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

Daniel Wallace,

Plaintiff,

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

INTERNATIONAL BUSINESS MACHINES CORPORATION;

RED HAT INC.;

NOVELL, INC.,

Defendants.

PLAINTIFF'S ANSWER BRIEF TO RED HAT, INC. AND NOVELL, INC.'S MOTION TO DISMISS COMPLAINT

Plaintiff Daniel Wallace appears in person and files the following Answer Brief pursuant to Local Rule 7.1.

Preliminary Statement

Plaintiff Daniel Wallace has previously filed a pending Motion for Summary Judgment. Plaintiff incorporates by reference into Plaintiff's Answer Brief his exhibits, the pleadings and other documents on file with the Court, and all matters of which the Court may take judicial notice. Plaintiff also has pending before the Court a more definite statement in the form of a Motion to Amend Complaint under F.R.Civ.P. Rule 15(a).

Violation of the Sherman Act

The Seventh Circuit has defined the elements of a claim under the Sherman Act's section 1:

"To state a claim for relief under section 1, a plaintiff must allege either that the contract, combination, or conspiracy resulted in a per se violation of the Sherman Act or that it unreasonably restrained competition in a relevant market. See Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993); Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1088 (7th Cir. 1992), cert. denied, 113 S. Ct. 2336 (1993); Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346, 1352 (7th Cir. 1982)." *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc., 62 F.3d 967, (7th Cir. 1995);*

Defendants Red Hat Inc. and Novell Inc. misunderstand the meaning of vertical alignment in antitrust analysis. The Defendants' reliance upon *State Oil v. Khan*, 522 U.S. 3 (1997) is misplaced in the case at hand.

Plaintiff Daniel Wallace has demonstrated by the evidence submitted that:

1.) Defendant Red Hat distributes the intellectual property in the Linux operating system at the retail market level under the Red Hat trademark. Said intellectual property is price-fixed by the GPL license at no charge to all third parties in the software package known as Red Hat LINUX 9 [Exhibit 4].

2.) Defendant Novell distributes the intellectual property in the Linux operating system at the retail market level under the Novell trademark. Said intellectual property is price-fixed by the GPL license at no charge to all third parties in the software package known as NOVELL SUSE LINUX PROFESSIONAL 9.3 [Exhibit 1].

The Defendants Red Hat Inc. and Novell Inc are distinct entities incorporated separately in the State of Delaware. They distribute the Linux operating system at many nationally syndicated retail outlet locations such as Best Buys and CompUSA stores and through nationally syndicated retail bookstore outlets such as Barnes and Noble. In addition, Defendants share the same license and distribute Linux by way of direct network connections from their

respective corporate Internet websites (http://www.redhat.com/ and http://www.novell.com/). They are without question distributors and marketers at the same distribution level.

"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)

The United States Department of Justice has issued guidelines for licensing intellectual property:

" The Agencies will not require the owner of intellectual property to create competition in its own technology. However, antitrust concerns may arise when a licensing arrangement harms competition among entities that would have been actual or likely potential competitors[15] in a relevant market in the absence of the license (entities in a "horizontal relationship"). A restraint in a licensing arrangement may harm such competition, for example, if it facilitates market division or price-fixing. In addition, license restrictions with respect to one market may harm such competition in another market by anti-competitively foreclosing access to, or significantly raising the price of, an important input,[16] or by facilitating coordination to increase price or reduce output." *Antitrust Guidelines for the Licensing of Intellectual Property (April 6, 1995) sec. 3.1*

Red Hat Inc. and Novell Inc. distribute the Linux operating system at a fixed price of "no charge" due to the requirements of the GPL license. In the absence of the GPL agreement they would be "actual or likely potential competitors" in the relevant market and therefore horizontal competitors.

The Defendants Red Hat Inc. and Novell Inc. are two distinct commercial entities that are potential horizontal competitors and this is sufficient to satisfy the minimum requirement of a "combination or conspiracy" for purposes of the Sherman Act's sec. 1. The Defendants' license (the GPL) establishes an express "concerted agreement" (the agreement is the gravamen of conspiracy) to fix

prices. The overt acts of product distribution at the same market level establish a "per se horizontal violation".

The actions of the Defendants Red Hat Inc. and Novell Inc. have therefore established a per se horizontal violation of the Sherman Act's sec 1.

All other co-conspirators who have joined the combination of Red Hat Inc. and Novell Inc. in the scheme by pooling their intellectual property under the GPL license (the conspiratorial agreement) in the Linux operating system are equally culpable in the same Sherman Act violation (Pinkerton doctrine):

"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)*

Antitrust Injury and Plaintiff's Standing to Sue

The Plaintiff has alleged in his complaint:

"This scheme denies the plaintiff Daniel Wallace an opportunity to earn future revenue in the field of computer programming."

Foreclosure of a market is one plausible and predictable consequence of a per se horizontal price-fixing scheme and is the basis for many antitrust claims.

Plaintiff Daniel Wallace has pending before the Court a Motion to Amend Complaint pursuant to F.R.Civ.P. Rule 15(a) that more definitely states market foreclosure and denial of opportunity for market entry.

Summary

Plaintiff Daniel Wallace has alleged at the pleading stage that:

1.) At least two or more legally distinct economic entities (Red Hat Inc. and Novell Inc.).

2.) Have expressly agreed by concerted action (adopting the GPL license).

3.) To fix the price of computer programs *per se* (GPL sec. 2(b)).

4.) In a horizontal restraint (Red Hat Inc. and Novell Inc. are on the same level of product distribution).

5.) Causing injury of the kind that the antitrust laws anticipate (market foreclosure).

6.) And threatened future injury (denial of market entry).

The above allegations if supported by competent evidence are sufficient to allow Plaintiff Daniel Wallace to prevail in his request for equitable relief:

"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)*

WHEREFORE, Plaintiff Daniel Wallace requests the Court DENY Defendants' Red Hat Inc. and Novell Inc. Motion to Dismiss pursuant to Rule 12(b)(6) and enter judgment in favor of Plaintiff Daniel Wallace.

Dated this 7th day of July, 2005.

Daniel Wallace, pro se
P.O. Box 572 317-861-6415
New Palestine, IN. 46163

Certificate of Service

A copy of the document(s) concerning this matter were sent by first-class U.S. mail, postage prepaid, to counsel of record:

Curtis W. McCauley
Philip A. Whistler
ICE MILLER
One American Square, Box 82001
Indianapolis, Indiana 46282-0200

Michael Gottschlich
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204

Dated this 7th day of July, 2005

Daniel Wallace