "subject to the rule of reason." *Apple, Inc.*, 791 F.3d at 321. In cases involving both horizontal and vertical agreements, all participants in the conspiracy may be liable "when the objective of the conspiracy [is] a *per se* unreasonable restraint of trade." *Id.* at 322.

b. Clayton Act

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." 15 U.S.C. § 15. To recover under Section 4, a plaintiff must "prove the existence of *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent that flows from that which makes defendants' acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (citation omitted). Accordingly, a plaintiff "can recover [for an antitrust injury] only if the loss stems from a competition-*reducing* aspect or effect of the defendant's

behavior." *Id.* at 344, 110 S.Ct. 1884; *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) ("The antitrust laws . . . were enacted for the protection of competition[,] not competitors.") (citation omitted).

In addition, plaintiffs "must prove that [their] claimed injury was caused by the violation." *Konik v. Champlain Valley Physicians Hosp. Med. Ctr.*, 733 F.2d 1007, 1019 (2d Cir. 1984). A plaintiff "need not exhaust all possible alternative sources of injury in fulfilling its burden of proving compensable injury"; nor must plaintiffs demonstrate that "defendant's unlawful conduct [is] the *sole* cause of the plaintiffs' alleged injuries." *Publ'n Paper Antitrust Litig.*, 690 F.3d at 66 (citation omitted). But a plaintiff must show that defendants' illegal conduct is "both a material and but-for cause" of the injury. *Id.*

ANALYSIS

I. Sherman Act

a. Parallel Conduct

"[C]onspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators." *Anderson News, L.L.C.*, 680 F.3d at 183 (citation omitted). One form of "admissible circumstantial evidence from which the fact finder may infer" a conspiracy is parallel business conduct. *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (citation omitted). "[E]vidence of [defendants'] parallel conduct alone," however, "cannot suffice to prove an antitrust conspiracy." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir. 1987). Where defendants' parallel conduct forms the basis of a Section 1 claim, plaintiffs must "show the existence of additional circumstances,

often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Id.* at 253.

On January 12, 13, and 14, 2009, Anderson said it was losing millions of dollars and then announced its plan to impose a surcharge of seven cents per magazine, plus a shift of inventory costs of at least $70 million from Anderson to the publishers. Anderson claimed that acceptance of the plan was critical to Anderson's continuing "viability." Anderson gave the publishers and distributors until January 23, 2009, to accept this proposal. If they did not accept, then Anderson would refuse to make deliveries of the publishers' magazines, as of February 1, 2009. When it announced the plan, Anderson did not disclose its agreement with Walmart and Kroger that they would take magazines only from Anderson, and not from any other wholesaler. Nor did Anderson mention the plan to prevent ProLogix East from making any deliveries. In effect, Anderson was saying: "It's me or nobody."

Anderson can not state when the conspiracy started, but it is clear that there was no conspiracy at the time of the initial publications of the Anderson plan. As of January 12, there was no conspiracy, and no one wanted to drive Anderson out of business. Indeed it was in the publishers' and distributors' best interest to keep Anderson in business, if only so that Anderson would pay what it admittedly owed to the distributors and publishers. According to Anderson, the conspiracy was formed "in a series of overlapping phases" subsequent to January 12. Opp. Mtn. (Kable), at 5.

The Anderson proposal was designed for its own benefit, but it had no advantage or benefit whatsoever

for the publishers and distributors. There was no economic reason for them to accept. But in order to prevent the publishers and distributors from shifting their business to alternate wholesalers, Anderson had devised its "going dark" plan to force the Defendants into acceptance. The publishers' and distributors' initial reactions are instructive. They reacted in a variety of ways, but were consistent in their determination that they were not acquiescing to the Anderson proposal.

- Bauer immediately informed Anderson that it would not agree to the surcharge and cost shift during the parties' initial meeting on January 13. Bauer ¶ 623.
- When Rodale learned of the surcharge and inventory cost shift on January 14, it contacted Curtis, its distributor, to reject Anderson's terms, but did not independently contact Anderson News regarding the proposal.[13] Rodale ¶¶ 708-13.
- AMI rejected the surcharge on January 21, via letter to Anderson News. Anderson Opp. (Rodale) ¶ 97.
- Curtis met with Anderson on January 21, but did not reach an agreement on behalf of its publisher clients. Anderson did not move from its surcharge proposal, or from the February 1, 2009 date. Thereafter, Castardi attempted to speak with Charles Anderson on multiple occasions, but Charles Anderson never returned

[13] Anderson asserts that "Rodale personnel had direct contact with high level Anderson personnel" during this time, but does not elaborate on who these individuals are, or what the "contact" entailed. Anderson Resp. (Rodale) ¶ 713.

his calls. Curtis ¶¶ 430, 432. Curtis announced on January 29 that it would seek alternative distribution for its publishers (Rodale, AMI, and Hachette). *Id.* ¶ 440.

- On January 25 and 27, TWR sought to maintain the existing arrangement for a 30-day period to permit the parties to continue negotiations. On January 31, according to Charles Anderson, TWR and Charles Anderson reached a hand-shake agreement, pursuant to which Time would not pay the surcharge, but would offer Anderson News an increased discount on Time's magazines. Anderson Opp. (Time) ¶ 15. On February 2, Time's CEO informed Anderson that Time would no longer ship magazines to Anderson. *Id.* ¶ 22.

These differing reactions do not support an inference of "parallel business conduct"; if anything, Defendants' initial reactions to Anderson's proposal are inconsistent with "a conscious commitment to a common scheme." *Monsanto Co.*, 465 U.S. at 764, 104 S.Ct. 1464 (citation omitted); *see RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F.Supp.2d 218, 231 (E.D.N.Y. 2009). Each of the Defendants acted in their own economic interest. There is no doubt, however, that Defendants' ultimate conclusions were the same, in that each Defendant eventually rejected Anderson's proposal to increase prices and shift inventory costs. Instead they moved their business to alternative wholesalers who continued to offer less onerous terms (*i.e.* more favorable to the publishers and distributors). *See Anderson News, L.L.C.*, 680 F.3d at 191 ("[T]he '*key* parallel conduct allegation' was that all of the publisher and distributor defendants ceased doing business with Anderson." (quoting

Anderson News, L.L.C. v. Am. Media, Inc., 732 F.Supp.2d 389, 398 (S.D.N.Y. 2010))). Because Defendants' ultimate reactions were to refuse to accept Anderson's price increase proposal and inventory cost shift and to move their business to wholesalers who offered lower prices and costs, the Court turns to whether Plaintiffs have provided evidence that Defendants' conduct was consistent with a conspiracy to drive Anderson out of business, or whether Defendants' proof is consistent with establishing independent action on behalf of each Defendant. *See Apex Oil Co.*, 822 F.2d at 253.

b. Plus Factors

"Plus factors" indicative of an illegal agreement include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (citation omitted). These plus factors are "neither exhaustive nor exclusive, but rather illustrative of the type of circumstances which, when combined with parallel behavior," may permit the inference of "the existence of an agreement." *Id.* at 136 n.6.

But the presence of plus factors certainly does not compel or "necessarily lead to an inference of conspiracy." *Apex Oil Co.*, 822 F.2d at 254. In some cases, plus factors "lead to an equally plausible inference of mere interdependent behavior, *i.e.*, actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement." *Id.*

Plaintiffs seek to introduce expert testimony that certain plus factors are in fact "super-plus" factors; that is, factors that "by themselves allow a strong inference of collusion." *See* Expert Report of Dr. Leslie Marx ("Marx Report"), ¶ 67. Plaintiff's expert, Dr. Marx, asserts that three "super-plus" factors are present in this case. *Id.* ¶ 68. Plaintiffs offer no evidence, however, that the term " 'super-plus' factors" has been generally accepted by the scientific or academic communities, or that Dr. Marx's methodology is reliable. Accordingly, Plaintiffs' use of, and reliance upon, the term "super-plus factors" is rejected. *See* Order Granting in Part and Denying in Part Defendants' Motions to Exclude Expert Testimony.

i. Common Motive to Conspire

Motive to conspire may be inferred where the parallel "action taken [by defendants] had the effect of creating a likelihood of increased profits." *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 287, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). An anti-competitive motive may also be inferred where there is evidence that "defendants were primarily motivated by a desire to damage plaintiff or put it out of business." *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969). Courts may not, however, "infer a conspiracy where the defendants have no 'rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations.' " *Ross v. Am. Express Co.*, 35 F.Supp.3d 407, 442 (S.D.N.Y. 2014) (quoting *AD/SAT*, 181 F.3d at 233).

Plaintiffs have not presented evidence supporting the inference that Defendants had a common motive to force Anderson News out of business. Anderson

concedes that there was no conspiracy to drive Anderson out of business prior to its January, 2009 proposal. The proposal offered nothing for the publishers and distributors, other than higher per-magazine charges and higher inventory costs. Other wholesalers offered better terms. Nonetheless, Plaintiffs conjure up two "motives" for Defendants to engage in the conspiracy; however, in each instance, Defendants' conduct was "as consistent with permissible competition as with illegal conspiracy." *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 588, 106 S.Ct. 1348.

First, Plaintiffs contend that if Anderson News successfully imposed its plan on distributors and publishers, they realized that other wholesalers would quickly follow suit. Plaintiffs point to an internal email written by Hubert Boehle, Bauer's CEO, which states that "if [the seven-cent surcharge] were to be introduced, . . . it goes without saying that all wholesalers would demand the same fee." Davis Decl., Ex. 330. Similarly, James Roberts of Kable emailed his colleague that "we are encouraging our publishers not to [agree to the Anderson proposal] since they would have to do it with every other wholesaler." *Id.*, Ex. 423.

Stripped to its essentials, Anderson argues that Defendants were concerned that agreeing to Anderson's proposal would encourage other wholesalers to implement similar surcharges and inventory cost shifts, so Defendants had a motive to conspire against Anderson News. This is a slender reed to support such a weighty conclusion. No Defendant was seeking to "increase[ ][its] profits"; rather, it is apparent that the publishers and distributors were trying to avoid a price increase for each magazine

and a shift of inventory costs that Anderson was trying to impose on them. *See First Nat'l Bank of Ariz.*, 391 U.S. at 287, 88 S.Ct. 1575. A far more plausible explanation for Defendants' conduct is that each Defendant was independently unwilling to accept the Anderson proposal, because acceptance would result in a substantial increase in costs. That other wholesalers might demand similar surcharges, if Anderson's proposal were successful, merely provided an additional reason for each Defendant to reject it. *See Ross*, 35 F.Supp.3d at 443.

Next, Anderson posits that Defendants sought to reduce the number of wholesalers in the single-copy market, because the remaining wholesalers could then extract pricing concessions from retailers, rather than from publishers. (Keep in mind that this argument is made by the entity which agreed with two of the nation's largest retailers to support Anderson in its going dark plan. *See* [App. 73a], *supra*.) Plaintiffs continue that, because retailers use only one wholesaler per geographical area, the exit of a single wholesaler from that area results in less competition between the remaining wholesalers. Those wholesalers therefore exert more power over retailers, and can seek concessions from retailers that wholesalers would otherwise obtain from publishers and distributors. *See Anderson News, L.L.C.*, 680 F.3d at 194 ("With only two national wholesalers, each with its own allocated territory, many retailers would have no other supplier choice; wholesalers could increase their profits by raising prices to the retailers, and not seek, as Anderson and Source had, to increase charges to the publishers.").

Plaintiffs' argument is based on the expert report of Dr. Marx, which in theory relies largely on commu-

nications by Defendants and retailers. For example, in an email dated January 30, 2009, a Hachette executive wrote that one benefit of Anderson News and Source exiting the market would be that "[f]ewer wholesalers reduce[ ] retailers['] options to play one wholesaler against another." Anderson Opp. (Curtis) ¶ 227. Richard Parker of Bauer wrote in an internal email regarding Anderson News and Source, "Hopefully they are both gone!"[14] Marx Report ¶ 130. Dr. Marx also refers to testimony from retailers referencing concerns that a reduction in the number of wholesalers would increase prices to retailers, and decrease services.

This line of argument puts speculation on top of conjecture and then projects a bad motive onto the Defendants. It also overlooks evidence that reducing the number of wholesalers was not in Defendants' interests. Indeed, evidence strongly suggests that Defendants wanted more, rather than fewer, wholesalers in the single-copy market, because more wholesalers meant more competition for both retailers' and publishers' business—resulting in more favorable terms for Defendants. *See* Curtis Mtn. at 7-8; Expert Report of Dr. Janusz Ordover ¶ 10. For example, the undisputed evidence demonstrates that, prior to Anderson's announcement of the proposal, Curtis had taken affirmative steps to help keep Anderson News in business. *See* Curtis ¶ 441; Bauer ¶ 632 (internal Bauer email stating that the "rosiest scenario" would be for Anderson to remain in business

---

[14] Similarly, Jim Gillis, Chief Operating Officer of Source's parent company, testified that, during separate conversations with Jacobsen of TWR and Castardi of Curtis, each stated that they sought to create a "two-wholesaler" system. Anderson Opp. (Curtis) ¶ 98.

but retract the magazine price increase). This is inconsistent with Defendants' alleged desire to force Plaintiffs out of the business.

Driving Anderson News out of business is not plausible because it was not in the Defendants' financial interest. In January 2009, Anderson News owed significant sums to Defendants. For example, Defendants contend that, at the time Anderson News exited the market, it owed Curtis $35 million, Bauer $16.66 million, and Kable $6 million. Curtis ¶ 442; Bauer ¶ 619; Kable ¶ 510. The total amount Anderson owed to Defendants was set at over $100 million in the bankruptcy proceeding.[15] Time ¶ 148. Forcing Anderson News out of business would deprive Defendants of being paid. It was in Defendants' best interest to keep Anderson viable and in business so it could repay its trade debts. Conspiring to force Anderson News out of business would virtually guarantee that Defendants would not recoup these amounts.

ii. Acts Against Individual Economic Self–Interest

Evidence that defendants' parallel acts were "against [their] apparent individual economic self-interest" may also "tend to exclude the possibility of independent parallel behavior." *Apex Oil Co.*, 822 F.2d at 254 (citation omitted). Parallel acts are less indicative of collusion, however, where defendants' actions are "economically reasonable." *See Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 2007 WL 39301, at *10 (S.D.N.Y. Jan. 8, 2007); *cf. In re Text*

[15] Anderson News disputes these amounts, but does not deny that it owed Defendants money at the time it exited the market. *See*, *e.g.*, Anderson Resp. (Curtis) ¶ 442.

Messaging Antitrust Litig., 782 F.3d 867, 879 (7th Cir. 2015) (observing that "[w]e can . . . without suspecting illegal collusion, expect competing firms to keep close track of each other's . . . market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it," and holding that "[t]acit collusion, also known as conscious parallelism," does not violate Section 1 of the Sherman Act). A defendant's "decision to terminate a service that [is] both costing . . . money and not bringing in additional revenue, and to install an alternative, cost-free service" is economically reasonable, and therefore "does not give rise to an inference of an unlawful conspiracy." *See AD/SAT*, 181 F.3d at 237-38; *First Nat'l Bank of Ariz.*, 391 U.S. at 279, 88 S.Ct. 1575 ("Obviously it would not have been evidence of conspiracy if [defendant] refused to deal with [plaintiff] because the price at which he proposed to sell oil was in excess of that at which oil could be obtained from others.").

Plaintiffs assert that Defendants' refusal to accept Anderson's magazine price increase and shift of inventory expenses was counter to Defendants' economic self-interest. Counsel could cite no case in which the antitrust laws were successfully invoked by an entity attempting to raise prices and shift inventory costs to its trading partners.[16] Dkt. 445, at

---

[16] One week after oral argument, Plaintiffs were still unable to discover any case support for their proposition. Dkt. 447, at 3. The Second Circuit analysis of the allegations of the amended pleading do not control. The Second Circuit emphasized that "the mere fact that an offer of goods or services at a given price may be nonnegotiable does not mean that the offerees, in responding to it, cannot violate the antitrust laws." *Anderson News, L.L.C.*, 680 F.3d 162 at 192. No court has ever held,

101. Plaintiffs persist in their novel (but unsupported) theory that it was in Defendants' self-interest to agree to Anderson's price increase proposal, if only to avoid disruption in the distribution of magazines.[17] Acceptance of the proposal would reward publishers, Anderson speculates: Defendants would gain increased display space at retailers' stores, since Anderson would have ceased distributing magazines from publishers who had not agreed to the surcharge. In support, Plaintiffs point to an internal DSI email regarding non-party Comag—who had continued to ship magazines to Anderson News—stating that Comag "continue[s] to receive distribution and . . . now receive dramatically better display because they are in our pockets! ! !" Anderson Opp. (Bauer) ¶ 204.

Plaintiffs' argument is illogical. If each Defendant acquiesced to the magazine surcharge and inventory cost shift, then no Defendants' distribution would be disrupted, and all of their magazines would be displayed in retail stores. Defendants therefore would have paid more to Anderson and accepted harmful monetary charges, but would have received no benefit in the form of increased retail space. Furthermore, Plaintiffs offer no evidence that Defendants viewed a temporary disruption in distribution to be

---

however, that the antitrust laws require businesses to accept a higher price than that which is offered by competitors.

[17] Plaintiffs seek to bolster their unpersuasive theory using Dr. Marx's expert testimony that it was in each Defendant's independent economic self-interest to continue to supply Anderson News with magazines. *See* Marx Report, ¶¶ 305, 318. Dr. Marx, however, provides no analysis to support this conclusion, other than repeating the contents of certain of Defendants' email communications. Such testimony is inadmissible under Fed.R.Evid. 702. *See* Order Granting in Part and Denying in Part Defendants' Motion to Exclude Expert Testimony.

more costly than the cumulative costs of accepting the Anderson proposal.

Absent collusion, plaintiffs claim, Defendants could not shift their business to an alternative wholesaler who was not seeking a surcharge, because retailers determined which wholesalers would distribute to their stores, and many retailers preferred to work with Anderson News. Again, it must be kept in mind that it was Anderson itself which arranged for two of the nation's largest retailers to refuse to do business with wholesalers other than Anderson. According to Anderson, a Defendant, acting unilaterally, would be unable to convince retailers to switch wholesalers from Anderson News to an alternative wholesaler. In 2008, for example, Curtis had attempted to unilaterally change its Texas wholesaler from Anderson News to TNG. Anderson Opp. (Curtis) ¶ 260. Wal-Mart refused to accept the change, however, and Curtis was forced to continue using Anderson News as its Texas wholesaler. *Id.* ¶¶ 261-62.

The evidence suggests that Defendants understood that the more publishers and distributors who shifted from Anderson News to an alternative wholesaler, the more pressure they could place on retailers to accept that wholesaler. For example, Alleger of Rodale wrote to Michael Porche of DSI that Comag had reached a deal with Anderson "and will continue to SHIP!" Alleger opined that "[Michael] Sullivan [of Comag] is dangerous." Anderson Opp. (Curtis) ¶ 153; *see id.* ¶ 103 (Castardi of Curtis stated during meeting with DSI that "[o]bviously, disagreement among publishers and national distributors with regard to alternative distribution will make it difficult to execute the alt[ernative] distribution plan."); Anderson Opp. (Kable) ¶ 208 (internal Bauer email stated that

it was "important" that Wal-Mart know that "not only Time but Bauer, AMI[,] all Curtis and Kable" would not ship magazines to Anderson News).

Even if any individual Defendant would be unable to unilaterally switch wholesalers, it was still consistent with each Defendant's independent self-interest to attempt to do so. Anderson News' wholesaler competitors TNG and Hudson News did not impose a per-magazine surcharge, nor did they attempt to shift inventory costs. Defendants' choices were therefore to: (1) acquiesce to the Anderson proposal which would have increased substantially their cost of doing business, or (2) seek to shift their business to another wholesaler, and not bear the additional cost and expense of giving in to Anderson's pricing demands. Defendants' choice to do the latter is consistent with their economic self-interest. *See Interborough News Co. v. Curtis Publ'g Co.*, 225 F.2d 289, 293 (2d Cir. 1955) (holding that distributor "had a legal right to break away from a wholesaler whose service it considered unsatisfactory and to set up and encourage by subsidy new competing wholesalers," and that there was "no reason . . . why [distributor] should not use every reasonable effort to influence and persuade other national distributors to patronize the new competing wholesalers," so long as "[e]ach defendant independently negotiated its agreements with its respective wholesalers" and "[e]ach new wholesaler was in spirited competition with plaintiff and each other").

Defendants could also, without colluding, work to shift their business to an alternate wholesaler, in the hope that other Defendants would do the same. Even if Defendants "ke[pt] close track of each other's" attempts to switch wholesalers, and "[found] it in their self-interest to imitate that behavior," this

would not violate the law. *See Text Messaging Antitrust Litig.*, 782 F.3d at 879. Indeed, it was Anderson News' own action—imposing a plan which was good for it, but unacceptable to everyone else—that provided a common economic stimulus for Defendants' attempts to switch wholesalers.[18] Plaintiffs have offered no evidence that it was *counter* to any individual Defendant's self-interest to shift its business to an alternate wholesaler.

iii. Interfirm Communications

Interfirm communications may be evidence of an illegal agreement, particularly where those communications "represent[ ] a departure from the ordinary pattern" of communications between defendants. *See United States v. Apple, Inc.*, 952 F.Supp.2d 638, 655 n.14 (S.D.N.Y. 2013). Interfirm communications are especially probative where there is evidence that defendants exchanged confidential information, *see In re Currency Conversion Fee Antitrust Litig.*, 773 F.Supp.2d 351, 369 (S.D.N.Y. 2011), or sought to conceal their communications. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F.Supp.2d 141, 176 (D. Conn. 2009). Yet a "mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement." *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981) (citation omitted).

---

[18] Plaintiffs concede that there is no evidence that, prior to the announcement of the Anderson price increase and inventory cost shift, Defendants conspired against Anderson News. The alleged conspiracy started post-January 12, 2009, and ended when Anderson shut its doors on February 9, 2009.

Plaintiffs set forth a number of telephone calls, emails, and meetings between Defendants that occurred between Anderson's announcement of its proposal and the date it exited the business. None of these communications, however—viewed separately or as a whole—provide "sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not."[19] *Publ'n Paper Antitrust Litig.*, 690 F.3d at 63 (citation omitted).

As an initial matter, many communications that occurred between Defendants were not only permissible, but were necessary for Defendants to respond to Anderson's proposal and to conduct their day-to-day business. Anderson was of course aware that Defendant Publishers had relationships with Defendant Distributors, and that certain Defendant Distributors represented multiple Defendant Publishers. Plaintiffs concede that conversations between "[n]ational distributors" and "their publishers for whom they work" are perfectly acceptable. Dkt. No. 445, at 37.

1. Meetings and Telephone Calls

Plaintiffs point to a number of meetings and telephone calls between Defendants that were direct competitors. For example, on January 14, 2009, following Charles Anderson's telephone conference announcing the seven-cent increase and inventory cost shift, David Pecker of AMI spoke via telephone to Ann Moore of Time, and to Cathie Black of Hearst, and discussed Anderson's terms. Anderson Opp. (Curtis) ¶ 62. Pecker also held a meeting with Rich-

[19] The meetings, telephone calls, and emails cited in this Order are not exhaustive of those that appear in the parties' papers. The Court has, however, considered all communications set forth in Plaintiffs' motions and Rule 56.1 Statements.

ard Parker of Bauer at AMI's offices; the Anderson price proposal was discussed. *Id.* ¶ 63. That day, telephone calls were also placed from Curtis to two of its competitors—Richard Jacobsen of TWR and Michael Duloc of Kable. *Id.* ¶ 62. On January 15 and 16, 2009, calls were placed from Bauer's office to competitors Time and Rodale, and from Curtis to competitors TWR and Kable. Jacobsen also spoke multiple times to Robert Castardi of Curtis. *Id.* ¶ 68. Competitors Duloc (Kable) and Castardi (Curtis) met for dinner on January 17, along with William Michalopoulous of Hachette. *Id.* ¶ 69. Between January 20 and January 30, Curtis and Kable each placed a number of calls to their distributor competitors; Bauer and Rodale each placed multiple calls to their publisher competitors. *Id.* ¶¶ 128-35. On January 29, competitors Duloc and Jacobsen met at Jacobsen's office, and the two also spoke via telephone the following morning. *Id.* ¶¶ 122-23. Competitors Parker and Pecker spoke via telephone that day as well.[20] *Id.* ¶ 122.

---

[20] Plaintiffs have also provided evidence that the "frequent telephone calls among the . . . Defendants during the period of their negotiations with [Anderson News] represented a departure from the ordinary pattern of calls among them." *See Apple, Inc.*, 791 F.3d at 302 (citation omitted). In particular, Plaintiffs assert that in the month prior to the announcement of the Anderson price increase and inventory cost shift, "defendants exchanged with other defendants who were their competitors, or with defendant publishers or national distributors with whom they did not have a publisher-distributor relationship," 39 telephone calls and/or text messages, with a total duration of 82.4 minutes. In contrast, from January 12, 2009 through February 12, 2009, there were "120 calls between direct competitor defendant publishers or national distributors, and 36 calls between defendant national distributors and non-client defendant publishers," with a total duration of 801.1 minutes. Anderson

At their depositions, when asked about these calls and meetings, the participants each categorically denied ever proposing or reaching any agreement concerning how to respond to Anderson. Their testimony is that, at most, the terms of the Anderson proposal were discussed; conversations between competitors regarding Anderson's terms do not, however, violate the law. Indeed, Anderson invited all competitors to participate in the January 14, 2009 industry call.

Moreover, in their Amended Complaint, Plaintiffs alleged that on January 29, executives from Hudson, TNG, Curtis, DSI, and TWR met at Hudson's offices, and "discussed and planned their collusive activity." Am. Compl. ¶ 63. That allegation was repeatedly cited in the Second Circuit's opinion, but discovery has now confirmed that the claim that this key meeting occurred is dubious at best. Instead of direct evidence of collusion, as the alleged meeting was previously heralded, we are called upon to draw inferences of the alleged illegal agreement, based on numerous telephone conversations and in-person meetings.

Anderson concedes that there was no conspiracy prior to its mid-January, 2009 announcement. Anderson's argument is now that Defendants' conspiracy "unfolded in a series of overlapping phases." *See*, *e.g.*, Opp. Mtn. (Kable), at 11. This is entirely inconsistent with Plaintiffs' burden to present circumstances that "reveal a . . . *meeting of minds* in an unlawful arrangement." *See Monsanto Co.*,

---

Opp. (Curtis) ¶¶ 283-84. Surely it was not a surprise to Anderson that its proposal, made on January 14 during an industry-wide telephone conference/interview, would stir up industry dialog.

465 U.S. at 764, 104 S.Ct. 1464 (citation omitted) (emphasis added).

2. Email Communications

Plaintiffs also point to email communications between competitor Defendants. It will be remembered that on January 12 and 13 Charles Anderson met with Time, AMI, and Bauer to propose the price increase and inventory cost shift. On January 13, 2009, Porsche of DSI emailed Pecker of AMI that he had spoken "to Rick Parker [of Bauer] last night" and that "[l]ike us [Parker] also believes we should start simultaneously using our collective resources and influence to direct business towards [TNG]."[21] Anderson Opp. (Curtis) ¶ 57. Michael Roscoe, a consultant to AMI and DSI, responded that the "best strategy" would be to "get Bauer and as many other big players as possible on board to moving business away from Anderson" and to "finaliz[e] a fail safe program to replace them entirely if they go down or walk away from the business." *Id.* ¶ 58. Pecker agreed. *Id.* After the call-in conference with John Harrington on January 14, 2009, Parker emailed his superior at Bauer on January 15: "[Time CEO] Ann Moore[,] . . . [Hearst President] Cathy Black[,] as a matter of fact no one will ag[r]ee. Pecker with us." *Id.* ¶ 65. Porche also emailed Pecker (AMI), stating that Roscoe "is asking [Castardi of Curtis] to call Wal-Mart," because "[w]e agree the more companies that get on the record saying they do not intend to pay the 7¢ fee the better." *Id.* ¶ 77.

On January 20, Phillippe Guelton, COO of Hachette, sent an internal email instructing Thomas

---

[21] DSI acted as a distributor for both AMI and Bauer. Time ¶ 13.

Masterson to "monitor closely how the industry is reacting" to Anderson's proposal. *Id.* ¶ 105. Guelton also told Masterson that Alaine LeMarchand, CEO of Hachette, had been in contact with Bauer, and that Bauer was "holding tight for now." *Id.* Masterson replied that "we are in constant touch with Curtis, DSI, and other publishers." *Id.* On January 27, 2009, Porche asked Parker (Bauer) "what [he was] hearing regarding *People* [m]agazine." *Id.* ¶ 113. That day, Parker emailed Time's logistics company seeking "any information on . . . any Time publishing being held up." *Id.* ¶ 111. Porche (DSI) emailed Pecker (AMI) that "Parker has notified me that both Anderson and Source were cut off by him and Kable. I just asked him for that info in writing." *Id.* ¶ 114. Porche sent the same information separately to Curtis. *Id.*

On January 28, 2009, Jacobsen sent an internal email stating that TWR's competitor Curtis was "shutting off ANCO," and that Bauer was "holding product back from Source and ANCO but [had] not come ou[t] publicly about [its] plans." *Id.* ¶ 120. Alleger of Rodale emailed a DSI executive two days later, asking "Our man in Bauerland still solid?"; the executive responded, "He's solid alright." *Id.* ¶ 126. The next day, Duloc (Kable) sent an internal email stating, "[S]poke to [Jacobsen] earlier and not shipping . . . Would think we will announce shut off . . . [Anderson News] tomorrow." *Id.* ¶ 174. On February 1, a DSI executive sent an internal email explaining that "Bauer is hanging around waiting to see what we do," and "Time Warner is sending 100% of their print to new locations."[22] *Id.* ¶ 180.

---

[22] Plaintiffs also contend that Defendants sought to conceal their communications. *See*, *e.g.*, *id.* ¶ 266 (internal Kable email following email exchange with Kable publisher client regarding

Defendants' emails do not indicate that a coordinated agreement existed. Instead, the communications demonstrate a *lack* of coordination among Defendants. Far from providing circumstantial evidence of a "conscious commitment to a common scheme," *see Monsanto Co.*, 465 U.S. at 764, 104 S.Ct. 1464 (citation omitted), Defendants' emails indicate that they did not know what their competitors were doing. In particular, the communications detail Defendants' numerous attempts to determine how other Defendants were reacting to the Anderson proposal—communications that would be unnecessary if Defendants had reached a "common . . . understanding." *Id.*; *see*, *e.g.*, Anderson Opp. (Curtis) ¶ 111 (Bauer seeking "any information on . . . any Time publishing being held up"); ¶ 114 (Porche informing AMI that "Parker [of Bauer] has notified me that both Anderson and Source were cut off by him and Kable," and stating "I just asked him for that info in writing"). It is to be expected that, in the absence of an agreement between Defendants, they would seek to "keep close track of each other's . . . market behavior" with respect to Anderson's proposal, and even "to imitate that behavior." *See Text Messaging Antitrust Litig.*, 782 F.3d at 879. The content of Defendants' emails show little more than industry participants endeavoring to gather information regarding how their competitors were reacting to the Anderson proposal. It was Anderson News itself that set the deadline for acceptance of its proposal to increase prices and shift inventory costs in excess of $70 million to the pub-

---

Anderson price increase and inventory cost shift, stating, "You need to call these guys when they email you."); ¶ 267 (email from Porti of Curtis responding to request from client regarding Anderson proposal, stating, "No E-mails . . . I am in all day . . . call when you get a moment").

lishers. As the deadline approached, and Anderson did not change it, there was increasing uncertainty—not conformity in action.

3. Communications with Wholesalers

Finally, Plaintiffs point to communications between Defendants and Anderson News or its wholesale competitors, which, Plaintiffs claim, support the inference of a conspiracy. For example, on January 17, during a call with Anderson, Castardi told Charles Anderson that he was "working together with [Jacobsen]," and that "whatever [Jacobsen] decided, [Curtis] was going along with." Anderson Opp. (Curtis) ¶ 145. On January 19, Castardi called retailers Wal-Mart and Kroger to discuss Anderson's efforts to lock other wholesalers out of Kroger and Wal-Mart. According to David Rustad, a buyer at Kroger, Castardi told him that "none of the[ ] publishers were going to support the 7-cent surcharge." *Id.* ¶ 79. Rustad also spoke to Jacobsen, who informed Rustad that he had spoken with "all [of] the publishers in the industry," and that "nobody was going to support the fee." *Id.* ¶ 82.

Jim Gillis, COO of Source's parent company, testified that Jacobsen told him that Jacobsen was "going to make it a two-magazine wholesaler system, and [Source] was not going to be one of them. *Id.* ¶ 98. Jacobsen told Gillis that, to do so, "All I need is Bob Castardi, and I got Bob Castardi." *Id.* Gillis also testified that Castardi had said, "[i]f Jacobsen says right, I go right. If he says left, I go left. We're in lockstep. We're doing this together. This is going to be a two-wholesaler system, and you ain't going to be one of them." *Id.* During a conversation with Charles Anderson, Castardi told Charles Anderson that he was "working" with Jacobsen, and that

Anderson should "let . . . Source go out first." *Id.* ¶ 144.

As with the email communications, none of these conversations indicate the existence of an illegal agreement between Defendants. At most, the conversations suggest that Defendants sought to determine how their competitors would behave, and even, perhaps, to imitate it. This does not violate the law. Accordingly, Plaintiffs' "mere showing of close relations or frequent meetings" between Defendants do not "sustain [their] burden absent evidence which would permit the inference that these close ties led to an illegal agreement." *H.L. Moore Drug Exch.*, 662 F.2d at 941 (citation omitted).

Plaintiffs have failed to present evidence that "tends to exclude the possibility that [Defendants] acted independently." *See Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 588, 106 S.Ct. 1348 (citation omitted). Rather, Plaintiffs have set forth evidence that Defendants, when presented with a common economic stimulus which Plaintiffs themselves instigated, acted in a manner that was consistent with each Defendant's own, separate economic self-interest. That Defendants' conduct was parallel is not dispositive.

Plaintiffs' theory, that Defendants acted contrary to their self-interest when they rejected the Anderson price increase and inventory costs, and shifted their business to alternative wholesalers who were not imposing a surcharge or imposing inventory costs, is a concoction which is not plausible. Indeed it is ridiculous. After six years of litigation, Anderson still cannot explain why it was in Defendants' interest to pay more per magazine, and assume substantial inventory costs. It is clear why no explanation is

possible; it was simply not in Defendants' interest to do so. This is especially so because other wholesalers were offering lower prices and were offering to bear inventory costs. Plaintiffs have not offered "strong direct or circumstantial evidence" that would "satisfy *Matsushita*'s 'tends to exclude' standard." *See Publ'n Paper Antitrust Litig.*, 690 F.3d at 63. Defendants' communications with one another following the announcement of Anderson's proposal do not provide this "strong . . . circumstantial evidence," because Plaintiffs have presented no evidence that the communications led to a "conscious commitment to a common scheme designed to achieve an unlawful objective." *See Monsanto Co.*, 465 U.S. at 764, 104 S.Ct. 1464 (citation omitted). Plaintiffs have thus failed to demonstrate a genuine issue of material fact regarding whether Defendants participated in a "concerted action" in violation of Section 1 of the Sherman Act.

II. Clayton Act

a. Antitrust Injury

Even assuming that Plaintiffs had demonstrated a genuine issue of material fact regarding the existence of a conspiracy between Defendants, and further assuming that such a conspiracy constituted an illegal agreement, Plaintiffs have failed to raise an issue of material fact regarding whether they have suffered an antitrust injury. *See Konik v. Champlain Valley Physicians Hosp. Med. Ctr.*, 733 F.2d 1007, 1019 (2d Cir. 1984).

It is undisputed that, with the exception of Source, Plaintiff's wholesaler competitors did not seek a price increase or to shift inventory costs, or that the prices and costs that Anderson News sought to impose were above that which other wholesalers were charging.

Plaintiffs fail to explain how Defendants' refusal to acquiesce to their above-market prices constitutes an antitrust injury. Indeed, a company's inability "to raise [its] prices" due to competition is not an antitrust injury. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337-38, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). Plaintiffs cannot demonstrate that Defendants' actions were "competition-reducing," because Anderson News was not attempting to "compete" with other wholesalers. *See id.* at 344, 110 S.Ct. 1884. Instead, Anderson News sought to unilaterally increase its rates above market price. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) ("The antitrust laws . . . were enacted for the protection of competition[,] not competitors.") (citation omitted).

b. Causation

Moreover, Plaintiffs fail to raise a genuine issue of material fact regarding whether Defendants' conduct caused Plaintiffs' alleged antitrust injury. The undisputed facts show that Anderson News' collapse was entirely due to its own actions, and nobody else's. *See Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 44 (2d Cir. 1986).

Prior to announcing the surcharge in January 2009, Anderson News had been losing money for years. In each fiscal year from 2004 through 2008, Anderson News reported income from continuing operations ranging from negative $18.9 million to negative $30.9 million. Time ¶ 48. During those years, Anderson News' earnings before interest, taxes, depreciation, and amortization, ranged from negative $12.5 million to negative $23 million. *Id.* ¶ 49. In fact, between 2004 and 2008, Anderson News reported positive net income only in 2006—and

that positive income was solely due to the sale of certain operations to its competitor Source. *Id.* ¶ 50.

When Charles Anderson made his January 2009 proposal for a price increase and inventory cost shift, he explicitly stated that "over the last 10 years . . . profits [had] eroded to nothing and into significant losses." *Id.* ¶ 76. If publishers did not agree to the Anderson proposal, Anderson News would likely exit the business. During his January 12 meeting with Ann Moore of Time, Charles Anderson told her that Anderson News needed to implement the price increase, and shift inventory expenses, "to be viable." *Id.* ¶ 69. While planning the telephone conference to announce and explain the proposal, Charles Anderson told John Harrington, who conducted the conference, that "if [Anderson News] didn't get an agreement . . . they would cease operations, they would close the doors." *Id.* ¶ 74. During the conference, Charles Anderson stated that "this business is not profitable and has not been for a very long time." *Id.* ¶ 76. Harrington also asked Charles Anderson, "[I]n the event of significant levels of non-cooperation, is it a possibility that Anderson News would leave the magazine distribution business?"; Charles Anderson responded, "The last thing we want to do is exit this business. But we—why should we continue to lose money in a business that doesn't . . . give us any return?" *Id.* ¶ 80.

Charles Anderson also made clear that Anderson News would not distribute magazines for publishers who did not agree to the surcharge and inventory cost shift proposal. *Id.* ¶ 79. (Harrington: "And if [publishers] haven't signed [the] form [assenting to Anderson's terms] as of February 1, you will refuse to distribute them?" C. Anderson: "Yes, that's correct.").

Once Anderson determined that publishers were not responding or submitting to the February 1, 2009 deadline, Charles Anderson implemented his "going dark" strategy-forcing ProLogix East to suspend operations, thus preventing ProLogix East from delivering magazines for Anderson News or TNG. *Id.* ¶¶ 63, 124. Instead of trying to increase prices and shift inventory costs, TNG retained its existing terms and prices. TNG sought and obtained a TRO forcing ProLogix East to reopen and permitting ProLogix to deliver TNG magazines. When Charles Anderson was unable to make good on his threat to stop deliveries for publishers who refused the price increase, the "floodgates" opened. *See id.* ¶ 135; ¶ 139 (C. Anderson testified that he informed "key retailers" that "because of this temporary restraining order, we're going to have to liquidate the company or sell what we can as quickly as we can"). That day, Charles Anderson decided to permanently close Anderson News, even though he had not, at that time, liquidated any assets or terminated any employees. *Id.* ¶¶ 137-38.

Even assuming that Defendants had conspired to reject Anderson News' proposal, it was Anderson News' own conduct and decisions that forced Anderson News out of business, not Defendants. Anderson News sought to counteract years of business losses by unilaterally raising its prices; Anderson News made clear that it would not distribute magazines for publishers who would not agree to the price increase; and Anderson News attempted to ensure that TNG could not distribute magazines during Anderson News' "dark" phase. *See Union Cosmetic Castle, Inc. v. Amorepacific Cosmetics USA, Inc.*, 454 F.Supp.2d 62, 71 (E.D.N.Y. 2006) ("[H]ere, the injury of which

the plaintiffs complain appears to be largely the result of their own business decisions.").

When Charles Anderson realized that his "going dark" strategy failed, he chose to shut down Anderson News, rather than explore alternatives. *See Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co. Inc.*, 510 F.2d 1140, 1142 (2d Cir. 1975) (where plaintiff had "voluntarily terminated" its business, there was "no causal connection between the alleged antitrust violations and th[e] business decision"). For example, Anderson News did not retract the price increase and seek to distribute magazines pursuant to pre-January 12, 2009 arrangements with publishers, nor did it seek court intervention to help enable it to remain in business.[23] Instead, Anderson made the decision to exit the business.

Plaintiffs have therefore failed to raise a genuine issue of material fact regarding whether Defendants' conduct was "both a material and but-for cause" of Plaintiffs' injury. *Publ'n Paper Antitrust Litig.*, 690 F.3d at 66.

III. State Law Claims

Plaintiffs assert claims for tortious interference and civil conspiracy, pursuant to New York state law.

a. Tortious Interference with Contract

The elements of tortious interference with contract "are (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's inten-

---

[23] In contrast, Anderson News' competitor Source filed—and was granted—a TRO requiring publishers to continue to supply it with magazines on pre-surcharge terms. *See* Counterclaims, *infra.*

tional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006) (citation omitted). Plaintiffs assert that, "even in the absence of a breach by [a] third party," a defendant tortiously interferes with contract where "the defendant prevent[s] the plaintiff from performing its contracts with third parties." Opp. Mtn. (Time), at 24. To the extent that Plaintiffs breached their contracts with retailers, the evidence indicates that it was Anderson's actions, not Defendants' actions, that caused Anderson to breach these contracts. Defendants' motion for summary judgment on the tortious interference with contract claim is therefore GRANTED.

b. Civil Conspiracy

Summary judgment for Defendants is also GRANTED with respect to Plaintiffs' civil conspiracy claim. New York "does not recognize an independent tort of conspiracy," *Kirch*, 449 F.3d at 401, and Plaintiffs have no provided evidence of "an otherwise actionable tort." *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 503 N.E.2d 102 (1986).

COUNTERCLAIMS

In February 2014, Defendants AMI, Hearst, and Time ("Counterclaim Plaintiffs") filed counterclaims against Anderson News and Charles Anderson ("Counterclaim Defendants"). The counterclaims alleged that Anderson News and its competitor Source had engaged in an illegal price-fixing conspiracy that caused Counterclaim Plaintiffs to lose profits and incur costs associated with making alternative distribution arrangements.

Anderson announced the Anderson price increase and inventory cost shift on January 12, 13, and 14, during meetings with publishers and the telephone conference with John Harrington of *The New Single Copy*. Time ¶¶ 68, 71. On January 19, 2009, Source sent a letter to publishers explaining that Source would also impose a seven-cent surcharge on each magazine it distributed. *Id.* ¶ 89. Like Anderson News, Source set February 1, 2009 as the effective date for the surcharge. Unlike Anderson News, however, Source did not seek to shift the costs of SBT inventory to publishers. Counterclaim ¶ 25.

When publishers, including Defendants, rejected both the Anderson proposal and the Source price increase, Charles Anderson implemented his "going dark" strategy. Counterclaim Opp. ¶ 71. On February 7, 2009, Bo Castle, President of Anderson Services, informed Anderson News and NGDS that ProLogix East would "stop production and deliveries immediately," and that its employees would "be notified not to report to work on Monday, February 9, 2009."[24] Time ¶ 126.

In contrast, Source contacted publishers to inform them it did not want any interruption in the distribution of publishers' magazines to retailers. *Id.* ¶¶ 98, 100. During the first week of February, Source rescinded its surcharge, but some publishers and distributors still refused to supply it with magazines. *Id.* ¶¶ 97, 101. On February 9, 2009, Source filed a lawsuit in the Southern District of New York seeking a TRO requiring AMI, Bauer, Curtis, DSI, Hachette, Hudson News, Kable, Time, TWR, and

---

[24] On February 9, the Delaware District Court granted a TRO forcing ProLogix East to reopen and resume distributing TNG's magazines. Time ¶ 134.

TNG to continue supplying it with magazines. *Id.* ¶ 102. This Court granted the TRO on February 12, 2009, and ordered the TRO Defendants to continue to supply magazines to Source "on the same terms and conditions under which the defendants respectively supplied such magazines to Source as of January 2009." *Id.* ¶ 103. Following entry of the TRO, the TRO Defendants reached settlements with Source, pursuant to which they continued to distribute magazines through Source. *Id.* ¶ 104.

Counterclaim Plaintiffs assert that Anderson News and Source conspired to fix prices by agreeing to implement a seven-cent surcharge on each magazine they distributed, and by convincing retailers not to accept magazines from publishers who did not pay the surcharge. Counterclaim Plaintiffs claim that they suffered lost profits from sales that they would have made, but for Anderson's "going dark" strategy, which prevented both Anderson News and TNG from delivering magazines to retailers. In addition, Counterclaim Plaintiffs claim that Anderson News improperly withheld payment on due and past-due notices in order to negatively impact Counterclaim Plaintiffs' cash flows and encourage them to accept the Anderson price increase and inventory cost shift. Finally, Counterclaim Plaintiffs argue that they incurred costs associated with making alternative arrangements to replace Anderson News and Source.

I. Legal Standard

To recover damages under Section 4 of the Clayton Act, a private plaintiff must demonstrate antitrust standing. *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75-76 (2d Cir. 2013). To do so, a plaintiff must show that it suffered an injury that is "of the type the antitrust laws were intended to

prevent and that flows from that which makes . . . defendants' acts unlawful." *Id.* at 76 (citation omitted). The injury suffered by the plaintiff therefore must "correspond[ ] to the rationale for finding a violation of the antitrust laws in the first place." *Atl. Richfield Co.*, 495 U.S. at 342, 110 S.Ct. 1884.

II. Analysis

Even assuming that Counterclaim Defendants conspired to fix prices, Counterclaim Plaintiffs have not suffered damages "of the type the antitrust laws were intended to prevent." *See Gatt Commc'ns, Inc.*, 711 F.3d at 76 (citation omitted). Counterclaim Plaintiffs do not claim that they paid inflated prices for Anderson News or Source magazines. Instead, they claim three types of damages: lost profits from sales that they would have made, but for Anderson's "going dark" strategy; improperly withheld payments on Anderson News' due and past-due notices; and costs associated with making alternative arrangements to replace Anderson News and Source.

These injuries do not "flow[ ] from that which makes" Counterclaim Defendants' acts unlawful, because Counterclaim Plaintiffs would have suffered each of these injuries even in the absence of a conspiracy. *Id.* Counterclaim Plaintiffs have provided no evidence that their responses to the Anderson price increase and inventory cost shift or the Source price increase would have been different, had the alleged conspiracy not existed. Nor have they provided evidence that the implementation of Anderson's "going dark" strategy was dependent on the alleged conspiracy. Rather, the evidence indicates that, even if Anderson News and Source had independently and unilaterally imposed the seven-cent surcharges, Counterclaim Plaintiffs would still have rejected

them. As a result, Anderson would have implemented its "going dark" strategy, and would have withheld payment for its due and past-due notices; and Counterclaim Plaintiffs would have sustained costs in finding alternative wholesalers to replace Anderson News and Source. Counterclaim Plaintiffs may indeed have suffered damages from Anderson News' and Source's conduct, but those damages were not due to Counterclaim Defendants' participation in the alleged conspiracy. Accordingly, the motion for summary judgment on the Counterclaims is GRANTED.

CONCLUSION

For the reasons set forth above, Defendants' motions for summary judgment are GRANTED. Counterclaim Defendants' motion for summary judgment on the counterclaims is also GRANTED.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 09 Civ. 2227(PAC)

ANDERSON NEWS, L.L.C. AND LLOYD WHITAKER, AS THE ASSIGNEE UNDER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS FOR ANDERSON SERVICES, L.L.C.,
Plaintiffs,

v.

AMERICAN MEDIA, INC., BAUER PUBLISHING CO., L.P., CURTIS CIRCULATION COMPANY, DISTRIBUTION SERVICES, INC., HACHETTE FILIPACCHI MEDIA U.S., INC., HEARST COMMUNICATIONS, INC., HUDSON NEWS DISTRIBUTORS LLC, KABLE DISTRIBUTION SERVICES, INC., RODALE, INC., TIME INC., AND TIME/WARNER RETAIL SALES & MARKETING, INC.,
Defendants.

AMERICAN MEDIA, INC., HEARST COMMUNICATIONS, INC., AND TIME INC.,
Counterclaim-Plaintiffs,

v.

ANDERSON NEWS, L.L.C. AND CHARLES ANDERSON, JR.,
Counterclaim-Defendants.

[Signed Aug. 20, 2015]

OPINION & ORDER

Honorable PAUL A. CROTTY, District Judge.

Plaintiffs Anderson News, L.L.C. ("Anderson News") and Lloyd Whitaker (together, "Plaintiffs") claim that Defendants[1] engaged in an antitrust conspiracy to drive Plaintiffs out of business, in violation of Section 1 of the Sherman Act and New York State law. On December 19, 2014, Defendants moved for summary judgment on all claims. In conjunction with Defendants' motions for summary judgment, Plaintiffs and Defendants each move to exclude proposed expert testimony.

Defendants seek to exclude the testimony of Professor Guhan Subramanian, Dr. Leslie Marx, Dr. Robert Picard, and Dr. Thomas Lys. Plaintiffs seek to exclude the testimony of Neil Beaton. Because this Court granted Defendants' motions for summary judgment, it is unnecessary to decide the motions relating to the parties' damages experts (Dr. Picard, Dr. Lys, and Beaton).[2] Accordingly, the Court will

---

[1] "Defendants" are American Media, Inc., Bauer Publishing Co., L.P., Curtis Circulation Company, Distribution Services, Inc., Hachette Filipacchi Media U.S., Inc., Hearst Communications, Inc., Kable Distribution Services, Inc., Rodale, Inc., Time Inc., and Time/Warner Retail Sales & Marketing, Inc.

[2] The Court rejects so much of Dr. Lys' proposed testimony which suggests that the Anderson companies were on the cusp of becoming a financial juggernaut, based on certain financial assumptions provided by Anderson. The Court relies on what Charles Anderson said about his company's financial condition as of January and February 2009, as well as Anderson's financial performance over the previous five years. If Anderson had chosen to stay in business, we might observe the actual result, but Anderson chose to quit the business. The proposed testimony amounts to speculation about the future.

decide only the motions concerning the testimony of Professor Subramanian and Dr. Marx.

There are numerous gaps in Plaintiffs' theory of the case, which they attempt to cover over with experts. Anderson's mid-January proposal, instead of being a demand or ultimatum, becomes a benign invitation to negotiate (Professor Subramanian). Without direct evidence of an antitrust conspiracy, various methods of communication between Defendants are styled as "super plus events" which permit an inference of conspiracy, even though an inference of independent action is more compelling (Dr. Marx).

I. Applicable Law

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

In considering whether an expert meets the requirements of Rule 702, the Court's inquiry "thus focuses on three issues: (1) whether the witness is qualified to be an expert; (2) whether the opinion is based upon reliable data and methodology; and (3) whether the expert's testimony on a particular

issue will assist the trier of fact." *Arista Records LLC v. Lime Group LLC*, 2011 WL 1674796, at *7 (S.D.N.Y. May 2, 2011).

To determine whether a theory is the product of "reliable principles and methods," *see* Fed.R.Evid. 702(c), courts generally consider whether the theory can be tested, whether it has been subjected to peer review, the error rate associated with the methodology, and whether the theory is generally accepted by the scientific community. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). An expert's data and methodology is reliable if there is a "rigorous analytical connection between [the] methodology and the expert's conclusions." *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005).

In addition, "[a]n expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *In re Fosamax Prods. Liab. Litig.*, 645 F.Supp.2d 164, 192 (S.D.N.Y. 2009) (citation omitted). Expert testimony is not "helpful" to a jury if the jury is "as capable of comprehending the primary facts and of drawing correct conclusions from them" as an expert. *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); *see Nimely*, 414 F.3d at 397 (an expert that "usurps . . . the role of the jury in applying [the] law to the facts before it . . . does not aid the jury in making a decision," but instead "attempts to substitute the expert's judgment for the jury's") (citation omitted). Moreover, experts who "merely recit[e] what is on the face of a document produced during discovery" do "no more than that which the finder of fact could him or herself do," and such experts' reports "may be precluded on this basis alone." *See*

Cross Commerce Media, Inc. v. Collective, Inc., 2014 U.S. Dist. LEXIS 117244, at *22 (S.D.N.Y. Aug. 21, 2014).

Also inadmissible are "expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise," *Nimely*, 414 F.3d at 398, as well as testimony regarding "the intent or motive of parties," or a "party's state of mind," *In re Rezulin Prods. Liab. Litig.*, 309 F.Supp.2d 531, 547 (S.D.N.Y. 2004); *LaSalle Bank Nat'l Assoc. v. CIBC, Inc.*, 2012 WL 466785, at *7 (S.D.N.Y. Feb. 14, 2012).

II. Application

a. Guhan Subramanian

Guhan Subramanian, a Harvard professor, specializes in business organizations and negotiation theory. Upon his review of, *inter alia*, the recording and transcript of the January 14, 2009 telephone interview to the single-copy magazine market in which Charles Anderson announced the price increase and inventory cost shift, the terms for acceptance, and the consequences for not accepting by February 1, 2009, Subramanian states that in his expert opinion: (1) Anderson intended the price increase and inventory cost shift to be negotiable, and (2) Defendants "knew or should have known" that, notwithstanding the February 1 deadline, the proposal was really an invitation to negotiate. Subramanian Report ¶ 105. Defendants move to exclude Professor Subramanian's testimony.

Professor Subramanian's testimony is inadmissible. There is ample, firsthand evidence of how the parties viewed Anderson's statement, expressed orally and in writing, which reflects the parties' contemporaneous understanding of what Anderson said and their

reactions. A jury is more than capable of "comprehending the primary facts" and "drawing . . . conclusions" from this evidence, without expert assistance. *See Salem*, 370 U.S. at 35. Permitting expert testimony on these issues would improperly "substitute the expert's judgment for the jury's" in determining the import of both spoken words and written documents. *See Nimely*, 414 F.3d at 398 (citation omitted).

The expert report also improperly opines on the parties' knowledge, motivations, and intent. *See*, *e.g.*, ¶ 105 ("Anderson intended its proposed Anderson Surcharge to be negotiable"); ¶ 67 ("Mr. Jacobsen . . . believed that follow-on negotiations with Anderson were possible"); ¶ 72 ("Mr. Anderson understood that Anderson and TWR had reached an agreement regarding the surcharge and discounts"); ¶ 77 ("I conclude from this e-mail chain that Kable knew that Anderson's proposal was negotiable"). This is not a proper subject for expert testimony.[3] *See In re*

---

[3] Plaintiffs also argue that Professor Subramanian's testimony is admissible because courts "routinely permit expert testimony on the 'customs and practice' of a particular industry." Opp. Mtn. at 18. Professor Subramanian testified, however, that he is *not* an expert in magazine publishing or the wholesaling of magazines. Wallace Decl., Ex. C, at 28-29. Professor Subramanian's proposed testimony regarding the "customs and practices of high-level business executives" is not equivalent to testimony regarding the customs and practices of a particular, specialized industry. Opp. Mtn, at 19. Plaintiffs' cases regarding "custom and practice" expert opinions all involve specialized industries. *See Reach Music Publ'g, Inc. v. Warner Chappell Music, Inc.*, 988 F.Supp.2d 395, 403 (S.D.N.Y. 2013) (music industry); *Media Sport & Arts s.r.l. v. Kinney Shoe Corp.*, 1999 WL 946354, at *3 (S.D.N.Y. Oct, 19, 1999) (sports industry); *Gill v. Arab Bank, PLC*, 893 F.Supp.2d 523, 537 (E.D.N.Y. 2012) (banking industry).

Rezulin Prods. Liab. Litig., 309 F.Supp.2d at 547. Defendants' motion to exclude Professor Subramanian's testimony is GRANTED.

b. Dr. Leslie Marx

Dr. Marx, an economics professor at Duke University, offers her opinion that Defendants' conduct was consistent with collusion. She bases her opinions on the presence of what she refers to as "super-plus factors," which are plus factors that "allow a strong inference of collusion." Report ¶ 67.

Dr. Marx's testimony regarding "super-plus" factors is inadmissible, because it appears to be a label conjured up for litigation rather than the "product of reliable principles and methods." *See* Fed.R.Evid. 702(c). Aside from works written by Dr. Marx and her co-authors, there is no scholarly or legal authority defining or using the term "super-plus factors." Nor is there an explanation of why "super-plus factors" demonstrate a stronger inference of collusion than traditional "plus factors." Instead, the Report merely states that "[p]lus factors differ in their strength," and cites to an article and a book, both authored by Dr. Marx and her colleagues. Report ¶ 67. The article identifies certain plus factors as "super-plus factors," based on general economic principals, and proposes an equation, based on the Bayes Theorem of probability, to determine the "strength" of a plus factor. Opp. Mtn., Ex. 5. Neither the article nor the book indicates that the proposed equation has been tested, or that it produces reliable results. Moskowitz Decl., Exs. 5, 6. Moreover, the fact that the term has not been adopted or used by anyone other than Dr. Marx and her colleagues indicates

that this term has not been generally accepted by the scientific community.[4] *See Daubert*, 509 U.S. at 594.

Dr. Marx's opinions regarding "super-plus factors" are therefore excluded. Her opinions regarding the existence of plus factors, and whether she believes that those factors are consistent with Defendants' actions in this case, however, are permitted. *See In re Titanium Dioxide Antitrust Litig.*, 2013 WL 1855980, at *4, *12; *In re Processed Egg Prods. Antitrust Litig.*, 2015 WL 337224, at *7-*9 (E.D.Pa. Jan. 26, 2015).

Defendants also seek to exclude Dr. Marx's opinion that it was in each Defendant's independent economic self-interest to continue to supply Anderson News with magazines. Defendants argue that Dr. Marx failed to take into account factors such as the cost of agreeing to the surcharge, the financial risk to Defendants if Anderson News failed to deliver magazines, and the fact that Defendants had the option of shipping to other wholesalers who did not impose a surcharge.

Although Dr. Marx's report refers to record evidence, such as emails in which Defendants acknowledged that they were losing sales by not shipping magazines to Anderson News' competitor, Source, there is

---

[4] Plaintiffs cite to *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 1855980, at *12 (D.Md. May 1, 2013), in which the Court permitted expert testimony regarding a "multi-factor guide" of economic factors indicating collusive conduct that the expert had developed in connection with the litigation. In that case, however, the Court determined that the factors in the expert's guide were consistent with the plus factors commonly relied upon by antitrust experts. In contrast, Dr. Marx seeks to testify that certain plus factors are *stronger* than others, in that they are more consistent with collusion than other plus factors. It is this portion of Dr. Marx's analysis that lacks support from other academic or legal sources.

no indication that she performed any actual analysis regarding Defendants' financial incentives to continue supplying Anderson News with magazines. Without any such analysis, or explanation as to why it was not performed, Dr. Marx's opinions on this point "merely recit[e] what is on the face of . . . document[s] produced during discovery." *See Cross Commerce Media, Inc.*, 2014 U.S. Dist. LEXIS 117244, at *22. Her opinions on this topic are therefore excluded.

Finally, Dr. Marx's report contains a number of references to Defendants' motivations, thought processes, and understanding.[5] These opinions are inadmissible. *See In re Rezulin Prods. Liab. Litig.*, 309 F.Supp.2d at 547.

Defendants' motion to exclude Dr, Marx's testimony is GRANTED with respect to testimony regarding the term "super-plus factors," Defendants' economic self-interest, and the parties' motivations, thoughts, or intentions. The motion is DENIED with respect to Dr. Marx's opinions regarding "plus factors."

CONCLUSION

For the reasons set forth above, the motion to exclude Professor Guhan Subramanian's testimony is GRANTED. The motion to exclude Dr. Leslie Marx's testimony is GRANTED in part and DENIED in part.

---

[5] *See*, *e.g.*, Report ¶ 106 (Defendants "perceived Walmart as being reluctant to switch wholesalers"); Report ¶ 161 ("Defendants clearly were conscious of potential future antitrust liability"); Report ¶ 214 (Defendants "monitored shipping channels and other sources to ensure that none of their competitors were intending to deviate from their plan to cut off Anderson and Source").

In light of this Order, and the Order GRANTING Defendants' and Counterclaim Defendants' motions for summary judgment, the Clerk is directed to enter judgment and close this case.

SO ORDERED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

SCOTT S. HARRIS
Clerk of the Court
(202) 479-3011

October 5, 2018

Mr. Michael K. Kellogg
Kellogg, Hansen, Todd,
Figel & Frederick, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, DC 20036-3209

Re: Anderson News, L.L.C., et al.
v. American Media, Inc., et al.,
Application No. 18A366

Dear Mr. Kellogg:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on October 5, 2018, extended the time to and including December 14, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk
by /s/ JACOB C. TRAVERS
Jacob C. Travers
Case Analyst

[attached notification list omitted]