

United States District Court
For the Northern District of California

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E-FILED on 10/25/10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

<p>MICHAEL EWERT, individually and on behalf of others similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>EBAY, INC.,</p> <p style="text-align: center;">Defendant.</p>	<p>No. C-07-02198 RMW</p> <p>ORDER GRANTING MOTIONS FOR CLASS CERTIFICATION, DENYING MOTION TO APPOINT CLASS COUNSEL, AND DENYING MOTIONS TO STRIKE</p> <p>[Re Docket Nos. 86, 88, 111]</p>
<p>THE MISSING LINK, INC., d/b/a BATH PLUS INC. and JEFFREY MARKS, individually and on behalf of others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>EBAY, INC.,</p> <p style="text-align: center;">Defendant.</p>	<p>No. C-07-04487 RMW</p> <p>[Re Docket Nos. 83, 121]</p>

In *Ewert v. eBay, Inc.*, C-07-2198 ("Ewert Case"), plaintiff Michael Ewert moves for class certification, to appoint class counsel, and to strike defendant eBay, Inc. ("eBay")'s expert report.

1 Similarly, in *The Missing Link, Inc. v. eBay, Inc.*, C-07-04487 ("Missing Link Case"), plaintiffs The
2 Missing Link, Inc. ("Missing Link") and Jeffrey Marks move for class certification and to strike
3 eBay's expert report. For the reasons set forth below, the court certifies a class action, denies
4 without prejudice the motion to appoint class counsel, and denies the motions to strike the expert
5 report.

6 I. BACKGROUND

7 eBay is "the largest virtual retail store and auction site on the internet." Missing Link Case,
8 Second Am. Compl. ("SAC") ¶ 17. Sellers on eBay are charged an "insertion fee" for posting the
9 listing as well as additional fees for optional services and upon sale of the item listed. Missing Link
10 Case, Hartrich Decl. Supp. Opp'n Mot. Class Cert. ("Hartrich Decl.") ¶¶ 7, 10. To post items for
11 sale on eBay.com, a seller must register with eBay and complete an online form requesting a listing
12 on eBay's site. *Id.* at ¶ 19. One such online listing request form is the Sell Your Item form. When
13 filling out the Sell Your Item form, a seller selects a selling format and a listing duration. Missing
14 Link Case, Quan Decl. Supp. Opp'n Mot. Class Cert. ("Quan Decl.") ¶ 2. The most common selling
15 formats are the auction-style and fixed-price formats. Hartrich Decl. ¶ 4. For a fixed-price listing,
16 the seller sets a designated price (the "Buy It Now" price) at which a buyer can purchase an item.
17 *Id.* For an auction-style listing, the seller sets a starting price for bidding and may also select a
18 reserve price, which is the minimum amount that the seller is willing to accept. *Id.* In addition, a
19 seller may choose to have a "Buy It Now" price on an auction-style listing, which gives buyers the
20 option of purchasing the item immediately at the "Buy It Now" price. *Id.* For both types of selling
21 formats, sellers choose a listing duration, such as 1, 3, 5, 7, or 10 days. *Id.* at ¶ 5.

22 Sellers also choose a start time for their listing. Ewert Case, Third Am. Compl. ("TAC") ¶ 5.
23 The default selection for a start time is "start listing when submitted." *Id.* According to plaintiffs,
24 even when this option is chosen, the listing does not begin immediately upon submission in that the
25 listing is not immediately searchable by prospective bidders. *Id.* ¶ 7. All listings are affected by
26 technical delays caused by the time necessary to index and load listings. Missing Link Case, Mot.
27 Class Cert. 3. In addition to these search indexing delays, some listings are also subject to Trust and
28 Safety delays, which are delays caused by eBay's efforts to scrutinize listings for errors, deficiencies,

1 fraudulent activity, or violations of eBay's rules. *Id.* at 4. Plaintiffs allege that eBay failed to
2 disclose the existence of these delays to sellers. Missing Link Case, Mot. Class Cert. 5. eBay also
3 does not extend the listing period to compensate for these delays. SAC ¶ 33. Accordingly, plaintiffs
4 allege that they did not receive the full duration requested for their listings. TAC ¶ 7.

5 Named plaintiff Missing Link is an Illinois corporation that sells bathroom fixtures online
6 and by other means. SAC ¶ 6. Named plaintiffs Jeffrey Marks and Michael Ewert are individuals
7 who purchased listings on eBay. SAC ¶ 7; TAC ¶¶ 5-6. Each of the named plaintiffs purchased
8 listings on eBay.com using the Sell Your Item form and claim that they did not receive the full
9 amount of listing time requested. SAC ¶¶ 6-7; TAC ¶¶ 5-6.

10 Missing Link and Marks assert claims against eBay for breach of contract and violation of
11 California's Unfair Competition Law ("UCL").¹ Ewert asserts the following claims against eBay: (1)
12 violation of the Consumers Legal Remedies Act ("CLRA"), (2) violation of the False Advertising
13 Law ("FAL"), and (3) violation of the UCL. The named plaintiffs in each case seek class
14 certification.

15 II. ANALYSIS

16 Class certification is a matter within the discretion of the district court, *Zinser v. Accufix*
17 *Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir.
18 2001), although the determination must be supported by sufficient factual findings, *Local Joint*
19 *Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th
20 Cir. 2001), and a proper understanding of the applicable law, *Hawkins v. Comparet-Cassani*, 251
21 F.3d 1230, 1237 (9th Cir. 2001).

22 A. Class Definition

23 "As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party
24 seeking class certification must demonstrate that an identifiable and ascertainable class exists."
25 *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D.Cal. 2009). "A class definition should be precise,

27 ¹ The SAC also asserts previously dismissed claims for unjust enrichment and breach of the
28 covenant of good faith and fair dealing solely for the purpose of preserving rights on appeal. SAC ¶
6 n.1.

1 objective, and presently ascertainable." *Id.* (citing *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311,
2 319 (C.D. Cal.1998)).

3 Ewert proposes the following class definition:

4 All eBay customers, beginning four years prior to the date of filing suit [April 20,
5 2007], who used eBay's 'Online Auction Format,' and through eBay's 'sell your item'
6 form selected a specific time duration for the auction, and chose the 'start time' option
7 of the 'start listing when submitted.' Excluded from the Class are: (a) Defendant,
8 eBay, and its subsidiaries, affiliates, officers, directors, agents and employees; (b) any
9 governmental entity; (c) any judge or judicial official assigned to this matter and his
10 or her family members; (d) claims for personal injury and wrongful death; and (e) any
11 and all legal representatives of the parties and their employees.

12 Ewert Case, Mot. Class Cert. 1. This class definition is based on a set of objective criteria and is
13 sufficiently ascertainable. However, as discussed below, this class definition appears to be over-
14 inclusive with respect to the asserted CLRA claim since it includes non-consumers.

15 Missing Link and Marks propose the following class definition:

16 all persons and entities who advertised a listing for sale on eBay.com using the Sell
17 Your Item form, using the default selection for the listing to start upon submission to
18 eBay. Excluded from the [] Class are governmental entities, Defendant and each of
19 its subsidiaries, employees, officers, and directors. Also excluded is any judge,
20 justice, or judicial officer presiding over this matter, and Plaintiff's counsel.

21 Missing Link Case, Mot. Class Cert. 7. This class definition is based on a set of objective criteria
22 and is sufficiently ascertainable, except that it lacks a start date for the class period. However, this
23 class definition is also over-inclusive in light of plaintiffs' proffered method for calculating damages
24 and restitution, as discussed below.

25 **B. Rule 23(a) Prerequisites**

26 Federal Rule of Civil Procedure 23(a) lists four conjunctive criteria that must be met to
27 certify a class action: numerosity, commonality of issues, typicality of the representative plaintiffs'
28 claims, and adequacy of representation. Fed. R. Civ. P. 23(a). A class may only be certified if the
court is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."
Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982). The plaintiff bears the burden of
demonstrating the requirements of Rule 23(a) are satisfied. *Hanon v. Dataproducts Corp.*, 976 F.2d
497, 508 (9th Cir. 1992).

1 In this case, there is no dispute regarding the satisfaction of the numerosity and commonality
2 requirements, as there are over one million class members and many common questions of law and
3 fact. Missing Link Case, Chorowsky Decl. Supp. Mot. Class Cert. ("Chorowsky Decl. 1") Ex. 12.
4 The parties dispute whether the typicality and adequacy requirements have been met.

5 **1. Typicality**

6 Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of
7 the claims or defenses of the class." Fed. R. Civ. Proc. 23(a)(3). The typicality requirement serves
8 to "assure that the interest of the named representative aligns with the interests of the class." *Hanon*,
9 976 F.2d at 508. "Typicality refers to the nature of the claim or defense of the class representative,
10 and not to the specific facts from which it arose or the relief sought." *Id.* "Under the rule's
11 permissive standards, representative claims are 'typical' if they are reasonably co-extensive with
12 those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*,
13 150 F.3d 1011, 1020 (9th Cir. 1998).

14 eBay contends that named plaintiffs Missing Link, Jeffrey Marks, and Michael Ewert do not
15 have claims typical of many class members because the class includes many sophisticated business
16 entities likely to have interests and motivations different from those of named plaintiffs. The court
17 notes that Missing Link is a business entity that had annual sales of over \$100,000 on eBay.com.
18 Pollack Dep. 21:1-3; *see* SAC ¶ 6. Moreover, the cases eBay cites do not support the blanket
19 proposition that minor purchasers cannot have claims typical of larger business entities. In *Graphics*
20 *Processing*, for example, the court found that named plaintiffs' claims were not typical of the
21 putative class because named plaintiffs were individuals who had made single purchases on non-
22 negotiable terms, while the majority of class members were wholesale purchasers with immense
23 bargaining power, who had purchased a wide array of products on individually negotiated terms. *In*
24 *re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 489-90 (N.D. Cal. 2008). In contrast,
25 the agreements at issue here are form contracts with standardized, non-negotiable terms, regardless
26 of the class member's level of sophistication or volume of business. Thus, named plaintiffs' claims
27 are not atypical simply because the class includes sophisticated business entities.

1 eBay also argues that the typicality requirement is not met because named plaintiffs are
2 subject to unique knowledge and consent defenses. "[A] named plaintiff's motion for class
3 certification should not be granted if there is a danger that absent class members will suffer if their
4 representative is preoccupied with defenses unique to it." *Hanon*, 976 F.2d at 508 (citations and
5 quotations omitted). Named plaintiffs admit that they continued purchasing listings on eBay even
6 after realizing that listings were sometimes delayed. *See* Ewert Dep. 41:12-19, 43:25-44:9; Pollack
7 Dep. 42:20-43:3; Marks Dep. 23:22-24:6, 30:2-24. While these admissions may pose difficulties for
8 named plaintiffs in establishing reliance, damages, and restitution, the court has not been presented
9 with any basis for believing that these difficulties are unique to named plaintiffs as opposed to
10 common among class members.

11 Named plaintiffs claim that they purchased listings on eBay.com using the Sell Your Item
12 form and chose the "start listing when submitted" time option, but their listings failed to begin
13 immediately upon submission. SAC ¶¶ 6-7; TAC ¶¶ 5-6. Their breach of contract, UCL, FAL, and
14 CLRA claims are based on the allegation that they did not receive the full amount of listing time
15 requested. The nature of their claims are sufficiently typical of the claims of the class to ensure that
16 their interests align with the interests of the class. The court thus finds that the typicality
17 requirement has been satisfied.

18 2. Adequacy

19 Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the
20 interests of the class." Fed. R. Civ. Proc. 23(a)(4). The adequacy requirement ensures that absent
21 class members are afforded adequate representation before being bound by a judgment. *Hanlon*, 150
22 F.3d at 1020. In determining adequacy, courts consider: "(1) do the named plaintiffs and their
23 counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and
24 their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill v. Inflight*
25 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

26 eBay does not challenge the adequacy of named plaintiffs' counsel. In the absence of any
27 evidence to the contrary, it appears that counsel representing named plaintiffs do not have any
28

1 conflict of interest with class members and would prosecute the action vigorously on behalf of the
2 class.

3 eBay contends that there is a conflict of interest between named plaintiffs and other class
4 members because named plaintiffs are seeking an injunction requiring eBay to extend the duration of
5 a listing whenever there is a delay to compensate for lost listing time. According to eBay, many
6 sellers want their listings to end at a specific time and thus would be harmed rather than benefited
7 from such an injunction. Plaintiffs point out that they have not requested an injunction requiring
8 eBay to automatically extend listing end times. They suggest various options for injunctive relief
9 that do not create any conflict of interest between class members, such as providing the option of
10 extending listings when there is a delay or simply providing sellers with full disclosure regarding the
11 potential for delays. Accordingly, the court finds no conflict of interest based on the supposedly
12 sought-after injunction.

13 eBay also argues that named plaintiffs are inadequate class representatives because they are
14 subject to unique knowledge and consent defenses and thus would be preoccupied with these unique
15 defenses. However, as noted above, the difficulties faced by named plaintiffs in prevailing on their
16 claims do not appear to be unique to them. The court finds no conflict of interest between named
17 plaintiffs and class members and no reason to believe named plaintiffs would fail to prosecute the
18 action vigorously on behalf of the class. Accordingly, the adequacy requirement has been satisfied.

19
20 **C. Rule 23(b) Types of Class Actions**

21 In addition to fulfilling the four prerequisites of Rule 23(a), a class action must also meet the
22 disjunctive requirements of Rule 23(b) by satisfying the criteria set forth in at least one of the three
23 types of class actions. Fed. R. Civ. P. 23. Plaintiffs allege that this class action may be maintained
24 as a Rule 23(b)(1) class, as a Rule 23(b)(2) class, or as a Rule 23(b)(3) class.

25 **1. Certification as a (b)(1) Class**

26 A class may be certified under Rule 23(b)(1) if individual actions would create a risk of
27 "inconsistent or varying adjudications with respect to individual class members that would establish
28 incompatible standards of conduct for the party opposing the class." Fed. R. Civ. Proc. 23(b)(1)(A).

1 at 17. The fact that this disclosure regarding potential delays already exists, though not dispositive,
2 suggests that plaintiffs' claims for injunctive and declaratory relief are incidental to a primary claim
3 for monetary relief. Having considered the objective effect of plaintiffs' claim for monetary relief on
4 the litigation, the court finds that the claim for monetary relief predominates, making class
5 certification under Rule 23(b)(2) inappropriate.

6 **3. Certification as a (b)(3) Class**

7 Rule 23(b)(3) requires that "questions of law or fact common to class members predominate
8 over any questions affecting only individual members, and that a class action is superior to other
9 available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

10 **a. Predominance**

11 The predominance inquiry "tests whether proposed classes are sufficiently cohesive to
12 warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022 (quoting *Amchem Prods., Inc. v.*
13 *Windsor*, 521 U.S. 591, 623 (1997)). The mere existence of common issues of fact or law is
14 insufficient, as such commonality is already required by Rule 23(a)(2). Predominance is met where
15 common questions, which can be resolved for all members on a class-wide basis, are such a
16 significant aspect of the case that they present "a clear justification for handling the dispute on a
17 representative rather than on an individual basis." *Id.*

18 Since plaintiffs' claims are based on allegations regarding eBay's uniform conduct toward all
19 class members, there is no question that there are many common questions of law and fact in this
20 case. Nonetheless, eBay contends that individual issues would be the focus of the litigation because
21 the court would need to engage in individualized inquiries into contract interpretation, reliance,
22 consumer status, damages, and restitution. The court therefore considers whether each of these
23 issues can be addressed on a class-wide basis.

24 **i. Contract Interpretation**

25 eBay appears to suggest that individualized inquiry is necessary to determine eBay's liability
26 for breach of contract because extrinsic evidence must be considered when engaging in contract
27 interpretation. In particular, eBay argues that the court must evaluate each seller's course of dealing
28 with eBay to understand the terms of each class member's contract with eBay. In support of its

1 claim, eBay cites the Restatement of Contracts, which states in part, "[w]here an agreement involves
2 repeated occasions for performance by either party with knowledge of the nature of the performance
3 and opportunity for objection to it by the other, any course of performance accepted or acquiesced in
4 without objection is given great weight in the interpretation of the agreement." Restatement
5 (Second) of Contracts § 202(4). Even though it is likely that many class members purchased more
6 than one listing from eBay, it appears that each contract between class members and eBay is for an
7 individual listing. Thus, none of the agreements at issue involve "repeated occasions for
8 performance." *Id.*

9 Moreover, eBay's argument fails to account for the limited role that extrinsic evidence plays
10 in contract interpretation. "[E]xtrinsic evidence is not admissible to add to, detract from, or vary the
11 terms of a written contract." *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.,*
12 *Inc.*, 69 Cal. 2d 33, 39 (1968). Extrinsic evidence can be used in contract interpretation when there
13 are ambiguous terms in the contract and may be used to establish ambiguity in contract terms. *Id.* at
14 40 n.8. However, the intent of the parties "is to be inferred, if possible, solely from the written
15 provisions of the contract." *AIU Ins. Co. v. Super. Ct.*, 51 Cal. 3d 807, 822 (1990). Thus, "if the
16 meaning a layperson would ascribe to contract language is not ambiguous, [courts are to] apply that
17 meaning." *Id.*

18 Plaintiffs contend that the duration and start time of listings were plain, unambiguous terms
19 in the Sell Your Item form. eBay has not alleged that any particular terms in the form contracts at
20 issue in this case are ambiguous. Moreover, even if eBay could establish some ambiguity using
21 extrinsic evidence, the ambiguous contract terms would interpreted against eBay, the drafter of the
22 form contract. *See* Restatement (Second) of Contracts § 206 ("In choosing among the reasonable
23 meanings of a promise or agreement or a term thereof, that meaning is generally preferred which
24 operates against the party who supplies the words or from whom a writing otherwise proceeds.").
25 Thus, eBay has failed to show how extrinsic evidence of ambiguity would affects its liability for
26 breach of contract.

27 eBay also claims that individualized inquiry into the knowledge of each class member is
28 needed to determine liability for breach of contract. However, as plaintiffs point out, when there is a

1 standardized agreement like the form contract at issue in this case, the agreement "is interpreted
2 wherever reasonable as treating alike all those similarly situated, without regard to their knowledge
3 or understanding of the standard terms of the writing." Restatement (Second) of Contracts § 211(2).
4 "[C]ourts in construing and applying a standardized contract seek to effectuate the reasonable
5 expectations of the average member of the public who accepts it. The result may be to give the
6 advantage of a restrictive reading to some sophisticated customers who contracted with knowledge
7 of an ambiguity or dispute." *Id.* at Comment e. Accordingly, in construing the form contract
8 between eBay and class members, the court need not delve into the actual knowledge of individual
9 class members. The court therefore concludes that plaintiffs' breach of contract claim does not raise
10 individual issues likely to be the object of most of the court's and the parties' efforts. *See Menagerie*
11 *Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, at *36 (C.D. Cal. Nov. 9, 2009) (quoting
12 *Kleiner v. First Nat'l Bank*, 97 F.R.D. 683, 691 (N.D. Ga. 1983)) ("[w]hen viewed in light of Rule
13 23, claims arising from interpretations of a form contract appear to present the classic case for
14 treatment as a class action, and breach of contract cases are routinely certified as such").

15 **ii. Reliance**

16 eBay asserts that class members cannot seek recovery under the UCL or the FAL without
17 proving that funds were obtained "by means of" the alleged fraudulent conduct. Because class
18 members who knew that auctions could be delayed did not rely upon eBay's allegedly fraudulent
19 representations in purchasing listings, eBay argues that individualized inquiry is needed to
20 determine which class members knew about the potential for delays.

21 The problem with eBay's argument is it rests upon a faulty premise – that individual proof of
22 reliance is required to recover under the UCL and under the FAL. Faced with virtually the same
23 argument raised by eBay, the California Supreme Court expressly rejected the idea that "plaintiff
24 must present individual proof that each allegedly defrauded consumer seeking restitution did not
25 know of the fraud, and that this requirement destroys the basis for a class suit." *Fletcher v. Security*
26 *Pacific Nat'l Bank*, 23 Cal. 3d 442, 449-50 (1979). In *Fletcher*, the Court analyzed the statutory
27 language in the FAL – which allows courts to issue orders that "may be necessary to restore to any
28 person in interest any money or property, real or personal, which *may have been acquired* by means

1 of" an unlawful practice, Cal. Bus. & Prof. Code § 17535 (emphasis added) – and concluded that
2 this language was "unquestionably broad enough to authorize a trial court to order restitution
3 without requiring the often impossible showing of the individual's lack of knowledge of the
4 fraudulent practice in each transaction." *Fletcher*, 23 Cal. 3d at 451. The UCL contains identical
5 statutory language – also permitting courts to issue orders that "may be necessary to restore to any
6 person in interest any money or property, real or personal, which *may have been acquired* by means
7 of" unfair competition, Cal. Bus. & Prof. Code § 17203 (emphasis added) – and the California
8 Supreme Court has made clear that "relief under the UCL is available without individualized proof
9 of deception, reliance and injury." *In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009). Therefore,
10 plaintiffs need not establish lack of knowledge by individual class members to recover under either
11 the UCL or the FAL.

12 eBay also argues that class members cannot seek recovery under the CLRA without proving
13 actual reliance. The CLRA allows recovery by "[a]ny consumer who suffers any damage *as a result*
14 *of* the use or employment by any person" of an unfair or deceptive business practice. Cal. Civ. Code
15 § 1780(a) (emphasis added). Since class members who knew that listings could be delayed did not
16 rely upon eBay's alleged misrepresentations in purchasing listings (and were not damaged as a result
17 of those misrepresentations), eBay contends that individualized inquiry into the knowledge of class
18 members is needed to determine liability under the CLRA.

19 However, under California law, "a presumption, or at least an inference, of reliance arises
20 whenever there is a showing that a misrepresentation was material." *In re Tobacco II Cases*, 46 Cal.
21 4th at 327. Moreover, materiality is determined by an objective standard. "A misrepresentation is
22 judged to be material if a reasonable man would attach importance to its existence or nonexistence
23 in determining his choice of action in the transaction in question." *Id.* (quotations omitted).

24 The alleged misrepresentations at issue in this case are the "duration" and "start time"
25 options on the Sell Your Item form. Since the proposed class is limited to those who purchased
26 listings from eBay using the Sell Your Item form, it is clear that the alleged misrepresentations were
27 communicated to every class member. Because materiality is determined based on an objective,
28 reasonable person standard, the issue of whether the alleged misrepresentations were material can be

1 addressed with class-wide evidence. Furthermore, once materiality has been established, a
2 presumption or inference of reliance arises. Thus, individualized inquiry into the actual knowledge
3 (or lack of knowledge) of each individual class member is not required to establish a violation of the
4 CLRA.

5 **iii. Consumer Status**

6 eBay contends that the court would have to engage in individualized inquiries to determine
7 whether each class member is entitled to protection under the UCL and the CLRA as a consumer.
8 According to eBay, corporations and other business entities generally cannot seek relief under the
9 UCL, particularly if they have the independent resources to pursue direct claims against the
10 defendant. The cases eBay cites, however, fail to support such a broad proposition. In *Rosenbluth*,
11 an individual sought to bring a representative action under the UCL on behalf of alleged victims
12 who were "sophisticated corporations, most in the Fortune 1000, each of which *negotiate[d]*
13 *contracts individually* with [the defendant]." *Rosenbluth Int'l v. Super. Ct.*, 101 Cal. App. 4th 1073,
14 1078 (2002) (emphasis added). The court had due process concerns because a representative UCL
15 action could deprive the alleged victims of the individual opportunity to seek more extensive
16 remedies than those available under the UCL. *Id.* Similarly, *Linear Technology* dealt with
17 "sophisticated corporate customers who have entered or will enter *their own contracts* with
18 [defendants]." *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (2007)
19 (emphasis added). Relying upon *Rosenbluth*, the court held that "where a UCL action is based on
20 contracts not involving either the public in general or individual consumers who are parties to the
21 contracts, a corporate plaintiff may not rely on the UCL for the relief it seeks." *Id.*

22 In contrast, this action deals exclusively with form contracts (even for those class members
23 who are corporations or other business entities) and involves individual consumers. Moreover, the
24 due process concerns raised in *Rosenbluth* and *Linear Technology* are inapplicable. If a class were
25 to be certified under Rule 23(b)(3), class members would be given notice and have the opportunity
26 to opt out. Fed. R. Civ. Proc. 23(c)(2)(B), (e)(4). Thus, individualized inquiry into the consumer
27 status of class members is unnecessary for plaintiffs' UCL claim.

1 As for plaintiffs' CLRA claim, eBay is correct that sellers who purchased listings for
2 business purposes would not be "consumers" entitled to recover under the CLRA. *See* Cal. Civ.
3 Code § 1780. The CLRA defines a "consumer" as "an individual who seeks or acquires, by
4 purchase or lease, any goods or services for personal, family, or household purposes." Cal. Civ.
5 Code § 1761(d). There can be little doubt that many non-consumers are included as class members
6 under either of plaintiffs' proposed class definitions. Plaintiffs have failed to suggest any potentially
7 viable means for determining the consumer status of class members without engaging in
8 individualized inquiry into the circumstances of each class member. As the party seeking class
9 certification, plaintiffs bear the burden of demonstrating that the requirements of Rule 23 have been
10 met. *See Narouz v. Charter Commc'ns., LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010). By failing to
11 show how class members' consumer status can be determined without individualized inquiry,
12 plaintiffs have failed to meet their burden of establishing that common questions of law and fact
13 predominate over individual questions with respect to their CLRA claim. The court therefore denies
14 class certification of the CLRA claim.

15 **iv. Damages**

16 eBay argues that damages for breach of contract cannot be established using class-wide
17 evidence because: (1) there is insufficient data on the duration of listing delays; (2) plaintiffs cannot
18 prove that any damages exist; and (3) even if there are damages in individual cases, there is no way
19 to determine which class members are entitled to damages and the amount of damages to which they
20 are entitled.

21 eBay's first argument is based on the fact that eBay does not retain data on the exact duration
22 of listing delays. Plaintiffs do not dispute that one must be able to determine the duration of the
23 alleged delays in order to calculate damages but contend that there is sufficient data to make
24 reasonable estimates of delay time using class-wide evidence. According to eBay: (1) there is no
25 data tracking the duration of search indexing delays for individual listings, and (2) although there is
26 data on individual listings held for Trust & Safety review, the only data available is the maximum
27 time allotted for review, not the actual duration of the Trust & Safety delay. *Missing Link Case*,
28 *Opp'n Class Cert. 23*. However, plaintiffs allege that all listings experience search indexing delays,

1 and eBay has data on aggregate average search indexing delays up until mid-2005 and from 2007 to
2 the present. Missing Link Case, Mot. Class Cert. 21. Given that search indexing delays are
3 generally brief (taking seconds or minutes, not hours or days), it would not be unreasonable to
4 estimate damages based on the average duration of search indexing delays.

5 Plaintiffs have also made reasonable suggestions regarding how to deal with the fact that the
6 data on Trust & Safety delays is limited to the maximum time allotted for review (as opposed to
7 tracking the actual delay time for each individual listing). Since listings are delayed for the
8 maximum time unless they are manually released by an eBay employee, plaintiffs can estimate
9 actual Trust & Safety delay time for individual listings based on the proportion of listings that are
10 manually reviewed and the average reduction in delay time for these manually reviewed listings.
11 Though these estimates may not perfectly capture the exact delay time for each individual listing,
12 plaintiffs have shown that there is sufficient data to reasonably estimate damages without resorting
13 to individualized proof. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555,
14 564-65 (1931) (holding that juries should be permitted to form a "reasonable and probable estimate"
15 of damages when the precise amount of damages is uncertain).

16 eBay's second argument – that no damages exist – addresses the merits of the case rather
17 than the issue of predominance and the appropriateness of class certification. It is premature at this
18 stage for the court to consider whether class members actually suffered damages as a result of the
19 alleged breach of contract.

20 eBay's third argument is that individualized inquiry is needed to determine which class
21 members are entitled to damages and how much. eBay seems to suggest that damages can only be
22 calculated using an income approach to valuation. The income approach values an asset by
23 "estimating the present value of the expected future cash flows generated by the asset." Prowse Rep.
24 ¶ 51. Under the income approach, the value of lost listing time is calculated as the difference
25 between the expected outcome of an undelayed listing and the expected outcome of a delayed
26 listing. *Id.* at ¶ 54. eBay contends that the income approach cannot be utilized without
27 individualized inquiry because this analysis requires accounting for a large number of factors that
28 influence the price at which an item sells, and "many of these factors are inherently individualized,

1 are not discoverable on a class wide basis, and an individualized inquiry is necessary to ascertain
2 them." *Id.* at ¶ 56.

3 Plaintiffs challenge the assumption that damages can only be calculated using the income
4 approach. According to plaintiffs, "[i]rrespective of the impact of lost time on item sales or price,
5 damages can be established as a function of lost time or lost access to the eBay marketplace."
6 Missing Link Case, Reply 15. To calculate damages based on the amount of listing time lost due to
7 delays, one would first determine the percentage of requested time that was lost (length of delay
8 divided by length of chosen listing duration) and then multiply this percentage with the insertion fee
9 paid. For example, if a seller paid a \$1.00 insertion fee for a 5-day listing, and the listing was
10 delayed for 1 day, the seller lost 20% of the requested listing time and would receive 20 cents in
11 damages. This methodology allows damages to be calculated on a class-wide basis, without
12 individualized inquiry.

13 For the most part, the court finds it plausible that damages calculated in this manner could
14 approximate the injury to class members. There is, however, one exception. Where the seller
15 purchased a listing with a "Buy It Now" price and successfully sold the item at the "Buy It Now"
16 price, this methodology would award damages to the seller even though no listing time was actually
17 lost as a result of the delay. Because the "Buy It Now" option allows buyers to purchase an item
18 immediately at the designated price, a listing with a "Buy It Now" option does not come with a set
19 listing duration. Instead, the listing duration selected by the seller is the maximum time that the
20 listing may be available to potential buyers. Even if no delay took place, a "Buy It Now" listing may
21 terminate before the end of the chosen duration, simply because the item sold at the "Buy It Now"
22 price. Thus, plaintiffs' damages methodology, which assumes that bargained-for listing time is lost
23 due to a delay, cannot be applied to "Buy It Now" listings where the item is successfully sold at the
24 "Buy It Now" price. For all other listings, the court finds that plaintiffs have identified a reasonable
25 method for calculating damages on a class-wide basis.

26 **v. Restitution**

27 "The object of restitution is to restore the status quo by returning to the plaintiff funds in
28 which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.

1 4th 1134, 1149 (2003). Accordingly, "a party seeking restitution must generally return any benefit
2 that it has received." *Dunkin v. Boskey*, 82 Cal. App. 4th 171, 198 (2000) (quotations omitted).
3 Moreover, restitution must be "based on a specific amount found owing," and this measurable
4 amount of restitution due must be supported by substantial evidence. *Colgan v. Leatherman Tool*
5 *Group, Inc.*, 135 Cal. App. 4th 663, 699-700 (2006).

6 eBay argues that restitution cannot be established using class-wide evidence because: (1)
7 individualized inquiry is needed to determine the amount of profit realized from individual listings;
8 and (2) there is no way to quantify the amount of restitution owed to class members. If plaintiffs
9 were to seek return of the entire purchase price as restitution, then it would be necessary to
10 determine the amount of profit, if any, realized from listings since a party seeking restitution must
11 return the benefit that it has received. *Dunkin*, 82 Cal. App. 4th at 198. Alternatively, if plaintiffs
12 seek return of a portion of the purchase price, they must provide substantial evidence quantifying
13 either the dollar amount or percentage of listing fees acquired by means of an illegal practice. It is
14 not sufficient for plaintiffs to simply show that some portion of the listing fees paid by class
15 members may have been acquired by means of an illegal practice. *See Colgan*, 135 Cal. App. 4th at
16 699-700 (reversing trial court's restitution order as unsupported where plaintiffs' expert testified that
17 fraudulent misrepresentation had a significant impact on consumers but failed to quantify the dollar
18 value of the impact).

19 Plaintiffs have set forth two theories of restitution: (1) return of all listing fees paid, or at a
20 minimum, the entire insertion fee paid, and (2) recovery for lost listing time as a portion of the
21 insertion fee paid. With respect to this first theory, plaintiffs have not shown why return of the
22 entire insertion fee would be a reasonable measure of the amount of restitution due. As a general
23 matter, plaintiffs do not contend that class members were deprived of the entire listing time
24 requested. Even if listing times were truncated as a result of delays, class members received the
25 benefit of some listing time. Since the purpose of restitution is to return class members to status
26 quo, the amount of restitution due must account for the benefit that class members received,
27 notwithstanding any alleged delay. Plaintiffs have not shown how the amount of profits realized
28 when items were successfully sold could be determined absent individualized inquiry.

1 Under plaintiffs' second theory of restitution, the amount of restitution owed may be
2 quantified as a function of lost listing time. The amount of restitution due can be measured in the
3 same way damages are calculated – by multiplying the insertion fee paid by the percentage of
4 requested time lost (length of delay divided by length of chosen listing duration). As discussed
5 above, with the exception of "Buy It Now" listings where an item sold at the "Buy It Now" price,
6 this methodology provides a reasonable means for calculating restitution on a class-wide basis
7 without individualized inquiry.

8 Since there is no need for individualized inquiries into contract interpretation, reliance,
9 consumer status,² damages, or restitution, the court concludes that the proposed class is sufficiently
10 cohesive to warrant adjudication by representation, so long as "Buy It Now" listings where the item
11 sold at the "Buy It Now" price are excluded, and plaintiffs' CLRA claim is excluded. With this
12 caveat, the court finds that the predominance requirement has been satisfied.

13 **b. Superiority**

14 To certify a Rule 23(b)(3) class, the court must find that "a class action is superior to other
15 available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).
16 In determining whether the superiority requirement has been met, the court must evaluate the
17 available alternative mechanisms for dispute resolution. *Hanlon*, 150 F.3d at 1023. The alternative
18 to a class action is individual claims for a small amount of damages or restitution. Due to the small
19 amount of money at issue, it is unlikely that consumers would find the time, effort, and cost of
20 seeking relief on an individual basis to be worthwhile. If a multitude of individual claims were to be
21 brought, it would also unnecessarily burden the judiciary. When a class action is likely to be
22 difficult to manage due to the need for individualized inquiries, the benefits of considering common
23 issues in one trial can be outweighed by the complexities of class action treatment. *Zinser*, 253 F.3d
24 at 1192. In this case, however, a class action would be manageable since the focus of the litigation
25 would be on common issues. Consequently, the court finds class treatment to be superior to
26 individual adjudications.


27 _____
28 ² As noted previously, individualized inquiry into consumer status is necessary for plaintiffs' CLRA
claim but not for any of the other asserted claims.

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on listings with the "Buy It Now" option where the item was sold at the "Buy It Now" price; (b) defendant eBay and its subsidiaries, affiliates, officers, directors, agents, and employees; (c) any governmental entity; (d) any judge or judicial officer presiding over this matter and his or her immediate family members; (e) claims for personal injury and wrongful death; and (e) any and all legal representatives of the parties and their employees.

The court denies class certification of plaintiffs' CLRA claim and denies plaintiffs' motion to strike eBay's expert report. The court orders the parties to show cause as to why the Missing Link Case and the Ewert Case should not be consolidated. The court also orders that the designation of class counsel be determined at that same hearing. Accordingly, the court denies without prejudice Ewert's motion to appoint his counsel as class counsel. Pending the hearing, the existing counsel may serve as temporary co-class counsel. However, it is likely that the court will appoint only one firm as counsel for the class. The hearing on the question of consolidation and appointment of class counsel will be held on November 5, 2010 at 9:00 a.m. The parties may each file a brief not to exceed fifteen pages in length setting forth their positions on consolidation and appointment of lead counsel by October 15, 2010 and a responsive brief not to exceed five pages by October 22, 2010.

The court does not believe that anything in this order reveals confidential information. However, in an abundance of caution, the court is publicly filing a redacted version, with small portions of the order relating to subject matter that the parties have sought to keep under seal redacted. The court has also lodged an unredacted copy of this order today. If the parties feel that the redacted portion discloses confidential information, they may advise the court of their basis for asserting confidentiality within 10 days. The court will evaluate any such confidentiality contention and make a decision whether to maintain the current redaction or to publicly file an unredacted order. If a request to maintain the confidentiality of the redacted portion is not received within 10 days, the court will publicly file an unredacted copy of this order.

DATED: 9/30/10 
RONALD M. WHYTE
United States District Judge