

**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.)	

**MOTION TO STAY BRIEFING
ON PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
AND TO STAY PRETRIAL CONFERENCE**

Defendant, International Business Machines Corporation (“IBM”), with the consent of Plaintiff Daniel Wallace and Defendants Red Hat, Inc. (“Ret Hat”) and Novell, Inc. (“Novell”), moves to stay the briefing on Plaintiff’s Motion for Summary Judgment and stay any pretrial conferences pending the resolution of IBM’s and the other Defendants’ Motions to Dismiss the Amended Complaint. In further support of this Motion, IBM states the following:

1. On May 9, 2005, Plaintiff filed his original Complaint.
2. On June 30, 2005, IBM timely filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), along with a supporting brief. Plaintiff filed a Motion for Summary Judgment on the same day.
3. On July 1, 2005, Plaintiff filed his Response to IBM’s Motion to Dismiss.

4. On July 5, 2005, Plaintiff filed an Amended Complaint.
5. On July 6, 2005, Defendants Red Hat and Novell filed a Motion to Dismiss under Rule 12(b)(6) along with a supporting brief.
6. On July 7, 2005, Plaintiff filed his Response to Red Hat and Novell's Motion to Dismiss.
7. On July 11, 2005, Judge Barker entered an Order granting Plaintiff's motion to amend his complaint, denying IBM's Motion to Dismiss the original complaint as moot, and providing Defendants until September 9, 2005 to respond to Plaintiff's motion for summary judgment.
8. On July 19, 2005, IBM filed a Motion to Dismiss the Amended Complaint, responding to the arguments contained in Plaintiff's Response and the new allegations in the Amended Complaint.
9. On July 22, 2005, Plaintiff filed his Response to IBM's Motion to Dismiss the Amended Complaint.
10. On August 5, 2005, IBM filed its Reply to Plaintiff's Response. Red Hat and Novell filed a Motion to Dismiss the Amended Complaint on August 8, 2005, incorporating by reference the arguments made in IBM's Motion to Dismiss the Amended Complaint and IBM's Reply.
11. IBM's Motion to Dismiss is now fully briefed and ready for a ruling by the Court.

12. The parties currently have a Pretrial Conference before Magistrate Judge Shields scheduled for August 18, 2005.

13. IBM has raised issues concerning Plaintiff's standing to sue and whether the Amended Complaint contains all elements of a claim under Section 1 of the Sherman Act. These are threshold issues that, under controlling Seventh Circuit authority, should be addressed at the outset of the lawsuit under Rule 12 (b)(6) before the parties engage in the expense of discovery. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984).

14. If IBM's Motion to Dismiss is not granted in full, IBM would require discovery of Plaintiff before it could fully respond to Plaintiff's Motion for Summary Judgment.

15. IBM counsel has consulted with Plaintiff and with counsel for Red Hat and Novell concerning a case management plan for this matter. During these discussions, all parties agreed that conducting discovery or completing the briefing on summary judgment would be premature at this time. All parties consented to stay the summary judgment briefing and any pretrial conferences until after the Court has ruled on the briefing already before the Court.

WHEREFORE, IBM prays for the Court to stay briefing on Plaintiff's Motion for Summary Judgment, and to stay the Pretrial Conference currently set for August 18, 2005, pending its ruling on IBM's Motion to Dismiss the Amended Complaint, and for all other necessary and proper relief.

Respectfully submitted,

s/ Kendall Millard

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Attorneys for Defendant, International
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th 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
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
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s/ Kendall Millard

Kendall Millard