

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; BMG MUSIC; CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC., Plaintiffs/Counterclaim Defendants, v. LIME GROUP LLC; MARK GORTON; and GREG BILDSON, Defendants, and LIME WIRE LLC, Defendant/Counterclaim Plaintiff.	06 Civ. 05936 (GEL)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS/COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COUNTERCLAIMS

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December 11, 2006

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PRELIMINARY STATEMENT

This is a familiar and straightforward case by copyright owners against copyright infringers. Defendants develop and promote an Internet file-sharing system that, by defendants' specific design and intent, has become one of the world's most notorious tools for infringement of plaintiffs' copyrighted sound recordings on a gigantic scale. This case is, in fact, just the latest case in which these plaintiffs—record companies who are owners of copyrighted sound recordings—have sued to stop such massive infringement by Internet entities. These cases have all been decided in the record companies' favor by courts around the country, including the Supreme Court of the United States.[1]

Familiar also, unfortunately, are strategic attempts like the counterclaims in this case to muddy the issues and increase the burden on the copyright owners by turning a straightforward infringement case into a sprawling, complex and meritless antitrust action.[2] Here, defendant Lime Wire LLC ("LW") brings federal antitrust and state law counterclaims against the record companies, claiming that the record companies have somehow violated the law by taking steps to prevent infringement of their copyrighted sound recordings.

Not only does LW ignore the fact that the record companies are fully entitled to protect their copyrights as a matter of law, but LW also does not—and indeed cannot—allege that it has antitrust standing. LW alleges no injury to itself, no facts suggesting that the record companies' conduct could cause it injury, and no harm to competition resulting in injury to LW

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[1] *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *cert. denied*, 124 S. Ct. 1069 (2004); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, CV 01-8541, CV 01-09923, 2006 WL 2806882 (C.D. Cal. Sept. 27, 2006).

[2] *See, e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litigs.*, MDL No. 1361, 2006 WL 2819811 (D. Me. Oct. 2, 2006); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F. Supp. 2d 1213 (C.D. Cal. 2003).

as a result of the record companies' alleged actions. Even apart from its lack of standing, LW's Sherman Act § 1 and § 2 claims must be dismissed because LW has not defined a relevant market; with respect to § 1, LW has alleged conspiracy in only conclusory terms; and with respect to § 2, LW has not alleged that *any* of the record companies has monopoly power, or has attempted or conspired to achieve monopoly power, in the alleged markets, relying instead on the non-existent "shared monopoly" theory. LW's state law claims also must be dismissed because there is no subject matter jurisdiction once the federal counterclaims are dismissed, and, in any event, LW has failed to plead essential elements of each of those claims.

The First Amended Counterclaims are LW's second attempt to plead antitrust and state law violations. All of these fatal defects nevertheless remain. LW simply does not—because it cannot—allege that it has antitrust standing or that the record companies have violated any law. Accordingly, all of LW's counterclaims should be dismissed, with prejudice.[3]

STATEMENT OF FACTS

A. Procedural History

Plaintiffs/counterclaim defendants ("plaintiffs" or the "record companies") filed the Complaint in this action ("Compl.") on August 4, 2006, alleging that Lime Wire LLC, Lime Group LLC, Mark Gorton and Greg Bildson (collectively, "defendants") are liable for the massive wholesale infringement of the record companies' copyrighted sound recordings through defendants' LimeWire software, system/network and related services. (*See* Compl. ¶¶ 1-3.)

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[3] Judge Loretta A. Preska is presiding over similar antitrust claims against the record companies in MDL-06-1780. A consolidated complaint is not due to be filed in that action until the beginning of next year. Should this motion not obviate the need to consider a motion to sever LW's antitrust counterclaims and transfer them to Judge Preska, the consolidated complaint will make clear the extent of the overlap between the counterclaims here and the claims in the MDL action. The record companies will then consider whether to move to sever (or alternatively, bifurcate) these counterclaims.

The defendants answered the Complaint on September 25, 2006, setting forth twenty-two affirmative defenses. One defendant, LW, also asserted six counterclaims. On November 17, 2006, LW amended its counterclaims and is now asserting eight counterclaims (the "First Amended Counterclaims" or "FAC"): for alleged violations of §§ 1 and 2 of the Sherman Act and three New York statutes (the Donnelly Act, the Crawford-Feld Act and General Business Law § 349), and for alleged tortious interference with prospective business relations. (FAC ¶¶ 62-91.)

B. The Allegations of the First Amended Counterclaims

While well-pleaded factual allegations must be presumed true for purposes of this motion to dismiss,[4] s*ee Brass v. American Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993), the Court need not accept as true "conclusory allegations and legal conclusions masquerading as facts," *see Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 179 (S.D.N.Y. 2006), or "naked assertions without supporting facts," *Pollack v. Laidlaw Holdings, Inc.*, Civ. No. 90-5788, 1995 WL 261518, at *1 (S.D.N.Y. May 3, 1995) (quotation omitted).

1. Lime Wire LLC's Business

LW has "developed and distributed a communication software program," called "LimeWire," that LW describes as "truly decentralized P2P technology." (FAC ¶ 43.) "P2P" or "peer-to-peer" technology allows millions of Internet users "to connect to each other directly." (*Id.* ¶ 26.)

Although LimeWire has a "built-in audio player component" that allows users to listen to sound recordings (Answer ¶ 45), LW nevertheless alleges that it was its "intent" to employ a "step-by-step plan to educate users that downloading copyrighted material was

[4] The record companies, of course, vigorously dispute LW's counterclaim allegations.

potentially illegal, and to instead encourage users to purchase music legally . . ." (FAC ¶ 45). As part of this alleged plan, LW says it developed a "hash-based" filter that required "content owners [to] provide [their] unique hashes to [LW] . . ." (*id.*), but LW complains the record companies "declined to participate" and "have denied [LW] reasonable access to the hashes of their copyrighted works" (*id.* ¶ 46).[5]

In addition to its LimeWire software, LW created "MagnetMix" in July 2003. (FAC ¶ 43.) Unlike LimeWire, MagnetMix is not a peer-to-peer technology. It is a website that allegedly "link[s] digital rights managed, licensed, and copyrighted content available over the Internet through the LimeWire software application." (*Id.*) Any content linked through the MagnetMix website is available "without charge." (*Id.*) Indeed, according to LW, "MagnetMix was created to foster [LW]'s vision of making *free* content available over the Internet." (*Id.* ¶ 44 (emphasis added).) Notwithstanding LW's "vision" of free content, LW says it "inten[ded] to utilize [MagnetMix] as a means to ultimately charge customers for downloading copyrighted content" over the Internet. (*Id.* ¶ 43.)

2. <u>The Alleged Relevant Markets</u>

LW alleges at least *nine* different and largely overlapping markets: (1) the market for "distribution of recorded music" (FAC ¶¶ 28, 33, 51, 63); (2) the market for "distribution of commercially valuable recorded music" (*id.* ¶¶ 69, 72); (3) the market for "digital distribution of recorded music" (*id.* ¶ 51); (4) the market for "online distribution of recorded music" (*id*. ¶ 63; *see also id.* ¶¶ 33, 34, 40); (5) the market for "electronic distribution of music via the Internet" (*id*. ¶ 28); (6) the market for "digital distribution of commercially valuable recorded music over the Internet" (*id.* ¶¶ 69, 72); (7) the market for "digital distribution within the United States of

[5] A "hash" is a unique identifier for an individual digital file. (FAC ¶ 45.)

commercially valuable copyrighted recorded music over the Internet" (*id.* ¶ 66; *see also id.* ¶ 50); (8) the market for "digital distribution of copyrighted content over the Internet" (*id.* ¶ 56); and (9) the market for "ownership of copyrighted content" (*id.* ¶ 51). None of these markets is defined, and each of them is described using different language purporting to limit them in different ways. For example, the alleged market for "digital distribution of recorded music" (*id.* ¶ 51) may include the distribution of digital sound recordings on compact discs, online distribution and other digital distribution methods, whereas the market for "online distribution of recorded music" (*id*. ¶ 63) appears to only include "online" music distribution. It is also unclear whether "online" distribution is meant to include only direct transfer of digital music files over the Internet, such as on iTunes, or extends to include packaged compact discs purchased from websites, such as Amazon.com.

Only some of these alleged markets are the subject of LW's antitrust claims against the record companies. In Count I, LW alleges that the record companies conspired to restrain trade in the "markets for the distribution of recorded music and online distribution of recorded music." (FAC ¶ 63.) In Count II, LW alleges that the record companies have acted to monopolize the "market for the digital distribution within the United States of commercially valuable copyrighted recorded music over the Internet." (*Id.* ¶ 66.) In Counts III and IV, LW alleges that the record companies have "attempted to monopolize" and have "conspired to attempt to monopolize and monopolize" the "distribution of commercially valuable recorded music and the digital distribution of commercially valuable recorded music over the Internet." (*Id.* ¶¶ 69, 72.) LW does not attempt to define any of those alleged markets, and does not allege how they relate to each other or to any of the various other alleged markets mentioned in the

First Amended Counterclaims. There is also no allegation of the record companies' share—either individually or collectively—in any of those alleged markets.

As for itself, LW contends that it is "a market participant and a competitor of [the record companies'] *affiliates* in the market for the distribution within the United States of copyrighted commercially valuable music over the Internet." (FAC ¶ 50 (emphasis added).) Nowhere are those "affiliates" identified.

3. LW's Allegations of Anticompetitive Conduct

According to LW, the record companies have conspired to "delay and disrupt the entry and emergence" of new methods for "electronically distributing music at lower cost and outside the control" of the record companies in order to preserve their supposed "oligopoly" over all methods of distributing recorded music. (FAC ¶ 28; *see also id.* ¶ 29.) LW further alleges that the record companies also "joined together and embarked on a scheme to cartelize" the market for the online digital distribution of recorded music. (*Id.* ¶ 33.) In furtherance of this alleged "scheme," LW alleges that the record companies have refused to license their copyrighted works for distribution over the Internet except on allegedly anticompetitive terms through two joint ventures both formed in 2001, MusicNet and pressplay (*id.* ¶¶ 30, 34-39), and have brought copyright infringement actions (*id.* ¶¶ 30, 32).

First, LW alleges that the record companies and their unidentified co-conspirators "refused to license any online distribution of their copyrighted works by any entity other than their own captive joint ventures" (*id.* ¶ 35), "imposed anticompetitive contract terms in the form of unduly restrictive licensing agreements" (*id.*), such as "dead end licenses" (*id.* ¶ 52), "obligated [licensees] not to negotiate with [the record companies] directly" (*id.* ¶ 38), and "intended" to use the joint ventures "to effect a price-fixing arrangement . . ." (*id.* ¶ 36). As a result, LW alleges that "independent retailers faced excessive wholesale prices," "consumers faced higher than competitive prices" and "[c]omposers and performers were deprived of competition from alternative means for the electronic distribution and marketing of their music." (*Id.* ¶ 36.) LW concedes, however, that the record companies have "for the most part divested themselves" of their interest in these joint ventures. (*Id.* ¶ 39.) LW also acknowledges, as it must, that the record companies have licensed their sound recordings to other entities *not* affiliated with them—such as Apple's iTunes, Rhapsody, Mashboxx and iMesh. (*Id.* ¶¶ 35, 45, 54.)[6] There is also no allegation that LW itself ever sought or obtained from plaintiffs any licenses for the online distribution of their copyrighted works.

Second, LW alleges that the record companies are bringing or threatening to bring copyright infringement actions against the operators of certain peer-to-peer services. (*Id.* ¶¶ 30, 32.) LW does not mention that these lawsuits have been uniformly successful. (*See supra* n.1.) Instead, LW suggests that such lawsuits are used as threats to "coerce all P2P companies" to accept "purchase offers" from iMesh because it alone uses an "acoustic fingerprinting technology" authorized by the RIAA to protect copyrighted music. (FAC ¶¶ 47-48.) LW, by contrast, alleges that it has developed its own "filter application, by deploying what is known as a 'hash-based' filter." (*Id.* ¶ 45.) However, LW says that its own "hash-based" filter does not work because the record companies allegedly refused to provide LW "reasonable access" to the "unique hashes" for their music. (*Id.* ¶¶ 45-46.) LW also alleges that the record companies

[6] Without any factual support, LW alleges the legal conclusion that the record companies somehow "control" iMesh and Altnet. (FAC ¶¶ 47-48.) With respect to iMesh, LW alleges only that RIAA "implied" that "iMesh was the only 'approved' mechanism to convert to a 'legal' site," and that iMesh disclosed to LW the financial statements of a peer-to-peer operator that recently settled an infringement action. (*Id.* ¶ 48.) Moreover, LW acknowledges that "from outward appearances iMesh is not controlled by the RIAA and the [record companies]." (*Id.* ¶ 47.) With respect to Altnet, LW's claim that plaintiffs "control" Altnet is based on the non-sequitur allegation that the record companies "demanded" that LW "obtain a license from Altnet before it would grant [LW] access to their library of hashes." (*Id.* ¶ 48.)

demanded that LW "take a license from Altnet" to its patents "if [LW] wish[ed] to obtain the necessary hashes to filter copyrighted works." (*Id.* ¶ 47; *see also id.* ¶¶ 46, 48.) As a result, LW asserts that the "means by which [the record companies] sought to harm [LW] was through a concerted refusal to deal with [LW] to deprive it of hashes . . . ." (*Id.* ¶ 50.) LW does not allege that LW ever asked for these hashes, nor does it identify who supposedly refused to provide them. Nor does LW allege any specific facts—such as meetings, negotiations or other communications—as to when or how it made such a request. (*Id.* ¶¶ 45-50.)[7]

ARGUMENT

A court considering a motion to dismiss must "assess the legal feasibility of the complaint." *Global Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 704 (S.D.N.Y. 1997). The Court must dismiss LW's First Amended Counterclaims if, taking all well-pleaded allegations as true, LW "can prove no set of facts in support of [its] claims which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). That is the case here.

I. LW LACKS STANDING TO ASSERT ITS ANTITRUST CLAIMS

All of LW's antitrust claims must be dismissed because LW has no standing to assert them. Indeed, those claims were brought to complicate this lawsuit and increase plaintiffs' burden, not because LW was actually harmed by the conduct about which it complains.

To state a Sherman Act claim under either § 1 or § 2, a private plaintiff must demonstrate antitrust standing. *See Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, No. 05-

[7] Paragraphs 49 and 59 of the counterclaims are lists of conclusorily alleged actions that the record companies allegedly undertook, all with regard to LW's peer-to-peer product, LimeWire, or with regard to peer-to-peer platforms generally. For example, LW alleges that the record companies "hack[ed] and explor[ed] the files of [LW] users" (FAC ¶ 59(a)) and falsely claimed that LW was a "pirate," a "smut peddler" or promoter of "child pornography" (*id.* ¶ 59(b)-(d)), and "pressur[ed] advertisers and other vendors and customers of Lime Wire and other peer-to-peer companies to stop doing business with them" (*id.* ¶ 49; *see also id.* ¶ 59(g),(h)).

1845-CV, 2006 WL 3041938, at *5 (2d Cir. Oct. 27, 2006) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 nn.5-6 (1986)). The Second Circuit has established a two-part test to determine whether a plaintiff has antitrust standing: (1) whether the plaintiff has alleged "antitrust injury"; and (2) whether other factors, "largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws." *Balaklaw v. Lovell*, 14 F.3d 793, 797 n.9 (2d Cir. 1994) (citation omitted); *accord Paycom*, 2006 WL 3041938, at *5-*6. LW fails both prongs of this test.

A. <u>LW Has Not Alleged "Antitrust Injury" in Any Relevant Market.</u>

As a threshold matter, to have antitrust standing, LW must allege that it suffered antitrust injury. Antitrust injury is "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 (1977). A private litigant must allege "(1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." *Blue Tree Hotels Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 220 (2d Cir. 2004) (citations omitted). LW has not alleged any of these elements.

1. <u>LW Has Not Alleged Injury-in-Fact.</u>

The First Amended Counterclaims do not contain a single factual allegation that the record companies' allegedly anticompetitive conduct has actually injured LW. LW does not allege that it lost any profits, paid higher prices, had its output restricted or was otherwise harmed. Simply put, LW makes no allegation *at all* that its peer-to-peer service or MagnetMix website have been negatively affected—much less in what way—as a result of the alleged misconduct. Without such alleged injury-in-fact, there is no antitrust injury. *See Blue Tree Hotels*, 369 F.3d at 220; *Eon Labs Mfg., Inc. v. Watson Pharms., Inc.*, 164 F. Supp. 2d 350, 356

(S.D.N.Y. 2001) (dismissing antitrust claims where anticompetitive conduct was not alleged to "in any way delay[] or prevent[] [plaintiff] from bringing its own . . . product to market").

LW's allegation that the record companies "sought to harm" LW by refusing to give LW "hashes" for their thousands upon thousands of sound recordings so LW could "filter" those copyrighted works using LW's own "hash-based filtering technology" (FAC ¶ 50; *see also id.* ¶ 46), is the closest LW comes to alleging injury-in-fact. But it is not enough. Nowhere does LW allege that its peer-to-peer service or MagnetMix website were in fact *harmed* by this alleged conduct, or in what way. LW does not allege, for example, that it was denied alternate filtering technology used by others, that the record companies provide hashes to others but not to LW, that LW could not have obtained the hashes from elsewhere, and that it was injured as a result. LW also does not allege any facts suggesting that the record companies refused to license their content to LW.

In addition, LW does not allege that *it* was injured by the alleged anticompetitive conduct of pressplay and MusicNet. LW asserts that the record companies used pressplay and MusicNet to engage in "price fixing" (FAC ¶ 36), to impose "unduly restrictive licensing agreements" (*id.* ¶ 35), and to "pool their copyrights for anticompetitive purposes" (*id.* ¶ 36). According to LW, the "pernicious results" of that conduct were that "independent retailers faced excessive wholesale prices," "consumers faced higher than competitive prices" and "[c]omposers and performers were deprived of competition from alternative means for the electronic distribution and marketing of their music." (*Id.* ¶ 36.) But LW does not claim to be an affected "retailer," "consumer," "composer," or "performer." LW does not allege that it ever sought to obtain a license, let alone acquired one at "excessive wholesale prices" or on "unduly restrictive" terms.[8] Indeed, LW's business is not even mentioned in this section of the First Amended Counterclaims. (*Id.* ¶¶ 31-40.) And LW certainly is not a consumer, composer or performer.

2. <u>LW Has Not Alleged that the Record Companies' Anticompetitive Conduct Caused LW Injury.</u>

In addition to injury-in-fact, antitrust injury "requires 'proof of *some* damage flowing from the unlawful conspiracy . . . .'" *Eon Labs*, 164 F. Supp. 2d at 356 (citations omitted; emphasis in original); *see also Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986) (lack of a "causal nexus between economic injury and an antitrust violation . . . is fatal to the merits of any antitrust claim"); *Frito-Lay, Inc. v. Bachman Co.*, 659 F. Supp. 1129, 1135 (S.D.N.Y. 1986) (dismissing claims where claimant alleged "no facts to show that its losses were a result of defendant's allegedly anticompetitive activity, rather than . . . some other problem"). At a minimum, this requires "that the injured party be a participant in the same market as the alleged malefactors." *See Automated Salvage Transp., Inc. v. Wheelabrator Envt'l Sys., Inc.*, 155 F.3d 59, 79 (2d Cir. 1998) (quotation and citations omitted). Here, to the extent that the First Amended Counterclaims can be read to allege any injury-in-fact at all, they do not allege a causal relationship between that injury and the record companies' alleged actions.

First, as shown above (*see supra* at 4-5), LW alleges at least nine markets but does not adequately allege that it participated in any of them. The sole allegation of LW's market participation is LW's conclusory claim to be a "market participant and a competitor of the [record companies'] affiliates" in "the market for the distribution within the United States of copyrighted commercially valuable music over the Internet." (FAC ¶ 50.) This allegation is

[8] To the extent LW attempts to assert that its free service, MagnetMix, is a retailer that was somehow injured by the wholesale prices and terms for online distribution set by pressplay and MusicNet, LW would be an indirect purchaser that lacks standing to sue the record companies under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 742-47 (1977).

insufficient and belied by LW's own pleading. LW does not explain how it "participates" in this alleged market or identify a single record company "affiliate"—let alone an "affiliate" of each record company that it has sued—with which it allegedly competes. To the contrary, LW itself alleges that it does *not* distribute content through its P2P software application, LimeWire. (FAC ¶ 43.)[9] LW itself also concedes that MagnetMix does *not* participate in that market since "MagnetMix was created to foster Lime Wire's vision of making *free* content available over the Internet." (*Id*. ¶ 44 (emphasis added); *see also id.* ¶ 43.) Without any factual allegations in support, LW's bare claim that it had the "intention to utilize [MagnetMix] as a means to ultimately charge customers for downloading copyrighted content" (*id*. ¶ 43) plainly is not enough. *See Weatherby v. RCA Corp.,* Nos. 85-CV-1615, 85-CV-1613, 85-CV-1614, 1986 WL 21336, at *6 (N.D.N.Y. May 9, 1986) (dismissing for lack of standing where plaintiffs did not allege they were "ready, willing, and able to enter" market from which they were excluded); *Levine v. Chase Manhattan Corp.*, No. 82 Civ. 4700, 1983 WL 1799, at *3 (S.D.N.Y. Mar. 21, 1983) (holding that "mere hope or expectation [of] engaging in defendants' business as a competitor" is not sufficient to establish antitrust standing) (internal quotation omitted).

Second, LW does not even attempt to link the alleged anticompetitive conduct about which it complains with any specific injury it says it suffered. Nor could it. The alleged terms of plaintiffs' licenses to third-parties (FAC ¶¶ 35, 52, 54) cannot have caused injury to LW, as LW was not a licensee and does not allege that it ever tried to become one. And the record companies' copyright actions against third-parties (*id.* ¶ 32) cannot, under any plausible scenario, have injured LW. Finally, LW's allegation that the record companies "intended" to harm it by declining "to participate" in its plan to use "hash-based" filtering (*id.* ¶¶ 45-46) does

[9] Again, although the record companies dispute this alleged fact, they accept it as true solely for purposes of this motion. (*See supra* at 3.)

not allege *how* that conduct actually harmed, or could have harmed, LW's peer-to-peer service or MagnetMix. In short, the required nexus between the alleged anticompetitive conduct—which at most affected a market in which LW does not participate—and any adverse impact on LW's peer-to-peer service or MagnetMix website—which is nowhere alleged—does not exist here.

3. LW Has Not Alleged Injury Related to the Purposes of the Antitrust Laws.

Even if LW suffered injury flowing from the alleged conspiracy—and no such injury is alleged—that injury must be "injury of the type the antitrust laws were intended to prevent." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (internal quotation omitted). "[T]he antitrust laws . . . were enacted for 'the protection of competition not competitors.'" *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe v. United States*, 370 U.S. 294, 320 (1962)). Harm to competition includes effects such as "negative impact[s] in prices, quantity or quality," *see Korshin v. Benedictine Hosp*., 34 F. Supp. 2d 133, 139-41 (N.D.N.Y. 1999), or reductions in consumer choice, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 241-43 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004). Where an antitrust claimant does not allege injury flowing from such adverse effects, its claims must be dismissed. *See George Huag Co., Inc. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139-40 (2d Cir. 1998) (upholding dismissal of antitrust claims where plaintiff failed to allege "that the challenged action has had an actual adverse effect on competition as a whole in the relevant market" (quotation omitted)).

Allegations regarding harm to competition or injury to LW of the type the antitrust laws were designed to prevent are nowhere to be found in LW's counterclaims. Neither the paragraphs of the counterclaims setting forth the record companies' alleged conduct toward LW (FAC ¶¶ 41-61), in which there are repeated references to the record companies' alleged purposes and intents (*see id.* ¶¶ 46, 51, 53, 54, 57, 60), nor the antitrust counts of the counterclaims (*id.* ¶¶ 62-73), contain a single allegation that any of those actions had any *effect* on competition.

Indeed, the only allegations that could even arguably be construed as alleging harm to competition are those in which *LW* is not mentioned at all. (FAC ¶¶ 31-40.) For example, LW alleges that the pricing terms of MusicNet's licenses, "by design and effect, eliminated price competition among [certain record companies]." (*Id.* ¶ 36.) There is also a vague allegation that the "purpose and effect" of the actions of MusicNet, pressplay and the suits against third-parties "was to delay, suppress and/or eliminate competition in the market for the online distribution of recorded music, to further concentrate their power over the market and to eventually set prices for online distribution to insure their continued profitability. . . . [The record companies] and their co-conspirators have been successful in eliminating many actual and potential competitors . . . ." (*Id.* ¶ 40.)

Not only do these allegations never mention LW, but they are also entirely conclusory. There are no *facts* alleged in support, and courts dismiss antitrust claims based on such conclusory allegations of harm to competition. *See, e.g., Volmar Distribs., Inc. v. The New York Post Co.*, 825 F. Supp. 1153, 1159-61 (S.D.N.Y. 1993) (dismissing complaint because "naked assertion" of harm to consumers and retailers fails to state an antitrust injury adequately when "it is wholly conclusory and is unsupported by any of the facts alleged"); *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 997 (S.D.N.Y. 1981) (conclusory allegations of harm to competition are insufficient to establish antitrust injury, absent alleged "supporting facts, such as the size of the relevant product and geographic markets, the amount of competition foreclosed, and how the acts of the defendants affected that competition").

As to alleged conduct that purportedly is directed at LW itself, those allegations either concern legitimate actions by rights-holders to prevent copyright infringement by the users of LW's peer-to-peer system (LimeWire), which, by LW's own allegation, is not in the market for distribution of sound recordings (FAC ¶ 43), or allege conduct that simply does not give rise to the sort of injury against which the antitrust laws were intended to protect—injury flowing from harm to competition itself. *See American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968). For example, LW alleges that the record companies "hack[ed] and explor[ed] the files of LimeWire users in order to frighten legitimate users of [ ] LimeWire" (FAC ¶ 59), and "employ[ed] certain anti-piracy methods that redirect or disrupt users of 'non-approved' digital distribution technology (such as peer-to-peer)" (*id.* ¶ 49). Even if true, this conduct would be targeted at LW's infringing activity and could not constitute harm to competition. Moreover, if the record companies used "digital watermarking [or] other security technology" (*id.* ¶ 49) to prevent *unauthorized* uses of their copyrighted works (including unauthorized reproduction and distribution of those works through LW's peer-to-peer software), there similarly would be no theory by which such conduct could have harmed competition for the online distribution of music.[10] Finally, the supposed frustration of LW's professed aim of attempting to minimize infringement by deploying a "hash-based" filter (FAC ¶ 45) does not even remotely implicate the antitrust laws' concern of protecting market competition. *See*

[10] Indeed, as copyright holders, the record companies have the right to decide whether and to whom to license their copyrighted works and have the exclusive right "arbitrarily to refuse to license one who seeks to exploit the work." *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990); *see also Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385 (3d Cir. 1999) (*en banc*); *In re Independent Serv. Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1176 (D. Kan. 2000). As the district court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* noted, "[t]he right to exclude is inherent in the grant of a copyright . . . ." 2006 WL 2806882, at *27.

generally Philip Areeda and Herbert Hovenhamp, Antitrust Law ¶ 381 (1995); *Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1375 (11th Cir. 1997).

B. LW is an Improper Antitrust Plaintiff.

Even if LW had properly alleged antitrust injury, it would still lack standing because it is not an "efficient enforcer" of the antitrust laws. *Paycom*, 2006 WL 3041938, at *6. The Second Circuit has articulated several factors in addition to antitrust injury that bear on whether a plaintiff has antitrust standing, including: "(1) 'the directness or indirectness of the asserted injury'; (2) 'the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement'; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Paycom*, 2006 WL 3041938, at *6 (quoting *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988)). Each of these factors further demonstrates that LW does not have standing to assert Sherman Act antitrust claims.

First, as discussed above, to the extent that LW has alleged harm, it has not alleged a direct causal connection between the record companies' alleged acts and that harm. (*See supra* at 12-13.) Indeed, as also shown above (*see supra* at 11-12), LW is not even a participant in any of the alleged relevant markets. Thus, any alleged injury to LW is too attenuated for LW to be a proper plaintiff. *See Information Resources, Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 414 (S.D.N.Y. 2000) (finding injury too indirect to support standing when plaintiff was not a participant in the alleged market). *Second*, LW itself identifies several categories of persons, including the peer-to-peer companies allegedly shut down by the record companies' conduct (*id.* ¶ 40) and "consumers," "composers" or "performers" (*id.* ¶ 36) allegedly affected by that conduct. LW, by contrast, suffered no harm and, indeed, did not decide to file any antitrust claims until after it was first sued for copyright infringement. *See Paycom*, 2006 WL 3041938, at *9; *Daniel v. American Bd. of Emergency Medicine*, 428 F.3d 408, 444 (2d Cir. 2005). *Third*, LW's alleged injury is at best speculative. (*See supra* at 9-11.) And, *fourth*, any calculation of LW's alleged damages also would be difficult to quantify as LW is not a participant in the markets it has identified. *See Illinois Brick*, 431 U.S. at 745.

II. LW HAS NOT ALLEGED A CLAIM UNDER THE SHERMAN ACT

In addition to its fundamental standing problem, LW's Sherman Act § 1 and § 2 claims must be dismissed because LW failed to allege other necessary elements of those claims. LW has not defined a relevant market, has not alleged the existence of a conspiracy to restrain trade in violation of § 1, and has not alleged the existence of a monopoly, attempted monopoly or conspiracy to monopolize in violation of § 2.

A. LW Has Not Properly Defined a Relevant Market.

To state a Sherman Act claim, an antitrust claimant "must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed." *Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., Inc.*, 812 F. Supp. 387, 391 (S.D.N.Y. 1993) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984)). LW has not done so.

In Counts I through IV, LW identifies a series of different markets that it asserts were affected by the same alleged anticompetitive conduct. (*See supra* at 5-6.) Aside from failing to allege why different markets should be analyzed in connection with LW's four Sherman Act claims, LW does not even attempt to define those alleged relevant markets. LW does not offer a "theoretically rational explanation", with *facts* supporting that explanation, for why it has asserted the alleged markets that are the subject of its claims or what are the boundaries of those alleged markets. *Smith & Johnson, Inc. v. Hedaya Home Fashions Inc.*, No. 96 Civ. 5821 MBM, 1996 WL 737194, at *6 (S.D.N.Y. Dec. 26, 1996), *aff'd*, 125 F.3d 844

(2d Cir. 1997) (quotation omitted). LW's pleading likewise contains no discussion of the reasonable interchangeability of music distributed via the Internet as compared with other music distribution channels by "reference to cross-elasticity of demand and the similarity of purpose and clientele of each product." *Id.* at *5; *accord Re-Alco*, 812 F. Supp. at 391-92. Since no relevant market has been defined, it is unclear whether the alleged markets that are the subject of LW's antitrust claims include all paid music downloads, music streaming, subscription services, the free downloads allegedly offered by LW or some combination of the foregoing. In the absence of such allegations, it is impossible to determine the record companies' share of a properly defined relevant market—and whether there is or could be a monopoly in that market—much less assess the competitive impact of the record companies' alleged conduct.

LW's failure to provide a coherent definition of the relevant market, and its failure to allege a factual basis for any of the markets alleged, are alone sufficient reasons to dismiss all of its Sherman Act claims. *See Smith & Johnson*, 1996 WL 737194, at *6 ("[P]laintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid ground for dismissal" (quotation omitted)); *Re-Alco*, 812 F. Supp. at 391-92 (dismissing complaint for, *inter alia*, not alleging a factual basis for the defined market); *Gianna Enters. v. Miss World (Jersey) Ltd.*, 551 F. Supp. 1348, 1353-54 (S.D.N.Y. 1982) ("The absence of an adequate market definition makes it impossible even to approximate the market effect of defendants' allegedly anticompetitive agreement . . . .").

B. <u>LW's Sherman Act § 1 Claim Must Be Dismissed Because LW Has Not Alleged the Existence of a Conspiracy.</u>

To state a Sherman Act § 1 claim for conspiracy, a party must allege the existence of the conspiracy in more than conclusory terms. *See* 15 U.S.C. § 1; *Paycom*, 2006 WL 3041938, at *7-*8. LW has sprinkled the words "conspired", "concerted" and "concertedly" throughout its allegations (*see, e.g.*, FAC ¶¶ 28, 36, 46, 47, 53, 57, 61, 63), but the mere allegation of "conspiracy" without "a sufficient supporting factual predicate" does not properly state a claim, *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006). *See also Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy . . . under the antitrust laws without any supporting facts permits dismissal"); *In re Elevator Antitrust Litig.*, No. 04 CV 1178 (TPG), 2006 WL 1470994, at *8 (S.D.N.Y. May 30, 2006) ("[S]omething in the way of a factual predicate for alleging a price fixing conspiracy must be pleaded."); *John's Insulation, Inc. v. Siska Constr. Co., Inc.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991) ("A general allegation of conspiracy, such as made in the [counterclaim], is a mere allegation of a legal conclusion and is inadequate of itself to state a cause of action.").

LW alleges no detail whatsoever regarding the alleged conspiracy. *First*, LW does not identify when the conspiracy allegedly came into being.[11] *Second*, while LW refers throughout the counterclaim allegations to the record companies' alleged "co-conspirators" (FAC ¶¶ 28, 29) and "affiliates" (*id.* ¶¶ 46, 50) it never identifies these "co-conspirators" or "affiliates." *See Petroleum for Contractors, Inc. v. Mobil Oil Co.*, No. 77 Civ. 3079, 1978 WL 1438, at *2 (S.D.N.Y. July 5, 1978) ("plaintiffs' failure to identify the parties with whom Mobil allegedly conspired renders these allegations insufficient to state a claim under § 1 of the Sherman Act."). *Third*, LW does not identify how the alleged conspiracy was formed and enforced. There are no allegations of communications among the record companies in furtherance of the alleged conspiracy, and the joint ventures referred to in the counterclaims (*id.*

[11] In fact, some of LW's allegations appear to concern events outside the four-year Sherman Act and Donnelly Act statute of limitations. (*See, e.g.*, FAC ¶¶ 32-33.) 15 U.S.C. § 15b; N.Y. Gen. Bus. Law § 340(5).

¶¶ 34-39) are, by LW's own allegations, no longer controlled by the record companies (*id.* ¶ 39). *See Floors-N-More, Inc. v. Freight Liquidators*, 142 F. Supp. 2d 496, 501 (S.D.N.Y. 2001) (dismissing § 1 claim where allegation of conspiracy was conclusory and plaintiffs did not even allege that defendants were aware of each other's actions).

Moreover, LW does not allege any specific facts showing that any, let alone all, of the record companies were approached by and refused to deal, either individually or collectively, with LW because of an alleged conspiracy. LW asserts only that the record companies "refused to do business" with LW and "concertedly declined to participate" in its plans to develop a "hash-based" filter. (FAC ¶ 46.) That is not enough. LW does not allege facts to suggest that this alleged refusal was the result of concerted action rather than the result of independent decision-making by each copyright holder not to license its copyrighted works to the operator of a peer-to-peer network that was and is, in each record company's respective judgment, a notorious vehicle for massive copyright infringement. Indeed, LW concedes that the record companies have licensed their content to certain companies—such as iTunes—that are not infringing and not owned by the record companies. (FAC ¶¶ 35, 45, 54.) To the extent that any record company declined to license copyrighted content to LW for distribution, LW's allegations do not assert that that record company did so for reasons other than each record company's respective economic self-interest and in light of the massive copyright infringement that is occurring on LimeWire. *See Paycom*, 2006 WL 3041938, at *7-*8 (holding that allegation that defendants "'conspired'" was a "legal conclusion" and claims must be dismissed when alleged facts "show[ed] only largely parallel behavior"); *In re Elevator Antitrust Litig.*, 2006 WL 1470994, at *8 (dismissing § 1 claim because complaint failed to allege any facts "which would indicate any likelihood that [the challenged conduct] was the result of a combination or conspiracy, as distinct from individual competitive conduct by the individual manufacturers"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL No. 1361, 2006 WL 2819811, at *12 (D. Me. Oct. 2, 2006) ("conclusory assertions that there was a combination and conspiracy" were "insufficient to withstand the motion to dismiss").[12]

C. <u>LW's Sherman Act § 2 Claims Must Be Dismissed Because LW Has Not Alleged the Existence of a Monopoly, Attempted Monopoly or Conspiracy to Monopolize.</u>

LW has alleged three claims under § 2 of the Sherman Act—for monopolization, for attempted monopolization and for conspiracy to monopolize. Each of these claims is fatally and incurably defective. Each relies on the misplaced theory that all 13 record companies, as a group, can be held collectively liable as if they were a single monopolist or potential monopolist. But the offense of monopolization only occurs where *one* firm possesses, attempts to obtain, or conspires with others to obtain monopoly power. *See* 15 U.S.C. § 2 (stating that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty . . . ."). By contrast, the "shared monopoly" theory on which LW relies has been soundly and repeatedly rejected in the Second Circuit. We address each of LW's monopolization claims, in turn, below.

1. <u>LW's Monopolization Claim Must Be Dismissed (Count II).</u>

A claim for monopolization under § 2 has two elements: (1) "the possession of monopoly power in the relevant market;" and (2) "the willful acquisition or maintenance of that power." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 61 (2d Cir. 1997) (quotation

[12] In addition, LW fails to allege that the alleged conspiratorial conduct resulted in foreclosure of competition in any relevant market. Thus, LW has failed to state a § 1 claim to the extent the alleged conduct would be assessed under the rule of reason. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998); *Jim Forno's Cont'l Motors, Inc. v. Subaru Distribs. Corp.*, 649 F. Supp. 746, 754 (N.D.N.Y. 1986).

omitted). LW's pleading fails to satisfy the first element for two independent and equally dispositive reasons.

First, LW has not alleged—and cannot allege—that *any* of the record companies possesses a monopoly in any relevant market. Instead, LW alleges that the record companies, as a group, have monopoly power "when they act in concert." (*See* FAC ¶ 66.) The Second Circuit has expressly rejected this "collective monopoly" or "shared monopoly" theory in the context of a § 2 attempted monopolization claim, and quoted approvingly from a district court decision that rejected the theory for monopolization claims. *See H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (citing *Consolidated Terminal Sys., Inc. v. ITT World Commc'ns, Inc.*, 535 F. Supp. 225, 228-29 (S.D.N.Y. 1982)). District courts in the Second Circuit also have rejected attempts by antitrust plaintiffs to premise § 2 monopolization claims on a "shared monopoly" theory. *See Linens of Europe, Inc. v. Best Mfg., Inc.*, No. 03 Civ. 9612 (GEL), 2004 WL 2071689, at *1 n.1 (S.D.N.Y. Sept. 16, 2004) (noting uniform rejection among district courts, but not deciding validity of the theory because § 2 monopolization claim had been abandoned); *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 256-57 (S.D.N.Y. 1995) (rejecting shared monopolization claim); *Flash Elecs., Inc. v. Universal Music & Video Distribution Corp.*, 312 F. Supp. 2d 379, 396-97 (E.D.N.Y. 2004) (dismissing claims of actual and attempted monopolization based on shared monopoly theory). The "shared monopoly" theory has also been rejected outside this circuit. *See, e.g., Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988); *JES Props., Inc. v. USA Equestrian, Inc.*, No. 802CV1585T24MAP, 2005 WL 1126665, at *18 (M.D. Fla. May 9, 2005), *aff'd on other grounds*, 458 F.3d 1224 (11th Cir. 2006); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 249 F. Supp. 2d 463, 470 (M.D. Pa. 2003), *rev'd in part on other grounds*, 401 F.3d 123 (3d

Cir. 2005); *In re Coordinated Pretrial Proceeding in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 481, 485 (C.D. Cal. 1991).

Second, even if a "shared monopoly" theory were a permissible basis for a Sherman Act § 2 claim, LW has not alleged that plaintiffs have such a "shared monopoly". As noted above, in Count II, LW alleges that the record companies have monopolized "the relevant market for the digital distribution within the United States of commercially valuable copyrighted recorded music over the Internet." (FAC ¶ 66.) Leaving aside that this alleged market is nowhere defined nor supported with facts, LW does not, and cannot, claim that plaintiffs, even acting as a group, have monopoly power in that alleged distribution market. Indeed, the First Amended Counterclaims are devoid of any allegation specifying the record companies' market share—either individually or collectively—in any alleged market for online music distribution.[13] Accordingly, LW's monopolization claim must be dismissed.

2. <u>LW's Attempted Monopolization Claim Must Be Dismissed (Count III).</u>

To state a claim for attempted monopolization, LW must allege "(1) that the [record companies have] engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). LW has not done so.

First, LW's attempted monopolization claim is asserted against all 13 record companies, and alleges that they have all "concertedly acted" to achieve monopoly power. (FAC ¶ 69.) As discussed above, however, LW's "shared monopoly" theory cannot, as a matter of law, state a § 2 claim. (*See supra* at 21-23.) Indeed, the Second Circuit has made clear that the

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[13] LW *does* allege that four of the record companies together "sell and distribute over 85% of all recorded music in the United States" (FAC ¶ 22), but that is an entirely distinct (albeit possibly overlapping) market from the market for Internet distribution that is the subject of LW's monopolization claim (*id.* ¶ 66).

market shares of distinct companies "could not be aggregated to establish an attempt to monopolize in violation of Sherman Act section two." *H.L. Hayden Co.*, 879 F.2d at 1018.

Second, LW's pleading is devoid of any allegation that there is a "dangerous probability of monopolization" in any relevant market. Those words—or anything approximating them—do not appear anywhere in the First Amended Counterclaims. (FAC ¶¶ 68-70.) That alone is sufficient to dismiss LW's attempted monopolization claim. *See, e.g.*, *Moccio v. Cablevision Sys. Corp.*, 208 F. Supp. 2d 361, 378 (E.D.N.Y. 2002) (dismissing attempted monopolization claim because, *inter alia*, plaintiff failed to allege dangerous possibility of monopolization); *Smith & Johnson*, 1996 WL 737194, at *5 (dismissing attempted monopolization claim because it failed to allege dangerous probability of monopolization).

Third, LW does not adequately allege that any record company acted with a "specific intent" to achieve a monopoly. Although LW makes the conclusory allegation that the "goal" and "specific purpose" of the record companies' alleged anticompetitive conduct was to acquire a monopoly (FAC ¶¶ 51, 60), LW does not offer any factual support for that assertion. Such conclusory allegations are insufficient to state a § 2 claim. *See Yoonessi v. N.Y. State Board for Prof'l Med. Conduct*, No. 03-CV-871S, 2005 WL 645223, at *26 (N.D.N.Y. Mar. 21, 2005) (dismissing § 2 claims because complaint "does not contain a single factual allegation in support of any element of Plaintiff's attempted monopolization or conspiracy claims against any of the moving Defendants"); *Nat'l Assoc. of Freelance Photographers v. Associated Press*, No. 97 Civ. 2267 (DLC), 1997 WL 759456, at *12 (S.D.N.Y. Dec. 10, 1997) (dismissing § 2 claims where there was "no allegation from which it could be found that AP wilfully acquired monopoly power or intends to acquire it in the future").

3. LW's Conspiracy to Monopolize Claim Must Be Dismissed (Count IV).

The elements of a conspiracy to monopolize claim are (1) "concerted action," (2) "the commission of an overt act in furtherance of the conspiracy," and (3) "specific intent to achieve an unlawful monopoly." *Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d Cir. 1987). LW has not properly alleged such a claim here.

First, LW has not alleged the existence of a conspiracy to vest monopoly power in a particular record company. (FAC ¶¶ 72.) Rather, LW, again, relies on a "shared monopoly" theory of liability to allege that the record companies, as a group, conspired to achieve collective monopoly power. (*Id.*) As noted above, the "shared monopoly" theory of liability for a § 2 claim has been repeatedly rejected. (*See supra* at 21-23.) While the Second Circuit has not yet addressed this theory in the context of a conspiracy to monopolize claim, § 2 claims premised on a group conspiracy to obtain a group monopoly—more aptly described as an oligopoly—have been repeatedly dismissed by courts inside and outside this Circuit. *See Standfacts Credit Servs., Inc. v. Experian Information Solutions, Inc.*, 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005) ("Since section 2 prohibits only monopolization by a single entity, as opposed to shared monopolization, an allegation of conspiracy to create a shared monopoly does not plead a claim of conspiracy under section 2." (citations omitted)); *Flash Elecs.*, 312 F. Supp. 2d at 397 (dismissing § 2 conspiracy claim based on agreement not to compete over large accounts); *Santana Prods, Inc. v. Sylvester & Assocs., Ltd.*, 121 F. Supp. 2d 729, 740-41 & n.1 (E.D.N.Y. 1999) (noting that conspiracy to monopolize claim may be cognizable where competitors seek to allocate a market, but dismissing § 2 claim because the "intended result of the 'concerted activity' alleged here may aptly be deemed a 'shared monopoly'"); *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 391-92 (D. Md. 1990) (distinguishing between alleged conspiracies in which "the aim of the conspiracy is to form a single entity to possess the illegal market power," which may be actionable under § 2, and alleged conspiracies in which "market power continues to be shared among these otherwise unrelated entities", which is not actionable under § 2).

Second, and in any event, LW fails to allege any *facts* supporting its conclusory assertions that the record companies participated in any conspiracy (*see supra* at 18-21), let alone a conspiracy in which the record companies specifically intended to achieve a monopoly, shared or otherwise. "Without allegations containing some basis in fact for such assertions, a Section 2 claim must be dismissed." *In re Elevator Antitrust Litig.*, 2006 WL 1470994, at *11.

III. LW'S STATE LAW CLAIMS FAIL AS A MATTER OF LAW.

As demonstrated above, LW's federal antitrust counterclaims (Counts I through IV) must be dismissed. Once those claims are dismissed, LW's state law claims also must fall for lack of subject matter jurisdiction. Even if that were not the case, each of LW's state law claims should be dismissed because each fails to state a claim.

A. Upon Dismissal of LW's Federal Claims, This Court Lacks Subject Matter Jurisdiction Over LW's State Law Claims (Counts V-VIII).

The only asserted basis of subject matter jurisdiction for LW's state law claims is supplemental jurisdiction. (FAC ¶ 17.) Indeed, that is the only basis on which the Court could have jurisdiction over those claims, as there is not complete diversity among the parties. (*See id*. ¶¶ 1-14.) LW's federal antitrust claims must be dismissed for the reasons set forth above (*see supra* Parts I, II), and upon dismissal of those claims, the state law claims must be dismissed as well. *See Lennon v. Miller*, 66 F.3d 416, 426 (2d Cir. 1995).

B. LW Fails to State a Claim in Counts V-VIII of the First Amended Counterclaims.

1. LW's Donnelly Act Claim Must Be Dismissed For the Same Reasons as Its Sherman Act Claims (Count V).

New York's Donnelly Act is "modeled" on the Sherman Act, and New York's highest court has held that the act "should be construed in light of federal precedent." *Kramer*, 890 F. Supp. at 254 (discussing *X.L.O. Concrete Corp. v. Rivergate Corp.*, 83 N.Y.2d 513, 518 (N.Y. 1994)). The Donnelly Act claim here is premised on the same allegations as LW's Sherman Act claims. (*Compare* FAC ¶¶ 74-77 *with* FAC ¶¶ 62-67.) Thus, LW's Donnelly Act claim fails for the same reasons as its Sherman Act claims. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2006 WL 2819811, at *18 (holding that Donnelly Act claim may be dismissed on same grounds as Sherman Act claims); *accord Granite Partners, L.P. v. Bear, Stearns & Co.*, 58 F. Supp. 2d 228, 246 (S.D.N.Y. 1999); *Kramer*, 890 F. Supp. at 254-59.

2. LW's Claim Under § 369-a of the New York General Business Law Must Be Dismissed Because Plaintiffs Are Not Seeking to Enforce a Minimum Resale Price Agreement (Count VI).

New York General Business Law § 369-a, known as the Crawford-Feld Act, is simply inapplicable here. That Act provides in full that: "Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer *shall not be enforceable or actionable at law*." N.Y. Gen. Bus. Law § 369-a (emphasis added). *See Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 772 (S.D.N.Y. 1980) (finding contract unenforceable). The record companies are not seeking to enforce any such agreement. Moreover, LW does not allege the existence of any such agreement between LW and any record company. Thus, LW's § 369-a claim must be dismissed.

3. LW's Claim Under § 349 of the New York General Business Law Must Be Dismissed Because LW Has Not Alleged Conduct Misleading to Consumers (Count VII).

To state a claim under N.Y. Gen. Bus. Law § 349, LW must allege "that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." *Linens of Europe*, 2004 WL 2071689, at *18; *accord Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 525 (S.D.N.Y. 2003). "[T]he gravamen of the complaint must be consumer injury or harm to the public interest." *Linens of*

Europe, 2004 WL 2071689, at *19. Moreover, that harm must result from a misleading act and the claimant must "plead with specificity the allegedly deceptive acts or practices that form the basis of [the §349 claim]." *Pelman*, 237 F. Supp. 2d at 526.

LW identifies neither a consumer deception nor how the public was supposedly deceived or harmed as required by § 349. *Linens of Europe*, 2004 WL 2071689, at *18-*19 (dismissing § 349 claim because complaint "allege[d] harm principally, if not exclusively, to" plaintiff, not consumers); *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003) (noting that "disputes between competitors where the core of the claim is harm to another business as opposed to consumers, both constitute situations which courts have found to reflect a public harm that is too insubstantial to satisfy the pleading requirements of § 349"); *Pelman*, 237 F. Supp. 2d at 526-30 (dismissing § 349 claims for failure to specify deceptive acts and failure to specify "a single specific advertisement, promotion or statement directed at . . . consumers"); *Tinlee Enter., Inc. v. Aetna Cas. & Sur. Co.*, 834 F. Supp. 605, 609-10 (E.D.N.Y. 1993) (dismissing § 349 claim for lack of specificity). LW's § 349 claim must therefore be dismissed.

4. <u>LW's Claim for Tortious Interference With Prospective Business Relations Must Be Dismissed (Count VIII).</u>

To state a claim for tortious interference with prospective business relations under New York law, LW must allege that: "(1) there was a business relationship with a third party; (2) defendant 'knew of that relationship and intentionally interfered with it;' (3) defendant either acted 'solely out of malice' or used wrongful means; and (4) defendant's 'interference caused injury to the relationship' with the third party." *Masefield AG v. Colonial Oil Indus.*, No. 5 Civ. 2231, 2006 WL 346178, at *8 (S.D.N.Y. Feb. 15, 2006) (citations omitted).

LW does not adequately plead any of these four elements. *First*, LW has failed to specify any "particular, existing business relationship though which [it] would have done business but for the allegedly tortious behavior." *Minn. Mining & Mfg. Co. v. Graham-Field, Inc.*, Civ. No. 96-3839, 1997 WL 166497, at *7 (S.D.N.Y. Apr. 9, 1997); *Envirosource, Inc. v. Horsehead Res. Dev. Co.*, Civ. No. 95-5106, 1996 WL 363091, at *14 (S.D.N.Y. July 1, 1996) ("A general allegation of interference with customers without any sufficiently particular allegation of interference with a specific contract or business relationship will not withstand a motion to dismiss." (internal quotation omitted)). *Second*, LW alleges nothing more than the bare conclusory allegation that the record companies were "aware of these relationships." (FAC ¶ 89.) That is not enough. *See Zdenek Marek v. Old Navy (Apparel) Inc.*, 348 F. Supp. 2d 275, 281 (S.D.N.Y. 2004) (dismissing claim where complaint lacked "any allegations that defendants had knowledge of any specific third parties interested in purchasing or licensing the [trademark] from plaintiff"). *Third*, LW alleges only that the record companies used "wrongful means" (*id.* ¶ 90), another insufficient conclusory allegation. *Finally*, LW has not pleaded any facts that would establish that contracts would have been entered into but for the record companies' alleged conduct. *See Weiss/Watson, Inc. v. Lange*, No. 87 Civ. 0032, 1990 WL 33601, at *4 (S.D.N.Y. Mar. 21, 1990) ("The 'would have been entered into' requirement is stringently construed, requiring more probability than 'being reasonably certain' or 'having a reasonable expectation'"); *Solar Travel Corp. v. Nachtomi*, No. 00 Civ. 3564, 2001 WL 641151, at *10 (S.D.N.Y. June 8, 2001). Count VIII must therefore be dismissed.

CONCLUSION

LW has already amended its counterclaims once and did not—because it could not—cure any of the defects that require dismissal. There is no reason to expect that LW would be able to do so if given an additional chance. Accordingly, for the reasons set forth above, we respectfully submit that the First Amended Counterclaims should be dismissed with prejudice, and without leave to amend. *See Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (per curiam) ("Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.").

December 11, 2006

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