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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
 20 Plaintiff,
 21
 22 v.
 23 EBAY INC.
 24
 25 Defendant.

Case No. 12-CV-05869-EJD-PSG
 JOINT CASE MANAGEMENT
 STATEMENT AND [PROPOSED]
 ORDER

Date: June 7, 2013
 Time: 10:00 a.m.
 Judge: Hon. Edward J. Davila

26 The parties to the above-entitled action jointly submit this **JOINT CASE**
 27 **MANAGEMENT STATEMENT AND [PROPOSED] ORDER** pursuant to the
 28 Standing Order for All Judges of the Northern District of California, dated July 1, 2011
 and Civil Local Rule 16-9. Pursuant to Rules 16(b) and 26(f) of the Federal Rules of
 Civil Procedure and Civil Local Rule 16-10(b), the parties respectfully request that the

1 Court adopt the non-disputed provisions of this Order as the Case Management Order in
2 this case.

3 **Plaintiff's Position**

4 The United States maintains that it has been unable, despite reasonable efforts, to
5 obtain the meaningful cooperation of Defendant in the meet and confer process, as
6 described in the accompanying Declaration of N. Scott Sacks, filed herein as Attachment
7 A. As a consequence, there is no agreement with respect to scheduling or discovery
8 issues.

9 **Defendant's Position**

10 The parties have met their obligation to meet and confer to discuss the parties'
11 positions on the topics required under the Standing Order for All Judges of the Northern
12 District of California, dated July 1, 2011 and revised May 8, 2013. Plaintiff circulated a
13 draft protective order on May 14, 2013. On May 21, 2013, Plaintiff circulated a draft of
14 this Joint Case Management Statement. On May 30, 2013, the parties met and conferred
15 by telephone. Each party on the call had the opportunity to discuss its position with
16 respect to each of the required topics. The parties' separate positions with respect to each
17 topic are indicated herein by sub-headings.

18 **1. Jurisdiction and Service**

19 The basis for the Court's subject matter jurisdiction is Sections 1 and 4 of the
20 Sherman Act, 15 U.S.C. §§ 1, 4 and 28 U.S.C. §§ 1331, 1337. The Court has personal
21 jurisdiction over Defendant, and venue is proper in this Court. Defendant has accepted
22 service of the Complaint and has waived service of summons. No parties remain to be
23 served.

24 **2. Facts**

25 **Plaintiff's Position**

26 Plaintiff alleges that no later than August, 2006, eBay, Inc. ("eBay"), and Intuit,
27 Inc. ("Intuit"), entered into a *quid pro quo* agreement that restrained each other's ability
28 to recruit and hire employees of the other company by preventing solicitation of each

1 firm's existing employees, and preventing eBay from hiring any Intuit employees. eBay
2 and Intuit refrained from recruiting from or hiring then-current employees of the other
3 firm, and both firms passed on opportunities to interview and hire attractive job
4 candidates. The agreement was entered into, implemented and enforced by executives
5 and directors of both firms, including but not limited to eBay's Margaret Whitman,
6 Maynard Webb, and Beth Axelrod and Intuit's Scott Cook, Sherry Whitely, and Rob
7 Lake. The agreement was naked, that is, not reasonably necessary to further any
8 procompetitive activity, such as a business collaboration between eBay and Intuit. This
9 agreement continued to at least 2009 and Plaintiff does not know if, and if so, when, the
10 agreement was terminated. The effect of the agreement was to restrain the opportunities
11 of employees of the two firms to obtain higher salaries, better benefits and job
12 opportunities, as well as distort the competitive process for allocating employees in labor
13 services markets.

14 **Defendant's Position**

15 Plaintiff's Amended Complaint ("Complaint") alleges that in November 2005, an
16 eBay officer approached an eBay Director seeking guidance regarding a proposed eBay
17 policy with respect to recruiting from Intuit, a company for which that eBay Director
18 served as founder and Chairman of the Executive Committee. As the Complaint alleges,
19 the eBay Director described an existing Intuit policy and made suggestions regarding the
20 proposed eBay policy. The eBay Director's reservations regarding hiring practices
21 between companies with shared officers or directors was not surprising, given the
22 potential conflicts of interest that might arise under those circumstances.

23 The Complaint alleges that eBay developed a policy under which it refrained from
24 recruiting, and for a time hiring, from Intuit. All of the communications alleged in the
25 Complaint that contributed to the development of that policy occurred solely between
26 eBay employees, officers, and Directors. The Complaint does not allege any facts
27 indicating that the challenged conduct occurred after June 2009, nearly four years ago.
28

1 The Complaint does not allege a single fact in support of Plaintiff's conclusory
2 allegation that the challenged policy restrained opportunities, salaries, or benefits for
3 employees of either eBay or Intuit. Nor does the Complaint allege facts that demonstrate
4 a meaningful impact on competition within any cognizable market.

5 **3. Legal Issues**

6 The key legal issues and the parties' respective positions were discussed at some
7 length in the Motion to Dismiss briefing and hearing. What follows here is a very brief
8 summary.

9 **Plaintiff's Position**

10 Plaintiff alleges that the agreement between eBay and Intuit, two independent
11 firms, was a naked market allocation agreement that was manifestly anticompetitive and
12 without any redeeming virtue, and thus constituted a *per se* violation of Section 1 of the
13 Sherman Act. Compl. ¶¶ 4, 26-28 (ECF No. 1); *see Leegin Creative Leather Prods., Inc.*
14 *v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *United States v. Brown*, 936 F.2d 1042, 1045
15 (9th Cir. 1991) (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972))
16 (holding that an agreement between purchasers of billboard leases to refrain from bidding
17 on each other's former leaseholds was a market allocation constituting a "classic *per se*
18 antitrust violation."). Neither detailed economic analysis of a labor services market nor
19 proof of actual anticompetitive effects is required for such a naked agreement to be
20 judged a *per se* unlawful market allocation agreement or otherwise a naked agreement
21 *per se* unlawful. *See Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 343-44
22 (1982); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011)
23 (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284,
24 289 (1985)).

25 Plaintiff alternatively alleges that the agreement constituted a violation of Section
26 1 of the Sherman Act under a "quick look" rule of reason analysis, as an observer with
27 even a rudimentary understanding of economics could conclude that the agreement would
28 have an anticompetitive effect. Compl. ¶ 29; *see Safeway*, 651 F.3d at 1134 (quoting

1 *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)). As such, in the absence of
2 any plausible procompetitive activity to which the alleged agreement was ancillary, the
3 agreement may be condemned without further detailed economic analysis under the rule
4 of reason. *See FTC v Ind. Fed'n of Dentists*, 476 U.S. 447, 459-60 (1986); *Nat'l*
5 *Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984).

6 **Defendant's Position**

7 Plaintiff's Complaint fails to allege facts sufficient to state a claim and must
8 therefore be dismissed, as articulated in eBay's Motion to Dismiss. To successfully state
9 a claim under Section One of the Sherman Act, a plaintiff must allege a contract,
10 combination or conspiracy between independent economic actors that unreasonably
11 restrained trade. The Complaint alleges neither, and it must therefore be dismissed.

12 Plaintiff's attempt to characterize an internal decision made among eBay
13 personnel as a Section One violation is contrary to long-standing antitrust doctrine that
14 requires the existence of an agreement between independent economic actors. *See*
15 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). This theory, if
16 accepted, would also threaten to create a conflict between Section One of the Sherman
17 Act and Section Eight of the Clayton Act, which allows officers and directors to serve on
18 multiple boards, provided that the companies involved do not compete above certain *de*
19 *minimis* numerical thresholds. 15 U.S.C. § 19(a)(1)-(2).

20 Plaintiff's Complaint also fails to allege any facts demonstrating that the
21 challenged policy harmed anyone, let alone caused the type of unreasonable harm to
22 competition that the antitrust laws actually prohibit. Instead, Plaintiff seeks to rely on
23 judicially-created presumptions of harm—the *per se* rule and the “quick look” doctrine—
24 that only apply under extraordinary circumstances. In doing so, Plaintiff ignores that no
25 court has ever applied the *per se* rule to find a bilateral agreement between potential
26 employers regarding hiring practices illegal, and the few courts that have considered such
27 arrangements have applied the presumptive antitrust standard—the rule of reason. *See,*
28 *e.g., Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999); *Union Circulation Co. v. FTC*, 241

1 F.2d 652 (2d Cir. 1957); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983).
2 Plaintiff's attempts to ignore precedent and apply the *per se* rule or "quick look" doctrine
3 are improper here and its claims should be dismissed.

4 Furthermore, Plaintiff has shown no indication that it intends to pursue a case
5 under the appropriate rule of reason standard, and the Complaint fails to allege the
6 required facts under that standard to demonstrate harm to any individual or to
7 competition within a cognizable market. Thus, Plaintiff's claims should be dismissed
8 without leave to amend.

9 **4. Motions**

10 On January 22, 2013, Defendant filed a Motion to Dismiss pursuant to Fed. R.
11 Civ. P. 12(b)(6). The Court held a hearing on April 26, 2013, and the Motion to Dismiss
12 is under submission. It is too early to determine whether either party will file any
13 additional motions.

14 **5. Amendment of Pleadings**

15 On April 23, 2013, the Court granted the Plaintiff's Stipulated Motion for Leave
16 to File an Amended Complaint. Stipulation & Order Granting United States' Stipulated
17 Mot. For Leave to File Am. Compl. (ECF No. 29). Plaintiff does not intend to further
18 amend its pleadings at this time.

19 **6. Evidence Preservation**

20 **Plaintiff's Position**

21 Plaintiff has reviewed the Guidelines Relating to the Discovery of Electronically
22 Stored Information ("ESI Guidelines"). The parties have not met and conferred pursuant
23 to Fed. R. Civ. P. 26(f) and ESI Guideline 2.02 regarding the preservation of evidence
24 relevant to the issues in this case, as described in the accompanying Declaration of N.
25 Scott Sacks. Plaintiff is committed to cooperating with the production of ESI in the most
26 efficient and least burdensome manner as the nature and scope of such productions
27 becomes better defined. Plaintiff proposes that neither party is required to preserve or
28 produce in discovery the following categories of information, some of which is ESI:

- 1 (1) voicemail messages, except where they are contained within the party's email
2 systems;
- 3 (2) e-mail or other electronic messages sent to or from a personal digital assistant
4 or smartphone (e.g., Blackberry or iPhone), provided that a copy of such e-mail or
5 message is routinely saved and preserved elsewhere;
- 6 (3) other electronic data stored on a personal digital assistant or smartphone, such
7 as calendar or contact data or notes, provided that a copy of such information is
8 routinely saved and preserved elsewhere;
- 9 (4) temporary or cache files, including Internet history, web browser cache, and
10 cookie files, wherever located;
- 11 (5) server, system, or network logs;
- 12 (6) documents sent solely between outside counsel for defendant (or persons
13 employed by or acting on behalf of such counsel) or solely between counsel for
14 the United States (or persons employed by the United States Department of
15 Justice) or between counsel for the United States and counsel for the State of
16 California;
- 17 (7) documents authored by Defendant's counsel that were not directly or
18 indirectly furnished to any person outside of Defendant's legal department(s) or
19 outside counsel, such as internal memoranda; and
- 20 (8) documents authored by counsel for (or other employees of) the United States
21 that were not directly or indirectly furnished to any third party, such as internal
22 memoranda.

23 **Defendant's Position**

24 In connection with discovery undertaken by the Plaintiff prior to the initiation of
25 this litigation, eBay suspended its standard retention policies related to documents,
26 including electronic documents, that it believed were potentially relevant to the issues
27 reasonably evident in this action. In brief, eBay employees identified as having some
28 connection to Plaintiff's claims, or Defendant's likely defenses, were notified by eBay to

1 retain relevant documents. This notice informed employees that they are to preserve, and
2 not destroy, any pertinent documents (electronic and hard copy) that could relate to this
3 litigation. eBay also preserved, at the specific request of the Plaintiff, certain database
4 information related to, among other things, employment applications and hiring. eBay
5 also made several productions of electronic information to Plaintiff. eBay believes that it
6 has met its obligations to preserve evidence as required under the Federal Rules. eBay
7 takes no position with respect to Plaintiff's proposal regarding specific categories of
8 information that may be exempt from a retention obligation. eBay believes that any
9 further issues related to retention of documents and electronic information should be
10 addressed following the Court's ruling on the pending Motion to Dismiss.

11 **7. Disclosures**

12 **Plaintiff's Position**

13 The parties will exchange initial disclosures pursuant to Fed. R. Civ. P. 26(a)
14 within fourteen (14) calendar days following the entry of a protective order by the Court.

15 In addition to the required disclosures under Fed. R. Civ. P. 26(a), the parties will
16 make the following productions:

- 17 a. Within fourteen (14) calendar days of the entry of a protective
18 order, Plaintiff shall produce to Defendant copies of all correspondence,
19 documents, data, transcripts, depositions or any other materials and statements in
20 any form, exchanged between Plaintiff and any non-party specifically relating to
21 Plaintiff's investigation of a possible unlawful agreement between Defendant and
22 Intuit (collectively "Investigation Materials"). Plaintiff shall produce all
23 Investigation Materials, regardless of whether those materials were produced
24 voluntarily or through compulsory process, such as by Civil Investigative
25 Demand. Plaintiff is not required to produce documents or other materials
26 originally received from Defendant during the course of the investigation.
27 Plaintiff shall produce all ESI in accordance with this Order. This paragraph shall
28 not be construed to require the production of Plaintiff's attorney work product,

1 confidential attorney-client communications, materials subject to the deliberative
2 process privilege or any other governmental privilege, or any documents relating
3 to communications between Plaintiff and the State of California.

4 b. Within fourteen (14) calendar days of the entry of a protective
5 order, Defendant shall produce to Plaintiff copies of all correspondence,
6 documents, data, transcripts, depositions or any other materials and statements in
7 any form, exchanged between Defendant and any third-party not working for or
8 on behalf of Defendant or its outside counsel related to or created in the course of
9 responding to Plaintiff's investigation of a possible unlawful agreement between
10 Defendant and Intuit (collectively "Defendant's Investigation Materials").

11 Defendant shall produce all of Defendant's Investigation Materials. Defendant
12 shall also produce all correspondence, documents, data, transcripts, depositions or
13 any other materials and statements in any form produced to any party pursuant to
14 any discovery related to *In re High-Tech Employee Antitrust Litig.*, Master
15 Docket No. 11-CV-02509-LHK (N.D. Cal. filed May 23, 2011). Defendant shall
16 produce all ESI in accordance with this Order. Defendant is not required to
17 produce documents or other written materials originally received from Plaintiff.
18 This paragraph shall not be construed to require the production of Defendant's
19 attorney work product or confidential attorney-client communications.

20 c. Every sixty (60) calendar days after the date of the initial
21 disclosures made pursuant to this Order, the parties shall exchange any
22 modifications or supplements to their disclosures.

23 **Defendant's Position**

24 eBay made several productions to Plaintiff prior to the initiation of this litigation.
25 These productions included electronic information, documents, database records and
26 presentations related to the facts that precipitated this action. eBay believes that these
27 productions satisfy the spirit of its requirements under Rules 26(a) of the Federal Rules of
28 Civil Procedure. In light of the pending and potentially case-dispositive Motion to

1 Dismiss, eBay believes that it is unnecessary for Plaintiff to produce materials under Rule
2 26(a) at this time. Rather, eBay believes that any such production should follow within
3 three (3) weeks of the Court's ruling.

4 **8. Discovery**

5 **Plaintiff's Position**

6 **a. Status of Discovery.** The parties have not satisfied their meet and confer
7 obligations under Federal Rule of Civil Procedure 26(f) and Civil Local Rule 16-3. As a
8 consequence, there is no agreement with respect to any elements of a discovery plan. To
9 date, there has been no discovery propounded.

10 **b. Production of Documents and ESI.**

11 Plaintiff has considered entering into a stipulated e-discovery order. The
12 foreseeable e-discovery issues are addressed in this section and Paragraph 6 of this Order.
13 Plaintiff is aware of the importance the Court places on cooperation and commits to
14 cooperate in good faith throughout the matter consistent with this Court's Guidelines for
15 the Discovery of ESI. Plaintiff proposes that in responding to an initial Fed. R. Civ. P. 34
16 request, the parties will meet and confer about the methods to search ESI in order to
17 identify ESI that is subject to production and filter out ESI that is not subject to
18 discovery. The parties shall designate liaisons to each other who are and will be
19 knowledgeable about and responsible for discussing their respective ESI, and the parties
20 will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes
21 without court intervention. Each e-discovery liaison will be, or have access to those who
22 are, knowledgeable about the technical aspects of e-discovery, including the location,
23 nature, accessibility, format, collection, search methodologies, and production of ESI in
24 this matter.

25 The parties shall produce all documents and ESI in accordance with the
26 Department of Justice's most recent Standard Specifications for Production of ESI ("DOJ
27 Standard") (filed herein as Attachment B), except when producing documents and ESI
28 received from non-parties. Documents previously produced by Defendant need not be

1 reproduced due to any failure to meet the current DOJ Standard. The parties shall
2 produce all documents and ESI received from non-parties in the same manner and format
3 in which the materials were originally produced by the non-party. Should either party
4 issue any document subpoena on non-parties, the instructions in that subpoena shall
5 conform with the above instructions on ESI.

6 **c. Protective Order.** The parties have not had discussions related to a draft
7 stipulated protective order, proposed by Plaintiff, governing the production and use of
8 confidential information.

9 **d. Proposed Discovery Plan.**

10 **Party Discovery**

11 Written Discovery. The parties shall serve no more than **thirty-five (35)**
12 document requests and no more than **thirty (30)** interrogatory requests on the opposing
13 party.

14 Depositions. Plaintiff is permitted a maximum of **one hundred and**
15 **twenty (120)** hours of deposition of current and past employees and directors of
16 Defendant, not including Scott Cook. Time shall be actual record time, and Plaintiff is
17 entitled to a maximum of **seven (7)** hours per deposition.

18 **Non-party Discovery**

19 Written Discovery. Parties shall request that non-parties simultaneously
20 produce materials to both Plaintiff and Defendant, regardless of which party sought the
21 materials. If, notwithstanding such request, the non-party did not produce copies to both
22 sides, the issuing party will provide a copy of all materials produced to the other side
23 within **seven (7)** calendar days after receipt of the materials from the non-party. Any
24 party that does not have access to materials provided by a non-party in response to a
25 subpoena issued pursuant to Fed. R. Civ. P. 45 for at least **two (2)** business days before
26 any deposition in which the materials will be used as exhibits may elect to have the
27 deposition postponed until the party has had access to the materials for at least **two (2)**
28 business days.

1 If a party modifies or explains a Fed. R. Civ. P. 45 document request or extends
2 the time to respond in writing, it shall simultaneously provide that written extension,
3 modification or explanation to the opposing party. Any oral modifications or extensions
4 of time by a party to a non-party must be conveyed to the opposing side as soon as
5 practicable but in any event no later than **one (1)** business day after such modification or
6 extension is granted.

7 Depositions. The parties are each permitted a maximum of **seventy-five**
8 **(75)** hours of deposition of current and past employees and directors of Intuit, including
9 Scott Cook. Time shall be actual record time, and each party is entitled to a maximum of
10 **seven (7)** hours of deposition of Scott Cook and two other Intuit employees designated by
11 each party. All other depositions shall be a maximum of **seven (7)** hours, with the right
12 to time evenly split between the parties.

13 The parties are each permitted a maximum of **forty-five (45)** hours of deposition
14 of non-parties other than current and past employees and directors of Intuit, with the right
15 to time in each deposition evenly split between the parties.

16 **e. Discovery of Expert Related Materials.** No party is required to preserve or
17 produce in discovery the following documents:

18 i. any form of oral or written communications or correspondence between
19 (1) counsel and expert witnesses; (2) counsel and expert witness staff; (3) expert
20 witnesses and their respective staff; (4) expert witnesses and other expert witnesses; (5)
21 employees of Plaintiff or Defendant and expert witnesses; or (6) employees of Plaintiff or
22 Defendant and expert witness' staff;

23 ii. notes, drafts, written communications, data formulations or runs, or any
24 database-related operations or other types of preliminary work created by, or for, expert
25 witnesses or their staff. The protections against discovery contained in this paragraph
26 shall not apply to any communications or documents that relate to a) compensation for
27 the expert's study or testimony or b) information upon which the expert relies as a basis
28 for any of his or her opinions or reports.

1 **f. Electronic Service.** Plaintiff proposes that the parties shall serve documents,
2 including pleadings, discovery requests, and trial materials, on each other through email,
3 except to the extent that transmission of any such documents electronically is impractical,
4 in which event service shall be made by hand or through overnight delivery. Service by
5 e-mail shall be considered the same as service by hand. The parties shall serve each other
6 with copies of all third-party discovery related materials (including but not limited to
7 every third-party subpoena for documents and/or testimony) as soon as is practical but in
8 no event later than **one (1)** business day after service on the third-party unless good cause
9 is shown. For electronic service to be effective, it should be served on the counsel for
10 both parties identified below:

11 Plaintiff: N. Scott Sacks, Jessica Butler-Arkow, Anna T. Pletcher, Ryan Struve,
12 Shane Wagman

13 Defendant: Thomas Brown, Samuel C. Zun, Kirby D. Behre

14 **Defendant's Position**

15 eBay and Plaintiff have cooperated over the course of several years during the
16 investigation prior to this litigation. In response to Plaintiff's requests for information
17 during that investigation, eBay searched the documents of more than 20 custodians using
18 search terms developed in cooperation with Plaintiff and made several productions to
19 Plaintiff prior to the initiation of this litigation. These productions included electronic
20 information, several thousand pages of documents, database records and presentations
21 related to the facts that precipitated this action. eBay believes that discussion of a plan
22 for additional discovery, including whatever discovery eBay might need to prepare a
23 defense of this action, should take place following a decision from the Court on eBay's
24 pending and potentially case-dispositive Motion to Dismiss. eBay also believes that
25 discovery in this matter should remain stayed pending a resolution on its potentially case-
26 dispositive motion.

27 eBay anticipates that the Court's decision on its Motion to Dismiss may provide
28 the parties with important guidance about the scope of the legal and factual issues

1 actually in dispute. eBay believes that such guidance will inform what additional
2 discovery is necessary. At present, eBay sees no reason for the parties to deviate from
3 the limits set forth under the Federal Rules of Civil Procedure on depositions or
4 interrogatories.

5 At this time, it is impossible to engage in a meaningful conversation about
6 Plaintiff's proposed protocol for the production of Electronically Stored Information.
7 Having already made several productions to Plaintiff of electronic information during the
8 investigation prior to this litigation without utilizing the proposed protocol, eBay believes
9 that the parties will be capable of managing any issues that may arise in the context of
10 specific future document requests reasonably propounded by Plaintiff. Plaintiff has not
11 identified any deficiency in past productions that might warrant the application of this
12 new protocol. It is not presently possible to determine whether eBay will be asked to
13 produce the specific categories of information identified in the proposed protocol,
14 including image-only files, proprietary file types, archive file types, shared resources,
15 audio/video data, or foreign-language material. Likewise, it is not presently possible to
16 determine whether eBay is capable of producing all or any of the 56 metadata fields
17 identified in the proposed protocol, or whether each of those fields is reasonably
18 calculated to lead to discovery of any evidence that could be relevant to this matter.

19 **9. Class Actions**

20 This is not a class action.

21 **10. Related Cases**

22 **Plaintiff's Position**

23 There is one related case: *California v. eBay, Inc.*, Case No. CV 12-5874-EJD
24 (N.D. Cal, filed Nov. 16, 2012). Discovery and scheduling should be coordinated and
25 simultaneous between the two cases, and that they can be tried simultaneously.

26 **Defendant's Position**

27 In light of the pending and potentially case-dispositive Motion to Dismiss, it is
28 premature at this time for the parties to discuss whether discovery, scheduling, or a trial

1 should be coordinated and simultaneous between the two cases. eBay believes that a
2 more efficient approach would be to discuss such coordination, if necessary, following
3 the Court's ruling on the pending Motion to Dismiss.

4 **11. Relief**

5 Plaintiff requests that:

- 6 (1) Defendant's agreement with Intuit to restrain competition for employees
7 be adjudged to violate Section 1 of the Sherman Act;
8 (2) Defendant be enjoined from enforcing or adhering to any existing
9 agreement that unreasonably restricts competition for employees between it and
10 any other person;
11 (3) Defendant be permanently enjoined from establishing any similar
12 agreement with any other person except as prescribed by the Court;
13 (4) Plaintiff be awarded the costs of this action; and
14 (5) such other relief as the Court may deem just and proper to redress and
15 prevent recurrence of the alleged violation and to dissipate the anticompetitive
16 effects of such conduct.

17 **12. Settlement and ADR**

18 The parties have discussed settlement prior to the filing of this case, and the
19 possible terms of settlement are understood by the parties. Pursuant to ADR Local Rule
20 3-5, the parties have reviewed the ADR Handbook, discussed it with their counsel, and
21 come to the conclusion that no ADR process is likely to deliver benefits sufficient to
22 justify the resources committed to its use, and this case should be exempted from
23 participating in any ADR process.

24 **13. Consent to Magistrate Judge for All Purposes**

25 Plaintiff has declined to consent to proceed before a Magistrate Judge for all
26 purposes.

27 **14. Other References**

28

1 The parties do not believe that this case is suitable for reference to binding
2 arbitration, special master, or the Judicial Panel on Multidistrict Litigation.

3 **15. Narrowing of Issues**

4 The parties do not believe that it is possible to narrow the issues at this time.

5 **16. Expedited Trial Procedure**

6 The parties do not believe that this case is appropriate to be handled under the
7 Expedited Trial Procedure of General Order 64.

8 **17. Scheduling**

9 **Plaintiff's Position**

10 Answer. Defendant shall answer the Complaint by the earlier of **a) three (3)**
11 **business days** after the entry of this Order, or b) as provided in Fed. R. Civ. P.
12 12(a)(4)(A).

13 Fact Discovery. Fact discovery shall be completed by **ten (10) months** after the
14 entry of this Order unless extended by the Court for good cause shown.

15 Expert Designation and Discovery. The parties shall identify any expert(s) that
16 they plan to call in their case-in-chief no later than **seven (7) calendar days** before filing
17 of the Joint Preliminary Pretrial Conference Statement. The parties shall identify any
18 anticipated rebuttal experts no later than **three (3) business days** before the Preliminary
19 Pretrial Conference. The parties shall serve any report(s) within **fourteen (14) calendar**
20 **days** after the close of fact discovery and any rebuttal reports within **twenty-one (21)**
21 **calendar days** after receipt of the underlying report that is addressed by the rebuttal
22 report. Depositions of experts must be completed within **sixty (60) calendar days** after
23 the close of fact discovery.

24 Preliminary Pretrial Conference. As required in this Court's **Standing Order**
25 **Regarding Preliminary and Final Pretrial Conferences and Trial Preparation in**
26 **Civil Cases** (hereafter "Standing Order"), a Preliminary Pretrial Conference shall be
27 scheduled approximately **thirty (30) days** before the close of discovery. Lead counsel
28 for the parties shall meet and confer no later than **twenty-one (21) calendar days** prior to

1 the filing of the Joint Preliminary Pretrial Conference Statement. No later than **ten (10)**
2 **calendar days** prior to Preliminary Pretrial Conference, the parties shall file a Joint
3 Preliminary Pretrial Conference Statement containing the items as required by the
4 Standing Order.

5 Witness Lists. The parties shall serve preliminary witness lists no later than
6 **seven (7) days** prior to the filing of the Joint Preliminary Pretrial Conference Statement.
7 The parties shall serve final witness lists **seven (7)** calendar days after the close of fact
8 discovery. The parties have the right to depose any person identified on the final witness
9 list that was not on the preliminary witness list within **twenty-one (21) calendar days** of
10 the date the final witness list was served.

11 Dispositive Motions. Dispositive motions must be filed within **sixty (60)**
12 **calendar days** of the close of fact discovery.

13 Trial. Plaintiff believes that this case can be ready for trial approximately **sixteen**
14 **(16) months** from the date of this Order.

15 **Defendant's Position**

16 In light of the pending Motion to Dismiss, it is premature at this time for the
17 parties to discuss scheduling issues, including scheduling issues related to discovery in
18 this action, at the level of detail contained in Plaintiff's proposal above. A more efficient
19 approach would be to discuss Plaintiff's proposals regarding scheduling, if necessary,
20 following the Court's ruling on the pending Motion to Dismiss. At a minimum, eBay
21 should not be ordered to answer Plaintiff's Complaint until the Court rules on its
22 potentially dispositive motion.

23 **18. Trial**

24 **Plaintiff's Position**

25 This case will be a bench trial. While it is difficult to estimate the expected length
26 of the trial at this point, Plaintiff expects that trial will require at least **ten (10) court**
27 **days.**

28 **Defendant's Position**

1 While eBay agrees this case will be a bench trial, eBay's position with respect to
2 trial length is that a more efficient approach would be to estimate trial length, if
3 necessary, following the Court's ruling on the pending Motion to Dismiss.

4 **19. Disclosure of Non-Party Interested Entities or Persons**

5 On January 7, 2013, Defendant filed its "Certification of Interested Entities or
6 Persons" as required by Civil Local Rule 3-16. The Certification states that eBay Inc. is
7 the only named defendant. The Certification also refers to Paragraph 9 of the Complaint,
8 which identifies "Intuit and senior executives at Intuit and eBay" as co-conspirators in the
9 alleged violation.

10 **20. Nationwide Service of Trial Subpoenas**

11 **Plaintiff's Position**

12 Good cause having been shown in view of the geographic dispersion of potential
13 witnesses in this action, the parties are permitted, pursuant to 15 U.S.C. § 23, to issue trial
14 subpoenas that may run into any other federal district requiring witnesses to attend this
15 Court. The availability of nationwide service of process, however, does not make a
16 witness that is otherwise "unavailable" for purposes of Fed. R. Civ. P. 32 and Fed. R.
17 Evid. 804, available under those rules.

18 **Defendant's Position**

19 As set forth above, it is premature at this time for the parties to meet and confer
20 regarding trial subpoenas. eBay is currently unaware of any geographic distribution of
21 witnesses, and as with many issues in this report, eBay believes that justice would be
22 more efficiently served by taking up these issues after the Court's ruling on the pending
23 Motion to Dismiss, which will likely clarify the scope of the dispute, legal and factual,
24 between the parties.

25 **21. Other Matters**

26 By signing this Joint Case Management Statement and [Proposed] Order, the
27 counsel for each party listed below concur in its filing. This document is being filed
28 through the Electronic Case Filing (ECF) system by attorney N. Scott Sacks of the United

1 States Department of Justice, Antitrust Division. By his signature, he attests that the
2 United States has obtained concurrence in the filing of this document from each counsel
3 signing the stipulation, pursuant to Civil Local Rule 5-1(i)(3). Copies of those signature
4 pages have been scanned in and attached in accord with the rule.

5
6 Dated: May 31, 2013

Respectfully Submitted,

7 _____
/s/

8 N. Scott Sacks
9 Counsel for Plaintiff United States
10 United States Department of Justice,
11 Antitrust Division
12 450 Fifth Street, NW, Suite 7100
13 Washington, DC 20530
Telephone: (202) 307-6200
Facsimile: (202) 616-8544
scott.sacks@usdoj.gov

14 _____
/s/

15 Thomas P. Brown
16 Attorney for Defendant eBay Inc.
17 PAUL HASTINGS LLP
18 55 Second Street, Twenty-Fourth Floor
19 San Francisco, CA 94105-3441
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CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:]

IT IS SO ORDERED.

Dated: _____

Edward J. Davila
United States District Court Judge

1 N. Scott Sacks, Attorney (D.C. Bar No. 913087)
2 Jessica N. Butler-Arkow, Attorney (D.C. Bar No. 430022)
3 Anna T. Pletcher, Attorney (California Bar No. 239730)
4 Adam Severt, Attorney (Member, Maryland Bar, numbers not assigned)
5 Ryan Struve, Attorney (D.C. Bar No. 495406)
6 Shane Wagman, Attorney (California Bar No. 283503)
7 United States Department of Justice
8 Antitrust Division
9 450 Fifth Street NW, Suite 7100
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14 Attorneys for Plaintiff United States of America

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

15 UNITED STATES OF AMERICA, 16 17 18 19 20	Plaintiff, v. EBAY INC. Defendant.
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Case No. 12-CV-05869 EJD
PROOF OF CONCURRENCE IN
FILING OF JOINT CASE
MANAGEMENT STATEMENT
AND [PROPOSED] ORDER

21 Pursuant to Civil Local Rule 5-1(i)(3), Plaintiff United States of America submits
22 the attached images of the signature pages showing proof that Defendant eBay, Inc. has
23 concurred in the filing of the Joint Case Management Statement and [Proposed] Order.
24 Under the Local Rule, by submitting these signature pages, the United States does not
25 need to maintain records supporting the concurrence until a year after final resolution of
26 the action.
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Dated: May 31, 2013

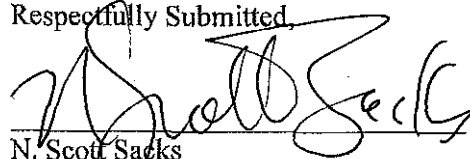
Respectfully Submitted,

/s/
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Dated: May 31, 2013

Respectfully Submitted,



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