

13-1607-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MINIFRAME LTD.,

Plaintiff-Appellant,

—against—

MICROSOFT CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

1. Microsoft spends the bulk of its brief arguing for extraordinarily broad antitrust immunity supposedly arising merely from its ownership of unidentified “intellectual property.” Put another way, Microsoft sidesteps the rule—entrenched in the case law—that any antitrust immunity is framed by the scope of a specific patent or copyright under which a defendant is allegedly acting. Absent boundaries provided by the scope of a particular patent or copyright, the immunity is unbounded—as Microsoft confirms. It offers the “general principle” that—because it is entitled not to license its intellectual property at all—it enjoys the “lesser right” to license its intellectual property on whatever terms it sees fit. But this unqualified general principle turns out to be unprincipled: it lacks support in the case law and importantly is at odds with *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). (Point I, *infra*).

2. Microsoft spends very few words trying to defend the reasoning of the district court. It fails to seriously confront MiniFrame’s detailed enumeration of the findings and inferences the district court drew in favor of Microsoft. Quite the opposite: Microsoft dresses some of its own arguments with factual contentions foreign to the Complaint. In the end, Microsoft’s brief serves to confirm that it was error for the district court to dismiss the Complaint on a Rule 12(b)(6) motion. (Point II, *infra*).

3. MiniFrame has plausibly alleged that Microsoft engaged in *unlawful* exclusionary conduct by leveraging its monopoly in the market for PC operating systems in order to maintain its monopoly in the market for server operating systems and to secure its monopoly in the market for multi-user systems. Microsoft does not challenge these market definitions or contest that it holds monopoly power in these markets. Nor does Microsoft even attempt to argue that its conduct helped consumers; Microsoft expressly states that the single-user restriction was designed to forbid the use of non-Microsoft PC sharing programs with Windows.

Microsoft does attempt to challenge the refusal to deal portion of MiniFrame's Section 2 claim, contending that Microsoft had never engaged in a cooperative relationship with MiniFrame before Microsoft imposed the single-user restriction in 2007 forbidding use of MiniFrame's SoftXpand program with Windows. But during 2003-07, Microsoft acquiesced in the sale and use of SoftXpand and, even more, endorsed one vendor's PC sharing program just like SoftXpand and sold another vendor's similar PC sharing program on Microsoft's website (the latter allegations never mentioned in Microsoft's brief). Microsoft's refusal to deal is especially pernicious, because Microsoft is not being asked to grant a license for MiniFrame to practice any Microsoft patent or use any of Microsoft's exclusive rights in a copyright; Microsoft is only being asked to return

to the *status quo ante* by removing the single-user restriction that Microsoft unilaterally imposed in its end user licenses for Windows. The Complaint additionally plausibly alleges predatory pricing for Microsoft’s Multipoint Service (“MPS”) product. (Point III, *infra*).

4. MiniFrame’s state law claims, which largely follow federal antitrust law, should be reinstated with the Section 2 claim. (Point IV, *infra*).

ARGUMENT

I. THE DISTRICT COURT ERRED IN ACCORDING ANTITRUST IMMUNITY TO MICROSOFT

MiniFrame showed in its opening brief how the district court erred by conferring broad antitrust immunity on Microsoft covering the single-user restriction premised merely on Microsoft’s ownership of unidentified intellectual property (and therefore not limited to the scope of a specific patent or copyright owned by Microsoft). (MiniFrame Br. 27-38). MiniFrame further showed that—at least for purposes of this Rule 12(b)(6) motion—the single-user restriction is not covered by any antitrust immunity because nothing alleged in the Complaint supports an inference that the imposition of this restriction falls within a particular claim of a patent or an exclusive right of a copyright owned by Microsoft. MiniFrame concluded that “[t]he district court’s decision effectively gives Microsoft *carte blanche* to violate the antitrust laws merely by claiming a right to protect some inchoate ‘intellectual property.’” (*Id.* 29).

Microsoft does not quarrel with this characterization of the district court's decision. Far from it. Microsoft argues that the district court correctly dismissed the Complaint based on Microsoft's supposed antitrust immunity. (Def. Br. 10). As a central tenet of its brief, Microsoft declaims that "this case is governed by the general principle that when an IP owner has the power to exclude all uses of its IP, it necessarily has the lesser power to license its IP as it sees fit." (*Id.* 16). Microsoft does not limit this "power" to the scope of any particular patent or copyright. No, Microsoft contends that the "power to license its IP as it sees fit" can be overcome only in the "narrow circumstances" when the IP is obtained by fraud, when the IP owner "engages in sham litigation to restrict use of its IP," or when the IP owner ties its IP to "unprotected products and extends its power into adjacent markets." (*Id.*). Microsoft concludes that "[b]ecause Microsoft's Windows embodies IP, and because Microsoft has the greater power to refuse to license altogether, . . . that lesser [single-user] restriction is protected by its IP rights and does not violate the antitrust laws." (Def. Br. 25).

Microsoft's "general principle" tramples the case law. The cases cited *both* in MiniFrame's opening brief and in Microsoft's brief tie any antitrust immunity to the scope of particular patents or copyrights and do not recognize a right to exclude without boundaries merely through ownership of some unidentified "intellectual property." Microsoft tries to evade this rule by selective

quotation; for example, it discusses *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000) (Def. Br. 2, 18, 19) without acknowledging the language from that case quoted in MiniFrame’s opening brief (at 38) (“so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant”). If Microsoft were right that—“[b]ecause Microsoft’s Windows embodies IP”—Microsoft has absolute immunity to forbid via its license for Windows the use of SoftXpand with the Windows operating system, Microsoft could similarly forbid the use of Google (instead of Microsoft’s Bing), WordPerfect (instead of Microsoft Word), and any Internet browser other than Microsoft’s Internet Explorer. The immunity claimed by Microsoft is that broad.

Yet Microsoft should know better: it has lost this argument before. In *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001), Microsoft argued that, “[I]f intellectual property rights have been lawfully acquired’ . . . ‘their subsequent exercise cannot give rise to antitrust liability.’” *Id.* (citation omitted). The D.C. Circuit emphatically rejected this argument:

Microsoft’s primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes: “[I]f intellectual property rights have been lawfully acquired,” it says, then “their subsequent exercise cannot give rise to antitrust liability.” That is no more correct than the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated:

“Intellectual property rights do not confer a privilege to violate the antitrust laws.”

Id. (citation omitted). MiniFrame’s opening brief (at 35) relied on this opinion; Microsoft’s brief ignores it.

Any doubt as to the wrongfulness of Microsoft’s “general principle” is extinguished by *FTC v. Actavis*. Microsoft attempts to distinguish this case on its facts (Def. Br. 19-20), but it ignores the language used in the majority and dissenting opinions that provides controlling authority for the instant appeal and that wipes away Microsoft’s “general principle.”

In *Actavis*, the Supreme Court held (5-3) that the Federal Trade Commission could pursue an antitrust claim against the manufacturer of a patented branded drug where that brand manufacturer entered into a “reverse payment” settlement agreement with the manufacturer of a generic version of the drug to withhold the generic drug from the market. The Court reversed the Eleventh Circuit, which held that a reverse payment settlement agreement generally is “immune from antitrust attack, so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.” *FTC v. Watson Pharms., Inc.*, 677 F.3d 1298, 1312 (11th Cir. 2012). Microsoft is correct in observing that the instant appeal does not involve a “reverse payment” (Def. Br. 20), but Microsoft is incorrect in asserting that “[n]othing in the Supreme Court’s recent decision in” *Actavis* is “contrary” to Microsoft’s proposition that its “broader power not to

license Windows software at all” “necessarily” gave Microsoft “the less sweeping power to license it subject to restrictions such as the single-user restriction.” (Def. Br. 19).

Here is why. Writing in dissent, Chief Justice Roberts argued that the “reverse payment” settlement was protected by the antitrust immunity arising from the patent in the branded drug. As his starting point, he stated that patent law “provides an exception to antitrust law, and the scope of the patent—*i.e.*, the rights conferred by the patent—forms the zone within which the patent holder may operate without facing antitrust immunity.” *Actavis*, 133 S. Ct. at 2238.

But even this degree of antitrust immunity may no longer be available to owners of patents and copyrights. The majority opinion in *Actavis* expressly rejected the Chief Justice’s starting point. Writing for the Court, Justice Breyer traced the Court’s prior decisions on the junction of patent and antitrust law and observed that “this Court answered the antitrust question by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents.” *Id.* at 2231. Critically, the Court held: “Whether a particular restraint lies ‘beyond the limits of the patent monopoly’ is a *conclusion* that flows from that analysis and not, as The CHIEF JUSTICE suggests, its starting point.” *Id.* at 2231-32.

In other words, ownership of a patent does not automatically confer antitrust immunity even within the scope of that patent; a court must examine the facts and the applicable policies of antitrust law in considering whether that immunity should apply. The Court’s holding is not limited to cases of reverse payments. Still, for purposes of the present appeal, this Court need not determine the extent of the examination to be conducted where a patentee acts within the scope of a patent. This is because the Complaint does not permit Microsoft to offer the defense that it was acting within the scope of any particular patent or copyright—the Complaint does not mention any patent or copyright.

Given the plethora of cases reciting the rule limiting immunity to the scope of a patent or copyright, Microsoft’s self-professed inability to understand the rule is perplexing. Its brief (at 23-24) questions how IP could possibly be commensurate with a licensing restriction and then mis-states MiniFrame’s argument. MiniFrame’s point is that antitrust immunity attaches only when the patentee’s conduct against the party asserting an antitrust claim fits within the scope of a claim of a patent. While *Actavis* abrogated this Court’s opinion in *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187 (2d Cir. 2006), it is still instructive to note that, in *Tamoxifen*, Judge Pooler in dissent agreed with the majority (Judge Sack joined by Judge Raggi) that “a settlement agreement that

confers on the patent holder a greater monopoly benefit than does the patent itself is illegal.” *Id.* at 224.¹

Bowman v. Monsanto Co., 133 S. Ct. 1761 (2013)—which Microsoft cites several times—cuts against Microsoft’s arguments. There, the Court enforced a license restricting a purchaser of Monsanto soy bean seeds from using the seeds beyond one season; the Court found that allowing persons and other seed companies to use and reproduce Monsanto seeds for subsequent seasons would “depriv[e] Monsanto of its monopoly.” *Id.* at 1767. The Court enforced a specific patent and the corresponding right conferred by patent law on the patentee to prohibit copying of the patented invention.

Microsoft mischaracterizes the Court’s analysis in *Bowman* as being an affirmation of a single use restriction. (Def. Br. 26-28). The opposite is true. As the Court noted, the patent exhaustion doctrine “confers on a purchaser, or any subsequent owner, ‘the right to use [or] sell’ the thing as he sees fit,” but the doctrine “leaves untouched the patentee’s ability to prevent a buyer from making *new copies* of the patented item.” *Id.* at 1766 (emphasis added). Applying the Court’s reasoning here, Microsoft is free to prevent others from *making copies* of

¹ Microsoft asserts that the single-user restriction “falls well within the boundaries of the legal monopoly that IP law affords Microsoft” and therefore “is not exclusionary conduct that violates the antitrust laws.” (Def. Br. 11). But this assertion fails to identify the scope of any particular patent or copyright owned by Microsoft. Microsoft later states: “Thus, there is no reason to look beyond the scope of the IP.” (Def. Br. 20). Microsoft’s statement makes little sense since neither Microsoft nor the district court ever looked at the “scope of the IP.”

Windows—which is what Microsoft’s earlier single computer restriction did (and which comes within the exclusive right to reproduce any validly copyrighted part of Windows). In contrast, Microsoft is not free to engage in anticompetitive conduct interfering with how a purchaser of a copy of Windows uses that copy—provided the purchaser does not make any unauthorized copies of Windows.

Microsoft is similarly wrong in arguing that the single-user restriction is related to the distribution right under the Copyright Act. (Def. Br. 25-26). Microsoft starts its argument by citing cases on illegal downloads of songs; in those cases, copies of a file containing a copyrighted song ended up on multiple computers. With SoftXpand, there is at all times only one copy of Windows installed on a single PC. SoftXpand permits multiple users to simultaneously use the single PC and its one copy of Windows. (A15 ¶ 40). The flaw in Microsoft’s argument is exposed on page 2 of its brief, where it speaks of “unauthorized sharing of Microsoft Windows”; the Copyright Act does not grant an exclusive right to share. And Microsoft misses the point of MiniFrame’s citation of *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (Def. Br. 21 n.8); MiniFrame used that case to corroborate that a copyright owner’s copyright rights are limited to those specified by statute.

In sum, the district court erred in according unbridled antitrust immunity to Microsoft when it grounded that immunity merely on Microsoft’s

ownership of undefined intellectual property and when it failed to limit that immunity to the scope of a specific patent or copyright. Microsoft urges this Court to affirm the district court's error, even though *Actavis* now makes the district court's error transparent and even though the D.C. Circuit so emphatically rejected Microsoft's earlier assertion of unlimited antitrust immunity. This Court should reject Microsoft's argument.

II. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT ON A RULE 12(b)(6) MOTION

While Microsoft repeatedly asserts that the district court came to the correct conclusion in dismissing MiniFrame's antitrust claim, it is striking how Microsoft barely mentions—let alone relies upon—the way the district court reached its conclusion. MiniFrame's opening brief contended—as a principal point—that the district court failed to follow the standard for a Rule 12(b)(6) motion (which this Court recently reiterated in the antitrust context in *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162 (2d Cir. 2012), *cert. denied sub nom. Curtis Circulation Co. v. Anderson News, L.L.C.*, 133 S. Ct. 846 (2013)). Microsoft never mentions *Anderson*, and it makes only a lame attempt via conclusory statements to address in passing MiniFrame's detailed enumeration of the district court's erroneous findings and inferences against MiniFrame. (Def. Br. 7) (observing that “MiniFrame discusses at length various purported impermissible factual inferences drawn by the District Court” and asserting that the

district court “properly applied the law to the fundamental premise of MiniFrame’s lawsuit” as well as that “MiniFrame confuses factual inferences with the District Court’s shorthand about the law, or simply misunderstands that the District Court did not make factual findings about matters outside the Complaint”); (Def. Br. 30-31) (offering conclusory assertions rather than point-by-point responses).

Microsoft’s inability to confront squarely the erroneous findings and inferences drawn by the district court signals how the decision below was incorrect. Surely, Microsoft cannot patch the holes in the district court’s analysis by asserting that “[r]eferences to patents [in the decision below] should be read as referring generally to IP rights” (Def. Br. 22 n. 9), or by asserting that the district court “properly took into account the basic premise of MiniFrame’s entire lawsuit.” (Def. Br. 21-22). And Microsoft is plainly wrong in arguing that MiniFrame “expressly conceded that Microsoft’s software embodies IP” (Def. Br. 22); MiniFrame made no such concession—Microsoft distorts snippets from the record.

In addition, Microsoft (like the district court) breaks through the four corners of the Complaint to make its arguments. For example, in its Introduction, Microsoft asserts that it licenses its software to end users “on terms that allow Microsoft to protect its IP, and at prices that allow it to earn a reasonable return on the substantial sums it invests in research and development.” (Def. Br. 1). None

of this is alleged in the Complaint. Similarly, Microsoft contends that MiniFrame, “seeing an opportunity,” released its SoftXpand product in “circumvention” of Microsoft’s end user license, resulting in “unauthorized sharing of Microsoft Windows.” (*Id.* 1-2). Here, too, these contentions find no grounding in the Complaint (and a right to prevent “unauthorized sharing” is not among the exclusive rights conferred by Section 106 of the Copyright Act). The Complaint alleges the opposite: that the sharing of a single copy of Windows was authorized until Microsoft imposed the single-user restriction. (A14-15 ¶¶ 37, 38, 40; A21-22 ¶¶ 58-59). Relatedly, Microsoft states that “MiniFrame’s SoftXpand product is designed with one primary purpose—to enable multiple users to share a single instance of Windows.” (Def. Br. 27). This is another alleged fact interposed by Microsoft; the Complaint actually alleges many times that SoftXpand was designed to enable users to take advantage of increasingly fast computer chips by sharing a single PC. (*See, e.g.*, A15 ¶ 40). The focus is on sharing a PC—which is the major cost item for a consumer, dwarfing the cost of a copy of a Windows program.

Microsoft also draws improper inferences from the Complaint to support its position. As an example, it wrongly characterizes the Complaint as being “premised on the assumption that Microsoft owns IP that it licenses”

because—if it was not—the refusal to deal claim “would make no sense.” (Def. Br. 21). Microsoft’s own words here reveal that it is reading into the Complaint.

Above all, Microsoft cannot convincingly explain how the district court accorded antitrust immunity to Microsoft based on patents and copyrights never referenced in the Complaint. Recognizing that it has this problem, Microsoft blames MiniFrame for not bringing a declaratory judgment action to challenge Microsoft’s patents and copyrights. (Def. Br. 20-21). This argument lacks merit: Microsoft concedes that it never asserted any infringement by MiniFrame of Microsoft patents or copyrights during the extended period while SoftXpand has been sold, and there can be no viable claim for declaratory judgment without the prior assertion of infringement of identified patents or copyrights.

And the absence of any mention in the Complaint of the patents and copyrights that should have been key to the holding below is—of course—another reason why the motion was improperly granted. Microsoft could have moved for summary judgment and put into the record the specific claims of patent and exclusive rights of copyright upon which it might attempt to base a claim of antitrust immunity. Microsoft’s failure to do so strongly suggests that it cannot cite any specific rights in its patents or copyrights that would immunize the single-user restriction. (Microsoft’s citation in footnote 10 of its brief to “cases [that] discuss and describe Microsoft’s IP” cannot cure the absence in the record of *this*

case of any specific patents or copyrights owned by Microsoft relevant to the single-user restriction.)²

In its opening brief (at 32), MiniFrame stated that it “is aware of no case before the district court’s decision [here] granting a Rule 12(b)(6) motion to dismiss an antitrust claim by according antitrust immunity based on such unidentified intellectual property rights.” Microsoft’s brief cites no such case and notably relies on cases decided at the summary judgment stage or after trial. (*See* Def. Br. 17-19). Despite detailed allegations of Microsoft’s monopoly power in several relevant markets and plausible allegations of exclusionary conduct and predatory pricing, the district court’s quick embrace of antitrust immunity for Microsoft led it to dismiss the action—before MiniFrame had any chance to develop through discovery the details of Microsoft’s initial support of PC sharing products, its subsequent shift in position, and the pricing structure for MPS. If the proper standard for Rule 12(b)(6) is applied to the allegations of the Complaint

² Microsoft argues that the lack of allegations about specific IP owned by Microsoft somehow precludes MiniFrame from alleging it did not infringe any of Microsoft’s patents or copyrights. (Def. Br. 24 n.11). In support of this argument, it cites a patent invalidity case; MiniFrame is not asserting an invalidity claim (and could not do so as a practical matter until Microsoft identified a particular patent as covering PC sharing). Microsoft argues that it is not estopped from defending its single-user restriction (Def. Br. 29), wrongly suggesting that MiniFrame asserted estoppel. All MiniFrame did was to point out that Microsoft never asserted patent or copyright infringement by MiniFrame and—as a sophisticated business cognizant of doctrines like waiver and estoppel—Microsoft surely would have made such a claim if it believed such a claim existed. (*See* MiniFrame Br. 33-34).

without first conferring antitrust immunity on Microsoft, it is clear that MiniFrame adequately pleaded a Section 2 claim that should survive a motion to dismiss.

III. THE COMPLAINT PLAUSIBLY STATES A SECTION 2 CLAIM

Microsoft does not challenge MiniFrame’s statement of the elements of a Section 2 claim. (MiniFrame Br. 25-26). In its opening brief, MiniFrame stated that the Complaint met these elements by depicting “Microsoft leveraging its monopoly in the PC operating system market to eliminate competition from the PC sharing and multi-user markets, in order to maintain Microsoft’s monopoly power in the server operating system market and multi-user market and to obtain monopoly power in the PC sharing market.” (*Id.* at 33). In further support of its claim, MiniFrame noted that Microsoft “admitted—even argued—before the district court that its conduct was exclusionary.” (*Id.*).

Microsoft’s brief nowhere questions the relevant markets as alleged in the Complaint, nor does Microsoft challenge the adequacy of the allegations that it possesses monopoly power in these markets. As it did below, Microsoft admits (and even argues) in its brief here that it engaged in exclusionary conduct by imposing the single-user restriction to preclude use of SoftXpand. (*E.g.*, Def. Br. 2) (“This change effectively forbade the use of a product like MiniFrame’s . . .”). So, the question is whether the Complaint plausibly pleads unlawful exclusionary conduct. It does.

A. Microsoft's Exclusionary Conduct Was Unlawful

The Complaint alleges in detail acts of deliberateness by Microsoft in violation of Section 2. Leveraging its monopoly position in the market for PC operating systems, Microsoft imposed in its license agreement for the Windows operating systems the new single-user restriction that unquestionably was aimed at excluding from the PC sharing market MiniFrame and other companies offering PC sharing software. (A22 ¶¶ 60-65). This new restriction was fundamentally different from the terms of Microsoft's earlier license that prohibited reproducing a copy of Windows for use on multiple computers; the new restriction barred simultaneous use of a single copy of Windows by multiple users on a single PC. (A22 ¶¶ 64-65). Microsoft followed its imposition of the single-user restriction by introducing its own MPS multiple-user product. (*See* MiniFrame Br. 9-13; A31 ¶ 113). In tandem, these steps enabled Microsoft to capture the PC sharing market that others had created and secure its monopoly in the larger multi-user market. (A33 ¶ 124).

Microsoft's predatory conduct directly caused injuries to MiniFrame and eliminated the benefit of competition for both manufacturers and consumers of PCs seeking multi-user solutions. (A43 ¶¶ 166-296). By exercising its monopoly power, Microsoft succeeded in causing OEMs (*i.e.*, manufacturers of PCs) to refrain from purchasing SoftXpand. (A44-50 ¶¶ 171-219). Importantly, the major

manufacturers of PCs favored SoftXpand’s ability to permit a business or family to share and use simultaneously a single PC. Put otherwise, the manufacturers did not see anything wrong in a program that allowed multiple users to share a single PC (as opposed to requiring each user to have their own separate PC). The Complaint alleges how Microsoft caused HP, Samsung, Toshiba and LG to halt steps to purchase SoftXpand. (A29 ¶ 97; A44-45 ¶ 174; A46, ¶ 186; A47 ¶ 197). This set of allegations highlights how Microsoft’s assertion (Def. Br. 1-2) that MiniFrame saw and seized an opportunity to “circumvent” Microsoft’s license is contrary to the allegations of the Complaint—the referenced allegations preclude any inference that MiniFrame acted nefariously in providing a multi-user solution that permitted multiple users to share a single PC (running a single copy of Windows).

The Complaint additionally details how Microsoft at once caused potential customers to back away from MiniFrame and harmed such customers. Most particularly, the Complaint alleges that J.P. Morgan Chase (“JPMC”) was ready to purchase 80,000 copies of SoftXpand subject to Microsoft’s consent and had offered to pay Microsoft licensing fees for 80,000 extra users of Windows to secure that consent. (A40 ¶ 149; A41 ¶ 156). Microsoft not only refused the fees offered it by JPMC; Microsoft threatened that, if JPMC purchased SoftXpand, Microsoft would cut off *all* customer support for JPMC’s computers running

Windows—a glaring example of abusive use of monopoly power sufficient to lead a major financial institution to blink. (A41 ¶ 155; A42 ¶¶ 160-62; *see* MiniFrame Br. 13-14). The fact that Microsoft acted with predatory intent may be inferred from the Complaint’s allegations that Microsoft’s own MPS product could not run on Windows XP (having been designed to run with the newer Windows 7); that the 80,000 computers onto which JPMC wanted to install SoftXpand still ran Windows XP (because only Windows XP would support some of JPMC’s own proprietary software); and that Microsoft’s conduct left JPMC without a way to carry out its plan of having retail banking customers operate a tablet with SoftXpand while their bank representatives ran a Windows XP PC simultaneously.

The Complaint, in sum, plausibly alleges unlawful exclusionary conduct that proximately injured MiniFrame and “impaired competition in an unnecessarily restrictive way.” *Aspen Skiing, Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). This conduct more than matches the evidence that led the District of Maryland (which presided over a multi-district litigation against Microsoft a few years ago) to sustain a Section 2 claim. *See In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d 730, 746 (D. Md. 2010) (“[I]t is not entirely clear that Microsoft’s conduct was merely a refusal to cooperate”), *rev’d in part on other grounds sub nom., Novell, Inc. v. Microsoft Corp.*, 429 F. App’x 254 (4th Cir. 2011). MiniFrame cited this case in its opening brief (at 39,

40); Microsoft makes no mention of it. At the very least, the allegations of the Complaint were far more than adequate to permit MiniFrame to proceed into discovery in order to develop further its claim against Microsoft.

B. Microsoft Engaged In An Unlawful Refusal To Deal

MiniFrame, in addition, alleged a refusal to deal by Microsoft. The Complaint details how, over a four year period, Microsoft acquiesced in the sale of SoftXpand, permitted one vendor (ThinSoft) to offer its PC sharing software on the Windows Market website, and gave its “endorsement and approval” to another vendor’s PC sharing product (NComputing Products). (A16 ¶ 42). Microsoft then abruptly reversed its course of dealing. MiniFrame further alleged that Microsoft’s new refusal to tolerate rivals after 2007 was accomplished not by “superior product, business acumen, or historical accident,” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), but by predatory conduct intended to eliminate competition. (*See, e.g.*, A38 ¶ 141). In particular, the Complaint alleges Microsoft’s “willingness to sacrifice immediate profits” in refusing the fees offered by JPMC in order to drive MiniFrame out of the PC sharing market. *Covad Comm’ns v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005); (*see* A41-42 ¶¶ 158-60). Microsoft tries to invert, rather than accept, the allegations of the Complaint by arguing that its conduct might have been intended to obtain higher proceeds by selling its MPS product to JPMC—but the Complaint alleges that

MPS could not work on JPMC's PCs because JPMC's PCs operated only with Windows XP and MPS only worked with Windows 7. (Def. Br. 35-36) (A42 ¶ 160).

And the nature of Microsoft's refusal exposes indisputable anticompetitive conduct. MiniFrame is not asking Microsoft to license any of Microsoft's patents or copyrights to MiniFrame, or—for that matter—to provide MiniFrame with any assistance or support for the sale of SoftXpand. Because SoftXpand does not infringe any Microsoft patent or copyright, MiniFrame had no need for Microsoft to do anything for MiniFrame. Except now, MiniFrame needs Microsoft to remove the prohibition on using SoftXpand with the Windows operating system that Microsoft unilaterally imposed for anticompetitive purposes. Microsoft is not really being asked to “deal” with MiniFrame; it is being asked to leave MiniFrame alone.

For this aspect of its claim, MiniFrame primarily relies on *Aspen Skiing*. Under *Aspen Skiing*, these allegations should have been examined by the district court for “the effect of the challenged pattern of conduct on consumers,” for “whether [Microsoft] has impaired competition in an unnecessarily restrictive way,” and for the existence of a valid business purpose. *Id.* at 605, 608-10. But the district court did not do so.

Microsoft questions MiniFrame’s reliance on a 30-year old decision (i.e., *Aspen Skiing*); suggests that *Aspen Skiing* might no longer be good law after *Verizon Commc’s Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); and notes that MiniFrame only mentioned *Trinko* as part of the citation of another case that quoted *Trinko*. (Def. Br. 38-40). All of this yields to simple answers. *Aspen Skiing* remains good law; *Trinko* (while confining *Aspen Skiing* to its own premises) recognizes *Aspen Skiing* as a valid precedent; *Actavis* illustrates how the Court continues to treat as valid its own antitrust opinions decided 100 years ago; and MiniFrame relied on *Aspen Skiing* rather than *Trinko* because *Aspen Skiing* is far closer to the allegations of the Complaint than is *Trinko*. *Trinko* arises in the context of a regulated industry (a factor critical to the Court’s analysis); this case and *Aspen Skiing* do not. *See also Creative Copier Servs. v. Xerox Corp.*, 344 F. Supp. 2d 858, 865 (D. Conn. 2004) (referring to the “seminal *Aspen Skiing* decision” and the “more recent[. . . *Trinko* case”). MiniFrame respected the teaching of *Trinko*, in which the Court stated that antitrust courts must “be attuned to the particular structure and circumstances of the industry at issue.” *Trinko*, 540 U.S. at 411. And MiniFrame respected *Trinko*’s concern about “antitrust courts . . . act[ing] as central planners,” *Id.* at 408; requiring Microsoft to restore the *status quo ante* by withdrawing the single-user restriction would require no “central planning” by this Court.

Microsoft further argues that *Aspen Skiing* is distinguishable from the facts of the present action and that MiniFrame’s claim is defeated by a failure to plausibly allege a prior course of dealing between Microsoft and MiniFrame or a relinquishment of short-term profits by Microsoft when it enacted the single-user restriction. (Def. Br. 39). Microsoft is wrong.³

True, there is no skiing going on in the Complaint here, but the Complaint alleges a parallel set of facts. Like in *Aspen Skiing*, the thrust of the Complaint is that Microsoft terminated a prior course of dealing in order to eliminate competition. Like in *Aspen Skiing*, Microsoft initially—and for four years—supported what MiniFrame was doing, both by acquiescing in the use of SoftXpand and more significantly by assisting vendors selling products similar to SoftXpand. Once again, Microsoft’s brief never mentions Microsoft’s initial support for the nascent PC sharing market. And Microsoft is unable to cite any case holding that initial support for other companies’ products in a new product category does not satisfy the “prior cooperation” prong for a refusal to deal claim. Microsoft’s subsequent refusal to permit PC sharing programs being used with Windows has grown in the briefing from an allegation in the Complaint to a

³ Microsoft criticizes MiniFrame for not referencing *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x. 554 (9th Cir. 2008) (Def. Br. 3), but this is an odd criticism. First, as the citation reveals, *LiveUniverse* is not a precedential opinion. Second, Microsoft on a different page (29) criticizes MiniFrame’s reliance on a Ninth Circuit published opinion, which Microsoft notes “has not been adopted by this Circuit.” In any event, the Complaint in this action alleges active support by Microsoft of PC sharing software before its imposition of the single-user restriction, a fact that distinguishes the instant case from *LiveUniverse*.

conceded fact. And MiniFrame’s opening brief (at 21) shows that the Complaint alleges in detail Microsoft’s foregoing of short-term profits.

C. Microsoft Engaged In Predatory And Discriminatory Pricing

The Complaint alleges that prior to introducing MPS to the market, Microsoft priced Windows Server 2008 R2 at \$1,000 plus Client Access Licenses at approximately \$200 per user for non-academic customers. (A34-35 ¶ 130). The Complaint further alleges that Microsoft then priced MPS, which includes Windows Server 2008 R2, at prices significantly below the price of Windows Server 2008 R2 alone. (A35 ¶ 131). In particular, the Complaint alleges that non-academic customers could purchase MPS (including Windows Server 2008 R2) for \$817 and academic customers for only \$133, versus the price of \$1,000 for Windows Server 2008 R2 alone. (A35 ¶ 131-32). Accordingly, the Complaint alleges that Microsoft is giving MPS away for free. Pricing a product for free necessarily means that the price is not “above predatory levels,” which is the standard expressed by the Supreme Court to avoid threatening competition and to avoid a claim of predatory pricing. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

These detailed allegations, made even without the benefit of discovery, are sufficient to plausibly allege predatory pricing. Microsoft argues that the allegation that MPS is offered for free is a “surmise” about MPS pricing

(Def. Br. 45), but on a Rule 12(b)(6) motion a specific allegation—even if described as a “surmise”—must be accepted as true. Microsoft adds that any allegation about “price” is “irrelevant” because the case law looks at “cost.” (*Id.*) Prior to discovery, MiniFrame lacked access to Microsoft’s actual cost data, and yet MiniFrame was able to plead that MPS is being sold below cost by alleging it is effectively being offered for free; there must be some cost—however small—to produce a product.

Microsoft’s reliance on *Brooke Group* for the proposition that only “below-cost” pricing is actionable under Section 2 is therefore misplaced. The Complaint does allege “below cost” pricing. Plus *Brooke Group* made clear that the actual test is proof “that the prices complained of are below an appropriate measure of its rival’s costs.” *Id.* at 222. Indeed, the Court went further, stating that “so long as [prices] are *above predatory levels*, they do not threaten competition.” *Id.* at 222 (emphasis added)(citation omitted). Because MPS is priced below predatory levels, as MiniFrame alleges in its Complaint, those prices do threaten competition and are subject to a Section 2 predatory pricing claim. And the Complaint contains numerous allegations that Microsoft engaged in unlawful price discrimination. (*See* A68-69, ¶¶ 338-41; A151 ¶ 12).

Microsoft’s argument that it cannot be held to violate the Robinson-Patman Act because it licenses software and the Act supposedly does not cover

software is also wrong. Microsoft cites no case that contains such a holding. Instead, Microsoft offers *Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148 (2d Cir. 2004) and argues that licenses to exploit IP are not covered by the Act. *Innomed*, however, focuses on the “dominant nature” of the subject of the contract. *Id.* at 156-59. In particular, in discussing potential liability under the Act, this Court discussed whether the tangible and intangible elements are “fused because they do not form independent or separate elements.” *Id.* at 158. A PC is a “fused” product because the PC typically has a copy of Windows pre-installed; a consumer must accept Microsoft’s license terms in order to operate the tangible PC even though he bought nothing directly from Microsoft (which is paid by the PC manufacturer rather than the end user). Thus, the transactions and products at issue are subject to the Act.

IV. THE COMPLAINT PLAUSIBLY ALLEGES STATE LAW CLAIMS

The parties agree that the district court’s rulings on MiniFrame’s Section 2 claim were incorporated into its rulings on MiniFrame’s state law claims, so that this Court’s determination on the Section 2 claim will largely resolve MiniFrame’s state law claims as well.

Specifically, as to the Donnelly Act, Microsoft argues that no claim is stated because the Complaint supposedly lacks allegations of “concerted monopolization.” (Def. Br. 78). But the Complaint alleges how Windows is

installed into PCs that were designed and manufactured by OEMs, including HP, Samsung, Toshiba and LG. (See A12 ¶¶ 26, 27; A27-28 ¶¶ 90-112; A44 ¶¶ 171-83; A46 ¶¶ 184-95; A47 ¶¶ 196-206, etc.). The elements of the Donnelly Act were met by allegations that each OEM worked with Microsoft to establish or maintain Microsoft's monopolies by terminating its business relationship with MiniFrame at *Microsoft's request*—which foreclosed the PC sharing market to MiniFrame through exclusionary conduct. (See A44 ¶ 173; A46 ¶ 188; A48 ¶¶ 199-203; A49 ¶¶ 209-10).

As to the Washington statutes, Microsoft argues that the requirement under Wash. Rev. Code § 19.86.020 to plead deception was not met. (Def. Br. 50). To the contrary, the Complaint alleges that consumers unknowingly had their right to install SoftXpand taken away when Microsoft changed the end user license agreements applicable to PCs (with Windows installed) purchased years earlier. That is, if a consumer bought a Windows-based PC in 2004 and bought SoftXpand soon thereafter, Microsoft's change to its license in 2007 made that PC with SoftXpand installed “a violation” of the license three years after the purchase. (See A20-22 ¶¶ 54-57; 61-64; A149 ¶ 4). Moreover, Microsoft concedes that MiniFrame and other companies relied on Microsoft's end user license as of 2003 in creating their PC sharing businesses. (Def. Br. 11); (A148-49 ¶ 3). Microsoft's

imposition of the single-user restriction four years later deceived the entire PC sharing market. (A22-23 ¶¶ 64-65).

To try to dissuade this Court from reinstating the tortious interference claim, Microsoft ignores the plain words of the Complaint. (Def. Br. 52). Contrary to Microsoft's arguments, the Complaint alleges that Microsoft went beyond "legitimately enforce[ing] the single user restriction and its IP rights" (Def. Br. 51), by threatening withdrawal of OEM builder licenses and/or complete technical support for MiniFrame's prospective customers. (A27-28 ¶¶ 90-91; A42 ¶ 162). Microsoft argues that the threat to JPMC was limited to PCs that had SoftXpand installed, if JPMC proceeded with MiniFrame. That is not what is alleged in the Complaint. As pleaded, JPMC insisted that it be permitted to work with MiniFrame and offered to pay Microsoft a full license fee for each additional seat installed. (A41-42 ¶ 156-59). Microsoft then stated that JPMC would not get *any* technical support if it proceeded with MiniFrame. (A41 ¶ 155). JPMC could not accept a complete withdrawal of *all* technical support from Microsoft, so JPMC abandoned the contemplated arrangement with MiniFrame. (A42 ¶ 162).

Microsoft also argues that "by the plain allegations, Microsoft was motivated by legitimate economic self-interest" and that "MiniFrame had no right to circumvent Microsoft's licenses to begin with." (Def. Br. 52). Microsoft completely ignores the allegations of the Complaint and has also tried to insulate

itself with an immunity simply not available to it. The Complaint specifically alleges how Microsoft was motivated by an intent to maintain and expand its monopolies by anticompetitive conduct and how Microsoft carried out this intent by imposing the wholly new single-user restriction. (A22 ¶¶ 60-65). These allegations leave no room to find that Microsoft was furthering any “legitimate economic self-interest” or that MiniFrame “circumvent[ed] Microsoft’s licenses to begin with.” (Def. Br. 52).

CONCLUSION

For the reasons stated above and in MiniFrame’s opening brief, the Court should reverse the district court’s Order and Judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,814 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Robert W. Morris
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