

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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DISTRICT COURT
DIVISION
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LAURA A. BIRKOS
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Daniel Wallace,
Plaintiff,

v.

Civil Complaint No. 1:05-cv-0678-JDT-VSS

INTERNATIONAL BUSINESS MACHINES CORPORATION;

RED HAT INC.;

NOVELL, INC.,

Defendants.

PLAINTIFF'S ANSWER BRIEF TO
DEFENDANT INTERNATIONAL BUSINESS
MACHINES CORPORATION'S MOTION TO DISMISS
THE AMENDED COMPLAINT

Plaintiff Daniel Wallace appears *pro persona* and files the following Answer Brief pursuant to Local Rule 7.1. The Plaintiff incorporates by reference his exhibits, the pleadings and other documents on file with the Court, and all matters of which the Court may take judicial notice.

PRELIMINARY STATEMENT

The Supreme Court has set a standard for assessing the sufficiency of a complaint under Rule 8:

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts [355 U.S. 41, 46] in support of his claim which would entitle him to relief." *CONLEY v. GIBSON*, 355 U.S. 41 (1957)

The Defendant IBM asserts that it is beyond doubt that:

1.) Plaintiff Daniel Wallace can demonstrate no set of facts that could support a claim of a combination or conspiracy involving Defendant IBM's concerted action with at least one other commercial entity.

2.) Plaintiff Daniel Wallace can demonstrate no set of facts that could support a claim that Defendant IBM participated in acts demonstrating an unreasonable restraint of trade.

3.) Plaintiff Daniel Wallace can demonstrate no set of facts that could support a claim of antitrust injury.

As we shall see, these claims by the Defendant are totally without merit.

Combination or Conspiracy

Plaintiff Daniel Wallace has alleged that at a least four named entities, INTERNATIONAL BUSINESS MACHINES CORPORATION, RED HAT INC., NOVELL INC. and the FREE SOFTWARE FOUNDATION INC., have conspired to fix the prices in the intellectual property comprising the Linux computer operating system. Plaintiff has alleged an express conspiratorial agreement known as the GNU GENERAL PUBLIC LICENSE:

"The Defendants INTERNATIONAL BUSINESS MACHINES CORPORATION, RED HAT INC. and NOVELL INC. have conspired with the FREE SOFTWARE FOUNDATION INC. and others to fix the price of intellectual property in computer programs that are collectively known as the Linux (or GNU/Linux) operating system.

The Defendants have conspired by using a price-fixing agreement known as the GNU GENERAL PUBLIC LICENSE to develop, distribute and leverage said operating system to provide Linux related computing services for small business, industry and educational institutions.

The Defendants have conspired by using a price-fixing agreement known as the GNU GENERAL PUBLIC LICENSE to develop, distribute and leverage said operating system to provide Linux related computing services for small business, industry and educational institutions"; *Plaintiff's Amended Complaint*

Defendant IBM surely is on notice as to the specific identity of least three alleged co-conspirators. Defendant IBM is also on notice as to the express alleged conspiratorial agreement used by the co-conspirators. These allegations are sufficient for notice pleading:

"To the contrary, all the Rules require is "a short and plain statement of the claim" 8 that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures [355 U.S. 41, 48] established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. 9 Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis."; *CONLEY v. GIBSON, supra*.

The Defendant IBM has admitted in prior federal court submissions that it has pooled it's intellectual property in Linux with co-conspirators in a "distributed collaboration" and that said intellectual property has been distributed by a number of co-conspirators in commercial business. See *Plaintiff's Exhibit 10*:

"Statement Of Undisputed Facts"¹

A. Linux.

"1. The development of Linux began when an undergraduate student at the University of Helsinki, Linus Torvalds, set out to create a new, free operating system. (Ex. 1 (SCO Linux Introduction Version 1.2) at 1-5.) In 1991, Torvalds began developing the Linux "kernel", the core of the operating system, and

posting news of his project to Internet newsgroups, along with a call for volunteers to assist in his efforts. (Id.)

2. With the Internet providing for a distributed collaboration, other programmers joined to write the code making up the kernel. (Ex. 1 at 1-5.) Torvalds directed the collaboration to a version 1.0 release of the Linux kernel in 1994. (Id.)

3. In the years that followed, thousands of developers, including developers at SCO and IBM, contributed to the further development of Linux. (See Ex. 2 (Ans. to Second Am. Countercls.) ¶ 45; Ex. 3 (SCO website pages identifying SCO's contributions to Linux); Ex. 4 (SCO's Fiscal Year 2000 10-K/A) at 15, 22, 26; Bennett Decl. ¶ 7.)

4. A number of companies distribute Linux. (Ex. 4 at 5-8, 26.) These distributors offer a variety of commercial Linux products, which typically comprise the Linux kernel, the applications that the kernel runs (which, with the kernel, comprise a complete operating system) and whatever else the distributor chooses to combine into an easily installable product. (See Id. at 5-8.)"; *Plaintiff's Exhibit 10.*

The defendant IBM does not even require "the liberal opportunity for discovery and the other pretrial procedures", *CONLEY v. GIBSON, supra.*, to be aware of these facts since they are Defendant IBM's own sworn statements in prior judicial proceedings.

The Defendant's claim that it is beyond doubt that Plaintiff Daniel Wallace can prove no set of facts in support of his claim concerning a combination or conspiracy is totally without merit.

Unreasonable Restraint of Trade

Plaintiff Daniel Wallace has alleged a *per se* horizontal price-fixing violation in his amended complaint:

"The Defendants' *per se* horizontal price-fixing scheme is rapidly foreclosing competition in the market for computer operating systems."

Defendant IBM refers to sec 2(b) of the alleged price fixing agreement, the GNU GENERAL PUBLIC LICENSE (GPL), see *Plaintiff's Exhibit 2*:

"2. You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work under the terms of Section 1 above, provided that you also meet all of these conditions: ...

b) 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."

Several things are obvious when examining this agreement -- the express agreement that is shared among the co-conspirators. For one thing it is a generic adhesion contract that applies to all copyright holders and all computer programs. Another thing to note is that it binds "all third parties". The GPL boldly states its scope of application:

"0. This License applies to any program or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of this General Public License."; *Plaintiff's Exhibit 2*.

It is immediately obvious that any contributing entity using this agreement is cross-licensing his intellectual property with all third parties' intellectual property in a computer program if those parties accept the GPL terms. It is also obvious that all the intellectual property that is pooled under this cross-licensing agreement is price fixed at "no charge to all third parties" who accept the license.

The Defendant IBM itself has described the GPL price-fixing scheme in a prior federal court submission:

"65. Among the "further restrictions" that the GPL and LGPL do not permit are royalties or licensing fees (Ex. 27 §§ 2, 3; Ex. 26 §§ 2, 4) (although fees can be collected for "the physical act of transferring a copy" of the code or for warranty protection). (Ex. 27 § 1; Ex. 26 § 1.) If modified works or machine-readable versions of GPL- or LGPL-licensed software are distributed, they must be licensed "at no charge to all third parties under the terms of this License." (Ex. 27 § 2 (emphasis added); Ex. 26 § 2; see also Ex. 27 § 3; Ex. 26 § 4.); *Plaintiff's Exhibit 10*

Licensing valuable intellectual property below cost at "no charge" has a specific name in antitrust terminology -- predatory pricing. The only competitive incentive for licensing intellectual property at "no charge" is to destroy competition and foreclose a targeted market in order to leverage profits in a related market.

It is without question that due to the cross-licensing provisions of the GPL that all entities who choose to contribute intellectual property to a pooled compilation such as the Linux operating system are potential equals at all levels of the product distribution chain -- when considered as "manufacturers" of intellectual property or when viewed as retail "distributors" of the pooled intellectual property.

"Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."; *BUSINESS ELECTRONICS v. SHARP ELECTRONICS*, 485 U.S. 717 (1988)

Defendant IBM has described the equality among entities who use the GPL license in a prior submission in federal court (see *Plaintiff's Exhibit 11*):

"25. Whereas the licenses for most software are programs designed to limit or restrict a licensee's freedom to share and change it, the GPL is intended

to guarantee a licensee's freedom to share and change free software -- to make sure the software is free for all its users. The GPL applies to any program whose authors commit to using it.

26. The GPL is designed to make sure that a licensee has the freedom to distribute copies of free software, receives source code or can get it if the licensee wants it, can change the software or use pieces of it in new free programs and knows the licensee can do these things.

27. The Linux kernel is subject to the GPL as it is comprised of programs and other works that contain notices placed by contributing copyright holders permitting distribution under the terms of the GPL. The Linux developers' public agreement to apply GPL terms expresses in a binding legal form the conscious public covenant that defines the open-source community -- a covenant that SCO itself supported as a Linux company for many years.

28. SCO accepted the terms of the GPL by modifying and distributing Linux products. By distributing Linux products under the GPL, SCO agreed, among other things, not to assert -- indeed, it is prohibited from asserting -- certain proprietary rights over any programs distributed by SCO under the terms of the GPL. SCO also agreed not to restrict further distribution of any programs distributed by SCO under the terms of the GPL."; *Plaintiff's Exhibit 11*

The cross-licensing provision "at no charge to all third parties" binds all who participate in a collaborative price-fixing agreement. An Individual act performed in furtherance of this price-fixing agreement is the common act of all collaborating licensees:

"And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that 'an overt act of one partner may be the act of all without [328 U.S. 640, 647] any new agreement specifically directed to that act.' United States v. Kissel, 218 U.S. 601, 608 , 31 S.Ct. 124, 126. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. Wiborg v. United States,

163 U.S. 632, 657, 658 S., 16 S.Ct. 1127, 1137, 1197."; *PINKERTON v. U. S.*, 328 U.S. 640 (1946).

At a minimum only two charged co-conspirators need contribute intellectual property as manufacturers (creators) to form a horizontal conspiracy. Likewise, only two co-conspirators need distribute the product at the retail level to form a horizontal conspiracy for antitrust purposes.

The Defendant IBM, through its own declarations, has admitted participation in a per se horizontal price-fixing scheme involving the cross-licensing of "thousands" of developers:

"19. In the years that followed, thousands of developers, including developers at IBM, contributed to the further development of Linux. Version 2.4 of the Linux kernel was released in 2001. IBM owns valid copyrights in its contributions to Linux, as illustrated below."; *Plaintiff's Exhibit 11*

It is beyond doubt that the Defendant IBM has used the Linux operating system in commercial transactions:

"43. Today, IBM has many Linux-related offerings: mainframes and servers that run Linux; memory solutions for Linux environments; a broad range of software offerings; services that include deployment of Linux-based e-business environments, migration of database applications and data to Linux systems, support for Linux-based cluster computing, server consolidation, and a 24-hour technical engineering support line. IBM has created a Linux Center of Competency that offers Linux training and support, applications testing, technical advice and a hands-on environment in which to evaluate Linux and Linux-based applications." *Plaintiff's Exhibit 11*

The Defendant IBM's claim that it is beyond doubt that Plaintiff Daniel Wallace can prove no set of facts in support of his claim concerning an unreasonable restraint in trade is totally without merit.

Antitrust Injury

Plaintiff Daniel Wallace has alleged market foreclosure and denial of opportunity to enter the market with his own operating system product:

"The Defendants' per se horizontal price-fixing scheme is rapidly foreclosing competition in the market for computer operating systems. Said price-fixing scheme threatens to prevent Plaintiff Daniel Wallace from entering into the free market with his own computer operating system"; *Plaintiff's Complaint*

Two elements must be alleged when pleading for equitable relief under § 16 of the Clayton Act:

1.) Threatened loss or damage of the type the antitrust laws were designed to prevent.

2.) Injury that flows from that which makes defendants' acts unlawful.

"To seek an injunction under § 16 of the Clayton Act, a private plaintiff must allege "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104 (1986).

Plaintiff has alleged threat of "market foreclosure" -- certainly a type of antitrust injury the antitrust laws are designed to prevent:

"The alleged conduct - higher service prices and market foreclosure - is facially anticompetitive and exactly the harm that antitrust laws aim to prevent."; *EASTMAN KODAK CO. v. IMAGE TECH. SVCS.*, 504 U.S. 451 (1992)

In 2003, the FREE SOFTWARE FOUNDATION INC., a named and uncharged co-conspirator in this case, described the exponential market foreclosure that flows from predatory pricing of computer programs at \$0.00 ("no charge"):

"It was, from the point of view of venture-capital funded, profit-making, investor-owned industries, an impossible goal, never achieved. We did it. GNU, Linux, and all the other thousands of programs in the free software world, run, as Rita correctly said, on everything. From the palmtop, the cell phone, and the single-purpose appliance—like the digital camera and the personal video recorder—to the mainframe...

We have been doing it in an exponential growth curve for slightly over twenty years. Now we have forty percent of the server market. We're going to have a hundred percent of the appliance market within five years..."; *Plaintiff's Exhibit 9*

The Plaintiff has further alleged denial of opportunity to enter and compete for profit in the relevant marketplace -- exactly the type of injury that flows from illegal market foreclosure due to predatory price-fixing.

The Defendant cites to the "intention and preparedness" test referred to in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982). This test is administered in the context of the relevant market and involves a varying combination of factors.

In the relevant market of intellectual property contained in computer programs, the investment in formal education and work experience of the individual developer is one factor of importance. The dominant factor is the investment cost of a skilled developer's time utilized in creating, modifying and testing the computer programs. The actual investment cost of physical reproduction of computer programs for marketing is a minimal factor -- a few cents per copy.

Filed on the record in this matter is Plaintiff's *DECLARATION OF PLAINTIFF DANIEL WALLACE*. Plaintiff notes his extensive background in computer technology that began while earning a B.S. degree in Physics at Indiana University in the 1970's. Plaintiff claims over twenty years of employment experience and continuing education in computer programming and associated technology fields, both in the manufacturing industry and as a small business entrepreneur.

Plaintiff Daniel Wallace has claimed an investment in the skilled time required to research, develop and test a computer operating system in order to enter the operating system market -- an investment that will become a total loss in light of an exponentially accelerating market foreclosure. These facts easily exceed the minimum threshold of the "intention and preparedness" test for a potential entrant in the relevant market of computer operating systems.

The Defendant's claim that it is beyond doubt that Plaintiff Daniel Wallace can prove no set of facts in support of his claim concerning antitrust injury is totally without merit.

Conclusion

The Defendant IBM's strategy in this Motion to Dismiss is obvious -- prevent this case from ever being examined on the merits. Despite abundant evidence on the record -- including statements in federal court by the Defendant IBM itself concerning the Linux operating system and the GPL licensing scheme -- the Defendant IBM has chosen to cynically ignore the facts on record in this matter and instead engage in an elaborate game of "gotcha" pleading. This ploy was soundly rejected by the Supreme Court:

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 "; *CONLEY v. GIBSON*, *supra*.

It stretches the imagination that Defendant IBM, the largest computer technology corporation in the World, does not have "fair notice of what the plaintiff's claim is and the grounds upon which it rests", when in reality it has been in litigation concerning Linux and the GPL for years. The Defendant IBM,

prior to the initiation of any "liberal opportunity for discovery", demands that Plaintiff Daniel Wallace prove his case by a preponderance of the evidence at the pleading stage or face dismissal with prejudice.

"The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" 8 that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures [355 U.S. 41, 48] established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. 9 Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis."; *CONLEY v. GIBSON, supra*.

WHEREFORE, Plaintiff Daniel Wallace requests the Court DENY Defendant INTERNATIONAL BUSINESS MACHINES CORPORATION Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6) and enter judgment in favor of Plaintiff Daniel Wallace.



Dated this 22nd day of July, 2005.


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Certificate of Service

A copy of the document(s) in this matter were sent by first-class U.S. mail,
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Daniel Wallace

Dated this 22nd day of July, 2005