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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL CIVIL WEST COURTHOUSE

CURT SCHLESINGER, PETER Lo Re, ADAM RUSSELL, JAMES ROTH, MARYAM AGHCHARY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TICKETMASTER, a Delaware Corporation,

Defendant.

CASE NO.: BC 304565

CLASS ACTION

Assigned for all purposes to:
Judge Kenneth R. Freeman
Department 310

FOURTH AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200, *ET SEQ.* AND SECTION 17500 *ET SEQ.*

ACTION FILED: October 21, 2003
TRIAL DATE: None Set
(5-year rule waived)

Plaintiffs allege:

NATURE OF THE CASE

1. This is a class action on behalf of consumers who purchased tickets from Ticketmaster.com over the internet from October 21, 1999 through February 27, 2013 in which

Plaintiffs and the class seek to secure redress, restitution and disgorgement from Defendant Ticketmaster for illegally overcharging for United Parcel Service ("UPS") delivery fees and Order Processing Fees ("OPF").

THE PARTIES

2. Plaintiff and appointed class representative Curt Schlesinger is over 18 years of age and resides in Evanston, Illinois.

3. Plaintiff and appointed class representative Peter Lo Re is over 18 years of age and resides in the Ronkonkoma, New York.

4. Plaintiff and proposed additional class representative James Roth is over 18 years of age and resides in Albany, New York.

5. Plaintiff and proposed additional class representative Adam Russell is over 18 years of age and resides in Newton, Massachusetts.

6. Plaintiff and proposed additional class representative Maryam Aghchay is over 18 years of age and resides in Sherman Oaks, California.

7. Defendant Ticketmaster ("Defendant") is a corporation organized under the laws of Delaware with its headquarters and principal place of business in Los Angeles, California. Ticketmaster, the world's leading ticketing company, sold more than 95 million tickets valued at more than $4 billion in 2002, through www.ticketmaster.com, one of the largest e-commerce sites on the Internet, through more than 3,500 retail Ticket Center outlets and 19 worldwide telephone call centers.

JURISDICTION AND VENUE

8. This is an action for unfair and deceptive practices and is brought under California Business & Professions Code § 17200 *et seq.* and § 17500 *et seq.,* to recover equitable relief stemming from Defendant's violations, as alleged herein. The Complaint states no federal causes of action and each Plaintiff expressly disclaims individual damages in excess of $75,000. This action was commenced before February 18, 2005, the effective date of The Class Action Fairness Act of 2005, Pub.C. 109-2, 119 Stat.4. The allegations in this Fourth Amended Complaint relate back to

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the allegations in the original complaint and concern, as did the allegations in the original complaint, the overcharging of customers for certain fees imposed on ticket purchases from Ticketmaster through its website: www.Ticketmaster.com. The fees charged by Ticketmaster that are at issue include the Order Processing Fee ("OPF") and UPS Delivery Fee ("UPS Fee"), both of which Plaintiffs and the class claim result in an improper charge, and Ticketmaster's "Convenience Charge", which Plaintiffs allege forms part of the misrepresentations of the OPF and UPS Fee. At all times relevant herein, Defendant was doing business in the State of California.

9. Venue is proper pursuant to Business & Professions Code § 17203 and Code of Civil Procedure §§ 395(a) and 395.5. Defendant's principal place of business is located in Los Angeles, California.

10. Further, Plaintiffs and each proposed class member were required by Defendant to agree to a forum selection clause vesting exclusive jurisdiction in Los Angeles County and containing a choice of law clause providing that California substantive law shall apply to all of their claims. The Court of Appeal has found that this clause vests this court with Jurisdiction over, and is a proper venue for, the claims of Plaintiffs and the members of the class.

CLASS ALLEGATIONS

11. Plaintiffs bring this action in their individual capacity and on behalf of the certified class.

12. A class (for the Order Processing Fee claims) and subclass (for the UPS delivery fee claims) has already been certified, on a nationwide basis, per the Court of Appeal Order of August 31, 2010 and this Court's Order of September 27, 2010, which was limited to Counts I and II of the Third Amended Complaint (the misrepresentation claims). They are no longer included in the class. Those claims are re-pled as Counts I through IV of this Fourth Amended Complaint, asserting misrepresentation claims under Bus. & Prof. Code §§ 17200 and 17500 for the OPF and UPS claims. The counts which were not certified for class treatment – the "unfair" and "unlawful" conduct counts (Counts III and IV of the Third Amended Complaint) -- are re-pled as Counts V and VI herein.

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13. The OPF class currently consists of all residents of the United States who purchased tickets using Ticketmaster's website, www.ticketmaster.com, from October 21, 1999 through October 19, 2011. The UPS subclass consists of all members of the class who purchased UPS delivery for their ticket order. Excluded from the class and subclass are Defendant, any entities in which Defendant has a controlling interest or which have a controlling interest in Defendant, and the officers, directors, employees, affiliates, and attorneys of Defendant, and any class members who have previously submitted an opt-out request in this case.[1]

14. This action may be properly maintained as a class action pursuant to the provisions of the Code of Civil Procedure § 382. Plaintiffs bring this action on behalf of themselves, individually and as "Representative Plaintiffs" for the class and subclass as set forth in Paragraph 13.

15. The class and subclass consist of millions of persons residing throughout California and the United States, and thus the members of the class are so numerous that joinder of all members is impracticable.

16. There is a well-defined community of interest among the members of the class and subclass. Like all members of the class and subclass, Representative Plaintiffs were wrongfully charged excessive UPS delivery fees for delivery of tickets purchased through Ticketmaster and/or paid an Order Processing Fee which was not related to the cost of processing tickets as Ticketmaster represented, but was a profit generator designed to maximize Ticketmaster's overall profit by obtaining a bottom-line dollar amount on deals with its clients, and had no known connection to the actual ticket fulfillment costs.[2] Further, in connection with their purchases, all members of the class

[1] Pursuant to the initial notice provided to the class in 2010, and the second notice provided in 2011 (in connection with the prior Settlement Agreement) some members of the class opted out of this case.

[2] At the commencement of this suit, Ticketmaster stated on its FAQ page that "[t]he order processing fee covers the cost to fulfill your ticket request when you purchase the tickets online or by phone. This charge includes services like taking and maintaining your order on our ticketing systems, arranging for shipping and/or coordinating with the box office will call. It is applied to an entire order. Both the venue or promoter and Ticketmaster determine the charge on an event-by-event basis." http://www.ticketmaster.com/h/faq.html. However, in deposition Ticketmaster admitted that the charge is not related to the cost to process tickets. This fact, however, is offered only as additional indicia of Ticketmaster's intent and efforts to mislead consumers and the public with respect to this charge; as set forth herein, Ticketmaster's practice is deceptive, misleading, and unfair regardless of whether a consumer ever viewed this particular FAQ.

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and subclass were charged Ticketmaster's Convenience Charge (and thus were exposed to web pages identifying that charge), which Plaintiffs assert aided the misrepresentations of the OPF and UPS Fee.

17. The factual basis of Ticketmaster's misconduct is common to all members of the class and to subclass, and represents common practices of wrongful conduct resulting in injury to all members of the class and subclass and unjust enrichment to Ticketmaster.

18. There are numerous questions of law and fact common to Representative Plaintiffs and the members of the class and subclass, and those questions predominate over any questions that may affect individual members of the class and subclass, as applicable. These common questions of law and fact include, *inter alia*:

A. For the subclass, whether Defendant misrepresented the UPS delivery fees and retained portions of the UPS delivery fees its customers paid for ticket delivery;

B. For the class, whether Defendant misrepresented and omitted material facts about its Order Processing Fee to its customers;

C. Whether the Convenience Charge aided the misrepresentations of the OPF and/or UPS Fee;

D. For the class and subclass, whether Defendant violated Business and Professions Code § 17200 *et seq.* by engaging in the unlawful, unfair or deceptive business acts, practices and methods alleged herein;

E. For the class and subclass, whether Defendant violated Business and Professions Code § 17500 *et seq.* by engaging in the unlawful, unfair or deceptive business acts, practices and methods alleged herein;

F. For the class and subclass, whether Representative Plaintiffs and the members of the class are entitled to restitution of the sums wrongfully collected from them by Defendant as a result of defendant's wrongful conduct alleged herein;

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G. For the class and subclass, whether Representative Plaintiffs and other members of the class are entitled to interest on the sums wrongfully collected from them by Defendant, and the rate of such interest.

19. Representative Plaintiffs' claims are typical of the claims of other members of the class and, where applicable, subclass, as all are similarly situated and were identically harmed by the same course of conduct. As such, Representative Plaintiffs and all members of the class and subclass have sustained economic damage arising from the common course of conduct by Defendant as alleged herein.

20. Based on the disputed facts (as explained herein) regarding whether Mr. Lo Re purchased the Bruce Springsteen tickets (for which he paid for UPS delivery) over the Internet or phone, and based on the undisputed fact that he did purchase some Bruce Springsteen tickets, on the same date, from Ticketmaster over the Internet, Mr. Lo Re is certified as a representative for the class (i.e., the OPF class), while Mr. Schlesinger is certified as the representative of the class and subclass. Plaintiffs request that the class certification order be amended to appoint each of the additional proposed class representatives, Adam Russell, James Roth and Maryam Aghchay, as representatives for the OPF class.

21. Representative Plaintiffs and their attorneys have fairly and adequately represented and protected the interests of the class and subclass for nearly a decade. Representative plaintiffs have retained counsel with substantial experience in prosecuting consumer class actions, and who have already been certified as lead counsel for the class in the this case. Representative Plaintiffs and their counsel have been, and remain, committed to vigorously prosecuting this action on behalf of the class and subclass and have the financial resources necessary to do so. Neither Representative Plaintiffs nor their counsel has any interest adverse to those of the class. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since individual joinder of all members of the class is impracticable. Furthermore, as the injury suffered by most individual members of the class is relatively small, the expense and burden of individual litigation would make it difficult or impossible for most individual members of the class to redress the wrongs

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done to them. The cost to the court system of such individual adjudication would be substantial. Individualized litigation would also present the potential for inconsistent or contrary judgments and would magnify the delay and expense to all parties and the court system in multiple trials of the same issues. By contrast, the conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system and protects the rights of each class member. Further the Court has already held that the case is manageable as a class action, and the proceedings over the past nine years have confirmed its manageability.

INDIVIDUAL AND SUBSTANTIVE ALLEGATIONS

22. **Curt Schlesinger's Wilco tickets purchase.** On or around July 14, 2003, Schlesinger purchased four tickets from Defendant over the Internet for a September 19, 2003 Wilco concert at the Auditorium Theatre in Chicago, Illinois.

23. The four Wilco tickets cost $120 ($30 each). Mr. Schlesinger was also required to pay a Building/Facility Charge of $8 ($2 per ticket)[3], a Convenience Charge of $21 ($5.25 per ticket)[4] and an Order Processing Fee (sometimes called a service charge) of $3.10.

24. As Mr. Schlesinger was checking out with his ticket order on-line, the following "window" directed him to choose his shipping method for the tickets:

[3] According to Ticketmaster, "This is a fee that Ticketmaster collects on behalf of the venue. The purpose for this charge varies from venue to venue. Not all venues charge a facility charge." http://www.ticketmaster.com/h/faq.html.

[4] According to Ticketmaster's representation on its website at the time the case was filed, "[t]his fee covers costs that allow Ticketmaster to provide the widest range of available tickets while giving you multiple ways to purchase ... A convenience charge is applied when you purchase from the Internet, phone or ticket outlet (e.g., at your local department store) and this charge may vary depending upon Ticketmaster's local agreements with its venue, promoter and outlet partners." http://www.ticketmaster.com/h/faq.html. This fact, however, is offered only as additional indicia of Ticketmaster's intent and efforts to mislead consumers and the public with respect to this charge; as set forth herein, Ticketmaster's practice is deceptive, misleading, and unfair regardless of whether a consumer ever viewed this particular FAQ.

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select ship method

A processing fee per order is applied in addition to the delivery prices per order listed below.

Select	Price Per Order	Delivery Method
US Customers		
○	$19.50	**UPS Delivery** (Receive by 10:30 am in 2 business days.)
○	$18.50	**UPS Delivery** (Receive by 5:00 pm in 2 business days.)
○	$14.50	**UPS Delivery** (Receive by 7:30 pm in 3 business days.Delivery by 7:30pm in 3 business days)
○	$25.00	**UPS Saturday Delivery** (Receive by noon on Saturday, if order placed by Wednesday prior.)
○	No additional charge	**Standard Mail** (Your tickets will be mailed to your billing address and delivered no later than 48 hours before the event in a plain unmarked white envelope.)

25. Mr. Schlesinger chose UPS delivery for 10:30 a.m. arrival in 2 business days for a cost of $19.50 (after tax).

26. As established by Mr. Schlesinger's prior deposition testimony in this case, at the time he made his purchase, Mr. Schlesinger believed that the UPS Delivery fee charged by Ticketmaster was a pass-through of the actual UPS Delivery fee. If Mr. Schlesinger had known that the UPS Delivery charge was being marked up by Ticketmaster he would not have purchased that delivery option.

27. Ticketmaster's Charleston, West Virginia distribution center thereafter sent out Mr. Schlesinger's Wilco Tickets on July 15, 2003 via UPS overnight delivery. The tickets arrived in Chicago on the morning of July 16, 2003.

28. Thus, Ticketmaster charged Mr. Schlesinger $19.50 to send his Wilco tickets via UPS overnight delivery from Charleston, West Virginia to Evanston, Illinois.

29. However, UPS did not charge Ticketmaster, nor did Ticketmaster pay UPS, $19.50 for the Wilco ticket delivery. In fact, at the commencement of this suit, UPS's non-discounted published rate for a letter package (such as was used for the tickets) from Charleston, West Virginia to Evanston, Illinois was only $16.35. Ticketmaster's discounted UPS rates, the actual price it paid UPS for Mr. Schlesinger's delivery was substantially less than $16.35.

30. As such, a portion of the $19.50 UPS delivery charge Mr. Schlesinger paid for delivery was secretly pocketed by Ticketmaster. No portion of the overcharge was returned to Mr. Schlesinger.

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31. By representing the $19.50 as a non-taxable "UPS Delivery" charge, separate from and in addition to the handling or processing charges which were allegedly the basis for the Order Processing Fee, and otherwise failing to disclose that the "UPS Delivery" charge was not a pass-through of the actual delivery charge, Ticketmaster falsely represented that the fee was a mere pass-through charge imposed by and collected for UPS, and that such charge represented the actual UPS shipping cost.

32. The additional sums secretly pocketed by Ticketmaster were unearned and did not constitute payment for goods or services actually furnished or performed.

33. Accordingly, Mr. Schlesinger was actually injured as a result of Ticketmaster's misrepresentations and omissions relating to the UPS Delivery charges in the amount of the UPS delivery charge ($19.50), or at least the price difference between the amount of the delivery option that he chose ($19.50) and a less expensive option which he would have chosen had he known that the UPS Delivery charge was not a pass-through, but still required delivery by means other than the U.S. mail.

34. In addition, unbeknownst to Mr. Schlesinger, the Order Processing Fee paid by Schlesinger was a profit generator for Ticketmaster, unrelated to the cost of processing tickets and designed to maximize Ticketmaster's overall profit by obtaining a bottom-line dollar amount on deals with its clients (i.e., venues).

35. If Mr. Schlesinger had known that the Order Processing Fee was in fact just a secret profit-generator, unrelated to the cost of actually processing his ticket purchase, he would not have paid the charge if there was any viable option for him to purchase the tickets without incurring this charge.

36. **Peter Lo Re's Bruce Springsteen tickets purchase.** On or around March 1, 2003, Mr. Lo Re purchased eight tickets from Defendant for a July 17, 2003 Bruce Springsteen concert at the Meadowlands Auditorium in New Jersey. Mr. Lo Re believes that he purchased these tickets over the Internet, although Ticketmaster asserts that he purchased these Tickets over the phone. It is

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undisputed that on or about March 1, 2003, Mr. Lo Re purchased some tickets for a Bruce Springsteen concert from Ticketmaster over the Internet.

37. Ticketmaster asserts that Mr. Lo Re placed a different order for Springsteen tickets over the Internet, and that Mr. Lo Re did not select UPS delivery for that order. Ticketmaster further contends that Mr. Lo Re's March 1, 2003 ticket order for which he selected UPS delivery was placed over the phone, and not on the Internet. Mr. Lo Re disputes these facts. However, it is undisputed that on or about March 1, 2003, Mr. Lo Re ordered and paid for Bruce Springsteen tickets from Ticketmaster, over the Internet, for which he paid an Order Processing Fee.

38. The eight Bruce Springsteen tickets cost $600 ($75 each). Mr. Lo Re was also required to pay a Building/Facility Charge of $16 ($2 per ticket), a Convenience Charge of $83.20 ($10.40 per ticket) and an Order Processing Fee of $3.55.

39. To the best of Mr. Lo Re's recollection and belief, as he was checking out with his ticket order on-line, the "select ship method" "window" directed him to choose his shipping method for the tickets.

40. Lo Re chose UPS delivery for arrival in 3 business days for a cost of $14.50 (after tax). Upon information and belief, Ticketmaster's distribution center thereafter sent Mr. Lo Re's Bruce Springsteen tickets out on March 3rd or 4th, 2003 via two-day UPS delivery.

41. Upon information and belief, Mr. Lo Re received the Bruce Springsteen tickets on March 5th or 6th, 2003, two days after they were sent by UPS.

42. Ticketmaster charged $14.50 to send Mr. Lo Re's Bruce Springsteen tickets via UPS two-day delivery from its distribution center to Ronkonkoma, New York.

43. However, UPS did not charge Ticketmaster, nor did Ticketmaster pay UPS, $14.50 for the Bruce Springsteen ticket delivery. The actual price Ticketmaster paid UPS for Mr. Lo Re's delivery was substantially less than $14.50.

44. As such, a portion of the $14.50 UPS delivery charge Mr. Lo Re paid for delivery was secretly pocketed by Ticketmaster. No portion of the overcharge was returned.

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45. By representing the $14.50 as a non-taxable "UPS Delivery" charge, separate from and in addition to the handling or processing charges which were allegedly the basis for the Order Processing Fee, and otherwise failing to disclose that the "UPS Delivery" charge was not a pass-through of the actual delivery charge, Ticketmaster falsely represented that the fee was a mere pass-through charge imposed by and collected for UPS, and that such charge represented the actual UPS shipping cost.

46. As established by Mr. Lo Re's prior deposition testimony in this case, at the time he made his purchase, Mr. Lo Re did not realize that UPS Delivery fee was being marked up by Ticketmaster and was not a pass-through of the actual UPS Delivery fee. If Mr. Lo Re had known that the UPS Delivery charge was being marked up by Ticketmaster, he would not have purchased that delivery option.

47. Accordingly, Mr. Lo Re was actually injured as a result of Ticketmaster's misrepresentations and omissions relating to the UPS Delivery charges in the amount of the UPS delivery charge ($14.50).

48. The additional sums secretly pocketed by Ticketmaster were unearned and did not constitute payment for goods or services actually furnished or performed.

49. In addition, unbeknownst to Mr. Lo Re, the Order Processing Fee paid by Mr. Lo Re was a profit generator for Ticketmaster, unrelated to the cost of processing tickets and designed to maximize Ticketmaster's overall profit by obtaining a bottom-line dollar amount on deals with its clients.

50. If Mr. Lo Re had known that the Order Processing Fee was in fact just a secret profit-generator, unrelated to the cost of actually processing his ticket purchase, he would not have paid the charge if there was any viable option for him to purchase the tickets without incurring this charge.

51. **James Roth's Ticket Purchases.** Mr. Roth purchased tickets from Ticketmaster.com on at least four occasions during the class period. On February 26, 2010 Mr. Roth made two separate ticket purchases for two Dave Mathews Band concerts at the Saratoga Performing Arts Center on June 4 and 5, 2010. Similarly on March 31, 2008 Mr. Roth made made two separate

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ticket purchases for two Dave Mathews Band concerts at the Saratoga Performing Arts Center on June 20 and 21, 2008.

52. For each of those purchases, Mr. Roth was required to pay an Order Processing Fee, in addition to the face value of the tickets and the other Ticketmaster fees.

53. At the time of his purchases, Mr. Roth was unaware that the Order Processing Fee imposed by Ticketmaster was a profit generator for Ticketmaster, unrelated to the cost of processing tickets and designed to maximize Ticketmaster's overall profit by obtaining a bottom-line dollar amount on deals with its clients.

54. If Mr. Roth had known that the Order Processing Fee was in fact just a secret profit-generator, unrelated to the cost of actually processing his ticket purchase, he would not have paid the charge if there was any viable option for him to purchase the tickets without incurring this charge.

55. As a result of Ticketmaster's misrepresentations and omissions regarding the Order Processing Fee, Mr. Roth was actually injured and lost money in an amount not less than the amount of the Order Processing Fees that he paid.

56. **Adam Russell's Ticket Purchases.** Mr. Russell purchased tickets from Ticketmaster.com on at least two occasions during the class period. On September 10, 2006 Mr. Russell purchased tickets for a Bob Dylan concert at the Cumberland County Civic Center on November 9, 2006. On September 9, 2006 Mr. Russell purchased tickets for a George Jones concert at the Bangor Auditorium on November 4, 2006.

57. For each of those purchases, Mr. Russell was required to pay an Order Processing Fee, in addition to the face value of the tickets and the other Ticketmaster fees.

58. At the time of his purchases, Mr. Russell was unaware that the Order Processing Fee imposed by Ticketmaster was a profit generator for Ticketmaster, unrelated to the cost of processing tickets and designed to maximize Ticketmaster's overall profit by obtaining a bottom-line dollar amount on deals with its clients.

59. If Mr. Russell had known that the Order Processing Fee was in fact just a secret profit-generator, unrelated to the cost of actually processing his ticket purchase, he would not have

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paid the charge if there was any viable option for him to purchase the tickets without incurring this charge.

60. As a result of Ticketmaster's misrepresentations and omissions regarding the Order Processing Fee, Mr. Russell was actually injured and lost money in an amount not less than the amount of the Order Processing Fees that he paid.

61. **Maryam Aghchay's Ticket Purchases.** Ms. Aghchay purchased tickets from Ticketmaster.com on at least two occasions during the class period. On August 3, 2008, Ms. Aghchay purchased 4 tickets for Tony Bennett at the Greek Theatre in Los Angeles on September 12, 2008. On October 7, 2004, Ms. Aghchay purchased 6 tickets for Ibrahim Tatlises at the Fred Kavali Theater in the Thousand Oaks Civic Center on October 22, 2004.

62. For each of those purchases, Ms. Aghchay was required to pay an Order Processing Fee, in addition to the face value of the tickets and the other Ticketmaster fees.

63. At the time of his purchases, Ms. Aghchay was unaware that the Order Processing Fee imposed by Ticketmaster was a profit generator for Ticketmaster, unrelated to the cost of processing tickets and designed to maximize Ticketmaster's overall profit by obtaining a bottom-line dollar amount on deals with its clients.

64. If Ms. Aghchay had known that the Order Processing Fee was in fact just a secret profit-generator, unrelated to the cost of actually processing her ticket purchase, she would not have paid the charge if there was any viable option for her to purchase the tickets without incurring this charge.

65. As a result of Ticketmaster's misrepresentations and omissions regarding the Order Processing Fee, Ms. Aghchay was actually injured and lost money in an amount not less than the amount of the Order Processing Fees that she paid.

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FIRST CAUSE OF ACTION

(For Violation of Business & Professions Code § 17200, *et seq.* Brought by Plaintiffs and the Subclass against Defendant for UPS Delivery Fees)

66. Plaintiffs reallege the forgoing paragraphs, and incorporate them as if fully set forth herein.

67. At all relevant times, California Business & Professions Code § 17200 *et seq.* was in full force and effect.

68. California Business & Professions Code § 17200 prohibits the use of "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [Cal. Bus. & Prof. Code § 17500 *et seq.*]".

69. California Business & Professions Code § 17203 provides that the court may enjoin any practices which violate § 17500 *et seq.* and further provides that the court may "make such orders . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by mean of such unfair competition."

70. California Business & Professions Code § 17500 provides, in relevant part, that (emphasis added):

> **It is unlawful for any person, firm, corporation** or association or any employee thereof with intent directly or indirectly to dispose of real or personal property to perform services, professional or otherwise, or anything of any nature whatsoever or **to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated** before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or **in any other manner or means whatever, including over the internet, any statement**, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, **which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading**, or for any person, firm or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

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71. Defendant affirmatively represented to Plaintiffs and the class members, both in California and other states throughout the nation, that when purchasing tickets from Ticketmaster they would be charged a "Convenience Charge" and an "Order Processing Fee," as previously alleged herein. Defendant further affirmatively represented that the "Order Processing Fee" was separate and in addition to the "delivery prices."

72. Defendant further affirmatively represented to Plaintiffs and the members of the class, that, if they wished to receive their tickets in a manner faster than standard U.S. Mail, they could select either second or third business day delivery via UPS for which they would additionally be charged "the delivery prices" as represented on Ticketmaster's website.

73. By affirmatively representing to Plaintiffs and the class members: (i) that they were being charged a separate, disclosed and agreed upon "processing fee;" and (ii) that the additional fees they were charged for expedited delivery were the "delivery prices" for "*UPS Delivery*," (italics added) Defendant disseminated or caused to be disseminated statements of fact, in connection with the ticket purchases, which Defendant knew, or should have known, were untrue and/or misleading in nature. All of these misrepresentations and omissions are evidenced on Ticketmaster's web page for selecting UPS Delivery and, thus, were presented to all subclass members (all of whom purchased the UPS delivery option), regardless of whether the subclass member also viewed Ticketmaster's FAQ pages. Additionally, all of the members of the class and subclass were charged a Convenience Charge by Ticketmaster, and were shown web pages representing the Convenience Charge which, Plaintiffs assert, formed part of the misrepresentations of the OPF and UPS fee by leading customers to believe that the Convenience Charge was the profit component for Ticketmaster while the OPF and UPS fee were based on, or related to, actual costs to Ticketmaster.

74. Defendant knew, or should have known, that its disseminations were untrue and/or misleading in that they misrepresented the additional fees for expedited delivery as merely passing through the UPS delivery charges, while Plaintiffs and members of the subclass were unknowingly being charged, and paying, separate and undisclosed charges to Defendant. In fact, the "delivery

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prices" charged by Defendant are not the actual UPS delivery charges incurred by Defendant; rather, they are substantially in excess of the actual UPS delivery charges incurred by Defendant.

75. As a direct result of Defendant's untrue and/or misleading disseminations, Defendant wrongly acquired money, which it was not entitled to, from Plaintiffs and the members of the subclass. Specifically, Defendant wrongly acquired money in excess of the actual UPS delivery charges it incurred in connection with Plaintiffs' and subclass members' purchases. Accordingly, pursuant to Bus. & Prof. Code § 17203, Plaintiffs and the members of the subclass are entitled to restitution and disgorgement from Defendant in an amount representing the money which they paid Defendant in excess of the actual UPS delivery charges incurred by Defendant in connection with their ticket purchases, or such other relief as may be determined by the court.

SECOND CAUSE OF ACTION

(Violation of California Business & Professional Code § 17200 – "Fraudulent" Prong Brought by Plaintiffs and the Class against Defendant for Order Processing Fees)

76. Plaintiffs incorporate the foregoing allegations as if fully set forth in this cause of action.

77. Plaintiffs and members of the class are consumers who have been injured in their money or property by purchasing one or more tickets from Ticketmaster and paying an Order Processing Fee, which fee was unlawful and/or not as represented.

78. Ticketmaster used various forms of media to advertise, call attention to or give publicity to the Order Processing Fee associated with its ticket sales by, among other things, falsely and deceptively misrepresenting that the fee is based on, or related to, order processing costs when, in fact, the fee is a profit generator for Ticketmaster, unrelated to the cost of processing tickets and designed to maximize Ticketmaster's overall profit by obtaining a bottom-line dollar amount on deals with its clients.

79. By representing the fee as an "Order Processing Fee" in juxtaposition to the other charges, such as the Facility Fee and the Convenience Charge (which customers understood to be the profit centers for Ticketmaster), which were presented to consumers on the same webpages,

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Ticketmaster misrepresented the OPF as being imposed to recover the costs associated with processing the order. This misrepresentation was made to all class members regardless of whether the class member also viewed Ticketmaster's FAQ pages.

80. Ticketmaster's conduct constitutes unfair competition and unfair, deceptive, untrue, or misleading advertising within the meaning of Cal. Bus. & Prof. Code § 17200, *et seq.* and § 17500, *et seq.*

81. Such advertisements were likely to deceive the general public.

82. Defendant knew, or reasonably should have known, that such advertising was false and/or misleading.

83. As a direct result of Defendant's untrue and/or misleading disseminations, Defendant wrongly acquired money from Plaintiffs and the class members to which it was not entitled. Specifically, Defendant wrongly acquired money for the Order Processing Fee it charged in connection with Plaintiffs' and the class members' purchases. Accordingly, pursuant to Bus. & Prof. Code § 17203, Plaintiffs and class members are entitled to restitution and disgorgement from Defendant in an amount representing the money which they paid Defendant for Order Processing Fees in connection with their ticket purchases.

THIRD CAUSE OF ACTION

(False Advertising in Violation of Business and Professions Code § 17500

Brought by Plaintiffs and the Subclass Against Ticketmaster for UPS Delivery Fees)

84. Plaintiffs reallege the foregoing paragraphs and incorporate them as if fully set forth in this cause of action.

85. Business and Professions Code § 17535 provides, in relevant part:

> Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or

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personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

86. By misrepresenting the UPS delivery fee as the fee charged by UPS for delivery of ticket orders, Ticketmaster has violated Bus. & Prof. Code § 17500 *et seq.*

87. As a result of Defendant's false advertisements, Plaintiffs have suffered an injury in fact and lost money or property – i.e., money that they paid to Ticketmaster for UPS delivery fees.

88. As a result of Defendant's false advertisements, Defendant has wrongly acquired money from Plaintiffs and the members of the subclass. Specifically, Defendant wrongly acquired money in excess of the actual UPS delivery charges it incurred in connection with Plaintiffs' and subclass members' purchases. Accordingly, pursuant to Bus. & Prof. Code § 17535, Plaintiffs and the members of the subclass are entitled to restitution and disgorgement from Defendant in an amount representing the money which they paid Defendant in excess of the actual UPS delivery charges incurred by Defendant in connection with their ticket purchases, or complete restitution of the purchase price, as may be determined by the Court.

FOURTH CAUSE OF ACTION

(False Advertising in Violation of Business and Professions Code § 17500 Brought by Plaintiffs and the Class Against Ticketmaster for Order Processing Fees)

89. Plaintiffs reallege the foregoing paragraphs and incorporate them as if fully set forth in this cause of action.

90. By misrepresenting the Order Processing as being related to, or based on, Ticketmaster's costs of processing the actual ticket orders, Ticketmaster has violated Bus. & Prof. Code § 17500 *et seq.*

91. As a result of Defendant's false advertisements, Plaintiffs have each suffered an injury in fact and lost money or property – i.e., money that they paid to Ticketmaster for Order Processing Fees.

92. As a result of Defendant's false advertisements, Defendant has wrongly acquired money from Plaintiffs and the members of the class. Specifically, Defendant wrongly obtained the money that Plaintiffs and the class members paid for Order Processing Fees. Accordingly, pursuant

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to Bus. & Prof. Code § 17535, Plaintiffs and the members of the subclass are entitled to restitution and disgorgement from Defendant in an amount representing the money which they paid to Ticketmaster for Order Processing Fees in connection with their ticket purchases, or such other relief as may be determined by the Court.

FIFTH CAUSE OF ACTION

(Violation of Business and Professions Code § 17200 -- "Unlawful Conduct"

Brought by Plaintiffs and the Class and Subclass against Ticketmaster

Relating to both the UPS Delivery Fees and Order Processing Fees)

93. Plaintiffs reallege the foregoing paragraphs and incorporate them as if fully set forth in this cause of action.

94. Per the Court's class certification order, this claim has not been certified for class treatment. Plaintiffs and the class reserve all of their rights to seek certification of this claim, both in the trial court or on appeal.

95. This Cause of Action relates only to the Order Processing Fees and UPS Delivery Fees.

96. California Business & Professions Code § 17200 provides that "unfair competition" in violation of the Act includes "any unlawful ...business act or practice." Accordingly, violations of the California Consumer Legal Remedies Act, Civil Code § 1750 *et seq.* ("CLRA") constitute unlawful business practices which a portion violate § 17200 *et seq.*

97. At all relevant times, the CLRA was in full force and effect. The CLRA provides, in relevant part:

> "[§ 1770] (a) The following unfair methods of competition and deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
>
> * * *
>
> (19) Inserting an unconscionable provision in the contract."
>
> California Civil Code § 1770 (a) (19).

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98. Plaintiffs and the members of the class and subclass are "consumers" within the meaning of Civil Code § 1761(d).

99. Nothing in this Count is directed at the face value of the tickets for any of the underlying events. Rather, the claims are limited solely to the two additional fees separately imposed by Ticketmaster for services allegedly incurred and related to processing and shipping of the tickets.

100. Arranging for the sale and delivery of tickets for sporting events, concerts, or other such events, constitutes a "service" within the meaning of Civil Code § 1761(b). This is irrespective of whether the tickets themselves are a "good" or "service" for purposes of the CLRA. Notably, for its services, Ticketmaster imposes fees which are separate from, and in addition to, the "face value" of the tickets (i.e., the license fee). This Count challenges only such separate service fees.

101. Delivering packages by commercial carrier constitutes a "service" within the meaning of Civil Code § 1761(b). In fact, the "S" in "UPS" stands for "Service".

102. The UPS Delivery Fee and Order Processing Fee imposed by Ticketmaster each constitute a "transaction" which results in the sale of "services" within the meaning of Civil Code §§ 1761(b) and (e), and 1770(a).

103. Ticketmaster is a "person" within the meaning of Civil Code § 1761(c).

104. **The Order Processing Fee and UPS Delivery Fees are Unconscionable.** Ticketmaster's imposition of the Order Processing Fee is both procedurally and substantively unconscionable.

105. Ticketmaster is a monopoly or oligopoly in the primary ticket market for the events for which it sells tickets. Typically, if not always, for the events for which it sells tickets, Ticketmaster has the exclusive rights to sell primary market tickets over the internet. The primary ticket market involves sales of tickets from the "box office" to the public at the "box office" or "face value" prices (plus Ticketmaster's fees), as contrasted to the re-sale market, which consists of secondary sales, typically by "scalpers" at inflated prices.

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106. The Order Processing Fee is procedurally unconscionable in that it arises and is imposed because of the dramatic inequality of bargaining positions between Ticketmaster and consumers. Consumers have little or no meaningful choice but to purchase their Internet tickets through Ticketmaster. Ticketmaster requires them to pay the Order Processing Fee, which is falsely represented as being correlated to fulfillment costs even though discovery has revealed that this is untrue and that the fee is simply imposed as a profit generator for Ticketmaster. Simply put, the Order Processing Fee is a mandatory and falsely represented charge, which is inserted into an adhesion contract.

107. The Order Processing Fee is also substantively unconscionable. As previously stated, Ticketmaster is either a monopoly or oligopoly for the Internet tickets purchased by Plaintiffs and Class Members. The Order Processing Fee is completely one sided and the true nature of the charge—an additional profit generator—is not only concealed, it is affirmatively misrepresented by Ticketmaster.

108. The UPS Delivery Fee is procedurally unconscionable in that it arises and is imposed because of the dramatic inequality of bargaining positions between Ticketmaster and consumers. As previously set forth, if consumers wanted expedited delivery of their tickets, they were not allowed to use other commercial carriers nor could they have the delivery fees charged to their own UPS account (thereby avoiding Ticketmaster's concealed markup). Further, under certain circumstances during the class period, Ticketmaster would *only* provide ticket delivery by UPS, thus forcing customers to pay its UPS delivery fee.

109. The UPS delivery fee is substantively unconscionable. As previously stated, Ticketmaster is either a monopoly or oligopoly for the Internet tickets purchased by Plaintiffs and class members, and requires customers to use UPS as the only carrier for expedited delivery of tickets. The UPS delivery option is completely one sided in that Ticketmaster used its monopolistic and/or oligopolistic power to exclude other delivery options and prices. Also, Ticketmaster makes a concealed markup on the UPS charges while misleading consumers to think they are only being charged the delivery fees paid by Ticketmaster to UPS.

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110. As further evidence establishing the unconscionability of both the Order Processing Fee and the UPS delivery fee, Ticketmaster imposes a strict time limit for consumers to purchase tickets—believed to be two minutes from the time Ticketmaster's website displays the ticket choices for the event designated by the consumer. By putting this tight time constraint on consumers, they are under added pressure to make their purchase without questioning or contesting the charges imposed by Ticketmaster.

111. As a result of Ticketmaster's violations of the CLRA, Plaintiffs and the members of the class and subclass have been directly damaged in the amounts they paid for order processing fees and, for the subclass, any UPS delivery charges which they paid, at least to the extent those charges exceed the amount UPS charged Ticketmaster for delivery of the tickets.

SIXTH CAUSE OF ACTION

(Unfair Practices in Violation of Business and Professions Code § 17200 – "Unfair Conduct" Brought by the Class and Subclass against Ticketmaster Relating to the UPS Delivery Fees and Order Processing Fees)

112. Plaintiffs reallege the foregoing paragraphs and incorporate them as if fully set forth in this cause of action.

113. Per the Court's class certification order, this claim has not been certified for class treatment. Plaintiffs and the class reserve all of their rights to seek certification of this claim, both in the trial court and/or on appeal.

114. This Cause of Action relates only to the Order Processing Fees and UPS Delivery Fees.

115. As previously alleged, Ticketmaster is a monopoly or oligopoly for primary ticket sales events for which it sells tickets.

116. For each purchase made by Plaintiffs and each class member, Ticketmaster imposed an Order Processing Fee.

117. If Plaintiffs and class members wanted to purchase on-line tickets for these events, they almost always had no meaningful alternative to purchasing through Ticketmaster. Further, they

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had no option to purchase on-line through Ticketmaster without paying the Order Processing Fee, in addition to the other mandatory charges imposed by Ticketmaster.

118. As stated herein, Ticketmaster falsely represented the Order Processing Fee is based on order processing costs when, in fact, it is just a secret profit generator.

119. If a customer, such as Plaintiffs and the subclass members elected expedited delivery for physically delivered tickets (as opposed to electronically delivered tickets) purchased on Ticketmaster's website, the only options that they were allowed to use were the marked up methods designated by Ticketmaster. For example, even if a customer had their own UPS account, Ticketmaster would not allow them to provide their account number (and this be billed only the UPS charge), but would force them to pay Ticketmaster's UPS Delivery Fee.

120. Each of these practices constitutes an unfair practice in violation of the Bus. & Prof. Code § 17200 *et seq.*

121. **The Order Processing Fee is Unfair.** The Order Processing Fee causes substantial harm to consumers. In the aggregate, Ticketmaster has charged class members in excess of $500 million for Order Processing Frees during the class period. There are no countervailing benefits to the consumer or competition derived from this falsely represented and mandatorily imposed fee. Indeed, Ticketmaster's practices are anti-competitive. Finally, consumers could not reasonably avoid paying these fees. As stated herein, the fees are mandatory and imposed by Ticketmaster on all Internet ticket purchases. Further, Plaintiffs and the class members have few, if any, meaningful alternatives to purchase tickets for the same events from other online sources.

122. **The UPS Delivery Fees are Unfair.** The UPS delivery fees cause substantial harm to consumers. In the aggregate, Ticketmaster's concealed markup for the UPS delivery fees during the class period amounts to tens of millions of dollars. There are no countervailing benefits to consumers or competition as a result of the concealed UPS markups. To the contrary, the conduct directly harms competition, as Ticketmaster will not allow consumers to use competitors of UPS. As previously set forth herein, consumers cannot reasonably avoid the injury because Ticketmaster

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will not allow them to use an alternate delivery service or even use their own UPS account, and consumers do not have meaningful alternatives to purchase their tickets online.

123. As a direct result of Ticketmaster's unfair practices, it wrongfully acquired money from Plaintiffs and members of the class and subclass to which it was not entitled. Specifically, Ticketmaster wrongly acquired money for the Order Processing Fees and any amount Ticketmaster charged members of the subclass in excess of amount that Ticketmaster paid UPS for delivery of the tickets to the subclass members. Accordingly, Plaintiffs and the members of the class and subclass are entitled to restitution and disgorgement from Ticketmaster in an amount representing the money which they paid Ticketmaster for Order Processing Fees and any amounts they paid Ticketmaster in excess of the actual UPS delivery charges incurred by Ticketmaster in connection with their ticket purchases.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually, and on behalf of the members of the class and subclass, pray for judgment and relief against Defendant as follows:

A. For an order certifying the class and subclass (as alleged herein), and appointing Plaintiffs and their counsel to represent the Class pursuant to California Code of Civil Procedure § 382;

B. Ordering Defendant to provide notice to the class.

C. Pursuant to California Business & Professions Code § 17203, for a declaration that Defendant has engaged in fraudulent, unlawful and unfair business acts and practices in violation of California Business & Professions Code § 17200 *et seq.*

D. Pursuant to California Business & Professions Code § 17203, for an order requiring Defendant to account for all money realized by it as a result of its unlawful conduct, as complained of herein, and requiring Defendant to provide restitution and/or disgorgement of the monies it improperly obtained by virtue of its wrongful acts to Plaintiffs and members of the class (for the Order Processing Fee) and members of

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the subclass (for both the Order Processing Fee and inflated UPS charges) in an amount to be determined according to proof;

E. Pursuant to California Business & Professions Code § 17535, for an order requiring Defendant to account for all money realized by it as a result of its unlawful conduct, as complained of herein, and requiring Defendant to provide restitution and/or disgorgement of the monies it improperly obtained by virtue of its wrongful acts to Plaintiffs and members of the class (for the Order Processing Fee) and members of the subclass (for both the Order Processing Fee and inflated UPS charges) in an amount to be determined according to proof;

F. For an award to Plaintiffs of their costs and disbursements and reasonable allowances for Plaintiffs' attorney's fees and expenses as allowed by statute, the common fund doctrine, the substantial benefit doctrine, or other authority requiring or authorizing Defendant to pay Plaintiffs' attorney's fees and litigation expenses;

G. For an award for pre- and post-judgment interest; and

H. Granting such other further relief as the Court may deem just and proper.

DATED: May 30, 2013

ALVARADO SMITH, APC

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE
Curt Schlesinger v. Ticketmaster
Superior Court of Los Angeles County, Central Civil West Courthouse
Case No. BC 304565

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is **ALVARADOSMITH, APC, 1 MacArthur Place, Santa Ana, CA 92707**.

On **May 30 , 2013**, I served the foregoing document described as **FOURTH AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200, *ET SEQ.* AND SECTION 17500 *ET SEQ.*** on the interested parties in this action.

☒ by placing the original and/or a true copy enclosed in (a) sealed envelope(s), addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **BY REGULAR MAIL:** I deposited such envelope in the mail at 1 MacArthur Place, Santa Ana, California. The envelope was mailed with postage fully prepaid.
I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.
BY THE ACT OF FILING OR SERVICE, THAT THE DOCUMENT WAS PRODUCED ON PAPER PURCHASED AS RECYCLED.

☐ **BY FACSIMILE MACHINE:** I Tele-Faxed a copy of the original document to the facsimile numbers listed on the attached service list.

☐ **BY OVERNIGHT MAIL:** I deposited such documents at the Overnite Express or Federal Express Drop Box located at 1 MacArthur Place, Santa Ana, California 92707. The envelope was deposited with delivery fees fully prepaid.

☐ **BY PERSONAL SERVICE:** I caused the above documents to be delivered by hand to the following addressee**

☒ I caused the above document(s) to be electronically served to counsel of record by transmission to **CASE ANYWHERE**.

☐ I caused ***COURTESY COPIES*** of the documents to be delivered by electronic mail to the email address(s) listed on the service list.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **May 30, 2013** at Santa Ana, California.

SANDRA MCLEOD

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SERVICE LIST

Curt Schlesinger v. Ticketmaster
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