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8
 9 UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 SAN JOSE DIVISION

12
 13 EBAY, INC.,

14 Plaintiff,

15 v.

16 DIGITAL POINT SOLUTIONS, INC., SHAWN
 HOGAN, KESSLER'S FLYING CIRCUS,
 17 THUNDERWOOD HOLDINGS, INC., TODD
 DUNNING, DUNNING ENTERPRISE, INC.,
 18 BRIAN DUNNING, BRIANDUNNING.COM,
 AND DOES 1-20,

19 Defendants.

CASE NO.: CV-08-4052 JF (PVT)

**DEFENDANTS TODD DUNNING AND
 DUNNING ENTERPRISE, INC.'S
 NOTICE OF MOTION AND MOTION
 TO STAY CIVIL ACTION PENDING
 RESOLUTION OF CRIMINAL
 PROCEEDINGS; MEMORANDUM
 OF POINTS AND AUTHORITIES**

Date: November 20, 2009
 Time: 9:00 a.m.
 Dept.: Courtroom 3, 5th Floor
 Honorable Jeremy Fogel

FREELAND COOPER & FOREMAN LLP

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FREELAND COOPER & FOREMAN LLP

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on November 20, 2009 at 9:00 a.m. in Courtroom 3 located at
3 280 South First Street, San Jose, California, before the Honorable Jeremy Fogel, Defendants Todd
4 Dunning and Dunning Enterprise, Inc. (“DEI”) (collectively, “Defendants”) will and hereby do move
5 the Court for an order staying this civil action as against Defendants pending the parallel criminal
6 proceeding pending against Defendant Todd Dunning.

7 As set forth more fully in Defendants’ Memorandum of Points and Authorities, this Motion is
8 made on the grounds that a stay of this civil action is necessary to protect Mr. Dunning’s Fifth
9 Amendment rights in connection with a criminal proceeding arising from the same underlying facts
10 that give rise to this action. In addition, the civil action should be stayed as to Defendant DEI because
11 Mr. Dunning is the only person that can speak on behalf of this entity regarding its ownership interest
12 in Kessler's Flying Circus, which was a participant in eBay's affiliate marketing program. This entity
13 will be greatly prejudiced by its inability to meaningfully defend itself in this civil action without Mr.
14 Dunning's testimony.

15 This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum
16 of Points and Authorities, all supporting papers including the Declarations of Todd Dunning and
17 Robert J. Breakstone, all pleadings and files in this matter and such additional evidence and argument
18 as may be permitted by the Court.

19 Dated: October __, 2009

FREELAND COOPER & FOREMAN LLP

20
21 By: _____ /s/
22 STEWART H. FOREMAN
23 Attorneys for Defendants Todd Dunning and
24 Dunning Enterprise, Inc.
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A stay of this action as to Defendants Todd Dunning and Dunning Enterprise, Inc. ("DEI") (collectively, "Defendants") is in the interests of justice and should be granted.

This civil action commenced by Plaintiff eBay Inc. ("eBay" or "Plaintiff") against Defendants arises from the same nexus of facts that triggered a Federal Bureau of Investigation ("FBI") investigation and federal criminal proceedings involving Mr. Dunning and the other individual defendants in this case. The Assistant United States Attorney Kyle F. Waldinger has identified Mr. Dunning as a "subject" of an open federal criminal investigation pending in the Northern District of California. Mr. Dunning should not be forced to choose between defending himself in this action and preserving his Fifth Amendment rights in the criminal matter. In light of the particular circumstances of this case and considering the interest of all parties involved, a stay of all civil proceedings is required pending the ongoing parallel criminal proceeding against Mr. Dunning. As set forth below, the District Court for the Northern District of California has recently stayed civil proceedings pending the resolution of criminal proceedings in cases involving facts remarkably similar to those of this case. *See, Continental Insurance Co. v. Cota*, No. 07-2052 SC, 2008 WL 4298372 (no LEXIS citation available) (N.D.Cal. Sept. 18, 2008) (J. Conti presiding); and *Jones v. Conte*, No. C 04-5312 SI, 2005 WL 1287017, 2005 U.S. Dist. LEXIS 46962 (N.D.Cal. Apr. 19, 2005) (J. Illston presiding). True and correct copies of the orders staying those civil actions pending resolution of the criminal proceedings are attached hereto as Exhibits A and B, respectively.

In addition, this civil proceeding should be stayed against Defendant DEI because Mr. Dunning is the only person that can speak on its behalf regarding its status as a co-owner of Kessler's Flying Circus ("KFC") which participated in eBay's affiliate marketing program. DEI was not involved in the operations of KFC or the affiliate marketing program, but it held an ownership interest as a general partner of KFC. Mr. Dunning and his wife are the only shareholders and officers of DEI, but because DEI was not involved in KFC's operations, Mrs. Todd Dunning was similarly not involved with KFC or the affiliate marketing program. Accordingly, there is no way to obtain information, if any, from DEI regarding KFC and the affiliate marketing program with eBay without₂

1 violating Mr. Dunning's privilege against self-incrimination. As such, DEI will be greatly prejudiced
 2 by its inability to meaningfully defend itself in this civil action if the stay is not granted. As set forth
 3 below, persuasive case law exists holding that under these circumstances it is appropriate to stay this
 4 civil proceedings as to the entity defendant as well.

5 In sum, a stay of proceedings in this civil action as to Defendants is in the interests of justice
 6 and should be granted.

7 II. STATEMENT OF FACTS

8 Mr. Todd Dunning and his wife are the only shareholders and officers of DEI. DEI was not
 9 involved in the operations of KFC, but only held an ownership interest as a general partner. An entity
 10 solely owned by Mr. Dunning's brother, Brian Dunning, known as Thunderwood Holdings, Inc.
 11 ("THI"), was the other owner of KFC. Until approximately June of 2007 when eBay terminated the
 12 relationship, KFC was in the business of implementing internet marketing programs on behalf of
 13 internet merchants such as eBay. In return for promoting and directing on-line traffic to eBay's
 14 website, KFC was paid by eBay's agent, Commission Junction, Inc. ("Commission Junction"),
 15 pursuant to a commission structure based on the amount of on-line traffic visiting eBay's website, and
 16 the number and amount of sales by eBay as a result of KFC's efforts.

17 eBay commenced this action on August 25, 2008, and filed its Second Amended Complaint
 18 ("SAC") on March 26, 2009. eBay alleges that its obligation to pay commissions is tracked through
 19 collections of data known as "cookies" (SAC, ¶ 21) and that Defendants (all of them) forced the
 20 placement of cookies on a computer intended to defraud eBay (otherwise called "cookie stuffing").
 21 (SAC, ¶ 24) eBay further alleges the Defendants engaged in a cookie stuffing scheme by redirecting
 22 computers, unbeknownst to their users, to the eBay website and causing eBay to drop a cookie on the
 23 users' computers without the users clicking on an eBay advertisement. (SAC, ¶ 25) eBay claims that
 24 it was injured because "KFC would receive payment for actions by users who had not been referred to
 25 eBay by Defendants' advertisements." (SAC, ¶ 27) A true and correct copy of the SAC is attached
 26 to Todd Dunning's Declaration as Exhibit "1."

27 On June 18, 2007, the FBI conducted an interview of Mr. Dunning at his personal residence
 28 located in Aliso Viejo, California. The FBI was interested in issues such as, "forcing cookies,"³

1 "forcing clicks," "inflating traffic", the function of "links" and "widgets," and the direction of internet
 2 traffic to the eBay website in connection with KFC's services relating to Commission Junction, Inc.
 3 and eBay. These are the same topics that are referenced in Plaintiff's Second Amended Complaint.

4 The FBI also served a search warrant on Brian Dunning, Todd Dunning's brother, at which
 5 time the FBI seized, itemized, and removed all computer equipment in Brian Dunning's home
 6 including all computers, disk drives, hard drives, cell phones and servers. These seized items
 7 contained, among other things, all the business records of KFC.

8 After the above referenced FBI interview, Mr. Todd Dunning retained criminal counsel,
 9 Robert J. Breakstone. As set forth in Mr. Breakstone's declaration filed herewith, through his
 10 representation of Mr. Dunning, Mr. Breakstone has learned that there is a grand jury investigation
 11 involving KFC and Mr. Dunning, and Mr. Dunning is now a "subject" of an open criminal
 12 investigation and that the FBI is working aggressively to complete its investigation. (*See* Declaration
 13 of Robert J. Breakstone filed herewith ("Breakstone Decl."), ¶¶ 3, 6.) In particular, Mr. Breakstone
 14 has been in contact with Assistant United States Attorney Kyle F. Waldinger who is the lead United
 15 States Attorney on the matter and who is assigned to the CHIP Unit. (*See id.*)

16 By its own description set forth on the official website of the United States Department of
 17 Justice, the CHIP Unit is charged with combating "cybercrime." In addition, the CHIP Unit "works
 18 closely with the FBI and other agencies **"to establish a relationship with the local high tech
 19 community and encourage them to refer cases to law enforcement."** (Emphasis added.) The
 20 CHIP Unit is specifically charged with **coordinating law enforcement and the technology industry
 21 to share expertise and information technology, to assist each other 24 hours a day, seven days a
 22 week, around the clock, to prevent cybercrime wherever possible...**" (Emphasis added.)¹

23 As set forth below, it cannot be reasonably disputed that a stay of proceedings to protect
 24 Mr. Dunning's constitutional rights is required in this case. Mr. Dunning should not be forced to
 25 choose between defending himself in this action and preserving his Fifth Amendment rights in the
 26 pending criminal investigation. In addition, by its own description the federal government is

27 _____
 28 ¹ *See* Declaration of William J. Kopeny in Support of Defendants Thunderwood Holdings, Inc, Brian
 Dunning and BrianDunning.com's Motion to Stay Civil Action ("Kopeny Decl."), ¶¶ 3, 8, Exh. 3-5.

1 coordinating with the technology industry, presumably including eBay, to assist in the prosecution of
 2 specifically the type of conduct alleged by eBay in this case. Allowing the government to monitor
 3 and coordinate with parallel civil proceedings hoping to obtain incriminating testimony or other
 4 advantages through civil discovery not only undermines the paramount purpose of the Fifth
 5 Amendment privilege but also violate concepts of fundamental fairness.

6 III. ARGUMENT

7 District courts have the inherent power and discretionary authority to stay proceedings when
 8 the interests of justice so require. *United States v. Kordel*, 397 U.S. 1, 12 n.27, 90 S. Ct. 763, 25 L.Ed.
 9 2d 1 (1970); *Landis v. North American Co.* 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed 153 (1936).
 10 Courts may decide to stay civil proceedings, postpone civil discovery, or impose protective orders.
 11 *SEC v. Dresser Indus., Inc.*, 628 F. 2d 1368, 1375 (D.C. Cir. 1980).

12 It is well recognized in the Ninth Circuit that the “decision whether to stay civil proceedings in
 13 the face of a parallel criminal proceeding should be made ‘in light of the particular circumstances and
 14 competing interests involved in the case’” and the “extent to which the defendant’s fifth amendment
 15 rights are implicated.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995)
 16 quoting *Federal Savings and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). The
 17 Fifth Amendment privilege against self incrimination may be invoked by the *mere possibility* of
 18 criminal prosecution. *Matter of Seper*, 705 F.2d 1499, 1501 (9th Cir. 1983).

19 A. The Implication of Mr. Dunning’s Fifth Amendment Rights Warrants A Stay Of This
 20 Action Pending Completion Of The Criminal Proceeding.

21 The District Court for the Northern District of California has twice recently stayed civil cases
 22 pending the resolution of related criminal proceedings. *See Continental Insurance Co. v. Cota*, 2008
 23 WL 4298372 (N.D.Cal., J. Conti presiding); and *Jones v. Conte*, 2005 WL 1287017 (N.D.Cal., J.
 24 Illston presiding). As set forth in both cases:

25 [t]he decision whether to stay civil proceedings in the face of a parallel
 26 criminal proceeding should be determined based on the circumstances
 27 and competing interests involved in the case. [*citing, Keating, supra*, 45
 28 F. 3d at 324]. The court should consider the following factors: 1) the
 extent to which the defendant’s Fifth Amendment rights are implicated;
 2) the interest of the plaintiff in proceeding with the litigation and the

1 potential prejudice to plaintiff of a delay; 3) the convenience of the court
 2 and the efficient use of judicial resources; 4) the interests of third
 3 parties; and 5) the interests of the public [the 'Keating Factors']. (*Id.*).
Jones, supra, at 1; *see also, Cota, supra*, at 2.

4 In *Jones*, the defendant Victor Conte was involved in a criminal case regarding allegations of
 5 unlawful distribution of performance enhancing drugs. While under indictment in the criminal case,
 6 Mr. Conte made a series of statements in the print and television media involving performance-
 7 enhancing drugs and professional athletes, including Marion Jones. As a result, on December 15,
 8 2004 Ms. Jones filed a complaint alleging defamation and tortious interference with business relations
 9 against Mr. Conte.

10 Judge Illston begins her analysis in the *Jones* case by recognizing that "[t]he strongest case for
 11 deferring civil proceedings until after completion of criminal proceedings is where a party under
 12 indictment for a serious offense is required to defend a civil or administrative action involving the
 13 same matter." *Jones, supra*, at 1, citing *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76
 14 (D.C. Cir. 1980). Judge Illston determined that both the civil and criminal cases arose from the
 15 defendant's alleged involvement in the distribution of performance-enhancing drugs, "as the veracity
 16 of his statements regarding plaintiff's actions directly relate to his involvement with the distribution of
 17 performance-enhancing drugs." *Id.*, at 2. As such, Judge Illston granted the requested stay as follows:

18 The Court finds that a stay is proper because '[i]f discovery moves
 19 forward, [the] defendant will be faced with the difficult choice between
 20 asserting [his] right against self-incrimination, thereby inviting prejudice
 21 in the civil case, or waiving those rights, thereby courting liability in the
 22 criminal case.' *Id.*, citing *Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 75
 (W.D.N.Y.2003).²

23 Judge Conti in *Continental Insurance Co. v. Cota*, 2008 WL 4298372 (N.D.Cal.) similarly

24 ² When faced with the issue of either allowing a civil action to proceed or protecting the Fifth
 25 Amendment rights of individual defendants against self incrimination, the majority of courts have
 26 consistently chosen the latter. See e.g. *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084,
 27 1089 (5th Cir. 1979) ("[although a three-year hiatus in the lawsuit is undesirable from the standpoint
 28 of both the court and the defendant, permitting such inconvenience seems preferable at this point to
 requiring plaintiff to choose between his silence and this lawsuit."); *White v. Mapco Gas Products,*
Inc., 116 F.R.D. 498 (D.C. Ark 1987); *Dienstag v. Bronsen*, 49 F.R.D. 327 (D.C.N.Y. 1970); *U.S. v.*
Steffes, 35 F.R.D. 24 (D.C. Mont. 1964).

1 determined that a stay of the civil action was warranted pending the resolution of a parallel criminal
 2 matter. The defendant in *Continental Insurance* was John Cota, the captain of the cargo ship COSCO
 3 BUSAN which collided with the Oakland Bay Bridge. As a result, the ship discharged 50,000 gallons
 4 of fuel oil into the San Francisco Bay. The federal government filed a criminal action against Mr.
 5 Cota and the companies that owned the COSCO BUSAN. Concurrently Continental Insurance filed a
 6 civil indemnity action against the companies that owned the ship and a civil declaratory relief action
 7 against Mr. Cota as to Continental's obligation to defend Mr. Cota and for reimbursement of the costs
 8 paid in Mr. Cota's defense. In addition, the owners of the COSCO BUSAN filed counter-claims
 9 against Mr. Cota which alleged wilful misconduct on the part of Mr. Cota.

10 In applying the *Keating* Factors referenced above, Judge Conti found that a stay of the civil
 11 action was warranted, noting that "[i]t is undisputed that all of the civil actions and the criminal action
 12 spring from the same nucleus of facts - the allision of the COSCO BUSAN with the Bay Bridge and
 13 the resulting oil spill." *Cota, supra*, at 2. Judge Conti further determined that "[i]t is difficult to
 14 imagine how adjudication of this issue would not implicate many of the factual issues underlying the
 15 criminal action. Accordingly, discovery propounded on Cota in the underlying civil action will likely
 16 implicate his fifth amendment right." *Id.*

17 In this case it cannot be reasonably disputed that this action springs from the same nucleus of
 18 facts as the pending criminal proceeding against Mr. Dunning. The Assistant United States Attorney
 19 Kyle F. Waldinger, who is the lead United States Attorney on the matter, confirmed that Mr. Todd
 20 Dunning is the "subject" of a criminal investigation, and the FBI is working aggressively to complete
 21 its investigation. (*See* Breakstone Decl, ¶ 6.) In addition, Mr. Waldinger has refused to allow Mr.
 22 Todd Dunning to obtain a copy of KFC's records seized by the FBI from Brian Dunning's home. (*See*
 23 *id.* at ¶ 4.)

24 The federal government has also apparently sought from the District Court, and obtained,
 25 several extensions of time to return all the materials seized from Mr. Brain Dunning's home pursuant
 26 to the aforementioned federal search warrant. In order to obtain such permission from the federal
 27 court, the United States Attorney must allege that there is an active criminal investigation, that the
 28 federal government believes the property seized constitutes, or is likely to constitute evidence of the₇

1 suspected crime, and that additional time is reasonably needed to complete the investigation. (*See*
2 *Kopeny Decl.*, ¶ 7.)

3 Using the words of Judge Conti, it is difficult to imagine how adjudication of this civil action
4 would not implicate many, if not all, of the factual issues underlying the criminal action. Both the
5 civil action and the criminal action arise from the same facts and share the exact same allegations.
6 Accordingly, discovery propounded on Mr. Dunning in this action will implicate Mr. Dunning's Fifth
7 Amendment right.

8 Mr. Dunning has carefully guarded his Fifth Amendment rights although his answer to the
9 Second Amended Complaint raises strong affirmative defenses. In a related but now settled case
10 brought by eBay's agent, Commission Junction, in Orange County Superior Court, regarding
11 commissions generated by KFC from the affiliate marketing program with eBay, Mr. Dunning
12 invoked his Fifth Amendment right and Commission Junction excused his appearance to answer
13 questions at a deposition. Commission Junction did not take any further steps to compel answers from
14 Mr. Dunning in that case. In this case, Defendants have objected to discovery requests based on Mr.
15 Dunning's Fifth Amendment rights and Mr. Dunning has not verified any discovery responses. In
16 order to preserve his Fifth Amendment rights, Mr. Dunning would be forced to sacrifice his ability to
17 effectively defend himself in this civil action if a stay is not granted. Mr. Dunning's testimony
18 ultimately will be needed to help prove the defenses in this case. Mr. Dunning should not be forced to
19 choose between defending himself in this action and preserving his Fifth Amendment rights while the
20 criminal investigation is pending.

21 Allowing this civil action to proceed would also give eBay a tremendous and unfair advantage
22 that it is not entitled to receive in a civil case. In the absence of a stay, eBay will surely have a much
23 easier time seeking a verdict without having to overcome any effective defenses without
24 Mr. Dunning's testimony. Yet, Mr. Dunning must continue to invoke his Fifth Amendment right in
25 the civil case until the pending criminal proceeding is resolved .

26 In addition, allowing the government to monitor parallel civil proceedings hoping to obtain
27 incriminating testimony or other advantages through civil discovery not only undermines the Fifth
28 Amendment privilege but also violates concepts of fundamental fairness. Although staying the civil

1 action may cause delay in eBay's efforts to prove its case for monetary damage, protecting a party's
2 constitutional rights in a criminal matter is paramount.

3 B. The Remainder of the *Keating* Factors Favor A Stay.

4 1. No Prejudice Will Befall eBay

5 The interest of eBay will not be prejudiced by a stay. A stay is permitted where the alleged
6 harm to the plaintiff "may be remedied by monetary damages and plaintiff can be adequately
7 compensated even if [it] obtains a judgment in [its] favor after the stay has lifted." *Jones, supra*, at 2;
8 *See also, Taylor, Bean & Whitaker Mortgage Corporation v. Triduanium Financial*, 2009 WL
9 2136986 (E.D.Cal. 2009) (granting a stay despite plaintiff's argument that it will be more difficult to
10 recover losses if the case is stayed). Moreover, the delay associated with a stay does not overcome the
11 paramount concern of protecting constitutional rights. *Cota, supra*, at 3.

12 In the present case, eBay alleges that it was injured because "KFC received payment for
13 actions by users who had not been referred to eBay by Defendants' advertisements." (SAC, ¶ 27)
14 KFC is no longer in business and defendants have been terminated from eBay's Affiliate Marketing
15 Program. As such, eBay has no concern of alleged ongoing harm. The harm alleged to eBay in this
16 case is solely monetary to recover allegedly excess commissions previously paid to KFC. Should
17 eBay be successful in its civil case after the stay is lifted, it can seek to enforce a judgment at that time
18 just as it can if no stay is granted and this case goes to trial sooner. Thus, the interest of eBay will not
19 be adversely impacted by a stay in the present case except for the passage of some additional time.

20 eBay waited over a year after KFC was "shutdown" before bringing this civil action, thus
21 indicating a lack of urgency on its part. eBay terminated KFC from the affiliate marketing program in
22 June 2007 yet it waited until August 2008 to file this action. Obviously eBay felt no urgency to
23 proceed initially so it cannot effectively argue that there is any urgency now that should preclude a
24 stay to assure fairness to Mr. Dunning. Any further delay will not cause any significant prejudice to
25 eBay when balanced against Mr. Dunning's rights to fair proceedings in both the criminal and civil
26 matters.

27 Moreover, the government seized computers and records over two years ago and has been
28 conducting its investigation since then. Presumably, after such a lengthy period, the government's

1 investigation should result in an indictment or abandonment soon. Once the criminal matter is
 2 resolved, the stay could be lifted, allowing eBay to pursue its civil case for alleged monetary damages
 3 with Defendants being able to present their defenses fully.

4 This factor weighs in favor of a stay.

5 2. Proceeding With This Action Severely Burdens Mr. Dunning

6 As set forth above, proceeding with this case will force Mr. Dunning to choose between
 7 defending himself in this action and preserving his Fifth Amendment rights.

8 In addition, proceeding with this action will unfairly allow the federal government to monitor
 9 this proceeding for the purpose of obtaining incriminating testimony or other advantages through civil
 10 discovery undermining the Fifth Amendment and all concepts of fundamental fairness. By its own
 11 account, the CHIP Unit of United States Attorney's Office is working closely with the technology
 12 industry, presumably including eBay, to prevent the wrongdoing alleged by eBay in this action.
 13 Indeed, eBay's counsel gave a copy of eBay's complaint in this matter to an Assistant United States
 14 Attorney assigned to the CHIP Unit (*see* Breakstone Decl., ¶ 6), thus demonstrating that eBay and the
 15 CHIP Unit are apparently working together. As detailed above, both the *Jones* and *Continental*
 16 *Insurance* courts recognized this injustice and ordered the civil actions stayed pending the conclusion
 17 of the parallel criminal proceedings.

18 The *Jones* and *Continental Insurance* courts' rational was recently adopted and affirmed in
 19 *Taylor, Bean & Whitaker, supra*, where a stay of civil proceedings pending parallel criminal
 20 proceeding was ordered because "[t]he parallel civil proceeding '**might undermine the party's Fifth**
 21 **Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the**
 22 **limits of Federal Rule of Criminal Procedure 16(b), expand the basis of the defense to the**
 23 **prosecution in advance of criminal trial, or otherwise prejudice the case.'**" *Id.* at 2, citing, *SEC v.*
 24 *Dresser, supra*, 628 F.2d at 1376.

25 As such, it cannot be reasonably disputed that proceeding with this action in light of the
 26 parallel criminal proceedings severely prejudice Mr. Dunning.

27 3. The Convenience Of The Court Weighs In Favor Of A Stay

28 A stay will promote the efficient use of this court. This case had several preliminary₁₀

1 procedural motions, but has just recently started to move forward with discovery by eBay. Indeed, the
 2 Defendants just filed their Answer to the Second Amended Complaint on September 9, 2009.
 3 Furthermore, there is no trial date and no dispositive motions are pending. As the *Jones* court noted,
 4 “[s]taying the case makes efficient use of judicial resource by insuring that common issues of fact will
 5 be resolved and subsequent civil discovery will proceed unobstructed by concerns regarding self
 6 incrimination.” *Jones, supra*, at 2 (internal citations omitted).

7 Due to the pending criminal investigation, the first discovery disputes concerning the
 8 invocation of the Fifth Amendment privilege by several defendants are now the subject of eBay's
 9 motions to compel. Additional disputes of this nature can be anticipated. Furthermore, Defendants
 10 are unable to produce documents responsive to eBay's discovery requests because the FBI seized
 11 computers, computer media, and hard copy documents (including all KFC business records), and has
 12 refused to return any items related to KFC to Brian Dunning (*see* Kopeny Decl., ¶¶ 2, 4, 7), and the
 13 FBI has refused to provide copies of the seized documents to Todd Dunning which could contain
 14 evidence useful to his defense in this action (*see* Breakstone Decl., ¶ 4). As Defendants are unable to
 15 produce responsive documents and unable to testify without waiving Mr. Dunning's Fifth Amendment
 16 rights, allowing this civil case to proceed while a criminal case is pending is not an efficient use of
 17 judicial resources because of the inevitability of additional discovery disputes. The convenience of
 18 the court weighs in favor of a stay, and ensures that civil discovery is not impeded by self-
 19 incrimination concerns once the criminal matter is resolved.

20 4. No Interests Of Persons Not Parties To The Action Will Be Affected By A Stay

21 The interest of persons not parties to this action will not be affected by a stay. Commission
 22 Junction has released its claims against the Defendants, and there appears to be no other person(s)
 23 who may be affected by this action that is not a party to the action.

24 5. The Interest Of The Public Favors A Stay

25 The interest of the public favors a stay because “the public’s interest in the integrity of the
 26 criminal case is entitled to precedence over the civil litigant.” *Jones, supra*, at 2; *see also, Javier H.*
 27 *V. Garcia-Botello, supra*, 218 F.R.D. at 75.

28 Furthermore, the public has never been and is not currently at risk based on any alleged₁₁

1 actions by Defendants in this case. Even accepting eBay's allegations as true, the alleged conduct did
 2 not harm the public. Furthermore, KFC is no longer in business, and all of KFC's activity with eBay's
 3 affiliate marketing program has ceased. Thus, there is no risk of harm to the public if this case is
 4 stayed. To the contrary, the public interest lies in preserving the integrity of the criminal case and
 5 should be given precedence over the civil litigant.

6 Considering all of the *Keating* Factors, as well as the recent decisions of this Court, the
 7 particular circumstances in the present case strongly favor granting a stay of all civil proceedings
 8 pending the conclusion of the criminal proceedings against Mr. Dunning.

9 C. A Stay Of This Action Pending The Conclusion Of The Criminal Proceeding Is
 10 Required As to DEI As Well.

11 Several District Courts have ruled that, where civil proceedings have been stayed as to
 12 individual defendants alleged to be part of a criminal enterprise, it is also appropriate to stay
 13 proceedings as to entity defendants. *American Express Business Finance Corp v. RW Prof Leasing*
 14 *Services Corp.*, 225 F. Supp 2d 263 (E.D.N.Y. 2003); *United States v. All Meat & Poultry Products*
 15 *Stored at LaGrou Cold Storage*, 2003 U.S. Dist. LEXIS 17677 (N.D. Ill. 2003); *Volmar Distributors,*
 16 *Inc. v. Interboro Distributors, Inc.*, 152 F.R.D. 36 (S.D.N.Y. 1993); *Bruner Corp v. Balogh*, 819 F.
 17 Supp. 811 (E.D. Wis. 1993) rev'd in part on other grounds, 133 F. 3d 491 (7th Cir. 1998).

18 In *All Meat & Poultry*, the federal government initiated both criminal and civil proceedings,
 19 including civil RICO claims, against individual and entity defendants. The entity defendants in the
 20 civil case moved for a stay of proceedings as to them, arguing that they would be unable to mount a
 21 defense because individuals alleged to be part of the RICO enterprise would simply invoke their Fifth
 22 Amendment rights in response to discovery requests. *See also, American Express, supra*, 225 F.
 23 Supp. 2d at 265; *Volmar, supra*, 152 F.R.D. at 41-42; and *Bruner*, 819 F.Supp at 816.

24 The district court in *All Meat & Poultry*, reasoned that not only would a stay of proceedings
 25 serve the interests of justice because the entity defendants' discovery efforts would otherwise be
 26 unfairly hindered but the stay would also promote judicial economy. The court made the following
 27 comments with regard to the balancing test when considering a stay of prosecution in the interest of
 28 judicial economy:

1 In the absence of a stay, the civil and criminal case will proceed
 2 simultaneously, presenting the potential for duplication of effort. If the
 3 civil proceedings are stayed, however, resolution of the related criminal
 4 matter may eliminate much of the Court's work in the civil action by
 5 simplifying the issues. In addition, in the absence of a stay, discovery in
 6 the civil litigation will no doubt become bogged down. As the owners
 7 concede, the court will be forced to make numerous individual rulings
 8 on what will likely be a long series of Fifth Amendment assertions.
 9 Convenience of the court will militate in favor of a stay where the
 10 outcome of a criminal case can be expected to remove the predicate for
 11 the assertions of the Fifth Amendment rights against self incrimination
 12 by potential deponents and lighten the work load of a court to review
 13 those assertions. There is also the possibility that transcripts or other
 14 evidence could be made available from the criminal proceedings,
 15 thereby eliminating the need for certain discovery in the civil action.
 16 Weighing all these considerations, we believe judicial economy
 17 would be better served by an entry of stay in the civil proceedings. *Id* at
 18 14 (internal citations omitted)

19 In *American Express*, the case involved parallel civil proceedings against individual and entity
 20 defendants. The district court granted a stay of civil discovery as to the two individual defendants to
 21 allow them to preserve their Fifth Amendment rights. *American Express, supra*, 225 F.Supp.2d at
 22 265. The district court also granted a stay of civil discovery as to the entity defendant, reasoning that
 23 the entity defendant would be unable to effectively conduct discovery and mount a defense without
 24 the availability of the individual defendants, each of whom were executive officers of the defendant
 25 corporation. *Id.*, at 265-266

26 Similarly, in *Bruner*, the district court granted a stay of civil proceedings as to an entity
 27 defendant in a RICO case. *Bruner, supra*, 819 F. Supp. at 816. The district court had granted a stay
 28 of civil proceedings as to the individual defendant alleged to be part of the RICO enterprise (and
 against whom parallel criminal proceedings were initiated). *Id.* The district court, in granting a stay as
 to the entity defendant, reasoned that "it is not likely" that the entity defendant "could proceed to trial
 without meaningful discovery from "the individual defendant alleged to be part of the RICO
 enterprise." *Id., see also, Volmar, supra*, 152 F.R.D. at 40-42.

Finally, in *Taylor, Bean & Whitaker*, the Court stayed the civil proceeding as against the entity
 defendant as well as the individual defendant. Acknowledging that a business entity has no Fifth
 Amendment right against self-incrimination, the Court nonetheless held as follows:

1 Second, plaintiff asserts that no Fifth Amendment privilege is
 2 implicated by the case against defendant Triduanum. The law is clear
 3 that a corporation has no privilege against compulsory self-
 4 incrimination. *United States v. Kordel*, 397 U.S. *United States v.*
 5 *Kordel*, 397 U.S. 1, 7-8 & n. 9, 90 S.Ct. 763, 25 L.Ed.2d 1 (9th Cir.
 6 1970) (collecting cases). **Nevertheless, the Fifth Amendment rights**
 7 **of every director or officer who may speak on behalf of Triduanum**
 8 **are implicated, and thus, Triduanum is likely to be greatly**
 9 **prejudiced in its ability to meaningfully defend itself in the civil**
 10 **matter.** *See, Cadence Design Sys. v. Avanti, Inc., No. C 95-20828*,
 11 1997 U.S. Dist. LEXIS 24147 (N.D. Cal. July 22, 1997) (holding that a
 12 partial stay was appropriate in a civil proceeding against a corporate
 13 defendant where certain key witnesses would not be able to testify on
 14 behalf of the corporation until the conclusion of criminal proceedings.)”
 15 *Taylor, Bean & Whitaker, supra*, at 3. (Emphasis added.)

16 As such, a stay of this action is warranted as against the entity Defendant DEI as well.

17 IV. CONCLUSION

18 For all of the foregoing reasons, Defendants respectfully request that the Motion be granted in
 19 its entirety and this action be stayed as to all Defendants pending the conclusion of the criminal
 20 proceedings against Mr. Dunning.

21 Dated: October 15, 2009

FREELAND COOPER & FOREMAN LLP

22 By:

/s/

23 STEWART H. FOREMAN

24 Attorneys for Defendants Todd Dunning and
 25 Dunning Enterprise, Inc.