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11 ATTORNEYS FOR PLAINTIFF
12 TASHA KEIRSEY

13 IN THE UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16 TASHA KEIRSEY, Individually and on
17 behalf of all others similarly situated,
18 Plaintiff,
19 v.
20 EBAY, INC.,
21 Defendant.

CV 12-01200
CASE NO. _____
PLAINTIFF'S ORIGINAL CLASS
ACTION COMPLAINT
Jury Trial Demanded

Filed

MAR - 9 2012

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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22 Plaintiff Tasha KeirseY ("KeirseY" or "Plaintiff"), individually and on behalf of all those
23 similarly situated, brings this action for damages and states:
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I. INTRODUCTORY STATEMENT

This case involves two overlapping problems with fees that eBay, Inc. (“eBay”) charges sellers who pay to list items for sale on eBay’s websites. First, sellers using “eBay Mobile”—which allows sellers to list items for sale on eBay’s websites through their mobile devices—were charged for optional upgrades that they did not ask for and were not told about. Upgrades that were supposed to be optional were instead automatically added to sellers’ listings, but were not disclosed, inflating the amount sellers paid to list items for sale on eBay through eBay Mobile. Second, when eBay discovers that its systems are improperly charging fees, it ought to tell its customers about the problem and account for the money eBay improperly collected. But it does not. On information and belief, eBay’s practice is *not* to proactively disclose system errors and overcharges to customers, even when eBay knows it has improperly charged and collected fees.

Accordingly, Keirsey brings this action for herself and a class of eBay members who have used eBay Mobile to list items for sale on eBay’s websites. For herself and the class, Keirsey asserts claims for breach of contract and of the duty of good faith and fair dealing (especially as to eBay’s failure to disclose known overcharges).

II. PARTIES

1. **Tasha Keirsey.** Keirsey is an individual residing in Federal Way, Washington. She is typical of the Class insofar as she was charged undisclosed Optional Feature Fees on listings made through eBay Mobile and was not advised that problems with eBay’s systems were resulting in overcharges that eBay knew about.

2. **eBay.** eBay is a Delaware corporation with its principal office at 2145 Hamilton Avenue, San Jose, California 95125. eBay, Inc. may be served through its registered agent, National Registered Agents, Inc., 2875 Michelle Drive, Suite 100, Irvine, California 92606.

III. JURISDICTION AND VENUE

3. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because this case is filed as a class action under Fed. R. Civ. P. 23 and on information and belief the aggregate amount in controversy exceeds the sum of

1 \$5,000,000.00, exclusive of interest and costs, and a substantial number of members of the class
2 of Plaintiffs are citizens of a state different from California.

3 4. **Venue.** Venue is proper in this district and division under 28 U.S.C. § 1391(a)
4 because (1) eBay resides in this judicial district; (2) a substantial part of the events or omissions
5 giving rise to the claims asserted herein occurred in this judicial district; and (3) eBay is subject
6 to personal jurisdiction in the Northern District of California.

7 5. **Intra-District Assignment: San Jose.** Pursuant to local Rules 3-2(c) and 3-5(b),
8 a substantial part of the events or omissions giving rise to the claims asserted herein occurred in
9 Santa Clara County, where eBay is located, and this case should be assigned to the San Jose
10 division pursuant to Local Rule 3-2(e).

11 **IV. BACKGROUND FACTS**

12 6. **eBay's Business.** According to eBay Inc.'s 2010 Form 10-K, eBay "connects
13 millions of buyers and sellers globally on a daily basis through eBay, the world's largest online
14 marketplace." At the end of September, 2011, eBay had almost 99 million active users (*i.e.*,
15 persons who bid on, bought, listed or sold an item during the preceding 12-month period). On
16 information and belief, all data for all users, including listings, the method the listing was made,
17 and fees charged, are contained in a single database system common for all eBay websites and
18 applications.

19 7. **eBay Membership and User Agreement.** In order to list items for sale, eBay
20 requires sellers to first become "members" of eBay by accepting a uniform User Agreement.
21 The User Agreement is a contract of adhesion and its terms are not negotiable by prospective
22 eBay members. Among other things, the User Agreement for all eBay members contains a
23 California choice of law provision and a forum selection clause designating courts located in
24 Santa Clara, County, California as the exclusive forum for litigating disputes with eBay.

25 8. **The eBay Fees Schedules.** The User Agreement states that eBay will charge
26 sellers based upon its "Fees schedule," which is a hyperlink that leads to other web pages that
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1 describe and quantify the applicable fees. The immediate link is to a page entitled “eBay.com
2 Fees” (the “Fees Schedule”). The Fees Schedule goes on to describe the fees for listings on
3 eBay.com. Links from the Fees Schedule go to web pages with fees for listings in the “eBay
4 Motors” and/or “Stores” categories, among others.¹ Collectively, the User Agreement and the
5 Fees Schedules comprise the operative contractual documents governing the fees for listings
6 made through eBay Mobile.

7 **9. Fees Schedules: Basic Fees and Optional Feature Fees.** The Fees Schedule
8 defines two distinct categories of fees, Basic fees (“Basic Fees”) and Optional Feature Fees
9 (“Optional Feature Fees”). The Basic Fees consist of the Insertion Fee and the Final Value Fee.
10 An Insertion Fee is an up-front mandatory fee eBay charges for placing a listing. The Final
11 Value Fee is a back-end mandatory fee charged only if the listing results in a successful sale. In
12 contrast, the Optional Feature Fees are not mandatory, but rather give sellers the ability to “add
13 optional features to help increase bid activity ... and chances for a successful sale” at an
14 additional cost. Since at least 2008, when eBay Mobile was launched, eBay told sellers, through
15 uniform representations in the Fees Schedule, that the Insertion Fee and Optional Feature Fees
16 comprised the total fee eBay charges sellers at the time of listing (collectively the “Listing
17 Fees”). Each member of the Class saw the same representation at the time they first downloaded
18 and/or activated eBay Mobile on their mobile device. Importantly, Optional Feature Fees are
19 defined separately from the Basic Fees. In particular, Optional Feature Fees are described in
20 tables distinct and separate from the tables for Basic Fees. eBay continually published the same
21 Fees Schedules to sellers telling them that the Optional Features were, as the name implies,
22 optional.

23 **10. eBay Mobile.** eBay Mobile is software provided by eBay that allows sellers to
24 use various mobile devices (like smart-phones) to list items for sale on eBay’s websites. On
25 information and belief, the eBay Mobile listing process (*i.e.*, how sellers create and upload their
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27 ¹ While the fees are different for “eBay Motors” and “Stores” listings, they fall under the same User Agreement and
28 are integrated into eBay’s online marketplace, alongside all other types of listings placed through eBay Mobile.

1 listings of items for sale to eBay's websites from mobile devices) is substantially the same in
2 both form and function for all mobile devices. According to eBay, eBay Mobile has been
3 downloaded more than 50 million times since its inception in 2008. The resulting activity
4 through eBay Mobile has also grown rapidly. According to eBay, the volume of sales of items
5 on eBay through mobile devices grew from \$600 million in 2009 to nearly \$2 billion in 2010,
6 which was expected to more than double for 2011 to almost \$5 billion (per eBay's 2011 third-
7 quarter results announcement). And on November 30, 2011, eBay announced that sellers were
8 using their mobile devices and eBay Mobile to create over 1,000,000 new listings *every week*. In
9 short, according to eBay, there are millions of eBay members who have used eBay Mobile to list
10 items for sale on eBay; the number is growing; and the volume of their transactions is increasing.

11 11. **eBay Mobile Fees.** Just like other listings placed on eBay's websites, fees for
12 listings created on mobile devices using eBay Mobile are governed by the User Agreement.
13 Consequently, Optional Feature Fees are supposed to be optional on eBay Mobile listings, just
14 like they are on eBay's traditional websites.

15 12. **Automatic Charges.** For some time period after eBay Mobile launched in 2008,
16 eBay charged Optional Feature Fees that sellers did not select (and indeed had no ability to select
17 or decline using eBay Mobile's pre-formatted electronic listing process) on eBay Mobile listings.
18 Moreover, eBay imposed these charges without disclosing that some or all of the fees were not
19 mandatory; were in fact optional and need not be incurred; and in any event could be wholly
20 avoided if listings were placed through eBay's websites. Upon information and belief, eBay
21 discovered its systems were improperly charging fees, including but not limited to the manner
22 described above, and yet failed to disclose those known system problems and improper charges
23 to eBay members.

24 13. **eBay's Agreements, Policies, and Practices are Identical for All Class**
25 **Members.** All of the foregoing allegations are based entirely upon eBay's User Agreement and
26 Fees Schedules as they existed in various forms throughout the Class Period. These web pages
27 should therefore be interpreted uniformly as to all Class Members, and eBay's conduct should be
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1 judged uniformly as to its effect on all Class Members. Moreover, the eBay User Agreement has
2 a California choice of law provision. California law may therefore be applied to the claims of all
3 Class Members.

4 **14. eBay Overcharged Keirse**y. Keirse)y used eBay Mobile to list items for sale on
5 eBay. The eBay Mobile listing process was standardized and did not include the ability to select
6 each of the various Optional Features typically available for new listings placed on eBay's
7 websites. At no point during the listing process did Keirse)y select any upgrades for which there
8 was an Optional Feature Fee pursuant to the User Agreement or Fees Schedule. Nor was Keirse)y
9 told that, by using eBay Mobile, eBay would automatically add and charge upgrades and
10 Optional Feature Fees to her listings or that she would be charged for photos that were supposed
11 to be free. To the contrary, Keirse)y relied on eBay to apply only the mandatory Insertion Fees
12 (since she did not select any options) and to charge only the minimum amount due under the
13 Fees Schedule. eBay Mobile did not disclose the existence of Optional Feature Fees on the
14 listings. Had Keirse)y known that using eBay Mobile would automatically incur Optional Feature
15 Fees, which she did not want, she would not have used eBay Mobile to list her items for sale.
16 Rather, she would have listed her items for sale through the eBay website and avoided all of the
17 "Optional Feature Fee" charges.

18 **15. eBay Knows it has a Problem**. After Keirse)y discovered the fees charged on her
19 listings were for unwanted upgrades that were supposed to be optional, that she did not select,
20 and indeed that she had no ability to select through eBay Mobile, she contacted eBay about the
21 problem. eBay responded that it knew eBay Mobile was "buggy" and unreliable. Surprisingly,
22 despite the fact eBay had been lauding eBay Mobile as a virtual panacea for sellers to easily
23 create and upload listings from their mobile devices, eBay's advice to Keirse)y was not to use
24 eBay Mobile to post new listings because it was not meant for sellers. Despite Keirse)y's
25 repeated efforts to have the improper charges reversed, eBay refused to fully refund the hidden,
26 automatic charges.

1 **16. The eBay Mobile Update.** At some point after Keirsej complained to eBay
2 about these problems in mid-to-late 2011, eBay updated eBay Mobile (the “eBay Mobile
3 Update”) to change the functionality of, and certain disclosures provided during, the eBay
4 Mobile listing process. Among other things, with the advent of the eBay Mobile Update, for the
5 first time, eBay added functionality to eBay Mobile letting the seller select or decline certain
6 options and alerting them to the specific Optional Feature Fees that would apply to the options
7 they selected during the listing process, breaking out the total of each fee in the final review
8 page. Keirsej specifically alleges eBay Mobile did not work this way before the eBay Mobile
9 Update, and in any event, at least through September 2011.

10 **V. CLASS ACTION ALLEGATIONS**

11 **17. Class Definition.** Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23
12 on behalf of the following class (the “Class”): all eBay members who, since the launch of eBay
13 Mobile through the date of the eBay Mobile Update (the “Class Period”), placed listings on
14 eBay’s websites using eBay Mobile. Excluded from the Class are eBay and its management,
15 officers, and directors, members of each of their immediate families, and any presiding
16 Magistrate or District Judge and their staff.

17 **18. Class Certification.** This action may be maintained as a class action because:

- 18 **a.** The Class is so numerous that joinder of all members is impracticable;
- 19 **b.** There are questions of law or fact common to the Class;
- 20 **c.** The claims or defenses of the representative parties are typical of the
21 claims or defenses of the Class; and
- 22 **d.** The representatives of the Class will fairly and adequately protect the
23 interests of the Class.

24 **19. Damages Class.** The Class is properly certifiable pursuant to Rule 23(b)(3) as a
25 damages class because the questions of law and fact common to the class predominate over any
26 questions affecting only individual members, and a class action is superior to other available
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1 methods for fairly and efficiently adjudicating the controversy. Among other things, each Class
2 member's interest in individually controlling the prosecution of the claims herein makes it
3 virtually impossible to assert those claims outside the class action context. Moreover, there is no
4 other litigation known by the undersigned counsel that asserts claims based on the facts in this
5 controversy. Concentrating litigation in this forum makes sense because it is the location of
6 eBay's principal office and principal place of business, the forum of eBay's choice under the
7 User Agreement, and because eBay has selected California law under the User Agreement.
8 Finally, there are no likely difficulties in managing this case as a class action and the Plaintiff's
9 counsel is experienced in class actions.

10 **20. Common Questions.** The common questions of law and fact include at least the
11 following:

- 12 **a.** The construction of the agreement between eBay and the Class members;
 - 13 **b.** eBay's obligations under the User Agreement, including but not limited to
14 interpretation of the incorporated Fees Schedules;
 - 15 **c.** Whether eBay has breached its agreement and covenant of good faith and
16 fair dealing insofar as its charges of Optional Feature Fees for items listed
17 through eBay Mobile are concerned;
 - 18 **d.** Whether and to what extent listings placed through eBay Mobile
19 improperly incurred fees for Optional Features that were not selected by
20 the seller during the standardized eBay Mobile listing process;
 - 21 **e.** Whether eBay breached its duty of good faith and fair dealing because it
22 knew that it had improperly applied charges to, and collected fees for,
23 transactions through eBay Mobile, yet failed to disclose the overcharges to
24 the Class; and
 - 25 **f.** The method and calculation of damages for members of the Class.
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1 **VI. FIRST CAUSE OF ACTION – BREACH OF CONTRACT AND**
2 **DUTY OF GOOD FAITH AND FAIR DEALING**

3 21. Plaintiff re-alleges each of the preceding paragraphs as if set forth fully herein.

4 22. Throughout the Class Period, eBay entered into identical contracts with Plaintiff
5 and all Class Members setting forth the fees for listings. Under the User Agreement, Optional
6 Feature Fees were supposed to be optional.

7 23. eBay breached its contract with Plaintiff and the Class and its covenant of good
8 faith and fair dealing by effectively making Optional Feature Fees mandatory through eBay
9 Mobile, especially given that sellers were not told at any point in the eBay Mobile listing process
10 that they would be charged Optional Feature Fees during the listing process. eBay improperly
11 charged fees for options that were not selected and imposed charges for other options that were
12 supposed to be free.

13 24. Plaintiff and the Class did not voluntarily agree to accept services other than as set
14 forth above and specifically did not ask for or agree to pay Optional Feature Fees, or agree to
15 fees that were otherwise supposed to be free, by using eBay Mobile listings before the eBay
16 Mobile Update.

17 25. Alternatively and in addition, eBay's contract with members using eBay Mobile
18 was and is one of adhesion, which must be construed against the drafter, eBay, and in favor of
19 Plaintiff and the Class.

20 26. Further, any and all provisions of any web page, invoice, or communication from
21 eBay purporting to contradict or alter the terms set out in the applicable User Agreement or its
22 Fees Schedules must be disregarded, construed in favor of Plaintiff and Class Members, and/or
23 declared unconscionable and unenforceable.

24 27. As a direct and proximate result of eBay's breach of contract and the attendant
25 covenant of good faith and fair dealing, Plaintiff and the Class have been damaged in the amount
26 of Optional Feature Fees and fees for services that were supposed to be free (including but not
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1 limited to photos) that were paid to eBay on listings created using eBay Mobile during the Class
2 Period.

3 28. In addition, eBay refused to fully refund the fees for the improper charges, despite
4 the fact eBay knew errors in its systems had caused it to charge and collect fees to which eBay
5 was not entitled under the Fees Schedules. On information and belief, even when eBay knows
6 its systems calculate and/or apply and collect fees erroneously, effectively overcharging sellers,
7 eBay's practice is not to disclose these improper charges, the problems with its systems that
8 systematically cause eBay to collect such improper charges, or that a refund is owed to eBay
9 members like Plaintiff and the Class. This failure to disclose and make appropriate refunds
10 breached eBay's duty of good faith and fair dealing to Plaintiff and the Class, damaging them in
11 the amount of the charges that eBay knew it was not supposed to collect, but did anyway, without
12 disclosing it had received sellers' funds in error.

13 29. The damages set forth above are (i) readily calculable from eBay's data, (ii)
14 common to and typical among all Class Members, and (iii) readily determinable from the
15 computer data in the possession of eBay.

16 **VII. SECOND CAUSE OF ACTION –**
17 **UNJUST ENRICHMENT/COMMON LAW RESTITUTION**

18 30. Plaintiff repeats and re-alleges each of the preceding paragraphs, as if set forth
19 fully herein.

20 31. In the alternative, eBay had no contract with Plaintiff and the Class to collect
21 Optional Feature Fees that were not disclosed as such, were not selected by Plaintiff and the
22 Class, and which they were not given the opportunity to decline at the time of listing. eBay is
23 not entitled to retain these overcharges, as the fees wrongfully collected by eBay belong to
24 Plaintiff and the Class. eBay has therefore unlawfully and unjustly enriched itself at the cost of
25 Plaintiff and the Class. Plaintiff and members of the Class therefore seek an order of restitution
26 and disgorgement of all or a portion of the fees eBay collected for Optional Feature Fees and/or
27 for uploaded photos on listings placed through eBay Mobile.

1 **VIII. MISCELLANEOUS**

2 **32. Conditions Precedent.** Plaintiff and the Class hereby allege that they have fully
3 complied with all contractual and other legal obligations and fully complied with all conditions
4 precedent to bringing this action and/or all such obligations or conditions are excused.

5 **33. Jury Demand.** Plaintiff and the Class demand a trial by jury.

6 **IX. PRAYER FOR RELIEF**

7 **34.** Plaintiff, on behalf of herself and on behalf of the Class, requests the following
8 relief:

- 9 a. An order certifying the Class and appointing Plaintiff as representative of
10 the Class and the undersigned counsel as Class Counsel;
- 11 b. Actual damages suffered by Plaintiff and the Class and/or full restitution
12 of all funds acquired through eBay's conduct;
- 13 c. Pre- and post-judgment interest; and
- 14 d. All other and further relief, general and special, legal and equitable, to
15 which the Plaintiff and Class may be justly entitled.

16 **X. CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

17 **35.** Pursuant to Civil L.R. 3-16, the undersigned certifies that, as of this date, other
18 than the named parties, there is no such interest to report.

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1 Dated: March 9, 2012.

2 Respectfully submitted,

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4 By: 

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