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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHELE MAZUR, individually and for all
others similarly situated,

Plaintiff,

v.

EBAY INC., HOT JEWELRY
AUCTIONS.COM d/b/a JEWELRY
OVERSTOCK AUCTIONS and
PARAMOUNT AUCTIONS, and DOES 1-
100, inclusive,

Defendants.

No. C 07-03967 MHP

MEMORANDUM & ORDER
Re: Defendants’ Motions to Stay,
Defendant eBay’s Motion to Dismiss and
Plaintiff’s Motion to Strike

On August 2, 2007 plaintiff Michele Mazur (“Mazur” or “plaintiff”), on behalf of herself and others similarly situated, brought suit against eBay Inc. (“eBay”) and Hot Jewelry Auctions.com (“HJA”) accusing the latter of shill bidding and the former of acquiescing in the same. Now before the court are both defendants’ motions to stay pending arbitration, eBay’s motion to dismiss and plaintiff’s motion to strike a declaration submitted by HJA. The court has considered the parties’ arguments fully, and for the reasons set forth below, the court rules as follows.

BACKGROUND

eBay is the world’s largest online auction hosting service. It strictly prohibits shill bidding—the practice of entering fake bids—on its website. Amongst the many services it provides, eBay also provides the Live Auction service, which allows eBay users to place bids on live auctions being held by auction houses and compete with floor bidders. The offline bids made by the floor bidders are reflected online, but eBay users are not provided any details regarding the bidder.

1 Mazur is an eBay user. In order to become a user, she had to accept and agree to eBay's
2 Terms and Conditions. See Somvichian Dec., Exh. A.¹ Further, in order to use the Live Auction
3 service, Mazur had to agree to eBay's Live Auction User Agreement. See id., Exh. B.

4 Defendant HJA holds auctions via eBay's live auction service using the monikers "Jewelry
5 Overstock Auctions" and "Paramount Auctions." Molayem Dec., ¶ 2. If an eBay user wants to bid
6 in one of HJA's auctions, the user is automatically presented with a copy of HJA's Terms and
7 Conditions to read and review. Id., ¶ 3. eBay users are able to read these Terms and Conditions
8 online by scrolling through the text of the terms. Hongola Dec., Exh. A. Alternatively, an eBay
9 user can also print the text of these Terms and Conditions. Id., Exh. B. eBay requires that HJA
10 upload a copy of its Terms and Conditions for every auction. Mazur was presented with HJA's
11 Terms and Conditions prior to bidding and she agreed to those Terms and Conditions, including the
12 Dispute Resolution provision. See Molayem Dec., ¶ 5.

13 The Dispute Resolution provision contained in the Terms and Conditions provides that if a
14 dispute between HJA and the plaintiff arises and cannot be resolved informally, the parties agree to
15 submit the dispute to In-House Attorneys, P.C. in Los Angeles, who will render a final and binding
16 decision. Specifically, the agreement states:

17 **DISPUTE RESOLUTION**

18 Should a dispute occur between JOA and Buyer (the parties) that cannot be resolved,
19 then the parties agree to the rules, regulations and procedures of the dispute
20 resolution described below and agree to the following procedures for Resolution of
21 the Dispute: If either party alleges that the other party is in default under this
22 agreement, then the dispute or allegation shall be submitted for Binding resolution to
23 In House Attorneys, P.C. in the City of Los Angeles, California. Each party shall
24 simply present their own case (limited to a maximum of one hour for each party) to In
25 House Attorneys, P.C., excluding witnesses, expert witnesses and attorneys. The
26 parties agree and acknowledge that they are completely waiving their rights to have
27 the dispute heard in a conventional manner including use of attorneys, arbitration,
28 mediation and any civil court in California having jurisdiction over the dispute. Any
award determined by In-House Attorneys, P.C. shall be binding and the prevailing
party shall be awarded full reimbursement of its actual paid fees in connection with
the dispute remedy listed herein.

25 Hongola Dec., Exh. B. This purported Dispute Resolution provision shall hereinafter be referred to
26 as the "contested provision." Mazur agreed to HJA's Terms and Conditions, which included the
27 contested provision, and bid during a HJA live auction. She won the auction and directly paid HJA

1 \$4,602.90 for several pieces of HJA’s jewelry that were then directly shipped to her.

2 In her complaint, Mazur claims that HJA made misrepresentations regarding the nature of its
3 auction services and engaged in shill bidding practices. She also complains that eBay falsely
4 claimed the live auctions were safe and involved carefully screened reputable international auction
5 houses with floor bidders. Thus, she alleges a number of contract, tort and statutory claims against
6 both defendants.

7
8 LEGAL STANDARD

9 I. Arbitration

10 The Federal Arbitration Act (“FAA”), 9 U.S.C. sections 1–16, requires federal courts to
11 enforce arbitration agreements and to stay any litigation that contravenes such agreements. The
12 court’s role under the FAA is limited to (1) determining whether a valid agreement to arbitrate exists
13 and, if it does, (2) deciding whether the agreement encompasses the dispute at issue. 9 U.S.C. § 4;
14 Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719–20 (9th Cir. 1999).

15 Despite the “liberal federal policy favoring arbitration agreements,” Green Tree Fin. Corp. v.
16 Randolph, 531 U.S. 79, 81 (2000), state law still has a role to play. In interpreting 9 U.S.C. section
17 2, the Supreme Court has held that “state law, whether of legislative or judicial origin, is applicable
18 *if* that law arose to govern issues concerning the validity, revocability, and enforceability of
19 contracts generally.” Perry v. Thomas, 482 U.S. 483, 492 n. 9 (1987). Therefore, “generally
20 applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate
21 arbitration agreements without contravening Section 2.” Doctor’s Assocs., Inc. v. Casarotto, 517
22 U.S. 681, 687 (1996). “In making this determination, federal courts may not address the validity or
23 enforceability of the contract as a whole.” Ticknor v. Choice Hotels Int’l, Inc., 265 F.3d 931, 937
24 (9th Cir. 2001) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967)).

25
26 II. Rule 12(b)(6)

27 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
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1 sufficiency of a claim.” Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule
2 12(b)(6) focuses on the “sufficiency” of a claim—and not the claim’s substantive merits—“a court
3 may [typically] look only at the face of the complaint to decide a motion to dismiss.” Van Buskirk
4 v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). Although the court is generally
5 confined to consideration of the allegations in the pleadings, when the complaint is accompanied by
6 attached documents, such documents are deemed part of the complaint and may be considered in
7 evaluating the merits of a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,
8 1267 (9th Cir. 1987).

9 A motion to dismiss should be granted if plaintiff fails to proffer “enough facts to state a
10 claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974
11 (2007). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient
12 facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699
13 (9th Cir. 1990).

14 Allegations of material fact are taken as true and construed in the light most favorable to the
15 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). The court
16 need not, however, accept as true allegations that are conclusory, legal conclusions, unwarranted
17 deductions of fact or unreasonable inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979,
18 988 (9th Cir. 2001); Clegg v. Cult Awareness Network, 18 F.3d 752, 754–55 (9th Cir. 1994).

19
20 III. Fraud-based claims

21 A plaintiff alleging fraud must satisfy a heightened pleading standard that requires
22 circumstances constituting fraud be pled with particularity. Fed. R. Civ. P. 9(b). Specifically, “[t]he
23 pleadings must state precisely the time, place, and nature of the misleading statements,
24 misrepresentations, and specific acts of fraud.” Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994),
25 cert. denied, 516 U.S. 810 (1995). In addition, plaintiffs seeking to satisfy Rule 9(b) must “set forth
26 an explanation as to why the statement or omission complained of was false and misleading.” In re
27 GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc); see Fecht v. Price Co., 70
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1 F.3d 1078, 1082 (9th Cir. 1995), cert. denied, 517 U.S. 1136 (1996). The pleading must be “specific
2 enough to give defendants notice of the particular misconduct . . . so that they can defend against the
3 charge and not just deny that they have done anything wrong.” Vess v. Ciba-Geigy Corp. USA, 317
4 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation omitted).

5 It is well established that Rule 9(b)’s requirement that allegations of fraud be pled with
6 particularity applies to state-law causes of action before a federal court: “[W]hile a federal court
7 will examine state law to determine whether the elements of fraud have been pled sufficiently to
8 state a cause of action, the Rule 9(b) requirement that the *circumstances* of the fraud must be stated
9 with particularity is a federally imposed rule.” Vess, 317 F.3d at 1103 (quoting Hayduk v. Lanna,
10 775 F.2d 441, 443 (1st Cir. 1985)); see also Jenkins v. Commonwealth Land Title Ins. Co., 95 F.3d
11 791, 796 (9th Cir. 1996).

12 This heightened pleading standard applies to allegations of fraud and allegations that sound
13 in fraud, including false misrepresentations. Vess, 317 F.3d at 1106–07; see also Meridian Project
14 Sys., Inc. v. Hardin Constr. Co., LLC, 404 F. Supp. 2d 1214, 1219 (E.D. Cal. 2005) (“It is well
15 settled in the Ninth Circuit that misrepresentation claims are a species of fraud, which must meet
16 Rule 9(b)’s particularity requirement.”); Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101,
17 1141 (C.D. Cal. 2003) (same).

18 19 DISCUSSION

20 I. The Contested Provision

21 HJA claims that the contested provision in its Terms and Conditions is binding and
22 enforceable and amounts to arbitration under the FAA. On this basis, HJA requests the court stay
23 this action pending the outcome of arbitration. There is no argument that if the contested provision
24 is valid, this court must stay the instant proceedings with respect to the causes of action covered by
25 the provision. Plaintiff, however, contends the provision is unconscionable and therefore
26 unenforceable. Alternatively, plaintiff argues that her claims are not encompassed by the terms of
27 the provision. The two-pronged Simula test requires the court to determine, first, if the contested
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1 provision is valid, and second, if the instant dispute falls within the scope of the provision.

2
3 A. Validity

4 There is no argument amongst the parties that California law applies. Under California law,
5 an arbitration agreement must be both procedurally and substantively unconscionable to be invalid.
6 Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000); see also Circuit
7 City Stores, Inc. v. Mantor, 335 F.3d 1101, 1105 (9th Cir. 2003). Procedural unconscionability
8 exists when there is oppression or surprise in an agreement because of unequal bargaining power.²
9 Armendariz, 24 Cal. 4th at 114. Substantive unconscionability exists when there are overly-harsh or
10 one-sided results. Id. The court applies a sliding scale that assesses procedural unconscionability in
11 proportion to substantive unconscionability: “The more substantively oppressive the contract term,
12 the less evidence of procedural unconscionability is required to come to the conclusion that the term
13 is unenforceable, and vice versa.” Id.

14 1. Procedural Unconscionability

15 As an initial matter, plaintiff argues that the version of the Terms and Conditions submitted
16 by HJA in the Walters declaration is not the version that users actually see. The court agrees. The
17 Walters declaration contains formatting and is much easier to read than the version actually seen by
18 users when they click to signify agreement. The Hongola declaration contains the same agreement
19 in the manner in which it is presented to the user. Compare Hongola Dec., Exh’s. A & B with
20 Walters Dec., Exh. A. In both instances, the contents of the agreement are identical. Id. Thus, the
21 court will consider Hongola’s declaration and ignore Walters’ declaration. In essence then,
22 plaintiff’s motion to strike Walters’ declaration is granted.³

23 The court examines two factors when analyzing the procedural unconscionability of a
24 contract: oppression and surprise. Mantor, 335 F.3d at 1106. Oppression arises when there is an
25 unequal balance of bargaining power between the parties to a contract that precludes the weaker
26 party from enjoying a meaningful opportunity to negotiate the terms of the contract. Id. Surprise
27 arises when the terms to which the parties allegedly agreed are “hidden in the prolix printed form
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1 drafted by the party seeking to enforce the disputed terms.” Id. (quoting Stirlen v. Supercuts, Inc.,
2 51 Cal. App. 4th 1519, 1532 (1997)).

3 Oppression analysis first asks whether the contract is one of adhesion. Nagrampa v.
4 Mailcoups, Inc., 469 F.3d 1257, 1281 (9th Cir. 2006) (citing Flores v. Transamerica HomeFirst, Inc.,
5 93 Cal. App. 4th 846, 853 (2001)). A contract of adhesion is “a standardized contract, which,
6 imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party
7 only the opportunity to adhere to the contract or reject it.” Ting v. AT&T, 319 F.3d 1126, 1148 (9th
8 Cir. 2003). Here, it is uncontested that the Terms and Conditions were drafted by HJA and plaintiff
9 had no opportunity to negotiate any of the provisions, including the contested provision. Though
10 plaintiff may be a business owner herself, her interaction with Live Auctions was in the capacity of
11 an ordinary consumer—she did not have a relationship with HJA that allowed her to negotiate the
12 Terms and Conditions. Thus, this agreement was unquestionably an oppressive contract of
13 adhesion.

14 This oppression was coupled with surprise. The format in which the Terms and Conditions
15 were presented to the plaintiff only allowed for a few single-spaced lines of block text to be visible
16 at any given time.⁴ Furthermore, there were no paragraph, section or heading breaks that would aid
17 in reading comprehension or allow the user to navigate to a particular section. This single-spaced
18 massive block of impenetrable text looked the same when printed out. The section headings in the
19 agreement, which were in all-caps, did not aid comprehension either since they were embedded in
20 the text and could not be easily ascertained. Thus, case law that accords weight to section headings
21 is inapposite. Accordingly, since both oppression and surprise were present, the court is satisfied
22 that the agreement was procedurally unconscionable.

23 HJA’s three arguments in opposition are easily disposed. First, the procedural
24 unconscionability is not reduced by the fact that HJA’s Terms and Conditions were available
25 elsewhere on eBay’s and HJA’s websites. Since plaintiff was not directed to these locations, the
26 presence of the Terms and Conditions at these locations is irrelevant. Second, the fact that plaintiff
27 could return her purchase within seven days also has no bearing upon the validity of the arbitration
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1 clause. Oestreicher v. Alienware Corp., 502 F. Supp. 2d 1061, 1070 (N. D. Cal. 2007) (Patel, J.), is
2 inapposite because this court did not base its holding upon the return policy, but declined to
3 establish a rule whereby “companies are required to ensure that customers actually read contracts
4 before agreeing to them.” Id. Third, plaintiff’s failure to allege that she could not have purchased
5 her goods elsewhere does not save the contested provision from being procedurally unconscionable.
6 This court will not require plaintiff to scour eBay’s website to determine the least oppressive terms
7 and conditions before bidding. Indeed, all terms and conditions on eBay’s website seem to be
8 presented in a similar fashion, though in most instances they are more readably formatted, thereby
9 removing the surprise element found here.

10 2. Substantive Unconscionability

11 Although “parties are generally free to structure arbitration agreements as they see fit,” Volt
12 Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 478–79
13 (1989), a determination of substantive unconscionability turns on the existence of overly-harsh or
14 one-sided results, Nagrampa, 469 F.3d at 1280. A contract may provide extra protection to the
15 superior party without being unconscionable, but that party’s need for the advantage must be
16 explained in the contract or be factually established. Ingle v. Circuit City Stores, 328 F.3d 1165,
17 1173 (9th Cir. 2003). The key consideration in finding substantive unconscionability is a lack of
18 mutuality. Nagrampa, 469 F.3d at 1281 (citing Abramson v. Jupiter Networks, Inc., 115 Cal. App.
19 4th 638, 651 (2004)). “Where an arbitration agreement is concerned, the agreement is
20 unconscionable unless the arbitration remedy contains a ‘modicum of bilaterality.’” Ting, 319 F.3d
21 at 1149 (citing Armendariz, 24 Cal. 4th at 117). “In determining whether an arbitration agreement is
22 sufficiently bilateral, courts assessing California law look beyond facial neutrality and examine the
23 actual effects of the challenged provision.” Id. (citations omitted). In sum, arbitration is intended to
24 be a “forum for neutral dispute resolution” and not a means of maximizing the advantage of the
25 drafter in an adhesion contract. See Armendariz, 24 Cal. 4th at 117.

26 The contested provision calls for In-House Attorneys, P.C. in Los Angeles to be the decision
27 makers. Plaintiff argues the would-be decision makers are not neutral because they claim to be a
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1 “virtual corporate legal department, offering [their] Small Business Clients a variety of services over
2 the internet.” Pl.’s Opp. to HJA’s Motion to Stay at 6. Indeed, In-House’s website states that it
3 offers “corporate clients all of the services and expertise typically provided by law firms to corporate
4 clients, eliminating the need for an in-house legal department.” Inhouse Attorneys, P.C.,
5 <http://www.in-house-lawyers.com> (last visited March 3, 2008). The website continues, “Inhouse is a
6 true alternative to in-house counsel.” *Id.* This leaves little doubt as to In-House’s duty of loyalty.
7 Interestingly, the “firm” lists only two lawyers, one of whom according to California State Bar
8 records has an address in Utah and shows no affiliation with In-House. The records also reflect that
9 he has been disciplined “w/actual suspension” and was returned to active status in 2006. The State
10 Bar of California, Attorney Search, [http://members.calbar.ca.gov/search/member_detail.aspx?](http://members.calbar.ca.gov/search/member_detail.aspx?x=208563)
11 [x=208563](http://members.calbar.ca.gov/search/member_detail.aspx?x=208563) (last visited March 3, 2008). Under all of these circumstances, In-House’s ability to offer
12 a neutral and fair resolution of the dispute is illusory.⁵

13 The terms of the contested provision also provide that each party has one hour to present its
14 case and that witnesses, including experts, and attorneys are not allowed. HJA claims the same
15 applies to both parties and therefore mutuality exists. This argument proves too much because it
16 also applies to a waiver of all litigation concerning the transaction. A complete waiver would be
17 bilateral, but would allow HJA to sell fake jewelry without any repercussions. HJA’s argument is
18 therefore unpersuasive. As discussed below, this bilateral restriction has far greater adverse
19 consequences for plaintiff than it does for HJA.

20 The court is concerned by the “no-witnesses” provision even though the same has been held
21 valid in this district. *See Kayne v. Thomas Kinkade Co.*, 2007 WL 4287364, at *5 n.4 (N. D. Cal.
22 Dec. 5, 2007) (Illston, J.) (order regarding motion to dismiss and motion to strike). The *Kayne*
23 court, however, upheld the provision only because “plaintiff was permitted to submit documentary
24 evidence, including declarations, in support of his arguments.” *Id.* There is no such provision here.
25 Since plaintiff has the burden of proof, this bilateral restriction banning witnesses has the effect of
26 favoring HJA. The one hour bilateral time restriction, which disallows complex cases with multiple
27 factual disputes to be adjudicated properly, also has the effect of favoring HJA. To this court, the
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1 envisioned proceedings seem indistinguishable from a small claims action being adjudicated by an
2 attorney of dubious qualifications and loyalties serving pro-tem. The court is also concerned about
3 whether discovery would be allowed. Since attorneys are banned, the scope, rules and procedures
4 regarding discovery are unclear. Without discovery, it would likely be impossible for plaintiff to
5 prove her case. In sum, the lopsided adverse consequences of the clause lead the court to find a high
6 degree of substantive unconscionability. This coupled with the procedural unconscionability found
7 above renders the contested provision invalid.⁶

8 Further, the clause is especially egregious because individual damages are likely to be small
9 and class actions are thus the only effective way to litigate such disputes. HJA claims that since the
10 contested provision does not explicitly prohibit class arbitration, this question would be a matter for
11 the decision maker. See Ramirez v. Cintas Corp., 2005 WL 2894628, at *8 (N.D. Cal. Nov. 2, 2005)
12 (White, J.) (motion to dismiss). However, this argument can cut both ways—since the provision
13 does not explicitly require class arbitration, the present class action must therefore proceed.
14 Ramirez is also distinguishable because the arbitration provision there incorporated the American
15 Arbitration Association’s rules. Id. at *2. In contrast, there are no rules here save plaintiff having
16 one hour in which to personally make all arguments regarding the merits of her own claims and the
17 claims of her class-members. This makes it de facto impossible to litigate a class action and thus
18 case law that holds de jure class action waivers to be substantively unconscionable is instructive
19 here.

20 The express terms of the provision state that parties are “completely waiving their rights to
21 have the dispute heard in a conventional manner including use of attorneys, arbitration, mediation
22 and any civil court in California having jurisdiction over the dispute.” Hongola Dec., Exh. B. This
23 clause not only disavows traditional mediation and arbitration—which HJA argues the provision
24 provides—but also seems to be a blanket class action waiver. This class action waiver would be
25 substantively unconscionable under the Shroyer standard. The first requirement is met. The
26 contract was presented on a “take it or leave it” basis with no opportunity to negotiate. The second
27 factor, regarding the amount of damages at issue, is also met because this court has held that
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1 individual damages of \$4,000 can sustain class actions. Oestreicher, 502 F. Supp. 2d at 1067–68.
2 Third, Mazur alleges HJA was aware of the shill bidding scheme and did so intentionally to defraud
3 customers. If proven, this would constitute a deliberate scheme to cheat consumers. Accordingly,
4 all Shroyer factors are satisfied. Finally, the adhesive nature of the contract provides the minimal
5 level of procedural unconscionability to render a contract unenforceable if the contract also contains
6 a substantively unconscionable class action waiver. See Gatton v. T-Mobile USA, Inc., 152 Cal.
7 App. 4th 571, 586–88 (2007). The class action waiver, if any, is therefore unconscionable and
8 unenforceable. Consequently, this class action may be brought under the circumstances here.

9 3. Fraud

10 Plaintiff’s argument that consent to the Terms and Conditions, including the contested
11 provision, was induced by fraud is to no avail. Her entire argument to this effect is a recitation of
12 the elements of fraud followed by blanket allegations of misrepresentation, knowledge, intent,
13 reliance and damages. This is nowhere near the level of showing necessary for the court to find the
14 entire contract void.

15
16 II. Motion to Dismiss

17 Defendant eBay moves to dismiss plaintiff’s causes of action one through eleven and twenty-
18 one.⁷ These causes of action allege that eBay made misrepresentations about Live Auctions in order
19 to intentionally attract and defraud its customers. Specifically, eBay misstated that live auctions
20 were “safe,” involved “floor bidders” and were carried out by “carefully-screened, reputable
21 international auction houses.” See generally Complaint. On a webpage on its site entitled “Are Live
22 Auctions Safe?,” eBay states:

23 Bidding on eBay Live Auctions is very safe. All live auctions are run by reputable
24 international auction houses, which are carefully screened by eBay before being
25 authorized to sell to you. Many of them have hundreds of years of experience in the
26 auction business and fully stand behind their merchandise.

27 Each lot on the Live Auctions site is offered under the auction house’s terms and
28 conditions of sale for that particular event. They usually include both satisfaction and
authenticity guarantees. Check the auction overview page of any lot that you might
be interested in for a full description of the terms and conditions of sale for that
auction. If you have any questions, contact the auction house’s administrative

1 contact - you can also find that information on the auction overview page.

2 In addition, you can always use the Feedback Forum to instantly check the
3 “reputation” or business practices of any eBay member. The Feedback Forum is a
4 place where eBay users leave comments about each other’s buying and selling
experiences. If you’re a bidder, check you’re [sic] an auction house’s Feedback
Profile to learn about the way they do business before you place a bid.

5 Somvichian Dec., Exh. C.

6 Based upon the above assertions, plaintiff claims the following: 1) violations of the
7 California Consumer Legal Remedies Act (“CLRA”), California Civil Code §§ 1750 et seq.;
8 2) violations of the California Unfair Competition Law (“UCL”), California Business Code §§
9 17200 et seq., 17500 et seq.; 3) wilful deception and deceit, California Civil Code §§ 1709, 1710; 4)
10 actual and constructive fraud, California Civil Code §§ 1572, 1573; 5) breach of contract;⁸ 6) unjust
11 enrichment; 7) negligence and negligence per se; and 8) violations of the federal RICO statute, 18
12 U.S.C. § 1962(c). eBay, however, argues that is has no liability because: 1) it is immune from
13 liability under section 230 of the Communication Decency Act (“CDA”); 2) its user agreements
14 have a release of liability; 3) plaintiff’s fraud contentions fail to meet heightened pleading
15 requirements; and 4) plaintiff’s unjust enrichment and negligence claims are improper. Each is
16 discussed in turn.

17
18 A. CDA

19 1. Applicability and Scope

20 The CDA establishes immunity for providers of interactive computer services that provide an
21 online platform allegedly used by third-parties to facilitate wrongful conduct. Specifically, section
22 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the
23 publisher or speaker of any information provided by another information content provider.” 47
24 U.S.C. § 230(c)(1). The provider of an interactive computer service is broadly defined to encompass
25 “any information service, system, or access software provider that provides or enables computer
26 access by multiple users to a computer server.” Id. § 230(f)(2). An information content provider is
27 “any person or entity that is responsible, in whole or in part, for the creation or development of
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1 information provided through the Internet or any other interactive computer service.” Id. §
2 230(f)(3). Here, eBay qualifies as the provider of an interactive computer service. See Genry v.
3 eBay, 99 Cal. App. 4th 816, 834 (2002) (holding eBay to be a provider of interactive computer
4 services). Similarly, HJA is an information content provider with respect to information about its
5 wares. Thus, to the extent plaintiff seeks to hold eBay liable for information provided by HJA, eBay
6 is immune from liability. See 47 U.S.C. § 230(e)(3) (“No cause of action may be brought and no
7 liability may be imposed under any State or local law that is inconsistent with this section.”).

8 eBay, however, may be both an interactive computer service as well as an information
9 content provider. See Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006)
10 (Whyte, J.) (“It is not inconsistent for eBay to be an interactive service provider and also an
11 information content provider; the categories are usually not mutually exclusive. The critical issue is
12 whether eBay acted as an information content provider with respect to the information that [plaintiff]
13 claim[s] is false or misleading.”). Plaintiff seeks to hold eBay liable for misconduct with respect to
14 eBay’s own statements regarding the safety, circumstances and caliber of its live auctions. The
15 CDA does not immunize eBay for its own fraudulent misconduct.

16 However, plaintiff’s assertion that eBay knew of the seller’s illegal conduct and failed to
17 prevent it is nevertheless under the ambit of section 230. Specifically:

18 Regarding the allegation that eBay knew or should have known about the sellers’
19 illegal conduct but failed to prevent it by withdrawing or altering the fraudulent
20 content, the Gentry court stated: ‘This is the classic kind of claim that Zeran found to
be preempted by section 230, . . . one that seeks to hold eBay liable for its exercise of
a publisher’s traditional editorial functions.’

21 Barrett v. Rosenthal, 40 Cal. 4th 33, 47 (2006) (citing Gentry, 99 Cal. App. 4th at 835). Similarly,
22 eBay’s assertion that the auction houses were screened is not actionable because “‘lawsuits seeking
23 to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such
24 as deciding whether to publish . . . —are barred.”’ Gentry, 99 Cal. App. 4th at 828–29 (quoting
25 Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)). Screening a potential auction house
26 when deciding whether to include it in Live Auctions is akin to deciding whether to publish and
27 therefore eBay is immune under section 230 for its screening decisions. eBay represents that it

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1 “carefully screens” for “reputable” auction houses, but the modifier “carefully” with respect to
2 “screened” and the adjective “reputable” both indicate opinion and are therefore not actionable.

3 2. Affirmative Representations

4 Independent of the above immunity, eBay’s assertions that the live auctions were “safe” and
5 involved “floor bidders” involved with “international” auction houses may still be actionable as
6 affirmative misrepresentations. Gentry is distinguishable in this respect because the assertions of
7 safety there were made upon the basis of user feedback. 99 Cal. App. 4th at 833–34. Specifically,
8 the indicators of safety—the color-coded star symbol, the Power Sellers endorsement and the
9 Feedback Forum—were all driven by eBay users. The Feedback Forum was populated by eBay
10 users and the star symbol and Power Sellers endorsement were merely short-hand representations
11 based upon an aggregation of information in the Feedback Forum. Id. There is no such parallel
12 here. eBay unequivocally stated, of its own volition, that live auctions were “safe” and involved
13 “floor bidders” and “international” auction houses.

14 eBay argues that it makes clear in its Live Auction User Agreement that it: 1) only provides a
15 venue; 2) is not involved in the actual transaction between buyer and seller; and 3) does not
16 guarantee any of the goods offered in any auction. Specifically, eBay is “solely a passive conduit”
17 and “not an auction house,” it is “not conducting the live auctions” and it does not have control over
18 the “quality, safety or legality of the items advertised.” Somvichian Dec., Exh. B.⁹ None of these
19 statements, save possibly the last one, have any bearing upon the credibility of the auction houses
20 that hold auctions on the Live Auctions site. Specifically, these statements, except possibly the last
21 one, do not negate either the fact that eBay vouched for the safety of live auctions or the implicit
22 suggestion that they have investigated the auction houses. Though eBay is correct in asserting that
23 the full contents of the agreement must be scrutinized, see Twombly, 127 S. Ct. at 1972 n.13, these
24 statements, as a whole, do not undermine eBay’s representation that Live Auctions are safe.

25 Moreover, the assurance that live auctions are “very safe” is followed by statements that the
26 auction house’s terms and conditions “usually include both satisfaction and authenticity guarantees.”
27 Somvichian Dec., Exh. C. The webpage goes on to state that the user “can always use the Feedback
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1 Forum to instantly check the ‘reputation’ or business practices of any eBay member. . . . If you’re a
2 bidder, check you’re [sic] an auction house’s Feedback Profile to learn about the way they do
3 business before you place a bid.” Id. These statements do not demonstrate that the initial safety
4 assurances were not made by eBay. Indeed, they indicate that guarantees made by the auction house
5 and the feedback of eBay users add to the safety, but do not demonstrate that eBay’s assurances
6 were premised upon the auction house’s guarantee and the Feedback Forum. Similarly, the webpage
7 entitled “Participating in Live Auctions using the Internet is safe, easy, and fun!” explains that, in
8 order to participate, the buyer must: 1) agree to eBay’s Live Auction terms and conditions; 2) sign
9 up for each individual auction with the auction house; 3) agree to the auction house’s terms and
10 conditions; 4) deal with the auction house directly. See id., Exh. D. Again, these statements do not
11 disavow eBay’s prior assurances of safety or demonstrate that the safety is premised upon following
12 the four outlined steps.

13 3. Falsity of the Representations

14 eBay claims that its representations are false only if the HJA engaged in wrongdoing and that
15 the CDA provides a safe harbor for exactly this type of derivative liability. See Doe v.
16 SexSearch.com, 502 F. Supp. 2d 719 (N. D. Ohio 2007). In SexSearch, defendant claimed that “all
17 persons on its site are ‘18+’ years of age.” 502 F. Supp. 2d at 729. There, however, defendant’s
18 statements were merely a regurgitation of its users’ representations. Specifically, “[i]n order to gain
19 access to SexSearch as a member, all potential members must check a box that appears on the
20 webpage, which states: ‘I am over 18, I have read and agree to the terms and conditions and the
21 privacy policy.’” Id. This action is distinguishable as eBay has not presented any evidence
22 regarding safety assurances it received from HJA and other auctioneers. In addition, in SexSearch,

23 Plaintiff, as a registered member of the site, knew the membership-registration
24 process did not involve an age-verification procedure. But more importantly,
25 Plaintiff cannot claim he was misled or he reasonably relied on the representation that
‘all members are 18+’ when the Terms and Conditions clearly state the website did
not guarantee (and took no responsibility for verifying) members’ ages.

26 Id. at 729–30. Though eBay’s Live Auctions User Agreement disavows any guarantee that
27 participating auction houses maintain licenses or comply with applicable laws, nothing specifically
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1 states that eBay does not guarantee that bidding in Live Auctions is safe. Consequently, SexSearch,
2 which had an explicit waiver, does not apply.

3 eBay claims Prickett v. InfoUSA, Inc., No. 4:05-CV-10, 2006 WL 887431, at *3 (E. D. Tex.
4 Mar. 30, 2006) is applicable here. In Prickett, a directory listing service assured its customers of the
5 following: “We deliver the utmost quality information, and this is one way we keep track of all the
6 business changes that are happening. We also call every business to verify the information, so you
7 can be assured of the most current and accurate listings.” 2006 WL 887431, at *3. The Prickett
8 court held, without any analysis:

9 Additionally, the Plaintiffs argue that the Defendant operated as an information
10 content provider because the Defendant assures the accuracy of its listings via its
11 verification process. The Plaintiffs are presumably alleging that they were harmed by
12 third party content and that the Defendant is liable for failing to verify the accuracy of
13 the content. See Barnes v. Yahoo!, Inc., 2005 WL 3005602, *4 (D.Or.2005). ‘Any
14 such claim by [the Plaintiffs] necessarily treats the [Defendant] as ‘publisher’ of the
15 content and is therefore barred by § 230.’ *Id.* The Plaintiffs’ argument that they seek
16 to hold the Defendant liable for its alleged failure to verify the accuracy of the listing
17 does not remove this case from the immunity provided by § 230. *See id.* ‘[The
18 Plaintiffs’] claim remains an effort to hold the [Defendant] liable for failing to
19 perform the duties of a publisher, . . .’ *Id.*

20 Id. at *5. The Barnes court, upon which Prickett relied, held:

21 Plaintiff’s argument that she seeks to hold defendant liable only for its alleged
22 ‘failure to fulfil its promise to remove the unauthorized profiles,’ does not remove
23 this case from the immunity provided by § 230. Plaintiff’s claim remains an effort to
24 hold the service provider liable for failing to perform the duties of a publisher, such
25 as screening or removing third-party content. See also, Schneider v. Amazon.com,
26 Inc., 108 Wash.App. 454, 31 P.3d 37, 41-43 (2001)(court rejected plaintiff’s claim
27 that defendant ‘promised to remove’ allegedly tortuous reviews, but then ‘failed to do
28 so, and reposted the reviews rather than deleting them.’ Court held that § 230 barred
29 plaintiff’s claim because the ‘broken promise’ claims were based on an alleged
30 ‘failure to remove the posting,’ and therefore based on defendant’s ‘exercise of
31 editorial discretion’ subject to § 230’s prohibition on publisher liability).

32 Barnes v. Yahoo!, Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *4 (D. Or. Nov. 8, 2005). In
33 Prickett and Barnes CDA immunity was established because of a failure to verify the accuracy of a
34 listing or the failure to remove unauthorized profiles. Since both acts fell squarely within the
35 publisher’s editorial function, the CDA was implicated. The case at bar, however, is opposite. eBay
36 did not make assurances of accuracy or promise to remove unauthorized auctioneers. Instead, eBay
37 promised that Live Auctions were safe. Though eBay styles safety as a screening function whereby
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1 eBay is responsible for the screening of safe auctioneers, this court is unconvinced. eBay's
2 statement regarding safety affects and creates an expectation regarding the procedures and manner in
3 which the auction is conducted and consequently goes beyond traditional editorial discretion.

4 Finally, plaintiff's argument that eBay is improperly converting the CDA from a shield to a
5 sword is without avail. Specifically, prior suits against eBay with respect to shill bidding practices
6 by others does not put eBay on notice with respect to HJA's alleged shill bidding.¹⁰ Furthermore, it
7 is unclear how eBay's current use of the CDA is as a sword and its prior use was a shield when in
8 both instances eBay invoked the CDA in a motion to dismiss.

9
10 B. User Agreements

11 The eBay Live Auction User Agreement has a release of liability in favor of eBay for any
12 disputes a user has with an auction house. Somvichian Dec., Exh. B, § 3(3). This provision is not
13 applicable in the instant case because plaintiff has an independent dispute with eBay based on
14 eBay's representations. This is true even though eBay's liability depends upon first establishing
15 HJA's wrongdoings. In addition, the eBay User Agreement has a provision which provides that
16 "[y]ou will not hold eBay responsible for other users' actions or inactions, including things they
17 post." Id., Exh. A, Liability section. This provision suffers from the same ailment as above.

18 eBay's argument that its User Agreements fully disclaim any warranties by eBay regarding
19 the auction houses' compliance with the law is also to no avail for the reasons stated above.
20 Furthermore, eBay states very conspicuously that Live Auctions are safe and then buries this
21 disclaimer in a User Agreement. These statements, if contradictory, require that this court deny the
22 motion to dismiss. In fact, since eBay has far superior bargaining power and made both of these
23 representations, any ambiguities ought to be construed against it.

24 Finally, plaintiff's argument regarding procurement of the agreements by fraud suffer from
25 the same defects as those enumerated above. Specifically, relying on eBay's statements that the
26 auctions were safe and run by carefully screened auctioneers to set aside the User Agreement puts
27 the cart before the horse. Before any agreement between plaintiff and eBay can be set aside,

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1 plaintiff must first demonstrate that HJA's actions converted those statements into
2 misrepresentations and that plaintiff relied upon those misrepresentations to her detriment.

3
4 C. Fraud

5 eBay argues that plaintiff fails to allege that she ever read or relied on any eBay statements
6 when deciding to purchase from HJA. This is correct. Plaintiff pleads reliance in a conclusory
7 manner and merely regurgitates the statements that allegedly induced reliance. These allegations,
8 which include eBay's assurances of "safety" and the participation of "carefully-screened,
9 international auction houses" purportedly put eBay on notice of the alleged misrepresentations that
10 form the basis of plaintiff's claims. Though "the court is not required to accept legal conclusions
11 cast in the form of factual allegations," it may accept them if those conclusions can reasonably be
12 drawn from the facts alleged. Clegg, 18 F.3d at 754-55. Here, however, plaintiff's contentions are
13 vague and conclusory. Thus, the court holds that plaintiff's fraud based claims, including the
14 CLRA, UCL, and RICO claims, are not properly pled.

15 The dictates of Federal Rule of Civil Procedure 9(b) require plaintiff to plead with specificity
16 the facts, circumstances, statements and misrepresentations that constitute the fraud. As stated
17 above, plaintiff must particularly set forth the time, place, and nature of the misleading statements,
18 misrepresentations and specific acts of fraud. Plaintiff must explain why the statement or omission
19 complained of was false and misleading. The same level of specificity is required with respect to
20 reliance. Finally, regarding the RICO claim, plaintiff is to provide the details requested in the RICO
21 standing order given to plaintiff's counsel during the hearing on January 14, 2008.

22 Due to a lack of particularity, the court dismisses plaintiff's fraud-based claims. However, in
23 order to allow plaintiff to allege fraud with specificity, the court grants plaintiff leave to amend her
24 complaint.

25
26 D. Unjust Enrichment

27 eBay also argues that unjust enrichment cannot be brought as a stand-alone claim if a legally
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1 enforceable contract between the parties exists. The section on unjust enrichment in the complaint
2 asks for restitution as a remedy. Plaintiff's briefing also suggests that the claim was included for the
3 remedy in case the User Agreement is unenforceable. Again, putting substance over form, this court
4 holds that plaintiff may validly seek restitution damages independent of how it is labeled. See
5 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). Furthermore, inconsistent theories of
6 recovery may be alleged in a complaint. Steps may be taken at trial to prevent duplicative recovery.

7
8 E. Negligence

9 Finally, eBay argues that plaintiff's negligence and negligence per se claims should be
10 dismissed as an improper effort to manufacture a tort from a contract dispute. Here, however,
11 plaintiff's allegations sound in fraud and not breach of contract. Therefore, Erllich v. Menezes, 21
12 Cal. 4th 543 (1999), does not apply. Plaintiff claims that since eBay guaranteed safety, they owed a
13 duty of care and were consequently in breach of that duty when they allowed shill bidding practices
14 to occur. This is sufficient to state a valid claim. eBay's argument that plaintiff's negligence claims
15 run afoul of the economic loss rule applies to damages only and is therefore premature.
16 Furthermore, the economic loss rule may apply to a manufacturer's liability only. See Aas v.
17 Superior Court, 24 Cal. 4th 627, 636 (2000) (superceded on other grounds by Cal. Civ. Code
18 §§ 895-945.5).

19
20 CONCLUSION

21 For the foregoing reasons, defendants' Motions to Stay are DENIED, eBay's Motion to
22 Dismiss is GRANTED in part and DENIED in part and Plaintiff's Motion to Strike is GRANTED.

23 As to those claims dismissed with leave to amend, an amended complaint, if any, shall be
24 filed within thirty (30) days of the date of this order. The answer shall be filed within thirty (30)
25 days of the filing of the amended complaint.

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27 IT IS SO ORDERED.
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Dated: March 3, 2008



MARILYN HALL PATEL
United States District Court Judge
Northern District of California

UNITED STATES DISTRICT COURT
For the Northern District of California

ENDNOTES

- 1
2 1. The court hereby takes judicial notice of the following under Federal Rule of Evidence
3 201(b): 1) eBay’s User Agreement; 2) eBay’s Live Auction User Agreement; 3) eBay’s “Are Live
4 Auctions Safe?” webpage; 4) eBay’s “How Live Auctions Work” webpage; and 5) Butler v. eBay,
5 Inc., 06-02704 JW (N. D. Cal. Dec. 13, 2006) (Ware, J.) (order granting defendant eBay’s motion to
6 dismiss the third cause of action). See generally Somvichian Dec.
- 7 2. Plaintiff argues that the standard from Shroyer v. New Cingular Wireless Servs., Inc., 498
8 F.3d 976, 982 (9th Cir. 2007), be used here. The Shroyer court held that procedural
9 unconscionability is determined by “focusing on oppression or surprise due to unequal bargaining
10 power” in order to set out a three-part standard. 498 F.3d at 982–83. Specifically, a contract was
11 procedurally unconscionable if: 1) the contract was a “a consumer contract of adhesion” drafted by a
12 party with superior bargaining power; 2) the agreement occurred “in a setting in which disputes
13 between the contracting parties predictably involve small amounts of damages”; and 3) “it is alleged
14 that the party with the superior bargaining power has carried out a scheme to deliberately cheat large
15 numbers of consumers out of individually small sums of money.” Id. at 983 (quoting Cohen v.
16 DirecTV, Inc., 142 Cal. App. 4th 1442, 1451–53 (2006)). This three-part standard, however, is
17 specific to class action waivers in consumer contracts and is therefore inapplicable here. Id. at 983.
18 The broader oppression and surprise standard, however, is applicable.
- 19 3. The court considers substance over form. Plaintiff’s characterization of her motion as a
20 motion to strike—which is only applicable to pleadings—is not fatal. The court will use the version
21 of the agreement most reflective of reality when making its decision.
- 22 4. HJA argues that it submitted the Terms and Conditions to eBay with section breaks and that
23 eBay must have removed the section breaks before posting the document. Who removed the section
24 breaks, however, is irrelevant because the issue is what plaintiff saw when she accepted the Terms
25 and Conditions. There is no dispute that plaintiff saw the Terms and Conditions without section
26 breaks. Similarly, the assertion that the Terms and Conditions may sometimes fail to fully load is
27 irrelevant because there has been no contention by plaintiff that the entire text was not available to
28 her when she signified assent.
5. Plaintiff claims that since In-House Attorneys makes no mention of arbitration services on its
website, the contested provision must have been drafted by In-House. Drafting the provision,
however, is insufficient to find substantive unconscionability as even reputable arbitration agencies
such as the American Arbitration Association provide language that parties may use in their
contracts. See Hongola Dec., Exh. C at 4.
6. Since the contested clause is held to be invalid, its scope is irrelevant. Consequently, both
defendants’ motions to stay are also denied.
7. Plaintiff has withdrawn her fifth cause of action against eBay.

1 8. Plaintiff appears to have withdrawn her breach of contract claim. See Pl.’s Opp. to Motion
2 to Dismiss at 7 (“Defendant is being sued for fraud, not breach of contract.”).

3 9. The eBay Live Auction User Agreement states, in relevant part:

4 **3. eBay is Only a Venue.**

5 **1. Services.** We are not an auction house and are not conducting the live
6 auctions. Our service allows you to participate in live auctions conducted by
7 the AHs. We are solely a passive conduit to facilitate communication between
8 you and the AH. We reserve the right in our sole discretion to change some or
9 all of our services at any time.

10 **2. Control.** We have no control over the quality, safety or legality of the items
11 advertised, the truth or accuracy of the listings, the ability of AHs to sell or
12 the ability of buyers to buy items. We do not ensure that a buyer or seller will
13 actually complete a transaction.

14 **3. Release.** Because we are not involved in the actual transaction between
15 buyers and AHs, in the event that you have a dispute with an AH, you release
16 eBay (and our officers, directors, agents, parent, subsidiaries, joint ventures,
17 and employees) from claims, demands and damages (actual and
18 consequential) of every kind and nature, known and unknown, suspected and
19 unsuspected, disclosed and undisclosed, arising out of or in any way
20 connected with such disputes. If you are a California resident, you waive
21 California Civil Code § 1542, which says: “A general release does not extend
22 to claims which the creditor does not know or suspect to exist in his favor at
23 the time of executing the release, which if known by him must have materially
24 affected his settlement with the debtor.”

25 **4. Auction Houses.** AHs will list items up for auction for you to bid on. Auction
26 dates and times, as well as the number, character, and order and schedule of the items
27 to be auctioned are set by the AH and are subject to change without notice. Individual
28 lots and items may be modified or changed at any time. Some lots and items that are
made available on the auction floor will not be included in the online live auction
services. We do not control the information that is provided by AH’s and which is
made available through our system. We do not guarantee that the AH’s maintain
proper auctioneer’s licenses or comply with all laws.

Somvichian Dec., Exh. B.

10. The court hereby takes judicial notice of the following pursuant to Federal Rule of Evidence
201: 1) Amended Class Action Complaint with Jury Demand, Farris v. GoAntiques, Inc., et al.,
2:05-CV-00227 (S. D. Ohio, dismissed Feb. 6, 2006); and 2) eBay’s Amended Motion to Dismiss
Plaintiff’s First Amended Complaint, Farris v. GoAntiques, Inc., et al., 2:05-CV-00227 (S. D. Ohio,
dismissed Feb. 6, 2006). See generally Siroka Dec.