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15 **UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN JOSE DIVISION**

18 UNITED STATES OF AMERICA,

19 Plaintiff,

20 v.

21 EBAY, INC.

22 Defendant.

23 **Case No. 12-CV-05869 EJD**

24 **AMENDED COMPLAINT**

25 The United States of America, acting under the direction of the Attorney General
26 of the United States, brings this civil antitrust action to obtain equitable relief against
27 Defendant eBay, Inc. (“eBay”), alleging as follows:

28 **NATURE OF THE ACTION**

1 This action challenges under Section 1 of the Sherman Act a no-
2 solicitation and no-hiring agreement between eBay and Intuit, Inc. (“Intuit”), pursuant
3 to which eBay and Intuit agreed not to recruit each other’s employees and eBay agreed
4 not to hire Intuit employees, even those that approached eBay for a job. This agreement

1 harmed employees by lowering the salaries and benefits they might otherwise have
2 commanded, and deprived these employees of better job opportunities at the other
3 company. Meg Whitman, then the CEO of eBay, and Scott Cook, Founder and
4 Chairman of the Executive Committee at Intuit, were intimately involved in forming,
5 monitoring, and enforcing this anticompetitive agreement.

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

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

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

20 **JURISDICTION AND VENUE**

21 5. eBay hires specialized computer engineers, scientists, and other employees
22 throughout the United States, and sells products and services throughout the United
23 States. Such activities, including the recruitment and hiring activities at issue in this
24 Complaint, are in the flow of and substantially affect interstate commerce. The Court
25 has subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. § 4, and
26 under 28 U.S.C. §§ 1331 and 1337 to prevent and restrain the Defendant from violating
27 Section 1 of the Sherman Act, 15 U.S.C. § 1.
28

1 method of competing for needed employees. For example, Beth Axelrod, eBay’s
2 Senior Vice President for Human Resources at the time the agreement with Intuit was in
3 effect, co-authored a book, “The War for Talent,” which emphasizes the importance of
4 “cold-calling” as a recruitment tool: “The recruiting game is changing for yet another
5 reason: It’s no longer sufficient to target your efforts to people looking for a job; you
6 have to reach people who aren’t looking.”

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

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

1 to sacrifice the welfare of Intuit’s employees in order to advance his own personal
2 interests in serving on eBay’s Board.

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

14 **THE UNLAWFUL AGREEMENT**

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

20 15. In November 2005, eBay’s Chief Operating Officer, Maynard Webb,
21 wrote to Scott Cook, Intuit’s Founder and Chairman of its Executive Committee, to “get
22 [Mr. Cook’s] advice on a specific hiring situation and then see if we could establish
23 some guidelines on an ongoing basis.” Mr. Webb asked Mr. Cook for “permission to
24 proceed” with hiring an Intuit employee who had contacted eBay regarding a job, and
25 then proposed a “structure” to Mr. Cook for future situations, whereby eBay would “not
26 actively recruit from Intuit.” Under Mr. Webb’s proposal, for Intuit candidates “below
27 Senior Director level” who contacted eBay regarding employment, eBay would be
28 permitted to hire them and would give Intuit “notice” only after a candidate accepted a

1 job offer. For Intuit candidates “at Senior Director level or above,” eBay would not
2 make an offer unless Intuit was notified in advance. Mr. Cook rejected this proposal
3 insofar as it allowed hiring of any employees without prior notice to Intuit, saying that
4 “we don’t recruit from board companies, period” and “[w]e’re passionate on this.” In
5 other words, because Mr. Cook served on eBay’s board, Intuit employees should be
6 denied any chance to work for eBay. Mr. Cook committed that Intuit would not make
7 an offer to anyone from eBay without first notifying eBay, and said “[w]e would ask the
8 same.”

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

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

25 18. On or about April 2007, eBay’s commitment metastasized into a no-hire
26 agreement. The impetus was a complaint from Mr. Cook to Ms. Whitman that he was
27 “quite unhappy” about a potential offer that eBay was going to make to an Intuit
28 employee who had approached eBay. Ms. Axelrod spoke with Ms. Whitman regarding

1 Mr. Cook's concerns, and instructed David Knight, then eBay's Vice President, Internal
2 Communications, to hold off on making the offer. Mr. Knight urged Ms. Axelrod to
3 find a way to make the offer happen, as the decision put the applicant "in a tough
4 position and us in a bad place with California law" and left eBay "another 6 months
5 away from getting another candidate" for the position. A week later, Mr. Knight wrote
6 to Ms. Axelrod and Ms. Whitman pleading with them to at least "negotiate" any shift
7 from a "no poaching" agreement to a "no hiring" agreement after this particular
8 applicant was hired, as eBay "desperately need[ed] this position filled."

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

20 20. Two eBay staffers sought to clarify the situation with Ms. Axelrod shortly
21 thereafter. Ms. Axelrod said: "We have an explicit hands of[f] that we cannot violate
22 with any Intuit employee. There is no flexibility on this." The staff asked for further
23 amplification: "This applies even if the Intuit employee has reached out and
24 specifically asked? If so then I assume that person could NEVER be hired by ebay
25 unless they quit Intuit first." Ms. Axelrod confirmed this was "correct." Ms. Axelrod
26 similarly explained the impact of the agreement to Ms. Whitman: "I keep getting
27 inquiries from our folks to recruit from Intuit and I am firmly holding the line. No
28 exceptions even if the candidate proactively contacts us." In another email exchange,

1 Ms. Axelrod explained that she was responding to all inquiries regarding hiring from
2 Intuit by “firmly holding the line and saying absolutely not (including to myself since
3 their comp[ensation] and ben[efits] person is supposed to be excellent!).”

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

15 22. eBay insisted that Intuit refrain from recruiting its employees in exchange
16 for the limitation on eBay’s ability to recruit and hire Intuit employees. On August 27,
17 2007, Ms. Axelrod wrote Ms. Whitman to complain that while eBay was sticking to its
18 agreement not to hire Intuit employees, “it is hard to do this when Intuit recruits our
19 folks.” Ms. Axelrod forwarded Ms. Whitman a recruiting flyer that Intuit had sent to an
20 eBay employee. Ms. Whitman forwarded Ms. Axelrod’s e-mail to Mr. Cook the same
21 day asking him to “remind your folks not to send this stuff to eBay people.” Mr. Cook
22 responded quickly: “#@!%\$#^&!!! Meg my apologies. I’ll find out how this slip up
23 occurred again. . . .”

24 23. Throughout the course of the agreement, eBay repeatedly declined
25 opportunities to hire or interview Intuit employees, even when eBay had open positions
26 for “quite some time,” when the potential employee “look[ed] great,” or when “the only
27 guy who was good was from [I]ntuit.” eBay employees were instructed not to pursue
28 potential hires that came from Intuit and to discard their resumes. When a candidate

1 applied for a position and told eBay that she had left Intuit, Ms. Axelrod went so far as
2 to write Mr. Cook to confirm that the applicant had, in fact, left the company.

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

8 25. The agreement between eBay and Intuit remained in effect for at least
9 some period of time after a United States Department of Justice investigation of
10 agreements between technology companies that restricted hiring practices became
11 public. One eBay employee asked another in June 2009 if she had been “able to
12 connect with Beth [Axelrod] re our policies around hiring from Intuit with respect to” a
13 former employee at eBay’s PayPal division who “wishes to return” and noted press
14 reports of the Department of Justice investigation. The employee responded: “It’s a no
15 go too complicated. We should move to plan b.” (Ellipses in original.)

16 **VIOLATION ALLEGED**

17 **(Violation of Section 1 of the Sherman Act)**

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

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

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

1 29. The no-solicitation and no-hire agreement between eBay and Intuit is also
 2 an unreasonable restraint of trade that is unlawful under Section 1 of the Sherman Act,
 3 15 U.S.C. § 1, under an abbreviated or “quick look” rule of reason analysis. The
 4 principal tendency of the agreement between eBay and Intuit is to restrain competition,
 5 as the nature of the restraint is obvious and the agreement has no legitimate pro-
 6 competitive justification. Even an observer with a rudimentary understanding of
 7 economics could therefore conclude the agreement would have an anticompetitive
 8 effect on employees and harm the competitive process.

9 **REQUESTED RELIEF**

10 The United States requests that:

- 11 (A) the Court adjudge and decree that the Defendant’s agreement with Intuit not to
 12 compete constitutes an illegal restraint of interstate trade and commerce in
 13 violation of Section 1 of the Sherman Act;
- 14 (B) the Defendant be enjoined and restrained from enforcing or adhering to any
 15 existing agreement that unreasonably restricts competition for employees
 16 between it and anyone else;
- 17 (C) the Defendant be permanently enjoined and restrained from establishing any
 18 similar agreement unreasonably restricting competition for employees except as
 19 prescribed by the Court;
- 20 (D) the United States be awarded such other relief as the Court may deem just and
 21 proper to redress and prevent recurrence of the alleged violation and to dissipate
 22 the anticompetitive effects of the illegal agreement entered into by eBay and
 23 Intuit; and
- 24 (E) the United States be awarded the costs of this action.

1 Dated: April 19, 2013

2
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4 OF AMERICA:

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