

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DANIEL WALLACE,)	
)	
Plaintiff,)	
)	
v.)	Cause No. 1:05-cv-618-JDT-TAB
)	
FREE SOFTWARE FOUNDATION, INC.,)	
)	
Defendant.)	

**FSF'S BRIEF IN SUPPORT OF ITS REASSERTED
MOTION TO DISMISS**

PRELIMINARY STATEMENT

On November 28, 2005, this Court dismissed Plaintiff's Third Amended Complaint, on the grounds that Plaintiff had not alleged any antitrust entry and therefore lacked standing, and gave Plaintiff leave to file an amended complaint within twenty (20) days "curing the deficiencies" identified by the Court. (*See* Entry Granting Motion to Dismiss the Complaint ("Entry") at 10-12). Two days later, on November 30, 2005, Plaintiff filed his Fourth Amended Complaint ("Complaint"). As discussed below, Plaintiff's last ditch effort to survive dismissal fails as a matter of law, because it fails to cure the deficiencies identified in the Court's Entry.

Because Plaintiff's current Complaint suffers from all the same defects as the last, Defendant, Free Software Foundation, Inc. ("FSF"), respectfully reasserts its prior Motion to Dismiss as against the Fourth Amended Complaint. Plaintiff still has not pleaded an antitrust injury. By facilitating the development and distribution of software to consumers at no cost other than the cost of the media on which it is distributed, the GNU General Public License ("GPL") plainly benefits consumers. Despite having now gone through five iterations of his complaint, Plaintiff still has not alleged specific facts to support a finding of injury to competition in some

identifiable segment of the market. Plaintiff merely repeats the same grievance as in his prior complaint, *i.e.*, he would like to develop an operating system of his own to compete with Windows, GNU/Linux, and other established operating systems, but is deterred from doing so because he fears that his efforts might not be rewarded financially to the extent that he would like. Plaintiff therefore seeks an injunction against an entire segment of the market that develops, supports, or uses software licensed under the GPL, because that would then improve his chances of making a profit in a business that he has yet to take any meaningful steps to start. Even if it were true that Plaintiff feels deterred by competition from software licensed under the GPL, that would not state a claim under the antitrust laws. Plaintiff's Fourth Amended Complaint should therefore be dismissed with prejudice for failure to state a claim upon which relief can be granted. In light of Plaintiff's inability to file a complaint stating a claim under the antitrust laws, even after the Court has identified the specific deficiencies in Plaintiff's pleadings, the Court should not allow Plaintiff to file any further amended complaints.¹

FOURTH AMENDED COMPLAINT

As to the issue of antitrust injury, which the Court found dispositive in its Entry, Plaintiff has made the following changes in going between the Third and Fourth Amended Complaints:

INJURY

The Defendant's ~~per se horizontal price~~ pooling and cross licensing of intellectual property with the described predatory price fixing scheme is rapidly foreclosing competition in the market for computer operating systems. Said predatory price- fixing scheme ~~threatens to prevent~~ prevents Plaintiff Daniel Wallace from ~~entering into the market with~~ marketing his own computer operating system as a competitor.

¹ FSF incorporates by reference and reasserts all of the arguments made in its briefing in support of its prior motion to dismiss, and for the sake of brevity FSF will not repeat them here. Instead, FSF will focus this brief on the issue of standing, which the Court found dispositive in its Entry granting the FSF's prior motion to dismiss.

(Cf. Third Amended Complaint and Fourth Amended Complaint.)

In response to the Court's order allowing Plaintiff an opportunity to "cure the deficiencies" in his allegations of antitrust standing, the only material changes made by Plaintiff are: (1) Plaintiff has dropped the allegation that the GPL is a "horizontal" agreement or a "per se" violation; (2) Plaintiff now claims that some undefined "price fixing scheme" related to the GPL actually prevents him (as opposed to just threatening to prevent him) from marketing his own computer operating system; and (3) Plaintiff has clarified that the alleged injury is to him "as a competitor."

ARGUMENT

I. Introduction.

None of Plaintiff's changes to his allegations regarding antitrust injury address, let alone cure, the deficiencies discussed in the Court's Entry. Plaintiff now admits that, as the Court held in its Entry, the GPL is not a horizontal agreement. (*See* Entry at 5-6.) That change does not save his complaint, because it does not bear on the issue of antitrust injury. On the contrary, it makes it clear that Plaintiff must come forward in his Complaint with specific facts that would support a finding, under the rule of reason, of a significant adverse effect on competition in some defined market.

It is well settled that an antitrust plaintiff does not meet its burden of stating a claim by merely employing antitrust catch phrases or other conclusory allegations. The federal courts "are not obliged to accept as true legal conclusions or unsupported conclusions of fact." *Hickey v. O'Bannon*, 287 F.3d 656, 657-58 (7th Cir. 2002); *see also McLeod v. Arrow Marine Transp., Inc.*, 258 F.3d 608, 614 (7th Cir.2001) (holding the same). The Seventh Circuit has held that an

antitrust plaintiff cannot rely on legal jargon and conclusory allegations like those found in Plaintiff's Complaint to survive a motion to dismiss:

The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts "do not at least outline or adumbrate" a violation of the Sherman Act, the plaintiffs "will get nowhere merely by dressing them up in the language of antitrust." When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to providing antitrust litigation with an exemption from Rule 12(b)(6).

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106-07 (7th Cir. 1984) (citations omitted). "[C]onclusory allegations which merely recite the litany of antitrust" will not suffice. *John's Insulation, Inc. v. Siska Constr. Co.*, 774 F. Supp. 156, 163 (S.D.N.Y.1991). See also *Dickson v. Microsoft Corp.*, 309 F.3d 193, 201-02 (4th Cir. 2002) (holding that vague or conclusory antitrust allegations will not withstand a motion to dismiss and affirming dismissal of the complaint without leave to amend); *SmileCare Dental Group v. Delta Dental Care Plan, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (holding that dismissal is proper where "the complaint states no set of facts which, if true, would constitute an antitrust offense, notwithstanding its conclusory language regarding the elimination of competition and improper purpose" and affirming dismissal of the complaint); and *Crane & Shovel Sales Corp. v. Bucyrus Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988) (holding that "[t]he essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion" and affirming dismissal of the complaint).

II. Plaintiff Has Failed to Address the Deficiencies Identified by the Court.

In this most recent iteration of his complaint, Plaintiff now alleges that the GPL does not just threaten to prevent, but actually does prevent him from creating and marketing his own computer operating system. That change does not address the Court's stated concerns or otherwise save Plaintiff's complaint, either. In its Entry, the Court assumed that Plaintiff had actually been deterred from competing in the market for computer operating systems. (*See* Entry at 10-11.)

If anything, the changes to Plaintiff's Complaint merely confirm the Court's conclusion in its Entry that the injury allegedly suffered by Plaintiff is not one that the antitrust laws were meant to address. Plaintiff specifically concedes that his injury relates to his status "as a competitor." (Complaint at 3.) In its Entry, the Court held as follows as to the Third Amended Complaint:

[Plaintiff] does not allege that he was injured as a consumer — a purchaser or user — of software governed by the GPL. Nor does he allege injury to the software market as a whole as a result of the GPL. Instead, Mr. Wallace's alleged injury relates only to his personal inability or unwillingness to enter into the software market because his efforts might not be rewarded financially. This injury constitutes harm to Mr. Wallace as a competitor, not harm to consumers specifically, or harm to competition in general. This is exactly the type of injury Brunswick forecloses.

(Entry at 10-11 [emphasis added].) Indeed, what the Court said about the Third Amended Complaint applies with even greater force to the Fourth Amended Complaint: Plaintiff has now expressly alleged that Plaintiff's injury is solely in his alleged capacity "as a competitor." (Complaint at 3.)

Thus, the allegations of the Fourth Amended Complaint show conclusively that Plaintiff lacks standing to sue because he has suffered no "antitrust injury." *See* FSF's Opening Brief in Support of Prior Motion to Dismiss at 6-7 (citing *Brunswick Corp. vs. Pueblo Bowl-O-Mat, Inc.*,

429 U.S. 477 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); and *Atlantic Richfield Co. vs. USA Petroleum Co.*, 495 U.S. 328 (1990)).

III. Plaintiff Has Not Alleged That He is Actually Prepared to Enter the Market for Providing Computer Operating Systems.

Furthermore, Plaintiff lacks standing because his Complaint does not allege any facts to show that in fact he is prepared to enter the market for providing computer operating systems. *See Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982), *disapproved of on other grounds by Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

Plaintiff has brought this lawsuit on his own behalf as an individual. There is no allegation that Plaintiff has formed a business, has raised capital or found investors, has hired programmers, sales people, or support staff, has actually developed a computer operating system, or has ever made a single sale of a computer operating system. Although Plaintiff may well have 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 tens of thousands of other computer programmers in the United States. 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 dominated by the likes of IBM and Microsoft, corporations with vast human and financial resources. With all due respect to Plaintiff's accomplishments over a long and successful career, Plaintiff has alleged no facts to show that he can meet the burden of proving "indicia of ultimate success" in starting an enterprise on his own that would be capable of competing in this market. Absent specific factual allegations sufficient to demonstrate genuine preparedness to enter the market for providing computer operating systems, Plaintiff's Fourth Amended Complaint must be dismissed for failure to satisfy the requirement of antitrust standing as well as antitrust injury.

IV. Plaintiff Should Not Be Granted Leave to File Yet Another Amended Complaint.

Finally, the Court should at this juncture dismiss Plaintiff's Complaint without leave to amend. Plaintiff's inability, notwithstanding the filing of five iterations of his Complaint, to allege facts showing antitrust injury or standing demonstrates that no further amendment could possibly save Plaintiff's claims. Typically, a dismissal under Rule 12(b)(6) is not final or on the merits and a court will give plaintiff leave to file an amended complaint. *See* Wright & Miller, 5A FEDERAL PRACTICE AND PROCEDURE § 1357 (1990). However, a dismissal without leave to amend is proper if the complaint cannot be saved with any amendment. *See id.*; *See also* Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002); Cruz v. Gomez, 202 F.3d 593, 597-98 (2d Cir. 2000). The Court has repeatedly afforded Plaintiff an opportunity to file a complaint that alleged facts showing that he can meet the requirements of antitrust injury and standing, and Plaintiff has repeatedly failed to do so. This failure indicates that Plaintiff's claims are without substantive merit under the antitrust laws, and further leave to amend would not correct this fundamental deficiency. *See* Dean v. Westchester County P.R.C., 309 F. Supp. 2d 587, 592-93

(S.D.N.Y. 2004) (dismissing complaint with prejudice and without leave to amend after *pro se* plaintiff failed address pleading deficiencies noted in the court's prior order). Moreover, at some point — and FSF would submit that point is now — it becomes fundamentally unfair to require a defendant to suffer the expense of responding to one baseless complaint after another.

CONCLUSION

For all of the above reasons, and for all of the reasons set out in FSF's briefs in support of its prior motion to dismiss, Plaintiff's Fourth Amended Complaint should be dismissed, with prejudice, under Fed. R. Civ. P. 12(b)(6), without leave to amend.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of December 2005, a copy of the foregoing has been deposited in the U.S. mail, first class postage prepaid, and sent by electronic mail addressed to:

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