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14 Attorneys for Plaintiff United States of America

15 **UNITED STATES DISTRICT COURT**
 16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 17 **SAN JOSE DIVISION**

18 UNITED STATES OF AMERICA,
 19
 20 Plaintiff,
 21
 22 v.
 23 EBAY INC.
 24
 25 Defendant.

Case No. 12-CV-05869-EJD
 ATTACHMENT A TO JOINT
 CASE MANAGEMENT
 STATEMENT AND [PROPOSED]
 ORDER: DECLARATION OF N.
 SCOTT SACKS IN SUPPORT OF
 JOINT CASE MANAGEMENT
 STATEMENT AND [PROPOSED]
 ORDER

26 I, N. Scott Sacks, declare as follows:

27 1. I am a member in good standing of the Bar of the District of Columbia. I
 28 am employed as an attorney by the United States Department of Justice, Antitrust
 Division, and am lead counsel for the United States in this case. I make this declaration
 of my own personal knowledge and, if called as a witness, would testify to the matters set
 forth below.

1 2. On January 23, 2013, the Court granted the parties' Stipulated Request for
2 an Order Changing Time and continued the Case Management Conference set for March
3 15, 2013 to June 7, 2013 and ordered the parties to file a Joint Case Management
4 Conference statement on or before May 31, 2013. Order Granting Stipulated Request for
5 Order Changing Time ("Order"), ECF No. 19.

6 3. On May 14, I contacted Thomas Brown, counsel for Defendant, by
7 telephone and informed him of my plans to send a draft protective order to him for
8 review and suggested that we plan to begin the meet and confer process. Mr. Brown
9 indicated that he thought that such activities were premature, given the pending
10 resolution of the Motion to Dismiss. I indicated that I would send him the draft
11 protective order and an initial draft of a joint case management statement nonetheless, so
12 that we could begin the meet and confer process.

13 4. On May 14, I sent Mr. Brown an email with an attached draft stipulated
14 protective order for review. In the email, I stated that we needed to begin to fulfill our
15 meet and confer responsibilities and asked him to respond to the proposed draft. I also
16 stated my intent to send a draft joint case management statement as a way to start
17 discussions about discovery and scheduling issues. A copy of the email (without
18 attachments) is attached as Exhibit A.

19 5. On May 21, Shane Wagman, counsel for the United States in this case,
20 sent Mr. Brown a proposed draft joint case management statement for his review, along
21 with my request to discuss the draft by the end of that week. A copy of this email
22 (without attachments), as well as an email from Mr. Brown acknowledging receipt of Ms.
23 Wagman's email, is attached as Exhibit B.

24 6. On May 23, I sent Mr. Brown and Nicole Gordon, counsel for the Office
25 of the California Attorney General, an email proposing a meet and confer call the next
26 day, May 24, and also proposed some additional language for the draft joint case
27 management statement that had been sent to them on May 21 by Ms. Wagman. The
28 email is attached as Exhibit C.

1 7. That same day, May 23, Mr. Brown responded to my request for a meet
2 and confer call the next day, and stated that Defendant continued to believe that such
3 discussions were premature. Mr. Brown proposed a discussion on May 30 of a
4 stipulation delaying the case management conference until after the Court ruled on
5 Defendant's Motion to Dismiss. *See Exhibit C.*

6 8. That same day, May 23, I responded by email to Mr. Brown stating that it
7 would be very useful to have a call that same day or the next day to discuss his proposal.
8 I stated that I doubted that we would agree to such a stipulation and would plan to file the
9 case management statement as required. I offered to be available that day or evening or
10 the next day, or otherwise would be available on Mr. Brown's proposed May 30 date.
11 *See Exhibit C.*

12 9. On May 24, Mr. Brown responded by email stating that they saw no need
13 for the call to take place that day, and asked whether I could be available the next week
14 as he had proposed, May 30, or if not, another time when I might be available that week.
15 *See Exhibit C.*

16 10. That same day, May 24, I responded by email to Mr. Brown agreeing to be
17 available for a call on May 30. *See Exhibit C.*

18 11. On May 30, numerous counsel for the parties, including myself and Mr.
19 Brown, as well as Nicole Gordon and Paul Moore, counsel for the State of California in
20 the related case, had a telephone conference. Counsel for Defendant requested that the
21 parties agree to a stipulated motion to delay the Joint Case Management Statement due
22 May 31, 2013, and the Case Management Conference set for June 7, 2013, until after the
23 Court ruled on Defendant's Motion to Dismiss. Defendant took the position that any
24 specific discussion related to the details of the schedule or discovery plan is premature in
25 light of the pending Motion to Dismiss. I and Ms. Gordon declined to agree to such a
26 stipulation. I stated that the parties have had an obligation to meet and confer under Fed.
27 R. Civ. P. 26(f) and Civil Local Rule 16-3 and to file a Joint Case Management
28 Conference statement on or before May 31, 2013, [pursuant to this Court's Order], and

1 that further delay is unwarranted and unnecessary. Ms. Gordon also noted that the
2 Motion to Dismiss is not dispositive of the claims in the related case in any event. In
3 addition, I stated that such a motion would be untimely [under Civil Local Rule 6-1(b)].

4 12. Mr. Brown repeated his position that any specific discussion related to the
5 details of the schedule or discovery plan is premature and inefficient until Defendant's
6 Motion to Dismiss is resolved. I refused to engage in extended discussion of this
7 position. Mr. Brown stated that he was willing to stay on the line to discuss these issues.
8 I stated that there was little point to such a discussion given both the timing of this call
9 and Mr. Brown's position that discussion of schedule and discovery details was
10 premature. I stated further that I was prepared to file a case management report on behalf
11 of Plaintiff only, given our failure to engage in meaningful meet and confer discussions.
12 Mr. Brown's position was that a joint statement was appropriate, even given the timing of
13 the call, and that there were some items that were agreed. I agreed to prepare a joint
14 statement, including sections stating the parties' respective positions, and insisted that
15 Mr. Brown forward language stating his position for inclusion in the joint statement in a
16 timely manner by 12:00 p.m. Eastern time, or that Plaintiff would file its own case
17 management statement.

18
19 I declare under penalty of perjury that the foregoing is true and correct.

20 Executed on May 31, 2013, in Washington, D.C.

21
22 _____
23 /s/
N. Scott Sacks

EXHIBIT A

Wagman, Shane

From: Sacks, Scott
Sent: Tuesday, May 14, 2013 2:56 PM
To: 'Brown, Thomas'
Cc: Wagman, Shane; 'Zun, Samuel C.'
Subject: US v. Ebay
Attachments: US v eBay - Draft Protective Order [clean].pdf; US v eBay - Draft Protective Order [redline].pdf; US v eBay - Draft Protective Order [clean].docx

Tom: As we discussed earlier, attached is a draft stipulated protective order for your review. I have attached a clean pdf as well as a pdf showing a redline against the district's model protective order language. I have also attached a Word version for your convenience in any editing. I know we have had no discussions about the substance of such an order, but I think we need to begin to fulfill our meet and confer responsibilities in view of what I assume is our reinstated case management conference on June 7. Please let me know whether the proposed order is agreeable or what changes you would make. I also intend to send you a draft of a joint case management statement in a few days as a way to start our discussions about discovery and scheduling issues. Based on our phone call, we may have different views and should begin to see how much agreement we can reach. Regards, Scott

EXHIBIT B

Wagman, Shane

From: Brown, Thomas [tombrown@paulhastings.com]
Sent: Tuesday, May 21, 2013 6:13 PM
To: Wagman, Shane
Cc: Sacks, Scott; Butler-Arkow, Jessica; Zun, Samuel C.
Subject: RE: US v eBay - Proposed Draft Joint Case Management Statement

Thanks Shane.

TPB

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

From: Wagman, Shane [Shane.Wagman@usdoj.gov]
Sent: Tuesday, May 21, 2013 12:47 PM Pacific Standard Time
To: Brown, Thomas
Cc: Sacks, Scott; Butler-Arkow, Jessica
Subject: US v eBay - Proposed Draft Joint Case Management Statement

Dear Mr. Brown,

I am writing on behalf of Scott Sacks. He requested that I email you the following message:

Attached is a proposed draft of a joint case management statement, which has a couple of blanks for you to state eBay's position and otherwise assumes that you agree with our proposal. Of course, we have not talked about any of this so it is all fair game. We are sending it in Word so that you can draft your own positions on top of the ones you disagree with, and we can then meet and confer and see the extent to which we can bridge any differences. Where we can't agree, we will briefly state each party's proposal and the justification therefore. The filing is due May 31, so I think we should discuss this the end of this week if possible. Please let me know when you can be available. I have shared this with California AG as well.

Regards,
Scott

I have attached Word and PDF versions of the proposed draft Joint Case Management Statement to this email. I have also included the DOJ's Standard Specification for the Production of ESI to be attached as Exhibit A pursuant to Section 8(b) of the proposed draft Joint Case Management Statement.

Please feel free to let me know if you have any questions.

Sincerely,

Shane D. Wagman
Trial Attorney
U.S. Department of Justice, Antitrust Division
Networks & Technology Enforcement Section
450 Fifth Street, NW, Suite 7100
Washington, DC 20530
(202) 353-0074

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EXHIBIT C

Wagman, Shane

From: Sacks, Scott
Sent: Friday, May 24, 2013 9:07 AM
To: 'Brown, Thomas'; 'Nicole Gordon'
Cc: Wagman, Shane; 'Zun, Samuel C.'; 'Behre, Kirby D.'
Subject: RE: meet and confer

Tom: We can be available next week as proposed, Thursday at 4 p.m. Regards, Scott

From: Brown, Thomas [mailto:tombrown@paulhastings.com]
Sent: Friday, May 24, 2013 6:48 AM
To: Sacks, Scott; 'Nicole Gordon'
Cc: Wagman, Shane; Zun, Samuel C.; Behre, Kirby D.
Subject: RE: meet and confer

Scott.

We see no need for this call to take place today. Please let me know whether you can be available as proposed next week. If not, please identify another time next week when you might be available.

Best,

TPB

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

From: Sacks, Scott [Scott.Sacks@usdoj.gov]
Sent: Thursday, May 23, 2013 10:36 AM Pacific Standard Time
To: Brown, Thomas; Nicole Gordon
Cc: Wagman, Shane; Zun, Samuel C.; Behre, Kirby D.
Subject: RE: meet and confer

Tom: Thank you for your prompt response. I think it would be very useful for us to have a call today or tomorrow to discuss your proposal. Absent something I am missing, I doubt we would agree to such a stipulation and would plan to file the Statement as required. I can be available some of this afternoon (or evening by cell if more convenient) and tomorrow after 11 am DC time as suggested below. Otherwise, we will be available next Thursday as you propose. Regards, Scott

From: Brown, Thomas [<mailto:tombrown@paulhastings.com>]
Sent: Thursday, May 23, 2013 12:36 PM
To: Sacks, Scott; 'Nicole Gordon'
Cc: Wagman, Shane; Zun, Samuel C.; Behre, Kirby D.
Subject: RE: meet and confer

Scott,

Thanks for your note. We continue to believe that these discussions are premature. We suggest that the parties schedule time next week to discuss a stipulation putting off the CMC until after the Court rules on our MTD. We are available for such a discussion at 4 pm et next Thursday.

Best,

TPB

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

From: Sacks, Scott [Scott.Sacks@usdoj.gov]

Sent: Thursday, May 23, 2013 07:48 AM Pacific Standard Time

To: Brown, Thomas; Nicole Gordon

Cc: Wagman, Shane

Subject: meet and confer

Tom and Nicole: I propose we have a meet and confer call tomorrow any time convenient for you both after 11 a.m. DC time. We can talk about going forward and deal with any issues in the draft that you are ready to talk about, and identify those that are not at issue. After looking at the just revised cms model and the model stipulated e-discovery order, I still think we don't need a separate order but would simply add some language to Para 8 of the draft I sent to you earlier. Below is the draft language I would add to Para. 8b, taken directly from the e-discovery model:

b. Production of Documents and ESI.

The parties have considered entering into a stipulated e-discovery order. The foreseeable e-discovery issues are addressed in this section and Paragraph 6 of this Order. The parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court's Guidelines for the Discovery of ESI. The parties agree that in responding to an initial Fed. R. Civ. P. 34 request, they will meet and confer about the methods to search ESI in order to identify ESI that is subject to production and filter out ESI that is not subject to discovery. The parties shall designate liaisons to each other who are and will be knowledgeable about and responsible for discussing their respective ESI, and the parties will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention. Each e-discovery liason will be, or have access to to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter.

The parties shall produce ...

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