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E-Filed 10/28/2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE EBAY SELLER ANTITRUST
LITIGATION

Case Number C 07-1882 JF (RS)

ORDER OVERRULING OBJECTION
TO AUGUST 17, 2009 FURTHER
ORDER REGARDING MOTION TO
COMPEL TESTIMONY AND
TRANSACTIONAL DATA

I. BACKGROUND

On March 25, 2009, Plaintiffs propounded eight document requests, with sixty-two separate sub-parts, seeking compilations of transactional data. On May 13, 2009, Plaintiffs moved to compel production with respect to fifty-five of these sub-parts. On July 13, 2009, this Court directed Defendant eBay, Inc. (“eBay”) to designate an additional corporate witness to answer questions related to Plaintiffs’ requests and to submit a further declaration detailing how and to what extent the material requested could be compiled from multiple data fields and at what cost. eBay complied with that order as of August 3, 2009. On August 17, 2009, Magistrate Judge Seeborg granted in part and denied in part Plaintiffs’ motion to compel production (“August 17th Order”). eBay has filed a timely objection to the August 17th Order, and the parties have submitted appropriate briefing. For the reasons discussed below, the objection will

1 be overruled.

2 II. LEGAL STANDARD

3 eBay has the burden of showing that the magistrate judge’s ruling is clearly erroneous or
4 contrary to law. “[T]he magistrate’s decision on a nondispositive issue will be reviewed by the
5 district court judge under the clearly erroneous standard.” *Bahn v. NME Hospitals, Inc.*, 929
6 F.2d 1404, 1414 (9th Cir. 1991); *see also* Fed. R. Civ. P. 72(a) (“The district judge in the case
7 must . . . set aside any part of the order that is clearly erroneous or is contrary to law.”). “In
8 finding that the magistrate judge’s decision is ‘clearly erroneous,’ the Court must arrive at a
9 definite and firm conviction that a mistake has been committed.” *EEOC v. Lexus of Serramonte*,
10 No. C 05-0962 SBA, 2006 WL 2619367, at *2 (N.D. Cal. Sept. 5, 2006). “This standard is
11 extremely deferential and the [m]agistrate’s rulings should be considered the final decisions of
12 the [d]istrict [c]ourt.” *Id.*

13 III. DISCUSSION

14 eBay alleges that the August 17th Order failed to take into account the limited benefit of
15 further production in light of the extensive discovery eBay already has provided. eBay contends
16 that the order was based upon two factual errors — first, the mistaken notion that the data to be
17 compiled is not new information and is readily available; and second, that retrieval of the
18 information likely would consume less time and fewer resources than eBay had estimated
19 originally. eBay claims that, in actuality, to comply with the order it would have to spend
20 hundreds of thousands of dollars to dedicate a highly specialized engineering resource for a
21 period of more than six months to create new data solely for the instant litigation. eBay argues
22 that such a requirement would be unduly burdensome. *See* FED. R. CIV. P. 26(b)(2)(C)(iii) (“the
23 court must limit the frequency or extent of discovery otherwise allowed by these rules or by local
24 rule if it determines that the burden or expense of the proposed discovery outweighs its likely
25 benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the
26 importance of the issues at stake in the action, and the importance of the discovery in resolving
27 the issues”).

1 **A. The Proposed Costs Are Not Clearly Unduly Burdensome**

2 Particularly in light of the demonstrated uncertainty of eBay’s cost estimates, this Court
3 concludes that Magistrate Judge Seeborg’s determination was not clearly erroneous. The August
4 17th Order was based upon a thorough record — two depositions, multiple declarations from
5 eBay’s engineers, a declaration from Plaintiffs’ consultant, five separate briefs filed by the
6 parties, and one prior discovery order providing the parties with guidance with respect to the
7 relevant issues. The August 17th Order states that “the actual cost and time [required] is
8 uncertain and might actually be much less than anticipated” and that “eBay’s financial and time
9 burden already have been reduced significantly through denial of the requests outlined above.”
10 eBay’s senior director of data warehouse development, Darren Bruntz, declared that the cost
11 estimate he provided could vary by as much as five hundred percent, although he believed that
12 his estimates were correct and often were overly conservative. eBay’s own papers contain
13 several different estimates, including a “conservative” estimate of between \$197,400 and
14 \$264,900, a second estimate of \$179,400, and a third estimate of nearly \$300,000. While it is
15 possible that these figures are understated, the fact remains that the estimates are uncertain.
16 Without any clear indication that the costs would be unduly burdensome even at the higher
17 amounts, eBay’s objection to the August 17th order cannot be sustained.

18 **B. The Need to Create a New Dataset of Historical Records Does Not Excuse**
19 **Production**

20 The Federal Rules of Civil Procedure clearly contemplate the production of information
21 from dynamic databases. Rule 34(a)(1)(A) allows a party to request “any designated documents
22 or electronically stored information . . . stored in any medium from which information can be
23 obtained.” Fed. R. Civ. P. 34(a)(1)(A). “Electronically stored information may exist in dynamic
24 databases . . . [D]iscovery of electronically stored information stands on equal footing with
25 discovery of paper documents.” Fed. R. Civ. P. 34 advisory committee’s note (2006
26 Amendment). *See also Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683 (N.D. Cal. 2006) (denying
27 third party Google’s motion to quash government subpoena which required production of
28 information from databases, despite the need for Google to create “new code to format and

1 extract query and URL data from many computer banks”). In light of this authority, Magistrate
2 Judge Seeborg did not clearly err in concluding that the technical burden to eBay of creating a
3 new dataset for the instant litigation does not excuse production.

4 **C. The August 17th Order Is Reasonable in Light of the Relevant Circumstances**

5 eBay also fails to show that Magistrate Judge Seeborg’s balancing of the relevant factors
6 established by the Federal Rules was clearly erroneous. The Rules provide that

7 the court must limit the frequency or extent of discovery otherwise
8 allowed . . . if it determines that the burden or expense of the
9 proposed discovery outweighs its likely benefit, considering the
10 needs of the case, the amount in controversy, the parties’ resources,
11 the importance of the issues at stake in the action, and the
12 importance of the discovery in resolving the issues.


13 FED. R. CIV. P. 26(b)(2)(C)(iii). Plaintiffs seek to represent millions of eBay auction sellers
14 allegedly injured by anti-competitive practices. Hundreds of millions of dollars are at stake.
15 eBay’s annual gross profits in 2008 were over \$6 billion, and its net income was \$1.8 billion.
16 Plaintiffs contend that the data eBay has provided thus far does not cover the entire class period
17 and is aggregate data rather than the raw data needed to create the statistical models necessary for
18 their case. While Magistrate Judge Seeborg has determined that the information sought by
19 Plaintiffs is relevant and that the costs and technical requirements involved are not unduly
20 burdensome, he also has scaled back the scope of discovery. His conclusions are not clearly
21 erroneous in light of all the relevant circumstances.

22 **III. ORDER**

23 The objection is OVERRULED.

24 **IT IS SO ORDERED.**

25 DATED: 10/28/2009

26 
27 JEREMY FOGEL
28 United States District Judge

1 This Order has been served upon the following persons:

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