

AUTHORITYMERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
Fall 2025

Tuesdays and Thursdays, 3:30 pm – 5:30 pm
Dale Collins

wdc30@georgetown.edu
www.appliedantitrust.com

READING GUIDANCE

Class 25 (November 20): Microsoft/Activision (Unit 13)

In this class, we will examine the FTC’s challenge to Microsoft Corporation’s proposed \$69 billion acquisition of Activision Blizzard, Inc., the largest transaction ever in the video-game industry.¹

Microsoft plays multiple roles relevant to the competitive analysis. As a console manufacturer, Microsoft produces the Xbox hardware and operates the underlying software infrastructure that third-party publishers must use to reach Xbox users. As a storefront operator, it runs a digital marketplace where users purchase games and in-game content, taking a standard revenue share on those transactions. As a subscription service provider, Microsoft offers Xbox Game Pass, which gives subscribers access to a rotating library of games for a monthly fee, providing an alternative business model to individual game purchases. As a cloud gaming provider, Microsoft’s Xbox Cloud Gaming enables users to stream and play games remotely across devices without requiring dedicated console hardware. Microsoft also publishes video games through Xbox Game Studios, which comprises 23 game development studios, including nine studios acquired as part of Microsoft’s 2021 acquisition of ZeniMax Media Inc.

Activision Blizzard is one of the largest third-party game publishers and content creators in the industry, with a portfolio that spans console, PC, and mobile platforms. Its most commercially important asset is the Call of Duty franchise, a first-person shooter game, which has historically been among the highest-selling annual console releases and has a substantial and persistent online user base. Call of Duty generates significant recurring revenue from game sales, downloadable content, and in-game microtransactions. Console purchasing decisions are often influenced by access to popular, annually released franchises. Both Microsoft and Sony have long regarded Call of Duty as a title that can significantly impact platform choice and user retention. Although Activision has released Call of Duty games on both Xbox and PlayStation since 2003, Sony has secured agreements that grant PlayStation users preferential benefits, including exclusive or timed-exclusive content and marketing rights. At the time, however, Call of Duty was not available on the Nintendo Switch or on any cloud gaming services or multigame subscription libraries upon release. In addition to Call of Duty, Activision’s catalog includes the Diablo and Overwatch franchises, World of Warcraft, and mobile properties such as Candy Crush, giving the publisher reach across segments that differ in business models, user demographics, and platform dependencies.

¹ FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023), *aff’d*, 136 F.4th 954 (9th Cir. 2025). A reasonably complete set of the most important filings in the litigation may be found [here](http://www.appliedantitrust.com) on AppliedAntitrust.com.

The FTC reviewed the proposed acquisition under the HSR Act. In the course of the investigation, the FTC concluded that the acquisition was likely to be anticompetitive in three respects:

- First, the acquisition would give Microsoft the ability and incentive to withhold or degrade Activision content—particularly Call of Duty—from rival high-performance console platforms, thereby softening competition between Xbox and PlayStation.
- Second, the acquisition would enable Microsoft to steer Activision titles toward its multigame subscription service, Xbox Game Pass, by either limiting access for rival subscription providers or by offering more favorable or timely versions of Activision content through its own service.
- Third, Microsoft’s ownership of Activision could allow it to foreclose competition in emerging cloud gaming markets by denying competing cloud gaming services access to Activision titles or by making such access less attractive due to price, quality, or timing differences.

Across these theories, the FTC argued that the loss of Activision as an independent publisher would reduce competition, raise entry barriers, and entrench Microsoft’s existing position across multiple connected layers of the video game ecosystem.

During the investigation, Microsoft sought to resolve the FTC’s concerns through a consent agreement. Microsoft offered a proposed consent decree that would have formalized its public commitments to make Call of Duty and certain other major Activision titles available on rival platforms for a defined period, reportedly at least ten years, and to do so on terms intended to ensure functional parity across platforms. The FTC rejected a consent agreement, reflecting its concern about the effectiveness and enforceability of behavioral remedies, especially in dynamic technology markets where contractual commitments may become difficult to monitor or may not anticipate future competitive developments.

After the consent proposal was declined, Microsoft independently pursued a strategy to implement similar commitments through private agreements with industry participants. Beginning in early 2023, Microsoft announced a series of ten-year contracts with Nintendo and several cloud-gaming providers under which Call of Duty and other Activision content would be made available on a non-exclusive basis and with feature parity. Microsoft also publicly reaffirmed its offer to enter into a similar long-term agreement with Sony for the PlayStation, but Sony declined to sign an agreement and continued to lobby the Commission to challenge the transaction. In the subsequent litigation, Microsoft pointed to these agreements and the offer to Sony as evidence that it lacked an incentive to foreclose rivals and instead sought broad distribution of Activision content across platforms and business models.

After concluding that these measures did not adequately address its concerns, the Commission voted to issue an administrative complaint challenging the acquisition. On December 8, 2022, the FTC issued an administrative complaint under Section 7 of the Clayton Act and Section 5 of the FTC Act, alleging that Microsoft’s acquisition of Activision was likely to substantially lessen competition in separate relevant markets for high-performance consoles, multigame subscription services, and emerging cloud gaming. The administrative complaint tracked the three foreclosure theories described above and alleged that the loss of Activision as an independent publisher

would reduce Microsoft’s rivals’ access to critical content, raise their costs, and entrench Microsoft’s position across multiple segments of the video game ecosystem.

The FTC did not initially seek preliminary injunctive relief in federal court under Section 13(b). The Commission has not publicly explained this sequencing choice. As a practical matter, however, Microsoft could not close the transaction while it remained under review by other competition authorities, including the European Commission and the U.K. Competition and Markets Authority, both of which continued to investigate the deal through 2022 and into 2023.² So long as foreign merger control rules independently prevented closing, a Section 13(b) preliminary injunction action in federal court would not have been ripe in the usual sense, because the parties could not consummate the transaction even in the absence of an injunction. As a result, there was no practical reason for the FTC to invoke Section 13(b) at that stage, and the agency proceeded initially through the administrative complaint process.

As the foreign investigation began to conclude, and any suspense periods drew to a close, the timing calculus changed. On June 12, 2023, the FTC filed a complaint in the Northern District of California under Section 13(b) of the FTC Act tracking the same three foreclosure theories set out in the administrative complaint and asking the district court to enjoin consummation of the merger until the Commission could complete its adjudication on the merits.

On July 10, 2023, after a five-day hearing, the district court denied the FTC’s request for a preliminary injunction.³ Judge Jacqueline Scott Corley held that the Commission had not shown it was likely to succeed on the merits of any of its theories. The court articulated the Section 13(b) standard as a two-step inquiry: (1) whether the FTC was likely to prevail in its underlying Section 7 case before the Commission, and (2) whether the equities favored relief. On the liability side, the court framed the case as turning on whether Microsoft would have both the ability and the incentive to foreclose rivals in any relevant market, and whether such foreclosure would probably lead to a substantial lessening of competition. The FTC urged a more lenient, “increased ability or incentive” disjunctive formulation, relying in part on the Commission’s Illumina/GRAIL decision. The court rejected that approach and insisted that, absent a showing of both ability *and* incentive to foreclose, there is no reasonable probability of anticompetitive foreclosure and thus no likely violation of Section 7.⁴ Judge Corley also rejected the FTC’s view that it needed only to show the combined firm would have a greater ability and incentive to

² Although the U.K. merger regime does not impose a mandatory statutory stand-still or suspension period like the U.S. HSR waiting period or the EU’s Article 7 standstill requirement, the Competition and Markets Authority (CMA) can impose interim measures—typically by issuing an Interim Enforcement Order (IEO)—to prevent closing or further integration while its investigation proceeds. In the *Microsoft Corporation/Activision Blizzard, Inc.* review, the CMA imposed an IEO (and later a merger inquiry order and final prohibition/remedy decision) that prevented Microsoft from acquiring control of Activision or integrating its business without CMA consent until the investigation, prohibition, and subsequent remedy process were complete.

³ The evidentiary preliminary injunction hearing began on June 22, 2023, twelve days after the complaint was filed. This accelerated schedule was possible because discovery in the administrative proceeding had been completed. Fact discovery had closed on April 7, 2023, and expert discovery closed thereafter. Also, an expedited schedule was necessary if the court was to render its decision before the merger agreement’s termination date of July 18, 2023. *See Microsoft Corp.*, 681 F. Supp. 3d at 1076.

⁴ “Illumina, however, provides no authority for this [disjunctive] proposition, nor could it. Under Section 7, the government must show a ‘reasonable probability of anticompetitive effect.’ If there is no incentive to foreclose, then there is no probability of foreclosure and the alleged concomitant anticompetitive effect. Likewise, if there is no ability, then a party’s incentive to foreclose is irrelevant. Indeed, the FTC’s expert, Dr. Lee, analyzed the anticompetitive effects of the merger based on ability and incentive.” *Id.* at 1190.

foreclose Call of Duty from its rivals than an independent Activision. Noting that Section 7 requires a reasonable probability of a substantial lessening of competition, Judge Corley observed “[t]hat the combined firm has more of an incentive than an independent Activision says nothing about whether the combination will ‘substantially’ lessen competition.”⁵ Judge Corley concluded: “Thus, to establish a likelihood of success on its ability and incentive foreclosure theory, the FTC must show the combined firm (1) has the ability to withhold Call of Duty, (2) has the incentive to withhold Call of Duty from its rivals, and (3) competition would probably be substantially lessened as a result of the withholding.”⁶

On the console theory, the court accepted the FTC’s “high-performance console market,” consisting only of Microsoft’s Xbox and Sony’s PlayStation Generation 9.⁷ The court also recognized that Call of Duty is an important input in this market, but concluded that the FTC had not shown Microsoft was likely to pull Call of Duty from PlayStation or materially degrade it. The opinion emphasizes the economic costs to Microsoft of losing existing Call of Duty revenues on PlayStation, the importance of cross-play and a large multiplayer base to the franchise’s value, and the evidence that Microsoft had kept other major titles (such as Minecraft) available on rival platforms after acquiring their developers. The court also gave considerable weight to Microsoft’s public and contractual commitments to keep Call of Duty on PlayStation on parity terms for a fixed period, treating those commitments as part of the “likely future world” rather than as speculative future remedies. On that record, Judge Corley held that the FTC had not shown a probable foreclosure strategy in the console market.

The court was similarly unpersuaded by the subscription and cloud gaming theories. It expressed skepticism about the FTC’s proposed markets for multigame subscription services and cloud streaming services, characterizing these segments as nascent and still evolving, and questioned whether the evidence established that they were distinct antitrust markets in which foreclosure of Activision content would likely have substantial competitive effects. Even assuming such markets, the court found that the FTC had not demonstrated that Microsoft would probably deny or materially disadvantage access to Activision titles in a way that would harm competition, particularly in light of Microsoft’s agreements with various cloud gaming providers and its stated strategy of distributing Activision content broadly to increase usage of its services.

⁵ *Id.*

⁶ *Id.* The FTC also argued that it could establish its prima facie case of anticompetitive harm through the Brown Shoe factors, such as the share of the market foreclosed, the nature and purpose of the transaction, barriers to entry, whether the merger will eliminate potential competition by one of the merging parties, and the degree of market power that would be possessed by the merged enterprise as shown by the number and strength of competing suppliers and purchasers. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 328 (1962). Judge Corley gave short shift to this argument. While she did not reject the *Brown Shoe* factors as a circumstantial means of proving anticompetitive foreclosure or raising costs to rivals, she appears to hold that the recitation of the factors is not enough and that the FTC also would have to show that these factors were probative in the circumstances of the case to show that the acquisition would give Microsoft the ability and incentive to foreclose its rivals. *Id.* at 1099-1100.

⁷ Significantly, and as far as I know uniquely, the court appeared at one point in the opinion to believe that in a Section 13(b) proceeding, the only question it could address was whether the FTC made out its prima facie case. “[T]he Court does not resolve conflicts in the evidence” and “the FTC need only make a ‘tenable showing that the market’ is Gen 9 consoles.” *Id.* at 1987 (citing *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984)). However, Judge Corley also observed that, if she was the “final decisionmaker on the merits,” she likely would have found Nintendo Switch to be part of the relevant market. *Id.* Later in the opinion, however, she recited, and appeared to use, the three-step burden-shifting framework of *Baker Hughes*. *Id.* at 1089.

These conclusions about the console, subscription, and cloud gaming theories are closely tied to how the FTC presented its economic case, where the FTC's prima facie showing of anticompetitive harm focused only on raising rivals' costs. Unlike Carl Shapiro's approach in AT&T/Time Warner, the FTC's economist modeled Microsoft's incentives to withhold or degrade Activision content and the resulting competitive harm, but did not embed a quantitative EDM analysis or other efficiencies within that model. In *Baker Hughes*' terms, the Commission's approach recognized that Step 1 requires only a showing that the merger would likely create the ability and incentive to foreclose rivals and thereby cause significant gross anticompetitive harm. Any claimed EDM or other offsets would be raised, if at all, by the merging parties at Step 2, with the court weighing the net effect at Step 3.⁸

Despite this change in litigation strategy, Judge Corley still rejected the FTC's economic model as showing prima facie gross anticompetitive harm. The court concluded that the FTC's RRC model failed to establish a prima facie case for foreclosure because it did not incorporate important features of the commercial environment that would influence Microsoft's pricing calculus in relation to downstream rivals. These included Microsoft's public and contractual commitments to broad distribution, the strategic importance of maintaining a large cross-platform Call of Duty player base, the reputational and commercial risks of degrading the PlayStation version, and Microsoft's prior experience in keeping acquired titles, such as Minecraft, on rival platforms. Without accounting for these constraints, the model's predictions rested on assumptions that the court viewed as insufficiently grounded in real-world behavior. On that basis alone, the court held that the FTC had not shown through its economic model that customers of Sony, competing subscription services, or competing cloud gaming platforms were likely to face higher prices, reduced access, or inferior quality postmerger.

The court also considered the FTC's non-expert evidence of a prima facie RRC effect, including testimony and declarations from Sony and other industry participants expressing concern that Microsoft would have both the ability and the incentive to disadvantage rival platforms. Judge Corley treated these statements with caution. She noted that much of the testimony was predictive and self-interested, lacked strong contemporaneous documentary support, or was consistent with competition on the merits rather than with a credible plan to foreclose. Internal Sony documents that the FTC cited as evidence of likely degradation or partial foreclosure were read more narrowly by the court, which found them at least as consistent with routine commercial bargaining over content and marketing terms. Taken together, this non-expert evidence did not persuade the court that, even apart from the flaws in the FTC's economic model, customers of Sony, competing subscription services, or competing cloud gaming platforms were likely to experience higher prices, reduced access, or inferior quality as a result of the merger. Because the Commission failed to demonstrate likely competitive harm to rivals' customers on the record as a whole, it did not carry its Step 1 burden, and the court did not reach a separate balancing of efficiencies or potential EDM benefits.

⁸ It is important to keep in mind that in a RRC-EDM analysis, while EDM will lower costs from the integrated firm's customers, RRC still will increase the costs of customers of the integrated firm's rivals. So the prima facie case of anticompetitive harm still requires the agency in Step 1 of *Baker Hughes* to adduce sufficient evidence to allow the trier of fact to conclude that the customers of rivals will see anticompetitive price increases. If the merging parties satisfy their burden in Step 2 on an EDM offset, then in Step 3 the court would compare the increased costs borne by the rivals' customers against the decreased costs borne by the integrated firm's customers. Unlike many defenses, EDM does not offset the harms to the rivals' customers.

In reaching these conclusions, the court credited a substantial body of evidence presented by the merging parties, which, in its view, pointed away from a profitable foreclosure strategy. It emphasized Microsoft’s public and contractual commitments, including early assurances to Sony that Call of Duty would remain available on PlayStation on parity terms, a signed ten-year commitment to continue supplying Call of Duty on Valve’s Steam platform, and a ten-year agreement to bring Call of Duty to Nintendo’s Switch, all of which the court viewed as inconsistent with an intent to withdraw or degrade the franchise on rival platforms. The court also relied on internal deal valuation materials showing that Microsoft’s projected returns from the acquisition assumed continued Call of Duty sales on PlayStation and other non-Microsoft platforms, and highlighted evidence that access to Activision’s mobile content was a central rationale for the transaction, which made a strategy of sacrificing broad distribution in order to favor a shrinking console business seem implausible. Judge Corley further noted that extensive discovery had not uncovered internal documents contradicting Microsoft’s stated intent to keep Call of Duty multiplatform; that cross-platform play and large, multiplatform communities were important drivers of the franchise’s financial success; that both Microsoft and Activision witnesses testified that withdrawing or degrading Call of Duty on PlayStation would cause serious reputational and commercial harm; and that Microsoft’s handling of the prior Mojang/Minecraft acquisition, where it kept and expanded a major cross-platform title on rival systems, provided a concrete example of how it had behaved when given the ability to make a popular game exclusive. Taken together, this evidence reinforced the court’s conclusion that Microsoft was unlikely to adopt a foreclosure strategy and would instead have strong incentives to maintain and expand Call of Duty’s availability across platforms.

After the court denied the preliminary injunction, the FTC filed a notice of appeal and moved under Rule 62(d) for an injunction pending appeal, which Judge Corley summarily denied. The FTC then sought an emergency injunction pending appeal from the Ninth Circuit, which the court of appeals likewise summarily denied. With no federal court injunction in place, Microsoft closed the acquisition of Activision Blizzard in October 2023 after obtaining the remaining foreign merger clearance decisions.⁹

On appeal, the Ninth Circuit affirmed. Reading Section 13(b) in light of its text and history, the panel emphasized that the “public interest” language does not authorize a fundamentally more lenient preliminary injunction standard than in ordinary equity; the FTC must still show a likelihood of success on the merits, not merely a non-frivolous theory or “possibility” of competitive harm. The court held that Judge Corley had applied that standard correctly and that her weighing of the evidence was entitled to deference. Turning to the merits, the panel agreed

⁹ The European Commission cleared the acquisition in May 2023 subject to behavioral commitments intended to ensure continued access to Activision titles on rival cloud streaming services. See Press Release, European Comm’n, [Commission Clears Acquisition of Activision Blizzard by Microsoft, Subject to Conditions](#) (May 15, 2023). The U.K. Competition and Markets Authority initially prohibited the original transaction but later cleared a revised structure in which Microsoft agreed to divest cloud streaming rights to Ubisoft outside the European Economic Area. See Competition & Mkts. Auth. (U.K.), [New Microsoft/Activision Deal Addresses Previous CMA Concerns in Cloud Gaming](#) (Sept. 22, 2023); Competition & Mkts. Auth. (U.K.), [Microsoft / Activision Blizzard \(Ex-Cloud Streaming Rights\) Merger Inquiry: Final Decision](#) (Oct. 13, 2023). By the time the CMA approved the modified deal, the transaction had already received merger clearance—most without conditions—from a wide range of other jurisdictions, including but not limited to Brazil, China, Japan, South Korea, South Africa, Saudi Arabia, Chile, and Ukraine. See Kevin Hitt, [FTC Files for TRO, Preliminary Injunction Against Microsoft–Activision Blizzard](#), Esports Advocate (June 12, 2023).

that, in the high-performance console market, the FTC had not shown that Microsoft was likely to make Call of Duty exclusive to Xbox or to supply a degraded version to PlayStation, given the economic importance of Call of Duty’s existing PlayStation user base, the evidence of Microsoft’s treatment of other acquired titles, and Microsoft’s contractual commitments to keep Call of Duty on rival consoles. In the multigame subscription market, the court stressed that Activision had historically refused to place its games on subscription services at all, so the merger’s effect of bringing that content onto Game Pass—even if done on exclusive terms—did not plausibly lessen competition relative to the but-for world. Finally, in the cloud streaming market, the panel held that the FTC had failed to show that Activision content would be available to cloud rivals absent the merger and that, in any event, the post-complaint restructuring of the deal and the Ubisoft cloud rights divestiture undermined the claim of likely future foreclosure. On this record, the Ninth Circuit concluded that the FTC had not raised sufficiently serious and substantial questions about a reasonable probability of anticompetitive effects in any market and therefore affirmed the denial of preliminary relief.

A Note on Professor Robin S. Lee’s Complete Foreclosure Model¹⁰

The FTC’s economic expert, Dr. Robin S. Lee, testified that Microsoft would have a profitable incentive postmerger to completely foreclose Call of Duty from PlayStation. His analysis rested on the incremental profitability approach: it would be profitable for Microsoft to withdraw Call of Duty from PlayStation if the incremental profit gains the merged firm would earn from PlayStation users who switch to Xbox to continue playing Call of Duty would exceed the profit Activision and Microsoft would lose by no longer selling Call of Duty on the PlayStation platform. Rather than modeling incremental price increases or degraded terms in a raising rivals’ costs framework, Lee framed a complete foreclosure decision as a static breakeven incentive calculation. Foreclosure is profitable if the actual switching rate exceeds the critical switching rate.¹¹

The court does not give us much detail on Lee’s model, but we can reconstruct the basic idea. Lee constructs a breakeven model to find the critical share of PlayStation Call of Duty users—those for whom the loss of Call of Duty would be salient enough to influence their platform choice—who would need to switch to Xbox for complete foreclosure of PlayStation to be profitable for Microsoft:

Incremental profit gain from switching users = Incremental profit loss from foreclosing PlayStation

$$s_{Critical} n_{PS} (\$m_X^{HW} + \$m_X^{COD}) = n_{PS} \$m_{PS}^{COD} \quad (1)$$

¹⁰ Robin S. Lee is a Professor of Economics at Harvard University, where he received his Ph.D. in Business Economics in 2008. His academic work focuses on industrial organization, applied microeconomic theory, and health economics, with an emphasis on vertical integration, platform and media markets, contracts and bargaining between firms, and the design of networks and matching between intermediaries and consumers. He is also a partner at the economics consulting firm Bates White LLC. In addition to testifying in Microsoft/Activision, he testified as an expert witness for the DOJ in *United States v. Google LLC* (ad tech), which was tried in the Eastern District of Virginia in 2024 and decided in 2025. *See United States v. Google LLC*, 778 F. Supp. 3d 797 (E.D. Va. 2025). You can find a redacted version of his written direct testimony in Microsoft/Activision [here](#). Dr. Dennis Carlton’s direct rebuttal testimony can be found [here](#).

¹¹ In a complete foreclosure model, all customers of the foreclosed rival are marginal customers. So the switching rate is the diversion rate.

where $s_{Critical}$ is the critical share of PlayStation COD users who would have to switch to Xbox for the complete foreclosure of discounted PlayStation to be profitable

n_{PS} is the number of PlayStation COD users for whom the loss of Call of Duty could influence their platform choice

$\$m_X^{HW}$ is Microsoft's upstream premerger dollar gross margin on the sale of an Xbox (calculated as the present discounted lifetime value (LTV) to Microsoft, including all expected hardware and platform revenue—disclosed in the opinion as 40 percent)

$\$m_X^{COD}$ is Activision's premerger downstream dollar gross margin on the sale of Call of Duty to an Xbox user (again, on an LTV basis—redacted in the public documents)

$\$m_{PS}^{COD}$ is Activision's premerger downstream dollar gross margin on the sale of Call of Duty to an PlayStation (again, on an LTV basis—redacted in the public documents)¹²

This model assumes that the LTV margins postmerger are the same as the premerger margins (i.e., there are no postmerger price changes or EDM).

Simplifying the breakeven equation yields:

$$s_{Critical} = \frac{\$m_{PS}^{COD}}{\$m_X^{HW} + \$m_X^{COD}}. \quad (2)$$

In applying this model, Dr. Lee used a real-world “conversion rate” of approximately 20 percent, meaning that roughly one in five dedicated PlayStation Call of Duty users would respond to the complete foreclosure of their platform by purchasing an Xbox. The 20 percent actual rate was above his critical switching rate (which was not publicly disclosed in the opinion), so he concluded that a complete foreclosure strategy would be profitable for Microsoft. Dr. Lee supported his 20 percent switching rate with two sources: (1) an internal 2019 Microsoft strategy memorandum that discussed how the loss or gain of a “must have” title could shift global console shares; and (2) a separate econometric “share model” he estimated that related Xbox and PlayStation monthly console shares to the availability and treatment of key titles, including Call of Duty. Taken together, Dr. Lee treated these materials as showing that changes in Call of Duty's availability can produce sizable shifts in console sales and supported his use of a 20 percent actual switching rate.

Judge Corley found this implementation unpersuasive for three reasons. First, Judge Corley emphasized that Dr. Lee's profitability conclusion was highly sensitive to his 20 percent “conversion rate.” Under Lee's own parameter estimates in his breakeven model, a modest reduction in the actual conversion rate from 20 percent to roughly 17.5 percent would make complete foreclosure unprofitable, as the lost PlayStation Call of Duty revenues would then outweigh the gains from additional Xbox users. In the court's view, this sensitivity meant that an accurate estimation of the actual switching rate was essential to his conclusion.

Second, Judge Corley found that Dr. Lee's reliance on the 2019 internal Microsoft strategy memo was misplaced. The memo stated that gaining or losing a “must have” title could shift

¹² Activision's LTV margin per user may differ by platform due to negotiated differences in revenue shares, licensing terms, marketing arrangements, and platform fees across Xbox and PlayStation.

global console shares by roughly 1–3 percentage points, and Dr. Lee treated that range as broadly consistent with the foreclosure analysis that relies on a 20 percent conversion rate among Call of Duty-dependent PlayStation users. The court emphasized, however, that the memo’s 1-3 percent figure was not tied to any documented methodology; Dr. Lee did not know what data underlay the estimate, what period or set of consoles it covered, or whether it described a new first-party exclusive or the treatment of a long-standing multiplatform title like Call of Duty. Even taken at face value, the memo implied a much smaller market-wide effect than his model required: Dr. Lee’s 20 percent conversion rate of affected users translated into a 5.5 percent switch rate for all console users, and he acknowledged that a 2 percent share shift would not be enough to make Call of Duty exclusivity profitable under his own breakeven analysis. On that record, the court concluded that the 2019 memo could not provide credible support for the 20 percent switching rate.

Third, Judge Corley found Dr. Lee’s separate share model deficient as support for his 20 percent conversion rate. In parameterizing his foreclosure incentive model, Dr. Lee relied on lifetime-value estimates based on worldwide monetization and platform economics, reflecting that both Call of Duty usage and the foreclosure decision operate in a global Gen 9 console market. The share model he used to justify the 20 percent actual switching rate, however, was estimated only on eighth-generation U.S. console data and assumed that those historical relationships carried over unchanged to the current worldwide market. The model predicted that making Call of Duty exclusive would increase Xbox’s share of new console sales by about 8.6 percentage points, and Dr. Lee argued that this predicted 8.6 percent shift showed that a large platform response to Call of Duty exclusivity was realistic and therefore that a 20 percent conversion rate among Call of Duty-motivated PlayStation users was plausible. The court disagreed. It found that the share model assigned no measurable role to non-exclusive games in console choice, treated each lost PlayStation user as if they would become an Xbox user rather than allowing for alternatives such as PC, mobile, or cloud play, and failed to justify extrapolating U.S. Gen 8 data to a global Gen 9 context. When Dr. Carlton relaxed these assumptions, the implied share shift fell to only a fraction of the 8.6 percent figure, so the model no longer provided evidence that Call of Duty exclusivity would generate the kind of large marketwide response that could be reconciled with a 20 percent switching rate among affected users. Taken together, these flaws left the share model unable to substantiate Dr. Lee’s global switching assumption.

The treatment of Dr. Lee’s model illustrates that, in vertical and platform-content cases, courts are willing to scrutinize both the internal logic and the empirical grounding of an incentive-to-foreclose model as part of the government’s prima facie burden. They will reject that showing at Step 1 of *Baker Hughes* if key behavioral assumptions—such as a 20 percent switching rate and the implied size of a “COD-dependent” user base—are not supported by credible data or are inconsistent with real-world commercial constraints.

On this record, the court concluded that the FTC had not shown that customers of Sony or competing subscription or cloud gaming services were likely to face higher prices, reduced access, or inferior quality postmerger. Accordingly, the FTC did not meet its Step 1 burden under *Baker Hughes* to demonstrate likely anticompetitive effects based on Microsoft’s postmerger incentives to engage in complete foreclosure.

* * *

As the end of the semester approaches and you are undoubtedly pressed for time, I will not require you to read all the materials. Read Microsoft's press release (pp. 3-11) for some background and read Judge Corley's opinion with some care (pp. 71-123). If you have the time, read the Ninth Circuit's decision, which, of course, has greater precedential value than the district court's opinion. However, the district court's opinion has the details that we need for this class.

As always, if you have any questions or want to talk about the materials further, please let me know. See you in class.

P.S. Remember that we have an optional review session scheduled for Tuesday, December 2, from 3:30 pm to 5:30 pm, in McD 110. The session will be recorded and available on Panopto if you are unable to attend.