No. ________

In The
Supreme Court of the United States

MINIFRAME LTD.,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cognizable claim can be stated for violation of Section 2 of the Sherman Act under this Court's decision in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), where a monopolist used its market power in one market to prohibit consumers from purchasing a rival's product in a related market without a "superior product [in the related market], business acumen or historic accident" (*id.* at 570-71) simply by incorporating that prohibition as a new license restriction for its dominant software product in the market it monopolizes.

RULE 29.6 DISCLOSURE STATEMENT

MiniFrame Ltd. certifies that Rapac Communication & Infrastructure Ltd., a publicly held entity, is the controlling shareholder of MiniFrame Ltd.; Inter-Gamma Investment Company Ltd. is a publicly held entity that is the corporate parent of Rapac.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner MiniFrame Ltd. ("MiniFrame") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's Summary Order (App., *infra*, App. 1-6) is reported at 551 F. App'x 1 (2d Cir. 2013). The District Court's March 28, 2013 decision granting the motion of Respondent Microsoft Corporation ("Microsoft") to dismiss MiniFrame's complaint ("Complaint") under Fed. R. Civ. P. 12(b)(6) (App., *infra*, App. 7-29) is unreported but available at 2013 WL 1385704.

JURISDICTION

The Second Circuit entered judgment on December 23, 2013. App. 1. Petitioner filed a timely petition for rehearing, which was denied on April 17, 2014. App. 30. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

In this case, Microsoft has been permitted by the Southern District of New York and then the Second Circuit to exploit its undeniable monopoly power in the market for operating systems used in personal computers ("PCs") – that is, its Windows software programs – to completely exclude MiniFrame from offering a product in a separate market: a "PC-sharing" software market. MiniFrame's SoftXpand PC-sharing computer program, launched in 2003, met a need for families and businesses that wanted to utilize the available power and speed of personal computers to have multiple users use a single PC simultaneously. With SoftXpand, one user can work at a personal computer while others use that same computer simply by connecting another set of peripheral devices – a monitor, a keyboard and a mouse – to the PC. The attraction of PC-sharing software is that it allows a family or a business to pay for only a single PC that can be shared simultaneously by multiple users; since a PC requires only a single operating system (which, for Intel-powered PCs, is usually a Windows operating system), the PC-sharing software results in multiple users of that PC sharing the single copy of Windows in the shared PC.

MiniFrame's 65-page Complaint alleged in detail that many PC manufacturers supported SoftXpand and stood ready to offer it with their PCs (which came with Windows pre-installed); they saw PC-sharing software as a way to *increase* sales (by attracting customers who might purchase a PC only if, for example, it could be used at the same time by two children in a family). The Complaint further detailed how JP Morgan Chase & Co. ("JPMC") reached agreement with MiniFrame to purchase 80,000 copies of SoftXpand, so that bank representatives at Chase branches could operate a PC and have a customer simultaneously operate a touchscreen connected to that PC to facilitate transactions.

At the time SoftXpand reached the market, the End User License Agreement ("EULA") for Windows programs prohibited a user from copying the Windows program, but it did not restrict users from sharing a single copy. (Microsoft purports not to sell copies of

Windows, but to sell only licenses to use Windows in accordance with various terms unilaterally imposed by Microsoft.) For more than four years, Microsoft not only acquiesced in the sale and use of PC-sharing programs, but it affirmatively promoted at least two such products made by other third party vendors (*i.e.*, not SoftXpand). But Microsoft abruptly shifted course in 2007, amending its EULA to expressly prohibit users from sharing a copy of Windows. It soon thereafter introduced its own Microsoft-branded PC-sharing product that completely took over the PC-sharing market inasmuch the amended EULA prohibited users from using any non-Microsoft PC-sharing program. As to SoftXpand in particular, Microsoft directly informed JPMC that – if it purchased the 80,000 copies of SoftXpand that it had intended to buy – Microsoft would terminate all product support for Windows programs used throughout JPMC (even though JPMC offered to pay a license fee for the use of each copy of SoftXpand). In a similar display of monopoly muscle power, Microsoft threatened PC-makers that wanted to install SoftXpand that Microsoft would terminate the license needed by a PC manufacturer to pre-install Windows into PCs as they were readied for market.

The District Court granted Microsoft's motion to dismiss the Complaint, condoning Microsoft's conduct primarily by according to Microsoft broad antitrust immunity based on IP ownership never identified in the Complaint and in the absence of any allegation (or record evidence) that SoftXpand copied or otherwise infringed any copyright or patent held by Microsoft. Having shielded Microsoft with non-existent IP rights, the District Court then more cursorily held that Microsoft could refuse to allow the use of non-Microsoft PC-sharing software (and, most particularly, MiniFrame's SoftXpand) because there was no prior business relationship between Microsoft and MiniFrame. The Second Circuit, while understandably shying away from the IP antitrust immunity ground applied by the District Court, nonetheless found business justification in that "Microsoft responded to the new technology by changing its licensing terms to prohibit Windows from being used by more than one user at a time, rather than restricting use on a per computer basis." App. 2. The court then affirmed on the basis that MiniFrame lacked a prior business relationship with Microsoft such that Microsoft was free to refuse to deal with MiniFrame.

Before the lower courts (and especially as the basis for its Petition for Rehearing in the Second Circuit), MiniFrame strove to make plain that it was *not* complaining that Microsoft was refusing to deal with it. That is, MiniFrame did not need anything from Microsoft to make SoftXpand work or to manufacture and deliver its product. MiniFrame asked for judicial protection from Microsoft's affirmative interference with MiniFrame's attempt to continue selling in the PC-sharing market: it needed Microsoft to return to the status quo ante and remove its prohibition against sharing of a single copy of Windows and to discontinue its threats against PC manufacturers and

JPMC, which were ready to buy tens of thousands of copies of SoftXpand from MiniFrame. Notably, the strength of Microsoft's monopoly power is such that it was able to cause a financial institution as large and powerful as JPMC to blink.

In opposing the motion to dismiss, MiniFrame heavily relied on this Court's seminal opinion in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), which set forth the basic standard for a Sherman Act, Section 2 claim against a defendant with monopoly market power: "[T]he willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." *Id.* at 570-71. However, because there are so few cases where a monopolist so blatantly displays exclusionary conduct as was alleged in the Complaint in this case, MiniFrame drew on the ample body of refusal to deal cases to flesh out its legal arguments. In response, both lower courts erroneously fixated on the facts of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) and held that MiniFrame failed to state a Section 2 claim because it could not match each fact on which *Aspen Skiing* rested. In so doing, the lower courts allowed a subsidiary rule applicable to a pure refusal to deal claim to trump the more general rule stated in *Grinnell* (that in turn rests directly on the statutory language) in the presence of pure predatory conduct – and did so, no less, on a Rule 12(b)(6) motion.

This case illustrates how far the pendulum has swung against antitrust plaintiffs attempting to plead a Section 2 claim, where a cramped reading of *Aspen Skiing* can doom a complaint (prior to any discovery) even where there are a plethora of plausible allegations of naked monopoly power used to extinguish market competition to the detriment of consumers – where a monopolist takes over an adjoining market without "a superior product, business acumen or historic accident." *Grinnell*, 384 U.S. at 570-71; *see* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, 5 (2004-05) ("A Section 2 standard that is animated by greater tolerance of aggressive dominant firm distribution strategies that both exclude and do not benefit consumers will, therefore, very likely lead to 'false negatives' and under-deterrence, with uncertain, but very likely substantial adverse consequences for the nascent competition that is often its target"). The Second Circuit's application of Section 2 thus is in conflict with *Grinnell*, and its wooden application of *Aspen Skiing* is entirely detached from the animating value that informed *Aspen Skiing* – that a company should not be required to assist a competitor's business. Critically, MiniFrame did not need assistance from Microsoft to sell its product; it only needed relief from Microsoft's exploitation of its monopoly in the operating system market and its resulting ability to impose a new restriction in its EULA for Windows that excluded all rivals in the PC-sharing market. To restore Section 2 as a protective measure for consumers – like families and businesses wishing to share a single PC – this Court should grant the petition and reverse the Second Circuit.

A. Allegations of the Complaint

MiniFrame was established in 2003 by an engineer who recognized that – with the ever increasingly fast microprocessor chips installed in personal computers – there was extra, unused power that could be tapped to enable multiple users to use a single PC at the same time. C.A. App. 15 ¶ 40. Traditionally, a single PC running a single PC operating system (such as Windows XP) would be accessed by a single user at a time (*i.e.*, a single user system). C.A. App. 14 ¶ 35. A multi-user computer system, on the other hand, is a computer system in which more than one user can work simultaneously. C.A. App. 11 ¶ 24. Prior to SoftXpand, the only type of multi-user systems available were server computer systems in which each user used her own PC (which had its own copy of an operating system) to access the server computer that was running a server operating system (*e.g.*, a Windows server operating system such as Windows Server 2008). The server generally also had application software like word processing and email that could be accessed by all of the PCs in the server system. C.A. App. 14 ¶¶ 35-36.

SoftXpand's innovation was to enable more than one user to use a single PC at the same time, instead of having to take turns or having to use multiple PCs. C.A. App. 15 ¶ 40. With SoftXpand, each additional user needs only a separate set of input/output peripherals (*i.e.*, mouse, keyboard and monitor) that can be connected to the single PC to share the PC. *Id.* SoftXpand was well accepted, recording incremental sales over 2003-07 in over 30 countries. *Id.*

Microsoft offers by license various Windows operating systems for PCs (*e.g.*, Windows XP, Windows 7, etc.) and Windows server operating systems (*e.g.*, Windows Server 2003, Windows Server 2008 R2, etc.) that are designed to run on Intel-powered PCs and servers, respectively. C.A. App. 12 ¶¶ 26-27. At the point SoftXpand was released in 2003, Microsoft's license (EULA) for users of its Windows operating systems for PCs restricted users from accessing or using one copy of the Windows system on *another computer*. C.A. App. 21 ¶ 56. That is, if a user bought the Windows software program or a PC with Windows pre-installed, the EULA prohibited the user from making a copy of Windows and installing that copy on another PC. *Id.* At that time, and until late 2007, Microsoft did not include any restriction of any kind in its EULAs that prevented multiple users from simultaneously *sharing* a single licensed copy of Windows running on a single PC. C.A. App. 14 ¶ 37.

MiniFrame's success prompted other companies, such as NComputing and Thinsoft, to release software like SoftXpand and to become part of the PC-sharing market that MiniFrame had created. C.A. App. 15-16 ¶¶ 41-43. For close to four years, MiniFrame and these other companies competed with each other while collectively growing the PC-sharing market for the benefit of computer consumers. Microsoft, in contrast, did not offer between 2003-07 any product that enabled a single Windows-based PC to be shared by multiple users at the same time, with each user working with his or her own set of peripherals. C.A. App. 14 ¶ 36. During this time, Microsoft sold at least one third-party PC-sharing product through the Microsoft on-line store and entered into a business relationship with the manufacturer of another one of SoftXpand's competitors. C.A. App. 16 ¶ 42; C.A. App. 21-22 ¶¶ 58-59; C.A. App. 167-69. But then Microsoft decided to leverage its monopoly power and take over the PC-sharing market entirely.

In 2007, Microsoft changed the terms in its EULAs for PC-operating systems in an exclusionary manner to foreclose MiniFrame and other companies from offering PC-sharing products. C.A. App. 22 ¶¶ 62-63. Specifically, Microsoft changed its EULAs from only prohibiting the use of one Windows operating system on more than one computer at a time (*i.e.*, the prohibition against *making copies* of the operating system software), to prohibiting more than one user from using one operating system at the same time (*i.e.*, the new single-user restriction which created a limit on how end users could *share* the PCs they purchased from PC manufacturers and the Windows operating system in those PCs). C.A. App. 20-22 ¶¶ 54-65.

While the change to the EULA was imposed on end users, it was, for all practical purposes, directed at MiniFrame and other PC-sharing software companies as well as the manufacturers of PCs. C.A. App. 19-21 ¶¶ 53-58. In particular, right after Microsoft changed its EULAs, PC manufacturers became fearful that Microsoft would restrict their access to Microsoft products and support if they included PC-sharing products in the PCs they manufactured and sold. C.A. App. 22-23 ¶ 65; C.A. App. 26-27 ¶¶ 85-90.

For example, in Spring 2009 Hewlett-Packard Company ("HP"), a manufacturer of PCs that run Windows, began discussions with MiniFrame to explore a joint effort in the PC-sharing market. C.A. App. 28-29 ¶¶ 92-94. HP stated that it was looking to offer a PC-sharing solution and was thinking of basing it on SoftXpand running with Windows XP for the education market. C.A. App. 28-29 ¶ 94. After a number of calls and after testing by both HP and MiniFrame, HP sent MiniFrame an HP Software License and Distribution Agreement to formalize their relationship. C.A. App. 29 ¶¶ 95-98. Yet, soon thereafter (before the agreement was signed), HP abruptly told MiniFrame that it had "decided to cancel the project at this time for a number of reasons." C.A. App. 30 ¶ 102. In fact, HP's decision to terminate the HP-MiniFrame PC-sharing solution was directly caused by pressure or other interference from Microsoft. C.A. App. 30 ¶ 105.

At the time HP terminated the potential project with MiniFrame, Microsoft did not have a PC-sharing product for sale. C.A. App. 30 ¶ 106. This soon changed. After ending talks with MiniFrame, HP launched the "HP MultiSeat Computing Solution," a multi-user configuration that shared a single operating system on a single PC. C.A. App. 30 ¶ 107. HP's new system utilized Microsoft's newly released MultiPoint Server ("MPS") instead of SoftXpand. C.A. App. 30 ¶ 107. Microsoft then amended its "Volume Licensing Brief" given to PC manufacturers to make clear to PC manufacturers and others that the *only* multi-user product that could be offered to consumers was Microsoft's:

> The Windows client operating system license terms do not permit multiple users to access or otherwise use one licensed copy of the software simultaneously. However, Windows Server operating systems and Windows MultiPoint Server are designed and licensed for multiuser scenarios and should be used for *all* Windows multiuser scenarios.

C.A. App. 33 ¶ 123.

MPS has functionality that is strikingly similar to that of SoftXpand. C.A. App. 33 ¶ 121. The Complaint alleged that Microsoft copied the functionality and underlying technology of SoftXpand in order to create MPS. C.A. App. 31 ¶ 108.

With its monopoly power in the PC operating system market, Microsoft was easily able to assure that end users and PC manufacturers would understand that they were *prohibited* from installing or using a non-Microsoft PC-sharing software program with a Windows PC operating system to create a multi-user system. C.A. App. 33 ¶ 124. Put another way, Microsoft forced consumers who wanted a multi-user computer system to purchase either a Windows server operating system (in which case the user would also need PCs to connect to the server) or Microsoft's MPS. C.A. App. 33 ¶ 124.

Microsoft's anticompetitive behavior did not stop with simply prohibiting PC manufacturers from using non-Microsoft products in the multi-user market. Microsoft suppressed sales of SoftXpand even where Microsoft did not offer a product that could meet the needs of particular consumers, such as those whose PCs ran Windows XP which was not compatible with MPS. C.A. App. 42 ¶ 160.

Microsoft's exclusionary conduct upended a $20 million deal between MiniFrame and JPMC. C.A. App. 42 ¶ 163; C.A. App. 54 ¶ 249. JPMC wanted to purchase 80,000 copies of SoftXpand for use on 80,000 PCs running Windows XP at roughly 5,300 retail bank locations. C.A. App. 39-40 ¶¶ 148-49. In particular, JPMC intended to add a touch-screen to each one of these Windows XP PCs so that a bank customer could access the same information as the bank employee working with the customer. C.A. App. 40 ¶ 149. That is, the bank employee would use a PC and the customer would also use that same PC at the same time via the touch screen device. C.A. App. 40 ¶ 150. JPMC even offered to pay Microsoft a full Windows license fee for each of the 80,000 additional access points that SoftXpand would provide even though only a single copy of Windows XP would be used by each PC. C.A. App. 41-42 ¶¶ 156-58. This arrangement would have brought Microsoft revenue from the sale of 80,000 additional licenses despite the fact that JPMC would not receive 80,000 additional copies of Windows XP in exchange. Microsoft nonetheless refused to allow the MiniFrame/JPMC deal to be concluded. C.A. App. 42 ¶ 160. Instead, Microsoft threatened to terminate all technical support for Microsoft products used by JPMC if JPMC proceeded to install SoftXpand on any of its PCs. C.A. App. 42 ¶ 162. By reason of Microsoft's interference, JPMC declined to go forward with MiniFrame. *Id.*

Microsoft's direct and indirect threats further resulted in the loss of millions of dollars of potential business from manufacturers of PCs that saw SoftXpand as a path to increased sales. HP estimated sales of 3 million PCs offering SoftXpand in 3 years (C.A. App. 29 ¶ 97); Samsung thought SoftXpand would drive sales of its Media Center (C.A. App. 44-45 ¶ 174); Toshiba thought SoftXpand would increase sales of its notebook computers and home networking solutions (C.A. App. 46 ¶ 186); and LG thought there were "real business opportunities" to use SoftXpand for the consumer market (C.A. App. 47 ¶ 197). The PC manufacturers were universally in favor of SoftXpand and uniformly expressed a desire to work with MiniFrame. C.A. App. 44 ¶ 171 – C.A. App. 48 ¶ 201. For example, PC manufacturers thought a consumer might be willing to purchase a PC if his two children could share it (because that consumer might not be able to afford two PCs). The consumer's economic motivation for using SoftXpand was not to avoid buying an extra copy of Windows – it was about getting more use out of a single computer and avoiding the large cost of an additional computer (which dwarfs the cost of a copy of Windows). It is true that sharing a single PC also involved sharing a single pre-installed copy of Windows, but this is a modern equivalent of two family members sharing one set of the Encyclopedia Britannica.

PC manufacturers did not dare to include SoftXpand among the software pre-loaded onto their PCs because of Microsoft's threatening conduct, which caused those manufacturers to end each and every deal with MiniFrame that was in the works. C.A. App. 28-30 ¶¶ 92-106; C.A. App. 44-50 ¶¶ 171-219. Moreover, additional deals worth millions of dollars were quashed by Microsoft's threats to potential distributors of SoftXpand, including direct statements that "MiniFrame's SoftXpand products were violating Microsoft's license terms." C.A. App. 50-59 ¶¶ 220-89. It is, therefore, clear that Microsoft's exclusionary conduct had a profound, adverse impact on MiniFrame, as well as on consumers whose choices in the PC-sharing market were severely limited by Microsoft's exclusionary conduct. C.A. App. 22-23 ¶ 65.

B. Procedural History

MiniFrame filed its Complaint in the United States District Court for the Southern District of New York on October 19, 2011. Counts I-IV all alleged that Microsoft violated Section 2 of the Sherman Act. C.A. App. 67 ¶¶ 334-35. Microsoft filed a pre-discovery motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on March 2, 2012. App. 11. On March 28, 2013, the district court granted Microsoft's motion. App. 28.

In its decision, the District Court repeatedly declined to accept allegations of the Complaint and to draw all inferences in favor of MiniFrame. Far from it. The court made findings and drew inferences in Microsoft's favor. In particular, the District Court inferred that Microsoft's license provisions "fit within the bounds of its patents" and that Microsoft's change to its EULAs was "an entirely valid exercise of its patent rights." App. 15-16. In other words, the court found that Microsoft had patent rights commensurate with the single-user restriction added to the EULAs. This finding has no basis in the Complaint, which does not mention or identify in any way even a single patent held by Microsoft or any Microsoft patent right. Similarly, the District Court found that "Microsoft's decision to change its licensing policy in 2007 – as opposed to an earlier date – can hardly be viewed as anticompetitive conduct." App. 16. The court then went on to find that "it is perfectly understandable that Microsoft chose to amend its licenses." App. 16.

On the contrary, the Complaint alleged that Microsoft's change in licensing policy in 2007 was exclusionary conduct that was carried out *to foreclose the market to MiniFrame* and others. C.A. App. 24 ¶ 75. Even more, the District Court found Microsoft's change to the EULA to be "an entirely valid exercise of its patent rights – that curtailed the ability of third parties to *reproduce* its software for multiple users." App. 16 (emphasis added). The Complaint, however, alleged the opposite – that SoftXpand does not cause any such reproduction. Tellingly, Microsoft has never sent a cease-and-desist letter or otherwise asserted that SoftXpand infringed any of its patents or copyrights (and Microsoft chose not to move for summary judgment with record evidence of copyrights and patents it owns). Through the filter of its findings, the District Court dismissed MiniFrame's claim on the basis that the Complaint failed to allege a prior relationship directly between MiniFrame and Microsoft.

By Summary Order issued on December 23, 2013, the Second Circuit affirmed. While neither endorsing nor reaching the District Court's conferral of IP rights to Microsoft, the Summary Order nonetheless made a finding of business justification favorable to Microsoft that "Microsoft responded to the new technology by changing its licensing terms to prohibit Windows from being used by more than one user at a time, rather than restricting use on a per computer basis." App. 2. The court then held:

> MiniFrame does not allege that Microsoft had any prior dealing with a competitor. Rather, MiniFrame alleges that Microsoft changed the terms by which Microsoft licenses its product to its customers. In fact, according to MiniFrame, Microsoft never officially approved the use of SoftXpand. Thus, MiniFrame's allegations do not fit within the *Trinko*/*Aspen Skiing* refusal to deal exception.

App. 4.

The Second Circuit denied a motion for panel rehearing on April 17, 2014. App. 30-31.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal antitrust law and provides an exceptional vehicle for clarifying the current role of *Grinnell*. "[T]he law with respect to non-price exclusionary behavior by dominant firms remains very much up in the air." Edward D. Cavanagh, *Trinko*: *A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 Me. L. Rev. 111, 113 (2007) (citing Robert Pitofsky, *Past, Present and Future Antitrust Enforcement at the Federal Trade Commission*, 72 U. Chi. L. Rev. 209, 217 (2005)). Importantly, this Court's decisions in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), were applied by the Second Circuit so as to wipe away any role for the seminal rule of anti-competitive conduct set forth in *Grinnell*. The allegations in this case vividly depict a monopolist exploiting market power to wipe out competition in an adjoining market. While the Second Circuit, like the District Court, pigeon-holed this case under the "refusal to deal" test of *Trinko* and *Aspen Skiing*, this case does not involve a party asking that a monopolist be forced to deal with it (whether by providing facilities, infrastructure or other support). All that MiniFrame has asked is that Microsoft *leave it alone*.

The Second Circuit declined to apply *Grinnell* and instead allowed this Court's *Trinko/Aspen Skiing* decisions to displace *Grinnell*. In *Grinnell*, this Court set forth the basic two-step test for determining whether a Section 2 violation of the Sherman Act exists: "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell*, 384 U.S. at 570-71. Under that test, the Complaint in this case plainly makes out a claim of unlawful exclusionary conduct.

Microsoft's motion did not challenge the pleading of monopoly power in a relevant market. Nor could it.

The Complaint alleged facts to support a finding that Microsoft has monopoly power in the markets for both (i) operating systems; and (ii) server operating systems. C.A. App. 13-14 ¶¶ 32-34.

MiniFrame's Complaint amply alleged facts to support a finding of the second *Grinnell* element in detailing how Microsoft exploited its monopoly power in the operating systems and server operating systems markets to willfully acquire monopoly power in the PC-sharing and market that was not related to growth, superior product, business acumen or historic accident (*i.e.*, unreasonable exclusionary conduct). Microsoft violated Section 2 when it wielded its monopoly power on the computer manufacturers and forced them to abandon their business plans with MiniFrame. C.A. App. 28 ¶ 91 ("Because of Microsoft's monopoly on client operating systems and the corresponding demand for Windows Client Operating Systems, [a PC manufacturer] would be severely disadvantaged if Microsoft were to refuse it a future [PC Manufacturer] System Builder License to preinstall Windows Client Operation Systems or to reduce the technical support Microsoft provides to its PC manufacturers."). The complaint further alleged that, in anticipation of launching its multi-user product, MPS, Microsoft changed its end user license agreement to eliminate competition by *foreclosing* MiniFrame and others like it from selling PC-sharing software. C.A. App. 22 ¶ 60; C.A. App. 24 ¶ 75; C.A. App. 31 ¶¶ 113-14. Microsoft admitted this allegation in its opposition brief to the Second Circuit (at 2) when it conceded that it had "altered the terms of the license to restrict the use of its PC OS to one 'user' at a time, rather than one computer [which] effectively forbade the use of a product like MiniFrame's to facilitate the unauthorized sharing of Microsoft Windows." Microsoft, however, had no legal basis to prevent the simultaneous sharing of a single copy of Windows among two or more users by using SoftXpand because SoftXpand does not copy or duplicate Windows. C.A. App. 15 ¶ 40.

The Summary Order took a very narrow, mechanical, approach to analyzing MiniFrame's claim. Such an approach fails to advance the policies of antitrust law. The refusal to deal doctrine is not set out by statute; it has emerged as a product of particular cases with specific facts at issue. Both *Aspen Skiing* and *Trinko*, make clear that what is important in the refusal to deal context are (i) the intent of the monopolist, *see Aspen Skiing*, 472 U.S. at 602 ("evidence of intent is merely relevant to the question [of] whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' – to use the words in the trial court's instructions – or 'predatory' to use a word scholars seem to favor"), and (ii) the "particular structure and circumstances of the industry at issue." *Trinko*, 540 U.S. 411. *Trinko* was a very narrow ruling because "[o]ne factor of particular importance [wa]s the existence of a regulatory structure designed to deter and remedy anticompetitive harm." *Id.* at 412. There is no such protective regulatory structure in the present action.

Notably, the facts in the Complaint were analogous to those that caused this Court to find a Section 2 violation in *Aspen Skiing*: "the monopolist elected to make an important change in a pattern of distribution that had originated in the competitive market and had persisted for several years." *Aspen Skiing*, 472 U.S. at 603. MiniFrame alleged that Microsoft (*i.e.*, the monopolist) elected to make an important change in licensing that had existed in the competitive market for more than four years. In *Aspen Skiing*, this Court stated that "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* at 605. That applies here. Indeed, the claim here is stronger than in *Aspen Skiing*. There, the monopolist was forced to provide aid and facilities to a rival; here no such forced help is sought. All that is required here is containing Microsoft's clear exercise of monopoly power.

As shown, MiniFrame's Complaint alleged that Microsoft amended its EULA to exclude rivals prior to introducing its own competing product, MPS. With that allegation taken as true, Microsoft's conduct should have been found to be exclusionary under the second prong of the *Grinnell* test for the purposes of the 12(b)(6) motion at issue, and the motion should have been denied. The lower courts, however, failed to perform the analysis required by this Court. *Aspen Skiing* instructs that "[i]t is relevant to consider [the] impact [of exclusionary conduct] on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605. Here, competition has not only been impaired; it has been destroyed. As alleged in the Complaint, the only available PC-sharing software remaining on the market is Microsoft's MPS – a situation that the antitrust laws were supposed to prevent.

Courts often recognize that Section 2 anticompetitive conduct comes in "too many forms and shapes to permit a comprehensive taxonomy." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1947 (2014). Yet the essence of anticompetitive conduct is clear enough. As *Novell* stated, "Refusal to deal doctrine . . . doesn't seek to displace doctrines that address a monopolist's more direct interference with rivals." *Id.* at 1076. *Novell* added that "a rival is always free to bring a section 2 claim for affirmatively interfering with its business activities in the markets place," *id.*, and that "[b]usiness torts generally . . . can sometimes give rise to antitrust liability." *Id.* at 1079. In fact, *Novell* observed that "today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid." *Id.* at 1072.

MiniFrame alleged that Microsoft repeatedly and directly interfered in its business dealings. This interference hit a high water mark when Microsoft directly threatened MiniFrame's customer JPMC. JPMC was committed to going forward with MiniFrame's solution to its problem – the only solution that would have worked for it. Instead, Microsoft's threats carried the day and JPMC was left without a workable answer to its problem because MPS, the only "authorized" PC-sharing solution, is not compatible with Windows XP which JPMC still utilized on the 80,000 PCs at issue.

At its core, MiniFrame's claim was grounded on *Grinnell*, not the refusal to deal doctrine. It referred to refusal to deal cases as analogous and to support its claim. But the present case is far different than the typical refusal to deal case. Again, MiniFrame was not asking that Microsoft be forced to deal with MiniFrame in the traditional sense. MiniFrame only asked for it and its partners to be left alone, by restoring the status quo ante and eliminating the restriction in Microsoft's license against simultaneous use – a restriction that Microsoft is able to enforce only because of its monopoly power.[1]

Both *Aspen Skiing* and *Trinko* emphasized that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the

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[1] In *Trinko*, this Court alluded to a supposed claim of "monopoly leveraging" and stated: "To the extent that the [Second Circuit] dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred. In any event, leveraging presupposes anti-competitive conduct, which in this case could only be the refusal-to-deal claim we have rejected." 540 U.S. at 415 n.4 (internal citation omitted). Before the lower courts, MiniFrame did use the word "leveraging" to describe what Microsoft did, but it did not attempt to plead a separate claim for monopoly leveraging. That is because MiniFrame plausibly pled that Microsoft completely took over the PC-sharing market and displaced all rivals – which is unlawful conduct under *Grinnell*.

right is unqualified." *Trinko*, 540 U.S. at 408 (quoting *Aspen Skiing*, 472 U.S. at 601). *Trinko* added that "[w]e have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.* Once more, MiniFrame's Complaint did not ask for "forced sharing," and identifying and remedying Microsoft's anticompetitive conduct is not difficult – all that is required is the removal of the single-user restriction Microsoft added after nearly half a decade of permitting sales of PC-sharing software. The Complaint exposes raw anticompetitive conduct; in such circumstances, "the right to refuse to deal" with another firm should give way to protection of competition for the benefit of consumers. Under *Aspen Skiing*, the lower courts should have examined "the effect of the challenged pattern of conduct on consumers," "whether it has impaired competition in an unnecessarily restrictive way," and the existence of a valid business purpose. 472 U.S. at 605, 608-10. Judged accordingly, MiniFrame's allegations give rise to a wholly plausible inference of exclusionary and anticompetitive conduct – *i.e.*, "predatory" conduct. *Id*. at 602 (the relevant question is "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory,' to use a word that scholars seem to favor").[2]

[2] The lower courts drew an inference against MiniFrame that Microsoft's change to its EULA to prohibit the sharing of a

(Continued on following page)

copy of Windows was in some way a legitimate response to new technology, but – apart from the impropriety of drawing inferences in favor of Microsoft on a motion to dismiss – the full set of allegations of the Complaint show predatory conduct. Microsoft not only changed the EULA to prohibit sharing of a copy of Windows – the conduct which the lower courts viewed as somehow justified – but also proceeded to introduce its own PC-sharing product. Thus, in short succession Microsoft used monopoly power to eliminate competition and create a clear field for its own product to enter.

By foreclosing discovery, the lower courts prevented MiniFrame from further developing the record of market domination and predatory conduct by Microsoft. *See*, *e.g.*, Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. Rev. 1611, 1640-41 (2010) ("The allegations of anticompetitive practices that have been leveled against Microsoft are hardly limited to refusals to deal, although these represent an important core. The literature on both the United States and European antitrust cases against Microsoft is enormous, and here we provide little more than a cross-reference. Many of the practices challenged in the Microsoft case were fairly conventional in antitrust lore. Further, condemnation seemed quite clearly warranted, given Microsoft's very significant market power. These practices included the 'tie' of the Microsoft Windows operating system and the Internet Explorer browser; pressure placed on Intel to refrain from developing a Java-enabled chip that would quickly process instructions across multiple operating systems; pressuring Apple to use Internet Explorer exclusively in the Mac version of Microsoft Office; preventing computer makers from altering the desktop so as to emphasize non-Microsoft products; exclusive dealing agreements that prevented some internet access providers from using alternative browser Netscape; agreements that gave software developers favored treatment if their programs excluded operation with Netscape or provided for better performance if Internet Explorer were used; and finally, deception of application software developers to induce them to use versions of Java programming language that did not have cross-platform capabilities.") (citations omitted).

In sum, MiniFrame and others created a new market of software that would enable manufacturers to sell PCs that families and businesses could share. After more than four years of permitting such sharing, Microsoft decided to enter the new market with its own software – MPS. Rather than compete on its own merit – be it with a superior product or by business acumen – Microsoft followed a path of unlawful predatory and exclusionary conduct by eliminating competition and leveraging its Windows monopoly power to force manufacturers to cancel millions of dollars of deals with MiniFrame. With competition virtually gone, Microsoft then introduced MPS and took over the PC-sharing market for itself.

Microsoft's conduct is of exactly the type that the Sherman Act was intended to prevent, because such conduct eliminates choice for consumers. The District Court erroneously viewed Microsoft as the victim not the perpetrator based on an improper application of undefined intellectual property rights. The Second Circuit, while not endorsing the District Court's analysis and rationale, created a business justification for Microsoft's exclusionary conduct out of thin air (at least because there was no mention of it in the Complaint – the only source of facts in the record). Microsoft's exclusionary conduct was pronounced and unjustifiable. This Court should accept this case and make clear to lower courts the vitality of *Grinnell*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of December, two thousand thirteen.

PRESENT: AMALYA L. KEARSE,
DENNIS JACOBS,
CHESTER J. STRAUB,
Circuit Judges.

MINIFRAME LTD.,

Plaintiff-Appellant,

v. 13-1607

MICROSOFT CORPORATION,

Defendant-Appellee.

FOR APPELLANT:
ROBERT W. MORRIS (Michael S. Oberman, Francesca C. Butnick, *on the brief*), Kramer Levin Naftalis & Frankel LLP, New York, NY.

FOR APPELLEE:
ROBERT A. ROSENFELD (Howard M. Ullman; Richard S. Goldstein, Orrick, Herrington & Sutcliffe LLP, New York, NY; David F. Smutny, Orrick, Herrington & Sutcliffe LLP, Washington, DC *on the brief*), Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

Appeal from the United States District Court for the Southern District of New York (Richard J. Sullivan, *Judge)*.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

This appeal concerns three pieces of software: plaintiff MiniFrame Ltd.'s SoftXpand, defendant Microsoft Corporation's competing product called MultiPoint Server, and Microsoft's Windows operating system.

For a time, Microsoft's Windows license required customers to install and use Windows on only one computer. SoftXpand allows multiple users to simultaneously access a single copy of Windows on a single computer. Users need only a workstation with basic peripheral hardware such as a monitor, mouse, and keyboard. Because only one computer is involved, using SoftXpand did not violate the Windows license. Microsoft responded to the new technology by changing its licensing terms to prohibit Windows from being used by more than one user at a time, rather than restricting use on a per computer basis.

MiniFrame argues that Microsoft's conduct violated Section 2 of the Sherman Act, 15 U.S.C. § 2, and related state laws. The District Court (Richard J. Sullivan, *Judge*) dismissed MiniFrame's complaint, and we **AFFIRM** that decision. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

"We review the grant of a motion to dismiss *de novo,* accepting as true the complaint's factual assertions and drawing all reasonable inferences in the plaintiff's favor. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *N.Y. Life Ins. Co. v. United States,* 724 F.3d 256, 261 (2d Cir. 2013) (internal citations and quotation marks omitted).

MiniFrame presents two theories of anticompetitive conduct: (I) refusal to deal and (II) predatory pricing.

I. Refusal to Deal

MiniFrame first argues that Microsoft's single user restriction is a "refusal to deal" pursuant to *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985) and *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S 398 (2004). "[A]s a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Trinko,* 540 U.S. at 408 (internal quotation marks and brackets omitted). There is a limited exception to that right, which "applies when a monopolist seeks to terminate a prior (voluntary) course of dealing with a competitor." *In re Elevator Antitrust Litig.,* 502 F.3d 47, 53 (2d Cir. 2007) (per curiam).

MiniFrame does not allege that Microsoft had any prior dealing with a competitor. Rather, MiniFrame alleges that Microsoft changed the terms by which Microsoft licenses its product to its customers. In fact, according to MiniFrame, Microsoft never officially approved the use of SoftXpand. Thus, MiniFrame's allegations do not fit within the *Trinko/Aspen Skiing* refusal to deal exception. We do not endorse and need not address the District Court's alternative rationale that Microsoft's conduct is immune from antitrust liability based on intellectual property law.

II. Predatory Pricing

MiniFrame also argues that Microsoft predatorily prices MultiPoint. "[F]irms may not charge 'predatory' prices – below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.,* 555 U.S. 438, 448 (2009). "[T]o prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) the prices complained of are below an appropriate measure of its rival's costs; and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices." *Id.* at 451 (internal quotation marks omitted).

MiniFrame's complaint does not satisfy the first prong because it does not provide any measure of cost. Rather, MiniFrame compares retail prices: alleging that Microsoft charges less for a bundle that includes MultiPoint and Windows than it does for Windows alone. Since there is no allegation that Microsoft is pricing below cost, MiniFrame fails to state a claim based on predatory pricing.[1]

III. State Law Claims

MiniFrame's state antitrust law claims under Washington Revised Code § 19.86.040 and New York's Donnelly Act, N.Y. Gen. Bus. Law § 340, fail for the same reasons its Sherman Act claims fail. And because MiniFrame does not show an antitrust violation, its

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[1] We only consider the theories of refusal to deal and predatory pricing. We do not address monopoly leveraging. *See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d 89, 108 (2d Cir. 2002), *rev'd, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S 398, 415 n.4 (2004). Counsel stated at oral argument that MiniFrame did not present that theory to us or to the District Court. Oral Arg. Tr. at 9:7 ("We didn't argue monopoly leveraging.").

Similarly, we do not consider bundled discounting, which was also not presented to us. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

Nor do we consider tying under Section 1 of the Sherman Act or price discrimination under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). MiniFrame's complaint did not set forth claims under those statutes.

tortious interference claim fails as well. *See Carvel Corp. v. Noonan,* 3 N.Y.3d 182, 190 (2004) ("[W]here a suit is based on interference with a nonbinding relationship, . . . as a general rule, the defendant's conduct must amount to a crime or an independent tort."). Finally, MiniFrame does not state a claim based on Washington Revised Code § 19.86.020. MiniFrame has not shown that Microsoft's conduct had "a capacity to deceive a substantial portion of the public" or that it "constitutes a per se unfair trade practice." *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash. 2d 778, 785-86 (1986) (en banc).[2]

For the foregoing reasons, and finding no merit in MiniFrame's other arguments, we hereby **AFFIRM** the judgment of the District Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
CLERK

[SEAL]

/s/ Catherine O'Hagan Wolfe

[2] "MiniFrame does not appeal from the dismissal of what was Count X," an unfair competition claim. *See* Appellant's Br. at 16 n.5 (incorrectly describing Count X as an unjust enrichment claim).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 11 Civ. 7419 (RJS)

MINIFRAME LTD.,

Plaintiff,

VERSUS

MICROSOFT CORPORATION,

Defendant.

MEMORANDUM AND ORDER
March 28, 2013

RICHARD J. SULLIVAN, District Judge:

MiniFrame Ltd. ("MiniFrame") brings this antitrust action against Microsoft Corporation ("Microsoft"), asserting violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, New York and Washington state law, and common law. Before the Court is Microsoft's motion to dismiss MiniFrame's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Microsoft's motion is granted.

I. BACKGROUND

A. Facts

Microsoft, a Washington corporation, sells, distributes, and licenses the popular software program Windows. As part of its product array, Microsoft offers various client operating systems, such as Windows XP and Windows 7, that are designed to run on personal computers ("PCs").[1] (Compl. ¶ 26.) In addition, Microsoft offers various Windows server operating systems, such as Windows Essential Business Server and Windows Home Server 2011, that are designed to run on servers. (*Id.* ¶ 27.) Prior to 2007, Microsoft did not include a restriction in its licenses on the number of *users* who could simultaneously access a single Windows client operating system. (*Id.* ¶ 37.) Instead, Microsoft limited the number of *computers* that could run its software at the same time. (*Id.* ¶ 53.) Thus, under a pre-2007 license, multiple users could access one copy of the Windows operating system simultaneously, as long as they did so from one computer. (*Id.* ¶ 56.)

In 2003, MiniFrame, an Israeli corporation, developed its "SoftXpand" line of PC-sharing software, which "permitted multiple users to simultaneously

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[1] The facts are drawn from the Complaint ("Compl.") and the documents and exhibits attached thereto. In deciding the instant motion, the Court also considered Defendant's Memorandum of Law ("Mem."), Plaintiff's Opposition ("Opp'n"), Defendant's Reply ("Reply"), and the transcript of oral argument, held on May 11, 2012 ("Tr.").

access and use a single Windows Client Operating System on a single PC" by using peripherals such as a monitor, keyboard, and mouse. (*Id.* ¶ 40.) While multi-user systems are typically hosted on servers – and therefore require a server operating system and a client license for each PC accessing the server – SoftXpand permitted users to share one PC and one client operating system. (*Id.* ¶¶ 44-46.) Because only one computer was used to run the client operating system, SoftXpand users were in compliance with the Microsoft licensing agreement. (*Id.* ¶ 40.) Accordingly, the cost of one Microsoft license for a multi-user SoftXpand system was significantly less than the cost of multiple licenses for a comparable server-based system. (*Id.*) Perhaps not surprisingly, MiniFrame's software has since been "used in over [thirty] countries." (*Id.*)

In 2007, Microsoft modified the licensing agreements for its client operating systems to include a single-user restriction. (*Id.* ¶¶ 58-59.) Pursuant to this restriction, any Microsoft customer installing a multi-user system had to license software for each user. (*Id.* ¶¶ 64-65.) Plaintiff alleges that "there is no technological reason why multiple users cannot access or use the same Windows Client Operating System at the same time." (*Id.* ¶ 66.) Nevertheless, as a result of the license modification, SoftXpand users were required to license software for each user, significantly increasing the cost of the system. (*Id.* ¶ 131.) At the same time, Microsoft was developing and in 2010 would release its own multi-user software, Windows MultiPoint Server ("MPS"). (*Id.*) Plaintiff argues that, because MPS is less expensive than the combination of SoftXpand and additional Microsoft licenses, customers "practically have no choice but to purchase [MPS] for any shared PC system." (*Id.* ¶ 135.) Moreover, Plaintiff accuses Microsoft of "wrongfully refus[ing] to deal and cooperate with MiniFrame, and its partners and customers, on commercially reasonable and nondiscriminatory terms" in the multi-user software market. (*Id.* ¶ 146.) As a result, Plaintiff alleges it lost a significant amount of business to Microsoft from both American and foreign companies. (*See* ¶¶ 148-289.)

B. Procedural History

Plaintiff commenced this action by filing its Complaint on October 19, 2011. (Doc. No. 1.) The Complaint states the following claims against Microsoft: (1) violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, for (a) monopolization of the server operating system market, (b) attempted monopolization of the PC sharing software market, (c) monopolization of the multi-user software market, and (d) attempted monopolization of the multi-user software market; (2) violation of New York's Donnelly Act, N.Y. Gen. Bus. Law § 340; (3) violation of Washington State's antitrust law, Wash. Rev. Code § 19.86.040, and unfair competition law, *Id.* § 19.86.020; and (4) common law claims for unfair competition and tortious interference with MiniFrame's business relationships.[2] (Compl. ¶¶ 334-52.)

Microsoft filed its motion to dismiss on March 2, 2012; MiniFrame responded on March 30, 2012; and Microsoft replied on April 13, 2012. (Doc. Nos. 19, 24, 25.) The Court heard oral argument on May 11, 2012.

II. Discussion

A. Legal Standard

For a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept all well-pleaded allegations contained in the complaint as true and draw all reasonable inferences in the plaintiffs favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir. 2007). To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). By contrast, a pleading that only "offers 'labels and conclusions' or 'a formulaic

[2] In its opposition papers, MiniFrame cites only New York law to support its common law unfair competition and tortious interference claims. (*See* Opp'n 31-33.) Accordingly, the Court considers these claims solely with reference to New York precedent.

recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly,* 550 U.S. at 555). If the plaintiff "ha[s] not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Twombly,* 550 U.S. at 570.

B. Sherman Act Claims

Section 2 of the Sherman Act states, "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2. The Clayton Act imposes civil liability for violations of the Sherman Act. *See id.* §§ 15, 26. Possession of monopoly power alone, however, does not violate the Sherman Act. Instead, it must be accompanied by anticompetitive conduct. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP,* 540 U.S. 398, 407 (2004).

Accordingly, to state a monopolization claim within the meaning of the antitrust laws, a plaintiff must allege facts supporting an inference of the defendant's (1) possession of monopoly power in the relevant market and (2) exclusionary conduct, or "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966). Attempted monopolization requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with

(2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456 (1993).

MiniFrame asserts two instances of purportedly anticompetitive conduct: Microsoft's inclusion of a single-user requirement in its Windows licenses, and its pricing of MPS. (Compl. ¶¶ 75, 135.) However, for the reasons set forth below, neither instance amounts to exclusionary, predatory, or anticompetitive conduct. MiniFrame's federal law claims are therefore dismissed.

1. Single-User Restriction

The crux of MiniFrame's first alleged instance of anticompetitive conduct is that Microsoft modified its licensing agreements to prohibit multiple users from concurrently using the same operating system. According to MiniFrame, this modification created an "unlawful barrier to entry for any competition to develop against [Microsoft in] the server operating systems market." (*Id.* ¶ 75.) Underscoring this claim, Plaintiff asserts that Microsoft refused to deal with MiniFrame and its customers "on commercially reasonable and nondiscriminatory terms," in an attempt to leverage its monopoly power in the multi-user software market. (*Id.* ¶ 146.) This allegation of anticompetitive conduct is insufficient for two distinct reasons.

a. Microsoft's Intellectual Property Rights

Patent holders possess broad authority to enforce their intellectual property rights without violating the antitrust laws. *See Eatoni Ergonomics, Inc. v. Research in Motion Corp.,* 486 F. App'x 186, 190-91 (2d. Cir. 2012) ("[Section] 2 does not obligate [a patent holder] to share its patented platform technology" because a patent grants its holder "the lawful power to exclude others' use."). Accordingly, a patent holder is under no obligation to license its technology to its rivals. *See* 35 U.S.C. § 271(d)(4) ("No patent owner otherwise entitled to relief . . . shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . refused to license or use any rights to the patent"); *SCM Corp. v. Xerox Corp.,* 645 F.2d 1195, 1204 (2d Cir. 1981) (finding that a patentee's refusal to license its technology "is expressly permitted by the patent laws" because "[t]he heart of [the patentee's] legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent"). Similarly, patent holders may freely impose conditions or limitations on the use of their technology. *See Monsanto Co. v. Scruggs,* 459 F.3d 1328, 1338 (Fed. Cir. 2006) ("Conduct falling within the scope of protection includes, *inter alia,* limited use licensing. . . ."); *see also United States v. Gen. Elec. Co.,* 272 U.S. 476, 489 (1926) (A patent holder may license its technology "for any royalty, or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure."). Thus, patent holders, like copyright owners, may within broad limits curb the development of a derivative market by refusing to license their technology or doing so only in a limited manner. *See UMG Recordings, Inc. v. MP3.com, Inc.,* 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000). Given these expansive rights, courts "will not inquire into [a patent holder's] subjective motivation for exerting [its] statutory rights, even though [its] refusal to sell or license [its] patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant." *In re Indep. Serv. Orgs. Antitrust Litig.,* 203 F.3d 1322, 1327-28 (Fed. Cir. 2000); *see also id.* at 1329 ("[I]n the absence of any evidence that the copyrights were obtained by unlawful means or were used to gain monopoly power beyond the statutory copyright granted by Congress," a refusal to deal claim predicated upon copyrighted materials fails as a matter of law.).

There is no dispute that the Windows client and server operating systems are Microsoft's intellectual property. (*See, e.g.,* Compl. ¶¶ 17, 26, 27; Opp'n 3.) As such, Microsoft is free to license – or not license – these products as it sees fit within the bounds of its patents. Accordingly, without facts demonstrating that Microsoft obtained its patents illegally or exceeded the bounds of its patent rights by, for instance, tying the sale of its software to other products, no antitrust claim can lie. MiniFrame asserts only that Microsoft's intellectual property rights, while providing a potentially valid justification for the single-user restriction, are "rebutted" by "Microsoft's broader course of anticompetitive conduct." (Opp'n 6.) Specifically, MiniFrame claims that Microsoft (1) "wrongfully refuse[d] to deal" with its rivals on PC-sharing software and (2) changed its licenses in 2007 to stunt growing competition despite the fact that Microsoft had not previously enforced its intellectual property rights. (Compl. ¶ 146; Opp'n 3.) MiniFrame's arguments fail as a matter of law. First, as discussed, patent holders have no duty to deal with their competitors or permit them access to their technology. *See* 35 U.S.C. § 271(d)(4); *SCM Corp.,* 645 F.2d at 1204. Second, Microsoft's decision to change its licensing agreements in 2007 – as opposed to an earlier date – can hardly be viewed as anticompetitive conduct. MiniFrame states that PC-sharing software was not developed until "2003 or 2004." (Compl. ¶ 36.) Thus, it is perfectly understandable that Microsoft chose to amend its licenses to limit *users* in 2007, when, previously, a limit on *computers* would have similarly protected its rights in a solely server-based world.

At base, Microsoft imposed a limitation on its licensing agreements – an entirely valid exercise of its patent rights – that curtailed the ability of third parties to reproduce its software for multiple users. This is a wholly justifiable business purpose, and courts have consistently recognized rights holders' interests in limiting such distribution. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913, 941 (2005) (finding file sharing system liable for copyright infringement where it permitted users to reproduce and distribute copyrighted files). Accordingly, the Court concludes that Microsoft was well within its rights to include a single-user restriction in its client operating system license agreements. Because MiniFrame nowhere states facts to support that Microsoft acquired its rights illegally, exceeded the scope of its patents, or even modified its licenses for an impermissible purpose, it fails to state a Sherman Act claim premised on Microsoft's single-user restriction.

b. No Duty to Deal

Even assuming *arguendo* that intellectual property law provides no defense for Microsoft's actions, MiniFrame's Sherman Act claim concerning the single-user restriction would still fail because Microsoft had no duty to deal with MiniFrame. Generally, a corporation has "no duty to aid competitors." *Trinko,* 540 U.S. at 411; *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 600 (1985). However, in narrow circumstances, a corporation may have a duty to deal with a rival when (1) it previously cooperated with the rival, but later refused to do so, and (2) in so doing, sacrificed short-term profits. *Trinko,* 540 U.S. at 409 (monopolists' duty to deal); *see also Spectrum Sports,* 506 U.S. at 459-58 (attempted monopolists' duty to deal). Thus, with respect to the second element, a plaintiff alleging failure to deal must plead facts demonstrating that the defendant intended to engage in predatory – and not merely competitive – behavior. *Aspen Skiing Co.,* 472 U.S. at 601-03.

Microsoft's amended licensing policies, as pleaded in the Complaint, do not fit within these narrow circumstances. First, the Complaint does not allege prior cooperation between Microsoft and MiniFrame. MiniFrame feebly argues that Microsoft's pre-2007 licensing agreements with its users – some of whom also used SoftXpand – established a prior course of dealing from which Microsoft could not unilaterally depart. (Compl. ¶¶ 37-38.) MiniFrame's argument, however, is wholly unsupported by the law. Courts have explicitly held that a prior course of dealing between an alleged monopolist and its end users is not equivalent to the monopolist's prior cooperation with a rival. *See LiveUniverse, Inc. v. MySpace, Inc.,* 304 F. App'x 554, 556 (9th Cir. 2008). Second, the Complaint nowhere states facts averring that Microsoft relinquished short-term profits to adopt the single-user restriction. In fact, the Complaint supports the reverse inference, specifically alleging that Microsoft's server operating systems "generate more revenue and are more profitable for Microsoft than shared PC systems." (Compl. ¶ 76.) MiniFrame's antitrust allegation largely rests on the claim that Microsoft changed its licensing agreements to increase the number of licenses users would have to purchase – an obvious boon to short-term profits. (*Id.*); *see MetroNet Services Corp. v. Qwest Corp.,* 383 F.3d 1124, 1132 (9th Cir. 2004) ("Qwest was not forsaking short-term profits by switching from system pricing to per location pricing, but rather was attempting to increase its short-term profits.”). Accordingly, MiniFrame has failed to plead a Sherman Act claim based on the duty to deal with rivals on multi-user software.

2. Predatory Pricing

MiniFrame finally asserts that Microsoft’s pricing of its MPS multi-user software was predatory within the meaning of the antitrust laws. (Compl. ¶ 131.) However, this claim too falls short. Predatory pricing occurs when “‘a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in.’” *Virgin Atl. Airways Ltd. v. British Airways PLC,* 257 F.3d 256, 266 (2d Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 584 n.8 (1986)). To establish predatory pricing, a plaintiff must prove: “(1) that the prices complained of are below an appropriate measure of its rival’s costs, and (2) that the predatory rival has a dangerous probability of recouping its investment through a below cost pricing scheme.” *Id.* (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222, 224 (1993)) (internal quotations omitted). Because of the difficulty in distinguishing pro-competitive prices from predatory conduct, courts often approach predatory pricing claims with caution. *See, e.g., AD/SAT v. Associated Press,* 920 F. Supp. 1287 (S.D.N.Y. 1996) (“Under normal circumstances, the lowering of prices stimulates competition. Because the mechanism by which a firm engages in predatory pricing is also lowering prices, a mistaken inference of predatory pricing is extremely costly." (internal quotation marks omitted)).

To sufficiently plead the first element of a predatory pricing claim, a plaintiff must assert more than the mere allegation that the defendant's prices were "below general market levels or the costs of a firm's competitors." *Brooke Grp. Ltd.,* 509 U.S. at 223. Instead, a plaintiff must plead something akin to "what [the defendant's] actual costs were" or, in some situations, "standard industry cost." *See Astra Media Grp., LLC v. Clear Channel Taxi Media, LLC,* 414 F. App'x 334, 336 (2d Cir. 2011); *see also Kelco Disposal, Inc. v. Browning-Ferris Indus.,* 845 F.2d 404, 407 (2d Cir. 1988) (deeming a defendant's average variable cost to be an appropriate measure for predatory pricing claims).

MiniFrame has not pled facts demonstrating that Microsoft licensed MPS below cost. MiniFrame alleges that MPS is bundled with Microsoft server products, and that the bundled price is lower than the previous price charged by Microsoft for its server products alone. (Compl. ¶¶ 116, 131-36.) Accordingly, MiniFrame asserts, Microsoft is necessarily selling MPS below cost. (Pl. Opp'n 18) At most, MiniFrame states facts indicating that Microsoft has discounted some of its software, but MiniFrame alleges no facts suggesting that Microsoft suffered *losses* on its pricing scheme. Accordingly, MiniFrame has failed to provide any indicia supporting a finding that Microsoft's price for licensing MPS was "below an appropriate measure" of its costs. Thus, MiniFrame has not pled facts supporting its predatory pricing claim.

* * *

For the reasons stated above, the Court concludes that MiniFrame has failed to plead facts supporting an inference that Microsoft engaged in predatory or anticompetitive conduct. Accordingly, MiniFrame's Sherman Act claims must be dismissed.

C. State Law Claims

Jurisdiction in this case is premised on the federal question presented as well as the diversity of citizenship of the parties. *See* 28 U.S.C. § 1332(a)(2). Thus, though MiniFrame's federal claims have been dismissed, the Court will also analyze the asserted state claims.

1. The Donnelly Act

The Donnelly Act is patterned after the Sherman Act and makes illegal any contract, arrangement, or agreement that unreasonably restrains or interferes with free competition in business. N.Y. Gen. Bus. Law § 340; *Anheuser-Busch, Inc. v. Abrams,* 525 N.Y.S.2d 816, 816 (N.Y. 1988). To state a claim under § 340 of the Donnelly Act, a plaintiff must: "(1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities." *Yankees Entm't & Sports Network v. Cablevision Sys. Corp.,* 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002) (citing *Great Atl. & Pac. Tea Co., Inc. v. Town of E. Hampton,* 997 F. Supp. 340, 352 (E.D.N.Y. 1998)). Conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act. *Id.* (citing *Sands v. Ticketmaster-N.Y., Inc.,* 616 N.Y.S.2d 362, 364 (N.Y. App. Div. 1994)). In addition, to establish standing to bring an antitrust suit, a plaintiff must demonstrate that it has sustained "an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Daniel v. Am. Bd. of Emergency Med.,* 428 F.3d 408, 438 (2d Cir. 2005) (internal quotations omitted).

The Complaint alleges only unilateral monopolization and attempted monopolization claims and, therefore, MiniFrame's claim fails to plead the fourth element required by the Donnelly Act. *See, e.g., State of New York v. Mobil Oil Corp.,* 381 N.Y.S.2d 426, 426 (1976) (finding "systematic and deliberate" unilateral price discrimination was not a conspiracy under the Donnelly Act). MiniFrame vainly argues that Microsoft "coerced cooperation" from customers, such as equipment manufacturers and end users, who were "forced" by Microsoft to not use SoftXpand. (Pl. Opp'n 29-30.) However, MiniFrame cannot by sleight of hand transform a unilaterally imposed licensing amendment into a cooperative conspiracy. Accordingly, MiniFrame has failed to plead facts supporting the existence of a conspiracy. In addition, for the reasons stated above, MiniFrame has failed to plead facts demonstrating anticompetitive conduct in satisfaction of the Donnelly Act's third element. *Anheuser-Busch, Inc.,* 525 N.Y.S.2d at 820 ("[T]he Donnelly Act – often called a 'Little Sherman Act' – should generally be construed in light of [f]ederal precedent and given a different interpretation only where [s]tate policy, differences in the statutory language[,] or the legislative history justify such a result."). Thus, MiniFrame's Donnelly Act claim is dismissed.

2. Washington Antitrust and Unfair Competition Laws

MiniFrame also brings claims under Washington's antitrust and unfair competition laws, which are construed in light of federal precedent. *See Rowan Nw. Decorators, Inc. v. Wash. State Convention & Trade Ctr.,* 898 P.2d 310, 314 n.14 (Wash. 1995). For reasons already discussed and others set forth below, MiniFrame's Washington state claims must be dismissed.

a. Section 19.86.040

Section 19.86.040 makes it "unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other persons to monopolize any part of trade or commerce." Wash. Rev.

Code § 19.86.040. Washington's prohibition on monopolies is "patterned after and contains nearly identical language to the federal Sherman Antitrust Act." *Rowan Nw. Decorators, Inc.,* 898 P.2d at 314. As such, application of Washington antitrust law is "guided by the interpretation given by the federal courts to the corresponding federal statutes." *Id.*; *see also Ceiling & Interior Sys. Supply, Inc. v. USG Interiors, Inc.,* 878 F. Supp. 1389, 1393 n.2 (W.D. Wash. 1993) (Section 19.86.040 "essentially follows [S]ection 2 of the Sherman Act.").

Moreover, the elements necessary to plead a claim for monopolization or attempted monopolization under Washington law mirror those under the Sherman Act. *See, e.g., Boeing Co. v. Sierracin Corp.,* 738 P.2d 665, 679 (Wash. 1987); *Morgan v. Microsoft Corp.,* 107 Wash. App. 1001 (2001). Thus, MiniFrame has failed to state a claim under section 19.86.040 for the same reasons it failed to state a federal antitrust claim.

b. Section 19.86.020

Section 19.86.020 makes illegal "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Wash. Rev. Code § 19.86.020. On its face, "the act demands no more than that a litigant sustain injury as a result of unfair or deceptive acts or practices in the conduct of any trade or commerce." *Anhold v. Daniels,* 614 P.2d 184, 187 (Wash. 1980). However, the Washington

Supreme Court has established a public interest requirement as a prerequisite to bringing a private action under this section. *Lightfoot v. MacDonald,* 544 P.2d 88, 90 (Wash. 1976). Thus, to plead a claim under this section, a plaintiff must allege: (1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) an impact upon the public interest; (4) an injury to the plaintiff's business or property; and (5) causation. *Alliance Shippers, Inc. v. Always Trans., Inc.,* No. 09 Civ. 3126 (RMP), 2011 WL 4352310, at *4 (E.D. Wash. Sept. 16, 2011). The public interest requirement may be satisfied by showing that "an act or practice which has a capacity to deceive a substantial portion of the public . . . has occurred in the conduct of any trade or commerce," or by establishing the occurrence of a "per se unfair trade practice," as proscribed by statute. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 719 P.2d 531, 535 (Wash. 1986).

MiniFrame has not sufficiently alleged that Microsoft deceived the public or violated a Washington statute. Clearly, Microsoft did not mislead the public by narrowing its licensing agreement from a single-computer to a single-user restriction – the terms of its licensing agreement are explicit. Moreover, it is simply implausible that the public expected Microsoft could not, or indeed would not, change its licensing terms in light of new technology or practices. Finally, while price predation within the meaning of federal law violates section 19.86.020, MiniFrame has not stated facts supporting an inference that

Microsoft engaged in such conduct. *See supra* Section II.B.2. Accordingly, this claim also fails, and both of MiniFrame's Washington state law claims are dismissed.

3. Unfair Competition

Under New York law, the gravamen of an unfair competition claim is the bad faith misappropriation of a competitor's commercial advantage. *See Major League Baseball Prop., Inc. v. Opening Day Prod., Inc.,* 385 F. Supp. 2d 256, 268 (S.D.N.Y. 2005); *Eagle Comtronics, Inc. v. Pico Prods., Inc.,* 682 N.Y.S.2d 505, 506-07 (N.Y. App. Div. 1998). MiniFrame baldly asserts that, "[o]n information and belief, Microsoft copied the functionality and underlying technology of MiniFrame's SoftXpand product, or otherwise obtained such functionality and underlying technology, to create the Windows MultiPoint Server." (Compl. ¶ 108.) However, the Complaint does not allege a single fact in support of the assertion that Microsoft misappropriated MiniFrame's multi-user technology. Moreover, the Complaint itself allows that Microsoft may have "otherwise obtained" the necessary technology. (*Id.*) Accordingly, MiniFrame has not stated a claim for unfair competition under New York law.

4. Tortious Interference

To prevail on a claim of tortious interference with business relations, a plaintiff must demonstrate that (1) it had business relations with a third party, (2) the defendant interfered with those relations, (3) the defendant, in doing so, acted for a wrongful purpose or used dishonest, unfair, or improper means, and (4) the defendant's acts injured the relationship. *Catskill Dev., L.L.C. v. Park Place Entm't Corp.,* 547 F.3d 115, 132 (2d Cir. 2008). The third element – the wrongful means requirement – is demanding in this context because "a plaintiff's mere interest or expectation in establishing a contractual relationship must be balanced against the competing interest of the interferer as well as the broader policy of fostering healthy competition." *Id.* (citing *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc.,* 641 N.Y.S.2d 581, 586 (N.Y. 1996); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.,* 428 N.Y.S.2d 628, 632-33 (1980)). To qualify as a wrongful means, a defendant's act must (1) be an independent crime or tort, (2) result solely from malice, or (3) amount to "extreme and unfair" economic pressure. *Friedman v. Coldwater Creek, Inc.,* 551 F. Supp. 2d 164, 169-70 (S.D.N.Y. 2008), *aff'd,* 321 F. App'x 58 (2d Cir. 2009) (citing *Carvel Corp. v. Noonan,* 785 N.Y.S.2d 359, 361-64 (N.Y. 2004)).

MiniFrame alleges that Microsoft interfered with its business relationships with a number of SoftXpand clients due to its single-user restriction and pricing of MPS. (*See, e.g.,* Compl. ¶¶ 148-65.) However, MiniFrame's allegations plainly fail to satisfy the wrongful means requirement. First, Microsoft's actions were within the bounds of the law, and MiniFrame pleads no facts to support a malicious motive. Second, it is apparent that even a broad view of "extreme and unfair" economic pressure would not encompass Microsoft's behavior. As discussed above, Microsoft is empowered to license and distribute its intellectual property as it sees fit, within the bounds of its patents, even to MiniFrame's current or potential customers. Accordingly, MiniFrame's tortious inference claim is dismissed.

III. Conclusion

For the reasons set forth above, the Court finds that MiniFrame has failed to state a claim against Microsoft under either federal or state law. Accordingly, Microsoft's motion to dismiss is GRANTED. The Clerk of the Court is respectfully directed to terminate the motion pending at Doc. No. 19 and to close this case.

SO ORDERED.

/s/ Richard J. Sullivan
RICHARD J. SULLIVAN
United States District Judge

Dated: March 28, 2013
New York, New York

* * *

MiniFrame is represented by Robert Morris and Timothy Helwick of Kramer Levin Naftalis & Frankel, LLP, 1177 Avenue of the Americas, New York, New York 10036.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of April, two thousand fourteen,

Before: Amalya L. Kearse,
Dennis Jacobs,
Chester J. Straub,
Circuit Judges.

MiniFrame Ltd.,

Plaintiff-Appellant,

v.

Microsoft Corporation,

Defendant-Appellee.

ORDER
Docket No. 13-1607

Appellant Miniframe Ltd., having filed a petition for panel rehearing and the panel that determined the appeal having considered the request, IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe