13-1607-cv

United States Court of Appeals

for the

Second Circuit

MINIFRAME LTD.,

Plaintiff-Appellant,

– v. –

MICROSOFT CORPORATION,

Defendant-Appellee.

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

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee Microsoft Corporation certifies that it is a publicly traded company, that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This case involves a software developer's right to protect its intellectual property ("IP") through valid license restrictions, and to choose how it will distribute its software products and with whom it will cooperate. Those are choices about which the antitrust laws have little, if anything, to say, as the District Court properly recognized in dismissing the Complaint.

Microsoft Corporation ("Microsoft") develops software that is protected by a range of IP rights and – consistent with and protected by those IP rights – it licenses that software to end users. It does so on terms that allow Microsoft to protect its IP, and at prices that allow it to earn a reasonable return on the substantial sums it invests in research and development. MiniFrame Ltd. ("MiniFrame"), the plaintiff here, built a business based on Microsoft's market success and on a loophole in Microsoft's license agreement with end users. Specifically, the end-user software license governing Microsoft's personal computer ("PC") operating system ("OS") software limited the use of that software to one computer at a time. Neither MiniFrame nor anyone else objected to that licensing restriction.

Instead, seeing an opportunity, MiniFrame developed its SoftXpand "sharing" software, which enabled multiple users to share a single copy of Microsoft PC OS running on a single computer. Not surprisingly, given this circumvention of its license, Microsoft altered the terms of the license to restrict the use of its PC OS to one "user" at a time, rather than one computer. This change effectively forbade the use of a product like MiniFrame's to facilitate the unauthorized sharing of Microsoft Windows, and it prompted MiniFrame to file its Complaint.

MiniFrame's attack on Microsoft's revised licenses states no claim for an antitrust violation, and is fundamentally inconsistent with the most basic principles of IP law. It is hornbook law that IP rights serve as exceptions to the antitrust laws, and an IP owner – who of course can choose not to license its IP at all – is free to license its IP on terms and at prices it sees fit. *See In re Indep. Serv. Orgs. Antitrust Litig.* ("*ISO*"), 203 F.3d 1322, 1327 (Fed. Cir. 2000); *Data Gen. Corporation v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 (1st Cir. 1994).[1]

Under antitrust law, moreover, a monopolist has no duty to deal with its competitors. It is because of these core precepts that MiniFrame is forced to shoehorn itself into a narrow antitrust exception that applies when a monopolist's prior course of dealing is interrupted or terminated. But even if this rule could trump IP rights – which it cannot – MiniFrame still has not stated the elements of

[1] *See also Corsearch, Inc. v. Thomson & Thomson*, 792 F. Supp. 305, 322 (S.D.N.Y. 1992) (copyright owner can terminate or limit licenses in any manner deemed appropriate); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999) (finding no reported case in which a court had imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright).

an antitrust claim. It does not allege that Microsoft previously engaged in a voluntary course of dealing with MiniFrame, nor could it – Microsoft's end-user license was (self-evidently) *with end users*. It would be an odd rule indeed by which MiniFrame could use that license agreement with third parties as a cudgel to permit it to maintain its business model, and MiniFrame cites no authority to support that strange result. Nor does it reference *LiveUniverse, Inc. v. MySpace, Inc.*, 304 Fed. Appx. 554, 556 (9th Cir. 2008), which expressly rejected the argument. Moreover, MiniFrame also does not allege – as the "prior course of dealing" exception requires – that Microsoft is sacrificing short-term profits by refusing to license software at Microsoft's own retail price. These deficiencies are fatal to MiniFrame's duty-to-deal theory. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415–16 (2004); *see also MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009).

The balance of MiniFrame's Complaint is a hodge-podge of even less meritorious claims. It asserts a theory of predatory pricing, which fails at the threshold because MiniFrame does not allege that Microsoft's pricing is below cost. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 256 (1993). MiniFrame also throws in various New York and Washington state-law claims, but those claims fail for the same reasons that its federal claims fail, and for others too. Simply put, Microsoft is free to set the terms on which it licenses its IP, and nothing in antitrust law is to the contrary.

JURISDICTION

Microsoft does not dispute MiniFrame's statement of jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court correctly determine that, as the owner of IP, Microsoft has the right to institute end-user licensing restrictions (such as the single-user restriction) under IP law, and that as a result, Microsoft cannot be liable under antitrust law for the single-user restriction?

2. Did the District Court correctly determine that, IP rights aside, Microsoft has no duty to deal or cooperate with a purported competitor with which it never previously dealt or cooperated?

3. Did the District Court correctly determine that the Complaint does not sufficiently allege predatory pricing because it does not allege that Microsoft priced the relevant product below cost?

4. Did the District Court correctly determine that Microsoft's unilateral licensing decisions cannot support state law claims for monopolization, unfair competition, and tortious interference?

STATEMENT OF THE CASE[2]

Microsoft does not dispute MiniFrame's summary of the procedural history. Here, Microsoft highlights additional facts alleged in the Complaint relevant to the District Court's decision.

Microsoft develops and licenses computer software, including "client" OS software that runs individual personal computers (such as the familiar Microsoft Windows software), and "server" OS software that runs servers. Servers are computers that link together multiple devices, such as PCs, and provide services to that network of devices (*e.g.*, print, Internet, database). (A10–12 ¶¶ 14–27).

For its part, MiniFrame is the developer of "sharing" software named "SoftXpand." That product enables multiple users seated at different terminals to simultaneously access and use a single copy of Microsoft's PC operating software running on a single PC. (A15 ¶ 40). The plain purpose and practical effect of MiniFrame's product were clear – to enable a group of people, whether roommates, coworkers, or anyone else, to buy just a single copy of Microsoft's operating system software, and to share it among them. *See* MiniFrame's Brief ("Br.") at 1, 8.

Two aspects of Microsoft's alleged conduct are principally at issue here. The first concerns a change in Microsoft's end-user license. MiniFrame alleges

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[2] The alleged facts are assumed to be true for purposes of this appeal.

that, before 2007, the license for Microsoft's PC operating system software restricted the use of that software to one license per computer. (A14 ¶ 37; A19–20 ¶¶ 50–53). According to the Complaint, that restriction changed in 2007 from one license per computer to one license per user – first for Microsoft's PC client OS, (A21 ¶ 58), and eventually for all of the versions of its PC OS licenses, (A22 ¶¶ 62–63). Following that change, MiniFrame alleges, customers who wanted to install a multi-user computer system that ran a Microsoft OS usually had no choice but to purchase a Microsoft server operating system. (A22–23 ¶ 65).

Second, in 2010, Microsoft launched its own server PC OS software product – Windows MultiPoint Server ("MPS") – to serve certain multi-user end customers. (A31–32 ¶¶ 113, 116). According to MiniFrame, MPS is licensed with some form of Microsoft's server OS. (A32 ¶ 116).[3] MiniFrame also makes a variety of assertions about the pricing of MPS. Specifically, it alleges that Microsoft's MPS is less expensive than a license for a Microsoft server OS. (A34–37 ¶¶ 130–136). MiniFrame also alleges, however, that MPS is licensed for substantial fees. According to MiniFrame, the non-academic price for MPS is $817, plus $139 per Client Access License ("CAL") per user (with a minimum of

[3] MiniFrame does not fully explain the connection between MPS and server OS. However, it does allege that MPS users "do not know that they are running a version of Windows Server 2008 R2." (A36–37 ¶ 136). Apparently, MiniFrame alleges that MPS is based on or utilizes (behind the scenes) Microsoft server OS technology. (A32 ¶¶ 116, 118).

five CALs). (A36–37 ¶¶ 134, 136). The MPS license fees are higher than the license fee for the Microsoft client OS alone. (A35–36 ¶¶ 132, 134) (client OS license fee is allegedly $120). The Complaint nowhere alleges that Microsoft priced MPS below MPS's cost.

SUMMARY OF ARGUMENT

1. MiniFrame's entire Complaint is premised upon the fundamental assumption that Microsoft Windows embodies valid and enforceable IP that MiniFrame's SoftXPand software product needs to access or with which it needs to interface. The District Court correctly determined that, as the owner of IP, Microsoft has the right to impose end-user licensing restrictions (such as the single-user restriction) on the use of its IP. As a result, Microsoft cannot be liable under antitrust law for the single-user restriction. In lieu of substantive legal argument, MiniFrame discusses at length various purported impermissible factual inferences drawn by the District Court. The District Court, however, properly applied the law to the fundamental premise of MiniFrame's lawsuit, *i.e.*, that Microsoft Windows embodies IP, and did not improperly infer anything about the nature of that IP. In other places, MiniFrame confuses factual inferences with the District Court's shorthand about the law, or simply misunderstands that the District Court did not make factual findings about matters outside the Complaint.

2. IP rights aside, Microsoft, even assuming, *arguendo*, that it is a

monopolist, has the right not to deal or cooperate with a purported competitor with which Microsoft never previously dealt or cooperated.

3. The District Court also correctly determined that the Complaint does not allege predatory pricing. The Complaint challenges Microsoft's pricing of its MPS software product. However, the Complaint does not allege that Microsoft priced its MPS product below cost. Because below-cost pricing is an essential element of a claim for price predation, this claim is legally insufficient as pleaded. Nor can MiniFrame now recharacterize its price predation claim as a price discrimination claim; the Complaint contains no claim for price discrimination, and in all events a competitor's price discrimination claim also requires allegation and proof of below-cost pricing. Additionally, the Robinson-Patman Act only applies to the sales of goods; licenses conferring the right to use intangible software are outside the scope of the Act.

4. Finally, the District Court correctly determined that Microsoft's unilateral licensing decisions cannot support state law claims for monopolization. Those claims fail for the same reasons as MiniFrame's federal antitrust claims. In addition, the claim under New York's Donnelly Act fails because that statute does not reach unilateral monopolization. With regard to Washington state law, MiniFrame has not stated a claim for unfair competition because it has not alleged that Microsoft engaged in any deceptive behavior. Its claim for tortious

interference also fails because Microsoft's licensing decisions regarding its own IP cannot constitute criminal, malicious, or extreme and unfair conduct.

ARGUMENT

I. STANDARD OF REVIEW AND ANTITRUST EXCLUSIONARY CONDUCT REQUIREMENT

A. Standard of Review

This case is on review from the District Court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). This Court reviews *de novo* the District Court's decision. *See Jackson v. New York*, 2013 U.S. App. LEXIS 13464, 1 (2d Cir. July 2, 2013) (affirming dismissal).

To survive a Rule 12(b)(6) motion, a claim must have facial plausibility. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That is, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions, and "a formulaic recitation of the elements of a cause of action will not do." *Id*. (internal citations omitted). Nor must a court accept as true a legal conclusion couched as a factual allegation. *Id*.; *see also Iqbal*, 556 U.S. at 678. A claim is plausible only when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *See Matson v. Bd. of Educ. of the City Sch. Dist. of New York*, 631 F.3d 57, 63 (2d Cir. 2011).

B. The Exclusionary Conduct Requirement for Sherman Act Section 2 Claims

Having a monopoly is by itself entirely lawful. As the Supreme Court explained in *Trinko*,

> [t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – . . . induces risk taking that produces innovation and economic growth.

Trinko, 540 U.S. at 407. Accordingly, a claim under Section 2 of the Sherman Act must plead exclusionary conduct – *i.e.*, the willful acquisition or maintenance of monopoly power, as distinguished from growth or development that results from a superior product, business acumen, or historic accident. *See United States v. Grinnell Corp*., 384 U.S. 563, 570–71 (1966). "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Trinko*, 540 U.S. at 407 (*emphasis* in original). Thus, the viability of MiniFrame's antitrust claims turns on whether imposition of the single-user restriction and Microsoft's MPS pricing constitute exclusionary conduct. As discussed below, they do not.

II. THE DISTRICT COURT CORRECTLY HELD THAT MICROSOFT'S IP RIGHTS IMMUNIZE FROM ANTITRUST SCRUTINY ITS SINGLE-USER LICENSING RESTRICTION

For many years, Microsoft licensed its Windows OS software for use on one personal computer at a time. That was but one of many restrictions contained in Microsoft's end-user license, *see* A157, and neither MiniFrame nor anyone else challenged Microsoft's right to include such a restriction in its licenses, whether on IP grounds or otherwise. As computer hardware technology advanced, *see Br*. at 7–8, MiniFrame developed its SoftXpand "PC sharing" software product to enable multiple users to simultaneously access and share a single copy of Microsoft's Windows OS. MiniFrame's "PC sharing" product enabled multiple end users to avoid paying Microsoft for the use of its flagship Windows OS product. Microsoft did not authorize, license, approve of or cooperate in the creation or sale of this software, and MiniFrame does not allege otherwise. To close the licensing loophole exploited by MiniFrame's product and others like it, Microsoft altered its Windows license terms to restrict use to one *user*, as opposed to one *computer*, at a time. Because this licensing restriction falls well within the boundaries of the legal monopoly that IP law affords Microsoft, the restriction is not exclusionary conduct that violates the antitrust laws. MiniFrame, therefore, has no Sherman Act claim.

A. IP Law Grants IP Owners a Limited Statutory Monopoly, Which Includes the Right Not to License IP

MiniFrame brings antitrust claims, not a complaint for declaratory relief under IP law, and therefore does not focus on the specific nature of Microsoft's IP rights. For that reason, we will refer to IP law generally, and in the argument below reference both patent and copyright law.

"'A patent . . . is an exception to the general rule against monopolies.'" *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 135 (1969) (legally, a patent amounts to a permissible monopoly over the protected work).[4] The same is true of copyrights. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).[5]

Because IP law confers a legal, limited monopoly over the invention or innovation covered by the IP, owners of IP are not required to put their IP to productive use or to let others use their IP. Patentees may "suppress the invention while continuing to prevent all others from using it." *Princo Corp. v. ITC*, 616 F.3d 1318, 1328 (Fed. Cir. 2010) (*en banc*) (citation omitted), *cert. denied*, ___ U.S. ___, 131 S. Ct. 2480 (2011); *see also Stewart v. Abend*, 495 U.S. 207, 228–29 (1990) ("nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("[t]he owner of [a] copyright, if [it] pleases, may refrain

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[4] *See also* 35 U.S.C. § 154(a)(1) (granting a patentee the "right to exclude others from making, using, offering for sale, or selling the invention").

[5] Section 106 of the Copyright Act of 1976 (17 U.S.C. §§ 101, *et seq*.) "confers a bundle of exclusive rights on the owner of [a] copyright." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985). These rights include the exclusive right to reproduce the copyrighted work (17 U.S.C. § 106(1)), the exclusive right to prepare derivative works based on the copyrighted work (17 U.S.C. § 106(2)), and the exclusive right to distribute copies of the work (17 U.S.C. § 106(3)).

from vending or licensing and content [itself] with simply exercising the right to exclude others from using [its] property"). Thus, Microsoft's IP rights give it the right to choose *not* to license Windows software *at all*. As discussed below, this broad right necessarily encompasses the lesser right to impose the single-user licensing restriction.

B. IP Owners Properly Use Licenses to Protect Their IP Rights and to Restrict Access to Their IP, Including Through Restrictions on the Number of Users or Uses

IP owners can protect their IP rights and restrict access to their IP by suing infringers under the copyright or patent laws. But that is not the only way to protect IP or place limitations on its use. A common and, generally, more efficient and productive way to do so is through the use of licenses. *See, e.g., Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1092 (N.D. Cal. 2000) ("[a] common method of distribution is through licensing agreements, which permit the copyright holder to place restrictions upon the distribution of its products"); *see also United States v. Gen. Elec. Co*., 272 U.S. 476, 489 (1926) ("a patentee may grant a license . . . 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"). There is nothing unusual or suspect about licensing, and protecting IP in this manner does not negate IP rights or reduce the limited monopoly granted by the IP laws. Indeed, licensing can be preferable to litigation

– it allows the use and dissemination of the invention or innovation covered by the IP, albeit on terms acceptable to the IP holder.

Not only are restrictions on users and uses fully permissible; they fall squarely within the bundle of statutory rights conferred by patent law. "[T]he owner of a patent may grant licenses to manufacture, use or sell upon conditions not inconsistent with the scope of the monopoly." *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175, 181 (1938). "[T]he rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property [patents], imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the [patented] article, will be upheld by the courts." *Bement v. Nat'l Harrow Co.*, 186 U.S. 70, 91 (1902).

Among the permissible license restrictions available for the protection of IP are "field of use" restrictions. *See Princo*, 616 F.3d at 1328 (patentee may limit a license to a particular field of use). And a limit on the number of uses – even to a single use – is a permissible field-of-use restriction. *See Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 703 (Fed. Cir. 1992) (upholding single-patient-only restriction on a patented medical device); *see also Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1338 (Fed. Cir. 2006) (patentees may lawfully limit the number of uses or users per license). Indeed, the Supreme Court just this Term confirmed that a single use restriction is within the scope of the patent grant. *See Bowman v.*

Monsanto Co., No. 11-796, ___ U.S. ___, 133 S. Ct. 1761 (2013) (unanimously upholding enforcement of Monsanto's single use/crop licensing restriction in connection with its patented herbicide-resistant seeds).

It is for these same basic reasons that exceeding the scope of a copyright license specifying the number or types of uses is an act of infringement. "A licensee infringes the owner's copyright if its use exceeds the scope of its license." *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (citing *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 20 (2d Cir. 1976)); *see also Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1159 (9th Cir. 2011) (if motion picture license is subject to condition that its exhibition must occur at specified times and places, licensees' exhibition at other times and places constitutes copyright infringement), *cert. denied*, ___ U.S. ___, 132 S. Ct. 2374 (2012); *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1156–57 (9th Cir. 2006) (architects granted a homebuilder the right to use copyrighted architectural plans to construct 80 homes; when the homebuilder without authorization used the plans in the construction of a different subdivision, it "exceeded the scope of its license," and was therefore liable for copyright infringement), *overruled on other grounds as stated in Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011).

C. Microsoft's Single-User Licensing Restriction Raises No Antitrust Issue

It is against the backdrop of these principles of IP law that MiniFrame alleges an antitrust violation. In assessing such a claim, it is important to keep in mind that – even outside the particular context of monopolies specially conferred by the IP laws – having a monopoly is not by itself unlawful. As discussed *supra* p. 10, a Sherman Act Section 2 claim must plead exclusionary and anticompetitive conduct.

The requirement of exclusionary conduct is all the less likely in the domain of IP law precisely because, as discussed above, IP owners are free to refuse to license or to limit the number of uses or users per license. An IP owner will be found to have exceeded the boundaries of the zone of exclusion only in narrow circumstances: when it obtains IP through fraud, *see Walker Process Equipment, Inc.*, 382 U.S. at 177; when it engages in sham litigation to restrict use of its IP, *see Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60–61 (1993); or when it ties its IP to unprotected products and extends its power into adjacent markets, *see Zenith Radio Corp.*, 395 U.S. at 136. This case involves no such conduct or circumstances, and MiniFrame does not allege that it does.

Instead, this case is governed by the general principle that when an IP owner has the power to exclude all uses of its IP, it necessarily has the lesser power to license its IP as it sees fit. *See UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (copyright holders can, within broad limits, and without violating antitrust law, curb the development of a derivative market by refusing to license a copyrighted work or by doing so only on limited terms). MiniFrame itself recognizes that "[a] refusal to license will be presumed legitimate [and will not violate antitrust law] if the conduct for which a license is withheld is in fact within the scope of an intellectual property right." Br. at 37 (quoting 1 Herbert Hovenkamp *et al.*, IP & Antitrust – An Analysis of Antitrust Principles Applied to Intellectual Property, § 13.3 at 13-39 (2d ed. Supp. 2012)). *See also Intergraph Corp.*, 195 F.3d at 1362 (finding no reported case in which a court had imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 (9th Cir. 1981) (rejecting theory that licensing agreements violated the Sherman Act; "[t]he right to license [a] patent, exclusively or otherwise, or to refuse to license at all, is 'the untrammeled right' of the patentee") (internal citations omitted).[6]

The principle that there is no antitrust violation caused by a decision to license only for limited uses or users follows *a fortiori* from the established principle that even a complete refusal to license is not subject to antitrust condemnation. The issue of refusing to license IP often arises when independent service organizations ("ISOs") challenge manufacturers' decisions not to grant

[6] Similarly, in the case of patent misuse doctrine, no patent owner otherwise entitled to relief for infringement or contributory infringement shall be denied relief or deemed guilty of misuse if it "refused to license or use any rights to the patent . . . ." 35 U.S.C. § 271(d)(4).

them licenses to use software or technology that is necessary (or at least useful) to service the manufacturers' equipment. Even though the ISOs and the manufacturers may be competitors in the same service market, the ISOs' antitrust claims are routinely rejected. In *Data General Corp.*, for instance, the First Circuit held that "the desire of an author to be the exclusive user of its original [copyrighted] work is a presumptively legitimate business justification for the author's refusal to license to competitors." 36 F.3d at 1182. "It is not the superiority of a work that allows the author to exclude others . . . but rather the limited monopoly granted by copyright law." *Id*. at 1184. Thus, Data General's desire to exercise its rights under the Copyright Act was a presumptively valid business justification for not licensing a diagnostic tool to competitors in the service aftermarket. *See id*. at 1187–88.

Similarly, in *ISO*, Xerox refused to sell patented parts and copyrighted manuals and software to independent repairers. The Federal Circuit declined to inquire into Xerox's motivation for refusing to sell or license its patented works, stating that, "[i]n the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws." *Id*. at 1327. The court also held that, "in 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. *See id*. at 1328–29; *see also Corsearch, Inc.*, 792 F. Supp. at 328 (regardless of antitrust limitations, T&T's copyright and the statutory monopoly it conferred entitled T&T to terminate unilaterally its rival's license to use a database for resale purposes).[7]

Here, because Microsoft had the broader power not to license Windows software at all, it necessarily had the less sweeping power to license it subject to restrictions such as the single-user restriction. As a result, the single-user restriction cannot support an antitrust claim.

Nothing in the Supreme Court's recent decision in *FTC v. Actavis, Inc*., No. 12-416, ___ U.S. ___, ___ S. Ct. ___ (2013), is to the contrary. In *Actavis*, the manufacturer of a brand name prescription drug brought a patent infringement suit

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[7] In *Image Technical Services, Inc. v. Eastman Kodak Co*., 125 F.3d 1195 (9th Cir. 1997), the Ninth Circuit held that a desire to profit from IP rights and a refusal to sell patented or copyrighted items is presumptively legitimate, *see id*. at 1219, but that the presumption can be rebutted by evidence that the monopolist acquired IP protection in an unlawful manner or by evidence of pretext. *See id*. The Ninth Circuit's evidence-of-pretext rule is the minority approach and here, in any event, there are no allegations of unlawful acquisition, and MiniFrame alleges no facts that plausibly support the conclusion that Microsoft is not attempting to legitimately profit from its IP. To the contrary, the Complaint alleges that Microsoft is now charging more in the aggregate for its licenses. (A35–36 ¶¶ 132, 134) (Microsoft Windows license fee is allegedly $120; the license fee for Microsoft's competing sharing software, MPS, is allegedly $817 plus a higher $139 fee per user).

against a generic drug manufacturer that intended to market an allegedly infringing version of the branded drug prior to the patent's expiration. In the specific context of the Hatch-Waxman Act, the Court considered whether the Sherman Act ever could be violated by a payment by the brand name manufacturer (the patentee) to the generic manufacturer (the alleged infringer) as part of a settlement in which the generic manufacturer would agree not to market the generic versions of the drug for some period of time within the patent term.

The *Actavis* Court recognized that these unusual reverse payments are "quite different" from typical settlement agreements in that "a party with no claim for damages . . . walks away with money simply so it will stay away from the patentee's market." *Id.*, slip op. at 13. Accordingly, the Court concluded that such payments could, under certain limited circumstances, violate the antitrust Rule of Reason. In *Actavis*, the patent litigation "put the patent's validity at issue, as well as its actual preclusive scope." *Id.*, slip op. at 8. Given this and other factors, "it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy." *Id.*, slip op. at 8–9. Here, the Hatch-Waxman Act is not implicated and there are no "reverse" payments. Thus, there is no reason to look beyond the scope of the IP. Further, MiniFrame has not put any particular patent at issue; it did not allege invalidity or patent misuse. *See discussion, infra* at 29.[8]

D. MiniFrame's Arguments Do Not Overcome the Principle that Microsoft's Licensing of Its Own IP Cannot Violate Antitrust Law

1. Microsoft's Windows software embodies IP

MiniFrame's entire Complaint is premised on the assumption that Microsoft owns IP that it licenses, that MiniFrame's business model requires a certain form of Microsoft end-user license, and that, as a result of the single-user restriction, MiniFrame's business model has become untenable. If Microsoft's Windows software did not embody protected IP, then MiniFrame's claim that Microsoft violated the Sherman Act by refusing to continue to deal with it under the old form of license agreement, *see* Br. at 38, would make no sense. After all, if there is no IP, then there could be no refusal to deal, because no license would have been required; MiniFrame would be free to copy, distribute or "share" whatever portions of Microsoft's Windows OS software it wished. Thus, the District Court did not make, and did not need to make, any "finding" that Microsoft has particular Windows copyrights or patents. Instead, the District Court properly took into

[8] Nor are cases such as *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), cited by MiniFrame in its Brief, relevant. In that copyright infringement action, the Court properly examined whether Aereo was infringing an enumerated statutory right, and did not consider antitrust issues.

account the basic premise of MiniFrame's entire lawsuit.[9]

This surely is why, in briefing and at argument below, MiniFrame expressly conceded that Microsoft's software embodies IP. *See* A181 ("at most, the EULAs could be construed to convey licenses to use Microsoft's copyright on the software"); *see also* A278 ("all they [Microsoft] do is make software and all the software has inherit [sic] within an IP"). These concessions are properly taken into account when considering a motion to dismiss. *See*, *e.g.*, *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 648 (6th Cir. 1991).[10]

MiniFrame suggests that Microsoft's Windows licenses do not, in fact, license Microsoft's IP to end users, *see* Br. at 34, but this argument misses the point of software licenses. Software is routinely distributed via license. Indeed, MiniFrame *itself* licenses, rather than sells, its SoftXpand software, and it does so on a per-user license basis. (A36 ¶ 134) ("$100 SoftXpand License per user"). An end user of software receives the right to use the software technology, including any patented or copyrighted technology embodied in the software, but does not

[9] While MiniFrame criticizes the District Court's opinion for referencing Microsoft patents, as discussed below, it is undisputed that Windows is also subject to copyright protection. References to patents should be read as referring generally to IP rights.

[10] Moreover, numerous published cases discuss and describe Microsoft's IP. *See, e.g.*, *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, 211 (E.D.N.Y. 1994); *see also Motorola Mobility, Inc. v. Microsoft Corp.*, 2012 U.S. Dist. LEXIS 149298, *75 (W.D. Wash. Aug. 9, 2012).

typically receive the separate right to use the patents or copyrights to develop other products. *See* Microsoft Product Use Rights, *available at* http://www.microsoft.com/licensing/about-licensing/product-licensing.aspx ("[i]f you comply with your . . . licensing agreement, you may *use* the software and online services as expressly permitted in these Product Use Rights") (*emphasis* supplied). In this way, the software vendor maintains control over its own IP (and how it is compensated for the use of products embodying such IP) save for the specific uses authorized – which is again something an IP holder like Microsoft is entitled to do. To turn a blind eye to this basic premise would render MiniFrame's allegations implausible under *Twombly*.

2. Antitrust immunity requires no finding that IP is "commensurate" with a licensing restriction

MiniFrame argues that because there is no evidence that Microsoft's IP rights are "commensurate" with the single-user restriction, its allegation that the restriction constitutes exclusionary conduct under the Sherman Act should survive a motion to dismiss. (Br. at 17). Its argument seems to be that IP rights remain subject to antitrust attack – notwithstanding the foundational principles discussed above – unless the IP rights expressly contain or reference the license restriction at issue, and unless the rival's use violates that restriction. Under MiniFrame's theory, for instance, a patent would have to specify how multiple users can use Windows software simultaneously, and the plaintiff's software would have to infringe the patent. (Br. at 37).

This argument confuses antitrust and IP law concepts and claims.[11] Although a typical infringement claim requires proof that a particular practice violates a particular IP right, absent an infringement claim, there is simply no need to determine whether MiniFrame's software infringes a particular Microsoft IP right. That is an issue, if at all, for another case and for another day.

In defending an antitrust claim predicated on a refusal to license IP, an IP owner like Microsoft is not attempting to affirmatively prevent its competitor ("C") from using or deploying *C's* IP. In such a case, the IP owner is only seeking *to keep its own IP to itself* – something it has a right to do under its legal monopoly. *See Stewart*, 495 U.S. at 228–29; *Princo*, 616 F.3d at 1328. As discussed above, antitrust law is simply not implicated unless the IP owner somehow exceeds the scope of the entire IP law grant (*e.g.*, because the IP was obtained by fraud, or the IP owner is tying the IP to some non-protected property).

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[11] As a preliminary matter, as part of its "commensurate" argument, MiniFrame asserts that its SoftXpand software is non-infringing. (Br. at 30). But nowhere does the Complaint make any such allegation, or explain how SoftXpand avoids infringement. If the applicability of antitrust principles turns on whether the product infringes, then it was MiniFrame's burden to make the requisite allegation. By making the strategic decision not to put the specifics of Microsoft's IP in the record, MiniFrame has defeated its own argument that SoftXpand is non-infringing. *Cf. Xilinx, Inc. v. Invention Inv. Fund I LP*, 2011 U.S. Dist. LEXIS 81986, *17–18 (N.D. Cal. July 27, 2011) (dismissing patent invalidity claims under *Twombly* and *Iqbal* because plaintiff did not provide any details about how the patents were allegedly invalid and did not identify a single accused product).

MiniFrame does not allege such extensions of Microsoft's lawful IP law rights. Rather, at issue here is the single-user restriction. Because Microsoft's Windows embodies IP, and because Microsoft has the greater power to refuse to license altogether, *see supra* pp. 16–21, that lesser restriction necessarily is protected by its IP rights and does not violate the antitrust laws. It is for this same basic reason that MiniFrame is wrong to assert that, for antitrust immunity to attach, IP rights must expressly contain or reference the license restriction at issue.[12]

Section 106(3) of the Copyright Act grants copyright owners the exclusive right to distribute copies of their works. That is why a file-sharing computer program on one user's computer that allows other computer users to obtain access to copyrighted files through the Internet is engaged in illicit "distribution" within the meaning of the Copyright Act. *See generally Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *UMG Recordings, Inc. v. Alburger*, 2009 U.S. Dist. LEXIS 91585, *10–11 (E.D. Pa. Sept. 29, 2009) (making available illegally downloaded work to other users violates the exclusive distribution right); *see also* 2-8 Nimmer on Copyright ("Nimmer") §§ 8.11[D][2][b], [D][2][a]

[12] In the case of copyrights, the argument also makes no sense. Although patents specify particular metes and bounds of IP, *see Corning Glass Works v. Sumitomo Electric U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989), a work is either copyrighted, or it is not. Nothing in the copyright registration speaks to whether a particular use is infringing.

(quoting definition of "distribute" as "to spread out or scatter").[13] Accordingly, Microsoft has the exclusive statutory right to limit distribution of its copyrighted software to a certain number of users per license – just as it has a right to specify license term limits, *see Kamakazi Music Corp. v. Robbins Music Corp*., 684 F.2d 228, 230 (2d Cir. 1982) (use after expiration of license is copyright infringement), or to specify that its IP can only be used at certain times and in certain places, *see Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 59 F.2d 70, 77 (1st Cir. 1932) (if motion picture license is subject to condition that its exhibition must occur at specified times and places, licensee's exhibition at other times and places constitutes infringement).

Patent law is the same. In *Bowman*, the Supreme Court addressed a farmer's replanting of patented seeds (engineered to be resistant to a Monsanto herbicide) in order to grow successive generations of crops. Monsanto patent licenses expressly specify that the seeds may be used in one (and only one) crop season. The farmer relied on the patent exhaustion doctrine, which limits a patentee's right to control what others can do with an article embodying or containing an invention – the

[13] *See also Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997) ("we hold that a library distributes a published work, within the meaning of the Copyright Act . . . when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public").

initial authorized sale of a patented item terminates all patent rights to that item.[14] *Bowman* held that the patent-exhaustion doctrine did not allow the farmer to replant the seeds. "If the purchaser of that article could make and sell endless copies, the patent would effectively protect the invention for just a single sale." *Bowman*, 133 S. Ct. at 1766. Even if Monsanto received its reward for the first seed it sells, other seed companies could reproduce and market the seeds, "thus depriving Monsanto of its monopoly." *Id*. at 1767.

MiniFrame's SoftXpand product is designed with one primary purpose – to enable multiple users to share a single instance of Windows, *see* Br. at 1, which violates the license terms. Just as Monsanto's patent rights do not require it to sit idly by while farmers replant its patented seeds, Microsoft's IP rights enable it to prevent dilution of its IP through unauthorized distribution, whether or not Microsoft's IP expressly relates to distribution methods.

3. The single-user licensing restriction protects Microsoft's IP rights and is not a "mere" contractual limitation

Related to its argument that IP rights must expressly reference licensing restrictions for those restrictions to be protected by the statutorily-granted monopoly, MiniFrame seeks to deprecate the single-user restriction as "a

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[14] *See Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008). Because software is licensed, not sold, a license of patented software does not even trigger the patent exhaustion doctrine, and so there is no reason even to consider the doctrine as a potential bar to IP enforcement.

contractual limitation on the use of the Windows operating system," which it says "is not protecting any statutorily recognized right in Microsoft's intellectual property." (Br. at 35). This argument simply misunderstands the relationship between an IP right and licenses granted pursuant to it. The license specifies the conditions under which the IP may be used. But contending that a license that protects copyright rights is "merely" a contract is to elevate form over substance and to misunderstand the nature of licenses and the applicable law.

The Microsoft license agreement expressly makes acceptance of the single-user restriction a condition of using the software. (A156). Only if the user "accept[s]" and "compl[ies]" with the restriction does the user have the right to use the Windows software. *Id*. Such a restriction on the use of IP is no "mere" contractual limitation, but rather flows from the core rights granted by IP law. *See Apple Inc.*, 658 F.3d at 1159; *LGS Architects, Inc.*, 434 F.3d 1156–57 (exceeding authorized number of uses is a copyright violation); *see also Bowman*, 133 S. Ct. at 1766; *Mallinckrodt*, 976 F.2d at 703 (exceeding authorized number of uses is a patent violation). When an end user of Windows exceeds the scope of a license, that use impinges upon Microsoft's IP rights.

MiniFrame cites *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 940 (9th Cir. 2010), for the proposition that to recover for copyright infringement based on breach of a license agreement, (i) the copying must exceed the scope of the defendant's license and (ii) the copyright owner's complaint must be grounded in an exclusive right of copyright such as unlawful reproduction or distribution). (Br. at 35). But even if this rule were correct – and it has not been adopted by this Circuit[15] – it does not help MiniFrame. A purely contractual covenant – *e.g.*, a whimsical requirement that a licensee of a book may not read the last ten pages, *see MDY Industries*, 629 F.3d at 940, or a requirement that purchasers of a printed book may not display the book prominently on a particular bookshelf – is not at issue here. Instead, as discussed above, limits on the number or frequency of use arise directly from an IP owner's core IP rights.

4. Microsoft is not estopped from defending its single-user licensing restriction

MiniFrame elected a preemptive strike on antitrust grounds. MiniFrame's preemptive choice is not proof that Windows is not protectable IP – indeed, it seems to suggest the contrary (why else would MiniFrame allege an actionable refusal to deal?). MiniFrame nevertheless suggests that Microsoft is estopped from defending against MiniFrame's antitrust claim because it has not yet sued or

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[15] *See Gilliam*, 538 F.2d at 20; *see also Marshall v. New Kids on the Block P'ship.*, 780 F. Supp. 1005, 1008 (S.D.N.Y. 1991) (third parties' violations of licensing restrictions are claims arising under the copyright laws rather than the law of contracts). *Cf. Major League Baseball Promotion v. Colour-Tex, Inc.*, 729 F. Supp. 1035, 1041 (D.N.J. 1990) ("[a] licensee who has failed to satisfy a condition of the license or has materially breached the licensing contract . . . can be held liable for acting without authorization and thereby infringing the licensor's copyright").

counterclaimed against MiniFrame for copyright or patent infringement. (Br. at 33). This contention makes no sense, and no case law supports it. If MiniFrame had desired, it could have filed a declaratory relief action seeking a ruling that SoftXpand was not infringing Microsoft's IP, or that Microsoft's IP was invalid. In that case, Microsoft obviously would be able to defend its IP rights. Microsoft's right to enforce its IP rights does not turn on the nature of the action filed, and Microsoft is not precluded from enforcing its rights because MiniFrame first pursued an antitrust attack.

5. The District Court drew no improper inferences

MiniFrame asserts that the District Court drew various improper inferences in Microsoft's favor. (Br. at 17–23). MiniFrame states repeatedly, for instance, that the Complaint does not even mention the word "patent," *see* Br. at 29, and argues that the District Court improperly "found" that Microsoft had patent rights "commensurate with" the single-user restriction, *see* Br. at 17. This misses the point entirely. The District Court did not make, and was not required to make, any "findings." As discussed *supra* pp. 21–23, MiniFrame's entire Complaint rests on the premise that Microsoft owns the IP embodied in the Windows OS. The District Court made no improper findings and drew no improper inferences, but instead recognized this fundamental premise and applied the law. (SPA4 (citing Complaint ¶¶ 17, 26–27)). The District Court correctly determined that

Microsoft's license provisions were "within the [overall] bounds" of its IP rights, SPA4, and MiniFrame's antitrust claims fail as a matter of law – whether or not Microsoft's IP rights are "commensurate" with the single-user restriction.

Similarly, MiniFrame asserts that the District Court "inferred" that MiniFrame's customers did not want to pay for additional licenses, while the Complaint alleges that Microsoft "would not permit them to do so." (Br. at 18). But nothing turns on this purported distinction. Whatever the subjective motivations of end users who bought SoftXpand, their use violated the terms of Microsoft's licenses, and Microsoft was free to refuse to facilitate that use, as discussed *infra* pp. 35–36 (addressing the specific allegations regarding JP Morgan Chase). MiniFrame also asserts that the District Court drew improper inferences about Microsoft's motivations for instituting the single-user restriction. (Br. at 19). But, as discussed *supra* pp. 18–19, Microsoft's subjective motivations are irrelevant. The single-user restriction can and does protect Microsoft's IP rights, and is therefore not subject to antitrust attack regardless of subjective intent. MiniFrame's other assertions about improper "inferences" are similarly misplaced. *Compare* Br. at 21 (alleged predatory pricing "inferences") with *infra* pp. 43–46 (MiniFrame asserted no below-cost predatory pricing claim), and Br. at 22 (alleged "inferences" about tortious interference motive) with *infra* pp. 51–54 (no tortious interference claim).

III. THE DISTRICT COURT CORRECTLY HELD THAT MICROSOFT HAD THE RIGHT TO REFUSE TO DEAL OR COOPERATE WITH MINIFRAME

A. *Trinko* Makes Clear That Microsoft Did Not Have to Deal or Cooperate with MiniFrame

As discussed above, Microsoft's IP rights dispose of MiniFrame's antitrust claims; those rights authorize Microsoft to license its IP on the terms, and at the prices, it sees fit. But IP rights aside, there is another, independent reason why MiniFrame's antitrust claims fail: Microsoft has the right to deal, or refuse to deal, with whom it wants. Simply put, Microsoft had no obligation to facilitate the business of MiniFrame, a potential competitor. The Supreme Court has recognized this antitrust rule for almost a century. *See United States v. Colgate & Co*., 250 U.S. 300, 307 (1919) (Sherman Act Section 2 "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell"); *see also Trinko*, 540 U.S. at 411 ("there is no duty to aid competitors"); *Pac. Bell Tel. Co. v. Linkline Commc'ns., Inc*., 555 U.S. 438, 444 (2009) (a business, even a putative monopolist, has "no antitrust duty to deal with its rivals at all") (citing *Trinko*).

Although there is a narrow exception for monopolists to the broad refusal to deal right under *Trinko*, this case does not fall within the exception. In rejecting a duty to deal, *Trinko* established the prerequisites for a Section 2 claim based on a monopolist's alleged failure to cooperate with a rival. There must have been prior voluntary cooperation with the excluded rival, which cooperation subsequently was terminated. *See Trinko*, 540 U.S. at 409 (complaint did "not allege that [Defendant] voluntarily engaged in a course of dealing with its rivals"). The alleged monopolist also must have sacrificed short-term profits. *Id.* (the defendant in *Trinko* did not turn down "a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher"). These tests are stringent, because "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are illsuited." *Id*. at 408.

MiniFrame has not satisfied either of these requirements. Nowhere does MiniFrame allege that Microsoft voluntarily engaged in a course of dealing with it. On the contrary, in fact, MiniFrame concedes that "Microsoft never officially approved the use of SoftXPand." (A25 ¶ 79). The absence of a course of dealing between Microsoft and MiniFrame requires upholding the dismissal of this action. *See In re Elevator Antitrust Litig*., 502 F.3d 47, 54 (2d Cir. 2007) .

MiniFrame responds only that Microsoft altered the terms of its license for *end users*. But licensing end users on a per-computer basis (as Microsoft did prior to the change in licensing terms) does not constitute a course of dealing *with*

MiniFrame. In *LiveUniverse, Inc. v. MySpace, Inc.*, a case remarkably similar to this one, the court affirmed a dismissal of a duty-to-deal claim premised on MySpace's redesign of its online platform, which precluded users from linking to content on the plaintiff's "vidiLife.com" site. 304 Fed. Appx. at 556. Although the redesign may have indicated a "prior course of dealing *between MySpace and its users*, nothing in the complaint suggests an agreement, or even an implicit understanding, *between MySpace and LiveUniverse* regarding the functionality of embedded links." *Id*. (*emphasis* in original).

The difference between affirmatively cooperating with rivals (a matter of choice) and dealing with one's own customers (an inevitability) is critical, because if dealing with customers gives rise to a duty to deal, the duty swallows the well-established right to refuse to deal. On MiniFrame's theory, the terms of Microsoft's end-user license would be frozen forever, to MiniFrame's benefit, even though Microsoft never dealt or cooperated with MiniFrame, or approved or licensed its product. We are unaware of any court that ever has found that a defendant's dealing with its own customers can form the basis of an antitrust duty to deal with rivals. Were that the rule, monopolists and putative monopolists would be required to constantly and vigilantly police every rival third-party use and take steps to immediately shut them down, lest they be held liable for antitrust treble damages and be subject to injunctions circumscribing their business practices. Such a rule would do nothing to advance, and would likely interfere with, the antitrust goals of improving consumer choice and welfare.

MiniFrame likewise does not sufficiently allege the second prong of the *Trinko* test – that Microsoft is sacrificing short-term profits by implementing the single-user license restriction. In fact, it alleges the opposite. The Complaint alleges that Windows server OS configurations (which MiniFrame alleges Microsoft wants to sell) "generate more revenue and are more profitable for Microsoft than shared PC systems." (A25 ¶ 76). As the District Court noted, it therefore was perfectly rational for Microsoft to prefer the former to the latter. (Special Appendix ("SPA") at SPA7; A35–36 ¶¶ 132–34) (outlining the theory that in a "competitive" market, *i.e.*, one where Microsoft licensed as MiniFrame demands, Microsoft's licensing fees would be lower).

MiniFrame points to an alleged business discussion with JP Morgan Chase, arguing that it shows that Microsoft sacrificed short-term profits in order to foreclose competition from MiniFrame's SoftXpand product. (Br. at 44). But MiniFrame's own allegations contradict that claim. According to the Complaint, MiniFrame asked JP Morgan Chase whether it would buy an additional Windows (client OS) license from Microsoft for each new touch screen that would run a "shared" copy of client OS. (A41 ¶ 156). JP Morgan Chase allegedly agreed to do so if Microsoft would approve the use of SoftXpand. *Id*. Microsoft did not approve, and instead offered its own MPS product to JP Morgan Chase. (A42 ¶ 160). Microsoft's decision to refuse to allow JP Morgan Chase to run "shared" copies of Windows using SoftXpand, even if JP Morgan Chase were to purchase a Windows license for each touch screen, did not sacrifice short-term profits (as *Trinko* requires) because – as MiniFrame itself alleges – the MPS license fees are higher than the license fee for Windows alone. (A35–36 ¶¶ 132, 134) (client OS license fee is $120; MPS license fee is $817 plus a higher $139 fee per user). Microsoft did not forsake short-term profits or turn down sales at its retail price; it stood by its licensing structure to achieve a higher-revenue transaction by licensing MPS. Seeking additional revenue by offering a product at a higher retail price is not a refusal to deal at retail prices. Microsoft properly acted to protect its products, its revenue, and its software licensing business model.

MetroNet Services Corporation v. Qwest Corporation confirms that Microsoft's licensing change fails to satisfy the second prong of *Trinko*. Qwest, a phone company, sold its Centrex phone service to businesses. Qwest priced Centrex on a "per system" basis, *i.e.*, based on the number of phone lines included in the Centrex package, regardless of whether those lines ran to a single location or multiple, separate locations. 383 F.3d at at 1127. Qwest offered volume discounts to businesses with more than 20 phone lines. Resellers such as MetroNet purchased volume-discounted Centrex lines from Qwest and resold them to aggregations of small businesses, each with 20 lines or fewer. *See id*. To eliminate this "arbitrage," which was hurting its profitability, Qwest changed its pricing structure, and required customers to have more than 20 lines at each location in order to receive a volume discount for the service to that location. *See id*. "Hence, 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." *Id*. at 1132. Qwest's switch to per-location pricing enabled it to maintain a discriminatory price structure established before resellers entered the market for service.[16] *See id*. at 1133.

MetroNet had no antitrust duty to deal claim, and neither does MiniFrame. In *MetroNet*, Qwest initially sold Centrex systems on a per system basis. *Id*. at 1127. Here, Microsoft licensed its client OS on a per computer basis. In *MetroNet*, Qwest discovered that its pricing structure created a loophole for resellers, including MetroNet. *Id*. Here, Microsoft discovered that its licensing structure inadvertently allowed companies like MiniFrame to enable their customers to "share" Microsoft's IP. In *MetroNet*, Qwest closed the loophole by

[16] When a supplier price "discriminates," it charges customers different prices. For example, airlines frequently sell airplane seats to business travelers (who tend to book seats only a few days before their flights) at higher prices than those they charge to vacation travelers (who book far in advance). Most end-user price discrimination is lawful and pro-competitive. Although MiniFrame argues that it has also asserted a claim for price discrimination, as discussed *infra* at pp. 46–48, it has not.

imposing a per-location pricing structure. Here, Microsoft similarly tightened its licensing provisions by instituting the single-user license restriction. *MetroNet*'s reasoning is directly applicable and forecloses MiniFrame's claim of a duty to deal.

B. *Aspen Skiing* Does Not Save MiniFrame's Antitrust Claims

Surprisingly, although *Trinko* is the Supreme Court's latest – and definitive – word on the narrow exception to the refusal to deal doctrine for a monopolist, MiniFrame mentions *Trinko* only once in passing in a citation to *In re Elevator Antitrust Litig*., 502 F.3d at 53. Instead, MiniFrame relies primarily on a nearly 30-year-old case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), which the *Trinko* Court expressly held is at or near the "outer boundary" of Section 2 liability. *See Trinko*, 540 U.S. at 409. Even if *Trinko* did not dispose of MiniFrame's allegations, *Aspen Skiing* does not save its claims.[17]

In *Aspen Skiing*, the owner of three ski mountains had sold a joint lift ticket together with the owner of a fourth mountain. The owner of those three mountains, who was the alleged monopolist, later withdrew that cooperation, going so far as to refuse to accept vouchers sold by the plaintiff for access to the

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[17] MiniFrame suggests that *Aspen Skiing* was merely an "evidentiary ruling." (Br. at 43). MiniFrame does not explain exactly what it means by this statement, but apparently contends that because *Aspen Skiing* was decided after a trial, the limitations it imposed on duty to deal claims are somehow not applicable in the context of a motion to dismiss. To state this argument is to refute it; *Aspen Skiing*, and then *Trinko* after it, set forth the contours of Section 2 liability for refusals to deal. Courts apply those standards in analyzing the legal sufficiency of such claims.

defendant's mountains – vouchers which were sold at the defendant's retail price and which would have fully compensated the defendant. *See* 472 U.S. at 593–94. By refusing the vouchers, the defendant sacrificed short-term profits, allegedly to secure and maintain its monopoly position by driving the owner of the fourth mountain out of the market. *See id.* at 594–98. The court upheld a jury verdict of monopolization.

Crucially, the competing ski mountains had previously cooperated in a joint venture-type arrangement from which the defendant later withdrew cooperation. Just as in *Trinko*, that prior cooperation was essential to the claim; had the resorts never cooperated with each other, the Supreme Court would not have found a duty to offer a joint ski ticket. Here, however, Microsoft never cooperated or dealt in any way with MiniFrame, which precludes the application of *Aspen Skiing*. *See id.*; *see also Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 826 F. Supp.2d 705, 709 (S.D.N.Y. 2011) (dismissing refusal–to-deal claim; even joint efforts to develop a product over several months did not constitute a legally sufficient prior course of dealing under *Aspen Skiing*).

In addition, *Aspen Skiing* also does not apply – even when (unlike here) there *was* a prior course of dealing – if the prior relationship was terminated in order to pursue a better or more lucrative business opportunity. For example, in *Christy Sports*, the defendant ski resort initially allowed a competitor to offer skis for rent at its resort, but later withdrew that authorization (as it was entitled to do so under a restrictive land covenant). The court affirmed dismissal of a Section 2 claim, noting that there was no indication that the resort terminated a profitable business relationship or was motivated "by anything other than a desire to make more money for itself" by offering its own skis for rent. *Christy Sports*, 555 F.3d at 1197. "The Sherman Act does not force DVRC [the resort] to assist a competitor in eating away its own customer base, especially when the competitor is offering DVRC nothing in return." *Id*.

> DVRC should not be forever locked into a business decision made in 1990. . . . This is so even if Christy is correct that by enforcing the restrictive covenant DVRC could increase the price and decrease the output of ski rentals at Deer Valley. It had the right to do so from the beginning, and the fact that it chose to do otherwise for some time does not eliminate that right. The antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path.

Id. at 1198.[18] The same is true here – Microsoft has legitimate, profit-maximizing reasons for licensing its software for use by one user at a time, and is not locked into a different, per-computer licensing structure merely because that structure inadvertently enabled MiniFrame's business model. MiniFrame seems to acknowledge as much when it writes that its Complaint is *not* premised on any

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[18] *See also Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216 , 1223–25 (10th Cir. 2009) (hospital's decision to invest in nephrology practice and recoup its investment without sharing its facilities with a competitor, and thus to avoid a potentially unprofitable relationship, did not support a duty-to-deal claim).

duty to deal with rivals. (A188).[19]

MiniFrame argues that if a prior course of cooperation were required to support a duty-to-deal claim, the defendant in *Aspen Skiing* could simply "have refused to extend parking privileges to patrons . . . of the other slope and, thereby, achieved the same exclusionary result." (Br. at 42 n.9). But this hypothetical implicitly assumes that the slopes were cooperating with each other on the lift ticket program, and that the defendant then withdrew parking privileges. If there were no cooperation with a rival slope in the first place, a slope operator would be free to offer parking privileges to patrons of other slopes but then change its mind. Such a decision would not be a termination of cooperation *with a rival*. *See Trinko*, 540 U.S. at 408–09; *LiveUniverse*, 304 Fed. Appx. at 556. And if done as part of an effort to boost revenues, it would be unobjectionable, even given a prior course of cooperation. *See Christy Sports*, 555 F.3d at 1197.[20]

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[19] *Black Box Corp. v. Avaya, Inc.*, U.S. Dist. LEXIS 72821(D.N.J. Aug. 29, 2008), does not salvage MiniFrame's argument. There, the plaintiff signed a dealer contract with the defendant, *see id*. at *4, and received various types of support from the defendant, *see id*. at *5–6, which was later terminated. No such cooperation is alleged here.

[20] As MiniFrame notes, *Aspen Skiing* relied on *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). But *Lorain Journal* was a boycott case – the alleged monopolist newspaper refused to sell advertising to patrons that also advertised with a competing radio station. A refusal to extend parking privileges (not a complete refusal to let patrons of other slopes park) is not a boycott; it is merely a decision to require patrons to pay their own way for parking. Similarly, MiniFrame does not allege that Microsoft has refused to sell Windows licenses to

C. No "Broad Course of Conduct" Supports MiniFrame's Duty to Deal Claim

Finally, MiniFrame argues that dismissal of its antitrust claims was improper because it alleged that Microsoft engaged in a "broad[] course of anticompetitive conduct," including developing its own MPS product and threatening to withhold service or to discontinue relations with customers (end users and original equipment manufacturers ("OEMs")). (Br. at 39). However, nothing in *Trinko* allows a "broad course of conduct" to substitute for the requirements of prior cooperation with a plaintiff and a sacrifice of short-term profits.

Moreover, developing a competing product is the essence of competition and no basis for an antitrust claim. MiniFrame expressly declines to allege that Microsoft copied MiniFrame's code. (Br. at 12 n.4). As to so-called threats to OEMs, MiniFrame alleges only Microsoft's enforcement of its IP rights. (A43 ¶ 167, A45 ¶ 175); (A80 at 3–10) (MiniFrame objects that Microsoft informed its customers of its license terms). And aside from instituting the single-user licensing restriction, the only form of exclusionary conduct allegedly directed at end users is Microsoft's "predatory pricing," but those allegations fail as discussed in Section IV, *infra*.

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anyone who deals with MiniFrame, and MiniFrame does not assert a boycott claim.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT MINIFRAME DID NOT ADEQUATELY PLEAD A CLAIM FOR PREDATORY PRICING

MiniFrame's other allegation of exclusionary conduct concerns supposedly "predatory" pricing of Microsoft's MPS product. The District Court properly dismissed this claim because MiniFrame did not allege the essential element of below-cost pricing.

A. Predatory Pricing Claims Require Allegation of Below-Cost Pricing

Predatory pricing schemes "are rarely tried, and even more rarely successful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)). That is because true predatory pricing itself is rare, for the simple reason that it is difficult for purported price predators to recoup their losses.

Brooke Group accordingly clarified that only *below-cost* pricing is actionable in a Section 2 claim for predatory pricing (or, for that matter, in a price discrimination claim under the Robinson-Patman Act when harm to a competitor (from so-called primary-line price discrimination) is alleged). *See* 509 U.S. at 222–23.

This fundamental rule is rooted in principles of antitrust policy, as well as concerns about judicial administrability. As the Supreme Court explained, below-cost pricing is an essential element of predatory pricing because (i) "[a]s a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control," and (ii) "discouraging a price cut and . . . depriving consumers of the benefits of lower prices . . . does not constitute sound antitrust policy." *Id*. at 223–24. For such a claim to proceed, therefore, the plaintiff must allege and prove both below-cost pricing and a dangerous probability that the defendant will recoup its losses after the predatory period is over. *See id*.[21]

Here, MiniFrame complains that Microsoft's pricing of its MPS product is too low. But low pricing is precisely what the antitrust laws are designed to foster, because such pricing is pro-competitive and enhances consumer welfare and choice. Only when prices are set below cost can they theoretically pose an antitrust concern. Because MiniFrame does not actually allege that Microsoft sold MPS below its cost, under *Brooke Group*, MiniFrame has no predatory pricing claim. This should end the analysis.

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[21] Indeed, courts routinely decline to regulate the fairness or adequacy of prices or terms of dealing between and among competitors. As stated in *Trinko*, "[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." *Trinko*, 540 U.S. at 415 (internal citations omitted).

B. MiniFrame's Surmise Regarding Microsoft's Pricing Policies Does Not Make Out a Predatory Pricing Claim

Relying on allegations that MPS is "bundled with" the Microsoft Windows Server 2008 R2 operating system, MiniFrame surmises that MPS was discounted to a *price* less than that of the server OS itself, and that MPS must therefore have been offered for "free." (Br. at 46); (A81:23–A82:8) (server OS licensed with MPS is "free"); (A34–37 ¶¶ 130–36). But this surmise about MPS pricing, even if it were true, is irrelevant. This allegation about *price* does not show that Microsoft sold below *cost*. MiniFrame's fundamental mistake is to compare, not MPS's price with MPS's cost, but to compare MPS's retail price *to the retail price of another Microsoft product* (server OS). (Br. at 46). On the relevant metric, the cost to Microsoft of Microsoft's own software, the Complaint is silent. *See*, *e.g.*, *Brooke Group*, 509 U.S. at 222–23 (citations omitted). At most, MiniFrame alleges that Microsoft priced some of its server OS products higher, and discounted another product "containing" server OS technology. But this is nothing more than lawful, pro-competitive price competition and discounting. *See Atl.Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339–40 (1990).

To expand on this point, MiniFrame's argument reflects two intertwined errors. MiniFrame contends that "Microsoft is giving MPS away for free," Br. at 47, because MPS is sold at a price less than Windows Server 2008 R2, with which MPS is "bundled." But of course MPS is decidedly *not* free. Indeed, MiniFrame alleges that Microsoft charges significant fees for MPS licenses.[22] Thus, the predicate of MiniFrame's argument (that MPS is priced for "free") is lacking. Proceeding from this missing predicate, MiniFrame infers that MPS must be sold below cost (because product cost must be above zero). (Br. at 47). But the Complaint does not contain a single allegation about MPS' cost, nor any allegation establishing that the substantial MPS price does not cover Microsoft's cost to sell MPS. Nor does MiniFrame allege that the MPS price does not cover the cost of the "bundled" server technology. MiniFrame's conjectures do not establish an actual allegation of below-cost pricing of MPS, and therefore fail to state a legally sufficient claim.

C. MiniFrame Pled No Price Discrimination Claim

Perhaps recognizing that it has not sufficiently alleged price predation, MiniFrame suggests at times that Microsoft's pricing of MPS may constitute unlawful price discrimination under the Robinson-Patman Act. (Br. at 46 & n.10). This price discrimination "claim" fails for a number of reasons.

First, the Complaint contains no claim or count for unlawful price discrimination under the Robinson-Patman Act. (A67–70 ¶¶ 334–52) (claims for

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[22] According to MiniFrame, the non-academic price for MPS (an application running on Windows Server 2008 R2) is $817, plus $139 per Client Access License ("CAL") per user (with a minimum of five CALs). (A36–37 ¶¶ 134, 136). That is, for a five-user MPS license, MiniFrame alleges that the price is $817 + $139 x 5, or $1,512.

relief). The District Court therefore had no price discrimination claim to dismiss.

Second, even if MiniFrame had alleged such a claim, a competitor's price discrimination claim (a so-called "primary line" discrimination claim) under the Robinson-Patman Act is subject to the same requirement of below-cost pricing claims under Sherman Act § 2.[23] Any such claim therefore would fail for the same reasons set forth above.

Third, the Robinson-Patman Act is only implicated by the sale of commodities. *See* 15 U.S.C. § 13(a). And as MiniFrame concedes, Microsoft does not sell its Windows software; it licenses it. Such licenses are outside the scope of the Robinson-Patman Act. *See Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148, 161 n.3 (2d Cir. 2004) (Sotomayor, J.) (contracts that grant a license to exploit IP contained in a commodity have been viewed as primarily concerned with intangible rights, and are therefore not covered by the Act).

Finally, MiniFrame has not alleged price discrimination involving commodities "of like grade and quality," 15 U.S.C. § 13(a), because as MiniFrame alleges, MPS and Windows Server 2008 R2 do not have identical functionality, and so are different products. *See FTC v. Borden Co.*, 383 U.S. 637, 641 (1966)

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[23] *See Brooke Group*, 509 U.S. at 222 ("whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs").

("like grade and quality" determined by (physical) product characteristics). For this reason, too, any such claim would have failed.

V. THE DISTRICT COURT CORRECTLY DISMISSED MINIFRAME'S STATE LAW CLAIMS

A. The Complaint Fails to State a Donnelly Act Claim

The District Court was correct to dismiss MiniFrame's Donnelly Act claim. *See* N.Y. Gen. Bus. Law § 340(1). First, such a claim is subject to the same requirements discussed above in the context of the Sherman Act, and therefore must be dismissed for those same reasons. *See Winstar Commc'ns., LLC v. Equity Office Props., Inc.*, 2005 U.S. Dist. LEXIS 42508, *14 n.9 (S.D.N.Y. Jan. 24, 2005) *aff'd*, 170 Fed. Appx. 740 (2d Cir. 2006).

Moreover, to state a claim under the Donnelly Act, a plaintiff must plead facts establishing a "reciprocal relationship of commitment between two or more legal or economic entities," *Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc*., 710 F.2d 87, 90 (2d Cir. 1983). In other words, a Donnelly Act violation requires a contract, combination, or conspiracy. *See State of New York v. Mobil Oil Co*., 38 N.Y.2d 460, 464 (N.Y. 1976). The Donnelly Act reaches only *concerted* monopolization – two or more actors working together to establish or maintain a monopoly – not unilateral conduct or attempted monopolization. *See Berman v. Riverbay Corp*., 1990 U.S. Dist. LEXIS 3372, *6 (S.D.N.Y. Mar. 29, 1990); *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc*., 823

N.Y.S. 2d 79, 84 (N.Y. App. Div. 2006). Here, however, the Complaint does not allege a concerted attempt to obtain or maintain a monopoly. In its Brief, MiniFrame now argues that Microsoft, "in combination with" unidentified "others" (including OEMs) restrained trade and created a monopoly in the multi-user market. (Br. at 51). However, the OEMs make hardware, and MiniFrame does not allege that they supply operating system software in competition with Microsoft, so they cannot work together with Microsoft to concertedly monopolize one of MiniFrame's purported software markets. Moreover, this vague allegation is insufficient to support a claim under the Donnelly Act, because "conclusory allegations of conspiracy are insufficient." *Yankees Entm't & Sports Network v. Cablevision Sys. Corp*., 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002) (citing *Sands v. Ticketmaster-N.Y., Inc.*, 616 N.Y.S.2d 362, 364 (N.Y. App. Div. 1994)).

MiniFrame also argues that *Columbia Gas of New York, Inc. v. NewYork State Electric & Gas Corp.*, 28 N.Y.2d 117, 127–28 (1971), supports its monopolization claims. (Br. at 52). But *Columbia Gas* involved a challenge to tying agreements, *i.e*., agreements between the defendant and third parties to require the third parties to purchase a "tied" product to obtain a "tying" product. Such agreements are distinct from the offense of unilateral monopolization, and the subsequent case of *Mobil Oil* made clear that the Donnelly Act reaches only concerted action. MiniFrame alleges no tying agreements.

B. The Complaint States No Claim Under Washington Statutes

MiniFrame concedes that the elements of a monopolization claim under Revised Code of Washington ("RCW") 19.86.040 mirror the requirements of a Sherman Act claim. (Br. at 55). That claim therefore fails for the same reasons as MiniFrame's federal antitrust claims. *See Rowan Nw. Decorators, Inc. v. Wash. State Convention and Trade Ctr.*, 898 P.2d 310, 314 (Wash. 1995).

MiniFrame's claim for unfair competition under RCW 19.86.020 also fails because MiniFrame does not state facts sufficient to show that Microsoft deceived the public, or violated one of the state statutes specially enumerated by the Washington Legislature as constituting an unfair or deceptive act. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535 (Wash. 1986); *Smale v. Cellco P'ship.*, 547 F. Supp. 2d 1181, 1188 (W.D. Wash. 2008). Although MiniFrame now argues that "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," *see* Br. at 54 (*emphasis* supplied), that is insufficient, because MiniFrame simply does not allege any behavior that actually was deceptive, nor could it. At most, it alleges that Microsoft changed its license terms, but the public had no reasonable expectation that Microsoft could not or would not amend those terms, which of course Microsoft had every right to do. And the licenses were clear and public and there is no allegation that the terms of the licenses were themselves deceptive.

Nor can MiniFrame save its RCW 19.86.020 claim by alleging that Microsoft had the capacity to mislead the public through "unfair" price predation, even assuming price predation were "misleading." For the reasons discussed *supra* pp. 43–46, MiniFrame has no claim for price predation.

C. The Complaint States No Claim for Tortious Interference

To plead the tort of interference with prospective economic relations, a plaintiff must allege that the defendant used improper means, which must (i) amount to an independent crime or tort, (ii) be the result solely of malice, or (iii) amount to "extreme and unfair" economic pressure. *See 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); *Carvel Corp. v. Noonan*, 3 N.Y. 3d 182, 189–93 (N.Y. 2004).[24] Similarly, interference with a contract (even one for a term) is not actionable where the "interference" is privileged or economically justified. *See Foster v. Churchill*, 87 N.Y.2d 744, 750 (N.Y. 1996).

Here, however, MiniFrame pleads facts establishing nothing more than that Microsoft legitimately enforced the single-user restriction and its IP rights. (A43

[24] The same standards apply to contracts that may be avoided by a party and to those terminable at will. *See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 192 (N.Y. 1980).

¶ 167) (OEMs allegedly approached Microsoft about using SoftXpand under or in connection with Microsoft's [client OS] licenses, but Microsoft allegedly declined to grant approval); (A45 ¶ 175) (Samsung allegedly informed MiniFrame that Microsoft's position was that SoftXpand use was against Microsoft [client OS] licensing policy); (A80: 3–10) (conceding that the alleged tortious interference consisted of Microsoft changing its license terms and informing its customers of the same). Because, by the plain terms of the allegations, Microsoft was motivated by legitimate economic self-interest and merely informed others of its license rights, its actions were therefore not improper. *See Carvel Corp.*, 3 N.Y. 3d at 189–93; *Advanced Global Tech, LLC v. Sirius Satellite Radio, Inc.*, 44 A.D.3d 317, 318 (N.Y. App. Div. 2007). Moreover, MiniFrame's interference claims fail because MiniFrame had no right to circumvent Microsoft's licenses to begin with. Any purported interference was justified and privileged.

MiniFrame argues that it has alleged interference above and beyond Microsoft's enforcement of the single-user restriction and its IP rights, but in fact, it has not. For example, MiniFrame cites to its Complaint concerning its potential client Addjust Technologies to suggest that Microsoft interfered with a purportedly compliant single-user implementation of SoftXpand. (A50 ¶¶ 221–22). But the Complaint itself clearly alleges that Microsoft told Addjust that Windows Server and MPS were the only operating systems licensed for "*multi*-user computing" (*emphasis* supplied). (A51 ¶ 224). Similarly, MiniFrame's potential client Toshiba was allegedly interested in MiniFrame's software solution "which enables multiple users to [use] the computing power of single PC or notebooks." (A46 ¶ 186). The simultaneous use of Windows by multiple users clearly violates Microsoft's license terms, so Microsoft was entitled to object to such a use. And although MiniFrame alleges that they told Microsoft that its proposed "Samsung solutions that included SoftXpand" were "going to be single user configurations," A44–45 ¶ 174, the Complaint alleges that SoftXpand allows simultaneous access by multiple users and nowhere indicates that this functionality can be turned off. Even if Samsung desired a single-user setup, Microsoft is entitled to object to its OEM licensee's use of third-party software that may allow end users to circumvent the single-user license restriction.

Finally, MiniFrame alleges that JP Morgan Chase decided not to proceed with MiniFrame's project because of "Microsoft's objections and Microsoft's threat to withdraw technical support from JP Morgan Chase." (A42 ¶ 162); Br. at 56. However, the Complaint makes clear that Microsoft allegedly refused to provide technical support to the extent that JP Morgan Chase installed SoftXpand on its computers "to create shared PC systems." (A41 ¶ 155). Because such shared PC systems violate Microsoft's license terms, nothing requires Microsoft to support such installations, and Microsoft's decision to decline support to the extent of the non-compliant use does not exceed its IP rights.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: New York, NY
July 19, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, the undersigned hereby certifies that this Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(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 13,394 words.

2. The Brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 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 A. Rosenfeld*______
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