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LEGAL ALERT

Legal Alert: Class-Action Antitrust Complaint Alleging an Unlawful Employer "No-Poaching" Conspiracy Appears to Have Survived a Motion to Dismiss

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Executive Summary: At a hearing yesterday in San Jose, California, a federal district court judge indicated from the bench that antitrust claims alleging an "over-arching conspiracy" to fix and suppress employee compensation through interconnected employer "no-poaching" agreements would survive a motion to dismiss for failure to state a claim.

The consolidated amended complaint, *In re: High Tech Employee Antitrust Litigation*, U.S. District Court, Northern District of California (5:11-cv-02509-LHK), was filed in 2011 on behalf of a class of tens of thousands of high-tech employees of Adobe Systems, Inc.; Apple, Inc.; Google Inc.; Intel Corp.; Intuit Inc.; LucasFilm Ltd. and Pixar covering a five-year period (January 1, 2005 – January 1, 2010). The complaint alleged, among other things, that the defendants conspired to fix and suppress the compensation of their high tech employees through interconnected agreements: (1) not to recruit one another's employees, (2) to notify one another when making an offer to another company's employee, and (3) when offering a position to another company's employee, neither company would counteroffer the initial offer. These agreements, plaintiffs alleged, were unknown to the employees and artificially suppressed their wages. Plaintiffs have suggested that damages could reach hundreds of millions of dollars.

Defendants filed a motion to dismiss alleging that the complaint did not sufficiently allege evidentiary facts (the "who, what, where, and when" type facts) to support an "over-arching conspiracy" claim against the defendants. From defendants' view, at best the factual allegations amounted to nothing more than separate, bi-lateral business arrangements that do not violate the antitrust laws.

In an unconventional procedural twist, last Thursday the parties filed a Joint Case Management Statement in which the plaintiffs took the opportunity to bolster their opposition to the motion to dismiss by marshalling internal defendant e-mails that suggested that the defendants were "aware" of the other defendants' "no-poaching" agreements. This evidence, say the plaintiffs, supports their theory that the bi-lateral agreements were, in fact, interconnected. Apparently, the internal e-mails cited by the plaintiffs were obtained from documents produced by the defendants to the Antitrust

Division of the U.S. Department of Justice (DOJ) during its investigation into the same conduct.

In mid-2010, the DOJ filed a civil suit against Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar alleging that bi-lateral agreements amounted to a *per se* violation of Section 1 of the Sherman Act. Without admitting liability, in March of 2011, those defendants settled that suit by agreeing not to participate in such agreements. For more information regarding this settlement, please see the March 2011 edition of Ford & Harrison's Noncompete News, Justice Department: Non-solicit Agreements Among High-Tech Employers Violate Antitrust Law, available on our web site at: http://www.fordharrison.com/shownewsletter.aspx?Show=7066.

The denial of a motion to dismiss is not a ruling on the substance of the claims, but merely permits the case to proceed. We will continue to keep you informed on the status of this case, which could have far-reaching implications for employers who enter into similar agreements. If you have any questions regarding the case or other labor or employment related issues, please contact the author of this Alert, Todd R. Seelman, tseelman@fordharrison.com, 303-592-8864, a partner in our Denver office and head of Ford & Harrison's Antitrust and Unfair Competition practice group, or the Ford & Harrison attorney with whom you usually work.