

ARISTA RECORDS LLC v. LIME GROUP LLC

532 F.SUPP.2D 556 (S.D.N.Y., 2007)

■ 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 and its wholly-owned subsidiary Lime Wire LLC (“Lime Wire”).... In addition, defendant/counter-plaintiff Lime Wire filed antitrust counterclaims under sections 1 and 2 of the Sherman Antitrust Act and section 4 of the Clayton Act, 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.... 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 [including passages within quotation marks] are taken from Lime Wire's Restated First Amended Counterclaims (“FAC”), except where noted. All factual allegations in the FAC are assumed to be true for purposes of this motion.

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.” 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. 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.

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. With the development of the internet and new technology in the 1990s, however, the costs of recording and distributing music dropped significantly. 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. “[U]nburdened by any tangible media,” consumers could play digital music on handheld devices such as iPods and cell phones and were no longer “dependent exclusively on the physical media products and distribution channels that historically had been controlled by the Counter-Defendants”.

...Counter-plaintiff Lime Wire designed and distributed a 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. 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. 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.”

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.”

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. 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. 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.” 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. 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 price per copy or work.” 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. Pressplay, which apparently functioned as a retail distributor, similarly “set both wholesale and retail prices for other retail distributors.” 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. As a condition of receiving license agreements from the joint ventures, moreover, retail licensees were “obligated not to negotiate with the Major Labels directly.”

2. iMesh

Although counter-defendants eventually divested their interests in the two joint ventures, they allegedly conspired again to control the distribution of their content by emerging P2P companies. 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 Although counter-defendants do not own interests in iMesh, they have allegedly implemented a plan “to coerce all P2P companies based in the United 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. 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. 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. 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. 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.

B. Mandatory Licensing for Hash-Based Filtering

As noted above, Lime Wire developed a P2P application that enabled users to search and download files directly from other networked users without using a centralized server. In July 2003, Lime Wire also created the MagnetMix website, which provided links to licensed, copyrighted content through Lime Wire's P2P application. 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 and content owners,” specifically, “independent labels and artists” and “independent retailers/distributors.”

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. As part of this plan, Lime Wire developed a “hash-based filtering mechanism to inhibit users from downloading copyrighted material without a license.” This hash-based filtering system was integral to the viability of MagnetMix

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

⁸ Hashes are metadata that act as unique identifiers for digital files. Lime Wire designed its filtering system to block copyrighted files based on the hashes unique to each work. *See infra*.

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.

Although “many content owners have agreed” to provide their unique hashes to Lime Wire, 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. According to Lime Wire, however, the patents Altnet owns are invalid, 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 the necessary hashes. 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.

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. 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” and refused to deal with ISPs “around the world that had entered, or proposed to enter, into advertising arrangements with Lime Wire.” The FAC also alleges that counter-defendants, “individually and collectively, through the [RIAA] and other organizations and companies, have engaged in ... unfair business practices” 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.

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-defendants now move to dismiss Lime Wire's counter-claims 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 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*, 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. 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.”)

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). 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. The Court must construe the counterclaim liberally and draw all reasonable inferences in the counter-plaintiff’s favor. 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); 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).

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. ... 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 (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*, 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). A private plaintiff seeking to recover under the antitrust laws must demonstrate “antitrust standing.” *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d

117, 121-22 (2d Cir.2007). To establish antitrust standing, a plaintiff not only must allege injury-in-fact to its “business or property” caused by the antitrust violation, but also must make “a showing of a special kind of ‘antitrust injury,’ as well as a showing that the plaintiff is an ‘efficient enforcer’ to assert a private antitrust claim.” *Port Dock*, 507 F.3d at 121-22.

The notion of “antitrust injury” grew from the recognition that a competitor may be injured not only by prohibited anticompetitive activity, but also by competition itself, and that the antitrust laws were not intended to afford the latter injuries a remedy. Antitrust injury, then, simply means “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). To demonstrate antitrust injury, “a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute.” *Blue Tree Hotels Inv., Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 220 (2d Cir.2004). The antitrust injury requirement thus ensures that a “plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.” *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

Even where a plaintiff adequately alleges an antitrust injury, it may still lack standing if it is not an “efficient enforcer” of the antitrust laws. The relevant factors to consider in determining whether a party who states an antitrust injury is nevertheless not a proper antitrust plaintiff include:

- (1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of antitrust injury.

Port Dock, 507 F.3d at 121-22. “The weight to be given the various factors will necessarily vary with the circumstances of particular cases.” *Paycom*, 467 F.3d at 291.

1. Price Restraints

As described above, Lime Wire alleges a conspiracy among counter-defendants to fix prices for licenses at both the wholesale and retail levels. At the wholesale level, Lime Wire alleges that counter-defendants used their joint ventures, MusicNet and pressplay, “to effect a price-fixing arrangement among horizontal competitors”—i.e., among the record companies themselves. Although such a horizontal price-fixing arrangement is per se unlawful under §1 of the Sherman Act, Lime Wire has not established that it suffered injury-in-fact as a result of counter-defendants’ purported arrangement. See *Atlantic Richfield*, 495 U.S. at 342 (noting that the “per se rule is a method of determining whether §1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury”).

Although Lime Wire “actively solicited licensed content” from “independent labels and artists” and “independent retailers/distributors,” the FAC contains no allegation that Lime Wire ever attempted to obtain or purchase a license from any of the counter-defendants or their respective joint ventures. ... Although Lime Wire's attempt to obtain hashes from counter-defendants suggests that it intended eventually to obtain licenses from them, nothing in Lime Wire's pleading indicates that it has, in fact, sought (or imminently will seek) such licenses from counter-defendants. Accordingly, Lime Wire cannot claim that it has suffered injury-in-fact as a result of counter-defendants' wholesale price-fixing scheme.

Lime Wire's allegation that counter-defendants, through their joint ventures, concertedly fixed prices for digital music licenses at the retail level similarly fails to state antitrust injury. Although such vertical price-fixing arrangements may ... be unlawful, Lime Wire has not established that it suffered injury-in-fact stemming from any such agreement.

To the extent Lime Wire claims that it was an interbrand retail competitor of counter-defendants' joint ventures, Lime Wire lacks standing to challenge the retail price-fixing agreement because the FAC contains no allegation that the fixed retail prices were predatory. See *Atlantic Richfield*, 495 U.S. at 339 (holding that vertical maximum price-fixing agreement “does not cause a competitor antitrust injury unless it results in predatory pricing”). Even accepting as true Lime Wire's allegation that MusicNet and pressplay concertedly fixed prices for their basic service plans at “\$9.95 per month,” this arrangement did not result in antitrust injury to Lime Wire because it was not constrained, at least in any anticompetitive way, in setting its own prices or offering its own level of services. To the extent counter-defendants' (non-predatory) price-fixing agreement resulted in lower prices being charged by retailers, “[t]his is not antitrust injury; indeed, cutting prices in order to increase business often is the very essence of competition.” *Atlantic Richfield*, 495 U.S. at 338.... Similarly, if \$9.95 per month was higher than a competitive market price, such conduct would harm consumers and violate the Sherman Act, but as a competitor of the joint ventures, Lime Wire would suffer no injury and indeed “stood to gain from any conspiracy to raise the market price.” *Atlantic Richfield*, 495 U.S. at 337; see *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n. 8 (1986) (noting that a competitor “may not complain of conspiracies that ... set minimum prices at any level”). To the extent Lime Wire claims that it was an intrabrand competitor of the joint ventures, moreover, given the absence of any allegation that Lime Wire actually sought to obtain licenses from any of the counter-defendants, Lime Wire was, at best, only a prospective intrabrand competitor. Accordingly, even if other intrabrand competitors suffered harm from counter-defendants' vertical price-fixing scheme, Lime Wire itself cannot claim that it suffered any actual injury, much less that it suffered the kind of direct, non-speculative injury that would make it an “efficient enforcer” to remedy such a scheme.

Accordingly, Lime Wire has failed to demonstrate the requisite antitrust injury necessary to establish standing to challenge counter-defendants' alleged fixing of prices at either the wholesale or retail levels.

2. Exclusive Distributorship Agreements

Lime Wire also alleges that counter-defendants concertedly entered into various exclusive distribution agreements—first through their joint ventures, and later, through iMesh—and imposed other distribution restraints, including requiring licensees to refrain from “negotiat[ing] with the Major Labels directly,” offering only “dead end licenses,” and “coerc[ing] all P2P companies based in the United 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. As with the price-fixing arrangements discussed above, however, Lime Wire fails to allege any actual injury that it has suffered as a result of these restraints.

As noted above, Lime Wire does not allege that it sought any licenses, “dead end” or otherwise, from any of the counter-defendants, nor does it allege that it has ever been prevented from negotiating with the record companies directly. Although Lime Wire asserts that it “approached the RIAA to obtain appropriate licenses,” Lime Wire does not plead any facts describing the relationship between counter-defendants and the RIAA, or the scope of the RIAA's authority to act on their behalf. See *Twombly*, 127 S.Ct. at 1971 n. 12 (noting that a conspiracy to restrain trade cannot be inferred “just because [one] belong[s] to the same trade guild as one of his competitors”). Indeed, according to the RIAA's own website, a company wishing to offer “digital downloads of music” needs to obtain “licenses” for such content, which “are granted by individual copyright owners,” not the RIAA. Lime Wire's allegation that RIAA officials “demanded” that it convert its user base on a short schedule and use only acoustic fingerprinting technology to filter, as well as its allegation that counter-defendants conspired with iMesh to coerce Lime Wire into accepting iMesh's buyout proposal by disclosing to Lime Wire the financial statements of another company that had recently settled with counter-defendants, are also insufficient to state injury-in-fact because such actions are more in the nature of preliminary negotiations than a concrete refusal to deal.

Accordingly, even though Lime Wire contends that it eventually planned to operate as a retail distributor of counter-defendants' music, the FAC contains no allegation that Lime Wire actually took the critical antecedent step of seeking any licenses from any of the counter-defendants. Lime Wire's retail competitors—in particular, those that have been refused licenses, those that have obtained only “dead end” licenses, or those that have been precluded from negotiating with counter-defendants directly—may have standing to challenge counter-defendants' distribution restraints, but Lime Wire itself, as merely a prospective distributor of counter-defendants' music, cannot establish that it has suffered injury-in-fact as a result of those restraints.

3. Mandatory Licensing for Hash-Based Filtering

Lime Wire alleges that counter-defendants concertedly refused to provide it with “reasonable access” to hashes of their copyrighted works by requiring it first to seek a license for hash-based filtering technology from Altnet, which allegedly held the proprietary rights to such technology. In contrast to the restraints alleged above, which may have harmed competition generally but did not injure Lime Wire specifically, counter-defendants' mandatory licensing regime inflicted direct and concrete antitrust injury on Lime Wire by raising its costs and thus impeding its ability, and the ability of other P2P retailers utilizing hash-based filtering technology, to operate as effective competitors in the digital distribution market. Accordingly, Lime Wire has established antitrust standing to challenge counter-defendants' mandatory licensing scheme.

The record companies assert that Lime Wire fails to explain how their refusal to provide hashes actually harmed Lime Wire's P2P service or MagnetMix. The FAC, however, specifically alleges that Lime Wire developed MagnetMix “for the business purpose...of acquiring, distributing, and selling licensed, digitally rights managed, copyrighted content over the Internet”.... Lime Wire's pleading adequately explains that the acquisition of hashes for use in its hash-based filtering system was integral to the success of MagnetMix because, without the identifying hashes, Lime Wire's customers could simply use its P2P software application to illegally download copyrighted content from other users for free, instead of purchasing such content legally through MagnetMix.

In light of this commercial rationale for procuring hashes, counter-defendants' mandatory licensing regime effectively raised the costs for Lime Wire and other retail distributors whose business models relied on hash-based filtering technology, thereby reducing the ability of such distributors to compete effectively with other intrabrand retailers selling counter-defendants' music. See *Primetime 24 Joint Venture v. NBC*, 219 F.3d 92, 98, 101-02 (2d Cir.2000) (holding that “coordinated efforts ... to impose costs upon [plaintiff] as a way of stifling competition” states claim under Sherman Act). Although “the primary purpose of the antitrust laws is to protect interbrand competition,” *Khan*, 522 U.S. at 15, the “antitrust laws are not entirely unconcerned with intrabrand restraints”. ...

Given counter-defendants' ownership and control of “the vast majority of copyrighted sound recordings sold in the United States,” the digital distribution market for copyrighted music appears structured in such a way that intrabrand competition—i.e., competition among retail distributors of counter-defendants' music—serves as “a critical source of competitive pressure on price, and hence of consumer welfare.” *Graphic Prods. Distribs.*, 717 F.2d at 1573. Accordingly, ...Lime Wire has pled sufficient facts to demonstrate that counter-defendants' mandatory licensing requirement not only caused injury to Lime Wire specifically, but also “plausibly” injured competition generally by reducing the ability of P2P retailers using hash-based filtering technology to compete effectively against other intrabrand competitors. Although counter-defendants may ultimately establish a legiti-

mate business purpose for their mandatory licensing requirement (i.e., that Altnet owns the patents to hash-based filtering), Lime Wire's allegations are sufficient to state an antitrust injury as this stage of the litigation.

In addition, Lime Wire has also demonstrated that its injury makes it an “efficient enforcer,” and thus a proper antitrust plaintiff, to challenge the mandatory licensing regime. In particular, Lime Wire alleges that the record companies' concerted refusal to provide it with “reasonable access” to their hashes directly harmed its ability to develop MagnetMix as a commercially viable entity, thus precluding it not only from becoming a retail distributor of counter-defendants' digital music, but also effectively foreclosing Lime Wire from the digital distribution market entirely, given the record companies' dominant market share. As a prospective retailer allegedly foreclosed from the market, Lime Wire falls within the “identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement.” *Paycom*, 467 F.3d at 290 (internal quotation marks omitted). In contrast to the pricing and distribution restraints described above, moreover, where other plaintiffs more directly harmed by counter-defendants' anticompetitive conduct may be entitled to recover damages, conferring antitrust standing on Lime Wire to challenge the mandatory licensing regime raises no “risk that other plaintiffs would be entitled to recover duplicative damages,” or that “damages would be difficult to apportion among possible victims of antitrust injury.” *Port Dock*, 507 F.3d at 121-22.

Accordingly, Lime Wire has alleged sufficient facts to establish antitrust standing to challenge counter-defendants' imposition of a mandatory licensing scheme for distributors utilizing hash-based filtering technology.

4. Other Alleged Anticompetitive Conduct

The FAC contains various other allegations of anticompetitive conduct, none of which are sufficient to confer antitrust standing on Lime Wire. For example, Lime Wire alleges that counter-defendants collectively required internet service providers (“ISPs”) to refrain from dealing with P2P companies and refused to do business with ISPs that had entered (or proposed to enter) into advertising arrangements with Lime Wire. Although such conduct might conceivably have caused antitrust injury to P2P retailers, and although Lime Wire itself may have suffered an injury-in-fact (e.g., lost advertising revenue), Lime Wire's allegations fail to explain how its injury is “of the type the antitrust laws were intended to prevent.” *Brunswick Corp.*, 429 U.S. at 489. Left to its own speculation, the Court might surmise that perhaps Lime Wire's theory of antitrust injury is that, as a result of counter-defendants' conduct towards ISPs, fewer ISPs will do business with Lime Wire, thus causing Lime Wire to lose advertising revenue and web traffic, thereby decreasing the total number of users of Lime Wire's P2P application, thereby diminishing the ability of Lime Wire to generate revenue through MagnetMix, thereby ultimately preventing MagnetMix from operating as an effective competitor in the digital distribution market. Even assuming *arguendo* that such harm would be sufficient to confer anti-

trust standing on Lime Wire, the FAC does not specifically articulate any of the links in this causal chain. See *Associated Gen. Contractors*, 459 U.S. at 526 (observing that it is improper “to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the anti-trust laws in ways that have not been alleged”). Accordingly, Lime Wire fails to demonstrate that it suffered antitrust injury stemming from counter-defendants' restraints on ISPs.

Lime Wire also contends that counter-defendants engaged in various unfair business practices, including hacking and exploring files of Lime Wire users, and falsely claiming that Lime Wire “promotes child pornography” and is a “pirate” and “smut peddler.” These allegations, however, fundamentally involve injuries to Lime Wire itself, not to competition generally. Although Lime Wire may be able to assert state tort law claims against counter-defendants for such conduct, it lacks standing to challenge this conduct under the federal antitrust laws.

In sum, the vast majority of Lime Wire's allegations do not state a claim for relief under the Sherman Act because they either fail to allege “an adverse effect on competition market-wide,” or they do not allege a “cognizable harm” to Lime Wire itself. Lime Wire only has antitrust standing to challenge counter-defendants' mandatory licensing regime for hash-based filtering technology. Accordingly, its Sherman Act claims may proceed only on this narrow ground.

...

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. As the Supreme Court 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.* 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.”

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

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

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, and thus sufficiently establishes the existence of concerted action.

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 statements of concerted action, or, at best, on mere parallel conduct. Lime Wire sprinkles the words “conspired,” “concerted,” and “concertedly” throughout the FAC, 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 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” 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.” 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.”

Although Lime Wire alleges that counter-defendants conspired to “force” it and other P2P companies to enter into a license with Altnet, there is an “obvious alternative 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 conspira-

²⁹ Indeed, as sellers of hashes, counter-defendants...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.

torial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy.” 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. ...

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 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.”).

NOTES AND QUESTIONS

1. *Arista* illustrates a familiar pattern in antitrust litigation: the antitrust dispute arises as a defensive counter-claim by a party sued for violation of some other obligation, here intellectual property rights.

2. This case introduces you to the enormous importance of two kinds of judicially created rules—invoked both at the pleading and summary judgment stages—that powerfully affect antitrust cases. First, the antitrust “standing” rules constrain the kinds of cases that private plaintiffs can bring, even when illegal conduct is assumed *arguendo*. Second, the “proof” rules govern the kinds of factual showings that a plaintiff must make in order to prove illegal conduct. As you will see shortly, the proof rules emerged out of conspiracy cases discussed in Ch.3. *Cf. Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). These latter cases establish a special burden of proof for a plaintiff who alleges an “implied conspiracy” for which there is no direct evidence. In order to get to the jury, the plaintiff must present evidence that “tends to exclude” any unilateral-behavior explanation of the evidence and also show that the alleged conspiracy “makes economic sense.” The *Twombly* rule about adequate factual pleading is, in principle, applicable to non-antitrust cases as well, but its practical importance beyond the antitrust area is not yet clear.

3. The so-called “special rules” discussed here can fairly be described as a series of filters that make it harder for private plaintiffs to get to a jury. (See also the discussion of market power filters in the Note on p. 55 above.) Look at the dates of the major cases cited as authority for the creation of these filters. Especially in combination with other changes in the more substantive rules of liability, such filters have dramatically changed modern antitrust law.

4. Do you understand the distinction between injury and antitrust injury? Many judges and lawyers do not, especially if they finished their legal training before 1977. Alerting partners to the importance of antitrust injury is often the first contribution an associate can make in an antitrust case.

5. How would you analyze and explain to a client whether he has standing? Does the concept of an “efficient enforcer” of the antitrust laws allow for predictability in this respect? Before exam time, you may want to revisit these questions with the decision in *Illinois Brick Co. v. Illinois*, discussed at Ch. 8 below, also in mind. *Illinois Brick* imputes *all* of the damages from a price-fixed product to the “direct purchasers” and thus bars indirect purchasers from recovering, even where the circumstances strongly suggest that all or a substantial part of the overcharge was “passed on” from the direct purchaser to indirect purchasers later in the distribution chain. (For instance, if the mineral water in the Cournotia scenario were resold by grocery stores that upped their price by the amount of the overcharge, the stores could recover but not the consumers.) Can you guess at why the court might restrict recovery in such an arguably “unfair” manner?

6. The district court judge in *Arista* alludes to many perceived deficiencies in Lime Wire’s framing of the complaint. Think back over these and consider whether they were instances of poor lawyering or, alternatively, incurable difficulties about the underlying facts.

7. Is injury a question of law or fact? What about *antitrust* injury?

8. How do the concepts of antitrust injury and standing relate to the notion of efficiency initially discussed in Note Ques. 10 on p. 4 above, or to the issue of consumer welfare discussed by Judges Bork and Wald in *Rothery, supra*?

9. Private enforcement of the antitrust laws is presumably a “good thing,” or Congress would not have legislated it. Is it appropriate then for courts to restrict private actions by judicially imposing rules of injury and standing that go beyond those imposed in other tort cases? If something is illegal, why should it matter *who* brings the action?

10. Antitrust cases often hinge on alternative characterizations of the competitive purpose and effect of particular business behavior. In *Arista*, what are the benign and malign competitive stories about what the counter-defendants were doing? Suppose that these alternative stories were almost equally credible. Consider the implications of the Note, at p. 66 above, about balancing Type I and Type II errors. Does that help you understand what may be going on?