EXHIBIT A

N. Scott Sacks, Attorney (D.C. Bar No. 913087)
Jessica N. Butler-Arkow, Attorney (D.C. Bar No. 430022)
Danielle Hauck, Attorney (Member, New York Bar, numbers not assigned)
Anna T. Pletcher, Attorney (California Bar No. 239730)
Adam T. Severt, Attorney (Member, Maryland Bar, numbers not assigned)
Ryan Struve, Attorney (D.C. Bar No. 495406)
Shane Wagman, Attorney (California Bar No. 283503)
United States Department of Justice, Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530
Telephone: (202) 307-6200
Facsimile: (202) 616-8544
E-mail: scott.sacks@usdoj.gov

Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. EBAY, INC. *Defendant*.	Case No. 12-CV-05869-EJD-PSG **COMPETITIVE IMPACT STATEMENT**

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States brought this lawsuit against Defendant eBay Inc. ("eBay") on November 16, 2012, to remedy a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] Section 1 of the Sherman Act outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The Sherman Act is designed to ensure "free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ." *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4-5 (1958)).

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

eBay filed a Motion to Dismiss ("Motion") pursuant to Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted), arguing that the Complaint

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

failed to allege (1) an actionable agreement between two separate and independent firms because the agreement was essentially the product of the relationship between eBay and one of its outside directors, Scott Cook, in his capacity as an eBay director and (2) harm to competition under a "rule of reason" analysis. Def.'s Mot. to Dismiss the Compl. Pursuant to FRCP 12(b)(6), & Mem. Of P. & A. In Support Thereof, *United States v. eBay Inc.*, --- F. Supp. 2d ----, 2013 WL 5423734 (N.D. Cal. Sept. 27, 2013) (No.12-cv-05869-EJD), ECF No. 15.

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

The Court found that the United States had alleged an actionable agreement between two separate firms, eBay and Intuit. *Id.* at *4. The Court, after noting that horizontal market allocation agreements typically constitute per se violations of Section 1, also found that the United States had adequately alleged a per se horizontal market allocation agreement. In doing so, the Court rejected eBay's contention that the fact that the alleged agreement involved a labor market should prevent the court from finding a "classic" horizontal market agreement that would warrant per se treatment. *Id.* at *5-6. The Court noted that eBay's argument that the alleged

restraint was not naked as alleged by the United States but was ancillary to a legitimate business purpose could only be resolved after discovery. *Id.* at *6.

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

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

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

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

As the Complaint alleges, senior executives and directors at eBay and Intuit reached this express agreement through direct and explicit communications. The executives actively managed and enforced the agreement through direct communications. For example, in November 2005, eBay Chief Operating Officer Maynard Webb asked Cook, Intuit's Founder and Chairman of its Board Executive Committee and an outside director of eBay, to enter into a no-solicitation

agreement under which eBay would not actively recruit from Intuit; eBay would notify Intuit in advance before offering a position at the Senior Director level or above to an Intuit employee; and eBay would notify Intuit after making an offer below that level. Intuit rejected the proposal because it allowed eBay to hire Intuit employees without prior notice to Intuit. Cook wrote that Intuit did not recruit from board companies (i.e., the companies from which its outside directors came), "period" and "[w]e're passionate on this." (Compl. ¶ 15.) Cook committed that Intuit would not make an offer to anyone from eBay without first notifying eBay. (Compl. ¶ 15.)

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

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

since their comp[ensation] and ben[efits] person is supposed to be excellent!).” (Compl. ¶ 20.) eBay recruiting personnel understood that “Meg [Whitman] and Scott Cook entered into the agreement (handshake style, not written) that eBay would not hire from Intuit, period.” (Compl. ¶ 21.)

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

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

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

III. THE AGREEMENT WAS A NAKED RESTRAINT AND NOT ANCILLARY TO ACHIEVING LEGITIMATE BUSINESS PURPOSES

A. The agreement was a naked restraint of trade that is per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1.

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

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

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

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

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

Accordingly, in denying eBay's Motion to Dismiss, the Court held in this case that the fact that the alleged market allocation occurs in an input market, *i.e.*, the employment market, did not, as a matter of law, prevent the Court from finding that the agreement as alleged amounts to a

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

"classic" horizontal market division, and that antitrust law does not treat employment markets differently from other markets in this respect. See *eBay, Inc.*, 2013 WL 5423734 at *5.

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

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

An agreement that would normally be condemned as a per se unlawful restraint on competition may nonetheless be lawful if it is ancillary to a legitimate procompetitive venture and reasonably necessary to achieve the procompetitive benefits of the collaboration. Ancillary restraints therefore are not per se unlawful, but rather are evaluated under the rule of reason,

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

which balances a restraint's procompetitive benefits against its anticompetitive effects.[4] To be considered "ancillary" under established antitrust law, however, the restraint must be a necessary or intrinsic part of the procompetitive collaboration.[5] Restraints that are broader than reasonably necessary to achieve the efficiencies from a business collaboration are not ancillary and are properly treated as per se unlawful.

The Division saw no evidence of a relevant legitimate collaborative project involving eBay and Intuit, nor was the recruiting agreement into which they entered, under established antitrust law, properly ancillary to any such collaboration if it existed. The agreement extended to all employees at the firms, regardless of any employee's relationship to any collaboration. The

[4] *See generally* Department of Justice, Antitrust Division, and Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* § 1.2 (2000) ("*Collaboration Guidelines*"). *See also Major League Baseball v. Salvino*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) ("a per se or quick look approach may apply . . . where a particular restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as a naked restraint against competition."); *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1121 (9th Cir. 2004) (describing ancillary restraints as "reasonably necessary to further the legitimate aims of the joint venture"); *rev'd on other grounds sub nom. Texaco v. Dagher*, 547 U.S. 1, 8 (2006); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986) ("[T]he restraints it imposes are reasonably necessary to the business it is authorized to conduct")*; In re Polygram Holdings., Inc.*, 2003 WL 21770765 (F.T.C. 2003) (stating that parties must prove that the restraint was "reasonably necessary" to permit them to achieve particular alleged efficiency), *aff'd*, *Polygram Holdings, Inc. v. F.T.C.*, 416 F.3d 29 (D.C. Cir. 2005).

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

agreement was not limited by geography, job function, product group, or time period. Accordingly, the agreement was not reasonably necessary for any collaboration between the two firms and hence, not a legitimate ancillary restraint.

IV. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

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

A. Prohibited Conduct

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

B. Conduct Not Prohibited

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

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

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

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

3. the settlement or compromise of legal disputes; and

4. contracts with resellers or OEMs; contracts with certain providers or recipients of services; or the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities.

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

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

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

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

If the no direct solicitation provision relates to an oral agreement, Section V.C of the proposed Final Judgment requires eBay to maintain documents sufficient to show the terms of the no direct solicitation provision, including: (1) the specific agreement to which the no direct solicitation provision is ancillary; (2) an identification, with reasonable specificity, of the employees who are subject to the no direct solicitation provision; and (3) the no direct solicitation provision's specific termination date or event.[8]

The purpose of Sections V.B. and V.C. is to ensure that no direct solicitation provisions related to eBay's contracts with resellers, OEMs, and providers of services, and collaborations with other companies, are reasonably necessary to the contract or collaboration. In addition, the

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

requirements set forth in Sections V.B and V.C of the proposed Final Judgment provide the United States with the ability to monitor eBay's compliance with the proposed Final Judgment.

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

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

C. Required Conduct

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

Under Section VI, eBay must file annually with the United States a statement identifying any agreement covered by Section V.A.5., and describing any violation or potential violation of

the Final Judgment known to any officer, director, human resources manager, or senior manager who supervises employee recruiting, solicitation, or hiring efforts. If one of these persons learns of a violation or potential violation of the Judgment, eBay must take steps to terminate or modify the activity to comply with the Judgment and maintain all documents related to the activity.

D. Compliance

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

V. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against eBay.

On the same date and in the same court this case was filed by the United States, the State of California filed a related case based on the same factual allegations, *The People of the State of California v. eBay, Inc.*, No. 12-cv-5874-EJD (N.D. Cal. filed November 16, 2012). On the same date that the United States filed its proposed final judgment in this case, the State of

California filed a proposed *parens patriae* settlement which would provide up to $2.675 million in restitution directly to individuals and to compensate for harm to the state's economy.

VI. PROCEDURES APPLICABLE FOR APPROVAL OR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

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

Written comments should be submitted to:

James J. Tierney
Chief, Networks & Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

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

VII. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

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

VIII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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

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

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

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

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's

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

> role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is '*within the reaches of the public interest.*' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

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

In addition, "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this

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

standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court,

with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[11]

IX. DETERMINATIVE DOCUMENTS

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

Dated: May 1, 2014

For Plaintiff United States of America,

/s/ N. Scott Sacks

N. Scott Sacks
Jessica N. Butler-Arkow
Danielle Hauck
Anna T. Pletcher
Adam T. Severt
Ryan Struve
Shane Wagman
Attorneys
United States Department of Justice
Antitrust Division
450 5th Street, NW, Suite 7100
Washington, DC 20530
Telephone: (202) 307-6200
Facsimile: (202) 616-8544
E-mail: scott.sacks@usdoj.gov

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