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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

EBAY, INC.,)
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 Plaintiff,)
)
 v.)
)
 DIGITAL POINT SOLUTIONS, ET AL.,)
)
 Defendants.)
_____)

Case No.: C 08-04052 JF (PVT)

ORDER GRANTING IN PART AND DEFERRING RULING IN PART ON PLAINTIFF EBAY, INC.'S TWO MOTIONS TO COMPEL

[Docket No. 123, 128]

Plaintiff eBay, Inc. moves to compel responses to requests for production, interrogatories and requests for admission from defendants Kessler's Flying Circus, Thunderwood Holdings, Inc., BrianDunning.com, Brian Dunning, Todd Dunning and Dunning Enterprise, Inc. Defendants Brian Dunning, BrianDunning.com, Thunderwood Holdings, Inc. and Kessler's Flying Circus oppose the motion. Separately, defendants Todd Dunning and Dunning Enterprise, Inc. oppose the motion. Additionally, plaintiff eBay moves to compel responses to requests for production, interrogatories and requests for admission from defendants Digital Point Solutions, Inc. and Shawn Hogan. Defendants Digital Point Solutions, Inc. and Shawn Hogan oppose the motion. On November 13, 2009, the parties appeared for hearing. Having reviewed the papers and considered the arguments of counsel,

1 IT IS HEREBY ORDERED that a ruling on plaintiff eBay's motion to compel responses
2 to requests for production, interrogatories and requests for admission from defendants Kessler's
3 Flying Circus, Thunderwood Holdings, Inc., Brian Dunning.com and Brian Dunning is deferred
4 for the reasons set forth below.¹

5 In the second amended complaint, plaintiff eBay alleges that defendants Kessler's Flying
6 Circus and Digital Point Solutions, Inc. engaged in a massive "cookie stuffing" operation using
7 software programs and/or code which caused users to be redirected to the eBay website even
8 though the user had not clicked on an eBay advertisement on a third party "affiliate" site.
9 Pursuant to Advertiser Service Agreements administered by the third party Commission
10 Junction, as a general matter, "affiliates" are compensated when revenue generating actions
11 occur on eBay's website within a specific timeframe. However, plaintiff eBay alleges that the
12 fraudulent "cookie stuffing" operation caused, *inter alia*, unauthorized access to eBay's
13 computers, corruption of eBay's data and alleged overpayments of commissions to defendants to
14 which they were not otherwise entitled.

15 Defendants Brain Dunning and Todd Dunning are brothers. Defendant Brian Dunning is
16 the founder and sole shareholder of the corporation known as Thunderwood Holdings, Inc.
17 Defendant Todd Dunning is an owner and shareholder in the corporation known as Dunning
18 Enterprise, Inc. The two corporations, Thunderwood Holdings, Inc. and Dunning Enterprise,
19 Inc., did business together as Kessler's Flying Circus. Until June 2007, it was in the business of
20 implementing Internet marketing programs on behalf of Internet merchants such as eBay.
21 Kessler's Flying Circus was operated out of Brian Dunning's home located at 15 High Bluff in
22 Laguna Niguel, California. ("Dunning residence").

23 Pursuant to a search warrant executed at the Dunning residence on June 18, 2007, federal
24 agents seized computers, computer media and documents. Federal agents also questioned at
25 length and in person both Brian Dunning and Todd Dunning. Assistant U.S. Attorney Kyle
26 Waldinger of the Computer Hacking and Intellectual Property Unit at the U.S. Attorney's Office

27
28 ¹ The holdings of this court are limited to the facts and particular circumstances
underlying the present motions.

1 in the Northern District of California has confirmed to defendants Brian Dunning and Todd
2 Dunning that they are subjects of an ongoing criminal investigation related to allegations of
3 “cookie stuffing” conducted by Kessler’s Flying Circus. Declaration of Stewart H. Foreman in
4 opposition to plaintiff’s motion to compel responses to requests for production, interrogatories
5 and request for admissions, ¶ 4, Exh. 2 and ¶ 6, Exh. 4. (“Foreman Decl.”). As a result,
6 defendants Brian Dunning and Todd Dunning, have been advised to, and have invoked their
7 Fifth Amendment rights against self-incrimination. Declaration of William J. Kopeny, ¶ 10.
8 (“Kopeny Decl.”).

9 Additionally, defendants have moved to stay the above-captioned action pending
10 resolution of the criminal proceedings. That motion is scheduled to be heard by the district court
11 on November 20, 2009. A further case management conference is scheduled to be held on
12 January 15, 2010.

13 By its motion to compel, plaintiff eBay seeks certain discovery from the corporate
14 defendants. The parties do not dispute that the individual defendants may invoke their Fifth
15 Amendment rights against self-incrimination. However, the parties dispute whether the
16 corporate defendants may be compelled to further respond to discovery.

17 A collective entity such as a partnership or corporation may not claim the privilege.
18 *Braswell v. U.S.*, 487 U.S. 99, 104, 108 S.Ct. 2284, 2288 (1988). *See also, Central States,*
19 *Southeast and Southwest Areas Pension Fund v. Carstensen Freight Lines, Inc.*, 1998 WL
20 413490 (N.D. Ill.) (“It is well established that corporations are not protected by the Fifth
21 Amendment.”). In addition, a person called upon to appear in a representative capacity for a
22 collective entity is not a person and may not invoke the privilege. *Id.* “[A] corporation has no
23 right to refuse to submit its books and records in a civil proceeding However, the act of
24 verifying interrogatories on behalf of companies is testimonial in nature and raises Fifth
25 Amendment concerns.” *Central States, Southeast and Southwest Areas Pension Fund v.*
26 *Carstensen Freight Lines, Inc.*, 1998 WL 413490 *3-4.

27 The corporation is obliged to “appoint an agent who could without fear of recrimination,
28 furnish such requested information as was available to the corporation.” *U.S. v. Kordel*, 397

1 U.S. 1, 9, 90 S.Ct 763, 768 (1970). In the event, “where no one can answer the interrogatories
2 addressed to the corporation without subjecting himself to a ‘real and appreciable’ risk of self-
3 incrimination, . . . the appropriate remedy would be a protective order under Rule 30(b),
4 postponing civil discovery until termination of the criminal action.” *Id.* The U.S. Supreme
5 Court has noted that such a case is a “troublesome question.” *Id.*

6 Here, the court finds that defendant Brian Dunning is the only person who can respond to
7 discovery propounded on Thunderwood Holdings, Inc., Brian Dunning.com and effectively,
8 Kessler’s Flying Circus. Declaration of Brian Dunning, ¶ 2. He is the founder and sole
9 shareholder in the corporation Thunderwood Holdings, Inc. *Id.* BrainDunning.com is not a
10 corporation but rather the name under which business has been conducted. *Id.* Defendant Todd
11 Dunning states that his corporation Dunning Enterprise, Inc. only held an ownership interest in
12 Kessler’s Flying Circus and was not involved in its business operations. Foreman Decl., ¶ 5,
13 Exh. 3.

14 Plaintiff eBay makes the point that the act of producing documents is distinguishable
15 from responding to interrogatories and requests for admissions. *See, e.g., U.S. v. Doe*, 465 U.S.
16 605, 610, 104 S.Ct. 1237, 1241 (1984)(“where the preparation of business records is voluntary,
17 no compulsion is present.”). However, defendant Brian Dunning insists there are no other
18 individuals or potential representatives to act on behalf of the corporation. In addition,
19 “engaging in that process piecemeal would not appear to advance the litigation in any significant
20 manner.” *See, e.g., Medina v. Argent Mortgage Co., et al.*, 2006 WL 1305230 *2 (N.D. Cal.).
21 Accordingly, the court finds it appropriate to defer ruling on plaintiff eBay’s motion to compel
22 further discovery from Kessler’s Flying Circus, Thunderwood Holdings, Inc. and Brian
23 Dunning.com. Not less than ten days before the next scheduled case management conference,
24 the aforementioned defendants shall advise the court regarding the status of the criminal
25 proceedings.

26 IT IS FURTHER ORDERED that plaintiff eBay’s motion to compel further discovery
27 from Dunning Enterprise, Inc. is granted. Unlike the other corporate defendants, Todd Dunning
28 and his wife are shareholders in Dunning Enterprise, Inc. And Mr. Dunning’s wife is the

1 secretary of the corporation. As a result, Mr. Dunning's wife has been able to respond to
2 discovery propounded on the corporation. To the extent that documents have never been
3 produced to federal agents (preceding and/or following Mr. Dunning's June 18, 2007 interview
4 with federal agents), either Todd Dunning or his wife may serve a declaration stating such facts.

5 IT IS FURTHER ORDERED that defendants Todd Dunning and Dunning Enterprise,
6 Inc.'s request for attorneys' fees totaling \$7,093.50 is denied. Pursuant to Civ. L.R. 7-8(a), any
7 motion for sanctions must be separately filed.

8 IT IS FURTHER ORDERED that a ruling on plaintiff eBay's motion to compel
9 responses to requests for production, interrogatories and requests for admission from defendants
10 Digital Point Solutions, Inc. and Shawn Hogan is deferred for the same reasons discussed above
11 (for defendants Thunderwood Holdings, Inc., BrianDunning.com and Kessler's Flying Circus).

12 Defendant Shawn Hogan is the sole officer, sole shareholder and sole director for the
13 corporation known as Digital Point Solutions, Inc. Declaration of Shawn Hogan in support of
14 opposition to plaintiff's motion to compel, ¶ 2. Like the Dunning brothers, he too, has been
15 advised by the U.S. Attorney's Office in the Northern District of California that he is the subject
16 of an ongoing criminal investigation involving the same allegations as those made in the
17 operative complaint in the above-captioned civil action. Declaration of Seyamack Kouretchian
18 in support of opposition of defendants Digital Point Solutions, Inc. and Shawn Hogan to
19 plaintiff's motion to compel, ¶ 2. ("Kouretchian Decl."). Indeed, defendant Hogan has been
20 advised that an indictment is expected sometime early next year. *Id.* As a result, and in response
21 to various discovery propounded upon him individually, defendant Hogan has invoked the Fifth
22 Amendment right against self-incrimination.

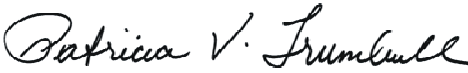
23 Defendant Hogan is the only person most knowledgeable about the business operations
24 of Digital Point Solutions, Inc. There does not appear to be any other corporate personnel who
25 could be designated to otherwise respond to discovery. Although a "corporate defendant cannot
26 invoke the protections of the fifth amendment," as a practical matter here, defendant Hogan is
27 the only person who could otherwise respond to discovery propounded upon the corporation.
28 *See, e.g., Medina v. Argent Mortgage Co., et al.*, 2006 WL 1305230 *2 (N.D. Cal.)(" . . .

1 important fact that the individual defendants are the persons most knowledgeable and the
2 persons whom the corporation would designate to testify on its behalf.”). To require Mr.
3 Hogan’s counsel to produce responsive documents without any assistance from defendant Hogan
4 is untenable. Accordingly, the ruling on plaintiff eBay’s motion to compel is deferred. Not less
5 than ten days before the next scheduled case management conference, the parties shall advise the
6 court regarding the status of the criminal proceedings.

7 IT IS FURTHER ORDERED that plaintiff eBay may move to compel further discovery
8 from third parties, including the co-location corporations known as Rackspace US, Inc. and
9 NetHere, Inc.

10 Because Dunning Enterprise, Inc. is a partner (with Thunderwood Holdings, Inc.) in
11 Kessler’s Flying Circus, either Todd Dunning or his wife shall execute the appropriate waivers
12 to Rackspace US, Inc. consenting to the release of responsive discovery.

13 Dated: November 19, 2009

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15 PATRICIA V. TRUMBULL
16 United States Magistrate Judge
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