UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 06-6994 AHM (RZx)	Date	June 4, 2007
Title	LIVEUNIVERSE, INC. v. MYSPACE, INC.		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE	
Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

I. INTRODUCTION

Plaintiff LiveUniverse, Inc. ("LiveUniverse") and Defendant MySpace, Inc. ("MySpace") operate online "social networking" websites at www.vidilife.com and www.myspace.com, respectively. Social networking websites allow visitors to create personal profiles containing text, graphics, and videos, as well as to view profiles of their friends and other users with similar interests. LiveUniverse alleges that MySpace prevents users from watching vidiLife videos that they or other users previously loaded onto their MySpace webpage, deletes references to "vidilife.com" on MySpace, and prevents MySpace users from mentioning "vidilife.com." LiveUniverse alleges that this conduct violates Section 2 of the Sherman Act ("Section 2") and California Business & Professions Code § 17200. On November 22, 2006, MySpace filed a motion to dismiss LiveUniverse's Complaint. This Court conducted a hearing on December 18, 2006, in which it granted that motion, with leave given to plaintiff to amend to clarify the "network effects" premise on which LiveUniverse relies. (See below).

On January 16, 2007, LiveUniverse filed a First Amended Complaint ("FAC") that again alleges that MySpace's conduct violates Section 2 of the Sherman Act and Cal. Bus. & Prof. Code § 17200. Specifically, the FAC alleges claims for monopolization and attempted monopolization in both the market for Internet-based social networking sites and in the market for advertising on Internet-based social networking websites.

On February 5, 2007, MySpace filed the present motion to dismiss the FAC. A hearing on that motion was held on March 5, 2007. MySpace argues that LiveUniverse's claim for violation of Section 2 of the Sherman Act should be dismissed, because

LiveUniverse has failed to allege: (1) a relevant antitrust market; (2) monopoly power or the probability of monopoly power in a relevant market; (3) any cognizable predatory or anticompetitive conduct to maintain or acquire a monopoly; and (4) any cognizable causal antitrust injury. MySpace further argues that LiveUniverse's claim for violation of Cal. Bus. & Prof. Code § 17200 should be dismissed, because it is derivative of LiveUniverse's defective antitrust claims.

As to the antitrust claims, I GRANT MySpace's motion, and this time with prejudice, because the conduct that LiveUniverse alleges to be exclusionary and hence anticompetitive is not actionable and because it has not alleged causal antitrust injury. As a consequence, its monopolization claims as to both markets are deficient. For much the same reasons, I find that LiveUniverse fails to sufficiently allege an *attempted* monopolization claim in either market. Finally, I also dismiss LiveUniverse's remaining Section 17200 cause of action, because it fails to state a claim for violation of that provision in the Business and Professions Code. (As to the Section 17200 claim, the dismissal is with leave to amend.)

II. GENERAL PRINCIPLES

A. Motion to Dismiss

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners*, 777 F.2d 462, 464 (9th Cir. 1985).

Federal Rule of Civil Procedure 8(a)(2) requires

> "only a short and plain statement of the claim showing that the pleader is entitled to relief," in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]" . . . While a complaint attacked by a Rule 12(b)(6)

> motion to dismiss does not need detailed factual allegations . . ., a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level."

Bell Atlantic Corp. v. Twombly, __ U.S. __, 2007 WL 1461066, *8 (May 21, 2007) (internal citations omitted).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). If the documents are not physically attached to the complaint, they may be considered if their "authenticity ... is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998). "The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d ed. 2004).

Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

B. Applicable Antitrust Pleading Standards

An antitrust claim may be dismissed "only if proof of no set of facts outlined by the complaint would justify relief." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989). The Ninth Circuit has stated that "summary dismissals of antitrust actions are disfavored." *Western Concrete Structures Co., Inc. v.*

Mitsui & Co., Inc., 760 F.2d 1013, 1016 (9th Cir. 1985) (internal citations omitted) (reversing dismissal of antitrust claims). However, "if the facts do not at least outline or adumbrate a violation of the Sherman Act, the [plaintiff] will get nowhere merely by dressing them up in the language of antitrust." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (internal citations omitted) (granting a motion to dismiss antitrust claims).

The Court is aware that many of the cases cited below are final judgments or rulings on summary judgment motions. Although the legal standards for such judgments and motions differ from those of a motion to dismiss, these cases define what is required to satisfy the elements of a Sherman Act claim as a matter of law.

C. Elements of a Claim Under Section 2 of the Sherman Act

Section 2 of the Sherman Antitrust Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. LiveUniverse alleges a violation of Section 2 based on two theories: (1) monopolization and (2) attempted monopolization.

1. Monopolization

The elements of a monopolization claim are: (1) possession of monopoly power in the relevant market; (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident;" and (3) causal antitrust injury. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992) (internal citations omitted); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (causal antitrust injury is an element of all antitrust suits brought by private parties seeking damages).

2. Attempted Monopolization

In determining whether a plaintiff has pled an attempted monopolization claim, the Court must first define the relevant market. *Spectrum Sports, Inc. v. McQuillan*, 506

U.S. 447, 455-56 (1993). The plaintiff must then allege four elements in that market: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury." *Rebel Oil*, 51 F.3d at 1433 (internal citations omitted).

III. "MONOPOLIZATION" ALLEGATIONS IN MARKET CONSISTING OF "INTERNET-BASED SOCIAL NETWORKING SITES"

A. Relevant Market

"A relevant market has two dimensions: (1) the relevant product market, which identifies the products or services that compete with each other, and (2) the relevant geographic market, which identifies the geographic area within which competition takes place." *America Online, Inc. v. GreatDeals.Net*, 49 F.Supp.2d 851, 857-58 (E.D.Va. 1999) [hereinafter "*America Online*"], *citing Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). "The outer boundaries of a relevant market are determined by reasonable interchangeability of use." *America Online,* 49 F.Supp.2d at 858, citing *Eastman Kodak*, 504 U.S. at 482. "Reasonable interchangeability of use" refers to consumers' practicable ability to switch from one product or service to another. *America Online,* 49 F.Supp.2d at 858, *citing ABA Section of Antitrust Law, Antitrust Law Developments* 500 (4th ed. 1997). "The test of reasonable interchangeability . . . [requires] the District Court to consider only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function." *United States v. Microsoft Corp.*, 253 F.3d 34, 53-54 (D.C. Cir. 2001) (internal citations omitted), *cert. denied* 534 U.S. 952 (2001) (hereinafter, "*Microsoft*").

The geographic market extends to the 'area of effective competition' . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand. Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka v. Univ. of Southern Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (internal citations omitted) (granting a motion to dismiss an antitrust claim for failure to allege a relevant market).

The FAC defines the first relevant market as "Internet-based social networking in the geographic region of the United States." (FAC ¶ 19). This market consists of websites that create a "virtual community to bring people together in a central location to chat, gossip, share ideas, share interests, make new friends, and engage in other social activities." (FAC ¶ 11). Although anyone with Internet access may visit these websites, users not only can visit, but can also create a unique personal profile on one or more site, as well as provide links to other users' personal profiles. (FAC ¶ 12). These personal profiles are publicly accessible on the social networking website and are intended to be shared with other users. (FAC ¶ 14). Users may incorporate text, audio, and video elements into their profiles, including streaming videos and links that can take visitors to other Internet websites not affiliated with MySpace. (FAC ¶¶ 14, 16). The FAC alleges that "the overwhelming majority of the content accessible through social networking websites is generated by users. The sites themselves merely provide the means for generating and/or displaying the content . . . ." (FAC ¶ 13).

According to a November 2006 "U.S. Consumer Generated Media Report" published by Hitwise USA (hereinafter, the "Hitwise Report"), "[s]ocial networking websites have emerged to become an integral part of web activity for many Internet users - in September 2006, one in every 20 Internet visits went to one of the top 20 social networks." (FAC ¶ 17; Hitwise Report, p. 29). [1]

The FAC also alleges that:

> Social networking websites offer a set of unique products and services that competing media cannot offer. The interactive, user-generated aspects of Internet-based social networking offer consumers an unprecedented degree of control over their experience, allowing them to collectively determine both the content and structure of networks of friends that they and others create. Passive internet media

[1] Hitwise describes itself as "the leading online competitive intelligence service." (Opp'n, Ex. A ("Hitwise Report"), p. 28). According to Hitwise, "[t]hrough relationships with [Internet Service Providers] around the world, Hitwise's patented methodology captures the anonymous online usage, search, and conversion behavior of 25 million Internet users." (*Id.*). In this order I cite this report frequently because it is specifically referred to in the FAC and MySpace attached it in support of its motion.

sites and other communication products such as e-mail do not possess these organic, interactive qualities.

(FAC ¶ 19).

MySpace argues that the market consisting of "Internet-based social networking sites" is not a "plausible" market for purposes of the Sherman Act. It claims that LiveUniverse has failed to account for other kinds of social networking that are interchangeable and has also failed to address differences in network sites' products, qualities, prices, etc. MySpace's main argument, however, is that its allegedly anticompetitive conduct consists only of the exclusion of LiveUniverse - - more accurately, the exclusion of the words "vidilife.com" and links to it - - from its own website. MySpace argues that a defendant's product alone cannot constitute the entire relevant market, citing *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992). In that case, the plaintiff alleged that defendant Turner Network Television ("TNT") had monopolized, or attempted to monopolize, "the market for the TNT channel in Metropolitan Denver." *Id.* at 1025-26. The Tenth Circuit dismissed that claim for failure to allege a relevant market, because "a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product." *Id.* at 1025, *citing United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) [hereinafter "*du Pont*"].[2] *TV Communications* and other cases like it are inapposite, because LiveUniverse simply does not allege that the MySpace site alone is the relevant market. Instead, LiveUniverse alleges that the MySpace site is one of many Internet-based social networking websites that compete with each other.

MySpace further argues that the proposed market is implausible, because there are "minimal limits to the number and scope of social networking sites." This argument is

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[2] *See also, Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp.*, in which the court dismissed an antitrust claim for failure to state a relevant market. 789 F.Supp. 760 (S.D. Miss. 1992). The court found that the only markets in which the defendant television stations, The Learning Channel and ESPN, possibly had market power were the markets for their own programs. *Id.* at 776. Thus, the plaintiff had not alleged a relevant market, because a manufacturer's natural monopoly over its own product is not a basis for antitrust liability under Section 2 of the Sherman Act. *Id.*

based on *America Online,* where the court dismissed defendants' antitrust counterclaim for failure to allege a relevant market. 49 F.Supp.2d at 859. The defendants in that case counter-claimed that America Online ("AOL") violated Section 2 of the Sherman Act by attempting to block the transmission to AOL subscribers of unsolicited bulk e-mail advertising. *Id.* at 854.[3] The court rejected the defendants' proposed relevant market of "e-mail advertising" and their proposed sub-market of Internet subscribers who are "accessed" through AOL, because it found that defendants could have advertised via numerous other means, including other advertising on the Internet, direct mail, and billboards. *Id.* at 857-58. The *America Online* court further found that the Internet could not be the relevant geographic market, because the Internet "cannot be defined with outer boundaries. It is not a place or location; it is infinite." *Id.* at 858. The court concluded that because the relevant market that counterclaimants alleged did not include interchangeable substitutes, their counterclaim should be dismissed.

America Online does not affect the "plausibility" of the relevant market that LiveUniverse has alleged here. Social networking websites have become, by now, an economic and social phenomenon. There is no mystery as to what they are, how they work, how they position themselves *vis-a-vis* other networks, or how they make money. Furthermore, LiveUniverse has alleged that the United States, rather than the worldwide Internet, is the relevant geographic market, and MySpace does not challenge the geographic scope of the proposed market.

MySpace cites *Tanaka v. University of Southern California,* 252 F.3d 1059, 1063 (9th Cir. 2001), for the additional proposition that an allegation of a relevant market requires more than a conclusory assertion that the proposed market is "unique." In *Tanaka*, the plaintiff was a college soccer player who claimed that a rule that prevented her from playing for one year following her transfer to another university violated Section 1 of the Sherman Act. *Id.* at 1061. The complaint alleged that the relevant product market was the University of California, Los Angeles ("UCLA") women's soccer program. *Id.* at 1063. In trying to justify why the market was limited to only that soccer program, rather than encompassing other college soccer programs or athletic conferences, the plaintiff simply stated that the UCLA program was "unique" and "not interchangeable with any other program in Los Angeles." *Id.* The Ninth Circuit upheld

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[3] AOL's suit sought damages and an injunction to prohibit the sending of such e-mail. *Id.* at 854.

the district court's dismissal of her claim, finding that "the very existence of any given intercollegiate athletic program is predicated upon the existence of a field of competition composed of other, similar programs," and that these other programs were interchangeable with the UCLA program for antitrust purposes. *Id.* at 1063-64.

Unlike the plaintiff in *Tanaka*, LiveUniverse's allegation that the proposed market is unique is not conclusory; it alleges that the market has "unique products and services" and that the "interactive, user-generated aspects" give users "an unprecedented degree of control over their experience, allowing them to collectively determine both the content and structure of networks of friends that they and others create." (FAC ¶ 19). The FAC also alleges that because other websites and means of communication, such as e-mail, do not contain these "organic, interactive qualities," they are not reasonably interchangeable substitutes for Internet-based social networking websites. (FAC ¶ 19). MySpace nevertheless argues that even these allegations are insufficient, because they do not "distinguish online dating sites and Internet connectivity services like America Online." The Court disagrees. Internet connectivity services are not reasonable substitutes, because their primary function is simply to give users the ability to access the Internet. As to online dating sites, although they do have similar "organic, interactive qualities" to social networking websites, their dominant function and purpose is to enable users to meet potential dates. Online dating sites are not reasonable substitutes for social networking websites, because the latter websites have significantly more functions and appeal than do online dating sites. For example, social networking websites are used to get in touch with old friends and to keep current friends informed about what's new and exciting. Although social networking websites may also be used for dating, if MySpace suddenly were to shut down, its members would not fill the social void by turning to online dating sites. Instead, they would likely set up profiles on a different social networking website.

For the foregoing reasons, the Court finds that LiveUniverse sufficiently alleges a relevant antitrust market of Internet-based social networking websites.

B. Monopoly Power

"Monopoly power is the power to control prices or exclude competition." *du Pont*, 351 U.S. at 391. It may be demonstrated through either direct evidence or circumstantial evidence. *Rebel Oil*, 51 F.3d at 1434. LiveUniverse alleges that MySpace's market power may be inferred from its having a dominant share of the market (social networking websites) and from its being protected from competition by entry

barriers. This requires that plaintiff: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.* (internal citations omitted).

1. LiveUniverse Adequately Alleges That Myspace Owns The Dominant Share of the Market

The FAC alleges that "[a]ccording to comScore Media Metrix, a leading Internet traffic measurement service, approximately 55.8 million of the more than 62.7 million individuals who frequented social networking sites in the Untied States in September 2006 visited MySpace, equal to 89% of the market." (FAC ¶ 24). "According to Hitwise, another leading Internet traffic measurement service, in September 2006, MySpace accounted for nearly '82% of visits to the leading social networking websites. . . .'" (FAC ¶ 25).

Courts have consistently found that an 80 percent share of the market constitutes a dominant share, with the Supreme Court having found that even a two-thirds share of the market can be considered dominant. *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). In *United States v. Grinnell Corp.*, the Supreme Court found that an 87-percent share of the central stations that monitored fire and security alarms was sufficient to establish monopoly power. 384 U.S. 563, 571 (1966). More recently, the Supreme Court found that Kodak's control of 80 percent to 95 percent of the photocopier and micrographic equipment service market "easily resolved" the requirement of monopoly power. *Eastman Kodak*, 504 U.S. at 481.

Even MySpace does not argue that, assuming that visits and visitors are a permissible indicator, the alleged percentages are not large enough to constitute a dominant share of the market.

MySpace does argue that the percentage of visits or visitors cannot be used to measure market share, because the "appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.,* 7 F.3d 986, 999 (11th Cir. 1993). Carried to its logical conclusion, MySpace's argument would mean that a company offering a free product, such as a social networking website, could never acquire market power, but MySpace offers no basis in

antitrust law, much less logic, for this conclusion. Indeed, market share can be measured by figures other than just sales or revenue. For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 590n.8 (1985), the Supreme Court used the number of skier visits to particular ski mountains to measure market share, because that number was correlated to revenue. Consistent with that approach, the FAC alleges that "[t]he primary source of revenue for MySpace – and, on information and belief, for the overwhelming majority of all United States social networking web sites – is advertising revenue generated from the number of visitors to the personal profiles and networks of friends generated with and contained within the social networking web platform." (FAC ¶ 18). "According to press reports, shortly after it purchased MySpace, News Corporation sold certain rights regarding ad-based searching of MySpace user profiles to Google in a deal whereby Google agreed to pay at least $900 million to MySpace over the first three years of the deal . . . ." *Id.*

For the foregoing reasons, the Court finds that Live Universe sufficiently alleges that MySpace has a dominant share of the market.

2. Live Universe Adequately Alleges Barriers to Entry

"A mere showing of substantial or even dominant market share alone cannot establish market power sufficient [for an antitrust violation]. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the [market leader's anticompetitive conduct]." *Rebel Oil*, 51 F.3d at 1439. LiveUniverse's allegations of barriers to entry are based on the concept of "network effects" in the market for Internet-based social networking websites.

In *Microsoft, supra,* the D.C. Circuit Court of Appeals characterized "network effects" as follows: "In markets characterized by network effects, one product or standard tends towards dominance, because the utility that a user derives from consumption of the good increases with the number of other agents consuming the good." 253 F.3d at 49 (internal citations omitted). For example, an individual consumer's demand for and benefit from a telephone network increases if there are more people using that network whom the consumer can call or from whom she can receive calls. *Id.* "Once a product or standard achieves wide acceptance, it becomes more or less entrenched. Competition in such industries is 'for the field' rather than 'within the

field.'" *Id.*

The FAC alleges that in the market for Internet-based social networking websites, network effects occur largely due to the "user-generated nature" of the content on those websites. (FAC ¶ 21). Quoting the Hitwise Report, the FAC alleges that "[t]he network effect in relation to social networking websites means that the more people use a website by adding profiles and content, the more valuable it becomes to each of its users. These users will be more likely to find content that interests them and connect with people they know. Thus more new people want to join it because they know they can be further assured of finding friends and interesting content." (FAC ¶ 22). Based on these network effects, LiveUniverse alleges that it is "difficult for new entrants to acquire any more than a very small market share without an enormous capital investment." (FAC ¶ 23).

In *Microsoft*, the plaintiffs argued that network effects were the basis for the alleged barriers to entry in the market for Intel-compatible PC operating systems. *Microsoft*, 253 F.3d at 49-50, 55. The Court of Appeals agreed that there was an "applications barrier to entry" and consequently upheld the district court's finding that Microsoft possessed monopoly power in that market. *Id.* at 55. This conclusion stemmed from "two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base." *Id.* The court explained that "[t]his 'chicken-and-egg' situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems." *Id.* The court also noted that this applications barrier to entry leads consumers to prefer the dominant operating system, even if they do not need all the available applications, because the consumers want an operating system that can run the types of applications in which they might later develop an interest. *Id.*

In *Microsoft*, the Court of Appeals affirmed the district court's judgment that Microsoft violated Section 2 of the Sherman Act by using anticompetitive means to maintain the monopoly of its Windows operating system. *Microsoft*, 253 F.3d at 46. However, the court reversed the district court's additional judgment that Microsoft violated Section 2 by attempting to monopolize the internet browser market. *Id.* The Court found that plaintiffs failed to prove that network effects could create barriers to entry in that market, rejecting the opposite conclusion of the district court because the district court "did not make two key findings: (1) that network effects were a necessary

or even probable, rather than merely possible, consequence of high market share in the browser market and (2) that a barrier to entry resulting from network effects would be 'significant' enough to confer monopoly power." *Id.* at 83.

MySpace does not dispute that the phenomenon of network effects applies to the proposed market of Internet-based social networking websites. Instead, it argues that LiveUniverse fails to allege how these network effects result in barriers to *entry* in the relevant market. It stresses that the *Microsoft* court cautioned that "[s]imply invoking the phrase 'network effects' without pointing to more evidence does not suffice to carry plaintiffs' burden in this respect." *Id.* at 84.

The Court rejects MySpace's contention on this point; the allegations of barriers to entry in the FAC are adequate, not only because *Microsoft* was decided after a trial, and hence the court held the plaintiffs to a higher standard than applicable for a motion to dismiss, but also because in addition to alleging "network effects," LiveUniverse alleges other characteristics of the market that *combine* with network effects to create barriers to entry. Quoting the Hitwise Report, for example, the FAC alleges that social networking websites rely on users to create profiles and content that, in turn, attract new users and visitors. (FAC ¶ 22). Just as the *Microsoft* court noted that an operating system requires developers to write applications for it, *Microsoft*, 253 F.3d at 55, social networking websites require a large number of profiles, content, and potential friends. (FAC ¶¶ 13, 19, 22.) Just as "most developers prefer to write for operating systems that already have a substantial consumer base," *Microsoft*, 253 F.3d at 55, users of social networking websites prefer to create their profiles and add content to a website where they are likely to be viewed by a greater number of users. (FAC ¶¶ 13, 19, 22.)

MySpace goes on to argue that notwithstanding "network effects," the dynamic nature of the market and the constant entry and exit of competitors undermine plaintiff's allegations about barriers to entry. It contends that "anyone with a computer and Internet access can start his or her own network and . . . there is no limit (other than time) to the number of websites a user can access." There is some merit to this argument. MySpace itself quickly overtook the former market leader, Friendster, despite the same alleged barriers to entry in the market. (Hitwise Report, p. 31). In addition, as the Hitwise Report points out, four social networking websites experienced market growth that outpaced the category between March and September 2006. (*Id.* at p.32) Moreover, social networking websites with special niches have shown the capacity to compete with MySpace. For example, Facebook became the preferred network among college students, because it was closed to non-students and thus appeared safer than

MySpace. (*Id.* at p.31). (According to the Hitwise Report, Facebook has the second highest market share among social networking websites. (*Id.*)). Furthermore, at the March 5, 2007 hearing, this Court mentioned a then-recent New York Times article stating that "[s]ocial networks are sprouting on the Internet these days like wild mushrooms." Brad Stone, *Social Networking's Next Phase*, N.Y. Times, March 3, 2007, at B1, B9 [hereinafter "*Social Networking's Next Phase*"].[4]

Although the fluidity that currently characterizes this industry does beg the question as to just how long MySpace can retain its market power, that there are many new entrants does not necessarily mean that LiveUniverse's allegations about barriers to entry are deficient. [5] "The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the [monopolist], they are unlikely to represent a challenge to the [monopolist's] market power." *Rebel Oil*, 51 F.3d at 1440

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[4] In the short interval since the hearing on this motion, other articles have appeared in the print media about the mounting increase in the popularity of social networking sites. *E.g.*, Patrick Day, *MySpace competition? The world is big enough*, Los Angeles Times, April 1, 2007, at E15 (noting that in internet social websites created in foreign countries, which are not within the market LiveUniverse alleges to be part of, MySpace is encountering formidable competition); Brad Stone & Matt Richtel, *One Call to Tell the World All about You*, N.Y. Times, April 30, 2007, at C1 (noting the growth of social networking via cell phones); Brad Stone, *Facebook Goes off the Campus*, N.Y. Times, May 25, 2007, at C1 (describing expansion of "Facebook" into MySpace's "turf").

[5] In *Microsoft,* the Court of Appeals observed that "Once a product or standard achieves wide acceptance, it becomes more or less entrenched. Competition in such industries is 'for the field' rather than 'within the field.' . . . In technologically dynamic markets, however, such entrenchment may be temporary, because innovation may alter the field altogether. . . . Rapid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements. . . . [T]here is no consensus among commentators on the question of whether, and to what extent, current monopolization doctrine should be amended to account for competition in technologically dynamic markets characterized by network effects." 253 F.3d at 49-50 (internal citations omitted).

(internal citations omitted). The article *"Social Networking's Next Phase*" itself notes that although there are many new social networking websites entering the market, at least some of the new entrants are finding it difficult to attract users when there are only a relatively few other members at the outset. *Social Networking's Next Phase*, at 89. For example, Google helped Nike design a soccer community site, but the site "does not appear to have significantly attracted users." *Id.* at B9. If two companies having the size, power and reputation of Google and Nike are encountering such difficulties, it is likely that other new entrants would, too.

The Hitwise Report concludes that "[w]hether or not any of these websites or other emerging websites erode MySpace's dominance is dependent on the ability to harness the network effect." (Hitwise Report, p.32). Data showed that in September 2006, 24% of the visits to the 19 other social networking websites with the highest market share came directly from MySpace. (*Id.*). This gives MySpace control over almost one in every four visits to its biggest potential competitors.

The recent and rapid growth of other social networking websites does not necessarily prove their ability to challenge MySpace's dominant share of the market. The four social networking websites whose growth outpaced that of the market combined for only 2.19% of the total market share, even after their rapid growth between March and September 2006. (Hitwise Report, pp. 31-32). The market share of visits to MySpace increased by 51% during the same period and increased by 129% between September 2005 and September 2006. (*Id.*, at p.32). As the Hitwise Report points out, the "growth of other social networking websites has not yet chipped away at MySpace's dominance in the category" and the potential for any website to challenge MySpace's dominance will depend on its "ability to harness the network effect." (*Id.*).

For the foregoing reasons, the Court finds, LiveUniverse sufficiently alleges that MySpace has monopoly power in the relevant market.

C. Exclusionary Conduct

To establish monopolization, plaintiff must allege and prove that MySpace acquired or maintains monopoly power by engaging in exclusionary conduct, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993). "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice." *Microsoft*, 253 F.3d at 58.

LiveUniverse alleges that MySpace committed three anticompetitive acts. First, MySpace destroyed users' ability to load and display their vidiLife videos on the MySpace system by redesigning its platform so that "all links to vidiLife video content embedded by MySpace users in their online profiles no longer function." (FAC ¶ 32) (emphasis in original). Second, MySpace deleted all references to "vidilife.com." Third, MySpace has blocked users not only from mentioning "vidiLife.com" on the MySpace system, but also from embedding links to the vidiLife website in their personal profiles. (FAC ¶ 33). MySpace also has allegedly blocked users from using social networking services offered by stickam.com, another Internet-based social networking service, and it deleted all references to yet another social networking site, revver.com. (FAC ¶ 36).

LiveUniverse alleges that this conduct is "part of a pattern and practice of anticompetitive behavior" against other social networking websites. (FAC ¶ 36). It alleges that MySpace's design changes "have no legitimate business purpose" and are "solely intended to maintain and extend [MySpace's] monopoly in Internet-based social networking and advertising on Internet-based social networking sites in the United States by stifling competition and enlarging existing barriers to entry." (FAC ¶ 35).

LiveUniverse further alleges that MySpace's behavior "discourages and effectively precludes new competitors from entering the market for social networking services, which also harms the consumer public." (FAC ¶ 37). "[C]onsumers who might otherwise have preferred the applications of rivals such as vidiLife to those of MySpace" must now "maintain their MySpace personal profiles without using rivals' products, or they may use rival's [sic] products but be cut off from the overwhelming majority of the content and viewers in the market." (FAC ¶ 37). MySpace has allegedly "diminished the quality of the consumer experience, thus injuring consumers and competition as a whole." (FAC ¶ 38). [6]

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[6] It remains to be seen whether causing this alleged "injury" to consumers will in fact backfire against MySpace. With Internet users being only (at most) a few clicks away from other sites on the Web, if MySpace's users/members react with hostility to

MySpace proffers several arguments why its conduct is not anticompetitive as a matter of law. The Court will deal with the two that are appropriate for determination on a motion to dismiss: First, that MySpace has the right to refuse to deal with a rival in the promotion of its own products and services, and second, that it has the right to prevent plaintiff from "free riding" off its investment and innovation.

1. Refusal to Deal and "Free Riding"

A company generally has a right to deal, or refuse to deal, with whomever it likes. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). As the Supreme Court stated in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004):

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." . . . However, "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.

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these measures, they may choose to use and visit rival sites.

In *Aspen Skiing*, the defendant owned three of the four Aspen, Colorado ski areas. 472 U.S. at 587-88, n.204. The plaintiff owned the fourth. They had cooperated for years in selling a joint ski ticket that allowed skiers to visit all four areas. The defendant ultimately cancelled the joint ticket after repeatedly seeking a larger share of the revenue. The plaintiff attempted to re-create the joint ticket, even offering to buy the defendant's tickets at retail price, but the defendant refused. The Supreme Court upheld the jury's finding of monopolization and its verdict for the plaintiff, finding that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-term benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id.* at 608. In other words, the defendant revealed an anticompetitive motive by refusing to continue the joint ticket, even if compensated at retail price.

In *Verizon*, in contrast, the Supreme Court unanimously held that a complaint alleging a breach of Verizon's statutory duty to share its telephone network with competitors did not state a monopolization claim under Section 2. *Verizon*, 540 U.S. at 416. The Telecommunications Act of 1996 attempted to facilitate the entry of competitors into the telecommunications market by imposing such a duty on incumbent phone companies. *Id.* at 402. The complaint alleged that Verizon filled rivals' service orders in a discriminatory manner as part of an anticompetitive scheme to discourage customers from using the competing phone companies. *Id.* at 404. Stating that *Aspen* "is at or near the outer boundary of § 2 liability," *Id.* at 409, the Supreme Court distinguished that case from *Verizon*. It noted that in *Verizon* the complaint did not allege that Verizon had ever voluntarily engaged in a course of dealing with its rivals or that it would have done so absent statutory compulsion. *Id.* at 409. "Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal . . .." *Id.* In *Verizon*, in short, there was no indication that the defendant's refusal to deal with competitors was "prompted not by competitive zeal but by anticompetitive malice." *Id.*

In *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004), the Ninth Circuit, too, rejected a Sherman Act Section 2 claim based on the Telecommunications Act's requirement that incumbent local exchange carriers ("ILEC's") provide access to competitors. Qwest, the ILEC, initially had a pricing structure for sales of phone services under which plaintiff MetroNet could resell phone services at a profit. *Id.* at 1127. When Qwest adopted a new pricing structure that eliminated Metronet's ability to resell the services at a profit, MetroNet filed suit, alleging that Qwest illegally maintained a monopoly over the market for small business

local telephone services in the Seattle/Tacoma area. *Id.* at 1126. In light of *Verizon*, the Ninth Circuit granted summary judgment in favor of Qwest. It ruled that *MetroNet* did not present circumstances that *Verizon* found significant to give rise to a refusal to deal claim under *Aspen Skiing*. For example, there was no evidence that Qwest sacrificed short-term profits for long-term exclusion of competition. *Id.* at 1132-33. The Court also stressed that Qwest did not refuse to provide the service to MetroNet, but merely imposed the same terms that it charged direct consumers. *Id.* at 1133.

Here, the FAC alleges that MySpace's previous "practice of allowing users the unfettered ability to reference other websites, including rival websites, was a prior course of dealing in the market. . . ." (FAC ¶ 32). LiveUniverse argues that this "prior course of dealing" distinguishes this case from *Verizon* and brings it within *Aspen Skiing*. This argument is flawed and unpersuasive. What was missing in *Verizon* and in *MetroNet* is missing here, too. In *Aspen Skiing*, the parties formally agreed to share revenues and expenses in a joint venture that lasted for more than 15 years. *Aspen Skiing*, 472 U.S. at 589-93. Moreover, as the *Verizon* court stressed, the *Aspen* defendant's "unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing" was evidence of predatory intent. *Verizon*, 540 U.S. at 409 (emphasis in original). Here, the "course of dealing" that the FAC alleges concerns the relationship of LiveUniverse and its users; the FAC contains no allegations of an affirmative decision or arrangement between MySpace and LiveUniverse to cooperate in any way, not even an informal agreement relating to their respective websites.

MySpace also argues that it has a right to prevent LiveUniverse from "free-riding" on MySpace's investment in its own website. In *Olympia Equipment Leasing Co. v. Western Union* Telegraph Co., 797 F.2d 370 (7th Cir. 1986, the plaintiff won a judgment in district court that the defendant violated Section 2 by changing its policies so that its sales force no longer referred customers to the plaintiff. In an opinion authored by Judge Posner, the Seventh Circuit reversed. *Id.* at 383. The opinion distinguished *Aspen* and concluded that the plaintiff had no right under antitrust law to benefit from its competitor's sales force: "Advertising a competitor's products free of charge is not a form of cooperation commonly found in competitive markets; it is the antithesis of competition." *Id.* at 377-378.

MySpace's allegedly anticompetitive conduct is somewhat similar to the conduct that the court found permissible in *Olympia.* Social networking websites derive the bulk

of their income from advertising displayed on their sites, with revenue directly related to the number of visits to the site. Every time a user "travels" from the MySpace site to the vidiLife site by clicking on a link, vidiLife's advertising revenue stands to grow. Assuming that advertisers' budgets are not unlimited, that could lead to a diminution in MySpace's revenue. Looked at another way, by eliminating any references to vidiLife.com and by deleting links to that site, MySpace may be viewed as merely preventing LiveUniverse from advertising its website free of charge on the MySpace site.

In *Morris Communications Corp. v. PGA Tours, Inc.*, 364 F.3d 1288, 1290 (11th Cir. 2004), a media company challenged the PGA Tour, Inc.'s ("PGA") alleged monopolization of markets for publication of real-time golf scores on the Internet and the sale of these scores. The PGA had developed a Real-Time Scoring System that quickly recorded players' scores, which it would not allow the plaintiff to re-sell to other Internet website publishers without first buying a license to do so. Plaintiff claimed this constituted an unlawful refusal to deal. The Eleventh Circuit affirmed the District Court's grant of summary judgment to the PGA. *Id.* at 1290. It stated that a "refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws even if that refusal injures competition." *Id.* at 1295. The Court found that the PGA's justification for its conduct was sufficient: it sought to prevent plaintiff from "free-riding" on its technology. *Id.* at 1295, 98. The court stressed that unlike the cases plaintiff relied on, the PGA was not preventing plaintiff from selling a product that plaintiff created and owned. *Id.* at 1297. Here, too, MySpace has taken no action that prevents plaintiff from promoting and operating its own site, independently of MySpace.

For the foregoing reasons, LiveUniverse fails to state a refusal to deal claim.

2. Product Design Changes

In general, it is not inherently anticompetitive for even a monopolist to make changes to its product design. "A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely through 'the process of invention and innovation' is necessarily tolerated by the antitrust laws." *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-45 (9th Cir. 1983) (holding that plaintiff-photofinisher failed to state a

Section 2 claim against defendant-manufacturer who allegedly developed new products that were incompatible with then-existing products and with photofinishing equipment); *overruled on other grounds and on another claim* by *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1987). As the Ninth Circuit noted, the defendant had no duty "to constrict[ ] product development so as to facilitate sales of rival products" or to help competitors "survive or expand." *Id.* at 545 (internal citations omitted).

Despite these principles, LiveUniverse nevertheless argues that MySpace modified its system so as to delete links to vidiLife.com from the MySpace site, to delete users' references to "vidilife.com" and to prevent users from making any future mention of or links to vidiLife.com. LiveUniverse alleges that these modifications constitute a change of product design that is actionable. For this contention, it relies entirely on *Microsoft, supra*. In that case, the D.C. Circuit found that Microsoft had a monopoly in the operating systems market and that it violated Section 2 by engaging in conduct that strengthened that monopoly by reducing the market share of Netscape, its primary competitor in a second, separate market, that of Internet browsers. 253 F.3d at 59-60.

LiveUniverse focuses on that portion of the fact-dependent, lengthy and complex opinion in *Microsoft* where the Court of Appeals noted that the District Court had found that Microsoft designed its Windows 98 operating system in a manner that "would override the user's choice of a browser other than [Microsoft's] Internet Explorer as his or her default browser." *Id.* at 65. The Court of Appeals also noted that Microsoft did not deny that "overriding the user's preference prevents some people from using other browsers" and it observed that "[b]ecause the override reduces [browser] rivals' usage share and protects Microsoft's [operating systems] monopoly, it too is anticompetitive." *Id.*[7] Here, LiveUniverse argues, MySpace engaged in similar conduct: it destroyed links to vidiLife content embedded in user profiles on the MySpace site.[8]

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[7] Because in the trial court the plaintiffs had not proffered evidence to rebut Microsoft's proffered justification for this conduct, the Court of Appeals reversed the District Court's finding of liability for this design change. 253 F.3d at 67.

[8] This overstates what actually has occurred, evidently. As MySpace argues (without refutation), "Users - including MySpace users - can email, blog and chat with their friends about 'LiveUniverse' and 'vidiLife' to their heart's content. The only thing that has been eliminated - and the only conduct at issue - is the presence of separate active links (*i.e.*, website addresses like 'www.vidiLife.com') on the MySpace.com website that take users directly from MySpace.com to vidiLife.com in a single mouse

Live Universe's allegations are not sufficient to establish anticompetitive conduct. MySpace's conduct is distinguishable from that of Microsoft, because it in no way prevents consumers from accessing the vidiLife site. It simply prevents them from using the MySpace site to do so. Unlike Microsoft's override of users' choice of default browsers, the destruction of links to vidiLife.com does not "override" users' preferences. Nor is the content of these links converted into MySpace content. Moreover, users are not restricted to MySpace content in the manner that the override restricted Windows users to Microsoft's browser, Internet Explorer. Users are only prevented from viewing and creating links to the vidiLife site directly through the MySpace site– they may still do so elsewhere. Thus, the only product design change by MySpace was an algorithm that enables it to compete in the relevant market without enabling LiveUniverse to take advantage of MySpace's success. Such behavior even a monopolist has the right to display. *Foremost Pro Color*, 703 F.2d at 545.

For the foregoing reasons, the FAC fails to state a claim containing justiciable allegations of exclusionary conduct.

D. Causal Antitrust Injury

Given that the FAC does not state a viable claim of anticompetitive, predatory misconduct, in principle it would be unnecessary to address this remaining element of a Sherman Act § 2 monopolization claim. But in order to provide a complete record on appeal, the Court will do so - - briefly.

> "A private plaintiff may not recover damages [for an antitrust violation] merely by showing injury causally linked to an illegal presence in the market. Instead, a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. . . . [I]njury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition."

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (internal citations

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click."

omitted). Phrased another way, antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, (1977) (internal citations omitted).

In addition to the previously-discussed allegations of MySpace's conduct directed toward LiveUniverse, the FAC alleges similar anticompetitive conduct toward two other competitors in the market. (FAC ¶ 36). LiveUniverse alleges that MySpace's behavior "discourages and effectively precludes new competitors from entering the market for social networking services, which also harms the consumer public. Users of vidiLife and other services that have spent long hours uploading and creating written, audio, and video self expression now find these efforts destroyed as they cannot use their content on MySpace." (FAC ¶ 37). "[C]onsumers who might otherwise have preferred the applications of rivals such as vidiLife to those of MySpace" must now "maintain their MySpace personal profiles without using rivals' products, or they may use rival's [sic] products but be cut off from the overwhelming majority of the content and viewers in the market." (FAC ¶ 37). The FAC further alleges that MySpace has "diminished the quality of the consumer experience, thus injuring consumers and competition as a whole." (FAC ¶ 38).

Harm to one or more competitors is not sufficient to constitute antitrust injury unless a plaintiff alleges harm to the competitive process, which in turn harms consumers. *Microsoft*, 253 F.3d at 58. Here, the harm to consumers that Live Universe has alleged is fanciful. The "long hours" that consumers devoted to "self expression" have not been wasted; the content they created is still available, and readily accessible. Internet aficionados easily move from one website to another in seconds. Although purporting to address the impact on competition generally, LiveUniverse really complains about the impact on LiveUniverse itself.

At the hearing, LiveUniverse's counsel analogized the alleged harm to consumers here to the harm in *Aspen Skiing*. It is unnecessary to go to lengths to show how misplaced that notion is. In *Aspen Skiing* the joint ticket covering four ski areas provided skiers with convenience and flexibility by expanding the number of runs available and allowing skiers to decide each day on which mountain they preferred to ski. *Aspen Skiing*, 472 U.S. at 605-06. The Court provided anecdotal evidence of skiers

coming to the fourth mountain and being angered when told that the joint ticket did not include this mountain. *Id*. at 606-07. Skiers were then forced to either (1) purchase an additional ticket and waste one day of their six-day joint ticket; (2) obtain a refund, which could take all morning and entailed the forfeit of the six-day discount; or (3) leave the mountain and waste time getting to one of the other ski areas. *Id.* at 607. The harm to these skiers greatly exceeds the harm suffered by patrons of social networking websites. To exit MySpace and visit vidiLife.com presents nothing comparable to the hassles endured by the *Aspen* skiers. Similarly, MySpace users who have placed links on the MySpace site to content on their vidiLife pages can easily place that content directly onto their MySpace site. In short, LiveUniverse does not sufficiently allege causal antitrust injury.

E. Conclusion Re Monopolization of Social Network Market

For the foregoing reasons, LiveUniverse has not alleged and cannot allege exclusionary conduct or causal antitrust injury in the market for Internet-based social networking websites. Therefore, the Court GRANTS MySpace's motion to dismiss LiveUniverse's monopolization claim in this market.

IV. "ATTEMPTED MONOPOLIZATION" ALLEGATIONS IN MARKET CONSISTING OF "INTERNET-BASED SOCIAL NETWORKING SITES"

As stated above, LiveUniverse must allege four elements in the relevant market to plead an attempted monopolization claim: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury." *Rebel Oil*, 51 F.3d at 1433.

In the FAC, LiveUniverse does not differentiate between its allegations of monopolization and attempted monopolization in the market consisting of Internet-based social networking websites. Thus, the Court need not repeat the foregoing analysis. The Court finds that for the same reasons stated above regarding the monopolization claim, LiveUniverse fails to allege the "predatory or anticompetitive conduct" or "causal antitrust injury" required to state an attempted monopolization claim and therefore fails to allege an attempted monopolization claim.

V. ALLEGATIONS RE MARKET CONSISTING OF "ADVERTISING ON INTERNET-BASED SOCIAL NETWORKING SITES"

LiveUniverse also alleges monopolization and attempted monopolization claims in the market for *advertising on* Internet-based social networking sites. Its allegations of anticompetitive conduct and causal antitrust injury are insufficient and therefore, without having to make findings regarding the other required elements, the Court dismisses these claims.

A. LiveUniverse's Monopolization Claim

1. Relevant Market

The FAC alleges that the "primary source of revenue for . . . the overwhelming majority of all United States social networking web sites . . . is advertising revenue generated from the number of visitors to the personal profiles and networks of friends generated with and contained within the social networking web platform." (FAC ¶ 18). The FAC alleges that "there are no good substitutes for" advertising on internet social networking sites, because:

> Such sites offer advertisers the unique ability to tap into user-generated content and to establish "buzz" about their products through word of mouth as users comment upon and share the advertising with others, essentially integrating an advertiser's message into the rumor mill. In addition, such sites offer the ability to reach an extremely targeted demographic based upon specific interests that traditional, passive advertising cannot offer. As more and more consumers share the advertiser's message with their likeminded friends, the message becomes the subject of a conversation detached from its commercial context and the advertiser is capable of targeting and penetrating its desired market in ways that are simply not possible through traditional advertising in passive media. . . . On information and belief, rival advertising media are not sufficiently close substitutes to force the defendant to sell its advertising at a competitive price and the defendant therefore earns monopoly margins on its advertising by charging a premium over prices that would prevail in a healthy competitive market.

(FAC ¶ 20).

Without making a finding as to whether LiveUniverse adequately alleges a relevant market or whether it even has standing as a participant in this alleged market to challenge MySpace's conduct, the Court will assume that this allegation is adequate.

2. Monopoly Power

Without making a finding as to whether LiveUniverse adequately alleges monopoly power, the Court will assume that it does.

3. Anticompetitive Conduct

MySpace argues, and LiveUniverse does not dispute, that the FAC "does not contain a single sentence of exclusionary conduct" in the market for advertising on Internet-based social networking websites. Assuming that LiveUniverse intended to incorporate by reference its allegations as to MySpace's conduct in the market for websites, the Court finds that LiveUniverse has not sufficiently alleged anticompetitive conduct, for the reasons discussed above.

4. Causal Antitrust Injury

LiveUniverse's allegations of causal antitrust injury in the market for advertising on Internet-based social networking sites also are insufficient. The FAC alleges that advertising is the primary source of revenue for all social networking sites, and that LiveUniverse's advertising revenue has declined due to MySpace's conduct. (FAC ¶ 39). But without adequate allegations of injury to competition itself, an injury suffered by one competitor is not sufficient to establish antitrust injury. *Microsoft*, 253 F.3d at 58. In an apparent effort to avoid this pitfall, LiveUniverse further alleges that MySpace reduces users' ability to generate content as they please, which in turn hurts advertisers who would benefit from the "unique ability to . . . establish 'buzz' about their products through word of mouth as users comment upon and share the advertising with others." (FAC ¶ 20). As stated above, however, the only conduct of MySpace that is alleged to affect users' ability to generate content does not in fact do so; they can generate whatever content they want on vidiLife.com. And advertisers can create or exploit "buzz" on that website. Thus, the Court finds that LiveUniverse does not sufficiently allege causal antitrust injury in the market for advertising on Internet-based social networking sites.

5. Conclusion

For the foregoing reasons, LiveUniverse cannot allege exclusionary conduct or causal antitrust injury in the market for advertising on Internet-based social networking

websites. Therefore, the Court GRANTS MySpace's motion to dismiss LiveUniverse's monopolization claim in this market.

B. LiveUniverse's Attempted Monopolization Claim

Like its allegations in the first relevant market, LiveUniverse does not differentiate between its allegations of monopolization and attempted monopolization in the market for advertising on Internet-based social networking websites. For the same reasons set forth just above, LiveUniverse fails to allege an attempted monopolization claim in the market for advertising on Internet-based social networking websites.

VI. LIVE UNIVERSE'S STATE LAW CLAIM

The second claim for relief in the FAC alleges that MySpace has engaged in "unlawful, unfair or fraudulent business practices," in violation of Cal. Bus. & Prof. Code § 17200, *et seq.* The Court separately addresses each of these three prongs. Based largely on the preceding analysis concerning the Section 2 claims, the Court finds that LiveUniverse fails to allege a statutory unfair competition claim under § 17200.

A. "Unlawful" Business Act or Practice Prong

"The 'unlawful' practices prohibited by Section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1120 (C.D.Cal. 2001). In the FAC, the only law allegedly violated by MySpace is Section 2 of the Sherman Act. Since this Court has already found that LiveUniverse fails to allege a Section 2 claim, the Court necessarily finds that LiveUniverse fails to allege an "unlawful" business act or practice.

B. "Unfair" Business Act or Practice Prong

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company*, 20 Cal.4th 163, 187 (Cal. 1999), the California Supreme Court adopted the following test for the "unfair" business act or practice prong:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law, *or* violates the policy or spirit of one of those laws because its effects are comparable to or the

> same as a violation of the law, *or* otherwise significantly threatens or harms competition. (emphasis added).

As LiveUniverse points out, this test is disjunctive, meaning that there are three alternative ways to state a claim under this prong. LiveUniverse fails to establish any of these alternatives.

As to the first alternative, the Court has already found that MySpace's conduct does not violate antitrust law. As to the second alternative, requiring effects that are "comparable to or the same as a violation of [antitrust] law," the Court has already found that LiveUniverse failed to allege that MySpace's conduct caused an anticompetitive effect. Similarly, the third alternative fails because LiveUniverse failed to allege how MySpace's conduct "significantly threaten[ed] or harm[ed] competition," as opposed to harming LiveUniverse.[9]

C. "Fraudulent" Business Act or Practice Prong

"This 'prong' of § 17200 is comparable to the 'unfair' prong at issue in *Cel-Tech*, *supra*; just as it is necessary under the 'unfair' prong to show harm not merely to the plaintiff-competitor but also to competition, so, too, should it be necessary under the 'fraudulent' prong to show deception to some members of the public, or harm to the public interest, and not merely to the direct competitor or other non-consumer party to a contract." *Watson Laboratories*, 178 F.Supp.2d at 1121. As addressed in detail above, LiveUniverse solely alleges harm to itself, rather than harm to the public interest. The FAC also fails to allege any deception to members of the public. Thus, LiveUniverse fails to allege a "fraudulent" business act or practice.

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[9] In *Chavez v. Whirlpool Corp.*, 93 Cal.App. 4th 363, 375 (Cal. Ct. App. 2001), the Court of Appeal held that "conduct alleged to be 'unfair' because it unreasonably restrains competition and harms consumers . . . is not 'unfair' if the conduct is deemed reasonable and condoned under the antitrust laws." Although the California Supreme Court has not articulated this principle, it appears to be sound and to be applicable here.

D. Conclusion re LiveUniverse's State Claim

For the foregoing reasons, the Court finds that LiveUniverse fails to state a claim under Cal. Bus. & Prof. Code § 17200. Therefore, the Court GRANTS MySpace's motion to dismiss this claim. Although the Court doubts that within the requirements of Fed. R. Civ. P. 11, plaintiff can state a different and viable Section 17200 claim, given that the scope of that section is potentially broad, the Court will permit plaintiff to attempt to do so. Any Second Amended Complaint shall be filed by not later than June 15, 2007. If no such amended complaint is filed by then, then the dismissal of the Section 17200 claim shall be with prejudice.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS MySpace's motion to dismiss the Sherman Act Section 2 claims with prejudice.[10] The Court GRANTS MySpace's motion to dismiss LiveUniverse's state claim without prejudice.

____ : ____

Initials of Preparer ____

[10] Dkt. No. 17.

A 1

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