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)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS/COUNTERCLAIM DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COUNTERCLAIMS AND IN OPPOSITION TO LIME WIRE LLC'S ALTERNATIVE MOTION FOR LEAVE TO REPLEAD

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Our opening brief set forth an array of reasons why LW's counterclaims fail as a matter of law. Despite its repetition, length and vehemence, LW's opposition fails to rebut these arguments. Instead, LW relies on fact allegations that are not asserted in its amended counterclaims and unsupportable legal arguments. Bereft of any facts or law to support its claims, LW is reduced to falsely asserting that plaintiffs have "pled guilty to conspiring to violate numerous antitrust laws" (Opp. at 1).[1] Apart from their impropriety, such reckless assertions are insufficient to overcome the fatal defects in LW's counterclaims.

I. LW LACKS STANDING TO ASSERT ITS ANTITRUST CLAIMS

A. LW Has Not Alleged "Antitrust Injury" in Any Relevant Market.

1. LW Has Not Alleged Injury-in-Fact.

LW's counterclaims are devoid of any allegation that its peer-to-peer service or MagnetMix website have actually been injured by plaintiffs' alleged conduct. (Br. at 9-11.) LW's opposition does not, and cannot, overcome this fatal defect, which alone is dispositive of LW's antitrust counterclaims.

First, LW asserts that plaintiffs have "ignore[d] the fundamental basis of LW's allegations" by suggesting that LW must "quantify[] monetary damages" to state a claim. (Opp. at 12.) LW is wrong. LW's pleading is fundamentally defective because LW does not allege how *it* was harmed *at all*. (Br. at 9-11.) The point is not that LW needs to quantify money damages; the point is that LW must allege that it actually suffered some injury. Because LW has not alleged any injury to itself—such as lost profits, higher prices or reduced output—LW could not have suffered antitrust injury and, therefore, lacks antitrust standing. (*Id.*)

[1] Because LW's inflammatory claim of criminal liability is utterly without any evidentiary foundation (as Rule 11 requires), we asked defense counsel to specifically and immediately retract the statement. Although defense counsel agreed that this assertion was without basis and committed to correct it immediately, they have not yet done so.

Second, in its brief (but not in its pleading), LW claims that it suffered injury-in-fact because it was somehow "foreclosed from the market." (Opp. at 12.) But LW did not plead that it was in fact foreclosed (indeed LW claims that MagnetMix and LimeWire are operating websites), and the allegations that LW now cites as support for that proposition say nothing of the sort. Paragraphs 46 through 48 allege only that plaintiffs "refused to do business" with LW by declining to give LW "reasonable access to the hashes of their copyrighted works," and paragraph 57 alleges only (in conclusory fashion) that plaintiffs "refused to do business" with LW "in order to harm [LW] in its business or property." Nowhere has LW alleged that it ever in fact asked any plaintiff for these hashes, nor does LW explain how it could have been harmed by plaintiffs' supposed failure to voluntarily provide the hashes to LW. To the contrary, LW alleges that MagnetMix and LimeWire are up and running (*i.e.*, not foreclosed) (FAC ¶¶ 43-45) and never asserts that either service requires these hashes to stay in business or compete.

Third, LW asserts that it "adequately allege[d] injury to its business and property arising from the Labels' wrongful acts," citing four boilerplate allegations (FAC ¶¶ 64, 67, 70, 73). (Opp. at 12.) But none of those allegations specifies in what way LW was itself harmed.

2. LW Has Not Alleged that Plaintiffs Caused LW Injury.

Even if LW were able to allege injury-in-fact (which as shown above it cannot), LW's counterclaims nonetheless fail because LW did not plead the required causal relationship between plaintiffs' alleged conduct and any injuries LW may have suffered. (Opp. at 10-15.) The closest LW comes to making such a claim is its bald assertion that the "Labels proximately caused its damages." (*Id.* at 13.) The law is clear that this is insufficient.

At a minimum, in order for plaintiffs to have caused LW's antitrust injury, both the plaintiffs and LW would need to be participants in the same relevant market. (Br. at 11-12.) As a threshold matter, however, LW has failed to allege that it participated in *any* of its many

alleged relevant markets. (*Id.*) While LW now suggests that it competes in three separate (but undefined) alleged "distribution" and "ownership" markets (Opp. at 12-13), it did not plead that. Rather, LW makes only the conclusory allegation that it competes in the "market for the distribution . . . of copyrighted commercially valuable music over the Internet." (FAC ¶ 50.) Yet, that allegation is belied by LW's own pleading—*i.e.*, that LW's P2P service does not distribute content (*id.* ¶ 43), and that MagnetMix was created to make "*free* content available" (*id.* ¶ 44 (emphasis added)). (Br. at 12.)

Moreover, LW's pleading does not allege how plaintiffs' alleged anticompetitive conduct could have caused LW any specific injury. (Br. at 12-13.) LW alleges no facts suggesting that plaintiffs refused to license their content to LW. All LW asserts is that plaintiffs declined to provide LW "hashes" to filter copyrighted content (Opp. at 13); LW does not explain *how* LW's supposed inability to use its "hash-based" filter could possibly have caused LW competitive harm. There also is no allegation that LW was denied alternate filtering technology used by others, that plaintiffs provide hashes to others and not to LW or that LW could not have obtained hashes elsewhere. To the contrary, LW concedes that an alternate filtering technology, "acoustic fingerprinting," is available to LW (FAC ¶ 46)—it just chooses not to use it.

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

In its opposition, LW asserts that plaintiffs harmed "competition in general" through the pressplay and MusicNet joint ventures, iMesh and their allegedly restrictive licenses. (Opp. at 10-11.) But these allegations have nothing to do with LW. Indeed, in the injury-in-fact section of its brief, LW focuses exclusively on its allegations that plaintiffs somehow foreclosed LW "from the market" by refusing to provide LW "hashes" to filter copyrighted content. (*Id.* at 12-13.) Thus, there is a fundamental disconnect between the conduct LW contends harmed *it* and the conduct LW contends harmed "competition in general." Even if LW had (i) alleged

injury to itself, (ii) that was caused by plaintiffs, its counterclaims would nevertheless fall short because that injury is not of the kind the antitrust laws were intended to prevent—injury flowing from harm to competition itself. *See Atl. Richfield Co. v. USA Petro. Co.*, 495 U.S. 328, 344 (1990). (Br. at 13-15.) Simply put, LW does not, and cannot, plead that plaintiffs' failure to give LW "hashes" interfered with market competition.

B. LW is an Improper Antitrust Plaintiff.

Based on no more than its flawed arguments with respect to its standing to bring its counterclaims, LW concludes that it is a proper antitrust plaintiff. (Opp. at 13-15.) However, as we demonstrated, each of the factors articulated by the Second Circuit that determine whether a plaintiff is an "efficient enforcer" of the antitrust laws shows that LW is not: LW's injuries (even if they existed, which they do not) are far too attenuated; LW did not decide to file any antitrust claims until after it was first sued for copyright infringement; LW itself has identified several categories of persons with more direct alleged injuries (FAC ¶¶ 36, 40); and LW's injuries are at best speculative. (Br. at 16-17.) Therefore, LW is not a proper antitrust plaintiff.

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

A. LW Has Not Properly Defined a Relevant Market.

In Counts I through IV, LW alleges that plaintiffs violated the Sherman Act through their conduct in a series of different markets, none of which is defined anywhere in LW's pleading. (Br. at 5-6, 17-18.) In its opposition, LW now attempts to recast its pleading by cobbling together a hodgepodge of general allegations that together, according to LW, properly define "a primary relevant market and two additional and/or alternative markets." (Opp. at 1; *see also id.* at 17-18.) LW's own allegations belie this claim.

LW pled many different alleged markets (Br. at 4-6), and the allegations on which it now relies in its opposition brief have nothing to do with defining any of them. (*See* FAC

¶¶ 19-30). Indeed, one of the "two other markets" that LW now asserts are the subject of its Sherman Act claims—"the market for ownership of copyrighted content in the United States" (Opp. at 18)—is not even mentioned in Counts I-IV (FAC ¶¶ 62-73). Likewise, LW did not plead, in words or in substance, "the lack of interchangeability, or cross-elasticity" (Opp. at 17) of music distributed via the Internet as compared with other music distribution channels.

Nevertheless, LW maintains that it is "not required to plead a relevant market" to support a *per se* § 1 claim. (Opp. at 15.) As the Supreme Court recently observed, however, the rule of reason "presumptively applies" to § 1 claims. *Texaco Inc. v. Dagher*, 126 S. Ct. 1276, 1279 (2006). Here, LW alleges that plaintiffs engaged in horizontal price fixing through their *joint ventures* (notably, this claim is never tied to any allegation that LW was injured); as the Supreme Court has held, such conduct does "not fall within the narrow category of activity that is *per se* unlawful." *Id.* at 1281. Moreover, to the extent that LW's claims could generally be characterized as alleging some sort of group licensing decision (which LW has failed to plead by failing to allege that it ever approached *any* of the plaintiffs to seek a license), the law is clear that such claims are analyzed under the rule of reason. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 20 (1979). Therefore, LW's § 1 claim is properly analyzed under the rule of reason—and fails as a matter of law because LW has not defined a relevant market. In addition, LW's failure to define a market is also fatal to its § 2 claims.

B. LW's Sherman Act § 1 Claim Should Be Dismissed.

We previously showed that LW's conclusory allegations of "conspiracy" do not satisfy even Rule 8(a)'s liberal pleading requirements. (Br. at 18-21.) In opposition, LW claims to have in fact alleged "the time the conspiracy began," "the names of the alleged co-conspirators," and "how the conspiracy was formed and enforced." (Opp. at 19.) That is wrong.

First, LW's allegations contain no detail regarding the alleged conspiracy, and its opposition brief does not offer any. According to LW, "the time the conspiracy began" was "years ago" (Opp. at 19), and it "identified the members of the conspiracy" as the "Labels," even though its pleading repeatedly refers to unnamed "co-conspirators" and "affiliates" (FAC ¶¶ 28, 29, 46, 50). Moreover, instead of explaining "how the conspiracy was formed and enforced," LW cites only its general allegations that plaintiffs' joint ventures provided the *opportunity* to "communicate." (Opp. at 21.) In short, what LW has alleged is a conspiracy of unknown origin and unspecified duration, involving the "Labels" and unidentified others, who may or may not have "communicated" at unspecified times and places about certain unspecified topics. Those allegations entirely lack the factual predicate required to plead a § 1 violation. (Br. at 19.)

Second, LW failed to allege any specific facts showing that any of the plaintiffs were ever approached by and refused to deal with LW *because of an alleged conspiracy*. (Br. at 20.) LW does not dispute this. LW also does not dispute that refusing to deal with LW would have been completely consistent with each plaintiff's respective economic self-interest not to do business with LW, a notorious vehicle for copyright infringement. Because LW has not alleged any facts "which would indicate any likelihood that [the alleged refusal to deal] was the result of a combination or conspiracy, as distinct from individual competitive conduct by the individual [record companies]," LW's § 1 claim must be dismissed. *In re Elevator Antitrust Litig.*, No. 04 CV 1178 (TPG), 2006 WL 1470994, at *10 (S.D.N.Y. May 30, 2006); *see also Cancall PCS, LLC v. Omnipoint Corp.*, No. 99 Civ. 3395 (AGS), 2001 WL 293981, at *6-*7 (S.D.N.Y. Mar. 26, 2001). (*See also* Br. at 20-21.)

Primetime 24 Joint Venture v. National Broadcasting Co., 219 F.3d 92 (2d Cir. 2000)—on which LW heavily relies (Opp. at 21-22)—is not to the contrary. In that case,

Primetime 24 alleged that it "attempted to deal individually with each of the affiliated stations." *Id.* at 102. According to Primetime 24, the affiliated stations allegedly all declined its overtures, and many "sent identical rejection letters." *Id.* The sufficiency of Primetime 24's conspiracy allegations was not at issue; rather, the Second Circuit addressed whether the *Noerr-Pennington* doctrine protected the challenged conduct. Here, by contrast, LW has not alleged that it approached any plaintiff individually, nor has LW alleged any *facts* suggesting that the alleged refusal to deal was the product of concerted action as opposed to independent decision-making.

C. LW's Sherman Act § 2 Claims Should Be Dismissed.

Our opening brief demonstrated that LW's three § 2 claims should all be dismissed because they each rely on the legally defective "shared monopoly" theory. (Br. at 21-26.) LW's responses are without merit.

First, claiming that "this area of antitrust law remains unsettled," LW asserts that "monopolization and attempt to monopolize claims based on shared monopolies will be permitted" once the Second Circuit and Supreme Court have addressed the issue. (Opp. at 24.) But, as LW concedes, the Second Circuit has already rejected LW's "shared monopoly" theory in *H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 (2d Cir. 1989). (Opp. at 24.) Likewise, the district courts have uniformly rejected attempts to premise § 2 claims on this misplaced theory. (Br. at 22 (collecting cases).) This result makes sense: the offense of monopolization occurs only when *one* firm possesses, attempts to obtain, or conspires with others to obtain monopoly power. *See* 15 U.S.C. § 2. Tellingly, LW does not—because it cannot—cite a single case sustaining a monopolization claim on its "shared monopoly" theory.[2]

[2] The most LW can say in good faith is that some circuits have "recognized the possibility" of shared monopoly claims under § 2. (Opp. at 23.) Even that is an overstatement. *See Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 44 (7th Cir. 1996) (affirming dismissal of § 1 claim based on "pattern of exclusive distribution rights"); *Harkins Amusement Enters., Inc. v.*

Second, LW contends that claims "for *conspiracy* to form shared monopolies . . . have been more clearly recognized as viable." (Opp. at 25.) That is wrong. Courts inside and outside this Circuit have repeatedly and consistently rejected § 2 claims premised on a group conspiracy to obtain a *group monopoly*. (Br. at 25 (collecting cases).) While some courts have observed that alleged conspiracies may be actionable under § 2 if they result in a single entity possessing monopoly power in part or all of a relevant market, those courts have made clear that an alleged conspiracy in which "market power continues to be shared among these otherwise unrelated entities" cannot give rise to a § 2 claim. *See Sun Dun, Inc. v. Coca-Cola Co.*, 740 F. Supp. 381, 391-92 (D. Md. 1990). (*See* Br. at 25-26.) That is exactly what LW has alleged here.

Third, LW fails to allege other essential elements of its § 2 claims. With respect to LW's monopolization claim (Count II), LW does not adequately allege that plaintiffs collectively have monopoly power in the alleged market "for the digital distribution within the United States of commercially valuable copyrighted music over the Internet" (FAC ¶ 66). (Br. at 23.) Notably, in its opposition, LW abandons its pleading and asserts that plaintiffs monopolized "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."—neither of which is the subject of Count II—and does not assert that plaintiffs monopolized "the market for the online digital distribution of copyrighted music in the U.S." (*Compare* FAC ¶¶ 65-67 *with* Opp. at 26.)

LW's attempted monopolization claim (Count III) also fails because LW has not adequately alleged that there is a "dangerous probability of monopolization" or that the "goal" of

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Gen. Cinema Corp., 850 F.2d 477, 490 (9th Cir. 1988) (affirming dismissal of § 2 claim based on "shared monopoly" theory after declining to decide whether theory "may be viable under some circumstances"); *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1115 (5th Cir. 1984) (addressing whether "an allegation of solicitation to monopolize was required to state a claim for attempted monopolization"). In any event, to the extent any of these authorities is inconsistent with *H.L. Hayden*, Second Circuit precedent clearly controls.

plaintiffs' alleged conduct was to acquire a monopoly. (Br. at 24.) Similarly, LW's conspiracy to monopolize claim (Count IV) is fatally defective because LW has not alleged any *facts*—and its opposition does not identify any—supporting its conclusory assertions that plaintiffs conspired with the specific intent to achieve a monopoly. (Br. at 26; Opp. at 26.)

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

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

The law in this Circuit is clear that courts should decline to exercise supplemental jurisdiction over state law claims when the federal claims originally giving rise to jurisdiction are dismissed. *See E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 33 (2d Cir. 2006); *Giordano v. City of N.Y.*, 274 F.3d 740, 754 (2d Cir. 2001). As LW's state law claims are unrelated to plaintiffs' copyright claims, we respectfully submit that should be the case here.

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

1. LW's Donnelly Act Claim (Count V). LW agrees that its Donnelly Act claim rises or falls with its Sherman Act claims. (Opp. at 27.) Because LW's Sherman Act claims should be dismissed, its Donnelly Act claim should also be dismissed. (Br. at 27.)

2. LW's Crawford-Feld Act Claim (Count VI). LW withdrew this claim.

3. LW's § 349 Claim (Count VII). We showed that LW's § 349 claim fails because LW did not allege a deceptive act directed at consumers or how the public was deceived or harmed by that act. (Br. at 27-28.) None of LW's responses alters this dispositive fact.

4. LW's Tortious Interference Claim (Count VIII). We previously demonstrated that LW did not plead any of the four elements of its claim of tortious interference with prospective business relations. (Br. at 28-29.) Rather, LW alleges, in bare conclusory terms, that LW had prospective business relations with unspecified "advertisers, vendors, and

customers" (FAC ¶ 58), that the record companies were somehow "aware of these relationships" (*id.* ¶ 89), and that they interfered with these relationships (*id.* ¶¶ 59, 90). That is not sufficient. (Br. at 29.)[3] Notably, LW also fails to plead—and its opposition does not offer—any *facts* that would establish that LW would have entered into any contracts but for the record companies' alleged conduct. (Br. at 29; Opp. at 29.) Therefore, Count VIII must be dismissed.

IV. LEAVE TO REPLEAD SHOULD BE DENIED

LW has already amended its counterclaims once and did not cure any of the defects that require dismissal. Nevertheless, LW now seeks leave to file a third pleading in the event the Court grants any part of this motion. But nothing in LW's brief "gives any indication of what additional facts [LW] would allege if permitted to amend." *2 Broadway LLC v. Credit Suisse First Boston Mortgage Capital LLC*, No. 00 Civ. 5773 GEL, 2001 WL 410074, at *13 (S.D.N.Y. Apr. 23, 2001). Nor is there any reason to expect that LW would be able to fix the defects warranting dismissal—such as its lack of standing or legally unsound § 2 claims—through discovery. Accordingly, LW's request to replead should be denied.

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[3] LW's reliance on *Volvo North America Corp. v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988), is misplaced. In that case, unlike here, plaintiff alleged several specific prospective business relations with which Volvo allegedly interfered. *Id.* at 75.