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 and Dunning Enterprise, Inc.

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

12 EBAY, INC.,

13 Plaintiff,

14 v.

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

18 Defendants.

CASE NO.: CV-08-4052 JF

**SUPPLEMENTAL
 DECLARATION OF STEWART
 FOREMAN IN SUPPORT OF
 DEFENDANTS TODD DUNNING
 AND DUNNING ENTERPRISE,
 INC.'S MOTION TO DISMISS
 SECOND AMENDED
 COMPLAINT**

Date: June 26, 2009
 Time: 9:00 a.m.
 Place: Courtroom 3, 5th Floor

22 I, Stewart H. Foreman, declare:

23 1. I am a member of the Bar of the State of California and I am admitted to practice
 24 before this Court. I am a partner in the firm of Freeland Cooper and Foreman LLP, located at
 25 150 Spear Street, Suite 1800, San Francisco, California 94105. I am counsel to Todd Dunning and
 26 Dunning Enterprise, Inc. who are defendants in this case.

27 2. I have personal knowledge of the facts contained in this Declaration and I am
 28 competent to testify.

1 3. Attached hereto and incorporated by reference herein as Exhibit 1 is a true and correct
 2 copy of the Publisher Service Agreement ("PSA") that was attached to the Second Amended
 3 Complaint filed by plaintiff in the case of *Commission Junction, Inc. v. Thunderwood Holdings, Inc.,*
 4 *et al.*, No. 30-2008-00101025, in the Superior Court of the State of California, County of Orange
 5 ("CJ Action"). This PSA was the basis for Commission Junction, Inc.'s ("CJ") claims for breach of
 6 contract and other causes of action. During the course of discovery in that case, and in preparation of
 7 trial exhibits, this copy of the PSA was the only one produced by CJ relating to defendant Kessler's
 8 Flying Circus's actions as a Publisher under the agreement and was used as the operative agreement in
 9 the CJ Action. Although the PSA forum contains spaces for signatures, it is in fact accepted over the
 10 internet and not actually signed by the parties. Unfortunately, an electronic error occurred when the
 11 current motion was originally filed, and only a portion of this exhibit was e-filed as part of the original
 12 Declaration of Stewart Foreman In Support of the Motion to Dismiss. This Exhibit 1 is the complete
 13 document as it should have been originally filed.

14 4. Attached hereto and incorporated by reference herein as Exhibit 2 is a true and correct
 15 copy of the Settlement And Mutual General Release Agreement dated March 9, 2009, between CJ, on
 16 the one hand and Todd Dunning, Dunning Enterprise, Inc., and Kessler's Flying Circus on the other
 17 hand. This document resulted in the settlement and dismissal of the CJ Action. This document was
 18 previously produced by these defendants to plaintiff eBay, Inc. ("eBay") in response to its discovery
 19 request in this case.

20 5. Attached hereto and incorporated by reference herein as Exhibit 3 is a true and correct
 21 copy of an email from Todd Miller of CJ to defendant Brian Dunning, dated June 27, 2007. This
 22 document was produced by CJ to these defendants during the course of the CJ Action and contains
 23 document identification number 000049. These defendants produced a copy of this document to eBay
 24 in this action in response to recent discovery requests.

25 6. Attached hereto and incorporated by reference herein as Exhibit 4 is a true and correct
 26 copy of plaintiff/cross-defendant CJ's Trial Brief filed in the CJ Action on March 6, 2009, in advance
 27 of the scheduled commencement of the trial in that case.

28 7. Attached hereto and incorporated by reference herein as Exhibit 5 is a diagram that I

