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 DEFENDANTS/COUNTER-PLAINTIFF'S OPPOSITION TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COUNTERCLAIMS AND, ALTERNATIVELY, MOTION FOR LEAVE TO REPLEAD

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INTRODUCTION

Plaintiffs/Counter-Defendants, who are owned and controlled by the major recording labels (Sony, EMI, Universal, and BMG) that control 85% of all music distributed in the world (the "Labels"), have sought to maintain and extend their dominance in the recorded music industry by using anticompetitive tactics to suppress competition and any new technology threatening their position. Like others, Defendant/Counter-Plaintiff Lime Wire LLC ("LW") sought to make innovations available, but the Labels, threatened with new competition as detailed in LW's First Amended Counterclaims ("FAC"), made LW a target of their continuing anticompetitive and slur campaign. Now, faced with claims for redress for their conduct, the Labels claim LW is just another in a long line of infringers like Napster, and belittle its legitimate claims as typical, empty countermeasures. The Labels, however, only filed this suit under the guise of protecting copyrights—having pled guilty to conspiring to violate numerous antitrust laws—this suit is simply another mechanism employed to snuff market competition.

The Labels improperly challenge LW's FAC by misconstruing the nature of LW's claims, exaggerating the applicable pleading requirements, and implying that different standards apply to causes of action brought as counterclaims. The usual rules of notice pleading, however, apply to antitrust counterclaims. Interestingly, unlike the typical motion to dismiss, the Labels' motion does not even claim an absence of fair notice. It cannot. LW's FAC provides fair notice of the claims asserted and adequately states claims for relief. Specifically, LW alleged:

- the Labels' conduct injured competition generally and LW specifically; thus, evidencing LW's standing to assert antitrust claims;
- a primary relevant market and two additional and/or alternative markets;
- the factual underpinnings of its claim under § 1 of the Sherman Act, including concerted refusals to deal that are illegal *per se*;

- a viable § 2 conspiracy claim despite the fact that the law is unsettled regarding claims based on collective market power; and

- the elements of its various state law claims (over which this Court may retain jurisdiction regardless of the disposition of the federal counterclaims).

Finally, should this Court find LW's FAC deficient, leave to amend should be granted.

BACKGROUND OF THE FIRST AMENDED COUNTERCLAIMS

A. The Industry

If diagrammed, the recorded music industry would resemble a bottom-heavy hourglass. At the top of the hourglass are thousands of artists who create music. *See* FAC ¶¶ 20, 22. At the bottom are millions of consumers who wish to listen to recorded music. *See id.* At the narrowest part of the hourglass are the record companies who control the rights to music from the artists, promote it, and distribute it to the ultimate consumers. *See* FAC ¶ 22. Historically, the Labels have dominated the narrow funnel between the artists and the consumers. *Id.*

Traditionally, recorded music has been distributed through tangible means like vinyl records, cassette tapes, and compact discs ("CDs"). FAC ¶ 21. Recording, promoting, and distributing physical copies of the artists' works previously required enormous expenditures, thereby creating huge barriers to market entry and protecting the Labels' dominance for decades. *Id.* ¶ 22. The Internet changed that and threatened the Labels' power— music became easier and cheaper to record, access, and store, and new competitors could broaden the narrow distribution channel between the artists and the consumers. *See id.* ¶¶ 22-23, 27-28. In an open, free market, the Labels would have been delighted to find additional willing purchasers of licenses. *See, e.g., id.* ¶ 24. In their closed, oligopolistic market, however, the Labels feared the loss of their supra-competitive profits and conspired to arrest emerging competition. *Id.* ¶¶ 28-29.

B. Lime Wire

LW is a new entrant into the market for Internet digital distribution of copyrighted music.

LW developed software known as "LimeWire" which is a true decentralized peer-to-peer ("P2P") application, allowing computer users to search for all sorts of digital information, including text, images, audio, video, and software files, much like search engines such as Google. FAC ¶¶ 26, 41, 43. Despite the Labels' claims, LW is not Napster; LimeWire has many valuable uses that do not infringe on copyrights (Napster's sole use was for the trading of music files (MP3s), nothing else). *See id.* ¶¶ 41-43. For example, LimeWire permits anyone to distribute games, software programs, photographs, and home videos at no cost. *See id.* Additionally, professional and amateur artists and authors can use LimeWire to publish their music and work for free and create interest in their content. *See id.* ¶ 23.

Moreover, unlike Napster and its successors, LW is totally decentralized; it does not rely on any central server or database to organize a network or assist users in searching for, transferring, or copying shared files; thus, LW has no knowledge or control over users' searches and file-sharing. FAC ¶¶ 41-43. LW also does not encourage infringement. Before users can install LimeWire, they must agree not to infringe copyrights. *Id.* ¶ 43. Users are then responsible for using the software properly (*id.*), as are users of Xerox machines and VCRs.

In July 2003, LW created a website called MagnetMix. FAC ¶ 43. Although the Labels deliberately misconstrue "LW's vision of making free content available over the internet" (*id.* ¶ 44), MagnetMix is not a means of piracy. *See id.* ¶¶ 44-45. It is an efficient online mechanism for distributing authorized, licensed content through LimeWire. *Id.* ¶ 43.

LW had several goals for MagnetMix. It wanted to publish free content made available by artists. FAC ¶ 44. It also planned to obtain licenses directly from artists and sell that content to its users. *See id.* Additionally, LW intended to sell directly licensed content owned by others or to redirect users to websites that sell licensed content, like Apple's iTunes. *See id.* ¶¶ 43-45.

To further MagnetMix's business plan, LW actively solicited licensed content from media and content owners, realizing that a library of established music would make MagnetMix more attractive to consumers and, thereby, appeal to more artists. *Id.* ¶¶ 30, 44.

Through MagnetMix and LimeWire, LW competes in the market for the digital distribution of copyrighted music over the Internet (FAC ¶ 50) and, necessarily, competes in the broader markets for licensing and distribution of all copyrighted music in the United States. *See id.* ¶¶ 50, 51. Thus, LW offered a direct link between artists and consumers and a means of bypassing the Labels' narrow distribution funnel, thereby challenging the Labels' dominance in the markets for licensing and distribution of copyrighted music. *See id.* ¶¶ 28, 43, 46, 51.

C. The Labels' Anticompetitive Conduct

Rather than compete on the merits in the new environment, the Labels took harsh, anticompetitive steps to squelch LW and companies similar to it. *See* FAC ¶¶ 29, 32, 49. The Labels' goal was to protect their dominance in two markets: (1) distribution of copyrighted music in the United States; and (2) licensing of copyrighted music in the United States for commercial distribution. *Id.* ¶¶ 32, 51. They also sought to leverage their existing power and extend their oligopoly into the market for the digital distribution of copyrighted music over the Internet or, at least, to suppress online music distribution to preserve as long as possible their control over pricing all avenues of distribution. *Id.* ¶¶ 30, 32-33, 51. Utilizing their trade group, the Recording Industry Association of America ("RIAA"), and others to coordinate their efforts, the Labels' attacks on LW and other P2P companies took a variety of forms. *See* FAC ¶¶ 60-61.

One early anticompetitive tactic involved forming two captive joint ventures, *MusicNet* and *pressplay*, to control the market for the digital distribution of copyrighted music over the Internet. FAC ¶¶ 33, 34. EMI, BMG, and Warner Music combined to form *MusicNet*, while *pressplay* was a joint venture between UMG and Sony Music. *Id.* ¶ 34. These digital distribution joint ventures became, for a time, the Labels' exclusive vehicle for licensing and making available music for online distribution. *Id.* Pursuant to the Labels' agreement, they also refused to license any online distribution of copyrighted works to any other company except under anticompetitive terms, foreclosing any real competition. *See* FAC ¶¶ 35, 38. The Labels used their captive joint ventures to fix the price of electronically distributed music and eliminate or limit competition among the joint venture participants (*Id.* ¶¶ 36-37), injuring competitors, consumers, artists, and competition. *See id.* ¶¶ 33, 36-38. Further, the joint ventures gave the Labels' executives opportunities to meet, set prices for licenses, and facilitate other unlawful collusive activity. *See id*. The Labels later divested most, but not all, of their interests in the joint ventures (FAC ¶ 39) and pursued other collusive attacks.[1]

The Labels next promoted, in concert, pet companies in which they or their affiliates have an interest, such as Roxio, Sharman Networks, Audible Magic, Altnet, Mashboxx, and iMesh. FAC ¶¶ 35, 56. For instance, the Labels, through the RIAA, agreed to deal exclusively with iMesh, a P2P company the Labels apparently control. *Id.* ¶¶ 47-48. To limit competition among the Labels themselves and to foreclose other market entrants, the Labels denominated iMesh the only "authorized" P2P file-sharing company in the United States. *Id.* iMesh officials, including its CEO—the former head of the RIAA—tout iMesh as the only RIAA-sanctioned business. FAC ¶ 47. To further their schemes and procure large profits, the Labels attempted to coerce LW and other P2P companies to sell their assets to iMesh for pennies, or be sued. *Id.* ¶¶ 47-48.

The Labels also colluded to price the licenses for their copyrighted material so high that independent distributors, like LW, cannot afford to stay in business unless they have another product tied to music distribution. FAC ¶ 54. Apple's iTunes, for example, stays in business

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[1] The Labels now argue, unconvincingly, that largely divesting their interests in the joint ventures somehow immunizes them from liability for their previous anticompetitive activity. Motion at 19-20.

despite paying the Labels' high licensing prices because it profits from sales of its iPod music player. *Id.* Pursuant to an anticompetitive agreement, the Labels have, however, all refused to grant LW licenses to their catalogs of recorded music even at these artificially high prices. *See* FAC ¶¶ 30, 38, 49, 57. This strategy would not work in a competitive market, that is, one operating without collusion. When LW approached the RIAA to obtain licenses, RIAA officials implied that iMesh was the only "approved" mechanism to convert to a "legal" site and rejected LW's proposals for operating any other way than under the iMesh plan. FAC ¶ 48.

Similarly, despite their charges of copyright infringement, the Labels combined to arrest LW's efforts to institute a system that would inhibit infringement and foster competition. To prevent its users from downloading copyrighted material without a license, LW created a mechanism for filtering copyrighted music. FAC ¶ 45. This system would block users' downloading of "unauthorized" files by comparing certain identifying metadata (known as "hashes") that are unique to each musical work. *Id.* For the filter to work, however, content owners, notably the Labels, must provide the unique, identifying hashes to LW. *Id.* This permits the filter to distinguish authorized works from unlicensed works. *See id.* These hashes are critical for LW to succeed in developing a business in competition with iMesh, which has access to these unique identifiers. *See id.* ¶ 47. Although many content owners have agreed to provide hashes to LW free of charge, the Labels have worked together, against their own interests if they had been acting independently, to deprive LW of hashes. *See* FAC ¶¶ 45-46, 50, 59(g). The Labels' goal is to control ultimately how and by whom their content is distributed over P2P networks through illegal agreements with iMesh and possibly others.

Instead of providing hashes, the Labels demanded that LW use their "preferred" filtering method offered by pet company, Audible Magic. FAC ¶ 46. The Labels also insisted that they would not provide LW with hashes unless LW first obtained a license from Altnet, a company allegedly holding the rights to hash-based filtering. *Id.* LW, however, believes that the Labels have entered into illegal agreements with Altnet and its related entity Sharman Networks and others to force LW to license Altnet technology even though the patents Altnet supposedly owns are invalid. *Id.* ¶¶ 46-47. The purpose of the Labels' boycott and other collusive activity was to prevent LW from competing with the Labels and their affiliates. FAC ¶ 46.

The Labels extended their conspiracy by upsetting LW's relationships with actual and potential advertisers, vendors, and customers. FAC ¶¶ 49, 58. For instance, the Labels have collectively required that contracts for the provision of content to Internet Service Providers ("ISPs") contain a clause forbidding the ISPs from doing business with P2P companies like LW. *Id.* Additionally, the Labels have hacked into users' data to explore the files of LW customers in order to frighten away LW users. *Id.* ¶ 59(a). The Labels also employed "anti-piracy" techniques to redirect or disrupt users of "non-approved" technology such as LimeWire. *Id.* ¶ 49. The Labels even impugned LW's reputation, falsely claiming that it is a "pirate," a "smut peddler," and a child pornography promoter.[2] FAC ¶ 59(b)-(d). Moreover, the Labels threatened P2P users with litigation and pressured artists not to license their work to P2P providers, like LW, that are not owned or controlled by the Labels. *Id.* ¶ 59(f)-(g).

The Labels' anticompetitive conduct drove actual and potential competitors from the market and artificially increased or maintained prices. FAC ¶¶ 36, 40, 53-54. LW has been foreclosed from the market. *See id.* ¶¶ 46-48. Specifically, the Labels' boycott prevented LW from obtaining licenses for the distribution of authorized copyrighted recorded music it sought to sell on MagnetMix. *See id.* ¶ ¶ 30, 38, 49, 57. This has prevented MagnetMix from offering an

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[2] The Labels criticize these and other allegations in FAC ¶¶ 49 and 59 as "conclusory," but it is hard to conceive of a more direct way to allege that LW has been besmirched as a "smut peddler" and worse.

established library of recorded music, making it less appealing to its users and, as a result, to artists. *See* FAC ¶ 30. Their conduct also prevented artists from utilizing MagnetMix to distribute their works. *See id.* ¶¶ 44, 46, 59(g). Additionally, the Labels' collusive conduct barred LW from obtaining the hashes it needs to inhibit copyright infringement by its users. *Id.* ¶¶ 45-46, 50, 59(i). Not only did this prevent LW from expanding MagnetMix pursuant to its business plan, it led to LW's being subjected to this lawsuit, despite LW's efforts to address the Labels' concerns. *See id.* ¶ 43-46. In sum, the Labels' conduct prevented LW from being an effective competitor and proximately caused LW's damages. *Id.* ¶¶ 61, 64, 67, 70, 73, 77.

ARGUMENT AND AUTHORITIES

I. Standard of Review

A complaint should not be dismissed on a Rule 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (this requirement applies "with no less force to a Sherman Act claim."). Following the Supreme Court's axiom that "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims," the Second Circuit has repeatedly held that the purpose of motions to dismiss is only to assess the legal feasibility of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 176 (2d Cir. 2004). When making that assessment, courts must accept the factual allegations as true and draw all inferences in the plaintiff's favor. *See Eternity Global*, 375 F.3d at 176 (citing *DeMuria v. Hawkes*, 328 F.3d 704, 706 (2d Cir. 2003)). Further, the Supreme Court has recognized that in antitrust cases in particular, where "the proof is largely in the hands of the alleged conspirators," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473

(1962), "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976); *see also In re European Rail Pass Litig.*, 166 F. Supp.2d 836, 839 (S.D.N.Y. 2001) (recognizing that dismissals on the pleadings are "especially disfavored in antitrust cases").

II. Lime Wire's Antitrust Claims

A. <u>The liberal pleading requirements of Rule 8 apply to antitrust complaints.</u>

Despite the Labels' attempts to imply the existence of more stringent requirements, traditional, liberal notice pleading rules apply to antitrust claims and counterclaims. FED. R. CIV. P. 8(a) requires plaintiffs to include only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). This statement must only give the defendant fair notice of the plaintiff's claim and its grounds. *Conley*, 355 U.S. at 47. The Second Circuit gauges the sufficiency of a complaint based on the "liberal system of 'notice pleading' set up by the Federal Rules." *Eternity Global*, 375 F.3d at 177 (quoting *Leatherman v. Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993)).

The Second Circuit has consistently held that antitrust cases do not fall within an exception to the rule of liberal notice pleading. *See Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001); *see also George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 (2d Cir. 1977). The FAC is more than adequate to give the Labels fair notice of LW's antitrust claims. Significantly, the Labels do not allege otherwise.

B. <u>Lime Wire has standing to assert its antitrust claims.</u>

The Labels ignore the very basis of LW's claims and the FAC's factual allegations so they may disingenuously cite the two-part antitrust standing test and claim that LW lacks standing. However, because LW sufficiently alleged an antitrust injury and is a proper antitrust plaintiff, the Labels' challenge to LW's standing fails.

1. *LW has alleged an antitrust injury.*

a) LW has alleged an antitrust injury to competition in general.

The first prong of the two-prong test for evaluating standing in an antitrust action is a determination of "whether the plaintiff suffered an antitrust injury." *Balaklaw v. Lovell*, 14 F.3d 793, 797 n.9 (2d Cir. 1994). An antitrust injury is defined as 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 (1977). "It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Id.* (citation omitted).

LW's injury—namely, foreclosure from the market as the result of a conspiracy—is unlike the injuries in most of the cases the Labels cite. Those cases involved injuries not of the type the antirust laws were intended to remedy.[3]

Contrarily, a competitor's injury suffered as a result of a conspiracy involving other competitors "is, if not prototypical, certainly the kind of injury about which the antitrust laws are concerned." *Disenos Artisticos E Industriales, S.A. v. Work*, 676 F. Supp. 1254, 1278 (E.D.N.Y. 1987); *see also Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 68 (2d Cir. 1988) (antitrust plaintiff whose interests "may coincide" with public interest of promoting competition satisfies the first element of the standing analysis). Allegations of group boycotts and concerted refusals to deal have long been held sufficient for purposes of pleading an antitrust injury, even if only a single merchant has been harmed. *See, e.g., Klor's, Inc. v. Broadway-Hale*

[3] *See, e.g., Brunswick*, 429 U.S. at 487-88; *Balaklaw*, 14 F.3d at 797-98; *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc.*, 467 F.3d 283 (2d Cir. 2006). In *Brunswick*, the Supreme Court held that the plaintiffs could not claim "antitrust injury" based upon an alleged *increase* of competition. *Brunswick*, 429 U.S. at 487-88. Similarly, the *Balaklaw* court determined that plaintiff, did not suffer an antitrust injury as the result of losing the competitive bidding process for a hospital's exclusive contract for services. *Balaklaw*, 14 F.3d at 797-98. In *Paycom*, the court rejected antitrust standing because the plaintiff was an indirect purchaser and, therefore, suffered an indirect or pass-through injury of the type forbidden in *Illinois Brick*. *Paycom*, 467 F.3d at 291-92 (applying *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

Stores, Inc., 359 U.S. 207, 213 (1959) (group boycotts are “not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy); *Primetime 24 Joint Venture v. National Broad. Co., Inc.*, 219 F.3d 92, 103-104 (2d Cir. 2000) (satellite operator suing networks for concerted refusal to license programming "clearly alleged injury both to itself and to competition generally"). A conspiracy between competitors and injuries arising from their concerted refusals to deal are precisely the types of anticompetitive actions and injuries that LW alleged in its FAC.

LW’s FAC complains that the Labels and their co-conspirators’ concerted actions harmed competition, and explains how. The FAC alleged that by conspiring to exclude LW from the market, the Labels have preserved their anticompetitive conspiracy to maintain high prices to consumers and limit competition for licensing music. For example, LW alleges in its FAC that the Labels and their co-conspirators “further conspired to use *MusicNet* and *pressplay* as a means to pool their copyrights for anticompetitive purposes,” one result being that “independent retailers faced excessive wholesale prices . . . , consumers faced higher than competitive prices . . ., and composers and performers were deprived of competition from alternative means for the electronic distribution and marketing of their music.” FAC ¶ 36. Moreover, LW alleged that the Labels, “through the RIAA, conspired to deal exclusively with iMesh so as to limit competition among them and foreclose entry by other competitors in the distribution of recorded music.” FAC ¶ 47. LW further alleged that the Labels “colluded to price their licenses so that most independent digital distributors” cannot stay in business “unless they have another product tied to the distribution of music.” *Id.* ¶ 54. As illustrated by these examples, LW sufficiently alleged the Labels’ anticompetitive actions and the resulting effects on competition. Therefore, LW’s pleadings sufficiently allege an antitrust injury to competition.

b) LW has alleged an antitrust injury to LW, individually.

In an effort to show that LW has not sustained an antitrust injury, the Labels go to great lengths to argue that LW has not alleged an "injury-in-fact," pointing primarily to a lack of allegations quantifying monetary damages. Again, the Labels ignore the fundamental basis of LW's antitrust claims—LW has been foreclosed from the market and prevented from operating as an effective competitor. FAC ¶¶ 46-48, 57. LW's foreclosure from the market is a direct, antitrust injury. *See, e.g., Chapdelaine Corp. Sec. & Co. v. Depository Trust & Clearing Corp.,* 2006 WL 2020950, at *4 (S.D.N.Y. July 13, 2006) (antitrust injury suffered when plaintiff "effectively foreclosed from competing in the relevant market"); *New York Medscan LLC v. New York Univ. Sch. of Med.*, 430 F. Supp. 2d 140, 147 (S.D.N.Y. 2006) (claim that conduct harmed business and reduced competition sufficiently alleged an antitrust injury).

The Labels further ignore the law's recognition that antitrust injuries are generally considered difficult to ascertain considering the "vagaries of the marketplace." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981). As a result of that difficulty, an antitrust plaintiff need not provide "'the kind of concrete, detailed proof of injury which is available in [non-antitrust] contexts'" since "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Id.* at 565, 566-67 (citations omitted). Considering the very early stage of this litigation, it is not surprising that LW's pleadings lack the type of quantification of damages sought by the Labels. Indeed, such detail is not required, even at the evidentiary stage. *See id.*

LW's FAC does, however, adequately allege injury to its business and property arising from the Labels' wrongful acts. *See* FAC ¶¶ 64, 67, 70, 73. LW also alleges that it is a competitor of the Labels in the markets for the distribution of all music and for copyright ownership (FAC ¶¶ 50, 51) and a competitor of their co-conspirators in the online distribution market. *See id.* ¶¶ 28, 43, 46-48; *see infra* at § II.C. LW's FAC alleges an antitrust injury through its description of how and why LW has been foreclosed from the markets and prevented from operating as an effective competitor by virtue of the Labels' concerted refusal to deal with LW.

For example, LW has alleged that the Labels and their co-conspirators have: (1) "concertedly declined to participate, refused to do business and have denied [LW] reasonable access to the hashes of their approved copyrighted works" (FAC ¶ 46); (2) "entered into illegal agreements with Altnet, Sharman Networks and others" to force LW to take a license from Altnet, which holds invalid patents, if LW wishes to obtain the necessary hashes needed to utilize its hash-based filtering technology (*id.* ¶ 47); and (3) through their "concerted refusal to deal" with LW, sought to deprive LW of hashes needed to filter copyrighted works and the necessary licenses. *Id.* ¶¶ 30, 35, 38, 50, 57, 59(i). LW also alleged that the Labels proximately caused its damages by conspiring to "unreasonably restrain trade and making statements and performing acts in furtherance of the combination and conspiracy alleged." FAC ¶ 61.

These allegations adequately allege an antitrust injury by placing the Labels on notice that: they foreclosed LW from the market and prevented it from operating as an effective competitor who would otherwise have benefited competition and consumers; and their illegal and concerted actions proximately caused LW's injuries. *See Intellective, Inc. v. Mass. Mut. Life Ins. Co.*, 190 F. Supp. 2d 600, 613, 613 n.3 (S.D.N.Y. 2002) (complaint need not be "a model in clarity" to allege plaintiff was prevented from competing in relevant market, an antitrust injury).

2. *LW is a proper antitrust plaintiff.*

Once the court determines that the plaintiff suffered an antitrust injury, it must then decide whether the plaintiff is an appropriate antitrust plaintiff by conducting a balancing test to "determine whether any of the 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*, 14 F.3d 793, 797 n.9. As the Labels point out, such factors can include "(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 speculative nature 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." *Volvo N. Am.*, 857 F.2d at 66 (citing *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540-545 (1983)).

With regard to the first of these factors, and as discussed in detail *supra* at II.B.1.b., LW adequately alleges that the Labels' anticompetitive conduct caused it a direct injury and that it competes in the relevant market. *See, e.g.* FAC ¶¶ 46-48, 50. As a result of those injuries, LW's own interest in redress sufficiently motivates it to vindicate the public interest and LW can do so effectively as a result of its expertise in the industry. Indeed, in cases involving exclusion from the market, like this one, a plaintiff-competitor is "likely the only potential plaintiff with enough knowledge and incentive to bring suit." *Reddy v. Puma*, 2006 WL 2711535, at *5 (E.D.N.Y. Sept. 21, 2006) (noting that in cases where the alleged injury to the public is widely dispersed, third parties have less incentive to sue and antitrust damages are less concrete). Accordingly, LW's self-interest and experience make it the proper plaintiff to enforce the antitrust laws here; thus, satisfying the second factor. With respect to the third factor, as addressed *supra* at II.B.1.b., LW has already been foreclosed from the market—thus, the harm has occurred and there remains nothing about which to speculate. Finally, as to the fourth factor, because LW suffered a direct injury, this case poses no risk of duplicate recovery. Tellingly, no such risk has been voiced by the Labels.

LW's allegations demonstrate that LW suffered an antitrust injury and is a proper antitrust plaintiff; therefore, the Labels' standing arguments must fail.

C. Lime Wire sufficiently alleged a relevant market for its Sherman Act claims.

LW is not required to plead a relevant market to support its *per se* § 1 Sherman Act violations of price fixing and group boycott. *See In re European Rail Pass*, 166 F. Supp. 2d at 844 (in cases governed by a *per se* analysis, "it is well settled that 'plaintiff is excused from defining the relevant product market.'" (citation omitted)); *see also Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 942 F. Supp. 905, 919 n. 7 (S.D.N.Y. 1996), *dismissed on reargument on other grounds*, 954 F. Supp. 733 (S.D.N.Y. 1997). To the extent that a relevant market analysis is needed for its other claims, LW alleged facts sufficient to support a relevant market.

At the pleading stage, a plaintiff must only allege facts that support a plausible product market that bears a "rational relation to the methodology courts prescribe to define a market for antitrust purposes" that is, an "analysis of the interchangeability of use or the cross-elasticity of demand . . ." *Todd*, 275 F.3d at 200, 203. The Supreme Court explains: "[d]etermination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956).

Yet "[t]he 'market,' as most concepts in law or economics, cannot be measured by metes and bounds." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 (1953). The proper market definition can be determined "only after a factual inquiry into the 'commercial realities.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482 (1992) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)). Indeed, "[b]ecause market definition is a deeply fact-intensive inquiry," courts are reluctant to dismiss complaints for failure to plead a relevant market. *See Todd*, 275 F.3d at 199-200. The Second Circuit has recognized that:

> Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Todd, 275 F.3d at 200 (footnotes omitted).

Although neither situation is applicable to the FAC, the Labels rely on cases involving these types of pleading deficiencies. In *Smith & Johnson*, for instance, the plaintiffs defined the relevant market to include a single product: afghans. *Smith & Johnson, Inc. v. Hedaya Home Fashions Inc.*, 1996 WL 737194, at *6 (S.D.N.Y. Dec. 26, 1996), *aff'd* 125 F.3d 844 (2d Cir. 1997). Yet nowhere in the complaint did the plaintiff "explain why afghans are not interchangeable with other similar products, *e.g.*, quilts, spreads, blankets and comforters, and why afghans constitute their own market." *Id.* Similarly, the relevant market in *Re-Alco* was defined to include only the defendant's program for health education. *Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc.*, 812 F. Supp. 387, 391 (S.D.N.Y. 1993). Recognizing that "the law is clear that the distribution of a single brand . . . does not constitute a legally cognizable market," the court found the allegations inadequate. *Id.* (citations omitted). The vast majority of dismissals for failure to plead a relevant market involve comparable narrowly-drawn alleged markets. *See, e.g., Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86-87 (2d Cir. 2000) (Yale education is not its own relevant market); *Theatre Party Assocs., Inc. v. Schubert Org., Inc.*, 695 F. Supp. 150, 153-55 (S.D.N.Y. 1988) (market limited to tickets to the play "Phantom of the Opera," but not including other Broadway shows, was not a relevant market).

Unlike these cases, LW's allegations do not implausibly restrict the market and warrant dismissal. LW has not limited its market definition to a single brand or product; all types of copyrighted music are included in the alleged relevant market. Nor has LW failed to provide the court with a plausible explanation for the alleged market; thus, the Labels' cases are inapposite.

To the contrary, LW sufficiently alleged facts in support of a relevant market in a way that is both plausible and related to antitrust methodology. LW alleged anticompetitive conduct by the Labels in the market for the digital distribution of copyrighted music over the Internet. For example, the FAC complains of the Labels' conspiracy in the "new market for the electronic distribution of music via the Internet" (FAC ¶ 28); concerted action "to delay and inhibit digital distribution" of copyrighted music (*id.* ¶ 30); conspiracy to exercise market power over "online digital distribution of recorded music" to the detriment of "consumers, composers, and performers" (*id.* ¶ 33); restraint of "the market for the digital distribution of copyrighted content over the Internet" (*id.* ¶ 56); and conspiracy in the market for "online distribution of recorded music." FAC ¶ 63.[4] The FAC includes a section on illegal activities in "the market of online distribution of music" (*id.* ¶¶ 31-40) and alleges that the effect of Labels' actions was to "delay, suppress and/or eliminate competition in the market for the online distribution of recorded music," (*id.* ¶ 40) and LW's P2P distribution technology threatened "market power over the means of digitally distributing content over the Internet." *Id.* ¶ 54.

Moreover, LW expressly distinguishes this proposed relevant market from the market for the "sale and distribution of the physical products (i.e., records, audio cassettes and CDs)" by describing the creation of a "new market for the electronic distribution of music via the Internet." *Id.* at ¶¶ 24-30. LW's allegations discuss the differences between physical recordings and digital music files "unburdened by any tangible media such as a CD." *See* FAC ¶¶ 21-23. The FAC also points out the lack of interchangeability, or cross-elasticity, between copyrighted music distributed over the Internet and its substitutes, due to the evolving recording industry (¶¶ 19-21),

[4] LW's FAC need not define the relevant product market, or even use that exact term. *See Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 392 (E.D.N.Y. 2004).

differences in production and distribution costs (¶¶ 22-23), the new uses for digital music files such as iPods and burning CDs (¶ 23), the impact of new technology on the marketplace (¶¶ 24-26), and the demands and practices of consumers (¶¶ 25-27). These factors combined to create a market for the distribution of copyrighted music via the Internet. *Id.* at ¶ 28.

The relevant market alleged in the FAC is, primarily, the market for the digital distribution of copyrighted music over the Internet in the United States. *See, e.g.,* FAC ¶¶ 28, 36, 56, 63. The use of different terminology to enhance readability and avoid repetition does not alter the fact that the allegations of the primary relevant market in the pleadings are consistent and provide the Labels with ample notice of the claims asserted against them.[5]

Because the Labels' anticompetitive tactics are vast and not confined to a single market, LW did allege two other markets—the market for distribution of all copyrighted music in the U.S. (including tangible media like CDs) and the market for ownership of copyrighted content in the United States (*e.g*. obtaining licenses from artists for copyrighted music). *See* FAC ¶¶ 32 and 51, respectively. These other markets were included in the FAC—not as a result of error or attempted obfuscation—but because of the Labels' strong presence in the music industry and the pervasiveness and reach of their anticompetitive conduct. Since the Labels' intentional anticompetitive conduct affects multiple markets, LW pled all relevant markets, in addition, and in the alternative, to the market for digital distribution of recorded music over the Internet.[6]

D. <u>Lime Wire has stated a claim under § 1 of the Sherman Act.</u>

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[5] In an attempt to enhance their challenge to the FAC, the Labels make much of variations in the wording used in LW's relevant market allegations, claiming that LW has alleged many separate markets. To inflate the figure, the Labels parse the wording of the FAC and find a number of separate markets where none exist. For instance, the Labels count the market for "online distribution of recorded music" (FAC ¶ 63) as separate from the market for "electronic distribution of music via the Internet" (FAC ¶ 28), although the two are synonymous.

[6] Claimants may allege multiple relevant markets. *See International Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 893 F. Supp. 1207, 1213-17 (S.D.N.Y. 1994), *aff'd* 62 F.3d 69 (2d Cir. 1995); FED. R. CIV. P. 8(e)(2).

The burden of pleading the factual underpinnings of a § 1 claim is "relatively modest." *See Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 112 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006); 15 U.S.C. § 1. Short of the extremes of pleading "bare bones" allegations or an "implausible" conspiracy, the complaint need only contain the usual short and plain statement required by Rule 8(a). *Id.* "It is not necessary to plead either the evidence or the facts upon which antitrust conspiracy claims are based in order for a complaint to withstand a motion to dismiss pursuant to Rule 12(b)(6)." *Alco Standard Corp. v. Schmid Bros., Inc.*, 647 F. Supp. 4, 6 (S.D.N.Y. 1986) (determining that a complaint identifying the co-conspirators and describing the nature and effect of the alleged conspiracy stated a § 1 claim).

Despite the applicable modest pleading burden, the Labels complain that LW's allegations of a § 1 conspiracy lack sufficient detail, namely, that LW does not allege (1) the time the conspiracy began; (2) the names of the alleged co-conspirators; and (3) how the conspiracy was formed and enforced.[7] Not only is there no requirement to allege such precise details, LW did, in fact, allege each of those facts.

1. *Origination of the conspiracy*

The Labels cite no authority for the proposition that a plaintiff must identify the conspiracy's beginning. Nevertheless, LW pled that the conspiracy began years ago, perhaps as early as 2000,[8] and continues to the present. *See, e.g.* FAC ¶¶ 33, 39, 61.

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[7] Almost as an afterthought, the Labels assert that LW did not allege that the conspiratorial conduct foreclosed competition in the relevant market, a requirement if the conduct is assessed under the rule of reason. LW, however, has alleged *per se* violations of § 1, so it need not plead that the conspiracy imposed an unreasonable restraint on trade in the relevant market. *See Trugman-Nash*, 942 F. Supp. at 919 n. 7; *see also Klor's*, 359 U.S. at 212. If, however, the rule of reason were employed to analyze the instant conspiracy, LW has adequately alleged that the Labels' conspiratorial conduct foreclosed competition. *See* FAC ¶¶ 40, 46-48, 50. Regardless, the question of whether a restraint is reasonable is usually a question for the fact-finder and cannot be disposed of on a motion to dismiss. *CBS, Inc. v. Ahern*, 108 F.R.D. 14, 28 n.26 (S.D.N.Y. 1985).

[8] The Labels' assertion that because the conspiracy began years ago, some allegations concern events beyond limitations is an inappropriate issue at this stage, particularly since an ongoing conspiracy is alleged.

2. *Members of the conspiracy*

A § 1 plaintiff is not required to identify by name or sue all of the members of the alleged conspiracy so long as the complaint alleges their existence. *Twombly*, 425 F.3d at 117-18 (finding allegations sufficient to give fair notice when the plaintiffs pled the identities of key participants and alleged unnamed "persons, firms, corporations, and associations" engaged in the conspiracy); *see also Trugman-Nash*, 942 F. Supp. at 917 n.6; *Expoconsul Int'l, Inc. v. A/E Sys., Inc.*, 711 F. Supp. 730, 735 (S.D.N.Y. 1989). In *Trugman-Nash*, the court found the amended complaint's reference to collective conduct on the part of a class of entities, New Zealand dairy farmers, sufficient to implicate a group of 15 cooperatives whose identities the plaintiff may have first learned from the defendants' Rule 12(b)(6) motion. *Trugman-Nash*, 942 F. Supp. at 917 n.6. Regarding the co-conspirators, the court aptly noted, "of course defendants know who they are." *Id.* Similarly, the *Expoconsul* court held that a plaintiff's identification of categories of co-conspirators, like "tradeshow exhibitors" and "attendees," sufficiently stated a claim, and since the specific names were largely in the defendant's possession, the plaintiff could conduct discovery to develop its claims. *Expoconsul*, 711 F. Supp. at 735.

The unpublished 1978 case the Labels cite is not in conflict. *See Petroleum for Contractors, Inc. v. Mobil Oil Co.*, 1978 WL 1438 (S.D.N.Y. July 5, 1978). That case did not hold that a failure to name every co-conspirator is fatal to a complaint. *Id.* It simply held insufficient an allegation that one entity, Mobil, conspired with vague, unidentified "others." *Id.* at *3. LW's allegations regarding the members of the instant conspiracy are not vague. To the contrary, LW adequately identified the members of the conspiracy.

LW's FAC alleges that the Labels conspired with one another. *See, e.g.* FAC ¶¶ 48-50, 52, 54, 56, 61. This alone is sufficient. *See Alco*, 647 F. Supp. at 6 (complaint sufficiently stated a § 1 claim when it alleged a conspiracy among a group of defendants, their subsidiaries, and affiliates).[9] LW, however, further alleges that the Labels have conspired with other entities as well, including iMesh (*id.* ¶ 47), Altnet (*id.* ¶¶ 46-47), and Sharman Networks (*id.*). The identities of additional co-conspirators may be uncovered during discovery.

3. *Formation and enforcement of the conspiracy*

The Labels' claim that LW did not allege how the conspiracy was formed and enforced is neither supported by the law nor correct. First, minute details about the operation of a conspiracy need not be alleged to state a claim under § 1. *See Twombly*, 425 F.3d at 111; *Alco*, 647 F. Supp. at 6; *see also Exponsul*, 711 F. Supp. at 735. Second, LW alleged sufficient facts about the nature of the Labels' conspiracy. For instance, the FAC includes allegations of communications among the Labels, such as those under the cover of their joint ventures and through the RIAA. FAC ¶¶ 38, 60-61. These allegations are sufficient. *See Twombly*, 425 F.3d at 118-19 (finding allegations were sufficient when they claimed that the defendants had frequent opportunities to organize and conduct their conspiracy through industry organizations).

LW also adequately alleged the underpinnings of the Labels' conspiracy, such as their refusals to deal. A concerted refusal to license copyrighted material to avoid competition, like the one alleged by LW, constitutes an actionable boycott. *See Primetime 24*, 219 F.3d at 103. In the illustrative case *Primetime 24*, a satellite television provider sued the major television networks and others for § 1 violations. *Id.* at 95. One basis for the suit was the networks' concerted refusal to license copyrighted programming to plaintiff, even though it would be in the networks' individual interests to do so. *Id.* at 95, 97. Noting the advantages of the new satellite technology, the Second Circuit determined that access to programming was essential to satellite operators' ability to compete. *Id.* at 95. The court further recognized that "while owners of

[9] The Labels complain that the FAC refers without specificity to their "affiliates," but the Labels' confusion over that term cannot be real as the Labels surely know the identities of their own affiliated companies.

copyrights may individually refuse to deal with a party seeking a license, such owners may not collectively refuse to deal to prevent competition." *Id.* at 99 (citing *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1, 19 (1979)). Additionally, while copyright holders may coordinate efforts to enforce copyrights against an alleged common infringer, they violate the Sherman Act if they agree to limit their individual freedom of action in licensing rights to such an infringer. *Id.* at 103. Acknowledging that the plaintiff offered services similar to the major networks' through a different technology and was a common competitive threat to the networks, the court held that the networks' alleged concerted refusal to license copyrighted programming to prevent competition constituted a boycott that, if proven, violated § 1. *Id.* at 103.

Like the *Primetime 24* plaintiff, LW has stated a refusal to deal claim. LW alleged that it is offering a competitive product through a different technology that is a competitive threat to the Labels' dominance over the distribution of copyrighted music. FAC at ¶ 22, 28-31, 43-46, 50. LW further alleged that obtaining both licenses and hashes from the Labels is essential to its ability to compete effectively. *Id.* ¶¶ 30, 43-45. Finally, LW alleged that despite their own best interests the Labels agreed not to deal with LW and, as a result, LW's efforts to obtain those licenses and hashes were rebuffed or met with threats. *See, e.g.,* FAC ¶¶ 24, 30, 38, 46-49, 57. These allegations, if proven, constitute a refusal to deal and, therefore, support a § 1 claim for relief . *See Primetime 24*, 219 F.3d at 103; *see also Intellective*, 190 F. Supp.2d at 616 (holding that group boycott was pled when plaintiff alleged that the dominant companies banded together to control the information plaintiff needed to compete and the "clear inference" of plaintiff's pleading was that the defendants' activities "completely precluded competition"). Thus, even without its other allegations regarding the Labels' conspiracy, LW has stated a § 1 claim.

Finally, there is no requirement that LW allege specific facts indicating that the Labels' conduct was not the result of independent decision-making by each label. LW pled the existence of a conspiracy based on an agreement rather than simply the parallel conduct of its members. *See Ambook Enters. v. Time Inc.*, 612 F.2d 604 (2d Cir. 1979) (discussing the role of consciously parallel business behavior as circumstantial evidence from which an agreement can be inferred).[10] Accordingly, LW's FAC alleges facts that, if proven, constitute a § 1 violation.

E. <u>Lime Wire has pled a viable claim under § 2 of the Sherman Act.</u>

Several circuits have recognized the possibility of shared monopoly claims under § 2 of the Sherman Act. *See, e.g., Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) (J. Easterbrook); *Harkins Amusement Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 490 (9th Cir. 1988) (refusing to hold that the shared monopoly theory may never be viable and acknowledging that oligopoly markets often exhibit the same effects as monopoly markets, but rejecting the theory in that case involving numerous sellers); *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1117-18 (5th Cir. 1984) (recognizing the claim of attempted joint monopolization under § 2 of the Sherman Act); *see also* 15 U.S.C. § 2. Legal commentators have also advanced the "shared monopoly" interpretation of § 2 of the Sherman Act, arguing:

> Congruent treatment of single-firm and shared monopoly would facilitate effective and rational antitrust enforcement. In real life, monopoly and oligopoly are rarely sharply distinguishable categories. The "monopolist" in antitrust parlance is really the "dominant firm" in economic parlance. . . . [E]ven in most instances where §2 can be applied, the extent to which power is "unilateral" or "cooperative" will be unclear.

IIIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 810 pp. 398-399 (2d ed. 2002). Despite acceptance by other

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[10] If LW were relying on parallel conduct to establish a conspiracy, to survive dismissal it would not be required to allege the "plus factors" of conscious parallelism—such as parallel acts against the self-interest of the conspirators. *Twombly*, 425 F.3d at 114. In any event, LW's complaint does allege that the Labels acted against their separate, competitive interests in denying LW licenses and in refusing to provide it with hashes. *See, e.g.,* FAC ¶ 24 (Labels profit from sales of copyrighted music) and ¶¶ 45-46, 50, 59 (Labels want to stop copyright infringement, yet refuse to help LW inhibit infringement).

authorities, similar theories have met with resistance in the Second Circuit. *See H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (agreeing that defendants' market shares could not be aggregated to establish attempt to monopolize).

The Labels so concede, however, that the Second Circuit has not directly addressed the viability of § 2 shared monopoly claims. In fact, one court recently noted that although district courts in the Second Circuit have held that allegations of a shared monopoly do not state a claim under § 2, the Second Circuit "has not addressed the issue." *Linens of Europe, Inc. v. Best Mfg., Inc.*, 2004 WL 2071689, at *1 n.1 (S.D.N.Y. Sept. 16, 2004). The court reasoned that "[t]he Supreme Court's decision in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), affirming the conviction of three major tobacco companies for a section 2 conspiracy, has given some courts pause about reaching a categorical conclusion." *Id.*

While prior case law does not unequivocally favor recognition of § 2 claims based on shared monopolies, this area of antitrust law remains unsettled. LW recognizes that this Court is bound by Second Circuit authority. However, given support for the shared monopoly theory in other jurisdictions—and even this district court[11]—LW believes that the theory is ripe for review. When the Second Circuit addresses it directly or the Supreme Court resolves the inter-circuit conflict, LW believes that monopolization and attempt to monopolize claims based on shared monopolies will be permitted and that it has adequately pled such claims in its FAC.[12]

[11] The Southern District of New York tacitly approved the shared monopoly concept in *Intellective* by refusing to dismiss that plaintiff's claims for attempt and conspiracy to monopolize based on allegations that a group of defendants had achieved monopoly power. 190 F. Supp.2d at 600

[12] Monopolization requires: (1) possession of monopoly power in the relevant market; and (2) willful acquisition or maintenance of that power. *Grinnell*, 384 U.S. at 570-71. LW has alleged the Labels' monopoly power in two relevant markets (FAC ¶¶ 22, 30, 32, 51) along with their many acts to acquire or maintain that power (*Id.* ¶¶ 28,30, 35, 38, 47-48, 50). The attempted monopolization requires: (1) anti-competitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a dangerous probability of success. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). LW provided multiple examples of exclusionary conduct in each of the alleged relevant markets (FAC ¶¶ 30, 33-39, 46-49, 52, 54-54), which "may be used to infer the second element,

Claims for *conspiracy* to form shared monopolies, on the other hand, have been more clearly recognized as viable. *See American Tobacco*, 328 U.S. at 796-97, 809-11, 814. One recent district court opinion noted that the viability of the shared monopoly theory in the context of a claim of conspiracy to monopolize has been left open. *Flash Elecs.,* 312 F. Supp. 2d at 397 (ultimately dismissing the § 2 claims because even under a permissive interpretation of the shared monopoly theory, the plaintiff had not sufficiently alleged such a claim). In *Santana Products*, relied on by the Labels, the court determined that a claim for conspiracy to monopolize may be stated against two or more competitors under certain circumstances "even if they do not form a single corporate entity." *Santana Prods., Inc. v. Sylvester & Assocs., Ltd.,* 121 F. Supp. 2d 729, 740 n.1 (E.D.N.Y 1999) (explaining that the Second Circuit has not addressed the theory of conspiracy to form a shared monopoly). The Labels contend that their dominance of the music industry as an oligopoly shields them from any antitrust repercussions. On the contrary, these collusive activities violate the Sherman Act prohibition against conspiracies to monopolize.

Under § 2 of the Sherman Act, conspiracy to monopolize requires proof of (1) "concerted action," (2) "overt acts in furtherance of the conspiracy," and (3) "specific intent to monopolize." *Volvo N. Am. Corp.*, 857 F.2d at 74. LW's FAC provides numerous illustrations of illegal conduct by the Labels to monopolize the relevant markets. The concerted actions of the Labels include, *inter alia*, combining to form joint ventures (FAC ¶¶ 34-39), pooling copyrights to restrict entry into the market for online digital distribution of copyrighted music (*id.* ¶¶ 33, 36), and collectively pursuing litigation against new market participants (*id.* ¶¶ 30, 47). The Labels furthered this conspiracy through overt acts, such as imposing uniform restrictive licenses on

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specific intent to monopolize." *Volvo,* 857 F.2d at 74. The Labels' existing monopolies supports the inference of dangerous probability of success in both the market for the distribution of copyrighted music in the U.S. and the market for ownership of copyrighted content in the U.S. *Id.* LW has further alleged this dangerous probability for the third market of online digital distribution of copyrighted music in the U.S. FAC ¶¶ 35, 38, 40, 47, 54.

distribution (FAC ¶¶ 35, 38), denying both licenses and hashes to all but a select few market participants (*id.* ¶¶ 46-49, 52, 54-55), and authorizing a single P2P file-sharing company, iMesh, to distribute their content (*id.* ¶¶ 47-48). Finally, throughout the development of this new market for online digital distribution of copyrighted music, the Labels have relentlessly pursued the goal of concentrating their power and collectively monopolizing the market (FAC ¶¶ 32-33, 40, 51) with specific intent to monopolize the relevant market (*id.* ¶¶ 32-33, 40, 51, 53, 60-61, 72).

Thus, LW stated § 2 claims as follows: monopolization, attempted monopolization, and conspiracy to monopolize both the market for the distribution of copyrighted music in the U.S. and the market for ownership of copyrighted content in the U.S.; and attempt and conspiracy to monopolize the market for the online digital distribution of copyrighted music in the U.S.[13]

III. Lime Wire's State Law Claims

A. <u>This Court may exercise supplemental jurisdiction over the state law claims.</u>

This Court may and should retain jurisdiction over LW's state law claims, regardless of whether the Sherman Act claims are dismissed. The Labels' contention that this Court *must* dismiss LW's state law claims if its federal claims are dismissed is incorrect. This Court has the discretion to exercise supplemental jurisdiction over state law claims even if it dismisses all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). In such instances, the court "must reassess its jurisdiction over the case by considering several related factors—judicial economy, convenience, fairness and comity." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 56 (2d Cir. 2004). Even if LW's Sherman Act claims are dismissed, the Labels' copyright claims will remain before the Court. Accordingly, judicial economy, convenience, fairness, and comity dictate that this Court opt to exercise supplemental jurisdiction over the state law claims.

[13] To the extent that the relevant markets stated in the FAC's Counts II-V are not in agreement with the markets set out above and in the general allegations of the FAC, LW seeks leave to replead. *See infra* § IV.

B. Lime Wire has properly pled a violation of the Donnelly Act.

The Donnelly Act was modeled on the Sherman Act and "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *Mahmud v. Kaufmann*, 454 F. Supp. 2d 150, 159 (S.D.N.Y. 2006) (citations omitted); *see* N.Y. Gen. Bus. Law § 340. Further, under New York law, "the state and federal antitrust statutes require 'identical basic elements of proof.'" *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 332-333 (S.D.N.Y. 2003). Because LW has adequately alleged claims under §§ 1 and 2 of the Sherman Act, LW's Donnelly Act claim has been properly pled as well. *See Mahmud*, 454 F. Supp. 2d at 159 (applying the same analysis to uphold claims under both the Sherman Act and the Donnelly Act); *Reading Int'l*, 317 F. Supp. 2d at 333.

C. Lime Wire withdraws its Crawford-Feld Act claim (N.Y. Gen. Bus. Law s 369-a).

D. Lime Wire has adequately pled a violation of N.Y. General Business Law § 349.

To state a claim for violation of New York General Business Law § 349, the plaintiff must show that an act or practice was consumer-oriented; that it was misleading in a material respect; and that the plaintiff was injured as a result. *See Leider v. Ralfe*, 387 F. Supp.2d 283, 292 (S.D.N.Y. 2005) (discussing New York law). LW has adequately pled a § 349 claim.

LW alleged that the Labels prevented consumers' access to alternative distribution channels for recorded music by marshalling their combined resources to maintain current pricing schemes and litigate their competitors out of the marketplace. FAC ¶¶ 28, 30. As a result of the Labels' price-fixing, consumers have been misled into paying artificially high prices for recorded music. *Id.* ¶¶ 36, 39. The Labels have also misled the public by spreading false information about LW so as to drive consumers and businesses away. *Id.* ¶ 59. Finally, LW has been injured by the Labels' activities. *See id.* ¶¶ 49, 54, 57. These facts adequately state a § 349 claim.

E. Lime Wire has stated a claim for tortious interference.

To state a claim for tortious interference of prospective business relations, a plaintiff must show: (1) it had a business relationship with a third party; (2) the defendant intentionally interfered with it; (3) the defendant acted for a wrongful purpose or used dishonest, unfair or improper means; and (4) the defendant's interference injured the relationship. *Scutti Enters., LLC v. Park Place Entm't Corp.*, 322 F.3d 211, 215 (2d Cir. 2003) (applying New York law). A plaintiff is not required to allege that any particular contract was lost as a result of the defendants' activities. *See Volvo N. Am.*, 857 F.2d at 75; *CBS*, 108 F.R.D. at 26-27. In *Volvo*, for example, the plaintiff alleged that the defendants' conduct included: persuading or intimidating third parties into refusing to associate with plaintiff; claiming that plaintiff was attempting to mislead the public; and using their monopoly power to threaten punitive action against businesses displaying plaintiff's promotional material. *Id.* at 74-75. The Second Circuit found these allegations sufficient to state a claim for tortious interference, noting that "[a]lthough Volvo does not allege any particular contract that was lost as a result of [defendants'] activities, Volvo does allege the requisite interference for the purpose of harming Volvo." *Id.* at 75. Similarly, the *CBS* counter-plaintiff stated a tortious interference claim with allegations that CBS prevented him from forming contracts by threatening to file lawsuits and discontinue business with the contracting companies. *CBS*, 108 F.R.D. at 26.

LW's FAC alleges similar interference with its business relations by the Labels. First, LW has alleged that the Labels knew of the business relationships LW had developed with vendors, advertisers and customers. FAC ¶ 58. Second, LW has pointed to specific conduct by the Labels to contact or harass these entities and individuals, all with the intent of their inhibiting business relations with LW. *Id.* ¶¶ 58-59. Third, like the *Volvo* defendants, the Labels employed a widespread campaign of deceptive, improper and unfair means, such as hacking into the files of LW users in an effort to intimidate and mislead legitimate users (*id.* ¶ 59(a)) and claiming that LW is a "smut peddler" who promotes child pornography (*id.* ¶¶ 59(b)-(d)). As in *CBS*, the Labels threatened litigation (*id.* ¶ 59(f)) and prevented LW from forming new contracts by requiring contract clauses prohibiting ISPs and others from doing business with LW (*id.* ¶ 58) and refusing to deal with the ISPs who did (*id.* ¶ 59(h)). Finally, as a result of the Labels' wrongful actions, LW lost both actual and potential customers (*id.* ¶¶ 88, 90) and potential business deals (*id.*). LW has, thus, stated a claim for tortious interference.

IV. Motion for Leave to Replead

If this Court determines that LW's FAC fails to state one or more of its claims sufficiently, LW respectfully requests leave to replead pursuant to Rule 15.

FED R. CIV. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court has admonished that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). If the underlying circumstances support relief, a plaintiff should have the "opportunity to test his claim on the merits." *Id.* Thus, leave should be freely given in the absence of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice, or futility. *Id.* Amendment is generally permitted when the request is made in the early stages of litigation. *See E*Trade Fin. Corp v. Deutsche Bank AG*, 420 F. Supp.2d 273, 283 (S.D.N.Y. 2006).

None of the *Foman* factors is an issue here. The Labels cite one unrelated case and argue there is no reason to think LW can improve its FAC. In *Ruffolo v. Oppenheimer & Co.*, however, the court held that denying a request for leave to replead a fraud claim was not an abuse of discretion when the amendment was unlikely to be productive. 987 F.2d 129, 131 (2d Cir. 1993) (per curiam). Critically, in departing from the mandate that leave to amend should be freely given, the *Ruffolo* court noted that the plaintiff "had already obtained all of the information he requested in nearly two years of discovery." *Id.* at 131-32.

In contrast, this case is in its infancy; it was filed in August 2006. The deadline for amending pleadings under this Court's scheduling order is March 9, 2007, almost two months away. Although LW promptly served discovery requests seeking information relevant to its antitrust claims, the Labels have yet to provide any substantive information or produce even a single piece of paper in response to those requests. LW anticipates that if and when the Labels cooperate with discovery, LW will learn additional details regarding its antitrust claims, such as the Labels' coordination of their joint ventures, the Labels' interests in captive companies like iMesh, Altnet, Sharman Networks, and Audible Magic, and, perhaps, the names of additional co-conspirators. Therefore, should this Court be at all inclined to grant the Labels' Motion to Dismiss, LW respectfully requests leave to amend its compliant to state its claims with greater specificity and with the benefit of discovery.

CONCLUSION

Lime Wire prays that this Court deny the Labels' Motion to Dismiss the First Amended Complaint or, in the alternative, grant it leave to amend its counterclaims.

Dated: January 18, 2007

Respectfully submitted,

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