CASE NO. 14-72745

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE ADOBE SYSTEMS, INC.,
APPLE, INC., GOOGLE, INC., and INTEL CORP.

ADOBE SYSTEMS, INC., APPLE INC., GOOGLE INC., and INTEL CORP., Defendants-Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent,

MICHAEL DEVINE, MARK FICHTNER, SIDDHARTH HARIHARAN, BRANDON MARSHALL, and DANIEL STOVER,
Plaintiffs - Real Parties in Interest.

From the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

RESPONSE OF PLAINTIFF AND REAL PARTY IN INTEREST MICHAEL DEVINE TO PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

Michael Devine is a named plaintiff and class representative who objected to the proposed settlement with Apple, Google, Intel and Adobe that the district court declined to preliminarily approve. He opposes the defendants' petition for a writ of mandamus on two grounds.

First, the petition should be dismissed because it is moot and the Court therefore lacks jurisdiction to entertain it. The parties agreed that if the district court denied preliminary approval of the settlement, "the case will proceed as if no settlement had been attempted." The Settlement Agreement therefore expired when the district court denied preliminary approval. The Court cannot order the district court to enter preliminary approval of an expired settlement. The petition must be dismissed.

Second, the petition should be denied because the defendants have not established any basis for this Court to undertake the "drastic and extraordinary" remedy of mandamus relief. The district court had broad discretion to deny preliminary approval, and exercised that discretion appropriately in finding that the settlement did not fall "within the range of reasonableness." Because the district court's application of the well-established test for preliminary approval to the unique facts and circumstances of this case was not clearly erroneous and does not establish a need for mandamus review, the petition must be denied.

BACKGROUND

I. Plaintiffs' Allegations

The named plaintiffs are software engineers who were former employees of the defendants, leading high tech companies Apple, Google, Intel, Adobe, Pixar, Lucasfilm and Intuit. They allege the defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1 and the Cartwright Act, Cal. Bus. & Prof. Code § 16720, et seq., by entering into illegal agreements (1) not to recruit each other's employees; (2) to notify each other when making an offer to another's employee; and (3) that, when offering a position to another company's employee, neither company would counteroffer above the initial offer. ECF No. 65, ¶¶ 55-107. Plaintiffs contend that as a result of the defendants' illegal conduct, they and the class members suffered damages in the amount of $3.05 billion. ECF No. 856-10. Were plaintiffs to prevail at trial, and the jury to accept their damages model, the recovery would be trebled to $9.15 billion. 15 U.S.C. § 15(a).

II. Plaintiffs Settle With Pixar, Lucasfilm and Intuit

Nearly a year before the settlement at issue in this petition, the plaintiffs negotiated settlements with Pixar, Lucasfilm and Intuit. *See* ECF No. 540. These defendants, whose employees accounted for fewer than 8% of class members and who paid approximately 5% of the total compensation paid to class members during the time period at issue, agreed to pay a total of $20 million to resolve the

claims against them. ECF No. 915 at 3:22-26. In granting final approval of the settlements, the district court cited "the risks, expense, complexity, and likely duration of further litigation," noting that the court had largely denied plaintiffs' motion for class certification and "there was no guarantee the Court would certify a Class or, if so, whether certification would survive Fed. R. Civ. Proc. 23(f) review." *Id.* at 3:1-7. The court also noted that the plaintiffs "faced substantial challenges to the admissibility and reliability of their expert opinions on antitrust impact and damages at the time these Settlements were reached." *Id.* at 3:7-8.

III. Plaintiffs' Proposed Settlement With Apple, Google, Intel and Adobe

On October 24, 2013, after the settlement with Pixar, Lucasfilm and Intuit, the district court issued an 86-page order certifying a class of the defendants' technical employees. ECF No. 531. In its order, the court discussed the plaintiffs' evidence at length, described it as "voluminous," "comprehensive," "extensive," "copious," and "compelling," and observed that "[t]his Court could not identify a case at the class certification stage with the level of documentary evidence Plaintiffs have presented in the instant case." *Id.* at 19 n.7, 25, 32, 51, 65, 66, 68, 69, 70, 74, 75, 83, 84. The district court also denied the defendants' five motions for summary judgment and denied the defendants' motion to exclude the testimony of the plaintiffs' expert on antitrust impact and damages. ECF Nos. 771, 788. This Court denied the defendants' Rule 23(f) petition. ECF No. 594.

In April 2014, class counsel and counsel for Apple, Google, Intel and Adobe informed the court that they had reached a settlement. ECF No. 900. The four defendants agreed to pay a total of $324.5 million. *See* Ex. A at 6 (§ I.A.29). Mr. Devine did not agree to the settlement, even though he would have been eligible for an $80,000 incentive award. ECF No. 920 at 9. After the plaintiffs filed their motion for preliminary approval, Mr. Devine retained new counsel and filed a brief in opposition to the motion for preliminary approval in which he argued that, based on a comparison of the strength of the case relative to the risks of continued litigation, the settlement amount was insufficient to fairly compensate class members and deter similar unlawful conduct in the future. ECF No. 934.

IV. The District Court's Denial of Preliminary Approval

Following a ninety-minute hearing, the district court issued an order denying the motion for preliminary approval of the settlement. ECF No. 974. In a 32-page order, the court compared the settlement with the earlier settlements in light of the risks the parties faced at the time each was negotiated (pages 7-10); analyzed the strength of the plaintiffs' case, discussing specific documentary evidence and deposition testimony bearing on the potential liability of each defendant (pages 10-27); and evaluated the weaknesses in the plaintiffs' case identified by class counsel (pages 27-30). The court concluded that the proponents of the settlement had not established that the settlement fell within the range of reasonableness, given the

strength of the evidence: "This Court has lived with this case for nearly three years, and during that time, the Court has reviewed a significant number of documents in adjudicating not only the substantive motions, but also the voluminous sealing requests. Having done so, the Court cannot conclude that the instant settlement falls within the range of reasonableness." *Id.* at 30:18-20.

ARGUMENT

I. The Petition Should Be Dismissed Because the Settlement Agreement Expired When the District Court Denied Preliminary Approval

The petition should be dismissed as moot because the plaintiffs and defendants Apple, Google, Intel and Adobe agreed that if the district court denied preliminary approval the case would proceed as if no settlement had been attempted. Section II.B.4 of the Settlement Agreement states:

> If the Court denies without leave to re-file the motion for Preliminary Approval the case will proceed as if no settlement had been attempted, and the Settling Parties shall be returned to their respective procedural postures, i.e., *status quo* as of April 24, 2014, so that the Settling Parties may take such litigation steps that Plaintiffs or the Settling Defendants otherwise would have been able to take absent the pendency of this Settlement Agreement. In the event the Settlement does not receive Preliminary Approval, the Settling Parties will negotiate and submit for Court approval a modified case schedule.

Ex. A at 8. There is no dispute that the district court denied the motion for preliminary approval without leave to re-file. And after the district court denied preliminary approval, the parties negotiated and submitted a modified case

schedule for Court approval. *See* ECF No. 981.

Under the Settlement Agreement's termination clause, the settlement expired on August 8, 2014, when the district court entered its order. There is no "meaningful relief" this Court can grant because there is no longer a settlement agreement in force between the parties. *See Southern Cal. Painters & Allied Trades v. Rodin & Co.*, 558 F.3d 1028, 1035 (9th Cir. 2009) (holding that "there is no longer a 'substantial controversy' for this court to resolve and no 'occasion for meaningful relief'" regarding a request for enforcement of "an expired agreement") (citation omitted); *see also Joc Inc. v. ExxonMobil Oil Corp.*, 507 F. App'x 208, 210 (3d Cir. 2012) (dismissing an appeal as moot where the parties' franchise contract had terminated and "because there is no longer any franchise to terminate or to save, we cannot grant either party effective relief"). Because the defendants cannot obtain the relief they seek—entry of an order granting preliminary approval of the settlement—their petition is moot and must be dismissed for lack of jurisdiction. *See Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999) ("If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction.").

By negotiating and submitting a modified case schedule for Court approval, the defendants have acknowledged that section II.B.4 was triggered by the district court's denial of preliminary approval. *See City of Hope Nat'l Med. Center v.*

Genentech, Inc., 181 P.2d 142, 155 (Cal. 2008) ("A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean."). Nonetheless, the defendants assert that they can appeal the district court's denial of preliminary approval because the Settlement Agreement is only ineffective if preliminary approval is denied "*finally*, after appellate review is exhausted." *See* Ex. C. But that is not what the parties bargained for and is not what the Settlement Agreement says. Section II.B.4 does not mention "*final*" denial of preliminary approval or contemplate appellate review of the district court's order. Instead, it provides that "the case will proceed as if no settlement has been attempted" if "the Court" denies preliminary approval, and "Court" is defined as "the United States District Court for the Northern District of California." Ex. A at 4 (§ I.A.8); *see also In re Stock Exchanges Options Trading Antitrust Litig.*, 2005 WL 1635158, at *5-7 (S.D.N.Y. July 8, 2005) (refusing "[t]o imply a clause such as 'unless vacated on appeal'" in a similar provision of a settlement agreement).

In addition to being contrary to the plain language of the agreement and the parties' conduct, the post hoc interpretation urged by the defendants makes no sense given the procedural context in which the Settlement Agreement was negotiated. *See* Cal. Civ. Code § 1647 ("A contract may be explained by the circumstances under which it was made, and the matter to which it relates."). As

the defendants acknowledge, orders granting or denying preliminary approval of class settlements are by their nature interlocutory and no appellate court has addressed, much less reversed, a district court's denial of preliminary approval. Since district courts retain discretion to disapprove a settlement at final approval, there is little point in undergoing the cost and delay of a lengthy appeal after denial of preliminary approval. For that reason, when courts deny preliminary approval, the parties either resume litigating the case or renegotiate the settlement. *See, e.g.*, *Tijero v. Aaron Brothers, Inc.*, 2013 WL 6700102, at *1-2 (N.D. Cal. Dec. 19, 2013) (granting preliminary approval to a proposed settlement that was revised by the parties after the court denied preliminary approval); *Fraley v. Facebook, Inc.*, 2012 WL 6013427, at *1 (N.D. Cal. Dec. 3, 2012) (same). The language of section II.B.4 is not reasonably susceptible to the interpretation proffered by the defendants,[1] particularly since an implied appellate process is inconsistent with the parties' agreement to return to litigation.

The defendants contend that *Gibson v. HoMedics, Inc.*, 2014 WL 2757585 (Cal. Ct. App. June 18, 2014), supports their position, but there was no analogous settlement term at issue in that case. At issue in *Gibson* was a provision that said

[1] *See Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1015 (9th Cir. 2012). If the Court finds that the language of section II.B.4 is reasonably susceptible to more than one interpretation, it should remand so the district court can consider extrinsic evidence of the parties' intent. *See Trident Center v. Conn. General Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988); *see also* Ex. A at 28 (§ VIII.L).

that if the trial court did not grant final approval of the settlement, "the court's *conditional certification of the settlement class* 'shall be deemed null and void, and each Party shall retain all of their respective rights as they existed prior to execution of [the settlement agreement].'" *Id.* at *5 (emphasis added). The court of appeal held that this provision "provided only that the court's conditional class certification shall be null and void" but did "*not* provide that all of the parties' obligations under the [settlement agreement] are null and void if the court does not grant final approval." *Id.* Another provision stated that "[i]n the event that this Settlement is not approved, … the [settlement agreement] shall be deemed null, void, and unenforceable." *Id.* But this provision set no deadline for final approval and the appellate court therefore held that "it cannot reasonably be construed that the parties' mutual obligations under the [settlement agreement] to cooperate and take all necessary and appropriate steps became unenforceable on the trial court's initial denial of final approval," particularly since the trial court only denied final approval because the plaintiff failed to submit a written order for preliminary approval and rescheduled the final approval hearing without notice. *Id.* at *2, 5.

In contrast to the settlement terms at issue in *Gibson*, the parties in this case negotiated a provision that extinguished the Settlement Agreement upon the district court's denial of preliminary approval by agreeing that under those circumstances "the case will proceed as if no settlement had been attempted." The

defendants also rely on section VIII.A of the Settlement Agreement, which provides that "[i]n the event that the Settlement Agreement is terminated, is not finally approved or does not become effective for any reason, judgment is not entered in accordance with this Agreement, or such judgment does not become final, then (a) this Settlement Agreement shall be null and void and of no force and effect …." Ex. A at 8. But the fact that the parties used slightly different language in this separate provision addressing the failure to obtain *final approval* of the settlement does not impact the plain meaning of the language of section II.B.4. The defendants have also argued that the implied covenant of good faith and fair dealing requires the plaintiffs who are parties to the Settlement Agreement (which does not include Mr. Devine) to support their petition, but implied contractual terms cannot contradict or vary express contractual terms. *See Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.*, 826 P.2d 710, 728 (Cal. 1992) ("implied terms should never be read to vary express terms"). Nor is this a case in which an exception to mootness applies. The "capable of repetition, yet evading review" exception "'applies only when (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, *and* (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.'" *Foster v. Carson*, 347 F.3d 742, 746 (9th Cir. 2003) (citation omitted). There is no reasonable expectation that the defendants will be subjected

to the same action again, since in the future they may negotiate a provision that allows for appellate review of the district court's denial of preliminary approval before the agreement is terminated.

II. Alternatively, the Petition Should Be Denied Because Defendants Have Established No Basis for the Mandamus Relief

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. United States District Court for D.C.*, 542 U.S. 367, 380 (2004) (citation omitted). It "may be obtained only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc) (citation omitted). The Court has established five guidelines to consider in determining whether mandamus is appropriate:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

A. The District Court's Order Is Not Clearly Erroneous

The third factor—whether the district court committed a clear error as a matter of law—"is a necessary condition for granting a writ of mandamus." *In re*

Van Dusen, 654 F.3d 838, 841 (9th Cir. 2011) ("We begin by considering the third Bauman factor, clear error, because the absence of this factor will defeat a petition for mandamus."). This Court finds a district court's order to be "'clearly erroneous as a matter of law as that term is used in mandamus analysis … only when, after a full review of the authorities, we are firmly convinced that the district court's interpretation was incorrect.'" *Stanley v. Chappell*, 764 F.3d 990, 996 (9th Cir. 2014) (alteration in original) (citation omitted); *see also Wilson v. United States District Court for Eastern District of Cal.*, 103 F.3d 828, 830 (9th Cir. 1996) ("[W]e will not grant mandamus relief simply because a district court commits an error, even one that would ultimately require reversal on appeal.").

1. The Approval or Rejection of a Class Settlement Is Committed to the Sound Discretion of the District Court

The defendants cannot show that the district's order is clearly erroneous as a matter of law because the "decision to approve or reject a settlement proposal is committed to the sound discretion of the district court judge." *Officers for Civil Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982). The Supreme Court instructs that it is generally inappropriate to use mandamus to review a district court's discretionary order. *See Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964) ("The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'") (citation omitted). A party seeking mandamus relief has "the

burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). But "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (citation omitted). Thus, "mandamus is generally not available to correct the erroneous discretionary decisions of the district courts." *United States v. Mehrmanesh*, 652 F.2d 766, 773 (9th Cir. 1980)). As this Court explained, "It is not our function to substitute our decision for that of the judge most familiar with the problem." *Wash. Public Utilities Group v. U.S. Dist. Court for W. Dist. of Wash.*, 843 F.2d 319, 324 (9th Cir. 1987) (citation omitted).

This Court will only find an abuse of discretion if the district court made "an error of law" or if its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 577 (1985)). In other words, "[u]nder abuse-of-discretion review we 'must affirm unless the district court applied the wrong legal standard or its findings of fact were illogical, implausible, or without support in the record.'" *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157, 1162 (9th Cir. 2013) (citation omitted) (addressing final approval of a class settlement).

2. The District Court Used a Well-Established Test in Evaluating the Motion for Preliminary Approval

The defendants acknowledge that "this Court has never articulated the standard governing preliminary approval." Pet. at 2.[2] The district courts in this Circuit, however, consistently employ a standard that considers whether the settlement "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval" or "within the range of reasonableness." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007) (citing Manual for Complex Litigation § 30.44 (2d ed. 1985)). In fact "[c]ourts in most circuits use some variation of this test," which "grew out of a statement in an early version of the Manual for Complex Litigation." William B. Rubenstein, Newberg on Class Actions § 13:13 (5th ed. 2014) (citation omitted); *see also* 2 McLaughlin on Class Actions § 6:7 (10th ed. 2013) ("Generally, a proposed settlement will be preliminarily approved unless there are obvious defects in the notice or other

[2] The defendants' petition can be denied on this basis alone, since "[t]he absence of controlling precedent weighs strongly against a finding of clear error." *Van Dusen*, 654 F.3d at 845; *see also In re Morgan*, 506 F.3d 705, 713 (9th Cir. 2007) (holding that the district court's error was not "clear error" because "no prior Ninth Circuit authority prohibited the course taken by the district court"); *see also Medhekar v. United States District Court for N. Dist. of Cal.*, 99 F.3d 325, 327 (9th Cir. 1996) ("Because this is a question of first impression not yet addressed by any circuit court in a published opinion, petitioners cannot satisfy the third and fourth Bauman factors, requiring a showing of a clear or oft-repeated error by the district court.").

technical flaws, or the settlement is outside the range of reasonableness or appears to be the product of collusion, rather than arms-length negotiation.").

The district court used the well-accepted test articulated in *In re Tableware* to determine whether the proposed settlement should be preliminarily approved. There was no suggestion of collusion or preferential treatment, so the district court's analysis focused on whether the settlement was "within the range of possible approval" or "within the range of reasonableness." In making this determination, courts focus on "substantive fairness and adequacy" and "consider plaintiffs' expected recovery balanced against the value of the settlement offer" as well as the risk and "anticipated expense and complexity of further litigation." *In re Tableware*, 484 F. Supp. 2d at 1080; *see also Cordy v. USS-Posco Industries*, 2014 WL 212587, at *3 (N.D. Cal. Jan. 17, 2014) (same). Courts have not hesitated to rely on extrinsic benchmarks, where they are available. *See, e.g., In re Netflix Privacy Litig.*, 2012 WL 2598819, at *2 (N.D. Cal. July 5, 2012) (finding that the relief "compares favorably to settlements in other online consumer privacy cases"); *Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 24-25 (D.D.C. 2011) ("The Court recognizes that the comparison of settlements in similar cases can be relevant when evaluating the fairness, adequacy, and reasonableness of a proposed settlement."); *see also* Newberg § 13:15 ("In ascertaining whether a settlement falls 'within the range of possible approval,' courts will compare the

settlement amount to the relief the class counsel expect to recover at trial," which "involves looking at the amount plaintiffs recovered in similar cases ….").

The district court determined that the proposed settlement did not fall "within the range of possible approval" for several reasons. First, the court compared it to the earlier settlements, determining that the $324.5 million settlement amount would have to be increased to at least $380 million to be proportional to the earlier $20 million settlements since Apple, Google, Intel and Adobe paid 95% of the total compensation paid to the class during the class period. ECF No. 974 at 7:13-24. The court observed that the plaintiffs "were at a particularly weak point in their case" when they negotiated the earlier settlements because the court had denied class certification. *Id.* at 9:22-24. The court concluded that the settling parties had not explained why the later settlements fell below the benchmark set by the prior settlements, given that the plaintiffs were negotiating from a position of much greater strength after obtaining class certification and defeating the defendants' five summary judgment motions, motion to exclude plaintiffs' expert on antitrust impact and damages, and Rule 23(f) petition. *Id.* at 9:19-10:20.

Also relevant to the court's analysis was the fact that the class members' potential recovery at trial could have exceeded $9 billion. *Id.* at 9:6-8. The plaintiffs' expert estimated the class members' damages at $3.05 billion, an

amount that would be automatically trebled to $9.15 billion if the plaintiffs prevailed at trial. *Id.* at 9:13-14. If the court approved the settlement, the total class recovery from all defendants of $344.5 million would amount to only 11.29% of the plaintiffs' estimated damages and 3.76% of trebled damages. *Id.* at 9:13-17.

The court discussed in great detail the documentary evidence and deposition testimony the parties had submitted in the course of briefing class certification, summary judgment, and other motions. *Id.* at 10:21-27:2. The court's review of the record revealed extensive written evidence of the anti-solicitation agreements among the defendants, typically in emails sent by high-ranking executives like Steve Jobs, Google's executive chairman and former CEO Eric Schmidt, former Adobe CEO Bruce Chizen, and Intel CEO Paul Otellini confirming their "hands-off" lists, their "gentleman's agreements," their "handshake no recruit" agreements, and their "do not call" lists. *Id.* at 12:22, 17:8-21, 21:19-20, 24:11, 29:7, 29:21; *see also In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1187-1205 (N.D. Cal. 2013) (certifying class and discussing at length the "copious common evidence in the form of Defendants' internal work documents, deposition transcripts, and email exchanges between Defendants' CEOs as well as other directors, officers, and senior managers, all of which support Plaintiffs' allegations that Defendants entered into express agreements not to compete for one another's employees"). This type of direct evidence is extremely rare in antitrust

cases. *See United States v. Reed*, 575 F.3d 900, 923 (9th Cir. 2009) ("'Because most conspiracies are clandestine in nature, the prosecution is seldom able to present direct evidence of the agreement.'").

The district court also addressed the weaknesses in the plaintiffs' case identified by class counsel. ECF No. 974 at 27:4-30:16. These risks included pending motions in limine on legal issues like whether the per se or rule of reason analysis should apply, as well as issues of proof at trial such as proving a single overarching conspiracy where several pairs of defendants did not have agreements with each other, proving damages in the face of attacks by six defense economists, and convincing jurors to award damages despite increases in class members' compensation over the years and anti-tech worker sentiment. *Id.*at 27:6-16. The court "recognize[d] that Plaintiffs face substantial risks if they proceed to trial," but also discussed "evidence in the record that mitigates at least some of the weakness in Plaintiffs' case." *Id.* at 27:17-30:16.

Ultimately, the district court drew on its knowledge of the evidence, legal issues, and litigation risks, gained from presiding over the case for nearly three years of hard-fought litigation, and concluded that the settlement did not fall within the range of possible approval. *Id.* at 30:18-21. Given the "ample evidence" supporting plaintiffs' claims and "the fact that the case evolved in Plaintiffs' favor" since the earlier settlements, the court found that "[t]he procedural history and

proximity to trial should have increased, not decreased, Plaintiffs' leverage from the time the settlements with [Pixar, Lucasfilm and Intuit] were reached a year ago." *Id.* at 31:6-14, 19-20. The court acknowledged that "the unpredictable nature of trial would have undoubtedly posed challenges for Plaintiffs," but observed that "the exposure for Defendants was even more substantial, both in terms of the potential of more than $9 billion in damages and in terms of other collateral consequences, including the spotlight that would have been placed on the evidence discussed in this Order and other evidence and testimony that would have been brought to light." *Id.* at 31:14-18. The court concluded that Apple, Google, Intel and Adobe "should, at a minimum, pay their fair share" compared to the earlier settlements. *Id.* at 31:24-27.

3. The Court's Analysis Cannot Be Fairly Characterized as "Rigid and Formulaic" or Contrary to *Rodriguez*

The defendants argue that the district court used a "rigid and formulaic approach" to preliminary approval that "imposed a strict requirement that the settlements be somehow proportionate to earlier settlements by different defendants." Pet. at 13. But the district court's opinion is far more nuanced than the defendants acknowledge. While the amount of the prior settlements was a factor in the court's decision, so was the likelihood that the plaintiffs would prevail at trial, the strength of the evidence against the defendants, the risks the plaintiffs faced in proving their claims, and the amount of the settlement compared with the potential

recovery at trial. After having "lived with this case for nearly three years," the district court was well equipped to assess the strengths and weaknesses of the parties' evidence and whether the amount of the proposed settlement was within the range of reasonableness. ECF No. 975 at 30:18.

At the hearing, defense counsel argued that the amount of the settlement compared favorably to the benchmark set by the earlier settlements:

> Mr. Van Nest: As a matter of fact, we think we're paying a premium in that if you look at the settlements that you've already approved, you approved $20 million settlements. That's about 8 percent of the class. I mean, if you do the math, our settlement should have been below $300 million. I mean, if it's just comparable, if we're just paying what, the same basis that that 20 million paid, we would have been in the 250 to 270 range. And believe me, as I think you know –
>
> The Court: How are you calculating that?
>
> Mr. Van Nest: Oh, if you just—if 8 percent of the class is worth 20 million, what's the other 92 percent worth? It's not 342 million. It's a number south of 300. So our point is, and we made it repeatedly in discussions with plaintiffs, that, you know, we're paying more—at the numbers we're negotiating now, we're paying more than the folks that settled out earlier, and in our situation, we felt that the biggest risk in this case was the trial itself.

6/25/14 Trans. at 36:4-21. In other words, counsel for defendants Apple, Google, Intel and Adobe attempted to justify the settlement by reference to their relative market share determined by number of employees. Mr. Devine's counsel pointed out that the settling parties had justified the earlier settlements by reference to the percentage of the total salary paid by those settling defendants (5%) in comparison

to the total salary paid by all defendants, not the percentage of total class members employed by those defendants (8%). *Id.* at 56:16-57:16, 62:2-13. Pixar, Lucasfilm and Intuit accounted for only 5% of the total class period compensation, while Apple, Google, Intel and Adobe together paid 95% of the totally class period compensation. ECF No. 539 at 16:18-22. An apples to apples comparison—using the 95% of total salary figure rather than the 92% of employees figure—indicated that the total settlement amount should be $400 million, with Apple, Google, Intel and Adobe paying $380 million.

The district court agreed with Mr. Devine that "the relevant inquiry has always been total Class compensation," including in the plans of allocation and the parties' determination of damages exposure. ECF No. 974 at 8:5-21. The defendants now contend that the district court's math is wrong because they paid only 94.386% of the total class member salary, not 95%. Pet. at 17. But the court used the number provided by the parties when they sought approval of the earlier settlements. *See* ECF No. 974 at 7:14-20. The defendants never sought to correct the record, either with supplemental filings before the court's order or a motion for reconsideration, instead making this argument for the first time in their petition. They also argue for the first time that the amount that would have been paid out by the proposed settlement is proportionally higher than the earlier settlements, but that is only because a large portion of the earlier settlements reimbursed class

counsel for significant upfront expenses, including the majority of expert costs. *See* ECF No. 539 at 19:5-13.[3]

Having encouraged the district court to use the earlier settlements as a benchmark, the defendants now mischaracterize the district court's analysis as "rigid and formulaic" in an effort to establish a clear error of law, arguing that the district court's analysis contravenes *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009). In *Rodriguez*, objectors to final approval of a settlement argued that the district court should have followed Seventh Circuit precedent requiring district courts to "determine the strength of the plaintiff's case on the merits balanced against the amount offered in settlement by 'quantifying the net expected value of continued litigation to the class.'" *Id.* at 965 (quoting *Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). In the Seventh Circuit, district courts must "estimate the range of possible outcomes and ascrib[e] a probability to each point on the range." *Id.* (alteration in original) (quoting *Synfuel*, 463 F.3d at 653). This Court affirmed, noting that it has "never prescribed a particular formula" that district courts must use to determine whether the amount of a proposed settlement amount is fair and reasonable when compared

[3] This Court has "consistently held that a party may not raise new issues of fact on appeal after declining to present those facts before the trial court." *Ramirez v. Galaza*, 334 F.3d 850, 859 n.6 (9th Cir. 2003); *see also In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) ("We apply a general rule against entertaining arguments on appeal that were not presented or developed before the district court.") (citation omitted).

with class members' potential recovery at trial. *Id.*

Thus, in *Rodriguez* this Court did not, as the defendants suggest, bar district courts from using any kind of formula in analyzing a proposed settlement. The Court merely declined to require district courts to use the Seventh Circuit's formula. The Court explained that "district judges naturally arrive at a reasonable range for settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." *Id.* These are exactly the considerations the district court used to arrive at a reasonable range for settlement in this case. And in *Rodriguez*, the district court "compared the settlement amount to the best possible outcome for the class" and approved a settlement that paid class members 30% of their single damages and 10% of trebled damages. *Id.* at 964. In affirming, this Court held that "the district court neither committed legal error, nor aside from that, clearly abused its discretion in weighing the amount offered in settlement in favor of approving the settlement." *Id.* at 965. The same rationale applies in this case. The district court did not commit legal error or clearly abuse its discretion in weighing the amount offered in settlement (far less than 30% of single damages and 10% of trebled damages) as one factor in disapproving the settlement.

The fact that the district court also found it useful to compare the amount of the prior settlements with the amount of the proposed settlement in light of the

risks the plaintiffs faced at the time each settlement was negotiated does not constitute clear error. The district court applied the correct rule of law, and its factual findings were not illogical, implausible, or without support in the record. It is difficult to see how the district court's analysis could be an abuse of discretion when this Court has recognized that "[u]ltimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Officers for Justice*, 688 F.2d at 625 (citation omitted).

4. The Defendants Ignore the Critical Role District Courts Serve in the Class Action Settlement Process

The defendants argue that the district court should have deferred to the settlement proponents' assessment of the value of the case, the strength of the evidence, and the risks of continued litigation. Pet. at 10, 19, 22. They suggest that at the preliminary approval stage, the court should have deferred to the judgment of class counsel because they are experienced and there was no suggestion of collusion. *Id*. at 12- 13. They argue that the court improperly "substitute[d] its own judgment for the parties' agreement." *Id*. at 10. They even suggest that the court prejudiced the parties by jeopardizing their settlement agreement. *Id*. at 9.

All of these arguments ignore the critical role of district courts in the approval of class action settlements. Federal Rule of Civil Procedure 23(e) requires judicial approval of any class action settlement. *Rodriguez*, 563 F.3d at 963. The purpose of this requirement "is to protect the unnamed members of the class from

unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). This Court has recognized that district courts are vested with broad discretion to evaluate the fairness, reasonableness and adequacy of class settlements because they are "exposed to the litigants, and their strategies, positions and proof" and are "aware of the expense and possible legal bars to success." *Officers for Justice*, 688 F.2d at 626. The district court "is on the firing line and can evaluate the action accordingly." *Id.* (citation omitted). By reaching its own conclusions about whether the settlement fell within the range of reasonableness, the district court fulfilled its duty to absent class members.[4]

In this case, the district court also had the benefit of an adversarial process, since Mr. Devine, one of the four class representatives, opposed the settlement as insufficient to compensate class members given the strength of the evidence compared to the risks of continued litigation. *See* ECF No. 934. At the hearing, the district court repeatedly pressed class counsel and defense counsel to explain why the proposed settlement fell short of the benchmark set by the earlier settlements despite the plaintiffs' increased leverage. *See generally* 6/25/14 Trans. Ultimately, the court was not satisfied with the answers they provided, which focused on

[4] The defendants also emphasize that the settlement was reached with the assistance of an experienced mediator, but as this Court has recognized, "the mere presence of a neutral mediator, though a factor weighing in favor of a finding of non-collusiveness, is not on its own dispositive of whether the end product is a fair, adequate, and reasonable settlement agreement." *In re Bluetooth*, 654 F.3d at 948.

litigation risks that existed at the time of the earlier settlements, such as the challenge of proving plaintiffs' claims and damages. Class counsel also mentioned jury testing, but the testing was not discussed in their briefing and class counsel did not provide it to the court in a supplemental submission after the hearing. The defendants contend that the district court erred in not addressing class counsel's jury testing in its order, but this Court has previously disapproved of a district court's reliance on counsel's "bald assertions" that were unsubstantiated by "corroborating evidence." *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011). The district court did acknowledge that "there very well may be weaknesses and challenges in Plaintiffs' case that counsel cannot reveal to this Court." ECF No. 974 at 31:23-24.[5]

After arguing that the district court's analysis exceeded the appropriate scope of review at preliminary approval, the defendants fault the district court for failing to apply the factors district courts must consider at final approval. Pet. at 18-22. Of course, the district court did consider most of those factors, including the strength of plaintiffs' case, the risk of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the stage of the proceedings, the experience and views of counsel, and the reaction of class

[5] The defendants also argue that the district court ignored the risk of decertification on appeal, but the court discussed that possibility with class counsel at the hearing, noting that the plaintiffs' negotiating position would have increased had they won at trial and then faced an appeal. 6/25/14 Trans. at 23:1-24:8.

members (and class representative Michael Devine) to the settlement. *See Officers for Justice* 688 F.2d at 625. As this Court has explained, the final approval analysis is flexible and case-specific since "[t]he relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Id.*

B. Defendants Can Challenge the Order on Direct Appeal

The defendants do not explain why, if they are correct that the Settlement Agreement remains in effect until preliminary approval is "denied *finally*, after appellate review has been exhausted," *see* Ex. C, the district court's denial of preliminary approval cannot be addressed on a direct appeal rather than through a writ of mandamus. Following trial, either or both parties may appeal and include the court's denial of preliminary approval among the appealed orders. *See American Ironworks & Erectors, Inc. v. N. American Const. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) ("a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment"); *see also Radcliffe v. Transunion LLC*, 419 F. App'x 768, 769 (9th Cir. 2011) (denying review of a district court's order denying the request of objectors to a class settlement to contact class members because "[t]he district court's order simply concerns the management of a class action, a matter entrusted to the court's discretion" and

"[t]he order is typical of class action management orders that may be reviewed on direct appeal from a final judgment").

That the parties may incur the increased litigation costs or inconvenience of trial is insufficient to justify mandamus relief. *See Calderon v. United States District Court for Central District of Cal.*, 163 F.3d 530, 534-35 (9th Cir. 1998) (en banc) ("When we say that a litigant has no adequate means for relief other than mandamus, or that he or she will be prejudiced in a way not correctable on appeal, we do not mean that the litigant has been forced by an erroneous ruling of the district court to suffer unnecessary cost and delay."), *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003); *Washington Public Utilities Group*, 843 F.2d at 325 (denying mandamus where the petitioners argued that "they will be required to endure the expense and inconvenience of a second massive trial"); *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 881-82 (1994) (finding that the right to avoid trial through settlement was "adequately vindicable" on appeal from a final judgment). Instead, "a litigant must demonstrate some burden imposed by a clearly erroneous district court order, other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system." *Calderon*, 163 F.3d at 535; *see also In re Sugar Antitrust Litig.*, 559 F.2d 481, 484 (9th Cir. 1977) ("We have consistently rejected petitioners' position that the costs of trying massive civil actions render review

after final judgment inadequate.").

The defendants contend that they are prejudiced because the district court "reached extensive 'ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute.'" Pet. at 9 (quoting *Officers for Justice*, 688 F.2d at 625). But the district court did not make any ultimate findings about any defendant's liability or resolve any contested issues of fact or law. It simply did what this Court instructed district courts to do in *Officers for Justice*, which is to "reach 'an intelligent and objective opinion of the probabilities of success should the claim be litigated' and 'form an educated estimate of the complexity, expense and likely duration of such litigation, … and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.'" 688 F.2d at 626 (alterations in original) (citation omitted).

C. There Is No Need to Provide Guidance on Preliminary Approval

The defendants argue that this Court must grant their petition because "[t]he proper standard for preliminary approval of class settlements is an important issue of first impression on which this Court's guidance is urgently needed." Pet. at 2. But the defendants have not established that the district court committed a legal error or that there is any reason why this Court must "provide necessary guidance to the district courts," both of which are required for supervisory mandamus. *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982). The district court did

not purport to establish a "standard" for preliminary approval or suggest that its analysis might be appropriate in any other case. And since the district court's order does not bind other district courts, there is little risk that its fact-specific analysis will impact the ability of parties to class action litigation to negotiate and obtain approval of settlements in the future.

CONCLUSION

Michael Devine requests that the Court dismiss the writ petition because the Settlement Agreement expired pursuant to its own terms when the district court denied preliminary approval. Alternatively, the petition should be denied because the defendants cannot show that the district court's order gave rise to "extraordinary circumstances" requiring mandamus relief.

DATED: October 14, 2014

Respectfully submitted,

GIRARD GIBBS LLP

/s/ Daniel C. Girard

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STATEMENT OF RELATED CASE

Plaintiff and Real Party in Interest Michael Devine is not aware of any related cases pending in this Circuit.

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on October 14, 2014.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Daniel C. Girard

EXHIBIT A

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Settlement Agreement" or "Settlement") is made and entered into on May 22, 2014, by and between: (a) Mark Fichtner, Siddharth Hariharan, and Daniel Stover (collectively, the "Moving Plaintiffs") individually and the Class of individuals they represent ("Plaintiffs" or the "Class," defined below), on the one hand; and (b) Defendants Adobe Systems Incorporated, Apple Inc., Google Inc., and Intel Corporation (collectively, the "Settling Defendants") on the other hand.

WHEREAS, Mark Fichtner, Siddharth Hariharan, Daniel Stover, and Michael Devine (collectively, "Named Plaintiffs" or "Class Representatives") are Court-appointed Class Representatives for the certified Class in the action captioned *In re High-Tech Employee Antitrust Litigation*, Case No. 11-CV-02509 LHK (the "Action") pending against Adobe Systems Incorporated, Apple Inc., Google Inc., Intel Corporation, Intuit Inc., Lucasfilm Ltd., and Pixar (collectively, the "Defendants") in the United States District Court for the Northern District of California (the "Court");

WHEREAS, on September 13, 2011, the Named Plaintiffs filed a Consolidated Amended Complaint (Dkt. 65) that alleges, among other things, that Defendants entered into agreements with each other not to recruit or cold call each other's employees in violation of federal and state antitrust and unfair competition laws;

WHEREAS, the Consolidated Amended Complaint further alleges, among other things, that, as a result of the agreements, Defendants undercompensated the Named Plaintiffs and the Class (collectively referred to as "Plaintiffs");

WHEREAS, the Consolidated Amended Complaint asserts claims under federal and state antitrust and unfair competition laws and seeks recovery of, among other things, unpaid compensation, interest, treble damages, costs and attorneys' fees;

WHEREAS, Intuit Inc., Lucasfilm Ltd., and Pixar previously reached settlements with Plaintiffs;

WHEREAS, the Settling Defendants have continued to vigorously defend the litigation;

WHEREAS, Plaintiffs and the Settling Defendants (collectively the "Settling Parties") have engaged in substantial arm's-length negotiations in an effort to resolve all claims that have been, or could have been, asserted in the Action, including through confidential mediation discussions with David A. Rotman of the firm of Gregorio, Haldeman & Rotman, and with Hon. Layn Phillips (Ret.) of the firm Irell & Manella, which negotiations resulted in the Settlement Agreement;

WHEREAS, the Settling Defendants have denied and continue to deny that they engaged in any wrongdoing of any kind, or that they violated or breached any law, regulation, or duty owed to the Plaintiffs, and they further deny that they have liability as a result of any and all allegations made in the Consolidated Amended Complaint or as part of the Action. The Settling Defendants are entering into the Agreement to eliminate the burdens, distractions, expense, and uncertainty of further litigation; and

WHEREAS, based on their analysis of the merits of the claims and the benefits provided to the Class by the Settlement Agreement, including an evaluation of a number of factors including the substantial risks of continued litigation and the possibility that the litigation if not settled now might not result in any recovery whatsoever for the Class or might result in a recovery that is less favorable to the Class, Class Counsel believe that it is in the interest of all members of the Class to resolve finally and completely their claims against the Settling Defendants and that the terms of the Settlement Agreement are in the best interests of the Class and are fair, reasonable, and adequate;

NOW, THEREFORE, in consideration of the promises, agreements, covenants, representations, and warranties set forth herein, and other good and valuable consideration provided for herein, the Settling Parties agree to a full, final and complete settlement of the Action on the following terms and conditions:

I. GENERAL TERMS OF THE SETTLEMENT AGREEMENT

A. Definitions

In addition to terms identified and defined elsewhere in this Settlement Agreement, and as used herein, the terms below shall have the following meanings:

1. "Action" means the lawsuits pending in the United States District Court for the Northern District of California, that were consolidated in the matter captioned, *In re High-Tech Employee Antitrust Litigation*, 11-CV-02509 LHK.

2. "Attorneys' Fees and Expenses" means the amounts approved by the Court for payment to Class Counsel, including attorneys' fees, costs, and litigation expenses, as described in Section VII.A herein.

3. "Class" means the class certified by the Court on October 24, 2013 (Dkt. 531): "All natural persons who work in the technical, creative, and/or research and development fields that were employed on a salaried basis in the United States by one or more of the following: (a) Apple from March 2005 through December 2009; (b) Adobe from May 2005 through December 2009; (c) Google from March 2005 through December 2009; (d) Intel from March 2005 through December 2009; (e) Intuit from June 2007 through December 2009; (f) Lucasfilm from January 2005 through December 2009; or (g) Pixar from January 2005 through December 2009" (collectively, the "Class Period"). Excluded from the Class are: retail employees, corporate officers, members of the boards of directors, and senior executives of all Defendants. The exact titles included in the Class ("Class Positions") are identified in Exhibit C to this Agreement.

4. "Class Counsel" means the law firms of Lieff Cabraser Heimann & Bernstein, LLP, the Joseph Saveri Law Firm, Inc., Berger & Montague, P.C., and Grant & Eisenhofer, P.A.

5. "Class Member" means any person who meets the "Class" definition above.

6. "Co-Lead Class Counsel" means the law firms Lieff Cabraser Heimann & Bernstein, LLP and the Joseph Saveri Law Firm, Inc.

7. "Consolidated Amended Complaint" means the Consolidated Amended Complaint filed in the Action on September 13, 2011 (Dkt. 65).

8. "Court" means the United States District Court for the Northern District of California.

9. "Defendants" means Adobe Systems Incorporated, Apple Inc., Google Inc., Intel Corporation, Intuit Inc., Lucasfilm, Ltd., and Pixar.

10. "Effective Date" is the effective date of the Settlement Agreement, as defined in Section II.F herein.

11. "Escrow Agent" means Citibank, N.A., which, assuming it agrees to do so, shall enter into an Escrow Agreement to carry out the tasks more fully detailed in that agreement, including to receive, hold, invest, and disburse the Settlement Fund, subject to the direction of the Notice Administrator. The Settling Parties may replace Citibank, N.A. with another mutually agreeable financial institution.

12. "Final Approval" means the order of the Court granting final approval of the Settlement Agreement pursuant to Federal Rule of Civil Procedure 23(e).

13. "Final Approval Hearing" or "Fairness Hearing" means the hearing at which the Court will consider Plaintiffs' motion for judgment and final approval of the Settlement.

14. "Moving Plaintiffs" means Mark Fichtner, Siddharth Hariharan, and Daniel Stover.

15. "Named Plaintiffs" and "Class Representatives" mean Michael Devine, Mark Fichtner, Siddharth Hariharan, and Daniel Stover.

16. "Notice" means the Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing, attached as Exhibit A , which is to be mailed directly to Class Members.

17. "Notice Administrator" means the entity which has been designated to provide notice to the Class and administer the Settlement Fund pursuant to Section II.A below and by order of the Court.

18. "Order and Final Judgment of Dismissal" means the Order which shall be submitted to the Court as described in Section II.E herein and entered by the Court as described in Section II.F herein.

19. "Plaintiffs" means the Named Plaintiffs and the Class, collectively.

20. "Plan of Allocation" means the formula by which the Settlement Fund will be distributed to Class Members as well as the timing and other aspects of the distribution attached as Exhibit B.

21. "Plan of Notice" means the plan for distributing the Notice to Class Members.

22. "Preliminary Approval" means the Court's Order preliminarily approving the Settlement, the Plan of Notice, the form of Notice, the Plan of Allocation, and other related matters.

23. "Protective Order" means the Stipulated Protective Order filed in the Action (Dkt. 95)

24. "Released Claims" means those claims specified in Section V.A. *infra*.

25. "Released Parties" means Adobe, Apple, Google and Intel, and their officers, directors, affiliates and employees, and the related entities specified in Section V.A *infra*.

26. "Settlement," "Agreement," and "Settlement Agreement" each mean the instant settlement terms agreed to by the Settling Parties as reflected in this Settlement Agreement and attachments hereto, including Attachment 1 and the Plan of Allocation.

27. "Settling Defendants" means Adobe Systems Incorporated, Apple Inc., Google Inc., and Intel Corporation.

28. "Settling Defendants' Counsel" means the law firms of Jones Day; Keker & Van Nest LLP; Mayer Brown LLP; Munger, Tolles, & Olson LLP; and O'Melveny & Myers LLP.

29. "Settlement Fund" means the three hundred twenty-four million five hundred thousand dollars ($324,500,000.00), subject to the operation of Section VIII.T, if applicable, that the Settling Defendants shall pay as described in Section III.A to be held, invested, administered, and disbursed pursuant to this Settlement Agreement.

B. Best Efforts to Effectuate the Settlement

Plaintiffs and the Settling Defendants agree to cooperate and work together in order to effectuate the Settlement, including after it has received Final Approval, as set forth in Section II.E. The Settling Defendants shall have no obligation to support any motion for Preliminary or Final Approval of the Settlement, except to confirm representations set forth in Section VIII.S, if so requested by Plaintiffs.

II. COURT APPROVAL OF SETTLEMENT AND CLASS NOTICE

A. Retention of Notice Administrator

Plaintiffs shall retain a Notice Administrator, which shall be responsible for the notice administration process, calculation of payments to the Class based on the Plan of Allocation approved by the court, distribution to Class Members, withholding and paying applicable taxes, and other duties as provided herein. Plaintiffs shall obtain approval by the Court of the choice of

Notice Administrator. The Notice Administrator shall sign and be bound by the Protective Order entered in the Action and be required to agree in writing in a form approved by the Settling Defendants, such approval not to be unreasonably withheld, to treat information it receives or generates as part of the notice administration process as confidential and to use such information solely for the purposes of notice administration, administering the Settlement Fund, including withholding taxes, and functions necessarily associated therewith or by this Agreement, and shall keep the information confidential, including from Class Counsel. The fees and expenses of the Notice Administrator shall be paid exclusively out of the Settlement Fund. Prior to the Effective Date, expenses incurred by the Notice Administrator relating to this Settlement and approved by the Court shall be paid solely from the Settlement Notice Fund, as set forth in Section III.A.1, upon invoice to Co-Lead Class Counsel and Settling Defendants' Counsel. In no event shall the Settling Defendants be separately responsible for fees or expenses of the Notice Administrator.

B. Preliminary Approval and Notice of Settlement

1. Mark Fichtner, Siddharth Hariharan, and Daniel Stover, by and through Co-Lead Class Counsel, shall file with the Court, promptly after the execution of this Settlement Agreement and no later than May 22, 2014 or such other date set by the Court, a motion for Preliminary Approval of the Settlement and Exhibits to the Settlement Agreement, which will include a Proposed Preliminary Approval Order, a proposed Notice of Proposed Settlement of Class Action Lawsuits and Fairness Hearing ("Notice"), and a Plan of Allocation. The Settling Defendants will then provide timely notice of such submission pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b).

2. Co-Lead Class Counsel shall provide the Settling Defendants with the draft motion for preliminary approval, proposed order, and supporting documents at least 5 days prior to the date such motion is filed.

3. In the event that the Court preliminarily approves the Settlement, Co-Lead Class Counsel shall, in accordance with Rule 23(c)(2) of the Federal Rules of Civil Procedure, direct the Notice Administrator approved by the Court to provide the Class with Notice as ordered by the Court.

4. If the Court denies without leave to re-file the motion for Preliminary Approval the case will proceed as if no settlement had been attempted, and the Settling Parties shall be returned to their respective procedural postures, i.e., *status quo* as of April 24, 2014, so that the Settling Parties may take such litigation steps that Plaintiffs or the Settling Defendants otherwise would have been able to take absent the pendency of this Settlement Agreement. In the event the Settlement does not receive Preliminary Approval, the Settling Parties will negotiate and submit for Court approval a modified case schedule.

5. Within twenty (20) days after the date of the Preliminary Approval Order:

(a) Co-Lead Class Counsel shall direct Heffler Claims Group, subject to and consistent with the extant Protective Order and all existing confidentiality and non-disclosure agreements, to transmit to Class Counsel, the Defendants, and the Notice Administrator the employee ID numbers and/or hashed social security numbers for all employees to whom Heffler Claims Group sent notices in connection with the certification of the litigation class in the Action (the "Prior Notice Recipients"). For the avoidance of doubt, "Prior Notice Recipients" shall include any employee that a Defendant or Heffler Claims Group has identified as a Class Member and shall not include persons who have been determined not to be Class Members. Specifically with respect to Google, "Prior Notice Recipients" shall mean those current and former Google employees to whom reminder notices were sent on or about March 13, 2014, as well as the other current and former Google employees who

were subsequently informed by Heffler Claims Group that they were Class Members. Heffler Claims Group shall transmit such information in a secure manner that has received the prior approval of Co-Lead Class Counsel and the Settling Defendants.

(b) Heffler Claims Group shall transmit to the Notice Administrator, subject to and consistent with the extant Protective Order and all existing confidentiality and non-disclosure agreements the full legal name, last known physical address (including the best information concerning each address, as determined using the national change of address database, information provided by Class Members, and other sources), and the compensation data and dates of employment in job titles identified in Exhibit C for the Prior Notice Recipients. Heffler Claims Group shall transmit such information in a secure manner that has received the prior approval of Co-Lead Class Counsel and the Settling Defendants;

(c) Each Defendant shall, at its option, either transmit the social security numbers for the Prior Notice Recipients employed by that Defendant to the Notice Administrator or request that Heffler Claims Group do so. In either case, the information shall be transmitted pursuant to and in a manner consistent with the extant Protective Order and all existing confidentiality and non-disclosure agreements.

[JKS1]

6. The Settling Parties intend that the Notice Administrator provide actual notice to each Class Member, to the extent practicable. Notice shall be mailed to all Class Members identified using the data provided to the Notice Administrator at approximately the same time. The Notice Administrator shall ensure that the Notice is mailed and posted on the internet within

14 days of receipt of all Defendants' Class Member data. Settling Defendants shall be provided with the form of notice to be distributed as well as the content of any website relating to administration of the Settlement no later than three business days before the Notice is distributed.

C. Objections

Unless the Court provides otherwise, objections to the Settlement, if any, must be submitted in writing, and must include a detailed description of the basis of the objection. Objections must be filed with the Court, with copies served on Co-Lead Class Counsel and Settling Defendants' Counsel, postmarked on or before a date certain to be specified on the Notice, which will be forty-five (45) days after the Notice was initially mailed to Class Members. No one may appear at the Final Approval Hearing for the purpose of objecting to the Settlement without first having filed and served his or her objection(s) in writing postmarked on or before forty-five (45) days after the Notice was mailed to Class Members.

D. Class Member Opt-Out

1. Any Class Member may request exclusion from the Class by "opting out." This procedure is in addition to the opt out opportunities provided to the Class in January through March 2014. Class Members who wish to opt out of the Class must complete and timely submit to the Notice Administrator a request for exclusion. To be effective, such requests for exclusion must state the Class Member's full legal name and address, and the approximate dates of his or her employment with one or more of the Defendants. All requests for exclusion must be signed and dated by the Class Member or his or her legal representative, and must be (1) mailed to the Notice Administrator via First Class United States Mail and postmarked by a date certain to be specified on the Notice, which will be 45 calendar days after the Notice Administrator makes the initial mailing of the Notice or (2) received by the Notice Administrator by that date, provided, however, that if a Class Member mails the Opt-Out Statement pursuant to option (1), it will be effective only

if received by the Notice Administrator on or before 10 calendar days after the end of the Opt-Out Period. The end of the "Opt-Out Period" shall be 45 calendar days after the Notice Administrator makes the initial mailing. Within eleven calendar days after the end of the Opt-Out Period, the Notice Administrator shall provide to all counsel for the Settling Parties all opt-out statements that are timely received and shall prepare a summary of the opt outs to be filed with the Court, which shall include the total number of Class Members who have opted out. Individuals who opt out are not entitled to any monetary award under the Settlement.

2. Class Counsel, Settling Defendants, and Settling Defendants' Counsel shall not solicit or encourage any Class Member to opt out of the Class or object to the Settlement.

E. Final Approval

1. The Final Approval Hearing shall be noticed for no earlier than 95 days from the date of the motion for preliminary approval to allow the Settling Defendants sufficient time to complete their obligations under the Class Action Fairness Act.

2. Prior to the Final Approval Hearing, on the date set by the Court, the Plaintiffs, through Co-Lead Class Counsel, shall submit a motion for final approval by the Court of the Settlement between the Settling Parties and Class Members (who are not properly excluded as provided herein) and the entry of an Order granting Final Approval of the Settlement that:

a. finds the Settlement and its terms to be fair, reasonable and adequate within the meaning of Rule 23(e) of the Federal Rules of Civil Procedure and directing its consummation pursuant to its terms;

b. finds that the Notice given constitutes due, adequate and sufficient notice, and meets the requirements of due process and any applicable laws;

c. provides for service payments from the Settlement Fund (as defined in Section VI herein) to the Named Plaintiffs in addition to whatever monies each will receive from the Settlement Fund pursuant to the Court-approved Plan of Allocation;

d. provides for payment of Attorneys' Fees and Expenses from the Settlement Fund (as provided in Section VII.A herein);

e. sets forth the method for allocating the Settlement Fund (set forth in the Plan of Allocation attached as Exhibit B);

f. directs that the Action be dismissed with prejudice as against Adobe, Apple, Google, and Intel, without costs to the Settling Parties;

g. approves the release of claims specified herein as binding and effective as to all Class Members (who are not otherwise properly excluded as provided herein) permanently barring and enjoining all Class Members (who are not otherwise properly excluded as provided herein) from asserting any Released Claims (as defined in Section V.A herein);

h. reserves exclusive and continuing jurisdiction over the Settlement, including the Settlement Fund (as defined in Section III.A herein) and the administration, consummation and interpretation of this Settlement Agreement; and

i. directs that an Order and Final Judgment of Dismissal be entered as between the Settling Parties in the Action.

3. Co-Lead Class Counsel shall provide the Settling Defendants with the draft motion for final approval and supporting documents at least 5 days prior to the date such motion is filed.

4. If so required by the Court in connection with approval of the Settlement, the Settling Parties agree to accept non-material or procedural changes to this Settlement Agreement.

However, the Settling Parties are not obligated to accept any changes in the monetary amount of relief or any other substantive change to their respective obligations.

5. The Notice Administrator's affidavit of compliance with Notice requirements must be filed 30 days prior to the Final Approval Hearing.

F. Effective Date of the Settlement

The Settlement shall become final and effective upon the occurrence of all of the following ("Effective Date"):

1. The Settlement receives Final Approval by the Court as required by Rule 23(e) of the Federal Rules of Civil Procedure;

2. As provided for in Section II.E herein, entry is made of the Order and Final Judgment of Dismissal; and

3. Completion of any appeal(s) from the Court's Order and Final Judgment of Dismissal and/or Order Granting Final Approval of the Settlement (including any such order on remand from a decision of an appeals court), provided, however, that a modification or reversal on appeal of any amount of the fees and expenses awarded by the Court from the Settlement Fund, or the amount of any service awards to the Plaintiffs shall not by itself prevent this Settlement from becoming final and effective if all other aspects of the final judgment have been affirmed. If no appeal is filed from the Court's order finally approving the Settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the Effective Date shall be the date on which the time for any such appeals has lapsed.

III. CONSIDERATION FOR SETTLEMENT

A. Monetary Settlement Fund

1. Subject to the provisions hereof, and in full, complete and final settlement and release of all Released Claims against the Settling Defendants and the Released Parties in the

Action, any claim for Attorneys' Fees and Expenses, administrative costs, and any and all amounts to be paid to Class Members, within ten (10) days from the date of the Court's Order granting Preliminary Approval of the Settlement, the Settling Defendants shall deposit or cause to be deposited by wire transfer to the Escrow Agent approved by the court $1,000,000.00 (the "Settlement Notice Fund") payable in lawful money of the United States. Within seven (7) calendar days or five (5) business days, whichever is longer, from the Effective Date, Settling Defendants shall deposit or cause to be deposited by wire transfer to the Escrow Agent the remaining $323,500,000.00 payable in lawful money of the United States, subject to the operation of Section VIII.T, if applicable. Under no circumstances shall the Settling Defendants or Released Parties be required to pay more than the total of $324,500,000.00. The Settlement Fund is the maximum amount that the Settling Defendants shall be required to pay for settlement of the Action. The Settlement Fund will cover compensation to the Class, additional service awards to the Named Plaintiffs, the fees and costs of the Escrow Agent and Notice Administrator, the employer's and employee's shares of payroll taxes associated with the Settlement, and Attorneys' Fees and Expenses to Class Counsel. No portion of the Settlement Fund will revert to the Settling Defendants unless the Settlement is terminated, as described in Section VIII.A, or is not finally approved or does not become effective for any reason.

2. The Escrow Agent will place the Settlement Fund in an interest-bearing account (the "Account") created by order of the Court intended to constitute a "qualified settlement fund" ("QSF") within the meaning of Section 1.468B-1 of the Treasury Regulations ("Treasury Regulations") promulgated under the U.S. Internal Revenue Code of 1986, as amended (the "Code"). Settling Defendants shall be the "transferor" to the QSF within the meaning of Section 1.468B-1(d)(1) of the Treasury Regulations with respect to the Settlement Fund or any other

amount transferred to the QSF pursuant to this Settlement Agreement. The Notice Administrator shall be the "administrator" of the QSF within the meaning of Section 1.468B-2(k)(3) of the Treasury Regulations, responsible for causing the filing of all tax returns required to be filed by or with respect to the QSF, paying from the QSF any taxes owed by or with respect to the QSF, and complying with any applicable information reporting or tax withholding requirements imposed by Section 1.468B-2(*l*)(2) of the Treasury Regulations or any other applicable law on or with respect to the QSF. Settling Defendants and the Notice Administrator shall reasonably cooperate in providing any statements or making any elections or filings necessary or required by applicable law for satisfying the requirements for qualification as a QSF, including any relation-back election within the meaning of Section 1.468B-1(j) of the Treasury Regulations.

3. The Settling Defendants, Settling Defendants' Counsel, and Released Parties shall have no liability, obligation or responsibility with respect to the investment, disbursement, or other administration or oversight of the Settlement Fund or QSF and shall have no liability, obligation or responsibility with respect to any liability, obligation or responsibility of the Escrow Agent or Notice Administrator, including but not limited to, liabilities, obligations or responsibilities arising in connection with the investment, disbursement or other administration of the Settlement Fund and QSF.

4. The Settlement Fund shall constitute a special award to the Class and to any Class Members receiving a payment and no portion shall be considered as a payment of overtime, salary, wages, and/or compensation under the terms of any company benefits plan or for any purpose except for tax purposes to the extent contemplated by Section IV.B. Any of the Settlement Fund's taxes due as a result of income earned or payments made by the Settlement Fund will be imposed upon and paid from the Settlement Fund. Interest earned by the Settlement Fund (less any tax

imposed upon such interest) shall be for the benefit of the Class, less reasonable Attorneys' Fees and Expenses approved by the Court, any Court-approved service award to the Named Plaintiffs, and payment of any and all administrative or other Court-approved expenses associated with the Action or Settlement. The Settling Defendants, Settling Defendants' Counsel, and Released Parties shall have no liability, obligation or responsibility for any such taxes, Attorneys' Fees and Expenses, interest, service awards or administrative or other expenses or for any reporting requirements relating thereto.

5. The Settling Defendants' transfer of the Settlement Fund to the Escrow Agent shall constitute full and complete satisfaction of their obligations under this Section III and any and all Released Claims. Following the Settling Defendants' transfer of the Settlement Fund, no Settling Defendant nor any Released Party shall have any liabilities, obligations or responsibilities with respect to the payment, disbursement, disposition or distribution of the Settlement Fund. Class Members shall look solely to the Settlement Fund for settlement and satisfaction against any Settling Defendant and any Released Party of all claims that are released herein, all Attorneys' Fees and Expenses, all service awards to Named Plaintiffs, and all administrative or other costs and expenses arising out of or related to the Action or the Settlement. Class Members shall not under any circumstances be entitled to any further payment from any Settling Defendant or any Released Party with respect to the Released Claims, the Action or the Settlement. In the event that the Settlement Agreement becomes final and effective, payment of the Settlement Fund will fully satisfy any and all Released Claims. Except as provided by Order of the Court, no Class Member shall have any interest in the Settlement Fund or any portion thereof.

6. Notwithstanding any effort, or failure, of the Notice Administrator or the Parties to treat the Account as a QSF, any tax liability, together with any interest or penalties imposed

thereon, incurred by any Settling Defendant or any Released Party resulting from income earned on the Settlement Fund or the Account or payments made from the Account (or the receipt of any payment under this paragraph) shall be reimbursed from the Account in the amount of such tax liability, interest or penalties promptly upon and in no event later than five (5) days after any Settling Defendant's or any Released Party's written request to the Notice Administrator.

IV. DISTRIBUTION OF SETTLEMENT FUND

A. Eligibility

1. Any Class Member who does not opt out pursuant to Section II.D will be deemed eligible for a payment hereunder.

2. Any Class Member who does not opt out pursuant to Section II.D is subject to and bound by the releases set forth in Section V.

3. Payments to Named Plaintiffs and Class Members shall not be considered as a payment of overtime, salary, wages and/or compensation under the terms of any company benefit plan or for any purpose except for tax purposes as provided under Section IV.B The receipt of settlement payments shall not affect the amount of any contribution to or level of benefits under any company benefit plan.

4. Within a reasonable time period after the Effective Date, the Notice Administrator shall render a determination as to the monetary award that should be paid to each eligible Class Member from the Settlement Fund based on the methodology set forth in the Plan of Allocation as approved by the Court.

5. The Notice Administrator's determination as to the monetary award that should be paid to each Class Member shall be final and not subject to review by, or appeal to, any court, mediator, arbitrator or other judicial body, including without limitation this Court. As will be reflected in the Final Approval Order, Class Counsel and the Released Parties shall have no

responsibility, and may not be held liable, for any determination reached by the Notice Administrator.

6. The Notice Administrator shall reserve $250,000.00 from the Settlement Fund to resolve any Class Member disputes or payment issues ("Dispute Fund") that arise within 180 days of the first date on which distribution of the Settlement Fund is made to Class Members.

7. The total amount of all monetary awards paid to Class Members, as determined by the Notice Administrator, shall not exceed the net amount of the Settlement Fund after all costs, expenses, service awards, Attorneys' Fees and Expenses and taxes have been paid, and the Dispute Fund has been reserved or fully utilized.

8. In the event monies remain as residue in the Settlement Fund following all distribution efforts approved by the Court and payment of all costs, expenses, service awards, Attorneys' Fees and Expenses and taxes (including, for example, residue resulting from Class Members' failure to negotiate checks or the Dispute Fund not having been fully utilized) ("Residue"), the Settling Parties shall jointly move the Court for an order disposing of all such funds by *cy pres* distribution to charitable and/or non-profit organizations whose principal purpose is the education, development, or advancement of workers as approved by the Court or by further distribution to the Class.

B. Settlement Fund Distribution Procedures

1. Allocation

Without admitting liability, the Settling Parties agree that one-sixth of the payments to Class Members is allocable to wages, one-sixth of such payments is allocable to lost mobility and career opportunities, and two-thirds of such payments is allocable to statutory multiplier damages. The parties agree that no portion of the Settlement Fund is attributable to government penalties or fines. Class Counsel, Moving Plaintiffs, and the Class represent and agree that they have not

received and/or relied upon any advice and/or representations from Settling Defendants and/or Settling Defendants' Counsel as to taxes, including as to the allocation of payments for tax purposes, the necessity for withholding, and/or the taxability of the consideration paid pursuant to this Agreement, whether pursuant to federal, state or local income tax statutes or otherwise. Co-Lead Class Counsel represents that neither Moving Plaintiffs nor Class Counsel has provided any advice as to the taxability of payments received pursuant to this Agreement.

2. Payment of Federal, State and Local Taxes

a. Payments to eligible Named Plaintiffs and other Class Members from the Account will be subject to applicable tax withholding and reporting requirements pursuant to the allocation set out in Section IV.B.1, and shall be made net of all applicable employment taxes, including, without limitation, federal, state and local income tax withholding and applicable FICA taxes.

b. The Notice Administrator, as administrator of the QSF, and on behalf of the QSF, is expected to and shall carry out all the duties and obligations of the QSF in accordance with the Code and Treasury Regulations and all other applicable law, including in respect of all withholding and employment taxes and all information reporting requirements with respect thereto.

c. The Notice Administrator, as administrator of the QSF, shall report that portion of the Settlement Fund payments made by the QSF allocable to wages and lost mobility and career opportunities to each eligible Class Member and to the United States Internal Revenue Service ("IRS") and to other appropriate taxing authorities (each of the IRS and any such other taxing authority, a "Taxing Authority," and collectively, "Taxing Authorities") on an IRS Form W-2, or any other applicable form for the reporting of amounts treated as wages for tax purposes. Such amounts shall be subject to applicable employment taxes and withholding taxes, including

without limitation FICA, FUTA, Medicare and any state and local taxes, including without limitation SUTA.

d. The Notice Administrator shall pay from the QSF the employee's and employer's shares of all U.S. federal, state, and local employment taxes, including without limitation the employer's share of FICA, FUTA, Medicare and any state and local taxes, including without limitation SUTA, required to be paid by an employee or employer on amounts as allocable to wages and lost mobility and career opportunities (all such U.S. federal, state and local taxes, collectively the "Payroll Taxes"). Neither Moving Plaintiffs, their counsel, Class Members nor the Notice Administrator shall seek payment for Payroll Taxes from the Settling Defendants or any Released Party.

e. The Notice Administrator, as administrator of the QSF, shall report that portion of the Settlement Fund payments made by the QSF allocable to statutory multiplier damages to each eligible Class Member and all applicable Taxing Authorities, to the extent required by law, under the Class Member's name and U.S. federal taxpayer identification number on IRS Forms 1099, or other applicable forms, and such payments shall be made without deduction for taxes and withholdings, except as required by law, as determined by the Notice Administrator, as administrator of the QSF making such payments.

f. The Notice Administrator shall be responsible to satisfy from the Settlement Fund any and all federal, state and local employment and withholding taxes, including, without limitation, federal, state and local income tax withholding, and any U.S. federal taxes including without limitation FICA, FUTA, and Medicare and any state employment taxes including without limitation SUTA. The Notice Administrator shall promptly provide to any Settling Defendant the information and documentation (including copies of applicable IRS and

state forms) reasonably requested by the Settling Defendant with respect to the payment or remittance of such employment and withholding taxes. The Notice Administrator shall satisfy all federal, state, local, and other reporting requirements (including without limitation any applicable reporting with respect to attorneys' fees and other costs subject to reporting), and any and all taxes, together with interest and penalties imposed thereon, and other obligations with respect to the payments or distributions from the Settlement Fund not otherwise addressed herein.

g. The Notice Administrator shall be responsible for procuring any required tax forms from the Class Members prior to making any such payments or distributions.

h. For avoidance of doubt, neither the Settling Defendants nor any Released Party nor Class Counsel shall have any liability, obligation or responsibility whatsoever for tax obligations arising from payments to any Class Member, or based on the activities and income of the QSF. In addition, neither the Settling Defendants nor any Released Party shall have any liability, obligation or responsibility whatsoever for tax obligations arising from payments to Class Counsel. The QSF will be solely responsible for its tax obligations. Each Class Member will be solely responsible for his/her tax obligations. Each Class Counsel attorney or firm will be solely responsible for his/her/its tax obligations.

V. RELEASES

A. Release And Covenant Not To Sue

1. Upon the Effective Date, each Moving Plaintiff and Class Member (who is not otherwise properly excluded as provided herein) (the "Releasors") shall release, forever discharge and covenant not to sue the Settling Defendants, their past or present parents, subsidiaries, divisions, affiliates, stockholders, officers, directors, insurers, employees, agents, attorneys, and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors, purchasers, and assigns of each of the foregoing) (the "Released Parties") from all

claims, whether federal or state, known or unknown, asserted or unasserted, regardless of legal theory, arising from or related to the facts, activities or circumstances alleged in the Consolidated Amended Complaint (Dkt. 65) or any other purported restriction on competition for employment or compensation of Named Plaintiffs or Class Members (collectively, the "Released Claims"). Released Claims shall be released up to the Effective Date of the Settlement whether or not alleged in the Consolidated Amended Complaint and whether or not any Class Member objects to the Settlement. For the avoidance of doubt, this Agreement shall not be construed to release any local, state or federal claim arising out of allegations of any product defect, discrimination, or personal or bodily injury, and shall not be construed to release any local, state or federal claim arising out of allegations of unlawful overtime or violations of ERISA or similar statutes that are unrelated to the facts, activities, or circumstances alleged in the Consolidated Amended Complaint or to the payments or distributions made pursuant to this Settlement.

2. Each Releasor expressly agrees that, upon the Effective Date, he, she, or it waives and forever releases with respect to the Released Claims any and all provisions, rights and benefits conferred by either (a) § 1542 of the California Civil Code, which reads:

> Section 1542. General release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

or (b) any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code.

3. Upon the Effective Date, Class Members shall be bound by the dismissal with prejudice of the Action and the release of the Released Claims set forth in this Section V.

VI. PLAINTIFF SERVICE AWARDS

At the Fairness Hearing, Co-Lead Class Counsel will seek Court approval for service awards to each of the Named Plaintiffs for their participation in the Action. The proposed service awards will be in addition to any monetary award to the Named Plaintiffs under the Plan of Allocation, and are subject to Court approval. Such service awards shall be paid by the Notice Administrator solely out of the Settlement Fund upon Court approval. Settling Defendants will take no position on the application for such service awards for requests that are $25,000.00 or less per Named Plaintiff (exclusive of previous service awards received in connection with other settlements). The amount requested will be consistent with class action jurisprudence in this District.

These service payments shall constitute a special award to Named Plaintiffs receiving such payments and shall not be considered as a payment of overtime, salary, wages and/or compensation under the terms of any company benefit plan or for any other purpose except to the extent required for tax purposes. The receipt of service payments shall not affect the amount of any contribution to or level of benefits under any company benefit plan.

VII. ATTORNEYS' FEES AND EXPENSES AND ADMINISTRATIVE EXPENSES

A. Attorneys' Fees and Expenses

1. Prior to the deadline for objections to the Settlement pursuant to Section II.C, Co-Lead Class Counsel may apply to the Court for an award of Attorneys' Fees and Expenses incurred on behalf of the Plaintiffs. All Attorneys' Fees and Expenses and any interest due any counsel (to the extent any interest is awarded) shall be payable solely out of the Settlement Fund in such amounts as the Court orders. No Settling Defendant nor any Released Party has any liability or responsibility for fees, costs, expenses, or interest, including without limitation attorneys' fees, costs, expenses, expert fees and costs or administrative fees or costs.

2. Upon the Effective Date, Class Counsel and Moving Plaintiffs, individually and on behalf of the Class and each individual Class Member, hereby irrevocably and unconditionally release, acquit, and forever discharge any claim that they may have against the Settling Defendants or any Released Party for Attorneys' Fees and Expenses or costs associated with this Action or Class Counsel's representation of Named Plaintiffs and/or the Class.

3. All Attorneys' Fees and Expenses and any interest due any counsel (to the extent any interest is awarded) for the Plaintiffs shall be payable solely out of the Settlement Fund and may be deducted from the Settlement Fund prior to the distribution to Class Members, but only on or after entry of an order by the Court approving any Attorneys' Fees and Expenses and only on or after the Effective Date. The undersigned Co-Lead Class Counsel may withdraw from the Account and allocate amongst counsel for the Plaintiffs the Attorneys Fees and Expenses so awarded.

4. Settling Defendants will not comment on or oppose Class Counsel's request for Attorneys' Fees so long as the request for fees is no greater than twenty-five percent (25%) of the Settlement Fund, a figure that the Settling Parties acknowledge has been recognized by courts as a reasonable benchmark in various class actions.

B. Costs of Notice and Administration

All costs of notice and administration shall be paid for solely from the Settlement Fund. Under no circumstances shall Settling Defendants or any Released Party be otherwise obligated to pay for costs of Notice or any costs to administer the Settlement.

VIII. OTHER CONDITIONS

A. Settlement Does Not Become Effective

In the event that the Settlement Agreement is terminated, is not finally approved or does not become effective for any reason, judgment is not entered in accordance with this Agreement,

or such judgment does not become final, then (a) this Settlement Agreement shall be null and void and of no force and effect, (b) any payments of the Settlement Fund, including the $1,000,000.00 Settlement Notice Fund transferred by Settling Defendants 10 days from Preliminary Approval and any and all interest earned thereon less monies expended toward settlement administration, shall be returned to the Settling Defendants within ten (10) business days from the date the Settlement Agreement becomes null and void, and (c) any release pursuant to Section V herein shall be of no force or effect. In such event, the case will proceed as if no settlement has been attempted, and the Settling Parties shall be returned to their respective procedural postures, i.e., *status quo* as of April 24, 2014, so that the Settling Parties may take such litigation steps that Plaintiffs or the Settling Defendants otherwise would have been able to take absent the pendency of this Settlement. However, any reversal, vacating, or modification on appeal of (1) any amount of the fees and expenses awarded by the Court to Class Counsel, or (2) any determination by the Court to award less than the amount requested in Attorneys' Fees and Expenses or service awards to Named Plaintiffs, shall not give rise to any right of termination or otherwise serve as a basis for termination of this Settlement Agreement.

In the event the Settlement does not become effective, the Settling Parties will negotiate and submit for Court approval a case schedule.

B. Preservation of Rights

The Settling Parties expressly reserve all of their rights, contentions and defenses if this Settlement does not become final and effective in accordance with the terms of this Settlement Agreement. The Settling Parties further agree that this Settlement Agreement, whether or not it shall become effective pursuant to Section II.F herein, and any and all negotiations, documents and discussions associated with it shall be without prejudice to the rights of any party, shall not be deemed or construed to be an admission or evidence of any violation of any statute or law, of any

liability or wrongdoing by any Settling Defendant, any Released Party, or any other Defendant, and shall not be deemed or construed to be an admission or evidence of the truth of any of the claims or allegations made in the Action, whether in this case or any other action or proceeding. The Settling Parties further acknowledge and agree that the negotiations and discussions that led to this Settlement are fully protected from disclosure by Federal Rule of Evidence 408 and California Evidence Code Sections 1119 and 1152.

C. Authority to Settle

The undersigned represent and warrant each has authority to enter into this Settlement Agreement on behalf of the party indicated below his or her name.

D. No Assignment

Class Counsel and Moving Plaintiffs represent and warrant that they have not assigned or transferred, or purported to assign or transfer, to any person or entity, any claim or any portion thereof or interest therein, including, but not limited to, any interest in the Action or any related action, and they further represent and warrant that they know of no such assignments or transfers on the part of any Class Member.

E. Binding Effect

This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Settling Parties and the Released Parties. Without limiting the generality of the foregoing, each and every covenant and agreement herein by the Moving Plaintiffs and Class Counsel shall be binding upon all Class Members.

F. Mistake

In entering and making this Agreement, the Settling Parties assume the risk of any mistake of fact or law. If the Settling Parties, or any of them, should later discover that any fact they relied upon in entering into this Agreement is not true, or that their understanding of the facts or law was

incorrect, the Settling Parties shall not be entitled to seek rescission of this Agreement, or otherwise attack the validity of the Agreement, based on any such mistake. This Agreement is intended to be final and binding upon the Settling Parties regardless of any mistake of fact or law.

G. Advice of Counsel

Except as set forth in this Agreement, the Settling Parties represent and warrant that they have not relied upon or been induced by any representation, statement or disclosure of the other Settling Parties or their attorneys or agents, but have relied upon their own knowledge and judgment and upon the advice and representation of their own counsel in entering into this Agreement. Each Settling Party warrants to the other Settling Parties that it has carefully read this Agreement, knows its contents, and has freely executed it. Each Settling Party, by execution of this Agreement, represents that it has been represented by independent counsel of its choice throughout all negotiations preceding the execution of this Agreement.

H. Integrated Agreement

This Settlement Agreement, including exhibits, contain the entire, complete, and integrated statement of each and every term and provision of the Settlement Agreement agreed to by and among the Settling Parties. This Settlement Agreement shall not be modified in any respect except by a writing executed by the undersigned in the representative capacities specified, or others who are authorized to act in such representative capacities.

I. Headings

The headings used in this Settlement Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Settlement Agreement.

J. No Drafting Presumption

All counsel to all Settling Parties hereto have materially participated in the drafting of this Settlement Agreement. No party hereto shall be considered to be the drafter of this Settlement

Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

K. Choice of Law

All terms of this Settlement Agreement shall be governed by and interpreted according to the substantive laws of the State of California without regard to its choice of law or conflict of laws principles.

L. Consent to Jurisdiction and Choice of Exclusive Forum

Any and all disputes arising from or related to the Settlement, the Settlement Agreement, or distribution of the Settlement Fund, including Attorneys' Fees and Expenses must be brought by a Settling Defendant, a Released Party, Plaintiffs, and/or each member of the Class, exclusively in the Court. Settling Defendants, Plaintiffs and each member of the Class hereby irrevocably submit to the exclusive and continuing jurisdiction of the Court for any suit, action, proceeding or dispute arising out of or relating to this Settlement Agreement or the applicability or interpretation of this Settlement Agreement, including, without limitation, any suit, action, proceeding or dispute relating to the release provisions herein, except that (a) this paragraph shall not prohibit any Released Party from asserting in the forum in which a claim is brought that the release herein is a defense, in whole or in part, to such claim, and (b) in the event that such a defense is asserted in that forum and this Court determines that it cannot bar the claim, this paragraph shall not prohibit the determination of the merits of the defense in that forum.

M. Enforcement of Settlement

Nothing in this Settlement Agreement prevents Settling Defendants or any Released Party from enforcing or asserting any release herein, subject to the provisions of Section V herein. Notwithstanding any other provision of this Settlement Agreement, this Settlement Agreement and the releases contained herein may be pleaded as a full and complete defense to any action, suit

or other proceeding that has been or may be instituted, prosecuted or attempted by any Moving Plaintiff or Class Member (who is not otherwise properly excluded as provided herein) with respect to any Released Claims and may be filed, offered and received into evidence and otherwise used for such defense.

N. Severability

In the event any one or more of the provisions of this Settlement Agreement shall for any reason be held to be illegal, invalid or unenforceable in any respect, such illegality, invalidity or unenforceability shall not affect any other provision if Settling Defendants' Counsel and Class Counsel mutually agree to proceed as if such illegal, invalid, or unenforceable provision had never been included in the Settlement Agreement.

O. No Admission

This Settlement shall not be deemed an admission of liability or wrongdoing on the part of any of the Settling Defendants, who have denied, and continue to deny that they engaged in any wrongdoing of any kind, or violated any law or regulation, or breached any duty owed to the Named Plaintiffs or the Class Members. Settling Defendants further deny that they are liable to or owe any form of compensation or damages to, anyone with respect to the alleged facts or causes of action asserted in the Action. Settling Defendants do not, by entering into this Settlement Agreement, admit that any or all of them have caused any damage or injury to any Class member as a result of the facts alleged or asserted in the Action and do not admit that Plaintiffs' calculations or methods of calculations of alleged damages are accurate or appropriate.

P. Execution in Counterparts

This Settlement Agreement may be executed in counterparts. Facsimile or PDF signatures shall be considered as valid signatures as of the date they bear.

Q. Appeals

The proposed order and final judgment shall provide that any Class Member that wishes to appeal the Court's Final Approval Order and Final Judgment, which appeal will delay the distribution of the Settlement Fund to the Class, shall post a bond with this Court in an amount to be determined by the Court as a condition of prosecuting such appeal.

R. Calculation of Time

To the extent that any timeframe set out in this Settlement Agreement is ambiguous, said ambiguity shall be resolved by applying the conventions contained in Rule 6 of the Federal Rules of Civil Procedure.

S. Representations to the Court About Settlement Negotiations

The Settling Parties confirm, and will so represent to the Court, that these settlement negotiations were arm's-length and facilitated through the aid of the mediators described above, that there was no discussion of attorneys' fees prior to negotiating the Settlement, and that there are no commitments between the Settling Parties beyond what is in the Settlement. Class Counsel and Settling Defendants' Counsel agree this Settlement is beneficial to the Class and will not represent otherwise to the Court.

T. Opt Out Credit

Settling Defendants shall be entitled to a pro rata reduction in the contribution to the Settlement Fund in the event that 4% or more of Class Members properly exclude themselves from this Action pursuant to the terms approved by the Court and described in the class notice.

IN WITNESS WHEREOF, the Settling Parties hereto through their fully authorized representatives have agreed to this Settlement Agreement on the date first herein above written.

ACCEPTED AND AGREED:

Dated: May 22, 2014 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

Kelly M. Dermody
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Dated: May 22, 2014 JOSEPH SAVERI LAW FIRM, INC.

Joseph R. Saveri
505 Montgomery Street, Suite 625
San Francisco, CA 94111
Telephone: (415) 500-6800
Facsimile: (415) 395-9940

Co-Lead Plaintiffs' Class Counsel

Dated: 5/22, 2014 On behalf of Adobe Systems, Incorporated

Name: _____

Title: SVP, GC

Date: May 22, 2014

Dated: _____, 2014 On behalf of Apple Inc.

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Google Inc.

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Intel Corporation

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Adobe Systems, Incorporated

Name: _____

Title: _____

Date: _____

Dated: May 22, 2014 On behalf of Apple Inc.

Name: Bruce Sewell

Title: General Counsel, Senior Vice President

Date: May 22, 2014

Dated: _____, 2014 On behalf of Google Inc.

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Intel Corporation

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Adobe Systems, Incorporated

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Apple Inc.

Name: _____

Title: _____

Date: _____

Dated: MAY 22, 2014 On behalf of Google Inc.

Name: Kent Walker

Title: SVP and GENERAL COUNSEL

Date: May 22, 2014

Dated: _____, 2014 On behalf of Intel Corporation

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Adobe Systems, Incorporated

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Apple Inc.

Name: _____

Title: _____

Date: _____

Dated: _____, 2014 On behalf of Google Inc.

Name: _____

Title: _____

Date: _____

Dated: May 22, 2014 On behalf of Intel Corporation

Name: Douglas Melamed

Title: Senior VP & General Counsel

Date: May 22, 2014

EXHIBIT B

GIRARD GIBBS
LLP

ATTORNEYS AT LAW

October 1, 2014

VIA ELECTRONIC MAIL

Robert A. Van Nest
KEKER & VAN NEST LLP
633 Battery Street
San Francisco, CA 94111
rvannest@kvn.com

Re: ***In re High-Tech Employee Antitrust Litigation***
Case No. 11-cv-2509-LHK

Dear Mr. Van Nest:

I am writing to request that you withdraw your clients' petition for writ of mandamus. By its own terms, the settlement agreement at issue expired when the district court rejected the proposed settlement.

The settlement agreement expressly contemplates the possibility that the district court would deny preliminary approval. On page 8, section II.B of the settlement agreement provides:

> **4. If the Court denies without leave to re-file the motion for Preliminary Approval the case will proceed as if no settlement had been attempted, and the Settling Parties shall be returned to their respective procedural postures, i.e., *status quo* as of April 24, 2014, so that the Settling Parties may take such litigation steps that Plaintiffs or the Settling Defendants otherwise would have been able to take absent the pendency of this Settlement Agreement. In the event the Settlement does not receive Preliminary Approval, the Settling Parties will negotiate and submit for Court approval a modified case schedule.**

As contemplated by paragraph 4, after the district court denied preliminary approval of the proposed settlement on August 8, 2014, the parties submitted a modified case schedule to the court, which was adopted by orders dated September 4, 2014 (ECF No. 982) and September 8, 2014 (ECF No. 986).

Accordingly, because the settlement agreement expired when the district court denied preliminary approval of the proposed settlement, your petition for writ of mandamus is moot, and the Ninth Circuit Court of Appeal is without jurisdiction.

Please let me know by the close of business on Thursday, October 2 if your clients agree to withdraw their appeal.

Yours very truly,

Girard Gibbs LLP

Daniel C. Girard

cc: Kelly M. Dermody
Joseph R. Saveri

EXHIBIT C

KEKER & VAN NEST LLP

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Robert A. Van Nest
(415) 391-5400
rvannest@kvn.com

October 2, 2014

VIA ELECTRONIC MAIL

Mr. Daniel C. Girard
Girard Gibbs LLP
601 California Street, Suite 1400
San Francisco, CA 94108

Re: *In re High-Tech Employee Antitrust Litigation*

Dear Daniel:

We write in response to your October 1 letter requesting that Defendants withdraw their pending Petition for a Writ of Mandamus in the Ninth Circuit. Defendants are not willing to do so. We disagree with your premise that the Settlement Agreement is expired or of no effect. Section II.B.4 provides that, "[i]f the Court denies without leave to re-file the motion for Preliminary Approval the case will proceed as if no settlement had been attempted…." You apparently believe that Judge Koh's denial of the motion for preliminary approval, by itself, nullifies the Settlement Agreement. But if the Ninth Circuit agrees that Judge Koh erred in denying preliminary approval and vacates her initial order, that (erroneous) order will have no effect and cannot render the settlement a nullity. Your interpretation of section II.B.4 also makes little sense, as it would foreclose seeking even extraordinary appellate review of an erroneous decision.

Of course, if preliminary approval is denied *finally*, after appellate review has been exhausted, the Settlement Agreement could not be finally approved and would become null and void. *See* section VIII.A (providing that if the settlement is not finally approved, it shall be "null and void;" in contrast, no such language appears in section II.B.4). But the current situation is that preliminary approval, and final approval, may still be obtained. As a consequence, the Settlement Agreement is still in effect and fully enforceable. *See e.g.*, *Gibson v. Homedics, Inc.*, 2014 WL 2757585, at *4-6 (Cal. App. 4 Dist., June 18, 2014) (unpublished) (finding settlement agreement required parties to take appropriate steps to effectuate agreement despite trial court's initial denial of final approval).

Via Electronic Mail

We are available at your convenience if you wish to discuss these issues further.

Sincerely,

Robert A. Van Nest