

Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

Petition for permission to appeal from the United States District Court
Northern District of California
The Honorable Lucy H. Koh, Presiding
Case No. 5:11-2509-LHK

**DEFENDANT-PETITIONERS' EXCERPTS OF RECORD
VOLUME I OF VIII**

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE) Case No.: 11-CV-02509-LHK
ANTITRUST LITIGATION)
)
) ORDER GRANTING PLAINTIFFS'
) SUPPLEMENTAL MOTION FOR
) CLASS CERTIFICATION
)

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Plaintiffs Michael Devine, Mark Fichtner, Siddharth Hariharan, Brandon Marshall, and Daniel Stover (collectively, "Plaintiffs"), individually and on behalf of a class of all those similarly situated, allege antitrust claims against their former employers, Adobe Systems Inc. ("Adobe"), Apple Inc. ("Apple"), Google Inc. ("Google"), Intel Corp. ("Intel"), Intuit Inc. ("Intuit"), Lucasfilm Ltd. ("Lucasfilm"), and Pixar (collectively, "Defendants"). Plaintiffs allege that Defendants conspired to suppress, and actually did suppress, employee compensation to artificially low levels by agreeing not to solicit each other's employees in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15.

On April 5, 2013, the Court granted in part and denied in part Plaintiffs' Motion for Class Certification with leave to amend. *See* Apr. 5 Class Cert. Order, ECF No. 382. Currently before

United States District Court
For the Northern District of California

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1 the Court is Plaintiffs' Supplemental Motion for Class Certification. *See* Pls.' Suppl. Mot. Class.
 2 Cert. ("Suppl. Class Cert. Mot."), ECF No. 418. Defendants filed an opposition, *see* Defs.' Opp'n
 3 to Pls.' Suppl. Mot. Class Cert. ("Suppl. Opp'n"), ECF No. 439, and Plaintiffs filed a reply, Pls.'
 4 Reply Suppl. Suppl. Mot. Class. Cert. ("Suppl. Reply"), ECF No. 455. The Court held a hearing on
 5 Plaintiffs' Supplemental Motion for Class Certification on August 8, 2013. *See* ECF No. 495.
 6 Having considered the parties' submissions, arguments, the relevant law, and the record in this
 7 case, the Court GRANTS Plaintiffs' Supplemental Motion for Class Certification and CERTIFIES
 8 Plaintiffs' proposed class of technical employees ("Technical Class").

9 **I. BACKGROUND**

10 **A. Factual Background**

11 **1. The Parties**

12 Defendants are leading high tech companies, each with a principal place of business in the
 13 San Francisco-Silicon Valley area of California. Apple is a market leader in consumer computer
 14 products and software. Defs.' Opp'n to Pls. Mot. Class. Cert. ("Opp'n") at 5, ECF No. 209. In
 15 2011, Apple's total revenues exceeded \$108 billion. *Id.* Google is the world's leading internet
 16 search provider. Report of Dr. Edward E. Leamer ("Leamer Rep.") ¶ 15, ECF No. 190. Google
 17 went public in 2004, and reached revenues of nearly \$38 billion in 2011. *Id.* Intel is the world's
 18 largest semiconductor chip maker. *Id.* ¶ 16. In 2011, Intel earned approximately \$54 billion.
 19 Adobe specializes in digital media and marketing software. *See id.* ¶ 13. In 2009, Adobe earned
 20 nearly \$3 billion in revenues. *Id.* Intuit specializes in financial planning and tax preparation
 21 programs. Opp'n at 5. In 2011, the company's revenues exceeded \$3.8 billion. Leamer Rep. ¶ 17.
 22 Lucasfilm is a film production company known for its computer animation expertise and for
 23 producing box office hits including the Star Wars films and the Indiana Jones franchise. *Id.* ¶ 18.
 24 Pixar is a leading computer animation film studio. *Id.* ¶ 19. In 2006, Walt Disney Productions
 25 acquired Pixar for approximately \$7.4 billion. *Id.*

26 Named Plaintiffs are software engineers who were former employees of Defendants.
 27 Devine worked for Adobe in the State of Washington from October of 2006 to July of 2008. *See*
 28 Consolidated Amended Complaint ("CAC") ¶ 16, ECF No. 65; Decl. Ann B. Shaver in Supp. Pls.'

1 Mot. for Class Cert. (“Shaver Decl.”), Ex. 6 ¶ 1, ECF No. 291. Fichtner worked for Intel in
 2 Arizona from July of 1993 through November of 2006 and again from May of 2008 through May
 3 of 2011. *See* CAC ¶ 17; Shaver Decl., Ex. 7 ¶ 1. Hariharan worked for Lucasfilm in California
 4 from January of 2007 through August of 2008. *See* CAC ¶ 18; Shaver Decl., Ex. 8 ¶ 1. Marshall
 5 worked for Adobe in California from July of 2006 through December of 2006. *See* CAC ¶ 19;
 6 Shaver Decl., Ex. 9 ¶ 1. Finally, Stover worked for Intuit in California from at least November of
 7 2006 through December of 2009. *See* CAC ¶ 20; Shaver Decl., Ex. 10 ¶ 1.

8 2. Market for High Tech Employees

9 Plaintiffs assert that in a properly functioning and lawfully competitive labor market, each
 10 Defendant would compete for employees by soliciting current employees from one or more of the
 11 other Defendants. *See* CAC ¶ 41. This method of recruiting, to which Defendants refer as “cold
 12 calling,” includes communicating directly in any manner—including orally, in writing,
 13 telephonically, or electronically—with another company’s employee who has not otherwise
 14 applied for a job. *Id.*

15 Plaintiffs allege that cold calling is a key competitive tool that companies use to recruit
 16 employees, particularly high tech employees with advanced skills and abilities. *Id.* ¶ 45. Through
 17 recruiting employees from competitors, a company is able to take advantage of the efforts its rival
 18 has expended in soliciting, interviewing, and training skilled labor, while simultaneously inflicting
 19 a cost on the rival by removing an employee on whom the rival may depend. *Id.* ¶ 44.

20 Plaintiffs further contend that the use of cold calling among Defendants commonly
 21 increases total compensation and mobility for all of Defendants’ employees. *See id.* ¶¶ 48, 50.
 22 Most directly, Plaintiffs allege that the practice of cold calling provides the recipient of a cold call
 23 with opportunities to secure higher wages either by switching to a rival company or by negotiating
 24 increased compensation with the recipient’s current employer. *Id.* ¶ 46. Plaintiffs further allege
 25 that the compensation effects of cold calling are not limited to those individuals who receive the
 26 calls. Rather, Plaintiffs allege, the effects of cold calling (and the effects of eliminating cold
 27 calling) have a broader, common impact on Defendants’ salaried employees, especially their
 28 technical employees. *Id.* ¶ 50.

3. Defendants' Alleged Conspiracy

Between approximately 2005 and 2009, Defendants Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar allegedly engaged in an “overarching conspiracy” to eliminate competition among Defendants for skilled labor. *Id.* ¶ 55; *see also id.* ¶¶ 1, 2. The conspiracy consisted of an interconnected web of express bilateral agreements among Defendants to abstain from actively soliciting each other’s employees. *Id.* ¶ 55.¹ Plaintiffs allege that each agreement involved a company under the control of Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) and/or a company that shared at least one director with Apple’s Board of Directors. *Id.* ¶¶ 55, 57. Defendants memorialized these nearly identical agreements in CEO-to-CEO emails and other documents, including “Do Not Call” lists, thereby putting each Defendant’s employees off-limits to other Defendants. Pls.’ Mot. Class Cert. (“Class Cert. Mot.”) at 1, ECF No. 187. Each bilateral agreement applied to all employees of a given pair of Defendants. *See* CAC ¶¶ 63, 76, 81, 88, 100, 105. These agreements were not limited by geography, job function, product group, or time period. Nor were they related to any specific business or other collaboration between Defendants. *Id.*

Plaintiffs allege that “Defendants entered into the express agreements and entered into the overarching conspiracy with knowledge of the other Defendants’ participation, and with the intent of accomplishing the conspiracy’s objective: to reduce employee compensation and mobility through eliminating competition for skilled labor.” *Id.* ¶ 55. Plaintiffs also allege that Defendants’ senior executives actively concealed each bilateral agreement and that Defendants’ employees generally were not informed of, nor did they agree to, the terms of any of the agreements. *Id.* ¶¶ 55, 108.

B. Procedural Background

1. Department of Justice Investigation

From 2009 through 2010, the Antitrust Division of the United States Department of Justice (“DOJ”) investigated Defendants’ employment and recruitment practices. *Id.* ¶¶ 3, 111.

¹ The parties refer to these agreements as “Do Not Cold Call” agreements, anti-solicitation agreements, anti-poaching agreements, and anti-competitive agreements. In this Order, the Court refers to these agreements as “anti-solicitation agreements.”

1 Following its investigation, the DOJ filed complaints in federal court against Defendants. *See*
 2 *United States v. Adobe Systems Inc.*, No. 10-1629, at 2 (D.D.C. Mar. 7, 2011) (“DOJ Adobe J.”),
 3 ECF No. 79-1, Ex. A; *United States v. Lucasfilm, Inc.*, No. 10-2220, 2011 WL 2636850, at *1
 4 (D.D.C. June 3, 2011) (“DOJ Lucasfilm J.”), ECF No. 79-1, Ex. B. The DOJ also filed stipulated
 5 proposed final judgments in each case. *See* DOJ Adobe J.; DOJ Lucasfilm J. In these stipulated
 6 proposed final judgments, Defendants did not admit any wrongdoing or violation of law, but they
 7 agreed to be “enjoined from attempting to enter into, maintaining or enforcing any agreement with
 8 any other person or in any way refrain[ing] [from] . . . soliciting, cold calling, recruiting, or
 9 otherwise competing for employees of the other person.” DOJ Adobe J. at 5; DOJ Lucasfilm J., at
 10 4; CAC ¶ 115. The District Court for the District of Columbia entered the stipulated proposed final
 11 judgments on March 17, 2011, and June 3, 2011. *See* DOJ Adobe J. at 12; DOJ Lucasfilm J. at 1;
 12 CAC ¶ 115.²

13 2. The Instant Action

14 a. Removal, Case Consolidation, and Preliminary Motions

15 The five cases underlying this consolidated action were initially filed in California Superior
 16 Court. *Hariharan v. Adobe Sys. Inc.*, Case No. 11-CV-574066 (Alameda Super. Ct. filed May 4,
 17 2011), ECF No. 1; *Marshall v. Adobe Sys. Inc.*, Case No. 11-CV-204052 (Santa Clara Super. Ct.
 18 filed June 28, 2011), ECF No. 43-2; *Devine v. Adobe Sys. Inc.*, Case No. 11-CV-204053 (Santa
 19 Clara Super. Ct. filed June 28, 2011), ECF No. 43-1; *Fichtner v. Adobe Sys. Inc.*, Case No. 11-CV-
 20 204187 (Santa Clara Super. Ct. filed June 30, 2011), ECF No. 43-3; *Stover v. Adobe Sys. Inc.*, Case
 21 No. 11-CV-205090 (Santa Clara Super. Ct. filed July 14, 2011), ECF No. 43-4.³

22 Defendants subsequently removed these five state court actions to the United States District
 23 Court for the Northern District of California. *Hariharan v. Adobe Sys. Inc.*, Case No. 11-2509
 24 (removed May 23, 2011), *see* ECF No. 1; *Marshall v. Adobe Sys. Inc.*, Case No. 11-3538 (removed
 25 July 19, 2011), *see* ECF No. 41; *Devine v. Adobe Sys. Inc.*, Case No. 11-3539 (removed July 19,

26
 27 ² Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed final
 judgment has no prima facie effect in any subsequent private lawsuit brought against Defendants.

28 ³ While the name of each Superior Court case listed only Adobe as the defendant, the complaints
 also named Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and Does 1-200, as defendants.

1 2011), *see* ECF No. 41; *Fichtner v. Adobe Sys. Inc.*, Case No. 11-3540 (removed July 19, 2011),
2 *see* ECF No. 41; and *Stover v. Adobe Sys. Inc.*, Case No. 11-3541 (removed July 19, 2011), *see*
3 ECF No. 41. On June 1, 2011, the lead case, *Hariharan v. Adobe Systems Inc.*, was reassigned
4 from Magistrate Judge Spero to Judge Armstrong. *See* ECF No. 24.

5 On July 19, 2011, Defendants collectively filed a motion to relate the five underlying
6 actions. *See* ECF No. 41. In the Motion to Relate, Defendants stated that, “[b]ecause the cases
7 involve substantially the same parties, events and allegations, and because it appears likely that
8 there would be an unduly burdensome duplication of labor and expense or conflicting results if
9 they were heard before different judges, Defendants believe they are related[.]” *Id.* at 3. Judge
10 Armstrong granted the Motion to Relate on July 27, 2011. *See* ECF No. 52. On August 2, 2011,
11 Plaintiff Siddharth Hariharan moved to transfer the related actions to the San Jose Division. *See*
12 ECF No. 56. Judge Armstrong granted the Motion to Transfer on August 4, 2011. *See* ECF No.
13 58.

14 On August 5, 2011, the five related underlying actions were reassigned to the undersigned
15 judge. *See* ECF No. 60. On September 6, 2011, the parties filed a joint stipulation to consolidate
16 the individual cases to “avoid duplication and unnecessary costs, and . . . [to] promote the efficient
17 conduct of proceedings.” ECF No. 63 at 2. Pursuant to this joint stipulation, the Court
18 consolidated the five underlying actions on September 12, 2011. *See* ECF No. 64. Plaintiffs filed
19 the Consolidated Amended Complaint on September 13, 2011. *See* CAC.

20 Defendants filed a Joint Motion to Dismiss the CAC on October 13, 2011, *see* ECF No. 79,
21 and, with leave of the Court, Lucasfilm filed its separate Motion to Dismiss on October 17, 2011,
22 *see* ECF No. 83. Following a hearing on January 26, 2012, *see* ECF No. 108, the Court granted in
23 part and denied in part Defendants’ Joint Motion to Dismiss and denied Lucasfilm’s Motion to
24 Dismiss on April 18, 2012, *see* ECF No. 119.

25 **b. Initial Motion for Class Certification**

26 On October 1, 2012, Plaintiffs filed their Motion for Class Certification along with an
27 expert report in support of the motion. *See* Class Cert. Mot.; Leamer Rep. In their class
28 certification motion, Plaintiffs sought certification of an “All Employee” class, which included

1 every salaried employee throughout the United States who worked for Defendants between 2005
2 and 2009. Class Cert. Mot. at 1. Plaintiffs estimated that this class included more than 100,000
3 employees. *See id.* at 5. In the alternative, Plaintiffs sought certification of a more limited class of
4 salaried technical, creative, and research and development employees (“Technical Class”). Class
5 Cert. Mot. at 1.

6 On November 12, 2012, Defendants filed their Opposition to Plaintiffs’ Motion for Class
7 Certification, *see* Opp’n, as well as a Motion to Strike the expert report and declarations submitted
8 by Plaintiffs, *see* ECF No. 210. Plaintiffs then filed their Consolidated Reply in Support of Class
9 Certification and in Opposition to the Motion to Strike on December 10, 2012. Pls.’ Consol. Reply
10 in Supp. of Mot. (“Reply”), ECF No. 247. On January 9, 2013, Defendants filed a Joint
11 Administrative Motion for Leave to Supplement the Record in Support of Defendants’ Opposition
12 to Class Certification, *see* ECF No. 263, to which Plaintiffs filed an opposition, *see* ECF No. 270.
13 The Court held a hearing on Plaintiffs’ Motion for Class Certification on January 17, 2013. *See*
14 ECF No. 282.

15 On April 5, 2013, the Court granted in part and denied in part Plaintiffs’ Motion for Class
16 Certification with leave to amend. *See* Apr. 5 Class Cert. Order. Specifically, the Court declined
17 to certify the class, but it did confirm as final the Court’s prior interim appointment of Lieff,
18 Cabraser, Heimann & Bernstein, LLP, and the Joseph Saveri Law Firm as Co-Lead Counsel and
19 appointed as Class Counsel the law firms that had served on the Executive Committee, Berger &
20 Montague, P.A. and Grant & Eisenhofer, P.A. *Id.* at 47. The Court recognized that these firms
21 have vigorously prosecuted this action and will continue to do so. *Id.*

22 The Court further denied Defendants’ Motion to Strike and granted in part and denied in
23 part Plaintiffs’ request to strike Defendants’ expert report and certain employee declarations. *Id.* at
24 49-52. Finally, the Court denied Defendants’ Joint Administrative Motion for Leave to
25 Supplement the Record in Support of Defendants’ Opposition to Class Certification. *Id.* at 52.

26 In granting in part and denying in part Plaintiffs’ Motion for Class Certification, the Court
27 first noted that Defendants did not dispute Plaintiffs’ assertion that both of the proposed classes
28 satisfied the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of

1 representation. *Id.* at 9 (citing Class Cert. Mot. at 4-6; Tr. of Jan. 17, 2013 Class Cert H'rg ("Jan.
2 17 Tr.") at 5:10-15, ECF No. 321). As such, the Court focused its analysis on whether Plaintiffs'
3 proposed classes satisfied Rule 23(b)(3)'s requirement that common questions predominate. In so
4 doing, the Court found that "the adjudication of Defendants' alleged antitrust violation will turn on
5 overwhelmingly common legal and factual issues." *Id.* at 13. In addition, the Court found that
6 Plaintiffs satisfied their Rule 23(b)(3) burden on the issue of the predominance of common issues
7 with respect to damages. *Id.* at 44.

8 However, the Court could not find, based on the evidence available to Plaintiffs at the time
9 of the initial Class Certification Motion, that Plaintiffs adequately demonstrated that common
10 issues with regard to the impact of the alleged violation on members of the All Employee Class or
11 Technical Class would predominate under Rule 23(b)(3). *Id.* at 44-45. Although Plaintiffs'
12 documentary evidence weighed "heavily in favor of finding that common issues predominate over
13 individual ones for the purpose of being able to prove antitrust impact," the Court expressed
14 concern that Plaintiffs' examples—such as email exchanges between CEOs and discrete human
15 resources documents from certain Defendants in particular years—might not be sufficient. *See id.*
16 at 33. The Court found that Plaintiffs might need "additional [documentary] support or empirical
17 analysis" to demonstrate that common evidence could be used to prove that all or nearly all
18 100,000 members of the All Employee Class were affected by the anti-solicitation agreements. *See*
19 *id.* In particular, the Court found that additional documentary support or empirical analysis would
20 be important to assure the Court that common issues predominated over individual issues given
21 that Defendants contested many of the factual bases of Plaintiffs' theories of harm and actively
22 criticized the reliability, admissibility, and persuasiveness of Plaintiffs' statistical analyses. *Id.*
23 The Court also questioned whether Plaintiffs' All Employee Class was overly broad and noted that
24 Plaintiffs' initial Motion for Class Certification provided little discussion or analysis to support
25 certifying Plaintiffs' more limited Technical Class over the All Employee Class. *See id.* at 29.

26 The Court afforded Plaintiffs leave to amend to address the Court's concerns. *See id.* at 52.
27 In so doing, the Court made clear that it was keenly aware that Defendants had failed to produce
28 significant amounts of discovery or make key witnesses available for depositions until after the

1 hearing on Plaintiffs' Motion for Class Certification. *Id.* at 47. The Court noted that Defendants'
2 failure to produce documents and witnesses hindered Plaintiffs' efforts to demonstrate that their
3 proposed classes satisfied the Rule 23 requirements. *Id.*

4 On May 10, 2013, Plaintiffs filed their Supplemental Motion for Class Certification, which
5 focuses on demonstrating that common issues predominate for the purpose of satisfying the
6 requirements of Rule 23(b)(3) with respect to the Technical Class. Suppl. Class Cert. Mot. at 2. In
7 the Supplemental Motion, Plaintiffs specifically address the Court's concerns regarding the
8 evidence of predominance with respect to the impact of the antitrust violation on all or nearly all of
9 the Technical Class. *See id.* at 22-25. Defendants filed their Opposition to Plaintiffs'
10 Supplemental Motion for Class Certification on June 21, 2013. *See* Suppl. Opp'n. Plaintiffs then
11 filed their Reply in support of their Supplemental Motion for Class Certification on July 12, 2013.
12 Suppl. Reply. Subsequently, Defendants filed objections to certain evidence in Plaintiffs' Reply.
13 ECF No. 469. Plaintiffs then filed a motion to enforce Local Rule 7-3(d)(1) and to strike
14 Defendants' improper Sur Reply, ECF No. 479, to which Defendants filed an Opposition, ECF No.
15 485.⁴ The parties have filed various motions for leave to file statements of recent decisions while
16 the Supplemental Motion for Class Certification has been pending before this Court. ECF Nos.
17 491, 496, 498, 499, 505.

18 On July 12, 2013, Plaintiffs' Co-Lead Class Counsel filed a letter informing the Court that
19 Plaintiffs and Defendants Pixar and Lucasfilm Ltd. reached an agreement to settle all individual
20 and class claims alleged in the CAC on behalf of Plaintiffs' proposed Technical Class. *See* ECF
21 No. 453. On July 30, 2013, Plaintiffs' Co-Lead Counsel filed a similar letter informing the Court

22 ⁴ The Court GRANTS IN PART and DENIES IN PART Defendants' Objections to Evidence in
23 Pls.' Reply Supp. Suppl. Class Cert., ECF No. 469. The Court GRANTS Defendants' Motion to
24 Strike Ms. Sandberg's declaration as improper. *Id.* (citing *Contratto v. Ethicon*, 227 F.R.D. 304,
25 308 n.5 (N.D. Cal. 2005) (striking witness declaration because it was an "attempt to introduce new
26 evidence in connection with their reply papers.")). The Court DENIES Defendants' request to
27 supplement the record as to the deposition testimony of Dr. Murphy. All of the excerpts to which
28 Defendants cite were properly submitted to the Court by Plaintiffs. Defendants' request constitutes
impermissible "further argument on the motion." Civ. L. R. 7-3(d)(1). The Court GRANTS
Defendants' request to supplement the record as to the deposition testimony of Dr. Shaw as the
excerpts to which Defendants cite were not submitted by Plaintiffs, and thus may be provided to
complete the record. The Court DENIES Defendants' request to strike Dr. Leamer's analyses
regarding salary ranges because it is proper rebuttal analysis. The Court GRANTS Defendants'
request to strike Dr. Leamer's "superadditive" theory in his rebuttal report.

1 that Plaintiffs and Defendant Intuit also reached an agreement to settle all individual and class
 2 claims alleged in the CAC on behalf of Plaintiffs' proposed Technical Class. *See* ECF No. 489.
 3 On September 21, 2013, Plaintiffs and Defendants Pixar, Lucasfilm, and Intuit filed a Motion for
 4 Preliminary Approval of Class Settlement. ECF No. 501. That motion is pending before this
 5 Court. Due to the settlements, Plaintiffs now only seek certification of a class for litigation
 6 purposes against Defendants Adobe, Apple, Google, and Intel. *See* Suppl. Reply at 1 n.1.

7 Nonetheless, all parties agree that the settlements do not have any impact on Plaintiffs'
 8 Supplemental Motion for Class Certification. *See* Pls.' Br. Re Impact of the Proposed Settlement
 9 on Pls.' Suppl. Mot. Class Cert., ECF No. 483 (noting that the settlements "preserve[] Plaintiffs'
 10 right to litigate against the non-settling Defendants for the entire amount of Plaintiffs' damages
 11 based on joint and several liability under the antitrust laws."); Defs.' Joint Br. Re the Impact of the
 12 Proposed Pixar and Lucasfilm Settlements on the Suppl. Class Cert. Mot., ECF No. 484 ("Plaintiffs
 13 agree that these proposed settlements have no effect on the pending motion for certification of the
 14 Technical Class."). Generally, the same Rule 23 standard applies for certification of a proposed
 15 class, whether for litigation or settlement purposes. *See Amchem Prod., Inc. v. Windsor*, 521 U.S.
 16 591, 619 (1997); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-23 (9th Cir. 1999).

17 **II. PROPOSED CLASS DEFINITION**

18 Named Plaintiffs now seek to certify only a nationwide class of salaried technical, creative,
 19 and research and development employees who worked for any Defendant while that Defendant
 20 participated in at least one anti-solicitation agreement with another Defendant. Thus, Plaintiffs
 21 bring before the Court a proposed class "comprising those technical employees whose work
 22 contributed to Defendants' core business functions, whom the Defendants heavily recruited and
 23 jealously guarded, and who appear at the very crux of Defendants' conspiracy and this case."
 24 Suppl. Mot. at 2. Specifically, Plaintiffs seek to certify a Technical Class defined as follows:

25 All natural persons who work in the technical, creative, and/or research and
 26 development fields that are employed on a salaried basis in the United States by one
 27 or more of the following: (a) Apple from March 2005 through December 2009; (b)
 28 Adobe from May 2005 through December 2009; (c) Google from March 2005
 through December 2009; (d) Intel from March 2005 through December 2009; (e)
 Intuit from June 2007 through December 2009; (f) Lucasfilm from January 2005

1 through December 2009; or (g) Pixar from January 2005 through December 2009.
 2 Excluded from the Class are: retail employees; corporate officers, members of the
 boards of directors, and senior executives of all Defendants.

3 *Id.* at iii.⁵

4 The proposed Technical Class consists of job titles identified in Appendix B to the Leamer
 5 Report, ECF No. 190, including: (1) Software Engineers, (2) Hardware Engineers and Component
 6 Designers, (3) Application Developers, (4) Programmers, (5) Product Developers, (6) User
 7 Interface or User Experience Designers, (7) Quality Analysts, (8) Research and Development, (9)
 8 Animators, Digital Artists, Creative Directors and Technical Editors, (10) Graphic Designers and
 9 Graphic Artists, (11) Web Developers, (12) IT Professionals, (13) Systems Engineers and
 10 Administrators, and (14) employees classified as technical professionals by their employers. *See*
 11 Leamer Rep., App. B, ¶ 155. Plaintiffs believe that this proposed class includes more than 50,000
 12 people. Class Cert. Mot. at 5.

13 **III. LEGAL STANDARD**

14 Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23
 15 does not set forth a mere pleading standard. To obtain class certification, Plaintiffs bear the burden
 16 of showing that they have met each of the four requirements of Rule 23(a) and at least one
 17 subsection of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended by*
 18 *273 F.3d 1266* (9th Cir. 2001). “A party seeking class certification must affirmatively demonstrate
 19 . . . compliance with the Rule.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

20 Rule 23(a) provides that a district court may certify a class only if: “(1) the class is so
 21 numerous that joinder of all members is impracticable; (2) there are questions of law or fact
 22 common to the class; (3) the claims or defenses of the representative parties are typical of the
 23 claims or defenses of the class; and (4) the representative parties will fairly and adequately protect
 24 the interests of the class.” Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of
 25 numerosity, commonality, typicality, and adequacy of representation to maintain a class action.

26 ⁵ As discussed above, in the initial Motion for Class Certification, Plaintiffs also sought to certify
 27 an “All Employee Class” consisting of more than 100,000 employees. Class Cert. Mot. at 1. The
 28 Court denied certification of both the All Employee and Technical classes without prejudice.
 Plaintiffs have, in their Supplemental Motion, moved to certify only the Technical Class.
 Accordingly, this Order pertains only to that Class.

1 *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Further, while Rule 23(a)
 2 is silent as to whether the class must be ascertainable, courts have held that the Rule implies this
 3 requirement as well. *See, e.g., Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 672 (N.D. Cal.
 4 2011).

5 If all four prerequisites of Rule 23(a) are satisfied, a court must also find that Plaintiffs
 6 “satisfy through evidentiary proof” at least one of the three subsections of Rule 23(b). *Comcast*
 7 *Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Rule 23(b) sets forth three general types of class
 8 actions. A class may be certified under Rule 23(b)(1) upon a showing that there is a risk of
 9 substantial prejudice or inconsistent adjudications from separate actions. Fed. R. Civ. P. 23(b)(1).
 10 A class may be certified under Rule 23(b)(2) if “the party opposing the class has acted or refused to
 11 act on grounds that apply generally to the class, so that final injunctive relief or corresponding
 12 declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Finally,
 13 a class may be certified under Rule 23(b)(3) if a court finds that “questions of law or fact common
 14 to class members predominate over any questions affecting only individual members, and that a
 15 class action is superior to other available methods for fairly and efficiently adjudicating the
 16 controversy.” Fed. R. Civ. P. 23(b)(3).

17 “[A] court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap
 18 with the merits of the plaintiff’s underlying claim.’” *Amgen Inc. v. Conn. Ret. Plans and Trust*
 19 *Funds*, 133 S. Ct. 1184, 1194 (2013) (quoting *Dukes*, 131 S. Ct. at 2551); *see also Mazza*, 666 F.3d
 20 at 588 (“Before certifying a class, the trial court must conduct a ‘rigorous analysis’ to determine
 21 whether the party seeking certification has met the prerequisites of Rule 23.” (quoting *Zinser*, 253
 22 F.3d at 1186)). This “rigorous” analysis applies to both Rule 23(a) and Rule 23(b). *Comcast*, 133
 23 S. Ct. at 1432 (discussing how Congress included “addition[al] . . . procedural safeguards for (b)(3)
 24 class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to
 25 opt out)” and how a court has a “duty to take a ‘close look’ at whether common questions
 26 predominate over individual ones”).

27 Nevertheless, “Rule 23 grants courts no license to engage in free-ranging merits inquiries at
 28 the certification stage.” *Amgen*, 133 S.Ct. at 1194-95. “Merits questions may be considered to the

1 extent—but only to the extent—that they are relevant to determining whether the Rule 23
2 prerequisites for class certification are satisfied.” *Id.* at 1195. If a court concludes that the moving
3 party has met its burden of proof, then the court has broad discretion to certify the class. *Zinser*,
4 253 F.3d at 1186.

5 **IV. DISCUSSION**

6 The Supreme Court has long recognized that class actions serve a valuable role in the
7 enforcement of antitrust laws. As the Supreme Court stated in *Hawaii v. Standard Oil Co.*, 405
8 U.S. 251, 262 (1972), “[e]very violation of the antitrust laws is a blow to the free-enterprise system
9 envisaged by Congress. This system depends on strong competition for its health and vigor, and
10 strong competition depends, in turn, on compliance with antitrust legislation.” *See also N. Pac. Ry.*
11 *Co. v. United States*, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive
12 charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.
13 It rests on the premise that the unrestrained interaction of competitive forces will yield the best
14 allocation of our economic resources . . . while at the same time providing an environment
15 conducive [sic] to the preservation of our democratic political and social institutions.”).

16 Thus, to “open[] the door of justice” to individuals harmed by antitrust violations while at
17 the same time penalizing antitrust violators, Congress chose to allow individuals to serve as private
18 attorneys general in antitrust actions and to recover treble damages for their injuries. *See*
19 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (citing the initial
20 Congressional debates concerning the Clayton Act’s damages provisions as evidence that the
21 sponsors saw treble damages both as a means of “giv(ing) the injured party ample damages for the
22 wrong suffered” and “as an important means of enforcing the law”); *see also Zenith Radio Corp.*
23 *v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (“The purpose of giving private parties
24 treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as
25 well the high purpose of enforcing the antitrust laws.”). As the Supreme Court noted in *Reiter v.*
26 *Sonotone Corp.*, 442 U.S. 330, 344 (1979), “[t]hese private suits provide a significant supplement
27 to the limited resources available to the Department of Justice for enforcing the antitrust laws and
28 deterring violations.”

1 Plaintiffs allege that Defendants entered into an “overarching conspiracy” to suppress
 2 employee compensation to artificially low levels. CAC ¶ 55. According to Plaintiffs, Defendants’
 3 agreements restrained trade and were thus per se unlawful under Section 1 of the Sherman
 4 Antitrust Act. *Id.* ¶ 2; Class Cert. Mot. at 1; *see* 15 U.S.C. § 1 (“Every contract, combination in the
 5 form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several
 6 States, or with foreign nations, is declared to be illegal.”); *see also Rebel Oil Co. v. Atl. Richfield*
 7 *Co.*, 51 F.3d 1421, 1431 (9th Cir. 1995) (explaining that Section 4 of the Clayton Act allows
 8 private parties to sue antitrust violators for damages).

9 Plaintiffs contend that, although the DOJ ultimately put an end to Defendants’ illegal
 10 agreements, the government was unable to compensate the victims of the conspiracy. Plaintiffs
 11 now bring this case as private attorneys general “to pick up where the DOJ left off, to seek
 12 damages for themselves and for the Class.” Class Cert. Mot. at 1.

13 **A. Rule 23(a) and Class Representatives**

14 Plaintiffs assert that their proposed Technical Class satisfies the elements of Rule 23(a):
 15 numerosity, commonality, typicality, and adequacy of representation. Class Cert. Mot. at 4-6; *see*
 16 Fed. R. Civ. P. 23(a). Defendants do not contest that Plaintiffs have satisfied these requirements.
 17 *See* Jan. 17 Tr. at 5:10-15. Nevertheless, the Court addresses each in turn.

18 First, the Court finds that Plaintiffs have satisfied Rule 23(a)(1)’s numerosity requirement.
 19 Pursuant to Rule 23(a)(1), Plaintiffs must show that “the class is so numerous that joinder of all
 20 members is impracticable.” Fed. R. Civ. P. 23(a)(1). Plaintiffs need not state the exact number of
 21 potential class members, nor is there a bright-line minimum threshold requirement. *In re Rubber*
 22 *Chems. Antitrust Litig.*, 232 F.R.D. 346, 350-51 (N.D. Cal. 2005). Rather, the Court must examine
 23 the specific facts of each case. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980). In this case, the
 24 parties agree that the Technical Class includes approximately 60,000 employees. *See* Class Cert.
 25 Mot. at 5; Opp’n at 4. The Court finds joinder of all members of this proposed class to be
 26 impracticable. Thus, the numerosity requirement is satisfied. *See* Fed. R. Civ. P. 23(a)(1).

27 Second, the Court finds that Plaintiffs have satisfied Rule 23(a)(2)’s commonality
 28 requirement. Rule 23(a)(2) requires that “there are questions of law or fact common to the class.”

1 *Dukes*, 131 S. Ct. at 2250-51. To satisfy the commonality requirement, Plaintiffs must show that
2 the class members have suffered “the same injury,” meaning that class members’ claims must
3 “depend upon a common contention” of such a nature that “determination of its truth or falsity will
4 resolve an issue that is central to the validity of each [claim] in one stroke.” *Id.* at 2551 (internal
5 quotation marks and citation omitted). Plaintiffs must demonstrate not merely the existence of a
6 common question, but rather “the capacity of a classwide proceeding to generate common *answers*
7 apt to drive the resolution of the litigation.” *Id.* (internal quotation marks omitted) (emphasis in
8 original). Nevertheless, “for purposes of Rule 23(a)(2), ‘[e]ven a single [common] question’ will
9 do.” *Id.* at 2556 (internal punctuation and citations omitted).

10 “Where an antitrust conspiracy has been alleged, courts have consistently held that ‘the
11 very nature of a conspiracy antitrust action compels a finding that common questions of law and
12 fact exist.’” *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 593 (N.D. Cal. 2010),
13 *amended in part by* No. 07-1827, 2011 WL 3268649 (N.D. Cal. July 28, 2011) (quoting *In re*
14 *Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 02-1486, 2006 WL 1530166, at *3
15 (N.D. Cal. June 5, 2006)). Antitrust liability alone constitutes a common question that “will
16 resolve an issue that is central to the validity” of each class member’s claim “in one stroke,” *Dukes*,
17 131 S. Ct. at 2551, “because proof of an alleged conspiracy will focus on defendants’ conduct and
18 not on the conduct of individual class members.” *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267
19 F.R.D. at 310 (citing cases). Indeed, the Court has already found that “the adjudication of
20 Defendants’ alleged antitrust violation will turn on overwhelmingly common legal and factual
21 issues.” Apr. 5 Class Cert. Order at 13. Moreover, Defendants do not dispute that there are some
22 common issues of law and fact. *See* Jan. 17 Tr. at 18:2-8. Because Plaintiffs have demonstrated
23 the existence of at least one common question capable of generating a common answer (antitrust
24 liability), the Court finds that the proposed class meets the commonality requirement of Rule
25 23(a)(2).

26 Third, the Court finds that Plaintiffs have satisfied Rule 23(a)(3)’s typicality requirement.
27 Under the “permissive standards” of Rule 23(a)(3), “representative claims are ‘typical’ if they are
28 reasonably co-extensive with those of absent class members; they need not be substantially

1 identical.” *Hanlon*, 150 F.3d at 1020; *accord Staton v. Boeing Inc.*, 327 F.3d 938, 957 (9th Cir.
 2 2003). “The test of typicality is whether other members have the same or similar injury, whether
 3 the action is based on conduct which is not unique to the named plaintiffs, and whether other class
 4 members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976
 5 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks and citation omitted). The purpose of the
 6 typicality requirement is to assure that the interests of the named representative align with the
 7 interests of the class. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984-85 (9th Cir. 2011).
 8 In antitrust cases, “typicality usually ‘will be established by plaintiffs and all class members
 9 alleging the same antitrust violations by defendants.’” *Pecover v. Elec. Arts, Inc.*, No. 08-2820,
 10 2010 WL 8742757, at *11 (N.D. Cal. Dec. 21, 2010) (quoting *In re Playmobil Antitrust Litig.*, 35
 11 F. Supp. 2d 231, 241 (E.D.N.Y. 1998)). In this case, all class members, regardless of their
 12 individual employers, allege the same injuries arising from common conduct: suppression of
 13 compensation due to Defendants’ anti-solicitation agreements. *See* Aug. 8, 2013 Class Cert. Hr’g
 14 Tr. (“Aug. 8 Tr.”) at 19:11-14, ECF No. 494 (“We’re alleging a single violation of the Sherman
 15 Act, a single conspiracy”). Accordingly, the Court finds that the named Plaintiffs’ interests
 16 align with the interests of the class, and the typicality requirement of Rule 23(a)(3) is satisfied.⁶

17 Finally, the Court finds that Plaintiffs satisfy Rule 23(a)(4)’s adequacy requirement. Legal
 18 adequacy of a class representative under Rule 23(a)(4) turns on two inquiries: (1) whether named
 19 plaintiffs and their counsel have “any conflicts of interest with other class members,” and
 20 (2) whether named plaintiffs and their counsel will “prosecute the action vigorously on behalf of
 21 the class.” *Hanlon*, 150 F.3d at 1020. As stated previously, the named Plaintiffs and Technical
 22 Class members share an interest in proving that Defendants’ conduct violated the antitrust laws and
 23

24 ⁶ At the August 8 hearing on the Supplemental Motion for Class Certification, the Court expressed
 25 concern regarding whether Hariharan, a former employee of Lucasfilm, could satisfy the typicality
 26 requirement given that Lucasfilm recently reached a settlement agreement with Plaintiffs. The
 27 Court is persuaded that Hariharan still satisfies the typicality requirement because he continues to
 28 have an active antitrust claim against the remaining members of the conspiracy. *See* Aug. 8 Tr. at
 21:15-23 ([T]he people who worked for the settled companies during the class period still have
 active claims against the other members of the conspiracy because . . . all of the members of the
 combination conspiracy . . . are liable for one another’s conduct.”); *see also In re TFT-LCD (Flat
 Panel) Antitrust Litig.*, 267 F.R.D. 594 (“[A] conspirator is jointly liable for everything done
 during the period of the conspiracy’s existence.”).

1 suppressed their compensation. In addition, the named Plaintiffs do not have any conflicts of
2 interest with class members. Shaver Decl. Ex. 6 ¶¶ 5-6; *id.*, Ex. 7 ¶¶ 5-6; *id.*, Ex. 8 ¶¶ 5-6; *id.*, Ex.
3 9 ¶¶ 5-6; *id.*, Ex. 10 ¶¶ 5-6. Thus, the Court finds that the Plaintiffs' proposed Technical Class
4 satisfies the adequacy requirement.

5 In addition to the four requirements explicitly provided in Rule 23(a), courts have held that
6 Rule 23(a) also implicitly requires that the class be ascertainable. *See, e.g., Herrera*, 274 F.R.D. at
7 672. A class definition is sufficient if the description of the class is "definite enough so that it is
8 administratively feasible for a court to ascertain whether an individual is a member." *O'Connor v.*
9 *Boeing N. Am. Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (internal citation omitted). In addition,
10 "the court must be able to [determine that] class members are included or excluded from the class
11 by reference to objective criteria." 5 James W. Moore, *Moore's Federal Practice*, § 23.21[3]
12 (Matthew Bender 3d ed.).

13 Here, Plaintiffs' proposed Technical Class consists of the job titles identified in Appendix B
14 to the Leamer Report, as discussed above. *See* Leamer Rep., App. B. Dr. Leamer selected these
15 job titles based on Defendants' own employment compensation data, which breaks jobs into
16 creative, technical, and research and development "job families." *Id.* Kevin F. Hallock, a labor
17 economist and expert in compensation structure and design, reviewed the titles included in the
18 proposed "Technical Class" and confirmed the titles selected for inclusion in the Technical Class in
19 light of Defendants' job families for technical workers. *See* Report of Kevin F. Hallock ("Hallock
20 Rep.") ¶¶ 241-44, ECF No. 417. In addition, within the proposed Technical Class, Plaintiffs seek
21 to include only employees who filled these job titles at Defendants' companies within a fixed
22 period of time (2005 to 2009 for all Defendants except Intuit, 2007 to 2009 for Intuit). Thus, the
23 Court finds that the class definition is ascertainable.

24 Having undertaken a "rigorous analysis" to determine whether the party seeking
25 certification has met the prerequisites of Rule 23, *Mazza*, 666 F.3d at 588, the Court finds that
26 Plaintiffs' proposed Technical Class satisfies the numerosity, commonality, typicality, and
27 adequacy requirements. In addition, the Court finds that Plaintiffs' proposed Technical Class is
28 ascertainable. Thus, Plaintiffs have satisfied the requirements set forth by Rule 23(a).

1 Further, because the named Plaintiffs and Class members share an interest in proving that
 2 Defendants' conduct violated the antitrust laws and suppressed their compensation and do not have
 3 any conflicts of interest, the Court now GRANTS Plaintiffs' request to appoint Michael Devine,
 4 Mark Fichtner, Siddharth Hariharan, Brandon Marshall, and Daniel Stover as class representatives.

5 **B. Rule 23(b)(3): Predominance**

6 Plaintiffs also contend that their proposed Technical Class satisfies the requirements of
 7 Rule 23(b)(3). Defendants disagree. Specifically, Defendants argue that Plaintiffs' proposed class
 8 does not satisfy Rule 23(b)(3)'s predominance requirement because neither antitrust impact nor
 9 damages can be proven on a classwide basis. Opp'n at 11; Suppl. Opp'n at 3-4. For the reasons
 10 discussed below, the Court finds that questions common to the class are likely to predominate over
 11 any individual questions.

12 The predominance analysis focuses on "the legal or factual questions that qualify each class
 13 member's case as a genuine controversy" to determine "whether proposed classes are sufficiently
 14 cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623; *see also*
 15 Fed. R. Civ. P. 23(b)(3) (holding that, to certify a class, the court must find that "questions of law
 16 or fact common to class members predominate over any questions affecting only individual
 17 members" (emphasis added)).

18 "Considering whether questions of law or fact common to class members predominate
 19 begins . . . with the elements of the underlying causes of action." *Erica P. John Fund, Inc. v.*
 20 *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). A court must analyze these elements to "determine
 21 which are subject to common proof and which are subject to individualized proof." *In re TFT-*
 22 *LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 311-13.

23 In this case, Plaintiffs allege a violation of Section 1 of the Sherman Antitrust Act, 15
 24 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15. *See* CAC ¶¶ 119-135;
 25 Class Cert. Mot. at 1. "[T]o establish an antitrust claim, plaintiffs typically must prove (1) a
 26 violation of antitrust laws, (2) an injury they suffered as a result of that violation, and (3) an
 27 estimated measure of damages." *In re New Motor Vehicles Canadian Export Antitrust Litigation*
 28 (*"In re New Motors"*), 522 F.3d 6, 19 n.18 (1st Cir. 2008).

1 Before the Court discusses whether common questions predominate with regard to each of
 2 these elements, the Court notes that the legal standards with respect to the predominance inquiry
 3 are not altogether clear. Specifically, the Court notes that there is no binding authority discussing
 4 the standard a court must apply in determining whether common issues predominate in a putative
 5 class action alleging wage suppression resulting from antitrust violations.⁷ Further, recent
 6 Supreme Court authority on class certification suggests that the law in this area remains somewhat
 7 unsettled.

8 In *Walmart v. Dukes*, the Supreme Court rejected certification of a class of more than one
 9 million female Walmart employees in a Title VII case, holding that “[a] party seeking class
 10 certification must affirmatively demonstrate his compliance with the rule.” *Dukes*, 131 S. Ct. at
 11 2551. The Supreme Court further noted that prior to certifying a class, a district court must engage
 12 in a “rigorous analysis” that will “entail some overlap with the merits of the plaintiff’s underlying
 13 claim.” *Id.* The Supreme Court held that the class could not be certified because the plaintiffs
 14 could not demonstrate commonality under Rule 23(a). *Id.* at 2554-57. The *Dukes* plaintiffs had
 15 relied on statistical evidence that women were paid less, anecdotal evidence of discrimination from
 16 120 women, and a sociologist who opined that there was a culture of sex stereotyping at Walmart.
 17 *Id.* at 2549. The Supreme Court found that this evidence was insufficient to establish commonality

18
 19 ⁷ In their initial opposition to Plaintiffs’ class certification motion, Defendants pointed to a series of
 20 antitrust class actions alleging wage suppression by horizontal agreement in which district courts
 21 outside this circuit denied class certification on the basis that individual issues of antitrust impact
 22 and damages would predominate over classwide issues. *See Weisfeld v. Sun Chemical Corp.*, 210
 23 F.R.D. 136 (D.N.J. 2002), *aff’d* by 84 F. App’x 257 (3d Cir. 2004); *Reed v. Advocate Health Care*,
 24 268 F.R.D. 573 (N.D. Ill. 2009); *Fleischman v. Albany Med. Ctr.*, No. 06-765, 2008 WL 2945993
 25 (N.D.N.Y. July 28, 2008); *In re Comp. of Managerial, Prof’l, & Technical Emps. Antitrust Litig.*,
 26 No. 02-2924, 2003 WL 26115698 (D.N.J. May 27, 2003). However, these cases are inapposite
 27 because they lack the comprehensive documentary record present in the instant case. Moreover, in
 28 the instant case, the comprehensive documentary record strongly supports the Plaintiffs’ experts’
 theories. In addition, intervening authority such as *Amgen* has refined the predominance inquiry
 since the cases cited by Defendants were decided. This is particularly true with respect to *Reed*, a
 Northern District of Illinois case that predates the Seventh Circuit’s decisions in *Butler v. Sears,*
Roebuck & Co., 722 F.3d 796 (7th Cir. 2013), and *Messner v. Northshore Univ. HealthSystem*, 669
 F.3d 802 (7th Cir. 2012). These two Seventh Circuit cases suggest that the *Reed* court construed
 the predominance requirement too stringently. The Court further notes that other district courts
 have certified wage suppression antitrust classes, including one since the latest Supreme Court
 cases. *See, e.g., Merenda v. VHS of Mich., Inc.*, No. 06-15601, 2013 WL 5106520 (E.D. Mich.
 Sept. 13, 2013); *Johnson v. Ariz. Hosp. & Healthcare Ass’n.*, No. 07-1292, 2009 WL 5031334 (D.
 Ariz. July 14, 2009).

1 because it demonstrated no general policy of discrimination and no corporate direction of store
2 managers' discretion. *Id.* at 2554. Accordingly, the Supreme Court, finding that commonality
3 required not just common questions but the capacity to generate a common answer in a classwide
4 proceeding, reversed the certification of the class. *Id.* at 2551.

5 Applying *Dukes*, the Ninth Circuit, in *Ellis v. Costco* vacated a district court's certification
6 of a class. 657 F.3d at 988. The *Ellis* court, discussing commonality, held that district courts must
7 consider the underlying merits in addressing class certification issues. *Id.* at 983. The Ninth
8 Circuit further concluded that when there is a battle of the experts on class certification, "rigorous
9 analysis" requires district courts to determine not only admissibility of the experts' statements, but
10 also the "persuasiveness of the evidence presented." *Id.* at 982.

11 Two years after it decided *Dukes*, the Supreme Court affirmed the certification of a class of
12 plaintiffs who were alleging securities fraud in *Amgen*. In *Amgen*, the Supreme Court held that
13 plaintiffs need not prove materiality, one of the elements of plaintiffs' securities fraud claim, at the
14 class certification stage; rather, the Supreme Court found that plaintiffs needed only demonstrate
15 that common questions would predominate. 133 S. Ct. at 1191. "Rule 23(b)(3) requires a showing
16 that *questions* common to the class predominate, not that those questions will be answered, on the
17 merits, in favor of the class." *Id.* As such, "the office of a Rule 23(b)(3) certification ruling is not
18 to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the
19 controversy 'fairly and efficiently.'" *Id.* Therefore, while class certification may require some
20 inquiry into the merits, "Rule 23 grants courts no license to engage in free-ranging merits inquiries
21 at the certification stage." *Id.* at 1194. Importantly, the Supreme Court specified that plaintiffs
22 were not required to demonstrate that common questions would predominate with respect to each
23 element. *Id.* at 1196 ("Rule 23(b)(3), however, does *not* require a plaintiff seeking class
24 certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.'" (alterations and emphasis in original)). Rather, the inquiry is more holistic.

26 One month after *Amgen*, the Supreme Court, in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426
27 (2013), reversed certification of a damages and liability class under Rule 23(b)(3). The district
28 court in *Comcast* had certified a class of more than two million Comcast subscribers who sought

1 damages for violations of federal antitrust laws. *Id.* at 1431. Plaintiffs in *Comcast* had proposed
2 four theories of antitrust impact, but the district court found that only one of those theories could be
3 proven using common evidence. *Id.* However, the district court certified a damages class
4 notwithstanding the fact that plaintiffs' expert calculated damages using a model that did not
5 isolate the damages resulting from the one credited theory of antitrust impact. *Id.* The Supreme
6 Court reversed the certification under a "straightforward application of class-certification
7 principles" due to the disconnect between the theory of impact and the theory of damages. *Id.* at
8 1433. The Court stated that "[c]alculations [of damages] need not be exact, but at the class-
9 certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent
10 with its liability case, particularly with respect to the alleged anticompetitive effect of the
11 violation." *Id.* Importantly, the Court suggested that some of the principles applied pursuant to
12 Rule 23(a) in *Dukes* also applied pursuant to Rule 23(b)(3). Specifically, the Court stated that Rule
13 23(b)(3) required a "rigorous analysis" and that Rule 23(b)(3) may require "inquiry into the merits
14 of the claim." *Id.* at 1432-33.

15 The Ninth Circuit, in line with the Supreme Court's admonition that *Comcast* created no
16 new law, read *Comcast* narrowly in *Levy v. Medline Industries*, 716 F.3d 510 (9th Cir. 2013).
17 There, the Ninth Circuit reversed a district court's denial of class certification in a case concerning
18 alleged violations of California labor laws. The Ninth Circuit held that even after *Comcast*, under
19 Ninth Circuit law, the fact that damages calculations would require individualized inquiries does
20 not defeat certification of a Rule 23(b)(3) class. *Id.* at 513-14. Thus, so long as "damages will be
21 calculated based on the wages each employee lost due to [defendant]'s unlawful practices,"
22 *Comcast* does not pose a barrier to class certification. *Id.*

23 Echoing *Levy*, the Seventh Circuit in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th
24 Cir. 2013), a post-*Comcast* consumer action alleging defects in washing machines, held that
25 individual questions with respect to damages do not defeat class certification. The Seventh Circuit
26 found that "[a] determination of liability could be followed by individual hearings to determine the
27 damages sustained by each class member." *Id.* at 789. The Seventh Circuit distinguished *Comcast*
28

1 on the basis that “there is no possibility in this case that damages could be attributed to acts of the
2 defendants that are not challenged on a class-wide basis.” *Id.* at 800.

3 The Seventh Circuit in *Butler* approvingly cited its previous decision in *Messner v.*
4 *Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012), where the Seventh Circuit had
5 reversed a denial of class certification. In *Messner*, the Seventh Circuit held that the predominance
6 inquiry does not require the total absence of individual questions, but rather that common questions
7 *predominate* over any individual questions. *Id.* at 815. Moreover, the Seventh Circuit in *Messner*
8 noted that for the purposes of predominance, the inquiry focused on whether common *questions*
9 *predominate* over individual questions—not whether plaintiffs could show “common answers to
10 those questions.” *Id.* at 819. The Seventh Circuit further cautioned against turning class
11 certification into a “dress rehearsal for the trial on the merits” and stated that in antitrust cases,
12 even rigorous application of the class certification standard “will frequently lead to certification.”
13 *Id.* at 811, 815; *see also Amchem*, 521 U.S. at 625 (“Predominance is a test readily met in certain
14 cases alleging consumer or securities fraud or violations of the antitrust laws.”). Importantly, in
15 both *Messner* and *Butler*, the Seventh Circuit rejected the proposition that “predominance is
16 determined simply by counting noses: that is, determining whether there are more common issues
17 or more individual issues, regardless of relative importance.” *Butler*, 727 F.3d at 801. Rather,
18 “predominance requires a qualitative assessment too; it is not bean counting.” *Id.*; *see also*
19 *Messner*, 669 F.3d at 814 (“There is no mathematical or mechanical test for evaluating
20 predominance.”).

21 The Seventh Circuit decision in *Butler* cited and was in accord with the Sixth Circuit’s
22 post-*Comcast* decision in *In re Whirlpool Corp. Front-Loading Washer Products Liability*
23 *Litigation*, 722 F.3d 838 (6th Cir. 2013). There, the Sixth Circuit affirmed the certification of a
24 class, finding that the district court had adequately considered the merits in determining that
25 common questions would predominate over individual questions. The Sixth Circuit found that like
26 *Amgen*, the defendant’s liability in the consumer class action would be classwide or non-existent.
27 *Id.* at 859. The Sixth Circuit further distinguished *Comcast* on the basis that *Comcast* concerned a
28 class certified for damages purposes in addition to liability purposes. *Id.* Accordingly, the Sixth

1 Circuit concluded that “the principles we glean from *Amgen* and *Comcast Corp.* include that to
 2 satisfy Rule 23(b)(3), named plaintiffs must show, and district courts must find, that questions of
 3 law or fact common to members of the class predominate over any questions that affect only
 4 individual members.” *Id.* at 860.

5 The D.C. Circuit has further elaborated on the qualitative assessment required by the Sixth
 6 and Seventh Circuits and concluded that such an assessment requires district courts to closely
 7 scrutinize factual evidence and expert reports that demonstrate that impact can be proven on a
 8 classwide basis. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 247 (D.C.
 9 Cir. 2013). The D.C. Circuit held that “[c]ommon questions of fact cannot predominate where
 10 there exists no reliable means of proving classwide injury in fact.” *Id.* at 252-53. The D.C. Circuit
 11 further stated that “[i]t is now indisputably the role of the district court to scrutinize the evidence
 12 before granting certification.” *Id.* at 253. The D.C. Circuit therefore found that “[i]t is now clear
 13 that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to
 14 show predominance—the rule commands it.” *Id.* at 255. Accordingly, the D.C. Circuit vacated the
 15 district court’s certification of the class because there were methodological problems with the
 16 plaintiffs’ expert reports that the district court had not considered. *Id.* at 252.⁸

17
 18
 19 ⁸ The First and Third Circuits in pre-*Dukes*, *Amgen*, and *Comcast* cases vacated district courts’
 20 certification of classes under Rule 23(b)(3) and remanded for reconsideration based in part on
 21 theories that have been superseded by intervening Supreme Court authority. *See In re New Motors*,
 22 522 F.3d at 8; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008). For
 23 example, the First and Third Circuits relied on a theory that “[i]n antitrust class actions, common
 24 issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be
 25 established through common proof.” *In re New Motors*, 522 F.3d at 20; *see also In re Hydrogen*
 26 *Peroxide Antitrust Litig.*, 552 F.3d at 311 (same). This appears to conflict with the Supreme
 27 Court’s conclusion in *Amgen* that “Rule 23(b)(3) . . . does *not* require a plaintiff seeking class
 28 certification to prove that each “elemen[t] of [her] claim [is] susceptible to classwide proof.”

133 S. Ct. at 1191 (emphasis in original). Nevertheless, some of the theories in *In re New Motors*
 and *In re Hydrogen Peroxide Antitrust Litigation* are consonant with *Amgen*. Specifically, the
 Third Circuit held that a rigorous analysis required resolving conflicts in expert opinions that go to
 certification and that a party’s indication that it intends to use common evidence is insufficient for
 certification. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 321-23. Similarly, the First
 Circuit held that a district court should have engaged in a searching inquiry into the validity of a
 novel and complex theory of impact. *In re New Motors*, 522 F.3d at 27. Accordingly, the First
 Circuit found that a district court should have addressed criticisms of the plaintiffs’ expert’s
 methodology. *Id.* In light of the fact that these theories appear to be consistent with Supreme
 Court authority, the Court applies them in the instant action.

1 Certain principles regarding the legal standard that this Court must apply in determining
 2 whether the Technical Class should be certified emerge from *Walmart*, *Amgen*, *Comcast*, and the
 3 circuit court cases applying this Supreme Court authority. First, and most importantly, the critical
 4 question that this Court must answer is whether common questions predominate over individual
 5 questions. *Amgen*, 133 S. Ct. at 1191. In essence, this Court must determine whether common
 6 evidence and common methodology could be used to prove the elements of the underlying cause of
 7 action. *Id.* Second, in answering this question, this Court must conduct a “rigorous” analysis.
 8 *Comcast Corp.*, 133 S. Ct. at 1432. This analysis may overlap with the merits, but the inquiry
 9 cannot require Plaintiffs to prove elements of their substantive case at the class certification stage.
 10 *Amgen*, 133 S. Ct. at 1194. Third, this Court must determine not only the admissibility of expert
 11 evidence that forms the basis of the methodology that demonstrates whether common questions
 12 predominate. *Ellis*, 657 F.3d at 982. Rather, this Court must also determine whether that expert
 13 evidence is persuasive, which may require the Court to resolve methodological disputes. *Id.*; see
 14 also *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. Fourth, the predominance
 15 inquiry is not a mechanical inquiry of “bean counting” to determine whether there are more
 16 individual questions than common questions. *Butler*, 727 F.3d at 801. Instead, the inquiry
 17 contemplates a qualitative assessment, which includes a hard look at the soundness of statistical
 18 models. *Id.*; *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. Fifth, Plaintiffs
 19 are not required to show that each element of the underlying cause of action is susceptible to
 20 classwide proof. *Amgen*, 133 S. Ct. at 1196. Rather, they need only show that common questions
 21 will predominate with respect to their case as a whole. *Id.*

22 With these principles in mind, this Court now turns to the elements and finds that common
 23 questions predominate overall and with regard to all three elements—antitrust violation, antitrust
 24 impact, and damages.

25 1. Antitrust Violation

26 Plaintiffs allege that Defendants engaged in an “overarching conspiracy” to eliminate
 27 competition among one another for skilled labor, with the intent and effect of suppressing the
 28 compensation and mobility of Defendants’ employees. CAC ¶¶ 1, 2, 55. Accordingly, Plaintiffs

1 contend that, at trial, “[p]roving Defendants’ conspiracy will be the overriding common issue for
 2 every Class Member.” Class Cert. Mot. at 2. In support of their allegations, Plaintiffs have set
 3 forth copious common evidence in the form of Defendants’ internal work documents, deposition
 4 transcripts, and email exchanges between Defendants’ CEOs as well as other directors, officers,
 5 and senior managers, all of which support Plaintiffs’ allegations that Defendants entered into
 6 express agreements not to compete for one another’s employees.

7 Defendants concede that adjudication of Defendants’ alleged antitrust violations will turn
 8 on common legal and factual issues. See Jan. 17 Tr. at 17:1-4 (Court: “Do you contest [the
 9 antitrust violation] prong of the analysis?” Defendants’ Counsel: “Not for purposes of this
 10 motion.”). As stated in this Court’s April 5 Class Certification Order, this Court agrees and finds
 11 that Plaintiffs have demonstrated that “adjudication of Defendants’ alleged antitrust violation will
 12 turn on overwhelmingly common legal and factual issues.” Apr. 5 Class Cert. Order at 13.

13 To prevail on a cause of action for violation of Section 1 of the Sherman Act, a plaintiff
 14 must show that: “(1) there was an agreement, conspiracy, or combination between two or more
 15 entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of
 16 reason analysis; and (3) the restraint affected interstate commerce.”⁹ *Am. Ad Mgmt., Inc. v. GTE*
 17 *Corp.*, 92 F.3d 781, 784 (9th Cir. 1996); see also *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062
 18 (9th Cir. 2001). Plaintiffs here present substantial evidence of Defendants’ antitrust violations, and
 19 all of that evidence is common to the Technical Class as a whole.

20 Plaintiffs’ evidence indicates that the roots of Defendants’ conspiracy appear to reach back
 21 to the mid-1980s, shortly after George Lucas (former Lucasfilm Chairman of the Board and CEO)
 22 sold Lucasfilm’s “computer division,” a “tech, research, and development company,” to Steve Jobs
 23 (Co-Founder, Former Chairman, Former CEO of Apple), who then renamed the division “Pixar.”
 24 Decl. of Lisa Cisneros (“Cisneros Decl.”), Ex. NN (Lucas Depo.) at 16, 59, ECF No. 418-2.
 25 George Lucas believed that companies should not compete against each other for employees,
 26 because “[i]t’s not a normal industrial competitive situation.” *Id.* at 52. As George Lucas
 27 explained, “I always—the rule we had, or the rule that I put down for everybody,” was that “we

28 ⁹ The third factor, whether the alleged restraint affected interstate commerce, is not disputed.

1 cannot get into a bidding war with other companies because we don't have the margins for that sort
 2 of thing." *Id.* at 44. Edward Catmull (Pixar President) agreed with George Lucas that the newly
 3 independent Pixar would reciprocate this non-compete "rule" with Lucasfilm. The companies thus
 4 agreed: (1) not to cold call each other's employees; (2) to notify each other when making an offer
 5 to an employee of the other company even if that employee applied for a job on his or her own
 6 initiative; and (3) that any offer would be "final" and would not be improved in response to a
 7 counter-offer by the employee's current employer (whether Lucasfilm or Pixar). Shaver Decl., Ex.
 8 3 (McAdams Depo.) at 145-46; Def. Lucasfilm Ltd.'s Am. Ans. to Consol. Am. Compl. ¶ 59, ECF
 9 No. 168 ("Lucasfilm and Pixar had a general understanding that they would not actively solicit
 10 candidates from the other via cold-calling.").

11 Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple), who was "very
 12 adamant about protecting his employee force," proceeded to expand the Pixar-Lucasfilm agreement
 13 to include Apple and its labor competitors. Cisneros Decl., Ex. RR (Catmull Depo.) at 195. As
 14 such, beginning no later than 2004, Pixar sought Steve Jobs' permission before making offers of
 15 employment to Apple employees, regardless of whether Pixar solicited the employee or the
 16 employee applied independently. *See* Shaver Decl., Ex. 62 (showing email from Rob Cook (Pixar
 17 Vice President of Advanced Technology) to Steve Jobs in 2004 requesting permission to make an
 18 offer to an Apple employee). On April 30, 2007, Lori McAdams (Pixar Vice President of Human
 19 Resources and Administration) and Danielle Lambert (Apple Head of Human Resources),
 20 formalized the two companies' understanding on the same terms as the "gentlemen's agreement"
 21 between Pixar and Lucasfilm. *See id.*, Ex. 66 (Lori McAdams informing recruiting team about her
 22 phone call with Danielle Lambert and that, "effective now, we'll follow a gentleman's agreement
 23 with Apple that is similar to our Lucasfilm agreement. That is . . . we won't directly solicit *any*
 24 Apple employee (including outside recruiters if we use them) . . . Danielle will ask her Recruiting
 25 team to follow the same procedure." (emphasis added)).

26 These agreements extended to other Defendants. On February 18, 2005, Bill Campbell
 27 (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google)
 28 assisted Steve Jobs (Co-Founder, Former Chairman, Former CEO of Apple) in entering into an

1 agreement with Eric Schmidt (Google Executive Chairman, Member of the Board of Directors, and
2 former CEO) at Google. *See id.*, Ex. 17 (email from Bill Campbell to Steve Jobs informing Steve
3 Jobs that Eric Schmidt “got directly involved and firmly stopped all efforts to recruit anyone from
4 Apple”). That same day, Danielle Lambert (Apple Head of Human Resources) ordered her staff to
5 “[p]lease add Google to your ‘hands-off’ list. We recently agreed not to recruit from one another
6 so if you hear of any recruiting they are doing against us, please be sure to let me know. Please be
7 sure to honor our side of the deal.” *Id.*, Ex. 23. Later that year, Amnon Geshuri (Google
8 Recruiting Director) was asked to create a formal “Do Not Cold Call” list of companies, including
9 Apple, which had “special agreements” with Google not to compete for employees. *See id.*, Ex.
10 27. The draft was presented to Google’s Executive Management Group, a committee consisting of
11 Google’s senior executives, including Eric Schmidt, Larry Page (Google Co-Founder), Sergey Brin
12 (Google Co-Founder), and Shona Brown (former Google Senior Vice President, Business
13 Operations). *See id.*, Ex. 28. Eric Schmidt approved the list. *See id.* (email from Eric Schmidt
14 stating “[t]his looks very good.”). When Shona Brown asked Eric Schmidt whether he had any
15 concerns with sharing information regarding the “Do Not Call” list with Google’s competitors, Eric
16 Schmidt responded that he preferred that it be shared “verbally[,] since I don’t want to create a
17 paper trail over which we can be sued later?” *Id.*, Ex. 41. Shona Brown responded: “makes sense
18 to do orally. i agree.” *Id.*

19 Two months after entering into an agreement with Google, Steve Jobs (Co-Founder, Former
20 Chairman, Former CEO of Apple) persuaded Adobe to enter into a nearly identical agreement with
21 Apple. On May 26, 2005, Steve Jobs complained to Bruce Chizen (former Adobe CEO) that
22 Adobe was recruiting Apple employees. *Id.*, Ex. 18. Bruce Chizen responded by saying, “I
23 thought we agreed not to recruit any senior level employees I would propose we keep it that
24 way. Open to discuss. It would be good to agree.” *Id.* Steve Jobs was not satisfied, and replied
25 by threatening to send Apple recruiters after Adobe’s employees: “OK, I’ll tell our recruiters that
26 they are free to approach any Adobe employee who is not a Sr. Director or VP. Am I
27 understanding your position correctly?” *Id.* Bruce Chizen immediately gave in: “I’d rather agree
28 NOT to actively solicit any employee from either company If you are in agreement I will let

1 my folks know.” *Id.* (emphasis in original). The next day, Theresa Townsley (Adobe Vice
2 President Human Resources) announced to her recruiting team, “Bruce and Steve Jobs have an
3 agreement that we are not to solicit ANY Apple employees, and vice versa.” *Id.*, Ex. 19 (emphasis
4 in original). Adobe then placed Apple on its “[c]ompanies that are off limits” list, which instructed
5 Adobe employees not to cold call Apple employees. *Id.*, Ex. 11.

6 In addition to Google’s anti-solicitation agreement with Apple, Google also entered into a
7 “no poaching policy” with Intel. *See, e.g., id.*, Ex. 51 (email from Paul Otellini (CEO of Intel and
8 Member of the Google Board of Directors) to Intel recruiter, dated April 16, 2007, stating, “I have
9 an unofficial no poaching policy with [Google]”). Eric Schmidt (Google Executive Chairman,
10 Member of the Board of Directors, and former CEO) confirmed this policy in a June 4, 2007, email
11 to Paul Otellini in which Eric Schmidt wrote, “I checked as to our recruiting policy with Intel.
12 ‘Intel has been listed on the Do Not Call List since the policy was created. No one in staffing
13 directly calls, networks, or emails into the company or its subsidiaries looking for talent.’
14 Hopefully there are no exceptions to this policy and if you become aware of this please let me
15 know immediately!” *Id.*, Ex. 56. Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead
16 Director of Apple, and advisor to Google) was also involved in the Google-Intel agreement, as
17 reflected in an email exchange from 2006 in which Bill Campbell agreed with Jonathan Rosenberg
18 (Google Advisor to the Office of CEO and former Senior Vice President of Product Management)
19 that Google should call Paul Otellini before making an offer to an Intel employee, regardless of
20 whether the Intel employee first approached Google. *See id.*, Ex. 37. Paul Otellini then forwarded
21 the email to Patricia Murray (Intel Senior Vice President and Director of Leadership Strategy and
22 former President of Human Resources), with a note stating, “FYI . . . Do not fwd.” *Id.* Two days
23 later, in an email entitled “global gentleman agreement with Google,” an Intel recruiter asked Paul
24 Otellini and another senior executive, “Are either of you aware of any agreement with Google that
25 prohibits us from recruiting Google’s senior talent?” *Id.*, Ex. 52. Paul Otellini replied, “Let me
26 clarify. We have nothing signed. We have a handshake ‘no recruit’ between eric and myself. I
27 would not like this broadly known.” *Id.* Plaintiffs note that, while the DOJ alleged that the
28 Google-Intel agreement began no later than September of 2007, other evidence suggests that the

1 agreement began in 2005, the same time as other Defendants' bilateral agreements. *See id.*, Ex. 28
2 (showing Intel on Google's "Do Not Call" list as early as 2005). In October of 2008, Intel also
3 agreed with Pixar that it "will not proactively pursue any Pixar employees going forward." Shaver
4 Decl., Ex. 70.

5 Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and
6 advisor to Google) also insisted that Google and Intuit enter into a non-compete agreement.
7 Although Google's "non-solicit policy" initially "cover[ed] only 18 Intuit employees," "Bill
8 [Campbell] requested that Intuit be added fully to the Do Not Call list." *Id.*, Ex. 31 (email, dated
9 June 6, 2007, between Arnon Geshuri (Google Recruiting Director) and Eric Schmidt (Google
10 Executive Chairman, Member of the Board of Directors, and former CEO)). Thus, by June 12,
11 2007, Intuit was added fully to the list. *Id.*, Ex. 26; *id.* Ex. 30 ("please update the DNC list to now
12 include Intuit 100% do not call."); *see also* Decl. of Dean Harvey ("Harvey Decl."), Ex. 25 at 13,
13 ECF No. 248 (stating that "Google's [Do Not Cold Call] policy for Intuit began in April 2006 and
14 was broadened in June 2007 to include all Intuit employees.").

15 Ultimately, by the time that the DOJ investigation began in the summer of 2009, Apple's
16 own "Hands Off (Do Not Call List)" included every Defendant. *See* Shaver Decl., Ex. 22. Steve
17 Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) also tried, unsuccessfully, to
18 enter into a similar agreement with Palm, Inc. ("Palm") following a period in which several
19 employees moved between the two companies. On August 22, 2007, Steve Jobs called Edward
20 Colligan (former President and CEO of Palm) to propose "an arrangement between Palm and
21 Apple by which neither company would hire the other's employees, including high tech
22 employees." Decl. of Edward Colligan ("Colligan Decl.") ¶ 6, ECF No. 293. Steve Jobs also
23 threatened to retaliate against Palm if Palm resisted. *Id.* ("Mr. Jobs also suggested that if Palm did
24 not agree to such an arrangement, Palm could face lawsuits alleging infringement of Apple's many
25 patents."). Edward Colligan nevertheless refused, writing to Steve Jobs, "[y]our proposal that we
26 agree that neither company will hire the other's employees, regardless of the individual's desires, is
27 not only wrong, it is likely illegal." *Id.*, Ex. A. Edward Colligan stated further, "I can't deny
28 people who elect to pursue their livelihood at Palm the right to do so simply because they now

1 work for Apple, and I wouldn't want you to do that to current Palm employees." *Id.* Edward
 2 Colligan held firm against Steve Jobs' threats, stating, "I want to be clear that we are not
 3 intimidated by your threat If you choose the litigation route, we can respond with our claims
 4 based on [Palm's] patent assets, but I don't think litigation is the answer." *Id.* Steve Jobs
 5 responded:

6 This is not satisfactory to Apple We must do whatever we can to stop this. I'm
 7 sure you realize the asymmetry in the financial resources of our respective
 8 companies when you say: "We will both just end up paying a lot of lawyers a lot of
 9 money." . . . My advice is to take a look at our patent portfolio before you make a
 10 final decision [on an anti-solicitation agreement] here.

11 *Id.*, Ex. B. Edward Colligan did not agree and did not communicate with Steve Jobs further
 12 regarding his proposal. *Id.* ¶ 8.

13 Defendants generally structured their agreements with each other to apply to all employees,
 14 regardless of job type, department, or geography. *See* Shaver Decl., Ex. 17 (Google would not
 15 recruit anyone from Apple); *id.*, Ex. 56 (Google would not call, network, or email into Intel or its
 16 subsidiaries looking for talent); *id.*, Ex. 19 (Apple and Adobe agreed not to solicit *any* employee
 17 from either company); *id.*, Ex. 60 (Lucasfilm and Pixar agreed "not to solicit each other's
 18 employees"); *id.*, Ex. 66 (Pixar agreed not to "directly solicit any Apple employee"); *see also*
 19 Harvey Decl., Ex. 25 at 13 (Google's Do Not Cold Call policy "include[d] all Intuit employees.").
 20 However, Defendants Apple and Intel agreed simply "NOT to hire top talent (esp technical) away
 21 from each other," rather than to avoid all anti-solicitation efforts. Shaver Decl., Ex. 55 (emphasis
 22 in original).

23 Plaintiffs maintain that Defendants' alleged conspiracy went on for years until revealed by
 24 the DOJ. After investigating Defendants' alleged conspiracy, "the DOJ concluded that Defendants
 25 reached 'facially anticompetitive' agreements that 'eliminated a significant form of competition . . .
 26 to the detriment of the affected employees who were likely deprived of competitively important
 27 information and access to better job opportunities.'" MTD Order at 3-4; CAC ¶ 112; *see also*
 28 Dep't of Just. Compl. Against Adobe, et al. ("DOJ Adobe Compl.") ¶¶ 2, 14, ECF No. 93-1; Dep't
 of Just. Compl. Against Lucasfilm ("DOJ Lucasfilm Compl.") ¶¶ 2, 15, 22, ECF No. 93-4. The

1 DOJ also determined that the agreements “were not ancillary to any legitimate collaboration,”
 2 “were broader than reasonably necessary for the formation or implementation of any collaborative
 3 effort,” and “disrupted the normal price-setting mechanisms that apply in the labor setting.” DOJ
 4 Adobe Compl. ¶ 16; DOJ Lucasfilm Compl. ¶ 17; CAC ¶ 112. The DOJ concluded that
 5 Defendants entered into agreements that were restraints of trade that were per se unlawful under the
 6 antitrust laws. DOJ Adobe Compl. ¶ 35; DOJ Lucasfilm Compl. ¶ 3; CAC ¶ 112. However, the
 7 government only obtained injunctive relief from the Defendants. It did not obtain any
 8 compensation for employees injured by the allegedly collusive activities.

9 This substantial evidence presented by Plaintiffs suggests that adjudication of Defendants’
 10 alleged antitrust violation will turn on legal and factual issues that are common to the Technical
 11 Class. Accordingly, the Court finds that common questions will predominate with respect to the
 12 alleged antitrust violation.

13 2. Antitrust Impact

14 Having found that common questions will predominate with respect to the first element,
 15 antitrust violation, the Court now turns to the second element, impact. “Antitrust ‘impact’—also
 16 referred to as antitrust injury—is the ‘fact of damage’ that results from a violation of the antitrust
 17 laws.” *In re DRAM Antitrust Litig.*, 2006 WL 1530166 at *7. “It is the causal link between the
 18 antitrust violation and the damages sought by plaintiffs.” *In re New Motors*, 522 F.3d at 19 n.18.

19 Plaintiffs marshal substantial evidence, including documentary evidence and expert reports
 20 using statistical modeling, economic theory, and data, to demonstrate that common questions will
 21 predominate over individual questions in determining the impact of the antitrust violations. The
 22 Court finds that the documentary evidence and expert reports paint a picture of Defendants’
 23 business practices and the market in which Defendants operate that suggests that common proof
 24 could be used to demonstrate the impact of Defendants’ actions on Technical Class members.
 25 Accordingly, the Court finds that Plaintiffs’ proposed methodology satisfies the predominance
 26 standard.

27 Specifically, the record suggests that all technical employees—not just those who would
 28 have received cold calls but for the anti-solicitation agreements—may have been impacted by the

1 agreements. Plaintiffs note that cold calling, a recruitment tool that Defendants viewed favorably,
2 has the effect of spreading information about salaries and benefits from recruiters of one firm to
3 employees of another. Leamer Rep. ¶ 71-76. Such information could then spread to other
4 employees within a firm and beyond, leading to widespread increases in employee compensation
5 across the labor market due to increased access to information. *Id.*

6 Further, Plaintiffs contend that Defendants had company-wide compensation structures,
7 which organized employees into job groups, levels, and families that were evaluated and paid in
8 relationship to all other groups. Suppl. Mot. at 15-22. In addition, Defendants valued internal
9 equity (the idea that similarly situated employees should be compensated similarly) within their
10 firms. *Id.* Because of a desire to maintain equity between employees, the upward pressure that
11 cold calls placed on the salaries of individual employees who would have received the calls would
12 have also affected other employees who were part of the same salary structure. As such, variances
13 in individual employees' salaries would affect other employees who were in a similar position.
14 Each Defendant's compensation structure could then have been influenced by the other
15 Defendants' structures as Defendants saw each other as competitors for the same labor pool.

16 Finally, Plaintiffs point to the fact that Defendants were motivated to retain their
17 employees. This, Plaintiffs contend, would have motivated each Defendant to provide financial
18 incentives to employees to respond to and to prevent poaching by other Defendants. Leamer Rep.
19 ¶ 105. Yet, because of the anti-solicitation agreements, Defendants did not need to initiate such
20 measures, which would have benefitted the entire Technical Class.

21 Ultimately, the Court is not tasked at this phase with determining whether Plaintiffs will
22 prevail on these theories. Rather, the question is narrower: whether Plaintiffs have presented a
23 sufficiently reliable theory to demonstrate that common evidence can be used to demonstrate
24 impact. The Court finds that, based on the extensive documentary evidence, economic theory,
25 data, and expert statistical modeling, Plaintiffs' methodology demonstrates that common issues are
26 likely to predominate over individual issues. The Court first discusses the substantial documentary
27 evidence, which supports Plaintiffs' theory of common impact, and then proceeds to discuss the
28

1 expert reports. The Court concludes by rejecting Defendants' attempt to identify flaws that would
2 undermine Plaintiffs' entire methodology.

3
4 **a. Documentary Evidence**

5 In Plaintiffs' Supplemental Motion for Class Certification, Plaintiffs submitted thousands of
6 pages of documents—all common evidence—which support Plaintiffs' theories of classwide harm
7 and undermine many of the representations previously made by Defendants. Plaintiffs' common
8 evidence suggests that, for the purpose of ultimately proving impact, common issues will
9 predominate over individual ones.

10 The Court begins by discussing the documentary evidence on the importance of cold calling
11 as a recruitment tool and the effect of the preclusion of cold calling on the Technical Class as a
12 whole. The Court then discusses the evidence of Defendants' rigid compensation structure and
13 importance of internal equity. The Court finally turns to the documentary evidence that
14 Defendants viewed each other as labor competitors, which may have resulted in individual
15 Defendants' wage suppression depressing other Defendants' employees' wages.

16 **i. Cold Calling and Recruitment**

17 Plaintiffs produce significant evidence that cold calling was an important part of
18 Defendants' recruitment practices and contend that the elimination of such recruitment through
19 cold calling had adverse effects on all Technical Class members.

20 **a) The Importance of Cold Calling as a Recruitment
21 Practice to Defendants**

22 Plaintiffs' documents support the allegation that, throughout the class period, Defendants
23 viewed recruitment, particularly of "passive candidates"—that is, employees who were not actively
24 looking for a new job—as crucial to their growth and development. Donna Morris (AdobeAdobe
25 Senior Vice President, Global Human Resources) described recruiting talent as "critical" to
26 company growth. Harvey Decl., Ex 1 (Morris Depo.), at 56:17-19 ("Q: Why is recruiting talent
27 important to Adobe? A: So our critical, most critical asset is people. So really we're an
28 [intellectual property]-based company."). Adobe also believed that an important way to source

1 “top talent” was to focus on “passive” talent, which it defined as “top performers [who] tend to be
2 entrenched” but “may be ‘willing to listen’ if the right opportunity is presented.” Shaver Decl., Ex.
3 14 at 3. As explained by Donna Morris, “often the very best candidates might not necessarily be
4 looking for Adobe. They might not even know that Adobe is a company where they can leverage
5 their capabilities. And so recruiting is a big, big aspect.” *Id.* at 57:13-17. To support Google’s
6 rapid growth, which included hiring “several thousand employees per year from 2006 to 2009,”
7 Google employed “as many as 800 recruiters while also working with external recruiting
8 agencies.” *See id.*, Ex. 25, at 7-8. Google also determined that “[p]assive sourcing will play an
9 increasingly larger role in recruiting as we move forward as a company.” Harvey Suppl. Decl., Ex.
10 14 (Google 2006 Sourcing Diagnostic).

11 The record also indicates that Defendants viewed cold calling as a key method to attract
12 potential employees. Intel estimated that, historically, competitive sourcing, including cold calling
13 and research, accounted for █████ percent of hires, Harvey Decl., Ex. 27, and stated in its
14 “Complete Guide to Sourcing” that “[Cold] Calling candidates is one of the most efficient and
15 effective ways to recruit,” Shaver Decl., Ex. 54. Similarly, Google found that although referrals
16 were the largest source of hires, “agencies and passively sourced candidates offer[ed] the highest
17 yield.” Harvey Suppl. Decl., Ex. 14. Consequently, in response to concerns over slow hiring,
18 Google’s Chief Culture Officer stated that “[c]old calling into companies to recruit is to be
19 expected unless they’re on our ‘don’t call’ list.” Shaver Decl., Ex. 42.

20 Further, Defendants appear to have been particularly concerned about their ability to recruit
21 employees for positions within the Technical Class. For example, shortly prior to Google’s anti-
22 solicitation agreement with Apple, Google determined that it needed to “dramatically increase the
23 engineering hiring rate.” Cisneros Decl., Ex. 1753. Thus, Google stated that it would “need to
24 drain competitors to accomplish this rate of hiring.” *Id.*; *see also* Harvey Suppl. Decl., Ex. 14
25 (Google 2006 Sourcing Diagnostic) (documenting a large “hiring gap” for engineering positions).
26 Relatedly, when a Senior Apple Executive stated in 2007 that his biggest challenge in the “EE
27 hiring plan” was finding high quality people, Mark Bentley (former Apple Director of Executive
28

1 Recruiting and Interim Human Resources Director) responded by stating: “Bottom line is that we
2 need to do more targeted recruiting of ‘passive’ candidates.” Harvey Suppl. Decl., Ex. 7.

3 Google also closely tracked the decline rate of its top technical candidates as well as the
4 loss of its technical employees. *See* Cisneros Decl., Ex. 173, at 1 (showing that “Google’s offer
5 decline rates ██████████, especially among senior and top technical candidates.”); *see also*
6 Shaver Decl., Ex. 45 (documenting how, during 2010, “██████ of technical employees who reported
7 leaving Google for another company went to a startup organization” and that Facebook accounted
8 for the highest portion of overall departures).

9 **b) Enforcement of the Anti-Solicitation Agreements**
10 **by Defendants**

11 While Defendants dispute that this absence of cold calling due to their anti-solicitation
12 agreements had any effect on job opportunities or flow of information to the class members, *see*
13 Opp’n at 17, Defendants’ own documents created during the alleged conspiracy tell a different
14 story.

15 First, Plaintiffs offer evidence indicating that, but for Defendants’ anti-solicitation
16 agreements, Defendants would have been cold calling one another’s employees. For example, in
17 November of 2005, Howard Look (former Pixar Vice President of Software) stated that Pixar was
18 struggling to find candidates, but “of course cannot recruit out of Apple.” Shaver Decl., Ex. 64.
19 Adobe personnel recognized that “Apple would be a great target to look into” for the purpose of
20 recruiting, but knew that they could not do so because, “[u]nfortunately, Bruce [Chizen (former
21 Adobe CEO)] and Apple CEO Steve Jobs have a gentleman’s agreement not to poach each other’s
22 talent.” Shaver Decl., Ex. 13. As Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead
23 Director of Apple, and advisor to Google) explained at his deposition, anti-solicitation agreements
24 prevented a competitor from going “A through Z” and calling “everybody that was a mid-level
25 engineer and above . . . that was what I objected to.” Cisneros Decl., Ex. EE (Campbell Depo.) at
26 30. Thus, by virtue of these anti-solicitation agreements, Defendants’ employees were deprived of
27 job information and opportunities.
28

1 Second, the evidence indicates that Defendants actively and aggressively enforced these
2 anti-solicitation agreements, which further demonstrates their harmful effects. In an email from
3 Arnon Geshuri (Google Recruiting Director) to Eric Schmidt (Google Executive Chairman,
4 Member of the Board of Directors, and former CEO) and Laszlo Bock (Google Senior Vice
5 President of People Operations), Arnon Geshuri confirmed: “[O]ur [Google] recruiters are strictly
6 following the Do Not Call policy regarding Intel and no one has called, networked, or emailed into
7 the company or its subsidiaries looking for talent.” Shaver Decl., Ex 35. Intel memorialized its
8 agreement with Pixar in a document which states, “We cannot recruit (including calling up,
9 emailing or enticing in any way) current Pixar employees to come to work for Intel. If a Pixar
10 employee applies to Intel without being recruited by Intel . . . [Pat Geslinger (former Intel Senior
11 Corporate Vice President)] will contact the CEO of Pixar for approval to hire.” *Id.*, Ex. 53.

12 Plaintiffs also offer evidence supporting their assertion that Defendants’ agreements were
13 particularly concerned with preventing the recruitment of one another’s technical employees.
14 Steve Jobs (Co-Founder, Former Chairman, and Former CEO of Apple) repeatedly contacted the
15 CEOs of co-Defendants to thwart the recruitment of Apple’s employees. For instance, when a
16 recruiter from Google’s engineering team contacted an Apple employee in 2007, Steve Jobs
17 forwarded the message to Eric Schmidt (Google Executive Chairman, Member of the Board of
18 Directors, and former CEO) and stated, “I would be very pleased if your recruiting department
19 would stop doing this.” *Id.*, Ex. 24. Google responded by making a “public example” out of the
20 recruiter and “terminat[ing] [the recruiter] within the hour.” *Id.* The aim of this public spectacle
21 was to “(hopefully) prevent future occurrences.” *Id.*; *see also* Cisneros Decl., Ex. 1869 (email
22 from Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and
23 advisor to Google) to Sergey Brin (Google Co-Founder), stating “Steve just called me again and is
24 pissed that we are still recruiting his browser guy.”); Shaver Decl., Ex. 25 (email from Steve Jobs
25 to Eric Schmidt) (“I am told that Googles [sic] new cell phone software group is relentlessly
26 recruiting in our iPod group. If this is indeed true, can you put a stop to it?”).

27 By “prevent[ing] future occurrences” of Google’s recruitment of Apple employees, *see*
28 Shaver Decl., Ex. 24, Apple employees were deprived of learning about potential job opportunities

1 at Google from more than 800 Google recruiters, as well as Google's external recruiting agencies.
2 See Harvey Decl., Ex. 25, at 7-8. In fact, Google even declined to hire some *former* Apple
3 engineers after Steve Jobs let it be known that he'd "strongly prefer that [Google] not hire these
4 guys." Cisneros Decl., Ex. 653.

5 Plaintiffs offer further evidence supporting their assertion that Defendants' CEOs
6 personally monitored and enforced their anti-solicitation agreements, especially as the agreements
7 applied to members of the Technical Class. For example, on September 26, 2007, Paul Otellini
8 (CEO of Intel and Member of the Google Board of Directors) received an internal complaint
9 regarding Google's successful recruiting efforts of Intel's technical employees. Shaver Decl., Ex.
10 57 ("Paul, I am losing so many people to Google We are countering but thought you should
11 know."). Paul Otellini's answer was to forward the email to Eric Schmidt (Google Executive
12 Chairman, Member of the Board of Directors, and former CEO): "Eric, can you pls help here???"
13 *Id.* Eric Schmidt obliged and forwarded the email to his recruiting team, who prepared a report for
14 Eric Schmidt on Google's activities. *Id.*, Ex. 35. The next day, Eric Schmidt replied to Paul
15 Otellini, "If we find that a recruiter called into Intel, we will terminate the recruiter." Ex. 50; *see*
16 *also* Cisneros Dec'l, Ex. 651 (May 4, 2006, e-mail from Paul Otellini to Eric Schmidt: "Sorry to
17 bother you again on this topic, but my guys are very troubled by Google continuing to recruit our
18 key players.").

19 Additionally, an email forwarded to Edward Catmull (Pixar President) indicated that Pixar
20 felt compelled to check with Steve Jobs (Co-Founder, Former Chairman, and Former CEO of
21 Apple) before extending a job offer to even an administrative assistant. Shaver Decl., Ex. 68. In
22 response, Edward Catmull emphasized to Rob Cook (Pixar Vice President of Advanced
23 Technology) that "[t]he key is to stay away from the engineers." *Id.* Consistent with this position,
24 Edward Catmull informed Steve Jobs via email that Pixar had received an application from an
25 Apple employee to work as a test automation engineer, but "[w]e declined." Cisneros Decl., Ex.
26 424. Several months later, that employee contacted Pixar again informing Pixar that he had
27 another offer and still planned to leave Apple. *Id.* Edward Catmull emailed Steve Jobs asking
28 whether Jobs would "object" if Pixar communicated with the employee, and Steve Jobs gave

1 permission. *Id.* Thus, Plaintiffs' evidence supports their claim that these anti-solicitation
 2 agreements, enforced by Defendants' top officers, stifled recruitment efforts of Technical Class
 3 members.

4 **c) The Effect of the Absence of Cold Calling on the**
 5 **Technical Class as a Whole**

6 In addition to showing that Defendants valued cold calling and that the absence of cold
 7 calling hampered recruitment of members of the Technical Class, the documentary evidence also
 8 suggests that the lack of cold calls had a profound and common effect on all members of the
 9 Technical Class.

10 Plaintiffs allege that the elimination of cold calling deprived all employees of information
 11 regarding pay packages that the employees could have used to obtain more lucrative employment
 12 or to gain leverage over their existing employers in negotiating pay increases. Class Cert. Mot. at
 13 16. The earning potential of a valuable employee who knows her market worth is illustrated by an
 14 email exchange at Adobe. Out of concern that one employee—a “star performer” due to his
 15 technical skills, intelligence, and collaborative abilities—might leave Adobe because “he could
 16 easily get a great job elsewhere if he desired,” Adobe considered how best to retain him. Cisneros
 17 Decl., Ex.1250. In so doing, Adobe expressed concern about the fact that this employee had
 18 already interviewed with [REDACTED] other companies and communicated with friends who worked there.
 19 *Id.* Thus, Adobe noted that the employee “was aware of his value in the market” as well as the fact
 20 that the employee’s friends from college were “[REDACTED]”

21 [REDACTED] *Id.* In response, Adobe decided to give the employee an immediate pay raise. *Id.*
 22 Similarly, as explained by Alex Lintner (Intuit Head of Global Business Division), “[w]henever
 23 somebody’s being targeted by an outside company and we want to retain them, we have a
 24 conversation around how we can retain them so they don’t take the offer from the outside
 25 company.” Hallock Rep. ¶ 199. In the example of one employee that Intuit wanted to retain, Intuit
 26 [REDACTED] which was an [REDACTED]
 27 [REDACTED] but, in light of the employee’s skills and contributions to the company, Intuit was “willing
 28 to make an investment.” *Id.*

1 While Defendants claim that counter-offers were generally made only to particular
2 individuals to retain key talent, Plaintiffs' evidence supports their allegation that the risk imposed
3 by cold calls and subsequent counteroffers may have had much broader effects. As noted by one
4 Google employee in response to Google's decision to make counteroffers to some individuals who
5 were recruited to go elsewhere, "[i]t's impossible to keep something like this a secret. The people
6 getting counter offers talk, not just to Googlers and ex-Googlers, but also to the competitors where
7 they received their offers (in the hopes of improving them), and those competitors talk too, using it
8 as a tool to recruit more Googlers." Shaver Decl., Ex. 59. This employee expressed frustration,
9 stating that by staying at Google, "it feels like my loyalty is being punished." *Id.*

10 Alan Eustace (Google Senior Vice President) commented on concerns regarding
11 competition for workers and Google's approach to counteroffers by noting that, "it sometimes
12 makes sense to make changes in compensation, even if it introduces discontinuities in your current
13 comp, to save your best people, and send a message to the hiring company that we'll fight for our
14 best people." *Id.* Because recruiting "a few really good people" could inspire "many, many others
15 [to] follow," Alan Eustace concluded, "[y]ou can't afford to be a rich target for other companies."
16 *Id.* According to him, the "long-term . . . right approach is not to deal with these situations as one-
17 off's but to have a *systematic approach* to compensation that makes it very difficult for anyone to
18 get a better offer." *Id.* (emphasis added).

19 This documentary evidence suggests that Defendants would have responded to the
20 information spread by cold calls not merely on an individual basis, but with a structural response
21 that affected all members of the Technical Class. Thus, Plaintiffs' evidence suggests not only that
22 the anti-solicitation agreements eliminated a key tool of recruitment, cold calling, but also that the
23 impact of this elimination affected the entire Technical Class. The documentary evidence supports
24 Plaintiffs' theory that Defendants' elimination of cold calling allowed Defendants not to have to
25 put in place structural incentives to retain employees. This common evidence provides support for
26 Plaintiffs' theory that if the anti-solicitation agreements did not exist, Defendants would have had
27 to take actions not only to retain the particular employees who may have received the cold calls,
28

1 but also that Defendants would have had to take broader action that would have affected the
2 Technical Class as a whole.

3 **ii. Compensation Structure and Internal Equity**

4 As set forth below, Plaintiffs' documentary evidence further shows that Defendants
5 maintained formal compensation structures and made significant efforts to maintain internal equity
6 within those structures. This additional documentary evidence further supports Plaintiffs' theory
7 that the anti-solicitation agreements' downward pressure on individual employees' salaries would
8 have applied similar downward pressure across Defendants' salary structure and on all Technical
9 Class employees' salaries.

10 First, Plaintiffs' evidence supports their claim that, during the class period, all Defendants
11 used formal administrative compensation structures and divided jobs into pay bands, zones, grades,
12 and ranges by which they evaluated and paid employees in groups in relationship to other groups.
13 At Adobe, every job position was assigned a job title, and every job title had a corresponding
14 salary range within Adobe's salary structure, which included a salary minimum, middle, and
15 maximum. *See* Cisneros Decl., Ex. C (Arriada-Keiper Depo.) at 16, 20, 159 189-90, 259; *id.*, Ex.
16 G (Vijungco Depo.) at 29. Adobe expected that the distribution of its existing employees' salaries
17 would fit [REDACTED] *Id.*, Ex. F (Streeter Depo.) at 57. Similarly, Apple's compensation data
18 shows that, for each year in the Class Period, Apple had a "job structure system," which included
19 categorizing and compensating its workforce according to a discrete set of company-wide job
20 levels assigned to all salaried employees and [REDACTED] sets of base salary ranges applicable
21 to [REDACTED]. *Id.*, Ex. M (Burmeister Depo.) at
22 14-15, 52-53; Brown Decl., Ex. 16 (Burmeister Decl.) ¶¶ 6, 10 & Ex. B. Every salary range
23 comprised centrally established "min," "mid" and "max" amounts. *See ids.*

24 Google also had many job families, many grades within job families, and many job titles
25 within grades. *See, e.g.,* Harvey Suppl. Decl., Exs. 15, 16; *see also* Cisneros Decl., Ex. S (Brown
26 Depo.) at 74-76 (discussing salary ranges utilized by Google); *id.*, Ex. X (Wagner Depo.) at 49-50
27 (testifying that Google's [REDACTED] salary ranges had generally the same structure" as the [REDACTED] salary
28 ranges). Throughout the class period, Google utilized salary ranges and pay bands with minima

1 and maxima and either means or medians. Hallock Rep. ¶ 66; *see* Cisneros Decl., Ex. S (Brown
 2 Depo.) at 74-76, *id.*, Ex. X (Wagner Depo.) at 49-50 (testifying that Google’s █████ salary ranges
 3 had generally the same structure as the █████ salary ranges). As explained by Shona Brown (former
 4 Google Senior Vice President, Business Operations), “if you discussed a specific role [at Google],
 5 you could understand that role was at a specific level on a certain job ladder.” Cisneros Decl., Ex.
 6 S (Brown Depo.) at 94-95; *id.*, Ex. Y (Conrad Depo.) at 23.

7 Likewise, Intel had a “compensation structure,” with job grades and job classifications. *See*
 8 *id.*, Ex. BB (McKell Depo.) at 73 (“[W]e break jobs into one of three categories—job families, we
 9 call them—R&D, tech, and nontech, there’s a lot more . . .”). The company assigned employees
 10 to a grade level based on their skills and experience. *Id.*, Ex. Y (Conrad Depo.) at 23; *see also id.*,
 11 Ex. CC (Murray Depo.) at 45 (explaining that everyone at Intel is assigned a “classification”
 12 similar to a job grade). Intel standardized its salary ranges throughout the company; each range
 13 applied to multiple jobs and most jobs spanned multiple salary grades. *Id.*, Ex. BB (McKell Depo.)
 14 at 59. Intel further █████, and compensation at Intel, like
 15 Adobe, █████
 16 █████ *Id.* at 62-63.

17 The other Defendants had similarly set salary structures. Intuit had job families and job
 18 titles—as indicated by documents tracking salary low, mid, and high information, job codes, and
 19 percentiles—and categorized jobs into █████ formal bands. Hallock Rep. ¶¶ 85, 89.
 20 Lucasfilm’s compensation scheme included job titles that were matched to job families, *see*
 21 Cisneros Decl., Ex. LL (Coker Depo.) at 246, as well as set salary ranges for employees who had
 22 similar job titles or job classifications, *id.*, Ex. NN (Lucas Depo.) at 137-138. Pixar used job
 23 families and groups, *see id.*, Ex. VV (Sheehy Depo.) at 78, 136, and established salary ranges for
 24 each position, *id.*, Ex. SS (McAdams Depo.) at 29.

25 Second, to ensure that employees were paid within the prescribed salary ranges, Defendants
 26 used specific guidelines and tools. For instance, to assist managers in staying within the prescribed
 27 ranges for setting and adjusting salaries, Adobe had an online salary planning tool as well as
 28 “salary matrixes” which provided managers with guidelines based on market salary data. *See*

1 Cisneros Decl., Ex. C (Arriada-Keiper Depo.) at 82-3 (“[E]ssentially the salary planning tool is
 2 populated with employee information for a particular manager, so the employees on their team
 3 [sic]. You have the ability to kind of look at their current compensation. It shows them what the
 4 range is for the current role that they’re in The tool also has the ability to provide kind of the
 5 guidelines that we recommend in terms of how managers might want to think about spending their
 6 allocated budget.”).

7 Apple also created a Human Resources and recruiting tool called ██████████ which was an
 8 internal system for tracking employee records and performance, and required managers to grade
 9 employees at ██████████ pre-set levels. *See id.*, Ex. I (Baja Depo.) at 142-43, 145-46); *id.*, Ex. N
 10 (Fadell Depo.) at 52-53; *id.*, Ex. O (Mansfield Depo.) at 33. As explained by Tony Fadell (former
 11 Apple Senior Vice President, Ipod Division, and advisor to Steve Jobs), ██████████ “would say, this is
 12 the employee, this is the level, here are the salary ranges, and through that tool we were then – we
 13 understood what the boundaries were.” *Id.*, Ex. N (Fadell Depo.) at 53.

14 Intel also used a software tool to provide guidance to managers about an employee’s pay
 15 range which would also take into account market reference ranges and merit. *See Harvey Suppl.*
 16 Decl., Ex. 9. As explained by Randall Goodwin (Intel Technology Development Manager), “[i]f
 17 the tool recommended something and we thought we wanted to make a proposed change that was
 18 outside its guidelines, we would write some justification.” Cisneros Decl., Ex. Z (Goodwin Depo.)
 19 at 52; *accord* Hallock Rep. ¶ 77.

20 Intuit similarly gave compensation guidelines to managers throughout the company. *See*
 21 Cisneros Decl., Ex. GG (McNeal Depo.) at 76, 99. Michael McNeal (Intuit Vice President of
 22 Talent Development, former Vice President of Talent Strategy, Vice President of Talent
 23 Acquisition, Director of Talent Acquisition, and Manager of Executive Recruitment)
 24 acknowledged, for example, that Intuit provided guidance about “the variables that [the company]
 25 usually use[s] to the make . . . decision[s]” about compensation. *Id.* at 99.

26 Similarly, Frank Wagner (Google Director of Compensation), testified that he could locate
 27 the target salary range for jobs at Google through an internal company website. *See id.*, Ex. X
 28 (Wagner Depo.) at 57-58 (“Q: And if you wanted to identify what the target salary would be for a

1 certain job within a certain grade, could you go online or go to some place . . . and pull up what
2 that was for that job family and that grade? . . . A: Yes.”).

3 Third, Plaintiffs’ evidence indicates that Defendants expected compensation to be set within
4 their salary ranges; deviations required special approval. Adobe’s practice, if employees were
5 below the minimum recommended salary range, was to “adjust them to the minimum as part of the
6 annual review” and “red flag them.” *Id.*, Ex. C (Arriada-Keiper Depo.) at 24. Deviations from the
7 salary ranges would also result in conversations with managers, wherein Adobe’s officers
8 explained, “we have a minimum for a reason because we believe you need to be in this range to be
9 competitive.” *Id.*

10 Similarly, Intel regularly ran reports showing the salary range distribution of its employees,
11 *id.*, Ex. BB (McKell Depo.) at 64, and, at Intuit, recruiters could not deviate from salary guidelines
12 without express approval, *id.*, Ex. HH (Nguyen Depo.) at 72-73, 90-92. At Apple, going outside
13 prescribed “guidelines” also required extra approval. *See id.*, Ex. J (Bechtel Depo.) at 217; *id.*, Ex.
14 N (Fadell Depo.) at 53 (“And if we were to go outside of that, then we would have to pull in a
15 bunch of people to then approve anything outside of that range.”). Google’s compensation
16 programs were designed, monitored, and overseen by a special department called “People Ops.”
17 *See id.*, Ex. 5 (Brown Depo.) at 24. And finally, at Pixar, Stephanie Sheehy (Pixar Manager of
18 Human Resources Analysis) and Lori McAdams (Pixar Vice President of Human Resources and
19 Administration) were responsible for ensuring that salaries for each job group remained within
20 their allocated pool. Cisneros Decl., Ex. VV (Sheehy Depo.) at 77-78.

21 Fourth, Plaintiffs’ evidence shows not only that Defendants maintained formal
22 compensation structures, but that the details of these structures were driven by concerns about
23 maintaining internal equity—the idea that employees doing the same work would generally be paid
24 similarly—in both hiring and promotions.

25 As explained by Debbie Streeter (Adobe Vice President, Total Rewards), Adobe “always
26 looked at internal equity as a data point, because if you are going to go hire somebody externally
27 that’s making . . . more than somebody who’s an existing employee that’s a high performer, you
28 need to know that before you bring them in.” *Id.*, Ex. F (Streeter Depo.) at 175. Similarly, when

1 considering whether to extend a counteroffer, Adobe advised “internal equity should ALWAYS be
2 considered.” *Id.*, Ex. 216.5.

3 Concerns about internal equity also permeated Apple’s compensation program. Steven
4 Burmeister (Apple Senior Director of Compensation) testified that internal equity—which
5 Burmeister defined as the notion of whether an employee’s compensation is “fair based on the
6 individual’s contribution relative to the other employees in your group, or across your
7 organization”—inheres in some, “if not all,” of the guidelines that managers consider in
8 determining starting salaries. *Id.*, Ex. M (Burmeister Depo.) at 61-64; *id.*, Ex. 1856. In fact, as
9 explained by Patrick Burke (former Apple Technical Recruiter and Staffing Manager), when hiring
10 a new employee at Apple, “compar[ing] the candidate” to the other people on the team they would
11 join “was the biggest determining factor on what salary we gave.” *Id.*, Ex. L (Burke Depo.) at 279
12 (emphasis added).

13 Likewise, Google considered internal equity to be an important goal. Google utilized a
14 salary algorithm in part for the purpose of “[e]nsur[ing] internal equity by managing salaries within
15 a reasonable range.” *Id.*, Ex. 1613. Furthermore, because Google “strive[d] to achieve fairness in
16 overall salary distribution,” “high performers with low salaries [would] get larger percentage
17 increases than high performers with high salaries.” *Id.*, Ex. 1618.14.

18 Similarly, Intel used internal equity “to determine wage rates for new hires and current
19 employees that corresponded to each job’s relative value to Intel.” *Id.*, Ex. BB (McKell Depo.) at
20 210-211; *id.*, Ex. 398.8. To assist in that process, Intel used a tool that generates an “Internal
21 Equity Report” when making offers to new employees. *Id.*, Ex. BB (McKell Depo.) at 212-13. In
22 the words of Ogden Reid (Intel Director of Compensation and Benefits), “[m]uch of our culture
23 screams egalitarianism While we play lip service to meritocracy, we really believe more in
24 treating everyone the same within broad bands.” *Id.*, Ex. 2035.4.

25 At Lucasfilm, all new positions and out-of-cycle compensation adjustments presented to its
26 compensation committee for approval were to be accompanied by “Peer Relationship” information
27 regarding how the subject employee’s (or candidate’s) colleagues inside the company were
28 compensated, and this factored heavily into committee decisions. *See id.*, Exs. 710, 729, 2084,

1 2092, 2094, 2096; *id.*, Ex. MM (Condiotti Depo.) at 41-42 (“[I]n most cases, when we got a comp
 2 request . . . it would have the survey data and all of the internal people that had—were in similar
 3 positions.”). Chris Galy (Lucasfilm Director of Talent Acquisition) testified that internal equity is
 4 “always one of the considerations” in determining pay for new hires and that he always discusses
 5 internal equity with the manager requesting the new hire. *See id.*, Ex. FF (Galy Depo.) at 200-03.
 6 Chris Galy explained that maintaining internal equity was important because “[y]ou don’t want to
 7 . . . hire one person and lose ten.” *Id.* at 201. Chris Galy also testified about a specific recent
 8 situation in which bringing in a new person at a higher salary required raising another employee’s
 9 salary in order to preserve internal equity. *Id.* at 194-95 (“[A]nd so we did an action [pay increase]
 10 for [REDACTED].”).¹⁰

11 Pixar similarly expressed concerns with maintaining internal equity. *See, e.g., id.*, Ex. QQ
 12 (Batali Depo.) at 67 (“[I]f someone feels like they’re being paid more than someone I know who
 13 has more value, it raises a bit of a flag”); *id.*, Ex. UU (Zissimos Depo.) at 71 (discussing comparing
 14 salaries of similar employees to ensure they were not “out of whack”).

15 Due to Defendants’ formalized pay structures and compensation design, Plaintiffs’
 16 evidence indicates that Defendants’ concerns with internal equity could lead to classwide changes
 17 in compensation levels as a result of the anti-solicitation agreements. In the face of inequities
 18 between new hires and existing employees, Defendants considered increasing compensation for
 19 existing employees. This precise dynamic is best reflected in Defendants’ own internal documents
 20 and emails before and after the anti-solicitation agreements. Lucasfilm regularly and proactively
 21 reviewed employee salaries to ensure its workforce was within range and implemented “[C]all-
 22 [O]ut [E]quity [A]djustment[s]”—individual compensation increases for the explicit purpose of
 23 “align[ing] the employee more appropriately in their salary range . . . [and] based on how that

24
 25 ¹⁰ Chris Galy stated in his deposition: “Where a manager would come in and say ‘I believe that I
 26 have an [sic] high-performing’ -- in fact, I just had one of these about a month ago, couple months
 27 ago, where we went out and hired somebody, and as we were looking at some of the folks on the
 28 team, we recognized that the person is -- we were at risk of potentially having this person feel like
 they were, you know, not in the market range, so we did an action for [REDACTED]. . . . We gave [REDACTED] a salary
 increase.” Cisneros Decl., Ex. FF (Galy Depo.) at 195. Defendants contest this anecdote by
 contending that the employee in question received a salary increase for purposes unrelated to
 internal equity. Yet the portions of Chris Galy’s deposition that the Defendants cite are not in the
 record. The Court relies on the materials that the parties placed in the record.

1 employee aligns with their internal peer group based on the same set of criteria.” *Id.*, Ex. OO
 2 (Maupin Depo.) at 194; *id.*, Ex. 730.

3 At Intel, a human resources document from 2002—prior to the anti-solicitation agreements
 4 —recognized “ [REDACTED]

5 [REDACTED]” and “ [REDACTED]
 6 [REDACTED]” *Id.*, Ex. 392. In response, Intel planned to: (1) “ [REDACTED]

7 [REDACTED] and (2)
 8 [REDACTED]

9 [REDACTED] *Id.* An Intel human resources document confirms that, [REDACTED]
 10 [REDACTED] Harvey Suppl. Decl., Ex. 10 at 7 (emphasis
 11 added).

12 At Adobe, five months before Bruce Chizen (former Adobe CEO) entered into an
 13 agreement with Steve Jobs (Co-Founder, former Chairman, and Former CEO of Apple) to
 14 eliminate cold calling between the companies, Donna Morris (Adobe Senior Vice President, Global
 15 Human Resources Division) expressed concern “about internal equity due to [REDACTED]

16 [REDACTED] Harvey Decl., Ex. 17 (“ [REDACTED]

17 [REDACTED]
 18 [REDACTED]”). Adobe personnel stated that, because of the [REDACTED], they may not be able to
 19 respond to the problem immediately “ [REDACTED]

20 [REDACTED]” *Id.*

21 The effects of internal equity may have been even more concentrated within the Technical
 22 Class. Intuit, for example, differentiated between compensation for engineers and other technical
 23 positions versus “all other[s].” Cisneros Decl., Ex. 2739.70. Technical employees had a [REDACTED]
 24 range of salaries and, even for employees of similar salaries, technical employees [REDACTED].
 25 *Id.* Pixar had a “Tools Software Engineer leveling matrix” that it used “to give [Pixar] a consistent
 26 framework for evaluating the expected contribution of [their] software engineers” and to justify
 27 adjusting salaries. *See id.*, Ex. 1309.1. After Pixar determined that some of its [REDACTED]

28 [REDACTED], Pixar decided to make “ [REDACTED]” *Id.* From Pixar’s

1 perspective, “[t]he goal of the new salary proposals is [to] compensate the lowest paid team-
 2 members who are performing at the highest levels. This is a ‘pre-emptive strike.’ We want to send
 3 a clear message to these [REDACTED] that we value them at least as much as some new hires who are
 4 seeing much more competitive offers from other companies.” *Id.*

5 In sum, Plaintiffs’ evidence supports their theory that Defendants’ formal compensation
 6 structures combined with the premium Defendants’ placed on internal equity created a market for
 7 the Technical Class of employees in which any individual’s compensation was intertwined with
 8 that of her peers. The Court finds persuasive Plaintiffs’ contention that common questions about
 9 the impact of Defendants’ compensation structures, their focus on internal equity, and the effects of
 10 these factors on the Technical Class as a whole are likely to predominate over any individual
 11 questions.

12 **iii. Impact of Labor Market Competition**

13 Thus far, the Court has discussed Plaintiffs’ documentary evidence of the effects of cold
 14 calling, Defendants’ compensation structures, and Defendants’ internal equity concerns on wage
 15 suppression across the Technical Class. Now, the Court turns to documentary evidence that
 16 suggests that wage suppression within an individual Defendant firm may have affected Technical
 17 Class members employed by other Defendant firms because the Defendants viewed each other as
 18 competitors for the same employees. This competition often meant that Defendants benchmarked
 19 compensation based on each other or based on common external sources.

20 Adobe, for example, viewed Google and Apple to be among its top competitors for talent
 21 and expressed concern about whether Adobe was “winning the talent war.” Shaver Decl., Ex.
 22 14. Adobe further considered itself in a “[REDACTED]-horse race from a benefits standpoint,” which included
 23 Google, Apple, and Intuit as among the other “horses.” *See* Shaver Decl., Ex. 15. In 2008, Adobe
 24 benchmarked its compensation against [REDACTED] companies including Google, Apple, and Intel. Shaver
 25 Decl., Ex. 15; *cf.* Cisneros Decl., Ex. 2800 (showing that, in 2010, Adobe considered Intuit to be a
 26 “direct peer,” and considered Apple, Google, and Intel to be “reference peers,” though Adobe did
 27 not actually benchmark compensation against these latter companies).

1 Similarly, throughout the class period, Google analyzed and compared its equity
2 compensation to Apple, Intel, Adobe, and Intuit, among other companies, each of which it
3 designated as a “peer company” based on meeting criteria such as being a “high-tech company,” a
4 “high-growth company,” and a “key labor market competitor.” *Id.*, Ex. 173. In 2007, based in part
5 on an analysis of Google as compared to its peer companies, Laszlo Bock (Google Senior Vice
6 President of People Operations) and Dave Rolefson (Google Equity Compensation Manager) wrote
7 that “[o]ur biggest labor market competitors are [REDACTED] to
8 beat Google for talent.” *Id.*

9 Apple identified Google, Intel, as well as The Walt Disney Company (which now owns
10 Pixar and Lucasfilm), as “peer companies,” a phrase Apple defined as “U.S.-based, stand-alone,
11 public companies that, in [the Apple compensation committee’s] view, compete with [Apple] for
12 talent, have revenue, market capitalization, and performance that are generally comparable to
13 [Apple].” Cisneros Decl., Ex. 1855.

14 Intel also benchmarked compensation against other “tech companies generally considered
15 comparable to Intel,” which Intel defined as a “[b]lend of semi, software, networking,
16 communications, and diversified computer companies.” Cisneros Decl., Ex. 2030.115. According
17 to Intel, in 2007, these comparable companies included Apple and Google. *Id.*

18 At Lucasfilm, a 2007 “Recruiting and Human Resources Update” prepared for a Board of
19 Directors meeting corroborates many of the dynamics that appear to have been at play for
20 Defendants. The update states that (1) passive talent was “difficult to find;” (2) Lucasfilm had
21 “[e]xtremely diverse needs for each division;” (3) its Bay Area competition included other
22 Defendants in this case including Pixar, Google, and “Silicon Valley” generally; and (4) some of
23 its most difficult positions to fill included members of the Technical Class, including [REDACTED]
24 [REDACTED] *Id.*, Ex. 690.19-22.

25 Further, there is evidence that Defendants also benchmarked their compensation data to
26 common external sources, most commonly Radford or Croner. Adobe, for example, pegged its
27 compensation structure as a [REDACTED]
28 [REDACTED]. *See id.*, Ex. C (Arriada-Keiper Depo.) at 16; *see also id.*, Ex. M

1 This new market data [from Radford] corroborates what we've been feeling about
 2 the bay area tech market heating up, and helps partially explain why recruiting has
 3 been so hard, and why we've lost two people to other tech companies ([REDACTED]
 4 [REDACTED]) We obviously want to be fiscally prudent and do our best to
 5 stay within our [REDACTED] budget, but we should also acknowledge the much higher
 6 cost of backfilling for experienced engineers. We have lots going for us beyond
 7 base salary . . . but for a software apps engineer, there's a lot going on out there,
 8 and with [REDACTED] [REDACTED], there is risk that we may
 9 lose more.

10 Cisneros Decl., Ex. 1306.

11 The concern Defendants felt about competition for employees contributed to Defendants'
 12 decisions to enter into anti-solicitation agreements. For example, in 2005, after hearing that
 13 Google was trying to recruit employees from Apple's Safari team, Steve Jobs (Co-Founder, Former
 14 Chairman, Former CEO of Apple) threatened Sergey Brin (Google Co-Founder), stating, as Brin
 15 recounted, "if you [Brin] hire a single one of these people that means war." *Id.*, Ex. 1871. In an
 16 email to Google's Executive Management Team as well as Bill Campbell (Chairman of Intuit
 17 Board of Directors, Co-Lead Director of Apple, and advisor to Google), Sergey Brin advised: "lets
 18 [sic] not make any new offers or contact new people at Apple until we have had a chance to
 19 discuss." *Id.* Similarly, in 2005, when considering whether to enter into an anti-solicitation
 20 agreement with Apple, Bruce Chizen (former Adobe CEO), expressed concerns about the loss of
 21 "top talent" if Adobe did not enter into an anti-solicitation agreement with Apple, stating, "if I tell
 22 Steve [Jobs] it's open season (other than senior managers), he will deliberately poach Adobe just to
 23 prove a point. Knowing Steve, he will go after some of our top Mac talent like [REDACTED] and he
 24 will do it in a way in which they will be enticed to come (extraordinary packages and Steve
 25 wooing)." Harvey Decl., Ex. 14.

26 In addition, Defendants appear to have perceived the anti-solicitation agreements as a way
 27 to stifle rising costs. From the perspective of George Lucas (former Lucasfilm Chairman of the
 28 Board and CEO), Lucasfilm "c[ould]not get into a bidding war with other companies because we
 don't have the margins for that sort of thing." Cisneros Decl., Ex. NN at 44; *see also* Shaver Decl.,
 Ex. 60 (stating in an email that Pixar and Lucasfilm "have agreed that we want to avoid bidding
 wars"). As expressed by Edward Catmull (Pixar President), "[e]very time a studio tries to grow
 rapidly . . . it seriously messes up the pay structure . . . by offering high salaries to grow at the rate

1 [a company] desire[s], people will hear about it and leave.” *Id.*, Ex. 61; *see also* Cisneros Decl.,
 2 Ex. RR (Catmull Depo.) at 179 (“So it messes up the pay structure. It does. It makes it very high.
 3 . . . That’s just the reality we’ve got. And I do feel strongly about it.”). Writing in response to the
 4 head of Disney Studios, Edward Catmull explained, “[w]e have avoided wars up here in
 5 Norther[n] California because all of the companies up here - Pixar, ILM [Lucasfilm], Dreamworks,
 6 and a couple smaller places - have conscientiously avoided raiding each other.” Shaver Decl., Ex.
 7 61. Notably, shortly after Steve Jobs entered into an anti-solicitation agreement with Google, Meg
 8 Whitman (former CEO of eBay) called Eric Schmidt (Google Executive Chairman, Member of the
 9 Board of Directors, and former CEO) “to talk about [Google’s] hiring practices.” Cisneros Decl.,
 10 Ex. 872. As Eric Schmidt told Google’s senior executives, Ms. Whitman said “Google is the talk
 11 of the valley because [you] are driving up salaries across the board.” *Id.*

12 The evidence therefore indicates that Defendants sought to enter into anti-solicitation
 13 agreements in an effort to stifle increased competition for labor and rising wages. To the extent
 14 that they were successful, Defendants did not need to increase compensation as much as they
 15 otherwise would have to attract and retain employees. This common evidence further suggests that
 16 the anti-solicitation agreements reached beyond individual members of the Technical Class and
 17 affected the compensation of the Technical Class as a whole, including across Defendant firms.
 18 The extensive documentary evidence Plaintiffs present therefore supports their theory that they will
 19 be able to prove the impact of the antitrust violations on a classwide basis.

20 **b. Expert Reports and Statistical Evidence**

21 To show that common issues predominate for the purpose of assessing classwide impact,
 22 Plaintiffs further retained the services of two experts: Edward E. Leamer, Ph.D.,¹¹ and Kevin F.
 23 Hallock, Ph.D.¹² Defendants presented reports from their own experts, Kevin M. Murphy, Ph.D.,¹³

24 ¹¹ Edward E. Leamer, Ph.D, is the Chauncey J. Medberry Professor of Management, Professor of
 25 Economics, and Professor of Statistics at the University of California, Los Angeles. Dr. Leamer
 26 earned a B.A. in Mathematics from Princeton University in 1966, and a Masters in Mathematics
 27 and a Ph.D. in Economics at the University of Michigan in 1970. He has published on the topics of
 28 econometric methodology and statistical analysis, international economics, and macro-economic
 forecasting, including on the subject of inferences that may appropriately be drawn from non-
 experimental data.

¹² Kevin F. Hallock, Ph.D., is the Donald C. Opatrny ’74 Chair of the Department of Economics,
 Joseph R. Rich ’80 Professor, Professor of Economics, Professor of Human Resources Studies, and

1 and Kathryn Shaw, Ph.D.,¹⁴ to attack Dr. Leamer's and Dr. Hallock's analyses and conclusions.
 2 The Court begins by describing the methodologies and analyses of Dr. Leamer and Dr. Hallock,
 3 which support Plaintiffs' theories of common impact of harm. The Court then turns to Defendants'
 4 criticisms of Dr. Leamer, Dr. Hallock, and the materials on which Dr. Leamer and Dr. Hallock
 5 rely. The Court finds that methodological deficiencies in Defendants' expert reports render the
 6 criticisms unpersuasive. The Court therefore finds that the methodologies and theories of Dr.
 7 Leamer and Dr. Hallock demonstrate that common questions are likely to predominate over
 8 individual questions.

9 **i. Dr. Leamer's Opinions Based on Economic Theory,**
 10 **Documentary Evidence, Data, and Statistical Analyses**

11 In Dr. Leamer's first expert report, which was presented in support of Plaintiff's Motion for
 12 Class Certification, Plaintiffs asked Dr. Leamer to evaluate whether classwide evidence was
 13 capable of showing that the anti-solicitation agreements artificially reduced the compensation of:
 14 (1) members of the Technical and All Employee classes generally, and (2) all or most members of
 15 each class. *See* Leamer Rep. ¶ 10(a). In addition, Plaintiffs asked Dr. Leamer to assess whether
 16 there was a reliable classwide or formulaic method capable of quantifying the amount of
 17 suppressed compensation suffered by each class member. Leamer Rep. ¶ 10(b). Dr. Leamer
 18 answered these questions in the affirmative.

19
 20
 21 Director of the Cornell Institute for Compensation Studies at Cornell University. Dr. Hallock
 22 earned a B.A. in Economics at the University of Massachusetts at Amherst in 1991, and a Ph.D. in
 23 Economics from Princeton University in 1995. He is a leading labor economist and an expert in
 24 compensation structure and design.

25 ¹³ Kevin M. Murphy, Ph.D., is the George J. Stigler Distinguished Service Professor of Economics
 26 in the Booth School of Business and the Department of Economics at the University of Chicago.
 27 Murphy received a bachelor's degree in economics from the University of California, Los Angeles,
 28 in 1981, and a Ph.D. in economics from the University of Chicago in 1986. Dr. Murphy has
 published on labor markets and the determinants of wages and compensation. His work in labor
 economics has addressed the market determinants of wage by skill level as well as the
 determination of relative wages across industries and occupations.

¹⁴ Kathryn Shaw, Ph.D., is the Ernst C. Arbuckle Professor of Economics at the Stanford Graduate
 School of Business. Dr. Shaw received an A.B. degree from Occidental College and Ph.D. in
 Economics from Harvard University. Dr. Shaw has published on the topic of personnel economics.
 She also co-pioneered the field of "insider econometrics," a research field in personnel economics
 in which researchers go within companies and use insider knowledge and data to identify the
 performance gains from management practices.

1 Dr. Leamer's analysis proceeded in two steps. First, Dr. Leamer explained that economic
2 studies and theory, documentary evidence, and statistical analyses were capable of showing that the
3 anti-solicitation agreements "tend[ed] to suppress employee compensation generally, by preventing
4 class members from discovering the true value of their work." Class Cert. Mot. at 16. In other
5 words, Dr. Leamer illustrated how classwide evidence was capable of showing that, at the very
6 least, Defendants were paying some members of the class less than they would have been paid in
7 the absence of the anti-solicitation agreements. Second, Dr. Leamer illustrated how economic
8 studies and theory, documentary evidence, and statistical analyses are capable of showing that this
9 suppression of compensation affected all or nearly all class members. Plaintiffs noted that Dr.
10 Leamer's approach followed a roadmap widely accepted in antitrust class actions that use evidence
11 of general price effects plus evidence of a price structure to conclude that common evidence is
12 capable of showing widespread harm to the class. *See, e.g., Johnson*, 2009 WL 5031334 at *8, 11
13 (finding predominance where conduct was alleged to suppress bill rates for nurses generally and
14 evidence was presented that bill rates were correlated with nurse pay rates); *see also In re*
15 *Linerboard Antitrust Litig.*, 305 F.3d 145, 153-55 (3d Cir. 2002) (endorsing regression plus pricing
16 structure study to show classwide impact).

17 In Dr. Leamer's supplemental expert report, which was prepared in support of the
18 supplemental motion for class certification, Plaintiffs asked Dr. Leamer to respond to questions
19 raised by the Court related to whether Dr. Leamer's initial methodology could show classwide
20 impact. Dr. Leamer focused his supplemental report on the Technical Class and found that his
21 additional analyses confirmed his "original finding of a somewhat rigid pay structure at each
22 Defendant that would have transmitted the effects of the agreements broadly, including throughout
23 the Technical Class." Leamer Suppl. Rep. ¶ 13.

24 a) Suppressed Compensation Generally

25 Dr. Leamer first concluded that classwide evidence was capable of showing that the anti-
26 solicitation agreements suppressed compensation of Technical Class members generally.
27 According to Dr. Leamer, this first step was supported by principles of information economics,
28 such as "market price discovery." Dr. Leamer noted that, when evaluating the functioning of labor

1 markets, economists often use a market equilibrium model, which “presume[s] that market forces
2 are powerful enough and work rapidly enough that virtually all transactions occur at approximately
3 the same price—the ‘market price’ which equilibrates supply and demand.” Leamer Rep. ¶ 71. In
4 reality, when labor market conditions change, high transaction costs and limited information flow
5 can slow the process by which transaction prices reach market equilibrium. *Id.* ¶¶ 72-73. “Market
6 price discovery” is the process by which participants in a market search for this equilibrium. *Id.*
7 ¶ 71.

8 Dr. Leamer opined that the high transaction costs—including time, money, and personal
9 dislocation—involved in searching for high tech jobs limit the number of existing workers seeking
10 new employment. *Id.* ¶ 74. Defendants and other high tech companies value potential employees
11 who are not actively looking for new employment opportunities (“passive candidates”) more than
12 those who are looking for new jobs (“active candidates”) because currently satisfied employees: (1)
13 tend to be perceived as more qualified, diligent, and reliable; (2) often have training, on-the-job
14 experience, and track records that save the hiring company search and training costs; and (3) are
15 valuable assets that, if hired away from rivals, can harm competitors. *Id.* ¶ 62. Thus, recruiting
16 these passive candidates by cold calling is both an important tool for employers and a key channel
17 of information for employees about outside opportunities. *Id.* ¶¶ 57-62, 75.

18 Dr. Leamer hypothesized that, by restricting cold calling and other competition over
19 employees, Defendants’ anti-solicitation agreements impaired information flow about
20 compensation and job offers. Class Cert. Mot. at 3. Defendants’ inhibition of employees’ ability
21 to discover and obtain the competitive value of their services meant employees were afforded
22 fewer opportunities to increase their salaries by moving between firms and deprived of information
23 that could have been used to negotiate higher wages and benefits within a firm. *See* Leamer Rep.
24 ¶¶ 71-76. In addition, Dr. Leamer opined that, by limiting the information available to employees,
25 Defendants could avoid taking affirmative steps, such as offering their employees financial rewards
26 and other forms of profit sharing, to retain employees with valuable firm-specific skills. *Id.* ¶¶ 77-
27 80.

28

1 In support of this hypothesis, Dr. Leamer cited to the work of Nobel Prize winning
 2 economists, such as Joseph Stiglitz, for the proposition that “even a small amount of information
 3 imperfection could have a profound effect on the nature of the equilibrium.” Joseph Stiglitz,
 4 *Information and the Change in the Paradigm in Economics*, 92 Am. Econ. Rev. 460, 461 (2002);
 5 see Leamer Reply Rep. ¶¶ 37, 38; see also *id.* ¶ 40 (“The fact that actions convey information leads
 6 people to alter their behavior, and changes how markets function. This is why information
 7 imperfections have such profound effects.”).

8 Dr. Leamer also relied on the documentary evidence—common to the class as a whole—as
 9 further support for the link between the anti-solicitation agreements and compensation reduction.
 10 See Leamer Rep. ¶¶ 81-88. For example, he cited to Defendants’ internal documents indicating
 11 that, but for the anti-solicitation agreements, Defendants would have been competing for labor and
 12 cold calling each other’s employees, and that Defendants recognized that cold calling and other
 13 forms of employee solicitation had the potential to drive up the cost of specific employees, which
 14 could then have broader effects. *Id.*

15 Finally, Dr. Leamer bolstered his findings with standard econometric analysis utilizing
 16 solely classwide evidence and methods. Dr. Leamer performed an analysis to show that employees
 17 who changed firms received higher compensation than those who stayed, reflecting the economic
 18 theory of price discovery at work. *Id.* ¶¶ 89-93. Dr. Leamer also performed multiple regression
 19 analyses,¹⁵ utilizing Defendants’ internal compensation data, to illustrate class members’
 20 undercompensation by comparing compensation during the conspiracy with compensation in a
 21 conspiracy-free, but-for world. Dr. Leamer concluded that the multiple regression analyses
 22 showed that the anti-solicitation agreements artificially suppressed compensation at each
 23 Defendant. Leamer Rep. ¶¶ 145-46, Figs. 20-24.

24 **b) Widespread Effect**

25
 26 ¹⁵ “A regression is a statistical tool designed to express the relationship between one variable, such
 27 as price, and explanatory variables that may affect the first variable. Regression analysis can be
 28 used to isolate the effect of an alleged conspiracy on price, taking into consideration other factors
 that might also influence price, like costs and demand.” *In re Aftermarket Auto. Lighting Prods.*
Antitrust Litig., 276 F.R.D. 364, 371 (C.D. Cal. 2011) (internal quotation marks and citation
 omitted).

1 Second, Dr. Leamer opined that economic studies and theory, documentary evidence, and
2 statistical analyses were capable of showing that this compensation suppression had widespread
3 effects. In both his initial report and his supplemental report, Dr. Leamer relied on economic
4 studies and theories of loyalty, fairness, and internal equity, as well as documentary evidence and
5 data, to explain how the adverse effects on compensation due to Defendants' anti-solicitation
6 agreements would have been felt by employees who would have received a cold call or had a
7 significant chance of receiving a cold call and employees who are linked to these groups due to
8 internal equity considerations. Leamer Rebuttal Suppl. Expert Decl. ("Leamer Suppl. Reply Rep.")
9 ¶¶ 27-28.

10 Based on economic studies and theories involving loyalty, fairness, and internal equity, Dr.
11 Leamer contended that labor markets do not behave like commodity markets. Rather, labor
12 markets rely on committed long-term relationships built on trust, understanding, and mutual
13 interests. Leamer Rep. ¶ 102. As Dr. Leamer explained: "If workers were commodities, every
14 small change to external or internal conditions would lead to recontracting, separation, or
15 termination. This would create enormous uncertainty and disruption and insecurity for employer
16 and employee." *Id.* Thus, both employers and employees seek ways to turn the market transaction
17 into secure long-term relationships, which "can come either from commitment (emotional or
18 financial) to the mission of the organization, or from jointly owned firm-specific assets." *Id.*
19 Companies thus attempt to create loyalty "by getting buy-in from the firm's mission and by making
20 the place of work as appealing as possible." *Id.* ¶ 103.

21 "One foundation of employee loyalty is a feeling of fairness that can translate into a sharing
22 of . . . [a firm's] rewards with more equality than a market might otherwise produce." *Id.* ¶ 104.
23 Firms seek to promote a feeling of fairness among employees to maintain or to increase
24 employees' commitment and contentment, which also leads to higher levels of productivity.
25 Leamer Suppl. Rep. ¶ 16. Dr. Leamer explained that, "[t]o maintain loyalty, it is usually better for
26 a firm to anticipate rather than to react to outside opportunities, since if a worker were to move to
27 another firm at a much higher level of compensation, coworkers left behind might feel they have
28

1 not been fairly compensated. That can have an adverse effect on worker loyalty, reducing
2 productivity and increasing interest in employment elsewhere.” Leamer Rep. ¶ 105.

3 Dr. Leamer opined that the information conveyed by an outside offer or a cold call could
4 stimulate a response by management that could extend beyond the specific individual who received
5 the cold call. As Dr. Leamer explained, “when management becomes aware of an attractive
6 outside opportunity for one individual this may make management aware also of the implicit
7 competitive threat to similar individuals and management may feel it wise to make a preemptive
8 move against that threat by an increase in compensation for these newly-threatened similar
9 employees.” Leamer Suppl. Rep. ¶ 15. Even though the market may not mandate a rise in
10 compensation for these similar individuals until they actually receive an outside offer, “preemptive
11 improvements” can minimize the disruption to employee loyalty that might occur when an
12 employee discovers the she was undercompensated. Leamer Rep. ¶ 105. Thus, “[c]old-[c]alling—
13 as well as just the threat of [c]old-[c]alling—puts upward pressure on compensation.” *Id.* ¶ 106.
14 Dr. Leamer opined that “a broad preemptive response is completely analogous to salary increases
15 that are tied to information provided by employment services regarding the compensation offered
16 by the ‘market.’” Leamer Suppl. Rep. ¶ 15. Essentially, Dr. Leamer opined that the “response to
17 bursts of cold calls and, even more, the response to the threat of cold calls” would raise internal
18 equity concerns that would spread the impact throughout the Technical Class. Leamer Suppl.
19 Reply Rep. ¶ 27.

20 In further support of his opinion, Dr. Leamer relied on documentary evidence, including
21 Defendants’ compensation data. This documentary evidence showed Dr. Leamer that Defendants
22 each employed company-wide compensation structures that included grades and titles, and that
23 high-level management established ranges of salaries for grades and titles, which left little scope
24 for individual variation. *Id.* ¶¶ 121-22. Defendants also established and regularly updated
25 compensation levels with the goals of: (1) providing similar compensation for all employees in the
26 same employment category; (2) providing specific relative compensation levels for employees in
27 different, hierarchically ordered, employment categories; (3) retaining employees; and (4)
28 maintaining employee productivity and contentment. *See id.* ¶ 122.

1 Dr. Leamer looked to standard economic labor theory and statistical analyses as additional
2 evidence that the anti-solicitation agreements would broadly affect members of the Technical
3 Class. He explained that his “statistical task is to identify the common factors in the individual
4 data and to apportion these common factors between internal and external forces.” Leamer Suppl.
5 Reply Rep. ¶ 29.

6 In his first expert report, Dr. Leamer conducted regression analyses based on Defendants’
7 salary structures and compensation data, to which the Court referred as Dr. Leamer’s “Common
8 Factors Analyses.” *See* Leamer Rep., Figs. 11-14. Specifically, Dr. Leamer’s Common Factors
9 Analyses assessed Defendants’ “firmwide compensation structures, and the formulaic way in
10 which total compensation was varied over time.” *Id.* ¶ 128. According to Dr. Leamer,
11 approximately 90 percent of the variation in any individual employee’s compensation can be
12 explained by common factors “such as age, number of months in the company, gender, location,
13 title, and employer.” *Id.*; *see also id.*, Figs. 11-14. Defendants do not dispute the “fact that job
14 titles explain a large fraction of the firm-wide variation in compensation.” Murphy Expert Report
15 (“Murphy Rep.”) ¶ 92, ECF No. 230. Dr. Leamer concludes that “[t]he fact that nearly all
16 variability in class member compensation at any point in time can be explained by common
17 variables means there was a systematic structure to employee compensation at each of the
18 Defendant firms.” Leamer Rep. ¶ 130. Dr. Leamer opined that these rigid wage structures, and the
19 fact that the coefficients in his regressions did not vary substantially over time, suggested that
20 “compensation of class members tended to move together over time and in response to common
21 factors,” such that the effects of the anti-solicitation agreements would be expected to be
22 experienced broadly. *Id.*

23 Second, Dr. Leamer opined that the evidence showed “a persistent salary structure across
24 employees consistent with important elements of equity in the Defendants’ compensation
25 practices.” *Id.* ¶ 134. Dr. Leamer specifically relied on five charts that depicted changes in the
26 base salaries and total compensation for ten major job titles at Apple between 2006 and 2009, and
27 the ten major job titles at Google between 2005 and 2009. *See id.*, Figs. 15-17. The Court referred
28 to these five charts as Dr. Leamer’s “Compensation Movement Charts.” Apr. 5 Class Cert. Order

1 at 36. Dr. Leamer contended that these charts offered further evidence that compensation for
2 different positions tended to move together over time (*i.e.*, if software engineers received a raise, so
3 did account executives). *See* Leamer Rep. ¶¶ 133-34. Based on this evidence, Dr. Leamer opined
4 that the anti-solicitation agreements that focused on subsets of workers would nonetheless have
5 broader effects because of a desire on Defendants' part to maintain the overall salary structure. *Id.*
6 ¶ 134.

7 Third, Dr. Leamer used a regression model to show that the anti-solicitation agreements had
8 some general impact on the Class and to quantify the total amount of that impact on the Class. *See*
9 Leamer Rep., Figs. 20-24. This model, to which the Court previously referred as the "Conduct
10 Regression" analysis, incorporated a range of variables designed to account for factors including:
11 (1) age, sex, and years at the company; (2) the effects on compensation caused by the anti-
12 solicitation agreements; and (3) the effects caused by factors specific to each Defendant (*e.g.*, firm
13 revenue, total number of new hires, etc.). *See id.*, Figs. 20, 23. Dr. Leamer used the model to
14 estimate the average or net under-compensation at each firm during the conspiracy period. *See id.*,
15 Fig. 22 and 24; Reply at 33.

16 In the Court's April 5 Class Certification Order, the Court stated that, "[a]ccepting
17 arguendo that the Common Factors Analyses are accurate, they show that factors such as where an
18 employee works and what an employee does play a large role in determining the employee's
19 salary." Apr. 5 Class Cert. Order at 36. However, the Court found that Dr. Leamer did not
20 establish that this fact implied that Defendants' salary structures were so rigid that compensation
21 for employees with *different* titles would move together through time such that a detrimental
22 impact to an employee with one job title would result in an impact to other employees in entirely
23 different jobs (*i.e.*, that any impact would ripple across the entire salary structure). *Id.*

24 The Court also found that Dr. Leamer's Compensation Movement Charts shed little light on
25 whether compensation of members of the All Employee Class (*e.g.*, a custodian at an Intel office in
26 Texas and an engineer at an Intel office in California) moved together over time because the
27 Compensation Movement Chart included only twenty job titles, primarily job titles from the
28 Technical Class at two companies out of the thousands of job titles at the seven companies

1 included in the classes. *Id.* at 36-38. The Court expressed concern that the twenty positions
 2 reflected on the chart were not representative of the compensation movement of all Class members.
 3 *See id.* at 36-38. The Court also found that these charts did not provide particularly compelling
 4 evidence regarding whether salaries at each company were linked because Dr. Leamer admitted
 5 that the allegedly parallel movement reflected in the charts was also consistent with a “non[-]rigid
 6 wage structure.” Brown Decl., Ex. 1 (Leamer Depo.) at 283:23-25.

7 Finally, the Court found that Dr. Leamer’s Conduct Regression analysis was capable of
 8 showing that Defendants’ total expenditures on compensation was less than they would have been
 9 in the absence of anti-solicitation agreements and thus capable of showing classwide damages.
 10 Apr. 5 Class Cert. Order at 38. The Court further found that the Conduct Regression was capable
 11 of showing that the anti-solicitation agreements had a general impact on class members. *Id.* The
 12 Court rejected Defendants’ contentions to the contrary. *Id.* at 39-42. In this Order, the Court
 13 discusses Conduct Regression primarily for the analysis’s utility in demonstrating classwide
 14 damages. However, the Court also notes, as it did in its previous order, that the Conduct
 15 Regression analysis is also capable of demonstrating a general classwide impact.

16 In response to the Court’s concerns that the extant statistical analyses could not show a
 17 rigid wage structure, Dr. Leamer submitted additional statistical analyses in his supplemental
 18 expert report. These new analyses focused on demonstrating that Defendants maintained a
 19 somewhat rigid wage structure not only within job titles, but also that Defendants maintained such
 20 a rigid wage structure *across* job titles. To demonstrate this, Dr. Leamer performed a correlation
 21 analysis on a job-title-by-job-title basis that compared the “movement over time of the average
 22 compensation of each title with the average compensation of the firm’s Technical Class.” Leamer
 23 Suppl. Rep. ¶ 4 (emphasis omitted). Dr. Leamer looked to the correlation analysis to measure
 24 “statistically how closely different variables move together.” *Id.* ¶ 22; *see also* Suppl. Reply at 4
 25 (stating that this correlation analysis is the quantitative equivalent of the co-movement charts). Dr.
 26 Leamer conducted the correlation analysis for all job titles, not just the twenty that Dr. Leamer
 27 presented in his initial report. Leamer Suppl. Rep. ¶ 4. This included all titles for which Dr.
 28 Leamer had at least six observations (a statistical threshold), which included 94% of Class Period

1 employee years. *Id.* ¶¶ 14, 30. He analyzed correlation over time in two dimensions: “correlation
 2 of compensation levels and correlations of compensation *changes*.” *Id.* ¶ 23 (emphasis in original).
 3 The former focuses on long-term movements, while the latter focuses on year-by-year movements.
 4 *Id.*

5 With respect to both, Dr. Leamer found that the “vast majority” of Technical Class
 6 employee job titles (weighted by number of employee years) at each firm correlated positively over
 7 time with the compensation of the overall set of Technical Class employees at that firm. *See id.* ¶
 8 32, Figs. 2, 3.¹⁶ As such, an increase in the compensation of each job title within any given firm
 9 was correlated with an increase in the overall compensation of Technical Class employees in that
 10 firm. In combination with the fact that 90% of employee total compensation is driven by common
 11 factors, Dr. Leamer contended that this sharing of gains across job titles over time further
 12 supported an inference of a somewhat rigid salary structure. *See id.* ¶ 4, Figs. 2, 3. Accordingly,
 13 Dr. Leamer’s supplemental analysis bolstered his finding of a rigid salary structure because it
 14 demonstrated that not only was there a rigid salary structure within job titles (which his initial
 15 analysis showed) but also that there was a rigid salary structure across job titles.

16 Dr. Leamer next presented a multiple regression model for each company designed to
 17 detect the effect of internal forces acting on class member compensation (*i.e.*, a rigid compensation
 18 structure), as opposed to external market forces. *See id.* ¶¶ 24-29. The model measured the effect
 19 of a number of explanatory variables on job title compensation. One variable was average
 20 Technical Class compensation at a particular company. *See id.* The effect of this variable reflects
 21 the degree to which compensation increases for the group are shared broadly at the same time. *Id.*
 22 ¶ 25. The next variable measured the effect of the *previous* year’s compensation, showing the
 23 degree to which gains in one year are later shared with other members of the Technical Class at the
 24 same company. *See id.* ¶ 26. Dr. Leamer’s model also included variables for the firm’s revenue
 25 and job growth in the San Jose-Sunnyvale-Santa Clara Metropolitan Statistical Area to allow for
 26 the possibility of alternative explanations for compensation increases. *Id.* ¶¶ 27-28.

27 ¹⁶ To account for titles with insufficient data to run the title-by-title analysis, Dr. Leamer also
 28 divides the employee groups into deciles and measures the correlation of each decile to the mean;
 these groups exhibit the same positive relationship. *See* Leamer Suppl. Rep. Figs. 9, 10.

1 Dr. Leamer estimated the regression on a title-by-title basis for job titles with adequate data
 2 within each company. *Id.* ¶¶ 24, 34-42; *see* Fig. 1 (Intel example), Figs. 6-8 (results).¹⁷ *Id.* ¶¶ 43-
 3 49, Figs. 11-12. The regressions indicated that the “vast majority” of employees fall within titles
 4 or groups that show: (1) that gains for the titles or groups are shared broadly at the same time and
 5 (2) that gains for some are shared with others in different job titles in a subsequent year. *See id.* ¶
 6 8.¹⁸ Dr. Leamer contended that this is consistent with his previous opinion that “all or almost all
 7 Defendants’ employees would have been impacted by the non-compete agreements.” *Id.*
 8 Moreover, Dr. Leamer opined that the fact that gains were shared over time strongly indicated that
 9 an internal sharing force, rather than only external market forces, drove the structure of class
 10 member compensation. *Id.* Dr. Leamer also demonstrated there is a much stronger correlation
 11 between compensation of job titles within a firm than there is between compensation of job titles
 12 between firms. This finding further reinforced his conclusion that each Defendant maintained a
 13 somewhat rigid pay structure and undermined Defendants’ contention that internal forces and pay
 14 structure play no role in setting compensation. *Id.* ¶¶ 65-68.

15 Dr. Leamer recognized that his analyses do include outliers—job titles that do not
 16 positively correlate to the average or do not show sharing over time. *Id.* ¶ 12. He noted, however,
 17 that the number of outliers was small, and in most cases the outliers involved titles with incomplete
 18 data. *See id.* ¶¶ 12, 50-64. Thus, the presence of a few outliers did not undermine his basic
 19 conclusions about how Defendants paid their employees. Such conclusions were also supported by

20 ¹⁷ Dr. Leamer also estimated regressions by splitting the Technical Class titles into deciles. Dr.
 21 Leamer explains that, to form the ten groups, he ranked titles on the basis of average (inflation
 22 adjusted) total compensation over the lifetime of the title and then divided these up into deciles
 23 based on employee-years. Although Dr. Leamer attempted to break the firms up into 10 equal
 24 sized groups (equal based on employee years), some groups ended up being larger than others
 25 because some titles were more populous than others. Leamer Suppl. Rep. ¶ 43, n.8.

26 ¹⁸ Plaintiffs argue that this latter result is particularly significant. Defendants’ expert, Dr. Murphy,
 27 initially contended that an “alternative hypothesis that the level of compensation of Defendants’
 28 employees is broadly determined by competition in a vast labor market for similar employees and
 that adjustments for unique circumstances of particular employees are highly individualized.”
 Murphy Rep. ¶ 89. Plaintiffs argue that this contention becomes unsupportable when used to
 explain why gains for some are shared with others in a *subsequent year*; there is not a sensible
 reason that an external force such as increased demand for computers would affect some
 employees in one year and the rest in the next, without resort to internal forces such as fairness
 concerns. Leamer Suppl. Rep. ¶ 8 (“Furthermore, the sharing of gains over time strongly indicates
 the existence of an internal sharing force driving the structure of class member compensation,
 rather than only external market forces.”).

1 economic theory and the evidentiary record. *See id.* ¶ 64. Importantly, Dr. Leamer also contended
 2 that he had not seen any evidence that any of the titles within the Technical Class would not have
 3 been harmed by the anti-solicitation agreements. *Id.*

4 Ultimately, Dr. Leamer concluded that common proof, “in the form of documents, data,
 5 economic theory, and statistical methodologies,” were capable of demonstrating that the anti-
 6 solicitation agreements artificially suppressed compensation of all or nearly all members of the
 7 Technical Class. Leamer Rep. ¶ 149.

8 **ii. Dr. Hallock’s Opinions Based on Defendants’ Testimony,
 9 Contemporaneous Documents, and Data**

10 In further support of Class Certification, Plaintiffs present a second expert report from Dr.
 11 Kevin F. Hallock, a leading labor economist and an expert in compensation structure and design.
 12 *See Hallock Rep.* ¶¶ 1-3. Dr. Hallock investigated whether Defendants used formal administrative
 13 pay systems, and whether the anti-solicitation agreements at issue would have suppressed the
 14 compensation of all or nearly all members of the Technical Class. In forming his opinions, Dr.
 15 Hallock reviewed only common evidence: Defendants’ testimony, contemporaneous documents,
 16 and data. *Suppl. Class Cert. Mot.* at 2.

17 Dr. Hallock found that Defendants all used formalized compensation systems that
 18 organized employees into pay ranges, grades, or families under umbrella systems. *Hallock Rep.*
 19 ¶ 45. In finding that all Defendants utilized formalized pay systems, Dr. Hallock relied on
 20 evidence that, among other things: (1) Defendants sorted their employees into job families and/or
 21 grades; (2) Defendants utilized salary ranges with a minimum, mid-point and maximum set based
 22 on external employment market data; and (3) Defendants used internal tools to assist managers
 23 with setting other employees’ compensation levels. *See id.* ¶¶ 45-109.

24 An important feature of these formal systems is that job titles, levels, and grades are valued
 25 relative to all other employee categories in the company. Employees who receive compensation
 26 outside of their guideline ranges are identified and corrected to bring them in line with the
 27 company structure. *See, e.g., id.* ¶¶ 114, 140, 160, 166, 181. According to Dr. Hallock, “[i]f the
 28 ratios [between a person and someone else who is similarly situated] diverge from each other, the

1 person will experience reactions of unfairness and inequity,” thus making internal equity
2 “important not only in setting up the original structure of a compensation system but also when
3 managing it.” *Id.* ¶ 110 (internal quotation marks omitted).

4 Dr. Hallock also found that Defendants used their compensation system to pay their
5 employees in systematic and structured ways. Dr. Hallock found that nearly all compensation
6 decisions were made company-wide on an annual basis and in a fashion that preserves existing
7 compensation relationships. When Defendants made “out of cycle” adjustments to retain certain
8 employees (such as to make counteroffers or pay retention bonuses in light of a competitor’s
9 solicitation), Defendants were careful to adjust the system to take the exceptions into account. Dr.
10 Hallock also found that Defendants adhered to principles of internal equity whereby similarly
11 situated and similarly performing employees were paid similarly. *See id.* ¶¶ 111-81.

12 Given Defendants’ formalized pay structures and compensation design, as well as issues of
13 equity and fairness present in the Defendant firms, Dr. Hallock opined that the anti-solicitation
14 agreements would have a widespread and systematic impact on compensation. *Id.* ¶ 237. First, Dr.
15 Hallock opined that “[a] direct impact on pay could occur if an employee did not receive a cold
16 call, or if the upward wage pressures on any of the employees in related groups or job families
17 were disrupted.” *Id.* ¶ 238. For example, Dr. Hallock hypothesized that one way that pay could be
18 lowered at Defendants for nearly all workers has to do with extraordinary employees. Dr. Hallock
19 noted that Defendants employed certain elite employees, and that cold calling often targeted these
20 top employees. *Id.* ¶ 239. Since the anti-solicitation agreements suppressed salaries of these top
21 employees and therefore lowered “the top of the box” in terms of the salary range, Hallock opined
22 that the entire box may be lowered as well, thus impacting “nearly all other workers.” *Id.*

23 Dr. Hallock also opined that external market data could influence wages, as there is
24 evidence that Defendants benchmark their data to external sources, most commonly Radford or
25 Croner. *See id.* ¶ 240. “[T]o the extent that pay is lowered at other firms through anti-competitive
26 and other behavior of firms,” Dr. Hallock found that “the market data they use for their own
27 structure will be lower” and hence “their own pay levels will be lower than they would be in the
28 absence of such agreements.” *Id.*

1 Finally, in support of Plaintiffs' Technical Class definition, Dr. Hallock examined
2 Defendants' pay structures and compensation design as they pertain to the Technical Class, and
3 concluded that the same mechanisms that would have transmitted pay suppression throughout the
4 Defendants' firms apply with even greater force to technical employees. *Id.* ¶ 246. Thus, if the
5 anti-solicitation agreements suppressed the pay of certain members of the Technical Class, all or
6 nearly all other members would be expected to have also been impacted. *See* Suppl. Mot. at 3.

7 **c. The Court's Conclusions and Defendants' Contentions**

8 Defendants argue that this Court should not certify the Technical Class because
9 individualized inquiries regarding who was impacted will predominate over common questions.
10 Defendants contend that their compensation policies and practices were highly individualized with
11 wide variation in compensation. According to Defendants, compensation was set by hundreds of
12 different managers who were directed to differentiate pay and reward high achieving employees.
13 As such, Defendants argue that pay raises to one employee would not necessarily affect the salary
14 of all other employees in the Technical Class.

15 In furtherance of their contention that individualized issues predominate, Defendants
16 contend that the individual pieces of evidence offered by Plaintiffs are unpersuasive. However, as
17 discussed below, Defendants cannot rebut the voluminous documentary evidence from Defendants'
18 internal files and the expert reports that rely on this documentary evidence.

19 First, the Court finds, as it did previously, that Dr. Leamer's market price discovery and
20 internal equity hypotheses offer theories subject to common proof for how Defendants' anti-
21 solicitation agreements suppressed compensation broadly. *See* Apr. 5 Class Cert. Order at 21.
22 While Defendants' expert, Dr. Murphy, criticized the economic literature upon which Dr. Leamer
23 relied, Dr. Murphy did not dispute the basic principles of information economics undergirding Dr.
24 Leamer's hypothesis. *See, e.g.*, Harvey Decl., ECF No. 297, Ex. 13 (Murphy Depo.) at 188:6-14;
25 192:25-193:6; 194:10-196:10; 197:7-19. Similarly, although Dr. Murphy criticized Dr. Leamer's
26 initial expert report because it did not compare the importance of maintaining internal equity to
27 other goals, such as procedural equity or the value of rewards for individual contributions as a
28 loyalty motivator, *see* Murphy Rep. ¶ 81, the Court does not find that this undermines Dr. Leamer's

1 hypothesis that internal equity played some role in affecting employment compensation. This is
2 particularly true in light of the extensive documentary evidence showing that Defendants valued
3 internal equity.

4 Second, the Court finds that Plaintiffs' documentary evidence provides substantial further
5 support for Plaintiffs' method of proving impact. Indeed, at trial, the Court predicts that this
6 evidence is likely to be among the most persuasive to a jury as it illustrates and confirms many of
7 the actual dynamics at play within Defendants' firms. While Defendants characterize Plaintiffs'
8 new evidence as "mostly old and off point," *see* Suppl. Opp'n at 13, the Court finds that this
9 evidence significantly bolsters Plaintiffs' showing that their method of proving impact will turn on
10 common evidence. For example, rather than a few documents showing that some Defendants
11 valued internal equity in their compensation practices, Plaintiffs' documentary evidence now
12 indicates that *all* Defendants valued internal equity. Further, the evidence now suggests that
13 internal equity was such an important aspect of Defendants' compensation practices that: (1)
14 Defendants utilized software tools to generate internal equity reports and to compare each
15 employee to his or her peers; (2) Defendants advised managers that internal equity was a prime
16 consideration when setting and adjusting salaries; and (3) Defendants actively monitored their
17 compensation structure to identify discrepancies within and beyond job titles and groups and to
18 make adjustments as necessary.

19 Despite this documentary evidence, Defendants contend that managers exercised broad
20 discretion when setting and adjusting salaries and that Defendants valued performance—to which
21 Defendants refer as "pay for performance"—over internal equity. However, Defendants'
22 documents indicate otherwise. For example, in a 2004 Human Resources presentation, Intel states
23 that, although "[c]ompensation differentiation is desired by Intel's Meritocracy philosophy," "short
24 and long term high performer differentiation is questionable." Harvey Suppl. Decl., Ex. 10 at 13.
25 Indeed, Intel notes that "[l]ack of differentiation has existed [REDACTED]
26 [REDACTED]." *Id.* at 19. As key "[v]ulnerability [c]hallenges," Intel identifies: (1) "[m]anagers (*in*)ability
27 to distinguish at [f]ocal"—"actual merit increases are significantly reduced from system generated
28 increases," "[l]ong term threat to retention of key players"; (2) "[l]ittle to no actual pay

1 *differentiation for* [REDACTED]; and (3) “[n]o explicit strategy to differentiate.” *Id.* at
2 24 (emphasis added).

3 Further, the documentary evidence indicates that even where “pay for performance” exists,
4 such differentiation is not inconsistent with Dr. Leamer’s theories of internal equity. For example,
5 a chart from Google shows that for a given level of performance, the higher the pre-adjustment
6 position, the lower the merit increase. *See, e.g., Cisneros, Ex. 1609.9* (Google documents noting
7 that it “tries to manage salaries in the [REDACTED] range and thus give minimal increases to very
8 strong performers who are paid relatively high.”). Specifically, Google’s documents show that an
9 employee whose salary is below the target salary would receive a larger percentage pay increase
10 than an employee whose salary exceeds the target even though both employees receive the same
11 performance review. *See Cisneros, Ex. 1855.107*. This demonstrates the coexistence of
12 performance-based pay and concerns of internal equity.

13 To contend that they valued “pay for performance” over internal equity, Defendants rely
14 principally on declarations from top management in their human resources, recruitment,
15 compensation, and benefits departments. However, the Court has already recognized that these
16 declarations were drafted for the specific purpose of opposing Plaintiffs’ class certification motion,
17 and accordingly, the Court finds that these documents are of a diminished probative value. *Cf. In*
18 *re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1061 (N.D. Cal. 2007)
19 (scrutinizing carefully declarations from Defendants’ employees that appeared “litigation driven”).
20 Indeed, many of the claims made in those declarations are inconsistent with the discovery Plaintiffs
21 obtained from Defendants after the hearing on Plaintiffs’ initial class certification motion. For
22 example, in a declaration created for the purposes of opposing the initial class certification motion,
23 Mason Stubblefield (Intuit Vice President of Human Resources) stated that “Intuit does not use
24 salary bands or ranges, either for existing employees or new hires.” Stubblefield Decl. ¶ 10. Yet,
25 in his deposition after the hearing on the class certification motion, Mason Stubblefield took the
26 diametrically opposite position, when he stated that “[t]here are [REDACTED] bands [at Intuit] inside the
27 company Each job that we have fits within a band Jobs fit into levels And different
28 numbers of levels get used in different job families based on business needs.” Stubblefield Depo.

1 87:8-88:24. In light of these demonstrated inconsistencies, the Court is more persuaded by the
2 internal documents Defendants created before and during the anti-solicitation agreements, such as
3 CEO-to-CEO emails, presentations regarding compensation and recruitment from the heads of
4 Defendants' human resources departments, and inter-office communications about internal equity
5 concerns, than the declarations Defendants created to oppose class certification and testimony that
6 is litigation driven.

7 Defendants further rely on Dr. Shaw's report to rebut Plaintiffs' contentions that
8 Defendants maintained formalized compensation structures. Dr. Shaw opines that Defendants
9 maintain a "pay for performance" philosophy implemented by individual managers based on
10 subjective evaluations of employees. Shaw Rep. ¶ 16. Dr. Shaw further contends that Dr.
11 Hallock's "top of the box" theory is unsupportable. *See id.* ¶¶ 41, 42, 54, 62, 66. Dr. Shaw opines
12 that, "[b]ased on Defendants' compensation systems, pay practices, and pay philosophy," she
13 "would not expect that a suppression of wages to some employees would affect all or nearly all
14 Technical Class members." *Id.* at 27.

15 The Court finds Dr. Shaw's criticisms of Plaintiffs' theories and of Dr. Hallock's report
16 unpersuasive. Dr. Shaw's report is conclusory and contrary to the overwhelming evidence in the
17 record. For example, Dr. Shaw relies heavily on the declarations Defendants created to oppose
18 class certification even though many of the claims in those declarations are inconsistent with
19 Defendants' own internal documents. *See id.* at 20-21 n.25 & n.26; 21 n.30 & n.32; and 23 n.35;
20 Shaw App. C ¶¶ 1, 2, 3, 4, 7, 8, 10, 11, 18, 24; Shaw App. D ¶¶ 1, 9. Further, although Dr. Shaw
21 emphasizes managers' broad discretion in setting compensation, Dr. Shaw did not systematically
22 investigate whether Defendants supervised and controlled their managers' use of discretion, and
23 Dr. Shaw admits that she did not assess whether managerial discretion made any significant
24 difference to employee pay. *See Shaver Suppl. Decl. Ex. O (Shaw Depo.)* 74:1-75:16, 93:16-22,
25 98:14-15. Dr. Shaw also asserts that, in technology-based firms, pay ranges assigned to job codes
26 are "mere guidelines for managers" and that the pay of workers is highly individualized. *See Shaw*
27 *Rep.* ¶ 30. However, the Court finds that Dr. Shaw's emphasis on managerial discretion is contrary
28 to the extensive documentary evidence discussed above, which suggests that the exercise of any

1 discretion was limited and that managers had to obtain authorization to deviate from Defendants’
 2 compensation structure. *See supra* section IV.B.2.a.ii; *see, e.g.*, Cisneros Decl., Ex. N (Fadell
 3 Depo.) at 53 (stating that to deviate from a prescribed salary range, Apple managers “would have
 4 to pull in a bunch of people to then approve anything outside of that range”); *id.*, Ex. C (Arriada-
 5 Keiper Depo.) at 24 (Adobe admonished managers who deviated from salary ranges that Adobe
 6 had “a minimum for a reason”). Moreover, Dr. Shaw’s contentions regarding the individualized
 7 nature of compensation are contrary to the statistical analysis provided by Dr. Leamer—which
 8 show that in 97% of class member employee-years, pay was within the prescribed range. Leamer
 9 Suppl. Reply Rep. ¶¶ 31, 67.

10 Defendants’ principal contentions, however, are challenges to Dr. Leamer’s statistical
 11 analyses.¹⁹ Before the Court turns to an analysis of the competing methodologies of Dr. Leamer
 12 and Defendants’ expert, Dr. Murphy, the Court notes that the importance of these statistical models
 13 is diminished in light of the extensive documentary evidence that supports Plaintiffs’ theory of
 14 impact. In other contexts, courts have long noted that statistical and anecdotal evidence must be
 15 considered in tandem. *See Coral Const. Co. v. King Cnty.*, 941 F.2d 910, 919 (9th Cir. 1991)
 16 (“[T]he combination of convincing anecdotal and statistical evidence is potent.”). This Court could
 17 not identify a case at the class certification stage with the level of documentary evidence Plaintiffs
 18 have presented in the instant case. The Court agrees with Dr. Leamer that “interpretation of non-
 19 experimental data needs to be sensitive to the context in which the data were generated, and
 20 persuasive conclusions from the numerical data require the information in the numerical data and
 21 the documents to be aligned.” Leamer Suppl. Rebuttal Rep. ¶ 11. After all, class certification
 22
 23

24 ¹⁹ Defendants moved to strike Dr. Leamer’s report in support of Plaintiffs’ initial motion for class
 25 certification for failure to provide reliable, relevant, and admissible testimony under *Daubert v.*
 26 *Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of
 27 Evidence. Defs.’ Mot. to Strike Rep. of Dr. Edward E. Leamer (“Mot. to Strike”), ECF No. 210.
 28 The Court rejected Defendants’ motion in its April 5 Class Certification Order. *See* Apr. 5 Class
 Cert. Order at 49-50 (“While the Court has concerns about the probativeness of some of Dr.
 Leamer’s statistical evidence . . . the Court does not find this evidence is so methodologically
 flawed as to warrant exclusion.”). In their Opposition to the Supplemental Motion for Class
 Certification, Defendants do not raise any new *Daubert* challenges to the expert opinions set forth
 by Dr. Leamer or Dr. Hallock. *See* Suppl. Opp’n.

1 requires a holistic, qualitative assessment; as the Seventh Circuit has noted, the class certification
2 analysis is not “bean counting.” *Butler*, 727 F.3d at 801.

3 The Court now turns to Defendants’ contentions that Dr. Leamer’s methodologies are
4 unpersuasive. Defendants contend that Dr. Leamer should not have relied on averages in his
5 correlation and multiple regression analyses because (1) averaging masks individualized issues, (2)
6 Dr. Leamer’s regression analysis is faulty due to an endogeneity problem, and (3) Dr. Leamer’s
7 statistical evidence cannot show causation. Suppl. Opp’n 13-14. Defendants argue that these flaws
8 render dubious Dr. Leamer’s conclusion that Defendants maintained a “rigid wage structure.” *See*
9 *id.* at 1-2. The Court finds that several of Defendants’ arguments are contrary to their own internal
10 documents and methodologies. Moreover, the Court finds that Defendants’ remaining contentions
11 do not suggest that Dr. Leamer’s statistical analyses should be rejected wholesale, particularly in
12 light of the extensive documentary evidence that supports Dr. Leamer’s conclusions. Thus, as
13 discussed below, the Court rejects Defendants’ contentions and accepts Dr. Leamer’s methodology.

14 Defendants’ primary criticisms of Dr. Leamer’s supplemental report turn on his use of
15 averaging in his correlation and multiple regression analyses. *See* Suppl. Opp’n at 1-2. Defendants
16 take issue with Dr. Leamer’s use of averages in his job-title-by-job-title correlation analysis, which
17 analyzes the “movement over time of the average compensation of each title with the average
18 compensation of the firm’s Technical Class.” Leamer Suppl. Rep. ¶ 4. Defendants contend that,
19 “[b]y averaging the compensation of all employees who hold the same job title or fall into the same
20 decile,” Dr. Leamer “necessarily wipes out the very thing he is supposed to be measuring—the
21 significant variation in individual employees’ compensation.” Suppl. Opp’n at 5. According to
22 Defendants, Dr. Leamer’s “correlation of averages would reach the same conclusion regardless of
23 whether all employees with the same job title received identical or vastly different compensation
24 over time and whether their compensation moved in lockstep or in opposite directions.” *Id.* at 6.
25 Defendants also object to Dr. Leamer’s use of averages in his company-specific multiple regression
26 models, designed to detect the effects of internal forces (*i.e.*, a wage structure) acting on class
27 member compensation, as opposed to merely external market forces. *See id.* at 5-6; 11-13.
28 Specifically, Defendants claim that Dr. Leamer’s multiple regression analysis masks individual

1 variation by using average job title compensation data rather than individual compensation data.
2 *Id.* at 13.

3 However, the Court finds that Dr. Leamer's averaging of the data appears to yield results
4 that, in the context of the correlation and multiple regression analyses, are consistent with
5 Plaintiffs' theory that there is a somewhat rigid wage structure. Dr. Leamer notes in his rebuttal
6 supplemental report that "the inherent noise in the individual level data tends to drown out the
7 signal of the internal pay structure [Plaintiffs] are trying to detect." Leamer Suppl. Rebuttal Rep. ¶
8 32. Dr. Murphy admits that averaging aggregate data is an appropriate statistical tool for the same
9 reasons given by Dr. Leamer. Shaver Decl., Ex. N (Murphy Depo.) 553:18-20 ("The reason you
10 do the averaging is so that you are left with a more systematic part and the idiosyncratic parts get
11 averaged out.").

12 With respect to both correlation and multiple regression analyses, Dr. Leamer averaged the
13 compensation of employees within each job title. Leamer Suppl. Rep. ¶¶ 18-29. While this kind of
14 averaging may have masked some of the individual variations *within* each job title, it was
15 necessary to determine whether there was a wage structure *across* job titles. *See* Aug. 8 Tr. at
16 97:11-22; 106:5-13.²⁰ The Court is therefore not persuaded that it should disregard the correlation
17 analysis for the purposes of showing a wage structure across job titles. The Common Factors
18 Analysis shows that approximately 90 percent of each employee's compensation is explained by
19 common factors—primarily by job title. Leamer Rep. ¶ 128; Aug. 8 Tr. at 105:10-24. Because
20 individual compensation is primarily determined by job title, as shown by the Common Factors
21 Analysis (which was run on an employee-by-employee basis without averaging, *see* Leamer Rep. ¶

22
23 ²⁰ Dr. Leamer explains in his supplemental report that he chose to work with title averages
because:

24 individual data is likely to be dominated by forces that operate at the individual
25 level, which can make it difficult to detect the firm wide effects including the spread
26 of the anti-cold-calling agreements broadly across the firms. Averaging across
27 individuals in a title can average out the individual effects, thus making the firm-
wide effects more transparent. In addition, a title-level analysis provides a clearer
perspective on the compensation structures the documentary evidence shows
Defendants used to maintain their many employees and maintain internal equity
among their employees.

28 Leamer Suppl. Rep. ¶ 19.

1 128, Fig. 11), and the correlation and multiple regression analyses show that compensation across
 2 job titles move together, the Court believes that Dr. Leamer's analysis bolsters Plaintiffs' theory
 3 that there is a wage structure in place under which an impact on some employees would have
 4 resulted in an impact to all or nearly all employees. The Court further notes that Dr. Leamer's
 5 conclusions in the Common Factors and correlation analyses are consistent with the documentary
 6 evidence that suggests that Defendants maintained a formal wage structure and valued internal
 7 equity.

8 Defendants' contention that averaging rendered unpersuasive Dr. Leamer's analyses is
 9 particularly unconvincing considering that Defendants themselves often aggregated their entire
 10 compensation budget and compared it to the budgets of other firms, or matched job title
 11 compensation within the company to similar titles across multiple companies. *See, e.g.*, Bock
 12 Depo. 44:12-20 (Google Senior Vice President of People Operations, testifying that Google's
 13 bonus amounts were calculated by taking "a set of people in like jobs, you calculate the [REDACTED]
 14 [REDACTED]. All those people, because they're in like jobs, will have the same [REDACTED] The
 15 [REDACTED] will be based on the [REDACTED] rather than on their [REDACTED]
 16 [REDACTED]."); *see also* Shaver Decl., Ex. 122 (email from Lori McAdams (Pixar Vice President of
 17 Human Resources and Administration) to Sharon Coker (former Lucasfilm Director and Senior
 18 Director of Human Resources), among others, asking about others' salary increase budget for FY
 19 '07 and stating "Ours is [REDACTED], but we may manage it closer to [REDACTED] on average. Are you doing
 20 anything close, more or less?"); Cisneros Decl., Ex. F (Streeter Depo.) at 46-47 (discussing how
 21 Adobe uses aggregated and average data from Radford for job titles and classifications, which it
 22 then uses in developing its own compensation structure).

23 Defendants further criticize Dr. Leamer's supplemental expert report on another similar
 24 basis. Defendants contend that Dr. Leamer ignores data that shows substantial variation in the
 25 levels and changes in individual employees' compensation. In contrast to Dr. Leamer, Dr. Murphy
 26 examines variation at the individual employee level and finds substantial divergence in
 27 compensation over time for individuals who start with the same job title. Defendants argue that
 28 these results show that it is wrong to infer that an increase in compensation for some employees

1 would result in an impact to all or nearly all employees. Rather, Defendants contend that the
2 results reflect managerial discretion. Opp'n at 10 (citing Murphy Rebuttal Rep., Exs. 2-3, & App.
3 B).

4 However, that Defendants differentiated pay is not inconsistent with Dr. Leamer's finding
5 that the Defendants maintained compensation structures that restrained that differentiation. Indeed,
6 as discussed above, the evidence supports the notion that differentiation, such as based on a "pay
7 for performance" philosophy, is not inconsistent with theories of internal equity. *See, e.g.*,
8 Cisneros Decl., Ex. 1609 (Google Chart showing that a high performance rating will result in an
9 employee compensated at [REDACTED] of Google's target salary having his/her salary increased by a
10 higher percentage than an individual with the same rating but compensated at a level higher than
11 Google's target salary). For example, Google notes that it "tries to manage salaries in the [REDACTED]
12 [REDACTED] range and thus give minimal increases to very strong performers who are paid relatively
13 high." *Id.*; *see also* Cisneros Decl., Ex. 1855.107 (showing that managerial discretion and
14 performance based compensation is not necessarily inconsistent with principles of internal equity at
15 Google).

16 Second, Defendants contend that Dr. Leamer's multiple regression analysis is unpersuasive
17 because it suffers from an endogeneity problem. Suppl. Opp'n at 13. An "endogeneity problem[]"
18 "... arises when some of the same unmeasured common factors drive both the independent and
19 dependent variables." Murphy Suppl. Rep. ¶ 43. Defendants argue that Dr. Leamer's "external"
20 San Jose-Sunnyvale-Santa Clara Metropolitan Statistical Area variable and unnamed omitted
21 variables affect "both average job title compensation [the dependent variable] and Leamer's
22 'internal' firm-wide average compensation variable [the independent variable]." Suppl. Opp'n at
23 13. Defendants argue that by "[i]gnoring this 'endogeneity' among his variables, Dr. Leamer
24 improperly concludes that the 'internal' variable meaningfully explains average job title
25 compensation ... while the 'external' variable does not." *Id.* Defendants contend that this is a
26 fundamental error that renders Dr. Leamer's model uninformative and his inferences from it
27 unsound. *Id.*

28

1 The Court is not persuaded by this concern. With respect to the San Jose variable,
2 Defendants have not provided quantitative analysis to show that the San Jose employment variable
3 skews the results with respect to the internal firm-wide average compensation variable. Rather,
4 Defendants offer the endogeneity theory without any support in the form of data, analysis, or case
5 law. A similar lack of specificity plagues Defendants' argument with respect to the unknown
6 variables that Defendants contend cause this endogeneity problem. Specifically, as Plaintiffs note,
7 Defendants have not "identif[ied] a single omitted variable, or show[n] how adding one would
8 change the results." Suppl. Reply at 9; *see also* Leamer Suppl. Rebuttal Rep. ¶ 61 (noting that Dr.
9 Murphy has "not presented *any* analysis showing that omitted non-sharing external or internal
10 effects are responsible for the positive sharing in [Dr. Leamer's] results").

11 Finally, Defendants argue that Dr. Leamer's analyses cannot address the question of
12 causation underlying Plaintiffs' theory of classwide impact, which Defendants characterize as
13 "whether compensation for class members was so rigidly interlinked that a wage increase for some
14 would cause a wage increase for substantially all." Suppl. Opp'n at 14. That is, Defendants
15 contend that Plaintiffs have not demonstrated that the anti-solicitation agreements *caused* any
16 depression in wages. However, Plaintiffs clarify that "Plaintiffs never argued that the impact of the
17 agreements would have been 'lockstep'—that a \$5 raise to one employee would have required a
18 simultaneous \$5 raise across the firm." Suppl. Reply at 8. Rather, as shown by the documentary
19 evidence, "by shielding their employees from waves of recruiting, Defendants not only avoided
20 individual raises, they also avoided having to make across-the-board preemptive increases to
21 compensation." *Id.*

22 As the documentary evidence above demonstrates, there is compelling evidence that in the
23 absence of the anti-solicitation agreements, Defendants would have had to make structural
24 preemptive or reactive changes. *See, e.g.,* Cisneros Decl., Ex. VV at 106 (Sheehy Depo.)
25 (explaining that a group of Pixar employees' base salary needed to be increased because Pixar was
26 "competing with technology companies in the Bay Area, and [its] recruiting team was hearing from
27 candidates that they were getting better offers elsewhere."); Leamer Suppl. Rebuttal Rep. ¶ 23
28 (citing deposition of Patricia Murray (Intel Senior Vice President and Director of Leadership

1 Strategy and former President of Human Resources), in which Murray explained, in response to a
2 question regarding whether Intel raised compensation for particular job categories or job ranges to
3 preemptively prevent attrition, “[i]f attrition was high in a particular job category somewhere in the
4 globe, that would be a fact considered in the many facts we assessed”). The Court finds persuasive
5 Dr. Leamer’s statement that economists “analyze correlations, which are routinely used. . . to draw
6 causal conclusions when supported by compelling frameworks and complementary information.”
7 Leamer Suppl. Rebuttal Rep. ¶ 13. In the instant case, the compelling documentary evidence along
8 with Plaintiffs’ expert theories and correlation analyses are capable of demonstrating causation on
9 a classwide basis.

10 In sum, the Court does not find persuasive Defendants’ criticisms of Dr. Leamer’s
11 methodology. Defendants have not presented any analysis that undermines Dr. Leamer’s analysis,
12 and many of Defendants’ arguments are contradicted by the documentary evidence. Accordingly,
13 the Court finds that Dr. Leamer’s methodology, in conjunction with and bolstered by the extensive
14 documentary evidence, is sufficient to meet the predominance standard with respect to impact.

15 **d. Conclusion on Impact**

16 Plaintiffs’ documentary evidence, along with the expert reports and statistical analyses that
17 rely on this evidence, establish that common issues between class members will predominate over
18 individual issues in proving antitrust impact. The documentary evidence supports Plaintiffs’ theory
19 that Defendants had formal compensation structures on a company-wide basis that placed a
20 premium on internal equity concerns, and that collusive communications between various
21 Defendants limited the proportion of each Defendants’ budget that would be dedicated to merit
22 increases. Further, the evidence suggests that the Defendants benchmarked their compensation
23 structures to external data and to each other. The documentary evidence and the expert reports also
24 support Plaintiffs’ theory that the top companies and top employees at these companies set a
25 ceiling, based on which all or nearly all employees of the Technical Class’s compensation was set.
26 This extensive evidence supports Plaintiffs’ theory that each technical employee’s compensation
27 was linked to those of her peers within and across Defendants’ firms.

28

1 Plaintiffs have also presented documentary and expert evidence about labor market
2 dynamics that would have affected compensation on a classwide basis. For example, Defendants
3 would have had to take preemptive steps, through bonuses and raises to ward off threats of
4 poaching by other Defendants. Further, Defendants would have had to react to any cold calling
5 and poaching of employees by increasing compensation in response to the spread of information
6 from outside and within Defendants' firms. Because of the structural concerns regarding internal
7 equity and the existing rigid compensation structures, the evidence suggests that any such
8 preemptive or reactive steps, in the absence of the anti-solicitation agreements, would have had
9 classwide effect and would have impacted all or nearly all members of the Technical Class.

10 One example, which concerns interactions between Google and non-party Facebook,
11 illustrates many of these theories, including the significance of the threat imposed by cold calling,
12 the disruption of internal equity, and how these dynamics would have, in the absence of the anti-
13 solicitation agreements, prompted Defendants to offer employees incentives to minimize attrition.

14 In March of 2008, Arnon Geshuri (Google Recruiting Director) discovered that non-party
15 Facebook had been cold calling into Google's Site Reliability Engineering ("SRE") team.
16 Geshuri's first response was to suggest contacting Sheryl Sandberg (Chief Operating Officer for
17 non-party Facebook) in an effort to "ask her to put a stop to the targeted sourcing effort directed at
18 our SRE team" and "to consider establishing a mutual 'Do Not Call' agreement that specifies that
19 we will not cold-call into each other." Cisneros Decl., Ex. 614. Arnon Geshuri also suggested
20 "look[ing] internally and review[ing] the attrition rate for the SRE group," stating, "[w]e may want
21 to consider additional individual retention incentives or *team incentives* to keep attrition as low as
22 possible in SRE." *Id.* (emphasis added). Finally, an alternative suggestion was to "[s]tart an
23 aggressive campaign to call into their company and go after their folks—no holds barred. We
24 would be unrelenting and a force of nature." *Id.*

25 In August of 2008, after losing one of many employees to Facebook, Google's Vice
26 President of Communications emailed Google's executive management group and Bill Campbell
27 (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google). In this
28 email, the Google Vice President expressed concern about Facebook's "poaching" and stated that

1 she had “offered [the employee] different roles and discussed his future at Google” but that she had
 2 “gone as far as [she could] without making promises about pay or title that would cause significant
 3 problems across [her] team.” *Id.* Bill Campbell’s response was to ask, “Who should contact
 4 Sheryl [Sandberg] (or [Facebook Founder] Mark [Zuckerberg]) to get a cease fire? We have to get
 5 a truce.” *Id.* Facebook refused.

6 Facebook continued to poach Google’s employees. In 2010, for example, [REDACTED] of
 7 Facebook’s new employees were recruited from Google. Leamer Rep. ¶ 109. Accordingly, in
 8 October 2010, Google began studying Facebook’s solicitation strategy. *Id.* A month later (and two
 9 months after the DOJ made public its investigation of Defendants), Google announced its “Big
 10 Bang,” which involved an increase to the base salary of *all* of its salaried employees by 10% and
 11 provided an immediate cash bonus of \$1,000 to all employees. Shaver Decl., Ex. 46. In an internal
 12 email, Laszlo Bock (Google Senior Vice President of People Operations) explained that the
 13 rationale for the Big Bang included: (1) being “responsive to rising attrition;” (2) supporting higher
 14 retention because “higher salaries generate higher fixed costs;” and (3) being “very strategic
 15 because start-ups don’t have the cash flow to match, and big companies are (a) too worried about
 16 internal equity and scalability to do this and (b) don’t have the margins to do this.” Shaver Decl.,
 17 Ex. 48.

18 The increased salaries within Google impacted the other Defendants as well. For example,
 19 Google’s “Big Bang” disrupted Apple’s compensation structure by forcing Apple to pay more for
 20 new hires which then created internal equity issues with current employees. David Alvarez (Apple
 21 Recruiting Manager and former Research Manager) responded as follows:

22 We will go back and review internal equity again and come up with a new proposal
 23 for your review. . . . [REDACTED]

24 [REDACTED] This is due to the market changing.
 25 This will most likely create an internal comp issue with current employees. In order
 26 to stay ahead and be competitive, we must be aggressive with our offers in order to
 27 close good talent. Having these new data points will help justify adjusting current
 28 employees. Great talent does come at a cost. . . . Just as a data point, Google gave
 its employees a 10% increase to deal with the aggressive offers out in the market.

Cisneros Decl., Ex. 1376. Google’s reaction to Facebook’s solicitation of its employees, and
 Apple’s subsequent reaction to Google’s actions, demonstrates the weakness of Defendants’

1 contention that the impact of the anti-solicitation agreements was localized to individual employees
2 who would have been solicited but for the agreements or that class members would have been
3 impacted differently depending on their individual circumstances. These contemporaneous
4 reactions of the Defendants to genuine competition for labor suggest instead that their response to
5 widespread solicitation of their employees would have been structural rather than individual.

6 3. Damages

7 In addition to disputing whether Plaintiffs can show impact on a classwide basis, the parties
8 dispute whether Plaintiffs can show damages on a classwide basis. The Supreme Court has held
9 that damages “[c]alculations need not be exact, but at the class-certification stage (as at trial), any
10 model supporting a ‘plaintiff’s damages case must be consistent with its liability case, particularly
11 with respect to the alleged anticompetitive effect of the violation.’” *Comcast*, 133 S. Ct. at 1433
12 (citing ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 57,
13 62 (2d ed. 2010)). In other words, “a damages suit cannot be certified to proceed as a class action
14 unless the damages sought are the result of the class-wide *injury* that the suit alleges.” *Butler*, 727
15 F.3d at 799 (emphasis in original).

16 Here, Plaintiffs rely on their expert, Dr. Leamer, to demonstrate that they can use reliable
17 methods to compute damages by applying classwide methods and analyses. *See* Class Cert. Mot. at
18 22 (citing Leamer Rep. ¶¶ 135-48). Dr. Leamer concluded that common evidence and a regression
19 approach could be used to create a model for quantifying the estimated cost to Technical Class
20 members resulting from Defendants’ challenged conduct. *Id.* ¶¶ 141-48. This model generated
21 percentages by which Defendants undercompensated their Technical Class employees in each of
22 the conspiracy years. *Id.*, Fig. 24. Specifically, Dr. Leamer estimated the effect of the anti-
23 solicitation agreements by contrasting compensation during the periods when the anti-solicitation
24 agreements were in effect with compensation before and after the anti-solicitation agreements. *Id.*
25 ¶ 136. Dr. Leamer’s model incorporated a range of variables designed to account for factors
26 including: (1) age, sex, and years at the company; (2) the effects on compensation caused by the
27 anti-solicitation agreements; (3) the effects caused by factors specific to each Defendant (*e.g.*, firm
28 revenue, total number of new hires, etc.); and (4) the effects caused by the industry. *See id.*, Fig.

1 23. Dr. Leamer used the model to show that the anti-solicitation agreements had some impact on
2 the Technical Class generally, and to estimate the average or net under-compensation at each
3 Defendant firm during the period in which the anti-solicitation agreements were in effect. *See id.*
4 Fig. 24; Reply at 33. Dr. Leamer’s model accounted for variations in the effect of the anti-
5 solicitation agreements over time and for variations among different kinds of employees. *Id.* ¶
6 146. Dr. Leamer contended that this econometric model of employee compensation could be used
7 in a straightforward formulaic fashion in conjunction with Defendants’ compensation data to
8 calculate damages for employees in the Technical Class. *See id.* ¶ 148; *see also id.* Figs. 3 & 4.

9 In the Court’s April 5 Class Certification Order, the Court considered Defendants’
10 criticisms of Dr. Leamer’s Conduct Regression, but ultimately found the Conduct Regression
11 model sufficient to satisfy Plaintiffs’ burden for the purpose of Rule 23(b)(3) on the issue of
12 damages. Apr. 5 Class Cert. Order at 43-44.

13 First, the Court rejected Defendants’ criticism that Dr. Leamer failed to conduct a
14 sensitivity analysis—an “exploration of how sensitive [a model’s] conclusions are to a choice of
15 variables.” Leamer Depo. at 351:4-6. Defendants argued that Dr. Leamer should have performed
16 “disaggregated” analyses for each Defendant using only data from that Defendant’s employees.
17 However, in light of the limited compensation data available to Dr. Leamer, Leamer Reply Rep.
18 ¶ 99, including the relatively short length of the data period, 2001-2011, the Court found that
19 aggregation may provide “a [more] robust analysis and yield more reliable and more meaningful
20 statistical results.” *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 523 (N.D. Cal. 2012). The
21 Court also was not persuaded by Dr. Murphy’s competing disaggregated model—which included
22 42 Defendant-specific variables, only 28 of which related to the effect of the anti-solicitation
23 agreements, *see* Murphy Rep., App. 9A, because the Court found that Dr. Murphy’s use of that
24 many variables could also “minimize artificially” the effects of the anti-solicitation agreements by
25 spreading those effects across a wider range of variables. *See* Apr. 5 Class Cert. Order at 39-40
26 (citing Leamer Reply Rep. ¶ 101).

27 Second, the Court rejected Defendants’ criticisms of Dr. Leamer’s choice of a benchmark
28 period. Apr. 5 Class Cert. Order at 40; Mot. to Strike at 13. Defendants argued that, if the

1 benchmark period was changed from the two years preceding and the two years following the
2 period during which the anti-solicitation agreements were in effect to only the two years following
3 this period, then the model showed net over-compensation rather than under-compensation. *See id.*
4 However, the Court noted that Defendants failed to explain why the benchmark period should be
5 limited in this way. Apr. 5 Class Cert. Order at 40. Defendants did not show that the pre-conduct
6 data was not comparable to data from the conduct period and therefore should be excluded.
7 Furthermore, the Court expressed concern that, in altering the benchmark periods, Defendants
8 reduced the total amount of data available regarding the non-conduct periods, which could then
9 result in less accurate results. *Id.* at 40-41.

10 Third, the Court rejected Defendants' argument that the Conduct Regression was flawed
11 because Dr. Leamer failed to include a variable to "control for changes in the value of . . . equity
12 compensation [to employees] over time." Mot. to Strike at 13. Defendants argued that when Dr.
13 Murphy introduced an equity variable, specifically a variable that tracks changes in the S&P 500,
14 the Conduct Regression yielded much smaller under-compensation for the All-Salaried Employee
15 Class and overcompensation for the Technical Class. *See* Murphy Rep. ¶ 138. The Court was not
16 persuaded by Defendants' contention because the equity variable Defendants selected—a variable
17 reflecting changes in the S&P 500—tracked variations in the stock price of hundreds of unrelated
18 companies. *See* Leamer Reply Rep. ¶ 89. Thus, the fact that including this variable significantly
19 altered the results of Dr. Leamer's analysis did not persuade the Court that Dr. Leamer's results
20 should be disregarded or that the Conduct Regression is flawed.

21 In addition to the sensitivity issues discussed above, Defendants argued that the Conduct
22 Regression was flawed because Dr. Leamer failed to account for the fact that compensation for
23 employees within the same firm is correlated. *See* Mot. to Strike at 16; Murphy Rep. ¶ 126. Dr.
24 Murphy opined that, given this correlation, Dr. Leamer should have clustered the standard errors.
25 *See* Murphy Rep. ¶ 126 ("A generally accepted method to take into account the fact that
26 observations used to estimate a regression contain[] 'groups' of observations that are affected by
27 certain common factors (such as those affecting a particular company or present in a single year) is
28 commonly referred to as 'clustering' the standard errors"). For the reasons set forth below, the

1 Court did not find that Dr. Leamer's failure to cluster the standard errors provided a sufficient basis
2 to reject the Conduct Regression. Apr. 5 Class Cert. Order at 42.

3 Even assuming that Dr. Leamer should have clustered the standard errors, the fact that
4 when the errors were clustered, the Conduct Regression's results were not statistically significant at
5 the 95 percent confidence level did not persuade the Court that the regression was unpersuasive.
6 *See Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1105 (D. Colo. 2006). Dr. Murphy
7 testified that a model's results need not necessarily be statistically significant to be reliable.
8 Murphy Depo. at 366:14-20. Further, as explained by Dr. Leamer, adjusting the standard errors
9 was only one way of controlling for correlations between employees. *See Leamer Reply Rep.*
10 ¶¶ 76, 78, 82, 83. Another approach would be to include variables to explain the commonalities
11 across firms. *See id.* ¶ 83. The Court noted that Dr. Leamer had already included one such
12 variable, revenue. *See id.* ¶¶ 82-83. Thus, the Court concluded that Dr. Leamer's failure to cluster
13 the standard errors did not provide a sufficient basis to conclude that the Conduct Regression failed
14 to provide a reliable methodology for the purposes of class certification. Apr. 5 Class Cert. Order
15 at 42.

16 Defendants now raise additional arguments not raised in their initial opposition to contend
17 that Dr. Leamer's methodology cannot be used to show that common questions are likely to
18 predominate with respect to damages. Specifically, renewing their argument that the use of a
19 single conduct variable for all Defendants was inappropriate,²¹ Defendants argue that Dr. Leamer's
20 most recent correlation analyses show that total compensation and changes in total compensation at
21

22 ²¹ Defendants also contend that, because the Court "'encouraged' Leamer to address . . . whether
23 additional variables were needed," Suppl. Opp'n at 23, and Dr. Leamer did not add variables to his
24 Conduct Regression analysis, Dr. Leamer's model should be rejected now. Defendants argue that
25 this is an issue of even greater importance now that Dr. Leamer opines that compensation within a
26 firm is highly correlated. Suppl. Opp'n at 23. Defendants maintain that, "[w]ithout accounting for
27 the correlation, Leamer's model cannot reliably determine or measure impact or damages." Suppl.
28 Opp'n at 23-24 (citing Murphy Suppl. Rep. ¶¶ 68-69). Dr. Leamer contends that he "considered
whether to add any variables" but is "not aware of any [he] need[s] to add at the present time."
Leamer Suppl. Reply Rep. ¶ 66. Given that the Court's acceptance of the Conduct Regression as a
means of proving and calculating harm to the Class was not contingent upon Dr. Leamer's addition
of more variables to his analysis, the Court does not reject Dr. Leamer's model on this basis.

1 Defendants diverged and sometimes moved in opposite directions. Suppl. Opp'n at 24 (citing
2 Leamer Rep., Tables 1 and 2). Defendants assert that, in light of these divergences, the use of a
3 single conduct variable for all Defendants is inappropriate. As set forth in the April 5 Class
4 Certification Order, Dr. Leamer's decision to use a single variable in his Conduct Regression was
5 understandable because "the available [compensation] data regarding Defendants' compensation
6 practices [is] 'limited.'" Apr. 5 Class Cert. Order at 39-40. Dr. Leamer's approach of aggregating
7 Defendants' data and calculating a single conduct variable, rather than using the limited data
8 regarding each Defendant to calculate separate conduct variables, "allowed Dr. Leamer to produce
9 a 'more coherent, more efficient model.'" *Id.* The Court is not persuaded that Dr. Leamer's use of
10 a single conduct variable prevents the Conduct Regression from serving as a reliable method of
11 determining damages.

12 Finally, Defendants argue that Dr. Leamer's Conduct Regression is overly sensitive to
13 variable choice. Opp'n at 24. The Court disagrees. Dr. Leamer specifically addresses this concern
14 in his reply report and rebuttal supplemental expert report. *See* Leamer Reply Rep. ¶¶ 85-97;
15 Leamer Suppl. Rebuttal Rep. ¶ 66 (discussing "the lack of sensitivity of [his] findings to inclusion
16 of alternative external control variables such as firm stock prices and to a different level of
17 aggregation."). The Court is not persuaded that the Conduct Regression model is so sensitive to
18 variable choice that it cannot be used to satisfy Plaintiffs' burden at class certification.

19 Because Dr. Leamer's model is supported by the economic literature (including Dr.
20 Shaw's), is statistically robust (*i.e.*, insensitive to alternative control variables), and is buttressed by
21 Dr. Leamer's subsequent analysis, the Court finds that Dr. Leamer's model is capable of
22 calculating classwide damages. Suppl. Reply at 15.

23 4. Conclusion Regarding Predominance

24 This Court's rigorous analysis shows that common issues are likely to predominate over
25 individual issues. Importantly, this Court's analysis of predominance involves a "qualitative
26 assessment." *See Butler*, 727 F.3d at 801. This qualitative assessment includes some analysis into
27 how this case, should it proceed to trial, would actually be litigated. *See In re New Motors*, 522
28 F.3d at 20 ("Under the predominance inquiry, a district court must formulate some predication as

1 to how specific issues will play out in order to determine whether common or individual issues
2 predominate in a given case.” (internal quotation marks omitted)).

3 As such, this Court notes that there is no dispute that antitrust violation can be shown using
4 exclusively evidence that is common to the entire Technical Class for the reasons discussed above.
5 The Court further finds that antitrust violation is likely to be a central, disputed issue at summary
6 judgment and at trial. Defendants have made quite clear—both through their motions to dismiss
7 and their initial opposition to the motion for class certification—that Defendants will seek to
8 contest the issue of antitrust violation by contending that their agreements had no anti-competitive
9 effect on the market. Specifically, Defendants have stated that they intend to “demonstrate that the
10 agreements should be evaluated under the rule of reason, were reasonable and lawful under that
11 standard, and could not have conceivably had any adverse effect on compensation in any relevant
12 labor market.” Opp’n at 5, n.1. The Supreme Court has stated that the rule of reason analysis
13 entails “significant costs” and is often “extensive and complex.” *See Arizona v. Maricopa Cnty.*
14 *Med. Soc’y*, 457 U.S. 332, 343 (1982).

15 Given the considerable, compelling common proof Plaintiffs have submitted regarding
16 Defendants’ alleged antitrust violation, as well as the parties’ actions indicating that they will
17 vigorously litigate the question of whether Defendants engaged in an antitrust violation, this
18 question is likely to be central to this litigation. At the very least, this aspect of the trial should not
19 be understated. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603,
20 611 (N.D. Cal. 2009) (“Plaintiffs need not show that there will be common proof on each element
21 of the claim. ‘In price-fixing cases, courts repeatedly have held that the existence of the conspiracy
22 is the predominant issue and warrants certification even where significant individual issues are
23 present.’” (quoting *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*,
24 209 F.R.D. 159, 167 (C.D. Cal. 2002))); *see* 6 Newberg on Class Actions § 18.25 (4th ed. 2002)
25 (“[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been
26 held to predominate over individual issues.”); 7AA Charles Alan Wright, Arthur Miller & Mary
27 Kay Kane, *Federal Practice and Procedure*, § 1781 (3d ed. 2005) (“whether a conspiracy existed
28 is a common question that is thought to predominate over other issues in the case”); *cf. Cordes &*

1 *Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007) (“Even if the district
2 court concludes that the issue of injury-in-fact presents individual questions, however, it does not
3 necessarily follow that they predominate over common ones and that class action treatment is
4 therefore unwarranted.”). As a result, the voluminous classwide proof of antitrust violation weighs
5 in favor of a finding that common questions predominate.

6 In addition to concluding that common questions will predominate with respect to the
7 central element of antitrust violation, the Court, having conducted a rigorous analysis, also finds
8 that common questions will predominate over individual questions with respect to impact. The
9 extensive documentary evidence suggests that Defendants maintained a formal wage structure and
10 valued internal equity. This suggests that the anti-solicitation agreements had a structural impact
11 on class members’ compensation. Furthermore, the Court, having taken a hard look at the experts’
12 reports, concludes that Plaintiffs have presented a methodology that supports a finding that the
13 evidence common to the class will be utilized in demonstrating impact. Finally, the Court finds
14 that Plaintiffs have set forth a methodology for calculating damages on a classwide basis. Thus,
15 following a rigorous analysis, the Court finds that Plaintiffs have satisfied Rule 23(b)(3)’s
16 predominance requirement with respect to all three elements—antitrust violation, impact, and
17 damages.

18 **C. Rule 23(b)(3): Superiority**

19 Rule 23(b)(3) also tests whether “a class action is superior to other available methods for
20 fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Under Rule 23(b)(3),
21 the Court must consider four non-exclusive factors in evaluating whether a class action is a
22 superior method of adjudicating plaintiffs’ claims: (1) the interest of each class member in
23 individually controlling the prosecution or defense of separate actions; (2) the extent and nature of
24 any litigation concerning the controversy already commenced by or against the class; (3) the
25 desirability of concentrating the litigation of the claims in the particular forum; and (4) the
26 difficulties likely to be encountered in the management of a class action. *Zinser*, 253 F.3d at 1190-
27 92.

28

1 Plaintiffs state that “[c]lass treatment is by definition superior to thousands of individual
2 claims in an antitrust case where common issues of liability and impact predominate.” Class Cert.
3 Mot. at 23 (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 314 (“[I]f common
4 questions are found to predominate in an antitrust action . . . the superiority prerequisite of Rule
5 23(b)(3) is satisfied.”)). Plaintiffs contend that Class members’ individual damages, even after
6 mandatory trebling, are insufficiently large to warrant individual litigation. *In re TFT-LCD (Flat
7 Panel) Antitrust Litig.*, 267 F.R.D. at 314-15 (noting that, in antitrust cases, individual damages
8 “are likely to be too small to justify litigation, but a class action would offer those with small
9 claims the opportunity for meaningful redress”).

10 Plaintiffs further contend that “[c]lass treatment will also be more manageable and efficient
11 than hundreds or thousands of individual actions litigating the same issues with nearly identical
12 proof. . . . Either defendants colluded or they did not; either their conspiracy artificially suppressed
13 their compensation structure or it did not. Any trial here will focus on these questions and the
14 same evidence, whether it involves a single employee or the Class as a whole.” Class Cert. Mot. at
15 23-24.

16 Defendants, however, argue that “[t]he ‘numerous and substantial separate issues’ each
17 class member would have to litigate to ‘establish his or her right to recover individually’ means
18 that ‘class action treatment is not the ‘superior’ method of adjudication.” Opp’n at 25 (citing
19 *Zinser*, 253 F.3d at 1192). During the hearing on Plaintiffs’ Supplemental Motion for Class
20 Certification, Defendants proposed instead holding multiple “bellwether” trials to accommodate
21 the groups of people impacted. Aug. 8 Tr. at 31-32. In response, counsel for Plaintiffs argued that
22 such an approach would not conserve resources because, “in every single case, the proof of impact
23 would be the opinion that this conduct . . . affected the pay structure of the entire company.” *Id.* at
24 67-68. The Court agrees. Given that Plaintiffs’ case rises and falls with their common evidence,
25 the Court does not find that conducting numerous bellwether trials, which will effectively be trials
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1 with Plaintiffs representing subclasses of employees, will ease case management.²² In fact, this
 2 would merely multiply the number of trials with the same issues and evidence.

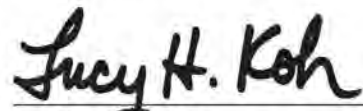
3 Thus, the Court finds that the Technical Class members' interests weigh in favor of having
 4 this case litigated as a class action. In addition, the nature of Defendants' alleged overarching
 5 conspiracy and the desirability of concentrating the litigation in one proceeding weigh heavily in
 6 favor of finding that class treatment is superior to other methods of adjudication of the controversy.
 7 *See Zinser*, 253 F.3d at 1190-92. The Court also finds that questions regarding manageability
 8 weigh in favor of finding class treatment superior to other methods of adjudication. Thus, the
 9 Court finds that Plaintiffs have satisfied the superiority requirement.

10 **V. CONCLUSION**

11 For the reasons set forth above, the Court finds that Plaintiffs have satisfied all of the
 12 requirements for Rule 23(a) of the Federal Rules of Civil Procedure, as well as the requirements of
 13 Rule 23(b)(3). Accordingly, the Court GRANTS Plaintiffs' Motion for Class Certification as to the
 14 Technical Class and appoints named Plaintiffs as Class Representatives.

15 **IT IS SO ORDERED.**

16 Dated: October 24, 2013

17 
 18 LUCY H. KOH
 19 United States District Judge

20
 21
 22 ²² Defendants further suggest that certifying the Technical Class would violate the Rules Enabling
 23 Act because it would prevent Defendants from asserting statutory defenses to which they are
 24 entitled. In making this argument, Defendants rely on a section of *Dukes* in which the Supreme
 25 Court held that Rule 23(b)(2), which provides for the certification of a class seeking injunctive
 26 relief and not damages, was not an appropriate vehicle for certifying a class of discrimination
 27 plaintiffs who sought backpay under Title VII. *Opp'n* at 25 (citing *Dukes*, 131 S. Ct. at 2561). The
 28 Supreme Court held that the putative class could not be certified in part because the defendant
 would not be able to litigate Title VII defenses that it may have had against individual class
 members. *Dukes*, 131 S. Ct. at 2561. As a result, class certification would have expanded
 plaintiffs' substantive rights under Title VII. This *Dukes* holding applied to a class under Rule
 23(b)(2), which provides for only injunctive relief and not for damages; thus, this holding is
 inapplicable to the instant case. Further, Defendants here have not identified any statutory defenses
 that Defendants would have against particular class members, nor have Defendants contended that
 certification would expand Plaintiffs' rights under the antitrust laws.

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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

IN RE: HIGH-TECH EMPLOYEE) Case No.: 11-CV-02509-LHK
ANTITRUST LITIGATION)
)
)
) ORDER GRANTING IN PART,
) DENYING IN PART MOTION FOR
) CLASS CERTIFICATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Plaintiffs Michael Devine, Mark Fichtner, Siddarth Hariharan, Brandon Marshall, and Daniel Stover (collectively, "Plaintiffs"), individually and on behalf of a class of all those similarly situated, allege antitrust claims against their former employers, Adobe Systems Inc. ("Adobe"), Apple Inc. ("Apple"), Google Inc. ("Google"), Intel Corp. ("Intel"), Intuit Inc. ("Intuit"), Lucasfilm Ltd. ("Lucasfilm"), and Pixar (collectively, "Defendants"), all of whom are high-tech companies with a principal place of business in the San Francisco-Silicon Valley area of California. Plaintiffs challenge an alleged overarching conspiracy among Defendants to fix and suppress employee compensation and to restrict employee mobility.

Before the Court is Plaintiffs' Motion for Class Certification. *See* Pls.' Mot. Class Cert. ("Mot."), ECF No. 187. Defendants oppose this motion and move to strike the expert report of Dr.

1 Edward E. Leamer (“Leamer Rep.”), which Plaintiffs submitted in support of their Motion for
 2 Class Certification. *See* Defs.’ Opp’n to Pls.’ Mot. for Class Cert. (“Opp’n”), ECF No. 209; Defs.’
 3 Mot. to Strike Rep. of Dr. Edward E. Leamer (“Mot. to Strike”), ECF No. 210. Plaintiffs similarly
 4 move to strike the expert report of Dr. Kevin M. Murphy, which Defendants submitted in
 5 opposition to Plaintiffs’ Motion for Class Certification, as well as certain employee declarations
 6 upon which Dr. Murphy relies. *See* Pls.’ Consolidated Reply in Supp. Mot. for Class Cert. &
 7 Opp’n to Defs.’ Mot. to Strike (“Reply”), ECF No. 247, at 38–40. Finally, Defendants seek to
 8 supplement the record in support of their opposition to class certification. *See* Defs.’ Joint Admin.
 9 Mot. for Leave to Supplement the Rec. in Supp. of Defs.’ Opp’n to Class Cert., ECF No. 263.
 10 Plaintiffs oppose. ECF No. 270.¹ The Court held a hearing on these motions on January 17, 2013.

11 Having considered the parties’ submissions, arguments, and the relevant law, the Court
 12 GRANTS in part and DENIES in part Plaintiffs’ Motion for Class Certification with leave to
 13 amend. The Court DENIES Defendants’ Motion to Strike and GRANTS in part and DENIES in
 14 part Plaintiffs’ request to strike Defendants’ expert report and certain employee declarations.
 15 Finally, the Court DENIES Defendants’ Joint Administrative Motion for Leave to Supplement the
 16 Record in Support of Defendants’ Opposition to Class Certification.

17 I. BACKGROUND

18 A. Factual Background

19 Plaintiffs are software engineers who were employed formerly by Defendants. Mr. Devine
 20 worked for Adobe in the State of Washington from October of 2006 through July of 2008. *See*
 21 Decl. Ann B. Shaver In Supp. Pls.’ Mot. for Class Cert. (“Shaver Decl.”), Ex. 6 ¶ 1, ECF No. 188;
 22 Consolidated Amended Complaint (“CAC”) ¶ 16, ECF No. 65. Mr. Fichtner worked for Intel in
 23 Arizona from May of 2008 through May of 2011. *See* Shaver Decl., Ex. 7 ¶ 1; CAC ¶ 17. Mr.
 24 Hariharan worked for Lucasfilm in California from January of 2007 through August of 2008. *See*
 25 Shaver Decl., Ex. 8 ¶ 1; CAC ¶ 18. Mr. Marshall worked for Adobe in California from July of
 26 2006 through December of 2006. *See* Shaver Decl., Ex. 9 ¶ 1; CAC ¶ 19. Finally, Mr. Stover

27 _____
 28 ¹ The Court will address Defendants’ Renewed Administrative Motion to File Under Seal, ECF
 No. 307, in a separate order.

1 worked for Intuit in California from November of 2006 through December of 2009. *See* Shaver
2 Decl., Ex. 10 ¶ 1; CAC ¶ 20.

3 1. Alleged Conspiracy

4 Plaintiffs allege that Defendants engaged in an “overarching conspiracy” to eliminate
5 competition amongst them for skilled labor, with the intent and effect of suppressing the
6 compensation and mobility of Defendants’ employees. CAC ¶¶ 1, 2, 55.

7 In a properly functioning and lawfully competitive labor market, each Defendant would
8 compete for employees by soliciting current employees from the other Defendants. CAC ¶ 41.
9 This method of recruiting, to which Defendants refer as “cold calling,” includes communicating
10 directly in any manner—including orally, in writing, telephonically, or electronically—with
11 another company’s employee who has not otherwise applied for a job opening. *Id.* Plaintiffs
12 allege that the use of cold calling among Defendants commonly increases total compensation and
13 mobility for all of Defendants’ employees. CAC ¶¶ 48, 50.

14 Here, each pair of Defendants allegedly entered into an express bilateral agreement not to
15 compete for each other’s employees. CAC ¶ 55.² Plaintiffs maintain that the agreements “were
16 developed to prevent a ‘bidding war’ for talent that would drive up wages across the Defendants.”
17 Mot. at 2. Defendants memorialized these nearly identical agreements in CEO-to-CEO emails and
18 other documents, including “Do Not Call” lists, putting each firm’s employees off-limits to other
19 Defendants. Mot. at 1. The bilateral agreements applied to all employees of a given pair of
20 Defendants. CAC ¶¶ 63, 76, 81, 88, 100, 105. They were not limited by geography, job function,
21 product group, or time period. *Id.* They also were not related to any specific collaboration among
22 Defendants. *Id.*

23 According to Plaintiffs, these anti-solicitation agreements “centered around three of the
24 most important figures in Silicon Valley: Apple CEO Steve Jobs, Google CEO Eric Schmidt, and
25 Intuit Chairman Bill Campbell, all of whom served on Apple’s Board of Directors throughout the
26 conspiracy.” Mot. at 2. Allegedly, these three individuals, as well as senior executives from each

27 ² The parties refer to these agreements as “Do Not Cold Call” agreements, anti-solicitation
28 agreements, anti-poaching agreements, and anti-competitive agreements. For the purpose of this
Order, the Court refers to these agreements as the “anti-solicitation agreements.”

1 Defendant, actively participated in negotiating, executing, monitoring compliance with, and
 2 policing violations of the bilateral agreements. CAC ¶¶ 55, 108. Plaintiffs also allege that
 3 Defendants' senior executives actively concealed each bilateral agreement, and Defendants'
 4 employees generally were not informed of, nor did they agree to, the terms of any of the
 5 agreements. *Id.*

6 Plaintiffs contend that Defendants' anti-solicitation agreements eliminated competition for
 7 employees and suppressed employees' compensation and mobility, thereby inflicting class-wide
 8 harm. CAC ¶ 110.

9 2. DOJ Investigation

10 From 2009 through 2010, the Antitrust Division of the Department of Justice ("DOJ")
 11 conducted an investigation into Defendants' employment and recruitment practices. CAC ¶¶ 3,
 12 111. After receiving documents produced by Defendants and interviewing witnesses, the DOJ
 13 concluded that Defendants reached "facially anticompetitive" agreements that "eliminated a
 14 significant form of competition to the detriment of the affected employees who were likely
 15 deprived of competitively important information and access to better job opportunities." CAC
 16 ¶ 112; *see also* ECF No. 93, Ex. A, at ¶¶ 2, 14 (Dep't of Justice Compl. Against Adobe, et al.);
 17 ECF No. 93, Ex. D, at ¶¶ 2, 15, 22 (Dep't of Justice Compl. Against Lucasfilm). The DOJ also
 18 determined that the agreements "were not ancillary to any legitimate collaboration," "were broader
 19 than reasonably necessary for the formation or implementation of any collaborative effort," and
 20 "disrupted the normal price-setting mechanisms that apply in the labor setting." DOJ Adobe
 21 Compl. ¶ 16; DOJ Lucasfilm Compl. ¶ 17; CAC ¶ 112. The DOJ concluded that Defendants
 22 entered into agreements that were naked restraints of trade that were *per se* unlawful under the
 23 antitrust laws. DOJ Adobe Compl. ¶ 35; DOJ Lucasfilm Compl. ¶ 3; CAC ¶ 112.

24 Following its investigation, the DOJ filed complaints in federal court against Defendants.
 25 *See* ECF No. 79-1, Ex. A, at 2 ("DOJ Adobe J."); *United States v. Lucasfilm, Inc.*, No. 10-02220
 26 (D.D.C. June 3, 2011), 2011 WL 2636850, at *1 ("DOJ Lucasfilm J."). The DOJ also filed
 27 stipulated proposed final judgments in each case. *Id.* In these stipulated proposed final judgments,
 28 Defendants did not admit any wrongdoing or violation of law, but they agreed to be "enjoined from

1 attempting to enter into, maintaining or enforcing any agreement with any other person or in any
 2 way refrain[ing] [from] . . . soliciting, cold calling, recruiting, or otherwise competing for
 3 employees of the other person.” DOJ Adobe J. at 5; ECF No. 79-1, Ex. B, DOJ Proposed Final J.
 4 Against Lucasfilm, at 4; CAC ¶ 115. The D.C. District Court entered the stipulated proposed final
 5 judgments on March 17, 2011, and June 2, 2011, respectively. DOJ Adobe J. at 12, DOJ Lucasfilm
 6 J. at 1; CAC ¶ 115.³

7 Plaintiffs contend that, although the DOJ ultimately put an end to these illegal agreements,
 8 the government was unable to compensate the victims of the conspiracy. Plaintiffs now bring this
 9 case as private attorneys general “to pick up where the DOJ left off, to seek damages for
 10 themselves and for the Class.” Mot. at 1.

11 **B. Procedural Background**

12 The original complaints in the five actions underlying this consolidated action were filed in
 13 California state court. *Hariharan v. Adobe Sys. Inc.*, Case No. 11574066 (Alameda Super. Ct. filed
 14 May 4, 2011); *Marshall v. Adobe Sys. Inc.*, Case No. 11-CV-204052 (Santa Clara Super. Ct. filed
 15 June 28, 2011); *Devine v. Adobe Sys. Inc.*, Case No. 11-CV-204053 (Santa Clara Super. Ct. filed
 16 June 28, 2011); *Fichtner v. Adobe Sys. Inc.*, Case No. 11-CV-204187 (Santa Clara Super. Ct. filed
 17 June 30, 2011); *Stover v. Adobe Sys. Inc.*, Case No. 11-CV-25090 (Santa Clara Super. Ct. filed July
 18 14, 2011).⁴ Defendants subsequently removed the five state court actions to the United States
 19 District Court for the Northern District of California. *Hariharan v. Adobe Sys. Inc.*, Case No. 11-
 20 2509 (removed May 23, 2011), ECF No. 1; *Marshall v. Adobe Sys. Inc.*, Case No. 11-3538
 21 (removed July 19, 2011), see ECF No. 41; *Devine v. Adobe Sys. Inc.*, Case No. 11-3539 (removed
 22 July 19, 2011), see ECF No. 41; *Fichtner v. Adobe Sys. Inc.*, Case No. 11-3540 (removed July 19,
 23 2011), see ECF No. 41; and *Stover v. Adobe Sys. Inc.*, Case No. 11-3541 (removed July 19, 2011),
 24 see ECF No. 41.

25 _____
 26 ³ Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final
 Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against
 Defendants.

27 ⁴ While the name of each Superior Court case listed only Adobe Systems Inc. as the Defendant,
 28 the Superior Court complaints also named as Defendants Apple, Google, Intel, Intuit, Lucasfilm,
 Pixar, and Does 1-200.

1 On June 1, 2011, the lead case, *Hariharan v. Adobe Systems Inc.*, was reassigned from
2 Magistrate Judge Spero to Judge Armstrong. ECF No. 24. On July 19, 2011, Intuit filed a motion
3 to relate the five underlying actions, ECF No. 41, which Judge Armstrong granted on July 27,
4 2011, ECF No. 52. On August 2, 2011, Plaintiff Siddharth Hariharan moved to transfer the five
5 underlying actions to the San Jose Division, ECF No. 56, which Judge Armstrong granted on
6 August 4, 2011, ECF No. 58.

7 On August 5, 2011, the underlying actions were reassigned to the undersigned judge. The
8 Court consolidated the five underlying actions on September 12, 2011, ECF No. 64, and Plaintiffs
9 filed the Consolidated Amended Complaint on September 13, 2011. ECF No. 65.

10 Defendants filed a joint motion to dismiss on October 13, 2011, ECF No. 79, and, with
11 leave of the Court, Lucasfilm filed its separate motion to dismiss on October 17, 2011, ECF No.
12 83. On April 18, 2012, the Court granted in part and denied in part Defendants' Joint Motion to
13 Dismiss and denied Lucasfilm's Motion to Dismiss. ECF No. 119.

14 On October 1, 2012, Plaintiffs filed their Motion for Class Certification. ECF No. 187. On
15 November 12, 2012, Defendants filed their opposition to Plaintiffs' Motion for Class Certification,
16 ECF No. 209, as well as a Motion to Strike the expert report submitted by Plaintiffs, ECF No. 210.
17 Plaintiffs then filed their Consolidated Reply in Support of Class Certification and in Opposition to
18 the Motion to Strike on December 10, 2012. ECF No. 247. On January 9, 2013, Defendants filed
19 a Joint Administrative Motion for Leave to Supplement the Record in Support of Defendants'
20 Opposition to Class Certification, ECF No. 263, to which Plaintiffs filed an opposition, ECF No.
21 270. The Court held a hearing on Plaintiffs' Motion for Class Certification on January 17, 2013.
22 Plaintiffs then filed a notice of new case law relevant to their Motion for Class Certification, *see*
23 ECF No. 339, and Defendants filed two similar notices, *see* ECF Nos. 343, 368.

24 C. Class Definition

25 Named Plaintiffs seek to certify a nationwide class of similarly situated individuals (the
26 "Class" or "All-Employee Class") defined as follows:

27 All natural persons employed on a salaried basis in the United States by one or more
28 of the following: (a) Apple from March 2005 through December 2009; (b) Adobe
from May 2005 through December 2009; (c) Google from March 2005 through

1 December 2009; (d) Intel from March 2005 through December 2009; (e) Intuit from
 2 June 2007 through December 2009; (f) Lucasfilm from January 2005 through
 3 December 2009; or (g) Pixar from January 2005 through December 2009. Excluded
 from the Class are: retail employees; corporate officers, members of the boards of
 directors, and senior executives of all Defendants.

4 Notice of Mot. at 1. Plaintiffs contend that the All-Employee Class includes more than 100,000
 5 members. Mot. at 5. According to Plaintiffs, the Class Definition is broad because Defendants
 6 designed their agreements to restrict competition for “ANY” employee, and Defendants enforced
 7 their agreements across a wide variety of employees to accomplish their goals. Mot. at 24.

8 Alternatively, Plaintiffs move the Court to certify the following class of salaried technical,
 9 creative, and research and development employees (the “Technical Class”),⁵ defined as follows:

10 All natural persons who work in the technical, creative, and/or research and
 11 development fields that are employed on a salaried basis in the United States by one
 12 or more of the following: (a) Apple from March 2005 through December 2009; (b)
 13 Adobe from May 2005 through December 2009; (c) Google from March 2005
 14 through December 2009; (d) Intel from March 2005 through December 2009; (e)
 15 Intuit from June 2007 through December 2009; (f) Lucasfilm from January 2005
 through December 2009; or (g) Pixar from January 2005 through December 2009
 [the “Technical Employee Class”]. Excluded from the Class are: retail employees;
 corporate officers, members of the boards of directors, and senior executives of all
 Defendants.

16 Notice of Mot. at 1. Plaintiffs believe that their alternative Technical Class includes more than
 17 50,000 people. Mot. at 5.

18 Plaintiffs also move the Court to appoint them as Class representatives and to confirm as
 19 final the Court’s prior interim appointment of Lief, Cabraser, Heimann & Bernstein, LLP, and the
 20 Joseph Saveri Law Firm as Co-Lead Counsel. *See* ECF No. 147. Finally, Plaintiffs move the
 21

22 ⁵ This proposed alternative class consists of those members of the Class with the following job
 23 titles: (1) Software Engineers, (2) Hardware Engineers and Component Designers, (3) Application
 24 Developers, (4) Programmers, (5) Product Developers, (6) User Interface or User Experience
 25 Designers, (7) Quality Analysts, (8) Research and Development, (9) Animators, Digital Artists,
 26 Creative Directors and Technical Editors, (10) Graphic Designers and Graphic Artists, (11) Web
 27 Developers, (12) IT Professionals, (13) Systems Engineers and Administrators, and (14)
 28 Employees classified as technical professionals by their employers.” *See* Report of Dr. Edward
 Leamer, App’x B, ECF No. 190 (“Leamer Rep.”). The Technical Employee Class does not include
 the following types of employees: (1) Non-technical Employees (marketing, accounting, finance,
 operations, etc.), (2) Senior Executives, (3) Non-U.S. employees, (4) Network Administrators, (5)
 Systems Support/Maintenance Personnel, (6) Facilities Maintenance Employees, or (7)
 Manufacturing Technicians.” *Id.*

1 Court to appoint as Class Counsel the law firms that have served on the Executive Committee,
 2 Berger & Montague, P.A. and Grant & Eisenhofer, P.A. Mot. at 2.

3 **II. LEGAL STANDARDS**

4 Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23
 5 does not set forth a mere pleading standard. To obtain class certification, plaintiffs bear the burden
 6 of showing that they have met each of the four requirements of Rule 23(a) and at least one
 7 requirement of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended*
 8 273 F.3d 1266 (9th Cir. 2001)). A party seeking class certification must affirmatively demonstrate
 9 "... compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ---, 131 S. Ct. 2541, 2551
 10 (2011).

11 Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so
 12 numerous that joinder of all members is impracticable; (2) there are questions of law and fact
 13 common to the class; (3) the claims or defenses of the representative parties are typical of the
 14 claims or defenses of the class; and (4) the representative parties will fairly and adequately protect
 15 the interests of the class." Fed. R. Civ. P. 23(a). That is, the class must, at a minimum, satisfy the
 16 requirements of numerosity, commonality, typicality, and adequacy of representation in order to
 17 maintain a class action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012);
 18 *see* Fed. R. Civ. P. 23(a). Further, while Rule 23(a) is silent as to whether the class must be
 19 ascertainable, courts have held that the rule implies this requirement as well. *See, e.g., Herrera v.*
 20 *LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 672 (N.D. Cal. 2011).

21 If all four prerequisites of Rule 23(a) are satisfied, the court must "satisfy through
 22 evidentiary proof" at least one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*,
 23 569 U.S. ---, 2013 WL 1222646, *4 (2013). Rule 23(b) sets forth three general types of class
 24 actions. A class may be certified under Rule 23(b)(1) upon a showing that there is a risk of
 25 substantial prejudice from separate actions. Fed. R. Civ. P. 23(b)(1). A class may be certified
 26 under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that
 27 apply generally to the class, so that final injunctive relief or corresponding declaratory relief is
 28 appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Finally, a class may be

1 certified under Rule 23(b)(3) if the court finds that “questions of law or fact common to class
2 members predominate over any questions affecting only individual members, and that a class
3 action is superior to other available methods for fairly and efficiently adjudicating the
4 controversy.” Fed. R. Civ. P. 23(b)(3).

5 “[A] court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap
6 with the merits of the plaintiff’s underlying claim.’” *Amgen Inc. v. Connecticut Retirement Plans
7 and Trust Funds*, 568 U.S. ---, 133 S.Ct. 1184, 1194 (2013) (quoting *Dukes*, 131 S.Ct. at 2551); *see*
8 *also Mazza*, 666 F.3d at 588 (“Before certifying a class, the trial court must conduct a ‘rigorous
9 analysis’ to determine whether the party seeking certification has met the prerequisites of Rule
10 23.”) (quoting *Zinser*, 253 F.3d at 1186). This analysis applies to Rule 23(a) and Rule 23(b).
11 *Comcast Corp.*, 569 U.S. ---, 2013 WL 1222646, *4. Nevertheless, “Rule 23 grants courts no
12 license to engage in free-ranging merits inquiries at the certification stage.” *Amgen Inc.*, 133 S.Ct.
13 at 1194-95. “Merits questions may be considered to the extent—but only to the extent—that they
14 are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”
15 *Id.* at 1195.

16 If a court concludes that the moving party has met its burden of proof, then the court has
17 broad discretion to certify the class. *Zinser*, 253 F.3d at 1186.

18 III. DISCUSSION

19 The Supreme Court has long recognized that class actions serve a valuable role in the
20 enforcement of antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v.*
21 *Standard Oil Co.*, 405 U.S. 251, 262 (1972). Here, Plaintiffs allege that Defendants violated the
22 antitrust laws by entering into an overarching illegal conspiracy in order to suppress employee
23 compensation to artificially low levels. *See Mot.* at 1.

24 Plaintiffs assert that both of their proposed classes satisfy the elements of Rule 23(a),
25 numerosity, commonality, typicality, and adequacy of representation. *Mot.* at 4-6; *see Fed. R. Civ.*
26 *P.* 23(a). Defendants do not contest that Plaintiffs have satisfied these requirements. *See Tr.* of
27 Jan. 17, 2013 Class Cert. Hr’g (“Tr.”) at 5:10-15.

1 Plaintiffs also contend that their proposed classes satisfy the requirements of Rule 23(b)(3).
 2 Defendants disagree. Specifically, Defendants argue that Plaintiffs' proposed classes do not satisfy
 3 Rule 23(b)(3)'s predominance requirement because neither antitrust impact nor damages can be
 4 proved on a class-wide basis. Opp'n at 11. In addition, Defendants contend that Rule 23(b)(3)'s
 5 superiority requirement is not satisfied. Opp'n at 25. This Order focuses exclusively on these
 6 disputes.

7 For the reasons stated herein, the Court does not find that Plaintiffs have fulfilled the
 8 requirements of Rule 23(b)(3). Plaintiffs shall have leave to amend. *See* Part IV.

9 **A. Predominance**

10 The predominance criterion of Rule 23(b)(3) is "far more demanding" than satisfying the
 11 commonality requirement set forth by Rule 23(a). *See Amchem Prods., Inc. v. Windsor*, 521 U.S.
 12 591, 624 (1997). Courts have a duty to look closely at whether this requirement is satisfied. *See*
 13 *Comcast Corp.*, 569 U.S. ---, 2013 WL 1222646, *4.

14 The predominance analysis focuses on "the legal or factual questions that qualify each class
 15 member's case as a genuine controversy" in order to determine "whether proposed classes are
 16 sufficiently cohesive to warrant adjudication by representation." *Amchen Prods., Inc.*, 521 U.S. at
 17 623. As Justice Ginsburg recently emphasized in *Amgen Inc. v. Connecticut Retirement Plans and*
 18 *Trust Funds*, "Rule 23(b)(3) requires a showing that *questions* common to the class predominate,
 19 not that those questions will be answered, on the merits, in favor of the class." 133 S.Ct. at 1191
 20 (emphasis in original).

21 Although "[t]here is no mathematical or mechanical test for evaluating predominance,"
 22 *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814 (7th Cir. 2012), Rule 23(b)(3) is
 23 generally met "where common questions, which can be resolved for all members on a class-wide
 24 basis, are such a significant aspect of the case that they present 'a clear justification for handling
 25 the dispute on a representative rather than on an individual basis.'" *Hanlon v. Chrysler Corp.*, 150
 26 F.3d 1011, 1022 (9th Cir. 1998) (amended) (internal quotation marks and citation omitted). "If, to
 27 make a prima facie showing on a given question, the members of a proposed class will need to
 28 present evidence that varies from member to member, then it is an individual question. If the same

1 evidence will suffice for each member to make a prima facie showing, then it becomes a common
 2 question.” *Messner*, 669 F.3d at 815 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th
 3 Cir. 2005)).

4 “Considering whether questions of law or fact common to class members predominate
 5 begins . . . with the elements of the underlying causes of action.” *Erica P. John Fund, Inc. v.*
 6 *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). A court must analyze these elements in order to
 7 “determine which are subject to common proof and which are subject to individualized proof.” *In*
 8 *re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 311-13 (N.D. Cal. 2010), *abrogated on*
 9 *other grounds in In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 755 n.7 (9th Cir. 2012).

10 In this case, Plaintiffs allege a violation of Section 1 of the Sherman Antitrust Act, 15
 11 U.S.C. § 1, and Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15. *See* Compl. ¶¶ 119-135;
 12 Mot. at 1. “[T]o establish an antitrust claim, plaintiffs typically must prove (1) a violation of
 13 antitrust laws, (2) an injury they suffered as a result of that violation, and (3) an estimated measure
 14 of damages.” *In re New Motor Vehicles Canadian Export Antitrust Litigation* (“*In re New*
 15 *Motors*”), 522 F.3d 6, 19 n.18 (1st Cir. 2008). The Court will address each in turn.

16 1. Antitrust Violation

17 Regarding the first element of Plaintiffs’ Section 1 antitrust claim, the parties agree, as does
 18 the Court, that common issues predominate. *See* Tr. at 17:1-4 (Court: “Do you contest [the
 19 antitrust violation] prong of the analysis?” Mr. Mittelstaedt for Defendants: “Not for purposes of
 20 this motion.”).

21 Plaintiffs assert that Defendants’ conspiracy and agreements restrained trade and are *per se*
 22 unlawful under Section 1 of the Sherman Antitrust Act. CAC ¶ 2; Mot. at 1; *see* 15 U.S.C. § 1
 23 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade
 24 or commerce among the several States, or with foreign nations, is declared to be illegal.”); *see also*
 25 *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1431 (9th Cir. 1995) (explaining that
 26 Section 4 of the Clayton Act allows private parties to sue antitrust violators for damages).

27 In support of Plaintiffs’ Section 1 claim, Plaintiffs have set forth evidence of Defendants’
 28 anti-solicitation agreements, which were memorialized in CEO-to-CEO emails and other

1 documents, such as “Do Not Call” lists putting each firm’s employees off-limits to other
 2 Defendants. These documents show that, while Steve Jobs was CEO of Apple, Apple entered into
 3 explicit anti-solicitation agreements with Adobe, Pixar, and Google, and included on its Hands Off
 4 (Do Not Call List) every Defendant in this case, including Intel, Intuit, and Lucasfilm. *See* Leamer
 5 Rep. ¶¶ 21, 22; *see also* Shaver Decl., Exs. 17, 19, 55, 66. In addition to its anti-solicitation
 6 agreement with Apple, Google also entered into anti-solicitation agreements with Intel and Intuit.
 7 *See, e.g.*, Shaver Decl., Ex. 56; Decl. Dean M. Harvey in Supp. Pls.’ Consolidated Reply (“Harvey
 8 Decl.”), ECF No. 93, Ex. 25. Intel and Pixar agreed not to “proactively pursue” each other’s
 9 employees. *See* Leamer Rep. at 9, n.26. Pixar and Lucasfilm agreed not to compete for each
 10 other’s workers, not to make counteroffers, and to notify each other before extending an offer to an
 11 employee. Shaver Decl., Ex. 60. These agreements applied to all employees, regardless of job
 12 function, product group, or geography.

13 Plaintiffs allege that Defendants’ senior executives concealed each bilateral agreement, and
 14 Defendants’ employees generally were not informed of, nor did they agree to, the terms of any of
 15 the agreements. For example, when discussing Google’s protocol for “Do Not Cold Call” and
 16 “Sensitive” companies, Google CEO Eric Schmidt stated, “I don’t want to create a paper trail over
 17 which we can be sued later? Not sure about this.” Shaver Decl., Ex. 41. Intel CEO, Paul Otellini,
 18 likewise stated: “[W]e have a handshake ‘no recruit’ between eric and myself. I would not like this
 19 broadly known.” Shaver Decl., Ex. 52. Similarly, when discussing Apple’s anti-solicitation policy
 20 with employees from Adobe, Ann Reeves and Brenda Everson of Apple reiterated that they did not
 21 want anything “in writing.” Harvey Decl., Ex. 21; *but see* Shaver Decl., Ex. 66 (“Any candidate
 22 we bring in for interviews [at Pixar] should be told of our gentleman’s agreement early on in the
 23 process.”).

24 Plaintiffs’ allegations mirror the DOJ’s findings following an investigation into Defendants’
 25 alleged misconduct, to which Defendants stipulated in a Final Judgment. *See* Shaver Decl., Ex. 71,
 26 *United States v. Adobe Systems Inc., et al.*, No. 10-1629 (D.D.C. Sept. 24, 2010) (ECF No. 2)
 27 (“DOJ Impact Statement”) (finding these agreements to be a “naked restraint on trade that w[ere]
 28 per se unlawful per Section 1 of the Sherman Act, 15 U.S.C. § 1”).

1 Defendants contend that, if this action proceeds, Defendants will seek to “demonstrate that
2 the agreements should be evaluated under the rule of reason, were reasonable and lawful under that
3 standard, and could not have conceivably had any adverse effect on compensation in any relevant
4 labor market.” Opp’n at 5, n.1. Nevertheless, during oral argument, Defendants conceded that the
5 question of antitrust liability is a common issue rather than an individual one. *See* Tr. at 18:2-8.

6 The Court need not resolve the issue of liability at this time. *See, e.g., Reed v. Advocate*
7 *Health Care*, 268 F.R.D. 573, 581 (N.D. Ill. 2009) (“[W]hether plaintiffs can prove that a
8 conspiracy *existed* is not an issue that we consider on class certification; rather, the question is
9 whether plaintiffs can prove a conspiracy *with common proof*, and the answer is yes.”) (emphasis
10 in original). For purposes of evaluating predominance, it is sufficient that the adjudication of
11 Defendants’ alleged antitrust violation will turn on overwhelmingly common legal and factual
12 issues. Defendants concede, and this Court finds, that Plaintiffs have satisfied this element of Rule
13 23(b)(3). *See* Tr. at 17:1-4.

14 2. Antitrust Impact

15 The second element of Plaintiffs’ Section 1 antitrust claim is impact. “Antitrust ‘impact’—
16 also referred to as antitrust injury—is the ‘fact of damage’ that results from a violation of the
17 antitrust laws.” *In re Dynamic Random Access Memory (“DRAM”) Antitrust Litig.*, No. 02-1486,
18 2006 WL 1530166, *7 (N.D. Cal. June 5, 2006). “It is the causal link between the antitrust
19 violation and the damages sought by plaintiffs.” *In re New Motors*, 522 F.3d at 19 n.18.

20 The question presented by this case is not whether Defendants’ anti-solicitation agreements
21 had an impact on any employees. Defendants concede that some employees may have been
22 impacted. *See* Tr. at 144:11-12 (“And I admit at the start, we are not saying that nobody was
23 impacted.”). The primary issue presented is whether Plaintiffs can show through common proof
24 that Defendants’ alleged conspiracy suppressed wages across the entire All Employee Class or,
25 alternatively, Technical Class, or whether proof of injury is actually “an individual question that
26 would have to be resolved by mini-trials examining the particular circumstances of each class
27 member.” *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 165 (N.D. Cal. 2001).

1 In analyzing whether Plaintiffs have satisfied their burden of showing that common proof
 2 will be able to demonstrate class-wide injury, the Court first considers whether Plaintiffs must
 3 establish antitrust impact in light of the nature of Defendants' alleged conspiracy and, if so, how
 4 persuasive Plaintiffs' proposed methodology for proving common impact must be to satisfy this
 5 requirement. The Court then analyzes the parties' evidence to determine whether Plaintiffs have
 6 satisfied Rule 23(b)(3)'s predominance requirement for the question of class-wide impact.

7 **a. Whether Plaintiffs Must Show Common Impact to Satisfy Rule**
 8 **23(b)(3)'s Predominance Requirement**

9 Plaintiffs first contend that, should the Court determine that common proof of Defendants'
 10 antitrust conspiracy will be the predominant issue at trial, the Court may grant class certification on
 11 that basis alone. *See* Mot. at 7. Specifically, Plaintiffs contend that because "the major factual and
 12 legal issues of whether the Defendants entered into the agreements, their scope, their duration, and
 13 their effect on compensation are *overwhelmingly* common, "th[is] case is no different than any
 14 other price-fixing cartel." Mot. at 6; *see also* Reply at 6 ("Prices do not need to be identical in
 15 order to be impacted by a common conspiracy; courts routinely certify class actions where, as here,
 16 any individual negotiations—of which there is little evidence—were commonly impacted by
 17 Defendants' misconduct."). The Court declines to make such a determination at this juncture.

18 As the Third Circuit stated in *In re Hydrogen Peroxide Antitrust Litig.*, "[i]n antitrust cases,
 19 impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance
 20 requirement because it is an element of the claim that may call for individual, as opposed to
 21 common, proof." 552 F.3d 305, 311 (3d Cir. 2008). Notably, at least five circuit courts and at
 22 least two district courts within this district have held that, for cases involving antitrust violations,
 23 common issues do not predominate unless the issue of impact is also susceptible to class-wide
 24 proof. *See In re New Motors*, 522 F.3d at 20 (1st Cir. 2008); *In re Hydrogen Peroxide Antitrust*
 25 *Litig.*, 552 F.3d 311-312 (3d Cir. 2008); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir.
 26 2003); *Messner*, 669 F.3d at 816 (7th Cir. 2012); *Monsanto Co.*, 400 F.3d at 566 (8th Cir. 2005);
 27 *California v. Infineon Technologies AG ("Infineon")*, No. 06-4333, 2008 WL 4155665, at *5 (N.D.
 28 Cal. Sept. 5, 2008); *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. at 500.

1 Moreover, as the Ninth Circuit noted recently in *Wang v. Chinese Daily News*, --- F.3d ---,
 2 2013 WL 781715, *5 (9th Cir. 2013), “[t]he main concern of the predominance inquiry . . . is the
 3 balance between individual and common issues.” *Id.* at 13 (internal quotation marks and citation
 4 omitted). Therefore, ““a district court abuses its discretion in relying on an internal uniform . . .
 5 policy to the near exclusion of other factors relevant to the predominance inquiry.”” *Id.* (quoting
 6 *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009)).

7 Due to concerns that questions of impact in this case may call for individualized inquiries
 8 that predominate over common ones, the Court finds that Plaintiffs must demonstrate a method for
 9 proving impact on a class-wide basis.

10 **b. Burden of Proof in Demonstrating Antitrust Impact**

11 The Court next addresses how persuasive Plaintiffs’ proposed methodology must be for
 12 demonstrating impact on a class-wide basis. In order to prove common impact, “[p]laintiff[s] must
 13 be able to establish, predominantly with generalized evidence, that all (or nearly all) members of
 14 the class suffered damage as a result of Defendants’ alleged anti-competitive conduct.” *In re TFT-*
 15 *LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 311 (internal quotation marks and citation
 16 omitted).

17 Plaintiffs assert that “[t]he court’s inquiry in this regard is focused and circumscribed;
 18 Plaintiffs need only advance a plausible methodology to demonstrate that antitrust injury *can be*
 19 *proven* on a class-wide basis.” Mot. at 15 (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*,
 20 267 F.R.D. at 311-13). Indeed, multiple courts within this district have endorsed such a standard.
 21 *See, e.g., California v. Infineon Technologies AG*, No. 06-4333, 2008 WL 4155665, at *9 (N.D.
 22 Cal. Sept. 5, 2008) (stating that, at the class certification stage, the Court must “discern only
 23 whether plaintiffs have advanced a plausible methodology to demonstrate that antitrust injury can
 24 be proven on a class-wide basis”); *DRAM*, 2006 WL 1530166, at *9 (same).

25 In applying the plausibility standard, some courts have stated that a court’s inquiry on class
 26 certification should be limited to whether plaintiffs merely “intend” to present “generalized”
 27 evidence of antitrust impact. *See e.g., DRAM*, 2006 WL 1530166, at *9. These courts have further
 28 stated that a court may not consider the merits or weigh competing expert testimony. *See e.g. id.*

1 (“[t]he Court . . . must avoid engaging in a battle of expert testimony”). Indeed, some courts have
 2 accepted expert testimony regarding impact so long as the methodology presented was “seemingly
 3 realistic,” and have declined to consider criticisms of that methodology. *Id.*, at *8-9 (holding that
 4 “Defendants’ challenge to plaintiffs’ [expert] evidence [concerning impact] . . . [went] to the merits
 5 of plaintiffs’ case” and therefore were not appropriate for class certification).

6 However, as explained by Judge Alsup in *In re Graphics Processing Units Antitrust*
 7 *Litigation (“In re GPU”)*, 253 F.R.D. 478 (N.D. Cal. 2008), even under a plausible methodology
 8 standard, “certification [should not be] automatic every time counsel dazzle the courtroom with
 9 graphs and tables.” *Id.* at 491. If the Court were to hold otherwise, “nearly all antitrust plaintiffs
 10 could survive certification without fully complying with Rule 23.” *Id.* at 492.⁶

11 The Court believes that conducting a thorough review of Plaintiffs’ theory and
 12 methodology is consistent with the requirement that the Court conduct a “rigorous analysis” to
 13 ensure that the predominance requirement is met. *See Comcast Corp.*, 569 U.S. ---, 2013 WL
 14 1222646, *4 (stating that the same analytical principles which apply to Rule 23(a), including that a
 15 court must conduct a “rigorous analysis,” govern Rule 23(b)). When parties stage a “battle of the
 16 experts” over whether Rule 23’s requirements have been satisfied, the Ninth Circuit’s decision in
 17 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), indicates that a court must not
 18 merely determine whether such evidence is admissible, but also “judg[e] the persuasiveness of the
 19 evidence presented.” *Id.* at 982. In addition, *Ellis* counsels that the Court must “resolve any
 20 factual disputes necessary to determine whether” Rule 23’s requirements have been satisfied. *Id.* at
 21 983 (stating that “the district court was required to resolve any factual disputes necessary to
 22 determine whether there was a common pattern and practice that could affect the class *as a whole*”)
 23 (emphasis in original).

24
 25 ⁶ Justice Scalia recently expressed similar sentiments when writing for the majority in *Comcast*
 26 *Corp. v. Berhrend*, another antitrust suit brought pursuant to Rule 23(b)(3). Specifically, Justice
 27 Scalia expressed concern that Rule 23(b)(3)’s predominance requirement would be “reduce[d] . . .
 28 to a nullity” if courts declined to assess whether a plaintiff’s proposed methodology for measuring
 and quantifying damages on a class-wide basis was “speculative.” *Comcast Corp.*, 569 U.S. ---,
 2013 WL 1222646, *5 (“Under that logic, at the class certification stage *any* method of
 measurement [would be] acceptable so long as it [could] be applied classwide, no matter how
 arbitrary the measurements may be.”) (emphasis in original).

1 With these principles in mind, the Court proceeds to determine whether Plaintiffs have
 2 shown that the predominance requirement is met for proving class-wide impact. For the reasons
 3 set forth below, the Court concludes that Plaintiffs have not, at this time, satisfied their burden with
 4 regard to the All Employee Class or the Technical Class.

5 **c. Methodology to Prove Class-wide Impact**

6 The Court next considers the methodology and evidence upon which the parties rely in
 7 addressing class-wide impact.

8 In support of showing that common issues predominate for the purpose of assessing class-
 9 wide impact, Plaintiffs submit an expert report of Edward E. Leamer, Ph.D.⁷ See ECF No. 190
 10 (“Leamer Rep.”). Plaintiffs asked Dr. Leamer to evaluate whether evidence common to each class
 11 is capable of showing that the anti-solicitation agreements artificially reduced the compensation of:
 12 (1) members of each class generally; and (2) all or most members of each class. Leamer Rep.
 13 ¶ 10(a). In addition, Plaintiffs asked Dr. Leamer to assess whether there is a reliable class-wide or
 14 formulaic method capable of quantifying the amount of suppressed compensation suffered by each
 15 Class. Leamer Rep. ¶ 10(b).

16 Dr. Leamer studied Defendants’ compensation data, reviewed Defendants’ internal
 17 documents about the agreements and their effects, and applied labor economics to the facts.
 18 Ultimately, Dr. Leamer concluded that common evidence and methods are capable of showing that
 19 (a) the agreements had an adverse effect on compensation; and (b) as a result of Defendants’ anti-
 20 solicitation agreements, the compensation of all or nearly all Class members was suppressed.

21 Dr. Leamer’s analysis proceeds in two steps. First, Dr. Leamer opines that economic
 22 studies and theory, documentary evidence, and statistical analyses are capable of showing that the
 23 anti-solicitation agreements “tend[ed] to suppress employee compensation generally, by preventing
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25 ⁷ Dr. Leamer is the Chauncey J. Medberry Professor of Management, Professor of Economics, and
 26 Professor of Statistics at the University of California at Los Angeles. Dr. Leamer earned a B.A.
 27 degree in Mathematics from Princeton University in 1966, and a Masters in Mathematics and a
 28 Ph.D. degree in Economics at the University of Michigan in 1970. He has published extensively in
 the fields of econometric methodology and statistical analysis, in international economics, and in
 macro-economic forecasting, including on the subject of inferences that may appropriately be
 drawn from non-experimental data.

1 Class members from discovering the true value of their work.” Mot. at 16. In other words, Dr.
2 Leamer opines that class-wide evidence is capable of showing that, at the very least, Defendants
3 were paying *some* members of the Class less than they would have been paid in the absence of the
4 anti-solicitation agreements.

5 According to Dr. Leamer, this first step is supported by principles of information
6 economics, such as “market price discovery.” Dr. Leamer notes that, when evaluating how labor
7 markets function, economists often use a market equilibrium model which “presume[s] that market
8 forces are powerful enough and work rapidly enough that virtually all transactions occur at
9 approximately the same price—the ‘market price’ which equilibrates supply and demand.” Leamer
10 Rep. ¶ 71. In reality, when market conditions change, high transaction costs and limited
11 information flow can slow the process by which transaction prices reach market equilibrium.
12 “Market price discovery” is the process by which participants in a market “search” for the right
13 price. Leamer Rep. ¶¶ 71-73; Leamer Reply ¶¶ 36-40.

14 Dr. Leamer hypothesizes that, by restricting cold-calling and other competition over
15 employees, Defendants’ anti-solicitation agreements impaired information flow about
16 compensation and job offers. Mot. at 3. As a result of inhibiting employees’ ability to discover
17 and obtain the competitive value of their services, employees were afforded fewer opportunities for
18 movement between firms—and thus fewer opportunities to increase their salaries—and deprived of
19 information that could have been used to negotiate higher wages and benefits within a firm. *See*
20 Leamer Rep. ¶¶ 71-76. In addition, Dr. Leamer opines that, by limiting the information available
21 to employees, Defendants could avoid taking affirmative steps, such as offering their employees
22 financial rewards, in order to retain employees with valuable, firm-specific skills. Leamer Rep.
23 ¶¶ 77-80.

24 Second, Dr. Leamer opines that economic studies and theory, documentary evidence, and
25 statistical analyses are capable of showing that this suppression of compensation affected all or
26 virtually all Class members. In order to explain how the adverse effects on compensation due to
27 Defendants’ anti-solicitation agreements would have been felt not only by employees who would
28

1 have been recruited, but by all employees corporation-wide, Dr. Leamer relies on theories of
2 loyalty, fairness, and “internal equity.”

3 Dr. Leamer contends that, “[o]ne foundation of employee loyalty is a feeling of fairness that
4 can translate into a sharing of . . . [a firm’s] rewards with more equality than a market might
5 otherwise produce.” Leamer Rep. ¶ 104. “‘Equitable’ compensation practices spread wage
6 increases or reductions across broad categories of workers.” *Id.* According to Dr. Leamer, this
7 “implies that when outside opportunities put pressure at one point in the wage structure calling for
8 higher wages for a few, firms tend to maintain the overall firm wage structure, rewarding everyone
9 for the improved outside opportunities of some workers.” *Id.* A key component of Dr. Leamer’s
10 theory is that the overall firm wage structure is “rigid.” *See, e.g.*, Leamer Rep. ¶ 101 (explaining
11 that common evidence can demonstrate that the artificial suppression of employee compensation
12 would have been widespread and extended to “all or nearly all members” of the All-Employee
13 Class and Technical Class based, in part, on “economic theory implicating firm incentives to
14 maintain worker loyalty by adhering to principles of internal equity through a *rigid* salary
15 structure.”).

16 Dr. Leamer further explains that, “[t]o maintain loyalty, it is usually better for a firm to
17 anticipate rather than to react to outside opportunities, since if a worker were to move to another
18 firm at a much higher level of compensation, coworkers left behind might feel they have not been
19 fairly compensated.” Leamer Rep. ¶ 105. This “can have an adverse effect on worker loyalty,
20 reducing productivity and increasing interest in employment elsewhere.” *Id.* Therefore, “[t]o
21 avoid this reduction in loyalty in the face of competition, firms may make preemptive
22 improvements in their compensation packages.” *Id.*

23 Essentially, Dr. Leamer opines that, by virtue of the interplay between information
24 economics and considerations of internal equity, cold-calls would have transmitted information to,
25 and put competitive pressure on, [REDACTED]
26 [REDACTED]. *See Reply at*
27 16; *see also* Leamer Rep. ¶ 104. Dr. Leamer further hypothesizes that, by virtue of entering into
28 the anti-solicitation agreements, firms are able to be more relaxed in maintaining competitive

1 compensation packages because such agreements: (1) “suppress competition directly;” (2) “reduce
2 the risk of employees becoming aware of pay practices elsewhere;” and (3) “otherwise eliminate
3 competition for ‘passive’ employees.” Leamer Rep. ¶ 106.

4 Defendants, through their own expert, Kevin M. Murphy, Ph.D.,⁸ attack Dr. Leamer’s
5 analysis and conclusions, and argue that individualized inquiries predominate over common ones
6 for the purpose of determining class-wide impact. *See* ECF No. 230 (“Murphy Rep.”). Defendants
7 contend that Dr. Leamer’s evidence is not only unpersuasive, *see* Opp’n at 11-25, but also
8 inadmissible under *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579 (1993), and Rule
9 702 of the Federal Rules of Evidence, *see* Mot. to Strike at 1. Defendants have moved to strike Dr.
10 Leamer’s testimony on the latter ground. *Id.* For the reasons stated in Part VI.B. *infra*, the Court
11 DENIES Defendants’ Motion to Strike.

12 While Dr. Murphy criticizes the economic literature upon which Dr. Leamer relies, he does
13 not dispute the basic principles of information economics undergirding Dr. Leamer’s hypothesis.
14 *See, e.g.*, Harvey Decl., ECF No. 93, Ex. 13 (“Murphy Dep.”) at 188:6-14; 192:25-193:6; 194:10-
15 196:10; 197:7-19. Similarly, although Dr. Murphy criticizes Dr. Leamer’s report because it does
16 not discuss the strength of the incentive to maintain internal equity as against other compensation
17 goals, such as procedural equity or the value of rewards for individual contributions as a loyalty
18 motivator, *see* Murphy Rep. ¶ 81, this does not negate Dr. Leamer’s hypothesis that internal equity
19 may have played some role in affecting employment compensation.

20 Therefore, the Court finds that Dr. Leamer’s market price discovery and internal equity
21 hypotheses offer theories subject to common proof for how Defendants’ anti-solicitation
22 agreements suppressed compensation broadly. However, as observed by the *In re GPU* Court,
23 theory is not sufficient to satisfy Rule 23(b)(3)’s requirements. *In re GPU*, 253 F.R.D. at 496.

24
25 ⁸ Dr. Murphy is the George J. Stigler Distinguished Service Professor of Economics in the Booth
26 School of Business and the Department of Economics at the University of Chicago. Professor
27 Murphy received a bachelor’s degree in economics from the University of California, Los Angeles,
28 in 1981, and a doctorate degree in economics from the University of Chicago in 1986. Dr. Murphy
has published extensively on labor markets and the determinants of wages and compensation. His
work in labor economics has addressed the market determinants of wage by skill level as well as
the determination of relative wages across industries and occupations.

1 Plaintiff must provide “‘properly analyzed, reliable *evidence*’ that a common method of proof
2 exists to prove impact on a class-wide basis.” *Id.* (emphasis added). Accordingly, the Court
3 proceeds to consider Dr. Leamer’s documentary and statistical evidence.

4 **d. Documentary Evidence Showing Antitrust Impact**

5 In support of proving class-wide impact, Plaintiffs set forth documentary evidence related
6 to: (1) the link between recruitment and “cold calling” and increased compensation; (2)
7 Defendants’ enforcement of the anti-solicitation agreements; and (3) Defendants’ policies and
8 procedures regarding recruitment, retention, and compensation, including documents that show
9 Defendants’ interest in preserving internal equity. In opposition, Defendants submit their own
10 documentary evidence addressing these subjects, including: (1) deposition transcripts and
11 interrogatory responses from the named Plaintiffs; (2) declarations from top management in their
12 human resources, recruitment, compensation and benefits departments; and (3) documents from
13 Google and Intel regarding compensation and benefits.

14 Having reviewed the parties’ materials, the Court finds that Plaintiffs’ common evidence
15 supports Dr. Leamer’s theories regarding price discovery and internal equity, and is likely to be
16 able to prove antitrust injury to at least a portion of Plaintiffs’ proposed Classes.

17 **i. All Employee Class**

18 Much of the common evidence set forth by Plaintiffs would apply to the question of
19 whether members of the All-Employee Class were impacted by Defendants’ anti-solicitation
20 agreements.

21 First, Plaintiffs set forth contemporaneous documents from Defendants’ internal files which
22 show that Defendants viewed competition for workers—including against other Defendants in this
23 lawsuit—as a significant problem. Adobe, for example, was concerned about whether it was
24 “winning the talent war,” Shaver Decl., Ex. 14; [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 [REDACTED] Shaver Decl., Ex. 15; *see*
28

1 also Shaver Decl., Ex. 34 (Google email sharing with staff a 2007 Forbes article entitled “The
2 Recruiting Wars: How to Beat Google to Tech Talent”).

3 Second, the evidence indicates that Defendants viewed recruitment, including cold calling,
4 as crucial to their growth and development. For instance, in order to support Google’s rapid
5 growth, [REDACTED]

6 [REDACTED] See
7 Harvey Decl., Ex. 25, at 7-8. In response to concerns over slow hiring, Google’s Chief Culture
8 Officer, emphasized that “[c]old calling into companies to recruit is to be expected unless they’re
9 on our ‘don’t call’ list.” Shaver Decl., Ex. 42. Donna Morris, the Senior Vice President of Global
10 Human Resources at Adobe, described recruiting talent as “critical” to company growth. Harvey
11 Decl., Ex 1 (“Q: Why is recruiting talent important to Adobe? A: So our critical, most critical
12 asset is people. So really we’re an [intellectual property]-based company.”). [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] *Id.* Intel estimated that, historically,
17 competitive sourcing, including cold calling and research, accounted for [REDACTED]
18 Harvey Decl., Ex. 27, and stated in its [REDACTED]

19 [REDACTED].
20 Third, the evidence indicates that, but for anti-solicitation agreements, high-tech companies
21 would solicit one another’s employees. Adobe personnel recognized that “Apple would be a great
22 target to look into” for the purpose of recruiting, but knew that they could not do so because,
23 “[u]nfortunately, Bruce [Chizen, CEO of Adobe] and Apple CEO Steve Jobs have a gentleman’s
24 agreement not to poach each other’s talent.” Shaver Decl., Ex. 13. Relatedly, as soon as eBay and
25 PayPal were lifted from Google’s “do not call list,” Google’s Director of Staffing Operations
26 emailed Google CEO Eric Schmidt stating, “staffing is ready to pursue several hundred leads and
27 candidates from these two companies for various roles within Google. Given the history with
28 eBay/PayPal and the potential escalation of any recruiting activity directly to you, are there any

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1 directions or sensitivities that you would like the staffing team to follow as we begin sourcing and
2 contacting talent.” Shaver Decl., Ex. 33. In response, Google CEO Eric Schmidt stated, “Yes,
3 good point. So as not to create an avalanche can you please propose and manage to a budget!” *Id.*

4 Fourth, Plaintiffs have offered evidence indicating that Defendants believed that increased
5 competition for workers could lead to higher wages for employees. As expressed by Pixar’s
6 President, Ed Catmull, “[e]very time a studio tries to grow rapidly... it seriously messes up the pay
7 structure . . . [B]y offering high salaries to grow at the rate they desire, people will hear about it and
8 leave.” Shaver Decl., Ex. 61.

9 Fifth, Plaintiffs have set forth evidence showing that cold-calling and solicitation could
10 transmit salary information that spread well beyond any single individual who received a job offer,
11 which supports Dr. Leamer’s price discovery theory. As noted by one Google employee in
12 response to Google’s decision to make counteroffers to some individuals who were recruited to go
13 elsewhere, [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] *Id.*

18 Plaintiffs have also set forth evidence indicating that Defendants generally did consider
19 internal equity as one factor in determining compensation when making offers to attract new
20 employees and counter-offers to retain existing employees. In making offers, Adobe, for example,

21 [REDACTED]
22 [REDACTED]

23 [REDACTED] Similarly, [REDACTED]
24 [REDACTED]

25 [REDACTED] Harvey Decl., Ex. 20. In response, [REDACTED]
26 [REDACTED]

27 [REDACTED] *Id.* Intel even had a computerized program that would run an “Internal
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1 Equity Report” as a tool that staffing consultants could use when developing new offers. *See*
2 Harvey Decl., Ex. 26.

3 In addition, documentary evidence indicates that Defendants recognized that challenges
4 posed by increased competition for employees often required systematic rather than isolated
5 compensation increases. For instance, [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 [REDACTED] However, [REDACTED]

10 [REDACTED]

11 [REDACTED] *Id.* According to him, [REDACTED]

12 [REDACTED]

13 [REDACTED] *Id.*

14 Plaintiffs’ evidence also supports Dr. Leamer’s theory that Defendants’ anti-solicitation
15 agreements were intended to avoid “bidding wars” for personnel that could drive up wages. *See,*
16 *e.g.,* Shaver Decl., Ex. 60 (stating in an email that Pixar and Lucasfilm “have agreed that we want
17 to avoid bidding wars”). As summarized by Pixar’s President, Ed Catmull, when writing to the
18 head of Disney Studios:

19 We have avoided wars up here in Norther[n] California because all of the
20 companies up here - Pixar, ILM [Lucasfilm], Dreamworks, and a couple smaller
places - have conscientiously avoided raiding each other.

21 Shaver Decl., Ex. 61. An email [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] Shaver Decl., Ex. 67.

26 Further evidence that the anti-solicitation agreements were intended to prevent bidding
27 wars and disruptions to internal equity may be found in [REDACTED]

28 [REDACTED]

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[REDACTED]

[REDACTED] Harvey Decl., Ex. 23. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

The evidence also indicates that, to avoid bidding wars that could drive up wages, Defendants structured the agreements to apply to *all* employees, regardless of job type, department, or geography. *See, e.g.*, Shaver Decl., Ex. 17 (a 2005 email from Bill Campbell, Chairman of the Board at Intuit, to Apple CEO Steve Jobs, stating that Google CEO Eric Schmidt, “firmly stopped all efforts to recruit anyone from Apple.”); Shaver Decl., Ex. 56 (a 2007 email from Google CEO Eric Schmidt to Intel CEO Paul Otellini, stating that “Intel has been on the Do Not Call list since the policy was created.”); Shaver Decl., Ex. 19 (a 2005 email between Bruce Chizen, then CEO of Adobe, and Apple CEO Steve Jobs agreeing not to solicit *any* employee from either company); Shaver Decl., Ex. 60 (a 2007 email showing that Lucasfilm and Pixar has an agreement “not to solicit each other’s employees”); Shaver Decl., Ex. 66 (a 2007 email from Lori McAdams, Vice President of Human Resources at Pixar, to Pixar’s recruiting team stating that, “effective now, we’ll follow a gentlemen’s agreement with Apple that is similar to our Lucasfilm agreement. That is . . . we won’t directly solicit any Apple employee (including outside recruiters if we use them.”); *see also* Harvey Decl., Ex. 25 at 13 ([REDACTED])

[REDACTED]

These anti-solicitation agreements prohibited recruiters from communicating directly with another company’s employee—whether orally, in writing, telephonically, or electronically—if that employee had not otherwise applied for a job opening. *See, e.g.*, Shaver Decl., Ex. 25, (“[O]ur [Google] recruiters are strictly following the Do Not Call policy regarding Intel and no one has called, networked, or emailed into the company or its subsidiaries looking for talent.”); Shaver Decl., Ex. 53 (“We cannot recruit (including calling up, emailing or enticing in any way) current

1 Pixar employees to come to work for Intel.”). However, some of Defendants’ agreements reached
2 beyond prohibitions on recruitment. Pixar and Lucasfilm, for example, agreed: (1) not to solicit
3 each other’s employees; (2) to notify each other when making an offer to an employee of the other
4 company even if that employee applied for a job on his or her own initiative; and (3) that any offer
5 would be “final” and would not be improved upon in response to a counter-offer by the person’s
6 current employer (whether Lucasfilm or Pixar). Shaver Decl., Ex. 60.

7 In addition, there were incidents in which Defendants refused to consider job applications
8 from employees of the other Defendants, even if the employees applied on their own initiative. For
9 example, in 2007, Apple personnel discussed an application from an Adobe employee who applied
10 for a position at Apple through a job posting. A senior human resources manager from Apple
11 stated that she “called [the employee] to ensure he is still an Adobe employee, explained our
12 mutual agreement/guidelines, and asked that he contact me should his employment with Adobe
13 terminate, but at this time I am unable to continue exploring with him.” See Harvey Decl., Ex. 21.

14 Indeed, the sustained personal efforts by the corporations’ own chief executives, including
15 but not limited to Apple CEO Steve Jobs, Google CEO Eric Schmidt, Pixar President Ed Catmull,
16 Intuit Chairman Bill Campbell, and Intel CEO Paul Otellini, to monitor and enforce these
17 agreements indicate that the agreements may have had broad effects on Defendants’ employees.
18 For instance, when a recruiter from Google’s engineering team contacted an Apple employee in
19 2007, Apple CEO Steve Jobs forwarded the message to Google CEO Eric Schmidt and stated, “I
20 would be very pleased if your recruiting department would stop doing this.” Shaver Decl., Ex. 24.
21 Google responded by making a “public example” out of the recruiter, and decided to “terminate
22 [the recruiter] within the hour.” *Id.* Also in 2007, Intel CEO Paul Otellini wrote to Google CEO
23 Eric Schmidt asking for help after learning that Google was recruiting Intel employees in Santa
24 Clara. Shaver Decl., Ex. 35. Eric Schmidt confirmed with Paul Otellini that Google “do[es] not
25 actively recruit from Intel . . . If we find that a recruiter called into Intel, we will terminate the
26 recruiter. We take these relationships exceptionally seriously.” Shaver Decl., Ex. 50.

27 Finally, based on the evidence, it appears that Defendants recognized that eliminating the
28 anti-solicitation agreements would lead to greater competition for employees and require enhanced

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1 incentives for retaining employees. For example, Dr. Leamer reports that, after the anti-solicitation
2 agreement between Adobe and Apple ended in 2007, someone from Adobe’s Competitive
3 Intelligence Group reported “recruiting and retaining top talent will likely be more competitive to
4 the extent that the high tech sector remains economically healthy . . . As Microsoft, Google and
5 Apple dial-up the volume on attracting Adobe resources, what changes or new approaches would
6 assist Adobe in retaining top talent?” *See* Leamer Rep. ¶ 88 (citing ADOBE_004964 – 004997 at
7 975).

8 Notably, two months after the DOJ’s antitrust investigation in this case was made public,

9 [REDACTED]
10 [REDACTED] Shaver
11 Decl., Ex. 46. In an internal email, [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 Shaver Decl., Ex. 48. Plaintiffs contend that “[t]his documentary evidence confirms the
17 mechanisms behind that agreements’ effect on compensation.” Mot. at 19.

18 Collectively, the Court finds that these documents provide support for Dr. Leamer’s
19 theories about how the anti-solicitation agreements could have impacted all or nearly all of the All
20 Employee Class.

21 **ii. Technical Class**

22 Despite all of this evidence which supports Plaintiffs’ proposed All-Employee Class, the
23 Court recognizes that some of Plaintiffs’ evidence indicates that the anti-solicitation agreements
24 may have affected only a subset of Plaintiffs’ proposed Classes, which may or may not correlate to
25 the proposed Technical Class. First, cold calling appears to have been particularly important for
26 attracting “top talent.” *See, e.g.*, Shaver Decl., Ex. 14 (stating, in an Adobe power point
27 presentation entitled “Global Talent, Attracting Senior Talent,” that a way to source “top talent”
28 was to focus on “passive” talent, which it defined as “top performers [who] tend to be entrenched”

1 but “may be ‘willing to listen’ if the right opportunity is presented.”); *see also* Harvey Decl., Ex.
 2 14 (demonstrating that Bruce Chizen, CEO of Adobe, had concerns about the loss of “top talent” if
 3 Adobe did not enter into an anti-solicitation agreement with Apple, specifically, “if I tell Steve
 4 [Jobs] it’s open season (other than senior managers), he will deliberately poach Adobe just to prove
 5 a point. Knowing Steve, he will go after some of our top Mac talent like Chris Cox and he will do
 6 it in a way in which they will be enticed to come (extraordinary packages and Steve wooing).”).

7 Second, some evidence indicates that Defendants were particularly concerned about the loss
 8 of technical employees. *See, e.g.*, Shaver Decl., Ex. 45 [REDACTED]

9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED] Defendants
 12 Apple and Intel agreed simply “NOT to hire top talent (esp technical) away from each other,”
 13 rather than to avoid all anti-solicitation efforts. Shaver Decl., Ex. 55.

14 Plaintiffs’ evidence also indicates that Defendants may have been more concerned about
 15 enforcing the anti-solicitation agreements for some categories of employees, such as engineers,
 16 than other categories of employees, such as administrative assistants. For example, Steve Jobs
 17 appears to have actively monitored and enforced the anti-solicitation agreements when he learned
 18 about Google’s software groups and engineering teams recruiting from Apple. *See* Shaver Decl.,
 19 Ex. 25 (showing that, in 2006, Apple CEO Steve Jobs emailed Google CEO Eric Schmidt stating:
 20 “I am told that Googles [*sic*] new cell phone software group is relentlessly recruiting in our iPod
 21 group. If this is indeed true, can you please put a stop to it?”); Shaver Decl., Ex. 24 (after a
 22 recruiter from Google’s engineering team tried to recruit an Apple employee in 2007, Steve Jobs
 23 forwarded the message to Eric Schmidt and wrote, “I would be very pleased if your recruiting
 24 department would stop doing this.”). In contrast, when Rob Cook, Vice President of Software
 25 Engineering at Pixar, asked Steve Jobs whether it would be okay to make an offer to an Apple
 26 employee that applied for a project coordinator/administrative assistant position, Steve Jobs
 27
 28

1 responded by saying, “Yea, it’s fine.” Shaver Decl., Ex. 68. Ed Catmull, Pixar’s President,
2 emphasized to Rob Cook that “[t]he key is to stay away from the engineers.” *Id.*⁹

3 Defendants also may have been more inclined to adjust the salaries of certain groups of
4 employees without necessarily making changes to all other job categories. Dr. Leamer, for
5 example, noted in his expert report that “[a]n internal Pixar email discussed an across-the-board
6 adjustment for ‘our underpaid engineers.’” Leamer Rep. ¶ 124. The author of the email states
7 “[w]e want to send a clear message to these engineers that we value them at least as much as some
8 new hires who are seeing much more competitive offers from other companies.” *Id.* (citing
9 PIX00049648-650). The email further refers to using a “leveling matrix” to “give us a consistent
10 framework for evaluating the expected contribution of our software engineers.” *Id.*

11 Although Plaintiffs’ proposed the Technical Class as an alternative class to be certified by
12 the Court, Plaintiffs provided little discussion or analysis to support this Class definition. *See* Mot.
13 at 25. In addition, Dr. Leamer’s expert report generally does not differentiate between evidence to
14 support the two proposed Classes. *See, e.g.*, Leamer Rep. ¶ 12. Plaintiffs explained during the
15 hearing that the Technical Class was intended to address the Court’s potential concerns about
16 “cohesiveness,” by focusing on the job titles of people working in software, technical, and creative
17 positions. Tr. at 22:11-21. Nonetheless, Plaintiffs believe that “the impact was broader than that.”
18 Tr. at 20-21. Perhaps unsurprisingly, Defendants dispute that the anti-solicitation agreements had
19 such an expansive impact as to affect all or nearly all of the Technical Class, and contend that this
20 proposed Class is not “data driven.” Tr. at 140: 5-8.

21 **iii. Defendants’ Evidence in Opposition to Proving**
22 **Common Impact**

23 Defendants have submitted evidence to demonstrate why they believe that individual issues
24 predominate over common ones for the purpose of assessing antitrust impact.

25 Defendants first contend that individualized issues predominate because, in order to identify
26 who was injured, the Court will have to determine: (1) who was likely to receive a cold call but for

27 ⁹ Of course, the fact that Pixar Vice President Rob Cook and Pixar President Ed Catmull felt
28 compelled to get approval from Steve Jobs before even hiring an administrative assistant seems to
weigh in favor of finding that these agreements had a much broader impact.

1 the agreements, (2) who would have accepted the call; (3) who would have taken the phone call far
2 enough to get some salary information; (4) who would have received an offer; and (5) who would
3 have taken that offer and moved jobs or tried to negotiate a higher wage with his or her boss. *See*
4 Tr. at 15:16-21; 19:1-4. To that end, Defendants highlight that, based on the named Plaintiffs'
5 depositions, it does not appear that: (1) any "named Plaintiff ever negotiated a salary increase at his
6 current employer based on a cold call;" or (2) any named Plaintiff "claim[s] to have received a
7 raise as a result of an offer made to another employee, from a cold call or otherwise, before, during,
8 or after the class period." *See* Opp'n at 8-10; *see also* Decl. of Christina A. Brown In Supp. Defs.'
9 Opp'n ("Brown Decl."), ECF No. 215, Exs. 3, 4, 5, 6 (depositions of named Plaintiffs Hariharan,
10 Stover, Fichtner, and Marshall). Further, Defendants note that "Plaintiffs admitted they were
11 aware of competitive salary levels from multiple sources, including friends, contact at other
12 companies, and websites." Opp'n at 10. Defendants also assert that Plaintiffs' different
13 backgrounds show the wide variation in employees' qualifications and circumstances that a
14 factfinder would have to assess to determine impact.

15 In addition, Defendants argue that, "[b]eyond trying to show that *someone's* salary was
16 reduced by a missed cold call, Plaintiffs would face the impossible task of showing with common
17 evidence that a raise for one employee would produce raises for all employees." *Id.* at 14.
18 Specifically, Defendants argue that there is no concrete evidence that each Defendant was "so
19 concerned with 'internal equity' that an increase in one employee's compensation would
20 automatically drive raises for all employees across all job categories." Opp'n at 1.

21 Defendants characterize Plaintiffs' evidentiary showing as consisting of mere documentary
22 "snippets" which distort the limited importance that Defendants actually placed on "internal
23 equity." *See* Opp'n at 18. For example, Defendants note that Intuit instructed its managers that
24 "'internal equity' is not an objective since talents and markets are not equal." Brown Decl., Ex. 19,
25 Decl. of Mason Stubblefield of Intuit.

26 Defendants also assert that, to the extent that they considered internal equity, the evidence
27 that they have submitted to the Court shows that Defendants were willing to make exceptions for
28 the purpose of attracting and retaining top talent. For example, an Intel powerpoint presentation

1 shows that Intel's "Offer Development Philosophy" considers "the candidate's position, market
2 competitiveness, and internal equity," but that Intel also "recognize[s] that we might have to push
3 internal equity for scarce talent and skills" and, "[a]lthough [Intel] may pay more for critical skills,
4 this does not mean we will elevate non-critical skilled employees to match." Brown Decl., Ex. 27.

5 In contrast to Dr. Leamer's hypothesis about Defendants' "somewhat rigid wage
6 structures," *see* Brown Decl., Ex. 1 ("Leamer Dep.") at 200:1-17, Defendants contend that, in
7 reality, their compensation policies and practices were highly individualized with wide variation in
8 compensation. Opp'n at 17.-20 According to Defendants, "compensation was set by hundreds of
9 different managers who were directed to [REDACTED]

10 [REDACTED] Opp'n at 6-8, 18. In other words, Defendants instructed
11 managers to reward high achieving employees such that pay raises to one employee might not
12 necessarily affect the salary of another employee. *See, e.g.*, Brown Decl., Ex. 21, Decl. of Frank
13 Wagner of Google ¶ 5 ("Google believes that top performers create a disproportionate value to the
14 company, and Google thus seeks to reward exponentially its top performers."); Brown Decl., Ex.
15 16, Decl. of Steven Burmeister of Apple ¶ 3 ("Apple's general philosophy has been to compensate
16 its employees based on their individual contributions to the company and differences in their job
17 scope, responsibilities, and experience."); Decl. of Mason Stubblefield of Intuit Decl. ¶ 19
18 (declaring that, at Intuit, "[i]ndividual salary increase determinations are not reviewed for
19 consistency with salaries elsewhere in the company or otherwise").

20 Defendants' declarations also support finding that, in the short term, an increase in one
21 employee's salary would not necessarily affect the salaries of everyone else. *See, e.g.*, Brown
22 Decl., Ex. 22, Decl. of Michelle Maupin of Lucasfilm ¶ 34 ("All salary increases must come out of
23 the division's salary budget. Therefore, if one employee receives a salary increase, less money is
24 left in the division's salary budget to increase the salaries of all other employees of that division.");
25 Decl. of Steve Burmeister of Apple ¶ 9 (stating that, although a "manager [at Apple] may go
26 outside of the recommended salary range for a particular job . . . she must stay within her overall
27 compensation budgets.").

1 Further, Defendants note that their policies varied in how each manager was directed to
2 handle counteroffers to employees who were solicited by other employees. While Pixar, Intel, and
3 Lucasfilm gave managers discretion to make counteroffers based on performance and other factors,
4 Adobe and Intuit had specific guidelines. *See* Brown Decl., Ex. 23, Decl. of Lori McAdams of
5 Pixar ¶ 23; Ex. 17, Decl. of Danny McKell of Intel ¶ 11; Ex. 22, Decl. of Michelle Maupin of
6 Lucasfilm ¶ 37; Ex. 14, Decl. of Donna Morris of Adobe ¶¶ 28-29; Ex. 19, Decl. of Mason
7 Stubblefield of Intuit ¶ 18.

8 Defendants also contend that they set varying compensation ranges for certain jobs, such
9 that managers had broad discretion to vary individual compensation, even up to 100% or more.
10 *See* Opp'n at 7-8 (citing Brown Decl., Ex. 23, Decl. of Lori McAdams of Pixar ¶ 9; Ex. 17, Decl.
11 of Danny McKell of Intel ¶ 10; Ex. 21, Decl. of Frank Wagner of Google ¶¶ 13, 30; Ex. 19, Decl.
12 of Mason Stubblefield of Intuit ¶ 10). Therefore, Defendants argue that determining whether a
13 raise for one employee would produce raises for all employees would require examining each
14 Defendants' salary structures, practices, and policies, as well as assessing how an individual
15 manager would handle compensation decisions. In light of these issues, Defendants argue that
16 "there is no common evidence to help Plaintiffs make the leap from a salary increase for someone
17 in the accounting department to the salaries of software engineers, in-house counsel, or
18 receptionists." Opp'n at 14.

19 Finally, Defendants emphasize that, despite Plaintiffs' heavy reliance on Google's "Big
20 Bang" to show class-wide impact, there is no evidence that other Defendants followed Google's
21 salary increase. Opp'n at 20. Defendants contend that the Big Bang was "unusual and unique."
22 *Id.*

23 The Court recognizes that some of the issues raised by Defendants may raise individual
24 questions about whether any particular employee was injured. However, much of the documentary
25 evidence Defendants have presented to rebut Plaintiffs' contentions arise in the context of
26 Defendants' own employees' declarations, which were drafted specifically to oppose this Motion
27 for Class Certification. *Cf. In re Wells Fargo Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053,
28 1061 (N.D. Cal. 2007) (scrutinizing carefully declarations from Defendants' employees that

1 appeared “litigation driven”). The Court is more persuaded by the internal, contemporaneous
2 documents created by Defendants before and during the anti-solicitation agreements, such as CEO-
3 to-CEO emails, powerpoint presentations regarding compensation and recruitment from the heads
4 of Defendants’ human resources departments, and inter-office communications about internal
5 equity concerns that corresponded to compensation decisions.

6 Thus, the Court finds that Plaintiffs’ documentary evidence weighs heavily in favor of
7 finding that common issues predominate over individual ones for the purpose of being able to
8 prove antitrust impact. Nevertheless, the Court has concerns that Plaintiffs’ examples, though
9 compelling, may not be sufficient to show that all or nearly all Class members were affected by the
10 anti-solicitation agreements without additional documentary support or empirical analysis.

11 **e. Econometric and Statistical Evidence**

12 Finally, Dr. Leamer offers econometric and statistical evidence, which he asserts bolsters
13 his conclusion that class-wide evidence can show that all or nearly all members of Plaintiffs’
14 proposed Classes were impacted by Defendants’ anti-solicitation agreements.

15 Dr. Leamer’s statistical evidence consists primarily of three different categories of
16 evidence. The first category of statistical evidence upon which Dr. Leamer relies consists of
17 regression analyses to which the Court refers as Dr. Leamer’s “Common Factors Analyses.” *See*
18 *Leamer Rep.*, Figures 11-14. Dr. Leamer’s Common Factors Analyses assess Defendants’
19 “firmwide compensation structures and the formulaic way in which total compensation was varied
20 over time.” *Leamer Rep.* ¶ 128. Dr. Leamer contends that this is evidence that Defendants
21 maintained rigid wage structures based on principles of “internal equity.” *See id.* ¶ 130. Dr.
22 Leamer opines that it may be inferred from the existence of these rigid wage structures that
23 “compensation of Class members tended to move together over time and in response to common
24 factors,” such that “the effects . . . [of] the [anti-solicitation] Agreements . . . would be expected to be
25 broadly experienced by all or nearly all members of the All-Employee Class and Technical Class.”
26 *Id.*

27 Second, Dr. Leamer offers evidence to show “a persistent salary structure across employees
28 consistent with important elements of equity in the Defendants’ compensation practices.” *Leamer*

1 Rep. ¶ 134. Dr. Leamer specifically relies on five charts which purport to track changes in the base
2 salaries and total compensation for the top 10 positions at Apple between 2006 and 2009, and the
3 top 10 positions at Google between 2005 and 2009. *See id.*, Figures 15-17. The Court refers to
4 these five charts as Dr. Leamer’s “Compensation Movement Charts.” Dr. Leamer contends that
5 these charts offer further evidence that compensation for different positions tended to move
6 together over time (*i.e.*, if software engineers received a raise, so did account executives). *See id.*
7 ¶ 134. Based on this evidence, Dr. Leamer opines that “[t]he non-compete-agreements which
8 might tend to focus on subsets of workers would nonetheless have effects that would spread across
9 all or almost all employees at the firm in order to maintain the overall salary structure.” *Id.*

10 Finally, Dr. Leamer supplies a regression model—the “Conduct Regression”—to: (1)
11 show that the anti-solicitation agreements had some impact on the Class (*i.e.*, impacted the Class
12 generally), and (2) quantify the total amount of the impact or damage experienced by each
13 proposed Class (*i.e.*, the total or net reduction in Defendants’ expenditures on compensation during
14 the Class period). *See* Leamer Rep., Figures 20-24 (“Conduct Regression”).¹⁰ According to
15 Plaintiffs, this model “estimates undercompensation for Defendants’ employees on a year-by-year
16 and defendant-by-defendant basis.” Mot. at 23 (citing Leamer Rep. ¶ 145, Fig. 22). “The model
17 allows the effectiveness of the agreements to vary over time and among different kinds of
18 workers.” *Id.* (citing Leamer Rep. ¶ 146).

19 Defendants argue that Dr. Leamer’s statistical and econometric evidence is deficient in
20 several respects and fails to provide persuasive support for Plaintiffs’ theory. *See* Mot. to Strike at
21 16-22; *see also* Opp’n at 20-21.

22 As to the Common Factors Analyses and Compensation Movement Charts, the Court is not
23 persuaded that these analyses support Dr. Leamer’s contention that the effects of the anti-
24 solicitation agreements would have spread to all or almost all employees. With respect to the
25 Conduct Regression, the Court is not persuaded that the Conduct Regression, by itself, provides a
26 plausible method of showing that the detrimental effects of the anti-solicitation agreements were

27
28 ¹⁰ Dr. Leamer prepared separate regression analyses for the All-Salaried Employee Class and the
Technical Class. The Court refers to both regressions collectively as the Conduct Regression.

1 experienced by all or nearly all Class members. Nevertheless, the Court is persuaded that the
 2 Conduct Regression provides a reasonable method of: (1) showing that the anti-solicitation
 3 agreements resulted in Defendants expending less money on compensation than they would have
 4 otherwise (*i.e.*, the Conduct Regression shows impact generally), and (2) quantifying the amount
 5 by which Defendants' expenditures were reduced (*i.e.*, providing a measure of class-wide damages
 6 to the Class). The Court addresses each of these evidentiary models in turn.

7 **i. Common Factors Analyses**

8 Dr. Leamer sets forth Common Factors Analyses, which he uses to show that compensation
 9 of Class members tended to move together over time and in response to common factors.
 10 According to Dr. Leamer, approximately 90 percent of the variation in any individual employee's
 11 compensation can be explained by common factors "such as age, number of months in the
 12 company, gender, location, title, and employer." Leamer Rep. ¶ 128; *see also id.*, Figures 11-14.
 13 Dr. Leamer contends that the Common Factor Analyses are significant because, if "Class members
 14 compensation at any point in time can be explained by common variables," it may be inferred that
 15 "the compensation of Class members tended to move together over time and in response to
 16 common factors" such that a detriment to one Class members' compensation would have affected
 17 the Class as a whole. *Id.* ¶ 130.

18 Defendants contend that Dr. Leamer's Common Factors Analyses prove nothing because
 19 "the 'fit' of these regressions—their ability to explain—is almost entirely attributable to where the
 20 employee works and his job title." Opp'n at 20. In critiquing Dr. Leamer's model, Dr. Murphy
 21 contends that "the regressions simply reflect that, in these labor markets like all competitive ones,
 22 what an employee does and whom she works for explain much of her compensation" and are not
 23 indicative of a rigid wage structure. *Id.* (citing Murphy Rep. ¶¶ 89-92). Defendants argue that the
 24 Common Factors Analyses cannot, as Dr. Leamer claims, establish "that compensation of different
 25 employees with different job titles are correlated with each other *over time*," such that it may be
 26 inferred that an impact to one Class member would have necessarily rippled out to other Class
 27 members. Opp'n at 21 (quoting Leamer Dep. 206:4-21). The Court agrees.
 28

1 First, as noted by Defendants, the Compensation Movement Charts only examine the
2 compensation movement for a small fraction of the total Class, approximately 20 job titles at two
3 companies out of the thousands of job titles included in the Classes, which were spread across all
4 seven Defendants. Mot. to Strike at 21. Furthermore, these job titles appear to be almost
5 exclusively titles that would be included in the Technical Class. Thus, these charts shed little light
6 on whether compensation for more disparate titles (*e.g.*, a custodian at an Intel office in Texas and
7 an engineer at an Intel office in California) moved together over time.

8 Moreover, during his deposition, Dr. Leamer admitted that “some” of the positions not
9 selected for inclusion in the Compensation Movement Charts would not show the same “consistent
10 movement” as the 20 positions that were selected for the charts. Leamer Dep. at 262:3-10
11 (discussing movement of compensation for Apple job titles); *see id.* at 275:13-18 (Dr. Leamer
12 stating that he was aware there might be “anomalous” results but that, “in the heat of the moment,”
13 he had decided to assume that “the anomalies would be resolved”).¹³ Consequently, it is not
14 clear that the 20 positions reflected on the chart are representative of the compensation movement
15 of all Class members. Indeed, Dr. Murphy expanded Dr. Leamer’s analysis to include the top 25
16 positions at each of the seven Defendants and found that, in any given year, compensation for these
17 positions moved in different directions (*e.g.*, compensation for some positions fell while
18 compensation for others rose) and by different percentages. *See* Murphy Rep., Ex. 18A, 18B. In
19 light of Plaintiffs’ failure to provide a broader sampling, the Court is not persuaded that the
20 Compensation Movement Charts are particularly probative of whether salaries for all or nearly all
21 Class members moved together over time.

22 Even putting aside the small sample size provided by the Compensation Movement Charts,
23 the Court is not be persuaded that the Compensation Movement Charts provide particularly
24 compelling evidence regarding whether salaries at each company were linked. Dr. Leamer

25 Dr. Leamer’s conclusions based on these charts, the Court will consider Defendants’ arguments
26 here.

27 ¹³ During his deposition, Dr. Leamer was asked whether the fact that “there are significant numbers
28 of other job titles that may not be consistently smooth . . . over time” affected his opinion. Dr.
Leamer stated that it did not, but only because he did not know for sure that the movement of any
of the thousands of omitted positions was not consistently smooth. Leamer Dep. at 3-17.

1 admitted that the allegedly parallel movement reflected in the charts is also consistent with a “non[
2] rigid wage structure.” Leamer Dep. at 283:23-25. This admission seriously undermines any
3 inferences that may be drawn from the Compensation Movement Charts.¹⁴

4 In light of the issues discussed above, the Court does not find that the Compensation
5 Movement Charts provide sufficient evidence supporting Plaintiffs’ argument that compensation
6 for all or nearly all employees in either the All Employee Class or the Technical Class were linked.

7 **iii. Conduct Regression**

8 Finally, Dr. Leamer uses a regression model to show that the anti-solicitation agreements
9 had some impact on the Class (*i.e.*, impacted the Class generally), and to quantify the total amount
10 of the impact on the Class (*i.e.*, the total or net reduction in Defendants’ expenditures on
11 compensation during the Class period). *See* Leamer Rep., Figures 20-24. This model incorporates
12 a range of variables designed to account for factors including: (1) age, sex, and years at the
13 company; (2) the effects on compensation caused by the anti-solicitation agreements (the “Conduct
14 Effects”); and (3) the effects caused by factors specific to each Defendant (*e.g.*, firm revenue, total
15 number of new hires, etc.). *See id.*, Figs. 20, 23. Dr. Leamer uses the model to estimate the
16 average or net under-compensation at each firm during the period in which the DNCC Agreements
17 were in effect. *See id.* Fig. 22 and 24; Reply at 33.

18 The Court is generally persuaded that the Conduct Regression is capable of: (1) showing
19 that, while the anti-solicitation agreements were in effect, Defendants’ total expenditures on
20 compensation were less than they should have been, and (2) providing an estimate of the net
21 amount by which Defendants were under-compensating their employees (class-wide damages).

22
23
24 ¹⁴ The Court is also concerned by the fact that the Compensation Movement Charts did not show
25 that salaries moved together in every year. Significantly, with respect to the Apple positions,
26 between 2007 and 2008 (one of the three year-long periods shown on the chart, or 33 percent of the
27 sample period), the total compensation for almost half of the positions moved in different
28 directions. *See* Leamer Rep., Fig. 15 (showing total compensation for four positions went down
between 2007 and 2008, while total compensation for approximately six positions rose); Murphy
Rep., App’x. 8B (same).

1 Defendants argue that the Conduct Regression is flawed in a number of respects. Mot. to
 2 Strike at 9; Opp'n at 22-24. As will be set forth below, the Court is not persuaded by Defendants'
 3 arguments. The Court addresses each of the flaws identified by the Defendants in turn.

4 First, Defendants contend that the Conduct Regression is flawed and should not be admitted
 5 because Dr. Leamer failed to conduct a sensitivity analysis. *See* Mot. to Strike at 11. A
 6 "sensitivity analysis... [is an] exploration of how sensitive [a model's] conclusions are to a choice
 7 of variables." Leamer Dep. at 351:4-6. Defendants contend that the Conduct Regression is
 8 sensitive in at least three respects, which the Court will now address.

9 The first purported "sensitivity" identified by Defendants has to do with Dr. Leamer's
 10 decision to perform the regression using aggregate data from all of Defendants' employees. Mot.
 11 to Strike at 12. Defendants contend that Dr. Leamer should have performed "disaggregated"
 12 analyses for each Defendant using only data from that Defendants' employees. *See id.* Defendants
 13 argue that, when Dr. Murphy disaggregated the Conduct Regression, he received dramatically
 14 different results. *See id.* at 12-13; Murphy Rep. ¶ 117 (finding that Lucasfilm and Pixar "show[ed]
 15 no 'undercompensation' but instead 'overcompensation' . . . throughout the period," Google,
 16 Adobe, and Intel showed overcompensation in some years, and Apple showed "much smaller"
 17 undercompensation).

18 As an initial matter, Dr. Murphy does not appear to have created truly disaggregated models
 19 for each Defendant. Rather, Dr. Murphy, like Dr. Leamer, generated a single model for all
 20 Defendants using aggregate data from all Defendants. However, unlike Dr. Leamer, Dr. Murphy
 21 included 42 additional Defendant-specific variables. *See* Murphy Rep. ¶ 116; Decl. of Edward E.
 22 Leamer Supp. of Reply ("Leamer Reply Rep."), ECF No. 247, ¶ 100. As Dr. Leamer testified, the
 23 use of so many additional Defendant-specific variables runs the risk of "overwhelm[ing] the
 24 model." Leamer Reply Rep. ¶ 100. Moreover, out of the 42 Defendant-specific variables
 25 introduced in Dr. Murphy's "disaggregated" model, 28 of them related to the effect of the anti-
 26 solicitation agreements. *See* Murphy Rep., App'x 9A. The use of so many of these variables may
 27 also "minimize artificially" the effects of the anti-solicitation agreements by spreading those effects
 28

1 across a wider range of variables. *See* Leamer Reply Rep. ¶ 101. In light of these issues, the Court
2 is not persuaded that Dr. Murphy's results are more credible than Dr. Leamer's.

3 Moreover, the Ninth Circuit has recognized that the use of aggregate data in regression
4 analysis is often appropriate "where [a] small sample size may distort the statistical analysis and
5 may render any findings not statistically probative." *Paige v. California*, 291 F.3d 1141, 1148 (9th
6 Cir. 2002) (amended). In such a case, the use of "aggregate numbers" may "allow for a [more]
7 robust analysis and yield more reliable and more meaningful statistical results." *Ellis v. Costco*
8 *Wholesale Corp.*, 285 F.R.D. 492, 523 (N.D. Cal. 2012), appeal dismissed (Jan. 16, 2013). Here,
9 Dr. Leamer stated that the available data regarding Defendants' compensation practices was
10 "limited," Leamer Reply Rep. ¶ 99, particularly by the relatively short length of the data period,
11 2001-2011. Thus, this would appear to be a circumstance where aggregation may be appropriate.
12 Moreover, as Dr. Leamer testified, the use of aggregate data allowed Dr. Leamer to produce a
13 "more coherent, more efficient model." Leamer Dep. at 364:8-365:7.

14 Finally, even if Dr. Murphy had developed truly disaggregated models, given that the use of
15 aggregate data may "yield more reliable and more meaningful statistical results," *Ellis*, 285 F.R.D.
16 at 523, it is not clear that these models would be reliable. *See* Leamer Reply Rep. ¶ 101 (stating
17 that completely disaggregating the model "would reduce the number [of observations] to at most
18 11 annual observations for each Defendant, and it would be impossible to estimate a model of the
19 scope of [Dr. Leamer's] with so few time-series experiments"). Thus, the Court is not persuaded
20 that Dr. Leamer's failure to disaggregate constitutes an error in his methodology.

21 The second alleged sensitivity identified by Defendants is Dr. Leamer's choice of a
22 benchmark period. Mot. to Strike at 13. Defendants argue that, if the benchmark period is
23 changed from the two years preceding and the two years following the period in which the anti-
24 solicitation agreements were in effect ("Conduct Period"), to only the two years following this
25 period, then the model shows that there was net over-compensation rather than under-
26 compensation. *See id.* The Court is not persuaded. Defendants fail to explain why it makes sense
27 to limit the benchmark period in this way. For example, Defendants have not shown that the pre-
28 conduct data should be excluded because it is not comparable to data from the conduct period.

1 Furthermore, the Court observes that, in altering the benchmark periods, Defendants have
2 reduced the total amount of data available regarding the non-conduct periods. As discussed
3 previously, less data may result in less accurate results. *See* Leamer Reply Rep. ¶ 96 (stating that
4 by eliminating the pre-conduct period data Dr. Murphy is attempting “to estimate the effect of the
5 conduct that occurred over five years” using only “two non-conspiracy years” and it is “startling
6 that Dr. Murphy would conduct such an exercise in light of his understanding that the information
7 in the data is limited.”). Thus, the fact that Dr. Leamer’s results are sensitive to Dr. Leamer’s
8 decision to use both pre- and post-conduct periods as benchmark periods does not persuade the
9 Court that Dr. Leamer’s Conduct Regression is flawed.

10 Defendants also contend that the Conduct Regression is flawed because Dr. Leamer failed
11 to include a variable to “control for changes in the value of . . . equity compensation [to employees]
12 over time.” Mot. to Strike at 13. Defendants contend that when Dr. Murphy introduced an equity
13 variable, specifically a variable that tracks changes in the S&P 500, the Conduct Regression
14 yielded much smaller under-compensation for the All-Salaried Employee Class and
15 overcompensation for the Technical Class. *See* Murphy Rep. ¶ 138. This argument fails.

16 As an initial matter, Dr. Leamer’s failure to include a variable for changes in the value of
17 the S&P 500’s stock price does not make the Conduct Regression inadmissible. *See Bazemore*,
18 478 U.S. at 400 (“Normally, failure to include variables will affect the analysis’ probativeness, not
19 its admissibility.”). Defendants have not persuaded the Court that this failure affects the probative
20 value of Dr. Leamer’s results. Significantly, the equity variable Defendants selected—a variable
21 reflecting changes in the S&P 500—does not track or reflect variations in Defendants’ stock prices
22 or compensation. Rather, it tracks variations in the stock price of hundreds of unrelated companies.
23 *See* Leamer Reply Rep. ¶ 89. Thus, the fact that including this variable significantly altered the
24 results of Dr. Leamer’s analysis does not persuade the Court that Dr. Leamer’s results should be
25 disregarded or that the Conduct Regression is flawed. Moreover, the Court notes that when Dr.
26 Leamer used each Defendants’ average stock prices as a variable (an ostensibly more relevant
27 variable), the model still predicted net under-compensation. *See* Leamer Reply, Fig. 10 and 11.

28

1 In addition to the sensitivity issues discussed above, Defendants argue that the Conduct
 2 Regression is flawed because Dr. Leamer failed to account for the fact that compensation for
 3 employees within the same firm is correlated. *See* Mot. to Strike at 16; Murphy Rep. ¶ 126. Dr.
 4 Murphy contends that, given this correlation, Dr. Leamer should have clustered the standard errors.
 5 *See* Murphy Rep. ¶ 126 (“A generally accepted method to take into account the fact that
 6 observations used to estimate a regression contain ‘groups’ of observations that are affected by
 7 certain common factors (such as those affecting a particular company or present in a single year) is
 8 commonly referred to as ‘clustering’ the standard errors”). Dr. Murphy states that clustering the
 9 standard errors reveals that Dr. Leamer’s results are not statistically significant because their “p-
 10 values” are greater than 5%. *Id.*, Ex. 22A.

11 The Court finds that Dr. Leamer’s failure to cluster the standard errors does not provide a
 12 sufficient basis to reject the Conduct Regression. Assuming *arguendo*, that Dr. Leamer should
 13 have clustered the standard errors, the fact that, when the errors are clustered, the Conduct
 14 Regression’s results are not statistically significant at the 95 percent level does not persuade the
 15 Court that the regression is inadmissible (although this failure might affect the model’s probative
 16 value). *See Cook v. Rockwell Int’l Corp.*, 580 F. Supp. 2d 1071, 1105 (D. Colo. 2006) (holding that
 17 neither “the Tenth Circuit ([nor] any other court) has adopted a rule barring admission of any
 18 epidemiological study that was not statistically significant at the 95-percent confidence level.”).
 19 Moreover, Dr. Murphy testified that a model’s results need not necessarily be statistically
 20 significant result to be reliable. Murphy Dep. at 366:14-20. Finally, as explained by Dr. Leamer,
 21 adjusting the standard errors is only one way of controlling for correlations between employees.
 22 *See* Leamer Reply Rep. ¶¶ 76, 78, 82, 83. Another approach would be to include variables to
 23 explain the commonalities across firms. *See id.* ¶ 83. Dr. Leamer has already included one such
 24 variable, revenue. *See id.* ¶¶ 82-83. Thus, the Court concludes that Dr. Leamer’s failure to cluster
 25 the standard errors does not provide a sufficient basis to conclude that the Conduct Regression does
 26 not provide a plausible methodology for the purposes of class certification.¹⁵

27 _____
 28 ¹⁵ The Court does, however, note that Dr. Leamer’s report is slightly ambiguous as to whether any
 variables besides revenue should have been included to control for correlations across employees.

1 In summary, the Court finds that Dr. Leamer's Common Factors Analyses and
 2 Compensation Movement charts fail to provide adequate support for, or confirmation of, his theory
 3 that there was a rigid wage structure such that an impact to some of Defendants' employees would
 4 necessarily have resulted in an impact to all or nearly all employees. The Court is, however,
 5 persuaded that Dr. Leamer's Conduct Regression provides a plausible methodology for showing
 6 generalized harm to the Class as well as estimating class-wide damages.

7 3. Damages

8 In addition to disputing whether Plaintiffs can show impact on a class-wide basis, the
 9 parties dispute whether Plaintiffs can show damages on a class-wide basis and whether the inability
 10 to prove damages using common evidence precludes a finding that the predominance requirement
 11 is met.

12 Plaintiffs contend that Dr. Leamer can calculate damages to the Class in the aggregate, and
 13 that this is sufficient for the purposes of class certification. Mot. at 23 (citing Leamer Rep. ¶¶ 135-
 14 48); see *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 324 (E.D. Mich. 2001) (collecting
 15 cases to support this proposition). Moreover, Plaintiffs contend that the Ninth Circuit has held that
 16 the need for individualized "damage calculations alone cannot defeat certification." *Yokoyama v.*
 17 *Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). Defendants argue that Dr.
 18 Leamer has admitted that his regressions cannot estimate damages on an individual basis. Opp'n at
 19 25 (citing Leamer Dep. at 23:23-24:7, 398:21-399:11).

20 Recently, the Supreme Court addressed the burden on plaintiffs at the class certification
 21 stage to show that damages are capable of measurement on a class-wide basis. Justice Scalia,
 22 writing for the majority, stated that "[c]alculations need not be exact, but at the class-certification
 23 stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its
 24 liability case, particularly with respect to the alleged anticompetitive effect of the violation."
 25 *Comcast Corp.*, 569 U.S. ---, 2013 WL 1222646, *5 (majority op.). Because the *Comcast*

26 *See* Leamer Reply Rep. ¶ 84 (indicating that, rather than clustering the standard errors, the "better
 27 route . . . is to find why the model does not track the employer-year averages well enough" and to
 28 find "another [appropriate] explanatory variable"). To the extent there are other variables that may
 improve the accuracy of the Conduct Regression and obviate the need for clustering, Dr. Leamer is
 encouraged to include them in his next report.

1 plaintiffs' methodology for proving damages was not tied to their theory of impact, plaintiffs had
 2 failed to satisfy Rule 23(b)(3)'s predominance requirement. Justices Ginsburg and Breyer, writing
 3 for the dissent, emphasized that the majority opinion "breaks no new ground on the standard of
 4 certifying a class action under Federal Rule of Civil Procedure 23(b)(3)." *Id.* *9 (Ginsburg and
 5 Breyer, JJ., dissenting). "In particular, the decision should not be read to require, as a prerequisite
 6 to certification, that damages attributable to a class-wide injury be measurable 'on a class-wide
 7 basis.'" *Id.* Indeed, "[r]ecognition that individual damages calculations do not preclude class
 8 certification under Rule 23(b)(3) is well nigh universal." *Id.*

9 Here, Dr. Leamer concludes that common evidence and a regression approach can be used
 10 to create a model for quantifying the estimated cost to Class members of Defendants' challenged
 11 conduct in terms of a percentage of wage suppression during the periods when anti-solicitation
 12 agreements were in effect for each Defendant. Leamer Rep. ¶¶ 141-48. While the Conduct
 13 Regression cannot estimate damages on an individual basis, *see* Leamer Dep. at 23:23-24:7, the
 14 Conduct Regression does provide a method of estimating the aggregate undercompensation to
 15 Defendants' employees on a year-by-year and defendant-by-defendant basis. *Id.* ¶ 145, Fig. 22.
 16 The model allows the effectiveness of the agreements to vary over time and among different kinds
 17 of workers. *Id.* ¶ 146. Dr. Leamer also demonstrates a model that estimates class-wide damages
 18 for members of the alternative Technical Class. *Id.* ¶ 147, Fig. 24.

19 Plaintiffs' method of calculating damages, as set forth by Dr. Leamer, is consistent with
 20 their theory of liability. In addition, for the reasons discussed above in regard to Dr. Leamer's
 21 Conduct Regression, the Court finds that Plaintiffs have established a plausible method for
 22 providing an estimate of damages to each proposed Class. Therefore, the Court finds that Plaintiffs
 23 have satisfied their burden, for the purpose of Rule 23(b)(3), on the issue of damages.

24 4. Conclusion Regarding Predominance

25 Having undertaken a rigorous analysis of Plaintiffs' evidence, the Court finds that Plaintiffs
 26 have satisfied their burden for predominance on the first and third elements of Plaintiffs' Section 1
 27 antitrust claim—antitrust violation and damage. However, the Court has concerns about the
 28 capacity of Plaintiffs' evidence and proposed methodology to prove impact to the All Employee

1 Class or the Technical Class. The Court is most concerned about whether the evidence will be able
 2 to show that Defendants maintained such rigid compensation structures that a suppression of wages
 3 to some employees would have affected all or nearly all Class members. The Court is also
 4 concerned that Plaintiffs' proposed classes may be defined so broadly as to include large numbers
 5 of people who were not necessarily harmed by Defendants' allegedly unlawful conduct. *See*
 6 *Kohen v. Pacific Inv. Management Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (stating that, while it is
 7 true "that a class will often include persons who have not been injured by the defendant's conduct,"
 8 "if the [class] definition is so broad that it sweeps within it persons who could not have been
 9 injured by the defendant's conduct, it is too broad" and the class should not be certified).
 10 However, the Court believes that, with the benefit of the discovery that has occurred since the
 11 hearing on this motion, Plaintiffs may be able to offer further proof to demonstrate how common
 12 evidence will be able to show class-wide impact to demonstrate why common issues predominate
 13 over individual ones. *See Part IV supra.*

14 **B. Superiority**

15 Rule 23(b)(3) also tests whether "a class action is superior to other available methods for
 16 the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Under Rule
 17 23(b)(3), the Court must consider four non-exclusive factors in evaluating whether a class action is
 18 a superior method of adjudicating the plaintiffs' claims: (1) the interest of each class member in
 19 individually controlling the prosecution or defense of separate actions; (2) the extent and nature of
 20 any litigation concerning the controversy already commenced by or against the class; (3) the
 21 desirability of concentrating the litigation of the claims in the particular forum; and (4) the
 22 difficulties likely to be encountered in the management of a class action. *Zinser*, 253 F.3d at 1190-
 23 92.

24 Plaintiffs state that "[c]lass treatment is by definition superior to thousands of individual
 25 claims in an antitrust case where common issues of liability and impact predominate." Mot. at 23
 26 (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. at 314, for the proposition that, "if
 27 common questions are found to predominate in an antitrust action . . . the superiority prerequisite
 28 of Rule 23(b)(3) is satisfied"). Plaintiffs contend that Class members' individual damages, even

1 after mandatory trebling, are insufficiently large to warrant individual litigation. *Id.* at 314-315
2 (noting that, in antitrust cases, individual damages “are likely to be too small to justify litigation,
3 but a class action would offer those with small claims the opportunity for meaningful redress”).

4 Plaintiffs further contend that “[c]lass treatment will also be more manageable and efficient
5 than hundreds or thousands of individual actions litigating the same issues with nearly identical
6 proof. . . . Either defendants colluded or they did not; either their conspiracy artificially suppressed
7 their compensation structure or it did not. Any trial here will focus on these questions and the
8 same evidence, whether it involves a single employee or the Class as a whole.” Mot. at 23-24.

9 Defendants contend that “[t]he ‘numerous and substantial separate issues’ each Class
10 member would have to litigate to ‘establish his or her right to recover individually’ means that
11 ‘class action treatment is not the ‘superior’ method of adjudication.” Opp’n at 25 (citing *Zinser*,
12 253 F.3d at 1192). According to Defendants, “Plaintiffs have presented no viable means to
13 determine antitrust impact or damages class-wide. Lumping all employees’ claims together would
14 violate the Rules Enabling Act.” *Id.* (citing 28 U.S.C. § 2072(b), and *Dukes*, 131 S Ct. at 2561). In
15 addition, Defendants argue that it would violate their due process right to assert “every available”
16 defense against each Class member. Opp’n at 25 (citing *Lindsey v. Normet*, 405 U.S. 56, 66
17 (1972)). As a result, class treatment of Plaintiffs’ claims would be unmanageable.” *Id.*

18 The Court finds that, for both the All Employee Class and the Technical Class, Class
19 members’ interests weigh in favor of having this case litigated as a class action. In addition, the
20 nature of Defendants’ alleged overarching conspiracy and the desirability of concentrating the
21 litigation in one forum weigh heavily in favor of finding that class treatment is superior to other
22 methods of adjudication of the controversy. *See Zinser*, 253 F.3d at 1190-92.

23 The Court is also inclined to find that questions regarding manageability weigh in favor of
24 finding class treatment superior to other methods of adjudication. However, in light of the Court’s
25 finding that Plaintiffs have failed to satisfy Rule 23(b)(3)’s predominance requirement at this time,
26 the Court declines to rule now on Plaintiffs’ ability to satisfy the superiority requirement.
27
28

IV. LEAVE TO AMEND

1 For the reasons stated herein, the Court does not find that Plaintiffs have satisfied the
2 predominance requirement of Rule 23(b)(3) for the purpose of the All Employee Class or the
3 Technical Class. Nevertheless, the Court is keenly aware that Defendants did not produce
4 significant amounts of discovery or make key witnesses available for depositions until after the
5 hearing on Plaintiffs' Motion for Class Certification. *See* Tr. at 80-125. Moreover, as discussed in
6 Section VI.A., Defendants' Opposition to Class Certification relied heavily on declarations from
7 Defendants' current employees, some of whom were not timely disclosed and whose documents
8 were not produced to Plaintiffs. Since the Class Certification hearing, Plaintiffs have conducted
9 approximately fifty depositions of Defendants' high-ranking employees, including Defendants'
10 CEOs and heads of Human Resources. *See* ECF Nos. 320, 327, 3336, 360, 365, 379. In addition,
11 during this time, Defendants have provided Plaintiffs with over ten thousand documents. *Id.*; *see*
12 *also* ECF No. 371. The Court believes that some of the recently produced discovery may affect
13 Plaintiffs' ability to satisfy the predominance requirement for one or both of their proposed
14 Classes. Therefore, while the Court DENIES Plaintiffs Motion for Class Certification, the Court
15 affords Plaintiffs leave to amend.

V. CLASS COUNSEL

16
17 In addition to deciding whether Plaintiffs' proposed Classes should be certified pursuant to
18 Rule 23, Plaintiffs' Motion for Class Certification requests that the Court determine whether named
19 Plaintiffs should be appointed as Class representatives and whether the Court should appoint
20 Interim Co-Lead Counsel as Co-Lead Class Counsel and interim members of the Executive
21 Committee as Class Counsel. *See* Notice of Mot. at 2, ECF No.187.

22 The Court hereby CONFIRMS as final the appointment of Lieff, Cabraser, Heimann
23 & Bernstein, LLP, and the Joseph Saveri Law Firm as Co-Lead Counsel. *See* ECF No. 147.

24 In addition, the Court GRANTS Plaintiffs' request to appoint as Class Counsel the law
25 firms that have served on the Executive Committee, Berger & Montague, P.A. and Grant &
26 Eisenhofer, P.A. Notice of Mot. at 2.

27 The Court declines to appoint Plaintiffs as Class representatives at this time.
28

1 **VI. SUPPLEMENTAL MOTIONS AND EVIDENTIARY OBJECTIONS**

2 **A. Defendants' Discovery Obligations**

3 Plaintiffs request that the Court exclude Dr. Murphy's expert report and deny Defendants'
4 Opposition because, for five of the eleven employee declarations that Defendants submitted in
5 opposition to class certification, "Defendants either refused to produce documents from the
6 witnesses' files or did not disclose the witnesses' identities (or did so in an untimely fashion),
7 impairing Plaintiffs' ability to explore whether evidence exists that may contradict the witnesses'
8 declarations." Reply at 39.

9 The disputed witness declarations include the declarations from: (1) Steven Burmeister
10 (Apple), Brown Decl., Ex. 16; (2) Mason Stubblefield (Intuit), Brown Decl., Ex. 19; (3) Danny
11 McKell (Intel), Brown Decl., Ex. 17; (4) Michelle Maupin (Lucasfilm), Brown Decl., Ex. 22; and
12 (5) Rosemary Arriada-Keiper (Adobe), Brown Decl., Ex. 24. Plaintiffs argue that exclusion is
13 appropriate under Federal Rule of Civil Procedure 37(c)(1).

14 "The Ninth Circuit gives 'particularly wide latitude to the district court's discretion to issue
15 sanctions under Rule 37(c)(1).'" *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541, 544 (N.D. Cal.
16 2009) (quoting *Yeti by Molly, Ltd. v. Deckers*, 259 F.3d 1101, 1106 (9th Cir. 2001)); *see also*
17 *Bollow v. Fed. Reserve Bank of S.F.*, 650 F.2d 1093, 1102 (9th Cir. 1981) (amended) ("The
18 decision whether to penalize a party for dilatory conduct during discovery proceedings is
19 committed to the sound discretion of the trial court."). In determining the appropriateness of
20 discovery sanctions, a court should consider the following factors: (1) "[T]he public's interest in
21 expeditious resolution of litigation;" (2) "the court's need to manage its docket;" (3) "the risk of
22 prejudice to the defendants;" (4) "the public policy favoring disposition of cases on their merits;"
23 and (5) "the availability of less drastic sanctions." *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th
24 Cir. 1997) (citing *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990)).

25 Plaintiffs contend that Ms. Arriada-Keiper's declaration should be excluded because she
26 "did not appear in Adobe's initial Rule 26(a) disclosures, and appeared in its supplemental
27 disclosures only after Plaintiffs moved for class certification." Reply at 40. Furthermore, Ms.
28 Arriada-Keiper's documents have not been produced. *Id.* Plaintiffs neither deposed Ms. Arriada-

1 Keiper nor received her documents prior to filing Plaintiffs' Motion for Class Certification. Thus,
2 Defendants have not shown that their failure to identify Ms. Arraida-Keiper in their Rule 26(a)
3 disclosures constituted harmless error. Furthermore, to the extent Ms. Arraida-Keiper's testimony
4 is redundant of Ms. Morris's, as Defendants contend, there does not appear to be any significant
5 prejudice to Defendants in excluding Ms. Arraida-Keiper's declaration. Thus, the Court GRANTS
6 Plaintiffs' request to strike Ms. Arraida-Keiper's declaration.

7 Similarly, the Court is concerned about the prejudice caused to Plaintiffs by virtue of
8 Defendants' failure to timely disclose Mr. Stubblefield, the Vice President of Human Resources at
9 Intuit, and Defendants' failure to provide the documents of Steven Burmeister, the Senior Director
10 of Compensation at Apple Inc. After considering the five-factor test articulated in *Wendt*,
11 especially the public policy favoring disposition of cases on their merits, the availability of less
12 drastic sanctions, and given that the Court is granting leave to amend, the Court declines to exclude
13 either Mr. Stubblefield's or Mr. Burmeister's declaration. However, to the extent that Defendants
14 still have not provided Plaintiffs with Mr. Burmeister's documents, Defendants are ORDERED to
15 do so within 7 days of this Order. Likewise, if Plaintiffs have not yet had the opportunity to depose
16 either Mr. Burmeister or Mr. Stubblefield on the substance of their declarations, Plaintiffs shall
17 have leave to do so.

18 The Court does not find that Plaintiffs have set forth good cause to strike either the
19 Declaration of Michelle Maupin, the Senior Manager of Compensation at Lucasfilm, Brown Decl.,
20 Ex. 22, or the Declaration of Danny McKelly, the Compensation and Benefits Specialist at Intel
21 Corporation, Brown Decl., Ex. 17. Plaintiffs' request to strike these declarations is DENIED.

22 **B. Motions to Strike Pursuant to *Daubert* and FRE 702**

23 Defendants move to strike the expert report of Dr. Leamer in support of Plaintiff's Motion
24 for Class Certification for failing to meet the standards required by *Daubert v. Merrell Dow*
25 *Pharms., Inc.*, 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence. See Mot. to
26 Strike at 1. Plaintiffs have likewise sought to exclude the expert report of Dr. Murphy on the same
27 basis. ECF No. 247, at 38-40. The Court DENIES both motions to strike.
28

1 When considering expert testimony offered pursuant to Rule 702, the trial court acts as a
2 “gatekeeper” by “making a preliminary determination of whether the expert’s testimony is
3 reliable.” *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002); *see*
4 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999); *Daubert*, 509 U.S. at 597. Expert
5 testimony is admissible if: (1) “the expert’s scientific, technical, or other specialized knowledge
6 will help the trier of fact to understand the evidence or to determine a fact in issue;” (2) “the
7 testimony is based on sufficient facts or data;” (3) “the testimony is the product of reliable
8 principles and methods;” and (4) “the expert has reliably applied the principles and methods to the
9 facts of the case.” Fed. R. Evid. 702. “Shaky but admissible evidence is to be attacked by cross
10 examination, contrary evidence, and attention to the burden of proof, not exclusion.” *Primiano v.*
11 *Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (citing *Daubert*, 509 U.S. at 594, 596).

12 Defendants move to strike Dr. Leamer’s testimony for three reasons. First, Defendants
13 criticize Dr. Leamer for failing to know “the messy facts of [the] case” and “ignor[ing] the basic
14 market facts.” *See* Mot. to Strike at 4 (citing *Champagne Metals v. Ken-Max Metals, Inc.*, 458
15 F.3d 1073, 1080 n.4 (10th Cir. 2006)). As the Federal Circuit stated in *i4i Ltd. P’ship v. Microsoft*
16 *Corp.*, 598 F.3d 831 (Fed. Cir. 2010), *cert. granted*, 562 U.S. ---, 131 S.Ct. 647 (2010), “it is not
17 the district court’s role under *Daubert* to evaluate the correctness of facts underlying an expert’s
18 testimony.” *Id.* at 856l. “Under *Daubert*, the district judge is ‘a gatekeeper, not a fact finder.’”
19 *Primiano*, 598 F.3d at 564 (citing *Daubert*, 509 U.S. at 594, 596). Second, Defendants move to
20 strike Dr. Leamer’s report because his “Conduct Regression” is methodologically flawed and his
21 Common Factors Analyses and Compensation Movement Charts are unreliable. Mot. to Strike at
22 4, 9, 16, and 18. While the Court has concerns about the probativeness of some of Dr. Leamer’s
23 statistical evidence, *see supra* Part III.A.2.d., the Court does not find this evidence is so
24 methodologically flawed as to warrant exclusion. Rather, this evidence is of the type to be
25 “attacked by cross examination, contrary evidence, and attention to the burden of proof.”
26 *Primiano*, 598 F.3d at 564. In addition, the Court finds Dr. Leamer’s expert report to be helpful to
27 the Court in understanding the evidence and determining the facts at issue in this antitrust case.
28 Accordingly, the Court DENIES Defendants’ Motion to Strike.

1 Plaintiffs contend that Dr. Murphy's report should be rejected as unscientific because Dr.
2 Murphy "has no theoretical or empirical support" for his claim that the anti-solicitation agreements
3 did not "meaningfully reduce the supply of information" or "affect market compensation." Reply
4 at 10. Plaintiffs criticize the fact that Dr. Murphy's hypothesis is untested, and based simply on
5 two employee declarations. *See* Murphy Rep. at 20 n.35 (citing Decl. of Jeff Vijungco and Decl. of
6 Chris Galy). The fact that these two declarations are from individuals who work for Defendants
7 does not necessarily make all of the information contained in their declarations untrustworthy. *Cf.*
8 *In re Wells Fargo Home Mortg. Overtime Pay Litigation*, 527 F.Supp.2d at 1060-1061 (closely
9 scrutinizing declarations from Defendants' employees, rather than excluding them entirely, in light
10 of "glaring reliability concerns" caused by "possible pressure arising from ongoing employment
11 relationships"). Rather than excluding Dr. Murphy's report on this basis, the Court finds that this
12 is also the type of evidence to be "attacked by . . . contrary evidence." *Primiano*, 598 F.3d at 564.
13 Accordingly, the Court DENIES Plaintiffs' request to strike Dr. Murphy's expert report as
14 inadmissible pursuant to *Daubert* and Rule 702.

15 **C. Plaintiffs' Additional Evidentiary Objections to Dr. Murphy's Report**

16 Plaintiffs also seek to exclude Dr. Murphy's report because he relies on interviews with
17 Defendants' employees that have never been adequately disclosed in violation of Rule
18 26(a)(2)(B)(ii) of the Federal Rules of Evidence.

19 Federal Rule of Procedure 26(a)(2)(b)(ii) states that an expert must provide a written report
20 that contains "the facts or data considered by the witness in forming" his opinions. Federal Rule of
21 Civil Procedure 37(c)(1) provides that, "[i]f a party fails to provide information . . . as required by
22 Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a
23 motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

24 Plaintiffs contend that, at Dr. Murphy's deposition on December 2, 2012, Dr. Murphy
25 admitted that he "gathered and relied on information in interviews he conducted with Defendants'
26 handpicked declarants" which included "information [that] was omitted from the declarations and
27 from Dr. Murphy's report." Reply at 38 (citing Murphy Dep. at 96:16-97:5; 98:21-101:3; 119:14-
28 123:5; 120:23-123:20; 312:5-15; 284:5-20; 294:15-25; 295:22-296:23). "In fact, the declarations

1 were not given to Dr. Murphy until right before he filed his report . . . [and] Dr. Murphy was
2 unable to testify to the omitted details of the interviews.” Reply at 38.

3 Defendants dispute that Dr. Murphy, or anyone who contributed to drafting the expert
4 report, relied on notes from the interviews when drafting the report. When specifically asked about
5 this issue at the Class Certification hearing, Mr. Hinman stated that “Mr. Murphy didn’t take any
6 notes, so he didn’t have any of his own to rely on, nor did he rely on any notes that anybody else
7 may have taken.” Tr. at 128:17-129:2. The Court takes Mr. Hinman at his word. Plaintiffs’
8 request to strike Dr. Murphy’s report on this basis is DENIED.

9 **D. Defendants’ Joint Administrative Motion for Leave to Supplement the Record**

10 On January 9, 2013, Defendants filed a Joint Administrative Motion for Leave to
11 Supplement the Record pursuant to Civil Local Rules 7-11 and 7-3(d). *See* ECF No. 263.
12 Defendants seek to supplement the record in order to “address and correct incomplete and
13 misleading information” that they contend Plaintiffs first submitted in their Reply. *Id.* at 2.
14 Plaintiffs filed their Reply on December 10, 2012. *See* ECF No. 247.

15 Pursuant to Civil Local Rule 7-3(d)(1), “[i]f new evidence has been submitted in the reply,
16 the opposing party may file within 7 days after the reply is filed, and serve an Objection to Reply
17 Evidence, which may not exceed 5 pages of text, stating its objections to the new evidence, which
18 may not include further argument on the motion.” Defendants’ motion failed to comply with this
19 rule as it was filed close to one month after Plaintiffs filed their reply and exceeded the Civil Local
20 Rule’s page limits. Accordingly, Defendants’ Joint Administrative Motion for Leave to
21 Supplement the Record is DENIED.

22 **VII. CONCLUSION**

23 For the reasons set forth above, the Court GRANTS in part and DENIES in part Plaintiffs’
24 Motion for Class Certification with leave to amend. The Court DENIES Defendants’ Motion to
25 Strike and GRANTS in part and DENIES in part Plaintiffs’ request to strike Defendants’ expert
26 report and certain employee declarations. Finally, the Court DENIES Defendants’ Joint
27 Administrative Motion for Leave to Supplement the Record in Support of Defendants’ Opposition
28 to Class Certification.

1 **IT IS SO ORDERED.**

2
3 Dated: April 4, 2013



LUCY H. KOH
United States District Judge

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United States District Court
For the Northern District of California