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

16 JEANETTE MERCADO, on behalf of herself
and all others similarly situated,

17 Plaintiff,

18 v.

19 EBAY INC., a Delaware Corporation,

20 Defendant.

No.

CLASS ACTION COMPLAINT FOR
VIOLATION OF CALIFORNIA’S UNFAIR
COMPETITION LAW, CALIFORNIA’S
CONSUMER LEGAL REMEDIES ACT,
AND QUASI-CONTRACT, RESTITUTION,
UNJUST ENRICHMENT

JURY TRIAL DEMANDED

CLASS ACTION

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1 Plaintiff Jeanette Mercado, on behalf of herself and other similarly situated consumers,
2 hereby brings this action against eBay Inc. for violations of California’s Unfair Competition Law
3 (“UCL”), Cal. Bus. & Prof. Code §§ 17200, et seq., Consumers Legal Remedies Act, California
4 Civil Code §1750, et seq. (the “CLRA”), and for quasi-contract/restitution/unjust enrichment.

5 INTRODUCTION

6 1. In the midst of the ongoing COVID-19 pandemic, while federal, state, and local
7 governments around the country declare states of emergency and issue mandates for citizens to stay
8 home and practice social distancing in order to avoid spreading the highly contagious novel
9 coronavirus that causes an often severe and sometimes fatal respiratory infection, unscrupulous
10 sellers opportunistically prey upon the public by gouging prices of essential items—like N-95, N-
11 100 and surgical masks; hand sanitizer and gel; disinfectant sprays like Lysol; disinfecting wipes;
12 toilet paper; gloves; paper towels; baby formula; baby wipes; tampons; and diapers—to
13 unconscionably profit off of vulnerable and fearful consumers during these unprecedented times.
14 Not only is such gross misconduct unfair and inhumane, it is a criminal offense that constitutes a
15 per se violation of California’s Unfair Competition Law. *See* Cal. Penal. Code §§ 396(h), (i).

16 2. While eBay now publicly states that it is trying to stem the use of eBay’s platform
17 by sellers who have charged, and continue to charge, gouging rates to consumers across the
18 country, eBay’s very business model not only allows but encourages such price gouging, to eBay’s
19 financial benefit: in addition to charging fees for initially listing items, eBay charges a “final value
20 fee” when items actually sell, which is calculated as a percentage of the total amount of the sale.¹
21 Thus, the higher the sale price, the more profit eBay stands to earn.

22 3. California has been at the front lines of the fight against the COVID-19 pandemic.
23 Indeed, on February 3, 2020, Santa Clara County—where eBay is headquartered—was the first in
24 the state to declare a state of emergency after its first confirmed COVID-19 infection. On March 4,
25 2020, Governor Newsom declared a State of Emergency per Government Code § 8625(c), and
26 thereafter instructed all “individuals living in the State of California to stay home or at their place
27

28 ¹<https://www.ebay.com/help/selling/fees-credits-invoices/selling-fees?id=4364#section2>
(last accessed May 3, 2020)

(last

1 of residence,” and to “[c]onsider on-line ordering for food and other supplies.”² By March 13,
2 2020, the United States of America declared a state of emergency pursuant to the National
3 Emergencies Act.³

4 4. Further, the CDC has advised all Americans to “[o]rder food and other items online
5 for home delivery or curbside pickup (if possible),” and to “[o]nly visit the grocery store, or other
6 stores selling household essentials, in person when you absolutely need to,” as “[t]his will limit
7 your potential exposure to others and the virus that causes COVID-19.”⁴

8 5. Due in large part to the widespread coronavirus shutdowns, and with product
9 scarcity pervading brick-and-mortar establishments, online retailers have enjoyed unparalleled
10 demand from consumers who need to obtain essential supplies without leaving their homes. It was
11 against this dire backdrop that Senator Edward J. Markey (D-Massachusetts) stated that internet-
12 based retailers “have a particular responsibility to guard against price gouging in current
13 circumstances as consumers—who are finding the shelves of local brick-and-mortar stores bare,
14 and who may wish to avoid venturing into crowded stores and shopping malls—turn to the
15 internet.”⁵

16 6. In short, the COVID-19 pandemic has sparked a profound shift in how the global
17 market operates. In light of the conditions the pandemic created—where consumers are ordered to
18 stay home and warned that venturing out into the public can be as dangerous as a game of Russian
19 roulette—Plaintiff and the Class are left with no choice but to purchase essential goods like N-95,
20 N-100 and surgical masks; hand sanitizer and gel; disinfectants like Lysol; disinfecting wipes;
21 toilet paper; gloves; paper towels; baby formula; baby wipes; tampons; and diapers from online
22 marketplaces like eBay.⁶

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24 ²https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Self_Isolation_Guidance_03.16.20.pdf (last accessed May 3, 2020); *see also* <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> (last accessed May 3, 2020).

25 ³<https://www.fema.gov/news-release/2020/03/13/president-donald-j-trump-directs-fema-support-under-emergency-declaration> (last accessed May 3, 2020).

26 ⁴<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last accessed May 3, 2020).

27 ⁵<https://www.markey.senate.gov/imo/media/doc/letter%20to%20Bezos%20re%20coronavirus%20price-gouging.pdf> (last accessed May 3, 2020).

28 ⁶ For these reasons, the Court should reject any attempt by eBay to enforce any restrictive provisions of the take-it-or-leave-it contract against its customers, especially during this emergency

1 15. eBay is an online auction and classified advertisement website. eBay is the world's
2 largest open marketplace with **1.3 billion** listings live at any given time and with millions of
3 transactions happening every day on its platform across more than 190 markets.⁷

4 16. Under current Centers for Disease Control and Prevention (CDC) guidance, N95
5 respirators are critical supplies that must be reserved for health care workers and other medical first
6 responders, rather than sold to the general public.⁸ As further stated by Mike Roman, CEO of 3M
7 (who manufactures n95 masks), “[e]very respirator mask that’s available right now should be
8 going to a healthcare worker on the front lines, caring for coronavirus-infected patients. They
9 should not be sold in stores to consumers.”⁹

10 17. On March 14, 2020, Jeanette, an Uber and Lyft driver—performing an essential
11 business and high-at-risk for infection due to the close proximity to the public—was sold a 2-pack
12 of n95 masks on eBay for a total of \$23.98. As the retail price of these masks as listed by Home
13 Depot, O’Reilly’s Auto Parts, and other national retailers never exceeded \$8.99, Jeanette purchased
14 the masks at a nearly **300% markup**.

15 18. California’s anti-price gouging statute, Cal. Penal Code § 396, strictly prohibits
16 price gouging during a declared emergency, and was enacted because “some merchants have taken
17 unfair advantage of consumers by greatly increasing prices for essential consumer goods and
18 services.” Cal. Penal Code § 396(a). The legislature acknowledged that “[w]hile the pricing of
19 consumer goods and services is generally best left to the marketplace under ordinary conditions,
20 when a declared state of emergency or local emergency results in abnormal disruptions of the
21 market, the public interest requires that excessive and unjustified increases in the prices of essential
22 consumer goods and services be prohibited.” *Id.*

23 19. To discourage price gouging, and make the prohibition effective and enforceable,
24 California’s anti-price gouging statute prohibits raising the price of many consumer goods and
25

26 ⁷ <https://www.ebayinc.com/stories/news/we-are-actively-removing-price-gouging-prohibited-items-from-ebays-marketplace/> (last accessed May 3, 2020).

27 ⁸ <https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/n95-respirators-and-surgical-masks-face-masks> (last accessed May 3, 2020).

28 ⁹ <https://www.cnn.com/2020/03/23/business/3m-ceo-n95-masks-target/index.html> (last accessed May 3, 2020).

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