

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKTIFFANY (NJ) INC. and TIFFANY AND  
COMPANY,

Plaintiffs,

v.

eBAY INC.,

Defendant.

04 Civ. 4607 (NRB)

**ANSWER**

ECF Case

Defendant eBay Inc. (“eBay”), by and through its undersigned counsel, hereby answers the First Amended Complaint (“Complaint”) of Tiffany (NJ) Inc. and Tiffany and Company (“Plaintiffs”) as follows:

1. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Complaint.
2. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of the Complaint.
3. eBay admits the allegations in Paragraph 3 of the Complaint.
4. eBay admits that this is a civil action and denies the remaining allegations in Paragraph 4 of the Complaint.
5. Paragraph 5 of the Complaint states legal conclusions as to which no responsive pleading is required.
6. eBay admits that it does business in the State of New York and denies that it committed any tortious acts. The remaining allegations in Paragraph 6 of the Complaint state legal conclusions as to which no responsive pleading is required.

7. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 7 of the Complaint.

8. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Complaint.

9. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 9 of the Complaint.

10. eBay denies the allegations in Paragraph 10 of the Complaint.

11. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 11 of the Complaint. eBay denies the remaining allegations in Paragraph 11 of the Complaint.

12. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 12 of the Complaint.

13. Paragraph 13 of the Complaint states legal conclusions as to which no responsive pleading is required.

14. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 14 of the Complaint.

15. eBay admits that it operates an Internet website at [www.ebay.com](http://www.ebay.com) and that it provides a service that enables third parties to post listings (i.e., advertisements) offering items they wish to sell in auction-style or fixed-price formats, and refers to its website for a full and accurate description of its service.

16. eBay denies the allegations in Paragraph 16 of the Complaint.

17. eBay denies the allegations in Paragraph 17 of the Complaint.

18. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 18 of the Complaint and refers to the documents attached as Exhibit 1 to the Complaint for a full and accurate statement of their contents.

19. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 19 of the Complaint and refers to the court decision cited in Paragraph 19 of the Complaint for a full and accurate statement of its contents.

20. eBay denies the allegations in Paragraph 20 of the Complaint.

21. eBay denies the allegations in Paragraph 21 of the Complaint.

22. eBay denies the allegations in Paragraph 22 of the Complaint.

23. eBay denies the allegations in Paragraph 23 of the Complaint.

24. eBay denies the allegations in Paragraph 24 of the Complaint.

25. eBay admits that Exhibit 2 appears to contain screenshots of the eBay home page as it may have existed in April and May of 2003 but denies that users currently encounter that content when visiting the eBay website. eBay admits that it has used its home page to promote categories of items offered by third parties. eBay admits that certain screenshots of the home page attached as Exhibit 2 to the Complaint contain a promotion relating to Mother's Day gifts and contain links to searches users can run on eBay, some of which include brand names. eBay denies the remaining allegations in Paragraph 25 of the Complaint.

26. eBay denies the allegations in Paragraph 26 of the Complaint.

27. eBay denies the allegations in Paragraph 27 of the Complaint.

28. eBay denies the allegations in Paragraph 28 of the Complaint.

29. eBay denies the allegations in Paragraph 29 of the Complaint.

30. eBay denies the allegations in Paragraph 30 of the Complaint.

31. eBay admits that counsel for Tiffany sent eBay a letter dated May 14, 2003 and refers to the document itself for a full and accurate statement of its contents.

32. eBay denies the allegations in Paragraph 32 of the Complaint.

33. eBay admits that Tiffany has made statements to eBay regarding the sales of certain quantities of items on eBay's website and refers to the May 14, 2003 letter sent by Tiffany to eBay for the content of those statements. eBay lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 33 of the Complaint.

34. eBay denies the allegations in Paragraph 34 of the Complaint.

35. eBay denies the allegations in Paragraph 35 of the Complaint.

36. eBay denies the allegations in Paragraph 36 of the Complaint.

37. eBay admits that it has removed all listings that Plaintiffs have reported to eBay as offering allegedly counterfeit Tiffany merchandise. eBay lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 37 of the Complaint.

38. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 38 of the Complaint.

39. eBay denies the allegations in Paragraph 39 of the Complaint.

40. eBay lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 40 of the Complaint.

41. eBay denies the allegations in Paragraph 41 of the Complaint.

42. eBay lacks knowledge and information sufficient to form a belief as to the allegations in Paragraph 42 of the Complaint with respect to alleged “counterfeiters” and denies the remaining allegations in Paragraph 42 of the Complaint.

43. eBay denies the allegations in Paragraph 43 of the Complaint.

44. eBay repeats and realleges each and every answer set forth in the preceding paragraphs as if fully set forth herein.

45. eBay denies the allegations in Paragraph 45 of the Complaint.

46. eBay repeats and realleges each and every answer set forth in the preceding paragraphs as if fully set forth herein.

47. eBay denies the allegations in Paragraph 47 of the Complaint.

48. eBay repeats and realleges each and every answer set forth in the preceding paragraphs as if fully set forth herein.

49. eBay denies the allegations in Paragraph 49 of the Complaint.

50. eBay repeats and realleges each and every answer set forth in the preceding paragraphs as if fully set forth herein.

51. eBay denies the allegations in Paragraph 51 of the Complaint.

52. eBay repeats and realleges each and every answer set forth in the preceding paragraphs as if fully set forth herein.

53. eBay denies the allegations in Paragraph 53 of the Complaint.

54. eBay repeats and realleges each and every answer set forth in the preceding paragraphs as if fully set forth herein.

55. eBay denies the allegations in Paragraph 55 of the Complaint.

## **AFFIRMATIVE DEFENSES**

### **First Affirmative Defense**

The Complaint fails to state a claim upon which relief can be granted.

### **Second Affirmative Defense**

Plaintiffs' claims are barred by the doctrine of equitable estoppel.

### **Third Affirmative Defense**

Plaintiffs' claims are barred by the doctrine of waiver.

### **Fourth Affirmative Defense**

Plaintiffs' claims are barred by the doctrine of nominative use.

### **Fifth Affirmative Defense**

Plaintiffs' claims are barred by the doctrine of exhaustion.

### **Sixth Affirmative Defense**

Plaintiffs' state law claims are barred by 47 U.S.C. § 230(c).

### **Seventh Affirmative Defense**

Plaintiffs have failed to mitigate their damages, if any.

### **Eighth Affirmative Defense**

Plaintiffs' prayer for damages is barred on the ground that such damages, if any, were not the result of acts, representations, or omissions by eBay.

### **Ninth Affirmative Defense**

Plaintiffs' prayer for damages is barred on the ground that the remedy for innocent infringement, if proven, is limited to an injunction against future presentation of the infringing material that would not result in delay of publication.

### **Tenth Affirmative Defense**

Plaintiffs' prayer for three times eBay's profits is barred on the ground that Plaintiffs have failed to allege or prove facts sufficient to show that eBay has intentionally used Plaintiffs' marks knowing that such marks are counterfeit marks.

### **Eleventh Affirmative Defense**

Plaintiffs' prayer for statutory damages is barred on the ground that Plaintiffs have failed to allege or prove facts sufficient to show that eBay has made willful use of Plaintiffs' marks.

### **Twelfth Affirmative Defense**

Plaintiffs' prayer for punitive damages is barred on the ground that Plaintiffs have failed to allege or prove facts sufficient to state a claim for punitive damages or to show that eBay is or was guilty of oppression, fraud or malice.

WHEREFORE, eBay prays:

1. That Plaintiffs take nothing by their Complaint and for a judgment in favor of eBay and against Plaintiffs, dismissing the Complaint;
2. That eBay be awarded its costs of suit, including reasonable attorney's fees; and
3. That this Court order such other and further relief as it may find just and proper.

### **JURY DEMAND**

eBay hereby demands trial by jury on all issues so triable.

Dated: October 1, 2004

Respectfully submitted,

WEIL, GOTSHAL & MANGES LLP  
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New York, New York 10153-0119  
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By:   
R. Bruce Rich

Attorneys for Defendant eBay Inc.




**CERTIFICATE OF SERVICE**

I, Mark J. Fiore, an attorney associated with Weil, Gotshal & Manges LLP,  
hereby certify that on this 1st day of October 2004, I caused a copy of Defendant's Answer to be  
served by hand and electronic mail on:

James B. Swire  
DORSEY & WHITNEY LLP  
250 Park Avenue  
New York, NY 10177  
(212) 415-9200

*Attorneys for Plaintiffs Tiffany (NJ) Inc. and Tiffany and Company*

  
Mark J. Fiore