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**\*E-FILED 05-25-2010\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

IN RE EBAY SELLER ANTITRUST  
LITIGATION

No. C07-01882 JF (HRL)

**ORDER DENYING EBAY, INC.’S  
MOTION FOR SANCTIONS**

**[Re: Docket No. 595]**

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eBay, Inc. moves for monetary and other sanctions against plaintiffs’ counsel at the Hagens, Berman, et al. law firm (“Hagens Berman”) for a claimed violation of the court’s Protective Order (Docket No. 68). Although though no documents have been disclosed to anyone or filed in any matter other than the instant action, eBay contends that Hagens Berman violated the Protective Order by reviewing eBay’s documents produced in the instant action, with an eye toward evaluating the documents’ potential relevance and possible use in another litigation filed against eBay: Sawyer v. Bill Me Later, et al., C10-00014JSW (the “Sawyer Action”).<sup>1</sup> Hagens Berman opposes the motion. Upon consideration of the moving and responding papers, as well as the arguments of counsel, this court rules as follows:

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<sup>1</sup> After the instant motion was briefed, the Sawyer Action was dismissed for lack of subject matter jurisdiction, without prejudice to Sawyer to re-file his claims in state court. At the motion hearing, this court was informed that Sawyer has re-filed his claims in state court.

1           The Protective Order provides that documents designated “Confidential” or “Highly  
2 Confidential” shall be used by any person (other than the producing party) solely for the purpose  
3 of the instant action. (See Docket No. 68, ¶ 3). Such designated documents are not to be used  
4 “for any business, competitive, personal, private, public or other purpose.” (Id.). In any event,  
5 “[a]ll documents and other materials produced in this litigation shall be used for purposes of this  
6 litigation only, whether or not a producing party designates such documents or materials as  
7 Confidential.” (Id. ¶ 1(c)).

8           To be clear, eBay does not contend that the filing of the Sawyer Action violated the  
9 Protective Order. This court is informed that no documents produced in the instant lawsuit have  
10 been filed in the Sawyer Action. And Hagens Berman represents that no third parties relevant to  
11 the Sawyer Action have been shown any documents produced in the instant antitrust litigation.

12           Essentially, the instant dispute boils down to a disagreement whether the Protective  
13 Order permits plaintiffs to so-called “mine” eBay’s document production in the instant action as  
14 source material for the Sawyer Action or other potential claims or actions. Plaintiffs protest that  
15 there is no record that any such “mining” has occurred. And, they maintain that, at any rate, the  
16 Protective Order should not be construed so broadly as to constrain plaintiffs’ counsel’s right  
17 and ability to practice law. eBay, however, does not seem to be going that far. Indeed, it agrees  
18 that plaintiffs’ counsel need not wipe their memories clean or somehow compartmentalize the  
19 mental impressions formed in the course of the instant action. At oral argument, eBay also  
20 seemed to agree that, to the extent Hagens Berman believes that documents produced in the  
21 instant lawsuit are also relevant to issues in the Sawyer Action, plaintiffs may pursue separate  
22 discovery as to those documents in that case. Nevertheless, eBay contends that if Hagens  
23 Berman were to review documents produced in the instant litigation for some purpose other than  
24 the instant litigation, then that review constitutes a prohibited “use” under the Protective Order.

25           Under the plain language of the Protective Order, this court agrees that any such review,  
26 if it occurred, would violate the Protective Order. At the same time, however, it is not clear  
27 whether an actual violation occurred here. eBay’s suspicions are fueled more by the absence of  
28 evidence as to what Hagens Berman may (or may not) have been doing with respect to eBay’s

1 documents. And, as discussed at the motion hearing, any such violation would be devilishly  
2 hard to police. At any rate, it is equally unclear what harm, if any, has been visited upon eBay as  
3 a result. Without more, this court is disinclined to impose sanctions for civil contempt.

4 Accordingly, eBay's motion for sanctions is denied. For good measure, however, this  
5 court makes the following admonition: the subject discovery shall not be reviewed, used, or  
6 disclosed in connection with any matter other than the instant action, absent a court order or  
7 eBay's consent.

8 Hagens Berman's request for an order directing plaintiffs' counsel to review and search  
9 for documents from the instant litigation that they contend are relevant to the Sawyer Action is  
10 also denied. The dispute over the factual overlap (or not) of the two cases has provided the  
11 backdrop for the instant motion. However, the question whether the Protective Order ought to  
12 be modified to permit use of discovery from the instant litigation in the Sawyer Action is not  
13 properly before this court on the instant motion.

14 SO ORDERED.

15 Dated: May 25, 2010

  
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HOWARD E. LLOYD  
UNITED STATES MAGISTRATE JUDGE

**United States District Court**

For the Northern District of California

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