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ATTORNEYS FOR PLAINTIFFS RICHARD NOLL  
 AND RHYTHM MOTOR SPORTS, LLC

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

RICHARD NOLL AND RHYTHM  
 MOTOR SPORTS, LLC, Individually  
 and on behalf of all others similarly  
 situated,

Plaintiffs,

v.

EBAY INC.,

Defendant.

CASE NO. 5:11-cv-04585-EJD

**JOINT NOTICE OF MOTION AND MOTION  
 FOR ORDER (1) CONDITIONALLY  
 CERTIFYING A SETTLEMENT CLASS AND  
 RELATED SETTLEMENT; (2) AUTHORIZING  
 DISTRIBUTION OF NOTICE OF SETTLEMENT;  
 AND (3) SETTING A SCHEDULE FOR THE  
 FINAL APPROVAL PROCESS; MEMORANDUM  
 OF POINTS AND AUTHORITIES**

Date: January 29, 2015

Time: 9:00 a.m.

Judge: Honorable Edward J. Davila

Courtroom: 4, 5th Floor

Trial Date: Not yet set

Jury Trial Demanded

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**NOTICE OF MOTION AND MOTION****TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

Please take notice that on January 29, 2015, at 9:00 a.m., or on such other date as the Court directs, in Courtroom 4, 5th Floor of the United States District Court, Northern District of California, San Jose Division, before the Honorable Edward J. Davila, Plaintiffs Richard Noll (“Noll”) and Rhythm Motor Sports, LLC (“Rhythm”) (collectively, “Plaintiffs”) on behalf of themselves and all those similarly situated, and Defendant eBay Inc. (“eBay”) (Plaintiffs and eBay collectively, “Parties” and each, a “Party”), will jointly move this Court for an order (1) provisionally certifying the proposed Class<sup>1</sup> for purposes of settlement only and preliminarily approving their proposed Settlement Agreement; (2) approving the proposed form and method of notice and authorizing its dissemination to the members of the Class; and (3) setting a schedule for the final approval process and distribution of settlement proceeds, including deadlines for Class Members to object to or request exclusion from the Settlement.<sup>2</sup>

Plaintiffs make this motion (“Motion”), with the joinder of counsel for eBay, pursuant to Federal Rule of Civil Procedure 23 as set forth in the accompanying brief. This Motion is based on this Notice; the accompanying Memorandum of Points and Authorities; the Declaration of Keith Verges (“Verges Declaration”) filed herewith; the Settlement Agreement attached hereto as Exhibit A; the proposed forms of notice attached hereto as Exhibit B; the proposed form of Preliminary Approval order attached hereto as Exhibit C; the Court’s file in this action; and such other argument or evidence as may be presented at or prior to the hearing.

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<sup>1</sup> Capitalized terms not defined herein have the meanings set forth in the Settlement Agreement.

<sup>2</sup> eBay joins in the request to approve the Settlement, but the characterizations of the case and the arguments contained herein are those of Plaintiffs, and eBay reserves all rights should the Settlement not be approved.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. STATEMENT OF ISSUES TO BE DECIDED**

1. Whether, pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), the proposed Class should be certified for settlement purposes.
2. Whether, pursuant to Federal Rule of Civil Procedure 23(e), the proposed Settlement should be approved, including the form and manner of notice, opportunity to request exclusion and object, and relief and method of distribution.

### **II. INTRODUCTION**

Plaintiffs and eBay request that the Court preliminarily approve the Parties' proposed Settlement, which would fully resolve the pending claims involving eBay sellers' use of Good 'Til Cancelled listings ("GTC Listing"). The proposed Settlement is the result of hard-fought litigation and arms-length negotiation overseen by two mediators well versed in high-stakes class action litigation (the Honorable Dickran Tevrizian and the Honorable Carl West, each of JAMS). The Settlement contemplates a \$6.4 million Gross Settlement Fund, with an estimated \$4.5 million Net Settlement Fund to be distributed to the Class. This latter amount provides fair compensation to the Class, in line with the approved settlements in other class actions involving eBay's selling fees and features. *See Custom LED v. eBay Inc.*, No. 12-cv-00350-JST, 2013 U.S. Dist. LEXIS 165881 (N.D. Cal. Nov. 20, 2013) (granting preliminary approval of a settlement in which the net benefit to the class of eBay sellers was between 1.8% to 16% of the fees paid for the selling feature in dispute). In addition, the overall settlement structure being proposed, including the use of eBay credits as a default method of distribution, has been previously approved in prior settlements as the most efficient means of providing benefits to a class of eBay sellers. *Id.* at \*23 (approving the use of credits as default method of payment); *Keirsev v. eBay Inc.*, No. 12-cv-01200-JST, 2013 U.S. Dist. LEXIS 152531, at \*13 (N.D. Cal. Oct. 22, 2013)



(same). For these reasons, and as further detailed below, the Parties jointly request that the Court grant preliminary approval of their proposed Settlement.

### **III. BACKGROUND**

#### **A. SUMMARY OF PLAINTIFFS' CLAIMS.**

This case arises from eBay's GTC Listing duration. Plaintiffs allege that "Good 'Til Cancelled" connotes an indefinite listing duration and that the contract and eBay's disclosures did not permit eBay to charge recurring listing fees<sup>3</sup> every 30 days for GTC Listings. Plaintiffs seek to recover all Insertion and Optional Feature Fees incurred after the initial 30-day listing period for GTC Listings placed during the Class Period (the "Disputed Fees"). eBay eventually amended its disclosures. During the Class Period, eBay added "Insertion fees are charged every 30 day period" to the end of the relevant fees schedules ("Fees Schedules"). As of June 20, 2012, the end of the Class Period, eBay had added verbiage "Insertion fees and optional feature fees are charged every 30-day period" to all of the operative Fees Schedules. This latter disclosure permits eBay to charge the fees in dispute every 30 days.

#### **B. SUMMARY OF EBAY'S DEFENSES.**

eBay has strenuously denied any wrongdoing or liability throughout the litigation, and continues to deny any wrongdoing or liability. The essence of eBay's merits defense is that (1) eBay provided full disclosures of the recurring fees for GTC listings for the entirety of the Class Period, (2) eBay's monthly invoices to sellers fully disclosed all fees charged for GTC listings, (3) Plaintiffs and putative Class Members voluntarily bought and paid for GTC listings with full knowledge that fees are charged on a recurring monthly basis, and (4) the contrary

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<sup>3</sup> eBay generally charges two types of fees to list an item: (1) an "Insertion Fee," which is the initial fee charged to list an item; and (2) "Optional Feature Fees" (sometimes called "advanced listing upgrade fees") for optional features or upgrades that sellers may buy to increase the chances for a successful sale, like highlighted or bolded listings. See <http://pages.ebay.com/help/sell/insertion-fee.html>.

1 assumption that GTC fees are charged a single time would be unreasonable in light of eBay's  
2 overall fee structure. eBay has also maintained that Plaintiffs cannot certify a class (other than  
3 for settlement purposes) in any event because (1) adjudicating eBay's defenses (including  
4 voluntary payments and failure to mitigate damages) would require individualized inquiry into  
5 each seller's knowledge of eBay's fee structure at the time of each listing, and (2) the behavior of  
6 Plaintiffs and other members of the proposed class rebutted Plaintiffs' claim that sellers  
7 uniformly were not aware of recurring fees for GTC Listings, among other issues.

9 **C. PROCEDURAL HISTORY.**

10 This case has been procedurally complex and hard fought. On September 15, 2011, Noll  
11 filed suit and eBay thrice moved to dismiss. On April 23, 2012, the Court granted eBay's first  
12 motion to dismiss the claims based on (1) fraud; (2) California's Unfair Competition Law, Cal.  
13 Bus. & Prof. Code § 17200 *et seq.* ("UCL"); (3) California's False Advertising Law, Cal. Bus. &  
14 Prof. Code § 17500 *et seq.* ("FAL"); (4) the Consumers Legal Remedies Act, Cal. Civ. Code  
15 § 1750 *et seq.* ("CLRA"); and (5) California Business & Professions Code § 17600 *et seq.*  
16 (automatic renewal/continuous service). On June 15, 2012, Noll filed his First Amended Class  
17 Action Complaint ("FAC") and on July 10, 2012, Plaintiff Rhythm filed a separate lawsuit and  
18 sought leave to intervene in the Noll case.

19  
20 On September 4, 2012, the Court granted Rhythm's Motion to Intervene and denied  
21 eBay's motion to dismiss the FAC as moot, requiring Plaintiffs to file a consolidated complaint.  
22 On October 2, 2012, Plaintiffs filed their Consolidated Second Amended Class Action Complaint  
23 ("SAC"). On May 30, 2013, the Court granted eBay's third motion to dismiss, with leave to  
24 amend (although without leave to the extent Insertion Fees were sought during times the Fees  
25 Schedules stated "Insertion Fees are charged every 30 day period.") The Court dismissed with  
26 prejudice the automatic renewal/continuous service count of the SAC.  
27  
28

On July 1, 2013, Plaintiffs filed their Consolidated Third Amended Complaint (“TAC”). In the TAC, Plaintiffs allege causes of action for (1) breach of contract; (2) UCL violations; (3) FAL violations; (4) violations of Business and Professions Code section 17600 (automatic renewal/continuous service); (5) CLRA violations; (6) unjust enrichment; (7) fraud; and (8) declaratory judgment. However, as described above, the Court had previously dismissed with prejudice the section 17600 claims and all claims for Insertion Fees during times when eBay’s fees schedules stated “Insertion Fees are charged every 30 day period.”

The Parties have engaged in extensive discovery. eBay produced over 90,000 pages of documents, and over 2 GB of data, including 40,000 transactions-worth of sample GTC listing data. eBay deposed both Named Plaintiffs, who agreed to travel from Florida and Arizona to avoid the expense and delay of discovery motion practice. Plaintiffs deposed eBay witnesses in California and Utah. Both Parties retained experts and exchanged expert reports. Expert depositions took place in California and Texas. [Verges Decl. ¶ 6.]

#### **D. BACKGROUND FACTS.**

The following is a simplified and abbreviated summary of the facts at issue in this case.

##### **1. eBay’s Marketplaces.**

Listings on eBay.com are governed by Fees Schedules depending on the nature of the listing, referenced herein as: (1) Core, (2) Motors, and (3) Stores.<sup>4</sup> [Verges Decl. ¶ 8.]

##### **2. The Available Listing Durations Before the Start of the Class Period.**

Before September 16, 2008, the commencement of the Class Period, the GTC listing duration was available only on the Stores marketplace, and not for Core or Motors listings.

---

<sup>4</sup> eBay “Core” is eBay’s overall marketplace on which sellers can list items for sale. eBay “Motors” consists of web pages on eBay dedicated to automotive vehicles, parts, and accessories, as described on the eBay website at <http://pages.ebay.com/help/buy/eBayMotors.html>. eBay Stores allows sellers to display all of their listed items in a single online “Store” (among other benefits), as described on the eBay website at <http://pages.ebay.com/help/sell/questions/ebay-store.html>.

During this time, the Stores Fees Schedule contained the following table that explained that all fees for GTC Listings would be charged on a recurring basis every 30 days:

Listing Upgrade Fees		
Features	30 days	Good 'Til Cancelled (recurring 30-day listing)
Gallery	Free	Free
Gallery Plus	\$0.35	\$0.35 / 30 days
Subtitle	\$0.02	\$0.02 / 30 days
Listing Designer	\$0.10	\$0.10 / 30 days
Scheduled Listings	\$0.10	\$0.10
Bold	\$1.00	\$1.00 / 30 days
Border	\$3.00	\$3.00 / 30 days
Highlight	\$5.00	\$5.00 / 30 days

The Stores Fees Schedule contained this table at all times from September 16, 2008 through March 29, 2010. [Verges Decl. ¶ 9.]

### **3. eBay Introduces GTC to Core and Motors.**

On September 16, 2008, eBay made the GTC duration available for listings on Core and Motors. According to Plaintiffs, the Fees Schedules for these listings did not state that GTC listing fees would recur, and the table of “Listing Upgrade Fees” looked like this:

Listing Upgrade Fees		
Feature	Fee -- Auction Style, Fixed Price Format (3, 5, 7, 10 Days)	Fee -- Fixed Price (30 Days, Good 'Til Cancelled), Classified Ad
Value Pack	\$0.65	\$2.00
Gallery*	Free	Free
Gallery Plus	\$0.35	\$1.00
Listing Designer**	\$0.10	\$0.30
Subtitle	\$0.50	\$1.50
Bold	\$2.00	\$4.00
Scheduled Listings	\$0.10	\$0.10
Gift Services	\$0.25	\$0.75
Border	\$4.00	\$8.00
Highlight	\$5.00	\$10.00
Gallery Featured	\$24.95	\$74.95
Home Page Featured	\$59.95	\$179.95
List in Two Categories***	x2	x2

1 [Verges Decl. ¶ 10.]

2 At the same time, however, eBay also undertook a campaign to promote and explain the  
3 GTC duration to its sellers. As part of that campaign, eBay provided an “August 2008 Update,”  
4 which provided more detail on how GTC Listings worked. The Parties argued vigorously about  
5 the legal relevance of the August 2008 Update, but it is undisputed that it contained the following  
6 disclosures:

8 Basic Fees tab: “sellers will now have the option to use the Good  
9 ‘Til Cancelled (GTC) duration which allows listings to  
10 automatically renew every 30 days. This option is also available at  
no extra cost.”

11 Fee FAQ tab: “GTC stands for Good ‘Til Cancelled. A listing with  
12 GTC duration will renew every 30 days until the item sells  
successfully. Insertion fees and all Feature Fees will be charged  
every 30 days at the time the listing is renewed.”

13 [August 2008 Update, Dkt. No. 27-3, at 4, 7; Verges Decl. ¶ 10.]. eBay also published and/or  
14 disseminated other information stating that GTC listing fees would be charged every 30 days,  
15 including disclosures provided directly to certain groups of sellers. [Verges Decl. ¶ 10.]

#### 17 **4. Revisions to the Fees Schedules.**

18 On December 16, 2008, eBay revised the Core Fees Schedule (but not the Motors Fees  
19 Schedule) by adding:

20 Good ‘Til Cancelled renews automatically every 30 days until the  
21 item sells or you end the listing. Insertion Fees are charged every  
22 30 day period.

23 [Verges Decl. ¶ 11.] eBay added this verbiage to the Motors and Stores Fees Schedules on  
24 March 30, 2010. [*Id.*] Finally, on June 19, 2012, (after this case was filed), eBay added to all  
25 three Fees Schedules the following disclosure:

26 Good ‘Til Cancelled listings renew automatically every 30 days  
27 until all of the items sell, you end the listing, or the listing violates

an eBay policy. Insertion fees and optional feature fees are charged every 30-day period.

[*Id.*] The Parties agree that listings initiated by eBay users after June 19, 2012 are not at issue in this case.

**E. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.**

On October 8, 2014, Plaintiffs filed their motion for class certification. The class proposed in that motion is substantively identical to that proposed in the Settlement Agreement:

all natural persons and entities who are United States residents and who (1) placed GTC Listings on eBay that commenced during the Class Period, and (2) were charged Disputed Fees. Excluded from the Class are the Judge of this Court and his staff, and all directors, officers, and managers of eBay, and their immediate families. A person or entity is deemed a "United States resident" for purposes of the foregoing if the primary contact information for the person or entity in eBay's current records is an address within the United States.

[Exh. C, § 1.4; *see* Verges Decl. ¶ 15.] The Class Period differs by marketplace, and is defined as: (1) for Stores Listings, the period from March 30, 2010 to June 19, 2012, and (2) for Core Listings and Motors Listings, the period from September 16, 2008 to June 19, 2012.<sup>5</sup> [Exh. C, § 1.23.] There are 1,192,947 unique user IDs in the Class.<sup>6</sup>

**IV. THE SETTLEMENT AGREEMENT**

The proposed Settlement provides for the establishment of a \$6,400,000 Gross Settlement Fund. The Net Settlement Fund (the Gross Settlement Fund, less administration costs, any fee and expense award to counsel, and any enhancement award to the Plaintiffs) will be distributed in the most direct and efficient method possible. There is no claims process, and most sellers will receive an automatic credit without the need to cash a check. Unless they choose otherwise,

<sup>5</sup> This limitation is due to the fact that the Stores Fees Schedule clearly stated that GTC fees would recur from September 16, 2008-March 29, 2010.

<sup>6</sup> [Verges Decl. ¶ 16.] A user ID is a user chosen identification name associated with an account. Each selling account must have a user ID. However, an eBay user can open multiple eBay accounts, so the same person may have more than one "user ID."

Class Members with Active eBay Accounts will receive an automatic credit to their account. Class Members without Active eBay Accounts, as well as Class Members with Closed Accounts, will receive a check. Active eBay Account holders will benefit from a credit because they are likely to continue using eBay and the credit will defray what they would otherwise have to pay out-of-pocket. Nevertheless, an Active eBay Account may request payment by check, provided the Class Member's recovery amount exceeds \$ 2.00 (for efficiency reasons, as explained below). The use of credits as a default method of distribution (1) ensures that the great majority of Class Members will receive a direct economic benefit without any effort on their part, and (2) minimizes the cost of sending unwanted checks, thereby maximizing the overall recovery to the Class. The proposed Settlement therefore delivers benefits to Class Members in the most direct, efficient, and effective method. More detail is as follows:

- **Settlement Fund and Distribution.** eBay will create a \$6,400,000 Gross Settlement Fund. This will be the entire financial obligation of eBay, inclusive of fees and costs of notice and administration. The Gross Settlement Fund will be used to pay any award of attorneys' fees and costs to Class Counsel, any enhancement award to Plaintiffs, and any costs incurred by the Claims Administrator in the administration of the Settlement. The Net Settlement Fund (the remainder of the Gross Settlement Fund after the payment of the above-described items), will be used to provide partial reimbursement of Disputed Fees to Class Members in the form of an account Credit or Settlement Check. Class Members will not need to submit a claim form to receive payment. By default, Class Members with Active eBay Accounts will receive a Credit, which will provide them with an automatic benefit. Class Members without Active eBay Accounts, including those with Closed eBay Accounts, will receive Settlement Checks. A Class Member with an Active eBay Account may also request compensation by check, provided that his or her total recovery amount is at least \$2.00. Active eBay Account holders receiving Credits can also request refunds of those Credits through eBay's refund policy.
- **No Reversion.** eBay will not be entitled to a reversion of any amount of the Gross Settlement Fund. Any returned or un-cashed checks shall be used to fund charitable donations, in equal amounts, to (1) the National Cyber-Forensics & Training Alliance, a nonprofit corporation, established in 1997, dedicated to protecting consumers from cyber crime and fraud, and (2) the National Consumer Law Center, a nonprofit organization focusing on low income consumer law issues.
- **Amount of Payments to Class Members.** The amount paid or credited to each Class Member will be calculated based on eBay's records. The calculation is explained in detail in Section 2.1 of the Settlement Agreement. In general, each Class Member's recovery will be based on the percentage of Disputed Fees that the



Class Member paid, as compared to the total Disputed Fees paid by all Class Members, for GTC Listings placed during the Class Period. It is expected that, after payment of all fees and expenses, each Class Member will be entitled to reimbursement of approximately 9% of all Disputed Fees that Class Members paid for GTC Listings placed during the Class Period.<sup>7</sup>

- **Payment After Final Approval/Appeals.** No payments from the Gross Settlement Fund will be made, except to pay the costs of notice and other administrative expenses, until approval is final and any appeals have been resolved.
- **Named Plaintiffs' Enhancement Award.** Each Named Plaintiff will seek \$15,000 as an enhancement award for participation as the class representatives in this Action, in acknowledgement of their assistance with the investigation of the claims, participation in discovery (including travel to California to appear for deposition), willingness to litigate on behalf of the Class, and other support provided on behalf of the Class.
- **Attorneys' Fees.** Class Counsel's attorneys' fees and costs award will be determined by the Court, and will be paid from the Gross Settlement Fund. eBay has agreed not to oppose Class Counsel's request for fees to the extent the Ninth Circuit Court of Appeals and the Northern District of California cases continue to acknowledge that 25% of a common fund is a "benchmark" fee for class counsel, subject to other considerations. Class Counsel will file their application for fees and costs within 45 days of preliminary approval, and the application will be available on the Settlement website. In order to comply with *In re Mercury Interactive Securities Litigation*, 618 F.3d 988 (9th Cir. 2010), Plaintiffs' Counsel's fee application will be filed and posted on the Internet posting website over a month prior to the objection deadline.
- **Notice.** The Parties have agreed to notify Class Members of the Settlement in the following ways: (i) by email to each Class Member, which shall include a hypertext link to the Settlement website; (ii) by Internet Posting, i.e., a Settlement website created to provide information about the Settlement, including the Full Notice; (iii) by Mail Notice for those Class Members whose email notices are returned as undeliverable; and (iv) by press release, in order to reach Class Members for whom eBay does not have a current email or postal address.
- **Release of Claims.** Under the Settlement Agreement, Class Members release all claims and causes of action that are asserted in the Action or could have been asserted based on the allegations in the Action, as more specifically defined in the Settlement Agreement.
- **Opting Out.** To be excluded from the Class, a Class Member must send an email, letter, or postcard to the Claims Administrator containing all of the following information: (a) the title of the Action: "*Richard Noll v. eBay Inc., Case No. 5:11-CV-04565 EJD*"; (b) the full name, address, telephone number (optional) and email

<sup>7</sup> These percentages are based on an estimated Net Settlement Fund of approximately \$4.5 million. The Gross Settlement Fund is \$6.4 million. Class Counsel intends to apply for 25% of the Gross Settlement fund and for an award of \$30,000 total in incentive awards for Named Plaintiffs, leaving \$4,770,000. Estimated costs and administrative expenses are \$200,000, leaving approximately \$4.5 million for the Net Settlement Fund. Total Disputed Fees are estimated at approximately \$50 million based on eBay's current best estimates and the exchange of data specific to this case.



address associated with the eBay account of the person requesting exclusion; (c) a statement that he/she does not wish to participate in the Settlement; and (d) a signature of the Class Member requesting exclusion. So-called “mass” or “class” opt-outs will not be allowed. If submitted by mail, the exclusion request must be postmarked on or before the date approved by the Court. If submitted electronically or by email, the exclusion request must be submitted by 11:59 p.m. Eastern Standard Time on or before the date approved by the Court. Under the current proposed schedule, Class Members will have 81 days after preliminary approval to exclude themselves from the Class.

- **Objections.** Any Class Member who has not opted out and wishes to object to any aspect of the proposed Settlement, must do so by filing a written objection with the Court and delivering a copy of the objection to Class Counsel and eBay’s Counsel no later than the date approved by the Court. Under the currently proposed schedule, Class Members will have 81 days after preliminary approval to file and serve their objections. The delivery date is deemed to be the date the objection is deposited in the U.S. mail as evidenced by the postmark. To be considered by the Court, the objection must include: (1) a heading containing the name and case number of the Action: *Richard Noll v. eBay Inc., Case No. 5:11-CV-04565 EJD*; (2) the Class Member’s name, email address, postal address, and telephone number that were used in conjunction with the Class Member’s eBay account; (3) a detailed statement of each objection and the factual and legal basis for each objection, and the relief that the Class Member is requesting; (4) a list of and copies of all documents or other exhibits which the Class Member may seek to use at the Fairness Hearing; and (5) a statement of whether the Class Member intends to appear, either in person or through counsel, at the Fairness Hearing, and if through counsel, a statement identifying the counsel’s name, postal address, phone number, email address, and the state bar(s) to which the counsel is admitted. Only those Class Members providing their notice of intention to appear at the Fairness Hearing, either personally or through their own, personal counsel, may speak at the Fairness Hearing. The mechanics for objecting are further detailed in the Settlement Agreement and proposed forms of notice.
- **Fairness Hearing.** The Parties propose a Fairness Hearing 130 days after the date on which preliminary approval of the Settlement is granted.

In determining to settle the Action, Plaintiffs and Class Counsel have taken into account the substantial expense and time necessary to prosecute the litigation through complete pretrial discovery, class certification (and any related appellate proceedings), trial, post-trial motions and subsequent appeals, taking into consideration the significant uncertainties in predicting the outcome of this, and any, complex litigation. During the course of the litigation, eBay has strenuously denied any liability and has maintained that no class could be properly certified. Plaintiffs recognize the uncertainty and risk of the outcome of any litigation, especially complex litigation such as this, and the difficulties and risks inherent in the trial of such an action. Accordingly, Class Counsel believes the Settlement to be fair, reasonable and adequate, and in

the best interests of the Class, and Plaintiffs desire to settle the claims of the Class against eBay on the terms and conditions described herein, which provide substantial and immediate benefits to the Class. eBay, while continuing to deny all allegations of wrongdoing or liability, desires to settle the Action in order to fully resolve the claims asserted in the Action and to avoid the further burdens of litigation.

## **V. ARGUMENT AND AUTHORITIES**

### **A. THE COURT SHOULD CERTIFY A SETTLEMENT CLASS.**

The party seeking class certification must show<sup>8</sup> that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. *In re Google Referrer Header Privacy Litig.*, No. 5:10-CV-04809 EJD, 2014 WL 1266091, at \*2 (N.D. Cal. Mar. 26, 2014); *accord Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548, 180 L. Ed. 2d 374 (2011). Rule 23(a) requires: (1) numerosity of parties; (2) commonality of legal and factual issues; (3) typicality of claims and defenses of the class representatives with the putative class; and (4) adequacy of representation. *Blake v. Arnett*, 663 F.2d 906, 912 (9th Cir. 1981). Rule 23(b) requires that questions of law or fact common to the class predominate over individual questions and that a class action be superior to other methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Applying these standards, Judge Tigar granted certification of a settlement class in two other eBay matters that involved similar issues and similar settlement structures. *See Custom LED*, 2013 U.S. Dist. LEXIS 165881, at \*27-28; *Keirse*y, 2013 U.S. Dist. LEXIS 152531, at \*24.

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<sup>8</sup> Evidence relevant to class certification need not be formally admissible under the Federal Rules of Evidence. *See Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 599 (C.D. Cal. 2008) (“a motion for class certification . . . need not be supported by admissible evidence”).

1           **1.     Numerosity.**

2           Rule 23(a) requires a class to be sufficiently numerous that joinder of all members would  
 3 be impracticable. Fed. R. Civ. P. 23(a)(1). There is no minimum number necessary for  
 4 numerosity. 8 Newberg on Class Actions § 24:16 (4th Ed.) (“Newberg”); *Breeden v. Benchmark*  
 5 *Lending Group, Inc.*, 229 F.R.D. 623, 628 (N.D. Cal. 2005) (236 potential class members  
 6 sufficient to satisfy numerosity requirement) (citing *Gen. Tel. Co. of the NW, Inc. v. EEOC*, 446  
 7 U.S. 318, 330 (1980)). Numerosity considerations also include dispersion of members and their  
 8 ability to initiate suit. *See generally*, 1 Newberg § 3:6; *see also In re Unioil Sec. Litig.*, 107  
 9 F.R.D. 615, 618 (C.D. Cal. 1985) (joinder impracticable given widespread geographic dispersion  
 10 of potential class members and small amount of individual claims). The Class consists of  
 11 holders of over one million unique eBay user IDs, and the Parties agree that numerosity is met.  
 12 The Court should likewise find numerosity.  
 13  
 14

15           **2.     Commonality and Predominance.**

16           Rule 23 contains two related commonality requirements, Rule 23(a)(2) commonality and  
 17 Rule 23(b)(3) predominance. *Holtz v. Lennox Hearth Prods., Inc.*, No. C 08-00836 CW, 2010  
 18 U.S. Dist. LEXIS 14553, at \*12-13 (N.D. Cal. Feb. 16, 2010). Rule 23(a)(2) requires that there  
 19 be questions of fact and law common to the entire class. *Id.* In the Ninth Circuit, Rule 23(a)(2)  
 20 commonality has “minimal” requirements. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-20  
 21 (9th Cir. 1988). This Court has also explained that “commonality simply requires that there be at  
 22 least one legal or factual issue common to the class,” *In re Verisign, Inc. Sec. Litig.*, No. C-02-  
 23 02270JW, 2005 U.S. Dist. LEXIS 10438, at \*13 (N.D. Cal. Jan. 13, 2005).  
 24

25           Rule 23(b)(3) requires that common issues predominate over individual issues. *Amchem*  
 26 *Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance tests whether a proposed class  
 27 is sufficiently cohesive to permit adjudication by representation. *In re Juniper Networks, Inc.*  
 28

1 *Sec. Litig.*, 264 F.R.D. 584, 587 (N.D. Cal. 2009); *see also In re Google Referrer Header*  
2 *Privacy Litig.*, No. 5:10-CV-04809 EJD, 2014 WL 1266091, at \*3 (N.D. Cal. Mar. 26, 2014)  
3 (finding commonality based on the “system-wide practice and policy” at issue in the case). The  
4 proposed Class presents common legal questions that predominate.

5  
6 Plaintiffs contend that this case arises out of a User Agreement and various web pages  
7 that describe the GTC Listing duration and the applicable fees, among other things. The User  
8 Agreement applies to all Class Members, and Plaintiffs contend that all questions related thereto  
9 are common. The Fees Schedules and other webpages that mention GTC Listings are likewise  
10 applicable to all Class Members. Plaintiffs contend that how GTC Listings were described, and  
11 how they worked, and the relevant contractual terms are the same for all Class Members, thus  
12 establishing both commonality and predominance.

### 13 14 **3. Typicality.**

15 Typicality requires that “the claims or defenses of the representative party be typical of  
16 the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The Ninth Circuit interprets  
17 typicality permissively. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). It is  
18 sufficient for the named plaintiff’s claims to arise from the same remedial and legal theories as  
19 the class claims. *Arnold v. United Artists Theater, Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994).

20  
21 Here, Plaintiffs’ claims arise from the same factual basis as any other member of the  
22 Class. Plaintiffs selected the GTC listing duration and testified that they believed the applicable  
23 Fees Schedules did not permit eBay to charge recurring fees not mentioned on those Fees  
24 Schedules. eBay challenged that assertion, among other ways, based on the fact that Plaintiffs  
25 continued to buy GTC Listings and pay recurring listing fees after they undisputedly knew that  
26 such fees would be charged (e.g., from their invoices and other information). Plaintiffs contend  
27 that eBay’s defenses as to Plaintiffs are typical of its defenses as to the entire Class. Moreover,  
28

1 Plaintiffs seek the same relief as other members of the Class. They do not seek any unique lost  
2 profits or other consequential damages, but merely a pro-rata refund of the Disputed Fees they  
3 paid during the Class Period.

4 **4. Adequacy.**

5 Adequacy requires that the class representative “fairly and adequately protect the  
6 interests of the class,” which requires (1) that there be no conflicts of interest between the  
7 representative and the proposed class; and (2) that qualified and competent counsel represent the  
8 proposed class. Fed. R. Civ. P. 23(a)(4). The purpose of this requirement is to ensure that  
9 settlement distributions are allocated fairly without prejudicing certain groups of class members.  
10 *Hanlon*, 150 F.3d at 1020. The allocation here is uniform for all Class Members, and applies  
11 independently of the particular eBay marketplace or date of listing. Moreover, Plaintiffs had  
12 listings throughout the Class Period and have no motivation to allocate more or less of the Net  
13 Settlement Fund to any marketplace or time period. Accordingly, Plaintiffs have no conflict with  
14 the Class and believe the proposed method of calculating settlement distributions is fair.

15 In addition, Plaintiffs’ attorneys have extensive experience in class action cases and have  
16 vigorously conducted discovery, research, and investigation of the Class claims. [Verges Decl.  
17 ¶¶ 2-6.] Plaintiffs’ counsel has studied thousands of pages of documents, engaged consulting and  
18 testifying experts to study computer data and render economic opinions, and also has extensive  
19 experience with eBay from prior litigation with eBay. [*Id.*] Accordingly, the adequacy  
20 requirements have been met.

21 **5. Superiority.**

22 Superiority focuses on evaluating whether “class wide litigation of common issues will  
23 reduce litigation costs and promote greater efficiency.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d  
24 1227, 1234 (9th Cir. 1996). A class action is the superior method for resolving this case by  
25

1 settlement because (a) the individual remedy for each Class Member is relatively small,<sup>9</sup> making  
 2 the expense and burden of continued individual litigation economically and procedurally  
 3 impracticable; (b) no other litigation on this topic exists; (c) this forum is the best place to  
 4 concentrate claims based on the location of eBay's headquarters, the evidence, and the witnesses;  
 5 and (d) the proposed settlement of this case is readily manageable. eBay agrees, for purposes of  
 6 settlement only, that certification of a settlement class is superior to other methods of  
 7 adjudication, because it efficiently resolves class claims promptly and at a lower cost than  
 8 continued litigation. Moreover, collective resolution of the claims avoids the possibility of  
 9 duplicative individual controversies or inconsistent future judicial determinations. The proposed  
 10 settlement administration process is far more manageable than individual lawsuits or other  
 11 claims by Class Members. In addition, the computer data that has already been analyzed in this  
 12 case provides for ready determination of each Class Member's proposed recovery. Accordingly,  
 13 the proposed class action settlement is superior to other individual means of adjudicating this  
 14 controversy, and the Court should therefore certify the Class for purposes of the settlement.

17 **B. THE COURT SHOULD GRANT PRELIMINARY**  
 18 **APPROVAL OF THE PROPOSED SETTLEMENT.**

19 Plaintiffs respectfully submit that the proposed Settlement is fair, reasonable, and  
 20 adequate and warrants preliminary approval.

21 **C. STANDARD FOR PRELIMINARY APPROVAL OF SETTLEMENT.**

22 The Ninth Circuit has declared a strong judicial policy in favor of class action settlement.  
 23 *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). This public policy  
 24 further means that the Ninth Circuit "has long deferred to the private consensual decision of the  
 25 parties" to settle. *See Rodriguez v. W. Publ'g Corp.* 563 F.3d 948, 965 (9th Cir. 2009); *see also*  
 26

27 <sup>9</sup> The Parties estimate that approximately \$40 in Disputed Fees were at issue per unique eBay user ID.  
 28

1 *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) ("strong judicial policy  
2 that favors settlements, particularly where complex class action litigation is concerned").

3 This Court should approve this Settlement if it finds that it is "fair, reasonable, and  
4 adequate." Fed. R. Civ. P. 23(e)(1)(C); *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD,  
5 2014 WL 4273358, at \*3-4 (N.D. Cal. Aug. 29, 2014). Therefore, the question is "not whether  
6 the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free  
7 from collusion." *Hanlon*, 150 F.3d at 1027. A settlement under Rule 23(e) requires that the  
8 Court balance a number of factors, including: (1) the strength of the plaintiff's case; (2) the risk,  
9 expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class  
10 action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery  
11 completed; (6) the experience and views of counsel; (7) the presence of a governmental  
12 participant; and (8) the reaction of the class members to the proposed settlement. *Rose*, 2014  
13 WL 4273358, at \*3-4; *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). This  
14 evaluation should be made in the context of a public policy which strongly favors the pretrial  
15 settlement of class action lawsuits. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625  
16 (9th Cir. 1982) ("Voluntary conciliation and settlement are the preferred means of dispute  
17 resolution. . . ."). The proposed settlement easily satisfies these criteria.

18  
19  
20  
21 **1. Application of This Standard.**

22 **a. The Strength of Plaintiffs' Case.**

23 Plaintiffs believe they have meritorious claims, but they nonetheless face substantial  
24 defenses based on eBay's assertion that its disclosures and invoices disclosed the disputed fees to  
25 sellers, among other issues that Plaintiffs would need to overcome in order to prevail on the  
26 merits. The Court has twice dismissed the fraud-based claims, and dismissed with prejudice all  
27 claims seeking recurring Insertion Fees at any time the operative Fees Schedules stated that  
28



1 “Insertion Fees are charged every 30-day period.” While Plaintiffs may appeal these rulings, the  
2 fact remains that there is no current claim to recover Insertion Fees for the majority of the  
3 proposed Class Period. [Verges Decl. ¶ 18.]

4 With respect to their remaining claims to recover recurring charges of Optional Feature  
5 Fees, Plaintiffs believe that eBay was required to clearly and unequivocally state that both  
6 Insertion Fees and Optional Feature Fees would be charged every 30 days for GTC Listings.  
7 However, there is risk that the Court or a jury might find that extrinsic evidence beyond the face  
8 of the contract, such as the August 2008 Update and other materials disclosing recurring fees,  
9 might permit eBay to charge fees on a recurring basis for GTC Listings. Moreover, it is  
10 undisputed that invoices with the itemized recurring fees were sent to all Class Members, and the  
11 Court or a jury might find that Class Members knowingly or voluntarily paid recurring fees,  
12 especially fees paid for listings that renewed for multiple months. In other words, as eBay has  
13 argued, even if a seller did not initially understand that fees would be charged every 30 days, the  
14 seller would still have known they were getting charged recurring fees when they received and  
15 paid invoices in the second and subsequent months of the listing. Accordingly, while Plaintiffs  
16 believe that the invoices were not adequate to disclose the recurring nature of fees for GTC  
17 Listings, there is a material risk that eBay could prevail on the merits and/or prevent class  
18 certification through this theory of “voluntary” payment or failure to mitigate damages. This risk  
19 is potentially greater for listings that renewed in several successive months, for which sellers  
20 would have received multiple monthly invoices. Accordingly, there are a significant number of  
21 risks on both class certification and the merits that make this immediate settlement fair. [*Id.*]



b. The Risk, Expense, Complexity, and  
Likely Duration of Further Litigation.

Additionally, the cost of litigating this dispute has been and would continue to be significant, and such costs can only increase. As noted by Judge Armstrong:

Had Federal Plaintiffs continued to litigate, they would have faced a host of potential risks and costs, including the potential for successful attacks on the pleadings, high costs associated with lengthy and complex litigation, potential loss on summary judgment, and risks and costs associated with trial, should the case progress that far. Indeed, even a favorable judgment at trial may face post-trial motions and even if liability was established, the amount of recoverable damages is uncertain. The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation.

*In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA(JCS), 2008 WL 5382544, at \*3 (N.D. Cal. Dec. 22, 2008). This case has already been expensive, both from a time and out-of-pocket cost perspective. Plaintiffs' counsel have devoted over three years to this case, have litigated multiple motions, and have participated in extensive discovery. Plaintiffs also anticipate that costs will significantly increase, due to merits discovery, the need to conduct extensive data analysis, and to analyze economic issues. Moreover, the case would likely continue for at least one more year in the trial court, not to mention delays on appeal. There could be an interlocutory appeal of any grant of class certification and there would almost certainly be an appeal on any merits decision favorable to Plaintiffs. All of these considerations would delay resolution of this case, and any potential benefits to sellers, for probably three additional years or longer. This delay would also mean that certain Class Members might not be reimbursed at all, because they might have changes of address or other changes that make notice and distribution of any award difficult or impossible. This Settlement prevents all of these issues and allows for immediate distribution of a substantial fraction of the Disputed Fees at issue. [Verges Decl. ¶¶ 19, 24.]

1                   c.       The Risk of Maintaining Class Action Status Throughout Trial.

2           No class has yet been certified and this Settlement further accounts for the risk that class  
3 certification would be denied. While Plaintiffs contend that all Class Members' experiences  
4 were identical and predicated on uniform web pages published by eBay, eBay would make many  
5 arguments to the contrary. For example, eBay asserts that Plaintiffs' contract claim cannot be  
6 certified because extrinsic evidence unique to each seller would be needed to determine each  
7 seller's expectations regarding the fees for GTC Listings and the seller's ability to recover  
8 payments of recurring fees. *See, e.g., Sacred Heart Health Sys., Inc. v. Humana Military*  
9 *Healthcare Servs., Inc.*, 601 F.3d 1159, 1176-77 (11th Cir. 2010) (denying certification of  
10 contract claim because "[e]ven the most common of contractual questions—those arising, for  
11 example, from the alleged breach of a form contract—do not guarantee predominance if  
12 individualized extrinsic evidence bears heavily on the interpretation of the class members'  
13 agreements"); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1030 (8th Cir. 2010) (denying  
14 certification because a contractual ambiguity "opens the door for extrinsic evidence about what  
15 each party intended when it entered the contract" so the defendant's "liability to the entire class  
16 for breach of contract cannot be established with common evidence"); *accord Lonely Maiden*  
17 *Prods., LLC v. GoldenTree Asset Mgmt., LP*, 201 Cal. App. 4th 368, 376 (2011). While Plaintiffs  
18 believe that any ambiguity in the contract must be resolved on a class-wide basis based on the  
19 objectively reasonable expectations of a typical consumer, eBay's argument presents a risk that  
20 certification might be denied due to individual issues on contract interpretation and on eBay's  
21 defenses of voluntary payments, mitigation, and others. [Verges Decl. ¶ 20.]

22           eBay also argues that Plaintiffs cannot show that the damages claims for all sellers can be  
23 resolved on a class-wide basis, and has provided an economic expert who opines that individual  
24 issues predominate. *See Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013) (plaintiff seeking  
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certification under Rule 23(b)(3) must establish “through evidentiary proof” that “damages are capable of measurement on a classwide basis”). eBay and its expert contend that individualized information such as the following would be required to assess liability and damages:

- Whether the person knew about recurring fees and/or had seen the August 2008 update and other information that disclosed recurring fees;
- The number of times the listing renewed;
- Whether the seller saw, studied and paid invoices with renewal fees;
- How many GTC Listings the seller placed, and whether the seller placed Stores GTC Listings prior to March 30, 2010 (which were subject to a Fees Schedule that properly disclosed recurring fees and could tend to dispel an assumption that GTC fees are charged only a single time); and
- The revenues and profits the seller received from each sale (which eBay claims must be offset against any recovery of fees).

[Verges Decl. ¶ 21.] Plaintiffs assert that *Comcast* is limited to antitrust cases where damages are intrinsically complex and that their refund model fits within the general rule that “damage calculations alone cannot defeat certification.” *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). Nonetheless, the need to present common proof of damages creates further risk on class certification and imposes significant added expense to the class for damages experts. The Settlement provides the Class a significant recovery on claims that eBay vigorously disputes and will eliminate the risk that no class might be certified.

**d. The Amount Offered in Settlement.**

The amount of the estimated Net Settlement Fund is approximately nine percent (9%) of the total amount of Disputed Fees at issue. Those Disputed Fees include the listing fees incurred in *all* renewal periods of the GTC Listings in dispute, not just the first renewal. The total amount of Disputed Fees attributable to the first renewal period alone is approximately \$9 million, so the

1 Net Settlement Fund is approximately 50% of these fees. Recovering half of those fees is an  
2 excellent result in the face of eBay's defense that, at most, only the first renewal period of each  
3 GTC Listing is at issue. [Verges Decl. ¶ 22.] In summary, given the Court's dismissal of many  
4 of Plaintiffs' initial claims, the risks presented on class certification, and the risks at trial,  
5 Plaintiffs' Counsel believes that this settlement is fair, reasonable, and adequate.  
6

7 **e. The Extent of Discovery Completed.**

8 Plaintiffs completed extensive discovery, described in the procedural history section  
9 above and in the attached declaration. [Verges Decl. ¶¶ 6-22.]

10 **f. The Experience and Views of Counsel.**

11 Given the uncertainty and substantial expense of going forward with a motion for class  
12 certification and trial on the merits against eBay, it is the informed opinion of Plaintiffs'  
13 experienced counsel that the proposed settlement is fair, reasonable and adequate, and warrants  
14 judicial approval. [Verges Decl. ¶¶ 6, 25]; *see Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*,  
15 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("Great weight" is accorded to the recommendation of  
16 counsel, who are most closely acquainted with the facts of the underlying litigation."). Plaintiffs'  
17 counsel has extensive experience in litigating class actions, and the Settlement was reached after  
18 thorough analysis of the applicable law and facts. The proposed Settlement is the result of  
19 extensive arm's-length bargaining and was achieved only after extensive analysis, hard-fought  
20 litigation, and difficult negotiations – including two formal mediations before retired judges  
21 (Judge Tevrizian and Judge West of JAMS). [Verges Decl. ¶25.] The issues have been hotly  
22 contested from the outset by extremely capable counsel on both sides. During the course of this  
23 litigation and the parties' settlement discussions, eBay argued vigorously that it had no liability  
24 to Plaintiffs and that no class could be certified. Although Plaintiffs believe they have  
25 meritorious claims, several potential hurdles weigh in favor of settlement, including  
26  
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(1) uncertainties surrounding contract construction on each of Plaintiffs' theories, (2) differences among sellers' experiences regarding the web pages viewed and invoices received, and (3) eBay's various defenses, which raise issues of voluntary payments, failure to mitigate damages, and other issues. In addition, the Parties and their respective experts could be expected to offer sharply conflicting opinions on how damages should be calculated (if at all) and the amount of damages for each listing (if any). All told, the Settlement will provide a significant recovery to the Class while eliminating the risk of a negative outcome in litigation

**g. The Presence of a Governmental Participant.**

There are no governmental participants, and Plaintiffs' counsel believes that this indicates no other option for recovery by the Class Members, another factor in favor of settlement.

**h. The Reaction of the Class Members to the Proposed Settlement.**

There have been no other cases instituted, and Plaintiffs' counsel has received numerous contacts from actual or prospective Class Members in favor of continuing to pursue eBay on this matter. Notice has not been distributed, and upon application for final approval, Plaintiffs' counsel will address the existence of any objections or other reactions by Class Members. At this stage, however, Plaintiffs' counsel believes that this factor warrants approval.

**2. Credits Are a Fair and Appropriate Method of Distributing Settlement Proceeds to Class Members with Active Accounts.**

As explained above, Class Members will not need to submit a claim to verify that they incurred Disputed Fees during the Class Period. Class Members with Active eBay Accounts do not need to do anything to receive a Credit. Judge Tigar has approved the use of credits as a default means of distribution in two other class settlements with eBay. *Custom LED, LLC*, 2013 U.S. Dist. LEXIS 165881, at \*13; *Keirse*, 2013 U.S. Dist. LEXIS 152531, at \*13. The Credit can be used to pay fees that Class Members may incur in using eBay, though if the Class

1 Member owes outstanding amounts to eBay, the Credit will be applied to satisfy those amounts  
2 first. Active eBay Account holders who prefer a check can request one, subject to limited  
3 exceptions as noted below. All Class Members without an Active eBay Account will receive a  
4 check. The Parties believe that this is the best way to deliver benefits to Class Members.

5  
6 **a. Credits Provide Direct Benefits to Class Members Regardless of How They Are Applied.**

7 Account Credits provide essentially the same benefit as a cash payment, and in some  
8 ways are better. First, for users with Active eBay Accounts, a Credit will be of immediate value  
9 and requires no effort to deposit a check to use those funds for existing or future eBay fees.  
10 Since all Class Members have placed listings on eBay in the past, there is a good likelihood that  
11 they have a balance due or will place a listing again and will easily benefit from their account  
12 Credit. Second, any Class Member can request a refund of any positive account balance under  
13 eBay's existing policy. See <http://pages.ebay.com/help/sell/refunds.html>.  
14

15 **b. Class Members Who Get Credits by Default Are Not Disadvantaged.**

16 Importantly, any Class Member who would otherwise get a Credit has the *option* to  
17 receive a Settlement Check on request (subject to a \$2 threshold for Active eBay Account  
18 holders as explained below). Thus, if a Class Member does not plan to continue selling on eBay,  
19 or if they do not want their Credits to be applied to outstanding balances, the seller can simply  
20 ask to receive the full settlement distribution by check (at no cost to them). [Exh. C at ¶ 2.1(e).]  
21

22 **c. Credits Are the Most Efficient Method of Distribution.**

23 Credits are the most cost-effective method of distribution because they can be  
24 implemented through existing eBay business processes and without a claims process. In  
25 contrast, it will cost approximately \$1 to send each check (including the costs of issuance and  
26 postage) with additional costs likely to be incurred for re-issuing and re-mailing checks to certain  
27  
28

1 Class Members. [Verges Decl. ¶ 26.] Given the estimated size of the class – approximately 1.2  
 2 million – the costs of distributing checks to all Class Members would significantly reduce the  
 3 amount of the Net Settlement Fund available for distribution to Class Members. For Class  
 4 Members with Active eBay Accounts whose recoveries are less than \$2.00, the Parties have  
 5 proposed to not offer a check option, since it makes little sense to send a check at a cost of half  
 6 the check amount, particularly where those costs will reduce the overall recovery to the Class.  
 7 Class Members without an Active eBay Account will be automatically sent a check.

9 **d. Credits Are the Most Effective Method**  
 10 **of Delivering Benefits to Class Members.**

11 Apart from cost considerations, Credits are also a more effective method of delivering  
 12 benefits because Credits will be placed automatically into Active eBay Accounts without any risk  
 13 that Class Members will simply not cash the checks they receive. In contrast, because  
 14 distributing checks requires current mailing addresses, Class Members must submit a claim form  
 15 or the Claims Administrator will have to rely on eBay's existing records, which may not reflect  
 16 the Class Member's current information. And even where Class Members receive their checks,  
 17 they must then go through the trouble of cashing them in order to receive any benefit. In  
 18 particular, Class Members who receive small checks may be unwilling to take the time to  
 19 negotiate the check and would likely prefer to get an automatic Credit.

21 Plaintiffs' counsel dealt with exactly these issues in the prior settlement of *Brice Yingling*  
 22 *d/b/a Alamo Autosports and Andy Scott v. eBay, Inc.*, Case No. C 09-01733, in this District  
 23 ("Yingling"), in which checks were sent to 2.5 million settlement class members. [Verges Decl.  
 24 ¶ 27.] The first mailing of checks cost over \$1.5 million, and there were continuing costs of over  
 25 \$100,000 for bank charges, reconciliation of bank charges, call center charges from the  
 26 administrator, and postage/processing for re-issued checks. *Id.* About 900,000 of the initial set  
 27  
 28

1 of 2.5 million checks were cashed. *Id.* In dollar volume, about \$20.3 million in checks were  
 2 issued, and about \$15.4 million were cashed. *Id.* Thereafter, Plaintiffs' counsel and the  
 3 administrator worked together to locate recipients. *Id.* First, about 10,500 checks totaling about  
 4 \$1.17 million were re-issued and mailed. *Id.* About \$500,400 of these checks were cashed. *Id.*  
 5 Second, the administrator compiled a list of persons who had not cashed checks of at least \$500  
 6 and did detailed research to locate and telephone them in an effort to be sure they would receive  
 7 and cash their checks. *Id.* This resulted in a third check mailing of 416 checks totaling about  
 8 \$626,000. *Id.* 338 checks were cashed. Of the original \$20 million in checks issued, about \$16  
 9 million were eventually cashed. *Id.* In contrast, issuing Credits ensures that Class Members with  
 10 Active eBay Accounts will get a direct economic benefit without requiring the Class Member to  
 11 do anything. For these reasons, Judge Tigar accepted the use of Credits as a default method of  
 12 distribution in both the *Custom LED* and *Keirse*y matters, as discussed above.  
 13  
 14

15 e. The *Cy Pres* Recipients Are the Next Best Recipients to Class Members.

16 As the Ninth Circuit recently recognized, the “*cy pres* doctrine allows a court to distribute  
 17 unclaimed or non-distributable portions of a class action settlement fund to the ‘next best’ class  
 18 of beneficiaries.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Nachshin*  
 19 *v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)). The *cy pres* remedy should “account for the  
 20 nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the  
 21 silent class members . . . .” *Id.* at 819-20. That said, the Ninth Circuit does “not require as part  
 22 of that doctrine that settling parties select a *cy pres* recipient that the court or class members  
 23 would find ideal. On the contrary, such an intrusion into the private parties’ negotiations would  
 24 be improper and disruptive to the settlement process.” *Id.* at 820-21; accord *Hanlon v. Chrysler*  
 25 *Corp.*, 150 F.3d. 1011, 1027 (9th Cir. 1998). With these principles in mind, the Parties agreed to  
 26 split any *cy pres* award equally between (1) National Cyber-Forensics & Training Alliance  
 27  
 28



1 (“NCFTA”); and (2) the National Consumer Law Center (“NCLC”), both non-profit  
 2 organizations. [Ex. C at ¶ 2.1(h).] These organizations were each accepted as appropriate cy  
 3 pres recipients in the *Custom LED* and *Keirse*y settlements. See *Custom LED*, 2013 U.S. Dist.  
 4 LEXIS 165881; *Keirse*y, 2013 U.S. Dist. LEXIS 152531.

5 NCFTA’s mission statement is:

6  
 7 Our mission is to provide a neutral collaborative venue where  
 8 global partners from industry, law enforcement and academia come  
 9 together, leveraging cross-sector resources to more effectively  
 10 analyze critical, real-time intelligence against emerging cyber  
 11 threats. The actionable intelligence developed is used to mitigate  
 12 and ultimately neutralize persistent global cyber threats, in an  
 13 effort to protect intellectual assets, countries and citizens.

14 <http://www.ncfta.net/Index.aspx>. One of several things NCFTA does is an Internet Fraud Alert  
 15 (“IFA”), a centralized clearinghouse and alerting mechanism allowing trusted participants to  
 16 report compromised credentials that have been uncovered online. Once reported, IFA will issue  
 17 an alert to the relevant financial institution or other service provider indicating its customer’s  
 18 credentials have been compromised. The parties believe that NCFTA has an appropriate nexus to  
 19 the purposes of fair internet trade by preventing the harm to consumers from cyber crime and to  
 20 educate and assist online marketplaces like eBay to make sure the internet is a safe and fair place  
 21 to do business.

### 22 **3. The NCLC Is a Frequent Recipient of Cy Pres Awards.**

23 Because of the expertise NCLC brings to bear in promoting justice at both the national  
 24 and state levels, it has received more than 300 awards over the past 15 years. The NCLC’s work  
 25 covers a broad range of issues, including consumer protection, unfair and deceptive acts and  
 26 practices, privacy rights, civil rights, and employment. The NCLC works with nonprofit and  
 27 legal services organizations, private attorneys, policymakers, and federal and state government  
 28 and courts across the nation. The NCLC litigates, publishes leading legal practice manuals and

1 consumer guides, provides expert testimony, writes investigative reports, trains advocates on  
 2 consumer law issues, testifies before rule-making bodies, and much more — all towards the goal  
 3 of economic justice. The NCLC therefore presents a good complement to the NCFTA with an  
 4 emphasis on consumer protection and advocacy, not just internet security in general. After much  
 5 negotiation, the parties concluded that these two organizations presented a fair, reasonable and  
 6 adequate destination for any leftover settlement funds since these organizations benefit the Class  
 7 by providing a fair internet and supporting consumer advocacy.  
 8

9 **4. The Proposed Settlement Notice Should Be**  
 10 **Approved and Its Dissemination Authorized.**

11 The Parties request that this Court approve the proposed forms of notice and the proposed  
 12 methods of distributing notice, which are similar to those approved in both the *Custom LED* and  
 13 *Keirse*y settlements. *Custom LED*, 2013 U.S. Dist. LEXIS 165881; *Keirse*y, 2013 U.S. Dist.  
 14 LEXIS 152531. Federal Rule of Civil Procedure 23(e) provides that “[t]he court must direct  
 15 notice in a reasonable manner to all class members who would be bound by the [proposed  
 16 settlement].” Fed. R. Civ. P. 23(e)(1). “Rule 23(e) gives the court ‘virtually complete’ discretion  
 17 as to the manner of service of settlement notice.” *Colesberry v. Ruiz Food Prods., Inc.*, No. CV  
 18 F 04-5516, 2006 U.S. Dist. LEXIS 45024, at \*20 (E.D. Cal. May 17, 2006) (citing *Franks v.*  
 19 *Kroger Co.*, 649 F.2d 1216, 1222-23 (6th Cir. 1981)).  
 20

21 Federal Rule of Civil Procedure 23(c)(2)(B) provides, in pertinent part that, “[f]or any  
 22 class certified under Rule 23(b)(3), the court must direct to class members the best notice  
 23 practicable under the circumstances, including individual notice to all members who can be  
 24 identified through a reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Proper notice should  
 25 include:  
 26

- 27 • the essential terms of the proposed settlement;

- disclosure of any special benefits provided to the class representatives;
- information regarding attorney fees;
- the time and place of the hearing to consider approval of the settlement, and the method for objecting to the settlement;
- explanation of the procedures for allocating and distributing settlement funds; and a procedure for making inquiries.

*Colesberry*, 2006 U.S. Dist. LEXIS 45024, at \*20.

The proposed notice and the method of dissemination meet each of these requirements. Email is the primary method by which eBay communicates with its customers. By definition, all Class Members formed their relationships with eBay via electronic communications and therefore email is the best way to notify the Class. Accordingly, Class Members will be sent notification via an email to their account, where available, which will notify them of the Settlement and provide a hyperlink to the Settlement website. For Class Members whose emails are undeliverable, or for which no email address is available, notice will be sent by United States mail to the last known address for that Class Member, if available. The Settlement website will also contain all of the relevant details of the Settlement. Finally, there will be a press release.

Accordingly, the content and method of dissemination of the proposed notice fully comports with the requirements of due process and applicable case law. *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266, at \*13-14 (N.D. Cal. Nov. 16, 2007) (“Email notice was particularly suitable in this case, where settlement class members’ claims arise from their visits to Defendants’ Internet websites.”); *accord Lundell v. Dell, Inc.*, No. C05-3970 JW (RS), 2006 U.S. Dist. LEXIS 90990, at \*2-3 (N.D. Cal. Dec. 5, 2006) (Ware, J.). The Court should approve the proposed Notice and direct that it be distributed as agreed.

**D. THE COURT SHOULD SCHEDULE A FAIRNESS HEARING AND  
APPROVE THE PROPOSED PRELIMINARY APPROVAL ORDER.**

Following the approval and entry of the proposed Preliminary Order and dissemination of notice to Class Members pursuant thereto, the Parties request the Court conduct a hearing (the “Fairness Hearing”) to determine whether a final judgment and order should be entered: (1) approving the proposed settlement as fair, reasonable and adequate to the Class; (2) dismissing this Action on the merits and with prejudice; (3) barring Plaintiffs and all Class Members from prosecuting, pursuing or litigating any of the Released Claims, as defined in the Settlement Agreement, against eBay; and (4) awarding Class Counsel’s fees and expenses from the Settlement Fund and granting an enhancement award to Plaintiffs. In that regard, the Parties propose the following deadlines:

Event	Proposed Deadline
Deadline for dissemination of Class Notice	Order <sup>10</sup> + 30 days
Deadline for Class Counsel to file application for award of attorneys’ fees, reimbursement of expenses, and request incentive awards for Plaintiffs	Order +45 days
Deadline for mailing requests for exclusion	Postmarked by Order + 81 days
Deadline for filing objections to settlement (including request for attorneys’ fees and Plaintiffs’ enhancement award)	Order + 81 days
Deadline for filing Motion for Final Approval and other submissions in support of Settlement	Order + 100 days
Deadline for Class Counsel to reply to any opposition memorandum filed by objectors	Order + 110 days
Deadline to file affidavit of notice of mailing	At or before Final Fairness Hearing
Fairness Hearing	Later of 130 days or June 11, 2015

<sup>10</sup> “Order” refers to any order preliminarily approving the class settlement.

## VI. CONCLUSION

For the foregoing reasons, Class Representatives respectfully request that this Court (1) conditionally certify the Class and preliminarily approve the terms of the Settlement reached by the parties; (2) approve the form and method of notice of the settlement and of the pendency of the litigation to the Class and order that such notice be given; and (3) set dates and procedures for the final fairness hearing, including deadlines for Class Members to file objections to the proposed settlement or to request that they be excluded from the settlement.

Dated: January 15, 2015.

Respectfully submitted,

By: /s/ Keith R. Verges

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ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record will be served with a copy of this document via the Court's CM/ECF system pursuant to the local rules of this Court, on this 15th day of January, 2015.

/s/ Keith R. Verges

Keith R. Verges

# EXHIBIT A

## SETTLEMENT AGREEMENT AND RELEASE

**THIS SETTLEMENT AGREEMENT AND RELEASE** (“*Settlement Agreement*”) is entered into between Plaintiffs Richard Noll (“Noll”) and Rhythm Motor Sports, LLC (“Rhythm”) (“*Plaintiffs*”), individually and in their representative capacities on behalf of the Class, and Defendant eBay Inc. (“*eBay*”) (Plaintiffs and eBay collectively, “*Parties*,” or singularly, “*Party*”), subject to approval of the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure.

### RECITALS

**A.** On September 15, 2011, Noll commenced a civil action in the United States District Court for the Northern District of California entitled *Richard Noll v. eBay Inc.*, Case No. 5:11-CV-04585 EJD (the “Action”), which related to recurring fees for listings placed with the Good ‘Til Cancelled duration (“GTC Listings”). On July 10, 2012, Rhythm commenced a substantially similar case entitled *Rhythm Motor Sports, LLC v. eBay Inc.*, Case No. 5:12-CV-03601 HRL, which was later voluntarily dismissed in conjunction with Rhythm’s intervention in the Action.

**B.** On October 31, 2011, and on October 17, 2012, eBay filed motions to dismiss the Original and Second Amended Class Action Complaints, respectively. In orders dated April 23, 2012 and May 30, 2012, the Court dismissed the claims based on (1) fraud; (2) California’s Unfair Competition Law (“UCL”) (California Business & Professions Code § 17200 *et seq.*); (3) the False Advertising Law (“FAL”) (California Business & Professions Code § 17500 *et seq.*); (4) the Consumers Legal Remedies Act (“CLRA”) (California Civil Code § 1750 *et seq.*); and (5) California Business & Professions Code § 17600 *et seq.* (automatic renewal/continuous service). The Court denied eBay’s motions to dismiss the claims for (1) breach of contract; (2) unjust enrichment; and (3) declaratory judgment. On July 1, 2013, Plaintiffs filed their Consolidated Third Amended Complaint (“TAC”). The TAC alleges and re-alleges further facts in support of the previously-dismissed claims based on the (1) UCL; (2) FAL; (3) CLRA; and (4) fraud. However, the Court had previously dismissed with prejudice the Section 17600 claims and all claims to recover Insertion Fees incurred during any time period in which the applicable Fees Schedules stated that “Insertion Fees are charged every 30 day period.” The Court also had dismissed each claim asserted against eBay Europe S.a.r.l. and eBay International AG with prejudice.

**C.** On March 20, 2014, eBay answered the TAC.

**D.** The Parties have participated in written discovery, document production, and several depositions, including depositions of the Parties and experts. The Parties also attended two mediations before the Honorable Dickran Tevrizian and the Honorable Carl J. West.

**E.** The Parties have investigated the facts and have analyzed the relevant legal issues with regard to the claims and defenses asserted in the Action. Based on these investigations, Plaintiffs believe the Action has merit, while eBay believes the Action has no merit.



**F.** The Parties have each considered the uncertainties of litigation; the benefits of the proposed settlement; the costs, risks, and delays associated with the continued prosecution of this complex litigation; and the likely appeals of any rulings in favor of either Plaintiffs or eBay.

**G.** In light of these considerations, and without admitting fault or liability on the part of eBay, it is now the intention of the Parties and the objective of this Settlement Agreement to dispose of, fully and completely and forever, the claims and causes of action in the Action as specified below.

#### **AGREEMENT**

**1. DEFINITIONS.** The following section defines terms that are not defined above. Some definitions use terms that are defined later in this section:

**1.1** The term “*Active eBay Account*” means an eBay account that is active, and is not on hold because of an outstanding negative balance. eBay accounts that are suspended, closed, or on hold because of a negative balance are not considered “Active eBay Accounts.”

**1.2** The term “*Claims Administrator*” means the entity, and any successors to that entity, that Plaintiffs’ Counsel retains to administer the Settlement process provided for in the Settlement Agreement, which may include, but is not limited to: (i) providing notices as contemplated herein; (ii) receiving and tracking opt-out notices; (iii) receiving and tracking requests for Settlement Checks and sending of the same; and (iv) calculating, based on records provided by eBay, the amounts of any Credits or Settlement Checks due Class Members.

**1.3** The terms “*Class Counsel*” or “*Plaintiffs’ Counsel*” means the law firm of Figari & Davenport L.L.P.

**1.4** The terms “*Class*” and “*Class Members*” mean all natural persons and entities who are United States residents and who (1) placed GTC Listings on eBay that commenced during the Class Period, and (2) were charged Disputed Fees. Excluded from the Class are the Judge of this Court and his staff, and all directors, officers, and managers of eBay, and their immediate families. A person or entity is deemed a “United States resident” for purposes of the foregoing if the primary contact information for the person or entity in eBay’s current records is an address within the United States. This class definition and the presumption of the existence of a class are for settlement purposes only.

**1.5** The term “*Closed eBay Account*” refers to an eBay account that is closed as of the date of this Settlement Agreement.

**1.6** The term “*Court*” means the United States District Court for the Northern District of California.

**1.7** The term “*Credit*” means a credit that will be applied to a Class Member’s eBay account in an amount as set forth in Section 2.1(d) below.

**1.8** The term “*Disputed Fees*” means the Insertion Fees and Optional Feature Fees incurred by Class Members after the initial 30-day listing period of a GTC Listing, less any amounts already refunded or credited by eBay to Class Members for such recurring Insertion Fees and Optional Feature Fees, as determined from eBay’s records.

**1.9** The term “*eBay’s Counsel*” means the law firm of Cooley LLP.

**1.10** The term “*Fairness Hearing*” means the hearing at which the Court decides whether to approve this Settlement Agreement as being fair, reasonable, and adequate.

**1.11** The term “*Final Order and Judgment*” means an order and judgment finally approving the Settlement of this Action. The Parties will agree upon the contents of a proposed form of Final Order and Judgment, and will attach that proposed order to Plaintiffs’ motion seeking final approval of the Settlement.

**1.12** The term “*Final Settlement Date*” means the date on which either of the following events has occurred: (a) if no appeal or request for review is filed or made, thirty-one (31) days after eBay receives ECF notice from Plaintiffs or the Court that the Court entered the Final Order and Judgment or (b) if any appeal or request for review is filed or made, fourteen (14) days after the date on which Plaintiffs file and eBay receives ECF notice that a court entered an order affirming the Final Order and Judgment or dismissed the appeal or otherwise denied review and the time for seeking all appeals has expired.

**1.13** The term “*Full Notice*” means the legal notice of the proposed Settlement terms, as approved by Class Counsel, eBay’s Counsel, and the Court, to be provided to Class Members under Section 3.3 of this Settlement Agreement.

**1.14** The term “*Gross Settlement Fund*” means the \$6,400,000 described in Section 2.1 of this Settlement Agreement.

**1.15** The term “*Net Settlement Fund*” means the remaining balance of the Gross Settlement Fund after payment of any and all fees and costs from the Gross Settlement Fund, including, but not limited to the court-approved award of fees and costs to Class Counsel, court-approved enhancement awards for Named Plaintiffs, and any administrative costs related to or incurred by the Claims Administrator.

**1.16** The term “*Internet Posting*” means a website to be established by the Claims Administrator for the proposed Settlement for the purposes of providing the Class with the Full Notice of the Settlement, and making the Full Notice available for downloading.

**1.17** The term “*Insertion Fee*” means the initial fee that an eBay seller is charged in order to list an item for sale on the eBay website. Insertion Fees are different from, and do not include Optional Feature Fees, defined below, or Final Value Fees, which are the fees that a seller is charged after a successful sale.

**1.18** The term “*Optional Feature Fee*” means the optional fee(s) that sellers may incur to purchase optional advanced listing upgrades or other optional features for their listings (e.g., scheduled listings, Gallery Plus, Listing Designer, Subtitle, Value Pack, and Bold).

Optional Feature Fees are different from, and do not include Insertion Fees, defined above, or Final Value Fees, which are the fees that a seller is charged after a successful sale.

**1.19** The term “*Named Plaintiffs*” means Plaintiffs Noll and Rhythm in their individual capacities.

**1.20** The term “*Preliminary Approval and Provisional Class Certification Order*” or “*Preliminary Approval Order*” means an order preliminarily approving the Settlement of this Action and provisionally certifying the Class. The Parties will agree upon the contents of a proposed form of Preliminary Approval and Provisional Class Certification Order, and will attach that proposed order to Plaintiffs’ motion for preliminary approval of the Settlement and for provisional class certification.

**1.21** The term “*Settlement*” means the settlement of this Action and related claims.

**1.22** The term “*Settlement Check*” means a check sent to a Class Member in lieu of a Credit.

**1.23** The term “*Class Period*” means (1) for Stores Listings, the period from March 30, 2010 to June 19, 2012, and (2) for Core Listings and Motors Listings, the period from September 16, 2008 to June 19, 2012.

**1.24** The term “*Summary Notice*” means the legal notice summarizing the proposed Settlement terms, as approved by Class Counsel, eBay’s Counsel, and the Court, which is to be provided to Class Members under Section 3.3(b) of this Settlement Agreement by email.

**1.25** The term “*Core Listing*” means a listing that, according to eBay’s records, was placed by a seller on the standard eBay marketplace (i.e., a listing that is not a Motors Listing or a Stores Listing).

**1.26** The term “*Motors Listing*” means a listing that, according to eBay’s records, was placed by a seller on eBay Motors, a specialty site on eBay for automotive vehicles, parts, and accessories, as described on the eBay website at <http://pages.ebay.com/help/buy/eBayMotors.html>.

**1.27** The term “*Stores Listing*” means a listing that, according to eBay’s records, was placed by a seller in an eBay Store, as described on the eBay website at <http://pages.ebay.com/help/sell/questions/ebay-store.html>.

**1.28** The plural of any term defined herein includes the singular and vice versa.

## **2. SETTLEMENT TERMS**

**2.1 Gross Settlement Fund.** As consideration for the Settlement and subject to Court approval, eBay will make available a Gross Settlement Fund in the total value of \$6,400,000. In no circumstance will eBay be obligated to pay any amount beyond the amount of

the Gross Settlement Fund. Amounts will be distributed from the Gross Settlement Fund as set forth below.

- (a) **Named Plaintiff Enhancement Awards.** Plaintiffs intend to seek and eBay does not object to an enhancement award of \$15,000 each to Named Plaintiffs for their participation in this Action, subject to Court approval. Plaintiffs agree to not petition the Court for or otherwise seek more than this amount for an enhancement award. A reduction by the Court or by an appellate court of the enhancement award sought by Plaintiffs shall not affect any of the Parties' rights and obligations under the Settlement Agreement, and shall only serve to increase the amount of the Net Settlement Fund to be distributed to Class Members. If the Court approves the Settlement of this Action and the enhancement award to Named Plaintiffs, eBay agrees to pay the enhancement award approved by the Court up to the amount specified above to Named Plaintiffs within thirty (30) days after the Final Settlement Date and receipt by eBay from Named Plaintiffs of the appropriate tax forms.
  
- (b) **Class Counsel's Attorneys' Fees and Costs Award.** Class Counsel's attorneys' fees and costs award will be determined by the Court, and will be paid from the Gross Settlement Fund. On or before the date specified in the Preliminary Approval Order, Class Counsel will submit their application requesting approval of an award of attorney's fees in an amount of up to 25% of the Gross Settlement Fund plus reasonable out-of-pocket costs and expenses. eBay will not oppose the requests in Sections 2.1 (a) and (b) above to the extent the Ninth Circuit Court of Appeals and the Northern District of California cases continue to acknowledge that 25% of a common fund is a "benchmark" fee for class counsel, subject to the Court's further discretion to examine the lodestar and other factors (Plaintiffs will submit their lodestar for examination by the Court and Class). A reduction by the Court or by an appellate court of Class Counsel's attorneys' fees and costs award shall not affect any of the Parties' other rights and obligations under the Settlement Agreement, and shall only serve to increase the amount of the Net Settlement Fund to be distributed to Class Members. eBay agrees to pay Class Counsel's attorneys' fees and costs award approved by the Court within thirty (30) days after the Final Settlement Date and receipt by eBay from Class Counsel of the appropriate tax forms.
  
- (c) **Administrative Costs.** Any costs incurred in connection with the administration of the settlement, including costs of notice, costs of the Internet Posting, amounts payable to the Claims Administrator (including all costs incurred by the Claims Administrator), and all other settlement administration costs will be paid from the Gross Settlement Fund. eBay agrees to pay the Claims Administrator in two installments. The first payment will occur after notice is substantially completed, and the payment will be due within thirty (30) days after receipt of an invoice

from the Claims Administrator. The second payment will be due after settlement payments to the Class Members are substantially distributed, and the payment to the Claims Administrator will be due within thirty (30) days after receipt of an invoice from the Claims Administrator.

(d) **Credits to Class Members.** After all payments are made out of the Gross Settlement Fund for the items listed in Sections 2.1(a)-(c) above, the amount of the Net Settlement Fund shall be distributed as Credits to Class Members with Active eBay Accounts as described below.

- (i) Unless the Class Member elects otherwise, each Class Member with an Active eBay Account will receive a Credit in an amount based on the percentage of Disputed Fees that the Class Member paid for GTC Listings placed during the Class Period, as compared to the total Disputed Fees that all Class Members paid for GTC Listings placed during the Class Period. Specifically, the amount of Credit due to each Class Member will be determined by calculating the amount of Disputed Fees that such Class Member incurred for GTC Listings placed during the Class Period, as a fraction of the total Disputed Fees incurred by all Class Members for GTC Listings placed during the Class Period, and applying that fraction to the Net Settlement Fund.
- (ii) To illustrate the calculation above, if the total Disputed Fees incurred by all Class Members for GTC Listings placed during the Class Period was \$10,000, and a particular Class Member incurred \$100 in Disputed Fees for GTC Listings placed during the Class Period, that Class Member would be entitled to receive 1% of the Net Settlement Fund.
- (iii) The Claims Administrator will be responsible for making the calculations above, based on records to be provided by eBay.
- (iv) For Class Members who have an outstanding balance due to eBay at the time of the issuance of the Credit, the Credit will be reduced by or applied to that outstanding balance.
- (v) If a Class Member has a remaining Credit after Credits are applied to outstanding amounts due to eBay, that Class Member can apply those remaining Credits in any manner pursuant to the normal terms and conditions that govern the use of credits by eBay users.
- (vi) Class Members with remaining Credit amounts who prefer not to use the Credit can apply for a refund of the Credit amount in accordance with eBay's existing "Requesting a refund of your eBay credit balance" policy, currently available at:

<http://pages.ebay.com/help/sell/refunds.html>.

- (vii) The calculation in Section 2.1(d) will not include Disputed Fees incurred by Class Members for which Class Members already received a refund, as determined by eBay's records. Such refunded Disputed Fees will be excluded from the calculation set forth above.
- (viii) eBay agrees to complete the issuance of Credits within 60 days after (1) the Final Settlement Date or (2) the date eBay receives data from the Claims Administrator sufficient to issue the Credits, whichever is later. eBay's issuance of such Credits will be based on the calculations by the Claims Administrator as to the amount of Credits to be received by each Class Member.

**(e) Settlement Checks to Class Members.**

- (i) Any Class Member with an Active eBay Account who does not want to receive settlement consideration in the form of a Credit may elect to receive a Settlement Check in lieu of a Credit, provided the payment due a Class Member is \$2.00 or more. To receive a Settlement Check instead of a Credit (a Class Member cannot receive both a Credit and a Settlement Check), a Class Member with an Active eBay Account must provide notice to the Claims Administrator using the process to be specified in the notices described in Section 3.3 below. This notice must be provided to the Claims Administrator no later than the date that a Class Member must either object to or opt out of the Settlement as set forth in Sections 3.6 and 3.7, below.
- (ii) The amount of the Settlement Check will be determined based on the same formula applicable to Credits, as described above in Section 2.1(d).
- (iii) The amount of a Settlement Check due to each Class Member will be determined by the Claims Administrator based on existing eBay data. The Claims Administrator shall not, however, be required to determine any balance due to eBay or offset against the check amount any amounts due to eBay.
- (iv) As stated in Section 2.1(e)(i), a Class Member is only eligible to receive a Settlement Check if the amount owed is \$2.00 or more, due to the costs associated with preparing and distributing Settlement Checks, which are approximately \$1.00 per check. For Class Members whose Credit is less than \$2.00 and who have requested a Settlement Check, the Claims Administrator shall send an email message informing him/her that a Credit will be

applied to the Class Member's eBay account.

- (v) The amount of a Settlement Check will not be based on Disputed Fees incurred by Class Members for which Class Members already received a refund, as determined by eBay's records. Such refunded Disputed Fees will be excluded from the calculation set forth in Section 2.1(d) above.
- (vi) If the Court grants final approval of the Settlement of this Action, eBay will provide to the Claims Administrator the appropriate amount necessary to fund Settlement Checks within thirty (30) days of the Final Settlement Date, and the Claims Administrator shall complete the issuance of the Settlement Checks within 60 days after the Final Settlement Date.

**(f) Class Members Who Do Not Have Active eBay Accounts**

- (i) Any Class Member who does not have an Active eBay account will receive a Settlement Check. For those Class Members who do not have Active eBay Accounts, the Claims Administrator will issue a Settlement Check to the name of the person associated with the account in eBay's records, and will send the check to the address associated with the account in eBay's records. To the extent the Class Member wants the check made out to a different person or sent to a different address, the Class Member must provide such information to the Claims Administrator. This notice must be provided to the Claims Administrator no later than the date that a Class Member must either object to or opt out of the Settlement as set forth in Sections 3.6 and 3.7, below.
- (ii) Any Class Member with a Closed eBay Account who does not receive Mail Notice must follow the same procedure as any other Class Member who requests a Settlement Check in order to receive a Settlement Check. This procedure is outlined in Section 2.1(e)(i), above.
- (iii) The amount of the Settlement Check due to Class Members who do not have an Active eBay Account will be determined based on the same formula applicable to Credits, as described above in Section 2.1(d). A Settlement Check due to Class Members who do not have an Active eBay Account is not required to be at least \$2.00.
- (iv) The amount of a Settlement Check due to each Class Member who does not have an Active eBay Account or who has a Closed eBay Account will be determined by the Claims Administrator based on existing eBay records.



- (v) The amount of a Settlement Check will not be based on Disputed Fees incurred by Class Members for which Class Members already received a refund, as determined by eBay's records. Such refunded Disputed Fees will be excluded from the calculation set forth above.
- (vi) If the Court grants final approval of the Settlement of this Action, eBay will provide to the Claims Administrator the appropriate amount necessary to fund Settlement Checks within thirty (30) days of the Final Settlement Date, and the Claims Administrator shall complete the issuance of the Settlement Checks within 60 days after the Final Settlement Date.
- (g) The amount due to each Class Member as determined by the Claims Administrator pursuant to subsections (d), (e) and (f) above will be deemed final as to Class Members, and Class Members will not be entitled to contest the accuracy of these calculations. eBay may, but is not obligated to, verify the Claims Administrator's calculations, and the Claims Administrator agrees to cooperate with reasonable requests for information in connection with such verification. In issuing Credits, eBay will rely on information from the Claims Administrator to determine which Class Members are entitled to Credits and the individual amounts of such Credits. In no circumstance will eBay be obligated to pay an amount in Credits and Settlement Checks that exceeds the amount of the Net Settlement Fund, regardless of the number of check requests from Class Members and regardless of any potential errors in calculations by the Claims Administrator.
- (h) **Distribution of Remaining Balance of Net Settlement Fund**
  - (i) Any balance remaining in the Net Settlement Fund (whether by reason of uncashed checks, Class Members with Closed eBay Accounts who do not request a Settlement Check, or otherwise) will be distributed to (1) the National Cyber-Forensics & Training Alliance ("NCFTA"), a non-profit corporation, established in 1997, dedicated to protecting consumers from cyber crime and fraud and (2) the National Consumer Law Center ("NCLC"), a nonprofit organization focusing on low income consumer law issues.

### **3. CLASS SETTLEMENT PROCEDURES**

**3.1 Cooperation to Obtain Court Approval.** The Parties will take all reasonable steps necessary to secure the Court's approval of this Settlement Agreement and the Settlement.



**3.2 Preliminary Approval and Provisional Class Certification.** Plaintiffs must move or apply for preliminary approval of the Settlement and provisional class certification by January 15, 2015, or as close to that date as practicable. The motion or application must request the Court to:

- (a) preliminarily approve this Settlement Agreement as being the product of serious, informed, non-collusive negotiations, having no obvious deficiencies, not improperly granting preferential treatment to the proposed class representatives or segments of the class, and falling within the range of possible approval;
- (b) preliminarily approve the form, manner, and content of the Full Notice, and Summary Notice described in Section 3.3;
- (c) set deadlines for objections, opting out, and the date and time of the Fairness Hearing;
- (d) provisionally certify the Class under Rule 23(b)(3) of the Federal Rules of Civil Procedure for settlement purposes only;
- (e) stay all proceedings in the Action until the Court renders a final decision on approval of the Settlement;
- (f) appoint Named Plaintiffs as representatives for the Class for settlement purposes only; and
- (g) appoint the law firm of Figari and Davenport, L.L.P. as Class Counsel for settlement purposes only.

The Parties will agree upon the contents of the proposed Preliminary Approval and Provisional Class Certification Order, and will attach their proposed form of Preliminary Approval Order to Plaintiffs' motion for preliminary approval of the Settlement and for provisional class certification.

**3.3 Notice.** Subject to the Court granting Preliminary Approval and Provisional Class Certification, the Parties agree that eBay, through the Claims Administrator, will provide the Class with notice of the proposed Settlement by the following methods. The Parties will agree upon the contents of the notices described in this section, and will attach their proposed forms of notice to Plaintiffs' motion for preliminary approval of the Settlement and for provisional class certification.

- (a) **Internet Posting.** Starting no later than 30 calendar days after entry of the Preliminary Approval Order, the Claims Administrator will set up an Internet website and post the Full Notice, which shall be downloadable. The website will be active until the Final Settlement Date. The website domain name shall be subject to the approval of each of the Parties, which approval shall not be unreasonably withheld.

- (b) **Summary Notice by Direct Email.** Within three (3) business days after entry of the Preliminary Approval Order, eBay shall provide data to the Claims Administrator necessary to send email and Mail Notice (as defined below), along with data necessary to calculate Credit and Settlement Check amounts, where that information is in the possession of eBay and can be obtained through reasonable efforts. Starting no later than 30 calendar days after entry of the Preliminary Approval Order, the Claims Administrator will send Summary Notice by email to each Class Member at the current email address that eBay maintains for each Class Member, provided eBay has an email address for the Class Member that can be identified through reasonable efforts. The Summary Notice will provide the URL of the Internet website containing the Full Notice and a U.S. postal mailing address for the Claims Administrator so that Class Members may request a paper copy of the Full Notice by U.S. mail.
- (c) **Summary Notice by Direct Mail.** For any Summary Notices sent to Class Members by email that are returned as undeliverable, Summary Notice will then be sent via first class mail (the "Mail Notice") to the mailing address, if any, associated with such Class Members that are currently in eBay's business records and can be obtained through reasonable efforts.
- (d) **Press Release.** Class Counsel will direct the issuance of a one-time press release regarding the Settlement Agreement. The contents of the press release will be as mutually agreed between eBay and Class Counsel, and shall generally be limited to a general notification of the Settlement Agreement, a statement that eBay disputes the allegations in the litigation, and a link to the website referenced above.
- (e) **Costs.** Any costs associated with the Summary Notice (either by email or direct mail) and the Internet Posting shall constitute an administrative cost and be paid from the Gross Settlement Fund. To the extent that additional notices are ordered by the Court or become necessary for the Court's approval of the Settlement Agreement, the costs, if any, of any additional notices will also constitute administrative costs to be paid from the Gross Settlement Fund.

**3.4 CAFA Notice.** Not later than ten (10) calendar days after the Settlement Agreement is filed with the Court, the Claims Administrator shall serve upon the relevant government officials notice of the proposed Settlement in accordance with 28 U.S.C. § 1715.

**3.5 Proof of Notice.** No later than seven (7) calendar days before the filing of Plaintiffs' motion in support of the Final Order and Judgment, Class Counsel will obtain a declaration from the Claims Administrator confirming that it has provided the Class with notice of the proposed Settlement in accordance with Section 3.3 above.

**3.6 Objections.** Any Class Member who has not submitted a timely written

exclusion request pursuant to Section 3.7 of this Settlement Agreement and who wishes to object to the fairness, reasonableness or adequacy of the Settlement Agreement or the proposed Settlement, to the attorneys' fees and costs award requested by Class Counsel, or to the enhancement awards for Named Plaintiffs, must do so by filing a written objection with the Court and delivering a copy of the objection to Class Counsel and eBay's Counsel no later than the date approved by the Court and specified in the notices provided for in Section 3.3 above. The delivery date is deemed to be the date the objection is deposited in the U.S. mail as evidenced by the postmark. It shall be the objector's responsibility to ensure receipt of any objection by the Court, Class Counsel, and eBay's Counsel. To be considered by the Court, the objection must include: (1) a heading containing the name and case number of the Action: *Richard Noll v. eBay Inc., Case No. 5:11-CV-04585 EJD*; (2) the Class Member's name, email address, postal address, and telephone number that were used in conjunction with the Class Member's eBay account; (3) a detailed statement of each objection and the factual and legal basis for each objection, and the relief that the Class Member is requesting; (4) a list of and copies of all documents or other exhibits which the Class Member may seek to use at the Fairness Hearing; and (5) a statement of whether the Class Member intends to appear, either in person or through counsel, at the Fairness Hearing, and if through counsel, a statement identifying the counsel's name, postal address, phone number, email address, and the state bar(s) to which the counsel is admitted. Any Class Member who files and serves a written objection, as described in this section, has the option to appear at the Fairness Hearing, either in person or through personal counsel hired at the Class Member's expense, to object to the fairness, reasonableness, or adequacy of the Settlement Agreement or the proposed Settlement, to the award of attorneys' fees and costs, or to the enhancement awards for Named Plaintiffs. However, Class Members or their attorneys intending to make an appearance at the Fairness Hearing must include a statement of intention to appear in the written objection filed with the Court and delivered to Class Counsel, and eBay's Counsel, and only those Class Members who include such a statement may speak at the Fairness Hearing. If a Class Member makes an objection or appears at the Fairness Hearing through an attorney, the Class Member will be responsible for his or her personal attorney's fees and costs.

**3.7 Opt-Out/Exclusion Requests.** Class Members may elect not to be bound by this Settlement Agreement and not to receive the compensation contemplated by this Settlement Agreement.

- (a) **Manner of Making Exclusion Request.** To make an Opt-Out/Exclusion Request, Class Members must send an email, letter, or postcard to the Claims Administrator providing: (a) the title of the Action: "*Richard Noll v. eBay Inc., Case No. 5:11-CV-04585 EJD*"; (b) the full name, address, telephone number (optional) and email address associated with the eBay account of the person requesting exclusion; (c) a statement that he/she does not wish to participate in the Settlement; and (d) a signature of the Class Member requesting exclusion. No Opt-Out/Exclusion Request will be valid unless all of the information above is included. So-called "mass" or "class" opt-outs purporting to be made on behalf of multiple persons or classes of persons shall not be allowed and shall be deemed invalid. If submitted by mail, the letter, postcard or form on which the request for exclusion is made must be postmarked on or before the date approved by

the Court and specified in the notices provided for in Section 3.3 above, with postage paid by the person requesting exclusion. If submitted electronically or by email, the Opt-Out/Exclusion Request must be submitted by 11:59 p.m. Eastern Standard Time on or before the date approved by the Court and specified in the notices provided for in Section 3.3. Any Class Member who does not serve a valid and timely written Opt-Out/Exclusion Request shall be bound by all subsequent proceedings, orders and judgments. Only Class Members who serve valid and timely Opt-Out/Exclusion Requests will be deemed to have opted out of the Class, unless the Court orders otherwise.

- (b) **Exclusion List.** On or before ten (10) calendar days after the Objection and Opt-Out deadline, the Claims Administrator shall provide eBay's Counsel and Class Counsel with a list of Class Members who have timely and validly excluded themselves from the Class. The Parties must file with the Court a complete list of all Class Members who have validly and timely excluded themselves from the Class.
- (c) **Termination Clause.** If the Class Members requesting exclusion include (1) at least one individual who paid more than \$500,000 in Disputed Fees, or (2) individuals whose aggregate Disputed Fees exceed 1% of the total Disputed Fees paid by all Class Members, then eBay may, in its sole discretion, notify Class Counsel in writing that it has elected to terminate this Settlement Agreement. Such notification of intent to terminate the Settlement Agreement must be provided a minimum of seven (7) calendar days before the filing deadline for the motion seeking final approval of the Settlement Agreement and entry of a proposed Final Order and Judgment. If this Settlement Agreement is terminated, it will be deemed null and void *ab initio*. In that event: (i) the Preliminary Approval Order and all of its provisions will be vacated by its own terms; (ii) the Action will revert to the status that existed before the Settlement Agreement's execution date; and (iii) no term or draft of this Settlement Agreement, or any part or aspect of the Parties' settlement discussions, negotiations, or documentation (including any declarations and briefs filed in support of the motion for preliminary or final approval) will have any effect or be admissible into evidence, for any purpose, in this Action or any other proceeding. However, eBay shall be responsible for paying out-of-pocket amounts that Class Counsel have incurred for payment of the Claims Administrator's reasonable fees incurred from the date of the Court's Preliminary Approval of the Settlement up to the date eBay notifies Class Counsel of termination, in an amount not to exceed \$150,000.

**3.8 Fairness Hearing and Final Order and Judgment.** Before the Fairness Hearing, Plaintiffs must move or apply for Court approval of a proposed Final Order and Judgment, the form of which shall be provided to eBay in advance of the Final Approval Hearing for review and approval. The Final Order and Judgment must be consistent with the material terms of this Settlement Agreement, including, but not limited to, the definition of the Class and

the scope of the release to be provided by Class Members. Class Counsel must file with the Court a complete list of all Class Members who have validly and timely excluded themselves from the Class. Class Counsel must also draft the application papers and give eBay's Counsel drafts of the motion or application and proposed order to review at least seven (7) calendar days before the application's filing deadline. eBay shall be permitted, but not required, to file its own joint or individual brief or statement of non-opposition in support of the motion or application for Final Order and Judgment.

**3.9 Action Status If Settlement Not Approved, Final Settlement Date Does Not Occur, or Gross Settlement Fund Not Fully Funded.** This Settlement Agreement is being entered into for settlement purposes only. This Settlement Agreement will be deemed null and void *ab initio* if: (a) the Court orders or proposes modifications of, or additions to, the Parties' proposed Preliminary Approval Order, their proposed Final Order and Judgment, the Settlement Agreement, or the proposed notices pursuant to Section 3.3 that are not acceptable to all Parties, (b) the Court does not preliminarily approve the Settlement or enter the Final Order and Judgment, or (c) the Final Settlement Date does not occur for any reason other than an objection to the amount of attorneys' fees and/or costs to be awarded to Class Counsel. In that event: (a) the Preliminary Approval Order and all of its provisions and/or the Final Order and Judgment and all of its provisions, as applicable, will be vacated by its or their own terms, including, but not limited to, vacating provisional certification of the Class, provisional appointment of Plaintiffs as class representatives and provisional appointment of Plaintiffs' counsel as Class Counsel, (b) the Action will revert to the status that existed before the Settlement Agreement's execution date, (c) no term or draft of this Settlement Agreement, or any part of the Parties' settlement discussions, negotiations or documentation will have any effect or be admissible into evidence for any purpose in the Action or any other proceeding, and (d) eBay shall retain all its rights to object to the maintenance of the Action as a class action, and nothing in this Settlement Agreement or other papers or proceedings related to the Settlement shall be used as evidence or argument by any Party concerning whether the Action may properly be maintained as a class action. In determining whether any Court-proposed or Court-ordered additions to or modifications of the Parties' proposed Preliminary Approval Order, proposed Final Order and Judgment, the Settlement Agreement, or the proposed notices pursuant to Section 3.3 are acceptable to the Parties as set forth above, the Parties each agree to exercise their judgment in good faith and will not reject additions or modifications that are merely technical or otherwise immaterial to the substance of the Settlement Agreement. If the Court orders or proposes additions or modifications to the Settlement Agreement (or to the proposed Preliminary Approval Order, Final Order and Judgment, or notices pursuant to Section 3.3), the Parties will each have seven (7) calendar days from the date of the Court's order to determine whether or not they will accept the Court's order or proposal. However, should either Party provide notice under this section that it will not accept the Court's order or proposal, then the noticing Party shall be responsible for paying the reasonable out-of-pocket expenses incurred by the other Party and paid to third parties for tasks necessary to the implementation of the Settlement from the date of the Court's Preliminary Approval of the Settlement to the date of such notice, in an amount not to exceed \$150,000.

#### 4. DISMISSAL OF ACTION AND RELEASES

**4.1 Judgment and Enforcement.** The Parties agree that should the Court grant final approval of the proposed Settlement and enter judgment, the Final Order and Judgment must include a provision for the retention of the Court's jurisdiction over the Parties to enforce the terms of this Settlement Agreement.

**4.2 Class Members' Release.** Upon entry of the Final Order and Judgment, Named Plaintiffs and all Class Members who do not validly and timely request to be excluded from the proposed Settlement, and each of their respective successors, assigns, legatees, heirs, and personal representatives release and forever discharge eBay Inc., and each of its respective direct or indirect parents, wholly or majority owned subsidiaries, affiliated and related entities, predecessors, successors and assigns, partners, privities, and any of their present and former directors, officers, employees, shareholders, agents, representatives, attorneys, accountants, insurers, and all persons acting by, through, under or in concert with them, or any of them, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, which they have or may have arising out of or relating in any way to any of the legal, factual, or other allegations made in the Action, or any legal theories that could have been raised based on the allegations of the Action (the ***"Released Claims"***).

With respect to the Released Claims, Named Plaintiffs and all Class Members who do not validly and timely request to be excluded from the Settlement, and each of their respective successors, assigns, legatees, heirs, and personal representatives, expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:

**"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."**

Named Plaintiffs and all Class Members fully understand that the facts in existence at the time this Settlement Agreement is executed and entry of the Preliminary Approval Order may be different from the facts now believed by Named Plaintiffs and Class Members and Class Counsel to be true and expressly accept and assume the risk of this possible difference in facts and agree that this Settlement Agreement remains effective despite any difference in facts. Further, Named Plaintiffs and Class Members agree that this waiver is an essential and material term of this release and the Settlement Agreement that underlies it and that without such waiver the Settlement Agreement would not have been accepted or agreed to.

**4.3 Named Plaintiffs' Release.** Upon entry of the Final Order and Judgment, Named Plaintiffs, and each of their owners, partners, successors, assigns, legatees, heirs, and personal representatives release and forever discharge defendant eBay Inc., and each of its respective direct or indirect parents, wholly or majority owned subsidiaries, affiliated and related entities, predecessors, successors and assigns, partners, privities, and any of their present and



former directors, officers, employees, shareholders, agents, representatives, attorneys, accountants, insurers, and all persons acting by, through, under or in concert with them, or any of them, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent as of the date the Parties execute this Settlement Agreement.

In addition, Named Plaintiffs, and each of their owners, partners, successors, assigns, legatees, heirs, and personal representatives, expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:

**“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”**

Named Plaintiffs fully understand that the facts in existence at the time this Settlement Agreement is executed may be different from the facts now believed by Named Plaintiffs and Class Counsel to be true and expressly accept and assume the risk of this possible difference in facts and agree that this Settlement Agreement remains effective despite any difference in fact. Further, Named Plaintiffs agree that this waiver is an essential and material term of this release and the Settlement Agreement that underlies it and that without such waiver the Settlement Agreement would not have been accepted or agreed to.

## **5. ADDITIONAL PROVISIONS**

**5.1 eBay's Denial of Wrongdoing.** This Settlement Agreement reflects the Parties' compromise and Settlement of the disputed claims. Its provisions, and all related drafts, communications and discussions, cannot be construed as or deemed to be evidence of an admission or concession of any point of fact or law by any person or entity and cannot be offered or received into evidence or requested in discovery in this Action or any other action or proceeding as evidence of an admission or concession.

**5.2 Information Provided by eBay.** eBay represents that it undertook a reasonable investigation and provided truthful, accurate and complete information based on that investigation regarding (1) the amounts of Disputed Fees paid by Class Members for GTC Listings placed at various times during the Class Period, including broken down by date, platform (e.g., Stores Listings, Motors Listings, and Core Listings) and number of renewals; (2) information regarding the content of eBay web pages related to GTC Listings and recurring fees; (3) statistics regarding the numbers of persons paying recurring fees for GTC Listings multiple times, including in excess of 10 times; and (4) sample data for GTC Listings. eBay acknowledges that this information was material to Class Counsel's evaluation of the case and that in order to minimize the expense of further discovery, Class Counsel has reasonably relied on the information provided by eBay.

**5.3 Change of Time Periods.** All time periods and dates described in this Settlement Agreement are subject to the Court's approval. These time periods and dates may be changed by the Court or by the Parties' written agreement without notice to the Class.

**5.4 Real Parties in Interest.** In executing this Settlement Agreement, the Parties warrant and represent that they, including Plaintiffs in their individual capacities and representative capacities on behalf of the Class, are the only persons or entities having any interest in the claims asserted in this Action. Neither these claims, nor any part of these claims, have been assigned, granted, or transferred in any way to any other person, firm, or entity.

**5.5 Voluntary Agreement.** The Parties executed this Settlement Agreement voluntarily and without duress or undue influence.

**5.6 Binding on Successors.** This Settlement Agreement binds and benefits the Parties' respective successors, assigns, legatees, heirs, and personal representatives.

**5.7 Parties Represented by Counsel.** The Parties acknowledge that: (a) they have been represented by independent counsel of their own choosing during the negotiation of this Settlement and the preparation of this Settlement Agreement; (b) they have read this Settlement Agreement and are fully aware of its contents; and (c) their respective counsel fully explained to them the Settlement Agreement and its legal effect.

**5.8 Authorization.** Each Party warrants and represents that there are no liens or claims of lien or assignments, in law or equity, against any of the claims or causes of action released by this Settlement Agreement and, further, that each Party is fully entitled and duly authorized to give this complete and final release and discharge.

**5.9 Entire Agreement.** This Settlement Agreement contains the entire agreement between the Parties and constitutes the complete, final, and exclusive embodiment of their agreement with respect to the Action. This Settlement Agreement is executed without reliance on any promise, representation, or warranty by any Party or any Party's representative other than those expressly set forth in this Settlement Agreement.

**5.10 Construction and Interpretation.** Neither the Parties nor any of the Parties' respective attorneys will be deemed the drafter of this Settlement Agreement for purposes of interpreting any provision in this Settlement Agreement in any judicial or other proceeding that may arise between them. This Settlement Agreement has been, and must be construed to have been, drafted by all the Parties to it, so that any rule that construes ambiguities against the drafter will have no force or effect.

**5.11 Headings and Formatting of Definitions.** The various headings used in this Settlement Agreement are solely for the Parties' convenience and may not be used to interpret this Settlement Agreement. Similarly, bolding and italicizing of definitional words and phrases is solely for the Parties' convenience and may not be used to interpret this Settlement Agreement. The headings and the formatting of the text in the definitions do not define, limit, extend, or describe the Parties' intent or the scope of this Settlement Agreement.



**5.12 Modifications and Amendments.** No amendment, change, or modification to this Settlement Agreement will be valid unless in writing signed by the Parties or their counsel.

**5.13 Governing Law.** This Settlement Agreement is governed by California law and must be interpreted under California law and without regard to conflict of laws principles.

**5.14 Further Assurances.** The Parties must execute and deliver any additional papers, documents and other assurances, and must do any other acts reasonably necessary to perform their obligations under this Settlement Agreement and to carry out this Settlement Agreement's expressed intent.

**5.15 Agreement Constitutes a Complete Defense.** To the extent permitted by law, this Settlement Agreement may be pled as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceedings that may be instituted, prosecuted or attempted in breach of or contrary to this Settlement Agreement.

**5.16 Execution Date.** This Settlement Agreement is deemed executed on the date the Settlement Agreement is signed by all of the undersigned.

**5.17 Counterparts.** This Settlement Agreement may be executed in counterparts, each of which constitutes an original, but all of which together constitutes one and the same instrument. Several signature pages may be collected and annexed to one or more documents to form a complete counterpart. Photocopies or PDF copies of executed copies of this Settlement Agreement may be treated as originals.

**5.18 Recitals.** The Recitals are incorporated by this reference and are part of the Settlement Agreement.

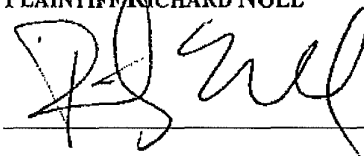
**5.19 Severability.** If any provision of this Settlement is declared by the Court to be invalid, void, or unenforceable, the remaining provisions of this Settlement will continue in full force and effect, unless the provision declared to be invalid, void, or unenforceable is material, at which point the Parties shall attempt to renegotiate the Settlement or, if that proves unavailing, Named Plaintiffs, or eBay can terminate the Settlement Agreement without prejudice to any Party.

**5.20 Inadmissibility.** This Settlement Agreement (whether approved or not approved, revoked, or made ineffective for any reason) and any proceedings or discussions related to this Settlement Agreement are inadmissible as evidence of any liability or wrongdoing whatsoever (other than for breach of this Settlement Agreement) in any Court or tribunal in any state, territory, or jurisdiction. Further, neither this Settlement Agreement, the Settlement contemplated by it, nor any proceedings taken under it, will be construed or offered or received into evidence as an admission, concession or presumption that class certification is appropriate, except to the extent necessary to consummate this Settlement Agreement and the binding effect of the Final Order and Judgment.

The Parties have agreed to the terms of this Settlement Agreement and have signed below.

Dated: January 15, 2015

PLAINTIFF RICHARD NOLL



Dated: January \_\_, 2015

PLAINTIFF RHYTHM MOTOR SPORTS, LLC

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By: \_\_\_\_\_

Title: \_\_\_\_\_

On behalf of Rhythm Motor Sports, LLC.  
Individually and in its Representative Capacity

Dated: January \_\_, 2015

DEFENDANT EBAY INC.

---

By: \_\_\_\_\_

Title: \_\_\_\_\_

On behalf of eBay Inc.

The Parties have agreed to the terms of this Settlement Agreement and have signed below.

Dated: January \_\_, 2015

PLAINTIFF RICHARD NOLL

\_\_\_\_\_


Dated: January 15, 2015

PLAINTIFF RHYTHM MOTOR SPORTS, LLC

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

  
member

On behalf of Rhythm Motor Sports, LLC.  
Individually and in its Representative Capacity

Dated: January \_\_, 2015

DEFENDANT EBAY INC.

\_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

On behalf of eBay Inc.

**The Parties have agreed to the terms of this Settlement Agreement and have signed below.**

Dated: January \_\_, 2015

**PLAINTIFF RICHARD NOLL**

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Dated: January \_\_, 2015

**PLAINTIFF RHYTHM MOTOR SPORTS, LLC**

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By: \_\_\_\_\_

Title: \_\_\_\_\_

On behalf of Rhythm Motor Sports, LLC.  
Individually and in its Representative Capacity

Dated: January 14, 2015

**DEFENDANT EBAY INC.**



By: BRAD SERWIN

Title: SVP, DEPUTY GENERAL COUNSEL

On behalf of eBay Inc.

# EXHIBIT B

## Noll v. eBay Class Action

### **CLASS ACTION SETTLEMENT NOTICE** **READ THIS NOTICE CAREFULLY** **YOUR LEGAL RIGHTS MAY BE AFFECTED**

This is the official website regarding the settlement (“Settlement”) of a class action lawsuit against eBay related to listings that sellers placed on eBay using the listing duration called “Good ‘Til Cancelled” (“GTC Listings”).

As detailed more fully below, the plaintiffs in this case allege that, for certain time periods, (1) eBay did not properly explain that the [Insertion Fees](#)<sup>1</sup> and [Optional Feature Fees](#) for GTC Listings would be charged on a recurring basis every 30 days, and (2) eBay should not have charged sellers [Insertion Fees](#) and [Optional Feature Fees](#) for GTC Listings except at the time of the initial listing. eBay denies all allegations in the lawsuit, and the Court has not ruled on the validity of the plaintiffs’ claims.

The case was filed in the United States District Court for the Northern District of California (the “Court”) and is entitled “*Richard Noll and Rhythm Motor Sports, LLC v. eBay Inc.*,” Case No. 5:11-CV-04585 (EJD) (the “Action”).

The parties have reached an agreement to settle the Action (“Settlement Agreement”). The Court preliminarily approved the Settlement on [\[DATE\]](#) and ordered that notice be sent to all [Class Members](#). The Court’s ruling also allows the law firm of Figari & Davenport LLP to act as [Class Counsel](#) for Settlement purposes and to represent the [Class](#). The Court’s ruling does not mean that the Court views the claims in this Action as having merit or not.

This website is maintained by the [Claims Administrator](#) (retained and supervised by [Class Counsel](#)) to provide information on how the proposed Settlement of the Action may affect you. Additional details about the Action can be found on the “Court Documents” page of this site: [Court Documents Page](#) [\[live link to the Court Documents page\]](#).

#### **A. WHO IS COVERED BY THE SETTLEMENT?**

The proposed Settlement covers the following people, defined as the “[Class](#)”:

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<sup>1</sup> Unless otherwise defined in this Class Action Settlement Notice, capitalized terms are defined in, and hyperlinked to, Section 1 of the Settlement Agreement, titled “Definitions”. You may access these Definitions by clicking on the capitalized terms themselves. In the event of an inconsistency between this website and the Settlement Agreement, the language of the Settlement Agreement is controlling.

all natural persons and entities who are United States residents and who (1) placed GTC Listings on eBay that commenced during the [Class Period](#), and (2) were charged [Disputed Fees](#). Excluded from the [Class](#) are the Judge of this Court and his staff, and all directors, officers, and managers of eBay, and their immediate families. An entity is deemed a “United States resident” for purposes of the foregoing if the primary contact information for the entity in eBay’s current records is an address within the United States.

The “[Class Period](#)” means (1) for Stores Listings, the period from March 30, 2010 to June 19, 2012, and (2) for [Core Listings](#) and [Motors Listings](#), the period from September 16, 2008 to June 19, 2012.

“[Disputed Fees](#)” means the [Insertion Fees](#) and [Optional Feature Fees](#) incurred by [Class Members](#) after the initial 30-day listing period of a GTC Listing, less any amounts already refunded or credited by eBay to [Class Members](#) for such recurring [Insertion Fees](#) and [Optional Feature Fees](#), as determined from eBay’s records.

If you believe you are a member of the [Class](#), but you did not get a direct email or postal mail notice, please double-check your inbox and any spam filters you may have. If your eBay user ID or other account information has changed since September 16, 2008, please update your information on the change-of-information page by [clicking here](#). [\[live link to the information update page\]](#) This information will be used to distribute any payments in this case.

**IF YOUR CURRENT EBAY SELLING ACCOUNT INFORMATION IS NOT CORRECT AND YOU DO NOT UPDATE YOUR INFORMATION AS DESCRIBED ABOVE, YOU MAY NOT GET THE BENEFIT OF THE SETTLEMENT.**

**B. WHAT ARE THE TERMS OF THE SETTLEMENT?**

The following is a summary of the terms of the proposed Settlement that received preliminary approval by the Court. The Court will hold a hearing on \_\_\_\_\_ to decide whether to grant final approval of the Settlement, a decision that will affect all [Class Members who do not exclude themselves from the Settlement](#).

**What Class Members Will Get in the Settlement, If It Is Approved.** Under the Settlement, eBay will establish a [Gross Settlement Fund](#) in the amount of \$ 6,400,000. The [Gross Settlement Fund](#) will be used to (1) reimburse, in part, [Disputed Fees](#) (net of any related credits or refunds) paid by the [Class](#) for [GTC Listings](#) placed during the [Class Period](#); (2) pay the administrative costs of the Settlement (including the costs of sending notice and to process [Settlement Checks](#)); and (3) compensate [Class Counsel](#) and the [Named Plaintiffs](#) (as discussed further below). The amount of the [Gross Settlement Fund](#) remaining after paying the above amounts is the “[Net Settlement](#)”

Fund.” At the time of preliminary approval of the Settlement, the best estimate is that the Net Settlement Fund will be approximately \$4.5 million.

Compensation will be made either by a credit to the Class Member's eBay account or by check. Most Class Members will receive a credit to their eBay account. Section D below describes which Class Members will receive which type of compensation and under what circumstances a Class Member can request payment by check.

The amount of the credit or check payment that a Class Member receives will be in proportion to the amount of Disputed Fees that the Class Member paid for GTC Listings placed during the Class Period, as determined by: (1) calculating the amount of Disputed Fees that each Class Member incurred for listings placed during the Class Period, as a percentage of the total Disputed Fees incurred by all Class Members for listings placed during the Class Period; and (2) applying that percentage to the Net Settlement Fund. To illustrate the calculation above, if the total Disputed Fees incurred for listings placed during the Class Period by all Class Members was \$10,000 and a particular Class Member incurred \$100 in Disputed Fees for listings placed during the Class Period, that Class Member would be entitled to receive 1% of the Net Settlement Fund. This same method of calculation applies regardless of whether payment is made by credit or check.

It is impossible to inform you precisely what your recovery will be without knowing the exact amount of the Net Settlement Fund, which will be impacted by the costs described above. At the time of preliminary approval of the Settlement, it is estimated that the Net Settlement Fund will be approximately \$4.5 million. This is based on a sum of (1) Class Counsel's attorneys' fees and costs request of \$1,670,000, (2) the proposed enhancement awards of \$30,000 (\$15,000 each) for the Named Plaintiffs for their participation in this Action, and (3) the estimate, as of the date of preliminary approval, of the costs for administering the Settlement, which is \$200,000. The actual amount could, of course, be higher or lower depending on the attorneys' fees and costs awarded by the Court, the enhancement awards awarded to the Named Plaintiffs, and the costs of administering the Settlement. If the Net Settlement Fund is \$4.5 million, your recovery will be equal to approximately 9% of all Disputed Fees you paid for GTC listings placed during the Class Period. By way of example, if you paid \$50 in Disputed Fees for GTC listings placed during the Class Period, you would receive approximately \$4.50 from the Net Settlement Fund.

If the Net Settlement Fund goes up or down by \$100,000 due to, for example, increased or decreased Settlement costs or an increased or decreased award to Class Counsel, or for any other reason, this percentage will increase or decrease by approximately 0.2%.

**What Class Counsel Will Ask for from the Court.** Class Counsel will ask the Court for an award of attorneys' fees of twenty-five percent (25%) of the Gross Settlement Fund, or \$1,600,000, together with costs to be paid from the Gross Settlement Fund (estimated at the time of preliminary approval to be approximately



\$70,000). eBay has agreed not to oppose this request so long as applicable legal precedent supports it. [Class Counsel](#)'s application for fees and costs will be available on the website \_\_\_\_\_ on or before \_\_\_\_\_. [Class Counsel](#) will also ask the Court to grant an enhancement award of \$15,000 each to [Named Plaintiffs](#) Richard Noll and Rhythm Motor Sports, LLC for acting as class representatives.

**What eBay Will Get in the Settlement, If It Is Approved.** In exchange for the compensation described above, [Class Members](#) will be deemed to have granted the following release of claims (the "[Release](#)"):

Upon entry of the [Final Order and Judgment](#), [Named Plaintiffs](#) and all [Class Members](#) who do not validly and timely request to be excluded from the proposed Settlement, and each of their respective successors, assigns, legatees, heirs, and personal representatives release and forever discharge eBay Inc., and each of its respective direct or indirect parents, wholly or majority owned subsidiaries, affiliated and related entities, predecessors, successors and assigns, partners, privities, and any of their present and former directors, officers, employees, shareholders, agents, representatives, attorneys, accountants, insurers, and all persons acting by, through, under or in concert with them, or any of them, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, which they have or may have arising out of or relating in any way to any of the legal, factual, or other allegations made in the Action, or any legal theories that could have been raised based on the allegations of the Action.

**THE RELEASE MEANS THAT YOU, AS A CLASS MEMBER, WILL GIVE UP YOUR RIGHT TO FILE A SEPARATE LAWSUIT ON YOUR OWN BEHALF IN ANY WAY RELATED TO THE ALLEGATIONS MADE IN THE ACTION.**

For additional details of the terms of the Settlement Agreement, please review the Settlement Agreement available for download by [clicking here](#) [[live link to Settlement Agreement](#)].

**C. WHAT ARE THE OPTIONS CLASS MEMBERS HAVE RELATED TO THE SETTLEMENT?**

[Class Members](#) have the following options related to the Settlement:

(1) If you do nothing, you will receive a credit or payment by check in an amount determined based on the calculation described in Section B above and as determined based on eBay's records. Credit or payment will be made as described in Section D below. Credit to your account is the default method of distributing the benefit to be received under the Settlement in order to provide an automatic benefit and to avoid the

expense of generating and mailing checks to everyone. **Please note that the credit will be applied automatically to any outstanding and unpaid balance, if any, you have with eBay. However, as described below, you may elect to receive payment by check (rather than an account credit) in certain circumstances.** [Class Members](#) who do nothing will be bound by the terms of the Settlement, including the [Release](#) as described in Section B above.

(2) [Class Members](#) can opt out of the Settlement, as explained below in Section E.

(3) [Class Members](#) can object to the Settlement, as explained below in Section F.

#### **D. HOW TO RECEIVE SETTLEMENT PAYMENT**

Receiving an account credit or check payment is easy and depends on whether or not a [Class Member](#): (1) has an [Active eBay Account](#); (2) has an eBay account that is not an [Active eBay Account](#); (3) has a [Closed eBay Account](#); or (4) requests a check (if eligible). The amount of the credit or payment will be calculated as described in Section B above.

**Active eBay Accounts.** If you have an [Active eBay Account](#), you will automatically receive a credit to this account. **It is not necessary for you to do anything if your account information is correct and you do not want a check instead of an account credit (see below for the limited check option).** **Please note that the credit will be applied automatically to any outstanding and unpaid balance, if any, you have with eBay.** If your account information with eBay is not current, please [click here](#) [\[live link to information update page\]](#) to update your account information by no later than \_\_\_\_\_.

**Inactive eBay Accounts.** If you do not have an [Active eBay Account](#) but you did not close your account (for example, if your account is suspended due to an outstanding negative balance or suspended due to some other issue), then you will automatically be sent a check to the current address associated with the account. **It is not necessary for you to do anything if your account information is correct.** If your account information with eBay is not current, please [click here](#) [\[live link to information update page\]](#) to update your account information by no later than \_\_\_\_\_.

**Closed eBay Accounts.** If you have a [Closed eBay Account](#), you are entitled to receive a check. However, if you did not receive notice of the Settlement directly by mail, **no check will be sent automatically and you must provide current address information**, because eBay was unable to find accurate contact information for you. To provide your current address information, please [click here](#) [\[live link to information update page\]](#) to update your account information by no later than \_\_\_\_\_.

**Check Option (Limited):** If you have an [Active eBay Account](#), your credit is greater than \$2.00, and you prefer to receive a check, please contact the [Settlement Administrator](#) to provide your name and address and to request payment by check. Information on how to request a check is available here: [\[live link to check request page\]](#). If you wish to request payment by check, you must do so by no later than \_\_\_\_\_. Please note that, for amounts less than \$2.00, no checks will be issued to [Active eBay Account](#) holders due to the expenses associated with processing and mailing a check and in order to minimize the costs of administration for the [Class](#) as a whole. Instead, [Active eBay Account](#) holders whose recovery is less than \$2.00 will receive an account credit. **If you request a check, the check amount will not be reduced or offset based on any amounts you owe to eBay.** Please note that, at any time, you may apply for a refund of any outstanding eBay credit balance you may have in connection with your eBay account, if any, in accordance with eBay's existing "Requesting a refund of your eBay credit balance" policy, currently available at <http://pages.ebay.com/help/sell/refunds.html>

**IF YOUR CURRENT EBAY ACCOUNT INFORMATION IS NOT CORRECT AND YOU DO NOT UPDATE YOUR INFORMATION AS DESCRIBED ABOVE, YOU MAY NOT GET THE BENEFIT OF THE SETTLEMENT.**

Any funds that cannot be distributed to [Class Members](#) will be distributed in equal portions to the (1) National Cyber-Forensics & Training Alliance and (2) the National Consumer Law Center, both non-profit organizations.

**E. HOW TO OPT OUT AND THE EFFECT OF OPTING OUT**

Instead of receiving compensation as part of the Settlement, [Class Members](#) may opt out of the [Class](#) by making an "Opt-Out/Exclusion Request" as specified in Section 4.7 of the Settlement Agreement. To make such a request, a [Class Member](#) must send an email, letter, or postcard to the [Claims Administrator](#) providing: (a) the title of the Action: "*Richard Noll v. eBay Inc., Case No. 5:11-CV-04565 EJD*"; (b) the full name, address, telephone number (optional) and email address associated with the eBay account of the person requesting exclusion; (c) a statement that the [Class Member](#) does not wish to participate in the Settlement; and (d) a signature of the [Class Member](#) requesting exclusion. No Opt-Out/Exclusion Request will be valid unless all of this information is included. So-called "mass" or "class" opt-outs purporting to be made on behalf of multiple persons or classes of persons shall not be allowed and shall be deemed invalid. If submitted by mail, the letter, postcard, or form on which the request for exclusion is made must be postmarked on or before \_\_\_\_\_, with postage paid by the person requesting exclusion. If submitted electronically or by email, the Opt-Out/Exclusion Request must be submitted by 11:59 p.m. Eastern Standard Time on or before \_\_\_\_\_. Any [Class Member](#) who does not submit a valid and timely written Opt-Out/Exclusion Request shall be bound by all subsequent proceedings, orders and judgments. Only [Class Members](#) who submit valid and timely Opt-Out/Exclusion Requests will be deemed to have opted out of the [Class](#), unless the Court orders otherwise.

**IF YOU ARE A CLASS MEMBER AND OPT OUT OF THE CLASS, YOU (1) WILL NOT RECEIVE ANY OF THE CREDITS OR CHECKS TO BE ISSUED AS PART OF THE SETTLEMENT; (2) WILL NOT BE BOUND BY THE FINAL ORDER OF DISMISSAL AND RELEASE IN THE ACTION; AND (3) MAY, IF YOU WISH AND AT YOUR OWN EXPENSE, PURSUE ON YOUR OWN BEHALF WHATEVER LEGAL RIGHTS YOU BELIEVE YOU MAY HAVE. YOU WILL ALSO NOT BE ALLOWED TO OBJECT TO THE SETTLEMENT IF YOU OPT OUT OF THE CLASS.**

#### **F. HOW TO SUBMIT AN OBJECTION**

Any [Class Member](#) who has not opted out of the [Class](#), as described above in Section E, can object to the fairness, reasonableness or adequacy of the Settlement Agreement or the proposed Settlement, to the attorneys' fees and costs award requested by Class Counsel, or to the requested enhancement awards for the [Named Plaintiffs](#). To do so, you must *file* your objection with the Court *and* deliver a copy to [eBay's Counsel](#) and [Class Counsel](#) by \_\_\_\_\_. The delivery date is deemed to be the date the objection is deposited in the U.S. mail as evidenced by the postmark. You *cannot* file your objection online, nor can you simply mail it to the [Claims Administrator](#). **It shall be your responsibility to ensure timely receipt of any objection by the Court, Class Counsel, and eBay's Counsel.**

To be considered by the Court, the objection must include: (1) a heading containing the name and case number of the Action: *Richard Noll v. eBay Inc., Case No. 5:11-CV-04565 EJD*; (2) the [Class Member's](#) name, email address, postal address, and telephone number that were used in conjunction with the [Class Member's](#) eBay account; (3) a detailed statement of each objection and the factual and legal basis for each objection and the relief that the [Class Member](#) is requesting; (4) a list of and copies of all documents or other exhibits which the [Class Member](#) may seek to use at the [Fairness Hearing](#); and (5) a statement of whether the [Class Member](#) intends to appear, either in person or through counsel, at the [Fairness Hearing](#), and if through counsel, a statement identifying the counsel's name, postal address, phone number, email address, and the state bar(s) to which the counsel is admitted. Neither [Class Counsel](#) nor [eBay's Counsel](#) may assist you in asserting objections; you will have to object on your own or hire, at your own expense, your own lawyer. Any [Class Member](#) who files and serves a written objection, as described in this section, has the option to appear at the [Fairness Hearing](#), either in person or through counsel, to object to the fairness, reasonableness, or adequacy of the [Settlement Agreement](#) or the proposed Settlement, to the award of attorneys' fees and costs to Class Counsel, and/or to the enhancement awards for the [Named Plaintiffs](#). However, [Class Members](#) or their attorneys intending to make an appearance at the [Fairness Hearing](#) must include a statement of intention to appear in the written objection filed with the Court and delivered to [Class Counsel](#), and [eBay's Counsel](#), and only those [Class Members](#) who include such a statement may speak at the [Fairness Hearing](#). If a [Class Member](#) makes an objection or appears at the [Fairness Hearing](#) through an attorney, the [Class Member](#) will be responsible for his or her personal attorney's fees and costs. In order to obtain the necessary addresses for the Court, [Class Counsel](#), and [eBay's Counsel](#), please [click here](#) **[live link to objections page]** to review the page regarding objections.

**G. WHEN WILL THE COURT CONSIDER THE SETTLEMENT?**

At \_\_\_\_:00 \_\_.m., Pacific Time, on \_\_\_\_\_, the Court will conduct a hearing to determine the fairness of the settlement and may enter an order finally approving the settlement (the “[Fairness Hearing](#)”). The hearing will take place in the Courtroom of the Honorable Edward J. Davila, Courtroom 4, 5<sup>th</sup> Floor, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113. [Class Counsel](#) will appear on behalf of the [Class](#).

**H. HOW TO GET MORE INFORMATION**

If, after you have read all of the contents of this website, you have further questions about the Action or Settlement, you may contact the [Claims Administrator](#) by email at [info@ebaygoodtilcancelledclassaction.com](mailto:info@ebaygoodtilcancelledclassaction.com) or call \_\_\_\_\_ toll free Monday through Friday, 8:00 a.m. to 5:00 p.m., Central Time. In addition, all of the court documents are on file with the Clerk of the Court, United States District Court for the Northern District of California, San Jose Division Court Clerk, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113, for inspection and copying at your own expense during regular business hours. The pleadings in the case can also be viewed online through PACER, the federal court system’s online pleadings database. PACER can be accessed at <http://pacer.psc.uscourts.gov>, and instructions for how to search for pleadings are provided at that website.

**PLEASE DO NOT CONTACT THE COURT, THE CLERK OF THE COURT, OR THE JUDGE ABOUT THIS LITIGATION.**

**PLEASE ALSO DO NOT CONTACT EBAY CUSTOMER SERVICE ABOUT THIS LITIGATION.**

**THEY ARE NOT PERMITTED TO ANSWER YOUR QUESTIONS.**

**IMPORTANT LEGAL NOTICE – PLEASE DO NOT DELETE OR DISCARD**

**This notice has been authorized by a Court. Please read it carefully.**

**If you are an eBay seller who used “Good ‘Til Cancelled” listings, you may be a member of a Class whose rights will be affected by a proposed Settlement, as summarized below.**

**A. INTRODUCTION**

Two eBay sellers have sued eBay, claiming that eBay did not adequately explain, at certain times, that fees for listings with the Good ‘Til Cancelled duration (“GTC Listings”) would be charged on a recurring basis every 30 days. The case is entitled *Richard Noll and Rhythm Motor Sports, LLC v. eBay Inc.*, Case No. 5:11-CV-04585 (EJD) (the “Action”). The Plaintiffs in the Action seek to recover certain fees that sellers paid for certain GTC Listings placed between September 16, 2008 and June 19, 2012.

eBay denies any wrongdoing. However, Plaintiffs and eBay have reached a settlement of the Action (the “Settlement”) and submitted it to the Court for approval. The Court has granted preliminary approval of the Settlement and allowed this notice to be sent. It will hold a further hearing at \_\_:00 a.m. PST on \_\_\_\_\_ to decide whether to grant final approval of the Settlement (the “Fairness Hearing”).

You are receiving this notice because you may be entitled to a partial refund of the fees you paid for GTC Listings in the relevant time period. This notice explains (1) whether you will be affected by the Settlement, (2) the basic terms of the Settlement, and (3) your options in connection with the Settlement. This notice provides only a partial summary of how the proposed Settlement may affect you. More details about the Action and the Settlement can be found at [\[live link to web page\]](#).

**B. WHO IS AFFECTED?**

This settlement affects: All persons and entities who are United States residents and who (1) placed GTC Listings on eBay that commenced during the Class Period, and (2) were charged Disputed Fees. The “Class Period” is, (1) for eBay Stores Listings, the period from March 30, 2010 to June 19, 2012, and (2) for all other eBay listings, the period from September 16, 2008 to June 19, 2012. The term “Disputed Fees” means the Insertion Fees and Optional Feature Fees incurred after the initial 30-day period of a GTC Listing (less prior refunds or credits for those fees).

**C. WHAT ARE THE TERMS OF THE SETTLEMENT?**

The Plaintiffs have filed a motion detailing the terms of the Settlement and explaining why they believe it is fair to the Class, which you can review here: [\[live link to web page\]](#).

eBay has agreed to pay \$6.4 million under the Settlement. This amount will be used to (1) reimburse, in part, the Disputed Fees that Class Members paid (net of prior refunds) either by a credit to Class Members’ eBay accounts or by check (discussed further below); (2) pay the administrative costs of the Settlement, which are currently estimated at \$200,000 (including the



costs of sending notice and processing settlement checks); (3) pay the attorneys' fees and costs of counsel for Plaintiffs and the Class (Plaintiffs have requested \$1.6 million, which is subject to Court approval); and (4) compensate the two Plaintiffs for their role in the Action (they have requested \$15,000 each, which is subject to Court approval).

In exchange, all Class Members (except those who opt out as explained below) will be legally bound by the Settlement and deemed to have released all claims against eBay that were, or could have been alleged, in the Action. **Please consult the Settlement website for details on the scope of this release.** [\[live link to web page\]](#).

#### **D. WHAT ARE MY OPTIONS?**

**Participate in the Settlement and receive a payment:** Most Class Members do not need to do anything to participate in the settlement. Class Members with an active eBay account in good standing (i.e., that is not suspended, on hold, or subject to similar restrictions) will automatically receive a credit ("Credit") to their eBay account. **Note that this credit will be used to offset any current balance you owe eBay.** If you have an active account and prefer to get a check, you may request one, but only if your recovery amount is at least \$2.00. You can request a check here: [\[live link to web page\]](#).

In general, Class Members whose eBay accounts are not in good standing, and those who have closed their eBay accounts, will receive payment by check. If you have closed your eBay Account, or if your contact information with eBay otherwise is not current, eBay may not have your address and you MUST follow the instructions at the web site to receive a check. Please [click here](#) [\[live link to information update page\]](#) to update your account information by no later than \_\_\_\_\_.

The method for calculating the amount of each Class Member's recovery is explained here: [\[live link to full notice\]](#)

**Opt-Out of the Settlement.** Instead of participating in the settlement, you can opt out, meaning you will not receive compensation, you will not be bound by the Settlement, and you cannot object (see below). Please consult the Settlement website for details on how to opt out: [\[live link to web page regarding objections and opting out\]](#). The deadline for opting out is \_\_\_\_\_.

**If you want to object to the Settlement:** If you do not opt out, you can submit an objection to the Settlement. Please consult the Settlement website for details on how to object and the steps that you must take if you desire to participate at the Fairness Hearing: [\[live link to web page regarding objections and opting out\]](#). The deadline for submitting objections is \_\_\_\_\_.

**E. HOW TO GET MORE INFORMATION**

Do not respond to this message; the address is not monitored and no one will read any responses. If you have further questions, please visit the Settlement website at \_\_\_\_\_. In addition, the court documents are available for inspection and copying at your own expense during regular business hours at the Clerk of the Court, United States District Court for the Northern District of California, San Jose Division Court Clerk, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113. The pleadings in the case can also be viewed online through PACER at <http://pacer.psc.uscourts.gov>, and instructions for how to search for pleadings are provided at that website.

**PLEASE DO NOT CONTACT THE COURT, THE CLERK OF THE COURT,  
OR THE JUDGE ABOUT THIS LITIGATION.**

**PLEASE ALSO DO NOT CONTACT EBAY OR CUSTOMER SERVICE ABOUT THIS  
LITIGATION.**

**THEY ARE NOT PERMITTED TO ANSWER YOUR QUESTIONS**



# EXHIBIT C

1 KEITH R. VERGES ([kverges@figdav.com](mailto:kverges@figdav.com))  
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12 ATTORNEYS FOR PLAINTIFFS RICHARD NOLL  
 13 AND RHYTHM MOTOR SPORTS, LLC

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

16 RICHARD NOLL AND RHYTHM )  
 17 MOTOR SPORTS, LLC, Individually )  
 18 and on behalf of all others similarly )  
 19 situated, )  
 20 Plaintiffs, )

21 v. )

22 EBAY INC., )

23 Defendant. )

CASE NO. 5:11-cv-04585-EJD

**ORDER CONDITIONALLY CERTIFYING A  
 SETTLEMENT CLASS AND PRELIMINARILY  
 APPROVING PROPOSED SETTLEMENT**

Date: January 29, 2015

Time: 9:00 a.m.

Judge: Honorable Edward J. Davila

Courtroom: 4, 5th Floor

Trial Date: Not yet set

Jury Trial Demanded

24 Upon review and consideration of the Joint Motion for Conditional Class Certification  
 25 and Preliminary Approval and all exhibits and other evidence submitted in support thereof,  
 26 including the Settlement Agreement dated January 15, 2015, executed by Plaintiffs individually  
 27

and on behalf of the Class<sup>1</sup>, and on behalf of Defendant eBay Inc. (“Defendant” or “eBay”), it is hereby **ORDERED** as follows:

### **CONDITIONAL CLASS CERTIFICATION**

For the reasons set forth more fully below, the Court certifies for purposes of settlement only the following Class:

All natural persons and entities who are United States residents and who (1) placed GTC Listings on eBay that commenced during the Class Period, and (2) were charged Disputed Fees. Excluded from the Class are the Judge of this Court and his staff, and all directors, officers, and managers of eBay, and their immediate families.

The “Class Period” is (1) for Stores Listings, the period from March 30, 2010 to June 19, 2012, and (2) for Core Listings and Motors Listings, the period from September 16, 2008 to June 19, 2012. The term “Disputed Fees” means the Insertion Fees and Optional Feature Fees incurred by Class Members after the initial 30-day listing period of a GTC Listing, less any amounts already refunded or credited by eBay to Class Members for such recurring Insertion Fees and Optional Feature Fees, as determined from eBay’s records. A person or entity is deemed a “United States resident” for purposes of the foregoing if the primary contact information for the person or entity in eBay’s current records is an address within the United States. This class definition and certification is made for settlement purposes only.

The Court finds that the Class is so numerous that joinder of all members is impracticable. In particular, the Court has considered the Parties’ submissions indicating that there are over one million unique eBay user IDs associated with the listings at issue in this case.

The Court also finds that there are questions of law or fact common to the Class for settlement purposes. In addition, pursuant to Rule 23(b)(3) the Court finds that, for settlement

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<sup>1</sup> Terms used in this Order that are defined in the Settlement Agreement are, unless otherwise defined herein, used in this Order as defined in the Settlement Agreement.

1 purposes, the questions of law or fact common to the Class Members predominate over any  
2 questions affecting only individual members. Among other things, this case involves a common  
3 User Agreement and incorporated Fees Schedules that apply to eBay sellers, and public web  
4 pages describing GTC Listings that were available to all eBay sellers. Further, this case involves  
5 the operational functionality of GTC Listings and methods of invoicing for GTC Listings that  
6 were broadly applicable. In addition, the question regarding whether the Settlement is fair,  
7 reasonable, and adequate to the Class presents a predominantly common issue.  
8

9 The Court finds that, for settlement purposes, the claims or defenses of the representative  
10 Plaintiffs are typical of the claims or defenses of the Class. Plaintiffs Noll and Rhythm Motor  
11 Sports allege that they used GTC Listings and paid Disputed Fees and are thus part of the Class.  
12 There is no allegation or evidence that Plaintiffs seek any relief different from other members of  
13 the Class; and the Settlement Agreement provides for the same calculation for relief to Plaintiffs  
14 as for other Class Members.  
15

16 The Court finds, for settlement purposes, that Plaintiffs will fairly and adequately protect  
17 the interests of the Class. The Court finds that there are no conflicts of interest between  
18 Plaintiffs and any proposed Class Member. Plaintiffs had listings during the proposed Class  
19 Period and will be subject to the same pro rata calculation of relief as any other Class Member.  
20

21 In addition, the Court finds that Plaintiffs' counsel has extensive experience in class  
22 action cases and has vigorously conducted discovery, research, and investigation of the claims of  
23 the Class. As set forth more fully below regarding the adequacy of the Settlement, the Court  
24 further finds that Plaintiffs' Counsel has diligently and fairly represented the best interests of the  
25 Class.  
26  
27

1 The Court further finds that certification of this class for settlement purposes is superior  
2 to other available methods for fairly and efficiently adjudicating the controversy. The Court  
3 finds that individual Class Members' interests in controlling the prosecution or defense of the  
4 separate actions are very small, given the relatively small average amount of Disputed Fees per  
5 Class Member. The Court also finds that there is no other litigation concerning the controversy  
6 already begun by or against Class Members.  
7

8 The Court further finds that, particularly with the aid of the Claims Administrator and the  
9 production of necessary data by eBay, there are no likely difficulties in managing the Settlement  
10 of this Action. eBay has committed to providing the relevant data in its possession necessary to  
11 identify Class Members and to enable the Claims Administrator to calculate the relief due each  
12 Class Member. This relief will be calculated as a pro rata share of the Disputed Fees incurred by  
13 each Class Member for GTC Listings placed during the Class Period in comparison to all such  
14 Disputed Fees for the Class as a whole, as specified in the Settlement Agreement. The Court  
15 finds that this should not be a particularly difficult process and that the Parties have adequately  
16 anticipated and provided for the necessary administrative tasks to accomplish the administration.  
17

18 The Court further appoints the law firm of Figari & Davenport, L.L.P as Class Counsel  
19 for settlement purposes under Rule 23(g) and authorizes Class Counsel to retain a Class  
20 Administrator in its discretion. In doing so, the Court has considered the work Class Counsel has  
21 done identifying and investigating potential claims in the action, Class Counsel's experience in  
22 handling class actions, other complex litigation, and the types of claims asserted in the action,  
23 Class Counsel's knowledge of the applicable law, and Class Counsel's resources that it will  
24 commit to representing the Class. The Court specifically finds that Class Counsel fulfills all of  
25  
26  
27

1 the foregoing requirements and that Class Counsel will fairly and adequately represent the  
2 interests of the Class.

3 As set forth more fully below, the Court finds that the proposed form of notice fulfills  
4 each of the elements of Rule 23(c)(2)(B) and that the notice is the best notice practicable under  
5 the circumstances.  
6

7 **PRELIMINARY APPROVAL OF SETTLEMENT**

8 1. The terms of the Settlement Agreement are hereby preliminarily approved, subject  
9 to further consideration thereof at the Fairness Hearing provided for below. The Court finds that  
10 the terms of the Settlement Agreement are sufficiently within the range of reasonableness such  
11 that notice of the proposed Settlement should be given as provided in paragraph 2 of this Order.  
12

13 2. Starting within thirty (30) days of entry of this Order, the initial dissemination of  
14 email notice and other notice contemplated in the Settlement Agreement shall be made to the  
15 Class in accordance with the Settlement Agreement, and the notice program shall thereafter be  
16 executed as set forth in the Settlement Agreement.

17 3. Non-substantive changes may be made to the notices contemplated by the  
18 Settlement Agreement by agreement of the Parties, without further order of this Court.

19 4. Prior to the Fairness Hearing, Class Counsel shall serve and file a sworn statement  
20 attesting to compliance with the provisions of paragraph 2 of this Order.  
21

22 5. The actions set forth in paragraph 2 of this Order are hereby found to be  
23 reasonably calculated to provide direct notice to Class Members and, when completed, shall  
24 constitute due and sufficient notice of the proposed Settlement and the Fairness Hearing to the  
25 persons affected by and/or entitled to participate in the Settlement, in full compliance with all  
26 applicable requirements of law including, but not limited to, Rule 23(c) of the Federal Rules of  
27

Civil Procedure and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

**MOTIONS FOR FINAL APPROVAL AND FOR APPROVAL OF PROPOSED  
PLAN OF ALLOCATION AND APPLICATION FOR ATTORNEYS' FEES**

6. Within 100 days of entry of this Order, Class Counsel shall file a motion for final approval of the Settlement.

7. Within 45 days of entry of this Order, Class Counsel shall file their application for attorneys' fees and expenses and request for enhancement awards to the class representatives ("Fee Application").

**THE FINAL FAIRNESS HEARING**

8. A hearing on final settlement approval (the "Fairness Hearing") is hereby scheduled to be held before the undersigned on \_\_\_\_\_ at \_\_:00 \_\_.m. in Courtroom 4, 5th Floor, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113, to consider: (a) the fairness, reasonableness and adequacy of the proposed Settlement; (b) the dismissal of this Action with prejudice as to Defendant and the entry of final judgment in the Action; (c) whether the distribution plan of Settlement proceeds should be approved; (d) whether an award of attorneys' fees, costs and expenses should be made to Class Counsel; and (e) whether an enhancement award should be made to Plaintiffs as class representatives.

9. The Court directs that any person or entity who is a member of the Class and who wishes to exclude himself, herself, itself, or themselves from the Class shall send an email, letter, or postcard to the Settlement Administrator stating: (a) the title of the Action: "Richard Noll v. eBay Inc., Case No. 5:11-CV-04565 EJD"; (b) the full name, address, telephone number (optional) and email address associated with the eBay account of the person requesting exclusion; (c) a statement that he/she does not wish to participate in the Settlement; and (d) a

signature of the Class Member requesting exclusion. No Opt-Out/Exclusion Request will be valid unless all of the information above is included. So-called “mass” or “class” opt-outs purporting to be made on behalf of multiple persons or classes of persons shall not be allowed and shall be deemed invalid. If submitted by mail, the letter, postcard, or form on which the request for exclusion is made must be postmarked on or before \_\_\_\_\_ with postage paid by the person requesting exclusion. If submitted electronically or by email, the Opt-Out/Exclusion Request must be submitted by 11:59 p.m. Eastern Standard Time on or before \_\_\_\_\_. Any Class Member who does not serve a valid and timely written Opt-Out/Exclusion Request shall be bound by all subsequent proceedings, orders, and judgments. Only Class Members who serve valid and timely Opt-Out/Exclusion Requests will be deemed to have opted out of the Class.

10. Any Class Member may appear at the Fairness Hearing in person or by counsel and may be heard, to the extent allowed by the Court, either in support of or in opposition to the fairness, reasonableness and adequacy of the proposed Settlement and the dismissal of the Action with prejudice as to Defendant and the entry of judgment; provided, however, that no person shall be heard in opposition to such Settlement, dismissal and/or entry of Judgment, and no papers or briefs submitted by or on behalf of any such person shall be accepted or considered by the Court, unless that person files a written objection with the Court and delivers a copy of the objection to Class Counsel and eBay’s Counsel no later than \_\_\_\_\_. The delivery date is deemed to be the date the objection is deposited in the U.S. mail as evidenced by the postmark. It shall be the objector’s responsibility to ensure receipt of any objection by the Court, Class Counsel, and eBay’s Counsel. To be considered by the Court, the objection must include:

(1) a heading containing the name and case number of the Action: Richard Noll v. eBay Inc.,



1 Case No. 5:11-CV-04565 EJD; (2) the Class Member's name, email address, postal address, and  
2 telephone number that were used in conjunction with the Class Member's eBay account; (3) a  
3 detailed statement of each objection and the factual and legal basis for each objection, and the  
4 relief that the Class Member is requesting; (4) a list of and copies of all documents or other  
5 exhibits which the Class Member may seek to use at the Fairness Hearing; and (5) a statement of  
6 whether the Class Member intends to appear, either in person or through counsel, at the Fairness  
7 Hearing, and if through counsel, a statement identifying the counsel's name, postal address,  
8 phone number, email address, and the state bar(s) to which the counsel is admitted. Any Class  
9 Member who files and serves a written objection, as described in this section, has the option to  
10 appear at the Fairness Hearing, either in person or through personal counsel hired at the Class  
11 Member's expense, to object to the fairness, reasonableness, or adequacy of the Settlement  
12 Agreement or the proposed Settlement, to the award of attorneys' fees and costs, and/or to the  
13 enhancement awards for the Named Plaintiffs. However, Class Members or their attorneys  
14 intending to make an appearance at the Fairness Hearing must include a statement of intention to  
15 appear in the written objection filed with the Court and delivered to Class Counsel and eBay's  
16 Counsel, and only those Class Members who include such a statement may speak at the Fairness  
17 Hearing. If a Class Member makes an objection or appears at the Fairness Hearing through an  
18 attorney, the Class Member will be responsible for his or her personal attorney's fees and costs.  
19  
20  
21 The relevant addresses for Plaintiffs' Counsel and eBay's Counsel are below:  
22  
23  
24  
25  
26  
27

1 Keith R. Verges  
2 Figari & Davenport, L.L.P.  
3 901 Main St., Ste. 3400  
4 Dallas, TX 75202-3796  
5 Class Counsel

Whitty Somvichian  
Cooley LLP  
101 California St., 5th Fl.  
San Francisco, CA 94111-5800  
Counsel for eBay Inc.

11. Responses to any objection or opposition to the proposed Settlement or Fee Application shall be filed no later than \_\_\_\_\_.

12. The date and time of the Fairness Hearing shall be set forth in the E-Mail Notice and Settlement Website, but shall be subject to adjournment by the Court without further notice to the Class Members other than that which may be posted at the Court or on the Court's website at [www.cand.uscourts.gov/](http://www.cand.uscourts.gov/).

#### **OTHER PROVISIONS**

13. Terms used in this Order that are defined in the Settlement Agreement are, unless otherwise defined herein, used in this Order as defined in the Settlement Agreement.

14. The Court retains continuing and exclusive jurisdiction over the Settlement, including all future proceedings concerning the administration, consummation and enforcement of this Agreement;

15. The Claims Administrator, working at the direction of Class Counsel, shall administer the Settlement so as to facilitate administrative matters and the distribution of payments to the Class Members and cy pres recipient in accordance with the terms and conditions of the Settlement Agreement.

16. It shall be the Claims Administrator's responsibility, working at the direction of Class Counsel, to prepare and provide the notices required by the Class Action Fairness Act of 2005, Pub. L. 109-2 (2005), including, but not limited to, the notices to the United States Department of Justice and to the Attorneys General of all states in which Class members reside,

1 as specified in 28 U.S.C. § 1715. Class Counsel shall cooperate in the drafting of such notices  
2 and Defendant shall provide Class Counsel with any and all information in its possession  
3 necessary for the preparation of these notices.

4  
5 17. In the event that the Settlement is terminated in accordance with the provisions of  
6 the Settlement Agreement, (1) the Settlement and all proceedings had in connection therewith  
7 shall be null and void, except insofar as expressly provided to the contrary in the Settlement  
8 Agreement, and without prejudice to the status quo ante rights of Defendant and the Class  
9 Members, and (2) the Settlement Agreement and all proceedings and communications regarding  
10 the Settlement may be offered as evidence or otherwise used only as specifically permitted under  
11 the terms of the Settlement.

12  
13 18. All proceedings in the Action against Defendant are hereby stayed until such time  
14 as the Court renders a final decision regarding the approval of the Settlement and, if it approves  
15 the Settlement, enters Judgment as provided in the Settlement Agreement.

16 19. Plaintiff and all members of the Class and any other person, representative, or  
17 entity acting on behalf of any members of the Class are, until the Fairness Hearing, barred and  
18 enjoined from filing, commencing, prosecuting, maintaining, intervening in, participating in (as  
19 members of a class action or otherwise), any claim, lawsuit, arbitration, administrative,  
20 regulatory or other proceeding arising out of the Released Claims against any of the Released  
21 Persons. The Court finds that issuance of this preliminary injunction is necessary and  
22 appropriate in aid of the Court's jurisdiction over the litigation and to protect and effectuate the  
23 Court's review of the Settlement.  
24

25 20. Nothing in this Order shall be construed or used as an admission, concession, or  
26 declaration by or against Defendant for any fault, wrongdoing, breach or liability. Nor shall this  
27

1 Order be construed or used as an admission, concession, or declaration by or against Plaintiff or  
2 members of the Class that their claims lack merit of that the relief requested in the operative  
3 Complaint in this Action is inappropriate, improper, or unavailable, or as a waiver by any party  
4 of any defenses or claims he, she, or it may have; nor shall this Order be construed as a finding  
5 or conclusion of the Court with respect to the merit or lack of merit of any claim asserted in the  
6 Action or the defense to any Claim asserted in the Action.  
7

8 SO ORDERED, ADJUDGED AND DECREED.

9 \_\_\_\_\_, 2015.

10  
11  
12 THE HONORABLE EDWARD J. DAVILA  
13 UNITED STATES DISTRICT JUDGE  
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16  
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ATTORNEYS FOR PLAINTIFFS RICHARD NOLL  
 AND RHYTHM MOTOR SPORTS, LLC

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

RICHARD NOLL AND RHYTHM )  
 MOTOR SPORTS, LLC, Individually and )  
 on behalf of all others similarly situated, )  
 )  
 Plaintiffs, )

CASE NO. 5:11-cv-04585-EJD

v. )

**DECLARATION OF KEITH VERGES**

EBAY INC., )

Defendant. )

Jury Trial Demanded

Keith R. Verges declares pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner in the law firm of Figari & Davenport, LLP ("Figari & Davenport"), which has been retained as counsel for Plaintiff in this action. I am duly admitted to practice in the State of Texas. I have personal knowledge of the facts contained herein, and they are true and

1 correct. Among other things, I have personally studied the documents, electronic data, and  
2 depositions in this case to learn the information set out below.

3 2. Attached as Exhibit 1 is a true and correct copy of a resume of the firm, Figari &  
4 Davenport.

5 3. Attached as Exhibit 2 is a true and correct copy of a list of class action lawsuits in  
6 which I and/or members of Figari & Davenport have served as counsel.

7 4. Attached as Exhibit 3 are true and correct copies of attorney biographies for me,  
8 Parker Young, and Raymond E. Walker, all of whom are counsel of record for Plaintiffs in this case.

9 5. As set out in the foregoing exhibits, I and the other attorneys at Figari & Davenport  
10 have extensive experience in handling class action and other complex commercial litigation. We  
11 have been lead counsel or co-lead counsel in many major class action or derivative lawsuits in state  
12 and federal courts across the country.

13 6. It is my opinion that the settlement in this matter is fair, reasonable, and adequate to  
14 the members of the Settlement Class. I base my opinion upon having reviewed thousands of pages  
15 of documents produced by eBay, having previously deposed and studied the depositions of seven  
16 (7) eBay employees in this and prior litigation with eBay, some of whom were deposed more than  
17 one time and in varying capacities. In addition, we performed significant independent research and  
18 investigation of applicable law, eBay's historic business practices, eBay customer complaints, and  
19 other e-commerce business practices. We also have become familiar with eBay's data from our  
20 own investigation and research, prior litigation, and in consultation with independent experts in  
21 information technology, including the Teradata technology that eBay uses. We extensively studied,  
22 with the assistance of a consulting expert, 40,000 transactions of sample data in this case, as well as  
23  
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1 SQL queries eBay used to gather that and other data produced in this case. The following is my  
2 assessment of some of the pros and cons that led me to agree to the settlement in this case.

3 7. As set forth in the Third Amended Complaint (“TAC”) and other court pleadings, the  
4 basic theory of this case is that eBay’s listing duration called Good ‘Til Cancelled (“GTC”)  
5 connotes an indefinite listing duration and that the contract and eBay’s disclosures did not permit  
6 eBay to charge recurring listing fees every 30 days for GTC listings. eBay generally charges two  
7 types of fees to list an item: (1) an “Insertion Fee” upon listing; and (2) a fee for optional features  
8 “Optional Feature Fee” or “Feature Fee” that gives sellers the ability to add certain listing upgrades  
9 to increase the chances for a successful sale, like highlighted or bold listings. eBay re-charges these  
10 fees every 30 days for GTC listings. Plaintiffs seek to recover all Insertion and Optional Feature  
11 Fees incurred after the initial 30-day listing period of GTC listings placed during the Class period of  
12 September 16, 2008 – June 19, 2012 (the “Disputed Fees”).  
13  
14

15 8. We originally learned of the problem when our clients brought to our attention the  
16 complaint that they expected GTC listings to renew automatically without any further listing fees.  
17 There is more detail in the FAC and other pleadings on file, but eBay operates three virtual  
18 marketplaces: (1) Core, (2) Motors, and (3) Stores. Each marketplace has its own Fees Schedule  
19 that links from the User Agreement. Each of the Fees Schedules sets out the fees for the available  
20 listing durations. As explained in more detail below, we allege that the Fees Schedules did not  
21 properly explain the recurring fees that eBay charged for GTC listings.  
22

23 9. Just before the September 16, 2008, commencement of the Class Period, the  
24 available listing durations for the different marketplaces were:

Marketplace	Durations
Core	1, 3, 5, 7, 10 days
Motors	1, 3, 5, 7, 10 days
Stores	30 days or GTC

Notably, Stores previously had the GTC duration and the Stores Fees Schedule contained the following table that explained the recurring nature of GTC listing fees:

Listing Upgrade Fees		
Features	30 days	Good 'Til Cancelled (recurring 30-day listing)
Gallery	Free	Free
Gallery Plus	\$0.35	\$0.35 / 30 days
Subtitle	\$0.02	\$0.02 / 30 days
Listing Designer	\$0.10	\$0.10 / 30 days
Scheduled Listings	\$0.10	\$0.10
Bold	\$1.00	\$1.00 / 30 days
Border	\$3.00	\$3.00 / 30 days
Highlight	\$5.00	\$5.00 / 30 days

The Stores Fees Schedule contained this table at all times from September 16, 2008, through March 29, 2010. Plaintiffs' complaint arises in part out of the fact that the Core and Motors Fees Schedules did not have a table like this during the Class Period.

10. On September 16, 2008, eBay introduced the GTC duration (that was previously limited to Stores) to Core and Motors. The Fees Schedules for these marketplaces did not state that GTC listing fees would recur, and the table of Listing Upgrade Fees (like that for Stores) looked like this:

Listing Upgrade Fees		
Feature	Fee -- Auction Style, Fixed Price Format (3, 5, 7, 10 Days)	Fee -- Fixed Price (30 Days, Good 'Til Cancelled), Classified Ad
Value Pack	\$0.65	\$2.00
Gallery*	Free	Free
Gallery Plus	\$0.35	\$1.00
Listing Designer**	\$0.10	\$0.30
Subtitle	\$0.00	\$1.30
Bold	\$2.00	\$4.00
Scheduled Listings	\$0.10	\$0.10
Gift Services	\$0.25	\$0.75
Border	\$4.00	\$8.00
Highlight	\$5.00	\$10.00
Gallery Featured	\$24.95	\$74.95
Home Page Featured	\$59.95	\$179.95
List in Two Categories***	x2	x2



[Dkt. 102-2 at 4-5.] However, eBay also undertook a campaign to promote and explain GTC to Core and Motors users, including the publication of an internet-based “August 2008 Update,” which had more detail on how GTC worked. The parties argued vigorously about the legal relevance of the August 2008 update, but it is undisputed that it contained the following:

Basic Fees tab: “sellers will now have the option to use the Good ‘Til Cancelled (GTC) duration which allows listings to automatically renew every 30 days. This option is also available at no extra cost.”

Fee FAQ tab: “GTC stands for Good ‘Til Cancelled. A listing with GTC duration will renew every 30 days until the item sells successfully. Insertion fees and all Feature Fees will be charged every 30 days at the time the listing is renewed.”

[August 2008 Update, Dkt. 27-3 at 4, 7.] eBay also published other information stating the GTC listing fees would be charged every 30 days.

11. During the Class Period, eBay added “Insertion fees are charged every 30 day period” to the end of the Fees Schedules. On December 16, 2008, eBay revised the Core Fees Schedule (but not the Motors Fees Schedule) by adding:

Good ‘Til Cancelled renews automatically every 30 days until the item sells or you end the listing. Insertion Fees are charged every 30 day period.

[Dkt. 102-5 at 6.] eBay added this verbiage to the Motors and Stores Fees Schedules on March 30, 2010. [Dkt. 102-6 at 7, Dkt. 102-7 at 5.] Finally, on June 20, 2012, (after this case was filed), eBay added to all three Fees Schedules the following:

Good ‘Til Cancelled listings renew automatically every 30 days until all of the items sell, you end the listing, or the listing violates an eBay policy. Insertion fees and optional feature fees are charged every 30-day period.

[E.g., Dkt. 102-8 at 6.] This disclosure permits eBay to charge the fees in dispute every 30 days and marks the end of the proposed Class Period.

12. eBay has consistently and vigorously defended this case from the very outset. This case has been procedurally complex and hard fought. On September 15, 2011, Noll filed suit and

1 eBay thrice moved to dismiss. On April 23, 2012, the Court granted eBay's first motion to dismiss  
2 the (1) fraud; (2) UCL; (3) FAL; and (4) CLRA claims without prejudice and with leave to amend.  
3 The Court denied eBay's motion to dismiss the claims for (1) breach of contract; (2) unjust  
4 enrichment; and (3) declaratory judgment. On June 15, 2012, Noll filed his First Amended Class  
5 Action Complaint ("FAC") and on July 10, 2012, Plaintiff Rhythm filed a separate lawsuit and  
6 sought leave to intervene in the Noll case.  
7

8 13. On September 4, 2012, the court granted Rhythm's Motion to Intervene and denied  
9 eBay's second motion to dismiss the FAC as moot, requiring Plaintiffs to file a consolidated  
10 complaint. On October 2, 2012, Plaintiffs filed their Consolidated Second Amended Class Action  
11 Complaint ("SAC"). On May 30, 2013, the Court granted eBay's third motion to dismiss, with  
12 leave to amend (although without leave to the extent Insertion Fees were sought during times the  
13 Fees Schedules stated "Insertion Fees are charged every 30 day period.") The Court dismissed with  
14 prejudice the automatic renewal/continuous service count of the SAC.  
15

16 14. On July 1, 2013, Plaintiffs filed their Consolidated Third Amended Complaint  
17 ("TAC"). In the TAC, Plaintiffs allege eight causes of action for (1) breach of contract; (2) UCL  
18 violations; (3) FAL violations; (4) violations of Cal. Bus. & Prof. Code § 17600 (automatic  
19 renewal/continuous service); (5) CLRA violations; (6) unjust enrichment; (7) fraud; and (8)  
20 declaratory judgment. However, as described above, the Court had previously dismissed with  
21 prejudice Count 4 and all claims for Insertion Fees are during times Fees Schedules stated  
22 "Insertion Fees charged every 30 day period."  
23

24 15. On October 8, 2014, Plaintiffs filed their motion for class certification. The Class  
25 sought is substantially the same as the Settlement Class:

26 all natural persons and entities who are United States residents and who (1) placed  
27 GTC listings on eBay that commenced during the Class Period, and (2) were charged  
28

1 Disputed Fees. Excluded from the Class are the Judge of this Court and his staff,  
2 and all directors, officers, and managers of eBay, and their immediate families. An  
3 entity is deemed a "United States resident" for purposes of the foregoing if the  
primary contact information for the entity in eBay's current records is an address  
within the United States.

4 16. The Class Period is September 16, 2008, to June 19, 2012; the listings included  
5 depend on the marketplace: (1) Core and Motors listings span this entire time span; and (2) eBay  
6 Stores listings are limited from March 30, 2010, to June 19, 2012<sup>1</sup>. There are 1,192,947 unique user  
7 IDs in the Settlement Class (a person could have more than one user ID).<sup>2</sup>  
8

9 17. eBay has strenuously denied any wrongdoing or liability throughout the litigation,  
10 and continues to deny any wrongdoing or liability. eBay's merits defense includes (1) its web site  
11 was revised during the proposed Class Period to say that "Insertion fees are charged every 30 day  
12 period;" (2) other web pages such as the "FAQ" section of the August 2008 Seller Update state that  
13 "Insertion Fees and all Feature Fees will be charged every 30 days at the time the listing is  
14 renewed;" (3) It is common sense that automatic renewal comes with renewed listing fees and  
15 Plaintiffs' interpretation of GTC would produce absurd results; and (4) Plaintiffs and the proposed  
16 Class received invoices itemizing the fees at issue each month and voluntarily paid the recurring  
17 fees without complaint. eBay also contends that no class can be certified for any purpose other than  
18 settlement. These considerations place at risk both the ability to certify a class and, even if it is  
19 certified, the extent of any recovery of recurring listing fees.  
20

21 18. The Court has twice dismissed the fraud-based claims, and dismissed with prejudice  
22 all claims seeking recurring insertion fees at any time the operative Fees Schedules stated that  
23 "Insertion Fees are charged every 30-day period." While Plaintiffs believe that their breach of  
24

25  
26 <sup>1</sup> This limitation is due to the fact that the Stores Fees Schedule clearly stated that GTC fees would recur from  
September 16, 2008-March 29, 2010.

27 <sup>2</sup> A user ID is a user chosen identification name associated with an account. Each account must have a user ID.  
28 However, an eBay user can open multiple eBay accounts, so the same person may have more than one "user ID."

1 contract claim required eBay to clearly and unequivocally state that both Insertion Fees and  
2 Optional Feature Fees would be charged every 30 days for GTC Listings, there is some risk that the  
3 Court or a jury might find that other extrinsic evidence, such as information in the August 2008  
4 Update, might permit eBay to charge recurring fees. Moreover, it is undisputed that invoices with  
5 the itemized recurring fees were sent to all Class Members and the Court or a jury might find that  
6 Class Members knowingly or voluntarily paid recurring fees, especially fees paid for listings that  
7 went on for multiple months. In other words, eBay posits that a person might not have understood  
8 that they would get charged every 30 days, but that the person definitely should have known they  
9 were getting charged the recurring fees when they received and paid invoices in months two and  
10 later. eBay also strenuously argued that persons who sold their item(s) received the full benefit of  
11 the bargain of fees. Accordingly, while Plaintiffs believe that the invoices were not properly sent to  
12 Class Members and were far from clear, there is an even greater risk for renewal fees charged for  
13 months two and later that eBay could prevail on the merits and/or prevent class certification  
14 through knowing or "voluntary" payment.

17 19. This case has already been expensive, both from a time and out-of-pocket cost  
18 perspective. Plaintiffs' counsel have devoted over three years to this case, including multiple  
19 motions and extensive discovery. Plaintiffs also anticipate that costs will significantly increase, due  
20 to merits discovery, extensive data analysis and economic issues involved. Moreover, the case  
21 would like continue for at least one more year in the trial court, not to mention delays on appeal. In  
22 that regard, there would probably be an interlocutory appeal of any grant of class certification and  
23 an appeal on any merits decision favorable to Plaintiffs. All of these considerations would delay  
24 even a successful resolution of this case for probably at least three more years. This delay would  
25  
26  
27  
28

1 also mean that certain Class Members might not be reimbursed, because they might have changes  
2 of address or other changes that make notice and distribution of any award difficult or impossible.

3 20. No class has yet been certified, and eBay has informed us of many defenses it plans  
4 to use to prevent class certification. While Plaintiff contends that all class members' experiences  
5 were identical and predicated on uniform web pages published by eBay, eBay made many  
6 arguments to the contrary. For example, eBay asserts that Plaintiffs' contract claim cannot be  
7 certified because the "full record" of extrinsic evidence needed to determine each seller's  
8 "expectations" regarding GTC will be unique to each seller. While Plaintiffs believe that contract  
9 interpretation must be resolved on a class-wide basis, based on the objectively reasonable  
10 expectations of a typical consumer, eBay's argument presents a risk that no class might be certified  
11 due to individual questions.  
12

13 21. eBay also argues that Plaintiffs cannot show that the damages claims for all sellers  
14 can be resolved on a class wide basis, and has provided an economic expert who opines that  
15 individual issues predominate. *See Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013) (plaintiff  
16 seeking certification under Rule 23(b)(3) must establish "through evidentiary proof" that "damages  
17 are capable of measurement on a classwide basis"). eBay and its expert contend that individualized  
18 information such as the following would be required to assess liability and damages:  
19

- 20 • Whether the person knew about recurring fees and/or had seen the August 2008  
21 update and other information that disclosed recurring fees sold;
  - 22 • The number of times the listing renewed;
  - 23 • Whether the seller saw, studied and paid invoices with renewal fees;
  - 24 • How many GTC listings the person had placed, such as whether the person had  
25 made Stores GTC listings prior to March 10, 2010;
  - 26 • The revenues and profits the seller received from each sale.
- 27  
28

1 While Plaintiffs assert that *Comcast* is limited to antitrust cases where damages are intrinsically  
2 complex and that their fee refund model fits within the general rule that “damage calculations alone  
3 cannot defeat certification,” (*Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir.  
4 2010)), common proof of damages presents a risk on class certification and significant expense to  
5 the class for damages experts.

6 22. Damages are important both on the merits and for class certification. Our simplest  
7 model is to recover all recurring listing fees for GTC listings. The total amount of Disputed Fees is  
8 approximately \$50 million. However, these fees are for all renewals, not just the first renewal.  
9 Some GTC listings renewed more than 10 times. eBay strenuously argues that, at most, all Class  
10 Members knew or should have known that they were paying recurring fees when they received an  
11 paid their first invoice. The total amount of Disputed Fees attributable to the first month’s renewal  
12 was approximately \$9 million.

14 23. We believe that the settlement amount of \$6.4 million and a pro rata distribution  
15 based on the percentage of Disputed Fees paid by each Class Member is the most economical and  
16 fair approach to maximize the amount recovered by each class member and minimize the expense  
17 of administration.

19 24. An additional element in the overall mix of information I considered was the time  
20 value of money. If we were to press for the maximum amount of recovery, and assuming we were  
21 to prevail, it is my opinion that collecting anything from eBay after it exhausts all of its procedural  
22 and appellate rights would take a minimum of an additional two to three years. A benefit of the  
23 settlement is an immediate payment to the Class.

25 25. All of the foregoing considerations were part of extensive negotiations prior to and  
26 during the two mediations and other settlement negotiations with eBay. Given the countervailing  
27 considerations presented by the two dismissal orders, eBay’s continued vigorous defense against  
28

1 our remaining claims, the potential for delay, the many substantive and class certification defenses,  
2 and potential difficulties in determining and proving damages, we believe that a substantial  
3 discount from the total amount of Disputed Fees was essential in order to bring closure, certainty,  
4 and definite relief to the Class. Moreover, no one had previously taken the time or initiative to  
5 assert these claims and we believe the settlement brings real benefit to Class Members. We believe  
6 that a \$6,400,000 total Settlement Fund is well within the acceptable range of relief in the case,  
7 and reflects a substantial premium over the relatively small amount of individual damages that  
8 spawned our investigation in the case. Additionally, we believe that the simplified, straight-  
9 percentage payment to all Class Members is the best way to efficiently distribute the available  
10 funds to the Class. I therefore believe the settlement is fair, reasonable and adequate to the Class.

11 26. I have worked with several different class action administrators to distribute  
12 payments in class action settlements. It has been my experience that, depending on the number of  
13 class members, it is a good estimate that it will cost approximately \$1 per class member to send a  
14 check (including the costs of issuance and postage), especially considering additional costs likely  
15 to be incurred for re-issuing and re-mailing checks to certain class members.

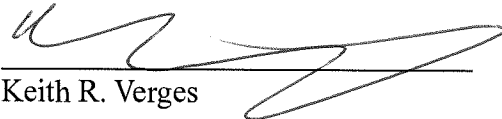
16 27. For small checks of less than \$1, class members will often not cash them. For  
17 example, I was lead class counsel in the prior settlement of *Brice Yingling d/b/a Alamo Autosports*  
18 *and Andy Scott v. eBay, Inc.*, Cause No. C 09-01733, In the United States District Court for the  
19 Northern District of California ("*Yingling*") in which checks were sent to 2.5 million settlement  
20 class members. The first mailing of checks cost over \$1.5 million, and thereafter there were  
21 continuing costs of over \$100,000 for bank charges, reconciliation of bank charges, call center  
22 charges from the administrator, and postage/processing for re-issued checks. About 900,000 of the  
23 initial set of 2.5 million checks were cashed. In dollar volume, about \$20.3 million in checks were  
24 issued, and about \$15.4 million were cashed. Thereafter, the administrator and I worked together  
25 to locate recipients. First, about 10,500 checks totaling about \$1.17 million were re-issued and  
26 mailed. About \$500,400 of these checks were cashed. Second, the administrator compiled a list of  
27 persons who had not cashed checks of at least \$500 and did detailed research to locate and  
28



1 telephone them in an effort to be sure they would receive and cash their checks. This resulted in a  
2 third check mailing of 416 checks totaling about \$626,000. 338 checks were cashed. Of the  
3 original \$20 million in checks issued, about \$16 million were eventually cashed.

4 I declare under penalty of perjury that the foregoing is true and correct.

5 Executed this 15<sup>th</sup> day of January, 2015.

6  
7   
8 Keith R. Verges

9  
10  
11  
12 **CERTIFICATE OF SERVICE**

13 I hereby certify that all counsel of record will be served with a copy of this document via the  
14 Court's CM/ECF system pursuant to the local rules of this Court, on this 15th day of January, 2015.

15  
16 /s/ Keith R. Verges

17 Keith R. Verges  
18  
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28



# **EXHIBIT 1**

## FIGARI & DAVENPORT

[www.figdav.com](http://www.figdav.com)



### EXCELLENCE

Figari & Davenport was one of the first commercial litigation boutiques in Dallas. It is known for excellence. That's why we are rated AV Premier. That's why we've had clients name us a "Go-To-Law-Firm of the Top U.S. Companies in the Labor and Employment Practice Area" and a "Go-To-Law-Firm for Financial Services Companies." Just this year we've been named a "2012 Top Ranked Law Firm" by LexisNexis Martindale Hubbell, a "Law 2012 Go-To Top 500 Firms" by Corporate Counsel magazine, and one of the "Best Law Firms" by U.S. News & World Report. We have six lawyers named Best Lawyers in America for business litigation, six lawyers recognized as Texas Super Lawyers including four who have been selected as "Super Lawyers" for 10 consecutive years. Three others have been called "Texas Rising Stars." We have an Advocate of the American Board of Trial Advocates and a Fellow of the American College of Trial Lawyers.

### DIVERSE CLIENTS

We guide businesses and individuals through their business disputes. Whether the client is a Fortune 500 company, a growing regional operation, a local shop, or an individual, we commit to provide each client exceptional service to obtain the best possible result.

### DIVERSE PRACTICE

Business disputes today are broad and varied. We advise and represent clients from beginning to end during disputes over their business contracts, employment agreements, non-compete agreements, trade secret contracts, insurance contracts, benefit plans, securities and other financial arrangements, software contracts, service agreements, leases, and marketing arrangements to name a few. We analyze, advise, mediate, arbitrate, litigate and try all kinds of disputes. We have handled class action, municipal, employment, insurance, contract, tort, trade practices, securities, intellectual property, software, and many other types of complex litigation throughout Texas and across the United States.

### EXPERIENCE

We combine experienced leadership with a new generation of experienced trial lawyers to deliver superior service and optimal results. We are proud to have served our clients for nearly 30 years.

## Figari & Davenport, LLP

3400 Bank of America Plaza  
901 Main Street  
Dallas, Texas 75202

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fax 214 939 2090

**Figari & Davenport, LLP** is one of the original and premier commercial litigation boutiques in Dallas. The firm was founded in 1986 by a group of trial lawyers, dedicated to providing superior service and obtaining the best possible results for their clients. As we enter our third decade, these core values remain constant as our firm continues to evolve, with new practice areas, a wide spectrum of complex and cutting edge cases, and a new generation of experienced trial lawyers.



### A Focus on Excellence

Our attorneys have gained tremendous legal and practical experience through the many pieces of complex civil litigation that we have handled in Texas and across the United States. Our litigation practice includes general business litigation, insurance litigation, labor and employment, securities litigation and arbitration, municipal litigation, and class actions. We know that winning a lawsuit in any of these areas requires strategy, drive, and the willingness to go beyond expectations. Using small teams of lawyers, we embrace this challenge and continually focus on excellence. We believe that by being fully prepared at each stage of a case, we can stay a step ahead of the other side and achieve superior results for our clients, whether through settlement, summary disposition, or trial.

Our peers and a variety of independent organizations throughout the state and country have been recognized the excellence of our attorneys. Over the years, Figari & Davenport lawyers repeatedly have been named in the *Best Lawyers in America* for business litigation, and identified as Texas Super Lawyers and among the Best Lawyers in Dallas. In 2006 and 2007, our firm was identified by a client as a Fortune 500 "go to" firm in the area of employment law.

FIGARI & DAVENPORT



### A Focus on Results

Our clients include Fortune 500 companies, smaller regional and entrepreneurial companies, as well as individuals. We represent clients in many industries, including banks and other financial institutions, technology companies, major insurance companies, municipalities, manufacturing concerns, automakers, real estate companies, aerospace and defense companies, and many others. We know that our clients want results. Our ability to work with them to achieve their objectives is a major contributing factor to our firm's ongoing success and one of the primary reasons that we enjoy many longstanding client relationships. We are proud of the many cases we have tried and won for clients before juries, judges, and arbitration panels, and equally proud of our ability to find creative solutions outside the courtroom whenever appropriate.

At Figari & Davenport, we emphasize trial and tactical skills, superlative client service, excellence and achievement. By staying true to our roots while we look to the future, Figari & Davenport strikes a balance that benefits our clients and fuels our legal practice.



### Areas of Practice

Figari & Davenport's practice focuses exclusively on commercial litigation. The firm has substantial experience and expertise in business litigation, insurance litigation, labor and employment, securities litigation and arbitration, and municipal litigation. Our lawyers have prepared and tried cases in each of these areas and have appeared in a multitude of forums, including state and federal courts in Texas and throughout the United States, arbitration panels, governmental agencies and tribunals, and civil service commissions. We also counsel clients on a broad range of pre-litigation matters and always strive to use our legal skills to further each client's particular business and strategic goals.

For more information regarding the practice of Figari & Davenport, LLP visit our website at [www.figdav.com](http://www.figdav.com).

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# **EXHIBIT 2**

CLASS SUITS

1. *Mario A. Vasquez, Michael Trudeau, Bobby Templeton, Juan Villanueva, Individually and on Behalf of Others Similarly Situated v. Commercial Union Life Insurance Company of America, Elmo Jackson, Mike Hodson, Phil Brody, Pro Financial Group, and Platinum Insurance Marketing, Inc.*

Represented Defendant (Mark T. Davenport, Keith R. Verges). Settled after class certification.

2. *In Re: General Motors Corporation, "Piston Slap" Products Liability Litigation*

Represented Defendants (A. Erin Dwyer, Keith R. Verges, Amanda D. Sotak). Class certification denied; case dismissed.

3. *John Wayne Caraway and George Hull, on Behalf of Themselves and All Others Similarly Situated, v. General Motors Corporation, a Delaware Corporation*

Represented Defendant (A. Erin Dwyer, Keith R. Verges, Amanda D. Sotak). Class certification denied; case dismissed.

4. *William Von Friewalde, Dave Hartman, Mark Compas, and Robert Bevins, et al. v. Boeing Aerospace Operations, Inc.*

Represented Defendant (Gary D. Eisenstat, Keith R. Verges, Amanda D. Sotak). Collective Action Decertified.

5. *Oscar Patino, In His Individual Capacity and On Behalf of All Similarly Situated Individuals v. Lawyers Title Insurance Corporation v. Capital Title of Texas, LLC*

Representing Defendant and Third-Party Plaintiff (Mark T. Davenport, Keith R. Verges, Raymond E. Walker). Partial summary judgment for Defendant; remaining claims pending.

6. *William S. Victory, Individually and On Behalf of All Others Similarly Situated v. Sneed Financial Services, LLC, Clifton Curtis Sneed, Jr., Unlimited Cash, Inc., Douglas Network Enterprises, and Lawyers Title Company*

Representing Defendant Lawyers Title Company (Mark T. Davenport, Keith R. Verges, Raymond E. Walker). Summary judgment for Lawyers Title Company.

7. *Cecil James Robinson, Individually and On Behalf of All Others Similarly Situated v. Commonwealth Land Title Insurance Company*

Represented Defendant (Mark T. Davenport, Keith R. Verges, Melissa A Mitchell). Plaintiff voluntarily dismissed.

8. *Barbara A. Mann and John Mann, Individually and as the Representatives of a Class of Similarly Situated Persons; Thaddeus M. Rolark and Antoinnette Rolark, Individually and as the Representatives of a Class of Similarly Situated Persons; Martin Acevedo, Individually and as the Representative of a Class of Similarly Situated Persons; v. Lawyers Title Insurance Corporation*

Represented Defendants (Mark T. Davenport, Keith R. Verges, Amanda D. Sotak). Settled.

9. *Thomas Wong, on Behalf of Himself and All Others Similarly Situated v. TrueBeginnings, LLC d/b/a True.com*

Represented Defendants (Gary D. Eisenstat, Keith R. Verges, Amanda D. Sotak). Settled.

10. *Francis D. Brown, Michael A. Olsen and Kirk D. Smith, Wyoming Residents, Suing on Behalf of Themselves and All Other Individuals Similarly Situated v. Royal Maccabees Life Insurance Company, A Michigan Corporation and a Member of Royal Insurance Group*

Represented Defendant (Mark T. Davenport and Keith R. Verges). Summary judgment granted to Defendant and affirmed on appeal by Tenth Circuit.

11. *Ricky Dan Hashop, Cathy Hines-Torregano, Ubaldo Garcia, and James Spencer, Jr., Individually, and On Behalf of All Persons Similarly Situated v. Rockwell Space Operations Company and Rockwell International Corporation*

Represented Defendants (Gary D. Eisenstat and Keith R. Verges). Settled.

12. *Gerald W. Dorsey, II, et al. v. Alamo Title Insurance of Texas, et al.*

Represented Defendants Lawyers Title Insurance Corporation and ATCOD (Mark T. Davenport, Parker D. Young, Keith R. Verges). Motion to Dismiss granted.

13. *Frank Bowden v. Public Service Company of New Mexico, Jerry D. Geist, John P. Bundrant, and M. H. Maerki*

Represented Defendant (Thomas A. Graves and Keith R. Verges). Settled.

14. *Thomas H. Ward v. General Motors Corporation*

Represented Defendant (A. Erin Dwyer, Tim Daniels, and Raymond E. Walker). Summary Judgment for Defendant.

15. *Jennie Farber and David S. Mielziner on Behalf of Themselves and All Others Similarly Situated v. Public Service Company of New Mexico; Jerry D. Geist; John P. Bundrant and Albert J. Robison*

Represented Defendant Public Service Company of New Mexico (Thomas Graves and Keith Verges). Settled.

16. *Tomasita L. Garcia, individually and on behalf of all others similarly situated v. Public Service Company of New Mexico, Jerry D. Geist, John P. Bundrant, Russell H. Stephens, E. R. Wood, Albert J. Robison, M.H. Maerki, James F. Jennings, and Robert B. Rountree*

Represented Defendant Public Service Company of New Mexico (Thomas Graves and Keith Verges). Settled.

17. *Paula Seigel, individually and on behalf of all others similarly situated v. Public Service Company of New Mexico; Jerry D. Geist; John P. Bundrant; Russell H. Stephens; E. R. Wood; Albert J. Robinson [sic, Robison]; M. H. Maerki; Robert B. Roundtree [sic, Rountree]; and James Jennings*

Represented Defendant Public Service Company of New Mexico (Thomas Graves and Keith Verges). Settled.

18. *Alfred Blumberg v. Public Service Company of New Mexico*

Represented Defendant Public Service Company of New Mexico (Thomas Graves and Keith Verges). Settled.

19. *The Klinefelter Family Revocable living Trust, et al. v. First Life Assurance Company, et al (Mega Life Insurance)*

Represented Defendant First Life Assurance Company (Mark Davenport and Keith Verges). Settled.

20. *Brice Yingling d/b/a Alamo Autosports and Andy Scott, Individually and on behalf of all others similarly situated v. eBay, Inc.*

Represented Plaintiffs (Parker Young, Keith Verges and Raymond Walker). Settled.

21. *Kaylen M. Silverberg, Individually and on behalf of all others similarly situated v. Hotels.com*

Represent Plaintiffs (Gary Eisenstat and Keith Verges). Settlement pending.



22. *Tasha Keirse, Individually and on behalf of all others similarly situated v. Ebay, Inc.*  
Represented Plaintiffs (Parker Young, Keith Verges and Raymond Walker).  
Settlement pending.
23. *Richard Noll and Rhythm Motor Sports, LLC, Individually and on behalf of all others similarly situated v. eBay, et al.*  
  
Represented Plaintiffs (Parker Young, Keith Verges and Raymond Walker).  
Active litigation.

# **EXHIBIT 3**

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Keith Verges  
Partner

**Fields of Practice**

Business Litigation  
Insurance Litigation  
Class Actions  
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Securities Litigation and Arbitration  
Intellectual Property Litigation

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**Practice Overview**

**AV® Preeminent™**

Mr. Verges has defended and prosecuted business litigation matters, class actions, and other cases in state and federal courts throughout Texas and nationally since joining Figari & Davenport in 1989. Mr. Verges has also handled contested administrative matters related to insurance and employment with the Texas Attorney General, Department of Insurance, and Commission on Human Rights.

During his tenure with the firm, Mr. Verges has handled many class action controversies, beginning with cases arising in securities and banking from 1989 to the mid-1990's, and subsequently extending into the internet and e-commerce businesses, insurance, employment, and products arenas. His range of class action experience includes representing stock issuers, directors, officers, special litigation committees, class members/objectors, and professional advisors. Mr. Verges' commercial litigation experience includes software and hardware development, patent infringement and validity, trademarks, copyrights, breach of warranty, partnership and co-owner disputes, insurance, employment, and covenants not to compete. His clients come from many fields, including utilities, insurance, real estate brokers, manufacturing, and information technology and include both privately held and publicly-traded companies.

**Highlights**

- Mr. Verges obtained the first-ever class action settlement against eBay that involved all-cash payments to certain eBay customers.
- In an appeal before the Tenth Circuit Court of Appeals, Mr. Verges obtained a holding that the illustration used to market a so-called "vanishing premium" life insurance policy was not a part of the contract.
- Mr. Verges and his client spearheaded a successful effort to control and limit third-party discovery at the industry-wide 2014 Biennial Title Insurance rate making hearing set for 2016.
- In a bench trial over breach of warranty for industrial printing equipment, Mr. Verges was able to obtain both actual and punitive damages for his client purchaser.

**Education**

JD, Southern Methodist University, magna cum laude, 1983

- Order of the Coif, 1989
- Leading Articles Editor, Southwestern Law Journal, 1983-1989

MA, Princeton University, 1983

BS, Southern Methodist University, summa cum laude, 1981, Phi Beta Kappa

**Honors**

Named a Texas Super Lawyer (Texas Monthly, 2005)

**Memberships**

State Bar of Texas

State Bar of Oklahoma

Barrister, The Patrick E. Higginbotham American Inn of Court, Dallas, Texas

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Parker D. Young  
Partner

#### Fields of Practice

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#### Practice Overview

##### AWP Preeminent™

Mr. Young has represented plaintiffs and defendants in lawsuits inside and outside Texas. His diverse business litigation background includes litigating complex cases involving:

- partnership disputes;
- class actions;
- commercial and residential construction disputes;
- employment disputes;
- real estate transactions;
- large scale commercial landlord-tenant issues;
- trademark and copyright infringement claims; and
- debtor/creditor relationships.

Mr. Young has extensive experience in the automotive manufacturing industry, having handled large cost recovery cases involving defective assembly parts and recalls. In addition to his business litigation practice, Mr. Young represents a number of Texas municipalities in various litigation-related matters, including labor and employment arbitrations, civil rights actions, and commercial contract cases. Mr. Young has frequently represented clients in arbitration proceedings, having tried more than 50 arbitration cases administered by a variety of organizations and agencies.

#### Highlights

- Recovered \$30,000,000 for a class of 2.5 million consumers against a Fortune 500 internet company.
- Obtained and collected an arbitration award of more than \$25,000,000 in favor of major automaker arising from supplier's delivery of defective automotive parts.
- Obtained an arbitration award in favor of client in a business valuation case, saving client \$30 million in the purchase of a large manufacturing business.
- Successfully defended a Fortune 500 company in a \$93 million suit brought by a major securities company's affiliate arising from a complex sale/leaseback transaction involving the client's corporate headquarters building.
- Won appeal on behalf of commercial tenant establishing significant precedent requiring precise demand from landlord prior to lease forfeiture. *Cuddeback Systems, Inc. v. BBE, L.L.C.*, 105 S.W.3d 66 (Tex. App. Eastland 2003).

#### Education

JD, University of Texas at Austin, with honors, 1987

BA, University of Texas at Austin, with honors, 1984

#### Memberships

- State Bar of Texas

#### Publications / Speaking Engagements

Consistency in Disciplinary Matters, 16th Annual Civil Service Workshop, February 21-22, 2002

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Raymond E. Walker  
Partner

**Fields of Practice**  
Business Litigation  
Insurance Litigation  
Class Actions

Phone 214.939.2048

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#### Practice Overview

Mr. Walker's practice focuses on commercial and insurance litigation, including class actions. He began with an externship with the Hon. Jerry Buchmeyer during law school. After law school, Mr. Walker served as a law clerk to the Hon. David Folsom in the United States District Court for the Eastern District of Texas, which developed a reputation as a "rocket docket" with a heavy load of patent and other complex commercial cases.

Since joining the firm as an associate, Mr. Walker has represented individuals and businesses across the country in a wide range of matters, from assorted business, partnership, and employment disputes to consumer class actions. Mr. Walker also routinely represents major life, health, and disability insurers, as well as their third-party administrators. Matters typically involve: benefit claims (state law and ERISA); preferred provider and network disputes; policy rescissions and related agent and policyholder fraud; subrogation and overpayments; reinsurance disputes; and other assorted contract and tort claims.

#### Highlights

- Mr. Walker was a key member of the legal team that obtained certification of a class of eBay Motors sellers alleging, among other things, that eBay overcharged final value fees based on its uniform, published fees schedules. After a federal court in California certified the class, which was upheld on appeal, eBay agreed to its first-ever class action settlement involving all-cash payments to certain eBay customers.
- In a bench trial, Mr. Walker (along with Doug Butler) successfully tried claims of a national insurance company against a preferred provider network for replicating errors on hospital charges for a number of patient-insurants.
- In a putative class action, Mr. Walker obtained a summary judgment in favor of a defendant life and annuity services company against investors who were allegedly duped into participating in a multi-million dollar Ponzi scheme.
- Mr. Walker obtained a summary judgment in favor of a national life insurance company sued by an employer-sponsored pension plan complaining that the insurance and annuity products used for funding caused the plan to incur life bond tax liability and penalties as a purported double tax shelter.
- After a local business obtained a TRO prohibiting a high-line automotive dealer based in Houston from competing in Dallas, Texas, Mr. Walker (along with Keith Verges) successfully fended off a request to expand the TRO into a temporary injunction.

#### Education

J.D., Southern Methodist University, Dedman School of Law, cum laude, 2002

- SMU Law Review
- SMU ABA National Negotiation Team, 2001
- SMU ABA International Client Counseling Team, 2000
- Board of Advocates "Excellence in Advocacy Award," 1999-2000

B.A., Texas A&M University, 1998

#### Honors

Named a Texas Rising Star (Texas Monthly, 2010 - 2013)

#### Memberships

- State Bar of Texas
- Dallas Bar Association

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