

1 Alan Kang, Esq. (Bar No. 235080)
AK LAW, A.C.P.C.
2 333 City Blvd. West, 17th Floor
Orange, CA 92868-5905
3 Telephone: (714) 388-6937
Facsimile: (855) 820-1099
4 Email: alan@aklawsc.com

5 Adam M. Moskowitz (*pro hac vice* forthcoming)
adam@moskowitz-law.com

6 Howard M. Bushman (*pro hac vice* forthcoming)
howard@moskowitz-law.com

7 Joseph M. Kaye (*pro hac vice* forthcoming)
joseph@moskowitz-law.com

8 THE MOSKOWITZ LAW FIRM, PLLC

9 2 Alhambra Plaza

Suite 601

10 Coral Gables, FL 33134

11 Telephone: (305) 740-1423

12 [*Additional Counsel on Signature Page*]

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

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

18 Plaintiff,

19 v.

20 EBAY INC., a Delaware Corporation,

21 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

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>
(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

23 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 7. Plaintiff brings this action on behalf of herself and all others similarly situated to
2 hold eBay accountable for permitting price gouging to run rampant across its platform in order to
3 enrich itself at the expense of vulnerable consumers in California and nationwide.

4 **JURISDICTION AND VENUE**

5 8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)
6 because this case is filed as a class action under Federal Rules of Civil Procedure 23 and the
7 aggregate amount in controversy exceeds the sum of \$5,000,000, exclusive of interest and costs,
8 and a substantial number of members of the nationwide class are citizens of a state different than
9 eBay.

10 9. Venue is proper in this district and division under 28 U.S.C. § 1391(a) because a
11 substantial part of the events or omissions giving rise to the claims asserted herein occurred in this
12 judicial district. Further, eBay resides in this district and is subject to personal jurisdiction in the
13 Northern District of California.

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

17 **PARTIES**

18 11. Plaintiff Jeanette Mercado is a resident and domicile of Orange County, California,
19 and thus a citizen of California.

20 12. Defendant eBay, Inc. is a Delaware corporation with its principal office at 2025
21 Hamilton Avenue, San Jose, California 95125. eBay is thus a citizen of California.

22 13. eBay may be served through its registered agent, CT Corporation System, 818 West
23 Seventh Street, Suite 930, Los Angeles, California 90017.

24 14. Venue is proper in this Court since this action has a substantial connection to this
25 forum because all of eBay's conduct as alleged herein emanated from its principal place of business
26 in Santa Clara County, California.

27 **FACTUAL ALLEGATIONS**

28 _____
time in our country, as unconscionable, contrary to public policy, and unenforceable.

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

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

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

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

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

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

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

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

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.