IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

eBay Domestic Holdings, Inc. Plaintiff, v. Craig Newmark and James Buckmaster, Defendants, and craigslist, Inc., Nominal Defendant.	C.A. No. 3705-CC **REDACTED VERSION** Dated: October 1, 2009

DEFENDANTS' CORRECTED PRETRIAL BRIEF

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Dated: September 25, 2009
Corrected: October 1, 2009
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PRELIMINARY STATEMENT

In August 2004, eBay purchased a minority interest in craigslist. eBay also acquired additional shareholder rights from Defendants, which included a right of first refusal ("ROFR") on any stock sale by the other shareholders or issuance by craigslist, a veto right over any increase in the number of authorized shares, and the ability to block a variety of corporate actions. But eBay would forfeit those rights if it engaged in "Competitive Activity" as defined in the Shareholders' Agreement ("SHA") executed by eBay and the other two craigslist shareholders, Craig Newmark and Jim Buckmaster.

eBay had wanted more. eBay sought at least 50% ownership of craigslist, a guaranteed seat on craigslist's Board, and the ability eventually to acquire all craigslist stock. Newmark and Buckmaster rejected those demands. They insisted on remaining firmly in control of craigslist in order to protect the unique business model that is at the heart of craigslist's success. When eBay pushed too hard, Buckmaster broke off negotiations with eBay.

Fearing that one of its actual or potential competitors—someone like Google—might purchase the minority interest, eBay rushed its senior executives, led by then-CEO Meg Whitman, to a hastily arranged meeting with Newmark and Buckmaster on July 22, 2004. eBay dropped its demands in favor of what eBay's lawyer called "a basic investment . . . without any extraordinary rights or obligations." Meg Whitman accepted that there was no path to control, and eBay was eager to be a typical minority shareholder. Whitman and the other eBay representatives also assured Newmark and Buckmaster of eBay's commitment to craigslist's unique business model and community values, reiterated that craigslist would be eBay's "play in classifieds," and agreed that if over the next few years craigslist was not comfortable with eBay as a shareholder, the two companies could go their separate ways.

eBay was not as committed to craigslist as it pretended to be. At the same time eBay was negotiating with Newmark and Buckmaster, eBay planned to acquire other classifieds

sites and was negotiating to buy Marktplaats, a successful classifieds site in the Netherlands. eBay also planned to build and launch its own worldwide classifieds site, then named "168" but that would be launched as "Kijiji" in March 2005. eBay disclosed none of that to craigslist, nor did it reveal that it planned to use its investment in craigslist to "get a seat at the table" where it could learn the "secret sauce" of the classifieds business, and then exploit that learning in the competitive ventures that were already underway. If it could not *own* craigslist, eBay would exploit its position as an insider and use craigslist's confidential information, experience, skill and innovations *against* craigslist.

On June 29, 2007, eBay launched its own classifieds site, Kijiji, in the U.S. in direct competition with craigslist, and ten days later, eBay's representative resigned from the craigslist Board. The Kijiji launch was unquestionably "Competitive Activity" under the SHA, and eBay's conduct not only confirmed the mounting evidence that eBay was misusing its insider position unfairly to compete with craigslist, it also provided craigslist the opportunity to implement measures to protect craigslist and its stockholders from serious threats posed by eBay.

Buckmaster's first instinct was to ask Whitman to honor her promise that eBay was not interested in being involved with craigslist unless craigslist was comfortable with eBay as a shareholder. When she rejected his request, claiming eBay could not imagine "parting with our shareholding in craigslist," Buckmaster initiated a careful and deliberative process to assess craigslist's options, and on January 1, 2008, the craigslist Board did three things:

- presented a ROFR for the company on identical terms to each shareholder, offering as inducement one new share of craigslist stock for each five shares currently held;[1]
- adopted a shareholder rights plan; and
- implemented several amendments to its certificate of incorporation and by-laws, including one that staggered the terms of its directors.

[1] eBay has not yet accepted or rejected the offered ROFR (and thus cannot claim any injury as a result of its failure to act on the offer), which it can accept any time prior to January 3, 2011.

eBay agreed in the summer of 2004 to leave management and control of craigslist in the hands of the other shareholders. eBay recognized that launching Kijiji in the U.S. would mean it lost all of its "investor protection and recapture rights," and that it would no longer be able unilaterally to place representatives on the craigslist Board. It made a calculated decision—based on the SHA and eBay's evaluation of state and federal laws protecting competition—to give up those rights for the opportunity to compete with craigslist in the U.S. eBay has no basis to complain about the actions craigslist took to protect itself from eBay's long secret, but in 2007 openly disclosed plans to compete with craigslist and exploit craigslist "weaknesses" learned while eBay had an agent on the craigslist Board.

The actions taken by the craigslist Board were not an unfair attack on eBay. They were reasonable and measured responses to the real threat eBay's actions posed to the long-term interests of craigslist and all of its shareholders. eBay cannot dispute that:

- it misled Newmark and Buckmaster about eBay's willingness to be a minority shareholder;
- it misrepresented to craigslist in 2004 its intentions in the classifieds space;
- it misused craigslist confidential information, providing that confidential information to eBay personnel involved in Kijiji and other eBay sites that competed, or were intended to compete, with craigslist;
- as eBay's competitive initiatives were disclosed in 2005, it misled craigslist by claiming the two entities would be part of an international partnership, when in fact the individuals heading those competitive ventures had already decided "not to support craigslist's international expansion" and to "compete with craigslist;"
- it launched Kijiji in the U.S., consciously seeking to exploit craigslist's "weaknesses" it had learned as an insider; and
- after that launch, it purchased misleading Google ads to misdirect consumers seeking craigslist to eBay sites.

eBay's own inequitable and anticompetitive conduct precludes it—as a matter of equity—from seeking relief from this Court for the actions craigslist took to protect itself and its community from that very same conduct.

STATEMENT OF FACTS

A. craigslist Is a Unique Company and Very Different from eBay

In 1995, Craig Newmark began an email list for San Francisco events. Incorporated as 1010 Cole Street, craigslist, Inc. ("craigslist") provides local internet classifieds for 700 communities worldwide as of September 2009. 50 million Americans use craigslist each month, posting 40 million classified ads, and generating 20 billion page views. In addition to being the most utilized internet classifieds site in the U.S. by far, and among the ten most used sites overall, craigslist is the most utilized classifieds service for obtaining employment, housing, second-hand goods, services, relationships and community information. By any measure, craigslist is an unqualified success—a success based upon a unique approach to doing business.

craigslist and its 32 employees provide highly valued services, upon which many millions rely, free of advertising and largely without charge. Despite its leadership in important market sectors, craigslist has foregone many short-term revenue-generating opportunities in order to align itself with its users to the greatest extent possible. Defendants believe subordinating traditional business imperatives to the needs and preferences of its community of users is quintessential to its success, and in the best interests of its shareholders.

In contrast, eBay is a large corporation with approximately 15,000 employees and $8.54 billion in revenue during 2008. [Exh. 1 (1/21/2009 eBay's Brief in Opposition to Defendants Motion to Compel at 10); DX559; DX737][2] eBay bills itself as "The World's Online Marketplace," operating online auction websites in 39 countries across the globe. eBay's business model is heavily focused on monetizing all of its services. [DX433 (Jacob Aqraou, part of eBay's Kijiji team, commenting, **REDACTED**

[2] Exhibits referred to herein, including Defendants' Trial Exhibits referred to herein ("DX"), are submitted with the Transmittal Affidavit of Michael A. Pittenger, filed contemporaneously herewith.

REDACTED eBay's growth has come through numerous acquisitions, making it an experienced and sophisticated acquirer. eBay spent REDACTED REDACTED alone, of which eBay's acquisition of its minority interest in craigslist represented only approximately REDACTED [DX337 at E00020656]

B. Phillip Knowlton Threatened to Destroy craigslist's Mission and Business Model

In early 2000, Jim Buckmaster responded to a craigslist posting and was hired as a programmer. Newmark recognized that Buckmaster had the skills to be an excellent manager, and by the end of 2000 Buckmaster was President and Chief Executive Officer of craigslist. In 2002, Newmark and the other shareholder, Phillip Knowlton, approved an issuance of stock to Buckmaster representing approximately REDACTED of craigslist, leaving Newmark with approximately REDACTED and Knowlton with approximately 28.4%.

Knowlton became dissatisfied with craigslist's business model and demanded that craigslist take steps to increase short-term profits. Knowlton threatened that unless craigslist changed its business model, he would sell his shares to a purchaser that would destroy craigslist. [Exh. 2 Buckmaster dep. 15:5-22; Exh. 3 Wes dep. 148:9-17 ("One of the explicit threats by Phillip Knowlton was to -- to sell his block of shares to somebody whose interests would be to -- I think the word was 'bleed craigslist and suck it dry.'")] Defendants took Knowlton's threats seriously, but efforts to negotiate with Knowlton were unsuccessful.

C. eBay Viewed craigslist As a Competitive Threat and Determined to Purchase Knowlton's Shares As Part of a Larger Classifieds Strategy

1. eBay Began Negotiations with Misrepresentations Intended to Make Its Proposal Attractive to Newmark and Buckmaster

When eBay learned that Knowlton's craigslist shares were for sale, fearing that Google or some other eBay competitor might acquire them (DX177), eBay determined to purchase Knowlton's shares itself. [DX178 (purchasing Knowlton's stock would REDACTED REDACTED DX510 at 4 of 7

REDACTED eBay contacted Knowlton in the spring of 2004, and in May 2004, eBay's Garrett Price approached Buckmaster about acquiring Knowlton's shares. Price emphasized four things:

- eBay did not want to be involved with craigslist if craigslist was not comfortable with eBay as a shareholder;
- eBay would be satisfied with Knowlton's shares and would leave management and ownership control with Newmark and Buckmaster;
- eBay would make its expertise (particularly in foreign language sites) and resources available to expand craigslist's international operations; and
- eBay would make craigslist its "play" in classifieds.

Each representation was critical to craigslist. eBay's commitment to support craigslist's expansion, especially internationally, was a direct benefit to craigslist's business. eBay's assurance that it would be satisfied with Knowlton's minority interest distinguished eBay's proposal from REDACTED which wanted ownership and control of craigslist. Price told his superiors that he "did not think it appropriate to broach issues of us owning a 100% at meeting . . . [because] jim very focused on 'control.'" [DX658] Price thought eBay "would get there in due course, but they are still getting their hands around eBay and concept of an outside investor." [*Id.*] Price told Buckmaster, "we were a lot less concerned at this early stage about 'control' and much more focused on getting the relationship right." [*Id.*] But he cautioned his superiors that eBay had to be careful about what it told Newmark and Buckmaster because, "they are concerned th[at] we will want all sorts of controls/rights, which actually plays into our hands." [*Id.*]

Price also knew that eBay was pursuing a broader strategy in classifieds, and the acquisition of Knowlton's shares was only one part of a multi-track strategy to acquire other classifieds sites and to build eBay's own classifieds site, eventually named Kijiji. [DX202 (slides 22-23, 34, 48); DX005 at EH00000355, 376, 387, 398; Exh. 4 Levey dep. 43:19-44:3]

Buckmaster had no idea that Price was misleading him to keep craigslist interested in eBay's bid for Knowlton's shares.

2. eBay and craigslist Entered into a Nondisclosure Agreement and Negotiations Commenced Between eBay and craigslist

On May 20, 2004, craigslist and eBay entered into a Nondisclosure Agreement ("NDA"), which strictly limited eBay's use of information regarding craigslist's "business, financial condition, operations, assets, and liabilities," whether craigslist provided the information "now or in the future." [DX192 at E00003886] eBay also put in place its own internal Confidential Transaction Agreement ("CTA"), which was supposed to be executed by all eBay personnel involved in the eBay-craigslist deal (which eBay called "Project Kringle"). The CTA recited that eBay had entered the NDA and that, therefore, "you are expressly prohibited from the disclosure of any and all information in respect of Project Kringle (and any and all work performed in connection with such project) to anyone who has not entered into this agreement." [DX193]

eBay's personnel soon presented a schedule of additional "investor protections" they would require in order to move forward with any share purchase, and which they expected to receive *gratis*, as well as "recapture rights" they wished to negotiate for, which would allow eBay to "recapture" the value it claimed its association with craigslist would create. [DX199] Rajiv Dutta, eBay's Chief Financial Officer, noted that of all potential rights, the right of first refusal was most important. [DX197 ("Of all, the protection that I would consider the highest (sic) priority is the ROFR.")] craigslist informed eBay it would have to negotiate with the company for any enhancements not inherent in Knowlton's shares.

eBay representatives met with Newmark and Buckmaster on June 7, 2004, and they again affirmed that:

- "[w]e really want to make your company ***the*** play for us in the classified space" and

- "[w]e have heard you loud and clear with respect to concerns around control."

[DX660 (emphasis in original)] Going into the negotiations, eBay hoped to acquire more shares than Knowlton owned, and Price asked Buckmaster to propose an eBay ownership percentage between 28% (Knowlton's interest) and 50% that craigslist could accept. Buckmaster did not offer eBay *any* additional shares, and craigslist held firm that eBay had to be satisfied with Knowlton's minority interest.

On June 23, 2004, eBay's Board approved the acquisition of

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[DX005 at EH00000290

295-307, 388

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The craigslist transaction was not the only one presented to eBay's Board on June 23; eBay management made a broad recommendation that eBay invest in

REDACTED [*Id.* at EH00000355, 376, 387, 398] The other "target" was Marktplaats (code named "Manhattan"), the leading classifieds site in the Netherlands, which eBay had been negotiating to acquire "even before we started engaging with Phillip Knowlton." [Exh. 4 Levey dep. 43:24-44:3; *see id.* 75:16-77:1 (Marktplaats and craigslist are "competitors"); DX005 at EH00000376, 398] Price and eBay concealed from craigslist both the multi-track "local C2C classifieds strategy" eBay was pursuing, and its negotiations to acquire Marktplaats.

3. eBay Commences the Misuse of craigslist's Confidential Information

eBay always sought to learn craigslist's "secret sauce" and "key metrics." [DX263 at E00040828; DX200 at E00011825 ("What is the secret sauce for classifieds success?")] As

Price put it internally, "[w]e are just learning. The great thing about the [craigslist] investment is we . . . get a seat at the table to learn." [DX251][3]

In July 2004, Price and Mike Reining (both of whom received the CTA (DX193; DX195)) asked Buckmaster to provide confidential craigslist site metrics, including current and historic traffic data (which included the number of daily, weekly, and monthly page views and visitors across all cities from 2000 through July 2004) and current and historic "postings" or "listings" data (which included the number of classified ad postings by city and by category). Price told Buckmaster that eBay would use the data to evaluate the purchase of Knowlton's shares. [Exh. 2 Buckmaster dep. 27:6-28:24] Relying on that representation, Buckmaster gave Reining direct access to the requested data, which resided behind craigslist's firewall, and Reining downloaded it to eBay servers. [DX209; DX210; DX215]

Contrary to eBay's representations and the NDA, and unbeknownst to Defendants, the data harvested by Reining was not used to evaluate the acquisition of Knowlton's shares—that transaction had already been approved by eBay's Board. The craigslist data was used to prepare presentations for senior eBay management about eBay's plans to learn "how to run [a] local C2C classifieds business" like craigslist, and build its own "Craigslist-style (sic) site." [DX237 (slides 54, 22-23, 26-34) (data obtained from craigslist's "server log" and "listings database"); DX223; *see also* DX594; DX595; DX596; DX597; DX216 (email relating to preparation of Telluride decks)] When Mike Reining asked Price if craigslist data could be used in the presentation at Whitman's Telluride ranch, Price responded,

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[DX231] Reining then pressed for a "definite[] answer," and Price

[3] Two years later, eBay confirmed in a PowerPoint slide presented to its Board of Directors that it *had* in fact

[DX025 at EH00000556] **REDACTED**

responded,

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[DX443; DX237 at E00016594]

Erik Hansen of the Kijiji team heard about those PowerPoint decks, but he could not find them on the servers to which he had access. Rob Veres, who had received and signed the CTA [DX193; DX195] forwarded the Telluride decks to Hansen, warning him, "[y]ou can't find them b/c it was a joint venture with Corporate Strategy, and in its current form it isn't for mass consumption . . . . Please don't forward them to ANYONE (even mgrs.). I'll be happy to walk through these with you." [DX249]

4. craigslist Breaks off Negotiations, but Then Reaches an Agreement with eBay in Reliance on Meg Whitman's Representations

In July, Price pressured Buckmaster to allow eBay to acquire more than Knowlton's minority interest, including a call option to purchase additional shares at some point in the future. [DX211] Defendants told eBay that its proposals were overreaching and unacceptable, and when eBay continued to press, craigslist broke off negotiations to pursue other potential solutions to Knowlton's desire for liquidity. [Exh. 3 Wes dep. 40:8-16] Meg Whitman, eBay's then-CEO, immediately requested an in-person meeting with Buckmaster and Newmark to save the deal. At this meeting Whitman shrugged off and distanced herself from demands that had been made of craigslist by her subordinates, saying, "Garrett was just being Garrett" and sometimes he "stepped over the line," but that she was now speaking definitively for eBay. She assured Defendants that:

- eBay accepted craigslist's community values as the guiding principle;
- "eBay was perfectly content with a minority shareholding, namely the shareholding that was being offered;" [Exh. 2 Buckmaster dep. 53:13-15]
- eBay would make craigslist "its play in classifieds;" [Exh. 2 Buckmaster dep. 53:8-9; *id.* 105:11-13 ("Meg had been very reassuring that . . . they

wanted craigslist to be their play in classifieds"); Exh. 3 Wes dep. 40:1-5; *see also* DX660]

- "eBay would make available a lot of different kinds of resources to us to help us -- with our goals as a company, and those included assistance in . . . developing international classifieds in local language. It included help with trust and safety issues. [She] described it as a cafeteria of resources that we . . . could pick and choose from to help us -- carry out our functions as a company and achieve our goals as a company, and that they wanted to give us those kinds of help because we would be their play in classifieds. And so, of course, that they would want to help us as much as they could -- since we would be their play . . . .;" [Exh. 2 Buckmaster dep. 133:17-134:6] and

- "[L]ike a courtship, it was very important, should it become clear to the parties that a closer relationship or any relationship between the two parties did not make sense or was not desired, that -- there be a way to unwind -- and for the -- parties essentially to go their separate ways." [Exh. 2 Buckmaster dep. 53:23-54:4]

On August 9, 2004—in reliance on eBay's representations—craigslist, Buckmaster and Newmark entered into the SHA (DX673) with eBay. [Exh. 2 Buckmaster dep. 94:14-16 ("We did rely heavily on the . . . representations that Meg Whitman had made to us"), 128:21-24 ("We entered in to that agreement based to a considerable extent on . . . representations by Meg Whitman that craigslist was to be eBay's classified play, period.")]

Later, Defendants requested that eBay founder Pierre Omidyar be nominated to be a craigslist director once the transaction closed. [Exh. 5 Newmark dep. 83:10-15] Defendants believed that Omidyar shared craigslist's values. [*Id.* at 83:23-84:2] eBay and Omidyar agreed to the request, which Newmark and Buckmaster took as a positive sign, and as comfort that Whitman's promises were sincere and that eBay agreed with, and would support, craigslist's mission.

5. eBay Was Secretly Planning to Compete Against craigslist Before the SHA Was Executed

At the same time eBay was assuring craigslist "you are our play," eBay's documents show that it was secretly planning to acquire competing classifieds sites and to launch its own, home-grown classifieds site. eBay would:

- build its own site (initially identified as "P168,"[4] and ultimately known as "Kijiji") [DX181 (slide 37) (emphasis added)], and
- at the same time, continue its ongoing negotiations to purchase Marktplaats (project "Manhattan"), the then-leading classifieds website in the Netherlands. [DX200 (slides 1-5); DX202 (slide 56)]

eBay had ambitious plans to REDACTED among online classifieds businesses worldwide and [DX235 (slide 60); DX202 REDACTED (eBay planned to and REDACTED Prior to closing its acquisition of the minority interest, eBay never disclosed those plans to the Defendants, who entered into the SHA based on the representations—made by Whitman, Price and other eBay representatives—that craigslist was to be "the play" in classifieds for eBay.

6. The Shareholders' Agreement Provided eBay Significant—but Conditional—Shareholder Rights and Imposed Strict Confidentiality Obligations

eBay and its counsel negotiated with Defendants for shareholder rights that Knowlton did not own.[5] The SHA provided eBay with (1) expansive approval/veto rights over company actions; (2) a right of first refusal over sales of shares by the other shareholders; and (3) along with all other shareholders, a pro-rata right of first refusal over future issuances of craigslist stock. [DX673 (SHA §§ 4.6, 5, 6, 7)] eBay would forfeit those rights, however, if eBay engaged in "Competitive Activity." [DX673 (SHA §§ 1.1(a), 8.3]

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[4] DX278 at E00031640 REDACTED

[5] eBay's Brief in Support of its Motion to Compel the Production of Documents Claimed as Privileged at 2 (eBay paid consideration to the Company "for certain 'preferred-type enhancements' . . . contained in 'protective provisions' of a Shareholders' Agreement," and those "certain additional rights" went "above and beyond those of the common shareholders in general . . . .").

eBay had sought a guaranteed seat on the craigslist Board, "which representative may be removed or replaced at any time by Purchaser [eBay] in its sole discretion." [DX001 at CLEB0013240, 265] eBay withdrew that request, and the final SHA included neither any guarantee of an eBay seat on the craigslist Board, nor the right of eBay to remove or replace a "Purchaser Designee" at its sole discretion. [DX002 at CLEB0003790 (deleting § 3.1(a)); DX673 § 3]

Section 4.3 of the SHA strictly obligated eBay "to keep confidential" any confidential information received from craigslist. [DX673 at E0000685] eBay could disclose such information to an "advisor, partner, subsidiary or parent" only if three strict requirements were met: (1) the disclosure had to be "for the purpose of evaluating [eBay's] investment in [craigslist]"; (2) the recipient had to be "advised of the confidentiality provisions of this Section 4.3"; and (3) the recipient had to "agree[] in writing to abide by such provisions." [DX673 at E0000685]

7. The NYAG "Inquiry" and Price's Attendance at the October 2004 craigslist Board Meeting While Concealing eBay's (and His Own) Conduct in Conflict with craigslist's Interests

Almost immediately after the transaction closed, the New York Attorney General's office ("NYAG") commenced an investigation of eBay's acquisition of the minority interest in craigslist, and by mid-September 2004 eBay was producing documents relating to craigslist, eBay's strategies and the transaction to the NYAG. [DX253] eBay did not mention the investigation to craigslist until October, and then eBay minimized the contact as a "routine inquiry." [Exh. 3 Wes dep. at 188:24-189:1, 189:12-16 (eBay did not mention the investigation until October, and described it as a "normal" and "routine kind of inquiry")]

On October 12, 2004, Price began attending craigslist Board meetings as eBay's "observer." [DX677; DX055 at 11 of 374 (CLEB0064610)] But he said nothing about the NYAG investigation, nor did he mention any of the mounting conflicts of interest between eBay and craigslist, even though on October 5, 2004, Price received a PowerPoint deck

shown to Meg Whitman on September 29, which stated that the eBay global classifieds group was

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[DX063 at E00030831]

Within ten days of the craigslist Board meeting, Erik Hansen, who had gotten the Telluride decks from Rob Veres, asked Price for confidential craigslist data that would be "helpful to plan [Kijiji's] capacity needs." [DX264] Price obtained the data from Buckmaster—without telling Buckmaster it would be used for Kijiji—and then turned it over to Hansen. The data was used to plan the development and launch of Kijiji in competition with craigslist. [DX264; DX269; Exh. 4 Levey dep. 55:12-56:7 (craigslist's information was "helpful data point" in developing Kijiji)]

In the meantime, thousands of pages of data Reining took off craigslist's confidential website on July 8 and 9 were forwarded (with Price's knowledge) to eBay executives who had nothing to do with eBay's minority interest in craigslist, but who were involved with competing eBay ventures, including Josh Silverman (who was then organizing the Kijiji launch) (DX269) and Michael Dearing of eBay's Marketplaces division—the division most threatened by classifieds. [DX245] Silverman—who at the time (November 2004) had no connection to craigslist but was deeply involved in eBay's classifieds strategy in Europe—used that confidential craigslist data to take a "stab at initial projections and success metrics" for Kijiji, which he shared with Price. [DX076] Although he continued to attend craigslist Board meetings and to communicate regularly with Buckmaster, Price never disclosed that craigslist's confidential information was being used that way.

8. eBay's Intent to Control craigslist

Contrary to Whitman's representations, eBay intended to gain control of craigslist even if it took "decades" (DX684) and to radically alter craigslist by

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REDACTED

REDACTED [DX202 (slides 36-38); DX187 (slides 21-23); DX203 (slides 4-8)]

Price told craigslist that REDACTED and have [DX678 (eBay CL"); DX299 (eBay REDACTED Exh. 2 Buckmaster dep. 132:19-24 ("eBay proposed that their personnel should -- be placed in our offices and have native access to everything that we had access to so that they could carry out company functions in our place")] At the February 1, 2005 craigslist Board meeting, Price and Omidyar again emphasized that it was REDACTED and that craigslist act as part of REDACTED [DX087 (slides 3, 40); *see also* DX088 REDACTED

D. After eBay Acquired the Minority Interest, It Continued to Assure Buckmaster that craigslist Was eBay's "Play" in Classifieds

1. eBay Told craigslist that eBay's Other Classifieds Acquisitions Would Be Part of an International Partnership with craigslist

In October 2004, Price told Ed Wes (craigslist's lawyer) that eBay was submitting a non-binding expression of interest in acquiring Rent.com. Price was careful to talk about the Rent.com acquisition in terms of the synergies between Rent.com and eBay's interest in craigslist. Price and others were concerned that it could be viewed as a "conflict with craigslist." [DX254]

On November 9, 2004, Price disclosed to craigslist the impending Marktplaats acquisition. Price did not disclose how long that acquisition had been in the works, but he argued it was necessary to respond to market conditions and "reassure[ed] us that nothing had changed in – eBay's desire to have craigslist be its play in classifieds." [Exh. 2 Buckmaster dep. at 105:11-19] Price always tied eBay classifieds acquisitions in late 2004 and early 2005 to the "international partnership" that would be negotiated between eBay and

craigslist. Initially, eBay's acquisition of other classifieds sites was a "source of concern" to craigslist (Exh. 2 Buckmaster dep. 127:1-14; *see also id.* 125:13-18), but eBay promised Defendants that all those initiatives would be subsumed by the "international partnership" between eBay and craigslist, and that craigslist was still eBay's play in classifieds. [Exh. 2 Buckmaster dep. 104:23-105:19; 127:15-22; Exh. 3 Wes dep. 41:19-42:1 ("continually throughout this period it was all in the context of 'We want to do this together,' . . . these acquisitions are going to be rolled in to some form of partnership with craigslist, that 'You're still our play.'")]

On December 10, 2004, Price delivered eBay's international licensing proposal, which provided that eBay would have the

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[DX285 at E00016990] Defendants were by this time used to the one-sidedness of eBay's initial proposals, but had been successful in negotiating with eBay in the past, and so took comfort in eBay's consistent representations that it was of the utmost importance to eBay that an all-encompassing international partnership ultimately be reached with which both sides were agreeable.

2. Garrett Price's January Surprise

On January 7, 2005, Price met with Wes and, in an extraordinary change in message and tone, he laid down what sounded like ultimatums about the eBay-craigslist relationship:

- **REDACTED**

- The next craigslist Board meeting "would be a 'Come to Jesus' meeting with lots of hard questions and demands . . . . if the demands are not accepted, then eBay will go its own way, without CL."

- "Garrett would like eBay and CL to work together. He is 'not interested in what CL can do independently.' There are two major incentives for working closely with eBay. First it is a way to be part of the 'winning team.' The second is to get $$ without doing anything (other than licensing the name)."

- Price said that craigslist employees "should be told that eBay will eventually end up owning CL (which will happen inevitably, unless 'things go badly')" . . . . An acquisition is 'inevitable.'"

[DX678][6] Price asked what Wes thought of the December 10 international proposal, and Wes said he "didn't see how it made sense, as it asked CL for an exclusive license, yet didn't commit to use the name at all." Price "said he would re-work the proposal prior to the board meeting to provide more detail." [*Id.*]

Defendants found Price's message to Wes surprising, not just because there had been nothing like it before January 7, but also because immediately afterwards, they proceeded with discussions about an overarching international partnership that would subsume the international efforts of both companies, with no ultimatums and no mention of any separate eBay classifieds site. The February 1, 2005 Board Meeting had no "Come to Jesus" element. [DX678] To the contrary, eBay presented a PowerPoint deck that held out the promise that any international classified launch would be done by the craigslist/eBay international partnership, not by eBay unilaterally. [DX317 (slides 30-36)] eBay was again selling its ability to help craigslist expand internationally. [*Id.* (slides 10-11, 28-29, 35, 39)] Reminiscent of negotiation of the SHA, it appeared Price had spoken out of turn on January 7, just as he had in the pre-SHA negotiations.

On February 9, 2005, Buckmaster provided a counter-proposal to eBay's international partnership. [DX325] At the preceding February 1 Board meeting, Price and Omidyar had asked Buckmaster to disclose the cities in which craigslist was considering a launch, and Buckmaster provided that list on February 21 noting, "the international cities may become

[6] DX678 is an email summarizing the meeting with Price, but Price confirmed the accuracy of the summary. [Exh. 6 Price dep. 269:2-272:14] Price acknowledged he "might be frightening" and "I have a very aggressive personality." [*Id.* at 272:19-21]

subject to an arrangement currently under discussion between craigslist and ebay." [DX329] When Price also asked for "the thought process behind launching in those particular cities at this time (and, for that matter, the cities you have launched in to date)," Buckmaster provided that information, too. [DX332]

3. eBay Prepares for the Kijiji International Launch

In late 2004, Price requested that eBay be given "real time access to [craigslist's] data base," and "complained" to craigslist's counsel when craigslist refused to provide that access. [DX678; Exh. 2 Buckmaster dep. 132:12-14] Price then offered to have Raymond Yue prepare a PowerPoint presentation for the February 1, 2005 craigslist Board meeting, claiming Omidyar was used to seeing things in that format. On that basis, Buckmaster gave Yue access to confidential craigslist information. Price forwarded the presentation, filled with craigslist confidential information, to senior eBay executives (DX310)—including Alex Kazim, who was in charge of the unit that would launch Kijiji (DX382); Josh Silverman, who would help launch Kijiji in Europe in a month (DX418); Jacob Aqraou, who would "own" the decision to launch Kijiji in the U.S. in 2007 (DX443); and Randy Ching, who had global responsibility for Kijiji. [DX382] Yue himself forwarded the confidential craigslist listings and financial data to Aqraou. [DX300 (slides 12-18)]

eBay's "rule-of-thumb" for Kijiji was simple: copy craigslist. [DX258; *see also* DX071 (slide 4)

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On January 31, Price had a "long conversation" with Buckmaster about craigslist's category structure, and, based on what he learned from Buckmaster, gave

[7] *See also* DX601
DX278 at E00031639 **REDACTED** DX255 (slide 2)

guidance to the Kijiji team about what Kijiji's category structure should be at launch. [DX315]

4. After the Kijiji Launch, eBay Continued to Use craigslist As a Pattern and Benchmark for Kijiji

eBay told Buckmaster it was launching Kijiji internationally sometime between February 9 and 18, 2005, and eBay continued to seek information from craigslist that it could use for Kijiji. Kent Walker and eBay "trust and safety" people called Buckmaster on February 22, and their questions about craigslist's flagging system left Buckmaster suspicious that "the call was definitely geared around (he *almost* said as much) intelligence-gathering for their own classifieds service launch." [DX330]

After the launch, Price, Silverman and others continued to use confidential craigslist metrics to project Kijiji's performance. [DX361; DX376 (slide 10); DX387 (slide 22)] And Kazim, Price, Aqraou and Reining discussed "data mining off craigslist," which Kazim described as "pretty cool." [DX339]

5. craigslist's March 28, 2005 Board Meeting

In March 2005, Price and Reining obtained craigslist's "monthly new listings" data for June 2004 through February 2005 based on the representation that the data would be presented to Whitman as a one-page summary. [DX342 at CLEB0008978] But the data was secretly sent to Aqraou and Kazim, not Whitman. [DX343] Several days later, Price persuaded Buckmaster to allow Reining to visit craigslist's offices to "help" Buckmaster prepare a presentation for Omidyar for the March 28 meeting of the craigslist Board. [DX348] When Buckmaster agreed, Price wrote to Reining, "do not take no for answer now that we have got this opening!" [*Id.*]

After visiting craigslist's offices and harvesting the desired data, Reining reassured Buckmaster that his purpose was to "help you have a more productive meeting with Pierre [Omidyar]." [DX349] But immediately after obtaining the data, Reining sent it to Price and

Aqraou—not Omidyar—saying, "I tried my hardest to get as much good data as possible," and "I sent you . . . all I have been able to get." [DX350] That data included confidential information about listings, revenue, expenses, and margins. [DX357 (slides 3-12, 16-17)] Reining also sent Aqraou a spreadsheet with detailed revenue and listings data for craigslist's top 35 cities. [DX091]

Buckmaster added one slide to Reining's deck—slide 19 entitled, "Expectations for craigslist – eBay relationship." [DX055 at 118 of 374 (E00045859)] The items on the slide included, "eBay content with minority equity stake, 3 year 'getting to know you' period;" "craigslist to represent eBay's primary classifieds interest;" and "eBay to help craigslist develop its multi-lingual international capabilities." [*Id.*] No one from eBay disagreed with a single point.

6. eBay Concealed Its Strategy to Compete with craigslist and Block craigslist's International Expansion

While eBay was assuring craigslist that it was eBay's play in classifieds, and that eBay would use its expertise to help craigslist expand internationally (including in a partnership where eBay's international ventures would be rolled into the agreement that they were negotiating), eBay was pursuing a very different strategy. The group within eBay charged with developing and launching Kijiji told Whitman in ***September 2004*** they were REDACTED and REDACTED [DX070 at E00030831] And in November 2004 eBay was planning that Kijiji would "launch initially in Europe ***and later in . . . the US***." [DX278 at E00031638 (emphasis added)] In February 2005, Price was discussing a "brilliant idea for competing with craigslist in the US," by REDACTED [DX321] The Kijiji group was, at the same time, looking for "a weak spot" or "an area where [craigslist] could be attacked," and contemplating "how to beat craigslist in the US." [DX322 at E0024765] Even Omidyar viewed craigslist from a "competitive point of view"

(Exh. 7 Omidyar dep. 197:6-11), and wanted to "compare initial growth rates of craigslist versus kijiji where we're in the same cities (grrr...)." [DX372] eBay took care to hide these intentions from craigslist.

In September 2005, Price told Buckmaster that eBay would launch "english-language classifieds of [its] own, giving [eBay] essentially '2 plays in the classifieds arena.'" [DX684] In November 2005, eBay launched English versions of Kijiji in direct competition against craigslist in various international markets. [DX390; Exh. 2 Buckmaster dep. 153:20-154:1]

7. craigslist Learned the Truth About the NYAG Investigation

After telling craigslist in October 2004 that the NYAG was making a routine "inquiry" into eBay's purchase of a minority interest in craigslist, in the six months that followed eBay made no further mention of the "inquiry" and did not provide craigslist a single update—even during the "craigslist-eBay Relationship" and "Legal Update" discussions during the March 28, 2005 craigslist Board meeting. [DX055 at 90-91 of 374 (CLEB0059097-98)] In April 2005, craigslist discovered for the first time that the NYAG had actually been conducting a full-blown investigation into the eBay-craigslist relationship, and that craigslist could expect to receive subpoenas from the NYAG.

Contrary to eBay's representations in October 2004, craigslist now learned that the NYAG investigation involved potentially serious antitrust consequences. On April 27, 2005, eBay sent a letter to the NYAG attempting to persuade the NYAG to call off the investigation. eBay told the NYAG that the SHA contained provisions that would protect fair competition in the event that eBay became a direct competitor of craigslist's in the U.S.:

> [Section 8.3 of the SHA] provides that if eBay launches an Internet jobs posting board . . . it will lose various shareholder rights, such as a board seat, approval of certain transactions, and right of first refusal on future stock issuances. . . .

[DX371 at EH00000250] eBay's lawyers also argued that Section 8.3 was for craigslist's benefit:

> [Automatic termination of certain rights was] intended to protect craigslist's business in the event eBay launches its own jobs site and not to prevent eBay from engaging in such a business. Craigslist has an interest in protecting its competitively sensitive information and its business in the event eBay becomes a competitor and these provisions were designed to provide that protection.

[*Id.* at EH00000253]

eBay knew the true scope of the NYAG investigation for months, and eBay's failure to disclose what it knew put craigslist at risk as it negotiated a potential joint venture with a party antitrust regulators might view as a competitor. Defendants felt betrayed by their shareholder, and that lack of candor further eroded craigslist's trust and confidence in eBay.

E. Josh Silverman Replaces Pierre Omidyar as eBay's Representative on the craigslist Board

In the fall of 2005, Meg Whitman invited Buckmaster to lunch and introduced him to Josh Silverman, whom she wanted to replace Omidyar on the craigslist Board. On November 21, 2005, Omidyar resigned and eBay nominated Silverman to serve in his place. That same day the craigslist Board (Buckmaster and Newmark) elected Silverman to the Board. [DX055 at 149 of 374 (CLEB0064741)] eBay did not disclose to craigslist that Silverman (1) "helped launch Kijiji" in Europe earlier that year (DX418), (2) did not want craigslist **REDACTED** that otherwise "would be using Kijiji" (DX326), and (3) complained that craigslist was "really a pain" when it attempted to expand internationally. [DX334]

F. eBay Plans Its Launch of Kijiji in the U.S. in Direct Competition with craigslist

1. In 2006 Silverman Was a Hopelessly Conflicted Member of the craigslist Board Assisting eBay in a Strategy That Would Bring Kijiji into Direct Competition with craigslist in the U.S.

In January 2006, Silverman—while a craigslist director—suggested internally at eBay that somebody from *Aqraou's Kijiji team* should gather and analyze craigslist's metrics to "help inform us a bit more about tipping points, etc." [DX097] Silverman recognized that "if we use someone who reports to Randy [Ching] I think the CL guys will be quite resistant to the idea, so I thought perhaps someone from your group." [*Id.*]

By March 2006, Silverman was discussing at eBay his "expectations of competition" with craigslist in the U.S., and by September 2006 he was REDACTED REDACTED [DX565 at 9, 11 (entries 122, 151, 154)] Silverman never disclosed that information to craigslist, even though he continued to attend craigslist Board meetings as a director.

2. Silverman Provided craigslist's Confidential Financial Information to the Kijiji Launch Team

Under the SHA, craigslist was required to provide eBay with detailed financial information. In June 2006, Silverman instructed eBay's accounting department to forward all craigslist's financial information to Randy Ching, who had "global responsibility for Kijiji." [DX103; DX382] Thereafter, craigslist's confidential financials were forwarded (without Defendants' knowledge) to Ching and others, at the same time eBay's global classifieds group was preparing to launch Kijiji in the U.S. [*E.g.*, DX104; DX105; DX106; DX107; DX108; DX113]

When Ching turned his global classifieds responsibilities over to Aqraou, Ching forwarded craigslist's financial information to Aqraou who then disseminated it to his team that was planning to launch Kijiji in the U.S. [DX109; DX112; DX114] Silverman even recommended (twice) that ***Aqraou*** take his place on the craigslist Board. [DX436; DX445]

Aqraou responded that he "would be happy to" succeed Silverman. [DX435] But John Donahoe, head of eBay Marketplaces, opposed the idea, because it did "not make sense to introduce a new face if we are just going to compete." [DX445]

3. Silverman Attends craigslist's March 14, 2007 Board Meeting with Knowledge of eBay's Plans, but Says Nothing

In late 2006, Jacob Aqraou's Kijiji team was working on a presentation of "our US launch recommendation." [DX420 (slides 3, 5) ("[r]ecommend launching Kijiji into U.S.," because "[a] fruitful relationship with craigslist is unlikely" and "we can succeed without them"); DX428 (presentation to show that

REDACTED

REDACTED

DX440 (presentation

Aqraou shared the presentation with Silverman, and asked for his help: "We are evaluating US Launch and will go over it next week; it would be good to get your thoughts, if you feel comfortable with that and have time for it?" [DX435] Silverman reviewed the presentation and suggested ways to make the launch recommendation more persuasive. [DX439] Silverman recognized the extreme and obvious conflict of interest he had in secretly helping to formulate—and promote—eBay's U.S. launch strategy while serving as a craigslist director, and he sought to "stall" the craigslist Board meeting until the U.S. launch was announced. [DX450]

On January 19, 2007, Aqraou and his team formally recommended to Whitman that eBay launch Kijiji in the U.S. [DX452 (slide 2)] In addition to Silverman, Brian Levey was aware of the U.S. classifieds strategy, and Levey, an eBay attorney, also participated in the discussion of who, if anyone, should replace Silverman on the craigslist Board. [DX447]

On March 12, 2007, Levey, who had negotiated both the original NDA with craigslist, and the SHA, including its confidentiality provisions, was trying to provide

craigslist metrical and financial craigslist data to Aqraou and his team. When Aqraou pressed Levey for more information, claiming "as a 25% shareholder you would assume these things [craigslist's growth in traffic metrics] were given to the shareholders ☺," Levey responded, "Jacob—Agreed! I just don't want to rock the boat." [DX464] However, Levey searched for information that might be valuable to Aqraou, and in less than an hour Levey sent Aqraou and his team the craigslist confidential financial statements provided to eBay pursuant to Section 4.2 of the SHA from October 2004 to January 31, 2007. [DX461]

Two days later, Levey was attending the craigslist Board meeting with Silverman where Buckmaster laid out craigslist's plans and budget for 2007 (DX473), but neither Silverman nor Levey disclosed eBay's launch plans, a development they knew would have a material impact on craigslist. [Exh. 4 Levey dep. 527:5-528:23; DX406 ("if we launch a classifieds local site in the US we will upset CL quite a bit")] In fact, Aqraou, Levey and others decided in April 2007 that eBay would conceal its plans until "about 10 days" before the actual launch. [DX121]

After the craigslist meeting, Levey forwarded to eBay employee Pat Kolek craigslist's current financial and budget information that he and Silverman received at the March 14, 2007 Board meeting, saying, "Here are the numbers for Craigslist's 2007 financial plan. Look at all that cash! Please pass along to whomever on a need-to-know basis. Thx!" [DX474] In April 2007, with the secret U.S. launch of Kijiji fast approaching, eBay did an "analysis on CL revenue" to determine "what Kijiji's potential could be." [DX476]

G. eBay Knew that Launching Its Own Classified Site in the U.S. Would Terminate Rights It Negotiated in the SHA

eBay carefully analyzed the advantages and disadvantages of launching Kijiji in the U.S., recognizing that doing so would cause eBay to

(DX452 (slide 5)),

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the

' (DX432

(slide 14)), and the right to (DX488). [*See also* DX371 at EH00000250 **REDACTED**

But eBay believed that those rights were of little value, because it was likely to lose them in August 2007 anyway. [DX413 (Silverman believed

REDACTED

DX432 (slide 2) (although

REDACTED

Silverman believed the choice was clear:

REDACTED

[DX439] Aqraou

H. eBay Launched Kijiji in the U.S. with Only Ten Days' Notice to craigslist

On June 19, 2007, Silverman telephoned Buckmaster and disclosed for the first time— **REDACTED** that eBay would launch Kijiji in more than 200 U.S. cities ***in just ten days***. [DX482] Silverman also told Buckmaster, "we continue to care a lot about the success of CL given that we are shareholders." [*Id.*] That was false. Kijiji's goals were (and are) to and to **REDACTED** [DX442 (slide 33)] In fact, far from caring about craigslist's continued success, eBay planned to [DX432 (slide 15) **REDACTED** (emphasis added)]

Knowing that it was about to lose its ability to block actions by the craigslist Board, eBay attempted to renegotiate the SHA just days before the impending launch. [DX488]

Among other things, eBay wanted to modify Section 4.6 so that, although eBay would still lose its approval rights, the Board would be required to give eBay "15 calendar days' advance notice" before taking any Section 4.6 actions, including any "adverse charter amendment" or "issuance of Company or subsidiary stock." [*Id.*] craigslist rejected eBay's proposal. The SHA was not amended, and eBay received no right to any advance notice prior to any adverse charter amendment or issuance of Company stock.

On June 29, 2007—after three years of accessing craigslist's confidential information and using it to aid Kijiji—eBay launched Kijiji.com in the U.S. in direct competition against craigslist. Immediately after the launch, Silverman—who had concealed the launch plans from craigslist for months—told Aqraou, "Congratulations my friend" (DX491) and promptly resigned from the craigslist Board without any discussion with Defendants.[8] Pursuant to Section 8.3(e) of the SHA, craigslist immediately sent eBay a "Notice of Competitive Activity."

I. The U.S. Launch of Kijiji and eBay's Subsequent Conduct Destroyed Any Residual Trust Defendants Had in eBay

The Kijiji U.S. launch destroyed any remaining confidence in eBay's good faith and candor, and deepened Defendants' suspicion that eBay had misused confidential information and was seeking to use its insider position to harm craigslist. Defendants knew that eBay had accessed craigslist's confidential information for years, and when eBay, with little warning, launched a website that was "remarkably similar to craigslist" they felt craigslist information had likely been misused in developing the site. [Exh. 3 Wes dep. 48:4-11, 48:21-49:5, 63:25-64:25, 65:23-66:1, 149:14-150:14, 156:2-157:12; *see also* DX504 (Newmark suspected that eBay had developed Kijiji "based on what they learned from us"); DX337 at

[8] eBay admits that Silverman was removed due to "competitive concerns associated with [his] prior experience." [Exh. 10 Compl. ¶ 22; *see also* DX418 (Silverman helped launch Kijiji in Europe); Exh. 10 Compl. ¶ 22 (Silverman continued to be "associated" with eBay's "classifieds businesses in Europe" for many months after being seated on the craigslist Board in November 2005)]

E00020656 (research firm reporting that Kijiji is remarkably similar to craigslist)] Defendants no longer believed the information they provided to eBay had been used for the permissible purposes eBay had cited in making its requests.

The launch also conclusively demonstrated that, contrary to eBay's oft-repeated representations both before and after acquiring its shares, craigslist was ***not*** eBay's "play" in classifieds. craigslist was just one of eBay's several classifieds initiatives, and eBay, through its other ventures, was a direct and aggressive competitor of craigslist, and one Defendants now suspected of unfair competition.

Buckmaster and Newmark realized that eBay must have had plans to launch Kijiji in the U.S. long before notifying craigslist on June 19, 2007, and that eBay had concealed its plans during that time, even though Silverman and others attended craigslist Board meetings and received craigslist's confidential plans and other information. Silverman's abrupt resignation after the launch, and eBay's attempt to replace him with its "in-house Competition Counsel," furthered Defendants' suspicions that eBay and Silverman had engaged in misconduct. After the U.S. launch, Buckmaster and Newmark believed that "eBay was a conflicted shareholder"—not to mention a direct competitor—that "did not share the best interests of the other shareholders and of the company." [Exh. 3 Wes dep. 38:5-16]

On July 12, 2007, Buckmaster reminded Whitman of her promises that eBay was "not interested in being involved with craigslist unless we were completely comfortable with eBay as a shareholder." [DX697] He informed her that craigslist was "no longer comfortable having eBay as a shareholder" with a Board seat and access to "our financials and other confidential information," and therefore requested that eBay join craigslist in exploring "options for our repurchase, or for otherwise finding a new home for these shares." [*Id.* at CLEB0006451] By email on July 23, Whitman refused, stating that eBay could not imagine "parting with our shareholding in craigslist, Inc. under any foreseeable

circumstances," and that, on the contrary, eBay wanted "to acquire the remainder of craigslist, Inc." [*Id.* at CLEB0006450] Whatever comfort Whitman's prior assurances had given Defendants, they knew those were empty promises on July 23 – any protection for craigslist, its unique business and its community would have to come from Defendants.

Thereafter, eBay set out to injure craigslist to the benefit of Kijiji and eBay by purchasing deceptive ads on Google and other sites – ads that exploited and eroded craigslist's name while fraudulently diverting users who were trying to reach the craigslist site. These ads featured blue underlined hyperlinks such as "Craigslist.org," "Craigslist.Com," and "www.Craigslist.Org" as follows:

Craigslist.org
100% Free local classifieds site!
Compare Kijiji & Craigslist.org.
www.Kijiji.com

Craigslist.Com
100% Free local classifieds site!
Compare Kijiji & Craigslist.Com.
www.Kijiji.com

Craigslist.org
Browse a huge selection now.
Find exactly what you want today.
www.ebay.com

www.Craigslist.Org
Vast Selection at Affordable Prices
Deal with Canadians and Save Money
www.ebay.ca

The "Craigslist.org," "Craigslist.Com," and "www.Craigslist.Org" links took users to Kijiji and eBay websites— not to craigslist as labeled. Outraged craigslist users brought the deceptive ads to Buckmaster's attention (DX512; DX505; DX514), and Buckmaster demanded that the deceptive ads be "promptly removed." [DX515] Aqraou's Kijiji team internally noted that eBay could "turn off the US paid stuff easily" (DX516), which it did. But eBay turned the paid ads back on some weeks later. [DX520; DX549]

J. The craigslist Board Implemented Governance Measures Designed to Protect the Interests of craigslist and All of Its Shareholders

1. For Six Months Following the U.S. Launch of Kijiji, the Board Carefully Considered with Counsel How to Protect craigslist

After the U.S. launch of Kijiji, and Whitman's refusal to honor her assurances to the Defendants, the craigslist Board (composed of Buckmaster and Newmark after Silverman resigned) sought the advice of company counsel to determine how to protect craigslist from the kinds of threats now presented by eBay. [Exh. 3 Wes dep. 38:5-16 (craigslist believed that "eBay was a conflicted shareholder, that it did not share the best interests of the other shareholders and of the company and that – that it was prudent to – to put in place protective provisions"); *id.* 60:22-61:2 (craigslist's concerns "came to a point where [craigslist] felt that action was appropriate in July of 2007")] For the next six months, the Board carefully considered a variety of options identified by counsel to protect craigslist and its unique and successful business model.

In July 2007, Wes raised the possibility of implementing a shareholders rights plan, and provided Buckmaster with portions of a treatise describing rights plans. [DX694; DX696] Wes also identified the possibility of implementing a "staggered board," which he described as a "routine anti-takeover defense" that would prevent a conflicted shareholder from unilaterally placing an agent on the craigslist Board. [DX501] Company counsel drafted multiple written memoranda analyzing the legality of rights plans and staggered boards (DX698; DX699 at CLEB0065088 ("no special considerations for privately held corporations")), and concluded that craigslist could implement both measures. [*Id.* at CLEB0065087-88] The Board met, reviewed counsel's advice and asked questions. [DX632]

On September 20, 2007, company counsel sent a memorandum to Buckmaster recommending that, in order "to maintain its corporate mission, a goal central to preserving long-term stockholder value," craigslist implement a rights plan and a staggered board.

[DX700] Counsel advised that doing so "would significantly improve [craigslist's] ability to deter the unwelcome acquisition of a majority of [craigslist's] shares and enhance current management's ability to implement [craigslist's] long-term strategic goals." [*Id.* at CLEB0071377] The Board's primary purpose in adopting the rights plan was to protect against an unwanted takeover by eBay—or other investors whose view of craigslist was incompatible with craigslist's mission and values—including in the event of the death of Newmark or Buckmaster. [DX684 (eBay "repeatedly emphasizing" that it "will [in]evitably acquire 100% of CL even if it takes decades"); DX678 ("eBay will eventually end up owning CL" and an "acquisition is 'inevitable'"); DX697 (eBay intends to acquire company); Exh. 5 Newmark dep. 305:3-14 (purpose of rights plan "was to discourage the acquisition of . . . control of the company by parties who might not have the interests of the company at heart")] If the Board determines to allow a proposed transfer, it may do so by redeeming the Rights. Either way, would-be acquirors must negotiate with the Board and obtain its approval before making an acquisition.

An important purpose of staggering Board elections was to prevent eBay from unilaterally placing another conflicted representative on the Board and thereby protect craigslist from the type of misconduct engaged in by eBay's prior Board members and observers. [Ex. 3 Wes dep. 311:7-8, 312:4-8 ("The goal was to prevent a conflicted Director from being seated on the craigslist Board of Directors," and the staggered board "was the -- device that was used to prevent that from happening")] The staggered board also served the purpose of deterring unwanted takeovers by eBay or anyone else by "prevent[ing] an incumbent board from being replaced immediately if shareholder control shifts." [DX501] Furthermore, the staggered Board protects the Board's ability to function properly, which would be compromised if a conflicted representative of a direct competitor were present during Board meetings.

Buckmaster carefully reviewed the September 20 memorandum, discussed its contents with counsel, and believed that it made sense to "proceed with all the recommended actions outlined in the memo." [DX701] Buckmaster wanted to proceed with the staggered board as soon as possible, but noted that the rights plan "seems a little more complicated, and may take more time." [DX702] Counsel recommended waiting to implement all changes at the same time, and Buckmaster followed counsel's advice. [DX702; DX511]

Ten days later, on October 1, 2007, Buckmaster and Newmark met with company counsel and discussed the proposed governance changes. After the meeting, counsel provided the Board with an updated version of the September 20 memorandum. [DX703] The Board carefully reviewed the updated memorandum and discussed its contents with company counsel. On October 6, 2007, company counsel sent a draft rights plan to Buckmaster for review. [DX705] Buckmaster read it and asked specific questions, which counsel answered. [DX706]

2. The Board Discussed the Recommended Corporate Governance Changes with Counsel at Its October 15 and 25, 2007 Meetings

At the October 15, 2007 meeting of the craigslist Board, the Board and company counsel again discussed the draft rights plan. [DX541; DX517; DX518] At the time, the draft plan provided that the rights would become exercisable, and the rights plan would be triggered, if (1) an existing shareholder acquired additional shares representing at least 0.5% of the outstanding stock of craigslist, or (2) a third party acquired shares representing at least 15% of craigslist's outstanding stock. [DX705 at CLEB0071317] Harold DeGraff—a Perkins Coie partner with experience working with shareholder rights plans—made a formal presentation to the Board regarding rights plans. [DX541; DX732 at CLEB0059391-96; DX123] DeGraff presented empirical data on rights plans which showed that (1) the announcement of those plans typically had a minimal impact on stock price; (2) those plans tended to increase takeover premiums paid; and (3) the trigger for third-party purchases was

typically set at 15%. [*Id.*] Buckmaster told counsel that the 15% trigger was acceptable, but suggested that the 0.5% trigger for share acquisitions by existing stockholders should be dropped to 0.01%. Counsel revised the rights plan accordingly. [DX519]

At the October 25, 2007 craigslist Board meeting, the Board and company counsel again discussed the rights plan, as well as a "Right of First Refusal Agreement" ("ROFR") into which Buckmaster and Newmark were considering entering to give craigslist rights over any future sale of their shares. [DX540; DX709] The ROFR was designed to enable the Board to evaluate proposed transfers of craigslist shares. If the Board determined that a proposed purchaser (whether eBay or a third party) was antagonistic to or otherwise incompatible with craigslist's mission or goals, craigslist could block the transfer by exercising its ROFR and purchasing the shares on the same terms as those being proposed. The Board recognized that the ROFR would provide maximum benefits and protections to craigslist only if ***all*** shareholders agreed to it, and therefore discussed how to incentivize all shareholders, including eBay, to act in craigslist's best interests and agree to the ROFR.

Buckmaster believed that an economic incentive was necessary to prevent eBay from holding out in the hope that it would receive a benefit (*i.e.*, the other shareholders agree to the ROFR, thereby benefiting craigslist directly and eBay derivatively) without having to give anything of value.[9] To deter holding out, Buckmaster proposed offering as an incentive to all three shareholders that craigslist would issue one additional share for every ten shares submitted to the ROFR. [DX710] During the weeks that followed, the Board and counsel carefully considered a variety of incentives—including shares representing a premium of 10% to 30% on each shareholder's existing stock—to induce all shareholders, including eBay, to act in craigslist's best interests. [*See* DX521; Exh. 2 Buckmaster dep. 215:1-18

[9] *See* Expert Report of Gregg A. Jarrell (Exh. 9 "Jarrell Report") at ¶¶ 83-90 (discussing "free rider" benefits that a shareholder would obtain if the other shareholders were to sign the ROFR but it refused).

("we were trying to come up with a ratio or percentage that would be adequate to induce each shareholder to sign up for the ROFR")]

The ROFR and the rights plan offer different protections and benefits to craigslist. The rights plan gives the Board the ability to evaluate proposed share acquisitions and, if appropriate, to effectively—by virtue of the consequences of triggering the rights—block takeovers or other sales of large blocks of stock that pose a threat to craigslist *without* increasing the ownership percentages of all non-selling shareholders (which would result from exercising the ROFR). The ROFR, on the other hand, allows the Board to evaluate a proposed sale of both large and smaller blocks of stock and, if appropriate, purchase the craigslist shares when doing so would be in craigslist's best interest. [Exh. 3 Wes dep. 36:12-18 (ROFR "intended to deal with smaller transactions, less than 15 percent")] The rights plan and the ROFR also enable the Board to ensure that would-be acquirors pay a fair price, including any control or other appropriate premiums. [Exh. 3 Wes dep. 133:21-134:18 (the rights plan and ROFR "as a bundle, protect craigslist against . . . any company gaining control of craigslist . . . without the Board's consent")]

On October 29, 2007, company counsel sent Buckmaster a set of revised documents, including drafts of the rights plan, ROFR, amended certificate of incorporation, and amended bylaws. [DX521; DX523; DX524] Buckmaster asked counsel questions about the math behind the rights plan (DX524; DX525; DX526), and took notes on the answers. [DX712] Counsel also sent Buckmaster a capitalization table showing the then-current shareholder ownership percentages, how those figures would change if eBay accepted the ROFR offer, and how they would change if eBay rejected the ROFR offer. [DX525 at CLEB0063446 (assuming 1:5 ratio for ROFR)]

Throughout November, Buckmaster considered multiple drafts of the rights plan and ROFR documents (DX713; DX527; DX528), and evaluated whether to use a 1:5 ratio or a 1:10 ratio for the ROFR. Buckmaster carefully reviewed the draft documents, asked

questions, and suggested further revisions. [DX529; DX530; DX531; DX532] Counsel incorporated Buckmaster's suggestions. [DX714; DX715; DX534] On November 29, 2007, Buckmaster, Newmark, and company counsel met again to discuss the ROFR and the rights plan. [DX533]

During December, the Board and craigslist counsel continued to refine the ROFR and rights plan documents, and Buckmaster continued to suggest revisions. [DX536; DX717; DX537; DX718; DX722; DX542] On December 4, 2007, Financial Intelligence, LLC, which had been retained by craigslist counsel to value craigslist's common stock in connection with taxation of employee stock options, issued its valuation report, concluding that as of June 30, 2006, the fair market value of craigslist's common stock was between REDACTED and REDACTED REDACTED with a "point estimate" of REDACTED [DX535]

On December 11, 2007, counsel advised Buckmaster that no stock issuance to any single shareholder in connection with the ROFR offer would exceed REDACTED REDACTED [DX719] Counsel told Buckmaster, "for purposes of gaining comfort . . . [we] will send an updated spreadsheet that shows the % increase that you and craig will have, if you both accept the offer and eBay doesn't." [*Id.*] The spreadsheet modeled four possible ROFR scenarios: (1) 1:5 ratio, eBay accepts; (2) 1:5 ratio, eBay rejects; (3) 1:10 ratio, eBay accepts; (4) 1:10 ratio, eBay rejects. [DX720] Under the second scenario (which would result in the largest transactions), Newmark's new shares would represent REDACTED of craigslist, and Buckmaster's about REDACTED of craigslist.[10] craigslist would have to be valued at over REDACTED in order for Newmark's new shares to be worth REDACTED and the Board was therefore comfortable that no stock issuance to a single shareholder would exceed REDACTED

[10] Those figures assume that no employee stock options are exercised. If options are exercised, each of those figures becomes smaller.

On or about December 15, 2007, after weeks of consideration, Buckmaster determined that using a 1:5 ratio for the ROFR offer would provide the proper incentive for all shareholders to act in craigslist's best interests, and would also provide an appropriate deterrent to free riding. [DX546; *accord* DX542; Exh. 3 Wes dep. 215:16-218:1 (Board determined the appropriate ratio based on what it considered "to be a fair inducement informed by the specifics of the craigslist/eBay relationship")] The Board's "expectation [was] that eBay will end up submitting its shares to the ROFR." [DX546]

Prior to the December 17, 2007 craigslist Board meeting, Buckmaster asked counsel to "triple-check that eBay is not in fact entitled to have their board nominee seated currently." [DX545] Counsel confirmed that eBay was not contractually entitled to seat a representative on the Board. Also prior to the meeting, counsel sent and Buckmaster reviewed a draft amended certificate of incorporation establishing staggered terms of service for directors. [DX543; DX544] At the meeting, the Board "discussed refinements that had been made in the proposed Rights Statement and [ROFR] since the time of the Board's last meeting," and other matters. [DX725; DX545; DX724] The Board also discussed Financial Intelligence's December 4, 2007 valuation report, approved a form of indemnification agreement (the "Indemnification Form"), and authorized craigslist to enter the form of agreement with Buckmaster and Newmark. [DX725] Company counsel proposed adopting indemnification agreements in connection with discussions of recruiting an outside director and because he had recently prepared such agreements for another client. [Exh. 3 Wes dep. 231:16-232:9] Although the Board approved the Indemnification Forms at the December 17 meeting, they were never signed by Newmark, Buckmaster, or craigslist.

3. After Careful Consideration with Counsel, the Board Implemented the Recommended Corporate Governance Changes to Protect craigslist, and Notified eBay of Those Changes

On December 27 and 28, 2007, company counsel sent the Board copies of the ROFR, rights plan, and charter and bylaw amendments (the "Governance Measures") for signature.

[DX551] Buckmaster and counsel discussed the timing for implementing the Governance Measures, and the Board followed counsel's advice. [DX550] On January 1, 2008, after six months of carefully considering the proposed Governance Measures with company counsel, the Board, acting by written consent, determined that the Governance Measures were in craigslist's best interest. Also on January 1, Buckmaster and Newmark approved and ratified (as shareholders) the adoption of the rights plan (as adopted, the "Rights Plan") and adopted and approved the charter amendments staggering the board. They also increased the authorized number of shares to facilitate the Rights Plan and ROFR, and authorized craigslist to offer "one additional share of common stock for every five shares submitted to the [ROFR] (the "Share Issuance")." [DX729]

On January 3, 2008, Buckmaster notified eBay of the recently implemented Governance Measures. [DX729] With respect to the ROFR, craigslist had made the identical offer to all three shareholders: one additional share for every five shares submitted to the ROFR. [*Id.*] Buckmaster and Newmark accepted craigslist's offer, submitted all their shares to the ROFR, and received the additional shares in exchange.[11] In order to give eBay ample time to consider the ROFR, the offer will remain open until January 3, 2011, or until 30 days after notice that the offer is being terminated. [*Id.*] To date, eBay has not accepted or rejected the ROFR offer.

[11] The ROFR superseded the rights of first refusal that Buckmaster and Newmark held over sales of each other's shares pursuant to the SHA: "[T]he Stockholders and the Company hereby agree that this Agreement shall govern the rights of the Stockholders to sell shares of capital stock of the Company held by the Stockholders . . . Any sale, assignment, transfer, pledge, hypothecation, or other encumbrance or disposition of Equity Securities not made in conformance with this Agreement shall be null and void . . . ." [DX729 (ROFR Recitals and Section 1)] *See also* Exh. 2 Buckmaster dep. at 220:6-16 (Buckmaster understood the ROFR superseded the prior right of first refusal between the shareholders).

ARGUMENT

I. THE GOVERNANCE MEASURES COMPORT WITH THE DIRECTORS' DUTIES UNDER DELAWARE LAW

A. The Directors' Decisions to Implement the Governance Measures Are Entitled to the Protections of the Business Judgment Rule

A board of directors has both the power and duty to implement measures to protect the corporation if the board reasonably perceives a threat to the corporate enterprise, irrespective of the threat's source. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1374 (Del. 1995); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949, 954, 958 (Del. 1985); *Nomad Acquisition Corp. v. Damon Corp.*, 1988 Del. Ch. LEXIS 133, at *13. Such measures are generally entitled to the protection of the business judgment rule. *See Unocal*, 493 A.2d at 954; *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1350 (Del. 1985). In some situations, however, a board's implementation of defensive measures will initially be subject to a threshold reasonableness review under the *Unocal* doctrine before the Court applies the protections of the business judgment rule. *See Moran*, 500 A.2d at 1356; *Unocal*, 493 A.2d at 954.

Threshold review under *Unocal* does not apply in the circumstances of this case for at least two reasons. First, *Unocal* applies where the circumstances pose the "omnipresent specter" that a board implemented defensive measures to further the directors' interests in maintaining their positions, rather than the interests of the corporation and its stockholders. *Unocal*, 493 A.2d at 954-55. Newmark and Buckmaster 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. Thus, the "omnipresent specter" that the directors were acting to protect their own positions on the board is not present and *Unocal* is not implicated.

Second, *Unocal* applies only to defensive measures implemented by unilateral board action (*i.e.*, action undertaken without stockholder approval). *Williams v. Geier*, 671 A.2d

1368, 1377 (Del. 1996); *see also In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 485 n.80 (Del. Ch. 2000) (refusing to apply *Unocal* because charter amendments were approved by shareholder vote and not unilaterally adopted by board). Here, each of the Governance Measures required approval of the holders of a majority of the outstanding stock for its implementation, and Buckmaster and Newmark gave that approval and ratified all the Governance Measures in their capacities as stockholders.[12] Accordingly, none of the Governance Measures involved unilateral board action of the sort that implicates *Unocal*. However, as explained below, even if the *Unocal* standard of review were applicable, Defendants' actions satisfy the *Unocal* test, and should be upheld as valid exercises of the Board's business judgment.

eBay's efforts to overcome the presumptions of the business judgment rule and invoke entire fairness review are likewise unavailing. To overcome those presumptions, eBay must "introduc[e] evidence either of director self-interest, if not self-dealing, or that the directors either lacked good faith or failed to exercise due care." *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989) (citation omitted). eBay has adduced no such evidence, and bare allegations of unfairness and bad faith do not satisfy the requisite burden. *Williams*, 671 A.2d at 1385 ("Conclusory allegations that the result of the [measure] was 'unfair' to the minority are not a substitute for analysis or proper pleading and proof of violation of fiduciary duty."). As explained below, Newmark and Buckmaster acted with due care, in good faith, and for valid business reasons, and their actions were neither fraudulent nor tainted by material self-interest. Accordingly, their decisions are entitled to the substantive protections of the business judgment rule. *Unocal*, 493 A.2d at 954.

[12] The charter amendment implementing the staggered board required stockholder approval under 8 *Del. C.* § 242. The Rights Plan and the Stock Issuance in connection with the ROFR likewise required a charter amendment to increase the number of authorized shares.

B. The Directors Exercised Due Care and Implemented the Governance Measures in Good Faith to Protect craigslist

1. The Directors Acted with Due Care

The fiduciary duty of care requires that corporate directors inform themselves of all material information reasonably available to them and, having so informed themselves, act with the requisite care in making their decisions. *See Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985), *overruled on other grounds, Gantler v. Stephens,* 965 A.2d 695, 713 (Del. 2009); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds, Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000). "[A]lleged deficiencies . . . must rise to the level of gross negligence if the directors' decision is to be condemned as uninformed." *Mount Moriah Cemetery v. Moritz*, 1991 WL 50149, at *4 (Del. Ch.), *aff'd*, 599 A.2d 413 (Del. 1991) (TABLE); *see also Aronson*, 473 A.2d at 813 n.6 (citing cases). This Court has succinctly summarized the heavy burden facing a plaintiff attempting to prove a breach of the duty of care, describing it as "onerous" and stating that the defendant's lack of care must be "egregious." *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 n.56 (Del. Ch. 2000).

In assessing whether a director has exercised due care, Delaware courts focus on the decision-making *process*, not the substance of the decision reached. *See In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) ("compliance with a director's duty of care can never appropriately be judicially determined by reference to *the content of the board decision* . . . apart from consideration of the good faith or rationality of the process employed") (emphasis in original); *Brehm,* 746 A.2d at 264 (in analyzing duty of care claims, "[c]ourts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context") (citation omitted).

The record to be presented at trial will establish that Defendants carefully evaluated the Governance Measures over the course of six months and had an active role in formulating them. [*See* Statement of Facts Section J above] During that six-month period, they held multiple formal board meetings, as well as informal meetings, and engaged in

extensive telephonic and email communications about the Governance Measures. During meetings, they discussed the Governance Measures and potential alternatives, asked questions of counsel, and instructed counsel to make revisions to the terms of the Governance Measures. The Directors considered detailed memoranda and other written presentations by counsel. Defendants also reviewed multiple, evolving drafts of the Governance Measures. For the ROFR, Defendants considered different ratios for the issuance of shares, and counsel prepared analyses—also reviewed by Defendants—based on different assumptions about the share issuance under the ROFR. Counsel similarly provided, and Defendants reviewed, analyses of the calculations under the Rights Plan as applied to craigslist's shares, and in the case of the Rights Plan (which Buckmaster found to be more complex than the other measures) a Perkins Coie partner with more expertise with rights plans was brought in to explain the measure in more detail and take questions.[13]

Only at the end of this extended and rigorous process of consideration and review did Defendants approve the Governance Measures. The thorough process employed by Defendants compels the conclusion that the directors satisfied their duty of care.[14]

2. The Directors Relied on the Advice of Counsel

Defendants also relied on the advice provided by counsel, which in and of itself precludes a finding of liability for breach of the duty of care. Directors are "fully protected in relying in good faith upon . . . opinions . . . or statements presented to the corporation by . . . any [] person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care

[13] Defendants also received a valuation report from Financial Intelligence (DX535) that—along with an opinion letter from counsel regarding whether the Share Issuance could potentially exceed the Hart-Scott-Rodino Act's filing threshold of $59 million—informed their understanding of craigslist's value.

[14] To the extent eBay continues to seek damages for alleged breaches of the duty of care, that relief is precluded by 8 *Del. C.* § 102(b)(7) and craigslist's exculpatory charter provision. [DX058 Article XI]

by or on behalf of the corporation." 8 *Del. C.* § 141(e). Soliciting and considering the advice of counsel is compelling evidence that directors have acted with due care. Thus, this Court found in *Cinerama, Inc. v. Technicolor, Inc.* that the "board's reliance upon experienced counsel ... evidence[d] good faith and the overall fairness of the process," and that "it is arguable that the board's good faith reliance on this legal testimony *may provide an independent basis for finding the directors not liable*" for approving the transaction at issue. 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995) (emphasis added); *see also Gaylord Container*, 753 A.2d at 479 ("[T]he Gaylord board engaged in a rational deliberative process to define the threat it faced, meeting on two occasions and receiving detailed legal advice from a distinguished outside law firm. This supports the conclusion that the board acted in an informed manner.") (footnote and citation omitted);[15] *Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *6, *13 (Del. Ch.) (plaintiffs failed to adduce any facts supporting allegation that defendants were grossly negligent where outside law firm advised the board that a decision approving the deal at issue would "properly fall within the realm of the directors' business judgment"); *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 72-73 (Del. 2006) (affirming trial court finding that chairman/CEO did not violate duty of care when he relied on advice of counsel in deciding that he could only fire company president pursuant to no-fault-termination term of employment contract).

3. The Directors Were Not Required to Engage a Financial Advisor to Perform an Evaluation or Render a Fairness Opinion

eBay also suggests that Defendants breached their duty of care by not incurring the significant time and expense required to engage a financial advisor to perform a valuation

[15] The plaintiffs in *Gaylord* attacked the company's law firm on the basis that, in addition to serving as company counsel, the firm also "had a traditional lawyer-client relationship with the company's CEO." *Id.* at 479 n.57. This Court rejected that attack. eBay's attempt to challenge the Defendants' reliance upon the advice provided by craigslist's long-standing counsel on the basis that Perkins Coie has provided limited estate planning services to Newmark and Buckmaster must similarly fail.

before approving the Governance Measures. eBay fails to recognize that craigslist was a private company, that the Governance Measures did not result in a change of control or other major overhaul of craigslist's capital structure (and, indeed, were not expected by Buckmaster and Newmark to result in any change to the relative ownership percentages of the shareholders), and that Buckmaster and Newmark had recently received a valuation of craigslist.

It is well settled that Delaware law does not require a board of directors to engage an independent financial advisor or obtain a professional valuation or fairness opinion to satisfy the duty of care. Indeed, "just how much information prudence requires before a decision is made is itself a question that calls for informed judgment of the kind courts are not equipped to make." *Citron v. Fairchild Camera & Instrument Corp.*, 1988 WL 53322, at *17 (Del. Ch.) (citation omitted), *aff'd*, 569 A.2d 53 (Del. 1989). This principle applies to the decision whether to engage a financial advisor or to obtain a formal valuation or fairness opinion. *See Oberly v. Kirby*, 592 A.2d 445, 472 (Del. 1991) (noting, in the context of a closely held, nonstock corporation, that "[a]lthough Delaware law requires that corporate directors evaluate the propriety of a given transaction on the basis of a full complement of information, it does not require that they seek a formal fairness opinion") (citation omitted); *Citron v. Steego Corp.*, 1988 WL 94738, at *9 (Del. Ch.) ("[W]hether the advice of an investment banker would be helpful or not in making a business decision of importance is itself a question demanding business judgment."); *Baldwin v. Bader*, 2008 WL 2875351, at *34 (D. Me.) ("[O]utside valuation studies are not essential to support informed business judgments, and fairness opinions by independent investment bankers are not required as a matter of law.") (applying Delaware law and citing *Van Gorkom*, 488 A.2d at 876).

As a privately held company evaluating the types of Governance Measures under consideration, including the ROFR and Share Issuance, it would have been unusual for craigslist to have engaged an investment banker. eBay made no attempt to value the original

ROFR or other protections that it negotiated as part of the Shareholders' Agreement. [Exh. 6 Price dep. 178:22-25 ("Q. How did eBay go about valuing these additional rights that it wished to acquire as part of the transaction? A. I don't believe that we valued them at all.")] Similarly, former eBay CEO Pierre Omidyar did not engage an investment banker to value eBay when it issued stock as a privately held company. [Exh. 7 Omidyar dep. 11:18-12:19] Engaging a financial advisor or incurring the expense of a formal valuation or fairness opinion would have been very expensive and would have had little utility in connection with the measures under consideration and in view of craigslist's closely-held status. [*See* Exh. 8 Jarrell dep. 100:23-101:16]

Defendants had recently received a valuation prepared by a financial advisor, Financial Intelligence. While that valuation was obtained for unrelated tax purposes and valued craigslist as of an earlier time, it informed the Defendants' judgment as to the expense and utility (or lack thereof) of obtaining a new valuation in connection with the Governance Measures. [Exh. 3 Wes dep. 165:2-13] Defendants considered that valuation and relied on their extensive knowledge of craigslist and advice from counsel in implementing the Governance Measures. [Exh. 2 Buckmaster dep. 215:19-217:11, 240:23-241:9] Their decision making process under such circumstances was more than sufficient to satisfy their duty of care. *See Gaylord Container*, 753 A.2d at 479, n.57 ("I also reject as inadequate to generate a triable issue of fact the plaintiffs' assertion that the board needed to retain an investment bank in addition to [counsel]. . . . [T]he board felt that it was adequately positioned to make a judgment about the defensive measures based on the input of [counsel] and company management and using their own business acumen.").[16]

[16] Even in the M&A context, there is no hard-and-fast requirement that a board obtain an independent valuation. *Crescent/Mach I Partners, L.P. v. Turner,* 846 A.2d 963, 984 (Del. Ch. 2000) ("[F]airness opinions prepared by independent investment bankers are generally not essential, as a matter of law, to support an informed business judgment.") (*citing Van Gorkom,* 488 A.2d at 876).

4. The Directors Acted in Good Faith

The Directors also acted in good faith in connection with their consideration and implementation of the Governance Measures. As discussed above, they carefully considered the Governance Measures and potential alternatives and implemented the Governance Measures, relying on advice of counsel, to protect against threats to craigslist, not to harm eBay or benefit themselves personally. eBay's argument that the Governance Measures were adopted in bad faith because they were designed to protect craigslist from eBay lacks any merit.

It is well settled that a board of directors has an "obligation to protect the corporate enterprise, which includes the stockholders, from harm reasonably perceived, irrespective of source," including when "a threat originates from third parties ***or other shareholders***." *Unocal,* 493 A.2d at 954-55 (emphasis added and citations and footnote omitted). eBay had revealed itself as a conflicted stockholder, it was engaged in direct competition with craigslist, it had acted to injure craigslist in order to benefit Kijiji, it had made clear its goal to control craigslist, and Defendants reasonably perceived that eBay had misused and abused its stockholder position and board representation to compete unfairly. Defendants believed there was a significant possibility eBay would continue to exploit its relationship with craigslist in the future for its own competitive advantage and to the disadvantage of craigslist and its unique business plan. Thus, contrary to eBay's allegations, the Governance Measures "[were] not devised to punish [eBay] but rather to save the corporation, of which [eBay] remain[s] a shareholder." *Baldwin*, 2008 WL 2875351, at *31 (applying Delaware law). "[T]here is no support in Delaware law for the proposition that, when responding to a perceived harm, a corporation must guarantee a benefit to a stockholder who is deliberately provoking the danger being addressed." *Unocal*, 493 A.2d at 958.

eBay complains that it did not receive advance notice of the Governance Measures, suggesting that the lack of advance notice somehow indicates bad faith. [Exh. 10 Compl. ¶¶

61-62] That is without merit because the Governance Measures were designed to address threats posed *by eBay*, and providing advance notice could have undermined or eviscerated the effectiveness of those Governance Measures. Moreover, eBay was not entitled to any advance notice. When eBay engaged in Competitive Activity, it knowingly and automatically surrendered its veto rights over governance actions encompassing the Governance Measures implemented by Defendants. As detailed in Section H of the Statement of Facts, eBay's counsel recognized that eBay had no right to notice and attempted to renegotiate the SHA, requesting "15 calendar days' advance notice before the completion or agreement to complete any: adverse charter amendment . . . [or] issuance of Company or subsidiary stock." [DX488] craigslist unsurprisingly declined to renegotiate the SHA for eBay's benefit. As a result, eBay was left without any right to advance notice of actions by the craigslist board encompassing the measures adopted. eBay had an opportunity to bargain for such a right and failed to obtain it. *See Nixon v. Blackwell*, 626 A.2d 1366, 1379-81 (Del. 1993) ("It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed [special right for a minority shareholder] for which the parties [could have] contracted").

C. Defendants Adopted the Governance Measures in the Context of the Parties' Shareholders' Agreement

Defendants' adoption of the Governance Measures did not occur in a legal vacuum, but in the context of the SHA that eBay had negotiated in 2004. eBay recognized that after it purchased its minority interest, the Board would have the inherent right to issue additional shares, make changes to the capital structure, amend the charter, and otherwise engage in a variety of governance transactions. eBay therefore negotiated for a variety of "investor protection and recapture rights," including rights that would protect it from dilution. Specifically, eBay obtained approval/veto rights over (1) a change to the number of authorized directors (SHA § 4.6(a)(i)); (2) a change in the number of authorized shares of

company stock (SHA § 4.6(a)(ii)); (3) any amendment of the charter documents that would "adversely affect[]" eBay (SHA § 4.6(a)(iii)); and (4) any payment of a dividend or other distribution with respect to company stock (SHA § 4.6(a)(vii)). [DX673] Newmark, Buckmaster and eBay all received pro-rata rights of first refusal over any future issuances of Company stock. [*Id.* § 5.1]

But eBay's rights, including the right to block the issuance of additional shares or exercise a right of first refusal over such an offering, were contingent and subject to termination. If eBay engaged in "Competitive Activity" all of eBay's rights under Sections 4.6 and 5.1 would terminate. [*Id.* § 8.3] eBay was well aware of that, and carefully considered the loss of those rights when deciding whether to launch Kijiji in the U.S. [*See* Statement of Facts section G above]

When it chose to engage in Competitive Activity, eBay knowingly abandoned its contractual right to block the types of transactions embodied by the Governance Measures. These facts demonstrate that, even at the time of its investment, eBay recognized that such Governance Measures might be undertaken by craigslist in the event eBay engaged in Competitive Activity, and eBay was unable to negotiate contractual protections from such measures. *Nixon*, 626 A.2d at 1379-80 ("A stockholder who bargains for stock in a closely-held corporation and who pays for those shares . . . can make a business judgment whether to buy into such a minority position, and if so on what terms. . . . [A] stockholder intending to buy into a minority position in a Delaware corporation may enter into definitive stockholder agreements, and such agreements may provide for elaborate [protections for the minority shareholder].") (citation omitted).

II. THE ADOPTION OF THE RIGHTS PLAN COMPORTED WITH THE DIRECTORS' FIDUCIARY DUTIES AND DELAWARE LAW

A. The Rights Plan Was Implemented for Legitimate Business Purposes and to Respond to Reasonably Perceived Threats to craigslist

If *Unocal* review were applicable, the business judgment rule would still protect the board's decision to implement the Governance Measures because (1) the Directors had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and (2) the Governance Measures chosen were "reasonable in relation to the threat posed." *See Unitrin*, 651 A.2d at 1373 (citing *Unocal*, 493 A.2d at 955).

The Directors' decision to adopt the Rights Plan comports with the first part of the *Unocal* test because the board made a reasonable, good faith determination that implementation of a Rights Plan was appropriate to protect craigslist in the long term by establishing several important protections. *See Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1990) ("The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals."); *Moran*, 500 A.2d at 1350 ("[P]re-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment.").

Although neither Newmark nor Buckmaster has any current plans to sell his shares, they realized not only that intentions can change but—because eBay often reminded them—that they are mortal and will pass away at some time in the future. After their deaths, their shares are likely to become liquid, either because of forced tax selling by heirs or a charity's desire to create liquidity. [Exh. 3 Wes dep. 83:17-84:1] Based on the information known to Defendants today, eBay will be the most likely purchaser of the available shares. eBay, which is not restrained by the limits of mortality, has repeatedly told Defendants that it wishes to acquire the entire company—including, most recently, *after* it decided to launch a direct competitor.[17] If eBay were to acquire control of craigslist, Defendants recognized the

[17] *E.g.*, DX678 (Price stressed to Wes that "an acquisition is 'inevitable,'" and craigslist employees "should be told that eBay will eventually end up owning CL"); DX697 ("[W]e would

significant possibility that eBay could fundamentally alter craigslist's business model and corporate values to the detriment of craigslist, its community, and its remaining minority stockholders. What makes craigslist so unique is its devotion to serving the user community, a focus which has led it to become one of the most successful and efficient internet sites in the world, long after most dot-coms created in the 1990s with more short-term business models have failed and disappeared. [*See* DX566 (5.8.09 Expert Report of Robert S. Cauthorn ("Cauthorn Report") at ¶¶ 20-23) (e.g., craigslist draws 76% as much traffic as eBay with far less than 1% of eBay's staff)] The fact that eBay holds a significant minority stake in craigslist would chill interest on the part of other potential bidders for any shares that were to be sold, allowing eBay to acquire a controlling interest in craigslist at an unfairly low price, or to acquire a controlling interest without offering an opportunity for liquidity to all shareholders on an equal basis.

The Rights Plan is intended to address the possibility that Newmark or Buckmaster (or one of their estates) may seek liquidity in the future, and to enable the board of directors, as it may be composed at such future time, to determine whether a proposed sale of stock would be in craigslist's best interests and appropriately respond to threats to corporate policy and effectiveness that may be posed by a potential acquirer. It also was designed to help ensure that a selling stockholder in such circumstances will receive a fair price. [*See* Exh. 3 Wes dep. 80:21-81:21 (explaining that future dynamic may be that eBay is only purchaser for whom shares would create majority block, and thus "could give an unfair low price")]

The Rights Plan also addresses the additional danger that eBay too could change its mind about retaining its shares in craigslist and that it has a motive—as a direct craigslist competitor—to sell its entire block of shares to another antagonistic shareholder. As

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welcome the opportunity to acquire the remainder of craigslist, Inc. we do not already own whenever you and Craig feel it would be appropriate."); DX684 at CLEB0066462 (Price "repeatedly emphasizing" that eBay "will [in]evitably acquire 100% of CL even if it takes decades").

described above, eBay acquired its shares from an incompatible shareholder (Knowlton) who threatened to sell his shares to a purchaser who would "bleed craigslist and suck it dry," and the board sought to protect against a future recurrence of that type of threat. [Exh. 3 Wes dep. 148:9-12; *see also* Exh. 9 Jarrell Report ¶¶ 69-72 (discussing potential harms to craigslist from an antagonistic stockholder)]

This Court has recognized the legitimate concerns posed by those very types of threats to the corporate policy and effectiveness and the propriety of implementing defensive measures to protect against them. *See, e.g., Paramount Commc'ns*, 571 A.2d at 1152-53 (denying injunction where the Time board had determined that an alternative to hostile offer presented greater long-term value for stockholders and that the hostile offer posed a threat to Time's survival and its "culture"); *Kors v. Carey*, 158 A.2d 136, 141 (Del. Ch. 1960) (upholding elimination of acquiror's stock where acquiror "presented a threat of a possible future business course which was entirely at odds with [the company's] traditions" because it favored "aggressive promotional schemes, and a readiness to sacrifice an established mode of doing business for quick profits . . . "); *see also, e.g., Gaylord Container*, 753 A.2d at 481 ("The primary purpose of a poison pill is to enable the target board of directors to prevent the acquisition of a majority of the company's stock through an inadequate and/or coercive tender offer."); *Nomad Acquisition Corp.*, 1988 Del. Ch. LEXIS 133, at *5 (declining to "order the redemption of rights where the effect of the redemption would negatively impact the shareholders' ability to realize full value for their shares") (citation omitted); *BNS Inc. v. Koppers Co., Inc.*, 683 F. Supp. 458, 475-76 (D. Del. 1988) (denying preliminary injunction where the directors of the target company determined that "the Company remaining independent would be a superior alternative over the long term to accepting the [tender] Offer").

As discussed above, the Directors exercised due care and acted in good faith in identifying threats to the corporation and considering appropriate measures, including the

Rights Plan, to protect against them. Accordingly, the Directors had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed . . . ." *Unitrin*, 651 A.2d at 1373 (directors satisfy their burden under the first part of *Unocal* by showing good faith and a reasonable investigation) (quoting *Unocal*, 493 A.2d at 955).[18]

B. The Rights Plan Is a Proportionate Response to the Identified Threats

As to the second part of the *Unocal* test, defensive measures are considered reasonable in relation to the threat posed if (1) they are not "coercive" or "preclusive" and (2) such measures are otherwise within "a range of reasonable responses" to the threat perceived. *See Unitrin*, 651 A.2d at 1367.[19] A board's decision need only be reasonable, not perfect, and the Court should accord the board wide latitude in discharging its duties and formulating a response. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45-46 (Del. 1994); *see also Unitrin*, 651 A.2d at 1385-86.

Rights plans are an "ordinary," "garden-variety defensive measure[]." *Gaylord Container*, 753 A.2d at 464. Yet they are an important and particularly effective tool for guarding against unfair or abusive stock acquisition threats and protecting stockholder value. *See id.* at 481. The adoption of a rights plan "does not destroy the assets of the corporation,"

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[18] eBay also agreed (in the SHA) that it would lose its right to block transactions like the Rights Plan if it competed with craigslist. The Rights Plan declares a "dividend distribution" of Rights. [DX729 (at E00004030)] By engaging in Competitive Activity eBay knowingly forfeited its existing right to veto "any payment or declaration, directly or indirectly, of a dividend or other distribution with respect to any equity security of the Company . . . ." [DX 673 SHA §§ 8.3, 4.6(a)(vii)] Moreover, "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. [DX673 SHA §§ 8.3, 4.6(a)(v)]

[19] A defensive mechanism is "coercive" if it is aimed at forcing upon stockholders a management-sponsored alternative to a third party proposal. *See Unitrin*, 651 A.2d at 1387; *Paramount Commc'ns v. Time*, 571 A.2d at 1154-55. A defensive mechanism is "preclusive" if it deprives stockholders of the right to receive all offers or precludes a bidder from seeking control by means of a proxy contest or otherwise. *See Unitrin*, 651 A.2d at 1387-88.

nor does it "result[] in any outflow of money from the corporation [or] impair[] its financial flexibility." *Moran*, 500 A.2d at 1354.

Delaware courts have consistently held that the adoption of a rights plan as a prospective defensive measure is a proportionate response that is neither preclusive nor coercive. The board retains the ability under a rights plan to redeem the rights (or amend the plan to render it inapplicable to a particular transaction), which affords the board the opportunity to evaluate all of the circumstances and to act accordingly if and when faced with a specific and imminent threat in the future. *See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 181 (Del. 1986); *Moran*, 500 A.2d at 1354-55; *Gaylord Container*, 753 A.2d at 481-82. Indeed, the Delaware Supreme Court has held that "pre-planning for the contingency of a hostile takeover" through adoption of a rights plan "might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment." *Moran*, 500 A.2d at 1350. This Court has similarly observed that:

> Delaware law does not require a board to wait until the eve of battle to consider the erection of sound defensive barriers. In fact, our law recognizes that such a requirement would encourage haste rather than due care.

Gaylord Container, 753 A.2d at 478 (citations omitted). For those reasons, "it seems *even more appropriate* to apply the business judgment rule" to defensive measures "adopted to ward off possible future advances and not . . . a specific threat." *Moran*, 500 A.2d at 1350 (emphasis added and citation omitted).

eBay has alleged no cognizable harm to it from the Rights Plan, but instead speculates that the measure is "manifestly designed to inhibit eBay from selling its shares to any buyer other than Newmark, Buckmaster, or the Company they control." [Exh. 10 Compl. ¶ 52] eBay's bare speculation does not state an actionable claim. *E.g., Williams*, 671 A.2d at 1385 ("Conclusory allegations that the result of the [measure] was 'unfair' to the minority are not

a substitute for analysis or proper pleading and proof of violation of fiduciary duty."). The Rights Plan cannot universally prevent eBay from selling its shares. eBay can sell its shares in blocks of less than 15% of craigslist's outstanding stock without triggering the Plan. And the Plan was not intended to prevent eBay from selling its shares. In fact, Buckmaster asked eBay to do exactly that (DX693 (Buckmaster proposing to help eBay find a buyer for its craigslist shares)), and would certainly permit a transfer to an appropriate purchaser. eBay rejected Buckmaster's request and there is no evidence that eBay intends to sell its shares in a transaction that could trigger the Rights Plan. [DX697; *see also* Exh. 11 1.6.09 eBay Reply Brief in Further Support of Its Motion to Compel ("1.6.09 eBay Reply", at 2) ("eBay refused and continues to refuse to sell its shares")]

eBay's assertion that the Rights Plan is an unreasonable measure because it could potentially be misused in the future has been rejected time and again by the Delaware courts. *See, e.g.*, *Moran*, 500 A.2d at 1350; *Coates v. Netro Corp.*, 2002 WL 31112340, at *6 (Del. Ch.) (dismissing claim because alleged future harm from adoption of rights plan was "presently abstract and divorced from any actual or threatened use against a specific, impending proposal" and, as such, did "not give rise to an actionable claim") (quotations and citation omitted); *Gaylord*, 753 A.2d at 464 ("in the abstract, the Gaylord board's decision to put in place rather ordinary defensive measures in advance of the elimination of the company's dual class voting structure cannot, as a matter of law, be deemed unreasonable"). If and when circumstances arise in the future that implicate the Rights Plan, the craigslist board of directors, as it then may be constituted, will be required to evaluate the then-existing circumstances and will be required to exercise prudent business judgment in the discharge of its fiduciary obligations at such time. *Moran*, 500 A.2d at 1350. As explained by Defendants' financial expert, professor Gregg A. Jarrell, the Rights Plan "can easily be removed by the craigslist board" to allow a sale by eBay, provided that the board finds that purchaser's interests aligned with those of craigslist. [Exh. 9 Jarrell Report ¶¶ 108-10]

Buckmaster offered to assist eBay to sell its stock to a new, non-competing, shareholder. [DX693] On the other hand, if eBay ever proposes to sell its shares to a hostile third party, the board's fiduciary duties would compel it to keep the Rights Plan in place. [*Id.* ¶¶ 108-09; *see also* Exh. 8 Jarrell dep. 179:15-180:21 (noting that craigslist's board appeared unlikely to oppose a sale by eBay unless the proposed sale was to another direct competitor such as Monster.com][20]

The Defendants' adoption of the Rights Plan was a reasonable and proportionate response to the possibility that an existing stockholder or a third party could, in the future, seek to acquire craigslist shares (whether from Buckmaster or Newmark (or one of their estates) or from eBay) under circumstances that pose a threat to corporate policy and effectiveness.

C. The Rights Plan Is Not an Interested Director Transaction and Is Not Otherwise Subject to Review Under the Entire Fairness Standard

eBay argues that the Rights Plan should be reviewed under the entire fairness standard because it was "approved by self-interested directors." [Exh. 10 Compl. ¶ 102] eBay cannot explain, however, how the directors are personally enriched by imposition of the Rights Plan or how they otherwise can be considered to have stood on both sides of the transaction or to have engaged in self-dealing. The Delaware Supreme Court has rejected the notion—advanced by eBay here—that a board's decision to adopt defensive measures loses the protection of the business judgment rule (and becomes subject to entire fairness review) merely as a result of an "inherent conflict" arising out of the prospect such measures could be used for entrenchment purposes. *See Unocal*, 493 A.2d at 954-55 (holding that board's duty in responding to potential threats to corporate control and effectiveness "is no different from

[20] In addition, given the 15% trigger, the Rights Plan would not be implicated if, for example, eBay were to sell half of its shares to one purchaser and the other half to another. *See* Exh. 9 Jarrell Report ¶ 110 n.75 (noting that eBay's expert, Professor Fischel, contends that there is "substantial interest" by third parties in craigslist shares and, thus, "it should be relatively easy for eBay to find multiple buyers to buy its stake").

any other responsibility it shoulders, and its decisions should be no less entitled to the respect they otherwise would be accorded in the realm of business judgment," notwithstanding "inherent conflict" posed by the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders . . . ") (footnote and citation omitted); *Moran*, 500 A.2d at 1350 (holding that adoption of defensive measures is entitled to protection of the business judgment rule for the reasons articulated in *Unocal*, whether defensive action is adopted as a prospective defensive measure to ward off possible future advances or as a mechanism to protect against a specific, imminent threat).

The rights under the Rights Plan were dividended pro rata to all stockholders, including eBay, and the Rights Plan applies equally to all stockholders. It is well settled that a transaction is not subject to entire fairness merely because directors receive a benefit, so long as that same benefit is shared equally with all stockholders. *See Gilbert v. El Paso Co.*, 575 A.2d 1131, 1146 (Del. 1990) (no self-dealing where "no board member received any special benefit which was not also extended to all shareholders"); *Unocal*, 493 A.2d at 958-59 (The "protection [of the business judgment rule] is not lost merely because Unocal's directors have tendered their shares in the exchange offer. . . . [T]hey are receiving a benefit shared generally by all other stockholders . . . ."); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 721-22 (Del. 1971) (entire fairness not applicable to board's decision to pay cash dividend proportionately to all stockholders, despite fact that board was controlled by majority stockholder); *Shields v. Shields*, 498 A.2d 161, 170 (Del. Ch. 1985) (defendant "was not engaging in a self-dealing transaction as the Delaware law has defined that term" where his benefit from the transaction was not "different from other shareholders . . . ").

eBay contends that the Rights Plan constitutes self-dealing because it specifically "carved out" exceptions for certain transfers that Defendants could make "for estate planning purposes." [Exh. 10 Compl. ¶ 53] But eBay fails to mention that the Rights Plan exempts other transfers that only eBay could make, including transfers to eBay's successor in interest

by merger. [DX729 at E00003970] craigslist has both individual and corporate shareholders, and the Rights Plan exempts particular transfers that are unique to each type of shareholder. There is nothing unfair or unusual about conferring "estate planning" benefits, as eBay calls them, on stockholders who are natural persons, particularly where analogous "corporate planning" benefits are afforded to stockholders that are corporations. In all events, the mere fact that a rights plan has necessarily different application to natural persons than it has to corporate stockholders does not give rise to a material conflict of interest. Otherwise, any time a Delaware corporation has at least one stockholder that is a corporation or other business entity and directors also own stock, nearly any corporate transaction impacting stockholders would automatically be subject to entire fairness review, given that directors of a Delaware corporation are statutorily required to be natural persons. 8 *Del. C.* § 141(b). eBay is unable to show any basis for invoking the entire fairness doctrine in connection with the Board's implementation of the Rights Plan.

D. Even If the Entire Fairness Standard Were Applicable, the Rights Plan Would Withstand Scrutiny Under That Standard

Even if the entire fairness standard were applicable, the craigslist board's adoption of the Rights Plan would also survive scrutiny under that standard. The entire fairness standard implicates considerations of process and price, with "[a]ll aspects of the issue ... examined as a whole since the question is one of entire fairness." *Cinerama*, 663 A.2d at 1163 (citation omitted); *Nixon*, 626 A.2d at 1379 (discriminatory stock ownership plan favoring employees upheld under analysis solely of fair dealing prong of standard). Here, the evidence establishes that the adoption of the Rights Plan was entirely fair to all shareholders, including eBay.

The craigslist board engaged in a careful and thorough process for considering, revising, receiving advice regarding, discussing, and ultimately approving the Rights Plan. When the board approved that Plan in January 2008, more than six months after the launch

of Kijiji in the U.S., it did so in direct recognition of the competitive threat posed by eBay. Newmark and Buckmaster carefully deliberated for more than six months over the appropriate measures to take in response to the eBay threat, and adopted the Rights Plan at the advice of, and after lengthy discussions with, legal counsel. *Parnes v. Bally Enter. Corp.*, 2001 WL 224774, at *13 (Del. Ch.) (transaction entirely fair when "Board also received the assistance and advice of experienced counsel, throughout the entire process"), *aff'd*, 788 A.2d 131 (Del. 2001) (TABLE); *Kahn v. Lynch Commc'ns Sys., Inc.*, 669 A.2d 79, 85 (Del. 1995) (transaction entirely fair when corporation's "committee had the benefit of outside legal counsel" in approving transaction); *Cinerama*, 663 A.2d at 1175 (similar). Newmark and Buckmaster correctly, and in good faith, believed that the Rights Plan served the best interests of craigslist and its shareholders. *Cinerama*, 663 A.2d at 1174 (transaction entirely fair when majority of board believed in good faith that it served shareholders' best interests). The Rights Plan treats all shareholders equally, as all shareholders are subject to the Rights Plan. *Kahn*, 669 A.2d at 86 (transaction entirely fair when "no shareholder was treated differently in the transaction from any other shareholder . . . "). The Rights Plan thus meets the "fair dealing" requirement of the entire fairness test.

To the extent price is implicated in consideration of a rights plan under the entire fairness standard, the Rights Plan satisfies that aspect of the test. In determining to adopt the Rights Plan, the craigslist board considered empirical evidence demonstrating that the adoption of a rights plan typically has minimal impact on the company's stock price and that such plans tend to increase takeover premiums paid. As noted, a rights plan "does not destroy the assets of the corporation" and does not "result[] in any outflow of money from the corporation [or] impair[] its financial flexibility." *Moran*, 500 A.2d at 1354. After receiving advice of counsel and extensive discussions over many months, the board determined to adopt a plan providing for a 15% trigger for third-party purchases and a .01% trigger for additional acquisitions by existing stockholders. Those triggers, and indeed the

Rights Plan itself, are consistent with rights plans adopted by thousands of other Delaware companies. Thus, adoption of the Rights Plan would pass muster under the entire fairness test were that standard applied to assess the validity of the Rights Plan.

III. THE DIRECTORS' DECISION TO IMPLEMENT THE ROFR AND SHARE ISSUANCE COMPORTED WITH THEIR FIDUCIARY DUTIES AND DELAWARE LAW

A. The ROFR and Related Share Issuance Serve Legitimate Business Purposes, Were Implemented in Response to Reasonably Perceived Threats, and Are a Proportionate Response to those Threats

The Directors implemented the ROFR and related Share Issuance for legitimate business purposes and to provide protection to craigslist from reasonably perceived threats to corporate policy and effectiveness. The ROFR and Share Issuance are a proportionate response to those threats. Thus, even if *Unocal* were the applicable threshold standard of review, the Directors' decision to implement those measures is entitled to the protection of the business judgment rule.

First refusal rights are specifically authorized by the DGCL (Section 202(c)(1)) and are prevalent in various types of contracts, providing "strong evidence that the economic benefits of ROFRs as a contractual device are often greater than the costs of ROFRs." [Exh. 9 Jarrell Report ¶ 5] In the corporate governance context, the value of first refusal rights has been widely recognized, including for decades under Delaware law. *E.g., Lawson v. Household Fin. Corp.*, 152 A. 723, 726 (Del. 1930) (company's right to purchase stock of selling shareholder "is necessary to the attainment of the objects set forth in the charter and the success of the company would be in danger without this right to purchase the stock"); *Agranoff v. Miller*, 734 A.2d 1066, 1073 (Del. Ch. 1999) (ROFR serves valid business purpose of protecting shareholder value and may "be undertaken by [the company's] board of directors consistent with its fiduciary duties . . . .") (citation omitted), *aff'd*, 737 A.2d 530 (Del. 1999) (TABLE). First refusal agreements are particularly valuable in a closely-held corporation like craigslist. As Defendants' expert, Daniel Fischel, has written,

> Closely held corporations often restrict the transfer or sale of shares. This is important, not only to ensure that investors are compatible as managers, but to preserve the less costly monitoring available when managers are significant owners.

Sery v. Fed. Bus. Ctrs. Inc., 2007 WL 4285915, at *5 (D.N.J. Apr. 19, 2007) (quoting Fischel expert report); *see also* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 Stan. L. Rev. 271, 273 (1986) ("Because the firm's principal investors are also its managers, it is often necessary to restrict the investors' ability to alienate their shares. Such restrictions increase the probability that those who manage will be compatible.").

The ROFR provides substantial benefits to craigslist. First, craigslist is a closely held corporation with only three shareholders—its founder, its CEO, and eBay—and as recognized by the court in *Lawson*, the identity of the shareholders of such a corporation is quite important. *Lawson*, 152 A. at 726. craigslist approved eBay's acquisition of its shares based on eBay's feigned commitment to common values and craigslist's unique business model. Now that eBay has broken its promises (*see* Statement of Fact Sections C.7 and I above), engaged in direct and unfair competition with craigslist (Statement of Fact Section I above), made very clear it does not in fact share craigslist's values or support its business plan (Statement of Fact Section I above), and misused its position as a stockholder and its board representation to harm craigslist (Statement of Fact Section I above), the Defendants have undertaken steps to protect against the threats posed by eBay and similar threats that could be posed in the future by others. The ROFR was a reasonable response to those threats because it allows craigslist to avoid similar problems in the future by assuring that eBay, Newmark, or Buckmaster (or Newmark's or Buckmaster's estates) will not sell their shares to a hostile shareholder without providing the board of directors an opportunity to evaluate the circumstances and exercise craigslist's right of first refusal, if appropriate. Defendants' past experience with Knowlton provides important context demonstrating the reasonableness of seeking a ROFR. [Statement of Facts Section B] Second, the Company ROFR is of particular value to craigslist because it allows craigslist to protect its unique and successful

approach to internet commerce. To maintain its mission, and to protect the success this mission has achieved, craigslist must have some ability to limit ownership of the company to like-minded shareholders. Third, the Company ROFR increases the likelihood that craigslist will be able to acquire its shares at a price negotiated by its shareholders if one of the shareholders decides to sell.[21]

As is the case with the Rights Plan, the ROFR is designed to protect against legitimate threats to craigslist. [*See* cases cited in Section II.A above] As also is the case with the Rights Plan, the ROFR is a prospective defensive measure, designed to give the board of directors, as it may be composed at a future time, an opportunity to evaluate proposed acquisitions of shares and assess whether they are in the best interests of craigslist or whether craigslist should exercise its first refusal rights and acquire the shares itself. The ROFR, therefore, is "reasonable in relation to the threat[s] posed." *Unitrin*, 651 A.2d at 1373 (citing *Unocal*, 493 A.2d at 955); *see also Moran*, 500 A.2d at 1356-57; *Coates*, 2002 WL 31112340, at *5-6; *Gaylord*, 753 A.2d at 464.

For the ROFR to be effective and provide the greatest value to the corporation, it is important that all shareholders, including eBay, agree to be bound by it. However, that optimal result is difficult to obtain, because each individual shareholder has an economic incentive to opt out while all other shareholders are bound. [Exh. 9 Jarrell Report ¶ 15] To overcome that obstacle and induce all shareholders to accept the ROFR, the board offered reorganization shares in a ratio that it believed would be sufficient for that purpose. [Exh. 2 Buckmaster dep. 215:10-12; Exh. 9 Jarrell Report ¶ 15 ("[T]he economic function of the new-share issuance is not to dilute any of the shareholders. Rather, its function is to use the

[21] Professor Jarrell describes in detail these and other economic benefits conveyed on craigslist by the Company ROFR in his Expert Report. [Exh. 9 Jarrell Report ¶¶ 55-61, 68-80] Professor Jarrell further discusses how ROFRs make it more likely that the ROFR-holder will have the opportunity to purchase the encumbered shares at below market value. [*Id.* ¶¶ 62-67] This is a cost to the holder of the encumbered shares, but an economic benefit to the ROFR-holder (which here is craigslist).

prospect of dilution to deter hold-outs that prevent the company from attaining the global optimum, in which case there is no dilution to any shareholder.")] That too was a reasonable and proportionate decision. *See Baldwin*, 2008 WL 2875351, at *31 (holding that "Board made a reasonable decision to offer compensation to shareholders as incentive for them to provide personal guaranties"); *H-M Wexford, LLC v. Encorp, Inc.*, 832 A.2d 129, 150 (Del. Ch. 2003) (upholding board's decision to issue additional shares to shareholders who agreed to settlement of issues related to initial offering).[22]

The Share Issuance did not render the ROFR coercive. eBay's argument that it did fails to distinguish between permissible "coercion" (*i.e.*, circumstances that lead to a decisional preference, but are not legally actionable) and wrongful or inequitable coercion, which occurs where a stockholder is "wrongfully induced to make a decision for reasons unrelated to merit." *Gradient OC Master Ltd. v. NBC Universal Inc.*, 930 A.2d 104, 117 (Del. Ch. 2007) (citation omitted); *see also Ivanhoe Partners v. Newmont Min. Corp.*, 533 A.2d 585, 605 (Del. Ch. 1987), *aff'd*, 535 A.2d 1334 (Del. 1987). The "coercion" eBay identifies is simply the economic incentives and disincentives associated with accepting or rejecting the ROFR—*i.e.*, obtaining increased stock ownership in exchange for a submitting the shares to a ROFR in favor of craigslist. Such incentives—the "economic merits" of the ROFR and Share Issuance—do not constitute wrongful coercion. *See Ivanhoe Partners,* 533 A.2d at 605; *Gradient*, 930 A.2d at 127 (holding that the structure of an exchange offer for preferred stock was not inequitably coercive under the circumstances); *H-M Wexford*, 832 A.2d at 151 (proposal to re-price offering by issuing additional units to holders was not

[22] eBay recognized (in the SHA) that a share issuance by craigslist could be accomplished without eBay's consent as a consequence of eBay's antagonistic choice to compete against craigslist. Specifically, eBay agreed that it would forfeit its negotiated right to exercise a ROFR over such issuances if it engaged in "Competitive Activity." [DX673 SHA §§ 8.3, 5.1] eBay also abandoned its right to prohibit "any increase . . . in the authorized number of shares of Common Stock" and its right to prohibit "the adoption . . . of any agreement . . . providing for the issuance of any capital stock or other security" if it launched a competing website. [*Id.* §§ 8.3, 4.6(a)(i), (v)]

wrongfully coercive, even though holders who refused to sign release would be excluded from consideration if 80% approved measure). eBay has ***not*** rejected the ROFR and it can still accept it anytime before January 3, 2011. That eBay's option remains open—it can accept, or choose to reject the ROFR—is "conclusive" proof that eBay is not being inequitably coerced. *Id.* (rejecting claim that plaintiff was "coerced"; "Wexford attempts to allege inequitable coercion as to it, notwithstanding the fact that it refused to participate in the Settlement Agreement—and, thus, was conclusively not coerced").[23]

Given the nature of the threats posed, Defendants would have been justified in taking more aggressive measures to protect craigslist. For example, in *Kors v. Carey*, the defendant directors addressed a threat similar to that posed by eBay here, where the acquiror "presented a threat of a possible future business course which was entirely at odds with [the company's] traditions" because it favored "aggressive promotional schemes, and a readiness to sacrifice an established mode of doing business for quick profits . . . ." 158 A.2d 136, 141 (Del. Ch. 1960). In that case, the Court of Chancery upheld defendants' *elimination* of the acquiror's stock—action much more aggressive than anything implemented by Defendants here. *Id.* at 144. If extinguishing eBay's share ownership altogether would have been a reasonable response to the threats it posed, then implementing the Governance Measures (including the ROFR and Share Issuance) is necessarily a proportionate response.

The Defendants' adoption of the ROFR and related Share Issuance was a reasonable and proportionate response to protect against the possibility that an existing stockholder or third party could, in the future, seek to acquire craigslist shares (whether from Buckmaster or

[23] Moreover, eBay is a large enterprise that generates billions of dollars in revenue. eBay does not consider even the ***entirety*** of its holdings in craigslist to be a significant asset of the company. [Exh. 13 Donahoe dep. 63:15-24] In such circumstances, it would not be tenable to find that the relatively insignificant reduction in eBay's ownership interest in craigslist (a reduction of only 3.56%) had a coercive effect that eBay was unable to resist.

Newmark (or one of their estates) or from eBay) under circumstances posing a threat to corporate policy and effectiveness.[24]

B. The ROFR and Share Issuance Were Not an Interested Director Transaction and Are Not Otherwise Subject to Review Under the Entire Fairness Standard

eBay alleges that the reorganization shares offered in connection with the ROFR are tainted by Defendants' self-interest because eBay has not received shares while Newmark and Buckmaster have. [Exh. 10 Compl. ¶ 84] That is baseless because the Share Issuance in connection with the ROFR was offered on the same terms to all stockholders, including eBay. As discussed above, it is well settled that a transaction is not subject to entire fairness review merely because directors receive a benefit, so long as that same benefit is shared equally with all stockholders. *See, e.g.*, *Gilbert*, 575 A.2d at 1146; *Unocal*, 493 A.2d at 958-59; *Sinclair Oil*, 280 A.2d at 721-22; *Shields*, 498 A.2d at 170.

Although eBay has not accepted the reorganization shares, it has not rejected them. eBay thus retains an unexercised option to participate in the share issuance until January 2011.[25] But eBay's "decision not to participate cannot, as a matter of law, taint with self-interest the Board of Directors' decision to authorize" the opportunity to acquire the additional shares. *H-M Wexford*, 832 A.2d at 150 (granting motion to dismiss fiduciary duty

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[24] eBay also suggests that the Board's decision to adopt the ROFR and Share Issuance should be reviewed under *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). The *Blasius* standard is discussed in detail in section IV.A below, but in summary, the stock issuance eBay challenges is analogous to the sort of "structural" changes to which Delaware courts have refused to apply *Blasius*, and it was not implemented by unilateral board action. Nor is it the type of "tactical" maneuvering designed to subvert the will of a stockholder majority voting on a particular transaction or proposal. Even if the Court were to take the unprecedented step of applying *Blasius* to the ROFR and Stock Issuance, for the reasons explained above and as Defendants will show at trial, they had a compelling justification for entering into the ROFR and Share Issuance. Indeed, the ROFR and related Share Issuance have elements similar to a "pay to play" arrangement, to which *Blasius* has never been applied. *E.g., Watchmark Corp. v. Argo Global Capital, LLC*, 2004 WL 2694894, at *4 (Del. Ch.) (applying business judgment rule), *clarified by* 2004 WL 3029915 (Del. Ch).

[25] eBay is essentially seeking an advisory opinion from the Court. If the ROFR passes muster, eBay will no doubt accept the reorganization shares and agree to the Company ROFR.

claims where offer was made on the same terms to all shareholders). Here, as in *H-M Wexford*, "a non-pro rata distribution of shares would not have occurred" if eBay accepted the reorganization shares, "and no 'benefit' would have resulted" from the shares issued to all shareholders. *Id.*; *see also Baldwin*, 2008 WL 2875351, at *32 (proposal "assured all seven shareholders (including those balking at providing personal guaranties) that all shareholders would share equally in the risk of providing such guaranties or, if not, those who did step up to the plate would be rewarded by the provision of a greater percentage of share ownership than those who did not").

The legally relevant inquiry is not whether eBay has accepted the reorganization shares—which is beyond Defendants' control—but that eBay was *offered* the opportunity to participate on the same terms as all other shareholders. *E.g., Gilbert*, 575 A.2d at 1146; *Baldwin*, 2008 WL 2875351, at *29 ("a director/shareholder who stands to benefit from a stock-offer plan or other corporate scheme does not engage in self-dealing when all shareholders are afforded the right to participate on equal terms in the transaction") (citation omitted); *Shields*, 498 A.2d at 170.[26]

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[26] *See also Williams v. 5300 Columbia Pike Corp.*, 901 F. Supp. 208, 212 (E.D. Va. 1995) (directors could not be deemed interested where "conversion plan was offered to all shareholders equally with the hope that all would participate) (applying Delaware law), *aff'd*, 103 F.3d 122 (4th Cir. 1996) (TABLE); *Unocal*, 493 A.2d at 958-59 (The "protection [of the business judgment rule] is not lost merely because Unocal's directors have tendered their shares in the exchange offer. . . . [T]hey are receiving a benefit shared generally by all other stockholders . . . ."); *Unitrin*, 651 A.2d at 1372 (directors' decision to implement repurchase program and to refrain from participating, which would cause their own ownership percentages to increase, was not self-dealing). Moreover, as eBay's own expert conceded, all shareholders (including eBay) receive at least some derivative benefit to the extent the company is benefited by the ROFR and the other transactions. [Exh. 12 Fischel dep. 106:1-6 ("Q. If there are benefits to craigslist from the challenged transactions or, for that matter, from any transaction . . . it benefits eBay, at least derivatively, to some degree; correct? A. All else equal, correct.")] eBay's expert further conceded that eBay receives an even greater benefit if the other shareholders agree to the Company ROFR and eBay refuses, resulting in eBay holding the only unencumbered shares. [Exh. 12 Fischel dep. 84:24-85:3; *see also* Exh. 9 Jarrell Report at 84-89 (explaining that the non-signing shareholder will "free ride" on the benefits of the Company ROFR and also will enjoy an increase in value of its shares given that such shares will be the only unencumbered shares of craigslist)]

eBay attempts to escape this controlling authority by arguing that its acceptance of the ROFR "would have markedly different effects on eBay than it had on Newmark and Buckmaster," because eBay's shares were not subject to a right of first refusal, while the Defendants' shares were burdened by the existing Shareholder ROFR. [Exh. 10 Compl. ¶ 45] [27] But it is undisputed that Defendants' shares were *not* previously subject to a ROFR held by craigslist. The opportunity to enter into the Company ROFR in exchange for the issuance of additional shares was made on the same terms to all stockholders. Contrary to eBay's apparent assumption, the reciprocal rights of first refusal held by Defendants under the Shareholders' Agreement were "superseded by the right of first refusal that the company would have" following the acceptance of the reorganization shares. [Exh. 2 Buckmaster dep. 220:12-16; Exh. 3 Wes dep. at 88:23-89:4;[28] *see also* Exh. 9 Jarrell Report ¶¶ 101-102 (explaining that Newmark and Buckmaster's decision to relinquish their individual ROFRs in favor of craigslist resulted in a disproportionate cost to them)][29]

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[27] eBay exaggerates the burden the Shareholder ROFR imposed on Newmark and Buckmaster in selling their shares. As Professor Jarrell has testified, the Shareholder ROFR was much less of an encumbrance on Newmark and Buckmaster than the Company ROFR because (1) it would be much harder for those individuals to exercise the Shareholder ROFR (because it would be hard for either of them to come up with the funds to buy the other's shares), and (2) the period for Newmark and Buckmaster to exercise the Shareholder ROFR was very short, making its exercise nearly impossible. [Jarrell dep. 289:8-290:16]

[28] The ROFR expressly provides that "the Stockholders and the Company hereby agree that this Agreement shall govern the rights of the Stockholders to sell shares of capital stock of the Company held by the Stockholders . . . [a]ny sale assignment, transfer, pledge, hypothecation or other encumbrance or disposition of Equity Securities not made in conformance with this Agreement shall be null and void." [DX729 at E00003950 (ROFR Recitals and § 1); *see also id.* § 7.8 (integration clause)]

[29] eBay also alleges that the ROFR exempted transfers to heirs, trusts, and charitable organizations, and that eBay, "as a for-profit company, receives no benefit from these exceptions, which are drafted for individual estate planning purposes." [Exh. 10 Compl. ¶ 45] As is the case with eBay's similar argument about the Rights Plan, eBay fails to mention that the ROFR exempts other transfers that only a corporate entity (like eBay) could make, including transfers to eBay's parent or successor in interest by merger. [ROFR § 3.3(b)] craigslist has two stockholders who are natural persons and one that is a corporate entity, and the ROFR exempts particular transfers that are unique to both types of stockholder.

C. Even If the Entire Fairness Standard Were Applicable, the ROFR and Share Issuance Would Withstand Scrutiny Under that Standard

Even if the ROFR and Share Issuance were subject to entire fairness review, the adoption of those measures should be upheld as entirely fair to all shareholders. As explained above, the ROFR serves several valid business purposes and benefits craigslist and its shareholders in numerous ways. The ROFR treats all shareholders the same in that all shareholders are given the opportunity to enter into the ROFR and accept its benefits and burdens on the same terms. *Kahn*, 669 A.2d at 86 (transaction was entirely fair when "no shareholder was treated differently in the transaction from any other shareholder . . . ."); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *13 (Del. Ch.) (similar). Newmark and Buckmaster carefully deliberated for months regarding the possibility of adopting a ROFR and related Share Issuance, and only approved the ROFR and Share Issuance at the recommendation of legal counsel. *Parnes*, 2001 WL 224774, at *13 (approving transaction as entirely fair when "Board also received the assistance and advice of experienced counsel throughout the entire process"); *Kahn*, 669 A.2d at 85 (transaction entirely fair when corporation's "committee had the benefit of outside legal counsel" in approving the transaction); *Cinerama*, 663 A.2d at 1175 (reliance on legal counsel is "a factor supporting fair dealing in an entire fairness analysis") (footnote omitted).

Not only was the adoption of the ROFR entirely fair from a process or dealing perspective, the ROFR also satisfies the fair price prong of the entire fairness test. Professor Jarrell has opined that issuing one share of new stock for every five shares submitted to craigslist ROFR was a reasonable exchange. [Exh. 9 Jarrell Report ¶¶ 91-93] Moreover, eBay's own expert witness, Professor Fischel, calculated a 30% illiquidity discount resulting from submitting shares to the ROFR, in which case Defendants received *too little* compensation (*i.e.*, 20%). The fact that Defendants were not overpaid for entering the ROFR—and more likely were underpaid—is demonstrated by eBay's decision (to date) not to accept the ROFR. *Rosenberg v. Oolie*, 1989 WL 122084, at *5-6 (Del. Ch.) (determining

price paid to directors by company in exchange for financing was entirely fair because other potential lenders were unwilling to accept the same price from the company).

eBay further argues that the ROFR is unfair because eBay has not received shares while Newmark and Buckmaster have. [Exh. 10 Compl. ¶ 84] However, as discussed above, the decision not to accept the ROFR is entirely eBay's—and it remains a decision eBay has refused to make. Just as such a decision cannot operate to establish self-interest on the part of directors, it cannot operate to establish unfairness. *H-M Wexford*, 832 A.2d at 150; *Baldwin*, 2008 WL 2875351, at *32. Defendants therefore submit the ROFR and Share Issuance satisfy the entire fairness standard.

D. The ROFR Does Not Violate the General Corporation Law

1. The ROFR and Share Issuance Do Not Violate 8 *Del. C.* § 152

eBay contends that Defendants violated 8 *Del. C.* § 152 by authorizing the issuance of shares in connection with the ROFR because "[n]o valid consideration was paid in exchange for the shares issued." [Exh. 10 Compl. ¶ 89] Section 152 provides that a board of directors may issue stock "for consideration consisting of cash, any tangible or intangible property or ***any benefit*** to the corporation, or any combination thereof." 8 *Del. C.* § 152 (emphasis added). The statute further provides that "[i]n the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive." *Id.* 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. *See Belle Isle Corp. v. MacBean*, 61 A.2d 699, 704 (Del. Ch. 1948); *Fonds de Regulation et de Controle Café Cacao v. Lion Capital Mgmt., LLC*, 2007 WL 315863, at *4 (Del. Ch.). For nearly 80 years, the Delaware courts have recognized that first refusal rights provide significant value, particularly in the context of a closely held business. *See, e.g., Lawson*, 152 A. at 726; *Agranoff v. Miller*, 1999 WL 219650, at *17 (Del. Ch.), *aff'd as modified*, 737 A.2d 530 (TABLE). The substantial benefits of the ROFR in this case are summarized in

Section III.A above. Thus, the receipt of a ROFR over its shareholders' stock unquestionably provides value to craigslist and satisfies Section 152.

2. The ROFR Does Not Violate 8 *Del. C.* § 202(b)

eBay also contends that the ROFR constitutes a violation of 8 *Del. C.* § 202(b) ("Section 202(b)"), which provides, among other things, that "[n]o restrictions [on the transfer of securities] shall be binding with respect to securities issued prior to the adoption of the restriction unless the holders of the securities are parties to an agreement or voted in favor of the restriction." That claim necessarily fails. First, no restrictions have been placed on eBay's craigslist shares because eBay has not submitted its craigslist shares to the Company ROFR. Second, the only means by which the ROFR would impose a transfer restriction on eBay's shares of craigslist stock would be by eBay's agreeing to the restriction. If eBay were to agree, that would negate application of the restriction in Section 202(b).

eBay argues that Section 202(b) is nevertheless implicated because the Share Issuance renders the ROFR coercive. [Exh. 10 Compl. ¶ 96] Once again, eBay fails to distinguish between permissible "coercion" and wrongful coercion. The doctrines of wrongful coercion and duress do not apply on these facts. As discussed above, the "coercion" eBay identifies arises out of the economic incentives and disincentives associated with accepting or rejecting the ROFR. Those terms do not render the transaction actionably coercive. *See Gradient*, 930 A.2d at 127; *H-M Wexford LLC*, 832 A.2d at 151. The fact that eBay's option to accept or reject the ROFR remains open (and not exercised by eBay) is "conclusive" proof that it has not been inequitably coerced. *See H-M Wexford*, 832 A.2d at 151.

IV. THE DIRECTORS' DECISION TO IMPLEMENT THE STAGGERED BOARD AMENDMENTS COMPORTED WITH THEIR FIDUCIARY DUTIES

A. The Staggered Board Amendments Serve Legitimate Business Purposes, Constitute a Proportionate Response to Reasonably Perceived Threats, and Were Implemented in Furtherance of a Compelling Justification

eBay contends that the Board's decision to implement the Staggered Board Amendments requires the Defendants to meet the "compelling justification" standard set forth in *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). eBay's argument relies on a fundamental misunderstanding of the narrow circumstances under which Delaware courts have applied *Blasius*. *See Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996) (*Blasius* is "applied rarely"). Rather than involving perceived suppression of *minority* stockholders' rights through actions clearly authorized by statute and the corporation's certificate of incorporation and ratified by a majority stockholder vote, *Blasius* has been applied only 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. Plaintiff's argument stands *Blasius* on its head, permitting *minority* stockholders to thwart the will of the *majority*.

In interpreting the *Blasius* primary-purpose standard of review, Delaware courts limit its application to unilateral board actions (*i.e.*, actions not approved by stockholders), the primary purpose of which is to disable a stockholder *majority* from acting on a *particular* transaction. For example, in *Stroud v. Grace,* 606 A.2d 75, 92 (Del. 1992), the Delaware Supreme Court refused to apply *Blasius* to review a board's decision to implement bylaw amendments establishing qualifications for directors and procedures for nominating candidates for election to the board. The plaintiff stockholders alleged that the amendments were designed to frustrate their ability to nominate themselves as directors. Because three of the directors together owned and controlled a majority position in the corporation's stock and, therefore, did not face any threat to their control, the Court reasoned that the "primary purpose" of the amendments could not be to interfere with or impede the stockholder franchise. *Id.* In addition, the Court noted that the holders of a majority of the corporation's

stock had ratified the amendments. *Id.* Thus, the Court observed, the "factual predicate of unilateral board action intended to inequitably manipulate the corporate machinery is completely absent here." *Id.* (citation omitted). The Court therefore concluded that the *Blasius* standard of review was not applicable to review the directors' adoption of the amendments. *Id.* at 92. *Stroud* is instructive here because Newmark and Buckmaster likewise own a majority position in the corporation's stock, did not act with a "primary purpose" of impeding the stockholder franchise, and implemented the Staggered Board Amendments through both Board and stockholder action.

Not only do the Delaware courts tend to apply *Blasius* only to situations in which a board acts unilaterally with the primary purpose of disenfranchising a stockholder majority, they historically have applied *Blasius* only to situations involving votes on particular proposals—not situations involving all prospective stockholder votes. *See, e.g., State of Wisconsin Investment Board v. Peerless Systems Corp.*, 2000 WL 1805376, at *11-12 (Del. Ch.) (applying *Blasius* standard where a stockholders' meeting was called at which stockholders were to vote on a board-sponsored proposal and the board determined to adjourn the meeting only after it became apparent that the proposal would fail if the meeting was held as scheduled); *Blasius*, 564 A.2d at 655-61 (applying compelling justification standard where board acted to thwart consent solicitation by which insurgent sought to gain control of board; board acted for primary purpose of "imped[ing] or preclud[ing] a majority of the shareholders from effectively adopting the course proposed" by the insurgent).

Conversely, Delaware courts have routinely declined to apply *Blasius* where the board action affects prospective stockholder votes generally. For example, in *Williams v. Geier*, the Delaware Supreme Court held that *Blasius* did not apply to evaluate a board's decision to implement a recapitalization plan that provided for a form of tenure voting. 671 A.2d at 1376. In *Gaylord Container*, this Court refused to apply *Blasius* to a board's decision to approve certain charter and bylaw amendments, including, among others, a

supermajority bylaw, an advance notice bylaw, and a charter provision requiring that stockholder action be taken at a meeting and not by written consent. 753 A.2d at 486-87.

As required by statute (8 *Del. C.* § 141(d)), the Staggered Board Amendments were approved by the holders of a majority of craigslist's outstanding stock and not by unilateral board action. For that reason alone, *Blasius* is not applicable here. *Blasius* should not apply to the Staggered Board Amendments for the additional reason that those measures did not interfere with the will of a stockholder majority as to the vote on a particular transaction.

Although neither *Blasius* nor the more deferential standard under *Unocal* is applicable to the Staggered Board Amendments,[30] the trial record will nonetheless show that the Defendants implemented the Staggered Board for compelling reasons and to protect against significant threats from eBay. The Directors came to believe that eBay had used its prior board representation as an intelligence gathering base for its competing websites. Discovery has confirmed that throughout the entire period during which eBay had access to the craigslist board, it misused that access to harm craigslist and benefit itself in unfair competition against craigslist. [*See* Statement of Facts Sections C, D, and F above]. The Directors had every reason to believe eBay would continue to engage in such conduct if given the opportunity to seat another board representative.[31]

The Board's approval of the Staggered Board Amendments was justified by compelling business, regulatory, and contractual reasons. When the designee of a company competitor sits on its competitor's board, the "serious ramification" is that the "Board would

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[30] *Unocal* is inapplicable because the Staggered Board Amendments were approved by the stockholders and not by unilateral board action. Moreover, the threat to which the Amendments were designed to respond—eBay's misuse of craigslist confidential information for competitive ends—is not one having implications for corporate control, thereby rendering *Unocal* inapplicable for that reason as well.

[31] Even eBay's expert, Professor Fischel, conceded that if Defendants' allegations of eBay's misconduct are accurate, "to me would justify not allowing eBay to have the Board seats." [Exh. 12 Fischel dep. 135:13-17; *see also id.* at 98:5-10]

be unable to perform its proper functions in connection with the management of the company without divulging to a competitor confidential information with respect to the development of processes and techniques; plans for improvements" and other information. *Elco Corp. v. Microdot Inc.*, 360 F. Supp. 741, 754 (D. Del. 1973) (enjoining competitor's acquisition because placing designee on the board would create a "listening line" that posed the potential for serious injury) (citation omitted).

The Staggered Board was a proportionate response to eBay's threat. The Amendments ensure that only the holders of a majority of craigslist's outstanding stock can elect the directors that sit on the craigslist Board—*i.e.*, that no single stockholder (including eBay) can unilaterally vote itself a Board seat. If eBay were to propose a candidate—for example, a truly independent director—whose position on the craigslist board would not pose the same threat as an eBay insider, then that person could be elected with the support of the Board or one stockholder in addition to eBay.

Significantly, eBay has acknowledged that craigslist has a compelling interest in protecting its competitively sensitive confidential information, and even that it had a right to implement these very sorts of protective measures to guard against eBay's improper use of such information. eBay made those representations to the New York Attorney General ("NYAG") during an investigation of potential antitrust violations by eBay. In a letter from eBay counsel to the NYAG arguing that eBay's acquisition of craigslist stock did not violate antitrust law, eBay forcefully argued that the SHA allowed craigslist to implement significant protective measures if eBay were to compete, *including denying eBay a board seat*. Referring to Section 8.3 of the SHA and its interaction with Section 4.6, eBay said:

> The craigslist provision provides that if eBay launches an Internet jobs posting board ('jobs site') it will lose various shareholder rights, ***such as a board seat***, approval of certain transactions, and right of first refusal on future stock issuances.

[DX371 at EH0000250 (emphasis added)] eBay further acknowledged that "Craigslist [sic] has an interest in protecting its competitively sensitive information and its business in the event eBay becomes a competitor and these provisions [i.e., Section 8.3 and 4.6] were designed to provide that protection . . . ." [*Id.* at EH00000253]

eBay was correct then, and cannot disavow those admissions now. It could have negotiated for contractual protection to preserve its ability to elect a director, but did not.[32] Likewise, it agreed that its contractual veto rights over amendments to the Certificate of Incorporation and Bylaws would fall away if it engaged in Competitive Activity. [DX673 SHA §§ 4.6 & 8.3]. Simply put, eBay failed to secure a perpetual right to representation on the craigslist board of directors and should not be able to create one now through misapplication of *Blasius*. *See Nixon*, 626 A.2d at 1379-81 (finding it would be inappropriate for the court to create a remedy for a minority shareholder for which the parties had not contracted).

B. The Staggered Board Amendments Are Not Subject to Review Under the Entire Fairness Standard, But That Standard Is Nonetheless Satisfied Here

The entire fairness form of review is not implicated by the Staggered Board Amendments because those measures did not personally benefit Buckmaster or Newmark in any way. The Staggered Board Amendments impact all stockholders equally and no stockholder has the ability to elect a director unilaterally without the support of at least one other stockholder. While Newmark and Buckmaster entered into a voting agreement at the time eBay acquired its stake in craigslist in 2004 and have agreed to vote their shares to elect each other (or their respective nominees) as directors, the Staggered Board Amendments neither enhanced nor diminished their rights pursuant to that agreement.

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[32] Although eBay sought a guaranteed seat on craigslist's Board, and the right to name that director in its sole discretion, eBay withdrew that request in the August 6, 2004 draft of the SHA. *See* Statement of Facts § C.6; 8.9.04 Final Shareholders' Agreement § 3 (DX673 at E00000681-82).

In all events, the Staggered Board Amendments are entirely fair. As with the ROFR and the Rights Plan, the Defendants implemented the staggered elections only after the competitive threat from eBay had come to a head with the June 2007 launch of Kijiji in the U.S. Even then, the decision to adopt staggered elections was not made impulsively, but instead took place more than six months after the Kijiji launch, during which time Newmark and Buckmaster, as explained above, carefully deliberated the appropriate measures to take and approved the implementation of staggered elections at the advice of legal counsel. *Parnes*, 2001 WL 224774, at *13; *Kahn*, 669 A.2d at 85. The staggered elections, as detailed above, serve valid business purposes and benefit craigslist in numerous ways, including by addressing the colossal problem of having a craigslist competitor present at craigslist Board meetings. [Exh. 8 Jarrell dep. 216:9-16; 218:7-219:8; 316:3-21 (discussing potential harms from having competitor on board)] Accordingly, Newmark and Buckmaster approved the staggered elections with a good faith and accurate belief that precluding eBay from unilaterally electing a director served craigslist's best interest. *Cinerama*, 663 A.2d at 1174. The implementation of the Staggered Board thus satisfies the "fair dealing" requirement of the entire fairness test.[33]

V. EBAY'S CLAIMS RELATED TO THE INDEMNIFICATION FORMS ARE PREMATURE AND MUST FAIL[34]

A. The Claims in Counts I and II Are Not Ripe

As set forth in Newmark and Buckmaster's briefs in support of their Motion for Partial Summary Judgment (Exh. 14), eBay's claims in Counts I and II of the Complaint are

[33] The second prong of the entire fairness test, fair price, has no relevance here. The Defendants did not pay out any money or other consideration in connection with the amendment of the charter or bylaws to provide for staggered elections. *Nixon*, 626 A.2d 1366 (upholding discriminatory stock ownership plan favoring employees under analysis solely of fair dealing prong of standard).

[34] The section of this Pretrial Brief relating to the Indemnification Forms is submitted on behalf of Defendants Newmark and Buckmaster only.

premature and fail to raise a justiciable controversy. Neither Newmark nor Buckmaster (nor anyone else) has entered into the challenged Indemnification Form, and no amounts have been advanced or committed pursuant to any such agreement. Moreover, neither Newmark nor Buckmaster will enter into any such agreement in the future. As a result, none of the allegedly "self-interested" harms from the Indemnification Forms have occurred or are in any sense likely to occur. For these and other reasons set forth more fully in the summary judgment briefs (Exhs. 14; 15), the Court should dismiss Counts I and II as not ripe.[35]

B. Newmark and Buckmaster's Approval of the Indemnification Form Is Not Self-Dealing

Similarly, eBay's argument that Newmark and Buckmaster's mere approval of the Indemnification Form breached their fiduciary duty of loyalty must be rejected. Defendants cannot "personally benefit" from an agreement never entered into, nor can they stand on both sides of a transaction that never took place.[36] [*See* Exh. 15 Reply In Support of Motion for Partial Summary Judgment at 5]

Nor can eBay assert that the *timing* of the approval of the Indemnification Form somehow demonstrates self-dealing or wrongful intent. Defendants Newmark and Buckmaster approved the form of agreement ***before*** implementing the Governance Measures and several weeks before eBay's Section 220 claim. In contrast, in *Orloff v. Shulman*, 2005

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[35] Defendants Newmark and Buckmaster expressly incorporate herein by reference the briefs in support of their Motion for Partial Summary Judgment As To Counts I and II of Plaintiff's Verified Complaint. [Exhs. 14; 15]

[36] Even if Defendants *had* entered into the Indemnification Forms and received indemnity payments, eBay's claims would fail because "[n]ormally, the receipt of indemnification is not deemed to taint related director actions with a presumption of self-interest." *In re Sea-Land Corp. S'holders Litig.*, 642 A.2d 792, 804 (Del. Ch. 1993) ("indemnification has become commonplace in corporate affairs, and . . . does not increase a director's wealth") (citations omitted), *aff'd*, 633 A.2d 371 (Del. 1993) (TABLE); *see also Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch.) ("[t]here is no basis for inferring [that] the receipt of indemnification benefits . . . taint[s] the [directors'] judgment") (citation omitted); *Caruana v. Saligman*, 1990 WL 212304, at *4 (Del. Ch.) (allegation that directors "approved a charter amendment limiting their liability" did not "creat[e] a reasonable doubt that the directors are disinterested or independent").

WL 5750635 (Del. Ch.), the defendant directors actually granted themselves new indemnification rights (which never happened here) ***after*** implementing the challenged transactions and "in conjunction with" the plaintiffs' Section 220 claim. Those facts were *still* insufficient to "suggest that the bylaw amendment at issue [was] unreasonable."[37] *Id.* at *13; *see also In re Sea-Land Corp.*, 642 A.2d at 804 (granting summary judgment for directors even though they indemnified themselves after they "knew that they would be sued . . . ."); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *12 (Del. Ch.) (finding no self-dealing where directors implemented mandatory advancement under "an 'imminent threat of litigation'" when they "'knew that they were being targeted . . .'") (footnote).[38]

C. eBay Has Failed to State a Claim for Waste Arising from the Indemnification Forms

Waste exists when expenditures are so disproportionately large compared to the value received "as to lie beyond the range at which any reasonable person might be willing to trade." *Brehm*, 746 A.2d at 263. Because ***no*** funds were expended under their terms—and indeed because the Indemnification Forms were never even executed—eBay is unable to maintain any colorable waste claim. *Chrysogelos v. London*, 1992 WL 58516, at *4 (Del.

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[37] The *Orloff* court held that the board's adoption of indemnification rights was not self-interested despite the fact that, prior to their adoption, the directors had *no* indemnification rights. 2005 WL 570635, at *6, 13. Newmark and Buckmaster, in contrast, were already indemnified to the full extent permitted under Delaware law when they approved the Indemnification Forms.

[38] eBay's claims related to the Indemnification Form appear pled as breaches of the duty of loyalty. However, to the extent eBay may attempt to characterize its claims as breaches of the duty of care, such claims likewise must fail. Newmark and Buckmaster cannot have been grossly negligent in transacting an agreement that never materialized (and never will). Moreover, Newmark and Buckmaster are exculpated from liability for breaches of the duty of care pursuant to the craigslist Certificate of Incorporation. [DX729 at E00004004 (Second Amended and Restated Certificate of Incorporation, Art. XI]; *see also Rothenberg v. Santa Fe Pac. Corp.*, 1992 WL 111206, at *4-5 (Del. Ch.) (dismissing duty of care claim based on exculpatory provision in certificate of incorporation).

Ch.) (dismissing waste claim based on approval of golden-parachute agreements that were never executed).

Apparently recognizing this flaw in its claim, eBay has quietly abandoned the "waste" theory pled in its Complaint (based on the allegation that the Indemnification Forms had been executed) and retreated to redefining the "waste" at issue as (1) expenses related to preparing the Indemnification Forms, and (2) expenses related to defending against eBay's claims in this litigation. Neither of these categories of expenses can support a waste claim. [*See* Exh. 15 Reply In Support of Motion for Partial Summary Judgment at 7-9]

The preparation of indemnification agreements for officers and directors is a common practice among Delaware corporations. Such agreements provide several benefits to the corporation, including enhancing its ability to recruit capable officers and directors. *See VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 84 (Del. 1998) ("We have long recognized that Section 145 serves the dual policies of: (a) allowing corporate officials to resist unjustified lawsuits . . . and (b) encouraging capable women and men to serve as corporate directors and officers . . . ."). craigslist may be expected to enjoy similar benefits by having the Indemnification Form on hand. [Exh. 3 Wes dep. at 235:22-236:11] eBay cannot conceivably establish that the costs of preparing the Indemnification Forms were so disproportionately large compared to these benefits "as to lie beyond the range at which any reasonable person might be willing to trade." *Brehm*, 746 A.2d at 263.

Finally, eBay's argument that the very act of *defending* against eBay's waste claim itself constitutes waste, is entirely circular. If Delaware courts credited such an argument, any party could state a viable waste claim based on *any* corporate action by merely alleging that expenditures to defend against the claim constitute waste. Nor can eBay establish that the fees spent defending its claim have been so disproportionate to the benefits of the Indemnification Forms as to constitute waste. *See Brehm*, 746 A.2d at 263-64 (under the

"stringent requirements of the waste test" an expenditure must be "irrational" from a business perspective to constitute waste).

VI. EBAY HAS UNCLEAN HANDS PRECLUDING RECOVERY UNDER ANY OF ITS CLAIMS

Inequitable conduct will preclude the plaintiff from recovering if the conduct has an "immediate and necessary" relation to the plaintiff's claim. *Nakahara v. NS 1991 Am. Trust,* 739 A.2d 770, 792 (Del. Ch. 1998) (quotation marks omitted). Here, eBay's misconduct and that of its representatives on the craigslist Board relates directly to whether craigslist should be forced to seat another eBay representative on its Board. eBay and its representatives knowingly obtained and distributed craigslist site metrics and financial information to aid in the development of sites intended to compete directly against craigslist. [*See generally* Statement of Facts Sections C, D and F above] In weighing the equities of whether eBay should be entitled to attend craigslist board meetings, the Court should consider how each of eBay's prior Board representatives worked to undermine craigslist, including by participating or acquiescing in the misuse of craigslist confidential information, all at the direction of eBay.[39] The Court should also consider eBay's professed intent to disrupt and destroy craigslist as a competitor if it cannot acquire it, as well as the fact that any future eBay representatives could engage in the same types of misconduct eBay has encouraged in the past. Neither eBay's contractual confidentiality obligations to craigslist nor the fiduciary responsibilities of its nominees to the craigslist board were sufficient in the past to protect craigslist from eBay's misconduct, and those protections are unlikely to be sufficient in the future.

Likewise, Defendants adopted the Rights Plan and ROFR to protect craigslist against eBay's efforts to injure it, either through seeking to acquire control of craigslist and

[39] The eBay employees who attended craigslist Board meetings are Pierre Omidyar, Garrett Price, Josh Silverman, Brian Levey, Kent Walker, and Lance Lanciault.

fundamentally altering it in a manner that would harm or be unfair to the remaining stockholders, or seeking to sell its craigslist shares to a hostile or incompatible shareholder. eBay's hands are not clean and eBay therefore is not entitled to the equitable remedies that it seeks. In fact, eBay is guilty of the very misconduct that the Rights Plan and ROFR were designed to protect against. eBay actually ***did*** intend to gain control of craigslist; eBay ***did*** intend to fundamentally alter craigslist to the detriment of the other stockholders;[40] and eBay ***did*** intend to "attack," "disrupt," "target," "exploit" and "kill" craigslist as a competitor.[41]

eBay initiated this action against craigslist and its directors contending that board action should be invalidated because eBay's conduct posed no threat and that the measures implemented in response to the perceived threat from eBay were unwarranted. Defendants will show at trial not only that the threat objectively existed and the response was objectively warranted, but also that eBay's actual conduct in carrying out the activities that posed the threat (as well as its actions to actively conceal that misconduct) were so reprehensible as to amount to unclean hands.

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[40] DX202 (slides 24, 56) (craigslist has REDACTED and eBay plans to REDACTED it); *id.* (slides 36-38) (eBay's REDACTED plans for craigslist); DX187 (slides 21-23) (same); DX203 (slides 4-8) (same); DX678 REDACTED DX088 REDACTED DX087 (slides 2-3, 40) REDACTED

[41] DX556 at E00017764 (after "Kijiji Talks Smack About Craigslist" article, "[t]he gloves are definitely off"; REDACTED We play to win. [Kijiji] will win in the U.S.'"); DX322 at E00024765 (eBay looking for REDACTED DX063 at E00030831 (eBay REDACTED and "plan[ned] to compete with Craigslist"); DX065 (slide 4); DX428 at E00033670 REDACTED DX440 at E00015574(according to Whitman, Kijiji's REDACTED REDACTED DX432 at E00017147 (slide 15) (eBay to REDACTED REDACTED in those markets); DX516 at E00033452 (eBay intentionally purchased deceptive Google ads in the U.S. that wrongfully diverted internet traffic away from craigslist to eBay and Kijiji).

VII. THE CORRECT REMEDY (IF ANY REMEDY IS APPROPRIATE) IS RESCISSION OF THE GOVERNANCE MEASURES

eBay, in its Verified Complaint, seeks rescissory damages as a remedy under most of its claims. Rescissory damages would be inappropriate because rescission is available. Rescission and rescissory damages are not equivalent remedies. Rescission is the preferred remedy, and rescissory *damages* are awarded only if it is not practical to rescind the transaction. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1072 (Del. Ch. 2003) ("Rescissory damages are designed to be the economic equivalent of rescission in a circumstance in which rescission is warranted, but not practicable. A solid body of case law so holds.") (citing cases), *aff'd*, 840 A.2d 641 (Del. 2003) (TABLE); *see also, e.g., Telstra Corp., Ltd. v. Dynegy, Inc.*, 2003 WL 1016984, at *8 (Del. Ch.) ("At equity, rescissory damages should *only* be awarded where the 'equitable remedy of rescission is impractical' but otherwise warranted.") (citation omitted) (emphasis added). Rescission is practicable in this case for each of the Counts in eBay's Complaint.[42]

[42] Indeed, eBay's counsel recently "agreed" with that proposition. [Exh. 8 Jarrell dep. 134:18-20 ("I don't think there's an argument about rescission being the primary remedy sought here. We actually agree with you."). eBay's testifying expert also agrees. [Exh. 12 Fischel dep. 172:2-24) (rescission would be "logical" and would eliminate the need to value craigslist)]

CONCLUSION

Defendants will prove at trial that their actions with regard to the Governance Measures are entitled to the protection of the business judgment rule, that even if they were not, the Governance Measures were reasonable and proportionate and entirely fair to eBay, and that eBay has unclean hands to obtain relief for its claims.

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Dated: September 25, 2009
Corrected: October 1, 2009
935604

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