

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

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 )  
 MICHELLE MAZUR, )  
*on Behalf of Herself and all* )  
*Others Similarly Situated,* )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 eBAY, INC., et al., )  
 )  
 Defendants.)

No. C 07-3967 (MHP)

San Francisco, California  
Monday, March 9, 2009  
(31 pages)

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs: Balestriere Lanza, PLLC  
BY: JOHN GERARD BALESTRIERE

For Defendants:  
(eBay, Inc.) Cooley, Godward, Kronish, LLP  
BY: WHITTY SOMVICHIAN

(Go Antiques) Farella, Braun & Martel  
THOMAS B. MAYHEW

(Hot Jewelry) Chapman, Glucksman & Dean  
BY: GREGORY KARL SABO

1 Monday, March 9, 2009

2 (3:15 p.m.)

3 (In open court)

4 DEPUTY CLERK: Michelle Mazur versus eBay, Inc.,  
5 et al., 07-3967.

6 THE COURT: May I have appearances, please?

7 MR. BALESTRIERE: John Balestriere for plaintiffs in  
8 the class.

9 MR. SOMVICHIAN: Whitty Somvichian for defendant eBay.

10 MR. MAYHEW: Thomas Mayhew for Go Antiques.

11 THE COURT: Good afternoon.

12 MR. SABO: Greg Sabo on behalf of Hot Jewelry  
13 Auctions.

14 THE COURT: Couldn't think of a better name than that?  
15 Sounds like some of our cases where a defendant is charged with  
16 trying to trade some of that stuff on the streets.

17 MR. BALESTRIERE: I think that's the point, your  
18 Honor.

19 THE COURT: In any event, it's not a particularly good  
20 name.

21 First of all, you're representing eBay?

22 MR. SOMVICHIAN: Yes, your Honor.

23 MS. FANG: Yes.

24 MR. SOMVICHIAN: This is Michelle Fang, counsel for  
25 eBaY.

1 MS. FANG: I'm here as representative for eBay.

2 THE COURT: I see. Okay. Who's your client then?  
3 I'm sorry?

4 MR. SOMVICHIAN: Mine?

5 THE COURT: Yes.

6 MR. SOMVICHIAN: EBay.

7 THE COURT: Who's going to be heard at this hearing?

8 MR. SOMVICHIAN: Me, your Honor.

9 THE COURT: Okay. So if you could answer a couple of  
10 questions, please.

11 It appears there are two different kinds of auctions  
12 that go on. One is what purports to be a live auction, and I  
13 use the word "purport", but you know what I mean, and it's not  
14 meant to be pejorative, so don't take offense at that. And  
15 then something that's called a core unit. Can you explain the  
16 differences between them to me, particularly "core unit"? The  
17 live aspect of it, I think I get.

18 MR. SOMVICHIAN: The terminology we used in the case  
19 and the briefing is to refer to the main eBay site. Ebay.com  
20 is kind of the core eBay. And that's the auction format.  
21 Typically three-, five-, or seven-day auction with online  
22 bidding. The dispute here is limited to live auctions.

23 And there was a separate website, different web  
24 address, related to live auctions, and one of the disputed  
25 issues is what is a live auction and what are the

1 representations around what is a live auction and how it  
2 operates and how different class members and consumers would  
3 have understood how that type of auction operates.

4 THE COURT: Now, if you go on to -- what is it,  
5 ebay.com, I gather, right?

6 MR. SOMVICHIAN: Yes.

7 THE COURT: And that's where you see all the  
8 merchandise, I guess, that's lined up that everybody's trying  
9 to sell, right?

10 MR. SOMVICHIAN: Yes.

11 THE COURT: Do you call that an auction, though,  
12 nonetheless?

13 MR. SOMVICHIAN: It's an auction-style listing for the  
14 products.

15 THE COURT: Because there may be several parties that  
16 would bid, and whoever what has the highest bid would get the  
17 particular item being sold?

18 MR. SIMVICHIAN: Correct, your Honor.

19 THE COURT: It's not just a single transaction like go  
20 to amazon.com, you want to buy something, you click and buy it.  
21 You're not competing with somebody else unless it happens to be  
22 the last one.

23 MR. SOMVICHIAN: I don't want to complicate matters,  
24 but there's also a buy-it-now option for certain items on eBay,  
25 so you go on ebay.com, you can type in a search item, a

1 particular product. You'll get search results for items that  
2 match whatever you've searched for -- those could be in  
3 different types of auction and sale formats. It could be what  
4 we call the eBay core auction format; it could be a buy-it-now;  
5 it could be a listing that is actually on the eBay Live auction  
6 website.

7 And just as a side note, the live auction website is  
8 no longer operating for various business reasons, so that's not  
9 true today, but during the class period they're complaining on,  
10 you can go on ebay.com, the core site, type in a search term  
11 and you would get results that are sold in each of those  
12 formats.

13 THE COURT: Now, with respect to the core auction, if  
14 you want to call it that, not the live auction, is there any  
15 reason why Go Antiques or Hot Jewelry would be involved?

16 MR. SOMVICHIAN: Yes.

17 THE COURT: They're involved as well?

18 MR. SOMVICHIAN: They would have listings that are on  
19 both the eBay core site and on the live auction site, and in  
20 fact, one of the issues having to do with the standing of one  
21 of the named plaintiffs, Miss Sarah Bates, has to do with  
22 whether or not he actually bought something on the live auction  
23 site versus the eBay core site with all of the internal data,  
24 eBay showing that she had actually bought items on the core  
25 site, and the confusion from her perspective stemming from the

1 fact that the seller defendants do sell items in both formats.

2 THE COURT: I see. Okay. Now, if you go onto  
3 ebay.com and then what, you can access this core auction site?

4 MR. SOMVICHIAN: Ebay.com is the core auction site.

5 THE COURT: Okay. Can you also then access from that  
6 the live auction? Like is there something on the side that  
7 says, you know, like a sidebar or something that says, you  
8 know, Join a live auction, or, Participate in a live auction,  
9 and you can click that and access it without accessing some  
10 other dot-com address?

11 MR. SOMVICHIAN: Yes. If you're on the ebay.com,  
12 there are a number of ways that you can get routed to the live  
13 auction site, at the time it was in operation. There was a tab  
14 that you could click on that would take you from the eBay core  
15 website, as we've been calling it, to the live auction website.  
16 And, as I mentioned, you could also get there through clicking  
17 on search results. Again, if you're on the eBay core site,  
18 ebay.com, you type in a query, you pull up a number of results,  
19 you can click on an item, that would take you also to the live  
20 auction website.

21 And one of the issues that we've raised is the fact  
22 that as users get directed, based on their own clicking, to the  
23 live auction website, there's no required path that they go  
24 through that would take them, that would expose them to these  
25 web pages that contain the alleged misstatements that form the

1 foundation of this case. You can go directly from that listing  
2 on eBay core to the live auction website without seeing any of  
3 these misrepresentations that are the basis of the plaintiff's  
4 claims.

5 MR. BALESTRIERE: May I respond to that, your Honor?

6 THE COURT: I have something else I want you to  
7 respond to. And I think that's -- I just want to get some  
8 understanding, basic understanding, of the differences of  
9 these. But what I'm curious about, given the nature of  
10 merchandise, given the various bids that may, you know, at any  
11 one time, be involved, how is -- how do you establish any kind  
12 of damages in this case?

13 MR. BALESTRIERE: Well, your Honor --

14 THE COURT: What is the damage? And how do you  
15 establish that on any kind of a class basis?

16 MR. BALESTRIERE: As eBay said itself when working  
17 with the New York Attorney General's office, the belief is that  
18 there's a uniform price inflation. That's what the academic  
19 literature says as well. This was a case where eBay and the  
20 other defendants wanted to have very limited discovery up to  
21 this point, so I'd love to get into more discovery and present  
22 more for your Honor to review, but there's a declaration in our  
23 reply which cites to a press release from the Attorney  
24 General's office in New York, July 7, 2007, when we were  
25 investigating eBay, but before we filed, where eBay's fraud

1 department worked with the Attorney General's office to bring  
2 down a shill bidder. And at the time, eBay and the Attorney  
3 General were saying that the price inflation was 20 percent.  
4 We actually think here it's a lot higher, because in that case  
5 what you have is an Internet bidder, there's another Internet  
6 bidder on this eBay core, and that other one, the second one,  
7 doesn't really exist. That's a shill.

8           What we have here is they say that there are, let's  
9 call them floor bids, or physical auctions -- because "live  
10 auction" is a little confusing -- that they say were physical  
11 auctions, and that's the chief misrepresentation, not eBay's  
12 vouching, though that helps the case, but they say there were  
13 physical auctions when in fact there were not. So we say that  
14 the price inflation would be even higher. This is something  
15 we'll get into before we would get to trial, and we would have  
16 an expert to discuss this, because if I'm online and I'm  
17 bidding on something but I think that there's an actual  
18 physical auction in a space like this, I'm going to rely even  
19 more on that person. They can see the item that's being bid on  
20 by other Internet bidders, so eBay in a separate case before we  
21 filed acknowledged that 20 percent was a good number. We say  
22 that it's at least that here. That's the way you do it. It's  
23 a uniform price inflation.

24           And to be clear --

25           THE COURT: That is if -- this was the State of

1 New York attempting to settle a case with eBay, right?

2 MR. BALESTRIERE: Where eBay, before they had this  
3 exposure, acknowledged that that made sense, that number.

4 THE COURT: But is that enough to persuade a court  
5 when, you know, after -- at some point after a class had been  
6 certified, if one is certified, and after there's been some  
7 decision on the merits, determining what each person who may be  
8 a member of the class is entitled to by way of damages?

9 MR. BALESTRIERE: Your Honor, we would put in an  
10 expert report at that point. And like I said, the academic  
11 literature says that there seems to be a uniform price  
12 inflation. It may be different, depending on the amounts  
13 involved.

14 As your Honor may remember, in this case we are  
15 dealing with some small items under \$100; and then there are  
16 items over \$3,000. So it may be that the price inflation is  
17 actually higher with the more expensive items. But we could  
18 easily come up with some kind of rule that says if the price  
19 paid was 500 or below, damages are 20 percent. If the price  
20 was 500 to 2500, it would be 25 percent. And if above 2500, 30  
21 percent. Or something like that.

22 THE COURT: And that is assuming then that in every  
23 case where a person who, let's see, how you decide -- are  
24 defining this class. All persons whose auctions were managed  
25 by seller defendants and operated by eBay who would have won

1 such auctions by virtue of being the highest bidder who was not  
2 a shill bidder. How can you, in fact, determine that? Who  
3 would have won?

4 MR. BALESTRIERE: Because this is -- and this is  
5 something that I think is confused somewhat in the papers.  
6 We're not saying that Go Antiques sometimes ran shill bidding  
7 and other times didn't or Hot Jewelry auctions or Neiman's or  
8 any of the seller defendants as defined. All of their  
9 auctions, their physical auctions, did not take place. Thus,  
10 any Internet bidding --

11 THE COURT: All of them did not take place or none of  
12 them took place?

13 MR. BALESTRIERE: Excuse me, none of them took place.  
14 That's what we're saying. That there was never a physical  
15 auction space for auctions run by Hot Jewelry, by Neiman's, by  
16 Go Antiques. There never was. There was either a computer  
17 program or individuals that were pretending to be those floor  
18 bidders. There were never floor bidders.

19 THE COURT: Were there always shill bidders every  
20 time?

21 MR. BALESTRIERE: There was always at least the  
22 possibility of shill bidding. That's something they seem to  
23 say if there wasn't actually a shill bid in an auction. But  
24 think about it in the perspective of the Internet bidder. You  
25 are getting on line; you like the item. But you think that

1 there's a room full of people ready to purchase it. So you bid  
2 based on that belief. That you are bidding -- here would be  
3 the analogy. You walk into this courtroom, and there's 19  
4 other people here besides you and you want to bid on an item.  
5 And it looks like a good price. So you decide to go for it  
6 rather than just engage in a transaction with the individual  
7 that's selling the item. Because you think, Well, 19 people  
8 could jump on that, at anytime. But it turns out that they're  
9 all shills.

10 That's essentially what we have here. All the  
11 Internet bidders that went to eBay Live, not core -- our case  
12 really has nothing to do with core. We're going after eBay  
13 Live, which they shut down after your Honor largely denied  
14 their motions to dismiss. I think that may be one of the  
15 business reasons involved here.

16 Every floor auction -- or none of these floor auctions  
17 actually took place. But people thought they were. People  
18 thought there was a real auction going on that they would be  
19 bidding in. And that's the reason why any Internet bidder who  
20 won was defrauded.

21 MR. SOMVICHIAN: Your Honor, with respect to the issue  
22 of damages, I want to emphasize that the difficulties that  
23 you're talking about go not really to -- and not simply to  
24 figuring out the amount of damages that might be owed to any  
25 specific individual, assuming that they can prove liability,

1 but rather to the liability case itself. It goes to showing  
2 whether or not any particular consumer was injured in any  
3 amount, and those are the difficulties we've pointed out.

4 The fact that counsel is making reference to this  
5 article that has a one-line reference to 20 percent, that's not  
6 a method, your Honor. That's not a method that would -- it's  
7 hearsay. It's submitted on reply for the first time. There  
8 are a host of reasons why it's not credible support and doesn't  
9 amount to a common method for showing injury.

10 And the reason that they didn't put in more evidence,  
11 and they had a full class certification discovery period to  
12 take more evidence, to take depositions, to submit expert  
13 reports -- they didn't do that. And they're now, according to  
14 this single article, suggesting that they may in the future be  
15 able to come up with a method, but an article that makes  
16 reference in one line to one specific fraudulent seller and a  
17 particular set of auction items and a reference that some of  
18 those items may have been inflated 20 percent doesn't amount to  
19 a method at all. There's no way to map that to any of the  
20 auctions that occurred here. There's certainly no way to map  
21 that and take that as a basis to say that every single auction  
22 that was at issue in this case involved the same types of  
23 items.

24 This article references a seller who sold jewelry. We  
25 have no idea whether the items at issue in that investigation

1 were similar at all to the items at issue here. One of the  
2 defendants is Go Antiques. They don't sell jewelry. They sell  
3 antique items and art. There's no basis to conclude that that  
4 20 percent reference has any bearing of any kind to the items  
5 sold by the defendant Go Antiques. There's no indication of  
6 any kind that the shill bidding practices at issue in this  
7 investigation are similar to the ones here in such a way that  
8 you can have a one-size-fits-all 20 percent inflation number  
9 applied to every single item in this case.

10 And the reason you can't have a one-size-fits-all  
11 method, your Honor, is because of the unique nature of the  
12 transactions at issue here. You can come up with a method, for  
13 example, a product defect case where you've got a model of car  
14 that have a type of defect. You can calculate the purchase  
15 price, compare it to the actual value with the defect and you  
16 can determine that members of the class were all injured  
17 because they didn't get the benefit of the bargain.

18 What we're dealing with here is a situation where  
19 we've got thousands of items, many thousands of items, each of  
20 which is a unique item. Jewelry. Counsel mentioned that the  
21 prices can range from \$100 to \$3,000. Probably ranges much  
22 more widely than that. And the type of products at issue are  
23 not commodity products. That can be analyzed in any systematic  
24 way. They're jewelry, art, antiques. These are things that  
25 inherently are subject to very individualistic and subjective

1 considerations in terms of how you might place a value on them.  
2 They're bought in a way that can't be analyzed in some uniform  
3 way because they each involve a unique sequence of bidding.

4 And the examples that we have put into the brief  
5 highlight the difficulties that will rise if you try to analyze  
6 each auction and attempt to determine necessary questions like  
7 whether there was any shill bidding; whether the shill bidding  
8 changed the outcome of the auction. In many instances, as we  
9 pointed out, the outcome would have been the same because there  
10 may have been multiple online eBay bidders who dictated the  
11 ultimate outcome of the auction.

12 You'd have to determine what the intrinsic value of  
13 the item is. Their fundamental damages claim is that everybody  
14 got ripped off because they bought something and what they got  
15 wasn't worth what they thought it was.

16 MR. BALESTRIERE: That's not true.

17 MR. SOMVICHIAN: You'd have to determine what each  
18 item was worth and --

19 THE COURT: Sometimes people go to an auction, and I'm  
20 sure online auctions as well, and they put it to themselves, on  
21 a certain item: I'm willing to go this way, period. It  
22 doesn't matter who's bidding. If they're willing to go that  
23 high, they will do it. But they won't go above that level.  
24 There are a lot of people who participate in auctions with that  
25 philosophy.

1 MR. BALESTRIERE: Your Honor, may I --

2 THE COURT: So I -- it just seems to me that it's  
3 awfully hard to certify a class when there's so many variables  
4 that are involved that have to be plugged in.

5 MR. BALESTRIERE: If I may, your Honor. First of all,  
6 with regards to the last point, this is not an intrinsic value  
7 case. If there was no shill bidding and someone bought  
8 something for \$10 and they looked at it and said, Oh, this is  
9 only worth \$5 to me, there would be no fraud. But that's not  
10 what we have. All the issues that Mr. Somvichian mentioned for  
11 the most part exist, but they're individual issues. The point  
12 is, in similar auction fraud cases, is that the auction was  
13 fraudulent. And at the end of the day, it's fairly simple what  
14 the fraud is. They say there are physical auctions. There are  
15 no physical auctions. This is what our investigation has  
16 uncovered. This is what industry insiders have told us. This  
17 is what our allegations are. And importantly, in a year and a  
18 half long case, nobody has come to us and said, Well, there  
19 actually were physical auctions.

20 We file a lot of class actions. We conduct  
21 investigations for months. Sometimes we're wrong. Well, we  
22 don't want to go forward in that kind of case.

23 That's not what happened here. By our numbers, there  
24 are at least three dozen seller/defendants. We only have a few  
25 here. But we have Does 1 through 100. They said that there

1 were physical auctions and there weren't. So everyone who  
2 purchased there was harmed. We think it can be done in a  
3 class-wide way.

4 Now, I think one point your Honor may be making --

5 THE COURT: Maybe you're entitled to injunctive  
6 relief, in which case, you don't need a class.

7 MR. BALESTRIERE: Well, but what about all the  
8 individuals -- we think it's at least tens of thousands, more  
9 likely hundreds of thousands, who paid millions for items that  
10 turned out to be not what they thought they were, and why is  
11 that not an intrinsic value? We make allegations --

12 THE COURT: But that's a different issue. Not what  
13 they thought they were. They saw what they were buying. If it  
14 turned out, in fact, they got something else -- they thought  
15 they bought a diamond ring for \$19 -- well, I know --

16 MR. BALESTRIERE: No, it's not like that.

17 THE COURT: -- turned out not to be a diamond.

18 MR. BALESTRIERE: If you look at the deposition, Miss  
19 Mazur's particularly, they say, I was relying upon -- and this  
20 is what they told us: They spent as much as they did looking  
21 at a grainy image, thinking, Well, there's a floor bidder there  
22 who just bid \$132 on that. If I just looked at this online,  
23 I'm not sure I would be willing to pay 132. But if it's that  
24 good, if someone else bid on it, well, I will bid now 142.  
25 That is the point.

1           And it's important to -- there's a lot of small issues  
2 in Go Antiques' brief. They talk about how art is a different  
3 item. Fine. But that's not what we're talking about. We're  
4 talking about the auction. They thought there were auctions,  
5 all the members of the class. But there really weren't. That  
6 is the misrepresentation. Not the vouching. Which is enough  
7 to keep eBay in this case and which is what made the fraud so  
8 broad.

9           If you look, again, at Miss Mazur and Miss Bates, they  
10 said they thought eBay -- if eBay was working with these  
11 defendants, there must be something there. I mean, without  
12 eBay, there wouldn't be this case because people wouldn't be  
13 buying from Hot Jewelry auctions. People didn't even know who  
14 they were. They were going through eBay to make these  
15 purchases. But -- once eBay vouched for them.

16           The point is, they were saying there were physical  
17 auctions. But there really weren't. These other individual  
18 issues would be like saying, you know, you come out of a  
19 consumer fraud claim, people have different reasons why they  
20 buy something. But if there's a lie about what's happening,  
21 you have a consumer fraud claim.

22           THE COURT: That usually involves the same item or  
23 type of item.

24           MR. BALESTRIERE: You're right. But the reason why  
25 the Congress changed Rule 23 to add predominance, you can

1 always add individual issues. Even the defendants don't say --  
2 they cannot say there are no common issues. They say the  
3 individual issues predominate. We say no. The single issue  
4 that matters the most, they say everywhere, there are floor  
5 auctions, when there aren't. That is present everywhere. Thus  
6 everyone thought there was a physical auction going on. I may  
7 be the only one on. Let me bid on that really quickly, because  
8 other floor bidders may jump in. Fine, you ended up winning,  
9 but I paid more than you would have but for the fact that there  
10 is -- you thought this floor auction was going on.

11           There may be two subclasses, your Honor. I think you  
12 may have gotten into that before about those that won and those  
13 that would have been won. But clearly there's a class of those  
14 that did win and were damaged because if there's a  
15 seller/defendant in this case, they said there was a physical  
16 auction, and there was not.

17           THE COURT: I don't know how you could tell who would  
18 have won unless there was only one bidder.

19           MR. BALESTRIERE: Maybe that's something we seek class  
20 cert on as we get into discovery. And with regards to  
21 discovery, we're ready to go into it.

22           THE COURT: I'm sure.

23           MR. BALESTRIERE: But I'm saying, we agreed to very  
24 limited discovery here, and to know of this self-serving  
25 declaration regarding Ms. Bates when her testimony under oath

1 and under cross-examination she says, I have bought from eBay  
2 Live. What they have in retort to that is some reference to  
3 internal documents, and they have a declaration of an  
4 individual who I'm sure is telling the truth -- I mean, I have  
5 no reason to disbelieve him. But I didn't get to cross that  
6 guy and say what exactly is this information? Especially as we  
7 bring up the core live portion.

8           What we've been told by industry insiders is this  
9 actually infected core. We can't allege that because we don't  
10 have enough. But this could actually be much broader than the  
11 floor auctions, the part of eBay that was shut down, what our  
12 industry insiders tell us is from this case. Look at the  
13 timing. You issued an order in March of last year. We filed  
14 our amended complaint in early April. They said they were  
15 shutting down eBay Live April 15th, about a week after we filed  
16 the new amended complaint.

17           THE COURT: It may have had something to do with  
18 Andrew Cuomo.

19           MR. BALESTRIERE: No. That was in July of '07.

20           THE COURT: And Mr. Mayhew, was it?

21           MR. MAYHEW: Yes, I saw the argument passing me by.

22           THE COURT: Go to it.

23           MR. MAYHEW: I wanted to comment on the damages point.  
24 Because, as we've set forth in our brief, art is something  
25 that -- it's unique. It's irreplaceable. Each thing has

1 different esthetic qualities. Each thing has different value.  
2 And to sweep it aside and say, Well, let's just say that it was  
3 a 20 percent markup on art because we were protecting a  
4 seller's reserve. And our terms and conditions were quite  
5 clear about that. Ms. Mazur, if we put her on the stand, would  
6 say, Oh, if I read that, probably I wouldn't have participated.  
7 A different person, unnamed class member, if we put them on the  
8 stand and said, If we had read our terms and conditions or  
9 maybe you did read our terms and conditions, so you didn't  
10 think that auction floor bid meant that there was somebody  
11 saying, Oh, that's worth \$300, you understood that there was a  
12 seller's reserve. And the only way we could make it work with  
13 eBay's platform was to call it an auction floor bid, but also  
14 to indicate that it was being used to protect the seller's  
15 reserve.

16 Different people had different beliefs about the way  
17 that this auction worked. Different people had different  
18 motivations for trying to buy the art that they wanted to buy.  
19 At the price they wanted to buy. As you commented on, some  
20 people look at a Matisse and they say, I want the Matisse, but  
21 only if I can get it for less than then \$1,000. If there's an  
22 auction floor bid to protect a seller's reserve and we have to  
23 assume that their allegations are true in terms of the  
24 merits -- I'm not allowed to contest the merits at this  
25 hearing, but nevertheless, if the auction floor bids are all,

1 you know, top out at \$300, and then this person bids up to  
2 \$10,000 because they love Matisse, and we could prove if they  
3 came to a hearing that they love Matisse, and that that's why  
4 they bought it, and it had nothing to do with the format, it  
5 had nothing to do whether it was on eBay core or eBay Live or  
6 Christies, or it was in a gallery. They were going pay \$10,000  
7 for that Matisse. That person wasn't damaged. That person  
8 didn't rely and there wasn't any causation between what they're  
9 complaining about.

10 THE COURT: If there are shill bidders, and of course,  
11 people are entitled to go on and believe that there were not  
12 shill bidders, right?

13 MR. MAYHEW: Some people might believe there were  
14 shill bidders and others may not. And that would be something  
15 that we would have.

16 MR. BALESTRIERE: That would be the same as saying  
17 some people think they're being defrauded.

18 THE COURT: Wouldn't having shill bidders, wouldn't  
19 that be a fraud? Is there anyplace in the, you know, wherever  
20 the person has access, could access when they went online, to  
21 find out about the, you know, what the ground rules, anyplace  
22 that said: We have shill bidders?

23 MR. MAYHEW: No, it doesn't say there are shill  
24 bidders.

25 THE COURT: Would they have the right to assume there

1 were no shill bidders, right?

2 MR. MAYHEW: That is their theory of the case.

3 MR. BALESTRIERE: That there were physical auctions.  
4 That's the point we need to come back to here.

5 With regard to this reserve, I've learned a lot, this  
6 notion of "reserve", basically it's what the bid starts at, \$5,  
7 \$10, whatever.

8 THE COURT: That's usually spelled out. Bids start at  
9 "X" amount. And up to that amount is the reserve.

10 MR. BALESTRIERE: And Ms. Mazur herself said if this  
11 would have said, Oh, this is the auctioneer bidding, I would  
12 have known it was the auctioneer. But it didn't. It said  
13 floor bidder. We can not now redefine floor bidder. It's not  
14 like we can say, Yes sometimes means no.

15 In regards to the art issue, I agree completely with  
16 what counsel is saying, that people make art purchases for  
17 different reasons. But it reminds me -- my wife's from Italy  
18 and when her sisters and mother come in, they love to go  
19 discount shopping, and there's a saying in Italian to make  
20 acquisitions, but they'll call it to make conquests. They love  
21 to shop. I hate it. But we could go to the same store and if  
22 we're both told this is what this really is, this is how this  
23 really works, this is the way things are, even though we have  
24 different motivations as to why we're buying it, we're both  
25 being harmed because the transaction is not fair. And that's

1 what we have here.

2           These transactions were not fair for one chief reason:  
3 They thought there were floor bidders auctioning on them or  
4 about to auction on them, bid on them, and that's what we keep  
5 coming back to. This is not an intrinsic value case. I mean,  
6 we have allegations that what the class representatives  
7 purchased were junk to show how -- the reason how the  
8 defendants were able to make the amount of money they were is  
9 because there was shill bidding. It wasn't somehow that the  
10 inherent value --

11           THE COURT: Let me ask you, if you carry that theory  
12 that you're talking about --

13           MR. BALESTRIERE: Sure.

14           THE COURT: You go into a store and you think that  
15 everything is as marked. That whatever item you're interested  
16 in has a price marked on it and that's it. But there are other  
17 people who go in who believe that you can negotiate. And they  
18 negotiate with the owner, and they get the price down to maybe  
19 several hundred dollars below what's on the price tag.

20           MR. BALESTRIERE: Right.

21           THE COURT: Are you, who comes in and pays the full  
22 price off the price tag, are you defrauded because others can  
23 come in and essentially bid it down?

24           MR. BALESTRIERE: I understand the question. No, I'm  
25 not. Because these are the rules of the game. Those stores I

1 mentioned that my wife and her sisters go to, they bid down and  
2 they get them to pay less than I certainly would. That's not  
3 the way it is here. There's one auction process. Everyone  
4 participates in the same way. The example might be Neiman  
5 Marcus, I think that's a store if you go into, and it says \$99,  
6 you can't negotiate with the seller to get less than that. I  
7 could be wrong. I hate buying anything. But that may well be  
8 the way it is. That's what we have here:

9           Everyone had to participate in the same auction.  
10 Everyone was told they were floor auctions. Now there's some  
11 question in the papers about whether or not you had to also see  
12 eBay's vouching for the seller/defendants. Everyone we've  
13 talked to said that at least the first time they did, and as we  
14 argue, reliance can be shown as a course of conduct here  
15 anyway, but that's not the key misrepresentation. The key  
16 misrepresentation is: We have physical auctions. And the  
17 truth is, they don't. I mean, we provide plenty of allegations  
18 regarding this.

19           THE COURT: What is this business about Ms. Mazur  
20 being a shill bidder herself? And does that make a difference?

21           MR. SOMVICHIAN: It does make a difference, your  
22 Honor. It raises a serious question about her ability to  
23 represent this class.

24           THE COURT: First of all, is there evidence of this?

25           MR. SOMVICHIAN: There is. Submitted in -- along with

1 our opposition, in one of the declarations. In the course of  
2 examining Miss Mazur's purchase transactions -- we didn't go  
3 out looking for whether she was a shill bidder or not, but in  
4 looking at the transactions, it became clear that her user name  
5 and another user name were bidding on each other's products,  
6 frequently losing but inflating the price ultimately paid by.  
7 The winning bidder. And based on the metrics that are used by  
8 eBay to try to protect improper bidding practices, this raises  
9 a serious red flag, and that the issue for today is not the  
10 result of whether or not she engaged in shill bidding.

11 THE COURT: But you're raising it, I thought, because  
12 you'd say it's a unique defense that goes to class  
13 certification.

14 MR. SOMVICHIAN: That's right, your Honor. And in  
15 counsel's reply brief, they framed it as well. eBay's trying  
16 to use this to support an unclean hands defense, and an unclean  
17 hands defense is not available for various reasons.

18 That's not really why we pointed it out, and that's  
19 not the real relevance of this. The relevance of it is, if in  
20 fact she was a shill bidder, and there's a serious record that  
21 indicates that that is the case, at minimum, it's going to be  
22 an important issue in the case that would go to undermining her  
23 reasonable reliance. If their theory is Miss Mazur and other  
24 consumers assumed that there was no shill bidding and they  
25 looked at eBay's very generalized statements of safety and

1 assumed that would be 100 percent guarantee against online  
2 abuse, they can't credibly engage in that claim if in fact she  
3 engaged in these kind of abuses also.

4 THE COURT: Was she asked about this at her  
5 deposition?

6 MR. SOMVICHIAN: She was.

7 THE COURT: What did she say?

8 MR. SOMVICHIAN: She said, That's somebody that I buy  
9 items from.

10 MR. BALESTRIERE: And they buy items from me.

11 MR. SOMVICHIAN: Miss Mazur is a seller also on eBay.  
12 Which, as an aside, makes her unable to pursue a CLRA claim,  
13 since she's buying items for resale.

14 THE COURT: Is she buying them to resell on eBay?

15 MR. BALESTRIERE: Both. But she is a seller.

16 THE COURT: Or is she buying them to sell in her own  
17 little shop?

18 MR. BALESTRIERE: The latter.

19 MR. SOMVICHIAN: And also on eBay. But her response  
20 to the questioning at the deposition was to say that she buys  
21 items from another eBay bidder essentially to help manage her  
22 inventory. If she needs something else, she would go to this  
23 other person, buy an item from them. It's unclear why she  
24 would do that if they have a relationship, why she wouldn't go  
25 directly to that person and why she would instead frequently

1 bid and lose, and in the instances where she won pay eBay's  
2 fees. That doesn't seem a reasonable way to manage her  
3 inventory, but a serious question that raises a unique defense  
4 as to Miss Mazur.

5 MR. BALESTRIERE: May I?

6 THE COURT: Briefly.

7 MR. BALESTRIERE: She's not a shill bidder, and I  
8 won't get into how we know that but it doesn't matter, it  
9 doesn't make her inadequate to represent this case. And the  
10 key reason is how we started out this argument: eBay core and  
11 eBay Live. She's not like a Go Antiques that was pretending  
12 they had a live, physical auction. She was a regular old eBay  
13 core seller. And in that regard, buyer.

14 It's a completely different -- you may as well say she  
15 stole a pack of gum someday. Well, maybe she did, and that's  
16 not good and you can attack her credibility on the stand for  
17 that, but that doesn't mean she's not adequate to represent a  
18 class in a completely different kind of misconduct.

19 So even if she was a shill bidder -- and she wasn't --  
20 but even if she were, she could still be adequate to represent  
21 eBay Live plaintiffs.

22 With regards to how she is not, see, reading her  
23 deposition, if you have time, your Honor, she really wasn't  
24 asked this directly. She under oath under cross-examination  
25 was saying how she had a friend that she sometimes worked with

1 who's 65 miles away. That's the reason why she wouldn't just  
2 go down the street and buy stuff from her. And they were both  
3 sellers and they would bid on each other's items. She said,  
4 under oath, under cross-examination, a woman who got a GED --  
5 and nothing against, most of my family have GED's -- but she  
6 was cross examined for the first time in her life in a  
7 deposition and she continued to come back and say, This is how  
8 I did it.

9 So that's in front of your Honor.

10 THE COURT: What's the implication of that, if you  
11 know that you're bidding for somebody else's goods and vice  
12 versa? Are you bidding up the price? To the extent that that  
13 may also raise questions about the effect that that has on  
14 other bidders that are not party to this, you know,  
15 interaction?

16 MR. BALESTRIERE: If you don't have the intention of  
17 actually purchasing the item. I mean, everyone bids, right?  
18 The shill bidders are those that don't want it. If they win  
19 it, it goes back in, or they're just trying to drive up the  
20 price.

21 Well, what Michelle Mazur said under oath, being  
22 cross-examined time and again, is when she was bidding on her  
23 friend's items she wanted them, and when her friend bid on her  
24 items, she wanted them. That is testimony that is before your  
25 Honor.

1           And look at the timing of this here. We talked about  
2 this serious evidence. Again, they had the opportunity to  
3 cross-examine Miss Mazur. We did not have the opportunity to  
4 cross-examine. I can't remember which individual of eBay, an  
5 eBay employee it was, who said that he ran some kind of  
6 algorithm.

7           THE COURT: Did you take his deposition?

8           MR. BALESTRIERE: No, they submitted a declaration.  
9 It's not like we could say, What information do you base this  
10 upon? An allegation made after she started suing them.

11          THE COURT: Is there anything further?

12          MR. SOMVICHIAN: Very, very briefly, your Honor.

13          THE COURT: Does Hot Jewelry want to say anything?

14          MR. SABO: Your Honor, I have nothing further to add  
15 at this point.

16          MR. SOMVICHIAN: Very briefly, your Honor. We've  
17 heard a lot today. I still haven't heard anything that comes  
18 close to a method for proving up damages. And one issue that  
19 we have heard repeatedly is counsel's statement that every user  
20 thought that there were floor bids with people physically  
21 present raising paddles in an auction. There's no categorical  
22 statement to that effect in any of the eBay web pages that  
23 they've complained about. So what these point to as kind of  
24 the overall, really the name of the service and the allegation  
25 being that everybody would have uniformly understood that in

1 the same way, there's no basis to believe that everybody would  
2 have had the same understanding, belief and reliance on the way  
3 that the live auction platform was named. There's no record to  
4 that effect. And there's any number of ways that a consumer  
5 could understand what a live auction is, and in many ways,  
6 doesn't connote a physical location at all. "Live" means  
7 contemporaneous bidding, and it is contrasted to the eBay core  
8 platform which takes place over three, five or seven days, and  
9 is much different than a live auction.

10 MR. MAYHEW: One other thing, one other aspect that we  
11 get from Ms. Mazur being a reseller, is that it means that she  
12 engaged in at least four other transactions that she was  
13 perfectly happy about, because she got an item for less than  
14 what she thought it was worth. She ended up reselling a  
15 ceramic vase, a topaz pendant, some rings, some Czechoslovakian  
16 beads, in each of those cases, she wasn't damaged. She resold  
17 the item. That shows that each item is unique. You have to  
18 look at the value of each item. She got a painting that she  
19 thought wasn't worth that much. She decided to not resell it  
20 after all.

21 The value of each item that she bought was unique, and  
22 it was unique to the item.

23 THE COURT: Did she sell them at a loss?

24 MR. BALESTRIERE: She didn't sell the specific item.

25 MR. MAYHEW: She did not sell the painting.

1 THE COURT: But the other items you're talking about,  
2 did she sell them at a loss?

3 MR. MAYHEW: I don't know if there's evidence in the  
4 transcript as to that.

5 MR. BALESTRIERE: But, Judge, she paid more than she  
6 would have otherwise. That's the key point. That she ended up  
7 bidding and paying more than she would have otherwise.

8 THE COURT: Okay.

9 MR. BALESTRIERE: Look at what's in the record. They  
10 do say, maybe it's not just eBay vouching everywhere. There  
11 are physical auctions taking place. That's how they talk about  
12 auctions.

13 THE COURT: The matter's submitted.

14 MR. SOMVICHIAN: Thank you, your Honor.

15 MR. BALESTRIERE: Thank you, your Honor.

16 (Adjourned)

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18  
19 CERTIFICATE OF REPORTER

20  
21 I, Connie Kuhl, Official Reporter for the United  
22 States Court, Northern District of California, hereby certify  
23 that the foregoing proceedings were reported by me, a certified  
24 shorthand reporter, and were thereafter transcribed under my  
25 direction into written form.

24 \_\_\_\_\_ S/S \_\_\_\_\_

25 Connie Kuhl, RMR, CRR  
Thursday, May 7, 2009