

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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

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

1 support of and in opposition to the proposed settlement. ECF Nos. 914, 949-51. The Court, having  
2 considered the briefing, the letters, the arguments presented at the hearing, and the record in this  
3 case, DENIES the Motion for Preliminary Approval for the reasons stated below.

4 **I. BACKGROUND AND PROCEDURAL HISTORY**

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

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

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

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

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

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

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

6 On April 24, 2014, counsel for Plaintiffs and counsel for Remaining Defendants sent a joint  
 7 letter to the Court indicating that they had reached a settlement. *See* ECF No. 900. This settlement  
 8 was reached two weeks before the Final Pretrial Conference and one month before the trial was set  
 9 to commence.<sup>2</sup> Upon receipt of the joint letter, the Court vacated the trial date and pretrial  
 10 deadlines and set a schedule for preliminary approval. *See* ECF No. 904. Shortly after counsel sent  
 11 the letter, the media disclosed the total amount of the settlement, and this Court received three  
 12 letters from individuals, not including Devine, objecting to the proposed settlement in response to  
 13 media reports of the settlement amount.<sup>3</sup> *See* ECF No. 914. On May 22, 2014, in accordance with  
 14 this Court's schedule, Plaintiffs filed their Motion for Preliminary Approval. *See* ECF No. 920.  
 15 Devine filed an Opposition on June 5, 2014.<sup>4</sup> *See* ECF No. 934. Plaintiffs filed a Reply on June 12,  
 16 2014. *See* ECF No. 938. The Court held a hearing on June 19, 2014. *See* ECF No. 948. After the  
 17 hearing, the Court received a letter from a Class member in opposition to the proposed settlement  
 18 and two letters from Class members in support of the proposed settlement. *See* ECF Nos. 949-51.

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

25 <sup>2</sup> Defendants' motions in limine, Plaintiffs' motion to exclude testimony from certain experts,  
 26 Defendants' motion to exclude testimony from certain experts, a motion to determine whether the  
 27 per se or rule of reason analysis applied, and a motion to compel were pending at the time the  
 28 settlement was reached.

<sup>3</sup> 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.

<sup>4</sup> 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

1 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *see also Cordy v. USS-Posco Indus.*, No. 12-553, 2013  
 2 WL 4028627, at \*3 (N.D. Cal. Aug. 1, 2013) (“Preliminary approval of a settlement and notice to  
 3 the proposed class is appropriate if the proposed settlement appears to be the product of serious,  
 4 informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant  
 5 preferential treatment to class representatives or segments of the class, and falls with the range of  
 6 possible approval.” (internal quotation marks omitted)). To undertake this analysis, the Court  
 7 “must consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *In*  
 8 *re Nat’l Football League Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa.  
 9 2014) (internal quotation marks omitted).

### 10 III. DISCUSSION

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

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

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 23 <sup>5</sup> Plaintiffs also assert that administration costs for the settlement would be \$160,000.

24 <sup>6</sup> Devine calculated that Class members would receive an average of \$3,573. The discrepancy  
 25 between this number and the Court’s calculation may result from the fact that Devine’s calculation  
 26 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).

27 <sup>7</sup> If the Court were to deny any portion of the requested fees, costs, or incentive payments, this  
 28 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.

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

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

11 **A. Comparison to the Initial Settlements**

12 **1. Comparing the Settlement Amounts**

13 The Court finds that the settlements with the Settled Defendants provide a useful  
 14 benchmark against which to analyze the reasonableness of the instant settlement. The settlements  
 15 with the Settled Defendants led to a fund totaling \$20 million. *See* ECF No. 915 at 3. In approving  
 16 the settlements, the Court relied upon the fact that the Settled Defendants employed 8% of Class  
 17 members and paid out 5% of the total Class compensation during the Class period. *See* ECF No.  
 18 539 at 16:20-22 (Plaintiffs' counsel's explanation at the preliminary approval hearing with the  
 19 Settled Defendants that the 5% figure "giv[es] you a sense of how big a slice of the case this  
 20 settlement is relative to the rest of the case"). If Remaining Defendants were to settle at the same  
 21 (or higher) rate as the Settled Defendants, Remaining Defendants' settlement fund would need to  
 22 total at least \$380 million. This number results from the fact that Remaining Defendants paid out  
 23 95% of the Class compensation during the Class period, while Settled Defendants paid only 5% of  
 24 the Class compensation during the Class period.<sup>8</sup>

25 At the hearing on the instant Motion, counsel for Remaining Defendants suggested that the  
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27 <sup>8</sup> One way to think about this is to set up the simple equation:  $5/95 = \$20,000,000/x$ . This equation  
 28 asks the question of how much 95% would be if 5% were \$20,000,000. Solving for x would result  
 in \$380,000,000.



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

22 Counsel for Remaining Defendants also suggested that benchmarking against the initial  
 23 settlements would be inappropriate because the magnitude of the settlement numbers for  
 24 Remaining Defendants dwarfs the numbers at issue in the Settled Defendants’ settlements. This  
 25 argument is premised on the idea that Defendants who caused more damage to the Class and who  
 26 benefited more by suppressing a greater portion of class compensation should have to pay less than  
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28 <sup>9</sup> Again,  $8/92 = \$20,000,000/x$  would lead to  $x = \$230,000,000$ .



1 Defendants who caused less damage and who benefited less from the allegedly wrongful conduct.  
2 This argument is unpersuasive. Remaining Defendants are alleged to have received 95% of the  
3 benefit of the anti-solicitation agreements and to have caused 95% of the harm suffered by the  
4 Class in terms of lost compensation. Therefore, Remaining Defendants should have to pay at least  
5 95% of the damages, which, under the instant settlement, they would not.

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

## 18 2. Relative Procedural Posture

19 The discount that Remaining Defendants have received vis-à-vis the Settled Defendants is  
20 particularly troubling in light of the changes in the procedural posture of the case between the two  
21 settlements, changes that the Court would expect to have increased, rather than decreased,  
22 Plaintiffs' bargaining power. Specifically, at the time the Settled Defendants settled, Plaintiffs were  
23 at a particularly weak point in their case. Though Plaintiffs had survived Defendants' motion to  
24 dismiss, Plaintiffs' motion for class certification had been denied, albeit without prejudice.  
25 Plaintiffs had re-briefed the class certification motion, but had no class certification ruling in their  
26 favor at the time they settled with the Settled Defendants. If the Court ultimately granted  
27 certification, Plaintiffs also did not know whether the Ninth Circuit would grant Federal Rule of  
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1 Civil Procedure 23(f) review and reverse the certification. Accordingly, at that point, Defendants  
2 had significant leverage.

3 In contrast, the procedural posture of the case swung dramatically in Plaintiffs' favor after  
4 the initial settlements were reached. Specifically, the Court certified the Class over the vigorous  
5 objections of Defendants. In the 86-page order granting class certification, the Court repeatedly  
6 referred to Plaintiffs' evidence as "substantial" and "extensive," and the Court stated that it "could  
7 not identify a case at the class certification stage with the level of documentary evidence Plaintiffs  
8 have presented in the instant case." ECF No. 531 at 69. Thereafter, the Ninth Circuit denied  
9 Defendants' request to review the class certification order under Federal Rule of Civil Procedure  
10 23(f). This Court also denied Defendants' five motions for summary judgment and denied  
11 Defendants' motion to exclude Plaintiffs' principal expert on antitrust impact and damages. The  
12 instant settlement was reached a mere two weeks before the final pretrial conference and one  
13 month before a trial at which damaging evidence regarding Defendants would have been presented.

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

#### 21 **B. Strength of Plaintiffs' Case**

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

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

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

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

### 21 **1. Evidence Related to Apple**

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

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

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27 <sup>10</sup> On the same day, Mr. Campbell sent an email to Mr. Brin and to Larry Page (Google Co-  
28 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.*

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

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

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

27 \_\_\_\_\_  
 28 <sup>11</sup> Mr. Jobs successfully expanded the anti-solicitation agreements to Macromedia, a company  
 acquired by Adobe, both before and after Adobe’s acquisition of Macromedia.

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

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

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

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

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

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

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

## 23 2. Evidence Related to Google

24 The evidence against Google is equally compelling. Email evidence reveals that Eric  
25 Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO)  
26 terminated at least two recruiters for violations of anti-solicitation agreements, and threatened to  
27 terminate more. As discussed above, there is direct evidence that Mr. Schmidt terminated a  
28

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

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

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

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

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

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

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

1 reasonable range.” ECF No. 814-19. Furthermore, because Google “strive[d] to achieve fairness in  
2 overall salary distribution,” “high performers with low salaries [would] get larger percentage  
3 increases than high performers with high salaries.” ECF No. 817-1 at 15.

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

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

22 Google’s impact on the labor market before the anti-solicitation agreements was best  
23 summarized by Meg Whitman (former CEO of eBay) who called Mr. Schmidt “to talk about  
24 [Google’s] hiring practices.” ECF No. 814-15. As Eric Schmidt told Google’s senior executives,  
25 Ms. Whitman said “Google is the talk of the valley because [you] are driving up salaries across the  
26 board.” *Id.* A year after this conversation, Google added eBay to its do-not-cold-call list. ECF No.  
27 291-28.

**3. Evidence Related to Intel**

1  
2 There is also compelling evidence against Intel. Google reacted to requests regarding  
3 enforcement of the anti-solicitation agreement made by Intel executives similarly to Google's  
4 reaction to Steve Jobs' request to enforce the agreements discussed above. For example, after Paul  
5 Otellini (CEO of Intel and Member of the Google Board of Directors) received an internal  
6 complaint regarding Google's successful recruiting efforts of Intel's technical employees on  
7 September 26, 2007, ECF No. 188-8 ("Paul, I am losing so many people to Google . . . . We are  
8 countering but thought you should know."), Mr. Otellini forwarded the email to Eric Schmidt  
9 (Google Executive Chairman, Member of the Board of Directors, and former CEO) and stated  
10 "Eric, can you pls help here???" *Id.* Mr. Schmidt obliged and forwarded the email to his recruiting  
11 team, who prepared a report for Mr. Schmidt on Google's activities. ECF No. 291-34. The next  
12 day, Mr. Schmidt replied to Mr. Otellini, "If we find that a recruiter called into Intel, we will  
13 terminate the recruiter," the same remedy afforded to violations of the Apple-Google agreement.  
14 ECF No. 531 at 37. In another email to Mr. Schmidt, Mr. Otellini stated, "Sorry to bother you  
15 again on this topic, but my guys are very troubled by Google continuing to recruit our key players."  
16 *See* ECF No. 428-8.

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

21 Furthermore, there is evidence that Mr. Otellini knew of the anti-solicitation agreements to  
22 which Intel was not a party. Specifically, both Sergey Brin (Google Co-Founder) and Mr. Schmidt  
23 of Google testified that they would have told Mr. Otellini that Google had an anti-solicitation  
24 agreement with Apple. ECF No. 639-1 at 74:15 ("I'm sure that we would have mentioned it[.]");  
25 ECF No. 819-12 at 60 ("I'm sure I spoke with Paul about this at some point."). Intel's own expert  
26 testified that Mr. Otellini was likely aware of Google's other bilateral agreements by virtue of Mr.  
27 Otellini's membership on Google's board. ECF No. 771 at 4. The fact that Intel was added to  
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1 Google’s do-not-cold-call list on the same day that Apple was added further suggests Intel’s  
2 participation in an overarching conspiracy. ECF No. 291-28.

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

7 Moreover, key documents related to antitrust impact also implicate Intel. Specifically, Intel  
8 recognized the importance of cold calling and stated in its “Complete Guide to Sourcing” that  
9 “[Cold] [c]alling candidates is one of the most efficient and effective ways to recruit.” ECF No.  
10 296-22. Intel also benchmarked compensation against other “tech companies generally considered  
11 comparable to Intel,” which Intel defined as a “[b]lend of semiconductor, software, networking,  
12 communications, and diversified computer companies.” ECF No. 754-2. According to Intel, in  
13 2007, these comparable companies included Apple and Google. *Id.* These documents suggest, as  
14 Plaintiffs contend, that the anti-solicitation agreements led to structural, rather than individual  
15 depression, of Class members’ wages.

16 Furthermore, Intel had a “compensation structure,” with job grades and job classifications.  
17 *See* ECF No. 745-13 at 73 (“[W]e break jobs into one of three categories—job families, we call  
18 them—R&D, tech, and nontech, there’s a lot more . . .”). The company assigned employees to a  
19 grade level based on their skills and experience. ECF No. 745-11 at 23; *see also* ECF No. 749-17 at  
20 45 (explaining that everyone at Intel is assigned a “classification” similar to a job grade). Intel  
21 standardized its salary ranges throughout the company; each range applied to multiple jobs, and  
22 most jobs spanned multiple salary grades. ECF No. 745-16 at 59. Intel further broke down its  
23 salary ranges into quartiles, and compensation at Intel followed “a bell-curve distribution, where  
24 most of the employees are in the middle quartiles, and a much smaller percentage are in the bottom  
25 and top quartiles.” *Id.* at 62-63.

26 Intel also used a software tool to provide guidance to managers about an employee’s pay  
27 range which would also take into account market reference ranges and merit. ECF No. 758-9. As  
28



1 explained by Randall Goodwin (Intel Technology Development Manager), “[i]f the tool  
2 recommended something and we thought we wanted to make a proposed change that was outside  
3 its guidelines, we would write some justification.” ECF No. 749-15 at 52. Similarly, Intel regularly  
4 ran reports showing the salary range distribution of its employees. ECF No. 749-16 at 64.

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

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

21 An Intel human resources document from 2002—prior to the anti-solicitation agreements—  
22 recognized “continuing inequities in the alignment of base salaries/EB targets between hired and  
23 acquired Intel employees” and “parallel issues relating to accurate job grading within these two  
24 populations.” ECF No. 750-15. In response, Intel planned to: (1) “Review exempt job grade  
25 assignments for job families with ‘critical skills.’ Make adjustments, as appropriate”; and (2)  
26 “Validate perception of inequities . . . . Scope impact to employees. Recommend adjustments, as  
27  
28

1 appropriate.” *Id.* An Intel human resources document confirms that, in or around 2004, “[n]ew hire  
2 salary premiums *drove* salary range adjustment.” ECF No. 298-5 at 7 (emphasis added).

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

#### 7 **4. Evidence Related to Adobe**

8 Evidence from Adobe also suggests that Adobe was aware of the impact of its anti-  
9 solicitation agreements. Adobe personnel recognized that “Apple would be a great target to look  
10 into” for the purpose of recruiting, but knew that they could not do so because, “[u]nfortunately,  
11 Bruce [Chizen (former Adobe CEO)] and Apple CEO Steve Jobs have a gentleman’s agreement  
12 not to poach each other’s talent.” ECF No. 291-13. Adobe executives were also part and parcel of  
13 the group of high-ranking executives that entered into, enforced, and attempted to expand the anti-  
14 solicitation agreements. Specifically, Mr. Chizen, in response to discovering that Apple was  
15 recruiting employees of Macromedia (a separate entity that Adobe would later acquire), helped  
16 ensure, through an email to Mr. Jobs, that Apple would honor Apple’s pre-existing anti-solicitation  
17 agreements with both Adobe and Macromedia after Adobe’s acquisition of Macromedia. ECF No.  
18 608-3 at 50.

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

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

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

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

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

17 Internal equity was important at Adobe, as it was at other Defendants. As explained by  
18 Debbie Streeter (Adobe Vice President, Total Rewards), Adobe "always look[ed] at internal equity  
19 as a data point, because if you are going to go hire somebody externally that's making . . . more  
20 than somebody who's an existing employee that's a high performer, you need to know that before  
21 you bring them in." ECF No. 749-5 at 175. Similarly, when considering whether to extend a  
22 counteroffer, Adobe advised "internal equity should ALWAYS be considered." ECF No. 746-7 at  
23 5.

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

3 **D. Weaknesses in Plaintiffs’ Case**

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

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

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23  
24 <sup>12</sup> Adobe also benchmarked compensation off external sources, which supports Plaintiffs’ theory of  
25 Class-wide impact and undermines Defendants’ theory that the anti-solicitation agreements had  
26 only one off, non-structural effects. For example, Adobe pegged its compensation structure as a  
27 “percentile” of average market compensation according to survey data from companies such as  
28 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.

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

25 In light of the overlapping nature of this small group of executives who negotiated and  
26 enforced the anti-solicitation agreements, it is not surprising that these executives knew of the other  
27 bilateral agreements to which their own firms were not a party. For example, both Mr. Brin and  
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1 Mr. Schmidt of Google testified that they would have told Mr. Otellini of Intel that Google had an  
2 anti-solicitation agreement with Apple. ECF No. 639-1 at 74:15 (“I’m sure we would have  
3 mentioned it[.]”); ECF No. 819-12 at 60 (“I’m sure I spoke with Paul about this at some point.”).  
4 Intel’s own expert testified that Mr. Otellini was likely aware of Google’s other bilateral  
5 agreements by virtue of Mr. Otellini’s membership on Google’s board. ECF No. 771 at 4.  
6 Moreover, Google recruiters knew of the Adobe-Apple agreement. *Id.* (Google recruiter’s notation  
7 that Apple has “a serious ‘hands-off’ policy with Adobe”). In addition, Mr. Schmidt of Google  
8 testified that it would be “fair to extrapolate” based on Mr. Schmidt’s knowledge of Mr. Jobs, that  
9 Mr. Jobs “would have extended [anti-solicitation agreements] to others.” ECF No. 638-8 at 170.  
10 Furthermore, it was this same mix of top executives that successfully and unsuccessfully attempted  
11 to expand the agreement to other companies in Silicon Valley, such as eBay, Facebook,  
12 Macromedia, and Palm, as discussed above, suggesting that the agreements were neither isolated  
13 nor one off agreements.

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

23 As to the contention that Plaintiffs would have to rebut Defendants’ contentions that the  
24 anti-solicitation agreements aided collaborations and were therefore pro-competitive, there is no  
25 documentary evidence that links the anti-solicitation agreements to any collaboration. None of the  
26 documents that memorialize collaboration agreements mentions the broad anti-solicitation  
27 agreements, and none of the documents that memorialize broad anti-solicitation agreements



1 mentions collaborations. Furthermore, even Defendants' experts conceded that those closest to the  
2 collaborations did not know of the anti-solicitation agreements. ECF No. 852-1 at 8. In addition,  
3 Defendants' top executives themselves acknowledge the lack of any collaborative purpose. For  
4 example, Mr. Chizen of Adobe admitted that the Adobe-Apple anti-solicitation agreement was "not  
5 limited to any particular projects on which Apple and Adobe were collaborating." ECF No. 962-7  
6 at 42. Moreover, the U.S. Department of Justice ("DOJ") also determined that the anti-solicitation  
7 agreements "were not ancillary to any legitimate collaboration," "were broader than reasonably  
8 necessary for the formation or implementation of any collaborative effort," and "disrupted the  
9 normal price-setting mechanisms that apply in the labor setting." ECF No. 93-1 ¶ 16; ECF No. 93-  
10 4 ¶ 7. The DOJ concluded that Defendants entered into agreements that were restraints of trade that  
11 were per se unlawful under the antitrust laws. ECF No. 93-1 ¶ 35; ECF No. 93-4 ¶ 3. Thus, despite  
12 the fact that Defendants have claimed since the beginning of this litigation that there were pro-  
13 competitive purposes related to collaborations for the anti-solicitation agreements and despite the  
14 fact that the purported collaborations were central to Defendants' motions for summary judgment,  
15 Defendants have failed to produce persuasive evidence that these anti-solicitation agreements  
16 related to collaborations or were pro-competitive.

#### 17 **IV. CONCLUSION**

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

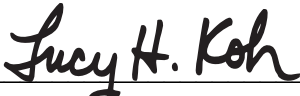
6 In light of this evidence, the Court is troubled by the fact that the instant settlement with  
7 Remaining Defendants is proportionally lower than the settlements with the Settled Defendants.  
8 This concern is magnified by the fact that the case evolved in Plaintiffs’ favor since those  
9 settlements.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

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

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

4 **IT IS SO ORDERED.**

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6 Dated: August 8, 2014

  
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LUCY H. KOH  
United States District Judge

United States District Court  
For the Northern District of California

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