

EXHIBIT C

**U.S. District Court
United States District Court for the District of Connecticut (New Haven)
CIVIL DOCKET FOR CASE #: 3:07-mc-00038-JBA**

Mercexchange LLC v. eBay, Inc et al
Assigned to: Judge Janet Bond Arterton
Cause: Motion to Compel

Date Filed: 02/02/2007
Jury Demand: None
Nature of Suit: 990 Other
Jurisdiction: Federal Question

Plaintiff

Mercexchange LLC

V.

Defendant

eBay, Inc

represented by **Allan M. Soobert**
Skadden, Arps, Slate, Meagher & Flom
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1440 New York Ave., N.W.
Washington, DC 20005-2111
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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Rowena Amanda Moffett

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Defendant**HALF.COM Inc**

represented by **Allan M. Soobert**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David R. Schaefer
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jeffrey G. Randall
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rowena Amanda Moffett
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

| Date Filed | # | Docket Text |
|------------|----------|--|
| 02/02/2007 | <u>1</u> | MOTION to Compel Kenneth Nahan to comply with a subpoena duces tecum by eBay, Inc, HALF.COM Inc.Responses due by 2/23/2007 (Pesta, J.) (Entered: 02/05/2007) |
| 02/02/2007 | <u>2</u> | Memorandum in Support re <u>1</u> MOTION to Compel filed by eBay, Inc, HALF.COM Inc. Modified text on 2/5/2007 to indicate no exhibits(Pesta, J.) (Entered: 02/05/2007) |
| 02/02/2007 | <u>3</u> | AFFIDAVIT re <u>1</u> MOTION to Compel Signed By David R. Schaefer filed by eBay, Inc, HALF.COM Inc. Exhibits in paper format only (too large) (Pesta, J.) (Entered: 02/05/2007) |
| 02/02/2007 | <u>4</u> | NOTICE of Appearance by David R. Schaefer on behalf of eBay, Inc, HALF.COM Inc (Pesta, J.) (Entered: 02/05/2007) |
| 02/02/2007 | <u>5</u> | Corporate Disclosure Statement by eBay, Inc, HALF.COM Inc. (Pesta, J.) (Entered: 02/05/2007) |
| 02/09/2007 | <u>7</u> | NOTICE of Appearance by Rowena Amanda Moffett on behalf of eBay, |

| | | |
|------------|----|--|
| | | Inc, HALF.COM Inc (Pesta, J.) (Entered: 02/12/2007) |
| 02/09/2007 | 8 | MOTION for Leave for Attorney Allan M. Soobert to Appear pro hac vice by eBay, Inc, HALF.COM Inc. Filing Fee \$25.00. Receipt Number N020519. (Pesta, J.) (Entered: 02/12/2007) |
| 02/09/2007 | 9 | MOTION for Leave for Attorney Jeffrey G. Randall to Appear pro hac vice by eBay, Inc, HALF.COM Inc. Filing Fee \$25.00. Receipt Number N020519. (Pesta, J.) (Entered: 02/12/2007) |
| 02/12/2007 | 6 | RULING granting 1 Motion to Compel. Signed by Judge Janet Bond Arterton on 2/9/07. (Pesta, J.) (Entered: 02/12/2007) |
| 02/12/2007 | 10 | ORDER granting 8 MOTION for Leave for Attorney Allan M. Soobert to Appear pro hac vice by eBay, Inc, HALF.COM Inc. Signed by Clerk on 2/12/07. (Pesta, J.) (Entered: 02/12/2007) |
| 02/12/2007 | 11 | ORDER granting 9 MOTION for Leave for Attorney Jeffrey G. Randall to Appear pro hac vice by eBay, Inc, HALF.COM Inc. Signed by Clerk on 2/12/07. (Pesta, J.) (Entered: 02/12/2007) |

| | | | |
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| PACER Service Center | | | |
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| 02/14/2007 12:38:52 | | | |
| PACER Login: | ██████████ | Client Code: | |
| Description: | Docket Report | Search Criteria: | 3:07-mc-00038-JBA |
| Billable Pages: | 2 | Cost: | 0.16 |

EXHIBIT D

**HUNTON &
WILLIAMS**

HUNTON & WILLIAMS LLP
SUITE 1000
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NORFOLK, VIRGINIA 23510

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FAX 757 • 625 • 7720

GREGORY N. STILLMAN
DIRECT DIAL: 757-640-5314
EMAIL: GSTILLMAN@HUNTON.COM
FILE NO: 56614.14

January 19, 2007

Via Facsimile

Jeffrey G. Randall, Esq.
Skadden, Arps, Slate, Meagher & Flom, LLP
525 University Avenue
Suite 1100
Palo Alto, CA 94306

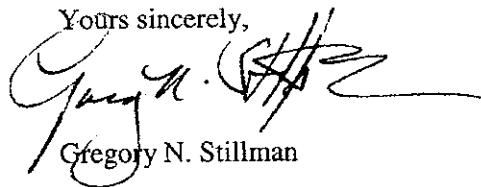
MercExchange v. eBay, Inc., Half.com, Inc.

Dear Jeff:

We will be representing Kenneth Nahan and are in receipt of your January 11, 2007 subpoena issued in Connecticut. Mr. Nahan objects to the requests in this subpoena as being overly broad and unduly burdensome, as well as seeking documents that are proprietary, highly confidential, and/or are protected by the attorney-client privilege. Based on these objections, Mr. Nahan does not plan on responding to this subpoena until we can have a "meet and confer" regarding these requests.

Best regards.

Yours sincerely,



Gregory N. Stillman

01368/05953

cc: Allan M. Soobert, Esq.
Robert W. McFarland, Esq.
Seth P. Waxman, Esq.

EXHIBIT E

Stillman, Greg

From: Stillman, Greg
Sent: Tuesday, January 23, 2007 12:13 PM
To: Jeff Randall (E-mail)
Subject: eBay

Jeff: when can we discuss the document production? I'm in New York all week, but could find some time for a phone conference if you are available. Thanks.

2/8/2007

EXHIBIT F

Hermoso, Jennifer

From: Stillman, Greg
Sent: Monday, February 05, 2007 2:56 PM
To: 'bankenbr@skadden.com'; Robert W. McFarland (E-mail)
Subject: eBay

Brian and Rob, I am having documents responsive to eBay's subpoena to Altitude Capital delivered to Rob this afternoon. We included a privilege log which I need to explain. The log identifies those documents we are withholding on a claim of privilege. You will also observe that we are withholding some documents under the designation "trial counsel only". We will produce these documents upon the entry of an appropriate confidentiality order which restricts access to Trial counsel only. I will try to get you a proposed order later this week for your consideration. Call me if you have any questions. Clearly we both need to set up a time for a meet and confer on a number of issues. Are you available tomorrow? I could do it most anytime after 11:00 am our time.

2/8/2007

EXHIBIT G

AO88 (Rev. 12/06) Subpoena in a Civil Case

**Issued by the
UNITED STATES DISTRICT COURT**

DISTRICT OF Connecticut

MercExchange, L.L.C.

SUBPOENA IN A CIVIL CASE

V.

eBay Inc. and Half.com, Inc.

Case Number:¹ 2:01-CV-736
Pending in E.D. Va.

TO: Kenneth Nahan
31 Reservoir Lane
Stamford, CT 06903-1924

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

| | |
|--------------------|---------------|
| PLACE OF TESTIMONY | COURTROOM |
| | DATE AND TIME |

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

| | |
|---------------------|---------------|
| PLACE OF DEPOSITION | DATE AND TIME |
| | |

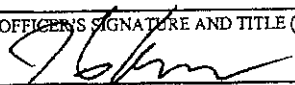
YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):
See the attached Schedule A

| | |
|--|-------------------------------------|
| PLACE Skadden, Arps, Slate, Meagher & Flom LLP Four Times Square, New York, New York 10036 | DATE AND TIME 1/24/2007 10:00 am |
|--|-------------------------------------|

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

| | |
|----------|---------------|
| PREMISES | DATE AND TIME |
| | |

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

| | |
|--|-----------------|
| ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)  | DATE 1-11-07 |
|--|-----------------|

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Jeff Randall of Skadden, Arps, Slate, Meagher & Flom, LLP (Def. Atty.)
525 University Ave., Suite 1100, Palo Alto, CA 94301 Tel. 650-470-4580

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

AO88 (Rev. 12/06) Subpoena in a Civil Case

PROOF OF SERVICE

| | |
|------------------------|-------------------|
| DATE | PLACE |
| SERVED | |
| SERVED ON (PRINT NAME) | MANNER OF SERVICE |
| SERVED BY (PRINT NAME) | TITLE |

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

| | | |
|-------------|------|---------------------|
| Executed on | DATE | SIGNATURE OF SERVER |
| | | ADDRESS OF SERVER |

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(ii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject

to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

SCHEDULE A

Pursuant to Federal Rules of Civil Procedure 34 and 45, defendants eBay Inc. and Half.com, Inc. ("eBay") hereby request that Kenneth Nahan produce for eBay's inspection and copying, each and every document and thing in his possession, custody, or control identified and described in the following Document Requests, such items to be produced on January 24, 2007 at 10:00 am EST at the offices of eBay's counsel, Skadden, Arps, Slate, Meagher, & Flom, 4 Times Square, New York, NY 10036, unless otherwise agreed.

I. DEFINITIONS AND INSTRUCTIONS

1. "MercExchange" refers to plaintiff MercExchange, L.L.C. and its parents, subsidiaries, affiliates, officers, principals, agents, divisions, departments, partners, predecessors, and successors thereof.

2. "eBay" refers to eBay Inc. and its parents, subsidiaries, affiliates, officers, principals, agents, divisions, departments, partners, predecessors, and successors thereof.

3. "Honicorp" refers to Honicorp and its parents, subsidiaries, affiliates, officers, principals, agents, divisions, departments, partners, predecessors, and successors thereof.

4. "Artsearch" refers to Artsearch and its parents, subsidiaries, affiliates, officers, principals, agents, divisions, departments, partners, predecessors, and successors thereof.

5. The "Newman video" refers to the video describing the Honicorp system, which was narrated by Edwin Newman, and bears a copyright date of 1992.

6. The term "confidentiality agreement" refers to any confidentiality agreements that were drafted for the purpose of maintaining the confidentiality of the Newman video.

7. The "2004 Nahan declaration" refers to the Declaration of Kenneth Nahan, which was signed on April 12, 2004.

8. "Document" has the same meaning as that used and defined in Federal Rule of Civil Procedure 34(a).

9. The term "person" means any natural person and any other cognizable entity, including (without limitation) corporations, proprietorships, partnerships, joint ventures, consortiums, clubs, associations, foundations, governmental agencies or instrumentalities, societies, and orders.

10. The term "communication" means any transmission of information from one person to another by any means.

11. The phrases "relate to," "relating to," or "relates to" shall be construed to mean evidencing, constituting, referring to, comprising, illustrating, recording, memorializing, supporting, or discussing.

12. If you withhold any document because of a claim of privilege, set forth, in writing, the privilege claimed and the facts on which you rely to support the claimed privilege, and furnish a list identifying each document for which privilege is claimed, together with the following information as to each such document: a brief description of its nature and subject matter, including the title and type of document; its date; the name and title of the author(s); the name and title of the person(s) to whom the document is addressed including all persons who received copies; the name and title of the person(s) to whom the document was sent; the number of pages; and the request to which the document is otherwise responsive.

II. DOCUMENT REQUESTS

REQUEST NO. 1

All documents relating to the alleged confidential status of the Newman video or any confidentiality agreements or control logs associated therewith.

REQUEST NO. 2

All documents relating to whom and under what conditions the Newman video was displayed or distributed prior to April 26, 1995.

REQUEST NO. 3

All documents relating to any meeting or call with any eBay attorneys, including, but not limited to, notes, records, or transcripts.

REQUEST NO. 4

All documents relating to any meeting or conversation with MercExchange and/or its attorneys, including, but not limited to, notes, records, or transcripts.

REQUEST NO. 5

All documents relating to the preparation of the 2004 Nahan declaration, including, but not limited to notes and drafts.

REQUEST NO. 6

All documents relating to any payments made by MercExchange, its attorneys, or agents to either Kenneth Nahan or Sherri Nahan.

REQUEST NO. 7

All documents relating to the efforts of Honicorp/Artsearch to raise capital including, but not limited to, the Honicorp Private Placement Memorandum and all information concerning its preparation and distribution prior to prior to April 26, 1995.

REQUEST NO. 8

All documents relating to the display of the Honicorp system on the Today Show in 1994.

REQUEST NO. 9

All documents relating to any public display or offer for sale the Honicorp/Artsearch system prior to April 26, 1995.

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

MERCEXCHANGE, L.L.C.,

Plaintiff,

Case NO. 2:01-CV-736

v.

eBAY, INC., and HALF.COM, INC.,

Defendants.

**PLAINTIFF MERCEXCHANGE, L.L.C.'S BRIEF IN SUPPORT OF MOTION TO
ENFORCE COURT'S DECEMBER 18 ORDER AND FOR PROTECTIVE ORDER
CONCERNING DEFENDANTS' OVERBROAD DISCOVERY REQUESTS AND
ATTEMPTED ENFORCEMENT OF SUBPOENAS DUCES TECUM**

I. INTRODUCTION

Plaintiff MercExchange, L.L.C. ("MercExchange") respectfully requests that the Court enter a protective order to limit defendants' subpoenas *duces tecum* and discovery requests on the grounds that they exceed the scope of discovery permitted by the Court's Order of December 18, 2006. MercExchange also requests that the Court preclude defendants from making further efforts to enforce their subpoenas in violation of Judge Friedman's Order.

This Court's December 18 Order expressly limited discovery only to that which is relevant to the two motions pending before the Court, specifically, MercExchange's request for a permanent injunction against infringement of the '265 Patent, and defendants' request for an indefinite stay of proceedings. In addition, this Court required the parties to contact Magistrate Judge Bradberry of this Court in the event of discovery disputes.

Notwithstanding the plain provisions of the Court's Order, defendants launched a half-dozen subpoenas *duces tecum* in five jurisdictions that substantially overreach. At least two of those subpoenas — issued upon MercExchange's law firm Fish & Richardson and its trial expert

witness Dr. Weaver — seek documents that have nothing to do with the pending motions. Examples of such overbroad requests include requests for virtually every document relating to any of MercExchange's patents or patent applications, and any documents pertaining to any possible infringement by defendants of any of MercExchange's patents. Defendants served subpoenas *duces tecum* upon MercExchange's law firm, Fish & Richardson, for virtually every document relating to MercExchange, including all of its confidential and privileged patent files. In an apparent effort to get a head start on discovery with respect to the yet-to-be-conducted '051 Patent trial, defendants served MercExchange's trial expert, Dr. Alfred Weaver, with a subpoena, even though he has no connection with the two motions pending before the Court.

As discussed *infra*, all of the subpoenas and document requests are substantially overbroad and, in the cases of the Fish & Richardson and Dr. Weaver subpoenas, are aimed entirely at documents having no legitimate relationship with the limited issues for which this Court permitted discovery. Defendants then filed five motions to compel in four separate courts across the country with respect to their subpoenas without making any genuine effort to meet-and-confer with counsel. In clear violation of this Court's Order, defendants also ignored this Court's mandate that they contact Magistrate Judge Bradberry with respect to these disputes.

II. BACKGROUND

As this Court is aware, this litigation was initiated in September 2001. MercExchange sued eBay for infringement of three patents, U.S. Patent No. 5,845,265 ("the '265 Patent"), U.S. Patent No. 6,085,176 ("the '176 Patent"), and U.S. Patent No. 6,202,051 ("the '051 Patent"). The case was litigated extensively, culminating in a five-week jury trial in April and May of 2003. The jury determined that defendants willfully infringed MercExchange's '265 Patent, and

the jury rejected defendants' invalidity defenses in their entirety.¹ The District Court entered judgment on the jury verdict in August 2003, but at that time denied MercExchange's post-trial motion for permanent injunction against continued infringement. *See generally MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp.2d 695, 711-15 (E.D. Va. 2003). Defendants appealed the infringement and validity verdicts to the Federal Circuit, and MercExchange cross-appealed this Court's denial of the permanent injunction and the ruling of summary judgment of invalidity with respect to the '051 Patent. In March 2005, the Federal Circuit issued its ruling on the appeal and affirmed the verdict of defendants' willful infringement and the validity of the '265 Patent. *See generally MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323 (Fed. Cir. 2005). The appellate court also reversed this Court's denial of permanent injunctive relief for MercExchange, and it reversed this Court's holding of invalidity of the '051 Patent, directing that the case be remanded for trial with respect to the '051 Patent.

eBay subsequently petitioned the United States Supreme Court for a *writ of certiorari* solely with respect to the permanent injunction issue. In May 2006, the Supreme Court issued its ruling and held that both this Court and the Federal Circuit had failed to apply the correct analysis with respect to that issue. *eBay, Inc. v. MercExchange, L.L.C.*, ___ U.S. ___, 126 S. Ct. 1837, 1840 (2006). The Court directed that this Court reconsider MercExchange's request for a permanent injunction under the four-factor standard articulated in the Supreme Court's opinion. *Id.* at 1839-41.

¹ Before trial, this Court held that MercExchange's '051 Patent was invalid under Section 112 of the patent laws. As noted *infra*, that ruling was later reversed by the United States Court of Appeals for the Federal Circuit. The jury also held that defendants had infringed the '176 Patent, but the Federal Circuit held that the asserted claims of that patent were invalid.

Meanwhile, ten months after the jury verdict in this case, and while the appeal was pending before the Federal Circuit, eBay belatedly petitioned the Patent and Trademark Office (“PTO”) for a reexamination of the ‘265, ‘176, and ‘051 Patents.² Those reexamination proceedings remain pending before the PTO and no final decision has been reached. However, this Court’s affirmed judgment of defendants’ infringement and validity of the ‘265 Patent cannot be affected by the PTO’s decision. Moreover, even if the PTO Examiners render a negative decision with respect to the validity of any of the claims of MercExchange’s patents, MercExchange would have the opportunity to appeal that decision to the PTO’s Board of Patent Appeals and ultimately the Federal Circuit, the same Court that has already held the ‘265 Patent to be valid.

Following the Supreme Court’s decision and the return of the mandate of this case from the Federal Circuit, this Court conducted a scheduling conference with the parties to determine what issues remained for resolution. The parties identified a number of issues yet to be resolved in this litigation, not the least of which includes a trial on the ‘051 Patent as well as an accounting and possible enhancement of damages for defendants’ post-verdict infringement of the ‘265 Patent. *MercExchange*, 275 F. Supp.2d at 714-15 (stating that Court would consider enhancing damages if defendants continued to infringe). Importantly, however, this Court determined that it would *not* proceed with respect to all of these issues but that, instead, it would consider only two issues at this time, first, MercExchange’s renewed motion for a permanent injunction and, second, defendants’ request that the entire proceeding be stayed pending the

² Of course, by this time defendants’ invalidity defenses with respect to the ‘265 Patent had already been rejected by the jury, and the Federal Circuit had defendants’ appeal of that verdict before it. The Federal Circuit affirmed that verdict in March 2005, even after defendants informed the appellate court that they had requested reexamination of the patent.

results of eBay's belatedly-sought reexamination.³ Thus, for example, the Court determined that it would not yet proceed with the trial of the '051 Patent case, or the issue of an accounting or enhancement of damages for defendants' willful post-verdict infringement.

The parties then briefed the permanent injunction and stay issues to this Court. With its pleadings, MercExchange provided declarations addressed to the four-factor test for injunctions and specifically to the irreparable harm that would result to MercExchange if the Court did not enter an injunction, or if the Court were to stay the proceedings indefinitely without first enjoining defendants. MercExchange's trial expert, Dr. Alfred Weaver, was *not* one of those declarants.⁴ Indeed, Dr. Weaver has no connection with either of the two motions pending before the Court. Rather, Dr. Weaver served as an expert witness at the trial of this case with respect to infringement and validity issues pertaining to the '265 Patent; these issues have been fully tried and affirmed on appeal. *See MercExchange*, 401 F.3d at 1327-31.

In this Court's Order and Opinion dated December 18, 2006, the Court held that it was proper for MercExchange to have submitted fresh evidence with respect to its need for a permanent injunction.⁵ Exhibit A, Order and Opinion of Dec. 18, 2006 ("Post-Appeal Order") at 6-7. On defendants' request for discovery relating to this new evidence, however, the Court determined that it would permit very *limited* discovery. Specifically, the Court held, "*all*

³ Reexamination proceedings have in some instances taken as many as ten years to resolve. eBay recently filed a request with the PTO seeking to initiate *another* reexamination proceeding, revealing that its reexamination gambit is nothing more than a delay tactic to prolong this litigation indefinitely.

⁴ Dr. Weaver is a Professor of Computer Science at the University of Virginia.

⁵ Although eBay contended that it was relevant that the PTO was considering post-trial reexaminations of the patents-in-suit, it argued that MercExchange's evidence should have been limited to that which existed at the trial of the case.

discovery requests must be confined to the investigation into events occurring subsequent to this Court's denial of MercExchange's initial Motion for an injunction." Post-Appeal Order at 15-16 (emphasis added). The Court further emphasized, "[t]o reiterate, the permissible discovery must relate to developments subsequent to August 6, 2003, that are relevant to MercExchange's motion for an injunction and eBay's motion to stay the proceedings." *Id.* at 17. The Court also held that "[i]n the event that discovery disputes arise, the parties *must* contact Magistrate Judge James Bradberry no later than February 6, 2007 to determine an expedited discovery dispute procedure." *Id.* at 16 (emphasis added).

Notwithstanding the discovery limitations and protocols in the Court's December 18 Order, defendants served subpoenas on, *inter alia*, MercExchange's trial expert Dr. Weaver, and MercExchange's law firm Fish & Richardson. Defendants also served subpoenas on Altitude Capital Partners, a firm that had invested in MercExchange, Ubid, an internet company with whom MercExchange had commercialized its patents, Kenneth Nahan, and Mr. Nahan's law firm Nordlicht & Hand.⁶

III. ARGUMENT

Defendants' subpoenas and their document requests upon MercExchange blatantly ignore the limitations on the scope of discovery established by this Court's Post-Appeal Order. This Court specifically limited the parties to discovery relevant to the two motions pending before the Court, MercExchange's request for a permanent injunction, and defendants' request for a stay of all proceedings. In light of the Court's decision to consider only these two motions, no issue of

⁶ MercExchange's counsel, Hunton & Williams, represents Dr. Weaver, Mr. Nahan, Altitude Capital Partners, and Nordlicht & Hand in connection with these subpoenas. MercExchange is also authorized to represent that each of these respondents, as well as Fish & Richardson, join in this motion for a protective order.

infringement or validity is currently before the Court. Indeed, defendants' willful infringement of the '265 Patent stands conclusively adjudged.

With respect to MercExchange's law firm, Fish & Richardson, defendants have requested, *inter alia*, literally every communication relating to any of MercExchange's patent prosecution or reexamination matters. *See* Exhibit B (*e.g.*, request no. 5 ("[a]ll documents relating to communications with the Patent Office from March 8, 2004 to the present"). Moreover, it is apparent from the tone and substance of defendants' subpoena that defendants are attempting to relitigate their allegation that MercExchange violated the protective order in this case by having its trial expert file declarations in the reexamination matters. *See id.*, (request nos. 1-4, 7). However, this Court has already thoroughly considered and ruled on this issue in its Post-Appeal Order, and it did not grant leave for defendants to take discovery in order to pursue their unwarranted allegations. Post-Appeal Order at 22-29.

With respect to Dr. Weaver, the documents sought by defendants again have no relevance to the limited issues currently pending before the Court. Defendants appear to be under the misguided belief that this Court is giving them a new trial with respect to infringement of the '265 Patent. Certainly, that is not the case. There is an affirmed jury verdict that defendants willfully infringed MercExchange's '265 Patent, and no issue of defendants' infringement of that patent is before the Court at this time. Likewise, as discussed *infra*, the remainder of defendants' requests to Dr. Weaver are overbroad and improper.

Defendants' requests upon Altitude Capital are typically overbroad, but nonetheless this company has already made a production of responsive documents on the same day that defendants filed a motion to compel in the Southern District of New York. Respondents

Kenneth Nahan and Nordlicht & Hand are in the process of gathering responsive non-privileged documents and intend to produce them shortly.

A. The Court Should Enter A Protective Order Precluding Defendants From Enforcing Their Overbroad Subpoenas In The Issuing Courts.

In an apparent effort to avoid this Court's limitations on the scope of discovery, defendants have filed five motions to compel in four other federal district courts across the country. Notwithstanding Judge Friedman's crystal-clear order mandating that the parties bring any discovery disputes before Magistrate Judge Bradberry by February 6, 2007 (Post-Appeal Order at 16), defendants never contacted this Court with respect to these issues in order that this Court might obviate the need to involve multiple federal district courts to resolve these matters. And regrettably, defendants have made highly misleading arguments to these Courts about the scope of discovery that this Court permitted. *See infra* at 9-10. Therefore, MercExchange requires immediate relief from this Court with respect to defendants' attempt to enforce subpoenas in the Western District of Virginia (Dr. Weaver) and the Southern District of California (Fish & Richardson) for documents that are wholly outside the scope of this Court's Post-Appeal Order.⁷

Moreover, defendants made no genuine effort to meet-and-confer with counsel before filing their salvo of "emergency" motions, even though MercExchange's counsel specifically requested the opportunity to meet and confer. *See* Exhibits C and D. Instead, defendants falsely contended to the other courts that MercExchange refused to meet and confer, when in fact it sought the opportunity to do so.

⁷ The respective courts have set dates for hearing and/or deciding defendants' motions on February 14 (W.D. Va.), February 15 (S.D. Cal.), and February 20 (S.D.N.Y.).

Thus, as a threshold matter, MercExchange requests that the Court enter a protective order precluding defendants from seeking to enforce their overbroad subpoenas in other district courts in a manner that exceeds the scope of discovery permitted by the Post-Appeal Order. And clearly, this Court is in the best position to construe what its own order means. *Cf. Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) (“[p]rudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders”); *Fincher v. Keller Indus., Inc.*, 129 F.R.D. 123, 125 (M.D.N.C. 1990) (while issuing courts have authority to enforce subpoenas, “parties’ discovery rights in [the issuing] district can rise no higher than their level in the district of trial”). And as discussed *infra*, defendants have attempted to mislead these other courts with respect to the scope of discovery permitted by this Court. While MercExchange recognizes that the issuing courts have jurisdiction to enforce subpoenas issued from those courts, defendants should not be entitled to violate this Court’s Post-Appeal Order by enforcing the subpoenas in an overbroad manner.

B. Defendants’ Subpoena Upon Dr. Weaver Is Overbroad, Improper, And Should Be Quashed

The subpoena upon MercExchange’s trial expert witness, Dr. Weaver, seeks solely information that is irrelevant to either of the issues pending before the Court. Defendants’ subpoena upon Dr. Weaver is an intentionally intrusive subpoena intended to invade upon the attorney-client privilege with respect to issues that are not even pending before this Court. Exhibit E (Weaver subpoena).

Remarkably, in a brief that defendants filed in support of their motion to compel in the Western District of Virginia, defendants represented that this Court had expressly authorized discovery of Dr. Weaver. Exhibit F (Defs’ W.D. Va. Br.) at 5 (“the Discovery Order specifically authorizes discovery of Dr. Weaver”); 6 (referring to “the EDVA Court’s express authorization

to take discovery of Mr. Weaver”); 8 (“the EDVA Court has granted eBay the opportunity to fully investigate Mr. Weaver’s involvement in the reexamination and his post-trial work for MercExchange”). Of course, defendants provided no citation for this proposition and there is none. This Court made no such ruling. To the contrary, this Court *denied* defendants’ request that MercExchange provide a control log for Dr. Weaver’s communications pertaining to this case. *See infra* at 14-15.

In an equally baseless argument, defendants further contended in their brief (and presumably will do so here) that because Dr. Weaver was MercExchange’s primary trial expert on infringement, his documents are likely to be essential to the pending issues before the Court because “eBay has since designed around this Patent”. Defs’ W.D.Va. Br. at 4. Defendants further contended that they must “determine the basis for MercExchange’s allegation that eBay continues to infringe the ‘265 Patent. As MercExchange’s leading expert of [sic] this issue, Mr. Weaver’s evidence it [sic] central to the determination of whether or not the EDVA Court will issue a permanent injunction.” *Id.*

This argument from defendants is wholly lacking in merit. There is an *affirmed* jury verdict of defendants’ willful infringement of the ‘265 Patent. *MercExchange*, 401 F.3d at 1327-31. Apparently, notwithstanding this affirmed verdict of infringement, defendants believe that MercExchange is under a burden to *again* prove that defendants infringe the ‘265 Patent in order to have a remedy for that infringement.

The infringement trial in this case is *over* with respect to the ‘265 Patent and defendants have exhausted their appeals. As such, under the law with respect to permanent injunctions, it is of no moment that defendants hint that they may have subsequently designed around the patent

claims. A recent federal district court decision aptly summarizes the law with respect to this point:

[Defendant] first urges that the injunction should be denied because it has ceased to manufacture and sell the infringing product. Cessation of production and sales *is not in and of itself sufficient "sound reason" to deny a permanent injunction.* *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1282 (Fed. Cir. 1988) (“*The mere fact that [infringer] was no longer making or selling the infringing filament and packing products is not a sufficient ground for denying an injunction against future infringement.*”) *Rather, the request for an injunction should be denied only when “the evidence is very persuasive that further infringement will not take place.”* *Id.* For example, where the infringer no longer had the manufacturing capacity to produce the infringing item, a permanent injunction was not appropriate. *Id.* In this case, the only evidence of [defendant’s] cessation of infringement is its own statement that it has done so. If this sufficed for the “very persuasive” evidence that infringement had permanently ceased, few permanent injunctions would issue. As explained in *General Electric Co. v. New England Electric Mfg. Co.*, “The argument in such circumstances is very simple. If the defendant be honest in his protestations an injunction will do him no harm; if he be dishonest, the court should place a strong hand upon him.” 128 F. 738, 740 (2d Cir. 1904).

Rosco, Inc. v. Mirror Lite Co., 2006 W.L. 2844400, * 4 (E.D.N.Y. Sept. 29, 2006) (emphasis added) (attached as Exhibit G).

Accordingly, it is not only insufficient, it is legally irrelevant to the issues pending before the Court that defendants suggest they may have ceased their willful infringement.

But defendants’ arguments are all the more lacking in merit because, as this Court observed in its December 18 Order, defendants presented no evidence or argument that they had in fact designed-around the claims of the ‘265 Patent. Although defendants publicly proclaimed after the trial that they had designed around the patent, when it came time to brief the pending issues before this Court, defendants failed to present any such evidence. This Court took special note of this, stating in its Post-Appeal Order, “*eBay appears to have failed to advance any evidence nor even make the express, yet uncorroborated, claim that it has in fact designed around the 265 Patent.*” Order at 12, n.9 (emphasis added). In light of their failure to so much

as proffer an argument that they have ceased infringement of the '265 Patent, their present contention that they require discovery from Dr. Weaver in order to get a grasp of MercExchange's infringement theories is wholly without merit.

Thus, contrary to what defendants have represented to the Western District of Virginia, there is no issue of infringement currently being considered by this Court. Defendants failed to present any evidence or argument that they no longer infringe the '265 Patent, and even had they done so, under the governing law that would not impact on whether a permanent injunction should enter. MercExchange is under no burden to prove for a second time that defendants infringe the '265 Patent in order to be entitled to a remedy for the willful infringement proven at trial.

And as with the subpoena upon Fish & Richardson, discussed *infra*, defendants appear to seek to relitigate their protective order motion by having Dr. Weaver produce discovery relating to his declarations in connection with the reexaminations. Exhibit E (request nos. 1-4). For all the same reasons discussed *infra* at 14-15, these discovery requests are improper and beyond the scope of discovery of the December 18 Order. This Court held that Dr. Weaver's declarations did not violate the protective order, and this Court expressly denied defendants' request that Dr. Weaver provide a control log with respect to his communications. Post-Appeal Order at 23, 29. For defendants to demand this same information via subpoena — and contend to another federal district court that this Court authorized that which it expressly denied — plainly ignores this Court's Order with respect to the issue.

Finally, defendants' subpoena upon Dr. Weaver violates the expert witness discovery procedures established for this litigation. Throughout this litigation, the parties agreed that they would not require the exchange of draft reports of their expert witnesses, nor would they require

production of the communications between counsel and their respective expert witnesses. Indeed, throughout the five and one-half year course of this litigation, defendants have never provided drafts of their expert witnesses' reports, nor did they produce their communications with expert witnesses or even a privilege log with respect to their communications with their expert witnesses. In a complete about-face, defendants now insist that MercExchange must provide such drafts and communications. There is no legitimate reason, however, why there should be one rule for MercExchange and a different rule for defendants.

C. The Subpoena Upon MercExchange's Law Firm, Fish & Richardson, Seeks Information That Is Irrelevant To The Issues Pending Before The Court And Should Be Quashed In Its Entirety.

Defendants' subpoena upon MercExchange's law firm, Fish & Richardson, bears special scrutiny as it is clearly intended to intrude on information protected by the attorney-client privilege and work product doctrine. Defendants have requested, *inter alia*, literally every communication relating to MercExchange's patent prosecution or reexamination matters. See Exhibit A (*e.g.*, request no. 5 ("[a]ll documents relating to communications with the Patent Office from March 8, 2004 to the present")).

MercExchange's internal communications with its counsel regarding patent prosecution and reexamination matters have no relevance to the two issues pending before the Court. The issues of infringement and validity of the '265 Patent have been tried and affirmed on appeal. And this Court has not yet authorized the parties to resume discovery with respect to the '051 Patent.

Defendants will undoubtedly argue that because they have invoked the PTO reexaminations of these two patents as a reason for this Court to stay all proceedings, this is the "camel's nose" that permits them to lift the tent off of all of MercExchange's communications with its patent counsel. However, the mere fact that defendants invoke the reexaminations as a

basis for granting a stay does not render relevant all manner of information pertaining to the conduct of the reexamination proceedings. Defendants have no right to participate in those *ex parte* reexamination proceedings (or MercExchange's other patent prosecution matters), and they have no cause for taking discovery in this Court for the purpose of those collateral administrative proceedings. Similarly, this Court has no power to resolve those proceedings before the PTO. The Court has before it the question whether to stay the case or not based on the fact that the reexaminations are ongoing but, stated simply, the parties are not going to "litigate" the reexaminations before this Court. Thus, all of defendants' discovery requests to Fish & Richardson are irrelevant to the issues before this Court. And clearly, much of this information will be privileged in any event.

It appears that defendants also intend to use this subpoena to relitigate another issue that this Court already resolved in its December 18 Order. Specifically, defendants made an unfounded allegation that MercExchange's expert witness Dr. Weaver violated the protective order in this case by serving declarations in the reexamination matters. With full knowledge that Dr. Weaver had served declarations in the reexamination proceedings, *defendants waited for two years without raising any objection in any manner whatsoever*. Without any attempt to meet-and-confer, defendants then sprung a motion for alleged violation of the protective order on MercExchange and asked that the Court sanction MercExchange.

The Court thoroughly considered and conclusively resolved this issue in its December 18 Order, holding that MercExchange had not violated the protective order, but also modifying the protective order to preclude Dr. Weaver from any further involvement in the reexamination proceedings. Post-Appeal Order at 22-29. Moreover, in response to a specific request from defendants that MercExchange provide a log of "all documents relating to communications with,

or analyses by, its experts regarding patent prosecution efforts,” the Court *overruled* defendants’ request. *Id.* at 23, 29.

Defendants now demand this very same information and they also seek to relitigate this issue by requesting production of literally every communication pertaining to the reexaminations and specifically to the declarations filed in connection with the reexaminations. Exhibit A at 4-5. Nothing in this Court’s Order permitted discovery of this nature, and the Court should not permit it now.

D. Defendants Should Be Precluded From Exceeding The Scope Of This Court’s Post-Appeal Order Through Their Subpoenas Upon Altitude Capital, Kenneth Nahan, and Nordlicht & Hand.

Defendants have moved in two other federal district courts to compel enforcement of subpoenas upon Altitude Capital, Kenneth Nahan, and Nordlicht & Hand. Exhibits H, I and J (attaching subpoenas). While each of these subpoenas is overbroad in various respects, each of these respondents intends to produce responsive, non-privileged documents. Altitude Capital produced responsive documents on February 5. Exhibit K. Mr. Nahan and Nordlicht & Hand timely objected to the subpoenas, but are searching for responsive documents and they intend to produce non-privileged documents to the extent they are found.

With respect to the scope of the latter two subpoenas, however, it appears defendants intend to utilize this opportunity to relitigate another issue that is no longer before the Court, specifically, the extent to which the so-called “Nahan or Honicorp system” constitutes prior art to MercExchange’s ‘265 Patent. Again, that issue has been conclusively resolved and is not before the Court.

The sole issue before the Court pertinent to Mr. Nahan and his law firm Nordlicht & Hand relates to a meeting they had with defendants’ counsel shortly before the trial of this case. *See generally* Post-Appeal Order at 17-21. After the close of discovery in this case and only one

month before trial, defendants' counsel produced a videotape relating to Mr. Nahan's "Honicorp" system, and they represented to MercExchange and the Court that this video of the Honicorp system was a public "infomercial." Over MercExchange's objection, the Court then allowed this tape into evidence at trial as possible prior art. After the Nahans read press accounts about the trial verdict, they contacted MercExchange's counsel and told them they had met with defendants' counsel before trial and had discussed the video. Mr. Nahan provided a declaration stating that he had told defendants' counsel before the trial that the video was confidential, *i.e.*, it was not a public "infomercial."⁸

MercExchange raised this issue as evidence of defendants' unclean hands, which weighed against defendants' request for the equitable relief of a stay of proceedings. In its December 18 Order, the Court permitted limited discovery with respect to this issue. Post-Appeal Order at 21. This Court made clear the limited purpose of the discovery, *viz.*, "such investigation is being permitted only as a result of eBay's tardy submission of the Newman video after the close of trial discovery." *Id.*

Thus, the issue before the Court is not whether defendants can now turn up some new evidence of prior art to belatedly bolster the defenses on which they lost at trial. Nor does it matter whether defendants can now dredge up some evidence of an earlier public disclosure of the Newman video or the Honicorp system generally. Rather, the issue is simply one of defendants' candor before this tribunal and what was communicated between the Nahans and defendants' counsel during their pretrial meeting. If defendants' representation to the Court was false when made, they cannot cure the falsity of their representation after the fact. Accordingly,

⁸ Under well-settled patent law, if the video was confidential it could not constitute "prior art."

discovery of Mr. Nahan and Nordlicht & Hand should be limited to the communications between the Nahans and defendants' counsel.

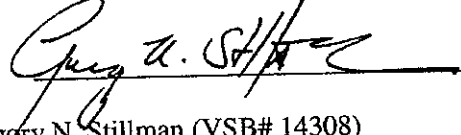
IV. CONCLUSION

For all the foregoing reasons, MercExchange respectfully requests that this Court enter a protective order precluding defendants from enforcing their subpoenas in other federal district courts in a manner that violates this Court's December 18 Order. MercExchange further requests that this Court quash and/or limit the scope of the subpoenas in a manner consistent with the limitations of this Court's Order.

Dated: February 9, 2007

Respectfully submitted,

MERCExchange, L.L.C.,

By: 

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Attorneys for Plaintiff
MercExchange, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2007, I caused a copy of the foregoing **PLAINTIFF MERCEXCHANGE, L.L.C.'S BRIEF IN SUPPORT OF MOTION TO ENFORCE COURT'S DECEMBER 18 ORDER AND FOR PROTECTIVE ORDER CONCERNING DEFENDANTS' OVERBROAD DISCOVERY REQUESTS AND ATTEMPTED ENFORCEMENT OF SUBPOENAS DUCES TECUM** to be served as follows:

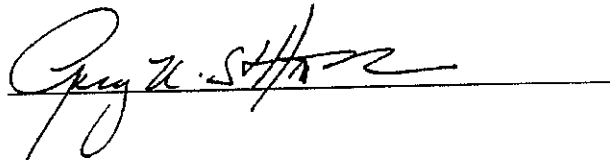
By Hand Upon:

Robert W. McFarland, VSB No. 24021
McGuire Woods, LLP
World Trade Center
101 West Main Street, Suite 900
Norfolk, VA 23510-1655
(757) 640-3700

By Overnight Mail Upon:

Jeffrey G. Randall
Skadden, Arps, Slate, Meagher & Flom, LLP
525 University Avenue
Suite 1100
Palo Alto, CA 94301

Allan M. Soobert
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, NW
Washington, DC 20005



A handwritten signature in black ink, appearing to read "Robert W. McFarland", is written over a horizontal line.

EXHIBIT I

Stillman, Greg

From: Stillman, Greg
Sent: Thursday, February 08, 2007 1:14 PM
To: 'Ankenbrandt, Brian'
Cc: Regan, Shawn; Young, David; Robertson, Scott
Subject: RE: eBay

brian, as you know, we have now complied with the subpoena issued to Altitude Capital, so I'm assuming eBay will withdraw its motion to compel against them. Please confirm as soon as possible. As for Nahan and Nordlicht subpoena, can you provide us proof of service as neither believe they have been served. In particular as for Nahan, could you advise us when they were served? thanks.

-----Original Message-----

From: Ankenbrandt, Brian [mailto:ANKENBR@skadden.com]
Sent: Tuesday, February 06, 2007 4:19 PM
To: Stillman, Greg
Subject: RE: eBay

Greg,

I'll call you in about 15 minutes.

Brian

-----Original Message-----

From: Stillman, Greg [mailto:gstillman@hunton.com]
Sent: Tuesday, February 06, 2007 12:50 PM
To: Ankenbrandt, Brian
Cc: Robertson, Scott; Young, David
Subject: RE: eBay

Brian how about your calling me at 4:15 my time. But let me give you a preview of our position, which of course will not be a surprise. First, nothing eBay has subpoenaed from Alf Weaver has any relevance to this proceeding Second, nothing eBay has requested pertaining to the reexam process is relevant. Third, you have received documents already from Altitude Capital. Fourth, you have received documents, or will shortly, from uBid. As for the Nahan's and their counsel, the Nahans are out of town, but we are working to collect responsive documents as soon as possible, and we hope to have this within the next ten days. But you already have our objections. Finally we do not believe that it is appropriate or efficient to have five separate motions to compel in four separate jurisdictions. These issues need to be resolved in the Eastern District of Virginia. Thanks. Look forward to speaking with you at 4:15.

-----Original Message-----

From: Ankenbrandt, Brian [mailto:ANKENBR@skadden.com]

Sent: Tuesday, February 06, 2007 2:21 PM
To: Stillman, Greg
Subject: RE: eBay

I forgot to mention: I'm available for the next 30 minutes (before 3pm your time) and then again after 4pm your time.

-----Original Message-----

From: Ankenbrandt, Brian
Sent: Tuesday, February 06, 2007 12:15 PM
To: 'Stillman, Greg'
Cc: Randall, Jeff; Soobert, Allan
Subject: RE: eBay

Greg,

Are you still available this afternoon to meet and confer concerning the third-parties' objections and responses to defendants' subpoenas? If so, please send me a number and time at which to reach you.

Brian

-----Original Message-----

From: Stillman, Greg [mailto:gstillman@hunton.com]
Sent: Monday, February 05, 2007 3:46 PM
To: Ankenbrandt, Brian
Subject: Re: eBay

Brian ii so no reason why we could not rely upon the existing protective order. Just send me something in writing that ebay (skadden) will honor its terms for altitude's documents. Thanks.

-----Original Message-----

From: Ankenbrandt, Brian <BANKENBR@skadden.com>
To: Stillman, Greg
CC: Robert W. McFarland (E-mail) <rmcfarland@mcguirewoods.com>; Randall, Jeff <JRANDALL@skadden.com>; Soobert, Allan <ASOOBERT@skadden.com>
Sent: Mon Feb 05 17:36:55 2007
Subject: RE: eBay

Greg,

Thanks for the update. Concerning the protective order issue, is there a problem with relying on the existing protective order and its "CONFIDENTIAL - ATTORNEY'S EYES ONLY" designation? If not, that might be the most expeditious solution.

Concerning a meet-and-confer on various discovery issues, I (or another attorney here) will get back to you after we've coordinated schedules for the people who may need to attend.

From: Stillman, Greg [mailto:gstillman@hunton.com]
Sent: Monday, February 05, 2007 12:56 PM
To: Ankenbrandt, Brian; Robert W. McFarland (E-mail)
Subject: eBay

Brian and Rob, I am having documents responsive to eBay's subpoena to Altitude Capital delivered to Rob this afternoon. We included a privilege log which I need to explain. The log identifies those documents we are withholding on a claim of privilege. You will also observe that we are withholding some documents under the designation "trial counsel only". We will produce these documents upon the entry of an appropriate confidentiality order which restricts access to Trial counsel only. I will try to get you a proposed order later this week for your consideration. Call me if you have any questions. Clearly we both need to set up a time for a meet and confer on a number of issues. Are you available tomorrow? I could do it most anytime after 11:00 am our time.

To ensure compliance with Treasury Department regulations, we advise you that, unless otherwise expressly indicated, any federal tax advice contained in this message was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

This e-mail and any attachments thereto, is intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified any dissemination, distribution or copying of this email, and any attachments thereto, is strictly prohibited. If you receive this email in error please immediately notify me at (212) 735-3000 and permanently delete the original copy and any copy of any e-mail, and any printout thereof.

Further information about the firm, a list of the Partners and their professional qualifications will be provided upon request.

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