No. 15-16973

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff – Appellee,

YOUCHAN LEE

Objector – Appellant,

v.

EBAY, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
U.S. District Court Case No.: 5:12-cv-05874-EJD
Honorable Edward J. Davila

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION & SUMMARY OF ARGUMENT

The district court committed clear error in approving the Settlement Agreement between the State of California and eBay, Inc. in the underlying matter (the "Settlement"). The Settlement falls woefully short of being fair, adequate and reasonable. *Fed. Rule Civ. Pro. Rule 23(e)(2).*

The Settlement has the same force and effect as a class action, particularly in its release of all relevant and very valuable claims against eBay by tens of thousands of claimants in exchange for *de minimus* compensation or no compensation at all. Virtually the entire population of affected employees, ninety-seven percent (97%) of what the State acknowledges is the eligible group of 31,000 claimants, will receive no compensation. Further, they will be forever barred from bringing similar claims against eBay, and potentially Intuit. Those who submit a claim receive a pittance of $150 to compensate them for eBay and Intuit's wrongful conduct, which likely cost the claimants employment opportunities exponentially more valuable than the Settlement represents.

The Settlement's "injunction" against eBay has meaningless enforcement mechanisms and zero compliance incentives or sanctions for violations, and expires after five years--four years less than the period of time covered by the proposed Settlement (from 2005 to 2014).

Moreover, the vast majority of the net settlement funds will be paid to the State for attorneys' fees and costs and to *cy pres* recipients that in no way will benefit aggrieved employees and bear only the most tenuous connection to the underlying issues.

A civil action filed in Los Angeles County Superior Court on June 26, 2015 as a proposed class action, with the proposed class represented by Plaintiffs Bernard Huang and Edward Kim, former employees of eBay and Intuit respectively, alleges the same wrongful conduct by eBay and Intuit in violation of the Sherman and Cartwright Anti-Trust acts, for a more expansive class period and much higher damages, including treble damages, to adequately compensate the class members and to meaningfully sanction the Defendants for their illegal conduct (the "Huang Action"). However, their claims may be released and they will be severely prejudiced if not irreparably harmed by the Settlement. Moreover, the Settlement essentially absolves Intuit of liability without any contribution from Intuit, further prejudicing the aggrieved employees here and in the Huang Action.

II. STATEMENT OF JURISDICTION

The People of the State of California, represented by the California Attorney General ("the State") commenced the underlying action against Ebay Inc. ("eBay") in the United States District Court, Northern District of California, San Jose

Division, Case Number 5:12-CV on November 16, 2012. The district court had jurisdiction under 15 U.S.C. § 1 and 28 U.S.C. §§ 1331, 1367(a). On September 11, 2015, the district court entered a Final Judgment, incorporating the Settlement Agreement entered between the State and eBay, subject of this appeal. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. ISSUES PRESENTED

Whether the trial court abused its discretion in finding the State of the State's Settlement with eBay to be fair, adequate and reasonable and thereon granting final approval.

IV. PERTINENT PROCEDURAL HISTORY

On November 16, 2012, the California Attorney General filed an action against eBay, Inc. ("eBay") alleging that eBay agreed to enter into a no-solicitation and no-hiring agreement in violation of Section 1 of the Sherman Act, the Cartwright Act, and the California Unfair Competition Law (hereinafter "State v. eBay"). Ultimately, on or about May 1, 2014, the State filed a Third Amended Complaint ("TAC"), following eBay's challenges to the pleadings. (ER 141.)

On May 1, 2014, the State and eBay entered into the Settlement. Pursuant to its terms, eBay agreed to pay $3.75 million to employees divided into three defined "Groups." (ER 22 at 26.) In May 2014, the State submitted a motion for

preliminary approval, which the district court granted after hearing on the motion on August 29, 2014. (ER 132, Transcript of Proceedings 08-29-2014, at p.11.) At the hearing on the State's Motion for Preliminary Approval on August 29, 2014, the discussion nearly exclusive centered on the form and nature of the proposed notice to the claimants, then estimated to be roughly 19,000, with the court expressing its primary concern being the notices reaching the "target audience" and not being ignored or destroyed as "spam" mailings (in the wake of recent retail database security breaches and the attendant consumer fears or cautions). (ER, 132, at pp. 4-5.) Otherwise, without any substantive discussion or argument, including as to the *cy pres* element, the court declared it believed the settlement to be "reasonable" and set the hearing for Final Approval on June 25, 2015. (ER 132, Transcript, 08-29-2014 at p. 9.) On March 3, 2015, Appellant filed Objections to the Class Action Settlement. (ER 130.) On May 26, 2015, California filed its Motion for Final Approval. (See, ER 22, Order, at p. 3, lines 3-4.)

On May 26, 2015, Appellant filed his Objections to Granting Final Approval of Class Action Settlement. (ER 114.) At the Fairness Hearing on June 25, 2015, this Court heard arguments from the State, counsel for eBay and counsel for the objectors, and continued the hearing on approval to September 10, 2015 to permit the submission of further information on the *cy pres* component of the settlement, as requested by the Court, as well as additional objections and/or argument and

information from objectors. (See, ER 37, Transcript of Proceedings on June 25, 2015, p. 27, lines 1-5 and p. 33, lines 1-23.)

On June 26, 2015, a Class Action Complaint was filed by Bernard Huang and Ed Kim as individuals on behalf of themselves and on behalf of similarly situated employees of eBay Inc. and Intuit Inc. alleging violations of the Sherman Act and Cartwright Act, Unfair Business Practices, Intentional and Negligent Interference with Prospective Business Advantage, (hereinafter the "Huang Action). (ER 50).[1] Rather than hearing supplemental argument from Appellant or on the *cy pres*, on September 3, 2015, the lower court entered its Order granting the Motion for Final Approval of Settlement ("Order") and vacating the September 10, 2015 hearing date. (ER 22.) The lower court entered Final Judgment and Order granting Judgment on September 11, 2015. (ER 13.)

V. STATEMENT OF THE CASE

A. The State's Allegations

The State alleged that eBay agreed to enter into a no-solicitation and no-hiring agreement in violation of Section 1of the Sherman Act, the Cartwright Act, and the California Unfair Competition Law. (ER 141, TAC, and 22, Order, at p. 2,

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[1] The Huang Action was removed to federal court on July 24, 2015 and then venued in the Northern District on September 4, 2015. See, ER 159-68, U.S.D.C. Docket.

lines 7-9.) The State also alleged that eBay and unnamed co-conspirator Intuit, Inc. ("Intuit"), pursuant to their agreement, agreed not to recruit each other's employees and eBay agreed not to hire any Intuit employees, even those that approached eBay for a job. (ER 141.) According to the State's Third Amended ("TAC"):

> "… [S]enior executives at Intuit and eBay, participated as co-conspirators in the violation alleged and performed acts and made statements in furtherance of the violation alleged… (ER 141, TAC ¶20.)
>
> "eBay's agreement with Intuit eliminated competition for employees. The agreement harmed employees by reducing the salaries, benefits, and employment opportunities they might otherwise have earned if competition had not been eliminated… misallocated labor between eBay and . . .distorted this competitive process and likely resulted in some of eBay's and Intuit's employees remaining in jobs that did not fully use their unique skills." (ER 141, TAC ¶21.)
>
> Instead of working harder to acquire this "critical and scarce" talent, eBay and Intuit called a truce in the "war for talent" to protect their own interests at the expense of their employees. … eBay valued its relationship with Intuit and the benefits eBay gained from restricting its own employees' career mobility above the welfare of its employees." (ER 141, TAC ¶22.) Neither eBay nor Intuit took any steps to ensure that employees affected by the agreement knew of its existence, or how it would impact them. (ER 141, TAC ¶23.)

The State further alleged the agreement was "enforced at the most senior levels of" eBay and Intuit. *Ibid.*

B. The Huang Complaint

The Complaint filed in the Huang Action ("Huang Complaint") alleges that eBay and Intuit entered into a no-solicitation and no-hiring agreement by which they agreed "not to recruit each other's software engineers and other similar tech employees," and thereby harmed "employees by lowering salaries and benefits, stifled mobility and deprived these employees of better job opportunities at the other company." (ER 50.) The relevant time period of the complaint encompasses the years 2006 through 2013, during which time it is alleged eBay and Intuit enforced their illegal agreement. Specifically:

> "Senior executives at eBay and Intuit entered into an agreement to restrict their ability to recruit and hire employees of the other company. The agreement prohibited either company from soliciting the other's employees for job opportunities and for over a year prevented at least eBay from hiring any employees from Intuit at all. The agreement was enforced at the highest levels of eBay and Intuit." (ER 50)

Huang and Kim, representative Plaintiffs in the Huang Action, and the class they seek to represent are former Intuit and eBay software engineers. Huang and Kim sought and/or were recruited for employment with the competitor Defendants (from eBay to Intuit (2007) and Intuit to eBay (2012), respectively) but were not hired. (ER 50). Huang and Kim only discovered that they were potentially harmed by eBay and/or Intuit when they received notice that they were each potential claimants in the State's action against eBay. (ER 50, p. 4, par. 15.)

C. The Settlement

As approved by the district court, the Settlement includes a grand total monetary award of $3.75 million. Of the $3.75 million, **$2.375** million will be set aside as restitution for employees or prospective employees at eBay **and Intuit** who were affected by the illegal agreement. At the time the parties first entered the Settlement, those employees were estimated to be approximately 13,900. By the time of the preliminary approval hearing, the estimate had already grown to 19,000. (ER 132, Transcript, 08/14/2014, p.2.) By the time of the final fairness hearing, that estimate ballooned to **31,000**. (ER 37, Transcript, 06/25/2015, p. 4.)

The Settlement divides the targeted employees into three groups of natural person who are residing in or have resided in California since January 1, 2005 (the "Settlement Period"), and who were employed by eBay or Intuit over the Settlement Period (each, a "Claimant"). (ER 22, Order, p. 5.) Restitution payments are earmarked to three distinct pools (each a "Claimant Pool"), and a Claimant can only recover as a member of one of three pools, even if the Claimant may meet the criteria for more than one of the Claimant Pools. *Ibid.*

Claimant Pool One is comprised of the approximately forty persons: (a) who, during the Settlement Period, were employed by Intuit and considered for but not offered a position at eBay, and (b) whom eBay has identified from the

documents in its possession, and (c) who is named on a list derived from eBay from its records that eBay will provide to California. *Ibid.*

Claimant Pool Two is comprised of the approximately nine hundred fifty persons: (a) who, during the Settlement Period, were employed by Intuit, and (b) applied for but were not offered a position at eBay, and (c) are not a member of Claimant Pool One or Claimant Pool Three, and (d) who are named on a list derived records that eBay will provide to the State. *Ibid.*

Claimant Pool Three is comprised of anyone: (a) who was employed by either eBay or Intuit during the Settlement Period, and (b) who is not a member of either Claimant Pool One or Claimant Pool Two, and (c) whose employment by either eBay or Intuit during the Settlement Period can be reasonably confirmed. (ER 22, Order, p. 5)

The Settlement includes provisions for "Prohibited Conduct," "Required Conduct" and "Enforcement" purporting to ban eBay from collusive, non-solicitation agreements and require reporting for 5 years. (ER 13, Final Judgment, Section VI., paragraphs A, B.) The "enforcement" consists of allowing the State to access eBay's records and employees for auditing purposes upon "written request… and reasonable notice to eBay, subject to any legally recognized

privilege. . ." (ER 13, Sec. VII. A.) There are no provisions for any sanctions, penalties or other punishment for violations. (ER 13, Sec. VII, pp. 5-6.)

As revealed on the record at the Approval Hearing on June 25, 2015, the estimated class members or claimants are 31,000, more than double the amount of covered employees originally estimated (at roughly 13,900) and used as the underlying assumption of the settlement. (ER 37, Transcript, 06/25/2015, p. 4.) Yet, the total monetary award of the Settlement remained at $2.375 million net settlement to the entire pool of employees released by the Settlement. The district court made no inquiry as to the impact of the tremendous increase in the number of employees on the settlement or whether the parties made any assessment or consideration of changing the settlement in light of the increase. Less than 16% responded, with the vast majority of responses being in the comparatively tiny Groups 1 and 2 (consisting of less than 1000 persons combined). (*Id*. at pp. 5-6)

The Settlement purports to release all relevant claims against eBay by tens of thousands of claimants in exchange for *de minimus* compensation or no compensation at all. (ER 22, Order, p. 6.) Virtually the entire population of affected employees, ninety-seven percent (97%) of all eligible claimants, receive no compensation. Further, the Settlement forever bars employees from bringing similar claims against eBay and potentially Intuit. (ER 22, Order p. 6, par. 4.) Those who made the effort to submit a claim will receive, after four months from

submission of the claim, the trifle of $150 to compensate them for eBay and Intuit's wrongful conduct, which likely cost them employment opportunities exponentially more valuable than the Settlement represents. (ER 22, Order, p. 10.)

The vast majority of the net settlement fuds will be paid to the State for attorneys' fees and costs and to *cy pres* recipients. (*Id*., pp. 10-11.) The district court initially expressed concern about the fact that the Settlement did not specify a *cy pres* recipient and was ambiguous (*Id.,* at pp. 9-10). The Court also queried why the State had not already vetted candidates and presented them for approval at the hearing on preliminary approval. *(Id*.) The State represented that it had twenty-three (23) *cy pres* recipient candidates to be vetted, and the court granted the State sixty days (60) to complete the process of selecting a recipient or narrowing the field to those it would present for court approval. *Ibid.,* at pp.11-14.) It is noteworthy that due to this unique circumstance, there was no opportunity to evaluate and voice opinion as to the State's plan for the *cy pres* distribution prior to final approval.

As Appellant's counsel advised the court, in addition to the objectors there were nine (9) employees who opted out of the settlement. (ER 37, Transcript, 06/25/2015, at pp. 19-20.) Counsel further highlighted the clear shortfall in the Settlement amount, citing to the State's own expert, Dr. Riddle of UCLA and the very high probability of success at trial—the potential for achieving up to ten times

the settlement amount plus treble damages. (*Id.*, pp. 19-20.) Counsel further noted that he State's case did not specifically involve Intuit or hold Intuit accountable in any way, yet the employees whose claims would be waived or released by the Settlement included Intuit employees. (ER 37, Transcript, 06/25/15 at pp. 19-20.)

The Huang Action alleges the same wrongful conduct by eBay and Intuit in violation of the Sherman and Cartwright Anti-Trust acts, for a more expansive class period and much higher damages, including treble damages, to adequately compensate the class members and to meaningfully sanction the Defendants for their illegal conduct. However, because of the Settlement, the claims of nearly all the will be released and they will be severely prejudiced if not irreparably harmed.

D. The State's Expert Report by Dr. Riddle

The State's own expert, Dr. Jon Riddle, an economics professor at UCLA, concluded in his report and sworn declaration, "that eBay's workers were harmed in the amount of $30.8 million and Intuit's employees were harmed in the amount of $26.1 million. Additional deadweight losses total $530,000…" (ER 157-158.) The Riddle Report, April 30, 2014, p. 26, Section VI.) Based on these figures, a successful trial of this action could yield treble damages of $172.2 million. Given the documentary evidence consisting in large part of eBay and Intuit emails, success at trial is highly likely. Appellant's Counsel highlighted Dr. Riddle's

findings to the district court at the approval hearing, adding that, given the unusually low risk of losing at trial with the available evidence (or the high chance of prevailing), "The amount of money that these class members are set to receive . . . amounts to 4 percent of what [the State's] expert estimates are the actual damages, that would be a 96 percent discount, which I don't think is appropriate here." (ER 37, Transcript, 06/25/2015, pp. 19-20.)

Despite this evidence, and the fact that nothing had changed other than the reaction of class members, the district court reached the same opinion about the fairness of the Settlement as it had uttered at the preliminary approval hearing, where, the district court virtually coached a statement from Counsel for the State that they were "proud of their work." See, ER 132, Transcript, 08/14/2014, pp. 10-11) Yet, while the court stated that it would consider all the issues raised by Appellant in objecting to the Settlement, without actually proceeding with the hearing it had scheduled, the court issued a final Order, finding "that the terms of the settlement are fair, adequate and reasonable." (ER 22, Order, p. 15.)

VI. LEGAL ARGUMENT

A. Standard of Review

A district court may approve a class action settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

While the underlying action was styled as an *in parens patriae,* as there are no specific standards for approving settlements in such cases, the district court followed common practice in reviewing and approving the Settlement following the rubrics of Federal Rule of Civil Procedure 23(e) (ER 22, Order. p. 3, Section II.)

On appeal, a district court's approval of a class action settlement under Rule 23(e) is reviewed for abuse of discretion, which is found when the court "'fails to apply the correct legal standard or bases its decision on unreasonable findings of fact.'" *Allen v. Bedolla*, 787 F.3d 1218, 1223-1224 (9th Cir. Cal. 2015) and *Dennis v. Kellogg Company* 697 F. 3d 858, 864 (9th Cir. Ca. 2012), citing *Nachshin v. AOL, LLC* 663 F. 3d 1034, 1038 (9th Cir. 2011) (omitting internal citations). This includes settlements that contain a proposed *cy pres* distribution, as in the instant matter. *Dennis v. Kellog, supra,* 697 F. 3d at 864.

"To survive appellate review [of a determination of substantive fairness], the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections." *Dennis v. Kellog, supra,* 697 F. 3d at 864 (citations and internal quotation marks omitted). In reviewing a determination of substantive fairness, where the terms of a class settlement "contain convincing indications that . . . self-interest rather than the class's interest in fact influenced the outcome of the negotiations," approval may be reversed.

Allen v. Bedolla, supra, 787 F.3d at 1223-1224, citing *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

Settlements "negotiated absent class certification," as in the present matter, "must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *Allen v. Bedolla*, supra, 787 F.3d at 1224, citing *In re Bluetooth, supra*, 654 F.3d at 946.

As did the Court in *Allen* and *Bluetooth*, the Court here should find that the district court "did not satisfy this procedural standard," and vacate the final settlement approval and "'remand so that the district court may conduct a more searching inquiry.'" *Allen v. Bedolla*, supra, 787 F.3d at 1224, quoting *In re Bluetooth, supra*, 654 F.3d at 938.

B. The District Court Did Not Comprehensively Explore All Pertinent Fairness Factors Including The Objections To The Settlement.

The district court's final approval of the Settlement and resulting judgment should be vacated because, as outlined above, the district court seemed to give precious little, even superficial scrutiny of various elements of the Settlement. The superficial analysis applied equally to the objections asserted by Appellant. Indeed, the district court issued its ruling before the additional hearing it had scheduled or the related supplemental briefing.

"The primary concern of [Rule 23(e)] is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982); *see also United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980) (describing the role of a judge reviewing a settlement as that of a "fiduciary serving as guardian for the unrepresented class members"). Among the eight factors recognized by the Ninth Circuit as guideposts to evaluating the substantive fairness of a proposed settlement are (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; and (5) the extent of discovery completed and the stage of the proceedings. *In re Bluetooth*, *supra*, 654 F.3d at 946.

The district court granted approval despite the numerous ways that the Settlement fails to adequately address, or even ignores, all five factors.

1. The Settlement Is Not Subject to Less Scrutiny Because It Is Brought as a *Parens Patriae* Action.

The State attempted to dismiss Appellant's objections by arguing that this case is not a class action, but rather a *parens patriae* matter, implying that the court has less of a fiduciary duty and/or that the proposed Settlement must meet a lower standard, is specious. (See, ER 37, Transcript, 06/25/2015, at 27:12 -16.) The State

argued below, and is expected to again argue, that the objections to the Settlement are misguided because this is not a class action nor class settlement.

The State's reliance on the *parens patriae* statute is at best, misplaced, if not wholly unjustified. "The *parens patriae* action is designed to provide a means of redress where a private class action is not viable. (See generally, Jones, Perspectives in Consumer Advocacy: Antitrust *Parens Patriae* Suits Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act -- A Solution for Wrongs Without Redress (1977) 5 Pepperdine L.Rev. 77, 78.)." *State of California v. Levi Strauss & Co.*, (1986) 41 Cal. 3d, 460, 477-478. The statute and procedural device is not designed to restrict consumer class actions, and its limitations are evidence in among other things the lack of treble damages available in *parens patriae* actions, in contrast to private class action. (*Ibid*., at fn 13.)

More importantly, the district court acknowledged and utilized the rubric of Rule 23(e), as the appropriate standard to determine the fairness, adequacy and reasonableness of the Settlement, as established in case law. (ER 22, Order, at p. 2, lines 7-9.)

a. The Monetary Relief is *De Minimus* to Nearly All Aggrieved Employees and Too Low to Prevent Future Violations.

The Settlement offers the possibility of a payment that is no more than nominal relative to the probable damages incurred by eBay and Intuit employees,

and sought by the Huang Action. Payment to the claimants of $2.375 million is too low in light of the strong evidence against the defendants and Dr. Riddle's opinion that the Class is owed $57.43 million.

Most striking is the purported "relief" to nearly all— a full 97%--of the former employees is de minimus--a mere $150 to each employee who expends the time and effort to submit a claim (and then wait four months for the check to issue) in compensation for potentially thousands of dollars lost in employment opportunities. (See, ER 22, Order, Section B. iii.)

The State touted the thousands of dollars to be paid to "the most harmed" (i.e., 40 of 31,000 employees) and "only" 23 objectors and opt-outs, and the "overwhelming claims rate" of less than 16%, as evidence of the fairness and adequacy of the Settlement. (ER 37, Transcript, 06/25/2015, at p. 17, lines 13-20) The "overwhelming response" to Group 1 who were promised a high payout incentive of $10,000 if they filed a claim, was 40% of 40 people, i.e., less than 20 claimants. (ER 37, Transcript, 06/25/2015, at p. 5, lines 8-13) Large payments to such a tiny percentage of the aggrieved employees does not support the fairness and adequacy of the Settlement, but speaks to its inequity as a whole. Indeed, the court must evaluate the fairness of the settlement as a whole, not by its individual components, but "fair, reasonable and adequate to **all concerned**." *Valdez v. The Neil Jones Food Company* (2013 U.S. Dist. LEXIS 111766, Aug. 11, 2014, E.D.

Ca) quoting *Lane v. Facebook Inc.* 696 F. 3d 811, 818-19 (9th Cir.2012) reh'g denied 709 F. 3d 791 (9th Cir. 2013) [emphasis added]; and *Hanlon v. Chrysler Corp.,* 150 F. 3d 1011, 1027 (9th Cir. 1998).

These payments to the less than 20 Group 1 claimants are analogous to enhancement awards to representative Plaintiffs, particularly *vis a vis* the awards to the remainder of the class members or the other 30,960 potential claimants. Where a settlement treats similarly situated class members differently, or "the settlement releases 'claims of parties who received no compensation in the settlement,'" final approval should be denied. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 604 (3d Cir. Pa. 2010). The district court offered no analysis of this deficit, simply accepting California's argument.

Notwithstanding the State's somewhat cavalier attitude to the 25 individuals who eschew the Settlement, courts must be cautious about 'inferring support from a small number of objectors to a sophisticated settlement."' *In re Ikon Office Solutions, Inc.,* 194 F.R.D. 166, 179 (E.D. Pa. 2000) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods., Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. Pa. 1995). To warrant legitimate approval, the Settlement should not contain "obvious deficiencies" or "improperly grant preferential treatment to class representative or segments of the class . . . ." *In re Tableware Antitrust Litigation* 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

The imbalance and unfairness of the Settlement payout to the vast majority of the covered employees is highlighted by the State's expert's valuation of the case when compared with the strengths and weakness of this case. The $2.375 million in net value to the class flies in the face of Dr. Riddle's conclusions, including his valuation of the case at $57.4 million, before any trebling of damages (available in the Huang Action). The Settlement represents less than 4% of what the class could win at trial. A 96% discount is not reasonable and not fair, in particular to 97% of the class who will receive virtually nothing. The district court's passing reference to the Settlement being adequate because "some of the employees' claims would be time barred," further evidences the lack of analysis. (ER 22, Order, p. 8, lines 6-8.) There is no record of nor attempt to quantifying what "some" of 31,000 employees represents. Indeed, there could be no such analysis as the parties did not conduct any discovery. More important, the district court made no analysis of the legal issue that the claims were time barred, such as whether the claimants had (as in the Huang and Kim situations) viable claims of delayed discovery, which would defeat statute of limitations arguments.

The Settlement is all the more egregiously unreasonable and unfair in light of the highly incriminating and indisputable documentary evidence, and thus unusually high likelihood of victory at trial. eBay and Intuit memorialized their unlawful agreements in email exchanges and "do not call" lists, and similarly

documented their efforts to enforce the agreements. The Class can present to a jury emails from the most senior people at Intuit and eBay, and other writings, which evidence the agreement not to interview, recruit, hire, etc. At trial, the Class members would have a stronger chance than in other cases with weaker evidence or the need to rely on inferences.

This was the scenario in the *In Re High Tech Employees Antitrust Litigation*, where the court did not initially grant approval because the **$324.5 million** dollar settlement was **not enough** based on the strong case those class members had. (ER: *In Re High-Tech Employee Antitrust Litigation,* 11-CV-0250, 2014 U.S. Dist. LEXIS 110064 (N.D. Cal. Aug. 8, 2014,) The Norther District court calculated, based on what the Settled Defendants had paid, ($20 million in initial settlement), that the Remaining Defendants would have to pay at least $380 million, more than $50 million greater than their proposal. *Id.* at pp. 9-11, 17-20. The court also noted that based upon the potential damages of over $3 billion calculated by Plaintiffs' expert, the total amount for both settlements would be 11.29% of single damages, or merely 3.76% of treble damages under the Sherman Act. *Id.* at p. 21.

Like the *In Re High Tech Employees* case, this case also includes highly incriminating emails from CEO level people at these companies agreeing to an anticompetitive agreement, which the State's own expert values at $57.43 million dollars in damages owed to the class.

2. The State Offered No Viable Justification for Failing to Name and Hold Intuit Directly Accountable.

The anti-competitive agreement at issue in the State's case is alleged to have been between eBay and Inuit. However, the State named only eBay as a defendant and requires only eBay to be fund the Settlement. This, despite the fact that the State's Third Amended Complaint and Dr. Riddle's expert report identify Inuit as a "co-conspirator" with eBay in the anticompetitive conduct at issue. Intuit's non-inclusion in the matter seems is even more questionable considering Dr. Riddle estimates that "… eBay's workers were harmed in the amount of $30.8 million and **Intuit's employees were harmed in the amount of $26.1 million**…" (ER, Riddle Report, p. 26. Emphasis added.)

The purported reason for Intuit's free pass in this case is the consent decree Intuit executed with the DOJ in the *U.S.A. v. Adobe Systems, Inc., et al.* case. (See, e.g. ER 13, Final Judgment, Section VI.B.) The State cited the "purely law enforcement action" in 2013 against Intuit, which the State admitted, and the district court acknowledged, did not seek or obtain any restitutionary relief from Intuit. (ER 37, Transcript, 06/25/2015, at p. 27, lines 12-24.) As if it offered any justification for excluding Intuit from the present action, the Sate added that "Intuit is under an injunction similar to tone eBay would under for this conduct." (*Ibid.)* As explained below, the Settlement's injunction is meaningless.

More important is what the State did not say—the State did not offer any explanation for why Intuit, which by the State's own admission had to be enjoined for the same conduct as eBay, was not held liable for compensatory damages to its employees. The reason is likely because such an omission is wholly unjustifiable.

Intuit should have been named in this lawsuit and should have been held to pay damages to the class along with eBay. If Intuit had been named in this case and pursued for damages the gross and net settlement figure would almost certainly be much greater, which would benefit the Class. The fact that Intuit was excluded should have given, but clearly did not give, the district court serious concerns about approving the Settlement.

3. The District Court Simply Accepted That The State Did Not Conduct Discovery Prior to Settlement Negotiations Relying on Information From Prior Litigation.

The district court accepted the State's arguments that it obtained sufficient information of the nature of the claims in *this action* from "similar actions involving the U.S. Department of Justice." Without any analysis of what the efforts or the information collected were, other than unspecified "information collected from the Department of Justice" and "investigation conducted prior to filing this action," the district court concluded that the State had obtained sufficient knowledge to "'demonstrate a good grasp on the merits of its case before

settlement talks began.'" (ER 22, Order, at p. 9, lines 3-7 [internal citation omitted].)

As for settlement efforts, again the court relied on the State's cursory statement that "the parties engaged in settlement negotiations, which were facilitated by phone conferences through the court's ADR program in December 2013 and January 2014." (ER 22, Order, at p. 2 lines 18-19.)

The State clearly did not take any depositions or conduct substantial interviews of potential claimants, nor of propounding or answering written discovery. This lack of discovery suggests a lack of diligence or perhaps a rush to resolve the case regardless of the additional evidence and leverage to be gained through discovery, by demonstrating how strong the case would be on its merits. This falls short of the *In re Bluetooth* and *Allen* standards and is not in the best interest of the Class.

The district court lacked basic information about the nature and magnitude of the actual claims, and gave little if any deference to the State's expert report on the industry realities. Thus, the district court could not justifiably conclude that the Settlement embodied reasonable compromise of all potentially affected eBay an Intuit employee claims for the paltry consideration paid for the release of those claims. (See, e.g., *Kullar v. Foot Locker* 168 Cal.App. 4th 116, 30, 133 [vacating

and remanding trial court's approval of settlement (entered without exchange of discovery), ordering, *inter alia*, that objectors be permitted to renew previously denied discovery requests].)

If anything, the primary substantive evidence presented by the State was Dr. Riddle's report (which the State claims is based on the documentary evidence from the prior Anti-trust cases), as highlighted above, contradicts the argument that the Settlement is fair, reasonable and adequate.

The district court's order approving the Settlement should be vacated and the parties should be ordered to complete discovery, including depositions of class members (or claimants), specific to the eBay and Intuit agreement in the State's case, to be able to properly gauge the value of this case to the Class.

4. The *Cy Pres* Element of the Settlement Further Evidences Its Unfairness.

The district court erred in approving the *cy pres* distribution, which awards more than one-third of the net settlement funds--over $898,000 of the already low net funds – to six charities, which were not designated or identified as part of the Settlement initially. (ER 22, Order, p. 11) Meanwhile, the vast majority of the class (97%) will go utterly uncompensated.

The district court declared that the "*cy pres* distribution is notable since it will further the objectives underlying the relevant antitrust statutes and the interest of silent class members." (ER 22, Order, p. 8, lines 10-13.) However, the *cy pres* designees, while all noble organizations, have no direct connection to aggrieved employees, and have at best indirect connection to the technology industry.

The *Cy Pres* Administrator selected six organizations to receive allocated *cy pres* funds: the California Teaching Fellows Foundation, DIY Girls, Filmmakers Collaborative SF, Hidden Genius Project, St. Anthony Foundation, and Turn2U Inc., DBA the Last Mile. (ER, 22, Order, p. 12.) While all are no doubt admirable groups, none does any work remotely connected to the harm done to claimants. The purported connection to this lawsuit appears to be that these groups will use the allocated *cy pres* distribution to promote awareness and training of underserved youth in technological skills or the technology industry, and thereby expand their employment horizons. *(Ibid.)* One group will reportedly earmark its allocated funds to promote videos "regarding antitrust protections." (*Id.*, par. 3.) Another organization will use the funds to "expand prison computer programming training, improve diversity and skills." (*Id.*, p. 12, par. 3, 6.) None of these noble endeavors addresses the harm done to those who clearly had the skills but were prevented from optimal employment opportunities due to eBay and Intuit's collusive, illegal conduct. And with the exception of one group which will purportedly produce

videos about unspecified anti-trust issues, nothing in the *cy pres* distribution proposal will address the conduct at issue in the underlying lawsuit, much less directly or even indirectly benefit aggrieved employees. Nonetheless, the district court found that the organizations had "the strongest nexus to the underlying lawsuit." because they "involve employment-related skills and training... in California." (ER 22, Order, p. 12, lines 26 through p. 13, lines 9-12.)

As the Ninth Circuit has noted, "not just any worthy recipient can qualify as an appropriate *cy pres* beneficiary." *Dennis v. Kellogg Co.,* 697 F. ed. 858, 865 (9th Cir., Cal. 2012). Rather, there must be "'a driving nexus between the plaintiff class and the *cy pres* beneficiaries.'" *Ibid.,* quoting *Nachshin v. AOL LLC*, 663 F. 3d 1034, 1038 (9th Cir. 2011). To avoid the risk of "'the whims and self-interests of the parties, their counsel, or the court'" influencing the selection of the *cy pres* beneficiaries, it must "'be tethered to the nature of the lawsuit and the interests of the silent class members'" which poses the risk that the selection process may answer to the whims and self-interests of the parties, their counsel, or the court." *Dennis, supra*, 697 F. 3d. at 867, citing *Nachshin*, 663 F.3d at 1039.

The district court cited this *Nachshin* standard, as well as that standard that the distribution "(1) address the objectives of the underlying statute(s) (2) target the plaintiff class, and (3) provide reasonable certainty that any member will be benefitted." *Id.,* At 1040. Yet, the district court applied the first component in the

most tenuous way and abrogated the second and third components, resulting in a selection that ultimately benefits eBay and Intuit.

According to the district court's Order granting final approval, the stated goal of the *cy pres* plan was "to bridge the digital divide among traditionally underserved youth and adults ... by preparing them to enter an increasingly technologically driven work force." (ER 22, Order, p. 11, lines 20-22.) By definition, this does nothing to impact the **current** class of aggrieved employees or potential employees of eBay or Intuit. Indeed, at best it only serves to increase the pool of possible employees in the next generation who may be subjected to similar anti-competitive practices (particularly after the expiration of the injunctive relief period). This "plan" does nothing to address deterrence from illegal conduct or remedy the impacts of the illegal conduct.

The underlying action was purportedly aimed at recovering compensatory damages for the employees aggrieved by eBay and Intuit's collusion in implementing illegal no-hire / no-solicitation agreements, thereby suppressing opportunities and wages. The underlying case did not claim discrimination or hostile work environment, nor that the aggrieved employees were disciplined, terminated or not hired due to lack of skills, unduly burdensome standards or pre-textual assertions about their purported skills. Nor was there any "digital divide" or disparate impact alleged. Thus, the court's nexus finding is erroneous.

This Court has repeatedly rejected *cy pres* proposals involving similarly tenuous connections to the litigated claims and aggrieved class members.

In *Six Mexican Workers v. Arizona Citrus Growers*, a class of undocumented Mexican farm workers sued various companies for violations of the Farm Labor Contractor Registration Act. 904 F.2d 1301, 1303 (9th Cir. 1990). The Court held that approval of the *cy pres* distribution to a charity that provided humanitarian aid in Mexico was an abuse of discretion because there was "no reasonable certainty" that any class member would benefit from it, even though the money would go "to areas where the class members may live." *Id*. at 1308. The Court found the district court's application of the *cy pres* doctrine to be "inadequate to serve the goals of the statute and protect the interests of the silent class members." *Id*. at 1312.

In *Nachshin*, AOL was accused of violating a number of statutes, including the UCL and the CLRA, by wrongfully inserting commercial footers into the plaintiffs' outgoing emails. *Nachshin, supra,* 663 F.3d at 1036. The class settlement included a promise by AOL to make substantial donations to three charities: the Legal Aid Foundation of Los Angeles, the Federal Judicial Center Foundation, and the Los Angeles and Santa Monica chapters of the Boys and Girls Club of America. *Id*. at 1037. Because these charities had no relation to the underlying claims or the class, the Court again found abuse of discretion and rejected the *cy pres* plan. *Id.* At 1040-1041. The Court recommended that the

parties select "beneficiaries from any number of non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance," which were the gravamen of the underlying lawsuit. *Id.* at 1041.

Finally, in *Dennis v. Kellogg*, the Court found that the proposed *cy pres* awards were "likewise divorced from the concerns embodied in consumer protection laws such as the UCL and the CLRA," under which the Plaintiff asserted causes of action for deceptive advertising and consumer fraud. *Dennis, supra,* 697 F. 3d at 866-867. The Court rejected the defendant's argument that donating to charities who feed the indigent relates to the underlying class claims because this case involved "the nutritional value of food." The Court noted that the gravamen of this lawsuit was that Kellogg *advertised* that its cereal *did* improve attentiveness. cause of action under the UCL and the CLRA, not the nutritional value of Frosted Mini-Wheats. Thus, appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising. On the face of the settlement's language, 'charities that provide food for the indigent" may not serve a single person within the plaintiff class of purchasers of Frosted Mini-Wheats. *Dennis, supra,* at 867.

Similarly, here, none of the charities identified addresses any anti-trust issues, such as the economic impact of eBay and Intuit's conduct, much less in any

way benefit current aggrieved employees. While they may indirectly provide the technology industry in the next generation or two with skilled candidates for hire, if anything, it is foreseeable that the resulting increase in the population of technology savvy or skilled candidates would only serve to drive down wages and salaries for such hires within the industry**. That would directly benefit eBay and Intuit, not the aggrieved employees here**. It may have the collateral, albeit remote, effect of obviating the presumed motivation for the anti-competitive conduct at issue. However, that is more speculation or wishful thinking than tangible expectation. As the Court noted in *Dennis*, the *cy pres* distribution "will only be of serendipitous value to the class purportedly protected by the settlement." *Id*. at 867.

In short, an inequitably high portion of the net settlement fund will go to *cy pres* recipients having at best a marginal relationship to the technology industry by virtue of claiming to train possible future tech industry applicants. This further evidences the district court's abuse of discretion in approving the Settlement.

5. The District Court Admits the Settlement's Injunctive Relief Component "Is Not of Significant Value."

The Settlement outlines purported injunctive relief which prohibits and requires conduct, and proposes enforcement, but in reality has no meaningful enforcement mechanism, no sanctions for violations, and expires after 5 years.

The "Prohibited Conduct" against eBay, which purports to enjoin only eBay from "attempting to enter into, entering into, maintaining or enforcing any agreement with any other person to in any way refrain from …or pressuring any person in any way to refrain from soliciting . . . or otherwise competing for employees of the other person." (ER 13, Final Judgment, Section IV.) The proposed "required conduct" of this injunction consists of requiring eBay to advise any successors of the Final Judgment and filing copies of its agreements and self-reporting violations to the State, which requirement expires in five (5) years. (*Id*., Section VI., paragraphs A, B.) The proposed "enforcement" consists of allowing the State to access eBay's records and employees for auditing purposes upon "written request… and reasonable notice to eBay, subject to any legally recognized privilege. . . ." (Section VII, Paragraph A.) By the State's own admission, the proposed Final Judgment contains no monetary sanctions, penalties or other forms of punishment for violation of, or for that matter any "incentive" not to violate, the injunction. (See ER 37, Transcript, 06/25/2015, pp. 5 – 6, [exchange between the court and State's counsel musing about the lack of enforcement provisions].)

The State's patent speculation and wishful thinking during the final approval hearing, and obvious lack of a clear enforcement plan, belies the argument that the injunctive provisions have any meaning. Yet the district court accepted this speculation without further inquiry. (*Id.*, at pp. 7-9.) Perhaps more risible is the

State's argument that the Settlement serves to "announce to companies that this is not a practice that is in line with the California antitrust rules" and that the State is "hoping that this case . . . keeps other companies from doing those sorts of things." (ER 37, Transcript, 06/25/2015, p. 7 lines 1-4.)

Stunningly, the district court admits that the injunctive relief of the Settlement contains **no "serious penalty . . . so as to deter eBay from violating the injunction"** and therefore **"is not of significant value."** (ER 22, Order, p. 8, ln 17-19. [Emphasis added].) Yet, the court still approved the Settlement based solely on the monetary value. (*Id.,* at lines 20-21.)

It defies credulity that a judgment of less than $4 million dollars against a multi-billion-dollar Silicon Valley giant such as eBay, with a short-lived, meaningless and toothless injunctive provision would, in any meaningful measure, deter future bad conduct. And the district court made no effort to explain how that affects any deterrence or punishment, much less adequately compensate the population of affected employees. Like the monetary element of the Settlement, the injunctive relief will neither make class members whole for past violations nor will it work to prevent future ones. Yet, when confronted with these realities, the district court pressed forward with final approval and judgment.

VIII. CONCLUSION

As the Court noted in *In re Bluetooth*, district courts must scrutinize settlements for "subtle signs" that the pursuit of "self-interests," whether by class counsel or individual plaintiffs may have "infect[ed] the negotiations" and does not evidence gross inequities. (*In re Bluetooth, supra*, at 947.) The district court failed in this obligation by approving the Settlement, which is not fair, reasonable or adequate.

The Settlement fails to compensate the vast majority of the aggrieved employees. The monetary amount and toothless, valueless injunctive provisions of the Settlement being so grossly disproportionate to the scope, power and financial standing of eBay alone (much less eBay and Intuit) should have compelled the district court to further analyze the circumstances and "develop the record" in more depth before final approval. These factors are compounded by the fact that over one-third of the net settlement fund will go to *cy pres* recipients with little if any nexus to the claims of the underlying lawsuit and no direct benefit whatsoever to aggrieved employees.

Former eBay and Intuit employees deserve a settlement that is fair, reasonable and adequate. The district court's Order approving the Settlement and

entering Judgment should be vacated, and the matter remanded for further proceedings.

Respectfully submitted,

March 11, 2016

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STATEMENT OF RELATED CASES

Appellant is unaware of any related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify under Ninth Circuit Rule 32-1 that this brief complies with the type-volume limitation in Fed. R. App. P., Rule 32(a)(7), in that the brief uses a proportionally spaced 14-point Times New Roman font, and contains 8,671 words.

Date: March 11, 2016 **HAMNER LAW OFFICES, APC**

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The People of State of California v. eBay Inc. No. 15-16973

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the CM/ECF system on March 11, 2016:

APPELLANT'S OPENING BRIEF

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system

Marie Bolanos — Declarant

Marie Bolanos /s/ — Signature