UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MINIFRAME LTD., Plaintiff, v. MICROSOFT CORPORATION, Defendant.	No. 11 CIV 7419 (RJS) (JCF) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF MICROSOFT CORPORATION'S MOTION TO DISMISS COMPLAINT

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I. INTRODUCTION

Microsoft Corporation ("Microsoft") develops software that contains valuable intellectual property ("IP"), and licenses it to end users on terms, and at prices, that allow Microsoft to protect its IP and earn a reasonable return on its R&D investment. Although Microsoft did not license the plaintiff, MiniFrame Ltd. ("MiniFrame"), to develop or commercialize Microsoft's software, MiniFrame nevertheless developed a business that exploited a provision in Microsoft's software license terms that restricted the use of Microsoft's personal computer ("PC") operating system ("OS") software to one computer at a time. Taking advantage of this provision, MiniFrame's SoftXpand "sharing" software allowed multiple users to simultaneously share a single copy of Microsoft PC OS as long as it was running on a single computer. Beginning in 2007, Microsoft altered its PC OS license terms to restrict the use of its PC OS to one user at a time (the "Single User Restriction") as opposed to one computer at a time. This change – even though MiniFrame has not been a Microsoft commercial licensee – in effect prevented MiniFrame from continuing to facilitate consumers' sharing of Microsoft's software products in derogation of Microsoft's license restrictions.

At their core, MiniFrame's federal antitrust and state claims stem from Microsoft's simple effort to protect its own IP. The claims fail both as a matter of IP law and antitrust law. As to the former, an IP owner is free to license its IP on terms and at prices it sees fit. *See, e.g., 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); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (copyright holders can, within broad limits, curb the development of a derivative market by refusing to license a copyrighted work or by doing so only on limited terms); *see also 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). This basic principle is sufficient to dispose of MiniFrame's antitrust claims, and should be the end of the analysis. Microsoft's rights to set its own IP license terms and prices are particularly robust here, because MiniFrame's products effectively enable the copying or sharing of Microsoft's IP – behavior that the courts have held Microsoft need not tolerate. *See, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (distributor of product with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties).

Should the Court reach MiniFrame's antitrust law arguments, the outcome would be the same because a monopolist has no general duty to deal with competitors. MiniFrame relies on a line of antitrust cases holding that a monopolist, in certain narrow and specific circumstances, can have a duty to deal with a rival. Plaintiff's Pre-Motion Letter at p. 2. Assuming, *arguendo*, that this case law even applies as a general matter to IP owners and can trump their IP rights (a proposition Microsoft rejects), MiniFrame still does not allege the predicate facts necessary to state a claim. First, it does not allege that Microsoft previously and voluntarily engaged in a course of dealing <u>with</u> <u>MiniFrame,</u> through licensing or otherwise. Microsoft's end user license was with <u>end users</u> and does not provide MiniFrame with a basis to freeze Microsoft's license terms or practices. Second, MiniFrame does not, and cannot, allege that Microsoft is now sacrificing short-term profits by refusing to license software at Microsoft's own retail price.

These deficiencies preclude MiniFrame's antitrust duty to deal arguments. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004); *see also MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004) (rejecting Section 2 claim

where telephone company changed its per-system business telephone pricing structure to prevent arbitrage by telephone service resellers, and insisted upon a per-location minimum number of phone lines in order to receive a discount), *cert. denied*, 544 U.S. 1049 (2005). 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).

Aside from its "duty to deal" claim, MiniFrame alleges only one other type of anti-competitive and exclusionary conduct – predatory pricing. However, this claim is completely inconsistent with established Supreme Court law governing such claims. MiniFrame's predatory pricing claim fails because it does not allege that Microsoft's pricing is below cost. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Finally, MiniFrame's state law claims fail for essentially the same reasons that its federal claims fail: Microsoft is free to set its own IP licensing terms, and is free to inform its customers of those terms.

II. FACTS[1]

Microsoft develops and licenses computer software, including PC OS software that runs individual personal computers and "server" OS software that runs servers. Servers are computers that link PCs together and provide services (*e.g.*, print, Internet, database) to PCs. Compl. ¶¶ 14-27. Around 2003, MiniFrame developed "SoftXpand" "sharing" software, which

[1] The facts set forth below are taken from the Complaint and are assumed to be true for purposes of this Motion only. Other alleged facts are discussed *infra* and are also assumed true for purposes of this Motion.

enables multiple users sitting at different terminals to simultaneously use one copy of Microsoft's PC OS running on a single PC. *Id.* ¶ 40.

MiniFrame alleges only two basic types of anti-competitive or exclusionary conduct. The first concerns a purported license term change. MiniFrame alleges that, before 2007, Microsoft's PC OS software licenses restricted the use of Microsoft's PC OS software to one computer per license. *Id.* ¶¶ 37, 50-53. According to the Complaint, in 2007, with the release of the Windows Vista version of Microsoft's PC OS, Microsoft's End User License Agreement ("EULA") for Microsoft's PC (also known as "client") OS included a single user restriction ("SUR"). *Id.* ¶ 58. MiniFrame alleges that Microsoft eventually incorporated the SUR into all of the various versions of its PC OS licenses. *Id.* ¶ 62. Following implementation of the SUR, customers usually had no choice but to purchase a Microsoft server OS if they wanted to install a multi-user computer system that ran a Microsoft OS. *Id.* ¶ 65.[2] MiniFrame alleges that Microsoft had no technological reason for imposing the SUR, *id.* ¶ 66, but it does not allege that Microsoft had no valid IP or economic interest in protecting, through the SUR, the IP embodied in its PC OS.

The second type of allegedly exclusionary conduct relates to product pricing. In 2010, Microsoft launched its own PC sharing software product – Windows MultiPoint Server ("MPS") – to serve multi-user end customers in this segment of the market. *Id.* ¶¶ 113, 116. According to

[2] MiniFrame alleges that this restriction was not universal. "For some customers, Microsoft took the position that the customer need only purchase a [client OS] license for each user . . . ." Compl. ¶ 86. "For other[] [customers], Microsoft indicated that the use of [Plaintiff's software] was acceptable without any other licenses." *Id.*

MiniFrame, MPS is licensed with some form of Microsoft's server OS. *Id.* ¶ 116.[3] MiniFrame alleges that Microsoft's MPS is less expensive than the combination of SoftXpand plus a Microsoft server OS license, and on this basis alleges predatory pricing. *Id.* ¶¶ 130-136. However, MiniFrame alleges that MPS is licensed for substantial fees. 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). *Id.* ¶¶ 134, 136. The MPS license fees are higher than the license fee for the Microsoft client OS alone. *See id.* ¶¶ 132, 134 (client OS license fee is allegedly $120; MPS license fee is allegedly $817 plus a higher $139 per client). MiniFrame does not allege that Microsoft priced MPS below cost.

III. MINIFRAME'S CLAIMS

MiniFrame predicates nine claims, or counts, on the above alleged facts relating to Microsoft's end-user licensing terms and its MPS pricing. Counts I through IV constitute MiniFrame's federal antitrust claims under Section 2 of the Sherman Act, 15 U.S.C. § 2. In Count I, MiniFrame alleges monopolization of the purported server OS market. Count II alleges monopolization of the purported PC sharing software market. Counts III and IV allege actual and attempted monopolization of the purported multi-user software market (which is a combined market of server OS and PC sharing software), respectively. MiniFrame alleges that Microsoft has a 41-42 percent share of the server OS market (by revenue), Compl. ¶ 33, and a 75 percent or greater share of the client OS market, *id.* ¶ 34. (MiniFrame does not allege Microsoft's share of

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

the PC sharing software market or the multi-user software market.)

Counts VII through X allege violations of state antitrust or unfair competition laws.[4] In Count VII, MiniFrame alleges that the purported EULA licensing term changes and MPS pricing constitute a violation of New York's antitrust law, the Donnelly Act (N.Y. Gen. Bus. Law § 340). Count VIII alleges a violation of Washington's antitrust law, RCW 19.86.040. Count IX alleges a violation of Washington's unfair competition law, RCW 19.86.020. Count X alleges a violation of unspecified unfair competition "common law."

Finally, in Count XI, MiniFrame alleges that Microsoft has tortiously interfered with MiniFrame's business relationships.

IV. DISCUSSION

A. Legal Standard

To survive a Rule 12(b)(6) motion, a claim must have facial plausibility. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). That is, a complaint's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Moreover, 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 the court accept as true a legal conclusion couched as a factual allegation. *Id.*; *see also Iqbal*, 129 S. Ct. at 1949. 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.

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[4] Between pages 61 and 62, the Complaint skips a Count V and VI. Because the paragraph numbers run consecutively after Paragraph 341, Microsoft assumes that MiniFrame erroneously labeled Count V as Count VII.

See Matson v. Board of Educ. of the City School Dist. of New York, 631 F.3d 57, 63 (2d Cir. 2011).

B. Exclusionary Conduct Requirement for Sherman Act Section 2 Claims

Having a monopoly is by itself entirely lawful. As the Supreme Court stated 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. Any Sherman Act Section 2 claim must therefore plead exclusionary conduct (*i.e.*, the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident). *See United States v. Grinnell Corp.*, 384 U.S. 563 (1966).[5] "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, a key question for this Motion is whether Microsoft's alleged imposition of the SUR and its MPS pricing constitute exclusionary conduct. As discussed below, the answer is "no," under both the case law that defines Microsoft's IP rights (which is by itself dispositive) and antitrust law.

C. Microsoft Has the Right to Protect Its Own IP Through Licensing Restrictions Such as the SUR

IP law provides IP owners with broad protections and freedom of action. An IP owner may enforce its IP rights without violating the antitrust laws unless it acts outside the scope of its

[5] The other elements of a Section 2 claim are discussed *infra* at pp. 21-25 in connection with MiniFrame's deficient server OS market allegations. Briefly, for monopolization, they include monopoly power in a relevant market and causal antitrust injury.

legal grant – by, for example, tying a patented product to an unpatented one if it has market power in the tying product (*e.g.*, *Illinois Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28 (2006)), or by obtaining IP rights through fraud (*e.g.*, *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 328 U.S. 172 (1965)). IP law fully justifies Microsoft's OS licensing terms and practices, and therefore necessitates the rejection of MiniFrame's antitrust claims.

1. Patentees and copyright holders can license their IP as they see fit

IP protections are similar for both copyrights and patents. Copyright holders need not license their works at all. *See* 17 U.S.C. § 106. When they do, they have broad rights to license as they wish. *See, e.g.*, *UMG Recordings, Inc.*, 92 F. Supp. 2d at 352 (copyright holders can, within broad limits, curb the development of a derivative market by refusing to license a copyrighted work or by doing so only on limited terms). In *Corsearch*, the court similarly held that a copyright owner can terminate or limit licenses in any manner deemed appropriate. *See Corsearch*, 792 F.Supp. at 322. And in *Wall Data Inc. v. Los Angeles County Sheriff's Dep't.*, 447 F.3d 769 (9th Cir. 2006), the court strictly enforced a per-computer license for software. Indeed, while copyright owners may choose simply to exclude others from their work (*i.e.,* to not transfer their rights), courts have long held that they may also condition the right to use their work on the acceptance of specific terms. *See Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1159 (9th Cir. 2011), *petition for cert. filed*, Dec. 27, 2011 (citing *Metro-Goldwyn-Mayer Distrib. 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).[6]

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[6] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), cited by MiniFrame in its pre-motion letter, does not contradict these principles. There, the court held that Microsoft could

Patent law provides similar rights and protections. *See* 35 U.S.C. § 271;[7] *see also* *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1338 (Fed. Cir. 2006) (discussing validity of patent license restrictions). Patentees may, for example, lawfully limit the number of uses or users per license. *See id.* at 1338, *remanded to Monsanto Co. v. Scruggs*, 2009 WL 536833 (N.D. Miss. Mar. 3, 2009), *leave to appeal denied*, 345 F. App'x 552 (Fed. Cir. 2009). In short, 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."

(footnote continued from previous page)
have a copyright defense to the extent it needed to act to prevent "substantial alterations" of its copyrighted works, but found that Microsoft had largely failed to substantiate that need. *See id.* at 63-64. In that 2001 case, Microsoft had (allegedly) coerced OEMs into not installing competitors' software (Internet browsers) on the computer "desktop." Here, by contrast, MiniFrame does not allege that Microsoft contractually bars use of MiniFrame's products. Instead, Microsoft relies on its copyrights/patents to license <u>its own products</u> on its own terms and at its own prices. Microsoft has not strayed beyond the bounds of its copyrights. *See also* *Psystar*, 658 F.3d at 1159 ("[a] software licensing agreement may reasonably restrict use of the software as long as it does not prevent the development of competing products"); *id.* at 1157 (interpreting the phrase "prevent the development" of competing products as literally barring their use and development by agreement).

[7] Under 35 U.S.C. § 271(d)(4), "[n]o patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (4) refused to license or use any rights to the patent."

United States v. General Elec. Co., 272 U.S. 476, 489 (1926).

2. Enforcement of IP rights does not violate the antitrust laws

The upshot of the IP law discussed above is that a firm's enforcement of its legitimate IP rights does not violate the antitrust laws. For example, with some frequency, independent service organizations ("ISOs") challenge manufacturers' decisions not to grant 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 fail. *See, e.g.*, *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1189 (1st Cir. 1994) (affirming summary judgment for manufacturer).

In *Data General*, for instance, the court 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." *Id.* 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. The First Circuit held that 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.

In *In re Indep. Serv. Org. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000) ("*ISO*"), Xerox refused to sell parts to independent repairers. The repairers brought antitrust claims, arguing that Xerox had unlawfully leveraged its (presumably legitimate) dominance in the equipment and parts market into dominance in the service market. At least some of Xerox's parts were patented, and its manuals and software were copyrighted. The court refused to inquire into Xerox's subjective motivation for refusing to sell or license its patented works, stating "[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 Federal Circuit 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 must also fail as a matter of law. *See id.* at 1328-29.[8]

Similarly, in *Corsearch*, a firm challenged its rival's termination of the firm's right to resell certain copyrighted materials. The rival, T&T, had developed its own proprietary trademark search database, and initially had allowed Corsearch to access it for the purpose of reselling search information to corporations, law firms, and others purchasing trademark searches (in competition with T&T). But T&T then changed its mind, and refused to grant Corsearch access going forward. The court determined that, regardless of antitrust limitations, T&T's copyright and the statutory monopoly it conferred entitled T&T to terminate unilaterally Corsearch's license to use the database for resale purposes. *See Corsearch,* 792 F.Supp. at 328.

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[8] *See also Triad Sys. Corp. v. Southeastern Express Co.,* 64 F.3d 1330, 1337 (9th Cir. 1995) ("Triad invented, developed, and marketed its software to enable its customers and its own technicians to service Triad computers. Southeastern [an ISO] is getting a free ride when it uses that software to perform precisely the same service. Triad is entitled to licensing fees from Southeastern and other ISOs that make use of Triad's software in servicing Triad computers."), *cert. denied*, 516 U.S. 1145 (1996). 17 U.S.C. § 117(c) legislatively overruled *Triad* as to limited servicing of computer software, but *Triad*'s reasoning remains good law in other contexts. *See Psystar*, 658 F.3d at 1158-59.

3. An IP owner's enforcement rights are particularly robust when confronted with a product or technology that enables the sharing or copying of the owner's IP

An IP owner's rights are perhaps at their zenith when confronted with a technology, like MiniFrame's, that effectively allows the copying or sharing of the IP. *See Grokster*, 545 U.S. 913 (distributor of product with the objective of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties). Similarly, in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the court affirmed a grant of a preliminary injunction against Napster, a peer-to-peer file sharing system that allowed copying of copyrighted music. To the same effect is *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009), where movie studios and the DVD industry secured a preliminary injunction against RealNetworks, which had marketed computer software that allowed consumers both to play DVDs on their computers as well as to "save" DVDs to their computer systems or disks. *See also UMG Recordings, Inc.*, 92 F. Supp. 2d at 352 (defendant liable for copyright infringement where its technology allowed the re-playing of subscribers' converted versions of CDs that defendant's software copied from plaintiffs' copyrighted CDs).

MiniFrame's technology effectively shares or copies Microsoft's client OS between and among multiple users simultaneously, in violation of Microsoft's license agreements. This is akin to a product that lets one cable TV subscriber split the cable signal and share it with his non-subscriber neighbors. Microsoft is not required to tolerate such infringements of its IP rights.

4. MiniFrame does not allege that Microsoft redesigned its products with no legitimate justification

Plaintiff cites *Xerox Corp. v. Media Sci. Int'l, Inc.*, 511 F. Supp. 2d 372 (S.D.N.Y. 2007), in its pre-motion letter for the proposition that the motive or justification for Microsoft's conduct

creates a question of fact that cannot be resolved on a motion to dismiss. Plaintiff's Pre-Motion Letter at p. 2. That case is inapposite. In *Xerox*, the defendant brought an antitrust counterclaim in response to Xerox's patent suit. As the only producer (other than Xerox) of solid ink sticks for solid ink printers (which were manufactured only by Xerox), the defendant alleged that Xerox (which had a 90% share of the ink stick market) altered the design of its printers to prevent the use of the defendant's sticks, and patented the changes to preclude any competitive modification. The defendant alleged that the changes were not necessary to benefit consumers, but were intended to quash competition. In refusing to dismiss the antitrust counterclaim, the court held that product re-design, when it suppresses competition and is without other justification, can violate the antitrust laws. *See id.* at 388. It ruled further that evidence of product improvements or valid business reasons for redesign would defeat the claim, but these were factual questions. *See id.* at 389.

Re-design is not at issue in this case. Here, the issue is how many individuals can use one Microsoft client OS license simultaneously. Put another way, because there is a direct relationship between the number of licensed users and the price, at issue here is the price of a Microsoft license. Unlike Xerox, which was alleged to have had no legitimate reason for making unnecessary design changes, Microsoft has a manifestly valid reason for safeguarding its own price structure and restricting others from circumventing its IP licensing intentions. Indeed, MiniFrame alleges that Microsoft's new licensing terms enable it to charge prices higher than what MiniFrame contends it should. *See* Compl. ¶ 132. Setting prices is the core function of a competitive market. Courts do not make good price regulators, and typically decline to act in such a capacity. *See infra* Section E. Finally, *Xerox* is an outlier. *See, e.g.*, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 1000 (9th Cir. 2010) (product

redesign does not violate Section 2 if it confers any legitimate benefit, and courts cannot balance benefits against alleged harms because such balancing would be unadministrable; "[a]bsent some form of coercive conduct by the monopolist, the ultimate worth of a genuine product improvement can be adequately judged only by the market itself").

In sum, IP law gives Microsoft the unfettered right to license its IP on terms, and at prices, it finds acceptable. Microsoft cannot violate the antitrust laws by exercising its legitimate IP rights. This single point disposes of MiniFrame's antitrust claims (in particular, its Sherman Act claims under Counts I – IV), and obviates the need for any further analysis.

D. Microsoft Has No Antitrust Duty to Deal With MiniFrame

As noted *supra* p. 2, under a separate line of case law, the monopolist with no IP rights to protect and enforce can (in theory) have an antitrust duty to deal with a rival – but only in very narrow and specific circumstances. *See Trinko*, 540 U.S. at 411 (generally, "there is no duty to aid competitors"). MiniFrame suggests in its pre-motion letter that Microsoft has just such an antitrust duty to deal. Microsoft is aware of no case holding that a duty to deal trumps an IP owner's rights to license its IP to end users on the terms and at the prices it sees fit. However, even if this case law applies to exercises of IP rights, Microsoft has no such duty.

In rejecting a duty to deal with rivals, *Trinko* established the prerequisites for a Section 2 claim based on a monopolist's alleged failure to cooperate with a rival. First, the plaintiff's Section 2 claim in *Trinko* failed because the complaint did "not allege that [Defendant] voluntarily engaged in a course of dealing with its rivals." *Id.* at 409. Prior voluntary cooperation and its subsequent termination are, therefore, required. Second, unlike in *Aspen*

Skiing,[9] 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." *Id.* at 409. Thus, sacrificing short-term profit also is required. 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 ill suited." *Id.* at 408. Additionally, compelling firms to share the source of their advantage is in tension with the underlying purpose of antitrust law, "since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* at 408.

MiniFrame has not satisfied either of those requirements, nor can it. Nowhere does MiniFrame allege that Microsoft voluntarily engaged in a course of dealing with MiniFrame. MiniFrame does not allege that Microsoft granted a license to MiniFrame and then changed the terms of that license. Indeed, "Microsoft never officially approved the use of SoftXPand." Compl. ¶ 79. Rather, MiniFrame alleges that Microsoft altered the terms of its license for end users. Prior to that alteration, MiniFrame exploited the per-computer license provision to market its SoftXpand product. But licensing end users on a per-computer basis does not constitute a

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[9] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In *Aspen Skiing*, the owner of three ski mountains had sold a joint ski lift ticket with the owner of a fourth mountain. But the alleged monopolist withdrew that cooperation, and even refused to accept vouchers sold by the plaintiff for access to the defendant's mountain – vouchers which were sold at the defendant's retail price and would have fully compensated the defendant. The court upheld a jury verdict against the defendant for monopolization. The *Trinko* court held that *Aspen Skiing* is at or near the outer boundary of Section 2 liability. *See Trinko*, 540 U.S. at 409. *Trinko* clarified that an antitrust duty to deal can arise only when the two factors discussed above are present.

course of dealing with MiniFrame, and changing the licensing policy is not a withdrawal of previously granted assistance.

In *Data General,* for example, the court held that the plaintiff could not rebut the presumption of a valid business justification to refuse to license IP by characterizing the defendant's policies as a monopolist's exclusionary withdrawal of previously-granted assistance. 365 F.3d at 1187-88. Similarly, in *LiveUniverse, Inc. v. MySpace, Inc.*, 304 Fed. Appx. 554, 556 (9th Cir. 2008), the court affirmed a dismissal of a duty to deal claim premised on MySpace's redesign of its platform, which precluded users from linking to content on the plaintiff's "vidiLife.com" site. *Id.* According to the Ninth Circuit, a duty to deal claim requires an affirmative decision or agreement to cooperate between competitors – a "voluntary arrangement" between the monopolist and its rival. 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).

Nor can Microsoft's prior licensing fee structure constitute a course of dealing with MiniFrame giving rise to a duty to deal, even if the prior structure unintentionally enabled MiniFrame's business model. "[I]f a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.,* 555 U.S. 438, 450 (2009). Stated differently, if a defendant is not required to provide an input at all, it is "not required to offer . . . service at the wholesale prices the plaintiffs would have preferred." *Id.* at 451. Microsoft is not required by law to produce, market and license its server OS, and can decline to do so. It therefore necessarily has the lesser power to license and price that product as

it sees fit, and its prior end user pricing is not a "course of dealing" with a competitor.

MiniFrame likewise does not allege factual support for the second prong of the *Trinko* test (*i.e.*, that Microsoft is sacrificing short-term profits by implementing the SUR). In fact, it alleges the opposite. The Complaint states 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." Compl. ¶ 76. It is thus perfectly rational for Microsoft to prefer the former to the latter. *See also id.* ¶¶ 132-134 (outlining theory that in a "competitive" market, *i.e.*, one where Microsoft licensed as MiniFrame demands, Microsoft's licensing fees would be lower).

In its pre-motion letter, MiniFrame references an alleged business discussion involving JP Morgan Chase, arguing that it shows that Microsoft refused short-term profits in order to foreclose competition as part of a long-term anti-competitive scheme. Plaintiff's Pre-Motion Letter at p. 2. According to the Complaint, MiniFrame asked JP Morgan Chase whether it would be willing to buy an additional client OS license from Microsoft for each new touch screen that would run a "shared" copy of client OS. Compl. ¶ 156. JP Morgan Chase allegedly agreed to do so if Microsoft would approve the use of SoftXpand for the project. *Id.* Microsoft did not approve, and instead offered its own MPS product as an option for JP Morgan Chase. *See id.* ¶ 160. What MiniFrame fails to grasp, however, is that Microsoft's decision to refuse to allow JP Morgan Chase to run "shared" copies of client OS using SoftXpand, even if JP Morgan Chase were to purchase a client OS license for each touch screen, was rational because – as Plaintiff states in its Complaint – the MPS license fees are higher than the license fee for the client OS alone. *Id.* ¶¶ 132, 134 (client OS license fee is allegedly $120; MPS license fee is allegedly $817 plus a higher $139 fee per user). Microsoft did not turn down a sale at its retail price; instead, it

stood by its licensing structure, desiring a higher-revenue transaction by licensing MPS.

MetroNet is directly on point. In *MetroNet*, 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. *See MetroNet*, 383 F.3d 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," 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.* Qwest changed its pricing structure after it realized that the resale of Centrex was hurting its own profitability. "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 price discrimination structure established before resellers entered the market for service.[10] *See id.* at 1133. For this reason, MetroNet had no antitrust duty to deal claim.

In *MetroNet*, Qwest initially sold Centrex systems on a per system basis. *Id.* at 1127. Here, Microsoft allegedly 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.*

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[10] When a supplier price "discriminates," it charges end users 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).

Here, Microsoft discovered that its licensing structure inadvertently allowed companies such as MiniFrame to enable their customers to "share" Microsoft's IP. In *MetroNet*, Qwest closed the loophole by imposing a per location pricing structure. Here, Microsoft similarly tightened its licensing provisions by instituting the SUR. MetroNet had no antitrust claim, and neither does MiniFrame. Microsoft has not forsaken short-term profits by refusing sales at retail prices. Rather, it has acted to protect its products, its revenue, and its software licensing business model.

In sum, even if the duty to deal line of case law was applicable, and even if it could somehow trump legitimate IP rights that permit Microsoft to license its own IP on its own terms and at prices it deems appropriate (Microsoft contends that it cannot), MiniFrame cannot shoehorn its case into the narrow *Trinko* rubric. It does not, and cannot, allege a prior voluntary course of dealing, or a sacrifice of short-term profits through a refusal to sell or license at retail prices. *See generally Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.) ("If a monopolist does extend a helping hand, though not required to do so, and later withdraws it . . . does he incur antitrust liability? We think not."). For these reasons as well, Counts I – IV of the Complaint should be dismissed.

E. MiniFrame Has No Predatory Pricing Claim

Aside from Microsoft's licensing restrictions, MiniFrame alleges only one other type of exclusionary conduct. MiniFrame's Complaint challenges the pricing of Microsoft's MPS as "predatory." Predatory pricing schemes, as the Supreme Court has noted on several occasions, "are rarely tried, and even more rarely successful." *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)). That, in part, is because it is very difficult for purported price predators to recoup their losses later. But, even putting aside the recoupment requirement that plaintiffs must satisfy, under *Brooke Group*, price predation requires <u>below-cost</u> pricing – something not alleged anywhere in the Complaint.

The *Brooke Group* rule is predicated upon fundamental principles of antitrust policy and judicial administrability. The Supreme Court insisted upon a high hurdle for any predatory pricing claims, 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. Thus, *Brooke Group* requires proof of both below-cost pricing and a dangerous probability that the defendant will recoup its investment in below-cost prices after the predatory period is over. *See id.*

In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), a case presaging the *Brooke Group* formulation, the Supreme Court found no antitrust injury where a firm lost sales to a rival charging non-predatory prices pursuant to a vertical, maximum-price-fixing scheme. The vertical agreements allegedly resulted in below-market level prices. *See id.* at 333. The Court held that such a scheme "does not cause a competitor antitrust injury unless it results in predatory pricing." *Id.* at 339. *"[In] the context of pricing practices, only predatory pricing has the requisite anticompetitive effect* . . . Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Id.* at 339-40 (internal citations omitted) (emphasis supplied); *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) ("[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition") (internal citations omitted). An opposite rule would be "perverse." *See id.*

> A firm complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." This is not *antitrust* injury; indeed, "cutting prices in order to increase business is the very essence of competition." . . . . "To hold that the antitrust laws protect competitors

> from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share."

Atlantic Richfield, 495 U.S. at 338 (internal citations omitted) (emphasis in original).

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

In its pre-motion letter, however, MiniFrame attempts to resurrect its predation claim. Compl. ¶ 116 (MPS is allegedly licensed "with" some form of Microsoft's server OS). In its letter, MiniFrame argues that MPS was discounted to a price less than that of the server OS itself. *Cf. also* Transcript of Proceedings (Jan. 20, 2012) at 8:23-9:8 (server OS licensed with MPS is "free"); Compl. ¶¶ 130-36. But this allegation, even if true, is irrelevant, because it does not establish that MPS (or indeed any other product) was licensed below cost. At most, MiniFrame alleges that Microsoft has priced some of its server OS products at one (higher) price point, and discounted another product "containing" server OS technology to a lower price point.[11] But this is nothing more than lawful, pro-competitive price competition, price

[11] Although MiniFrame claims that MPS is somehow based upon server OS technology, it never actually alleges that MPS licensees have access to or can use the underlying server technology to run a server. Indeed, it alleges that MPS users "do not know they are running a version of Windows Server 2008 R2 . . . ." Compl. ¶ 136. Thus, MiniFrame seems to allege that MPS users do not, in fact, receive an actual server OS license. That, of course, means that MPS users are not receiving anything "free."

discrimination and discounting. MiniFrame affirmatively alleges that Microsoft charges significant fees for MPS licenses[12] – and it does not allege that those license fees result in below-cost pricing of any product. That is, for a five-user MPS license, MiniFrame does not (and cannot) allege that the price (purportedly $817 + $139 x 5, or $1,592) does not cover the cost of either MPS, or Microsoft's Windows Server OS, or both.

Because MiniFrame does not, and cannot, allege below-cost MPS pricing, MiniFrame cannot allege predatory pricing in violation of the Sherman Act in connection with Counts I – IV of the Complaint.

F. MiniFrame Has Failed to Allege Economically Plausible Markets, And Fails To Allege Microsoft's Market Share in the Purported Combined Server OS and PC Sharing Software Market

As explained below, MiniFrame alleges two smaller (in relative terms) separate server OS and PC sharing software markets that are deficient as a matter of law, because they do not take into account the elasticity of demand that MiniFrame itself alleges between these purported markets. Although MiniFrame also alleges a larger server OS + PC sharing software market (the "multi-user" software market), it does not allege Microsoft's share of that larger market (something it must do to make out a claim). It is for this reason that the deficiency in MiniFrame's purported server OS only and PC sharing only markets is significant. MiniFrame's server OS market monopolization claim (Count I), its PC sharing software monopolization claim (Count II), and its claims relating to the combined server OS + PC sharing software market (Counts III and IV) should be dismissed.

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[12] According to MiniFrame, the non-academic price for MPS (an application running on Windows Server 2008 R2) is $817, plus $139 per CAL per user (with a minimum of five CALs). Compl. ¶¶ 134, 136.

Monopolization under Sherman Act Section 2 requires (i) possession of monopoly power in a relevant market, (ii) willful acquisition or maintenance of that power, and (iii) causal antitrust injury. *See Atlantic Richfield*, 495 U.S. at 334; *Grinnell Corp.*, 384 U.S. at 570-71.[13] Attempted monopolization requires (i) specific intent to monopolize, (ii) predatory or anti-competitive conduct, and (iii) a dangerous probability of success. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *see also Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995) (antitrust injury must be demonstrated).

All Sherman Act Section 2 claims require a plaintiff to establish a relevant market. *See, e.g.*, *Spectrum Sports*, 506 U.S. at 456 (attempted monopolization claims). "Without a definition of [the] market, there is no way to measure [a defendant's] ability to lessen or destroy competition." *Walker Process*, 382 U.S. at 177. Thus, the definition of the relevant market is often the key to a Section 2 case. If the market definition fails as a matter of law, then the plaintiff cannot establish that the defendant has monopolized (or attempted to monopolize) a market. Moreover, if the relevant market is necessarily larger than the plaintiff's definition, the defendant may lack the requisite market share or power even to be considered a monopolist in the first place. If a defendant is not a monopolist, then it is not subject to the special rules that sometimes govern a monopolist's behavior. *See, e.g.*, discussion of *Trinko, supra*.

Twombly requires that relevant markets be economically plausible. "[W]ell-pled allegations must nudge the claim 'across the line from conceivable to plausible.'" *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1333 (11th Cir. 2010) (internal citations omitted).

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[13] Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Courts routinely dismiss antitrust claims for failure to allege a plausible or facially sustainable market. *See, e.g.*, *id.* at 1337 (visco-elastic mattresses did not constitute their own market separate from innerspring mattresses; both are products "on which people sleep"); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) ("PSKS alleged two alternative product markets, neither of which encompasses interchangeable substitute products or recognizes the cross-elasticity of demand for . . . goods."), *cert. denied*, ___ U.S. ___, 131 S. Ct. 1476 (2011).[14] The circuit courts have not hesitated to affirm grants of motions to dismiss on the basis of an insufficiently pled or totally unsupportable proposed market. *See, e.g.*, *Michigan Division-Monument Builders of N. Am. v. Michigan Cemetery Ass'n*, 524 F.3d 726, 733 (6th Cir. 2008) (citing cases); *see also City of N.Y. v. Group Health Inc.*, 2010 WL 2132246 (S.D.N.Y. May 11, 2010) (Sullivan, J.) at *3-4 (market definition implausible as matter of law), *aff'd*, 649 F.3d 151 (2d Cir. 2011).

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).[15] The basic

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[14] *See also Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591 (8th Cir. 2009) (product market could not be limited by how consumers pay for cardiology procedures), *cert. denied*, ___ U.S. ___, 130 S. Ct. 3506 (2010); *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1195-96 (N.D. Cal. 2008) (neither Macintosh computer OS, nor Macintosh OS-compatible computers, could be its own product market).

[15] The cross-elasticity of demand is an economic variable that measures the change in the quantity demanded by consumers of one product relative to the change in price of another. A

principle is that the relevant market definition must encompass the realities of competition. *See Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994). Where a plaintiff defines its proposed relevant market without reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted. *See, e.g.*, *Chapman v. New York State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008) (internal citations omitted), *cert. denied*, ___ U.S. ___, 130 S. Ct. 552 (2009); *see also Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001) (Sotomayor, J.) (plaintiff must allege sufficient facts to show that an alleged product market bears a "rational relation to the methodology courts prescribe to define a market for antitrust purposes – analysis of the interchangeability of use or the cross-elasticity of demand") (internal citations omitted).

Here, it is implausible that MiniFrame's "server OS market" is separate and distinct from its alleged PC sharing software market, given MiniFrame's numerous allegations of significant demand elasticity between these two purported markets. MiniFrame alleges that:

- "[S]hared PC systems <u>became a serious competitive threat</u> to the server operating system market as well as Microsoft's monopoly . . . in the server operating system market." Compl. ¶ 48 (emphasis supplied);

- "[S]hared PC systems based on Windows Client Operating Systems <u>also threaten</u> Microsoft's monopoly in the server operating systems market." *Id.* ¶ 300 (emphasis supplied);

- "'Multi-user software' is software that permits a multi-user computer system to be created. PC sharing software <u>is a type of multi-user software</u>. A server operating

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high cross-elasticity indicates that two products are close substitutes for each other and may be in the same market. *See Jacobs*, 626 F.3d at 1337 n.13.

system may be considered to be another type of multi-user software even though it provides services to connected PCs." *Id.* ¶ 25 (emphasis supplied); and

- "Before PC sharing software was developed in 2003 or 2004, there was no cost effective multi-user computer system alternative to a server operating system configuration." *Id.* ¶ 36 (emphasis supplied).

See also id. ¶ 44 (describing the similar functions of the two types of systems). On these facts – alleged by MiniFrame itself – there can be no doubt that "PC sharing software" and server OS software compete with each other. If consumers are willing to switch back and forth from server OS to PC sharing software, as the Complaint suggests, then the two products have a high cross-elasticity of demand and they cannot be in separate product markets. And so neither the separate, alleged server OS market, nor the separate, alleged PC sharing software market, is economically plausible or legally cognizable.

On similar facts, in *Psystar*, the court held that the antitrust counterclaimant had failed to plead a plausible relevant market consisting of the Macintosh OS when the counterclaim itself explained that Macintosh OS performs the same functions as other OSes. *See id.*, 586 F. Supp. 2d at 1199. Indeed, Psystar's allegations were "internally contradictory"; it alleged that Mac OS was a separate market, but it also alleged that Apple engaged in anticompetitive conduct in order to protect its valuable monopoly in the Mac OS market. *See id.* at 1200. But if Apple's Mac OS was threatened by other OSes, prompting it to take "anticompetitive" action, then the Mac OS could not be its own market. *See id.*

For the same reasons, MiniFrame's claim for monopolization of the server OS market (Count I) is legally deficient. If PC sharing software is a "threat" to Microsoft's server OS position, then it competes with the server OS and cannot be sealed away in a separate market. This infirmity extends to the alleged separate PC sharing software market as well. If there is substantial cross-elasticity of demand, then the PC sharing software market is also artificially and

implausibly limited. Count II, therefore, also should be dismissed.

Although MiniFrame alleges a larger, combined server OS / PC sharing software market (the purported multi-user software market), the defects noted above are significant because in the larger purported market, MiniFrame does not even allege Microsoft's market share (which must be smaller than any share of the purported server OS market alone). That omission precludes MiniFrame's Section 2 claims in connection with the purported larger market. *See International Distribution Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 791 (2d Cir. 1987) ("[w]e have consistently interpreted both monopoly and the attempt to monopolize as requiring some measure of market power"), *cert. denied*, 482 U.S. 915 (1987); *see also id.* at 791 (dangerous probability requires a "significant" market share). In sum, MiniFrame has alleged monopolization of two smaller and legally deficient markets, and has failed to allege Microsoft's market share in a purported larger market.

G. MiniFrame's Foreign Commerce Claims Are Beyond the Reach of the Sherman Act

MiniFrame's foreign commerce claims are outside the reach of the Sherman Act.[16] Because many of MiniFrame's claims relate to foreign conduct involving foreign parties, the

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[16] Many courts have held that the FTAIA imposes a subject matter jurisdiction bar. *See, e.g.*, *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (*en banc*). More recently, the Third Circuit has held that the FTAIA defines elements of a Sherman Act claim. *See Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), *petition for cert. filed*, Jan. 5, 2012. However, it does not matter whether this portion of Microsoft's Motion is treated under Rule 12(b)(1) or under Rule 12(b)(6); either way, MiniFrame has not pled and cannot plead around the FTAIA.

Court's ruling on this point would significantly reduce the scope of the case as well as the discovery burden on both parties if the Court does not dismiss the entire Complaint.

The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a

> . . . initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim.

F. Hoffman-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004) (emphasis in original). On remand from the Supreme Court's decision in *Empagran*, the D.C. Circuit held that the linkage between domestic injury and foreign injury must be a tight one. "But for" causation is not enough, *i.e.*, alleging that the foreign injury could not have occurred "but for" the domestic injury is insufficient. Instead, a plaintiff must show <u>proximate</u> causation, *i.e.*, in the case of a foreign plaintiff suing for a foreign injury, the plaintiff must show that the domestic effect of the anti-competitive conduct directly gave rise to the foreign injury. *See Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1092 (2006).

Here, MiniFrame is incorporated and located in Israel. Compl. ¶ 5. It alleges that it was engaged in commerce with entities in several foreign states. *See, e.g.*, *id.* ¶ 172 (Korea); ¶ 220 (France); ¶ 236 (Belgium); ¶ 241 (Portugal). Commerce between Israel and these other countries is foreign commerce, which is presumptively outside the FTAIA's exclusionary rule. *See* IB P. Areeda & H. Hovenkamp, ANTITRUST LAW (3d ed. 2006) ¶ 272 at p. 290 ("[p]urely foreign commerce involves transactions between a foreign buyer and a foreign seller").

To maintain its foreign commerce claims, MiniFrame must, therefore, bring its allegations within the *Empagran* rule, which it has not done and cannot do. For instance, in *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555 (D. Del. 2006), AMD, a

competitor of Intel, alleged that Intel had monopolized a microprocessor market by engaging in anti-competitive conduct including exclusive dealing with original equipment manufacturers ("OEMs"), unlawful price discrimination, and threatening OEMs with retaliation if they introduced any AMD-based computer platforms. *See id.* at 557. Although AMD was headquartered in the U.S., it sought recovery for lost sales of foreign-made products to customers in foreign countries. *See id.* at 559. The court concluded that the Sherman Act did not reach those claims. *See id.* Intel's foreign conduct – directed at foreign customers – did not have a direct, substantial, and foreseeable effect on United States commerce. *See id.* at 560. AMD's argument that its lost foreign sales resulted in lost profitability, which, in turn, resulted in lost revenues to shareholders and missed opportunities to invest and compete in the United States, was premised on "a multitude of speculative and changing factors affecting business and investment decisions, including market conditions, the cost of financing, supply and demand, the success or failure of research and development efforts, the availability of funds and world-wide economic and political conditions." *Id.* at 560-61. Although AMD alleged a unified, worldwide global market, its allegations of foreign conduct amounted to nothing more than a "ripple effect" on the U.S. domestic market, "and the FTAIA prevents the Sherman Act from reaching such 'ripple effects.'" *Id.* at 561. Because AMD had not alleged that foreign activity had a direct, substantial, and foreseeable effect on U.S. commerce, AMD could not demonstrate that any domestic effect gave rise to its Sherman Act claim, let alone proximately caused the foreign effects that it challenged. *See id.*[17]

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[17] *See also Information Res., Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000) (no jurisdiction where foreign pricing conduct by U.S. firm allegedly injured subsidiaries of American company abroad; alleged foreign injury did not have a direct U.S.

The same reasoning applies here. To the extent that Microsoft's foreign license terms, or its communications with foreign customers about those terms, affected MiniFrame's sales in foreign commerce, those actions did not cause a direct, substantial, and foreseeable effect on U.S. commerce that proximately caused MiniFrame's alleged foreign damages. Those foreign claims, therefore, are beyond the reach of the Sherman Act.[18]

Nor can MiniFrame establish that the FTAIA's limited and residual "import commerce" exception applies. The import commerce exception brings foreign anti-competitive conduct back within the Sherman Act's reach only if and to the extent the defendant's conduct actually "involves" U.S. import trade or commerce. *See Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 301-02 (3d Cir. 2002), *overruled on other grounds* by *Animal Science* 654 F.3d 462; *see also Animal Science*, 654 F.3d at 470 (import exception requires that defendant's conduct target imports); *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650, 660-61 (7th Cir. 2011), *vacated and rehearing en banc granted*, Dec. 2, 2011. Microsoft's alleged licensing activities overseas are not alleged to, and did not, target U.S. import commerce. They are, therefore, outside the

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effect), *appeal dismissed*, 294 F.3d 447 (2d Cir. 2002); *Papst Motoren GMbH & Co. KG v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F. Supp. 864 (S.D.N.Y. 1986) (dismissing monopolization counterclaims based on lost sales of computer monitors in Japan); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102 (S.D.N.Y. 1984) (rejecting German company's attempt to bring antitrust suit in the U.S. by claiming that the monopoly that caused its foreign injury also harmed consumers in the U.S.).

[18] Microsoft does not contend that, to the extent MiniFrame alleges its business within the United States itself was affected, its domestic commerce claims are outside the Sherman Act.

reach of the Sherman Act in connection with Counts I – IV of the Complaint.

H. MiniFrame Has Not Adequately Pled State Law Claims

For largely the same reasons that MiniFrame's federal antitrust claims fail, so do its state law claims. Microsoft is entitled to license its IP on terms of its choosing. That is especially true here because, to a great extent, MiniFrame merely alleges that customers had concerns about MiniFrame's product and reached out to Microsoft, which confirmed the client OS licensing limitations. *See, e.g.*, Compl. ¶ 85 ("many of MiniFrame's potential partners and customers contacted Microsoft seeking Microsoft's approval on the use of SoftXpand to create a shared PC system"); ¶ 167 (listing the various OEMs and stating "in each instance, when the OEM approached Microsoft for approval to continue working with MiniFrame"). No law prevents Microsoft from responding to inquiries and restating its own licensing terms and conditions.

Donnelly Act Claim (Count VII). MiniFrame's claim under the Donnelly Act fails because the Donnelly Act does not reach unilateral monopolization or attempted monopolization claims (such as are alleged here). *See Berman v. Riverbay Corp.*, 1990 WL 116765 at *2 (S.D.N.Y. March 29, 1990); *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 823 N.Y.S. 2d 79, 85 (2d Dep't. 2006).[19] MiniFrame has not alleged unlawful concerted

[19] *Harlem River Consumers Coop, Inc. v. Assoc. Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1283 (S.D.N.Y. 1976), merely held that some showing of concerted action is an essential element of a Donnelly Act claim, and found insufficient evidence of such concerted action on the part of 35 out of 38 defendants. *See id.* at 1283. The court found sufficient evidence to send to the jury a Donnelly Act claim against two individuals and a local union. There was an "alleged combination of business and union power which allegedly induced the plaintiff's suppliers not to deal with the Co-op." *Id.* at 1286. But, the court did so by perfunctorily comparing the Donnelly

action or a conspiracy in restraint of trade.

New York Unfair Competition Law (Count X). New York Unfair Competition Common Law prohibits 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). MiniFrame's Complaint alleges no such activity. In its pre-motion letter, MiniFrame attempts to bring its claim within the bad faith misappropriation framework by citing ¶ 108 of the Complaint, which states: "[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." (emphasis supplied). "Otherwise obtain[ing]" functionality and technology does not amount to bad faith misappropriation of technology. MiniFrame also cites *LinkCo, Inc. v. Fujitsu, Ltd.*, 230 F. Supp. 2d 492, 500-02 (S.D.N.Y. 2002), where the court declined to grant defendant Fujitsu's Judgment as a Matter of Law motion on a misappropriation of information case arising out of Fujitsu's alleged misuse of software architecture information. That case is inapposite because there was "sufficient proof for a reasonable jury to find that Fujitsu misappropriated the information in bad

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Act claim to a Sherman Act Section 1 (agreement in restraint of trade) claim, not a Section 2 claim. Although the Complaint may allege that Microsoft informed customers of its license terms, and that customers acquiesced and decided not to violate the licenses, those allegations do not amount to an agreement or meeting of the minds between and among Microsoft and OEMs to monopolize a software market – a market in which the OEMs do not compete. *Cf. Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 85 (2d Cir. 1981) (conspiracy to monopolize requires proof of all parties' specific intent to monopolize), *cert. denied*, 455 U.S. 943 (1982).

faith and used it for its own benefit." *Id.* at 502. Fujitsu received information from LinkCo's former employees that should not have been disclosed. *Id.* No such facts are pled here.

Tortious Interference Claims (Count XI). MiniFrame pleads facts that show nothing more than Microsoft's legitimate enforcement of its IP rights. *See, e.g.*, Compl. ¶ 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); ¶ 175 (Samsung allegedly informed MiniFrame that Microsoft's position was that SoftXpand use was against Microsoft [client OS] licensing policy); *see also* Transcript of Proceedings (Jan. 20, 2012) at 7:3-10 (the alleged tortious interference consisted of Microsoft changing its license terms and informing its customers of the same).

This conduct, by definition, does not rise to the level of "improper means" required for interference with prospective relations, and also is privileged, justified or both. As to the tort of interference with prospective economic relations, defendant must use 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). Microsoft was allegedly motivated at least in part by legitimate economic self-interest, and merely informed others of its license rights; its actions were 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). If and to the extent MiniFrame alleges interference with any actual contract, 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). MiniFrame does not allege term

contracts, and also does not allege Microsoft's actual knowledge of any contracts (a necessary element of the tort). Finally, these claims fail because MiniFrame had no right to circumvent Microsoft's licenses to begin with. Any purported interference was justified and privileged. *See Foster v. Churchill*, 87 N.Y.2d 744, 750 (N.Y. 1996).

Washington Law Claims (Counts VIII and IX). The RCW 19.86.040 (monopolization) claim fails for the same reasons as the federal claims. *See Rowan Northwestern Decorators, Inc. v. Washington State Convention and Trade Ctr.*, 898 P.2d 310, 314 (Wash. 1995).

The RCW 19.86.020 (unfair competition) claim fails because MiniFrame does not state facts sufficient to show that Microsoft deceived the public, or violated one of the specifically-enumerated Washington statutes the violation of which has been declared by the Legislature to constitute an unfair or deceptive act. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 785-86 (1986); *Smale v. Cellco P'ship*, 547 F. Supp. 2d 1181, 1188 (W.D. Wash. 2008). Although MiniFrame argues in its pre-motion letter that it has alleged deception of the public "with respect to the legality of the SUR," and therefore states a claim, that is mere bootstrapping. MiniFrame alleges no actual deceptive behavior (the licenses are what they are). Under MiniFrame's approach, any unlawful activity would constitute "deception" of the public about its "legality," and this exception would entirely swallow the rule.

Finally, although enactment of Washington's unfair competition statute arguably supersedes pre-existing Washington unfair competition common law, such common law only provided for a cause of action for misappropriation of property or for "passing off" of goods, *see Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 742 (1973), which MiniFrame does not allege.

V. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that the Court dismiss MiniFrame's Complaint in its entirety with prejudice.

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Respectfully submitted,

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