
AMERICAN ARBITRATION ASSOCIATION

EMMANUEL D. KEPAS,

ORDER ON MOTION TO COMPEL

Claimant,

Case No. 77 160 00465 06 JOJO

vs.

Arbitrator: Theresa L. Corrada

EBAY, INC., a Delaware Corporation,

Respondent.

I. INTRODUCTION

These matters to be decided have been raised in Claimant Emmanuel D. Kepas's Motion for Default Judgment or, in the Alternative, Motion for Sanctions and Order Compelling Inspection by Forensic Examiner. Respondent eBay, Inc. filed a Memorandum in Opposition to Claimant's Motion for Default Judgment, and Kepas filed a Reply Memorandum.

Kepas requests default judgment against eBay for alleged discovery abuses and alteration of a document. In the alternative, Kepas asserts an inference that documents eBay has failed to produce and/or destroyed would be unfavorable to eBay. Kepas also seeks an order requiring eBay to submit the computers of Dutton, Jones, Anderson, Bringuel, Weber and Heitland and eBay's Outlook server for inspection by a forensic examiner to determine: 1) whether additional relevant email exists; 2) whether other documents produced have been altered; 3) who altered the December 17, 2005 email; 4) the time of creation and the author/creator of the PIP; and 5) the time of creation and the author/creator of the Summary Investigation. Finally, Kepas seeks an award of fees.

eBay asserts that it has not engaged in any discovery abuses and default judgment is unwarranted. As to all documents Kepas claims eBay failed to produce, eBay asserts that it has not failed to produce the documents, that it has searched for and cannot find the documents, that some of the documents Kepas seeks are not relevant and/or likely never existed, and that there is no evidence that a document was intentionally altered by eBay or that the existence and production of two versions of the same document actually hindered Kepas's prosecution of his case. eBay further argues that there is no need for a forensic examiner because its search has been thorough.

Because Kepas raised more than a dozen issues, I shall address them separately below, roughly in the order Kepas raised them.

II. THE ISSUES

A. Email Between Jones and Dutton Pertaining to Kepas.

Kepas testified that Dutton told him that Jones sent her an email personally attacking Kepas. Kepas raised this matter in a hotline complaint. Later, Kepas complained to eBay management that he was being retaliated against for his hotline complaints. Thus, Kepas contends, the email between Dutton and Jones concerning him is particularly relevant to his claims.

In written discovery, Kepas requested emails between Dutton, Jones and Patterson pertaining to him. It appears that eBay produced some responsive email, but the email from Jones to Dutton that Kepas says Dutton told him about was not included. After Dutton testified in her deposition that she saves most business-related email in her email folders and that eBay also archives email, Kepas asked eBay to search Dutton's email folders and eBay's archives again for email responsive to his discovery request.

Thereafter, eBay's counsel asked Dutton and Jones whether they had any additional documents that had not yet been produced. This request yielded several more emails, which were produced to Kepas, but still the email from Jones to Dutton mentioned above was not included. eBay asserts that it has conducted a thorough search and has produced all emails it can locate between Jones and Dutton about Kepas.

eBay does not believe that email Kepas claims Jones sent to Dutton personally attacking him ever existed because, it claims, Jones testified that she never sent such an email to Dutton. But Kepas points out that, in fact, Ms. Jones testified that she did not *recall* sending such an email. eBay also says Dutton testified that Jones did not send her an email indicating that Jones disliked Kepas and that she (Dutton) never told Kepas that Jones had sent such an email. (eBay did not provide me the deposition page upon which this testimony appears, but Kepas does not contest it.)

It is beyond obvious that eBay cannot produce a document that never existed. However, the fact that Dutton and Jones testified that they "do not recall" such an email and have not voluntarily turned it over does not rationally lead to the conclusion that the email never existed. If eBay's search efforts were, as indicated in the correspondence, limited to simply asking the very subjects of Kepas's complaints to preserve and voluntarily turn over documents that may cast them in an unfavorable light or support Kepas's claims, such efforts were inadequate. It may very well be that eBay's personnel would carry out this task honestly and in good faith; however, witnesses, regardless of their trustworthiness, should not be given the opportunity to filter evidence by deleting unfavorable documents or even by innocently failing to produce documents that they did not, from a lay perspective, deem pertinent.

eBay's bald assertion that it has diligently searched for such documents and cannot find them has not allayed Kepas's suspicion that email about him between Dutton and Jones exists that still has not been produced. Kepas's suspicions are understandable, given the dilatory nature of eBay's document production. As Kepas points out, eBay failed to produce several potentially

relevant documents requested in discovery until very late in the discovery period, and then only after Kepas learned that such documents existed by deposing witnesses.

Related to this issue is Kepas's concern that eBay has not taken appropriate measures to preserve relevant documents because Human Resources (HR) representatives Anderson and Heitland both testified that they did not instruct potential witnesses not to destroy documents or take any action to collect and preserve relevant documents. In addition, Kepas contends that Mariele Weber testified that she received an email from Jessica Pigott in August 2007 expressing concerns about Dutton's instruction for her to "clean out" Dutton's email in-box while Dutton was out of the office and that Weber did not instruct Pigott not to delete the emails. (Kepas did not provide a transcript of this testimony.)

In response, eBay contends there is no evidence that Dutton was seeking to delete email relevant to this lawsuit because her email to Pigott occurred in August 2007, nearly a year after Kepas's employment was terminated, and that Pigott did not delete any emails from Dutton's in-box. eBay did not provide any evidence supporting this assertion. Moreover, eBay did not address the testimony of Anderson and Heitland that they took no action to preserve potentially relevant documents or explain what actions, if any, it did take to ensure the preservation of relevant documents.

"Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC* ("*Zubulake V*"), 229 F.R.D. 422, 431 (S.D.N.Y. 2004). "A party's discovery obligations do not end with the implementation of a 'litigation hold'--to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Id.* at 432. "**[I]t is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.**" *Id.* Counsel has an affirmative obligation to "communicate directly with the 'key players' in the litigation, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto. Because these 'key players' are the 'employees likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place." *Id.* at 433-34.

eBay's discovery obligations have not been met if it did not take affirmative steps to prevent the destruction of relevant documents and if it did nothing more to search for documents than to simply ask witnesses to forward whatever documents they happened to have kept. eBay's general assertions that no documents have been destroyed and that it has "searched" for relevant documents do not disclose: 1) whether eBay took specific action to preserve relevant documents and whether that action was taken as soon as it knew this action was imminent; 2) whether any "litigation hold" was implemented and how it was enforced; 3) whether any of the witnesses may have (intentionally or unintentionally) deleted potentially relevant information; 4) what steps eBay took to identify potential sources of discoverable information, including archived email that may have been deleted from witnesses' files; and 5) how these potential sources were searched, who searched them and when.

Therefore, I order as follows. Within fifteen days of the date of this Order, eBay shall file an affidavit or affidavits, signed under oath by a person or persons with direct knowledge of the matters stated therein (the "Affidavits"). The Affidavit(s) shall describe: 1) all efforts made by eBay (and its employees and counsel) to secure and prevent the destruction of documents (whether paper or electronic) that may be relevant to this case and when such actions were taken; 2) all efforts made to locate documents responsive to Kepas's discovery request concerning email among Dutton, Jones and Patterson pertaining to him, as well as other documents discussed below; 3) what, if any, efforts eBay made to retrieve requested email and other documents discussed below from system archives.

B. December 17, 2005 Email

eBay produced two versions of an email dated December 17, 2005. The second one, produced fairly recently, contains language that was omitted from the one produced earlier. Kepas surmises that someone must have altered the first email to make it more supportive of eBay's defenses in this lawsuit. Kepas concludes that if this document was altered, other documents may have been altered as well.

eBay argues that the fact that it produced both versions negates any inference of bad faith. eBay argues that if it had deliberately altered the email to gain some advantage in this suit, it would not have produced the original. eBay further argues that its production of the two versions of the same email did not hinder Kepas's preparation of his case in any way and that Kepas is free to explore in discovery the meaning of the existence of the two versions of the same email.

eBay avoids providing any explanation of why the two versions of the email exist, further fueling Kepas's suspicions. There *may* be a perfectly innocent and plausible reason why the two versions exist, but eBay is in a better position to determine this than Kepas is. Therefore, eBay shall investigate why the two versions exist and provide an explanation (if any) in its Affidavit(s). In addition, eBay shall produce both versions of the email electronically in their native form, with all metadata intact, to Kepas's counsel within 15 days.

C. Documents Pertaining to the "Fairly Big HR Issue" Noted in Dutton's 2004 Individual Performance Planning Review

Dutton's 2004 Individual Performance Planning Review ("IPPR") noted that Dutton had tried to identify the source of certain complaints against her, creating a "fairly big HR issue." Kepas contends that one would expect there to be documentation pertaining to a "fairly big HR issue," yet no documents were produced.

eBay says that it has searched and not found any documents pertaining to this and that there is no evidence such documentation exists. eBay claims that the author of the IPPR, Eric Salvatierra, testified that the issue was never reported to HR and that his remark simply meant that this was a "personnel" issue on which he orally counseled Dutton. (eBay did not provide the transcript in which this testimony was given, but Kepas does not dispute it.)

Obviously, eBay cannot produce documents that do not exist, and it is not clear whether such documents ever existed. On the other hand, Kepas is entitled to some assurance that eBay took reasonable measures to locate any documents. Therefore, the Affidavit(s) to be submitted by eBay shall describe all efforts it has made to locate the documents (if any) concerning this "HR issue."

D. Colgan's Notes of May 2005 Skip Level Meeting

Kepas complains that eBay has not produced Chris Colgan's notes of May 2005 Skip Level Meeting in which Dutton was discussed. Kepas believes there are notes because Berger testified that he believed Colgan took notes. Again, eBay says it has searched but could not locate any such notes. (Colgan is no longer employed by eBay.) Again, it is not clear whether Colgan actually did take notes or whether eBay would have the notes. The eBay Affidavit(s) should describe all efforts it made to locate the Colgan notes.

E. August or September 2007 Complaint(s) about Dutton

Susan Dutton testified a complaint was filed against her in September 2007, but she did not know what it was about. Janna Heitland also confirmed that at some unknown time Jason Hughes had complained about Dutton, but that she did not know the nature of the complaints.

For some unexplained reason, eBay did not initially produce these complaints. However, on January 10, 2008, eBay did produce an email from Hughes to Anderson dated August 9, 2007 re: "Susan Dutton concern" (the "Hughes Complaint"). eBay's counsel advised Kepas's counsel that eBay believes that this email is the complaint referred to by Dutton and Heitland and that no other complaints about Dutton in this time frame exist. Thus, this issue appears to be resolved. However, eBay should attest to this in its Affidavit(s), and describe all efforts it has made to determine whether there were any other complaints against Dutton that it has failed to disclose to Kepas.

F. Pigott Complaints

In his email, Hughes mentioned that he asked Jessica [Pigott] to create a document about her concerns with Dutton and address it with HR. Hughes stated that he believed she would set up an appointment with Anderson or Heitland "very soon." Hughes also suggested that "we each write up a document about our own experiences and some issues that are out there still." Hughes's email also suggests that there would be a meeting with the HR department about these concerns.

According to Anderson, Pigott did discuss her concerns with Anderson. Pigott later discussed other concerns with Mariele Weber in a meeting that lasted half an hour to an hour. Weber testified that she generally makes notes when interviewing employees who have complaints. (Heitland, who was not involved in this particular complaint, also testified that it was her standard practice to keep notes and summaries of employee complaints.) Weber testified that Lissa Minkin-Marquez investigated Pigott's complaints. Pigott also visited or spoke to HR about Dutton's request that Pigott clean out Dutton's in box.

Kepas complains that eBay has not produced any documentation of Pigott's complaints or HR's investigation of them.

In correspondence, eBay's counsel stated that Anderson and Weber would look for other documentation pertaining to these complaints and determine whether to produce them, as these complaints occurred almost 18 months after Kepas's employment ended. eBay also says it has searched for documents and that none exist. However, according to Kepas, eBay subsequently produced (on February 22, 2008, the date eBay filed its response to Kepas's motion) a series of emails from Pigott to HR, including a particularly relevant one in which Pigott reported that Dutton seemed to be acting "peculiar" towards her after she complained.

It is unclear whether eBay initially withheld these documents on grounds of relevance (due to the fact that the events occurred long after Kepas's employment ended) or whether eBay just failed to locate the Pigott documents before February 22, 2008. Either way, eBay's conduct is problematic. eBay is not entitled to withhold responsive documents on grounds that they are "irrelevant." My previous discovery Order notes, "The parties have reached an agreement on a resolution of the dispute over Interrogatory No. 1 as follows: eBay will produce all complaints of discrimination, harassment and nontrivial inappropriate conduct, including complaints of unequal or unfair treatment and/or retaliation made to Human Resources, the supervisors of Dutton, Jones or Patterson, or the eBay Ethics Hotline, concerning or referring to Dutton, Jones and/or Patterson." There was no cut-off date in this agreement.

If, on the other hand, eBay failed to produce the documents earlier because it only just found them, it appears that eBay's previous efforts to search for requested documents was inadequate. Kepas is entitled to know whether appropriate and adequate efforts have been made to locate these documents, as well as others that may exist. Therefore, eBay must describe in its Affidavit(s) all efforts made to locate documents related to Pigott's complaints and the related HR investigation.

I note that the testimony strongly suggests that it is HR's general practice to document such complaints and investigations. If so, Kepas will likely explore at the hearing why Pigott's complaint was not documented and, if it was documented, why such documents, which seem to be directly responsive to Kepas's discovery requests, were not preserved and produced. There may be perfectly reasonable explanations, or there may not be. I shall draw whatever inferences are appropriate, if any, in light of all the evidence at the hearing.

G. Vahdati Complaint Mentioning Dutton

Heitland testified that Carolyn Vahdati called the Alertline with a concern that Dutton might fire her because of rumors that were being spread about Vahdati by another employee. Kepas claims that Vahdati's complaint (eventually produced by eBay) stated that she *feared* Ms. Dutton would *unfairly* terminate her employment and implies that eBay improperly withheld the complaint from him. eBay explains that it did not produce the complaint because it was not a complaint about Dutton, but a complaint about another employee who was spreading rumors about Vahdati.

Since neither party provided a copy of Vahdati's complaint to me, I cannot determine which party most accurately describes the complaint. But even if eBay's description is accurate, as noted above, eBay agreed to produce "complaints . . . concerning *or referring to* Dutton, Jones and/or Patterson." Clearly, the complaint did *refer to* Dutton, even if it was not *about* her, and it should have been produced to Kepas earlier. In any event, the issue is now moot, since the complaint was ultimately produced to Kepas. If eBay has withheld any other complaints concerning *or referring to* Dutton, Jones and/or Patterson, those complaints should be produced to Kepas within five days.

H. Watz Complaint About Dutton

Phil Watz testified he complained about Dutton to Hughes orally in October 2007 and to "someone from corporate" whose name he cannot recall. He also spoke about this issue in a skip level meeting in 2005. Watz's complaint on both occasions was that Dutton was "micromanaging" him because of a disciplinary action he had received due to inappropriate language. Watz claimed he had improved his language sufficiently for the disciplinary action to be "stricken from the record" but that Dutton still held it against him by withholding a promotion. Kepas contends that documentation pertaining to Watz's complaint was not produced, nor was Watz identified as someone who complained about Dutton in eBay's interrogatory responses.

eBay initially states that it need not produce information pertaining to Watz's complaint because it had nothing to do with discrimination, harassment or inappropriate behavior on the part of Dutton. I disagree. eBay is not entitled to withhold information it deems irrelevant. Moreover, eBay agreed to produce all complaints concerning Dutton, including complaints of unfair treatment, of whatever sort. If documentation exists pertaining to Watz's complaint, it must be produced. Additionally, if eBay has withheld other information pertaining to complaints about Dutton, Jones and/or Patterson on grounds that the complaints are not similar to Kepas's or do not involve discrimination, harassment or inappropriate behavior, eBay must produce this information immediately. The parties can argue about relevance at the hearing.

eBay states that it has searched and cannot locate any documents pertaining to Watz's complaint. Watz did not testify that he ever made a *written* complaint, so it is possible that documentation does not exist. However, eBay should include in its Affidavit(s) a description of all efforts made to locate any documents pertaining to Watz's complaint.

I. Ericsson Complaint About Dutton

Watz testified that Clint Ericsson told him that he (Ericsson) was going to HR with complaints about Dutton. He did not know who Ericsson may have spoken to in HR. Berger testified that he heard Ericsson complain that Dutton was reclassifying his job and taking away his projects and that he (Berger) was "under the impression" that Ericsson was keeping records that he submitted to HR. Hughes also testified that Ericsson showed him approximately twenty pages of documentation pertaining to complaints and said he was going to send it to "somebody in the organization when he exited the company."

Neither witness confirmed that Ericsson actually *did* submit the documentation or any other written complaint to HR or upper level management. eBay contends it has searched and cannot locate such records; however, it is unclear what specific efforts eBay made to locate documents pertaining to Ericsson's complaint. Therefore, eBay should include in its Affidavit(s) a description of all efforts it has made to locate these documents.¹

J. Wagner Report of Silvy Complaint About Dutton

Anderson testified that Sonny Wagner reported to Hughes an incident involving Dutton that she (Wagner) heard about from a co-worker, Silvy. Hughes then reported the incident to Anderson. Reportedly, Silvy said that while Dutton and Silvy were on a business trip in June 2007, they spent the evening in a bar with three men (not eBay employees) and that Dutton had "paired off" with one of the men later that evening, leaving Silvy with the other two men. Kepas complains that eBay has not produced documentation pertaining to Wagner's reports of Dutton's behavior on this business trip in June of 2007, or any investigation thereof.

eBay says it need not produce such documentation, if any exists, because the incident is irrelevant; Silvy herself actually had no complaint about the incident in question. (eBay did not provide the pertinent deposition testimony, but this was not disputed by Kepas.).

I disagree with eBay's contention. A complaint is a complaint regardless of whether it was made by the employee involved in the incident or by another employee who heard about the incident. Again, eBay is not entitled to withhold information requested in discovery on grounds that eBay does not deem it relevant.

It is not clear whether any such documentation ever existed. Wagner did not testify that her report to Anderson was reduced to writing, and there is no indication that anyone "investigated" the incident or prepared documentation of it. However, if documents do exist pertaining to this exchange of information about Dutton's conduct, eBay must produce them. If it cannot locate any such documents after a thorough search, it must describe in its Affidavit(s) all efforts made to locate documents pertaining to this incident.

K. Whalen Complaints about Jones

Joyce Whalen testified that twice in late 2005 she reported to Anderson what she considered to be offensive, ageist comments made by Wendy Jones and documented the incidents in email to him. Whalen stated that Anderson told her he would talk to Jones about it. She also testified that in 2005 she complained to Anderson either orally or in an email on two other occasions about Jones' use of humor in the workplace, specifically her reference to women as "chicks" and her comment that she and a training manager dressed alike. Whalen claims that Anderson told her he had received other reports of Jones's inappropriate comments and that he

¹ Kepas also complains that eBay failed to identify Ericsson as an employee who complained about Dutton in response to Kepas's interrogatories even though Hughes, an eBay manager knew about the complaints. The issue was raised for the first time in the reply brief, and it is unclear what relief, if any, Kepas seeks since he now has the information.

needed to "get her back on track." In contrast to Whalen's testimony, Anderson testified that he was not aware of any complaints Whalen made about Jones.

Whalen also testified that Kathy Dalpes told her that several directors (including Dalpes, Payne and possibly Fawson) met with Anderson and Bringuel to discuss Jones' inappropriate behavior and that she heard this from Dalpes sometime between August 2005 and March 2006.

eBay says Bringuel testified that he does not remember such complaints (although the transcript of this testimony was not provided). In any event, eBay claims it searched and was unable to locate any documents pertaining to the matters Whalen testified to.

In his reply, Kepas states that he recently obtained one of Whalen's above-mentioned emails to Anderson directly from Whalen (who is no longer employed by eBay). Apparently, either Anderson failed to retain a written employee complaint potentially concerning perceived discriminatory comments, or eBay's search efforts were not sufficient to find such a complaint, even after it was specifically described and requested. Either way, Kepas will likely explore these issues at the hearing, and I shall draw whatever inferences are appropriate in light of all the evidence.

In the meantime, Kepas is entitled to know, and eBay must include in its Affidavit(s), what specific efforts eBay made to locate the emails from Whalen to Anderson and any other documents that may exist pertaining to the issues Whalen discussed, as described above.

L. Dombrowski Complaint about Jones

eBay preemptively raised the issue of a sexual harassment complaint that Carol Dombrowski made to HR about Jones in November 2007. eBay says prior arbitrator, Carol Clawson, limited Kepas's discovery to a 5-year period and that Kepas chose four years before and one year after his termination. eBay refuses to produce Dombrowski's complaint both because it falls outside that 5-year period and because Kepas has not made a sexual harassment complaint against Jones so, it contends, the complaint is not relevant. In reply, Kepas points out that Jones testified that she was told the complaint also involved "fear of retribution."

I am unaware of any orders the prior arbitrator made concerning discovery in this case. It was my understanding that she recused herself before ruling on Kepas's prior motion to compel. In any event, my Order dated November 5, 2007 governs the discovery at issue here. As mentioned above, that Order does not contain a cut-off date for complaint information, and Dombrowski's complaint clearly falls within the scope of the complaints eBay previously agreed to produce. The Dombrowski complaint and related documents must be produced to Kepas within five days. I shall entertain eBay's relevance arguments at the hearing.

M. Kepas 2006 Performance Improvement Plan and Investigation Summary

Kepas states that eBay relies on a Performance Improvement Plan ("PIP") for Kepas dated March 7, 2006 to support its contention that Kepas was terminated for performance deficiencies. Anderson testified Dutton wrote the PIP, and he only edited it. Kepas contends that email from Dutton to Anderson on March 6, 2006 re "Items for the PIP for Manny" suggests

Anderson authored the PIP. Kepas contends that eBay also produced an Investigation Summary that appears to have been prepared by Anderson, but Anderson testified that some sections were written by Mike Bringuel. Kepas asks to have a forensic examiner determine who actually authored these documents.

The email from Dutton to Anderson on March 6, 2006 is subject to interpretation, but it does not suggest, on its face, that Anderson wrote the PIP and not Dutton. Perhaps Dutton was summarizing her points to Anderson before she wrote the PIP. In any event, it seems clear that both Dutton and Anderson worked on the PIP and that the extent of their input was fully explored in their depositions. Likewise, it appears that Kepas had an opportunity to fully explore in deposition what contributions Bringuel made to the Investigation Summary. A forensic examiner could not shed enough additional light on these issues to justify the expense.

However, because these documents seem to be central to the case, I will order that eBay produce all versions, drafts and final versions of both the PIP and the Investigation Summary in their native formats, with all metadata intact. If Kepas still believes a forensic examiner is necessary, he can hire one at his own expense to review the data pertaining to these documents.

III. CONCLUSION

Kepas's request for default judgment against eBay is denied. There has not been a sufficient showing of willful misconduct on the part of eBay to support such a drastic sanction.

Kepas seeks an inference that the documents eBay has failed to produce would be unfavorable to eBay. As mentioned above, it would be premature for me to determine whether any such inference is appropriate. However, if the evidence presented at the hearing convinces me that eBay has destroyed evidence, or that eBay or its HR department failed to maintain adequate records of employee complaints and investigations, I shall not hesitate to draw whatever inferences are appropriate in the context of the other evidence in the case.

Kepas seeks an order requiring eBay to submit the computers of Dutton, Jones, Anderson, Bringuel, Weber and Heitland and eBay's Outlook server to inspection by a forensic examiner to determine: 1) whether additional relevant email exists; 2) whether other documents produced have been altered; 3) who altered the December 17, 2005 email; 4) the time of creation and the author/creator of the PIP; and 5) the time of creation and the author/creator of the Summary Investigation.

I do not believe that a forensic examiner is necessary for items 3, 4 and 5, because I have ordered eBay to produce the documents, and all drafts thereof, in their native form with all metadata intact, which should reveal this information. Kepas can hire a forensic examiner to review this data if he desires.

As to item 2 (a forensic examination to determine whether other documents have been altered), such a suggestion appears to me to be unworkable and impractical. Kepas has not explained what procedure a forensic examiner would employ to determine whether other documents have been altered, what the cost of such a procedure would likely be, and who should

bear such cost. All we know at this point is that there is one single document that appears in two versions. I have asked eBay to investigate this and provide an explanation, if one can be found. Once we know why the two versions exist, I will determine whether any further investigation is necessary.

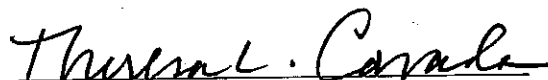
As to item 1, a forensic examiner is unnecessary if eBay and its counsel have indeed made sufficient efforts to locate the requested documents. Whether eBay's efforts have been sufficient should be apparent from the Affidavit(s) I have directed eBay to submit. In my view, eBay will have made sufficient efforts to locate the documents if:

- it has made a thorough and reasonable effort to determine the likely sources, locations, paper files, databases and/or archives where such documents would likely be located (if they do exist);
- a qualified information technology specialist (who is not directly involved in this case and who does not have a supervisory or subordinate relationship with any of the witnesses in this case) has searched the pertinent electronic databases, files and archives identified under step 1, including the computer files of Dutton, Jones, Anderson, Bringuel, Weber and Heitland and eBay's Outlook server, to locate all of the requested documents;
- with regard to paper files, qualified eBay personnel (who are not directly involved in this case and who do not have a supervisory or subordinate relationship with any of the witnesses in this case) or law firm personnel have searched the files where such documents might be located (if they exist), including files that may be warehoused or off-site, if any;
- the search for documents, both paper and electronic, has been conducted under the specific instruction and direct supervision of eBay's counsel in this case.

I expect the Affidavit(s) to contain specific information about what sources of data were searched, what terms were searched and how the searches were conducted, rather than generalized statements. If the Affidavit(s) submitted by eBay demonstrate that its efforts to locate the requested documents have been insufficient, I intend to revisit Kepas's request to order eBay to submit the relevant computers and archives to a forensic examination at eBay's expense.

Finally, Kepas seeks an award of fees. I shall reserve this issue for a ruling at a later date.

Dated this 7th day of March, 2008.


Theresa L. Corrada, Arbitrator