

# **EXHIBIT K**

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

EBAY, INC., ) CV-08-4052-JF  
)  
PLAINTIFF, ) SAN JOSE, CALIFORNIA  
)  
VS. )  
) AUGUST 14, 2009  
DIGITAL POINT SOLUTIONS, )  
INC. ET AL, )  
) PAGES 1-11  
DEFENDANT. )

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JEREMY FOGEL  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: O'MELVENY & MYERS LLP  
EBAY BY: DAVID EBERHART  
JEAN NIEHAUS  
TWO EMBARCADERO CTR, 28TH FL  
SAN FRANCISCO, CA 94111

FOR THE DEFENDANT: COAST LAW GROUP, LLP  
DIGITAL POINT BY: ROSS CAMPBELL  
SOLUTIONS, HOGAN 169 SAXONY RD, STE204  
ENCINITAS, CA 92024

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER CLANTON, CSR,  
CERTIFICATE NUMBER 13185

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FOR THE DEFENDANT: RUS, MILIBAND & SMITH, APC  
BRIAN DUNNING, BY: LEO PRESIADO  
BRIANDUNNING.COM, 2211 MICHELSON DR, 7TH FL  
THUNDERWOOD IRVINE, CA 92612

FOR THE DEFENDANT: FREELAND COOPER & FOREMAN, LLP  
TODD DUNNING, BY: STEWART FOREMAN  
DUNNING ENTERPRISE 150 SPEAR ST., STE 1800  
SAN FRANCISCO, CA 94105

FOR THE DEFENDANT: LAW OFFICE OF PATRICK MCCLELLAN  
KESSLER'S FLYING BY: PATRICK MCCLELLAN  
CIRCUS 2211 MICHELSON DR., #700  
IRVINE, CA 92612

1 SAN JOSE, CALIFORNIA AUGUST 14, 2009

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE  
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: EBAY VERSUS DIGITAL POINT  
6 SOLUTIONS.

7 MR. EBERHART: GOOD MORNING, YOUR HONOR.  
8 DAVID EBERHART ON BEHALF OF EBAY WITH MY COLLEAGUE  
9 JEAN NIEHAUS.

10 MS. NIEHAUS: GOOD MORNING, YOUR HONOR.

11 THE COURT: WE SHOULD HAVE A NUMBER OF  
12 TELEPHONIC APPEARANCES ON BEHALF OF DEFENDANTS IN  
13 THIS MATTER.

14 MR. PRESIADO: GOOD MORNING, YOUR HONOR.  
15 LEO PRESIADO, RUS MILIBAND & SMITH, ON BEHALF OF  
16 DEFENDANTS THUNDERWOOD HOLDINGS, INC., BRIAN  
17 DUNNING AND BRIANDUNNING.COM.

18 MR. FOREMAN: GOOD MORNING, YOUR HONOR.  
19 STEWART FOREMAN ON BEHALF OF TODD DUNNING AND  
20 DUNNING ENTERPRISES.

21 MR. MCCLELLAN: GOOD MORNING, YOUR HONOR.  
22 PATRICK MCCLELLAN ON BEHALF OF KESSLER'S FLYING  
23 CIRCUS.

24 MR. CAMPBELL: GOOD MORNING, YOUR HONOR.  
25 ROSS CAMPBELL ON BEHALF OF DEFENDANTS SHAWN HOGAN

1 AND DIGITAL POINT SOLUTIONS, INC.

2 THE COURT: OKAY.

3 YOU HAVE A RULING ON THE MOTIONS THAT  
4 WERE PENDING. IT WAS JUST POSTED THIS WEEK. AND  
5 IT IS GOING TO INVOLVE, I GUESS AT THE MINIMUM,  
6 SOME DISCOVERY THAT MAY LEAD TO A RENEWAL OF THE  
7 FORUM SELECTION CLAUSE ISSUE. BUT I'M WONDERING  
8 WHAT COULD BE DONE IN THE MEANTIME.

9 I DON'T KNOW WHETHER THE PARTIES HAVE  
10 ATTEMPTED ANY TYPE OF SETTLEMENT. I DON'T KNOW  
11 WHETHER IT'S TIME NOW TO GET THE PARTIES AND DO AN  
12 ADR PROCESS OR WHAT YOU WANT TO DO IN LIGHT OF THE  
13 RULING THAT THE COURT ISSUED.

14 SO LET ME GET SOME INPUT FIRST FROM EBAY  
15 AND THEN THE DEFENDANTS.

16 MR. EBERHART: I THINK FROM EBAY'S  
17 PERSPECTIVE, YOUR HONOR, UNTIL WE HAVE SOME  
18 DISCOVERY AND IN PARTICULAR UNTIL THERE'S SOME  
19 RESOLUTION OF WHAT'S HAPPENING WITH THE CRIMINAL  
20 INVESTIGATION, I THINK IT'S PREMATURE TO GO TO ADR.

21 EBAY IS NOT OPPOSED TO GOING ADR AT SOME  
22 POINT AFTER THOSE ISSUES HAVE BEEN RESOLVED BUT I  
23 DO BELIEVE IT'S PREMATURE RIGHT NOW.

24 THE COURT: DO YOU HAVE A MOTION TO  
25 COMPEL OR ANYTHING LIKE THAT PENDING BEFORE THE

1 MAGISTRATE JUDGE WITH REGARD TO ANY OF THE  
2 MATERIALS OF THE DEFENDANTS HAVE NOT PRODUCED?

3 MR. EBERHART: WE DO NOT YET, YOUR HONOR,  
4 BECAUSE WE WERE AWAITING THE COURT'S DECISION AS TO  
5 WHETHER THIS WOULD BE THE ACTUAL PLACE TO BRING THE  
6 MOTION OR WHETHER WE SHOULD BRING IT IN ANOTHER  
7 COURT.

8 NOW THAT WE UNDERSTAND WE WILL BE HERE,  
9 WE WILL PROCEED WITH THE MAGISTRATE ON IT.

10 THE COURT: AND I TAKE THE DEFENDANT'S  
11 POSITION IS THAT SOME OF THE DISCOVERY EBAY WANTS  
12 IS PRIVILEGED BECAUSE THERE'S STILL A PENDING  
13 CRIMINAL MATTER?

14 MR. PRESIADO: YOUR HONOR, THIS IS  
15 LEO PRESIADO. I WAS UNAWARE OF THE RULING ON THE  
16 MOTION. I HAVEN'T RECEIVED IT.

17 THE COURT: IT SHOULD HAVE BEEN  
18 INSTANTANEOUSLY AVAILABLE.

19 MR. EBERHART: I WILL CONCEDE WE HAVE NOT  
20 SEEN IT EITHER. THE ECF SYSTEM DID NOT SEND IT  
21 OUT.

22 THE COURT: THAT'S TOO BAD. I'M SORRY.  
23 I'M TRYING TO REMEMBER WHAT DAY IT WENT UP. IT WAS  
24 EARLIER THIS WEEK, MONDAY OR TUESDAY. AND THAT'S A  
25 GLITCH WE SHOULD CORRECT.

1 MR. FOREMAN: YOUR HONOR, THIS IS STEWART  
2 FOREMAN. WE HAVEN'T RECEIVED IT EITHER.

3 THE COURT: I'M REALLY SORRY. I JUST  
4 ASSUMED YOU HAD ALL SEEN IT.

5 MR. FOREMAN: YOUR HONOR --

6 THE COURT: HOLD ON JUST A SECOND,  
7 COUNSEL, IF YOU WOULD.

8 THE CLERK: I SEE THE LAST --

9 THE COURT: OH, YOU KNOW WHAT, I KNOW  
10 WHERE IT IS. YEAH. I MISSPOKE. I'M DONE WITH IT,  
11 MY LAW CLERK NEEDS TO MAKE MY LAST EDITORIAL  
12 CHANGES, SO IT WILL PROBABLY BE POSTED LATER TODAY.  
13 I'M SORRY FOR THE CONFUSION.

14 BOTTOM LINE IS THE COURT DECIDED THAT  
15 SOME OF THE CLAIMS, THE CFAA CLAIM, THE RICO CLAIM  
16 ARE PROPERLY VENUED HERE.

17 THE QUESTION OF WHETHER THE FORUM  
18 SELECTION CLAUSE AND PSA REQUIRES THAT AT LEAST  
19 THOSE CLAIMS AND THOSE THAT EMANATE FROM IT BE  
20 HEARD IN A DIFFERENT COURT WAS ONE THAT THE COURT  
21 FELT CANNOT BE RESOLVED WITHOUT DISCOVERY BECAUSE  
22 OF THE DISPUTE AS TO WHETHER THE PSA IS EVEN IN  
23 PLAY.

24 THAT'S A VERY ROUGH SUMMARY OF WHAT'S IN  
25 THE RULING. I DON'T WANT TO DISCUSS IT. I WILL

1 TELL YOU THAT'S WHAT IT IS.

2 SO AT LEAST FOR THE TIME BEING THE CASE  
3 WILL REMAIN HERE, BUT THAT'S WITHOUT PREJUDICE TO  
4 THAT ISSUE BEING REVISITED.

5 OKAY. SO MR. FOREMAN, YOU WERE STARTING  
6 TO SAY SOMETHING?

7 MR. FOREMAN: YES. THANK YOU,  
8 YOUR HONOR.

9 I JUST WANTED TO EXPRESS A DISAGREEMENT  
10 ON THE ISSUE I BELIEVE COUNSEL FOR EBAY MENTIONED  
11 ABOUT THE -- NO VALUE IN ATTEMPTING TO HAVE SOME  
12 MEDIATION PROCESS.

13 AND MY COMMENT ABOUT THAT IS THAT, NUMBER  
14 ONE, WITH THIS PENDING FEDERAL MATTER, WE HAVE NO  
15 CONTROL OVER ITS TIMING. NOTHING HAS HAPPENED IN  
16 THE LAST TWO YEARS, AND THERE'S NO INDICATION THAT  
17 WE'RE AWARE THAT ANYTHING IS GOING TO HAPPEN IN THE  
18 NEAR FUTURE.

19 AND IT SEEMS TO ME WE SHOULDN'T BE  
20 WAITING FOR SOMETHING THAT WE HAVE ABSOLUTELY NO  
21 CONTROL OVER BEFORE WE TRY AND SEE IF THERE'S A  
22 RESOLUTION.

23 THE COURT: ARE YOU WILLING TO PROVIDE  
24 DISCOVERY -- OBVIOUSLY, I'M NOT ASKING FOR CLIENTS  
25 TO WAIVE ANY FIFTH AMENDMENT PRIVILEGE, BUT ARE YOU



1 WILLING TO PROVIDE ENOUGH DISCOVERY THAT THERE  
2 COULD BE SOME TRACTION IN THOSE DISCUSSIONS?

3 HAS THERE BEEN ANY CONVERSATION AS TO  
4 WHAT KIND OF DISCOVERY COULD BE PROVIDED?

5 MR. FOREMAN: AT LEAST ON BEHALF OF MY  
6 CLIENTS THERE'S VERY LIMITED DISCOVERY.

7 I HAD TOLD EBAY PENDING YOUR DECISION ON  
8 THIS MATTER THAT THERE WAS A LIMITED AMOUNT OF  
9 ADDITIONAL SUPPLEMENTAL DISCOVERY THAT MY CLIENTS  
10 COULD GIVE AND WE WILL NOW DO THAT IN LIGHT OF WHAT  
11 YOU'VE DESCRIBED YOUR ORDER TO BE.

12 QUITE FRANKLY, IT'S EXTREMELY LIMITED AND  
13 MY CLIENT DOESN'T HAVE CONTROL OVER THE DOCUMENTS.  
14 THEY HAVE BEEN TAKEN BY THE F.B.I. AND THEY WON'T  
15 LET US COPY THEM, SO WE HAVE NOTHING TO GIVE.  
16 THAT'S A PROBLEM WE ARE CONTINUALLY FACED WITH.

17 I THINK THE RELEVANT DISCOVERY, FOR  
18 PURPOSES OF BEING ABLE TO SIT DOWN AND TALK, IT'S  
19 IN THE HANDS OF ALL THE PARTIES. IT'S PRIMARILY  
20 FROM A COMMISSION JUNCTION. AND THAT DISCOVERY HAS  
21 BEEN MADE AVAILABLE. I THINK ALL THE PARTIES KNOW  
22 WHAT THE COMMISSIONS WERE THAT WERE PAID.

23 I GOT, I BELIEVE EBAY WITH ITS COMPUTING  
24 POWER KNOWS EXACTLY WHAT'S GOING ON. IN FACT, I  
25 THINK THE DEFENDANT IS REALLY THE ONLY ONE -- THEY

1 DON'T HAVE THE DOCUMENTS AND WE ARE NOT LIKELY TO  
2 GET THEM.

3 THE COURT: MAYBE I SHOULD ASK EBAY'S  
4 COUNSEL TO EXPLAIN WHAT YOU NEED IN ORDER TO HAVE A  
5 MEANINGFUL DISCUSSION.

6 MR. EBERHART: CERTAINLY, YOUR HONOR.

7 FIRST OF ALL, LET ME SAY IT IS OUR  
8 UNDERSTANDING THAT THERE'S MATERIAL IN THE HANDS OF  
9 THIRD PARTIES, COMPANIES NAMED RACKSPACE AND  
10 NETHERE, THAT MAY BE DUPLICATIVE OF WHAT WAS SEIZED  
11 BY THE F.B.I.

12 AND EBAY HAS SUBPOENAED THAT MATERIAL  
13 FROM RACKSPACE AND NETHERE. THE DEFENDANTS HAVE  
14 OPPOSED PRODUCTION OF THAT MATERIAL. PERHAPS WE  
15 COULD HAVE A BREAKTHROUGH IN LIGHT OF THE COURT'S  
16 RULING AND MOVE FORWARD THERE.

17 THAT MATERIAL IS THE SPECIFIC CODE THAT  
18 WAS USED BY THE DEFENDANTS TO DEFRAUD EBAY. AND WE  
19 BELIEVE STRONGLY WE NEED TO SEE THAT, HAVE THE  
20 CONFIRMATION THAT IT DID WHAT WE BELIEVE IT WAS  
21 DOING, AND THAT WILL ALLOW US TO HAVE A MEANINGFUL  
22 SETTLEMENT DISCUSSION.

23 THE COURT: YOU COULD GET A BETTER  
24 OBJECTIVE SENSE OF THE MERITS OF YOUR CASE?

25 MR. EBERHART: CORRECT, YOUR HONOR.

1 THE COURT: LET ME MAKE A SUGGESTION  
2 SINCE I BELIEVED YOU HAD THE RULING IN HAND AND  
3 EVIDENTLY NOW IT'S CLEAR THAT YOU DON'T. SO LET ME  
4 GET YOU THE RULING FIRST BECAUSE IT'S PRETTY  
5 DETAILED, AS YOU MIGHT IMAGINE.

6 THEN LET ME SUGGEST YOU HAVE A MEET AND  
7 CONFER ABOUT DISCOVERY IN LIGHT OF THE RULING. IF  
8 THERE ARE MOTIONS, GET THEM BEFORE JUDGE TRUMBULL  
9 SO THEY CAN BE HEARD AND I WILL SUGGEST WE  
10 RECONVENE IN ABOUT 45 DAYS.

11 SO THAT WILL TAKE US TO SEPTEMBER 25TH IF  
12 EVERYONE IS AVAILABLE AT THAT TIME.

13 HEARING NO OBJECTIONS, SEPTEMBER 25TH AT  
14 10:30 FOR CMC AND CASE PLANNING.

15 AND I'M GOING TO SPECIFICALLY DIRECT  
16 COUNSEL TO MEET AND CONFER ABOUT DISCOVERY SO THEY  
17 CAN REDUCE THE AMOUNT OF MOTION PRACTICE.

18 THANKS VERY MUCH.

19 (WHEREUPON, THE PROCEEDINGS IN THIS  
20 MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT  
REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,  
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
TRANSCRIPTION TO THE BEST OF MY ABILITY.

\_\_\_\_\_  
SUMMER A. CLANTON, CSR, RPR  
CERTIFICATE NUMBER 13185