

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

DANIEL WALLACE,

Plaintiff,

v.

Case No. 1:05-cv-618-JDT-TAB

FREE SOFTWARE FOUNDATION, INC.,

Defendant.

**BRIEF IN SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS THE COMPLAINT**

**I.**

**PRELIMINARY STATEMENT**

Since it is difficult to determine from the single substantive paragraph of the Complaint precisely what Plaintiff's claim is, Defendant has resorted to Plaintiff's Motion for Summary Judgment to better understand Plaintiff's legal theory, which appears to be that by promoting the growth of "open source" computer software, which competes with "proprietary" computer software, Defendant has "foreclosed competition" in the market for "proprietary" software. Completely absent from the Complaint, however, is any allegation that this promotion of competition between "open source" and "proprietary" software injures consumers. This absence of an allegation of harm to consumers is fatal to the Complaint. Moreover, even if it were possible for Plaintiff to allege some harm to competition in the abstract, Plaintiff has not alleged antitrust injury to himself, and thus lacks standing. For all these reasons, the Complaint is fatally flawed and should be dismissed with prejudice.

## II.

### FACTUAL BACKGROUND

Defendant Free Software Foundation, Inc. ("FSF") is a not-for-profit corporation whose purpose is to promote the use and development of free software, that is computer software that may be freely copied, modified and redistributed by its users.<sup>1</sup> FSF writes and distributes free software of its own and also publishes licenses to facilitate free software distribution by others. One such free software license is known as the GNU General Public License ("GPL").

The GPL provides a legal framework under which developers of free software can make the source code for the software available to the public without concern that other developers might appropriate their work for use in proprietary software. In pertinent part, the GPL provides that, if a licensee of computer software under the GPL modifies that software or creates a derivative work from it, that subsequent work, when distributed, must be licensed to all third parties at no charge under the same terms and conditions.<sup>2</sup> The license provision in question, Section 2(b) of the GPL, states: "You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License." *See Exhibit A.*

The developers of free software projects make their source code available to the public, allowing anyone to review and suggest improvements to the code. The GPL assures that their work will not be appropriated by others and incorporated into proprietary software, the source code for which is generally not open to the public. The open distribution of the source code

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<sup>1</sup> This software is often, but from FSF's point of view wrongly, described as "open source software." FSF was founded in 1985 to publicize the cause of software that is "free as in freedom." The phrase "open source" was first used in 1998 to describe the same software licensing pattern pioneered by FSF. This brief therefore refers to "free software" rather than "open source."

<sup>2</sup> Note, however, that although the licensing of derivative works, when made, is required to be at no fee, the GPL does not restrict the ability of persons distributing derivative works of free software to charge fees for either the initial act of distribution or the work involved in making modifications. (*See, e.g., GPL § 2.*)

under the GPL thus facilitates the refinement and improvement of software by a large population of programmers, so that ultimately consumers benefit by receiving a superior product at less cost. The GNU/Linux operating system is probably the best known example of a computer program that has been developed using the free software model, and is licensed pursuant to the GPL.

### III.

#### **SUMMARY OF ARGUMENT**

One would think that from the standpoint of the antitrust laws, increased competition which results in greater choice and lower prices to consumers would be desirable. Review of the case law confirms that to be true. Plaintiff has not alleged any agreement of the sort that is condemned by the antitrust laws. Moreover, even if Plaintiff could articulate some harm to competition in the abstract, the allegations of the Complaint show that Plaintiff lacks standing. Plaintiff's own alleged harm flows only from additional competition in the marketplace, which is not the sort of harm with which the antitrust laws are concerned. The Complaint should therefore be dismissed with prejudice.

### IV.

#### **ARGUMENT**

##### **A. Vertical maximum price restraints are not *per se* unlawful.**

The essence of Plaintiff's Complaint appears to be directed at Section 2(b) of the GPL, which requires licensees of GPL'd software to license any derivative works they create at no charge. Assuming for the sake of argument that Plaintiff has standing to bring this Complaint, this agreement could be analogized to a vertical maximum price restraint, *i.e.*, a requirement by the licensor that the licensee charge no more than X amount upon relicense. The United States Supreme Court in *State Oil Company vs. Khan*, 522 U.S. 3 (1997), held that vertical maximum

price fixing agreements are not *per se* unlawful. Therefore, Plaintiff has plainly failed to allege a *per se* violation of the Sherman Act.

Moreover, even before *State Oil vs. Khan*, courts recognized that the unique attributes of intellectual property licenses made *per se* treatment of vertical price restraints in software licenses inappropriate. See *LucasArts Entertainment Company vs. Humongous Entertainment Company*, 870 F. Supp. 285 (N.D.Cal. 1993) (granting summary judgment *against* licensee who claimed that license provision regulating resale prices for derivative works violated the Sherman Act).

The provision of the GPL challenged by Plaintiff does not fall within any category of agreements that are condemned *per se* under the Sherman Act. It is therefore to be evaluated under the Rule of Reason. *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1071 (11th Cir. 2004). In cases subject to the Rule of Reason, anticompetitive effect must be specifically alleged. In *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), the Seventh Circuit upheld the dismissal of the plaintiff's complaint on the basis that the plaintiff had not alleged an anticompetitive effect:

The fatal flaw in these pleadings is the absence of any allegation, either direct or inferential, of an anticompetitive effect. In this regard, it is important to note that the egregiousness of the defendants' behavior does not, by itself, constitute a violation of § 1. Tortious activities in the form, for example, of unfair competition do not contravene the antitrust laws unless accompanied by the requisite anticompetitive effect. Losing business to a competitor is an inevitable consequence of the economic system that the Sherman Act was designed to protect; some enterprises will prevail and others will not, but it is the function of § 1 to compensate the unfortunate only when their demise is accompanied by a generalized injury to the market. As the Supreme Court has aptly stated, the antitrust laws were designed to protect competition, not merely competitors.

*Id.* at 1109 (citations omitted). Plaintiff does not allege any facts showing an anticompetitive effect, and this dooms Plaintiff's Complaint.

The Seventh Circuit's opinion in *Car Carriers* also holds that an antitrust plaintiff must do more than make conclusory allegations like those found in Plaintiff's Complaint:

Thus, in the context of a 12(b)(6) challenge, the question is whether, if we accept all the allegations--including those relating to purpose and intent--as true, the plaintiffs have successfully pleaded a contract, combination, or conspiracy in restraint of trade within the meaning of the Sherman Act. The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts "do not at least outline or adumbrate" a violation of the Sherman Act, the plaintiffs "will get nowhere merely by dressing them up in the language of antitrust." When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to providing antitrust litigation with an exemption from Rule 12(b)(6).

*Car Carriers*, 745 F.2d at 1106-07 (citations omitted).

In short, Plaintiff has completely failed to plead the elements of a violation of the Sherman Act. The Complaint should therefore be dismissed.

**B. Plaintiff has failed to allege antitrust injury or show Plaintiff's standing to sue.**

The allegations of the Complaint also show that Plaintiff lacks standing to sue because he has suffered no "antitrust injury." This lack of standing and lack of antitrust injury is a separate, and independently sufficient, basis on which to dismiss the Complaint.

The Supreme Court first articulated in the case of *Brunswick Corp. vs. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the requirement that a plaintiff suing under the Clayton Act establish "antitrust injury." In *Brunswick*, the plaintiffs were independent bowling alley operators who alleged that they had been injured by the defendant's unlawful acquisition of failing bowling centers in their neighborhoods. Plaintiffs alleged that if the centers had been allowed to fail, or had been acquired by a less well-financed competitor, the plaintiffs would have been subject to less competition, and would therefore have made greater profits. The Supreme Court, in reversing a judgment in favor of the plaintiffs and ordering judgment NOV on

their antitrust claims, explained that a plaintiff who alleges injury by reason of a violation of the Sherman Act must allege more than mere "but for" causation. Such a plaintiff must allege injury that flows directly from the anticompetitive aspect of the challenged activity. The Court reiterated that because the antitrust laws were created for the protection of *competition*, not individual competitors, a plaintiff does not state a claim under the Sherman Act when he merely complains that increased marketplace competition has diminished his profits.

The Supreme Court has reaffirmed and extended the holding of *Brunswick* in subsequent cases that are dispositive here.

First, in *Atlantic Richfield Co. vs. USA Petroleum Co.*, 495 U.S. 328 (1990), the Court held that a competitor who alleged that he had lost sales and profits due to his competitor's vertical maximum price fixing scheme lacked standing to sue under the antitrust laws. That is precisely the situation presented by this Complaint. *Atlantic Richfield* establishes that Plaintiff has no standing to bring this Complaint, even if the alleged vertical maximum price fixing agreement were *per se* unlawful, which after *State Oil vs. Khan* it plainly is not.

The fact that Plaintiff seeks only injunctive relief, rather than damages, does not save the Complaint from dismissal. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), the Court held that the antitrust injury requirement applies equally to plaintiffs seeking injunctive relief under section 16 of the Clayton Act. The Court held that a plaintiff who sought only injunctive relief still needed to show a threat of antitrust injury, and that merely alleging that a merger would result in his competitor's ability to charge lower prices, which would in turn cause the plaintiff to lose profits, had not satisfied that requirement.

In short, under *State Oil vs. Khan*, Plaintiff has not alleged a substantive violation of the Sherman Act. Moreover, under the *Brunswick*, *Atlantic Richfield*, and *Cargill* cases, Plaintiff has

not alleged any actual or threatened "antitrust injury" of the sort that would give him standing to sue. Therefore, even if Plaintiff had stated the elements of an antitrust violation – which he has not – the Complaint should still be dismissed.

V.

**CONCLUSION**

For all the above reasons, the Complaint should be dismissed, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

ICE MILLER

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served upon the following by first-class United States mail, postage prepaid, this 22d day of June, 2005.

Daniel Wallace  
P.O. Box 572  
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s/ Philip A. Whistler  
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Philip A. Whistler

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