

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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November 9, 2009

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

Dear Counsel:

For the reasons briefly mentioned herein, I grant in part and deny in part eBay's motion *in limine* to exclude evidence of alleged misuse of craigslist information and unfair competition. eBay asserts several grounds for its *in limine* motion, but I only need address one to dispose of the motion.

eBay contends that the corporate governance changes defendants enacted are violations of defendants' fiduciary duties, and the relief eBay seeks is rescission of those corporate governance changes—a remedy that would re-enable eBay to have a seat on, or exert influence over the composition of, craigslist's board of directors and would remove various protections for defendants afforded under the rights plan and the right of first refusal.

Defendants assert that the corporate governance changes were a response to the conduct of eBay's representatives while those representatives sat on the craigslist board of directors, and to the threats to craigslist that existed as a result of eBay's conduct and in the absence of the governance changes. Taken together, these elements *may* satisfy an "unclean hands" standard. The conduct of eBay's representatives while those representatives sat on the craigslist board of directors may relate to the matter in controversy, insofar as the corporate governance changes at craigslist were a response to that conduct; and the conduct of eBay's representatives to the craigslist board of directors appears to have an immediate and necessary relationship to the equitable remedy that eBay seeks to obtain in the litigation, insofar as that remedy might re-enable eBay to have a seat on or exert influence over the craigslist board. Furthermore, to the extent a threat to craigslist arose not in the form of pure competition but from inequitable conduct on the part of eBay, and to the extent the corporate governance changes were a response to that threat and now are the target of eBay's claim for relief, the standards of an "unclean hands" defense may also be met.

Given that the standards of an "unclean hands" defense may be met, that the doctrine does not appear to be definitively irrelevant here, and that "unclean hands" does not impose an evidentiary limit to what was known at the time the governance changes were enacted, defendants are entitled to present evidence in support of their assertion that they enacted the corporate governance changes as a response to conduct of eBay and its representatives on the craigslist board. In urging this "unclean hands" defense, defendants are permitted to present evidence of eBay's conduct even if defendants were not aware of that conduct at the time they enacted the corporate governance changes.

My ruling on this matter, however, is not one that imposes no limitations on defendants. Defendants are permitted to introduce evidence of eBay's conduct—whether known to defendants at the time of the governance changes or not—so long as the evidence is *directly related* to eBay's involvement with craigslist's board of directors or inequitable conduct, and not simply evidence of pure competition in the marketplace. eBay is free to object to evidence it believes does not speak to the conduct defendants allege was inequitable, and this Court will be mindful of the relevance of all evidence to lines of defense other than "unclean hands."

Because the ruling on the "unclean hands" defense is dispositive of the issue whether defendants are permitted to introduce evidence of eBay's conduct even if that conduct was unknown to defendants at the time they enacted the corporate governance changes, I need not address the issues of the California Action and

whether the appropriate standard of review for the governance changes is *Unocal* or entire fairness. I reserve judgment on those questions.

Although my ruling on “unclean hands” is dispositive to the issue whether defendants may introduce evidence of eBay’s conduct even if that conduct was unknown to defendants at the time they enacted the corporate governance changes, there are additional arguments relating to the testimony of Robert Cauthorn that are independent of the reach of my “unclean hands” ruling. Defendants are correct in their description of the flexibility this Court has when determining the admissibility of expert testimony. When determining admissibility, I can rely on the specific criteria set forth in *Daubert*¹ or on any other set of reasonable reliability criteria. In *Bowen*,² the Delaware Supreme Court outlined a set of reasonable criteria more expansive and flexible than that of *Daubert*. Included in—and inherently critical to—that set of criteria is whether the evidence in question is relevant, and whether the expert testimony will assist me in understanding the evidence or in determining a fact in issue.

Those portions of Cauthorn’s testimony that simply restate facts—and do not provide expert insight into what the facts themselves mean—do not assist me in understanding evidence or in determining a fact in issue. As these portions of Cauthorn’s expert testimony are not helpful, I grant that portion of eBay’s motion *in limine* to exclude those portions of his testimony.

In regard to those portions of Cauthorn’s testimony that offer his opinions, I deny without prejudice the portion of eBay’s motion *in limine* to exclude Cauthorn’s testimony on the basis that he is not an expert witness, that his opinions are not relevant, or that his opinions are not based on reliable data or methodologies. I will give appropriate weight to Cauthorn’s testimony on the basis of his experience and on the basis of what reliability and credibility I draw from his testimony. eBay is free to object when it believes Cauthorn’s testimony is barred by the rules of evidence, and is free to present testimony of its own in relation to the conclusions Cauthorn has drawn.

¹ *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

² *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787 (Del. 2006).

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 "III" at the end.

William B. Chandler III

WBCIII:bjt