

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY
AND COMPANY,

04 Civ. 4607 (RJS)

Plaintiffs,

-against-

eBAY INC.,

Defendant.

PLAINTIFFS' POST-TRIAL MEMORANDUM

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Zalewska Decl. ¶¶ 8, 10. The prices of Tiffany silver merchandise sold outside the United States do not vary significantly from the prices within the United States. Zalewska Decl. ¶ 8.⁴

B. eBay's Symbiotic Relationship With Its Seller Community

eBay has created and now operates the well-known online marketplace in which eBay's member sellers, with extensive assistance from eBay, create listings offering items for sale to eBay's member buyers in auction-style, fixed price or "Buy It Now" listings.⁵ Briggs Decl. ¶¶ 9, 15. eBay exercises control over who may or may not trade on its website by requiring all users to register with eBay and sign eBay's User Agreement. Briggs Decl. ¶ 13; DX 77. If a user violates the terms or conditions of the User Agreement, eBay may take disciplinary action against the seller, including removing the seller's listings, issuing a warning and/or suspending the user. Briggs Decl. ¶ 14.

eBay exercises control over the items that are listed on its website. DX 77 at 3-4; Chesnut Decl. ¶¶ 33, 35. eBay maintains a list of prohibited items such as drugs, firearms and alcohol products, for which it routinely screens in order to keep such items from being offered for sale on eBay. PX 4. In addition, eBay runs a "fraud engine" that is purportedly designed to identify "suspicious" listings that may violate any of eBay's rules, including rules prohibiting the

⁴ eBay attempts to argue that there has been a diversion of, and therefore a secondary market for, genuine new Tiffany silver jewelry. eBay Proposed Findings ¶¶ 52-53. However, eBay has not come forth with any evidence in support of that proposition, and instead relies on pure conjecture. In fact, Tiffany has not experienced any diversion of silver jewelry during the time period of its dispute with eBay. See Cepek Decl. ¶ 15; Chen Decl. ¶¶ 13-16; Shibley Decl. ¶¶ 7-9. Indeed, there is little or no economic incentive for the diversion of Tiffany merchandise into the secondary market. Zalewska Decl. ¶ 8; Chen Decl. ¶ 15. Consequently, eBay's argument about diversion is a red herring and should be wholly disregarded.

⁵ Under the system created by eBay, sellers may have multiple listings for the same item or one listing with multiple quantities of the same item. DX 77 at 3; Zalewska Decl. ¶ 80. In addition, sellers, who are anonymous to the public, can sell the same goods through multiple user identifications. See Tr. 671:18-672:2.

sale of the counterfeit goods or goods that infringe the trademarks of companies such as Tiffany. Tr. 581:11-582:12; Chesnut Decl. ¶ 35; DX 125. For a number of years, eBay has used filters that can delay listings that involve the sale of goods, as well as filters that look at quantity and price. Tr. 648:5-648:7, 659:10-661:23, 664:4-664:22; PX 342 at 12; PX 378; DX 125. Once the engine identifies a listing, eBay employees (known as CSRs) can review that listing to determine whether it should be taken off the eBay website. Tr. 586:17-588:10, 589:12-589:24; Chesnut Decl. ¶ 38; DX 13.

eBay has built a business model that is designed to work closely with sellers to foster the increase of their sale of goods on eBay, including Tiffany jewelry. Zeig Dep. 141:21-145:4; Tr. 406:18-407:25; PX 129; PX 184. In that regard, eBay provides substantial information and assistance to sellers. Tr. 401:10-401:23. eBay's revenue is dependent on the growth of sellers' sales activities on eBay in several ways. Tr. 406:18-407:25. When an eBay seller lists an item, eBay charges the seller an Insertion Fee, ranging from \$0.20 to \$4.80 depending on the starting price, plus a Final Value Fee, ranging from 5.25% to 10% of the final price. Briggs Decl. ¶ 20; PX 1151. eBay's Chief Marketing Officer, Gary Briggs, testified that, in 2006, approximately 33% of eBay North America's income was derived from listing fees and approximately 45% from final value fees. Tr. 407:3-407:9. eBay also profits from fees charged by PayPal, an eBay company, to process the transaction. Tr. 393:4-393:16. PayPal charges the eBay seller a fee ranging from 1.9% to 2.9% of the sale price, plus \$0.30. PX 1156.

This fee structure leads eBay to take affirmative steps designed to increase its sellers' sales. Tr. 406:18-407:25. eBay's revenue and profit growth is dependent on these actions. Tr. 406:18-407:25. Mr. Briggs testified that eBay "wants[s] to have [its] sellers understand what

buyers are interested in, and [it] feel[s] that [it is] very much in the business of trying to help [its] sellers succeed.” Tr. 406:23-407:2.

eBay works with its sellers to provide them with extensive assistance to help increase their sales. Tr. 401:10-401:23. eBay conducts seminars and workshops to educate sellers on growing their business. Tr. 403:11-403:14; PX 981, PX 989. eBay offers marketing advice about creating the “perfect” listing to attract buyers. Tr. 415:20-417:1; PX 1015. eBay offers an “Advanced Selling” program that provides its sellers with data and research to help them identify “hot sales opportunities.” Tr. 406:4-406:17; PX 987. eBay distributes marketing calendars so that its sellers can list goods to coincide with eBay promotions. Tr. 409:2-409:19; PX 985. eBay provides “expert” consultants, whom eBay sellers may call to receive advice on growing their business. Tr. 409:25-411:4; PX 990. eBay has even established its Main Street Program, which facilitates sellers’ lobbying of government officials regarding regulations and legislation that may affect their and eBay’s businesses. Tr. 413:7-413:22; PX 1024.

eBay provides its top sellers, known as PowerSellers, with even greater assistance and benefits.⁶ Tr. 401:10-401:23. As Mr. Briggs testified, the bigger the seller, the more support eBay provides. *Id.* PowerSellers are provided dedicated account managers. Tr. 427:7-427:15. eBay publishes newsletters for PowerSellers that provide further information on eBay promotions and advanced selling education. Tr. 423:6-423:12; PX 397. At all relevant times, eBay offered a co-op advertising program in which it reimbursed PowerSellers 25% of the charges that they incurred for advertisements in qualifying publications. Tr. 423:17-424:4, 440:3-440:20; PX 52; PX 397. eBay offered its PowerSellers health care benefits, Tr. 438:19-

⁶ As discussed below, counterfeiters have been able to exploit the credibility and luster of being a PowerSeller to sell counterfeit Tiffany silver jewelry. See this Memo at 34, infra.

439:20, PX 52, business liability insurance, PX 406, and working lines of credit to finance their business. PX 129.

At all pertinent times, eBay management teams were responsible for overseeing the growth of products sold on eBay within each formal product category, such as Jewelry & Watches. Tr. 417:9-420:19; Poletti Dep. 13:14-13:22. The Jewelry & Watches team ran an account management program for its 20 top sellers. Zeig Dep. 31:13-35:16, 35:5-37:8; Tr. 417:9-419:23. That program provided eBay's sellers with information on business planning and auction strategy consultation. Zeig Dep. 31:13-35:16; PX 200 at 16. eBay conducted group conference calls with sellers, in which eBay shared information on such topics as eBay's marketing programs and top-searched keywords. PX 184; see PX 200 at 7; Zeig Dep. 117:18-118:11. Plaintiffs Exhibit 184, for example, shows that eBay provided its seller with "the most effective keywords for [sellers'] program," including the words that provided the best return on investments. eBay identified "Tiffany" as one of the top-searched keywords that it provided to top sellers during these calls. PX 184. When it was encouraging its top sellers to use the "Tiffany" key word, the Jewelry & Watches team gave no thought to whether the goods were counterfeit. Zeig Dep. 147:99-148:1.

In order to "boost" the sellers' sales, eBay continued to advise its sellers to take advantage of the demand for Tiffany merchandise as part of eBay's effort to grow the Jewelry & Watches category. PX 129; 995, 1038, 184, 1018, 1064, 1026; Tr. 457:20-460:3. For instance, in 2004, a PowerSeller newsletter to jewelry sellers advised Power Sellers to "us[e] recommended keywords to boost sales." "Tiffany & Co." is among the recommended keywords provided. PX 129. eBay provides all its users with, documents such as the "Hot Categories Report." PX 995. eBay's description for The Hot Categories Report is: "Hot . . . Very Hot . . .

Super Hot! Discovery which categories and products are on fire – where bid to item ratios are high and demand is outpacing supply!” PX 1026; see also PX 287. eBay published a report in the Seller Central section of its website in September 2006 that told sellers that “Tiffany” is a “hot” keyword among buyers in the Jewelry & Watches category. PX 995. eBay provides its users with what it calls the “Holiday Hot List.” PX 1018. As Mr. Briggs acknowledged, the “Holiday Hot List” “suggest[s] to our sellers the types of items that our buyers will have interest in during the holiday season. Tr. 457:20-459:3. The Holiday Hot List distributed in the Seller Central section of eBay’s website in September 2006 states: “to help [sellers] prepare, we have created a detailed list of products predicted to be in high demand and short supply this holiday season”. PX 1026. eBay included “Tiffany” on its “Holiday Hot List.” PX 1018. Finally, eBay encourages its sellers to view the eBay Pulse webpage, which tracks buyer trends, “hot picks,” “top searches” and “most watched items.” PX 1026; Tr. 461:4-464:19. In September 2006 and March 2007, eBay told users that the terms “Tiffany” and “Tiffany & Co.” were top search terms. PX 1038, PX 1164.

eBay recognizes that its “buyers are very interested in brands.” Tr. 446:21-446:25. In order to attract potential buyers to its website, eBay has devoted a significant effort to assisting the growth of eBay sellers in the Jewelry & Watches category. Tr. 418:11-419:23; Poletti Dep. 13:6-13:22. Indeed, eBay considers itself to be a competitor of Tiffany and the principal source of “value” pricing of Tiffany jewelry. Poletti Dep. 72:19-72:22, 74:16-75:13. eBay regularly conducts promotions to increase bidding on auctions and to increase sales of fashionable and luxury brands, including Tiffany. Zeig Dep. 49:15-50:15, 64:5-67:6; PX 61; PX 63.

Prior to receiving a demand letter from Tiffany in 2003, eBay actively advertised the availability of Tiffany merchandise to purchase, by displaying the TIFFANY Marks on its

homepage and greeting pages. PX 392; PX 1064. Additionally, eBay purchased sponsored link advertisements on Yahoo! and Google advertising the availability of “Tiffany” items. Briggs Decl. ¶ 25; PX 491; PX 1065. Sometime after Tiffany’s protest in May 2003, eBay advised Tiffany that it had ceased purchasing those links. Briggs Decl. ¶¶ 25, 32. Nevertheless, eBay continued to reimburse sellers who registered as “affiliates” for buying sponsored links on Google that advertised the sale of Tiffany jewelry on eBay because advertisements drove business to eBay.⁷ PX 477-480, 482; Tr. 469:4-470:2.

As a result, eBay has generated substantial revenues from the sale of “Tiffany” silver jewelry since 2000. Poletti Dep. 59:15-62:9. Between April 2000 and August 2005, there were 456,551 sales of Tiffany jewelry in the Jewelry & Watches category.⁸ PX 394 at 1. eBay’s Jewelry and Watches Category Manager estimated that, between April 2000 and June 2004, eBay earned \$4.1 million in revenue from completed listings with “Tiffany” in the listing title in the Jewelry & Watches category. Poletti Dep. 59:15-62:9.

C. eBay Knows that It Is a Principal Source for Counterfeit Tiffany Silver Jewelry

Sometime in 2003, Tiffany observed that the largest marketplace, by far, for the sale of counterfeit Tiffany silver jewelry was eBay. Kowalski Decl. ¶ 28; Tr. 841:11-841:16. Indeed, it brought civil actions against several eBay sellers: Katz Jewelers, Inc., Starglam.com, Inc. (which

⁷ Under the “affiliate” program that Commission Junction ran on behalf of eBay, Tr. 469:4-469:18, Commission Junction reimbursed the affiliate advertiser for directing business to eBay through sponsored link advertisements. Briggs Decl. ¶ 35; PX 481, 1013; Tr. 469:4-470:2. eBay provided the funds used to reimburse these affiliates. Tr. 469:19-470:2. After it ceased purchasing links itself, eBay never instructed Commission Junction to preclude its affiliates from using “Tiffany” as a sponsored link. Tr. 472:2-472:19.

⁸ This figure consists of completed sales for the following subcategories: Body Jewelry, Bracelets, Charms & Charm Bracelets, Children’s Jewelry, Designer Brands, Earrings, Men’s Jewelry, Necklace & Pendants, Pins & Brooches, Rings. PX 394. The calculations exclude numerous types of “Tiffany” items not at issue here, e.g., loose beads, watches, and ethnic and tribal jewelry.

was also criminally prosecuted), Erika Hughes and David Verbout. Tr. 838:25-840:4; Kowalski Decl. ¶¶ 15-16. Tiffany also pursued over 600 enforcement actions. Tr. 801:2-801:21. As the amount of counterfeit Tiffany silver merchandise available on eBay continued to grow, Tiffany made the decision that it was not economical to pursue legal action against individual sellers of counterfeit Tiffany merchandise on eBay. Tr. 800:20-805:6. Rather, it concluded that it was most effective to address the problem by confronting eBay. Tr. 804:11-805:6, 816:23-817:17; Kowalski Decl. ¶¶ 22-23.

In May 2003, Tiffany directed its outside counsel to write eBay to complain about the problem of counterfeit Tiffany jewelry on eBay and to seek eBay's cooperation in stopping the illegal conduct. Kowalski Decl. ¶ 17; PX 489. In that letter, Tiffany advised eBay that there are no authorized third-party vendors for Tiffany merchandise and that it should therefore "be apparent to eBay that any seller of a significant lot – i.e. five pieces or more – of purported 'Tiffany' jewelry is almost certainly selling counterfeit merchandise."⁹ Kowalski Decl. ¶¶ 17-18; PX 489. eBay responded by encouraging Tiffany to utilize a third party program, Ranger Online, to report counterfeit items to eBay,¹⁰ but rebuffed Tiffany's request to remove listings for "Tiffany" items for which the seller had listed multiple "Tiffany" items. PX 490.

⁹ Tiffany believed that the number "five" was a conservative estimate as an indicator that a seller was offering counterfeit Tiffany merchandise. This number is based, in part, on the fact that Tiffany is primarily a gift store and that the purchase of multiple items is not common. Tr. 795:17-797:2 Also, Tiffany has a liberal return policy with a 30-day full money-back guarantee. It is thus difficult to imagine a circumstance where a seller would sell new Tiffany jewelry for substantially less than retail on eBay, let alone 5 or more Tiffany pieces. Tr. 795:17-797:2; Zalewska Decl. ¶ 21. Based on its experience, Tiffany concluded that this yardstick was reliable. Tr. 220:6-220:17.

¹⁰ Tiffany attempted to use Ranger Online, but found it ineffective because the program merely conducted keyword searches for Tiffany. Tr. 227:14-228:2 Tiffany still had to review the listings and report the items to eBay. Tr. 227:14-228:2. Moreover, Ranger Online allowed a rights owner to report only one listing at a time and even eBay was not happy with Tiffany's use of Ranger Online. DX 81.

Tiffany then attempted to curtail the problem by participating in eBay's VeRO program. Zalewska Decl. ¶ 22. Tiffany employees monitored eBay, and submitted Notices of Claimed Infringement ("NOCI's") to eBay for the listings that they had a good faith belief infringed on the TIFFANY Marks. *Id.* ¶ 35; PX 968. eBay removed the listings at Tiffany's request, but apparently nothing more. Zalewska Decl. ¶ 43. There is no evidence, other than unsubstantiated assertions, that eBay actually suspended these sellers even temporarily, much less permanently.¹¹ Tr. 631:4-631:9; PX 1136.

Even after approximately one year of steady reporting to eBay, the number of listings for counterfeit Tiffany merchandise increased. PX 1082; Zalewska Decl. ¶¶ 75-76; Kowalski Decl. ¶ 22. From the time of eBay's June 2003 refusal to prohibit sellers from offering five or more "Tiffany" items through May 2004, Tiffany reported 46,252 infringing listings. PX 1082.¹² Indeed, by August 2003, Tiffany had catapulted to the top of the list of rights owners filing notices in the VeRO program, and was the second largest reporter as of that time. DX 81; PX 92.

The vast majority of counterfeit "Tiffany" merchandise sold on eBay is of a significantly inferior quality, resulting in a meaningful loss of goodwill for Tiffany among the purchasers of those goods, as evidenced by the numerous complaints that Tiffany received from eBay buyers.

¹¹ eBay proffered conclusory evidence regarding its suspension policies, and asserted that it was its practice to suspend repeat sellers of counterfeit goods. Chesnut Decl. ¶ 46. However, even though eBay has the ability to identify and obtain such information, Piatetsky-Shapiro Decl. ¶¶ 74-84. eBay claims that it is unable to provide any data regarding the number of individuals that it suspended as a result of either Tiffany's NOCI's or eBay's supposed proactive efforts to review listings for the sale of Tiffany jewelry. PX 1136. In other words, even though eBay is the sole source of the data and is able to provide that data, it has failed to proffer any evidence that substantiates its claim that it suspended sellers who listed counterfeit Tiffany silver jewelry for sale.

¹² The figures from PX 1082 represent only reported listings. Zalewska Decl. ¶ 74. The actual number of reported items is greater because a single listing may have offered multiple "Tiffany" items. Zalewska Decl. ¶ 80; *see* DX 77 at 3.

Lange Decl. ¶ 6. Between April 2003 and October 2007, Tiffany's Customer Service Department received over 3,900 emails regarding "Tiffany" items on eBay. The majority of the emails regarded questions about whether the product was fake and whether Tiffany was aware of the problem. *Id.* As a result of the numerous people who encountered counterfeit Tiffany merchandise through eBay, the TIFFANY Marks and Tiffany's reputation as a purveyor of high quality jewelry have been diluted and tarnished. Naggiar Decl. ¶¶ 19-20.

At the beginning of 2004, in order to assess the extent of the problem, Tiffany conducted a survey, in which it purchased at random silver jewelry items available on eBay that used "TIFFANY sterling" in the listing (the "2004 Buying Program"). Zalewska Decl. ¶¶ 61-62; Mantis Decl. ¶¶ 5, 10. In accordance with the Mantis protocol, Tiffany's law firm conducted the survey, and purchased 186 pieces of "Tiffany" silver jewelry. Grasso Decl. ¶¶ 3, 33. Tiffany's quality management personnel inspected and evaluated each of these items. Callan Decl. ¶¶ 14-17, 31. They found that 136 items, or 73.1%, were counterfeit and only 5% were genuine. Grasso Decl. ¶ 33; Mantis Decl. ¶ 20; PX 434. The balance, 21.9%, was potentially actionable, but not pure counterfeits (e.g., they were "imitation"). Mantis Decl. ¶ 20; PX 434.¹³

In June 2004, because of the 2004 Buying Program's results and the increased number of listings, Tiffany once again wrote to eBay to demand that eBay take action. Kowalski Decl. ¶ 22; PX 492. In the letter, Tiffany advised eBay about the results of the 2004 Buying

¹³ In the Spring of 2005, after this action was commenced, Tiffany repeated its survey, in order to determine whether the number of counterfeit items being listed on eBay continued to be predominantly counterfeit (the "2005 Buying Program"). Grasso Decl. ¶¶ 35-36; Zalewska Decl. ¶ 66. The results of the 2005 Buying Program were strikingly similar, as Tiffany's quality management personnel found that 75.5 % of the 139 items purchased were counterfeit. Mantis Decl. ¶ 20; PX 433.

Program.¹⁴ PX 492. Despite the details letter regarding the 2004 Buying Program, eBay did not respond to the letter or show any interest in learning any information about the 2004 Buying Program. Kowalski Decl. ¶ 23.

Even after Tiffany commenced this action, it continued to participate in the VeRO program and to advise eBay of the pervasive listing of counterfeit goods. Zalewska Decl. ¶¶ 67, 76-79. In each year from 2003 through 2006, Tiffany reported substantially more listings than it did the year prior. PX 1082. In 2003, Tiffany reported 20,915 infringing listings. In 2004, Tiffany reported 45,242 infringing listings. In 2005, Tiffany reported 59,012 infringing listings. In 2006, Tiffany reported 134,779 infringing listings. Zalewska Decl. ¶ 78; PX 1082; Tr. 97:20-99:18. As of September 30, 2007, Tiffany reported 24,201 infringing listings in 2007. Zalewska Decl. ¶ 79. All told, Tiffany reported 284,149 infringing listings. Zalewska Decl. ¶ 80; Tr. 195:1-195:8. According to eBay's own monthly records, of the 14,000 rights owners who participate in the VeRO program, Chesnut Decl. ¶ 17, Tiffany was among the top 10 reporters in 21 of the 28 months between June 2003 and September 2005. PX 253-283.¹⁵

At the same time that Tiffany was complaining to eBay about the sale of counterfeit goods, buyers were also complaining to eBay.¹⁶ PX 493-645. Based on the limited discovery

¹⁴ The letter's statements regarding the 2004 Buying Program were not general and vague. Rather, the letter described the program to purchase sterling silver products at random, in accordance with a protocol designed by an expert retained by Tiffany. Further, it disclosed that 186 pieces were purchased between January 26 and February 20, 2004, at prices ranging from \$8.95 to \$395. Finally, it disclosed that, after physically inspecting those goods, Tiffany determined that no less than 73% of the goods were counterfeit and that only 5% of the goods were genuine. See PX 492.

¹⁵ eBay's data is incomplete. For instance, PX 282 and PX 283, the monthly reports for November and December 2005, respectively, inexplicably do not show any notices from Tiffany. See also PX 261, 276, 277, 281. In fact, Tiffany reported 6,932 and 2,024 listings during those two months, and thus should have been recorded as the number one reporter in November. PX 1082.

¹⁶ For example, one customer said: "I purchased this Tiffany's ring, which I now believe is counterfeit. I have emailed the seller, without any response. I also noticed that another buyer recently bought a pair of earrings from this same seller that also ended up being counterfeit." PX 641.

that eBay provided, 125 consumers complained to eBay during the last six weeks of 2004. PX 493-645. In addition, the court has heard testimony from individuals regarding the purchase of counterfeit goods that sellers falsely represented were new and genuine. Badart Decl. ¶¶ 3-12; Byron Decl. ¶¶ 7-16, 20; Lahood Decl. ¶¶ 4-8, 14. All of these consumers complained to eBay and/or PayPal. Badart Decl. ¶ 14; Byron Decl. ¶ 17; Lahood Decl. ¶ 9. For instance, in November 2005, Elizabeth Badart purchased what she believed to be genuine Tiffany bracelet and earrings from an eBay seller. Badart Decl. ¶ 7. Once she received them, it was clear to her that the “Tiffany” items were fake. Badart Decl. ¶ 11. Ms. Badart complained to PayPal on November 8, 2005, and it took repeated efforts over the next month before Pay Pal sent her a refund. Baldart Decl. ¶¶ 14-20.

Reporting listings through the VeRO program was an arduous and unsatisfactory process. Cacucciolo Decl. ¶¶ 42, 45-48; Zalewska Decl. ¶¶ 83-85, 87-88; Tr. 203:21-207:3. Because Tiffany could not evaluate a listing any sooner than any member of the public, a counterfeit Tiffany item was often sold before Tiffany has a chance to report the listing. Cacucciolo Decl. ¶ 47; PX 1075; PX 1077; PX 1078. Moreover, there were overwhelming numbers of “Tiffany” listings on eBay at any given time. Tr. 203:21-205:8. Zalewska Decl. ¶ 83; Cacucciolo Decl. ¶ 47. From early 2003 through 2006, a search for “Tiffany” and “silver” could return upward of 1,000 results. Zalewska Decl. ¶ 83. Because eBay required a good faith belief that every listing is infringing in order for a rights owner to report it, Tr. 626:21-628:4, Tiffany had to review each and every listing before it could submit NOCI’s. Zalewska Decl. ¶¶ 27, 34-35. Yet, Tiffany simply could not review every “Tiffany” listing in a day. Zalewska Decl. ¶ 83; Tr. 203:21-205:8. This problem was compounded by the fact that new items were constantly being added to the

site, and Tiffany just could not keep up. Zalewska Decl. ¶ 83; Cacucciolo Decl. ¶ 47; Tr. 204:8-204:15.

D. eBay Has Failed to Stop the Listing of Counterfeit Tiffany Silver Jewelry

eBay relies on its VeRO program to show that it is purportedly responding to the listings of counterfeit goods. Chesnut Decl. ¶ 15; eBay Proposed Findings of Fact ¶¶ 9-14. That program shifts the responsibility to the rights owners such as Tiffany, Chesnut Decl. ¶¶ 15-17, and enables eBay to profit from the sale of counterfeit merchandise unless and until the rights owner submits a NOCI with respect to a listing and eBay acts before a sale is concluded.

When Tiffany submitted NOCI's to eBay, eBay took listings down. Zalewska Decl. ¶ 87. However, as noted above, there is no evidence that eBay took any long term actions against the sellers listings those goods (i.e., whether it banned those sellers from using eBay to sell goods). See this Memo at 11, supra. Nor did eBay ever investigate whether Tiffany's or its customers' complaints were valid. Tr. 682:24-684:15.

Tiffany found that using the VeRO program to eliminate the listing of counterfeit goods was both frustrating and insufficient. Kowalski Decl. ¶ 19; Zalewska Decl. ¶¶ 83-85, 87-88. The VeRO program did not meaningfully mitigate, let alone eradicate the problem, as eBay's own data shows that, between April 2000 and August 2005, 456,551 pieces of Tiffany silver jewelry were sold on eBay in spite of all of the NOCI's submitted by Tiffany. PX 394.

eBay contends that it used its "fraud engine" to review listings of Tiffany goods and that it proactively took down such listings on its own without getting any notices from Tiffany. Chesnut Decl. ¶¶ 37-38; Tr. 664:4-665:3; DX 125. However, eBay produced no evidence regarding the number listings that it purportedly took down, Tr. 594:13-594:17, nor produced any evidence at trial of any examples of listings that it proactively took down.

eBay's fraud engine was inherently insufficient to do the job. Piatetsky-Shapiro Decl. ¶¶ 17-26. The filters that eBay employed looked exclusively for listings that admitted that the goods were not genuine. Piatetsky-Shapiro Decl. ¶¶ 18-24; DX 135; PX 1096. Thus, the fraud engine could not detect listings that falsely stated that the goods were new and genuine. Piatetsky-Shapiro Decl. ¶ 24; Tr. 738:12-740:20.

After it saw in August 2003 that Tiffany had become the second largest reporter under the VeRO program, see DX 81, eBay contends that it took action to address that problem. Tr. 743:13-744:20. According to eBay, the plan was to adopt better filters to detect the sale of counterfeit goods. Kammerath Dep. 108:24-109:22; Tr. 744:10-744:20. Yet, eBay never adopted any new filters other than the "replica" filters that it had always used. See PX 1096; Piatetsky-Shapiro Decl. ¶¶ 18-24. The failure of eBay to take any further action is corroborated by the growing numbers of NOCI's that Tiffany filed each year.¹⁷ PX 1082; Zalewska Decl. ¶¶ 74-78.

eBay could have taken steps to implement filters and other measures to prevent the sale of counterfeit merchandise. Piatetsky-Shapiro Decl. ¶ 14; Tr. 664:4-664:22, 659:10-659:13, 665:4-665:11, 738:12-740:20. Yet, it did not do so. Piatetsky-Shapiro Declaration ¶ 14, 54; Tr. 324:16-325:18. For instance, in late 2006, eBay began to delay the ability of buyers to view on the website listings that use certain brand names, including Tiffany, for 6 to 12 hours in order to conduct manual reviews of these listings. Tr. 655:23-656:14. eBay uses that delay to

¹⁷ eBay disputes that such an inference should be drawn from the increasing number of resources devoted to VeRO reporting by Tiffany. Tr. 100:14-100:18 However, during the period 2003 through 2005, when Tiffany employed approximately the same level of resources for VeRO reporting, see Tr. 83:9-84:2, Zalewska Decl. ¶ 67, those notices steadily increased. PX 1082. Thus, Tiffany's increase in resources devoted to VeRO reporting in 2006 cannot be used to dispute that the problem continued to grow after Ms. Kammerath's comments in August 2003.

determine whether the sellers will be allowed to offer such items. Tr. 654:9-654:23. Yet, as early as 2004, it was technically feasible for eBay to delay listings, including for “Tiffany silver”. Tr. 665:4-665:11. It also was feasible in 2004 for eBay to implement quantity filters that flagged listings offering multiple items. Tr. 659:10-659:13. Had eBay employed these filters at that time, an eBay CSR could have reviewed such listings, as well as the sellers’ other listings. Tr. 666:1-667:2. If the CSR found that the flagged listing or any of the sellers’ other listings were “suspicious”, the CSR could have taken them down. Tr. 587:19-589:24.

eBay’s filters for “Tiffany” items were also inadequate because they were applied to only one listing at a time. Piatetsky-Shapiro Decl. ¶ 17; Tr. 354:6-354:19. Since eBay’s sellers of counterfeit goods tend to offer many items for sale, a more effective approach would have been to apply the filters to sellers with characteristics indicative of a counterfeiter. Piatetsky-Shapiro Decl. ¶ 17. Tiffany’s expert, Dr. Gregory Piatetsky-Shapiro, has been a leader in the field of data mining since its beginnings in the late 1980s. Piatetsky-Shapiro Decl. ¶¶ 2-6; PX 1041. He demonstrated that, using data mining techniques commonly used by corporations, eBay could have designed programs that identified listings of likely counterfeit Tiffany items and the sellers thereof. Piatetsky-Shapiro Decl. ¶¶ 14, 26-29; Tr. 357:3-357:15. Indeed, Dr. Piatetsky-Shapiro’s “suspiciousness” criteria come directly from eBay’s own documents for its CSRs describing the indicia of “suspicious” behavior. Piatetsky-Shapiro Decl. ¶¶ 30-31; PX 340, 344 at 5-6, 10-12; Tr. 324:16-325:10; Fultz Dep. 68:7-68:11, 77:16-78:5, 81:1-82:2, 85:1-88:1, 94:5-103:23.

ARGUMENT

A party is liable for contributory trademark infringement if it has “intentionally induce[d] another to infringe a trademark,” or has continued to offer its services to those other parties

CONCLUSION

For the foregoing reasons, this Court should enter findings and conclusions that eBay violated the Lanham Act, New York law and common law with respect to the TIFFANY Marks and should enter an order granting Tiffany permanent injunctive relief requiring eBay to take such affirmative steps on an ongoing and continuing basis that are technically feasible to screen for and to prevent the listing of counterfeit Tiffany silver jewelry on eBay auction sites and to remove any such listings that may appear on any of eBay's auction sites.

In addition, Tiffany respectfully requests that the Court defer its determination of damages and entitlement to attorneys' fees until after the conclusion of such a hearing. In accordance with 15 U.S.C. § 1117, the Court should issue an order setting a schedule for: (i) discovery on the issue of eBay's profits; and (ii) the Court's determination of profits and statutory damages as well as Tiffany's attorney's fees and (iii) Tiffany's election between statutory damages and eBay's profits.

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