	Case5:11-cv-02509-LHK Document4	18 Filed05/10/13 Page1 of 31	
1	Richard M. Heimann (State Bar No. 63607)		
2	Kelly M. Dermody (State Bar No. 171716) Eric B. Fastiff (State Bar No. 182260) Brandan P. Clackin (State Bar No. 100643)		
3	Brendan P. Glackin (State Bar No. 199643) Dean M. Harvey (State Bar No. 250298)		
4	Anne B. Shaver (State Bar No. 255928) Lisa J. Cisneros (State Bar No. 251473)		
5	LIEFF CABRASER HEIMANN & BERNST 275 Battery Street, 29th Floor	TEIN, LLP	
6	San Francisco, California 94111-3339 Telephone: (415) 956-1000 Facsimile: (415) 956-1008		
7			
8	Joseph R. Saveri (State Bar No. 130064) Lisa J. Leebove (State Bar No. 186705) James G. Dallal (State Bar No. 277826)		
9	JOSEPH SAVERI LAW FIRM 505 Montgomery Street, Suite 625		
10	San Francisco, California 94111 Telephone: (415) 500-6800		
11	Facsimile: (415) 500-6803		
12	Co-Lead Class Counsel		
13	[Additional counsel listed on signature page]		
14	UNITED STATES DISTRICT COURT		
15	NORTHERN DISTRICT OF CALIFORNIA		
16	SAN JOSE DIVISION		
17			
18	IN RE: HIGH-TECH EMPLOYEE	Master Docket No. 11-CV-2509-LHK	
19	ANTITRUST LITIGATION	PLAINTIFFS' SUPPLEMENTAL MOTION	
20	THIS DOCUMENT RELATES TO:	AND BRIEF IN SUPPORT OF CLASS CERTIFICATION	
21	ALL ACTIONS	Date: August 8, 2013	
22		Time: 1:30 pm Courtroom: 8, 4th Floor	
23		Judge: Honorable Lucy H. Koh	
24			
25			
26			
27			
28			
	1095373.15	PLTFS' SUPPL. MOTION FOR CLASS CERT. & MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK	

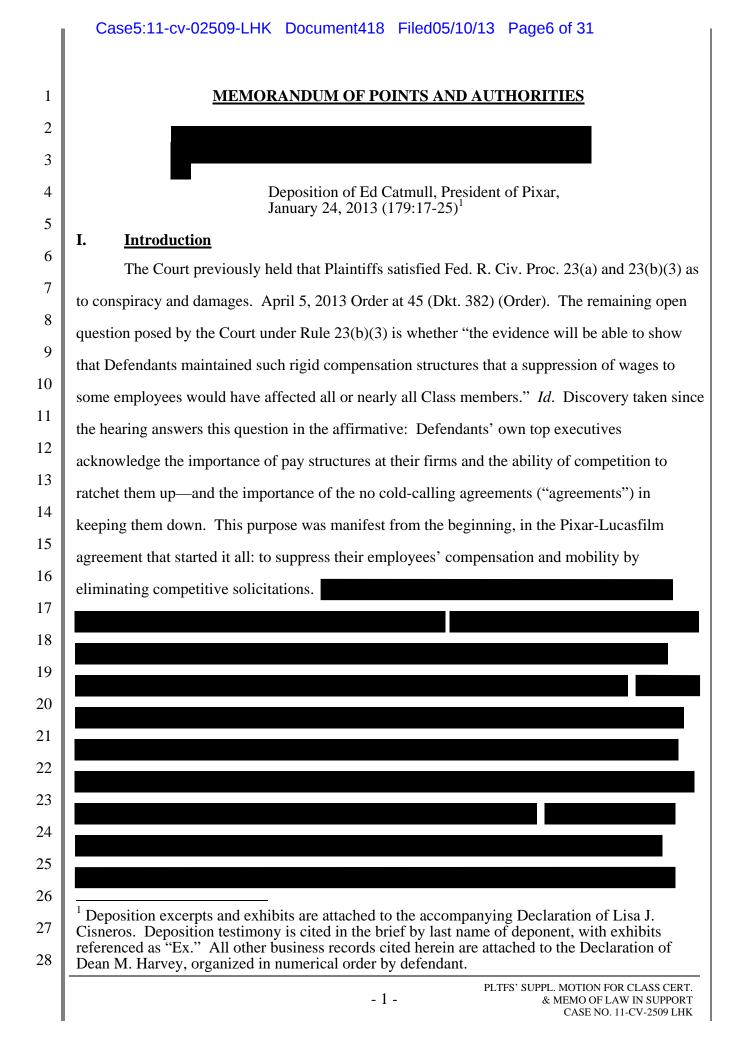
	Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page2 of 31		
1		TABLE OF CONTENTS	
2		Pag	;e
3	SUPPLEME	NTAL MOTION FOR CLASS CERTIFICATION II	Π
4	STATEMEN	T OF ISSUES TO BE DECIDEDIV	V
5	MEMORAN	IDUM OF POINTS AND AUTHORITIES	1
6	I.	Introduction	1
7	II.	Legal Standards	4
8 9	III.	Defendants' Conspiracy Commonly Impacted All or Nearly All Class Members, Satisfying Rule 23(b)(3)	
9		A. The Anti-Solicitation Agreements Suppressed Compensation Across the Class Systematically, By Design	6
11 12		B. While the Conspiracy Prohibited Solicitation Broadly, Defendants Focused On Suppressing the Compensation and Mobility of Their Technical Employees	0
12		C. Dr. Hallock's Analysis Shows That Defendants' Formalized Pay	U
13		Structures and Pay Practices Would Have Transmitted Impact to All Or Nearly All Technical Employees	3
15		1. Adobe 1	5
16		2. Apple	6
17		3. Google1	7
18		4. Intel 1	8
19		5. Intuit 1 ¹	9
20		6. Lucasfilm	0
21		7. Pixar	2
22		D. Dr. Leamer Addresses the Court's Concerns and Confirms That All	
23		or Nearly All Members of the Technical Class Would Have Been Impacted	2
24	IV.	The Court Should Appoint the Named Plaintiffs as Class Representatives	
25	V.	Superiority2	5
26	VI.	Conclusion	5
27			
28			
	1095373.15	- i - PLTFS' SUPPL. MOTION FOR CLASS CERT. & MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK	

	Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page3 of 31
1	TABLE OF AUTHORITIES
2	Page
3	Cases
4	Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, U.S, 133 S. Ct. 1184 (2013)
5	Blackie v. Barrack,
6 7	524 F.2d 891 (9th Cir. 1975)
8 9	Erica P. John Fund, Inc. v. Halliburton Co., 2013 U.S. App. LEXIS 8933 (5th Cir. April 30, 2013)
9	<i>In re Diamond Foods, Inc.</i> , 2013 U.S. Dist. LEXIS 64464 (May 6, 2013)
11 12	In re Motor Fuel Temperature Sales Practices Litig., 2013 U.S. Dist. LEXIS 50667 (D. Kan. April 5, 2013)
13	In re Urethane Antitrust Litig., 251 F.R.D. 629 (D. Kan. July 28, 2008)
14 15	Martins v. 3PD, Inc., 2013 U.S. Dist. LEXIS 45753 (D. Mass. March 28, 2013)
16 17	Saucedo v. NW Mgmt. & Realty Servs., 2013 U.S. Dist. LEXIS 27858 (E.D. Wash. Feb. 27, 2013)
17	(L.D. Wash, 100.27, 2013)
10	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	1095373.15 - ii - PLTFS' SUPPL. MOTION FOR CLASS CERT. & MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK

SUPPLEMENTAL MOTION FOR CLASS CERTIFICATION

1	
2	Plaintiffs bring this Supplemental Motion for Class Certification to address questions
3	posed by the Court with respect to class certification in the Court's April 5, 2013 Order.
4	(Dkt. 382) (Order). While Plaintiffs respectfully submit the evidence supports certification of
5	either the class of all-salaried employees or the class of technical, creative, and research and
6	development employees ("Technical Class") previously proposed by Plaintiffs, there is powerful
7	evidence that the no-cold calling agreements at issue in this case were designed substantially to
8	disrupt recruiting of Technical Class employees. Accordingly, Plaintiffs have focused their
9	supplemental briefing and analysis on demonstrating impact to all or nearly all of the Technical
10	Class. Plaintiffs hereby adopt and amend their prior request for certification of the Technical
11	Class as set forth originally in Plaintiffs' October 1, 2012 Motion for Class Certification (Dkt.
12	187), and consisting of job titles identified in Appendix B to the Report of Edward Leamer dated
13	October 1, 2012 (Dkt. 190), as follows:
14	All natural persons who work in the technical, creative, and/or research and
15 16	development fields that are employed on a salaried basis in the United States by one or more of the following: (a) Apple from March 2005 through December 2009; (b) Adobe from May 2005 through December 2009; (c) Google from March
10	2005 through December 2009; (d) Intel from March 2005 through December 2009; (e) Intuit from June 2007 through December 2009; (f) Lucasfilm from January
18 19	2005 through December 2009; or (g) Pixar from January 2005 through December 2009. Excluded from the Class are: retail employees; corporate officers, members of the boards of directors, and senior executives of all Defendants.
19 20	This amended motion is based on this supplemental memorandum, the Report of Dr. Kevin F.
20 21	Hallock, the Supplemental Report of Dr. Edward E. Leamer, the Declarations of Dean M. Harvey
21	and Lisa J. Cisneros, all exhibits and appendices to such documents, the pleadings and other
23	documents on file in this consolidated action (including all pleadings and other documents
24	Plaintiffs previously filed in connection with Plaintiffs' October 1, 2012 Motion for Class
25	Certification, and Plaintiffs' December 10, 2012 Consolidated Reply in Support of Class
26	Certification and Opposition to Defendants' Motion to Strike), and any oral argument that has
20 27	been or may be presented to the Court.
28	
-0	

	Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page5 of 31
1	STATEMENT OF ISSUES TO BE DECIDED
2	The issues to be decided are:
3	1. Whether pay suppression resulting from Defendants' anti-solicitation agreements
4	would have impacted all or nearly all members of the Technical Class;
5	2. Whether the Court should appoint Plaintiffs as Class representatives; and
6	3. Whether "a class action is superior to other available methods for the fair and
7	efficient adjudication of the controversy."
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	1095373.15 - iv - PLTFS' SUPPL. MOTION FOR CLASS CERT. & MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK

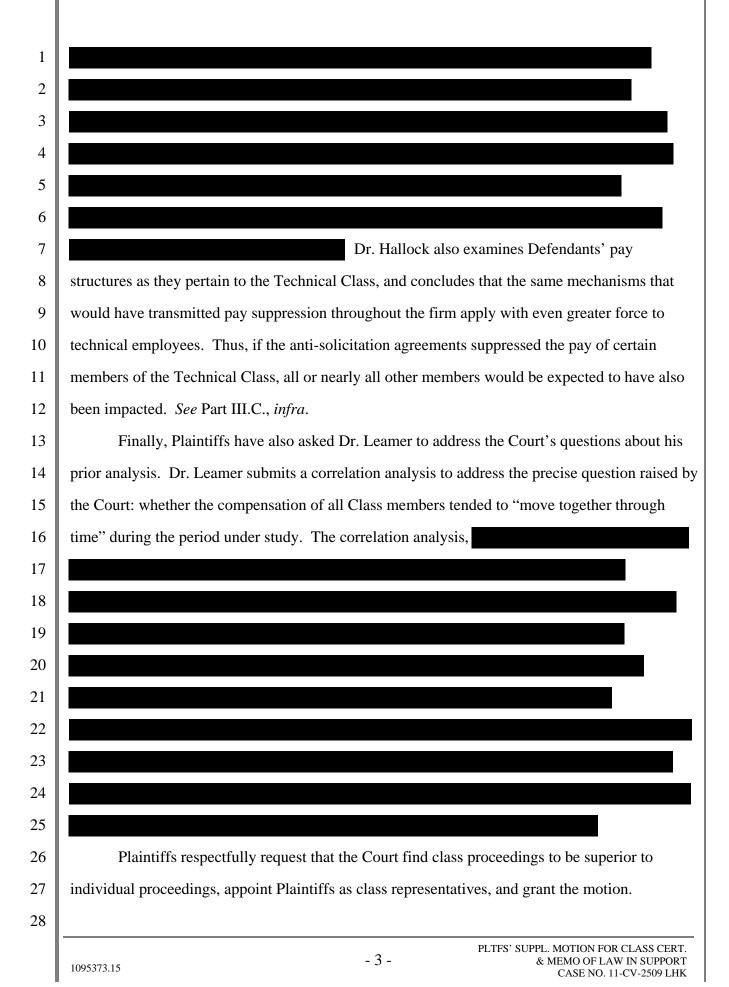


1 2 Further discovery confirms that while these agreements affected all of Defendants' 3 employees, they particularly targeted their technical and creative talent. Plaintiffs therefore 4 request certification of a class of salaried technical, creative, and research and development 5 employees ("Technical Class") who worked for a Defendant while that Defendant participated in 6 at least one anti-solicitation agreement with another Defendant. Plaintiffs bring before the Court 7 a proposed Class comprising those technical employees whose work contributed to Defendants' 8 core business functions, whom the Defendants heavily recruited and jealously guarded, and who 9 appear at the very crux of Defendants' conspiracy and this case. See Part III.B., infra. In 10 addition, the composition of the Technical Class has been reviewed by Professor Kevin F. 11 Hallock of Cornell University. Dr. Hallock is the Donald C. Opatrny '74 Chair of the Department 12 of Economics, Joseph R. Rich '80 Professor, Professor of Economics, Professor of Human 13 Resource Studies, and Director of the Cornell Institute for Compensation Studies. He is a leading 14 labor economist and an expert in compensation structure and design. Dr. Hallock confirms that 15 the titles selected for inclusion in the proposed Class are appropriate based on Defendants' formal 16 and structured compensation systems and Defendants' own job families for their technical 17 workers. Hallock ¶¶ 241-244. 18 Dr. Hallock investigated whether Defendants used formal administrative pay systems, and 19 whether the anti-solicitation agreements at issue would have suppressed the compensation of all 20 or nearly all members of the Technical Class. Dr. Hallock reviewed only common evidence: 21 Defendants' testimony, and Defendants' contemporaneous documents and data. 22 Dr. Hallock finds that Defendants all used formalized compensation systems that 23 organized employees into a single pay structure. 24 25 26 27 28

1095373.15

PLTFS' SUPPL. MOTION FOR CLASS CERT. & MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK



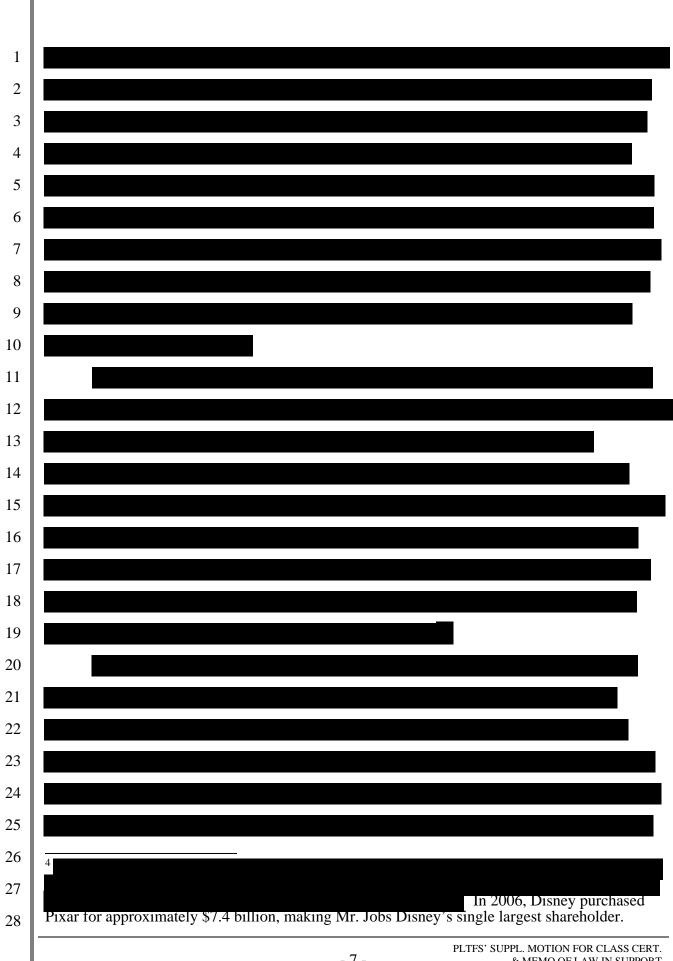


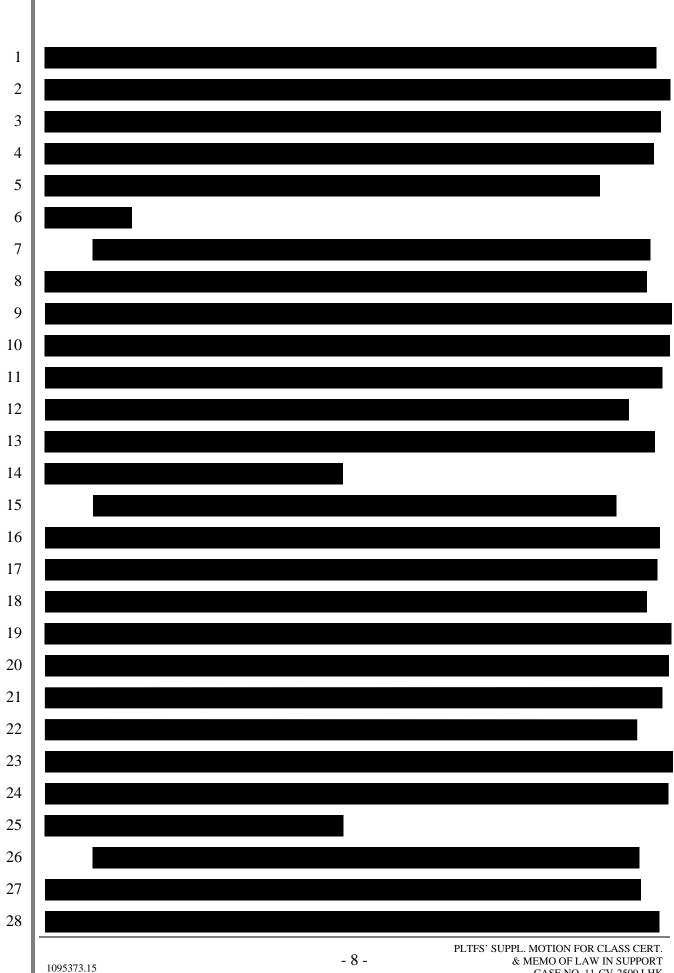
1 II. Legal Standards

2	The Supreme Court in Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,		
3	U.S, 133 S. Ct. 1184 (2013), clarified the degree to which a district court should address the		
4	merits of a case when deciding whether common issues predominate under Rule 23(b)(3). The		
5	Supreme Court rejected the notion that a district court can or should "engage in free-ranging		
6	merits inquiries at the certification stage." Id. at 1194-95. The Court explained that the purpose		
7	of examining common evidence is to evaluate the risk that should that evidence fail the court will		
8	be inundated with individualized questions. Id. at 1196 ("there is no risk whatever that a		
9	failure of proof on the common question of materiality will result in individual questions		
10	predominating."). In other words, a court should consider under Rule 23 the consequences for the		
11	evidence of a failure of the proposed class-wide proof; where a decision on the merits against the		
12	class promises to bring the case to an end, then a court need not reach that decision at the class		
13	certification stage to find predominance. Id. Rejecting the contrary view of the dissenters, the		
14	Court held expressly:		
15	Rule 23(b)(3), however, does <i>not</i> require a plaintiff seeking class		
16	certification to prove that each "elemen[t] of [her] claim [is] susceptible to classwide proof." <i>Post</i> , at 7. What the rule does		
17	require is that common questions " <i>predominate</i> over any questions affecting only individual [class] members." Fed. Rule Civ. Proc.		
18	23(b)(3).		
19	<i>Id.</i> at 1196 (emphasis and alterations in original). ²		
20	Comcast Corp. v. Behrend, 569 U.S, 133 S. Ct. 1426 (2013) follows Amgen's rule.		
21	The Comcast plaintiffs alleged that multiple dissimilar monopolistic acts allowed Comcast to		
22	raise rates on over 2 million cable subscribers across 16 counties in 3 states. <i>Id.</i> at 1430 or 1435.		
23	² The Ninth Circuit has yet to address <i>Amgen</i> and, apart from this Court's prior order regarding		
24	class certification, no district court decision offers a detailed, substantive analysis of the case. See e.g., Saucedo v. NW Mgmt. & Realty Servs., 2013 U.S. Dist. LEXIS 27858 (E.D. Wash. Feb. 27,		
25	2013). The Fifth Circuit, however, closely analyzed <i>Amgen</i> and applied its principles in <i>Erica P</i> . <i>John Fund, Inc. v. Halliburton Co.</i> , 2013 U.S. App. LEXIS 8933 (5th Cir. April 30, 2013),		
26	affirming class certification. There, the Fifth Circuit held that, at the class certification stage, it is improper to determine the absence of price impact and weigh the defendant's rebuttal evidence		
27	because resolving the question in favor of the defendant would preclude plaintiffs from establishing an essential element of their securities claim and would effectively end the case. <i>Id.</i>		
28	at *25-29.		
	PLTFS' SUPPL. MOTION FOR CLASS CERT. - 4 - & MEMO OF LAW IN SUPPORT		

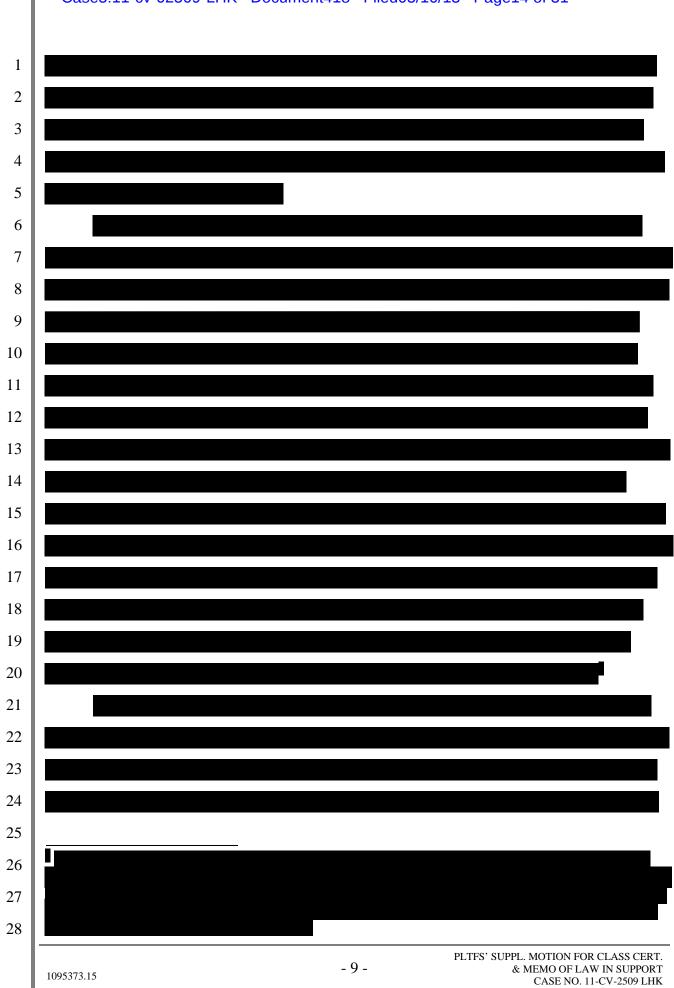
1	On the theories of harm articulated in that case, the Supreme Court held that the proposed		
2	damages methodology failed to satisfy Rule 23(b)(3) because "Questions of individual damage		
3	calculations will inevitably overwhelm questions common to the class." Id. at 1433. This case-		
4	specific finding followed from the fact that some theories of harm themselves were susceptible to		
5	class-wide proof while others were individualized. According to the Court, Comcast broke no		
6	new ground. Id. at 1433 ("This case thus turns on the straightforward application of class-		
7	certification principles; it provides no occasion for the dissent's extended discussion, post, at 5-		
8	11 (GINSBURG and BREYER, JJ., dissenting), of substantive antitrust law."). ³		
9	III. Defendants' Conspiracy Commonly Impacted All or Nearly All Class Members,		
10	Satisfying Rule 23(b)(3)		
11	The only available theory of harm to the Technical Class—that the agreements suppressed		
11	compensation on a company-wide or nearly company-wide basis—is by definition only provable		
12	on a class basis. Defendants have never identified a specific "individualized" question of impact that will be raised should this common proof fail. Plaintiffs meet the standards articulated in <i>Amgen</i> and <i>Comcast</i> for the simple reason that if Plaintiffs' proposed proof of class-wide impact fails, the consequence will be that the case is over. Or, to borrow from <i>Amgen</i> , plaintiffs'		
13 14			
14			
15 16			
10	failure to present sufficient evidence of [class-wide wage		
	suppression] to defeat a summary-judgment motion or to prevail at trial would not cause individual [impact] questions to overwhelm		
18	the questions common to the class. Instead, the failure of proof on		
19	³ No Ninth Circuit opinion has applied <i>Comcast</i> , but cases in the Northern District have cited		
20	it. The most relevant, substantive discussion is found in <i>In re Diamond Foods, Inc.</i> , 2013 U.S. Dist. LEXIS 64464, *34-36 (May 6, 2013) (Alsup, J.), where the court considered <i>Comcast</i> prior		
21	to granting class certification in a securities case. The court recited established law stating that "[t]he amount of damages is invariably an individual question and does not defeat class action		
22	treatment." <i>Id.</i> at *36 (citing <i>Blackie v. Barrack</i> , 524 F.2d 891, 905 (9th Cir. 1975)). The court then held that the plaintiff "has sufficiently shown that damages [we]re capable of measurement		
23	on a classwide basis such that individual damage calculations d[id] not threaten to overwhelm questions common to the class." <i>Id.</i> at *37. <i>See also Martins v. 3PD, Inc.</i> , 2013 U.S. Dist.		
24	LEXIS 45753, *21 n.3 (D. Mass. March 28, 2013) (noting that in <i>Comcast</i> the parties did not dispute, and the court assumed, certain key issues and, thus, the decision did not overturn existing		
25	case law that common questions of liability can predominate even if some individual damages issues remain); <i>In re Motor Fuel Temperature Sales Practices Litig.</i> , 2013 U.S. Dist. LEXIS		
26	50667 (D. Kan. April 5, 2013) (stating that "[t]he possibility that individual issues may predominate the issue of damages does not defeat class certification by making [the liability]		
27	aspect of the case unmanageable") (quoting <i>In re Urethane Antitrust Litig.</i> , 251 F.R.D. 629, 633, 639 (D. Kan. July 28, 2008)) (alterations in original).		
28			

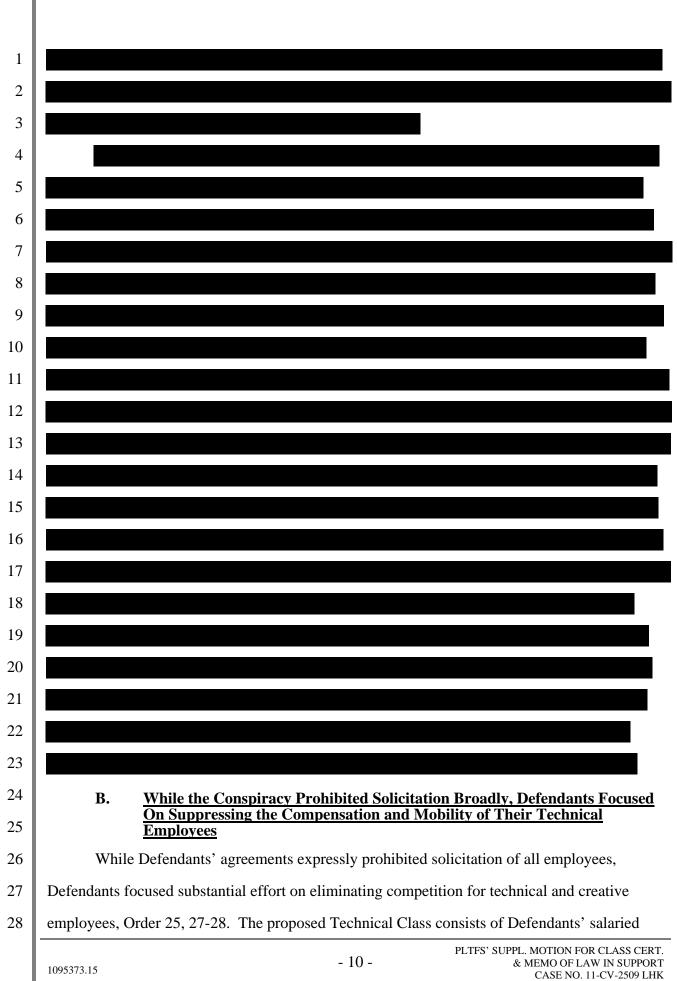
	Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page11 of 31
1	the element of [class-wide wage suppression] would end the case for one and for all.
2	Among 122 S. Ct. at 1106. Discovery taken since the bearing re-confirms that the impact of the
3	<i>Amgen</i> , 133 S. Ct. at 1196. Discovery taken since the hearing re-confirms that the impact of the unlawful agreements is a common question that will be proved using common evidence.
4	
5 6	A. <u>The Anti-Solicitation Agreements Suppressed Compensation Across the Class</u> <u>Systematically, By Design</u>
7	The Court earlier found that "the adjudication of Defendants' alleged antitrust violation
8	will turn on overwhelmingly common legal and factual issues." Order at 13. Subsequent
9	discovery has confirmed that the common evidence regarding Defendants' violation also
10	demonstrates antitrust impact: the purpose and effect of the violation was to suppress
11	systematically the compensation of Defendants' employees.
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	PLTFS' SUPPL. MOTION FOR CLASS CERT.
	- 6 - & MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK



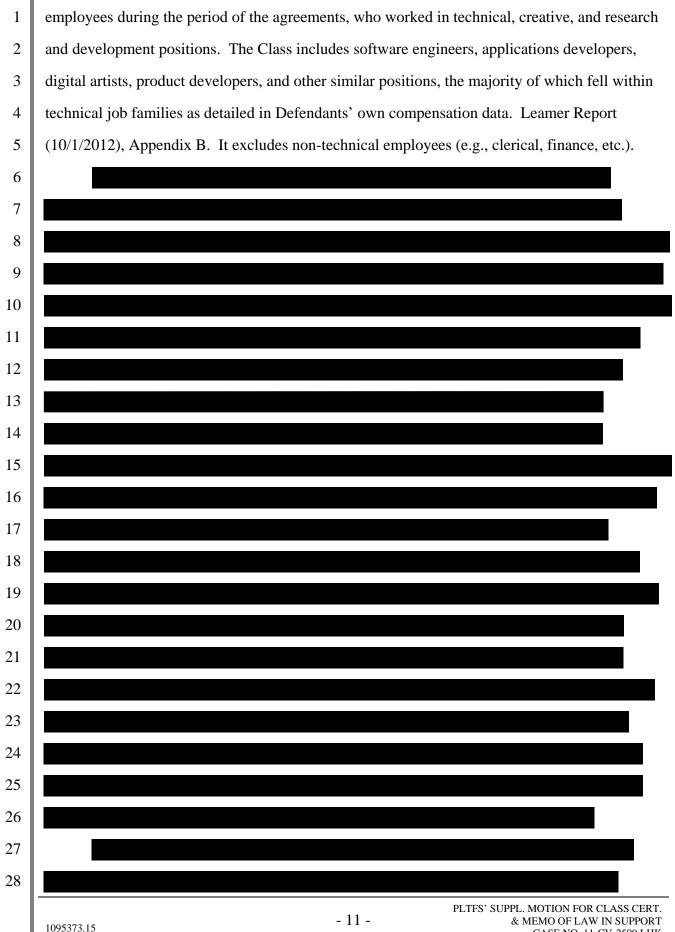


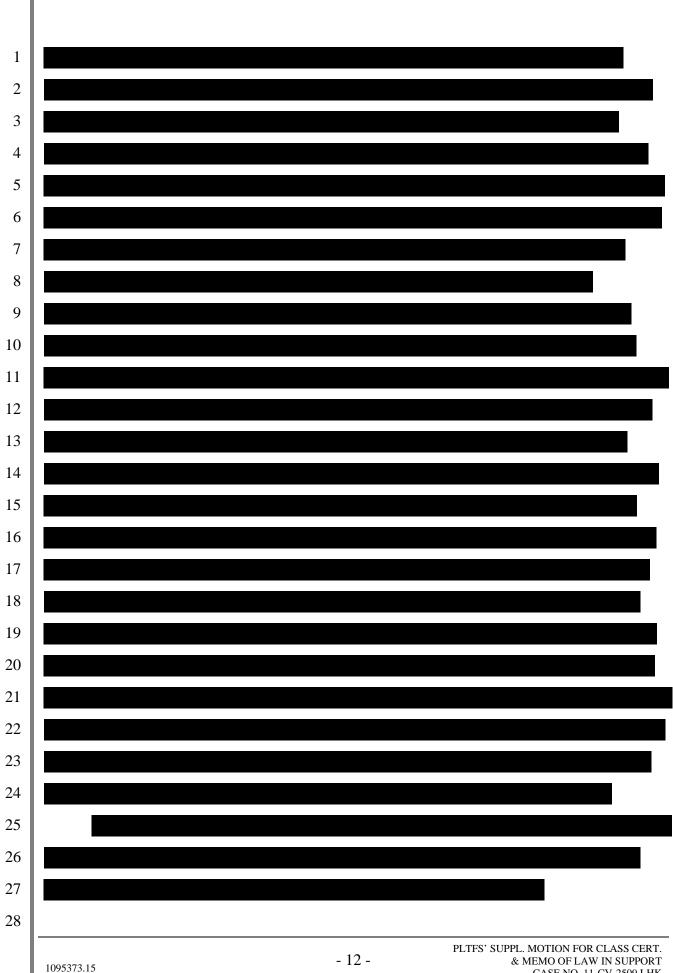
& MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK





Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page16 of 31



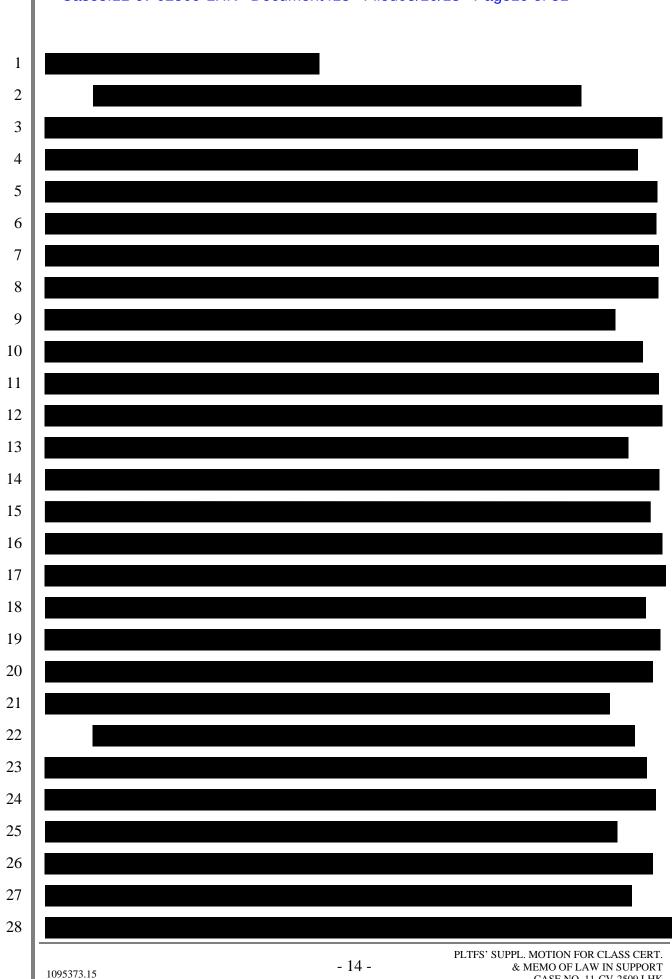


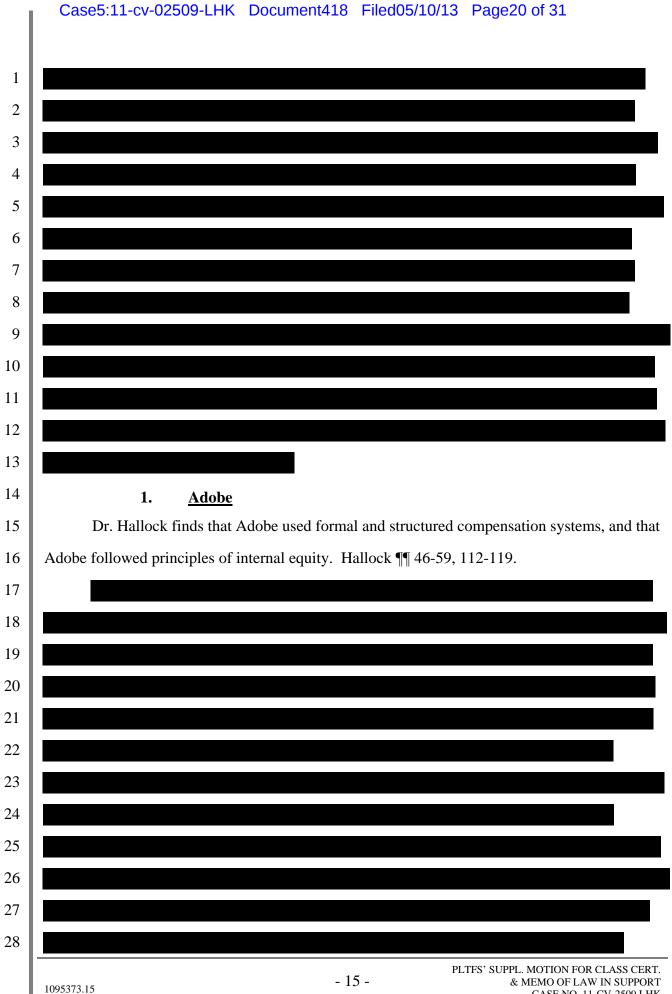
1 2 C.

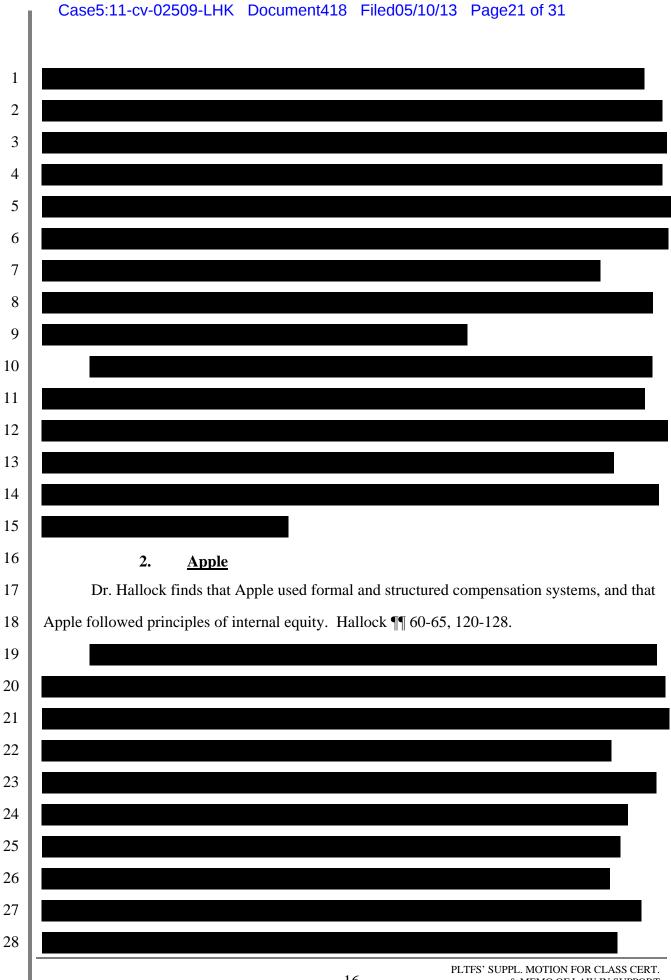
Dr. Hallock's Analysis Shows That Defendants' Formalized Pay Structures and Pay Practices Would Have Transmitted Impact to All Or Nearly All <u>Technical Employees</u>

Dr. Kevin Hallock, a leading labor economist and expert on compensation structure and 3 4 design, answers two questions. First, he analyzes Defendants' pay systems and compensation practices to determine whether they used formal administrative pay structures, and concludes they 5 do. Second, he analyzes whether suppressing recruiting of Defendants' workers, including the 6 Technical Class, would have resulted in suppressing their pay, and concludes that it would. 7 "Agreements such as restrictions on cold-calling could be expected to limit and have negative 8 consequences on employee compensation for those workers directly involved and for nearly all 9 employees. Given the formalized pay structures and compensation design in defendant firms 10 nearly all salaried employees could be expected to have pay that would otherwise be higher." 11 Hallock ¶ 254. Dr. Hallock also examined the proposed Technical Class, and concludes that 12 "although the restrictions could affect all or nearly all workers, there was more concentration and 13 emphasis on the technical class." Id. ¶ 246. For both empirical analyses, Dr. Hallock relies on 14 common evidence consisting of witness testimony and Defendants' contemporaneous business 15 records. 16

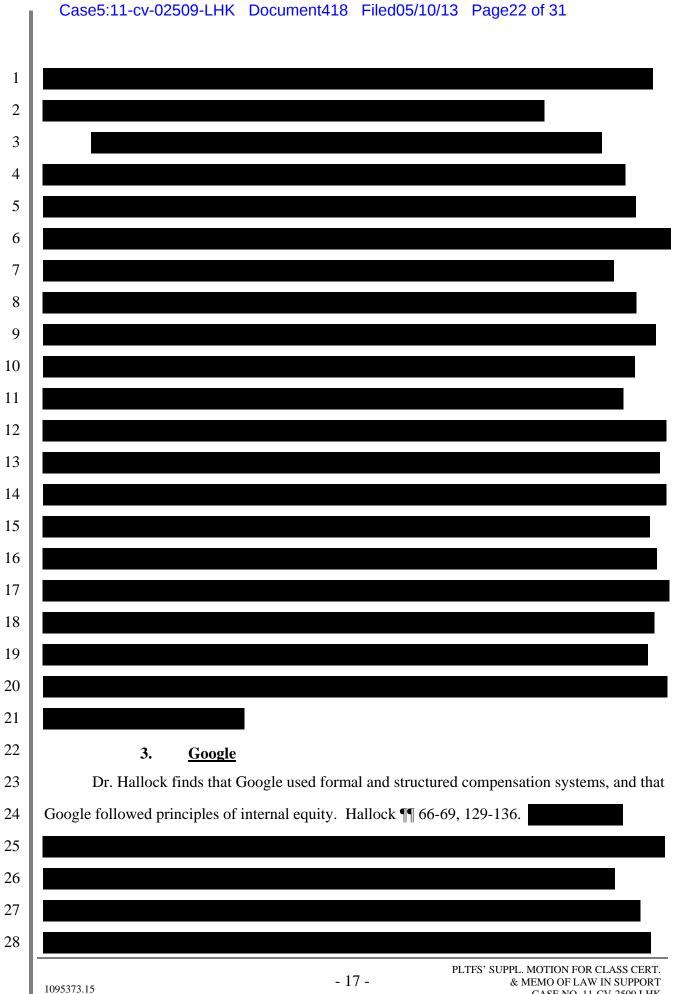


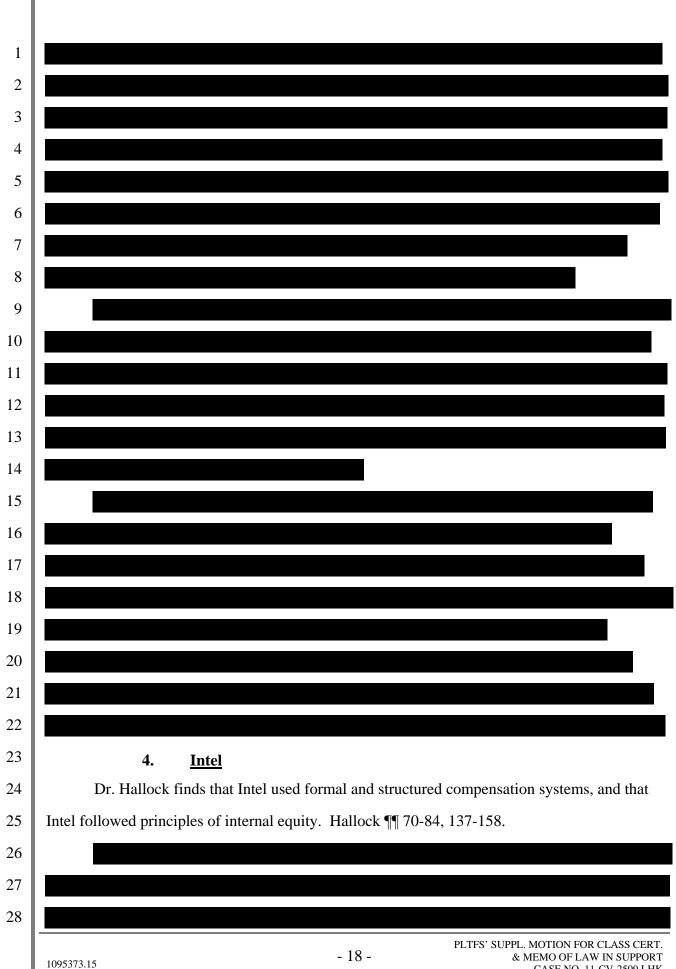




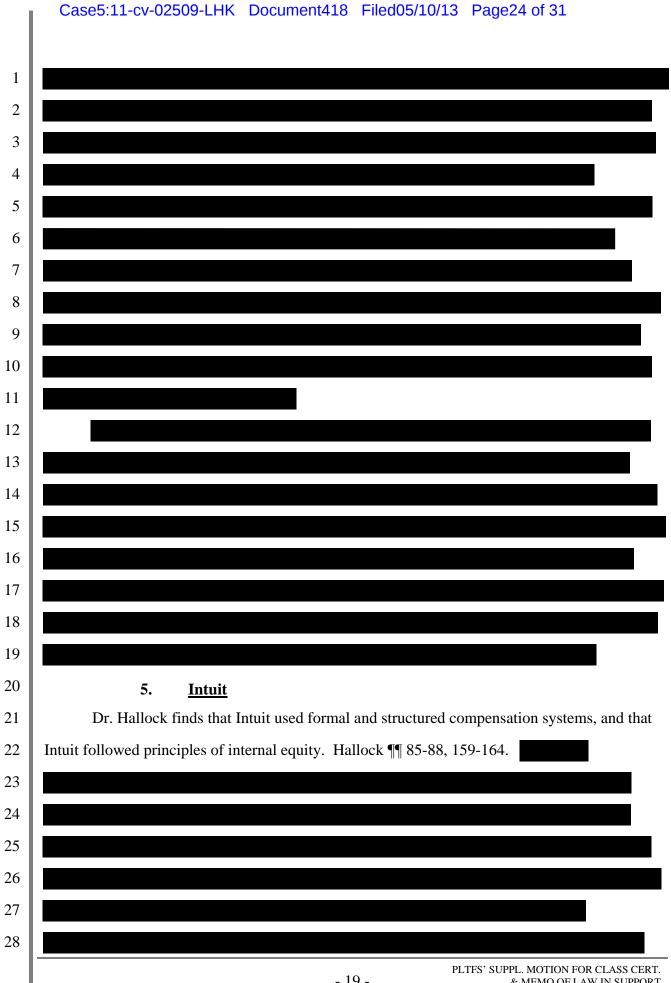


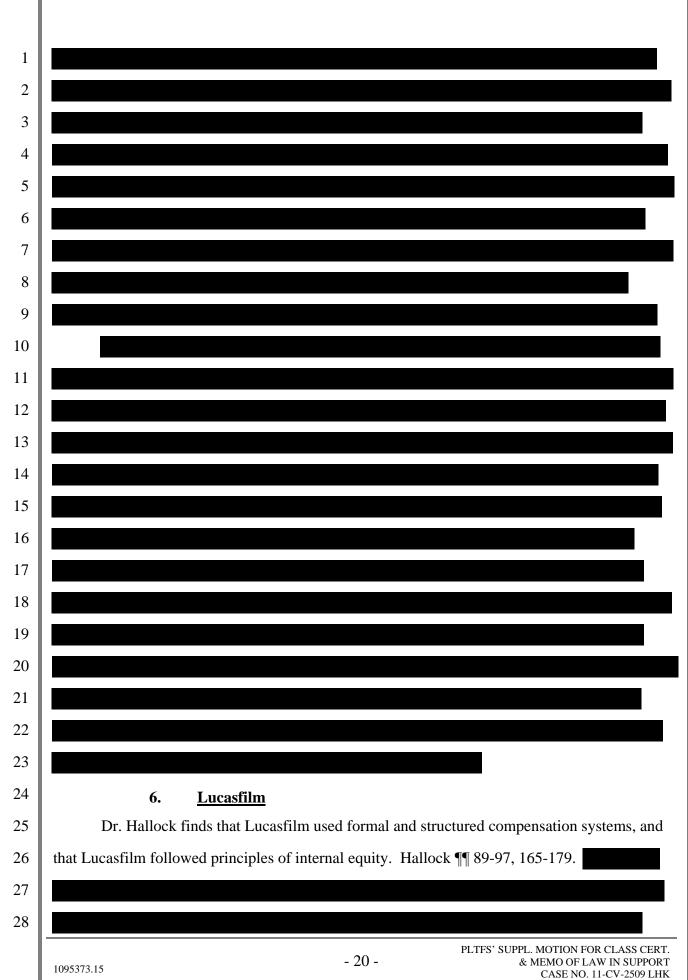
1095373.15





Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page23 of 31

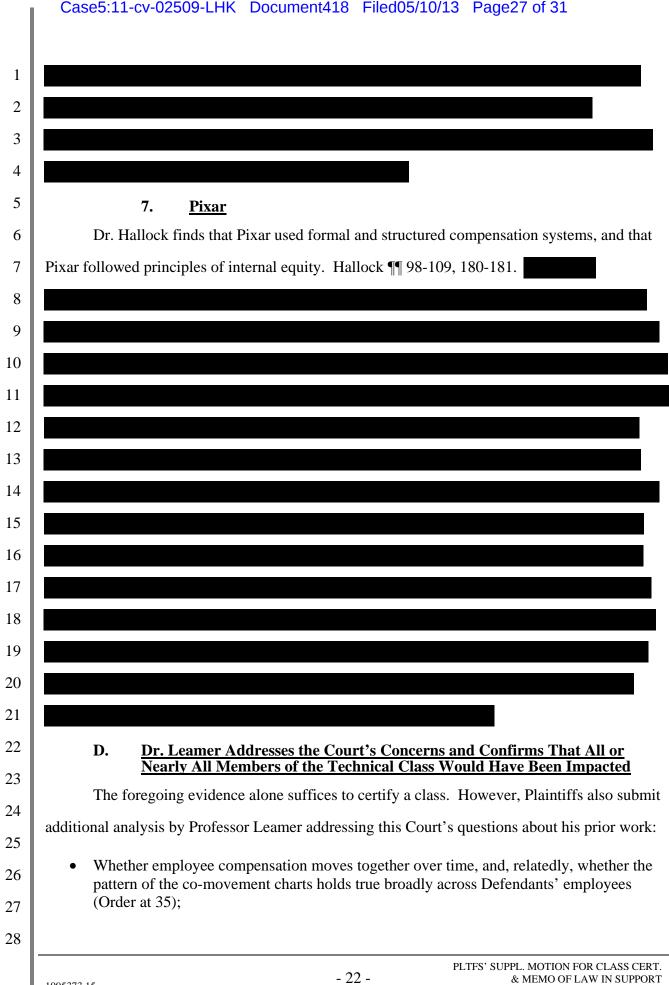


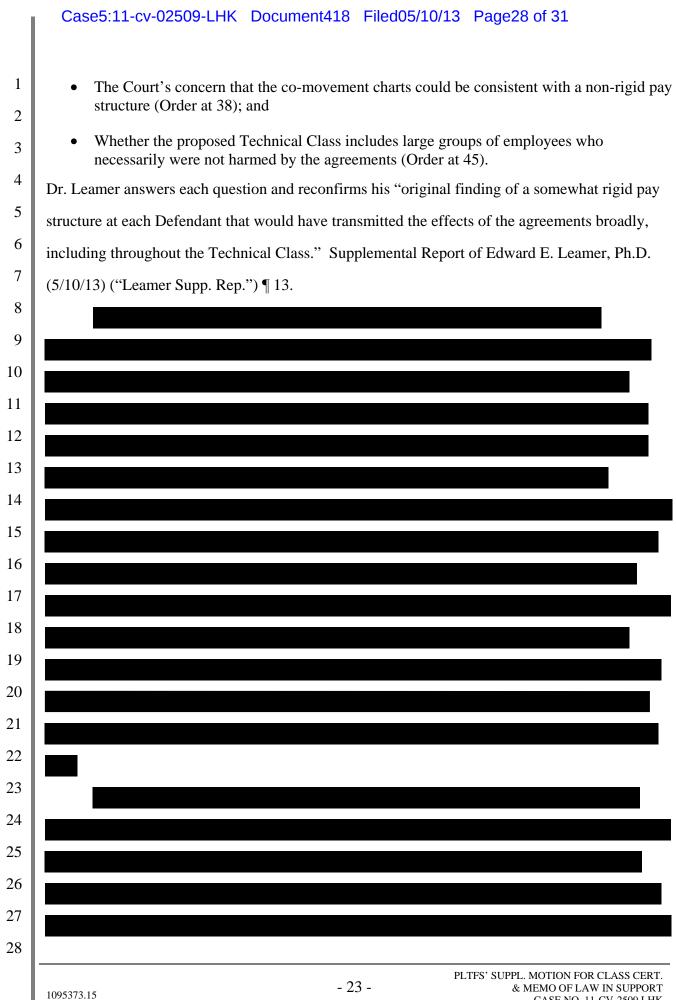


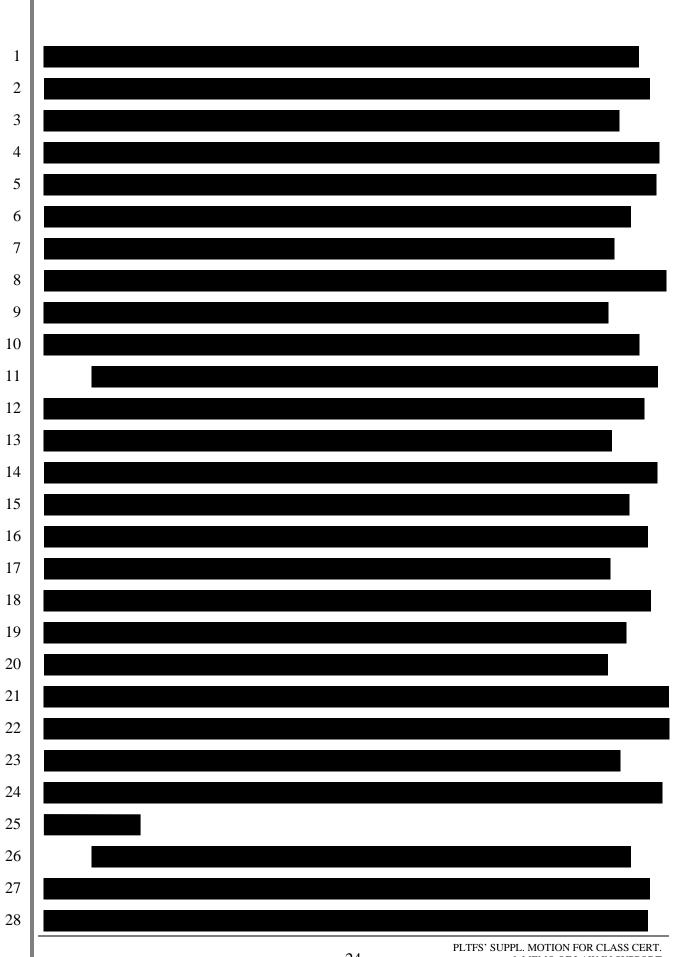


Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page26 of 31

1095373.15







Case5:11-cv-02509-LHK Document418 Filed05/10/13 Page29 of 31

1			
2			
3			
4			
5			
6 7	IV.	<u>The Court Should Appoint the Named Plaintiffs as Class Representatives</u> The named Plaintiffs and Class members share an interest in proving that Defendants'	
8	condu	ct violated the antitrust laws and suppressed their compensation, and do not have any	
9		cts of interest with class members. <i>See</i> Shaver Decl. Dkt. 188, Ex. 6 (Decl. of Michael	
10	Devine ¶ 1), Ex. 7 (Decl. of Mark Fichtner ¶ 1), Ex. 8 (Decl.of Siddharth Hariharan ¶ 1), Ex. 9		
11	(Decl. of Brandon Marshall \P 1), and Ex. 10 (Decl. of Daniel Stover \P 1). For the same reasons		
12	set forth in Plaintiffs' opening papers, the named Plaintiffs satisfy Fed. R. Civ. P. 23(a)(4) and		
13	should	d be appointed Class Representatives.	
14	V.	<u>Superiority</u>	
15		Plaintiffs renew their request on this finding, which the Court did not reach previously.	
16	VI.	<u>Conclusion</u>	
17		For the foregoing reasons, Plaintiffs respectfully request that the motion be granted.	
18	Dated	d: May 10, 2013 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP	
19			
20		By: <u>/s/ Kelly M. Dermody</u> Richard M. Heimann (State Bar No. 63607)	
21		Kelly M. Dermody (State Bar No. 171716) Eric B. Fastiff (State Bar No. 182260)	
22		Brendan P. Glackin (State Bar No. 199643)	
23		Dean M. Harvey (State Bar No. 250298) Anne B. Shaver (State Bar No. 255928) Lisa L. Cisparos (State Par No. 251473)	
24		Lisa J. Cisneros (State Bar No. 251473) LIEFF CABRASER HEIMANN & BERNSTEIN, LLP 275 Dettern Street, 20th Electron	
25		275 Battery Street, 29th Floor San Francisco, California 94111-3339	
26		Telephone: (415) 956-1000 Facsimile: (415) 956-1008	
27			
28			
	1095373	- 25 - PLTFS' SUPPL. MOTION FOR CLASS CERT. & MEMO OF LAW IN SUPPORT CASE NO. 11-CV-2509 LHK	

	Case5:11-cv-02509-LHK	Document418 Filed05/10/13 Page31 of 31
1		
2		JOSEPH SAVERI LAW FIRM
3		By: <u>/s/ Joseph R. Saveri</u>
4		Joseph R. Saveri (State Bar No. 130064) Lisa J. Leebove (State Bar No. 186705) James G. Dallal (State Bar No. 277826)
5		JOSEPH SAVERI LAW FIRM 505 Montgomery Street, Suite 625
6		San Francisco, California 94111 Telephone: (415) 500-6800
7		Facsimile: (415) 500-6803
8		Co-Lead Class Counsel
9		Eric L. Cramer BERGER & MONTAGUE, P.C.
10		1622 Locust Street Philadelphia, PA 19103
11		Telephone: (800) 424-6690 Facsimile: (215) 875-4604
12		Linda P. Nussbaum
13		Peter A. Barile III GRANT & EISENHOFER P.A.
14		485 Lexington Avenue, 29th Floor New York, NY 10017
15		Telephone: (646) 722-8500 Facsimile: (646) 722-8501
16		Class Counsel
17		
18		
19 20		
20 21		
21		
22		
23		
24		
23 26		
27		
28		
	1095373.15	- 26 - PLTFS' SUPPL. MOTION FOR CLASS C & MEMO OF LAW IN SUPP CASE NO. 11-CV-2509