

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DANIEL WALLACE,)	
)	
Plaintiff,)	
)	
v.)	
)	Cause No. 1:05-cv-678-SEB-VSS
INTERNATIONAL BUSINESS MACHINES)	
CORPORATION, RED HAT, INC., and NOVELL,)	
INC.,)	
)	
Defendants.)	

**REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION
TO DISMISS PLAINTIFF'S COMPLAINT**

I. Introduction

In reply to Plaintiff's Answer Brief to Defendants' Novell Inc. and Red Hat Inc. Motion to Dismiss the Amended Complaint ("Response Brief") (Pleading No. 42), Defendants Red Hat, Inc. ("Red Hat"), and Novell, Inc. ("Novell"), join in and adopt the arguments asserted by Co-Defendant International Business Machines Corporation ("IBM") in its Reply Brief in Support of Defendant International Business Machines Corporation's Motion to Dismiss the Amended Complaint ("IBM's Reply Brief") (Pleading No. 39).

Plaintiff's response to Red Hat and Novell's Motion to Dismiss the Amended Complaint is, for the most part, identical in substance to the response Plaintiff gave to IBM's Motion to Dismiss the Amended Complaint. However, Red Hat and Novell would submit the following in further support of their Motion to Dismiss the Amended Complaint.

II. Argument

In his effort to avoid dismissal of his claims, Plaintiff strays far from the allegations of his Amended Complaint. Instead of addressing Defendants' position that the GNU General

Public License ("GPL") does not violate the antitrust laws, Plaintiff devotes the bulk of his Response Brief to manufacturing an argument that Defendants have entered into "cross licensing" or "pooling" agreements with each other. This argument is beside the point because no such "cross licensing" or "pooling" agreements are alleged in the Amended Complaint.

In the Amended Complaint, Plaintiff correctly points out that the GPL is the agreement under which IBM, Novell, and Red Hat distribute their respective versions of the GNU/Linux operating system to consumers:

The Defendants have conspired by using a price-fixing agreement known as the GNU GENERAL PUBLIC LICENSE to develop, distribute and leverage the Linux operating system to provide computing services to consumers.

(Amended Complaint at 2.) Plaintiff has brought this lawsuit to enjoin IBM, Novell, and Red Hat from developing and distributing their versions of the GNU/Linux operating system to consumers in the course of commerce:

The Plaintiff respectfully requests the Court grant equitable relief in the form of an injunction prohibiting the development and distribution of the Linux operating system under the GNU GENERAL PUBLIC LICENSE in the course of commerce by [Defendants].

(Amended Complaint at 3.)

Conspicuously absent from the Amended Complaint is any allegation that Defendants have entered into horizontal "cross licensing" or "pooling" agreements among themselves. To the contrary, the GPL, which is the target of Plaintiff's Amended Complaint, is a software licensing agreement under which the GNU/Linux Operating System is licensed by distributors (such as Defendants) to users. The express purpose of the GPL is to make certain that "the software is free for all its users." (GPL, Preamble.)

Plaintiff's mischaracterization of the GPL in his in his Response Brief has no bearing on the resolution of the pending Motion to Dismiss because the Court can examine the GPL itself.

"[T]o the extent that the terms of an attached contract conflict with the allegations of the complaint, the contract controls." *Centers v. Centennial Mortg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005). The express terms of the GPL control here, and those terms trump the wishful characterizations found in Plaintiff's Response Brief.¹

Contrary to Plaintiff, the GPL is indisputably a *vertical* agreement between the licensee and the licensor of the underlying software. The relationship between licensee and licensor under the GPL is essentially the relationship between a buyer and a seller. "[W]e treat the [software] licenses as ordinary contracts accompanying the sale of products." *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996). "[B]y definition, vertically related firms exist in a buyer-seller relationship, and agreements are essential to buying and selling." XI Herbert Hovenkamp, *Antitrust Law* ¶ 1902d (2d ed. 2005).

Moreover, the Amended Complaint makes clear that Plaintiff is not challenging any such agreements but is instead challenging the use of the GPL by Defendants in distributing their respective versions of the GNU/Linux operating system to consumers. The Court should therefore disregard the arguments made by Plaintiff in his Response Brief that are based on hypothetical "cross licensing" or "pooling" agreements which are not even mentioned in the Amended Complaint.²

Plaintiff mistakenly relies on *Antitrust Guidelines for the Licensing of Intellectual Property*, U.S. Department of Justice, April 6, 1995.³ (*See* Response Brief at 5.) The *Antitrust*

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. Sun Life Assur. Co. of Canada*, 737 F.Supp. 1058, 1066 (S.D. Ind. 1989).

² "Pooling" or "cross licensing" agreements between or among Defendants are not mentioned in the original Complaint, either. Like the Amended Complaint, the original Complaint attacked the use of the GPL "in the sale and promotion of computer software products" as a scheme "to fix the prices of computer programs." (Original Complaint at 2.)

³ This document is available online at <http://www.usdoj.gov/aatr/public/guidelines/ipguide.htm>.

Guidelines do not apply to this private lawsuit, and the specific passage cited by Plaintiff does not square with the facts as alleged in the Amended Complaint. Plaintiff cites the following passage from the *Antitrust Guidelines*:

For analytical purposes, the [Department of Justice and the Federal Trade Commission] ordinarily will treat a relationship between a licensor and its licensees, or between 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 at 14.

The concerns of the *Antitrust Guidelines* are directed to license agreements that preclude or eliminate competition between the parties. The passage cited by Plaintiff applies only where, unlike here, the challenged license agreement changes the relationship between the parties by precluding competition between them that would otherwise exist absent the license agreement. Defendants are competitors in the distribution of GNU/Linux operating system notwithstanding the GPL, and the terms of the GPL do not change their competitive relationship.

As noted by Plaintiff in his Response Brief each of Defendants distributes their respective versions of GNU/Linux operating system to "consumers" generally. (Response Brief at 5.) There is no allegation in the Amended Complaint that Defendants have agreed not to compete for customers for their respective versions of the GNU/Linux operating system. Plaintiff could not credibly make any such allegation, because the public advertisements of Defendants touting the merits of their respective distributions and soliciting customers would refute it.

In any case, the *Antitrust Guidelines* have no application to this private lawsuit. They apply only to enforcement actions brought by the Justice Department or the Federal Trade Commission. "These guidelines state the antitrust enforcement policy of the U.S. Department of Justice and the Federal Trade Commission...." *Antitrust Guidelines* at 1.

Likewise, the Court should reject Plaintiff's afterthought argument that the Amended Complaint states a claim for "predatory pricing." (*See* Response Brief at 5, citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)).⁴ The allegations of the Amended Complaint, which incorporates the GPL by reference, demonstrate that Plaintiff cannot prevail on a claim for predatory pricing.

In order to prevail on a claim for predatory pricing, Plaintiff must show that Defendants have conspired under the GPL to sell the GNU/Linux operating system at loss. More specifically, Plaintiff must show that as a consequence of the GPL the software is distributed at a price below average variable or incremental cost. *See MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1120-21 (7th Cir. 1983). However, the allegations of the Amended Complaint directly refute any such contention. The GPL expressly allows Defendants to charge a fee to recover the variable or incremental costs associated with distributing software licensed under the GPL: "You may charge a fee for the physical act of transferring a copy." (GPL ¶ 1.)⁵

Plaintiff must also show that Defendants have a reasonable expectation of recouping their losses in the future by charging higher prices for software licensed under the GPL after their competitors have been eliminated. "Predatory pricing is prohibited because of the fear that a monopoly or dominant firm will deliberately sacrifice present revenues for the purpose of driving rivals from the market and then recoup its losses through higher profits earned in the absence of competition." *MCI*, 708 F.2d at 1112. By its own terms, the GPL precludes

⁴ The Amended Complaint does not allege "predatory pricing." Instead, it alleges "price fixing." (Amended Complaint at 2.) In a vain attempt to avoid dismissal of his claims, Plaintiff first raised the issue of supposed "predatory pricing" only after Defendants had correctly noted that the vertical maximum price restraints were not subject to per se treatment under the antitrust laws.

⁵ Development costs would not be included in variable or incremental costs for common sense reasons. The only cost associated with distributing one additional copy of the GNU/Linux operating system is the cost of copying the software to a CD and shipping it or making it available for download, and the GPL expressly allows the recovery of such costs.

Defendants from charging a license fee for software distributed under the GPL, making "recoupment" impossible.⁶

Finally, the Court should reject Plaintiff's argument that he has antitrust standing as a consequence of the "alleged denial of opportunity to enter and compete" with IBM, Red Hat, and Novell. (Response Brief at 7.) Although Plaintiff has a respectable background in computers, including an undergraduate degree in physics and many years of practical experience as a computer programmer, that does not distinguish him from the host of other computer programmers in the United States for the purpose of antitrust standing.

It takes more than a college degree and some familiarity with the marketplace to meet the "intention and preparedness" requirement for antitrust standing. "Uniformly, the courts have drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is accompanied by certain indicia of ultimate success. Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his *intention* to enter a field; he must also demonstrate his *preparedness* to do so." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir.1977) (footnotes omitted) (emphasis in original).

The Court can take judicial notice that the market for computer operating systems is occupied by the likes of IBM and Microsoft, corporations with thousands of employees and comparatively vast financial resources. With all due respect to Plaintiff's accomplishments as an individual over a long and successful career, Plaintiff has cited no "indicia of ultimate success" in starting an enterprise on his own that would be capable of competing in this particular market. Absent allegations sufficient to demonstrate intention *and* preparedness to enter the market for

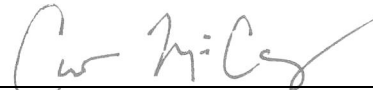
⁶ In fact, the GPL contains language that would effectively preclude Defendants from ever amending the GPL to require payment of a license fee. If new versions of the GPL are ever published, the licensee always has the option

computer operating systems, Plaintiff's Amended Complaint should be dismissed for failure to satisfy the requirement of antitrust standing.

III. Conclusion

For all of the above reasons, and for all of the reasons set out in IBM's Brief and Reply Brief in Support of its Motion to Dismiss, which have been adopted by Red Hat and Novell, Plaintiff's Complaint should be dismissed, with prejudice, under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,



Philip A. Whistler (#1205-49)
Curtis W. McCauley (#16456-49)

Attorneys for Defendants Red Hat, Inc., and
Novell, Inc.

ICE MILLER
One American Square Box 82001
Indianapolis, IN 46282-0002
317.236.2100

CERTIFICATE OF SERVICE

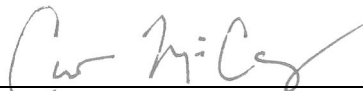
The undersigned hereby certifies that on the 1st day September 2005, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Michael Gottschlich
BARNES & THORNBURG
mgottsch@btlaw.com

Kendall H. Millard
BARNES & THORNBURG
kmillard@btlaw.com

The undersigned hereby certifies that on the 1st day of September 2005, a copy of the foregoing has been deposited in the U.S. mail, first class postage prepaid, addressed to:

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



Curtis W. McCauley

ICE MILLER
One American Square Box 82001
Indianapolis, IN 46282-0002
317.236.2100