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11 **UNITED STATES DISTRICT COURT**  
 12 **NORTHERN DISTRICT OF CALIFORNIA**  
 13 **SAN JOSE DIVISION**

15 IN RE HIGH-TECH EMPLOYEE  
 ANTITRUST LITIGATION

Master Docket No. 11-CV-2509-LHK

16 **DEFENDANTS' REPLY IN SUPPORT OF**  
 17 **JOINT MOTION TO DISMISS THE**  
**CONSOLIDATED AMENDED**  
**COMPLAINT**

18 THIS DOCUMENT RELATES TO:  
 19 ALL ACTIONS

20 **ORAL ARGUMENT REQUESTED**

21 DATE: January 26, 2012  
 22 TIME: 1:30 pm  
 23 COURTROOM: Courtroom 8, 4th Floor  
 24 JUDGE: Honorable Lucy H. Koh

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U.S. Dep't of Labor, Bureau of Labor Statistics, *The Employment Situation: June 2007*, [http://www.bls.gov/news.release/archives/empsit\\_07062007.pdf](http://www.bls.gov/news.release/archives/empsit_07062007.pdf)..... 16

## INTRODUCTION

1  
2 Plaintiffs' opposition brief essentially concedes that their claim of an overarching  
3 conspiracy—what this Court termed the “motherlode conspiracy”—is nothing more than a  
4 patchwork of separate alleged bilateral agreements. Plaintiffs made the strategic decision to try to  
5 lump all Defendants together into this “single conspiracy” (Opp. at 12) so that Defendants would  
6 each be jointly and severally liable for alleged agreements that have nothing to do with them.  
7 Having decided to pursue a “single conspiracy” claim (Opp. at 12), that is the claim that must be  
8 tested under *Twombly*. Because Plaintiffs allege no evidentiary facts that plausibly suggest a  
9 single conspiracy, *Twombly* requires that their antitrust claims be dismissed.

10 Plaintiffs argue that their overarching conspiracy claim should nonetheless stand because  
11 these alleged bilateral agreements were supposedly “identical, interconnected, and operated over  
12 the same time period.” (Opp. at 10.) This is just the kind of conclusory labeling, unsupported by  
13 evidentiary facts, that *Twombly* rejected. Plaintiffs' boilerplate, repetitive description of the  
14 alleged agreements is so lacking in detail that no conclusion can be drawn about their actual  
15 degree of similarity. And where Plaintiffs do provide additional detail (as with the alleged  
16 Pixar/Lucasfilm agreement), that detail shows that the alleged agreement was very different from  
17 any of the others. Plaintiffs' allegations likewise make clear that, rather than covering the same  
18 time period, the alleged agreements were entered at different times and covered different periods.

19 But Plaintiffs' allegations fail for the more fundamental reason that courts have repeatedly  
20 held that allegations of facially similar conduct raise no inference of conspiracy. Companies in  
21 competitive markets frequently engage in broadly similar conduct. To rely on supposedly similar  
22 conduct, Plaintiffs must allege facts showing that the companies would not rationally engage in  
23 such conduct absent a conspiracy. Plaintiffs allege no such facts here. Nor could they. There are  
24 numerous legitimate reasons why companies would decide to limit their methods of recruiting  
25 from other companies, as recognized in the provisions of the DOJ consent decree permitting such  
26 agreements in a variety of circumstances. It therefore makes no difference that the supposedly  
27 parallel conduct is a series of alleged bilateral agreements. Plaintiffs allege nothing to show that  
28 the alleged bilateral agreements are connected in any way. For example, Plaintiffs allege nothing



1 to show that Lucasfilm, which allegedly agreed not to cold call employees at Pixar, had any  
2 knowledge of or interest in, or even could benefit from, any alleged non-solicitation agreement  
3 between Intel and Google.

4 Plaintiffs suggest at times that their Complaint should stand if they have alleged at least  
5 some kind of antitrust claim against each Defendant. (Opp. at 1.) This argument fundamentally  
6 misconstrues *Twombly* and the critical difference between a series of bilateral agreements and an  
7 overarching conspiracy. In the absence of sufficient evidentiary allegations of a single  
8 overarching conspiracy, there is no basis to hold Intuit, for example, liable based on an alleged  
9 agreement between Adobe and Apple, or to hold Apple liable based on an alleged agreement  
10 between Google and Intel. For tactical reasons alone, Plaintiffs chose to allege that disconnected  
11 alleged agreements among the Defendants are part of a single antitrust conspiracy. That is the  
12 antitrust conspiracy claim the Court must evaluate here.

13 Plaintiffs devote a significant portion of their Opposition to arguing that non-solicitation  
14 agreements are per se violations. This argument is both irrelevant and wrong as a matter of law.  
15 It is irrelevant because the existence of a conspiracy is a threshold requirement, and the  
16 conspiracy that Plaintiffs have alleged—a “single conspiracy” among these seven Defendants—  
17 fails for lack of factual allegations regardless of how it is labeled. It is wrong because every court  
18 that has addressed the issue has concluded that non-solicitation agreements are treated under the  
19 rule of reason, not as per se violations.

20 Plaintiffs’ antitrust claims also fail because they have alleged no plausible facts to show  
21 how they could have been injured by the purported “overarching conspiracy” or even the alleged  
22 bilateral agreements. The *Twombly* requirement to allege evidentiary facts applies with equal  
23 force to the element of antitrust injury as it does to the element of conspiracy. Plaintiffs have not  
24 alleged any specific injury they suffered caused by any alleged conspiracy. Nor have they alleged  
25 any plausible theory to support a market-wide impact that affected their salaries. This failure is  
26 not accidental; there is no plausible labor market that Defendants collectively control that would  
27 give them even the possibility of affecting salaries on a market-wide basis.

28 Plaintiffs’ § 16600 claim should be dismissed because § 16600 does not reach non-

1 solicitation agreements involving employees. Plaintiffs cite cases to show that § 16600 has been  
2 applied to agreements involving non-solicitation of clients and non-hiring of employees, but those  
3 cases are irrelevant here because Plaintiffs' allegations involve non-solicitation of employees.  
4 The law uniformly holds that such agreements do not violate § 16600.

5 Finally, Plaintiffs' § 17200 claim also should be dismissed. Plaintiffs do not contend that  
6 the "fraudulent" prong of § 17200 applies, and they concede that their § 17200 claim premised on  
7 "unlawful" conduct fails if their other claims fail. They argue that their "unfair" claim should  
8 survive even if their antitrust claims fail, but they ignore the many decisions—including one from  
9 this Court—which have held that a plaintiff cannot save a failed antitrust conspiracy claim by  
10 alleging that the same conduct was "unfair" under the UCL.

## 11 ARGUMENT

### 12 I. PLAINTIFFS' ANTITRUST CLAIMS SHOULD BE DISMISSED.

#### 13 A. Plaintiffs' "Notice Pleading" Standard Is Not the Law.

14 The Ninth Circuit has held that "[a]t least for the purposes of adequate pleading in  
15 antitrust cases, the [Supreme] Court specifically abrogated the usual 'notice pleading' rule, found  
16 in Federal Rule of Civil Procedure 8(a)(2)." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047  
17 n.5 (9th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 561 (2007)). Plaintiffs  
18 ignore this precedent. They argue that as long as Defendants have notice of the claim against  
19 them, their antitrust allegations should stand because "[t]here are no special pleading standards  
20 for antitrust cases." (Opp. at 7.) Plaintiffs cite fifteen cases supposedly relating to pleading  
21 standards, but fail even to mention *Kendall*, the leading Ninth Circuit decision. (Opp. at 7-8.)  
22 *Kendall* held that an antitrust conspiracy claim requires *evidentiary facts* that support a plausible  
23 conspiracy. *Kendall*, 518 F.3d at 1047 (plaintiffs must "plead not just ultimate facts (such as a  
24 conspiracy), but evidentiary facts which, if true, will prove" the alleged antitrust violation); *see*  
25 *also Twombly*, 550 U.S. at 555 ("[f]actual allegations must be enough to raise a right to relief  
26 above the speculative level"); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009)  
27 (plaintiffs must plead "factual content that allows the court to draw the reasonable inference that  
28 the defendant is liable for the misconduct alleged").

1           **B. Plaintiffs Have Identified No Evidentiary Facts to Support the Only Claim**  
2           **They Allege—an “Overarching,” Multilateral Conspiracy.**

3           Plaintiffs allege no facts plausibly supporting an overarching conspiracy. Nothing in the  
4           Complaint suggests that any Defendant had an interest in any alleged agreement other than its  
5           own. Plaintiffs allege no evidence of any coordination of any one pair of companies with any  
6           other pair, and no communications that even *hint* at an overarching conspiracy. Plaintiffs admit  
7           that the “single conspiracy” they allege left Defendants free to cold call most of the other  
8           Defendants’ employees. (Opp. at 12.) In other words, Defendants supposedly reached a single  
9           agreement to use non-solicitation agreements “to fix and suppress the compensation of their  
10          employees,” but did so in a way that allowed Defendants to do most of the time exactly what the  
11          agreement supposedly prohibited. The lack of any evidentiary allegations supporting an  
12          overarching conspiracy, combined with the incoherence of how Plaintiffs allege it functioned,  
13          renders Plaintiffs’ effort to turn the alleged bilateral agreements into a single overarching  
14          conspiracy “implausible.” *Kendall*, 518 F.3d at 1047; *see also William O. Gilley Enters. v. Atl.*  
15          *Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009) (“on a motion to dismiss in an antitrust case, a  
16          court must determine whether an antitrust claim is ‘plausible’ in light of basic economic  
17          principles” and common sense).<sup>1</sup>

18          Plaintiffs’ primary argument is that an overall conspiracy may be inferred because the  
19          alleged bilateral agreements were supposedly “identical.” (Opp. at 10.) But this is just the kind  
20          of unsupported, conclusory allegation that *Twombly* rejects. Plaintiffs’ assertion fails at the outset  
21          based on their concession (Opp. at 12 n.8) that the alleged agreement between Pixar and  
22          Lucasfilm is different in significant respects from any of the other agreements. (*Compare* Compl.  
23          ¶¶ 59-61 (Pixar/Lucasfilm) *with, e.g.,* ¶ 73 (Apple/Adobe), ¶ 98 (Google/Intel).) And the other  
24          alleged bilateral agreements are described so generically that it is not possible to draw any  
25          meaningful conclusion about whether they are actually similar at all. (*E.g.,* Compl. ¶ 73 (alleging

26          \_\_\_\_\_

27          <sup>1</sup> Defendants do not concede the existence of the bilateral agreements alleged in the Complaint.  
28          However, the Court need not decide whether the bilateral agreements have been pleaded with  
sufficient specificity because Plaintiffs’ antitrust claims are predicated on a single, overarching  
conspiracy—not simply a series of bilateral agreements.

1 agreement between Apple and Adobe “not to cold call each other’s employees”), ¶ 79 (alleging  
2 agreement between Google and Intel “not to cold call each other’s employees”).)

3 But even if Plaintiffs had adequately alleged agreements that were broadly similar, the  
4 existence of facially similar agreements between different pairs of companies is not alone  
5 sufficient to allege a single agreement among all such companies. *See In re Iowa Ready-Mix*  
6 *Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 972-75 (N.D. Iowa 2011); *In re Late Fee & Over-*  
7 *Limit Fee Litig.*, 528 F. Supp. 2d 953, 961-63 (N.D. Cal. 2007) (parallel actions taken at the same  
8 time do not by themselves raise an inference of a conspiracy). Courts have allowed parallel  
9 conduct to support an inference of conspiracy only when such parallel conduct would not be  
10 rational in the absence of a conspiracy. *Twombly*, 550 U.S. at 556 n.4 (holding insufficient  
11 allegations that defendants each decided not to enter each other’s incumbent territories because  
12 plaintiffs alleged no facts showing that those decisions were independently irrational). For  
13 example, in *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), the court  
14 inferred a conspiracy from parallel pricing behavior based in large part on the allegation that “in  
15 the face of steeply falling costs, the defendants increased their prices.” *Id.* at 628. This kind of  
16 “anomalous behavior,” along with other factors, supported the inference that the price increases  
17 were the result of collusive behavior. *Id.* *See also Starr v. Sony BMG Music Entm’t*, 592 F.3d  
18 314, 327 (2d Cir. 2010) (upholding antitrust complaint where “plaintiffs have alleged behavior  
19 that would plausibly contravene each defendant’s self-interest in the absence of similar behavior  
20 by rivals”); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1095 (N.D.  
21 Cal. 2007) (denying motion to dismiss where alleged behavior was not economically rational on  
22 its own or in defendants’ independent self-interest).

23 Here, Plaintiffs allege no behavior that is irrational or so contrary to self-interest to raise  
24 an inference of a broader conspiracy. Quite to the contrary. There are obvious legitimate and  
25 procompetitive reasons why individual companies would enter into bilateral non-solicitation  
26 agreements without any broader conspiracy. For example, non-solicitation agreements encourage  
27 companies to devote employees to joint ventures because they will not be concerned that those  
28 employees will be actively poached by their business partner. Absent the agreement, companies

1 may abandon the collaboration, limit the participation of their employees, or take other measures  
2 that may make the collaboration less effective and innovative. And if a company perceives that  
3 its business partner is routinely attempting to lure away its employees, it is less likely to explore  
4 joint development projects, which may lead to further reduction in efficiencies and innovation.  
5 Given the benefits of non-solicitation agreements for the two parties to those agreements, the  
6 alleged bilateral agreements would stand on their own without the need for any broader  
7 conspiracy. Unlike the “parallel conduct” cases relied on by Plaintiffs, there are no allegations  
8 here—like parallel price hikes by all Defendants in the face of sharply falling costs—that make  
9 the alleged bilateral agreements “anomalous” behavior that flies in the face of expected economic  
10 decision-making. The Complaint lacks factual allegations to show that any Defendant entered  
11 into a bilateral agreement for any reason other than that specific alleged bilateral agreement.

12 The description of the alleged bilateral agreements as “interconnected” is not an  
13 evidentiary fact, but a label for a conclusion that is also contradicted by other allegations. Intuit’s  
14 alleged agreement in June 2007 not to cold call Google’s employees is not “interconnected” in  
15 any sense with Apple’s alleged agreement with Adobe two years earlier. Plaintiffs’ assertion that  
16 the agreements operated “over the same time period” is also inconsistent with Plaintiffs’ own  
17 allegations. The alleged Pixar/Lucasfilm agreement is alleged to have begun “no later than  
18 January 2005” (Compl. ¶ 58), whereas other agreements are not alleged to have begun until more  
19 than two years later (*e.g.*, Compl. ¶ 98 (Google/Intel in September 2007).)

20 Likewise insufficient are Plaintiffs’ allegations that Jobs and Schmidt were involved in  
21 their companies’ bilateral non-solicitation agreements. That Apple’s and Google’s CEOs were  
22 allegedly involved in the agreements involving Apple and Google does not alter the bilateral  
23 nature of the alleged agreements. Nor is the allegation that Jobs and Schmidt both sat on Apple’s  
24 board of directors evidence of a broader conspiracy. As Plaintiffs admit, overlapping board  
25 membership merely provides “an opportunity to conspire,” and “an opportunity for the requisite  
26 knowledge and intent regarding the express agreements.” (Opp. at 10.) The case law is clear that  
27 an opportunity to collude is not sufficient to plead a conspiracy, even where defendants are  
28 alleged to have participated in recurring industry-wide meetings or associations and have had

1 many opportunities to communicate directly. *See, e.g., In re Citric Acid Litig.*, 191 F.3d 1090,  
2 1103 (9th Cir. 1999) (rejecting plaintiff’s attempt to infer a conspiracy from multiple meetings  
3 and telephone conversations because such meetings “do not tend to exclude the possibility of  
4 legitimate activity”); *In re Elevator Antitrust Litig.*, No. 04-1178, 2006 WL 1470994, at \*10-11  
5 (S.D.N.Y. May 30, 2006) (explaining that “the allegation that elevator company executives attend  
6 trade, industry, or social functions together is clearly insufficient to state a claim”).

7 It does not matter, as Plaintiffs claim, that they have labeled the alleged parallel conduct  
8 itself a per se violation. (Opp. at 12-13.) As demonstrated below, the premise of this argument is  
9 wrong; non-solicitation agreements are uniformly judged under the rule of reason. But even  
10 accepting the premise, the argument fails. In *In re Iowa Ready-Mix Concrete Antitrust Litigation*,  
11 the defendants had pleaded guilty to criminal antitrust violations “as to certain *bilateral*  
12 agreements” between individual pairs of defendants. 768 F. Supp. 2d at 975 (emphasis in  
13 original). The court rejected plaintiffs’ contention that these bilateral agreements were sufficient  
14 to allege a broader, “industry-wide” conspiracy involving all of the defendants. *Id.* Plaintiffs  
15 attempt to distinguish *Iowa Ready-Mix* on its facts,<sup>2</sup> but ignore the case’s basic principle—that  
16 even criminal guilty pleas to per se unlawful bilateral agreements do not alone support an  
17 inference of an “industry-wide” conspiracy. *Id.* at 975, 978. This is precisely the problem with  
18 Plaintiffs’ overarching conspiracy claim here. Similarly, in *In re Insurance Brokerage Antitrust*  
19 *Litigation*, the court held that allegations of similar “hub-and-spoke” conspiracies between  
20 brokers and their insurer-partners “fail to plausibly imply” a broader “global conspiracy” among  
21 all defendant brokers and insurers. 618 F.3d 300, 348 (3d Cir. 2010). (*See Mot.* at 13.) Plaintiffs  
22 do not even address *In re Insurance Brokerage*.

23 Plaintiffs repeatedly cite their allegation that Defendants entered into the bilateral  
24 agreements “with knowledge of the other Defendants’ participation, and with the intent of  
25

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26 <sup>2</sup> Plaintiffs point to the statement in *Iowa Ready-Mix* that the plaintiffs had “not specifically  
27 alleged that any particular plaintiff purchased ready-mix concrete from any particular defendant  
28 during the class period.” 768 F. Supp. 2d at 978. (Opp. at 14.) This observation only reflected  
the court’s doubts about plaintiffs’ standing. However, the court did not reach the issue of  
standing because plaintiffs failed to allege sufficient facts of an overarching conspiracy.

1 accomplishing the conspiracy’s objective.” (Opp. at 3, 6, 9.) These are nothing more than  
2 conclusory allegations, and *Kendall* requires that they be disregarded. 518 F.3d at 1048 (rejecting  
3 similar recitation that defendants had “knowingly, intentionally and actively participated” in the  
4 alleged conspiracy).

5 Plaintiffs’ reliance on criminal conspiracy cases such as *Perlaza* and *Reed* is misplaced.  
6 (See Opp. at 11.) As these cases make clear, before a defendant may be held liable for  
7 participation in a conspiracy, the government must establish that a conspiracy existed in the first  
8 place. *United States v. Perlaza*, 439 F.3d 1149, 1177 (9th Cir. 2006) (“*once the existence of a*  
9 *conspiracy is established*, a defendant may be convicted of knowing participation therein”)  
10 (emphasis added); *United States v. Reed*, 575 F.3d 900, 923-24 (9th Cir. 2009) (government must  
11 prove “an agreement to accomplish an illegal objective . . . . [O]nce a conspiracy is established,  
12 only a slight connection to the conspiracy is necessary . . . .”) (emphasis added). Plaintiffs’  
13 Complaint fails because it does not adequately allege that *an overarching conspiracy existed at*  
14 *all*. Without sufficient evidence of the existence of an overarching conspiracy, it is of no import  
15 that conspiracy law requires only evidence of “knowing participation.”

16 The civil conspiracy authorities Plaintiffs cite (*see* Opp. at 15-16) likewise make clear that  
17 the existence of a conspiracy must be established before any defendant’s participation in or  
18 liability for the conspiracy is relevant. *See, e.g., ABA Model Jury Instructions in Civil Antitrust*  
19 *Cases*, at B-14 (2005 ed.) (“*If you find that the alleged conspiracy existed*, then the acts and  
20 statements of the conspirators are binding on all those whom you find were members of the  
21 conspiracy.”) (emphasis added); *Beltz Travel Serv. Inc. v. Int’l Air Transp. Ass’n*, 620 F.2d 1360,  
22 1367 (9th Cir. 1980) (“*If Beltz can establish the existence of a conspiracy* in violation of the  
23 antitrust laws and that appellees were a part of such a conspiracy, appellees will be liable for the  
24 acts of all members of the conspiracy in furtherance of the conspiracy”) (emphasis added); *In re*  
25 *Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 779, 789-90 (N.D. Cal. 2007) (defendant  
26 challenged only the extent of his own participation in the alleged price-fixing conspiracy, and not  
27 the existence of the alleged conspiracy). Here the Complaint fails to meet this basic  
28 prerequisite—alleging sufficient facts to support an overarching conspiracy.



1 The distinction between a series of alleged bilateral agreements and an overarching  
2 conspiracy is not mere semantics. The distinction goes to fundamental issues of liability, proof,  
3 and fairness. Unless Plaintiffs can establish an overarching conspiracy, there is no basis to hold  
4 Adobe, for example, liable for an alleged agreement between Lucasfilm and Pixar. *See, e.g.,*  
5 *Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002) (where plaintiff had alleged  
6 separate bilateral conspiracies between Microsoft and three OEMs, one OEM could not be held  
7 responsible for Microsoft’s acts with the other OEMs because “only acts taken in furtherance of  
8 *that* alleged conspiracy are appropriately considered in determining the adverse effects of the  
9 claimed restraints on trade, not acts of one conspirator taken in furtherance of other possible,  
10 distinct conspiracies”) (emphasis added). And trying to bring claims based on separate alleged  
11 bilateral agreements in one case also would raise serious evidentiary and joinder questions. *See,*  
12 *e.g., Wynn v. Nat’l Broad. Co.*, 234 F. Supp. 2d 1067, 1078-79 (C.D. Cal. 2002) (allegation that  
13 defendants engaged in the same “pattern and practice” of discrimination in hiring employees was  
14 not sufficient to satisfy the requirement for joinder that the claims against all defendants “arise[]  
15 out of the same transaction or occurrence”). While Plaintiffs no doubt perceive a tactical  
16 advantage in the joint and several liability that would attach to an overarching conspiracy, that is  
17 not a proper basis for lumping Defendants together into one claim. There is no “overarching  
18 conspiracy,” and the Court should dismiss Plaintiffs’ antitrust claims on that basis alone.

19 **C. Plaintiffs’ Argument That Non-solicitation Agreements Are “Per Se”**  
20 **Antitrust Violations Is Both Irrelevant and Wrong as a Matter of Law.**

21 Plaintiffs repeatedly assert that non-solicitation agreements are judged under the per se  
22 standard rather than the rule of reason. (Opp. at 2, 13, 22-25.) To resolve this motion, the Court  
23 need not decide which standard applies. Plaintiffs’ claim of an overarching conspiracy fails  
24 because they have alleged no evidentiary facts to support such a conspiracy. Nonetheless,  
25 Plaintiffs are simply wrong in their assertion that non-solicitation agreements are per se illegal.

26 Per se treatment is the exception. Courts have applied such treatment to only a few types  
27 of agreements—principally price-fixing, market allocation and bid rigging. As a matter of law,  
28 such conduct is unlawful regardless of its actual impact on the relevant market and any benefits it



1 may generate. By contrast, the rule of reason is the “presumptive form of analysis” used to judge  
2 most alleged antitrust violations. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). The rule of reason  
3 requires a balancing of the benefits from the challenged restraint against any alleged  
4 anticompetitive impact on the market.

5 Before a court may condemn a category of activity as per se illegal, it must conduct some  
6 assessment of whether there is a legitimate business justification for the collaboration. *Broad.*  
7 *Music, Inc. v. Columbia Broad. Sys., Inc.* (“*BMP*”), 441 U.S. 1, 7-8, 19-20 (1979). In *BMI*, the  
8 Court identified two questions central to this assessment. First, is the practice “plainly  
9 anticompetitive” in that it “facially appears to be one that would always or almost always tend to  
10 restrict competition or decrease output.” *Id.* at 8, 19-20 (citation omitted). Second, is the practice  
11 “designed to increase economic efficiency and render markets more, rather than less,  
12 competitive.” *Id.* at 19-20 (internal quotation omitted). Put differently: “Per se treatment is  
13 proper only ‘[o]nce experience with a particular kind of restraint enables the [c]ourt to predict  
14 with confidence that the rule of reason will condemn it.’” *Cal. ex rel. Harris v. Safeway, Inc.*,  
15 651 F.3d 1118, 1133 (9th Cir. 2011) (en banc) (quoting *Arizona v. Maricopa Cnty. Med. Soc’y*,  
16 457 U.S. 332, 344 (1982)) (rejecting per se treatment and “quick look” analysis for revenue-  
17 sharing agreement among grocery stores during union strike); *see also BMI*, 441 U.S. at 20 &  
18 n.33 (per se classification reserved for activities that, based on “considerable” judicial and  
19 economic experience, have been shown to have “no purpose except stifling of competition”)  
20 (citation omitted); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“*Per se* treatment is appropriate  
21 once experience with a particular kind of restraint enables the Court to predict with confidence  
22 that the rule of reason will condemn it.”) (internal quotation omitted). The Supreme Court has  
23 cautioned against expanding the per se category to encompass new types of agreements,  
24 particularly without a careful inquiry into the procompetitive effects and justifications for those  
25 agreements. *See FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986) (the Court has “been  
26 slow to . . . extend per se analysis to restraints imposed in the context of business relationships  
27 where the economic impact of certain practices is not immediately obvious”); *In re Online DVD*  
28 *Rental Antitrust Litig.*, No. M 09–2029, 2011 WL 5883772, at \*10 (N.D. Cal. Nov. 23, 2011)

1 (declining to apply per se treatment to a promotion agreement between Netflix and Walmart  
2 based in part on “plaintiffs’ inability to cite any legal authority otherwise clearly establishing the  
3 manifestly anticompetitive nature of joint promotion agreements such as the one in question”).

4 Defendants are unaware of a single case applying the per se rule to employee non-  
5 solicitation agreements such as those alleged here. In fact, the Ninth Circuit has specifically  
6 refused to apply the per se rule to an agreement prohibiting a former executive from “raiding” his  
7 former employer’s employees. *See Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 899-901 (9th Cir.  
8 1983). Noting that such agreements “often serve legitimate business concerns,” the court held  
9 broadly that “courts have had inadequate experience with noncompetition and noninterference  
10 covenants to warrant a per se categorization.” *Id.* at 900. The non-solicitation agreements  
11 alleged here are significantly less restrictive than the no-hire agreement in *Aydin Corp.* because  
12 the alleged agreements here do not prohibit the hiring of any employee.

13 The complete absence of support for Plaintiffs’ position is unsurprising. Non-solicitation  
14 practices are “dissimilar in several significant respects” from the classic per se offenses. *Union*  
15 *Circulation Co. v. FTC*, 241 F.2d 652, 656-57 (2d Cir. 1957). Unlike classic per se offenses,  
16 non-solicitation arrangements often serve legitimate and procompetitive business purposes, “such  
17 as preserving trade secrets and protecting investments in personnel.” *See Aydin Corp.*, 718 F.2d  
18 at 900. For example, when two companies collaborate on joint venture projects, a non-  
19 solicitation agreement allows the companies to participate in the project freely and without fear  
20 that the other company is going to hire away their employees. Absent such an agreement, the  
21 procompetitive collaboration might never take place.

22 Given their legitimate, pro-competitive reasons, courts have uniformly held non-  
23 solicitation agreements to a rule of reason standard, rather than per se treatment. Indeed, courts  
24 have applied a rule of reason analysis even where the alleged restraint precluded the hiring of  
25 employees altogether. *See Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001) (“no-hire  
26 agreement . . . is more appropriately analyzed under the rule of reason”). *Accord Haines v.*  
27 *Verimed Healthcare Network LLC*, 613 F. Supp. 2d 1133, 1136-37 (E.D. Mo. 2009); *Weisfeld v.*  
28 *Sun Chem. Corp.*, 210 F.R.D. 136, 138, 143 (D.N.J. 2002); *UARCO Inc. v. Lam*, 18 F. Supp. 2d

1 1116, 1124 (D. Haw. 1998); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 866-67 (M.D. Tenn.  
2 1980).

3 The classification of non-solicitation agreements under the rule of reason is categorical  
4 and does not turn on whether the non-solicitation agreements were ancillary to some lawful  
5 business collaboration. *See Aydin Corp.*, 718 F.2d at 901 (rejecting argument that per se  
6 treatment of a no-hire agreement is appropriate unless the no-hire agreement was ancillary to a  
7 valid agreement). In *Union Circulation*, for example, the Second Circuit applied the rule of  
8 reason to an agreement among several magazine subscription sales agencies not to hire one  
9 another's agents for one year after termination. 241 F.2d at 657. This agreement was a flat ban  
10 on hiring, and not ancillary to any business collaboration among the agencies. *Id.* at 655-56. The  
11 court nevertheless rejected per se treatment "[b]ecause a harmful effect upon competition [was]  
12 not clearly apparent." *Id.* at 657. Forty years later, the Second Circuit reaffirmed its decision to  
13 apply the rule of reason to such activities in considering an agreement among insurance firms not  
14 to recruit and hire each others' agents. *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999)  
15 ("Although such agreements fall within the ambit of antitrust law, we have nonetheless denied  
16 them *per se* treatment because a harmful effect upon competition was not clearly apparent.")  
17 (internal quotation omitted).<sup>3</sup>

18 Lacking support in the law, Plaintiffs rely heavily on the allegation found in DOJ's  
19 complaints against Defendants that the alleged bilateral agreements constitute per se violations.  
20 These allegations carry no weight. Contrary to Plaintiffs' characterization (Opp. at 24), DOJ does  
21 not make "findings"; DOJ is a plaintiff in litigation and, like any litigant, it makes allegations.  
22

23 <sup>3</sup> Plaintiffs' cited cases are inapposite because they uniformly involve the kind of price-fixing and  
24 market allocation arrangements that have historically been accorded per se treatment; none  
25 involved employee non-solicitation agreements. *See United States v. Socony-Vacuum Oil Co.*,  
26 310 U.S. 150, 166-67 (1940) (price-fixing conspiracy by oil companies to raise the price of  
27 gasoline through a joint program to purchase surplus gasoline on the spot market); *United States*  
28 *v. Brown*, 936 F.2d 1042, 1044-45 (9th Cir. 1991) (market allocation agreement by billboard  
companies that restricted ability to compete for each other's billboard locations); *United States v.*  
*Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1368-70 (6th Cir. 1988) (customer allocation  
agreement between booking agents not to compete for each other's customers); *Fleischman v.*  
*Albany Med. Ctr.*, 728 F. Supp. 2d 130, 137-38 (N.D.N.Y. 2010) (conspiracy among hospitals to  
fix wages of nurses in Albany area).

1 Defendants strongly disagree with DOJ’s characterization of the bilateral agreements as per se  
2 violations, and no court ever adopted DOJ’s argument. To the contrary, the judgments entered in  
3 the DOJ cases expressly disclaim any admission of wrongdoing or violation of law by  
4 Defendants. (Judgments at 2.) Defendants admitted only that DOJ had alleged a claim under  
5 Section 1 of the Sherman Act, not that DOJ had alleged a valid per se claim. And, of course, DOJ  
6 never alleged the “overarching conspiracy” that Plaintiffs are trying to manufacture here.<sup>4</sup>

7 In any case, Plaintiffs’ own conduct in this litigation belies their argument that the alleged  
8 non-solicitation agreements constitute per se violations. Plaintiffs initially sought injunctive  
9 relief as part of their antitrust claims (Compl. ¶ 126), but dismissed that request because the DOJ  
10 consent decrees already provided the injunctive relief that Plaintiffs could have obtained. (CMC  
11 Tr. at 78:16-22; Docket No. 89.) By so agreeing, Plaintiffs conceded that the law allows  
12 Defendants to enter into non-solicitation agreements in a wide range of circumstances.  
13 (Judgments §§ V.A.1.-5.) Defendants can use non-solicitation agreements (a) as part of  
14 collaboration agreements, such as joint development, technology integration, joint ventures, joint  
15 projects such as teaming agreements, and the shared use of facilities (Judgments § V.A.5(iii));  
16 (b) in connection with a wide range of business transactions, including mergers, acquisitions,  
17 investments, and divestitures (*id.* § V.A.2); (c) in contracts with consultants, auditors, vendors,  
18 recruiting agencies, or providers of temporary or contract employees (*id.* § V.A.3); (d) in  
19 settlement or compromise of legal disputes (*id.* § V.A.4); and (e) in employment or severance  
20 agreements with their employees (*id.* § V.A.1).

21 These broad categories of proper non-solicitation agreements—which Plaintiffs do not  
22 challenge—necessarily imply that the per se approach cannot be applied to the category of non-

23 \_\_\_\_\_  
24 <sup>4</sup> Plaintiffs’ suggestion that judicial estoppel applies to the DOJ consent decrees is nonsense. (*See*  
25 *Opp.* at 6.) As Plaintiffs’ cases make clear, judicial estoppel precludes a party from taking  
26 inconsistent positions in the same litigation only when the issue was previously litigated and  
27 relied upon. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel  
28 “generally prevents a party from prevailing in one phase of a case on an argument and then  
relying on a contradictory argument to prevail in another phase”); *Yniguez v. Arizona*, 939 F.2d  
727, 738 (9th Cir. 1991) (judicial estoppel warranted because “we will not allow a party to seek  
an outcome directly contrary to the result he sought and obtained in the district court”) (emphasis  
omitted). This is not the same litigation, nor are Defendants’ positions inconsistent because,  
unlike Plaintiffs here, DOJ never alleged any “overarching conspiracy.”

1 solicitation agreements. In other words, the fact that a wide variety of non-solicitation  
2 agreements are permissible means that any challenged non-solicitation agreement must be  
3 considered based on its pro-competitive benefits and impact on the relevant market. Such an  
4 analysis under the proper rule of reason standard would show that the attack on the alleged  
5 bilateral agreements alleged in the Complaint is meritless. The Court would have to conduct a  
6 full analysis of their procompetitive benefits, and consider factors such as the relevant market,  
7 market power, and alleged competitive harm—factors Plaintiffs try to avoid by mislabeling their  
8 claim a per se violation. Plaintiffs’ claims are properly evaluated under the rule of reason.

9 **D. Plaintiffs’ Claims of Injury Are Unsupported by the Required Factual**  
10 **Allegations.**

11 Plaintiffs’ antitrust claims also fail because they have not alleged facts to plausibly show  
12 that they have suffered injury. An antitrust plaintiff must allege that he suffered injury regardless  
13 of whether he alleges a per se or rule of reason case. *Atl. Richfield Co. v. USA Petroleum Co.*,  
14 495 U.S. 328, 341, 344 (1990) (rejecting the “suggestion that no antitrust injury need be shown  
15 where a *per se* violation is involved”; in a per se case, “the need for the antitrust injury  
16 requirement is underscored”); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 n.5  
17 (9th Cir. 2000) (in per se price-fixing case, plaintiffs “still must prove injury in fact and antitrust  
18 injury”); *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 268 (3d Cir. 1998) (plaintiff  
19 “must establish that he actually sustained injury-in-fact to business or property”) (internal  
20 quotations omitted, citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 360, at 192  
21 (1995)).<sup>5</sup> *Twombly*’s pleading standard applies equally to allegations of injury as to any other  
22 element of Plaintiffs’ claims: “[A]n antitrust claimant must put forth factual ‘allegations  
23 plausibly suggesting (not merely consistent with)’ antitrust injury.” *NicSand, Inc. v. 3M Co.*, 507  
24 F.3d 442, 451 (6th Cir. 2007) (citing *Twombly*, 550 U.S. at 557).

25 \_\_\_\_\_  
26 <sup>5</sup> Plaintiffs must plead injury in fact and antitrust injury. *See Atl. Richfield*, 495 U.S. at 334  
27 (“injury, although causally related to an antitrust violation, nevertheless will not qualify as  
28 ‘antitrust injury’ unless it is attributable to an anti-competitive aspect of the practice under  
scrutiny”). Plaintiffs’ references to Article III standing and damages in their discussion of injury  
muddy the waters. (Opp. at 17, 20.) Defendants only challenged Plaintiffs’ Article III standing  
to seek injunctive and declaratory relief in light of their status as Defendants’ former employees.

1 Plaintiffs have alleged no evidentiary facts showing that they were injured by the alleged  
2 bilateral agreements, let alone the alleged “overarching conspiracy.” There are no facts to  
3 suggest how Plaintiff Hariharan, for example, would have been harmed by Lucasfilm’s alleged  
4 agreement with Pixar or by any overarching conspiracy among the Defendants. This is not  
5 surprising given that under the Complaint’s allegations, every Defendant except Pixar (and every  
6 other employer in the world) was free to solicit Hariharan for employment. (Even Pixar was free  
7 to *hire* Hariharan if he applied or was referred by a friend or headhunter; under Plaintiffs’  
8 allegations, Pixar was restricted only from cold calling him.) Nor do any of the named Plaintiffs  
9 assert any injury unique to them; rather, they assert that they were harmed in the same way as  
10 everyone else who worked for the Defendants. But such an allegation of injury must be based on  
11 evidentiary facts and be plausible. *See NicSand*, 507 F.3d at 451.

12 Plaintiffs describe generally ways that cold calling *could* have an “impact on employee  
13 compensation.” (Opp. at 20-21.) However, Plaintiffs fail to identify the relevant employment  
14 market(s) in which they allege compensation has been suppressed, or to allege facts showing that  
15 Defendants have power in those markets. Absent those allegations, Plaintiffs cannot plausibly  
16 allege that they have been harmed by any alleged conduct by Defendants. *See Am. Ad Mgmt.,*  
17 *Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999) (“Antitrust injury requires the  
18 plaintiff to have suffered its injury in the market where competition is being restrained.”). This  
19 requirement is distinct from the requirement that a plaintiff allege a relevant market and market  
20 power to plead the existence of an antitrust *violation* in a rule of reason case. Plaintiffs have  
21 failed to establish any plausible basis for their claim that they were *injured* by the supposed  
22 overarching conspiracy. To put it another way, Plaintiffs have shown no plausible basis to  
23 believe that the seven Defendant companies possessed the ability (i.e., market power) to control  
24 and suppress wages and employee mobility as Plaintiffs claim.

25 Plaintiffs’ claims of injury are particularly implausible considering the multitude of high-  
26 technology companies and other employers that compete against Defendants to hire from the  
27 broad set of all salaried, non-retail employees comprising Plaintiffs’ alleged class. Well over 100  
28



1 million workers were employed in the United States throughout the purported class period,<sup>6</sup> and  
2 Plaintiffs offer no facts to suggest that these seven companies had any ability to control any  
3 segment of that enormous labor market. The Complaint does not even attempt to address this,  
4 and Plaintiffs ignore this defect in their Opposition.

5 Plaintiffs cite a number of cases in which employees successfully established antitrust  
6 injury. (Opp. at 18-19.) In each case, however, the plaintiffs alleged injury flowing specifically  
7 to them as a result of the alleged conspiracy. *See Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543  
8 (10th Cir. 1995) (plaintiff had applied to work for defendant and was told that he could expect a  
9 firm offer of employment, but was subsequently turned down because defendant had agreed not  
10 to hire employees of plaintiff's former employer); *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*,  
11 540 F.2d 824, 827 (5th Cir. 1976) (plaintiff sought out employment with each defendant and was  
12 rejected by each); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 333 (7th Cir. 1967) (plaintiff  
13 was employed first by one defendant and then another defendant, but was terminated by the  
14 second defendant on account of its no-hire agreement with the first); *Doe v. Ariz. Hosp. &*  
15 *Healthcare Ass'n*, No. CV 07-1292, 2009 U.S. Dist. LEXIS 42871, at \*8-9 (D. Ariz. Mar. 19,  
16 2009) (plaintiffs were registered nurses who worked for and intended to continue working for  
17 defendant hospitals through nursing agencies). Plaintiffs have alleged nothing of this sort here.  
18 They do not allege that they would have applied or taken a job with another Defendant but for the  
19 alleged separate agreements or "overarching" conspiracy, or that the alleged conspiracy affected  
20 their particular employment options or choices. Plaintiffs' failure to plead any plausible injury  
21 requires dismissal of their claims. *See CBS Cos. v. Equifax, Inc.*, 561 F.3d 569, 572-73 (6th Cir.  
22 2009) (antitrust claim properly dismissed for failure to allege facts supporting injury).<sup>7</sup>

23  
24  
25 <sup>6</sup> U.S. Dep't of Labor, Bureau of Labor Statistics, *The Employment Situation: June 2007*,  
26 [http://www.bls.gov/news.release/archives/empsit\\_07062007.pdf](http://www.bls.gov/news.release/archives/empsit_07062007.pdf) (146 million workers in the  
United States as of June 2007, the midpoint of Plaintiffs' alleged class period).

27 <sup>7</sup> *See also Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 256-57 (3d Cir.  
28 2010) (rejecting plaintiffs' attempt to base claim on alleged bilateral agreements because they  
failed to allege facts to show that such individual agreements caused anticompetitive injury).

1 **II. DEFENDANTS' ALLEGED EMPLOYEE NON-SOLICITATION AGREEMENTS**  
2 **DID NOT VIOLATE § 16600.**

3 Settled California law holds that an agreement not to solicit employees “does not violate  
4 Section 16600.” See *Thomas Weisel Partners LLC v. BNP Paribas*, 2010 WL 546497, at \*4-6  
5 (N.D. Cal. Feb. 10, 2010), citing *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 279-80 (1985). An  
6 employee non-solicitation agreement does “not hamper[] [anyone] from seeking employment  
7 . . . . All they lose is the option of being contacted . . . first.” *Loral*, 174 Cal. App. 3d at 279. As  
8 this Court noted in *Thomas Weisel*, “it is crucial to distinguish at the outset among the differing  
9 types of contractual provisions that might implicate a section 16600 violation.” *Thomas Weisel*,  
10 2010 WL 546497, at \*3. California courts draw a clear distinction between agreements not to  
11 solicit *clients*, which in certain circumstances can restrict a person from practicing a profession,  
12 and agreements not to solicit *employees*, which cannot. *Id.* at \*4-6. A prohibition on soliciting  
13 former clients can violate Section 16600 because it can inhibit a person from pursuing a lawful  
14 career, whereas agreements not to solicit employees place no restrictions on the employees’  
15 pursuit of their career. Thus, while Section 16600 does protect the right to “engag[e] in a lawful  
16 profession, trade, or business,” nothing in Section 16600 or the cases interpreting it grants or  
17 protects any right of an employee to be cold called or otherwise solicited by another employer.  
18 Cal. Bus. & Prof. Code § 16600; *Thomas Weisel*, 2010 WL 546497, at \*4-6. No case holds to the  
19 contrary. The Court should therefore dismiss the Section 16600 claim with prejudice.

20 Plaintiffs fail to distinguish this Court’s decision in *Thomas Weisel*. Plaintiffs concede  
21 (Opp. at 27) that *Thomas Weisel*, *Loral*, and *Buskuhl* all stand for the proposition that an  
22 agreement of the type that Plaintiffs allege here that prohibits “raiding” or soliciting a competing  
23 employer’s employees “does not violate section 16600.” *Thomas Weisel*, 2010 WL 546497, at  
24 \*4-6. Contrary to Plaintiffs’ suggestion, those cases do not turn on whether the agreements at  
25 issue have a “legitimate purpose” (Opp. at 27). And if they did depend on some legitimate  
26 purpose, the same “anti-raiding” purpose to foster legitimate business relationships exists here.

27 With no response to that settled law, Plaintiffs instead attempt to brand the alleged  
28 agreements here as lacking “societal benefit” and without “pro-competitive justification.” As



1 support for this argument, however, Plaintiffs focus entirely on cases that involve irrelevant  
 2 agreements *not to compete for clients*. (Opp. at 25-28 (citing *Edwards*, *VL Systems*, and  
 3 *Silguero*.) Plaintiffs' argument is off point.

4 Plaintiffs rely heavily on *Edwards*—a case they say “makes clear that Defendants’ explicit  
 5 agreements [not to solicit each other’s employees] alone . . . are unlawful per se under section  
 6 16600 . . . .” (Opp. at 26:26-28.) That reliance is misplaced. *Edwards* expressly did not  
 7 “address” agreements “not to solicit away” *employees* because “Edwards [did] not . . . contend  
 8 that the provision of the noncompetition agreement prohibiting him from recruiting Andersen’s  
 9 employees violated section 16600.” *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 942, 946  
 10 n.4 (2008). Instead, *Edwards* held that a non-competition agreement that restricted Edwards from  
 11 working for or soliciting work from any of defendant’s *clients* was “invalid [under 16600]  
 12 because it restrained his ability to practice his profession.” *Id.* at 948.

13 Plaintiffs’ attempt to rely on *VL Systems* is similarly misplaced. (Opp. at 28.) There, the  
 14 court invalidated a contractual provision “covering not only solicitation by Star Trac, *but all*  
 15 *hiring*” of employees. *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708, 718 (2007) (emphasis  
 16 added). *VL Systems* cited and discussed *Loral* in detail, but distinguished it because *Loral*  
 17 “ultimately held that the provision at issue was more like a nonsolicitation or nondisclosure  
 18 agreement than an invalid noncompete.” *Id.* at 714. Thus, *VL Systems*, like *Edwards*, is  
 19 irrelevant to the line of cases holding that Section 16600 does not reach employee non-solicitation  
 20 provisions as a matter of law.<sup>8</sup>

21 The non-solicitation agreements Plaintiffs allege here are of the type that were held

22 <sup>8</sup> The other cases Plaintiffs cite are similarly inapposite. *Silguero v. Creteguard, Inc.*, 187 Cal.  
 23 App. 4th 60 (2010), did not involve an employee non-solicitation agreement, but rather involved a  
 24 noncompetition agreement, “which prohibited [plaintiff] ‘from all sales activities for 18 months  
 25 following either departure or termination.’” *Id.* at 64. *Retirement Group v. Galante*, 176 Cal.  
 26 App. 4th 1226 (2009), also did not involve an employee non-solicitation agreement, but merely  
 27 held, as in *Edwards*, that contracts restraining solicitation of customers violated Section 16600.  
 28 *Id.* at 1238-42. Finally, in *Richmond Technologies, Inc. v. Aumtech Business Solutions*,  
 No. 11-CV02460, 2011 WL 2607158 (N.D. Cal. July 1, 2011), the court invalidated an agreement  
 that “broadly prohibit[ed] Aumtech India from ‘enter[ing] into any agreement’ with ePayware’s  
 clients or employees . . . .” *Id.* at \*18. Thus, the invalid agreement in *Richmond Technologies*  
 not only restricted solicitation of employees, but also restricted *hiring* of employees and  
 solicitation of *clients*, unlike the alleged agreements here.

1 permissible in *Thomas Weisel* and *Loral*, and are clearly distinguishable from those that were  
2 alleged in *VL Systems* and *Edwards*. The alleged employee non-solicitation agreements do “not  
3 violate Section 16600” as a matter of law. *Thomas Weisel*, 2010 WL 546497, at \*4.

4 **III. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED A CLAIM UNDER**  
5 **CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200.**

6 Plaintiffs’ Opposition does nothing to save their UCL claim. Defendants detailed in their  
7 motion how Plaintiffs had failed to establish either “unlawful, unfair or fraudulent” conduct under  
8 the UCL. (Mot. at 22-23.) Plaintiffs’ Opposition does not contend that the “fraudulent” prong  
9 applies, and concedes that a UCL claim premised on “unlawful” conduct cannot survive if  
10 Plaintiffs’ antitrust claims or other statutory claims fail. (Opp. at 28.) Instead, Plaintiffs contend  
11 that even in the absence of a viable antitrust claim, those same allegations can nevertheless  
12 establish a UCL violation predicated on “unfair” conduct. Plaintiffs attempt to distinguish  
13 *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001), by claiming that the *Chavez* court  
14 “did not grasp . . . that the UCL has a broader scope than the antitrust statutes.” (Opp. at 29.) But  
15 countless courts, including this one, have agreed with *Chavez* and refused to allow a plaintiff to  
16 save a failed antitrust conspiracy claim by alleging that the same conduct was “unfair” under the  
17 UCL. *See Digital Sun v. Toro Co.*, No. 10-CV-4567, 2011 WL 1044502, at \*5 (N.D. Cal.  
18 Mar. 22, 2011) (Koh, J.) (dismissing UCL claim based on Sherman Act claim) (citing *Breakdown*  
19 *Servs., Ltd. v. Now Casting, Inc.*, 550 F. Supp. 2d 1123, 1142 (C.D. Cal. 2007) (“in a case where  
20 plaintiff’s § 17200 claim is predicated on antitrust violations that fail to withstand summary  
21 judgment, the § 17200 claim must also fail”)); *see also SC Manufactured Homes, Inc. v. Liebert*,  
22 162 Cal. App. 4th 68, 93 (2008) (failure of Cartwright Act claim means plaintiff cannot allege  
23 that the same conduct was “unfair” under the UCL) (citing *Chavez*); *In re Cipro Cases I & II*,  
24 No. D056361, 2011 WL 5120688, at \*23 (Cal. Ct. App. Oct. 31, 2011) (“Our conclusion that  
25 defendants are not liable under the Cartwright Act for entering into the Cipro agreements is also  
26 dispositive of plaintiffs’ causes of action for violation of the UCL and common law  
27 monopolization.”); *Facebook, Inc. v. Power Ventures, Inc.*, No. C08-05780, 2010 U.S. Dist.  
28 LEXIS 93517, at \*44-45 (N.D. Cal. July 20, 2010) (dismissing UCL claim that was “premiered on

1 th[e] same conduct” as claim under the Sherman Act).<sup>9</sup> Here, Plaintiffs contend that it is *both* an  
 2 unlawful conspiracy *and* an unfair business practice for “Defendants to conspire, in secret, to  
 3 deny their own employees the market value of their labor.” (Opp. at 30.) Because those  
 4 allegations do not support a viable antitrust conspiracy claim, their UCL claim—whether labeled  
 5 as unlawful or unfair—must fail along with it.

6 Plaintiffs also completely ignore Defendants’ showing that Plaintiffs failed to allege a  
 7 “loss of money or property” required to establish standing under the UCL. (Mot. at 23-24.)  
 8 Plaintiffs point to no allegations suggesting how alleged agreements between a handful of  
 9 companies—only four of which involved their employers—resulted in their loss of money or  
 10 property, and their UCL claim must be dismissed for this reason as well.

11 Finally, Plaintiffs claim, in a single conclusory sentence, that they may “seek monetary  
 12 equitable remedies under the UCL” and imply that they can seek non-restitutionary disgorgement.  
 13 (Opp. at 30 & n.20.) Plaintiffs suggest that such relief is not foreclosed by the California  
 14 Supreme Court’s decision in *Korea Supply Co.* “because that case examined only available  
 15 remedies to an ‘individual private plaintiff under the UCL.’” (*Id.* (quoting *Korea Supply Co. v.*  
 16 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003)).) But Plaintiffs cannot avoid the express  
 17 language of *Korea Supply* that “disgorgement of money obtained through an unfair business  
 18 practice is an available remedy in a representative action only to the extent that it constitutes  
 19 restitution.” *Korea Supply*, 29 Cal. 4th at 1145 .

## 20 CONCLUSION

21 For the reasons set forth above and in Defendants’ opening brief, the Court should dismiss  
 22 the Consolidated Amended Complaint.

23 Dated: December 2, 2011

O’MELVENY & MYERS LLP

24 By: /s/ Michael F. Tubach

25 Michael F. Tubach

26 <sup>9</sup> Plaintiffs’ citation to cases allowing a UCL claim to proceed where the alleged unfair  
 27 competition is premised on a statute that does not provide a private right of action are beside the  
 28 point and have no bearing on Plaintiffs’ claims here. See *Chabner v. United of Omaha Life Ins.*  
*Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000); *Ferrington v. McAfee, Inc.*, No. 10-CV-01455, 2010  
 U.S. Dist. LEXIS 106600 (N.D. Cal. Oct. 5, 2010) (Koh, J.).

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**ATTESTATION OF CONCURRENCE IN FILING**

Pursuant to General Order No. 45, Section X(B) regarding signatures, I, Michael F. Tubach, hereby attest that concurrence in the filing of this Defendants' Reply in Support of Joint Motion to Dismiss the Consolidated Amended Complaint has been obtained from Defendants Intel Corp., Google Inc., Lucasfilm Ltd., Adobe Systems Inc., Intuit Inc., and Pixar.

Dated: December 2, 2011

O'MELVENY & MYERS LLP

By: /s/ Michael F. Tubach

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