

# EXHIBIT 4

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11  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF ORANGE, CENTRAL BRANCH  
14

15 COMMISSION JUNCTION, INC., )  
16 Plaintiff, )  
17 v. )  
18 THUNDERWOOD HOLDINGS, INC. dba )  
19 KESSLER'S FLYING CIRCUS; TODD )  
DUNNING; BRIAN DUNNING; and )  
20 DOES 1 through 50, inclusive, )  
21 Defendants. )  
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CASE NO.: 30-2008 00101025  
ASSIGNED FOR ALL PURPOSES TO:  
JUDGE RANDELL L. WILKINSON  
DEPARTMENT C25

**PLAINTIFF/CROSS-DEFENDANT  
COMMISSION JUNCTION, INC.'S  
TRIAL BRIEF**

TRIAL DATE: March 9, 2009  
TIME: 9:00 a.m.  
DEPARTMENT: C25

26 Plaintiff and Cross-Defendant Commission Junction, Inc. submits the following  
27 Trial Brief for use at the March 9, 2009 Trial.

28 ///

## I.

**BRIEF DESCRIPTION OF PERTINENT FACTS**

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2  
3 This matter involves Commission Junction, Inc.'s request for  
4 payment/reimbursement of \$565,517.84 from the Defendants based on their improper  
5 activity with an eBay, Inc. incentive program administered by Commission Junction,  
6 Inc. ("CJI").

7 Through eBay's website, sellers list items for sale and buyers bid on and purchase  
8 items of interest. eBay earns revenue when a seller places an item for sale and when the  
9 item is sold. eBay's Affiliate Marketing Program is designed to increase traffic to eBay's  
10 website. The persons and entities that advertise on behalf of eBay, whether on their own  
11 sites or on sites of other third parties are known as "Affiliates." Affiliates earn  
12 commissions payable by eBay under the Affiliate Marketing Program when a series of  
13 events occur. Because compensation to the Affiliate is tied to actions by the user, it is  
14 essential that eBay be able to determine whether a sale occurred by virtue of the fact that  
15 the user was referred to eBay by a particular Affiliate's advertisement.

16 Accordingly, eBay entered into agreements with Plaintiff CJI to track sales  
17 information using information placed in the new user's browser; in essence, CJI  
18 administered the Affiliate Marketing Program. The relationship between eBay and CJI was  
19 governed by an Advertiser Service Agreement. Under those agreements, CJI was  
20 responsible for, among other things, tracking Affiliate traffic, monitoring compliance by  
21 Affiliates, preventing and detecting fraudulent activity, and paying Affiliates using funds  
22 remitted by eBay. In that regard, CJI has monitored thousands of Affiliates, buyers, and  
23 sellers.

24 As part of the services it renders with respect to eBay's Affiliate Marketing  
25 Program, CJI pays eBay Affiliates on a periodic basis (usually monthly), with funds  
26 remitted by eBay, based on the number of sales/purchases by users referred by those  
27 Affiliates.

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1 In addition to CJI's monitoring of the eBay program, in April of 2005, CJI and the  
2 Defendants entered into a written Publisher Service Agreement ("Agreement") whereby  
3 CJI agreed to further track commission payments legally and properly earned by Kessler's  
4 Flying Circus through its Internet programs. The Agreement includes the following  
5 provisions:

6 [KESSLER] "may not place Links to an Advertiser's Web Site or Web Site  
7 content in third party newsgroups, message boards, blogs, unsolicited email  
8 and other types of spam, link farms, counters, chatrooms, or guestbooks."  
9 Agreement at Section 1(d)(i);

10  
11 The Publisher Service Agreement is not signed since the Defendants entered into the  
12 Agreement through the Internet and an "electronic signature". In this litigation, the  
13 Defendants have admitted to entering into the attached Agreement.

14 Beginning in April of 2007, the Defendants breached the Agreement by, inter alia,  
15 providing third parties with the ability to place widgets on websites that the Defendants did  
16 not own/operate without permission from the website owners to do so, including their  
17 "MySpaceMaps" which provided widgets users placed on social networking profiles,  
18 including MySpace.

19 Myspace.com is a social networking website that has strict user compliance rules  
20 posted on its site. In addition to the above, the Defendants violated MySpace terms, which  
21 prohibit commercial activity without consent.

22 Importantly, the Defendants were able to force a "cookie" to implant on a user's  
23 computer without the user knowing that he or she visited the website that placed the  
24 cookie. Once the forced cookie was implanted, anytime that computer user (or those who  
25 had visited that user's web page) purchased or sold anything on eBay, the Defendants were  
26 improperly credited with a sale through the eBay Affiliate program, even those users who  
27 had never visited the Defendants' websites. That manipulation resulted in millions of  
28 dollars being paid by CJI to the Defendants subject to reimbursement by eBay.

1 The last payment made by CJI to the Defendants was a wire transfer for  
2 \$565,517.84 sent in June of 2007 for, although not known at the time, improper "sales"  
3 tracked to the Defendants. Within days of sending the funds to the Defendants, eBay  
4 contacted CJI and informed CJI of the Defendants' wrongful actions and refused to  
5 reimburse CJI for the \$565,517.84 payment sent to the Defendants. Despite repeated  
6 requests by CJI to the Defendants that the funds be returned to CJI, the Defendants have  
7 refused and this lawsuit followed.

8 Also, following the CJI June 2007 payment to the Defendants, CJI received a U.S.  
9 Attorney Subpoena and a Federal Grand Jury Subpoena seeking documents regarding the  
10 Defendants and their transactions. Several months ago, eBay filed a lawsuit in the United  
11 States District Court, Northern District of California, against the Defendants alleging  
12 statutory violations of illegally accessing and violating computer networks and  
13 racketeering, as well as fraud. It appears that eBay is seeking restitution for other money it  
14 paid to the Defendants through CJI or otherwise. In summary, the Defendants wrongfully  
15 obtained the \$565,517.84 payment from CJI and eBay refuses to reimburse CJI for the  
16 subject payment. Accordingly, CJI is seeking \$565,517.84, plus interest, costs, and  
17 attorneys' fees.

## 18 19 II.

### 20 PROCEDURAL BACKGROUND

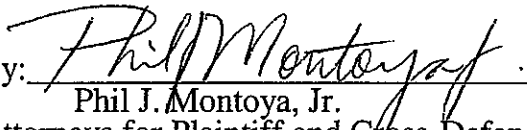
21 On May 16, 2008, Plaintiff CJI filed its Second Amended Complaint (the operative  
22 complaint) which alleges the following causes of action: (1) Breach of Contract; (2) Open  
23 Book Account; (3) Account Stated; (4) Reasonable Value; (5) Conversion; (6) Unfair  
24 Competition; and (7) Declaratory Relief. The Defendants have served general denial  
25 Answers to the Second Amended Complaint.

26 On July 25, 2008, Defendant Kessler's Flying Circus served its Cross-Complaint  
27 against CJI which alleges the following causes of action: (1) Breach of Contract;  
28 (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; and (3) Accounting.

1 CJI has served a general denial Answer to the Cross-Complaint. The Court has scheduled a  
2 jury trial to take place on March 9, 2008. CJI has posted jury fees.

3  
4 Dated: March 5, 2009

ERNSTER LAW OFFICES, P.C.

5 By:   
6 Phil J. Montoya, Jr.  
7 Attorneys for Plaintiff and Cross-Defendant  
8 Commission Junction, Inc.

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**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
 )ss.  
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 70 So. Lake Avenue, Suite 750, Pasadena, CA 91101.

On March 6, 2009, I served the foregoing document described as:  
**PLAINTIFF/CROSS-DEFENDANT COMMISSION JUNCTION, INC.'S TRIAL BRIEF** on all interested parties in said action by:

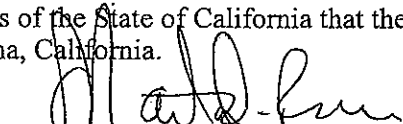
(X) placing ( ) the original (X) a true copy thereof, as follows:

(X) **By Messenger Service** - I served the documents by placing them in an envelope/package addressed to the persons at the addresses listed below and provided them to a professional messenger service for service.

Ronald Rus, Esq.  
Leo J. Presiado, Esq.  
Rus, Miliban & Smith  
Von Karman Towers, Seventh Floor  
2211 Michelson Drive  
Irvine, CA 92612  
Telephone: (949) 752-7100  
Facsimile: (949) 252-1514  
*Attorney for Defendant, BRIAN DUNNING and THUNDERWOOD HOLDINGS, INC.*

Patrick Kelly McClellan, Esq.  
Von Karman Towers  
2211 Michelson Drive, Seventh Floor  
Irvine, California 92612  
Telephone: (949) 752-7100  
Facsimile: (949) 252-1514  
***KESSLER'S FLYING CIRCUS and DUNNING ENTERPRISE, INC***

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 6, 2009 at Pasadena, California.

  
Marta I. Rincon

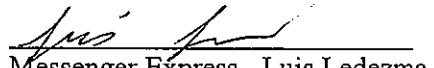
**DECLARATION OF MESSENGER**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is Messenger Express, 5503 Cahuenga Blvd., Suite 100, No. Hollywood, California 91601

(X) **By Personal Service** - I personally delivered the envelope or package for a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in the envelope/package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

I served the envelope/package, as stated above, on March 6, 2009.

  
Messenger Express - Luis Ledezma  
Luis

**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 70 South Lake Avenue, Suite 750, Pasadena, California 91101.

On March 6, 2009, I served the foregoing document described as **PLAINTIFF/CROSS-DEFENDANT COMMISSION JUNCTION, INC.'S TRIAL BRIEF** by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Stewart H. Foreman, Esq.  
Freeland Cooper & Foreman LLP  
150 Spear Street, Suite 1800  
San Francisco, California 94105  
Telephone: (415) 541-0200  
Facsimile: (415) 495-4332  
[foreman@freelandlaw.com](mailto:foreman@freelandlaw.com)  
*Attorney for Defendant, TODD DUNNING*

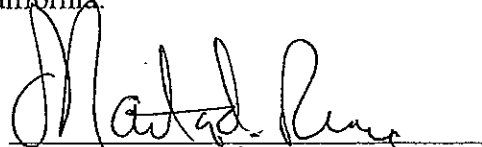
**(X) (BY FEDERAL EXPRESS SERVICE/OVERNITE EXPRESS)** I enclosed the documents in an envelope/package provided by an overnight delivery carrier and addressed to the persons at the addresses above-stated. I placed the envelope/package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

**(X) By E-Mail or Electronic Transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the email addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

This document was produced on paper purchased as recycled.

**(X) STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 6, 2009, at Pasadena, California.

  
Marta I. Rincon