No. 23-15992

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

MICROSOFT CORP., and ACTIVISION BLIZZARD, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California No. 3:23-cv-2880; Hon. Jacqueline Scott Corley

BRIEF OF FORMER ANTITRUST ENFORCERS AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016)	18
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FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008)	18
Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1st Cir. 1988)	8
Hospital Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986)	8
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Mississippi River Corp. v. FTC, 454 F.2d 1083 (8th Cir. 1972)	5



Republic Tobacco Co. v. North Atl. Trading Co., 381 F.3d 717 (7th Cir. 2004)	13
U.S. Steel Corp. v. FTC, 426 F.2d 592 (6th Cir. 1970)	5, 6
United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)	6
United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017)	14, 16
United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018)	7
United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019)	8, 21, 22
United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990)	14
United States v. Kennecott Copper Corp., 231 F. Supp. 95 (S.D.N.Y. 1964)	5
United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)	13
STATUTES	
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Clayton Act (Antitrust Act), Pub. L. No. 63-212, § 7, 38 Stat. 730 (1914)	3, 4
15 U.S.C. § 18	14
15 II S C & 18 (1950)	1 5



OTHER AUTHORITIES

10 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (4th ed.)	, 11
Ward S. Bowman, Jr.:	
The Prerequisites and Effects of Resale Price Maintenance, 22 U. Chi. L. Rev. 825 (1955)	7
Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957)	7
Complaint, <i>United States v. Visa Inc.</i> , No. 20-cv-7810 (N.D. Cal. Nov. 5, 2020), ECF No. 1	.20
Aaron Director & Edward H. Levi, <i>Law and the Future:</i> Trade Regulation, 51 N.W. U. L. Rev. 281	7
Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 7, https://perma.cc/HF79-ECLN	.10
D. Bruce Hoffman, Acting Dir., Bureau of Competition, Fed. Trade Comm'n, Vertical Merger Enforcement at the FTC (Jan. 10, 2018), https://perma.cc/6AXA-QJDY	.12
Herbert Hovenkamp, Competitive Harm from Vertical Mergers, 59 Rev. of Indus. Org. 139 (2021)	.13
Jon Sallet, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, <i>The Interesting Case of the Vertical Merger</i> (Nov. 17, 2016), https://perma.cc/DL7D-4SLJ	.12
Lester G. Telser, Why Should Manufacturers Want Fair Trade? 3 J.L. & Econ. 86 (1960)	7



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