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eBay Inc.

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

EMMANUEL D. KEPAS,
Claimant,
v.
EBAY INC.,
Respondent.

**REPLY MEMORANDUM IN SUPPORT
OF EBAY INC.'S MOTION FOR
PROTECTIVE ORDER**

Case No. 77 160 00465 06 JOJO

Respondent eBay Inc. ("eBay") submits this Reply Memorandum in support of its Motion for Protective Order. For the reasons set forth below, the arbitrator should issue a protective order preventing the deposition of Margaret C. Whitman, eBay's President and Chief Executive Officer, from proceeding. eBay is also entitled to an award of sanctions against Claimant Emmanuel D. Kepas ("Kepas") and/or his counsel in the amount of eBay's attorneys' fees and costs incurred in bringing its motion for protective order.

ARGUMENT

I. KEPAS SHOULD NOT BE ALLOWED TO DEPOSE MS. WHITMAN.

In support of his request to depose Ms. Whitman, Kepas relies on inapposite cases standing for the proposition that highly-placed executives are not immune from being deposed. This is true, *if the executive has unique or superior knowledge of discoverable information and*

when the party requesting the deposition has already exhausted less intrusive discovery methods.¹ As of the date of this Reply Memorandum, Kepas has taken 20 depositions. However, not one of the 20 witnesses deposed to date has indicated that Ms. Whitman possesses any unique personal knowledge of the matters at issue. Realizing this, Kepas attempts to shift his burden to eBay, arguing that “eBay fails to attach an affidavit from Ms. Whitman” demonstrating her lack of unique knowledge. eBay, however, is not required to do so—Kepas must establish cause for Ms. Whitman’s deposition. Regardless, eBay has attached an affidavit from Ms. Whitman to this Reply Memorandum. (See Whitman Affidavit, Exhibit A.) Despite Kepas’ bald speculation to the contrary, Ms. Whitman’s Affidavit clearly establishes what Kepas already knows—that Ms. Whitman possesses no personal knowledge of the matters at issue.

Kepas speculates that “because Ms. Whitman joined eBay in March 1998, as its CEO and President, it is *highly likely* that Ms. Whitman witnessed Ms. Dutton’s inappropriate and sexually suggestive conduct at the eBay Christmas parties, including the incident . . . in which Ms. Dutton

¹ See *Thomas v. IBM*, 48 F.3d 478, 483 (10th Cir. 1995) (affirming grant of protective order precluding deposition of chairman of board of directors of IBM because chairman had no knowledge of employee claiming age discrimination or knowledge of employee’s work); *Baine v. Gen’l Motors Corp.*, 141 F.R.D. 332, 335-36 (M.D. Ala. 1991) (granting protective order precluding deposition of vice president of General Motors and highest ranking officer of Buick division); *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979) (affirming protective order blocking deposition of Upjohn’s president); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) (upholding district court’s protective order barring plaintiffs from deposing Farmers’ chief executive officer); *Evans v. Allstate Ins. Co.*, 216 F.R.D. 515, 519 (N.D. Okla. 2003) (granting protective order precluding depositions of senior corporate officers of Allstate, stating: “Rule 26(b) gives the court power to regulate harassing or burdensome depositions, and that unless a high level executive has unique personal knowledge about the controversy, the court should regulate the discovery process to avoid oppression, inconvenience, and burden to the corporation and to the executive”). Kepas makes no attempt to distinguish the *Salter*, *Lewelling*, or *Evans* cases, nor could he. He attempts to distinguish *Thomas* and *Bain* merely by arguing that, unlike the executives in those cases, Ms. Whitman’s “*expected knowledge*” is unique and personal. (Emphasis added.) As discussed below, this is simply untrue.

gave an eBay executive a lap dance.” (Emphasis added.) This argument is absurd.² No witness to date has testified that he or she personally witnessed Ms. Dutton give an eBay executive a “lap dance” at an eBay Christmas party.³ More importantly for purposes of this motion, no witness to date has testified that Ms. Whitman witnessed the alleged “lap dance” or was even aware of the allegation.⁴ The former executive for whom Kepas alleges Ms. Dutton performed a “lap dance” is Maynard Webb, *not Ms. Whitman*. And the “lap dance” is alleged to have occurred *before* Kepas was even employed by eBay. Even putting aside the foregoing facts which clearly undermine Kepas’ request to depose Ms. Whitman, Ms. Whitman states in her Affidavit that

² Apparently, Kepas believes that any person who was employed by eBay at the time of the alleged lap dance incident is subject to being deposed.

³ (*See, e.g.*, Deposition of Will King at 13 (“Q: Have you ever heard anyone tell a story about [Susan] giving a lap dance to somebody at a Christmas party? A: No. Q: You never heard that? A: No. Q: Do you attend Christmas parties? A: Yes.”); Deposition of Scott Berger at 18 (“Q: Did you ever hear stories that Susan had performed a lap dance at a Christmas party? A: I have not. Q: You never did? A: No.”); Deposition of Philip Watz at 14 (“Q: Have you ever heard any stories about Susan performing a lap dance on an eBay employee at a Christmas party? A: No.”); Deposition of Bryan Kaufman at 9 (“Q: Did you ever hear stories about her performing a lap dance at a Christmas party? A: No.”); Deposition of Scott Newman at 26 (“Q: So you don’t recall a lap dance being performed at a Christmas party on Maynard Webb? A: No”); Deposition of Jon Wakeham (“Q: Have you heard that Ms. Dutton performed a lap dance on an eBay executive? A: Never.”); Deposition of Gabrielle Pezely at 31 (“Q: Did you ever hear a story or rumor that Susan Dutton performed a lap dance on an eBay executive at a Christmas party? A: Once a paper was published. A: You had never heard that before Manny’s complaint was published? A: No.”); Deposition of Aubrey Anderson at 19 (“Q: Have you ever heard stories that Susan performed a lap dance on an eBay executive at a Christmas party? A: I have heard that, but I only read it from the lawsuit that Manny brought up.”).)

⁴ In his Opposition Memorandum, Kepas alleges that Joyce Whalen, a former eBay employee, testified that “Ms. Dutton gave an eBay executive a lap dance.” This statement is misleading. Ms. Whalen testified that she “wasn’t aware of the event” (Whalen Depo at 75:20), but that another employee told her about a Christmas party at which Ms. Dutton allegedly “danc[ed] very suggestively” in front of Maynard Webb *before Ms. Whalen was even employed by eBay*. (*See id.* at 52:24.) Importantly, Ms. Whalen did not testify that she was told Ms. Whitman witnessed the alleged event. Indeed, Ms. Whitman is not mentioned in Ms. Whalen’s deposition.

“[she has] never witnessed inappropriate or sexually suggestive conduct by Ms. Dutton *at any time.*” (Whitman Aff. ¶ 7 (emphasis added).)

Kepas next argues that Susan Dutton, Kepas’ supervisor, reported to Ms. Whitman when Ms. Dutton was developing mature audiences policies for eBay. According to Kepas, this fact is relevant because Ms. Dutton *might* have explained sexually explicit terms used in the mature audiences policies to Ms. Whitman. This speculation is also untrue. Ms. Dutton testified in her deposition that she did work on certain proposals concerning the mature audiences policies which were ultimately presented to Ms. Whitman. However, Ms. Dutton stated that the presentation to Ms. Whitman was made by managers in San Jose, California—Ms. Dutton participated by phone. Ms. Dutton also stated that she never met with Ms. Whitman in person concerning the mature audiences policies. (See Deposition of Susan Dutton, Vol. I, at 32:3-5 (“Q: Did you ever meet with Meg Whitman personally about this? A: I did not.”).) Moreover, Ms Whitman states in her Affidavit that “[a]lthough certain proposals concerning eBay’s mature audiences policies were presented to [her], [she] ha[s] no recollection of speaking to Ms. Dutton concerning such policies. Indeed, [she] ha[s] no recollection of meeting with Ms. Dutton *at any time.*” (Whitman Aff. ¶ 6 (emphasis added).) Thus Kepas’ bald speculation that Ms. Dutton *might have* explained the meaning of certain sexually explicit terms to Ms. Whitman is simply untrue.⁵

⁵ Regardless, as eBay explained in its memorandum in support of its motion for protective order, whether Ms. Dutton was aware of the meaning of certain sexually explicit terms is irrelevant and does not justify deposing eBay’s most senior executive. In this lawsuit, Ms. Dutton claims that she was unaware of the meaning of one sexually explicit term: “circle jerk.” This term, however, is not even alleged to be included or mentioned in eBay’s mature audiences policies (and, in fact, is not). Thus there would have been no reason for Ms. Dutton to have discussed this term with Ms. Whitman. Besides, if Kepas desires to know whether Ms. Dutton is aware of the meaning of certain sexually explicit terms, there are clearly less intrusive means of

Finally, Kepas speculates that Ms. Whitman might have personal knowledge concerning this case because he sent her a letter enclosing a draft complaint while he was still employed by eBay. Kepas further speculates that “because he was terminated *after* he wrote Ms. Whitman,” he should be entitled to inquire into whether Ms. Whitman reviewed his claims, and whether she participated in the decision to terminate his employment. Again, Kepas is wrong. As an initial matter, a plaintiff cannot subject a high-level executive to deposition merely by sending her a letter. Regardless, Ms. Whitman states in her Affidavit that although she “understands that Kepas alleges that he sent [her] a letter enclosing a draft complaint . . . , [she has] no recollection of receiving Kepas’ letter, [and that,] if such a letter was received by [her] office, [her] general practice is to have such mail forwarded to eBay’s legal department.” (Whitman Aff. ¶ 5.) Significantly, Ms. Whitman states in her Affidavit that she “was not involved in the decision to terminate Kepas’ employment with eBay.” (*Id.* ¶ 4.) Obviously, to the extent Ms. Whitman had any subsequent conversations with eBay’s legal department concerning Kepas’ draft complaint, such communications would be protected from disclosure by the attorney-client privilege.

In sum, Kepas has decided on a litigation tactic of harassing eBay by noticing the deposition of its President and CEO, Ms. Whitman, who possesses no personal knowledge concerning the facts of this case. Ms. Whitman is not alleged to have engaged in any harassing or discriminatory conduct toward Kepas; she was not involved in any investigation concerning Kepas’ claims; and she was not involved in the decision to terminate Kepas’ employment. Indeed, Ms. Whitman states in her Affidavit that she has “no recollection of meeting with or speaking to Kepas at any time.” (Whitman Aff. ¶ 3.) Because Ms. Whitman possesses no

obtaining this information. By way of example, Kepas could have asked Ms. Dutton if she was aware of the meaning of such terms during her deposition, which spanned nearly two days.

unique personal knowledge of the matters at issue, deposing her would be oppressive, inconvenient, and burdensome. This result is not avoided by the fact that Kepas promises to keep his deposition to one hour. Thus the arbitrator should enter a protective order preventing Kepas from deposing Ms. Whitman.

II. EBAY IS ENTITLED TO SANCTIONS.

As set forth above, Kepas' arguments in support of his request to depose Ms. Whitman are frivolous. However, despite eBay's repeated objections, Kepas and his counsel have refused to withdraw their improper deposition notice. eBay is therefore entitled to an award of sanctions in the amount of its attorneys' fees incurred in bringing this motion for protective order.

DATED: February 7, 2008.

STOEL RIVES LLP


Matthew M. Durham

Justin B. Palmer

Attorneys for Respondent

eBay Inc.

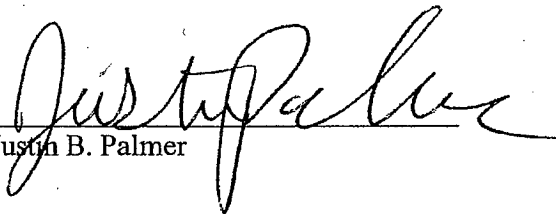
CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF EBAY INC.'S MOTION FOR PROTECTIVE ORDER was served on the 7th day of February 2008, to the following by the method(s) indicated:

D. Scott Crook
Kathryn J. Steffey
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215 South State Street, Suite 650
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Via email

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Fresno, CA 93704
Via US mail


Justin B. Palmer

**EXHIBIT A:
AFFIDAVIT OF MARGARET C. WHITMAN**

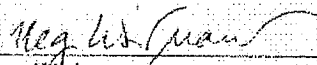
4. I was not involved in any disciplinary action directed at Kepas while he was employed by eBay; I was not involved in any investigation concerning Kepas' allegations of harassment or discrimination; and I was not involved in the decision to terminate Kepas' employment with eBay.

5. I understand that Kepas alleges that he sent me a letter enclosing a draft complaint while he was still employed by eBay. I have no recollection of receiving Kepas' letter. If such a letter was received by my office, my general practice is to have such mail forwarded to eBay's legal department.

6. I also understand that Kepas alleges that a current eBay employee, Susan Dutton, reported to me while she and other employees were developing mature audiences policies for eBay. Although certain proposals concerning eBay's mature audiences policies were presented to me, I have no recollection of speaking to Ms. Dutton concerning such policies. Indeed, I have no recollection of meeting with Ms. Dutton at any time.

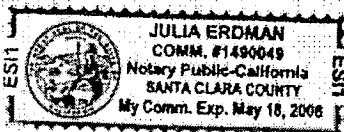
7. Finally, I have never witnessed inappropriate or sexually suggestive conduct by Ms. Dutton at any time.

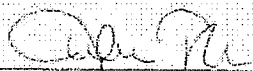
DATED: February 7, 2008.



Meg Whitman

SUBSCRIBED AND SWORN before me this 7 day of February, 2008.





Notary Public

Julia Clayton

From: Scott Crook
Sent: Thursday, February 07, 2008 6:38 PM
To: Julia Clayton
Subject: FW: eBay's Reply Memorandum in Support of Motion for Protective Order--Kepas v. ebay, Case No. 77 160 00456 06 DECR



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KB)

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

From: Palmer, Justin [mailto:JBPALMER@stoel.com]
Sent: Thursday, February 07, 2008 6:32 PM
To: TCorrada@ir-law.com; Durham, Matt; Scott Crook; Kathryn Steffey
Cc: crowd@adr.org
Subject: eBay's Reply Memorandum in Support of Motion for Protective Order--Kepas v. ebay, Case No. 77 160 00456 06 DECR

Attached please find eBay Inc.'s Reply Memorandum in Support of its Motion for Protective Order. An Affidavit of Margaret C. Whitman is attached to the Reply Memorandum as Exhibit A. It is eBay's position that the Whitman Affidavit renders any hearing on this matter unnecessary. However, if the arbitrator determines that a hearing is necessary, counsel for eBay is available for a hearing tomorrow, Feb. 8th, at 2:30 pm mountain.

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