

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

<b>I. (a) PLAINTIFFS</b> EBAY INC.	<b>DEFENDANTS</b> SEE ATTACHMENT
<b>(b)</b> County of Residence of First Listed Plaintiff <b>Santa Clara County</b> (EXCEPT IN U.S. PLAINTIFF CASES)	County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.
<b>(c)</b> Attorney's (Firm Name, Address, and Telephone Number) SEE ATTACHMENT	Attorneys (If Known)

BZ E-filing ADR

<b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)
-----------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)		
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)		

	<b>PTF</b>	<b>DEF</b>	
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)				
CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury — Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus — Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input checked="" type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

**V. ORIGIN** (Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
 18 U.S.C. §§ 1030, 1962(c)

Brief description of cause:  
 Fraud and related activity in connection with computers and RICO.

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

**DEMAND \$** SEE ATTACHMENT

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

**IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)**

(PLACE AND "X" IN ONE BOX ONLY)

SAN FRANCISCO/OAKLAND  SAN JOSE

DATE: August 25, 2008

SIGNATURE OF ATTORNEY OF RECORD:  
*Sharon M. Buzgel (ck)*

FILED  
00 AUG 25 PM 2:32  
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CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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8  
9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

BZ

12 EBAY INC.,

CV Case No. 08

4052

13 Plaintiff,

COMPLAINT FOR

14 v.

- (1) Violations of 18 U.S.C. § 1030
- (2) Violations of 18 U.S.C. § 1962(c)
- (3) Fraud
- (4) Violations of California Pen. Code § 502
- (5) Restitution and Unjust Enrichment
- (6) California B&P Code § 17200;

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

19 Defendants.

DEMAND FOR JURY TRIAL

22  
23 For its complaint, Plaintiff eBay Inc. alleges as set forth below. The factual  
24 allegations set forth herein have evidentiary support or, to the extent they are contained in  
25 a paragraph made on information and belief, likely will have evidentiary support after a  
26 reasonable opportunity for further investigation or discovery.

27 PARTIES

28 1. At all times relevant herein, Plaintiff eBay Inc. ("eBay") was a corporation

1 organized and existing under the laws of the State of Delaware, with its principal place of  
2 business in the State of California.

3 2. eBay is informed and believes and, on that basis, alleges that at all times  
4 relevant herein Defendant Digital Point Solutions, Inc. was a California corporation, doing  
5 business in the State of California.

6 3. eBay is informed and believes and, on that basis, alleges that at all times  
7 relevant herein Defendant Shawn Hogan was an individual residing and doing business in  
8 the State of California.

9 4. Defendants Digital Point Solutions, Inc. and Shawn Hogan will be  
10 collectively referred to herein as "DPS."

11 5. eBay is informed and believes and, on that basis, alleges that at all times  
12 relevant herein Defendant Kessler's Flying Circus was a California general partnership  
13 doing business in the State of California.

14 6. eBay is informed and believes and, on that basis, alleges that at all times  
15 relevant herein Defendant Thunderwood Holdings, Inc. was a California corporation and  
16 was a general partner of Defendant Kessler's Flying Circus.

17 7. eBay is informed and believes and, on that basis, alleges that at all times  
18 relevant herein Defendant Brian Dunning was an individual residing and doing business in  
19 the State of California and was the sole owner of Defendant Thunderwood Holdings, Inc.

20 8. eBay is informed and believes and, on that basis, alleges that at all times  
21 relevant herein Defendant Todd Dunning was an individual residing and doing business in  
22 the State of California and was a general partner of Defendant Kessler's Flying Circus.

23 9. eBay is informed and believes and, on that basis, alleges that at all times  
24 relevant herein Defendant BrianDunning.com was a website and/or business entity  
25 through which Defendants Brian Dunning and/or Todd Dunning committed some or all of  
26 the acts alleged herein.

27 10. Defendants Kessler's Flying Circus, Thunderwood Holdings, Inc.,  
28 BrianDunning.com, Brian Dunning, and Todd Dunning will be collectively referred to

1 herein as “KFC.”

2 11. eBay is ignorant of the true names and capacities of defendants sued herein  
3 as Does 1 through 20, inclusive, and therefore sues said defendants by such fictitious  
4 names. eBay will amend this complaint to allege the true names and capacities of said  
5 defendants when they are ascertained. eBay is informed and believes and, on that basis,  
6 alleges that each of the fictitiously named defendants is responsible in some manner to  
7 pay the obligations described herein, and that eBay’s losses as alleged herein were  
8 proximately caused by said defendants’ conduct.

9 12. Unless otherwise specified, DPS, KFC and Does 1-20 will be referred to  
10 collectively herein as “Defendants.”

11 **JURISDICTION AND VENUE**

12 13. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331  
13 and 1367.

14 14. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)(1),  
15 1391(b)(2) and 1391(c), and 18 U.S.C. § 1965(a).

16 15. Pursuant to the User Agreements entered into by Defendants Shawn Hogan,  
17 Brian Dunning and Todd Dunning, as discussed *infra*, they have consented to the  
18 jurisdiction of and venue in the Northern District of California.

19 **INTRADISTRICT ASSIGNMENT**

20 16. Assignment to the San Jose Division is proper pursuant to Local Rules 3-  
21 2(c) and (e) because a substantial part of the events or omissions that give rise to eBay’s  
22 claim occurred in San Jose, Santa Clara County, California. eBay’s corporate  
23 headquarters are located in San Jose, Santa Clara County, California, and Defendants’  
24 wrongful actions were specifically directed at and intended to affect eBay in San Jose,  
25 Santa Clara County, California as discussed in detail below.

26 **GENERAL ALLEGATIONS**

27 **eBay’s Affiliate Marketing Program**

28 17. eBay offers to the public an online marketplace that enables trade on a local,

1 national and international basis. Through eBay's website, sellers may list items for sale  
2 and buyers may bid on and purchase items of interest. eBay earns revenue when a seller  
3 places an item for sale and when the item is sold. eBay may also earn revenue depending  
4 on various features selected by the seller, *e.g.*, listing upgrades and photo displays.

5 18. eBay's Affiliate Marketing Program is designed to increase traffic to eBay's  
6 website through the placement of advertisements for eBay on third-party websites. eBay  
7 seeks to increase traffic to its site so that more people will be exposed to eBay's service  
8 and begin using eBay to buy or sell goods, thereby generating revenue for eBay. The  
9 persons and entities that advertise on behalf of eBay—whether on their own sites or on  
10 sites of other third parties—are known as "affiliates." eBay's Affiliate Marketing  
11 Program is intended to compensate affiliates only when the advertisement in question  
12 causes a user to take some action at eBay's site that directly provides revenue to eBay or  
13 indicates that the new user is likely to take such an action in the future. Accordingly,  
14 affiliates earn commissions payable by eBay under the Affiliate Marketing Program when  
15 the following sequence of events occurs: (1) the affiliate publishes an eBay advertisement,  
16 (2) a user clicks on the eBay advertisement and is directed to eBay's website (the  
17 "Referred Visit"), and (3) that user subsequently engages in a commission-generating  
18 event (a "Revenue Action"). Revenue Actions, include, by way of example: (1) becoming  
19 a new, registered user of eBay within 30 days of the Referred Visit, or (2) purchasing an  
20 item from a third-party seller on eBay within seven days of the Referred Visit. Because  
21 compensation to the affiliate is tied to actions by the user, it is essential that eBay be able  
22 to determine whether a Revenue Action occurred by virtue of the fact that the user was  
23 referred to eBay by a particular affiliate's advertisement. eBay and/or Commission  
24 Junction, Inc. ("CJ") tracks this information using information placed in the new user's  
25 browser, as discussed below.

26 19. At all relevant times, eBay used the services of CJ, a subsidiary of  
27 ValueClick, Inc., in administering the Affiliate Marketing Program. The relationship  
28 between eBay and CJ was governed at all relevant times by various Advertiser Service

1 Agreements. Under those agreements, CJ was responsible for, among other things,  
2 recruiting affiliates, tracking affiliate traffic, monitoring compliance by affiliates,  
3 preventing and detecting fraudulent activity, and paying affiliates using funds remitted by  
4 eBay.

5 20. eBay's obligation to pay commissions is tracked by matching a user's  
6 Revenue Actions on eBay's site to the affiliate that directed the user to eBay. This  
7 tracking is accomplished through the use of a digital tag called a "cookie" that is stored in  
8 the user's web browser. Cookies are collections of data commonly used by websites to  
9 store and associate useful information with a given user. Cookies typically store  
10 information such as usernames, passwords, and user preferences for a particular user; that  
11 information makes it more efficient for users to access web pages and provides a means  
12 for websites to track and authenticate users. Cookies are placed or "dropped" in a user's  
13 browser by a website when that user visits the website.

14 21. In the case of eBay's Affiliate Marketing Program, cookies are used to  
15 confirm that a user was directed to eBay from a specific affiliate. Specifically, when a  
16 user clicks on an affiliate advertisement and is directed to eBay's site, eBay's site drops a  
17 cookie on the user's computer. That cookie identifies the site that referred the user to  
18 eBay and/or the specific affiliate responsible for directing the traffic to eBay. If the user  
19 later engages in a Revenue Action within the specified time period, eBay and/or CJ  
20 determines—based on the data in the cookie—which affiliate, if any, should be credited  
21 with the referral and receive the commission. If cookies from multiple affiliates are  
22 present on the user's computer, the most recent cookie dropped is credited with the  
23 Revenue Action. If there is no qualifying cookie on the computer, then no affiliate is  
24 credited.

25 22. As part of the services it renders with respect to eBay's Affiliate Marketing  
26 Program, CJ pays affiliates on a periodic basis (usually monthly), with funds remitted by  
27 eBay, based on the number of Revenue Actions taken by users referred by those affiliates.

28 The Fraudulent "Cookie Stuffing" Schemes

1           23.   “Cookie stuffing” is a term used to describe the forced placement of a  
2 cookie on a computer, typically by causing a cookie from a particular website to be placed  
3 on the user’s computer without the user knowing that he or she visited the website that  
4 placed the cookie. DPS and KFC engaged in cookie stuffing intended to defraud eBay.  
5 The allegations set forth in paragraphs 24-30, 36-37, 42-43 and 50-51 below describing  
6 Defendants’ cookie stuffing schemes based on eBay’s information and belief are based on  
7 eBay’s analysis of the Defendants’ websites and/or technology and the way in which a  
8 user’s web browser interacts with Defendants’ sites and/or technology, and on eBay’s  
9 analysis of historical data relating to traffic purportedly driven to eBay by Defendants.  
10 Certain other details regarding Defendants’ cookie stuffing schemes are exclusively  
11 within Defendants’ control.

12           24.   eBay is informed and believes and, on that basis, alleges that DPS and KFC  
13 each accomplished their cookie stuffing through software programs and/or code that,  
14 unbeknownst to the user, redirected the user’s computer to the eBay website without the  
15 user actually clicking on an eBay advertisement link, or even becoming aware that they  
16 had left the page they were previously viewing. As a result, the eBay site would be  
17 prompted to drop an eBay cookie on the user’s computer even though the user never  
18 clicked on an eBay advertisement or even realized that their computer had ever visited the  
19 eBay site.

20           25.   eBay is informed and believes and, on that basis, alleges that the software  
21 programs utilized by each of DPS and KFC caused the user’s computer to access eBay’s  
22 computers in an unauthorized way and/or to exceed the authorized access to eBay’s  
23 computers because that access occurred solely to force the dropping of the eBay cookie  
24 and thereby wrongfully associate future Revenue Actions, if any, by that user with DPS or  
25 KFC.

26           26.   eBay is informed and believes and, on that basis, alleges that once the  
27 cookie was stuffed on the user’s computer by one or more of the Defendants, any future  
28 Revenue Actions initiated by that user when the user later visited eBay intentionally, and

1 not as a result of any advertisement placed by Defendants, appeared to be eligible for  
2 commissions payable to one of the Defendants (provided those actions took place within  
3 the prescribed periods of time). Hence DPS or KFC would receive payment for actions by  
4 users who had not been referred to eBay by Defendants' advertisements, thereby injuring  
5 eBay.

6 27. eBay is informed and believes and, on that basis, alleges that DPS and/or  
7 KFC used certain technological measures to prevent eBay from discovering their  
8 wrongdoing. At certain relevant times DPS and/or KFC used technology that would stuff  
9 cookies on only those computers that had not been previously stuffed by that Defendant.  
10 The purpose of this action was to avoid discovery by eBay and/or CJ of evidence of  
11 stuffing—e.g., that a single user had multiple cookies pointing to the same affiliate or that  
12 there was an abnormal ratio of cookies placed by DPS and KFC to the Revenue Actions  
13 attributable to users referred by DPS and KFC—and thereby conceal the schemes from  
14 eBay and CJ's monitoring activities. In addition, at certain relevant times DPS and/or  
15 KFC used technology that would avoid stuffing cookies on computers that appeared to be  
16 geographically located in San Jose, California (the location of eBay's headquarters) or  
17 Santa Barbara, California (the location of CJ's headquarters). The purpose of this action  
18 was to evade efforts by eBay and/or CJ to detect the cookie stuffing mechanism if they  
19 attempted to observe the wrongdoing from their normal places of business.

20 28. eBay is informed and believes and, on that basis, alleges that DPS also used  
21 at least one additional technological measure to conceal its wrongdoing: DPS used  
22 images placed on web pages to effectuate its cookie stuffing scheme, and caused those  
23 images to be so small that they were effectively invisible to the user and, accordingly,  
24 difficult to detect.

25 29. eBay is informed and believes and, on that basis, alleges that KFC also used  
26 at least one additional technological measure to conceal its wrongdoing: KFC used  
27 JavaScript code contained in web pages to effectuate its cookie stuffing scheme, and  
28 purposefully obscured the purpose and effect of that code so that, even when that code



1 was discovered, it was difficult to determine its actual effect. This caused KFC's cookie  
2 stuffing to be difficult to detect, whether by human or machine efforts.

3 30. eBay is informed and believes and, on that basis, alleges that in addition to  
4 these technological measures, DPS and KFC each actively sought to prevent detection by  
5 eBay and CJ by explicitly denying to eBay and/or CJ that any wrongdoing had occurred.  
6 For example, when Shawn Hogan was contacted by CJ in connection with suspicions of  
7 cookie stuffing by DPS, he attributed the suspicious activity to "coding errors," which he  
8 later purported to have "corrected."

9 31. As a result of the cookie stuffing schemes employed by DPS and KFC, eBay  
10 paid commissions (via CJ) to each of DPS and KFC for a substantial number of Revenue  
11 Actions that were in no way related to referral of any user by either DPS's or KFC's  
12 advertisements and for which neither DPS nor KFC were due compensation.

13 **FIRST CAUSE OF ACTION**

14 **(Violations of 18 U.S.C. § 1030)**

15 32. eBay realleges each and every allegation set forth in Paragraphs 1 through  
16 31, inclusive, and incorporates them by reference herein.

17 33. Through their cookie stuffing schemes as described above, DPS and KFC  
18 each knowingly, intentionally and with intent to defraud accessed eBay's computers  
19 without authorization and/or exceeded their authorized access to eBay's computers in  
20 order to further their fraudulent schemes.

21 34. DPS's and KFC's access of eBay's computers was unauthorized because the  
22 only purpose of that access was to defraud eBay. In addition, Defendants Shawn  
23 Hogan's, Brian Dunning's and Todd Dunning's access of eBay's computers was  
24 unauthorized and/or exceeded their authorized access, because each was a registered eBay  
25 user and each had agreed to be bound by the eBay User Agreement in effect at the time.  
26 The User Agreements accepted by each of Defendants Shawn Hogan, Brian Dunning and  
27 Todd Dunning were substantially similar. The User Agreements (a) prohibited the use of  
28 any "device, software or routine" to interfere with or attempt to interfere with the proper

1 working of the eBay site or any activities conducted on the eBay site, and (b) required  
2 compliance with all applicable laws regarding the use of eBay's servers. Defendants  
3 Shawn Hogan, Brian Dunning and Todd Dunning, through their cookie stuffing schemes,  
4 violated those User Agreements and in so doing, accessed the eBay computers without  
5 authorization and/or exceeded their authorized access.

6 35. eBay's computers are used in interstate and foreign commerce.

7 36. Through their unauthorized access, Defendants DPS and DOES 1-10  
8 fraudulently obtained commissions for Revenue Actions that were in no way related to  
9 those Defendants' advertisements and for which those Defendants were due no  
10 compensation. Upon information and belief, through their unauthorized access,  
11 Defendants DPS and DOES 1-10 also caused harm to eBay's computers and caused loss  
12 to eBay in each year from at least December 2003 through June 2007, aggregating more  
13 than \$5,000.

14 37. Through their unauthorized access, Defendants KFC and DOES 11-20  
15 fraudulently obtained commissions for Revenue Actions that were in no way related to  
16 those Defendants' advertisements and for which those Defendants were due no  
17 compensation. Upon information and belief, through their unauthorized access,  
18 Defendants KFC and DOES 11-20 also caused harm to eBay's computers and caused loss  
19 to eBay in each year from at least December 2004 through June 2007, aggregating more  
20 than \$5,000.

21 38. DPS's and KFC's actions constitute violations of the Computer Fraud and  
22 Abuse Act, 18 U.S.C. § 1030.

23 39. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as  
24 more fully set forth below.

25 **SECOND CAUSE OF ACTION**

26 **(Violations of 18 U.S.C. § 1962(c))**

27 40. eBay realleges each and every allegation set forth in Paragraphs 1 through  
28 39, inclusive, and incorporates them by reference herein.

1           41. Defendants Shawn Hogan's, Brian Dunning's, and Todd Dunning's  
2 unlawful, tortious and otherwise actionable conduct constitute violations of 18 U.S.C. §  
3 1962(c).

4           42. Defendant Shawn Hogan and DOES 1-10 (the "Hogan Group") engaged in  
5 activities through the company Digital Point Solutions, Inc., which constitutes an  
6 enterprise under RICO. Through Digital Point Solutions, Inc., the Hogan Group  
7 associated with each other and others for the common purpose of defrauding eBay of  
8 commission fees by designing and implementing the cookie stuffing scheme described  
9 above. Upon information and belief, the Hogan Group's activities were ongoing, and  
10 Digital Point Solutions, Inc. functioned as a continuing unit in operating the fraudulent  
11 cookie stuffing scheme from approximately December 2003 through June 2007.

12           43. Defendants Brian Dunning, Todd Dunning and DOES 11-20 (the "Dunning  
13 Group") engaged in activities through the companies Kessler's Flying Circus,  
14 Thunderwood Holdings, Inc., and BrianDunning.com, and each company constitutes a  
15 RICO enterprise. Through Kessler's Flying Circus, Thunderwood Holdings, Inc., and  
16 BrianDunning.com, the Dunning Group associated with each other and others for the  
17 common purpose of defrauding eBay of commission fees by designing and implementing  
18 the cookie stuffing scheme described above. Upon information and belief, the Dunning  
19 Group's activities were ongoing, and Kessler's Flying Circus, Thunderwood Holdings,  
20 Inc., and BrianDunning.com functioned individually, and with each other, as continuing  
21 units in operating the fraudulent cookie stuffing scheme from approximately December  
22 2004 through June 2007.

23           44. The members of the Hogan Group and Dunning Group each committed  
24 multiple violations of the predicate act of mail and wire fraud, 18 U.S.C. § 1343, through  
25 their cookie stuffing schemes. Specifically, schemes to defraud eBay existed by which  
26 the members of the Hogan Group and Dunning Group each stuffed eBay cookies onto  
27 computers for the purpose of defrauding eBay of commission fees due only for legitimate  
28 Revenue Actions associated with a given affiliate. The members of the Hogan Group and

1 Dunning Group each participated in these schemes with the specific intent to defraud  
2 eBay of commissions. Use of the Internet was essential to the schemes: the members of  
3 the Hogan Group and Dunning Group stuffed a cookie onto a computer when a user was  
4 browsing the Internet, and the stuffed cookie was later read and recognized when that  
5 Internet user accessed eBay's website on the Internet and either registered with the site,  
6 purchased an item or engaged in some other Revenue Action. The members of the Hogan  
7 Group and Dunning Group each, by use of their technology, caused users' web browsers  
8 to convey a representation by the Hogan Group and/or the Dunning Group to eBay that  
9 the user had accessed the eBay website via an advertisement placed by either DPS or  
10 KFC, when in fact, a substantial portion of those users never knowingly or intentionally  
11 visited the eBay website based on an advertisement placed by either DPS or KFC. These  
12 fraudulent acts and representations were repeated multiple times, and each act constitutes  
13 a violation of 18 U.S.C. § 1343 through the use of interstate wires.

14 45. Each violation of 18 U.S.C. § 1343 constitutes a separate instance of  
15 "racketeering activity" as defined in 18 U.S.C. § 1961(1) and was committed in  
16 furtherance of the conspiracy to defraud eBay of commission fees not legitimately earned  
17 by either DPS or KFC. Together, these violations constitute a pattern of racketeering  
18 activity: the violations have the same or similar purposes, results, participants, victims  
19 and/or methods of commission.

20 46. The racketeering activity committed by each of the members of the Hogan  
21 Group and Dunning Group affected the interstate activity of Internet web browsing. In  
22 addition, Internet marketing, including the marketing at issue here that utilizes  
23 advertisements seen by Internet users in all 50 states and provides commissions for  
24 actions taken by eBay users across all 50 states, is also an interstate activity that was  
25 affected by the racketeering activity committed by each of the members of the Hogan  
26 Group and Dunning Group.

27 47. The actions of each of the members of the Hogan Group and Dunning  
28 Group were undertaken with fraud, malice or oppression, or with a conscious disregard of

1 the rights of eBay and, therefore, eBay is entitled to an award of exemplary and punitive  
2 damages against each of the members of the Hogan Group and Dunning Group, in an  
3 amount according to proof at trial.

4 48. WHEREFORE, eBay prays for judgment against each of the members of the  
5 Hogan Group and Dunning Group, as more fully set forth below.

6 **THIRD CAUSE OF ACTION**

7 **(Fraud)**

8 49. eBay realleges each and every allegation set forth in Paragraphs 1 through  
9 48, inclusive, and incorporates them by reference herein.

10 50. DPS and DOES 1-10, by use of their cookie stuffing computer programs  
11 and/or code, caused users' web browsers to convey a representation by those defendants  
12 to eBay that the user had accessed the eBay website via an advertisement placed by DPS.  
13 eBay is informed and believed and, on that basis, alleges that this conduct began in or  
14 around December 2003 and continued through at least June 2007.

15 51. KFC and DOES 11-20, by use of their cookie stuffing computer programs  
16 and/or code, caused users' web browsers to convey a representation by those defendants  
17 to eBay that the user had accessed the eBay website via an advertisement placed by KFC.  
18 eBay is informed and believed and, on that basis, alleges that this conduct began in or  
19 around December 2004 and continued through at least June 2007.

20 52. The representations made and/or caused to be made by each of DPS, KFC  
21 and DOES 1-20 were in fact false. The true facts were that a substantial portion of the  
22 users ostensibly referred by each of DPS, KFC and DOES 1-20 to the eBay site had not  
23 been referred by those Defendants, that those users had never knowingly or intentionally  
24 visited the eBay site based on any advertisement or referral from any of those Defendants,  
25 and that the information contained in cookies in those users' web browsers was actually  
26 the product of the false and misleading cookie stuffing schemes employed by each of  
27 DPS, KFC and DOES 1-20.

28 53. When DPS, KFC and DOES 1-20 made these representations (or caused

1 them to be made), they knew them to be false and made these representations (or caused  
2 them to be made) with the intention to deceive and defraud eBay and induce eBay to act  
3 in reliance on these representations.

4 54. eBay, at the time these representations were made (or caused to be made) by  
5 DPS, KFC and DOES 1-20, was ignorant of the falsity of the representations and believed  
6 them to be true. In reliance on these representations, eBay was induced to, and did, make  
7 commission payments to each of DPS and KFC (via CJ) in consideration for referrals that  
8 eBay believed to be legitimate and bona fide. Had eBay known the true facts, it would  
9 not have made such commission payments. eBay's reliance on the representations of  
10 DPS, KFC and DOES 1-20 was justified.

11 55. As a proximate result of the fraudulent conduct of each of DPS, KFC and  
12 DOES 1-20, eBay paid commissions and fees to DPS and KFC (via CJ) for referrals that  
13 had never occurred, for which eBay received no value, and for which eBay owed nothing  
14 to DPS or KFC.

15 56. As a proximate result thereof, eBay has been damaged in an amount to be  
16 proven at trial.

17 57. Defendants' actions were undertaken with fraud, malice or oppression, or  
18 with a conscious disregard of the rights of eBay and, therefore, eBay is entitled to an  
19 award of exemplary and punitive damages against each of DPS, KFC and DOES 1-20, in  
20 an amount according to proof at trial.

21 58. WHEREFORE, eBay prays for judgment against each of DPS, KFC and  
22 DOES 1-20, as more fully set forth below.

#### 23 **FOURTH CAUSE OF ACTION**

#### 24 **(Violations of California Penal Code § 502)**

25 59. eBay realleges each and every allegation set forth in Paragraphs 1 through  
26 58, inclusive, and incorporates them by reference herein.

27 60. Each of DPS and KFC have knowingly and without permission: altered,  
28 damaged, deleted, destroyed, or otherwise used eBay's computer, computer system, or

1 computer network in order to devise and execute a cookie stuffing scheme or artifice in  
2 order to defraud and deceive; and/or altered, damaged, deleted, destroyed, or otherwise  
3 used eBay's computer, computer system, or computer network in order to wrongfully  
4 control or obtain money and property; and/or accessed or caused to be accessed eBay's  
5 computer, computer system, or computer network.

6 61. DPS's and KFC's unauthorized access and use of eBay's computers has  
7 damaged and caused loss to eBay.

8 62. DPS's and KFC's actions constitute violations of California Penal Code §  
9 502(c).

10 63. DPS's and KFC's actions were undertaken with fraud, malice or oppression,  
11 or with a conscious disregard of the rights of eBay and, therefore, eBay is entitled to an  
12 award of exemplary and punitive damages against each of DPS and KFC, in an amount  
13 according to proof at trial.

14 64. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as  
15 more fully set forth below.

16 **FIFTH CAUSE OF ACTION**

17 **(Restitution and Unjust Enrichment)**

18 65. eBay realleges each and every allegation set forth in Paragraphs 1 through  
19 64, inclusive, and incorporates them by reference herein.

20 66. Through their cookie stuffing schemes, as described above, each of DPS and  
21 KFC received a benefit from eBay, in the form of artificially and fraudulently inflated  
22 commissions paid to DPS and KFC (via CJ) for Revenue Actions that were not associated  
23 with any referral from those Defendants.

24 67. In light of DPS's and KFC's conduct, it would be unjust for DPS and KFC  
25 to retain the benefits they obtained from eBay.

26 68. DPS and KFC have been unjustly enriched by eBay's payments and should  
27 be required in equity to make restitution of these payments to eBay.

28 69. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as

1 more fully set forth below.

2 **SIXTH CAUSE OF ACTION**

3 **(California Business and Professions Code § 17200)**

4 70. eBay realleges each and every allegation set forth in Paragraphs 1 through  
5 69, inclusive, and incorporates them by reference herein.

6 71. Through their cookie stuffing schemes, as described above, each of DPS and  
7 KFC engaged in unlawful, unfair and/or fraudulent business practices. Such conduct by  
8 each of DPS and KFC violates California Business and Professions Code § 17200 et. seq.

9 72. As discussed herein, DPS's and KFC's business practices of engaging in  
10 cookie stuffing were unlawful under state and federal laws, including but not limited to  
11 the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the civil RICO statute, 18 U.S.C. §  
12 1962(c), California Penal Code § 502, and constituted common law fraud.

13 73. DPS's and KFC's conduct was also fraudulent and deceptive, and was  
14 unfair to eBay, in that it offended established public policy, and/or was immoral,  
15 unethical, oppressive, unscrupulous and substantially injurious to eBay.

16 74. As a direct result of DPS's and KFC's conduct, eBay has suffered an injury  
17 in fact and has lost money and/or property that has been wrongfully retained by each of  
18 DPS and KFC.

19 75. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as  
20 more fully set forth below.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, based upon the foregoing, eBay prays for judgment against  
23 Defendants, and each of them, for:

- 24 i. Judgment in favor of eBay and against all Defendants on all causes of  
25 action;
- 26 ii. An award of compensatory damages according to proof at trial;
- 27 iii. An award of punitive damages according to proof at trial;
- 28 iv. An award of treble damages against Defendants Shawn Hogan, Brian



- 1 Dunning and Todd Dunning, pursuant to 18 U.S.C. § 1964 according to proof at trial;
- 2 v. An award requiring Defendants to disgorge all ill-gotten gains and to return
- 3 the eBay funds by which Defendants have been unjustly enriched;
- 4 vi. An award of restitution, according to proof at trial;
- 5 vii. An injunction prohibiting Defendants from (a) disseminating, sharing or
- 6 otherwise making available any cookie stuffing technology to others; (b) possessing,
- 7 disseminating, sharing, or otherwise making available any technology intended or capable
- 8 of being used to defraud eBay; and (c) having any further involvement with any person or
- 9 entity participating in the eBay Affiliate Marketing Program;
- 10 viii. An award of pre-judgment and post-judgment interest;
- 11 ix. An award of attorney's fees and costs of suit incurred herein; and
- 12 x. Such other further relief as the Court may deem just and proper.

13 Dated: August 25, 2008

O'MELVENY & MYERS LLP

14  
15  
16 By: 

David R. Eberhart, Esq.  
Sharon M. Bunzel, Esq.  
Colleen M. Kennedy, Esq.  
Attorneys for Plaintiff eBAY INC.

17  
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19  
20 **DEMAND FOR JURY TRIAL**

21 eBay hereby demands a trial by jury of all claims in this action.

22  
23 Dated: August 25, 2008

O'MELVENY & MYERS LLP

24  
25 By: 

David R. Eberhart, Esq.  
Sharon M. Bunzel, Esq.  
Colleen M. Kennedy, Esq.  
Attorneys for Plaintiff eBAY INC.