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

Daniel Wallace,

Plaintiff,

v. Civil Complaint No. 1:05-cv-0678-RLY-VSS

INTERNATIONAL BUSINESS MACHINES CORPORATION, et al.,

Defendants.

# PLAINTIFF'S ANSWER BRIEF TO DEFENDANTS' NOVELL INC AND RED HAT INC 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 all other documents on file with the Court, and those matters of which the Court may take judicial notice.

## PRELIMINARY STATEMENT

The Seventh Circuit has ruled on the standard for assessing the sufficiency of a complaint under F.R.Civ.P. Rule 8(a):

"This court reviews dismissals of complaints de novo. See Conley v. Gibson, 355 U.S. 41, 45-46 , 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). "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 in support of his claim which would entitle him to relief." Id. A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. See Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984). But such allegations need only state a possible claim, not a winning claim. See, e.g., Conley, 355 U.S. at 45 -46, 78 S. Ct. at 102; Trevino v. Union Pac. R.R. Co., 916 F.2d 1230, 1234 (7th Cir.

1990) ("The federal rules do not require a plaintiff to allege sufficient facts to establish his right to a judgment. All it requires [sic] . . . is a 'short and plain' . . . statement of what his claim is.") (quoting Fed. R. Civ. P. 8(a)(2)). And this court has steadfastly held that a plaintiff's complaint "need not plead facts or legal theories; it is enough to set out a claim for relief . . . ." Nance v. Vieregge, No. 96-1822, 1998 WL 315959 at *1 (7th Cir. June 17, 1998). Moreover, "[a] complaint may not be dismissed under Fed. R. Civ. P. 12(b)(6) just because it omits factual allegations . . . ." La Porte County Republican Cent. Comm. v. Board of Comm'rs of the County of La Porte, 43 F.3d 1126, 1129 (7th Cir. 1994)." *PEGRAM. ET AL. v. HERDRICH, 154 F. 3d 362 (CA7 1998).*

The Sherman Act is broadly written and meant to embrace every conceivable unreasonable restraint of trade regardless of form or appearance:

"... [A]lthough it was held in the Standard [221 U.S. 106, 181] Oil Case that, giving to the statute a reasonable construction, the words 'restraint of trade' did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the 1st and 2d sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."; *U.S. v. AMERICAN TOBACCO CO.,* 221 U.S. 106 (1911).

Three elements need be alleged for a successful claim under section 1 of the Sherman Act:

1) A contract, combination or conspiracy.

2) An unreasonable restraint of trade in a relevant market.

3) An antitrust injury.

See *Denny's Marina, Inc. v. Renfro Prods. Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993)

CONTRACT, COMBINATION OR CONSPIRACY

Plaintiff Daniel Wallace has alleged that at a least four named entities,

NOVELL INC., RED HAT INC., INTERNATIONAL BUSINESS MACHINES CORPORATION, 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"; *Plaintiff's Amended Complaint*

Defendants NOVELL and RED HAT are surely on notice as to the specific identity of four alleged co-conspirators in this scheme. Defendants NOVELL and RED HAT are also on notice as to the express alleged conspiratorial agreement used by the co-conspirators. Plaintiff's *Amended Complaint* obviously contains sufficient "direct or inferential allegations", *PEGRAM. ET AL. supra*, for the required element of a "contract, combination or conspiracy " *Denny's Marina Inc., supra*.

UNREASONABLE RESTRAINT OF TRADE IN A RELEVANT MARKET

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."

The alleged price fixing agreement is 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 utilized by the co-conspirators. For one thing it is a generic adhesion contract that applies to all copyright licensors of copyrighted code in a computer program. Another thing to note is that it is an agreement which 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 licensor using this agreement is cross-licensing his intellectual property with all other third party contributing licensors in a computer program if they accept the GPL terms. It is also obvious that all intellectual property pooled under this cross-licensing agreement is price fixed at "no charge to all third parties.

Independent copyright owners such as NOVELL INC. and RED HAT INC. who have cross-licensed their copyrights under the GPL are obviously in a horizontal relationship as licensors.

In the absence of the pooling through the GPL license, the Defendants would be competing developers creating their own operating system. The pooling of copyrights is hostile to the intent of the antitrust laws -- there is no

pooling exception for "blocking copyrights" in contrast to patents where conflicting patents sometimes prevent the manufacture of a product:

> "Although it is possible that two copyright owners will each claim that the other copied certain material from it, such symmetrical claims are much less likely than in patent cases. As a result, there is no corollary in copyright law to this important class of patent disputes that require investigation of the merits. n62 Where blocking copyright cases do arise, the legal outcome is different because there is no law of "blocking copyrights." n63 Rather, the creator of a work that uses infringing material from another loses all copyright in the newly created work."; *Anticompetitive Settlement of Intellectual Property Disputes*, Hovenkamp, Janis and Lemley, *87 Minn. L. Rev.* 1719, 1737 (June 2003).

Commercial firms such as the Defendants NOVELL INC., RED HAT INC. and IBM INC., that distribute their cross-licensed GPL products such as the Linux operating system to consumers, are potential horizontal competitors at the same product distribution level. Absent the GPL license, the Defendants would be actual or likely competitors -- free to set their prices in accord with free market forces.

> "The Agencies will treat a relationship between a licensor and its licensees, as horizontal when they would have been actual or likely potential competitors in a relevant market in the absence of the license." *Antitrust Guidelines for the Licensing of Intellectual Property*; U.S. Department of Justice and the Federal Trade Commission (April 6, 1995).

Under a rule of reason analysis, no competitive justification for the GPL license scheme can be established. Licensing of valuable intellectual property below cost at "no charge" has a specific name in antitrust terminology -- predatory pricing. The only competitive incentive for licensing pooled intellectual property that is price-fixed at "no charge" is to eliminate competition and foreclose a targeted market in order to leverage profits in a related market.

> "Predatory pricing is thus a practice "inimical to the purposes of [the antitrust] laws," Brunswick, 429 U.S., at 488, and one capable of inflicting

antitrust injury."; *CARGILL, INC. v. MONFORT OF COLORADO, INC.,* 479 U.S. 104, 118 (1986).

Plaintiff's *Amended Complaint* obviously contains sufficient "direct or inferential allegations", *PEGRAM. ET AL. supra*, for the required element of an "an unreasonable restraint of trade in a relevant market", *Denny's Marina Inc., supra.*

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 (15 U.S.C. sec 26):

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 a threat of "market foreclosure" -- a type of antitrust injury the Supreme Court has described as "facially anticompetitive".

"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)

Fixing the price of valuable copyrighted property at "no charge" $0.00

is not simply "price cutting " -- it is obviously "predatory pricing" as the term is used in antitrust contexts. This below cost (at no charge) pricing of computer programs has no competitive virtue whatsoever. The obvious goal is to eliminate competition and foreclose the targeted market. This result causes damage to potential competitors as well as free market competition.

The Supreme Court has explicitly stated that predatory pricing harms both competitors and competition:

"Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. 12 It is a practice [479 U.S. 104, 118] that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice "inimical to the purposes of [the antitrust] laws," Brunswick, 429 U.S., at 488, and one capable of inflicting antitrust injury."; *CARGILL, INC. v. MONFORT OF COLORADO, INC.,* 479 U.S. 104 (1986)

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 Defendants cite 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

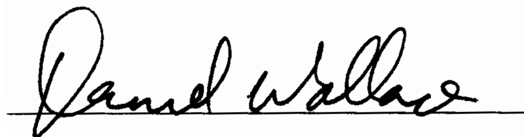
exceed the minimum threshold of the "intention and preparedness" test for a potential entrant in the relevant market of computer operating systems.

Plaintiff's *Amended Complaint* obviously contains sufficient "direct or inferential allegations", *PEGRAM. ET AL. supra*, for the required element of an "antitrust injury", *Denny's Marina Inc., supra*.

## CONCLUSION

Plaintiff Daniel Wallace has alleged that at least four named co-conspirators have used an express agreement to pool their copyrights in the computer operating system market. Plaintiff has alleged said copyrights are horizontally price-fixed at predatory levels. Plaintiff Daniel Wallace has alleged threatened antitrust injury. These allegations are sufficient to satisfy the notice pleading requirements of F.R.Civ.P Rule 8(a).

WHEREFORE, Plaintiff Daniel Wallace requests the Court DENY Defendants' NOVELL INC. and RED HAT INC. Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6) and enter judgment in favor of Plaintiff Daniel Wallace.



Dated this 11th day of August 2005.

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# Certificate of Service

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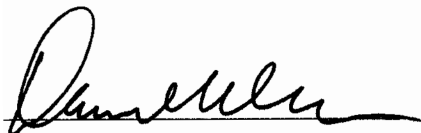
Dated this 11th day of August, 2005



Daniel Wallace