

Case No. _____

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE ADOBE SYSTEMS, INC.,
APPLE, INC., GOOGLE, INC., and INTEL CORP.

ADOBE SYSTEMS, INC., APPLE INC., GOOGLE INC., and
INTEL CORP., Defendants-Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, Respondent,

MICHAEL DEVINE, MARK FICHTNER, SIDDHARTH HARIHARAN,
BRANDON MARSHALL, and DANIEL STOVER,
Plaintiffs-Real Parties in Interest.

From the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

The district court committed clear legal error by creating an unprecedented and rigid test for preliminary settlement approval in class actions, and then using that test to reject a \$324.5 million cash settlement reached after months of vigorous arm's-length negotiation among experienced counsel aided by the mediation services of a highly regarded former federal judge. There was no suggestion that the settlement was collusive; indeed, it was the highest settlement ever in an employment antitrust case and satisfied any preliminary approval test ever articulated by any federal court. But the court nonetheless refused to grant preliminary approval, because it deemed the settlement to be 16% lower than a “benchmark” supposedly set by earlier settlements by different defendants under entirely different circumstances. This formulaic approach to the parties’ settlement contravenes *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009), where this Court explained that it “put[s] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, and [has] never prescribed a particular formula by which that outcome must be tested.” *Id.* at 965.

The district court’s benchmark formula impermissibly substituted the court’s assessment of the value of the case for that of the parties who have been litigating the case for more than three years, and in particular plaintiffs’ counsel, who were “sobered” by the “very real risks” faced at trial after devoting “a lot of work

product” to analyzing the case and conducting jury research and other “empirical work”—none of which the district court had access to. 6/19/14 Tr. 25:4-17, 75:1-5, 75:15-21. The district court dismissed the parties’ analysis of the trial risks, suggesting that, unless the settlement was larger, the court had—in its own words—“wasted years on this case.” *Id.* at 74:25. This too directly contradicts *Rodriguez*, which held that “[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” 563 F.3d at 967 (alteration in original) (citation omitted).

The proper standard for preliminary approval of class settlements is an important issue of first impression on which this Court’s guidance is urgently needed. The court below acknowledged the “relatively scant appellate authority regarding the standard.” Dkt. 974 (“Op.”) at 5:23-25. In fact, this Court has never articulated the standard governing preliminary approval, and has no ready means of addressing this interlocutory issue except through mandamus. Because the order is not appealable, mandamus is the parties’ only avenue of relief in order to avoid clear and irreparable damage. *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1065-66 (9th Cir. 2007).

The district court’s stunning decision has attracted substantial national media attention. The decision forces plaintiffs to seek to obtain a unanimous jury verdict

and a damages award exceeding \$324.5 million—even though their jury research tells them there is a very real chance that they and the absent class members will receive nothing. And it forces defendants to abandon the bargain they reached with highly qualified class counsel and instead either pay at least an additional \$55.5 million to settle the case or proceed to trial. This Court should therefore issue the writ because, without mandamus, this fundamentally erroneous ruling will evade appellate review, irreparably harm plaintiffs, absent class members, and defendants, and make it significantly more difficult for parties to settle class actions in future cases.

BACKGROUND

Plaintiffs allege that defendants (Pixar, Lucasfilm, Apple, Adobe, Google, Intuit, and Intel) entered into an illegal conspiracy not to “cold-call” each other’s technical employees, and seek treble damages under federal and state antitrust laws. Plaintiffs do not allege that the defendants agreed not to *hire* one another’s employees. Rather, the alleged conspiracy comprised only six two-party “do-not-cold-call” agreements; and no defendant was involved in more than three, so that most employees had unlimited access to cold calls from most other defendants.

After initially denying class certification in April 2013 without prejudice (Dkt. 382), the court granted certification in October 2013 after plaintiffs narrowed their class definition to “technical employees” (Dkt. 531). While plaintiffs’ second

certification motion was pending, plaintiffs settled with Lucasfilm and Pixar for \$9 million, and with Intuit for \$11 million (Dkts. 501, 540), which the court approved (Dkt. 540).

The district court has since denied defendants' summary judgment motions (Dkt. 771) and granted in part and denied in part defendants' motions to exclude plaintiffs' expert testimony (Dkt. 788). Trial was set for May 27, 2014. Dkt. 388.

In May 2014, after months of vigorous arm's-length negotiations, plaintiffs executed a settlement agreement with the remaining defendants. Dkt. 921 ¶ 10. The agreement (Dkt. 921 Ex.1) resolves all remaining claims in exchange for \$324,500,000, to be paid directly to all identified class members. Plaintiffs termed this "the second largest settlement of employee class action claims in history" and "(by far) the largest recovery ever achieved in an employee class action bringing claims under the antitrust laws, on either an aggregate or net per class member basis." Dkt. 938, at 2:12-15. Plaintiffs were required to seek preliminary approval of the settlement by the district court, after which the class would be notified and invited to comment on or object to the settlement before the court finally approved the settlement. *See Rodriguez*, 563 F.3d at 957-58.

On June 19, 2014, the district court held a hearing to consider plaintiffs' motion for preliminary approval of the settlement. Dkts. 920, 948. During the hearing, plaintiffs explained they had "done jury testing," through which they

“f[ou]nd out what jurors think about this evidence, what jurors think about these class members, what jurors think about certain themes that are in this case.” 6/19/14 Tr. 24:23-25:3. The results of the jury testing cast serious doubt on the viability of plaintiffs’ claims at trial; counsel explained that “you have to be sobered when you do that kind of testing to understand that while you might have great evidence, you have to overcome a number of hurdles.” *Id.* at 25:4-6.

Plaintiffs walked the court through “several” of these hurdles. 6/19/14 Tr. 25:7-17. “There is a risk that a jury might find that there was no overarching conspiracy”; “the jury might conclude that these workers are among the most desirable in the world and they had plenty of other opportunity to go other places besides these seven companies”; and jurors might not “like plaintiffs’ damages model,” or “think that it wasn’t \$3 billion,” but “less than \$1 billion,” or “some small fraction.” *Id.* at 26:21-27:9. Plaintiffs acknowledged the “risk that a jury, hearing a whole bunch of different experts, even as we think we have the best one, might come to a different perspective.” *Id.* at 27:24-28:1. Plaintiffs thus explained that “[i]t is not without ... great concern that we would ever take this case to trial.” *Id.* at 64:2-3.

Plaintiffs also explained that they had analyzed “other cases that have been tried in this district recently where people got less than what we’re getting as a percentage of exposure.” 6/19/14 Tr. 28:12-14. “And the problem for us, as we

look at what’s happened in other antitrust trials in the last decade, is that it’s very, very tough.” *Id.* at 25:15-17. Indeed, plaintiffs explained, in antitrust cases involving actual price-fixing agreements and criminal guilty pleas—neither of which were present here—plaintiffs have received tiny fractions of the damages they sought. *Id.* at 28:12-31:1; *see also* Dkt. 921 Exs. 4-5 (analysis of other jury awards).

Despite plaintiffs’ grave concerns with their case, on August 8, 2014, the court denied preliminary approval of the settlement. Dkt. 974. The court admitted that “Class counsel have been zealous advocates for the Class.” Op. 31:21; *see also* Dkt. 531, at 7:20-21 (class counsel “have vigorously prosecuted this action and will continue to do so”). But the court found that “the total settlement amount falls below the range of reasonableness” because, according to the court, “Class members recover less on a proportional basis from the instant settlement with Remaining Defendants than from the settlement with the Settled Defendants a year ago.” Op. 6:21-7:2. The court reasoned that the “Remaining Defendants are alleged to have received 95% of the benefit of the anti-solicitation agreements and to have caused 95% of the harm suffered by the Class in terms of lost compensation,” and that, as a result, the “Remaining Defendants should have to pay at least 95% of the damages” Op. 9:2-5. Because the court’s novel and unsupported test and calculation purportedly required a settlement of “at least \$380

million” (Op. 7:22 & n.8)—\$55.5 million more than the parties agreed to—the court rejected the settlement.

ISSUE PRESENTED

Whether a district court can, at the preliminary approval stage, reject an arm’s-length, non-collusive class action settlement reached by experienced counsel after extensive discovery, motions practice, and jury research, which exposed very real risks that compelled plaintiffs to settle their claims, because the court deems the settlement amount 16% too low based on a rigid and formulaic comparison with an earlier settlement.

RELIEF SOUGHT

Petitioners seek a writ of mandamus directing the district court (1) to vacate its order denying preliminary approval of the \$324.5 million settlement and (2) to enter an order granting preliminary approval.

LEGAL STANDARD

This Court weighs five factors in determining whether to grant a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651:

- (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
- (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
- (3) The district court’s order is clearly erroneous as a matter of law.
- (4) The district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
- (5) The district court’s order raises new and important problems, or issues of law of first impression.

Douglas v. U.S. Dist. Court, 495 F.3d 1062, 1065-66 (9th Cir. 2007) (quoting *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)) (internal quotation marks omitted). Not every element of the mandamus standard must be satisfied in order to warrant a writ. *Valenzuela–Gonzalez v. U.S. Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990) (“all five factors need not be satisfied at once”). “Exercise of [the Court’s] supervisory mandamus authority is particularly appropriate when an important question of law would repeatedly evade review because of the collateral nature of the issue.” *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1304 (9th Cir. 1982).

ARGUMENT

I. The Preliminary Approval Standard Will Evade Appellate Review and Harm the Parties Absent Mandamus

It is beyond dispute that the issues presented by the district court’s order denying preliminary approval will evade appellate review, and that the parties will be irreparably harmed, absent this Court’s issuing a writ of mandate. These elements of the mandamus standards are therefore clearly established here.

Petitioners lack any other means to secure relief. The order denying preliminary approval is not a final judgment or otherwise appealable. And unlike evidentiary rulings and other orders that are reviewable once a final judgment is entered, there will never be an opportunity for a direct appeal of a district court’s order denying preliminary approval of a settlement.

Moreover, if the court's errors are not corrected now, the \$324.5 million settlement will be nullified and the resources spent in negotiating it will be wasted. Either the parties will proceed to trial—where either defendants or plaintiffs, including the absent class members, will lose—or defendants under the court's order will be forced to pay at least an additional \$55.5 million above the record-setting amount they agreed to. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 72 (2d Cir. 1994) (“jeopardizing a settlement agreement causes prejudice to the existing parties to a lawsuit”).

The prejudice to defendants would be particularly acute here, where the district court reached extensive “ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). The court's comments expressing its view on hotly contested issues such as the supposed culpability of defendants and their executives (Op. 11-16) were widely reported in the press including on the front page of *The New York Times* (David Streitfeld, *Court Rejects Deal on Hiring in Silicon Valley*, N.Y. Times, Aug. 8, 2014, at A-1 (lede: “There is ‘ample evidence’ that Silicon Valley was engaged in ‘an overarching conspiracy’ against its own employees, a federal judge said on Friday, and it should either pay dearly or have its secrets exposed at trial”)), threatening to taint the jury pool and prejudice defendants' ability to obtain a fair trial.

II. The District Court’s New Preliminary Approval Standard Is Clearly Erroneous as a Matter of Law

The parties negotiated at arm’s length for several months aided by an experienced mediator. Their efforts were informed by a fully developed evidentiary record, careful analysis of the risks of trial, and rigorous jury testing. From this process, the parties agreed to the highest recorded settlement amount of any employee class action under the antitrust laws. It was clearly erroneous for the district court to substitute its own judgment for the parties’ agreement based on an unprecedented “benchmark” analysis. The error is magnified here, where the analysis is untethered to—and actually at odds with—plaintiffs’ counsel’s calculation of the class’s likelihood of recovery.

A. The Court’s Benchmark Standard for Preliminary Approval Is Clear Legal Error

This Court requires district courts at the *final* approval stage to “explore[] comprehensively all factors” in determining whether to approve a class action settlement, including:

(1) the strength of 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; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Rodriguez, 563 F.3d at 963-64 (citation and internal quotation marks omitted).

This Court has never articulated the standard for *preliminary* approval of a class

settlement, but numerous district courts around the country have held that “[t]he standards for preliminary approval” of a class settlement “are not as stringent as those applied for final approval.” *In re Crocs, Inc. Sec. Litig.*, 2013 WL 4547404, at *3 (D. Colo. Aug. 28, 2013); *see also Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008) (“the standard for preliminary approval is far less demanding” than the standard for final approval); Dkt. 920, at 14-15 (citing several cases). At the preliminary stage, district courts in this Circuit focus on whether a settlement agreement “was the product of non-collusive, arms’ length negotiations conducted by capable and experienced counsel.” *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013).

In undertaking the approval analysis, this Court has emphasized the “strong judicial policy that favors settlement, particularly where complex class action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). “[V]oluntary conciliation and settlement are the preferred means of dispute resolution,” and “[t]his is especially true in complex class action litigation.” *Officers for Justice*, 688 F.2d at 625.

The Court recognized in *Rodriguez* that, even in the context of more stringent *final* approval, “[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.” 563 F.3d at 967 (quoting *In re Pac. Enters. Sec.*

Litig., 47 F.3d 373, 378 (9th Cir. 1995)). Courts must “put a good deal of stock in the product of an arms-length, non-collusive negotiated resolution” and defer to a “private consensual decision of the parties.” *Id.* at 965. The possibility “that the settlement could have been better ... does not mean the settlement presented was not fair, reasonable or adequate.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). As a result, a court’s role in approving a settlement is not to demand the *best* or *highest* settlement amount; rather, review “*must be limited* to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties” and is on the whole reasonable and fair. *Officers for Justice*, 688 F.2d at 625 (emphasis added).

District courts in this Circuit, following *Rodriguez*, have therefore “afforded a *presumption* of fairness and reasonableness [to] a settlement agreement where that agreement was the product of non-collusive, arms’ length negotiations conducted by capable and experienced counsel.” *In re Netflix*, 2013 WL 1120801, at *4 (emphasis added); *see also City P’ship Co. v. Atl. Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) (“When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement”). This presumption is particularly appropriate at the preliminary approval stage because class members will have an opportunity to

lodge objections before final approval.

No one has alleged any sort of collusion in agreeing to the settlement, yet the court improperly failed to presume the settlement was fair and reasonable. It was undisputed below that the settlement was “the result of years of hard-fought litigation and arm’s length negotiations conducted by capable counsel with extensive experience in class action litigation” (Dkt. 938, at 2:6-8), and the objector specifically explained that he was not arguing that plaintiffs “got together with the defendants and entered into a collusive settlement” (6/19/14 Tr. 10:4-7). The court nonetheless disapproved the settlement based on a formula of its own creation that imposed a strict requirement that the settlements be somehow proportionate to earlier settlements by different defendants.¹ And the court’s formula ignored that those defendants were jointly and severally liable for any judgment, with no right to contribution, so that a strict proportionality approach based on “liability shares” is especially misguided and unprincipled.

The court’s rigid and formulaic approach to preliminary settlement approval unduly narrowed the “range of possible approval” (Manual for Complex Litigation

¹ The court appears to have adopted the recommendation of the objector, who asked the court to avoid the “historically ... deferential approach” of “postponing close scrutiny of proposed settlements until final approval,” and instead because “this case is ... highly visible[,] ... take an active role in evaluating the merits of [the] proposed settlement[s] early in the process.” Dkt. 934, at 7:10-22.

(3d) § 30.41 (1995)), and directly contravenes *Rodriguez*; indeed, no other federal appellate court has adopted the standard in the context of either preliminary or final approval. It is a clear error of law warranting mandamus review.

The court began by comparing the present settlement to an earlier settlement involving much smaller defendants (Op. 7 n.8), which, given their relative size, may have settled for an amount reflecting their anticipated litigation expenses rather than any measure of share or fault. The court improperly assumed the defendants were comparable, ignored joint and several liability, and brushed aside the developments that came later in the case and were unfavorable to plaintiffs' position. Instead, the court determined that the present defendants had agreed to pay proportionally less than the defendants that settled previously. Op. 6-7. Applying this unprecedented proportionality approach, the court concluded that the \$324.5 million settlement fell outside the "range of reasonableness" because defendants "should, at a minimum, pay their fair share as compared to the Settled Defendants." Op. 6:11-20, 31:25.

The district court purportedly premised its formulaic test on a Pennsylvania district court decision (*In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014)), which in turn was based on cases holding that the "primary" or "most important" factor concerning the fairness of a settlement is "plaintiffs' expected recovery balanced against the value of the

settlement offer” (*In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007); *see also Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). None of those decisions, however, involved any comparisons with other defendants’ settlements.

Moreover, in *Rodriguez*, this Court specifically considered and rejected a formulaic approach, and reaffirmed that it has “*never* prescribed a particular formula” for approving settlements. 563 F.3d at 965 (emphasis added); *see also id.* (“[T]he factors we identify, are somewhat different [from *Synfuel*]. We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, ... and have never prescribed a particular formula by which that outcome must be tested.”) (citation omitted). As this Court has cautioned elsewhere, “that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2d Cir. 1974)).

“Settlement negotiation is an art more than a science” (*Ellis v. Midland Credit Mgmt., Inc.*, 2012 WL 4356251, at *5 (D. Colo. Sept. 24, 2012)), and involves a nuanced and delicate exercise of judgment that should not be second-guessed de novo by a court. But the district court here did just that, substituting a

formulaic test and the court’s own view of the likely outcome at trial for the judgment of plaintiffs’ counsel, whose “jury testing,” “work product,” and “empirical work” left counsel “sobered” by the “very, very real risks” faced at trial. 6/19/14 Tr. 25:4-17, 63:22-25, 75:1-5, 75:15-21. The court also nullified months of settlement negotiations directed by an experienced and respected mediator, former federal district judge Layn Phillips (Dkt. 921 ¶ 10), despite this Court’s recognition of the value of an experienced mediator (*see Rodriguez*, 563 F.3d at 965-66), who helps ensure that settlement negotiations are “fair and conducted at arm’s length” (*In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 221 (E.D.N.Y. 2013)).

The practical effect of the court’s approach was to impose a variant of a “most favored nations” rule for prior settlements—even though the parties had not negotiated or come to such an agreement. Rather than entitling the prior-settling parties to refunds based on later settlements, the court’s rule forces later-settling parties to essentially match the amounts agreed to in the earlier settlements. Most favored nations arrangements have been “disfavored because they often inhibit compromise and settlement.” *Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1203 (6th Cir. 1996); *see also 4 Newberg on Class Actions* § 12:2 (4th ed. 2014) (“most favored nations clauses are criticized in the Manual for Complex Litigation and are rarely included in most class settlement agreements”).

And the imposition of a similar arrangement by a court falls entirely outside the proper judicial role: “[T]he power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed.” *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986).

To make matters worse, the district court’s calculation of the proportionality among the settlements was incorrect. The court reasoned that defendants “received 95% of the benefit ... and ... caused 95% of the harm.” Op. 9:2-3. But plaintiffs’ damages model actually shows that only 94.386% of the damages are payable to the present defendants’ employees, so that even under the trial court’s flawed methodology, the “appropriate benchmark settlement” would be \$336.2 million, just slightly higher than the actual settlement amount. Dkt. 964-5, at 380 Ex. V.3 (setting out alleged damages payable to each defendant’s employees). In addition, using the same formula, the *net* amount of the present settlement that will be paid to class members is proportionately *greater* than it was in the prior settlement, because the proportion of the previous settlement that was allotted for fees and expenses is significantly higher than in the present settlement. Dkt. 916, at 5 (granting \$8.7 million, or more than 40%, of the \$20 million total for fees and expenses). In substituting its formulaic calculation for the judgment of the parties, the court therefore not only committed legal error but also misapplied its own

erroneous standard. The court’s mathematical errors highlight the fundamentally inappropriate nature of the court’s formulaic methodology, given that very small changes in the inputs to the formula can mean the difference between approving and rejecting a settlement even if all the other factors overwhelmingly favor approval.

B. The Arm’s-Length Settlement Reached by the Parties Is Reasonable and Should Be Given Preliminary Approval

Under a proper analysis, the settlement between the parties unquestionably should have received preliminary approval.

Two of the relevant factors in final settlement approval—the risk, expense, complexity, and likely duration of further litigation; and the extent of discovery completed and the stage of the proceedings (*Rodriguez*, 563 F.3d at 966-67)—weigh strongly in favor of approval, given how much time and resources had been devoted to the case, and the complex trial that lay ahead. The significant “experience ... of counsel” also is indisputable. *Id.* at 963. And the fact that the settlement here “is in cash, not in kind” is a particularly “good indicator of a beneficial settlement.” *Id.* at 965. That these factors are clearly established should have at the very least caused the district court to presume the settlement was reasonable, but the court accorded them no weight at all.

As to the strength of their case, plaintiffs acknowledged that to establish liability, much less obtain a \$3 billion damages award, they “have to overcome a

number of hurdles.” 6/19/14 Tr. 25:4-6. There is a significant risk that a jury would not link together six separate two-party “do-not-cold-call” agreements into one massive conspiracy, which is required by plaintiffs’ damages model. There is also a risk that the jury would reject the only evidence in favor of the model: the testimony of a single expert who admits the results are not statistically significant. Plaintiffs’ counsel explained that their jury research left them “sobered by ... learning how difficult it is to convince a unanimous room of people ... to meet the standard in this case.” *Id.* at 75:3-5. Based on these and other significant litigation risks, plaintiffs determined that \$324.5 million was a reasonable settlement figure.

The court gave no weight to plaintiffs’ counsel’s considered and good-faith acknowledgment of the “very, very real risks” plaintiffs faced. 6/19/14 Tr. 25:13-14. Rather, the court substituted its own view of the evidence, which the court believed supports plaintiffs’ case. Op. 10-30. In so doing, the court disregarded the substantial weaknesses in plaintiffs’ case, as well as plaintiffs’ repeated explanation of their concerns based on, among other things, their confidential jury testing.

The court also determined that any risk plaintiffs faced going to trial “existed and was even greater when Plaintiffs settled with the Settled Defendants a year ago” (Op. 7), but there is no basis for this conclusion. The court reasoned that because the court had certified the class and denied summary judgment, “the

procedural posture of the case swung dramatically in Plaintiffs' favor after the initial settlements were reached." Op. 10:3-4. But this Court in *Rodriguez* counseled precisely the opposite; it approved the district court's determination that "successfully opposing ... summary judgment did not mean that the class had established liability or would obtain a favorable, unanimous jury verdict." 563 F.3d at 964. The district court's contrary decision here was legal error.

Moreover, the district court ignored the serious weaknesses in plaintiffs' case identified by defendants. For example, plaintiffs do not allege any agreement on the level of employee compensation, nor do they even allege any agreement not to hire each other's employees; and plaintiffs allege no express agreement at all among all defendants. Rather, plaintiffs allege that seven defendants, through six alleged two-party agreements not to "cold-call" each other's employees, somehow conspired as one group to depress the wages of all their employees. Plaintiffs are correct that there is a "very real risk" that a jury would reject plaintiffs' theory.

In fact, at trial, if plaintiffs failed to prove that any *one* of the six agreements was not part of their alleged overarching conspiracy, defendants would avoid any damages whatsoever. Plaintiffs contend that the compensation of *every* technical employee at all seven companies was suppressed by about 10% each year of the class period, resulting in \$3 billion in depressed wages. Dkt. 967-1, at 21 Fig. 7. Plaintiffs' expert's opinion arriving at the \$3 billion figure was integrally premised

on the involvement of *all seven defendants* in the alleged conspiracy. Dkt. 564, at 13; Dkt. 938, at 11. As he acknowledged, if a single defendant was found not to be part of the conspiracy, his model could not calculate damages. Dkt. 569-14, at 1031:19-1032:14. With no damages model, plaintiffs would be unable to recover damages, let alone \$3 billion, and would be unable to proceed with a class action. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013).

The district court also took it as a given that class certification was final and settled because the Ninth Circuit did not grant interlocutory review. Op. 10:8-20. But the court ignored the risk that defendants would prevail on appeal from class certification after final judgment. The district court's analysis was, again, directly contrary to *Rodriguez*. See 563 F.3d at 966 (although 23(f) petition had been denied, “[a]t the time of settlement, the risk remained that the nationwide class might be decertified”).

Even plaintiffs acknowledged that “the issue of class certification is still an open issue on appeal.” 6/19/14 Tr. 23:5-6. Courts of appeals have reversed the certification of a class even after judgment following trial. See, e.g., *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 336-37 (4th Cir. 1998). Defendants would have strong arguments on appeal from the certification of a broad and disparate class of 60,000 technical employees ranging from Intel semiconductor design engineers in Massachusetts to Lucasfilm digital animators in

Silicon Valley. Plaintiffs’ theory of antitrust impact depended on an unprecedented use of aggregate analyses and averages that were extrapolated class-wide, which several courts of appeals have rejected (*see, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253-55 (D.C. Cir. 2013)), and which were not even statistically significant (Dkt. 715, at 3). The risk that defendants ultimately would prevail on class certification therefore should have been considered as part of the *Rodriguez* analysis.

In essence, the district court considered what it perceived to be the strengths of plaintiffs’ case, while ignoring the fact that *plaintiffs themselves* developed serious concerns about their evidence and legal theories based on a comprehensive view of the record and jury testing that post-dated the earlier settlements. Such a one-sided analysis clearly is not the required “comprehensive[]” “explor[ation of] all factors” that this Court requires. *Rodriguez*, 563 F.3d at 964 (citation omitted).

III. If Allowed to Stand, the Court’s Decision on an Important Matter of First Impression Will Severely Hamper Class Settlement

This petition also presents a compelling case for mandamus review because important “issues of law of first impression” will completely evade review in the absence of a writ of mandate. *Douglas*, 495 F.3d at 1065-66.

The district court expressly acknowledged the “scant appellate guidance” (Op. 5:24) on the standard district courts should use to review preliminary approval motions. Plaintiffs “couldn’t find a single circuit level decision where a court says

this is the standard that you, as a district court, are required to apply.” 6/19/14 Tr. 11:15-18. This Court has never opined on the standards district courts are to use when deciding whether to grant preliminary approval of a settlement. As a result, the district courts in this Circuit, including the district court here, have been left to rely heavily on decisions from other district courts in determining how to evaluate class action settlements. Op. 5-6; *see also, e.g., Christensen v. Hillyard, Inc.*, 2014 WL 3749523, at *3-4 (N.D. Cal. July 30, 2014).

Failing to review this ruling would create “new and important problems” warranting mandamus (*Douglas*, 495 F.3d at 1065-66), as the court’s widely publicized benchmark methodology—if adopted elsewhere—will significantly hinder parties’ ability to settle in future class actions. Class counsel who are looking to reach early settlements with fewer than all defendants to finance prosecution of the litigation will be forced to assume that the early settlements will create a floor below which they will not be allowed to settle with the remaining defendants. Defendants who do not settle early in the litigation will be bound against their will by the settlement decisions of their co-defendants. The court’s rule thus restricts the ability of plaintiffs and defendants to reach negotiated settlements fully informed by the myriad factors that should guide the parties’ decisionmaking.

In addition, courts considering whether to approve early settlements between

a class and fewer than all defendants will be forced to consider whether the resulting “benchmark settlement amount” for the remaining defendants would be sufficient to warrant later approval by the court. If it would not, the court might conclude that the early settlement, for that reason alone, was not in the best interest of the class and therefore refuse to approve it.

These results will deter class settlement and disrupt the efforts of class counsel to finance complex litigation. The decision below has received unusually widespread publicity,² and certainly has come to the attention of district courts and the class settlement objectors’ bar. This Court’s review is therefore critical to ensure that class settlement remains a viable option for parties in order to resolve complex class actions in a fair and efficient manner.

CONCLUSION

This petition presents an issue of first impression that is vital to the civil justice system’s ability to resolve aggregated claims. The district court’s rejection

² *E.g.*, David Streitfeld, *Court Rejects Deal on Hiring in Silicon Valley*, N.Y. Times, Aug. 8, 2014, at A-1 (“I cannot recall a judge saying in a class-action case that the amount of settlement is too low and you need to go back and go for broke at trial,” said Daniel Crane, who teaches antitrust law at the University of Michigan Law School. “This is very striking.”); Jeff Elder, *Judge Rejects Settlement in Silicon Valley Wage Case*, Wall St. J., Aug. 8, 2014, <http://online.wsj.com/articles/judge-rejects-settlement-in-silicon-valley-wage-case-1407528633>; Chris O’Brien, *Deal is rejected in tech hiring case*, L.A. Times, Aug. 9, 2014, at 4; Kristen V. Brown, *She lays down law to tech’s giants*, S.F. Chron., Aug. 10, 2014, at A-1; Brandon Bailey, *Judge Orders Tech Giants to Fatten Offer*, San Jose Mercury News, Aug. 9, 2014, at 1-A.

of the settlement was clear error as a matter of law. The district court applied a mechanical formula that overrode sensitive judgments of the class's own counsel based on confidential information regarding the serious risks posed by their claims and their chances of success at trial. The ruling will inflict significant harm on all parties and the class action procedure. Absent mandamus, this controversial and erroneous ruling will evade review. This Court should grant the petition.

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ATTESTATION: The filer attests that concurrence in the filing of this document has been obtained from all signatories.

STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases pending in this circuit.

CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is O'Melveny & Myers LLP, Two Embarcadero Center, 28th Floor, San Francisco, CA 94111.

On September 4, 2014, I served the following document(s):

PETITION FOR WRIT OF MANDAMUS

by transmitting on this date via Email and/or U.S. Mail a true and correct copy of the above referenced documents.

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I declare under penalty of perjury under the laws of the State of California
that the above is true and correct.

Executed on September 4, 2014, at San Francisco, California.

/s/ Michael O'Donnell
Michael O'Donnell

**ORDER DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT
WITH ADOBE, APPLE, GOOGLE,
AND INTEL**

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

)	Case No.: 11-CV-02509-LHK
)	
IN RE: HIGH-TECH EMPLOYEE)	ORDER DENYING PLAINTIFFS’
ANTITRUST LITIGATION)	MOTION FOR PRELIMINARY
)	APPROVAL OF SETTLEMENTS WITH
)	ADOBE, APPLE, GOOGLE, AND
)	INTEL
_____)	
THIS DOCUMENT RELATES TO:)	
)	
ALL ACTIONS)	
)	
_____)	

Before the Court is a Motion for Preliminary Approval of Class Action Settlement with Defendants Adobe Systems Inc. (“Adobe”), Apple Inc. (“Apple”), Google Inc. (“Google”), and Intel Corp. (“Intel”) (hereafter, “Remaining Defendants”) brought by three class representatives, Mark Fichtner, Siddharth Hariharan, and Daniel Stover (hereafter, “Plaintiffs”). *See* ECF No. 920. The Settlement provides for \$324.5 million in recovery for the class in exchange for release of antitrust claims. A fourth class representative, Michael Devine (“Devine”), has filed an Opposition contending that the settlement amount is inadequate. *See* ECF No. 934. Plaintiffs have filed a Reply. *See* ECF No. 938. Plaintiffs, Remaining Defendants, and Devine appeared at a hearing on June 19, 2014. *See* ECF No. 940. In addition, a number of Class members have submitted letters in

1 support of and in opposition to the proposed settlement. ECF Nos. 914, 949-51. The Court, having
2 considered the briefing, the letters, the arguments presented at the hearing, and the record in this
3 case, DENIES the Motion for Preliminary Approval for the reasons stated below.

4 **I. BACKGROUND AND PROCEDURAL HISTORY**

5 Michael Devine, Mark Fichtner, Siddharth Hariharan, and Daniel Stover, individually and
6 on behalf of a class of all those similarly situated, allege antitrust claims against their former
7 employers, Adobe, Apple, Google, Intel, Intuit Inc. (“Intuit”), Lucasfilm Ltd. (“Lucasfilm”), and
8 Pixar (collectively, “Defendants”). Plaintiffs allege that Defendants entered into an overarching
9 conspiracy through a series of bilateral agreements not to solicit each other’s employees in
10 violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton
11 Antitrust Act, 15 U.S.C. § 15. Plaintiffs contend that the overarching conspiracy, made up of a
12 series of six bilateral agreements (Pixar-Lucasfilm, Apple-Adobe, Apple-Google, Apple-Pixar,
13 Google-Intuit, and Google-Intel) suppressed wages of Defendants’ employees.

14 The five cases underlying this consolidated action were initially filed in California Superior
15 Court and removed to federal court. *See* ECF No. 532 at 5. The cases were related by Judge
16 Sandra Brown Armstrong, who also granted a motion to transfer the related actions to the San
17 Jose Division. *See* ECF Nos. 52, 58. After being assigned to the undersigned judge, the cases were
18 consolidated pursuant to the parties’ stipulation. *See* ECF No. 64. Plaintiffs filed a consolidated
19 complaint on September 23, 2011, *see* ECF No. 65, which Defendants jointly moved to dismiss,
20 *see* ECF No. 79. In addition, Lucasfilm filed a separate motion to dismiss on October 17, 2011. *See*
21 ECF No. 83. The Court granted in part and denied in part the joint motion to dismiss and denied
22 Lucasfilm’s separate motion to dismiss. *See* ECF No. 119.

23 On October 1, 2012, Plaintiffs filed a motion for class certification. *See* ECF No. 187. The
24 motion sought certification of a class of all of the seven Defendants’ employees or, in the
25 alternative, a narrower class of just technical employees of the seven Defendants. After full
26 briefing and a hearing, the Court denied class certification on April 5, 2013. *See* ECF No. 382. The
27 Court was concerned that Plaintiffs’ documentary evidence and empirical analysis were

1 insufficient to determine that common questions predominated over individual questions with
2 respect to the issue of antitrust impact. *See id.* at 33. Moreover, the Court expressed concern that
3 there was insufficient analysis in the class certification motion regarding the class of technical
4 employees. *Id.* at 29. The Court afforded Plaintiffs leave to amend to address the Court's concerns.
5 *See id.* at 52.

6 On May 10, 2013, Plaintiffs filed their amended class certification motion, seeking to
7 certify only the narrower class of technical employees. *See* ECF No. 418. Defendants filed their
8 opposition on June 21, 2013, ECF No. 439, and Plaintiffs filed their reply on July 12, 2013, ECF
9 No. 455. The hearing on the amended motion was set for August 5, 2013.

10 On July 12 and 30, 2013, after class certification had been initially denied and while an
11 amended motion was pending, Plaintiffs settled with Pixar, Lucasfilm, and Intuit (hereafter,
12 "Settled Defendants"). *See* ECF Nos. 453, 489. Plaintiffs filed a motion for preliminary approval of
13 the settlements with Settled Defendants on September 21, 2013. *See* ECF No. 501. No opposition
14 to the motion was filed, and the Court granted the motion on October 30, 2013, following a hearing
15 on October 21, 2013. *See* ECF No. 540. The Court held a fairness hearing on May 1, 2014, ECF
16 No. 913, and granted final approval of the settlements and accompanying requests for attorneys'
17 fees, costs, and incentive awards over five objections on May 16, 2014, ECF Nos. 915-16.
18 Judgment was entered as to the Settled Defendants on June 20, 2014. ECF No. 947.

19 After the Settled Defendants settled, this Court certified a class of technical employees of
20 the seven Defendants (hereafter, "the Class") on October 25, 2013 in an 86-page order granting
21 Plaintiffs' amended class certification motion. *See* ECF No. 532. The Remaining Defendants
22 petitioned the Ninth Circuit to review that order under Federal Rule of Civil Procedure 23(f). After
23 full briefing, including the filing of an amicus brief by the National and California Chambers of
24 Commerce and the National Association of Manufacturing urging the Ninth Circuit to grant
25 review, the Ninth Circuit denied review on January 15, 2014. *See* ECF No. 594.

26 Meanwhile, in this Court, the Remaining Defendants filed a total of five motions for
27 summary judgment and filed motions to strike and to exclude the testimony of Plaintiffs' principal
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1 expert on antitrust impact and damages, Dr. Edward Leamer, who opined that the total damages to
 2 the Class exceeded \$3 billion in wages Class members would have earned in the absence of the
 3 anti-solicitation agreements.¹ The Court denied the motions for summary judgment on March 28,
 4 2014, and on April 4, 2014, denied the motion to exclude Dr. Leamer and denied in large part the
 5 motion to strike Dr. Leamer's testimony. ECF Nos. 777, 788.

6 On April 24, 2014, counsel for Plaintiffs and counsel for Remaining Defendants sent a joint
 7 letter to the Court indicating that they had reached a settlement. *See* ECF No. 900. This settlement
 8 was reached two weeks before the Final Pretrial Conference and one month before the trial was set
 9 to commence.² Upon receipt of the joint letter, the Court vacated the trial date and pretrial
 10 deadlines and set a schedule for preliminary approval. *See* ECF No. 904. Shortly after counsel sent
 11 the letter, the media disclosed the total amount of the settlement, and this Court received three
 12 letters from individuals, not including Devine, objecting to the proposed settlement in response to
 13 media reports of the settlement amount.³ *See* ECF No. 914. On May 22, 2014, in accordance with
 14 this Court's schedule, Plaintiffs filed their Motion for Preliminary Approval. *See* ECF No. 920.
 15 Devine filed an Opposition on June 5, 2014.⁴ *See* ECF No. 934. Plaintiffs filed a Reply on June 12,
 16 2014. *See* ECF No. 938. The Court held a hearing on June 19, 2014. *See* ECF No. 948. After the
 17 hearing, the Court received a letter from a Class member in opposition to the proposed settlement
 18 and two letters from Class members in support of the proposed settlement. *See* ECF Nos. 949-51.

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 22 ¹ Dr. Leamer was subject to vigorous attack in the initial class certification motion, and this Court
 23 agreed with some of Defendants' contentions with respect to Dr. Leamer and thus rejected the
 24 initial class certification motion. *See* ECF No. 382 at 33-43.

25 ² Defendants' motions in limine, Plaintiffs' motion to exclude testimony from certain experts,
 26 Defendants' motion to exclude testimony from certain experts, a motion to determine whether the
 27 per se or rule of reason analysis applied, and a motion to compel were pending at the time the
 28 settlement was reached.

³ Plaintiffs in the instant Motion represent that two of the letters are from non-Class members and
 that the third letter is from a Class member who may be withdrawing his objection. *See* ECF No.
 920 at 18 n.11. The objection has not been withdrawn at the time of this Order.

⁴ Devine stated in his Opposition that the Opposition was designed to supersede a letter that he had
 previously sent to the Court. *See* ECF No. at 934 n.2. The Court did not receive any letter from
 Devine. Accordingly, the Court has considered only Devine's Opposition.

II. LEGAL STANDARD

The Court must review the fairness of class action settlements under Federal Rule of Civil Procedure 23(e). The Rule states that “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.” The Rule requires the Court to “direct notice in a reasonable manner to all class members who would be bound by the proposal” and further states that if a settlement “would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(1)-(2). The principal purpose of the Court’s supervision of class action settlements is to ensure “the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.” *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

District courts have interpreted Rule 23(e) to require a two-step process for the approval of class action settlements: “the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage, the Ninth Circuit has stated that “[a]ssessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; 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.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

In contrast to these well-established, non-exhaustive factors for final approval, there is relatively scant appellate authority regarding the standard that a district court must apply in reviewing a settlement at the preliminary approval stage. Some district courts, echoing commentators, have stated that the relevant inquiry is whether the settlement “falls within the range of possible approval” or “within the range of reasonableness.” *In re Tableware Antitrust Litig.*, 484

1 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *see also Cordy v. USS-Posco Indus.*, No. 12-553, 2013
 2 WL 4028627, at *3 (N.D. Cal. Aug. 1, 2013) (“Preliminary approval of a settlement and notice to
 3 the proposed class is appropriate if the proposed settlement appears to be the product of serious,
 4 informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant
 5 preferential treatment to class representatives or segments of the class, and falls with the range of
 6 possible approval.” (internal quotation marks omitted)). To undertake this analysis, the Court
 7 “must consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *In*
 8 *re Nat’l Football League Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa.
 9 2014) (internal quotation marks omitted).

10 **III. DISCUSSION**

11 Pursuant to the terms of the instant settlement, Class members who have not already opted
 12 out and who do not opt out will relinquish their rights to file suit against the Remaining Defendants
 13 for the claims at issue in this case. In exchange, Remaining Defendants will pay a total of \$324.5
 14 million, of which Plaintiffs’ counsel may seek up to 25% (approximately \$81 million) in attorneys’
 15 fees, \$1.2 million in costs, and \$80,000 per class representative in incentive payments. In addition,
 16 the settlement allows Remaining Defendants a pro rata reduction in the total amount they must pay
 17 if more than 4% of Class members opt out after receiving notice.⁵ Class members would receive an
 18 average of approximately \$3,750⁶ from the instant settlement if the Court were to grant all
 19 requested deductions and there were no further opt-outs.⁷

20 The Court finds the total settlement amount falls below the range of reasonableness. The
 21 Court is concerned that Class members recover less on a proportional basis from the instant

22
 23 ⁵ Plaintiffs also assert that administration costs for the settlement would be \$160,000.

24 ⁶ Devine calculated that Class members would receive an average of \$3,573. The discrepancy
 25 between this number and the Court’s calculation may result from the fact that Devine’s calculation
 26 does not account for the fact that 147 individuals have already opted out of the Class. The Court’s
 calculation resulted from subtracting the requested attorneys’ fees (\$81,125,000), costs
 (\$1,200,000), incentive awards (\$400,000), and estimated administration costs (\$160,000) from the
 settlement amount (\$324,500,000) and dividing the resulting number by the total number of
 remaining class members (64,466).

27 ⁷ If the Court were to deny any portion of the requested fees, costs, or incentive payments, this
 28 would increase individual Class members’ recovery. If less than 4% of the Class were to opt out,
 that would also increase individual Class members’ recovery.

1 settlement with Remaining Defendants than from the settlement with the Settled Defendants a year
 2 ago, despite the fact that the case has progressed consistently in the Class's favor since then.
 3 Counsel's sole explanation for this reduced figure is that there are weaknesses in Plaintiffs' case
 4 such that the Class faces a substantial risk of non-recovery. However, that risk existed and was
 5 even greater when Plaintiffs settled with the Settled Defendants a year ago, when class certification
 6 had been denied.

7 The Court begins by comparing the instant settlement with Remaining Defendants to the
 8 settlements with the Settled Defendants, in light of the facts that existed at the time each settlement
 9 was reached. The Court then discusses the relative strengths and weaknesses of Plaintiffs' case to
 10 assess the reasonableness of the instant settlement.

11 **A. Comparison to the Initial Settlements**

12 **1. Comparing the Settlement Amounts**

13 The Court finds that the settlements with the Settled Defendants provide a useful
 14 benchmark against which to analyze the reasonableness of the instant settlement. The settlements
 15 with the Settled Defendants led to a fund totaling \$20 million. *See* ECF No. 915 at 3. In approving
 16 the settlements, the Court relied upon the fact that the Settled Defendants employed 8% of Class
 17 members and paid out 5% of the total Class compensation during the Class period. *See* ECF No.
 18 539 at 16:20-22 (Plaintiffs' counsel's explanation at the preliminary approval hearing with the
 19 Settled Defendants that the 5% figure "giv[es] you a sense of how big a slice of the case this
 20 settlement is relative to the rest of the case"). If Remaining Defendants were to settle at the same
 21 (or higher) rate as the Settled Defendants, Remaining Defendants' settlement fund would need to
 22 total at least \$380 million. This number results from the fact that Remaining Defendants paid out
 23 95% of the Class compensation during the Class period, while Settled Defendants paid only 5% of
 24 the Class compensation during the Class period.⁸

25 At the hearing on the instant Motion, counsel for Remaining Defendants suggested that the
 26

27 ⁸ One way to think about this is to set up the simple equation: $5/95 = \$20,000,000/x$. This equation
 28 asks the question of how much 95% would be if 5% were \$20,000,000. Solving for x would result
 in \$380,000,000.

1 relevant benchmark is not total Class compensation, but rather is total Class membership. This
2 would result in a benchmark figure for the Remaining Defendants of \$230 million (92 divided by 8
3 is 11.5; 11.5 times \$20 million is \$230 million).⁹ At a minimum, counsel suggested, the Court
4 should compare the settlement amount to a range of \$230 million to \$380 million, within which the
5 instant settlement falls. The Court rejects counsel's suggestion, which is contrary to the record.
6 Counsel has provided no basis for why the number of Class members employed by each Defendant
7 is a relevant metric. To the contrary, the relevant inquiry has always been total Class compensation.
8 For example, in both of the settlements with the Settled Defendants and in the instant settlement,
9 the Plans of Allocation call for determining each individual Class member's pay out by dividing
10 the Class member's compensation during the Class period by *the total Class compensation during*
11 *the Class period*. ECF No. 809 at 6 (noting that the denominator in the plan of allocation in the
12 settlements with the Settled Defendants is the "total of base salaries paid to all approved Claimants
13 in class positions during the Class period"); ECF No. 920 at 22 (same in the instant settlement); *see*
14 *also* ECF No. 539 at 16:20-22 (Plaintiffs' counsel's statement that percent of the total Class
15 compensation was relevant for benchmarking the settlements with the Settled Defendants to the
16 rest of the case). At no point in the record has the percentage of Class membership employed by
17 each Defendant ever been the relevant factor for determining damages exposure. Accordingly, the
18 Court rejects the metric proposed by counsel for Remaining Defendants. Using the Settled
19 Defendants' settlements as a yardstick, the appropriate benchmark settlement for the Remaining
20 Defendants would be at least \$380 million, more than \$50 million greater than what the instant
21 settlement provides.

22 Counsel for Remaining Defendants also suggested that benchmarking against the initial
23 settlements would be inappropriate because the magnitude of the settlement numbers for
24 Remaining Defendants dwarfs the numbers at issue in the Settled Defendants' settlements. This
25 argument is premised on the idea that Defendants who caused more damage to the Class and who
26 benefited more by suppressing a greater portion of class compensation should have to pay less than
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28 ⁹ Again, $8/92 = \$20,000,000/x$ would lead to $x = \$230,000,000$.

1 Defendants who caused less damage and who benefited less from the allegedly wrongful conduct.
2 This argument is unpersuasive. Remaining Defendants are alleged to have received 95% of the
3 benefit of the anti-solicitation agreements and to have caused 95% of the harm suffered by the
4 Class in terms of lost compensation. Therefore, Remaining Defendants should have to pay at least
5 95% of the damages, which, under the instant settlement, they would not.

6 The Court also notes that had Plaintiffs prevailed at trial on their more than \$3 billion
7 damages claim, antitrust law provides for automatic trebling, *see* 15 U.S.C. § 15(a), so the total
8 damages award could potentially have exceeded \$9 billion. While the Ninth Circuit has not
9 determined whether settlement amounts in antitrust cases must be compared to the single damages
10 award requested by Plaintiffs or the automatically trebled damages amount, *see Rodriguez v. W.*
11 *Publ'g Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009), the instant settlement would lead to a total
12 recovery of 11.29% of the single damages proposed by Plaintiffs' expert or 3.76% of the treble
13 damages. Specifically, Dr. Leamer has calculated the total damages to the Class resulting from
14 Defendants' allegedly unlawful conduct as \$3.05 billion. *See* ECF No. 856-10. If the Court
15 approves the instant settlements, the total settlements with all Defendants would be \$344.5 million.
16 This total would amount to 11.29% of the single damages that Dr. Leamer opines the Class
17 suffered or 3.76% if Dr. Leamer's damages figure had been trebled.

18 2. Relative Procedural Posture

19 The discount that Remaining Defendants have received vis-à-vis the Settled Defendants is
20 particularly troubling in light of the changes in the procedural posture of the case between the two
21 settlements, changes that the Court would expect to have increased, rather than decreased,
22 Plaintiffs' bargaining power. Specifically, at the time the Settled Defendants settled, Plaintiffs were
23 at a particularly weak point in their case. Though Plaintiffs had survived Defendants' motion to
24 dismiss, Plaintiffs' motion for class certification had been denied, albeit without prejudice.
25 Plaintiffs had re-briefed the class certification motion, but had no class certification ruling in their
26 favor at the time they settled with the Settled Defendants. If the Court ultimately granted
27 certification, Plaintiffs also did not know whether the Ninth Circuit would grant Federal Rule of
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1 Civil Procedure 23(f) review and reverse the certification. Accordingly, at that point, Defendants
2 had significant leverage.

3 In contrast, the procedural posture of the case swung dramatically in Plaintiffs' favor after
4 the initial settlements were reached. Specifically, the Court certified the Class over the vigorous
5 objections of Defendants. In the 86-page order granting class certification, the Court repeatedly
6 referred to Plaintiffs' evidence as "substantial" and "extensive," and the Court stated that it "could
7 not identify a case at the class certification stage with the level of documentary evidence Plaintiffs
8 have presented in the instant case." ECF No. 531 at 69. Thereafter, the Ninth Circuit denied
9 Defendants' request to review the class certification order under Federal Rule of Civil Procedure
10 23(f). This Court also denied Defendants' five motions for summary judgment and denied
11 Defendants' motion to exclude Plaintiffs' principal expert on antitrust impact and damages. The
12 instant settlement was reached a mere two weeks before the final pretrial conference and one
13 month before a trial at which damaging evidence regarding Defendants would have been presented.

14 In sum, Plaintiffs were in a much stronger position at the time of the instant settlement—
15 after the Class had been certified, appellate review of class certification had been denied, and
16 Defendants' dispositive motions and motion to exclude Dr. Leamer's testimony had been denied—
17 than they were at the time of the settlements with the Settled Defendants, when class certification
18 had been denied. This shift in the procedural posture, which the Court would expect to have
19 increased Plaintiffs' bargaining power, makes the more recent settlements for a proportionally
20 lower amount even more troubling.

21 **B. Strength of Plaintiffs' Case**

22 The Court now turns to the strength of Plaintiffs' case against the Remaining Defendants to
23 evaluate the reasonableness of the settlement.

24 At the hearing on the instant Motion, Plaintiffs' counsel contended that one of the reasons
25 the instant settlement was proportionally lower than the previous settlements is that the
26 documentary evidence against the Settled Defendants (particularly, Lucasfilm and Pixar) is more
27 compelling than the documentary evidence against the Remaining Defendants. As an initial matter,
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1 the Court notes that relevant evidence regarding the Settled Defendants would be admissible at a
2 trial against Remaining Defendants because Plaintiffs allege an overarching conspiracy that
3 included all Defendants. Accordingly, evidence regarding the role of Lucasfilm and Pixar in the
4 creation of and the intended effect of the overarching conspiracy would be admissible.

5 Nonetheless, the Court notes that Plaintiffs are correct that there are particularly clear
6 statements from Lucasfilm and Pixar executives regarding the nature and goals of the alleged
7 conspiracy. Specifically, Edward Catmull (Pixar President) conceded in his deposition that anti-
8 solicitation agreements were in place because solicitation “messes up the pay structure.” ECF No.
9 431-9 at 81. Similarly, George Lucas (former Lucasfilm Chairman of the Board and CEO) stated,
10 “we cannot get into a bidding war with other companies because we don’t have the margins for that
11 sort of thing.” ECF No. 749-23 at 9.

12 However, there is equally compelling evidence that comes from the documents of the
13 Remaining Defendants. This is particularly true for Google and Apple, the executives of which
14 extensively discussed and enforced the anti-solicitation agreements. Specifically, as discussed in
15 extensive detail in this Court’s previous orders, Steve Jobs (Co-Founder, Former Chairman, and
16 Former CEO of Apple, Former CEO of Pixar), Eric Schmidt (Google Executive Chairman,
17 Member of the Board of Directors, and former CEO), and Bill Campbell (Chairman of Intuit Board
18 of Directors, Co-Lead Director of Apple, and advisor to Google) were key players in creating and
19 enforcing the anti-solicitation agreements. The Court now turns to the evidence against the
20 Remaining Defendants that the finder of fact is likely to find compelling.

21 **1. Evidence Related to Apple**

22 There is substantial and compelling evidence that Steve Jobs (Co-Founder, Former
23 Chairman, and Former CEO of Apple, Former CEO of Pixar) was a, if not the, central figure in the
24 alleged conspiracy. Several witnesses, in their depositions, testified to Mr. Jobs’ role in the anti-
25 solicitation agreements. For example, Eric Schmidt (Google Executive Chairman, Member of the
26 Board of Directors, and former CEO) stated that Mr. Jobs “believed that you should not be hiring
27 each others’, you know, technical people” and that “it was inappropriate in [Mr. Jobs’] view for us
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1 to be calling in and hiring people.” ECF No. 819-12 at 77. Edward Catmull (Pixar President) stated
2 that Mr. Jobs “was very adamant about protecting his employee force.” ECF No. 431-9 at 97.
3 Sergey Brin (Google Co-Founder) testified that “I think Mr. Jobs’ view was that people shouldn’t
4 piss him off. And I think that things that pissed him off were—would be hiring, you know—
5 whatever.” ECF No. 639-1 at 112. There would thus be ample evidence Mr. Jobs was involved in
6 expanding the original anti-solicitation agreement between Lucasfilm and Pixar to the other
7 Defendants in this case. After the agreements were extended, Mr. Jobs played a central role in
8 enforcing these agreements. Four particular sets of evidence are likely to be compelling to the fact-
9 finder.

10 *First*, after hearing that Google was trying to recruit employees from Apple’s Safari team,
11 Mr. Jobs threatened Mr. Brin, stating, as Mr. Brin recounted, “if you hire a single one of these
12 people that means war.” ECF No. 833-15.¹⁰ In an email to Google’s Executive Management Team
13 as well as Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and
14 advisor to Google), Mr. Brin advised: “lets [sic] not make any new offers or contact new people at
15 Apple until we have had a chance to discuss.” *Id.* Mr. Campbell then wrote to Mr. Jobs: “Eric
16 [Schmidt] told me that he got directly involved and firmly stopped all efforts to recruit anyone
17 from Apple.” ECF No. 746-5. As Mr. Brin testified in his deposition, “Eric made a—you know,
18 a—you know, at least some kind of—had a conversation with Bill to relate to Steve to calm him
19 down.” ECF No. 639-1 at 61. As Mr. Schmidt put it, “Steve was unhappy, and Steve’s unhappiness
20 absolutely influenced the change we made in recruiting practice.” ECF No. 819-12 at 21. Danielle
21 Lambert (Apple’s head of Human Resources) reciprocated to maintain Apple’s end of the anti-
22 solicitation agreements, instructing Apple recruiters: “Please add Google to your ‘hands-off’ list.
23 We recently agreed not to recruit from one another so if you hear of any recruiting they are doing
24 against us, please be sure to let me know.” ECF No. 746-15.

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26
27 ¹⁰ On the same day, Mr. Campbell sent an email to Mr. Brin and to Larry Page (Google Co-
28 Founder) stating, “Steve just called me again and is pissed that we are still recruiting his browser
guy.” ECF No. 428-13. Mr. Page responded “[h]e called a few minutes ago and demanded to talk
to me.” *Id.*

1 *Second*, other Defendants’ CEOs maintained the anti-solicitation agreements out of fear of
2 and deference to Mr. Jobs. For example, in 2005, when considering whether to enter into an anti-
3 solicitation agreement with Apple, Bruce Chizen (former Adobe CEO), expressed concerns about
4 the loss of “top talent” if Adobe did not enter into an anti-solicitation agreement with Apple,
5 stating, “if I tell Steve it’s open season (other than senior managers), he will deliberately poach
6 Adobe just to prove a point. Knowing Steve, he will go after some of our top Mac talent like Chris
7 Cox and he will do it in a way in which they will be enticed to come (extraordinary packages and
8 Steve wooing).”¹¹ ECF No. 297-15.

9 This was the genesis of the Apple-Adobe agreement. Specifically, after Mr. Jobs
10 complained to Mr. Chizen on May 26, 2005 that Adobe was recruiting Apple employees, ECF No.
11 291-17, Mr. Chizen responded by saying, “I thought we agreed not to recruit any senior level
12 employees I would propose we keep it that way. Open to discuss. It would be good to agree.”
13 *Id.* Mr. Jobs was not satisfied, and replied by threatening to send Apple recruiters after Adobe’s
14 employees: “OK, I’ll tell our recruiters that they are free to approach any Adobe employee who is
15 not a Sr. Director or VP. Am I understanding your position correctly?” *Id.* Mr. Chizen immediately
16 gave in: “I’d rather agree NOT to actively solicit any employee from either company If you
17 are in agreement I will let my folks know.” *Id.* (emphasis in original). The next day, Theresa
18 Townsley (Adobe Vice President Human Resources) announced to her recruiting team, “Bruce and
19 Steve Jobs have an agreement that we are not to solicit ANY Apple employees, and vice versa.”
20 ECF No. 291-18 (emphasis in original). Adobe then placed Apple on its “[c]ompanies that are off
21 limits” list, which instructed Adobe employees not to cold call Apple employees. ECF No. 291-11.

22 Google took even more drastic actions in response to Mr. Jobs. For example, when a
23 recruiter from Google’s engineering team contacted an Apple employee in 2007, Mr. Jobs
24 forwarded the message to Mr. Schmidt and stated, “I would be very pleased if your recruiting
25 department would stop doing this.” ECF No. 291-23. Google responded by making a “public
26 example” out of the recruiter and “terminat[ing] [the recruiter] within the hour.” *Id.* The aim of this

27 _____
28 ¹¹ Mr. Jobs successfully expanded the anti-solicitation agreements to Macromedia, a company
acquired by Adobe, both before and after Adobe’s acquisition of Macromedia.

1 public spectacle was to “(hopefully) prevent future occurrences.” *Id.* Once the recruiter was
2 terminated, Mr. Schmidt emailed Mr. Jobs, apologizing and informing Mr. Jobs that the recruiter
3 had been terminated. Mr. Jobs forwarded Mr. Schmidt’s email to an Apple human resources
4 official and stated merely, “:).” ECF No. 746-9.

5 A year prior to this termination, Google similarly took seriously Mr. Jobs’ concerns.
6 Specifically, in 2006, Mr. Jobs emailed Mr. Schmidt and said, “I am told that Googles [sic] new
7 cell phone software group is relentlessly recruiting in our iPod group. If this is indeed true, can you
8 put a stop to it?” ECF No. 291-24 at 3. After Mr. Schmidt forwarded this to Human Resources
9 professionals at Google, Arnon Geshuri (Google Recruiting Director) prepared a detailed report
10 stating that an extensive investigation did not find a breach of the anti-solicitation agreement.

11 Similarly, in 2006, Google scrapped plans to open a Google engineering center in Paris
12 after a Google executive emailed Mr. Jobs to ask whether Google could hire three *former* Apple
13 engineers to work at the prospective facility, and Mr. Jobs responded “[w]e’d strongly prefer that
14 you not hire these guys.” ECF No. 814-2. The whole interaction began with Google’s request to
15 Steve Jobs for permission to hire Jean-Marie Hullot, an Apple engineer. The record is not clear
16 whether Mr. Hullot was a current or former Apple employee. A Google executive contacted Steve
17 Jobs to ask whether Google could make an offer to Mr. Hullot, and Mr. Jobs did not timely respond
18 to the Google executive’s request. At this point, the Google executive turned to Intuit’s Board
19 Chairman Bill Campbell as a potential ambassador from Google to Mr. Jobs. Specifically, the
20 Google executive noted that Mr. Campbell “is on the board at Apple and Google, so Steve will
21 probably return his call.” ECF No. 428-6. The same day that Mr. Campbell reached out to Mr.
22 Jobs, Mr. Jobs responded to the Google executive, seeking more information on what exactly the
23 Apple engineer would be working. ECF No. 428-9. Once Mr. Jobs was satisfied, he stated that the
24 hire “would be fine with me.” *Id.* However, two weeks later, when Mr. Hullot and a Google
25 executive sought Mr. Jobs’ permission to hire four of Mr. Hullot’s former Apple colleagues (three
26 were former Apple employees and one had given notice of impending departure from Apple), Mr.
27 Jobs promptly responded, indicating that the hires would not be acceptable. ECF No. 428-9.

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1 Google promptly scrapped the plan, and the Google executive responded deferentially to Mr. Jobs,
2 stating, “Steve, Based on your strong preference that we not hire the ex-Apple engineers, Jean-
3 Marie and I decided not to open a Google Paris engineering center.” *Id.* The Google executive also
4 forwarded the email thread to Mr. Brin, Larry Page (Google Co-Founder), and Mr. Campbell. *Id.*

5 *Third*, Mr. Jobs attempted (unsuccessfully) to expand the anti-solicitation agreements to
6 Palm, even threatening litigation. Specifically, Mr. Jobs called Edward Colligan (former President
7 and CEO of Palm) to ask Mr. Colligan to enter into an anti-solicitation agreement and threatened
8 patent litigation against Palm if Palm refused to do so. ECF No. 293 ¶¶ 6-8. Mr. Colligan
9 responded via email, and told Mr. Jobs that Mr. Jobs’ “proposal that we agree that neither company
10 will hire the other’s employees, regardless of the individual’s desires, is not only wrong, it is likely
11 illegal.” *Id.* at 4-5. Mr. Colligan went on to say that, “We can’t dictate where someone will work,
12 nor should we try. I can’t deny people who elect to pursue their livelihood at Palm the right to do
13 so simply because they now work for Apple, and I wouldn’t want you to do that to current Palm
14 employees.” *Id.* at 5. Finally, Mr. Colligan wrote that “[t]hreatening Palm with a patent lawsuit in
15 response to a decision by one employee to leave Apple is just out of line. A lawsuit would not
16 serve either of our interests, and will not stop employees from migrating between our companies
17 We will both just end up paying a lot of lawyers a lot of money.” *Id.* at 5-6. Mr. Jobs wrote
18 the following back to Mr. Colligan: “This is not satisfactory to Apple.” *Id.* at 8. Mr. Jobs went on
19 to write that “I’m sure you realize the asymmetry in the financial resources of our respective
20 companies when you say: ‘we will both just end up paying a lot of lawyers a lot of money.’” *Id.*
21 Mr. Jobs concluded: “My advice is to take a look at our patent portfolio before you make a final
22 decision here.” *Id.*

23 *Fourth*, Apple’s documents provide strong support for Plaintiffs’ theory of impact, namely
24 that rigid wage structures and internal equity concerns would have led Defendants to engage in
25 structural changes to compensation structures to mitigate the competitive threat that solicitation
26 would have posed. Apple’s compensation data shows that, for each year in the Class period, Apple
27 had a “job structure system,” which included categorizing and compensating its workforce
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1 according to a discrete set of company-wide job levels assigned to all salaried employees and four
2 associated sets of base salary ranges applicable to “Top,” “Major,” “National,” and “Small”
3 geographic markets. ECF No. 745-7 at 14-15, 52-53; ECF No.517-16 ¶¶ 6, 10 & Ex. B. Every
4 salary range had a “min,” “mid,” and “max” figure. *See id.* Apple also created a Human Resources
5 and recruiting tool called “Merlin,” which was an internal system for tracking employee records
6 and performance, and required managers to grade employees at one of four pre-set levels. *See* ECF
7 No. 749-6 at 142-43, 145-46; ECF No. 749-11 at 52-53; ECF No. 749-12 at 33. As explained by
8 Tony Fadell (former Apple Senior Vice President, iPod Division, and advisor to Steve Jobs),
9 Merlin “would say, this is the employee, this is the level, here are the salary ranges, and through
10 that tool we were then—we understood what the boundaries were.” ECF No. 749-11 at 53. Going
11 outside these prescribed “guidelines” also required extra approval. ECF No. 749-7 at 217; ECF No.
12 749-11 at 53 (“And if we were to go outside of that, then we would have to pull in a bunch of
13 people to then approve anything outside of that range.”).

14 Concerns about internal equity also permeated Apple’s compensation program. Steven
15 Burmeister (Apple Senior Director of Compensation) testified that internal equity—which Mr.
16 Burmeister defined as the notion of whether an employee’s compensation is “fair based on the
17 individual’s contribution relative to the other employees in your group, or across your
18 organization”—inheres in some, “if not all,” of the guidelines that managers consider in
19 determining starting salaries. ECF No. 745-7 at 61-64; ECF No. 753-12. In fact, as explained by
20 Patrick Burke (former Apple Technical Recruiter and Staffing Manager), when hiring a new
21 employee at Apple, “compar[ing] the candidate” to the other people on the team they would join
22 “was the biggest determining factor on what salary we gave.” ECF No. 745-6 at 279.

23 2. Evidence Related to Google

24 The evidence against Google is equally compelling. Email evidence reveals that Eric
25 Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO)
26 terminated at least two recruiters for violations of anti-solicitation agreements, and threatened to
27 terminate more. As discussed above, there is direct evidence that Mr. Schmidt terminated a
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1 recruiter at Steve Jobs' behest after the recruiter attempted to solicit an Apple employee. Moreover,
2 in an email to Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple,
3 and advisor to Google), Mr. Schmidt indicated that he directed a for-cause termination of another
4 Google recruiter, who had attempted to recruit an executive of eBay, which was on Google's do-
5 not-cold-call list. ECF No. 814-14. Finally, as discussed in more detail below, Mr. Schmidt
6 informed Paul Otellini (CEO of Intel and Member of the Google Board of Directors) that Mr.
7 Schmidt would terminate any recruiter who recruited Intel employees.

8 Furthermore, Google maintained a formal "Do Not Call" list, which grouped together
9 Apple, Intel, and Intuit and was approved by top executives. ECF No. 291-28. The list also
10 included other companies, such as Genentech, Paypal, and eBay. *Id.* A draft of the "Do Not Call"
11 list was presented to Google's Executive Management Group, a committee consisting of Google's
12 senior executives, including Mr. Schmidt, Larry Page (Google Co-Founder), Sergey Brin (Google
13 Co-Founder), and Shona Brown (former Google Senior Vice President of Business Operations).
14 ECF No. 291-26. Mr. Schmidt approved the list. *See id.*; *see also* ECF No. 291-27 (email from Mr.
15 Schmidt stating: "This looks very good."). Moreover, there is evidence that Google executives
16 knew that the anti-solicitation agreements could lead to legal troubles, but nevertheless proceeded
17 with the agreements. When Ms. Brown asked Mr. Schmidt whether he had any concerns with
18 sharing information regarding the "Do Not Call" list with Google's competitors, Mr. Schmidt
19 responded that he preferred that it be shared "verbally[,] since I don't want to create a paper trail
20 over which we can be sued later?" ECF No. 291-40. Ms. Brown responded: "makes sense to do
21 orally. i agree." *Id.*

22 Google's response to competition from Facebook also demonstrates the impact of the
23 alleged conspiracy. Google had long been concerned about Facebook hiring's effect on retention.
24 For example, in an email to top Google executives, Mr. Brin in 2007 stated that "the facebook
25 phenomenon creates a real retention problem." ECF No. 814-4. A month later, Mr. Brin announced
26 a policy of making counteroffers within one hour to any Google employee who received an offer
27 from Facebook. ECF No. 963-2.

1 In March 2008, Arnon Geshuri (Google Recruiting Director) discovered that non-party
2 Facebook had been cold calling into Google’s Site Reliability Engineering (“SRE”) team. Mr.
3 Geshuri’s first response was to suggest contacting Sheryl Sandberg (Chief Operating Officer for
4 non-party Facebook) in an effort to “ask her to put a stop to the targeted sourcing effort directed at
5 our SRE team” and “to consider establishing a mutual ‘Do Not Call’ agreement that specifies that
6 we will not cold-call into each other.” ECF No. 963-3. Mr. Geshuri also suggested “look[ing]
7 internally and review[ing] the attrition rate for the SRE group,” stating, “[w]e may want to consider
8 additional individual retention incentives or *team incentives* to keep attrition as low as possible in
9 SRE.” *Id.* (emphasis added). Finally, an alternative suggestion was to “[s]tart an aggressive
10 campaign to call into their company and go after their folks—no holds barred. We would be
11 unrelenting and a force of nature.” *Id.* In response, Bill Campbell (Chairman of Intuit Board of
12 Directors, Co-Lead Director of Apple, and advisor to Google), in his capacity as an advisor to
13 Google, suggested “Who should contact Sheryl [Sandberg] (or Mark [Zuckerberg]) to get a cease
14 fire? We have to get a truce.” *Id.* Facebook refused.

15 In 2010, Google altered its salary structure with a “Big Bang” in response to Facebook’s
16 hiring, which provides additional support for Plaintiffs’ theory of antitrust impact. Specifically,
17 after a period in which Google lost a significant number of employees to Facebook, Google began
18 to study Facebook’s solicitation of Google employees. ECF No. 190 ¶ 109. One month after
19 beginning this study, Google announced its “Big Bang,” which involved an increase to the base
20 salary of *all* of its salaried employees by 10% and provided an immediate cash bonus of \$1,000 to
21 all employees. ECF No. 296-18. Laszlo Bock (Google Senior Vice President of People Operations)
22 explained that the rationale for the Big Bang included: (1) being “responsive to rising attrition;” (2)
23 supporting higher retention because “higher salaries generate higher fixed costs;” and (3) being
24 “very strategic because start-ups don’t have the cash flow to match, and big companies are (a) too
25 worried about internal equity and scalability to do this and (b) don’t have the margins to do this.”
26 ECF No. 296-20.

1 Other Google documents provide further evidence of Plaintiffs’ theory of antitrust impact.
2 For example, Google’s Chief Culture Officer stated that “[c]old calling into companies to recruit is
3 to be expected unless they’re on our ‘don’t call’ list.” ECF No. 291-41. Moreover, Google found
4 that although referrals were the largest source of hires, “agencies and passively sourced candidates
5 offer[ed] the highest yield.” ECF No. 780-8. The spread of information between employees had
6 there been active solicitations—which is central to Plaintiffs’ theory of impact—is also
7 demonstrated in Google’s evidence. For example, one Google employee states that “[i]t’s
8 impossible to keep something like this a secret. The people getting counter offers talk, not just to
9 Googlers and ex-Googlers, but also to the competitors where they received their offers (in the
10 hopes of improving them), and those competitors talk too, using it as a tool to recruit more
11 Googlers.” ECF No. 296-23.

12 The wage structure and internal equity concerns at Google also support Plaintiffs’ theory of
13 impact. Google had many job families, many grades within job families, and many job titles within
14 grades. *See, e.g.*, ECF No. 298-7, ECF No. 298-8; *see also* Cisneros Decl., Ex. S (Brown Depo.) at
15 74-76 (discussing salary ranges utilized by Google); ECF No. 780-4 at 25-26 (testifying that
16 Google’s 2007 salary ranges had generally the same structure as the 2004 salary ranges).
17 Throughout the Class period, Google utilized salary ranges and pay bands with minima and
18 maxima and either means or medians. ECF No. 958-1 ¶ 66; *see* ECF No. 427-3 at 15-17. As
19 explained by Shona Brown (former Google Senior Vice President, Business Operations), “if you
20 discussed a specific role [at Google], you could understand that role was at a specific level on a
21 certain job ladder.” ECF No. 427-3 at 27-28; ECF No. 745-11. Frank Wagner (Google Director of
22 Compensation) testified that he could locate the target salary range for jobs at Google through an
23 internal company website. *See* ECF No. 780-4 at 31-32 (“Q: And if you wanted to identify what
24 the target salary would be for a certain job within a certain grade, could you go online or go to
25 some place . . . and pull up what that was for that job family and that grade? . . . A: Yes.”).
26 Moreover, Google considered internal equity to be an important goal. Google utilized a salary
27 algorithm in part for the purpose of “[e]nsur[ing] internal equity by managing salaries within a
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1 reasonable range.” ECF No. 814-19. Furthermore, because Google “strive[d] to achieve fairness in
2 overall salary distribution,” “high performers with low salaries [would] get larger percentage
3 increases than high performers with high salaries.” ECF No. 817-1 at 15.

4 In addition, Google analyzed and compared its equity compensation to Apple, Intel, Adobe,
5 and Intuit, among other companies, each of which it designated as a “peer company” based on
6 meeting criteria such as being a “high-tech company,” a “high-growth company,” and a “key labor
7 market competitor.” ECF No. 773-1. In 2007, based in part on an analysis of Google as compared
8 to its peer companies, Mr. Bock and Dave Rolefson (Google Equity Compensation Manager) wrote
9 that “[o]ur biggest labor market competitors are significantly exceeding their own guidelines to
10 beat Google for talent.” *Id.*

11 Finally, Google’s own documents undermine Defendants’ principal theory of lack of
12 antitrust impact, that compensation decisions would be one off and not classwide. Alan Eustace
13 (Google Senior Vice President) commented on concerns regarding competition for workers and
14 Google’s approach to counteroffers by noting that, “it sometimes makes sense to make changes in
15 compensation, even if it introduces discontinuities in your current comp, to save your best people,
16 and send a message to the hiring company that we’ll fight for our best people.” ECF No. 296-23.
17 Because recruiting “a few really good people” could inspire “many, many others [to] follow,” Mr.
18 Eustace concluded, “[y]ou can’t afford to be a rich target for other companies.” *Id.* According to
19 him, the “long-term . . . right approach is not to deal with these situations as one-off’s but to have a
20 *systematic approach* to compensation that makes it very difficult for anyone to get a better offer.”
21 *Id.* (emphasis added).

22 Google’s impact on the labor market before the anti-solicitation agreements was best
23 summarized by Meg Whitman (former CEO of eBay) who called Mr. Schmidt “to talk about
24 [Google’s] hiring practices.” ECF No. 814-15. As Eric Schmidt told Google’s senior executives,
25 Ms. Whitman said “Google is the talk of the valley because [you] are driving up salaries across the
26 board.” *Id.* A year after this conversation, Google added eBay to its do-not-cold-call list. ECF No.
27 291-28.

3. Evidence Related to Intel

1
2 There is also compelling evidence against Intel. Google reacted to requests regarding
3 enforcement of the anti-solicitation agreement made by Intel executives similarly to Google's
4 reaction to Steve Jobs' request to enforce the agreements discussed above. For example, after Paul
5 Otellini (CEO of Intel and Member of the Google Board of Directors) received an internal
6 complaint regarding Google's successful recruiting efforts of Intel's technical employees on
7 September 26, 2007, ECF No. 188-8 ("Paul, I am losing so many people to Google We are
8 countering but thought you should know."), Mr. Otellini forwarded the email to Eric Schmidt
9 (Google Executive Chairman, Member of the Board of Directors, and former CEO) and stated
10 "Eric, can you pls help here???" *Id.* Mr. Schmidt obliged and forwarded the email to his recruiting
11 team, who prepared a report for Mr. Schmidt on Google's activities. ECF No. 291-34. The next
12 day, Mr. Schmidt replied to Mr. Otellini, "If we find that a recruiter called into Intel, we will
13 terminate the recruiter," the same remedy afforded to violations of the Apple-Google agreement.
14 ECF No. 531 at 37. In another email to Mr. Schmidt, Mr. Otellini stated, "Sorry to bother you
15 again on this topic, but my guys are very troubled by Google continuing to recruit our key players."
16 *See* ECF No. 428-8.

17 Moreover, Mr. Otellini was aware that the anti-solicitation agreement could be legally
18 troublesome. Specifically, Mr. Otellini stated in an email to another Intel executive regarding the
19 Google-Intel agreement: "Let me clarify. We have nothing signed. We have a handshake 'no
20 recruit' between eric and myself. I would not like this broadly known." *Id.*

21 Furthermore, there is evidence that Mr. Otellini knew of the anti-solicitation agreements to
22 which Intel was not a party. Specifically, both Sergey Brin (Google Co-Founder) and Mr. Schmidt
23 of Google testified that they would have told Mr. Otellini that Google had an anti-solicitation
24 agreement with Apple. ECF No. 639-1 at 74:15 ("I'm sure that we would have mentioned it[.]");
25 ECF No. 819-12 at 60 ("I'm sure I spoke with Paul about this at some point."). Intel's own expert
26 testified that Mr. Otellini was likely aware of Google's other bilateral agreements by virtue of Mr.
27 Otellini's membership on Google's board. ECF No. 771 at 4. The fact that Intel was added to
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1 Google’s do-not-cold-call list on the same day that Apple was added further suggests Intel’s
2 participation in an overarching conspiracy. ECF No. 291-28.

3 Additionally, notwithstanding the fact that Intel and Google were competitors for talent,
4 Mr. Otellini “lifted from Google” a Google document discussing the bonus plans of peer
5 companies including Apple and Intel. Cisneros Decl., Ex. 463. True competitors for talent would
6 not likely share such sensitive bonus information absent agreements not to compete.

7 Moreover, key documents related to antitrust impact also implicate Intel. Specifically, Intel
8 recognized the importance of cold calling and stated in its “Complete Guide to Sourcing” that
9 “[Cold] [c]alling candidates is one of the most efficient and effective ways to recruit.” ECF No.
10 296-22. Intel also benchmarked compensation against other “tech companies generally considered
11 comparable to Intel,” which Intel defined as a “[b]lend of semiconductor, software, networking,
12 communications, and diversified computer companies.” ECF No. 754-2. According to Intel, in
13 2007, these comparable companies included Apple and Google. *Id.* These documents suggest, as
14 Plaintiffs contend, that the anti-solicitation agreements led to structural, rather than individual
15 depression, of Class members’ wages.

16 Furthermore, Intel had a “compensation structure,” with job grades and job classifications.
17 *See* ECF No. 745-13 at 73 (“[W]e break jobs into one of three categories—job families, we call
18 them—R&D, tech, and nontech, there’s a lot more . . .”). The company assigned employees to a
19 grade level based on their skills and experience. ECF No. 745-11 at 23; *see also* ECF No. 749-17 at
20 45 (explaining that everyone at Intel is assigned a “classification” similar to a job grade). Intel
21 standardized its salary ranges throughout the company; each range applied to multiple jobs, and
22 most jobs spanned multiple salary grades. ECF No. 745-16 at 59. Intel further broke down its
23 salary ranges into quartiles, and compensation at Intel followed “a bell-curve distribution, where
24 most of the employees are in the middle quartiles, and a much smaller percentage are in the bottom
25 and top quartiles.” *Id.* at 62-63.

26 Intel also used a software tool to provide guidance to managers about an employee’s pay
27 range which would also take into account market reference ranges and merit. ECF No. 758-9. As
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1 explained by Randall Goodwin (Intel Technology Development Manager), “[i]f the tool
2 recommended something and we thought we wanted to make a proposed change that was outside
3 its guidelines, we would write some justification.” ECF No. 749-15 at 52. Similarly, Intel regularly
4 ran reports showing the salary range distribution of its employees. ECF No. 749-16 at 64.

5 The evidence also supports the rigidity of Intel’s wage structure. For example, in a 2004
6 Human Resources presentation, Intel states that, although “[c]ompensation differentiation is
7 desired by Intel’s Meritocracy philosophy,” “short and long term high performer differentiation is
8 questionable.” ECF No. 758-10 at 13. Indeed, Intel notes that “[l]ack of differentiation has existed
9 historically based on an analysis of ’99 data.” *Id.* at 19. As key “[v]ulnerability [c]hallenges,” Intel
10 identifies: (1) “[m]anagers (*in*)ability to distinguish at [f]ocal”—“actual merit increases are
11 significantly reduced from system generated increases,” “[l]ong term threat to retention of key
12 players”; (2) “[l]ittle to no actual pay differentiation for HPs [high performers]”; and (3) “[n]o
13 explicit strategy to differentiate.” *Id.* at 24 (emphasis added).

14 In addition, Intel used internal equity “to determine wage rates for new hires and current
15 employees that correspond to each job’s relative value to Intel.” ECF No. 749-16 at 210-11; ECF
16 No. 961-5. To assist in that process, Intel used a tool that generates an “Internal Equity Report”
17 when making offers to new employees. ECF No. 749-16 at 212-13. In the words of Ogden Reid
18 (Intel Director of Compensation and Benefits), “[m]uch of our culture screams egalitarianism
19 While we play lip service to meritocracy, we really believe more in treating everyone the same
20 within broad bands.” ECF No. 769-8.

21 An Intel human resources document from 2002—prior to the anti-solicitation agreements—
22 recognized “continuing inequities in the alignment of base salaries/EB targets between hired and
23 acquired Intel employees” and “parallel issues relating to accurate job grading within these two
24 populations.” ECF No. 750-15. In response, Intel planned to: (1) “Review exempt job grade
25 assignments for job families with ‘critical skills.’ Make adjustments, as appropriate”; and (2)
26 “Validate perception of inequities Scope impact to employees. Recommend adjustments, as
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1 appropriate.” *Id.* An Intel human resources document confirms that, in or around 2004, “[n]ew hire
2 salary premiums *drove* salary range adjustment.” ECF No. 298-5 at 7 (emphasis added).

3 Intel would “match an Intel job code in grade to a market survey job code in grade,” ECF
4 No. 749-16 at 89, and use that as part of the process for determining its “own focal process or pay
5 delivery,” *id.* at 23. If job codes fell below the midpoint, plus or minus a certain percent, the
6 company made “special market adjustment[s].” *Id.* at 90.

7 **4. Evidence Related to Adobe**

8 Evidence from Adobe also suggests that Adobe was aware of the impact of its anti-
9 solicitation agreements. Adobe personnel recognized that “Apple would be a great target to look
10 into” for the purpose of recruiting, but knew that they could not do so because, “[u]nfortunately,
11 Bruce [Chizen (former Adobe CEO)] and Apple CEO Steve Jobs have a gentleman’s agreement
12 not to poach each other’s talent.” ECF No. 291-13. Adobe executives were also part and parcel of
13 the group of high-ranking executives that entered into, enforced, and attempted to expand the anti-
14 solicitation agreements. Specifically, Mr. Chizen, in response to discovering that Apple was
15 recruiting employees of Macromedia (a separate entity that Adobe would later acquire), helped
16 ensure, through an email to Mr. Jobs, that Apple would honor Apple’s pre-existing anti-solicitation
17 agreements with both Adobe and Macromedia after Adobe’s acquisition of Macromedia. ECF No.
18 608-3 at 50.

19 Adobe viewed Google and Apple to be among its top competitors for talent and expressed
20 concern about whether Adobe was “winning the talent war.” ECF No. 296-3. Adobe further
21 considered itself in a “six-horse race from a benefits standpoint,” which included Google, Apple,
22 and Intuit as among the other “horses.” *See* ECF No. 296-4. In 2008, Adobe benchmarked its
23 compensation against nine companies including Google, Apple, and Intel. ECF No. 296-4; *cf.* ECF
24 No. 652-6 (showing that, in 2010, Adobe considered Intuit to be a “direct peer,” and considered
25 Apple, Google, and Intel to be “reference peers,” though Adobe did not actually benchmark
26 compensation against these latter companies).

1 Nevertheless, despite viewing other Defendants as competitors, evidence from Adobe
2 suggests that Adobe had knowledge of the bilateral agreements to which Adobe was not a party.
3 Specifically, Adobe shared confidential compensation information with other Defendants, despite
4 the fact that Adobe viewed at least some of the other Defendants as competitors and did not have a
5 bilateral agreement with them. For example, HR personnel at Intuit and at Adobe exchanged
6 information labeled “confidential” regarding how much compensation each firm would give and to
7 which employees that year. ECF No. 652-8. Adobe and Intuit shared confidential compensation
8 information even though the two companies had no bilateral anti-solicitation agreement, and
9 Adobe viewed Intuit as a direct competitor for talent. Such direct competitors for talent would not
10 likely share such sensitive compensation information in the absence of an overarching conspiracy.

11 Meanwhile, Google circulated an email that expressly discussed how its “budget is
12 comparable to other tech companies” and compared the precise percentage of Google’s merit
13 budget increases to that of Adobe, Apple, and Intel. ECF No. 807-13. Google had Adobe’s precise
14 percentage of merit budget increases even though Google and Adobe had no bilateral anti-
15 solicitation agreement. Such sharing of sensitive compensation information among competitors is
16 further evidence of an overarching conspiracy.

17 Adobe recognized that in the absence of the anti-solicitation agreements, pay increases
18 would be necessary, echoing Plaintiffs’ theory of impact. For example, out of concern that one
19 employee—a “star performer” due to his technical skills, intelligence, and collaborative abilities—
20 might leave Adobe because “he could easily get a great job elsewhere if he desired,” Adobe
21 considered how best to retain him. ECF No. 799-22. In so doing, Adobe expressed concern about
22 the fact that this employee had already interviewed with four other companies and communicated
23 with friends who worked there. *Id.* Thus, Adobe noted that the employee “was aware of his value
24 in the market” as well as the fact that the employee’s friends from college were “making
25 approximately \$15k more per year than he [wa]s.” *Id.* In response, Adobe decided to give the
26 employee an immediate pay raise. *Id.*

1 Plaintiffs' theory of impact is also supported by evidence that every job position at Adobe
2 was assigned a job title, and every job title had a corresponding salary range within Adobe's salary
3 structure, which included a salary minimum, middle, and maximum. *See* ECF No. 804-17 at 4, 8,
4 72, 85-86. Adobe expected that the distribution of its existing employees' salaries would fit "a bell
5 curve." ECF No. 749-5 at 57. To assist managers in staying within the prescribed ranges for setting
6 and adjusting salaries, Adobe had an online salary planning tool as well as salary matrices, which
7 provided managers with guidelines based on market salary data. *See* ECF No. 804-17 at 29-30
8 ("[E]ssentially the salary planning tool is populated with employee information for a particular
9 manager, so the employees on their team [sic]. You have the ability to kind of look at their current
10 compensation. It shows them what the range is for the current role that they're in The tool also
11 has the ability to provide kind of the guidelines that we recommend in terms of how managers
12 might want to think about spending their allocated budget."). Adobe's practice, if employees were
13 below the minimum recommended salary range, was to "adjust them to the minimum as part of the
14 annual review" and "red flag them." *Id.* at 12. Deviations from the salary ranges would also result
15 in conversations with managers, wherein Adobe's officers explained, "we have a minimum for a
16 reason because we believe you need to be in this range to be competitive." *Id.*

17 Internal equity was important at Adobe, as it was at other Defendants. As explained by
18 Debbie Streeter (Adobe Vice President, Total Rewards), Adobe "always look[ed] at internal equity
19 as a data point, because if you are going to go hire somebody externally that's making . . . more
20 than somebody who's an existing employee that's a high performer, you need to know that before
21 you bring them in." ECF No. 749-5 at 175. Similarly, when considering whether to extend a
22 counteroffer, Adobe advised "internal equity should ALWAYS be considered." ECF No. 746-7 at
23 5.

24 Moreover, Donna Morris (Adobe Senior Vice President, Global Human Resources
25 Division) expressed concern "about internal equity due to compression (the market driving pay for
26 new hires above the current employees)." ECF No. 298-9 ("Reality is new hires are requiring base
27 pay at or above the midpoint due to an increasingly aggressive market."). Adobe personnel stated
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1 that, because of the fixed budget, they may not be able to respond to the problem immediately “but
2 could look at [compression] for FY2006 if market remains aggressive.”¹² *Id.*

3 **D. Weaknesses in Plaintiffs’ Case**

4 Plaintiffs contend that though this evidence is compelling, there are also weaknesses in
5 Plaintiffs’ case that make trial risky. Plaintiffs contend that these risks are substantial. Specifically,
6 Plaintiffs point to the following challenges that they would have faced in presenting their case to a
7 jury: (1) convincing a jury to find a single overarching conspiracy among the seven Defendants in
8 light of the fact that several pairs of Defendants did not have anti-solicitation agreements with each
9 other; (2) proving damages in light of the fact that Defendants intended to present six expert
10 economists that would attack the methodology of Plaintiffs’ experts; and (3) overcoming the fact
11 that Class members’ compensation has increased in the last ten years despite a sluggish economy
12 and overcoming general anti-tech worker sentiment in light of the perceived and actual wealth of
13 Class members. Plaintiffs also point to outstanding legal issues, such as the pending motions in
14 limine and the pending motion to determine whether the per se or rule of reason analysis should
15 apply, which could have aided Defendants’ ability to present a case that the bilateral agreements
16 had a pro-competitive purpose. *See* ECF No. 938 at 10-14.

17 The Court recognizes that Plaintiffs face substantial risks if they proceed to trial.
18 Nonetheless, the Court cannot, in light of the evidence above, conclude that the instant settlement
19 amount is within the range of reasonableness, particularly compared to the settlements with the
20 Settled Defendants and the subsequent development of the litigation. The Court further notes that
21 there is evidence in the record that mitigate at least some of the weaknesses in Plaintiffs’ case.

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24 ¹² Adobe also benchmarked compensation off external sources, which supports Plaintiffs’ theory of
25 Class-wide impact and undermines Defendants’ theory that the anti-solicitation agreements had
26 only one off, non-structural effects. For example, Adobe pegged its compensation structure as a
27 “percentile” of average market compensation according to survey data from companies such as
28 Radford. ECF No. 804-17 at 4. Mr. Chizen explained that the particular market targets that Adobe
used as benchmarks for setting salary ranges “tended to be software, high-tech, those that were
geographically similar to wherever the position existed.” ECF No. 962-7 at 22. This demonstrated
that the salary structures of the various Defendants were linked, such that the effect of one
Defendant’s salary structure would ripple across to the other Defendants through external sources
like Radford.

1 As to proving an overarching conspiracy, several pieces of evidence undermine
2 Defendants' contentions that the bilateral agreements were unrelated to each other. Importantly,
3 two individuals, Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) and Bill
4 Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to
5 Google), personally entered into or facilitated each of the bilateral agreements in this case.
6 Specifically, Mr. Jobs and George Lucas (former Chairman and CEO of Lucasfilm), created the
7 initial anti-solicitation agreement between Lucasfilm and Pixar when Mr. Jobs was an executive at
8 Pixar. Thereafter, Apple, under the leadership of Mr. Jobs, entered into an agreement with Pixar,
9 which, as discussed below, Pixar executives compared to the Lucasfilm-Pixar agreement. It was
10 Mr. Jobs again, who, as discussed above, reached out to Sergey Brin (Google Co-Founder) and
11 Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and former CEO)
12 to create the Apple-Google agreement. This agreement was reached with the assistance of Mr.
13 Campbell, who was Intuit's Board Chairman, a friend of Mr. Jobs, and an advisor to Google. The
14 Apple-Google agreement was discussed at Google Board meetings, at which both Mr. Campbell
15 and Paul Otellini (Chief Executive Officer of Intel and Member of the Google Board of Directors)
16 were present. ECF No. 819-10 at 47. After discussions between Mr. Brin and Mr. Otellini and
17 between Mr. Schmidt and Mr. Otellini, Intel was added to Google's do-not-cold-call list. Mr.
18 Campbell then used his influence at Google to successfully lobby Google to add Intuit, of which
19 Mr. Campbell was Chairman of the Board of Directors, to Google's do-not-cold-call list. *See* ECF
20 No. 780-6 at 8-9. Moreover, it was a mere two months after Mr. Jobs entered into the Apple-
21 Google agreement that Apple pressured Bruce Chizen (former CEO of Adobe) to enter into an
22 Apple-Adobe agreement. ECF No. 291-17. As this discussion demonstrates, Mr. Jobs and Mr.
23 Campbell were the individuals most closely linked to the formation of each step of the alleged
24 conspiracy, as they were present in the process of forming each of the links.

25 In light of the overlapping nature of this small group of executives who negotiated and
26 enforced the anti-solicitation agreements, it is not surprising that these executives knew of the other
27 bilateral agreements to which their own firms were not a party. For example, both Mr. Brin and
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1 Mr. Schmidt of Google testified that they would have told Mr. Otellini of Intel that Google had an
2 anti-solicitation agreement with Apple. ECF No. 639-1 at 74:15 (“I’m sure we would have
3 mentioned it[.]”); ECF No. 819-12 at 60 (“I’m sure I spoke with Paul about this at some point.”).
4 Intel’s own expert testified that Mr. Otellini was likely aware of Google’s other bilateral
5 agreements by virtue of Mr. Otellini’s membership on Google’s board. ECF No. 771 at 4.
6 Moreover, Google recruiters knew of the Adobe-Apple agreement. *Id.* (Google recruiter’s notation
7 that Apple has “a serious ‘hands-off’ policy with Adobe”). In addition, Mr. Schmidt of Google
8 testified that it would be “fair to extrapolate” based on Mr. Schmidt’s knowledge of Mr. Jobs, that
9 Mr. Jobs “would have extended [anti-solicitation agreements] to others.” ECF No. 638-8 at 170.
10 Furthermore, it was this same mix of top executives that successfully and unsuccessfully attempted
11 to expand the agreement to other companies in Silicon Valley, such as eBay, Facebook,
12 Macromedia, and Palm, as discussed above, suggesting that the agreements were neither isolated
13 nor one off agreements.

14 In addition, the six bilateral agreements contained nearly identical terms, precluding each
15 pair of Defendants from affirmatively soliciting any of each other’s employees. ECF No. 531 at 30.
16 Moreover, as discussed above, Defendants recognized the similarity of the agreements. For
17 example, Google lumped together Apple, Intel, and Intuit on Google’s “do-not-cold-call” list.
18 Furthermore, Google’s “do-not-cold-call” list stated that the Apple-Google agreement and the
19 Intel-Google agreement commenced on the same date. Finally, in an email, Lori McAdams (Pixar
20 Vice President of Human Resources and Administration), explicitly compared the anti-solicitation
21 agreements, stating that “effective now, we’ll follow a gentleman’s agreement with Apple that is
22 similar to our Lucasfilm agreement.” ECF No. 531 at 26.

23 As to the contention that Plaintiffs would have to rebut Defendants’ contentions that the
24 anti-solicitation agreements aided collaborations and were therefore pro-competitive, there is no
25 documentary evidence that links the anti-solicitation agreements to any collaboration. None of the
26 documents that memorialize collaboration agreements mentions the broad anti-solicitation
27 agreements, and none of the documents that memorialize broad anti-solicitation agreements

1 mentions collaborations. Furthermore, even Defendants' experts conceded that those closest to the
2 collaborations did not know of the anti-solicitation agreements. ECF No. 852-1 at 8. In addition,
3 Defendants' top executives themselves acknowledge the lack of any collaborative purpose. For
4 example, Mr. Chizen of Adobe admitted that the Adobe-Apple anti-solicitation agreement was "not
5 limited to any particular projects on which Apple and Adobe were collaborating." ECF No. 962-7
6 at 42. Moreover, the U.S. Department of Justice ("DOJ") also determined that the anti-solicitation
7 agreements "were not ancillary to any legitimate collaboration," "were broader than reasonably
8 necessary for the formation or implementation of any collaborative effort," and "disrupted the
9 normal price-setting mechanisms that apply in the labor setting." ECF No. 93-1 ¶ 16; ECF No. 93-
10 4 ¶ 7. The DOJ concluded that Defendants entered into agreements that were restraints of trade that
11 were per se unlawful under the antitrust laws. ECF No. 93-1 ¶ 35; ECF No. 93-4 ¶ 3. Thus, despite
12 the fact that Defendants have claimed since the beginning of this litigation that there were pro-
13 competitive purposes related to collaborations for the anti-solicitation agreements and despite the
14 fact that the purported collaborations were central to Defendants' motions for summary judgment,
15 Defendants have failed to produce persuasive evidence that these anti-solicitation agreements
16 related to collaborations or were pro-competitive.

17 **IV. CONCLUSION**

18 This Court has lived with this case for nearly three years, and during that time, the Court
19 has reviewed a significant number of documents in adjudicating not only the substantive motions,
20 but also the voluminous sealing requests. Having done so, the Court cannot conclude that the
21 instant settlement falls within the range of reasonableness. As this Court stated in its summary
22 judgment order, there is ample evidence of an overarching conspiracy between the seven
23 Defendants, including "[t]he similarities in the various agreements, the small number of
24 intertwining high-level executives who entered into and enforced the agreements, Defendants'
25 knowledge about the other agreements, the sharing and benchmarking of confidential
26 compensation information among Defendants and even between firms that did not have bilateral
27 anti-solicitation agreements, along with Defendants' expansion and attempted expansion of the
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1 anti-solicitation agreements.” ECF No. 771 at 7-8. Moreover, as discussed above and in this
2 Court’s class certification order, the evidence of Defendants’ rigid wage structures and internal
3 equity concerns, along with statements from Defendants’ own executives, are likely to prove
4 compelling in establishing the impact of the anti-solicitation agreements: a Class-wide depression
5 of wages.

6 In light of this evidence, the Court is troubled by the fact that the instant settlement with
7 Remaining Defendants is proportionally lower than the settlements with the Settled Defendants.
8 This concern is magnified by the fact that the case evolved in Plaintiffs’ favor since those
9 settlements. At the time those settlements were reached, Defendants still could have defeated class
10 certification before this Court, Defendants still could have successfully sought appellate review and
11 reversal of any class certification, Defendants still could have prevailed on summary judgment, or
12 Defendants still could have succeeded in their attempt to exclude Plaintiffs’ principal expert. In
13 contrast, the instant settlement was reached a mere month before trial was set to commence and
14 after these opportunities for Defendants had evaporated. While the unpredictable nature of trial
15 would have undoubtedly posed challenges for Plaintiffs, the exposure for Defendants was even
16 more substantial, both in terms of the potential of more than \$9 billion in damages and in terms of
17 other collateral consequences, including the spotlight that would have been placed on the evidence
18 discussed in this Order and other evidence and testimony that would have been brought to light.
19 The procedural history and proximity to trial should have increased, not decreased, Plaintiffs’
20 leverage from the time the settlements with the Settled Defendants were reached a year ago.

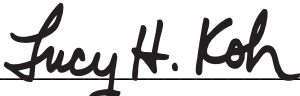
21 The Court acknowledges that Class counsel have been zealous advocates for the Class and
22 have funded this litigation themselves against extraordinarily well-resourced adversaries.
23 Moreover, there very well may be weaknesses and challenges in Plaintiffs’ case that counsel
24 cannot reveal to this Court. Nonetheless, the Court concludes that the Remaining Defendants
25 should, at a minimum, pay their fair share as compared to the Settled Defendants, who resolved
26 their case with Plaintiffs at a stage of the litigation where Defendants had much more leverage over
27 Plaintiffs.

1 For the foregoing reasons, the Court DENIES Plaintiffs' Motion for Preliminary Approval
2 of the settlements with Remaining Defendants. The Court further sets a Case Management
3 Conference for September 10, 2014 at 2 p.m.

4 **IT IS SO ORDERED.**

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Dated: August 8, 2014



LUCY H. KOH
United States District Judge

United States District Court
For the Northern District of California

**JUNE 19, 2014 HEARING
TRANSCRIPT**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE) C-11-02509 LHK
ANTITRUST LITIGATION,)
) SAN JOSE, CALIFORNIA
)
) JUNE 19, 2014
THIS DOCUMENT RELATES TO:)
ALL ACTIONS) PAGES 1-76

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

FOR THE PLAINTIFFS: JOSEPH SAVERI LAW FIRM
BY: JOSEPH SAVERI
255 CALIFORNIA STREET, SUITE 450
SAN FRANCISCO, CALIFORNIA 94111

LIEFF, CABRASER,
HEIMANN & BERNSTEIN
BY: KELLY M. DERMODY
BRENDAN P. GLACKIN
DEAN M. HARVEY
275 BATTERY STREET, 30TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

APPEARANCES CONTINUED ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

UNITED STATES COURT REPORTERS

1 SAN JOSE, CALIFORNIA JUNE 19, 2014
2 PROCEEDINGS
01:50PM 3 (COURT CONVENED AT 1:50 P.M.)
01:50PM 4 THE CLERK: CALLING CASE NUMBER C-11-02509 LHK, IN
01:50PM 5 RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION.
01:50PM 6 MS. DERMODY: GOOD AFTERNOON, YOUR HONOR.
01:50PM 7 KELLY DERMODY FROM LEIFF CABRASER. WITH ME ARE MY PARTNERS,
01:50PM 8 BRENDAN GLACKIN AND DEAN HARVEY.
01:50PM 9 MR. SAVERI: GOOD AFTERNOON, YOUR HONOR.
01:50PM 10 JOSEPH SAVERI.
01:51PM 11 MR. GIRARD: GOOD AFTERNOON. I'M DAN GIRARD
01:51PM 12 APPEARING FOR CLASS REPRESENTATIVE MICHAEL DEVINE.
01:51PM 13 THE COURT: OKAY.
01:51PM 14 MR. VAN NEST: GOOD AFTERNOON, YOUR HONOR.
01:51PM 15 BOB VAN NEST, KEKER & VAN NEST, HERE FOR GOOGLE, AND I'M HERE
01:51PM 16 WITH JUSTINA SESSIONS.
01:51PM 17 THE COURT: OKAY.
01:51PM 18 MR. RILEY: GOOD AFTERNOON, YOUR HONOR. GEORGE RILEY
01:51PM 19 OF O'MELVENY & MYERS. I REPRESENT APPLE. I'M HERE WITH MY
01:51PM 20 COLLEAGUE, CHRISTINA BROWN.
01:51PM 21 MS. KAHN: GOOD AFTERNOON. LIN KAHN FROM JONES DAY
01:51PM 22 ON BEHALF OF ADOBE.
01:51PM 23 MR. PERRY: AND STEVE PERRY FROM MUNGER TOLLES FOR
01:51PM 24 INTEL.
01:51PM 25 THE COURT: OKAY. GOOD AFTERNOON TO EVERYONE AND
UNITED STATES COURT REPORTERS

1 APPEARANCES (CONTINUED)
2 FOR THE PLAINTIFFS: JOSEPH SAVERI LAW FIRM
3 BY: JOSEPH R. SAVERI
4 505 MONTGOMERY STREET, SUITE 625
5 SAN FRANCISCO, CALIFORNIA 94111
6 FOR DEFENDANT KEKER & VAN NEST
7 GOOGLE: BY: ROBERT A. VAN NEST
8 JUSTINA K. SESSIONS
9 633 BATTERY STREET
10 SAN FRANCISCO, CALIFORNIA 94111
11 FOR DEFENDANT O'MELVENY & MYERS
12 APPLE: BY: GEORGE A. RILEY
13 CHRISTINA BROWN
14 TWO EMBARCADERO CENTER
15 28TH FLOOR
16 SAN FRANCISCO, CALIFORNIA 94111
17 FOR DEFENDANTS JONES DAY
18 ADOBE: BY: LIN W. KAHN
19 555 CALIFORNIA STREET, 26TH FLOOR
20 SAN FRANCISCO, CALIFORNIA 94104
21 FOR DEFENDANT MUNGER, TOLLES & OLSEN
22 INTEL: BY: STEVEN M. PERRY
23 355 SOUTH GRAND AVENUE, 35TH FLOOR
24 LOS ANGELES, CALIFORNIA 90071
25 FOR MICHAEL DEVINE: GIRARD GIBBS
BY: DANIEL C. GIRARD
601 CALIFORNIA STREET, 14TH FLOOR
SAN FRANCISCO, CALIFORNIA 94108

UNITED STATES COURT REPORTERS

01:51PM 1 WELCOME.
01:51PM 2 HOW MANY OPT OUTS TO THE LITIGATION CLASS WERE --
01:51PM 3 MS. DERMODY: YOUR HONOR, WE CAN GET THAT NUMBER FOR
01:51PM 4 YOU. IT WAS NOT VERY MANY.
01:51PM 5 THE COURT: OKAY. HOW MANY OPT OUTS WERE THERE TO
01:52PM 6 THE LUCASFILM/PIXAR SETTLEMENT?
01:52PM 7 MS. DERMODY: I THINK IT WAS 160, SOMEWHERE IN THERE,
01:52PM 8 155 OR SOMETHING LIKE THAT, YOUR HONOR. IT WAS IN YOUR ORDER.
01:52PM 9 AND THERE WERE NOT THAT MANY MORE THAT WERE JUST
01:52PM 10 LITIGATION. IT WAS DE MINIMIS.
01:52PM 11 THE COURT: OKAY. WHAT ABOUT FOR INTUIT CLASS? ARE
01:52PM 12 THOSE --
01:52PM 13 MS. DERMODY: I MEAN ALL TOGETHER.
01:52PM 14 THE COURT: IF I REMEMBER, THOSE WERE THE SAME.
01:52PM 15 MS. DERMODY: YES.
01:52PM 16 THE COURT: THEY OPTED OUT OF BOTH. BUT DID THEY
01:52PM 17 ALSO OPT OUT OF THE LITIGATION CLASS SIMULTANEOUSLY, OR NOT?
01:52PM 18 MS. DERMODY: THERE WERE SOME THAT DID. IT WAS KIND
01:52PM 19 OF A MIX, DIFFERENT BUCKETS. THERE WERE MOSTLY PEOPLE THAT IF
01:52PM 20 THEY OPTED OUT, THEY OPTED OUT OF THE SETTLEMENTS OF THE PIXAR,
01:52PM 21 LUCAS, AND INTUIT, AND THEN THERE WERE SOME ADDITIONAL ONES
01:52PM 22 THAT OPTED OUT OF THE LITIGATION THAT WAS ONGOING.
01:52PM 23 THE COURT: SO YOU DON'T KNOW THE NUMBER OF THE
01:52PM 24 LITIGATION OPT OUTS AT THIS TIME?
01:52PM 25 MS. DERMODY: ONLY THAT IT WAS RELATIVELY NOT THAT

UNITED STATES COURT REPORTERS

01:52PM **1** MANY MORE PEOPLE, YOUR HONOR. IT WAS A SMALL NUMBER OF PEOPLE.
 01:52PM **2** MAYBE YOU ALL REMEMBER IT BETTER THAN I DO, BUT IT WAS
 01:52PM **3** TOTAL --
 01:52PM **4** THE COURT: DOES ANYBODY KNOW?
 01:52PM **5** MS. DERMODY: TOTAL OPT OUTS? IT WAS IN THE LOW
 01:53PM **6** HUNDREDS. WE CAN GET THAT RIGHT NOW.
 01:53PM **7** THE COURT: IS THAT GOING TO COUNT TOWARDS THE 4
 01:53PM **8** PERCENT OPT OUTS?
 01:53PM **9** MS. DERMODY: IT'S NOT, YOUR HONOR, NO. THIS WOULD
 01:53PM **10** BE 4 PERCENT ON TOP OF WHAT HAS ALREADY BEEN AN OPT OUT NUMBER.
 01:53PM **11** AND GIVEN THE --
 01:53PM **12** THE COURT: I GUESS I DON'T UNDERSTAND. 4 PERCENT ON
 01:53PM **13** TOP OF IT --
 01:53PM **14** MS. DERMODY: SO THERE ARE SOME PEOPLE THAT ARE NO
 01:53PM **15** LONGER IN THE CLASS BECAUSE THEY'VE OPTED OUT. AS THE CASE IS
 01:53PM **16** CURRENTLY COMPOSED, THOSE PEOPLE DO NOT EXIST IN THE CASE
 01:53PM **17** ANYMORE.
 01:53PM **18** THE COURT: UM-HUM.
 01:53PM **19** MS. DERMODY: THE PRO RATA REDUCTION THAT YOU SAW,
 01:53PM **20** YOUR HONOR, IN THE SETTLEMENT AGREEMENT WOULD ONLY KICK IN IF
 01:53PM **21** THEY KNEW 4 PERCENT, SOMETHING IN EXCESS OF 2500 PEOPLE NOW, IN
 01:53PM **22** ADDITION, OPTED OUT.
 01:53PM **23** SO IT WOULD BE A SIGNIFICANTLY LARGER, EXPONENTIALLY
 01:53PM **24** LARGER NUMBER OF PEOPLE THAN OPTED OUT THE FIRST TIME.
 01:53PM **25** THE COURT: YOU KNOW, THE SETTLEMENT WITH LUCASFILM,

UNITED STATES COURT REPORTERS

01:55PM **1** SETTLEMENT?
 01:55PM **2** MS. DERMODY: THERE WAS A --
 01:55PM **3** THE COURT: I DON'T HAVE THAT.
 01:55PM **4** MS. DERMODY: IT'S IN THE SETTLEMENT AGREEMENT, YOUR
 01:55PM **5** HONOR. WE CAN PULL IT UP.
 01:55PM **6** THE CONCEPT OF THERE BEING A PRO RATA REDUCTION FOR A
 01:55PM **7** CERTAIN NUMBER OF OPT OUTS AND THE CONCEPT OF THERE BEING A
 01:55PM **8** TERMINATION POSSIBILITY WITH A CERTAIN NUMBER OF OPT OUTS WAS
 01:55PM **9** SOMETHING THAT HAPPENED IN THE PRIOR SETTLEMENT AGREEMENTS.
 01:55PM **10** THE COURT: OH, OKAY. CAN I SEE THAT? BECAUSE I'M
 01:55PM **11** SORRY, I DON'T RECALL THAT.
 01:55PM **12** MS. DERMODY: YES, YOUR HONOR. WE'LL FIND THAT FOR
 01:55PM **13** YOU. I'M AFRAID I DON'T HAVE IT IN FRONT OF ME. I DIDN'T
 01:56PM **14** BRING THAT WITH ME TODAY.
 01:56PM **15** THE COURT: OKAY.
 01:56PM **16** MS. DERMODY: BUT WE'LL LOCATE IT.
 01:56PM **17** THE COURT: OKAY.
 01:56PM **18** MS. DERMODY: AND IF IT WOULD HELP YOUR HONOR --
 01:56PM **19** THE COURT: IS PARVES SYED MOHAMED OBJECTING? I KNOW
 01:56PM **20** YOU HAD A FOOTNOTE IN YOUR MOTION THAT YOU DIDN'T THINK THAT HE
 01:56PM **21** WAS. WHAT DID YOU BASE THAT ON?
 01:56PM **22** MS. DERMODY: A CONVERSATION WITH HIM, YOUR HONOR.
 01:56PM **23** AT THE TIME THAT WE -- AFTER WE REVIEWED THAT LETTER, WE SPOKE
 01:56PM **24** WITH HIM. IT WAS OUR UNDERSTANDING THAT HE HAD AN INTENT TO
 01:56PM **25** WITHDRAW THAT OBJECTION.

UNITED STATES COURT REPORTERS

01:53PM **1** PIXAR, AND INTUIT DIDN'T HAVE THIS 4 PERCENT REVERTER. WHY --
 01:54PM **2** IN SOME SENSES, LUCASFILM AND PIXAR, AS WELL AS INTUIT, ARE
 01:54PM **3** PAYING MORE OF THEIR -- A HIGHER PROPORTION OF THEIR LIABILITY
 01:54PM **4** THAN GOOGLE, APPLE, INTEL, AND ADOBE. WHY IS THAT?
 01:54PM **5** MS. DERMODY: THERE WAS A PRO RATA REDUCTION THAT
 01:54PM **6** WOULD KICK IN THAT WAS SET FORTH IN THOSE OTHER SETTLEMENT
 01:54PM **7** AGREEMENTS. IT WAS A -- I THINK IT WAS 10 PERCENT OR SOMETHING
 01:54PM **8** IN PIXAR, LUCAS, AND INTUIT. SO THE CONCEPT EXISTED IN THE
 01:54PM **9** PRIOR SETTLEMENT AGREEMENTS.
 01:54PM **10** HERE WE -- IT JUST WAS DIFFERENT DEFENDANTS, DIFFERENT
 01:54PM **11** NEGOTIATIONS, DIFFERENT TERMS THAT WERE BEING DISCUSSED.
 01:54PM **12** AND SO WE HAD THE SAME CONCEPT, THAT THERE BE SOME NUMBER
 01:54PM **13** OF PEOPLE -- THERE WAS SOME PRICE POINT AT WHICH, FOR THE
 01:54PM **14** DEFENDANTS TO HAVE TO PAY, FROM THEIR POINT OF VIEW, HAVE TO
 01:54PM **15** PAY INTO A CLASS FUND WHILE LEAVING OPEN THE LIABILITY OF
 01:54PM **16** THOUSANDS OF PEOPLE SEEMED TO BE, AS THEY EXPRESSED IT,
 01:54PM **17** SOMETHING THAT SHOULD BE ACCOUNTED FOR.
 01:55PM **18** SO IT WOULDN'T BE LESS CONSIDERATION TO THE CLASS. IT
 01:55PM **19** WOULD BE JUST A PRO RATA REDUCTION THAT WOULD KICK IN. THE
 01:55PM **20** SAME NUMBER OF PEOPLE WOULD HAVE THE SAME NET RESULT OF THE
 01:55PM **21** CASE IF YOU HIT A CERTAIN THRESHOLD, AGAIN, ONE THAT I, AS
 01:55PM **22** CLASS COUNSEL, DON'T THINK WILL BE REACHED, BUT WHICH IS KIND
 01:55PM **23** OF A BACKSTOP FOR THE DEFENDANTS IN THE EVENT THAT IT IS.
 01:55PM **24** THE COURT: OKAY. I'M UNCLEAR. YOU'RE SAYING THERE
 01:55PM **25** WAS A 10 PERCENT REVERTER IN THE LUCASFILM, PIXAR, AND INTUIT

UNITED STATES COURT REPORTERS

01:56PM **1** TO DATE THAT HASN'T HAPPENED. I DON'T KNOW WHETHER OR NOT
 01:56PM **2** HE CONTINUES TO WANT TO WITHDRAW THAT OBJECTION OR CONTINUES TO
 01:56PM **3** WANT TO SAY THAT HE WANTS THERE TO BE MORE MONEY IN THE
 01:56PM **4** SETTLEMENT. I'M NOT SURE EITHER WAY.
 01:56PM **5** THE COURT: OKAY. AND IS MR. MOHAMMED HERE TODAY?
 01:56PM **6** ALL RIGHT. LET ME GIVE MR. GIRARD AN OPPORTUNITY TO
 01:56PM **7** RESPOND TO THE PLAINTIFFS' REPLY.
 01:57PM **8** I'D ALSO LIKE TO ASK WHETHER MR. DEVINE ACTUALLY SENT THAT
 01:57PM **9** MAY 11, 2014 LETTER TO THE COURT, BECAUSE I NEVER GOT IT. DO
 01:57PM **10** YOU KNOW IF HE ACTUALLY SENT IT?
 01:57PM **11** MR. GIRARD: I DO NOT KNOW THE ANSWER TO THAT
 01:57PM **12** QUESTION AS TO WHETHER IT WAS ACTUALLY SENT. I BELIEVE IT WAS
 01:57PM **13** FROM SPEAKING WITH HIM. AND IF YOU'D LIKE TO SEE IT, WE WILL
 01:57PM **14** PRODUCE IT TO THE COURT.
 01:57PM **15** WE HAVE TALKED WITH MR. DEVINE AT LENGTH AND COUNSELLED
 01:57PM **16** HIM ON THE ISSUES SURROUNDING THE APPROVAL OF CLASS ACTION
 01:57PM **17** SETTLEMENTS, AND THE OPPOSITION TO THE MOTION FOR PRELIMINARY
 01:57PM **18** APPROVAL THAT WAS FILED ON HIS BEHALF REFLECTS HIS POSITION IN
 01:57PM **19** OPPOSITION AND IT SUPERSEDES THE LETTER.
 01:57PM **20** SO THESE ARE THE ARGUMENTS THAT HE IS ELECTING TO PUT
 01:57PM **21** FORWARD IN OPPOSITION TO THE SETTLEMENT, AND I'M PREPARED TO
 01:57PM **22** SPEAK TO THOSE IF THIS IS THE RIGHT TIME FOR THAT.
 01:57PM **23** THE COURT: YES. I WOULD LIKE TO HEAR YOUR RESPONSE
 01:57PM **24** TO THE PLAINTIFFS' REPLY.
 01:57PM **25** MR. GIRARD: SURE.

UNITED STATES COURT REPORTERS

01:57PM **1** THE COURT: OKAY.

01:57PM **2** MR. GIRARD: SO TO START WITH, THE ARGUMENT IS MADE

01:58PM **3** THAT THE SETTLEMENT IS LARGE, PUT IT THAT WAY, \$324.5 MILLION,

01:58PM **4** AND IT IS INDISPUTABLY A VERY LARGE AMOUNT OF MONEY.

01:58PM **5** THE PERSPECTIVE THAT MR. DEVINE IS APPROACHING IS HIS

01:58PM **6** PERSPECTIVE AS AN INDIVIDUAL. IT'S NOT LOOKING BACK AND

01:58PM **7** SAYING, "IS IT OR ISN'T IT A BIG AMOUNT OF MONEY?"

01:58PM **8** HIS PERSPECTIVE IS THAT WHAT THIS REPRESENTS FOR HIM IS

01:58PM **9** AROUND \$3500 TO \$3600, AND FOR THAT PRICE, IF YOU ASKED HIM,

01:58PM **10** "WOULD YOU BE WILLING TO GIVE THE DEFENDANTS THE RIGHT TO

01:58PM **11** MANIPULATE THE MARKET FOR THE SERVICES HE PROVIDES FOR FOUR

01:58PM **12** YEARS FOR \$3600, OR WOULD YOU PREFER TO TAKE YOUR CHANCES,

01:58PM **13** KNOWING THAT YOU MIGHT LOSE THAT MONEY, BUT YOU MIGHT ALSO GET

01:58PM **14** A LOT MORE?"

01:58PM **15** AND SPECIFICALLY HERE WE THINK THAT IF THE PLAINTIFFS WIN

01:58PM **16** UNDER THEIR MODEL, THAT LOT MORE IS \$144,000, APPROXIMATELY.

01:59PM **17** I THINK, IF HE'S RATIONAL, HIS ANSWER -- AND HE IS -- AND

01:59PM **18** HIS ANSWER IS, "WHAT ARE MY CHANCES? ARE MY CHANCES 97 AND A

01:59PM **19** HALF PERCENT THAT I WILL DO WORSE THAN THIS \$3600?"

01:59PM **20** AND HE SAYS, "GIVEN THOSE ODDS, I DON'T THINK SO. I'LL

01:59PM **21** TAKE MY CHANCES ON AN INDIVIDUAL LEVEL."

01:59PM **22** AND HE'S HERE SPEAKING FOR THAT PERSPECTIVE, WHICH IS THAT

01:59PM **23** HE'S PREPARED TO PUT THIS AMOUNT OF MONEY AT RISK BECAUSE THE

01:59PM **24** AMOUNT THAT HE GETS SPECIFICALLY INDIVIDUALLY, NOTWITHSTANDING

01:59PM **25** HOW BIG THE SETTLEMENT IS, IS INSUFFICIENT, IN HIS MIND, IN

UNITED STATES COURT REPORTERS

01:59PM **1** RELATION TO WHAT HE STANDS TO GAIN IF THIS CASE GOES FORWARD.

01:59PM **2** NOW, IT'S TRUE THAT THE AMOUNT OF MONEY THAT COUNSEL

01:59PM **3** OBTAINED -- AND TO BE CLEAR, THIS IS AN OBJECTION TO THE

01:59PM **4** SUFFICIENCY OF THE RECOVERY. IT'S NOT AN OBJECTION TO THE

01:59PM **5** ADEQUACY OF REPRESENTATION. SO WE'RE NOT CLAIMING THAT COUNSEL

01:59PM **6** WAS -- SOLD OUT THE CASE BECAUSE THEY GOT TOGETHER WITH THE

01:59PM **7** DEFENDANTS AND ENTERED INTO A COLLUSIVE SETTLEMENT. THAT

02:00PM **8** WOULDN'T BE A SERIOUS CLAIM AND THAT'S NOT THE CLAIM BEING

02:00PM **9** MADE. THE CLAIM GOES SOLELY TO THE SUFFICIENCY OF THE

02:00PM **10** RECOVERY.

02:00PM **11** AND THE ARGUMENT THAT MR. DEVINE MAKES IS THAT IF YOU LOOK

02:00PM **12** AT THIS SETTLEMENT, YES, IT'S TRUE THAT IT'S 325 MILLION, BUT I

02:00PM **13** CAN'T THINK OF ANY OTHER TYPE OF CASE THAT HAD THIS TYPE OF

02:00PM **14** EVIDENCE THAT WAS THIS CLOSE TO TRIAL.

02:00PM **15** SO, YES, IT'S A LOT OF MONEY. BUT IT'S ALSO A VERY, VERY

02:00PM **16** STRONG CASE, AND WHERE WE ARE HERE IS PRELIMINARY APPROVAL.

02:00PM **17** AND WE KNOW WHAT'S GOING TO HAPPEN HERE. IF THE COURT

02:00PM **18** ENTERS AN ORDER PRELIMINARILY APPROVING THE SETTLEMENT, NOTICE

02:00PM **19** WILL GO OUT AND SOME NUMBER OF CLASS MEMBERS WILL OBJECT TO THE

02:00PM **20** SETTLEMENT AND CLASS COUNSEL WILL SAY THAT NUMBER, WHATEVER IT

02:00PM **21** IS, IS SMALL IN RELATION TO THE TOTAL NUMBER OF CLASS MEMBERS,

02:00PM **22** AND THEY'LL PROBABLY BE RIGHT AND IT'S A LEGITIMATE ARGUMENT

02:00PM **23** AND I'VE MADE IT MANY TIMES AS CLASS COUNSEL.

02:00PM **24** BUT I THINK THE TREND IS TO TAKE THE HARD LOOK NOW RATHER

02:00PM **25** THAN DEFER TO FINAL APPROVAL, BECAUSE IF YOU ENTER PRELIMINARY

UNITED STATES COURT REPORTERS

02:00PM **1** APPROVAL NOW, THE WRITING IS ON THE WALL THAT WE'LL GET TO THAT

02:01PM **2** POINT AND THEY'LL SAY IT'S A SMALL AMOUNT AND, THEREFORE, THE

02:01PM **3** MOST -- MOST OF THE CLASS IS HAPPY WITH THE SETTLEMENT AND THE

02:01PM **4** COURT SHOULD APPROVE IT.

02:01PM **5** WHAT'S UNIQUE ABOUT THIS CASE, I THINK -- AND PLAINTIFFS'

02:01PM **6** COUNSEL POINTED OUT THAT MOST OF THE CASES WHERE THE COURTS ARE

02:01PM **7** PUSHING BACK AT PRELIMINARY APPROVAL, A NUMBER OF THOSE CASES

02:01PM **8** INVOLVE FAIRLY QUESTIONABLE SETTLEMENTS AND NOT THE BEST WORK

02:01PM **9** NECESSARILY DONE BY PLAINTIFFS' COUNSEL, AND THAT'S NOT THE

02:01PM **10** ARGUMENT WE'RE MAKING HERE.

02:01PM **11** BUT THIS COURT, IN THIS PARTICULAR CASE, IS UNIQUELY

02:01PM **12** SITUATED TO EXERCISE ITS DISCRETION AT THIS STAGE, AND THIS IS

02:01PM **13** REALLY WHAT PRELIMINARY APPROVAL IS, IS THE COURT ACTING AS A

02:01PM **14** GATEKEEPER.

02:01PM **15** YOU KNOW, WHAT'S INTERESTING ABOUT RULE 23 IS THERE'S

02:01PM **16** NOTHING IN THERE ABOUT PRELIMINARY APPROVAL. WE COULDN'T FIND

02:01PM **17** A SINGLE CIRCUIT LEVEL DECISION WHERE A COURT SAYS THIS IS THE

02:01PM **18** STANDARD THAT YOU, AS A DISTRICT COURT, ARE REQUIRED TO APPLY.

02:01PM **19** THE DISTRICT COURTS REPEAT THE STANDARD GENERALLY THAT THE

02:02PM **20** COURT IS MAKING AN OVERALL ASSESSMENT OF THE FAIRNESS AND

02:02PM **21** LOOKING FOR SIGNS OF COLLUSION.

02:02PM **22** BUT AT THE SAME TIME, THE INSTRUCTION IS TO THIS COURT TO

02:02PM **23** LOOK HARD AND, IF YOU HAVE CONCERNS, TO EXPRESS THOSE CONCERNS

02:02PM **24** NOW.

02:02PM **25** SO WHAT MR. DEVINE'S POSITION IS IS THAT FROM THE

UNITED STATES COURT REPORTERS

02:02PM **1** PERSPECTIVE OF ANY INDIVIDUAL MEMBER OF THIS CLASS, IF YOU'RE

02:02PM **2** PRESENTED WITH THE BARGAIN OF CONSENTING TO THIS CONDUCT AND

02:02PM **3** ENTERING INTO A RELEASE, IF YOU LOOK AT IT FROM HIS INDIVIDUAL

02:02PM **4** PERSPECTIVE, LIKE A PERSONAL INJURY CASE, IF HE'S GIVEN THE

02:02PM **5** CHOICE OF TAKING \$3600 OR PLAYING IT FORWARD FOR THE

02:02PM **6** POSSIBILITY OF DOING A LOT BETTER, AND WHEN YOU LOOK AT THE

02:02PM **7** CONDUCT INVOLVED AND YOU THINK ABOUT WHAT THE DEFENDANTS DID

02:02PM **8** HERE AND HOW THAT AFFECTED THE MARKET FOR THE SERVICES THAT HE

02:02PM **9** AND THE OTHER MEMBERS OF THE CLASS ARE PROVIDING, THAT THEY

02:02PM **10** WOULD PREFER TO TAKE THEIR CHANCES.

02:02PM **11** AND HE'S NOT SAYING -- HE'S NOT SAYING THAT THERE'S NO

02:03PM **12** SETTLEMENT EVER THAT COULD POSSIBLY BE SATISFACTORY TO HIM.

02:03PM **13** HE'S SAYING THAT HE LOOKS AT THIS AND HE THINKS THIS SETTLEMENT

02:03PM **14** IS SHORT OF THE MARK AND THAT IT WOULD BE WORTH IT --

02:03PM **15** THE COURT: HOW MUCH SHORT OF THE MARK DOES HE THINK

02:03PM **16** IT IS?

02:03PM **17** MR. GIRARD: I THINK HE -- HIS CONCERN WAS THAT HE

02:03PM **18** WAS CONCERNED WITH THE PROCESS, TO SOME EXTENT.

02:03PM **19** AND TO ANSWER THAT QUESTION, I GUESS I WOULD -- I WANT TO

02:03PM **20** GIVE A SPECIFIC RESPONSE RATHER THAN AN OVERLY GENERAL ONE.

02:03PM **21** I DON'T THINK WE'RE TALKING ABOUT MULTIPLES OF THIS

02:03PM **22** NUMBER. ONE THOUGHT THAT WE HAD, IN TERMS OF WHAT THIS COURT

02:03PM **23** MIGHT CONSIDER DOING, IS IF THE COURT SHARES ANY OF THESE

02:03PM **24** CONCERNS ABOUT THE SUFFICIENCY OF THE SETTLEMENT, TO GIVE THE

02:03PM **25** PARTIES AN OPPORTUNITY TO GO BACK TO THE TABLE WITH MR. DEVINE

UNITED STATES COURT REPORTERS

02:03PM **1** REPRESENTED, ALONG WITH CLASS COUNSEL, AND SEE IF, IN THE

02:03PM **2** CONTEXT OF THE MEDIATION, THE DEFENDANTS ARE WILLING TO PAY ANY

02:03PM **3** MORE IN SETTLEMENT.

02:04PM **4** IF THE ANSWER IS NO, THEN THE COURT CAN RULE ON THIS

02:04PM **5** MOTION AS IT'S BEEN PRESENTED TO THE COURT.

02:04PM **6** IF WE'RE ABLE TO COME BACK WITH A SUBSTANTIALLY IMPROVED,

02:04PM **7** OR EVEN A MODESTLY IMPROVED SETTLEMENT, THE COURT WILL HAVE A

02:04PM **8** DIFFERENT CALCULUS IN FRONT OF IT AND PROBABLY A SETTLEMENT

02:04PM **9** THAT ALL THE CLASS REPRESENTATIVES SUPPORT.

02:04PM **10** THAT'S A PROCESS WE'D BE WILLING TO TAKE ON IF THE COURT

02:04PM **11** IS SO INCLINED.

02:04PM **12** AND --

02:04PM **13** THE COURT: WHAT ABOUT MR. DEVINE JUST OPTING OUT AND

02:04PM **14** LITIGATING HIS OWN INDIVIDUAL CASE?

02:04PM **15** MR. GIRARD: WELL, THAT'S A POSSIBILITY AND WE'VE

02:04PM **16** CERTAINLY TALKED WITH HIM ABOUT THAT.

02:04PM **17** THE SITUATION FROM HIS POINT OF VIEW, IT'S THE SAME

02:04PM **18** SITUATION THAT WAS DISCUSSED RECENTLY BY THE SUPREME COURT IN

02:04PM **19** THE ITALIAN COLORS CASE ON ARBITRATION. HE'S GOING TO BE

02:04PM **20** LOOKING THEN AT A CLAIM THAT'S WORTH, ON AVERAGE, \$140,000

02:04PM **21** TREBLED, AND HE'S GOING TO BE LOOKING AT EXPENSES FOR EXPERTS

02:05PM **22** THAT ARE GOING TO BE MANY MULTIPLES OF THAT.

02:05PM **23** SO THE OPT OUT RATE HERE IS A, YOU KNOW, RELATIVELY WEAK

02:05PM **24** EXPEDIENT UNLESS THE VOLUME OF OPT OUTS ARE SUCH THAT IT'S

02:05PM **25** POSSIBLE TO AGGREGATE SOME GROUP OF PEOPLE WHO SHARE THE SAME

UNITED STATES COURT REPORTERS

02:06PM **1** ALL FAIR ARGUMENTS.

02:06PM **2** THE FLIP SIDE IS, WHAT ABOUT THE POSSIBILITY THAT THE

02:06PM **3** DEFENDANTS END UP HAVING TO PAY OVER A BILLION DOLLARS BEFORE

02:06PM **4** TREBLING?

02:06PM **5** THEY'RE EQUALLY LEGITIMATE POINTS TO CONSIDER.

02:06PM **6** SO WE'RE NOT -- I MEAN, THIS ISN'T THE OBJECTION WHERE

02:06PM **7** SOMEBODY COMES AND WAVES OFF ALL THE REALITIES AND RISKS OF

02:06PM **8** TRIAL. WE HAVE A TREMENDOUS LEVEL OF APPRECIATION FOR THE WORK

02:07PM **9** THAT'S GONE INTO THIS PROCESS AND HOW HARD COUNSEL HAVE WORKED.

02:07PM **10** THIS IS REALLY A CLASS REPRESENTATIVE WHO'S SPEAKING UP,

02:07PM **11** DOING THE RIGHT THING IN TERMS OF COMING FORWARD TO THE COURT

02:07PM **12** WITH THE BENEFIT OF HIS EXPERIENCE AND THE THOUGHT AND, TO SOME

02:07PM **13** EXTENT, THE PERSONAL TRAVAIL ALL FOUR OF THESE CLASS

02:07PM **14** REPRESENTATIVES HAVE SUFFERED PROFESSIONALLY FROM HAVING TO

02:07PM **15** TAKE ON THIS INDUSTRY AND THESE DEFENDANTS, AND I THINK THE

02:07PM **16** COST THAT THEY PERCEIVE IN THAT TO THEM AS FAR AS THE

02:07PM **17** PROFESSIONAL CONSEQUENCES THAT THEY MAY SUFFER FOR HAVING

02:07PM **18** BROUGHT THESE CASES AND SAYING, "SOMEHOW WE FEEL LIKE WE'VE

02:07PM **19** BEEN LEFT SHORT HERE, THAT THIS ISN'T THE KIND OF RESULT THAT

02:07PM **20** WE THOUGHT, WHEN WE GOT INTO THIS, WAS WHAT WE WERE LOOKING

02:07PM **21** FOR."

02:07PM **22** AND, YOU KNOW, YOU THINK ABOUT THIS -- AND I DON'T WANT TO

02:07PM **23** GET TOO PHILOSOPHICAL HERE, SO I'M GOING TO CUT TO THE POINT

02:08PM **24** HERE -- BUT YOU THINK ABOUT THIS COUNTRY AND HOW HARD PEOPLE

02:08PM **25** WORK TO GET THESE TYPES OF JOBS AND HOW IMPORTANT IT IS TO A

UNITED STATES COURT REPORTERS

02:05PM **1** VIEW HE HAS AND WANT TO PROCEED.

02:05PM **2** THE COURT: WHAT ABOUT THE -- WHAT ABOUT THE SPECIFIC

02:05PM **3** ARGUMENTS THAT THE PLAINTIFFS MAKE IN THEIR REPLY THAT, YOU

02:05PM **4** KNOW, MR. -- DR. LEAMER ONLY PROVIDED A DAMAGES ANALYSIS FOR

02:05PM **5** THE OVERARCHING CONSPIRACY, AND IF THE JURY WERE TO FIND THAT

02:05PM **6** ONE OF THE SEVEN DEFENDANTS DIDN'T ACTUALLY JOIN IN THAT

02:05PM **7** CONSPIRACY, THERE WOULDN'T BE SORT OF AN ALTERNATIVE DAMAGES

02:05PM **8** CALCULATION FOR THE JURY TO RELY ON.

02:05PM **9** MR. GIRARD: SO THEY MADE A NUMBER OF ARGUMENTS LIKE

02:05PM **10** THAT.

02:05PM **11** THE COURT: YEAH.

02:06PM **12** MR. GIRARD: AND THERE WAS AN ISSUE ABOUT WHETHER THE

02:06PM **13** COURT WOULD ORDER THAT THE STANDARD IS GOING TO BE PER SE

02:06PM **14** VERSUS RULE OF REASON --

02:06PM **15** THE COURT: UM-HUM.

02:06PM **16** MR. GIRARD: -- A NUMBER OF EVIDENTIARY MOTIONS THAT

02:06PM **17** WERE BEFORE THE COURT, AND THE NEED FOR A UNANIMOUS JURY, ET

02:06PM **18** CETERA.

02:06PM **19** I MEAN, I PUT ALL OF THOSE UNDER THE UMBRELLA GENERALLY OF

02:06PM **20** TRIAL IS RISKY.

02:06PM **21** THE COURT: UM-HUM.

02:06PM **22** MR. GIRARD: BUT THIS IS NOT A SITUATION HERE WHERE

02:06PM **23** THE CASE IS, YOU KNOW, AT THE MOTION TO DISMISS STAGE, OR EVEN

02:06PM **24** AT THE SUMMARY JUDGMENT STAGE. I MEAN, WE'RE HERE POST CLASS

02:06PM **25** CERTIFICATION, POST RULE 23, VERY CLOSE TO TRIAL, AND THOSE ARE

UNITED STATES COURT REPORTERS

02:08PM **1** LOT OF THE, THE GENERATION OF PEOPLE THAT ARE COMING UP,

02:08PM **2** ENTERING THE WORK FORCE, THE SACRIFICES SOMEBODY LIKE

02:08PM **3** MR. DEVINE MADE, THE LOANS THEY TOOK OUT TO BE EDUCATED AND SO

02:08PM **4** FORTH, AND ANYTHING ABOUT THE RHETORIC THAT IS BEING SOLD BY

02:08PM **5** THE PEOPLE WHO ENTERED INTO THESE AGREEMENTS ABOUT FREE

02:08PM **6** ENTERPRISE AND INDIVIDUAL RESPONSIBILITY AND ON AND ON, AND YOU

02:08PM **7** LOOK AT THE FACT THAT THEY WERE GETTING TOGETHER AND FIXING THE

02:08PM **8** PRICE FOR THESE SERVICES.

02:08PM **9** I MEAN, I THINK FROM THEIR POINT OF VIEW, IT'S VERY TOUGH

02:08PM **10** TO GIVE IT UP AT THIS POINT FOR THE TRADE THAT I REFERRED TO,

02:08PM **11** THE \$3600 FOR THE RIGHT TO FIX THIS MARKET FOR FOUR YEARS.

02:08PM **12** AND SO THAT'S, THAT'S THE PERSPECTIVE IN WHICH HE IS

02:08PM **13** APPROACHING THE COURT TODAY.

02:08PM **14** THE COURT: ALL RIGHT. THANK YOU.

02:08PM **15** LET ME HEAR FROM THE PLAINTIFFS.

02:09PM **16** MS. DERMODY: YOUR HONOR, DO YOU WANT TO HEAR THE

02:09PM **17** HOUSEKEEPING THINGS FIRST IN RESPONSE TO YOUR QUESTIONS?

02:09PM **18** THE COURT: SURE. HOW MANY CLASS --

02:09PM **19** MS. DERMODY: SO FROM --

02:09PM **20** THE COURT: -- LITIGATION CLASS OPT OUTS WERE THERE?

02:09PM **21** MS. DERMODY: SIXTY-ONE.

02:09PM **22** THE COURT: OKAY.

02:09PM **23** MR. DERMODY: AND IN BOTH THE PIXAR, LUCAS, AND

02:09PM **24** INTUIT SETTLEMENTS, THERE WAS AN ATTACHMENT 1. SO IF YOUR

02:09PM **25** HONOR WAS LOOKING IN THE BODY OF THE SETTLEMENT AGREEMENTS, YOU

UNITED STATES COURT REPORTERS

02:09PM **1** MIGHT NOT HAVE SEEN IT.

02:09PM **2** BUT IF YOU LOOK TO THE FIRST ATTACHMENT, IT'S IN THERE.

02:09PM **3** IT TALKS ABOUT A PRO RATA REDUCTION, AND IN PIXAR/LUCASFILM IT

02:09PM **4** WAS 10 PERCENT WAS THE THRESHOLD, AND ONCE YOU HAD 10 PERCENT

02:09PM **5** OPT OUTS, THEN YOU WOULD START HAVING A PRO RATA REDUCTION OF

02:09PM **6** THE CLASS CONSIDERATION.

02:09PM **7** THE COURT: WHY IS IT SO MUCH LOWER HERE?

02:09PM **8** MS. DERMODY: I THINK IT'S A DIFFERENT POINT IN THE

02:09PM **9** CASE, DIFFERENT ISSUES IN THE CASE IN TERMS OF CONCERNS ABOUT

02:09PM **10** OPT OUTS, YOUR HONOR.

02:09PM **11** I THINK THAT WAS REALLY ALL THAT WAS GOING ON. I MEAN --

02:09PM **12** THE COURT: OKAY. THE POINT IN THE CASE WOULD

02:09PM **13** ACTUALLY DICTATE FOR A HIGHER NUMBER, RIGHT? I MEAN THE --

02:09PM **14** MS. DERMODY: NOT IF YOU --

02:09PM **15** THE COURT: -- THE LUCASFILM/PIXAR/INTUIT FOLKS

02:10PM **16** SETTLED WHEN I HAD DENIED THE CLASS CERTIFICATION MOTION.

02:10PM **17** SO THESE DEFENDANTS SETTLED AFTER I HAD CERTIFIED THE

02:10PM **18** CLASS, AFTER THE NINTH CIRCUIT HAD REFUSED TO REVIEW MY CLASS

02:10PM **19** CERTIFICATION ORDER, AFTER I HAD DENIED SUMMARY JUDGMENT, AFTER

02:10PM **20** I HAD DENIED THE DAUBERT EXCLUDING DR. LEAMER'S DAMAGES

02:10PM **21** ANALYSIS.

02:10PM **22** MS. DERMODY: RIGHT.

02:10PM **23** THE COURT: SO IF ANYTHING, THAT NUMBER SHOULD BE

02:10PM **24** GOING UP AND NOT GOING DOWN.

02:10PM **25** MS. DERMODY: YOU WOULD THINK, IN GENERAL, THAT WOULD

UNITED STATES COURT REPORTERS

02:10PM **1** BE TRUE FOR A LOT OF TERMS, YOUR HONOR.

02:10PM **2** THE COURT: UM-HUM.

02:10PM **3** MS. DERMODY: BUT ON THAT PARTICULAR ONE, AT THE TIME

02:10PM **4** OF THE PIXAR/LUCAS SETTLEMENT, AS YOU MIGHT REMEMBER, THERE WAS

02:10PM **5** NO PRIOR PRELIMINARY APPROVAL INFORMATION THAT ANYONE IN THE

02:10PM **6** CLASS MIGHT OBJECT TO THAT SETTLEMENT.

02:10PM **7** WE HAD A DIFFERENT SCENARIO HERE. SO IT WAS A

02:10PM **8** DIFFERENT -- IT WAS JUST A DIFFERENT -- THE PLACE WAS SET

02:10PM **9** DIFFERENTLY FOR THAT PARTICULAR TERM TO BE NEGOTIATED THAN IT

02:10PM **10** WAS AT THE TIME OF THE PIXAR/LUCAS SETTLEMENT, DIFFERENT FACTS

02:10PM **11** IN THE GROUND.

02:10PM **12** THE COURT: OKAY. SO TELL ME THEN WHAT YOU KNEW AT

02:10PM **13** THE TIME YOU SETTLED, BECAUSE MY UNDERSTANDING IS YOU DIDN'T

02:10PM **14** GET THESE OBJECTIONS UNTIL AFTER PEOPLE, SOMEBODY AT "THE

02:11PM **15** NEW YORK TIMES" LEAKED THE 324 MILLION NUMBER.

02:11PM **16** MS. DERMODY: RIGHT. I DON'T KNOW HOW THAT --

02:11PM **17** THE COURT: RIGHT. SO I GUESS I'M UNCLEAR. HOW ARE

02:11PM **18** OBJECTIONS THAT POST-DATED THE ANNOUNCEMENT OF THE SETTLEMENT

02:11PM **19** AMOUNT, THE ONES THAT MOTIVATED THE NUMBER DURING THE

02:11PM **20** SETTLEMENT NEGOTIATIONS THAT PRECEDED THAT NUMBER COMING OUT?

02:11PM **21** MS. DERMODY: WELL, AT THE --

02:11PM **22** THE COURT: DOES THAT MAKE SENSE TO YOU?

02:11PM **23** MS. DERMODY: YES, YOUR HONOR.

02:11PM **24** THE COURT: THAT DOESN'T MAKE SENSE TO ME.

02:11PM **25** MS. DERMODY: I UNDERSTAND THE QUESTION COMPLETELY.

UNITED STATES COURT REPORTERS

02:11PM **1** I JUST WANT TO MAKE VERY CLEAR TO THE COURT THAT THE

02:11PM **2** PARTIES AGREED THAT THEY WOULD NOT RELEASE ANY OF THE TERMS

02:11PM **3** UNTIL THEY PRESENTED THEM TO YOUR HONOR. NO ONE ON THE

02:11PM **4** PLAINTIFFS' SIDE SPOKE TO ANY MEDIA ABOUT ANY OF THE SPECIFIC

02:11PM **5** TERMS OF THE SETTLEMENT. I DON'T KNOW WHERE "THE NEW YORK

02:11PM **6** TIMES" GOT THEIR INFORMATION. TO THIS DAY, I'M PERSONALLY VERY

02:11PM **7** UPSET THAT THAT INFORMATION WAS OUT THERE BECAUSE THE PARTIES

02:11PM **8** WERE STILL NEGOTIATING THE TERMS OF THE SETTLEMENT AGREEMENT.

02:11PM **9** SO THAT WAS STILL IN PLAY, THAT PARTICULAR TERM, AND THAT

02:11PM **10** PARTICULAR TERM WAS INFORMED BY FEEDBACK THAT HAPPENED, IN PART

02:11PM **11** FROM "THE NEW YORK TIMES," RIGHT AFTERWARDS.

02:11PM **12** SO YOU HAVE TO DEAL WITH THE FACTS IN THE GROUND THAT

02:12PM **13** HAPPENED AT THE TIME YOU'RE NEGOTIATING THOSE TERMS AND THAT IS

02:12PM **14** THE DIFFERENCE.

02:12PM **15** IF THAT TERM ITSELF IS THE STICKING POINT FOR YOUR HONOR,

02:12PM **16** ABSOLUTELY WE'RE GOING TO HAVE TO SORT OF GO AND ADDRESS THAT.

02:12PM **17** BUT I WANT YOUR HONOR TO UNDERSTAND THAT WE WEREN'T

02:12PM **18** DEALING WITH THE EXACT SAME INFORMATION ABOUT OPT OUTS THAT WE

02:12PM **19** WERE WHEN WE NEGOTIATED THE PIXAR/LUCASFILM --

02:12PM **20** THE COURT: I GUESS IT STILL DOESN'T MAKE SENSE TO

02:12PM **21** ME. YOUR JUSTIFICATION FOR THE NUMBER GOING DOWN IS BASED ON

02:12PM **22** OBJECTIONS THAT OCCURRED AFTER YOU HAD ALREADY AGREED TO THE

02:12PM **23** NUMBER.

02:12PM **24** MS. DERMODY: YOUR HONOR, IT'S A -- IT'S A FUNNY

02:12PM **25** POSITION --

UNITED STATES COURT REPORTERS

02:12PM **1** THE COURT: BECAUSE YOU ANNOUNCED -- YOU SENT THE

02:12PM **2** LETTER TO ME THAT YOU HAD REACHED A SETTLEMENT AT ABOUT THE

02:12PM **3** EXACT SAME TIME.

02:12PM **4** MS. DERMODY: YES, YOUR HONOR.

02:12PM **5** THE COURT: SO I ASSUME WHEN YOU SENT THAT LETTER TO

02:12PM **6** ME, YOU HAD THIS 4 PERCENT NUMBER.

02:12PM **7** MS. DERMODY: NO. WE HAD THE -- I MEAN, YOUR HONOR

02:12PM **8** IS SORT OF ASKING ME TO REVEAL A LOT OF SETTLEMENT PRIVILEGES,

02:12PM **9** SO I'M HAVING A HARD TIME WITH THIS.

02:12PM **10** BUT I WILL TELL YOU THAT --

02:12PM **11** THE COURT: WELL, YOU'RE THE ONE THAT OPENED THE

02:12PM **12** DOOR. YOU'RE THE ONE THAT GAVE THAT AS THE JUSTIFICATION FOR

02:12PM **13** WHY THE NUMBER IS LOWER THAN 10 PERCENT TO 4 PERCENT, RIGHT? I

02:12PM **14** MEAN, IF YOU HADN'T OPENED THE DOOR, I WOULDN'T BE FOLLOWING

02:12PM **15** THIS LINE OF INQUIRY.

02:12PM **16** MS. DERMODY: I WANT TO MAKE SURE THE COURT

02:13PM **17** UNDERSTANDS, BECAUSE I APPRECIATE THE QUESTION. IT'S A

02:13PM **18** COMPLETELY FAIR QUESTION.

02:13PM **19** THE COURT: I GUESS I DON'T UNDERSTAND.

02:13PM **20** MS. DERMODY: THE 324. --

02:13PM **21** THE COURT: THE EARLIER DEFENDANTS SETTLED AT A POINT

02:13PM **22** WHEN THEY HAD MUCH MORE LEVERAGE.

02:13PM **23** THESE DEFENDANTS SETTLED AFTER THEIR LEVERAGE WAS LARGELY

02:13PM **24** GONE. AS SOON AS THE NINTH CIRCUIT SAID, "WE'RE NOT GOING TO

02:13PM **25** REVIEW THIS CLASS CERT ORDER," THEY WERE GOING TO BE FORCED TO

UNITED STATES COURT REPORTERS

02:13PM **1** GO TO TRIAL, AND I SUSPECT THEY WOULD HAVE WON, IN WHICH CASE
 02:13PM **2** THERE WOULD HAVE BEEN AUTOMATIC TREBLING.
 02:13PM **3** NOW, GRANTED, I UNDERSTAND THE APPEAL RISKS.
 02:13PM **4** BUT IT'S STILL -- FROM A NEGOTIATING STANDPOINT, THESE
 02:13PM **5** DEFENDANTS SHOULD HAVE HAD LESS LEVERAGE THAN THE
 02:13PM **6** LUCASFILM/PIXAR/INTUIT DEFENDANTS WHO SETTLED WHEN THE ONLY
 02:13PM **7** ORDER WAS DENYING THE CLASS CERT MOTION.
 02:13PM **8** MS. DERMODY: SO, YOUR HONOR --
 02:13PM **9** THE COURT: SO WHY ARE THEY PAYING -- WHY ARE THE
 02:13PM **10** EARLIER SETTLING DEFENDANTS BEING PENALIZED BY PAYING A HIGHER
 02:13PM **11** PROPORTION OF THEIR DAMAGES LIABILITY THAN THESE DEFENDANTS?
 02:13PM **12** MS. DERMODY: WELL, LET ME MAKE IT TOTALLY CLEAR.
 02:13PM **13** THE COURT: YEAH.
 02:14PM **14** MS. DERMODY: THE PRIOR DEFENDANTS PAID A HUNDRED
 02:14PM **15** PERCENT, 100 PERCENT OF WHAT WAS IN THE SETTLEMENT AGREEMENT.
 02:14PM **16** WE EXPECT THESE DEFENDANTS WILL PAY 100 PERCENT OF WHAT IS
 02:14PM **17** PROMISED IN THE SETTLEMENT AGREEMENT.
 02:14PM **18** THE ONLY TIME THAT THERE'S ANY POSSIBILITY THAT THERE WILL
 02:14PM **19** BE A PRO RATA REDUCTION IS IF YOU HIT A THRESHOLD OF OVER 2500
 02:14PM **20** NEW OPT OUTS AFTER WE HAD 61 THE LAST TIME AROUND.
 02:14PM **21** SO THIS IS TALK -- THIS IS SORT OF EXPECTING THE WORST
 02:14PM **22** POSSIBLE CASE SCENARIO THAT, BASED ON THE PRIOR SETTLEMENTS --
 02:14PM **23** WE DIDN'T KNOW, PRIOR TO THOSE SETTLEMENTS, WHO WOULD OPT OUT.
 02:14PM **24** NOW WE HAVE BETTER INFORMATION THAT VERY FEW PEOPLE OPTED
 02:14PM **25** OUT LAST TIME AND IT WAS A VERY SMALL SETTLEMENT AMOUNT.

UNITED STATES COURT REPORTERS

02:14PM **1** THIS TIME, IT'S A MUCH GREATER SETTLEMENT AMOUNT. WE
 02:14PM **2** DON'T HAVE ANY EXPECTATION THAT MORE PEOPLE WILL SUDDENLY
 02:14PM **3** DECIDE TO EXERCISE THAT OPTION.
 02:14PM **4** SO I'M -- I JUST WANT TO MAKE SURE YOUR HONOR UNDERSTANDS
 02:14PM **5** THAT THEY'RE NOT GOING TO PAY LESS, NOT UNLESS YOU HAVE A VERY,
 02:14PM **6** VERY LARGE NUMBER OF PEOPLE SUDDENLY COMING OUT OF THE WOODWORK
 02:14PM **7** TO OPT OUT, WHICH WE HAVE NO REASON TO BELIEVE IS GOING TO BE
 02:15PM **8** THE CASE.
 02:15PM **9** THE COURT: OKAY. SEPARATE FROM THIS REVERTER,
 02:15PM **10** SEPARATE FROM THIS REVERTER, IT DOES APPEAR THAT THESE LATER
 02:15PM **11** SETTLING DEFENDANTS ARE PAYING A LOWER PROPORTION OF THEIR
 02:15PM **12** POTENTIAL DAMAGES LIABILITY THAN THE EARLIER SETTLING
 02:15PM **13** DEFENDANTS, AND IT DOESN'T MAKE SENSE TO ME BECAUSE THEY SHOULD
 02:15PM **14** HAVE HAD LESS LEVERAGE THAN THE EARLIER SETTLING DEFENDANTS.
 02:15PM **15** MS. DERMODY: I THINK I WOULD DISAGREE WITH THE FIRST
 02:15PM **16** ASSUMPTION, YOUR HONOR.
 02:15PM **17** THE COURT: OKAY.
 02:15PM **18** MS. DERMODY: I DO THINK THAT THERE IS A SIMILAR
 02:15PM **19** RATIO IN TERMS OF THE EARLIER DEFENDANTS AND THESE DEFENDANTS,
 02:15PM **20** AND I CAN APPRECIATE WHY YOUR HONOR WOULD ASK THE QUESTION THAT
 02:15PM **21** YOUR HONOR IS ASKING.
 02:15PM **22** AND I THINK FROM OUR PERSPECTIVE, I WANT IT TO BE REALLY
 02:15PM **23** CLEAR WHAT WE WERE LOOKING AT AND WHY WE THINK IT WOULD BE
 02:15PM **24** MALPRACTICE FOR US, AS CLASS COUNSEL, NOT TO GIVE THE CLASS A
 02:15PM **25** CHANCE TO HEAR THAT THEY COULD GET \$324.5 MILLION.

UNITED STATES COURT REPORTERS

02:15PM **1** HERE'S HOW WE SAW THE LAY OF THE LAND, YOUR HONOR. SO
 02:16PM **2** WHILE THE NINTH CIRCUIT DID NOT GRANT THE 23(F), AND WE WERE
 02:16PM **3** DELIGHTED THAT THAT HAPPENED, THE NINTH CIRCUIT DID NOT GRANT
 02:16PM **4** 23(F) AND THEN RULE FOR US, AFFIRM ON THE MERITS.
 02:16PM **5** SO FROM OUR PERSPECTIVE, THE ISSUE OF CLASS CERTIFICATION
 02:16PM **6** IS STILL AN OPEN ISSUE ON APPEAL. SO THAT ISSUE DOESN'T GET
 02:16PM **7** TAKEN OFF THE TABLE BECAUSE OF 23(F) BEING DENIED. THAT'S
 02:16PM **8** STILL OUT THERE.
 02:16PM **9** THE COURT: RIGHT. BUT WHAT IS YOUR NEGOTIATING
 02:16PM **10** POSITION IF YOU HAD GONE TO TRIAL AND YOU HAD WON AND THEN YOU
 02:16PM **11** HAD THE APPEAL PROCESS PENDING? YOUR NEGOTIATION LEVERAGE
 02:16PM **12** WOULD HAVE INCREASED.
 02:16PM **13** MS. DERMODY: ABSOLUTELY, YOUR HONOR.
 02:16PM **14** THE COURT: IT WOULD HAVE INCREASED.
 02:16PM **15** MS. DERMODY: SO LET'S TALK ABOUT THE TRIAL.
 02:16PM **16** THE COURT: LET'S TALK ABOUT THE NINTH CIRCUIT. YOU
 02:16PM **17** DON'T THINK, EN BANC, THERE WOULD HAVE BEEN A GOOD -- EN
 02:16PM **18** BANC -- THERE WOULD HAVE BEEN A GOOD POSSIBILITY THAT THE CLASS
 02:16PM **19** CERT ORDER WOULD HAVE BEEN AFFIRMED?
 02:16PM **20** MS. DERMODY: I THINK IT'S A POSSIBILITY.
 02:16PM **21** AND THEN WHAT ARE YOUR ODDS IN THE SUPREME COURT, YOUR
 02:16PM **22** HONOR?
 02:16PM **23** THE COURT: WELL, I THINK IF YOU WANT TO DO AN ORDER
 02:16PM **24** THAT RESTRICTS CLASS ACTIONS, I DON'T KNOW IF THIS IS THE
 02:16PM **25** POSTER CHILD FOR DOING THAT.

UNITED STATES COURT REPORTERS

02:16PM **1** WHAT DO YOU THINK? DO YOU THINK THE SUPREME COURT WOULD
 02:17PM **2** HAVE WANTED TO DO IT IN THIS CASE? YOU DON'T THINK PERHAPS
 02:17PM **3** THERE MIGHT HAVE BEEN A LEGISLATIVE FIX? THIS WOULD HAVE BEEN
 02:17PM **4** LIKE A LILLY LEDBETTER SITUATION WHERE THERE MAY HAVE BEEN A
 02:17PM **5** LEGISLATIVE RESPONSE?
 02:17PM **6** I MEAN, I JUST DON'T THINK THAT THIS IS THE -- IF THERE
 02:17PM **7** WERE GOING TO BE A GOOD CASE FOR FURTHER RESTRICTING CLASS
 02:17PM **8** ACTIONS, I'M NOT SURE THIS IS THE ONE.
 02:17PM **9** MS. DERMODY: IT SOUNDS -- WHAT YOU'RE SAYING, YOUR
 02:17PM **10** HONOR, SOUNDS LIKE CONVERSATIONS THAT ME AND MY PARTNERS HAVE
 02:17PM **11** AROUND THE CONFERENCE ROOM TABLE ABOUT CASES ALL THE TIME,
 02:17PM **12** INCLUDING THIS CASE, AND WHY IT'S SO HARD, WITH A CASE LIKE
 02:17PM **13** THIS, TO KNOW WHAT'S THE RIGHT THING TO DO FOR A BUNCH OF
 02:17PM **14** ABSENT CLASS MEMBERS WHOSE RIGHTS YOU HOLD IN YOUR HAND BY YOUR
 02:17PM **15** NEGOTIATION.
 02:17PM **16** AND WHEN YOU HAVE A CASE WHERE YOU CAN RECOGNIZE THAT
 02:17PM **17** THERE IS A RISK, YOU HAVE TO TAKE THAT RISK SERIOUSLY. EVEN IF
 02:17PM **18** YOU THINK YOU HAVE A GREAT CASE AND IT'S THE MOST WONDERFUL
 02:17PM **19** CASE, YOU HAVE TO AT LEAST ACKNOWLEDGE THAT THE RISK EXISTS.
 02:17PM **20** THAT'S ONLY ONE RISK. IT IS A RISK. IT MAY NOT BE EVEN
 02:17PM **21** THE RISK THAT WE THOUGHT WAS THE GREATEST RISK.
 02:17PM **22** I THINK YOUR HONOR MAY HAVE ASSUMED MORE THAN WE DID ABOUT
 02:18PM **23** THE LACK OF RISK AT TRIAL, AND WE HAVE DONE JURY TESTING, AS I
 02:18PM **24** KNOW THE DEFENDANTS HAVE DONE JURY TESTING -- AS ANYONE I'M
 02:18PM **25** SURE THAT COMES BEFORE YOUR HONOR DOES IN A COMPLEX LITIGATION

UNITED STATES COURT REPORTERS

02:18PM **1** IN THIS COURT -- TO FIND OUT WHAT JURORS THINK ABOUT THIS
 02:18PM **2** EVIDENCE, WHAT JURORS THINK ABOUT THESE CLASS MEMBERS, WHAT
 02:18PM **3** JURORS THINK ABOUT CERTAIN THEMES THAT ARE IN THIS CASE.
 02:18PM **4** AND YOU HAVE TO BE SOBERED WHEN YOU DO THAT KIND OF
 02:18PM **5** TESTING TO UNDERSTAND THAT WHILE YOU MIGHT HAVE GREAT EVIDENCE,
 02:18PM **6** YOU HAVE TO OVERCOME A NUMBER OF HURDLES.
 02:18PM **7** IN THIS CASE, AS THE COURT WELL KNOWS, WE HAD SEVERAL. WE
 02:18PM **8** HAVE JURORS HAVE TO FIND UNANIMOUSLY THERE WAS AN OVERARCHING
 02:18PM **9** CONSPIRACY AMONG ALL SEVEN COMPANIES; WE HAVE JURORS HAVE TO
 02:18PM **10** FIND THAT THERE WAS IMPACT UNANIMOUSLY; AND JURORS HAVE TO COME
 02:18PM **11** UP WITH A DAMAGES FIGURE THAT'S GOING TO RIVAL WHAT WE'VE
 02:18PM **12** SECURED HERE, THAT IS, A SUM CERTAIN.
 02:18PM **13** AND WHEN WE EXPLORE ALL OF THOSE THINGS, THOSE ARE VERY,
 02:18PM **14** VERY REAL RISKS FOR PLAINTIFFS, VERY REAL RISKS.
 02:18PM **15** AND THE PROBLEM FOR US, AS WE LOOK AT WHAT'S HAPPENED IN
 02:19PM **16** OTHER ANTITRUST TRIALS IN THE LAST DECADE, IS THAT IT'S VERY,
 02:19PM **17** VERY TOUGH.
 02:19PM **18** THE COURT: LET ME ASK YOU A QUESTION. IN YOUR
 02:19PM **19** PAPERS, YOU SAY AT LEAST TWICE, OR AT LEAST ONCE, THAT IF ONE
 02:19PM **20** OF THE SEVEN DEFENDANTS WAS FOUND NOT TO HAVE PARTICIPATED IN
 02:19PM **21** AN OVERARCHING CONSPIRACY, THE DAMAGES WOULD HAVE BEEN ZERO.
 02:19PM **22** DO YOU REALLY THINK THAT'S THE CASE? IT WOULD HAVE BEEN ZERO?
 02:19PM **23** MS. DERMODY: IF THE -- THAT'S NOT OUR POSITION. I'M
 02:19PM **24** SAYING WHAT WE KNOW THE DEFENDANTS WOULD ARGUE, AND WE WOULD
 02:19PM **25** HAVE TO PRESENT OUR POSITIONS AGAINST THAT. WE WOULD DISAGREE

UNITED STATES COURT REPORTERS

02:20PM **1** WORKERS ARE AMONG THE MOST DESIRABLE IN THE WORLD AND THEY HAD
 02:20PM **2** PLENTY OF OTHER OPPORTUNITY TO GO OTHER PLACES BESIDES THESE
 02:20PM **3** SEVEN COMPANIES. JURORS MIGHT CONCLUDE THAT.
 02:20PM **4** JURORS MIGHT SAY THERE WAS AN OVERARCHING CONSPIRACY AND
 02:20PM **5** THERE WAS SOME IMPACT, BUT WE DON'T LIKE PLAINTIFFS' DAMAGES
 02:20PM **6** MODEL, THAT WE ACTUALLY LISTENED TO WHAT THE DEFENDANTS'
 02:21PM **7** EXPERTS, SIX ECONOMISTS, ARE GOING TO SAY, AND WE THINK THAT IT
 02:21PM **8** WASN'T \$3 BILLION. WE THINK IT WAS LESS THAN \$1 BILLION. WE
 02:21PM **9** THINK IT WAS SOME SMALL FRACTION.
 02:21PM **10** THE COURT: WELL THEN, WHY DIDN'T YOU ALL PROPOSE,
 02:21PM **11** THEN, A BETTER, MORE ACCURATE, MORE PERSUASIVE DAMAGES MODEL?
 02:21PM **12** I MEAN, YOU'RE ALMOST NOW A VICTIM OF YOUR OWN SUCCESS.
 02:21PM **13** YOU'RE THE ONES THAT PUT OUT THE 3 BILLION NUMBER. THAT'S WHAT
 02:21PM **14** HAS GOTTEN EVERYONE'S EXPECTATIONS SO HIGH. IF YOU ALL HAD NOT
 02:21PM **15** BEEN SO AGGRESSIVE WITH YOUR DAMAGES MODEL AND THEORY, PERHAPS
 02:21PM **16** WE WOULDN'T BE IN THIS SITUATION, RIGHT? YOU ARE THE ONES WHO
 02:21PM **17** HAVE CREATED THE VERY HIGH EXPECTATIONS OF THIS CLASS.
 02:21PM **18** MS. DERMODY: WELL, I THINK THAT'S INTERESTING
 02:21PM **19** FEEDBACK, YOUR HONOR.
 02:21PM **20** WE PUT TOGETHER THE MODEL THAT OUR EXPERT, INDEPENDENTLY,
 02:21PM **21** DECIDED WAS THE MODEL TO REFLECT WHAT OUR EXPERT BELIEVED TO BE
 02:21PM **22** THE BUT FOR WORLD IF THESE AGREEMENTS HAD NOT EXISTED. THAT
 02:21PM **23** WAS OUR EXPERT'S POINT OF VIEW. FULL STOP.
 02:22PM **24** WE HAVE TO ACKNOWLEDGE THE RISK THAT A JURY, HEARING A
 02:22PM **25** WHOLE BUNCH OF DIFFERENT EXPERTS, EVEN AS WE THINK WE HAVE THE

UNITED STATES COURT REPORTERS

02:19PM **1** WITH THAT.
 02:19PM **2** BUT THEY WOULD HAVE ARGUMENTS ABOUT THAT BECAUSE OUR
 02:19PM **3** THEORY OF THE CASE IS OVERARCHING CONSPIRACY. OUR DAMAGES
 02:19PM **4** MODEL REFLECTS AN OVERARCHING CONSPIRACY.
 02:19PM **5** THE DEFENDANTS WOULD MAKE ARGUMENTS THAT WE HAVE TO
 02:19PM **6** CREDIT, YOUR HONOR.
 02:19PM **7** I UNDERSTAND THE COURT'S SKEPTICISM BECAUSE THE COURT
 02:19PM **8** KNOWS, AS WE KNOW, WHAT WE'VE UNCOVERED IN THIS CASE.
 02:19PM **9** THE COURT: I'VE LOOKED AT -- THROUGH ALL THOSE
 02:19PM **10** SEALING REQUESTS, I'VE LOOKED AT MUCH OF THESE DOCUMENTS
 02:19PM **11** MYSELF, ALL THE E-MAILS, ALL OF THE REPORTS.
 02:20PM **12** SO I'M ASKING YOU, HAVING GONE THROUGH A LOT OF THOSE
 02:20PM **13** SEALING REQUESTS, WHICH WAS NOT VERY MUCH FUN, AND KNOWING WHAT
 02:20PM **14** A LOT OF THE DOCUMENTS ARE IN THIS CASE, YOU REALLY THINK THE
 02:20PM **15** DAMAGES WOULD HAVE BEEN ZERO IF THIS HAD GONE TO TRIAL?
 02:20PM **16** I MEAN, I JUST FEEL LIKE THAT IS SUCH A STRETCH.
 02:20PM **17** MS. DERMODY: WHAT I'M SAYING TO YOU, YOUR HONOR --
 02:20PM **18** THE COURT: YEAH.
 02:20PM **19** MS. DERMODY: -- IS THAT THERE IS A RISK.
 02:20PM **20** THE COURT: UM-HUM.
 02:20PM **21** MS. DERMODY: THERE IS A RISK. THERE'S A RISK THAT A
 02:20PM **22** JURY MIGHT FIND THAT THERE WAS NO OVERARCHING CONSPIRACY, AND
 02:20PM **23** YET, THEY MIGHT THINK THERE WAS AN IMPACT.
 02:20PM **24** A JURY MIGHT FIND THAT THERE WAS AN OVERARCHING CONSPIRACY
 02:20PM **25** AND NO IMPACT BECAUSE THE JURY MIGHT CONCLUDE THAT THESE

UNITED STATES COURT REPORTERS

02:22PM **1** BEST ONE, MIGHT COME TO A DIFFERENT PERSPECTIVE.
 02:22PM **2** AND WHILE I WOULD LOVE IT IF I WAS TRYING THIS CASE TO
 02:22PM **3** "THE NEW YORK TIMES" EDITORIAL BOARD, THE FACT OF THE MATTER
 02:22PM **4** IS, WE WOULD BE TRYING THIS CASE TO THE JURORS THAT ARE HERE
 02:22PM **5** AND WE HAVE TO DEAL WITH THE REALITY THAT THOSE JURORS MIGHT
 02:22PM **6** NOT SEE IT THE WAY WE SEE IT, OR EVEN HOW YOUR HONOR HAS SEEN
 02:22PM **7** THE EVIDENCE. THAT IS JUST A REALITY.
 02:22PM **8** SO WHEN WE LOOK AT THOSE THINGS AND WE UNDERSTAND THAT
 02:22PM **9** THERE IS SOME RISK AT EACH STEP OF THE WAY THAT WE'RE NOT GOING
 02:22PM **10** TO EITHER PREVAIL, OR IF WE PREVAIL, NOT GET THAT AMOUNT OF
 02:22PM **11** MONEY, AND WE HAVE IN HAND \$324 AND A HALF MILLION ON TOP OF 20
 02:22PM **12** MILLION WE'VE ALREADY RECOVERED, AND WE CAN LOOK AT OTHER CASES
 02:22PM **13** THAT HAVE BEEN TRIED IN THIS DISTRICT RECENTLY WHERE PEOPLE GOT
 02:22PM **14** LESS THAN WHAT WE'RE GETTING AS A PERCENTAGE OF EXPOSURE --
 02:22PM **15** THE COURT: OKAY. BUT THAT -- YOU KNOW, UNLESS YOU
 02:23PM **16** SHOW ME THE DOCUMENTS IN THOSE LCD-TFD CASES, I JUST DON'T
 02:23PM **17** THINK THAT'S USEFUL. THAT'S NOT USEFUL. THAT'S A TOTALLY
 02:23PM **18** DIFFERENT CASE.
 02:23PM **19** MS. DERMODY: BUT THERE WERE 14 GUILTY PLEAS IN THAT
 02:23PM **20** CASE.
 02:23PM **21** WE HAD NO GUILTY PLEAS HERE. IN SOME WAYS THAT CASE WAS
 02:23PM **22** MUCH MORE COMPELLING ON THE EVIDENCE.
 02:23PM **23** I MEAN, THEY'RE APPLES AND ORANGES IN SO MANY RESPECTS,
 02:23PM **24** YOUR HONOR.
 02:23PM **25** BUT I JUST WANT TO SAY THAT --

UNITED STATES COURT REPORTERS

02:23PM **1** THE COURT: DO YOU REALLY THINK THAT PRICE FIXING ON
 02:23PM **2** TV'S IS MORE COMPELLING THAN THE FACTS OF THIS CASE?
 02:23PM **3** MS. DERMODY: WELL, I WILL USE A DIFFERENT CASE THAT,
 02:23PM **4** AT LEAST FOR ME, COMPETES WITH THIS ONE FOR BEING COMPELLING,
 02:23PM **5** AND THAT'S THE ABBOTT CASE, THE SMITHKLINE BEECHAM CASE THAT
 02:23PM **6** WAS BEFORE JUDGE WILKEN THAT WAS A DRUG PRICE FIXING CASE FOR
 02:23PM **7** AN AIDS DRUG, AND IN THAT CASE YOU HAVE A HISTORY OF ALLEGED
 02:23PM **8** PRACTICE OF PEOPLE ELEVATING --
 02:23PM **9** THE COURT: WELL, I STILL DON'T THINK --
 02:23PM **10** MS. DERMODY: -- THE PRICE OF AN AIDS DRUG. THE JURY
 02:23PM **11** GOT --
 02:23PM **12** THE COURT: UNLESS YOU'RE GOING TO GIVE ME ALL THE
 02:23PM **13** DOCUMENTATION SO I CAN FAMILIARIZE MYSELF WITH THE FACTS OF
 02:23PM **14** THOSE CASES, I JUST DON'T THINK RANDOMLY PULLING OUT OTHER
 02:23PM **15** VERDICTS OF OTHER CASES IS REALLY USEFUL.
 02:24PM **16** MS. DERMODY: OKAY, YOUR HONOR. I MEAN, IF THERE'S
 02:24PM **17** SOMETHING THAT WE COULD SUBMIT TO YOUR HONOR THAT WOULD BE MORE
 02:24PM **18** HELPFUL, I WOULD BE REALLY MORE THAN HAPPY TO DO IT.
 02:24PM **19** I THINK WHAT WE'RE STRUGGLING WITH IS THAT THE STANDARD
 02:24PM **20** HERE IS NOT, YOU KNOW, WHAT MIGHT BE THE BEST POSSIBLE
 02:24PM **21** SCENARIO.
 02:24PM **22** THE STANDARD HERE IS SORT OF THE RANGE OF REASONABLENESS
 02:24PM **23** BASED ON THE RISK IN THIS CASE. AND FROM OUR PERSPECTIVE, AS
 02:24PM **24** PEOPLE THAT LIVED AND BREATHED AND SWEATED AND SACRIFICED FOR
 02:24PM **25** THIS CASE, AND JUST 100 PERCENT DID EVERYTHING WE COULD FOR
 UNITED STATES COURT REPORTERS

02:24PM **1** THESE CLASS MEMBERS -- I MEAN, HONESTLY, YOUR HONOR, WE HAVE
 02:24PM **2** DONE EVERYTHING WE COULD TO DO THIS CASE RIGHT -- WE BELIEVE
 02:24PM **3** THAT THIS IS THE RIGHT THING TO DO FOR THE CLASS.
 02:24PM **4** WE THINK IT WOULD BE ABSOLUTELY UNETHICAL FOR US TO SEE
 02:24PM **5** THAT THERE WAS THIS MUCH MONEY AVAILABLE FOR THE CLASS ON THESE
 02:24PM **6** CLAIMS AND TO IGNORE THAT AND GO TO TRIAL KNOWING THAT THERE
 02:24PM **7** MIGHT BE A VERY STRONG RISK THAT THE CLASS GETS NOTHING.
 02:24PM **8** THAT DID NOT SEEM AT ALL TENABLE TO US, YOUR HONOR, AND WE
 02:24PM **9** JUST HAVE PROVIDED THE COURT VARIOUS BENCHMARKS WE THOUGHT
 02:25PM **10** WOULD BE USEFUL TO SEE THAT THIS RISK IS SOMETHING THAT OTHER
 02:25PM **11** GOOD LAWYERS, OTHER EXPERIENCED LAWYERS HAVE COME TO SIMILAR
 02:25PM **12** RISK CALCULATIONS.
 02:25PM **13** I MEAN, ONE OF THE MOST INTERESTING COMPARISONS, PERHAPS
 02:25PM **14** TO US ONLY, IS WHAT WE PUT FORWARD IN THAT --
 02:25PM **15** THE COURT: WASN'T THE LCD-TFT YOUR CASE? WASN'T
 02:25PM **16** THAT LEIFF CABRASER?
 02:25PM **17** MS. DERMODY: IT WAS OUR CASE.
 02:25PM **18** THE COURT: OKAY. WHICH ONE, THE TOSHIBA OR BEST BUY
 02:25PM **19** VERSUS HANNSTAR --
 02:25PM **20** MS. DERMODY: TOSHIBA. WE TRIED THAT CASE, YOUR
 02:25PM **21** HONOR.
 02:25PM **22** THE COURT: UM-HUM.
 02:25PM **23** MS. DERMODY: AND IN EXHIBIT A TO OUR REPLY BRIEF, WE
 02:25PM **24** PUT FORWARD ALL OF THE ANTITRUST EMPLOYEE CLASS ACTIONS THAT WE
 02:25PM **25** COULD FIND, AND WE PUT FORWARD WHAT WE UNDERSTAND TO BE THE
 UNITED STATES COURT REPORTERS

02:25PM **1** RESULTS IN THOSE CASES SO YOUR HONOR CAN SEE THEM.
 02:25PM **2** AND I THINK WHAT IS INTERESTING IS TO LOOK AT EVEN THE
 02:25PM **3** EBAY CASE, WHICH THE CALIFORNIA ATTORNEY GENERAL'S OFFICE
 02:25PM **4** PROSECUTED, SOME OF THE BEST LAWYERS IN THE STATE ARE IN THAT
 02:25PM **5** OFFICE, REALLY SMART, TALENTED PEOPLE, AND THE RECOVERY IN THAT
 02:25PM **6** CASE WAS 1/23RD OF WHAT WE GOT HERE, AND THIS IS 20 -- I SHOULD
 02:25PM **7** SAY THIS IS 23 TIMES WHAT THEY GOT THERE.
 02:26PM **8** THESE --
 02:26PM **9** THE COURT: WELL, UNLESS YOU'RE GOING TO SHOW ME THE
 02:26PM **10** DOCUMENTS IN THAT CASE -- I DON'T BELIEVE THERE WAS CLASS CERT
 02:26PM **11** IN THAT CASE. I DON'T BELIEVE THERE WAS SUMMARY JUDGMENT IN
 02:26PM **12** THAT CASE. I DON'T THINK IT HAD GONE THROUGH THE DAUBERT
 02:26PM **13** MOTIONS IN THAT CASE.
 02:26PM **14** BUT REGARDLESS, I DON'T FIND IT VERY HELPFUL, UNLESS
 02:26PM **15** YOU'RE REALLY GOING TO GIVE ME DEEP INFORMATION ABOUT THOSE
 02:26PM **16** CASES, TO SAY, "ALL OF THESE OTHER CASES, BECAUSE I'VE SLAPPED
 02:26PM **17** ANTITRUST LABELS ON THEM, ARE COMPARABLE TO THIS."
 02:26PM **18** BECAUSE IF WE'RE JUST GOING TO TALK ABOUT RANDOM TRIALS, I
 02:26PM **19** CAN DO THAT, TOO. I JUST DON'T THINK -- UNLESS WE GO DEEPLY
 02:26PM **20** INTO WHAT THE FACTS ARE TO REALLY SEE IF IT'S COMPARABLE OR
 02:26PM **21** NOT, IT'S TOO GENERAL, I THINK.
 02:26PM **22** MS. DERMODY: OKAY, YOUR HONOR. WHAT WOULD BE
 02:26PM **23** HELPFUL TO THE COURT?
 02:26PM **24** THE COURT: SO EXPLAIN TO ME -- I MEAN, YOUR POSITION
 02:26PM **25** APPEARS TO BE THAT IF ONE DEFENDANT WAS NOT FOUND TO HAVE
 UNITED STATES COURT REPORTERS

02:27PM **1** PARTICIPATED IN THE OVERARCHING CONSPIRACY, THEN DAMAGES WOULD
 02:27PM **2** HAVE BEEN ZERO AND THE CLASS WOULD HAVE GOTTEN NOTHING.
 02:27PM **3** BUT I DON'T THINK THAT'S TRUE. YOU ALSO WOULD HAVE THE
 02:27PM **4** LEVERAGE TO APPEAL OR, YOU KNOW, THERE WOULD HAVE BEEN ANOTHER
 02:27PM **5** SETTLEMENT. IT JUST WOULD HAVE BEEN LATER IN THE PROCESS.
 02:27PM **6** MS. DERMODY: SO --
 02:27PM **7** THE COURT: AND YOUR LEVERAGE -- ANYWAY, I JUST HAVE
 02:27PM **8** CONCERNS ABOUT WHETHER THIS IS REALLY FAIR TO THE CLASS, AND I
 02:27PM **9** HAVEN'T MADE A DECISION YET ABOUT WHAT I'M GOING TO DO. I'D
 02:27PM **10** LIKE TO THINK ABOUT IT FURTHER.
 02:27PM **11** BUT I DO HAVE A CONCERN ABOUT WHETHER THIS IS A SUFFICIENT
 02:27PM **12** RECOVERY FOR THE CLASS. I -- YOU KNOW, I AM NOT AT ALL SAYING
 02:27PM **13** THAT THE PLAINTIFFS HAVEN'T BEEN ZEALOUS ADVOCATES IN DOING
 02:27PM **14** EVERYTHING POSSIBLE FOR THE CLASS, BUT I JUST DO HAVE A
 02:27PM **15** QUESTION AND I NEED TO THINK ABOUT IT FURTHER.
 02:27PM **16** MS. DERMODY: OKAY, YOUR HONOR.
 02:27PM **17** THE COURT: SO IF THERE'S NOTHING MORE THAT YOU WANT
 02:28PM **18** TO SAY?
 02:28PM **19** NOW, YOU'RE GOING FOR \$81 MILLION. WHAT'S YOUR LODESTAR,
 02:28PM **20** AND WHY SHOULD THAT GO TO YOU INSTEAD OF THE CLASS?
 02:28PM **21** MS. DERMODY: YOUR HONOR, ALL WE'VE SAID IS TO NOTICE
 02:28PM **22** THE CLASS THAT WE MIGHT REQUEST UP TO THAT. LAST TIME WE
 02:28PM **23** NOTICED THE CLASS AND WE REQUESTED LESS THAN WHAT WE NOTICED.
 02:28PM **24** IT'S THE BENCHMARK IN THE NINTH CIRCUIT. WE WOULD THINK
 02:28PM **25** IT WOULD BE WARRANTED HERE GIVEN THE WORK IN THIS CASE.
 UNITED STATES COURT REPORTERS

02:28PM **1** THE COURT: WHAT'S YOUR LODESTAR? BECAUSE FROM THE
 02:28PM **2** FIRST SETTLEMENT, IT LOOKED LIKE LEIFF CABRASER'S WAS, WHAT,
 02:28PM **3** ABOUT 8 MILLION THROUGH OCTOBER OF, YOU KNOW, OCTOBER 30TH OF
 02:28PM **4** 2013, 8.4 MILLION.
 02:28PM **5** SO WHAT'S THE LODESTAR IF YOU ADD UP ALL THE DIFFERENT LAW
 02:28PM **6** FIRMS THAT ARE INVOLVED IN THIS LITIGATION?
 02:28PM **7** MS. DERMODY: I DON'T HAVE THAT INFORMATION FOR YOUR
 02:28PM **8** HONOR. I'M SORRY.
 02:28PM **9** THE COURT: ALL RIGHT. SO FOR THE FIRST SETTLEMENT,
 02:28PM **10** NOBODY LOOKED AT THAT FOR THE SETTLEMENT WITH LUCAS FILM,
 02:28PM **11** PIXAR, AND INTUIT?
 02:28PM **12** MS. DERMODY: I JUST DON'T HAVE THE NUMBERS HANDY FOR
 02:28PM **13** YOUR HONOR. I'M SORRY. I DON'T WANT TO MISLEAD THE COURT.
 02:29PM **14** THE COURT: OKAY. WELL, YOU KNOW, MR. SAVERI SAID
 02:29PM **15** THAT HE WOULD FILE HIS FEES DOCUMENTS FOR THE FIRST SETTLEMENT.
 02:29PM **16** I DON'T BELIEVE I GOT THAT.
 02:29PM **17** WHAT ARE YOUR LAW FIRM'S -- WHAT'S YOUR LAW FIRM'S --
 02:29PM **18** MR. SAVERI: AS OF THE TIME OF THAT, OF THE PRIOR
 02:29PM **19** SETTLEMENT, MY FIRM'S LODESTAR WAS APPROXIMATELY \$4 MILLION.
 02:29PM **20** THE COURT: OKAY. SO -- AND I BELIEVE THAT
 02:29PM **21** SETTLEMENT WAS REACHED IN, WHAT, APRIL OF 2013? IS THAT
 02:29PM **22** SOMEWHERE AROUND THERE? OR, NO, WHEN WAS THAT? SEPTEMBER?
 02:29PM **23** MS. DERMODY: IT WAS APPROVED IN OCTOBER, YOUR HONOR.
 02:29PM **24** THE COURT: RIGHT. BUT I -- I GUESS I'M TRYING TO
 02:29PM **25** FIGURE OUT, YOU'RE SAYING UP TO THE POINT OF SETTLEMENT, SO

UNITED STATES COURT REPORTERS

02:29PM **1** WHAT LINE ARE YOU DRAWING HERE? WHAT'S THE DATE,
 02:29PM **2** APPROXIMATELY?
 02:29PM **3** MR. SAVERI: I BELIEVE IT WAS OCTOBER OF LAST YEAR.
 02:29PM **4** THE COURT: OKAY. SO THROUGH -- ALSO THROUGH SOME
 02:29PM **5** POINT IN OCTOBER?
 02:29PM **6** MR. SAVERI: YEAH.
 02:29PM **7** THE COURT: OKAY.
 02:29PM **8** MR. SAVERI: AND, YOUR HONOR, SINCE THAT POINT IN
 02:29PM **9** TIME, I MEAN, WE DID A LOT OF ADDITIONAL WORK IN THE CASE.
 02:29PM **10** THE COURT: SURE.
 02:29PM **11** MR. SAVERI: THE LIEFF CABRASER FOLKS DID A LOT OF
 02:29PM **12** WORK.
 02:29PM **13** THE COURT: SURE.
 02:29PM **14** MR. SAVERI: MY OFFICE DID. SO THERE'S ADDITIONAL
 02:29PM **15** LODESTAR. I JUST WANT TO BE --
 02:29PM **16** THE COURT: YES, I COMPLETELY UNDERSTAND THAT.
 02:29PM **17** BUT YOU HAVE NO IDEA WITH REGARD TO -- I BELIEVE THERE
 02:30PM **18** ARE, WHAT, AT LEAST THREE OTHER LAW FIRMS?
 02:30PM **19** MS. DERMODY: TWO OTHER FIRMS, YOUR HONOR.
 02:30PM **20** THE COURT: TWO OTHER FIRMS.
 02:30PM **21** MR. SAVERI: I THINK IT'S FAIR TO SAY THAT BETWEEN
 02:30PM **22** THE TWO OF US, WE HAVE THE GREAT MAJORITY OF THE TIME IN THIS
 02:30PM **23** CASE.
 02:30PM **24** THE COURT: SURE, SURE.
 02:30PM **25** MR. SAVERI: I MEAN, AND THAT'S CONSISTENT WITH WHAT

UNITED STATES COURT REPORTERS

02:30PM **1** YOU'VE SEEN IN THE CASE.
 02:30PM **2** MS. DERMODY: YEAH. WE CAN GET THE ACTUAL NUMBER.
 02:30PM **3** WE HAVE THEIRS.
 02:30PM **4** THE COURT: OKAY. THE SETTLEMENT AGREEMENT SAYS THE
 02:30PM **5** DEFENDANTS TAKE NO POSITION ON THE SERVICE AWARDS IF THE AWARDS
 02:30PM **6** ARE \$25,000 OR LESS.
 02:30PM **7** NOW, THE PROPOSED SERVICE AWARDS ARE 80,000. DOES THAT
 02:30PM **8** MEAN THE DEFENDANTS ARE GOING TO TAKE A POSITION? OR YOU'RE
 02:30PM **9** GOING TO REMAIN SILENT?
 02:30PM **10** MR. VAN NEST: WE'RE GOING TO REMAIN SILENT, YOUR
 02:30PM **11** HONOR.
 02:30PM **12** THE COURT: OKAY.
 02:30PM **13** MR. VAN NEST: THAT'S UP TO YOUR HONOR'S DISCRETION.
 02:30PM **14** THE COURT: OKAY.
 02:30PM **15** MR. VAN NEST: I WOULD LIKE TO COMMENT ON THE
 02:30PM **16** SETTLEMENT OVERALL WHEN YOUR HONOR GETS TO US THOUGH.
 02:30PM **17** THE COURT: ACTUALLY, WHY DON'T WE GO AHEAD AND DO
 02:30PM **18** THAT NOW? I HAVE SOME OTHER MORE MECHANICAL QUESTIONS ABOUT
 02:30PM **19** THE SETTLEMENT. THOSE CAN WAIT.
 02:31PM **20** MR. VAN NEST: SURE.
 02:31PM **21** THE COURT: SO -- YEAH.
 02:31PM **22** MR. VAN NEST: JUST A COUPLE OF QUICK POINTS.
 02:31PM **23** THE COURT: YES.
 02:31PM **24** MR. VAN NEST: I THINK YOUR HONOR STARTED WITH THE
 02:31PM **25** PREMISE SOMEHOW THAT THE SETTLING DEFENDANTS HERE ARE PAYING A

UNITED STATES COURT REPORTERS

02:31PM **1** HIGHER PERCENTAGE THAN THE EARLIER -- A LOWER PERCENTAGE.
 02:31PM **2** WE DON'T LOOK AT IT THAT WAY AT ALL.
 02:31PM **3** THE COURT: OKAY.
 02:31PM **4** MR. VAN NEST: AS A MATTER OF FACT, WE THINK WE'RE
 02:31PM **5** PAYING A PREMIUM IN THAT IF YOU LOOK AT THE SETTLEMENTS THAT
 02:31PM **6** YOU'VE ALREADY APPROVED, YOU APPROVED \$20 MILLION SETTLEMENTS.
 02:31PM **7** THAT'S ABOUT 8 PERCENT OF THE CLASS.
 02:31PM **8** I MEAN, IF YOU DO THE MATH, OUR SETTLEMENT SHOULD HAVE
 02:31PM **9** BEEN BELOW \$300 MILLION. I MEAN, IF IT'S JUST COMPARABLE, IF
 02:31PM **10** WE'RE JUST PAYING WHAT, THE SAME BASIS THAT THAT 20 MILLION
 02:31PM **11** PAID, WE WOULD HAVE BEEN IN THE 250 TO 270 TO 280 RANGE.
 02:31PM **12** AND BELIEVE ME, AS I THINK YOU KNOW --
 02:31PM **13** THE COURT: HOW ARE YOU CALCULATING THAT?
 02:31PM **14** MR. VAN NEST: OH, IF YOU JUST -- IF 8 PERCENT OF THE
 02:31PM **15** CLASS IS WORTH 20 MILLION, WHAT'S THE OTHER 92 PERCENT WORTH?
 02:31PM **16** IT'S NOT 324 MILLION. IT'S A NUMBER SOUTH OF 300.
 02:31PM **17** SO OUR POINT IS, AND WE MADE IT REPEATEDLY IN DISCUSSIONS
 02:32PM **18** WITH PLAINTIFFS, THAT, YOU KNOW, WE'RE PAYING MORE -- AT THE
 02:32PM **19** NUMBERS WE'RE NEGOTIATING NOW, WE'RE PAYING MORE THAN THE FOLKS
 02:32PM **20** THAT SETTLED OUT EARLIER, AND IN OUR SITUATION, WE FELT THAT
 02:32PM **21** THE BIGGEST RISK IN THIS CASE WAS THE TRIAL ITSELF.
 02:32PM **22** AND IF I COULD MAKE JUST A COUPLE OF POINTS ABOUT THIS
 02:32PM **23** TRIAL, YOUR HONOR, THAT I THINK ARE SIGNIFICANT?
 02:32PM **24** THE COURT: OKAY.
 02:32PM **25** MR. VAN NEST: IT IS TRUE THAT DR. LEAMER BASED HIS

UNITED STATES COURT REPORTERS

02:32PM **1** DAMAGE MODEL ON AN ALL-IN APPROACH. IT WAS ALL SEVEN
 02:32PM **2** DEFENDANTS PARTICIPATING. IF YOU TOOK OUT ONE OR MORE
 02:32PM **3** DEFENDANTS, HIS MODEL FELL APART AND IN SOME CASES SHOWED THAT
 02:32PM **4** SOME DEFENDANTS HAD OVERCOMPENSATED PEOPLE.
 02:32PM **5** IN OTHER WORDS, HIS MODEL ONLY WORKED -- AND HE CONCEDED
 02:32PM **6** THIS, WE'D BE HAPPY TO SUBMIT A SHORT BRIEF ON IT -- HE
 02:32PM **7** CONCEDED THAT HIS MODEL WOULDN'T WORK IF NOT ALL DEFENDANTS
 02:32PM **8** WERE FOUND TO BE PARTICIPANTS.
 02:33PM **9** NOW, YOUR HONOR RECOGNIZES, AND COUNSEL SAID IT IN HER
 02:33PM **10** BRIEF, THAT OBVIOUSLY THESE BILATERAL AGREEMENTS WERE ENTERED
 02:33PM **11** INTO OVER A WIDE PERIOD OF TIME, SOME IN DIFFERENT INDUSTRIES,
 02:33PM **12** AND SO ONE OF THE BIG RISKS IN THE TRIAL WAS THAT ONE DEFENDANT
 02:33PM **13** WOULD BE OUT.
 02:33PM **14** THE COURT: YES.
 02:33PM **15** MR. VAN NEST: THE OTHER BIG RISK --
 02:33PM **16** THE COURT: OKAY. BUT LET'S PLAY THAT OUT. SO WHAT
 02:33PM **17** WOULD HAVE HAPPENED? YOU DON'T THINK THE JURORS, ONE
 02:33PM **18** POSSIBILITY COULD HAVE BEEN TO TAKE OUT OF DR. LEAMER'S DAMAGES
 02:33PM **19** MODEL, OR SOME PERCENTAGE OF THAT MODEL, TAKE OUT THAT
 02:33PM **20** PERCENTAGE OF THAT DEFENDANT'S EMPLOYEES? OR YOU'RE SAYING
 02:33PM **21** THAT -- YOU'RE SAYING THE JURY COULD HAVE COME UP WITH NOTHING?
 02:33PM **22** MR. VAN NEST: YEAH.
 02:33PM **23** THE COURT: IF THEY DIDN'T ACCEPT IT WHOLE HOG, THEY
 02:33PM **24** WOULD COME UP WITH ZERO?
 02:33PM **25** MR. VAN NEST: TWO THINGS.

UNITED STATES COURT REPORTERS

02:34PM **1** BUT I THINK EVEN IF I HADN'T --
 02:34PM **2** THE COURT: YOU WOULD HAVE A JMOL MOTION?
 02:34PM **3** MR. VAN NEST: I WOULD HAVE A GOOD MOTION UNDER
 02:34PM **4** COMCAST.
 02:34PM **5** NOW, I DON'T, FRANKLY, THINK THAT THAT'S THE BIGGEST RISK.
 02:34PM **6** THE COURT: YEAH.
 02:34PM **7** MR. VAN NEST: I'LL TELL YOU, I THINK THE BIGGEST
 02:34PM **8** RISK IN THIS CASE --
 02:34PM **9** THE COURT: YEAH.
 02:34PM **10** MR. VAN NEST: -- IS THAT THEY HAD A HUGE NUMBER,
 02:34PM **11** \$3 BILLION, AND THE FACTS ON THE GROUND WERE THAT TECH
 02:34PM **12** EMPLOYEES IN THE CLASS WERE PAID WAY ABOVE BOTH THE NATIONAL
 02:34PM **13** AND THE REGIONAL AVERAGE, AND THEIR PAY WENT UP, NOT BY A
 02:34PM **14** LITTLE, BUT EVERY YEAR IT WENT UP BY MORE THAN IT HAD EITHER
 02:35PM **15** BEFORE OR AFTER THE CLASS PERIOD.
 02:35PM **16** SO THERE'S A VERY STRONG ARGUMENT THAT THAT \$3 BILLION
 02:35PM **17** NUMBER EVERYBODY IS TALKING ABOUT WAS ABSOLUTELY INCONSISTENT
 02:35PM **18** WITH THE FACTS ON THE GROUND.
 02:35PM **19** AND WHY DO YOU THINK THAT HE COULD HAVE --
 02:35PM **20** THE COURT: BUT YOU'RE COMPARING THEM, WHAT, LIKE THE
 02:35PM **21** PLAINTIFFS JUST TO THE AVERAGE INCOME IN SANTA CLARA COUNTY?
 02:35PM **22** MR. VAN NEST: NO, NO, NO, NO.
 02:35PM **23** THE COURT: BECAUSE THAT'S WHAT THEY DO IN THEIR
 02:35PM **24** REPLY BRIEF.
 02:35PM **25** MR. VAN NEST: THEY DO.

UNITED STATES COURT REPORTERS

02:33PM **1** THE COURT: IS THAT -- I JUST WANT TO KNOW --
 02:33PM **2** MR. VAN NEST: YEAH.
 02:33PM **3** THE COURT: -- WHAT ARE YOU SAYING?
 02:33PM **4** MR. VAN NEST: ABSOLUTELY.
 02:33PM **5** THE COURT: IF THE JURY FOUND THAT ONE, THEY WOULD GO
 02:33PM **6** WITH ZERO? BECAUSE I -- I FIND THAT A LITTLE BIT DIFFICULT TO
 02:33PM **7** BELIEVE.
 02:33PM **8** MR. VAN NEST: I DON'T.
 02:33PM **9** THE COURT: YOU THINK THAT THE JURY WOULD COME UP
 02:33PM **10** WITH ZERO?
 02:33PM **11** MR. VAN NEST: BUT HERE'S THE POINT. THEY HAD AN
 02:33PM **12** EXPERT REPORT THAT WAS ONE FLAVOR.
 02:33PM **13** THE COURT: UM-HUM.
 02:33PM **14** MR. VAN NEST: ALL SEVEN IN, HERE'S THE NUMBER.
 02:34PM **15** THE COURT: UM-HUM.
 02:34PM **16** MR. VAN NEST: DR. LEAMER CONCEDED, IN DEPOSITION,
 02:34PM **17** "IF YOU TAKE ONE DEFENDANT OUT, MY MODEL DOESN'T WORK."
 02:34PM **18** THEY THEN -- WE THEN WOULD BE ARGUING TO YOUR HONOR, UNDER
 02:34PM **19** COMCAST AND ALL THE RECENT SUPREME COURT CASES, THAT THEY DON'T
 02:34PM **20** HAVE A DAMAGE MODEL TO GIVE TO THE JURY TO PRODUCE ANYTHING
 02:34PM **21** OTHER THAN SPECULATION.
 02:34PM **22** THE COURT: UM-HUM.
 02:34PM **23** MR. VAN NEST: SO DO I THINK I HAD A CHANCE TO
 02:34PM **24** PERSUADE THE JURY, GIVEN THAT, THAT THEY SHOULDN'T AWARD
 02:34PM **25** DAMAGES BECAUSE THERE WASN'T A BASIS? YOU BET I DO.

UNITED STATES COURT REPORTERS

02:35PM **1** THE COURT: THEY JUST SAY, WELL, SANTA CLARA COUNTY,
 02:35PM **2** AVERAGE INCOME IS THIS; THEREFORE, THERE WOULD HAVE BEEN A LOT
 02:35PM **3** OF RESENTMENT THAT THESE ARE TECH WORK WORKERS THAT ARE MAKING
 02:35PM **4** MORE THAN THE AVERAGE INCOME.
 02:35PM **5** MR. VAN NEST: WHAT WE SAID IN OUR DAUBERT --
 02:35PM **6** THE COURT: YEAH.
 02:35PM **7** MR. VAN NEST: -- WAS THAT THEY ARE ABOVE THE
 02:35PM **8** NATIONAL AND THE REGIONAL AVERAGE FOR TECH WORKERS. IF YOU
 02:35PM **9** LOOK AT TECH WORKERS ON AVERAGE, IN THE NATION OR REGIONALLY
 02:35PM **10** HERE, THESE CLASS MEMBERS WERE PAID WAY -- I'M NOT TALKING 1 OR
 02:35PM **11** 2 PERCENT -- BUT WAY ABOVE THAT AVERAGE AND THEIR PAY WENT UP.
 02:35PM **12** THE COURT: BUT ISN'T THIS WHERE YOU COME IF YOU ARE
 02:35PM **13** A TOP TECH WORKER?
 02:35PM **14** MR. VAN NEST: SURE.
 02:35PM **15** THE COURT: WOULDN'T YOU BE IN SILICON VALLEY --
 02:35PM **16** MR. VAN NEST: ABSOLUTELY.
 02:35PM **17** THE COURT: -- VERSUS IN BROKEN ARROW, OKLAHOMA?
 02:36PM **18** MR. VAN NEST: SURE. MY POINT IS THAT THEIR WHOLE
 02:36PM **19** CASE WAS PREMISED ON SOMEHOW PAY BEING SUPPRESSED; AND, YET, IN
 02:36PM **20** THE CLASS PERIOD, PAY WENT UP MORE EVERY YEAR THAN IT HAD GONE
 02:36PM **21** UP BEFORE OR AFTER.
 02:36PM **22** THE COURT: BUT THE THEORY IS IT COULD HAVE GONE UP
 02:36PM **23** EVEN MORE.
 02:36PM **24** MR. VAN NEST: SURE.
 02:36PM **25** THE COURT: AND I DON'T THINK THAT'S INCONSISTENT

UNITED STATES COURT REPORTERS

02:36PM **1** WITH SAYING TECH WORKERS HERE MAKE MORE THAN TECH WORKERS IN
 02:36PM **2** ALABAMA, MAINE, WHEREVER YOU WANT TO TALK ABOUT IT, AND THAT
 02:36PM **3** THEIR SALARIES COULD HAVE BEEN EVEN HIGHER.
 02:36PM **4** MR. VAN NEST: BUT YOU AND I --
 02:36PM **5** THE COURT: I JUST DON'T THINK THAT'S INCONSISTENT.
 02:36PM **6** MR. VAN NEST: BUT HOW MUCH DO YOU WANT TO GAMBLE ON
 02:36PM **7** THAT? I MEAN, THERE HAVE BEEN A LOT OF BILLION DOLLAR CLAIMS
 02:36PM **8** MADE IN OUR DISTRICT --
 02:36PM **9** THE COURT: WELL, HOW MUCH DID YOU ALL WANT TO GAMBLE
 02:36PM **10** WITH ALL OF THAT INFORMATION COMING OUT? HOW MUCH DID YOU ALL
 02:36PM **11** WANT TO GO TO TRIAL ON THIS?
 02:36PM **12** MR. VAN NEST: WE BELIEVE --
 02:36PM **13** THE COURT: I MEAN, YOU'VE SEEN HOW OUR JURY POOLS
 02:36PM **14** ARE HERE IN SAN JOSE. I THINK THEY WOULD HAVE FOUND THESE
 02:36PM **15** DOCUMENTS VERY SIGNIFICANT AND PRETTY COMPELLING.
 02:36PM **16** MR. VAN NEST: I'M NOT DISAGREEING WITH THAT.
 02:36PM **17** THE COURT: THEY WOULD HAVE FOUND A LOT OF THE
 02:36PM **18** TESTIMONY VERY COMPELLING. THEY WOULD HAVE FOUND A LOT OF THE
 02:36PM **19** E-MAILS VERY COMPELLING.
 02:37PM **20** HOW MUCH -- YOU KNOW, I UNDERSTAND WE'RE ALL FOCUSED ON
 02:37PM **21** HOW MUCH THE PLAINTIFFS DIDN'T WANT TO GO TO TRIAL.
 02:37PM **22** LET'S TALK ABOUT HOW MUCH THE DEFENDANTS DIDN'T WANT TO GO
 02:37PM **23** TO TRIAL. HOW MUCH WAS THAT WORTH?
 02:37PM **24** MR. VAN NEST: YOU CAN PRICE IT.
 02:37PM **25** THE COURT: HOW COME YOU'RE NOT REALLY FOCUSING ON

UNITED STATES COURT REPORTERS

02:37PM **1** THAT?
 02:37PM **2** MR. VAN NEST: WE PRICED IT. IT'S \$324.5 MILLION.
 02:37PM **3** IN OTHER WORDS, GIVEN ALL THE RISKS AND GIVEN MONTHS OF
 02:37PM **4** WORK WITH JUDGE PHILLIPS, THAT'S WHAT WE -- THAT'S WHAT WE
 02:37PM **5** CONCLUDED.
 02:37PM **6** THE COURT: IT'S NOT JUST FINANCIAL RISKS. IT'S
 02:37PM **7** OTHER DAMAGE THAT YOUR COMPANIES WOULD GET IN TRYING TO RECRUIT
 02:37PM **8** OTHER EMPLOYEES AND WHAT THAT WOULD DO TO YOUR IMAGE, TO YOUR
 02:37PM **9** GOOD WILL. I MEAN, IT WOULD HAVE HAD A LOT OF COST OTHER THAN
 02:37PM **10** JUST STRICTLY MONETARY.
 02:37PM **11** MR. VAN NEST: I'M NOT DENYING THAT ONE BIT.
 02:37PM **12** BUT YOUR HONOR'S QUESTION, WHAT'S IT WORTH TO US, WE PUT
 02:37PM **13** OUR MONEY WHERE OUR MOUTH IS, RIGHT? WE NEGOTIATED FOR A
 02:37PM **14** SETTLEMENT AND ACHIEVED A SETTLEMENT THAT IS FAIR AND
 02:37PM **15** REASONABLE TO THE CLASS IN LIGHT OF ALL THE RISKS.
 02:37PM **16** I'M JUST POINTING OUT THAT THERE ARE LOTS OF RISKS ON THE
 02:38PM **17** PLAINTIFFS' SIDE THAT MEAN THERE'S A REAL POSSIBILITY OF EITHER
 02:38PM **18** A LOW VERDICT OR NO VERDICT OR A VERDICT THAT DOESN'T REACH THE
 02:38PM **19** SETTLEMENT THAT WE'VE ACHIEVED.
 02:38PM **20** FOR EXAMPLE, FOR EXAMPLE, WE ALL KNOW THAT YOU CAN COME
 02:38PM **21** INTO COURT WITH A BILLION DOLLAR CLAIM AND END UP WITH A LOT
 02:38PM **22** LESS MONEY, RIGHT? I MEAN, THAT HAPPENS ALL THE TIME.
 02:38PM **23** AND IN THIS PARTICULAR CASE, THE FOCUS THAT YOUR HONOR
 02:38PM **24** HAD, BECAUSE THAT'S WHAT WAS PRESENTED, WAS ON THE LIABILITY
 02:38PM **25** SIDE, WE HAD SUMMARY JUDGMENT MOTIONS AND ALL THAT, AND A

UNITED STATES COURT REPORTERS

02:38PM **1** LITTLE BIT ON THE DAMAGES SIDE IN THE DAUBERTS.
 02:38PM **2** BUT THE REAL RISK IN THE CASE WAS --
 02:38PM **3** THE COURT: WELL, THE DAMAGES ALSO CAME UP A LOT IN
 02:38PM **4** THE TWO CLASS CERT ISSUES -- MOTIONS, EXCUSE ME.
 02:38PM **5** MR. VAN NEST: TO SOME DEGREE, THEY DID.
 02:38PM **6** THE COURT: YEAH.
 02:38PM **7** MR. VAN NEST: BUT THAT'S WHERE THERE'S A HUGE RANGE
 02:38PM **8** OF RISK, WHICH IS WHY I SAY THE NUMBER THAT WE ACHIEVED IS
 02:38PM **9** ABSOLUTELY IN LINE, AND A LITTLE BETTER FOR THE PLAINTIFFS,
 02:38PM **10** THAN THE NUMBER THAT WAS ACHIEVED IN THE FIRST SETTLEMENT.
 02:38PM **11** SO GIVEN -- GIVEN THAT THAT'S 8 TO 10 PERCENT OF THE CLASS
 02:39PM **12** THAT PAID \$20 MILLION, IT IS ABSOLUTELY FAIR AND REASONABLE FOR
 02:39PM **13** THE REST OF THE -- FOR THE DEFENDANTS EMPLOYING THE REST OF THE
 02:39PM **14** CLASS TO PAY THE 324.5 MILLION. IT'S IN LINE WITH IT, IT'S A
 02:39PM **15** PREMIUM OVER IT, AND MAYBE THAT'S CONSISTENT WITH THE FACT THAT
 02:39PM **16** THE CASE WAS A LITTLE MORE WELL DEVELOPED BY THE TIME IT GOT
 02:39PM **17** THERE.
 02:39PM **18** BUT I DO THINK THAT WHAT COUNSEL HAS SAID ABOUT THE RISK
 02:39PM **19** OF A NO OR LOW VERDICT IS -- CANNOT BE IGNORED OR OVERLOOKED IN
 02:39PM **20** THIS CASE GIVEN THE ECONOMIC FACTS ON THE GROUND, AND GIVEN
 02:39PM **21** THAT EVEN YOUR HONOR RECOGNIZED THAT DR. LEAMER'S RESULTS AT
 02:39PM **22** THAT T-SCORE WEREN'T STATISTICALLY SIGNIFICANT BY ANY MEASURE
 02:39PM **23** THAT ANY ECONOMIST, MATHEMATICIAN, OR SCIENTIST HAS EVER
 02:39PM **24** APPROVED.
 02:39PM **25** AND ALTHOUGH THAT PASSED DAUBERT, IT MIGHT NOT PASS A JURY

UNITED STATES COURT REPORTERS

02:39PM **1** TO HEAR THAT THIS GUY'S REPORT -- WHICH IS THE ONLY THING THAT
 02:40PM **2** GIVES THEM A NUMBER -- WAS NOT STATISTICALLY SIGNIFICANT BY ANY
 02:40PM **3** TRADITIONAL MEASURE OF SIGNIFICANCE IN ANY SORT OF SCIENTIFIC,
 02:40PM **4** ACADEMIC, MATHEMATIC, OR EVEN INDUSTRIAL COMMUNITY.
 02:40PM **5** AND THAT WAS A HUGE, SIGNIFICANT FACT FOR US FOR
 02:40PM **6** PRESENTATION TO THE JURY AND, FRANKLY, THE ONLY -- THE ONLY
 02:40PM **7** EVIDENCE, IF YOU WANT TO CALL IT THAT, THEY HAD OF THAT NUMBER
 02:40PM **8** WAS DR. LEAMER'S OPINION.
 02:40PM **9** THERE WASN'T ANY OTHER INTRINSIC EVIDENCE THAT LEADS TO
 02:40PM **10** THAT NUMBER. THE INTRINSIC EVIDENCE LEADS TO A SHOWING THAT I
 02:40PM **11** MENTIONED OF PAY GOING UP AND BEING ABOVE AVERAGE.
 02:40PM **12** SO IF HE DOESN'T HAVE A SIGNIFICANTLY SIGNIFICANT RESULT,
 02:40PM **13** WOULD YOU HANG YOUR HAT ON A JURY TRIAL IN THAT SITUATION WHEN
 02:40PM **14** YOU HAVE ONE EXPERT PRESENTING DAMAGES WHOSE T-SCORE IS HIGHER
 02:40PM **15** THAN ANY OTHER COURT OR VERDICT THAT WE WERE ABLE TO FIND HAS
 02:40PM **16** EVER SUPPORTED?
 02:40PM **17** I MEAN, THAT'S ANOTHER FACTOR, I THINK, THAT CAUSED, YOU
 02:41PM **18** KNOW, THE PARTIES TO COME WHERE THEY DID.
 02:41PM **19** NOW, I WILL SAY THAT THIS SETTLEMENT WAS ACHIEVED OVER A
 02:41PM **20** QUITE LONG PERIOD OF TIME. IT STARTED WITH MEETINGS, BUT IT
 02:41PM **21** CONTINUED FOR MONTHS WITH JUDGE PHILLIPS ACTIVELY INVOLVED AND
 02:41PM **22** JUDGE PHILLIPS GUIDING THE PARTIES TO WHERE WE ULTIMATELY ENDED
 02:41PM **23** UP.
 02:41PM **24** AND WHILE, OF COURSE, THE SETTLEMENT DISCUSSIONS ARE
 02:41PM **25** CONFIDENTIAL, I DON'T THINK THERE'S ANY QUESTION THAT YOU HAD

UNITED STATES COURT REPORTERS

02:41PM **1** KNOWLEDGEABLE, EXPERIENCED COUNSEL ON BOTH SIDES, AND A VERY
 02:41PM **2** KNOWLEDGEABLE, EXPERIENCED MEDIATOR WHO WAS WELL AWARE OF ALL
 02:41PM **3** OF THESE RISKS AND WHAT'S BEEN HAPPENING AT TRIALS HERE AND
 02:41PM **4** AROUND THE COUNTRY.
 02:41PM **5** AND, YOU KNOW, TO COME UP WITH THIS NUMBER, WHICH IS, I
 02:41PM **6** GUESS, THE SECOND BIGGEST NUMBER IN HISTORY FOR A SETTLEMENT OF
 02:41PM **7** THIS KIND, I THINK THAT'S A PRETTY SIGNIFICANT ACHIEVEMENT AND
 02:41PM **8** I THINK THAT THE PARTIES DIDN'T COME TO IT OVERNIGHT. IT TOOK
 02:41PM **9** A WHOLE LOT OF WORK AND A WHOLE LOT OF TIME AND EFFORT BY A LOT
 02:42PM **10** OF PEOPLE TO GET THAT NUMBER DONE.
 02:42PM **11** THE ONLY OTHER COMMENT I'LL MAKE IS THAT I THINK YOUR
 02:42PM **12** HONOR'S COMMENTS ON THE SO-CALLED PRO RATA, IT -- THIS
 02:42PM **13** SETTLEMENT IS A LITTLE BIT DIFFERENT IN THAT THERE'S NO CLAIMS
 02:42PM **14** PROCESS. WE'RE JUST GOING TO WRITE CHECKS. WE HAVE THE
 02:42PM **15** ADDRESSES. WE HAVE THE IDENTITIES. THERE'S NO CLAIMS PROCESS.
 02:42PM **16** SO IT'S NOT A REVERTER IN THE SENSE THAT WE THINK OF
 02:42PM **17** REVERSIONS. IT'S A SAFETY VALVE, IF A REALLY HIGH NUMBER OF
 02:42PM **18** PEOPLE OPT OUT, TO GIVE THE DEFENDANTS THE FUNDS TO DEAL WITH
 02:42PM **19** THOSE OPT OUTS.
 02:42PM **20** NOW, I DON'T THINK ANY OF US EXPECT OPT OUTS AT THIS
 02:42PM **21** LEVEL. THERE WERE 61 OPT OUTS FROM THE LITIGATION CLASS AND
 02:42PM **22** NOT VERY MANY FROM THE SETTLEMENT CLASS.
 02:42PM **23** AND SO I THINK THAT THIS REALLY IS A SAFETY VALVE, AND I
 02:42PM **24** DON'T THINK IT'S FAIR TO THE PLAINTIFFS, OR US, TO SAY, "WELL,
 02:42PM **25** THESE OTHER GUYS, THEIR PRO RATA STARTED AT THIS NUMBER."

UNITED STATES COURT REPORTERS

02:42PM **1** YOU HAVE TO TAKE THE SETTLEMENT IN ITS ENTIRETY. IN OTHER
 02:43PM **2** WORDS, WE DIDN'T NEGOTIATE ONE LITTLE PIECE AT A TIME. THIS
 02:43PM **3** WAS ONE SETTLEMENT WITH A LOT OF MOVING PARTS AND A LOT OF
 02:43PM **4** ELEMENTS, AND SO MAYBE WE GOT A LITTLE BETTER BLOW PROVISION,
 02:43PM **5** YOU KNOW, IN TERMS OF A PRO RATA.
 02:43PM **6** BUT WHEN YOU'RE PAYING 324 MILLION, MAYBE YOU'RE ENTITLED
 02:43PM **7** TO IT. THOSE GUYS PAID 20 MILLION, AND SO THEIR RISK OF OPT
 02:43PM **8** OUTS, WHATEVER IT WAS, YOU KNOW, THEY DIDN'T -- THAT AMOUNT OF
 02:43PM **9** MONEY IS SO VASTLY DIFFERENT FROM THE MONEY THAT THESE
 02:43PM **10** DEFENDANTS PAID THAT IT'S QUITE NATURAL TO SAY, AND TO EXPECT,
 02:43PM **11** THAT A PRO RATA TYPE SAFETY VALVE MIGHT BE DIFFERENT.
 02:43PM **12** AND WE DIDN'T NEGOTIATE THIS DEAL FROM THE EARLIER DEAL.
 02:43PM **13** THIS SETTLEMENT WAS ACHIEVED BY THESE DEFENDANTS WITH THE
 02:43PM **14** PLAINTIFFS BASED ON THE FACTS THAT WE HAD FROM OUR CASE.
 02:43PM **15** AND SO WE -- I, FRANKLY, WASN'T EVEN AWARE OF WHAT THEIR
 02:43PM **16** PERCENTAGE PRO RATA IN THE LUCASFILM DEAL WAS UNTIL IT CAME UP
 02:43PM **17** THIS MORNING. I JUST KNEW THAT, GIVEN THE AMOUNT OF MONEY WE
 02:44PM **18** WERE SPENDING TO RESOLVE THIS, AND THE POSSIBILITY THAT I WOULD
 02:44PM **19** BE LEFT IN AN EXTREME CASE -- AND IT IS EXTREME -- WITH A LARGE
 02:44PM **20** NUMBER OF OPT OUTS, I WANTED, ASKED FOR, AND NEGOTIATED HARD
 02:44PM **21** FOR THE RIGHT TO GET SOME SMALL AMOUNT OF MONEY BACK TO DEAL
 02:44PM **22** WITH THOSE SO THAT I COULD EITHER TRY OR RESOLVE THOSE CASES.
 02:44PM **23** AND THAT'S ALL IT IS. IT'S -- IT'S ONE SMALL PIECE OF A
 02:44PM **24** BIGGER RESOLUTION, AND I DON'T THINK IT'S FAIR TO COMPARE, YOU
 02:44PM **25** KNOW, THAT PRO RATA TO ANY OTHER BECAUSE OUR SETTLEMENT WAS SO

UNITED STATES COURT REPORTERS

02:44PM **1** MUCH BIGGER AND MORE SIGNIFICANT THAN THE ONE THAT YOUR HONOR
 02:44PM **2** APPROVED A COUPLE OF MONTHS AGO. IT TOOK CARE OF 90-PLUS
 02:44PM **3** PERCENT OF THE CLASS, SO IT'S A MUCH BIGGER DEAL FROM THAT
 02:44PM **4** PERSPECTIVE.
 02:44PM **5** SO I JUST THINK YOU HAVE TO TAKE ALL OF THESE ELEMENTS IN
 02:44PM **6** CONTEXT OF THE OVERALL GLOBAL DEAL.
 02:44PM **7** THE COURT: WHAT WAS THE NUMBER OF OPT OUTS IN THE
 02:44PM **8** LUCASFILM/PIXAR/INTUIT? DO YOU HAVE THAT NUMBER NOW?
 02:44PM **9** MR. VAN NEST: SIXTY-ONE --
 02:45PM **10** THE COURT: WAS FOR THE LITIGATION CLASS.
 02:45PM **11** MR. VAN NEST: -- OPTED OUT OF THE LITIGATION CLASS.
 02:45PM **12** THE COURT: YEAH. SO THAT WOULD HAVE BEEN --
 02:45PM **13** MR. VAN NEST: IT'S MORE FOR THE SETTLEMENT CLASS,
 02:45PM **14** BUT IT'S LESS THAN 200, I THINK.
 02:45PM **15** MS. DERMODY: IT'S 147, YOUR HONOR.
 02:45PM **16** THE COURT: OKAY. AND THEY ARE THE ONES WHO OPTED
 02:45PM **17** OUT OF BOTH THE LUCASFILM, PIXAR, AND INTUIT CLASSES, RIGHT?
 02:45PM **18** MS. DERMODY: IT'S THE SETTLEMENT CLASS.
 02:45PM **19** THE COURT: THE SETTLEMENT CLASSES.
 02:45PM **20** MS. DERMODY: RIGHT. AND THEN 61 JUST OPTED OUT OF
 02:45PM **21** THE LITIGATION --
 02:45PM **22** THE COURT: OF THE LITIGATION CLASS. OKAY.
 02:45PM **23** ALL RIGHT. AND THERE WAS A CLAIM FORM IN THAT SETTLEMENT?
 02:45PM **24** MS. DERMODY: THAT'S RIGHT, YOUR HONOR.
 02:45PM **25** THE COURT: OKAY. WELL, I WAS HAPPY TO SEE THAT

UNITED STATES COURT REPORTERS

02:45PM **1** THERE'S NO CLAIM FORM HERE.
 02:45PM **2** MR. VAN NEST: WE THINK IT'S BETTER FOR OUR MEMBERS.
 02:45PM **3** MS. DERMODY: YEAH. AND WE'VE NOW TESTED THE
 02:45PM **4** ADDRESSES, SO WE KNOW WE HAVE VERY GOOD ADDRESSES. WE'VE
 02:45PM **5** UPDATED ALL OF THEM ONE TIME ALREADY, SO WE HAVE A GREAT DEAL
 02:45PM **6** OF CONFIDENCE WE'LL REACH EVERYONE.
 02:45PM **7** THE COURT: SO LET ME -- I HAVE SOME MECHANICAL
 02:45PM **8** QUESTIONS.
 02:45PM **9** YOU STOOD UP -- MR. GIRARD, LET ME DO MY MECHANICAL
 02:45PM **10** QUESTIONS AND THEN I'LL GIVE EVERYBODY AN OPPORTUNITY.
 02:45PM **11** MR. GIRARD: OKAY.
 02:45PM **12** THE COURT: OKAY. THERE'S A PROVISION IN THE
 02:46PM **13** SETTLEMENT AGREEMENT THAT SAYS THE NON-CASHED CHECKS GO TO
 02:46PM **14** EITHER A CY PRES RECIPIENT OR FOR FURTHER CLASS DISTRIBUTION,
 02:46PM **15** AND I WANTED TO GET A SENSE OF HOW THAT WAS LIKELY TO PROCEED.
 02:46PM **16** WOULD THERE BE A CERTAIN AMOUNT -- I MEAN, CERTAINLY IF IT'S A
 02:46PM **17** REALLY LARGE NUMBER, AT SOME POINT IT SHOULD GO TO THE CLASS
 02:46PM **18** FOR FURTHER DISTRIBUTION --
 02:46PM **19** MS. DERMODY: RIGHT.
 02:46PM **20** THE COURT: -- VERSUS GOING TO A CY PRES RECIPIENT.
 02:46PM **21** BUT HOW WERE YOU PLANNING TO APPROACH THAT QUESTION?
 02:46PM **22** MS. DERMODY: YOUR HONOR, CAN YOU DIRECT ME TO WHERE
 02:46PM **23** YOU ARE IN THE SETTLEMENT?
 02:46PM **24** THE COURT: YEAH, SURE.
 02:46PM **25** MS. DERMODY: I'D BE HAPPY TO TAKE A LOOK AT THAT

UNITED STATES COURT REPORTERS

02:46PM **1** CLAUSE.

02:46PM **2** THE COURT: NO PROBLEM.

02:46PM **3** MS. DERMODY: OKAY.

02:46PM **4** THE COURT: I'M LOOKING AT -- ON PAGE 18 --

02:46PM **5** MS. DERMODY: THANK YOU.

02:46PM **6** THE COURT: -- IT'S PARAGRAPH 8 OF 4A IS THE SECTION.

02:46PM **7** MS. DERMODY: OH. YES, YOUR HONOR.

02:47PM **8** WE INTENDED TO COME BACK TO THE COURT SO THAT THE COURT

02:47PM **9** WOULD EITHER BLESS THE APPROACH OF CY PRES, OR WE COULD HAVE A

02:47PM **10** CONVERSATION WITH THE COURT TO DETERMINE WHETHER IT MADE SENSE

02:47PM **11** FROM AN ECONOMIC STANDPOINT TO PAY FOR THE MAIL TO

02:47PM **12** REDISTRIBUTE.

02:47PM **13** IT'S NOT EXPECTED, WITH THIS TYPE OF PROCESS, THAT WE

02:47PM **14** WOULD HAVE THAT MUCH MONEY AT THE END OF THE DAY BECAUSE IT

02:47PM **15** WOULD ONLY BE PEOPLE WHO RECEIVED CHECKS THAT THEY DIDN'T CASH,

02:47PM **16** AND IN A TYPICAL CASE, THAT MIGHT BE \$10,000 OR SOMETHING LIKE

02:47PM **17** THAT, MAYBE EVEN \$20,000.

02:47PM **18** BUT YOU DON'T TEND TO SEE A MILLION DOLLARS OF UNCASHED

02:47PM **19** CHECKS. THAT WOULD BE VERY RARE.

02:47PM **20** THE COURT: SO IS YOUR THINKING ABOUT THIS QUESTION

02:47PM **21** THAT IF IT TURNS OUT THAT THE AMOUNT IS EFFECTIVELY DE MINIMIS

02:47PM **22** AND WOULDN'T ACTUALLY PAY FOR ITSELF IN TERMS OF THE

02:47PM **23** ADMINISTRATIONS COSTS, TO THEN GIVE IT TO A CY PRES RECIPIENT?

02:47PM **24** MS. DERMODY: THAT'S RIGHT, YOUR HONOR.

02:47PM **25** THE COURT: BUT IF IT EXCEEDS THE COST OF

UNITED STATES COURT REPORTERS

02:49PM **1** ADD THEM.

02:49PM **2** THE COURT: OKAY. IF I APPROVE THIS SETTLEMENT, I

02:49PM **3** WOULD WANT IT TO BE ON A PRETTY TIGHT TIMEFRAME.

02:49PM **4** MS. DERMODY: YES.

02:49PM **5** THE COURT: AND THIS IS THE SCHEDULE I WOULD

02:49PM **6** RECOMMEND AND I WANTED TO SEE IF THAT WOULD BE FEASIBLE FOR THE

02:49PM **7** PARTIES AND FOR THE CLAIMS ADMINISTRATOR.

02:49PM **8** SO SUBMISSION OF REVISED NOTICE AND PROPOSED ORDER --

02:50PM **9** ACTUALLY, MOST LIKELY -- WE MAY JUST MAKE THE CHANGES OURSELVES

02:50PM **10** TO THE NOTICE.

02:50PM **11** BUT -- I GUESS THE TRANSFERRING OF THE MATERIALS FROM THE

02:50PM **12** PRIOR SETTLEMENT ADMINISTRATOR TO THE NEW ONE BY JUNE 30TH;

02:50PM **13** NOTICE MAILED AND POSTED TO THE INTERNET, JULY 14TH.

02:50PM **14** MS. DERMODY: YOUR HONOR, I'M SORRY. CAN I STOP YOU

02:50PM **15** ON THE VERY FIRST ONE?

02:50PM **16** THE COURT: YES. IS THAT TOO TIGHT?

02:50PM **17** MS. DERMODY: YES, I'M SORRY. HEFFLER AND GILARDI I

02:50PM **18** THINK HAVE TALKED ABOUT 20 DAYS FROM THE ORDER. IF THE ORDER

02:50PM **19** WAS TODAY, 20 DAYS WOULD BE JULY 9.

02:50PM **20** THE COURT: FOR, WHAT, THE TRANSFERRING OF MATERIALS?

02:50PM **21** MS. DERMODY: THE TRANSFER, YES.

02:50PM **22** THE COURT: OH. THEY NEED 20 DAYS?

02:50PM **23** MS. DERMODY: BECAUSE THERE'S SOME SECURITY ISSUES

02:50PM **24** AROUND THE DATA. IT'S NOT SOMETHING THAT CAN BE DONE SIMPLY.

02:50PM **25** I JUST WANT TO MAKE SURE THEY HAVE ENOUGH TIME TO DO IT

UNITED STATES COURT REPORTERS

02:47PM **1** DISTRIBUTION AND ADMINISTRATION, THEN TO SEND IT TO THE CLASS?

02:47PM **2** MS. DERMODY: ABSOLUTELY, YES.

02:48PM **3** THE COURT: OKAY. ALL RIGHT. THAT'S FINE.

02:48PM **4** THIS DISPUTE FUND ISN'T DEFINED ANYWHERE AND IT'S NOT IN

02:48PM **5** THE NOTICE. THIS IS PARAGRAPH 6 ON THE SAME PAGE.

02:48PM **6** MS. DERMODY: YES, YOUR HONOR.

02:48PM **7** THE COURT: I WAS UNCLEAR ON IS THIS FUND MONEY THAT

02:48PM **8** GOES TO THE CLAIMS ADMINISTRATOR TO RESOLVE DISPUTES AND PAY

02:48PM **9** FOR ADMINISTRATION COSTS? OR IS THIS SORT OF A FUND THAT WILL

02:48PM **10** BE PAID TO ANY CLASS MEMBER WHO SUCCESSFULLY DISPUTES THEIR

02:48PM **11** PAYMENT AMOUNT?

02:48PM **12** MS. DERMODY: THE LATTER, YOUR HONOR, YES. IT'S --

02:48PM **13** WITH THE -- IT'S JUST TO MAKE SURE THAT THERE'S MONEY LEFT OVER

02:48PM **14** IN CASE THERE'S A CLASS MEMBER WHO EITHER HAS A RECORD KEEPING

02:48PM **15** ISSUE WITH THE DATA AND BELIEVES, AND CORRECTLY BELIEVES, THAT

02:48PM **16** HE OR SHE SHOULD HAVE HAD A HIGHER FORMULA PAY OUT, OR IF THERE

02:48PM **17** IS A PERSON WHO, FOR SOME REASON, DOESN'T RECEIVE A CHECK AND

02:48PM **18** THEY'RE IN THE CLASS DATA AND IT'S JUST A MISTAKE, EITHER ON

02:49PM **19** THE ADMINISTRATOR'S STANDPOINT OR IN THE DEFENDANTS' DATA

02:49PM **20** KEEPING OF PEOPLE IN THIS CLASS, THAT WE HAVE MONEY TO PAY

02:49PM **21** THOSE FOLKS WHO MIGHT SHOW UP JUST AFTER CHECKS ARE ISSUED.

02:49PM **22** THE COURT: AND NEITHER THIS DISPUTE FUND NOR THE

02:49PM **23** REVERTER OR THE CY PRES ISSUE ARE ACTUALLY IN THE NOTICE. WAS

02:49PM **24** THERE A REASON WHY THOSE WEREN'T INCLUDED IN THERE?

02:49PM **25** MS. DERMODY: NO, YOUR HONOR. BUT WE CAN CERTAINLY

UNITED STATES COURT REPORTERS

02:50PM **1** SECURELY AND THE RIGHT WAY.

02:51PM **2** THE COURT: ALL RIGHT. WELL, THEN, I ASSUME THAT

02:51PM **3** THAT WOULD PUSH EVERYTHING ELSE BACK.

02:51PM **4** MS. DERMODY: THAT'S WHY I STOPPED YOUR HONOR. I'M

02:51PM **5** SORRY.

02:51PM **6** THE COURT: OKAY. SO --

02:51PM **7** MS. DERMODY: IF IT WOULD HELP YOUR HONOR, I COULD

02:51PM **8** GIVE YOU A LIST I WROTE OUT IF WE USED JULY 9.

02:51PM **9** THE COURT: WELL, WHAT IF THAT WOULD BE JULY 14TH?

02:51PM **10** THAT WOULD BE THE DATE OF THE TRANSFER, ROUGHLY 20 DAYS FROM

02:51PM **11** MONDAY, JUNE 23RD.

02:51PM **12** THEN HOW MUCH TIME WOULD YOU NEED TO MAIL THE NOTICE AND

02:51PM **13** POST IT TO THE INTERNET?

02:51PM **14** MS. DERMODY: TWO WEEKS, YOUR HONOR. SO THAT WOULD

02:51PM **15** BE JULY 28, AND THAT'S A MONDAY.

02:52PM **16** THE COURT: OKAY. AND THEN THE MOTION FOR ATTORNEYS'

02:52PM **17** FEES AND COSTS, YOU'RE SAYING 31 DAYS FROM THE NOTICE DATE, SO

02:52PM **18** THAT WOULD BE ROUGHLY --

02:52PM **19** MS. DERMODY: AUGUST 28.

02:52PM **20** THE COURT: THAT WOULD BE AUGUST 28 OF 2014.

02:52PM **21** OKAY. AND THEN I GUESS I'M UNCLEAR. SOME OF THE DATES

02:52PM **22** ARE OFF THE -- THEY KIND OF SWITCH FROM THE NOTICE DATE BEING

02:52PM **23** THE ANCHOR DATE TO THE FINAL APPROVAL HEARING BEING THE ANCHOR

02:52PM **24** DATE.

02:52PM **25** MS. DERMODY: YES. I'M SORRY, YOUR HONOR.

UNITED STATES COURT REPORTERS

02:52PM **1** THE COURT: WHAT -- I GUESS FOR THE MOTION FOR FINAL
 02:52PM **2** APPROVAL, THAT WOULD BE 70 DAYS FROM THE NOTICE DATE, WHICH
 02:53PM **3** WOULD HAVE BEEN JULY 28.
 02:53PM **4** MS. DERMODY: SO IT MIGHT BE EASIER TO SET THE OPT
 02:53PM **5** OUT OBJECTION DEADLINE, WHICH I THINK UNDER THIS WOULD BE
 02:53PM **6** SEPTEMBER 11TH.
 02:53PM **7** AND THEN WE MIGHT WANT TO HAVE TWO WEEKS FOR THE OPENING
 02:53PM **8** BRIEF FOR FINAL APPROVAL, AND THAT WOULD THEN BE THREE WEEKS
 02:53PM **9** BEFORE THE HEARING DATE.
 02:53PM **10** THE COURT: YOU MEAN TWO WEEKS AFTER SEPTEMBER 11TH?
 02:53PM **11** MS. DERMODY: CORRECT. THANK YOU.
 02:53PM **12** (PAUSE IN PROCEEDINGS.)
 02:53PM **13** THE COURT: HOW MUCH TIME AFTER THE MOTION FOR FINAL
 02:53PM **14** APPROVAL IS NEEDED FOR THE CLAIMS ADMINISTER AFFIDAVIT OF
 02:53PM **15** COMPLIANCE WITH THE NOTICE REQUIREMENTS?
 02:53PM **16** MS. DERMODY: I THINK THAT THAT CAN BE 30 DAYS BEFORE
 02:54PM **17** THE FINAL APPROVAL HEARING, YOUR HONOR. SO IF THAT HEARING WAS
 02:54PM **18** ON OCTOBER 16, IT WOULD BE THE 30 DAYS BEFORE THAT. I THINK
 02:54PM **19** THAT WOULD BE SEPTEMBER 16.
 02:54PM **20** THE COURT: AND THE REPLIES WOULD BE?
 02:54PM **21** MS. DERMODY: A WEEK BEFORE THE HEARING IF THAT WORKS
 02:54PM **22** FOR YOUR HONOR.
 02:54PM **23** THE COURT: I NEED TO CHECK -- MS. PARKER BROWN, CAN
 02:54PM **24** YOU TAKE A LOOK AT OCTOBER 16?
 02:54PM **25** OR WE COULD DO IT EVEN SOONER, OCTOBER -- HOW -- WHAT IS

UNITED STATES COURT REPORTERS

02:55PM **1** SLIP, THE NOTICES DON'T GET OUT, THE DATE IS NOT QUITE RIGHT.
 02:55PM **2** WE'VE HAD THIS HAPPEN. WE THINK WE'VE GOT IT CLEARED UP, BUT
 02:55PM **3** WE DON'T KNOW.
 02:55PM **4** WHY NOT GIVE OURSELVES AN EXTRA WEEK AND THEN WE HAVE SOME
 02:56PM **5** FLEXIBILITY?
 02:56PM **6** THE COURT: LET'S SEE WHAT WE HAVE ON THE 23RD AND
 02:56PM **7** THE 30TH.
 02:56PM **8** MR. VAN NEST: YEAH.
 02:56PM **9** (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
 02:56PM **10** CLERK.)
 02:56PM **11** THE COURT: WELL, NEITHER OF THOSE DATES ARE GREAT
 02:56PM **12** FOR US, BUT I'M HAPPY TO --
 02:56PM **13** THE CLERK: NOVEMBER 6TH MIGHT WORK.
 02:56PM **14** THE COURT: WHAT'S ON NOVEMBER 6TH?
 02:56PM **15** (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
 02:56PM **16** CLERK.)
 02:56PM **17** THE COURT: I -- YOU KNOW, IF I'M GOING TO APPROVE
 02:57PM **18** THIS, I DON'T WANT TO DELAY PAYMENT FURTHER THAN NECESSARY.
 02:57PM **19** YOU KNOW, I GUESS NOVEMBER 6TH IS PROBABLY SLIGHTLY
 02:57PM **20** BETTER, BUT I'M FINE WITH ALSO HAVING THIS ON THE 23RD OR THE
 02:57PM **21** 30TH.
 02:57PM **22** MR. VAN NEST: EITHER ONE IS FINE WITH US. ANY ONE
 02:57PM **23** OF THOSE THREE DATES IS FINE, YOUR HONOR.
 02:57PM **24** MS. DERMODY: SAME FOR US, YOUR HONOR.
 02:57PM **25** THE COURT: OKAY.

UNITED STATES COURT REPORTERS

02:54PM **1** THE EARLIEST DATE WE COULD DO IT THAT WOULD GIVE YOU ENOUGH
 02:54PM **2** TIME TO GET EVERYTHING DONE?
 02:54PM **3** MS. DERMODY: WELL, IF WE ARE FILING OUR OPENING
 02:54PM **4** FINAL APPROVAL BRIEF ON SEPTEMBER 25, AND IF THERE'S GOING TO
 02:54PM **5** BE ANY OBJECTOR BRIEFING THAT'S GOING TO FOLLOW THAT, THEN WE
 02:54PM **6** MIGHT ACTUALLY KIND OF HAVE TO HAVE A BRIEFING SCHEDULE OF
 02:54PM **7** SEPTEMBER 25, WITH THE EXPECTATION THAT SOMETHING GETS FILED BY
 02:54PM **8** OBJECTORS A WEEK LATER, AND WE REPLY TO THAT BY THE 9TH.
 02:54PM **9** SO THAT'S THE TROUBLE OF TRYING TO MOVE SOMETHING EARLIER
 02:54PM **10** THAN THE 16TH I THINK, YOUR HONOR.
 02:55PM **11** THE COURT: OKAY. SO THIS WOULD SAY THE REPLIES THEN
 02:55PM **12** WOULD BE DUE OCTOBER 9, AND THE HEARING DATE WILL THEN BE
 02:55PM **13** OCTOBER 16TH.
 02:55PM **14** THE CLERK: ON OCTOBER 16TH, WE CURRENTLY HAVE --
 02:55PM **15** YESTERDAY YOU SET DISPOSITIVE MOTIONS ON BRAZIL V. DOLE FOR THE
 02:55PM **16** 16TH.
 02:55PM **17** THE COURT: UM-HUM.
 02:55PM **18** (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
 02:55PM **19** CLERK.)
 02:55PM **20** MR. VAN NEST: YOUR HONOR, IN LIGHT OF THE PROBLEMS
 02:55PM **21** WE'VE HAD ON THESE EARLIER ONES JUST WITH PAPERWORK AND
 02:55PM **22** WHATNOT, I WOULD JUST SUGGEST MOVING IT BACK A WEEK OR TWO SO
 02:55PM **23** WE DON'T HAVE TO COME BACK AND MOVE IT AGAIN.
 02:55PM **24** THE COURT: YOU MEAN MOVE THE 16TH A WEEK?
 02:55PM **25** MR. VAN NEST: MOVE IT BACK A WEEK. THE NOTICES

UNITED STATES COURT REPORTERS

02:57PM **1** (DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE
 02:57PM **2** CLERK.)
 02:58PM **3** THE COURT: I'LL GO AHEAD AND SET THIS ON
 02:58PM **4** NOVEMBER 6TH IF I'M GOING TO APPROVE IT, AND THAT WAY WE CAN
 02:58PM **5** EVEN BUILD IN A LITTLE TIME THROUGHOUT -- I ASSUME EVERYONE IS
 02:58PM **6** AVAILABLE ON THE 6TH? IS THAT DATE OKAY?
 02:58PM **7** MS. DERMODY: YES, YOUR HONOR.
 02:58PM **8** MR. VAN NEST: YES, YOUR HONOR.
 02:58PM **9** THE COURT: OKAY. I THINK THAT WAS IT. I MEAN,
 02:59PM **10** THERE ARE SOME NITS ON THE NOTICE, BUT I DON'T THINK THEY'RE
 02:59PM **11** IMPORTANT ENOUGH TO TAKE UP YOUR TIME.
 02:59PM **12** I'LL GIVE EVERYONE A LAST OPPORTUNITY TO BE HEARD, AND
 02:59PM **13** THEN WE'RE GOING TO TAKE A BREAK BEFORE I CALL MY LAST CASE.
 02:59PM **14** MR. GIRARD: FINAL COMMENTS, YOUR HONOR.
 02:59PM **15** THE COURT: OKAY.
 02:59PM **16** MR. GIRARD: ON THE AMOUNT THAT THE DEFENDANTS ARE
 02:59PM **17** PAYING, THE COURT REFERRED SEVERAL TIMES TO THE IMPLICIT, I
 02:59PM **18** THINK I'LL CALL IT MARKET SHARE, IMPLIED BY THE EARLIER
 02:59PM **19** SETTLEMENT, THE 20 MILLION, AND MR. VAN NEST POINTED TO 8
 02:59PM **20** PERCENT.
 02:59PM **21** THE COLLOQUY THAT OCCURRED BETWEEN THE COURT AND COUNSEL
 02:59PM **22** AT PRELIMINARY APPROVAL ON THE EARLIER SETTLEMENTS --
 02:59PM **23** THE COURT: UM-HUM.
 02:59PM **24** MR. GIRARD: -- WAS THAT THE AMOUNT BEING PAID,
 03:00PM **25** WHAT -- WHAT THE DISCUSSION WAS, WAS THAT THEY HAD 8 PERCENT OF

UNITED STATES COURT REPORTERS

03:00PM **1** THE WORK FORCE, BUT THE AMOUNT THEY PAID AMOUNTED TO 5 PERCENT
 03:00PM **2** OF THE TOTAL AMOUNT PAID.
 03:00PM **3** SO THE IMPLICIT NUMBER, IF YOU USE 20 PERCENT AS A
 03:00PM **4** BENCHMARK FOR THESE REMAINING DEFENDANTS, I COME UP WITH IS 400
 03:00PM **5** MILLION, SO WE WOULD BE 75 MILLION SHORT IF WE WERE USING THAT
 03:00PM **6** AS A BENCHMARK.
 03:00PM **7** AND THE REFERENCE IS THE TRANSCRIPT OF THE PRELIMINARY --
 03:00PM **8** PRELIMINARY APPROVAL HEARING AT PAGE 16, AND AT LINE 18,
 03:00PM **9** THERE'S A DISCUSSION BETWEEN MS. DERMODY AND YOUR HONOR IN
 03:00PM **10** WHICH THESE NUMBERS ARE BEING DISCUSSED AND THE 20 PERCENT --
 03:00PM **11** OR 20 MILLION AND HOW THAT REPRESENTS 8 PERCENT OF THE WORK
 03:00PM **12** FORCE NUMERICALLY, BUT 5 PERCENT FROM THE POINT OF VIEW OF THE
 03:00PM **13** AMOUNT THEY PAID IN RELATION TO THE TOTAL AMOUNT OF SALARIES
 03:00PM **14** PAID.
 03:00PM **15** SO TO THE EXTENT I HEARD THE COURT TO BE SAYING THIS
 03:00PM **16** NUMBER SEEMED LIGHT, I THINK THAT'S THE ANSWER.
 03:01PM **17** SECOND, THE DISTRICT COURT -- THE COURT MADE A NUMBER OF
 03:01PM **18** COMMENTS THAT, IN MY EXPERIENCE, THE COMMENTS HAVE BEEN PRETTY
 03:01PM **19** EFFECTIVE IN FOCUSSED THE MIND OF DECISION MAKERS ABOUT
 03:01PM **20** SETTLEMENT, AND IF THE COURT DECIDED NOT TO APPROVE THIS AT
 03:01PM **21** THIS STAGE AND SENT THE PARTIES BACK TO TRY AGAIN, I THINK
 03:01PM **22** YOU'VE MADE IT PRETTY CLEAR, AND I HAVE A SENSE FROM THE
 03:01PM **23** DISCUSSION WHERE THAT BENCHMARK IS, AND I HAVE A FEELING THAT
 03:01PM **24** THAT -- THAT THE COURT'S COMMENTS ARE GOING TO ELICIT A
 03:01PM **25** FAVORABLE RESPONSE. BUT THE ONLY WAY TO FIND THAT OUT IS TO

UNITED STATES COURT REPORTERS

03:01PM **1** TRY.
 03:01PM **2** A COMMENT ABOUT THE ROLE OF JUDGE PHILLIPS. I AGREE HE'S
 03:01PM **3** A HIGHLY RESPECTED MEDIATOR AND VERY WELL EXPERIENCED.
 03:01PM **4** HE WAS ALSO THE MEDIATOR IN THAT NFL CONCUSSION SETTLEMENT
 03:01PM **5** WE CITED TO THE COURT THAT JUDGE BRODY DECLINED TO
 03:01PM **6** PRELIMINARILY APPROVE AND HE, LIKE THIS CASE, HAD CONCLUDED
 03:01PM **7** THAT SETTLEMENT WAS FAIR.
 03:01PM **8** THE JUDGE DID NOT GRANT PRELIMINARY APPROVAL BECAUSE OF
 03:01PM **9** HER CONCERNS WITH THE AMOUNT OF THE RECOVERY, AND IT'S NOT
 03:02PM **10** BECAUSE JUDGE PHILLIPS WASN'T DOING HIS JOB. HIS JOB IS TO
 03:02PM **11** BRING THE PARTIES TOGETHER TO AGREE ON THE NUMBER.
 03:02PM **12** IT'S NOW THE JOB THIS COURT HAS TO DECIDE WHETHER THE
 03:02PM **13** SETTLEMENT IS FAIR OR NOT.
 03:02PM **14** SO I DON'T THINK IT'S ANY DETRACTION ON THE PERFORMANCE OF
 03:02PM **15** JUDGE PHILLIPS TO POINT OUT THAT THE FACT THAT A MEDIATOR
 03:02PM **16** BRINGS THE PARTIES TOGETHER DOESN'T MEAN THAT THE RESULTING
 03:02PM **17** SETTLEMENT WAS FAIR, AND THE COURTS HAVE NOT TREATED THE ROLE
 03:02PM **18** OF A MEDIATOR AS DISPOSITIVE ON THAT QUESTION.
 03:02PM **19** LAST POINT. IF YOU DO DECIDE TO GO FORWARD AND GRANT
 03:02PM **20** PRELIMINARY APPROVAL, OUR SUGGESTION WOULD BE THAT THE NOTICE
 03:02PM **21** INCLUDE THE NUMBERS THAT WE'VE BEEN DISCUSSING IN THE SENSE
 03:02PM **22** SPECIFICALLY OF THE POTENTIAL RECOVERY, THE RECOVERY PER
 03:02PM **23** PERSON, AND WHAT THE RECOVERY WOULD BE ON THE THEORY OF DAMAGE
 03:02PM **24** IF THE CASE WERE TO BE WON AT TRIAL SO THAT FROM THE
 03:02PM **25** PERSPECTIVE OF A CLASS MEMBER -- AND FINALLY, THE AMOUNT OF

UNITED STATES COURT REPORTERS

03:02PM **1** PERSONS IN THE CLASS -- SO THAT THE NUMBERS ARE RIGHT THERE AND
 03:03PM **2** SOMEBODY DOESN'T HAVE TO GO DO THE MATH, BECAUSE I THINK THE
 03:03PM **3** AVERAGE PERSON IS NOT GOING TO JUMP TO THE CONCLUSION THAT THEY
 03:03PM **4** CAN DO THAT MATH AND THAT THAT'S GOING TO BE HOW THEY KNOW.
 03:03PM **5** SO IT'S EASY ENOUGH TO DO THAT LANGUAGE. IF YOU APPROVE,
 03:03PM **6** I WOULD PROPOSE LANGUAGE TO CLASS COUNSEL. I'M SURE WE COULD
 03:03PM **7** AGREE ON AN INSERTION TO THE NOTICE THAT WOULD ADD THAT
 03:03PM **8** INFORMATION.
 03:03PM **9** AND SO IF YOU'RE GOING FORWARD, IT'S, I THINK, CONSISTENT
 03:03PM **10** WITH THE NORTHERN DISTRICT'S RECENT GUIDELINES. THOSE CALL FOR
 03:03PM **11** THIS INFORMATION IN THE MOVING PAPERS, AND A NUMBER OF COURTS
 03:03PM **12** HAVE REQUIRED THAT INFORMATION IN THE NOTICE. IT'S REQUIRED
 03:03PM **13** UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT, AND IT'S
 03:03PM **14** EASY ENOUGH TO DO FROM A PRACTICAL PERSPECTIVE.
 03:03PM **15** AND IF YOU WANT TO PROCEED WITH THIS SETTLEMENT, IT'S ONE
 03:03PM **16** WAY OF GIVING THE CLASS MEMBERS THE INFORMATION THAT MR. DEVINE
 03:03PM **17** WAS CONCERNED ABOUT.
 03:03PM **18** THE COURT: YOU MEAN PUTTING IN THE \$141,331?
 03:04PM **19** MR. GIRARD: YEAH. AND TO THE EXTENT THE CONCERN IS
 03:04PM **20** THAT'S A TREBLED NUMBER, IT CAN BE CLARIFIED THAT THAT WOULD BE
 03:04PM **21** AFTER TREBLING.
 03:04PM **22** BUT I THINK, YEAH, THE SHORT ANSWER IS YES.
 03:04PM **23** THE COURT: WHY DON'T I HAVE MR. VAN NEST, WHY DON'T
 03:04PM **24** YOU RESPOND? I MEAN, IT IS TRUE THAT THE FIRST SETTLEMENT, THE
 03:04PM **25** PERCENTAGE OF THE CLASS COMPENSATION WAS 5 PERCENT, AND THE

UNITED STATES COURT REPORTERS

03:04PM **1** PERCENTAGE OF CLASS MEMBERSHIP WAS 8 PERCENT, AND IF WE DID
 03:04PM **2** THAT STRAIGHT CALCULATION, IT WOULD HAVE BEEN HIGHER.
 03:04PM **3** MR. VAN NEST: NO. THE NUMBER -- IT CONFIRMS
 03:04PM **4** ABSOLUTELY THAT THE SETTLEMENT IS RIGHT IN THE SWEET SPOT.
 03:04PM **5** IF 8 PERCENT IS THE BENCHMARK, AND THAT'S WHAT WE THOUGHT
 03:04PM **6** WAS FAIR AND WHAT WE ARGUED IN THE MEDIATION, THEN OUR SHARE OF
 03:04PM **7** THE SETTLEMENT WOULD HAVE BEEN 230 MILLION, BECAUSE IF 8
 03:04PM **8** PERCENT OF THE CLASS -- IF THOSE DEFENDANTS, EMPLOYING 8
 03:04PM **9** PERCENT, PAID 20 MILLION, THEN THE FULL VALUE OF THAT
 03:04PM **10** SETTLEMENT IS 250 MILLION, ABSOLUTELY.
 03:05PM **11** THE COURT: NO, NO, NO. THE PERCENTAGE -- OKAY, 8
 03:05PM **12** PERCENT. BUT WHY SHOULD YOU GET THE SAME DEAL --
 03:05PM **13** MR. VAN NEST: WE DIDN'T.
 03:05PM **14** THE COURT: -- AS THOSE --
 03:05PM **15** MR. VAN NEST: WE DIDN'T. WE GOT A DEAL THAT WAS 50
 03:05PM **16** PERCENT MORE EXPENSIVE.
 03:05PM **17** THE COURT: OKAY. LET ME HAVE MR. GIRARD -- OKAY.
 03:05PM **18** TELL ME AGAIN -- AND I'M SORRY I DIDN'T WORK OUT THE NUMBERS IN
 03:05PM **19** ADVANCE. I AGREE WITH YOU THE PERCENTAGE OF CLASS COMPENSATION
 03:05PM **20** WAS 5 PERCENT. THE PERCENTAGE OF CLASS MEMBERSHIP WAS 8
 03:05PM **21** PERCENT FOR THE INTUIT, LUCASFILM, PIXAR FILM.
 03:05PM **22** WHAT WOULD THE NUMBER HAVE BEEN? I'M SORRY I DIDN'T
 03:05PM **23** CALCULATE THIS IN ADVANCE.
 03:05PM **24** MR. GIRARD: SO I'M DOING THE SAME DIVISION THAT
 03:05PM **25** MR. VAN NEST IS DOING, BUT WITH 5 PERCENT INSTEAD OF 8 PERCENT,

UNITED STATES COURT REPORTERS

03:05PM **1** WHICH GIVES YOU 400 MILLION. SO WE'RE --

03:05PM **2** THE COURT: OKAY. SO TELL ME WHAT YOU'RE DOING AND

03:05PM **3** WHY YOU ALL ARE COMING OUT WITH DIFFERENT NUMBERS. GO AHEAD.

03:05PM **4** MR. VAN NEST: NO, NO. WE'RE COMING OUT WITH THE

03:05PM **5** SAME NUMBERS, YOUR HONOR.

03:05PM **6** IF YOU LOOK AT IT AS 5 PERCENT OF THE COMPENSATION PAID --

03:05PM **7** THE COURT: UM-HUM.

03:05PM **8** MR. VAN NEST: -- IF THAT GROUP PAID 20, THEN THE

03:05PM **9** TOTAL VALUE OF THAT IS 400.

03:05PM **10** IF, HOWEVER, YOU LOOK AT IT AS 8 PERCENT OF THE CLASS THAT

03:05PM **11** YOU EMPLOYED, THEN THE TOTAL SETTLEMENT IS 250.

03:06PM **12** THIS NUMBER IS RIGHT IN THE MIDDLE OF THAT, WHICH IS WHY I

03:06PM **13** SAY IT'S AN ABSOLUTELY FAIR NUMBER. IT'S -- YOU COULD LOOK AT

03:06PM **14** IT ONE WAY OR THE OTHER. I THINK, AND I THINK THE DEFENDANTS

03:06PM **15** BELIEVE, THE FAIR WAY TO LOOK AT IT IS, WHAT PERCENTAGE OF THE

03:06PM **16** CLASS DID YOU FOLKS EMPLOY THAT PAID? AND WHO -- IF THAT'S --

03:06PM **17** THAT'S A WAY TO DIVIDE IT UP.

03:06PM **18** YOU COULD ALSO DIVIDE IT UP BASED ON THE PERCENTAGE OF

03:06PM **19** PAY.

03:06PM **20** BUT EITHER WAY YOU DO IT, THIS NUMBER IS RIGHT IN THE

03:06PM **21** SWEET SPOT OF WHAT IS NOT ONLY FAIR, BUT IN MANY WAYS A PREMIUM

03:06PM **22** OVER THE SETTLEMENT THAT YOUR HONOR APPROVED A COUPLE OF MONTHS

03:06PM **23** AGO. THAT'S ALL.

03:06PM **24** THE COURT: ALL RIGHT. LET ME HEAR FROM MR. GIRARD.

03:06PM **25** WHY SHOULD IT BE A PERCENTAGE OF THE CLASS COMPENSATION VERSUS

UNITED STATES COURT REPORTERS

03:06PM **1** THE PERCENTAGE OF THE CLASS MEMBERSHIP?

03:06PM **2** MR. GIRARD: BECAUSE DAMAGES ARE AWARDED BASED ON

03:06PM **3** COMPENSATION, ONE.

03:06PM **4** TWO, BECAUSE THE EARLIER SETTLEMENTS TYPICALLY ARE FIRST

03:06PM **5** OUT SETTLEMENTS THAT ARE USED TO FUND THE LATER LITIGATION WITH

03:06PM **6** THE UNDERSTANDING THAT LATER SETTLING DEFENDANTS ARE GOING TO

03:07PM **7** PAY MORE.

03:07PM **8** AS YOUR HONOR ACKNOWLEDGED, THESE DEFENDANTS WERE FACING A

03:07PM **9** TRIAL. THE EARLIER DEFENDANTS SETTLED AT A TIME WHEN THERE WAS

03:07PM **10** LESS RISK IN THE CASE.

03:07PM **11** BUT EVEN IF IT'S A PURE APPLES TO APPLES COMPARISON, SINCE

03:07PM **12** DAMAGES ARE AWARDED BASED ON COMPENSATION, THE BENCHMARK NUMBER

03:07PM **13** IS 400, NOT THE NUMBER MR. VAN NEST SUGGESTED.

03:07PM **14** THE COURT: BUT DO YOU AGREE WITH HIM, IF THE

03:07PM **15** BENCHMARK WAS 8 PERCENT, THE NUMBER WOULD BE 250? DO YOU AGREE

03:07PM **16** WITH HIM ON THAT?

03:07PM **17** MR. GIRARD: WHATEVER THE MATH IS. I AGREE WITH HIM

03:07PM **18** ON THE MATHEMATICAL CALCULATION, SO IF YOU USE THAT, YES.

03:07PM **19** THE COURT: OKAY.

03:07PM **20** MR. GIRARD: IT DOESN'T ADDRESS THE ARGUMENTS ABOUT

03:07PM **21** THE HEIGHTENED RISK TO THE DEFENDANTS BECAUSE OF THE STAGE AT

03:07PM **22** WHICH THEY'RE SETTling AND THE FACT THAT THEY CHOSE TO PLAY ON

03:07PM **23** THE HOPES THAT THEY WOULD GET OUT, THAT THEY WOULD GET THE

03:07PM **24** CLASS CERTIFICATION ORDER REVERSED, DIDN'T GET THAT, AND

03:07PM **25** TYPICALLY THEY PAY A PRICE FOR THAT BY HAVING TO PAY A HIGHER

UNITED STATES COURT REPORTERS

03:07PM **1** PERCENTAGE.

03:07PM **2** MS. DERMODY: AND, YOUR HONOR, I JUST WANTED TO SAY

03:07PM **3** THAT CLASS COUNSEL, AT THE START OF THIS HEARING, ACKNOWLEDGED

03:07PM **4** THAT WHERE WE ARE RIGHT NOW IS PRICED IN A RATIO THAT'S VERY

03:07PM **5** SIMILAR TO THE FIRST TIME AROUND AND THAT WE BASED OUR DECISION

03:08PM **6** NOT ON THIS IDEA OF HAVING, YOU KNOW, EVEN MORE MONEY AND THIS

03:08PM **7** IS WHY WE'RE TRYING TO SELL THIS TO THE COURT, BUT ON THIS RISK

03:08PM **8** THAT WE THINK IS VERY REAL.

03:08PM **9** YOU KNOW, WHEN WE HAD THE FIRST SETTLEMENT, AS THE COURT

03:08PM **10** MAY RECALL, THE ONLY CORPORATE ADMISSIONS IN THIS CASE WERE

03:08PM **11** FROM THE PIXAR/LUCAS CORPORATE EXECUTIVES. THOSE ARE THE -- IN

03:08PM **12** SOME WAYS, THOSE WERE THE STRONGEST PIECES OF EVIDENCE IN THE

03:08PM **13** CASE, AND THEY CASHED OUT.

03:08PM **14** THERE WAS DIFFERENT EVIDENCE, SOME VERY GOOD EVIDENCE, BUT

03:08PM **15** DIFFERENT TYPES OF EVIDENCE PUTTING TOGETHER THE PIECES WITH

03:08PM **16** THE OTHER DEFENDANTS. SO YOU HAVE TO WEIGH SOME OF THOSE

03:08PM **17** ISSUES AS WELL.

03:08PM **18** AND I THINK, YOUR HONOR, THAT IF YOU WOULD TALK TO OUR

03:08PM **19** TEAM ABOUT WHO HAS BEEN DRINKING THE KOOL-AID ON THIS CASE THE

03:08PM **20** MOST, THEY PROBABLY WOULD NAME ME AS THAT PERSON WHO HAS BEEN

03:08PM **21** ZEALOUS ABOUT TAKING THIS CASE TO TRIAL.

03:08PM **22** BUT WHEN YOU GO THROUGH JURY TESTING AND YOU ACTUALLY SHOW

03:08PM **23** JURORS IN THIS DISTRICT THIS EVIDENCE AND TEST WITH THEM THEIR

03:08PM **24** ATTITUDES ABOUT THESE CLAIMS AND THESE CLASS MEMBERS, YOU HAVE

03:08PM **25** TO BE SOBERED ABOUT WHAT THE RISKS ARE WITH THIS JURY POOL,

UNITED STATES COURT REPORTERS

03:09PM **1** WITH THIS EVIDENCE.

03:09PM **2** IT IS NOT WITHOUT, YOU KNOW, GREAT CONCERN THAT WE WOULD

03:09PM **3** EVER TAKE THIS CASE TO TRIAL, AND THAT'S WHY WE THINK THIS IS

03:09PM **4** AN EXCELLENT DEAL AND IT WOULD BE WRONG FOR US NOT TO PRESENT

03:09PM **5** IT TO THE CLASS.

03:09PM **6** THE COURT: OKAY. BUT WHY -- I MEAN, I WAS THINKING

03:09PM **7** OF THE 5 PERCENT, NOT THE 8 PERCENT. WHY SHOULDN'T YOU HAVE AT

03:09PM **8** LEAST GOTTEN THE SAME COMPENSATION AS THE EARLIER CASE?

03:09PM **9** YOU'RE SAYING BECAUSE YOUR CASE AGAINST THESE DEFENDANTS

03:09PM **10** WAS WEAKER THAN YOUR CASE AGAINST LUCASFILM AND PIXAR? I FIND

03:09PM **11** THAT KIND OF HARD CONSIDERING WHO THE KEY PEOPLE WERE, LIKE

03:09PM **12** STEVE JOBS. YOU HAVE THE -- YOU HAVE MR. CAMPBELL WITH GOOGLE,

03:09PM **13** YOU HAVE THE WHOLE FACEBOOK SOLICITATION, YOU HAVE THE

03:09PM **14** SOLICITATION WITH EBAY. I MEAN, BOTH MR. CAMPBELL AND

03:09PM **15** MR. SCHMIDT WERE INVOLVED IN THAT.

03:09PM **16** I MEAN, I SEE WHAT YOU'RE SAYING. CERTAINLY THE QUOTES OF

03:09PM **17** THE CEOS FOR LUCASFILM AND PIXAR WERE VERY GOOD FOR YOU.

03:10PM **18** MS. DERMODY: ESPECIALLY ABOUT THEIR MOTIVATION FOR

03:10PM **19** WHY THEY ENTERED INTO THE AGREEMENTS. THERE'S NO ONE ELSE WHO

03:10PM **20** HAS SAID THE THINGS THAT THEY SAID.

03:10PM **21** THE COURT: BUT I WOULD -- WELL, ANYWAY, YOU TELL ME.

03:10PM **22** SO WHY DO THESE DEFENDANTS GET A DISCOUNT? BECAUSE YOU THINK

03:10PM **23** YOUR CASE WAS WEAKER AGAINST STEVE JOBS?

03:10PM **24** MS. DERMODY: I DON'T THINK THAT THEY GOT A DISCOUNT.

03:10PM **25** THE COURT: YOU THINK YOUR CASE WAS WEAKER AGAINST

UNITED STATES COURT REPORTERS

03:10PM **1** ERIC SCHMIDT?
 03:10PM **2** MS. DERMODY: I THINK THE RATIO IS VERY SIMILAR IN
 03:10PM **3** TERMS OF WHAT HAPPENED BEFORE AND WHAT HAPPENED NOW. AND I
 03:10PM **4** UNDERSTAND. IT'S WHAT WE WRESTLED WITH OURSELVES ABOUT THIS
 03:10PM **5** SETTLEMENT, YOUR HONOR.
 03:10PM **6** IT'S BECAUSE, AT THE END OF THE DAY, THE RISK OF LOSING AT
 03:10PM **7** TRIAL NEVER CHANGED.
 03:10PM **8** AT THE END OF THE DAY, THE RISK OF LOSING CERTAIN PRETRIAL
 03:10PM **9** ORDERS ON APPEAL NEVER CHANGED.
 03:10PM **10** THE COURT: YOU KNOW, I WISH YOU HAD TOLD ME HOW WEAK
 03:10PM **11** YOUR CASE WAS FOR CLASS CERT AND ON ALL THOSE DAUBERT MOTIONS.
 03:10PM **12** I MEAN, THAT WOULD HAVE BEEN HELPFUL INFORMATION.
 03:10PM **13** I WAS CERTAINLY HEARING A DIFFERENT TUNE --
 03:10PM **14** MS. DERMODY: I DON'T THINK YOU --
 03:10PM **15** THE COURT: -- FROM YOUR SIDE OF THE COURTROOM DURING
 03:10PM **16** ALL THE PREVIOUS MOTIONS IN THIS CASE.
 03:10PM **17** IF I HAD KNOWN WHAT A LOSER THIS WAS, PERHAPS, YOU KNOW --
 03:10PM **18** THE COURT, YOU KNOW, DID 90-PAGE ORDERS.
 03:11PM **19** MS. DERMODY: YOUR HONOR, I THINK WE'RE --
 03:11PM **20** THE COURT: AND IF I HAD KNOWN WHAT A WEAK CASE THIS
 03:11PM **21** WAS, PERHAPS THIS SHOULDN'T HAVE GOTTEN AS MUCH OF THE COURT'S
 03:11PM **22** RESOURCES AS IT DID.
 03:11PM **23** MS. DERMODY: BUT, YOUR HONOR, I THINK THAT --
 03:11PM **24** THE COURT: YEAH.
 03:11PM **25** MS. DERMODY: -- HOW THE COURT FEELS ABOUT IT IS

UNITED STATES COURT REPORTERS

03:12PM **1** THEIR LIABILITY --
 03:12PM **2** MS. DERMODY: THIS IS --
 03:12PM **3** THE COURT: -- AND THEY SETTLED EARLY.
 03:12PM **4** MS. DERMODY: RIGHT. THIS IS THE MARKET TESTING,
 03:12PM **5** YOUR HONOR.
 03:12PM **6** THE COURT: OKAY.
 03:12PM **7** MS. DERMODY: WHEN YOU HAVE JURORS LOOKING AT
 03:12PM **8** EVIDENCE, JURORS THINK VERY HIGHLY OF WHAT PEOPLE SAY AS
 03:12PM **9** ADMISSIONS. THEY DON'T NEED TO CONNECT ANY DOTS. THEY CAN
 03:12PM **10** TAKE IT AT FACE VALUE BECAUSE A PERSON SAID IT.
 03:12PM **11** AND SO FROM A JUROR PERSPECTIVE, THERE ARE CERTAIN TYPES
 03:12PM **12** OF EVIDENCE THAT ARE, THAT ARE VERY HOT. THEY'RE TOXIC, YOU
 03:12PM **13** KNOW? THEY'RE -- THEY'RE ATOMIC.
 03:12PM **14** AND THERE ARE OTHER TYPES OF EVIDENCE THAT REQUIRE LEAPS
 03:12PM **15** OF LOGIC AND CONNECTING DOTS AND YOU HAVE TO HAVE JURORS THAT
 03:13PM **16** ARE WILLING TO ROLL UP THEIR SLEEVES AND REALLY PUT THOSE DOTS
 03:13PM **17** TOGETHER IN ORDER TO UNDERSTAND.
 03:13PM **18** AND YOU MIGHT NOT GET THE JURORS THAT DO THE LATTER, BUT
 03:13PM **19** YOU MIGHT GET JURORS THAT DO THE FORMER ALL DAY LONG BECAUSE
 03:13PM **20** IT'S QUITE SIMPLE TO DO.
 03:13PM **21** AND SO FROM A JUROR PERSPECTIVE, I DON'T KNOW IF I COULD
 03:13PM **22** SAY THAT IT WAS STRONGER WITH THE LUCASFILM AND PIXAR -- I
 03:13PM **23** DON'T KNOW THAT I WOULD SAY THAT.
 03:13PM **24** BUT I WOULD SAY THAT SOME OF THE EVIDENCE WAS MUCH EASIER
 03:13PM **25** FOR THEM, MUCH MORE ACCESSIBLE FOR THEM, AND IN THAT WAY, WE

UNITED STATES COURT REPORTERS

03:11PM **1** MAYBE, I THINK, IN FAIRNESS, NOT LOOKING AT THE FULL PICTURE.
 03:11PM **2** THE COURT: OKAY.
 03:11PM **3** MS. DERMODY: THIS HONESTLY IS ONE OF THE BIGGEST
 03:11PM **4** SETTLEMENTS, ONE OF THE BIGGEST RESULTS EVER IN A CASE LIKE
 03:11PM **5** THIS. IT IS THE SINGLE BIGGEST RESULT EVER IN AN ANTITRUST
 03:11PM **6** EMPLOYMENT CASE, EVER, BY FAR, ON AN AGGREGATE BASIS OR ON A
 03:11PM **7** PER CAPITA CLASS MEMBER BASIS.
 03:11PM **8** IT IS A HUGE RESULT BY EXPONENTIALLY MORE THAN OTHER
 03:11PM **9** RESULTS THAT HAVE BEEN ACHIEVED, INCLUDING THE EBAY/INTUIT
 03:11PM **10** AGREEMENT, AND YOUR HONOR DOES KNOW A LOT ABOUT THAT ONE, IN
 03:11PM **11** THIS DISTRICT.
 03:11PM **12** ALSO, IN THE EMPLOYMENT CLASS ACTION WORLD, THERE HAVE
 03:11PM **13** BEEN TONS OF EMPLOYMENT CLASS ACTIONS. THERE IS ONLY ONE THAT
 03:11PM **14** HAD A GREATER RESULT THAN THIS. IT TOOK 23 YEARS AGAINST THE
 03:11PM **15** U.S. GOVERNMENT.
 03:11PM **16** THIS IS A HUGE ACHIEVEMENT. IT'S VERY SUBSTANTIAL. IT
 03:12PM **17** MAY FEEL LIKE IT'S NOT THE WHOLE THING, THAT WE COULD HAVE
 03:12PM **18** GOTTEN MORE.
 03:12PM **19** AND, YES, I THINK IN EVERY SETTLEMENT, IT'S THE VIRTUE OF
 03:12PM **20** SETTling IS YOU'RE COMPROMISING WHAT WAS POSSIBLE.
 03:12PM **21** THE COURT: BUT ANSWER MY QUESTION. DO YOU BELIEVE
 03:12PM **22** YOUR CASE WAS WEAKER AGAINST GOOGLE, APPLE, ADOBE, AND INTEL
 03:12PM **23** THAN AGAINST LUCASFILM, PIXAR, AND INTUIT?
 03:12PM **24** MS. DERMODY: NO.
 03:12PM **25** THE COURT: BECAUSE THEY PAID A HIGHER PROPORTION OF

UNITED STATES COURT REPORTERS

03:13PM **1** HAD TO FIGURE OUT WHAT WOULD BE THE REACTION IN COMPARISON TO
 03:13PM **2** THAT EVIDENCE WITH SOME OF THE OTHER DEFENDANTS.
 03:13PM **3** IT IS A RISK, YOUR HONOR. IT'S A RISK WE HAD TO
 03:13PM **4** ACKNOWLEDGE.
 03:13PM **5** THE COURT: BECAUSE THE DOCUMENTARY EVIDENCE IN TERMS
 03:13PM **6** OF E-MAILS I THINK WAS STRONGER AGAINST THESE DEFENDANTS THAN
 03:13PM **7** AGAINST LUCASFILM AND PIXAR, EVEN IF THEIR CEO STATEMENTS WERE
 03:13PM **8** MORE INFLAMMATORY.
 03:13PM **9** MS. DERMODY: THERE WAS A TREMENDOUS RECORD IN THIS
 03:13PM **10** CASE, YOUR HONOR, ABSOLUTELY.
 03:13PM **11** AND IF I PERSONALLY BELIEVED THAT I COULD GO TO TRIAL
 03:14PM **12** RIGHT NOW AND DO BETTER THAN WHAT WE'RE GIVING TO YOUR HONOR
 03:14PM **13** TODAY, I WOULD DO IT. I WOULD DO IT A HUNDRED TIMES IN A ROW.
 03:14PM **14** THE REASON WE'RE COMING HERE TODAY, YOUR HONOR, IS
 03:14PM **15** BECAUSE, IN OUR BEST JUDGMENT, THIS IS THE RIGHT THING TO DO
 03:14PM **16** FOR THIS CLASS. IF WE DIDN'T THINK THAT, WE WOULD NOT BE HERE
 03:14PM **17** BEFORE YOU.
 03:14PM **18** MR. VAN NEST: YOUR HONOR, COULD I MAKE ONE OTHER
 03:14PM **19** COMMENT?
 03:14PM **20** THE COURT: YEAH. I MEAN, YOU KNOW, THE RATIONALE
 03:14PM **21** GIVEN IN THE BRIEFS IS, OH, THIS SAVES COURT RESOURCES. WELL,
 03:14PM **22** YOU'VE ALREADY SPENT THIS COURT'S RESOURCES. THAT IS NOT A
 03:14PM **23** RATIONALE.
 03:14PM **24** THIS NEEDS TO BE THE FAIREST COMPENSATION, YOU KNOW, A
 03:14PM **25** FAIR RESOLUTION FOR THE CLASS. THIS COURT WAS COMPLETELY

UNITED STATES COURT REPORTERS

03:14PM **1** PREPARED TO GO TO TRIAL ON THIS CASE.

03:14PM **2** SO WHEN I HEAR, "OH, BUT WE SAVED YOU TIME," I'M SORRY,

03:14PM **3** THAT'S NOT COMPELLING TO ME. THAT'S NOT A GOOD REASON TO ADOPT

03:14PM **4** THIS. IT'S IN THE MOTION, IT'S IN THE REPLY, AND IT'S NOT

03:14PM **5** PERSUASIVE.

03:14PM **6** BUT GO AHEAD.

03:14PM **7** MR. VAN NEST: TWO OTHER POINTS.

03:14PM **8** YOUR HONOR, YOU TALK ABOUT WEIGHING EVIDENCE.

03:14PM **9** THE COURT: YEAH.

03:14PM **10** MR. VAN NEST: TWO THINGS. REMEMBER THAT THE EARLIER

03:14PM **11** PARTIES THAT SETTLED WERE PAYING GENERALLY LOWER SALARIES. THE

03:14PM **12** PARTIES THAT ARE SETTLING HERE, PARTICULARLY GOOGLE AND APPLE,

03:15PM **13** WERE AT THE VERY TOP OF THE MARKET.

03:15PM **14** ALSO, LIKE I SAY --

03:15PM **15** THE COURT: BUT WHICH WAY DOES THAT CUT?

03:15PM **16** MR. VAN NEST: IT CUTS --

03:15PM **17** THE COURT: WHICH WAY DOES THAT CUT?

03:15PM **18** MR. VAN NEST: FOR JURORS --

03:15PM **19** THE COURT: I MEAN, THAT MEANS THAT THE EMPLOYEES

03:15PM **20** COULD POTENTIALLY HAVE EARNED EVEN MORE AND YOU SHOULDN'T BE

03:15PM **21** PAYING LESS THAN YOUR PROPORTION THAN LUCASFILM AND PIXAR.

03:15PM **22** MR. VAN NEST: IT CUTS IN THIS WAY: PEOPLE DO NOT

03:15PM **23** FEEL AS THOUGH THOSE EMPLOYEES WERE TREATED UNFAIRLY WHEN THEIR

03:15PM **24** PAY WAS 50 OR MORE PERCENT HIGHER THAN THE AVERAGE TECH WORKER.

03:15PM **25** IT'S HARD TO GET A JUROR TO AGREE THAT THAT'S

UNITED STATES COURT REPORTERS

03:15PM **1** UNDERCOMPENSATION WHEN THOSE FOLKS ARE MAKING SUCH A PREMIUM

03:15PM **2** OVER EVERYBODY ELSE IN THE BUSINESS. THAT'S ONE THING.

03:15PM **3** THE OTHER KEY FACT IS THAT INTEL EMPLOYED 60 PERCENT OF

03:15PM **4** THE CLASS. SO 60 PERCENT OF THE CLASS -- YOUR HONOR KNOWS THIS

03:15PM **5** FROM THE EARLIER BRIEFING. THE EVIDENCE AGAINST INTEL WAS

03:15PM **6** RELATIVELY THIN, RIGHT? ONE BILATERAL AGREEMENT, VERY LITTLE

03:15PM **7** E-MAIL TRAFFIC. THAT WASN'T THE BARN BURNER OF THE CASE.

03:16PM **8** THE CASE THAT YOUR HONOR SAW EARLIER WITH COMMENTS BY

03:16PM **9** MR. CATMULL AND MR. LUCAS AND OTHERS WHERE THEY WERE INDICATING

03:16PM **10** THEY WANTED TO SUPPRESS PAY, THERE WAS NONE OF THAT IN THIS

03:16PM **11** GROUP OF FOUR.

03:16PM **12** AND IN PARTICULAR WITH RESPECT TO INTEL WHERE THERE WAS

03:16PM **13** ONLY A SINGLE AGREEMENT WITH A COMPANY THAT IT WAS DOING A LOT

03:16PM **14** OF BUSINESS WITH, I DO THINK THERE'S A REAL QUESTION --

03:16PM **15** THE COURT: RIGHT, OKAY. BUT THERE WAS MR. SCHMIDT'S

03:16PM **16** TESTIMONY AND SERGEY BRIN'S TESTIMONY THAT MR. OTELLINI OF

03:16PM **17** INTEL KNEW ABOUT THE APPLE/GOOGLE AGREEMENT, RIGHT?

03:16PM **18** MR. VAN NEST: BUT --

03:16PM **19** THE COURT: I MEAN, THERE WAS CERTAINLY EVIDENCE.

03:16PM **20** INTEL'S OWN EXPERT TESTIFIED THAT MR. OTELLINI WAS LIKELY AWARE

03:16PM **21** OF GOOGLE'S OTHER BILATERAL AGREEMENTS BY VIRTUE OF

03:16PM **22** MR. OTELLINI'S MEMBERSHIP ON GOOGLE'S BOARD.

03:16PM **23** I MEAN, I THINK THERE WAS -- INTEL CONCEDES THAT

03:16PM **24** MR. OTELLINI KNEW THE CONTENTS OF GOOGLE'S DO NOT COLD CALL

03:16PM **25** LIST, WHICH INCLUDED APPLE AND INTEL.

UNITED STATES COURT REPORTERS

03:16PM **1** I MEAN, I --

03:17PM **2** MR. VAN NEST: BUT, AGAIN --

03:17PM **3** THE COURT: I THINK THERE WAS CERTAINLY EVIDENCE THAT

03:17PM **4** THE PLAINTIFFS COULD POINT TO THAT INTEL WAS AWARE OF OTHER

03:17PM **5** DEFENDANTS' AGREEMENTS AND THE COLD CALL AGREEMENTS OF OTHER

03:17PM **6** COMPANIES THAT INCLUDED OTHER COMPANIES, EVEN IF THEY DIDN'T

03:17PM **7** HAVE A DIRECT BILATERAL AGREEMENT WITH INTEL.

03:17PM **8** MR. VAN NEST: BUT, YOUR HONOR, THE ARGUMENT IS, IS

03:17PM **9** IT A FAIR SETTLEMENT? WE'RE TALKING ABOUT \$324 MILLION.

03:17PM **10** THAT'S ALL PRICED INTO THAT.

03:17PM **11** AND YOU HAVE MR. DEVINE SAYING, "WELL, IT SHOULD HAVE BEEN

03:17PM **12** A LITTLE BIT MORE." BALONEY. THAT'S ALL WITHIN THE RANGE OF

03:17PM **13** JUDGMENT AND THE RANGE OF EXPERIENCE AND THE RANGE OF RISK.

03:17PM **14** IT'S NOT AS THOUGH WE'RE LOOKING AT A 15 OR \$20 MILLION

03:17PM **15** SETTLEMENT. WE'RE LOOKING AT A \$324 MILLION SETTLEMENT WHICH,

03:17PM **16** NO MATTER HOW YOU CALCULATE IS, IS MANY, MANY FACTORS HIGHER

03:17PM **17** THAN WHAT THE EARLIER GUYS SETTLED FOR.

03:17PM **18** SO THIS IS ALL WITHIN THE RANGE OF DISCRETION AND

03:17PM **19** JUDGMENT. THAT'S WHY I THINK THIS IS NOT A CLOSE CALL MYSELF

03:17PM **20** GIVEN THE RISKS ON BOTH SIDES, GIVEN THE AMOUNT OF MONEY THAT

03:18PM **21** WAS ACHIEVED, GIVEN THE --

03:18PM **22** THE COURT: OKAY. BUT LET ME ASK YOU, IF YOU USE THE

03:18PM **23** 5 PERCENT, THEN THIS IS ABOUT 76,000 -- 76 MILLION SHORT. WHAT

03:18PM **24** IS THAT?

03:18PM **25** MR. VAN NEST: WHY WOULD --

UNITED STATES COURT REPORTERS

03:18PM **1** THE COURT: DO YOU AGREE WITH THE PLAINTIFFS THAT

03:18PM **2** THEIR CASE AGAINST YOU WAS WEAKER THAN THE CASE AGAINST

03:18PM **3** LUCASFILM AND PIXAR? OR WHAT'S YOUR VIEW?

03:18PM **4** MR. VAN NEST: I DON'T THINK IT'S --

03:18PM **5** THE COURT: NO, I'M JUST SAYING -- I UNDERSTAND YOUR

03:18PM **6** POINT THAT IF YOU USE THE PERCENTAGE OF CLASS MEMBERSHIP, THIS

03:18PM **7** LOOKS LIKE IT'S A NEGOTIATED AMOUNT.

03:18PM **8** MR. VAN NEST: EVEN --

03:18PM **9** THE COURT: BUT JUST --

03:18PM **10** MR. VAN NEST: LET'S USE YOUR NUMBER.

03:18PM **11** THE COURT: -- LOOKING AT THE 5 PERCENT.

03:18PM **12** MR. VAN NEST: LET'S USE YOUR NUMBER. IT'S A

03:18PM **13** QUESTION OF JUDGMENT. YOU CAN'T JUST MULTIPLY THE NUMBER OUT.

03:18PM **14** IT'S A QUESTION -- YOU'VE GOT A LOT MORE MONEY AT STAKE. THEY

03:18PM **15** HAS A SETTLEMENT OF \$20 MILLION.

03:18PM **16** THE COURT: OKAY. THAT'S WHY I WANTED TO KNOW, WHAT

03:18PM **17** IS IT THAT MAKES A DIFFERENCE?

03:18PM **18** MR. VAN NEST: WHAT MAKES IT --

03:18PM **19** THE COURT: IS IT BECAUSE WE'RE TALKING ABOUT LARGER

03:18PM **20** AMOUNTS OF MONEY? IS THAT SORT OF THE LOWER PERCENTAGE OR WHAT

03:18PM **21** IS IT?

03:18PM **22** MR. VAN NEST: IT'S ONE THING TO RISK 20 MILLION.

03:18PM **23** THE COURT: OKAY.

03:19PM **24** MR. VAN NEST: IT'S ANOTHER TO RISK 324 MILLION.

03:19PM **25** THAT'S A MUCH BIGGER RISK, RIGHT? I MEAN, JUST FROM THEIR

UNITED STATES COURT REPORTERS

03:19PM **1** STANDPOINT OF COMPENSATING THE CLASS --

03:19PM **2** THE COURT: OKAY.

03:19PM **3** MR. VAN NEST: -- IT'S ONE THING TO SAY, "OKAY, I'M

03:19PM **4** GOING TO FORGO 20 MILLION AND TAKE MY SHOT."

03:19PM **5** IT'S QUITE ANOTHER THING TO SAY, "I'LL FORGO 324 MILLION

03:19PM **6** AND TAKE MY SHOT." I MEAN, THAT IS A VASTLY DIFFERENT

03:19PM **7** QUESTION.

03:19PM **8** AND, YES, THE EVIDENCE IS DIFFERENT IN THE TWO CASES AND,

03:19PM **9** YES, WE CAN ALL DISAGREE ABOUT WHAT IT MEANS.

03:19PM **10** BUT ULTIMATELY NONE OF THAT MATTERS BECAUSE IT'S A HUGE

03:19PM **11** RISK, ONE WAY OR THE OTHER, THAT THE JURY SEES IT YOUR WAY, AND

03:19PM **12** IF THEY DON'T, YOU HAVE SQUANDERED \$324 MILLION, WHICH IS NOW A

03:19PM **13** SURE THING, YOU KNOW, IF THE SETTLEMENT WERE TO BE APPROVED.

03:19PM **14** SO I DON'T -- I DON'T, FOR ONE MINUTE, THINK THE

03:19PM **15** DIFFERENCE BETWEEN 400 AND 324 IS MEANINGFUL, I DON'T, BECAUSE

03:19PM **16** THIS IS ALL WITHIN THE RANGE OF JUDGMENT.

03:19PM **17** YOU CAN'T JUST TAKE A RULER AND MULTIPLY IT OUT AND SAY

03:19PM **18** YOU'RE FALLING SHORT.

03:19PM **19** AND EVEN IF YOU DID THAT, IF YOU USE MY RULER, WE'RE

03:19PM **20** PAYING A PREMIUM. IF YOU USE THEIR RULER, WE'RE PAYING LESS.

03:20PM **21** BUT IT'S ALL WITHIN THE RANGE OF A REASONABLE RECOVERY FOR

03:20PM **22** THE CLASS IN LIGHT OF ALL OF THE VARIOUS RISKS. THAT'S WHAT IT

03:20PM **23** IS.

03:20PM **24** SO I DON'T THINK YOU WOULD REACH A DIFFERENT RESULT EVEN

03:20PM **25** IF YOU SAID, "I THINK THE FAIR WAY TO LOOK AT IT IS BASED ON

UNITED STATES COURT REPORTERS

03:20PM **1** PAY, 5 PERCENT."

03:20PM **2** I STILL THINK THIS IS EASILY WITHIN THE RANGE OF A

03:20PM **3** REASONABLE RESULT GIVEN EVERYTHING WE'VE TALKED ABOUT.

03:20PM **4** YOUR HONOR AND I COULD DEBATE ALL DAY HOW THE EVIDENCE

03:20PM **5** COMES OUT, BUT YOU AND I BOTH KNOW, IT'S THE JURY THAT DECIDES,

03:20PM **6** AND THAT'S VERY HARD TO PREDICT, VERY HARD TO PREDICT.

03:20PM **7** AND I WOULDN'T, IN A MILLION YEARS, IF I WERE IN THEIR

03:20PM **8** SHOES, RISK \$324 MILLION ON WHAT I THOUGHT A JURY OF EIGHT

03:20PM **9** PEOPLE WAS GOING TO DO IN A CASE LIKE THIS WITH SO MUCH

03:20PM **10** DISPARATE EVIDENCE AND SO MANY DIFFERENT FACETS.

03:20PM **11** THAT'S, I THINK, THE KEY TAKE AWAY. IT'S A MUCH, MUCH

03:20PM **12** BIGGER RISK FOR THE CLASS.

03:20PM **13** MY ONLY OTHER COMMENT IS I DON'T THINK WE SHOULD BE

03:20PM **14** GETTING INTO PUTTING NUMBERS INTO THE NOTICE OF WHAT THE CLASS

03:21PM **15** COULD HAVE WON, I MEAN, BECAUSE THAT IS SO SPECULATIVE.

03:21PM **16** THE COURT: I'M NOT GOING TO DO THAT.

03:21PM **17** MR. VAN NEST: YEAH. THANK YOU.

03:21PM **18** THE COURT: ALL RIGHT.

03:21PM **19** OKAY. DO YOU WANT TO HAVE THE LAST WORD?

03:21PM **20** MS. DERMODY: I JUST WANT TO MAKE IT CLEAR ON THE

03:21PM **21** RECORD, YOUR HONOR, THAT EVERYTHING I'VE BEEN TALKING ABOUT

03:21PM **22** TODAY IS ABOUT RISK ASSESSMENT AND IT'S NOT ABOUT THE

03:21PM **23** PLAINTIFFS' FEELING ABOUT THE CASE BEING A WEAK CASE OR TRYING

03:21PM **24** TO TELL YOUR HONOR THIS WAS A DOG AND ALL OF THAT.

03:21PM **25** THE COURT: AND WHY WE WASTED YEARS ON THIS CASE.

UNITED STATES COURT REPORTERS

03:21PM **1** MS. DERMODY: NO. IT'S US SAYING TO YOUR HONOR, WE

03:21PM **2** HAVE BEEN DRIVING THIS TRAIN AND WE RAN INTO JURY WORK, AND WE

03:21PM **3** HAVE BEEN SOBERED BY DOING THAT WORK AND BY LEARNING HOW

03:21PM **4** DIFFICULT IT IS TO CONVINCING A UNANIMOUS ROOM OF PEOPLE, EVEN

03:21PM **5** WITH THIS EVIDENCE, TO MEET THE STANDARD IN THIS CASE.

03:21PM **6** AND SO WHAT -- COULD WE HAVE DONE IT? IS IT POSSIBLE?

03:21PM **7** THE COURT: WERE YOU DOING RULE OF REASON OR WERE YOU

03:21PM **8** DOING PER SE IN YOUR JURY STUDIES?

03:22PM **9** MS. DERMODY: WE WERE DOING EVERYTHING IN THE MOST

03:22PM **10** FAVORABLE WAY TO US, INCLUDING THINGS LIKE TELLING THE JURY

03:22PM **11** ABOUT THE D.O.J. INVESTIGATION.

03:22PM **12** I MEAN, YOUR HONOR, I JUST -- YOU KNOW, THE RISK THAT --

03:22PM **13** THE COURT: I WOULD HAVE ALLOWED THAT PROBABLY.

03:22PM **14** PROBABLY.

03:22PM **15** MS. DERMODY: WELL, AT THE RISK OF EXPOSING A LOT OF

03:22PM **16** WORK PRODUCT THAT WE WOULD NOT WANT THE DEFENDANTS TO HAVE IF

03:22PM **17** THE COURT WAS TO DENY OUR REQUEST TO APPROVE THE SETTLEMENT, I

03:22PM **18** DO WANT THE COURT TO UNDERSTAND THE AMOUNT OF CONCERN AND

03:22PM **19** EFFORT AND THE EMPIRICAL WORK WE DID TO GET TO A PLACE WHERE WE

03:22PM **20** RECOGNIZE THAT THAT RISK WAS NOT THEORETICAL, THAT IT WAS REAL,

03:22PM **21** AND WE HAD TO AT LEAST ACKNOWLEDGE IT.

03:22PM **22** THE COURT: OKAY. ALL RIGHT. THANK YOU ALL VERY

03:22PM **23** MUCH.

03:22PM **24** MR. VAN NEST: THANK YOU, YOUR HONOR.

03:22PM **25** THE COURT: LET'S TAKE A BREAK BEFORE THE LAST CASE.

UNITED STATES COURT REPORTERS

03:22PM **1** THANK YOU FOR YOUR PATIENCE FOR THE LAST CASE.

03:22PM **2** MS. DERMODY: THANK YOU, YOUR HONOR.

03:22PM **3** (THE PROCEEDINGS WERE CONCLUDED AT 3:22 P.M.)

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UNITED STATES COURT REPORTERS

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JUNE 24, 2014

UNITED STATES COURT REPORTERS