



eBay Domestic Holdings, Inc. v. Newmark, et al., C.A. No. 3705-CC (Del. Ch. Oct. 2, 2009) (Chandler, C.)

In this letter decision, the Court of Chancery granted defendants' motion for partial summary judgment, dismissing claims brought by eBay Domestic Holdings, Inc. that challenged the director defendants' approval of a new form of indemnification agreement. In January 2008, the craigslist board of directors approved (and the stockholders ratified) a series of transactions, including adoption of a rights plan and implementation of a staggered board, designed to protect craigslist from various threats, including threats posed by eBay, which is a craigslist stockholder and also a competitor. eBay brought suit to challenge those transactions as well as a form of indemnification agreement that had previously been approved by the craigslist board of directors. eBay argued that the board's approval of the new form of indemnification agreement constituted self-dealing and waste, even though the two members of the board, Jim Buckmaster and Craig Newmark, had never entered into the form of agreement with craigslist. Defendants maintained that the new form of agreement was approved for future recruitment purposes only and therefore proper, arguing also that eBay's claims were not ripe for adjudication because Newmark and Buckmaster, who were already entitled to indemnification and advancement to the fullest extent permitted under Delaware law, had never executed agreements based on the new form. The Court agreed and dismissed eBay's claims. The Court further noted that, had the claims been ripe, they were mooted in light of Newmark and Buckmaster's un rebutted affidavits confirming they had no intention ever to execute the new indemnification agreements.

The full opinion is available [here](#).



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Decided: October 2, 2009

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Re: *eBay Domestic Holdings, Inc. v. Newmark, et al.*
Civil Action No. 3705-CC

Dear Counsel:

Pending before me is defendants' Motion for Partial Summary Judgment as to Counts I and II of Plaintiff's Verified Complaint (the "Motion"). Defendants' Motion resulted from its contention that plaintiff's claims for breach of fiduciary duty (Count I) and waste (Count II) are not ripe for judicial determination. For the reasons stated below, I grant the Motion.

I. BACKGROUND

Plaintiff, eBay Domestic Holdings, Inc. (“eBay”), is the sole outside and minority stockholder of craigslist, Inc. (“craigslist” or the “Company”), the online classifieds service company, which is majority-owned and directed by defendants, Craig Newmark and James Buckmaster. In late 2004, eBay bought, on a fully diluted basis, approximately 25% of shares of common stock of the Company. In 2005, eBay launched a new online classifieds company, Kijiji.com. Introduced first overseas, eBay eventually brought it to the United States in 2007. craigslist viewed the domestic Kijiji operations as competitive and thus began, as eBay alleges, a war.

For the six months spanning July 2007 through January 2008, defendants allegedly plotted to coerce eBay to divest its interest in craigslist. Specifically, eBay contends the following coercive package of transactions were approved by the craigslist Board: diluting eBay’s equity interest, establishing a staggered board, adopting a poison pill, and approving a new form of indemnification agreement. It is the last “transaction” that is currently before me on motion for summary judgment.

On December 17, 2007, Newmark and Buckmaster, as the craigslist Board, approved the new form of indemnification agreement. Before the new form was proposed, both directors were indemnified to the fullest extent under Delaware law. craigslist alleges that the proposed new indemnification form was approved

merely for future recruitment purposes. eBay has, however, presented evidence (in the form of emails) that Newmark and Buckmaster intended to execute the agreements themselves but failed due to an alleged oversight. The record is unclear as to why the agreements were not executed, but it is undisputed that neither Newmark nor Buckmaster ever signed the proposed new indemnification agreements, nor will they execute them in the future. Additionally, there is no dispute that craigslist has not paid or advanced anything to anyone pursuant to the proposed new indemnification form.

eBay alleges two claims against defendants based on the proposed indemnification form. First, defendants breached their fiduciary duty to the corporation and its shareholders by self-dealing when they approved the new indemnification agreement forms. Second, defendants committed waste by using corporate assets to prepare and defend the new indemnification agreements.

II. ANALYSIS

To obtain partial summary judgment, the moving party must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.¹ As always, the Court must view all evidence in the light most favorable to the non-moving party.²

After carefully considering both parties' written submissions, I conclude that

¹ *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990).

² *Banet v. Fonds de Regulation et de Controle Café Cacao*, 2009 WL 529207, at *3 (Del. Ch. Feb. 18, 2009).

defendants have met their burden of establishing that no issue of material fact exists and hence are entitled to judgment as a matter of law on both the breach of fiduciary duty (Count I) and waste (Count II) claims of plaintiff's verified complaint. Although defendants proffer many grounds for which I may grant summary judgment, the first is sufficient: neither claim in Count I nor II is ripe for judicial review.

Delaware courts only hear disputes that are ripe for judicial determination.³ “[A] ripe dispute is one where litigation ‘sooner rather than later appears to be unavoidable,’ and one in which the ‘material facts are static.’”⁴ Delaware courts have repeatedly refused to rule on proposed-but-untaken actions of boards “consistent with a well established reluctance to issue advisory or hypothetical opinions.”⁵ craigslist's proposed-but-never-executed indemnification agreements are no exception. Indeed, this Court held in *Chrysogelos* that “without any allegation that the corporation has entered or will enter into contracts binding upon the corporation, a determination of the legal sufficiency of this ‘claim’, which is not ripe for adjudication, would amount to an impermissible advisory opinion.”⁶

Here, no indemnification agreement has been executed and no funds have been expended under the new proposed form of indemnification agreement. Without an actual agreement there is no contract or transaction for me to examine

³ See *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476 (Del. 1989).

⁴ *Bebchuck v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) (citing *Stroud*, 552 A.2d at 476).

⁵ *Id.*

⁶ *Chrysogelos v. London*, 1992 WL 58516, at *2, 4 (Del. Ch. Mar. 25, 1992).

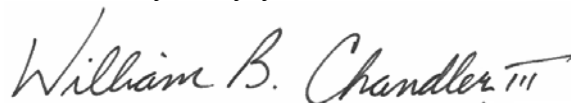
under self-dealing or waste claims. Not only is eBay's argument speculative in that the parties may enter the agreement at some future date, it is now moot in light of Newmark and Buckmaster's unrebutted affidavits confirming, under oath, no intent to ever enter the indemnification agreements, now or in the future. Without an executed contract or a completed transaction, eBay's claims in Counts I and II are not ripe for review and thus should be dismissed.

III. CONCLUSION

For all these reasons, defendants have established entitlement to summary judgment as to Counts I and II of plaintiff's verified complaint. Defendants' motion for partial summary judgment is therefore granted, and Counts I and II are dismissed.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and includes a horizontal line under the "III" at the end.

William B. Chandler III

WBCIII:dmq