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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.)
) JANUARY 29, 2010
DIGITAL POINT SOLUTIONS,)
INC. ET AL,)
) PAGES 1-20
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 A P P E A R A N C E S, (CONT.)

2

3 FOR THE DEFENDANT: RUS, MILIBAND & SMITH, APC
4 BRIAN DUNNING, BY: LEO PRESIADO
5 BRIANDUNNING.COM, 2211 MICHELSON DR, 7TH FL
6 THUNDERWOOD IRVINE, CA 92612
7 KESSLER'S FLYING
8 CIRCUS

9

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

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1 SAN JOSE, CALIFORNIA

JANUARY 29, 2010

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

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

49AM 5 THE COURT: EBAY VERSUS DIGITAL POINT
49AM 6 SOLUTIONS CASE.

50AM 7 MS. BUNZEL: GOOD MORNING, YOUR HONOR.
50AM 8 SHARON BUNZEL AND DAVID EBERHART OF O'MELVENY &
50AM 9 MYERS ON BEHALF OF THE PLAINTIFF, EBAY.

50AM 10 MR. CAMPBELL: GOOD MORNING, YOUR HONOR.
50AM 11 ROSS CAMPBELL ON BEHALF OF DEFENDANTS SHAWN HOGAN
50AM 12 AND DIGITAL POINT SOLUTIONS INC.

50AM 13 MR. PRESIADO: GOOD MORNING, YOUR HONOR.
50AM 14 LEO PRESIADO, RUS, MULIBAND & SMITH, FOR DEFENDANTS
50AM 15 BRIAN DUNNING, BRIANDUNNING.COM, THUNDERWOOD
50AM 16 HOLDINGS AND SPECIALLY APPEARING FOR KESSLER'S
50AM 17 FLYING CIRCUS.

50AM 18 MR. FOREMAN: GOOD MORNING, YOUR HONOR.
50AM 19 STEWART FOREMAN FOR DEFENDANTS TODD DUNNING AND
50AM 20 DUNNING ENTERPRISES.

50AM 21 THE COURT: GOOD MORNING.

50AM 22 I HAVE A COUPLE OF QUESTIONS THAT ARE
50AM 23 REALLY OUTSIDE THE MOVING PAPERS.

50AM 24 THE COURT'S ORDER ON EBAY'S OBJECTIONS TO
50AM 25 JUDGE TRUMBULL'S ORDER WAS ISSUED ONLY A COUPLE OF

51AM 1 WEEKS AGO. AND I'M NOT SURE WHAT THE IMPACT OF
51AM 2 THAT RULING IS ON THE MATTERS THAT ARE ON CALENDAR
51AM 3 TODAY.

51AM 4 THE COURT CONCLUDED THAT THE CORPORATE
51AM 5 DEFENDANTS COULD AND SHOULD RESPOND TO DISCOVERY
51AM 6 AND I THINK THAT RULING WOULD APPLY WITH EQUAL
51AM 7 FORCE TO THE PLEADINGS.

51AM 8 AND THE COURT LAID OUT, AND I THINK EBAY
51AM 9 ACTUALLY ADDRESSES IT IN ITS MOVING PAPERS HERE,
51AM 10 THAT THERE ARE MEANS THAT THAT COULD BE DONE
51AM 11 WITHOUT IMPLICATING THE FIFTH AMENDMENT RIGHTS OF
51AM 12 THE INDIVIDUAL DEFENDANTS.

51AM 13 SO I GUESS MY FIRST QUESTION REALLY WOULD
51AM 14 BE FROM DEFENSE COUNSEL. HAVE YOU DIGESTED THAT
51AM 15 RULING? WHAT IMPACT, IF ANY, DOES IT HAVE ON YOUR
51AM 16 STAY MOTION AND YOUR OPPOSITION TO THE MOTION TO
51AM 17 STRIKE TODAY?

51AM 18 MR. CAMPBELL: THANK YOU, YOUR HONOR.

51AM 19 FROM THE DPS DEFENDANT'S STANDPOINT A
52AM 20 STAY CONTINUES TO BE ABSOLUTELY WARRANTED AND
52AM 21 NECESSARY IN THIS CASE.

52AM 22 WITH RESPECT TO THE IMPLICATIONS OF THE
52AM 23 COURT'S RECENT ORDER ON THE DISCOVERY ISSUES, THE
52AM 24 JANUARY 12TH ORDER, I THINK AS A STARTING POINT,
52AM 25 ALTHOUGH THE CONSTITUTION DOES NOT REQUIRE AS A

52AM 1 MATTER OF LAW THAT A STAY BE ISSUED, THE COURTS
52AM 2 HAVE RECOGNIZED THAT TO PRESERVE THE INTEGRITY OF
52AM 3 THE FIFTH AMENDMENT, STAYS ARE APPROPRIATE; AND
52AM 4 THIS IS ONE OF THOSE INSTANCES.

52AM 5 AND SO IN THAT RESPECT, STAYS ARE
52AM 6 INTENDED TO THE PREVENT THE DEFENDANT FROM CHOOSING
52AM 7 BETWEEN ASSERTING THE FIFTH AMENDMENT IN WHICH A
52AM 8 NEGATIVE INFERENCE CAN BE DRAWN AND WE COULD LOSE
52AM 9 THE CIVIL CASE, OR NOT ASSERTING THE FIFTH
52AM 10 AMENDMENT AND HAVING THAT TESTIMONY LATER USED IN A
52AM 11 CRIMINAL MATTER.

52AM 12 THOSE CONCERNS AND THE REASONS FOR A STAY
52AM 13 CONTINUE TO DIRECTLY APPLY AND WILL CONTINUE TO
52AM 14 DIRECTLY APPLY IN THIS CASE. THAT INCLUDES MATTERS
52AM 15 OUTSIDE THE JANUARY 12TH ORDER.

52AM 16 SO AT A MINIMUM WE WOULD REQUEST THE STAY
52AM 17 IS CERTAINLY RELEVANT AS TO MATTERS NOT ENCOMPASSED
53AM 18 IN THE JANUARY 12TH ORDER.

53AM 19 NOW, HOWEVER, WITH RESPECT TO THE SOME OF
53AM 20 THE GLOBAL STAY CASES THAT WE CITED WITH RESPECT TO
53AM 21 THE PRESENT MOTION IT APPEARS SOME OF THOSE
53AM 22 AUTHORITIES WERE NOT FULLY CONSIDERED WITH RESPECT
53AM 23 TO THE ISSUANCE OF JANUARY 12TH ORDER BECAUSE THE
53AM 24 MOTION FOR STAY WAS NOT BEFORE JUDGE TRUMBULL.

53AM 25 PLAINTIFF ARGUED THAT THOSE STAY CASES

53AM 1 WERE SIMPLY NOT RELEVANT TO ITS MOTIONS TO COMPEL
53AM 2 AND THE COURT SEEMED TO AGREE.

53AM 3 AND TO THE EXTENT THOSE AUTHORITIES WERE
53AM 4 NOT CONSIDERED, THEY ARE FULLY RIPE FOR
53AM 5 CONSIDERATION NOW. AND SIGNIFICANTLY, THOSE CASES
53AM 6 HOLD THAT TO THE EXTENT THE STAY IS OTHERWISE
53AM 7 APPROPRIATE IT SHOULD APPLY GLOBALLY AND IT SHOULD
53AM 8 INCLUDE ALL PARTIES IN DISCOVERY.

53AM 9 AND THE REASONS FOR THOSE RATIONAL IS
53AM 10 WELL SUPPORTED IN TERMS OF JUDICIAL ECONOMY NOT
53AM 11 PROCEEDING WITH LITIGATION ON PIECEMEAL OR
53AM 12 SEGMENTED BASIS IN TERMS OF DISCOVERY.

53AM 13 IN TERMS OF THE CORPORATE DEFENDANT NOT
53AM 14 BEING ADEQUATELY ABLE TO DEFEND ITSELF GIVEN THE
53AM 15 INDIVIDUAL DEFENDANT'S ASSERTION OF THE FIFTH
54AM 16 AMENDMENT.

54AM 17 AND PRESERVING THE INTEGRITY OF THE
54AM 18 CRIMINAL MATTER AND ALLOWING CIVIL DISCOVERY TO
54AM 19 MOVE FORWARD IN FULL ONCE THE PREDICATE FOR
54AM 20 ASSERTING FIFTH AMENDMENT IS NO LONGER IN PLAY.

54AM 21 SO WE WOULD ALSO ESSENTIALLY REQUEST THAT
54AM 22 THE STAY SHOULD BE ISSUED. WE WOULD SUGGEST IT BE
54AM 23 FINITE AND FOR AN INDEFINITE PERIOD THROUGH APRIL
54AM 24 THE COURT: APRIL. IS THAT BASED ON SOME
54AM 25 NEW INFORMATION YOU HAVE FROM THE U.S. ATTORNEY'S

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OFFICE?

MR. CAMPBELL: THE INFORMATION IS BASED ON THE MOST RECENT SUBSTANTIVE INFORMATION WE HAVE FROM THE U.S. ATTORNEY'S OFFICE WHICH IS THAT THEY INTENDED TO PURSUE AND HAVE AN INDICTMENT RETURNED AFTER THE COMMENCEMENT OF THE NEW YEAR. AND THAT WOULD ALLOW THAT TO FULLY PLAY OUT AND WE NARROWLY TAYLOR TO THAT INFORMATION.

I THINK THAT IS AN APPROPRIATE WAY TO LOOK AT THIS MATTER IN TERMS OF THAT KIND OF A STAY WOULD CERTAINLY NOT PREJUDICE TO EBAY'S RIGHTS, AND THAT'S SORT OF GETTING INTO ONE OF THE KEATING FACTORS WHICH I WOULD BE HAPPY TO ADDRESS.

THE COURT: THAT'S OKAY. I WAS REALLY ASKING FOR YOUR INTEGRATION, IF YOU WILL, OF THE JANUARY 12TH ARGUMENTS THAT ARE BEFORE THE COURT.

YOU HAVE NOTHING NEW ON THE TIMING OF ANY INDICTMENT BEYOND WHAT'S IN YOUR PAPERS?

MR. CAMPBELL: THAT'S CORRECT.

THE COURT: IS THAT TRUE FOR ALL THE DEFENDANTS?

MR. PRESIADO: WITH RESPECT TO THE INDICTMENT, THE TIMING?

THE COURT: BOTH QUESTIONS. THE IMPLICATIONS OF THE JANUARY 12TH DISCOVERY ORDER

55AM 1 AND THE TIMING OF THE INDICTMENT.

55AM 2 MR. PRESIADO: WITH RESPECT TO THE TIMING
55AM 3 OF THE INDICTMENT, THAT IS CORRECT, WITH RESPECT TO
55AM 4 MY CLIENTS AS WELL, YOUR HONOR.

55AM 5 I WOULD LIKE TO ADD HOW THE ORDER FITS
55AM 6 INTO THE MOTION TO STAY OTHER THAN WHAT WAS STATED
55AM 7 BY MR. CAMPBELL.

55AM 8 I THINK, IF ANYTHING, IT HIGHLIGHTS THE
55AM 9 NEED FOR A STAY PRIMARILY BECAUSE IT'S NOW SET UP
55AM 10 THAT THERE WILL BE PIECEMEAL LITIGATION TO THE
55AM 11 EXTENT THIS CASE PROCEEDS, PARTICULARLY WITH
55AM 12 RESPECT TO THE DISCOVERY WHERE IT'S UNDERSTOOD AND
55AM 13 AGREED THAT THE INDIVIDUALS DO NOT HAVE TO
55AM 14 PARTICIPATE IN DISCOVERY WHILE THE COURT HAS
55AM 15 ORDERED THAT THE CORPORATE DEFENDANTS DO. SO I
55AM 16 THINK THAT PLAYS INTO A STAY.

56AM 17 IT ALSO AFFIRMED THAT THERE'S NO QUESTION
56AM 18 THAT THE PARALLEL PROCEEDINGS, THE CRIMINAL
56AM 19 PROCEEDING AND THE CIVIL PROCEEDING, ARE BASED ON
56AM 20 THE SAME ALLEGED WRONG AGAINST THE DEFENDANTS.
56AM 21 THERE'S NO QUESTION ABOUT THAT NOW AFTER THE ORDER.
56AM 22 SO I THINK THOSE TWO FACTS PLAY INTO THE
56AM 23 APPLICATION.

56AM 24 THE COURT: THANK YOU.

56AM 25 MR. FOREMAN, DO YOU HAVE ANYTHING TO ADD

56AM 1 BEFORE I HEAR FROM COUNSEL?

56AM 2 MR. FOREMAN: MR. FOREMAN: YOUR HONOR,
56AM 3 AS FAR AS YOUR DISCOVERY ORDER, I DON'T THINK IT
56AM 4 HAD, AS I READ IT, UNLESS I'M READING IT WRONG,
56AM 5 PARTICULARLY IMPACT ON MR. DUNNING OR DEI.

56AM 6 WE ARE IN THE PROCESS OF COMPLYING WITH
56AM 7 JUDGE TRUMBULL'S ORDER WITH RESPECT TO THE TWO
56AM 8 ELEMENTS THAT SHE IDENTIFIED THAT AFFECTED MY
56AM 9 CLIENTS, AND I HAVE BEEN TALKING WITH EBAY'S
56AM 10 COUNSEL TO COMPLY WITH THAT ORDER.

56AM 11 THE COURT: OKAY. THANK YOU.

56AM 12 MR. CAMPBELL: I WOULD POINT OUT ON THE
56AM 13 QUESTION OF THIS INFORMATION FROM THE U.S.
56AM 14 ATTORNEY, I AGREE WITH WHAT MY CO-COUNSEL HAVE
56AM 15 SAID, BUT I BELIEVE THAT DPS'S COUNSEL SUBMITTED A
57AM 16 LETTER, I THINK IT WAS TO JUDGE TRUMBULL, BUT
57AM 17 ANYWAY, INDICATING THAT THE U.S. ATTORNEY HAD
57AM 18 SUBSEQUENTLY REFUSED TO HAVE ANY FURTHER DISCUSSION
57AM 19 WITH DPS'S COUNSEL ABOUT TIMING.

57AM 20 AND I THINK WHILE THAT'S NOT SUBSTANTIVE
57AM 21 INFORMATION, I THINK IT SUPPORTS EVEN IF YOU
57AM 22 RECOLLECT THE FACT AS TO WHAT THE U.S. ATTORNEY HAD
57AM 23 EARLIER SAID ABOUT THE EMINENT PROSPECT OF AN
57AM 24 INDICTMENT, BECAUSE BASICALLY THE U.S. ATTORNEY NOW
57AM 25 IS CLAMMING UP.

57AM 1 AND I THINK THE REASONABLE INFERENCE FROM
57AM 2 THAT IS THAT THEY ARE DOING EXACTLY WHAT THEY
57AM 3 ORIGINALLY SAID AND THEY ARE GETTING READY FOR AN
57AM 4 INDICTMENT SOMETIME EARLY THIS YEAR.

57AM 5 THE COURT: OKAY. THANK YOU.

57AM 6 ALL RIGHT.

57AM 7 MS. BUNZEL: THANK YOU, YOUR HONOR.

57AM 8 I THINK THE COURT'S QUESTION IS EXACTLY
57AM 9 THE RIGHT ONE TO BEGIN WITH. THE COURT'S RULING ON
57AM 10 EBAY'S MOTIONS TO COMPEL ESSENTIALLY ESTABLISHES
57AM 11 THAT SUBSTANTIAL DISCOVERY CAN NOW PROCEED WITHOUT
57AM 12 IMPLICATING ANYONE'S FIFTH AMENDMENT RIGHTS.

57AM 13 AND UNDER KEATING, THAT'S THE THRESHOLD
57AM 14 ISSUE. ARE THERE FIFTH AMENDMENT RIGHTS THAT ARE
58AM 15 IMPLICATED?

58AM 16 AND AT THIS POINT IN THESE PROCEEDINGS,
58AM 17 REALLY LOOKING AT WHERE WE ARE RIGHT NOW, WHAT
58AM 18 DISCOVERY IS OUTSTANDING, WHAT THE DEFENDANTS HAVE
58AM 19 BEEN ORDERED TO PRODUCE, THE ANSWER TO THAT IS
58AM 20 SIMPLY NO.

58AM 21 THE COURT HAS ORDERED DISCOVERY TO
58AM 22 PROCEED IN THE WAYS THAT IT HAS ORDERED, NO FIFTH
58AM 23 AMENDMENT RIGHTS ARE IMPLICATED.

58AM 24 THE COURT: THAT COULD ALSO APPLY TO
58AM 25 ANSWERING THE COMPLAINT.

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MS. BUNZEL: THAT'S EXACTLY RIGHT,
YOUR HONOR.

AND WITH RESPECT TO THE INDICTMENT, NOW
WE'VE PUSHED IT TO APRIL. WE HAVE BEEN HEARING FOR
OVER A YEAR NOW, IN THIS CASE ALONE, LONGER THAN
THAT IF YOU LOOK AT THE COMMISSION JUNCTION CASE,
THAT THIS INDICTMENT IS COMING, COMING AROUND THE
CORNER EVEN AS WE SPEAK.

THE FACT OF THE MATTER IS WE JUST CAN'T
KNOW WHETHER AN INDICTMENT IS COMING OR NOT. AND I
WOULD URGE THE COURT TO LOOK AT THE DECLARATIONS
THAT HAVE BEEN SUBMITTED.

FRANKLY, THERE'S ONLY ONE OF OUR EIGHT
DEFENDANTS, I THINK WE HAVE, THAT'S EVEN BEEN
IDENTIFIED AS A TARGET. AND THE REST OF THE
INDIVIDUALS ARE, AT MOST, SUBJECTS.

ALL THEY HAVE BEEN ABLE TO REPORT IS THAT
AUSA WALDINGER HAS SAID THAT HE WILL SEEK AN
INDICTMENT. THAT'S THE SAME STATEMENTS THAT ARE
MADE IN MANY OTHER STATE CASES INCLUDING
APPLIED MATERIALS FROM JUDGE WHYTE.

THERE THEY HAD A DECLARATION SAYING
PRECISELY THE SAME THING. THE AUSA WILL BE SEEKING
AN INDICTMENT.

UNTIL WE ACTUALLY SEE AN INDICTMENT, WE

59AM 1 DON'T KNOW WHO WILL BE CHARGED, WE DON'T KNOW WHAT
59AM 2 WILL BE CHARGED, WE DON'T KNOW WHETHER SOME
59AM 3 DEFENDANTS ARE COOPERATING OR WILL BE OFFERED
59AM 4 IMMUNITY. THEY WON'T HAVE ANY FIFTH AMENDMENT
59AM 5 CONCERNS.

59AM 6 THE COURT: AND THERE MAY BE EITHER A
59AM 7 DISCRETIONARY BASIS OR REQUIREMENT FOR A STAY ONCE
59AM 8 AN INDICTMENT ISSUES.

59AM 9 MS. BUNZEL: YOUR HONOR, I THINK ONCE AN
59AM 10 INDICTMENT ISSUES THEN WE WILL ALL LOOK AT IT.
59AM 11 THEN WE WILL KNOW WHO IS CHARGED AND WHAT THEY ARE
00AM 12 CHARGED WITH. WE WILL KNOW WHAT STATUS THIS CASE
00AM 13 IS IN, HAS DISCOVERY BEEN ABLE TO PROCEED, ARE WE
00AM 14 CLOSER TO MEDIATION OR SETTLEMENT.

00AM 15 FRANKLY, THE PARTIES MIGHT BE IN A
00AM 16 POSITION AT THAT POINT TO AGREE UPON SOME FORM OF
00AM 17 STAY IF ONE IS APPROPRIATE. THERE ARE LOTS OF
00AM 18 CASES WHERE AN INDICTMENT ISSUES AND STILL NO STAY
00AM 19 IS GRANTED.

00AM 20 SO I THINK WE JUST CAN'T ASSESS IT UNTIL
00AM 21 THAT POINT.

00AM 22 THE COURT: AND THEN I HAD ONE OTHER
00AM 23 QUESTION FOR EBAY WHICH IS: WHAT ONGOING HARM IS
00AM 24 THERE? OTHER THAN THE DESIRE TO GET THE CASE OVER
00AM 25 WITH AND TO GET COMPENSATED FOR THE HARM THAT WAS

00AM 1 DONE, FROM WHAT I CAN TELL THERE'S NO ONGOING HARM
00AM 2 HERE.

00AM 3 SO THE ONLY PREJUDICE THAT EBAY WOULD
00AM 4 SUFFER FROM A STAY IS IT WOULD HAVE TO WAIT TO GET
00AM 5 THE SIMPLE REMEDY.

00AM 6 MS. BUNZEL: WELL, YOUR HONOR, I THINK
00AM 7 THE PREJUDICE ANALYSIS WITH RESPECT TO EBAY HAS TWO
00AM 8 FACTORS TO IT.

00AM 9 FIRST, IT'S WITH RESPECT TO OUR DAMAGES
00AM 10 CLAIM. AND THERE ARE SEVERAL CASES IN WHICH THE
01AM 11 COURTS HAVE SAID THAT DELAYING ESPECIALLY A FRAUD
01AM 12 VICTIM'S PURSUIT OF DAMAGES DISCOVERY WHILE THE
01AM 13 DEFENDANTS DEplete THEIR RESOURCES IN DEFENDING
01AM 14 AGAINST A CRIMINAL CASE OR FIGHTING AGAINST A
01AM 15 CRIMINAL INVESTIGATION, THAT IS PREJUDICE. AND
01AM 16 THAT'S PRECISELY THE BASIS OF THE RULING IN
01AM 17 APPLIED MATERIALS. SO THAT IS ONE ASPECT OF THE
01AM 18 PREJUDICE TO EBAY.

01AM 19 THE OTHER THING THAT'S IMPORTANT TO
01AM 20 REMEMBER IS THAT WE HAVE ALSO REQUESTED INJUNCTIVE
01AM 21 RELIEF HERE. AND THE CASES ALSO MAKE CLEAR THAT
01AM 22 WHEN A PLAINTIFF IS SEEKING INJUNCTIVE RELIEF
01AM 23 THERE'S SIMPLY NO BASIS TO POSTPONE THAT KIND OF
01AM 24 RECOVERY.

01AM 25 ACTUALLY, SINCE WE DON'T HAVE DISCOVERY

01AM 1 YET, WE DON'T REALLY KNOW IF THERE'S ONGOING HARM.
01AM 2 WE DON'T KNOW WHAT THE DEFENDANTS HAVE DONE WITH
01AM 3 THEIR NEFARIOUS CODE. WE DON'T KNOW WHO ELSE THEY
01AM 4 ARE AFFILIATING WITH. WE JUST SIMPLY DON'T KNOW.

01AM 5 SO I DON'T THINK THERE'S A BASIS TO
01AM 6 POSTPONE THAT DISCOVERY TO EBAY. WE COULD BE
02AM 7 PREJUDICED IN THE MEANWHILE FROM GETTING THE
02AM 8 REMEDIES THAT WE ARE SEEKING. AND SINCE THERE'S NO
02AM 9 BASIS FOR A STAY THERE'S JUST NO POINT IN DENYING
02AM 10 US THOSE REMEDIES.

02AM 11 THE COURT: OKAY. ALL RIGHT.

02AM 12 COUNSEL, HERE'S WHAT I'M GOING TO DO --
02AM 13 I'M SORRY, DO YOU HAVE SOMETHING TO SAY?

02AM 14 MR. CAMPBELL: JUST ADDRESSING THE ISSUES
02AM 15 OF PREJUDICE.

02AM 16 IN TERMS OF THE EXPENDITURE OF FUNDS IN
02AM 17 TERMS OF A DEFENSE COUNSEL DEFENDING THE CASE, A
02AM 18 STAY WOULD ACTUALLY ALLOW FUNDS NOT TO BE EXPENDED
02AM 19 IN THIS CASE. AND SO, SUBSTANTIAL --

02AM 20 THE COURT: RIGHT.

02AM 21 MR. CAMPBELL: SO I DON'T THINK THAT'S AN
02AM 22 ISSUE.

02AM 23 IN TERMS OF THE INJUNCTIVE RELIEF CLAIM,
02AM 24 THERE'S NO QUESTION THE DEFENDANTS WERE TERMINATED
02AM 25 FROM THE PROGRAM. AS SET FORTH IN PLAINTIFF'S OWN

02AM 1 COMPLAINT, THAT HAPPENED IN JUNE OF 2007.

02AM 2 SO IN TERMS OF ONGOING HARM, THAT DOESN'T
02AM 3 SEEM TO HAVE ANY BASIS.

02AM 4 THE COURT: SIR?

02AM 5 MR. PRESIADO: AND JUST QUICKLY,
02AM 6 YOUR HONOR, I THINK WHAT MAY BE OVERLOOKED HERE IS
02AM 7 THE RELATIONSHIP BETWEEN EBAY AND THE UNITED STATES
03AM 8 ATTORNEY.

03AM 9 AS WE DOCUMENT IN OUR PAPERS, IT'S THE
03AM 10 STATED MOTIVATION OF THE UNITED STATES ATTORNEY,
03AM 11 PARTICULARLY THE CHIP UNIT, THE STATE OF MODE OF
03AM 12 OPERATION TO WORK SYMBIOTICALLY WITH THE TECH
03AM 13 COMMUNITY, SUCH AS EBAY, WITH RESPECT TO THESE
03AM 14 ALLEGED CYBER CRIMES.

03AM 15 SO IT'S NOT A TYPICAL SITUATION WHERE THE
03AM 16 DEFENDANT COMES IN AND SAYS, I'M BEING INVESTIGATED
03AM 17 BY THE GOVERNMENT. I THINK IF YOU LOOK AT THE
03AM 18 PARTICULAR ASPECTS OF THIS CASE IT SEEMS TO ME, AND
03AM 19 JUST BASED ON THE FACT THAT EBAY'S INVESTIGATION
03AM 20 ENDED WHEN THE ATTORNEY GENERAL STEPPED IN AND
03AM 21 BEGAN HIS INVESTIGATION, I THINK THAT SHOWS, AS
03AM 22 THEY STATED ON THEIR WEBSITE, THAT THE GOVERNMENT
03AM 23 IS ATTEMPTING TO WORK HAND-IN-HAND WITH THE TECH
03AM 24 COMMUNITY ON THESE ISSUES.

03AM 25 SO IT SEEMS TO ME THAT WHAT CAN'T BE

03AM 1 OVERLOOKED IS THAT THE POTENTIAL PREJUDICE IS
04AM 2 GREATER HERE BECAUSE THE SHARING OF INFORMATION, AS
04AM 3 IS STATED ON THEIR WEBSITE.

04AM 4 THE COURT: OKAY. GOT IT.

04AM 5 LET'S DO THIS. I'M GOING TO GIVE YOU A
04AM 6 CMC DATE, FEBRUARY 26TH, SO FOUR WEEKS FROM TODAY.
04AM 7 LET'S SEE WHAT HAPPENS.

04AM 8 I'LL ISSUE ORDERS ON THE PENDING MOTIONS
04AM 9 BUT WHAT I WANT TO DO IS KEEP A CLOSE EYE ON WHAT'S
04AM 10 GOING WITH REGARD TO THE PROSECUTION. AND IF YOU
04AM 11 HEAR ANYTHING IN THE MEANTIME, LET ME KNOW. IF
04AM 12 THERE'S NOTHING NEW ON THE 26TH OF FEBRUARY WE CAN
04AM 13 CONTINUE THE DATE ANOTHER 30 DAYS OR SO.

04AM 14 I WILL TELL YOU MY INCLINATION. I AM NOT
04AM 15 SET ON THIS. I WILL THINK ABOUT IT, BUT MY
04AM 16 INCLINATION IS TO ALLOW THE STATUS QUO TO CONTINUE,
04AM 17 GET SOME ANSWERS FROM THE CORPORATE DEFENDANTS AND
05AM 18 THEN SEE WHAT HAPPENS WITH THE PROSECUTION.

05AM 19 BUT I'M GOING TO THINK THAT THROUGH
05AM 20 BEFORE I MAKE A FINAL ORDER IN THAT REGARD. BUT I
05AM 21 WANTED TO GIVE YOU A HEADS UP ABOUT IT.

05AM 22 MS. BUNZEL: YOUR HONOR, AS A POINT OF
05AM 23 CLARIFICATION, WHEN YOU SAY YOUR INCLINATION IS TO
05AM 24 ALLOW THE STATUS QUO TO CONTINUE, DOES THAT MEAN
05AM 25 INCLUDING THE STATUS QUO OF YOUR ORDER WITH RESPECT

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TO DISCOVERY?

THE COURT: THE DISCOVERY ORDER, AND I THINK IT'S IMPLICIT IN THAT THAT I WOULD GRANT YOUR MOTION TO STRIKE AND DIRECT THE CORPORATE DEFENDANTS TO FILE ANSWERS THAT COMPLY WITH THE RULES.

BUT THAT'S TENTATIVE. I AM GOING TO GIVE THE MATTER SOME FURTHER THOUGHT.

THERE WILL BE A WRITTEN ORDER. I'M TELLING YOU THIS BECAUSE I DON'T WANT PEOPLE TO BE GUESSING WHAT I'M THINKING. BUT UNTIL YOU GET THE WRITTEN ORDER, DON'T ASSUME ANYTHING.

MR. CAMPBELL: YOUR HONOR, ONE FINAL POINT.

WITH RESPECT TO CONSIDERING THESE MATTERS, IT MIGHT MAKE SENSE FROM OUR STANDPOINT TO, IN ORDER TO PRESERVE THE RELIEF WE ARE REQUESTING BY WAY OF MOTION, TO HAVE THE EFFECT OF THE JANUARY 12TH ORDER NOT TAKE EFFECT UNTIL THE ORDER ON THE PRESENT ISSUE FOR STAY.

THE COURT: I THINK THAT'S WHY I MADE THE COMMENT I DID. AT THE MOMENT, YOU SHOULD ASSUME THE JANUARY 12TH ORDER IS IN EFFECT.

I DO NOT KNOW WHAT THE DEADLINE DATES ARE FOR COMPLIANCE, AND PERHAPS YOU CAN TALK WITH

06AM 1 COUNSEL ABOUT THAT.

06AM 2 WHAT I MEANT BY KEEPING STATUS QUO IS
06AM 3 WHERE WE ARE NOW IN TERMS OF THIS CASE IS I MADE AN
06AM 4 ORDER ON JANUARY 12TH WHICH REFLECTED MY VIEW OF
06AM 5 THE 25TH AMENDMENT AS IT WAS TEED UP BY THAT
06AM 6 DISPUTE.

06AM 7 THAT'S THE OPERATIVE VIEW AND THAT'S WHY
06AM 8 I'M INCLINED TO GRANT EBAY'S MOTION TO STRIKE WITH,
06AM 9 OBVIOUSLY, LEAVE TO FILE AN AMENDED ANSWER.

06AM 10 AND I'M NOT INCLINED TO STAY THE MATTER
06AM 11 AT THIS POINT, BUT I DO WANT TO KEEP A CLOSE EYE ON
06AM 12 IT BECAUSE THINGS CAN HAPPEN.

06AM 13 I DON'T WANT ANYBODY TO GET CAUGHT IN A
06AM 14 SITUATION WHERE NINE MONTHS FROM NOW WE ARE STILL
06AM 15 WAITING FOR THE U.S. ATTORNEY. THAT'S NOT AN
06AM 16 ACCEPTABLE SITUATION.

06AM 17 I KNOW THAT UNIT PRETTY WELL. I SEE THEM
06AM 18 IN THIS COURT ALL THE TIME. IF THEY'RE INDICATING
06AM 19 THAT THEY ARE GOING TO BE BRINGING DOWN AN
07AM 20 INDICTMENT SOON, I THINK IT'S LIKELY THEY WILL.

07AM 21 AND I WOULD LIKE TO KEEP A CLOSE EYE ON
07AM 22 THINGS. IF THERE'S AN INDICTMENT, THEN WE HAVE TO
07AM 23 RECALIBRATE THE ENTIRE CASE.

07AM 24 ALL RIGHT. THANK YOU.

07AM 25 MATTER SUBMITTED.

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MS. BUNZEL: THANK YOU, YOUR HONOR.

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MR. CAMPBELL: THANK YOU, YOUR HONOR.

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(WHEREUPON, THE PROCEEDINGS IN THIS

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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, CRR
CERTIFICATE NUMBER 13185