No. 15-16973

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellee,

YOUCHAN LEE,

Objector and Appellant,

v.

EBAY INC.,

Defendant and Appellee.

On Appeal from the United States District Court
for the Northern District of California

5:12-cv-05874-EJD
The Honorable Edward J. Davila

BRIEF OF APPELLEES

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I. ISSUE PRESENTED

Where California and federal antitrust laws expressly permit the Attorney General of the State of California to bring *parens patriae* claims, did the District Court abuse its discretion in finding the *parens patriae* settlement between the State of California and eBay to be fair, adequate, and reasonable?

II. SUMMARY OF ARGUMENT

Over 31,000 individuals received notice of a *parens patriae* settlement between Appellees the State of California ("California") and eBay Inc. ("eBay"). Following a full briefing, the District Court approved the settlement, finding it to be "fair, adequate, and reasonable." ER 36.[1] One objector, Youchan Lee, whose arguments were briefed and heard at the hearing of the Motion for Final Approval, seeks to dissolve the settlement based on his fundamental misunderstanding of the case.

The standard for court review of *parens patriae* settlements entered into by a state attorney general is not clearly established by precedent or legislative intent; however, it is certainly no more stringent than the standard

[1] Appellant Lee used "ER" for citations to his Excerpts of Record. Appellees California and eBay have designated supplemental portions of the record for the Court's review, designated as "SER."

under which private class action settlements are scrutinized. Because the District Court carefully applied the well-established standards for approval of a class action settlement, Lee cannot demonstrate that approval of this *parens patriae* settlement was an abuse of discretion.

In this case, the California Attorney General ("Attorney General"), Kamala Harris, brought the underlying action as *parens patriae* against eBay alleging that eBay and Intuit, Inc. ("Intuit"), entered into a "no poaching" agreement regarding each other's employees. Working with the United States Department of Justice, which brought separate actions against eBay and Intuit, the Attorney General conducted an investigation, reviewed thousands of pages of documents, and ultimately concluded that this settlement was appropriate and fair. The District Court agreed. Exercising its sovereign power, the State settled the case. Lee offers no meaningful reason why that settlement should be set aside.

The District Court evaluated the fairness, reasonableness, and adequacy of the settlement and examined the seminal and dispositive *Hanlon* factors in detail, confirming that the settlement is fair and reasonable under established law. The District Court concluded this was a fair and adequate settlement affording relief that might never come but for the settlement. With his

objection, Lee is preventing thousands who filed claims from receiving the relief the settlement affords them. That delay should end and this settlement and the District Court's judgment should be affirmed.

III. STATEMENT OF JURISDICTION

Appellees do not contest the Statement of Jurisdiction in Appellant's Opening Brief.

IV. STATEMENT OF THE CASE

A. Course of Proceedings

The California Attorney General brought the underlying action seeking injunctive relief, both as chief law enforcement officer of the State of California and later as *parens patriae* on behalf of natural persons in California[2] pursuant to the Sherman Act, Cartwright Act, and Unfair Competition Law. ER 141-143. The United States Department of Justice brought a similar case against eBay on the same day. *United States v. eBay Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013). The Attorney General alleged that as part of a "no-poaching agreement," eBay and its co-conspirator, Intuit, agreed not to recruit each other's employees, and eBay agreed not to hire any Intuit employees. ER 146-151. The Attorney General entered into

[2] As discussed below, *parens patriae* claims were added to the Third Amended Complaint.

an earlier settlement with Intuit based on the same facts. *California v. Intuit, Inc.*, CV 13-02933 (N.D. Cal. June 26, 2013).

The Attorney General's original complaint, filed on November 16, 2012, sought injunctive relief under both federal and state antitrust laws, and civil penalties under the state unfair competition statute. Neither class action nor *parens patriae* claims were made. California filed a First Amended Complaint on June 4, 2013. The District Court granted eBay's Motion to Dismiss on September 27, 2013, finding that California failed to demonstrate standing, but gave California leave to amend the complaint. ER 166, SER 6. California filed a Second Amended Complaint on October 11, 2013 (ER 166), which addressed the District Court's concerns and was met with another Motion to Dismiss from eBay, who has consistently denied any wrongdoing. The parties stipulated to a stay of the case on January 21, 2014 in order to explore settlement options. ER 164.

Counsel experienced in antitrust law represented the parties in settlement negotiations conducted on an arms' length basis. There were multiple in-person and telephonic conferences. ER 30-31. Howard Herman, ADR Program Director of the District Court, facilitated two Alternative

Dispute Resolution telephone conferences between the parties on December 3, 2013 and January 17, 2014. ER 23, 164.

B. *Parens Patriae* Settlement and Preliminary Approval

As part of the settlement process, on May 1, 2014, the Attorney General filed a Third Amended Complaint which included new *parens patriae* allegations. ER 143. Between California's initial complaint and the settlement, no private class action had been filed regarding the alleged conspiracy between eBay and Intuit. Hence, California believed that assertion and settlement of *parens patriae* claims was the only way for affected employees (whose claims were expiring due to the statute of limitations) to receive monetary compensation. The District Court agreed "that a $2.375 million restitution fund for affected individuals is significant given that some employees' claims would be time-barred." ER 29. Following its filing of the Third Amended Complaint, California filed a motion for preliminary approval of the settlement. ER 23, 163. After a hearing and full briefing, the District Court granted California's motion. ER 24, 163.

1. The Terms of the Settlement

The settlement included the following relief and terms:

Monetary Relief to Individuals: Under the terms of the *parens patriae* settlement, eBay is required to pay $3.75 million in total. ER 26. The settlement set aside $2.375 million of the $3.75 million for restitution for persons affected by the alleged "no poaching" agreement. ER 26.

The settlement separated individuals into three claimant pools: [3]

- Claimant Pool One consists of 38 individuals employed at Intuit, who applied, were considered for, but not offered a position at eBay. Each claimant will receive $10,000.
- Claimant Pool Two consists of 1341 individuals who were employed by Intuit during the settlement period and merely applied for, but were not offered, a position at eBay. Each claimant will receive $1,500.
- Claimant Pool Three consists of 30,850 individuals who were merely employed by Intuit or eBay. Each claimant will receive $150. ER 26.

Because the claims rate was somewhat unpredictable, for purposes of preliminary approval, the proposed recovery to each pool was presented as a

[3] The claimants in each of the pools resided in California between January 1, 2005 and the time of settlement, and were employed by eBay or Intuit. ER 26.

range. (For example, Claimant Pool 1 would recover between $5000 and $10,000.) ER 32-33, SER 10. Given the total amount of funds and the response rate, each recipient will receive the maximum amount proposed at the preliminary approval stage. SER 10.

Monetary Relief to California: Because California also brought the action on its own behalf, the settlement included relief beyond restitution to class members. eBay will also pay $1.375 million to the State, consisting of (a) $250,000 in Civil Penalties; (b) $300,000 in harm to the California economy; (c) $675,000 in attorney's fees and costs; and (d) $150,000 for claims administration including the costs of notice. ER 19, 26-27.

Cooperation: eBay agreed to provide documents and information relevant to the litigation or settlement, including identifying individuals, such as current or former employees, who may have relevant information necessary to implement the settlement. ER 27.

Injunctive Relief: In addition to the monetary terms of the settlement and cooperation, eBay agreed to an injunction with both California and the United States Department of Justice, enjoining eBay from entering into an agreement with another entity to refrain from recruiting or competing for employees of another company, except for agreements that are not

prohibited by existing law. California sought this relief as part of its sovereign power, hoping to restore competition for employees in the high-tech sector in California. ER 15-18, 27.

Release: Any California natural person (1) whose claims were represented by the California Attorney General acting in her capacity and under her powers as *parens patriae* under sections 4C and 16 of the Clayton Act, 15 U.S.C. §§ 15c and 26, and the Cartwright Act, Cal. Bus. & Prof. Code § 16760; and (2) who did not timely file an opt-out, would release all claims that were or could have been asserted against eBay in connection with the facts and events alleged in the Third Amended Complaint. ER 19, 27.

2. Notice, Claims, and *Cy Pres*

After the District Court granted preliminary approval, California implemented a notice and claims process through Gilardi & Co. LLC, an outside claims administrator, with the cooperation of eBay and Intuit. ER 25. Gilardi completed direct notice to 31,547 mailing addresses and 12,263 email addresses of potential claimants by November 24, 2014. ER 25, SER 47. Indirect notice via publication began on November 19, 2014 and was

completed by February 25, 2015. ER 25, SER 48. From 31,547 notices, only two objections and 23 opt-outs were received. ER 31.

Gilardi received 4,880 valid claims: 15 in Pool One to be paid up to $10,000 each; 343 in Pool Two to be paid up to $1,500 each; and 4,522 in Pool Three to be paid up to $150 each. ER 26, SER 43. 15.47% of all eligible claimants submitted claims. ER 31.

The following chart illustrates the claims rates by pool:

Claimant Pool	Total	Filed	Percentage
1	38	15	39.5%
2	1,341	343	25.6%
3	30,850	4,522	14.7%
All	31,547	4,880	15.47%

ER 31, SER 43.

Despite the strong claims rates, $898,695 of the funds set aside for individuals will remain. ER 31. Instead of reverting back to eBay, these funds will be issued *cy pres*, in the form of grants for specific projects. ER 32. In consultation with an outside *cy pres* administrator, the Attorney General developed a *cy pres* distribution process consistent with California Department of Justice policy and California jurisprudence. California selected the following nonprofit organizations to receive *cy pres* funds:

1) Filmmakers Collaborative SF ($250,000): to develop and implement a comprehensive education and information campaign utilizing video, web

and print materials tailored to reach, impact, and educate those seeking employment in the technology industry or in work requiring technology related skills.

2) Turn2U Inc., DBA The Last Mile ($150,000): to expand in-prison Computer Programming Training (CPT) into an institution not currently served, potentially a women's facility, and incorporate curriculum enhancements, proposed video instruction, and improved project evaluation metrics.

3) California Teaching Fellows Foundation ($50,000): to support Youth Tech Academy that delivers technology-based training to underserved Central Valley students.

4) DIY Girls ($148,695): to support the Tech Exploration program encompassing hands-on workshops, field trips, and day and residential summer programs targeted toward underserved girls between grades 6 and 8 in Los Angeles.

5) Hidden Genius ($150,000): to expand its Immersion Program component and provide support to at least two other Hidden Genius programs geared toward black males in middle and high school from

underserved communities throughout Oakland, and surrounding areas in the East Bay.

6) St. Anthony Foundation ($150,000): to provide comprehensive job-skills training for 200 indigent drug addicts and alcoholics in recovery. ER 32-34.

C. Final Approval

Following the notice and claims period, the parties continued to litigate the settlement through the final approval process. Before the final approval hearing, Lee briefed his objections to what he erroneously called the "class action settlement." Youchan Lee's Objection to Granting of Approval of Class Action Settlement, ER 114-29; Declaration of Christopher J. Hamner in Support, ER 62-3. Specifically, Lee argued that the settlement amount was too low, the State had a strong case, and Intuit should be included in the settlement. ER 34-35. Lee's counsel presented lengthy argument (roughly nine pages of a 34-page transcript) expressing his opposition, in detail, to the "class" settlement. SER 24-33.

The District Court did not grant final approval after the hearing. Instead, the District Court requested supplemental briefing identifying the specific *cy pres* recipients. SER 39. Lee did not oppose or object to the

identified recipients. Once it had fully vetted the *cy pres* plan, the District Court granted final approval to the settlement after finding its terms to be "fair, adequate, and reasonable." ER 36. The District Court discussed Lee's objections at length in its decision, concluding they had no effect on the final settlement. ER 34-35, 162, SER 24-33. The District Court entered judgment on September 11, 2015. ER 13-21.

V. ARGUMENT

This settlement is fair under any standard and should be affirmed. Lee's arguments, however, raise considerations relating to California's ability to exercise its sovereign powers as *parens patriae*. When the Attorney General brings or settles a claim as a *parens patriae* it does not bring a class claim or settle a class action. It does something fundamentally different: it seeks to protect its citizens. It is important that the distinction between class and *parens patriae* be maintained in finding this settlement is fair and proper under any standard of review.

A. *Parens Patriae* Cases Are Not Class Actions; Additional Deference is Warranted in Reviewing *Parens Patriae* Settlements.

Both the Clayton Act and the Cartwright Act provide that the California Attorney General may bring antitrust claims for damages on behalf of natural person residents of the State. 15 U.S.C.A. § 15c(a)(1); Cal.

Bus. & Prof. Code, § 16760(a)(1).[4] Neither statute, however, sets forth a standard by which proposed *parens patriae* settlements are approved. ER 24. Federal courts in cases involving combined class and *parens* settlements — including the Northern District of California in *In re TFT-LCD* — have adopted the two-step approval procedure and standards used for approval of class action settlements under Federal Rule of Civil Procedure Rule 23. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, M 07-1827 SI, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) (granting final approval to a combined class and *parens patriae* settlement after preliminary approvals in 2012).[5]

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[4] Compare: "Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title." 15 U.S.C.A. § 15c(a)(1) (West).

with:

"The Attorney General may bring a civil action in the name of the people of the State of California, as *parens patriae* on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by those natural persons to their property by reason of any violation of this chapter." Cal. Bus. & Prof. Code, § 16760(a)(1).

[5] Other jurisdictions also follow this approach with combined class and *parens* settlements: "[w]hile the statute does not state the standard to use in approving a *parens patriae* settlement, courts have adopted the standard

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In this appeal, no parties claim that the District Court below erred in borrowing Rule 23's procedures, which would require Lee to show a "clear abuse of discretion." *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009) (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)), as "[a]ppellate review of the district court's fairness determination is 'extremely limited' . . ." *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir.1998)). Rather, the District Court's ruling must be affirmed if the Court applied the proper legal standard and the Court's findings of fact were not clearly erroneous. *See Rodriguez*, 563 F.3d at 963.

But applying Rule 23's procedures should not lead this Court to treat the State or the case as any other class settlement. Lee does not (and cannot)

(…continued)
used in class actions." *States of N.Y. & Md. v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 680 (S.D.N.Y. 1991) (granting final approval of a nationwide *parens patriae* settlement over the objections of certain plaintiffs because sufficient notice was provided pursuant to the preliminary approval order). "Under this standard, the Court will approve the Settlement Agreements if they are fair, reasonable and adequate." *Id.*; *see also In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000); *New York v. Salton, Inc.*, 265 F. Supp. 2d 310, 313 (S.D.N.Y. 2003) (noting that "[a]lthough [15 U.S.C.] section 15c(c) does not specify the legal standard for approval [of *parens patriae* settlements], courts look generally to the standard applied in approving class action settlements under Federal Rule of Civil Procedure 23(e).").

provide support for the idea that a *parens patriae* case is a putative class action because courts have been careful to distinguish *parens patriae* matters from class actions. Indeed, *parens patriae* suits are fundamentally different from class actions because they lack fundamental attributes of class actions. *See, Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (finding that *parens patriae* actions are not "class actions" and thus not subject to removal under the Class Action Fairness Act) (citing *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 850 (9th Cir. 2011)). *See also, Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739-40 (2014) (finding *parens patriae* actions distinct from class actions).

As a *parens patriae* action, this case was brought on behalf of California natural persons by the Attorney General. Bringing a *parens patriae* suit is a unique, substantive power "inherent in the supreme power of every State" to further its sovereign and quasi-sovereign interests, such as protecting "the health and well-being — both physical and economic — of its residents in general." *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 600, 607 (1982) (internal quotation marks omitted).

As the District Court noted, the fact "that government lawyers negotiated the settlement gives this factor considerable weight, as the State

is charged with the trust of protecting the state and its citizens." ER 30; *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) ("Court may place greater weight . . . in addressing a settlement negotiated by government attorneys committed to protecting the public interest"); *In re Toys R Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) ("the participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected").

Since a *parens patriae* action has no class representatives and state attorneys are not paid on contingency, the issues most relevant on appeal from a class action settlement—an excessive award of attorneys' fees in relation to the benefits to the class and class lawyers crafting a distribution of relief to favored class members at the expense of other class members — are of only marginal relevance in a *parens patriae* settlement. *C.f. Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) ("the assumption in scrutinizing a class action settlement agreement must be, and has always been, that the members of the class retain an interest in assuring that the fees to be paid class counsel are not unreasonably high"). Because the usual private class action concerns about inequitable distribution plans are absent from *parens patriae* matters brought by an official elected to represent the

people, it is appropriate for the Court to consider that the settlement was negotiated by "government attorneys committed to protecting the public interest." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002)

Statutory and case law are clear: a *parens patriae* matter is not a class action. The fact that a *parens patriae* suit is a representative action, or that Rule 23 approval procedures might be applied, does not transform a *parens patriae* case into a class action.

B. Lee Cannot Show an Abuse of Discretion Even Under the Standards Applied to Class Actions.

The difference between a *parens patriae* claim and a class claim is important. But, even if this Court applies the standards used in evaluating class actions, without any accommodation for, or deference to, the fact that this settlement does not involve a class action, the outcome should not change. The District Court properly concluded the settlement was fair and did not abuse its discretion in doing so.

1. The District Court Properly Used Its Discretion in Determining the Fairness, Reasonableness, and Adequacy of the Settlement.

Lee argues that the District Court "seemed to give precious little, even superficial scrutiny of various elements of the settlement." Appellant's

Opening Brief at 15. This argument is without merit, wholly inconsistent with the record, and based on a misunderstanding of well-established legal precedent.

"Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only role in reviewing the substance of that settlement is to ensure that it is 'fair, adequate, and free from collusion.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). District courts are guided in that determination by the *Hanlon* factors:

> the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial matter; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Id. In its order granting final approval, the District Court addressed each of these factors. ER 24, 28-32, 34-36.

The District Court carefully reviewed the information provided by the Attorney General, eBay, and Lee and after full briefing, a preliminary approval hearing, a final approval hearing, and supplemental briefing, the District Court concluded that the settlement was fair, reasonable, and adequate. The District Court not only addressed the *Hanlon* factors, but also examined each factor in detail: the fairness of the settlement (ER 26-27); the strength of plaintiffs' case and the risk, expense, complexity, and likely duration of further litigation (ER 28); the amount offered in settlement (ER 28-29); the extent of discovery completed and the state of the proceedings (ER 29-30); the experience and views of counsel, and the presence of a governmental participant (ER 30-31); and the reaction of claimants (including Lee) (ER 31-32, 34-36). In addition, the District Court carefully reviewed the appropriateness of the notice plan (ER 25-26) and the *cy pres* distribution (ER 32-34).

Lee asks this Court to retry the Motion for Final Approval, [6] rather than examine whether the District Court's use of discretion was proper. The

[6] Lee asks the Court to evaluate the initial pre-discovery expert report filed with the original complaint, the "attitude" of the attorneys negotiating the settlement, and the organizations awarded *cy pres* funds. Lee's brief also speculates on the possible awards from an imaginary class action, claiming

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details of the settlement, however, are not at issue. The question is whether the District Court abused its discretion in finding that the settlement was "fair, reasonable, and adequate." All this Court must examine, if it chooses to apply the class action standard, is whether the District Court comprehensively explored all factors. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009) (quoting *Officers for Justice v. Civil Serv. Comm'n of San Francisco,* 688 F.2d 615, 625 (9th Cir. 1982)).

The Court's Order Granting Motion for Final Approval of Settlement demonstrates that it did so. ER 22-36. After full briefing and argument, the District Court carefully examined whether notice was appropriate and whether the settlement was fair. ER 24-27. The District Court looked to the reaction of recipients, including extensive briefing and comments from Lee, and examined the *cy pres* plan. ER 31-36. The District Court would not grant final approval until the *cy pres* recipients were identified. SER 19-20. Lee's objections to what he doggedly called a "class action" settlement were fully heard by the District Court. SER 24-33. From this, it is clear that the

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that ". . . a successful trial of this action could yield treble damages of $172.2 million." Appellant's Opening Brief at 12.

District Court properly used its discretion and that settlement was abundantly fair and adequate. Lee cannot, and has not, shown otherwise.

2. The District Court Properly Found that the Negotiated Settlement was Fair.

a. The District Court may approve a settlement below total potential recovery.

Lee argues that the monetary relief provided by the settlement offer is "de minimis" and "no more than nominal relative to the probable damages incurred by eBay and Intuit employees." Appellant's Opening Brief at 17. Again, Lee misunderstands – or ignores–controlling case law regarding what courts have determined qualifies as a fair and reasonable settlement.

"It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir, 2000) (quoting *Officers for Justice*, 688 F.2d at 628). District courts evaluate the reasonableness of monetary relief in light of the "uncertainties of trial" and the variability in "estimates of the maximum amount of damages recoverable in a successful litigation." *Id.* In *Mego*, the Ninth Circuit found that the district court did not abuse its discretion in concluding that a settlement of $1.725 million — including all fees and costs — was fair and adequate when the maximum damages estimate was $12

million, which provided a 14% recovery. Thus, here, the District Court's conclusion that a $3.75 million dollar settlement — 12% of the maximum damages estimated by California's expert — was reasonable is in accordance with controlling case law.

b. The District Court properly took into account the risks of litigation in approving the settlement amount.

Although California had strong liability claims against eBay, eBay mounted a vigorous defense and succeeded in its first motion to dismiss. California promptly amended its complaint, but as eBay's initial victory proves, there are risks inherent to litigation. A $3.75 million settlement is 12% of the $30.8 million in damages attributable to eBay estimated by California's expert, Jon Riddle, whose pre-discovery expert report assumed no litigation risk. SER 72. Given the risks of continued litigation, this is commensurate with the 14% figure in *Mego*. The District Court was correct in finding that "a negotiated resolution provides for certain recovery in the face of uncertainty in litigation." ER 28.

c. The District Court properly evaluated the settlement by comparing it to actual damages.

Lee claims that the settlement is inadequate because "[t]he $2.375 million in net value to the class flies in the face of Dr. Riddle's conclusion,

including his valuation of the case at $57.4 million, before any trebling of damages (available in the Huang Action)." Appellant's Opening Brief at 20.

Case law overwhelmingly supports evaluating the reasonableness of an antitrust settlement amount by comparing it to actual damages rather than treble damages. *See, e.g., Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 964 (9th Cir. 2009) ("courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any consideration to treble damages"); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1298 (2d Cir. 1990) ("[T]he district judge correctly recognized that it is inappropriate to measure the adequacy of a settlement amount by comparing to a trebled base recovery figure").

As seen in *Mego*, the appropriate comparison is in the total settlement amount, not in "net value," and treble damages should not be used. *In re Mego*, 213 F.3d at 457, 459 (which used the settlement amount before fees and costs). Therefore, the proper comparison is $3.75 million[7] (12%) in

[7] Lee's $57.4 million figure misguidedly combines damages attributable to eBay ($30.8 million) and to Intuit ($26.1 million). SER 72. eBay's settlement did not release *parens patriae* claims against Intuit, and therefore only the eBay damages should be considered with respect to this settlement.

recovery out of $30.8 million in maximum damages,[8] in line with the 14% in *Mego*.[9]

d. Lee's reliance on *Allen* is misplaced.

Lee also cites *Allen v. Bedola* for the proposition that class actions must undergo higher scrutiny for collusion. 787 F.3d 1218, 1224 (9th Cir. 2015) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). Lee's reliance on *Allen*, however, is misplaced. *Allen* is a warning about self-dealing, which occurs "(1) when counsel receive a disproportionate distribution of the settlement; (2) when the parties negotiate

[8] Direct monetary relief here is significant. Claimant Pool 1, the people directly affected by the alleged agreement, will receive $10,000. Claimant Pool 2, the people who were not directly affected but nevertheless tried to switch jobs, will receive $1,500. Claimant Pool 3 will receive $150, for merely being employed at either company during the relevant time period.

[9] Even comparing "net value" to individual claimants, the Attorney General's settlement compares well with the settlement in *In re Mego*. The *Mego* settlement allowed a 33.3% attorney's fee, $10,000 in incentive awards, and all notice, administration, and tax preparation fees to be taken from the $1.725 million settlement. *In re Mego*, 213 F.3d at 457. Assuming the notice and administration costs are $0 in *Mego* after attorneys' fees and incentive awards, $1.14 million is left for the class, about 9.5% of the $12 million in maximum estimated damages in *Mego*. Here, the $2.375 million set aside for California individuals is 7.7% of the $30.8 in maximum estimated damages, which is well within range of the *Mego* settlement, especially given that notice and administration costs are already taken into account.

a 'clear sailing' arrangement (i.e., an arrangement where defendant will not object to a certain fee request by class counsel); and (3) when the parties create a reverter that returns unclaimed fees to the defendant." *Allen*, 787 F.3d at 1224 (internal quotations omitted). None of the *Allen* "signs" are present in this case. Here, attorney's fees are $675,000; there was no "clear sailing" arrangement; and, instead of a reverter, in which unclaimed funds return to eBay, all unclaimed funds will go to *cy pres* recipients. Contrary to Lee's assertions, *Allen* supports *dismissal* of Lee's appeal.[10]

3. The Claims Rate is Strong.

Lee also takes issue with the 15.47% overall claims rate, but cites no case law to support his assertion that this figure makes the settlement unfair or inadequate. Appellant's Opening Brief at 18. Settlements have been approved with much lower claims rates. "Settlements of large class action suits have been approved even where less than five percent of the class files claims." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d

[10] *Bluetooth* also supports dismissal. The case involved 26 putative class actions. *Bluetooth*, 654 F.3d at 938. Class counsel received up to $800,000, with $100,000 *cy pres* and no recovery for any member of the putative class. *Id.* In the instant *parens patriae* matter, there is significant recovery for all members of the claimant pools. All leftover, unclaimed funds going to *cy pres*. The attempt to analogize the settlement at issue and *Bluetooth* is inapposite.

1301, 1306 (9th Cir. 1990) (citing 2 NEWBERG ON CLASS ACTIONS at Appendix 8–2, §§ 8.44–45). *See also, In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 945 (9th Cir. 2015).

Further, in *Mego*, this Court held that such a reaction of the class, or in this case harmed employees, is an indication that the Court did not abuse its discretion in finding that the settlement was fair, adequate, and reasonable. The fact that there was only one opt-out and a "handful" of objectors out of 5400 class members added support to the reasonableness of the settlement. *In re Mego Fin.Corp. Sec. Litig.*, 213 F.3d 454, 459 (2000). Here, there were 23 opt-outs and two objectors out of 31,547 potential claimants. ER 24, 31. This is comparable to the figures in *Mego* and further supports the reasonableness of the settlement.

4. Settlement at This Stage of the Litigation was Appropriate.

Lee argues that, because the settlement was reached pre-discovery, there was a "lack of diligence," and that the District Court should have ordered the parties to complete discovery so "additional evidence and leverage" can be gained for settlement negotiations. Appellant's Opening Brief at 24. However, "in the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties

have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998)). In *Mego*, "extensive formal discovery had not been completed"; but "the district court noted that Class Counsel conducted significant investigation, discovery and research, and presented the court with documentation supporting those services." *Id.*

California worked with the United States Department of Justice, who had filed its own case on the same day, in evaluating the factual and legal strengths and weaknesses of this case, in detail, before settlement, including reviewing thousands of pages of documents. ER 29. Like class counsel in *Mego*, California worked with an economic expert, Jon M. Riddle, to further prepare for the litigation. Dr. Riddle, an economist and expert on antitrust issues provided a report which cited the extensive documents and data made available to California during the course of discovery. SER 78. Because California conducted significant investigation, discovery, and research, California had sufficient information to settle at this stage of the litigation without further discovery.

5. The Existence of the "Huang Complaint" is Immaterial to this Matter and the District Court's Approval.

Lee argues that the Attorney General is not allowed to pursue a *parens patriae* action at all, based on a class action suit filed by Lee's counsel, the "Huang Complaint," on June 25, 2015, more than one year after the Motion for Preliminary Approval was filed and three months after notice was completed. Appellant's Opening Brief at 20. California included a *parens patriae* element two years after filing the original Complaint, after it was clear that no class action would be filed within the four-year statute of limitations for antitrust matters. The release only applies to claims against eBay, but not claims against Intuit. The existence of the "Huang Complaint," which came much later than the initial settlement, is irrelevant to determining whether the District Court abused its discretion.

The California Attorney General has, in prior price-fixing cases, worked with private class counsel with the joint understanding that neither *parens patriae* nor class actions could supplant each other but rather would serve as part of a combined strategy aimed at maximizing the deterrence goal of the antitrust laws. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386-87 (D.D.C. 2002); *In re Cardizem CD Antitrust Litig.*,

218 F.R.D. 508, 525 (E.D.Mich. 2003); *TFT-LCD Antitrust Litig.*, 2013 WL 1365900 at *1 (N.D. Cal., Apr. 3, 2013, M 07-1827 SI) (granting final approval of global settlement of *parens patriae* and class actions). The necessity for this combined strategy, in which neither a private class action nor a public *parens patriae* action can supplant each other, is recognized by the California Supreme Court. *See Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758, 776-78 (2010).

Indeed, California law anticipates this scenario. California Business & Professions Code Section 16760(a)(1) contemplates parallel *parens patriae* and private actions. The statute states: "The court shall exclude from the amount of monetary relief awarded in the (*parens patriae)* action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury." This suggests that the legislature anticipated parallel lawsuits and provided a mechanism for them to coexist.

The creation of the *parens patriae* device does not limit the force and effect of class actions. Rather, both schemes are necessary for antitrust enforcement; the remedies obtained through *parens patriae* and class actions serve as an offset. *Id.* As they are not mutually exclusive, class actions do not trump *parens patriae* cases and the presence of the Huang Complaint

here has no bearing on whether the District Court properly approved the settlement.

6. Alleged Co-conspirator Intuit was Not a Necessary Party.

Lee claims that "[t]he fact that Intuit was excluded [from the present action] should have given, but clearly did not give, the district court serious concerns about approving the Settlement." Appellant's Opening Brief at 23. Lee fails, however, to provide any case law to support a claim that Intuit *must* have been included in the action for the settlement to be considered fair. This is because Lee cannot show that Intuit was a required party to the action.

The District Court properly found that Intuit is not a required party. ER 35. Federal Rule of Civil Procedure 19 requires joinder of a party only if: (1) in that person's absence, the court cannot accord complete relief among existing parties; or (2) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Those conditions do not apply here. First, the District Court was able to accord complete relief between eBay and California, including the Attorney General in her *parens* capacity, in this action. As a general rule, it "is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990). eBay and California reached a settlement that provided recovery to the State as well as California natural persons affected by eBay's conduct. The District Court found the settlement to be fair, adequate, and reasonable, thus according complete relief among the parties. Intuit's joinder was not necessary for this process.

Second, interests subject to the action were affected by the State's decision pursue Intuit's conduct in a separate case, *The People of The State of California v. Intuit, Inc.*, No. 13-cv-2933 (N.D. Cal. Jun. 26, 2013). California's settlement with eBay does not release *parens patriae* claims against Intuit; it only releases *parens patriae* claims against eBay. The separate *People v. Intuit* case does not involve *parens patriae* claims at all; that case is solely based on California's law enforcement interests. Therefore, California natural persons affected by the alleged eBay-Intuit

conspiracy may pursue any claims they may have against Intuit, whether as individuals or through a class action.

7. The District Court Properly Approved Distribution of *Cy Pres* Funds.

Lee takes issue with the charities chosen for *cy pres* distribution, for the first time in his appeal, stating that the designees, "while all noble organizations, have no direct connect to aggrieved employees and have at best indirect connection to the technology industry." Appellant's Opening Brief at 26. This claim lacks merit.

The District Court's approval of a settlement, including a proposed *cy pres* distribution, is reviewed for abuse of discretion. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). When reviewing a district court's *cy pres* distribution, this Court restrains itself from reviewing de novo the district court's findings and will not substitute its own "notions of fairness for those of the district judge." *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982).

Cy pres awards must qualify as the "next best distribution" as compared to giving the funds directly to class members. *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990)

(citing *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 72 (D.N.J. 1971)). In *Six (6) Mexican Workers*, this court, "found no Ninth Circuit precedent rejecting the use of *cy pres* or fluid distribution solely as a method of allocating unclaimed damages." *Id.* at 1307. While the case was remanded to the lower court in order to better distribute unclaimed funds (and failing that, escheating the funds to the state), it affirmed the use of *cy pres* grants as an appropriate method to distribute funds to ensure that wrongdoers do not "retain ill gotten gains" simply because of the administrative difficulties associated with small individual damages. *Id.* at 1305.

In addition, *cy pres* awards must meet the three guiding standards originally articulated in *Six (6) Mexican Workers*. In order to receive court approval, *cy pres* awards must: "(1) address the objectives of the underlying statutes, (2) target the plaintiff class, or (3) provide reasonable certainty that any member will be benefitted." *Nachshin*, 663 F.3d at 1040. This Court also required that in order to target the plaintiff class in the distribution the recipients of the *cy pres* grants must take into consideration the "broad geographic distribution of the class." *Id.* at 1040. Moreover, the *cy pres* award must not benefit a group "too remote from the plaintiff class." *Dennis*

v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012). For a *cy pres* beneficiary to be appropriate, the selection of the beneficiary should be "tethered to the nature of the lawsuit and interests of the silent class members." *Nachshin*, 663 F.3d at 1039.

It is not required "that settling parties select a *cy pres* recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process." *Lane v. Facebook, Inc.*, 696 F.3d 811, 820-21(9th Cir. 2012). Contrary to Lee's argument, the District Court did not abuse its discretion in its careful review and approval of California's *cy pres* grantees.

The District Court held a fairness hearing (ER 22, 24, 25), and reviewed the *cy pres* portion of the settlement under Rule 23 and the standard articulated in *Nachshin*. ER 32. The Court required an additional filing identifying all *cy pres* recipients before Final Approval was issued. In its Final Order, the District Court held, "[i]n the context of class actions settlements, a court may employ the *cy pres* doctrine to put the unclaimed funds to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class." ER 32 (citing *Nachshin*, 663 F.3d at 1038). For a *cy pres* beneficiary to be appropriate, the selection of the beneficiary

should be "tethered to the nature of the lawsuit and interests of the silent class members." ER 32 (citing *Nachshin*, 663 F.3d at 1039). The District Court applied the proper legal standard in reviewing the *cy pres* recipients and used that standard to reach findings of fact that are not clearly erroneous.

a. The lower court's findings of fact were not erroneous.

The District Court found that the agreement between eBay and Intuit distorted the competition among employers for skilled employees and likely resulted in some of eBay's and Intuit's employees remaining in jobs that did not fully use their unique skills. ER 23. ("[T]he agreement harmed California's economy by depriving Silicon Valley of its usual pollinators of ideas, hurting the overall competitiveness of the region.")

The allegations rested on eBay's suppression of competition for high-tech workers in California and suppression of competition between eBay and Intuit for employees. The restriction of mobility of employees between companies impacted the broader California labor and employment market, as well as wages and benefits for high-tech employees. This suppression of mobility and competition in the California labor market formed the basis of

California's *cy pres* awards and became the nexus between the harmed individuals and the *cy pres* grantees.

The District Court found that "each of the identified organizations has a nexus to the underlying lawsuit in that they involve employment-related skills and training, and are all located in California. As such, the Court approves the six *cy pres* recipients selected by California and the *Cy Pres* Administrator." ER 34. Because of this substantial nexus between the lawsuit, the statutes, and the harmed individuals, the District Court properly exercised its discretion in finding that the *cy pres* awards were fair, adequate, and reasonable. *In re Mego Fin. Corp Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) ("we will affirm if the district court judge applies the proper legal standard and his findings of fact are not clearly erroneous"); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011) ("we review a district court's approval of class action settlement for clear abuse of discretion and will affirm if the district judge applies the proper legal standard and his findings of fact are not clearly erroneous").

b. The *cy pres* designees have a direct nexus with the technology industry.

Federal courts, however, "have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds." *Six (6)*

Mexican Workers, 904 F.2d at 1307. As discussed above, the District Court did not abuse its discretion when it found that "each of the identified organizations has a nexus to the underlying lawsuit in that they involve employment related skills and training, and are all located in California." ER 34.

Moreover, Lee's assertion that the *cy pres* grantees "have at best indirect connection" (Appellant's Opening Brief at 26) to the technology industry is perfectly consistent with this court's jurisprudence when it found that in applying *cy pres* funds to their next best compensation uses may include for the "indirect" benefit of the class. *Nachshin*, 663 F.3d at 1038. Therefore, Lee's own admission that these cy pres grantees have an "indirect connection" is sufficient to meet this Court's guidelines for entities entitled to receive *cy pres* grants. *Id.*

c. Lee's objections regarding 9th Circuit case law and failed *cy pres* recipients are inapplicable.

Lee incorrectly analogizes the *cy pres* recipients in three other cases to this matter.

The underlying problem, in *Six (6) Mexican Workers*, was that it was unclear how much of the class could be located, and significant efforts were not made to return funds directly to class members. *Six (6) Mexican*

Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1306 (9th Cir. 1990). In this case, however, California was able to identify almost all potential recipients with available contact information. "The district court's choice among [*cy pres*] distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990). The silent group to be benefited by *cy pres* is a much smaller part of the overall litigation here than in *Six (6) Mexican Workers.*

Moreover, Lee claims that, in *Six (6) Mexican Workers,* the *cy pres* plan was disapproved on the basis that class members would not be guaranteed to benefit from the charities selected, and the same situation applies in this case. In fact, the underlying problem with *cy pres* in that case was that the sole *cy pres* recipient, the "IAF [Inter-American Fund], is not an organization with a substantial record of service nor is it limited in its choice of projects" and that instead "any distribution plan should be supervised by the court or a court appointed master to ensure that the funds are distributed in accordance with the goals of the remedy." *Six (6) Mexican Workers*, 904 F.2d at 1308. In this case, the Attorney General has done exactly that: "The State engaged the services of *cy pres* fund administrator Harry M. Snyder

('Cy Pres Administrator'), and became involved in an extensive process to select the recipients. . . . For each application received, the Cy Pres Administrator reviewed the applicant's proposal, financial information for at least two years, and supplemental information about the organization and project for which it was seeking funding." ER 32. The District Court further found that "the use of a neutral Cy Pres Administrator to guide the process provides objectivity and fairness to the selection of the *cy pres* recipients. Moreover, each of the identified organizations has a nexus to the underlying lawsuit in that they involve employment-related skills and training, and are all located in California." ER 34. Because the *cy pres* grantees in this case were selected in consultation with an outside administrator, were chosen based on past performance, and are directly related to employment in California, the concern in *Six (6) Mexican Workers* regarding the quality of the *cy pres* grantee does not exist here.

Lee also tries to compare the *cy pres* grantees in this case to the grantees in *Nachshin*. The *Nachshin* grants were made to "geographically isolated and substantively unrelated charities" on behalf of a nationwide putative class of over 66 million members. *Nachshin*, 663 F.3d at 1036. Given the size of the putative class, "all current AOL members", monetary

damages were small and difficult to ascertain – there was no individual recovery. *Id.*

Unlike *Nachshin*, the instant *cy pres* plan meets the standard in *Six (6) Mexican Workers*. The proposed awards (1) address the objectives of the underlying statutes, (2) target the plaintiff class, and (3) provide reasonable certainty that any member will be benefitted. *See Nachshin*, 663 F.3d at 1040. In the instant matter (1) all harmed individuals interested in compensation for their harm have submitted claims and will therefore be directly compensated, (2) all of the proposed *cy pres* recipients are located in California, and (3) each organization has a substantial nexus to the underlying statutes and harmed individuals in that they aim to educate high-tech employees about their rights regarding antitrust laws in California or help prepare individuals to be better high-tech employees. ER 33-34, Final Approval Order at p. 12-13.

Lee uses *Dennis v. Kellogg* as an example in which the court found that the *cy pres* award was divorced from the concerns of the applicable statute. 697 F.3d 858, 861 (9th Cir. 2012). *Dennis* held that the complaint did not allege that Kellogg's cereal was unhealthy or lacked nutritional value, but instead that the cereal *did* improve attentiveness. *Id.* at 866-67. Since those

alleged misrepresentations are what provided the causes of action under the UCL and CLRA, and not the nutritional value of Frosted Mini-Wheats, the "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." *Id.*

Unlike *Dennis*, the Attorney General's proposed *cy pres* grantees are consistent with the statutes used as the basis of this lawsuit and the individuals harmed by the defendant's alleged conduct. The State of California's Third Amended Complaint alleged that,

> Natural persons employed in the high tech industry were injured, and will continue to be injured, in their business and property by lower wages and benefits, and fewer opportunities, to which they would have had access, as a direct and indirect result of the actions of eBay and its coconspirators. This includes the future deprivation of competition arising from the failure of eBay to discontinue its wrongful conduct until at least the USDOJ investigation, and very likely afterwards as well.

ER 152. The language of the State of California's Third Amended Complaint shows a substantial nexus between the lawsuit and the proposed *cy pres* grantees. This substantial nexus demonstrates that the District Court did not abuse its discretion in approving the *cy pres* grantees.

8. The District Court Properly Approved the Injunctive Relief Portion of the Settlement.

Lee argues that the settlement's injunctive relief "is not of significant value" because it has no "meaningful" enforcement, no sanctions for violations, and expires after five years. Appellant's Opening Brief at 31-33. Even taking Lee's claims to be true, Lee fails to provide a single case cite showing that this type of finding would provide a basis for overturning an entire *parens* settlement. Moreover, the District Court's own findings contradict Lee's claims. Lee states that the District Court found that the injunctive relief was "not of significant value" in its order and indicates (although never expressly states) that the settlement should be overturned on these grounds. Appellant's Opening Brief at 33. However, Lee fails to mention the District Court's finding on the fairness of the settlement offer *as a whole*, specifically that the District Court looked at the injunctive relief, as well as the monetary amount offered in settlement, and concluded that while the injunctive relief "is less impressive . . . given the monetary recovery

obtained, this factor weighs in favor of settlement." ER 29. Therefore, Lee has failed to provide any basis for overturning the settlement.

VI. CONCLUSION

The District Court's determination should be upheld and Lee's appeal dismissed because (1) the result would not change even if the Court treated this *parens patriae* case as a class action; (2) the District Court examined all relevant factors in determining that the proposed *parens patriae* settlement was fair, reasonable, and adequate; and (3) Lee has not and cannot show that the District Court abused its discretion.

Dated: May 11, 2016

/s/ Nicole S. Gordon
NICOLE S. GORDON
Deputy Attorney General
Attorney for The People of the State of California

Dated: May 11, 2016

/s/ Thomas P. Brown
THOMAS P. BROWN
Attorney for eBay Inc.

ATTESTATION OF FILING

Pursuant to Circuit Rule 25-5(e), I hereby attest that I obtained concurrence in the filing of this Brief from the attorneys for eBay Inc. listed in the signature block above.

/s/ Nicole S. Gordon
NICOLE S. GORDON
Deputy Attorney General

15-16973

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellee,

v.

YOUCHAN LEE,

Objector and Appellant,

EBAY INC.,

Defendant and Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: May 11, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 15-16973

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 8,127 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

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☐ 4. **Amicus Briefs**.

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May 11, 2016
Dated

/s/ Nicole S. Gordon
Nicole S. Gordon
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **The People of the State of California, Youchan Lee v. eBay Inc.** No. **15-16973**

I hereby certify that on May 11, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. BRIEF OF APPELLEES
2. APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 11, 2016, at San Francisco, California.

Michelle CoSeng
Declarant

Signature

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