eBay Inc.
1250 Eye Street, NW, Suite 1002
Washington, 20005

www.ebay.com

June 9, 2009

The Honorable Herb Kohl
Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Committee on the Judiciary
308 Hart Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

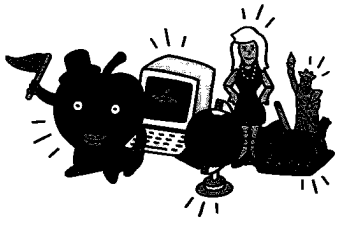
Once again, thank you for your invitation to participate in the Subcommittee's recent hearing entitled, "The Discount Pricing Consumer Protection Act: Do We Need to Restore the Ban on Vertical Price Fixing?" Per your recent request, I have included below answers to your additional questions sent by mail for inclusion in the official record.

Question 1 – What is the impact of Internet-scanning companies like "NetEnforcers" on eBay?

eBay's experiences working with sellers and manufacturers confirm that Retail Price Fixing has restricted intra-brand competition, in particular among small and mid-sized Internet retailers, like the ones who sell on the eBay marketplace. As you mentioned, NetEnforcers is a third-party service provider that works for manufacturers to scan the Internet, including the eBay platform, every day to look for sellers offering discounted prices. With the information that NetEnforcers gives them, manufacturers then puts intense pressure on sellers to raise their prices. In cases where our sellers have an authorized relationship with the manufacturer, *Leegin* has provided an immediate fix – authorized sellers are contacted by manufacturers and simply informed that they are contractually obligated to sell their products at a higher price.

The situation is much more interesting for sellers who are not authorized distributors of a certain product, and instead choose to sell on the thriving, value-oriented, and perfectly legal gray market. In these cases, manufacturers do not have the contractual relationship to force a seller to change its prices, so they use any tools at their disposal to enforce their minimum prices. In many cases, this means that manufacturers scour low-priced eBay listings of completely legitimate products (provided courtesy of NetEnforcers) and assert technical copyright violations. They then use this alleged copyright violation to make eBay take down the low-priced product listing. Mission accomplished.

One example I mentioned during the hearing was of a company called CaptiveWorks. This electronic company used false claims of trademark violations to take down several



low-priced eBay listings. When the seller asked CaptiveWorks why it was claiming that his listings were replicas when they were in fact authentic, the company made it clear that it targeted his listings because they were being sold at a lower price. In another case, Laguna Beach Jeans Company went after a seller for selling its products at a discount on eBay, saying simply that it "does not authorize eBay sales," and that selling its products at a lower price "than [it] sells on eBay" would impact its market. For these businesses, the *Leegin* decision has clearly been interpreted as a "green light" to stop low-price competition by legitimate sellers. We are in the beginning stages of research on our marketplace to see how this fact has impacted pricing over time, and we believe that it will show that our eBay community will have fewer low-priced options.

Question 2 – Is free-riding a legitimate problem in the Internet age?

Traditional retailers contend that innovative Internet retailers are able to offer lower prices to consumers because they "free-ride" on the promotional investments of their traditional counterparts. The traditional "free-rider" argument contends that rather than providing consumers with pre-sale information through, for example product demonstrations and other methods, small and mid-size Internet retailers depend on competing brick-and-mortar retailers to do this, and then divert "educated" consumers away through offering them lower prices obtained through their cost savings. Traditional retailers claim that only RPM can protect them this unfair competition.

From eBay's perspective there are many problems with this argument. The most significant of these problems is that, as previously described and subsequently elaborated upon, the realities of 21st Century retailing and the Internet turns the traditional free-rider justification for RPM on its head.

Recent data backs up the argument that consumer's retail experience has evolved in the Internet age. A recent Wall Street Journal article described these "New Information Shoppers" using the Internet to gather information on products before they make a purchase. Nearly 70% of Americans now say they consult product reviews or consumer ratings before they make their buying decisions, and spend at least 30 minutes online every week to help them decide what and whether to buy. And, since we know that the percentage of actual transactions that are completed online is much smaller, we must conclude that folks are actually researching product information on-line, but then making their purchases at a brick & mortar store. That is exactly the opposite of what many RPM supporters would have you believe. Internet retail is not actually "free-riding" on the existing retail ecosystem; established retailers are free-riding on the tremendous consumer information tools created by Internet innovators.

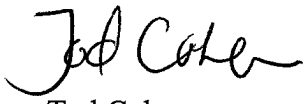
Question 3 – Does eBay support S. 148, the Discount Pricing Consumer Protection Act?

eBay strongly support S. 148, the Discount Pricing Consumer Protection Act. This bill is urgently needed to correct the mistaken *Leegin* decision and restore nearly 100 years of anti-trust law. It is our view that Retail Pricing Fixing stifles retail competition, reduces

consumer choice, and leads to higher prices. The retail ecosystem should continue to be varied and open to many different kinds of retail entities offering distinct retail experiences. Manufacturers use RPM to discipline and eliminate discount sellers. This ignores the fact that some resellers offer better prices because they are simply more efficient. Consumers should have the opportunity to choose whether they want the exclusive feel and increased service of a boutique shopping experience, or the value and convenience of more "mass-market" shopping options, whether online or offline. Consumers will choose what is best for them given their individual circumstances.

If you have any questions regarding these answers or the attached hearing transcript, please feel free to contact Amanda Pedigo in my Washington D.C. office. She can be reached at (202) 551-0081.

Sincerely,



Tod Cohen