

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-21349 CIV-KING-GARBER

**OSVALDO A. IZQUIERDO COLON, an
Individual, and d/b/a BEST DEAL
PERFORMANCE,**

Plaintiff/Counterdefendant,

vs.

**INNOVATE! TECHNOLOGY, INC., a/k/a
INNOVATE MOTORSPORTS, a California
Corporation,**

Defendant/Counterclaimant

**INNOVATE! TECHNOLOGY, INC., a/k/a
INNOVATE MOTORSPORTS, a California
Corporation,**

Third-Party Plaintiff

vs.

EBAY, INC., a California Corporation,

Third-Party Defendant.

**eBAY, INC.,
a Delaware corporation,**

Third-Party Defendant and Counterclaimant,

vs.

**INNOVATE! TECHNOLOGY, INC.,
a California Corporation,**

Counterdefendant.

eBAY'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS TO THIRD-PARTY CLAIM OF INNOVATE! TECHNOLOGY, INC.

Answering the unnumbered paragraph on page 11 of the Counterclaims Against Plaintiff and Third-Party Complaint Against eBay Inc., entitled Nature of the Action, third party defendant eBay Inc. (“eBay”) admits that third party plaintiff Innovate! Technology, Inc., (“Innovate”) purports to seek the relief described and purports to name eBay as a third party to the action and eBay further avers that the third party complaint speaks for itself. Except as expressly so admitted and averred, eBay denies the allegations of this paragraph and specifically denies that Innovate is entitled to indemnification or any other relief.

1. Answering Paragraph 1, eBay admits that this Court has subject matter jurisdiction of the claims alleged.

2. Answering the first sentence of Paragraph 2, eBay lacks sufficient information to admit or deny the allegations. Answering the second and third sentences of Paragraph 2, eBay avers that the allegations are legal conclusions as to which no response is required and further avers that the ruling referred to speaks for itself. Except as expressly admitted and averred, eBay denies the allegations of Paragraph 2.

3. Answering Paragraph 3, eBay lacks sufficient information to admit or deny the allegations.

4. Answering Paragraph 4, eBay lacks sufficient information to admit or deny the allegations.

5. Answering Paragraph 5, eBay denies that it is a California corporation. eBay admits that it has a principal place of business in San Jose, California.

6. Answering Paragraph 6, eBay lacks sufficient information to admit or deny the allegations.

7. Answering Paragraph 7, eBay lacks sufficient information to admit or deny the allegations.

8. Answering Paragraph 8, eBay lacks sufficient information to admit or deny the allegations.

9. Answering Paragraph 9, eBay lacks sufficient information to admit or deny the allegations.

10. Answering Paragraph 10, eBay avers that the allegations are legal conclusions to which no response is required and further avers that the agreements referred to speak for themselves and otherwise eBay lacks sufficient information to admit or deny the allegations.

11. Answering Paragraph 11, eBay avers that the agreements referred to speak for themselves and otherwise eBay lacks sufficient information to admit or deny the allegations.

12. Answering Paragraph 12, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay lacks information sufficient to admit or deny the allegations.

13. Answering Paragraph 13, eBay lacks information sufficient to admit or deny the allegations.

14. Answering Paragraph 14, eBay avers that the allegations are legal conclusions to which no response is required and further avers that the agreements referred to speak for themselves and otherwise eBay lacks information sufficient to admit or deny the allegations.

15. Answering Paragraph 15, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay lacks information sufficient to admit or deny the allegations.

16. Answering Paragraph 16, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay lacks information sufficient to admit or deny the allegations.

17. Answering Paragraph 17, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay admits that it has adopted a policy, the Verified Rights Owner Program (“VeRO”), which is in compliance with the safe harbor provisions of the Digital Millennium Copyright Act (“DMCA”), which speaks for itself. Except as expressly so averred and admitted, eBay denies the allegations of Paragraph 17.

18. Answering Paragraph 18, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself. Except as expressly so averred, eBay denies the allegations of Paragraph 18.

19. Answering Paragraph 19, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself. Except as expressly so averred, eBay denies the allegations of Paragraph 19.

20. Answering Paragraph 20, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself. Except as expressly so averred, eBay denies the allegations of Paragraph 20.

21. Answering Paragraph 21, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself.

22. Answering Paragraph 22, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself.

23. Answering Paragraph 23, eBay avers that the allegations are vague and no response can therefore be made but to the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself.

24. Answering Paragraph 24, eBay lacks sufficient information to admit or deny the allegations.

25. Answering Paragraph 25, eBay admits that it received by fax a Notice Of Claimed Infringement on April 12, 2007 (“April 12 Notice”), a copy of which is attached as Exhibit F to eBay’s Answer to Third Party Complaint and Counterclaim Against Innovate Technology, Inc. filed concurrently herewith (“eBay’s Counterclaim”). Except as expressly admitted, eBay denies the allegations of Paragraph 25.

26. Answering Paragraph 26, eBay avers that the April 12 Notice speaks for itself. Except as expressly averred, eBay denies the allegations of Paragraph 26.

27. Answering Paragraph 27, eBay admits that after receipt of the April 12 Notice, eBay removed a number of Colon’s auction listings and sent Colon emails notifying him that the auction listings had been removed. Except as expressly admitted, eBay denies the allegations of Paragraph 27.

28. Answering Paragraph 28, eBay lacks sufficient information to admit or deny the allegations.

29. Answering Paragraph 29, eBay lacks sufficient information to admit or deny the allegations.

30. Answering Paragraph 30, eBay lacks sufficient information to admit or deny the allegations.

31. Answering Paragraph 31, eBay admits that it received a Counter-Notice Regarding Removed Listing from Colon dated April 17, 2007 (“April 17 Counter-Notice”). Except as expressly admitted, eBay denies the allegations of Paragraph 31.

32. Answering Paragraph 32, eBay avers that the April 17 Counter-Notice speaks for itself and otherwise denies the allegations.

33. Answering Paragraph 33, eBay avers that its VeRO program speaks for itself and eBay admits that it notified Innovate pursuant to its VeRO policy that it would reinstate the disputed auction-style listings which were the subject of the April 12 Notice and April 17 Counter-Notice unless within ten business days Innovate informed eBay that Innovate had initiated a legal action against Colon. Except as expressly averred and admitted eBay denies the allegations of Paragraph 33.

34. Answering Paragraph 34, eBay admits that on May 4, 2007, it reinstated some auction-style listings for Colon pursuant to its VeRO program. Except as expressly admitted, eBay denies the allegations of Paragraph 34.

35. Answering Paragraph 35, eBay admits that certain auction-style listings that were removed pursuant to notices filed by Innovate were relisted on May 6, 2007 and otherwise denies the allegations.

36. Answering Paragraph 36, eBay denies the allegations and avers that it received a Notice of Claimed Infringement from Innovate dated May 7, 2007, asserting that certain of Colon's listings violated Innovate's intellectual property rights.

37. Answering Paragraph 37, eBay avers that the allegations are vague and no response can therefore be made. To the extent eBay comprehends the allegations, eBay admits that it has removed certain of Colon's auction-style listings pursuant to its VeRO program, which program speaks for itself. Except as expressly admitted and averred, eBay denies the allegations of Paragraph 37.

38. Answering Paragraph 38, eBay avers that the allegations are vague and no response is therefore required. To the extent eBay comprehends the allegations, eBay lacks sufficient information to admit or deny the allegations.

39. Answering Paragraph 39, eBay lacks sufficient information to admit or deny the allegations.

40. Answering Paragraph 40, eBay avers that the allegations are vague and no response is therefore required and further avers that, to the extent the allegations refer to Colon's Complaint in this action, the Complaint speaks for itself. eBay otherwise lacks information sufficient to admit or deny the allegations.

41. Answering Paragraphs 41 through and including Paragraph 96 entitled Counterclaims Against Colon, the allegations in those paragraphs are alleged solely against Colon and not against eBay and therefore no response by eBay is required. To the extent a response is required, eBay lacks information sufficient to admit or deny the allegations in those paragraphs.

THIRD PARTY CLAIM AGAINST EBAY

1. Answering Paragraph 1 of the Third Party Claim Against eBay, eBay avers that Colon's Complaint speaks for itself and otherwise eBay lacks sufficient information to admit or deny the allegations.

2. Answering Paragraph 2, eBay avers that the allegations are a legal conclusion as to which no response is required and to the extent a response is required eBay denies the allegations.

3. Answering Paragraph 3, eBay avers that the allegations are vague and no response is therefore required. To the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself and otherwise denies the allegations.

4. Answering Paragraph 4, eBay avers that the allegations are vague and no response is therefore required. To the extent eBay comprehends the allegations, eBay avers that its VeRO program speaks for itself and otherwise denies the allegations.

5. Answering Paragraph 5, eBay denies the allegations.

6. Answering Paragraph 6, eBay denies the allegations.

7. Answering Paragraph 7, eBay denies the allegations.

eBay further denies that Innovate is entitled to the relief requested or any relief whatsoever.

AFFIRMATIVE DEFENSES

1. The third party complaint fails to state facts upon which relief can be granted.
2. The third party complaint is barred by the Digital Millennium Copyright Act.
3. The third party complaint is barred by the doctrines of estoppel, acquiescence and waiver.
4. The third party complaint is barred by the doctrine of unclean hands.
5. The third party complaint is indefinite.

6. To the extent Innovate has been damaged, that damage results wholly or in part from the conduct of Innovate or others over whom eBay has no control.

eBay requests that Innovate's Third Party Claim be dismissed with prejudice and eBay awarded its costs and such other relief as the Court deems just.

EBAY'S COUNTERCLAIMS AGAINST INNOVATE

JURISDICTION & VENUE

1. This Court has subject matter jurisdiction over eBay's federal claims under *28 U.S.C. § 1331* and *1338*. The federal claims arise under the *Digital Millennium Copyright Act, 17 U.S.C. § 512* and the Declaratory Judgment Act, 28 U.S. C. Section 2201. This Court has supplemental subject matter jurisdiction over eBay's state-law claims under *28 U.S.C. § 1367(a)*.

2. This Court has personal jurisdiction over Innovate and venue is proper in the Southern District of Florida pursuant to *28 U.S.C. §1391(b) and (c)*, as Innovate has appeared in this action and has filed a third party claim against eBay in this District.

PRELIMINARY STATEMENT

3. eBay is the world's largest online marketplace. More than 220 million users worldwide have offered for sale and purchased billions of items across more than 50,000 categories via the eBay website. eBay itself does not sell any products; rather, akin to a newspaper's classified advertisements, eBay's users create and post descriptions of products which are called "listings" soliciting offers for those products. eBay is not responsible in any manner for the third party information that comprises the listings; that is, eBay does not create, pre-approve or edit the content, title or description of any listing provided by any seller. Any registered eBay user can bid on any of the approximately 100 million items listed on the eBay website at any given time in an auction-style format or buy any item offered at a fixed price.

eBay does not own, possess, control or inspect the items sold through its site and has no ability to determine the authenticity of such items.

4. To enhance the experience of eBay's users and provide a safe and secure marketplace, eBay enables intellectual property rights owners to identify listings offering infringing products for sale. eBay developed a program, known as the Verified Rights Owners program or VeRO, which offers tools and mechanisms for intellectual property rights owners to police the eBay marketplace for counterfeit products which are bad for eBay and its marketplace as well as for rights owners. However, when purported rights owners such as Innovate abuse eBay's VeRO Program, they act to the detriment of eBay, its sellers and the broader consuming public.

5. eBay brings this action for damages for violation of the Digital Millennium Copyright Act ("DMCA"), for interference with contract and prospective economic advantage, unfair business practices and misrepresentation arising out of Innovate's filing of false copyright and patent infringement notices under eBay's VeRO Program. Innovate has repeatedly filed notices of claimed infringement ("NOCI") alleging that the sale by Colon and other sellers of Innovate products infringes Innovate's intellectual property rights when in fact Innovate does not have a good faith belief that its intellectual property rights have been violated. On information and belief, Innovate does not contend that the products which are the subject of Innovate's NOCIs are counterfeit. Rather Innovate contends that genuine Innovate products offered for sale by third parties on eBay infringe on the basis that the products are distributed under purported patent and copyright licenses which restrict distribution of the products to sales by authorized resellers at certain minimum prices. On information and belief, Innovate's patent and copyright licenses do not restrict the re-sale of Innovate products as Innovate claims and, even if those

license purported to create such restrictions, those restrictions would be unenforceable. Innovate's NOCIs are not a good faith attempt to protect its intellectual property rights. Instead, they are an effort by Innovate to impede the legitimate re-sale of Innovate product by *bona fide* purchasers such as Colon, and other sellers via eBay, by knowingly misrepresenting its intellectual property rights in an attempt to manipulate the secondary product market/s through artificially higher prices. Upon information and belief, to date, Innovate's conduct has improperly caused the removal of more than 100 listings from the eBay website.

6. Innovate's pattern of filing false notices harms eBay in many direct and indirect ways including preventing eBay from earning fees on the listings and sale of such products which are removed as a result of the NOCIs. The conduct further harms eBay in that it undermines the bidding and sale process for sellers on eBay who are subject to such false notices by imposing, at a minimum delay and disruption, and likely results in diminished sales of such products even where listings are reinstated. Sellers subjected to repeated false NOCIs may become disaffected with eBay and, to the extent such sellers conclude that eBay condones or does not effectively respond to the filing of such false NOCIs, those sellers may trade less often or not at all on eBay or move their business to eBay's competitors. Further, sellers who are the subject of multiple notices by rights owners may be suspended from using eBay. Innovate's pattern of filing false NOCIs further harms eBay in that bidders and buyers and potential bidders and buyers who are notified that listings in which they are interested or are engaged in bidding have been removed may become disaffected with the process of trading on eBay and as a result engage in fewer or no transactions on eBay. In addition, Innovate's practices prevent buyers from purchasing genuine items at the best prices the market will bear.

7. eBay also seeks a declaratory judgment that Innovate's purported Third Party Complaint against eBay is without merit and should be dismissed with prejudice. Innovate's Complaint seeks to hold eBay liable to indemnify Innovate for the harm resulting to Innovate from Innovate's own actions in filing NOCIs with eBay and thus causing the removal of certain listings. The claims are without any basis in law. Finally, eBay seeks an injunction preventing Innovate from filing false NOCIs.

PARTIES

8. eBay is a Delaware corporation having its principle place of business at 2145 Hamilton Avenue, San Jose, California 95125.

9. On information and belief, Innovate is a corporation incorporated in Delaware with its principal place of business in Irvine, California.

THE EBAY MARKETPLACE

10. Sellers wishing to offer products for sale register with eBay, write a brief description of the item they wish to list, and a page is then posted on eBay describing that item (the "listing"). Sellers can choose to sell either in an auction-style format where potential buyers bid on the item or in a fixed price format where the item is offered for sale at the price set by the seller. eBay charges a fee for the listing, which may include a basic fee and optional feature fees where certain enhancements, for example a special icon, are included in the listing. eBay may also receive a final value fee which represents a percentage of the ultimate selling price of the item listed.

11. Since its inception in the mid-90's, eBay has enjoyed tremendous growth as people around the world have discovered the benefits of trading on eBay, including the ability to

quickly locate and purchase products of interest in a secure trading environment. Today, a vast array of products and services are sold on eBay involving many of millions of users world wide.

12. Transactions involving the offer for sale and the purchase of products on eBay are conducted between the buyers and sellers. eBay does not participate in the transactions but rather merely provides the venue and related technologies for such transactions to occur. Although eBay has adopted and implements policies with respect to items offered for sale on the site with the objective of enhancing its users' experience and optimizing the opportunity for trading effectively on eBay, eBay does not and cannot review the many millions of individual listings to determine, *inter alia*, if the items offered for sale by sellers infringe the intellectual property rights of others. eBay has a very limited ability to determine the authenticity of items because it never possesses or inspects the items offered for sale on eBay nor could eBay be expert in the hundreds of millions of items offered for sale on eBay at any given time and the myriad of rights potentially implicated by the offer for sale of that volume of items such that eBay could identify infringements. For these reasons, as well as the responsibility the law places on rights owners to enforce their own intellectual property rights, eBay must rely on the cooperation of, and good faith reporting by, rights owners through the VeRO program. Necessarily, the integrity of the VeRO program is vital to the success of the eBay marketplace. More than 18,000 rights owners, from individuals to Fortune 500 companies, participate in eBay's VeRO program.

13. The VeRO program was developed, in part, to effectuate the safe harbor provisions of the Digital Millennium Copyright Act (the "DCMA"). The DMCA was enacted to address liability for copyright infringement arising in connection with providing access to content via the Internet. The DCMA safe harbor provisions provide immunity to websites, such

as eBay, from claims of copyright infringement where the site adopts procedures to permit rights owners to complain of infringement as long as the website (or “online service provider” or “OSP”) acts to remove the allegedly infringing material upon receiving a “notice of claimed infringement” from the copyright owner and meets certain other requirements as set forth in the DMCA. eBay’s VeRO program incorporates this notice procedure.

14. The DMCA also provides a mechanism for a subscriber to an OSP who is targeted by a notice of claimed infringement to contest the notice by submitting a “counter notice” to the OSP stating “under penalty of perjury that the subscriber has a good faith belief that the material was removed . . . as a result of mistake or misidentification of the material.” An OSP will enjoy a safe harbor from liability if, upon receiving a counter notice from a subscriber, it notifies the person who filed the notice of claimed infringement that it will reinstate the removed material in ten business days unless it receives notice that there is a pending legal action to restrain the subscriber from continuing to post the allegedly infringing material. eBay’s VeRO program adopts this counter notice procedure.

15. The VeRO program is prominently posted on eBay’s website. Under the program, owners of intellectual property who participate in the VeRO program can submit a NOCI to eBay stating that a particular listing violates their intellectual property rights. In completing the NOCI, the reporting party, as required by the DMCA with respect to copyrights, must sign a statement, under penalty of perjury, that it has a good-faith belief that the identified listing violates its intellectual property rights or the intellectual property rights of someone it represents.

16. When the reporting party submits a proper NOCI regarding a particular listing, eBay will remove the listing which is the subject of the notice. eBay generally does not

independently review the validity of the NOCI (other than ensuring the form is properly completed) because it typically has no basis upon which to decide the merits of such claims but relies upon the verified notice. The seller has the opportunity to submit a counter-notice contesting the claimed infringement. At that point, eBay will reinstate the seller's listings unless the reporting party files a lawsuit against the seller and notifies eBay it has done so. In that event, eBay will not allow the listing to be reposted until the lawsuit is resolved. Sellers who are the subject of multiple NOCIs are subject to suspension from eBay. eBay users who are suspended from eBay, based on false NOCIs from rights owners, unfairly cost eBay and its sellers revenue. In addition, such actions also unfairly deny consumers of choice.

17. In or about April 2005, Innovate began participating in eBay's VeRO program. Innovate created an About Me page to post on the eBay website which described Innovate's intellectual property rights and to which Innovate could direct sellers to respond to questions about its intellectual property. As a matter of policy, and consistent with (for example and without limitation) Section 230 of the Communication Decency Act (47 U.S.C. §230), eBay does not edit the About Me pages of its users (other than to remove, for example, profanity). In its About Me pages, Innovate falsely claimed that its products are "sold only through authorized dealers" and that "[t]he sale of [Innovate] products by anyone other than authorized dealers, in strict compliance with the terms of their license, constitutes patent infringement and may subject the infringer to substantial liability." Innovate also stated on its "About Me" page that "Innovate is the owner of certain copyrights to all of the technical data, photos, graphics, software, product literature, catalogues, product specifications, installation guides, user guides, promotional material and other types of information used in association with its products and/or posted on its websites" and asserted that "[t]hese items may not be used by anyone without

express written permission from Innovate” and that “[a]ny copying, reproduction or use of these materials without permission is a violation of federal law.”

18. Since participating in the VeRO Program, from at least April 10, 2007 to the present, Innovate has submitted dozens of NOCIs against various listings by various sellers offering Innovate product for sale, resulting in the improper removal of numerous listings of many sellers on eBay.

19. On or about December 2006, Plaintiff Colon listed certain Innovate product for sale on eBay and over the ensuing months in 2007 listed additional Innovate product for sale via eBay.

20. On April 10, 2007, eBay received from Innovate via fax a NOCI asserting under penalty of perjury that twenty two of Colon's listings of Innovate product for sale via eBay, infringed two “and more” of Innovate’s patents (the “April 10 Notice”). A true and correct copy of the April 10 Notice is attached hereto as Exhibit A and incorporated herein by reference. Two of the listings targeted by the April 10 NOCI were directed to Colon listings for a battery pack and carrying case (Listing No. ‘008) and a wideband Lambda cable (Listing No. ‘523). True and correct copies these Listings are attached hereto as Exhibits B, and C and incorporated herein by this reference. Subsequently, on April 11, 12, and 13, 2007, eBay received from Innovate additional NOCIs addressing listings of Innovate product by Colon and asserting under penalty of perjury that the attempted sale of such products violated the same two identified patents “and more” owned by Innovate (the “April Notices”). True and correct copies of the April Notices are attached as Exhibit D and incorporated herein by reference.

21. Pursuant to its VeRO Program, after receiving the April Notices, eBay removed the subject Colon Listings and notified Colon of its receipt of the Notices, advising Colon that

his Listings had been removed “because the intellectual property rights owner notified us, under penalty of perjury, that your listing infringes on their patents.” eBay concurrently notified all high bidders that the auctions subject to the April Notices had been cancelled.

22. Colon responded to the April 12 Notice filed by Innovate and submitted to eBay, as provided for in the VeRO Program, a Counter-Notice contesting the removal of his listings of Innovate product. A true and correct copy of this Counter-Notice is attached hereto as Exhibit E and is incorporated herein by reference. On or about April 19, 2007, eBay pursuant to its VeRO Program, advised Innovate that Innovate had ten business days to notify eBay that it had initiated a legal action against Colon or the listings would be reinstated. A true and correct copy of eBay’s notice to Innovate is attached hereto as Exhibit F and incorporated herein by reference.

23. On information and belief Innovate failed to take any legal action against Colon within the ten day period. On May 4, 2007, eBay reinstated the Innovate products on eBay and Colon began selling those products again.

24. On May 7, 2007, Innovate filed a NOCI against Colon’s Innovate listings (“May 7 Notice”). The notice included the relisted products and additional Innovate products offered by Colon. The May 7 Notice asserted under penalty of perjury that the sale of the listed Innovate product infringed Innovate’s copyrights in its software. A true and correct copy of the May 7 Notice is attached hereto as Exhibit G and incorporated herein by this reference.

25. After receiving the May 7 Notice, eBay removed the subject listings (with the exception of the relisted items subject to the Counter-Notice) and advised Colon that his listings had been removed “because the intellectual property rights owner notified us, under penalty of perjury, that your listing infringes on their copyrights.” eBay again notified all high bidders that the listings had been cancelled.

26. On information and belief, Colon thereafter did not list Innovate product for sale on eBay.

27. Colon's listings for Innovate products were removed as result of NOCIs submitted to eBay by Innovate and in accordance with eBay's VeRO Program.

28. On information and belief, Innovate did not have a good faith basis for submitting any of its NOCIs to eBay regarding the Colon listings of Innovate product and instead knowingly misrepresented its intellectual property rights and submitted those notices with the intent of preventing the legitimate re-sale by Colon of genuine Innovate products at prices lower than those offered by Innovate authorized dealers. On information and belief, Colon was a *bona fide* purchaser and had the right to resell the Innovate products on the secondary market. On further information and belief, in any event, Innovate's purported licenses did not provide that product could be sold only by authorized sellers or only at specified minimum prices.

29. On information and belief, the NOCIs filed by Innovate against other sellers listing Innovate product for sale on the eBay site were similarly false and without legal basis.

30. Innovate's improper NOCIs based on assertion of infringement of copyright violate the DMCA and those NOCIs and Innovate's NOCIs based on false claims of patent infringement have interfered with eBay's relationship with Colon and other sellers and have caused damage to eBay and its sellers. Further, Innovate's improper notices threaten and chill the potential sale of other Innovate product via the eBay website and cause additional damage to eBay and its sellers. Moreover, Innovate's conduct harms the buying public who have a right to purchase genuine products at the best price the competitive market will bear.

31. Unless, enjoined, on information and belief, Innovate will continue to send false NOCIs to eBay causing continuing harm to eBay and its users.

**FIRST CLAIM FOR RELIEF
MISREPRESENTATION OF COPYRIGHT
INFRINGEMENT UNDER THE DMCA, 17 U.S.C. § 512(f) (2005)**

eBay incorporates Paragraphs 1 through 30 as if fully set forth herein.

32. By submitting false NOCIs to eBay regarding the listings of Innovate product by Colon and other eBay sellers, Innovate knowingly and materially misrepresented that the sale by Colon and other sellers of such products infringed Innovate's copyright.

33. eBay relied upon NOCIs submitted by Innovate in removing the listings of Innovate product by Colon and other sellers.

34. Innovate's conduct is in violation of the DMCA and has caused harm to eBay.

**SECOND CLAIM FOR RELIEF
MISREPRESENTATION**

eBay hereby incorporates Paragraphs 1 through 30 as if fully set forth herein.

35. By submitting false NOCIs to eBay regarding the listings of Innovate product by Colon and other eBay sellers, Innovate knowingly and intentionally, or negligently, misrepresented that the sale of such product violated Innovate's intellectual property rights.

36. eBay relied upon NOCIs submitted by Innovate in removing the listings of Innovate product by Colon and other sellers.

37. Innovate's conduct has caused harm to eBay.

**THIRD CLAIM FOR RELIEF
TORTIOUS INTERFERENCE WITH CONTRACT**

eBay hereby incorporates Paragraphs 1 through 36 as if fully set forth herein.

38. Colon had valid contracts with eBay to sell products on the eBay site.

39. Innovate had knowledge of Colon's contracts with eBay.

40. Innovate intentionally filed false NOCIs to disrupt Colon's contracts with eBay.

In the alternative, Innovate negligently filed the false NOCIs.

41. Innovate's conduct caused eBay to terminate Colon's listings and suspend Colon's account.

42. Innovate's conduct has resulted in lost profits and other damage to eBay.

**FOURTH CLAIM FOR RELIEF
TORTIOUS INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE**

eBay hereby incorporates Paragraphs 1 through 36 as if fully set forth herein.

43. Colon had an economic relationship with eBay, with the probability of future economic benefit to eBay.

44. Innovate had knowledge of Colon's economic relationship with eBay.

45. Innovate intentionally and wrongfully filed false NOCIs to disrupt Colon's economic relationship with eBay, causing eBay to lose the opportunity to earn revenue from future sales of Innovate product by Colon and otherwise causing damage to eBay. Innovate's conduct was independently wrongful in that it constituted a false notice under the DMCA, misrepresentation and unfair business practices.

46. In the alternative, Innovate negligently filed the false NOCIs against Colon.

47. Innovate's conduct has resulted in lost profits and other damage to eBay.

**FIFTH CLAIM FOR RELIEF
UNFAIR, DECEPTIVE, AND FRAUDULENT BUSINESS PRACTICES**

eBay hereby incorporates Paragraphs 1 through 46 as if fully set forth herein.

48. Innovate's conduct constitutes unfair, deceptive, and fraudulent business practices under the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 and the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501 .201-213 (2005).

49. Innovate's conduct has resulted in lost profits and other damage to eBay.

**SIXTH CLAIM FOR RELIEF
DECLARATORY AND INJUNCTIVE RELIEF**

eBay hereby incorporates Paragraphs 1 through 48 as if fully set forth herein.

50. Innovate contends that Colon's purchase and resale of Innovate products infringes its copyrights and patents.

51. Colon contends that his sale of Innovate products does not infringe any of Innovate's copyrights or patents.

52. Innovate has repeatedly submitted NOCIs to eBay directed to Colon's sale of Innovate product via eBay.

53. As a result of Innovate's submission of NOCIs, eBay has removed certain of Colon's listings pursuant to its VeRO Program.

54. Innovate contends that eBay is liable for any damage suffered by Colon as a result of the termination of Colon's listings following the submission by Innovate of its NOCIs. Innovate further contends that eBay must indemnify Innovate from any damage Innovate suffers as a result of Innovate's submission to eBay of NOCIs and eBay's resulting removal of the listings identified in those NOCIs. eBay contends that the NOCIs submitted by Innovate were not submitted in good faith and were false. In any event, whether the NOCIs were false or in good faith or accurate, eBay contends that it has no liability to Innovate or anyone as a result of taking action to remove listings following receipt of NOCIs and in compliance with its posted VeRO program and/or under the safe harbor provisions of the DMCA.

55. There is a real and actual controversy between eBay and Innovate regarding eBay's liability for any damage caused Colon and eBay's obligation to indemnify Innovate for any such damage.

DEMAND FOR RELIEF

eBay demands judgment as follows:

- a. Damages and attorney fees under the DMCA;
- b. Damages for misrepresentation, interference with contract and with prospective economic advantage, as proved, and actual damages, punitive damages, and/or statutory damages, costs, and attorney's fees under Fla.Stat. § 501.201, *et seq.* and Cal. Bus. & Prof. Code §17200;
- c. A declaratory judgment that eBay is not liable for any damages incurred by Colon or by Innovate as a result of eBay's removal of listings or any other actions taken by eBay as a result of receipt of NOCIs from Innovate;
- d. A preliminary and permanent injunction enjoining Innovate from filing false NOCIs; and
- e. Such other relief as the Court finds appropriate.

Dated: January 4, 2008
Miami, FL

s/ Jennifer Coberly
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered by mail on January 4, 2008, to all counsel on the attached service list.

s/. Jennifer Coberly _____
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