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, Defendants,
andcraigslist, Inc., Nominal Defendant.
No. 3705-CC.
December 3, 2009.

Plaintiff's Answering Brief in Response to Defendants' Corrected Pretrial Brief

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REDACTED VERSION

Dated: December 3, 2009

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INTRODUCTION

In this action, Plaintiff eBay[FN1] seeks to rescind an unprecedented set of Transactions adopted by the Insiders: (1) the Dilutive Issuance; (2) the Poison Pill; and (3) the Amendments. Accordingly, on September 25, 2009, eBay submitted to this Court a Pretrial Brief ("Plaintiff's Brief") that contains a detailed statement of facts showing the interested nature of the Transactions and detailing the unfair process that led to the substantively unfair nature of the Transactions.

FN1. Capitalized terms not defined herein have the meanings ascribed to them in Plaintiff's Brief.

That same day, Defendants filed their pretrial brief (as corrected on October 1, 2009, "Defendants' Brief" or "DB"). Defendants' Brief illustrates their fundamental litigation strategy: to ignore the conflicting interests of the Insiders, who owed fiduciary duties to eBay, and instead to attempt to place eBay, the victim of the Insiders' conduct (and which is not a fiduciary), on trial. However, Defendants *admit* that the allegations underlying their "destroy the victim" litigation strategy - *i.e.*, allegations of "misuse of craigslist confidential information for competitive ends" (DB at 71 n.30) - do not have "implications for corporate control" (*id.*). Therefore, those allegations are unrelated to the adoption of the Company ROFR and concomitant Dilutive Issuance or the Poison Pill and cannot support the Insiders' adoption of those Transactions.

Moreover, the purported evidence presented by Defendants with respect to *all* Transactions, including the Amendments, relates solely to Defendants' predetermined litigation strategy and not to either a showing that the Insiders met their fiduciary duties or to a genuine "unclean hands" affirmative defense. eBay respectfully submits this answering brief in response to Defendants' flawed "put the victim on trial" litigation strategy.

STATEMENT OF FACTS

I. *TRANSACTIONS AT ISSUE.*

The Insiders are fiduciaries and their self-dealing actions are at issue. The flawed process that these fiduciaries undertook prior to the Transactions is laid out in detail in Plaintiff's Brief. The adoption of three self-dealing transactions is at issue:

?? *Dilutive Issuance:* Through the Dilutive Issuance, the Insiders authorized the issuance of shares *to themselves,* in exchange for consideration (the Company ROFR on their shares), and at an exchange ratio, *they determined themselves,* thereby diluting eBay and arrogating *to themselves* the economic and voting benefits inherent in a larger percentage ownership. The Dilutive Issuance correspondingly reduced the size of eBay's stake in the Company by approximately one-eighth. The Insiders made no attempt to value the shares they issued or the ROFR the Company received, or to account for the unique harm that the sole minority shareholder (eBay) experienced. Although Defendants claim that eBay may climb out of its diluted position by signing a Company ROFR that would impose on its shares (which are currently freely transferable) a burden that was rejected in connection with eBay's 2004 investment, this option would exact a very high (and unique) cost on eBay, a cost that the Insiders did not bear when they executed their Company ROFRs. Defendants never dispute the fact that the fiduciaries failed to value the shares, the ROFR signed by the Insiders, or the ROFR proffered to eBay.

?? *Poison Pill:* Unlike a traditional poison pill in a public company context, the Poison Pill adopted by the Insiders does not treat all shareholders equally. For example, the Poison Pill has significant exceptions that run in favor of the

?? Insiders with respect to succession-related transactions.[FN2] Moreover, under the definition of "beneficial ownership" in the Poison Pill, eBay cannot partner with either of the Insiders in the same way the Insiders can continue to partner with one another with respect to director elections, thus cementing the Insiders' current control status and ensuring that eBay always will be relegated to minority status. At the same time, the Poison Pill is drafted to permit the Insiders freely to transfer shares to each other. (In short, either Insider can acquire the other Insider's shares, but eBay cannot.) Moreover, Defendants' expert has stated that the Insiders will waive the Poison Pill only if a potential purchaser's interests are "aligned with those of craigslist and its *insider* shareholders." HD 97 ¶¶ 23, 108 (emphasis added).[FN3] The Poison Pill thus both preserves the Insiders' control over the Company, and uniquely disadvantages eBay.

FN2. Defendants incorrectly state that "the Rights Plan exempts ... transfers to eBay's successor in interest by merger." DB at 55-56. This is false: the Poison Pill only exempts from its restrictions a successor in interest by merger if such successor *"remains a wholly-owned direct or indirect subsidiary of eBay, Inc."* Declaration of Samuel T. Hirzel, Esquire In Support Of Plaintiff's Pretrial Brief ("HD") 110 § l(r)(ii) (emphasis added). (The same language appears in the exception to the transfer restrictions in the Company ROFR. HD 111 §3.3(b)(ii)) Accordingly, the only transaction that may fall within this exception with respect to eBay is an internal reorganization merger, not a transaction with an outside party. Such an exception simply is not equivalent to an exception that allows the Insiders to determine the transferors in the most likely scenario in which their shares would be transferred (*i.e.*, the heirs following the death of one of the Insiders).

FN3. Defendants selectively quote their expert's Report for the proposition that the Poison Pill can be removed if a purchaser's interests are aligned with craigslist, but conveniently omit the second circumstance identified by that expert as a likely predicate to pulling the Poison Pill: that the purchaser's interests are aligned with the *"insider* shareholders." *Compare* DB at 53 *with* HD 97 ¶¶ 23, 108. In other words, the Insiders have complete control over whose interests are deemed aligned with their own, and, thus, all avenues to minority shareholder liquidity lead directly to the Insiders.

?? *Amendments:* The Amendments approved by the Insiders eliminate eBay's ability to designate a director to the Board, thus affecting a voting and economic detriment to eBay, while further solidifying the Insiders' control over the Company. The Insiders admit that the purpose of the Amendments was "to eliminate eBay's ability to elect a director." HD 97 ¶ 114; *accord* Newmark 290-291; Wes 227. Coupled with the Dilutive Issuance and Poison Pill, the Insiders' strategy is clear - put eBay forever in a box from which it can only extricate itself on terms dictated by the Insiders, who as the only other shareholders of the Company, and only directors of the Company, are not so uniquely constrained.

Thus, each element of the Transactions provided a specific benefit to the fiduciary Insiders and a corresponding detriment to eBay, the minority shareholder.

ARGUMENT

I. *STANDARD OF REVIEW.*

A. Entire Fairness Applies To The Adoption Of All Of The *Transactions*.

It is well-settled under Delaware law that when controlling shareholders stand on both sides of a transaction, the entire fairness standard applies without exception. *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994); *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536 (Del. Ch. 2000); *Cit-*

ron v. E.I. du Pont de Nemours & Co., 584 A.2d 490 (Del. Ch. 1990). Here, it is indisputable that the Insiders stood on both sides of the Dilutive Issuance, through which the Insiders authorized the issuance of shares *to themselves* in exchange for consideration (the execution of the Company ROFR), and at an exchange ratio, *they determined themselves*. In addition, given the divergent impact of the Poison Pill and the Amendments on the Insiders and eBay, and that the Insiders authorized those Transactions on the one hand and received their benefits on the other, the Insiders stood on both sides of those Transactions as well.

As discussed with specificity in Plaintiff's Brief, the Transactions were uniquely beneficial to the Insiders and uniquely detrimental to eBay. However, even if the Transactions were not viewed as classic self-dealing because they "applied to everyone" in the same way (which they did not), such a "fact" would simply be evidence of fairness, and would not eliminate the applicability of the entire fairness standard. Indeed, this Court has recently held that where controlling shareholders do not stand on both sides of a transaction in the "classic sense" but are nevertheless impacted differently by a transaction, entire fairness applies unless the transaction is "(1) recommended by a disinterested and independent special committee, *and* (2) approved by stockholders in a non-waivable vote of the majority of all the minority

stockholders." *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *12 (Del. Ch. Oct. 2, 2009) (emphasis in original). Neither procedural test was met: only the Insiders approved (or even had advance knowledge of) the Transactions.

B. The Business Judgment Rule Does Not Apply To The Adoption Of *The Transactions*.

1. *Defendants' "Ratification" Argument Is Without Merit.*

Defendants' argument that the business judgment rule applies to *the Insiders'* adoption of the Transactions *as directors* because *the Insiders* approved the Transactions *as shareholders* is without merit. Simply put, ratification must be disinterested - two individuals wearing their shareholder hats cannot ratify actions *they themselves* took wearing their director hats.

Moreover, the Supreme Court recently held that even in the context of a true (*i.e.*, disinterested) ratification "the scope of the shareholder ratification doctrine must be limited to its so-called 'classic' form; that is, to circumstances where a fully informed shareholder vote approves director action *that does not legally require shareholder approval in order to become legally effective.*" *Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009) (emphasis added); *see also* Declaration of Ryan Stottmann, Esquire In Support Of Plaintiff's Answering Brief In Response To Defendants' Corrected Pretrial Brief ("SD") 1, at 4 (Perkins Coie memo advising clients not to "expect to obtain the benefits of shareholder ratification of director action that also requires shareholder approval, such as approval of a merger, an amendment to the certificate of incorporation, a sale of all or substantially all the assets of the corporation or a dissolution of the corporation. Such a transaction will likely be reviewed under an entire fairness standard, meaning it must be entirely fair in both process and price"); SD 2, at 2 (article by Richards, Layton & Finger attorneys describing *Gantler* as finding objectionable "the attempt by defendants, *post hoc,* to transform the vote that they were legally required to obtain to authorize the challenged transaction into a vote to authorize the transaction *and* to approve any and all conduct and factors that would otherwise call into question the directors' disinterestedness and independence") (emphasis in original). Defendants admit that "[t]he charter amendment implementing the staggered board required stockholder approval under 8 *Del. C.* § 242" and that "[t]he Rights Plan and the Stock Issuance in connection with the ROFR likewise required a charter amendment to increase the number of authorized shares." DB at 39 n.12. Accordingly, even if true (*i.e.*, disinterested) shareholder ratification existed (which it does not), as a matter of law it would not have the effect Defendants claim it would have.

2. Defendants' *Unocal-Related* Argument Does Not Invoke The Business Judgment Rule Because It Does Not Address

The Conflict Inherent In The Transactions.

Although Defendants indicated throughout much of this litigation that they would "defend the challenged governance changes by arguing that they were a reasonable response to a threat posed by eBay" (3/6/09 Tr. at 18), Defendants' Brief argues that the business judgment rule applies because *Unocal* does not. Defendants' argument for the inapplicability of *Unocal* is that "the 'omnipresent specter' that the directors were acting to protect their own positions on the board is not present" because the Insiders "together own a majority of craigslist's stock and are parties to a voting agreement under which each has agreed to vote to elect the other (or the other's nominee) as a director." DB at 38. This argument misses the mark: because of the conflicts created by the Transactions, the stricter standard of entire fairness applies regardless of whether the Transactions were defensive.

Moreover, Defendants' admission that there was no threat of a takeover refutes entirely the only *documented* and *ex ante* justification they have offered for the Transactions - protecting the Company from a hostile takeover attempt. *See, e.g.*, HD 84 at CLEB0071374 (September 20 Memorandum) (exclusively relying on the threat from an "unwanted takeover attempt"); HD 93 at 1 (signed minutes of October 15, 2007 Board meeting) (same); HD 95 (signed minutes of October 25, 2007 Board meeting) (citing no threats to the Company); HD 104 (signed minutes of December 17, 2007 Board meeting) (same). Essentially, Defendants argue that craigslist *is not* susceptible to a hostile takeover for purposes of determining the applicable standard of review, but that it *is* susceptible to a hostile takeover for purposes of evaluating the Insiders' actions. This absurd position fails in any event because eBay never had, and still lacks, any current pathway to control of craigslist given the unified nature of the Insiders' allegiance to one another and their oft-stated (and sworn) position that neither of them had or has any intention to sell any shares to anyone, let alone eBay. Buckmaster 183, 193; Wes 86; HD 121 (Newmark stating "death is my exit strategy").

C. The Compelling Justification Standard Applies To The Adoption *Of The Dilutive Issuance And Amendments.*

Defendants argue that the compelling justification standard should not apply to the Dilutive Issuance and the Amendments because that standard only applies "in situations in which directors have taken unilateral action to thwart the will of the holders of a *majority* of the stock to vote on a *particular* matter." DB at 69 (emphasis in original); *see also id.* at 63 n.24. Defendants' distinction is found nowhere in Delaware's jurisprudence. The fundamental principle underlying the compelling justification standard is that a board taking "acts done for the primary purpose of impeding the exercise of stockholder voting power .. bears the heavy burden of demonstrating a compelling justification for such action." *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988). This principle is at its "highest when the board action relates to the election of directors or other instances of directorial control." *Esopus Creek Value LP v. Hauf*, 913 A.2d 593, 602 (Del. Ch. 2006).

At the time of the adoption of the Transactions, the Company had a cumulative voting regime in effect - a regime designed to protect the interests of the minority with board representation. Here, Defendants have admitted that the sole purpose of the Amendments was to eliminate eBay's ability to use cumulative voting to designate a member to the Board (Newmark 307; HD 97 114).[FN4] Thus, the Board acted for the clear and admitted purpose of thwarting eBay's vote at the next annual meeting (having already refused to put eBay's designee on the Board in the interim between meetings).[FN5]

FN4. The record shows that the Dilutive Issuance had a similar effect.

FN5. For the reasons discussed in Plaintiff's Brief, the compelling justification standard cannot be satisfied in this case.

II. THE MAJORITY OF DEFENDANTS' BRIEF IS IRRELEVANT TO *THIS LITIGATION AND DOES NOT SUPPORT*

THEIR DEFENSE.

Only eight pages in Defendants' Brief are focused on the facts leading to the adoption of the Transactions. The remainder of Defendants' Brief contains allegations and arguments that are irrelevant to this litigation and fail to support their purported affirmative defense.

A. The Loss Of Contract Rights Following Delivery Of The Notice Of Competitive Activity Does Not Demonstrate Fairness Of The *Transactions*.

Defendants insinuate that the fact that certain rights of eBay were eliminated following delivery of the Notice of Competitive Activity is relevant to the review of the Insiders' actions (although, other than stating that these rights fell away, it is not clear what *argument* Defendants are trying to make).[FN6] However, this fact has no bearing on whether the Insiders met their fiduciary obligations in approving the Transactions.

> FN6. In at least one case, Defendants are simply wrong about the lost veto rights: Defendants suggest that " 'the adoption ... of a[] plan ... providing for the issuance of... any option or right to acquire any capital stock or other security' was expressly contemplated by the parties as a potential response by Defendants to eBay engaging in Competitive Activity against craigslist." DB at 51 n.18 (ellipses in original). However, Defendants' misleading use of ellipses obfuscates the fact that the section of the Shareholders' Agreement cited by Defendants refers only to such plans "with respect to the Company's officers, directors, or employees," and not to other options such as those underlying the Poison Pill. HD 10 § 4.6(a)(v).

The fact that eBay lost veto rights over certain actions by craigslist does not mean that the Insiders, as fiduciaries, are free to approve any such actions. To be clear, prior to the delivery of the Notice of Competitive Activity, eBay could, solely for its own benefit, veto certain actions that craigslist could otherwise take. Afterwards, those actions were no longer subject to an eBay veto, but could still only be approved in the proper exercise of the Insiders' fiduciary duties. *See Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("[I]nequitable action does not become permissible simply because it is legally possible.").[FN7]

> FN7. Defendants' citation to *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993), is unavailing. *Nixon* held that there are no "special rules" (*i.e.*, special *additional* rights for minority shareholders) for closely held corporations. *Id.* at 1379. Here, it is *Defendants* who are seeking to apply a special rule in this case by implying that, when certain of eBay's veto rights were eliminated, certain of the Insiders' duties *as fiduciaries* were eliminated as well. This "special rule," however, runs counter to bedrock Delaware law.

B. Statements Made During The Negotiation Of The Agreements Documenting eBay's 2004 Investment Are Not Relevant To The *Fairness Of The Transactions*.

Much of Defendants' Brief is devoted to statements purportedly made by representatives of eBay during the *negotiation* of eBay's 2004 investment in the Company, which purportedly commit eBay never to participate in the domestic classifieds business other than through craigslist. Such statements are irrelevant to the question whether the Transactions were fair or compellingly justified. eBay and craigslist ultimately entered into an extensively negotiated and documented transaction that did not involve such a commitment. Both the Stock Purchase Agreement and the Shareholders' Agreement contain an integration clause and neither of those Agreements contains a "you are our play" representation.[FN8] To the contrary, the contracts documenting the 2004 eBay investment expressly contemplate a competitive relationship between eBay and craigslist, even in the area of domestic classifieds. As this Court has held, "a party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a 'but we did rely on those other representations' fraudulent induce-

ment claim." *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1057 (Del. Ch. 2006); *see also id*. at 1056 ("When addressing contracts that were the product of give-and-take between commercial parties who had the ability to walk away freely, this court [] ... ha[s] honored clauses in which contracted parties have disclaimed reliance on extra-contractual representations, which prohibits the promising party from reneging on its promise by premising a fraudulent inducement claim on statements of fact it had previously said were neither made to it nor had an effect on it.").

> FN8. Specifically, Section 9.3 of the Shareholders' Agreement (HD 10) provides:
> *Entire Agreement*. This Agreement, the exhibits and schedules hereto, the Purchase Agreement and the other documents delivered pursuant hereto and thereto constitute the full and entire understanding and agreement between the parties with regard to the subjects hereof and no party shall be liable or bound to any other in any manner by any oral or written representations, warranties, covenants and agreements except as specifically set forth herein and therein.
> Section 6.4 of the Stock Purchase Agreement (HD 11) provides:
> *Entire Agreement*. This Agreement, the exhibits and schedules hereto, the Shareholders' Agreement and the other documents delivered pursuant hereto constitute the full and entire understanding and agreement between the parties with regard to the subjects hereof and thereof and no party shall be liable or bound to any other in any manner by any oral or written representations, warranties, covenants and agreements except as specifically set forth herein and therein.

Indeed, Buckmaster testified that he realized that many important statements that were allegedly made to him were not in the Shareholders' Agreement when he signed it and he understood they were not in there and signed anyway.[FN9] Thus, Defendants simply cannot allege that their adoption of the Transactions was fair because of statements made prior to signing. In fact, such allegations demonstrate just the opposite - that the Insiders used their positions as fiduciaries to obtain (through the adoption of the Transactions) the very contract rights they failed to obtain from eBay three years earlier in a contract negotiation [Text redacted in copy.], as demonstrated by the following chart:

> FN9. The following colloquy from the deposition of Buckmaster (51-52) is enlightening:
> Q. Did you [read the shareholders' agreement before you signed it]?
> A. Well, there were very important representations made to us upon which we relied in entering these deal documents that are not specified in these deal documents.
> Q. And were you aware of that at the time you signed the shareholders' agreement?
> A. I believe that I was.

SOUGHT BY INSIDERS IN 2004	RESULT OF NEGOTIATIONS	STATUS FOLLOWING TRANSACTIONS
Outright Ban on Insiders' Sale of Shares to eBay. (HD 7, draft Shareholders' Agreement at 19)	Not obtained.	Effective ban absent consent of both Insiders through Poison Pill.
Co-Sale Rights on Insiders' Sale of Shares to eBay. (HD 7, draft Shareholders' Agreement at 19)	Any such rights fall away on trigger of Competitive Activity clause.	Can be achieved through Poison Pill.
If eBay engages in Competitive Activity, it must divest. (HD 7, draft Shareholders' Agreement at 25)	Replaced By "Divorce Provision" with *no* divestiture requirement. (Wes 293-94)	Transactions designed with goal of eBay divestiture.

Company ROFR over eBay's stake. (HD 7, draft Shareholders' Agreement at 25)	Not obtained.	Insiders seeking to coerce eBay to accede to such a Company ROFR. Poison Pill operates as a Company ROFR on sale of more than 15%.
Broad limitation on competition. (HD 7, draft Shareholders' Agreement at 2; Buckmaster 45; Levey 174-79; Wes 283-84)	Explicit right for eBay to compete.	Competition is purported "justification" for actions.
Voting trust provision to address forced sale to cover estate taxes. (HD 8, at 1)	Rejected; eBay suggests "effective estate planning." (HD 8, at 1)	"Death Problem" is purported justification for actions.
[Text redacted in copy.] (Price 181; HD 3)	[Text redacted in copy.]	[Text redacted in copy.]

C. Defendants' Misuse Of Information Allegations Do Not Support *Their Defense*.

The great majority of Defendants Brief is devoted to their allegations of eBay's misuse of information. However, Defendants *admit* that these allegations do not have "implications for corporate control." DB at 71 n.30. Similarly, Defendants' own expert has testified that the alleged misuse of information and "eBay's role and the acrimony between the parties at this point" is "completely independent" of the Company ROFR and concomitant Dilutive Issuance (Jarrell 93) and that the Poison Pill is unnecessary except to the extent it addresses the so-called "Death Problem." Jarrell 144-145. Thus, allegations of misuse of information are unrelated to the adoption of the Company ROFR and concomitant Dilutive Issuance or the Poison Pill. As a matter of law and as the law of this case, this evidence cannot support Defendants' unclean hands defense with respect to the Company ROFR and concomitant Dilutive Issuance or the Poison Pill because those Transactions simply are not *"directly related* to eBay's involvement with craigslist's board of directors or [alleged] inequitable conduct." 11/9/09 Op. at 2 (emphasis in original).

Moreover, because Defendants *still* have not proffered any evidence that the Insiders knew of and considered eBay's alleged misuse of information at the time they adopted any of the Transactions (including the Amendments), but rather, have admitted that the Insiders did not learn *any* facts about eBay's alleged misuse of Company information until after they received discovery in this litigation (Wes 156), this evidence is not relevant to a defense of the Insiders' actions actually based on the *merits* of the Insiders' conduct (as opposed to an "unclean hands" affirmative defense). *See* 3/6/09 Tr. at 18 (holding that to the extent Defendants "will defend the challenged governance changes by arguing that they were a reasonable response to a threat posed by eBay," this "defense must be based on what the directors of craigslist knew and considered at the time they adopted the governance measures"); *see also Atl. Research Corp. v. Clabir Corp.*, 1987 WL 758584, at *1 (Del. Ch. Feb. 10, 1987); *In re Circon Corp. S'holders Litig.*, 1998 WL 34350590, at *1 (Del. Ch. Mar. 11, 1998).

In sum, there are three Transactions at issue, with respect to which Defendants may attempt to utilize two different defenses - a defense on the merits and an affirmative "unclean hands" defense. However, notwithstanding Defendants' "put the victim on trial" litigation strategy, Defendants' allegations of eBay's misuse of information is at most potentially relevant to a very narrow slice of this litigation, as illustrated in the below chart:

Company ROFR / Dilut- Poison Pill Amendments

	ive Issuance		
Defense Based on Merits of Insiders' Actions	IRRELEVANT - Did not "know and consider"	IRRELEVANT - Did not "know and consider"	IRRELEVANT Did not "know and consider"
"Unclean Hands" Affirmative Defense	IRRELEVANT - Unrelated	IRRELEVANT - Unrelated	ONLY POTENTIAL RELEVANCE

And, for the reasons addressed below and as will be shown at trial, even though potentially relevant to a narrow slice of this litigation, Defendants' allegations of eBay's misuse of information are without merit.

D. The Allegedly "Deceptive Ads" Discussed In Defendants' Brief Are Irrelevant And Highlight The Unfairness Of The Insiders' *Actions*.

In perhaps the most blatant example of Defendants' "put the victim on trial" litigation strategy, Defendants' Brief cites to eBay's purchase of certain "adwords" or "keywords" run by its internet marketing group. DB at 29. However, Defendants' own expert explains that such "adwords" or "keywords" can be purchased by any person, whether or not a shareholder. DX 566 ¶ 42.[FN10] In other words, the "adword" or "keyword" purchases have nothing to do with allegations of misuse of information by eBay; rather, they are "simply evidence of pure competition in the marketplace." 11/9/09 Op. at 2; *see also* Donahoe 123-126 (describing "adword" and "keyword" purchases as "the way Google works" with respect to advertising, and explaining that because search tools such as Google, Yahoo, and Microsoft work in such a way, eBay utilizes a machine to purchase twenty million "adwords" or "keywords" a month). Although craigslist could have "taken the gloves off" (to paraphrase Cauthorn) with respect to its response to eBay as a third party, such "adword" or "keyword" purchases have nothing to do with the fact that eBay is a shareholder, or had board representatives, and none of the Company ROFR and concomitant Dilutive Issuance, Poison Pill, and Amendments addresses this issue at all. To the extent the Insiders took action to harm eBay as a shareholder because they wanted to reach a commercial result, it is clear that they abused their fiduciary positions. *Cf. Blommer Chocolate Co. v. Blommer,* 1992 WL 245969, at *6 (Del. Ch. Sept. 28, 1992) (observing that even if a sale of shares to a competitor "results in a loss of valuable business relationship[s]," such loss in business relationships "make a weak case for the issuance of an injunction since the assumed loss or injury was itself one that the corporation never had a reasonable expectation of legally precluding").

FN10. References to Exhibits to the Transmittal Affidavit of Michael A. Pittenger In Support of Defendants' Pretrial Brief are referred to herein as "DX."

III. DEFENDANTS HAVE FAILED TO SHOW THAT THE *TRANSACTIONS ARE ENTIRELY FAIR*.

Once stripped of the irrelevant, distraction-oriented facts, what becomes strikingly clear is that Defendants' Brief devotes only eight pages to a discussion of the Board "process" leading to the adoption of the Transactions. This shows both (i) the Insiders' failure to undertake a proper process and (ii) Defendants' attempt to mask that lack of process by placing the victim of their actions on trial. Simply put, there was no process here.[FN11]

FN11. Perhaps Defendants' Brief fails to describe the process leading to the adoption of the Transactions in detail because Defendants themselves are confused about what that "process" was. Defendants have represented to this Court that there were three Board meetings leading to the adoption of the Transactions - those held on October 15, 2007, October 25, 2007, and December 17, 2007 - and that the Transactions were adopted by the Board on January 1, 2008. However, evidence produced by Defendants in discovery indicates that the Transactions initially may have been adopted at the October 25, 2007 Board meeting. SD 3 at CLEB0071264 (draft minutes for October 25 Board meeting *attached to an e-mail sent four days after the date of that Board meeting* authorizing the Poison Pill and the Amendments); *id*. at CLEB0071257 (draft of minutes for an October 29, 2007 Board

meeting discussing "ratification of" the Poison Pill, Dilutive Issuance, and Amendments); SD 4 (October 29, 2007 e-mail from Ananda Martin at Perkins Coie to Buckmaster describing the October 25, 2007 Board resolution as authorizing the Poison Pill); SD 5 (October 29, 2007 e-mail from Martin to Newmark explaining that a conference call is scheduled to "ratify the adoption of the pill, right of first refusal, etc."); SD 6 (unsigned minutes of December 17, 2007 Board meeting indicating the meeting was "held to ratify certain matters raised at the October 25, 2007 Board meeting" and discussing each of the Transactions). Certain other evidence indicates that the Transactions may have been adopted, and the documents underlying the Transactions may have been executed, on December 17, 2007. SD 7, at CLEB0016054 (December 8, 2007 e-mail from Martin to Wes stating "[t]he board approved the ROFR and Poison Pill yesterday," attaching "links to the most recent versions of the does," and indicating that she has "the signed versions down here").

Apparently, the process described to this Court in Defendants' Brief was "staged" (in Wes's own words) (SD 8) for, among other reasons, feigning compliance with the notice requirements of Section 228 of the DGCL. SD 9.

A. The Defendants Cannot Argue A Proper Process Was Followed By Pointing To Actions That Ordinarily Would Be Taken By A *Disinterested Board Of A Non-Controlled Corporation*.

The minutes of the Board meetings belie any argument that the Insiders adopted the Transactions for anything other than protecting the Company "from an unwanted takeover attempt." *Cf.* SD 1 at 4 (Perkins Coie client memo stating that "minutes should reflect appropriate board process to neutralize conflicts of interest and show the board acted in a fully informed manner. If the entire fairness standard applies, the record should support both the fairness of the process and the fairness of the price"); Wes 27-28 (testifying that if notable issues are raised at a board meeting, they should be documented). Accordingly, Defendants' Brief is written as if craigslist is a non-controlled corporation with a dispersed group of investors and as if the Insiders comprised a large board considering the best interest of that fluid group of shareholders.

The reality is that craigslist is a controlled company with only three shareholders, two of whom (i) form a control group; (ii) are the Company's only two directors; and (iii) are the Company's key executive officers. Defendants highlight this reality noting that "the 'omnipresent specter' that the directors were acting to protect their own positions on the board is not present" because the Insiders "together own a majority of craigslist's stock and are parties to a voting agreement under which each has agreed to vote to elect the other (or the other's nominee) as a director." DB at 38; *see also* Buckmaster 235 (testifying that a threat of a hostile takeover attempt was not "imminent"); Wes 85 (same); HD 97 ¶¶ 78-79 (Defendants' expert observing that "a potential takeover by a hostile insider" is "theoretical or at least negligible"); HD 82 n.1. (e-mail from Wes to Buckmaster attaching materials explaining that, in private companies that are not widely held, "the ownership of such companies is not sufficiently dispersed to make them vulnerable to hostile takeovers"). And although Defendants rely heavily on the "Death Problem" in their Brief, there is no evidence that such a problem was a basis for the Insiders' actions; in fact after over fifteen seconds of contemplation at his deposition, *Buckmaster expressly disclaimed that the Insiders considered the "Death Problem" in adopting the Transactions*. Buckmaster 223.[FN12] Any suggestion to the contrary in Defendants' Brief runs completely counter to this testimony, and to the documented evidence from the period leading to the adoption of the Transactions, and provides yet another example of Defendants' pattern of misrepresentation. *Compare* Buckmaster 223 (stating, in response to a question whether one of the concerns that the Insiders had in December 2007 was "what would happen if one of you died and the shares ended up in either your [or] Mr. Newmark's heirs," "I don't think that was specifically a concern.") *with* DB at 48 ("Although neither Newmark nor Buckmaster has any current plans to sell his shares, they realized [past tense] ... that they are mortal and will pass away at some time in the future.") (emphasis added).

FN12. Clicking on this citation in the iBrief will launch the video of this segment of the deposition of Buckmaster.

Plaintiff's brief recounts in full the lack of a proper process prior to adoption of the Transactions. However, because Defendants' Brief reads as if authored in defense of actions taken by the board of a widely held company, it is worthwhile to note the following:

?? The Insiders did *not* take into account the relative positions of each shareholder with respect to the Transactions or the impact of the Transactions on each shareholder. With respect to the Dilutive Issuance, Defendants' own expert has testified that "if you had one shareholder that had disproportionately high costs of entering into" a ROFR, or "there are differing relative benefits from the company getting a ROFR over each individual stockholder shares," such facts would impact the analysis undertaken in determining the exchange ratio. Jarrell 261-65. With respect to the Poison Pill, the Insiders allegedly drafted the succession-related exceptions because of "differences" between eBay and the Insiders (Wes 209); however, when the differences between the Insiders and eBay harm eBay (by, for example, preventing eBay from partnering with the Insiders the same way the Insiders can partner with each other), such differences are "a difference [] [s]o what?" Jarrell 207.

?? Defendants' Brief states that "[r]ights plans are an 'ordinary,' 'garden-variety defensive measure[]." DB at 51. However, the treatise Wes sent to Buckmaster observed that poison pills *in the private company context* are rare because "the ownership of such companies is not sufficiently dispersed to make them vulnerable to hostile takeovers" and because "the shareholders do not wish to cede to their boards the ability to control such a powerful defensive weapon if an unsolicited takeover were attempted." HD 82 n.1.[FN13] Once again, Defendants' Brief is written as if craigslist were a widely held, non-controlled public company.

FN13. Inexplicably, exactly one month to the day after sending this portion of a treatise to Buckmaster, Wes sent a memorandum to Buckmaster stating that "[a] preliminary review of case law *and secondary sources* revealed no special considerations for privately held corporations seeking to implement shareholder rights plans." DX 699, at CLEB0065088 (emphasis added).

?? Although Defendants' Brief describes a staggered board as a "routine anti-takeover defense" (DB at 30), staggered boards certainly are not routine in the private company context. Indeed, even in the public company context, staggered boards are no longer "routine."

B. Defendants Ignore Ways In Which The Poison Pill Operates *Differently For The Insiders Than For eBay*.

As a result of being written as if craigslist were a non-controlled company, Defendants' Brief fails to take into account the ways in which the Poison Pill operates differently for the Insiders than for eBay.[FN14] For example, Defendants' Brief simply does not take into account that under the definition of "beneficial ownership" in the Poison Pill, eBay cannot partner with either of the Insiders in the same way the Insiders are now allowed to partner with each other, thus effectively eliminating the sole avenue for eBay to influence control of the Board. Accordingly, Defendants' Brief does not, because it cannot, refute that the Poison Pill is preclusive and therefore violates fundamental Delaware law upholding poison pills only to the extent they do not "fundamentally restrict[] stockholders' rights to conduct a proxy contest." *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985).[FN15] Nor does Defendants' Brief address that, because the Insiders are deemed to "own" each other's shares for purposes of the Poison Pill, they are free to transfer shares among themselves.

FN14. Rather than address eBay's arguments, Defendants create a straw-man argument to defend against. Defendants suggest eBay has advanced the notion that adoption of a Poison Pill is an interested transaction "merely as a result of an 'inherent conflict' arising out of the prospect such measures could be used for entrenchment purposes." DB at 54. eBay has advanced no such argument. Rather, the Poison Pill is an interested transaction,

not solely because the Insiders have indicated they will only pull it with respect to parties compatible with *themselves,* nor solely because of the succession-related exceptions Defendants addressed by mischaracterization, but also because of the very arguments Defendants chose to ignore.

FN15. Defendants clearly were aware of this bedrock principle of Delaware law, as an early draft of the Poison Pill contained language with respect to exceptions designed to address the issue. *See* SD 10 § 1(d)(ii) (October 6, 2007 e-mail from Wes to Buckmaster containing draft of Poison Pill); *see also* HD 94, at 2 (Perkins Coie memorandum to the Insiders stating that "[a] stockholder rights plan, however, is *not designed to deter a proxy contest* or an offer to purchase the entire company at a price and on terms that would be in the best interest of all shareholders") (emphasis added).

What Defendants' Brief does do, however, is demonstrate Defendants' own belief that the combination of the Company ROFR and concomitant Dilutive Issuance is coercive in nature and thus violates both *Unocal* and Section 202 of the DGCL. Specifically, Defendants represent to the Court their belief that "[i]f the [Company] ROFR passes muster, eBay will *no doubt* accept the reorganization shares and agree to the Company ROFR." DB at 63 n.25 (emphasis added); *accord In re Gen. Motors Class H S'holders Litig.,* 734 A.2d 611, 620 (Del. Ch. 1999) (defining actionable coercion as a circumstance created to cause a shareholder to agree to a transaction "for some reason other than the merits of the transaction") (quoting *Williams v. Geier,* 671 A.2d 1368, 1382-83 (Del. 1996)).[FN16]

FN16. Defendants' admit the combination of the Company ROFR and Dilutive Issuance is coercive, but argue the combination is not "actionably" coercive. Defendants twist the facts to support their argument. Defendants argue that the coercion "eBay identifies is simply the economic incentives and disincentives associated with accepting or rejecting the [Company] ROFR-i.e., obtaining *increased stock ownership* in exchange for a submitting [sic] the shares to a ROFR in favor of craigslist." DB at 61 (emphasis added). However, Wes has testified that there would be no value to the shares issued to eBay if eBay were to sign the Company ROFR. Wes 100 ("there's very little, you know, value to shares where it is issued to all three shareholders in percentage to the - to the shareholding, you know"). Here, the coercion is not a result of the "option" to obtain "increased stock ownership," but rather the result of holding a diluted percentage ownership interest in craigslist if eBay did not accede to the restrictive Company ROFR. This is the very form of actionable coercion repeatedly identified by Delaware courts. *See Gradient OC Master, Ltd. v. NBC Universal, Inc.,* 930 A.2d 104, 117 (Del. Ch. 2007) ("On the other hand, an action is 'actionably coercive' if, in the context of a tender offer, it 'threatens to extinguish or dilute a percentage ownership interest in relation to the interests of other stockholders.' ") (quoting *Weiss v. Samsonite Corp.,* 741 A.2d 366 (Del. Ch. 1999), *aff'd,* 746 A.2d 277 (Del. 1999)). Indeed, Defendants' expert admitted that the combination of the Company ROFR and Dilutive Issuance is "a way to convince the hold-out, other than just the pure merits of the ROFR, to sign onto the ROFR." Jarrell 252. Such admission comports virtually word-for-word with the definition of actionable coercion utilized by this Court. *In re Gen. Motors Class H S'holders Litig.,* 734 A.2d at 620 (quoting *Williams,* 671 A.2d at 1382-83).

C. The Insiders' Reliance On Wes Does Not Insulate Defendants *From The Insiders' Bad Faith. Self-Interested Conduct.*

Defendants' attempt to shield themselves from liability based on the Insiders' misguided reliance on Wes as both their personal counsel and counsel for the Company similarly fails. The issues upon which Wes acted as counsel for the Company overlapped with the issues for which he was retained by the Insiders in their personal capacity. Wes acted as personal counsel for the Insiders with respect to *estate-planning* and *lax matters*. Wes 17; HD 74 (engagement letter between Perkins Coie and Newmark); HD 75 (engagement letter between Perkins Coie and Buckmaster). Both the Company ROFR and Poison Pill contain "carve out" provisions allowing the Insiders to transfer their shares for *estate planning* reasons without triggering the restrictions in either of those documents (HD 110 § 1(r)(ii); HD 111 § 3.3(b)(ii)), and

evidence produced in discovery indicates that Wes was concerned about the *"fax-free"* status of the Transactions as to the Insiders, but expressed no such similar concern as to eBay, the only other shareholder of the Company. HD 101. Moreover, even the expert retained by Defendants in this litigation testified that, his review of the transcripts of depositions taken in this litigation, including the fact that the Insiders were receiving advice regarding the Indemnification Agreements, "suggest[ed to him] that Mr. Buckmaster *had his own attorney*." Jarrell 66-67 (emphasis added).[FN17]

> FN17. Defendants' reliance on *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 479 n.57 (Del. Ch. 2000), to wish away this conflict is entirely misplaced, as the facts of that case alone make plain. In *Gaylord*, the law firm whose independence was attacked by the plaintiffs had provided advice to the Company's CEO and chairman of the board in connection with the initial public offering of the Company (*and not in a personal capacity),* which took place *seven years* prior to the defensive measures challenged in that case. The Court did not find the law firm conflicted, basing its decision on the fact that any tilting of interest toward the CEO would alienate the *ten other independent directors* who were not represented personally by the law firm. *Id*. ("Most important, it would be unusual to require a board dominated by independent directors to retain special counsel simply because company counsel of long-standing had a traditional lawyer-client relationship with the company's CEO.").

Of course, while Defendants are happy to point out the instances in which the Insiders chose to "rely" on this conflicted counsel's advice, they do not highlight the instances in which the Insiders chose to ignore this advice. For example, the treatise sent by Wes to Buckmaster, which Defendants cite as evidence of the Insiders' due care, *expressly states* that poison pills in the private company context are rare because "the ownership of such companies is not sufficiently dispersed to make them vulnerable to hostile takeovers" and because "the shareholders do not wish to cede to their boards the ability to control such a powerful defensive weapon if an unsolicited takeover were attempted." HD 82 n.1. Additionally, Wes provided a memorandum to the Insiders indicating both that "[t]o assist the board in its consideration of the possible need for, and merits of, a stockholder rights plan, *the advice of a company's financial* and legal advisors *is typically sought"* and that "[d]irectors are *encouraged to consult with their financial advisors as to the impact of a rights plan on earnings per share and the financial statements of a company*." HD 94 at 3 (emphasis added). However, the Insiders never engaged a financial advisor.[FN18] Although fiduciaries do have a right to pick and choose which advice of counsel to follow, they do not have the right to hide behind reliance on counsel wholesale without even acknowledging the advice that they chose not to take and that undermines their defense.

> FN18. Once again, Defendants utilize a straw-man strategy, this time creating an impression eBay has argued the Insiders were required to obtain a fairness opinion. DB at 42-43. eBay has not suggested that the Insiders were required to obtain a fairness opinion. Rather, eBay has suggested the Insiders should have followed their own counsel's advice to retain a financial advisor with respect to the Poison Pill, and should have extended that engagement to advice with respect to the Dilutive Issuance.
>
> Defendants' effort to inflate the value of the Financial Intelligence report to the Insiders' "process" also fails. Buckmaster has testified that it would be "too strong of a term" to say he "relied" on that report. Buckmaster 181. Moreover, notwithstanding the possession of the Financial Intelligence report, the Insiders deemed it necessary to obtain a "confirming ... opinion" (Wes 167) - an opinion that, when ultimately delivered almost 15 months after the Transactions were adopted, shows the value of the Company was between REDACTED (point estimate of Common Stock) and REDACTED (adjusted enterprise value) higher than the valuations in the Financial Intelligence report. *Compare* HD 117, at 21-22 (Financial Intelligence report showing an adjusted value of craigslist as of June 30, 2006 of [Text redacted in copy.] and a point estimate of common stock of craigslist as of that date of [Text redacted in copy.] *with* HD 118, at 28-30 (Pagemill report showing an adjusted value of craigslist as of December 31, 2007 of [Text redacted in copy.] and a point estimate of the common stock of

craigslist as of that date of [Text redacted in copy.] per share).

Finally, Defendants' suggestion that the Insiders received "an opinion letter from counsel regarding whether the Share Issuance could potentially exceed the Hart-Scott-Rodino Act's filing threshold of $59 million" that "informed their understanding of craigslist's value" (DB at 41) is a gross mischaracterization. Defendants' Brief contained no citation for this assertion. When pressed as to what document Defendants' Brief was referring to, Defendants counsel cited *an internal Perkins Coie e-mail* forwarded solely to Buckmaster that contains one attorney's ruminations and a conclusion that "I think we are okay." *See* SD 11 (11/23/09 letter from Clinten N. Garrett, Esq. to Samuel T. Hirzel, Esq.); DX 719. To the extent the Insiders purport to have relied upon an internal law firm e-mail to "inform their understanding" of the value of the Company in connection with the issuance of the Reorganization Shares, their process was clearly defective, unless Perkins Coie is considered an expert in financial matters. *See Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 892 (Del. Ch. 1999) (capitalized earnings analysis prepared by a law firm that "had no special qualification to" prepare such an analysis "conceded to be defective").

D. Evidence Recently Discovered By eBay But Not Produced By *Defendants Further Illustrates The Lack Of "Process."*

As discussed in Plaintiff's Brief, the Insiders abjectly failed to value the alleged consideration received by craigslist in connection with the Dilutive Issuance (*i.e.*, the Company ROFR), both generally, and vis-a-vis the Company's three shareholders. eBay recently discovered through its own investigation a filing Perkins Coie made on behalf of craigslist (SD 12 (the "California Filing")), which Filing (i) further proves that the Insiders failed to value the Company ROFR and (ii) demonstrates that such failure was not only a violation of Delaware law, but also of California law. Under California law, the California Filing must indicate a value for the shares issued to the Insiders, and that value must represent "the price at which the company proposes to sell the securities, or the value, as alleged in the application, or the actual value, as determined by the commissioner, *of the consideration (if other than money)* to be received in exchange therefor, or of the securities when sold, whichever is greater." *Cal. Corp. Code* § 25608(g) (Deering 2009); *see also* SD 13 (instruction from California Department of Corporations that the California Filing must state "the actual value of the consideration (if other than money) to be received in exchange for the securities").

Defendants clearly understood these instructions, as they followed them to a tee in their filing with respect to the issuance of shares to Buckmaster in 2003. SD 14.[FN19] However, the California Filing values the shares issued to the Insiders in exchange for their execution of the Company ROFR at $494. SD 12. Accordingly, by failing to value the Company ROFR, the Insiders not only violated the mandate under Section 152 of the DGCL to value the consideration received in exchange for the Reorganization Shares (*i.e.*, the Company ROFR),[FN20] but also with respect to a materially identical mandate under California law.[FN21]

FN19. Accordingly, Defendants' feigned ignorance of these instructions and purported explanation to this Court that Defendants simply listed the par value of the shares issued to the Insiders in the California Filing is another casual mischaracterization to this Court by Defendants. *See* Defs' Reply Br. In Support Of Mot. To Compel & For Sanctions, at 10-11 (10/23/09) ("[H]ad eBay bothered to perform some simple arithmetic, it could have advised the Court that the $494.00 'value of the transaction' referenced in this public document is merely the result of multiplying the number of Reorganization Shares issued to Messrs. Newmark and Buckmaster in connection with the ROFR (9,880,000) by the par value of those shares ($.00005 per share))."

FN20. In yet another attempt to avoid eBay's claims by knocking down a straw man, Defendants' Brief states that "eBay cannot sustain its heavy burden of establishing a violation of Section 152 because it cannot show actual fraud or that craigslist obtained *no* benefit under the ROFR." DB at 67 (emphasis in original). Of course, eBay's argument is not that craigslist obtained no benefit under the Company ROFR (although the existence of

such a benefit is a dubious proposition for the reasons set forth at pages 50-51 in Plaintiff's Brief); whether or not craigslist received such a benefit is not the issue. Rather, the issue is that the Insiders absolutely failed to value the Company ROFR - a clear mandate under Section 152. *See generally* Plaintiff's Brief at 56-57 (discussing this mandate and the Insiders' failure to address it).

FN21. The only other implication of the California Filing is that the Insiders actually valued the Company ROFR obtained from the Insiders at $494.00, a valuation devastating to their case.

IV. *DEFENDANTS' "UNCLEAN HANDS" ARGUMENTS FAIL.*

A. Defendants' "Unclean Hands" Argument With Respect To The Adoption Of The Company ROFR And Concomitant Dilutive *Issuance, As Well As The Poison Pill Fails As A Matter Of Law.*

In its November 9, 2009 letter opinion, this Court set out the law of this case with respect to Defendants' "unclean defense" affirmative defense: evidence supporting such a defense must be *"directly related* to eBay's involvement with craigslist's board of directors or [alleged] inequitable conduct, and not simply evidence of pure competition in the marketplace." 11/9/09 Op. at 2 (emphasis in original). Because Defendants *admit* that their assertions with respect to alleged inequitable conduct by eBay would not have "implications for corporate control" (DB at 71 n.30), that the primary purpose of the adoption of the Poison Pill is to thwart a potential change in control (DB at 31), and that such assertions are unrelated to the Company ROFR and concomitant Dilutive Issuance (Jarrell 93), such allegations cannot support Defendants' unclean hands defense as a matter of law with respect to the adoption of those Transactions.

Defendants recognize such allegations cannot support Defendants' unclean hands defense as a matter of law - the entirety of Defendants' unclean hands argument with respect to the Company ROFR and concomitant Dilutive Issuance and the Poison Pill is devoid of any mention of inequitable conduct by eBay. Rather, Defendants' unclean hands arguments with respect to those Transactions are limited to two: (i) eBay hopes to one day increase its stake in craigslist and (ii) "eBay *did* intend to 'attack,' 'disrupt,' 'target,' 'exploit' and 'kill' craigslist *as a competitor."* DB at 79 (first emphasis in original, second emphasis added). Of course, such allegations, even if true, are "simply evidence of pure competition in the marketplace," 11/9/09 Op. at 2, and as a matter of the law of this case cannot support an unclean hands defense. Moreover, such allegations presuppose both that, absent the Company ROFR and concomitant Dilutive Issuance and Poison Pill, the Company is vulnerable to a hostile takeover and that eBay's ability to compete would be limited. Such presuppositions, as discussed above, lack merit, particularly given that the most banal defense possible to these purported threats remained firmly within the Insiders' control - they just had to continue their refusal even to consider selling shares to eBay and their control regime would remain firmly entrenched.[FN22]

FN22. And, even if the Insiders had considered the "Death Problem" at the time of adopting the Poison Pill (which they did not), such "problem" could be addressed through less restrictive means, such as through "effective estate planning." HD 8; *see also* Jarrell 194, 199 (admitting that "[i]f one could deal with this so-called heir issue or heir problem," it could possibly make a difference in his opinion, and responding to a question of whether a restrictive poison pill could be put in to address the so-called death problem when it actually arises, "you better put it in while the getting is good"). *Cf. Hollinger Int'l, Inc. v. Black,* 844 A.2d 1022, 1086 (Del. Ch. 2004) (finding the adoption of a rights plan not to be proportionate to a specific threat because "other more directly tailored legal remedies ... exist to address" the threat).

In *Blommer Chocolate Co. v. Blommer,* 1992 WL 245969 (Del. Ch. Sept. 28, 1992), directors and fifty percent owners of a company sought to enjoin or rescind the sale by the (former) other fifty percent owners of the company to a competitor. The plaintiffs alleged that the former shareholders "have disclosed confidential corporate information" to the competitor

in order "to advance or promote the sale of their stock." *Id*. at *1. The Court assumed the plaintiff's allegations were true. (Indeed, while the Court stated that "in other circumstances stronger words might be used to characterize actions of [the type the former shareholders allegedly engaged in], in the circumstances apparently present in this case I believe the terms ill-advised and inappropriate are probably fitting." *Id*. at *6.) However, this Court refused to allow the plaintiffs to use such allegations to obtain a result they could have, but did not, contract for:

Third, Blommer has no legal right to exclude Cargill [the competitor] or its designees from its board even if the presence of Cargill in Blommer's ownership structure results in the loss of useful business relationships. The principals of this family corporation could have elected to restrict the transfer of its stock. The law would enforce such arrangements. But they did not do so. Thus, even if one assumes that the sale to Cargill flows from the violation of loyalty by [the former shareholder] in a but-for sense, and that the sale results in a loss of valuable business relationship[s], those assumptions make a weak case for the issuance of an injunction since the assumed loss or injury was itself one that the corporation never had a reasonable expectation of legally precluding.

Id. Here, the Insiders' actions went way beyond those of the plaintiff in *Blommer*. In *Blommer,* the plaintiffs sought a judicial determination of their rights. Here, the Insiders' took inequitable action to force upon eBay transfer restrictions they could have, but did not, obtain in 2004, and seek the Court's blessing for such actions under the guise of an unclean hands defense. As in *Blommer,* Defendants' attempt to obtain something they "never had a reasonable expectation of legally" obtaining should be rejected.

B. Defendants' "Unclean Hands" Argument With Respect To The *Amendments Fails As A Matter Of Law And A Matter Of Fact*.

As discussed above, Defendants' allegations regarding eBay's misuse of information is at most *potentially* relevant to a very narrow slice of this litigation: an affirmative unclean hands defense (and not one based on the merits of the Insiders' actions) regarding eBay's request for rescission of the Amendments. However, the large majority of evidence presented by Defendants with respect to this defense relates solely to a predetermined litigation strategy of putting the victim on trial and is not *"directly related"* (11/9/09 Op. at 2) to eBay's involvement with the Board or "inequitable conduct" by eBay.[FN23]

FN23. eBay addresses the issues in this Section IV(B) solely to defend against Defendants' unclean hands strategy, and this discussion is not offered affirmatively as part of eBay's case-in-chief. *See* 11/9/09 Op. at 2 ("[T]his Court will be mindful of the relevance of all evidence to lines of defense other than 'unclean hands.' ").

1. Defendants' "Unclean Hands" Argument With Respect To The *Amendments Fails As A Matter Of Law*.

Defendants admit that, as expressly memorialized in the Shareholders' Agreement, eBay retained the absolute right to compete with the Company in the classifieds business, including with respect to job listings / resume postings, both internationally and in the United States. Buckmaster 88; Wes 56-57 & 252. The parties specifically contemplated and contracted for the relationship that would exist between eBay and the Company following a decision by eBay to engage in such competitive activity in the United States.[FN24] The contract governing the parties' relationship following eBay's investment stated that the option to declare a state of "Competitive Activity," and the effects flowing from such a declaration, would be the Company's "sole remedy" for any action that may arise or result from eBay engaging in such activity. The narrow carve out to this "sole remedy" provision is directly on point: if eBay were to breach "its confidentiality obligations to the Company in connection with its Competitive Activity," the Company could bring a claim *for damages*. HD 10 § 8.3. Defendants, recognizing this contractual limitation, have brought such a claim for damages in California *this damages claim is the sole remedy of Defendants for an alleged breach of eBay's "confidentiality obligations to the Company in connection with its Competitive Activity." See* Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 175 (Del. 2002) ("[C]ourts will not construe a contract as taking away other forms of appropriate relief, in-

cluding equitable relief, *unless the contract explicitly provides for an exclusive remedy."*) (emphasis added). Accordingly, Defendants' unclean hands defense with respect to the Amendments is simply an attempt to punish eBay for engaging in conduct that is completely acceptable under the agreement entered into at the time of eBay's 2004 investment in the Company and to obtain a remedy for eBay's alleged inequitable misconduct beyond that contracted for by the parties, and thus fails as a matter of law.

> FN24. None of the parties' carefully negotiated rights would be affected by eBay engaging in such competitive activity internationally.

2. Defendants' "Unclean Hands" Argument With Respect To The *Amendments Fails As A Matter Of Fact.*

Defendants' unclean hands argument also fails as a matter of fact because it ignores the asymmetry of the relationship between the Insiders and eBay. The Insiders are, and have been since the time of eBay's investment, the controlling shareholders of craigslist, the majority (and now all) of the directors of craigslist, and the key executive officers of craigslist. As a result, the Insiders are fiduciaries to craigslist and *all* of its shareholders, including eBay. Conversely, eBay is a minority shareholder and is not a fiduciary of craigslist. Thus, eBay has no fiduciary duty to be "fair" in a legal sense - as recognized in this Court's November 9, 2009, opinion, eBay has a right to engage in "pure competition in the marketplace," even if that competition is "take the gloves off" (to paraphrase Cauthorn) competition.

Indeed, much of the statement of "facts" in Defendants' Brief discusses statements made, and actions taken, by eBay employees who were not craigslist Board members. However, neither eBay, as a minority shareholder, nor these individuals, are fiduciaries of craigslist. In fact, the allegations underlying this unclean hands defense do not involve inequitable conduct by either Omidyar or Silverman at the time that they served as directors of craigslist[FN25] and do not involve any conduct by eBay that could not occur in the absence of a board seat eliminated by the Amendments. Such allegations, therefore, cannot have "an immediate and necessary relationship to the equitable remedy that eBay seeks to obtain in the litigation, insofar as that remedy may re-enable eBay to have a seat on or exert influence over the craigslist board." 11/9/09 Op. at 2.

> FN25. Defendants have conceded that Mr. Omidyar was never observed "doing anything inappropriate in his capacity as a craigslist director" (Wes 237-38) and that "there was [sic] no feelings that, you know, Pierre Omidyar would have been doing anything other than the right thing. We had no concern. He was-he is and/or was, you know, a very highly esteemed person that was craigslist's choice as the ideal director, so, no, there were no concerns at all." Wes 240-41. Similarly, Defendants have conceded that other than a concern that Silverman "hadn't been candid with craigslist in terms of what he knew about eBay's competitive plans" at the second board meeting he attended (Wes 263) (an allegation that is completely false, as explained in the Chart attached hereto as Annex A), there was nothing that caused a belief that Silverman "acted improperly." Wes 265.

Further, Defendants' attempt to move beyond the contractually limited remedy of damages for eBay's alleged breach of its confidentiality obligations by taking anecdotal snippets from documents does not withstand scrutiny when those documents are put in their proper context, as explained in detail in the Chart attached hereto as Annex A. More generally, defendants do not contend that any craigslist information was distributed improperly outside of eBay. Any information provided to eBay was provided with full knowledge of eBay's right to compete with craigslist under the Shareholders' Agreement and knowing that eBay was, in fact, competing with craigslist internationally. The alleged "misuse" of information is disconnected temporally from the Transactions challenged in this litigation.[FN26] Indeed, Defendants stopped providing "metrical" information to eBay by early 2006. Wes 49-50, 253, 256. Much of this information was of questionable "confidentiality," at best, because it was available from public sources such as the craigslist.org website, Nielsens and Comscore. *See, e.g.,* DB at 19 (citing DX 339 (discussing third-party "data mining off craigslist")); SD 15;

SD 16; SD 17; SD 18 & Silverman (12/19/08) 269-70 (discussing market research available from Nielsens). *See, e.g.*, *Blommer*, 1992 WL 245969, at *6 (declining to issue a preliminary injunction with respect to alleged misuse of information on the grounds that "[p]laintiff could point to no specific information made available to [the competitor] that would not be available from the market that appears at this stage to be critical or even significant to [the company] operation"). Simply put, the "facts" argued in support of Defendants' unclean hands arguments, when put in accurate context (including, without limitation, (i) the sources of the information received by eBay and (ii) temporal relationship of the allegedly "misuse" of information to the Amendments, and as laid out in detail in the Chart attached hereto as Annex A) fail to satisfy the "immediate and necessary relationship" test that must be met to prove facts supporting an unclean hands defense with respect to eBay's request for rescission of the Amendments at trial. *See, e.g.*, 11/9/09 Op. at 2. *See also Kousi v. Sugahara*, 1991 WL 248408, at *3-4 (Del. Ch. Nov. 21, 1991) (granting partial summary judgment rejecting an unclean hands defense where it lacked a "immediate and necessary" relationship to the plaintiffs' claims); *In re Farm Indus., Inc.*, 196 A.2d 582, 590 (Del. Ch. 1963) (holding that "[s]ince none of the claims to which we are now concerned have any relation to the formation of the agreements at issue or to purported breaches thereof, I am of the opinion that [the doctrine of unclean hands] may not be invoked so as to deny relief."); *Blanchette v. Providence & Worcester Co.*, 428 F. Supp. 347, 357 (D. Del. 1977) (noting that the unclean hands doctrine "is applicable only where the party seeking equitable relief is guilty of a violation involving the transaction in litigation" and it has "an immediate and necessary relationship to the equity which he seeks to obtain in the matter in litigation" and rejecting unclean hands defense where the defendants "point to nothing that plaintiffs have done in connection with the [transaction challenged in the litigation] which... subjects them to the defense of unclean hands"). Accordingly, Defendants' unclean hands defense with respect to eBay's request for rescission of the Amendments fails as a matter of fact, in addition to its failure as a matter of law.

> FN26. Defendants constantly and misleadingly conflate time periods. *See, e.g.*, DB at 10 & 18 (arguing that Mr. Aqraou was responsible for the launch of Kijiji.com when at the time of the communication discussed, he was in Finance and Strategy for New Ventures).

CONCLUSION

Defendants' fundamental litigation strategy is to ignore the conflicting interests of the Insiders, who owe fiduciary duties to eBay, and instead to attempt to place eBay, the victim of the Insiders' conduct (and not a fiduciary), on trial. Indeed, based on Defendants' behavior in discovery and the structuring of Defendants' Brief, it appears Defendants will utilize the great majority of their allotted time at trial on the factual matters at issue in the Chart attached as hereto as Annex A. As this Brief has illustrated, Defendants' strategy is fatally flawed. No matter how hard Defendants try to place the victim on trial, they will be unable to mask their lack of answers either for the conflicting interests of the fiduciary Insiders or the ways in which the Transactions violate fundamental Delaware law. Simply put, Defendants cannot escape that it is the Insiders who are on trial, not eBay.

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November 25, 2009

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2009 WL 4729464 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)

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