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## **Silicon Valley Giants, Victims of their Own Success: DOJ Claims Otherwise Lawful “No Cold Calling” Agreements Among Tech Heavyweights Violate the Sherman Antitrust Act**

By Tyler M. Paetkau and Olga Savage

### **Introduction**

In a surprise to many in the Silicon Valley and beyond, the Antitrust Division of the United States Department of Justice (“DOJ”) recently sued and settled claims against several technology industry heavyweights for claimed anti-competitive agreements not to “cold call” one another’s engineers. The DOJ’s lawsuit and settlement are somewhat surprising in light of California courts’ endorsement of certain post-employment contractual restrictions against solicitation of employees, sometimes called “anti-raiding,” “non-interference” or “no poaching” provisions. Upon closer examination, however, the DOJ’s lawsuit and the recent settlement may not be so surprising in view of the anti-competitive effects such agreements can have on employee mobility. This article examines the relevant California case law and the recent DOJ settlement.

### **California Case Law Has Recognized the Enforceability of Certain Post-Employment Contractual Restrictions on Solicitation of Employees, So-Called “Anti-Raiding” Provisions**

California courts are well-known for their categorical rejection of any post-employment contractual provision that restricts, even indirectly, the ability of employees to engage in their chosen profession or business.

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Relying on California’s strong and oft-reiterated public policy as set forth in California Business and Professions Code section 16600, which prohibits “any” agreement “by which anyone is restrained from engaging in a lawful profession, trade or business of any kind,” California courts have declared unenforceable and voided contractual non-compete provisions;<sup>1</sup> non-solicitation of customers provisions (even those limited in time and geographical scope) where the court did not find the provision necessary to protect the former employer’s trade secrets;<sup>2</sup> and provisions restricting a company’s customer or former employee from hiring the company’s employees (so-called “no hire” provisions).<sup>3</sup> California case law has long held that such antisolicitation agreements are void as unlawful business restraints except where their enforcement is

necessary to protect trade secrets.<sup>4</sup> California courts have held that such post-employment covenants restrict the ability of employees to engage in their professions and, therefore, impermissibly restrict employee mobility, and stifle innovation and fair competition.<sup>5</sup>

Despite their unwavering commitment to employee mobility and betterment, fair competition, and denying enforcement of post-employment anti-competitive covenants, the California courts have created certain exceptions to the rule prohibiting post-employment restrictive covenants. One such exception is for so-called “anti-raiding” provisions, which prohibit former employees from soliciting their former employer’s employees. In *Loral Corporation v. Moyes*,<sup>6</sup> for example, the court upheld the validity of a one-year

<sup>1</sup> *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 860 (1994) (finding a one year non-compete, purporting to bar at-will employees from providing traffic services to any television or radio station unenforceable); *Latona v. Aetna U.S. Healthcare, Inc.*, 82 F. Supp. 2d 1089, 1093 (C.D. Cal. 1999) (citing *Scott v. Snelling and Snelling, Inc.*, 732 F. Supp. 1034, 1039–40 (N.D. Cal. 1990) (“California courts have repeatedly held that [S]ection 16600 should be interpreted as broadly as its language reads”). As the California Supreme Court most recently observed, Section 16600 represents California’s “settled legislative policy in favor of open competition and employee mobility.” *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946 (2008).

<sup>2</sup> *Kolani v. Gluska*, 64 Cal. App. 4th 402, 405 (1998) (provision limiting solicitation of customers in 40-mile radius “an outright prohibition on competition and is void”); *D’Sa v. Playhut, Inc.*, 85 Cal. App. 4th 927, 934 (2001) (non-solicitation provision void where unnecessary to protect employer’s trade secrets); *Muggill v. Reuben H. Donnelly Corp.*, 62 Cal. 2d 239, 242 (1965) (holding Section 16600 invalidates non-competes, except where necessary to protect trade secrets of employer).

<sup>3</sup> *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708, 716–17 (2007) (“[I]t is inconsequential whether the restriction is termed a ‘no-hire’ provision . . . or a ‘covenant not to compete’ . . . [The company] is not allowed to accomplish by indirection that which it cannot accomplish directly”).

<sup>4</sup> *See, e.g., Kolani*, 64 Cal. App. 4th at 405; *D’Sa*, 85 Cal. App. 4th at 934; *Muggill*, 62 Cal. 2d at 242.

<sup>5</sup> California law provides for certain limited statutory exceptions in the sale-of-business context. *See* Walter M. Stella & Tyler M. Paetkau, *California’s Statutory Exceptions to Restraints on Trade: Open Competition and Employee Mobility Give Way to Buyers and Sellers of Businesses*, 2008 Bender’s Calif. Lab. & Empl. Bull. 17 (Jan. 2008). For example, the buyer of an existing business may require that the seller not compete with the buyer for a reasonable period of time within a reasonable geographic area. Cal. Bus. & Prof. Code § 16601; *see also Hill Medical Corp. v. Wycoff*, 86 Cal. App. 4th 895, 901–02 (2001) (goodwill exception narrowly construed; departing doctor sold 7 percent of equity in medical partnership; physicians made no attempt to value separately “goodwill” of partnership in deal document). Another statutory exception applies in the case of a sale or other disposition of all of the covenantor’s (seller’s) shares in a corporation. Cal. Bus. & Prof. Code § 16601; *see also Vacco Indus., Inc. v. Van Den Berg*, 5 Cal. App. 4th 34, 48–49 (1992) (non-compete upheld as to former employee who owned less than 3 percent of outstanding shares of former employer). Also, a partnership may prevent a departing partner from competing after the partnership dissolves. Cal. Bus. & Prof. Code § 16602; *Bosley Med. Group v. Abramson*, 161 Cal. App. 3d 284, 292 (1984).

<sup>6</sup> 174 Cal. App. 3d 268 (1985).

non-solicitation of employees provision in a contract with a former employee, finding that, unlike a “no-hire” provision, the covenant “only slightly affects” employees’ ability to engage in their profession. This decision seemingly excludes reasonable employee non-solicitation clauses of reasonable duration from the scope of unlawful anti-competitive covenants.<sup>7</sup>

The *Moyes* Court summarized California law regarding “[t]he impact of . . . [S]ection 16600 on nondisclosure, non-solicitation and noncompetition promises” as follows:

The basic rule in this state is that contracts precluding a former employee from obtaining new employment with a competitor are invalid under [S]ection 16600. “This section invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so, unless they are necessary to protect the employer’s trade secrets. . . .” As *Muggill v. Reuben H. Donnelly Corporation*,<sup>8</sup> indicates, reasonably limited restrictions which tend more to promote than restrain trade and business do not violate the statute. Section 16600 does not invalidate an employee’s agreement not to disclose his former employer’s confidential customer lists or other trade secrets or not to solicit those customers. *Thus, the statute invalidates an agreement penalizing a former employee for obtaining employment with a competitor, but does not necessarily affect an agreement delimiting how he can compete.* Our question then is whether a noninterference agreement not to solicit former coworkers to leave the employer is more like a noncompetition agreement which is invalid, or a

nondisclosure or non-solicitation agreement which may be valid.<sup>9</sup>

The *Moyes* Court noted that “California courts have apparently not addressed the application of [Section 16600] to a former employee’s agreement not to disrupt, damage, impair or interfere with his former employer by ‘raiding’ its work-staff, in other words, a noninterference agreement.”<sup>10</sup> The court observed that “[g]enerally the law of unfair competition prohibits former employees from disclosing or misusing an employer’s trade secrets and confidential information—even in the absence of contractual restrictions.”<sup>11</sup> Moreover, “[c]ases suggest that when permissible solicitation of an employer’s customers is at issue, a contract may prohibit more than the law of the marketplace otherwise would.”<sup>12</sup> The *Moyes* Court quoted the California Supreme Court’s decision in *Aetna Building Maintenance Company v. West*:<sup>13</sup> “*In the absence of an enforceable contract containing negative covenants to the contrary, equity will not enjoin a former employee from soliciting business from his former employer’s customers, provided his competition is fairly and legally conducted.*”<sup>14</sup> Therefore, the *Moyes* Court concluded, “contractual restrictions may have more impact in a non-solicitation case than a nondisclosure case.”<sup>15</sup>

<sup>9</sup> *Moyes*, 174 Cal. App. 3d at 275–76 (quoting *Muggill*, 62 Cal. 2d at 242–43) (emphasis added); see also *John F. Matull & Assocs., Inc. v. Cloutier*, 194 Cal. App. 3d 1049, 1054–55 (1987) (“Thus, while the statute invalidates agreements which penalize a former employee for obtaining employment with a competitor, it does not necessarily affect an agreement delimiting how that employee can compete. Similarly, a former employee may engage in a competitive business for herself and compete with her former employer, provided such competition is fair and legal. . . . Nevertheless, respondent had a right to protect against appellant trying to obtain the [respondent’s] clients for herself through active solicitation should she grow dissatisfied with her association with respondent. We cannot say as a matter of law, therefore, that the antisolicitation covenant was invalid or unenforceable.”).

<sup>10</sup> *Moyes*, 174 Cal. App. 3d at 275.

<sup>11</sup> *Id.* (citing *Empire Steam Laundry v. Lozier*, 165 Cal. 95, 99 (1913)).

<sup>12</sup> *Id.*

<sup>13</sup> 39 Cal. 2d 198, 203 (1952).

<sup>14</sup> *Moyes*, 174 Cal. App. 3d at 275 (citing *West*, 39 Cal. 2d at 203) (emphasis added).

<sup>15</sup> *Id.*

<sup>7</sup> *Id.* at 279–80.

<sup>8</sup> 62 Cal. 2d 239 (1965).

With respect to the “anti-raiding” provision at issue in *Moyes*, the appellate court blessed it as only restricting the former employee’s mobility “in a small way”:

The restriction presumably was sought by plaintiffs in order to maintain a stable work force and enable the employer to remain in business. This restriction has the apparent impact of limiting Moyes’ business practices in a small way in order to promote [his former employer’s] business. *This noninterference agreement has no overall negative impact on trade or business.* We hold that this contract, as construed, is not void on its face under Business and Professions Code section 16600.<sup>16</sup>

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<sup>16</sup> *Id.* at 280 (emphasis added). In addition to the enforceability of post-employment restrictive covenants, “the law of unfair competition has struggled with the recurrent problem of when solicitation of another’s employees gives rise to tort liability.” *Id.* at 276. See also *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 352–353 (1966); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 255 (1968); Annotation, *Liability for Inducing Employee Not Engaged for Definite Term To Move To Competitor*, 24 A.L.R. 3d 821. One California appellate court, for example, held that an employer cannot be liable in tort for interfering with a competitor’s “at-will” employment contracts, provided no unlawful methods are used. *GAB Business Services v. Lindsey & Newsom Claim Services, Inc.*, 83 Cal. App. 4th 409, 426–27 (2000). On August 12, 2004, however, a unanimous California Supreme Court decided *Reeves v. Hanlon*, 33 Cal. 4th 1140 (2004), overruling *GAB Business Services* on this point:

The primary issue presented is whether a defendant may be held liable under an intentional interference theory for having induced an at-will employee to quit working for the plaintiff. Because an interference as such is primarily an interference with the future relation between the plaintiff and the at-will employee, we hold that inducing the termination of an at-will employment relation may be actionable under the standard applicable to claims for intentional interference with prospective economic advantage. Accordingly, to recover for a defendant’s interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act—i.e., an act “proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1159 (*Korea Supply*))—that induced the at-will employee to leave the plaintiff.

*Reeves*, 33 Cal. 4th at 1145.

### **The DOJ’s Antitrust Lawsuit Against Six Technology Heavyweights Challenging Their “No Cold Calling” Agreements**

Given the ruthless scrutiny with which California courts dissect any contractual provision that has even the slightest indicia of an anti-competitive effect, one would think that when a California court bestows its blessing on a restrictive covenant, employers should be able to draft, execute and enforce the approved covenant with complete peace of mind as to the legality and enforceability of such limited contractual restrictions. At least six giants in the Silicon Valley high tech industry thought so.

Between 2005 and 2007, apparently relying on *Moyes*, Silicon Valley heavy hitters Adobe Systems, Inc. (“Adobe”), Apple Inc. (“Apple”), Google Inc. (“Google”), Intel Corporation (“Intel”), Intuit, Inc. (“Intuit”), and Pixar entered into a series of bilateral agreements not to “cold call” each others’ employees to fill employment openings at their respective companies.

These tech companies justified the agreements, in part, on the ground that the agreements would allow the companies to work together on joint ventures and other projects without fear that their business partners would poach their valued engineers. In other words, as in *Moyes*, the contractual, no cold calling “restriction presumably was sought. . . . in order to maintain a stable work force and enable the employers[s] to remain in business.”<sup>17</sup>

This collaboration is not the only recent example of tech companies fighting the potentially destructive effects of *en masse* employee crossover to competitor companies: Google just announced an across-the-board 10 percent pay raise, reportedly to retain its valuable engineers from resigning to work for rival Facebook.<sup>18</sup> The numbers suggest that Google’s concern is well-founded: “Of the more than 1,900 Facebook employees with resumes on LinkedIn, 300—around 15 [percent] of Facebook’s staff—list Google as a past employer.”<sup>19</sup> Whether this daunting statistic is a result of intentional employee poaching by Facebook from the outside, an organized employee defection from the inside, or just part of Silicon Valley’s “revolving door trend,” which

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<sup>17</sup> *Moyes*, 174 Cal. App. 3d at 280.

<sup>18</sup> See David Goldman, *Google’s Fight to Keep its Top Minds*, CNNMoney.com (Nov. 10, 2010), available at [http://money.cnn.com/2010/11/10/technology/google\\_brain\\_drain/index.htm](http://money.cnn.com/2010/11/10/technology/google_brain_drain/index.htm).

<sup>19</sup> *Id.*

Joel Achramowicz, an analyst at Blaylock Robert Van, describes as “part of the cross-fertilization that occurs,”<sup>20</sup> it certainly legitimizes the concerns that presumably led to the six contracting tech companies’ decision to take collaborative measures to prevent employee raiding.

The collaboration was short-lived, however, as the Networks and Technology Section of the DOJ’s Anti-trust Division promptly stepped in where the California courts have, to date, remained silent.

On September 24, 2010, the DOJ filed a complaint (“DOJ Complaint”) in the United States District Court for the District of Columbia against Adobe, Apple, Google, Intel, Intuit and Pixar (collectively, the “Defendant Companies”), alleging violations of section 1<sup>21</sup> of the Sherman Antitrust Act<sup>22</sup> (“Sherman Act”).<sup>23</sup> The DOJ Complaint alleges that, between 2005 and 2007, the Defendant Companies entered into a series of bilateral agreements not to cold call each others’ employees to fill employment openings at their respective companies.<sup>24</sup> “Cold calling,” as defined by the DOJ Complaint, “involves communicating directly in any manner (including orally, in writing, telephonically, or electronically) with another firm’s employee who has not otherwise applied for a job opening.”<sup>25</sup> The DOJ alleged that senior executives at the Defendant Companies reached these agreements “through direct and explicit communications,” and “actively managed and enforced” the agreements by,

among other things, placing the employees of the companies with whom they had entered into the agreements on their internal “Do Not Call” lists and disseminating these lists to their employees in their Hiring Policies and Protocols manuals, with explicit instructions not to cold call the listed individuals.<sup>26</sup>

The effect of these no cold calling agreements, the DOJ claimed, is a substantial restraint on competition in the high tech labor market “to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities.”<sup>27</sup> Although the DOJ acknowledged that the Defendant Companies “employ a variety of recruiting techniques,” it described cold calling as “a particularly effective method of competing for computer engineers and computer scientists.”<sup>28</sup> On those grounds, the DOJ charged that the no cold calling agreements are “per se unlawful” under section 1 of the Sherman Antitrust Act.<sup>29</sup> Unlike the one-year “anti-raiding” provision upheld by the California Court of Appeal in *Moyes*, the tech companies’ no cold call agreements apparently *did* have an “overall negative impact on trade or business.”<sup>30</sup>

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”<sup>31</sup> The DOJ’s Antitrust Division has statutory authority to enforce Section 1 by civil and criminal proceedings. The main advantage of claiming that a contractual provision is “per se unlawful” under Section 1, as the DOJ did in its Complaint, is that it relieves the complaining party from having to prove any intent to restrain trade or commerce on the part of the drafter of the provision or any actual restraining effect of the challenged agreement.<sup>32</sup> According to the United States Supreme Court, “certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they

<sup>20</sup> *Id.*

<sup>21</sup> 15 U.S.C. § 1.

<sup>22</sup> 15 U.S.C. §§ 1–7.

<sup>23</sup> See Complaint, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D. D.C. Sept. 24, 2010) (“DOJ Complaint”), available at <http://www.justice.gov/atr/cases/f262600/262654.htm>; DOJ Press Release, *Justice Department Requires Six High Tech Companies to Stop Entering Into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/262648.htm](http://www.justice.gov/atr/public/press_releases/2010/262648.htm).

<sup>24</sup> The DOJ Complaint identified five no-cold calling agreements: (1) an Apple-Google agreement executed no later than 2006; (2) an Apple-Adobe agreement executed no later than May 2005; (3) an Apple-Pixar agreement executed no later than April 2007; (4) a Google-Intel agreement executed no later than September 2007; and (5) a Google-Intuit agreement in June 2007. Unlike the first four agreements, the alleged Google-Intuit agreement was non-reciprocal. Pursuant to that agreement, only Google could not cold call Intuit employees, but not vice versa. DOJ Complaint, 15–32.

<sup>25</sup> DOJ Complaint, 13.

<sup>26</sup> See *e.g.*, DOJ Complaint, 19.

<sup>27</sup> DOJ Complaint, 14.

<sup>28</sup> DOJ Complaint, 13.

<sup>29</sup> DOJ Complaint, 14.

<sup>30</sup> *Moyes*, 174 Cal. App. 3d at 276.

<sup>31</sup> 15 U.S.C. § 1.

<sup>32</sup> *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386–89 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); see also *White Motor v. United States*, 372 U.S. 253, 259–60 (1963).

have caused or the business excuse for their use.”<sup>33</sup> Practices deemed to be per se unlawful under Section 1 include price-fixing,<sup>34</sup> group boycotts<sup>35</sup> and tying arrangements.<sup>36</sup>

In the context of non-compete agreements, at least one court has found that an agreement among competitors not to solicit one another’s customers was a per se violation of Section 1. In *United States v. Cooperative Theaters of Ohio, Inc.*,<sup>37</sup> a case upon which the DOJ relied heavily in its Competitive Impact Statement<sup>38</sup> in support of its Complaint against the Defendant Companies, the Sixth Circuit found that a non-solicitation of customers agreement between two movie theater booking agents was “undeniably a type of customer allocation scheme,” which is a per se violation of Section 1.<sup>39</sup>

To be sure, the *Cooperative Theaters* decision does not contradict California case law, which unequivocally prohibits non-solicitation of customer agreements unless they are necessary to protect a company’s trade secrets. However, California courts have distinguished a plainly unlawful *customer* non-solicitation provision from the valid and enforceable non-solicitation of *employees* provision of reasonable duration, or “anti-raiding” provisions.

Nevertheless, despite the longstanding California case law supporting reasonable and limited contractual anti-raiding provisions, the Defendant Companies promptly and informally agreed to the DOJ’s demand that it dissolve the allegedly unlawful no cold-calling agreements, without admitting any liability or wrongdoing. Additionally, they agreed to a settlement with the DOJ (“Proposed Settlement”)<sup>40</sup> that is significantly broader than a simple prohibition of the already existing no cold

calling contracts. The Proposed Settlement, awaiting federal court approval, enjoins the Defendant Companies from “attempting to enter into, entering into, maintaining or enforcing any agreement with any person to in any way refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person.”<sup>41</sup> The Proposed Settlement effectively bars the companies from entering into or enforcing any non-solicitation of employees agreement with any other company—not just its co-defendants.

#### **Exceptions to the Prohibition of Non-Solicitation of Employees (“Anti-Raiding”) Agreements**

Significantly, the DOJ’s Proposed Settlement does appear to have implicitly acknowledged California case law by creating an exception to the prohibition for no direct solicitation provisions “contained within existing and future employment or severance agreements with [the Defendant Companies’] employees,” although (unlike California courts) not for agreements brought over by employees from their former employers.<sup>42</sup> The Proposed Settlement also excepts from prohibited conduct entering into, maintaining and enforcing “no direct solicitation” provisions that:

- are “reasonably necessary for mergers or acquisitions, consummated or unconsummated, investments, or divestitures, including due diligence related thereto”;
- are “reasonably necessary for contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers”;
- are “reasonably necessary for the settlement or compromise of legal disputes”; and
- are “reasonably necessary for (i) contracts with resellers or [original equipment manufacturers, i.e.,] OEMs; (ii) contracts with providers or recipients of services . . .; or (iii) the function of a legitimate collaborative agreement, such as joint development, technology integration, joint

<sup>33</sup> *Northern Pac. Ry.*, 356 U.S. at 5.

<sup>34</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 217–18 (1940).

<sup>35</sup> *Fashion Originators’ Guild v. Federal Trade Comm’n*, 312 U.S. 457, 466 (1941).

<sup>36</sup> *International Salt Co. v. United States*, 332 U.S. 392, 398 (1947).

<sup>37</sup> 845 F.2d 1367 (6th Cir. 1988).

<sup>38</sup> Competitive Impact Statement, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D. D.C. Sept. 24, 2010), available at <http://www.justice.gov/atr/cases/f262600/262650.htm>.

<sup>39</sup> *Cooperative Theaters*, 845 F.2d at 1373.

<sup>40</sup> [Proposed] Judgment, Exhibit A to Stipulation, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D. D.C. Sept. 24, 2010) (“Proposed Settlement”), available at <http://www.justice.gov/atr/cases/f262600/262660.htm>.

<sup>41</sup> Proposed Settlement, IV. Any person may submit written comments concerning the Proposed Settlement within 60 days of its publication. At the conclusion of the 60-day comment period, the court may enter final judgment upon a finding that it serves the public interest.

<sup>42</sup> Proposed Settlement, V(A)(1).

ventures, joint projects (including teaming agreements), and the shared use of facilities.”<sup>43</sup>

Additionally, the Proposed Settlement imposes on any such non-solicitation agreements a number of requirements, some of which do not—at least from a reading of *Moyes*—seem to be requirements under California law. California courts would probably agree with the Proposed Settlement’s requirements that the non-solicitation agreements “contain a specific termination date or event” and “be signed by all parties to the agreement.”<sup>44</sup> The *Moyes* Court, after all, approved a non-solicitation agreement based, in part, on the fact that it had a reasonable duration, and signature by all parties to a contract, which is a basic tenet of contract law. The Proposed Settlement’s requirement that the non-solicitation agreement “identify, with specificity, the agreement to which it is ancillary”<sup>45</sup> also does not appear to impose restrictions heavier than those of California case law, as the only type of non-solicitation agreement approved by California courts to date has been in the context of, and necessarily ancillary to, a separation agreement. However, *Moyes*, on its face, does not appear to require, as does the DOJ’s Proposed Settlement, that all non-solicitation agreements “be narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement” and “identify with reasonable specificity the employees who are subject to the agreement.”<sup>46</sup> The *Moyes* Court, after all, was satisfied with the validity of a separation agreement that barred solicitation of all of the former employer’s employees, none of whom were identified in the agreement or actually involved in the agreement, directly or otherwise. The Proposed Settlement contains prohibitions not only broader than the Defendant Companies’ alleged offenses, but also broader than the behaviors prohibited by California law.

#### **Recognition, Ratification or Enforcement of Competitors’ Non-Competition Agreements**

Also to be borne in mind is *Silguero v. Creteguard, Inc.*, a recent California Court of Appeal decision holding that even employers that do *not* enter into invalid noncompetition agreements can, nonetheless, be liable for recognizing, ratifying or enforcing them.<sup>47</sup> In *Silguero*, the employer acknowledged that

an applicant’s post-employment covenant not to compete with a former employer was unenforceable under California law, but terminated her employment upon discovery of the covenant anyway due to the risk of litigation. The employee, Rosemary Silguero, had signed an agreement with her former employer, Floor Seal Technology, Inc. (“FST”), that prohibited her “from all sales activities for 18 months following either departure or termination.”<sup>48</sup> After her termination of employment with FST, Silguero found employment with Creteguard, Inc.<sup>49</sup> FST contacted Creteguard and “requested the cooperation and participation of [Creteguard] in enforcing” Silguero’s non-compete.<sup>50</sup> Creteguard promptly terminated Silguero’s employment out of “respect and understanding with colleagues in the same industry,” notwithstanding its belief that “non-compete clauses are not legally enforceable here in California.”<sup>51</sup>

Silguero brought a *Tameny*<sup>52</sup> claim for wrongful termination in violation of public policy against Creteguard, alleging that Creteguard’s “enforcement and ratification of an illegal and void non-compete agreement . . . violated . . . the public policy of the State of California.”<sup>53</sup> In denying Creteguard’s demurrer to Silguero’s complaint, the court agreed with Silguero, finding that the “understanding” between FST and Creteguard is the equivalent of an unlawful no-hire agreement.<sup>54</sup> In reaching this determination, the *Silguero* Court reasoned that an employer “should not be ‘allowed to accomplish by indirection that which it cannot accomplish directly.’”<sup>55</sup> The court concluded that permitting a *Tameny* claim under such circumstances “furthers the interest of employees in their own mobility and betterment.”<sup>56</sup>

#### **Conclusion**

On one hand, the DOJ’s argument that the no cold-calling agreements are unlawful anti-competitive covenants seems to contradict California courts’ decisions in

<sup>43</sup> Proposed Settlement, V(A)(2)-(5).

<sup>44</sup> Proposed Settlement, V(B)(4)-(5).

<sup>45</sup> Proposed Settlement, V(B)(1).

<sup>46</sup> Proposed Settlement, V(B)(2)-(3).

<sup>47</sup> 187 Cal. App. 4th 60, 70 (July 30, 2010).

<sup>48</sup> *Id.* at 64.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 64–65.

<sup>51</sup> *Id.* at 65.

<sup>52</sup> See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980).

<sup>53</sup> *Silguero*, 187 Cal. App. 4th at 65.

<sup>54</sup> *Id.* at 70.

<sup>55</sup> *Id.* (citing *VLS Systems*, 152 Cal. App. 4th at 716–17).

<sup>56</sup> *Id.*

cases like *Moyes*. On the other hand, the legal reasoning of both the California courts and the federal courts interpreting the Sherman Act is impact-driven: Contracts are unlawful if they have a “pernicious effect on competition,” or if they restrict the ability of employees to engage in their profession.<sup>57</sup> And while one non-solicitation of employees provision in one severance or employment agreement may have only a minimal impact, if any, on the general labor market, non-solicitation agreements between the largest companies in Silicon Valley arguably restrict employee mobility and affect the overall labor market. The unfortunate truth appears to be that the more successful a business is, and the more of an impact it is capable of having on the labor market, the more careful it has to be to avoid accusations of unlawful anti-competitive behavior. This is the inevitable effect of an impact-driven legal analysis.

The lesson to be taken from the DOJ’s lawsuit against the six tech giants, as well as the recent the recent

California appellate decision in *Silguero*, is that employers bear a legal responsibility, not only to refrain from drafting and entering into agreements that unlawfully restrain competition, but to refuse to enforce such agreements, even if enforcement is requested of them in the tempting guise of a request for professional courtesy and “respect and understanding with colleagues in the same industry.”<sup>58</sup>

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<sup>57</sup> See, e.g., *Northern Pac. Ry.*, 356 U.S. at 5 (emphasis added).

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<sup>58</sup> *Silguero*, 187 Cal. App. 4th at 65.