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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

OPPOSITION OF THE UNITED STATES TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO FRCP RULE 12(B)(6)

Hearing Date: April 26, 2013
Time: 9:00 a.m.

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OPPOSITION OF THE UNITED STATES TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

I. ISSUE TO BE DECIDED

Whether the Complaint states a claim involving an agreement between two separate firms upon which relief may be granted under Section 1 of the Sherman Act.

II. INTRODUCTION

eBay and Intuit, two large and successful technology companies, decided to stop competing for each other's employees, in essence declaring a truce in "The War for Talent." The most senior executives of the two firms reached and enforced an explicit agreement that they would not recruit each other's employees. Later, they agreed further that eBay would not hire Intuit employees at all. In doing so, the two firms deprived their employees of the opportunity to earn higher salaries and benefits and limited their opportunities for career advancement. The alleged agreement also distorted the competitive process in the labor market that matches employees and jobs.

The agreement served no purpose other than to restrict competition for employees. The agreement was not pursuant to a joint venture or other collaborative business relationship between the two firms that might, in some other circumstances, justify specifically-tailored agreements necessary to achieve a lawful procompetitive purpose. It was a "naked" restraint on competition, of the sort most clearly condemned by antitrust law. Thus, the alleged "no-solicit" and "no-hire" agreement was a *per se* violation of Section 1 of the Sherman Act ("Section 1").

eBay's Motion to Dismiss essentially ignores the facts alleged in the Complaint, which must be taken as true for present purposes, and instead argues its own facts. eBay then offers unprecedented and incorrect interpretations of law that are inconsistent with basic antitrust principles and which would potentially confer broad antitrust immunity on firms with common directors. For example, much of eBay's argument hinges on the fact that Scott Cook is an

outside director on eBay's board. However, Cook is also a Founder and Chairman of the Executive Committee of Intuit's board. The two firms are rivals in attracting highly skilled workers. eBay asserts that the agreement was between eBay and Cook, not eBay and Intuit as the Complaint alleges, and that a single overlapping director shields the companies against Section 1 scrutiny. This wholly novel view would potentially create a chasm in Section 1 enforcement.

The Complaint alleges a violation of Section 1 under the *per se* rule or, alternatively, under "quick look" rule of reason analysis, where no market-wide anticompetitive effects must be pled or proven. eBay argues that the Complaint should be dismissed because it did not allege facts, such as actual harm to broader market competition (i.e., competition that goes beyond that between eBay and Intuit), as full rule of reason analysis might require. But that ignores the whole point of the *per se* and "quick look" doctrines, that some agreements are so obviously anticompetitive and lacking any redeeming justification that they may be condemned without requiring the full blown analysis that antitrust law requires in other circumstances. It is also wrong because the Complaint must be judged on its own terms for purposes of Rule 12(b)(6) rather than under eBay's different standard and facts. Viewed generously, the most that can be said for eBay's rule of reason arguments is that they present questions of fact that must be resolved after discovery, and thus its Motion is, at best, premature.

Finally, eBay argues that a director interlock permitted by Section 8 of the Clayton Act preempts enforcement of Section 1. This is utterly unsupported by law and contrary to legislative purpose, and would allow firms to subvert Section 1 simply by creating director interlocks.

III. THE LEGAL STANDARD

When deciding a motion to dismiss, a court must accept "all factual allegations in the

complaint as true and construe them in the light most favorable to the nonmoving party." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1058 (9th Cir. 2012); *see also Guillen v. Bank of America Corp.*, No. 5:10-cv-05825, 2011 WL 4071996 (N.D. Cal. 2011). Moreover, a court must "draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Lacey v. Maricopa County*, 693 F.3d 896, 911 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). A complaint meets this standard when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

IV. FACTUAL BACKGROUND

No later than August 2006, eBay and Intuit entered into an agreement limiting each others' ability to recruit and hire employees of the other company. The agreement, which continued at least until 2009, prohibited each firm from soliciting the other's employees for employment, and for over a year, prevented eBay from hiring any Intuit employees. (Compl. ¶¶ 1, 2, 17.)

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. (¶¶ 5, 10, 11.)

The agreement harmed employees by depriving them of opportunities for better jobs with higher salaries and greater benefits at the other firm. (¶¶ 1, 3.) The agreement also distorted the

competitive process in the labor markets in which eBay and Intuit compete. (¶ 11.) Several Intuit and eBay personnel, not individually named as defendants, undertook acts and made statements in furtherance of the agreement, including forming the agreement, adhering to it, and enforcing it. (¶ 9.)

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." (¶ 15.) Cook committed that Intuit would not make an offer to anyone from eBay without first notifying eBay. (¶ 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. (¶ 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. (¶¶ 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." (¶ 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. (¶ 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!)." (¶ 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." (¶ 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 . . . ." (¶ 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." (¶ 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. (¶ 24.)

V. THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED[1]

A. The Complaint alleges an actionable conspiracy between two non-affiliated corporations.

The core of the Complaint is that eBay and Intuit entered into an agreement to limit competition between them in the hiring of each other's employees. It cannot be seriously disputed that the two firms are distinct and independent entities capable of conspiring for purposes of Section 1. There is no basis to suggest that an agreement between the two falls within the reach of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984), or subsequent cases holding that agreements between two parts of the same firm or economic enterprise are beyond the reach of Section 1.

In *Copperweld*, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [Section] 1" because a "parent and its wholly owned subsidiary have a complete unity of interest." *Id.* at 771. Coordinated activity by separate divisions within a single corporation "does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests …." *Id.* at 770-71. *See also, Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606**,** 611 (6th Cir. 1987) (wholly-owned sibling corporations not separate Section 1

[1] Defendant's motion is pursuant to Fed. R. Civ. P. 12(b)(6), not 12(b)(1) (subject-matter jurisdiction) but Defendant nevertheless questions, in a footnote, the Complaint's supposed failure to explain how the activities at issue "are in the flow of and substantially affect interstate commerce," which Defendant incorrectly states, is "required for the Court to have subject matter jurisdiction." (Mot. to Dismiss 6, n.3.) The Sherman Act reaches both conduct in and conduct that merely affects interstate commerce. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980). In the Ninth Circuit, subject matter jurisdiction is established if some aspect of a defendant's general business activities infected by the illegal agreement substantially affects interstate commerce; the alleged agreement itself need not have the requisite effect. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1143-44 (9th Cir. 2003) (citing *McLain*, 444 U.S. at 242-43). eBay and Intuit "sell products and services throughout the United States," (Compl. ¶ 5), obviously through the activities of the employees they hire. This is sufficient to allege subject-matter jurisdiction.

entities); *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) ("two corporations wholly-owned by three persons who together manage all affairs of the two corporations" are not separate Section 1 entities).

Defendant cites no case, and the United States is aware of none, holding that two otherwise totally separate firms, with only a single director in common, should be considered a single firm under Section 1. "[W]here firms are not an economic unity and are at least potential competitors, they are usually not a single entity for antitrust purposes." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003) . Thus, to the extent that eBay is suggesting a common director makes it and Intuit a single entity for Section 1 purposes, that argument is without precedent and without merit.

Defendant argues *Copperweld* should be expanded to cover an agreement between eBay and one of its outside directors. To make this argument, eBay recasts the Complaint as challenging nothing more than an internal eBay "policy," (Mot. to Dismiss 9, 10), a matter that "concerns only the interaction of people affiliated with a single entity." (*Id.* at 6-7.) Defendant argues that eBay, its executives, and its Board members "cannot be separated from eBay." (*Id.* at 9.) That is because the executives and Board members are presumed as a matter of Delaware corporate law to have acted "in good faith and in the honest belief that the action taken was in the best interests of the company." (*Id.*) Therefore, board members and the corporation, it is argued, cannot conspire together under *Copperweld*. (*Id.*)

But that characterization cannot possibly be squared with a reading of the plain language of the Complaint, which unmistakably alleges a *quid pro quo* between the two companies that restricted their hiring practices. That is, each company agreed not to compete for the other's employees. *See* (Compl. ¶¶ 1-2, 4) (agreement between eBay and "Intuit, Inc."); (Compl. ¶ 8) (corporate status of eBay); (Compl. ¶ 9) (identifying "Intuit" as "co-conspirator" in the violation

alleged); (Compl. ¶ 14) (alleging agreement between Intuit and eBay between specific dates).

Moreover, eBay's contention that Cook's status as an eBay director immunizes the alleged agreement from antitrust scrutiny defies all common sense. Cook is a Founder and Chairman of the Intuit Board's Executive Committee.[2] The inescapable inference is that Cook was acting in accord with Intuit's policies and business interests when he rejected a proposal from eBay to establish limited guidelines for recruitment of Intuit employees by eBay and requested that eBay not make any offer to an Intuit employee without prior notice. (*See* Compl. ¶ 15.) When Cook complained to Whitman that he was "quite unhappy" about a potential offer eBay was going to make to an Intuit employee, (Compl. ¶ 18), Cook was concerned about Intuit's interests, not eBay's. Moreover, Intuit acted as if it were bound by the terms of the agreement with eBay, something it would not have done had Cook reached an agreement with eBay solely in his capacity as a member of the eBay board. (*See* Compl. ¶¶ 15, 22.) eBay's contention that Cook was merely trying to serve eBay's interests is wholly implausible.

Further, if Defendant's argument were correct, it would mean that two firms that have a common director could, through that director, effectively agree on a restraint of trade that would be exempt from scrutiny under Section 1, no matter how anticompetitive. Neither *Copperweld* nor Delaware corporate law compels such a result.

B. The Complaint alleges facts sufficient to support a finding that eBay's conduct violates Section 1 of the Sherman Act.

The Complaint alleges that eBay and Intuit agreed not to recruit each other's employees and that eBay would not hire Intuit employees. It alleges that the agreement deprived employees

[2] Indeed, Defendant turns the business reality of Cook's role as an outside director on its head by arguing that the Complaint "imputes to Mr. Cook the interests of one of the other companies for which he also served as director" and characterizes as a "mere fact" that Cook "has interests outside of his role as an eBay Director…" (Mot. to Dismiss 6, 8.) Defendant appears to regard Cook's role at Intuit an incidental matter.

of opportunities for increased salaries, benefits, and employment opportunities, and distorted the competition between the two firms for employees. Taking these facts as true, the Complaint easily passes muster under Rule 12(b)(6).

Defendant does not directly dispute this so much as claim that a full rule of reason analysis is the appropriate standard and the Complaint thus fails because it did not allege that the conspiracy "actually affected market outcomes." (Mot. to Dismiss 13.) eBay is wrong for several reasons. The *per se* rule is appropriate in this case because the alleged agreement is a naked market allocation, manifestly anticompetitive and lacks any redeeming procompetitive virtue. The alleged agreement is also unlawful under a "quick look" rule of reason standard, as one with only a rudimentary understanding of economics could conclude that the agreement was anticompetitive and lacked any procompetitive justification. Lastly, whether the rule of reason applies is not appropriately decided on a Rule 12(b)(6) motion because deciding that question requires resolution of disputed facts, specifically any purported justification for the agreement.

1. The alleged market allocation agreement is *per se* unlawful.

Certain "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal per se." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). "To justify a per se prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack ... any redeeming virtue." *Leegin Creative Leather Prods. v. PSKS*, 551 U.S. 877, 886 (2007) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977) and *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 289 (1985)). Restraints deemed *per se* unlawful "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." *California ex rel. Harris v. Safeway Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (en banc) (citing *Nw.*

Wholesale Stationers, 472 U.S. at 289 quoting *N. Pac. Ry v. United States*, 356 U.S. 1, 5 (1958))).

The Complaint alleges that eBay's agreement with Intuit is a "naked" market allocation agreement. A restraint is "naked" when it "has no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). A market allocation occurs when "competitors at the same level agree to divide up the market for a given product." *Safeway*, 651 F.3d at 1137 (quoting *Metro Indus. v. Sammi*, 82 F.3d 839, 844 (9th Cir. 1996)).[3] Here, eBay and Intuit are competitors at the same level in the labor market: they are both employers competing to obtain sophisticated expertise critical to the creation and production of the products and services they sell. The two firms agreed to allocate employees between themselves based on the employees' current employer.[4]

Naked market allocation agreements are *per se* unlawful. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972) ("One of the classic examples of a per se violation of § 1 is an agreement between two competitors at the same level of the market structure to allocate territories in order to minimize competition."); *see also Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (citing *Topco* and finding such agreements anticompetitive and unlawful on their face whether parties split a market in which they both do business or reserved markets to one or the other); *Safeway*, 651 F.3d at 1137 (market allocations among competitors at the same

[3] *See also Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (market allocation doctrine is somewhat elastic in that it contemplates *per se* treatment for conduct that "sufficiently approximates an agreement to allocate markets").

[4] *Per se* treatment is likewise appropriate for the period when eBay's agreement with Intuit was limited to non-solicitation. *See United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1371 (6th Cir. 1988) (finding *per se* treatment appropriate for an agreement between two movie theatre booking agents not to "*actively* solicit each other's customers," despite the defendants' arguments that they "remained free to accept *unsolicited* business from their competitor's customers," and that the agreement did not apply to unaffiliated potential customers) (emphasis in original)).

market level are per se antitrust violations (citing *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991))).

The leading antitrust treatise characterizes agreements among employers to not compete for employees as a *per se* service division, or market allocation, agreement:

> An agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement. . . . Such agreements are generally unlawful per se, but for the fact that most qualify for the antitrust labor immunity when negotiated as part of the collective bargaining process.

12 Herbert Hovenkamp, Antitrust Law, ¶ 2013b at 148 (2012 Third Edition).[5]

Regardless of how it is characterized, the agreement between eBay and Intuit is *per se* unlawful because it has a "pernicious effect on competition and lack of any redeeming virtue." *See N. Pac. Ry*, 356 U.S. at 5. *See also Safeway*, 651 F.3d at 1133. Simply put, eBay's agreement with Intuit lacks any procompetitive benefit and served "no purpose except stifling competition." *See White Motor*, 372 U.S. at 263. *See also United States v. Andreas*, 216 F.3d 645, 667 (7th Cir. 2000) (*per se* rule applied despite "the fact that the lysine producers' scheme did not fit precisely the characterization of a prototypical *per se* practice"). Importantly, the *per se* determination does not turn "upon formalistic line drawing," such as whether particular restraint is characterized in a particular way. *See Safeway*, 651 F.3d at 1133 (quoting *Leegin*, 551 U.S. at 887).[6]

[5] Agreements between employers should be distinguished from non-competition agreements between employers and employees because the latter are "purely vertical." *Id.* at 143; *see also Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 900-01 (9th Cir. 1983).

[6] In light of the above, it is hardly surprising that in the pending class action suit in this district on high-tech industry hiring restraints growing out of related United States cases against *Adobe et al.*, No. 1:10-cv-01629 (D.D.C. September 24, 2010), Judge Koh found that the plaintiffs had successfully pled a *per se* violation for purposes of deciding the Rule 12(b)(6) motion. *In re High-Tech Employee Antitrust Litig.*, 856 F.Supp.2d 1103, 1122 (N.D. Cal. 2012).

2. Defendant's arguments against per se analysis are without merit.

Defendant makes three arguments against application of the per se rule: 1) that *per se* condemnation is reserved for agreements that are plainly anticompetitive and, even then, the Complaint must explain how the alleged agreement would actually suppress output or increase price; 2) no court has previously applied the *per se* rule to a bilateral agreement regarding recruiting or hiring practices; and 3) the remedy accepted by the government to resolve earlier enforcement actions in similar cases confirms no impact to competition should be presumed.

a. The alleged agreement is plainly anticompetitive and facts relating to actual competitive harm need not be pled.

Based on the facts alleged in the Complaint, the challenged market allocation agreement is manifestly anticompetitive. On its face, it eliminated competition between the two firms and thus harmed employees by depriving them of the opportunity to earn higher salaries and benefits, as well as limiting their employment opportunities. It also distorted the competitive process that is supposed to allocate employees between the two firms, interfering with the normal competitive price-setting mechanisms that result in efficient matching of employers and employees.

Where, as here, the harm to competition alleged in the Complaint is obvious and the agreement lacks any redeeming procompetitive virtue, *per se* treatment is appropriate. There is no need for detailed market analysis. *See Safeway*, 651 F.3d at 1133. The United States is not required to plead, much less prove, actual effects to prevail under the *per se* (or "quick look") standards. *See, e.g.*, *National Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100 (1984); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 474, 460 (1986). Indeed, the very purpose of the *per se* rule is to avoid costly inquiries into actual economic effects, the primary domain of a full rule of reason analysis. *See, e.g.*, *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982).

eBay's reliance on *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1

(1979) ("BMI"), is completely misplaced. *BMI* involved cooperation among copyright holders of music aimed at making their music more widely available while, at the same time, protecting their intellectual property rights. The Supreme Court concluded that the blanket copyright license at issue was not *per se* unlawful price-fixing and thus rule of reason analysis was required. *BMI*, 441 U.S. at 24. "[T]he blanket license, as we see it, is not a naked [restraint] of trade with no purpose except stifling of competition, *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use." *BMI*, 441 U.S. at 20. The Supreme Court concluded that "a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies …." *Id.* at 21.

BMI teaches that while "naked" restraints, such as the agreement alleged in the Complaint, warrant *per se* condemnation without further detailed analysis, "ancillary restraints," such as the blanket license, may be reasonably necessary to the achievement of some procompetitive activity and are therefore subject to the rule of reason. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695; *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *Freeman*, 322 F.3d at 1151; *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."). Because there are no procompetitive benefits to the agreement alleged in this Complaint, *BMI* is not contrary to Plaintiff's position that the agreement is *per se* illegal.

b. That no court has previously applied the *per se* rule to a bilateral agreement regarding recruiting or hiring practices is no bar to *per se* analysis in this case.

Defendant argues that no court has applied the *per se* rule to agreements such as the one

alleged in this Complaint, and there are few cases applying the *per se* rule to similar agreements relating to the sale of labor services. Of course, it is hardly surprising that such a blatant conspiracy aimed at employees may be rare. Moreover, many restraints on labor services that would be *per se* unlawful "qualify for the antitrust labor immunity when negotiated as part of a collective bargaining process," 12 Herbert Hovenkamp, Antitrust Law, ¶ 2013b at 148 (2012 Third Edition); *see also, Brown v. Pro Football, Inc.*, 518 U.S. 231, 236-37 (1996), or are ancillary to a procompetitive activity. *See, e.g., Neeld v. NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979). Here, eBay does not claim it is entitled to immunity based on a collective bargaining agreement or because of an ancillary precompetitive agreement.

eBay's argument also confuses judicial experience with a particular market and judicial experience with a particular type of restraint. It is the nature of the restraint (here, market allocation), not the particular market (here, labor services), that is critical to the application of the *per se* rule. *See Maricopa Cnty. Med. Soc'y*, 457 U.S. at 349-51 ("We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry…. [T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules…."); *see also* 11 Herbert Hovenkamp, Antitrust Law, ¶1911(c) at 336 (2011 Third Edition) (removal of conduct from *per se* to quick look must be based on "more than a restraint that merely involves some new product or service that has not previously been subjected to §1 scrutiny. For example, alleged price fixing in the market for hula hoops would not be removed from the per se to quick look "merely because a search of the case law reveals no previous challenges to hula-hoop cartels.").

Labor markets are input markets. There is no basis to treat labor services differently from

any other production input.[7] The antitrust laws apply to the sale of services, including employment services. *See Goldfarb v. Va. State Bar*, 421 U.S. 774, 787 (1975) (citing *Am. Med. Ass'n v. United States*, 317 U.S. 519 (1943) ("our cases have specifically included the sale of services within [Section] 1.")); *Radovich v. Nat'l Football League*, 352 U.S. 445, 448–450 (1957) (the Court refused to apply baseball's antitrust exemption to an alleged boycott of a football player, implicitly concluding that an agreement to restrain trade in employment services was within the scope of the Sherman Act); *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 742–43 (9th Cir. 1984) (reinstating a complaint that alleged an agreement amongst firms to interfere with the plaintiff's ability to be employed in the labels industry).

The Court of Appeals for the Ninth Circuit has applied the *per se* rule to a market allocation agreement in an analogous setting. *United States v. Brown*, 936 F.2d 1042, 1044–45 (9th Cir. 1991). The *Brown* conspirators competed for billboard leases and agreed to refrain from "bidding on each other's former leaseholds for a period of one year after the space was lost or abandoned by [the other conspirator]." *Id.* Even though the agreement was limited to an input market (the procurement of billboard leases) and did not extend to downstream advertising sales, the court found a *per se* illegal market allocation. The court explained: "The agreement restricted each company's ability to compete for the other's billboard sites. It 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 (emphasis added). In so holding, the Ninth Circuit made no distinction between market allocation

[7] *See* 2A Phillip E. Areeda, Herbert Hovenkamp, Roger D. Blair & Christine Piette Durrance, Antitrust Law, ¶ 352c at 254-55 (2007 Third Edition) ("Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.") (footnote omitted).

agreements in input and output markets.[8] Particularly relevant to this case, where the allocation involves only workers already employed by eBay or Intuit, and not all potential employees, the input market allocation in *Brown* extended only to leases already held by the conspirators. *Id.* at 1044. *See also United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1371-73 (6th Cir. 1988) (allocation did not apply to unaffiliated customers).

Defendant argues that courts have uniformly applied the rule of reason in cases involving labor services. (Mot. to Dismiss 17-20.) However, those cases are inapposite because they involve restraints that are ancillary to some procompetitive arrangement or are not between horizontal competition. *See Bogan v. Hodgkins*, 166 F.3d 509, 514 n. 6, 515 (2d Cir. 1999) (akin to an *intra*firm agreement; even if the agreement was *inter*firm, defendant provided "sound allegations of procompetitive benefit"); *Union Circulation v. FTC*, 241 F.2d 652, 655 (2d Cir. 1957) (ancillary to industry-wide effort to curb "deceptive selling practices and other fraudulent conduct…"); *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001) (ancillary to sale of a corporate subsidiary); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 900-01 (9th Cir. 1983) (involving a purely vertical agreement between an employer and a former employee).[9]

c. The government's prior consent decrees do not suggest that per se analysis in this case is inappropriate.

The government recently entered consent decrees in two cases involving similar types of bilateral no-solicitation agreements, *United States v. Adobe et al.*, No. 1:10-cv-01629 (D.D.C.

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[8] Input markets should be analyzed in the same manner as output markets. *See* 12 Herbert Hovenkamp, Antitrust Law, ¶ 2013a at 147 (2012 Third Edition) ("agreements among buyers that divide the markets in which they purchase. . . . if such arrangements are 'naked' and not immunized, they are illegal per se."); *see also Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 321 (2007).

[9] The other case cited by Defendant, *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967), is inapposite because it did not address whether the *per se* rule or the rule of reason applied to the no-switching agreement at issue.

September 24, 2010) and *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. June 3, 2011). The consent decrees explicitly exempt certain types of conduct from their prohibitions. These exceptions recognize that agreements between firms to restrict recruiting or hiring may be essential to conduct business in certain limited contexts, for example, the sale of a business or in an employment termination agreement between an employer and an employee. (Mot. to Dismiss 22-24.) eBay contends that these negotiated exceptions prove that *per se* treatment is not appropriate here. (Mot. to Dismiss 22-24.) But that contention is entirely divorced from the context of this case, in which the challenged agreement serves no legitimate purpose and is not the product of a negotiated consent decree.

3. The alleged restraint is unlawful under a "quick look" rule of reason analysis.

If the Court declines to apply the *per se* rule, it should use a "quick look" rule of reason analysis. Conduct may be condemned after a "quick look" if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Safeway*, 651 F.3d at 1134 (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)); *see also* 11 Herbert Hovenkamp, Antitrust Law, ¶ 1911(a) at 326 (2011 Third Edition) ("quick look" is "intended to connote that a certain class of restraints, while not unambiguously in the per se category, may require a less elaborate examination to establish that their principal or only effect is anticompetitive."). Such condemnation can be accomplished "'in the twinkling on an eye.'" *Safeway*, 651 F.3d at 1134 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984)). No further inquiry into market power or actual harm to competition is necessary if there is no procompetitive justification for the restraint. *See Indiana Fed'n of Dentists*, 446 U.S. at 460. Indeed, "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output,'" and that such a restriction "requires some competitive

justification even in the absence of a detailed market analysis.'" *Indiana Fed'n of Dentists*, 476 U.S. at 460 (quoting *Nat'l Society of Prof'l Eng'rs*, 435 U.S. at 692); *see also NCAA*, 468 U.S. at 110.

One of the cases principally relied on by Defendant, *Union Circulation*, involved a restraint that was condemned after a quick look. (*See* Mot. to Dismiss 18.) In that case, although the conduct at issue had been in place for decades, the Court declined to examine actual effects, instead concluding "it appears that the reasonably foreseeable effect of the 'no-switching' agreements will be to impair or diminish competition between existing subscription agencies, and to prevent would-be competitors from engaging in similar activity." *Union Circulation*, 241 F.2d at 658; *see also id.* at 657 ("[T]he agreements should be struck down if their reasonable tendency, as distinguished from actual past effect, is to injure or obstruct competition").[10]

Here, the United States has alleged that eBay's agreement with Intuit is a naked restraint with readily apparent anticompetitive effects and no procompetitive justification. If the Defendant offers a procompetitive justification for the restraint, the Court can readily determine whether such justification is plausible under a "quick look" analysis. Unless Defendant is able to produce evidence of a significant procompetitive justification, the restraint should be condemned without further analysis. Defendant's vague assertions that there was more to the interactions between Cook and the eBay board or that a procompetitive effect "might" plausibly have been the elimination of a point of friction between Cook and eBay senior management, (Mot. to Dismiss 24), appears to suggest that Cook's irritation at eBay for competing for Intuit's employees justifies an otherwise *per se* unlawful agreement. This is surely wrong. Nonetheless,

[10] Although this decision predates a more formal articulation of the quick look or "truncated" rule of reason, commentators cited by Defendant (Mot. to Dismiss 23) have also classified *Union Circulation* as a quick look case. Brian R. Henry and Joseph M. Miller, *"Sorry, We Can't Hire You ... We Promised Not To": The Antitrust Implications of Entering Into No-Hire Agreements*, 11–Fall Antitrust 39 (1996) ("In applying a truncated rule of reason analysis . . . the court had no difficulty in condemning the agreements.")

if Defendant wishes to make this factual argument, it should do so at a later stage in the case, not in a motion to dismiss.

4. Whether *per se*, "quick look," or rule of reason analysis applies is not appropriate for resolution on a Rule 12(b)(6) motion.

The Complaint pleads an ample factual basis to conclude that the agreement is *per se* unlawful, but if the *per se* rule is not applied, the agreement is properly found unlawful under a "quick look" analysis. Defendant argues that the Complaint should be dismissed because it fails to state a claim under a full rule of reason analysis. Courts, however, appropriately reject 12(b)(6) motions based on such arguments, resolving the question of whether *per se* or rule of reason applies after there is a factual record. *See In re High-Tech Employee Antitrust Litig.*, 856 F. Supp.2d 1103, 1122 (N.D. Cal. 2012) (as the parties agreed, "the Court need not decide now whether *per se* or rule of reason analysis applies. . . that decision is more appropriate on a motion for summary judgment"); *Pecover v. Elecs. Arts Inc.*, 633 F.Supp.2d 976, 983 (N.D. Cal. 2009). Indeed, the cases on which Defendant relies addressed this issue at summary judgment or later. *See BMI*, 441 U.S. at 6; *Bogan*, 166 F.3d at 512-13; *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 333 (7th Cir. 1967); *Eichorn.*, 248 F.3d at 136; *Aydin*, 718 F.2d at 899.

This is appropriate because determining which rule applies requires a "factual inquiry" that is "improper at this stage in the proceedings." *Pecover*, 633 F.Supp.2d at 983; s*ee Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1131, 1133 (N.D. Cal. 2005) (on a motion to dismiss, declining to decide whether rule of reason applied because the question of whether a restraint is naked or ancillary is "quintessentially one of fact."). Indeed, Defendant's rule of reason argument invokes disputed facts. Defendant claims, somewhat ambiguously, that the challenged agreement "did not represent the sum total of interaction between the alleged participants" and "might plausibly have produced a net pro-competitive effect or no effect by eliminating a point of friction between senior management of eBay and a Director." (Mot. to

Dismiss 22.) Whether the agreement was ancillary to some procompetitive activity is a disputed factual question appropriately addressed after discovery creates a factual record.

C. Section 8 of the Clayton Act does not immunize a conspiracy from scrutiny under Section 1.

Section 8 of the Clayton Act, 15 U.S.C. § 19(a)(2), bans so-called "interlocking directorates," *i.e.*, situations in which two competitors have common directors. "Section 8 nip[s] in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates." *United States v. W.T. Grant Co.*, 345 U.S. 629, 638, n.4 (1953); *see also* S. Rep. No. 101-286 (1990). Not all interlocking directorates are banned by Section 8. The statute contains a number of *de minimis* exceptions.

Because Intuit executive and board member Cook also serves on the eBay board, there is an interlock between the two companies. Whether that interlock is lawful or unlawful is not a matter addressed in the Complaint. From that unremarkable point, eBay argues that the arrangement does not violate Section 8, which may or may not be the case. Then comes eBay's truly Olympian leap: that a lawful interlocking directorate immunizes any agreements between two companies from scrutiny under Section 1 of the Sherman Act. That proposition is fashioned from thin air. There is no precedent or other authority which supports it and we are unaware of any prior case in which the argument has even been advanced, much less adopted by a federal court. Nor do either of the two journal articles cited by eBay remotely suggest that a non-violation of Section 8 of the Clayton Act confers Section 1 immunity on two corporations with an overlapping director.

There is, however, directly contradictory legislative history. Congress regarded "interlocking directorates . . . as a precursor to restraint and monopoly and thus as a most serious threat to free competition, and . . . such interlocking directorates were strongly condemned." S. Rep. No. 101-286 at 3-4 (1990) (also noting that the 1914 Clayton Act was intended to

"supplement and strengthen" the 1890 Sherman Act). When Congress enacted *de minimis* limitations on Section 8, the Antitrust Division explained in congressional testimony:

> In assessing risk [created by the *de minimis* exceptions], it must be remembered that section 8 is not the exclusive safeguard against anticompetitive behavior. Should any interlock, including one involving relatively small amounts of sales, turn out actually to restrain competition, other antitrust remedies--including criminal prosecution under the Sherman Act--are readily at hand.[11]

There is also a long line of cases holding that immunity from violations of the antitrust laws is disfavored. *See, e.g., United States v. Nat'l Ass'n of Sec. Dealers, Inc*., 422 U.S. 694, 719-20 (1975); *Northrup Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1056 (9th Cir.) (1983) (citing cases). Antitrust immunity exists only where Congress' intent to grant immunity is clear. Nothing in the language or legislative history of Section 8 supports eBay's wholly novel immunity argument and, to reiterate, the United States is not aware of a single case in the ninety-nine year history of Section 8 that agrees with eBay's interpretation.

Needless to say, Section 8 immunity for violations of Section 1 would threaten to tear a large hole in the fabric of the nation's antitrust laws. Indeed, it would have the perverse result of encouraging interlocking directorates as competing firms could risk the benign penalties associated with Section 8 violations (typically removing the offending director from one of the problematic board seats) in order to gain protection from much more serious Section 1 sanctions (e.g., fines, treble damages, criminal penalties). Surely Congress never intended that result. The most that can be said for eBay's argument is that it is "creative," but it is also flatly wrong and should be rejected.

[11] *Increasing Sherman Act Crim. Penalties and Amending Clayton Act Interlocking Directorates: Hearing Before Subcomm. on Econ. and Comm. Law, H. Judiciary Comm.*, 101st Cong. 41 (1989) (Answers to Questions, Michael J. Boudin, Assistant Attorney General) (Attached as Ex. A at 21).

VI. CONCLUSION

This case is about a secret agreement between eBay and Intuit (not eBay and Cook as Defendant argues) to not compete for each other's employees. This agreement, entered and enforced by senior executives of the two firms, harmed their employees by depriving them of opportunities for higher salaries and benefits as well as possibly more attractive job opportunities. The agreement also harmed the competitive process that allocated labor between the two firms. There is no reason to exempt the agreement between eBay and Intuit from Section 1 scrutiny simply because Intuit's Cook also sits on eBay's board.

The Complaint alleges the agreement was a naked market allocation, plainly anticompetitive and served no redeeming purpose. No elaborate analysis is necessary to reach this conclusion and such agreements are *per se* unlawful, or alternatively, unlawful under the "quick look" standard. Defendant disagrees, arguing that the Complaint failed to allege facts sufficient to support a full rule of reason analysis, which is its view of the proper standard to be applied here. Defendant is wrong, among other things critically failing to distinguish between naked restraints and ancillary restraints. The Motion is to be decided on whether the Complaint alleges sufficient facts to support its theory of violation, not Defendant's, and it clearly does.

The Motion to Dismiss should be DENIED.

Dated: February 26, 2013

Respectfully Submitted,

_____/s/_____

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