

EXHIBIT N

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.)
) SEPTEMBER 25, 2009
DIGITAL POINT SOLUTIONS,)
INC. ET AL,)
) PAGES 1-10
DEFENDANT.)

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
SHARON BUNZEL
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

1 FOR THE DEFENDANT: RUS, MILIBAND & SMITH, APC
BRIAN DUNNING, BY: LEO PRESIADO
2 BRIANDUNNING.COM, 2211 MICHELSON DR, 7TH FL
THUNDERWOOD IRVINE, CA 92612
3

4 FOR THE DEFENDANT: FREELAND COOPER & FOREMAN, LLP
TODD DUNNING, BY: STEWART FOREMAN
5 DUNNING ENTERPRISE 150 SPEAR ST., STE 1800
SAN FRANCISCO, CA 94105
6

7 FOR THE DEFENDANT: LAW OFFICE OF PATRICK MCCLELLAN
KESSLER'S FLYING BY: PATRICK MCCLELLAN
8 CIRCUS 2211 MICHELSON DR., #700
IRVINE, CA 92612
9

1 SAN JOSE, CALIFORNIA SEPTEMBER 25, 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. PRESIADO: GOOD MORNING, YOUR HONOR.
8 LEO PRESIADO FOR DEFENDANTS BRIAN DUNNING,
9 THUNDERWOOD HOLDINGS INC., AND BRIANDUNNING.COM.

10 MR. EBERHART: GOOD MORNING, YOUR HONOR.
11 DAVID EBERHART AND SHARON BUNZEL FOR EBAY.

12 MS. BUNZEL: GOOD MORNING, YOUR HONOR.

13 MR. FOREMAN: GOOD MORNING, YOUR HONOR.
14 STEWART FOREMAN FOR DEFENDANTS TODD DUNNING AND
15 DUNNING ENTERPRISE.

16 MR. MCCLELLAN: GOOD MORNING, YOUR HONOR.
17 PATRICK MCCLELLAN FOR DEFENDANT KESSLER'S FLYING
18 CIRCUS.

19 MR. CAMPBELL: GOOD MORNING, YOUR HONOR.
20 ROSS CAMPBELL FOR DEFENDANTS HOGAN AND DIGITAL
21 POINT SOLUTIONS, INC.

22 THE COURT: OKAY.

23 HOW ABOUT THIS ISSUE OF GETTING THE
24 PARTIES TOGETHER TO SEE IF THEY CAN RESOLVE THE
25 CASE?

1 I UNDERSTAND EBAY BELIEVES IT NEEDS SOME
2 ADDITIONAL DISCOVERY, BUT WOULD IT MAKE SOME SENSE
3 TO AT LEAST SET A TARGET DATE. YOU HAD A MOTION TO
4 COMPEL SET FOR THE END OF OCTOBER; IS THAT RIGHT?

5 MR. EBERHART: WE DO, YOUR HONOR. AND WE
6 HAD A FURTHER MEET AND CONFER WITH MR. HOGAN AND
7 HIS AFFILIATED ENTITY. THEY PRODUCED SOME
8 ADDITIONAL MATERIALS JUST TWO DAYS AGO.

9 WE STILL EXPECT THERE'S GOING TO BE A
10 MOTION TO COMPEL AGAINST THEM AND WE WILL FILE THAT
11 NEXT WEEK. SO WE WILL HAVE TWO MOTIONS TO COMPEL
12 SET FOR THE END OF OCTOBER.

13 SO IT'S OUR EXPECTATION THAT FOLLOWING
14 RULINGS ON THOSE MOTIONS TO COMPEL AND EITHER
15 COMPLIANCE WITH THOSE OR, YOU KNOW, IF THERE'S A
16 RULING AGAINST EBAY, THEN WE COULD SET SOME DATE
17 FOR A MEDIATION AFTER THAT.

18 THE COURT: IS THAT WHAT YOU WANT TO DO
19 WITH MEDIATION?

20 MR. EBERHART: THAT IS EBAY'S PREFERENCE,
21 YOUR HONOR.

22 THE COURT: AND YOU WANT TO DO IT THROUGH
23 THE COURT PROGRAM OR PRIVATELY?

24 MR. EBERHART: I THINK WE WOULD PREFER TO
25 DO IT PRIVATELY.

1 THE COURT: IS THAT AGREEABLE TO ALL THE
2 DEFENDANTS?

3 MR. FOREMAN: YOUR HONOR, THIS IS STEWART
4 FOREMAN FOR TODD DUNNING.

5 WE WOULD PREFER THE MEDIATION SOONER
6 RATHER THAN LATER, AND ALSO TO USE THE COURT
7 SYSTEM. FRANKLY, YOUR HONOR, MY CLIENT CAN'T
8 AFFORD PRIVATE MEDIATION.

9 THE COURT: WELL, THE COURT MEDIATION
10 PROGRAM, I REALIZE IT'S SELF-SERVING TO SAY THIS,
11 BUT IT'S AN ABSOLUTELY OUTSTANDING PROGRAM.

12 AND EVEN A CASE WHICH HAS AS MANY
13 COMPLEXITIES AS THIS ONE IS NOT BEYOND ITS
14 CAPABILITIES, THEY JUST HAVE TO MATCH SOMEONE TO
15 THIS THAT CAN HANDLE THE ACTION.

16 LET ME SUGGEST -- I'M GOING TO SET A
17 DEADLINE FOR COMPLETING MEDIATION 90 DAYS OUT. IF
18 THE MOTIONS TO COMPEL RESULT IN THE NEED TO ADJUST
19 THAT SCHEDULE, I WILL BE HAPPY TO DO THAT.

20 I WILL WAIT AND SEE WHAT HAPPENS. BUT I
21 DO THINK WE'VE HAD A YEAR OF MOTION PRACTICE. WE
22 NEED TO GET MOVING ONE WAY OR THE OTHER.

23 AND I UNDERSTAND EBAY NEEDS SOME
24 DOCUMENTS AND THAT'S PERFECTLY LEGITIMATE, BUT I
25 WOULD LIKE TO KEEP THE BALL ROLLING.

1 MR. PRESIADO: YOUR HONOR, THIS IS LEO
2 PRESIADO. JUST SO I CAN LET YOU KNOW WHERE MY
3 CLIENTS ARE.

4 WE RESERVED THE DATE OF NOVEMBER 6TH AND
5 THAT'S THE FIRST DAY WE CAN GET TO HAVE A MOTION TO
6 STAY THE MATTER HEARD BASED ON THE IMPLICATION OF
7 MY CLIENT'S FIFTH AMENDMENT RIGHTS.

8 I HAD BEEN INVOLVED WITH MEET AND CONFER
9 DISCUSSIONS WITH COUNSEL FOR PLAINTIFF TO ARRANGE
10 FOR THE SCHEDULING OF THAT MOTION WHICH IS HEARD
11 BEFORE YOUR HONOR TOGETHER WITH THE MOTION TO
12 COMPEL WHICH IS SET BEFORE MAGISTRATE
13 JUDGE TRUMBULL.

14 PLAINTIFF WAS NOT WILLING TO AGREE TO ANY
15 TYPE OF SCHEDULING. BUT I WOULD REQUEST THAT THOSE
16 TWO MATTERS, BECAUSE THEY ARE RELATED, BE HEARD AT
17 THE SAME TIME BEFORE YOUR HONOR, IF POSSIBLE

18 THE COURT: WELL, THE MOTION TO COMPEL, I
19 TAKE, IS GOING TO INVOLVE A DETERMINATION AS TO
20 WHETHER THE FIFTH AMENDMENT ARGUMENT IS GOING TO BE
21 RAISED IN THE CONTEXT OF YOUR RESPONSE TO THE
22 MOTION TO COMPEL. AND THAT ACTUALLY IS SOMETHING
23 THAT THE MAGISTRATE JUDGE WOULD HAVE INITIAL
24 PURVIEW OF.

25 MR. PRESIADO: BUT TO THE EXTENT WE ARE

1 REQUESTING THE ENTIRE CASE BE STAYED AND WE ARE
2 UNABLE TO GET A HEARING DATE AT THE SAME TIME OR
3 EARLIER --

4 THE COURT: BUT LET ME JUST PLAY THIS
5 OUT.

6 IT SEEMS TO ME YOU COULD HAVE YOUR
7 HEARING WITH JUDGE TRUMBULL, AND HER MOTION DAYS
8 ARE DIFFERENT FROM MINE. YOU COULD HAVE A HEARING
9 WITH HER. SHE COULD DECIDE THAT YOU DON'T HAVE TO
10 PROVIDE THE INFORMATION, IN WHICH CASE THERE ISN'T
11 ANY NEED FOR A STAY.

12 OR SHE COULD DECIDE THAT YOU DO HAVE TO
13 PROVIDE IT IN WHICH CASE YOUR STAY MOTION WOULD
14 THEN BE RIGHT. AND IN EITHER CASE I WOULD BE
15 INFORMED BY THE RULING THAT SHE MADE.

16 I DON'T KNOW THAT IT MAKES SENSE TO TAKE
17 WHAT'S ESSENTIALLY A DISCOVERY MOTION AND HAVE IT
18 HEARD AT THE SAME TIME AS A CASE MANAGEMENT MOTION,
19 OTHER THAN THE PHYSICAL CONVENIENCE OF COUNSEL
20 BEING HERE, BUT I THINK THEY ARE SEPARATE ISSUES.

21 MR. PRESIADO: AND THAT IS A PRIMARY
22 CONCERN, YOUR HONOR.

23 COUNSEL IS DOWN HERE IN SOUTHERN
24 CALIFORNIA. TO HAVE TO ARRANGE TWO HEARINGS IN
25 THAT AMOUNT OF TIME, THE COST OF THAT ON WHAT

1 ALREADY HAS BEEN AN EXPENSIVE ENDEAVOR IS
2 PROHIBITIVE.

3 THE COURT: GO AHEAD, SIR.

4 MR. PRESIADO: SO IF FOR THAT CONCERN
5 ALONE THEY COULD BE CONSOLIDATED, THAT WOULD BE A
6 VERY --

7 THE COURT: I JUST ORDINARILY WOULD NOT
8 HEAR A DISCOVERY MOTION. THAT'S JUST THE WAY WE'VE
9 GOT OUR CASE MANAGEMENT SET UP.

10 IT'S POSSIBLE THE STAY MOTION COULD BE
11 DONE.

12 MR. PRESIADO: IT COULD MOOT THE MOTION
13 TO COMPEL WHICH WOULD REQUIRE ONLY ONE APPEARANCE.

14 MR. EBERHART: YOUR HONOR, WE DON'T
15 BELIEVE IT WOULD MOOT THE MOTION TO COMPEL BECAUSE
16 THE MOTION TO COMPEL DEALS NOT ONLY WITH THE
17 INDIVIDUALS BUT WITH THE ENTITIES.

18 THE COURT: RIGHT. AND --

19 MR. PRESIADO: THAT'S JUST A STAY MOTION.

20 THE COURT: WELL, IT SEEMS TO ME THE
21 MOTION TO COMPEL SHOULD BE HEARD.

22 THE MOTION TO STAY SEEMS TO ME, JUST
23 THINKING ABOUT IT LOGICALLY, IS GOING TO BE
24 INFORMED BY THE RESULT ON THE MOTION TO COMPEL.
25 AND COUNSEL, IF YOU WANT TO APPEAR TELEPHONICALLY,

1 IT'S FINE, YOU KNOW, THAT'S ANOTHER ACCOMMODATION
2 THE COURT CAN MAKE.

3 YOU'RE DOING THAT TODAY. AND I JUST --
4 JUST THINKING ABOUT THIS, I'D LIKE TO SEE WHAT
5 JUDGE TRUMBULL'S TAKE IS ON THE MATTER BEFORE
6 DECIDING WHETHER A STAY IS REQUIRED.

7 SO I THINK WE WILL LEAVE IT THE WAY IT IS
8 BUT I WILL CERTAINLY -- IN AN ORDER TO ACCOMMODATE
9 YOU TO KEEP THE EXPENSES DOWN. I KNOW
10 JUDGE TRUMBULL WILL TOO, YOU CAN TAKE THAT UP WITH
11 HER.

12 MR. PRESIADO: THANK YOU, YOUR HONOR. I
13 APPRECIATE THAT.

14 THE COURT: SO LET'S SET A TENTATIVE DATE
15 FOR COMPLETING MEDIATION OF JANUARY 15TH AND SET A
16 CASE MANAGEMENT CONFERENCE FOR THAT DATE. THEN I
17 CAN TWEAK THAT IF NECESSARY WHEN I SEE YOU
18 NOVEMBER 6TH FOR THE HEARING ON THE STAY MOTION.

19 MR. EBERHART: THANK YOU, YOUR HONOR.

20 MR. PRESIADO: THANK YOU, YOUR HONOR.

21 (WHEREUPON, THE PROCEEDINGS IN THIS
22 MATTER WERE CONCLUDED.)
23
24
25

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