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12 ATTORNEYS FOR PLAINTIFF  
 13 CUSTOM LED LLC

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

cu

HRL

16	CUSTOM LED, LLC,	)	CV 12-00350
17	Plaintiff,	)	EASE NO.
18		)	
19	v.	)	
20	EBAY INC., EBAY EUROPE S.A.R.L.,	)	PLAINTIFF'S ORIGINAL CLASS
21	and EBAY INTERNATIONAL AG,	)	ACTION COMPLAINT
22	Defendants.	)	Jury Trial Demanded

23 Plaintiff Custom LED, LLC ("Custom LED"), individually and on behalf of all those  
 24 similarly situated, brings this action for damages and states:  
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1 **I. INTRODUCTORY STATEMENT**

2 Plaintiff brings this case individually and on behalf of all other persons who paid for so-  
3 called "Featured Plus!" listings on eBay Motors. As set forth more fully below, Featured Plus!  
4 listings were supposed to appear "at the top of the search results list page." This turns out to be  
5 incorrect because Featured Plus! listings do not receive any priority unless a search happens to  
6 be initiated from eBay Motors. Moreover, for certain types of searches, such as those based on  
7 price, date of listing, or geographic location, Featured Plus! listings receive no priority in search  
8 results. Finally, during part of the proposed class period, the Featured Plus! option was entirely  
9 non-functional, which resulted in Featured Plus! listings receiving no search result priority  
10 whatsoever, regardless of where the search was initiated. Accordingly, Plaintiff and the Class did  
11 not receive benefits promised by eBay in exchange for Featured Plus! listing fees.  
12

13 **II. PARTIES**

14  
15 1. **Custom LED LLC.** Custom LED, LLC is a limited liability company domiciled  
16 in New Jersey. Custom LED is typical of the Class insofar as it has paid Featured Plus! listing  
17 fees and did not receive the promised and agreed-upon search result priority associated  
18 therewith.

19 2. **eBay.** eBay Inc. is a Delaware corporation with its principal office at 2145  
20 Hamilton Avenue, San Jose, California 95125. eBay Inc. may be served through its registered  
21 agent, National Registered Agents, Inc., 2875 Michelle Drive, Suite 100, Irvine, California  
22 92606. eBay Europe is located at 22-24 Boulevard Royal, L-2449 Luxembourg. eBay  
23 International is a company incorporated under the laws of Switzerland with its principal office  
24 located at Helvetiastrasse 15/17, 3005, Bern, Switzerland. eBay International and Europe may  
25 be served pursuant to Convention on the Service Abroad of Judicial and Extrajudicial Documents  
26 in Civil or Commercial Matters (the "Hague Convention") or, if necessary, any other method  
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1 prescribed by Fed. R. Civ. P. 4(f). Plaintiff brings this action against all eBay entities because the  
2 User Agreement and eBay's integrated web pages discussed below draw no distinction between  
3 eBay Inc., eBay Europe or eBay International and on information and belief eBay Inc. owns and  
4 exerts complete dominion and control over eBay Europe and eBay International and/or all three  
5 engaged in concerted action.

### 6 **III. JURISDICTION AND VENUE**

7  
8 **3. Subject Matter Jurisdiction.** This Court has subject matter jurisdiction pursuant  
9 to 28 U.S.C. § 1332(d)(2) because this case is filed as a class action under Fed. R. Civ. P. 23 and  
10 the aggregate amount in controversy exceeds the sum of \$5,000,000.00, exclusive of interest and  
11 costs, and a substantial number of members of the class of Plaintiffs are citizens of a state  
12 different from California.

13  
14 **4. Venue.** Venue is proper in this district and division under 28 U.S.C. § 1391(a)  
15 because (1) eBay resides in this judicial district; (2) a substantial part of the events or omissions  
16 giving rise to the claims asserted herein occurred in this judicial district; and (3) eBay is subject  
17 to personal jurisdiction in the Northern District of California.

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

### 22 **IV. BACKGROUND FACTS**

23  
24 **6. eBay's Business.** According to eBay Inc.'s 2010 Form 10-K, eBay "connects  
25 millions of buyers and sellers globally on a daily basis through eBay, the world's largest online  
26 marketplace." eBay utilizes various entry points into its integrated online business, including  
27 www.ebay.com (also known as "Core eBay"), www.motors.ebay.com ("eBay Motors"), and  
28

1 [stores.ebay.com](http://stores.ebay.com) ("eBay Stores"). All of these web pages are interconnected and a search for an  
2 item listed on eBay Motors can be initiated from many of the eBay web pages, including Core  
3 eBay and eBay Stores. In many instances, because of the common web design, format, and  
4 interconnectedness of the different eBay web pages, users navigating within the eBay website  
5 cannot readily discern whether they are on a webpage that is technically on Core eBay, eBay  
6 Motors, or eBay Stores unless the user (1) pays specific attention to the URL of the particular  
7 webpage he is viewing and (2) has a full and complete understanding of the organizational  
8 structure of eBay's web pages. At the end of September, 2011, eBay had almost 99 million  
9 active users (*i.e.*, persons who bid on, bought, listed or sold an item during the preceding 12-  
10 month period). On information and belief, all data for all users, including listings and fees  
11 charged, are contained in a single database system common for all eBay URLs and for all eBay  
12 entities, including without limitation eBay Inc, eBay International and eBay Europe.  
13  
14

15 7. **eBay Membership and User Agreement.** In order to list items for sale, eBay  
16 requires sellers on the web pages listed above to first become "members" of eBay by accepting a  
17 uniform User Agreement, a true and correct copy of which is attached as Exhibit A and  
18 incorporated herein by this reference. The User Agreement is a contract of adhesion and its  
19 terms are not negotiable by prospective eBay members. The User Agreement states:

20 By using eBay (including eBay.com and its related sites, services, and  
21 tools), you agree to the following terms with eBay Inc. . . . .

22 Thus, by virtue of this provision, the User Agreement governing all listings on eBay Motors  
23 (which is one of the related web pages where a direct hyperlink to the User Agreement appears)  
24 is between each eBay member and, at a minimum, eBay Inc., regardless of where a user resides  
25 or is located. The User Agreement further provides that eBay members residing in the United  
26 States contract with eBay Inc., while members residing elsewhere, in addition to contracting with  
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1 eBay Inc., also contract with either eBay Europe or eBay International. However, eBay Inc.,  
2 eBay Europe and eBay International are all parties to the same User Agreement with Plaintiff.  
3 Thus, the User Agreement is the same for Plaintiff and all proposed Class members regardless of  
4 which eBay entities are involved. Among other things, the User Agreement contains a California  
5 choice of law provision and a forum selection clause designating courts located in Santa Clara,  
6 County, California as the exclusive forum for litigating disputes with eBay. Notably, there is no  
7 discernable difference among eBay, eBay Europe and eBay International. They each operate  
8 their businesses through eBay and its integrated web pages and, upon information and belief,  
9 share operations and/or personnel. They are effectively alter egos of one another and, in light of  
10 the Fees Schedules at issue here, Plaintiff alleges they acted jointly to misrepresent the nature of  
11 services provided by the Featured Plus! listing option to Plaintiff and the Class through uniform  
12 misrepresentations. Accordingly, references herein to "eBay" apply equally to all Defendants.

13       8.     **The eBay Fees Schedules.** The User Agreement states that eBay will charge  
14 sellers based upon its "Fees schedule," which is a hyperlink that leads to other web pages that  
15 describe and quantify the applicable fees. The immediate link is to a page entitled "eBay.com  
16 Fees" (the "eBay.com Fees Schedule"). The eBay.com Fees Schedule (1) begins with further  
17 links for eBay Motors, eBay Stores, Classified Ads, Real Estate, and PayPal; and (2) goes on to  
18 describe the fees for listings on Core eBay. Thus, the eBay.com Fees Schedule, which is a  
19 hyperlinked web page from the User Agreement, contains the fees for listings initiated on Core  
20 eBay; links from the eBay.com Fees Schedule go to web pages with fees for other types of  
21 listings, such as items initially listed on eBay Motors (the "eBay Motors Fees Schedule") or  
22 through eBay Stores (the "eBay Stores Fees Schedule"). True and correct copies of the  
23 eBay.com Fees Schedule, the eBay Motors Fees Schedule, and the eBay Stores Fees Schedule  
24 (collectively referred to hereinafter as the "Fees Schedules") are attached as Exhibits B, C, and  
25 D, respectively, and incorporated herein by this reference.  
26  
27  
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1           **9.     Searching For Listings Throughout eBay.** Listings placed on Core eBay, eBay  
2 Motors, and eBay Stores can be found by prospective buyers from virtually any location within  
3 the integrated eBay web pages. The web pages within Core eBay, eBay Motors and eBay Stores  
4 contain a search box that allows the user to type in key words and conduct a search. For  
5 example, a person searching for an automotive part can go to Core eBay, type in the part name,  
6 and search all eBay categories. The search result will include listings that were placed by sellers  
7 in eBay Motors, among other things. The prospective buyer need not even know about potential  
8 differences between Core eBay, eBay Motors and eBay Stores to search for items listed via all  
9 three pages. Thus, regardless of where a listing is placed, search results within Core eBay  
10 routinely display listings that were placed by sellers on eBay Motors and/or eBay Stores. Also, it  
11 is not unusual for certain searches to return so many results that it takes more than one web page  
12 to display the results; sometimes there can be literally hundreds of thousands of results for a  
13 given search term. eBay therefore offers sellers the ostensible option to pay extra to give their  
14 listings priority in search results, as described below.

17           **10.    The Featured Plus! Optional Fee.** The eBay Motors Fees Schedule includes  
18 certain “Optional Feature Fees,” specifically including the “Featured Plus!” option that is the  
19 subject of the claims asserted herein. On the eBay Motors Fees Schedule, Featured Plus! is one  
20 of the most expensive optional feature fees, costing as much as \$39.95 per listing. This fee is  
21 particularly expensive in comparison to the normal, required Listing Fees, which are often free  
22 and always less than \$1.00.<sup>1</sup> Within the eBay Motors Fees Schedule, the term “Featured Plus!”  
23 is hyperlinked to another web page (the “Featured Plus! Description Page”) describing what  
24 sellers are purchasing when they pay the Featured Plus! fee. A true and correct copy of the

26  
27 <sup>1</sup> In the Vehicles category of eBay Motors, the current basic Insertion Fees are as low as \$0.00 for users who do not  
28 list more than six listings in a calendar year. For auction-style listings in the eBay Motors Parts & Accessories  
category, the first 50 listings per month incur no Insertion Fees and Fixed Price listings pay a \$0.50 insertion fee.

1 Featured Plus! Description Page is attached as Exhibit E and incorporated herein by this  
2 reference. As of at least June 2010, the Featured Plus! Description Page stated:

3 **Featured Plus!:** Your item appears in the **Featured Items** section at the  
4 top of the search results list page.

5 Collectively, the User Agreement, Fees Schedules, and above-referenced description of Featured  
6 Plus! comprise the operative contractual documents and provisions that describe the promised  
7 benefit of Featured Plus! listings on eBay Motors.

8 **11. eBay's Item Listing Volume.** eBay has made a concerted and deliberate effort to  
9 have literally millions of items continuously listed for sale. eBay's published metrics state that,  
10 for the quarter ending September 30, 2011, eBay had 98.7 million active users and 459.2 million  
11 payments made for a gross merchandise volume of \$14.666 billion. If the published take rate of  
12 3.78% represents the number of listings that resulted in a transaction and payment, then these  
13 figures reflect over 12 billion listings during the quarter. For popular items, searches can result  
14 in tens or hundreds of thousands of matches.

15  
16 **12. Search Results and Priority.** eBay charges a high price for Featured Plus!  
17 listings because it knows sellers value listing priority in search results. Given the large number  
18 of items listed on eBay at any given time, it is not unusual to have hundreds, thousands, and even  
19 hundreds of thousands of matches for a search. Priority in the search results therefore can  
20 dramatically improve the likelihood that a prospective buyer will see and ultimately purchase an  
21 item. Accordingly, throughout the Class Period, eBay promoted the expensive Featured Plus!  
22 option to sellers as a way to improve the priority of their listings in search results and give  
23 themselves an advantage against competing listings.  
24

25  
26 **13. How Searches Work.** A prospective buyer can search for an item on eBay and  
27 sort the search results in many different ways. For example, the buyer can simply go to the Core  
28

1 eBay home page and type search terms into a box that appears at the top of the page. A person  
2 searching for high intensity discharge headlights can type the term "HID" into the box, press  
3 search, and there will be hundreds of thousands of search results (as of the date of filing this  
4 Complaint). No more than 200 individual results can be displayed at once and eBay will not  
5 give buyers the ability to see more than 10,000 total results in any given search. The search  
6 results page will allow the user to narrow the results down to specific categories through links  
7 shown on the left side of the screen. In addition, the user may sort the search results by the  
8 following priorities: (1) time: ending soonest; (2) time: newly listed; (3) price plus shipping:  
9 lowest first; (4) price plus shipping: highest first; (5) price: highest first; (6) distance: nearest  
10 first; and (7) Best Match.  
11

12       14.    **Featured Plus! Does Not Work.** Contrary to the representations of the Featured  
13 Plus! Description Page, Featured Plus! does not always mean that "Your item appears in the  
14 **Featured Items** section at the top of the search results list page." For example, if a search for  
15 "HID" is simultaneously initiated from within both Core eBay and eBay Motors across all eBay  
16 categories, each search will return an identical number of listings. The vast majority of the  
17 search results are listings placed by sellers through eBay Motors and those eBay Motors search  
18 results are shown and accessible regardless of whether the search is initiated from the Core eBay  
19 homepage or from the eBay Motors page. But in neither search result will Featured Plus! listings  
20 appear at the top of the search results list page. Indeed, in many instances, eBay Motors listings  
21 by sellers who did not purchase the Featured Plus! listing option are displayed **prior** to other  
22 eBay Motors listings that did pay the expensive fee for Featured Plus! Instead, the only way to  
23 get a Featured Plus! listing to appear at the top of any search results page is to begin the search  
24 from a webpage with a URL that begins with "motors.ebay.com" and to also specifically limit  
25  
26  
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28



1 the search to eBay Motors listings. But even taking these two steps does not necessarily put  
2 Featured Plus! Listings at the top of the results.

3 If the user has not selected "Best Match" in the "sort by" box prior to initiating a new  
4 search, Featured Plus! items receive no priority whatsoever, even if the search is begun from a  
5 page that has an eBay Motors URL. Thus, in order for a person to receive any benefit from a  
6 Feature Plus! listing, a prospective buyer must do all of these three things: (1) initiate the search  
7 from a webpage within eBay Motors; (2) limit the search to listings within eBay Motors; and (3)  
8 sort the results by "Best Match." Otherwise, Featured Plus! listings do not appear at the top of  
9 the search results.  
10

11 **15. Lack of Priority for Featured Plus! Listings.** As a result of the foregoing, an  
12 eBay seller who selected and paid for a Featured Plus! listing does not always receive the  
13 promised priority by having his item "appear in the Featured Items section at the top of a search  
14 results list page." For searches that are sorted by any of the six options other than Best Match,  
15 there is no Featured Item priority on any search. For items sorted by Best Match, the only  
16 possibility of an item appearing at the top of the search results page is if the prospective buyer  
17 first navigated to an eBay Motors web page and performed a search only within eBay Motors  
18 listings. Consequently, many listings placed for free get higher priority than listings for which  
19 sellers paid for the Feature Plus! option.  
20

21 **16. Featured Plus! Was Non-Functional for Periods of Time.** On information and  
22 belief, during certain periods, the Featured Plus! option was completely non-functional such that  
23 no search result priority was obtained for Featured Plus! listings regardless of where or how the  
24 search was initiated or how the search results were sorted. Indeed, during Plaintiff's discussions  
25 with eBay's employees to complain about the non-functionality of Featured Plus! in the latter  
26  
27  
28

1 half of 2011, eBay's representatives acknowledged that Featured Plus! was not operating  
2 correctly and that there was a "known bug" that eBay was attempting to fix. Notwithstanding  
3 these admissions that Featured Plus! was non-functional for a period of time (the "Known Bug  
4 Period"), eBay nevertheless continued to market and sell Featured Plus! to Plaintiff and the Class  
5 and to charge sellers the full published fee for that option.  
6

7 **17. eBay's Agreements, Policies, and Practices are Identical for All Class**

8 **Members.** All of the foregoing allegations are based entirely upon eBay's User Agreement and  
9 the above-described web pages. In addition, eBay's search procedures are identical for all  
10 persons who use any of the eBay web pages described above. The web pages should therefore  
11 be interpreted uniformly as to all Class Members and eBay's conduct should be judged uniformly  
12 as to its effect on all Class Members. Moreover, the eBay User Agreement has a California  
13 choice of law provision. California law may therefore be applied to the claims of all Class  
14 Members.  
15

16 **18. Examples of Custom LED's Typical and Common Experience With eBay.**

17 Custom LED has been an eBay member since September 2006. Custom LED sells light emitting  
18 diode products and accessories that can be used for, among other things, automobiles and  
19 motorcycles. At least as early as April 2011,<sup>2</sup> Custom LED reviewed and relied on eBay's  
20 promise in the Featured Plus! Description Page that a Featured Plus! item "appears in the  
21 Featured Items section at the top of the search results list page." Custom LED would not have  
22 purchased the Featured Plus! option had it known that those listings would not have priority at  
23 the top of all eBay search results. Among other things, at the time Custom LED placed its  
24 listings, it was not aware that the only types of searches that would result in any priority for its  
25

26 \_\_\_\_\_  
27 <sup>2</sup> Custom LED cannot recall with certainty exact dates of any prior listings using Featured Plus!, but does recall  
28 reviewing eBay web pages with representations that Featured Plus! Listings would have priority over listings that  
did not have that feature.

1 listings were searches initiated from web pages within www.motors.ebay.com and where the  
2 search results were sorted by "Best Match." Consequently, Custom LED did not receive the  
3 promised value of the Featured Plus! listings it placed.

#### 4 **V. CLASS ACTION ALLEGATIONS**

5 **19. Class Definition.** Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23  
6 on behalf of the following class (the "Class"): all eBay members subject to the eBay User  
7 Agreement who, within the past four (4) years (the "Class Period"), paid for the Featured Plus!  
8 optional feature in any listings.<sup>3</sup> Excluded from the Class are eBay and its management, officers,  
9 and directors, members of each of their immediate families, and any presiding Magistrate or  
10 District Judge and their staff.

11 **20. Class Certification.** This action may be maintained as a class action because:

- 12
- 13 a. The Class is so numerous that joinder of all members is impracticable;
- 14
- 15 b. There are questions of law or fact common to the Class;
- 16
- 17 c. The claims or defenses of the representative parties are typical of the  
claims or defenses of the Class; and
- 18
- 19 d. The representatives of the Class will fairly and adequately protect the  
interests of the Class.
- 20

21

22 <sup>3</sup> eBay has recently changed the Featured Plus! description to include the following italicized language: "**Featured**  
Plus!: Your item appears in the **Featured Items** section at the top of the search results page (*for Motors site*  
23 *searches*)."  
eBay made this revision only after Plaintiff complained about Featured Plus!, presumably in an attempt  
to alleviate part of the complaints and claims set forth herein. But the additional language in the Featured Plus!  
description does not address the fact that Featured Items receive no priority outside a "Best Match" search. In  
24 addition, the additional language does not explain that the search cannot include all eBay categories. Furthermore,  
the new parenthetical language still does not advise sellers that searches on Core eBay or from other non-eBay  
Motors web pages will not give search result priority to Featured Plus! listings. To the contrary, since searches on  
25 eBay.com across all eBay categories routinely return results from eBay Motors, Plaintiff alleges that such searches  
must, by definition, be searching the eBay Motors site and therefore constitute "Motors site searches." Even under  
26 eBay's new description, Featured Plus! listings should receive search result priority in any search that returns eBay  
Motors listings. Accordingly, Plaintiff alleges that the contractual breaches and other legal violations described in  
27 the following causes of action are on-going and that the Class Period remains open-ended.

28

1           **21. Declaratory/Injunctive Relief.** The Class is properly certifiable pursuant to Rule  
2 23(b)(2) because eBay has acted or refused to act on grounds that apply generally to the Class, so  
3 that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class  
4 as a whole.

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

17           **23. Common Questions.** The common questions of law and fact include at least the  
18 following:

- 19           a. The construction of the agreement between eBay and the Class members;
- 20           b. eBay's obligations in exchange for accepting the Featured Plus! fees;
- 21           c. The uniform algorithm and method used by eBay for prioritizing search  
22 results, including results listed with the Featured Plus! option;
- 23           d. Whether Featured Plus! listings appear with any priority in searches other  
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1 than "Best Match" searches;

2 e. How the uniform and standardized "Best Match" search works insofar as  
3 the priority of search results is concerned;

4 f. Whether eBay has breached its agreement and covenant of good faith and  
5 fair dealing insofar as its return of services in exchange for Featured Plus!  
6 fees is concerned;

7  
8 g. Whether the additional parenthetical disclosure regarding "for Motors site  
9 searches" is sufficient to allow eBay's failure to prioritize Featured Plus!  
10 listings for searches that are sorted other than by "Best Match" and for  
11 searches of Motors site listings from web pages that do not contain the  
12 motors.ebay.com URL;

13  
14 h. Whether and to what extent Featured Plus! was non-functional for some  
15 period of time;

16 i. Whether eBay advertised and collected fees for Featured Plus! when it  
17 knew the service did not work as advertised; and

18 j. The method and calculation of damages for members of the Class.

19 **VI. FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

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

21 25. Throughout the Class Period, eBay entered into identical contracts with Plaintiff  
22 and all Class Members setting forth the fees for and properties of Featured Plus! listings.  
23 Plaintiff and Class therefore entered into unambiguous and identical contracts with eBay to give  
24 Featured Plus! listings priority over listings without this option. Plaintiff and the Class expected,  
25 and were entitled to receive, search results giving priority of their Featured Plus! listings above  
26 other listings for which no Featured Plus! fees were paid, regardless of the eBay web page from  
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28

1 which the search was initiated or the manner in which the search results were sorted.

2       26. eBay breached its contracts with Plaintiff and the Class and its covenant of good  
3 faith and fair dealing, by failing to provide the promised priority for Featured Plus! listings as  
4 described above.

5       27. Plaintiff and the Class did not agree or consent to have their Featured Plus!  
6 listings placed lower in priority than listings without the Featured Plus! option and furthermore  
7 did not agree to alter, modify, or amend their contracts with eBay in a manner that would permit  
8 eBay to reduce the priority of Featured Plus! listings. Among other things, Plaintiff and the  
9 Class did not voluntarily agree to accept lesser services than promised by eBay by paying  
10 invoices prepared by eBay.  
11

12       28. Alternatively and in addition, the User Agreement, Fees Schedules, and the  
13 Featured Plus! Description Page constitute a contract of adhesion which must be construed  
14 against the drafter, eBay, and in favor of Plaintiff and the Class.  
15

16       29. Further, any and all provisions of any web page, invoice, or communication from  
17 eBay purporting to contradict or alter the terms set out in the applicable User Agreement, Fees  
18 Schedules, and the Featured Plus! Description Page must be disregarded, construed in favor of  
19 Plaintiff and Class Members and/or declared unconscionable and unenforceable.  
20

21       30. As a direct and proximate result of eBay's breach of contract and the attendant  
22 covenant of good faith and fair dealing, Plaintiff and the Class have been damaged in the amount  
23 of Featured Plus! fees paid, insofar as eBay failed to provide the promised return consideration in  
24 terms of priority of the Featured Plus! listings. The damages are (i) readily calculable from  
25 eBay's data, (ii) common to and typical among all Class Members, and (iii) readily determinable  
26 from the computer data in the possession of eBay.  
27  
28

1 **VII. SECOND CAUSE OF ACTION – UNFAIR COMPETITION**

2 31. Plaintiff repeats and re-alleges each of the preceding paragraphs, as if set forth  
3 fully herein.

4 32. The California Business & Professions Code § 17200 provides that “unfair  
5 competition shall mean and include any unlawful, unfair or fraudulent business act or practice.”  
6 Defendants’ policy and practice regarding Featured Plus! constitutes a “business practice” and is  
7 unlawful, unfair, and/or fraudulent. eBay’s representation and promise that listings with  
8 Featured Plus! would obtain search result priority “at the top of the search results list page” was  
9 untrue at the times eBay made this statement.<sup>4</sup> Notwithstanding such knowledge, eBay  
10 nevertheless continued to market, sell, and collect fees for the Featured Plus! option without  
11 advising its customers of any limitation in the functioning of Featured Plus!  
12

13 33. eBay’s business practices described above are unlawful, unfair, and/or fraudulent  
14 in that they violate at least the following laws:

- 15
- 16 a. Breach of contract and the duty of good faith and fair dealing.
  - 17 b. eBay’s conduct constitutes unjust enrichment insofar as it knowingly  
18 charged fees for which sellers would not and did not obtain the promised and represented search  
19 result priority.
  - 20 c. eBay violated Cal. Bus. & Prof. Code § 17500 because its representations  
21 that Featured Plus! listings would appear “at the top of the search results list page” were untrue  
22 and misleading, and eBay knew, or by the exercise of reasonable care should have known, that  
23 the Featured Plus! Description Page was untrue or misleading.  
24

25 \_\_\_\_\_  
26 <sup>4</sup> eBay changes its web pages from time to time; prior versions are not accessible to the public and discovery will be  
27 required to determine the dates and contents of the User Agreement, Fees Schedules and Featured Plus! Description  
28 Pages throughout the Class Period. Moreover, to the extent the Featured Plus! Priority was completely non-  
functional, any representations as to priority were untrue. Again, discovery will be required to determine the extent  
and duration of non-functionality of Featured Plus!.

1           d.     eBay violated Cal. Bus. & Prof. Code § 17500 and/or § 17507 because its  
2 representations regarding Featured Plus! were misleading and did not clearly and conspicuously  
3 state that Featured Plus! would not properly function.

4           e.     eBay violated Cal. Bus. & Prof. Code § 17507 because its representations  
5 regarding Featured Plus! on eBay.com were a “bait and switch” tactic and its advertising claims  
6 or representations did not clearly and conspicuously identify the limitations associated with the  
7 functionality of Featured Plus!.

8           f.     eBay violated Cal. Civ. Code § 1670.5 by, among other things, procuring  
9 contracts or contract provisions from Plaintiff and the Class that were unconscionable at the time  
10 they were made and further by promising and representing that the extremely expensive Featured  
11 Plus! listings would appear “at the top of the search results list page” despite eBay’s substantially  
12 greater bargaining power and greater knowledge that Featured Plus! had limited or no  
13 functionality.  
14  
15

16           g.     Independently and in addition, eBay’s conduct described above is unfair  
17 under Cal. Bus. & Prof. Code § 17200, et seq. It is fundamentally unfair, contrary to public  
18 policy, immoral, unethical, oppressive, unscrupulous, and injurious to Plaintiff and the Class for  
19 eBay to announce and promise that Featured Plus! listings would appear “at the top of the search  
20 results list page” despite eBay’s substantially greater bargaining power and greater knowledge  
21 that Featured Plus! had limited or no functionality. There is no justification or excuse for eBay’s  
22 practices and/or any such justification is outweighed by the consequences and harm to Plaintiff  
23 and Class members. In addition, to the extent that eBay attempts to avoid its published Fees  
24 Schedules and/or the Featured Plus! Description Page by reference to other web pages, extra-  
25 contractual communications, or portions of web pages not part of the User Agreement, that  
26  
27  
28



1 conduct is also unfair, unconscionable, and violates §§ 17200 et seq. In that regard, eBay's  
2 conduct constitutes an unfair business practice for the following additional reasons:

3 (i) The consumer injury resulting from eBay's malfeasance is  
4 substantial;

5 (ii) The consumer injury is not outweighed by countervailing benefits  
6 to consumers or competition; and

7 (iii) Consumers could not reasonably have avoided the injury caused by  
8 eBay's conduct.  
9

10 34. Plaintiff and the Class are officers, persons, corporations or associations that have  
11 suffered an injury in fact and lost money or property as a result of eBay's violations of Cal. Bus.  
12 & Prof. Code § 17200, et seq.

13 **VIII. THIRD CAUSE OF ACTION - FALSE ADVERTISING LAW**

14 35. Plaintiff repeats and re-alleges each of the preceding paragraphs, as if set forth  
15 fully herein.

16 36. During the period when eBay represented that listings with Featured Plus! would  
17 obtain search result priority "at the top of the search results list page," eBay violated Cal. Bus. &  
18 Prof. Code § 17500 because its representations regarding Featured Plus! were untrue and  
19 misleading, and eBay knew, or by the exercise of reasonable care should have known, that these  
20 statements were untrue or misleading.  
21

22 37. During the period when eBay represented that listings with Featured Plus! would  
23 obtain search result priority "at the top of the search results list page," eBay violated Cal. Bus. &  
24 Prof. Code § 17500 and/or § 17507 because its representations regarding Featured Plus! were  
25 misleading and did not clearly and conspicuously state that Featured Plus! had limited or no  
26 functionality and benefits, and because eBay advertised and collected fees for the Featured! Plus  
27  
28

1 option when it knew no priority, service or benefit was being provided in exchange for payment  
2 of the fee.

3       **38.** During the period when eBay represented that listings with Featured Plus! would  
4 obtain search result priority “at the top of the search results list page,” eBay violated Cal. Bus. &  
5 Prof. Code § 17507 because its representations regarding Featured Plus! were a “bait and switch”  
6 tactic and its advertising claims or representations did not clearly and conspicuously identify the  
7 limitations associated with Featured Plus! listings.

9       **39.** Plaintiff and the Class are officers, persons, corporations or associations that  
10 suffered an injury in fact and lost money as a result of eBay’s violation of Cal. Bus. & Prof. Code  
11 § 17500 *et seq.*

12       **40.** eBay’s conduct described above violates Cal. Bus. & Prof. Code § 17500 *et seq.*  
13 and entitles Plaintiff and the Class to restitution and injunctive relief as provided by Cal. Bus. &  
14 Prof. Code § 17535.

15  
16                   **IX. FOURTH CAUSE OF ACTION - FRAUD AND DECEIT**

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

19       **42.** During the period when eBay represented that listings with Featured Plus! would  
20 obtain search result priority “at the top of the search results list page,” eBay violated Cal. Civ.  
21 Code §§ 1572 (actual fraud), 1709 and 1710, because at the time eBay published its Fees  
22 Schedules and the Featured Plus! Description Page, and Plaintiff and the Class listed items for  
23 sale, eBay knowingly, willfully, and/or recklessly made material misrepresentations, or omitted  
24 material facts, regarding the functionality of Featured Plus! eBay engaged in this conduct in  
25 order to induce Plaintiff and Class members to list items for sale with the optional Featured Plus!  
26 fee, and Plaintiff and the Class reasonably relied on eBay’s misrepresentations to their detriment.  
27  
28

1 Plaintiff and the Class therefore seek all damages proximately caused by eBay as a result of this  
2 wrongful conduct.

3  
4 **X. FIFTH CAUSE OF ACTION –  
UNJUST ENRICHMENT/COMMON LAW RESTITUTION**

5 43. Plaintiff repeats and re-alleges each of the preceding paragraphs, as if set forth  
6 fully herein.

7 44. By promising Plaintiff and the Class that Featured Plus! listings would have  
8 priority over listings without this feature, but failing to provide search result priority over listings  
9 that did not include the Featured Plus! Option, the fee charged by eBay for Featured Plus! was  
10 not fully earned by eBay and, therefore, eBay collected fees in excess of those to which it was  
11 contractually or otherwise entitled. eBay has therefore unlawfully and unjustly enriched itself at  
12 the cost of Plaintiff and the Class. Plaintiff and members of the Class therefore seek an order of  
13 restitution and disgorgement of all or a portion of the fees eBay collected for the Featured Plus!  
14 listings.  
15

16 **XI. SIXTH CAUSE OF ACTION – DECLARATORY JUDGMENT**

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

20 46. **Declaratory Relief.** Pursuant to 28 U.S.C. §§ 2201-2, Plaintiff and the Class  
21 state that an actual controversy with eBay exists and they seek a declaration regarding their  
22 rights and other legal relations as follows.

23 47. **Contractual Rights.** Plaintiff and the Class seek a declaration construing and  
24 enforcing the User Agreement, applicable Fees Schedules, the Featured Plus! Description Page,  
25 and eBay's obligations for Featured Plus! listings arising thereunder. Plaintiff and the Class seek  
26 a declaration that Featured Plus! listings must be placed at the top of the search results list page,  
27  
28

1 irrespective of where the search is initiated or how it is sorted and that Featured Plus! Listings  
2 are entitled to priority over listings without this feature. eBay's conduct is ongoing and Plaintiff  
3 therefore seeks prospective relief regarding the parties' rights and obligations under their User  
4 Agreement.

## 5 **XII. MISCELLANEOUS**

6  
7 **48. Conditions Precedent.** Plaintiff and the Class hereby allege that they have fully  
8 complied with all contractual and other legal obligations and fully complied with all conditions  
9 precedent to bringing this action and/or all such obligations or conditions are excused.

10 **49. Jury Demand.** Plaintiff and the Class demand a trial by jury.

## 11 **XIII. PRAYER FOR RELIEF**

12 **50.** Plaintiff, on behalf of itself and on behalf of the Class, requests the following  
13 relief:

14 **a.** An order certifying the Class and appointing Plaintiff as representative of  
15 the Class and the undersigned counsel as Class Counsel;

16 **b.** Declaratory judgment interpreting the applicable User Agreement, Fees  
17 Schedules, and the Featured Plus! Description Page to determine that eBay was obligated to  
18 place Featured Plus! listings at the top of the search results list page, irrespective of how that  
19 page is generated and/or sorted and that Featured Plus! Listings are entitled to priority over  
20 listings without this feature;

21 **c.** Actual damages suffered by Plaintiff and the Class and/or full restitution  
22 of all funds acquired from eBay's unfair dealing;

23 **d.** Punitive, exemplary and all other enhanced damages to the extent  
24 available under law;

25 **e.** Pre- and post-judgment interest; and  
26  
27  
28

1 f. All other and further relief, general and special, legal and equitable, to  
2 which the Plaintiff and Class may be justly entitled.

3 **XIV. CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

4 51. Pursuant to Civil L.R. 3-16, the undersigned certifies that, as of this date, other  
5 than the named parties, there is no such interest to report.  
6

7  
8 Dated: January 23, 2012.

9 Respectfully submitted,

10  
11 By: 

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