



**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

September 16, 2009

William M. Lafferty
Samuel T. Hirzel
Ryan D. Stottmann
Pauletta J. Brown
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
Wilmington, DE 19801

Arthur L. Dent
Michael A. Pittenger
Berton W. Ashman, Jr.
Potter Anderson & Corroon LLP
Hercules Plaza
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899

Re: *eBay Domestic Holdings, Inc. v. Newmark, et al.*
Civil Action No. 3705-CC

Dear Counsel:

Although I previously indicated to you that I would reserve decision on these motions pending decision on eBay's motion in limine, the approaching trial compels me to provide you some guidance on discovery matters to facilitate your preparation for trial. Defendants request that the Court order eBay to withdraw the "highly confidential" designation from certain documents produced by eBay in 2008 that were previously produced to the New York Attorney General. The highly confidential designation prevents Newmark and Buckmaster from reviewing those documents, and defendants contend that the documents do not warrant the highly confidential designation. Defendants also contend that their outside attorneys lack the technical expertise and knowledge of craigslist to understand the importance or sensitivity of the documents and would like to

discuss the documents with Newmark and Buckmaster to gain a better understanding of their implications. eBay contends that it only agreed to produce the documents in this action as an accommodation, and on an as-is basis, without re-review for confidentiality, privilege, or responsiveness. The documents at issue were produced approximately four years ago to the New York Attorney General in connection with an investigation of potential anti-competitive behavior by eBay. A significant majority of the documents are more than four years old, and more than 99% are more than three years old.

Trial is fast approaching in this case, and defendants' motion in limine has not yet been decided. Although eBay asserts that it produced the documents only as an "accommodation" because they are not relevant to this action, whether the documents will be admissible at trial has yet to be determined. Accordingly, and because I have not yet ruled on the motion in limine, discovery should proceed so that the parties can prepare for trial even while awaiting the Court's ruling on admissibility.

In their May 18, 2009 letter, defendants indicate that they reviewed the documents and reduced the number of documents they seek to have eBay review and re-designate by approximately 90%—to less than 1,900 documents. This good faith effort to reach a compromise directly addresses any concerns regarding burden to eBay. Accordingly, I will order eBay to review the approximately 1,900 documents specified by defendants and only designate as highly confidential those documents that eBay in good faith determines warrant such a designation. If the documents do not warrant highly confidential designation, they should be re-designated appropriately. eBay has one week to review the documents, after which time any document that eBay has not reviewed and determined in good faith warrants highly confidential designation will be re-designated as confidential.

Next, defendants request that the Court order eBay to produce unredacted versions of its board minutes. Although it produced minutes of board meetings that referred to craigslist, eBay redacted information that it contends is not related to craigslist or otherwise relevant to this litigation. In connection with a May 4, 2009 deposition, defendants saw unredacted copies of the board minutes, and now contend that the redacted portions are relevant because they relate to eBay's classifieds strategy and were improperly redacted. Although defendants contend that the evidence will not be admissible at trial, I have not yet ruled on the motion in limine, and discovery should proceed so that the parties can prepare for trial until the Court is able to make a ruling on admissibility. Moreover, as the Court

already noted in the March 6, 2009 ruling, evidence of eBay's conduct that was not known to the craigslist directors at the time could be relevant by way of rebuttal if eBay introduces evidence that its conduct was proper and did not pose a threat to craigslist. Accordingly, and to facilitate efficient trial preparation and decrease the likelihood of any further delay, eBay should produce to defendants unredacted versions of the board minutes.

Finally, defendants request that the Court order eBay to produce certain documents that were previously produced to defendants but that eBay is now attempting to "claw back" on grounds of privilege. Although eBay initially produced the documents, it sought to claw back the documents after defendants argued that the documents were privileged and that their production resulted in subject matter waiver of privilege. On March 6, 2009, I ruled that eBay's good faith review and production of documents did not result in a waiver as to all counsel communications that are privileged. The rationale for this ruling was a desire to avoid discouraging litigants from making a good faith effort to produce non-privileged documents while withholding documents that are privileged. I also noted that if eBay inadvertently produced some documents that may better be classified as privileged, then they can be recalled by eBay in this case without waiving the privilege.

Defendants now contend that the documents are not privileged, and that eBay has waived any privilege that may have otherwise applied. I must admit that defendants' arguments as to why eBay has waived privilege as to the documents it actually produced raise some concerns. I still also have concerns, however, about not deterring the disclosure of non-privileged documents by too severely constraining the claw-back of inadvertently produced documents. Moreover, both sides argue extensively regarding the opposing party's inconsistent positions with respect to whether the documents are privileged, the circumstances surrounding eBay's production of the documents, and even the scope of my March 6, 2009 ruling. Importantly, these tedious disputes are directly related to the inconsistency and gamesmanship evident by both parties on this issue. As a result, the most appropriate and equitable resolution of this issue is a ruling based on whether the documents are, in fact, actually privileged. If the documents are not privileged on their face, then eBay cannot withhold them on privilege grounds. If they are privileged on their face, then eBay will be permitted to withhold them from craigslist. I should also note that I am not convinced by defendants' argument that the crime/fraud exception to attorney-client privilege applies here.

eBay bears the burden of establishing that each of the documents it seeks to withhold or claw back is privileged. In its May 26, 2009 response letter, eBay fails to demonstrate that the documents are privileged attorney-client communications. eBay states that each of the documents was either drafted by a lawyer, a communication with a lawyer, or a communication referencing what a lawyer said previously. A document, however, is not privileged merely because it was drafted by or communicated to a lawyer. Rather, a communication with an in-house lawyer is only privileged if the communication was for the purpose of legal, as opposed to business, advice. Although eBay correctly points out that the distinction may sometimes be difficult to make, that fact does not relieve eBay of its burden of demonstrating that privilege applies.

eBay has failed to demonstrate in its letter submissions on this issue that the documents it seeks to claw back are privileged. Accordingly, the documents defendants seek should be produced unless, within one week, eBay provides a detailed privilege log that identifies and describes each document and demonstrates that each document is privileged. If eBay attempts to make such a demonstration, defendants will have an opportunity to make objections, after which time the Court will make a determination of whether or not the documents are privileged.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and includes a horizontal line under the name.

William B. Chandler III

WBCIII:jmb