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24 UNITED STATES DISTRICT COURT
25 CENTRAL DISTRICT OF CALIFORNIA

26 METRO-GOLDWYN-MAYER
27 STUDIOS INC., et al.,

28 Plaintiffs,

v.

GROKSTER, LTD., et al.,

Defendants.

JERRY LEIBER, et al.,

Plaintiffs,

v.

CONSUMER EMPOWERMENT BV
a/k/a FASTTRACK, et al.,

Defendants.

AND RELATED COUNTERCLAIMS.

Case No. CV 01 08541 SVW (PJWx)
(Consolidated with CV 01 09923 SVW
(PJWx))

**NOTICE OF MOTION AND MOTION
OF PLAINTIFFS/COUNTERCLAIM-
DEFENDANTS TO DISMISS THE
AMENDED COUNTERCLAIMS OF
DEFENDANT/COUNTERCLAIMANT
SHARMAN NETWORKS LTD. FOR
FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF; DECLARATION OF
ROBERT J. SHAUGHNESSY;
EXHIBITS**

Date: April 28, 2003

Time: 1:30 p.m.

Ctrlm: The Hon. Stephen V. Wilson

1 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:
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3 PLEASE TAKE NOTICE that, on Monday, April 28, 2003, at 1:30 p.m., or as
4 soon thereafter as counsel may be heard, in the Courtroom of the Honorable
5 Stephen V. Wilson, 312 N. Spring Street, Los Angeles, California 90012, all
6 Plaintiffs in Case No. CV 01 08541 SVW (PJWx) will and hereby do move the Court
7 pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing with
8 prejudice the Amended Counterclaims of defendant Sharman Networks Ltd. for
9 failure to state a claim upon which relief can be granted.

10 This Motion is and will be based on this Notice of Motion, the accompanying
11 Memorandum of Points and Authorities, the court records and files, and upon such
12 other evidence and argument that may be offered at the hearing on the Motion.

13 This Motion is made following the conference of counsel pursuant to Local
14 Rule 7-3 that took place on February 21, 2003. See, Declaration of Robert J.
15 Shaughnessy, attached hereto, at paragraph 2.
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By: David E. Kendall
David E. Kendall

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12 **FEDERAL STATUTES**

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20 **STATE STATUTES**

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| 21 | Cal. Bus. & Prof. Code § 16726 (Cartwright Act)..... | 1 |
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24 **MISCELLANEOUS**

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| 25 | IIIA Phillip E. Areeda & Herbert Hovenkamp, <u>Antitrust Law</u> ¶ 810g | 17 |
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1 | the Sherman Act. Id. ¶¶ 84-88. Count V is a claim for unfair business practices and
2 | unfair competition under California Business and Professions Code §§ 17200, et seq.
3 | Id. ¶¶ 89-93. The core of Sharman’s grievance (and each of its claims) appears to be
4 | that Plaintiffs concertedly and unlawfully refused to license their copyrighted works
5 | *to a third party, called Altnet*, which allegedly wishes to sell copies of those works
6 | for downloading by users of Sharman’s Kazaa Media Desktop software (“KMD”).
7 | See, e.g., id. ¶¶ 39, 59.

8 | Sharman previously has represented that its own business is “developing
9 | graphical interface features for a peer-to-peer software tool, and selling advertising
10 | for display in connection with that software.” Memorandum of Points and
11 | Authorities in Support of Defendant Sharman Networks Limited’s Motion to Dismiss
12 | the First Amended Complaint for Lack of Subject Matter Jurisdiction and Other
13 | Grounds (Sept. 30, 2002) (“Sharman Jurisdiction Memo.”) at 1. Sharman
14 | consistently describes its software as “contentless.” Id. at 1, 25 (“content neutral”);
15 | Reply Memorandum in Support of Sharman Networks Limited Motion to Dismiss
16 | (Nov. 18, 2002) at 1, 10. The Amended Counterclaims allege that *Altnet* – which is
17 | an entity entirely distinct from Sharman – has developed a digital rights management
18 | (“DRM”) technology that purportedly enables content owners to distribute digital
19 | files securely, and receive payment for downloads, by means of KMD and other
20 | decentralized peer-to-peer systems. Am. Counterclaims ¶ 51. According to
21 | Sharman, the Altnet technology can “populate” the shared folders of KMD users with
22 | DRM-controlled files of copyrighted works; cause those files to appear first on the
23 | list a user obtains in response to a search query; and “encourage” users to “pay for all
24 | copyrighted works or otherwise access copyrighted works only in accordance with
25 | terms of access set by the owners.” Id. ¶ 39. Sharman alleges that it and Altnet
26 | believe that use of the Altnet technology can solve “the problem confronted by the
27 | Industry plaintiffs” – the rampant piracy of Plaintiffs’ works by users of KMD and
28 | other peer-to-peer services. Id. ¶ 59.

1 Sharman alleges that “to test and succeed in discouraging the wrongful
2 use of the KMD using the Altnet technology, Altnet needed non-discriminatory, fair,
3 and competitive access to the Industry plaintiffs’ copyrighted works to digitally wrap
4 and make available for download and purchase by users of the KMD.” *Id.* To that
5 end, Sharman alleges, Altnet met with representatives of certain record company
6 Plaintiffs “to acquire rights and/or sell its services to offer copyrighted works in
7 response to search queries by users of the KMD.” *Id.* ¶ 62. There is no suggestion
8 that *Sharman*, itself, met or sought to meet with any plaintiff, or that Altnet met or
9 sought to meet with any motion picture plaintiff. Sharman alleges that, despite
10 Altnet’s overtures to “certain” (unnamed) record companies, “plaintiffs have
11 concertedly declined to participate, refused to do business and have denied Sharman
12 and Altnet reasonable access to [Plaintiffs’] copyrighted works.” *Id.* ¶ 59. The
13 alleged motivation for that refusal is that Plaintiffs, who Sharman claims occupy a
14 “dominant position in the distribution of musical and movie content,” *id.* ¶ 37,
15 collectively wish to dominate the digital distribution of such content, *id.* ¶¶ 36, 65.

16 Sharman’s narrative of Plaintiffs’ alleged refusal to deal with Altnet,
17 including related background facts, occupies virtually all of the allegations common
18 to all its claims – paragraphs 34 through 40 and 42 through 66 of the Amended
19 Counterclaims. Dropped into the middle of that account is the unrelated and entirely
20 conclusory allegation – not present in the original Counterclaims, but added by
21 Sharman’s amendment – that Plaintiffs have “concertedly refus[ed] to deal with other
22 companies that agreed to do business with Sharman, or otherwise pressur[ed] such
23 companies into ceasing their business relationships with Sharman.” *Id.* ¶ 41.

24 Although Sharman is surely in a position to name such “other companies” if they
25 exist, it identifies none. Indeed, there is no elaboration whatsoever on this allegation.

26 In addition, at the end of its factual narrative Sharman sets forth, seem-
27 ingly as an afterthought, a cryptic and utterly conclusory laundry list of more than a
28 dozen other types of “wrongful conduct” that Plaintiffs have allegedly engaged in to

1 further “their joint efforts to promote Musicnet, pressplay and Movielink.” Id. ¶ 67.
2 Those latter entities are digital distribution ventures “in which many of the Industry
3 Plaintiffs and their corporate affiliates have direct equity interests.”² Id. Among the
4 conduct alleged is:

- 5 • “Denials of music and movie licenses to competitors”;
- 6 • “Unfair control of distribution fees”;
- 7 • “Conduct that is the subject of ongoing Federal Trade
8 Commission investigations involving the digital distribution
9 of copyrighted works”; and
- 10 • “Refusing to negotiate with competitive providers of digital
11 distribution services.”

12 Id. ¶ 67(c), (d), (f), (i). Sharman does not explain any of these charges.

13 Finally, Sharman alleges that Plaintiffs “have engaged in unfair business
14 conduct including spoofing and computer hacking.” Id. ¶ 68. “Spoofing” and “com-
15 puter hacking” are not explained. Sharman adds that the Recording Industry Associ-
16 ation of America and other entities “have been secretly engaged in the distribution of
17 RIAA member promotional content using the KMD at the very time they have been
18 downloading rogue files onto KMD and other peer-to-peer applications to discourage
19 the sharing of files other than their clients’ promotional content.” Id.

20 ARGUMENT

21 I. CONCLUSORY ALLEGATIONS ARE NOT ENOUGH TO STATE A 22 CLAIM FOR ANTITRUST VIOLATIONS AND RELATED WRONGS.

23 Dismissal of a claim under Rule 12(b)(6) is warranted if it relies on a
24 legal theory that is not cognizable or if it invokes a viable legal theory but fails to
25

26 ² Movielink is a joint venture of affiliates of Plaintiffs Metro-Goldwyn-Mayer
27 Studios, Columbia Pictures, Paramount Pictures, Time Warner Entertainment, and
28 Plaintiffs Disney and Twentieth Century Fox have no connection to that venture.

1 plead facts essential to that theory. Robertson v. Dean Witter Reynolds, Inc., 749
2 F.2d 530, 534 (9th Cir. 1984). In addition wholly conclusory allegations and legal
3 conclusions masquerading as factual allegations may be disregarded. W. Min.
4 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981); Glen Holly Entm't, Inc. v.
5 Tektronix, Inc., 100 F. Supp. 2d 1073, 1075 (C.D. Cal. 1999). Some reasonable
6 specificity and clarity in a pleading are required by Rule 8(a) to provide the opposing
7 party with fair notice of the claims against it. McKeever v. Block, 932 F.2d 795, 798
8 (9th Cir. 1991) (plaintiff must provide “sufficient allegations to put defendants fairly
9 on notice of the claims against them”).

10 These principles apply with full force to antitrust claims. In antitrust
11 cases, “a district court must retain the power to insist upon some specificity in
12 pleading before allowing a potentially massive factual controversy to proceed.”
13 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459
14 U.S. 519, 528 n.17, 103 S. Ct. 897, 903 n.17, 74 L. Ed. 2d 723, 732 n.17 (1983)
15 (reinstating Rule 12(b)(6) dismissal of antitrust claims); accord Pennsylvania ex rel.
16 Zimmerman v. Pepsico, Inc., 836 F.2d 173, 182 (3d Cir. 1988) (“[t]he costs of
17 modern federal antitrust litigation and the increasing caseload of the federal courts
18 counsel against sending the parties into discovery when there is no reasonable
19 likelihood that the plaintiffs can construct a claim from the events related in the
20 complaint.” (quotation omitted)). “[T]he essential elements of a private antitrust
21 claim must be alleged in more than vague and conclusory terms to defeat a motion to
22 dismiss.” Kingray, Inc. v. Nat’l Basketball Ass’n, Inc., 188 F. Supp. 2d 1177, 1186
23 (S.D. Cal. 2002). A claimant “must, at a minimum, sketch the outline of the antitrust
24 violation with allegations of supporting factual detail.” Les Shockley Racing, Inc. v.
25 Nat’l Hot Rod Ass’n, 884 F.2d 504, 507-08 (9th Cir. 1989). If the well-pleaded facts
26 “do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs
27 will get nowhere merely by dressing them up in the language of antitrust.” Rutman
28 Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987) (internal

1 quotations omitted). Accordingly, courts commonly dismiss antitrust claims for
2 failure to state a claim. E.g., SmileCare Dental Group v. Delta Dental Plan, Inc., 88
3 F.3d 780 (9th Cir. 1996); Rutman Wine Co., 829 F.2d at 729; Kingray, Inc., 188 F.
4 Supp. 2d at 1177; Glen Holly, 100 F. Supp. 2d at 1073; Transphase Sys., Inc. v. S.
5 Cal. Edison Co., 839 F. Supp. 711 (C.D. Cal. 1993).

6 All of Sharman's claims suffer from infirmities that compel dismissal
7 under Rule 12(b)(6) and cannot be cured. For clarity of exposition, we address those
8 claims in an order different from Sharman's. We first address the claim under
9 Section 1 of the Sherman Act and the similar claim under the Cartwright Act. Next,
10 we take up the claim under Section 2 of the Sherman Act. We then address the
11 declaratory judgment claim, and finally the claim under California Business and
12 Professions Code § 17200.

13 **II. SHARMAN FAILS TO STATE A CLAIM UNDER SECTION 1 OF THE** 14 **SHERMAN ACT.**

15 The elements of a claim under Section 1 of the Sherman Act are: "(1)
16 an agreement, conspiracy, or combination among two or more persons or distinct
17 business entities; (2) which is intended to harm or unreasonably restrain competition;
18 and (3) which actually causes injury to competition, beyond the impact on the
19 claimant, within a field of commerce in which the claimant is engaged (i.e., 'antitrust
20 injury')." McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988).

21 Sharman's Section 1 claim is deficient as to at least the first and third of those
22 elements. We address the issue of antitrust injury first.

23 **A. Sharman Cannot Allege Antitrust Injury.**

24 To state a Sherman Act claim, it is not enough for a private party simply
25 to allege that it has suffered some harm causally connected to the defendants' anti-
26 competitive conduct. Associated Gen. Contractors, 459 U.S. at 535. Rather, the
27 claimant must adequately allege "the existence of *antitrust* injury, which is to say
28 injury of the type the antitrust laws were intended to prevent and that flows from that

1 | which makes defendants' acts unlawful." Atl. Richfield Co. v. USA Petroleum Co.,
2 | 495 U.S. 328, 334, 110 S. Ct. 1884, 1889, 109 L. Ed. 2d 333, 343 (1990) (internal
3 | quotation omitted; emphasis in original). Allegations of antitrust injury must show
4 | that the claimant is or was a participant "in the same market where competition is
5 | being restrained" and suffered its injury in that market. Glen Holly, 100 F. Supp. 2d
6 | at 1077. Whether an alleged injury is *antitrust* injury is an issue of law. Am. Ad
7 | Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1055-57 (9th Cir. 1999). The
8 | claimant's failure to allege antitrust injury is a defect that warrants dismissal of its
9 | claim. Newman v. Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir. 1987);
10 | Kingray, Inc., 188 F. Supp. 2d at 1187; Glen Holly, 100 F. Supp. 2d at 1076-77.

11 | It is clear that Sharman has not suffered antitrust injury. First, by its
12 | own admission, Sharman does not participate in, and has not suffered injury in, any
13 | market in which competition has allegedly been restrained. Second, the alleged in-
14 | jury to itself that Sharman describes is not one that the antitrust laws were intended to
15 | remedy. These fatal defects cannot be cured by further amendment of the counter-
16 | claims.

17 | **1. No Participation or Injury in Restrained Market.**

18 | As an essential part of alleging antitrust injury, the claimant must articu-
19 | late an intelligible definition of the relevant product and geographic market. Glen
20 | Holly, 100 F. Supp. 2d at 1077-78. Nowhere does Sharman specify what it contends
21 | to be the relevant market for purposes of its Section 1 claim. At different points in
22 | the counterclaims, it refers to several significantly different product markets in which
23 | the record company and motion picture Plaintiffs operate, without clearly identifying
24 | any of them as the relevant market.

25 | For example, as to the motion picture Plaintiffs, Sharman mentions "the
26 | market for the copyright licensed distribution of first-run major motion pictures in
27 | theaters within the United States and thereafter on tape and DVD," Am. Counter-
28 | claims ¶ 44; "the market for digital distribution of copyrighted . . . movie content," id

1 ¶ 65; and “the market for copyright licensed, digital distribution of . . . major motion
2 pictures over the Internet,” *id.* ¶ 37. Sharman’s allegations of the markets in which
3 the record company Plaintiffs participate are equally varied: “[t]he label, manufac-
4 turing and distribution segments of the recorded music industry,” Am. Counterclaims
5 ¶ 43; “the market for the copyright licensed distribution within the United States of
6 recorded music,” *id.* ¶ 42; “the market for digital distribution of copyrighted music . .
7 . content,” *id.* ¶ 65; and “the market for copyright licensed, digital distribution of
8 sound recordings . . . over the Internet,” *id.* ¶ 37.

9 Sharman’s failure to supply a coherent definition of the relevant market,
10 in itself, is a sufficient reason to dismiss the Section 1 claim. *See, e.g., Queen City*
11 *Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436-37, 442 (3d Cir. 1997); *Re-*
12 *Alco Indus., Inc. v. Nat’l Center for Health Educ., Inc.*, 812 F. Supp. 387, 391
13 (S.D.N.Y. 1993); *Gianna Enters. v. Miss World (Jersey) Ltd.*, 551 F. Supp. 1348,
14 1353 (S.D.N.Y. 1982).

15 Equally important, however, regardless of which of the cited markets
16 Sharman contends is the relevant one, it is plain that *Sharman is not a participant in*
17 *any of them*. Sharman, by its own characterization, does not buy from, sell to, com-
18 pete in, or otherwise participate in any of the “markets” mentioned in the Amended
19 Counterclaims – all of which involve the distribution of copyrighted content. Its sole
20 business, it claims, is to develop and provide a “*contentless* software tool” and to sell
21 advertising for display in connection with that software. Sharman Jurisdiction
22 Memo. at 1-2 (emphasis added).³ Although Sharman casually refers in places to
23 Plaintiffs’ alleged refusal to deal “with Altnet and Sharman,” *e.g.*, Am. Counter-

24
25 ³ In assessing the legal sufficiency of the Amended Counterclaims, the Court
26 may properly take judicial notice of Sharman’s prior admissions in briefs and other
27 filings in this action. *See MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504
28 (9th Cir. 1986) (court may take judicial notice of matters outside the pleadings
without converting Rule 12(b)(6) motion to motion for summary judgment); *Pac.*
Bell Tel. Co. v. City of Hawthorne, 188 F. Supp. 2d 1169, 1172 (C.D. Cal. 2001)
 (“Courts generally take judicial notice of court filings or pleadings.”).

1 claims ¶¶ 40, 67, there is no allegation that *Sharman* has sought to do any business
2 with any Plaintiff. Sharman’s more specific allegations make clear that, as between
3 Altnet and itself, the only one that arguably participates in any alleged market with
4 any of the Plaintiffs – the only one that allegedly seeks to sell services to, and license
5 rights from, Plaintiffs – is *Altnet*, not Sharman. See id. ¶ 51 (“Altnet technology
6 allowed copyright owners to securely distribute digitized information”); id. ¶ 59
7 (“Altnet needed non-discriminatory, fair, and competitive access to the Industry
8 plaintiffs’ copyrighted works”); id. ¶ 62 (“Altnet and its executives” met with record
9 company representatives “to acquire rights and/or to sell its services”); id. ¶ 78
10 (Plaintiffs “have failed to provide Altnet access to copyrighted works”). But Altnet,
11 of course, is not the antitrust claimant here – only Sharman is.

12 After Plaintiffs pointed out the failure of the original counterclaims to
13 allege antitrust injury, Sharman amended its pleading to add the assertion that Altnet
14 pays it a fee when KMD users receive DRM-protected content delivered by Altnet.
15 Id. ¶ 61. The Amended Counterclaims now allege that Plaintiffs’ purported
16 concerted refusal to license their works to Altnet for DRM-protected distribution has
17 caused Sharman injury “in the form of lost revenue.” Id. ¶ 40. Sharman obviously
18 has no additional facts that it can allege on the subject of antitrust injury. But the
19 new allegations, far from rectifying the original counterclaims’ omission to allege
20 antitrust injury, underscore the complete absence of such injury here. Sharman’s
21 alleged injury stems not from its participation in any market in which Plaintiffs oper-
22 ate, but from its participation in the *separate* market for peer-to-peer software, where
23 Sharman has struck a deal with Altnet to “bundle” Altnet’s technology with its own
24 KMD software. Id. ¶ 59. That Sharman may receive a commission on transactions
25 with KMD users that Altnet consummates in the market for digital distribution of
26 content does not make Sharman a participant in the latter market, as the Ninth Circuit
27 has clearly held in a factually analogous context. Eagle v. Star-Kist Foods, Inc., 812
28 F.2d 538, 540-41 (9th Cir. 1987) (finding no antitrust injury to fishing boat crew

1 members who received commission on fish catch because crew members were not
2 participants in the sale of the fish, which was the market in which the defendants
3 allegedly restrained trade); accord Glen Holly, 100 F. Supp. 2d at 1084 n.17 (citing
4 Eagle and noting that “[i]t is not sufficient that the plaintiff’s harm be closely tied to
5 the market in which trade was restrained, if plaintiff is not a participant in that
6 market”).

7 Related to the preceding point, by alleging harm only to itself, Am.
8 Counterclaims ¶ 79, Sharman ignores a central axiom of antitrust law – only injury to
9 **competition**, not competitors, is actionable. Brunswick Corp. v. Pueblo Bowl-O-Mat
10 Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701, 711-12 (1977) (“The
11 antitrust laws . . . were enacted for the protection of competition, not competitors”).
12 Even if Sharman were a competitor of Plaintiffs, which it assuredly (and admittedly)
13 is not, its antitrust claims fail because they allege only injury to Sharman itself rather
14 than to the process of competition. See, e.g., Indeck Energy Servs. v. Consumer
15 Energy Co., 250 F.3d 972, 976-77 (6th Cir. 2001) (dismissing antitrust claim where
16 plaintiff alleged injury to itself but not to other market participants); George Haug
17 Co., Inc. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139-40 (2d Cir. 1998)
18 (plaintiff failed to allege “that the challenged action has had an actual adverse effect
19 on competition as a whole in the relevant market; to prove it has been harmed as an
20 individual competitor will not suffice”).⁴

21
22 ⁴ Sharman cannot stave off dismissal for lack of antitrust injury with its new
23 conclusory allegation that it has been harmed by Plaintiffs’ alleged concerted refusal
24 to deal with unnamed companies, in unidentified markets, that agreed to do business
25 with it, or by Plaintiffs’ alleged pressuring of such companies to cease their business
26 relationships with it. Am. Counterclaims ¶ 41. First, the unexplained assertions of
27 paragraph 41 do not allege antitrust injury. See, e.g., Volmar Distribs., Inc. v. N.Y.
28 Post Co., 825 F. Supp. 1153, 1160 (S.D.N.Y. 1993) (dismissing claim because
alleged antitrust injury “is wholly conclusory and is unsupported”); Frito-Lay, Inc. v.
Bachman Co., 659 F. Supp. 1129, 1133 (S.D.N.Y. 1986) (“[F]acts must be pleaded
from which [antitrust injury] can be inferred”). Again, Sharman’s allegations do not
suggest that Plaintiffs’ supposed conduct has adversely affected **competition** in any
relevant market(s), only that it has affected Sharman itself. See Brunswick Corp.,
429 U.S. at 488. Second, paragraph 41 of the Amended Counterclaims suffers from
the same defect as Sharman’s allegations about Plaintiffs’ alleged refusal to deal with

1 (quotation omitted); see also id. at 1083 (antitrust laws do not protect consumers
2 against conduct that devalues their current inventory of goods). To note the obvious,
3 Congress intended the Copyright Act, not the antitrust laws, to be the vehicle for
4 addressing injuries relating to copyright infringement. See Reiffin v. Microsoft
5 Corp., 158 F. Supp. 2d 1016, 1034 (N.D. Cal. 2001) (“The antitrust laws . . . are
6 concerned with consumer welfare and not with regulating the efforts of competing
7 parties to gain and utilize monopoly patent rights.”). Sharman’s allegations do not
8 state an antitrust injury as a matter of law, and the defect in Sharman’s theory of
9 injury cannot be cured by further amendment of the counterclaims.

10 **B. Sharman Does Not and Cannot Adequately Plead a Conspiracy.**

11 A party asserting a claim under Section 1 must plead an agreement
12 between two or more persons to restrain trade through concerted action. Ernest W.
13 Hahn, Inc. v. Coddling, 615 F.2d 830, 845 (9th Cir. 1980); Microsoft Corp. v. BEC
14 Computer Co., 818 F. Supp. 1313, 1317 (C.D. Cal. 1992). Unilateral conduct – even
15 consciously parallel conduct by multiple firms – is not illegal under Section 1.
16 Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 74 S. Ct.
17 257, 259-60, 98 L. Ed. 273, 279 (1954); 49er Chevrolet, Inc v. Gen. Motors Corp.,
18 803 F.2d 1463, 1468 (9th Cir. 1986).

19 In a wide variety of contexts, courts recognize that conclusory allega-
20 tions of conspiracy are insufficient to state a claim. See, e.g., Karim-Panahi v. Los
21 Angeles Police Dep’t, 839 F.2d 621, 626 (9th Cir. 1988) (conspiracy claim under 42
22 U.S.C. § 1985 “must allege facts to support the allegation that defendants conspired
23 together. A mere allegation of conspiracy without factual specificity is insuffici-
24 ent.”). To state a viable claim under Section 1 of the Sherman Act, a party must do
25 more than write the words “concerted action.” “A general allegation of conspiracy
26 without a statement of the facts is an allegation of a legal conclusion and insufficient
27 of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs
28 must plead the facts constituting the conspiracy” Zimmerman, 836 F.2d at 182

1 (quotation omitted). “[A] bare bones statement of conspiracy . . . under the antitrust
2 laws without any supporting facts permits dismissal.” Heart Disease Research
3 Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972); accord Lombard’s,
4 Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985); Kingray, 188 F. Supp.
5 2d at 1188-92; Aquatherm Indus., Inc. v. Fla. Power & Light Co., 971 F. Supp. 1419,
6 1428-30 (M.D. Fla. 1997), aff’d, 145 F.3d 1258 (11th Cir. 1998). To survive a
7 motion to dismiss, a Section 1 claim must set forth the “means by which [the]
8 conspiracy came about,” Zimmerman, 836 F.2d at 182, and other “attendant circum-
9 stances,” Aquatherm, 971 F. Supp. at 1429. It must also articulate facts or circum-
10 stances suggesting that the alleged co-conspirators did not act independently.
11 Aquatherm, 971 F. Supp. at 1431; Ben Sheftall Distrib. Co v. Mirta de Perales, Inc.,
12 791 F. Supp. 1575, 1583-84 (S.D. Ga. 1992).

13 Sharman’s description of an alleged conspiracy to restrain trade is fatally
14 deficient. The Amended Counterclaims offer nothing but conclusory allegations of a
15 conspiracy among the Plaintiffs and others. Sharman repeats those allegations lib-
16 erally throughout its pleading, but at every point they are nothing but bald assertions
17 – unsupported by *any* factual particulars. It is clear that Sharman has no facts to
18 allege on this issue.

19 Sharman begins with the boilerplate allegation that every “named party”
20 – it presumably means “named plaintiff” – in the MGM case “was the agent and co-
21 conspirator of the other” in connection with the alleged concerted activity. Am.
22 Counterclaims ¶ 30. But Sharman fails to identify, even generically, all of the
23 participants in the supposed conspiracy. It charges that the “parties [i.e., Plaintiffs]
24 *and co-conspirators*” have utilized three trade associations of the recording and
25 motion picture industries to commit their wrongful acts. Id. (emphasis added). Shar-
26 man does not suggest who the non-plaintiff co-conspirators were or are. Failure to
27 apprise the defendants of the identity of their alleged co-conspirators is a defect that,
28 in itself, calls for dismissal of a Section 1 claim. See, e.g., Garshman v. Universal

1 | Res. Holding, Inc., 824 F.2d 223, 230 (3d Cir. 1987); Lombard's, 753 F.2d at 975;
2 | Newport Components, Inc. v. NEC Home Elecs. (USA), Inc., 671 F. Supp. 1525,
3 | 1545-46 (C.D. Cal. 1987).

4 | Sharman's pleading of concerted action is likewise fatally deficient.
5 | Nowhere does Sharman offer anything more substantive than the repeated incantation
6 | of the word "concerted" or some variant thereof. See Am. Counterclaims ¶ 37
7 | (Plaintiffs "engaged in a concerted and organized pattern of wrongful conduct"); id. ¶
8 | 40 (by "concertedly refusing to deal with Altnet and with Sharman," Plaintiffs have
9 | unreasonably failed to discourage infringement of their copyrighted works); id. ¶¶ 42,
10 | 44 (the record company and motion picture Plaintiffs "dominate, and, when they act
11 | in concert" have monopoly power in, the respective markets for commercial
12 | distribution of their works); id. ¶ 59 ("the Industry Plaintiffs have concertedly
13 | declined to participate" in using Altnet's technology); id. ¶ 64 ("the Industry
14 | plaintiffs and co-conspirators, in furtherance of their anticompetitive aims,
15 | concertedly refused to deal with Altnet and Sharman"); id. ¶ 67 ("Industry plaintiffs'
16 | concerted refusal to deal with Altnet and with Sharman is in furtherance of an
17 | anticompetitive purpose to promote a monopoly.").

18 | Sharman does not explain when the alleged conspiracy came into being;
19 | how it was formed and enforced; or whether it continues (many of the allegations
20 | about Plaintiffs' conduct are couched in the past tense, yet Sharman says the conspir-
21 | acy will continue unless enjoined, id. ¶ 80). Sharman refers in passing to digital-
22 | distribution joint ventures in which some Plaintiffs or their affiliates have an interest,
23 | id. ¶ 67, but cannot allege that those joint ventures involve any agreement among the
24 | participating Plaintiffs not to license their works to Altnet. Most significantly, Shar-
25 | man cannot set forth *any facts* to suggest that Plaintiffs' failure to license their copy-
26 | righted works to Altnet has been the result of concerted action – rather than the
27 | independent business judgment of each Plaintiff not to offer its works by means of a
28 | peer-to-peer network that was and is a notorious vehicle for massive copyright

1 infringement. See Harkins Amusement Enters., Inc. v. Gen. Cinema Corp., 850 F.2d
2 477, 483 (9th Cir. 1988) (“[T]he [movie] distributors possessed the absolute right to
3 refuse to license films to Harkins as long as their decisions were based on
4 independent business judgment.”); Kolling v. Dow Jones & Co., 137 Cal. App. 3d
5 709, 720, 187 Cal. Rptr. 797, 805 (1982) (“Unilateral refusal by a producer to deal
6 with a distributor, absent proof that it was pursuant to an illegal conspiracy, does not
7 violate the antitrust laws.”); see also Stewart v. Abend, 495 U.S. 207, 228-29, 110 S.
8 Ct. 1750, 1764-65, 109 L. Ed. 2d 184, 205-06 (1990) (copyright owner is free
9 “arbitrarily to refuse to license” its works).

10 **III. THE CARTWRIGHT ACT CLAIM FAILS FOR THE SAME REASONS** 11 **AS THE SECTION 1 CLAIM.**

12 The deficiencies that call for dismissal of Sharman’s Section 1 claim
13 also compel dismissal of its Cartwright Act claim (Count III).

14 Like Section 1 of the Sherman Act, the Cartwright Act requires a
15 claimant to allege that it has suffered antitrust injury – “that is, the type of injury the
16 antitrust laws were intended to prevent, and which flows from the invidious conduct
17 which renders defendants’ acts unlawful.” Morrison v. Viacom, Inc., 66 Cal. App.
18 4th 534, 548, 78 Cal. Rptr. 2d 133, 141 (1998) (quotation omitted). As explained
19 above, Sharman’s alleged injuries – the loss of fees from Altnet outside of any
20 allegedly restrained market, and the frustration of Sharman’s purported desire to
21 reduce the continued rampant copyright infringement by users of KMD – are not the
22 sort that are the concern of the antitrust laws.

23 The Cartwright Act, like Section 1 of the Sherman Act, prohibits
24 conspiracies to restrain trade. Lloyd Design Corp. v. Mercedes Benz of N. Am., Inc.,
25 66 Cal. App. 4th 716, 720-21, 78 Cal. Rptr. 2d 185, 187 (1998). A party asserting
26 Cartwright Act claims must do more than repeatedly invoke the conclusory label
27 “concerted action.” See Chi. Title Ins. Co. v. Great W. Fin. Corp., 69 Cal. 2d 305,
28 316-18, 70 Cal. Rptr. 849, 856-57 (1968); Chavez v. Whirlpool Corp., 93 Cal. App.

1 4th 363, 373-74, 113 Cal. Rptr. 2d 175, 182-83 (2001). A complaint that fails to state
2 a conspiracy for purposes of the Sherman Act also fails to do so under the Cartwright
3 Act. Newport Components, Inc., 671 F. Supp. at 1549-50 (dismissing Cartwright Act
4 claim for failure to plead cognizable Sherman Act conspiracy). Thus, Sharman's
5 Cartwright Act claim does not, and cannot, adequately allege a conspiracy among the
6 Plaintiffs.

7 **IV. SHARMAN CANNOT STATE A CLAIM UNDER SECTION 2 OF** 8 **THE SHERMAN ACT.**

9 Count IV of the Amended Counterclaims is a claim for monopolization
10 under Section 2 of the Sherman Act. "Claims for violation of Section 2 must allege
11 two key elements: (1) the possession of monopoly power in the relevant market and
12 (2) the willful acquisition or maintenance of that power." Amarel v. Connell, 102
13 F.3d 1494, 1521 (9th Cir. 1996). A Section 2 claim must also allege that the claimant
14 suffered antitrust injury as a result of the unlawful conduct. SmileCare Dental
15 Group, 88 F.3d at 783. Sharman's Section 2 claim fails because Sharman cannot
16 allege that Plaintiffs' possess "monopoly" power in any sense that the law
17 recognizes. In addition, Sharman cannot allege that it has suffered antitrust injury.

18 **A. There Is No Such Thing as a "Collective Monopoly."**

19 Sharman's Section 2 claim rests on a fundamentally erroneous notion of
20 "monopoly" under the Sherman Act. Sharman does not allege that any single
21 Plaintiff has acquired or maintained monopoly power in any market. Rather, it
22 charges that the record company Plaintiffs, *as a group*, and the motion picture
23 Plaintiffs, *as a group*, possess what it calls a "collective monopoly" in the markets
24 for the distribution of copyrighted musical recordings and movies, respectively. Am.
25 Counterclaims ¶ 65; see also id. ¶¶ 85-86 (record company and motion picture
26 Plaintiffs have monopoly power "when they act in concert"). But there is no basis in
27 the law for the theory that a "collective" or "shared" monopoly (*i.e.*, an oligopoly)
28 violates Section 2.

1 “Collective monopoly” is an oxymoron. As the Supreme Court has
2 observed, “§ 2 addresses the actions of *single firms* that monopolize.” Spectrum
3 Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 113 S. Ct. 884, 889, 122 L. Ed. 2d 247,
4 255-56 (1993) (emphasis added); accord Oksanen v. Page Mem’l Hosp., 945 F.2d
5 696, 709 (4th Cir. 1991) (“[S]ection two involves the actions of a single firm to
6 control a market.”). “An examination of the history of the Sherman Act reveals that
7 Congress’ concept of ‘monopoly’ did not include ‘shared monopolies’ or
8 ‘oligopolies’ at all, but rather the complete domination of a market by a single
9 economic entity.” Sun Dun, Inc. v. Coca-Cola Co., 740 F. Supp. 381, 391 (D. Md.
10 1990). For these reasons, “courts and the Federal Trade Commission have
11 universally rejected claims that Section 2 condemns ‘shared’ monopoly.” Santana
12 Prods., Inc. v. Sylvester & Assocs., Ltd., 121 F. Supp. 2d 729, 737 (E.D.N.Y. 1999)
13 (quoting IIIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 810g (2d ed.
14 1996)).

15 In 1988, the Ninth Circuit called the theory of shared monopoly “a novel
16 one,” and observed that “no case has held the § 2 monopolization provision applic-
17 able to shared monopoly.” Harkins Amusement, 850 F.2d at 490 (quotation omitted).
18 The court rejected the plaintiff’s attempt to invoke the theory on the facts of that case,
19 which involved a market with “numerous sellers” – nine national film distributors.
20 Id. In the wake of Harkins Amusement, this Court, while noting the narrowness of its
21 holding, made clear that an alleged shared monopoly is “beyond the reach of § 2 of
22 the Sherman Act.” In re Coordinated Pretrial Proceedings in Petroleum Prods.
23 Antitrust Litig., 782 F. Supp. 481, 485 (C.D. Cal. 1991) (Tashima, J.). Other courts
24 agree. See, e.g., Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 256-57
25 (S.D.N.Y. 1995); Sun Dun, 740 F. Supp. at 391; H.L. Hayden Co. v. Siemens Med.
26 Sys., Inc., 672 F. Supp. 724, 742 (S.D.N.Y. 1987), aff’d 879 F.2d 1005 (2d Cir.
27 1989); Feldman v. Jackson Mem’l Hosp., 571 F. Supp. 1000, 1010-11 (S.D. Fla.
28 1983), aff’d mem., 752 F.2d 647 (11th Cir. 1985); Consol. Terminal Sys., Inc. v. ITT

1 World Communications, Inc., 535 F. Supp. 225, 228-29 (S.D.N.Y. 1982). For these
2 reasons, Sharman cannot ground a Section 2 claim on allegations of “collective
3 monopoly.”⁵

4 **B. Sharman Does Not Even Allege that Plaintiffs’ Possess a “Collective
5 Monopoly” in the Affected Markets.**

6 Sharman’s Section 2 claim is fatally deficient for a second reason –
7 Sharman does not allege that Plaintiffs, even if “acting in concert,” possess monopoly
8 power *in the allegedly affected markets*.

9 “Monopoly power is defined as ‘the power to control prices or exclude
10 competition’” in the relevant market. Am. Prof’l Testing Serv. v. Harcourt Brace
11 Jovanovich Legal & Prof’l Publ’ns, 108 F.3d 1147, 1154 (9th Cir. 1997) (quoting
12 United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994,
13 1005, 100 L. Ed. 1264, 1278 (1956)). Although the opacity of its allegations makes it
14 difficult to be sure, Sharman seems to posit “the market[s] for copyright licensed,
15 digital distribution within the United States over the Internet” of sound recordings
16 and motion pictures as the relevant markets for purposes of its Section 2 claim. Am.
17 Counterclaims ¶¶ 85-86. But Sharman does not suggest (because it cannot) that
18 Plaintiffs, even as a group, have monopoly power *in those alleged markets*. On the
19 contrary, Sharman asserts that “the world’s leading distributor of digitally protected
20 content” is *Altnet*. Id. ¶ 60. That allegation makes clear that both of the critical
21 indicia of monopoly are lacking here – that the purported monopolist “owns a
22

23 ⁵ Nor do such allegations support a claim under Section 2 for conspiracy to
24 monopolize. Because the maintenance of an oligopoly is not unlawful under Section
25 2, a conspiracy to achieve that objective is not unlawful, either. See, e.g., Sun Dun,
26 740 F. Supp. at 390 (“[C]ompetitors, by conspiring to maintain or create an
27 oligopoly, do not run afoul of the Section 2 prohibitions”). In addition, as noted
28 above, Sharman cannot properly allege the existence of a conspiracy of any sort.
Supra at 12-15. Failure to allege a conspiracy for purposes of Section 1 also requires
dismissal of a conspiracy claim under Section 2. See, e.g., Dickson v. Microsoft
Corp., 309 F.3d 193, 211 (4th Cir. 2002); D’Last Corp. v. Ugent, 863 F. Supp. 763,
769 (N. D. Ill. 1994), aff’d mem., 51 F.3d 275 (7th Cir. 1995).

1 dominant share of that market” and that there exist “significant barriers to entry” into
2 the market. Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997), aff’d, 525
3 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999).

4 **C. Sharman Cannot Allege Antitrust Injury.**

5 Finally, Section 2 of the Sherman Act, like Section 1, requires the claim-
6 ant to allege that it has sustained antitrust injury in a relevant market. Supermarket of
7 Homes, Inc v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1404-05 (9th
8 Cir. 1986). As explained above, the Amended Counterclaims show that Sharman has
9 suffered no such injury. Supra at 7-10.

10 **V. SHARMAN’S REQUEST FOR A DECLARATION OF COPYRIGHT**
11 **MISUSE IS POINTLESS, AND IN ANY EVENT FAILS TO STATE A**
12 **CLAIM.**

13 In Sharman’s original counterclaims, Count I was denominated as a
14 claim for “copyright misuse.” The relief it sought was a declaration that Plaintiffs
15 have engaged in copyright misuse, and an injunction barring Plaintiffs from taking
16 action to enforce any of the their U.S. copyrights against any person until the misuse
17 has ceased. After Plaintiffs informed Sharman that there is no cause of action for
18 “copyright misuse,” Exhibit A, Sharman amended the counterclaims cosmetically to
19 re-label Count I as a claim for a “Declaratory Judgment of Copyright Misuse.”⁶
20 Count I is an improper use of the declaratory judgment mechanism, and in any event
21 fails to allege that Plaintiffs have engaged in copyright misuse.

22 **A. A Declaratory Judgment Will Not Serve Any Useful Purpose.**

23 Copyright misuse is a narrow, judge-made affirmative *defense* to a claim
24 for infringement. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 n.8
25 (9th Cir. 2001) (referring to the “affirmative defense of copyright misuse”); Practice

26 ⁶ Sharman has dropped an explicit request for an injunction under this claim,
27 although some vestiges of that request remain. See Am. Counterclaims ¶ 73. But the
28 judicial declaration it seeks -- that, among other things, Plaintiffs are “not entitled to
take any further action to enforce any of their United States copyrights,” id. at 36 –
is, as a practical matter, indistinguishable from an injunction.

1 | Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 520 (9th Cir. 1997), amended
2 | by 133 F.3d 1140 (9th Cir. 1998); Triad Corp v. Southeastern Express Co., 64 F.3d
3 | 1330, 1336 (9th Cir. 1995). Indeed, Sharman has pled copyright misuse as its First
4 | *Affirmative Defense*. Am. Counterclaim at 10. But where a party has already pled
5 | misuse as an affirmative defense, the misuse doctrine is not properly the basis for an
6 | affirmative claim. In Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment
7 | Services, 746 F. Supp. 320 (S.D.N.Y. 1990), the copyright infringement defendants
8 | not only set up misuse as an affirmative defense but also asserted it as an independent
9 | cause of action on which they sought declaratory relief. The court summarily
10 | rejected “defendant’s assertion of the copyright misuse doctrine as a vehicle for
11 | affirmative relief,” and noted that “[s]uch a claim is unprecedented.” Id. at 328.

12 | It is improper for Sharman to re-package its First Affirmative Defense
13 | as a wholly redundant counterclaim for a declaratory judgment. A claim for a dec-
14 | laratory judgment is appropriate only where it will “serve a useful purpose.” Bilbrey
15 | v. Brown, 738 F.2d 1462, 1470 (9th Cir. 1984). There is no purpose in entertaining a
16 | duplicative claim for declaratory relief. “By misdesignating [an] affirmative defense
17 | as a Counterclaim and pleading it again, [defendants] have accomplished nothing
18 | more than complicating the pleadings.” Rayman v. Peoples Sav. Corp., 735 F. Supp.
19 | 842, 851 (N.D. Ill. 1990) (denying leave to add redundant declaratory relief
20 | counterclaim); see also Fed. R. Civ. P. 8(c) (“When a party has mistakenly
21 | designated a defense as a counterclaim,” the court “shall treat the pleading as if there
22 | had been a proper designation.”); Fed. R. Civ. P. 12(f) (“[T]he court may order
23 | stricken from any pleading . . . any redundant . . . matter.”).

24 | Sharman’s request for a declaratory judgment of copyright misuse will
25 | not “serve a useful purpose” for a second reason. Misuse is only a *temporary* bar to
26 | a copyright owner’s enforcement of its copyright. The disability lasts only as long as
27 | the misuse continues. Once it ends, the owner may resume enforcement of the
28 | copyright. Practice Mgmt., 121 F.3d at 520 n.9; In re Napster, Inc. Copyright Litig.,

1 191 F. Supp. 2d 1087, 1108 (N.D. Cal. 2002) (“The doctrine does not prevent
2 plaintiffs from ultimately recovering for acts of infringement that occur during the
3 period of misuse. The issue focuses on when plaintiffs can bring or pursue an action
4 for infringement, not for which acts of infringement they can recover.”) Thus, no
5 practical purpose would be served by a declaration that Plaintiffs “are not entitled to
6 take any further action to enforce any of their United States copyrights . . . until the
7 misuse has been abandoned and the effects of such misuse have been dissipated.”
8 Am. Counterclaims at 36. Such a declaration would be obsolete and useless the day
9 after being rendered, because it would necessarily beg the question of whether and
10 when the misuse and its effects have ended. Those issues would be open to litigation
11 in any future dispute.

12 **B. Sharman Does Not Allege Conduct Constituting Copyright Misuse.**

13 In any event, whether considered as a claim for declaratory relief or as a
14 defense, Sharman’s allegations cannot, as a matter of law, make out a case of
15 copyright misuse. Copyright misuse occurs when a copyright owner engages in an
16 antitrust violation or other conduct that “expands the statutory copyright monopoly in
17 order to gain control over areas outside the scope of the monopoly.” In re Napster,
18 191 F. Supp. 2d at 1103 (citing Practice Mgmt., 121 F.3d at 520). As explained
19 supra at 6-19, Sharman fails to allege that Plaintiffs have violated the antitrust laws.
20 Nor does (or can) Sharman suggest that Plaintiffs have engaged in what courts regard
21 as the paradigmatic act of copyright misuse – entering into an “unduly restrictive
22 copyright licensing agreements.” In re Napster, 191 F. Supp. 2d at 1105; see also id.
23 at 1105-06 (noting Napster’s contention that the license it entered with MusicNet, a
24 joint venture of certain major record companies, contained unduly restrictive terms).
25 Quite the opposite, the upshot of Sharman’s theory is that Plaintiffs have *not* entered
26 into licensing agreements allowing digital distribution of their works to users of
27 KMD. One of the rights granted by the copyright monopoly is precisely the right
28 “arbitrarily to refuse to license one who seeks to exploit the work.” Stewart, 495

1 U.S. at 228-29; accord Orson, Inc. v. Miramax Film Corp., 189 F.3d 377, 385 (3d
2 Cir. 1999) (en banc). Thus, it is not misuse of the monopoly for a copyright owner to
3 exercise that very right and decline to license its works. See, e.g., Triad, 64 F.3d at
4 1337; Service & Training, Inc. v. Data General Corp., 963 F.2d 680, 690 (4th Cir.
5 1992); In re Independent Serv. Organizations Antitrust Litig., 85 F. Supp. 2d 1130,
6 1176 (D. Kan. 2000) (“A copyright holder may refrain from vending or licensing [its
7 product] and content [itself] with simply exercising the right to exclude others from
8 using [its] property”).⁷ It necessarily follows that a copyright owner has no
9 obligation to grant a license to infringers so that they will be transformed thereby into
10 authorized users. See A&M Records, 239 F.3d at 1028-29 (rejecting suggestion that
11 court should create a compulsory license for Napster’s benefit). No further amend-
12 ment can cure this fundamental defect in Sharman’s theory of copyright misuse.

13 The perfunctory catch-all list of Plaintiffs’ alleged misdeeds in
14 paragraphs 67 and 68 of the Amended Counterclaims is also insufficient to support a
15 misuse defense. See Microsoft Corp v. Jesse’s Computers & Repair, Inc., 211 F.R.D.
16 681, 684 (M.D. Fla. 2002) (recognizing that “a defendant must do more than make
17 conclusory allegations” of copyright misuse and holding that allegation that “Plaintiff
18 has engaged in licensing and other practices that constitute copyright misuse . . . falls
19 woefully short of even the liberal requirements of Rule 8” (internal quotation
20 omitted)); Astra Aktiebolag v. Genpharm Inc., No. 98 Cir. 3657 (BSJ), 2000 WL
21 257119, at *2 (S.D.N.Y Mar. 8, 2000) (attached as Exhibit B) (dismissing patent
22 misuse defense where defendant “offers nothing more than conclusory allegations”
23 that “leav[e] the Plaintiffs utterly without notice of the misconduct alleged”).

24
25 ⁷ The Ninth Circuit has held that a *monopolist’s* refusal to license its copyrights
26 may in some circumstances violate Section 2 of the Sherman Act, although even a
27 monopolist’s refusal to license is presumptively lawful. Image Technical Servs., Inc.
28 v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1997). That holding has no
relevance here. As noted above, Sharman does not allege that any of the Plaintiffs,
individually, is a monopolist.

1 Finally, as noted, the doctrine of copyright misuse merely suspends a
2 plaintiff's right to enforce its copyrights during the period of misuse. See Lasercomb
3 Am., Inc. v. Reynolds, 911 F.2d 970, 979 n.22 (4th Cir. 1990); In re Napster, 191 F.
4 Supp. 2d at 1108. If no misuse is occurring at the time the copyright holder seeks to
5 enforce its copyrights, the defense is not available. Sharman does not allege that
6 Plaintiffs are currently engaged in copyright misuse. It casts its charges of mis-
7 conduct in the past tense, see Am. Counterclaims ¶¶ 70-71, or the past perfect tense,
8 id. ¶¶ 67, 68. Sharman's only allusion to continuing misuse is that unidentified
9 "affiliates of the Industry plaintiffs . . . have perpetrated repeated acts of copyright
10 misuse that continue." Id. ¶ 37 (emphasis added). That vague and conclusory alleg-
11 ation does not satisfy Rule 8(a), and in any event there is no authority for the notion
12 that the misconduct of an "affiliate" deprives a plaintiff of the right to enforce its own
13 copyrights.

14 Accordingly, Sharman's claim for a declaratory judgment of copyright
15 misuse should be dismissed with prejudice.

16 **VI. SHARMAN CANNOT STATE A CLAIM FOR VIOLATION OF**
17 **BUSINESS AND PROFESSIONS CODE SECTION 17200.**

18 Count V of the Amended Counterclaims invokes the California unfair
19 competition law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* That statute defines unfair
20 competition to include "any unlawful, unfair or fraudulent business act or practice."
21 Each of the terms "unlawful," "unfair," and "fraudulent" describes a different species
22 of conduct proscribed by the statute. People ex. rel. Lockyer v. Fremont Life Ins.
23 Co., 104 Cal. App. 4th 508, 515, 128 Cal. Rptr. 2d 463, 469 (2002). Sharman
24 apparently contends that Plaintiffs have engaged in all three types of unfair
25 competition, see Am. Counterclaims ¶¶ 90-93, but its allegations, even accepting
26 them as true, cannot state a claim under any theory.

27 With respect to the "unlawful" prong of the statute, violation of
28 "virtually any state, federal or local law can serve as the predicate for an action under

1 Section 17200.” Fremont, 104 Cal. App. 4th at 515, 128 Cal. Rptr. 2d at 469
2 (internal quotation and emphasis omitted). However, the only violation of law that
3 Sharman alludes to in its pleading is Plaintiffs’ supposed antitrust violations. For the
4 reasons explained above, Sharman does not state a claim for violation of the antitrust
5 laws. “Where a plaintiff fails to state an antitrust claim, and where an unfair
6 competition claim is based upon the same allegations, such state claims are properly
7 dismissed.” Formula One Licensing, B.V. v. Purple Interactive Ltd., No. C 00-2222
8 MMC, 2001 U.S. Dist. LEXIS 2968, at *13 (N.D. Cal. Feb. 6, 2001) (attached as
9 Exhibit C).

10 The “fraudulent” language in Section 17200 applies when “the public is
11 likely to be deceived” by a company’s business practices. Fremont, 104 Cal. App.
12 4th at 516, 128 Cal. Rptr. 2d at 471 (quotation omitted); see also Watson
13 Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1121 (C.D.
14 Cal. 2001) (“[T]here is no case authority that ‘fraudulent’ business acts are separately
15 actionable by business competitors absent a showing that the public . . . is likely to be
16 deceived”). A Section 17200 claim based on fraudulent conduct must be alleged
17 with particularity, as required by Rule 9(b). Vess v. Ciba-Geigy Corp. USA, 317
18 F.3d 1097, 1105-08 (9th Cir. 2003). Sharman does not offer any allegations – much
19 less particularized allegations – that Plaintiffs have engaged in fraudulent conduct or
20 that the public is likely to be deceived by Plaintiffs’ actions.

21 This leaves the portion of the statute that proscribes “unfair” business
22 acts. Apart from the conclusory and deficient assertions of conspiracy, the main
23 body of Sharman’s allegations (concerning *Altnet’s* inability to secure licenses from
24 Plaintiffs) describes at most a collection of alleged unilateral business decisions by
25 Plaintiffs not to license their copyrighted works to a firm that proposes to distribute
26 them through a particular channel. Such unilateral conduct is permissible under the
27 copyright laws, Stewart, 495 U.S. at 228-29, the antitrust laws, Theatre Enters., 346
28 U.S. at 541, and, as a matter of law, is not “unfair” for purposes of Section 17200,

1 | Chavez, 93 Cal. App. 4th at 374-75, 113 Cal. Rptr. 2d at 183-84. The allegations in
2 | the grab-bag paragraphs 67 and 68 of the Amended Counterclaims cannot salvage the
3 | claim. “A plaintiff alleging unfair business practices under the unfair competition
4 | statutes ‘must state with reasonable particularity the facts supporting the statutory
5 | elements of the violation.’” Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F.
6 | Supp. 1303, 1316 (N.D. Cal. 1997) (quoting Khoury v. Maly’s of California, Inc., 14
7 | Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708, 712 (1993)); accord Aquino v. Credit
8 | Control Servs., 4 F. Supp. 2d 927, 930 (N.D. Cal. 1998). Paragraphs 67 and 68 fall
9 | well short of that standard. Allegations of conduct such as those that state, in their
10 | entirety, “[u]nfair control of distribution fees” and “[c]onduct that is the subject of
11 | ongoing Federal Trade Commission investigations involving the digital distribution
12 | of copyrighted works,” Am. Counterclaims ¶ 67(d), (f), do not provide Plaintiffs or
13 | the Court with any meaningful information about which Plaintiffs Sharman is
14 | referring to, what aspect of the alleged conduct Sharman claims is unfair, or why.

15 | CONCLUSION

16 | For the reasons stated, the Motion should be granted, and Sharman’s
17 | Amended Counterclaims should be dismissed with prejudice.

1
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February 12, 2003

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Re: Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster Ltd., et al.
No. 01-08541 SVW (PJWx) (C.D. Cal.)

Gentlemen:

The MGM plaintiffs intend to move to dismiss the counterclaims for failure to state a claim on which relief can be granted. You have asked me to provide you, before our "meet and confer" session with respect to the motion, for a letter describing the grounds for the motion. Although I do not believe plaintiffs are required to provide such a written description as part of the "meet and confer" process, the motion rests on the following arguments:

Count I – copyright misuse

There is no such thing as an affirmative cause of action for "copyright misuse."

EXHIBIT A

David B. Casselman, Esquire
Lawrence M. Hadley, Esquire
February 12, 2003
Page 2

Count II – Sherman Act § 1

A. Sharman does not adequately plead a conspiracy or state facts suggesting that the alleged refusals to deal with Altnet were anything other than independent business judgments by plaintiffs.

B. Sharman does not intelligibly identify the relevant market.

C. Sharman has not suffered antitrust injury. It does not participate in the allegedly restrained markets, and the harm it has allegedly sustained is not the sort of injury that the antitrust laws were designed to protect against.

Count III – Cartwright Act

This claim fails for the same reasons as the Sherman Act § 1 claim.

Count IV – Sherman Act § 2

A. Sharman alleges only a “collective monopoly,” which is not a cognizable violation of § 2.

B. Sharman appears to invoke the theory of “monopoly leveraging,” i.e., that plaintiffs have used their alleged dominance in the market for traditional distribution of recorded music and movies to gain an unfair advantage in the market for digital distribution of content. But Sharman does not suggest that plaintiffs have monopoly power in the market for digital distribution. There is no § 2 claim in such circumstances.

C. Sharman has not suffered antitrust injury.

Count V -- § 17200

Sharman identifies no “unlawful” conduct by plaintiffs other than alleged antitrust violations, which allegations are insufficient for the reasons noted above. Sharman identifies no alleged “fraudulent” conduct by plaintiffs. And Sharman’s vague and conclusory allegations in paragraphs 64-65 of the Counterclaim are not sufficient to give plaintiffs fair notice of any claim of “unfair” conduct.

* * *

WILLIAMS & CONNOLLY LLP

David B. Casselman, Esquire
Lawrence M. Hadley, Esquire
February 12, 2003
Page 3

I look forward to promptly convening, and completing, our meet-and-confer session today.

Sincerely yours,

A handwritten signature in black ink that reads "Robert J. Shaughnessy". The signature is written in a cursive, flowing style with a large, prominent initial "R".

Robert J. Shaughnessy

H
Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Astra AKTIEBOLAG, et al., Plaintiffs,
v.
GENPHARM INC., Defendant.

No. 98 Civ. 3657(BSJ).

March 8, 2000.

MEMORANDUM OPINION AND ORDER

JONES, J.

*1 Originally filed before this Court were motions by the plaintiffs Astra Aktiebolag, Aktiebolaget Hassle, Astra Merck Enterprises Inc., and Astra Merck Inc. (collectively "Astra") to strike certain affirmative defenses and counterclaims of the defendant Genpharm. First, Astra moved to strike certain patent unenforceability and invalidity defenses based upon the fact that Genpharm had failed to provide proper notice under the Food and Drug Administration statute. See 21 U.S.C. § 355(j)(5)(B)(ii). Recognizing this deficiency, Genpharm subsequently filed a supplemental notice and a second lawsuit was filed by Astra based upon that second notice. Accordingly, at a conference on December 3, 1999, this motion was withdrawn by the plaintiffs.

Second, Astra argued that Genpharm failed to meet the specific pleading requirements of Fed.R.Civ.P. 9(b) with respect to Genpharm's inequitable conduct allegations surrounding the '230 patent. This Court disagrees.

At the outset the Court notes that there is no dispute that an allegation of inequitable conduct sounds in fraud and therefore must comply with Rule 9(b). This flows from the simple principle that a patent applicant must prosecute an application with candor, good faith and honesty in the Patent and Trademark Office ("PTO"). A breach of this duty constitutes inequitable conduct. See *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1178 (Fed.Cir.1995). The parties also agree that

inequitable conduct may be established with evidence of a failure to disclose material information coupled with an intent to deceive.

Rule 9(b) provides that pleadings alleging fraud must state "the circumstances constituting fraud ... with particularity." *Id.* This has generally been held to require the identification of the statements alleged to be fraudulent, the speaker, where and when the statements were made and an explanation of why the statements were fraudulent. See *Poly-America, Inc. v. GSE Lining Tech., Inc.*, No. Civ. A. 3:96-CV-2690, 1998 WL 355477 (N.D. Tex. June 29, 1998); *Rainin Instrument Company, Inc. v. Osmo Souvanimej*, 96 Civ. 7073(HB), 1997 WL 576008 (S.D.N.Y. Sept. 16, 1997). Genpharm's pleadings meet these requirements. First, Genpharm alleged in its answer that: "The applicants and/or their agents knowingly withheld prior art more material than the prior art they disclosed to the examiner during prosecution of the '230 patent..." (¶ 68.) This identifies the speakers as the applicants and or their attorneys and the time and place of the non disclosure as during the prosecution of the '230 patent. In the next paragraph Genpharm identifies the non-disclosed statement by identifying the material art withheld to include "at least European Patent No. 124,495, "Omeprazole Salts." To the extent that Astra argues that this gives them notice of one specific piece of prior art but is insufficient to place them on notice of any other allegedly material omissions they are correct. Accordingly, the phrase "includes at least" in paragraphs 69 and 157 is stricken.

*2 Finally and more importantly, Astra argues that Genpharm has failed sufficiently to plead materiality in failing to explain why the alleged omission was material and also failed to plead intent with particularity. This Court finds that Genpharm's allegation that Astra omitted "more material prior art" than the prior art they did disclose during the prosecution of the patent is sufficient. If true, the omission works a fraud on the PTO by virtue of the fact that it breaches the duty of candor to the PTO and renders the patent unenforceable. See *Poly-America*, 1998 WL 355477, at *4. Read together with the identification of the specific patent allegedly omitted, the plaintiffs have sufficient notice of the inequitable conduct claim and will not be prejudiced by the pleadings. See *Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, 820 F.Supp. 150, 154 (D.Del.1992).

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EXHIBIT B

As to Genpharm's obligation to plead intent with particularity, Rule 9(b) provides that "intent may be averred generally." Fed.R.Civ.P. 9(b). Genpharm's allegation that the withholding was done "knowingly and with intent to mislead" (§ 68,) especially when coupled with the allegation that the same patent was cited by the applicants in the specification of a related patent and that the examiners were different (§§ 69, 70,) are more than enough to meet the requirement.

Third, Astra argued that Genpharm failed to meet the specific pleading requirements of Fed.R.Civ.P. 9(b) with regard to its allegations of patent misuse. In its opposition papers, however, Genpharm represented that its "patent misuse allegations are not grounded upon inequitable conduct before the PTO." "Genpharm has not made fraud-based allegations," and "Genpharm has not alleged patent misuse due to the attempted enforcement of a patent known to be invalid or unenforceable." Based upon these representations Astra, in its reply papers withdrew "this portion of its motion directed to patent misuse."

The question of whether Genpharm has sufficiently plead the defense of patent misuse under Fed.R.Civ.P. 12(f), however, remains. The allegation that Genpharm makes as to the 794, '305 and '342 patents is that the "patent and all the claims thereof are unenforceable due to patent misuse, and an unlawful attempt to extend patent rights." Presumably the phrase "an unlawful attempt to extend patent rights" is intended by the defendant as an allusion to conduct on the part of the plaintiff/patentee with an anticompetitive effect. See *Virginia Panel Corp. v. MacPanel Co.*, 133 F.3d 860, 868 (Fed.Cir.1997). For instance, practices such as "tying" arrangements may under certain circumstances form the basis for patent misuse. Here, however, Genpharm offers nothing more than conclusory allegations which provide no factual basis for this defense--leaving the plaintiffs utterly without notice of the misconduct alleged. Accordingly, the Court strikes the patent misuse defense without prejudice and with leave to replead.

CONCLUSION

*3 For the foregoing reasons plaintiffs' motion to strike defendant's patent invalidity defenses is withdrawn, the motion to strike the allegations of patent unenforceability due to inequitable conduct

is granted only insofar as the words "includes at least" are stricken, and the motion to strike the allegations of patent misuse is granted without prejudice.

SO ORDERED:

2000 WL 257119, 2000 WL 257119 (S.D.N.Y.)

END OF DOCUMENT

1 of 1 DOCUMENT

**FORMULA ONE LICENSING, B.V., Plaintiff, v. PURPLE INTERACTIVE LTD., et al.,
Defendants; FORMULA1.COM LTD., et al., Counterclaim Plaintiffs v. FORMULA ONE
LICENSING, B.V., et al., Counterclaim Defendants**

No. C 00-2222 MMC

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

2001 U.S. Dist. LEXIS 2968

February 6, 2001, Decided

February 6, 2001, Filed

DISPOSITION:

[*1] Counter-defendants' motion to dismiss GRANTED and, with the exception of Count Nine of Formula1.com's FAAC, all counterclaims DISMISSED with leave to amend to cure the deficiencies noted.

CASE SUMMARY

PROCEDURAL POSTURE: In an action alleging trademark infringement in electronic commerce, plaintiffs moved to dismiss defendants' amended counterclaims pursuant to Fed. R. Civ. P. 12(b)(6).

OVERVIEW: After plaintiff filed the instant complaint, defendants counterclaimed alleging antitrust, monopolization, group boycott, and state law counterclaims of unfair competition, and interference with prospective economic advantage. Plaintiff's motion to dismiss was granted. With the exception of one counterclaim, defendants were given leave to amend their counterclaims. The antitrust counterclaims lacked the required particularity needed for a sham exception found under the Noerr-Pennington doctrine. The monopoly claims were based on a market defined by trademarks. They cannot be used to define markets, trademarks are used to define makers. The group boycott counterclaims failed to plead the existence of an agreement between the parties engaged in the boycott. Because the state law unfair competition counterclaim was based on the anti-trust counterclaims, it had to be dismissed. The interference with prospective economic advantage counterclaim had to be dismissed because it was derivative of the antitrust counterclaims.

OUTCOME: The motion to dismiss counterclaims was granted. With the exception of one counterclaim, defendants were given leave to cure the deficiencies. Eight antitrust counterclaims lacked the required particularity for the sham exception to apply, the monopolization counterclaims lacked the identity of a product market not defined in terms of trademarks, the group boycott counterclaims lacked the pleading of any agreement.

LexisNexis(TM) HEADNOTES- Core Concepts

Cyberlaw > Trademarks > Internet Domain Names
[HN1] Uniform Domain Name Dispute Resolution Policy proceedings are held before the World Intellectual Property Organization Arbitration and Mediation Center, operated by the World Intellectual Property Organization.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine
[HN2] Under the Noerr-Pennington doctrine, those who petition government for redress are generally immune from antitrust liability. The doctrine applies to petitions to courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine
[HN3] Where an antitrust plaintiff challenges the filing of a complaint, immunity from antitrust liability is lost only if a party engages in sham petitioning. To state a claim based on the sham exception, the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships. Such allegations must be pleaded with specificity.

Trademark Law > Subject Matter
[HN4] Without a definition of the market there is no way to measure a party's ability to lessen or destroy compe-

EXHIBIT C

tion. Product markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product.

Antitrust & Trade Law > Monopolization

[HN5] Monopoly power allegations must be appraised in light of the relevant product markets.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

[HN6] Sherman Act § 1 prohibits agreements that unreasonably restrain trade. Certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful per se. Other alleged violations are subject to rule of reason analysis to determine whether particular concerted conduct unreasonably restrains competition.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

[HN7] An antitrust plaintiff bringing a claim based upon a per se violation need not identify the relevant product market in which the parties compete.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

[HN8] Where a claim is based upon an alleged group boycott, a per se analysis is appropriate only if the boycott involves horizontal agreements among direct competitors.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

[HN9] To state a rule of reason claim, a party must sufficiently identify the relevant product markets in which it and counter-defendants compete, and allege facts demonstrating that counter-defendants conduct has an anticompetitive effect on such markets.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements

[HN10] Where a plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed.

Torts > Business & Employment Torts > Interference With Prospective Advantage

[HN11] To state an interference with prospective advantage claim, a plaintiff must allege conduct that is wrongful by some legal measure other than the fact of interference itself.

Torts > Business & Employment Torts > Interference With Prospective Advantage

[HN12] Where a plaintiff seeks to base a claim of interference with prospective economic advantage upon the

pursuit of litigation, the plaintiff must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor.

Torts > Business & Employment Torts > Interference With Prospective Advantage

[HN13] The elements of the tort of interference with prospective economic advantage include an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff, and actual disruption of the relationship.

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For PURPLE INTERACTIVE LIMITED, FORMULA1.COM LTD, PURPLE TRAINING LTD, BRUCE MCDIFFETT, FORMULA 1 INTERNET, defendants: Jeffrey G. Benz, Mark H. Wildasin, Coudert Brothers, San Francisco, CA.

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For FORMULA ONE LICENSING B.V., Counter-defendant: David W. Slaby, McDermott Will & Emery, Menlo Park, CA.

JUDGES:

MAXINE M. CHESNEY, United States District Judge.

OPINIONBY:

MAXINE M. CHESNEY

OPINION:

ORDER GRANTING [*2] COUNTER-DEFENDANTS' MOTION TO DISMISS; VACATING HEARING

Before the Court is the motion of plaintiff/counter-defendant Formula One Licensing B.V. ("FOLBV") and counter-defendants Federation Internationale de L'Automobile ("FIA") and Formula One Management

Limited ("FOM") (collectively "counter-defendants") to dismiss amended counterclaims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants/Counterclaimants Formula1.com Ltd., Purple Training Ltd., Purple Interactive Ltd., Bruce McDiffett, First One Co., and Formula 1 Internet (collectively "counterclaimants") filed opposition, to which counter-defendants replied. The Court deems the matter appropriate for decision on the papers filed in support of and in opposition to the motion, VACATES the hearing scheduled for February 2, 2001, and rules as follows.

BACKGROUND

Plaintiff FOLBV, in its First Amended Complaint ("FAC"), alleges that it owns and maintains trademarks and trade names used in connection with the annual FIA Formula One World Championship motor sport race, including F1, F1 Formula 1 and Design, Formula One, Formula 1, and FIA Formula 1 World Championship and Design. FOLBV alleges that defendants [*3] Formula1.com Ltd. and Purple Training Ltd (collectively "Formula1.com"), n1 defendant Purple Interactive Ltd. ("Purple Interactive"), and defendants Bruce McDiffett, First One Co., and Formula 1 Internet (collectively "McDiffett"), n2 are infringing FOLBV's trademarks.

n1 In its First Amended Answer and Counterclaims ("FAAC"), Formula1.com Ltd. and Purple Training Ltd. state that they are the same entity. "Purple Training Ltd. was the prior name of the entity currently known as Formula1.com Limited." (Formula1.com's FAAC at P 104.)

n2 According to the FAC and McDiffett's First Amended Answer and Counterclaims ("FAAC"), McDiffett is an individual who does business as First One Co. and as Formula 1 Internet.

Formula1.com's FAAC pleads eight antitrust claims (Counts One through Eight), one trademark cancellation claim (Count Nine), n3 and two state law claims, respectively, unfair competition, Cal. Bus. & Prof. Code § 17200, (Count Ten) and tortious interference with existing and prospective economic advantage [*4] ("IPEA") (Count Eleven). Formula1.com alleges that it competes with counter-defendants in a market defined as "the market for sales of FIA Formula One Championship-related motor sport goods and services." (See Formula1.com's FAAC at P 121.) Formula1.com alleges that counter-defendants have engaged in the following allegedly anticompetitive activity: (1) filing an allegedly meritless proceeding under the Uniform Domain Name Dispute Resolution Policy ("UDRP") against McDiffett; n4 (2)

filing a meritless complaint in this action; (3) publishing knowingly false statements in the marketplace accusing Formula1.com of trademark infringement; (4) refusing to supply photographs relating to the FIA Formula One World Championship to certain websites, including that owned by Formula1.com; (5) excluding Formula1.com from the market by refusing to deal with Formula1.com; and (6) instructing a Ferrari apparel licensee, TSS&P, not to supply Formula1.com with Ferrari merchandise.

n3 Count Nine is not challenged by the instant motion.

n4 [HN1] UDRP proceedings are held before the World Intellectual Property Organization ("WIPO") Arbitration and Mediation Center. See *PACCAR, Inc. v. TeleScan Technologies, L.L.C.*, 115 F. Supp. 2d 772, 777 n.4 (E.D. Mich. 2000). "Operated by the World Intellectual Property Organization (WIPO), the WIPO Arbitration and Mediation Center mediates and arbitrates cases involving Internet domain name disputes." Id.

[*5]

Separate amended counterclaims have been filed by defendants Purple Interactive and McDiffett. Both of these counterclaimants plead a single IPEA claim, which claims are, in all respects, identical.

DISCUSSION

I. Antitrust Claims

A. Noerr-Pennington Doctrine

All eight antitrust claims brought by Formula1.com are based, in part, upon FOLBV's filing a complaint in the instant action. To the extent the counterclaims are based on FOLBV's initiation of the instant action, counter-defendants contend they are immune from liability under the Noerr-Pennington doctrine. [HN2] Under the Noerr-Pennington doctrine, "those who petition government for redress are generally immune from antitrust liability." See *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 56, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993); see also *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). The doctrine applies to "petitions to courts." See *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). [*6]

[HN3] Where an antitrust plaintiff challenges the filing of a complaint, "immunity from antitrust liability is lost only if a party engages in 'sham' petitioning." See *USS-Posco Industries v. Contra Costa County Building*

& Construction Trades Council, AFL-CIO, 31 F.3d 800, 810 (9th Cir. 1994). To state a claim based on the "sham exception," "the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships." See *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998). Such allegations must be pleaded with specificity. See *Boone v. Redevelopment Agency*, 841 F.2d 886, 894 (9th Cir. 1988); see, e.g., *Oregon Natural Resources Council*, 944 F.2d at 535 (holding dismissal of antitrust claim based on filing lawsuit proper where plaintiff "failed to plead with particularity that [defendant's lawsuit] was a sham").

Counter-defendants are thus entitled to immunity from antitrust liability based on the filing of the instant action unless Formula1.com pleads with particularity facts to show that it can establish [*7] the "sham exception." See *Kottle*, 146 F.3d at 1060, 1063. The only allegation made by Formula1.com specific to such claim is the following: "FOLBV has instigated a meritless trademark infringement action against the defendants in this action alleging the infringement of unenforceable, generic marks." (See Formula1.com's FAAC at P 123.) Such allegation is insufficient to meet the heightened pleading requirement. Accordingly, to the extent Formula1.com's eight antitrust claims are based on FOLBV's filing of the instant complaint, such claims are DISMISSED with leave to amend to state with particularity facts necessary to plead the "sham exception" to the Noerr-Pennington doctrine.

B. Monopolization Claims

Formula1.com alleges in the first six counts that counter-defendants are violating § 2 of the Sherman Act by engaging in monopolization and attempted monopolization. All such claims require Formula1.com to identify a relevant product market. "[HN4] Without a definition of the market there is no way to measure [the defendant's] ability to lesson or destroy competition." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993) [*8] (citation omitted) (holding monopolization claims must be appraised in terms of alleged relevant market).

Counter-defendants contend Formula1.com's identification of a relevant product market is deficient in that, inter alia, Formula1.com has defined the product market in terms of trademarks. "Product markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product." *Generac Corp. v. Caterpillar, Inc.*, 172 F.3d 971, 977 (7th Cir. 1999); see, e.g., *Weber v. National Football League*, 112 F. Supp. 2d 667, 673-74 (N.D. Ohio 2000) (holding seller of internet domain names misidentified relevant product market as market for two specific domain names in which de-

fendants held trademarks; actual relevant product market was market for domain names generally). Here, by identifying the allegedly relevant product market as "the market for sales of FIA Formula One Championship-related motor sport goods and services," (see Formula1.com's FAAC at P 121), Formula1.com appears to have defined a product market in terms of one or more trademarks. Accordingly, these antitrust claims are DISMISSED with leave to amend [*9] to identify a product market not defined in terms of trademarks. n5

n5 Counter-defendants also argue that Formula1.com fails to sufficiently allege that counter-defendants have monopoly power in the relevant product market. As stated above [HN5] monopoly power allegations must be appraised in light of the relevant product markets. Given the Court's finding that Formula1.com has not sufficiently identified a relevant product market, the Court need not decide whether Formula1.com has adequately alleged monopoly power.

C. Group Boycott Claims

Formula1.com alleges in Counts Seven and Eight that counter-defendants are violating § 1 of the Sherman Act by conspiring to engage in a group boycott to prevent Formula1.com from competing in the relevant product market. Count Seven is pleaded under a per se theory. Count Eight is pleaded under a rule of reason theory.

"[HN6] Sherman Act § 1 prohibits agreements that unreasonably restrain trade." *Big Bear Lodging Assoc. v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999). [*10] "Certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful per se." *Id.* (quoting *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)). n6 "Other alleged violations are subject to 'rule of reason' analysis to determine 'whether particular concerted conduct unreasonably restrains competition.'" *Id.* (quoting *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988)).

n6 [HN7] An antitrust plaintiff bringing a claim based upon a per se violation need not identify the relevant product market in which the parties compete. See *id.* at 1445-50.

[HN8] Where, as here, a claim is based upon an alleged group boycott, a per se analysis is appropriate only if the boycott "involves horizontal agreements among di-

rect competitors. [*11] * See *NYNEX Corp.*, 525 U.S. at 135; see, e.g., *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941) (finding per se rule applicable to claim that clothing designers, manufacturers, and suppliers agreed not to sell their products to retailers who bought clothes from competing manufacturers and suppliers).

Counter-defendants argue that Count Seven is deficient because Formula1.com does not allege that FOLBV, FOM, and FIA are direct competitors. Formula1.com alleges that FIA controls "the television and other media rights relating to all FIA sanctioned events," (see Formula1.com's FAAC at P 100), that FOM's "principal business [] is promotion of the FIA Formula One Championship, including ... marketing the broadcast rights to the Championship," (see id. at P 103), and that FOLBV "claims to own and maintain the Formula One family of trademarks and trade names" used in connection with the FIA Formula One World Championship." (See id. at P 106.) Such allegations cannot be reasonably interpreted to state that FIA, FOM, and FOLBV are direct competitors. Further, to the extent Formula1.com argues [*12] that its group boycott conspiracy claim is premised upon an agreement between Ferrari apparel licensee TSS&P and FOM, no such agreement is pleaded in the counterclaim, nor is any allegation made that TSS&P is a direct competitor of FOM or any other counter-defendant. Accordingly, Count Seven is DISMISSED with leave to amend.

In Count Eight, Formula1.com seeks to plead a rule of reason claim. [HN9] To state such a claim, Formula1.com must sufficiently identify the relevant product markets in which it and counter-defendants compete, and allege facts demonstrating that counter-defendants conduct has an anticompetitive effect on such markets. See *Big Bear Lodging*, 182 F.3d at 1101-02, 1105 (holding plaintiff seeking to prove § 1 violation under rule of reason must identify relevant product markets). As stated above, Formula1.com has not sufficiently alleged a relevant product market. Accordingly, Count Eight is DISMISSED with leave to amend.

II. State Claims

A. Unfair Competition

In Count Ten of Formula1.com's FAAC, Formula1.com alleges that counter-defendants' actions constitute a violation of California Business & Professions Code § 17200. As pleaded, such [*13] claim is derivative of the antitrust claims. As stated above, however, the antitrust claims are deficiently pleaded. [HN10] Where a plaintiff fails to state an antitrust claim, and where an unfair competition claim

is based upon the same allegations, such state claims are properly dismissed. See *Kentmaster Mfg. Co. v. Jarvis Products Corp.*, 146 F.3d 691, 695 (9th Cir. 1998). Accordingly, Formula1.com's unfair competition claim is DISMISSED with leave to amend.

B. Interference With Prospective Economic Advantage

In Count Eleven, Formula1.com alleges an IPEA claim. In their separate FAACs, Purple Interactive and McDiffett each allege an IPEA claim as well. n7

n7 Although Purple Interactive and McDiffett plead no antitrust claims, their IPEA claims are based on much of the same behavior as alleged by Formula1.com, and, in particular, that counter-defendants interfered by filing the instant action, by instituting an UDRP proceeding with the WIPO Arbitration and Mediation Center, and by falsely accusing counterclaimants of trademark infringement.

[*14] [HN11]

To state an IPEA claim, a plaintiff must allege "conduct that [is] wrongful by some legal measure other than the fact of interference itself." See id. at 695 (citation omitted). Although the California courts have not provided a definitive meaning of "wrongful" conduct, in *Red, Bath & Beyond v. La Jolla Village Square Venture Partners*, 52 Cal. App. 4th 867 (Cal. Ct. App. 1997), the California Court of Appeal acknowledged that various courts have defined that phrase as follows: (1) conduct that is independently tortious or a restraint of trade; (2) conduct violating a statute, regulation, a recognized rule of common law, or an established standard of a trade or profession, or (3) conduct that is illegal, unfair, or immoral according to common understandings of society. See id. at 882 n.10.

Counter-defendants argue that the conduct alleged by counterclaimants is not "wrongful." Counter-defendants further argue that none of the IPEA claims identifies any particular relationship that has been disrupted by counter-defendants.

1. Wrongful Conduct

Counter-defendants argue and Formula1.com agrees that the wrongful conduct forming [*15] the basis for Formula1.com's IPEA claim is, in large part, the antitrust activity alleged earlier in the FAAC. Accordingly, each party adopts its arguments made in connection with Formula1.com's antitrust claims. As discussed above, Formula1.com has not sufficiently pleaded an antitrust claim. Consequently, Formula1.com's IPEA claim fails

to the extent that claim is derivative of Formula1.com's antitrust claims. See *Kenmaster*, 146 F.3d at 695.

Formula1.com argues, as do Purple Interactive and McDiffett, that they have sufficiently identified "wrongful" conduct by alleging FOLBV's trademark infringement claims are baseless and without merit. [HN12] Where a plaintiff seeks to base a claim of interference with prospective economic advantage upon the pursuit of litigation, the plaintiff "must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." See *Pacific Gas & Elec. Co. v. Bear Stearns*, 50 Cal. 3d 1118, 1137, 270 Cal. Rptr. 1, 791 P.2d 587 (Cal. 1990). Here, counterclaimants cannot allege the subject action concluded in their favor, as the litigation is on going. Accordingly, to the extent [*16] counterclaimants' IPEA claims are based upon the initiation of the Instant action by FOLBV, such claims are premature. n8

n8 Although counterclaimants have alleged that the UDRP proceeding concluded in McDiffett's favor, counterclaimants, for the reasons discussed infra, have not sufficiently pleaded a claim based on FOLBV's initiation of that proceeding. For the same reasons, counterclaimants have not sufficiently pleaded an IPEA claim based on the allegation that counter-defendants made false accusations of trademark infringement.

2. Disruption of Relationship

[HN13] The elements of the tort of interference with prospective economic advantage include "an economic relationship between the plaintiff and some third party,

with the probability of future economic benefit to the plaintiff," and "actual disruption of the relationship." See *Morton v. Rank America, Inc.*, 812 F. Supp. 1062, 1075 (C.D. Cal. 1993) (quoting *Pacific Gas & Elec.*, 50 Cal. 3d at 1126 n.2). Here, counterclaimants [*17] allege in the most general terms that their relationships with "customers" have been disrupted. Counterclaimants fail to identify with any degree of particularity the relationships which form the basis of these claims or the manner in which counter-defendants' actions interfered therewith. As a result, counterclaimants have not provided sufficient information to meet even the minimal pleading requirements under the Federal Rules. See Fed. R. Civ. P. (a); *Conley v. Gibson*, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (holding Rule 8(a) requires statement "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests").

Accordingly, counterclaimants' IPEA claims are DISMISSED with leave to amend.

CONCLUSION

For the reasons stated, counter-defendants' motion to dismiss is hereby GRANTED and, with the exception of Count Nine of Formula1.com's FAAC, all counterclaims are DISMISSED with leave to amend to cure the deficiencies noted. Any such amended counterclaims shall be filed no later than 30 days from the date of this order.

IT IS SO ORDERED.

Dated: FEB X 6 2001

MAXINE M. CHESNEY

United [*18] States District Judge

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14 UNITED STATES DISTRICT COURT FOR THE
15 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

16 METRO-GOLDWYN-MAYER
17 STUDIOS, INC., *et al.*,

18 Plaintiffs,

19 vs.

20 GROKSTER, LTD., *et al.*,

21 Defendants.

22 JERRY LEIBER, *et al.*,

23 Plaintiffs,

24 vs.

25 CONSUMER EMPOWERMENT BV
a/k/a FASTTRACK, *et al.*,

26 Defendants.

27 AND RELATED COUNTERCLAIMS
28

) Case No.: CV 01-08541 SVW (PJWx)
(Consolidated with Case No.:
CV 01-09923 SVW (PJWx))

**[PROPOSED] ORDER RE:
PLAINTIFFS/COUNTERCLAIM-
DEFENDANTS' MOTION TO
DISMISS AMENDED
COUNTERCLAIMS OF
DEFENDANT AND
COUNTERCLAIMANT
SHARMAN NETWORKS LTD.
FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF
CAN BE GRANTED**

Hearing Date: April 28, 2003
Time: 1:30 p.m.
Place: Courtroom 6
Judge: Hon. Stephen V.
Wilson

1 IT IS HEREBY ORDERED AS FOLLOWS:

2 Having considered the evidence before it, and the papers and arguments
3 presented by the respective parties, the Court grants Plaintiffs/Counterclaim-
4 Defednats' Motion to Dismiss the Amended Counterclaims of
5 Defendant/Counterclaimant Sharman Networks LTD without leave to amend.
6

7 DATED: _____
8

_____ The Honorable Stephen V. Wilson
United States District Judge

9
10 Dated: March 24, 2003

11 Submitted By:

12 
13 David E. Kendall

14
15 DAVID E. KENDALL
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Interscope Records, LaFace Records,
Motown Record Company, L.P., The
RCA Records Label, a unit of BMG
Music d/b/a BMG Entertainment, Sony
Music Entertainment Inc., UMG
Recordings, Inc., Virgin Records
America, Inc., Walt Disney Records, and
Zomba Recording Corporation

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Cinema Corp., Atlantic Recording Corp., Atlantic Rhino Ventures Inc. d/b/a Rhino Entertainment Co., Elektra Entertainment Group, Inc., London-Sire Records Inc., Warner Bros. Records Inc., WEA International Inc., and Warner Music Latina Inc.

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within entitled action. My business address is 1553 Ventura Boulevard, Encino, California 91436-3103.

On March 24, 2003, I served the within document(s) described as **NOTICE OF MOTION AND MOTION OF PLAINTIFFS/COUNTERCLAIM-DEFENDANTS TO DISMISS THE AMENDED COUNTERCLAIMS OF DEFENDANT/COUNTERCLAIMANT SHARMAN NETWORKS LTD. FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF ROBERT J. SHAUGHNESSY; EXHIBITS and [PROPOSED] ORDER RE: PLAINTIFFS/COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS AMENDED COUNTERCLAIMS OF DEFENDANT AND COUNTERCLAIMANT SHARMAN NETWORKS LTD. FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** on the interested parties to this action who are listed on the attached Service List.

- BY MAIL:** By placing a true copy thereof in sealed envelopes and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.
- BY HAND (FEDERAL COURT):** By placing a true copy thereof in sealed envelopes and causing such envelopes to be hand-delivered to the offices of the parties listed on the attached Service List.
- BY FAX:** By transmitting a true copy thereof via facsimile machine to the offices or the parties listed on the attached Service List. I caused the copy to be transmitted from the facsimile number of (213) 629-9022 or (213) 629-5584. The transmission was reported as complete and without error.
- BY OVERNIGHT MAIL (VIA FEDERAL EXPRESS):** By placing a true copy thereof in sealed envelopes and causing them to be deposited in the Federal Express Depository maintained at 1000 Wilshire Boulevard, Los Angeles, CA 90017. The envelopes were sent with Federal Express fees therefor fully paid, with written instructions for "next-day" delivery.

FEDERAL: I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct of my own personal knowledge, that I am a member of the Bar of this Court, and that I executed this document on March 24, 2003 at Los Angeles, California.



JAN B. NORMAN

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within entitled action. My business address is 1553 Ventura Boulevard, Encino, California 91436-3103.

On March 24, 2003, I served the within document(s) described as **NOTICE OF MOTION AND MOTION OF PLAINTIFFS/COUNTERCLAIM-DEFENDANTS TO DISMISS THE AMENDED COUNTERCLAIMS OF DEFENDANT/COUNTERCLAIMANT SHARMAN NETWORKS LTD. FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF ROBERT J. SHAUGHNESSY; EXHIBITS and [PROPOSED] ORDER RE: PLAINTIFFS/COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS AMENDED COUNTERCLAIMS OF DEFENDANT AND COUNTERCLAIMANT SHARMAN NETWORKS LTD. FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** on the interested parties to this action who are listed on the attached Service List.

- (X) **BY MAIL:** By placing a true copy thereof in sealed envelopes and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.
- () **BY HAND (FEDERAL COURT):** By placing a true copy thereof in sealed envelopes and causing such envelopes to be hand-delivered to the offices of the parties listed on the attached Service List.
- () **BY FAX:** By transmitting a true copy thereof via facsimile machine to the offices or the parties listed on the attached Service List. I caused the copy to be transmitted from the facsimile number of (213) 629-9022 or (213) 629-5584. The transmission was reported as complete and without error.
- () **BY OVERNIGHT MAIL (VIA FEDERAL EXPRESS):** By placing a true copy thereof in sealed envelopes and causing them to be deposited in the Federal Express Depository maintained at 1000 Wilshire Boulevard, Los Angeles, CA 90017. The envelopes were sent with Federal Express fees therefor fully paid, with written instructions for "next-day" delivery.

(X) **FEDERAL:** I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct of my own personal knowledge, that I am a member of the Bar of this Court, and that I executed this document on March 24, 2003 at Los Angeles, California.



JAN B. NORMAN

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16 *Records America, Inc., Walt Disney Records, and*
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