13-1607-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MINIFRAME LTD.,

Plaintiff-Appellant,

—against—

MICROSOFT CORPORATION,

Defendant-Appellee.

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, and to enable Circuit Judges of the Court to evaluate possible disqualification or recusal, appellant MiniFrame Ltd. certifies that the following publically held entities are corporate parents, affiliates and/or subsidiaries of MiniFrame Ltd.: Rapac Communication & Infrastructure Ltd. and Inter-Gamma Investment Company Ltd.

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INTRODUCTION

MiniFrame launched its SoftXpand PC-sharing computer program in 2003. SoftXpand 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 at the *same time*. With SoftXpand, one user could work at a personal computer while others could use that same computer simultaneously simply by connecting another set of peripheral devices—a monitor, a keyboard and a mouse—to the PC. Prior to SoftXpand, multiple users in a family or business seeking to work at the same time needed to have a separate PC for each user (which could be linked together by a server computer).

SoftXpand recorded incremental sales over the years 2003-07. By 2007, a number of other companies had entered the PC sharing market and offered products similar to SoftXpand. Not only did Microsoft acquiesce initially as these products created this new market; Microsoft facilitated this market by offering one vendor's PC sharing product on its online store. Microsoft never said that SoftXpand infringed any of Microsoft's patents or copyrights.

But then everything changed. In 2007, Microsoft decided that it wanted not merely a piece of this nascent market; it wanted the whole market for itself. In quick succession, Microsoft amended the licenses that it includes with Microsoft's PC operating systems (*i.e.*, the successive iterations of Windows for

PCs) to add a single-user restriction prohibiting simultaneous use of Windows by more than one user at a time on a single PC. Microsoft then introduced its own PC sharing product called MultiPoint Server ("MPS") and—instead of letting the earlier introduced products compete against MPS—Microsoft used its monopoly power in the market for PC operating systems and predatory pricing for MPS to bolster its control of the multi-user market (that is, the PC sharing market together with the server-based multiple-user solution).

The impact was immediate. Potential purchasers of SoftXpand bolted at the prospect of violating Microsoft's single-user restriction, especially the most significant potential customers of MiniFrame. JP Morgan Chase ("JPMC"), for example, stood ready to purchase 80,000 copies of SoftXpand, subject to Microsoft's approval. Microsoft delivered precisely the opposite message: it threatened to withhold *all* customer support for Windows operating systems at JPMC if JPMC installed the SoftXpand program—even though JPMC offered to pay Microsoft a license fee for each of the 80,000 additional users. At no time did Microsoft contend that the contemplated use of SoftXpand by JPMC would infringe any of Microsoft's patents or copyrights—just the single-user restriction that Microsoft unilaterally imposed on users of Windows PC operating systems.

Any court accepting the allegations set out in MiniFrame's 65-page Complaint as true and drawing inferences from those allegations in favor of

MiniFrame should conclude that the Complaint states claims for violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; New York and Washington State statutes; and common law. But the district court found otherwise, primarily because of its erroneous finding that "[a]t 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." (SPA5)[1]. This core finding has no support in the Complaint: there is no mention of any patent in the Complaint let alone allegations showing "an entirely lawful exercise of patent rights." In addition, the district court was just plain wrong in holding that the patent law permitted Microsoft to engage in exclusionary conduct. While some courts have held that the patent law permits a patentee to engage in exclusionary conduct, this limited immunity applies *only* to the extent that the scope of the patentee's anticompetitive conduct correlates with the scope of an asserted patent claim, and here Microsoft was *not* acting under any claim of a patent.

And, despite the allegations of the Complaint showing unlawful conduct by Microsoft, the district court's decision infers that *MiniFrame* was doing something wrong. After observing that the "cost of one Microsoft license for a multi-user SoftXpand system was significantly less than the cost of multiple

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[1] Citations to the Joint Appendix are in the format: (A___) and citations to the Special Appendix are in the format (SPA___),

[Windows] licenses" in a multiple PC system, the court pointedly stated: "Perhaps not surprisingly, MiniFrame's software has since been 'used in over [thirty] countries."' (SPA2)(quoting Complaint ¶ 40). But, as decisions of this Court have shown, new technologies that make it easier or less expensive for a consumer or business to use a copyrighted work are permitted so long as there is no infringement of any of the exclusive rights in that copyrighted work. *See, e.g.*, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013). Microsoft has never alleged—and could not allege—that SoftXpand copies or otherwise unlawfully utilizes any expression of Microsoft protected by copyright law. To be sure, the Complaint nowhere alleges any exclusive right accorded to Microsoft by copyright law being infringed by the use of SoftXpand. On the contrary, the Complaint alleges that the use of SoftXpand does *not* infringe any of Microsoft's exclusive rights of copyright.

By deciding the motion to dismiss with findings and inferences at odds with the allegations of the Complaint and by conferring broad antitrust immunity to Microsoft premised on some unidentified "intellectual property" (SPA4-5), the district court was drawn to error in its ruling on each claim. MiniFrame's Complaint should be reinstated.

JURISDICTION

The district court had jurisdiction under 15 U.S.C. §§ 4, 15 and 26; and 28 U.S.C. §§ 1331, 1332(a)(2), 1337 and 1367. This Court has jurisdiction under 28 U.S.C. § 1291. On April 24, 2013, MiniFrame filed a timely notice of appeal from the district court's Order dismissing the case that was entered on March 28, 2013.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in dismissing MiniFrame's Complaint where: (1) the court ruled that Microsoft had the right to engage in exclusionary conduct to protect unidentified intellectual property based on undefined patents; (2) the court made findings and drew inferences in favor of Microsoft; and (3) the court did not accept MiniFrame's detailed allegations that: (i) Microsoft was in possession of monopoly power in the relevant markets; and (ii) Microsoft obtained and maintained that monopoly power through exclusionary conduct and predatory pricing?

2. Did the district court err in dismissing MiniFrame's claims under New York's Donnelly Act and Washington's Section 19.86.040, where the court's errors in dismissing the federal antitrust claims led to its dismissal of the state antitrust claims?

3. Did the district court err in dismissing MiniFrame's tortious interference claim by ignoring paragraphs 148-165 of the Complaint that describe how Microsoft exerted "extreme and unfair economic pressure" on MiniFrame's potential client JPMC, at least by threatening to withhold future technical support if JPMC purchased and installed MiniFrame's SoftXpand product (*see* A41 ¶ 155)?

STATEMENT OF THE CASE

This is an appeal from a March 28, 2013 Order dismissing MiniFrame's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) issued by the United States District Court for the Southern District of New York (Sullivan, D.J.) (SPA1-10), and the corresponding Judgment entered by the Clerk of the District Court on March 29, 2013. (SPA11).

STATEMENT OF FACTS

A. The Allegations of the Complaint

1. The Parties

MiniFrame is a corporation organized and existing under the laws of Israel with its principal place of business located at 43 Hamelacha Street, 42504 Netanya, Israel. (A9 ¶ 5).

Microsoft is a corporation organized and existing under the laws of the State of Washington, with its principal place of business located at One Microsoft Way, Redmond, Washington. (A9 ¶ 6). Microsoft sells, distributes and licenses various Windows client operating systems (*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 PCs and servers, respectively. (A12 ¶¶ 26-27).

2. PC Sharing Software

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. (A15 ¶ 40). Traditionally, a single PC running a single PC (or "client") operating system (like Windows XP) would be accessed by a single user at a time (*i.e.*, a single user system). (A14 ¶ 35). However, those PCs allowed (and still allow) more than one user to log onto the single PC at the same time, but each user had to take his turn separately (*e.g.*, the second user would switch screens and log in using a separate user ID without logging out the original user).

A "multi-user computer system," on the other hand, is a computer system in which more than one user can work simultaneously. (A11 ¶ 24). Prior to SoftXpand, the only type of multi-user systems available were server computer systems in which each user used their own PC (which had its own copy of an operating system, such as Windows XP) 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 the application software that could be accessed by all of the PCs in the server system. (A14 ¶¶ 35-36).[2]

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. (A15 ¶ 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 and becoming used in over 30 countries. *Id.*

At the point SoftXpand was released in 2003, Microsoft's End User License Agreement ("EULA") for its Windows PC systems only restricted users from accessing or using one copy of the Windows system on another *computer*. (A21 ¶ 56). That is, if a user bought a copy of Windows or a PC with Windows pre-installed, the EULA prevented the user from making a copy of the Windows system and installing that extra copy of Windows on another PC. *Id.* At that time, and up to late 2007, Microsoft did not include any restriction of any kind in its

[2] In greater detail, a server computer system is a system that includes a server computer and multiple PCs that enable users to access the server computer and the software running on it through the PCs. (A11 ¶ 20). A server computer is a computer that links PCs together and provides centralized access to those PCs for things such as application software like word processing programs or an e-mail system. (A10 ¶ 16).

EULAs preventing multiple users from simultaneously sharing a single licensed copy of Windows running on a single PC. (A14 ¶ 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. (A15-16 ¶¶ 41-43). Microsoft, in contrast, did not have between 2003-07 any product allowing a single Windows-based PC to be shared by multiple users at the same time, with each user working with their own set of peripherals. (A14 ¶ 36). For close to four years, MiniFrame and these other companies competed with each other while collectively growing the PC sharing market (which—with server-based systems—constituted the multi-user market). But then Microsoft decided to leverage its monopoly power and take over the PC sharing market. (A21-22 ¶¶ 58-59).

3. Microsoft's Single-User Restriction

As the sales of PC sharing software increased, Microsoft became concerned that its monopolies in the server market and the multi-user market were being threatened. (A18 ¶ 48). In 2007, responding to this competitive threat, Microsoft materially 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. (A22 ¶¶ 62-63). In particular, 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 old prohibition which prevented *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 *use* the PCs they purchased from PC manufacturers and the operating system in those PCs). (A20-22 ¶¶ 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 original equipment manufacturers ("OEMs") that make PCs. (Microsoft does not manufacture PCs). (A19-21 ¶¶ 53-58).[3] In particular, right after Microsoft changed its EULAs, OEMs became fearful that—if they used PC sharing software—Microsoft would restrict their access to Microsoft products and support. (A22-23¶ 65; A26-27 ¶ 85-90).

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[3] OEMs—in this setting—are the companies that manufacture their own products, such as the hardware components of fully-assembled PCs, laptops, and peripherals (*e.g.*, Hewlett-Packard, Sony, Samsung, etc.). (A27-28 ¶ 90). OEMs cannot install Microsoft software without Microsoft's OEM System Builder License that permits (and in fact often requires) the OEMs to pre-install Windows client operating systems in their products. (A28 ¶ 91). Because of Microsoft's monopoly on client operating systems and the corresponding demand for Windows systems, an OEM would be severely disadvantaged if Microsoft were to refuse it a future OEM System Builder License or to reduce the technical support Microsoft provides these OEMs. (A28 ¶ 91).

For example, in Spring 2009 Hewlett-Packard Company ("HP"), an OEM engaged in the business of manufacturing PCs with a Windows client operating system, began discussions with MiniFrame to explore a joint effort in the PC sharing market. (A28-29 ¶¶ 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. (A28-29 ¶ 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. (A29 ¶¶ 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." (A30 ¶ 102). HP's decision to terminate the HP-MiniFrame PC sharing solution was directly caused by pressure or other interference from Microsoft. (A30 ¶ 105).

4. Microsoft Starts Selling its PC Sharing Product, MultiPoint Server

At the time HP terminated the potential project with MiniFrame, Microsoft did not have a PC sharing product for sale. (A30 ¶ 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. (A30 ¶ 107). HP's system utilized Microsoft's newly released MultiPoint Server ("MPS"). (A30 ¶ 107). Then Microsoft amended its

"Volume Licensing Brief" given to OEMs to make clear to OEMs and others that the *only* multi-user solution 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. (A33 ¶ 123).

MPS is an application that runs on top of a version of the Windows Server 2008 R2 operating system to give the host computer shared PC functionality. (A32 ¶¶ 116-18). MPS has functionality that is a strikingly similar to that of SoftXpand. (A33 ¶ 121). The Complaint alleges that Microsoft copied the functionality and underlying technology of SoftXpand in order to create MPS. (A31 ¶ 108).[4]

With its monopoly power in the PC operating system, server operating system and multi-user markets, Microsoft was easily able to assure that end users and OEMs understood 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. (A33 ¶ 124). Put another way, Microsoft forced consumers who wanted a multi-user computer system to purchase either a

[4] To be clear, MiniFrame does not allege that Microsoft copied the code in MiniFrame's software, but instead alleges that Microsoft analyzed SoftXpand and then copied its features and functionality to make MPS remarkably similar to the Windows XP version of SoftXpand. (A31 ¶ 108).

Windows server operating system (in which case the user would also need PCs to connect to the server) or Microsoft's MPS. (A33 ¶ 124).

5. Microsoft Directs Its Monopoly Power Against MiniFrame

Microsoft did not stop with simply prohibiting OEMs 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 (*e.g.*, unlike SoftXpand, Microsoft's MPS did not run on Windows XP, so a consumer running Windows XP had no multi-user options to choose from). (A42 ¶ 160).

Microsoft's exclusionary conduct upended a $20 million deal between MiniFrame and JPMC (JP Morgan Chase). (A42 ¶ 163; A54 ¶ 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. (A39-40 ¶¶ 148-49). 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. (A40 ¶ 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. (A40 ¶ 150). JPMC offered to pay Microsoft a full Windows license fee for each of the 80,000 additional access points that SoftXpand would provide. (A41-42 ¶¶ 156-58). This arrangement would bring Microsoft revenue from the sale of 80,000 additional licenses despite the fact that JPMC would not be getting 80,000 additional copies of Windows XP. Microsoft refused to allow the MiniFrame/JPMC deal to be concluded. (A42 ¶ 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. (A42 ¶ 162).

By reason of Microsoft's interference, JPMC declined to go forward with Miniframe. *Id.* As noted above, Microsoft could not provide JPMC with the arrangement it wanted because Microsoft's MPS did not work with Windows XP. (A42 ¶ 160). JPMC was still using Window XP because it had essential proprietary software that ran only on Windows XP. SoftXpand was the only PC sharing product on the market that came in both Windows XP and Windows 7 versions. JPMC could have used SoftXpand immediately, and would also have had a smooth transition path if and when it migrated to Windows 7. (A40 ¶ 150). So, even though JPMC was one of Microsoft's large clients and was offering to pay a full license fee for 80,000 PCs running SoftXpand, and even though Microsoft did not have a product to offer JPMC in place of SoftXpand, Microsoft chose to leave JPMC with no solution in order to maintain its monopoly in the server operating system and multi-user markets. (A39-42 ¶¶ 148-62).

JPMC is not the only instance of harm to MiniFrame. Microsoft's direct and indirect threats and interference with MiniFrame's potential customers has caused millions of dollars of potential business to be lost. OEMs saw SoftXpand as a path to increased sales, not decreased sales. HP estimated sales of 3 million PCs offering SoftXpand in 3 years (A29 ¶ 97); Samsung thought SoftXpand would drive sales of its Media Center (A44-45 ¶ 174); Toshiba thought SoftXpand would increase sales of its notebook computers and home networking solutions (A46 ¶ 186); and LG thought there were "real business opportunities" to use SoftXpand for the consumer market (A47 ¶ 197).

In each of these situations, however, Microsoft's threatening conduct caused the OEMs to end each and every deal with MiniFrame that was in the works. (A28-30 ¶ 92-106; A44-50 ¶ 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." (A50-59 ¶¶ 220-89). It is, therefore, clear Microsoft's 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. (A22-23 ¶ 65).

6. The Claims for Relief

The Complaint sets forth eight (8) separate claims for relief:[5]

i. Count I – Violation of Section 2 of the Sherman Act for maintaining monopolization of the server operating system market. (A67 ¶¶ 334-35).

ii. Count II – Violation of Section 2 of the Sherman Act for attempted monopolization of the PC sharing software market. (A68 ¶ 336-37).

iii. Count III – Violation of Section 2 of the Sherman Act for maintaining monopolization of the multi-user software market. (A68 ¶¶ 338-39).

iv. Count IV – Violation of Section 2 of the Sherman Act for attempted monopolization of the multi-user software market (including the PC sharing market). (A68-69 ¶¶ 340-41).

v. Count VII – Violation of Donnelly Act, N.Y. Gen. Bus. Law Section 340. (A69 ¶¶ 342-43).

vi. Count VIII – Violation of Washington State's RCW 19.86.040. (A69 ¶¶ 344-46).

vii. Count IX – Violation of RCW 19.86.020. (A70 ¶¶ 347-48).

viii. Count XI—Tortious interference under common law. (A70 ¶¶ 351-52).

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[5] Counts V and VI were omitted from the Complaint as filed and MiniFrame does not appeal from the dismissal of what was Count X (unjust enrichment).

B. The Decision Below

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. (SPA3). On May 11, 2012, after full briefing, oral argument was held. *Id.* On March 28, 2013, the district court issued its decision, granting Microsoft's motion. (SPA10).

In its decision, the district court repeatedly declined to accept allegations of the Complaint and to draw all inferences in favor of MiniFrame. Instead, the court made findings and drew inferences in Microsoft's favor:

First, the district court inferred that Microsoft's license provisions "fit within the bounds of its patents" (SPA4) and that Microsoft's change to its EULAs was "an entirely valid exercise of its patent rights." (SPA5). 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.

Second, the district court did not accept MiniFrame's allegation that Microsoft will not permit *any* multi-user licensing of its Windows client operating systems with non-Microsoft products, resulting in the complete and total shut down of the market for MiniFrame and other PC-sharing software manufacturers. (A22-23 ¶ 65). The court instead stated that Microsoft's change to the EULAs meant that "any Microsoft customer installing a multi-user system had to license software for each user." (SPA2). The court inferred that MiniFrame and its customers were simply trying to avoid paying license fees to Microsoft, when, in fact, Microsoft would not permit them to do so (*see*, *e.g.*, A41-42 ¶¶ 156-60). (SPA2). Paragraphs 64-65 of the Complaint are cited by the district court in support of the court's inference (in favor of Microsoft) that MiniFrame's customers did not want to pay for additional licenses. (SPA2). The cited paragraphs allege just the opposite. MiniFrame alleged that Microsoft's change to the EULAs *forbid* PC sharing with the Windows client operating system. (A22 ¶ 64). Moreover, the Complaint alleges that if a user wants a multi-user installation, the only option is to buy a *server*, not a PC (because using that PC as a multi-sharing PC is *forbidden* for the owner of the PC). (A22-23 ¶ 65). Server systems are significantly more expensive to purchase, and are significantly more difficult to install, operate and maintain. (A16 ¶ 44). And the only company offering a compatible server operating system is Microsoft, which has a monopoly in the multi-user market maintained by the license change. As alleged in the Complaint: "Based on these Single User Restrictions, customers have *no choice* but to purchase a Windows Server Operating System if they want to install a multi-user computer system." (A22-23 ¶ 65). The court did not draw an inference in favor of MiniFrame from the detailed allegations of how JPMC offered to buy 80,000 additional licenses from Microsoft, but Microsoft refused to accept those payments and instead withheld approval for JPMC's use of SoftXpand. (A41-42 ¶¶ 156-60).

Third, the district court drew inferences regarding Microsoft's motivation in changing its license policy that were contrary to what is alleged in the Complaint. In particular, the 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*." (SPA5). The court then went on to find that "*it is perfectly understandable* that Microsoft chose to amend its licenses . . ." (SPA5). The court inferred that "Microsoft changed its licensing agreements to increase *the number* of licenses users would have to purchase." (SPA6). None of this was in the Complaint. On the contrary, the Complaint alleges that Microsoft's change in licensing policy in 2007 was exclusionary conduct that was carried out *to foreclose the market to MiniFrame* and others. (A24 ¶ 75).

Fourth, the district court did not accept MiniFrame's allegation that SoftXpand does not copy Microsoft's software, and instead utilizes features and characteristics that are inherent in every version of Windows since at least Windows XP. (A23 ¶ 68). The court found Microsoft's change to the EULA as "an entirely valid exercise of its patent rights—that curtailed the ability of third parties to *reproduce* its software for multiple users." (SPA5). The Complaint, however, alleges the opposite—that there is no such reproduction. Moreover, there was no basis in the Complaint from which the court could make a finding on how SoftXpand works (*i.e.*, whether it reproduced Microsoft's software), as the Complaint does allege any proprietary details of how SoftXpand works.

Fifth, regarding the "Duty to Deal," the court did not accept MiniFrame's allegations in support of a prior course of dealings. Specifically, the Complaint alleges that "companies [like MiniFrame] were *free to develop* and sell PC sharing software. . . without anyone violating the relevant license from Microsoft." (A15 ¶ 38). The Complaint next alleges that Microsoft, in its role as the developer of the Windows operating system, cooperated with the entire Windows software development community, including companies such as MiniFrame, on a regular basis—alleging, as an example, that Microsoft issues guidelines and rules for software developers to follow and which developers, in turn, rely on in order to comply with Microsoft's requirements. (A13-16 ¶¶ 32-43). The Complaint then alleges that Microsoft contacted MiniFrame directly and asserted that the use of SoftXpand violated the end user agreement, and that "Microsoft did not and would not *allow* any shared PC systems using Windows Client Operating Systems" (A38-39 ¶¶ 142-45), even though it had *allowed* such application software to be sold in the market for four years prior to its change. Moreover, Microsoft itself previously sold at least one third party PC sharing software program on its website. (A168-69).

<u>Sixth</u>, regarding "Predatory pricing," the court drew the inference that Microsoft changed its license terms as "an obvious boon to short-term profits," (SPA6). The Complaint alleges different motives. The Complaint alleges that Microsoft became aware of the competitive threat of PC sharing software and changed its license terms to completely and totally take over the market that other companies had created. (A22-23 ¶¶ 62-65). Further, the Complaint alleges that, at least in the JPMC example, Microsoft refused the sale of 80,000 additional Windows licenses and threatened to withdraw support if JPMC purchased SoftXpand (*i.e.,* foregoing short-term profits), in order to preserve its monopoly of the multi-user market. (A39-43 ¶¶ 148-65). Then, the court held that "MiniFrame failed to provide any indicia supporting a finding that Microsoft's price for licensing [MultiPoint Server] was 'below an appropriate measure' of its costs," by inferring that Microsoft merely "discounted some of its software." (SPA7). On the contrary, the Complaint alleges that Microsoft sold Windows Server 2008 for roughly $1,000. (A35 ¶ 131). MPS was sold for $133, but it included Windows Server 2008 as part of the installation package. (A32 ¶ 116; A35 ¶ 131). The Complaint alleges that Microsoft was giving MPS away for free (which would obviously be below cost), because a user who purchased MPS for $133 got the $1,000 Windows server product as well for almost 90% off of the normal cost of the server product alone. (A35-37 ¶¶ 131-36). These allegations were as detailed

as possible prior to any discovery. In fact, during oral argument on the motion, the court noted that "there is virtually no way" to obtain detailed cost/pricing information "unless you have a mole," which, of course would be illegal. (A251, lns. 3-4).

Seventh, regarding tortuous interference, the court stated that "MiniFrame pleads no facts to support malicious motive." (SPA10). The Complaint, however, alleges JPMC was prepared to install SoftXpand software on its PCs, and that it was prepared to pay Microsoft a full license fee for each additional seat utilized. (A41-42 ¶¶ 156-60). In response, Microsoft refused to accept those license payments and instead threatened to withdraw technical support from JPMC if JPMC proceeded to work with MiniFrame. (A42 ¶ 162). Microsoft's threat, as alleged in the Complaint, provides the requisite support for an inference of a malicious motive on Microsoft's part that should have been accepted by the court. Instead, the court drew the inference that Microsoft did not have "a malicious motive" and dismissed MiniFrame's tortious interference claim.[6]

Eighth, the court refused to accept the well-pleaded allegations that Microsoft's exclusionary conduct in changing the EULA completely and totally prevented any company from participating in a market—the PC sharing market—

6 Again, there is nothing on the record regarding Microsoft's motives other than what is alleged by MiniFrame because Microsoft has not yet filed an answer or counterclaims in the case.

that MiniFrame and those other companies created and developed. (A15-16 ¶ 40-43; A22-23 ¶ 65). Microsoft made this clear in numerous publications, such as in its release of a brief on Volume Licensing in March 2008:

> Windows client operating systems license terms *do not permit* multiple users to access or otherwise use one licensed copy of the software simultaneously. (A22-23 ¶ 65).

Thus, as MiniFrame alleged, Microsoft had possession of monopoly power in the relevant market (when users have only one purchasing choice in a market, they are purchasing from a monopolist). (A22-23 ¶ 65). Moreover, MiniFrame alleged that Microsoft's exclusionary conduct with regard to changing the EULA gave it (or allowed it to maintain) that monopoly power as opposed to growth or development as a consequence of a superior product. (A23-24 ¶¶ 69-71, 75).

SUMMARY OF ARGUMENT

1. The district court's decision rests on two overlapping errors. First, the court held that Microsoft was entitled to engage in exclusionary conduct as the owner of patents and other intellectual property. There is no basis for this holding: the court never identifies any claim of a patent or any exclusive right of copyright under which Microsoft was supposedly acting when shutting MiniFrame out of the PC sharing market. Second, having started by recognizing a measure of antitrust immunity for Microsoft, the district court proceeded to make findings and to draw

inferences in favor of Microsoft, rather than accepting the allegations of the Complaint as true and drawing all inferences in favor of MiniFrame. Most notably, the Complaint makes no mention of any patent owned by Microsoft or of any exclusive right of copyright owned by Microsoft; all of the court's findings premised on patents or copyrights owned by Microsoft are at odds with the allegations of the Complaint.

Accepting the allegations of the Complaint as true, the Complaint plausibly states a claim under Section 2 of the Sherman Act by showing how Microsoft engaged in unlawful exclusionary conduct and predatory pricing in order to maintain its monopolies in the markets for server operating systems and for multi-user systems and to achieve monopoly power in the PC sharing market. (Point I, *infra*).

2. The district court's findings on MiniFrame's Section 2 claims were applied in the dismissal of MiniFrame's claims under New York's Donnelly Act and the Revised Code of Washington; once the district court's errors are corrected, it is clear that the Complaint states claims under those statutes. MiniFrame also stated a claim for tortious interference with business relations. The court held that MiniFrame failed to plead wrongful means, but the Complaint contains detailed allegations showing how Microsoft pulled the rug from under multiple deals

MiniFrame was on the verge of concluding in order to maintain and expand Microsoft's monopoly power. (Point II, *infra*).

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal of a complaint pursuant to Rule 12(b)(6), "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Gatt Communications, Inc. v. PMC Assoc.*, 711 F.3d 68, 74-75 (2d Cir. 2013)(citation and quotation marks omitted).

ARGUMENT

I. THE COMPLAINT PLAUSIBLY STATES A CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

A. The Legal Standard

Section 2 of the Sherman Act prohibits monopolization of "any part of the trade or commerce among the several States." 15 U.S.C. § 2. To state a § 2 claim, a plaintiff must allege '"(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."' *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (*per curiam*) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). To state an attempted monopolization claim, a plaintiff must allege that the defendant has: "(1) engaged in predatory or anticompetitive conduct, with (2) the specific intent to monopolize, and (3) the dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Exclusionary conduct can be a violation of § 2. *See Grinnell*, 384 U.S. at 571. A firm engages in anticompetitive conduct by '"conduct without a legitimate business purpose that makes sense only because it eliminates competition."' *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 124 (2d Cir. 2007) (quoting *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004)); *see also Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (a monopolist's actions are anticompetitive or exclusionary "if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonable necessary for such competition," and "if the conduct appears reasonably capable of contributing significantly to creating or maintaining monopoly power.") (citation and internal quotation marks omitted).

A viable complaint must be based on factual allegations that state a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (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."

Iqbal, 556 U.S. at 678. Even post-*Twombly*, a district court should "tak[e] as true all material factual 'allegations of the Complaint,'" "draw[ing] all reasonable inferences and resolv[ing] all conflicts and ambiguities in favor of plaintiff[]." *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 168 (2d Cir. 2012), *cert. denied sub nom. Curtis Circulation Co. v. Anderson News, L.L.C.*, 133 S. Ct. 846 (2013). "The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion . . . . A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." 680 F.3d at 185.

B. The District Court Erred In Holding That Microsoft Was "Exercising Valid Patent Rights" And Acting To Protect Unidentified Intellectual Property

The district court's decision proceeds from its statement that "[p]atent holders possess broad authority to enforce their intellectual property rights without violating the antitrust laws." (SPA4). Importantly, the district court did not begin its analysis by examining whether the Complaint plausibility stated a claim. The court began instead by focusing on the protection from antitrust liability supposedly available to Microsoft as a patent owner and then considered whether the Complaint adequately alleged anticompetitive conduct that overcame this protection.

Thus, the court found MiniFrame's allegations to be insufficient absent "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." (SPA4). The court similarly found that MiniFrame's arguments in opposition to the motion below "fail as a matter of law," because "patent holders have no duty to deal with their competitors or permit them access to their technology." (SPA5). The court then made an "interpretive finding," *Anderson News*, LLC, 680 F.3d at 190, that "[a]t 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." (SPA5). From this core finding, the court "conclude[d] that Microsoft was well within its rights to include a single-user restriction in its client operating system license agreement." (SPA5). The court ultimately held that MiniFrame failed to state a Sherman Act claim "premised on Microsoft's single-user restriction" because the Complaint "nowhere states facts to support that Microsoft acquired its [patent] rights illegally, exceeded the scope of its patents, or even modified its licenses for an impermissible purpose." (SPA5).

The district court clearly erred in dismissing MiniFrame's § 2 claim. The court found that Microsoft's conduct in changing the EULA was an "entirely valid exercise of [Microsoft's] patent rights," but on a Rule 12(b)(6) motion the district court should not have made such a finding. The word "patent" does not even appear in the Complaint, and there are no allegations of patent rights that Microsoft might possess and validly exercise. The district court's dismissal of MiniFrame's claim based on facts completely foreign to the Complaint—and at odds with the allegations actually in the Complaint—requires reversal under the standard for testing the sufficiency of a claim under Rule 12(b)(6). *See Anderson News, L.L.C.*, 680 F.3d at 173-74.

The omission of any reference to any Microsoft patent in the Complaint is not the result of an effort by MiniFrame to sidestep applicable patents in order to avoid a dismissal at the threshold motion stage. The EULAs at the heart of the case do not identify any patent that is the basis for the single-user restriction. The district court—after asserting that "[t]here is no dispute that the Windows client and server operating systems are Microsoft's intellectual property" (SPA4)—never moved beyond this generality to identify a specific claim in any patent that constitutes "Microsoft's intellectual property" in its PC operating system. The district court's decision effectively gives Microsoft *carte blanche* to violate the antitrust laws merely by claiming a right to protect some inchoate "intellectual property."

Similarly, the district court did not identify any exclusive right conferred to Microsoft under Section 106 of the Copyright Act that was being infringed by SoftXpand. *See* 17 U.S.C. § 106. The district court made passing references to copyright cases but never stated or applied the principles applicable where an antitrust claim is asserted against a copyright owner. The court—as quoted above—found it "an entirely valid exercise of [Microsoft's] patent rights" for Microsoft to "curtail[] the ability of third parties to *reproduce* its software for multiple users" (emphasis added). (SPA5).

Yet the district court's implicit finding that users of SoftXpand were improperly "reproducing" Microsoft's software is clear error for two reasons. First, the court did not point to any protected expression owned by Microsoft that was being unlawfully reproduced by MiniFrame or by SoftXpand users. Second, on a Rule 12(b)(6) motion, the district court made a finding of fact against MiniFrame that had no basis in the allegations of the Complaint. Nowhere does the Complaint allege that protected expression of Microsoft was being reproduced in violation of an exclusive right of copyright. On the contrary, the Complaint alleges that no protected expression of Microsoft was being copied by the use of SoftXpand and that Microsoft has never accused MiniFrame of copyright infringement. Critically, the district court's holding rests on an incorrect finding of fact in direct conflict with the allegations of the Complaint.[7]

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[7] For the same reason, the district court also erred in finding that "it is perfectly understandable that Microsoft chose to amend its licenses to limit *users* in

Decisions of this Court illustrate how, in an alleged copyright infringement context, the pivotal inquiry is whether any of the exclusive rights of copyright is being infringed. For example, in *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), the Court addressed whether Aereo is infringing the copyrights held by owners of programs broadcast on network television by enabling Aereo's subscribers in the New York City area to watch those programs over the internet for a monthly fee paid to Aereo. It was undisputed that Aereo did not have a license from any of these copyright owners to record or transmit their programs and that Aereo's subscribers—because of the Aereo service—no longer needed to access these programs via a coaxial cable service (where the cable services are licensed by, and do pay fees to, the copyright owners).

The majority opinion by Judge Droney (joined by Gleeson, D.J.) held that Aereo was not infringing the public performance right accorded to copyright owners under Section 106 of the Copyright Act (and more particularly, the so-called "Transmit Clause" in the statutory definition of the public performance right). In dissent, Judge Chin explained why Aereo's service should be held to infringe the copyright owner's public performance right. The point for the present case is that neither the majority nor the dissent found that the copyright owners had some unidentified intellectual property rights, nor did either opinion turn simply on

2007, when, previously a limit on *computers* would have similarly protected its rights in a solely server-based world." (SPA5).

the fact that Aereo was causing the copyright owners to earn less revenue when cable subscribers switched over to become Aereo subscribers. Applying an expanding line of case law on the Transmit Clause, each opinion closely examined the language and intent of the Transmit Clause to determine whether an enumerated right under the Copyright Act is being infringed.

The district court in the present case did not engage in such an analysis. Instead, the court cited *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005), for "finding file sharing system liable for copyright infringement where it permitted users to reproduce and distribute copyrighted files"—implying that SoftXpand infringed copyrighted expression of Microsoft. Once more, the district court did not state just how and when SoftXpand supposedly permitted users to reproduce any part of a Windows operating system (and, in fact, had no basis in the record from which such an inference could be drawn). Nonetheless, the district court accorded broad protection to Microsoft merely because it might be the owner of certain uninfringed copyrights unrelated to the single-user restriction. MiniFrame is aware of no case before the district court's decision granting a Rule 12(b)(6) motion to dismiss an antitrust claim by according antitrust immunity based on such unidentified intellectual property rights.

C. **Microsoft's Conduct Is Unlawfully Exclusionary**

The allegations of the Complaint do not depict Microsoft as protecting intellectual property. The allegations of the Complaint do depict Microsoft leveraging its monopoly in the PC operating system market to eliminate competition from the PC sharing and multi-user markets, in order to maintain Microsoft's monopoly power in the server operating system market and multi-user market and to obtain monopoly power in the PC sharing market. While disputing the alleged illegality of its conduct, Microsoft admitted—even argued—before the district court that its conduct was exclusionary ("Mr. Rosenfeld [on behalf of Microsoft] just said with great pride that, yes, they are exclusionary.") (A263). The allegations of the Complaint plausibly allege unlawful exclusionary conduct.

First, any finding that Microsoft's single-user restriction was designed to protect its intellectual property rights is precluded by the Complaint's allegation (never challenged by Microsoft on the motion below) that Microsoft did not attempt to enforce any such IP rights either prior or subsequent to the imposition of the restriction in 2007. A company as sophisticated as Microsoft would not leave itself exposed to defenses of waiver, estoppel and implied license by unduly delaying enforcement of patents or copyrights—if it actually had applicable patents or copyrights to enforce during the nearly ten years since SoftXpand was released. *See, e.g., A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1028

(Fed. Cir. 1992) (*en banc*) (a patentee's delay in bringing suit may bar recovery of infringement damages). The further detailed allegations of how Microsoft resorted to its market power to coerce cooperation from others, as opposed to filing an enforcement lawsuit, should surely have prevented any finding that Microsoft was lawfully protecting some purported IP rights.

<u>Second</u>, even though Microsoft's EULAs are called "licenses," and specify various restrictions on how the software may be used, they say nothing specific about the intellectual property that the district court found to be controlling. (A156-66). As a matter of law, patent rights must be clearly identified in a license. *See, e.g., Intel Corp. v. Broadcom Corp.*, 173 F. Supp. 2d 201, 213 (D. Del. 2001) (When interpreting a license, Federal Circuit authority has held that "the right to use proprietary technology does not necessarily convey any patent rights and the omission of an express provision providing for the licensing of patent rights demonstrated that the contract did not provide a license for patent rights") (citing *State Contracting & Eng'g Corp. v. Florida*, 258 F.3d 1329, 1339-40 (Fed. Cir. 2001)). Microsoft's EULAs do *not* provide a license to any of Microsoft's patent rights or copyrights to any purchaser of a Windows operating system (e.g., the packaging that comes with Windows, in fact, expressly states that no such licenses are granted to the purchaser of Windows). (A265-66).

Third, the single-user restriction is a *contractual limitation* on the use of the Windows operating systems, imposed by Microsoft when it opted to do so. This restriction is not protecting any statutorily recognized right in Microsoft's intellectual property. (A149 ¶ 5; A21-22 ¶¶ 58). After all, the Copyright Act conveys only exclusive rights to reproduce, prepare derivative works, distribute, perform publicly or display publicly (17 U.S.C. § 106)—none of which is at issue here. *See United States v. Microsoft Corp.*, 253 F.3d 34, 63-64 (D.C. Cir. 2001) (*en banc*); *see also MDY Indus. LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 940-42 (9th Cir. 2011) (using the exclusive rights enumerated in the Copyright Act to distinguish between breach of contract and copyright infringement in the context of a software license). This is confirmed by the reasoning of the D.C. District Court, which took issue with similar restrictions in Microsoft licenses *that went beyond* Microsoft's enumerated rights under the Copyright Act. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 40 (D.D.C. 2000) (finding after trial that "Microsoft has presented no evidence that the contractual (or the technological) restrictions it placed on OEMs' ability to alter Windows derive from any of the enumerated rights explicitly granted to a copyright holder under the Copyright Act"), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

Sister circuits have held that the appropriate impact of copyright protection on a refusal to deal analysis is to create a rebuttable presumption of a valid business justification. *See, e.g.*, *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1187 & n.64 (1st Cir. 1994) ("[A]n author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification," but "we do not hold that an antitrust plaintiff can never rebut this presumption."). The copyright presumption is rebuttable by a plaintiff upon a showing of sufficient anticompetitive harm in the relevant market. *Id.* at 1185; *see also Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1218 (9th Cir. 1997) ("This presumption does not 'rest on formalistic distinctions' which 'are generally disfavored in antitrust laws;' rather it is based on 'actual market realities.'" (quoting *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 466-67 (1992)). Further, the Ninth Circuit has considered the copyright holder's intent to determine whether or not an IP justification was merely a "pretextual business justification to mask anticompetitive conduct." *Image Technical Servs.*, 125 F.3d at 1219. This approach has also been endorsed by leading academic commentary on the subject. 1 Herbert Hovenkamp *et al.*, IP & Antitrust—An Analysis of Antitrust Principles Applied to Intellectual Property, § 13.3 at 13-35 (2d ed. Supp. 2012) (criticizing an irrebuttable presumption of legality when a restriction "covers rights not granted by the intellectual property laws").

The Complaint's allegations of a broad course of anticompetitive conduct, such as the sacrifice of short-term profits and the conspicuous timing at which Microsoft introduced its own competing MPS product to the market, and the accompanying anticompetitive intent are more than sufficient to rebut any such presumption. As stated by 1 Herbert Hovenkamp *et al.*, § 13.3 at 13-39:

> The protection of the intellectual property laws should extend only as far as those laws themselves extend. A refusal to license will be presumed legitimate if the conduct for which a license is withheld is in fact within the scope of an intellectual property right. But the presumption should not extend to protect refusals to license that go beyond the scope of the intellectual property rights themselves.

SoftXpand allows multiple users to access a single copy of a Windows PC operating system; it does not work by "copying" any Microsoft software. (A15 ¶ 40). Before Microsoft imposed the single-user restriction, end users were able to use SoftXpand on their PCs because SoftXpand was designed to run with Windows PC operating systems. Running SoftXpand on a PC with a Windows PC operating system does not infringe any Microsoft patent or any exclusive right of copyright owned by Microsoft. The single-user restriction that Microsoft added to its EULAs is an attempt to exclude PC sharing software by contract. It goes beyond the scope of any patent or copyright that Microsoft holds. This restriction was added for anticompetitive purposes and is not protected from antitrust liability by any supposed intellectual property rights. (A24 ¶ 75). *See In* *re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327-28 (Fed. Cir. 2000) (emphasis added) ("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*."); *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.'") (emphasis added)(citation omitted).

D. Microsoft's Refusal To Deal And Change Of Policy Give Rise To A Plausible Evidentiary Inference of Anticompetitive Conduct

Microsoft cannot unilaterally terminate a prior course of dealing without raising the specter of monopolistic intentions. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 53 (2d Cir. 2007) (an exception to lawful refusal to deal is "when a monopolist seeks to terminate a prior (voluntary) course of dealing with a competitor") (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) and *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 409 (2004)). Prior to 2007, Microsoft's EULA *permitted* multi-user access to a single PC running a single Windows operation system, including by means of PC sharing software like SoftXpand or similar products from other competitors.[8] The Complaint alleges that Microsoft's imposition of the single-user restriction in 2007 constituted a conscious "termination" of a prior course of dealing, without any technological justification, after and in response to competitors like MiniFrame innovating and investing sunk costs into developing a previously non-existent part of the market for multi-user systems (*i.e.*, the PC sharing market). (A148-49 ¶¶ 3-5; A15-18 ¶ 40-48; A24 ¶ 75).

Moreover, the Complaint also alleges a much broader course of anticompetitive conduct, including refusing proffered license fees, threatening to withhold service or to discontinue relations with customers (*e.g.*, end-users and OEMs) if they install SoftXpand, and developing its own product with similar functionality. This additional predatory conduct confirms Microsoft's anticompetitive purpose. (A39-59 ¶¶ 148-259; *see also* A150-52 ¶ 7-14); *Cf. In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp. 2d 730, 746 (D. Md. 2010) ("[I]t is not entirely clear that Microsoft's conduct was merely a refusal to cooperate" in light of evidence of affirmative anticompetitive conduct), *rev'd in part on other*

8 In fact, as MiniFrame presented to the district court, Microsoft's own Windows Marketplace website previously offered for sale other multi-user software such as Thinsoft's WinConnect Server XP (a competing PC sharing software designed to run on a client OS that Microsoft sold for $299.95). (A168-69; also available at http://www.thinsoftinc.com/success_reviews.aspx) MiniFrame also offered to submit evidence that, prior to the single-user restriction, Microsoft told at least one early MiniFrame customer that SoftXpand was compliant so long as there was a EULA for each user. (A282).

grounds sub nom., *Novell, Inc. v. Microsoft Corp.*, 429 F. App'x 254 (4th Cir. 2011).

The district court held that MiniFrame's allegations failed as a matter of law. First, the court reiterated that "patent holders have no duty to deal with their competitors or permit them access to their technology." (SPA5). For the reasons discussed in Point I.B above, it was error to dismiss MiniFrame's claim premised on Microsoft's ownership of unidentified patents that are unrelated to the single-user restriction.

The district court held in the alternative that Microsoft does not have a duty to deal with rivals such as MiniFrame. (SPA6). The Complaint is not premised on any such absolute duty. But, as the Supreme Court made clear in *Aspen Skiing*, "[t]he absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have *evidentiary* significance, or that it may not give rise to *liability* in certain circumstances." 472 U.S. at 601 (emphasis added). Rather, "[i]f 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 (quoting R. Bork, *The Antitrust Paradox* 138 (1978)). Even a unilateral refusal to deal can be unlawful if not motivated by technological or efficiency concerns or some other business justification — issues not appropriate to resolve at the motion to dismiss stage. *See Black Box Corp. v. Avaya, Inc.*, 2008 WL 4117844, at *16 (D.N.J. Aug. 29, 2008) (denying dismissal of § 2 claim based on refusal to deal).

Under *Aspen Skiing*, the district court 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").

The Complaint alleges the adverse effect on consumers and competition caused by Microsoft's imposition of the single-user restriction and related anticompetitive conduct. Consumers have no choice but to install a server-based multi-PC solution, even where a PC sharing system would equally or better suit their needs. (A18 ¶ 48; *see also* A149-51 ¶¶ 5, 7, 11). In addition, OEM suppliers and other potential SoftXpand customers are being strong-armed and coerced into not dealing with PC sharing software competitors like MiniFrame for fear of losing their own relationship with Microsoft. (A150 ¶ 7; A27-28 ¶¶ 90-91).

Aspen Skiing relied on the decision in *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53 (1951), which held that the refusal of a monopolist newspaper publisher to sell advertising to persons that patronized a competing small radio station violated § 2 of the Sherman Act. Here, Microsoft's threats and refusals to deal with customers that seek approval to use PC sharing software are analogous behavior in violation of the antitrust laws. (A150-52 ¶¶ 7, 9, 11-14). As a result, MiniFrame has lost vast amounts of business and faces its own likely demise (A29 ¶ 96; A43 ¶¶ 166-69; A42 ¶ 163; A44 ¶ 172; A47 ¶ 193; A48 ¶ 204; A49 ¶ 211; A51 ¶ 227; A52 ¶ 233; A150 ¶ 7), while at least one other PC sharing software vendor (NComputing) already has changed its business model so that it no longer competes with Microsoft. (A16 ¶¶ 41-42; A37 ¶ 139; A59-60 ¶¶ 290-96).

The district court discounted these allegations, finding that Microsoft did not have a duty to deal with MiniFrame because MiniFrame supposedly failed to plead that Microsoft had a prior course of dealing cooperatively with MiniFrame (as distinct from users of both the Microsoft operating systems and SoftXpand.) (SPA5). This is a distinction without a difference.[9] MiniFrame designed SoftXpand to work with Windows; by implementing the single-user restriction,

[9] Indeed, if that were the case, the monopolist ski slope operator in *Aspen Skiing* simply could have refused to extend parking privileges to patrons (with whom it did not have a prior course of dealing) of the other slope and, thereby, achieved the same exclusionary result with impunity under the antitrust laws.

Microsoft changed the way it did business with software developers, including MiniFrame. Before the single-user restriction, Microsoft not only permitted PC sharing software for use with its operating systems, but it also promoted and sold at least one vendor's PC sharing software on its website. Thus, there clearly was a change in Microsoft's prior course of conduct for anticompetitive reasons.

Aspen Skiing is an evidentiary ruling, whereby a change in a prior course of conduct can give rise to an anticompetitive inference based on the totality of facts alleged. *Aspen,* 472 U.S. at 608-11. Here, Microsoft is alleged to have initially chosen to implement a per computer restriction, and then to have changed that to a single-user restriction in the face of competition. (A22 ¶ 66; A149-50 ¶¶ 4-5). In 2003, Microsoft was focused on linking multiple computers to servers to increase computing capacity. In contrast, MiniFrame and others in the PC sharing market recognized the growth prospects in the excess capacity of personal computers and, in turn, their ability to serve multiple users simultaneously. (A15 ¶ 40; A148-49 ¶ 3). In light of this technological advancement in microprocessor power, MiniFrame created an innovative product that allows multiple users to share a single PC for multiple applications. MiniFrame's product was a *permissible* (and even promoted) use under Microsoft's EULA until 2007. Microsoft then foreclosed that avenue of competition, not by developing a superior product, but by restricting consumers' access to PC sharing software, like MiniFrame's, for no technological or legitimate business reason.

The district court also found that Microsoft had no duty to deal with MiniFrame because "the Complaint nowhere states facts averring that Microsoft relinquished short-term profits to adopt the single-user restriction." (SPA6). But the Complaint expressly alleges that Microsoft *did forgo* short-term profits—in the form of a proposal by JPMC to pay 80,000 license fees—that is, a fee for each additional user in a proposed transaction with MiniFrame. (A41-42 ¶¶ 156-60; *see also* A151-52 ¶¶ 13, 14). The district court added that the Complaint supports a "reverse inference" that, by imposing the single-use restriction and forcing out MiniFrame, Microsoft would "increase the number of [operating system] licenses users would have to purchase—an obvious boon to short-term profits." (SPA6). In so doing, the district court erred by drawing this "reverse inference" on a Rule 12(b)(6) motion against MiniFrame.

The facts here are the digital equivalent to those in *Aspen Skiing*, and the result should be the same. Microsoft is a monopolist that owns and controls the operating systems on which developers design and consumers run software—effectively, the primary slopes on the digital mountain. For no technological reason or legitimate business purpose, Microsoft refuses to allow competitors like MiniFrame to run their software on Windows, even when customers are willing to pay Microsoft fees for the use of the Windows operating system by each additional user in a shared PC system. (A41-42 ¶¶ 156-60; A151-52 ¶¶ 13-14; *see Data General*, 36 F.3d at 1183 ("[A] unilateral refusal to deal is prima facie exclusionary if there is evidence of *harm* to the competitive process; a valid business justification requires proof of countervailing *benefits* to the competitive process.")). As a result, end-users have no meaningful choice but to choose a server-based product, which is virtually certain to be a Microsoft product. Even small customers—*e.g.*, small businesses, schools, families—for whom a PC sharing system makes more economic sense than buying unnecessary excess computer hardware, have no choice but to use a server-based solution like Microsoft's MPS regardless of their actual needs or (more likely) to forgo multi-user computing entirely. (A16-18 ¶¶ 44-48).

E. Microsoft Engages In Predatory And Discriminatory Pricing

In addition to its allegations of unlawful exclusionary conduct, the Complaint alleges as a basis for § 2 liability that Microsoft engaged in predatory and discriminatory pricing that were designed to exclude competition from the PC sharing market in favor of Microsoft's own newly-developed MPS. (*See* A68-69 ¶¶ 338-41; A151 ¶ 12). Shortly before the introduction of MPS, Microsoft imposed the single-user restriction and thereby prohibited customers from using third-party PC sharing software such as SoftXpand with Windows unless the customer also purchased both (i) a Windows Server 2008 R2 license at approximately $1,000 per server and (ii) a Client Access License at approximately $200 per user, for a total non-academic cost of $1,200. (A34-35 ¶ 130). After the launch of MPS, non-academic customers (*i.e.*, customers unaffiliated with educational institutions) could purchase Microsoft's MPS for $817 (or $133 academic rate) per server (versus $1,000 for a Windows Server 2008 R2 license) and Microsoft's Client Access License for $139 (or $29 academic rate) per user (versus approximately $200) to create a shared PC system, for a total non-academic cost of $956 (or $162 academic rate). (A35 ¶ 131). This non-academic customer rate for using MPS with Microsoft's required licenses was, therefore, at least 20% less than the total for using a competing PC sharing product licensed under Windows Server 2008 R2. However, MPS is bundled with the same Windows Server 2008 R2 operating system and, therefore, should cost more—not less—than the $1,000 cost of purchasing the server operating system alone. (A35-37 ¶¶ 132-36). Microsoft is either giving MPS away for free or discriminatorily pricing its server operating system—Windows Server 2008 R2—to customers who buy its MPS product versus those who buy a PC sharing product of a competitor. Either way, Microsoft is violating the antitrust laws, either by predatory or discriminatory pricing.[10]

[10] Price discrimination is made unlawful by § 2(a) of the Clayton Act, 38 Stat.

The district court ruled that price predation requires allegations of below-cost pricing and of loses on the pricing scheme—something it said was not alleged anywhere in the Complaint. (SPA6-7). That is not correct. The Complaint asserts (prior to, and without the benefit of, any discovery) that Microsoft is giving MPS away for free, from which it may be inferred that there is below-cost pricing (given that there must be some cost, whether marginal, variable or sunk, to a product). (A36 ¶¶ 134-36; A151¶12; *See BanxCorp v. Bankrate Inc.*, 2011 WL 6934836, at *10 (D.N.J. Dec. 30, 2011) ("In the antitrust context, 'predatory' means pricing below some measure of cost.") (citations omitted)). The Supreme Court has declined to state the relevant definition of "cost," which depends on the facts at hand. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 n.1 (1993) ("[W]e again decline to resolve the conflict among the lower courts over the appropriate measure of cost."). MiniFrame also alleges that the

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730, as amended by the Robinson-Patman Act, which provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality … where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a).

cost of MPS, bundled with the server operating system, is below the retail cost of the server operating system alone. (A36 ¶¶ 135-36; A151 ¶ 12).

The Complaint is not based on Microsoft's low pricing of MPS as compared to the pricing for SoftXpand. Rather, the Complaint alleges Microsoft's discriminatory (and, hence, predatory) operating system and client access licenses whereby a customer that preferred to use a third-party's PC sharing software, like SoftXpand, would have paid more in unnecessary licensing fees than the customer pays for the same licenses bundled by Microsoft with its own MPS product. (A35-37 ¶¶ 131-36). That is precisely the type of predatory pricing tactic proscribed under § 2, as well as under the Robinson Patman Act. The Supreme Court has reiterated that price discrimination "is merely a price difference" to the extent that it threatens to injure competition. *Brooke Group*, 509 U.S. at 220 (citation and internal quotation marks omitted). MiniFrame is alleging a price difference that consumers pay for a Windows Server 2008 R2 license depending on whether it is bundled with Microsoft's MPS product or used in combination with a third-party PC sharing software, like SoftXpand. (A35-37 ¶¶ 131-36) This undisputed price difference is designed for no other purpose than to exclude competition. Such "low prices" in this context do not benefit consumers; they artificially limit consumer choice.

Section 2 condemns "predatory pricing when it 'poses a dangerous probability of actual monopolization . . .,' whereas the Robinson-Patman Act [which prohibits price discrimination] requires only that there be a 'reasonable possibility' of substantial injury to competition before its protections are triggered." *Brooke Group*, 509 U.S. at 222 (internal citations omitted). The Supreme Court has explained: "[T]he essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and therefore gain and exercise control over prices in the relevant market." *Id*. That is exactly what MiniFrame alleges here—that Microsoft unfairly priced its license fees applicable to a customer of a third-party's PC sharing software, like MiniFrame's SoftXpand, for the purpose of eliminating competition while it seeks to monopolize the market with its own discriminatorily priced MPS product and bundled OS and related CAL licenses. (A35-37 ¶¶ 131-36).

F. <u>The Complaint Adequately Alleges A Relevant Product Market</u>

For antitrust purposes, "[t]he relevant market is defined as all products reasonably interchangeable by consumers for the same purposes." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (internal quotation marks and citation omitted); *City of N.Y. v. Group Health Inc.*, 2010 WL 2132246, at *3 (S.D.N.Y. May 11, 2010) *aff'd*, 649 F.3d 151 (2d Cir. 2011).

Typically, the precise definition of the relevant market is a fact issue that should not be resolved on a motion to dismiss, without the benefit of discovery. *See Alt. Electrodes, LLC v. Empi, Inc.*, 597 F. Supp. 2d 322, 333-34 (E.D.N.Y. 2009) (market definition is a "deeply fact-intensive inquiry" not appropriate for motion to dismiss) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001)).

The district court did not rule on a relevant market. The Complaint, however, alleges facts sufficient to show that Microsoft has monopoly power in each of several potentially relevant markets: (a) the server operating system market (just as Microsoft has a well-established monopoly in the PC (or client) operating system market); (b) the multi-user market, which includes both server-based solutions and PC sharing software; and, alternatively, (c) the PC sharing market, which could include Microsoft's MPS (even though it runs on a server operating system). (A12-14 ¶¶ 28, 32-34; A26 ¶ 82-84; A32 ¶ 119; A61-64 ¶¶ 297-305).

The Complaint very specifically alleges facts to show that Microsoft uses its monopoly power in the PC and server operating system markets, along with predatory conduct (*e.g.*, the single-user restriction, threats and refusals to service end-users and OEMs that install SoftXpand, and discriminatory pricing tactics for unnecessary licenses) to foreclose competition from PC sharing software in the market for multi-user software, such that Microsoft has, or there is a dangerous probability of its achieving, monopoly power in that market. (A12-14 ¶¶ 28-30, 32-34; A33-34 ¶¶ 124-26; A61-65 ¶¶ 297-309). In turn, by eliminating competition from the PC sharing market, Microsoft furthers its monopoly over the server operating system market. Microsoft's monopolistic practices thus come full circle—it prevents competition from PC sharing software and steers competition to server-based systems, where it already dominates. In fact, with its newly-developed MPS product, Microsoft also competes directly in the PC sharing market, which MiniFrame alleges in the alternative, should a court determine that server-based multi-user and PC sharing markets are separate markets.

II. THE COMPLAINT PLAUSIBLY ALLEGES STATE LAW CLAIMS

A. The Complaint States A Claim Under the Donnelly Act

The Donnelly Act provides that "[e]very contract, agreement, arrangement or combination whereby [a] monopoly…is or may be established or maintained, or whereby [c]ompetition…may be restrained" is illegal. N.Y. Gen. Bus. Law. § 340(1).

MiniFrame alleges here that Microsoft's conduct, in combination with others, including OEMs that are forced into cooperation with Microsoft not to use SoftXpand, restrains competition and results in a monopoly in the multi-user market. (A149-50 ¶¶ 6-7). The district court ruled that the Complaint only alleges unilateral action by Microsoft. (SPA7). However, the Complaint alleges that

Microsoft's concerted actions with OEMs are illegal arrangements that fall under the ambit of the Donnelly Act. The meaning of "arrangement" under the Donnelly Act has been interpreted broadly. *See State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 464, 381 N.Y.S.2d 426, 428 (1976) (an arrangement includes "a reciprocal relationship of commitment between two or more legal or economic entities"); *see also Eagle Spring Water Co., v. Webb & Knapp, Inc.*, 236 N.Y.S.2d 266, 275 (Sup. Ct. N.Y. Cty. 1962) (an arrangement includes "all of the various acts, devices and agreements under which the participants are operating for the accomplishment of their purpose."). Here, through threats to withhold services and other anticompetitive conduct (A149-52 ¶¶ 5-14), Microsoft has coerced cooperation from OEMs to exclude PC sharing software like MiniFrame's SoftXpand.

In *Columbia Gas of New York*, the plaintiff, the sole distributor of natural gas in the relevant geographic markets, charged that the sole distributor of electricity in those same geographic markets abused "its monopolistic position in the lighting market to restrict the freedom of municipalities to choose among competing energy sources in the space heating market." *Columbia Gas of N.Y., Inc. v. N.Y. State Elec. & Gas Corp.*, 28 N.Y.2d 117, 127, 320 N.Y.S.2d 57, 65 (1971). The plaintiff argued that the electricity provider used the leverage from its monopolistic position in the lighting market to coerce customers to use electricity for heating and therefore attempted to obtain a monopoly in the heating market.

Id. The court found that the alleged actions "may…be unlawful it if can be shown to have actually restrained competition" and therefore constituted a cause of action under the Donnelly Act. *Id.* at 128, 320 N.Y.S.2d at 66.

The district court here held, "for the reasons stated above [discussing the Sherman Act claim], MiniFrame has failed to plead facts demonstrating anticompetitive conduct" sufficient for a Donnelly Act claim. But, as shown above, the Complaint plausibly alleges anticompetitive conduct sufficient for a Sherman Act claim — and, thus, for a Donnelly Act claim.

B. The Complaint States Claims Under Washington State Statutes

The Complaint states an unfair competition claim under Section 19.86.020 of the Revised Code of Washington, the state in which Microsoft is headquartered. A plaintiff asserting a claim under this statute must show that the defendant engaged in "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Wash. Rev. Code § 19.86.020; *see also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535-36 (Wash. 1986).

The district court erred in holding that the Complaint fails to plead deception of the public. The Complaint alleges various acts of Microsoft that deceived the public. First, the single-computer restrictions that were an integral part of Microsoft's license prior to 2007 allowed for technological growth that enabled companies like MiniFrame, NComputing, and Thinsoft to innovate multi-user technology. (A148-49 ¶ 3). Consumers using these products to create a shared PC system prior to the 2007 change in the EULA were in compliance with the EULA's single-computer requirement. (A149 ¶ 4). Microsoft's shifting policies related to its single-user restriction had the capacity to mislead both the companies that relied on Microsoft's license to generate their own pioneering technology and the consumers who ultimately benefitted from the technological improvements. In fact, consumers who upgraded their EULA-compliant multi-user Windows XP systems to Windows 7 unknowingly had their right to multi-user computing taken away by Microsoft. (A20-22 ¶¶ 54-57, 61-64).

Furthermore, MiniFrame's allegations of predatory pricing and price discrimination are clear examples of unfair actions taken by Microsoft that had the capacity to mislead the public. *See Thurman Indus., Inc. v. Pay'N Pak Stores, Inc.*, 709 F. Supp. 985, 998 (W.D. Wash. 1987) (noting that Section 19.86.020 parallels Section 5 of the FTC Act and as such, prohibits violations of price discrimination and of the Robinson-Patman Act), *abrogated on other grounds sub nom., Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116 (9th Cir. 2003). Microsoft's unfair and discriminatory pricing of its MPS licenses and CALs do not accurately reflect the market price and therefore has the capacity to deceive the consumer. (A34-36 ¶ 130-36; A151 ¶ 12); *see also* above Section II.B. Accordingly, MiniFrame properly alleges a claim under Wash. Rev. Code § 19.86.020 and at a minimum demonstrates fact issues not suitable to decide on a motion to dismiss.

The district court correctly held that the elements of a Wash. Rev. Code § 19.86.040 claim mirror the requirements of a Sherman Act claim. Because MiniFrame's federal antitrust claim is sufficient, the monopolization claim under Wash. Rev. Code § 19.86.040 is also sufficient. *See Rowan Northwestern Decorators, Inc. v. Wash. State Convention & Trade Ctr.*, 898 P.2d 310, 314 (Wash. Ct. App. 1995).

C. The Complaint States A Claim Of Tortious Interference With Business Relations

In order to state a claim for tortious interference with business relations under New York law, the plaintiff must demonstrate that the defendant "acted solely out of malice, or used dishonest, unfair, or improper means." *Lindner v. IBM Corp.*, 2008 WL 2461934, at *12 (S.D.N.Y. June 18, 2008). A defendant's interference is improper if his conduct creates an unlawful restraint of trade or is intended to illegally restrain competition in violation of antitrust provisions. *See* Restatement (Second) of Torts § 768(c) cmt. f (1979).

The district court held that the Complaint failed to plead wrongful means. On the contrary, the Complaint contains numerous allegations of Microsoft's interference with MiniFrame's business relations by improper means. In particular, under the pretext of enforcing its EULA, Microsoft unfairly thwarted

MiniFrame's prospective contracts with JPMC, HP, and numerous other OEMs. (A65-67 ¶¶ 310-33). Microsoft also forbids OEMs from installing SoftXpand, even for use in a manner compliant with the single-user restriction (A44-45 ¶¶ 173-75), including by threatening to refuse technical support. (A42 ¶ 162; A150-52 ¶¶ 7, 9-14).

Additionally, Microsoft makes dishonest statements regarding the legality of SoftXpand under Window's EULA and SUR. Microsoft has asserted that SoftXpand is *entirely* incompatible with Microsoft's EULA and SUR, as opposed to distinguishing between SoftXpand's compliant and non-compliant functionality. (A44-46 ¶¶ 173-75, 188; A50 ¶¶ 221-22). For example, MiniFrame's prospective business relationship with Samsung involved single-user configurations of SoftXpand, which did not violate Microsoft's licensing restrictions. (A44-45 ¶ 174). Even so, "Microsoft was steadfast in refusing to grant permission to Samsung to work with MiniFrame under any circumstance." *Id.* Microsoft's threats to OEMs regarding uses of SoftXpand compliant with its EULA and SUR constitute improper means of interfering with MiniFrame's potential customers. Similarly, the Complaint alleges that Microsoft misinformed others of its license rights out of a motivation to monopolize the market and exclude competition. In short, the Complaint stated a tortious interference claim.

CONCLUSION

For the reasons stated above, the Court should reverse the district court's Order and Judgment.

Dated: New York, New York
June 14, 2013

Respectfully submitted,

By: /s/ Robert W. Morris

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CERTIFICATE OF COMPLIANCE

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

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 13,036 words.

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

/s/ Robert W. Morris
ROBERT W. MORRIS

SPECIAL APPENDIX

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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.

[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.").

(*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 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 non-discriminatory 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.)

[2] In its opposition papers, MiniFrame cites only New York law to support its common law unfair

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 plaintiff's 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 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

competition and tortious interference claims. (*See* Opp'n 31-33.) Accordingly, the Court considers these claims solely with reference to New York precedent.

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 non-discriminatory 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.YS.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.

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 DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--X

MINIFRAME LTD.,

Plaintiff,

-against-

MICROSOFT CORPORATION,

Defendant.

--X

11 CIVIL 7419 (RJS)

JUDGMENT

Microsoft Corporation having moved to dismiss MiniFrame's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the matter having come before the Honorable Richard J. Sullivan, United States District Judge, and the Court, on March 28, 2013, having rendered its Memorandum and Order granting Microsoft's motion to dismiss, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated March 28, 2013, Microsoft's motion to dismiss is granted; accordingly, the case is closed.

Dated: New York, New York
March 29, 2013

RUBY J. KRAJICK

Clerk of Court

BY: ______

Deputy Clerk

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