Todd, 275 F.3d at 200 (internal quotation marks and citation omitted). "Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." Id. at 199-200.[24]

Although counter-defendants seize on Lime Wire's use of different terminology in various sections of the FAC to describe the relevant product market, construing the allegations in the counterclaim as a whole, see Yoder v. Orthomolecular Nutrition Inst. Inc., 751 F.2d 555, 562 (2d Cir. 1985), it is clear that Lime Wire defines the relevant product market as the market for the digital distribution of copyrighted music over the internet. (Counter-P. Mem. 18; see, e.g., FAC ¶¶ 28, 56, 63.) To the extent that scattered sections of the FAC contain minor differences in the description of the relevant product market, such discrepancies are "mere technical defects"

---

[24] As an initial matter, Lime Wire claims that it is not required to plead a relevant market to support its *per se* Sherman Act § 1 claims of "price fixing" and "group boycott." (Counter-P. Mem. 15.) See In re European Rail Pass Antitrust Litig., 166 F. Supp. 2d 836, 844 (S.D.N.Y. 2001) (noting that in antitrust cases governed by *per se* analysis, "it is well settled that plaintiff is excused from defining the relevant product market" (internal quotation marks omitted)). As explained above, however, Lime Wire has not established standing to challenge any of counter-defendants' alleged price fixing schemes. Moreover, counter-defendants' mandatory licensing regime does not constitute a "group boycott" — i.e., an unlawful agreement among horizontal competitors to pressure a supplier or customer not to deal with another competitor. Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284, 293-94 (1985); Balaklaw, 14 F.3d at 800. Such boycotts are *per se* unlawful because they involve concerted action by competitors "to protect their own turf." Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust § 5.8b, at 299 (2d ed. 2006); see FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986) (observing that "the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"). In contrast, counter-defendants' mandatory licensing requirement is not aimed at excluding horizontal competitors, but rather, constitutes an effort "to impose terms they concertedly favor on vertically related buyers," and thus "evoke quite different policy questions" from the "classic boycott." Sullivan, The Law of Antitrust § 5.8b, at 299. Such concerted refusals to deal are analyzed under the rule of reason, see Indiana Fed'n of Dentists, 476 U.S. 458-59, and thus Lime Wire must plead a relevant market to survive counter-defendants' motion to dismiss.

Dockets.Justia.com

in Lime Wire's pleading insufficient to justify dismissal. Arfons v. E.I. Du Pont de Nemours & Co., 261 F.2d 434, 435 (2d Cir. 1958) ("It is now well established that dismissals for mere technical defects or ambiguities in the pleadings are not favored.").

In addition, Lime Wire alleges sufficient facts to offer a plausible explanation of why the relevant product market should be limited to the digital distribution of copyrighted music over the internet. The FAC expressly distinguishes this market from the "sale and distribution of physical products (i.e., records, audio cassettes and CDs)," discusses the differences between physical recordings and digital music files "unburdened by any tangible media such as a CD," and describes consumers' ability to arrange, place, and play digitally recorded music on their personal computers, iPods, and other hand held devices. (FAC ¶¶ 23-24.) Read broadly, these allegations provide at least a "plausible" reason why consumers would not respond to a "slight increase" in the prices charged by digital distributors of music by switching to physical products such as audio cassettes or CDs — i.e., that such physical products are not readily compatible with consumers' preferences and expectations regarding the portability, arrangement, and playing of music. Todd, 275 F.3d at 200, 202.

Accordingly, Lime Wire has adequately alleged a relevant product market for its claims under §§ 1 and 2 of the Sherman Act.

C. Sherman Act § 1

Count One of Lime Wire's FAC alleges a "conspiracy in restraint of trade" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[25] (See FAC ¶¶ 62-64.) As the Supreme Court

[25] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1.

recently instructed in Bell Atlantic v. Twombly, to state a § 1 claim for conspiracy, a party must state "allegations plausibly suggesting (not merely consistent with) agreement." 127 S. Ct. at 1966; see In re Elevator Antitrust Litig., 502 F.3d at 50 ("[I]t is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement."). To survive a motion to dismiss, a pleading must contain "enough factual matter (taken as true) to suggest that an agreement [to engage in anticompetitive conduct] was made." Id. (alteration in original) (internal quotation marks omitted). While Twombly does not impose a heightened pleading standard, a complaint must contain enough facts to "nudge [plaintiff's] claims across the line from conceivable to plausible." Twombly, 127 S. Ct. at 1974.

Preliminarily, because Lime Wire has established antitrust standing only with respect to its challenge to counter-defendants' mandatory licensing regime for hash-based filtering technology, the Court's inquiry is confined solely to the question of whether Lime Wire has alleged sufficient facts plausibly suggesting an agreement among counter-defendants to impose this licensing requirement in concert.[26] Counter-defendants assert that Lime Wire has not alleged any facts plausibly suggestive of a conspiracy, while Lime Wire contends that the record companies' refusal to provide it with "reasonable access" to their hashes runs counter to each company's economic self-interest (FAC ¶ 46), and thus sufficiently establishes the existence of concerted action. (Counter-P. Mem. 23 n.10; Counter-P. Letter Br., May 24, 2007, at 2-3.)

As with the plaintiffs' claim in Twombly, Lime Wire's contention that the record companies conspired to impose a mandatory licensing regime relies either on wholly conclusory

---

[26] Thus, although the FAC alleges an actual business combination formed by counter-defendants — i.e., MusicNet and pressplay (FAC ¶ 34) — Lime Wire cannot rely on this allegation because it lacks standing to challenge any restraints related to the joint ventures.

statements of concerted action, or, at best, on mere parallel conduct. Lime Wire sprinkles the words "conspired," "concerted," and "concertedly" throughout the FAC,[27] but its pleading "furnishes no clue as to which of the [thirteen counter-defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." Twombly, 127 S. Ct. at 1970 n.10. Indeed, the FAC does not allege any facts identifying which record companies were actually approached by Lime Wire, which companies refused to provide hashes or required Lime Wire to seek a license from Altnet, when such refusals took place or how they were effectuated, or whether any of the companies were aware of each other's actions.

The closest Lime Wire comes to alleging concerted action is its claim that it approached the RIAA to "seek approval of its hash-based filtering system" but was turned down. (FAC ¶ 48.) As noted above, however, Lime Wire fails to plead any facts describing the relationship between counter-defendants and the RIAA, or the extent to which the RIAA is authorized to act on their behalf. Without this factual context, Lime Wire's allegation that the record companies "utilized" the RIAA as a vehicle for concerted action (id. ¶ 61) is wholly conclusory. See Paycom, 467 F.3d at 289 (noting that conclusory statements cannot "substitute for minimally sufficient factual allegations" (internal quotation marks omitted)). Moreover, even assuming *arguendo* that the RIAA was authorized to act on behalf of all counter-defendants, the FAC does not allege that the *RIAA* implemented the alleged mandatory licensing scheme; rather, the FAC specifically alleges that it was counter-defendants themselves — not the RIAA acting as their

[27] See, e.g., FAC ¶ 46 (alleging that "Counter-Defendants and their co-conspirators have concertedly . . . refused to do business and have denied Lime Wire reasonable access to the hashes of their copyrighted works"); id. (alleging that "Altnet . . . conspired with [counter-defendants] to 'force' Lime Wire and other P2P companies to enter into a license with Altnet in order to obtain the[] necessary hashes").

agent — that directly "force[d] Lime Wire and other P2P companies to enter into a license with Altnet." (FAC ¶ 46.) Accordingly, Lime Wire's allegations regarding the RIAA not only fail to plausibly suggest the existence of a conspiracy, but also do not implicate the narrow ground upon which Lime Wire's § 1 claim rests.

The FAC also contains no facts plausibly suggesting that counter-defendants' refusal to provide Lime Wire with "reasonable access to the hashes of their copyrighted works" (id.) was the result of anything other than independent decision-making by each company to refrain from doing business with "the operator of a peer-to-peer network that was and is, in each record company's respective judgment, a notorious vehicle for massive copyright infringement." (Counter-D. Mem. 20.) See Verizon Commc'ns Inc. v. Trinko, 540 U.S. 398, 408 (2004) (observing that "as a general matter, the Sherman Act does not restrict the long recognized right of [a] . . . manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" (alteration in original) (internal quotation marks omitted)); Primetime 24 Joint Venture, 219 F.3d at 99 (noting that "owners of copyrights may individually refuse to deal with a party seeking a license").[28]

Although Lime Wire alleges that counter-defendants conspired to "force" it and other P2P companies to enter into a license with Altnet (FAC ¶ 46), there is an "obvious alternative

[28] Lime Wire relies heavily on Primetime 24 Joint Venture v. NBC, in which the Second Circuit held that a plaintiff satellite broadcaster's allegation that the major television networks concertedly refused to issue it licenses to copyrighted programs stated a § 1 claim. 219 F.3d at 103-04. (Counter-P. Mem. 21-22.) The plaintiff in Primetime 24, however, explicitly alleged facts plausibly suggestive of a conspiracy. See id. at 102 (alleging that networks' affiliates "sent identical rejection letters," and that two networks "specifically discouraged their affiliated stations from dealing with [plaintiff]"). The FAC, in contrast, contains no such facts from which an agreement among counter-defendants can plausibly be inferred.

explanation" for the record companies' insistence on the licensing requirement — i.e., that each company independently decided (whether rightly or wrongly) that Altnet legitimately owned the patents to hash-based filtering.[29] Twombly, 127 S. Ct. at 1971 ("[W]hile the plaintiff may believe the defendants conspired . . . , the defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy." (internal quotation marks omitted)). Although the ultimate validity of Altnet's patents is a question of fact that cannot be resolved at this stage of the litigation, nothing in the FAC suggests that the record companies' insistence that Lime Wire obtain a license from Altnet "was anything more than the natural, unilateral reaction" of each company to avoid the transparently clear risk of litigation that would arise if it were to provide hashes to Lime Wire, and thereby (potentially) facilitate Lime Wire's infringement of Altnet's patents. Id. at 1971. Even assuming *arguendo* that Lime Wire can ultimately prove that Altnet's patents are invalid, each record company — regardless of the behavior of the other record companies — still had ample reason to steer clear of potential litigation by taking the simple precautionary step of requiring Lime Wire to obtain a license from Altnet. Accordingly, "when viewed in light of common economic

---

[29] Indeed, as sellers of hashes, counter-defendants, at least in the absence of other economic reasons to restrict their pool of distributors, see, e.g., GTE Sylvania, 433 U.S. at 54-55 (discussing potential efficiency gains from vertical non-price restraints), would prefer to have more buyers to bid up the price for hashes and reduce the ability of any one buyer to exert significant market power, see Todd, 275 F.3d at 202 ("A greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question."). Counter-defendants' alleged refusal to sell hashes to any retailer without a license from Altnet would thus arguably *depress* the price for hashes, hardly an incentive for counter-defendants to conspire to take such action. Presumably then, a record company would only require a buyer of hashes to obtain a license from Altnet if that company determined that Altnet's patents were valid; otherwise, it would solicit bids from a larger pool of buyers, and thus be able to sell its hashes for a higher price.

experience," counter-defendants' alleged licensing requirement does not plausibly suggest the existence of concerted action.[30] Id.

In sum, Lime Wire has failed to plead facts plausibly suggesting a "meeting of the minds" among any of the counter-defendants to refuse "reasonable access" to their hashes (FAC ¶ 46) by imposing a mandatory licensing regime for hash-based filtering technology. Twombly, 127 S. Ct. at 1966. Because Lime Wire's allegations regarding the existence of a conspiracy cross neither "the line between the conclusory and the factual," nor the line between the "factually neutral and the factually suggestive," its § 1 claim must be dismissed. Id. at 1966 n.5; see id. at 1966 ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

D. Sherman Act § 2

Counts Two through Four of the FAC allege that counter-defendants, acting together as a group, monopolized, attempted to monopolize, and conspired to monopolize the market for the digital distribution of copyrighted music over the internet, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.[31] (FAC ¶¶ 65-73.) All three of Lime Wire's § 2 claims are thus premised on a

---

[30] Lime Wire also alleges that the joint ventures "provided a forum in which executives of the parent distribution companies met to discuss their own pricing and prices of competitors." (FAC ¶ 38.) Although is not entirely clear from the FAC whether counter-defendants had already divested their interests in the joint ventures by the time they implemented the licensing requirement (see id. ¶ 39), even assuming *arguendo* that they had not divested their interests, it is well settled that "the mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred." See Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 545 (2d Cir. 1993).

[31] Section 2 of the Sherman Act makes it illegal for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

theory of "shared monopoly" — i.e., that all 13 counter-defendants can be held collectively liable as if they were a single monopolist or potential monopolist.

Claims under Section 2 of the Sherman Act involve challenges to market dominance by "single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454 (1993). Although some commentators have suggested that a shared monopoly among several firms could be attacked under § 2 even though no individual firm possessed the power to set prices or exclude competition, see, e.g., Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 810 (1996), cited in Flash Elecs., 312 F. Supp. 2d at 397, Lime Wire does not cite a single case upholding a § 2 claim on the basis of a shared monopoly. The Second Circuit has specifically rejected the shared monopoly theory in the context of a § 2 claim alleging attempted monpolization. See H.L. Hayden Co. of N.Y. v. Siemens Med. Systems, Inc., 879 F.2d 1005, 1018 (2d Cir. 1989) (holding that "market shares of [defendants] could not be aggregated to establish an attempt to monopolize").[32] Moreover, "districts courts in this and other districts have uniformly held or approved the view that allegations of a 'shared monopoly' do not state a claim under section 2 of the Sherman Act." Linens of Europe, Inc. v. Best Mfg., Inc., No. 03 Civ. 9612, 2004 WL 2071689, at *1 n.1 (S.D.N.Y. Sept. 16, 2004); accord Klickads, Inc. v. Real Estate Bd. of N.Y., No. 04 Civ. 8042, 2007 WL 2254721, at *8-9 (S.D.N.Y. Aug. 6, 2007); Kahn

---

any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2.

[32] The only other court of appeals decision to address specifically the shared monopoly theory is Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988). In that case, the Ninth Circuit declined to decide "whether the shared monopoly theory may be viable under some circumstances." Id. at 490.

v. iBiquity Digital Corp., No. 06 Civ. 1536, 2006 WL 3592366, at *5 (S.D.N.Y. Dec. 7, 2006); Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc., 405 F. Supp. 2d 1141, 1152-53 (C.D. Cal. 2005); Flash Elecs., 312 F. Supp. 2d at 396-97; Santana Prods., Inc. v. Sylvester & Assocs. Ltd., 121 F. Supp. 2d 729, 737-38 (E.D.N.Y. 1999); Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 867 F. Supp. 925, 941 (D. Or. 1994); Sun Dun, Inc. v. Coca-Cola Co., 740 F. Supp. 381, 390-91 (D. Md. 1990).

Lime Wire contends that even if a shared monopoly cannot form the basis of monopolization or attempted monopolization claims under § 2, "[c]laims for *conspiracy* to form shared monopolies . . . have been more clearly recognized as viable." (Counter-P. Mem. 25.) The 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 § 2 conspiracy, has given some courts pause about categorically rejecting the shared monopoly theory in the context of a conspiracy to monopolize claim. See, e.g., H.L. Hayden Co. v. Siemens Med. Sys., Inc., 672 F. Supp. 724, 741-42 (S.D.N.Y. 1987). Some district courts, moreover, although expressing skepticism generally about the shared monopoly theory, have suggested that the theory may be viable in the context of a claim for conspiracy to monopolize "if the aim of the conspiracy is to form a single entity to possess the illegal market power," Sun Dun, 740 F. Supp. at 391-92, or "where two or more competitors seek to allocate a market and exclude competitors, even if they do not form a single corporate entity," Santana Prods., 121 F. Supp. 2d at 740 n.1. Even assuming *arguendo* the correctness of this suggestion, however, the FAC alleges neither that counter-defendants sought to unite in a single monopolistic entity nor that they sought to allocate shares of the relevant market. Furthermore, even if the FAC did contain such allegations, Lime

Wire still would fail to state a claim for conspiracy to monopolize because, as explained above, the FAC does not contain sufficient facts to plausibly suggest the existence of a conspiracy. See In re Elevator Antitrust Litig., 502 F.3d at 50 (noting that "our precedents support application of Twombly to the conspiracy claims asserted under both Section 1 and Section 2").

Accordingly, Counts Two through Four of the FAC, alleging claims under § 2 of the Sherman Act, must be dismissed.

E. State Law Claims

Counts Five and Seven of the FAC allege violations of New York State statutory law prohibiting conspiracy in restraint of trade, see N.Y. Gen. Bus. Law § 340 ("Donnelly Act"), and deceptive trade practices, see id. § 349, respectively.[33] (FAC ¶¶ 74-77, 82-86.) Count Eight alleges a claim under common law for tortious interference with prospective business relations. (FAC ¶¶ 87-91.) Counter-defendants urge dismissal of these state law claims on the ground that dismissal of Lime Wire's federal antitrust counterclaims deprives the Court of subject matter jurisdiction over the state law claims. (Counter-D. Mem. 26.) Lime Wire contends that the Court retains discretion to exercise supplemental jurisdiction over its state law claims even if its federal antitrust counterclaims are dismissed. (Counter-P. Mem. 26.)

Congress has directed that "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). "A state law claim forms part of the same controversy if it and the federal

---

[33] Lime Wire has withdrawn its claim under Count Six alleging a violation of the Crawford-Feld Act, N.Y. Gen. Bus. Law § 369-A. (FAC ¶¶ 78-81; Counter-P. Mem. 27.)

claim 'derive from a common nucleus of operative fact.'" Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 308 (2d Cir. 2004), quoting Cicio v. Does, 321 F.3d 83, 97 (2d Cir. 2003), quoting City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 165 (1997), quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); see Lyndonville Sav. Bank & Trust Co. v. Lussier, 211 F.3d 697, 704 (2d Cir. 2000) (noting that supplemental jurisdiction does not exist "when the federal and state claims rest[] on essentially unrelated facts"). Where, as in this case, a defendant has asserted counterclaims, § 1367(a) "confers supplemental jurisdiction over those counterclaims that fall within the same case or controversy as either (1) the plaintiff's original claims or (2) the counterclaims asserted under federal law, because all of these claims are 'within [the Court's] original jurisdiction.'" Pro Bono Investments, Inc. v. Gerry, No. 03 Civ. 4347, 2005 WL 2429787, at *12 (S.D.N.Y. Sept. 30, 2005) (alteration in original), quoting 28 U.S.C. § 1367(a).

Although Lime Wire's state law counterclaims do not share a "common nucleus" of facts with the record companies' federal copyright claims,[34] they do share such a factual relationship with its own federal antitrust counterclaims. Indeed, Lime Wire's Donnelly Act claim overlaps completely with its federal antitrust claim, see Reading Int'l, 317 F. Supp. 2d at 332-33 (observing that "[u]nder New York law, the state and federal antitrust statutes require identical basic elements of proof" (internal quotation marks omitted)), and its claims for deceptive trade practices and tortious interference with prospective business relations rely on many of the same factual allegations regarding counter-defendants' anticompetitive conduct underlying its antitrust

[34] See infra at 41-42.

claims. (See Counter-P. Mem. 27-29.) Although counter-defendants argue that dismissal of Lime Wire's federal antitrust counterclaims deprives the Court of subject matter jurisdiction over the state law claims, it is well settled that a Rule 12(b)(6) dismissal of a federal counterclaim does not impact a court's authority to exercise supplemental jurisdiction under § 1367(a). See Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996) (affirming district court's exercise of supplemental jurisdiction over state law claim, even though federal claim had been dismissed pursuant to Fed. R. Civ. P. 12(b)(6)); Sea-Land Service, Inc. v. Lozen Int'l, LLC, 285 F.3d 808, 814 (9th Cir. 2002) (holding that district court did not abuse its discretion in considering merits of state law counterclaim that "form[ed] part of the same case" as federal counterclaim, even though court had dismissed federal counterclaim, quoting 28 U.S.C. § 1367(a)). Accordingly, despite dismissing Lime Wire's federal antitrust counterclaims, the Court retains the discretion to exercise supplemental jurisdiction over its state law claims because they "form part of the same case" as the federal antitrust counterclaims. 28 U.S.C. § 1367(a).

In deciding whether to use its discretion to exercise supplemental jurisdiction, however, a court must also "consider whether any of the four grounds set out in subsection 1367(c) are present to an extent that would warrant the exercise of discretion to decline assertion of [such] jurisdiction." Jones v. Ford Motor Credit Co., 358 F.3d 205, 214 (2d Cir. 2004).[35] "[W]here at

---

[35] Under § 1367(c), a district court may decline to exercise supplemental jurisdiction over a state law claim if:

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has

least one of the subsection 1367(c) factors is applicable, a district court should not decline to exercise supplemental jurisdiction unless it also determines that doing so would not promote . . . economy, convenience, fairness, and comity." Id.; see Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 446-48 (2d Cir. 1998).

As an initial matter, supplemental jurisdiction should clearly be exercised over Lime Wire's Donnelly Act claim because, as noted above, that claim overlaps completely with its federal antitrust counterclaims. Accordingly, like its federal counterclaims, Lime Wire's Donnelly Act claim must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). See Wright v. Associated Ins. Cos. Inc., 29 F.3d 1244, 1251 (7th Cir. 1994) ("If the district court, in deciding a federal claim, decides an issue dispositive of a pendent claim, there is no use leaving the latter to the state court."). With respect to Lime Wire's remaining state law claims, § 1367(c)(1) is inapplicable because those claims assert routine business-related harms that do not involve particularly "novel or complex" questions of state law. 28 U.S.C. § 1367 (c)(1). Subsection 1367(c)(2) is also inapposite as the remaining state law claims do not "substantially predominate[] over the claim or claims over which the district court has original jurisdiction." Id. § 1367 (c)(2). Although Lime Wire's state law antitrust claim could potentially have "predominate[d]" over the record companies' federal copyright claims, see Twombly, 127 S. Ct. at 1967 (noting that "proceeding to antitrust discovery can be expensive" and citing study discussing the "unusually high cost of discovery in antitrust cases"), its remaining state law

---

original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

claims are not "more complex" or "more salient in the case as a whole" than the record companies' federal copyright claims, Luongo v. National Mut. Ins. Co., No. 95 Civ. 3190, 1996 WL 445365, at *5 (S.D.N.Y. Aug. 7, 1996). Subsection 1367(c)(3) also appears inapplicable because the Court, despite dismissing Lime Wire's federal antitrust counterclaims, still retains "original jurisdiction" over the federal copyright claims that are the subject of the record companies' Complaint.[36] 28 U.S.C. § 1367(c)(3); see Pro Bono Investments, 2005 WL 2429787, at *14, citing Jones, 358 F.3d at 214. Accordingly, the only remaining basis for declining supplemental jurisdiction is § 1367(c)(4), which permits courts to decline supplemental jurisdiction if, "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(4).

---

[36] Although § 1367(c)(3) authorizes a court to decline supplemental jurisdiction only where "the district court has dismissed *all* claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3) (emphasis added), a literal application of that rule might lead to an anomalous result where, as here, the defendant's state law counterclaims share a "common nucleus" of facts, not with the federal claims asserted in the plaintiff's complaint, but rather, with its own federal counterclaims. Gibbs, 383 U.S. at 725. Because a federal counterclaim may be heard in federal court without being "part of the same case" as the federal claim in the plaintiff's complaint, 28 U.S.C. 1367(a), a defendant with a state law counterclaim that could not be brought independently in federal court may nevertheless be able to secure a federal forum for that claim by bootstrapping it onto a federal counterclaim that shares a "common nucleus" of facts with its state law counterclaim. Even if the federal counterclaim is later dismissed, a literal application of § 1367(c)(3) in this context would render that subsection unavailable as a basis for declining supplemental jurisdiction because the court would still retain "original jurisdiction" over the federal claim in the plaintiff's complaint. 28 U.S.C. § 1367(c)(3); see Pro Bono Investments, 2005 WL 2429787, at *14. Such an interpretation of § 1367(c)(3) would thus encourage defendants with state law counterclaims that could not otherwise be brought in federal court to bring weak (but not frivolous or insubstantial, see Nowak, 81 F.3d at 1188-89) federal counterclaims to strategically take advantage of this boot-strapping procedure. The Court need not decide whether this interpretation of § 1367(c)(3) is correct, however, because even if that subsection is inapplicable on its face, the Court concludes that, pursuant to § 1367(c)(4), supplemental jurisdiction over Lime Wire's remaining state law claims should not be exercised. See infra at 41-43.

The Second Circuit has instructed that in determining whether to apply § 1367(c)(4), a district court should "articulate why the circumstances of the case are exceptional in addition to inquiring whether [economy, convenience, fairness, and comity] provide compelling reasons for declining jurisdiction." Itar-Tass Russian News Agency, 140 F.3d at 446 (internal quotation marks omitted). A district court should decline supplemental jurisdiction under § 1367(c)(4) "only if the circumstances are quite unusual." Id. at 448 (internal quotation marks omitted); see Jones, 358 F.3d at 215. This is such an "unusual" case.

In contrast to the typical case involving supplemental jurisdiction, in which a defendant brings a state law counterclaim that shares the same "common nucleus" of facts as the federal claim asserted in the plaintiff's complaint, jurisdiction over Lime Wire's state law counterclaims is predicated on those claims sharing the same "common nucleus" of facts as its own federal antitrust counterclaims. Indeed, the factual relationship between Lime Wire's remaining state law counterclaims and the record companies' federal copyright claims is attenuated at best. In their Complaint, the record companies allege, inter alia, that Lime Wire "creat[ed] unauthorized reproductions" of copyrighted sound recordings, "distribut[ed] copies of such sound recordings to the public," sold software "designed specifically to facilitate high volumes of infringement," and "buil[t] and maintain[ed] a business model to profit directly from a high volume of infringing use." (Compl. ¶¶ 66, 70.) In contrast, Lime Wire's remaining state law counterclaims are based largely on allegations that the record companies imposed "artificially high prices," "hack[ed] into the files" of Lime Wire software users, coerced ISPs to refrain from doing business with Lime Wire, and "spread[] false information" that Lime Wire is a "smut peddler" that promotes child pornography. (Counter-P. Mem. 27-29.) As this comparison makes clear,

the factual allegations underlying the record companies' federal copyright claims do not share a "common nucleus" of operative facts with Lime Wire's remaining state law counterclaims,[37] and thus Lime Wire could not have brought those counterclaims independently in federal court without bootstrapping them to its federal antitrust counterclaims. Now that the federal (and state) antitrust counterclaims have been dismissed, it would be an anomalous result if those same state law counterclaims were now permitted to remain in federal court when the only federal claims left in the action are the record companies' copyright claims. Such a result would encourage defendants with state law counterclaims that could not otherwise be brought in federal court to bring weak federal counterclaims to take advantage of this boot-strapping procedure.[38] Accordingly, to discourage such strategic behavior, supplemental jurisdiction over Lime Wire's remaining state law counterclaims should not be exercised.

This conclusion is further buttressed by considerations of fairness, judicial economy, convenience and comity. See Itar-Tass Russian News Agency, 140 F.3d at 447. Although fact discovery is underway and has been scheduled to conclude later this month, Lime Wire has requested that the discovery period be extended for "at least six months." (Letter from Charles S. Baker, Esq., to the Court, dated Oct. 19, 2007, at 4.) Lime Wire's request indicates to the Court that, at least from Lime Wire's perspective, discovery on its claims and defenses,

---

[37] Although Lime Wire has raised an affirmative defense of "copyright misuse" (D. Corrected First Amended Ans. 12), it is not clear whether, if at all, the factual bases underlying that defense will overlap with the factual allegations that form the basis of Lime Wire's state law counterclaims. Indeed, Lime Wire itself has not asserted, much less demonstrated, that such a factual relationship exists. Within the Second Circuit, moreover, "misuse or abuse of copyright is not firmly established as . . . an affirmative defense." Shady Records, Inc. v. Source Enters., Inc., No. 03 Civ. 9944, 2005 WL 14920, at *15 (S.D.N.Y. Jan. 3, 2005).

[38] See supra note 36.

including its state law counterclaims, is far from complete. This is not a case, then, where "there has been substantial expenditure in time, effort, and money in preparing the [state law] claims" such that "knocking them down with a belated rejection of supplemental jurisdiction may not be fair." Motorola Credit Corp. v. Uzan, 388 F.3d 39, 56 (2d Cir. 2004) (internal quotation marks omitted). As discovery has not yet been completed, moreover, the Court has not expended any of its own judicial resources reviewing a voluminous factual record, for example, or conducting a trial. Cf. id. (noting general proposition that "if [all] federal claims are dismissed *before trial* . . ., the state claims should be dismissed as well" (internal quotation marks omitted) (alteration and omission in original)). Lime Wire does not explain why any other factors, such as inconvenience to the parties or comity, would point toward the exercise of supplemental jurisdiction, nor could it, since the New York State court, located directly across from the federal courthouse in Manhattan, routinely adjudicates the business-related state law claims asserted by Lime Wire.

Accordingly, pursuant to 28 U.S.C. § 1367(c)(4), the Court declines to exercise supplemental jurisdiction over Lime Wire's remaining state law counterclaims.

F. Leave to Replead

In its opposition papers, Lime Wire requests leave to amend the FAC to cure any deficiencies in its pleading. (Counter-P. Mem. 29-30.) Under Rule 15 of the Federal Rules of Civil Procedure, a party generally "may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Although "[l]eave to amend should be freely granted, . . . the district court has the discretion to deny leave if there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the

opposing party." Jin v. Metro. Life Ins. Co., 310 F.3d 84, 101 (2d Cir. 2002). Counter-defendants oppose Lime Wire's motion for leave to replead solely on the ground that granting leave would be futile. (Counter-D. Reply Mem. 10.) "An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)." Lucente v. IBM Corp., 310 F.3d 243, 258 (2d Cir. 2002); see Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993) ("Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.").

Although Lime Wire has already amended its counterclaims once, it has since received substantial discovery from counter-defendants, including "more than 1 million pages of documents and approximately 100 gigabytes [] of data . . . which roughly equates to more than 29 million pages." (Letter from Charles S. Baker, Esq., to the Court, dated Oct. 19, 2007, at 2.) By the record companies' own admission, these documents include two million pages relating specifically to antitrust productions that the companies previously made to government authorities or other parties in prior lawsuits. (Id. at 12.) Despite receiving such discovery, Lime Wire has not yet identified any additional facts it would plead that would enable it, for example, to demonstrate the existence of a conspiracy among counter-defendants. Because briefing for the pending motion concluded before Lime Wire received the bulk of the discovery materials it now has in its possession, the Court will deny Lime Wire's motion for leave to replead without prejudice. Without some indication of what additional facts, if any, Lime Wire can assert in support of its failed counterclaims, the Court cannot conclude that leave to replead is in the interests of justice, and the Court accordingly will not grant Lime Wire an open-ended permission to replead that could result in another round of motions to dismiss. However,

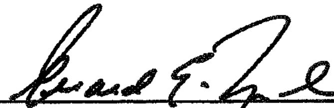
without such an indication, neither can the Court determine that the projected repleading would be futile. Thus, if Lime Wire submits another motion for leave to replead, it must provide the Court with an "indication of what additional facts [it] would allege if permitted to amend" by attaching its proposed pleading to the motion. 2 Broadway L.L.C. v. Credit Suisse First Boston Mortg. Capital L.L.C., No. 00 Civ. 5773, 2001 WL 410074, at *13 (S.D.N.Y. Apr. 23, 2001).

CONCLUSION

Counter-defendants' motion to dismiss Lime Wire's counterclaims is granted. Lime Wire's first through fifth claims for relief are dismissed with prejudice for failure to state a claim. Lime Wire's sixth through eighth claims for relief are dismissed without prejudice to refiling in New York State court. Lime Wire's motion for leave to replead is denied without prejudice.

SO ORDERED:

Dated: New York, New York
December 3, 2007



GERARD E. LYNCH
United States District Judge