

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

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

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

In his Answer Brief (“Response”) to the Motion to Dismiss the Amended Complaint filed by Defendant International Business Machines Corporation (“IBM”), Plaintiff fails to address the main thrust of IBM’s Brief: Plaintiff’s Amended Complaint should be dismissed because the allegations of the Complaint itself, including the terms of the GNU Public License (“GPL”) attached to the Complaint, demonstrate that the agreement at issue does not violate antitrust laws and because Plaintiff has no legally cognizable antitrust injury. Instead, Plaintiff’s Response rests on the incorrect belief that giving “notice” of his allegations is all that is required under the Federal Rules, regardless of the inherent and fatal flaws in his claim. The Amended Complaint must therefore be dismissed with prejudice under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

I. LEGAL STANDARD.

Plaintiff appears to believe that so long as he provides defendants with “fair notice” of his claims that the Court cannot dismiss even though his claims have no legal merit. (Response at 11.) As noted in one of the cases Plaintiff cited, however, “[t]his 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.” *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999). Even assuming Plaintiff’s Amended Complaint gave IBM proper notice of his claims, his case must be dismissed because the substance of his claims has no legal merit. *Id.*

Plaintiff also appears to believe his claim can survive a motion to dismiss simply by alleging legal conclusions like “per se horizontal price-fixing scheme.” (Am Compl. at 2.) This is clearly insufficient, as the “invocation of antitrust terms of art does not confer immunity from a motion to dismiss; to the contrary, these conclusory statements must be accompanied by supporting factual allegations.” *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1110 (7th Cir. 1984). Further, “[i]n considering a motion to dismiss, the court is not required to don blinders and to ignore commercial reality.” *Id.*

Plaintiff cites *Conley v. Gibson*, 355 U.S. 41 (1957) for the notion that a complaint should not be dismissed for failure to state a claim unless a plaintiff can prove “no set of facts which would entitle him to relief.” (Response at 1, quoting *Conley* at 46.) Even taking all the facts alleged as true, as we must on a 12(b)(6) motion, Plaintiff can prove no set of facts that would entitle him to relief for the reasons articulated in IBM’s Motion to Dismiss and this Reply.

II. PLAINTIFF DEMONSTRATES HE CANNOT SHOW ANY ANTITRUST INJURY, AS REQUIRED FOR STANDING TO BRING AN ANTITRUST CASE.

Plaintiff's Response reflects a fundamental misunderstanding about what is required to show "antitrust injury," and his arguments serve only to confirm that he does not have standing to bring this case. Plaintiff fails to explain how licensing software code through the GPL at no cost to consumers would harm consumers. His argument centers only around him as a competitor and the "denial of opportunity [for him] to enter and compete for profit in the relevant marketplace." (Response at 10.)

Plaintiff quotes *Cargill Inc. v. Monfort of Colorado, Inc.*, 4798 U.S. 104 (1986), but that case wholly supports IBM's position that Plaintiff cannot show antitrust injury. The Supreme Court in that case held that a private plaintiff seeking equitable relief under the antitrust laws must allege "threatened loss or damage of the type the antitrust laws were designed to prevent." *Id.* at 113. The plaintiff in that case failed to allege antitrust injury where the only threatened injury was its inability to compete against the efficiencies of a larger competitor. *Id.* at 115. The Court made clear that "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition." *Id.* at 116. Accordingly, the fact that Plaintiff might be unable to enter the market and "profit" from fees he would charge consumers for licensing his operating system cannot by itself be the "loss or damage of the type the antitrust laws were designed to prevent." *Id.* at 113.

Plaintiff argues that his inability to enter the market results in a "market foreclosure," which he claims is "exactly the harm that antitrust laws aim to prevent." (Response at 9, quoting *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 478 (1992).) The "market

foreclosure” in *Kodak*, however, had the opposite effect of the “foreclosure” alleged by Plaintiff here. Kodak had allegedly foreclosed independent service organizations from competing in the market to service Kodak copy machines, which resulted in “higher service prices” to consumers. *Id.* at 455, 478. The market foreclosure in *Kodak* was the type of harm the antitrust laws were intended to prevent because the lack of competition would result in *higher* consumer prices. *Id.*

In the present case, however, Plaintiff complains that the prices are too *low* and requests the Court enjoin the GPL so he can *raise* the prices consumers would have to pay for a license and make a “profit.” (Response at 10.) This is not the type of harm the antitrust laws were intended to prevent, so Plaintiff cannot show the requisite antitrust injury required for standing. Plaintiff’s lack of standing is inherent, so this case must be dismissed with prejudice.

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

Plaintiff appears to believe that he can avoid alleging any actual agreement among the Defendants provided that he puts IBM on “notice” of the identity of “at least three alleged co-conspirators” and of his allegations concerning the GPL to which Defendants unilaterally contribute. (Response at 3.) As explained above, however, putting IBM on “notice” of Plaintiff’s claim is not sufficient to prevent dismissal where, as here, essential elements of his claim are missing. *See Kirksey*, 168 F.3d at 1041.

Plaintiff still fails to allege the essential element of concerted action *between* or *among* the Defendants as required for all Section One claims.¹ Plaintiff maintains that the Defendants and “thousands of developers” “conspired by using” the GPL through their decisions to contribute code to the Linux operating system. (Response at 2-4, 8.)² As contributing code to the Linux operating system under the terms of the GPL constitutes nothing more than a series of unilateral actions, the requirement of concerted activity cannot be met.

Plaintiff quotes an old criminal case stating that an overt act by one conspirator is an “act of all without any new agreement specifically directed to that act,” in an apparent attempt to argue that each time a person unilaterally decides to contribute code to Linux, they are committing an overt act to a conspiracy with every other contributor without needing a “new agreement” each time. (Response at 7-8, quoting *Pinkerton v. United States*, 328 U.S. 640, 646 (1946) (internal citations omitted).) To the extent this is Plaintiff’s argument, it fails to show any concerted action in this case because there logically cannot be a “new agreement” without some existing agreement to which the act is directed. Plaintiff has failed to allege any existing

¹ Plaintiff argues in his Response that the GPL constitutes “predatory pricing” or “predatory price-fixing.” (Response at 6, 9-10.) To the extent this indicates Plaintiff is now attempting to make a monopolization claim under Section Two of the Sherman Act, this claim can easily be dismissed. Plaintiff has failed to allege the required elements of a Section Two predatory pricing claim, including any allegation that the Defendants lowered prices with “a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.” *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 597-598 (1986) (reversing the finding of predatory pricing because an alleged conspiracy among several companies to charge below-market prices was “an economically senseless conspiracy”). A predatory pricing claim would therefore fail to even make it to the starting gate.

² Plaintiff purports to quote from his Amended Complaint, but much of the language quoted is in fact nowhere to be found in either the Complaint or Amended Complaint. He states that he alleged that the use of the GPL constitutes an agreement “to develop, distribute and leverage [the Linux] operating system to provide Linux related computing services for small businesses, industry and educational institutions,” (Response at 2), but this language is not contained anywhere in the pleadings. Even if the added allegation were considered a proper further amendment to his complaint, however, it would not add anything to the analysis, and the Amended Complaint would still have to be dismissed for the reasons described herein.

agreement between or among Defendants, so unilateral contributions to the Linux operating system cannot be in furtherance of such an agreement.

It is clear Plaintiff cannot allege anything other than unilateral conduct in contributing code to the Linux operating system. The Amended Complaint must therefore be dismissed on this basis as well.

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

Plaintiff fails to address IBM's argument that his claims should be analyzed under the rule of reason as a vertical maximum price fixing claim under *State Oil v. Khan*, 522 U.S. 3, 22 (1997). A licensor and a licensee have a vertical, not a horizontal, relationship, so any claim with the GPL as the "agreement" must be analyzed as a vertical agreement subject to the rule of reason. *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir 1999).

Plaintiff also makes no attempt to correct his failure to allege the elements required for a rule of reason case. *See generally 42nd Parallel North v. E Street Denim Co.*, 286 F.3d 401, 404 (7th Cir. 2002). Despite a section in the Response entitled "Unreasonable Restraint of Trade," (Response at 4), Plaintiff makes no argument that the GPL has had an anticompetitive effect in a relevant market, or that IBM had the requisite market power.

A plaintiff who fails to respond responsively to arguments raised in a motion to dismiss but merely stands on the allegations in the complaint forfeits his right to continue litigating the case. *Kirksey*, 168 F.3d at 1043. As the Plaintiff failed to allege the required elements of a rule

of reason case or address this failure in his Response, the Amended Complaint must now be dismissed with prejudice.

CONCLUSION

Plaintiff has failed to state any claim under the antitrust laws, even after an opportunity to amend his complaint and argue his case in a Response. The inherent defects in the nature of Plaintiff's alleged injury, the Defendants' unilateral actions, and the lack of any anticompetitive effects, require that this case be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of August, 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
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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
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s/ Kendall Millard

Kendall Millard