

FAKE: FORGERY, LIES, & EBAY

by Kenneth Walton

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Summary: This book details Kenneth Walton's involvement in fraudulent art auctions on eBay during the late 1990's, which eventually led to his felony conviction and disbarment from the legal profession. Occurring during the early years of eBay, Walton and his associates used various tactics including "shill bidding," deceptive descriptions, and forged paintings to defraud countless eBay buyers. Walton's downfall occurred when he aroused the suspicions of the news media, the art world and the FBI by attempting to auction a thrift shop painting with the forged signature of Richard Diebenkorn.

About the Author: Kenneth Walton received his J.D. from the University of California, Hastings College of Law in 1997.² Walton practiced law first as an associate at Kronick, Moskovitz, Tiedemann & Girard and then later as a solo practitioner in Sacramento, California until he was disbarred following his felony conviction for wire fraud. Following his legal career,

¹ J.D. Candidate, Syracuse University College of Law, 2008; Executive Editor, *Syracuse Science and Technology Law Reporter*.

² KENNETH WALTON, *FAKE: FORGERY, LIES, & EBAY* 5 (Simon Spotlight Entertainment, 2006).

Walton established HammerTap, a software company which sold eBay computer applications. This is his first book.³

Chapter 1 – THE FIRST PART.

- **Chapter Summary:** In this chapter, Walton describes how he was first introduced to eBay by Kenneth Fetterman. The author also introduces the term “shill bidding,” the practice of artificially bidding on an auction, in order to inflate the hammer price.
- **Chapter Discussion:** This chapter serves three purposes: (1) to introduce the author; (2) to introduce Kenneth Fetterman; and (3) to describe the practice of shill bidding on eBay in 1998. Walton describes himself as a restless Sacramento lawyer who is not satisfied with either his salary or his career choice. When Walton’s old army buddy Kenneth Fetterman introduced him to eBay, Walton saw this as a perfect opportunity to earn some extra money. Fetterman made a living by buying art at flea markets, garage sales and antiques stores, which he then sold on eBay.

The most important aspect of this chapter is the overview of the practice of shill bidding. While not unique to online auctions, shill bidding is the practice of bidding on one’s own auction in order to inflate the price of the item being auctioned. The author claims that traditionally shill bidding has never been severely punished. In jurisdictions where it is prohibited, the punishment is merely a small fine or a ticket. According to Walton, shill bidding had always violated eBay’s rules. However, in 1998 the company had no

³ Kenneth Walton, author of Fake: Forgery, Lies & eBay, www.kennethwalton.com/aboutme.html (last visited Jan. 23, 2008).

mechanism by which to enforce this rule. This chapter ends with Walton's account of his first investment in an auction with Fetterman.

Chapter 2 - THE SECOND PART.

- **Chapter Summary:** This chapter describes the initial paintings which the author sold on eBay. Moreover, he details how he used deceptive descriptions in order to sell these paintings.
- **Chapter Discussion:** In this chapter, the author describes his first painting purchases and how he subsequently sold the paintings on eBay. After creating an eBay account, Walton created additional account names and used these additional names to leave false and misleading feedback on his own account. For example, he wrote on his own account "great communication, prompt response."⁴ Such actions were against eBay rules and regulations at the time. The author noted that eBay later modified its system so that feedback could only be "exchanged between users who had completed a transaction."⁵

The author describes several deceptive tactics which he learned from Fetterman and used when selling paintings. He would describe all his paintings as coming from an "estate" in order to give the paintings a sense of history and provenance. The author justified this because legally "all 'estate' means is the stuff someone owns."⁶ Moreover, the author claimed he would place shill bids to "attract attention" to his paintings.⁷

⁴ WALTON, *supra* note 2, at 22.

⁵ *Id.* at 23.

⁶ *Id.* at 25.

⁷ *Id.* at 31.

Chapter 3- THE THIRD PART.

- **Chapter Summary:** In this chapter, the author describes more instances of deceptive descriptions and shill bidding.
- **Chapter Discussion:** The author describes instances of deceptive or questionable tactics used to sell a painting. In one such instance, the author and Fetterman purchased a painting at an antique store. The following day, when Fetterman gave the author the painting to sell on eBay, he noticed that the painting had been signed by “HW.” The author did not remember it being signed when it was purchased. After the auction ended, the buyer contacted the author and told him that “HW” stood for Winslow Homer, a famous painter. This was one of the first instances where the author was involved with “passing off suspicious paintings.”⁸ In a subsequent sale of another painting, the author intentionally “played dumb” by incorrectly spelling the name of an artist in order to spark interest among bidders. The author justified this so-called “naïve seller approach” by stating that by playing stupid, he was not outright lying.⁹ Moreover, the author noted that he and Fetterman would bid on each others’ auctions. To that regard, the author claimed that shill bidding “was no grand scheme, just a tacit understanding that shilling was part of how we did business.”¹⁰

Chapter 4 – THE FOURTH PART.

- **Chapter Summary-** This chapter discusses the Alberto Giacometti painting.

⁸*Id.* at 46.

⁹ WALTON, *supra* note 2, at 51.

¹⁰ *Id.* at 57.

- **Chapter Discussion:** In this chapter the author discussed a painting by “Alberto Giacometti” which he suspected Fetterman had forged. In addition to its questionable authenticity, Walton asserted that Fetterman placed a shill bid under the artist’s nephew’s name to increase the bidding. Following the sale of the “Giacometti” painting, the author received an e-mail from a previous buyer which stated: “I see what you are doing...you offer paintings with confusing signatures and pretend you don’t know what they are...I figured it out when I saw the horrendous ‘Giacometti’ sell for so much.”¹¹ The author did not necessarily see this as a warning, just a message that he was being watched.

Chapter 5 – THE FIFTH PART.

- **Chapter Summary-** This chapter discusses the “Clyfford Still” painting. Moreover, the author discusses deceptive and fraudulent practices used by others on eBay during this time period.
- **Chapter Discussion:** In this chapter, the author discusses the deceptive tactics used to sell a painting by “Clyfford Still.” The painting in question was signed “C.Still” on the back of a painting. The author notes that Clyfford Still usually signed his first name, however he told the buyer incorrectly that the artist would sometimes sign paintings “C.Still.” In this chapter the author also discussed other deceptive and illegal practices that were occurring on eBay at the time. For example, in September 1999, eBay canceled a sale of a human kidney. In July 1999, a man plead guilty for not delivering over \$37,000 worth of electronics that individuals had won in his eBay auctions.

¹¹ *Id.* at 78.

Chapter 6 – THE SIXTH PART.

- **Chapter Summary:** In this chapter, the author explains how he forged the “Diebenkorn” painting. In addition, the author gives a historical overview of art forgeries.
- **Chapter Discussion:** The author describes how he got the “Diebenkorn” painting and how he subsequently forged the artist’s signature before putting it up for auction. The “Diebenkorn” painting was purchased during the author’s final art buying trip with Fetterman. Prior to this painting, the author had never actually forged any of the paintings he sold. He signed the painting “RD52” in the style of Richard Diebenkorn.

In addition, the author discusses the history of art forgery, starting from late nineteenth century until World War II. The author identifies Elmyr de Hory, a forger in mid-twentieth century, as being responsible for selling over sixty million dollars worth of forged paintings by such artists as Picasso and Matisse. The author even notes that artists themselves have been involved in forgeries of their own work. In the 1960’s, the New York Attorney General sued to stop the convicted French forger David Stein from selling even his own work because of the government’s fear that the work would be sold as originals.¹² Surrealist painter Giorgio de Chirico was highly criticized but never convicted of forgery when he created forgeries of his own paintings by signing older dates on new copies.

Chapter 7 - THE SEVENTH PART.

- **Chapter Summary:** In this chapter, the author discusses the Diebenkorn auction.

¹² State v. Wright Hepburn Webster Gallery Ltd., 314 N.Y.S. 2d 661, 663 (N.Y. Sup. Ct 1970).

- **Chapter Discussion:** For the Diebenkorn auction, the author created a new eBay ID with fake feedback. In the description of the painting the author claimed that the painting was purchased in Berkeley, CA and stated that he was selling the painting because his wife did not like it. In reality, the painting was purchased in Las Vegas and the author was not married. In addition to this deceptive description, Fetterman placed shill bids with the author's alternate eBay ID. When the auction closed, the winning bid was \$135,805.

Chapter 8 - THE EIGHTH PART.

- **Chapter Summary:** This chapter discusses the immediate aftermath of the Diebenkorn auction.
- **Chapter Discussion:** In this chapter, the author discusses the press inquiry into the auction. Members of the press were able to figure out who the author was and how he lied in the description of the painting. Moreover, eBay subsequently canceled the auction because of the shill bidding and suspended the author's eBay accounts. To further complicate matters, the winner of the auction threatened to sue the author if Walton backed out of the sale.

Chapter 9 - THE NINTH PART.

- **Chapter Summary:** This chapter further discusses the repercussions of the Diebenkorn auction.
- **Chapter Discussion:** In this chapter, the author further discusses the *New York Times* investigation into the Diebenkorn auction. In response to the growing public intrigue, Fetterman launched "operation obscure-a shill," in which he unsuccessfully attempted to

hide his shell bid accounts by using them to buy items legitimately.¹³ Lastly in this chapter, a reporter informed the author that the FBI was investigating him for his eBay activity.

Chapter 10 - THE TENTH PART.

- **Chapter Summary:** The author describes how he destroyed all evidence of his eBay activity and subsequently hired an attorney to represent him in the ongoing investigation.
- **Chapter Discussion:** After confirming that the FBI was investigating him, Walton destroyed all auction printouts and evidence from his eBay activity. Moreover, he contacted Fetterman and told him that they were being investigated. Subsequently, the author hired a criminal attorney to represent him; however, he still maintained that the painting was purchased in Berkeley and that he did not forge the signature. In addition, although he was permanently banned from eBay, he began selling art again through his cousin.

Chapter 11 - THE ELEVENTH PART.

- **Chapter Summary:** The author explains how he continued to sell paintings and waited to be indicted.
- **Chapter Discussion:** In this chapter, the author explains how he waited in anticipation to be charged for his eBay sales. However, he did not believe a jury would find him guilty unless it was proven that he had forged the Diebenkorn. According to the author, in order for him to be convicted of fraud, the prosecutor would have to show that he made a

¹³ WALTON, *supra* note 2, at 164.

“material misrepresentation” about a painting which was auctioned. At the conclusion of the chapter, the author was informed that his bank records had been seized by the Department of Justice and that he would likely be charged with felony wire fraud for his eBay activities.

Chapter 12 - THE TWELFTH PART.

- **Chapter Summary:** The author describes how he agreed to work with federal prosecutors and to testify against Fetterman. In addition, Walton finally admitted to forging the Diebenkorn painting.
- **Chapter Discussion:** In this chapter, the author describes his cooperation with the government in exchange for leniency. He recognized however, that by pleading to felony wire fraud, he would be disbarred. After admitting to his attorney that he had forged the Diebenkorn, Walton was interviewed by the government and explained his involvement in the eBay auctions, including his shill bidding. In that interview, Walton stated that apart from the Diebenkorn, he did not know for sure that the other paintings were fakes; however he suspected that they were.

Chapter 13 - THE THIRTEENTH PART.

- **Chapter Summary:** The author explains how he was disbarred and convicted of felony wire fraud.
- **Chapter Discussion:** In this chapter, the author describes how he voluntarily disbarred himself, rather than being disbarred against his will. As a result of this action, he was not authorized to practice law for at least ten years. After his legal career ended, he began

working as a software engineer and created FeeFinder and other applications used in eBay auctions.

For the deal that he made with federal prosecutors, the author agreed to plead guilty to the fraud charges, which were based on his shill bidding, the use of fake eBay IDs and the false feedback. In addition to being disbarred, he also agreed to pay \$62,000 in restitution to the affected eBay users, testify against co-conspirators, relinquish the Diebenkorn painting and agree never to “directly or indirectly participate in eBay auctions.”¹⁴ On April 17, 2001, Walton plead guilty to wire fraud.

Chapter 14 - THE FOURTEENTH PART.

- **Chapter Summary:** The author explains what happened to Fetterman after the FBI began investigating their eBay activities.
- **Chapter Discussion:** Soon after being informed that he was being investigated, Fetterman left the Sacramento area. After living in Lake Tahoe, Fetterman and a woman named Terri Lee Gailpeaux decided to flee after his indictment was announced on television. Living under false names, the couple traveled in California, Arizona, New Mexico and Texas until Gailpeaux turned herself in to the FBI for harboring a fugitive. Gailpeaux was later sentenced to ten months in prison for the crime of harboring Fetterman.

¹⁴ *Id.* at 239-46.

Chapter 15 - THE FIFTEENTH PART.

- **Chapter Summary:** The author describes how his software company grew following his conviction and how eBay subsequently forced him to sell the company. The author also notes how Fetterman was arrested by the FBI.
- **Chapter Discussion:** The author explains in this chapter that Fetterman was arrested in January 2003 in Wichita, Kansas when he was pulled over for a minor traffic violation. Moreover, the author discusses the success of his company, HammerTap, and such applications as DeepAnalysis. According to the author, “DeepAnalysis was the first program to lend transparency to the eBay marketplace.”¹⁵ While the federal government was not necessarily pleased that Walton was working on the eBay software, such work did not technically violate the plea agreement. However, eBay demanded that Walton discontinue selling DeepAnalysis because they claimed it “allowed users to “trespass” on the website” under the doctrine of trespass to chattel.¹⁶ After meeting with eBay, the author learned that the company did not have a problem with the software itself, just with Walton. According to eBay, Walton was responsible for “the second most embarrassing public event in the history of this company...and under no circumstances [would] we ever enter into any kind of business relationship with any company even remotely affiliated with you.”¹⁷ In order to prevent any legal action against his company, Walton sold HammerTap to Bight Builders on October 31, 2003. Since that date, the author claims he has not engaged in any activity involving eBay whatsoever.

¹⁵ *Id.* at 268.

¹⁶ *Id.* at 280.

¹⁷ *Id.* at 282.

Chapter 16 - THE LAST PART.

- **Chapter Summary:** The author discusses his sentencing and what eventually happened to Fetterman.
- **Chapter Discussion:** In this chapter, the author discusses how it took three and half years for him to be sentenced for his eBay activities. Although he could have been sentenced to eighteen months in prison, because of his cooperation with prosecutors, the author was sentenced to only nine months of probation. Moreover, the court required that the author and his co-conspirators be held jointly and severely liable for \$94,683 in restitution to affected eBay buyers. After spending a year in jail, Fetterman pled guilty to money laundering and was sentenced to forty-six months in prison. Because Fetterman plead guilty, the author did not have to testify against him.

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