

**\*E-FILED 07-19-2010\***

NOT FOR CITATION  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 ON MOTION TO MODIFY  
PROTECTIVE ORDER**

**[Re: Docket No. 608]**

---

INTRODUCTION

In this antitrust case, one of the law firms representing the plaintiffs also represents a different plaintiff in another case in which eBay, Inc. (eBay) is also a defendant. Those lawyers move here to modify the existing protective order to allow them to use in the other case discovery that was obtained in the instant action. As we will see, the sticking point is not so much the modification of the protective order, so that relevant discovery in one lawsuit can be used in the other. Instead, it is this: Who gets to comb through the antitrust discovery produced by eBay in order to decide which few documents may be relevant in the other case? The plaintiffs' lawyers or eBay's?

BACKGROUND

Plaintiffs in the instant action (the "Antitrust Case") claim that eBay is a monopolist in the online auction market and abuses its market dominance by engaging in anticompetitive acts

1 aimed at reducing or eliminating existing or potential future competitive threats. The alleged  
2 anticompetitive activities include, for example, buying up strategic competitors or entering into  
3 agreements with them that protect eBay's dominance. One of the plaintiffs' law firms in this  
4 putative class action is Hagens Berman Sobol Shapiro LLP ("Hagens Berman").

5 In the Antitrust Case, the court entered a stipulated protective order which provides, in  
6 relevant part:

7 All documents and other materials produced in this litigation shall  
8 be used for purposes of this litigation only, whether or not a producing  
party designates such documents or materials as Confidential.

9 \* \* \* \* \*

10 Confidential Information or Highly Confidential Information shall  
11 be used by any person, other than the producing party, solely for the  
12 purpose of conducting the actions and shall in no event be used for any  
business, competitive, personal, private, public or other purpose.

13 (Docket No. 68, Mar. 26, 2008 Protective Order, ¶1(c) and ¶3)).

14 The Antitrust Case is over, at least at the trial level. The court granted summary  
15 judgment for eBay. Plaintiffs appealed, and the appeal is pending.

16 After the filing of the Antitrust Case, Hagens Berman filed another putative class action,  
17 *Sawyer v. Bill Me Later, et al.* eBay owns Bill Me Later and is also a defendant in that case.  
18 *Sawyer* originally was filed in the Northern District of California and assigned to Judge Jeffrey  
19 White. Judge White ultimately dismissed it for lack of subject matter jurisdiction, without  
20 prejudice to refile the claims in state court. (See C10-00014JSW, Docket No. 37). Hagens  
21 Berman subsequently filed the complaint in Los Angeles County Superior Court. Thereupon,  
22 defendants removed it to federal court, and the suit currently is pending in the Central District  
23 of California.

24 *Sawyer* is not an antitrust case. Rather, *Sawyer* alleges that Bill Me Later, aided by  
25 eBay, violates California consumer protection laws by charging usurious interest and imposing  
26 impermissible penalty fees on loans made to online purchasers of good and services. Bill Me  
27 Later says it is not subject to consumer protection laws that apply to lenders because it is merely  
28 a servicing agent and not a lender. There is a bank, says Bill Me Later, that makes the loans.

(Banks are, apparently, not subject to the consumer protection laws in question.) Not so, says Sawyer: Bill Me Later is the actual lender, and the bank's presence in the transaction is mere window dressing to mask Bill Me Later's true role. The key legal issue in *Sawyer* is how to characterize Bill Me Later's role when online buyers finance their purchases through Bill Me Later.

## DISCUSSION

Hagens Berman now moves in this Antitrust Case to modify the protective order.<sup>1</sup> They want a "limited modification [that] will allow Plaintiffs' counsel to use a discrete subset of the documents produced in this action that are highly relevant in the *Sawyer* litigation . . . ." (Mot. at 1:4-5). Although the movants go to lengths to disguise it, their seemingly simple request is not so simple in fact and raises two distinct issues, one of them easy to decide and one not so.

### 1. Modify the Protective Order?

A decision which guides this court's analysis is *Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003). The Ninth Circuit "strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation." *Id.* at 1131. And, the existence of a protective order in one case should not bar litigants in another, related, case from obtaining the discovery they need. *Id.* Thus, this first question is an easy one. eBay should not be able to use the Antitrust Case protective order as a shield to bar Sawyer from discovering documents which happen to be subject to that protective order. In other words, in *Sawyer*, eBay may not object to producing a responsive document on the basis that it is subject to a protective order in the Antitrust Case. To that extent, the motion to modify the protective order is granted.

That modification, however, does not mean that Mr. Sawyer will ultimately obtain all the discovery that he wants. Nor does it mean that eBay is stripped of its right to object to their production in that case. As explained in *Foltz*:

---

<sup>1</sup> It is a coincidence that Hagens Berman represents the plaintiffs in both the Antitrust Case and in *Sawyer*. It is actually Mr. Sawyer, and not the plaintiffs in the Antitrust Case, who wants the protective order modified. It seems that Hagens Berman should have moved on behalf of Mr. Sawyer to intervene in the Antitrust Case so that Sawyer could seek the modification. However, eBay does not quibble with Hagen Berman's procedural shortcut, and this court will not take issue with it either.

Even if the issuing court modifies the protective order, it does not decide whether the collateral litigants will ultimately obtain the discovery materials. As the Fifth and Tenth Circuits have noted, once the district court has modified its protective order, it must refrain from embroiling itself in the specific discovery disputes applicable only to the collateral suits.

\* \* \* \* \*

The disputes over the ultimate discoverability of specific materials covered by the protective order must be resolved by the collateral courts. *Allowing the parties to the collateral litigation to raise specific relevance and privilege objections to the production of any otherwise properly protected materials in the collateral courts further serves to prevent the subversion of limitations on discovery in the collateral proceedings. These procedures also preserve the proper role of each of the courts involved:* the court responsible for the original protective order decides whether modifying the order will eliminate the potential for duplicative discovery. If the protective order is modified, the collateral courts may freely control the discovery processes in the controversies before them without running up against the protective order of another court.

*Id.* at 1133 (citations omitted) (emphasis added).

2. With the Protective Order modified as just described, what degree of “use” do Sawyer’s lawyers get to make of the Antitrust Case discovery?

This is the harder question. The facts are somewhat unique, because Sawyer’s lawyers, on account of their role in the Antitrust Case, already are in possession of all of the documents disclosed by eBay in that case. So, suggests Hagens Berman, since we already have that body of information, let us comb through it and pick out the documents relevant to Sawyer’s claims against Bill Me Later and eBay. According to Hagens Berman, that will save eBay the time and trouble of doing that job itself. Not surprisingly, eBay vigorously objects to that procedure, pointing out that, under the Federal Rules of Civil Procedure, it is the litigant responding to discovery requests, and that litigant’s own lawyer, who searches for and identifies responsive documents that are relevant to the asserted claims or defenses. The opposing lawyer does not get that luxury.

This court’s answer might be different if the Antitrust Case and *Sawyer* were truly “collateral” cases. They are not. The Antitrust Case alleges violations of Sections 1 and 2 of the Sherman Act as well as comparable California laws prohibiting restraints on trade. *Sawyer* alleges violations of California’s usury laws and consumer protection statutes. There

1 is little or no overlap of issues. Indeed, in response to Judge White's Order to Show Cause  
2 Regarding Subject Matter Jurisdiction (the original *Sawyer* action filed in the Northern  
3 District, No. 10 CV-0014 JSW), Hagens Berman stated that "the [*Sawyer*] Complaint focuses  
4 primarily on Bill Me Later's business model, which predates the purchase by eBay. The  
5 allegations do not concern the distinct business of the parent eBay, which include online  
6 auctions, online classifieds, secondary tickets, shopping segments, apartment listings, fixed-  
7 price media and online communications." (See C07-01882, Docket No. 605 (Llyr Decl., Ex.  
8 G at 5:10-14); Case No. C10-00014JSW, Docket No. 35 at 5:10-14).

9 Since the Antitrust Case is on appeal, there would presumably be no legitimate reason  
10 for Hagens Berman to be rooting through eBay's Antitrust Case discovery documents now.  
11 But, its lawyers claim to remember that there were some that discussed the Bill Me Later  
12 business model. That is, some of the Antitrust Case documents are relevant (i.e., would be  
13 responsive to a request for production) to the claims in *Sawyer*. How many? Hagens Berman  
14 does not know, but says it is not too many. eBay's lawyers concede that there are some  
15 among the 197,000 documents (2.2 million pages), but surely less than 1,000. Hagens  
16 Berman does not appear to disagree with that estimate. No one suggests that these 1,000 or so  
17 are segregated, or in a particular "file," or somehow readily identifiable. They apparently are  
18 mixed in the 197,000, and someone would have to go looking for them.<sup>2</sup>

19 To the heart of the issue: who searches through the 197,000 documents to locate the  
20 1,000 or less that would be relevant to Sawyer's claims? Hagens Berman argues that, since  
21 they already possess the whole corpus of eBay's Antitrust Case document production, it makes  
22 sense that this court should modify the protective order so that they (and not eBay) should  
23 search them and decide what they want in *Sawyer*. They disarmingly describe their proposal  
24 as follows: "The modification would instead simply enable the mechanics of identifying  
25 particular documents to be used in the Sawyer litigation." (Reply at 1:12-13). Under this  
26 procedure, once eBay found out (how?) what Hagens Berman chose for use in *Sawyer*, it

---

27  
28 <sup>2</sup> This court is not told what percentage of these documents are stored electronically. If so, then whoever is doing the looking would probably use one of the commercially available software search programs.

1 would then—presumably—have to seek a protective order if it disagreed with any of Hagens  
2 Berman’s choices. This stands discovery practice on its head.

3 eBay argues forcefully that, while Hagens Berman has the 197,000 documents for  
4 Antitrust Case purposes, they do not have the right to “mine” through them and decide what  
5 they would like to use in *Sawyer*. eBay maintains that it is eBay’s obligation (and right)  
6 under federal discovery rules to make a reasonable and diligent search through all of its  
7 documents—including, presumably, its Antitrust Case document production—to locate  
8 documents responsive to appropriate requests for production in *Sawyer*.

9 This court sees no efficiency in permitting Hagens Berman to go through the Antitrust  
10 Case eBay documents. It may save eBay the “trouble” of going through them, but eBay does  
11 not want to be saved that “trouble.” It likewise does not save time. True, Hagens Berman  
12 says they may get the documents they want faster if they choose them themselves, but—with  
13 the *Sawyer* case still in its infancy—the “sooner rather than later” argument does not carry  
14 much weight.

15 When pressed at the motion hearing to articulate how Mr. Sawyer would be harmed if  
16 his lawyers had to obtain discovery in the prescribed, normal manner, rather than by an  
17 abnormal process that reversed the role of who searches for and identifies relevant material,  
18 all that plaintiff’s counsel could offer was that they do not trust eBay to turn over everything  
19 that it should.

20 This court appreciates that opposing attorneys, particularly in high stakes litigation,  
21 may come to distrust each other. Distrust is practically an occupational hazard of that work.  
22 But, based on nothing more tangible than feelings of distrust (no evidence, no indisputable  
23 examples) should the court give the go ahead to Sawyer’s lawyers? If all, or even most, of the  
24 Antitrust Case discovery was relevant to *Sawyer*, then the decision would be easy. Here,  
25 though, the best estimate is that less than one-half of one percent of the Antitrust Case  
26 documents would be discoverable in *Sawyer*. That is very slim relevance to support what  
27 amounts to an extraordinary request. This court declines to take that step.  
28

1 That is not to say that Hagens Berman cannot obtain relevant documents from eBay to  
2 support Sawyer's claims; and, certainly the Antitrust Case discovery documents are one of  
3 what are likely numerous places where such documents will be found. But, Hagens Berman  
4 cannot get them through a "self-help" search of documents they happen to have in their  
5 possession, for an entirely different reason and subject to a protective order.

6 In conclusion, the protective order is modified to the extent that it may not be used as a  
7 shield by eBay to prevent Sawyer's lawyers from obtaining documents otherwise discoverable  
8 from eBay. The order is not "modified" to allow Sawyer's lawyers to go through their set of  
9 eBay's Antitrust Case document productions and select what they want to use for *Sawyer*.

10 SO ORDERED.

11 Dated: July 19, 2010

  
\_\_\_\_\_  
HOWARD R. LOTT  
UNITED STATES MAGISTRATE JUDGE

5:07-cv-01882-JF Notice has been electronically mailed to:

Aaron H. Darsky aarondarsky@msn.com  
 Beverly Tse btse@kmlp.com  
 Brynly R. Llyr bllyr@omm.com  
 Christine Pedigo Bartholomew cbartholomew@finkelsteinthompson.com,  
 sanfran@finkelsteinthompson.com  
 Christopher S. Studebaker cstudebaker@kmlp.com  
 Daniel Hume dhume@kmslaw.com  
 David E. Kovel dkovel@kmlp.com  
 Dixie Lee Noonan dnoonan@omm.com, bbelina@omm.com  
 Elaine T. Byszewski elaine@hbsslaw.com, jenniferb@hbsslaw.com  
 George W. Sampson george@hbsslaw.com  
 I. Stephen Rabin srabin@rabinpeckel.com  
 Jeff D Friedman jefff@hbsslaw.com, george@hbsslaw.com, pashad@hbsslaw.com,  
 sf\_filings@hbsslaw.com  
 Jeffrey Squire squire@bragarwexler.com  
 Joseph P. Garland jpg65@columbia.edu  
 Joseph V. McBride jmcbride@rabinpeckel.com  
 Julie Dawn Wood jwood@omm.com, ihaas@omm.com  
 Karina Kosharskyy kkosharskyy@kmlp.com  
 Katherine Robison krobison@omm.com, rgonzalez@omm.com  
 Kenneth G. Walsh kwalsh@kmlp.com  
 Michael Andrew McShane mmcshane@audetlaw.com, jbaker@audetlaw.com  
 Michael Frederick Tubach mtubach@omm.com, kquintanilla@omm.com  
 Randall W. Edwards REdwards@omm.com  
 Read Ambler readambler@yahoo.com  
 Reginald Von Terrell reggiet2@aol.com  
 Robert L. Stolebarger robert.stolebarger@hro.com  
 Rosemary M. Rivas rrivas@finkelsteinthompson.com, jdito@finkelsteinthompson.com,  
 mpunzalan@finkelsteinthompson.com, sdoerrer@finkelsteinthompson.com,  
 srenwick@finkelsteinthompson.com, ttien@finkelsteinthompson.com  
 Shana E. Scarlett pashad@hbsslaw.com, shanas@hbsslaw.com  
 Steve W. Berman carrie@hbsslaw.com, steve@hbsslaw.com  
 Susan L. Germaise sgermaise@mcguirewoods.com  
 Thomas Patrick Brown tbrown@omm.com, dbordessa@omm.com

Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.