However, in response to requests for an extension of the public comment period relating to the Columbus, Mississippi site, the United States has elected to extend the comment period with respect to the Columbus, Mississippi site and to accept public comments received no later than May 21, 2014.

Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *Tronox and United States* v. *Anadarko Petroleum Corp.,* D.J. Ref. No. 90–11–3–09688. All comments must be received no later than May 21, 2014. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Settlement Agreement may be examined and downloaded at a Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Settlement Agreement upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ–ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $32.00 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without exhibits or notice of lodging, the cost is $14.75.

Maureen M. Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2014–11063 Filed 5–13–14; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Ebay Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Northern District of California in *United States of America* v. *eBay Inc.,* Civil Action No. 12–5869. On November 16, 2012, the United States filed a Complaint alleging that eBay Inc. entered into an agreement with Intuit, Inc., that restrained the recruiting and hiring of high technology workers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment prevents eBay from maintaining or entering into similar agreements.

Copies of the Complaint, as amended, Stipulation, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr*, and at the Office of the Clerk of the United States District Court for the Northern District of California. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site, filed with the Court and, under certain circumstances, published in the **Federal Register**. Comments should be directed to James J. Tierney, Chief, Networks and Technology Enforcement Section, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: 202–307–6640).

Patricia Brink,

Director of Civil Enforcement.

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[Additional counsel listed on signature page]

Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EBAY, INC., Defendant.

Case No. 12–CV–05869 EJD

Amended 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 Defendant eBay, Inc. (''eBay''), alleging as follows:

Nature of the Action

1. This action challenges under Section 1 of the Sherman Act a no-solicitation and no-hiring agreement between eBay and Intuit, Inc. (''Intuit''), pursuant to which eBay and Intuit agreed not to recruit each other's employees and eBay agreed not to hire Intuit employees, even those that approached eBay for a job. This agreement harmed employees by lowering the salaries and benefits they might otherwise have commanded, and deprived these employees of better job opportunities at the other company. Meg Whitman, then the CEO of eBay, and Scott Cook, Founder and Chairman of the Executive Committee at Intuit, were intimately involved in forming, monitoring, and enforcing this anticompetitive agreement.

2. Senior executives at eBay and Intuit entered into an evolving ''handshake'' agreement to restrict their ability to recruit and hire employees of the other company. The agreement, which was entered into no later than 2006, prohibited either company from soliciting one another's employees for employment opportunities, and, for over a year, prevented at least eBay from hiring any employees from Intuit at all. The agreement was enforced at the highest levels of each company.

3. The agreement reduced eBay's and Intuit's incentives and ability to compete for employees and restricted employees' mobility. This agreement thus harmed employees by lowering the salaries and benefits they otherwise would have commanded, and deprived these employees of better job opportunities at the other company.

4. This agreement between eBay and Intuit is a naked restraint of trade that is per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. 1. The United States seeks an order prohibiting any such agreement and other relief.

Jurisdiction and Venue

5. eBay hires specialized computer engineers, scientists, and other employees throughout the United

States, and sells products and services 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 Defendant from violating Section 1 of the Sherman Act, 15 U.S.C. 1.

6. 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). eBay transacts or has transacted business in this district and has its principal place of business here. A substantial part of the events that gave rise to this action occurred here.

Intradistrict Assignment

7. Venue is proper in the San Jose Division because this action arose primarily in Santa Clara County. Civil L.R. 3–2(c), (e). A substantial part of the events that gave rise to the claim occurred in Santa Clara County, and eBay has its principal place of business in Santa Clara County. Judge Koh in the San Jose Division is currently presiding over a case that is similar in certain respects. In addition, the Attorney General of the State of California is filing a Complaint that is related to the United States' Complaint, pursuant to the requirements of Local Rule 3–12(a).

Defendant

8. eBay is a Delaware corporation with its principal place of business in San Jose, California.

Co-Conspirators

9. Various other corporations and persons not made defendants in this Complaint, including Intuit and senior executives at Intuit and eBay, participated as co-conspirators in the violation alleged and performed acts and made statements in furtherance of the violation alleged. Intuit is not named as a defendant in this action because Intuit is subject to a court order in *United States* v. *Adobe Systems,* No. 10–01629 (D.D.C. judgment entered Mar. 17, 2011), barring it from entering into or enforcing any agreement that improperly limits competition for employee services.

Trade and Commerce

10. Firms in the same or similar industries often compete to hire and retain talented employees. This is particularly true in technology industries in which particular expertise and highly specialized skills sought by one firm can often be found at another firm. Solicitation of skilled employees at other companies is an effective method of competing for needed employees. For example, Beth Axelrod, eBay's Senior Vice President for Human Resources at the time the agreement with Intuit was in effect, co-authored a book, ''The War for Talent,'' which emphasizes the importance of ''cold-calling'' as a recruitment tool: ''The recruiting game is changing for yet another reason: It's no longer sufficient to target your efforts to people looking for a job; you have to reach people who aren't looking.''

11. eBay's agreement with Intuit eliminated this competition. The agreement harmed employees by reducing the salaries, benefits, and employment opportunities they might otherwise have earned if competition had not been eliminated. The agreement also misallocated labor between eBay and Intuit—companies that drove innovation based in no small measure on the talent of their employees. In a well-functioning labor market, employers compete to attract the most valuable talent for their needs. Competition among employers for skilled employees may benefit employees' salaries and benefits, and facilitates employee mobility. The no-solicitation and no-hiring agreement between Intuit and eBay distorted this competitive process and likely resulted in some of eBay's and Intuit's employees remaining in jobs that did not fully utilize their unique skills. Ms. Axelrod and her co-authors described how the ''structural forces fueling the war for talent'' have resulted in power ''shift[ing] from the corporation to the individual,'' giving ''talented individuals . . . the negotiating leverage to ratchet up their expectation for their careers.''

12. Instead of working harder to acquire this critical and scarce talent, eBay and Intuit called a truce in the ''war for talent'' to protect their own interests at the expense of their employees. eBay initially sought a limited no-solicitation agreement aimed at high-level executives. eBay ultimately agreed to an expansive no-solicitation and no-hire agreement in large part to placate Intuit's Mr. Cook, who was serving as a member of eBay's Board of Directors and who, at the same time, was making several complaints on behalf of Intuit about eBay's hiring practices. eBay elevated the interests of Mr. Cook above the welfare of its own employees. Similarly, Mr. Cook was willing to sacrifice the welfare of Intuit's employees in order to advance his own personal interests in serving on eBay's Board.

13. Neither eBay nor Intuit publicly announced their no hire/no solicit agreement or ensured that all potentially affected employees were aware of the agreement. Disclosure of the agreement could have created substantial legal problems for eBay and Intuit under California law and significant embarrassment for the executives and other individuals who entered into, and monitored compliance with, the agreement on behalf of the two firms. Many eBay and Intuit employees reside in California, a state with a strong public policy prohibiting firms from restricting employee movement by, among other things, barring employers from enforcing ''no compete'' agreements. California law provides that ''every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.'' California Business & Professions Code § 16600.

The Unlawful Agreement

14. Beginning no later than 2006, and lasting at least until 2009, Intuit and eBay maintained an illegal agreement that restricted their ability to actively recruit employees from each other, and for some part of that time, further restricted eBay from hiring any employees from Intuit. As alleged in more detail below, this agreement was entered into and enforced at the most senior levels of these two companies.

15. In November 2005, eBay's Chief Operating Officer, Maynard Webb, wrote to Scott Cook, Intuit's Founder and Chairman of its Executive Committee, to ''get [Mr. Cook's] advice on a specific hiring situation and then see if we could establish some guidelines on an ongoing basis.'' Mr. Webb asked Mr. Cook for ''permission to proceed'' with hiring an Intuit employee who had contacted eBay regarding a job, and then proposed a ''structure'' to Mr. Cook for future situations, whereby eBay would ''not actively recruit from Intuit.'' Under Mr. Webb's proposal, for Intuit candidates ''below Senior Director level'' who contacted eBay regarding employment, eBay would be permitted to hire them and would give Intuit ''notice'' only after a candidate accepted a job offer. For Intuit candidates ''at Senior Director level or above,'' eBay would not make an offer unless Intuit was notified in advance. Mr. Cook rejected this proposal insofar as it allowed hiring of any employees without prior notice to Intuit, saying that ''we don't recruit from board companies, period'' and ''[w]e're passionate on this.'' In other words, because Mr. Cook served on eBay's board, Intuit employees should be

denied any chance to work for eBay. Mr. Cook committed that Intuit would not make an offer to anyone from eBay without first notifying eBay, and said ''[w]e would ask the same.''

16. A month later, in December 2005, Meg Whitman, the CEO of eBay at the time, and Mr. Cook discussed the competition for two employees with an eye toward eliminating that competition altogether. As Ms. Whitman told Ms. Axelrod, Mr. Cook was ''slightly miffed by our recent hire of two Intuit executives.''

17. No later than August 2006, the initial agreement between eBay and Intuit restricting the hiring of each other's employees was put into effect. In August 2006, when eBay considered hiring an Intuit employee for an opening at its PayPal subsidiary, Ms. Axelrod said that while she was ''happy to have a word with Meg [Whitman] about it,'' Ms. Axelrod was ''quite confident she will say hands off because Scott [Cook] insists on a no poach policy with Intuit.'' When the PayPal executive asked Ms. Axelrod to confer with Ms. Whitman, Ms. Axelrod reported back that ''I confirmed with Meg [Whitman] that we cannot proceed without notifying Scott Cook first.'' eBay does not appear to have pursued the potential candidate beyond this point as everyone agreed ''that it's to[o] awkward to call Scott [Cook] when we don't even know if the candidate has interest,'' demonstrating that the non-solicitation agreement had a distinct chilling effect on recruitment and hiring between the two companies.

18. On or about April 2007, eBay's commitment metastasized into a no-hire agreement. The impetus was a complaint from Mr. Cook to Ms. Whitman that he was ''quite unhappy'' about a potential offer that eBay was going to make to an Intuit employee who had approached eBay. Ms. Axelrod spoke with Ms. Whitman regarding Mr. Cook's concerns, and instructed David Knight, then eBay's Vice President, Internal Communications, to hold off on making the offer. Mr. Knight urged Ms. Axelrod to find a way to make the offer happen, as the decision put the applicant ''in a tough position and us in a bad place with California law'' and left eBay ''another 6 months away from getting another candidate'' for the position. A week later, Mr. Knight wrote to Ms. Axelrod and Ms. Whitman pleading with them to at least ''negotiate'' any shift from a ''no poaching'' agreement to a ''no hiring'' agreement after this particular applicant was hired, as eBay ''desperately need[ed] this position filled.''

19. While Ms. Axelrod ultimately authorized Mr. Knight to extend an offer to this Intuit employee, eBay did expand the agreement to prohibit eBay from hiring any employee from Intuit, regardless of how that employee applied for the job. A few months later, for example, an eBay human resources manager alerted Ms. Axelrod to a potential ''situation'' and wanted to know if eBay ''continue[d] to be sensitive to Scott [Cook]'s request'' or if there was ''any flexibility on hiring from Intuit.'' The Intuit candidate was ''getting a lot of responses from managers directly'' before the human resource manager's team was involved as his ''education is fantastic.'' Ms. Axelrod confirmed, however, that even when an Intuit employee was ''dying'' to work for eBay and had proactively reached out to eBay, hiring managers had ''no flexibility'' and must keep their ''hands off'' the potential applicant.

20. Two eBay staffers sought to clarify the situation with Ms. Axelrod shortly thereafter. Ms. Axelrod said: ''We have an explicit hands of[f] that we cannot violate with any Intuit employee. There is no flexibility on this.'' The staff asked for further amplification: ''This applies even if the Intuit employee has reached out and specifically asked? If so then I assume that person could NEVER be hired by ebay unless they quit Intuit first.'' Ms. Axelrod confirmed this was ''correct.'' Ms. Axelrod similarly explained the impact of the agreement to Ms. Whitman: ''I keep getting inquiries from our folks to recruit from Intuit and I am firmly holding the line. No exceptions even if the candidate proactively contacts us.'' In another email exchange, Ms. Axelrod explained that she was responding to all inquiries regarding hiring from Intuit by ''firmly holding the line and saying absolutely not (including to myself since their comp[ensation] and ben[efits] person is supposed to be excellent!).''

21. Mr. Cook was a driving force behind eBay's no-hire agreement with Intuit. In one 2007 email, an eBay recruiter confirmed that the message to Intuit candidates should be that eBay was ''not allowed to hire from Intuit per Scott Cook regardless of whether the candidate applies directly or if we reach out.'' eBay recruiting personnel understood that ''Meg [Whitman] and Scott Cook entered into the agreement (handshake style, not written) that eBay would not hire from Intuit, period.'' Mr. Cook and Intuit, on the other hand, agreed that Intuit would not recruit from eBay. Mr. Cook explained to one applicant who had decided to work for eBay but expressed a future interest in joining Intuit, that ''Intuit is precluded from recruiting you'' unless eBay has decided it does not need the employee or where the employee informs his management and then proactively contacts Intuit.

22. eBay insisted that Intuit refrain from recruiting its employees in exchange for the limitation on eBay's ability to recruit and hire Intuit employees. On August 27, 2007, Ms. Axelrod wrote Ms. Whitman to complain that while eBay was sticking to its agreement not to hire Intuit employees, ''it is hard to do this when Intuit recruits our folks.'' Ms. Axelrod forwarded Ms. Whitman a recruiting flyer that Intuit had sent to an eBay employee. Ms. Whitman forwarded Ms. Axelrod's email to Mr. Cook the same day asking him to ''remind your folks not to send this stuff to eBay people.'' Mr. Cook responded quickly: ''#@!%$#^&!!! Meg my apologies. I'll find out how this slip up occurred again. . . .''

23. Throughout the course of the agreement, eBay repeatedly declined opportunities to hire or interview Intuit employees, even when eBay had open positions for ''quite some time,'' when the potential employee ''look[ed] great,'' or when ''the only guy who was good was from [I]ntuit.'' eBay employees were instructed not to pursue potential hires that came from Intuit and to discard their resumes. When a candidate applied for a position and told eBay that she had left Intuit, Ms. Axelrod went so far as to write Mr. Cook to confirm that the applicant had, in fact, left the company.

24. The companies acknowledged that throughout the agreement, they ''passed'' on ''talented'' applicants, consistent with their anticompetitive agreement. The repeated requests from lower level employees at both companies to be allowed to recruit employees from the other firm demonstrates that the agreement denied employees the opportunity to compete for better job opportunities.

25. The agreement between eBay and Intuit remained in effect for at least some period of time after a United States Department of Justice investigation of agreements between technology companies that restricted hiring practices became public. One eBay employee asked another in June 2009 if she had been ''able to connect with Beth [Axelrod] re our policies around hiring from Intuit with respect to'' a former employee at eBay's PayPal division who ''wishes to return'' and noted press reports of the Department of Justice investigation. The employee responded: ''It's a no go . . . too

complicated. We should move to plan b.'' (Ellipses in original.)

Violation Alleged (Violation of Section 1 of the Sherman Act)

26. The United States hereby incorporates paragraphs 1 through 25.

27. eBay and Intuit are direct competitors for employees, including specialized computer engineers and scientists, covered by the agreement at issue here. eBay and Intuit entered into a naked no-solicitation and no-hire agreement, thereby reducing their ability and incentive to compete for employees. This agreement suppressed competition between eBay and Intuit, thereby limiting affected employees' ability to secure better compensation, benefits, and working conditions.

28. eBay's agreement with Intuit is per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. 1. No elaborate industry analysis is required to demonstrate the anticompetitive character of this agreement.

29. The no-solicitation and no-hire agreement between eBay and Intuit is also an unreasonable restraint of trade that is unlawful under Section 1 of the Sherman Act, 15 U.S.C. 1, under an abbreviated or ''quick look'' rule of reason analysis. The principal tendency of the agreement between eBay and Intuit is to restrain competition, as the nature of the restraint is obvious and the agreement has no legitimate pro-competitive justification. Even an observer with a rudimentary understanding of economics could therefore conclude the agreement would have an anticompetitive effect on employees and harm the competitive process.

Requested Relief

The United States requests that:

(A) The Court adjudge and decree that the Defendant's agreement with Intuit not to compete constitutes an illegal restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act;

(B) the Defendant be enjoined and restrained from enforcing or adhering to any existing agreement that unreasonably restricts competition for employees between it and anyone else;

(C) the Defendant be permanently enjoined and restrained from establishing any similar agreement unreasonably restricting competition for employees except as prescribed by the Court;

(D) the United States be awarded such other relief as the Court may deem just and proper to redress and prevent recurrence of the alleged violation and to dissipate the anticompetitive effects of the illegal agreement entered into by eBay and Intuit; and

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

Dated: April 19, 2013.

For Plaintiff United States Of America.
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EXHIBIT A

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Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. EBAY, INC., *Defendant.*

Case No. 12–CV–05869–EJD–PSG

COMPETITIVE IMPACT STATEMENT

Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

The United States brought this lawsuit against Defendant eBay Inc. (''eBay'') on November 16, 2012, to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. 1.[1] Section 1 of the Sherman Act outlaws ''[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.'' 15 U.S.C. 1. The Sherman Act is designed to ensure ''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, the lowest prices, the highest quality and the greatest material progress. . . .'' *National Collegiate Athletic Assn* v. *Board of Regents of Univ. of Okla.,* 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 4–5 (1958)).

The Complaint alleges that eBay entered an agreement with Intuit, Inc. (''Intuit''), pursuant to which each firm agreed to restrict certain employee recruiting and hiring practices. The two firms agreed not to recruit each other's employees, and eBay agreed not to hire Intuit employees. The effect of this agreement was to reduce competition for highly-skilled technical and other employees, diminish potential employment opportunities for those same employees, and interfere with the competitive and efficient functioning of the price-setting mechanism in the labor market that would otherwise have prevailed. The Complaint alleged the agreement is a naked restraint of trade and violates Section 1 of the Sherman Act, 15 U.S.C. 1.

[1] The United States filed an Amended Complaint on June 4, 2013. Am. Compl., *United States* v. *eBay Inc.,* No.12–cv–05869–EJD (N.D. Cal. filed June 4, 2013), ECF No. 36. All references to the Complaint refer to the Amended Complaint.

eBay filed a Motion to Dismiss (''Motion'') pursuant to Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted), arguing that the Complaint failed to allege (1) an actionable agreement between two separate and independent firms because the agreement was essentially the product of the relationship between eBay and one of its outside directors, Scott Cook, in his capacity as an eBay director and (2) harm to competition under a ''rule of reason'' analysis. Def.'s Mot. to Dismiss the Compl. Pursuant to FRCP 12(b)(6), & Mem. Of P. & A. In Support Thereof, *United States* v. *eBay Inc.,* ____ F. Supp. 2d ____, 2013 WL 5423734 (N.D. Cal. Sept. 27, 2013) (No.12–cv–05869–EJD), ECF No. 15.

In Opposition to the Motion, the United States maintained that the Complaint alleged facts to demonstrate that the agreement was between eBay and Intuit as two separate and independent firms (*i.e,* that Cook was acting in his capacity as Chairman of the Executive Committee of Intuit, Inc.), and that the alleged ''naked'' horizontal market allocation agreement was ''per se'' unlawful or, alternatively, unlawful under a ''quick-look'' rule of reason analysis, and thus a full rule of reason analysis was unnecessary. Opp'n of the United States to Def.'s Mot. to Dismiss Pursuant to FRCP Rule 12(b)(6), *United States* v. *eBay Inc.,* ____ F. Supp. 2d ____, 2013 WL 5423734 (N.D. Cal. Sept. 27, 2013) (No.12–cv–05869–EJD), ECF No. 24. After eBay's Reply brief and a hearing, the Court denied the motion to dismiss on September 27, 2013. *United States* v. *eBay Inc.,* ____ F. Supp. 2d ____, 2013 WL 5423734 (N.D. Cal. Sept. 27, 2013).

The Court found that the United States had alleged an actionable agreement between two separate firms, eBay and Intuit. *Id.* at *4. The Court, after noting that horizontal market allocation agreements typically constitute per se violations of Section 1, also found that the United States had adequately alleged a per se horizontal market allocation agreement. In doing so, the Court rejected eBay's contention that the fact that the alleged agreement involved a labor market should prevent the court from finding a ''classic'' horizontal market agreement that would warrant per se treatment. *Id.* at *5–6. The Court noted that eBay's argument that the alleged restraint was not naked as alleged by the United States but was ancillary to a legitimate business purpose could only be resolved after discovery. *Id.* at *6.

The United States today filed a Stipulation and proposed Final Judgment which would remedy the violation by enjoining eBay from enforcing any such agreements currently in effect, and prohibit eBay from entering similar agreements in the future. The United States and eBay have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation of the Antitrust Laws

eBay and Intuit compete to hire specialized computer engineers, scientists, and other categories of employees. According to eBay's Senior Vice President for Human Resources, and co-author of The War for Talent, soliciting the employees of other firms in similar industries is an important arena of competition. (Compl. ¶¶ 5, 10, 11.)

Beginning no later than 2006, and lasting at least until 2009, Intuit and eBay maintained an illegal agreement that restricted their ability to actively recruit employees from each other, and for some part of that time, further restricted eBay from hiring any employees from Intuit. The agreement covered all employees of both firms and was not limited by geography, job function, product group, or time period.

As the Complaint alleges, senior executives and directors at eBay and Intuit reached this express agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communications. For example, in November 2005, eBay Chief Operating Officer Maynard Webb asked Cook, Intuit's Founder and Chairman of its Board Executive Committee and an outside director of eBay, to enter into a no-solicitation agreement under which eBay would not actively recruit from Intuit; eBay would notify Intuit in advance before offering a position at the Senior Director level or above to an Intuit employee; and eBay would notify Intuit after making an offer below that level. Intuit rejected the proposal because it allowed eBay to hire Intuit employees without prior notice to Intuit. Cook wrote that Intuit did not recruit from board companies (i.e., the companies from which its outside directors came), ''period'' and ''[w]e're passionate on this.'' (Compl. ¶ 15.) Cook committed that Intuit would not make an offer to anyone from eBay without first notifying eBay. (Compl. ¶ 15.)

In December 2005, eBay Chief Executive Officer Meg Whitman and Cook again discussed their firms' competition for employees with an eye toward ending that competition entirely. (Compl. ¶ 16.) Ultimately, an agreement not to solicit each other's employees was put into effect. When eBay considered hiring an Intuit employee for an opening at Paypal, executives internally expected that Whitman ''will say hands off because Scott [Cook] insists on a no poach policy with Intuit.'' Whitman confirmed that eBay could not proceed without notifying Intuit. (Compl. ¶ 17.)

In April 2007, eBay and Intuit expanded their agreement to bar eBay from hiring any Intuit employees. Cook had complained to eBay about a potential offer to an Intuit employee who had approached eBay. Even when Intuit employees were well-suited for its positions, eBay refrained from hiring them due to its agreement with Intuit. (Compl. ¶¶ 19–20.) As eBay's Senior Vice President for Human Resources Beth Axelrod explained to recruiting staff, ''We have an explicit hands of[f] that we cannot violate with any Intuit employee. There is no flexibility on this.'' (Compl. ¶ 20.) When asked if the agreement meant that a ''person could NEVER be hired by eBay unless they quit Intuit first,'' Axelrod confirmed that this was the case. (Compl. ¶ 20.) In another email exchange, Axelrod explained that she was responding to all inquiries regarding hiring from Intuit by ''firmly holding the line and saying absolutely not (including to myself since their comp[ensation] and ben[efits] person is supposed to be excellent!).'' (Compl. ¶ 20.) eBay recruiting personnel understood that ''Meg [Whitman] and Scott Cook entered into the agreement (handshake style, not written) that eBay would not hire from Intuit, period.'' (Compl. ¶ 21.)

eBay insisted that Intuit refrain from recruiting its employees in exchange for a limitation on eBay's ability to recruit and hire Intuit employees. Both eBay and Intuit personnel policed adherence to the agreement. In 2007, Whitman complained to Cook that Intuit had solicited eBay's employees even though eBay was sticking to its agreement not to hire Intuit employees. Cook apologized, ''#@!%$#^&!!! Meg my apologies. I'll find out how this slip up occurred again . . . .'' (Compl. ¶ 22.)

Throughout the course of the agreement, eBay repeatedly declined opportunities to hire or interview Intuit employees, even when eBay had open

positions for ''quite some time,'' when the potential employee ''look[ed] great,'' or when ''the only guy who was good was from [I]ntuit.'' (Compl. ¶ 23.) Both Intuit and eBay acknowledged that throughout the agreement, they ''passed'' on ''talented'' applicants, consistent with their anticompetitive agreement. The repeated requests from lower level employees at both companies to be allowed to recruit employees from the other firm demonstrates that there were opportunities for employees to move between the two firms and that employees were denied those opportunities. (Compl. ¶ 24.)

The agreement harmed employees by depriving them of opportunities for better jobs with higher salaries and greater benefits at the other firm. (Compl. ¶¶ 1, 3, 11.) The agreement also distorted the competitive process in the labor markets in which eBay and Intuit compete. (Compl. ¶ 11.)

III. The Agreement Was a Naked Restraint and Not Ancillary To Achieving Legitimate Business Purposes

A. The Agreement Was a Naked Restraint of Trade That Is Per Se Unlawful Under Section 1 of the Sherman Act, 15 U.S.C. 1

The law has long recognized that ''certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'' *Northern Pac. Ry.,* 356 U.S. at 545; *accord, Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. 643, 646 n.9 (1980). Such naked restraints of competition among horizontal competitors (*i.e.,* agreements that have a pernicious effect on competition with no redeeming virtue), such as price-fixing or market allocation agreements, are deemed per se unlawful.

eBay's agreement with Intuit is a per se unlawful horizontal market allocation agreement under Section 1 of the Sherman Act. *See eBay, Inc., 2013 WL 5423734* at *5–*7 (in denying Defendant's Motion to Dismiss, the Court recognized that a horizontal market allocation typically constitutes a per se violation of Section 1 and that the facts alleged in the United States' Complaint taken as true ''suffice to state a horizontal market allocation agreement''). The two firms' concerted behavior both reduced their ability to compete for employees and disrupted the normal competitive mechanisms that allocate employees in labor markets. The market allocation agreement is facially anticompetitive because it clearly eliminated significant competition between the firms to attract technical and other employees. Overall, the agreement diminished competition to the detriment of the affected employees who likely were deprived of competitively important information and access to better job opportunities, as well as distorting competition in the labor market.

In analogous circumstances, the Sixth Circuit has held that an agreement among competitors not to solicit one another's customers was a per se violation of the antitrust laws. *U.S.* v. *Cooperative Theaters of Ohio, Inc.,* 845 F.2d 1367 (6th Cir. 1988). In that case, two movie theater booking agents agreed to refrain from actively soliciting each other's customers. Despite the defendants' arguments that they ''remained free to accept *unsolicited* business from their competitors' customers,'' *id.* (emphasis in original), the Sixth Circuit found their no-solicitation agreement'' was ''undeniably a type of customer allocation scheme which courts have often condemned in the past as a per se violation of the Sherman Act.'' *Id.* at 1373.

B. The Per Se Rule Against Naked Restraints of Trade Applies With Equal Force in Labor Markets

Market allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets, as anticompetitive agreements in both input and output markets create allocative inefficiencies.[2] Nor are labor markets treated differently than other input markets under the antitrust laws.

Accordingly, in denying eBay's Motion to Dismiss, the Court held in this case that the fact that the alleged market allocation occurs in an input market, *i.e.,* the employment market, did not, as a matter of law, prevent the Court from finding that the agreement as alleged amounts to a ''classic'' horizontal market division, and that antitrust law does not treat employment markets differently from other markets in this respect. See *eBay, Inc.,* 2013 WL 5423734 at *5.

The United States has previously challenged restraints on employment as per se illegal.[3] In fact, the restraint challenged here is broader than the no cold call restraints challenged in *United States* v. *Adobe Systems, Inc.* and the prohibition on counteroffers challenged in *United States* v. *Lucasfilm Ltd.,* because the conduct challenged here also prohibited eBay from hiring Intuit employees. The prohibition of hiring in its entirety renders the eBay-Intuit agreement, taken as a whole, more pernicious than previously-challenged agreements to refrain from cold-calling or counter-offering, and is also per se unlawful. *See National Soc'y of Prof. Engineers* v. *United States,* 435 U.S. 679, 695 (1978); *Harkins Amusement Enter., Inc.* v. *Gen. Cinema Corp.,* 850 F.2d 477, 487 (9th Cir. 1988).

C. The Unlawful Agreements Were Not Ancillary to a Legitimate Procompetitive Venture

An agreement that would normally be condemned as a per se unlawful restraint on competition may nonetheless be lawful if it is ancillary to a legitimate procompetitive venture and reasonably necessary to achieve the procompetitive benefits of the collaboration. Ancillary restraints therefore are not per se unlawful, but rather are evaluated under the rule of reason, which balances a restraint's procompetitive benefits against its anticompetitive effects.[4] To be

[2] In 1991, the Antitrust Division brought an action against conspirators who competed to procure billboard leases and who had agreed to refrain from bidding on each other's former leases for a year after the space was lost or abandoned by the other conspirator. *United States* v. *Brown,* 936 F.2d 1042 (9th Cir. 1991) (affirming jury verdict convicting defendants of conspiring to restrain trade in violation of 15 U.S.C. 1). The agreement was limited to an input market (the procurement of billboard leases) and did not extend to downstream sales (in which the parties also competed). In affirming defendants' convictions, the appellate court held that the agreement was per se unlawful, finding that the agreement restricted each company's ability to compete for the other's billboard sites and clearly allocated markets between the two billboard companies. A market allocation agreement between two companies at the same market level is a classic per se antitrust violation. *Id.* at 1045.

[3] In September 2010, the United States filed suit charging six high technology companies with a per se violation of Section 1 for entering bilateral agreements to prohibit each company from cold calling the other company's employees. *United States* v. *Adobe Sys., Inc., et al.;* Proposed Final Judgment and Competitive Impact Statement, 75 FR 60820, 60820–01 (Oct. 1, 2010); Final Judgment, *United States* v. *Adobe Sys., Inc., et al.,* 10–cv–1629 (D.D.C. Mar. 17, 2011), ECF No. 17. In December 2010, the United States filed suit charging Lucasfilm Ltd. with a per se violation of Section 1 for entering an agreement with Pixar to prohibit cold calling of each other's employees and setting forth anti-counteroffer rules that restrained bidding for employees. *United States* v. *Lucasfilm Ltd.;* Proposed Final Judgment and Competitive Impact Statement, 75 FR 81651–01 (Dec. 28, 2010); Order, *United States* v. *Lucasfilm Ltd.,* 10–cv–2220 (D.D.C. June 3, 2011), ECF No. 7.

[4] *See generally* Department of Justice, Antitrust Division, and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* § 1.2 (2000) (''*Collaboration Guidelines*''). *See also Major League Baseball* v. *Salvino,* 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) (''a per se

considered ''ancillary'' under established antitrust law, however, the restraint must be a necessary or intrinsic part of the procompetitive collaboration.[5] Restraints that are broader than reasonably necessary to achieve the efficiencies from a business collaboration are not ancillary and are properly treated as per se unlawful.

The Division saw no evidence of a relevant legitimate collaborative project involving eBay and Intuit, nor was the recruiting agreement into which they entered, under established antitrust law, properly ancillary to any such collaboration if it existed. The agreement extended to all employees at the firms, regardless of any employee's relationship to any collaboration. The agreement was not limited by geography, job function, product group, or time period. Accordingly, the agreement was not reasonably necessary for any collaboration between the two firms and hence, not a legitimate ancillary restraint.

IV. Explanation of the Proposed Final Judgment

The proposed Final Judgment sets forth (1) conduct in which eBay may not engage; (2) conduct in which eBay may engage without violating the proposed Final Judgment; (3) certain actions eBay is required to take to ensure compliance with the terms of the proposed Final Judgment; and (4) oversight procedures the United States may use to ensure compliance with the proposed Final Judgment. Section VI of the proposed Final Judgment provides that these provisions will expire five years after entry of the proposed Final Judgment.

A. Prohibited Conduct

The proposed Final Judgment is essentially the same as that entered in *United States* v. *Adobe Sys., Inc., et al.;* Proposed Final Judgment and Competitive Impact Statement, 75 FR 60820, 60820–01 (Oct. 1, 2010). Section IV of the proposed Final Judgment preserves competition for employees by prohibiting eBay, and all other persons in active concert or participation with eBay with notice of the Final Judgment, from agreeing, or attempting to agree, with another person to refrain from cold calling, soliciting, recruiting, hiring or otherwise competing for employees of the other person. It also prohibits eBay from requesting or pressuring another person to refrain from cold calling, soliciting, recruiting, hiring or otherwise competing for employees of the other person. These provisions prohibit agreements not to make counteroffers and agreements to notify each other when making an offer to each other's employee.

B. Conduct Not Prohibited

The Final Judgment does not prohibit all agreements related to employee solicitation and recruitment. Section V makes clear that the proposed Final Judgment does not prohibit ''no direct solicitation provisions'' [6] that are reasonably necessary for, and thus ancillary to, legitimate procompetitive collaborations.[7] Such restraints remain subject to scrutiny under the rule of reason.

Section V.A.1 does not prohibit no direct solicitation provisions contained in existing and future employment or severance agreements with eBay's employees. Narrowly tailored no direct solicitation provisions are often included in severance agreements and rarely present competition concerns. Sections V.A.2–5 also make clear that the proposed Final Judgment does not prohibit no direct solicitation provisions reasonably necessary for:

1. Mergers or acquisitions (consummated or unconsummated), investments, or divestitures, including due diligence related thereto;

2. contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers;

3. the settlement or compromise of legal disputes; and

4. contracts with resellers or OEMs; contracts with certain providers or recipients of services; or 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.

Section V of the proposed Final Judgment contains additional requirements applicable to no direct solicitation provisions contained in these types of contracts and collaboration agreements. The proposed Final Judgment recognizes that eBay may sometimes enter written or unwritten contracts and collaboration agreements and sets forth requirements that recognize the different nature of written and unwritten contracts.

Thus, for written contracts, Section V.B of the proposed Final Judgment requires eBay to: (1) Identify, with specificity, the agreement to which the no direct solicitation provision is ancillary; (2) narrowly tailor the no direct solicitation provision to affect only employees who are anticipated to be directly involved in the arrangement; (3) identify with reasonable specificity the employees who are subject to the no direct solicitation provision; (4) include a specific termination date or event; and (5) sign the agreement, including any modifications to the agreement.

If the no direct solicitation provision relates to an oral agreement, Section V.C of the proposed Final Judgment requires eBay to maintain documents sufficient to show the terms of the no direct solicitation provision, including: (1) The specific agreement to which the no direct solicitation provision is ancillary; (2) an identification, with reasonable specificity, of the employees who are subject to the no direct solicitation provision; and (3) the no direct

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or quick look approach may apply . . . where a particular restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as a naked restraint against competition.''); *Dagher* v. *Saudi Refining, Inc.,* 369 F.3d 1108, 1121 (9th Cir. 2004) (describing ancillary restraints as ''reasonably necessary to further the legitimate aims of the joint venture''); *rev'd on other grounds sub nom. Texaco* v. *Dagher,* 547 U.S. 1, 8 (2006); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.,* 792 F.2d 210, 227 (D.C. Cir. 1986) (''[T]he restraints it imposes are reasonably necessary to the business it is authorized to conduct''); *In re Polygram Holdings., Inc.,* 2003 WL 21770765 (F.T.C. 2003) (stating that parties must prove that the restraint was ''reasonably necessary'' to permit them to achieve particular alleged efficiency), *aff'd, Polygram Holdings, Inc.* v. *F.T.C.,* 416 F.3d 29 (D.C. Cir. 2005).

[5] *See Rothery Storage & Van Co.,* 792 F.2d at 227 (national moving network in which the participants shared physical resources, scheduling, training, and advertising resources, could forbid contractors from free riding by using its equipment, uniforms, and trucks for business they were conducting on their own); *Salvino,* 542 F.3d at 337 (Sotomayor, J., concurring) (Major League Baseball teams' formal joint venture to exclusively license, and share profits for, team trademarks, resulted in ''decreased transaction costs, lower enforcement and monitoring costs, and the ability to one-stop shop. . . .'' and such benefits ''could not exist without the . . . agreements.''); *Addamax* v. *Open Software Found.,* 152 F.3d 48 (1st Cir. 1998) (computer manufacturers' nonprofit joint research and development venture agreement on price to be paid for security software that was used by the joint venture was ancillary to effort to develop a new operating system). *See also Collaboration Guidelines* at § 3.2 (''[I]f the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then . . . the agreement is not reasonably necessary.'').

[6] Section II.C. of the proposed Final Judgment defines ''no direct solicitation provision'' as ''any agreement, or part of an agreement, among two or more persons that restrains any person from hiring, cold calling, soliciting, recruiting, or otherwise competing for employees of another person.''

[7] The Complaint alleges a violation of the Sherman Antitrust Act, 15 U.S.C. 1. The scope of the Final Judgment is limited to violations of the federal antitrust laws. It prohibits certain conduct and specifies other conduct that the Judgment would not prohibit. The Judgment does not address whether any conduct it does not prohibit would be prohibited by other federal or state laws, including California Business & Professions Code § 16600 (prohibiting firms from restraining employee movement).

solicitation provision's specific termination date or event.[8]

The purpose of Sections V.B. and V.C. is to ensure that no direct solicitation provisions related to eBay's contracts with resellers, OEMs, and providers of services, and collaborations with other companies, are reasonably necessary to the contract or collaboration. In addition, the requirements set forth in Sections V.B and V.C of the proposed Final Judgment provide the United States with the ability to monitor eBay's compliance with the proposed Final Judgment.

eBay has a number of routine consulting and services agreements that contain no direct solicitation provisions that may not comply with the terms of the proposed Final Judgment. To avoid the unnecessary burden of identifying these existing contracts and re-negotiating any no direct solicitation provisions, Section V.D of the proposed Final Judgment provides that eBay shall not be required to modify or conform existing no direct solicitation provisions included in consulting or services agreements to the extent such provisions violate this Final Judgment. The Final Judgment further prohibits eBay from enforcing any such existing no direct solicitation provision that would violate the proposed Final Judgment.

Finally, Section V.E of the proposed Final Judgment provides that eBay is not prohibited from unilaterally adopting or maintaining a policy not to consider applications from employees of another person, or not to solicit, cold call, recruit or hire employees of another person, provided that eBay does not request or pressure another person to adopt, enforce, or maintain such a policy.

C. Required Conduct

Section VI of the proposed Final Judgment sets forth various mandatory procedures to ensure eBay's compliance with the proposed Final Judgment, including providing officers, directors, human resource managers, and senior managers who supervise employee recruiting with copies of the proposed Final Judgment and annual briefings about its terms. Section VI.A.5 requires eBay to provide its employees with reasonably accessible notice of the existence of all agreements covered by Section V.A.5 and entered into by the company.

Under Section VI, eBay must file annually with the United States a statement identifying any agreement covered by Section V.A.5., and describing any violation or potential violation of the Final Judgment known to any officer, director, human resources manager, or senior manager who supervises employee recruiting, solicitation, or hiring efforts. If one of these persons learns of a violation or potential violation of the Judgment, eBay must take steps to terminate or modify the activity to comply with the Judgment and maintain all documents related to the activity.

D. Compliance

To facilitate monitoring of eBay's compliance with the proposed Final Judgment, Section VII grants the United States access, upon reasonable notice, to eBay's records and documents relating to matters contained in the proposed Final Judgment. eBay must also make its employees available for interviews or depositions about such matters. Moreover, upon request, eBay must answer interrogatories and prepare written reports relating to matters contained in the proposed Final Judgment.

V. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. 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 that may be brought against eBay.

On the same date and in the same court this case was filed by the United States, the State of California filed a related case based on the same factual allegations, *The People of the State of California* v. *eBay, Inc.,* No. 12–cv–5874–EJD (N.D. Cal. filed November 16, 2012). On the same date that the United States filed its proposed final judgment in this case, the State of California filed a proposed *parens patriae* settlement which would provide up to $2.675 million in restitution directly to individuals and to compensate for harm to the state's economy.

VI. Procedures Applicable for Approval or Modification of the Proposed Final Judgment

The United States and eBay have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: James J. Tierney, Chief, Networks & Technology Enforcement Section, Antitrust Division, United States Department of Justice, 450 Fifth Street NW., Suite 7100, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VII. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against eBay. The United States is satisfied, however, that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure that employees can benefit from competition between eBay and others. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

[8] For example, eBay might document these requirements through electronic mail or in memoranda that it will retain.

VIII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the United States is entitled to ''broad discretion to settle with the Defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable'').[9]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is '*within the reaches of the public interest.*' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[10] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

In addition, ''a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *American Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged.''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d. at 1459–60. Courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of

[9] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[10] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '').

prompt and less costly settlement through the consent decree process.'' 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[11]

IX. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that the United States considered in formulating the proposed Final Judgment.

Dated: May 1, 2014.

For Plaintiff United States of America.

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EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff,
v.
EBAY INC., Defendant.

Case No. 12–CV–05869–EJD–PSG

[PROPOSED] FINAL JUDGMENT

[Proposed] Final Judgment

WHEREAS, the United States of America filed its Complaint on November 16, 2012, alleging that the Defendant participated in an agreement in violation of Section One of the Sherman Act, and the United States and the Defendant, by their attorneys, have consented to the entry of this Final Judgment without trial or further adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any admission by the Defendant that the law has been violated or of any issue of fact or law;

AND WHEREAS, the Defendant agrees 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 further adjudication of any issue of fact or law, and upon consent of the Defendant, it is ORDERED, ADJUDGED, AND DECREED:

I. Jurisdiction

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

II. Definitions

As used in this Final Judgment:

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

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

C. ''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, hiring, or otherwise competing for employees of another person.

D. ''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.

E. ''Senior manager'' means any company officer or employee above the level of vice president.

III. Applicability

This Final Judgment applies to eBay, as defined in Section II, and to all other persons in active concert or participation with eBay who receive actual notice of this Final Judgment by personal service or otherwise.

IV. Prohibited Conduct

The 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 hiring, soliciting, cold calling, recruiting, or otherwise competing for employees of the other person.

V. Conduct Not Prohibited

A. Nothing in Section IV shall prohibit the 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 the 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 the Defendant enters into,

[11] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

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. The Defendant 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 the Defendant's consulting or services agreements in effect as of the date of this Final Judgment (or in effect as of the time the Defendant acquires a company that is a party to such an agreement).

E. Nothing in Section IV shall prohibit the 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 the Defendant is prohibited from requesting that any other person adopt, enforce, or maintain such a policy, and is prohibited from pressuring any other person to adopt, enforce, or maintain such a policy.

VI. Required Conduct

A. The Defendant shall:

1. Furnish a copy of this Final Judgment and related Competitive Impact Statement within sixty (60) days of entry of the Final Judgment to its 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 (30) 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 sixty (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 the 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, the 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 the Defendant learns of any violation or potential violation of any of the terms and conditions contained in this Final Judgment, the 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 the Defendant, subject to any legally recognized privilege, be permitted:

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

2. to interview, either informally or on the record, the 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 the Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, the 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 the 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 EBay): 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.

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

United States District Judge

[FR Doc. 2014–11056 Filed 5–13–14; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Virtual Public Meeting of the Advisory Committee on Apprenticeship (ACA)

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice of a virtual public meeting.

SUMMARY: Pursuant to Section 10 of the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2 § 10), notice is hereby given to announce an open virtual meeting of the Advisory Committee on Apprenticeship (ACA) on Tuesday, June 3, 2014, which can be accessed from the Office of Apprenticeship's homepage: *http://www.doleta.gov/oa/*. The ACA is a discretionary committee established by the Secretary of Labor, in accordance with FACA, as amended in 5 U.S.C. App. 2, and its implementing regulations (41 CFR 101–6 and 102–3). All meetings of the ACA are open to the public. A virtual meeting of the ACA provides a cost savings to the government while still offering a venue that allows for public participation and transparency, as required by FACA.

DATES: The meeting will begin at approximately 12:30 p.m. Eastern Standard Time on Tuesday, June 3, 2014, and will adjourn at approximately 4:30 p.m. The meeting is being held virtually. Dial-in instructions will be posted on the Office of Apprenticeship's homepage at *http://www.doleta.gov/oa,* as well as any updates to the agenda and meeting logistics.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Official, Mr. John V. Ladd, Administrator, Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–5311, Washington, DC 20210, Telephone: (202) 693–2796 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: In order to promote openness, and increase public participation, webinar and audio conference technology will be used throughout the meeting. Webinar and audio instructions will be prominently posted on the Office of Apprenticeship homepage: *http://www.doleta.gov/oa/.* Members of the public are encouraged to attend the meeting virtually. For members of the public wishing to attend in person, a listening room, with limited seating, will be made available upon request. Members of the public that have made requests to attend in person are encouraged to arrive early to allow for security clearance into the Francis Perkins Building.

Security and Transportation Instructions for the Frances Perkins Building

Meeting participants should use the visitor's entrance to access the Frances Perkins Building, one block north of Constitution Avenue on 3rd and C Streets NW. For security purposes meeting participants must:

1. Present valid photo identification (ID) to receive a visitor badge.

2. Know the name of the event you are attending: the meeting event is the Advisory Committee on Apprenticeship meeting.

3. Visitor badges are issued by the security officer at the Visitor Entrance located at 3rd and C Streets NW., as described above.

4. Laptops and other electronic devices may be inspected and logged for identification purposes.

5. Due to limited parking options, Metro rail is the easiest way to travel to the Frances Perkins Building. For individuals wishing to take metro rail, the closest metro stop to the building is Judiciary Square on the Red Line.

Notice of Intent To Attend the Meeting

1. All meeting participants are being asked to submit a notice of intent to attend by Tuesday, May 20, 2014, via email to Mr. John V. Ladd at *oa.administrator@dol.gov,* with the subject line ''June 2014 Virtual ACA Meeting.''

2. Please indicate if you will be attending virtually, or in person, to ensure adequate space is arranged to accommodate all meeting participants.

3. If individuals have special needs and/or disabilities that will require special accommodations, please contact Kenya Huckaby on (202) 693–3795 or via email at *huckaby.kenya@dol.gov* no later than Tuesday, May 20, 2014.

4. Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. John V. Ladd via email at *oa.administrator@dol.gov,* subject line ''June 2014 Virtual ACA Meeting,'' or to the Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue NW., Washington, DC 20210. Such submissions will be included in the record for the meeting if received by Tuesday, May 20, 2014.

5. See below regarding members of the public wishing to speak at the ACA meeting.

Purpose of the Meeting and Topics To Be Discussed

The primary purpose of the meeting is to discuss and focus on committee updates and several recent initiatives impacting the national Registered Apprenticeship system. The meeting agenda will include the following topics:

- Updates on the American Apprenticeship Grant Initiative
- Report Outs and Updates from Workgroups
- Plans for Manufacturing Focused Meeting in September 2014
- Status and Activity of Committee after June 2014
- Other Matters of Interest to the Apprenticeship Community
- Public Comment
- Adjourn