U.S. Department of Justice

Antitrust Division

RFK Main Justice Building

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September 15, 2020

BY ELECTRONIC FILING

Hon. Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103
(415) 355-8000

Re: *Stromberg v. Qualcomm Inc.*, No. 19-15159

United States' Statement Concerning *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir. Aug. 11, 2020)

Dear Ms. Dwyer:

Pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States," I write on behalf of the United States to respond to the Court's question "whether *FTC v. Qualcomm* directly resolves any of plaintiffs' claims in this case and, if so, what effect that may have on the certification questions

raised in this appeal." Aug. 17, 2020 Order 3 (Dkt. 202). In the United States' view, *FTC v. Qualcomm* has no effect on questions 2 and 3 presented by Qualcomm, and we take no position on its ultimate effect on question 1 or the plaintiffs' underlying claims in this case.

There does not appear to be any overlap between the *FTC v. Qualcomm* decision arising from the FTC's enforcement action, brought under federal antitrust law, and Qualcomm's questions 2 and 3. Qualcomm's question 2 asks whether the 250-million-member, nationwide class certified by the district court is so unwieldy as to violate Qualcomm's due process rights. Its question 3 is the issue on which the United States and several states filed an amici brief; namely, "[w]hether the district court erred by holding that a single state's rule allowing indirect purchasers to sue for damages applies to the claims of a nationwide class in the face of contrary rules from many other states and contrary federal policy." Gov't Amici Br. 3 (Dkt.

No. 18).[1] Both questions concern the correctness of the district court's class-certification decision on grounds unrelated to the correctness of the substantive antitrust theories underlying the plaintiffs' claims. Therefore, the considerations described in our amicus brief continue to be presented, and the district court's decision on this point could continue to, in our view, have negative effects on the development of the law.

Qualcomm's first question presented, on the other hand, mounts a challenge to the district court's acceptance of the plaintiffs' expert model as evidence of class-wide antitrust impact. There is plausibly some overlap between this question and the merits issues decided in *FTC v. Qualcomm* because Qualcomm's arguments could be read as attacking the facts and antitrust theories underlying that model. In addition, interpretations of federal law like those in *FTC v. Qualcomm* are instructive with

[1] Amici addressed only "the district court's ruling on this particular ground," Gov't Amici Br. 2, and took no position on, among other things, "whether a class limited to residents of states allowing recovery by indirect purchasers would eliminate the predominance problem presented by a nationwide class," *id.* at 19 n.3.

respect to interpreting the claims brought in this case under California's Cartwright Act, such that Sherman Act and Cartwright Act claims often rise or fall together.[2] Consequently, to the extent that the plaintiffs' expert model is based on what the *FTC v. Qualcomm* decision deems lawful conduct, it cannot serve

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[2] This Court treats most merits elements of antitrust violations under the Sherman Act and the Cartwright Act as analogous. *See Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1131 n.5 (9th Cir. 2015) ("Because the analysis under the Cartwright Act is identical to that under the Sherman Act, we also affirm the district court's dismissal of the Cartwright Act claim." (citations omitted)); *cf.* Qualcomm Supp'l Letter Br. 9 n.1 (Dkt. 204) (noting California law does not recognize single-firm monopolization). For certain threshold issues, such as timeliness, however, this Court has recognized state and federal law may differ. *See Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205 n.4 (9th Cir. 2014) ("The Cartwright Act claim was dismissed based on a holding that the interpretation of California's antitrust statute was coextensive with the Sherman Act. This is no longer the law in California."); *cf. Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044, 1064 (N.D. Cal. 2016) (explaining that "[t]he California Supreme Court has held that federal interpretations of the Sherman Act are instructive in interpreting California's Cartwright Act," concluding California-specific rules did not apply on the facts to the California claims, and dismissing both Sherman Act and Cartwright Act claims). In addition, of course, the California legislature has enacted law providing that the federal indirect-purchaser rule set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), does not apply to antitrust claims under California law, *see Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1070 (Cal. 2010).

as a basis for class certification because projected impact "caused by factors unrelated to an accepted theory of antitrust harm [is] not 'anticompetitive' in any sense relevant here." *Comcast Corp. v. Behrend*, 569 U.S. 27, 38 (2013); *see* Makan Delrahim, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Merricks v. Mastercard*: "Passing on" the U.S. Experience* 7, Competition Policy International (May 5, 2020), https://www.competitionpolicyinternational.com/wp-content/uploads/2020/05/North-America-Column-May-2020-Full.pdf ("The Supreme Court [in *Comcast*] . . . determined the plaintiffs did not meet the predominance standard for class certification because their expert's calculation of damages—which assumed the validity of the plaintiffs' four theories of antitrust impact rather than the validity of the single theory accepted by the district court—was not 'tie[d]' or 'attributable' to the one accepted theory of liability."). The government amici took no position on the details of plaintiffs' expert model in their amici brief, however, and thus the United States takes no position on

the ultimate effect of *FTC v. Qualcomm* on that question, or plaintiffs' underlying claims in this case.

Respectfully submitted,

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