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E-Filed 9/1/2009

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE EBAY SELLER ANTITRUST
LITIGATION

Case No. C 07-01882 JF (RS)

ORDER¹ DENYING DEFENDANT'S
ADMINISTRATIVE REQUEST FOR
AN EVIDENTIARY HEARING ON
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION; AND GRANTING
IN PART PLAINTIFFS'
ADMINISTRATIVE MOTION TO
VACATE HEARING DATE ON
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
REQUEST FOR CASE
MANAGEMENT CONFERENCE

[Re: Docket Nos. 344, 349]

Pursuant to Local Rule 7-11, Defendant eBay, Inc. ("eBay") requests an evidentiary hearing on Plaintiffs' Motion for Class Certification to determine whether Plaintiffs are able to establish the requirements for class certification under Rule 23. Plaintiffs oppose the request.

¹ This disposition is not designated for publication in the official reports.

Case No. C 07-01882 JF (RS)

ORDER DENYING DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING AND GRANTING IN PART PLAINTIFFS' MOTION TO VACATE HEARING DATE ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR CASE MANAGEMENT CONFERENCE

(JFEX1)

1 The Court has read the moving and responding papers. For the reasons set forth below, eBay's
2 request will be denied.

3 Additionally, Plaintiffs seek an order pursuant to Local Rule 6-3 vacating the hearing date
4 on eBay's motion for summary judgment and request that a case management conference be set
5 on either August 28, 2009 or September 4, 2009. In the alternative, Plaintiffs request that a case
6 management conference be set for October 16, 2009, the same date as the hearing on Plaintiffs'
7 motion for class certification. eBay opposes Plaintiffs' motion. The Court has read the moving
8 and responding papers and, for the reasons set forth below, the motion will be granted in part.

9 I. DEFENDANT'S REQUEST FOR EVIDENTIARY HEARING

10 A. Legal Standard

11 In determining whether class certification is appropriate, "the question is not whether the
12 plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether
13 the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78
14 (1974). "A class action may only be certified if the trial court is satisfied, after a rigorous
15 analysis, that the prerequisites of Rule 23(a) have been satisfied."² *Gen. Tel. Co. Of the Sw. v.*
16 *Falcon*, 457 U.S. 147, 161 (1982). At the class certification stage, "it is enough that [plaintiffs'
17 expert] presented properly-analyzed, scientifically reliable evidence tending to show that a
18 common question of fact. . .exists with respect to all members of the class." *Dukes v. Wal-Mart*,
19 509 F.3d 1168, 1179 (9th Cir 2007).

20 When determining whether class certification is proper, the court may need to go beyond
21 the pleadings and permit some discovery and/or an evidentiary hearing to determine whether a
22 class may be certified. *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 & n. 14 (11th Cir. 2008).

24
25 ² Fed. R. Civ. Proc. 23(a): "One or more members of a class may sue or be sued as
26 representative parties on behalf of all members only if: (1) the class is so numerous that joinder
27 of all members is impracticable; (2) there are questions of law or fact common to the class; (3)
28 the claims or defenses of the representative parties are typical of the claims or defenses of the
class."

1 Such action is warranted “if the existing record is inadequate for resolving the relevant issues.”
2 *In Re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996).

3 **B. Discussion**

4 Resolving disputes raised by competing experts in complex antitrust cases is no simple
5 task. Ultimately, the Court must leave disputes over the results reached and assumptions made
6 with respect to competing methodologies to the trier of fact, and discern only whether the
7 plaintiffs have advanced a plausible methodology to demonstrate that antitrust injury can be
8 proved on a class-wide basis. *In re Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (1996). The
9 Court’s duty at this stage is to determine, after rigorous analysis, whether each prerequisite of
10 class certification under Rule 23 has been met.

11 The question here is whether this Court, as part of its rigorous analysis, should hold an
12 evidentiary hearing in order to evaluate the credibility of expert testimony presented by the
13 parties. eBay notes correctly that, in recent years, courts have exhibited a greater willingness to
14 test the viability of methodologies that experts propose to show class wide impact and injury
15 using common proof, and are increasingly skeptical of plaintiffs’ experts who offer only
16 generalized and theoretical opinions that a particular methodology may serve this purpose
17 without also submitting a functioning model that is tailored to market facts in the case at hand.
18 *In re Graphics Processing units Antitrust Litig.*, 253 F.R.D. 478, 492 (N.D. Cal. 2008).
19 Nonetheless, “district courts have broad discretion to control the class certification process.”
20 *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009). Accordingly, given
21 the breadth of the record available in this case,³ testimony from the same witnesses who will
22 have submitted extensive reports and who have been deposed for numerous hours is not likely to
23 produce significant information that is not already contained in the record.

24 eBay cites cases for the unremarkable proposition that often the pleadings alone will not

25
26 ³ By the time of the hearing on Plaintiffs’ motion for class certification, the record will
27 contain approximately 130 pages of legal briefs, 109 pages of expert reports (excluding exhibits
28 and Plaintiffs’ yet to be filed reply expert report(s)), 136 pages of witness declarations, 231 pages
of witness transcript testimony, and 183 exhibits.

1 resolve the question of class certification and that some discovery will be warranted. *Id.* Here,
2 since both parties have had the opportunity to conduct discovery to an extent that has produced a
3 substantial record, the Court sees no need to receive cumulative live testimony.

4
5 **II. PLAINTIFFS' ADMINISTRATIVE MOTION TO VACATE HEARING DATE ON**
6 **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

7 **A. Summary of Arguments**

8 Plaintiffs seek to vacate the hearing date on eBay's motion for summary judgment on the
9 ground that the current schedule deprives them of time to prepare adequately. Specifically,
10 Plaintiffs assert that, in addition to the untenable time frame created by the current schedule,
11 eBay's motion for summary judgment is premature given the volume of outstanding discovery
12 and Judge Seeborg's recent orders compelling additional discovery.

13 eBay opposes Plaintiffs' motion to vacate, suggesting that the motion essentially is a
14 motion pursuant to Rule 56(f), thinly veiled as an administrative motion so as to circumvent the
15 formal pleading requirements under the Rule. eBay also contends that Plaintiffs are not unduly
16 burdened by the current schedule and long have been aware that eBay intended to file a motion
17 for summary judgment in this time frame.

18 **B. Discussion**

19 eBay has noticed its summary judgment motion for hearing on October 9, 2009, one week
20 before the hearing on Plaintiffs' motion for class certification. Under the current schedule,
21 Plaintiffs' opposition to eBay's motion for summary judgment would be due on September 18,
22 2009, only four days after the due date for their reply brief in support of class certification.

23 The Court concludes that it is most efficient to hear Plaintiffs' motion for class
24 certification and eBay's motion for summary judgment concurrently. The Court's initial
25 inclination then is to reschedule the hearing on eBay's motion for summary judgment to October
26 16, 2009. However, because of a scheduling conflict that has arisen only recently, the Court is
27 unavailable on October 16. Accordingly, the Court will set both matters for hearing on October

1 30, 2009 at 9:00 a.m. This schedule accommodates Plaintiffs' desire for more time to oppose
2 eBay's summary judgment motion as well as eBay's desire for expeditious proceedings.

3 A case management conference is hereby scheduled for October 30, 2009, immediately
4 following the hearing on the motions.

5 **III. ORDER**

6 Good cause therefore appearing,

7 (1) eBay's request for an evidentiary hearing is DENIED;

8 (2) Plaintiffs' motion to vacate hearing date on Defendants' motion for summary
9 judgment is GRANTED IN PART. The motion for class certification and motion for summary
10 judgment are set for hearing on October 30, 2009 at 9:00 a.m.; and

11 (3) A case management conference is set for October 30, 2009 at 9:00 a.m., immediately
12 following hearing on the motions.

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14 IT IS SO ORDERED.

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16 DATED: September 1, 2009

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19 JEREMY FOGEL
20 United States District Judge
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