

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

DANIEL WALLACE,)	
)	
Plaintiff,)	
)	
v.)	Civil Complaint No.: 1:05-cv-0678-JDT-VSS
)	
INTERNATIONAL BUSINESS)	
MACHINES CORPORATION;)	
RED HAT INC.;)	
NOVELL, INC.,)	
)	
Defendants.)	

**BRIEF IN SUPPORT OF DEFENDANT
INTERNATIONAL BUSINESS MACHINES CORPORATION'S
MOTION TO DISMISS THE AMENDED COMPLAINT**

The day after defendant International Business Machines Corporation (“IBM”) timely filed its Motion to Dismiss the original two-page Complaint in this matter, plaintiff Daniel Wallace (“Plaintiff”) filed his Answer Brief to the Motion to Dismiss (“Answer Brief”), followed the next business day by a two-page Amended Complaint. Because the Amended Complaint fails to remedy the fatal flaws in the original Complaint, IBM incorporates by reference its Brief in Support of its Motion to Dismiss the original Complaint, and focuses in this Brief on the inadequacy of the amendments to the Complaint.

The Amended Complaint serves to confirm that even with a chance to amend, Plaintiff cannot demonstrate the antitrust injury required for standing, cannot show a combination or conspiracy and, under the rule of reason, cannot show any unreasonable restraint of trade or anticompetitive effect in a relevant market. Plaintiff’s failure to correct the flaws in the original

Complaint by his amendment further demonstrates that his inability to state an antitrust claim is inherent and incurable. The Amended Complaint must therefore be dismissed with prejudice. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1105 (7th Cir. 1984) (upholding dismissal with prejudice where the antitrust claims had “inherent internal flaws” and were “non-curable”).

INTRODUCTION

The GNU General Public License (“GPL”), the subject of the original and Amended Complaint,¹ is a part of the legal framework for what is commonly referred to as “free” or “open source” software. Under the GPL, licensees of computer programs are not charged for the license, but are required to license any derivative works that they create using the licensed software under the same terms and conditions, which include (a) making the source code freely available, and (b) not charging for the license. (See GPL, attached to Plaintiff’s original Complaint.)

Section 2(b) of the GPL provides:

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.

Thus, under Section 2(b) of the GPL, any licensee of “open source” or “free” software (a) is not charged for the license, (b) receives the source code and is free to improve the program and make derivative works from it, but (c) must, if publishing or distributing any improvements

¹ The Court may properly consider the terms of the GPL in ruling on the Motion to Dismiss. “[I]t is well established that material which is attached to, or incorporated by reference in, the plaintiff’s complaint may be considered by the Court on a motion to dismiss under Rule 12(b)(6).” *Dryden v. SunLife Assur. Co. of Canada*, 737 F.Supp. 1058, 1066 (S.D. Ind. 1989).

or derivative works, in turn license such works, at no charge, to all third parties under the same terms.

In the original Complaint, plaintiff sought to enjoin the use of the GPL for any software. (Compl. at 2.) In the Amended Complaint, Plaintiff has limited his requested injunctive relief to cover only the Linux operating system, one of the “open source” programs licensed under the GPL. (Am. Compl. at 2.)

Because both the original and Amended Complaints are so vague, we look also to the Answer Brief to better understand Plaintiff’s claims. Plaintiff alleges that the mere use of the GPL, for Linux or other software programs, constitutes “price-fixing” at zero, since all derivative works must be licensed at “no charge.” (Answer Brief at 5-6.) For the reasons articulated in IBM’s Brief in Support of its Motion to Dismiss the Original Complaint, and as further explained in this Brief, this claim is inherently flawed under the established antitrust laws, and no further amendment could remedy it.

ARGUMENT

I. LEGAL STANDARD.

Plaintiff’s Answer Brief first discusses the appropriate standard on a 12(b)(6) motion, and argues IBM should have instead responded to the “vagueness” in his Complaint with a motion for a more definite statement under Rule 12(e). (Answer Brief at 2.) The case Plaintiff cites to support his argument, however, wholly supports dismissal of this action under Rule 12(b)(6).

Plaintiff quotes Judge Posner in *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) for the uncontested notion that a plaintiff need only file a short statement of the legal claim in order to state a claim in federal court. (Answer Brief at 2.) Judge Posner also held in that same case, however, that mere allegations are insufficient where the plaintiff fails to adequately respond to issues raised in a motion to dismiss. *Kirksey* at 1041. In fact, Judge Posner affirmed dismissal of the complaint in that case for much the same reason as the Court should dismiss the present action — it had no legal merit.

Where the plaintiff has gone astray is in supposing that a complaint which complies with Rule 8(a)(2) is immune from a motion to dismiss. This confuses form with substance. Rule 8(a)(2) specifies the conditions of the formal adequacy of a pleading. It does not specify the conditions of its substantive adequacy, that is, its legal merit. Suppose the complaint had alleged that the defendants had violated Illinois or federal law by failing to obtain a license to manufacture cigarettes. The complaint would comply with Rule 8(a)(2), but, assuming no such license is required, it would be highly vulnerable to dismissal under Rule 12(b)(6). If the defendants filed a motion to dismiss in which they pointed out that there was no such licensing requirement, it would not be responsive of the plaintiff to say that she was not “required at this stage of litigation to specifically characterize or identify the legal basis of the claims in the complaint.” The defendants would have given reasons for dismissing the complaint despite its formal beauties, and she would have to give reasons against. Our system of justice is adversarial, and our judges are busy people. If they are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff’s research and try to discover whether there might be something to say against the defendants’ reasoning.

Id.

A plaintiff cannot evade the requirement of pleading all elements of a Section One claim “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.’” *Car Carriers*, 745 F.2d at 1106 (citations omitted). An antitrust case must be dismissed “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).” *Id.* at 1106-07. Furthermore, a complaint must be judged in light of the circumstances and market context, including whether conclusory allegations are economically sensible. *See Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992.)

Plaintiff also asserts that the “courteous response” to his vague and ambiguous Complaint would be to file a motion for a more definite statement under Rule 12(e) rather than a motion to dismiss under Rule 12(b)(6). (Answer Brief at 2.) Although a more definite statement would certainly be required to enable IBM to formulate an answer and prepare a defense, it would not cure the *legal* defects inherent in Plaintiff’s claim. In short, plaintiff has pled himself out of court by alleging claims and facts that could not, in any circumstances, state a claim for relief recognized in the law. *See Alpha School Bus Co. v. Wagner*, 2004 WL 1368804 at *3 (N.D. Ill. 2004) (citing *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994)) (“[I]t is quite possible for a plaintiff to plead himself out of court by alleging facts that could not under any circumstances constitute an antitrust violation.”); *In re Wade*, 969 F.2d 241, 249 (7th Cir. 1992) (A plaintiff can “plead himself out of court by attaching documents to the complaint that indicate he or she is not entitled to judgment.”).

Plaintiff claims that the vagueness in his Complaint is “of the Defendant’s own making” because “it is nearly impossible to decipher what the GPL actually is or means.” (Answer Brief at 3 and 5.) This is not the standard, however, in a 12(b)(6) or 12(e) Motion. Plaintiff has the burden to sufficiently allege an antitrust violation, and even assuming IBM had drafted the GPL

(which it did not), its alleged vagueness has no bearing on whether Plaintiff can state a claim under the antitrust laws.

For the reasons described below, this action should be dismissed under Rule 12(b)(6) without leave to amend. Permitting further amendment would only prolong the misery for this terminally ill action.

II. THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFF'S PLEADINGS AND ANSWER BRIEF DEMONSTRATE THAT HE SUFFERED NO ANTITRUST INJURY, AS REQUIRED FOR STANDING TO BRING AN ANTITRUST CASE.

Plaintiff's claims, even as amended, still fail to show the antitrust injury required for standing in an antitrust case. Congress passed the antitrust laws to protect consumers from higher prices, not to enable a competitor to charge for something the consumer would otherwise have been able to use for free. *See generally Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for 'the protection of competition, not competitors.'") (citation omitted). A competitor who cannot make as much profit as he would like – or enter a market he would like to enter – because the prices are too low does not have standing to bring a case under Section One of the Sherman Act. *Id.* Yet, a higher price for the consumer is precisely what Plaintiff is seeking in both his original and Amended Complaint. He wants to enjoin the "development and distribution of the Linux operating system" under the terms of the GPL, which requires it to be licensed free of charge to all who wish to use it, so that he can enter the market with "his own computer operating system," and, one must assume, charge consumers to use it. (Am. Compl. at 2-3.)

The superficial amendments Plaintiff made to his Complaint do not at all address or correct this fundamental and inherent flaw in his claim. Plaintiff amended his single-sentence statement of injury from an allegation that the defendants' use of the GPL "denies plaintiff Daniel Wallace an opportunity to earn future revenue in the field of computer programming," (Compl. at 2), to "threatens to prevent Plaintiff Daniel Wallace from entering into the free market with his own computer operating system." (Am. Compl. at 2.) In both pleadings it is clear that Plaintiff is at most a competitor of companies licensing software under the GPL who wants to be able to charge potential licensees to use his operating system, but who feels he is unable to compete against the price of "no charge."

Plaintiff argues he does not need to show antitrust injury because he believes he has alleged a "*per se*" violation of the antitrust laws. (Am. Compl. at 2; Answer Brief at 7.) Plaintiff has plainly confused the requirement to show an "antitrust injury" as a prerequisite for standing (even for *per se* violations) with the requirement to show an "unreasonable restraint of trade" under the rule of reason.

A plaintiff who has adequately alleged a *per se* violation of Section One of the Sherman Act is relieved from having to prove an unreasonable restraint of trade, as such violations are considered so "pernicious" that an unreasonable restraint is presumed. *See Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). The text Plaintiff in his Answer Brief quotes from *Northern Pacific* itself makes clear that it concerns only the relief from proving that "a particular restraint has been unreasonable." *Id.* Antitrust injury was not at issue in that case, as it was brought by the United States.

On the other hand, a plaintiff must show “antitrust injury” as a preliminary matter to have standing to bring a case, regardless of whether the allegations would be analyzed as *per se* or under the rule of reason. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

As the Supreme Court in that case explained:

We also reject respondent’s suggestion that no antitrust injury need be shown where a *per se* violation is involved. The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act. *Per se* and rule-of-reason analysis are but two methods of determining whether a restraint is “unreasonable,” *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects. . . . The purpose of the antitrust injury requirement is different. It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.

Id. at 341-342.

The Amended Complaint makes clear that the injury alleged by the Plaintiff does not constitute the requisite “antitrust injury.” Plaintiff does not allege an injury to competition or to the market, but only to himself as a competitor or potential competitor. Defendants’ alleged actions “threaten” to prevent *him* from entering the market, an allegation that is only focused on his own business, not any injury to competition or consumers. Plaintiff confirms in his Answer Brief and Amended Complaint that the “price-fixing” he alleges is a price “fixed” at “zero.” (Answer Brief at 5 and 6; Am. Compl. at 2.) As the *Northern Pacific* case cited by Plaintiff noted, a purpose for the Sherman Act is to promote the “lowest prices” to consumers, and zero is the lowest conceivable price one could offer. 356 U.S. at 5.

Further, common sense dictates that a licensing system that requires consumers incur “no charge” to use and copy the programs would benefit consumers, not harm them. In fact, “open source” software benefits consumers as it enables licensees to fix any bugs in the system

themselves, thus improving the software. The GPL then requires such modifications, if distributed by the licensee, to be licensed free of charge to any subsequent licensees, permitting the improved software to be distributed and used widely and resulting in a benefit to all who use it. It is difficult to imagine what “injury” flows to consumers from such an arrangement.

Plaintiff also lacks antitrust standing because his claimed injury is too speculative, one of the factors to consider in determining whether the required nexus exists between violation and injury. *See Midwest Gas Services, Inc. v. Indiana Gas Co., Inc.*, 317 F.3d 703, 710 (7th Cir. 2003). He claims only that the use of the GPL “threatens to prevent” him from entering the market. (Am. Compl. at 2.) He does not allege that he has suffered any damages to date, and does not even allege he is currently competing or even prepared to compete in the “computer programming” market. To the extent Plaintiff is trying to claim standing as a potential entrant into the “market for computer operating systems” he still fails to meet the “intention and preparedness” requirement for antitrust standing. *See Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982), *disapproved of on other grounds by Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

Plaintiff has not been able to cure his lack of antitrust injury or antitrust standing by amendment. It is clear that Plaintiff is, if anything, a competitor of the defendants who is seeking an injunction that would likely harm consumers rather than protect them. Plaintiff’s status as a competitor is inherent, and leave to amend cannot cure such a characteristic. Accordingly, the Amended Complaint should be dismissed with prejudice. *See Car Carriers*, 745 F.2d at 1105.

III. THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO ALLEGE THE CONCERTED ACTION REQUIRED FOR A SECTION ONE CLAIM.

The Plaintiff still does not allege facts to support a conclusion that defendants agreed or conspired to do anything, let alone anything illegal. A plaintiff must be able to show some sort of concerted activity for a valid claim under Section One of the Sherman Act. *See generally Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (emphasizing that Section One simply does not reach unilateral conduct); *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061 (7th Cir. 1981) (same). All Plaintiff can show, however, is a series of unilateral actions.

Plaintiff initially alleged the defendants “used or conspired to promote” the GPL. (Comp. at 2.) In response to IBM’s Motion to Dismiss the original Complaint, Plaintiff now alleges that the defendants “conspired by using” the GPL. (Am. Compl. at 2.) The only alleged agreement is “the agreement known as the” GPL. *Id.* In other words, Plaintiff alleges that, by the very act of using the GPL, defendants have somehow “conspired.”

The Plaintiff apparently misunderstands the requirement that all Section One claims show concerted activity. Section One of the Sherman Act requires a showing of a “contract, combination or conspiracy,” 15 U.S.C. § 1, and Plaintiff cites several cases to show that the GPL, a license agreement, is a “contract.” (Answer Brief at 3.) Having established that the GPL is a “contract,” he then notes that the defendants “are all contributors and licensees” to Linux, and are “competing licensors.” *Id.* at 6. The sum of Plaintiff’s arguments is that there is a “contract” and defendants “use” this contract. Plaintiff apparently believes that alleging the

existence of a common “contract” (the GPL license), to which defendants have unilaterally decided to adhere, is sufficient to allege a violation of Section One. Noticeably absent is any allegation of any agreement or concerted action *between* or *among* any of the defendants.

The truth of the matter is that Plaintiff could not, in good faith, allege any facts showing a combination or conspiracy concerning the GPL. The GPL by its nature is a series of unilateral decisions to create “open source” software, and the activity challenged here is the individual decision by a company to “use” the GPL to distribute computer programs rather than any number of other means for distribution. The use of the GPL is, therefore, a unilateral act, and Plaintiff cannot show the required combination or conspiracy.

It is clear Plaintiff cannot allege anything other than unilateral conduct by the defendants. As Plaintiff has already attempted, and failed, to correct the lack of any allegation of the requisite concerted activity in his Amended Complaint, this action should now be dismissed without leave to further amend.

IV. THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM UNDER THE RULE OF REASON.

Even if Plaintiff had standing to bring this action and properly alleged concerted action, (neither of which is true), the Amended Complaint must still be dismissed because, notwithstanding his conclusory allegation of a *per se* violation, his claims are to be analyzed under the rule of reason as a vertical maximum price fixing claim. *State Oil v. Khan*, 522 U.S. 3, 22 (1997) (“Vertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason.”). Because plaintiff

has failed to allege the requisite competitive impact or any unreasonable restraint of trade in a relevant market, the Amended Complaint must fail.

Plaintiff's conclusory allegations of a *per se* violation "must be scrutinized to determine whether such a characterization is appropriate," *Car Carriers*, 745 F.2d at 1108, because "we should not throw labels like *per se* around loosely, without some appreciation for the economic arrangements we are evaluating." *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir 1999). Plaintiff argues that the *per se* rather than rule of reason analysis should apply to this case because the defendants are "co-equal competing licensors" of Linux, and are therefore "horizontal competitors." (Answer Brief at 6.) The fact that defendants may be in the same level in the distribution chain and therefore "horizontal" competitors in some markets, however, does not make them horizontal competitors in relation to the GPL.

As indicated in the previous section, Plaintiff does not allege any agreement or concerted activity between or among these competitors. The only agreement with which Plaintiff has issue is the GPL itself, and the alleged unreasonable restraints on subsequent licensees. Such a relationship between a licensor and a licensee is a vertical, not a horizontal, relationship. *See Generac* at 977 (holding that the licensing of intellectual property rights created a vertical relationship for antitrust analysis, even if the licensee and licensor were competitors in other contexts). Any claim with the GPL as the "agreement" must therefore be analyzed as a vertical agreement between licensee and licensor of the underlying software. *See also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) ("[W]e treat the [software] licenses as ordinary contracts accompanying the sale of products."); XI Herbert Hovenkamp,

Antitrust Law ¶ 1902d (2d ed. 2005) (“[B]y definition, vertically related firms exist in a buyer-seller relationship, and agreements are essential to buying and selling.”).

Plaintiff also attempts to refute the rule of reason analysis required for vertical *maximum* price maintenance under *State Oil* by asserting that the GPL “fixes the *minimum* price . . . at zero.” (Answer Brief at 6.) (emphasis added.) The argument that “no charge” is a minimum rather than a maximum price is unfounded, and demonstrably incorrect on the face of the GPL.

The GPL states that derivative works must be licensed at “no charge.” It does not require one to license the work at a minimum price of “zero.” The essence of a “minimum” price is that higher prices, but not lower prices, could be charged. The GPL, however, prohibits a licensor from charging a licensee *more* than zero dollars for the license to a derivative work, not from charging *less* than zero. The “price” of zero is therefore a maximum price, not a minimum price. Plaintiff’s allegations accordingly must be analyzed under the rule of reason as a vertical restraint on the maximum price subsequent licensees may charge to license any modifications they make to the software.

Even given the chance to amend his Complaint, Plaintiff still has failed to allege that the challenged restraint has resulted in an unreasonable restraint of trade or an anticompetitive effect in a relevant market, as required for all rule of reason cases. *See 42nd Parallel North v. E Street Denim Co.*, 286 F.3d 401, 404 (7th Cir. 2002); *Car Carriers*, 745 F.2d at 1109 (“The fatal flaw in these pleadings is the absence of any allegation, either direct or inferential, of an anticompetitive effect.”) (citations omitted); *BCB Anesthesia Care, Ltd. v. Passavant Mem’l Area Hosp. Ass’n*, 36 F.3d 664, 669 (7th Cir. 1994) (affirming dismissal where there was “little reason to infer that there [was] an impact on competition within the relevant market”).

Plaintiff has narrowed his alleged relevant market from “computer programs” (Compl. at 2), to the “market for computer operating systems.” (Am. Compl. at 2.) This market is still too vague, as clearly not all “computer operating systems” compete with or are substitutes for the Linux operating system. Furthermore, Plaintiff still fails to define any geographic market. *See Sanderson v. Spectrum Labs, Inc.*, 227 F. Supp.2d 1001, 1012 (N.D. Ind. 2000) (granting a motion to dismiss antitrust claim where plaintiff failed to identify a relevant geographic market).

Even assuming Plaintiff alleged a cognizable market, however, there is still no allegation or even an indication in the Amended Complaint that defendants’ actions restrained trade in that market, or caused any anticompetitive effects. As discussed in detail above, the Amended Complaint only alleges the “threat[]” that *Plaintiff* may not be able to enter the market. It does not allege any adverse effect on competition or on consumers.

The Amended Complaint also fails to allege IBM had the requisite market power. Plaintiff must show IBM had market power, that is, the power to “raise prices above a competitive level without losing its business,” as a prerequisite to showing anticompetitive effects. *42nd Parallel*, 286 F.3d at 404 (citations omitted). Nowhere in the Amended Complaint does it allege, or even suggest, that any defendant had the power to raise prices above a competitive level. Plaintiff therefore has not sufficiently alleged the market power or competitive impact required to state a claim under the rule of reason.

CONCLUSION

Plaintiff has wholly failed to state any claim under the antitrust laws, even after an opportunity to amend. Due to inherent defects in the nature of his alleged injury, the unilateral

actions of defendants, and the lack of any anticompetitive effects, this case should be dismissed with prejudice as these defects cannot be cured by further amendment.

Respectfully submitted,

s/ Michael Gottschlich

Michael Gottschlich (#22668-49)

Kendall Millard (#25430-49)

Barnes & Thornburg LLP

11 South Meridian Street

Indianapolis, Indiana 46204

Telephone: (317) 236-1313

Facsimile: (317) 231-7433

Attorneys for Defendant, International
Business Machines Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of July, 2005, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following by operation of the Court's electronic filing system:

Curtis W. McCauley	mccauley@icemiller.com
Philip A. Whistler	philip.whistler@icemiller.com

The above filing will also be served via U.S. mail on the following, and all attorneys that the Court's notice of delivery indicates will be delivered by other means:

Daniel Wallace
P. O. Box 572
New Palestine, IN 46163

s/ Kendall Millard

Kendall Millard

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