High-Tech Employee Antitrust Litigation

High-Tech Employee Antitrust Litigation is a 2010 United States Department of Justice (DOJ) antitrust action and a 2013 civil class action against several Silicon Valley companies for alleged "no cold call" agreements which restrained the recruitment of high-tech employees.

The defendants are Adobe, Apple Inc., Google, Intel, Intuit, Pixar, Lucasfilm and eBay, all high-technology companies with a principal place of business in the San Francisco–Silicon Valley area of California.

The civil class action was filed by five plaintiffs, one of whom has died; it accused the tech companies of collusion between 2005 and 2009 to refrain from recruiting each other's employees.

Contents

"No cold call" agreements

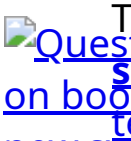
Cold calling is one of the main methods used by companies in the high-technology sector to recruit employees with advanced and specialised skills, such as software and hardware engineers, programmers, animators, digital artists, Web developers and other technical professionals.[1] Cold calling involves communicating directly in any manner with another firm's employee who has not otherwise applied for a job opening. Cold calling may be done in person, by phone, letter, or email.[2] According to the legal brief filed by a plaintiff in one of the class-action cases, cold calling is an effective method of recruiting for the high-technology sector because "employees of other [high-technology] companies are often unresponsive to other recruiting strategies... [and] current satisfied employees tend to be more qualified, harder working, and more stable than those who are actively looking for employment."[3]

Amy Lambert, Google's associate general counsel, noted in a blog post shortly after the DOJ's actions, that Google's definition of cold calling does not necessarily eliminate recruiting by letter or email, but only the process of calling on the telephone. By implication, recruiting through LinkedIn incurs recruiting by "InMail" - LinkedIn's own mail contact system: "In order to maintain a good working relationship with these companies, in 2005 we decided not to "cold call" employees at a few of our partner companies. Our policy only impacted cold calling, and we continued to recruit from these companies through LinkedIn, job fairs, employee referrals, or when candidates approached Google directly. In fact, we hired hundreds of employees from the companies involved during this time period."

The challenged "no cold call" agreements are alleged bilateral agreements between high technology companies not to cold call each other's employees. The DOJ alleges that senior executives at each company negotiated to have their employees added to 'no call' lists maintained by human resources personnel or in company hiring manuals. The alleged agreements were not limited by geography, job function, product group, or time period. The alleged bilateral agreements were between: (1) Apple and Google, (2) Apple and Adobe, (3) Apple and Pixar, (4) Google and Intel, (5) Google and Intuit,[4] and (6) Lucasfilm and Pixar.[5]

The civil class action further alleges that agreements also existed to (1) "provide notification when making an offer to another [company]'s employee (without the knowledge or consent of the employee)" and (2) "agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer."[3]

Department of Justice antitrust action



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On September 24, 2010, the United States Department of Justice Antitrust Division filed a complaint in the US District Court for the District of Columbia alleging violations of Section 1 of the Sherman Act. In *US v. Adobe Systems Inc., et al.*, the Department of Justice alleged that Adobe, Apple, Google, Intel, Intuit, and Pixar had violated Section 1 of the Sherman Act by entering into a series of bilateral "No Cold Call" Agreements to prevent the recruitment of their employees (a similar but separate suit was filed against Lucasfilm on December 21, 2010[6]). The DOJ alleged in their Complaint that the companies had reached "facially anticompetitive" agreements that "eliminated a significant form of competition...to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities." The DOJ also alleged that the agreements "were not ancillary to any legitimate collaboration," "were much broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted the normal price-setting mechanisms that apply in the labor setting."[4] The same day it filed the suit, the DOJ and the defendants proposed a settlement.[7]

A final judgment enforcing the settlement was entered by the court on March 17, 2011.[8] Although the DOJ Complaint only challenged the alleged "no cold call" agreements, in the settlement, the companies agreed to a more broad prohibition against "attempting

to enter into, entering into, maintaining or enforcing any agreement with any other person to in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person", for a period of five years; the court can grant an extension.[8] The settlement agreement does not provide any compensation for company employees affected by the alleged agreements.[9] Lucasfilm entered into a similar settlement agreement in December 2010.[5]

Civil class action

In re: High-Tech Employee Antitrust Litigation (U.S. District Court, Northern District of California 11-cv-2509 [10]) is a class-action lawsuit on behalf of over 64,000 employees of Adobe, Apple Inc., Google, Intel, Intuit, Pixar and Lucasfilm (the last two are subsidiaries of Disney) against their employer alleging that their wages were repressed due to alleged agreements between their employers not to hire employees from their competitors.[11][12] The case was filed on May 4, 2011 by a former software engineer at Lucasfilm and alleges violations of California's antitrust statute, Business and Professions Code sections 16720 et seq. (the "Cartwright Act"); Business and Professions Code section 16600; and California's unfair competition law, Business and Professions Code sections 17200, et seq. Focusing on the network of connections around former Apple CEO Steve Jobs, the Complaint alleges "an interconnected web of express agreements, each with the active involvement and participation of a company under the control of Steve Jobs...and/or a company that shared at least one member of Apple's board of directors." The alleged intent of this conspiracy was "to reduce employee compensation and mobility through eliminating competition for skilled labor."[13]

On October 24, 2013 the United States District Court for the Northern District of California granted class certification for all employees of Defendant companies from January 1, 2005 through January 1, 2010.[9]

As of October 31, 2013, Intuit, Pixar and Lucasfilm have reached a tentative settlement agreement. Pixar and Lucasfilm agreed to pay $9 million in damages, and Intuit agreed to pay $11 million in damages.[9] In May 2014, Judge Lucy Koh approved the $20 million

settlement between Lucasfilm, Pixar, and Intuit and their employees. Class members in this settlement, which involved fewer than 8% of the 65,000 employees affected, will receive around $3,840 each.[14]

The trial of the class action for the remaining Defendant companies was scheduled to begin on May 27, 2014. The plaintiffs intended to ask the jury for $3 billion in compensation, a number which could in turn have tripled to $9 billion under antitrust law.[15] However, in late April 2014, the four remaining defendants, Apple Inc, Google, Intel and Adobe Systems, agreed to settle out of court. Any settlement must be approved by Judge Lucy Koh.[16][17]

On May 23, 2014, Apple, Google, Intel, Adobe agreed to settle for $324.5 million. Lawyers sought 25% in attorneys' fees, plus expenses of as much as $1.2 million, according to the filing. Additional award payments of $80,000 would be sought for each named plaintiff who served as a class representative.[18] Payouts will average a few thousand dollars based on the salary of the employee at the time of the complaint.

In June 2014, Judge Lucy Koh expressed concern that the settlement may not be a good one for the plaintiffs. Michael Devine, one of the plaintiffs, said the settlement is unjust. In a letter he wrote to the judge he said the settlement represents only one-tenth of the $3 billion in compensation the 64,000 workers could have made if the defendants had not colluded.[19]

On August 8, 2014, Judge Koh rejected the settlement as insufficient on the basis of the evidence and exposure. Rejecting a settlement is unusual in such cases. This left the defendants with a choice between raising their settlement offer or facing a trial.[20]

On September 8, 2014, Judge Koh set April 9, 2015 as the actual trial date for the remaining defendants, with a pre-trial conference scheduled for December 19, 2014. Also, as of early September 2014, the defendants had re-entered mediation to determine whether a new settlement could be reached.[21]

A final approval hearing was held on July 9, 2015.[22] On Wednesday September 2, 2015, Judge Lucy H. Koh signed an order granting Motion for Final Approval of Class Action Settlement. The settlement website stated that Adobe, Apple, Google, and Intel has reached a settlement of $415 million and other companies settled for $20 million.

According to the settlement website, Gilardi & Co., LLC distributed the settlement to class members the week of December 21, 2015.

See also

- Eric Schmidt § Role in illegal non-recruiting agreements
- Antipoaching

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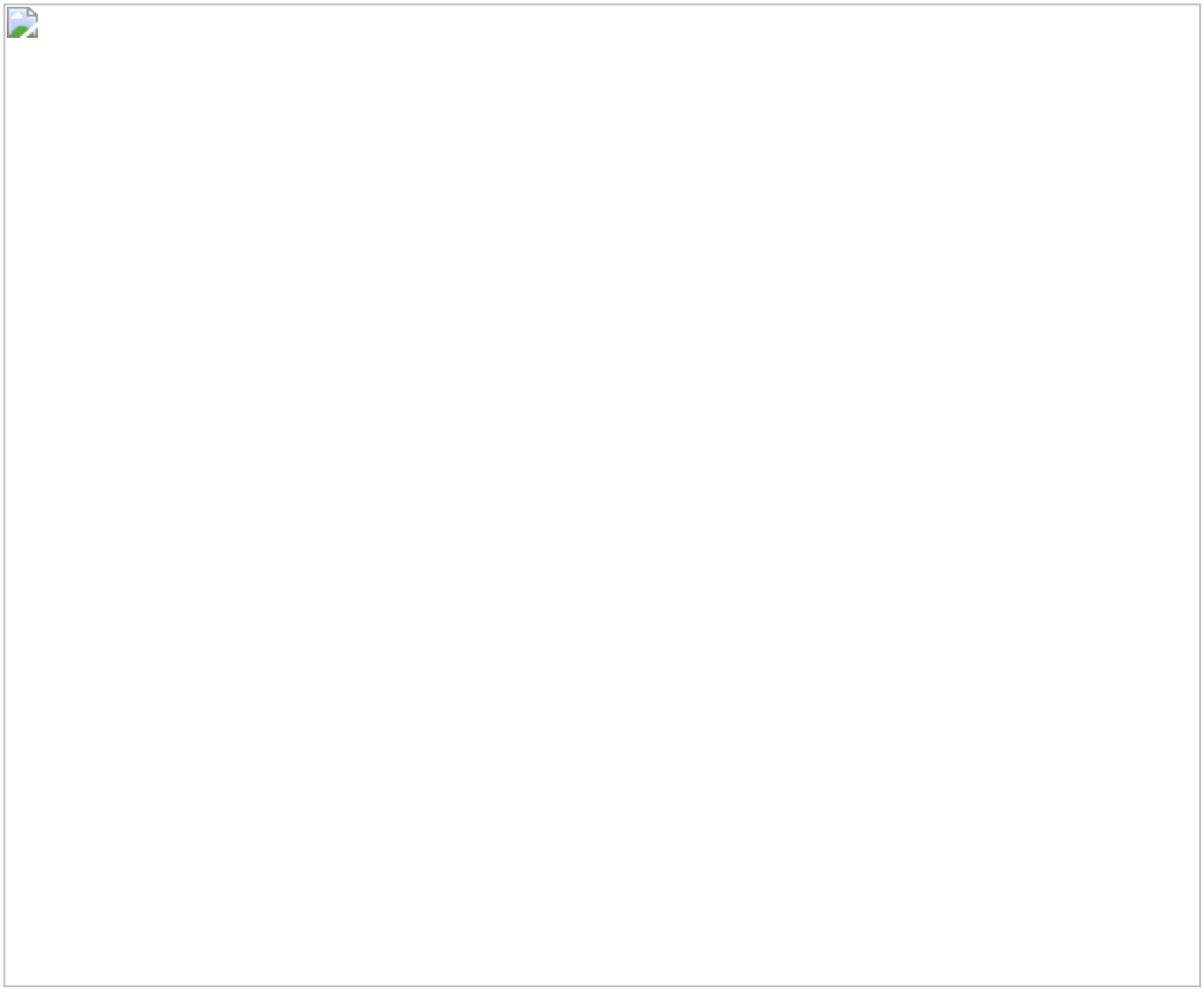
External links

- Docket for US v. Adobe Systems Inc., et al.
- Docket for US v. Lucasfilm Ltd.
- The Silicon Valley Anti-Poaching Conspiracy
- Docket for In re: High-Tech Employee Antitrust Litigation
- Order Granting Plaintiffs' Supplemental Motion for Class Certification, *In re High-Tech Employee Antitrust Litigation*, no 11-CV-02509 (N.D. Cal. Oct. 24, 2013)
- High-Tech Employee Antitrust Litigation Settlement Administration Website
- http://pando.com/tag/techtopus/
- *http://pando.com/2014/03/30/court-docs-google-hiked-wages-to-combat-hot-young-facebook-after-sheryl-sandberg-refused-to-join-hiring-cartel/

The Techtopus: How Silicon Valley's most celebrated CEOs conspired to drive down 100,000 tech engineers' wages



By Mark Ames , **written on** January 23, 2014

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From The News **Desk**

In early 2005, as demand for Silicon Valley engineers began booming, Apple's Steve Jobs sealed a secret and illegal pact with Google's Eric Schmidt to artificially push their workers wages lower by agreeing not to recruit each other's employees, sharing wage scale information, and punishing violators. On February 27, 2005, Bill Campbell, a member of Apple's board of directors and senior advisor to Google, emailed Jobs to confirm that Eric Schmidt "got directly involved and firmly stopped all efforts to recruit anyone from Apple."

Later that year, Schmidt instructed his Sr VP for Business Operation Shona Brown to keep the pact a secret and only share information "verbally, since I don't want to create a paper trail over which we can be sued later?"

These secret conversations and agreements between some of the biggest names in Silicon Valley were first exposed in a Department of Justice antitrust investigation launched by the Obama Administration in 2010. That DOJ suit became the basis of a class action lawsuit filed on behalf of over 100,000 tech employees whose wages were artificially lowered — an estimated $9 billion effectively stolen by the high-flying companies from their workers to pad company earnings — in the second half of the 2000s. Last week, the 9th Circuit Court of Appeals denied attempts by Apple, Google, Intel, and Adobe to have the lawsuit tossed, and gave final approval for the class action suit to go forward. A jury trial date has been set for May 27 in San Jose, before US District Court judge Lucy Koh, who presided over the Samsung-Apple patent suit.

In a related but separate investigation and ongoing suit, eBay and its former CEO Meg Whitman, now CEO of HP, are being sued by both the federal government and the state of California for arranging a similar, secret wage-theft agreement with Intuit (and possibly Google as well) during the same period.

The secret wage-theft agreements between Apple, Google, Intel, Adobe, Intuit, and Pixar (now owned by Disney) are described in court papers obtained by PandoDaily as "an overarching conspiracy" in violation of the Sherman Antitrust Act and the Clayton Antitrust Act, and at times it reads like something lifted straight out of the robber baron era that produced those laws. Today's inequality crisis is America's worst on record since statistics were first recorded a hundred years ago — the only comparison would be to the era of the railroad tycoons in the late 19th century.

Shortly after sealing the pact with Google, Jobs strong-armed Adobe into joining after he complained to CEO Bruce Chizen that Adobe was recruiting Apple's employees. Chizen sheepishly responded that he thought only a small class of employees were off-limits:

> I thought we agreed not to recruit any senior level employees.... I would propose we keep it that way. Open to discuss. It would be good to agree.

Jobs responded by threatening war:

> OK, I'll tell our recruiters they are free to approach any Adobe employee who is not a Sr. Director or VP. Am I understanding your position correctly?

Adobe's Chizen immediately backed down:

> I'd rather agree NOT to actively solicit any employee from either company.....If you are in agreement, I will let my folks know.

The next day, Chizen let his folks — Adobe's VP of Human Resources — know that "we are not to solicit ANY Apple employees, and visa versa." Chizen was worried that if he didn't agree, Jobs would make Adobe pay:

> if I tell Steve [Jobs] it's open season (other than senior managers), he will deliberately poach Adobe just to prove a point. Knowing Steve, he will go after some of our top Mac talent...and he will do it in a way in which they will be enticed to come (extraordinary packages and Steve wooing).

Indeed Jobs even threatened war against Google early 2005 before their "gentlemen's agreement," telling Sergey Brin to back off recruiting Apple's Safari team:

> if you [Brin] hire a single one of these people that means war.

Brin immediately advised Google's Executive Management Team to halt all recruiting of Apple employees until an agreement was discussed.

In the geopolitics of Silicon Valley tech power, Adobe was no match for a corporate superpower like Apple. Inequality of the sort we're experiencing today affects everyone in ways we haven't even thought of — whether it's Jobs bullying slightly lesser executives into joining an illegal wage-theft pact, or the tens of thousands of workers whose wages were artificially lowered, transferred into higher corporate earnings, and higher compensations for those already richest and most powerful to begin with.

Over the next two years, as the tech industry entered another frothing bubble, the secret wage-theft pact which began with Apple, Google and Pixar expanded to include Intuit and Intel. The secret agreements were based on relationships, and those relationships were forged in Silicon Valley's incestuous boards of directors, which in the past has been recognized mostly as a problem for shareholders and corporate governance advocates, rather than for the tens of thousands of employees whose wages and lives are viscerally affected by their clubby backroom deals. Intel CEO Paul Otellini joined Google's board of directors in 2004, a part-time gig that netted Otellini $23 million in 2007, with tens of millions more in Google stock options still in his name — which worked out to $464,000 per Google board event if you only counted the stock options Otellini cashed out — dwarfing what Otellini made off his Intel stock options, despite spending most of his career with the company.

Meanwhile, Eric Schmidt served on Apple's board of directors until 2009, when a DoJ antitrust investigation pushed him to resign. Intuit's chairman at the time, Bill Campbell, also served on Apple's board of directors, and as official advisor — "consigliere" — to Google chief Eric Schmidt, until he resigned from Google in 2010. Campbell, a celebrated figure ("a quasi-religious force for good in Silicon Valley") played a key behind-the-scenes role connecting the various CEOs into the wage-theft pact. Steve Jobs, who took regular Sunday walks with Campbell near their Palo Alto homes, valued Campbell for his ability "to get A and B work out of people," gushing that the conduit at the center of the $9 billion wage theft suit, "loves people, and he loves growing people."

Indeed. Eric Schmidt has been, if anything, even more profuse in his praise of Campbell. Schmidt credits Campbell for structuring Google when Schmidt was brought on board in 2001:

> His contribution to Google — it is literally not possible to overstate. He essentially architected the organizational structure.

Court documents show it was Campbell who first brought together Jobs and Schmidt to form the core of the Silicon Valley wage-theft pact. And Campbell's name appears as the early conduit bringing Intel into the pact with Google:

> Bill Campbell (Chairman of Intuit Board of Directors, Co-Lead Director of Apple, and advisor to Google) was also involved in the Google-Intel agreement, as reflected in an email exchange from 2006 in which Bill Campbell agreed with Jonathan Rosenberg (Google Advisor to the Office of CEO and former Senior Vice President of Product Management) that Google should call [Intel CEO] Paul Otellini before making an offer to an Intel employee, regardless of whether the Intel employee first approached Google.

Getting Google on board with the wage-theft pact was the key for Apple from the start — articles in the tech press in 2005 pointed at Google's recruitment drive and incentives were the key reason why tech wages soared that year, at the highest rate in well over a decade.

Campbell helped bring in Google, Intel, and, in 2006, Campbell saw to it that Intuit — the company he chaired — also joined the pact.

From the peaks of Silicon Valley, Campbell's interpersonal skills were magical and awe-inspiring, a crucial factor in creating so much unimaginable wealth for their companies and themselves. Jobs said of Campbell:

> There is something deeply human about him.

And Schmidt swooned:

> He is my closest confidant...because he is the definition of trust.

Things — and people — look very different when you're down in the Valley. In the nearly 100-page court opinion issued last October by Judge Koh granting class status to the lawsuit, Campbell comes off as anything but mystical and "deeply human." He comes off as a scheming consigliere carrying out some of the drearier tasks that the oligarchs he served were constitutionally not so capable of arranging without him.

But the realities of inequality and capitalism invariably lead to mysticism of this sort, a natural human response to the dreary realities of concentrating so much wealth and power in the hands of a dozen interlocking board members at the expense of 100,000 employees, and so many other negative knock-off effects on the politics and culture of the world they dominate.

One of the more telling elements to this lawsuit is the role played by "Star Wars" creator George Lucas, who emerges as the Obi-Wan Kenobi of the wage-theft scheme. It's almost too perfectly symbolic that Lucas — the symbiosis of Baby Boomer New Age mysticism, Left Coast power, political infantilism, and dreary 19th century labor exploitation — should be responsible for dreaming up the wage theft scheme back in the mid-1980s, when Lucas sold the computer animation division of Lucasfilm, Pixar, to Steve Jobs.

As Pixar went independent in 1986, Lucas explained his philosophy about how competition for computer engineers violated his sense of normalcy — and profit margins. According to court documents:

> George Lucas believed that companies should not compete against each other for employees, because '[i]t's not normal industrial competitive situation.' As George Lucas explained, 'I always — the rule we had, or the rule that I put down for everybody,' was that 'we cannot get into a bidding war with other companies because we don't have the margins for that sort of thing.'

Translated, Lucas' wage-reduction agreement meant that Lucasfilm and Pixar agreed to a) never cold call each other's employees; b) notify each other if making an offer to an employee of the other company, even if that employee applied for the job on his or her own without being recruited; c) any offer made would be "final" so as to avoid a costly bidding war that would drive up not just the employee's salary, but also drive up the pay scale of every other employee in the firm.

Jobs held to this agreement, and used it as the basis two decades later to suppress employee costs just as fierce competition was driving up tech engineers' wages.

The companies argued that the non-recruitment agreements had nothing to do with driving down wages. But the court ruled that there was "extensive documentary evidence" that the pacts were designed specifically to push down wages, and that they succeeded in doing so. The evidence includes software tools used by the companies to keep tabs on pay scales to ensure that within job "families" or titles, pay remained equitable within a margin of variation, and that as competition and recruitment boiled over in 2005, emails between executives and human resources departments complained about the pressure on wages caused by recruiters cold calling their employees, and bidding wars for key engineers.

Google, like the others, used a "salary algorithm" to ensure salaries remained within a tight band across like jobs. Although tech companies like to claim that talent and hard work are rewarded, in private, Google's "People Ops" department kept overall compensation essentially equitable by making sure that lower-paid employees who performed well got higher salary increases than higher-paid employees who also performed well.

As Intel's director of Compensation and Benefits bluntly summed up the Silicon Valley culture's official cant versus its actual practices,

> While we pay lip service to meritocracy, we really believe more in treating everyone the same within broad bands.

The companies in the pact shared their salary data with each other in order to coordinate and keep down wages — something unimaginable had the firms not agreed to not compete for each other's employees. And they fired their own recruiters on just a phone call from a pact member CEO.

In 2007, when Jobs learned that Google tried recruiting one of Apple's employees, he forwarded the message to Eric Schmidt with a personal comment attached: "I would be very pleased if your recruiting department would stop doing this."

Within an hour, Google made a "public example" by "terminating" the recruiter in such a manner as to "(hopefully) prevent future occurrences."

Likewise, when Intel CEO Paul Otellini heard that Google was recruiting their tech staff, he sent a message to Eric Schmidt: "Eric, can you pls help here???"

The next day, Schmidt wrote back to Otellini: "If we find that a recruiter called into Intel, we will terminate the recruiter."

One of the reasons why non-recruitment works so well in artificially lowering workers' wages is that it deprives employees of information about the job market, particularly one as competitive and overheating as Silicon Valley's in the mid-2000s. As the companies' own internal documents and statements showed, they generally considered cold-calling recruitment of "passive" talent — workers not necessarily looking for a job until enticed by a recruiter — to be the most important means of hiring the best employees.

Just before joining the wage-theft pact with Apple, Google's human resources executives are quoted sounding the alarm that they needed to "dramatically increase the engineering hiring rate" and that would require "drain[ing] competitors to accomplish this rate of hiring." One CEO who noticed Google's hiring spree was eBay CEO Meg Whitman, who in early 2005 called Eric Schmidt to complain, "Google is the talk of the Valley because [you] are driving up salaries across the board." Around this time, eBay entered an illegal wage-theft non-solicitation scheme of its own with Bill Campbell's Intuit, which is still being tried in ongoing federal and California state suits.

Google placed the highest premium on "passive" talent that they cold-called because "passively sourced candidates offer[ed] the highest yield," according to court documents. The reason is like the old Groucho Marx joke about not wanting to belong to a club that would let you join it — workers actively seeking a new employer were assumed to have something wrong with them; workers who weren't looking were assumed to be the kind of good happy talented workers that company poachers would want on their team.

For all of the high-minded talk of post-industrial technotopia and Silicon Valley as worker's paradise, what we see here in stark ugly detail is how the same old world scams and rules are still operative.

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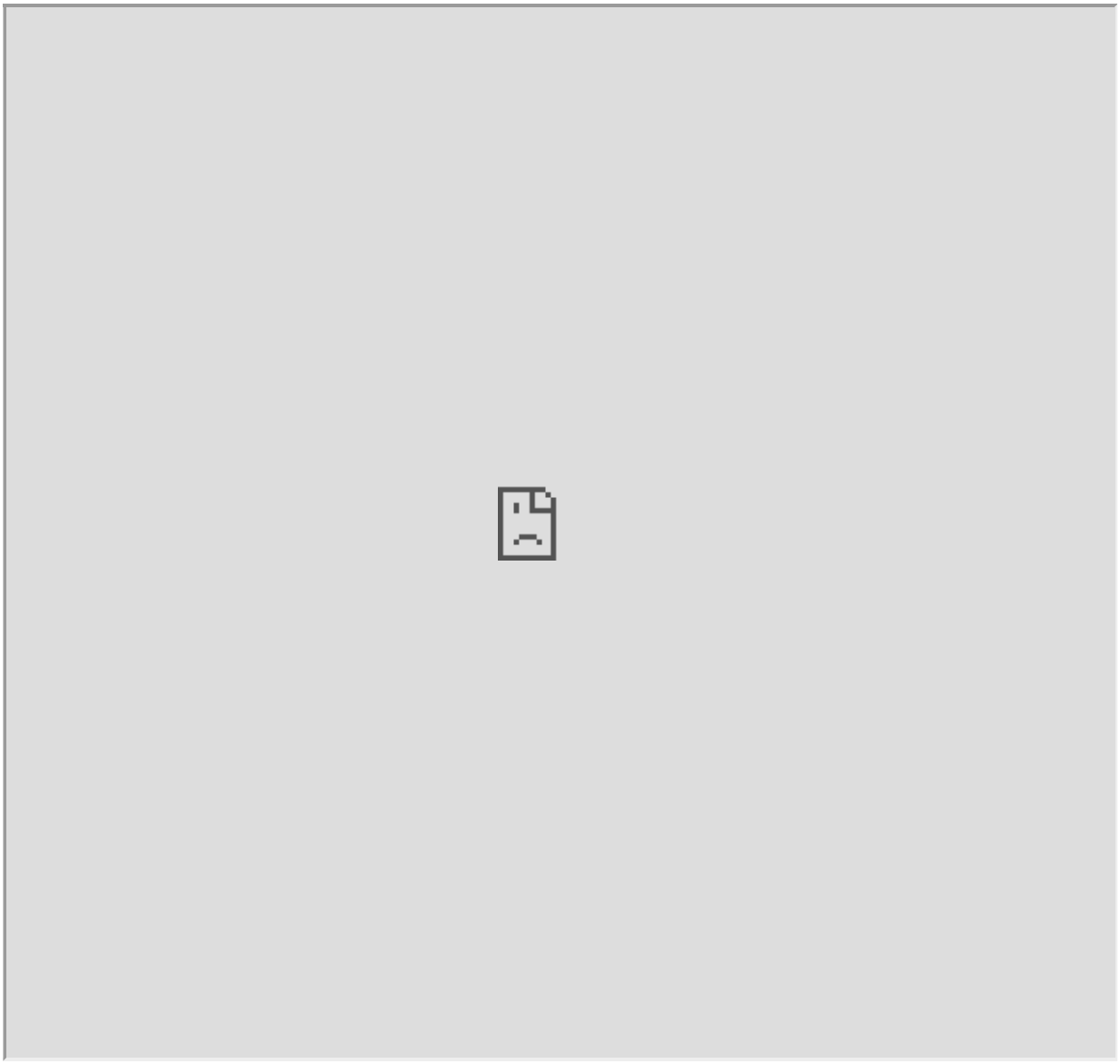
Court documents below...

October 24, 2013 Class Cert Order



[Illustration by Brad Jonas for Pando]