EXHIBIT 2

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; GREG BILDSON; M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP,

Defendants,

and

LIME WIRE LLC,

Defendant/Counterclaim Plaintiff.

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06 Civ. 5936 (GEL)

OPINION AND ORDER

Katherine B. Forrest, Cravath, Swaine & Moore LLP, New York, NY (Kenneth L. Doroshow, Recording Industry Association of America, Washington, DC, on the brief) for Plaintiffs and Counterclaim Defendants.

Charles S. Baker, Joseph D. Cohen, Porter & Hedges, LLP (Lauren Handler, Porzio, Bromberg & Newman, Morristown, NJ, on the brief) for Defendants and Counterclaim Plaintiff.

GERARD E. LYNCH, District Judge:

Plaintiffs/counter-defendants are thirteen major record companies that filed a complaint alleging copyright infringement under federal law and assorted claims under New York State law against defendants Lime Group LLC, its wholly-owned subsidiary Lime Wire LLC ("Lime Wire"), two officers of the corporate entities, and a limited partnership controlled by one of the officers. (Compl. ¶¶ 29-35.[1]) All defendants have answered the Complaint. In addition, defendant/counter-plaintiff Lime Wire filed antitrust counterclaims under sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that counter-defendants conspired through various illegal means to restrain trade and monopolize the market for the digital distribution within the United States of copyrighted sound recordings over the internet. Lime Wire also asserts ancillary counterclaims under New York State law for conspiracy in restraint of trade, deceptive trade practices, and tortious interference with prospective business relations. Counter-defendants now move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Lime Wire's counterclaims. For the reasons discussed below, the motion will be granted.

BACKGROUND

The following facts are taken from Lime Wire's Restated First Amended Counterclaims ("FAC") (Doc. #42), except where noted. All factual allegations in the FAC are assumed to be true for purposes of this motion. See Manufacturers Hanover Trust Co. v. Yanakas, 7 F.3d 310, 312 (2d Cir. 1993).

[1] All references to the Complaint in this opinion are to the First Amended Complaint (Doc. # 45).

I. Technological Advances in the Music Distribution Industry

Counter-defendants are thirteen major record companies that collectively own the rights to "the vast majority of copyrighted sound recordings sold in the United States." (Compl. ¶ 23.) Through exclusive recording contracts with artists and control over promotion and physical distribution channels, counter-defendants have become the dominant players in the music distribution industry. (FAC ¶¶ 22, 30.) Four record labels (the "Major Labels") — each of whom own distribution companies that are parties to this litigation — sell and distribute over 85% of all recorded music in the United States.[2] (Id. ¶ 22.)

Traditionally, the recording, duplication, and physical distribution of music to retailers and consumers required considerable resources that few individual artists could afford without the assistance of record companies in the music distribution industry. (Id.) With the development of the internet and new technology in the 1990s, however, the costs of recording and distributing music dropped significantly. (Id. ¶ 23.) Artists could digitally record their own songs using their own equipment and personal computers, and digital music could be distributed at very low cost over the internet to consumers without the need for physical products (e.g., records, cassette tapes, and compact discs) or physical store locations. (Id.) "[U]nburdened by any tangible media" (id.), consumers could play digital music on handheld devices such as iPods and cell

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[2] The four Major Labels are (1) EMI, which owns Capitol Records, Inc., Priority Records LLC, and Virgin Records America, Inc.; (2) Sony, which owns Arista Records LLC, BMG Music, LaFace Records LLC, and Sony BMG Music Entertainment; (3) Warner Music Group, which owns Warner Bros. Records Inc., Atlantic Recording Corporation, and Elektra Entertainment Group Inc.; and (4) Universal Music Group, which owns UMG Recordings, Inc., Interscope Records, and Motown Record Company, L.P. (Letter from Charles S. Baker, Esq., to the Court, dated Nov. 16, 2007, at 7.) For purposes of this opinion, the terms "distribution companies," "record companies," and "counter-defendants" are used interchangeably.

phones and were no longer "dependent exclusively on the physical media products and distribution channels that historically had been controlled by the Counter-Defendants" (id. ¶ 27).

At the forefront of these technological advances were companies such as Napster, which developed a file-sharing application that allowed networked users to exchange digital files through centralized servers that acted as "brokers."[3] (Id. ¶ 42.) Counter-plaintiff Lime Wire designed and distributed a similar file-sharing application utilizing "peer-to-peer" ("P2P") technology, which allows users to search and download files directly from other online users without utilizing a centralized server.[4] (Id. ¶ 43.) In addition to its P2P application, Lime Wire also created the "MagnetMix" website, which provided users of its software application with links to licensed, copyrighted music content. (Id.) At its creation, MagnetMix provided links to such content for free, but Lime Wire alleges that it intended to utilize MagnetMix in conjunction with its P2P application "as a means to ultimately charge customers for downloading copyrighted content." (Id.)

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[3] Although Napster users connected to one another to exchange digital files, centralized servers run by Napster maintained directories of all the files that users were sharing online. (FAC ¶ 42.) Unfortunately for Napster, the vast majority of files exchanged through its file-sharing network were copyrighted, see Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 924 (2005) (describing Napster as a "notorious file-sharing service"), and the company was eventually held liable for vicarious and contributory copyright infringement, see A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[4] In its Corrected First Amended Answer (Doc. # 42), Lime Wire expressly denies the allegations of copyright infringement set forth in the record companies' Complaint. (D. Corrected First Amended Ans. ¶¶ 65-108.) According to the FAC, "[u]sers who install Lime Wire on their computers do so by their own volition and are only able to install the Lime Wire application if they first agree not to use the application to infringe the copyrights of others." (FAC ¶ 43.) As a result, individuals using Lime Wire's file-sharing application do so without its assistance and "in the manner that they alone choose." (Id.)

II. Alleged Anticompetitive Conduct

In response to the technological changes affecting the music distribution industry, counter-defendants, through an array of allegedly anticompetitive activities, "conspired to delay and disrupt the entry and emergence of . . . alternative means for distribution, and to extend their oligopoly in the distribution of recorded music over the new market for the electronic distribution of music via the Internet." (Id. ¶ 28.)

A. Price-Fixing and Exclusive Distributorship Agreements

1. MusicNet and pressplay

In 2000, each of the Major Labels, through their distribution companies, launched its own website for the digital distribution of music. (Id. ¶ 33.) By mid-2001, the record companies changed course and formed two joint ventures — MusicNet and pressplay — that became the exclusive vehicles through which counter-defendants would license music content for online distribution.[5] (Id. ¶¶ 34, 35.) Counter-defendants allegedly used these joint ventures "as conduits for colluding to fix prices" as they "provided a forum in which executives of the parent distribution companies met to discuss their own pricing and prices of competitors." (Id. ¶ 38.) Through the joint ventures, the record companies allegedly "pool[ed] their copyrights" and "effect[ed] a price-fixing arrangement" for licenses at both the wholesale and retail levels. (Id. ¶ 36.) In particular, the FAC alleges that "MusicNet's wholesale price was a share of a licensee's revenues, subject to a minimum payment, to be shared among the Major Labels, rather than a

[5] MusicNet was a joint venture among EMI (whose subsidiaries are parties to this litigation), BMG and Warner Music, and also allegedly served as the sole source for Sony and UMG music content as well. (FAC ¶¶ 34, 36.) Pressplay was a joint venture between UMG and Sony Music. (Id. ¶ 34.)

price per copy or work."[6] (Id.) This pricing scheme purportedly "eliminated wholesale price competition among all the Counter-Defendants and their co-conspirators" and resulted in "excessive wholesale prices" for retailers and "higher than competitive prices" for consumers. (Id.) Pressplay, which apparently functioned as a retail distributor, similarly "set both wholesale and retail prices for other retail distributors." (Id. ¶ 37.) Counter-defendants also allegedly coordinated to set fixed prices across the two joint ventures as both MusicNet and pressplay charged consumers "$9.95 per month" for their basic service plans. (Id. ¶ 38.) As a condition of receiving license agreements from the joint ventures, moreover, retail licensees were "obligated not to negotiate with the Major Labels directly." (Id.)

2. iMesh

Although counter-defendants eventually divested their interests in the two joint ventures (id. ¶ 39), they allegedly conspired again to control the distribution of their content by emerging P2P companies (id. ¶ 47; see id. ¶ 35). According to the FAC, the record companies conspired to deal exclusively with a P2P company called iMesh, which has "been granted a license by the Major Labels to allow distribution of their content," and offers the only filtering mechanism (acoustic fingerprinting technology) approved by the Recording Industry Association of America ("RIAA").[7] (Id. ¶ 47.) Although counter-defendants do not own interests in iMesh (id.; see id. ¶ 56), they have allegedly implemented a plan "to coerce all P2P companies based in the United

[6] It is unclear whether MusicNet's "wholesale price" was for a blanket license to all works in the Major Labels' catalogs, see Broadcast Music, Inc. v. CBS, 441 U.S. 1, 24 (1979) (subjecting "blanket license" pricing scheme to rule of reason analysis), or for a more limited license to a subset of those works.

[7] Filtering mechanisms prevent P2P users from downloading copyrighted songs from other networked users without authorization.

States to accept iMesh's purchase offers" and turn over their user base for conversion to the iMesh platform, or face litigation by the RIAA. (Id. ¶ 47.) When Lime Wire approached the RIAA to obtain licenses and seek approval of its hash-based filtering system,[8] RIAA officials rejected its proposals and "demanded" that Lime Wire convert its user base and use only acoustic fingerprinting technology. (Id. ¶ 48; see id. ¶ 46.) iMesh also purportedly disclosed to Lime Wire the financial statements of another company that had recently settled with counter-defendants in an attempt to pressure Lime Wire to accept iMesh's buyout proposal. (Id. ¶ 48.) The record companies have also allegedly refused to license their content to third parties except under so-called "dead end licenses," which are one-time licenses to retrieve a digital file from a server. (Id. ¶ 52.) Because P2P applications do not utilize a centralized server, such "dead end" licensing allegedly precludes P2P retailers utilizing non-iMesh platforms from obtaining licenses from the Major Labels. (Id.)

B. Mandatory Licensing for Hash-Based Filtering

As noted above, Lime Wire developed and distributed a P2P application that enabled users to search and download files directly from other networked users without using a centralized server. (Id. ¶ 43.) In July 2003, Lime Wire also created the MagnetMix website, which provided links to licensed, copyrighted content through Lime Wire's P2P application. (Id.) Because MagnetMix was allegedly created for the business purpose of "acquiring, distributing, and selling" such content over the internet, Lime Wire "actively solicited licensed content from media

[8] Hashes are metadata that act as unique identifiers for digital files. (FAC ¶ 45.) Lime Wire designed its filtering system to block copyrighted files based on the hashes unique to each work. (Id.) See infra at 8.

and content owners," specifically, "independent labels and artists" and "independent retailers/distributors."[9] (Id. ¶ 44.)

Lime Wire alleges that it intended to implement a "step-by-step plan to educate users that downloading copyrighted material was potentially illegal, and to instead encourage users to purchase music legally" through MagnetMix, or re-direct them to licensed sites such as Apple's iTunes store. (Id. ¶ 45.) As part of this plan, Lime Wire developed a "hash-based filtering mechanism to inhibit users from downloading copyrighted material without a license."[10] (Id.) This hash-based filtering system was integral to the commercial viability of MagnetMix because without it, users could simply use Lime Wire's P2P application to download copyrighted content illegally from other networked users without charge, instead of purchasing such content legally through MagnetMix.[11]

Although "many content owners have agreed" to provide their unique hashes to Lime Wire (id.), counter-defendants and their co-conspirators allegedly declined to provide Lime Wire with any hashes unless it first obtained a licence from Altnet, a company which purportedly held the proprietary rights to hash-based filtering (id. ¶ 46). According to Lime Wire, however, the patents Altnet owns are invalid (id. ¶ 47), and counter-defendants allegedly conspired with Altnet to "force" Lime Wire and other P2P companies to obtain a license from Altnet in order to obtain

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[9] Notably, the FAC does not allege that Lime Wire solicited licensed, copyrighted content from any of the counter-defendants.

[10] See supra note 8.

[11] See FAC ¶ 45 ("Lime Wire planned to utilize a robust filtering mechanism to inhibit users from downloading copyrighted works and to allow competitive access to the Counter-Defendants' copyrighted works to make available for download and purchase by users of the LimeWire application.").

the necessary hashes (id. ¶ 46; see id. ¶ 47). Through this mandatory licensing regime, counter-defendants allegedly engaged in "boycott and collusive activity" intended to injure Lime Wire as a retailer in the digital distribution market. (Id. ¶ 46.)

C. Other Alleged Anticompetitive Conduct

The FAC further alleges that counter-defendants conspired "to coerce actual and potential advertisers, vendors, and customers" to stop doing business with Lime Wire. (Id. ¶ 58.) Specifically, counter-defendants allegedly "required that contracts for the provision of content to Internet Services Providers (ISPs) have a clause forbidding those ISPs from doing business with providers of peer-to-peer software, including Lime Wire" (id.), and refused to deal with ISPs "around the world that had entered, or proposed to enter, into advertising arrangements with Lime Wire" (id. ¶ 59). The FAC also alleges that counter-defendants, "individually and collectively, through the [RIAA] and other organizations and companies, have engaged in . . . unfair business practices" (id. ¶ 60), including (1) hacking and exploring files of Lime Wire software users; (2) falsely claiming that Lime Wire "promotes child pornography" and is a "pirate" and "smut peddler"; (3) threatening users of P2P software with litigation, based upon information obtained by illegal means; and (4) pressuring artists not to license their works to providers of P2P software that were not owned or controlled by counter-defendants (id. ¶ 59).

In sum, Lime Wire contends that counter-defendants and their co-conspirators have engaged in an integrated conspiracy to foreclose competitors and monopolize the market for the digital distribution of copyrighted music over the internet. Counter-defendants, in contrast, characterize Lime Wire's allegations as merely a strategic attempt to "muddy the issues," "increase the burden on copyright owners," and "transform a straightforward infringement case into a sprawling, complex and meritless antitrust action." (Counter-D. Mem. 1.) Counter-defendants now move to dismiss Lime Wire's counterclaims pursuant to Fed. R. Civ. P. 12(b)(6), raising numerous challenges to the sufficiency of Lime Wire's pleading, discussed in turn below.

DISCUSSION

A complaint, or in this case, a counterclaim, may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) where it fails to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1974 (2007). As the Second Circuit has recently instructed, Twombly requires that a party bringing a claim satisfy "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007). A party's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S. Ct. at 1964-65 (internal quotation marks and alteration omitted). In order to state a claim, the factual allegations contained in the pleading "must be enough to raise a right to relief above the speculative level." Id. at 1965; see In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007) ("While Twombly does not require heightened fact pleading of specifics, it does require enough facts to nudge plaintiffs' claims across the line from conceivable to plausible." (internal quotation marks and alteration omitted)).

When deciding a 12(b)(6) motion to dismiss a counterclaim, the Court must take as true the facts as alleged in the counterclaim. See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174-75 (1965); Universal Acupuncture Pain Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 196 F. Supp. 2d 378, 382 (S.D.N.Y. 2002). The Court may consider documents incorporated in the counterclaim by reference, matters of which judicial notice may be taken, or documents that the counter-plaintiff relied on in bringing suit. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002). The Court must construe the counterclaim liberally and draw all reasonable inferences in the counter-plaintiff's favor. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007). However, conclusory statements cannot "substitute for minimally sufficient factual allegations." Paycom Billing Servs. v. Mastercard Int'l, Inc., 467 F.3d 283, 289 (2d Cir. 2006) (internal quotation marks omitted); see Amron v. Morgan Stanley Inv. Advisors Inc., 464 F.3d 338, 344 (2d Cir. 2006) (noting that "bald assertions and conclusions of law will not suffice" to defeat motion to dismiss (internal quotation marks omitted)).

I. Federal Antitrust Claims

Lime Wire alleges that counter-defendants have conspired to foreclose competition in and monopolize the market for the digital distribution within the United States of copyrighted music over the internet. It seeks treble damages under sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and section 4 of the Clayton Act, 15 U.S.C. § 15.[12] (FAC ¶¶ 93-96.) Counter-defendants raise a number of defenses, including: (1) that Lime Wire lacks standing to prosecute its antitrust counterclaims because it has not suffered antitrust injury and is not a proper antitrust plaintiff, (2) that Lime Wire has failed to define a relevant market, (3) that Lime Wire's Sherman Act § 1 claim fails because the FAC does not sufficiently allege the existence of a conspiracy, and

[12] The Sherman Act contains the substantive prohibitions against anticompetitive conduct, while private parties are granted the right to sue for violations of the antitrust laws by § 4 (damages) and § 16 (injunctive relief) of the Clayton Act. See Paycom, 467 F.3d at 290.

(4) that Lime Wire's Sherman Act § 2 claims fail because the FAC erroneously relies on a "shared monopoly" theory of liability.

A. Antitrust Standing

While Congress intended the antitrust laws to prevent the concentration of market power and protect competition, not every injured plaintiff may seek to recover damages. See Associated Gen. Contractors v. California State Council of Carpenters, Inc., 459 U.S. 519, 534 (1983) ("Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." (internal quotation marks omitted)). A private plaintiff seeking to recover under the antitrust laws must demonstrate "antitrust standing." Port Dock & Stone Corp. v. Oldcastle Ne., Inc., ___ F.3d ___, No. 06 Civ. 4908, 2007 WL 3071637, at *3 (2d Cir. Oct. 23, 2007). To establish antitrust standing, a plaintiff not only must allege injury-in-fact to its "business or property" caused by the antitrust violation,[13] 15 U.S.C.

[13] Preliminarily, counter-defendants argue that Lime Wire lacks standing to sue under the antitrust laws because it is not yet a functioning business participating in the digital distribution market. (Counter-D. Mem. 12-13.) Lime Wire, in turn, asserts that it is precisely counter-defendants' anticompetitive conduct that foreclosed it from entering the market. (Counter-P. Mem. 13.) "Under § 4 of the Clayton Act, it is as unlawful to prevent a person from engaging in a business as it is to drive a person out of business." Waldron v. British Petroleum Co., 231 F. Supp. 72, 81 (S.D.N.Y. 1964). Where a party "alleges that [it] has been prevented from engaging in a business, [it] must show that [it] had the intention and preparedness to engage in that business." Id.; see Indium Corp. of Am. v. Semi-Alloys, Inc., 611 F. Supp. 379, 385 (N.D.N.Y. 1985) (observing that, in determining whether plaintiff has demonstrated the "requisite intention and preparedness," courts consider, inter alia, "[a]ffirmative action on the part of plaintiff to engage in the proposed business"). Lime Wire alleges that it created a P2P file-sharing application, developed the MagnetMix website, secured licenses and hashes from independent artists and labels, entered into advertising arrangements with ISPs, and attempted to obtain hashes from counter-defendants but were turned down. Collectively, these affirmative steps are sufficient to demonstrate that Lime Wire had the "requisite intention and preparedness" to enter the digital distribution market, Indium, 611 F. Supp. at 385, and that it was "ready, willing, and able" to operate as a retail distributor of counter-defendants' music, id. at 385 n.14 (emphasis omitted). Accordingly, although Lime Wire is only a prospective retail distributor, it may nevertheless assert damages as a "business" under Section 4 of the Clayton Act. See 2A