No. 14-60

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that this Court's established precedent regarding refusal-to-deal claims supported dismissal of MiniFrame's monopolization claims—which arise from Microsoft's changes to its own software licenses and seek to require Microsoft to share its software.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Microsoft Corporation states that it is a publicly traded company, that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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The summary ruling of the Court of Appeals (Pet. App. 1-6) was designated as unpublished and is reported at 551 F. App'x 1. The Court of Appeals' order denying a petition for rehearing (Pet. App. 30) is unreported. The opinion of the District Court (Pet. App. 7-29) is not published in the Federal Supplement, but is available at 2013 WL 1385704.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 2013. On April 17, 2014, the Court of Appeals denied Petitioner's timely petition for rehearing. The petition for certiorari was timely filed on July 16, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATEMENT

1. Petitioner MiniFrame Ltd.'s Complaint in the District Court challenged the right of Respondent Microsoft Corporation to protect its intellectual property (IP) through valid license restrictions and to choose how it will distribute its own software products. All of MiniFrame's allegations of exclusionary or anti-competitive conduct, including those about interference with MiniFrame's contractual or prospective economic relationships, flow from Microsoft's decisions regarding the licensing of its *own* software products.

Microsoft develops and licenses computer software, including "client" operating system (OS) software that runs individual personal computers (PCs) and "server" OS software that runs servers. Servers are computers that link together multiple devices, such as PCs, and provide services to that network of devices (*e.g.*, print, Internet, and database services). *See* Complaint ¶¶ 14-27, CA2 App. 10-12.

MiniFrame is the developer of a so-called "PC-sharing" software product named "SoftXpand." SoftXpand enables multiple users seated at different terminals to simultaneously access and use a single copy of Microsoft's PC OS running on one PC. *See id.* ¶ 40, CA2 App. 15. In other words, SoftXpand is intended to and does enable a group of people to buy only a single copy of Microsoft's OS software and to share it simultaneously among them. *See* MiniFrame CA2 Br. 1, 8; *see also* Pet. 3 ("PC-sharing software results in multiple users of that PC sharing the single copy of Windows in the shared PC.").

The Complaint alleged that, to function, SoftXpand requires access to Microsoft's PC OS software, *see* Complaint ¶ 40, CA2 App. 15. Indeed, if SoftXpand did not require access to or an interface with Microsoft's PC OS, MiniFrame would be indifferent to Microsoft's licensing of its PC OS, and would never have filed this lawsuit.

Although SoftXpand uses Microsoft's OS as an input—actually, *the* input—to produce the PC "sharing" product it delivers to end users, the

Complaint nowhere alleged that Microsoft dealt with or assisted MiniFrame in developing, marketing, or distributing SoftXpand, or otherwise cooperated with MiniFrame in any way. To the contrary, the Complaint alleged that "Microsoft never officially approved the use of SoftXpand with any Windows Client Operating System." Complaint ¶ 79, CA2 App. 25.

Microsoft licenses its software, including its PC OS software, to end users. MiniFrame began marketing SoftXpand sometime after 2003. Subsequently, Microsoft changed its end-user license agreement (EULA) for its Windows OS software. As alleged in the Complaint, before 2007, the license for Microsoft's PC OS software limited the use of that software to a single computer. *See* Complaint ¶¶ 37, 50-53, CA2 App. 14, 19-20. In 2007, Microsoft changed that PC client OS restriction from one computer per license to one user per license—first for Microsoft's PC client OS. *See id*. ¶¶ 58, 62-63, CA2 App. 21-22. As a result of that change, MiniFrame alleged, customers who wanted to create a multi-user computer system that ran a Microsoft OS needed to purchase a Microsoft server OS, *see id*. ¶ 65, CA2 App. 22-23, and could not use SoftXpand.

Although the Complaint alleged that Microsoft interfered with MiniFrame's contractual or economic relationships, that alleged interference stemmed entirely from Microsoft's licensing decisions and Microsoft's informing its customers about its license restrictions. *See*, *e.g.*, D. Ct. Tr. 7:3-10, CA2 App. 80 (MiniFrame's counsel's concession that the alleged interference consisted of Microsoft changing its licensing terms and informing its customers of the same). *See also* Pet. 15 (MiniFrame's deals were quashed by "Microsoft's threats to potential distributors of SoftXpand, including direct statements that 'MiniFrame's SoftXpand products were violating Microsoft's licensing terms.'") (cit. omit.). Further, Microsoft's explanations of its license terms typically were in response to customer requests for information or clarification about license restrictions—MiniFrame did not allege that Microsoft engaged in some sort of affirmative public campaign against SoftXpand, or that Microsoft brought a single lawsuit to prevent the sale of SoftXpand. *See* Complaint ¶ 167, CA2 App. 43 ("when . . . OEM[s] approached Microsoft for approval to continue working with MiniFrame, Microsoft said 'No.'").

2. MiniFrame challenged Microsoft's revision of its own PC OS license terms as a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* Complaint ¶¶ 78-84, 334-341, CA2 App. 25-26, 67-69. The District Court dismissed the Sherman Act claims. The Court reasoned that, as the owner of IP, Microsoft had the right to impose end-user licensing restrictions (such as the single-user restriction) on the use of its IP. *See* Pet. App. 14-17.[1] The District

[1] MiniFrame's entire Complaint was premised upon the fundamental assumption that Microsoft Windows embodies valid and enforceable IP that SoftXpand needs to access or with which it needs to interface. If that were not the case, MiniFrame's Complaint—which seeks forced sharing of Microsoft's PC OS—would be unnecessary. *See also* D. Ct. Tr 52:2-3, CA2 App. 278 (statement of MiniFrame counsel during

Court also determined that MiniFrame's antitrust claims failed for an *independent* reason—even assuming, *arguendo*, that Microsoft is a monopolist, it has the right not to deal or cooperate with a purported competitor with which Microsoft never previously dealt or cooperated. *See* Pet. App. 17-19.

3. In an unpublished summary opinion, the Second Circuit affirmed. The court explained that Microsoft had no duty to deal with MiniFrame. *See* Pet. App. 4. Because MiniFrame did not allege that Microsoft had any prior dealings with it, but alleged only that Microsoft changed the terms by which Microsoft licenses its software products to its own customers, the Second Circuit held that MiniFrame's claim did not fall within an exception to the refusal-to-deal doctrine. *See id.* 3-4.[2]

ARGUMENT

This Petition, challenging the unpublished Second Circuit *per curiam* ruling, presents neither a circuit conflict nor any *bona fide* conflict with existing Supreme Court authority. The Second Circuit properly and straightforwardly applied this Court's precedents to what is plainly a refusal-to-

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District Court hearing that "all they [Microsoft] do is make software and all the software has inherit [sic] within an IP.").

[2] The Second Circuit did not reach the District Court's IP reasoning. MiniFrame also raised a predatory pricing claim, which the District Court dismissed. The Second Circuit affirmed that dismissal, and MiniFrame does not raise the price predation claim in its Petition, and, thus, has abandoned it.

deal antitrust claim. Although Petitioner now argues that the refusal-to-deal precedent has no application here, this was not its position in the District Court or the Court of Appeals, and is a baseless elevation of labels over the substance of the allegations in the Complaint. Finally, Petitioner's invitation to disregard nearly 100 years of established precedent specifically addressing refusal-to-deal antitrust claims is wholly unjustified and, in any event, would not save Petitioner's claims from dismissal. Accordingly, the Petition should be denied.

1. The Petition here presents no circuit conflict that might require resolution by this Court. Indeed, the Petition does not even attempt to articulate a *potential* circuit conflict raised by the Second Circuit's unpublished summary ruling. The absence of any circuit conflict militates strongly against review by this Court. *See* Rule 10.

2. As the Court of Appeals recognized, the allegations here raise a refusal-to-deal claim. It has been established for almost a century that, as a general rule, firms (even monopolists) have a right to deal, or refuse to deal, with whom they choose without violating the antitrust laws. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (Sherman Act Section 2 "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; and, of course, he may announce in advance the circumstances under which he will refuse to sell."). The exceptions to that rule are narrow and have no

application here, as the Court of Appeals held (Pet. App. 4).

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004), this Court reaffirmed that "there is no duty to aid competitors." *See also Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 444 (2009) (a business, even a putative monopolist, has "no antitrust duty to deal with its rivals at all"). *Trinko* explained that refusals to deal are generally lawful, and defined a narrow exception for certain conduct by a monopolist. Specifically, for a monopolist's refusal to deal to be actionable as exclusionary conduct, this Court held that there must have been prior voluntary cooperation with the excluded rival that subsequently was terminated. *See Trinko*, 540 U.S. at 409. In addition, in terminating the voluntary relationship, the alleged monopolist must have sacrificed short-term profits. *See id*. These elements of the very limited *Trinko* exception are stringent because "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Id*. at 408.

The Court of Appeals here correctly held that *Trinko* controls and requires rejection of MiniFrame's Section 2 claim. The Court of Appeals explained: "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." Pet. App. 4. That reasoning is correct and presents no substantial issue of law warranting this Court's review.

In its Petition, MiniFrame argues that *Trinko* should not control here because it was decided in the context of a "regulatory structure designed to deter and remedy anticompetitive harm." Pet. 21 (quoting *Trinko*, 540 U.S. at 412). But nothing in *Trinko* suggests that its two-factor refusal-to-deal analysis—which looks to whether the monopolist had a prior course of dealing with its rival and irrationally sacrificed profits in terminating that relationship—applies only where robust or comprehensive regulations can deter anti-competitive harm. Cases decided after *Trinko* regularly have applied *Trinko*'s reasoning in the absence of any regulatory structure. *See, e.g.*, *LiveUniverse, Inc. v. MySpace, Inc.,* 304 Fed. Appx. 554, 556 (9th Cir. 2008); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 53-54 (2d Cir. 2007).[3]

[3] Contrary to MiniFrame's argument, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985), also provides no basis to avoid *Trinko*. There, the Court upheld a jury verdict of monopolization against the owner of three ski mountains that had sold a joint lift ticket with the owner of a fourth mountain. The Court noted that the competing ski mountains previously had cooperated in a joint venture-type arrangement from which the defendant later withdrew cooperation. *See id.* at 589-91. Just as in *Trinko*, prior cooperation was essential to the claim; had the resorts never cooperated with each other, the Court would not have found a duty to offer a joint ski lift ticket.

MiniFrame further attempts to avoid this Court's established refusal-to-deal precedents by arguing that it did not plead a refusal-to-deal—*see*, *e.g.*, Pet. 5 (MiniFrame was "*not* complaining that Microsoft was refusing to deal with it" but sought judicial protection from Microsoft's "affirmative interference" with MiniFrame's business) (emphasis in original). This is a strange argument given that MiniFrame's appeal brief had an entire section titled "Microsoft's Refusal to Deal and Change of Policy Give Rise to a Plausible Evidentiary Inference of Anticompetitive Conduct." MiniFrame CA2 Opening Br. 38. *See also* MiniFrame CA2 Reply Br. 20 ("MiniFrame, in addition, alleged a refusal to deal by Microsoft.").

In any event, MiniFrame's argument improperly places a premium on self-serving labels and ignores MiniFrame's actual allegations. This case presents a classic refusal-to-deal fact-pattern. SoftXpand requires someone else's product—here, Microsoft's PC OS software—to function. *See* Complaint ¶ 40, CA2 App. 15. Put otherwise, SoftXpand needs Microsoft's OS as an input to produce the "shared" Microsoft OS product it delivers to end users. If SoftXpand did not require access to or an interface with Microsoft's PC OS, MiniFrame would be indifferent to Microsoft's licensing of its PC OS, and would never have filed this lawsuit. At its heart, MiniFrame's Complaint seeks to require Microsoft to change its license to enable MiniFrame to access or interface with Microsoft's Windows OS. Only in this way can MiniFrame sell its SoftXpand product to end users in compliance with the licenses.[4]

In *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1947 (2014), the Court rejected a similar argument that a refusal-to-deal claim could avoid dismissal if labeled as a claim for affirmative interference. Novell challenged Microsoft's decision to no longer support certain "application programming interfaces" that had been disclosed in a previous pre-release "beta" version of Windows95 (which Novell argued were valuable to it). Attempting to escape unfavorable refusal-to-deal analysis, Novell asked the court "to toy with the act-omission distinction, seeking to have [it] describe Microsoft's conduct as an 'affirmative' act of interference rather than an 'omission' of assistance . . . ." *Id.* at 1079. The Court properly declined to do so, holding that "[t]raditional refusal-to-deal doctrine is not so easily evaded." *Id.*[5]

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[4] Contrary to MiniFrame's arguments now, forced dealing is exactly what it seeks. *See* Pet. 25 ("all that is required [to remedy the alleged violations] is the removal of the single-user restriction Microsoft added" to its PC OS licenses). That request to deal squarely implicates this Court's prior refusal-to-deal decisions in *Colgate*, *Trinko*, and *Linkline*.

[5] In *Novell*, the Court held that the decision to withdraw support for certain computer application programming interfaces could not constitute a refusal to deal in violation of Section 2. *See id.*, 731 F.3d at 1066, 1076. MiniFrame cites *Novell*'s statement that "[b]usiness torts generally . . . can sometimes give rise to antitrust liability." Pet. 23, quoting *Novell*, 731 F.3d at 1079. In the full passage, the *Novell* Court actually wrote that "[b]usiness torts generally, and acts of fraud more particularly can sometimes give rise to antitrust liability. At least when the defendant's deceptive actions . . .

Here, the Court of Appeals correctly saw MiniFrame's claim as a refusal-to-deal and rejected it on that basis. MiniFrame's game-playing with labels to avoid *Trinko* is not a valid basis for challenging the Court of Appeals' ruling or for seeking review by this Court. *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do").

And the application of the *Trinko* exception to the unique set of facts presented by this case does not warrant this Court's review. MiniFrame's Complaint alleges a putative competitor (i) whose product requires access to a dominant firm's product, (ii) with whom the dominant firm did not previously cooperate, and (iii) who accuses the dominant firm of monopolization as a result of a unilateral change in the dominant firm's own end user licenses—a change that purportedly has an impact on a collateral market. MiniFrame does not argue that such facts are likely to recur in the future. Nor does it actually argue that, if *Trinko* applies, the Court of Appeals' resolution of the Section 2 claim would be incorrect.

3. Having no legitimate basis to challenge the application of *Trinko* to this case, MiniFrame now tries to change the subject by arguing that a

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are so widespread and longstanding and practically incapable of refutation that they are capable of injuring [competition]." *Id*. at 1079-80. Nothing in MiniFrame's Complaint suggested that Microsoft committed "acts of fraud" or "deceptive" actions, which the Second Circuit specifically recognized in affirming the dismissal of MiniFrame's state law claims. *See* Pet. App. 6.

Section 2 claim can, nonetheless, be separately based on *United States v. Grinnell*, 384 U.S. 563 (1966). But MiniFrame acknowledges, as it must, that *Grinnell* merely sets forth the general standard for monopolization claims. It does not directly address refusals to deal, which are subject to a "subsidiary" rule. *See* Pet. 6. As this case presents a refusal-to-deal claim, there is nothing in *Grinnell* that would suggest or drive a different result.[6] Indeed, MiniFrame's reliance on *Grinnell* is nothing short of an invitation to ignore nearly 100 years of precedent directly addressing refusal-to-deal claims. This precedent is not inconsistent with *Grinnell*; to the contrary, it demonstrates how *Grinnell's* second prong—exclusionary or anticompetitive conduct—is to be applied when the particular conduct alleged is (as here) a refusal-to-deal. *See Novell,* 731 F.3d at 1072 (while anticompetitive conduct comes in many forms, "[w]ith time and a gathering body of experience, courts have been able to adapt this general in-

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[6] *Grinnell* involved anti-competitive acquisitions, restrictive agreements that allocated markets, and pricing practices that "contained competitors." *Id.*, 384 U.S. at 576. Most of the decision focused on matters irrelevant to the Petition, such as the proper definition of product and geographic markets, *see id.* at 573-76, and the proper scope of the government's remedies, *see id.* at 577-80. Insofar as *Grinnell* is relevant at all, it is relevant only for generally noting that the offense of monopoly requires proof both of (i) monopoly power and (ii) "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." *Id.* at 570-71. This second monopolization factor is often termed exclusionary or anti-competitive conduct. *See Trinko*, 540 U.S. at 407; I ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (7th ed. 2012) at pp. 240-41.

quiry to particular circumstances, developing considerably more specific rules for common forms of alleged misconduct . . .”).

Moreover, MiniFrame did not advance its newly-minted *Grinnell* argument until the Second Circuit oral argument. Its Court of Appeals briefing mentioned *Grinnell* only once in the opening brief and once in the reply, both in passing, and MiniFrame did not even list *Grinnell* in the Table of Authorities of its District Court brief.[7] Because MiniFrame made little attempt to develop its *Grinnell* argument below and meaningfully allow the District Court or the Court of Appeals to address it, this case is an exceedingly poor vehicle to address the application of *Grinnell* to refusal-to-deal claims such as those presented here.

Even ignoring the mountain of applicable precedent addressing refusal-to-deal claims and instead examining this case under *Grinnell* would not help MiniFrame's claims. MiniFrame's arguments merely beg the question—whether Microsoft's change in its end-user license terms constitutes the “willful acquisition or maintenance” of monopoly power. Neither *Grinnell*, nor any other branch of Section 2 jurisprudence, would require Microsoft to maintain its pre-2007 license terms in

[7] *See* MiniFrame's Opposition to Microsoft's Motion to Dismiss in the District Court, CA2 App. 186-194 (discussing refusal-to-deal law); MiniFrame CA2 Opening Brief at 20, 38-45 (addressing refusal-to-deal law, and discussing at length the application of *Aspen Skiing*); MiniFrame CA2 Reply Brief at 2-3, 20-24 (same).

perpetuity and eliminate its ability to respond to competitive market conditions. *See Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1194, 1198 (10th Cir. 2009) (rejecting monopolization claims under *Grinnell* and *Trinko*).

Thus, MiniFrame's invitation to marginalize all of this Court's refusal-to-deal case law is misguided, not properly presented, and will not aid its attempt to avoid dismissal of its claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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