For Opinion See 2009 WL 3806162 , 2009 WL 3494348 , 2009 WL 3205674 , 2009 WL 1664840

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Chancery Court of Delaware.
EBAY DOMESTIC HOLDINGS, INC., Plaintiff,
v.
Craig NEWMARK and James Buckmaster, and craigslist, Inc., Defendants.
No. 3705-CC.
December 8, 2009.

Reply in Support of Defendants' Pretrial Brief

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REDACTED VERSION

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Preliminary Statement[FN1]

FN1. Capitalized terms have the meanings used in Defendants' Pretrial Brief.

eBay's late-filed Plaintiffs Answering Brief ("PAB" or "Response Brief")[FN2] consists in large part of material recycled (often verbatim) from its Pretrial Brief, and its entire contents could have (and arguably should have) been presented earlier. Yet eBay still fails to dispute the following dispositive issues:

FN2. eBay and Defendants agreed that they would concurrently file Pretrial Briefs on September *25*,

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2009. Defendants honored that agreement. Just hours before the November 20 pretrial conference, eBay notified Defendants that it intended to file a "short" answering brief. eBay then requested leave from this Court to submit "a very short" brief "early next week" for the purpose of addressing intervening "discovery rulings ... depositions ... document production ... and, also, Your Honor's motion in limine ruling." [11.20.09 Pretrial Conf. Tr. at 12:20-13:18] At about 6:00 p.m. Eastern time on November 25-the evening before Thanksgiving and with only one full business week remaining before the scheduled start of trial--eBay filed a thirty-five page "Answering Brief" with a five-page, single-spaced "annex" chart. eBay must have spent weeks researching and drafting the Brief, and Defendants would have mere days to respond.

• eBay recognized that it could be denied a craigslist Board scat if it launched a competing classifieds site in the United States. In fact, it expressly represented to the New York Attorney General's office that upon engaging in competitive activity, "it will lose various shareholder rights, *such as a board seat,* approval of certain transactions, and right of first refusal on future stock issuances." [DX371 at EH00000250 (emphasis added)][FN3]

FN3. To avoid burdening the Court with duplicative paper exhibits, Defendants are not filing with this Reply separate copies of (1) trial exhibits (copies of which will be delivered to the Court separately on December 4 in connection with the trial), or (2) exhibits to Defendants' Pretrial Brief. All exhibits referenced herein will be included in the DVD brief to be filed.

• Defendants offered all shareholders the same opportunity to accept one reorganization share per five shares held in exchange for submitting their shares to a company ROFR.

• Delaware law does *not* require perfect equality of treatment among shareholders, particularly with respect to a shareholder that is posing the threat that a board's action is designed to address. eBay admits as much by arguing inconsistently that, on the one hand, the craigslist Board acted improperly by treating eBay differently, and, on the other hand, Defendants acted improperly by *not* offering eBay a *different* (higher) stock-issuance ratio than Newmark and Buckmaster in connection with the ROFR.

• The Rights Plan implemented by Defendants has not been triggered, there is no imminent proposal that would trigger it, and eBay has repeatedly stated that it has no intention of selling its craigslist interest. All of eBay's complaints about the Plan are based on speculation that future events will implicate the Plan and that Defendants - sometime in the future - will breach their fiduciary duties.

• eBay is a direct competitor with dramatically different values than craigslist, and has vowed that it "will [in]evitably acquire 100% of CL even if it takes decades." [DX684] Delaware law endorses a board's right to protect the company's "corporate policy and effectiveness," and to take appropriate action *before* a threat becomes imminent.

While eBay's Response Brief contains little or no new information, the record *has* been augmented with the following additional discovery since the parties' Pretrial Briefs were filed:

• After months of asserting privilege over "claw back" documents that contradicted its litigation positions, eBay agreed to drop its privilege claims as to those documents in response to Defendants' Letter Brief submitted to the Court on October 29, 2009. The claw back documents confirm, *inter alia,* that eBay understood it would lose its Board seat and other protections when it launched Kijiji in the United States, and further demonstrate eBay's calculated attempts to deceive Defendants.

• Although its late-filed Response Brief repeats the mantra that eBay has been "victimized" by Defendants,

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eBay's current CEO, former CEO, founder, and current CFO all recently testified that eBay's investment in craigslist is "insignificant" to eBay and not on the "radar screen." eBay's professed view that craigslist is "insignificant" helps to explain eBay's belief that it could exploit its insider position with impunity.

• eBay raises for the first time a new explanation for how it handled confidential craigslist information. Throughout this litigation, eBay has asserted that "natural firewalls" within eBay were in place to protect craigslist's information from inappropriate dissemination. That is demonstrably false. Now eBay's in-house counsel has abandoned that story altogether, and asserts that "the Shareholders Agreement was drafted broadly so as to allow wide dissemination of craigslist's confidential information within eBay." As explained herein, that statement too is demonstrably false.

Although eBay dwarfs craigslist, and has expressly threatened to dominate and ultimately subsume it, the PAB repeatedly characterizes eBay as "the victim," and tars craigslist with a "put the victim on trial" strategy. Underlying eBay's rhetoric is its exclusive focus on its own narrow self-interest, and utter disregard for the best interests of craigslist.

eBay does not dispute that rights of first refusal are widely understood (including by its own expert) to provide benefits to a closely held corporation. Nor does eBay dispute that a corporation has the right to protect its confidential information from misuse by a competitor, or that a board may enact a rights plan to protect corporate policy and effectiveness from being disturbed by potential future takeover threats. eBay is no "victim." It is a duplicitous fox (possessing virtually unlimited resources) that is disappointed the craigslist henhouse is no longer open and unguarded.[FN4]

FN4. eBay's ninety-page Pretrial Brief was riddled with factual errors, mischaracterizations, and baseless accusations. eBay's Response Brief perpetuates many of them, and introduces new ones. Defendants will not go into detail about each misstatement here, but address some of the more egregious misstatements in the accompanying Annex A.

I. STANDARD OF REVIEW.

A. The Business Judgment Rule Applies to Defendants' Adoption of the Governance Measures.

As explained below, and contrary to eBay's arguments, the business judgment rule must be applied to Defendants' adoption of the Governance Measures.

1. eBay's Brief Misstates Controlling Law and Facts.

eBay asserts (without authority) that the entire fairness standard must apply to the three challenged Governance Measures, even if the Measures " 'applied to everyone' in the same way." [Response Brief at 5] That is not the case. It is well settled that entire fairness is *not* the appropriate standard where the benefit of a measure is shared equally by all of the shareholders. *See Gilbert v. El Paso Co.*, 575 A.2d 113 1, 1146 (Del. 1990) (finding no self-dealing where "no board member received any special benefit which was not also extended to all shareholders"); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958-59 (Del. 1985) (The "protection [of the business judgment rule] is not lost merely because Unocal's directors have tendered their shares in the exchange offer .... [They are receiving a benefit shared generally by all other stockholders ..."))[FN5]

FN5. *See also Sinclair Oil Corp. v. Levien,* 280 A.2d 717, 721-22 (Del. 1971) (holding that entire fairness not applicable to board's decision to pay cash dividend proportionately to all stockholders, despite

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fact that board was controlled by majority stockholder); *Shields v. Shields*, 498 A.2d 161, 170 (Del. Ch. 1985) (defendant "was not engaging in a self-dealing transaction as the Delaware law has defined that term" where his benefit from the transaction was not "different from other shareholders") (citation omitted).

With respect to the ROFR, eBay was offered the same opportunity as Defendants to accept one reorganization share for each five shares held, in exchange for allowing its stock to be bound by a ROFR held by the Company. The Response Brief does not dispute that transactions structured in this manner have consistently been upheld under Delaware law. *E.g.*, *H-M Wexford, LLC v. Encorp, Inc.*, 832 A.2d 129, 150 (Del. Ch. 2003) (upholding board's decision to issue additional shares to shareholders who agreed to settlement of issues related to initial offering); *Baldwin v. Bader*, 2008 WL 2875351, at *31 (D. Me.) (holding that the "Board made a reasonable decision to offer [stock] to shareholders as incentive for them to provide personal guaranties") (applying Delaware law).[FN6]

FN6. eBay again claims (PAB 22 n.16) that it has been unlawfully coerced by the transaction. To the contrary, it "was *conclusively not coerced"* because it has thus far "refused to participate" in the ROFR. *H-M Wexford*, 832 A.2d at 151 (emphasis added). Nor would its acceptance of the offered shares constitute actionable coercion. *Id.* (holding that proposal to re-price offering by issuing additional units to holders was not wrongfully coercive, even though holders who refused to sign release would be excluded from consideration if 80% approved measure). Contrary to eBay's assertions, Defendants have not "admit [ted]" that the ROFR is coercive at all. Defendants have said that they structured the transaction in a manner rationally designed to encourage full participation, and thus to achieve the greatest economic benefit for the corporation.

eBay also fails to provide any basis for applying the entire fairness standard to the adoption of the Rights Plan or Staggered Board. Defendants were not personally enriched by the Rights Plan. Nor can they be said to stand on both sides of a protective measure that does not transfer any assets of the corporation. As discussed further below, the Rights Plan was designed to address the threat of a potential future takeover, and as the Delaware Supreme Court has observed, "it seems *even more appropriate* to apply the business judgment rule" to governance measures "adopted to ward off possible future advances and not ... a specific threat." *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1350 (Del. 1985) (emphasis added and citation omitted). Likewise, the staggered board impacts all shareholders equally because no shareholder has the ability to elect a director unilaterally without the support of at least one other stockholder.[FN7] eBay (as discussed below and in Defendants' Corrected Pretrial Brief (hereinafter "Defendants' Pretrial Brief")) understood and in fact stated to the NYAG that it would surrender its claim to a Board seat if it launched a competing classifieds site in the United States.[FN8] If eBay were to propose an acceptable independent board nominee, that person could be elected with the support of one additional shareholder or the approval of the Board.

FN7. Without citation to authority, eBay asserts (PAB at 20) that staggered boards "are not routine in the private company context," and "even in the public company context, staggered boards are no longer 'routine.' " But not so rare, apparently, as to cause eBay to abandon *its own* staggered (or "classified") board. [Exh. 1 (11.18.09 Swan dep. at 130:7-131:6 (eBay has a classified board in place today))]. Pages from deposition transcripts cited herein are attached as exhibits to the transmittal affidavit of Michael A. Pittenger, submitted contemporaneously herewith.

FN8. In addition, eBay's expert agreed that craigslist was entitled to restrict access to its board to pro-

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tect its competitive information from misuse. [Exh. 2 (05.29.09 Fischel dep. at 97:18-98:10 ("[T]here would he a logic that this particular individual [Silverman] should not be on the Board and there might be a reason to restrict access to the Board to prevent people who had an interest in using their Board position to take actions to the detriment of craigslist")); *id*. at 135:13-16 ("It's not just a potential threat but an actual threat based on the allegations that have been made, that, to me would justify not allowing eBay to have the Board seats.")]

eBay's reliance on this Court's ruling in *In re John Q. Hammons Hotels Inc. Shareholders Litigation* is misplaced. That case arose in the context of a merger transaction with an independent third party that was negotiated by the company's controlling shareholder. 2009 WL 3165613, at *10 (Del. Ch.). The plaintiffs in *Hammons* argued that, under *Kahn v. Lynch Communications Systems, Inc.*, 638 A.2d 1110 (Del. 1994), "the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness." 2009 WL 3165613, at *10 (quotation marks omitted). This Court, however, held that *Lynch* did not mandate entire fairness as the exclusive standard of review because Hammons did not stand on both sides of the transaction. *Id*. The Court observed that even under the circumstances presented, the business judgment rule would have applied "if the transaction were (1) recommended by a disinterested and independent special committee *and* (2) approved by stockholders in a non-waivable vote of the majority of all minority stockholders." *Id*. at *12 (emphasis in original and footnote omitted). Nowhere does the Court suggest that *Hammons* or *Lynch* have any applicability outside the specific factual context of cash-out mergers in which a controlling stockholder arguably has a conflicting interest, and such an extension to the adoptions of protective measures, such as a rights plan, would be contrary to *Unocal* and the other authority cited above and in Defendant's Pretrial Brief. *Hammons* is thus inapposite.

2. Delaware Law Does Not Require Equal Treatment of Shareholders.

Even if eBay could demonstrate disparate treatment with respect to the Governance Measures, that would be unavailing because there "is no support in Delaware law for the proposition that, when responding to a perceived harm, a corporation must guarantee a benefit to a stockholder" that, like eBay here, "is deliberately provoking the danger being addressed." *Unocal*, 493 A.2d at 958. Rather, "[i]t is well established that, under Delaware law, 'stockholders need not always be treated equally for all purposes.' " *H-M Wexford*, 832 A.2d at 151 (citation omitted); *In re Sea-Land Corp. S'holder Litig.*, 642 A.2d 792, 799 n.10 (Del. Ch.) ("in some circumstances Delaware law permits shareholders (as distinguished from shares) to be treated unequally") (citations omitted), *aff'd*, 633 A.2d 371 (Del. 1993).[FN9]

FN9. eBay acknowledges this fact by arguing (Pretrial Br. at 70) that it should receive more favorable treatment under the ROFR because it is a competitor and therefore a ROFR over its shares is supposedly worth more to the Company than a ROFR over Defendants' shares.

A board of directors has not just the right but the "obligation to protect the corporate enterprise, which includes the stockholders, from harm reasonably perceived," including when "a threat originates from third parties *or other shareholders*." *Unocal*, 493 A.2d at 953-55 (emphasis added).

3. The Protective Measures Serve Legitimate Corporate Purposes and Are Immediately and Necessarily Connected to eBay's Misconduct.[FN10]

FN10. Sections TI.A, III.A, and IV.A of Defendants' Pretrial Brief explain how the Protective Measures protect against threats posed by eBay, and those sections are incorporated herein by this reference.

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At the time the craigslist Board implemented the Protective Measures, it reasonably believed that eBay posed serious threats to the craigslist corporate enterprise, including:

• *Misuse of information*. The Board was concerned that an agent of a direct competitor sitting on the craigslist Board created a serious risk of future misuse of craigslist's confidential information. That concern was heightened by the Board's justified and strong suspicion that such misuse had occurred in the past.

• *Hinder Board functions*. The Board believed eBay could no longer be trusted to keep its commitments and that the Board would not be able to function properly if the agent of a direct competitor was a director, attended meetings, and voted in Board decisions.

• *Future hostile takeover*. The Board believed that eBay represented a potentially hostile and damaging takeover threat, especially after Newmark and Buckmaster passed away. In fact, eBay had repeatedly told Defendants that it would "[in]evitably acquire 100% of CL even if it takes decades."[FN11]

> FN11. DX684; *see also* DX697 ("we would welcome the opportunity to acquire the remainder of craigslist, Inc. we do not already own whenever you and Craig feel it would be appropriate"); DX678 at CLEB0069127 ("an acquisition is 'inevitable,' " and eBay will "end up owning CL").

• *Unfair share price*. The Board was concerned eBay was positioning itself to be the only potential purchaser of future sales of craigslist stock so it could unfairly depress the price other shareholders could obtain for their stock.

• *Strategic sale*. The Board was concerned that eBay, like Knowlton, might attempt to "sell to companies whose interests [were] ... adverse to the craigslist community" for the purpose of injuring craigslist, with which eBay was by then a direct competitor. [Pretrial Br. at 1 (quotations omitted)][FN12]

> FN12. eBay had proven itself to be a conflicted shareholder capable of such conduct. eBay had launched Kijiji on virtually no notice (after what appeared to be months, if not years, of deceiving craigslist of its true purpose in purchasing a stake in craigslist), was suspected of misusing craigslist's confidential information to benefit Kijiji, and had placed fraudulent Google ads calculated to deceive craigslist users, confuse the general public, tarnish craigslist, and to wrongfully divert internet traffic away from craigslist to eBay's own sites.

To protect the Company against those threats, the Board (acting on the advice of counsel) implemented the Governance Measures. A combination of measures was implemented because the Board reasonably believed no single measure would be sufficient to protect the Company against all perceived threats.[FN13]

> FN13. eBay argues that the Rights Plan and ROFR are unrelated to eBay's misuse of information (PAB at 1, 13-14; Pretrial Br. at 30, 62, 87), and that none of the measures addresses the deceptive Google ads (PAB at 16). But that misconduct was relevant to the ROFR and the Rights Plan because it demonstrated that eBay was a conflicted shareholder willing to directly injure craigslist to benefit its own classifieds business.

The first measure, the *Staggered Board,* restricts eBay's ability unilaterally to place *conflicted eBay agents* on the craigslist Board, thereby protecting (1) the Company against further misuse of its confidential information and plans and (2) the Board's ability to function properly. eBay's contention that "the sole and admitted purpose of the [Staggered Board] is to eliminate eBay's ability to designate *any* member (even one completely independent of eBay) to the Board" is wrong. [Pretrial Br. at 78] The Staggered Board does not prevent eBay from nom-

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inating directors, and it does not prevent eBay nominees from being seated. It simply prevents eBay-a direct competitor-from *unilaterally* placing its nominees on the craigslist Board. In order to be seated, an eBay nominee must have support from another shareholder or the Board.

The second measure, the *Shareholder Rights Plan,* was designed to protect the Company from acquisitions of Company stock that the Board believed were not in the longterm best interests of the Company and all its shareholders. eBay argues that a rights plan is unjustified because craigslist is not vulnerable to a hostile takeover. [Pretrial Br. at 25, 29; PAB at 20] eBay even claims that Defendants have "admi[tted] that there was no threat of a takeover." [PAB at 7][FN14] But Defendants made no such admission, and eBay ignores the *timing* of the takeover threat. As long as Newmark and Buckmaster continue to hold their shares and have no interest in selling them, eBay cannot acquire the Company. But when those shares become liquid-which they inevitably will, whether due to death, incapacity, or otherwise-the threat of a hostile acquisition by eBay increases, especially given eBay's repeated statements that it will "[in]evitably acquire 100% of CL even if it takes decades." [DX684; *see also* DX697; DX678 at CLEB0069127] For that reason, the Board implemented a rights plan without any "sunset provision." [DX703 at CLEB0071366 (counsel recommended no sunset provision because "the duration of the threat of takeover is unknown.")]

> FN14. eBay further claims that Company counsel "disavowed" any threat of a hostile takeover. [Pretrial Br. at 42] Assertions such as this damage eBay's credibility. Ed Wes sent Buckmaster a chapter from a treatise on rights plans, which stated that ownership of private companies was frequently not sufficiently dispersed to give rise to hostile-takeover vulnerability. Wes never "disavowed" the existence of a hostile takeover threat.

eBay complains that the Rights Plan should have been kept " 'on the shelf' until [Newmark or Buckmaster] passes away." [Pretrial Br. at 64 n.60] But the Rights Plan protects the Company *right* now-not merely after Newmark or Buckmaster are gone--against the threat of a strategic sale of a large block of Company stock and it does so on a "clear day," not as a reaction to an unsolicited offer. The Board reasonably believed that it was prudent and in the Company's best interest to have a rights plan in place *before* any offer to purchase was made, and before any other liquidity event that could occur without warning.

eBay claims that the Rights Plan was unnecessary because "effective estate planning" could have addressed what eBay calls the "Death Problem," *i.e.,* "the threat of a firesale by a cash-strapped heir." [Pretrial Br. at 64, 68] eBay overlooks the true scope of the protections provided by the Rights Plan. It protects against *any* acquisition by eBay or any other party that the Board determines is not in the best interests of the Company, *regardless* of whether an heir is "cash-strapped" or flush. Regardless of whether effective estate planning could provide some level of protection, the Company can still take reasonable measures to protect its interests and the interests of its shareholders.[FN15]

> FN15. eBay contends (PAB at 18) that "there is no evidence" Defendants considered the effect of their deaths when assessing the need for the Governance Measures. This claim is based on misleading and incomplete citation to Mr. Buckmaster's testimony that he had not considered a specific question regarding timing of a first-refusal trigger; specifically, whether his or Mr. Newmark's first refusal rights would be activated upon the death of the other, or only upon an attempted sale by the other's heirs. Mr. Buckmaster was not sure he understood the question, but did not think that particular timing question had been in his mind at the time. [Exh. 3 (03.05.09 Buckmaster dep. at 222:23-224:18)] eBay's assertion is proven false by specific, contemporaneous documentation of Defendants' concern about the

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> "Death Problem." [DX535 at CLEB0071733 (a report dated December 4, 2007 stating, "management's rationale for issuing options to employees is that in the event of the death of one or more of the management team (Craig Newmark or Jim Buckmaster), there would be a possibility of a change of control of the Company.")] Deposition testimony also shows that Defendants considered the "Death Problem" at the time: "Q. Why was it that -- I think you -- you said that this issue about Jim and Craig being mortals and the fact that they could die has been sort of an issue all along; correct? A. Correct. Q. Why was it that in July of 2007 this came -- to the forefront? A. I mean, it could come -- I mean -- I think there was a new found level of concern and a feeling that there was a need to protect the company." [Exh. 4 (01.20.09 Wes dep. at 85:9-18)] *[See also* Exh. 5 (01.16.09 Newmark dep. at 281:20-282:1) ("Q. So in light of the fact that eBay could never take over craigslist without a willingness of the two existing shareholders to sell shares to eBay, what would be the threat that eBay posed? A: Okay. One such threat would be in the case of Jim's or my demise")]. Defendants will show at trial that eBay's potential acquisition of shares after the death of Newmark or Buckmaster was one of the principal reasons for adopting the Rights Plan.

The third measure, the *Company ROFR,* was designed to enable the Company to purchase its shares whenever the Board determined that they were proposed to be sold (1) at a below-market price or (2) to a purchaser that the Board determined would be hostile to or incompatible with the craigslist corporate enterprise. Because the Company is always a potential bidder, the ROFR protects the Company against strategic sales, hostile takeovers, and against the effort of a large shareholder to compel an unfair price.

In sum, each of the Governance Measures serves the legitimate business purpose of protecting the corporate enterprise from the short- and long-term threats perceived by the Board, as illustrated above and in Defendants' Pretrial Brief.

4. The Governance Measures Do Not Treat eBay Unfairly or Disparately.

a. The Staggered Board does not treat eBay unfairly.

eBay claims that the Staggered Board uniquely disadvantages eBay. [Pretrial Br. at 78] But it is undisputed that the Staggered Board *applies* to all shareholders equally. The *effects* are the same too. The Staggered Board prevents *all shareholders not* just eBay from *unilaterally* seating a nominee without any support from other shareholders. That is true for Newmark and Buckmaster, as well as for eBay. The Staggered Board does not prevent eBay from nominating directors, and it does not prevent eBay's nominees from being seated, provided they receive the requisite level of support from other shareholders.

eBay's loss of the ability unilaterally to seat its nominees is exactly what the parties bargained for and expected. In fact, eBay agreed it would lose its ability to block a reduction in the size of the Board if eBay engaged in competitive activity. [DX673 SHA § 4.6(a)(i), (iii) (eBay lost approval rights over "any ... decrease in the authorized number of members of the Company's Board," and over "any amendment ... of the charter documents ... that adversely affects [eBay]")]

eBay even represented to the NYAG that if eBay launched Kijiji in the U.S., eBay "will lose various shareholder rights, *such as a board seat."* [DX371 at EH00000250 (emphasis added)] eBay further told the NYAG that "Craigslist has an interest in protecting its competitively sensitive information and its business in the event eBay becomes a competitor and these provisions [including the loss of a board seat] were designed to provide that protection." [DX371 at EH00000253] Other eBay documents confirm that eBay fully expected that it would not

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have a Board seat after engaging in competitive activity. *[E.g.,* DX347; DX413; DX490; DX447 (claw back)] [FN16]

FN16. That a direct competitor would not have the right to unilaterally place its nominees on craigslist's Board is unremarkable. *[See* DX568 (Jarrell Report ¶ 115) ("eBay is a sophisticated investor that could have foreseen that its ability to unilaterally elect a director to the craigslist board could be lost if it triggered the 'Competitive Activity' clause of the Shareholders' Agreement")]

b. The Rights Plan does not treat eBay unfairly.

eBay advances four untenable reasons for why it believes that the Rights Plan treats it unfairly, none of which is ripe for adjudication. In each attack eBay assumes that Newmark and Buckmaster will ignore their fiduciary duties in hypothetical, future scenarios. None of the conduct eBay assumes has happened, and the Court should not accept eBay's unwarranted assumptions, or act to resolve an issue that will probably never arise.

First, eBay claims that the Rights Plan allows Newmark and Buckmaster to "partner" with each other, but prevents eBay from "partnering," thereby eliminating "the sole avenue for eBay to influence control of the Board." [PAB at 3, 20-21; Pretrial Br. at 43, 45, 81] The Rights Plan requires Board approval before any shareholders can enter into voting agreements, and eBay is not singled out for unique treatment. The Board approved the voting agreement between Newmark and Buckmaster. In fact, *eBay itself approved Defendants' voting agreement* at the time of the 2004 transaction. Any future shareholder voting agreements - regardless of the identity of the shareholders -- will likewise require Board approval. If eBay wants to "partner" with another shareholder, it is certainly free to seek Board approval to do so. Moreover, merely because eBay is restricted from entering into a voting agreement with another shareholder without prior Board approval does not prevent eBay from requesting Newmark or Buckmaster's support (as stockholders) or the Board's support to elect an independent candidate nominated by eBay.

Second, eBay argues that Newmark and Buckmaster, but not eBay, "are free to transfer shares among themselves." [PAB at 21; Pretrial Br. at 45, 77] That is not accurate. Newmark and Buckmaster have both submitted their shares to the Company ROFR, and therefore any proposed transfer of their shares will be subject to review by the Board. Newmark and Buckmaster are therefore not "free" to sell their stock to each other or anyone else without Board approval. Nor was the Rights Plan intended to exempt their shares from its operation. In contrast, eBay (which has not granted the Company ROFR) is currently able to sell its entire stake without triggering the Rights Plan and without Board approval, as long as it does not sell more than 15% of the Company to a single purchaser.[FN17]

FN17. The existing voting agreement between Newmark and Buckmaster binds each of them to vote for only one director proposed by the other party (out of three authorized board members) and does not apply to other shareholder votes, including votes on amendments to the charter or bylaws, or for approval of an M&A transaction. eBay at no time has requested the Board to interpret whether this very limited voting agreement is the type of voting agreement that is contemplated in the definition of beneficial ownership under the Rights Plan. Even assuming that a hypothetical future transfer between Newmark and Buckmaster would be deemed by the Board not to trigger the Rights Plan itself, the relevant point is that such a transfer is still subject to review by the Board pursuant to the ROFR.

Third, eBay claims that Newmark and Buckmaster can simply suspend the Rights Plan to allow any sale of their shares that they personally want to allow, with the result that the Rights Plan negatively impacts the liquidity of

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eBay's shares, but not Buckmaster's or Newmark's. [Pretrial Br. at 39, 45, 77] eBay ignores that the Board has a fiduciary duty to act in the Company's best interests in determining whether to redeem the rights or amend the Rights Plan to allow a particular sale that would otherwise trigger the Rights Plan, whether the proposed sale is by Newmark, Buckmaster, their estates or heirs, or eBay. eBay's suggestion that Newmark and Buckmaster might breach their fiduciary duties *in the future* by allowing a transfer of their own shares that is not in the Company's best interests is base speculation that cannot support a claim.[FN18] The Delaware courts have consistently explained that a board's potential future use of a rights plan should be evaluated at such future time, under the circumstances then existing, and have never stricken down a rights plan, as eBay argues should be done here, merely because it is conceivable that directors could someday breach their fiduciary duties in utilizing the plan in response to a future threat. *See, e.g., Moran,* 500 A.2d at 1354, 1357 (upholding validity of rights plan, rejecting assertion that rights plan impermissibly infringes on stockholders' ability to accept future offers, and explaining that the "ultimate response to an actual takeover bid must be judged by the Directors' actions at that [future] time"); *Leonard Loventhal Account v. Hilton Hotels Corp.,* 2000 WL 1528909, at *11-12 (Del. Ch.) (holding adoption of rights plan valid while deferring any decision as to whether board's future actions in connection with that plan would comport with directors' duties at such future, unknown time), *aff'd,* 780 A.2d 245 (Del. 2001); *In re Gaylord Container Corp. S'holders Litig.,* 753 A.2d 462, 481 (Del. Ch. 2000) (holding that mere adoption of a rights plan is not in itself preclusive under Delaware law; the board's decision to keep the plan in place in the face of an actual, future acquisition offer will be scrutinized at that time).

> FN18. As support for its speculation, eBay cites a statement by Professor Jarrell that the Board would suspend the Rights Plan to allow a sale *of eBay's shares* if the Board determined that the potential purchaser's interests were "aligned with craigslist and its insider shareholders." [DX568 (Jarrell Report ¶ 108); *see also* Pretrial Br. at 39] Of course, saying "insider shareholders" is equivalent in these circumstances to saying "all remaining shareholders" (other than the selling shareholder). There is nothing unusual or improper about seeking to ensure that a potential purchaser is aligned with the best interests of the Company and all remaining shareholders. And eBay ignores Professor Jarrell's relevant deposition testimony: "Q. So it's okay for Jim and Craig as the only two directors to adopt a pill so that they can align the interest, so they can help align the interest of any potential buyer *with them as individuals? A. No. Look, they have a fiduciary obligation to the company, and that has to be their decision-making process, I would imagine, as directors."* [Exh. 6 at 186:2-189:11 (08.28.09 Jarrell dep.) (emphasis added)]

Fourth, eBay complains that the Rights Plan makes certain succession-related exemptions available to the individual shareholders, but not to the corporate shareholder. [PAB at 2-3][FN19] eBay accuses Defendants of "incorrectly stat [ing] that 'the Rights Plan exempts ... transfers to eBay's successors-in-interest- by merger," when (according to eBay) "the only transaction that may fall within this exception ... is an internal reorganization merger, not a transaction with an outside party." [PAB at 3 n.2] eBay has its facts wrong. The merger exception encompasses the traditional "triangular merger" structure, and therefore would permit eBay Domestic Holdings to engage in acquisitions and other transactions, as long as eBay was the owner of the successor merged company. The same exception is contained in the Company ROFR that eBay thus far has refused to accept.

> FN19. Pages 55-56 of Defendants' Pretrial Brief (incorporated herein by this reference) explained that the Rights Plan exempts particular transfers that are unique to the individual shareholders, and others that are unique to the corporate shareholder. Section III.C of eBay's Response Brief (at 20-22) sets forth the ways in which eBay believes that "the Poison Pill operates differently for the Insiders than for

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eBay," yet contains no response at all to pages 55-56 of Defendants' Pretrial Brief, and does not even mention succession-related transfers. In fact, eBay's only response is to make the unsupported assertion that the exemption for corporate shareholders "simply is not equivalent" to the exemption for individual shareholders. [PAB at 3 n.2] But the fact that a rights plan necessarily applies differently to natural persons than it does to corporate stockholders creates no material conflict of interest.

c. The Company ROFR does not treat eBay unfairly.

eBay argues that the Company ROFR treats eBay differently than it treats Newmark and Buckmaster in four ways. Again, eBay's arguments are based not on facts, but on unwarranted and non-justiciable assumptions about possible future conduct.

First, eBay claims that if the Company ROFR is exercised over a proposed sale of Buckmaster's or Newmark's shares, the result will be that Newmark or Buckmaster-but not eBay-will gain control (*i.e.,* own more than 50%) of the Company. [Pretrial Br. at 37-38, 49, 64, 76][FN20] But eBay admits that "[t]his effect results from eBay's position as the smallest shareholder," and is "due to the equity stake of the shareholders at the time." [Pretrial Br. at 49, 75 (emphases added)] It is *not* due to any differential or inequitable treatment under the Company ROFR itself.[FN21]

FN20. If exercise of the ROFR would cause one shareholder's ownership percentage to exceed 50%, that would be among the factors the future Board would consider in determining whether exercising the ROFR would be in the best interests of the Company and all its shareholders.

FN21. eBay also complains that as a shareholder, it will have to bear its pro-rata portion of the costs of exercising the Company ROFR. [Pretrial Br. at 37, 49, 64] There is nothing disparate or unfair resulting from the fact each stockholder of any corporation necessarily (albeit indirectly) bears a pro-rata portion of any corporate expense. eBay fails to mention that it will also share pro-rata in the benefits of an exercise of the Company ROFR, including an increased ownership percentage.

Second, eBay argues that granting the Company ROFR does not impact the liquidity of Newmark and Buckmaster's shares to the same extent it would eBay's shares because, as directors, Newmark and Buckmaster retain the ability to veto the exercise of the Company ROFR. [Pretrial Br. at 37, 47-48, 50] But Newmark and Buckmaster cannot "veto" an exercise of the ROFR simply because doing so would be in their personal interests. If future circumstances present the Board with an opportunity to consider exercising the ROFR, the directors at that time would be obligated to act in the best interests of the Company and all its shareholders in determining whether to exercise the ROFR. This is yet another example of eBay speculating that the directors could conceivably breach their duties in the future and then making the illogical leap to conclude that such unfounded speculation somehow requires invalidation of the ROFR today. Delaware law does not support such an argument.

Third, eBay claims that it would incur a higher "cost" in granting the Company ROFR than Newmark and Buckmaster did, because their shares were already burdened by personal refusal rights they held over each other's shares under the Shareholders' Agreement, while eBay's shares were not so burdened. [PAB at 2; Pretrial Br. at 47-48, 57, 70, 75-76] eBay fails to explain how the "cost" to the shareholders of granting the Company ROFR is relevant. From the Company's perspective, the value of a ROFR granted by a shareholder in no way depends on whether the shares were or were not previously burdened in favor of another party. And to the extent the "cost" to the shareholders is relevant at all, eBay only looks at half of the equation. eBay ignores the "costs" Newmark and Buckmaster incurred by the loss of the refusal rights they previously held over each other's shares.[FN22]

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eBay, in contrast, would give up no refusal rights by granting the Company ROFR.

> FN22. Newmark and Buckmaster both understood and intended that by granting the Company ROFR, they were simultaneously relinquishing their personal first refusal rights over each other's shares, and effectively transferring those rights to the Company. eBay is confused on this point, alternately arguing that Buckmaster's and Newmark's personal refusal rights still exist (Pretrial Br. at 48) and that they "[fell] away on trigger of Competitive Activity clause" [Pretrial Br. at 73; PAB at 13]

Fourth, eBay asserts that its grant of the Company ROFR would confer a greater benefit upon the Company than Buckmaster and Newmark's grant, *because eBay is a competitor,* and that the Company should therefore pay eBay a higher "premium" for granting the ROFR than it paid to Newmark and Buckmaster. [Pretrial Br. at 70; *see also id*. at 52, 56-57, 58] But the fact that eBay is more likely than Newmark or Buckmaster to try to injure the Company through a strategic sale of its shares is no reason to *reward* eBay, and eBay's veiled threat is further confirmation of the necessity of the Company ROFR in the first place.

d. The Company ROFR does not dilute eBay.

eBay claims that the purpose in offering additional shares in connection with the ROFR was to dilute eBay's interest to less than 25% and increase Newmark and Buckmaster's interests. *[See* Pretrial Br. at 25-26, 28, 31-32, 36, 71, 72, 81] That was not the purpose. If Newmark and Buckmaster's goal was to increase their ownership percentages, they could simply have caused the Company to issue additional shares, and purchased the shares themselves.[FN23] Similarly, if their goal had been to dilute eBay to less than 25%, Buckmaster could have made that decision in a heartbeat, rather than going through the careful analysis of what premium might induce eBay to accept the ROFR and avoid any dilution.[FN24] Nor has eBay alleged that Newmark and Buckmaster have taken or proposed taking any stockholder vote that would require 75% approval under the certificate of incorporation.

> FN23. Newmark and Buckmaster hold a pro-rata right of first refusal on issuances of Company stock. [SHA § 5.1] eBay lost that right when it engaged in competitive activity. [SHA §§ 8.3, 5.1; DX371 at EH00000250 (if eBay engages in competitive activity, it "will lose various shareholder rights, such as a ... right of first refusal on future stock issuances")]

> FN24. eBay claims that Newmark and Buckmaster have "arrogat[ed] *to themselves* the economic and voting benefits inherent in a larger percentage ownership." [PAB at 2 (emphasis in original); Pretrial Br. at 45] Neither Buckmaster nor Newmark has received any economic benefit (and eBay cites none) as a result of the additional shares received in exchange for granting the Company ROFR. The Company has paid no dividends to shareholders. Nor has there been any shareholder vote since implementation of the Company ROFR in which Newmark or Buckmaster could have exercised increased "voting benefits."

In fact, eBay has not been diluted on a fully diluted basis. It holds an option it can unilaterally exercise for another year that would give it the same percentage ownership it had before the ROFR. eBay still has another year to make a decision regarding whether to exercise the ROFR, and Defendants continue to expect that eBay will grant the Company ROFR and receive the additional shares being offered. *[E.g.,* DX546] That eBay has refused to participate means that the Company is still vulnerable to a specific threat that the Board sought to protect against (a strategic sale of eBay's shares for the purpose of injuring the Company).

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5. Application of the Business Judgment Rule Does Not Depend on the Shareholders' "Ratification" of the Governance Measures.

eBay argues that "Defendants' 'ratification' argument is without merit," and that Defendants are not entitled to the presumption of the business judgment rule. [PAB at 6 (capitalization in headings omitted)] It is not clear what eBay means by its reference to a ratification argument because Defendants have never made a ratification argument of the type eBay suggests. Defendants did explain in their Pretrial Brief that invocation of both *Unocal* and *Blasius* is appropriate only where the challenged measures were implemented by unilateral board action, and that neither standard should be applied where the action at issue also required and/or received stockholder approval. [Defs. Pretrial Br. at 38-40, 63 n.24, 69-71]. *See Williams v. Geier,* 671 A.2d 1368, 1377 (Del. 1996) (holding that *Unocal* applies only to defensive measures implemented by unilateral board action (*i.e.*, action undertaken without stockholder approval)); *Stroud v. Grace,* 606 A.2d 75, 92 (Del. 1992) (declining to apply *Blasius* where holders of a majority of the corporation's stock had ratified the bylaw amendments at issue and, therefore, the "factual predicate of unilateral board action intended to inequitably manipulate the corporate machinery is completely absent here") (citation omitted); *Gaylord,* 753 A.2d at 485 n.80 (refusing to apply *Unocal* because charter amendments were approved by shareholder vote and not unilaterally adopted by board). Indeed, the amendments to the craigslist Certificate of Incorporation that were necessary to increase the number of authorized shares (as needed for the Rights Plan and stock issuance in connection with the ROFR) and to stagger the board terms required stockholder approval under the General Corporation Law. Thus, implementation of the Governance Measures did not involve unilateral Board action and neither *Unocal* nor *Blasius* review should apply. Moreover, as explained in Defendants' Pretrial Brief, eBay has not and cannot show that judicial review under the entire fairness standard is appropriate. Accordingly, the Governance Measures should be reviewed under the business judgment rule - but not as a result of stockholder "ratification" as eBay incorrectly asserts Defendants have argued; rather, the business judgment rule (and not *Unocal* or *Blasius*) applies here because the Measures were not implemented by unilateral board action, which is a necessary prerequisite to enhanced scrutiny review under either doctrine.[FN25]

> FN25. eBay's reliance on *Gantler v. Stephens,* 965 A.2d 695 (Del. 2009), is misplaced. *Gantler* addressed the circumstances under which ratification by minority stockholders could reinstate business judgment review in circumstances in which entire fairness was otherwise applicable. *Gantler* did not address or purport to overrule long-standing precedent holding that enhanced scrutiny review under *Unocal* and *Blasius* should apply only in the case of unilateral board action. Defendants have never argued that stockholder ratification in the sense addressed by the Supreme Court in *Gantler* has any applicability to this case.

Although eBay criticizes Defendants' approval of the measures in their capacities as shareholders, "[t]he fact that controlling shareholders voted in favor of the transaction is irrelevant as long as they did not breach their fiduciary duties to the minority [share]holders." *Stroud v. Grace,* 606 A.2d 75, 83-84 (Del. 1992). It is well settled that a stockholder is entitled to vote his or its shares *qua* stockholder in the way it chooses, even if in the stockholder's own interest. *See, e.g., McMullin v. Beran,* 765 A.2d 910 (Del. 2000); *Thorpe v. CERBCO, Inc.,* 647 A.2d 436, 440-41 (Del. 1996) (holding that even a controlling shareholder is permitted to vote entirely in its self-interest in the context of a transaction that requires a shareholder vote under Delaware law). Moreover, a stockholder (even a controlling stockholder) is not required to sacrifice its own interests when voting to benefit a minority stockholder. *See Getty Oil Co. v. Skelly Oil,* 267 A.2d 883, 888 (Del. 1970).

B. There Is No Inconsistency in Defendants' Position Regarding the Inapplicability of the *Unocal* Standard.

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eBay makes two assertions relating to the application of the *Unocal* standard. First, eBay claims that *Unocal* cannot apply because "the conflicts created by the Transactions" require application of the entire fairness standard. Second, eBay accuses Defendants of inconsistency with respect to which standard of review should apply. eBay is incorrect on both counts.

The first argument simply repeats eBay's assertion that the entire fairness standard must apply to the Governance Measures. This is wrong for the reasons stated herein and in Defendants' Pretrial Brief. Nor is there any inconsistency in Defendants' position relating to a potential future takeover threat. This case presents the unusual circumstance in which eBay constitutes a threat to the "corporate policy and effectiveness" of craigslist (a *Unocal-type* threat), but Defendants indisputably lack any entrenchment motive because they are the majority shareholders of a private corporation. *[See* Compl. ¶ 47 (Defendants "control the enterprise and comprise the entire Board"); eBay's Pretrial Br. at 60 ("[T]here is no dispute that a 'threat to corporate control,' the threat that motivates *Unocal,* did not exist at the time of the Transactions.")]

Defendants have repeatedly stated-and eBay cannot be genuinely confused on this point-that the Rights Plan is designed to address a *future* takeover by eBay or another hostile purchaser, after Defendants have passed away (or changed their minds and decided to dispose of their shares). eBay has repeatedly told Defendants that it wishes to acquire the entire company including, most recently, *after* it decided to launch a direct competitor. [FN26] The Rights Plan is designed to address the threat of this future takeover, providing a future board with tools to protect the Company at such future time. The Delaware courts have consistently upheld the use of protective measures designed to give boards the ability to respond to unknown future threats of that nature, even where there is no imminent threat of a takeover. *See, e.g., Moran v. Household Int'l, Inc.,* 500 A.2d 1346 (Del. 1985); *Gaylord,* 753 A.2d at 481. In fact, the Delaware Supreme Court has observed that pre-planning for the contingency of a hostile future takeover through adoption of a rights plan should be entitled to substantial business judgment deference because such a measure "might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment." *Moran,* 500 A.2d at 1350, 1345-55.

FN26. *E.g.,* DX678 (Price stressed to Wes that "[a]n acquisition is 'inevitable,' " and craigslist employees "should be told that eBay will eventually end up owning CL."); DX697 ("[W]e would welcome the opportunity to acquire the remainder of craigslist, Inc. we do not already own whenever you and Craig feel it would be appropriate."); DX684 at CLEB0066462 (Price "repeatedly emphasizing" that eBay "will [in]evitably acquire 100% of CL even if it takes decades.").

C. Defendants' Actions Satisfy the Entire Fairness Standard.

1. eBay Misstates Facts Regarding the Process Defendants Followed.

Defendants' Pretrial Brief details the painstaking process Defendants employed to satisfy their duty of care. eBay nitpicks about that process, but its criticisms are misleading. For example, eBay asserts (PAB at 17 n.11) that "the process described to this Court in Defendants' Brief was 'staged' (in Wes's own words)." This is disingenuous. Wes wrote to Buckmaster, "here is how I see the various board of directors, shareholder consents, amended charter, rofr and letter to ebay being staged," and then set forth a timeline of events. [DX550] The word "staged" was used by Wes to mean, "sequenced," and not with the sinister meaning implied by eBay.

2. Defendants Reasonably Relied on the Advice of Counsel.

eBay's allegation that company counsel Ed Wes provided legal advice to the Directors in their *individual capacities* relating to the Board's adoption of the Governance Measures is not true. Wes did not represent Newmark

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or Buckmaster in their individual capacities in connection with their approval of the Governance Measures; nor did he represent Newmark or Buckmaster individually in connection with eBay's purchase of its minority interest in craigslist. [Exh. 4 (01.20.09 Wes dep. at 32:22-33:20)] The representation of Buckmaster and Newmark individually by Perkins Coie attorneys in connection with minor estate planning matters in no way creates a disabling conflict or negates the reliability of the legal advice Perkins Coie provided in connection with the Governance Measures.

As set forth more fully below and in Defendants' Pretrial Brief, Newmark and Buckmaster carefully deliberated for months over the appropriate measures to take in response to the eBay threat, and adopted the Governance Measures at the advice of, and after lengthy discussions with, legal counsel. It is well settled that an important factor in establishing the "fair dealing" requirement of the entire fairness test is whether, as here, a board consulted and received the advice of competent counsel. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994) (finding that the "board's reliance upon experienced counsel ... evidence[d] good faith and the overall fairness of the process," and that "it is arguable that the board's good faith reliance on this legal testimony *may provide an independent basis for finding the directors not liable"* for approving the transaction at issue) (emphasis added), *aff'd,* 663 A.2d 1156 (Del. 1995); *Gaylord,* 753 A.2d at 479 ("[T]he Gaylord board engaged in a rational deliberative process to define the threat it faced, meeting on two occasions and receiving detailed legal advice from a distinguished outside law firm. This supports the conclusion that the board acted in an informed manner.") (footnote and citation omitted).[FN27]

> FN27. eBay labors to distinguish *In re Gaylord Container Corporation Shareholders Litigation,* but mentions nothing of the other controlling case law (*Parnes, Kahn, Cinerama,* etc.) supporting Defendants' position.

eBay's final effort to impugn the process undertaken by Newmark and Buckmaster is to trump up occasions when they allegedly did not follow company counsel's advice. But the example that eBay proffers does not demonstrate that the Board "ignored" company counsel. Just the opposite: the treatise provided to the Directors by company counsel (HD 82) is consistent with the advice provided (and followed). *[See* Exh. 4 (01.20.09 Wes dep. at 213:16-214:1) ("[W]e did discuss that it's unusual, that the pills that are known are for public companies, but that's just because public companies have to publish what they do, but that there's no reason that the same reasons that justify a pill for a public company wouldn't be equally applicable to a private company.")][FN28]

> FN28. Ignored by eBay's criticism is that it is also unusual for a private corporation to have as a minority shareholder a multi-billion dollar competitor with an avowed goal of acquiring or killing it. Defendants' business judgment was tailored to this real-world situation.

Moreover, eBay concedes it is not arguing that "craigslist received no benefit under the Company ROFR," but still insists that Defendants violated Section 152 of the General Corporation Law "by failing to value the Company ROFR." [PAB at 27 & n. 20] eBay's Pretrial Brief (at 80-81) mischaracterized this Court's opinion in *Fonds de Regulation,* which was that while "directors are required to place a value upon consideration ... equally longstanding precedent holds that *this valuation need not be formally recorded."* 2007 WL 315863, at *4 (Del. Ch.) (emphasis added and citations omitted). Moreover, the Court found that the Plaintiff in *Fonds* failed to carry its "weighty burden" under Section 152, because there was testimony at trial that the purchaser "had contributed substantial services to" the issuing corporation. *Id.* There is no indication in *Fonds* that the issuer placed a *specific* dollar valuation on the services rendered, or even purported to have done so. *See also Wise v. Universal Corp.*, 93 F. Supp. 393, 396 (D. Del. 1950) (warrants issued "as an inducement for [employee] to enter into

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his employment contract" were supported by valid consideration, notwithstanding any indication in opinion that specific dollar valuation was formally placed on the employment contract) (internal quotations omitted).

Defendants recognized that first refusal rights would be beneficial to craigslist, and accordingly offered what they believed was a reasonable stock incentive to each shareholder to enter into the ROFR.[FN29] Requiring Defendants to engage in a more formal valuation would impose a burden on them that this Court held does not exist in Delaware law, and which is contrary to the plain language of Section 152. 8 *Del. C.* § 152 (stating the board may issue stock "for consideration consisting of ... *any benefit* to the corporation," and "[i]n the absence of actual fraud," the directors' judgment "as to the value of such consideration shall be conclusive") (emphasis added). As Professor Jarrell testified, conducting a formal valuation to place a dollar value on a ROFR would be an esoteric, expensive, and speculative process of dubious value. [Exh. 6 (08.28.09 Jarrell dep. at 101:13-102:7; 309:21-24)][FN30]

FN29. *See* DX729 at E00004023 (recital in ROFR agreement, stating "the Board has determined that it is in the best interests of the Company and its stockholders to give the Company the right of first refusal with respect to transfers of the Company's Common Shares" and "the stockholders have determined that the terms and conditions of the Proposed Right of First refusal are fair and reasonable to the Company and its stockholders.")

FN30. It is also uncontroverted that Defendants had recently received a valuation prepared by a financial advisor, Financial Intelligence, which informed the Defendants' judgment as to the expense and utility (or lack thereof) of obtaining a new valuation in connection with the Governance Measures. *[See* Exh. 4 (01.20.09 Wes dep. at 165:2-13)] And, despite eBay's efforts to discredit it, it is uncontroverted that Defendants had the opinion of antitrust counsel that no stock issuance to any single shareholder in connection with the ROFR offer would exceed REDACTED which also informed their understanding of craigslist's value. [DX 719]

3. The Process Defendants Followed Was Not Grossly Negligent and Satisfies the Entire Fairness Standard.

eBay fails to refute that Defendants engaged in a drawn out, deliberate, and thorough consideration of the Governance Measures. For the six months following the U.S. launch of Kijiji, and eBay's refusal to honor its repeated assurances to the Defendants, the Board carefully considered a variety of options identified by company counsel to protect craigslist and its unique and successful business model. As set forth on pages 30-36 of Defendants' Pretrial Brief, Defendants carefully evaluated the Governance Measures during that six-month period and had an active role in formulating them.[FN31] Only at the end of this lengthy and rigorous process of consideration and review did Defendants approve the Governance Measures.[FN32]

FN31. eBay attempts to create confusion surrounding the approval of the Governance Measures where there is none. [PAB at 17 n. 11 As Wes explained, draft minutes for the craigslist Board meetings, including the October 25, 2007 Board meeting, were prepared in advance to "cover the agenda items for the Board." *[See* Exh. 4 (01.20.09 Wes dep. at 338:16-344:2)] The record to be presented at trial is that Perkins Coie associate Ananda Martin would often prepare ready-to-execute versions of the corporate governance measures for the meetings, but Buckmaster on multiple occasions decided that he wanted more time to consider the measures, so their approval would be postponed. Because Wes and Martin would anticipate at each meeting that the Board would implement the corporate governance measures, Martin, as a housekeeping matter, would prepare draft minutes reflecting the approval of the corporate governance measures at the upcoming meeting. Despite these "false start[s]" (Exh. 4 01.20.09 Wes dep.

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at 343:19-344:2), the Governance Measures were ultimately approved and adopted January 1, 2008 (not at the board meeting on December 17, 2007) for accounting purposes (Exh. 4 01.20.09 Wes. dep. at 119:18-121:11) - not, as eBay alleges, to "feign[] compliance" with Delaware law.

FN32. eBay continues to argue that a Form 25102(f) filed on behalf of craigslist with the California Department of Corporations (the "California Filing") somehow shows that Defendants did not properly value the ROFR and violated Delaware and California law. As previously explained in Defendants' October 23, 2009 reply brief in support of their motion to compel, the $494 value reflected in the filing with respect to the shares issued to Messrs. Newmark and Buckmaster in connection with the ROFR is merely the result of multiplying the number of shares issued to them (9,880,000) by the par value of those shares ($0.00005 per share). As Defendants will show at trial, Perkins Coie, which made the filing on behalf of craigslist, determined that the aggregate par value of the shares to be issued was the appropriate value to recite in the form because shares were offered to all stockholders on the same terms. The transaction, therefore, was treated as a reorganizational issuance akin to a stock dividend or stock split for which the appropriate valuation to report on the form is aggregate par value. At the time, craigslist and Perkins Coie still expected eBay to enter into the ROFR, but did not include the aggregate par value of the shares to be issued to eBay on the form because those shares had not yet been issued. Accordingly, eBay's argument about the California Filing is much ado about nothing. The filing was not made in violation of any law and it has no bearing on whether craigslist received adequate consideration for the issuance of the shares issued in connection with the ROFR.

D. The Compelling Justification Standard Does Not Apply.

The Board's adoption of the Staggered Board amendments is not governed by the "compelling justification" standard of *Blasius Industries v. Atlas Corporation,* 564 A.2d 651 (Del. Ch. 1988). eBay's cursory argument to the contrary relies on a fundamental misreading *of Blasius* and ignores the factual bases for Defendants' actions.

Delaware courts have limited application of the "compelling justification" standard to rare circumstances where a board has taken unilateral action to thwart-not implement-the will of a majority of stockholders on a particular matter. *E.g., Williams,* 671 A.2d at 1376 (*Blasius* is "applied rarely"); *Stroud,* 606 A.2d at 92 (refusing to review bylaw amendments under *Blasius,* reasoning that the "primary purpose" of the amendments could not be to interfere with or impede the stockholder franchise) (internal quotations omitted). Here, there was no unilateral Board action - the Staggered Board Amendments were approved by the holders of a majority of craigslist's outstanding stock - and the measures did not interfere with the will of the stockholder majority as to the vote on a particular transaction.

Even if *Blasius* were found to apply, Defendants had compelling reasons for implementing the Staggered Board. *[See* Defs.' Pretrial Br. at 71-73] The Directors believed - and discovery in this action has proven - that eBay has used its board representatives to gather competitive intelligence for eBay websites. *[E.g.,* Defs.' Pretrial Br. at 5-21; 23-25] The Directors therefore had every reason to believe eBay would continue to engage in such conduct if it seated another Board representative. *[Id.]* Likewise, the Staggered Board was a proportionate response to the threats posed by eBay, a fact eBay has acknowledged in response to an investigation by the New York Attorney General into potential antitrust violations by eBay. *[See* Defs.' Pretrial Br. at 72-73]

E. eBay's Attacks on the Rights Plan and ROFR Are Based on eBay's Prediction the Defendants Will Breach Their Fiduciary Duties in the Future.

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eBay claims that the Rights Plan and ROFR treat eBay unfairly because Newmark and Buckmaster *"will make future decisions* with respect to the Company ROFR and the Poison Pill *according to their own best interests."* [Pretrial Br. at 37 (emphasis added)] Specifically, eBay claims that in the future Newmark and Buckmaster will "cause the Company to waive the Poison Pill with respect to any sale" of their own shares, regardless of whether doing so would be in the Company's best interests. [Pretrial Br. at 39, 74, 84] Similarly, eBay claims that the ROFR is unfair to eBay, because Newmark and Buckmaster have "an effective veto on the exercise of the Company ROFR," and, in the future, will "exercise that veto in their own self-interest." [Pretrial Br. at 50] eBay's predictions about Newmark and Buckmaster's *future* behavior cannot support a claim for breach of fiduciary duty. *E.g.*, *Coates v. Netro Corp.*, 2002 WL 31112340, at *6 (Del. Ch.) (dismissing claim because alleged future harm from adoption of rights plan was "presently abstract and divorced from any actual or threatened use against a specific, impending proposal" and, as such, did "not give rise to an actionable claim") (quotations and citation omitted).

II. THE COURT HAS ALREADY RULED THAT EBAY'S INEQUITABLE CONDUCT IS RELEVANT.

eBay devotes much of its brief to arguing that its own misconduct is irrelevant. [PAB at 10-15] The Court already ruled on that issue, however, when it denied eBay's Motion in Limine. eBay's misconduct is relevant to its unclean hands and is also relevant to the Defendants' reasonableness in adopting the Governance Measures.

A. Terms of the Shareholders' Agreement Provide Context for Defendants' Actions.

As context for understanding the parties' obligations, eBay finds great meaning in terms that were *not* embodied in the SHA, but dismisses as meaningless the terms that *were* included in that agreement. eBay (for the second time) presents (PAB at 13) a chart of purported rights Defendants sought but did not obtain in the SHA.[FN33] eBay's apparent argument (PAB at 12-13) is that, because Defendants did not obtain certain contract rights in the SHA, craigslist was forever barred from adopting the Governance Measures.[FN34] But eBay cannot support its assertion with any citation to authority. And eBay simply ignores the fact that the parties were not competing in the United States when the SHA was negotiated, but recognized that their relationship would fundamentally change if eBay chose to compete against craigslist. Simply put, Defendants' decision not to insist on particular rights pre-competition was not a promise to refrain from protecting craigslist's interests post-competition. eBay presents no evidence to the contrary.

> FN33. The chart on page 13 of the Response Brief (which is virtually identical to the chart on pages 73-74 of eBay's Pretrial Brief) is riddled with inaccuracies. For example, eBay asserts (first column, first row) that Newmark and Buckmaster originally sought an "Outright Ban on Insiders' Sale of Shares to eBay." But the draft Shareholders' Agreement cited in support states that Newmark and Buckmaster wanted *"co-sale rights* as against one another with respect to any sale to Purchaser or its affiliates (*or* a ban on one Shareholder's selling to *Purchaser...without the consent* of the other)." That is not an "outright ban." And the co-sale rights that Newmark and Buckmaster sought were actually obtained. [SHA § 6] eBay also claims (first and second columns, second row) that "Co-Sale Rights on Insiders' Sale of Shares to eBay.. fall away on trigger of Competitive Activity clause." That directly contradicts eBay's repeated statements throughout its pretrial briefs that those "Co-Sale Rights" still exist today. *[E.g.*, Pretrial Br. at 48]
>
> FN34. eBay goes so far as to suggest - absent any support and directly contrary to the express terms of the SHA - that Defendants had an obligation to return the $16 million dollars paid by eBay to obtain its

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special shareholder rights when eBay chose to abandon those rights by competing against craigslist in the U.S.

Moreover, in its attempt to argue what is not in the SHA and therefore not central to this dispute, eBay ignores the actual terms of the SHA, under which eBay lost specific protections when it chose to compete against craigslist in the U.S. In assessing whether the issuance of stock pursuant to the Company ROFR was an unfair dilution, or instead a measured means for protecting the Company's long-term identity and purpose, it is instructive to review the agreement the parties actually negotiated regarding post-competition stock issuances. eBay recognized that a board of directors has an inherent power to issue company stock when it purchased its minority interest, and therefore negotiated for special rights that would enable eBay to avoid dilution by blocking increases in the number of authorized shares of Company stock, as well as issuances of Company stock. [DX197 at E00000313 (most important term of proposed SHA was ROFR in order to prevent Defendants from diluting eBay's interest)] eBay ultimately obtained rights of first refusal to shield itself from dilution (along with other approval rights), which were set forth in the highly negotiated Shareholders' Agreement. [DX673 at §§ 5, 4.6(a)(ii), 4.6(a)(v)]

But eBay's right to block the issuance of additional shares was contingent. The Shareholders' Agreement also provided that if eBay engaged in "Competitive Activity" against craigslist all of eBay's share-issuance-control rights under Sections 5 and 4.6 would terminate. [DX673 at § 8.3] It is well settled that assessing directors' compliance with their fiduciary duties is always a contextual inquiry.[FN35] eBay's current claim that the issuance of stock pursuant to the Company ROFR is a breach of Defendants' fiduciary duties therefore should be viewed in light of eBay's prior acquiescence to additional share issuances by the Company if it engaged in Competitive Activity. eBay took full advantage of the opportunity to demand the contractual duties owed by Defendants under the SHA, and that fact is relevant in determining whether the post-competition issuance of ROFR stock was shocking and egregious, or rather anticipated and reasonable. *Nixon v. Blackwell*, 626 A.2d 1366, 1379-80 (Del. 1993) ("A stockholder who bargains for stock in a closely held corporation and who pays for those shares ... can make a business judgment whether to buy into such minority position, and if so on what terms.... [A] stockholder intending to buy into a minority position in a Delaware corporation may enter into definitive stockholder agreements, and such agreements may provide for elaborate [protections for the minority shareholder]") (citations omitted)."

FN35. *See, e.g.*, *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

eBay knowingly surrendered a panoply of share-issuance-control rights when it chose to engage in Competitive Activity, including its "right of first refusal on company issuances," its right to block an "increase or decrease [in] the authorized number of shares of common stock," and the right to "approve, amend or terminate any agreement or plan with respect to craigslist's officers, directors or employees that relates to the issuance of securities, rights to acquire securities or any other instrument convertible into having rights to acquire securities." [DX240.01 at E00029257, 29259] By itself, eBay's loss of its light of first refusal over company share issuances meant that the craigslist Board could have caused the company to issue shares without providing eBay *any* opportunity to participate. But the Board's action was more measured than that. It offered each shareholder - including eBay - the opportunity to receive one reorganization share in exchange for every five shares held, as an inducement to enter into a ROFR that Defendants determined would benefit the Company. After contracting that its competitive activity would preclude it from blocking stock issuances in which eBay did not participate, eBay cannot rightfully complain about the reasonable measure Defendants implemented. *Blommer Chocolate Co. v. Blommer*, 1992 WL 245969, at *6 (Del. Ch.) (explaining that weak claim for injunction based on breach of fidu-

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ciary duty exists when "the assumed loss or injury was itself one that the [plaintiff] never had a reasonable expectation of legally precluding").

B. eBay Mischaracterizes the Meaning of its Misleading Negotiation Statements.

eBay misunderstands the importance of its misrepresentations in negotiating the craigslist investment. eBay argues (PAB at 10-12) that those misrepresentations are irrelevant because they were not incorporated into the written terms of the Stock Purchase Agreement and Shareholders' Agreement. Again, the Court already ruled on the motion in limine, and eBay's misguided arguments go only to the weight of the evidence.[FN36]

> FN36. eBay's argument is also inconsistent with its other argument, emphasized throughout its Pretrial Brief and Pretrial Response Brief (and the detailed charts it included in both), to the effect that the terms that were not included in the Shareholders' Agreement are relevant to whether Defendants had the power to implement the Governance Measures.

In support of its arguments, eBay cites cases regarding fraudulent inducement. That reliance is misplaced as the negotiation misstatements are probative evidence of Defendants' state of knowledge at the time they voted on the Governance Measures, not whether eBay fraudulently induced Defendants into the SHA (a claim to be decided in the California action). eBay's misrepresentations are not only relevant to this lawsuit, but they are probative and persuasive evidence of what *informed Defendants' decision* that, because eBay had lied in the past about fundamental elements of the parties' relationship, it would be unwise to remain exposed to further misrepresentations or misconduct by eBay and it would be prudent to adopt measures to protect the Company from eBay's predations. Directors are entitled-indeed, expected-to consider the risks facing their company in the light of known facts, including the fact that a third party had been dishonest with the company in the past. *See Unocal*, 493 A.2d at 953-55.

C. eBay's Misuse of Information Supports Defendants' Unclean Hands Defense for Each of eBay's Claims.

eBay claims (PAB at 14) this Court held that evidence of eBay's misuse of craigslist information cannot support an unclean hands defense with respect to the Company ROFR or Rights Plan. In fact, this Court held that Defendants *are* permitted to introduce evidence of eBay's actions so long as those actions are directly related to any of eBay's "inequitable conduct:"

Defendants are permitted to introduce evidence of eBay's conduct-whether known to defendants at the time of the governance changes or not-so long as the evidence is *directly related* to eBay's involvement with craigslist's board of directors or inequitable conduct, and not simply evidence of pure competition in the marketplace.

[11/9/09 Order at 2] eBay's acquisition and subsequent misuse of craigslist secrets to compete unfairly against craigslist not only *relate* to eBay's inequitable conduct-those acts *are* inequitable conduct. Moreover, as explained in more detail in section I.A.3 above, eBay's misuse of craigslist data is immediately and necessarily related to Defendants' adoption of the Company ROFR and Rights Plan: it demonstrates eBay's efforts to damage craigslist in order to benefit Kijiji. Every company is entitled to protect itself from the hostile actions of a competitor.

D. eBay's Gross Violations of Internet Conventions in Placing Misleading Ads and Unauthorized Scraping of the craigslist Site Are Pertinent to the Reasons the craigslist Board Adopted the Governance Measures and Are Also Persuasive and Probative Evidence of eBay's Unclean Hands, Not "Pure Competition."

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eBay (PAB at 15) declares itself to be the victim of its own decision to misleadingly divert users from craigslist to eBay. eBay placed ads that purported to take the user to "craigslist.org" but actually took the user to Kijiji or eBay. Defendants became aware (from their own experience and outraged craigslist users) that eBay had hijacked craigslist's name and web address to divert traffic to eBay and Kijiji during late 2007 the very time during which Defendants were considering the Governance Measures. Among other things, eBay's conduct was a gross violation of trademark law and internet conventions and clarified beyond any doubt that eBay considered itself at war against craigslist-a war in which eBay apparently believed the normal rules of competition did not apply. [Exh. 7 (05.29.09 Cauthorn dep. at 145:8-16; 146:18-147:21); DX560 (Google prohibits use of misleading adwords: "As an overarching rule, all AdWords advertising should follow the same fundamental principles. Ads should: clearly and accurately represent your site.")]

eBay further violated internet conventions and craigslist's "terms of use" (which govern how the craigslist website may be used by third parties) by repeatedly "scraping" the craigslist website- surreptitiously obtaining data from the craigslist site to gain competitive advantage against craigslist. eBay understands full-well that such unauthorized scraping is beyond the bounds of legitimate business competition. It has gone to court and obtained an injunction to prevent others from scraping the eBay website. [DX581; DX582]

Seizing on its interpretation of language in the Court's November 9, 2009 Order, eBay now wants to place all of its inequitable conduct under the umbrella of "pure competition in the marketplace." [PAB at 16, 28, 32] But even if eBay's corporate code permits "competition" unbounded by applicable law, contractual terms of use, ethics or internet conventions, it is absurd to insist that Defendants, as fiduciaries of craigslist, could not (or did not) consider such conduct when evaluating and implementing the Governance Measures. In fact, in assessing the threat posed by eBay and the appropriate responses to that threat, Defendants had an obligation to consider all evidence relating to the nature of the threat, including all relevant evidence of eBay's "character" and the nature of its intentions *vis-á-vis* its relationship with craigslist.

III. RECENT DISCOVERY CONFIRMS THAT EBAY HAS UNCLEAN HANDS AND THAT DEFENDANTS' ACTIONS WERE PRUDENT.

Although purportedly intended to be a supplement, eBay's Response Brief ignores the new information developed after the filing of the parties' Pretrial Briefs. That new information reveals that eBay expected and acceded to the loss of a seat on the craigslist board; confirms eBay's inequitable conduct toward Defendants; and abandons one of eBay's primary defenses of its misconduct-i.e., that eBay had appropriate firewalls in place to protect Defendants' confidential information from misuse.[FN37]

> FN37. Annex A to eBay's Response Brief is a cherry-picked selection of facts to which eBay has now added its own spin. eBay ignores most of the facts Defendants recited in their Pretrial Brief, including many of the most important. For example, at the time eBay was negotiating to purchase a stake in craigslist and reassuring craigslist that it would be eBay's play in classifieds, eBay was simultaneously negotiating to purchase Marktplaats, viewing craigslist and Marktplaats as "two targets that could form the foundation for a local C2C classifieds strategy." The Marktplaats negotiations were not disclosed to craigslist prior to the completion of the craigslist-eBay transaction. [Pretrial Br. at 8] While eBay responds to the general allegation that "information obtained by Reining in July 2004 'was used to prepare presentations for senior eBay management,' " [Annex A at 1], it does *not* respond to several specific allegations concerning those 2004 presentations. First, eBay does not address the allegation that the "craigslist data was used to prepare presentations for senior eBay management about eBay's plans to

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learn ‘how to run [a] local C2C classifieds business' like craigslist, and build its own ‘Craigslist-style (sic) site.’ ” [Pretrial Br. at 9] Second, eBay does not respond to the allegation that Price recognized that eBay “may have an issue with telluride invitees that are not members of corp dev/strat, exec staff, or the board. do not want to make too big a deal out of this, but we are party to a legal contract,” but nevertheless recommended that the data be included in the Telluride presentations. [Id.] Third, eBay does not respond to the allegation that in August 2004, Erik Hansen of the Kijiji team heard about the Telluride decks and had them forwarded to him by Rob Veres, who specifically noted that the decks weren't for “mass consumption.” [Id. at 10] At a February 1, 2005 craigslist Board meeting - around the time of the Kijiji international launch - Price and Omidyar asked Buckmaster for information concerning the cities in which craigslist was considering a launch, and to obtain craigslist's thought process as to when to launch in cities. [Pretrial Br. at 17-18] eBay's internal documents show that its strategy for Kijiji was to copy craigslist and use craigslist as a benchmark. [Defs.' Pretrial Brief at 18] In February 2005, at the time of the international launch of Kijiji, “Kent Walker and eBay ‘trust and safety’ people called Buckmaster ... about craigslist's flagging system,” leaving “Buckmaster suspicious that ‘the call was definitely geared around (he *almost* said as much) intelligence-gathering for their own classifieds service launch.’ ” [Pretrial Br. at 19] After the international launch of Kijiji, “Price, Silverman and others [from eBay] continued to use confidential craigslist metrics to project Kijiji's performance.” [Pretrial Br. at 19] When it nominated Silverman to the craigslist Board, “eBay did not disclose to craigslist that Silverman (1) ‘helped launch Kijiji’ in Europe earlier that year (DX418), (2) did not want craigslist ‘trying to peel away the expats' that otherwise ‘would be using Kijiji’ (DX326), and (3) complained that craigslist was ‘really a pain’ when it attempted to expand internationally. [DX334]” [Pretrial Br. at 22] In January 2006, Silverman - while a craigslist director - suggested internally at eBay that somebody from Aqraou's Kijiji team should gather and analyze craigslist's metrics to “help inform us a bit more about tipping points, etc.” [DX097] Silverman recognized that “if we use someone who reports to Randy [Ching] I think the CL guys will be quite resistant to the idea, so I thought perhaps someone from your group.” [Pretrial Br. at 22] “By March 2006, Silverman was discussing his ‘expectations of competition’ with craigslist in the U.S., and by September 2006 he was ‘soliciting legal advice regarding [the] U.S. launch of Kijiji.’ [DX565 at 9, 11 (entries 122, 151, 154)] Silverman never disclosed that information to craigslist, even though he continued to attend craigslist Board meetings as a director.” [Pretrial Br. at 23] In December 2006 - while a craigslist director - Silverman reviewed a presentation by Aqraou recommending that Kijiji launch in the US and gave suggestions to make it more persuasive. [Pretrial Br. at 24]

A. eBay Understood That It Would Lose Its Board Seat and Other Protections When It Launched a Competing Classifieds Site in the United States.

Underlying this action is eBay's attempt to evade consequences that it fully *expected* when it launched a competing classifieds site in the United States. Defendants were prevented from citing any “claw back” documents in their Pretrial Brief because eBay did not abandon its privilege claims over them until November 6, 2009. Several of the claw back documents confirm that eBay expected to lose its board seat upon the launch of Kijiji in the United States.

In an undated Summary of Selected Rights Under the Shareholders' Agreement, eBay's counsel noted bluntly that, “eBay's board seat is not a contractual right under the Shareholders' Agreement.” [DX240.01 at E00029261 (clawback)] If eBay engaged in competitive activity, it would lose its right to veto any “increase or decrease [in] the number of members of the board of directors,” and any “amend[ment] or repeal [of] any provision of any

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charter documents *that would adversely affect eBay." [Id.* at E00029257 (emphasis added); DX673 at § 8.3] After eBay engaged in competitive activity, craigslist chose to protect its board deliberations by amending the charter documents to implement a staggered board. It could have accomplished the same result by reducing the number of directors from 3 to 2. eBay had surrendered its veto right over both actions.

In January 2007, eBay's in-house counsel, Brian Levey, revealingly wrote Silverman and Aqraou that, "[i]f we are going to compete, perhaps it's cleanest to have me be the board member since they'd have a much tougher time alleging that I'm using any confidential info to benefit our business." [DX447 (claw back)] In response, Silverman - eBay's Board representative at the time - identified the fatal flaw in Levey's proposal: "I'd expect that we would lose our Board seat right away, no?" *[Id.]* Consistent with Silverman's expectation, eBay's CFO, Bob Swan, understood "that we would lose some rights, possibly a board seat, as it relates to our investment in craigslist" when eBay launched classifieds in the U.S. with a jobs category. [Exh. 1 (11.18.09 Swan dep. at 147:23-148:2)] eBay's CEO, John Donahoe, had the same understanding. [Exh. 8 (04.27.09 Donahoe dep. at 80:19-24)]

As set forth above, eBay also told the New York Attorney General's Office that if it "launches an Internet jobs posting board ('jobs site') it will lose various shareholder rights, *such as a board seat,* approval of certain transactions, and right of first refusal on future stock issuances." [DX371 at EH00000250 (emphasis added)]. eBay's opposition to the staggered board thus contradicts the bargain it struck under the Shareholders' Agreement, its own demonstrated understanding of that bargain, and its representations to a law enforcement tribunal that was investigating precisely the competitive issues raised by eBay's holding a craigslist Board seat.

B. The Claw Back Documents Demonstrate eBay's Mendacity.

Delaware law permits Defendants to implement measures to protect the corporation if the board reasonably perceives a threat "to corporate policy and effectiveness" from a shareholder. *Unocal,* 493 A.2d at 955. The claw back documents provide further insight into the threat posed by eBay, and the artifice eBay employed to conceal it. For instance, in February 2006, Josh Silverman sent Kent Walker a draft PowerPoint that he intended to present at the next craigslist Board meeting. [DX404 at E00029255 (claw back)] Walker advised deleting one slide "in order to de-emphasize our acquisition, or any too direct suggestion of how we'd work with them." *[Id.* at E00029254]

eBay continued to evaluate launching classifieds in the United States over the next two years, while Josh Silverman attended craigslist Board meetings. Ten days before the launch of Kijiji in the United States, Brian Levey provided Silverman with "Talking Points" to feed Buckmaster, which were designed to downplay the launch and perpetuate eBay's deception about the parties' relationship. Silverman was instructed to communicate that the launch was "[a] natural and relatively costless incremental extension of existing worldwide classifieds platform." [DX482 at E00009943] eBay's scheming to deceive craigslist on these important matters is made even worse by the fact that the tool selected by eBay to deliver this misleading information was Silverman, who was then a director of craigslist.

Incredibly, Levey's Talking Points even couched the announcement under the guise that, "[i]n the spirit of our good working relationship, [Silverman] wanted to share some recent non-public learnings from eBay's classifieds team. Give you a heads up so that you're not surprised and don't read about it first." [DX482 E00009942] That was pure fiction. [Exh. 9 (11.23.09 Levey dep. at 547:6-10) (Levey did "not necessarily" believe there was a good working relationship between the parties)] As far back as June 2005, eBay internally had declared the re-

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lationship with craigslist "dead." [DX377] Behind the scenes, eBay's CFO was cheering on Aqraou to defeat craigslist (DX437) and eBay was plotting to launch "disruptive businesses" in the U.S. [DX144 at EH00002715] eBay was a direct and aggressive competitor. Yet it attempted to conceal its intentions from craigslist even as it entered the U.S. classifieds market with the determination to "play to win." [DX556 at E00017764] After the call with Buckmaster, Silverman's recommendation to Aqraou, Levey and others was "that we continue the low-key tone where we don't expect them to be concerned or upset (and express surprise if they do) and see how that plays out." [DX482 at E00009942]

C. eBay's Latest Excuse for Misusing craigslist's Confidential Information Is as Hollow as Its Previous Excuses.
In two previous depositions, Brian Levey claimed that craigslist's confidential information was protected from improper dissemination within eBay by "natural firewalls." [Exh. 9 (11.18.08 Levey dep. at 60:1-19; 05.07.09 Levey dep. at 338:9-13)] That claim was false. Levey personally had disseminated confidential craigslist financial information to the individuals with responsibility for building and launching eBay's competitive sites. [DX461 (sending Aqraou and his team the craigslist confidential financial statements provided to eBay pursuant to Section 4.2 of the SHA from October 2004 to January 31, 2007)] The sharing of craigslist's confidential financial and metrical information to build and benchmark competing sites was pervasive within eBay. *[See, e.g.,* Defs.' Pretrial Br. at 8-10, 18-20, 23-25]

Without disclosing its serious breaches to craigslist, eBay tried to give false assurances that craigslist's confidential information had not and would not be misused by eBay. Meg Whitman's July 23, 2007 email to Jim Buckmaster represented that, "[i]n keeping with the emphasis our culture places on integrity, we have already taken even further steps to completely firewall off the operations relating to our Kijiji offering in the U.S. from the corporate management of our investment in craigslist Inc." [DX697] Brian Levey circulated an internal memorandum that admonished that, "[a]s a precautionary measure to ensure proper firewalls are in place, Tom [Jeon, eBay's proposed board designee] will not be sharing any information he learns from Craigslist [sic] in his capacity as eBay's director with the Classifieds/Kijiji team and/or with other folks who are involved in setting Kijiji's business plans." [DX495] Even eBay's Complaint represented to this Court that, "as a matter of good corporate governance, eBay notified the Company in early July 2007 ... that Silverman had resigned as eBay's Designee on the Board to alleviate any perception of competitive concerns associated with Silverman's prior experience." [Compl. ¶ 22]

Finally recognizing the futility of arguing that firewalls had always been in place to protect craigslist's confidential information, eBay has changed its story. Now eBay denies that there was any need for firewalls within eBay. Levey testified in his recent deposition that "the confidentiality restriction in the shareholders agreement was drafted broadly so as to allow that dissemination [of craigslist's confidential information] within eBay." [Exh. 9 (11.23.09 Levey dep. at 576:22-29)]

The notion that eBay was *permitted* to widely disseminate craigslist's confidential information is as demonstrably untrue as Levey's previous claim that "natural firewalls" prevented such dissemination from happening. The Shareholders' Agreement expressly limits eBay's use of craigslist's confidential information to "the purpose of evaluating its investment in the Company." [DX673 at § 4.3] It further provides that any person who receives the information for that purpose must be "advised of the confidentiality provisions of this Section 4.3 and agree[] in writing to abide by such provisions." *[Id.]* Moreover, even assuming for the sake of argument that there was no written confidentiality agreement in place (which is clearly not the case), it is preposterous for eBay to assert that it was somehow entitled to use an eBay representative sitting on the craigslist board to funnel competitively sensitive information to the people within eBay who were tasked with launching the directly com-

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petitive Kijiji site.

eBay has never produced any writing by any eBay employee reflecting compliance with Section 4.3 and no eBay witness was aware of any such agreement. Nor can eBay plausibly claim that its uses of craigslist's confidential information were to evaluate the craigslist investment. eBay repeatedly told Buckmaster that it needed information for one purpose, but then secretly transmitted it to the teams that were designing, launching, and benchmarking eBay's competitive sites. Such deception would have been unnecessary had eBay believed it was using craigslist's confidential information appropriately. eBay's CEO has also testified that craigslist data was used to benchmark and improve the performance of Kijiji. [Exh. 8 (11.20.09 Donahoe dep. at 166:2-17)]

CONCLUSION

Defendants' adoption of the Governance Measures is entitled to the protection of the business judgment rule, and eBay's misconduct constitutes unclean hands that preclude it from obtaining an equitable remedy.

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