ANTITRUST LAW

Unit 5: Antitrust Class Actions

Case Study:
High Tech Employees "No Poach" Antitrust Litigation

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High Tech Employees "No Poach" Antitrust Litigation

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Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, SEPTEMBER 24, 2010
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AT
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JUSTICE DEPARTMENT REQUIRES SIX HIGH TECH COMPANIES TO STOP ENTERING INTO ANTICOMPETITIVE EMPLOYEE SOLICITATION AGREEMENTS

Settlement Preserves Competition for High Tech Employees

WASHINGTON — The Department of Justice announced today that it has reached a settlement with six high technology companies–Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar–that prevents them from entering into no solicitation agreements for employees. The department said that the agreements eliminated a significant form of competition to attract highly skilled employees, and overall diminished competition to the detriment of affected employees who were likely deprived of competitively important information and access to better job opportunities.

The Department of Justice's Antitrust Division filed a civil antitrust complaint today in U.S. District Court for the District of Columbia, along with a proposed settlement that, if approved by the court, would resolve the lawsuit.

According to the complaint, the six companies entered into agreements that restrained competition between them for highly skilled employees. The agreements between Apple and Google, Apple and Adobe, Apple and Pixar and Google and Intel prevented the companies from directly soliciting each other's employees. An agreement between Google and Intuit prevented Google from directly soliciting Intuit employees.

"The agreements challenged here restrained competition for affected employees without any procompetitive justification and distorted the competitive process," said Molly S. Boast, Deputy Assistant Attorney General in the Department of Justice's Antitrust Division. "The proposed settlement resolves the department's antitrust concerns with regard to these no solicitation agreements."

In the high technology sector, there is a strong demand for employees with advanced or specialized skills, the department said. One of the principal means by which high tech companies recruit these types of employees is to solicit them directly from other companies in a process referred to as, "cold calling." This form of competition, when unrestrained, results in better career opportunities, the department said.

According to the complaint, the companies engaged in a practice of agreeing not to cold call any employee at the other company. The complaint indicates that the agreements were formed and actively managed by senior executives of these companies.

The complaint alleges that the companies' actions reduced their ability to compete for high tech workers and interfered with the proper functioning of the price-setting mechanism that otherwise would have prevailed in competition for employees. None of the agreements was limited by geography, job function, product group or time period. Thus, they were broader than reasonably necessary for any collaboration between the companies, the department said.

The department said in its complaint:

- Beginning no later than 2006, Apple and Google executives agreed not to cold call each other's employees. Apple placed Google on its internal "Do Not Call List," which instructed employees not to directly solicit employees from the listed companies. Similarly, Google listed Apple among the companies that had special agreements with Google and were part of the "Do Not Cold Call" list;

- Beginning no later than May 2005, senior Apple and Adobe executives agreed not to cold call each other's employees. Apple placed Adobe on its internal "Do Not Call List" and similarly, Adobe included Apple in its internal list of "Companies that are off limits";

- Beginning no later than April 2007, Apple and Pixar executives agreed not to cold call each other's employees. Apple placed Pixar on its internal "Do Not Call List" and senior executives at Pixar instructed human resources personnel to adhere to the agreement and maintain a paper trail;

- Beginning no later than September 2007, Google and Intel executives agreed not to cold call each other's employees. In its hiring policies and protocol manual, Google listed Intel among the companies that have special agreements with Google and are part of the "Do Not Cold Call" list. Similarly, Intel instructed its human resources staff about the existence of the agreement; and

- In June 2007, Google and Intuit executives agreed that Google would not cold call any Intuit employee. In its hiring policies and protocol manual, Google also listed Intuit among the companies that have special agreements with Google and are part of the "Do Not Cold Call" list.

The proposed settlement, which if accepted by the court will be in effect for five years, prohibits the companies from engaging in anticompetitive no solicitation agreements. Although the complaint alleges only that the companies agreed to ban cold calling, the proposed settlement more broadly prohibits the companies from entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees. The companies will also implement compliance measures tailored to these practices.

Today's complaint arose out of a larger investigation by the Antitrust Division into employment practices by high tech firms. The division continues to investigate other similar no solicitation agreements.

Adobe Systems Inc. is a Delaware corporation with its principal place of business in San Jose, Calif., and 2009 revenues of nearly $3 billion. Apple Inc. is a California corporation with its principal place of business in Cupertino, Calif., and 2009 revenues of more than $42 billion. Google Inc. is a Delaware corporation with its principal place of business in Mountain View, Calif., and 2009 revenues of more than $23 billion. Intel Inc. is a Delaware corporation with its principal place of business in Santa Clara, Calif., and 2009 revenues of more than $35 billion. Intuit Inc. is a Delaware corporation with its principal place of business in Mountain View, Calif., and 2009 revenues more than $3 billion. Pixar is a California corporation with its principal place of business in Emeryville, Calif.

The proposed settlement, along with the department's competitive impact statement, will be published in The Federal Register, as required by the Antitrust Procedures and Penalties Act. Any person may submit written comments concerning the proposed settlement within 60 days of its publication to James J. Tierney, Chief, Networks & Technology Enforcement Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street N.W., Suite 7100, Washington D.C. 20530. At the conclusion of the 60-day comment period, the court may enter the final judgment upon a finding that it serves the public interest.

# # #

10-1076

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
U.S. Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 7100
Washington, DC 20530,

Plaintiff,

v.

ADOBE SYSTEMS, INC.
345 Park Avenue
San Jose, CA 95110;

APPLE INC.
1 Infinite Loop
Cupertino, CA 95014;

GOOGLE INC.
1600 Amphitheater Parkway
Mountain View, CA 94043;

INTEL CORPORATION
2200 Mission College Boulevard
Santa Clara, CA 95054;

INTUIT, INC.
2632 Marine Way
Mountain View, CA 94043; and

PIXAR
1200 Park Avenue
Emeryville, CA 94608,

Defendants.

Case: 1:10-cv-01629
Assigned To : Kollar-Kotelly, Colleen
Assign. Date : 9/24/2010
Description: Antitrust

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable relief against Defendants Adobe Systems, Inc. ("Adobe"), Apple Inc. ("Apple"), Google Inc. ("Google"), Intel Corporation ("Intel"), Intuit, Inc. ("Intuit"), and Pixar, alleging as follows:

NATURE OF THE ACTION

1. This action challenges under Section 1 of the Sherman Act five bilateral no cold call agreements among Adobe, Apple, Google, Intel, Intuit, and Pixar.

2. Defendants compete for highly skilled technical employees ("high tech employees") and solicit employees at other high tech companies to fill employment openings. Defendants' concerted behavior both reduced their ability to compete for employees and disrupted the normal price-setting mechanisms that apply in the labor setting. These no cold call agreements are facially anticompetitive because they eliminated a significant form of competition to attract high tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities.

3. Defendants' agreements are restraints of trade that are per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States seeks an order prohibiting such agreements.

JURISDICTION AND VENUE

4. Each Defendant hires specialized computer engineers and scientists throughout the United States, and each sells high technology products throughout the United States. Such activities, including the recruitment and hiring activities at issue in this Complaint, are in the

flow of and substantially affect interstate commerce. The Court has subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. § 4, and under 28 U.S.C. §§ 1331 and 1337 to prevent and restrain the Defendants from violating Section 1 of the Sherman Act, 15 U.S.C. § 1.

5. Venue is proper in this judicial district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391(b)(2), (c). Defendants transact or have transacted substantial business here.

DEFENDANTS

6. Defendant Adobe is a Delaware corporation with its principal place of business in San Jose, California.

7. Defendant Apple is a California corporation with its principal place of business in Cupertino, California.

8. Defendant Google is a Delaware corporation with its principal place of business in Mountain View, California.

9. Defendant Intel is a Delaware corporation with its principal place of business in Santa Clara, California.

10. Defendant Intuit is a Delaware corporation with its principal place of business in Mountain View, California.

11. Defendant Pixar is a California corporation with its principal place of business in Emeryville, California.

TRADE AND COMMERCE

12. High tech labor is characterized by expertise and specialization. Defendants compete for high tech employees, and in particular specialized computer science and engineering

talent on the basis of salaries, benefits, and career opportunities. In recent years, talented computer engineers and computer scientists have been in high demand.

13. Although Defendants employ a variety of recruiting techniques, cold calling another firm's employees is a particularly effective method of competing for computer engineers and computer scientists. Cold calling involves communicating directly in any manner (including orally, in writing, telephonically, or electronically) with another firm's employee who has not otherwise applied for a job opening. Defendants frequently recruit employees by cold calling because other firms' employees have the specialized skills necessary for the vacant position and may be unresponsive to other methods of recruiting. For example, several Defendants at times have received an extraordinary number of job applications per year. Yet these companies still cold called engineers and scientists at other high tech companies to fill certain positions.

14. In a well-functioning labor market, employers compete to attract the most valuable talent for their needs. Defendants' concerted behavior both reduced their ability to compete for employees and disrupted the normal price-setting mechanisms that apply in the labor setting. These no cold call agreements are facially anticompetitive because they eliminated a significant form of competition to attract high tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities.

The Unlawful Agreements

15. The six Defendants entered into five substantially similar agreements not to cold call employees. The agreements were between (i) Apple and Google, (ii) Apple and Adobe, (iii) Apple and Pixar, (iv) Google and Intel, and (v) Google and Intuit. As detailed below, these

agreements were created and enforced by senior executives of these companies.

16. These no cold call agreements were not ancillary to any legitimate collaboration between Defendants. None of the agreements was limited by geography, job function, product group, or time period. Thus, they were much broader than reasonably necessary for the formation or implementation of any collaborative effort. The lack of necessity for these broad agreements is further demonstrated by the fact that Defendants engaged in substantial collaborations that either did not include no cold call agreements or contained narrowly tailored hiring restrictions.

Apple-Google Agreement

17. Beginning no later than 2006, Apple and Google agreed not to cold call each other's employees. Senior executives at Apple and Google reached an express no cold call agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communications.

18. The Apple-Google agreement covered all Google and all Apple employees and was not limited by geography, job function, product group, or time period. Moreover, employees were not informed of and did not agree to this restriction.

19. In furtherance of this agreement, Apple placed Google on its internal "Do Not Call List," which instructed Apple employees not to cold call employees from the listed companies, including Google. Similarly, in its Hiring Policies and Protocols manual, Google listed Apple among the companies that had special agreements with Google and were part of the "Do Not Cold Call" list. The manual instructed Google employees not to cold call employees of the listed companies.

20. The companies, through their senior executives, policed potential breaches of the agreement. In February 2006 and March 2007, Apple complained to Google regarding recruiting efforts Google had made and, on both occasions, Google investigated the matter internally and reported its findings back to Apple.

Apple-Adobe Agreement

21. Beginning no later than May 2005, Apple and Adobe agreed not to cold call each other's employees. Senior executives at Apple and Adobe reached an express no cold call agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communications.

22. The Apple-Adobe agreement covered all Adobe and all Apple employees and was not limited by geography, job function, product group, or time period. Moreover, employees were not informed of and did not agree to this restriction.

23. In furtherance of this agreement, Apple placed Adobe on its internal "Do Not Call List," which instructed Apple employees not to cold call employees from the listed companies, including Adobe. Similarly, Adobe included Apple in its internal list of "Companies that are off limits," instructing recruiters not to cold call candidates from Apple.

Apple-Pixar Agreement

24. Beginning no later than April 2007, Apple and Pixar agreed not to cold call each other's employees. Senior executives at Apple and Pixar reached an express no cold call agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communications.

25. The Apple-Pixar agreement covered all Pixar and all Apple employees and was

not limited by geography, job function, product group, or time period. Moreover, employees were not informed of and did not agree to this restriction.

26. In furtherance of this agreement, Apple placed Pixar on its internal "Do Not Call List," which instructed Apple employees not to cold call employees from the listed companies, including Pixar. Similarly, Pixar instructed Pixar human resources personnel to adhere to the agreement and maintain a paper trail establishing that Pixar had not actively recruited job applicants from Apple.

Google-Intel Agreement

27. Beginning no later than September 2007, Google and Intel agreed not to cold call each other's employees. Senior executives at Google and Intel reached an express no cold call agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communications.

28. The agreement covered all Intel and all Google employees and was not limited by geography, job function, product group, or time period. Moreover, employees were not informed of and did not agree to this restriction.

29. In furtherance of this agreement, Google listed Intel in its Hiring Policies and Protocols manual among the companies that have special agreements with Google and were part of the "Do Not Cold Call" list. The manual instructed Google employees not to cold call employees of the listed companies. Similarly, Intel instructed its human resources staff about the existence of the agreement.

Google-Intuit Agreement

30. In June 2007, Google and Intuit agreed that Google would not cold call any Intuit

employee. Senior executives at Google and Intuit reached an express no cold call agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communications.

31. The agreement covered all Intuit employees and was not limited by geography, job function, product group, or time period. Moreover, Intuit employees were not informed of and did not agree to this restriction.

32. In furtherance of this agreement, in its Hiring Policies and Protocols manual, Google listed Intuit among the companies that had special agreements with Google and were part of the "Do Not Cold Call" list. The manual instructed Google employees not to cold call employees of the listed companies.

VIOLATION ALLEGED

(Violation of Section 1 of the Sherman Act)

33. The United States hereby incorporates paragraphs 1 through 32.

34. Defendants are direct competitors for employees, including specialized computer engineers and scientists, covered by the agreements at issue here. Defendants' concerted behavior both reduced their ability to compete for employees and disrupted the normal price-setting mechanisms that apply in the labor setting. These no cold call agreements are facially anticompetitive because they eliminated a significant form of competition to attract high tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities.

35. Defendants' agreements constitute unreasonable restraints of trade that are per se

unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1.

REQUESTED RELIEF

The United States requests that the Court:

(A) adjudge and decree that Defendants' agreements not to compete constitute illegal restraints of interstate trade and commerce in violation of Section 1 of the Sherman Act;

(B) enjoin and restrain Defendants from enforcing or adhering to existing agreements that unreasonably restrict competition for employees between them;

(C) permanently enjoin and restrain each Defendant from establishing any similar agreement unreasonably restricting competition for employees except as prescribed by the Court;

(D) award the United States such other relief as the Court may deem just and proper to redress and prevent recurrence of the alleged violations and to dissipate the anticompetitive effects of the illegal agreements entered into by Adobe, Apple, Google, Intel, Intuit, and Pixar; and

(E) the United States be awarded the costs of this action.

Dated this 24th day of September 2010.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

Molly S Boast /JRK

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CERTIFICATE OF SERVICE

I, Ryan Struve, hereby certify that on September 24, 2010, I caused a copy of the Complaint to be served on Defendants Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corporation, Intuit, Inc., and Pixar by mailing the document via email to the duly authorized legal representatives of the defendants, as follows:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. ADOBE SYSTEMS, INC.; APPLE INC.; GOOGLE INC.; INTEL CORPORATION; INTUIT, INC.; and PIXAR, *Defendants.*	10cv1629

FINAL JUDGMENT

WHEREAS, the United States of America filed its Complaint on September 24, 2010, alleging that each of the Defendants participated in at least one agreement in violation of Section One of the Sherman Act, and the United States and the Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS this Final Judgment does not constitute any admission by the Defendants that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

AND WHEREAS, the Defendants agree to be bound by the provisions of this Final Judgment pending its approval by this Court;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the Defendants, it is ORDERED, ADJUDGED, AND DECREED.

I. JURISDICTION

This Court has jurisdiction over the subject matter and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the Defendants under Section One of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "Adobe" means Adobe Systems, Inc., its (i) successors and assigns, (ii) controlled subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and (iii) their directors, officers, managers, agents acting within the scope of their agency, and employees.

B. "Apple" means Apple Inc., its (i) successors and assigns, (ii) controlled subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and (iii) their directors, officers, managers, agents acting within the scope of their agency, and employees.

C. "Google" means Google Inc., its (i) successors and assigns, (ii) controlled subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and (iii) their directors, officers, managers, agents acting within the scope of their agency, and employees.

D. "Intel" means Intel Corporation, its (i) successors and assigns, (ii) controlled subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and (iii) their directors, officers, managers, agents acting within the scope of their agency, and employees.

E. "Intuit" means Intuit, Inc., its (i) successors and assigns, (ii) controlled subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and (iii) their directors, officers, managers, agents acting within the scope of their agency, and employees.

F. "Pixar" means Pixar, its (i) successors and assigns, (ii) controlled subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and (iii) their directors, officers, managers, agents acting within the scope of their agency, and employees. Pixar shall include directors, officers, managers, agents, or employees of any parent of or any entity under common control with Pixar, only when such individuals are acting in their capacity as directors, officers, managers, agents, or employees of Pixar.

G. "Agreement" means any contract, arrangement, or understanding, formal or informal, oral or written, between two or more persons.

H. "No direct solicitation provision" means any agreement, or part of an agreement, among two or more persons that restrains any person from cold calling, soliciting, recruiting, or otherwise competing for employees of another person.

I. "Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

J. "Senior manager" means any company officer or employee above the level of vice president.

III. APPLICABILITY

This Final Judgment applies to Adobe, Apple, Google, Intel, Intuit, and Pixar, as defined in Section II, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

Each Defendant is enjoined from attempting to enter into, entering into, maintaining or enforcing any agreement with any other person to in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person.

V. CONDUCT NOT PROHIBITED

A. Nothing in Section IV shall prohibit a Defendant and any other person from attempting to enter into, entering into, maintaining or enforcing a no direct solicitation provision, provided the no direct solicitation provision is:

1. contained within existing and future employment or severance agreements with the Defendant's employees;
2. reasonably necessary for mergers or acquisitions, consummated or unconsummated, investments, or divestitures, including due diligence related thereto;
3. reasonably necessary for contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers;

4. reasonably necessary for the settlement or compromise of legal disputes; or

5. reasonably necessary for (i) contracts with resellers or OEMs; (ii) contracts with providers or recipients of services other than those enumerated in paragraphs V.A. 1 - 4 above; or (iii) the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities.

B. All no direct solicitation provisions that relate to written agreements described in Section V.A.5.i, ii, or iii, that a Defendant enters into, renews, or affirmatively extends after the date of entry of this Final Judgment shall:

1. identify, with specificity, the agreement to which it is ancillary;

2. be narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement;

3. identify with reasonable specificity the employees who are subject to the agreement;

4. contain a specific termination date or event; and

5. be signed by all parties to the agreement, including any modifications to the agreement.

C. For all no direct solicitation provisions that relate to unwritten agreements described in Section V.A.5.i, ii, or iii, that a Defendant enters into, renews, or affirmatively extends after the date of entry of this Final Judgment, the Defendant shall maintain documents sufficient to show:

1. the specific agreement to which the no direct solicitation provision is ancillary;

2. the employees, identified with reasonable specificity, who are subject to the no direct solicitation provision; and

3. the provision's specific termination date or event.

D. Defendants shall not be required to modify or conform, but shall not enforce, any no direct solicitation provision to the extent it violates this Final Judgment if the no direct solicitation provision appears in Defendants' consulting or services agreements in effect as of the date of this Final Judgment (or in effect as of the time a Defendant acquires a company that is a party to such an agreement).

E. Nothing in Section IV shall prohibit a Defendant from unilaterally deciding to adopt a policy not to consider applications from employees of another person, or to solicit, cold call, recruit or hire employees of another person, provided that Defendants are prohibited from requesting that any other person adopt, enforce, or maintain such a policy, and are prohibited from pressuring any other person to adopt, enforce, or maintain such a policy.

VI. REQUIRED CONDUCT

A. Each Defendant shall:

1. furnish a copy of this Final Judgment and related Competitive Impact Statement within sixty days of entry of the Final Judgment to each Defendant's officers, directors, human resources managers, and senior

managers who supervise employee recruiting, solicitation, or hiring efforts;

2. furnish a copy of this Final Judgment and related Competitive Impact Statement to any person who succeeds to a position described in Section VI.A.1 within thirty days of that succession;

3. annually brief each person designated in Sections VI.A.1 and VI.A.2 on the meaning and requirements of this Final Judgment and the antitrust laws;

4. obtain from each person designated in Sections VI.A.1 and VI.A.2, within 60 days of that person's receipt of the Final Judgment, a certification that he or she (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) is not aware of any violation of the Final Judgment that has not been reported to the Defendant; and (iii) understands that any person's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against each Defendant and/or any person who violates this Final Judgment;

5. provide employees reasonably accessible notice of the existence of all agreements covered by Section V.A.5 and entered into by the company; and

6. maintain (i) a copy of all agreements covered by Section V.A.5; and (ii) a record of certifications received pursuant to this Section.

B. For five (5) years after the entry of this Final Judgment, on or before its anniversary date, each Defendant shall file with the United States an annual statement identifying and providing copies of any agreement and any modifications thereto described in Section V.A.5, as well as describing any violation or potential violation of this Final Judgment known to any officer, director, human resources manager, or senior manager who supervises employee recruiting, solicitation, or hiring efforts. Descriptions of violations or potential violations of this Final Judgment shall include, to the extent practicable, a description of any communications constituting the violation or potential violation, including the date and place of the communication, the persons involved, and the subject matter of the communication.

C. If any officer, director, human resources manager, or senior manager who supervises employee recruiting, solicitation, or hiring efforts of a Defendant learns of any violation or potential violation of any of the terms and conditions contained in this Final Judgment, that Defendant shall promptly take appropriate action to terminate or modify the activity so as to comply with this Final Judgment and maintain all documents related to any violation or potential violation of this Final Judgment.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to each Defendant, subject to any legally recognized privilege, be permitted:

1. access during each Defendant's regular office hours to inspect and copy, or at the option of the United States, to require each Defendant to provide electronic or hard copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of each Defendant, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, each Defendant's officers, employees, or agents, who may have their counsel, including any individual counsel, present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by any Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, each Defendant shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a Defendant to the United States, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal

Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give the Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. EXPIRATION OF FINAL JUDGMENT

Unless this court grants an extension, this Final Judgment shall expire five (5) years from the date of its approval by the Court.

X. NOTICE

For purposes of this Final Judgment, any notice or other communication shall be given to the persons at the addresses set forth below (or such other addresses as they may specify in writing to Adobe, Apple, Google, Intel, Intuit, and Pixar):

Chief
Networks & Technology Enforcement Section
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

XI. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the Procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this final judgment is in the public interest.

Date: March 17, 2011

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

Reggie B. Walton

United States District Judge

Joseph R. Saveri (State Bar No. 130064)
Eric B. Fastiff (State Bar No. 182260)
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[Additional counsel listed on signature page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Master Docket No. 11-CV-2509-LHK **CONSOLIDATED AMENDED COMPLAINT**

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JURY DEMAND 27

Plaintiffs Michael Devine, Mark Fichtner, Siddharth Hariharan, Brandon Marshall, and Daniel Stover, individually and on behalf of a class of all those similarly situated (the "Class"), complain against defendants Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., Pixar, and DOES 1-200 (collectively, "Defendants"), and allege as follows:

I. <u>SUMMARY OF THE ACTION</u>

1. This class action challenges a conspiracy among Defendants to fix and suppress the compensation of their employees. Without the knowledge or consent of their employees, Defendants' senior executives entered into an interconnected web of express agreements to eliminate competition among them for skilled labor. This conspiracy included: (1) agreements not to recruit each other's employees; (2) agreements to notify each other when making an offer to another's employee; and (3) agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer.

2. The intended and actual effect of these agreements was to fix and suppress employee compensation, and to impose unlawful restrictions on employee mobility. Defendants' conspiracy and agreements restrained trade and are *per se* unlawful under federal and California law. Plaintiffs seek injunctive relief and damages for violations of: Section 1 of the Sherman Act, 15 U.S.C. § 1; the Cartwright Act, California Business and Professions Code §§ 16720, *et seq.*; California Business and Professions Code § 16600; and California Business and Professions Code §§ 17200, *et seq.*

3. In 2009 through 2010, the Antitrust Division of the United States Department of Justice (the "DOJ") investigated Defendants' misconduct. The DOJ found that Defendants' agreements violated the Sherman Act *per se* and "are facially anticompetitive because they eliminated a significant form of competition to attract high tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities." The DOJ concluded that Defendants' agreements "disrupted the normal price-setting mechanisms that apply in the labor setting."

4. The DOJ confirmed that it will not seek to compensate employees who were injured by Defendants' agreements. Without this class action, Plaintiffs and the Class will not receive compensation for their injuries, and Defendants will continue to retain the benefits of their unlawful collusion.

II. JURISDICTION AND VENUE

5. Plaintiffs bring this action to recover damages and obtain injunctive relief, including treble damages, costs of suit, and reasonable attorneys' fees arising from Defendants violations of: Section 1 of the Sherman Act, 15 U.S.C. § 1; the Cartwright Act, California Business and Professions Code §§ 16720, *et seq.*; California Business and Professions Code § 16600; and California Business and Professions Code §§ 17200, *et seq.*

6. The Court has subject matter jurisdiction pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) and 28 U.S.C. §§ 1331 and 1337.

7. Venue is proper in this judicial district pursuant to Section 12 of the Clayton Act (15 U.S.C. § 22) and 28 U.S.C. § 1391(b), (c), and (d) because a substantial part of the events giving rise to Plaintiffs' claims occurred in this district, a substantial portion of the affected interstate trade and commerce was carried out in this district, and one or more of the defendants reside in this district.

8. Defendants are subject to the jurisdiction of this Court by virtue of their nationwide contacts and other activities, as well as their contacts with the State of California.

III. CHOICE OF LAW

9. California law applies to the claims of Plaintiffs and all Class members. Application of California law is constitutional, and California has a strong interest in deterring unlawful business practices of resident corporations and compensating those harmed by activities occurring in and emanating from California.

10. California is the state in which Defendants negotiated, entered into, implemented, monitored, and enforced the conspiracy and associated agreements. These illicit activities were centered within, and for the most part occurred within, the County of Santa Clara.

11. Defendants' actively concealed their participation in the conspiracy, and actively concealed the existence of their unlawful agreements, in California. These active concealment efforts were centered within the County of Santa Clara.

12. California is the State in which Plaintiffs' and Class members' relationship with the Defendants is centered. More specifically, Santa Clara is the County in which Plaintiffs and Class members' relationship with Defendants is centered. At least a majority of class members reside in California. At least 98% of Class members were employed by Defendants who maintained (and continue to maintain) their principal places of business in Santa Clara.

13. Plaintiffs and Class members were injured by conduct occurring in, and emanating from, California. The overwhelming majority of the conduct causing the injuries suffered by Plaintiffs and Class members occurred within the County of Santa Clara.

14. For these reasons, among others, California has significant contacts, and a significant aggregation of contacts, creating state interests, with all parties and the acts alleged herein.

15. California's substantial interests far exceed those of any other state.

IV. THE PARTIES

A. Plaintiffs

16. Plaintiff Michael Devine is a citizen of the State of Washington. From approximately October of 2006 through July 7, 2008, Mr. Devine was a citizen of the State of Washington and worked in the state of Washington as a software engineer for Adobe Systems Inc. Mr. Devine was injured in his business or property by reason of the violations alleged herein.

17. Plaintiff Mark Fichtner is a citizen of the State of Arizona. From approximately May of 2008 through May of 2011, Mr. Fichtner was a citizen of the State of Arizona and worked in the State of Arizona as a software engineer for Intel Corp. Mr. Fichtner was injured in his business or property by reason of the violations alleged herein.

18. Plaintiff Siddharth Hariharan is a citizen of the State of California. From January 8, 2007 through August 15, 2008, Mr. Hariharan was a citizen of the State of California

and worked in California as a software engineer for Lucasfilm. Mr. Hariharan was injured in his business or property by reason of the violations alleged herein.

19. Plaintiff Brandon Marshall is a citizen of the State of California and resides in the County of Santa Clara. From approximately July of 2006 through December of 2006, Mr. Marshall was a citizen of the State of California, resided in the County of Santa Clara, and worked in the County of Santa Clara as a software engineer for Adobe Systems Inc. Mr. Marshall was injured in his business or property by reason of the violations alleged herein.

20. Plaintiff Daniel Stover is a citizen of the State of Washington. From July of 2006 through December of 2010, Mr. Stover was a citizen of the State of California and worked in the County of Santa Clara as a software engineer for Intuit Inc. Mr. Stover was injured in his business or property by reason of the violations alleged herein.

B. Defendants

21. Defendant Adobe Systems Inc. ("Adobe") is a Delaware corporation with its principal place of business located at 345 Park Avenue, San Jose, California 95110.

22. Defendant Apple Inc. ("Apple") is a California corporation with its principal place of business located at 1 Infinite Loop, Cupertino, California 95014.

23. Defendant Google Inc. ("Google") is a Delaware corporation with its principal place of business located at 1600 Amphitheatre Parkway, Mountain View, California 94043.

24. Defendant Intel Corp. ("Intel") is a Delaware corporation with its principal place of business located at 2200 Mission College Boulevard, Santa Clara, California 95054.

25. Defendant Intuit Inc. ("Intuit") is a Delaware corporation with its principal place of business located at 2632 Marine Way, Mountain View, California 94043.

26. Defendant Lucasfilm Ltd. ("Lucasfilm") is a California corporation with its principal place of business located at 1110 Gorgas Ave., in San Francisco, California 94129.

27. Defendant Pixar is a California corporation with its principal place of business located at 1200 Park Avenue, Emeryville, California 94608.

28. Plaintiffs allege on information and belief that DOES 1-50, inclusive, were co-conspirators with other Defendants in the violations alleged in this Complaint and performed acts and made statements in furtherance thereof. DOES 1-50 are corporations, companies, partnerships, or other business entities that maintain their principal places of business in California. Plaintiffs are presently unaware of the true names and identities of those defendants sued herein as DOES 1-50. Plaintiffs will amend this Complaint to allege the true names of the DOE defendants when they are able to ascertain them.

29. Plaintiffs allege on information and belief that DOES 51-200, inclusive, were co-conspirators with other Defendants in the violations alleged in this Complaint and performed acts and made statements in furtherance thereof. DOES 51-200 are residents of the State of California and are corporate officers, members of the boards of directors, or senior executives of Adobe, Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and DOES 1-50. Plaintiffs are presently unaware of the true names and identities of those defendants sued herein as DOES 51-200. Plaintiffs will amend this Complaint to allege the true names of the DOE defendants when they are able to ascertain them.

V. CLASS ACTION ALLEGATIONS

30. Plaintiffs bring this action on behalf of themselves and all others similarly situated (the "Class") pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3). The Class is defined as follows:

> All natural persons employed by Defendants in the United States on a salaried basis during the period from January 1, 2005 through January 1, 2010 (the "Class Period"). Excluded from the Class are: retail employees; corporate officers, members of the boards of directors, and senior executives of Defendants who entered into the illicit agreements alleged herein; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.

31. Plaintiffs do not, as yet, know the exact size of the Class because such information is in the exclusive control of Defendants. Based upon the nature of the trade and commerce involved, Plaintiffs believe that there are at least tens of thousands of Class members,

and that Class members are geographically dispersed throughout California and the United States. Joinder of all members of the Class, therefore, is not practicable.

32. The questions of law or fact common to the Class include but are not limited to:

a. whether the conduct of Defendants violated the Sherman Act or Cartwright Act;

b. whether Defendants' conspiracy and associated agreements, or any one of them, constitute a *per se* violation of the Sherman Act or Cartwright Act;

c. whether Defendants' agreements are void as a matter of law under California Business and Professions Code § 16600;

d. whether the conduct of Defendants violated California Business and Professions Code §§ 17200, *et seq.*;

e. whether Defendants fraudulently concealed their conduct;

f. whether Defendants' conspiracy and associated agreements restrained trade, commerce, or competition for skilled labor among Defendants;

g. whether Plaintiffs and the Class suffered antitrust injury or were threatened with injury;

h. the difference between the total compensation Plaintiffs and the Class received from Defendants, and the total compensation Plaintiffs and the Class would have received from Defendants in the absence of the illegal acts, contracts, combinations, and conspiracy alleged herein;

i. the type and measure of damages suffered by Plaintiffs and the Class.

33. These and other questions of law and fact are common to the Class, and predominate over any questions affecting only individual Class members.

34. Plaintiffs' claims are typical of the claims of the Class.

35. Plaintiffs will fairly and adequately represent the interests of the Class and have no conflict with the interests of the Class.

36. Plaintiffs have retained competent counsel experienced in antitrust litigation and class action litigation to represent themselves and the Class.

37. Defendants have acted on grounds generally applicable to the Class, thereby making final injunctive relief appropriate with respect to the Class as a whole.

38. This class action is superior to the alternatives, if any, for the fair and efficient adjudication of this controversy. Prosecution as a class action will eliminate the possibility of repetitive litigation. There will be no material difficulty in the management of this action as a class action. By contrast, prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for Defendants.

VI. FACTUAL ALLEGATIONS

A. Trade And Commerce

39. During the Class Period, Defendants employed Class members in California and throughout the United States, including this judicial district.

40. Defendants' conduct substantially affected interstate commerce throughout the United States and caused antitrust injury throughout the United States.

B. Market For High Technology Employees

41. In a properly functioning and lawfully competitive labor market, each Defendant would compete for employees by soliciting current employees of one or more other Defendants. Defendants refer to this recruiting method as "cold calling." Cold calling includes communicating directly in any manner (including orally, in writing, telephonically, or electronically) with another firm's employee who has not otherwise applied for a job opening.

42. Cold calling is a particularly effective recruiting method because current employees of other companies are often unresponsive to other recruiting strategies.

43. Defendants and other high technology companies classify potential employees into two categories: first, those who are currently employed by rival firms and not actively seeking to change employers; and second, those who are actively looking for employment offers (either because they are unemployed, or because they are unsatisfied with

their current employer). Defendants and other high technology companies value potential employees of the first category significantly higher than potential employees of the second category, because current satisfied employees tend to be more qualified, harder working, and more stable than those who are actively looking for employment.

44. In addition, a company searching for a new hire is eager to save costs and avoid risks by poaching that employee from a rival company. Through poaching, a company is able to take advantage of the efforts its rival has expended in soliciting, interviewing, and training skilled labor, while simultaneously inflicting a cost on the rival by removing an employee on whom the rival may depend.

45. For these reasons and others, cold calling is a key competitive tool companies use to recruit employees, particularly high technology employees with advanced skills and abilities.

46. The practice of cold calling has a significant impact on employee compensation in a variety of ways. First, without receiving cold calls from rival companies, current employees lack information regarding potential pay packages and lack leverage over their employers in negotiating pay increases. When a current employee receives a cold call from a rival company with an offer that exceeds her current compensation, the current employee may either accept that offer and move from one employer to another, or use the offer to negotiate increased compensation from her current employer. In either case, the recipient of the cold call has an opportunity to use competition among potential employers to increase her compensation and mobility.

47. Second, once an employee receives information regarding potential compensation from rival employers through a cold call, that employee is likely to inform other employees of her current employer. These other employees often use the information themselves to negotiate pay increases or move from one employer to another, despite the fact that they themselves did not receive a cold call.

48. Third, cold calling a rival's employees provides information to the cold caller regarding its rival's compensation practices. Increased information and transparency

regarding compensation levels tends to increase compensation across all current employees, because there is pressure to match or exceed the highest compensation package offered by rivals in order to remain competitive.

49. Fourth, cold calling is a significant factor responsible for losing employees to rivals. When a company expects that its employees will be cold called by rivals with employment offers, the company will preemptively increase the compensation of its employees in order to reduce the risk that its rivals will be able to poach relatively undercompensated employees.

50. The compensation effects of cold calling are not limited to the particular individuals who receive cold calls, or to the particular individuals who would have received cold calls but for the anticompetitive agreements alleged herein. Instead, the effects of cold calling (and the effects of eliminating cold calling, pursuant to agreement) commonly impact all salaried employees of the participating companies.

51. Defendants carefully monitor and manage their internal compensation levels to achieve certain goals, including:

a. maintaining approximate compensation parity among employees within the same employment categories (for example, among junior software engineers);

b. maintaining certain compensation relationships among employees across different employment categories (for example, among junior software engineers relative to senior software engineers);

c. maintaining high employee morale and productivity;

d. retaining employees; and

e. attracting new and talented employees.

52. To accomplish these objectives, Defendants set baseline compensation levels for different employee categories that apply to all employees within those categories. Defendants also compare baseline compensation levels across different employee categories. Defendants update baseline compensation levels regularly.

53. While Defendants sometimes engage in negotiations regarding compensation levels with individual employees, these negotiations occur from a starting point of the pre-existing and pre-determined baseline compensation level. The eventual compensation any particular employee receives is either entirely determined by the baseline level, or is profoundly influenced by it. In either case, suppression of baseline compensation will result in suppression of total compensation.

54. Thus, under competitive and lawful conditions, Defendants would use cold calling as one of their most important tools for recruiting and retaining skilled labor, and the use of cold calling among Defendants commonly impacts and increases total compensation and mobility of all Defendants' employees.

C. <u>Defendants' Conspiracy To Fix The Compensation Of Their Employees At Artificially Low Levels</u>

55. Defendants' conspiracy consisted of an interconnected web of express agreements, each with the active involvement and participation of a company under the control of Steven P. Jobs ("Steve Jobs") and/or a company that shared at least one member of Apple's board of directors. Defendants entered into the express agreements and entered into the overarching conspiracy with knowledge of the other Defendants' participation, and with the intent of accomplishing the conspiracy's objective: to reduce employee compensation and mobility through eliminating competition for skilled labor.

2. <u>The Conspiracy Began With Secret and Express Agreements Between Pixar And Lucasfilm</u>

56. The conspiracy began with an agreement between senior executives of Pixar and Lucasfilm to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of their employees.

57. Pixar and Lucasfilm have a shared history. In 1986, Steve Jobs purchased Lucasfilm's computer graphics division, established it as an independent company, and called it "Pixar." Thereafter and until 2006, Steve Jobs remained C.E.O. of Pixar.

58. Before Steve Jobs's departure as C.E.O. of Pixar and beginning no later than January 2005, senior executives of Pixar and Lucasfilm entered into at least three agreements to eliminate competition between them for skilled labor.

59. First, each agreed not to cold call each other's employees.

60. Second, each agreed to notify the other company when making an offer to an employee of the other company, if that employee applied for a job notwithstanding the absence of cold calling.

61. Third, each agreed that if either made an offer to such an employee of the other company, neither company would counteroffer above the initial offer. This third agreement was created with the intent and effect of eliminating "bidding wars," whereby an employee could use multiple rounds of bidding between Pixar and Lucasfilm to increase her total compensation.

62. Pixar and Lucasfilm reached these express agreements through direct and explicit communications among senior executives. Pixar drafted the written terms of the agreements in Emeryville, California and sent those terms to Lucasfilm. Pixar and Lucasfilm then provided the written terms to management and certain senior employees with the relevant hiring or recruiting responsibilities.

63. The three agreements covered all employees of the two companies, were not limited by geography, job function, product group, or time period, and were not ancillary to any legitimate collaboration between Pixar and Lucasfilm.

64. Senior executives of Pixar and Lucasfilm actively concealed their unlawful agreements. Employees of Pixar and Lucasfilm were not aware of, and did not agree to, the terms of the agreements between Pixar and Lucasfilm.

65. After entering into the agreements, senior executives of both Pixar and Lucasfilm monitored compliance and policed violations. For instance, in 2007, from its principal place of business in Emeryville, California, Pixar twice contacted Lucasfilm regarding suspected violations of their agreements. Lucasfilm responded by changing its conduct to conform to its anticompetitive agreements with Pixar. The senior executives of Pixar who monitored

Lucasfilm's compliance and policed Lucasfilm's violations worked in Pixar's principal place of business in Emeryville, California.

66. Until no later than May of 2005, Lucasfilm employees were harmed primarily through the actions and inactions of Pixar, pursuant to Pixar's illicit agreements with Lucasfilm (agreements that were drafted in Emeryville, California).

67. First, but for its agreements with Lucasfilm, Pixar would have cold called Lucasfilm employees from Pixar's principal place of business in Emeryville, California, where Pixar's management and senior employees with the relevant hiring or recruiting responsibilities worked. Instead, pursuant to agreement, Pixar (in Emeryville, California) directed its management and certain senior employees not to cold call Lucasfilm employees.

68. Second, when Pixar (from Emeryville, California) made an offer to a Lucasfilm employee, Pixar (from Emeryville, California) notified Lucasfilm of the terms of the offer.

69. Third, if Lucasfilm, upon receiving Pixar's notification, decided to match Pixar's offer to retain the employees in question, Pixar (from Emeryville, California) did not raise its offer beyond Pixar's initial bid.

70. Thus, until no later than May of 2005, the acts that reduced artificially the compensation of Lucasfilm employees occurred primarily in Pixar's offices in Emeryville, California.

71. After no later than May of 2005, and continuing until approximately January 1, 2010, Lucafilm employees were also harmed by the conduct of the remaining Defendants, as hereafter alleged. The conduct of the remaining Defendants occurred principally in the County of Santa Clara.

3. <u>Apple Enters Into A Similar Express Agreement With Adobe</u>

72. Shortly after Pixar entered into the agreements with Lucasfilm, Apple (which was then also under the control of Steve Jobs) entered into an agreement with Adobe that was identical to the first agreement Pixar entered into with Lucasfilm. Apple and Adobe agreed

to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of their employees.

73. Beginning no later than May 2005, Apple and Adobe agreed not to cold call each other's employees.

74. Senior executives of Apple and Adobe reached the agreement through direct and explicit communications. These executives then actively managed and enforced the agreement through further direct communications.

75. This explicit agreement between Apple and Adobe was negotiated, finalized, implemented, and enforced in the County of Santa Clara.

76. The agreement between Apple and Adobe concerned all Apple and all Adobe employees, was not limited by geography, job function, product group, or time period, and was not ancillary to any legitimate collaboration between the companies.

77. Senior executives of Apple and Adobe actively concealed their unlawful agreement and their participation in the conspiracy. These concealment efforts occurred principally in the County of Santa Clara. Employees of Apple and Adobe were not aware of, and did not agree to, these restrictions.

78. In complying with the agreement, Apple placed Adobe on its internal "Do Not Call List," which instructed Apple recruiters not to cold call Adobe employees. Adobe included Apple on its internal list of "Companies that are off limits," instructing its employees not to cold call employees of Apple. Both of these lists were created and maintained in the County of Santa Clara.

4. Apple Enters Into an Express Agreement with Google To Suppress Employee Compensation And Eliminate Competition

79. The conspiracy expanded to include Google no later than 2006. Apple and Google agreed to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of their employees. Senior executives of Apple and Google expressly agreed, through direct communications, not to cold call each other's employees. During 2006, Arthur D. Levinson sat on the boards of both Apple and Google.

80. This explicit agreement between Apple and Google was negotiated, finalized, implemented, and enforced in the County of Santa Clara.

81. The agreement between Apple and Google concerned all Apple and all Google employees, was not limited by geography, job function, product group, or time period, and was not ancillary to any legitimate collaboration between the companies.

82. Apple and Google actively concealed their agreement and their participation in the conspiracy. These concealment efforts occurred principally in the County of Santa Clara. Employees were not informed of and did not agree to the restrictions.

83. To ensure compliance with the agreement, Apple placed Google on its internal "Do Not Call List," which instructed Apple employees not to cold call Google employees. In turn, Google placed Apple on its internal "Do Not Cold Call" list, and instructed relevant employees not to cold call Apple employees. Both of these lists were created and maintained in the County of Santa Clara.

84. Senior executives of Apple and Google monitored compliance with the agreement and policed violations. In February and March 2007, Apple contacted Google to complain about suspected violations of the agreement. In response, Google conducted an internal investigation and reported its findings back to Apple. These enforcement activities occurred in the County of Santa Clara.

5. Apple Enters Into Another Express Agreement with Pixar

85. Beginning no later than April 2007, Apple entered into an agreement with Pixar that was identical to its earlier agreements with Adobe and Google. Apple and Pixar agreed to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of their employees. Senior executives of Apple and Pixar expressly agreed, through direct communications, not to cold call each other's employees.

86. This explicit agreement between Apple and Pixar was negotiated, finalized, implemented, and enforced in the County of Santa Clara and the County of Alameda.

87. At this time, Steve Jobs continued to exert substantial control over Pixar. On January 24, 2006, Jobs announced that he had agreed to sell Pixar to the Walt Disney

Company. After the deal closed, Jobs became the single largest shareholder of the Walt Disney Company, with over 6% of the company's stock. Jobs thereafter sat on Disney's board of directors and continued to oversee Disney's animation businesses, including Pixar.

88. The agreement between Apple and Pixar concerned all Apple and all Pixar employees, was not limited by geography, job function, product group, or time period, and was not ancillary to any legitimate collaboration between the companies.

89. Apple and Pixar actively concealed their agreement and their participation in the conspiracy. Employees were not informed of and did not agree to the restrictions.

90. To ensure compliance with the agreement, Apple placed Pixar on its internal "Do Not Call List," which instructed Apple employees not to cold call Pixar employees. Apple created and maintained this list in the County of Santa Clara. Pixar instructed its human resource personnel to adhere to the agreement and to preserve documentary evidence establishing that Pixar had not actively recruited Apple employees.

91. Senior executives of Apple and Pixar monitored compliance with the agreement and policed violations.

6. <u>Steve Jobs Attempts To Expand the Conspiracy to Include Palm Inc.</u>

92. In approximately August 2007, Steve Jobs contacted the CEO of Palm Inc. ("Palm"), Edward T. Colligan ("Ed Colligan"), to propose that Apple and Palm agree to refrain from hiring each other's employees.

93. In the several months preceding August 2007, Apple and Palm cold called each other's employees and otherwise competed for each other's skilled labor. Apple hired approximately 2% of Palm's workforce, and Palm hired a valuable and highly talented Apple executive, Jon Rubinstein, among other Apple employees. This lawful competition led to increased compensation for employees of the companies and increased labor mobility and choice.

94. Steve Jobs sought to end competition between Palm and Apple for skilled labor. Steve Jobs communicated directly with Ed Colligan, stating that "We must do whatever we can" to stop cold calling and other competitive recruiting efforts between the companies.

Steve Jobs attempted to intimidate Palm into agreeing to the proposal by threatening litigation, and stating that Apple had patents and more money than Palm.

95. Ed Colligan rebuffed Steve Jobs' efforts, telling him: "Your proposal that we agree that neither company will hire the other's employees, regardless of the individual's desires, is not only wrong, it is likely illegal."

96. Approximately all of the relevant events and communications regarding Steve Jobs' illicit offer to Palm, and Ed Colligan's refusal, occurred within the County of Santa Clara.

7. <u>Google Enters Into An Express Agreement With Intel</u>

97. In 2007, Google CEO Eric Schmidt sat on Apple's board of directors, along with Arthur D. Levinson, who continued to sit on the boards of both Apple and Google.

98. Beginning no later than September 2007, Google entered into an agreement with Intel that was identical to Google's earlier agreement with Apple, and identical to Apple's earlier agreements with Adobe and Pixar. Google and Intel agreed to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of their employees. Senior executives of Google and Intel expressly agreed, through direct communications, not to cold call each other's employees.

99. This explicit agreement between Google and Intel was negotiated, finalized, implemented, and enforced in the County of Santa Clara.

100. The agreement between Google and Intel concerned all Google and all Intel employees, was not limited by geography, job function, product group, or time period, and was not ancillary to any legitimate collaboration between the companies. Google and Intel actively concealed their agreement and their participation in the conspiracy. These concealment efforts occurred principally in the County of Santa Clara. Employees were not informed of and did not agree to the restrictions.

101. To ensure compliance with the agreement, Google listed Intel on its "Do Not Cold Call" list and instructed Google employees not to cold call Intel employees. Intel also informed its relevant personnel about its agreement with Google, and instructed them not to cold

call Google employees. Google's "Do Not Cold Call" list was created and maintained in the County of Santa Clara.

102. Senior executives of Google and Intel monitored compliance with the agreement and policed violations. These enforcement activities occurred in the County of Santa Clara.

8. <u>Google and Intuit Enter Into Another Express Agreement</u>

103. In June 2007, Google entered into an express agreement with Intuit that was identical to Google's earlier agreements with Intel and Apple, and identical to the earlier agreements between Apple and Adobe, and between Apple and Pixar. Google CEO Eric Schmidt sat on Apple's board of directors, along with Arthur D. Levinson, who continued to sit on the boards of both Apple and Google.

104. Google and Intuit agreed to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of their employees. Senior executives of Google and Intuit expressly agreed, through direct communications, not to cold call each other's employees. This explicit agreement between Google and Intuit was negotiated, finalized, implemented, and enforced in the County of Santa Clara.

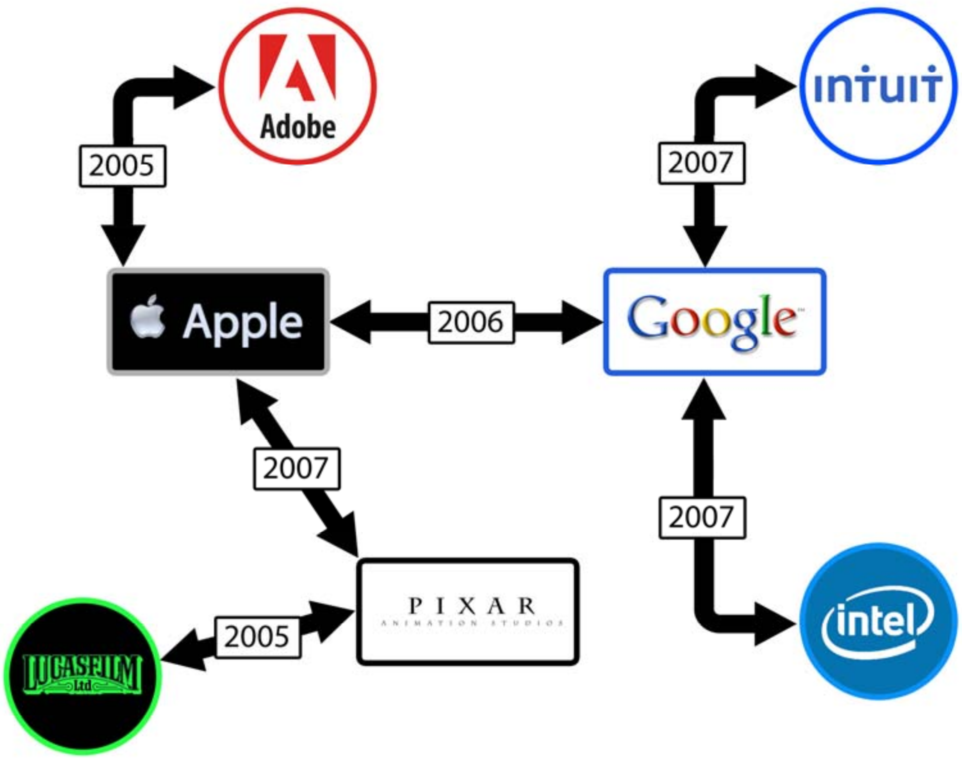
105. The agreement between Google and Intuit concerned all Google and all Intuit employees, was not limited by geography, job function, product group, or time period, and was not ancillary to any legitimate collaboration between the companies. Google and Intuit actively concealed their agreement and their participation in the conspiracy. These concealment efforts occurred principally in the County of Santa Clara. Employees were not informed of and did not agree to the restrictions.

106. To ensure compliance with the agreement, Google listed Intuit on its "Do Not Cold Call" list and instructed Google employees not to cold call Intuit employees. Intuit also informed its relevant personnel about its agreement with Google, and instructed them not to cold call Google employees.

107. Senior executives of Google and Intuit monitored compliance with the agreement and policed violations. These enforcement activities occurred in the County of Santa Clara.

D. <u>Effects Of Defendants' Conspiracy On Plaintiffs And The Class</u>

108. Defendants eliminated competition for skilled labor by entering into the interconnected web of agreements, and the overarching conspiracy, alleged herein. These agreements are summarized graphically as follows:



Defendants entered into, implemented, and policed these agreements with the knowledge of the overall conspiracy, and did so with the intent and effect of fixing the compensation of the employees of participating companies at artificially low levels. For example, every agreement alleged herein directly involved a company either controlled by Steve Jobs, or a company that shared a member of its board of directors with Apple. As additional companies joined the conspiracy, competition among participating companies for skilled labor further decreased, and compensation and mobility of the employees of participating companies was further suppressed. These anticompetitive effects were the purpose of the agreements, and Defendants succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market.

109. Defendants' conspiracy was an ideal tool to suppress their employees' compensation. Whereas agreements to fix specific and individual compensation packages would be hopelessly complex and impossible to monitor, implement, and police, eliminating entire categories of competition for skilled labor (that affected the compensation and mobility of all employees in a common and predictable fashion) was simple to implement and easy to enforce.

110. Plaintiffs and each member of the Class were harmed by each and every agreement herein alleged. The elimination of competition and suppression of compensation and mobility had a cumulative effect on all Class members. For example, an individual who was an employee of Lucasfilm received lower compensation and faced unlawful obstacles to mobility as a result of not only the illicit agreements with Pixar, but also as a result of Pixar's agreement with Apple, and so on.

E. The Investigation By The Antitrust Division Of The United States Department Of Justice And Subsequent Admissions By Defendants

111. Beginning in approximately 2009, the Antitrust Division of the United States Department of Justice (the "DOJ") conducted an investigation into the employment practices of Defendants. The DOJ issued Civil Investigative Demands to Defendants that resulted in Defendants producing responsive documents to the DOJ. The DOJ also interviewed witnesses to certain of the agreements alleged herein.

112. After reviewing these materials, the DOJ concluded that Defendants had agreed to naked restraints of trade that were *per se* unlawful under the antitrust laws. The DOJ found that Defendants' agreements "are facially anticompetitive because they eliminated a significant form of competition to attract high tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities." The DOJ further found that the agreements "disrupted the normal price-setting mechanisms that apply in the labor setting."

113. The DOJ also concluded that Defendants' agreements "were not ancillary to any legitimate collaboration" and were "much broader than reasonably necessary for the formation or implementation of any collaborative effort."

114. On September 24, 2010, the DOJ filed a complaint regarding Defendants' agreements against Adobe, Apple, Google, Intel, Intuit, and Pixar. On December 21, 2010, the DOJ filed another complaint regarding Defendants' agreements, this time against Lucasfilm and Pixar. In both cases, the DOJ filed stipulated proposed final judgments in which Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar agreed that the DOJ's complaints "state[] a claim upon which relief may be granted" under federal antitrust law.

115. In the stipulated proposed final judgments, Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar agreed to be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." Defendants also agreed to a variety of enforcement measures and to comply with ongoing inspection procedures. The United States District Court for the District of Columbia entered the stipulated proposed final judgments on March 17, 2011 and June 3, 2011.

116. After the DOJ's investigation became public in the fall of 2010, Defendants acknowledged participating in the agreements the DOJ alleged in its complaints. These acknowledgments included a statement on September 24, 2010 by Amy Lambert, associate general counsel for Google, who stated that, for years, Google had "decided" not to "'cold call' employees at a few of our partner companies." Lambert also said that a "number of other tech companies had similar 'no cold call' policies—policies which the U.S. Justice Department has been investigating for the past year."

117. The DOJ did not seek monetary penalties of any kind against Defendants, and made no effort to compensate employees of the Defendants who were harmed by Defendants' anticompetitive conduct.

118. Without this class action, Plaintiffs and the Class will be unable to obtain compensation for the harm they suffered, and Defendants will retain the benefits of their unlawful conspiracy.

FIRST CLAIM FOR RELIEF
(*Violations of Section 1 of the Sherman Act, 15 U.S.C. § 1*)

119. Plaintiffs, on behalf of themselves and all others similarly situated, reallege and incorporate herein by reference each of the allegations contained in the preceding paragraphs of this Complaint, and further allege against Defendants and each of them as follows:

120. Defendants entered into and engaged in unlawful agreements in restraint of the trade and commerce described above in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Beginning no later than January 2005 and continuing at least through 2009, Defendants engaged in continuing trusts in restraint of trade and commerce in violation of Section 1 of the Sherman Act.

121. Defendants' agreements have included concerted action and undertakings among the Defendants with the purpose and effect of: (a) fixing the compensation of Plaintiffs and the Class at artificially low levels; and (b) eliminating, to a substantial degree, competition among Defendants for skilled labor.

122. As a direct and proximate result of Defendants' combinations and contracts to restrain trade and eliminate competition for skilled labor, members of the Class have suffered injury to their property and have been deprived of the benefits of free and fair competition on the merits.

123. The unlawful agreements among Defendants has had the following effects, among others:

a. competition among Defendants for skilled labor has been suppressed, restrained, and eliminated; and

b. Plaintiffs and class members have received lower compensation from Defendants than they otherwise would have received in the absence of Defendants' unlawful agreements, and, as a result, have been injured in their property and have suffered damages in an amount according to proof at trial.

124. The acts done by each Defendant as part of, and in furtherance of, their contracts, combinations or conspiracies were authorized, ordered, or done by their respective officers, directors, agents, employees, or representatives while actively engaged in the management of each Defendant's affairs.

125. Defendants' contracts, combinations and/or conspiracies are *per se* violations of Section 1 of the Sherman Act.

126. Accordingly, Plaintiffs and members of the Class seek three times their damages caused by Defendants' violations of Section 1 of the Sherman Act, the costs of bringing suit, reasonable attorneys' fees, and a permanent injunction enjoining Defendants' from ever again entering into similar agreements in violation of Section 1 of the Sherman Act.

SECOND CLAIM FOR RELIEF
(*Violations of the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720, et seq.*)

127. Plaintiffs, on behalf of themselves and all others similarly situated, reallege and incorporate herein by reference each of the allegations contained in the preceding paragraphs of this Complaint, and further alleges against Defendants and each of them as follows:

128. Defendants entered into and engaged in an unlawful trust in restraint of the trade and commerce described above in violation of California Business and Professions Code section 16720. Beginning no later than January 2005 and continuing at least through 2009, Defendants engaged in continuing trusts in restraint of trade and commerce in violation of the Cartwright Act.

129. Defendants' trusts have included concerted action and undertakings among the Defendants with the purpose and effect of: (a) fixing the compensation of Plaintiffs and the Class at artificially low levels; and (b) eliminating, to a substantial degree, competition among Defendants for skilled labor.

130. As a direct and proximate result of Defendants' combinations and contracts to restrain trade and eliminate competition for skilled labor, members of the Class have suffered

injury to their property and have been deprived of the benefits of free and fair competition on the merits.

131. The unlawful trust among Defendants has had the following effects, among others:

a. competition among Defendants for skilled labor has been suppressed, restrained, and eliminated; and

b. Plaintiffs and Class members have received lower compensation from Defendants than they otherwise would have received in the absence of Defendants' unlawful trust, and, as a result, have been injured in their property and have suffered damages in an amount according to proof at trial.

132. Plaintiffs and members of the Class are "persons" within the meaning of the Cartwright Act as defined in section 16702.

133. The acts done by each Defendant as part of, and in furtherance of, their contracts, combinations or conspiracies were authorized, ordered, or done by their respective officers, directors, agents, employees, or representatives while actively engaged in the management of each Defendant's affairs.

134. Defendants' contracts, combinations and/or conspiracies are *per se* violations of the Cartwright Act.

135. Accordingly, Plaintiffs and members of the Class seek three times their damages caused by Defendants' violations of the Cartwright Act, the costs of bringing suit, reasonable attorneys' fees, and a permanent injunction enjoining Defendants' from ever again entering into similar agreements in violation of the Cartwright Act.

THIRD CLAIM FOR RELIEF
(*Violations of Cal. Bus. & Prof. Code § 16600*)

136. Plaintiffs, on behalf of themselves and all others similarly situated, reallege and incorporate herein by reference each of the allegations contained in the preceding paragraphs of this Complaint, and further alleges against Defendants and each of them as follows:

137. Defendants entered into, implemented, and enforced express agreements that are unlawful and void under Section 16600.

138. Defendants' agreements and conspiracy have included concerted action and undertakings among the Defendants with the purpose and effect of: (a) reducing open competition among Defendants for skilled labor; (b) reducing employee mobility; (c) eliminating opportunities for employees to pursue lawful employment of their choice; and (d) limiting employee professional betterment.

139. Defendants' agreements and conspiracy are contrary to California's settled legislative policy in favor of open competition and employee mobility, and are therefore void and unlawful.

140. Defendants' agreements and conspiracy were not intended to protect and were not limited to protect any legitimate proprietary interest of Defendants.

141. Defendants' agreements and conspiracy do not fall within any statutory exception to Section 16600.

142. The acts done by each Defendant as part of, and in furtherance of, their contracts, combinations or conspiracies were authorized, ordered, or done by their respective officers, directors, agents, employees, or representatives while actively engaged in the management of each Defendant's affairs.

143. Accordingly, Plaintiffs and members of the Class seek a judicial declaration that Defendants' agreements and conspiracy are void as a matter of law under Section 16600, and a permanent injunction enjoining Defendants' from ever again entering into similar agreements in violation of Section 16600.

FOURTH CLAIM FOR RELIEF
(*Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, et seq.*)

144. Plaintiffs, on behalf of themselves and all others similarly situated, reallege and incorporate herein by reference each of the allegations contained in the preceding paragraphs of this Complaint, and further alleges against Defendants as follows:

145. Defendants' actions to restrain trade and fix the total compensation of their employees constitute unfair competition and unlawful, unfair, and fraudulent business acts and practices in violation of California Business and Professional Code sections 17200, *et seq.*

146. The conduct of Defendants in engaging in combinations with others with the intent, purpose, and effect of creating and carrying out restrictions in trade and commerce; eliminating competition among them for skilled labor; and fixing the compensation of their employees at artificially low levels, constitute and was intended to constitute unfair competition and unlawful, unfair, and fraudulent business acts and practices within the meaning of California Business and Professions Code section 17200.

147. Defendants also violated California's Unfair Competition Law by violating the Sherman Act, Cartwright Act, and/or by violating Section 16600.

148. As a result of Defendants' violations of Business and Professions Code section 17200, Defendants have unjustly enriched themselves at the expense of Plaintiffs and the Class. The unjust enrichment continues to accrue as the unlawful, unfair, and fraudulent business acts and practices continue.

149. To prevent their unjust enrichment, Defendants and their co-conspirators should be required pursuant to Business and Professions Code sections 17203 and 17204 to disgorge their illegal gains for the purpose of making full restitution to all injured class members identified hereinabove. Defendants should also be permanently enjoined from continuing their violations of Business and Professions Code section 17200.

150. The acts and business practices, as alleged herein, constituted and constitute a common, continuous, and continuing course of conduct of unfair competition by means of unfair, unlawful, and/or fraudulent business acts or practices within the meaning of California Business and Professions Code section 17200, *et seq.*, including, but in no way limited to, violations of the Sherman Act, Cartwright Act, and/or Section 16600.

151. Defendants' acts and business practices as described above, whether or not in violation of the Sherman Act, Cartwright Act, and/or Section 16600 are otherwise unfair, unconscionable, unlawful, and fraudulent.

152. Accordingly, Plaintiffs, on behalf of themselves and all others similarly situated, requests the following classwide equitable relief:

a. that a judicial determination and declaration be made of the rights of Plaintiffs and the Class members, and the corresponding responsibilities of Defendants;

b. that Defendants be declared to be financially responsible for the costs and expenses of a Court-approved notice program by mail, broadcast media, and publication designed to give immediate notification to class members; and

c. requiring disgorgement and/or imposing a constructive trust upon Defendants' ill-gotten gains, freezing Defendants' assets, and/or requiring Defendants to pay restitution to Plaintiffs and to all members of the Class of all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court enter judgment on their behalf and that of the Class by adjudging and decreeing that:

153. This action may be maintained as a class action, with Plaintiffs as the designated Class representatives and their counsel as Class counsel;

154. Defendants have engaged in a trust, contract, combination, or conspiracy in violation of Section 1 of the Sherman Act and California Business and Professions Code section 16750(a), and that Plaintiffs and the members of the Class have been damaged and injured in their business and property as a result of this violation;

155. The alleged combinations and conspiracy be adjudged and decreed to be *per se* violations of the Sherman Act and Cartwright Act;

156. Plaintiffs and the members of the Class they represent recover threefold the damages determined to have been sustained by them as a result of the conduct of Defendants, complained of herein, and that judgment be entered against Defendants for the amount so determined;

157. The alleged combinations and conspiracy be adjudged void and unlawful under Section 16600;

158. The conduct of Defendants constitutes unlawful, unfair, and/or fraudulent business practices within the meaning of California's Unfair Competition Law, California Business and Professions Code section 17200, *et seq.*;

159. Judgment be entered against Defendants and in favor of Plaintiffs and each member of the Class they represent, for restitution and disgorgement of ill-gotten gains as allowed by law and equity as determined to have been sustained by them, together with the costs of suit, including reasonable attorneys' fees;

160. For prejudgment and post-judgment interest;

161. For equitable relief, including a judicial determination of the rights and responsibilities of the parties;

162. For attorneys' fees;

163. For costs of suit; and

164. For such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a jury trial for all claims and issues so triable.

Dated: September 2, 2011

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION	Case No.: 11-CV-02509-LHK ORDER GRANTING PLAINTIFFS' SUPPLEMENTAL MOTION FOR CLASS CERTIFICATION
THIS DOCUMENT RELATES TO: **ALL ACTIONS**	

Plaintiffs Michael Devine, Mark Fichtner, Siddharth Hariharan, Brandon Marshall, and Daniel Stover (collectively, "Plaintiffs"), individually and on behalf of a class of all those similarly situated, allege antitrust claims against their former employers, Adobe Systems Inc. ("Adobe"), Apple Inc. ("Apple"), Google Inc. ("Google"), Intel Corp. ("Intel"), Intuit Inc. ("Intuit"), Lucasfilm Ltd. ("Lucasfilm"), and Pixar (collectively, "Defendants"). Plaintiffs allege that Defendants conspired to suppress, and actually did suppress, employee compensation to artificially low levels by agreeing not to solicit each other's employees in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15.

On April 5, 2013, the Court granted in part and denied in part Plaintiffs' Motion for Class Certification with leave to amend. *See* Apr. 5 Class Cert. Order, ECF No. 382. Currently before the Court is Plaintiffs' Supplemental Motion for Class Certification. *See* Pls.' Suppl. Mot. Class. Cert. ("Suppl. Class Cert. Mot."), ECF No. 418. Defendants filed an opposition, *see* Defs.' Opp'n to Pls.' Suppl. Mot. Class Cert. ("Suppl. Opp'n"), ECF No. 439, and Plaintiffs filed a reply, Pls.' Reply Supp. Suppl. Mot. Class. Cert. ("Suppl. Reply"), ECF No. 455. The Court held a hearing on Plaintiffs' Supplemental Motion for Class Certification on August 8, 2013. *See* ECF No. 495. Having considered the parties' submissions, arguments, the relevant law, and the record in this case, the Court GRANTS Plaintiffs' Supplemental Motion for Class Certification and CERTIFIES Plaintiffs' proposed class of technical employees ("Technical Class").

I. BACKGROUND

A. Factual Background

1. The Parties

Defendants are leading high tech companies, each with a principal place of business in the San Francisco-Silicon Valley area of California. Apple is a market leader in consumer computer products and software. Defs.' Opp'n to Pls. Mot. Class. Cert. ("Opp'n") at 5, ECF No. 209. In 2011, Apple's total revenues exceeded $108 billion. *Id*. Google is the world's leading internet search provider. Report of Dr. Edward E. Leamer ("Leamer Rep.") ¶ 15, ECF No. 190. Google went public in 2004, and reached revenues of nearly $38 billion in 2011. *Id*. Intel is the world's largest semiconductor chip maker. *Id.* ¶ 16. In 2011, Intel earned approximately $54 billion. Adobe specializes in digital media and marketing software. *See id.* ¶ 13. In 2009, Adobe earned nearly $3 billion in revenues. *Id*. Intuit specializes in financial planning and tax preparation programs. Opp'n at 5. In 2011, the company's revenues exceeded $3.8 billion. Leamer Rep. ¶ 17. Lucasfilm is a film production company known for its computer animation expertise and for producing box office hits including the Star Wars films and the Indiana Jones franchise. *Id.* ¶ 18. Pixar is a leading computer animation film studio. *Id.* ¶ 19. In 2006, Walt Disney Productions acquired Pixar for approximately $7.4 billion. *Id*.

Named Plaintiffs are software engineers who were former employees of Defendants. Devine worked for Adobe in the State of Washington from October of 2006 to July of 2008. *See* Consolidated Amended Complaint ("CAC") ¶ 16, ECF No. 65; Decl. Ann B. Shaver in Supp. Pls.'

Mot. for Class Cert. ("Shaver Decl."), Ex. 6 ¶ 1, ECF No. 291. Fichtner worked for Intel in Arizona from July of 1993 through November of 2006 and again from May of 2008 through May of 2011. *See* CAC ¶ 17; Shaver Decl., Ex. 7 ¶ 1. Hariharan worked for Lucasfilm in California from January of 2007 through August of 2008. *See* CAC ¶ 18; Shaver Decl., Ex. 8 ¶ 1. Marshall worked for Adobe in California from July of 2006 through December of 2006. *See* CAC ¶ 19; Shaver Decl., Ex. 9 ¶ 1. Finally, Stover worked for Intuit in California from at least November of 2006 through December of 2009. *See* CAC ¶ 20; Shaver Decl., Ex. 10 ¶ 1.

2. Market for High Tech Employees

Plaintiffs assert that in a properly functioning and lawfully competitive labor market, each Defendant would compete for employees by soliciting current employees from one or more of the other Defendants. *See* CAC ¶ 41. This method of recruiting, to which Defendants refer as "cold calling," includes communicating directly in any manner—including orally, in writing, telephonically, or electronically—with another company's employee who has not otherwise applied for a job. *Id.*

Plaintiffs allege that cold calling is a key competitive tool that companies use to recruit employees, particularly high tech employees with advanced skills and abilities. *Id.* ¶ 45. Through recruiting employees from competitors, a company is able to take advantage of the efforts its rival has expended in soliciting, interviewing, and training skilled labor, while simultaneously inflicting a cost on the rival by removing an employee on whom the rival may depend. *Id.* ¶ 44.

Plaintiffs further contend that the use of cold calling among Defendants commonly increases total compensation and mobility for all of Defendants' employees. *See id.* ¶¶ 48, 50. Most directly, Plaintiffs allege that the practice of cold calling provides the recipient of a cold call with opportunities to secure higher wages either by switching to a rival company or by negotiating increased compensation with the recipient's current employer. *Id.* ¶ 46. Plaintiffs further allege that the compensation effects of cold calling are not limited to those individuals who receive the calls. Rather, Plaintiffs allege, the effects of cold calling (and the effects of eliminating cold calling) have a broader, common impact on Defendants' salaried employees, especially their technical employees. *Id.* ¶ 50.

3. Defendants' Alleged Conspiracy

Between approximately 2005 and 2009, Defendants Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar allegedly engaged in an "overarching conspiracy" to eliminate competition among Defendants for skilled labor. *Id.* ¶ 55; *see also id.* ¶¶ 1, 2. The conspiracy consisted of an interconnected web of express bilateral agreements among Defendants to abstain from actively soliciting each other's employees. *Id.* ¶ 55.[1] Plaintiffs allege that each agreement involved a company under the control of Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) and/or a company that shared at least one director with Apple's Board of Directors. *Id.* ¶¶ 55, 57. Defendants memorialized these nearly identical agreements in CEO-to-CEO emails and other documents, including "Do Not Call" lists, thereby putting each Defendant's employees off-limits to other Defendants. Pls.' Mot. Class Cert. ("Class Cert. Mot.") at 1, ECF No. 187. Each bilateral agreement applied to all employees of a given pair of Defendants. *See* CAC ¶¶ 63, 76, 81, 88, 100, 105. These agreements were not limited by geography, job function, product group, or time period. Nor were they related to any specific business or other collaboration between Defendants. *Id*.

Plaintiffs allege that "Defendants entered into the express agreements and entered into the overarching conspiracy with knowledge of the other Defendants' participation, and with the intent of accomplishing the conspiracy's objective: to reduce employee compensation and mobility through eliminating competition for skilled labor." *Id.* ¶ 55. Plaintiffs also allege that Defendants' senior executives actively concealed each bilateral agreement and that Defendants' employees generally were not informed of, nor did they agree to, the terms of any of the agreements. *Id.* ¶¶ 55, 108.

B. Procedural Background

1. Department of Justice Investigation

From 2009 through 2010, the Antitrust Division of the United States Department of Justice ("DOJ") investigated Defendants' employment and recruitment practices. *Id.* ¶¶ 3, 111.

[1] The parties refer to these agreements as "Do Not Cold Call" agreements, anti-solicitation agreements, anti-poaching agreements, and anti-competitive agreements. In this Order, the Court refers to these agreements as "anti-solicitation agreements."

Following its investigation, the DOJ filed complaints in federal court against Defendants. *See United States v. Adobe Systems Inc.*, No. 10-1629, at 2 (D.D.C. Mar. 7, 2011) ("DOJ Adobe J."), ECF No. 79-1, Ex. A; *United States v. Lucasfilm, Inc.*, No. 10-2220, 2011 WL 2636850, at *1 (D.D.C. June 3, 2011) ("DOJ Lucasfilm J."), ECF No. 79-1, Ex. B. The DOJ also filed stipulated proposed final judgments in each case. *See* DOJ Adobe J.; DOJ Lucasfilm J. In these stipulated proposed final judgments, Defendants did not admit any wrongdoing or violation of law, but they agreed to be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain[ing] [from] . . . soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." DOJ Adobe J. at 5; DOJ Lucasfilm J., at 4; CAC ¶ 115. The District Court for the District of Columbia entered the stipulated proposed final judgments on March 17, 2011, and June 3, 2011. *See* DOJ Adobe J. at 12; DOJ Lucasfilm J. at 1; CAC ¶ 115.[2]

2. The Instant Action

a. Removal, Case Consolidation, and Preliminary Motions

The five cases underlying this consolidated action were initially filed in California Superior Court. *Hariharan v. Adobe Sys. Inc.*, Case No. 11-CV-574066 (Alameda Super. Ct. filed May 4, 2011), ECF No. 1; *Marshall v. Adobe Sys. Inc.*, Case No. 11-CV-204052 (Santa Clara Super. Ct. filed June 28, 2011), ECF No. 43-2; *Devine v. Adobe Sys. Inc.*, Case No. 11-CV-204053 (Santa Clara Super. Ct. filed June 28, 2011), ECF No. 43-1; *Fichtner v. Adobe Sys. Inc.*, Case No. 11-CV-204187 (Santa Clara Super. Ct. filed June 30, 2011), ECF No. 43-3; *Stover v. Adobe Sys. Inc.*, Case No. 11-CV-205090 (Santa Clara Super. Ct. filed July 14, 2011), ECF No. 43-4.[3]

Defendants subsequently removed these five state court actions to the United States District Court for the Northern District of California. *Hariharan v. Adobe Sys. Inc.*, Case No. 11-2509 (removed May 23, 2011), *see* ECF No. 1; *Marshall v. Adobe Sys. Inc.*, Case No. 11-3538 (removed July 19, 2011), *see* ECF No. 41; *Devine v. Adobe Sys. Inc.*, Case No. 11-3539 (removed July 19,

[2] Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed final judgment has no prima facie effect in any subsequent private lawsuit brought against Defendants.
[3] While the name of each Superior Court case listed only Adobe as the defendant, the complaints also named Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and Does 1-200, as defendants.

2011), *see* ECF No. 41; *Fichtner v. Adobe Sys. Inc.*, Case No. 11-3540 (removed July 19, 2011), *see* ECF No. 41; and *Stover v. Adobe Sys. Inc.*, Case No. 11-3541 (removed July 19, 2011), *see* ECF No. 41. On June 1, 2011, the lead case, *Hariharan v. Adobe Systems Inc.*, was reassigned from Magistrate Judge Spero to Judge Armstrong. *See* ECF No. 24.

On July 19, 2011, Defendants collectively filed a motion to relate the five underlying actions. *See* ECF No. 41. In the Motion to Relate, Defendants stated that, "[b]ecause the cases involve substantially the same parties, events and allegations, and because it appears likely that there would be an unduly burdensome duplication of labor and expense or conflicting results if they were heard before different judges, Defendants believe they are related[.]" *Id.* at 3. Judge Armstrong granted the Motion to Relate on July 27, 2011. *See* ECF No. 52. On August 2, 2011, Plaintiff Siddharth Hariharan moved to transfer the related actions to the San Jose Division. *See* ECF No. 56. Judge Armstrong granted the Motion to Transfer on August 4, 2011. *See* ECF No. 58.

On August 5, 2011, the five related underlying actions were reassigned to the undersigned judge. *See* ECF No. 60. On September 6, 2011, the parties filed a joint stipulation to consolidate the individual cases to "avoid duplication and unnecessary costs, and . . . [to] promote the efficient conduct of proceedings." ECF No. 63 at 2. Pursuant to this joint stipulation, the Court consolidated the five underlying actions on September 12, 2011. *See* ECF No. 64. Plaintiffs filed the Consolidated Amended Complaint on September 13, 2011. *See* CAC.

Defendants filed a Joint Motion to Dismiss the CAC on October 13, 2011, *see* ECF No. 79, and, with leave of the Court, Lucasfilm filed its separate Motion to Dismiss on October 17, 2011, *see* ECF No. 83. Following a hearing on January 26, 2012, *see* ECF No. 108, the Court granted in part and denied in part Defendants' Joint Motion to Dismiss and denied Lucasfilm's Motion to Dismiss on April 18, 2012, *see* ECF No. 119.

b. Initial Motion for Class Certification

On October 1, 2012, Plaintiffs filed their Motion for Class Certification along with an expert report in support of the motion. *See* Class Cert. Mot.; Leamer Rep. In their class certification motion, Plaintiffs sought certification of an "All Employee" class, which included every salaried employee throughout the United States who worked for Defendants between 2005 and 2009. Class Cert. Mot. at 1. Plaintiffs estimated that this class included more than 100,000 employees. *See id.* at 5. In the alternative, Plaintiffs sought certification of a more limited class of salaried technical, creative, and research and development employees ("Technical Class"). Class Cert. Mot. at 1.

On November 12, 2012, Defendants filed their Opposition to Plaintiffs' Motion for Class Certification, *see* Opp'n, as well as a Motion to Strike the expert report and declarations submitted by Plaintiffs, *see* ECF No. 210. Plaintiffs then filed their Consolidated Reply in Support of Class Certification and in Opposition to the Motion to Strike on December 10, 2012. Pls.' Consol. Reply in Supp. of Mot. ("Reply"), ECF No. 247. On January 9, 2013, Defendants filed a Joint Administrative Motion for Leave to Supplement the Record in Support of Defendants' Opposition to Class Certification, *see* ECF No. 263, to which Plaintiffs filed an opposition, *see* ECF No. 270. The Court held a hearing on Plaintiffs' Motion for Class Certification on January 17, 2013. *See* ECF No. 282.

On April 5, 2013, the Court granted in part and denied in part Plaintiffs' Motion for Class Certification with leave to amend. *See* Apr. 5 Class Cert. Order. Specifically, the Court declined to certify the class, but it did confirm as final the Court's prior interim appointment of Lieff, Cabraser, Heimann & Bernstein, LLP, and the Joseph Saveri Law Firm as Co-Lead Counsel and appointed as Class Counsel the law firms that had served on the Executive Committee, Berger & Montague, P.A. and Grant & Eisenhofer, P.A. *Id.* at 47. The Court recognized that these firms have vigorously prosecuted this action and will continue to do so. *Id.*

The Court further denied Defendants' Motion to Strike and granted in part and denied in part Plaintiffs' request to strike Defendants' expert report and certain employee declarations. *Id.* at 49-52. Finally, the Court denied Defendants' Joint Administrative Motion for Leave to Supplement the Record in Support of Defendants' Opposition to Class Certification. *Id.* at 52.

In granting in part and denying in part Plaintiffs' Motion for Class Certification, the Court first noted that Defendants did not dispute Plaintiffs' assertion that both of the proposed classes satisfied the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *Id.* at 9 (citing Class Cert. Mot. at 4-6; Tr. of Jan. 17, 2013 Class Cert H'rg ("Jan. 17 Tr.") at 5:10-15, ECF No. 321). As such, the Court focused its analysis on whether Plaintiffs' proposed classes satisfied Rule 23(b)(3)'s requirement that common questions predominate. In so doing, the Court found that "the adjudication of Defendants' alleged antitrust violation will turn on overwhelmingly common legal and factual issues." *Id.* at 13. In addition, the Court found that Plaintiffs satisfied their Rule 23(b)(3) burden on the issue of the predominance of common issues with respect to damages. *Id.* at 44.

However, the Court could not find, based on the evidence available to Plaintiffs at the time of the initial Class Certification Motion, that Plaintiffs adequately demonstrated that common issues with regard to the impact of the alleged violation on members of the All Employee Class or Technical Class would predominate under Rule 23(b)(3). *Id.* at 44-45. Although Plaintiffs' documentary evidence weighed "heavily in favor of finding that common issues predominate over individual ones for the purpose of being able to prove antitrust impact," the Court expressed concern that Plaintiffs' examples—such as email exchanges between CEOs and discrete human resources documents from certain Defendants in particular years—might not be sufficient. *See id.* at 33. The Court found that Plaintiffs might need "additional [documentary] support or empirical analysis" to demonstrate that common evidence could be used to prove that all or nearly all 100,000 members of the All Employee Class were affected by the anti-solicitation agreements. *See id.* In particular, the Court found that additional documentary support or empirical analysis would be important to assure the Court that common issues predominated over individual issues given that Defendants contested many of the factual bases of Plaintiffs' theories of harm and actively criticized the reliability, admissibility, and persuasiveness of Plaintiffs' statistical analyses. *Id.* The Court also questioned whether Plaintiffs' All Employee Class was overly broad and noted that Plaintiffs' initial Motion for Class Certification provided little discussion or analysis to support certifying Plaintiffs' more limited Technical Class over the All Employee Class. *See id.* at 29.

The Court afforded Plaintiffs leave to amend to address the Court's concerns. *See id.* at 52. In so doing, the Court made clear that it was keenly aware that Defendants had failed to produce significant amounts of discovery or make key witnesses available for depositions until after the hearing on Plaintiffs' Motion for Class Certification. *Id.* at 47. The Court noted that Defendants' failure to produce documents and witnesses hindered Plaintiffs' efforts to demonstrate that their proposed classes satisfied the Rule 23 requirements. *Id.*

On May 10, 2013, Plaintiffs filed their Supplemental Motion for Class Certification, which focuses on demonstrating that common issues predominate for the purpose of satisfying the requirements of Rule 23(b)(3) with respect to the Technical Class. Suppl. Class Cert. Mot. at 2. In the Supplemental Motion, Plaintiffs specifically address the Court's concerns regarding the evidence of predominance with respect to the impact of the antitrust violation on all or nearly all of the Technical Class. *See id.* at 22-25. Defendants filed their Opposition to Plaintiffs' Supplemental Motion for Class Certification on June 21, 2013. *See* Suppl. Opp'n. Plaintiffs then filed their Reply in support of their Supplemental Motion for Class Certification on July 12, 2013. Suppl. Reply. Subsequently, Defendants filed objections to certain evidence in Plaintiffs' Reply. ECF No. 469. Plaintiffs then filed a motion to enforce Local Rule 7-3(d)(1) and to strike Defendants' improper Sur Reply, ECF No. 479, to which Defendants filed an Opposition, ECF No. 485.[4] The parties have filed various motions for leave to file statements of recent decisions while the Supplemental Motion for Class Certification has been pending before this Court. ECF Nos. 491, 496, 498, 499, 505.

On July 12, 2013, Plaintiffs' Co-Lead Class Counsel filed a letter informing the Court that Plaintiffs and Defendants Pixar and Lucasfilm Ltd. reached an agreement to settle all individual and class claims alleged in the CAC on behalf of Plaintiffs' proposed Technical Class. *See* ECF No. 453. On July 30, 2013, Plaintiffs' Co-Lead Counsel filed a similar letter informing the Court

[4] The Court GRANTS IN PART and DENIES IN PART Defendants' Objections to Evidence in Pls.' Reply Supp. Suppl. Class Cert., ECF No. 469. The Court GRANTS Defendants' Motion to Strike Ms. Sandberg's declaration as improper. *Id.* (citing *Contratto v. Ethicon*, 227 F.R.D. 304, 308 n.5 (N.D. Cal. 2005) (striking witness declaration because it was an "attempt to introduce new evidence in connection with their reply papers.")). The Court DENIES Defendants' request to supplement the record as to the deposition testimony of Dr. Murphy. All of the excerpts to which Defendants cite were properly submitted to the Court by Plaintiffs. Defendants' request constitutes impermissible "further argument on the motion." Civ. L. R. 7-3(d)(1). The Court GRANTS Defendants' request to supplement the record as to the deposition testimony of Dr. Shaw as the excerpts to which Defendants cite were not submitted by Plaintiffs, and thus may be provided to complete the record. The Court DENIES Defendants' request to strike Dr. Leamer's analyses regarding salary ranges because it is proper rebuttal analysis. The Court GRANTS Defendants' request to strike Dr. Leamer's "superadditive" theory in his rebuttal report.

that Plaintiffs and Defendant Intuit also reached an agreement to settle all individual and class claims alleged in the CAC on behalf of Plaintiffs' proposed Technical Class. *See* ECF No. 489. On September 21, 2013, Plaintiffs and Defendants Pixar, Lucasfilm, and Intuit filed a Motion for Preliminary Approval of Class Settlement. ECF No. 501. That motion is pending before this Court. Due to the settlements, Plaintiffs now only seek certification of a class for litigation purposes against Defendants Adobe, Apple, Google, and Intel. *See* Suppl. Reply at 1 n.1.

Nonetheless, all parties agree that the settlements do not have any impact on Plaintiffs' Supplemental Motion for Class Certification. *See* Pls.' Br. Re Impact of the Proposed Settlement on Pls.' Suppl. Mot. Class Cert., ECF No. 483 (noting that the settlements "preserve[] Plaintiffs' right to litigate against the non-settling Defendants for the entire amount of Plaintiffs' damages based on joint and several liability under the antitrust laws."); Defs.' Joint Br. Re the Impact of the Proposed Pixar and Lucasfilm Settlements on the Suppl. Class Cert. Mot., ECF No. 484 ("Plaintiffs agree that these proposed settlements have no effect on the pending motion for certification of the Technical Class."). Generally, the same Rule 23 standard applies for certification of a proposed class, whether for litigation or settlement purposes. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 619 (1997); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-23 (9th Cir. 1999).

II. PROPOSED CLASS DEFINITION

Named Plaintiffs now seek to certify only a nationwide class of salaried technical, creative, and research and development employees who worked for any Defendant while that Defendant participated in at least one anti-solicitation agreement with another Defendant. Thus, Plaintiffs bring before the Court a proposed class "comprising those technical employees whose work contributed to Defendants' core business functions, whom the Defendants heavily recruited and jealously guarded, and who appear at the very crux of Defendants' conspiracy and this case." Suppl. Mot. at 2. Specifically, Plaintiffs seek to certify a Technical Class defined as follows:

> All natural persons who work in the technical, creative, and/or research and development fields that are employed on a salaried basis in the United States by one or more of the following: (a) Apple from March 2005 through December 2009; (b) Adobe from May 2005 through December 2009; (c) Google from March 2005 through December 2009; (d) Intel from March 2005 through December 2009; (e) Intuit from June 2007 through December 2009; (f) Lucasfilm from January 2005

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> through December 2009; or (g) Pixar from January 2005 through December 2009. Excluded from the Class are: retail employees; corporate officers, members of the boards of directors, and senior executives of all Defendants.

Id. at iii.[5]

The proposed Technical Class consists of job titles identified in Appendix B to the Leamer Report, ECF No. 190, including: (1) Software Engineers, (2) Hardware Engineers and Component Designers, (3) Application Developers, (4) Programmers, (5) Product Developers, (6) User Interface or User Experience Designers, (7) Quality Analysts, (8) Research and Development, (9) Animators, Digital Artists, Creative Directors and Technical Editors, (10) Graphic Designers and Graphic Artists, (11) Web Developers, (12) IT Professionals, (13) Systems Engineers and Administrators, and (14) employees classified as technical professionals by their employers. *See* Leamer Rep., App. B, ¶ 155. Plaintiffs believe that this proposed class includes more than 50,000 people. Class Cert. Mot. at 5.

III. LEGAL STANDARD

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23 does not set forth a mere pleading standard. To obtain class certification, Plaintiffs bear the burden of showing that they have met each of the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended by* 273 F.3d 1266 (9th Cir. 2001). "A party seeking class certification must affirmatively demonstrate . . . compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action.

[5] As discussed above, in the initial Motion for Class Certification, Plaintiffs also sought to certify an "All Employee Class" consisting of more than 100,000 employees. Class Cert. Mot. at 1. The Court denied certification of both the All Employee and Technical classes without prejudice. Plaintiffs have, in their Supplemental Motion, moved to certify only the Technical Class. Accordingly, this Order pertains only to that Class.

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Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012). Further, while Rule 23(a) is silent as to whether the class must be ascertainable, courts have held that the Rule implies this requirement as well. *See, e.g.*, *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 672 (N.D. Cal. 2011).

If all four prerequisites of Rule 23(a) are satisfied, a court must also find that Plaintiffs "satisfy through evidentiary proof" at least one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Rule 23(b) sets forth three general types of class actions. A class may be certified under Rule 23(b)(1) upon a showing that there is a risk of substantial prejudice or inconsistent adjudications from separate actions. Fed. R. Civ. P. 23(b)(1). A class may be certified under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Finally, a class may be certified under Rule 23(b)(3) if a court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

"[A] court's class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim.'" *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1194 (2013) (quoting *Dukes*, 131 S. Ct. at 2551); *see also Mazza*, 666 F.3d at 588 ("'Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23.'" (quoting *Zinser*, 253 F.3d at 1186)). This "rigorous" analysis applies to both Rule 23(a) and Rule 23(b). *Comcast*, 133 S. Ct. at 1432 (discussing how Congress included "addition[al] . . . procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out)" and how a court has a "duty to take a 'close look' at whether common questions predominate over individual ones").

Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S.Ct. at 1194-95. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*. at 1195. If a court concludes that the moving party has met its burden of proof, then the court has broad discretion to certify the class. *Zinser*, 253 F.3d at 1186.

IV. DISCUSSION

The Supreme Court has long recognized that class actions serve a valuable role in the enforcement of antitrust laws. As the Supreme Court stated in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972), "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation." *See also N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources . . . while at the same time providing an environment conductive [sic] to the preservation of our democratic political and social institutions.").

Thus, to "open[] the door of justice" to individuals harmed by antitrust violations while at the same time penalizing antitrust violators, Congress chose to allow individuals to serve as private attorneys general in antitrust actions and to recover treble damages for their injuries. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (citing the initial Congressional debates concerning the Clayton Act's damages provisions as evidence that the sponsors saw treble damages both as a means of "giv(ing) the injured party ample damages for the wrong suffered" and "as an important means of enforcing the law"); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("The purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."). As the Supreme Court noted in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979), "[t]hese private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."

Plaintiffs allege that Defendants entered into an "overarching conspiracy" to suppress employee compensation to artificially low levels. CAC ¶ 55. According to Plaintiffs, Defendants' agreements restrained trade and were thus per se unlawful under Section 1 of the Sherman Antitrust Act. *Id.* ¶ 2; Class Cert. Mot. at 1; *see* 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1431 (9th Cir. 1995) (explaining that Section 4 of the Clayton Act allows private parties to sue antitrust violators for damages).

Plaintiffs contend that, although the DOJ ultimately put an end to Defendants' illegal agreements, the government was unable to compensate the victims of the conspiracy. Plaintiffs now bring this case as private attorneys general "to pick up where the DOJ left off, to seek damages for themselves and for the Class." Class Cert. Mot. at 1.

A. Rule 23(a) and Class Representatives

Plaintiffs assert that their proposed Technical Class satisfies the elements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Class Cert. Mot. at 4-6; *see* Fed. R. Civ. P. 23(a). Defendants do not contest that Plaintiffs have satisfied these requirements. *See* Jan. 17 Tr. at 5:10-15. Nevertheless, the Court addresses each in turn.

First, the Court finds that Plaintiffs have satisfied Rule 23(a)(1)'s numerosity requirement. Pursuant to Rule 23(a)(1), Plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs need not state the exact number of potential class members, nor is there a bright-line minimum threshold requirement. *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350-51 (N.D. Cal. 2005). Rather, the Court must examine the specific facts of each case. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980). In this case, the parties agree that the Technical Class includes approximately 60,000 employees. *See* Class Cert. Mot. at 5; Opp'n at 4. The Court finds joinder of all members of this proposed class to be impracticable. Thus, the numerosity requirement is satisfied. *See* Fed. R. Civ. P. 23(a)(1).

Second, the Court finds that Plaintiffs have satisfied Rule 23(a)(2)'s commonality requirement. Rule 23(a)(2) requires that "there are questions of law or fact common to the class."

Dukes, 131 S. Ct. at 2250-51. To satisfy the commonality requirement, Plaintiffs must show that the class members have suffered "the same injury," meaning that class members' claims must "depend upon a common contention" of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Id.* at 2551 (internal quotation marks and citation omitted). Plaintiffs must demonstrate not merely the existence of a common question, but rather "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quotation marks omitted) (emphasis in original). Nevertheless, "for purposes of Rule 23(a)(2), '[e]ven a single [common] question' will do." *Id.* at 2556 (internal punctuation and citations omitted).

"Where an antitrust conspiracy has been alleged, courts have consistently held that 'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'" *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 593 (N.D. Cal. 2010), *amended in part by* No. 07-1827, 2011 WL 3268649 (N.D. Cal. July 28, 2011) (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 02-1486, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006)). Antitrust liability alone constitutes a common question that "will resolve an issue that is central to the validity" of each class member's claim "in one stroke," *Dukes*, 131 S. Ct. at 2551, "because proof of an alleged conspiracy will focus on defendants' conduct and not on the conduct of individual class members." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 310 (citing cases). Indeed, the Court has already found that "the adjudication of Defendants' alleged antitrust violation will turn on overwhelmingly common legal and factual issues." Apr. 5 Class Cert. Order at 13. Moreover, Defendants do not dispute that there are some common issues of law and fact. *See* Jan. 17 Tr. at 18:2-8. Because Plaintiffs have demonstrated the existence of at least one common question capable of generating a common answer (antitrust liability), the Court finds that the proposed class meets the commonality requirement of Rule 23(a)(2).

Third, the Court finds that Plaintiffs have satisfied Rule 23(a)(3)'s typicality requirement. Under the "permissive standards" of Rule 23(a)(3), "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *accord Staton v. Boeing Inc.*, 327 F.3d 938, 957 (9th Cir. 2003). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks and citation omitted). The purpose of the typicality requirement is to assure that the interests of the named representative align with the interests of the class. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984-85 (9th Cir. 2011). In antitrust cases, "typicality usually 'will be established by plaintiffs and all class members alleging the same antitrust violations by defendants.'" *Pecover v. Elec. Arts, Inc.*, No. 08-2820, 2010 WL 8742757, at *11 (N.D. Cal. Dec. 21, 2010) (quoting *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998)). In this case, all class members, regardless of their individual employers, allege the same injuries arising from common conduct: suppression of compensation due to Defendants' anti-solicitation agreements. *See* Aug. 8, 2013 Class Cert. Hr'g Tr. ("Aug. 8 Tr.") at 19:11-14, ECF No. 494 ("We're alleging a single violation of the Sherman Act, a single conspiracy . . . ."). Accordingly, the Court finds that the named Plaintiffs' interests align with the interests of the class, and the typicality requirement of Rule 23(a)(3) is satisfied.[6]

Finally, the Court finds that Plaintiffs satisfy Rule 23(a)(4)'s adequacy requirement. Legal adequacy of a class representative under Rule 23(a)(4) turns on two inquiries: (1) whether named plaintiffs and their counsel have "any conflicts of interest with other class members," and (2) whether named plaintiffs and their counsel will "prosecute the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 1020. As stated previously, the named Plaintiffs and Technical Class members share an interest in proving that Defendants' conduct violated the antitrust laws and

[6] At the August 8 hearing on the Supplemental Motion for Class Certification, the Court expressed concern regarding whether Hariharan, a former employee of Lucasfilm, could satisfy the typicality requirement given that Lucasfilm recently reached a settlement agreement with Plaintiffs. The Court is persuaded that Hariharan still satisfies the typicality requirement because he continues to have an active antitrust claim against the remaining members of the conspiracy. *See* Aug. 8 Tr. at 21:15-23 ([T]he people who worked for the settled companies during the class period still have active claims against the other members of the conspiracy because . . . all of the members of the combination conspiracy . . . are liable for one another's conduct."); *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 594 ("[A] conspirator is jointly liable for everything done during the period of the conspiracy's existence.").

suppressed their compensation. In addition, the named Plaintiffs do not have any conflicts of interest with class members. Shaver Decl. Ex. 6 ¶¶ 5-6; *id*., Ex. 7 ¶¶ 5-6; *id*., Ex. 8 ¶¶ 5-6; *id*., Ex. 9 ¶¶ 5-6; *id*., Ex. 10 ¶¶ 5-6. Thus, the Court finds that the Plaintiffs' proposed Technical Class satisfies the adequacy requirement.

In addition to the four requirements explicitly provided in Rule 23(a), courts have held that Rule 23(a) also implicitly requires that the class be ascertainable. *See, e.g.*, *Herrera*, 274 F.R.D. at 672. A class definition is sufficient if the description of the class is "definite enough so that it is administratively feasible for a court to ascertain whether an individual is a member." *O'Connor v. Boeing N. Am. Inc.*, 184 F.R.D**.** 311, 319 (C.D. Cal. 1998) (internal citation omitted). In addition, "the court must be able to [determine that] class members are included or excluded from the class by reference to objective criteria." 5 James W. Moore, *Moore's Federal Practice*, § 23.21[3] (Matthew Bender 3d ed.).

Here, Plaintiffs' proposed Technical Class consists of the job titles identified in Appendix B to the Leamer Report, as discussed above. *See* Leamer Rep., App. B. Dr. Leamer selected these job titles based on Defendants' own employment compensation data, which breaks jobs into creative, technical, and research and development "job families." *Id*. Kevin F. Hallock, a labor economist and expert in compensation structure and design, reviewed the titles included in the proposed "Technical Class" and confirmed the titles selected for inclusion in the Technical Class in light of Defendants' job families for technical workers. *See* Report of Kevin F. Hallock ("Hallock Rep.") ¶¶ 241-44, ECF No. 417. In addition, within the proposed Technical Class, Plaintiffs seek to include only employees who filled these job titles at Defendants' companies within a fixed period of time (2005 to 2009 for all Defendants except Intuit, 2007 to 2009 for Intuit). Thus, the Court finds that the class definition is ascertainable.

Having undertaken a "'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23," *Mazza*, 666 F.3d at 588, the Court finds that Plaintiffs' proposed Technical Class satisfies the numerosity, commonality, typicality, and adequacy requirements. In addition, the Court finds that Plaintiffs' proposed Technical Class is ascertainable. Thus, Plaintiffs have satisfied the requirements set forth by Rule 23(a).

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Further, because the named Plaintiffs and Class members share an interest in proving that Defendants' conduct violated the antitrust laws and suppressed their compensation and do not have any conflicts of interest, the Court now GRANTS Plaintiffs' request to appoint Michael Devine, Mark Fichtner, Siddharth Hariharan, Brandon Marshall, and Daniel Stover as class representatives.

B. Rule 23(b)(3): Predominance

Plaintiffs also contend that their proposed Technical Class satisfies the requirements of Rule 23(b)(3). Defendants disagree. Specifically, Defendants argue that Plaintiffs' proposed class does not satisfy Rule 23(b)(3)'s predominance requirement because neither antitrust impact nor damages can be proven on a classwide basis. Opp'n at 11; Suppl. Opp'n at 3-4. For the reasons discussed below, the Court finds that questions common to the class are likely to predominate over any individual questions.

The predominance analysis focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy" to determine "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchen Prods.*, 521 U.S. at 623; *see also* Fed. R. Civ. P. 23(b)(3) (holding that, to certify a class, the court must find that "questions of law *or* fact common to class members predominate over any questions affecting only individual members" (emphasis added)).

"Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying causes of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). A court must analyze these elements to "determine which are subject to common proof and which are subject to individualized proof." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 311-13.

In this case, Plaintiffs allege a violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15. *See* CAC ¶¶ 119-135; Class Cert. Mot. at 1. "[T]o establish an antitrust claim, plaintiffs typically must prove (1) a violation of antitrust laws, (2) an injury they suffered as a result of that violation, and (3) an estimated measure of damages." *In re New Motor Vehicles Canadian Export Antitrust Litigation ("In re New Motors")*, 522 F.3d 6, 19 n.18 (1st Cir. 2008).

Before the Court discusses whether common questions predominate with regard to each of these elements, the Court notes that the legal standards with respect to the predominance inquiry are not altogether clear. Specifically, the Court notes that there is no binding authority discussing the standard a court must apply in determining whether common issues predominate in a putative class action alleging wage suppression resulting from antitrust violations.[7] Further, recent Supreme Court authority on class certification suggests that the law in this area remains somewhat unsettled.

In *Walmart v. Dukes*, the Supreme Court rejected certification of a class of more than one million female Walmart employees in a Title VII case, holding that "[a] party seeking class certification must affirmatively demonstrate his compliance with the rule." *Dukes*, 131 S. Ct. at 2551. The Supreme Court further noted that prior to certifying a class, a district court must engage in a "rigorous analysis" that will "entail some overlap with the merits of the plaintiff's underlying claim." *Id.* The Supreme Court held that the class could not be certified because the plaintiffs could not demonstrate commonality under Rule 23(a). *Id.* at 2554-57. The *Dukes* plaintiffs had relied on statistical evidence that women were paid less, anecdotal evidence of discrimination from 120 women, and a sociologist who opined that there was a culture of sex stereotyping at Walmart. *Id.* at 2549. The Supreme Court found that this evidence was insufficient to establish commonality

[7] In their initial opposition to Plaintiffs' class certification motion, Defendants pointed to a series of antitrust class actions alleging wage suppression by horizontal agreement in which district courts outside this circuit denied class certification on the basis that individual issues of antitrust impact and damages would predominate over classwide issues. *See Weisfeld v. Sun Chemical Corp.*, 210 F.R.D. 136 (D.N.J. 2002), *aff'd by* 84 F. App'x 257 (3d Cir. 2004); *Reed v. Advocate Health Care*, 268 F.R.D. 573 (N.D. Ill. 2009); *Fleischman v. Albany Med. Ctr.*, No. 06-765, 2008 WL 2945993 (N.D.N.Y. July 28, 2008); *In re Comp. of Managerial, Prof'l, & Technical Emps. Antitrust Litig.*, No. 02-2924, 2003 WL 26115698 (D.N.J. May 27, 2003). However, these cases are inapposite because they lack the comprehensive documentary record present in the instant case. Moreover, in the instant case, the comprehensive documentary record strongly supports the Plaintiffs' experts' theories. In addition, intervening authority such as *Amgen* has refined the predominance inquiry since the cases cited by Defendants were decided. This is particularly true with respect to *Reed*, a Northern District of Illinois case that predates the Seventh Circuit's decisions in *Butler v. Sears, Roebuck & Co.*, 722 F.3d 796 (7th Cir. 2013), and *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012). These two Seventh Circuit cases suggest that the *Reed* court construed the predominance requirement too stringently. The Court further notes that other district courts have certified wage suppression antitrust classes, including one since the latest Supreme Court cases. *See, e.g.*, *Merenda v. VHS of Mich., Inc.*, No. 06-15601, 2013 WL 5106520 (E.D. Mich. Sept. 13, 2013); *Johnson v. Ariz. Hosp. & Healthcare Ass'n.*, No. 07-1292, 2009 WL 5031334 (D. Ariz. July 14, 2009).

because it demonstrated no general policy of discrimination and no corporate direction of store managers' discretion. *Id.* at 2554. Accordingly, the Supreme Court, finding that commonality required not just common questions but the capacity to generate a common answer in a classwide proceeding, reversed the certification of the class. *Id.* at 2551.

Applying *Dukes*, the Ninth Circuit, in *Ellis v. Costco* vacated a district court's certification of a class. 657 F.3d at 988. The *Ellis* court, discussing commonality, held that district courts must consider the underlying merits in addressing class certification issues. *Id.* at 983. The Ninth Circuit further concluded that when there is a battle of the experts on class certification, "rigorous analysis" requires district courts to determine not only admissibility of the experts' statements, but also the "persuasiveness of the evidence presented." *Id.* at 982.

Two years after it decided *Dukes*, the Supreme Court affirmed the certification of a class of plaintiffs who were alleging securities fraud in *Amgen*. In *Amgen*, the Supreme Court held that plaintiffs need not prove materiality, one of the elements of plaintiffs' securities fraud claim, at the class certification stage; rather, the Supreme Court found that plaintiffs needed only demonstrate that common questions would predominate. 133 S. Ct. at 1191. "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* As such, "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Id.* Therefore, while class certification may require some inquiry into the merits, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id.* at 1194. Importantly, the Supreme Court specified that plaintiffs were not required to demonstrate that common questions would predominate with respect to each element. *Id.* at 1196 ("Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.'" (alterations and emphasis in original)). Rather, the inquiry is more holistic.

One month after *Amgen*, the Supreme Court, in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), reversed certification of a damages and liability class under Rule 23(b)(3). The district court in *Comcast* had certified a class of more than two million Comcast subscribers who sought

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damages for violations of federal antitrust laws. *Id.* at 1431. Plaintiffs in *Comcast* had proposed four theories of antitrust impact, but the district court found that only one of those theories could be proven using common evidence. *Id.* However, the district court certified a damages class notwithstanding the fact that plaintiffs' expert calculated damages using a model that did not isolate the damages resulting from the one credited theory of antitrust impact. *Id.* The Supreme Court reversed the certification under a "straightforward application of class-certification principles" due to the disconnect between the theory of impact and the theory of damages. *Id.* at 1433. The Court stated that "[c]alculations [of damages] need not be exact, but at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." *Id.* Importantly, the Court suggested that some of the principles applied pursuant to Rule 23(a) in *Dukes* also applied pursuant to Rule 23(b)(3). Specifically, the Court stated that Rule 23(b)(3) required a "rigorous analysis" and that Rule 23(b)(3) may require "inquiry into the merits of the claim." *Id.* at 1432-33.

The Ninth Circuit, in line with the Supreme Court's admonition that *Comcast* created no new law, read *Comcast* narrowly in *Levya v. Medline Industries*, 716 F.3d 510 (9th Cir. 2013). There, the Ninth Circuit reversed a district court's denial of class certification in a case concerning alleged violations of California labor laws. The Ninth Circuit held that even after *Comcast*, under Ninth Circuit law, the fact that damages calculations would require individualized inquiries does not defeat certification of a Rule 23(b)(3) class. *Id.* at 513-14. Thus, so long as "damages will be calculated based on the wages each employee lost due to [defendant]'s unlawful practices," *Comcast* does not pose a barrier to class certification. *Id.*

Echoing *Levya*, the Seventh Circuit in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), a post-*Comcast* consumer action alleging defects in washing machines, held that individual questions with respect to damages do not defeat class certification. The Seventh Circuit found that "[a] determination of liability could be followed by individual hearings to determine the damages sustained by each class member." *Id.* at 789. The Seventh Circuit distinguished *Comcast*

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on the basis that "there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis." *Id.* at 800.

The Seventh Circuit in *Butler* approvingly cited its previous decision in *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012), where the Seventh Circuit had reversed a denial of class certification. In *Messner*, the Seventh Circuit held that the predominance inquiry does not require the total absence of individual questions, but rather that common questions *predominate* over any individual questions. *Id.* at 815. Moreover, the Seventh Circuit in *Messner* noted that for the purposes of predominance, the inquiry focused on whether common *questions* predominate over individual questions—not whether plaintiffs could show "common answers to those questions." *Id.* at 819. The Seventh Circuit further cautioned against turning class certification into a "dress rehearsal for the trial on the merits" and stated that in antitrust cases, even rigorous application of the class certification standard "will frequently lead to certification." *Id.* at 811, 815; *see also Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."). Importantly, in both *Messner* and *Butler*, the Seventh Circuit rejected the proposition that "predominance is determined simply by counting noses: that is, determining whether there are more common issues or more individual issues, regardless of relative importance." *Butler*, 727 F.3d at 801. Rather, "predominance requires a qualitative assessment too; it is not bean counting." *Id.*; *see also Messner*, 669 F.3d at 814 ("There is no mathematical or mechanical test for evaluating predominance.").

The Seventh Circuit decision in *Butler* cited and was in accord with the Sixth Circuit's post-*Comcast* decision in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013). There, the Sixth Circuit affirmed the certification of a class, finding that the district court had adequately considered the merits in determining that common questions would predominate over individual questions. The Sixth Circuit found that like *Amgen*, the defendant's liability in the consumer class action would be classwide or non-existent. *Id.* at 859. The Sixth Circuit further distinguished *Comcast* on the basis that *Comcast* concerned a class certified for damages purposes in addition to liability purposes. *Id.* Accordingly, the Sixth

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Circuit concluded that "the principles we glean from *Amgen* and *Comcast Corp.* include that to satisfy Rule 23(b)(3), named plaintiffs must show, and district courts must find, that questions of law or fact common to members of the class predominate over any questions that affect only individual members." *Id.* at 860.

The D.C. Circuit has further elaborated on the qualitative assessment required by the Sixth and Seventh Circuits and concluded that such an assessment requires district courts to closely scrutinize factual evidence and expert reports that demonstrate that impact can be proven on a classwide basis. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 247 (D.C. Cir. 2013). The D.C. Circuit held that "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Id.* at 252-53. The D.C. Circuit further stated that "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification." *Id.* at 253. The D.C. Circuit therefore found that "[i]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *Id.* at 255. Accordingly, the D.C. Circuit vacated the district court's certification of the class because there were methodological problems with the plaintiffs' expert reports that the district court had not considered. *Id.* at 252.[8]

[8] The First and Third Circuits in pre-*Dukes*, *Amgen*, and *Comcast* cases vacated district courts' certification of classes under Rule 23(b)(3) and remanded for reconsideration based in part on theories that have been superseded by intervening Supreme Court authority. *See In re New Motors*, 522 F.3d at 8; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008). For example, the First and Third Circuits relied on a theory that "[i]n antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof." *In re New Motors*, 522 F.3d at 20; *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 311 (same). This appears to conflict with the Supreme Court's conclusion in *Amgen* that "Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each "elemen[t] of [her] claim [is] susceptible to classwide proof." 133 S. Ct. at 1191 (emphasis in original). Nevertheless, some of the theories in *In re New Motors* and *In re Hydrogen Peroxide Antitrust Litigation* are consonant with *Amgen*. Specifically, the Third Circuit held that a rigorous analysis required resolving conflicts in expert opinions that go to certification and that a party's indication that it intends to use common evidence is insufficient for certification. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 321-23. Similarly, the First Circuit held that a district court should have engaged in a searching inquiry into the validity of a novel and complex theory of impact. *In re New Motors*, 522 F.3d at 27. Accordingly, the First Circuit found that a district court should have addressed criticisms of the plaintiffs' expert's methodology. *Id.* In light of the fact that these theories appear to be consistent with Supreme Court authority, the Court applies them in the instant action.

Certain principles regarding the legal standard that this Court must apply in determining whether the Technical Class should be certified emerge from *Walmart*, *Amgen*, *Comcast*, and the circuit court cases applying this Supreme Court authority. First, and most importantly, the critical question that this Court must answer is whether common questions predominate over individual questions. *Amgen*, 133 S. Ct. at 1191. In essence, this Court must determine whether common evidence and common methodology could be used to prove the elements of the underlying cause of action. *Id.* Second, in answering this question, this Court must conduct a "rigorous" analysis. *Comcast Corp.*, 133 S. Ct. at 1432. This analysis may overlap with the merits, but the inquiry cannot require Plaintiffs to prove elements of their substantive case at the class certification stage. *Amgen*, 133 S. Ct. at 1194. Third, this Court must determine not only the admissibility of expert evidence that forms the basis of the methodology that demonstrates whether common questions predominate. *Ellis*, 657 F.3d at 982. Rather, this Court must also determine whether that expert evidence is persuasive, which may require the Court to resolve methodological disputes. *Id.; see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. Fourth, the predominance inquiry is not a mechanical inquiry of "bean counting" to determine whether there are more individual questions than common questions. *Butler*, 727 F.3d at 801. Instead, the inquiry contemplates a qualitative assessment, which includes a hard look at the soundness of statistical models. *Id.; In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. Fifth, Plaintiffs are not required to show that each element of the underlying cause of action is susceptible to classwide proof. *Amgen*, 133 S. Ct. at 1196. Rather, they need only show that common questions will predominate with respect to their case as a whole. *Id.*

With these principles in mind, this Court now turns to the elements and finds that common questions predominate overall and with regard to all three elements—antitrust violation, antitrust impact, and damages.

1. Antitrust Violation

Plaintiffs allege that Defendants engaged in an "overarching conspiracy" to eliminate competition among one another for skilled labor, with the intent and effect of suppressing the compensation and mobility of Defendants' employees. CAC ¶¶ 1, 2, 55. Accordingly, Plaintiffs contend that, at trial, "[p]roving Defendants' conspiracy will be the overriding common issue for every Class Member." Class Cert. Mot. at 2. In support of their allegations, Plaintiffs have set forth copious common evidence in the form of Defendants' internal work documents, deposition transcripts, and email exchanges between Defendants' CEOs as well as other directors, officers, and senior managers, all of which support Plaintiffs' allegations that Defendants entered into express agreements not to compete for one another's employees.

Defendants concede that adjudication of Defendants' alleged antitrust violations will turn on common legal and factual issues. *See* Jan. 17 Tr. at 17:1-4 (Court: "Do you contest [the antitrust violation] prong of the analysis?" Defendants' Counsel: "Not for purposes of this motion."). As stated in this Court's April 5 Class Certification Order, this Court agrees and finds that Plaintiffs have demonstrated that "adjudication of Defendants' alleged antitrust violation will turn on overwhelmingly common legal and factual issues." Apr. 5 Class Cert. Order at 13.

To prevail on a cause of action for violation of Section 1 of the Sherman Act, a plaintiff must show that: "(1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce."[9] *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996); *see also Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001). Plaintiffs here present substantial evidence of Defendants' antitrust violations, and all of that evidence is common to the Technical Class as a whole.

Plaintiffs' evidence indicates that the roots of Defendants' conspiracy appear to reach back to the mid-1980s, shortly after George Lucas (former Lucasfilm Chairman of the Board and CEO) sold Lucasfilm's "computer division," a "tech, research, and development company," to Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple), who then renamed the division "Pixar." Decl. of Lisa Cisneros ("Cisneros Decl."), Ex. NN (Lucas Depo.) at 16, 59, ECF No. 418-2. George Lucas believed that companies should not compete against each other for employees, because "[i]t's not a normal industrial competitive situation." *Id*. at 52. As George Lucas explained, "I always—the rule we had, or the rule that I put down for everybody," was that "we

[9] The third factor, whether the alleged restraint affected interstate commerce, is not disputed.

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cannot get into a bidding war with other companies because we don't have the margins for that sort of thing." *Id*. at 44. Edward Catmull (Pixar President) agreed with George Lucas that the newly independent Pixar would reciprocate this non-compete "rule" with Lucasfilm. The companies thus agreed: (1) not to cold call each other's employees; (2) to notify each other when making an offer to an employee of the other company even if that employee applied for a job on his or her own initiative; and (3) that any offer would be "final" and would not be improved in response to a counter-offer by the employee's current employer (whether Lucasfilm or Pixar). Shaver Decl., Ex. 3 (McAdams Depo.) at 145-46; Def. Lucasfilm Ltd.'s Am. Ans. to Consol. Am. Compl. ¶ 59, ECF No. 168 ("Lucasfilm and Pixar had a general understanding that they would not actively solicit candidates from the other via cold-calling.").

Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple), who was "very adamant about protecting his employee force," proceeded to expand the Pixar-Lucasfilm agreement to include Apple and its labor competitors. Cisneros Decl., Ex. RR (Catmull Depo.) at 195. As such, beginning no later than 2004, Pixar sought Steve Jobs' permission before making offers of employment to Apple employees, regardless of whether Pixar solicited the employee or the employee applied independently. *See* Shaver Decl., Ex. 62 (showing email from Rob Cook (Pixar Vice President of Advanced Technology) to Steve Jobs in 2004 requesting permission to make an offer to an Apple employee). On April 30, 2007, Lori McAdams (Pixar Vice President of Human Resources and Administration) and Danielle Lambert (Apple Head of Human Resources), formalized the two companies' understanding on the same terms as the "gentlemen's agreement" between Pixar and Lucasfilm. *See id*., Ex. 66 (Lori McAdams informing recruiting team about her phone call with Danielle Lambert and that, "effective now, we'll follow a gentleman's agreement with Apple that is similar to our Lucasfilm agreement. That is . . . we won't directly solicit *any* Apple employee (including outside recruiters if we use them) . . . . Danielle will ask her Recruiting team to follow the same procedure." (emphasis added)).

These agreements extended to other Defendants. On February 18, 2005, Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) assisted Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple) in entering into an agreement with Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) at Google. *See id.*, Ex. 17 (email from Bill Campbell to Steve Jobs informing Steve Jobs that Eric Schmidt "got directly involved and firmly stopped all efforts to recruit anyone from Apple"). That same day, Danielle Lambert (Apple Head of Human Resources) ordered her staff to "[p]lease add Google to your 'hands-off' list. We recently agreed not to recruit from one another so if you hear of any recruiting they are doing against us, please be sure to let me know. Please be sure to honor our side of the deal." *Id.*, Ex. 23. Later that year, Arnnon Geshuri (Google Recruiting Director) was asked to create a formal "Do Not Cold Call" list of companies, including Apple, which had "special agreements" with Google not to compete for employees. *See id.*, Ex. 27. The draft was presented to Google's Executive Management Group, a committee consisting of Google's senior executives, including Eric Schmidt, Larry Page (Google Co-Founder), Sergey Brin (Google Co-Founder), and Shona Brown (former Google Senior Vice President, Business Operations). *See id.*, Ex. 28. Eric Schmidt approved the list. *See id.* (email from Eric Schmidt stating "[t]his looks very good."). When Shona Brown asked Eric Schmidt whether he had any concerns with sharing information regarding the "Do Not Call" list with Google's competitors, Eric Schmidt responded that he preferred that it be shared "verbally[,] since I don't want to create a paper trail over which we can be sued later?" *Id.*, Ex. 41. Shona Brown responded: "makes sense to do orally. i agree." *Id.*

Two months after entering into an agreement with Google, Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple) persuaded Adobe to enter into a nearly identical agreement with Apple. On May 26, 2005, Steve Jobs complained to Bruce Chizen (former Adobe CEO) that Adobe was recruiting Apple employees. *Id.*, Ex. 18. Bruce Chizen responded by saying, "I thought we agreed not to recruit any senior level employees . . . . I would propose we keep it that way. Open to discuss. It would be good to agree." *Id.* Steve Jobs was not satisfied, and replied by threatening to send Apple recruiters after Adobe's employees: "OK, I'll tell our recruiters that they are free to approach any Adobe employee who is not a Sr. Director or VP. Am I understanding your position correctly?" *Id.* Bruce Chizen immediately gave in: "I'd rather agree NOT to actively solicit any employee from either company . . . . If you are in agreement I will let

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my folks know." *Id.* (emphasis in original). The next day, Theresa Townsley (Adobe Vice President Human Resources) announced to her recruiting team, "Bruce and Steve Jobs have an agreement that we are not to solicit ANY Apple employees, and vice versa." *Id.*, Ex. 19 (emphasis in original). Adobe then placed Apple on its "[c]ompanies that are off limits" list, which instructed Adobe employees not to cold call Apple employees. *Id.*, Ex. 11.

In addition to Google's anti-solicitation agreement with Apple, Google also entered into a "no poaching policy" with Intel. *See, e.g.*, *id.*, Ex. 51 (email from Paul Otellini (CEO of Intel and Member of the Google Board of Directors) to Intel recruiter, dated April 16, 2007, stating, "I have an unofficial no poaching policy with [Google]"). Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) confirmed this policy in a June 4, 2007, email to Paul Otellini in which Eric Schmidt wrote, "I checked as to our recruiting policy with Intel. 'Intel has been listed on the Do Not Call List since the policy was created. No one in staffing directly calls, networks, or emails into the company or its subsidiaries looking for talent.' Hopefully there are no exceptions to this policy and if you become aware of this please let me know immediately!" *Id.*, Ex. 56. Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) was also involved in the Google-Intel agreement, as reflected in an email exchange from 2006 in which Bill Campbell agreed with Jonathan Rosenberg (Google Advisor to the Office of CEO and former Senior Vice President of Product Management) that Google should call Paul Otellini before making an offer to an Intel employee, regardless of whether the Intel employee first approached Google. *See id.*, Ex. 37. Paul Otellini then forwarded the email to Patricia Murray (Intel Senior Vice President and Director of Leadership Strategy and former President of Human Resources), with a note stating, "FYI . . . Do not fwd." *Id.* Two days later, in an email entitled "global gentleman agreement with Google," an Intel recruiter asked Paul Otellini and another senior executive, "Are either of you aware of any agreement with Google that prohibits us from recruiting Google's senior talent?" *Id.*, Ex. 52. Paul Otellini replied, "Let me clarify. We have nothing signed. We have a handshake 'no recruit' between eric and myself. I would not like this broadly known." *Id.* Plaintiffs note that, while the DOJ alleged that the Google-Intel agreement began no later than September of 2007, other evidence suggests that the agreement began in 2005, the same time as other Defendants' bilateral agreements. *See id*., Ex. 28 (showing Intel on Google's "Do Not Call" list as early as 2005). In October of 2008, Intel also agreed with Pixar that it "will not proactively pursue any Pixar employees going forward." Shaver Decl., Ex. 70.

Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) also insisted that Google and Intuit enter into a non-compete agreement. Although Google's "non-solicit policy" initially "cover[ed] only 18 Intuit employees," "Bill [Campbell] requested that Intuit be added fully to the Do Not Call list." *Id*., Ex. 31 (email, dated June 6, 2007, between Arnnon Geshuri (Google Recruiting Director) and Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO)). Thus, by June 12, 2007, Intuit was added fully to the list. *Id*., Ex. 26; *id*. Ex. 30 ("please update the DNC list to now include Intuit 100% do not call."); *see also* Decl. of Dean Harvey ("Harvey Decl."), Ex. 25 at 13, ECF No. 248 (stating that "Google's [Do Not Cold Call] policy for Intuit began in April 2006 and was broadened in June 2007 to include all Intuit employees.").

Ultimately, by the time that the DOJ investigation began in the summer of 2009, Apple's own "Hands Off (Do Not Call List)" included every Defendant. *See* Shaver Decl., Ex. 22. Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) also tried, unsuccessfully, to enter into a similar agreement with Palm, Inc. ("Palm") following a period in which several employees moved between the two companies. On August 22, 2007, Steve Jobs called Edward Colligan (former President and CEO of Palm) to propose "an arrangement between Palm and Apple by which neither company would hire the other's employees, including high tech employees." Decl. of Edward Colligan ("Colligan Decl.") ¶ 6, ECF No. 293. Steve Jobs also threatened to retaliate against Palm if Palm resisted. *Id*. ("Mr. Jobs also suggested that if Palm did not agree to such an arrangement, Palm could face lawsuits alleging infringement of Apple's many patents."). Edward Colligan nevertheless refused, writing to Steve Jobs, "[y]our proposal that we agree that neither company will hire the other's employees, regardless of the individual's desires, is not only wrong, it is likely illegal." *Id*., Ex. A. Edward Colligan stated further, "I can't deny people who elect to pursue their livelihood at Palm the right to do so simply because they now work for Apple, and I wouldn't want you to do that to current Palm employees." *Id.* Edward Colligan held firm against Steve Jobs' threats, stating, "I want to be clear that we are not intimidated by your threat . . . . If you choose the litigation route, we can respond with our claims based on [Palm's] patent assets, but I don't think litigation is the answer." *Id.* Steve Jobs responded:

> This is not satisfactory to Apple . . . . We must do whatever we can to stop this. I'm sure you realize the asymmetry in the financial resources of our respective companies when you say: "We will both just end up paying a lot of lawyers a lot of money." . . . My advice is to take a look at our patent portfolio before you make a final decision [on an anti-solicitation agreement] here.

Id., Ex. B. Edward Colligan did not agree and did not communicate with Steve Jobs further regarding his proposal. *Id.* ¶ 8.

Defendants generally structured their agreements with each other to apply to all employees, regardless of job type, department, or geography. *See* Shaver Decl., Ex. 17 (Google would not recruit anyone from Apple); *id.*, Ex. 56 (Google would not call, network, or email into Intel or its subsidiaries looking for talent); *id.*, Ex. 19 (Apple and Adobe agreed not to solicit *any* employee from either company); *id*., Ex. 60 (Lucasfilm and Pixar agreed "not to solicit each other's employees"); *id*., Ex. 66 (Pixar agreed not to "directly solicit any Apple employee"); *see also* Harvey Decl., Ex. 25 at 13 (Google's Do Not Cold Call policy "include[d] all Intuit employees."). However, Defendants Apple and Intel agreed simply "NOT to hire top talent (esp technical) away from each other," rather than to avoid all anti-solicitation efforts. Shaver Decl., Ex. 55 (emphasis in original).

Plaintiffs maintain that Defendants' alleged conspiracy went on for years until revealed by the DOJ. After investigating Defendants' alleged conspiracy, "the DOJ concluded that Defendants reached 'facially anticompetitive' agreements that 'eliminated a significant form of competition . . . to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities.'" MTD Order at 3-4; CAC ¶ 112; *see also* Dep't of Just. Compl. Against Adobe, et al. ("DOJ Adobe Compl.") ¶¶ 2, 14, ECF No. 93-1; Dep't of Just. Compl. Against Lucasfilm ("DOJ Lucasfilm Compl.") ¶¶ 2, 15, 22, ECF No. 93-4. The

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DOJ also determined that the agreements "were not ancillary to any legitimate collaboration," "were broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted the normal price-setting mechanisms that apply in the labor setting." DOJ Adobe Compl. ¶ 16; DOJ Lucasfilm Compl. ¶ 17; CAC ¶ 112. The DOJ concluded that Defendants entered into agreements that were restraints of trade that were per se unlawful under the antitrust laws. DOJ Adobe Compl. ¶ 35; DOJ Lucasfilm Compl. ¶ 3; CAC ¶ 112. However, the government only obtained injunctive relief from the Defendants. It did not obtain any compensation for employees injured by the allegedly collusive activities.

This substantial evidence presented by Plaintiffs suggests that adjudication of Defendants' alleged antitrust violation will turn on legal and factual issues that are common to the Technical Class. Accordingly, the Court finds that common questions will predominate with respect to the alleged antitrust violation.

2. Antitrust Impact

Having found that common questions will predominate with respect to the first element, antitrust violation, the Court now turns to the second element, impact. "Antitrust 'impact'—also referred to as antitrust injury—is the 'fact of damage' that results from a violation of the antitrust laws." *In re DRAM Antitrust Litig.*, 2006 WL 1530166 at *7. "It is the causal link between the antitrust violation and the damages sought by plaintiffs." *In re New Motors*, 522 F.3d at 19 n.18.

Plaintiffs marshal substantial evidence, including documentary evidence and expert reports using statistical modeling, economic theory, and data, to demonstrate that common questions will predominate over individual questions in determining the impact of the antitrust violations. The Court finds that the documentary evidence and expert reports paint a picture of Defendants' business practices and the market in which Defendants operate that suggests that common proof could be used to demonstrate the impact of Defendants' actions on Technical Class members. Accordingly, the Court finds that Plaintiffs' proposed methodology satisfies the predominance standard.

Specifically, the record suggests that all technical employees—not just those who would have received cold calls but for the anti-solicitation agreements—may have been impacted by the

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agreements. Plaintiffs note that cold calling, a recruitment tool that Defendants viewed favorably, has the effect of spreading information about salaries and benefits from recruiters of one firm to employees of another. Leamer Rep. ¶ 71-76. Such information could then spread to other employees within a firm and beyond, leading to widespread increases in employee compensation across the labor market due to increased access to information. *Id.*

Further, Plaintiffs contend that Defendants had company-wide compensation structures, which organized employees into job groups, levels, and families that were evaluated and paid in relationship to all other groups. Suppl. Mot. at 15-22. In addition, Defendants valued internal equity (the idea that similarly situated employees should be compensated similarly) within their firms. *Id.* Because of a desire to maintain equity between employees, the upward pressure that cold calls placed on the salaries of individual employees who would have received the calls would have also affected other employees who were part of the same salary structure. As such, variances in individual employees' salaries would affect other employees who were in a similar position. Each Defendant's compensation structure could then have been influenced by the other Defendants' structures as Defendants saw each other as competitors for the same labor pool.

Finally, Plaintiffs point to the fact that Defendants were motivated to retain their employees. This, Plaintiffs contend, would have motivated each Defendant to provide financial incentives to employees to respond to and to prevent poaching by other Defendants. Leamer Rep. ¶ 105. Yet, because of the anti-solicitation agreements, Defendants did not need to initiate such measures, which would have benefitted the entire Technical Class.

Ultimately, the Court is not tasked at this phase with determining whether Plaintiffs will prevail on these theories. Rather, the question is narrower: whether Plaintiffs have presented a sufficiently reliable theory to demonstrate that common evidence can be used to demonstrate impact. The Court finds that, based on the extensive documentary evidence, economic theory, data, and expert statistical modeling, Plaintiffs' methodology demonstrates that common issues are likely to predominate over individual issues. The Court first discusses the substantial documentary evidence, which supports Plaintiffs' theory of common impact, and then proceeds to discuss the expert reports. The Court concludes by rejecting Defendants' attempt to identify flaws that would undermine Plaintiffs' entire methodology.

a. Documentary Evidence

In Plaintiffs' Supplemental Motion for Class Certification, Plaintiffs submitted thousands of pages of documents—all common evidence—which support Plaintiffs' theories of classwide harm and undermine many of the representations previously made by Defendants. Plaintiffs' common evidence suggests that, for the purpose of ultimately proving impact, common issues will predominate over individual ones.

The Court begins by discussing the documentary evidence on the importance of cold calling as a recruitment tool and the effect of the preclusion of cold calling on the Technical Class as a whole. The Court then discusses the evidence of Defendants' rigid compensation structure and importance of internal equity. The Court finally turns to the documentary evidence that Defendants viewed each other as labor competitors, which may have resulted in individual Defendants' wage suppression depressing other Defendants' employees' wages.

i. Cold Calling and Recruitment

Plaintiffs produce significant evidence that cold calling was an important part of Defendants' recruitment practices and contend that the elimination of such recruitment through cold calling had adverse effects on all Technical Class members.

a) The Importance of Cold Calling as a Recruitment Practice to Defendants

Plaintiffs' documents support the allegation that, throughout the class period, Defendants viewed recruitment, particularly of "passive candidates"—that is, employees who were not actively looking for a new job—as crucial to their growth and development. Donna Morris (AdobeAdobe Senior Vice President, Global Human Resources) described recruiting talent as "critical" to company growth. Harvey Decl., Ex 1 (Morris Depo.), at 56:17-19 ("Q: Why is recruiting talent important to Adobe? A: So our critical, most critical asset is people. So really we're an [intellectual property]-based company."). Adobe also believed that an important way to source "top talent" was to focus on "passive" talent, which it defined as "top performers [who] tend to be entrenched" but "may be 'willing to listen' if the right opportunity is presented." Shaver Decl., Ex. 14 at 3. As explained by Donna Morris, "often the very best candidates might not necessarily be looking for Adobe. They might not even know that Adobe is a company where they can leverage their capabilities. And so recruiting is a big, big aspect." *Id*. at 57:13-17. To support Google's rapid growth, which included hiring "several thousand employees per year from 2006 to 2009," Google employed "as many as 800 recruiters while also working with external recruiting agencies." *See id*., Ex. 25, at 7-8. Google also determined that "[p]assive sourcing will play an increasingly larger role in recruiting as we move forward as a company." Harvey Suppl. Decl., Ex. 14 (Google 2006 Sourcing Diagnostic).

The record also indicates that Defendants viewed cold calling as a key method to attract potential employees. Intel estimated that, historically, competitive sourcing, including cold calling and research, accounted for [redacted] percent of hires, Harvey Decl., Ex. 27, and stated in its "Complete Guide to Sourcing" that "[Cold] Calling candidates is one of the most efficient and effective ways to recruit, " Shaver Decl., Ex. 54. Similarly, Google found that although referrals were the largest source of hires, "agencies and passively sourced candidates offer[ed] the highest yield." Harvey Suppl. Decl., Ex. 14. Consequently, in response to concerns over slow hiring, Google's Chief Culture Officer stated that "[c]old calling into companies to recruit is to be expected unless they're on our 'don't call' list." Shaver Decl., Ex. 42.

Further, Defendants appear to have been particularly concerned about their ability to recruit employees for positions within the Technical Class. For example, shortly prior to Google's anti-solicitation agreement with Apple, Google determined that it needed to "dramatically increase the engineering hiring rate." Cisneros Decl., Ex. 1753. Thus, Google stated that it would "need to drain competitors to accomplish this rate of hiring." *Id.*; *see also* Harvey Suppl. Decl., Ex. 14 (Google 2006 Sourcing Diagnostic) (documenting a large "hiring gap" for engineering positions). Relatedly, when a Senior Apple Executive stated in 2007 that his biggest challenge in the "EE hiring plan" was finding high quality people, Mark Bentley (former Apple Director of Executive

Recruiting and Interim Human Resources Director) responded by stating: "Bottom line is that we need to do more targeted recruiting of 'passive' candidates." Harvey Suppl. Decl., Ex. 7.

Google also closely tracked the decline rate of its top technical candidates as well as the loss of its technical employees. *See* Cisneros Decl., Ex. 173, at 1 (showing that "Google's offer decline rates [redacted], especially among senior and top technical candidates."); *see also* Shaver Decl., Ex. 45 (documenting how, during 2010, "[redacted] of technical employees who reported leaving Google for another company went to a startup organization" and that Facebook accounted for the highest portion of overall departures).

b) Enforcement of the Anti-Solicitation Agreements by Defendants

While Defendants dispute that this absence of cold calling due to their anti-solicitation agreements had any effect on job opportunities or flow of information to the class members, *see* Opp'n at 17, Defendants' own documents created during the alleged conspiracy tell a different story.

First, Plaintiffs offer evidence indicating that, but for Defendants' anti-solicitation agreements, Defendants would have been cold calling one another's employees. For example, in November of 2005, Howard Look (former Pixar Vice President of Software) stated that Pixar was struggling to find candidates, but "of course cannot recruit out of Apple." Shaver Decl., Ex. 64. Adobe personnel recognized that "Apple would be a great target to look into" for the purpose of recruiting, but knew that they could not do so because, "[u]nfortunately, Bruce [Chizen (former Adobe CEO)] and Apple CEO Steve Jobs have a gentleman's agreement not to poach each other's talent." Shaver Decl., Ex. 13. As Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) explained at his deposition, anti-solicitation agreements prevented a competitor from going "A through Z" and calling "everybody that was a mid-level engineer and above . . . that was what I objected to." Cisneros Decl., Ex. EE (Campbell Depo.) at 30. Thus, by virtue of these anti-solicitation agreements, Defendants' employees were deprived of job information and opportunities.

Second, the evidence indicates that Defendants actively and aggressively enforced these anti-solicitation agreements, which further demonstrates their harmful effects. In an email from Arnnon Geshuri (Google Recruiting Director) to Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) and Laszlo Bock (Google Senior Vice President of People Operations), Arnnon Geshuri confirmed: "[O]ur [Google] recruiters are strictly following the Do Not Call policy regarding Intel and no one has called, networked, or emailed into the company or its subsidiaries looking for talent." Shaver Decl., Ex 35. Intel memorialized its agreement with Pixar in a document which states, "We cannot recruit (including calling up, emailing or enticing in any way) current Pixar employees to come to work for Intel. If a Pixar employee applies to Intel without being recruited by Intel . . . [Pat Geslinger (former Intel Senior Corporate Vice President)] will contact the CEO of Pixar for approval to hire." *Id*., Ex. 53.

Plaintiffs also offer evidence supporting their assertion that Defendants' agreements were particularly concerned with preventing the recruitment of one another's technical employees. Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) repeatedly contacted the CEOs of co-Defendants to thwart the recruitment of Apple's employees. For instance, when a recruiter from Google's engineering team contacted an Apple employee in 2007, Steve Jobs forwarded the message to Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) and stated, "I would be very pleased if your recruiting department would stop doing this." *Id*., Ex. 24. Google responded by making a "public example" out of the recruiter and "terminat[ing] [the recruiter] within the hour." *Id*. The aim of this public spectacle was to "(hopefully) prevent future occurrences." *Id.*; *see also* Cisneros Decl., Ex. 1869 (email from Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) to Sergey Brin (Google Co-Founder), stating "Steve just called me again and is pissed that we are still recruiting his browser guy."); Shaver Decl., Ex. 25 (email from Steve Jobs to Eric Schmidt) ("I am told that Googles [sic] new cell phone software group is relentlessly recruiting in our iPod group. If this is indeed true, can you put a stop to it?").

By "prevent[ing] future occurrences" of Google's recruitment of Apple employees, *see* Shaver Decl., Ex. 24, Apple employees were deprived of learning about potential job opportunities at Google from more than 800 Google recruiters, as well as Google's external recruiting agencies. *See* Harvey Decl., Ex. 25, at 7-8. In fact, Google even declined to hire some *former* Apple engineers after Steve Jobs let it be known that he'd "strongly prefer that [Google] not hire these guys." Cisneros Decl., Ex. 653.

Plaintiffs offer further evidence supporting their assertion that Defendants' CEOs personally monitored and enforced their anti-solicitation agreements, especially as the agreements applied to members of the Technical Class. For example, on September 26, 2007, Paul Otellini (CEO of Intel and Member of the Google Board of Directors) received an internal complaint regarding Google's successful recruiting efforts of Intel's technical employees. Shaver Decl., Ex. 57 ("Paul, I am losing so many people to Google . . . . We are countering but thought you should know."). Paul Otellini's answer was to forward the email to Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO): "Eric, can you pls help here???" *Id.* Eric Schmidt obliged and forwarded the email to his recruiting team, who prepared a report for Eric Schmidt on Google's activities. *Id.*, Ex. 35. The next day, Eric Schmidt replied to Paul Otellini, "If we find that a recruiter called into Intel, we will terminate the recruiter." Ex. 50; *see also* Cisneros Dec'l, Ex. 651 (May 4, 2006, e-mail from Paul Otellini to Eric Schmidt: "Sorry to bother you again on this topic, but my guys are very troubled by Google continuing to recruit our key players.").

Additionally, an email forwarded to Edward Catmull (Pixar President) indicated that Pixar felt compelled to check with Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) before extending a job offer to even an administrative assistant. Shaver Decl., Ex. 68. In response, Edward Catmull emphasized to Rob Cook (Pixar Vice President of Advanced Technology) that "[t]he key is to stay away from the engineers." *Id.* Consistent with this position, Edward Catmull informed Steve Jobs via email that Pixar had received an application from an Apple employee to work as a test automation engineer, but "[w]e declined." Cisneros Decl., Ex. 424. Several months later, that employee contacted Pixar again informing Pixar that he had another offer and still planned to leave Apple. *Id.* Edward Catmull emailed Steve Jobs asking whether Jobs would "object" if Pixar communicated with the employee, and Steve Jobs gave permission. *Id*. Thus, Plaintiffs' evidence supports their claim that these anti-solicitation agreements, enforced by Defendants' top officers, stifled recruitment efforts of Technical Class members.

c) The Effect of the Absence of Cold Calling on the Technical Class as a Whole

In addition to showing that Defendants valued cold calling and that the absence of cold calling hampered recruitment of members of the Technical Class, the documentary evidence also suggests that the lack of cold calls had a profound and common effect on all members of the Technical Class.

Plaintiffs allege that the elimination of cold calling deprived all employees of information regarding pay packages that the employees could have used to obtain more lucrative employment or to gain leverage over their existing employers in negotiating pay increases. Class Cert. Mot. at 16. The earning potential of a valuable employee who knows her market worth is illustrated by an email exchange at Adobe. Out of concern that one employee—a "star performer" due to his technical skills, intelligence, and collaborative abilities—might leave Adobe because "he could easily get a great job elsewhere if he desired," Adobe considered how best to retain him. Cisneros Decl., Ex.1250. In so doing, Adobe expressed concern about the fact that this employee had already interviewed with [redacted] other companies and communicated with friends who worked there. *Id.* Thus, Adobe noted that the employee "was aware of his value in the market" as well as the fact that the employee's friends from college were "[redacted] *Id.* In response, Adobe decided to give the employee an immediate pay raise. *Id.* Similarly, as explained by Alex Lintner (Intuit Head of Global Business Division), "[w]henever somebody's being targeted by an outside company and we want to retain them, we have a conversation around how we can retain them so they don't take the offer from the outside company." Hallock Rep. ¶ 199. In the example of one employee that Intuit wanted to retain, Intuit [redacted] which was an [redacted] but, in light of the employee's skills and contributions to the company, Intuit was "willing to make an investment." *Id.*

While Defendants claim that counter-offers were generally made only to particular individuals to retain key talent, Plaintiffs' evidence supports their allegation that the risk imposed by cold calls and subsequent counteroffers may have had much broader effects. As noted by one Google employee in response to Google's decision to make counteroffers to some individuals who were recruited to go elsewhere, "[i]t's impossible to keep something like this a secret. The people getting counter offers talk, not just to Googlers and ex-Googlers, but also to the competitors where they received their offers (in the hopes of improving them), and those competitors talk too, using it as a tool to recruit more Googlers." Shaver Decl., Ex. 59. This employee expressed frustration, stating that by staying at Google, "it feels like my loyalty is being punished." *Id.*

Alan Eustace (Google Senior Vice President) commented on concerns regarding competition for workers and Google's approach to counteroffers by noting that, "it sometimes makes sense to make changes in compensation, even if it introduces discontinuities in your current comp, to save your best people, and send a message to the hiring company that we'll fight for our best people." *Id*. Because recruiting "a few really good people" could inspire "many, many others [to] follow," Alan Eustace concluded, "[y]ou can't afford to be a rich target for other companies." *Id.* According to him, the "long-term . . . right approach is not to deal with these situations as one-off's but to have a *systematic approach* to compensation that makes it very difficult for anyone to get a better offer." *Id*. (emphasis added).

This documentary evidence suggests that Defendants would have responded to the information spread by cold calls not merely on an individual basis, but with a structural response that affected all members of the Technical Class. Thus, Plaintiffs' evidence suggests not only that the anti-solicitation agreements eliminated a key tool of recruitment, cold calling, but also that the impact of this elimination affected the entire Technical Class. The documentary evidence supports Plaintiffs' theory that Defendants' elimination of cold calling allowed Defendants not to have to put in place structural incentives to retain employees. This common evidence provides support for Plaintiffs' theory that if the anti-solicitation agreements did not exist, Defendants would have had to take actions not only to retain the particular employees who may have received the cold calls, but also that Defendants would have had to take broader action that would have affected the Technical Class as a whole.

ii. Compensation Structure and Internal Equity

As set forth below, Plaintiffs' documentary evidence further shows that Defendants maintained formal compensation structures and made significant efforts to maintain internal equity within those structures. This additional documentary evidence further supports Plaintiffs' theory that the anti-solicitation agreements' downward pressure on individual employees' salaries would have applied similar downward pressure across Defendants' salary structure and on all Technical Class employees' salaries.

First, Plaintiffs' evidence supports their claim that, during the class period, all Defendants used formal administrative compensation structures and divided jobs into pay bands, zones, grades, and ranges by which they evaluated and paid employees in groups in relationship to other groups. At Adobe, every job position was assigned a job title, and every job title had a corresponding salary range within Adobe's salary structure, which included a salary minimum, middle, and maximum. *See* Cisneros Decl., Ex. C (Arriada-Keiper Depo.) at 16, 20, 159 189-90, 259; *id.*, Ex. G (Vijungco Depo.) at 29. Adobe expected that the distribution of its existing employees' salaries would fit [redacted] *Id.*, Ex. F (Streeter Depo.) at 57. Similarly, Apple's compensation data shows that, for each year in the Class Period, Apple had a "job structure system," which included categorizing and compensating its workforce according to a discrete set of company-wide job levels assigned to all salaried employees and [redacted] sets of base salary ranges applicable to [redacted]. *Id.*, Ex. M (Burmeister Depo.) at 14-15, 52-53; Brown Decl., Ex. 16 (Burmeister Decl.) ¶¶ 6, 10 & Ex. B. Every salary range comprised centrally established "min," "mid" and "max" amounts. *See ids.*

Google also had many job families, many grades within job families, and many job titles within grades. *See, e.g.*, Harvey Suppl. Decl., Exs. 15, 16; *see also* Cisneros Decl., Ex. S (Brown Depo.) at 74-76 (discussing salary ranges utilized by Google); *id.*, Ex. X (Wagner Depo.) at 49-50 (testifying that Google's [redacted] salary ranges had generally the same structure" as the [redacted] salary ranges). Throughout the class period, Google utilized salary ranges and pay bands with minima and maxima and either means or medians. Hallock Rep. ¶ 66; *see* Cisenors Decl., Ex. S (Brown Depo.) at 74-76, *id.*, Ex. X (Wagner Depo.) at 49-50 (testifying that Google's [redacted] salary ranges had generally the same structure as the [redacted] salary ranges). As explained by Shona Brown (former Google Senior Vice President, Business Operations), "if you discussed a specific role [at Google], you could understand that role was at a specific level on a certain job ladder." Cisneros Decl., Ex. S (Brown Depo.) at 94-95; *id*., Ex. Y (Conrad Depo.) at 23.

Likewise, Intel had a "compensation structure," with job grades and job classifications. *See id*., Ex. BB (McKell Depo.) at 73 ("[W]e break jobs into one of three categories—job families, we call them—R&D, tech, and nontech, there's a lot more . . . ."). The company assigned employees to a grade level based on their skills and experience. *Id*., Ex. Y (Conrad Depo.) at 23; *see also id*., Ex. CC (Murray Depo.) at 45 (explaining that everyone at Intel is assigned a "classification" similar to a job grade). Intel standardized its salary ranges throughout the company; each range applied to multiple jobs and most jobs spanned multiple salary grades. *Id*., Ex. BB (McKell Depo.) at 59. Intel further [redacted], and compensation at Intel, like Adobe, [redacted] *Id.* at 62-63.

The other Defendants had similarly set salary structures. Intuit had job families and job titles—as indicated by documents tracking salary low, mid, and high information, job codes, and percentiles—and categorized jobs into [redacted] formal bands. Hallock Rep. ¶¶ 85, 89. Lucasfilm's compensation scheme included job titles that were matched to job families, *see* Cisneros Decl., Ex. LL (Coker Depo.) at 246, as well as set salary ranges for employees who had similar job titles or job classifications, *id*., Ex. NN (Lucas Depo.) at 137-138. Pixar used job families and groups, *see id*., Ex. VV (Sheehy Depo.) at 78, 136, and established salary ranges for each position, *id*., Ex. SS (McAdams Depo.) at 29.

Second, to ensure that employees were paid within the prescribed salary ranges, Defendants used specific guidelines and tools. For instance, to assist managers in staying within the prescribed ranges for setting and adjusting salaries, Adobe had an online salary planning tool as well as "salary matrixes" which provided managers with guidelines based on market salary data. *See*

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Cisneros Decl., Ex. C (Arriada-Keiper Depo.) at 82-3 ("[E]ssentially the salary planning tool is populated with employee information for a particular manager, so the employees on their team [sic]. You have the ability to kind of look at their current compensation. It shows them what the range is for the current role that they're in . . . . The tool also has the ability to provide kind of the guidelines that we recommend in terms of how managers might want to think about spending their allocated budget.").

Apple also created a Human Resources and recruiting tool called [redacted] which was an internal system for tracking employee records and performance, and required managers to grade employees at [redacted] pre-set levels. *See id*., Ex. I (Baja Depo.) at 142-43, 145-46); *id*., Ex. N (Fadell Depo.) at 52-53; *id*., Ex. O (Mansfield Depo.) at 33. As explained by Tony Fadell (former Apple Senior Vice President, Ipod Division, and advisor to Steve Jobs), [redacted] "would say, this is the employee, this is the level, here are the salary ranges, and through that tool we were then – we understood what the boundaries were." *Id*., Ex. N (Fadell Depo.) at 53.

Intel also used a software tool to provide guidance to managers about an employee's pay range which would also take into account market reference ranges and merit. *See* Harvey Suppl. Decl., Ex. 9. As explained by Randall Goodwin (Intel Technology Development Manager), "[i]f the tool recommended something and we thought we wanted to make a proposed change that was outside its guidelines, we would write some justification." Cisneros Decl., Ex. Z (Goodwin Depo.) at 52; *accord* Hallock Rep. ¶ 77.

Intuit similarly gave compensation guidelines to managers throughout the company. *See* Cisneros Decl., Ex. GG (McNeal Depo.) at 76, 99. Michael McNeal (Intuit Vice President of Talent Development, former Vice President of Talent Strategy, Vice President of Talent Acquisition, Director of Talent Acquisition, and Manager of Executive Recruitment) acknowledged, for example, that Intuit provided guidance about "the variables that [the company] usually use[s] to the make . . . decision[s]" about compensation. *Id.* at 99.

Similarly, Frank Wagner (Google Director of Compensation), testified that he could locate the target salary range for jobs at Google through an internal company website. *See id*., Ex. X (Wagner Depo.) at 57-58 ("Q: And if you wanted to identify what the target salary would be for a certain job within a certain grade, could you go online or go to some place . . . and pull up what that was for that job family and that grade? . . . A: Yes.”).

Third, Plaintiffs’ evidence indicates that Defendants expected compensation to be set within their salary ranges; deviations required special approval. Adobe’s practice, if employees were below the minimum recommended salary range, was to “adjust them to the minimum as part of the annual review” and “red flag them.” *Id*., Ex. C (Arriada-Keiper Depo.) at 24. Deviations from the salary ranges would also result in conversations with managers, wherein Adobe’s officers explained, “we have a minimum for a reason because we believe you need to be in this range to be competitive.” *Id.*

Similarly, Intel regularly ran reports showing the salary range distribution of its employees, *id*., Ex. BB (McKell Depo.) at 64, and, at Intuit, recruiters could not deviate from salary guidelines without express approval, *id*., Ex. HH (Nguyen Depo.) at 72-73, 90-92. At Apple, going outside prescribed “guidelines” also required extra approval. *See id*., Ex. J (Bechtel Depo.) at 217; *id*., Ex. N (Fadell Depo.) at 53 (“And if we were to go outside of that, then we would have to pull in a bunch of people to then approve anything outside of that range.”). Google’s compensation programs were designed, monitored, and overseen by a special department called “People Ops.” *See id.*, Ex. 5 (Brown Depo.) at 24. And finally, at Pixar, Stephanie Sheehy (Pixar Manager of Human Resources Analysis) and Lori McAdams (Pixar Vice President of Human Resources and Administration) were responsible for ensuring that salaries for each job group remained within their allocated pool. Cisneros Decl., Ex. VV (Sheehy Depo.) at 77-78.

Fourth, Plaintiffs’ evidence shows not only that Defendants maintained formal compensation structures, but that the details of these structures were driven by concerns about maintaining internal equity—the idea that employees doing the same work would generally be paid similarly—in both hiring and promotions.

As explained by Debbie Streeter (Adobe Vice President, Total Rewards), Adobe “always looked at internal equity as a data point, because if you are going to go hire somebody externally that’s making . . . more than somebody who’s an existing employee that’s a high performer, you need to know that before you bring them in.” *Id*., Ex. F (Streeter Depo.) at 175. Similarly, when considering whether to extend a counteroffer, Adobe advised "internal equity should ALWAYS be considered." *Id*., Ex. 216.5.

Concerns about internal equity also permeated Apple's compensation program. Steven Burmeister (Apple Senior Director of Compensation) testified that internal equity—which Burmeister defined as the notion of whether an employee's compensation is "fair based on the individual's contribution relative to the other employees in your group, or across your organization"—inheres in some, "if not all," of the guidelines that managers consider in determining starting salaries. *Id*., Ex. M (Burmeister Depo.) at 61-64; *id*., Ex. 1856. In fact, as explained by Patrick Burke (former Apple Technical Recruiter and Staffing Manager), when hiring a new employee at Apple, "compar[ing] the candidate" to the other people on the team they would join "was the biggest determining factor on what salary we gave." *Id*., Ex. L (Burke Depo.) at 279 (emphasis added).

Likewise, Google considered internal equity to be an important goal. Google utilized a salary algorithm in part for the purpose of "[e]nsur[ing] internal equity by managing salaries within a reasonable range." *Id*., Ex. 1613. Furthermore, because Google "strive[d] to achieve fairness in overall salary distribution," "high performers with low salaries [would] get larger percentage increases than high performers with high salaries." *Id*., Ex. 1618.14.

Similarly, Intel used internal equity "to determine wage rates for new hires and current employees that corresponded to each job's relative value to Intel." *Id*., Ex. BB (McKell Depo.) at 210-211; *id*., Ex. 398.8. To assist in that process, Intel used a tool that generates an "Internal Equity Report" when making offers to new employees. *Id*., Ex. BB (McKell Depo.) at 212-13. In the words of Ogden Reid (Intel Director of Compensation and Benefits), "[m]uch of our culture screams egalitarianism . . . . While we play lip service to meritocracy, we really believe more in treating everyone the same within broad bands." *Id*., Ex. 2035.4.

At Lucasfilm, all new positions and out-of-cycle compensation adjustments presented to its compensation committee for approval were to be accompanied by "Peer Relationship" information regarding how the subject employee's (or candidate's) colleagues inside the company were compensated, and this factored heavily into committee decisions. *See id*., Exs. 710, 729, 2084, 2092, 2094, 2096; *id.*, Ex. MM (Condiotti Depo.) at 41-42 ("[I]n most cases, when we got a comp request . . . it would have the survey data and all of the internal people that had—were in similar positions."). Chris Galy (Lucasfilm Director of Talent Acquisition) testified that internal equity is "always one of the considerations" in determining pay for new hires and that he always discusses internal equity with the manager requesting the new hire. *See id.*, Ex. FF (Galy Depo.) at 200-03. Chris Galy explained that maintaining internal equity was important because "[y]ou don't want to . . . hire one person and lose ten." *Id.* at 201. Chris Galy also testified about a specific recent situation in which bringing in a new person at a higher salary required raising another employee's salary in order to preserve internal equity. *Id.* at 194-95 ("[A]nd so we did an action [pay increase] for [redacted]."").[10]

Pixar similarly expressed concerns with maintaining internal equity. *See, e.g.*, *id.*, Ex. QQ (Batali Depo.) at 67 ("[I]f someone feels like they're being paid more than someone I know who has more value, it raises a bit of a flag"); *id.*, Ex. UU (Zissimos Depo.) at 71 (discussing comparing salaries of similar employees to ensure they were not "out of whack").

Due to Defendants' formalized pay structures and compensation design, Plaintiffs' evidence indicates that Defendants' concerns with internal equity could lead to classwide changes in compensation levels as a result of the anti-solicitation agreements. In the face of inequities between new hires and existing employees, Defendants considered increasing compensation for existing employees. This precise dynamic is best reflected in Defendants' own internal documents and emails before and after the anti-solicitation agreements. Lucasfilm regularly and proactively reviewed employee salaries to ensure its workforce was within range and implemented "[C]all-[O]ut [E]quity [A]djustment[s]"—individual compensation increases for the explicit purpose of "align[ing] the employee more appropriately in their salary range . . . [and] based on how that

[10] Chris Galy stated in his deposition: "Where a manager would come in and say 'I believe that I have an [sic] high-performing' -- in fact, I just had one of these about a month ago, couple months ago, where we went out and hired somebody, and as we were looking at some of the folks on the team, we recognized that the person is -- we were at risk of potentially having this person feel like they were, you know, not in the market range, so we did an action for [redacted]. . . . We gave [redacted] a salary increase." Cisneros Decl., Ex. FF (Galy Depo.) at 195. Defendants contest this anecdote by contending that the employee in question received a salary increase for purposes unrelated to internal equity. Yet the portions of Chris Galy's deposition that the Defendants cite are not in the record. The Court relies on the materials that the parties placed in the record.

employee aligns with their internal peer group based on the same set of criteria." *Id*., Ex. OO (Maupin Depo.) at 194; *id.*, Ex. 730.

At Intel, a human resources document from 2002—prior to the anti-solicitation agreements —recognized "[redacted]" and "[redacted]" *Id*., Ex. 392. In response, Intel planned to: (1) "[redacted] and (2) [redacted] *Id.* An Intel human resources document confirms that, [redacted] Harvey Suppl. Decl., Ex. 10 at 7 (emphasis added).

At Adobe, five months before Bruce Chizen (former Adobe CEO) entered into an agreement with Steve Jobs (Co-Founder, former Chairman, and Former CEO of Apple) to eliminate cold calling between the companies, Donna Morris (Adobe Senior Vice President, Global Human Resources Division) expressed concern "about internal equity due to [redacted] Harvey Decl., Ex. 17 ("[redacted]"). Adobe personnel stated that, because of the [redacted], they may not be able to respond to the problem immediately "[redacted]" *Id.*

The effects of internal equity may have been even more concentrated within the Technical Class. Intuit, for example, differentiated between compensation for engineers and other technical positions versus "all other[s]." Cisneros Decl., Ex. 2739.70. Technical employees had a [redacted] range of salaries and, even for employees of similar salaries, technical employees [redacted]. *Id*. Pixar had a "Tools Software Engineer leveling matrix" that it used "to give [Pixar] a consistent framework for evaluating the expected contribution of [their] software engineers" and to justify adjusting salaries. *See id*., Ex. 1309.1. After Pixar determined that some of its [redacted], Pixar decided to make "[redacted]." *Id*. From Pixar's perspective, "[t]he goal of the new salary proposals is [to] compensate the lowest paid team-members who are performing at the highest levels. This is a 'pre-emptive strike.' We want to send a clear message to these [redacted] that we value them at least as much as some new hires who are seeing much more competitive offers from other companies." *Id*.

In sum, Plaintiffs' evidence supports their theory that Defendants' formal compensation structures combined with the premium Defendants' placed on internal equity created a market for the Technical Class of employees in which any individual's compensation was intertwined with that of her peers. The Court finds persuasive Plaintiffs' contention that common questions about the impact of Defendants' compensation structures, their focus on internal equity, and the effects of these factors on the Technical Class as a whole are likely to predominate over any individual questions.

iii. Impact of Labor Market Competition

Thus far, the Court has discussed Plaintiffs' documentary evidence of the effects of cold calling, Defendants' compensation structures, and Defendants' internal equity concerns on wage suppression across the Technical Class. Now, the Court turns to documentary evidence that suggests that wage suppression within an individual Defendant firm may have affected Technical Class members employed by other Defendant firms because the Defendants viewed each other as competitors for the same employees. This competition often meant that Defendants benchmarked compensation based on each other or based on common external sources.

Adobe, for example, viewed Google and Apple to be among its top competitors for talent and expressed concerned about whether Adobe was "winning the talent war." Shaver Decl., Ex. 14. Adobe further considered itself in a "[redacted]-horse race from a benefits standpoint," which included Google, Apple, and Intuit as among the other "horses." *See* Shaver Decl., Ex. 15. In 2008, Adobe benchmarked its compensation against [redacted] companies including Google, Apple, and Intel. Shaver Decl., Ex. 15; *cf*. Cisneros Decl., Ex. 2800 (showing that, in 2010, Adobe considered Intuit to be a "direct peer," and considered Apple, Google, and Intel to be "reference peers," though Adobe did not actually benchmark compensation against these latter companies).

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Similarly, throughout the class period, Google analyzed and compared its equity compensation to Apple, Intel, Adobe, and Intuit, among other companies, each of which it designated as a "peer company" based on meeting criteria such as being a "high-tech company," a "high-growth company," and a "key labor market competitor." *Id.*, Ex. 173. In 2007, based in part on an analysis of Google as compared to its peer companies, Laszlo Bock (Google Senior Vice President of People Operations) and Dave Rolefson (Google Equity Compensation Manager) wrote that "[o]ur biggest labor market competitors are [redacted] to beat Google for talent." *Id.*

Apple identified Google, Intel, as well as The Walt Disney Company (which now owns Pixar and Lucasfilm), as "peer companies," a phrase Apple defined as "U.S.-based, stand-alone, public companies that, in [the Apple compensation committee's] view, compete with [Apple] for talent, have revenue, market capitalization, and performance that are generally comparable to [Apple]." Cisneros Decl., Ex. 1855.

Intel also benchmarked compensation against other "tech companies generally considered comparable to Intel," which Intel defined as a "[b]lend of semi, software, networking, communications, and diversified computer companies." Cisneros Decl., Ex. 2030.115. According to Intel, in 2007, these comparable companies included Apple and Google. *Id.*

At Lucasfilm, a 2007 "Recruiting and Human Resources Update" prepared for a Board of Directors meeting corroborates many of the dynamics that appear to have been at play for Defendants. The update states that (1) passive talent was "difficult to find;" (2) Lucasfilm had "[e]xtremely diverse needs for each division;" (3) its Bay Area competition included other Defendants in this case including Pixar, Google, and "Silicon Valley" generally; and (4) some of its most difficult positions to fill included members of the Technical Class, including [redacted] *Id.*, Ex. 690.19-.22.

Further, there is evidence that Defendants also benchmarked their compensation data to common external sources, most commonly Radford or Croner. Adobe, for example, pegged its compensation structure as a [redacted]. *See id.*, Ex. C (Arriada-Keiper Depo.) at 16; *see also id.*, Ex. M

(Burmeister Depo.) at 52-55 (discussing how Apple used external market data, such as Radford, as a "reference" when determining salary ranges); *id.*, Ex. 1309.1 (showing that Pixar compared itself against the Radford survey). Bruce Chizen (former Adobe CEO) explained that the particular market targets that Adobe used as benchmarks for setting salary ranges "tended to be software, high-tech, those that were geographically similar to wherever the position existed." *Id.*, Ex. A (Chizen Depo.) at 98. At times, Defendants would make adjustments to their salaries in order to stay competitive. For example, Intel would "[redacted]," *id.*, Ex. BB at 89, and use that as part of the process for determining its "own focal process or pay delivery," *id.*, Ex. CC at 23. [redacted] *Id.*, Ex. BB at 90.

Plaintiffs' documentary evidence further suggests that when determining the competitiveness of their own pay practices, Defendants matched job title compensation within the company to similar titles across multiple companies and shared compensation information. *See* Shaver Suppl. Decl., Ex. 122 (email from Lori McAdams (Pixar Vice President of Human Resources and Administration) to Sharon Coker (former Lucasfilm Director and Senior Director of Human Resources), among others, asking about others' "salary increase budget for FY '07" and stating "[o]urs is [redacted], but we may manage it closer to [redacted] on average. Are you doing anything close, more or less?"); Cisneros Decl., Ex. 621 (email from Laszlo Bock (Google Senior Vice President of People Operations) stating, "[o]ur budget is comparable to other tech companies . . . . We called tech companies this week to check merit budgets to compare to our 3.9%. They told us their merit budgets are: . . . Adobe – [redacted] . . . Apple – [redacted] . . . Intel – [redacted] . . .). Defendants could safely share this data only because they were not in fact competing for employees due to the anti-solicitation agreements.

The pressure Defendants would have experienced due to market competition, including competition against other Defendants in this case, is reflected in a 2006 email from Howard Look (former Pixar Vice President of Software) to Lori McAdams (Pixar Vice President of Human Resources and Administration), Ed Catmull (Pixar President), and Ali Rowghani (Pixar CFO and Senior Vice President of Strategic Planning):

> This new market data [from Radford] corroborates what we've been feeling about the bay area tech market heating up, and helps partially explain why recruiting has been so hard, and why we've lost two people to other tech companies ([redacted]) . . . . We obviously want to be fiscally prudent and do our best to stay within our [redacted] budget, but we should also acknowledge the much higher cost of backfilling for experienced engineers. We have lots going for us beyond base salary . . . but for a software apps engineer, there's a lot going on out there, and with [redacted], there is risk that we may lose more.

Cisneros Decl., Ex. 1306.

The concern Defendants felt about competition for employees contributed to Defendants' decisions to enter into anti-solicitation agreements. For example, in 2005, after hearing that Google was trying to recruit employees from Apple's Safari team, Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple) threatened Sergey Brin (Google Co-Founder), stating, as Brin recounted, "if you [Brin] hire a single one of these people that means war." *Id*., Ex. 1871. In an email to Google's Executive Management Team as well as Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), Sergey Brin advised: "lets [sic] not make any new offers or contact new people at Apple until we have had a chance to discuss." *Id.* Similarly, in 2005, when considering whether to enter into an anti-solicitation agreement with Apple, Bruce Chizen (former Adobe CEO), expressed concerns about the loss of "top talent" if Adobe did not enter into an anti-solicitation agreement with Apple, stating, "if I tell Steve [Jobs] it's open season (other than senior managers), he will deliberately poach Adobe just to prove a point. Knowing Steve, he will go after some of our top Mac talent like [redacted] and he will do it in a way in which they will be enticed to come (extraordinary packages and Steve wooing)." Harvey Decl., Ex. 14.

In addition, Defendants appear to have perceived the anti-solicitation agreements as a way to stifle rising costs. From the perspective of George Lucas (former Lucasfilm Chairman of the Board and CEO), Lucasfilm "c[ould]not get into a bidding war with other companies because we don't have the margins for that sort of thing." Cisneros Decl., Ex. NN at 44; *see also* Shaver Decl., Ex. 60 (stating in an email that Pixar and Lucasfilm "have agreed that we want to avoid bidding wars"). As expressed by Edward Catmull (Pixar President), "[e]very time a studio tries to grow rapidly . . . it seriously messes up the pay structure . . . by offering high salaries to grow at the rate

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[a company] desire[s], people will hear about it and leave." *Id*., Ex. 61; *see also* Cisneros Decl., Ex. RR (Catmull Depo.) at 179 ("So it messes up the pay structure. It does. It makes it very high. . . . That's just the reality we've got. And I do feel strongly about it."). Writing in response to the head of Disney Studios, Edward Catmull explained, "[w]e have avoided wars up here in Norther[n] California because all of the companies up here - Pixar, ILM [Lucasfilm], Dreamworks, and a couple smaller places - have conscientiously avoided raiding each other." Shaver Decl., Ex. 61. Notably, shortly after Steve Jobs entered into an anti-solicitation agreement with Google, Meg Whitman (former CEO of eBay) called Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) "to talk about [Google's] hiring practices." Cisneros Decl., Ex. 872. As Eric Schmidt told Google's senior executives, Ms. Whitman said "Google is the talk of the valley because [you] are driving up salaries across the board." *Id.*

The evidence therefore indicates that Defendants sought to enter into anti-solicitation agreements in an effort to stifle increased competition for labor and rising wages. To the extent that they were successful, Defendants did not need to increase compensation as much as they otherwise would have to attract and retain employees. This common evidence further suggests that the anti-solicitation agreements reached beyond individual members of the Technical Class and affected the compensation of the Technical Class as a whole, including across Defendant firms. The extensive documentary evidence Plaintiffs present therefore supports their theory that they will be able to prove the impact of the antitrust violations on a classwide basis.

b. Expert Reports and Statistical Evidence

To show that common issues predominate for the purpose of assessing classwide impact, Plaintiffs further retained the services of two experts: Edward E. Leamer, Ph.D.,[11] and Kevin F. Hallock, Ph.D.[12] Defendants presented reports from their own experts, Kevin M. Murphy, Ph.D.,[13]

[11] Edward E. Leamer, Ph.D, is the Chauncey J. Medberry Professor of Management, Professor of Economics, and Professor of Statistics at the University of California, Los Angeles. Dr. Leamer earned a B.A. in Mathematics from Princeton University in 1966, and a Masters in Mathematics and a Ph.D. in Economics at the University of Michigan in 1970. He has published on the topics of econometric methodology and statistical analysis, international economics, and macro-economic forecasting, including on the subject of inferences that may appropriately be drawn from non-experimental data.

[12] Kevin F. Hallock, Ph.D., is the Donald C. Opatrny '74 Chair of the Department of Economics, Joseph R. Rich '80 Professor, Professor of Economics, Professor of Human Resources Studies, and

and Kathryn Shaw, Ph.D.,[14] to attack Dr. Leamer's and Dr. Hallock's analyses and conclusions. The Court begins by describing the methodologies and analyses of Dr. Leamer and Dr. Hallock, which support Plaintiffs' theories of common impact of harm. The Court then turns to Defendants' criticisms of Dr. Leamer, Dr. Hallock, and the materials on which Dr. Leamer and Dr. Hallock rely. The Court finds that methodological deficiencies in Defendants' expert reports render the criticisms unpersuasive. The Court therefore finds that the methodologies and theories of Dr. Leamer and Dr. Hallock demonstrate that common questions are likely to predominate over individual questions.

i. Dr. Leamer's Opinions Based on Economic Theory, Documentary Evidence, Data, and Statistical Analyses

In Dr. Leamer's first expert report, which was presented in support of Plaintiff's Motion for Class Certification, Plaintiffs asked Dr. Leamer to evaluate whether classwide evidence was capable of showing that the anti-solicitation agreements artificially reduced the compensation of: (1) members of the Technical and All Employee classes generally, and (2) all or most members of each class. *See* Leamer Rep. ¶ 10(a). In addition, Plaintiffs asked Dr. Leamer to assess whether there was a reliable classwide or formulaic method capable of quantifying the amount of suppressed compensation suffered by each class member. Leamer Rep. ¶ 10(b). Dr. Leamer answered these questions in the affirmative.

Director of the Cornell Institute for Compensation Studies at Cornell University. Dr. Hallock earned a B.A. in Economics at the University of Massachusetts at Amherst in 1991, and a Ph.D. in Economics from Princeton University in 1995. He is a leading labor economist and an expert in compensation structure and design.

[13] Kevin M. Murphy, Ph.D., is the George J. Stigler Distinguished Service Professor of Economics in the Booth School of Business and the Department of Economics at the University of Chicago. Murphy received a bachelor's degree in economics from the University of California, Los Angeles, in 1981, and a Ph.D. in economics from the University of Chicago in 1986. Dr. Murphy has published on labor markets and the determinants of wages and compensation. His work in labor economics has addressed the market determinants of wage by skill level as well as the determination of relative wages across industries and occupations.

[14] Kathryn Shaw, Ph.D., is the Ernst C. Arbuckle Professor of Economics at the Stanford Graduate School of Business. Dr. Shaw received an A.B. degree from Occidental College and Ph.D. in Economics from Harvard University. Dr. Shaw has published on the topic of personnel economics. She also co-pioneered the field of "insider econometrics," a research field in personnel economics in which researchers go within companies and use insider knowledge and data to identify the performance gains from management practices.

Dr. Leamer's analysis proceeded in two steps. First, Dr. Leamer explained that economic studies and theory, documentary evidence, and statistical analyses were capable of showing that the anti-solicitation agreements "tend[ed] to suppress employee compensation generally, by preventing class members from discovering the true value of their work." Class Cert. Mot. at 16. In other words, Dr. Leamer illustrated how classwide evidence was capable of showing that, at the very least, Defendants were paying some members of the class less than they would have been paid in the absence of the anti-solicitation agreements. Second, Dr. Leamer illustrated how economic studies and theory, documentary evidence, and statistical analyses are capable of showing that this suppression of compensation affected all or nearly all class members. Plaintiffs noted that Dr. Leamer's approach followed a roadmap widely accepted in antitrust class actions that use evidence of general price effects plus evidence of a price structure to conclude that common evidence is capable of showing widespread harm to the class. *See, e.g.*, *Johnson*, 2009 WL 5031334 at *8, 11 (finding predominance where conduct was alleged to suppress bill rates for nurses generally and evidence was presented that bill rates were correlated with nurse pay rates); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-55 (3d Cir. 2002) (endorsing regression plus pricing structure study to show classwide impact).

In Dr. Leamer's supplemental expert report, which was prepared in support of the supplemental motion for class certification, Plaintiffs asked Dr. Leamer to respond to questions raised by the Court related to whether Dr. Leamer's initial methodology could show classwide impact. Dr. Leamer focused his supplemental report on the Technical Class and found that his additional analyses confirmed his "original finding of a somewhat rigid pay structure at each Defendant that would have transmitted the effects of the agreements broadly, including throughout the Technical Class." Leamer Suppl. Rep. ¶ 13.

a) Suppressed Compensation Generally

Dr. Leamer first concluded that classwide evidence was capable of showing that the anti-solicitation agreements suppressed compensation of Technical Class members generally. According to Dr. Leamer, this first step was supported by principles of information economics, such as "market price discovery." Dr. Leamer noted that, when evaluating the functioning of labor markets, economists often use a market equilibrium model, which "presume[s] that market forces are powerful enough and work rapidly enough that virtually all transactions occur at approximately the same price—the 'market price' which equilibrates supply and demand." Leamer Rep. ¶ 71. In reality, when labor market conditions change, high transaction costs and limited information flow can slow the process by which transaction prices reach market equilibrium. *Id.* ¶¶ 72-73. "Market price discovery" is the process by which participants in a market search for this equilibrium. *Id.* ¶ 71.

Dr. Leamer opined that the high transaction costs—including time, money, and personal dislocation—involved in searching for high tech jobs limit the number of existing workers seeking new employment. *Id.* ¶ 74. Defendants and other high tech companies value potential employees who are not actively looking for new employment opportunities ("passive candidates") more than those who are looking for new jobs ("active candidates") because currently satisfied employees: (1) tend to be perceived as more qualified, diligent, and reliable; (2) often have training, on-the-job experience, and track records that save the hiring company search and training costs; and (3) are valuable assets that, if hired away from rivals, can harm competitors. *Id.* ¶ 62. Thus, recruiting these passive candidates by cold calling is both an important tool for employers and a key channel of information for employees about outside opportunities. *Id.* ¶¶ 57-62, 75.

Dr. Leamer hypothesized that, by restricting cold calling and other competition over employees, Defendants' anti-solicitation agreements impaired information flow about compensation and job offers. Class Cert. Mot. at 3. Defendants' inhibition of employees' ability to discover and obtain the competitive value of their services meant employees were afforded fewer opportunities to increase their salaries by moving between firms and deprived of information that could have been used to negotiate higher wages and benefits within a firm. *See* Leamer Rep. ¶¶ 71-76. In addition, Dr. Leamer opined that, by limiting the information available to employees, Defendants could avoid taking affirmative steps, such as offering their employees financial rewards and other forms of profit sharing, to retain employees with valuable firm-specific skills. *Id.* ¶¶ 77-80.

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In support of this hypothesis, Dr. Leamer cited to the work of Nobel Prize winning economists, such as Joseph Stiglitz, for the proposition that "even a small amount of information imperfection could have a profound effect on the nature of the equilibrium." Joseph Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 Am. Econ. Rev. 460, 461 (2002); *see* Leamer Reply Rep. ¶¶ 37, 38; *see also id*. ¶ 40 ("The fact that actions convey information leads people to alter their behavior, and changes how markets function. This is why information imperfections have such profound effects.").

Dr. Leamer also relied on the documentary evidence—common to the class as a whole—as further support for the link between the anti-solicitation agreements and compensation reduction. *See* Leamer Rep. ¶¶ 81-88. For example, he cited to Defendants' internal documents indicating that, but for the anti-solicitation agreements, Defendants would have been competing for labor and cold calling each other's employees, and that Defendants recognized that cold calling and other forms of employee solicitation had the potential to drive up the cost of specific employees, which could then have broader effects. *Id.*

Finally, Dr. Leamer bolstered his findings with standard econometric analysis utilizing solely classwide evidence and methods. Dr. Leamer performed an analysis to show that employees who changed firms received higher compensation than those who stayed, reflecting the economic theory of price discovery at work. *Id*. ¶¶ 89-93. Dr. Leamer also performed multiple regression analyses,[15] utilizing Defendants' internal compensation data, to illustrate class members' undercompensation by comparing compensation during the conspiracy with compensation in a conspiracy-free, but-for world. Dr. Leamer concluded that the multiple regression analyses showed that the anti-solicitation agreements artificially suppressed compensation at each Defendant. Leamer Rep. ¶¶ 145-46, Figs. 20-24.

b) Widespread Effect

[15] "A regression is a statistical tool designed to express the relationship between one variable, such as price, and explanatory variables that may affect the first variable. Regression analysis can be used to isolate the effect of an alleged conspiracy on price, taking into consideration other factors that might also influence price, like costs and demand." *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 371 (C.D. Cal. 2011) (internal quotation marks and citation omitted).

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Second, Dr. Leamer opined that economic studies and theory, documentary evidence, and statistical analyses were capable of showing that this compensation suppression had widespread effects. In both his initial report and his supplemental report, Dr. Leamer relied on economic studies and theories of loyalty, fairness, and internal equity, as well as documentary evidence and data, to explain how the adverse effects on compensation due to Defendants' anti-solicitation agreements would have been felt by employees who would have received a cold call or had a significant chance of receiving a cold call and employees who are linked to these groups due to internal equity considerations. Leamer Rebuttal Suppl. Expert Decl. ("Leamer Suppl. Reply Rep.") ¶¶ 27-28.

Based on economic studies and theories involving loyalty, fairness, and internal equity, Dr. Leamer contended that labor markets do not behave like commodity markets. Rather, labor markets rely on committed long-term relationships built on trust, understanding, and mutual interests. Leamer Rep. ¶ 102. As Dr. Leamer explained: "If workers were commodities, every small change to external or internal conditions would lead to recontracting, separation, or termination. This would create enormous uncertainty and disruption and insecurity for employer and employee." *Id.* Thus, both employers and employees seek ways to turn the market transaction into secure long-term relationships, which "can come either from commitment (emotional or financial) to the mission of the organization, or from jointly owned firm-specific assets." *Id*. Companies thus attempt to create loyalty "by getting buy-in from the firm's mission and by making the place of work as appealing as possible." *Id*. ¶ 103.

"One foundation of employee loyalty is a feeling of fairness that can translate into a sharing of . . . [a firm's] rewards with more equality than a market might otherwise produce." *Id.* ¶ 104. Firms seek to promote a feeling of fairness among employees to maintain or to increase employees' commitment and contentment, which also leads to higher levels of productivity. Leamer Suppl. Rep. ¶ 16. Dr. Leamer explained that, "[t]o maintain loyalty, it is usually better for a firm to anticipate rather than to react to outside opportunities, since if a worker were to move to another firm at a much higher level of compensation, coworkers left behind might feel they have not been fairly compensated. That can have an adverse effect on worker loyalty, reducing productivity and increasing interest in employment elsewhere." Leamer Rep. ¶ 105.

Dr. Leamer opined that the information conveyed by an outside offer or a cold call could stimulate a response by management that could extend beyond the specific individual who received the cold call. As Dr. Leamer explained, "when management becomes aware of an attractive outside opportunity for one individual this may make management aware also of the implicit competitive threat to similar individuals and management may feel it wise to make a preemptive move against that threat by an increase in compensation for these newly-threatened similar employees." Leamer Suppl. Rep. ¶ 15. Even though the market may not mandate a rise in compensation for these similar individuals until they actually receive an outside offer, "preemptive improvements" can minimize the disruption to employee loyalty that might occur when an employee discovers the she was undercompensated. Leamer Rep. ¶ 105. Thus, "[c]old-[c]alling—as well as just the threat of [c]old-[c]alling—puts upward pressure on compensation." *Id.* ¶ 106. Dr. Leamer opined that "a broad preemptive response is completely analogous to salary increases that are tied to information provided by employment services regarding the compensation offered by the 'market.'" Leamer Suppl. Rep. ¶ 15. Essentially, Dr. Leamer opined that the "response to bursts of cold calls and, even more, the response to the threat of cold calls" would raise internal equity concerns that would spread the impact throughout the Technical Class. Leamer Suppl. Reply Rep. ¶ 27.

In further support of his opinion, Dr. Leamer relied on documentary evidence, including Defendants' compensation data. This documentary evidence showed Dr. Leamer that Defendants each employed company-wide compensation structures that included grades and titles, and that high-level management established ranges of salaries for grades and titles, which left little scope for individual variation. *Id.* ¶¶ 121-22. Defendants also established and regularly updated compensation levels with the goals of: (1) providing similar compensation for all employees in the same employment category; (2) providing specific relative compensation levels for employees in different, hierarchically ordered, employment categories; (3) retaining employees; and (4) maintaining employee productivity and contentment. *See id.* ¶ 122.

Dr. Leamer looked to standard economic labor theory and statistical analyses as additional evidence that the anti-solicitation agreements would broadly affect members of the Technical Class. He explained that his "statistical task is to identify the common factors in the individual data and to apportion these common factors between internal and external forces." Leamer Suppl. Reply Rep. ¶ 29.

In his first expert report, Dr. Leamer conducted regression analyses based on Defendants' salary structures and compensation data, to which the Court referred as Dr. Leamer's "Common Factors Analyses." *See* Leamer Rep., Figs. 11-14. Specifically, Dr. Leamer's Common Factors Analyses assessed Defendants' "firmwide compensation structures, and the formulaic way in which total compensation was varied over time." *Id.* ¶ 128. According to Dr. Leamer, approximately 90 percent of the variation in any individual employee's compensation can be explained by common factors "such as age, number of months in the company, gender, location, title, and employer." *Id.*; *see also id.*, Figs. 11-14. Defendants do not dispute the "fact that job titles explain a large fraction of the firm-wide variation in compensation." Murphy Expert Report ("Murphy Rep.") ¶ 92, ECF No. 230. Dr. Leamer concludes that "[t]he fact that nearly all variability in class member compensation at any point in time can be explained by common variables means there was a systematic structure to employee compensation at each of the Defendant firms." Leamer Rep. ¶ 130. Dr. Leamer opined that these rigid wage structures, and the fact that the coefficients in his regressions did not vary substantially over time, suggested that "compensation of class members tended to move together over time and in response to common factors," such that the effects of the anti-solicitation agreements would be expected to be experienced broadly. *Id.*

Second, Dr. Leamer opined that the evidence showed "a persistent salary structure across employees consistent with important elements of equity in the Defendants' compensation practices." *Id.* ¶ 134. Dr. Leamer specifically relied on five charts that depicted changes in the base salaries and total compensation for ten major job titles at Apple between 2006 and 2009, and the ten major job titles at Google between 2005 and 2009. *See id.*, Figs. 15-17. The Court referred to these five charts as Dr. Leamer's "Compensation Movement Charts." Apr. 5 Class Cert. Order at 36. Dr. Leamer contended that these charts offered further evidence that compensation for different positions tended to move together over time (*i.e.*, if software engineers received a raise, so did account executives). *See* Leamer Rep. ¶¶ 133-34. Based on this evidence, Dr. Leamer opined that the anti-solicitation agreements that focused on subsets of workers would nonetheless have broader effects because of a desire on Defendants' part to maintain the overall salary structure. *Id*. ¶ 134.

Third, Dr. Leamer used a regression model to show that the anti-solicitation agreements had some general impact on the Class and to quantify the total amount of that impact on the Class. *See* Leamer Rep., Figs. 20-24. This model, to which the Court previously referred as the "Conduct Regression" analysis, incorporated a range of variables designed to account for factors including: (1) age, sex, and years at the company; (2) the effects on compensation caused by the anti-solicitation agreements; and (3) the effects caused by factors specific to each Defendant (*e.g.*, firm revenue, total number of new hires, etc.). *See id.*, Figs. 20, 23. Dr. Leamer used the model to estimate the average or net under-compensation at each firm during the conspiracy period. *See id.*, Fig. 22 and 24; Reply at 33.

In the Court's April 5 Class Certification Order, the Court stated that, "[a]ccepting arguendo that the Common Factors Analyses are accurate, they show that factors such as where an employee works and what an employee does play a large role in determining the employee's salary." Apr. 5 Class Cert. Order at 36. However, the Court found that Dr. Leamer did not establish that this fact implied that Defendants' salary structures were so rigid that compensation for employees with *different* titles would move together through time such that a detrimental impact to an employee with one job title would result in an impact to other employees in entirely different jobs (*i.e*., that any impact would ripple across the entire salary structure). *Id.*

The Court also found that Dr. Leamer's Compensation Movement Charts shed little light on whether compensation of members of the All Employee Class (*e.g.*, a custodian at an Intel office in Texas and an engineer at an Intel office in California) moved together over time because the Compensation Movement Chart included only twenty job titles, primarily job titles from the Technical Class at two companies out of the thousands of job titles at the seven companies

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included in the classes. *Id.* at 36-38. The Court expressed concern that the twenty positions reflected on the chart were not representative of the compensation movement of all Class members. *See id.* at 36-38. The Court also found that these charts did not provide particularly compelling evidence regarding whether salaries at each company were linked because Dr. Leamer admitted that the allegedly parallel movement reflected in the charts was also consistent with a "non[-]rigid wage structure." Brown Decl., Ex. 1 (Leamer Depo.) at 283:23-25.

Finally, the Court found that Dr. Leamer's Conduct Regression analysis was capable of showing that Defendants' total expenditures on compensation was less than they would have been in the absence of anti-solicitation agreements and thus capable of showing classwide damages. Apr. 5 Class Cert. Order at 38. The Court further found that the Conduct Regression was capable of showing that the anti-solicitation agreements had a general impact on class members. *Id.* The Court rejected Defendants' contentions to the contrary. *Id.* at 39-42. In this Order, the Court discusses Conduct Regression primarily for the analysis's utility in demonstrating classwide damages. However, the Court also notes, as it did in its previous order, that the Conduct Regression analysis is also capable of demonstrating a general classwide impact.

In response to the Court's concerns that the extant statistical analyses could not show a rigid wage structure, Dr. Leamer submitted additional statistical analyses in his supplemental expert report. These new analyses focused on demonstrating that Defendants maintained a somewhat rigid wage structure not only within job titles, but also that Defendants maintained such a rigid wage structure *across* job titles. To demonstrate this, Dr. Leamer performed a correlation analysis on a job-title-by-job-title basis that compared the "movement over time of the average compensation of each title with the average compensation of the firm's Technical Class." Leamer Suppl. Rep. ¶ 4 (emphasis omitted). Dr. Leamer looked to the correlation analysis to measure "statistically how closely different variables move together." *Id.* ¶ 22; *see also* Suppl. Reply at 4 (stating that this correlation analysis is the quantitative equivalent of the co-movement charts). Dr. Leamer conducted the correlation analysis for all job titles, not just the twenty that Dr. Leamer presented in his initial report. Leamer Suppl. Rep. ¶ 4. This included all titles for which Dr. Leamer had at least six observations (a statistical threshold), which included 94% of Class Period employee years. *Id.* ¶¶ 14, 30. He analyzed correlation over time in two dimensions: "correlation of compensation levels and correlations of compensation *changes*." *Id*. ¶ 23 (emphasis in original). The former focuses on long-term movements, while the latter focuses on year-by-year movements. *Id.*

With respect to both, Dr. Leamer found that the "vast majority" of Technical Class employee job titles (weighted by number of employee years) at each firm correlated positively over time with the compensation of the overall set of Technical Class employees at that firm. *See id.* ¶ 32, Figs. 2, 3.[16] As such, an increase in the compensation of each job title within any given firm was correlated with an increase in the overall compensation of Technical Class employees in that firm. In combination with the fact that 90% of employee total compensation is driven by common factors, Dr. Leamer contended that this sharing of gains across job titles over time further supported an inference of a somewhat rigid salary structure. *See id.* ¶ 4, Figs. 2, 3. Accordingly, Dr. Leamer's supplemental analysis bolstered his finding of a rigid salary structure because it demonstrated that not only was there a rigid salary structure within job titles (which his initial analysis showed) but also that there was a rigid salary structure across job titles.

Dr. Leamer next presented a multiple regression model for each company designed to detect the effect of internal forces acting on class member compensation (*i.e.*, a rigid compensation structure), as opposed to external market forces. *See id.* ¶¶ 24-29. The model measured the effect of a number of explanatory variables on job title compensation. One variable was average Technical Class compensation at a particular company. *See id.* The effect of this variable reflects the degree to which compensation increases for the group are shared broadly at the same time. *Id*. ¶ 25. The next variable measured the effect of the *previous* year's compensation, showing the degree to which gains in one year are later shared with other members of the Technical Class at the same company. *See id*. ¶ 26. Dr. Leamer's model also included variables for the firm's revenue and job growth in the San Jose-Sunnyvale-Santa Clara Metropolitan Statistical Area to allow for the possibility of alternative explanations for compensation increases. *Id*. ¶¶ 27-28.

[16] To account for titles with insufficient data to run the title-by-title analysis, Dr. Leamer also divides the employee groups into deciles and measures the correlation of each decile to the mean; these groups exhibit the same positive relationship. *See* Leamer Suppl. Rep. Figs. 9, 10.

Dr. Leamer estimated the regression on a title-by-title basis for job titles with adequate data within each company. *Id*. ¶¶ 24, 34-42; *see* Fig. 1 (Intel example), Figs. 6-8 (results).[17] *Id*. ¶¶ 43-49, Figs. 11-12. The regressions indicated that the "vast majority" of employees fall within titles or groups that show: (1) that gains for the titles or groups are shared broadly at the same time and (2) that gains for some are shared with others in different job titles in a subsequent year. *See id.* ¶ 8.[18] Dr. Leamer contended that this is consistent with his previous opinion that "all or almost all Defendants' employees would have been impacted by the non-compete agreements." *Id*. Moreover, Dr. Leamer opined that the fact that gains were shared over time strongly indicated that an internal sharing force, rather than only external market forces, drove the structure of class member compensation. *Id*. Dr. Leamer also demonstrated there is a much stronger correlation between compensation of job titles within a firm than there is between compensation of job titles between firms. This finding further reinforced his conclusion that each Defendant maintained a somewhat rigid pay structure and undermined Defendants' contention that internal forces and pay structure play no role in setting compensation. *Id.* ¶¶ 65-68.

Dr. Leamer recognized that his analyses do include outliers—job titles that do not positively correlate to the average or do not show sharing over time. *Id.* ¶ 12. He noted, however, that the number of outliers was small, and in most cases the outliers involved titles with incomplete data. *See id.* ¶¶ 12, 50-64. Thus, the presence of a few outliers did not undermine his basic conclusions about how Defendants paid their employees. Such conclusions were also supported by

[17] Dr. Leamer also estimated regressions by splitting the Technical Class titles into deciles. Dr. Leamer explains that, to form the ten groups, he ranked titles on the basis of average (inflation adjusted) total compensation over the lifetime of the title and then divided these up into deciles based on employee-years. Although Dr. Leamer attempted to break the firms up into 10 equal sized groups (equal based on employee years), some groups ended up being larger than others because some titles were more populous than others. Leamer Suppl. Rep. ¶ 43, n.8.

[18] Plaintiffs argue that this latter result is particularly significant. Defendants' expert, Dr. Murphy, initially contended that an "alternative hypothesis that the level of compensation of Defendants' employees is broadly determined by competition in a vast labor market for similar employees and that adjustments for unique circumstances of particular employees are highly individualized." Murphy Rep. ¶ 89. Plaintiffs argue that this contention becomes unsupportable when used to explain why gains for some are shared with others in a *subsequent year*; there is not a sensible reason that an external force such as increased demand for computers would affect some employees in one year and the rest in the next, without resort to internal forces such as fairness concerns. Leamer Suppl. Rep. ¶ 8 ("Furthermore, the sharing of gains over time strongly indicates the existence of an internal sharing force driving the structure of class member compensation, rather than only external market forces.").

economic theory and the evidentiary record. *See id.* ¶ 64. Importantly, Dr. Leamer also contended that he had not seen any evidence that any of the titles within the Technical Class would not have been harmed by the anti-solicitation agreements. *Id.*

Ultimately, Dr. Leamer concluded that common proof, "in the form of documents, data, economic theory, and statistical methodologies," were capable of demonstrating that the anti-solicitation agreements artificially suppressed compensation of all or nearly all members of the Technical Class. Leamer Rep. ¶ 149.

ii. Dr. Hallock's Opinions Based on Defendants' Testimony, Contemporaneous Documents, and Data

In further support of Class Certification, Plaintiffs present a second expert report from Dr. Kevin F. Hallock, a leading labor economist and an expert in compensation structure and design. *See* Hallock Rep. ¶¶ 1-3. Dr. Hallock investigated whether Defendants used formal administrative pay systems, and whether the anti-solicitation agreements at issue would have suppressed the compensation of all or nearly all members of the Technical Class. In forming his opinions, Dr. Hallock reviewed only common evidence: Defendants' testimony, contemporaneous documents, and data. Suppl. Class Cert. Mot. at 2.

Dr. Hallock found that Defendants all used formalized compensation systems that organized employees into pay ranges, grades, or families under umbrella systems. Hallock Rep. ¶ 45. In finding that all Defendants utilized formalized pay systems, Dr. Hallock relied on evidence that, among other things: (1) Defendants sorted their employees into job families and/or grades; (2) Defendants utilized salary ranges with a minimum, mid-point and maximum set based on external employment market data; and (3) Defendants used internal tools to assist managers with setting other employees' compensation levels. *See id.* ¶¶ 45-109.

An important feature of these formal systems is that job titles, levels, and grades are valued relative to all other employee categories in the company. Employees who receive compensation outside of their guideline ranges are identified and corrected to bring them in line with the company structure. *See, e.g., id.* ¶¶ 114, 140, 160, 166, 181. According to Dr. Hallock, "[i]f the ratios [between a person and someone else who is similarly situated] diverge from each other, the person will experience reactions of unfairness and inequity," thus making internal equity "important not only in setting up the original structure of a compensation system but also when managing it." *Id.* ¶ 110 (internal quotation marks omitted).

Dr. Hallock also found that Defendants used their compensation system to pay their employees in systematic and structured ways. Dr. Hallock found that nearly all compensation decisions were made company-wide on an annual basis and in a fashion that preserves existing compensation relationships. When Defendants made "out of cycle" adjustments to retain certain employees (such as to make counteroffers or pay retention bonuses in light of a competitor's solicitation), Defendants were careful to adjust the system to take the exceptions into account. Dr. Hallock also found that Defendants adhered to principles of internal equity whereby similarly situated and similarly performing employees were paid similarly. *See id.* ¶¶ 111-81.

Given Defendants' formalized pay structures and compensation design, as well as issues of equity and fairness present in the Defendant firms, Dr. Hallock opined that the anti-solicitation agreements would have a widespread and systematic impact on compensation. *Id.* ¶ 237. First, Dr. Hallock opined that "[a] direct impact on pay could occur if an employee did not receive a cold call, or if the upward wage pressures on any of the employees in related groups or job families were disrupted." *Id.* ¶ 238. For example, Dr. Hallock hypothesized that one way that pay could be lowered at Defendants for nearly all workers has to do with extraordinary employees. Dr. Hallock noted that Defendants employed certain elite employees, and that cold calling often targeted these top employees. *Id.* ¶ 239. Since the anti-solicitation agreements suppressed salaries of these top employees and therefore lowered "the top of the box" in terms of the salary range, Hallock opined that the entire box may be lowered as well, thus impacting "nearly all other workers." *Id.*

Dr. Hallock also opined that external market data could influence wages, as there is evidence that Defendants benchmark their data to external sources, most commonly Radford or Croner. *See id.* ¶ 240. "[T]o the extent that pay is lowered at other firms through anti-competitive and other behavior of firms," Dr. Hallock found that "the market data they use for their own structure will be lower" and hence "their own pay levels will be lower than they would be in the absence of such agreements." *Id.*

Finally, in support of Plaintiffs' Technical Class definition, Dr. Hallock examined Defendants' pay structures and compensation design as they pertain to the Technical Class, and concluded that the same mechanisms that would have transmitted pay suppression throughout the Defendants' firms apply with even greater force to technical employees. *Id.* ¶ 246. Thus, if the anti-solicitation agreements suppressed the pay of certain members of the Technical Class, all or nearly all other members would be expected to have also been impacted. *See* Suppl. Mot. at 3.

c. The Court's Conclusions and Defendants' Contentions

Defendants argue that this Court should not certify the Technical Class because individualized inquiries regarding who was impacted will predominate over common questions. Defendants contend that their compensation policies and practices were highly individualized with wide variation in compensation. According to Defendants, compensation was set by hundreds of different managers who were directed to differentiate pay and reward high achieving employees. As such, Defendants argue that pay raises to one employee would not necessarily affect the salary of all other employees in the Technical Class.

In furtherance of their contention that individualized issues predominate, Defendants contend that the individual pieces of evidence offered by Plaintiffs are unpersuasive. However, as discussed below, Defendants cannot rebut the voluminous documentary evidence from Defendants' internal files and the expert reports that rely on this documentary evidence.

First, the Court finds, as it did previously, that Dr. Leamer's market price discovery and internal equity hypotheses offer theories subject to common proof for how Defendants' anti-solicitation agreements suppressed compensation broadly. *See* Apr. 5 Class Cert. Order at 21. While Defendants' expert, Dr. Murphy, criticized the economic literature upon which Dr. Leamer relied, Dr. Murphy did not dispute the basic principles of information economics undergirding Dr. Leamer's hypothesis. *See. e.g.*, Harvey Decl., ECF No. 297, Ex. 13 (Murphy Depo.) at 188:6-14; 192:25-193:6; 194:10-196:10; 197:7-19. Similarly, although Dr. Murphy criticized Dr. Leamer's initial expert report because it did not compare the importance of maintaining internal equity to other goals, such as procedural equity or the value of rewards for individual contributions as a loyalty motivator, s*ee* Murphy Rep. ¶ 81, the Court does not find that this undermines Dr. Leamer's hypothesis that internal equity played some role in affecting employment compensation. This is particularly true in light of the extensive documentary evidence showing that Defendants valued internal equity.

Second, the Court finds that Plaintiffs' documentary evidence provides substantial further support for Plaintiffs' method of proving impact. Indeed, at trial, the Court predicts that this evidence is likely to be among the most persuasive to a jury as it illustrates and confirms many of the actual dynamics at play within Defendants' firms. While Defendants characterize Plaintiffs' new evidence as "mostly old and off point," *see* Suppl. Opp'n at 13, the Court finds that this evidence significantly bolsters Plaintiffs' showing that their method of proving impact will turn on common evidence. For example, rather than a few documents showing that some Defendants valued internal equity in their compensation practices, Plaintiffs' documentary evidence now indicates that *all* Defendants valued internal equity. Further, the evidence now suggests that internal equity was such an important aspect of Defendants' compensation practices that: (1) Defendants utilized software tools to generate internal equity reports and to compare each employee to his or her peers; (2) Defendants advised managers that internal equity was a prime consideration when setting and adjusting salaries; and (3) Defendants actively monitored their compensation structure to identify discrepancies within and beyond job titles and groups and to make adjustments as necessary.

Despite this documentary evidence, Defendants contend that managers exercised broad discretion when setting and adjusting salaries and that Defendants valued performance—to which Defendants refer as "pay for performance"—over internal equity. However, Defendants' documents indicate otherwise. For example, in a 2004 Human Resources presentation, Intel states that, although "[c]ompensation differentiation is desired by Intel's Meritocracy philosophy," "short and long term high performer differentiation is questionable." Harvey Suppl. Decl., Ex. 10 at 13. Indeed, Intel notes that "[l]ack of differentiation has existed [redacted]." *Id*. at 19. As key "[v]ulnerability [c]hallenges," Intel identifies: (1) "[m]anagers *(in)ability* to distinguish at [f]ocal"—"actual merit increases are significantly reduced from system generated increases," "[l]ong term threat to retention of key players"; (2) "*[l]ittle to no actual pay* *differentiation for* [redacted]"; and (3) "[n]o explicit strategy to differentiate." *Id.* at 24 (emphasis added).

Further, the documentary evidence indicates that even where "pay for performance" exists, such differentiation is not inconsistent with Dr. Leamer's theories of internal equity. For example, a chart from Google shows that for a given level of performance, the higher the pre-adjustment position, the lower the merit increase. *See, e.g.*, Cisneros, Ex. 1609.9 (Google documents noting that it "tries to manage salaries in the [redacted] range and thus give minimal increases to very strong performers who are paid relatively high."). Specifically, Google's documents show that an employee whose salary is below the target salary would receive a larger percentage pay increase than an employee whose salary exceeds the target even though both employees receive the same performance review. *See* Cisneros, Ex. 1855.107. This demonstrates the coexistence of performance-based pay and concerns of internal equity.

To contend that they valued "pay for performance" over internal equity, Defendants rely principally on declarations from top management in their human resources, recruitment, compensation, and benefits departments. However, the Court has already recognized that these declarations were drafted for the specific purpose of opposing Plaintiffs' class certification motion, and accordingly, the Court finds that these documents are of a diminished probative value. *Cf. In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1061 (N.D. Cal. 2007) (scrutinizing carefully declarations from Defendants' employees that appeared "litigation driven"). Indeed, many of the claims made in those declarations are inconsistent with the discovery Plaintiffs obtained from Defendants after the hearing on Plaintiffs' initial class certification motion. For example, in a declaration created for the purposes of opposing the initial class certification motion, Mason Stubblefield (Intuit Vice President of Human Resources) stated that "Intuit does not use salary bands or ranges, either for existing employees or new hires." Stubblefield Decl. ¶ 10. Yet, in his deposition after the hearing on the class certification motion, Mason Stubblefield took the diametrically opposite position, when he stated that "[t]here are [redacted] bands [at Intuit] inside the company . . . . Each job that we have fits within a band . . . . Jobs fit into levels . . . . And different numbers of levels get used in different job families based on business needs." Stubblefield Depo.

87:8-88:24. In light of these demonstrated inconsistencies, the Court is more persuaded by the internal documents Defendants created before and during the anti-solicitation agreements, such as CEO-to-CEO emails, presentations regarding compensation and recruitment from the heads of Defendants' human resources departments, and inter-office communications about internal equity concerns, than the declarations Defendants created to oppose class certification and testimony that is litigation driven.

Defendants further rely on Dr. Shaw's report to rebut Plaintiffs' contentions that Defendants maintained formalized compensation structures. Dr. Shaw opines that Defendants maintain a "pay for performance" philosophy implemented by individual managers based on subjective evaluations of employees. Shaw Rep. ¶ 16. Dr. Shaw further contends that Dr. Hallock's "top of the box" theory is unsupportable. *See id.* ¶¶ 41, 42, 54, 62, 66. Dr. Shaw opines that, "[b]ased on Defendants' compensation systems, pay practices, and pay philosophy," she "would not expect that a suppression of wages to some employees would affect all or nearly all Technical Class members." *Id.* at 27.

The Court finds Dr. Shaw's criticisms of Plaintiffs' theories and of Dr. Hallock's report unpersuasive. Dr. Shaw's report is conclusory and contrary to the overwhelming evidence in the record. For example, Dr. Shaw relies heavily on the declarations Defendants created to oppose class certification even though many of the claims in those declarations are inconsistent with Defendants' own internal documents. *See id.* at 20-21 n.25 & n.26; 21 n.30 & n.32; and 23 n.35; Shaw App. C ¶¶ 1, 2, 3, 4, 7, 8, 10, 11, 18, 24; Shaw App. D ¶¶ 1, 9. Further, although Dr. Shaw emphasizes managers' broad discretion in setting compensation, Dr. Shaw did not systematically investigate whether Defendants supervised and controlled their managers' use of discretion, and Dr. Shaw admits that she did not assess whether managerial discretion made any significant difference to employee pay. *See* Shaver Suppl. Decl. Ex. O (Shaw Depo.) 74:1-75:16, 93:16-22, 98:14-15. Dr. Shaw also asserts that, in technology-based firms, pay ranges assigned to job codes are "mere guidelines for managers" and that the pay of workers is highly individualized. *See* Shaw Rep. ¶ 30. However, the Court finds that Dr. Shaw's emphasis on managerial discretion is contrary to the extensive documentary evidence discussed above, which suggests that the exercise of any discretion was limited and that managers had to obtain authorization to deviate from Defendants' compensation structure. *See supra* section IV.B.2.a.ii; *see, e.g.*, Cisneros Decl., Ex. N (Fadell Depo.) at 53 (stating that to deviate from a prescribed salary range, Apple managers "would have to pull in a bunch of people to then approve anything outside of that range"); *id.*, Ex. C (Arriada-Keiper Depo.) at 24 (Adobe admonished managers who deviated from salary ranges that Adobe had "a minimum for a reason"). Moreover, Dr. Shaw's contentions regarding the individualized nature of compensation are contrary to the statistical analysis provided by Dr. Leamer—which show that in 97% of class member employee-years, pay was within the prescribed range. Leamer Suppl. Reply Rep. ¶¶ 31, 67.

Defendants' principal contentions, however, are challenges to Dr. Leamer's statistical analyses.[19] Before the Court turns to an analysis of the competing methodologies of Dr. Leamer and Defendants' expert, Dr. Murphy, the Court notes that the importance of these statistical models is diminished in light of the extensive documentary evidence that supports Plaintiffs' theory of impact. In other contexts, courts have long noted that statistical and anecdotal evidence must be considered in tandem. *See Coral Const. Co. v. King Cnty.*, 941 F.2d 910, 919 (9th Cir. 1991) ("[T]he combination of convincing anecdotal and statistical evidence is potent."). This Court could not identify a case at the class certification stage with the level of documentary evidence Plaintiffs have presented in the instant case. The Court agrees with Dr. Leamer that "interpretation of non-experimental data needs to be sensitive to the context in which the data were generated, and persuasive conclusions from the numerical data require the information in the numerical data and the documents to be aligned." Leamer Suppl. Rebuttal Rep. ¶ 11. After all, class certification

[19] Defendants moved to strike Dr. Leamer's report in support of Plaintiffs' initial motion for class certification for failure to provide reliable, relevant, and admissible testimony under *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence. Defs.' Mot. to Strike Rep. of Dr. Edward E. Leamer ("Mot. to Strike"). ECF No. 210. The Court rejected Defendants' motion in its April 5 Class Certification Order. *See* Apr. 5 Class Cert. Order at 49-50 ("While the Court has concerns about the probativeness of some of Dr. Leamer's statistical evidence . . . the Court does not find this evidence is so methodologically flawed as to warrant exclusion."). In their Opposition to the Supplemental Motion for Class Certification, Defendants do not raise any new *Daubert* challenges to the expert opinions set forth by Dr. Leamer or Dr. Hallock. *See* Suppl. Opp'n.

requires a holistic, qualitative assessment; as the Seventh Circuit has noted, the class certification analysis is not "bean counting." *Butler*, 727 F.3d at 801.

The Court now turns to Defendants' contentions that Dr. Leamer's methodologies are unpersuasive. Defendants contend that Dr. Leamer should not have relied on averages in his correlation and multiple regression analyses because (1) averaging masks individualized issues, (2) Dr. Leamer's regression analysis is faulty due to an endogeneity problem, and (3) Dr. Leamer's statistical evidence cannot show causation. Suppl. Opp'n 13-14. Defendants argue that these flaws render dubious Dr. Leamer's conclusion that Defendants maintained a "rigid wage structure." *See id.* at 1-2. The Court finds that several of Defendants' arguments are contrary to their own internal documents and methodologies. Moreover, the Court finds that Defendants' remaining contentions do not suggest that Dr. Leamer's statistical analyses should be rejected wholesale, particularly in light of the extensive documentary evidence that supports Dr. Leamer's conclusions. Thus, as discussed below, the Court rejects Defendants' contentions and accepts Dr. Leamer's methodology.

Defendants' primary criticisms of Dr. Leamer's supplemental report turn on his use of averaging in his correlation and multiple regression analyses. *See* Suppl. Opp'n at 1-2. Defendants take issue with Dr. Leamer's use of averages in his job-title-by-job-title correlation analysis, which analyzes the "movement over time of the average compensation of each title with the average compensation of the firm's Technical Class." Leamer Suppl. Rep. ¶ 4. Defendants contend that, "[b]y averaging the compensation of all employees who hold the same job title or fall into the same decile," Dr. Leamer "necessarily wipes out the very thing he is supposed to be measuring—the significant variation in individual employees' compensation." Suppl. Opp'n at 5. According to Defendants, Dr. Leamer's "correlation of averages would reach the same conclusion regardless of whether all employees with the same job title received identical or vastly different compensation over time and whether their compensation moved in lockstep or in opposite directions." *Id.* at 6. Defendants also object to Dr. Leamer's use of averages in his company-specific multiple regression models, designed to detect the effects of internal forces (*i.e.*, a wage structure) acting on class member compensation, as opposed to merely external market forces. *See id.* at 5-6; 11-13. Specifically, Defendants claim that Dr. Leamer's multiple regression analysis masks individual variation by using average job title compensation data rather than individual compensation data. *Id.* at 13.

However, the Court finds that Dr. Leamer's averaging of the data appears to yield results that, in the context of the correlation and multiple regression analyses, are consistent with Plaintiffs' theory that there is a somewhat rigid wage structure. Dr. Leamer notes in his rebuttal supplemental report that "the inherent noise in the individual level data tends to drown out the signal of the internal pay structure [Plaintiffs] are trying to detect." Leamer Suppl. Rebuttal Rep. ¶ 32. Dr. Murphy admits that averaging aggregate data is an appropriate statistical tool for the same reasons given by Dr. Leamer. Shaver Decl., Ex. N (Murphy Depo.) 553:18-20 ("The reason you do the averaging is so that you are left with a more systematic part and the idiosyncratic parts get averaged out.").

With respect to both correlation and multiple regression analyses, Dr. Leamer averaged the compensation of employees within each job title. Leamer Suppl. Rep. ¶¶ 18-29. While this kind of averaging may have masked some of the individual variations *within* each job title, it was necessary to determine whether there was a wage structure *across* job titles. *See* Aug. 8 Tr. at 97:11-22; 106:5-13.[20] The Court is therefore not persuaded that it should disregard the correlation analysis for the purposes of showing a wage structure across job titles. The Common Factors Analysis shows that approximately 90 percent of each employee's compensation is explained by common factors—primarily by job title. Leamer Rep. ¶ 128; Aug. 8 Tr. at 105:10-24. Because individual compensation is primarily determined by job title, as shown by the Common Factors Analysis (which was run on an employee-by-employee basis without averaging, *see* Leamer Rep. ¶

[20] Dr. Leamer explains in his supplemental report that he chose to work with title averages because:

> individual data is likely to be dominated by forces that operate at the individual level, which can make it difficult to detect the firm wide effects including the spread of the anti-cold-calling agreements broadly across the firms. Averaging across individuals in a title can average out the individual effects, thus making the firm-wide effects more transparent. In addition, a title-level analysis provides a clearer perspective on the compensation structures the documentary evidence shows Defendants used to maintain their many employees and maintain internal equity among their employees.

Leamer Suppl. Rep. ¶ 19.

128, Fig. 11), and the correlation and multiple regression analyses show that compensation across job titles move together, the Court believes that Dr. Leamer's analysis bolsters Plaintiffs' theory that there is a wage structure in place under which an impact on some employees would have resulted in an impact to all or nearly all employees. The Court further notes that Dr. Leamer's conclusions in the Common Factors and correlation analyses are consistent with the documentary evidence that suggests that Defendants maintained a formal wage structure and valued internal equity.

Defendants' contention that averaging rendered unpersuasive Dr. Leamer's analyses is particularly unconvincing considering that Defendants themselves often aggregated their entire compensation budget and compared it to the budgets of other firms, or matched job title compensation within the company to similar titles across multiple companies. *See, e.g.*, Bock Depo. 44:12-20 (Google Senior Vice President of People Operations, testifying that Google's bonus amounts were calculated by taking "a set of people in like jobs, you calculate the [redacted]. All those people, because they're in like jobs, will have the same [redacted] . . . . The [redacted] will be based on the [redacted] rather than on their [redacted]."); *see also* Shaver Decl., Ex. 122 (email from Lori McAdams (Pixar Vice President of Human Resources and Administration) to Sharon Coker (former Lucasfilm Director and Senior Director of Human Resources), among others, asking about others' salary increase budget for FY '07 and stating "Ours is [redacted], but we may manage it closer to [redacted] on average. Are you doing anything close, more or less?"); Cisneros Decl., Ex. F (Streeter Depo.) at 46-47 (discussing how Adobe uses aggregated and average data from Radford for job titles and classifications, which it then uses in developing its own compensation structure).

Defendants further criticize Dr. Leamer's supplemental expert report on another similar basis. Defendants contend that Dr. Leamer ignores data that shows substantial variation in the levels and changes in individual employees' compensation. In contrast to Dr. Leamer, Dr. Murphy examines variation at the individual employee level and finds substantial divergence in compensation over time for individuals who start with the same job title. Defendants argue that these results show that it is wrong to infer that an increase in compensation for some employees

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would result in an impact to all or nearly all employees. Rather, Defendants contend that the results reflect managerial discretion. Opp'n at 10 (citing Murphy Rebuttal Rep., Exs. 2-3, & App. B).

However, that Defendants differentiated pay is not inconsistent with Dr. Leamer's finding that the Defendants maintained compensation structures that restrained that differentiation. Indeed, as discussed above, the evidence supports the notion that differentiation, such as based on a "pay for performance" philosophy, is not inconsistent with theories of internal equity. *See, e.g.*, Cisneros Decl., Ex. 1609 (Google Chart showing that a high performance rating will result in an employee compensated at [redacted] of Google's target salary having his/her salary increased by a higher percentage than an individual with the same rating but compensated at a level higher than Google's target salary). For example, Google notes that it "tries to manage salaries in the [redacted] range and thus give minimal increases to very strong performers who are paid relatively high." *Id.*; *see also* Cisneros Decl., Ex. 1855.107 (showing that managerial discretion and performance based compensation is not necessarily inconsistent with principles of internal equity at Google).

Second, Defendants contend that Dr. Leamer's multiple regression analysis is unpersuasive because it suffers from an endogeneity problem. Suppl. Opp'n at 13. An "'endogeneity problem[]' . . . arises when some of the same unmeasured common factors drive both the independent and dependent variables." Murphy Suppl. Rep. ¶ 43. Defendants argue that Dr. Leamer's "external" San Jose-Sunnyvale-Santa Clara Metropolitan Statistical Area variable and unnamed omitted variables affect "both average job title compensation [the dependent variable] *and* Leamer's 'internal' firm-wide average compensation variable [the independent variable]." Suppl. Opp'n at 13. Defendants argue that by "[i]gnoring this 'endogeneity' among his variables, Dr. Leamer improperly concludes that the "internal" variable meaningfully explains average job title compensation . . . while the 'external' variable does not." *Id.* Defendants contend that this is a fundamental error that renders Dr. Leamer's model uninformative and his inferences from it unsound. *Id.*

The Court is not persuaded by this concern. With respect to the San Jose variable, Defendants have not provided quantitative analysis to show that the San Jose employment variable skews the results with respect to the internal firm-wide average compensation variable. Rather, Defendants offer the endogeneity theory without any support in the form of data, analysis, or case law. A similar lack of specificity plagues Defendants' argument with respect to the unknown variables that Defendants contend cause this endogeneity problem. Specifically, as Plaintiffs note, Defendants have not "identif[ied] a single omitted variable, or show[n] how adding one would change the results." Suppl. Reply at 9; *see also* Leamer Suppl. Rebuttal Rep. ¶ 61 (noting that Dr. Murphy has "not presented *any* analysis showing that omitted non-sharing external or internal effects are responsible for the positive sharing in [Dr. Leamer's] results").

Finally, Defendants argue that Dr. Leamer's analyses cannot address the question of causation underlying Plaintiffs' theory of classwide impact, which Defendants characterize as "whether compensation for class members was so rigidly interlinked that a wage increase for some would cause a wage increase for substantially all." Suppl. Opp'n at 14. That is, Defendants contend that Plaintiffs have not demonstrated that the anti-solicitation agreements *caused* any depression in wages. However, Plaintiffs clarify that "Plaintiffs never argued that the impact of the agreements would have been 'lockstep'—that a $5 raise to one employee would have required a simultaneous $5 raise across the firm." Suppl. Reply at 8. Rather, as shown by the documentary evidence, "by shielding their employees from waves of recruiting, Defendants not only avoided individual raises, they also avoided having to make across-the-board preemptive increases to compensation." *Id.*

As the documentary evidence above demonstrates, there is compelling evidence that in the absence of the anti-solicitation agreements, Defendants would have had to make structural preemptive or reactive changes. *See, e.g.*, Cisneros Decl., Ex. VV at 106 (Sheehy Depo.) (explaining that a group of Pixar employees' base salary needed to be increased because Pixar was "competing with technology companies in the Bay Area, and [its] recruiting team was hearing from candidates that they were getting better offers elsewhere."); Leamer Suppl. Rebuttal Rep. ¶ 23 (citing deposition of Patricia Murray (Intel Senior Vice President and Director of Leadership

Strategy and former President of Human Resources), in which Murray explained, in response to a question regarding whether Intel raised compensation for particular job categories or job ranges to preemptively prevent attrition, "[i]f attrition was high in a particular job category somewhere in the globe, that would be a fact considered in the many facts we assessed"). The Court finds persuasive Dr. Leamer's statement that economists "analyze correlations, which are routinely used. . . to draw causal conclusions when supported by compelling frameworks and complementary information." Leamer Suppl. Rebuttal Rep. ¶ 13. In the instant case, the compelling documentary evidence along with Plaintiffs' expert theories and correlation analyses are capable of demonstrating causation on a classwide basis.

In sum, the Court does not find persuasive Defendants' criticisms of Dr. Leamer's methodology. Defendants have not presented any analysis that undermines Dr. Leamer's analysis, and many of Defendants' arguments are contradicted by the documentary evidence. Accordingly, the Court finds that Dr. Leamer's methodology, in conjunction with and bolstered by the extensive documentary evidence, is sufficient to meet the predominance standard with respect to impact.

d. Conclusion on Impact

Plaintiffs' documentary evidence, along with the expert reports and statistical analyses that rely on this evidence, establish that common issues between class members will predominate over individual issues in proving antitrust impact. The documentary evidence supports Plaintiffs' theory that Defendants had formal compensation structures on a company-wide basis that placed a premium on internal equity concerns, and that collusive communications between various Defendants limited the proportion of each Defendants' budget that would be dedicated to merit increases. Further, the evidence suggests that the Defendants benchmarked their compensation structures to external data and to each other. The documentary evidence and the expert reports also support Plaintiffs' theory that the top companies and top employees at these companies set a ceiling, based on which all or nearly all employees of the Technical Class's compensation was set. This extensive evidence supports Plaintiffs' theory that each technical employee's compensation was linked to those of her peers within and across Defendants' firms.

Plaintiffs have also presented documentary and expert evidence about labor market dynamics that would have affected compensation on a classwide basis. For example, Defendants would have had to take preemptive steps, through bonuses and raises to ward off threats of poaching by other Defendants. Further, Defendants would have had to react to any cold calling and poaching of employees by increasing compensation in response to the spread of information from outside and within Defendants' firms. Because of the structural concerns regarding internal equity and the existing rigid compensation structures, the evidence suggests that any such preemptive or reactive steps, in the absence of the anti-solicitation agreements, would have had classwide effect and would have impacted all or nearly all members of the Technical Class.

One example, which concerns interactions between Google and non-party Facebook, illustrates many of these theories, including the significance of the threat imposed by cold calling, the disruption of internal equity, and how these dynamics would have, in the absence of the anti-solicitation agreements, prompted Defendants to offer employees incentives to minimize attrition.

In March of 2008, Arnnon Geshuri (Google Recruiting Director) discovered that non-party Facebook had been cold calling into Google's Site Reliability Engineering ("SRE") team. Geshuri's first response was to suggest contacting Sheryl Sandberg (Chief Operating Officer for non-party Facebook) in an effort to "ask her to put a stop to the targeted sourcing effort directed at our SRE team" and "to consider establishing a mutual 'Do Not Call' agreement that specifies that we will not cold-call into each other." Cisneros Decl., Ex. 614. Arnnon Geshuri also suggested "look[ing] internally and review[ing] the attrition rate for the SRE group," stating, "[w]e may want to consider additional individual retention incentives or *team incentives* to keep attrition as low as possible in SRE." *Id*. (emphasis added). Finally, an alternative suggestion was to "[s]tart an aggressive campaign to call into their company and go after their folks—no holds barred. We would be unrelenting and a force of nature." *Id*.

In August of 2008, after losing one of many employees to Facebook, Google's Vice President of Communications emailed Google's executive management group and Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google). In this email, the Google Vice President expressed concern about Facebook's "poaching" and stated that she had "offered [the employee] different roles and discussed his future at Google" but that she had "gone as far as [she could] without making promises about pay or title that would cause significant problems across [her] team." *Id*. Bill Campbell's response was to ask, "Who should contact Sheryl [Sandberg] (or [Facebook Founder] Mark [Zuckerberg]) to get a cease fire? We have to get a truce." *Id*. Facebook refused.

Facebook continued to poach Google's employees. In 2010, for example, [redacted] of Facebook's new employees were recruited from Google. Leamer Rep. ¶ 109. Accordingly, in October 2010, Google began studying Facebook's solicitation strategy. *Id.* A month later (and two months after the DOJ made public its investigation of Defendants), Google announced its "Big Bang," which involved an increase to the base salary of *all* of its salaried employees by 10% and provided an immediate cash bonus of $1,000 to all employees. Shaver Decl., Ex. 46. In an internal email, Laszlo Bock (Google Senior Vice President of People Operations) explained that the rationale for the Big Bang included: (1) being "responsive to rising attrition;" (2) supporting higher retention because "higher salaries generate higher fixed costs;" and (3) being "very strategic because start-ups don't have the cash flow to match, and big companies are (a) too worried about internal equity and scalability to do this and (b) don't have the margins to do this." Shaver Decl., Ex. 48.

The increased salaries within Google impacted the other Defendants as well. For example, Google's "Big Bang" disrupted Apple's compensation structure by forcing Apple to pay more for new hires which then created internal equity issues with current employees. David Alvarez (Apple Recruiting Manager and former Research Manager) responded as follows:

> We will go back and review internal equity again and come up with a new proposal for your review. . . . [redacted] This is due to the market changing. This will most likely create an internal comp issue with current employees. In order to stay ahead and be competitive, we must be aggressive with our offers in order to close good talent. Having these new data points will help justify adjusting current employees. Great talent does come at a cost. . . . Just as a data point, Google gave its employees a 10% increase to deal with the aggressive offers out in the market.

Cisneros Decl., Ex. 1376. Google's reaction to Facebook's solicitation of its employees, and Apple's subsequent reaction to Google's actions, demonstrates the weakness of Defendants' contention that the impact of the anti-solicitation agreements was localized to individual employees who would have been solicited but for the agreements or that class members would have been impacted differently depending on their individual circumstances. These contemporaneous reactions of the Defendants to genuine competition for labor suggest instead that their response to widespread solicitation of their employees would have been structural rather than individual.

3. Damages

In addition to disputing whether Plaintiffs can show impact on a classwide basis, the parties dispute whether Plaintiffs can show damages on a classwide basis. The Supreme Court has held that damages "[c]alculations need not be exact, but at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'" *Comcast*, 133 S. Ct. at 1433 (citing ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)). In other words, "a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges." *Butler*, 727 F.3d at 799 (emphasis in original).

Here, Plaintiffs rely on their expert, Dr. Leamer, to demonstrate that they can use reliable methods to compute damages by applying classwide methods and analyses. *See* Class Cert. Mot. at 22 (citing Leamer Rep. ¶¶ 135-48). Dr. Leamer concluded that common evidence and a regression approach could be used to create a model for quantifying the estimated cost to Technical Class members resulting from Defendants' challenged conduct. *Id.* ¶¶ 141-48. This model generated percentages by which Defendants undercompensated their Technical Class employees in each of the conspiracy years. *Id.*, Fig. 24. Specifically, Dr. Leamer estimated the effect of the anti-solicitation agreements by contrasting compensation during the periods when the anti-solicitation agreements were in effect with compensation before and after the anti-solicitation agreements. *Id.* ¶ 136. Dr. Leamer's model incorporated a range of variables designed to account for factors including: (1) age, sex, and years at the company; (2) the effects on compensation caused by the anti-solicitation agreements; (3) the effects caused by factors specific to each Defendant (*e.g.*, firm revenue, total number of new hires, etc.); and (4) the effects caused by the industry. *See id.*, Fig.

23. Dr. Leamer used the model to show that the anti-solicitation agreements had some impact on the Technical Class generally, and to estimate the average or net under-compensation at each Defendant firm during the period in which the anti-solicitation agreements were in effect. *See id.* Fig. 24; Reply at 33. Dr. Leamer's model accounted for variations in the effect of the anti-solicitation agreements over time and for variations among different kinds of employees. *Id.* ¶ 146. Dr. Leamer contended that this econometric model of employee compensation could be used in a straightforward formulaic fashion in conjunction with Defendants' compensation data to calculate damages for employees in the Technical Class. *See id.* ¶ 148; *see also id.* Figs. 3 & 4.

In the Court's April 5 Class Certification Order, the Court considered Defendants' criticisms of Dr. Leamer's Conduct Regression, but ultimately found the Conduct Regression model sufficient to satisfy Plaintiffs' burden for the purpose of Rule 23(b)(3) on the issue of damages. Apr. 5 Class Cert. Order at 43-44.

First, the Court rejected Defendants' criticism that Dr. Leamer failed to conduct a sensitivity analysis—an "exploration of how sensitive [a model's] conclusions are to a choice of variables." Leamer Depo. at 351:4-6. Defendants argued that Dr. Leamer should have performed "disaggregated" analyses for each Defendant using only data from that Defendant's employees. However, in light of the limited compensation data available to Dr. Leamer, Leamer Reply Rep. ¶ 99, including the relatively short length of the data period, 2001-2011, the Court found that aggregation may provide "a [more] robust analysis and yield more reliable and more meaningful statistical results." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 523 (N.D. Cal. 2012). The Court also was not persuaded by Dr. Murphy's competing disaggregated model—which included 42 Defendant-specific variables, only 28 of which related to the effect of the anti-solicitation agreements, *see* Murphy Rep., App. 9A, because the Court found that Dr. Murphy's use of that many variables could also "minimize artificially" the effects of the anti-solicitation agreements by spreading those effects across a wider range of variables. *See* Apr. 5 Class Cert. Order at 39-40 (citing Leamer Reply Rep. ¶ 101).

Second, the Court rejected Defendants' criticisms of Dr. Leamer's choice of a benchmark period. Apr. 5 Class Cert. Order at 40; Mot. to Strike at 13. Defendants argued that, if the benchmark period was changed from the two years preceding and the two years following the period during which the anti-solicitation agreements were in effect to only the two years following this period, then the model showed net over-compensation rather than under-compensation. *See id*. However, the Court noted that Defendants failed to explain why the benchmark period should be limited in this way. Apr. 5 Class Cert. Order at 40. Defendants did not show that the pre-conduct data was not comparable to data from the conduct period and therefore should be excluded. Furthermore, the Court expressed concern that, in altering the benchmark periods, Defendants reduced the total amount of data available regarding the non-conduct periods, which could then result in less accurate results. *Id.* at 40-41.

Third, the Court rejected Defendants' argument that the Conduct Regression was flawed because Dr. Leamer failed to include a variable to "control for changes in the value of . . . equity compensation [to employees] over time." Mot. to Strike at 13. Defendants argued that when Dr. Murphy introduced an equity variable, specifically a variable that tracks changes in the S&P 500, the Conduct Regression yielded much smaller under-compensation for the All-Salaried Employee Class and overcompensation for the Technical Class. *See* Murphy Rep. ¶ 138. The Court was not persuaded by Defendants' contention because the equity variable Defendants selected—a variable reflecting changes in the S&P 500—tracked variations in the stock price of hundreds of unrelated companies. *See* Leamer Reply Rep. ¶ 89. Thus, the fact that including this variable significantly altered the results of Dr. Leamer's analysis did not persuade the Court that Dr. Leamer's results should be disregarded or that the Conduct Regression is flawed.

In addition to the sensitivity issues discussed above, Defendants argued that the Conduct Regression was flawed because Dr. Leamer failed to account for the fact that compensation for employees within the same firm is correlated. *See* Mot. to Strike at 16; Murphy Rep. ¶ 126. Dr. Murphy opined that, given this correlation, Dr. Leamer should have clustered the standard errors. *See* Murphy Rep. ¶ 126 ("A generally accepted method to take into account the fact that observations used to estimate a regression contain[] 'groups' of observations that are affected by certain common factors (such as those affecting a particular company or present in a single year) is commonly referred to as 'clustering' the standard errors"). For the reasons set forth below, the

Court did not find that Dr. Leamer's failure to cluster the standard errors provided a sufficient basis to reject the Conduct Regression. Apr. 5 Class Cert. Order at 42.

Even assuming that Dr. Leamer should have clustered the standard errors, the fact that when the errors were clustered, the Conduct Regression's results were not statistically significant at the 95 percent confidence level did not persuade the Court that the regression was unpersuasive. *See Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1105 (D. Colo. 2006). Dr. Murphy testified that a model's results need not necessarily be statistically significant to be reliable. Murphy Depo. at 366:14-20. Further, as explained by Dr. Leamer, adjusting the standard errors was only one way of controlling for correlations between employees. *See* Leamer Reply Rep. ¶¶ 76, 78, 82, 83. Another approach would be to include variables to explain the commonalities across firms. *See id.* ¶ 83. The Court noted that Dr. Leamer had already included one such variable, revenue. *See id.* ¶¶ 82-83. Thus, the Court concluded that Dr. Leamer's failure to cluster the standard errors did not provide a sufficient basis to conclude that the Conduct Regression failed to provide a reliable methodology for the purposes of class certification. Apr. 5 Class Cert. Order at 42.

Defendants now raise additional arguments not raised in their initial opposition to contend that Dr. Leamer's methodology cannot be used to show that common questions are likely to predominate with respect to damages. Specifically, renewing their argument that the use of a single conduct variable for all Defendants was inappropriate,[21] Defendants argue that Dr. Leamer's most recent correlation analyses show that total compensation and changes in total compensation at

[21] Defendants also contend that, because the Court "'encouraged' Leamer to address . . . whether additional variables were needed," Suppl. Opp'n at 23, and Dr. Leamer did not add variables to his Conduct Regression analysis, Dr. Leamer's model should be rejected now. Defendants argue that this is an issue of even greater importance now that Dr. Leamer opines that compensation within a firm is highly correlated. Suppl. Opp'n at 23. Defendants maintain that, "[w]ithout accounting for the correlation, Leamer's model cannot reliably determine or measure impact or damages." Suppl. Opp'n at 23-24 (citing Murphy Suppl. Rep. ¶¶ 68-69). Dr. Leamer contends that he "considered whether to add any variables" but is "not aware of any [he] need[s] to add at the present time." Leamer Suppl. Reply Rep. ¶ 66. Given that the Court's acceptance of the Conduct Regression as a means of proving and calculating harm to the Class was not contingent upon Dr. Leamer's addition of more variables to his analysis, the Court does not reject Dr. Leamer's model on this basis.

Defendants diverged and sometimes moved in opposite directions. Suppl. Opp'n at 24 (citing Leamer Rep., Tables 1 and 2). Defendants assert that, in light of these divergences, the use of a single conduct variable for all Defendants is inappropriate. As set forth in the April 5 Class Certification Order, Dr. Leamer's decision to use a single variable in his Conduct Regression was understandable because "the available [compensation] data regarding Defendants' compensation practices [is] 'limited.'" Apr. 5 Class Cert. Order at 39-40. Dr. Leamer's approach of aggregating Defendants' data and calculating a single conduct variable, rather than using the limited data regarding each Defendant to calculate separate conduct variables, "allowed Dr. Leamer to produce a 'more coherent, more efficient model.'" *Id.* The Court is not persuaded that Dr. Leamer's use of a single conduct variable prevents the Conduct Regression from serving as a reliable method of determining damages.

Finally, Defendants argue that Dr. Leamer's Conduct Regression is overly sensitive to variable choice. Opp'n at 24. The Court disagrees. Dr. Leamer specifically addresses this concern in his reply report and rebuttal supplemental expert report. *See* Leamer Reply Rep. ¶¶ 85-97; Leamer Suppl. Rebuttal Rep. ¶ 66 (discussing "the lack of sensitivity of [his] findings to inclusion of alternative external control variables such as firm stock prices and to a different level of aggregation."). The Court is not persuaded that the Conduct Regression model is so sensitive to variable choice that it cannot be used to satisfy Plaintiffs' burden at class certification.

Because Dr. Leamer's model is supported by the economic literature (including Dr. Shaw's), is statistically robust (*i.e.*, insensitive to alternative control variables), and is buttressed by Dr. Leamer's subsequent analysis, the Court finds that Dr. Leamer's model is capable of calculating classwide damages. Suppl. Reply at 15.

4. Conclusion Regarding Predominance

This Court's rigorous analysis shows that common issues are likely to predominate over individual issues. Importantly, this Court's analysis of predominance involves a "qualitative assessment." *See Butler*, 727 F.3d at 801. This qualitative assessment includes some analysis into how this case, should it proceed to trial, would actually be litigated. *See In re New Motors*, 522 F.3d at 20 ("Under the predominance inquiry, a district court must formulate some predication as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." (internal quotation marks omitted)).

As such, this Court notes that there is no dispute that antitrust violation can be shown using exclusively evidence that is common to the entire Technical Class for the reasons discussed above. The Court further finds that antitrust violation is likely to be a central, disputed issue at summary judgment and at trial. Defendants have made quite clear—both through their motions to dismiss and their initial opposition to the motion for class certification—that Defendants will seek to contest the issue of antitrust violation by contending that their agreements had no anti-competitive effect on the market. Specifically, Defendants have stated that they intend to "demonstrate that the agreements should be evaluated under the rule of reason, were reasonable and lawful under that standard, and could not have conceivably had any adverse effect on compensation in any relevant labor market." Opp'n at 5, n.1. The Supreme Court has stated that the rule of reason analysis entails "significant costs" and is often "extensive and complex." *See Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 343 (1982).

Given the considerable, compelling common proof Plaintiffs have submitted regarding Defendants' alleged antitrust violation, as well as the parties' actions indicating that they will vigorously litigate the question of whether Defendants engaged in an antitrust violation, this question is likely to be central to this litigation. At the very least, this aspect of the trial should not be understated. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 611 (N.D. Cal. 2009) ("Plaintiffs need not show that there will be common proof on each element of the claim. 'In price-fixing cases, courts repeatedly have held that the existence of the conspiracy is the predominant issue and warrants certification even where significant individual issues are present.'" (quoting *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 167 (C.D. Cal. 2002))); *see* 6 Newberg on Class Actions § 18.25 (4th ed. 2002) ("[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues."); 7AA Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1781 (3d ed. 2005) ("whether a conspiracy existed is a common question that is thought to predominate over other issues in the case"); *cf. Cordes &*

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Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 108 (2d Cir. 2007) ("Even if the district court concludes that the issue of injury-in-fact presents individual questions, however, it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted."). As a result, the voluminous classwide proof of antitrust violation weighs in favor of a finding that common questions predominate.

In addition to concluding that common questions will predominate with respect to the central element of antitrust violation, the Court, having conducted a rigorous analysis, also finds that common questions will predominate over individual questions with respect to impact. The extensive documentary evidence suggests that Defendants maintained a formal wage structure and valued internal equity. This suggests that the anti-solicitation agreements had a structural impact on class members' compensation. Furthermore, the Court, having taken a hard look at the experts' reports, concludes that Plaintiffs have presented a methodology that supports a finding that the evidence common to the class will be utilized in demonstrating impact. Finally, the Court finds that Plaintiffs have set forth a methodology for calculating damages on a classwide basis. Thus, following a rigorous analysis, the Court finds that Plaintiffs have satisfied Rule 23(b)(3)'s predominance requirement with respect to all three elements—antitrust violation, impact, and damages.

C. Rule 23(b)(3): Superiority

Rule 23(b)(3) also tests whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Under Rule 23(b)(3), the Court must consider four non-exclusive factors in evaluating whether a class action is a superior method of adjudicating plaintiffs' claims: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Zinser*, 253 F.3d at 1190-92.

Plaintiffs state that "[c]lass treatment is by definition superior to thousands of individual claims in an antitrust case where common issues of liability and impact predominate." Class Cert. Mot. at 23 (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 314 ("[I]f common questions are found to predominate in an antitrust action . . . the superiority prerequisite of Rule 23(b)(3) is satisfied.")). Plaintiffs contend that Class members' individual damages, even after mandatory trebling, are insufficiently large to warrant individual litigation. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 314-15 (noting that, in antitrust cases, individual damages "are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress").

Plaintiffs further contend that "[c]lass treatment will also be more manageable and efficient than hundreds or thousands of individual actions litigating the same issues with nearly identical proof. . . . Either defendants colluded or they did not; either their conspiracy artificially suppressed their compensation structure or it did not. Any trial here will focus on these questions and the same evidence, whether it involves a single employee or the Class as a whole." Class Cert. Mot. at 23-24.

Defendants, however, argue that "[t]he 'numerous and substantial separate issues' each class member would have to litigate to 'establish his or her right to recover individually' means that 'class action treatment is not the 'superior' method of adjudication." Opp'n at 25 (citing *Zinser*, 253 F.3d at 1192). During the hearing on Plaintiffs' Supplemental Motion for Class Certification, Defendants proposed instead holding multiple "bellwether" trials to accommodate the groups of people impacted. Aug. 8 Tr. at 31-32. In response, counsel for Plaintiffs argued that such an approach would not conserve resources because, "in every single case, the proof of impact would be the opinion that this conduct . . . affected the pay structure of the entire company." *Id.* at 67-68. The Court agrees. Given that Plaintiffs' case rises and falls with their common evidence, the Court does not find that conducting numerous bellwether trials, which will effectively be trials

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with Plaintiffs representing subclasses of employees, will ease case management.[22] In fact, this would merely multiply the number of trials with the same issues and evidence.

Thus, the Court finds that the Technical Class members' interests weigh in favor of having this case litigated as a class action. In addition, the nature of Defendants' alleged overarching conspiracy and the desirability of concentrating the litigation in one proceeding weigh heavily in favor of finding that class treatment is superior to other methods of adjudication of the controversy. *See Zinser*, 253 F.3d at 1190-92. The Court also finds that questions regarding manageability weigh in favor of finding class treatment superior to other methods of adjudication. Thus, the Court finds that Plaintiffs have satisfied the superiority requirement.

V. CONCLUSION

For the reasons set forth above, the Court finds that Plaintiffs have satisfied all of the requirements for Rule 23(a) of the Federal Rules of Civil Procedure, as well as the requirements of Rule 23(b)(3). Accordingly, the Court GRANTS Plaintiffs' Motion for Class Certification as to the Technical Class and appoints named Plaintiffs as Class Representatives.

IT IS SO ORDERED.

Dated: October 24, 2013

Lucy H. Koh

LUCY H. KOH
United States District Judge

[22] Defendants further suggest that certifying the Technical Class would violate the Rules Enabling Act because it would prevent Defendants from asserting statutory defenses to which they are entitled. In making this argument, Defendants rely on a section of *Dukes* in which the Supreme Court held that Rule 23(b)(2), which provides for the certification of a class seeking injunctive relief and not damages, was not an appropriate vehicle for certifying a class of discrimination plaintiffs who sought backpay under Title VII. Opp'n at 25 (citing *Dukes*, 131 S. Ct. at 2561). The Supreme Court held that the putative class could not be certified in part because the defendant would not be able to litigate Title VII defenses that it may have had against individual class members. *Dukes*, 131 S. Ct. at 2561. As a result, class certification would have expanded plaintiffs' substantive rights under Title VII. This *Dukes* holding applied to a class under Rule 23(b)(2), which provides for only injunctive relief and not for damages; thus, this holding is inapplicable to the instant case. Further, Defendants here have not identified any statutory defenses that Defendants would have against particular class members, nor have Defendants contended that certification would expand Plaintiffs' rights under the antitrust laws.

FILED

JAN 14 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION. SIDDHARTH HARIHARAN; et al., Plaintiffs - Respondents, v. ADOBE SYSTEMS, INC.; et al., Defendants - Petitioners.	No. 13-80223 D.C. No. 5:11-cv-02509-LHK Northern District of California, San Jose ORDER

Before: TROTT and PAEZ, Circuit Judges.

Petitioners' motion to seal portions of the excerpts of record is granted. Respondents' motion to seal portions of their supplemental excerpts of record is granted. All documents sealed pursuant to the district court's January 24, 2012 protective order and referenced in the parties' motions shall remain under seal.

The motion of the Chamber of Commerce, et al., for leave to file an *amicus curiae* brief in support of petitioners is granted. The Clerk shall file the brief submitted on November 14, 2013.

KS/MOATT

Petitioners' motion for leave to file a reply in support of the petition for permission to appeal is granted. Petitioners' November 25, 2013 reply has been filed.

The court, in its discretion, denies the petition for permission to appeal the district court's October 24, 2013 order granting class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam).

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Master Docket No. 11-CV-2509-LHK **ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS WITH PIXAR, LUCASFILM, AND INTUIT**

This matter is before the Court on Plaintiffs' motion for final approval of the proposed class action settlements (the "Settlements") between individual and representative Plaintiffs Michael Devine, Mark Fichtner, Siddharth Hariharan, and Daniel Stover ("Plaintiffs") and the Class they represent, and Intuit Inc., Lucasfilm, Ltd., and Pixar (collectively the "Settling Defendants").[1] Having considered the Motion, the Settling Parties' Settlement Agreements, the pleadings and other papers filed in this Action, the statements of counsel and the parties, and all of the arguments and evidence presented at the Final Approval Hearing held on May 1, 2014, and for good cause shown, IT IS HEREBY ORDERED as follows:

[1] Representative Plaintiff Brandon Marshall died on December 10, 2013, while these Settlements were pending before this Court. Mr. Marshall's estate shall receive the settlement share to which Mr. Marshall is entitled pursuant to the terms of the Settlements.

1. Unless otherwise defined herein, all terms that are capitalized herein shall have the meanings ascribed to those terms in the Settlement Agreements.

2. The Court has jurisdiction over the subject matter of the Settlement Agreements with respect to and over all parties to the Settlement Agreements, including all Class members and Settling Defendants Pixar, Lucasfilm, Ltd., and Intuit, Inc.

3. The Court confirms its October 30, 2013 Order granting conditional class certification to the Settlement Class.

I. **<u>The Settlement Is Fair, Adequate, and Reasonable</u>**

4. In evaluating a proposed class action settlement under Federal Rule of Civil Procedure 23(e), the standard is whether the settlement "is fundamentally fair, adequate, and reasonable." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). A district court may consider some or all of the following factors when making this determination: "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Officers for Justice*, 688 F.2d at 625. The Court finds that the Settlements are fair, adequate, and reasonable in light of these factors.

5. First, the Settlements reflect the strength of Plaintiffs' case as well as the Settling Defendants' position. This Court has been "exposed to the litigants and their strategies, positions and proof," *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988) (quotation marks and citation omitted), and finds that the judicial policy favoring the compromise and settlement of class action suits is applicable here. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The Court is also satisfied that the Settlements were reached after arm's length negotiations by capable counsel, and were not a product of fraud, overreaching, or collusion among the parties. *Id.* at 1290.

6. Second, the risks, expense, complexity, and likely duration of further litigation also support the Court's final approval of the Settlements. Plaintiffs and the Settling Defendants entered into the Settlements in July 2013 after the Court had largely denied Plaintiffs' Class Certification Motion without prejudice, and before the Court ruled on Plaintiffs' Supplemental Class Certification Motion. At the time of the Settlements, there was no guarantee the Court would certify a Class or, if so, whether certification would survive Fed. R. Civ. Proc. 23(f) review. Furthermore, Plaintiffs faced substantial challenges to the admissibility and reliability of their expert opinions on antitrust impact and damages at the time these Settlements were reached. If the case had proceeded to trial, the issues would have been complex and significant. Through the Settlements, the parties reduced the scope of the ongoing litigation and lessened the expense and burden of summary judgment and trial.

7. Third, the extent of discovery completed and the stage of proceedings support approval. The factual investigation and legal analysis required in the three years of this litigation were very substantial. During the discovery process, Class Counsel reviewed over 3.2 million pages of documents, and took or defended nearly 100 depositions, including deposing 85 Defendant fact witnesses, taking or defending numerous expert depositions, and defending the five Class Representative depositions. Dermody Decl., ¶ 9. Defendants also propounded document requests, for which Plaintiffs produced over 31,000 pages. *Id.* With expert assistance, Class Counsel analyzed over 15 gigabytes of employment-related compensation and recruiting data, and studied all Defendants' compensation systems. *Id.* The discovery process, which is now complete, has been thorough.

8. Fourth, the Settlements provide for substantial consideration—a total of $20 million ($9 million from Pixar and Lucasfilm and $11 million from Intuit)— particularly in light of the fact that the Settling Defendants collectively account for less than 8% of Class members, and together account for approximately 5% of total Class compensation. The Settling Defendants also agreed to cooperate with Plaintiffs in terms of authenticating documents and providing the last known contact information for current or former employee-witnesses for notice or subpoena

purposes to the extent consistent with California law. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983). In return, Plaintiffs have agreed to a reasonable and fair release of claims against the Settling Defendants. Moreover, at the time of the Settlements, the Settlements preserved Plaintiffs' ability to pursue all damages caused by the conspiracy, including damages from the Settling Defendants' conduct, from Adobe, Apple, Google, and Intel ("Remaining Defendants"), who remain jointly and severally liable. *In re Corrugated Container Antitrust Litig.*, No. M.D.L. 310, 1981 WL 2093, at *17 (S.D. Tex. June 4, 1981).

9. Fifth, the views of Plaintiffs' counsel, who are experienced in litigating and settling antitrust class actions, weigh in favor of final approval. *Linney v. Cellular Alaska P'Ship*, No. 96-3008-DJL, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff'd* 151 F.3d 1234 (9th Cir. 1998). Plaintiffs' counsel have conducted an extensive investigation into the factual and legal issues raised in this Action and endorse the Settlements as fair, adequate, and reasonable.

10. Finally, the reaction of the Class members supports the Court's final approval of the Settlements. Only 147 Class members have timely opted out of the Settlements, while 11,055 Class members have filed claim forms. Only five Class members have objected to the Settlements.[2]

a. Mr. Sanocki and Mr. Brown object to the amount of the Settlement fund, stating that it should be greater in order to deter anticompetitive behavior in the future. However, these objections do not account for the fact that the Settlements do not constitute all of the relief to the Class. Nor do these objections account for the fact that, at the time of the Settlements, the Class remained able to seek the full amount of estimated damages from the Remaining Defendants, including estimated damages resulting from the Settling Defendants' alleged misconduct. Moreover, the Settlements are appropriate in light of the factors addressed above, including the amount recovered and the risks Plaintiffs faced in pursuing their claims.

[2] According to Plaintiffs' counsel, none of the objections or opt-outs were settlement specific. That is, all opt-outs and objections were to both the Intuit Settlement and the Lucasfilm/Pixar Settlement.

b. Ms. Merrell and Mr. Grosse appear to object not to the terms of these Settlements, but to the litigation itself and any possible settlement of the action.[3] The compelling documentary evidence and expert analyses suggests that this litigation was well-founded. Furthermore, these objections are inconsistent with the Class's interests and contradict the judicial policy favoring settlement of class actions. *City of Seattle*, 955 F.2d at 1276.

c. Finally, Mr. Minshall objected on the grounds that all employee salary information should have been made available so that he could evaluate it and that the settlements should have covered employees who worked for companies that are not defendants in this case because he believes that the agreements may have had broader market impact. On the first point, each Class member knows his or her own salary data or can confirm such from the Claims Administrator. There is no basis to allow Class members access to all salary data, which is highly confidential, but which has already been analyzed for the Court's benefit in the Class certification papers, which are publicly available on the docket. *See Californians for Disability Rights, Inc. v. Cal. DOT*, No. 06-5125-SBA, 2010 U.S. Dist. LEXIS 62837, at *27 (N.D. Cal. June 2, 2010) (overruling class member objection to lack of public information on defendant's overall budget because Plaintiffs and class counsel had considered the information when negotiating settlement). The Court notes that the class papers and supporting expert reports presented their experts' analysis of salary data, antitrust impact, and damages, which were publicly available at the time of settlement approval. As for his second ground, this has no merit, as the claims of employees outside of the Class positions (e.g., at other employers) are not the subject of this case and are not released by these Settlements. The litigation is limited to the seven companies named as defendants, and the Class includes only employees from those companies. In short, Mr. Minshall is seeking something that is not possible in this lawsuit. Therefore, the Court finds that the objections do not cast doubt on the fairness, adequacy, and reasonableness of the Settlements.

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[3] Ms. Merrell's objections to the amount of attorneys' fees and costs requested by Class Counsel is discussed separately in this Court's order granting Class Counsel's requests for fees, costs, and service awards.

11. Accordingly, the Court finds that the Settlements are fair, adequate, and reasonable within the meaning of Rule 23(e) of the Federal Rules of Civil Procedure.

II. The Notice Program Was Appropriate

12. Federal Rule of Civil Procedure 23(c)(2)(B) requires that the settling parties provide settlement class members with "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

13. The Court finds that the notice program, approved by the Court on October 30, 2013, has been implemented and complies with Fed. R. Civ. P. 23(c)(2)(B). Notice was sent to all Class members by first class mail. The Notice, which was edited and approved by this Court, provided a clear description of who is a member of the Class and Class members' rights and options under the Settlements. The Notice explained how to file a claim and receive money from the Settlements, how to opt out of one or both of the Settlements, how to object to one or both of the Settlements, how to obtain copies of relevant papers filed in the case, and how to contact Class Counsel and the Claims Administrator.

14. In addition, the Court-approved Claims Administrator set up a telephone hotline and a case-specific website (the address of which was included in the notice) where Class members can access copies of the Settlement Agreements; the notice; the claim form; the Court's order certifying the litigation Class; the Court's order preliminarily approving the Settlements; and Plaintiffs' motion for attorneys' fees, reimbursement of expenses, and service awards (and supporting declarations of Class Counsel and the Class Representatives). Class members could file claims by mail or electronically on the website. Class members could opt out of or object to

the Settlements by mail or by email. Though the opt-out email address was not functioning for the first three weeks of the notice period, the problem was addressed by a reminder notice sent to Class members that explained the problem with the opt-out email address and its restored functionality, and informed them of extended dates for exercising their rights under the Settlements. There is no evidence that any Class member wanted to opt out but was unable to do so.

III. <u>The Plan of Allocation Is Fair, Reasonable, and Adequate</u>

15. The Plan of Allocation is fair, reasonable, and adequate. It will provide each claimant with a fractional share based upon each claimant's total base salary received during the conspiracy period. *See In re Oracle Sec. Litig.*, No. 90-0931-VRW, 1994 U.S. Dist. LEXIS 21593, at *3 (N.D. Cal. June 18, 1994) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable."). The Plan of Allocation here is a simple, efficient way to allocate the Settlement funds to claimants based on the extent of their injuries, which are proportional to their differing salaries. Such fractional shares are "cost-effective, simple, and fundamentally fair." *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 285 (D. Minn. 1997); *see also In re Electrical Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 404 (D.N.J. 2006) (finding pro rata distribution "eminently reasonable and fair to the class members."). The Court also notes that there will be no reversion of unclaimed funds to any Settling Defendant. Accordingly, the Plan of Allocation is approved.

IV. <u>Final Judgment And Dismissal</u>

16. By means of this Final Approval Order, the Court hereby enters final judgment in this action as between Plaintiffs and the Class and Settling Defendants, as defined in Federal Rule of Civil Procedure 58(a)(1).

17. All Released Claims of Plaintiffs and the Class are hereby released as against Intuit, Lucasfilm, and Pixar and all other Released Parties as defined in the Settlements.

18. The Court finds that the Class members who have exercised their right to exclude themselves from this Action, by submitting timely requests for exclusion pursuant to the notice

mailed to the Class, are not included in or bound by this order and final judgment. The excluded Class members are listed in Exhibit A.

19. Without affecting the finality of the Court's judgment in any way, the Court retains jurisdiction over this matter for purposes of resolving issues relating to the interpretation, administration, implementation, effectuation, and enforcement of the Settlements.

20. The parties and the Claims Administrator are hereby ordered to comply with the terms of the Settlements.

21. This action is dismissed with prejudice as against the Settling Defendants, each side to bear its own costs and attorneys' fees except as provided by the Settlements and the Court's orders.

Dated: May 16, 2014

Lucy H. Koh

LUCY H. KOH
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Master Docket No. 11-CV-2509-LHK **ORDER GRANTING PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS**

On May 1, 2014, this Court held a hearing on Plaintiffs' motion for an order granting approval of Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Litigation Costs, and Service Awards. Based on the papers filed with the Court and presentations made to the Court at the hearing, the Court hereby grants Class Counsel's request.

I. The Requested Award of Attorneys' Fees is Appropriate

Plaintiffs seek attorneys' fees of $5,000,000, reflecting twenty-five percent of the common Settlement Funds. Under the common fund doctrine, 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1175 (S.D. Cal. 2007) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003)); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Where, as here, the parties establish a common fund to settle a class action, courts have discretion to choose either the "percentage" method or the "lodestar/multiplier" method to determine a reasonable attorneys' fee. *See Hanlon v. Chrysler Group*, 150 F. 3d 1011, 1029 (9th Cir. 1998); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997). The Ninth Circuit has held that, regardless of whether a court "applies the lodestar or the percentage method, 'we require only that fee awards in common fund cases be *reasonable* under the circumstances.'" *Id.* (quoting *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990)) (emphasis in original); *see Staton*, 327 F.3d at 963.

Under the percentage method, Plaintiffs' request for attorneys' fees in the amount of twenty-five percent of the Settlement Funds is in line with the benchmark in this Circuit. *Paul, Johnson, Alston & Hunt v. Granulty*, 886 F.2d 268, 272 (9th Cir. 1989). The Court finds that it is reasonable to award Class Counsel twenty-five percent of the Settlement Funds based on the following factors: 1) the result obtained for the class; 2) the risk incurred by Class Counsel in prosecuting this complex case; 3) Class Counsel's skills and experience; 4) the burden on Class Counsel of litigating this case on a contingency basis; and 5) the modest size of the fee request as compared to the market rate for fees as a percentage of common funds in other class settlements. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *64-74 (C.D. Cal. June 10, 2005).

Class Counsel Lieff, Cabraser, Heimann & Bernstein, LLP has submitted its billing records in the instant litigation through October 30, 2013, the date of this Court's Preliminary Settlement Approval of Plaintiffs' Settlements with Intuit, Pixar, and Lucasfilm. The Court has reviewed these records along with the Plaintiffs' submissions in support of Lieff, Cabraser's billing rates. The Court finds that Lieff, Cabraser's lodestar alone exceeds the requested $5,000,000. Accordingly, the lodestar cross-check confirms that Class Counsel here seek attorneys' fees that are modest compared to their lodestar.

Only one Class member, Emma Merrell, objected to Plaintiffs' fee request, which was disclosed in the settlement notice sent to Class members. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994-95 (9th Cir. 2010). Ms. Merrell's objection expressed concern about the potential for a $10 million fee and cost award (the actual amount requested is $8.699 million, reflecting a request of $3.699 million in costs and $5 million in fees). However, Ms. Merrell's objection did not take into account that the Settlements for which the costs and fees have been requested are in partial resolution of all of the claims in the case, with all claims against the remaining four Defendants continuing as of the time of the Settlements. In addition, Ms. Merrell states her concern for the financial well-being of the Defendant that employed her and indicates that she does not believe the conduct at issue in this case affected her. This suggests that the crux of her objection is not that she as a Class member should receive more from the Settlements, but that the case should not have been brought at all. This is not a valid objection, particularly in light of the fact that the Court has found this litigation to be meritorious. *See, e.g.*, *Wren v. RGIS Inventory Specialists*, No. 06-05778-JCS, 2011 U.S. Dist. LEXIS 38667, at *40-41 (N.D. Cal. Apr. 1, 2011).

Accordingly, having considered the record in this case and the response of the Class, this Court finds Class Counsel's request for fees is reasonable.

II. <u>Class Counsel's Request for Reimbursement of Litigation Expenses is Reasonable.</u>

Class Counsel submitted declarations reflecting $3,699,844.31 in litigation expenses incurred as of October 30, 2013, the date of Preliminary Settlement Approval. These costs include: (1) expert witness fees; (2) mediators' fees; (3) a document vendor to host the over 3 million pages of documents produced; (4) court reporting and videographer services for nearly 100 depositions taken by Plaintiffs in this case; (5) electronic research; (6) copying, mailing, and serving documents; and (7) case-related travel for Plaintiffs, witnesses, experts, and counsel. Class Counsel incurred these out-of-pocket costs without assurance that they would be repaid. These litigation expenses were necessary to secure the resolution of this litigation. As discussed above, Ms. Merrell is the sole class member who has objected to the amount of costs. However, as noted above, Ms. Merrell seems to be more concerned about the well-being of her former employer, Defendant Pixar, and whether this litigation should have been brought in the first instance than maximizing recovery for the Class. Furthermore, this Court recognizes the complexity and necessity of the expert evidence in advancing this litigation. In light of the scope of expert discovery and the document-intensive nature of the litigation, the Court finds Class Counsel's request for reimbursement of litigation expenses is reasonable.

III. <u>The Service Award Payments to the Class Representatives are Fair and Reasonable.</u>

Plaintiffs request approval of service awards to the Class Representatives in the amount of $20,000 each. The Court finds that the service awards to the Class Representatives are fair and reasonable under the *Staton* factors. *Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

First, the Class Representatives have expended substantial time and effort in pursuing this litigation, and in so doing have protected the interests of the Class. Class Representatives Michael Devine, Mark Fichtner, Daniel Stover, and Siddharth Hariharan submitted detailed declarations describing their contribution to the prosecution and settlement of this case, as well as the amount of time expended thereon. Dkt. Nos. 720-23. Class Counsel have submitted a similar declaration from attorney Dean M. Harvey on behalf of the estate of recently deceased Class Representative Brandon Marshall, describing Mr. Marshall's service to the Class before his death. Dkt. No. 726. The Class Representatives have described numerous efforts they undertook in this litigation, including providing assistance to Class Counsel regarding the initial investigation; preparing and reviewing the complaint; reviewing drafts of pleadings and other documents;

gathering documents and other potential evidence about Defendants and their claims; assisting with various aspects of written and other discovery; discussing the strategy and progress of all mediations in the case; appearing for deposition; and participating in regular communications about the case. Dkt. Nos. 720 at ¶8; 721 at ¶8; 722 at ¶8; 723 at ¶8; 726 at ¶10. These efforts protected the interests of the Class by furthering Class Counsel's prosecution of the case.

Second, the Class has benefitted from the efforts of the Class Representatives. This litigation, and the resulting settlements, would not have been possible without the Class Representatives' willingness to serve in the role. Courts recognize that Class Representatives face some risk of retaliation, particularly in the employment context. *See Staton*, 327 F.3d at 977; *Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, 2010 U.S. Dist. LEXIS 12762, *4 (S.D.N.Y. February 9, 2010) ("[F]ormer employees put in jeopardy their ability to depend on the employer for references in connection with future employment."). Importantly, in sworn statements, the Class Representatives described the risks they took in filing such a case against companies of such "prominence and power" in the "close-knit" high-technology industry. Dkt. Nos. 720 at ¶9; 721 at ¶9; 722 at ¶9; 723 at ¶9; *see also* Dkt. No. 726 at ¶11.

In this case, Defendants served subpoenas for employment records from the Class Representatives' current and former employers, reinforcing the taint of this litigation against the Class Representatives across their professional networks. Dkt. Nos. 720 at ¶9 (six subpoenas on non-party employers); 721 at ¶9 (two subpoenas on non-party employers); 722 at ¶9 (two subpoenas on non-party employers); 723 at ¶9 (nine subpoenas on non-party employers); *see also* Dkt. No. 726 at ¶11 (nine subpoenas on non-party employers).

Each Class Representative expressed a fear that other technology companies or clients might not want to work with them in the future due to their role in this case. Dkt. Nos. 720 at ¶9; 721 at ¶9; 722 at ¶9; 723 at ¶9; *see also* Dkt. No. 726 at ¶11. As each Class Representative stated, "That risk will continue throughout my career." Dkt. Nos. 720 at ¶9; 721 at ¶9; 722 at ¶9; 723 at ¶9. Accordingly, absent Class members are able to participate in the settlement without the risks that the Class Representatives faced.

In addition, the service awards here do not raise any prospect of improper coercion.

Unlike in *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th Cir. 2013), each of these five Class Representatives preserved the right to separately and independently support, object to or comment upon any settlement. At no time was any Class Representative advised by Class Counsel that his entitlement to a service award was conditioned on that Class Representative's support for the settlements. Nor do the modest service awards requested in this case, which amount to just 0.4 percent of the total recovery, create a conflict or potential conflict between the Class Representatives and the Class, as in *Staton*, 327 F.3d at 975-78 or *Rodriguez v. W. Pub. Corp.*, 563 F.948 (9th Cir. 2009). Finally, no Class member has objected to the requested service awards.

In light of the record described above, the Court finds that the Class Representatives have expended substantial time and effort in pursuing this litigation and have protected the interests of the Class; and the Class has benefitted from the Class Representatives' actions with a monetary settlement of $20 million. The requested service awards are therefore reasonable and fair.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Court hereby finds and concludes that due and adequate notice was directed to all persons and entities who are Class members, advising them of Class Counsel's intent to seek attorneys' fees and expenses, and service awards for the Class Representatives, and of their right to object thereto.

2. A full and fair opportunity was accorded to all such persons and entities to be heard.

3. Only one Class member objected to Class Counsel's request for attorneys' fees or expenses, or to the service awards, and that objection is overruled.

4. The Court hereby grants Plaintiffs' request for attorneys' fees at the benchmark of twenty-five percent of the Settlement Funds ($5,000,000), plus reimbursement of $3,699,844.31 in litigation expenses, for a combined total of $8,699,844.31. In addition, the Court hereby grants Plaintiffs' request for service awards in the amount of $20,000 each to Class Representatives Michael Devine, Mark Fichtner, Siddharth Hariharan and Daniel Stover, as well as to the estate of recently deceased Class Representative Brandon Marshall. The awarded

attorneys' fees and costs and service awards shall be paid pursuant to the terms of the Settlement Agreements, with the amounts deducted from each of the two funds proportional to each fund's total.

Dated: May 16, 2014

Lucy H. Koh

LUCY H. KOH
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION	Case No.: 11-CV-02509-LHK
THIS DOCUMENT RELATES TO: **ALL ACTIONS**	ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS WITH ADOBE, APPLE, GOOGLE, AND INTEL

Before the Court is a Motion for Preliminary Approval of Class Action Settlement with Defendants Adobe Systems Inc. ("Adobe"), Apple Inc. ("Apple"), Google Inc. ("Google"), and Intel Corp. ("Intel") (hereafter, "Remaining Defendants") brought by three class representatives, Mark Fichtner, Siddharth Hariharan, and Daniel Stover (hereafter, "Plaintiffs"). *See* ECF No. 920. The Settlement provides for $324.5 million in recovery for the class in exchange for release of antitrust claims. A fourth class representative, Michael Devine ("Devine"), has filed an Opposition contending that the settlement amount is inadequate. *See* ECF No. 934. Plaintiffs have filed a Reply. *See* ECF No. 938. Plaintiffs, Remaining Defendants, and Devine appeared at a hearing on June 19, 2014. *See* ECF No. 940. In addition, a number of Class members have submitted letters in support of and in opposition to the proposed settlement. ECF Nos. 914, 949-51. The Court, having considered the briefing, the letters, the arguments presented at the hearing, and the record in this case, DENIES the Motion for Preliminary Approval for the reasons stated below.

I. BACKGROUND AND PROCEDURAL HISTORY

Michael Devine, Mark Fichtner, Siddharth Hariharan, and Daniel Stover, individually and on behalf of a class of all those similarly situated, allege antitrust claims against their former employers, Adobe, Apple, Google, Intel, Intuit Inc. ("Intuit"), Lucasfilm Ltd. ("Lucasfilm"), and Pixar (collectively, "Defendants"). Plaintiffs allege that Defendants entered into an overarching conspiracy through a series of bilateral agreements not to solicit each other's employees in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15. Plaintiffs contend that the overarching conspiracy, made up of a series of six bilateral agreements (Pixar-Lucasfilm, Apple-Adobe, Apple-Google, Apple-Pixar, Google-Intuit, and Google-Intel) suppressed wages of Defendants' employees.

The five cases underlying this consolidated action were initially filed in California Superior Court and removed to federal court. *See* ECF No. 532 at 5. The cases were related by Judge Saundra Brown Armstrong, who also granted a motion to transfer the related actions to the San Jose Division. *See* ECF Nos. 52, 58. After being assigned to the undersigned judge, the cases were consolidated pursuant to the parties' stipulation. *See* ECF No. 64. Plaintiffs filed a consolidated complaint on September 23, 2011, *see* ECF No. 65, which Defendants jointly moved to dismiss, *see* ECF No. 79. In addition, Lucasfilm filed a separate motion to dismiss on October 17, 2011. *See* ECF No. 83. The Court granted in part and denied in part the joint motion to dismiss and denied Lucasfilm's separate motion to dismiss. *See* ECF No. 119.

On October 1, 2012, Plaintiffs filed a motion for class certification. *See* ECF No. 187. The motion sought certification of a class of all of the seven Defendants' employees or, in the alternative, a narrower class of just technical employees of the seven Defendants. After full briefing and a hearing, the Court denied class certification on April 5, 2013. *See* ECF No. 382. The Court was concerned that Plaintiffs' documentary evidence and empirical analysis were insufficient to determine that common questions predominated over individual questions with respect to the issue of antitrust impact. *See id.* at 33. Moreover, the Court expressed concern that there was insufficient analysis in the class certification motion regarding the class of technical employees. *Id.* at 29. The Court afforded Plaintiffs leave to amend to address the Court's concerns. *See id.* at 52.

On May 10, 2013, Plaintiffs filed their amended class certification motion, seeking to certify only the narrower class of technical employees. *See* ECF No. 418. Defendants filed their opposition on June 21, 2013, ECF No. 439, and Plaintiffs filed their reply on July 12, 2013, ECF No. 455. The hearing on the amended motion was set for August 5, 2013.

On July 12 and 30, 2013, after class certification had been initially denied and while an amended motion was pending, Plaintiffs settled with Pixar, Lucasfilm, and Intuit (hereafter, "Settled Defendants"). *See* ECF Nos. 453, 489. Plaintiffs filed a motion for preliminary approval of the settlements with Settled Defendants on September 21, 2013. *See* ECF No. 501. No opposition to the motion was filed, and the Court granted the motion on October 30, 2013, following a hearing on October 21, 2013. *See* ECF No. 540. The Court held a fairness hearing on May 1, 2014, ECF No. 913, and granted final approval of the settlements and accompanying requests for attorneys' fees, costs, and incentive awards over five objections on May 16, 2014, ECF Nos. 915-16. Judgment was entered as to the Settled Defendants on June 20, 2014. ECF No. 947.

After the Settled Defendants settled, this Court certified a class of technical employees of the seven Defendants (hereafter, "the Class") on October 25, 2013 in an 86-page order granting Plaintiffs' amended class certification motion. *See* ECF No. 532. The Remaining Defendants petitioned the Ninth Circuit to review that order under Federal Rule of Civil Procedure 23(f). After full briefing, including the filing of an amicus brief by the National and California Chambers of Commerce and the National Association of Manufacturing urging the Ninth Circuit to grant review, the Ninth Circuit denied review on January 15, 2014. *See* ECF No. 594.

Meanwhile, in this Court, the Remaining Defendants filed a total of five motions for summary judgment and filed motions to strike and to exclude the testimony of Plaintiffs' principal expert on antitrust impact and damages, Dr. Edward Leamer, who opined that the total damages to the Class exceeded $3 billion in wages Class members would have earned in the absence of the anti-solicitation agreements.[1] The Court denied the motions for summary judgment on March 28, 2014, and on April 4, 2014, denied the motion to exclude Dr. Leamer and denied in large part the motion to strike Dr. Leamer's testimony. ECF Nos. 777, 788.

On April 24, 2014, counsel for Plaintiffs and counsel for Remaining Defendants sent a joint letter to the Court indicating that they had reached a settlement. *See* ECF No. 900. This settlement was reached two weeks before the Final Pretrial Conference and one month before the trial was set to commence.[2] Upon receipt of the joint letter, the Court vacated the trial date and pretrial deadlines and set a schedule for preliminary approval. *See* ECF No. 904. Shortly after counsel sent the letter, the media disclosed the total amount of the settlement, and this Court received three letters from individuals, not including Devine, objecting to the proposed settlement in response to media reports of the settlement amount.[3] *See* ECF No. 914. On May 22, 2014, in accordance with this Court's schedule, Plaintiffs filed their Motion for Preliminary Approval. *See* ECF No. 920. Devine filed an Opposition on June 5, 2014.[4] *See* ECF No. 934. Plaintiffs filed a Reply on June 12, 2014. *See* ECF No. 938. The Court held a hearing on June 19, 2014. *See* ECF No. 948. After the hearing, the Court received a letter from a Class member in opposition to the proposed settlement and two letters from Class members in support of the proposed settlement. *See* ECF Nos. 949-51.

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[1] Dr. Leamer was subject to vigorous attack in the initial class certification motion, and this Court agreed with some of Defendants' contentions with respect to Dr. Leamer and thus rejected the initial class certification motion. *See* ECF No. 382 at 33-43.

[2] Defendants' motions in limine, Plaintiffs' motion to exclude testimony from certain experts, Defendants' motion to exclude testimony from certain experts, a motion to determine whether the per se or rule of reason analysis applied, and a motion to compel were pending at the time the settlement was reached.

[3] Plaintiffs in the instant Motion represent that two of the letters are from non-Class members and that the third letter is from a Class member who may be withdrawing his objection. *See* ECF No. 920 at 18 n.11. The objection has not been withdrawn at the time of this Order.

[4] Devine stated in his Opposition that the Opposition was designed to supersede a letter that he had previously sent to the Court. *See* ECF No. at 934 n.2. The Court did not receive any letter from Devine. Accordingly, the Court has considered only Devine's Opposition.

II. LEGAL STANDARD

The Court must review the fairness of class action settlements under Federal Rule of Civil Procedure 23(e). The Rule states that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." The Rule requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal" and further states that if a settlement "would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)-(2). The principal purpose of the Court's supervision of class action settlements is to ensure "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

District courts have interpreted Rule 23(e) to require a two-step process for the approval of class action settlements: "the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage, the Ninth Circuit has stated that "[a]ssessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

In contrast to these well-established, non-exhaustive factors for final approval, there is relatively scant appellate authority regarding the standard that a district court must apply in reviewing a settlement at the preliminary approval stage. Some district courts, echoing commentators, have stated that the relevant inquiry is whether the settlement "falls within the range of possible approval" or "within the range of reasonableness." *In re Tableware Antitrust Litig.*, 484

F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *see also Cordy v. USS-Posco Indus.*, No. 12-553, 2013 WL 4028627, at *3 (N.D. Cal. Aug. 1, 2013) ("Preliminary approval of a settlement and notice to the proposed class is appropriate if the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible approval." (internal quotation marks omitted)). To undertake this analysis, the Court "must consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014) (internal quotation marks omitted).

III. DISCUSSION

Pursuant to the terms of the instant settlement, Class members who have not already opted out and who do not opt out will relinquish their rights to file suit against the Remaining Defendants for the claims at issue in this case. In exchange, Remaining Defendants will pay a total of $324.5 million, of which Plaintiffs' counsel may seek up to 25% (approximately $81 million) in attorneys' fees, $1.2 million in costs, and $80,000 per class representative in incentive payments. In addition, the settlement allows Remaining Defendants a pro rata reduction in the total amount they must pay if more than 4% of Class members opt out after receiving notice.[5] Class members would receive an average of approximately $3,750[6] from the instant settlement if the Court were to grant all requested deductions and there were no further opt-outs.[7]

The Court finds the total settlement amount falls below the range of reasonableness. The Court is concerned that Class members recover less on a proportional basis from the instant

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[5] Plaintiffs also assert that administration costs for the settlement would be $160,000.

[6] Devine calculated that Class members would receive an average of $3,573. The discrepancy between this number and the Court's calculation may result from the fact that Devine's calculation does not account for the fact that 147 individuals have already opted out of the Class. The Court's calculation resulted from subtracting the requested attorneys' fees ($81,125,000), costs ($1,200,000), incentive awards ($400,000), and estimated administration costs ($160,000) from the settlement amount ($324,500,000) and dividing the resulting number by the total number of remaining class members (64,466).

[7] If the Court were to deny any portion of the requested fees, costs, or incentive payments, this would increase individual Class members' recovery. If less than 4% of the Class were to opt out, that would also increase individual Class members' recovery.

settlement with Remaining Defendants than from the settlement with the Settled Defendants a year ago, despite the fact that the case has progressed consistently in the Class's favor since then. Counsel's sole explanation for this reduced figure is that there are weaknesses in Plaintiffs' case such that the Class faces a substantial risk of non-recovery. However, that risk existed and was even greater when Plaintiffs settled with the Settled Defendants a year ago, when class certification had been denied.

The Court begins by comparing the instant settlement with Remaining Defendants to the settlements with the Settled Defendants, in light of the facts that existed at the time each settlement was reached. The Court then discusses the relative strengths and weaknesses of Plaintiffs' case to assess the reasonableness of the instant settlement.

A. Comparison to the Initial Settlements

1. Comparing the Settlement Amounts

The Court finds that the settlements with the Settled Defendants provide a useful benchmark against which to analyze the reasonableness of the instant settlement. The settlements with the Settled Defendants led to a fund totaling $20 million. *See* ECF No. 915 at 3. In approving the settlements, the Court relied upon the fact that the Settled Defendants employed 8% of Class members and paid out 5% of the total Class compensation during the Class period. *See* ECF No. 539 at 16:20-22 (Plaintiffs' counsel's explanation at the preliminary approval hearing with the Settled Defendants that the 5% figure "giv[es] you a sense of how big a slice of the case this settlement is relative to the rest of the case"). If Remaining Defendants were to settle at the same (or higher) rate as the Settled Defendants, Remaining Defendants' settlement fund would need to total at least $380 million. This number results from the fact that Remaining Defendants paid out 95% of the Class compensation during the Class period, while Settled Defendants paid only 5% of the Class compensation during the Class period.[8]

At the hearing on the instant Motion, counsel for Remaining Defendants suggested that the

[8] One way to think about this is to set up the simple equation: 5/95 = $20,000,000/x. This equation asks the question of how much 95% would be if 5% were $20,000,000. Solving for x would result in $380,000,000.

relevant benchmark is not total Class compensation, but rather is total Class membership. This would result in a benchmark figure for the Remaining Defendants of $230 million (92 divided by 8 is 11.5; 11.5 times $20 million is $230 million).[9] At a minimum, counsel suggested, the Court should compare the settlement amount to a range of $230 million to $380 million, within which the instant settlement falls. The Court rejects counsel's suggestion, which is contrary to the record. Counsel has provided no basis for why the number of Class members employed by each Defendant is a relevant metric. To the contrary, the relevant inquiry has always been total Class compensation. For example, in both of the settlements with the Settled Defendants and in the instant settlement, the Plans of Allocation call for determining each individual Class member's pay out by dividing the Class member's compensation during the Class period by *the total Class compensation during the Class period*. ECF No. 809 at 6 (noting that the denominator in the plan of allocation in the settlements with the Settled Defendants is the "total of base salaries paid to all approved Claimants in class positions during the Class period"); ECF No. 920 at 22 (same in the instant settlement); *see also* ECF No. 539 at 16:20-22 (Plaintiffs' counsel's statement that percent of the total Class compensation was relevant for benchmarking the settlements with the Settled Defendants to the rest of the case). At no point in the record has the percentage of Class membership employed by each Defendant ever been the relevant factor for determining damages exposure. Accordingly, the Court rejects the metric proposed by counsel for Remaining Defendants. Using the Settled Defendants' settlements as a yardstick, the appropriate benchmark settlement for the Remaining Defendants would be at least $380 million, more than $50 million greater than what the instant settlement provides.

Counsel for Remaining Defendants also suggested that benchmarking against the initial settlements would be inappropriate because the magnitude of the settlement numbers for Remaining Defendants dwarfs the numbers at issue in the Settled Defendants' settlements. This argument is premised on the idea that Defendants who caused more damage to the Class and who benefited more by suppressing a greater portion of class compensation should have to pay less than

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[9] Again, 8/92 = $20,000,000/x would lead to x = $230,000,000.

Defendants who caused less damage and who benefited less from the allegedly wrongful conduct. This argument is unpersuasive. Remaining Defendants are alleged to have received 95% of the benefit of the anti-solicitation agreements and to have caused 95% of the harm suffered by the Class in terms of lost compensation. Therefore, Remaining Defendants should have to pay at least 95% of the damages, which, under the instant settlement, they would not.

The Court also notes that had Plaintiffs prevailed at trial on their more than $3 billion damages claim, antitrust law provides for automatic trebling, *see* 15 U.S.C. § 15(a), so the total damages award could potentially have exceeded $9 billion. While the Ninth Circuit has not determined whether settlement amounts in antitrust cases must be compared to the single damages award requested by Plaintiffs or the automatically trebled damages amount, *see Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009), the instant settlement would lead to a total recovery of 11.29% of the single damages proposed by Plaintiffs' expert or 3.76% of the treble damages. Specifically, Dr. Leamer has calculated the total damages to the Class resulting from Defendants' allegedly unlawful conduct as $3.05 billion. *See* ECF No. 856-10. If the Court approves the instant settlements, the total settlements with all Defendants would be $344.5 million. This total would amount to 11.29% of the single damages that Dr. Leamer opines the Class suffered or 3.76% if Dr. Leamer's damages figure had been trebled.

2. Relative Procedural Posture

The discount that Remaining Defendants have received vis-à-vis the Settled Defendants is particularly troubling in light of the changes in the procedural posture of the case between the two settlements, changes that the Court would expect to have increased, rather than decreased, Plaintiffs' bargaining power. Specifically, at the time the Settled Defendants settled, Plaintiffs were at a particularly weak point in their case. Though Plaintiffs had survived Defendants' motion to dismiss, Plaintiffs' motion for class certification had been denied, albeit without prejudice. Plaintiffs had re-briefed the class certification motion, but had no class certification ruling in their favor at the time they settled with the Settled Defendants. If the Court ultimately granted certification, Plaintiffs also did not know whether the Ninth Circuit would grant Federal Rule of

Civil Procedure 23(f) review and reverse the certification. Accordingly, at that point, Defendants had significant leverage.

In contrast, the procedural posture of the case swung dramatically in Plaintiffs' favor after the initial settlements were reached. Specifically, the Court certified the Class over the vigorous objections of Defendants. In the 86-page order granting class certification, the Court repeatedly referred to Plaintiffs' evidence as "substantial" and "extensive," and the Court stated that it "could not identify a case at the class certification stage with the level of documentary evidence Plaintiffs have presented in the instant case." ECF No. 531 at 69. Thereafter, the Ninth Circuit denied Defendants' request to review the class certification order under Federal Rule of Civil Procedure 23(f). This Court also denied Defendants' five motions for summary judgment and denied Defendants' motion to exclude Plaintiffs' principal expert on antitrust impact and damages. The instant settlement was reached a mere two weeks before the final pretrial conference and one month before a trial at which damaging evidence regarding Defendants would have been presented.

In sum, Plaintiffs were in a much stronger position at the time of the instant settlement—after the Class had been certified, appellate review of class certification had been denied, and Defendants' dispositive motions and motion to exclude Dr. Leamer's testimony had been denied—than they were at the time of the settlements with the Settled Defendants, when class certification had been denied. This shift in the procedural posture, which the Court would expect to have increased Plaintiffs' bargaining power, makes the more recent settlements for a proportionally lower amount even more troubling.

B. Strength of Plaintiffs' Case

The Court now turns to the strength of Plaintiffs' case against the Remaining Defendants to evaluate the reasonableness of the settlement.

At the hearing on the instant Motion, Plaintiffs' counsel contended that one of the reasons the instant settlement was proportionally lower than the previous settlements is that the documentary evidence against the Settled Defendants (particularly, Lucasfilm and Pixar) is more compelling than the documentary evidence against the Remaining Defendants. As an initial matter, the Court notes that relevant evidence regarding the Settled Defendants would be admissible at a trial against Remaining Defendants because Plaintiffs allege an overarching conspiracy that included all Defendants. Accordingly, evidence regarding the role of Lucasfilm and Pixar in the creation of and the intended effect of the overarching conspiracy would be admissible.

Nonetheless, the Court notes that Plaintiffs are correct that there are particularly clear statements from Lucasfilm and Pixar executives regarding the nature and goals of the alleged conspiracy. Specifically, Edward Catmull (Pixar President) conceded in his deposition that anti-solicitation agreements were in place because solicitation "messes up the pay structure." ECF No. 431-9 at 81. Similarly, George Lucas (former Lucasfilm Chairman of the Board and CEO) stated, "we cannot get into a bidding war with other companies because we don't have the margins for that sort of thing." ECF No. 749-23 at 9.

However, there is equally compelling evidence that comes from the documents of the Remaining Defendants. This is particularly true for Google and Apple, the executives of which extensively discussed and enforced the anti-solicitation agreements. Specifically, as discussed in extensive detail in this Court's previous orders, Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple, Former CEO of Pixar), Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO), and Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) were key players in creating and enforcing the anti-solicitation agreements. The Court now turns to the evidence against the Remaining Defendants that the finder of fact is likely to find compelling.

1. Evidence Related to Apple

There is substantial and compelling evidence that Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple, Former CEO of Pixar) was a, if not the, central figure in the alleged conspiracy. Several witnesses, in their depositions, testified to Mr. Jobs' role in the anti-solicitation agreements. For example, Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) stated that Mr. Jobs "believed that you should not be hiring each others', you know, technical people" and that "it was inappropriate in [Mr. Jobs'] view for us to be calling in and hiring people." ECF No. 819-12 at 77. Edward Catmull (Pixar President) stated that Mr. Jobs "was very adamant about protecting his employee force." ECF No. 431-9 at 97. Sergey Brin (Google Co-Founder) testified that "I think Mr. Jobs' view was that people shouldn't piss him off. And I think that things that pissed him off were—would be hiring, you know—whatever." ECF No. 639-1 at 112. There would thus be ample evidence Mr. Jobs was involved in expanding the original anti-solicitation agreement between Lucasfilm and Pixar to the other Defendants in this case. After the agreements were extended, Mr. Jobs played a central role in enforcing these agreements. Four particular sets of evidence are likely to be compelling to the fact-finder.

First, after hearing that Google was trying to recruit employees from Apple's Safari team, Mr. Jobs threatened Mr. Brin, stating, as Mr. Brin recounted, "if you hire a single one of these people that means war." ECF No. 833-15.[10] In an email to Google's Executive Management Team as well as Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), Mr. Brin advised: "lets [sic] not make any new offers or contact new people at Apple until we have had a chance to discuss." *Id.* Mr. Campbell then wrote to Mr. Jobs: "Eric [Schmidt] told me that he got directly involved and firmly stopped all efforts to recruit anyone from Apple." ECF No. 746-5. As Mr. Brin testified in his deposition, "Eric made a—you know, a—you know, at least some kind of—had a conversation with Bill to relate to Steve to calm him down." ECF No. 639-1 at 61. As Mr. Schmidt put it, "Steve was unhappy, and Steve's unhappiness absolutely influenced the change we made in recruiting practice." ECF No. 819-12 at 21. Danielle Lambert (Apple's head of Human Resources) reciprocated to maintain Apple's end of the anti-solicitation agreements, instructing Apple recruiters: "Please add Google to your 'hands-off' list. We recently agreed not to recruit from one another so if you hear of any recruiting they are doing against us, please be sure to let me know." ECF No. 746-15.

[10] On the same day, Mr. Campbell sent an email to Mr. Brin and to Larry Page (Google Co-Founder) stating, "Steve just called me again and is pissed that we are still recruiting his browser guy." ECF No. 428-13. Mr. Page responded "[h]e called a few minutes ago and demanded to talk to me." *Id.*

Second, other Defendants' CEOs maintained the anti-solicitation agreements out of fear of and deference to Mr. Jobs. For example, in 2005, when considering whether to enter into an anti-solicitation agreement with Apple, Bruce Chizen (former Adobe CEO), expressed concerns about the loss of "top talent" if Adobe did not enter into an anti-solicitation agreement with Apple, stating, "if I tell Steve it's open season (other than senior managers), he will deliberately poach Adobe just to prove a point. Knowing Steve, he will go after some of our top Mac talent like Chris Cox and he will do it in a way in which they will be enticed to come (extraordinary packages and Steve wooing)."[11] ECF No. 297-15.

This was the genesis of the Apple-Adobe agreement. Specifically, after Mr. Jobs complained to Mr. Chizen on May 26, 2005 that Adobe was recruiting Apple employees, ECF No. 291-17, Mr. Chizen responded by saying, "I thought we agreed not to recruit any senior level employees . . . . I would propose we keep it that way. Open to discuss. It would be good to agree." *Id*. Mr. Jobs was not satisfied, and replied by threatening to send Apple recruiters after Adobe's employees: "OK, I'll tell our recruiters that they are free to approach any Adobe employee who is not a Sr. Director or VP. Am I understanding your position correctly?" *Id*. Mr. Chizen immediately gave in: "I'd rather agree NOT to actively solicit any employee from either company . . . . If you are in agreement I will let my folks know." *Id*. (emphasis in original). The next day, Theresa Townsley (Adobe Vice President Human Resources) announced to her recruiting team, "Bruce and Steve Jobs have an agreement that we are not to solicit ANY Apple employees, and vice versa." ECF No. 291-18 (emphasis in original). Adobe then placed Apple on its "[c]ompanies that are off limits" list, which instructed Adobe employees not to cold call Apple employees. ECF No. 291-11.

Google took even more drastic actions in response to Mr. Jobs. For example, when a recruiter from Google's engineering team contacted an Apple employee in 2007, Mr. Jobs forwarded the message to Mr. Schmidt and stated, "I would be very pleased if your recruiting department would stop doing this." ECF No. 291-23. Google responded by making a "public example" out of the recruiter and "terminat[ing] [the recruiter] within the hour." *Id*. The aim of this

[11] Mr. Jobs successfully expanded the anti-solicitation agreements to Macromedia, a company acquired by Adobe, both before and after Adobe's acquisition of Macromedia.

public spectacle was to "(hopefully) prevent future occurrences." *Id.* Once the recruiter was terminated, Mr. Schmidt emailed Mr. Jobs, apologizing and informing Mr. Jobs that the recruiter had been terminated. Mr. Jobs forwarded Mr. Schmidt's email to an Apple human resources official and stated merely, ":)." ECF No. 746-9.

A year prior to this termination, Google similarly took seriously Mr. Jobs' concerns. Specifically, in 2006, Mr. Jobs emailed Mr. Schmidt and said, "I am told that Googles [sic] new cell phone software group is relentlessly recruiting in our iPod group. If this is indeed true, can you put a stop to it?" ECF No. 291-24 at 3. After Mr. Schmidt forwarded this to Human Resources professionals at Google, Arnnon Geshuri (Google Recruiting Director) prepared a detailed report stating that an extensive investigation did not find a breach of the anti-solicitation agreement.

Similarly, in 2006, Google scrapped plans to open a Google engineering center in Paris after a Google executive emailed Mr. Jobs to ask whether Google could hire three *former* Apple engineers to work at the prospective facility, and Mr. Jobs responded "[w]e'd strongly prefer that you not hire these guys." ECF No. 814-2. The whole interaction began with Google's request to Steve Jobs for permission to hire Jean-Marie Hullot, an Apple engineer. The record is not clear whether Mr. Hullot was a current or former Apple employee. A Google executive contacted Steve Jobs to ask whether Google could make an offer to Mr. Hullot, and Mr. Jobs did not timely respond to the Google executive's request. At this point, the Google executive turned to Intuit's Board Chairman Bill Campbell as a potential ambassador from Google to Mr. Jobs. Specifically, the Google executive noted that Mr. Campbell "is on the board at Apple and Google, so Steve will probably return his call." ECF No. 428-6. The same day that Mr. Campbell reached out to Mr. Jobs, Mr. Jobs responded to the Google executive, seeking more information on what exactly the Apple engineer would be working. ECF No. 428-9. Once Mr. Jobs was satisfied, he stated that the hire "would be fine with me." *Id.* However, two weeks later, when Mr. Hullot and a Google executive sought Mr. Jobs' permission to hire four of Mr. Hullot's former Apple colleagues (three were former Apple employees and one had given notice of impending departure from Apple), Mr. Jobs promptly responded, indicating that the hires would not be acceptable. ECF No. 428-9.

Google promptly scrapped the plan, and the Google executive responded deferentially to Mr. Jobs, stating, "Steve, Based on your strong preference that we not hire the ex-Apple engineers, Jean-Marie and I decided not to open a Google Paris engineering center." *Id.* The Google executive also forwarded the email thread to Mr. Brin, Larry Page (Google Co-Founder), and Mr. Campbell. *Id.*

Third, Mr. Jobs attempted (unsuccessfully) to expand the anti-solicitation agreements to Palm, even threatening litigation. Specifically, Mr. Jobs called Edward Colligan (former President and CEO of Palm) to ask Mr. Colligan to enter into an anti-solicitation agreement and threatened patent litigation against Palm if Palm refused to do so. ECF No. 293 ¶¶ 6-8. Mr. Colligan responded via email, and told Mr. Jobs that Mr. Jobs' "proposal that we agree that neither company will hire the other's employees, regardless of the individual's desires, is not only wrong, it is likely illegal." *Id.* at 4-5. Mr. Colligan went on to say that, "We can't dictate where someone will work, nor should we try. I can't deny people who elect to pursue their livelihood at Palm the right to do so simply because they now work for Apple, and I wouldn't want you to do that to current Palm employees." *Id.* at 5. Finally, Mr. Colligan wrote that "[t]hreatening Palm with a patent lawsuit in response to a decision by one employee to leave Apple is just out of line. A lawsuit would not serve either of our interests, and will not stop employees from migrating between our companies . . . . We will both just end up paying a lot of lawyers a lot of money." *Id.* at 5-6. Mr. Jobs wrote the following back to Mr. Colligan: "This is not satisfactory to Apple." *Id.* at 8. Mr. Jobs went on to write that "I'm sure you realize the asymmetry in the financial resources of our respective companies when you say: 'we will both just end up paying a lot of lawyers a lot of money.'" *Id.* Mr. Jobs concluded: "My advice is to take a look at our patent portfolio before you make a final decision here." *Id.*

Fourth, Apple's documents provide strong support for Plaintiffs' theory of impact, namely that rigid wage structures and internal equity concerns would have led Defendants to engage in structural changes to compensation structures to mitigate the competitive threat that solicitation would have posed. Apple's compensation data shows that, for each year in the Class period, Apple had a "job structure system," which included categorizing and compensating its workforce according to a discrete set of company-wide job levels assigned to all salaried employees and four associated sets of base salary ranges applicable to "Top," "Major," "National," and "Small" geographic markets. ECF No. 745-7 at 14-15, 52-53; ECF No.517-16 ¶¶ 6, 10 & Ex. B. Every salary range had a "min," "mid," and "max" figure. *See id*. Apple also created a Human Resources and recruiting tool called "Merlin," which was an internal system for tracking employee records and performance, and required managers to grade employees at one of four pre-set levels. *See* ECF No. 749-6 at 142-43, 145-46; ECF No. 749-11 at 52-53; ECF No. 749-12 at 33. As explained by Tony Fadell (former Apple Senior Vice President, iPod Division, and advisor to Steve Jobs), Merlin "would say, this is the employee, this is the level, here are the salary ranges, and through that tool we were then—we understood what the boundaries were." ECF No. 749-11 at 53. Going outside these prescribed "guidelines" also required extra approval. ECF No. 749-7 at 217; ECF No. 749-11 at 53 ("And if we were to go outside of that, then we would have to pull in a bunch of people to then approve anything outside of that range.").

Concerns about internal equity also permeated Apple's compensation program. Steven Burmeister (Apple Senior Director of Compensation) testified that internal equity—which Mr. Burmeister defined as the notion of whether an employee's compensation is "fair based on the individual's contribution relative to the other employees in your group, or across your organization"—inheres in some, "if not all," of the guidelines that managers consider in determining starting salaries. ECF No. 745-7 at 61-64; ECF No. 753-12. In fact, as explained by Patrick Burke (former Apple Technical Recruiter and Staffing Manager), when hiring a new employee at Apple, "compar[ing] the candidate" to the other people on the team they would join "was the biggest determining factor on what salary we gave." ECF No. 745-6 at 279.

2. Evidence Related to Google

The evidence against Google is equally compelling. Email evidence reveals that Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) terminated at least two recruiters for violations of anti-solicitation agreements, and threatened to terminate more. As discussed above, there is direct evidence that Mr. Schmidt terminated a

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recruiter at Steve Jobs' behest after the recruiter attempted to solicit an Apple employee. Moreover, in an email to Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), Mr. Schmidt indicated that he directed a for-cause termination of another Google recruiter, who had attempted to recruit an executive of eBay, which was on Google's do-not-cold-call list. ECF No. 814-14. Finally, as discussed in more detail below, Mr. Schmidt informed Paul Otellini (CEO of Intel and Member of the Google Board of Directors) that Mr. Schmidt would terminate any recruiter who recruited Intel employees.

Furthermore, Google maintained a formal "Do Not Call" list, which grouped together Apple, Intel, and Intuit and was approved by top executives. ECF No. 291-28. The list also included other companies, such as Genentech, Paypal, and eBay. *Id.* A draft of the "Do Not Call" list was presented to Google's Executive Management Group, a committee consisting of Google's senior executives, including Mr. Schmidt, Larry Page (Google Co-Founder), Sergey Brin (Google Co-Founder), and Shona Brown (former Google Senior Vice President of Business Operations). ECF No. 291-26. Mr. Schmidt approved the list. *See id.*; *see also* ECF No. 291-27 (email from Mr. Schmidt stating: "This looks very good."). Moreover, there is evidence that Google executives knew that the anti-solicitation agreements could lead to legal troubles, but nevertheless proceeded with the agreements. When Ms. Brown asked Mr. Schmidt whether he had any concerns with sharing information regarding the "Do Not Call" list with Google's competitors, Mr. Schmidt responded that he preferred that it be shared "verbally[,] since I don't want to create a paper trail over which we can be sued later?" ECF No. 291-40. Ms. Brown responded: "makes sense to do orally. i agree." *Id.*

Google's response to competition from Facebook also demonstrates the impact of the alleged conspiracy. Google had long been concerned about Facebook hiring's effect on retention. For example, in an email to top Google executives, Mr. Brin in 2007 stated that "the facebook phenomenon creates a real retention problem." ECF No. 814-4. A month later, Mr. Brin announced a policy of making counteroffers within one hour to any Google employee who received an offer from Facebook. ECF No. 963-2.

In March 2008, Arnnon Geshuri (Google Recruiting Director) discovered that non-party Facebook had been cold calling into Google's Site Reliability Engineering ("SRE") team. Mr. Geshuri's first response was to suggest contacting Sheryl Sandberg (Chief Operating Officer for non-party Facebook) in an effort to "ask her to put a stop to the targeted sourcing effort directed at our SRE team" and "to consider establishing a mutual 'Do Not Call' agreement that specifies that we will not cold-call into each other." ECF No. 963-3. Mr. Geshuri also suggested "look[ing] internally and review[ing] the attrition rate for the SRE group," stating, "[w]e may want to consider additional individual retention incentives or *team incentives* to keep attrition as low as possible in SRE." *Id*. (emphasis added). Finally, an alternative suggestion was to "[s]tart an aggressive campaign to call into their company and go after their folks—no holds barred. We would be unrelenting and a force of nature." *Id*. In response, Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), in his capacity as an advisor to Google, suggested "Who should contact Sheryl [Sandberg] (or Mark [Zuckerberg]) to get a cease fire? We have to get a truce." *Id.* Facebook refused.

In 2010, Google altered its salary structure with a "Big Bang" in response to Facebook's hiring, which provides additional support for Plaintiffs' theory of antitrust impact. Specifically, after a period in which Google lost a significant number of employees to Facebook, Google began to study Facebook's solicitation of Google employees. ECF No. 190 ¶ 109. One month after beginning this study, Google announced its "Big Bang," which involved an increase to the base salary of *all* of its salaried employees by 10% and provided an immediate cash bonus of $1,000 to all employees. ECF No. 296-18. Laszlo Bock (Google Senior Vice President of People Operations) explained that the rationale for the Big Bang included: (1) being "responsive to rising attrition;" (2) supporting higher retention because "higher salaries generate higher fixed costs;" and (3) being "very strategic because start-ups don't have the cash flow to match, and big companies are (a) too worried about internal equity and scalability to do this and (b) don't have the margins to do this." ECF No. 296-20.

Other Google documents provide further evidence of Plaintiffs' theory of antitrust impact. For example, Google's Chief Culture Officer stated that "[c]old calling into companies to recruit is to be expected unless they're on our 'don't call' list." ECF No. 291-41. Moreover, Google found that although referrals were the largest source of hires, "agencies and passively sourced candidates offer[ed] the highest yield." ECF No. 780-8. The spread of information between employees had there been active solicitations—which is central to Plaintiffs' theory of impact—is also demonstrated in Google's evidence. For example, one Google employee states that "[i]t's impossible to keep something like this a secret. The people getting counter offers talk, not just to Googlers and ex-Googlers, but also to the competitors where they received their offers (in the hopes of improving them), and those competitors talk too, using it as a tool to recruit more Googlers." ECF No. 296-23.

The wage structure and internal equity concerns at Google also support Plaintiffs' theory of impact. Google had many job families, many grades within job families, and many job titles within grades. *See*, *e.g.*, ECF No. 298-7, ECF No. 298-8; *see also* Cisneros Decl., Ex. S (Brown Depo.) at 74-76 (discussing salary ranges utilized by Google); ECF No. 780-4 at 25-26 (testifying that Google's 2007 salary ranges had generally the same structure as the 2004 salary ranges). Throughout the Class period, Google utilized salary ranges and pay bands with minima and maxima and either means or medians. ECF No. 958-1 ¶ 66; *see* ECF No. 427-3 at 15-17. As explained by Shona Brown (former Google Senior Vice President, Business Operations), "if you discussed a specific role [at Google], you could understand that role was at a specific level on a certain job ladder." ECF No. 427-3 at 27-28; ECF No. 745-11. Frank Wagner (Google Director of Compensation) testified that he could locate the target salary range for jobs at Google through an internal company website. *See* ECF No. 780-4 at 31-32 ("Q: And if you wanted to identify what the target salary would be for a certain job within a certain grade, could you go online or go to some place . . . and pull up what that was for that job family and that grade? . . . A: Yes."). Moreover, Google considered internal equity to be an important goal. Google utilized a salary algorithm in part for the purpose of "[e]nsur[ing] internal equity by managing salaries within a reasonable range." ECF No. 814-19. Furthermore, because Google "strive[d] to achieve fairness in overall salary distribution," "high performers with low salaries [would] get larger percentage increases than high performers with high salaries." ECF No. 817-1 at 15.

In addition, Google analyzed and compared its equity compensation to Apple, Intel, Adobe, and Intuit, among other companies, each of which it designated as a "peer company" based on meeting criteria such as being a "high-tech company," a "high-growth company," and a "key labor market competitor." ECF No. 773-1. In 2007, based in part on an analysis of Google as compared to its peer companies, Mr. Bock and Dave Rolefson (Google Equity Compensation Manager) wrote that "[o]ur biggest labor market competitors are significantly exceeding their own guidelines to beat Google for talent." *Id.*

Finally, Google's own documents undermine Defendants' principal theory of lack of antitrust impact, that compensation decisions would be one off and not classwide. Alan Eustace (Google Senior Vice President) commented on concerns regarding competition for workers and Google's approach to counteroffers by noting that, "it sometimes makes sense to make changes in compensation, even if it introduces discontinuities in your current comp, to save your best people, and send a message to the hiring company that we'll fight for our best people." ECF No. 296-23. Because recruiting "a few really good people" could inspire "many, many others [to] follow," Mr. Eustace concluded, "[y]ou can't afford to be a rich target for other companies." *Id.* According to him, the "long-term . . . right approach is not to deal with these situations as one-off's but to have a *systematic approach* to compensation that makes it very difficult for anyone to get a better offer." *Id.* (emphasis added).

Google's impact on the labor market before the anti-solicitation agreements was best summarized by Meg Whitman (former CEO of eBay) who called Mr. Schmidt "to talk about [Google's] hiring practices." ECF No. 814-15. As Eric Schmidt told Google's senior executives, Ms. Whitman said "Google is the talk of the valley because [you] are driving up salaries across the board." *Id.* A year after this conversation, Google added eBay to its do-not-cold-call list. ECF No. 291-28.

3. Evidence Related to Intel

There is also compelling evidence against Intel. Google reacted to requests regarding enforcement of the anti-solicitation agreement made by Intel executives similarly to Google's reaction to Steve Jobs' request to enforce the agreements discussed above. For example, after Paul Otellini (CEO of Intel and Member of the Google Board of Directors) received an internal complaint regarding Google's successful recruiting efforts of Intel's technical employees on September 26, 2007, ECF No. 188-8 ("Paul, I am losing so many people to Google . . . . We are countering but thought you should know."), Mr. Otellini forwarded the email to Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) and stated "Eric, can you pls help here???" *Id.* Mr. Schmidt obliged and forwarded the email to his recruiting team, who prepared a report for Mr. Schmidt on Google's activities. ECF No. 291-34. The next day, Mr. Schmidt replied to Mr. Otellini, "If we find that a recruiter called into Intel, we will terminate the recruiter," the same remedy afforded to violations of the Apple-Google agreement. ECF No. 531 at 37. In another email to Mr. Schmidt, Mr. Otellini stated, "Sorry to bother you again on this topic, but my guys are very troubled by Google continuing to recruit our key players." *See* ECF No. 428-8.

Moreover, Mr. Otellini was aware that the anti-solicitation agreement could be legally troublesome. Specifically, Mr. Otellini stated in an email to another Intel executive regarding the Google-Intel agreement: "Let me clarify. We have nothing signed. We have a handshake 'no recruit' between eric and myself. I would not like this broadly known." *Id.*

Furthermore, there is evidence that Mr. Otellini knew of the anti-solicitation agreements to which Intel was not a party. Specifically, both Sergey Brin (Google Co-Founder) and Mr. Schmidt of Google testified that they would have told Mr. Otellini that Google had an anti-solicitation agreement with Apple. ECF No. 639-1 at 74:15 ("I'm sure that we would have mentioned it[.]"); ECF No. 819-12 at 60 ("I'm sure I spoke with Paul about this at some point."). Intel's own expert testified that Mr. Otellini was likely aware of Google's other bilateral agreements by virtue of Mr. Otellini's membership on Google's board. ECF No. 771 at 4. The fact that Intel was added to

Google's do-not-cold-call list on the same day that Apple was added further suggests Intel's participation in an overarching conspiracy. ECF No. 291-28.

Additionally, notwithstanding the fact that Intel and Google were competitors for talent, Mr. Otellini "lifted from Google" a Google document discussing the bonus plans of peer companies including Apple and Intel. Cisneros Decl., Ex. 463. True competitors for talent would not likely share such sensitive bonus information absent agreements not to compete.

Moreover, key documents related to antitrust impact also implicate Intel. Specifically, Intel recognized the importance of cold calling and stated in its "Complete Guide to Sourcing" that "[Cold] [c]alling candidates is one of the most efficient and effective ways to recruit." ECF No. 296-22. Intel also benchmarked compensation against other "tech companies generally considered comparable to Intel," which Intel defined as a "[b]lend of semiconductor, software, networking, communications, and diversified computer companies." ECF No. 754-2. According to Intel, in 2007, these comparable companies included Apple and Google. *Id.* These documents suggest, as Plaintiffs contend, that the anti-solicitation agreements led to structural, rather than individual depression, of Class members' wages.

Furthermore, Intel had a "compensation structure," with job grades and job classifications. *See* ECF No. 745-13 at 73 ("[W]e break jobs into one of three categories—job families, we call them—R&D, tech, and nontech, there's a lot more . . . ."). The company assigned employees to a grade level based on their skills and experience. ECF No. 745-11 at 23; *see also* ECF No. 749-17 at 45 (explaining that everyone at Intel is assigned a "classification" similar to a job grade). Intel standardized its salary ranges throughout the company; each range applied to multiple jobs, and most jobs spanned multiple salary grades. ECF No. 745-16 at 59. Intel further broke down its salary ranges into quartiles, and compensation at Intel followed "a bell-curve distribution, where most of the employees are in the middle quartiles, and a much smaller percentage are in the bottom and top quartiles." *Id.* at 62-63.

Intel also used a software tool to provide guidance to managers about an employee's pay range which would also take into account market reference ranges and merit. ECF No. 758-9. As explained by Randall Goodwin (Intel Technology Development Manager), "[i]f the tool recommended something and we thought we wanted to make a proposed change that was outside its guidelines, we would write some justification." ECF No. 749-15 at 52. Similarly, Intel regularly ran reports showing the salary range distribution of its employees. ECF No. 749-16 at 64.

The evidence also supports the rigidity of Intel's wage structure. For example, in a 2004 Human Resources presentation, Intel states that, although "[c]ompensation differentiation is desired by Intel's Meritocracy philosophy," "short and long term high performer differentiation is questionable." ECF No. 758-10 at 13. Indeed, Intel notes that "[l]ack of differentiation has existed historically based on an analysis of '99 data." *Id*. at 19. As key "[v]ulnerability [c]hallenges," Intel identifies: (1) "[m]anagers *(in)ability* to distinguish at [f]ocal"—"actual merit increases are significantly reduced from system generated increases," "[l]ong term threat to retention of key players"; (2) "*[l]ittle to no actual pay differentiation for HPs* [high performers]"; and (3) "[n]o explicit strategy to differentiate." *Id*. at 24 (emphasis added).

In addition, Intel used internal equity "to determine wage rates for new hires and current employees that correspond to each job's relative value to Intel." ECF No. 749-16 at 210-11; ECF No. 961-5. To assist in that process, Intel used a tool that generates an "Internal Equity Report" when making offers to new employees. ECF No. 749-16 at 212-13. In the words of Ogden Reid (Intel Director of Compensation and Benefits), "[m]uch of our culture screams egalitarianism . . . . While we play lip service to meritocracy, we really believe more in treating everyone the same within broad bands." ECF No. 769-8.

An Intel human resources document from 2002—prior to the anti-solicitation agreements—recognized "continuing inequities in the alignment of base salaries/EB targets between hired and acquired Intel employees" and "parallel issues relating to accurate job grading within these two populations." ECF No. 750-15. In response, Intel planned to: (1) "Review exempt job grade assignments for job families with 'critical skills.' Make adjustments, as appropriate"; and (2) "Validate perception of inequities . . . . Scope impact to employees. Recommend adjustments, as appropriate." *Id.* An Intel human resources document confirms that, in or around 2004, "[n]ew hire salary premiums *drove* salary range adjustment." ECF No. 298-5 at 7 (emphasis added).

Intel would "match an Intel job code in grade to a market survey job code in grade," ECF No. 749-16 at 89, and use that as part of the process for determining its "own focal process or pay delivery," *id.* at 23. If job codes fell below the midpoint, plus or minus a certain percent, the company made "special market adjustment[s]." *Id.* at 90.

4. Evidence Related to Adobe

Evidence from Adobe also suggests that Adobe was aware of the impact of its anti-solicitation agreements. Adobe personnel recognized that "Apple would be a great target to look into" for the purpose of recruiting, but knew that they could not do so because, "[u]nfortunately, Bruce [Chizen (former Adobe CEO)] and Apple CEO Steve Jobs have a gentleman's agreement not to poach each other's talent." ECF No. 291-13. Adobe executives were also part and parcel of the group of high-ranking executives that entered into, enforced, and attempted to expand the anti-solicitation agreements. Specifically, Mr. Chizen, in response to discovering that Apple was recruiting employees of Macromedia (a separate entity that Adobe would later acquire), helped ensure, through an email to Mr. Jobs, that Apple would honor Apple's pre-existing anti-solicitation agreements with both Adobe and Macromedia after Adobe's acquisition of Macromedia. ECF No. 608-3 at 50.

Adobe viewed Google and Apple to be among its top competitors for talent and expressed concern about whether Adobe was "winning the talent war." ECF No. 296-3. Adobe further considered itself in a "six-horse race from a benefits standpoint," which included Google, Apple, and Intuit as among the other "horses." *See* ECF No. 296-4. In 2008, Adobe benchmarked its compensation against nine companies including Google, Apple, and Intel. ECF No. 296-4; *cf.* ECF No. 652-6 (showing that, in 2010, Adobe considered Intuit to be a "direct peer," and considered Apple, Google, and Intel to be "reference peers," though Adobe did not actually benchmark compensation against these latter companies).

Nevertheless, despite viewing other Defendants as competitors, evidence from Adobe suggests that Adobe had knowledge of the bilateral agreements to which Adobe was not a party. Specifically, Adobe shared confidential compensation information with other Defendants, despite the fact that Adobe viewed at least some of the other Defendants as competitors and did not have a bilateral agreement with them. For example, HR personnel at Intuit and at Adobe exchanged information labeled "confidential" regarding how much compensation each firm would give and to which employees that year. ECF No. 652-8. Adobe and Intuit shared confidential compensation information even though the two companies had no bilateral anti-solicitation agreement, and Adobe viewed Intuit as a direct competitor for talent. Such direct competitors for talent would not likely share such sensitive compensation information in the absence of an overarching conspiracy.

Meanwhile, Google circulated an email that expressly discussed how its "budget is comparable to other tech companies" and compared the precise percentage of Google's merit budget increases to that of Adobe, Apple, and Intel. ECF No. 807-13. Google had Adobe's precise percentage of merit budget increases even though Google and Adobe had no bilateral anti-solicitation agreement. Such sharing of sensitive compensation information among competitors is further evidence of an overarching conspiracy.

Adobe recognized that in the absence of the anti-solicitation agreements, pay increases would be necessary, echoing Plaintiffs' theory of impact. For example, out of concern that one employee—a "star performer" due to his technical skills, intelligence, and collaborative abilities—might leave Adobe because "he could easily get a great job elsewhere if he desired," Adobe considered how best to retain him. ECF No. 799-22. In so doing, Adobe expressed concern about the fact that this employee had already interviewed with four other companies and communicated with friends who worked there. *Id.* Thus, Adobe noted that the employee "was aware of his value in the market" as well as the fact that the employee's friends from college were "making approximately $15k more per year than he [wa]s." *Id.* In response, Adobe decided to give the employee an immediate pay raise. *Id.*

Plaintiffs' theory of impact is also supported by evidence that every job position at Adobe was assigned a job title, and every job title had a corresponding salary range within Adobe's salary structure, which included a salary minimum, middle, and maximum. *See* ECF No. 804-17 at 4, 8, 72, 85-86. Adobe expected that the distribution of its existing employees' salaries would fit "a bell curve." ECF No. 749-5 at 57. To assist managers in staying within the prescribed ranges for setting and adjusting salaries, Adobe had an online salary planning tool as well as salary matrices, which provided managers with guidelines based on market salary data. *See* ECF No. 804-17 at 29-30 ("[E]ssentially the salary planning tool is populated with employee information for a particular manager, so the employees on their team [sic]. You have the ability to kind of look at their current compensation. It shows them what the range is for the current role that they're in . . . . The tool also has the ability to provide kind of the guidelines that we recommend in terms of how managers might want to think about spending their allocated budget."). Adobe's practice, if employees were below the minimum recommended salary range, was to "adjust them to the minimum as part of the annual review" and "red flag them." *Id*. at 12. Deviations from the salary ranges would also result in conversations with managers, wherein Adobe's officers explained, "we have a minimum for a reason because we believe you need to be in this range to be competitive." *Id.*

Internal equity was important at Adobe, as it was at other Defendants. As explained by Debbie Streeter (Adobe Vice President, Total Rewards), Adobe "always look[ed] at internal equity as a data point, because if you are going to go hire somebody externally that's making . . . more than somebody who's an existing employee that's a high performer, you need to know that before you bring them in." ECF No.749-5 at 175. Similarly, when considering whether to extend a counteroffer, Adobe advised "internal equity should ALWAYS be considered." ECF No. 746-7 at 5.

Moreover, Donna Morris (Adobe Senior Vice President, Global Human Resources Division) expressed concern "about internal equity due to compression (the market driving pay for new hires above the current employees)." ECF No. 298-9 ("Reality is new hires are requiring base pay at or above the midpoint due to an increasingly aggressive market."). Adobe personnel stated that, because of the fixed budget, they may not be able to respond to the problem immediately "but could look at [compression] for FY2006 if market remains aggressive."[12] *Id.*

D. Weaknesses in Plaintiffs' Case

Plaintiffs contend that though this evidence is compelling, there are also weaknesses in Plaintiffs' case that make trial risky. Plaintiffs contend that these risks are substantial. Specifically, Plaintiffs point to the following challenges that they would have faced in presenting their case to a jury: (1) convincing a jury to find a single overarching conspiracy among the seven Defendants in light of the fact that several pairs of Defendants did not have anti-solicitation agreements with each other; (2) proving damages in light of the fact that Defendants intended to present six expert economists that would attack the methodology of Plaintiffs' experts; and (3) overcoming the fact that Class members' compensation has increased in the last ten years despite a sluggish economy and overcoming general anti-tech worker sentiment in light of the perceived and actual wealth of Class members. Plaintiffs also point to outstanding legal issues, such as the pending motions in limine and the pending motion to determine whether the per se or rule of reason analysis should apply, which could have aided Defendants' ability to present a case that the bilateral agreements had a pro-competitive purpose. *See* ECF No. 938 at 10-14.

The Court recognizes that Plaintiffs face substantial risks if they proceed to trial. Nonetheless, the Court cannot, in light of the evidence above, conclude that the instant settlement amount is within the range of reasonableness, particularly compared to the settlements with the Settled Defendants and the subsequent development of the litigation. The Court further notes that there is evidence in the record that mitigate at least some of the weaknesses in Plaintiffs' case.

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[12] Adobe also benchmarked compensation off external sources, which supports Plaintiffs' theory of Class-wide impact and undermines Defendants' theory that the anti-solicitation agreements had only one off, non-structural effects. For example, Adobe pegged its compensation structure as a "percentile" of average market compensation according to survey data from companies such as Radford. ECF No. 804-17 at 4. Mr. Chizen explained that the particular market targets that Adobe used as benchmarks for setting salary ranges "tended to be software, high-tech, those that were geographically similar to wherever the position existed." ECF No. 962-7 at 22. This demonstrated that the salary structures of the various Defendants were linked, such that the effect of one Defendant's salary structure would ripple across to the other Defendants through external sources like Radford.

As to proving an overarching conspiracy, several pieces of evidence undermine Defendants' contentions that the bilateral agreements were unrelated to each other. Importantly, two individuals, Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) and Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google), personally entered into or facilitated each of the bilateral agreements in this case. Specifically, Mr. Jobs and George Lucas (former Chairman and CEO of Lucasfilm), created the initial anti-solicitation agreement between Lucasfilm and Pixar when Mr. Jobs was an executive at Pixar. Thereafter, Apple, under the leadership of Mr. Jobs, entered into an agreement with Pixar, which, as discussed below, Pixar executives compared to the Lucasfilm-Pixar agreement. It was Mr. Jobs again, who, as discussed above, reached out to Sergey Brin (Google Co-Founder) and Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO) to create the Apple-Google agreement. This agreement was reached with the assistance of Mr. Campbell, who was Intuit's Board Chairman, a friend of Mr. Jobs, and an advisor to Google. The Apple-Google agreement was discussed at Google Board meetings, at which both Mr. Campbell and Paul Otellini (Chief Executive Officer of Intel and Member of the Google Board of Directors) were present. ECF No. 819-10 at 47. After discussions between Mr. Brin and Mr. Otellini and between Mr. Schmidt and Mr. Otellini, Intel was added to Google's do-not-cold-call list. Mr. Campbell then used his influence at Google to successfully lobby Google to add Intuit, of which Mr. Campbell was Chairman of the Board of Directors, to Google's do-not-cold-call list. *See* ECF No. 780-6 at 8-9. Moreover, it was a mere two months after Mr. Jobs entered into the Apple-Google agreement that Apple pressured Bruce Chizen (former CEO of Adobe) to enter into an Apple-Adobe agreement. ECF No. 291-17. As this discussion demonstrates, Mr. Jobs and Mr. Campbell were the individuals most closely linked to the formation of each step of the alleged conspiracy, as they were present in the process of forming each of the links.

In light of the overlapping nature of this small group of executives who negotiated and enforced the anti-solicitation agreements, it is not surprising that these executives knew of the other bilateral agreements to which their own firms were not a party. For example, both Mr. Brin and

Mr. Schmidt of Google testified that they would have told Mr. Otellini of Intel that Google had an anti-solicitation agreement with Apple. ECF No. 639-1 at 74:15 ("I'm sure we would have mentioned it[.]"); ECF No. 819-12 at 60 ("I'm sure I spoke with Paul about this at some point."). Intel's own expert testified that Mr. Otellini was likely aware of Google's other bilateral agreements by virtue of Mr. Otellini's membership on Google's board. ECF No. 771 at 4. Moreover, Google recruiters knew of the Adobe-Apple agreement. *Id.* (Google recruiter's notation that Apple has "a serious 'hands-off' policy with Adobe"). In addition, Mr. Schmidt of Google testified that it would be "fair to extrapolate" based on Mr. Schmidt's knowledge of Mr. Jobs, that Mr. Jobs "would have extended [anti-solicitation agreements] to others." ECF No. 638-8 at 170. Furthermore, it was this same mix of top executives that successfully and unsuccessfully attempted to expand the agreement to other companies in Silicon Valley, such as eBay, Facebook, Macromedia, and Palm, as discussed above, suggesting that the agreements were neither isolated nor one off agreements.

In addition, the six bilateral agreements contained nearly identical terms, precluding each pair of Defendants from affirmatively soliciting any of each other's employees. ECF No. 531 at 30. Moreover, as discussed above, Defendants recognized the similarity of the agreements. For example, Google lumped together Apple, Intel, and Intuit on Google's "do-not-cold-call" list. Furthermore, Google's "do-not-cold-call" list stated that the Apple-Google agreement and the Intel-Google agreement commenced on the same date. Finally, in an email, Lori McAdams (Pixar Vice President of Human Resources and Administration), explicitly compared the anti-solicitation agreements, stating that "effective now, we'll follow a gentleman's agreement with Apple that is similar to our Lucasfilm agreement." ECF No. 531 at 26.

As to the contention that Plaintiffs would have to rebut Defendants' contentions that the anti-solicitation agreements aided collaborations and were therefore pro-competitive, there is no documentary evidence that links the anti-solicitation agreements to any collaboration. None of the documents that memorialize collaboration agreements mentions the broad anti-solicitation agreements, and none of the documents that memorialize broad anti-solicitation agreements mentions collaborations. Furthermore, even Defendants' experts conceded that those closest to the collaborations did not know of the anti-solicitation agreements. ECF No. 852-1 at 8. In addition, Defendants' top executives themselves acknowledge the lack of any collaborative purpose. For example, Mr. Chizen of Adobe admitted that the Adobe-Apple anti-solicitation agreement was "not limited to any particular projects on which Apple and Adobe were collaborating." ECF No. 962-7 at 42. Moreover, the U.S. Department of Justice ("DOJ") also determined that the anti-solicitation agreements "were not ancillary to any legitimate collaboration," "were broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted the normal price-setting mechanisms that apply in the labor setting." ECF No. 93-1 ¶ 16; ECF No. 93-4 ¶ 7. The DOJ concluded that Defendants entered into agreements that were restraints of trade that were per se unlawful under the antitrust laws. ECF No. 93-1 ¶ 35; ECF No. 93-4 ¶ 3. Thus, despite the fact that Defendants have claimed since the beginning of this litigation that there were pro-competitive purposes related to collaborations for the anti-solicitation agreements and despite the fact that the purported collaborations were central to Defendants' motions for summary judgment, Defendants have failed to produce persuasive evidence that these anti-solicitation agreements related to collaborations or were pro-competitive.

IV. CONCLUSION

This Court has lived with this case for nearly three years, and during that time, the Court has reviewed a significant number of documents in adjudicating not only the substantive motions, but also the voluminous sealing requests. Having done so, the Court cannot conclude that the instant settlement falls within the range of reasonableness. As this Court stated in its summary judgment order, there is ample evidence of an overarching conspiracy between the seven Defendants, including "[t]he similarities in the various agreements, the small number of intertwining high-level executives who entered into and enforced the agreements, Defendants' knowledge about the other agreements, the sharing and benchmarking of confidential compensation information among Defendants and even between firms that did not have bilateral anti-solicitation agreements, along with Defendants' expansion and attempted expansion of the anti-solicitation agreements." ECF No. 771 at 7-8. Moreover, as discussed above and in this Court's class certification order, the evidence of Defendants' rigid wage structures and internal equity concerns, along with statements from Defendants' own executives, are likely to prove compelling in establishing the impact of the anti-solicitation agreements: a Class-wide depression of wages.

In light of this evidence, the Court is troubled by the fact that the instant settlement with Remaining Defendants is proportionally lower than the settlements with the Settled Defendants. This concern is magnified by the fact that the case evolved in Plaintiffs' favor since those settlements. At the time those settlements were reached, Defendants still could have defeated class certification before this Court, Defendants still could have successfully sought appellate review and reversal of any class certification, Defendants still could have prevailed on summary judgment, or Defendants still could have succeeded in their attempt to exclude Plaintiffs' principal expert. In contrast, the instant settlement was reached a mere month before trial was set to commence and after these opportunities for Defendants had evaporated. While the unpredictable nature of trial would have undoubtedly posed challenges for Plaintiffs, the exposure for Defendants was even more substantial, both in terms of the potential of more than $9 billion in damages and in terms of other collateral consequences, including the spotlight that would have been placed on the evidence discussed in this Order and other evidence and testimony that would have been brought to light. The procedural history and proximity to trial should have increased, not decreased, Plaintiffs' leverage from the time the settlements with the Settled Defendants were reached a year ago.

The Court acknowledges that Class counsel have been zealous advocates for the Class and have funded this litigation themselves against extraordinarily well-resourced adversaries. Moreover, there very well may be weaknesses and challenges in Plaintiffs' case that counsel cannot reveal to this Court. Nonetheless, the Court concludes that the Remaining Defendants should, at a minimum, pay their fair share as compared to the Settled Defendants, who resolved their case with Plaintiffs at a stage of the litigation where Defendants had much more leverage over Plaintiffs.

For the foregoing reasons, the Court DENIES Plaintiffs' Motion for Preliminary Approval of the settlements with Remaining Defendants. The Court further sets a Case Management Conference for September 10, 2014 at 2 p.m.

IT IS SO ORDERED.

Dated: August 8, 2014

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: **ALL ACTIONS**	Case No.: 11-CV-02509-LHK **ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANTS ADOBE SYSTEMS INCORPORATED, APPLE INC., GOOGLE INC., AND INTEL CORPORATION, APPROVING FORM AND MANNER OF NOTICE, AND SCHEDULING FINAL APPROVAL HEARING**

This matter is before the Court on Plaintiffs' motion for preliminary approval of the proposed class action settlement (the "Settlement") between individual and representative Plaintiffs Mark Fichtner, Siddharth Hariharan, Daniel Stover, and Michael Devine and the Class of individuals they represent ("Plaintiffs") and Defendants Adobe Systems Incorporated, Apple Inc., Google Inc., and Intel Corporation (collectively, the "Settling Defendants"), as set forth in the Settlement Agreement. Having considered the Motion, the Settling Parties' Settlement

Agreement, the proposed form of notice to the Class, the pleadings and other papers filed in this Action, and the statements of counsel and the parties, and for good cause shown, **IT IS HEREBY ORDERED** as follows:

1. Unless otherwise defined herein, all terms that are capitalized herein shall have meanings ascribed to those terms in the Settlement Agreement.

2. The Court has jurisdiction over this Action (and all actions and proceedings consolidated in the Action), Plaintiffs, Class Members, Adobe, Apple, Google, and Intel, the Released Parties, and any party to any agreement that is part of or related to the Settlement Agreement.

3. To grant preliminary approval of the proposed Settlement, the Court need only find that it falls within "the range of reasonableness." Alba Conte et al., *Newberg on Class Actions* § 11.25, at 11-91 (4th ed. 2002). *The Manual for Complex Litigation (Fourth)* (2004) ("*Manual*") characterizes the preliminary approval stage as an "initial evaluation" of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentation from the settling parties. *Manual* § 21.632. A proposed settlement may be finally approved by the trial court if it is determined to be "fundamentally fair, adequate and reasonable." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). While consideration of the requirements for final approval is unnecessary at this stage, all of the relevant factors weigh in favor of approving the Settlement proposed here.

4. First, the Settlement appears to be the result of arm's-length negotiations among experienced counsel. On May 22, 2014, Plaintiffs Mark Fichtner, Siddharth Hariharan, and Daniel Stover moved the Court to preliminarily approve a settlement agreement with Defendants providing for a settlement fund of $324,500,000. The Court denied preliminary approval on August 8, 2014 (Dkt. 974). Thereafter, the parties resumed arm's-length negotiations through Hon. Layn Phillips (Ret.), an experienced mediator, while continuing to litigate outstanding pre-

trial matters. Plaintiffs filed a reply in support of their motion for application of the *per se* standard (Dkt. 988), and Defendants requested leave to file a supplemental opposition (Dkt. 990 & 990-1), which was granted (Dkt. 1023). Plaintiffs also filed a motion to unseal all papers associated with their motion to compel (Dkt. 991), which Defendants opposed (Dkt. 994; *see also* Dkt. 1029).

5. Meanwhile, on September 4, 2014, Defendants filed a Petition for a Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit, seeking an order vacating the Court's denial of preliminary approval and directing the Court to preliminarily approve the $324,500,000 settlement. (9th Cir. Case No. 14-72545, Dkt. 1.) On September 22, 2014, the Ninth Circuit issued an order stating that Defendants' "petition for a writ of mandamus raises issues that warrant a response," ordered Plaintiffs to file a response, set a date for Defendants' reply, and ordered that upon completion of briefing the matter shall be placed on the next available merits panel for oral argument. (9th Cir. Dkt. 2; Dkt. 993.) Plaintiffs (and Michael Devine separately) opposed Defendants' petition (9th Cir. Dkt. Nos. 4 & 6), and Defendants replied (9th Cir. Dkt. 10). Putative amici curiae Chamber of Commerce of the United States of America, California Chamber of Commerce, and economic scholars filed motions for leave to file amici curiae briefs in support of the petition (9th Cir. Dkts. 8 & 9), which the Ninth Circuit referred to the panel to be assigned to hear the merits of the petition (9th Cir. Dkt. 15). Plaintiffs (and Michael Devine separately) opposed the motions for leave to file amici curiae briefs. (9th Cir. Dkts. 13 & 16.) The Ninth Circuit scheduled oral argument on the petition for March 13, 2015. (9th Cir. Dkt. 19.) On January 30, 2015, the Settling Defendants filed an unopposed motion to dismiss the mandamus petition (9th Cir. Dkt. 23), which the Ninth Circuit granted on February 2, 2015 (9th Cir. Dkt. 24).

6. At the time of settlement, the following motions remained pending: Defendants' motion to exclude Dr. Matthew Marx's testimony; Plaintiffs' motion to exclude Defendants' experts'

testimony; Plaintiffs' motion for application of the *per se* standard; Defendants' motions *in limine*; and Plaintiffs' motion to compel. In addition, Plaintiffs and Defendants have continued to engage in the exchange of extensive pretrial disclosures and conferences regarding trial exhibits, witnesses, the joint pretrial statement, the authentication of business records and potential depositions related thereto, and many other issues.

7. Second, the consideration—a total of $415 million—is substantial, particularly in light of the risk that the jury could find no liability or award no damages. When combined with the $20 million received from Plaintiffs' previous settlements with Defendants Pixar, Lucasfilm, and Intuit, the result for the Class in this litigation will total $435 million.

8. Third, the Settlement's Plan of Allocation provides a neutral and fair way to compensate Class members based on their salary and alleged injury. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

9. Fourth, litigation through trial would be complex and costly, which settlement avoids. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). While settlement provides the Class with a timely, certain, and meaningful cash recovery, a trial—and any subsequent appeals—is highly uncertain, and in any event would substantially delay any recovery achieved.

10. Fifth, the Settling Parties agreed to settle at a particularly advanced stage of the proceedings—after class certification and the completion of discovery and dispositive motions.

11. Accordingly, the Court finds that notice to the Class is appropriate and that the Plan of Allocation is sufficiently fair, reasonable, and adequate such that it is hereby preliminarily approved, subject to further consideration at the hearing to be held as set forth below.

THE CLASS

12. On October 24, 2013, this Court entered an Order certifying a class pursuant to Rule 23 of the Federal Rules of Civil Procedure, defined as all natural persons who work in the

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technical, creative, and/or research and development fields that were employed on a salaried basis in the United States by one or more of the following: (a) Apple from March 2005 through December 2009; (b) Adobe from May 2005 through December 2009; (c) Google from March 2005 through December 2009; (d) Intel from March 2005 through December 2009; (e) Intuit from June 2007 through December 2009; (f) Lucasfilm from January 2005 through December 2009; or (g) Pixar from January 2005 through December 2009 (the "Class Period"). Excluded from the Class are: retail employees, corporate officers, members of the boards of directors, and senior executives of all Defendants. In its Order, this Court found that the requirements of Rule 23(a) and (b)(3) were met. On January 15, 2014, the Ninth Circuit denied Defendants' Petition for review pursuant to Rule 23(f) of this Court's class certification Order. The proposed Settlement here includes a class definition identical to the Class defined above and certified by this Court.

NOTICE TO CLASS MEMBERS

13. The Court approves the Notice of Proposed Settlement of Class Action, Fairness Hearing, and Right to Appear (the "Settlement Notice"), and finds that the dissemination of the Notice substantially in the manner and form set forth in the Settlement Agreement complies fully with the requirements of Federal Rule of Civil Procedure 23 and due process of law, and is the best notice practicable under the circumstances.

14. The notice procedures set forth in the Settlement Agreement are hereby found to be the best practicable means of providing notice of the Settlement Agreement under the circumstances and, when completed, shall constitute due and sufficient notice of the proposed Settlement Agreement and the Final Approval Hearing to all persons affected by and/or entitled to participate in the Settlement Agreement, in full compliance with the applicable requirements of Federal Rule of Civil Procedure 23 and due process.

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ADMINISTRATION OF THE SETTLEMENT FUND

15. The Court hereby appoints Gilardi & Co., LLC, as administrator (the "Notice Administrator"). Consistent with the Settlement Agreement, the responsibilities of the Notice Administrator shall include: (a) maintaining a post office box for purposes of communicating with Class Members, including receiving any objections; (b) disseminating the Notice to the Class; (c) maintaining a website to enable Class Members to access relevant documents; (d) receiving and maintaining documents sent from Class Members relating to Settlement administration and requests for exclusion; (e) handling withholding, reporting, payment, dissemination of forms, and other aspects of Settlement administration relating to all applicable taxes as set forth in the Settlement Agreement; and (f) distributing Settlement checks to Class Members. Pursuant to the Settlement Agreement, the costs of the Notice Administrator's services and all other reasonable costs of Settlement administration shall be paid out of the Settlement Fund, subject to Court review and approval, with certain notice and administration costs incurred prior to the Effective Date advanced by Adobe, Apple, Google, and Intel as provided in the Settlement Agreement.

16. All funds held by the Escrow Agent (Citibank, N.A.) after the Effective Date of the Settlement as defined in the Settlement Agreement shall be deemed and considered to be in *custodia legis*, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Settlement Agreement and further order(s) of the Court.

17. The Settlement Fund, to be held at Citibank, N.A., shall be established as a fiduciary account and administered in accordance with the provisions of the Settlement Agreement. The Court approves the establishment of the escrow account under the Settlement Agreement as a qualified settlement fund ("QSF") pursuant to Internal Revenue Code Section 1.468B-1 and the Treasury Regulations promulgated thereunder, and retains continuing jurisdiction as to any issue that may arise in connection with the formation and/or administration of this QSF.

18. By no later than March 23, 2015:

(a) Co-Lead Class Counsel shall direct Heffler Claims Group, subject to and consistent with the extant Protective Order and all existing confidentiality and non-disclosure agreements, to transmit to Class Counsel, the Defendants, and the Notice Administrator the employee ID numbers and/or hashed social security numbers for all employees to whom Heffler Claims Group sent notices in connection with the certification of the litigation class in the Action (the "Prior Notice Recipients"). For the avoidance of doubt, "Prior Notice Recipients" shall include any employee that a Defendant has identified as a Class Member and shall not include persons who have been determined not to be Class Members. Specifically with respect to Google, "Prior Notice Recipients" shall mean those current and former Google employees to whom reminder notices were sent on or about March 13, 2014, as well as the other current and former Google employees who were subsequently informed by Heffler Claims Group that they were Class Members. Heffler Claims Group shall transmit such information in a secure manner that has received the prior approval of Co-Lead Class Counsel and the Settling Defendants.

(b) Heffler Claims Group shall transmit to the Notice Administrator, subject to and consistent with the extant Protective Order and all existing confidentiality and non-disclosure agreements the full legal name, and last known physical address (including the best information concerning each address, as determined using the national change of address database, information provided by Class Members, and other sources) for the Prior Notice Recipients. Heffler Claims Group shall transmit such information in a secure manner that has received the prior approval of Co-Lead Class Counsel and the Settling Defendants.

(c) Each Defendant shall, at its option, either transmit the social security numbers for the Prior Notice Recipients employed by that Defendant to the Notice Administrator or request that Heffler Claims Group do so. In either case, the information shall be transmitted pursuant to and in a manner consistent with the extant Protective Order and all existing confidentiality and non-disclosure agreements.

19. The Notice attached to this Order satisfies the requirements of the Federal Rules of Civil Procedure and of due process and, accordingly, is approved for dissemination to the Class. By no later than April 6, 2015, after receiving the information in paragraph 18, the Notice Administrator shall cause the Settlement Notice to be mailed by first-class mail, postage prepaid, to Class Members pursuant to the procedures described in the Settlement, and to any Class Member who requests one; and, in conjunction with Class Counsel, shall maintain the case-specific website providing case information, court documents relating to the Settlement and the Notice. By no later than June 5, 2015, the Claims Administrator shall file with the Court an Affidavit of Compliance with Notice Requirements.

20. All costs incurred in disseminating Notice and administering the Settlement shall be paid from the Settlement Fund pursuant to the Settlement Agreement, with certain notice and administration costs incurred prior to the Effective Date advanced by Adobe, Apple, Google, and Intel as provided in the Settlement Agreement.

RESPONSE BY CLASS MEMBERS AND THE SCHEDULING OF A FINAL APPROVAL HEARING

21. Class Members will have until May 21, 2015, to opt out (the "Opt-Out Deadline") of the Class.

22. Any Class Member who wishes to be excluded (opt out) from the Class must send a written Request for Exclusion to the Notice Administrator on or before the close of the Opt-Out Deadline. Members of the Class may not exclude themselves by filing Requests for Exclusion as a group or class, but must in each instance individually and personally execute a Request for Exclusion. Class Members who exclude themselves from the Class will not be eligible to receive

any benefits under the Settlement, will not be bound by any further orders or judgments entered in this matter, and will preserve their ability independently to pursue any claims they may have against Adobe, Apple, Google, and Intel.

23. Class Counsel and counsel for Plaintiff Michael Devine shall file their respective motions for payment of attorneys' fees, costs, and for Plaintiff Service Awards, no later than May 7, 2015.

24. All Class Members who did not properly and timely request exclusion from the Class shall, upon entry of the Final Approval Order and Judgment, be bound by all the terms and provisions of the Settlement Agreement, including the Release provisions, whether or not such Class Member objected to the Settlement and whether or not such Class Member received consideration under the Settlement Agreement.

25. A final hearing on the Settlement Agreement ("Final Approval Hearing") shall be held before the Court at 1:30 p.m. on Thursday, July 9, 2015, in Courtroom 8, 4th Floor, of the Northern District of California, 280 South 1st Street, San Jose, CA 95113. Such hearing is more than 90 days from the completion of notice pursuant to the Class Action Fairness Act.

26. At the Final Approval Hearing, the Court will consider (a) the fairness, reasonableness, and adequacy of the proposed Settlement Agreement and whether the Settlement Agreement should be granted final approval by the Court; (b) approval of the proposed Plan of Allocation; and (c) entry of a Final Approval Order and Judgment including the Settlement Release. Class Counsel's application for payment of costs and attorneys' fees and counsel for Plaintiff Michael Devine's application for payment of costs and attorneys' fees, and all requests for the Court to approve service awards to the Named Plaintiffs, shall also be heard at the time of the hearing.

27. The date and time of the Final Approval Hearing shall be subject to adjournment by the Court without further notice to the Class Members, other than that which may be posted by the

Court. Should the Court adjourn the date for the Final Approval Hearing, such adjournment shall not alter the deadlines for mailing of the Notice, nor the deadlines for submissions of settlement objections, requests for exclusion, or notices of intention to appear at the Final Approval Hearing unless those dates are explicitly changed by subsequent Order.

28. Any Class Member who did not elect to be excluded from the Class may, but need not, enter an appearance through his or her own attorney. For Settlement purposes, Class Counsel will continue to represent Class Members who do not timely object and do not have an attorney enter an appearance on their behalf.

29. Any Class Member who did not elect to be excluded from the Class may, but need not, submit comments or objections to (a) the Settlement Agreement, (b) entry of a Final Approval Order and Judgment approving the Settlement Agreement, (c) any application for payment of attorneys' fees and costs, and/or (d) service award requests, by mailing a written comment or objection to the addresses provided by the Notice Administrator in the Notice.

30. Any Class Member making an objection (an "Objector") must sign the objection personally, even if represented by counsel, and provide the Class Member's name and full residence or business address and a statement signed under penalty of perjury that the Class Member was an employee and member of the Class. An objection must state why the Objector objects to the Settlement Agreement and provide a basis in support, together with any documents such person wishes to be considered in support of the objection. If an Objector intends to appear at the hearing, personally or through counsel, the Objector must include with the objection a statement of the Objector's intent to appear at the hearing. The objection must also contain a detailed list of any other objections by the Objector, as well as by the Objector's attorney, to any class action settlements submitted to any court in the United States in the previous five years.

31. Objections, along with any statements of intent to appear, must be postmarked no later than May 21, 2015, and mailed to the addresses provided by the Notice Administrator in the

Notice. If counsel is appearing on behalf of more than one Class Member, counsel must identify each such Class Member and each such Class Member must have complied with this Order.

32. Only Class Members who have filed and served valid and timely objections accompanied by notices of intent to appear shall be entitled to be heard at the Final Approval Hearing. Any Class Member who does not timely file and serve an objection in writing in accordance with the procedure set forth in the Notice and mandated in this Order shall be deemed to have waived any objection to (a) the Settlement Agreement; (b) entry of a Final Approval Order and Judgment; (c) Class Counsel's and Devine's Counsel's application for payment of costs and anticipated request for fees; and (d) service award requests for the Named Plaintiffs, whether by appeal, collateral attack, or otherwise.

33. Class Members need not appear at the hearing or take any other action to indicate their approval.

34. Upon entry of the Final Approval Order and Judgment, all Class Members who have not personally and timely requested to be excluded from the Class will be enjoined from proceeding against Adobe, Apple, Google, and Intel and all other Released Parties with respect to all of the Released Claims, consistent with the Settlement Agreement.

35. The schedule by which the events referenced above shall occur is as follows:

Event	**Date**
Prior Settlement Administrator Transfers Materials to New Administrator	March 23, 2015
Notice of Class Action Settlement to Be Mailed and Posted on Internet	April 6, 2015
Class Counsel and Devine Counsel Motions for Payment of Costs and Award of Attorneys' Fees, and Motions for Plaintiffs' Service Awards	May 7, 2015

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Event	Date
Opt-Out Deadline; Objection Deadline; Deadline for Class Members to Provide Notice of Intent to Appear at Final Approval Hearing	May 21, 2015
Notice Administrator Affidavit of Compliance with Notice Requirements	June 5, 2015
Motion for Final Approval	June 15, 2015
Replies in Support of Motions for Final Approval, Attorneys' Fees and Costs, and Service Awards to Be Filed by Moving Parties	June 29, 2015
Final Approval Hearing	July 9, 2015, at 1:30 p.m.

36. All further proceedings as to Adobe, Apple, Google, and Intel are hereby stayed, except for any actions required to effectuate or enforce the Settlement Agreement, or matters related to the Settlement Fund, including applications for attorneys' fees, payment of costs, and service awards to Class Representatives.

37. In the event the Settlement Agreement and the proposed Settlement are terminated or do not become effective pursuant to the applicable provisions of the Settlement Agreement, the Settlement Agreement and all related proceedings shall, except as expressly provided in the Settlement Agreement, become void and shall have no further force or effect, and Plaintiffs shall retain all of their current rights against Adobe, Apple, Google, and Intel and any other Released Party, and Adobe, Apple, Google, and Intel and any other Released Parties shall retain any and all of their current defenses and arguments thereto so that the Settling Parties may take such litigation steps that the Settling Parties otherwise would have been able to take absent the pendency of this Settlement. These Actions shall thereupon revert forthwith to their respective procedural and substantive status prior to January 7, 2015, and shall proceed as if the Settlement Agreement had not been executed.

38. Neither this Order nor the Settlement Agreement, nor any other Settlement-related document nor anything contained or contemplated therein, nor any proceedings undertaken in accordance with the terms set forth in the Settlement Agreement or herein or in any other Settlement-related document, shall constitute, be construed as, or be deemed to be evidence of or an admission or concession by Adobe, Apple, Google, and/or Intel as to the validity of any claim that has been or could have been asserted against any of them or as to any liability by either as to any matter encompassed by the Settlement Agreement.

IT IS SO ORDERED.

Dated: March 3, 2015

Lucy H. Koh

LUCY H. KOH
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Master Docket No. 11-CV-2509-LHK **~~[PROPOSED]~~ FINAL JUDGMENT AND DISMISSAL**

The Court hereby enters final judgment in this action as between Plaintiffs and the Class and Defendants Adobe Systems, Incorporated, Apple Inc., Google Inc., and Intel Corporation ("Defendants"), as defined in Federal Rule of Civil Procedure 58(a). Pursuant to this Final Judgment:

1. All Released Claims of Plaintiffs and the Class are hereby released as against Defendants and all other Released Parties as defined in the Settlement.

2. The Court finds that the Class Members who have exercised their right to exclude themselves from this Action, by submitting timely requests for exclusion pursuant to the notice mailed to the Class, are not included in or bound by this order and final judgment. The excluded Class Members are listed in Exhibit A to the proposed final judgment filed on June 15, 2015. *See* ECF No. 1088-1.

3. Without affecting the finality of the Court's judgment in any way, the Court retains jurisdiction over this matter for purposes of resolving issues relating to the interpretation, administration, implementation, effectuation, and enforcement of the Settlement.

4. The parties and the Notice Administrator are hereby ordered to comply with the terms of the Settlement.

5. This action is dismissed with prejudice as against the Defendants, each side to bear its own costs and attorneys' fees except as provided by the Settlement and the Court's orders.

6. This document constitutes a final judgment and separate document for purposes of Federal Rule of Civil Procedure 58(a).

7. The Court finds, pursuant to Rules 54(a) and (b) of the Federal Rules of Civil Procedure, that this Final Judgment should be entered and that there is no just reason for delay in the entry of this Final Judgment as to Plaintiffs and the Class and Defendants. Accordingly, the Clerk is hereby directed to enter Judgment forthwith.

8. The Clerk shall close the following case files: 11-CV-02509-LHK; 11-CV-03538-LHK; 11-CV-03539-LHK; 11-CV-03540-LHK; 11-CV-03541-LHK.

Dated: September 2, 2015

Lucy H. Koh

LUCY H. KOH
United States District Judge