

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

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Submitted: October 23, 2009

Decided: October 29, 2009

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

Dear Counsel:

I have carefully reviewed the briefs in support of and in opposition to defendants' motion to compel. In summary, my order on each of the six forms of relief requested by defendants is as follows: (1) pursuant to this Court's September 16 Order, plaintiff must produce unredacted board minutes and materials from the years 2004 through 2008 *to the extent those minutes discuss in any way plaintiff's classifieds business*, but plaintiff does not have to produce unredacted versions of all board minutes and materials from this period; (2) defendants may continue their depositions of Meg Whitman, Brian Levey, John Donahoe, and Pierre Omidyar but must limit the scope of any continued depositions to questions about the relevant board meetings identified by defendants upon review of the minutes produced by

plaintiff in response to this and the September 16 Order; (3) defendants may depose Bob Swan; (4) plaintiff must perform a search of Bob Swan's files for all relevant, responsive, non-privileged materials and produce any such materials to defendants; (5) defendants are not entitled to fees or sanctions for the May 21 motion, this motion, or for additional depositions; and (6) defendants are not entitled to have an attorney present during the Court's *in camera* review of materials submitted by plaintiffs. My determination on each of the six forms of relief requested by defendants is explained more fully below.

1. Defendants ask the Court to order plaintiff to produce complete, unredacted versions of all board minutes and related materials from the years 2004 through 2008

Defendants filed a letter motion on May 21, 2009 asking the Court to either (a) order plaintiff to produce all board minutes and materials from 2004 through 2008 in unredacted form or (b) "order [plaintiff] to produce at a minimum its board minutes and board materials in unredacted form to the extent they discuss *in any way* [plaintiff's] classifieds business."¹ On September 16 this Court ruled on the motion as follows:

[D]efendants 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 [A]s 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 . . . eBay should produce to defendants unredacted versions of the board minutes.²

¹ Defs.' Mot. to Compel 3 (emphasis added).

² Sept. 16 Order at 4 (emphasis added).

The parties dispute the meaning of this Order. Defendants contend that the Order requires an unredacted production of all board minutes and materials while plaintiff contends that the Order requires production of only those board minutes that in some way discuss plaintiff's classifieds business. Plaintiff also contends that the Order does not require production of board materials, just board minutes.³

I take this occasion to make the September 16 Order perfectly clear. The Order requires plaintiff to produce unredacted board minutes and materials from 2004 through 2008 that discuss *in any way* plaintiff's classifieds business. As shown above, I emphasized in the September 16 Order that plaintiff's competitive conduct in the classifieds business is conditionally relevant to this case and therefore discovery of board minutes and materials dealing with that conduct is appropriate. Nevertheless, it would not be appropriate to order that all board minutes are discoverable without regard to content.⁴ This would run afoul of Chancery Court Rule 26, which directs that material is only discoverable if it is relevant to a claim or defense in the case.⁵ While the Court has broad discretion to manage discovery, it cannot abandon or disregard the relevance requirement in Rule 26. Board minutes or materials that contain absolutely no mention of plaintiff's classifieds business are not relevant to a claim or defense and, accordingly, are not discoverable.

For the sake of further clarification I note that use of the word "craigslist" in a given set of board minutes or a given set of materials does not make those minutes or materials per se relevant. Simple mention of "craigslist" in a document does not necessarily mean that the document's substance relates to a claim or defense in the case (*e.g.*, a sentence stating that plaintiff owns approximately twenty-five percent of "craigslist" or a list of plaintiff's investments that includes "craigslist" is irrelevant if not accompanied by some discussion about plaintiff's classifieds business).

In their briefs, defendants specifically identify four as-yet-unproduced documents that they believe might contain information about plaintiff's classifieds business. They are a budget presentation given at the January 10, 2007 board

³ Despite this contention, plaintiff produced board materials in response to the September 16 Order. Accordingly, I conclude that plaintiff correctly understood that the September 16 Order applies to board materials as well as minutes.

⁴ Nor was this the Court's September 16 Order, as should be evident from the repeated use of the term "relevant" in the Letter Opinion.

⁵ CH. CT. R. 26.

meeting, a financial presentation given at the March 28, 2007 board meeting, and the minutes of the March 2006 and January 2008 board meetings. Plaintiff maintains that these documents are not relevant but is nevertheless willing to submit them for an *in camera* review. Accordingly, to facilitate an efficient resolution of this particular dispute, plaintiff is hereby ordered to submit these four documents for *in camera* review. The Court will review these documents in conjunction with its *in camera* review of the eight board presentations previously submitted and will inform the parties whether these documents must be produced under the September 16 Order.

2. Defendants ask the Court to order Meg Whitman, Brian Levey, John Donahoe, and Pierre Omidyar to submit to continued deposition

Defendants identify several passages from plaintiff's board minutes—produced in response to the September 16 Order—that discuss plaintiff's classifieds business generally as well as plaintiff's relationship to defendants (e.g., the January 10, 2007 minutes discuss the possibility of plaintiff venturing into the U.S. classifieds business and the effect such a move might have on its relationship with defendants). Defendants argue that because these passages were redacted when the above-named individuals were deposed, defendants did not have a fair opportunity to question the above-named individuals about the specific discussions held in pertinent board meetings and should therefore be permitted to continue their depositions in order to posit questions about these specific board meetings. Plaintiff responds that the passages identified by defendants do not reveal any information that defendants were not already aware of when they conducted the depositions and that defendants already questioned the above-named individuals about that information. Plaintiff identifies several documents (other than board minutes) that defendants cite in their pretrial brief that disclose the same information recently unearthed in the unredacted board minutes, as well as several lines of questioning in the original depositions that explore this information. According to plaintiff, continuing the depositions would not add anything to the record.

I hold that defendants should be permitted to continue their depositions of the above-named individuals. In so doing, however, defendants must specifically limit the scope of the depositions to questions about the boards' classifieds business discussions that defendant identified upon review of the unredacted board minutes. Though it is true that defendants were generally aware of the information in the board minutes and questioned the above-named individuals in a general fashion about it, defendants did not have the opportunity to explore the *specific*

discussions that were held in the pertinent board meetings. Nor did defendants know at which board meetings those discussions took place. Board minutes contain high-level statements and are often generic in nature. Thus, it is no surprise that the statements in the unredacted board minutes appear cumulative of information in other documents. But the specific discussions held in those board meetings may not be cumulative. Defendants should be permitted to explore the detailed content of those discussions to the extent such content is relevant. Defendants did not have that opportunity at the original deposition because they were unaware of the specific board meetings in which a discussion of plaintiff's classifieds business had taken place.

3. Defendants ask the Court to permit a first deposition of Bob Swan

Defendants identify a passage from the March 28, 2007 board minutes—produced in response to the September 16 Order—that describes plaintiff's CFO, Bob Swan, as giving plaintiff's board an update regarding plaintiff's relationship with craigslist. Defendants assert that they were unaware Swan played any role in monitoring or managing plaintiff's relationship with craigslist prior to reading this passage and so didn't seek to depose Swan previously. Accordingly, defendants ask the Court to permit them to depose Swan. Plaintiff responds that it is a matter of public record that Swan is plaintiff's CFO and, therefore, defendants were fully aware that Swan regularly attended, and made presentations at, board meetings. Plaintiff contends that defendants' request to depose Swan is untimely and unreasonable in light of what they already knew about him.

I hold that defendants should be permitted to depose Swan. Even though defendants were aware of Swan's role as CFO and his attendance and participation in board meetings, it is not clear that defendants knew or should have known Swan was specifically involved in monitoring or managing plaintiff's relationship with craigslist. Although the statement in the March 28, 2007 minutes that Swan "updated the board" doesn't make it clear that Swan was heavily involved in the eBay-craigslist relationship, defendants should be permitted to explore the level of his involvement. Defendants did not have specific notice that they should depose Swan based on the documents plaintiff had produced during discovery because the sentence in the March 28, 2007 board minutes was redacted.

4. Defendants ask the Court to compel plaintiff to produce all relevant, responsive, non-privileged materials from Bob Swan's files

Defendants assert that they did not previously list Swan as a potential custodian of relevant records because they were unaware of his involvement in either monitoring or managing the eBay-craigslist relationship. Accordingly, defendants ask the Court to order plaintiff to perform a search of Swan's files for all relevant, responsive, non-privileged materials. Plaintiff responds that defendants were fully aware that Swan was the CFO when they previously requested that a search of personnel files be performed and, accordingly, should have asked that Swan's files be searched at that time.

I hold that a search of Swan's files for all relevant, responsive, non-privileged materials is in order for essentially the same reasons that a deposition of Swan is appropriate. Plaintiff redacted the statement in the March 28, 2007 board minutes that discussed Swan's update to the board about plaintiff's investment in craigslist. Without the benefit of that statement, defendants did not have specific notice that they should search Swan's files. Defendants were generally aware of Swan's role as CFO and his attendance at board meetings, but given that plaintiff is a large, multifaceted organization, it is not clear that defendants should have known Swan's files were likely to contain information about plaintiff's classifieds business. Defendants only came to know that Swan was comfortable updating the board about the craigslist investment when they read the March 28 minutes. With that knowledge—obtained after defendants' original file-search request—defendants now have a specific reason to suspect that Swan has discoverable information in his files. In particular, defendants could reasonably believe that Swan relied on relevant information in his files in giving the update to the board.

I also hold that defendants will be permitted to depose additional material witnesses should any be discovered based on a review of Swan's files. The basis for this holding is the same as for my holdings above permitting additional depositions and document discovery. Namely, to the extent relevant information was redacted from documents produced during discovery, defendants were unable to make further discovery requests based on those documents at the appropriate time and will be permitted to do so now.

5. Defendants ask for an award of fees and expenses incurred in connection with (a) the May 21 motion to compel production of unredacted board minutes and materials, (b) this present motion to compel, and (c) any additional depositions ordered by the Court

Defendants contend that Chancery Court Rule 37(a)(4) requires plaintiff to pay the expenses of their May 21 motion, this motion, and any expenses associated with additional depositions.⁶ Plaintiff responds that an award of fees would be unjust because its redaction of relevant portions of the minutes was an inadvertent oversight, not a knowing concealment or the result of grossly negligent conduct.⁷

First, I hold that defendants are not entitled to be reimbursed for fees or expenses associated with the motions. Even though plaintiff redacted relevant portions of the minutes before the September 16 Order, it is not clear that this redaction was intentional. This Court has never required perfection in document production. Absent clear evidence that the failure to produce relevant documents was something other than a mistake, it would be unjust to require plaintiff to pay the fees associated with the motion. It is not clear from the evidence that plaintiff intentionally concealed information from defendants.

In modern litigation mistakes and oversights in document production often occur. Parties face significant challenges in their attempts to comply with appropriate discovery requests. They often must sift through large quantities of documentation for relevant and responsive material, all-the-while screening out irrelevant, privileged, or otherwise undiscoverable information. In such an environment mistakes are inevitable and fees should not be awarded unless it is clear information was intentionally withheld.

⁶ The relevant portion of the rule reads:

If the motion is granted . . . the Court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including the attorney's fees, unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

CH. CT. R. 37(a)(4) (emphasis added).

⁷ *Dow Chem. Canada Inc. v. HRD Corp.*, 2009 WL 2355742, at *6-7 (D. Del. July 30, 2009).

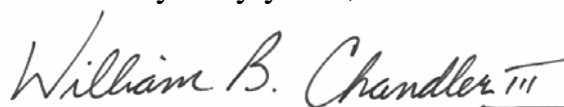
Second, I hold that defendants are not entitled to fees for continued or additional depositions. Chancery Court Rule 37 deals specifically with costs incurred “in obtaining the order.” It does not provide that costs relating to the additional discovery ordered be reimbursed. If defendants had received the redacted information from plaintiff before the May 21 motion they presumably would have pursued the discovery they request in this motion and would have born the costs of that discovery themselves at that time. The only costs defendants would have been spared are costs associated with the motions.⁸ Accordingly, reimbursement for costs associated with the additional depositions would amount to inappropriate fee shifting not in harmony with Rule 37.

6. Defendants ask the Court to permit one of their attorneys to be present for the *in camera* review of the eight board presentations submitted by plaintiff so that defendants’ attorneys “may advise the Court as to the significance of the presentations”

The gist of defendants’ request here is that one of their attorneys can help the Court determine the relevance of the eight presentations submitted for *in camera* review. Apart from the fact that if one of defendants’ attorneys participates in the *in camera* review it would no longer be “in camera,” the Court is competent enough to evaluate the relevance of the eight presentations on its own. Accordingly, defendants’ request to have one of its attorneys review the presentations is denied.

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:arh

⁸ Costs which, though perhaps unfortunate, are not reimbursable as described previously.