

E-Filed 8/17/2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

EBAY INC.,

Plaintiff,

v.

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

Defendants.

Case Number C 08-4052 JF (PVT)

ORDER¹ (1) DENYING MOTIONS TO
DISMISS FOR IMPROPER VENUE; (2)
DENYING MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON
WHICH RELIEF MAY BE GRANTED;
AND (3) DENYING MOTION TO
TRANSFER

[re: doc. nos. 71, 73, 76, 82]

In its Second Amended Complaint ("SAC"), Plaintiff eBay Inc. ("eBay") alleges that Defendants Digital Point Solutions, Inc., Kessler's Flying Circus, Thunderwood Holdings, Inc., Todd Dunning, Todd Dunning Enterprises, Inc., Brian Dunning, BrianDunning.com, and Does 1-20 engaged in scheme to defraud eBay in violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 *et seq.*, and the Racketeer Influenced and Corrupt Organizations

¹ This disposition is not designated for publication in the official reports.

1 Act (“RICO”), 18 U.S.C. 1962(c). eBay also asserts multiple state-law claims for relief.
2 Defendants move to dismiss the SAC for improper venue and for failure to state a claim upon
3 which relief may be granted.² In the alternative, Defendants seek transfer of the instant action to
4 the United States District Court for the Central District of California pursuant to 28 U.S.C.
5 §1404(a).³ For the reasons set forth below, Defendants’ motions will be denied.

7 I. BACKGROUND

8 eBay maintains an Affiliate Marketing Program (“AMP”) through which persons or
9 entities that display eBay advertisements are reimbursed for referrals. SAC ¶ 19. Under the
10 AMP, eBay will pay a referral fee to those individuals—known as “affiliates”—when an
11 advertisement placed by an affiliate is clicked on by a web user. *Id.* When a user clicks on an
12 advertisement, that user’s web browser is directed to eBay’s website. *Id.* When the user
13 accesses eBay’s website, a “cookie” is deposited onto the user’s computer. *Id.* ¶¶ 19, 21. This
14 cookie contains information identifying the referring affiliate and may be used to track whether
15 the user returns to the eBay website. *Id.* ¶¶ 21-22. A subsequent visit to the eBay website may
16 result in payment of a referral fee to the referring affiliate if the user engages in a “Revenue
17 Action,” which occurs when the user registers with eBay or utilizes eBay’s auction service. *Id.*
18 ¶¶ 19, 22. If multiple cookies are present on the user’s computer, which may occur if the user

21 ² Three separate motions to dismiss were filed by the following groups of Defendants: (1)
22 Kessler’s Flying Circus, Thunderwood Holdings, Inc., Brian Dunning, BrianDunning.com
23 (collectively, the “KFC Defendants”); (2) Todd Dunning and Dunning Enterprise, Inc.
24 (collectively, the “Todd Dunning Defendants”); and (3) Digital Point Solutions (“DPS”) and
25 Shawn Hogan (collectively, the “DPS Defendants”). The SAC alleges that the KFC Defendants
and the Todd Dunning Defendants are interrelated entities, SAC ¶¶ 5-11, and where appropriate
those parties will be referred to collectively as the “Non-DPS Defendants.”

26 ³ Both of the Non-DPS Defendants seek dismissal of the SAC pursuant to Fed. R. Civ. P.
27 12(b)(3) and 12(b)(6). In the alternative, the Todd Dunning Defendants request transfer of the
28 instant action to the Central District of California. The DPS Defendants move to dismiss the
complaint pursuant to Rule 12(b)(6) or to transfer under §1404(a).

1 has clicked on several different advertisements before engaging in a revenue action, the most
2 recently deposited cookie (and its corresponding affiliate) will be credited for any revenue
3 actions. *See id.* ¶ 22. Many users visit eBay’s website without being referred by an affiliate, and
4 Revenue Actions performed by such users do not result in a commission payment. *Id.*

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6 To administer the AMP, eBay engaged Commission Junction (“CJ”), a subsidiary of
7 ValueClick, Inc. SAC ¶ 20. The SAC alleges that at all relevant times the relationship between
8 eBay and CJ was governed by a series of advertiser service agreements. *See id.* Pursuant to
9 those agreements, CJ was responsible for “recruiting affiliates, tracking affiliate traffic,
10 monitoring compliance by affiliates, preventing and detecting fraudulent activity, and paying
11 affiliates [for credited Revenue Actions] using funds remitted by eBay.” *Id.* eBay alleges that
12 each group of Defendants engaged in “cookie stuffing” to manipulate the AMP, resulting in over-
13 payment of advertising fees. SAC ¶ 24. While Defendants’ precise method of deception is not
14 alleged, eBay surmises that Defendants used software code to direct users’ web browsers to
15 eBay’s website, without the users’ knowledge or any affirmative action on the part of users. *Id.*
16 ¶¶ 24-25. Each time a web browser was redirected eBay’s website, eBay would deposit a cookie
17 on that user’s computer, credited to one or more of the Defendants even though the user had not
18 been referred to eBay by means of a legitimate advertisement. *Id.* ¶¶ 25-27. As a result, fees for
19 subsequent Revenue Actions by that user were paid to Defendants. *Id.* ¶ 27. eBay also alleges
20 that Defendants delayed eBay’s investigation by communicating with each other in furtherance of
21 their alleged cookie-stuffing scheme, and that they employed various technological measures to
22 avoid detection. *Id.* ¶¶ 27-31. In addition, Defendants allegedly denied any wrongdoing when
23 questioned by eBay about apparent abnormalities in the commissions being paid to Defendants
24 under the AMP. *Id.* ¶¶ 32, 60.

1 At some point in mid-2007, eBay and CJ uncovered Defendants' alleged scheme. *See*
2 SAC ¶¶ 52-57. On January 4, 2008, CJ sued the Non-DPS Defendants for breach of contract in
3 the Orange Superior Court (the "CJ Action"). *See id.* ¶ 34. The issues in the CJ Action
4 essentially arose out of the same conduct alleged in the SAC, with CJ seeking the return of fees
5 paid to several Defendants on the ground that such fees were improperly credited because of the
6 alleged cookie-stuffing scheme. *Id.* The CJ Action settled prior to the filing of the SAC. *See id.*

8 eBay commenced the instant action on August 25, 2008 and the First Amended
9 Complaint ("FAC") was filed on October 7, 2008. The Non-DPS Defendants moved to dismiss
10 the FAC pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue and in the alternative also
11 sought dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The DPS
12 Defendants also moved to dismiss the FAC for failure to state a claim.⁴ The Court granted the
13 motion to dismiss for improper venue with leave to amend, and granted in part the motion by
14 DPS Defendants to dismiss for failure to state a claim, again with leave to amend. eBay filed the
15 operative SAC on March 26, 2009.

18 II. DISCUSSION

19 A. Improper Venue

20 A valid forum selection clause may provide the basis of a motion to dismiss for improper
21 venue pursuant to Fed. R. Civ. P. 12(b)(3). *See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320,
22 323-24 (9th Cir. 1996). In connection with a Rule 12(b)(3) motion, the allegations in the
23 complaint need not be accepted as true, and the Court may consider evidence outside the
24 pleadings. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004). While the
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27 ⁴ DPS Defendants state that they did not move to dismiss the FAC for improper venue or
28 for failure to state a claim based on the ground now raised in their instant motion because they
were unaware of certain key documents during the previous round of motions.

1 plaintiff ultimately bears the burden of showing that venue is proper, *see Piedmont Label Co. v.*
2 *Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979), “the trial court must draw all
3 reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor
4 of the non-moving party.” *Murphy*, 362 F.3d at 1138.⁵

6 1. The AMP Agreements

7 In support of their motions to dismiss for improper venue, the Non-DPS Defendants have
8 submitted unsigned copies of two AMP-related agreements, a Publisher’s Service Agreement
9 (“PSA”) and a Terms and Conditions (“T&C”) Agreement.⁶ It appears that the PSA governs the
10 contractual relationship between CJ and individual advertising affiliates. *See* Compendium Ex.
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12 2. The T&C Agreement apparently governs the relationship between eBay and the advertising
13 affiliates. *See id.* Ex. 3. *See also* Kennedy Decl. Ex. 19, ¶ 5.8.6. As an exhibit to its opposition
14 to the instant motions to dismiss, eBay has submitted a copy of a Master Service Agreement
15 (“MSA”) between eBay and CJ, which governs CJ’s obligations to eBay under the AMP. *See*
16 Kennedy Decl. Ex. 19. The MSA references both the PSA and the T&C Agreement. *Id.* ¶¶ 1.23,
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18 3.1. Accordingly, and for purposes of the resolving the instant motions, the Court will assume
19 that the AMP is maintained via a triangular contractual relationship between eBay, CJ, and
20 various advertising affiliates.
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24 ⁵ Federal law applies to the interpretation of a forum selection clause. *Doe 1 v. AOL LLC*,
25 552 F.3d 1077, 1081 (9th Cir. 2009). Contract interpretation under federal law is guided by
26 “general principles for interpreting contracts.” *Id.* (quoting *Klamath Water Users Protective*
Ass’n v. Patterson, 204 F.3d 1206, 1210 (9th Cir.1999)).

27 ⁶ The T&C Agreement appears to be a “click-through” agreement, *see* Compendium Ex.
28 3, ¶ 19, while the copy of the PSA submitted as an exhibit contains a signature block. *Id.* Ex. 2
at 6.

1 considered the primary and controlling agreement for all claims related to the PSA.” *Id.*

2 3. User Agreement

3 eBay contends that the SAC cures the inadequacies of its prior pleadings because the
4 SAC alleges that eBay’s claims arise from unauthorized access to its servers rather than a breach
5 of either the PSA or the T&C Agreement. The SAC alleges that any user who accesses eBay’s
6 website must comply with the terms of eBay’s “User Agreement.” *See* SAC ¶ 26. The User
7 Agreement governs the terms of use with respect to eBay’s website, stating in relevant part:
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9 Your User Agreement

10 The following describes the terms on which eBay offers you access
11 to our services.

12 Introduction

13 Welcome to eBay. By using the services on the eBay website
14 (eBay.com and other related websites where this agreement
15 appears) you are agreeing to the following terms...Before you
16 become a member of eBay you must read and accept all of the
17 terms and conditions in, and linked to, this User Agreement and the
18 Privacy Policy...

19 Using eBay

20 While using eBay, you will not...

21 violate any laws, [or] third party rights...

22 distribute viruses or any other technologies that may harm
23 eBay, or the interests or property of eBay users...

24 Compendium Ex. 7 at 1.⁸ The User Agreement contains a forum selection clause that states
25 “[y]ou agree that any claim or dispute you may have against eBay must be resolved by a court
26 located in Santa Clara County, California, except as otherwise agreed by the parties.” *Id* at 4.

27 ⁸ The parties dispute the actual language of the User Agreement in effect and allegedly
28 entered into by certain Defendants, but that issue does not preclude resolution of the instant
motions.

1 In response the Court's earlier order, the SAC now contains the following allegations
2 with respect to the User Agreement and Defendants' actions:

3 [T]he software programs utilized by each [Defendant] caused the
4 user's computer to access eBay's computers in an unauthorized
5 way and/or to exceed the authorized access to eBay's computers.
6 Because [Defendants] caused this access through and without the
7 knowledge or active participation of those users, the access of any
8 such user's computer to eBay's site is attributable to [Defendants].
9 The only authorization given to the Defendants to access eBay's
10 site in any manner was by way of eBay's User Agreement. The
11 User Agreement was explicitly agreed to by the individual
12 Defendants when they became registered eBay users on the
13 following dates: Shawn Hogan on May 17, 1999; Brian Dunning
14 on November 10, 2000; and Todd Dunning on May, 21, 2003. The
15 remaining named Defendants, Digital Point Solutions, Kessler's
16 Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise,
17 Inc. and BrianDunning.com, were on constructive and/or actual
18 notice that the User Agreement governed their access to eBay's
19 website, based on the explicit agreement of their owners/principals
20 to the terms of the User Agreement, as well as eBay's display on its
21 website at all relevant times of the statement that use of the website
22 constitutes acceptance of the User Agreement. Defendants' access
23 to eBay was unauthorized by, and violated, the terms of the User
24 Agreement because it occurred solely to force the dropping of the
25 eBay cookie and thereby wrongfully access eBay's computer
26 servers. Each of the causes of action set forth herein arises out of
27 those violations of the User Agreement.
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19 SAC ¶ 26. While the parties dispute whether one or more Defendants actually entered into any
20 User Agreement, that factual issue cannot be resolved on a motion to dismiss, and eBay has
21 claimed that any access that exceeded the bounds of the User Agreement was unauthorized. *See*
22 *id.* ("The only authorization given to the Defendants to access eBay's site in any manner was by
23 way of eBay's User Agreement."). *See also Facebook, Inc. v. Power Ventures, Inc.*, No. C
24 08-5780, 2009 WL 1299698, at *4 (N.D. Cal. May 11, 2009) ("Access for purposes that
25 explicitly are prohibited by the terms of use is clearly unauthorized.").

1 In addition, the Court need not resolve whether any of the Defendants in fact were parties
2 to the User Agreement to find that the facts alleged in the SAC could support a cognizable CFAA
3 claim. Instead, and as the Court held previously with respect to Defendant DPS, unauthorized
4 access to eBay's website for the purposes of corrupting data may constitute a CFAA violation,
5 regardless of whether such actions also violated the User Agreement. See Order at 9, Feb. 24,
6 2009.
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8 4. Applicability of Forum Selection Clause in PSA

9 In contrast to eBay's assertions as to the primacy of the User Agreement, the Non-DPS
10 Defendants contend that all of the claims for relief set forth in the SAC arise out of the alleged
11 abuse of the AMP program, and thus the PSA's forum selection clause applies because eBay is a
12 third-party beneficiary to that agreement. See *TAAG Linhas Aereas de Angola v. Transamerica*
13 *Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("it is well-settled contract law that the scope
14 of a third-party beneficiary's rights is defined by the contract...a forum selection clause can
15 restrict a third-party beneficiary to the designated forum."). In addition, while eBay is not suing
16 for breach of the PSA or the T&C Agreement as such, a forum selection clause nonetheless may
17 apply to non-contract claims if resolution of those claims "relates to interpretation of the
18 contract." *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988).
19 Accordingly, the pertinent inquiry here is whether eBay's claims for relief can be "adjudicated
20 without analyzing whether the parties were in compliance with the contract." *Id.* See also
21 *Crescent Int'l, Inc. v. Avatar Cmtys., Inc.*, 857 F.2d 943, 944 (3d Cir. 1988) ("pleading alternate
22 non-contractual theories is not alone enough to avoid a forum selection clause if the claims
23 asserted arise out of the contractual relation and implicate the contract's terms."); *Multimin USA,*
24 *Inc. v. Walco Internation, Inc.*, CV 06-0226, 2006 WL 1046964, at *7 (E.D. Cal. Apr. 11, 2006)
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1 (“Even if claims in an action do not allege breach of the contract containing the forum selection
2 clause, the forum selection clause still applies if the claims asserted arise out of the contractual
3 relation or implicate the contract’s terms.”). In other words, the question is whether eBay is
4 seeking relief for violations of the User Agreement (or injuries caused by unauthorized access to
5 eBay’s website), or whether the SAC more properly is viewed as an end-around attempt to
6 recover funds that should not have been paid out under the AMP program.

8 The SAC does recite allegations that sound in contract, including a quasi-contractual
9 claim for unjust enrichment that seeks restitution. *See* SAC ¶¶ 82-86. A quasi-contract “is a
10 noncontractual obligation that is treated procedurally as if it were a contract and is also referred
11 to by some courts as unjust enrichment or restitution.” Williston on Contracts § 1:6 (4th Ed.
12 2009). In addition, eBay’s civil RICO, common-law fraud, § 502, and UCL claims refer to
13 Defendants’ scheme to obtain undeserved commission payments and allege injury based upon
14 those improper payments. Accordingly, the resolution the non-CFAA claims as currently pled,
15 including a determination as to which payments were proper as opposed to payments for
16 fraudulently obtained Revenue Actions, would appear to require at least some interpretation of
17 the AMP agreements. Indeed, certain allegations in the SAC could be read as referencing
18 implicitly breach of the PSA and T&C Agreements. *See id.* ¶ 38 (“No agreement entered into by
19 any Defendant in connection with eBay’s Affiliate Marketing Program, including but not limited
20 to any Publisher Service Agreement that may have been entered into between CJ and one or more
21 of Defendants and/or any Terms and Conditions of the Affiliate Marketing Program agreed to by
22 one or more of Defendants [allowed unauthorized access to eBay’s website]”); ¶ 27 (“once the
23 cookie was stuffed on the user’s computer by one or more of the Defendants, any future Revenue
24 Actions initiated by that user when the user later visited eBay intentionally, and not as a result of
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1 any advertisement placed by Defendants, appeared to be eligible for commissions payable to one
2 of the Defendants (provided those actions took place within the prescribed periods of time).
3 Hence [Defendants] would receive payment for actions by users who had not been referred to
4 eBay by Defendants' advertisements, thereby injuring eBay."); ¶ 83 ("Through their cookie
5 stuffing schemes, as described above, [Defendants] received a benefit from eBay, in the form of
6 artificially and fraudulently inflated commissions paid to [Defendants] (via CJ) for Revenue
7 Actions that were not associated with any referral from those Defendants.").

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10 eBay nonetheless argues that it is not bound by the PSA's forum selection clause because
11 it is not suing to enforce the terms of the agreements. eBay cites *Comer v. Micor, Inc.*, 278 F.
12 Supp. 2d 1030 (N.D. Cal. 2003), in which the district court declined to enforce an arbitration
13 clause against a the plaintiff, a purported third-party beneficiary under the relevant agreements,
14 because the plaintiff was not suing for breach of the agreements. *Id.* at 1040 ("Plaintiff himself is
15 not suing for breach of contract; that is, he is not suing to enforce the terms of the Agreements,
16 but instead to enforce the Plans' rights vis-à-vis their fiduciaries under ERISA."). The *Comer*
17 court concluded that the plaintiff was not bound by the forum selection clause because "a
18 third-party *beneficiary* is not a third-party *obligor*." *Id.* at 1041 (emphasis in original) (citing
19 *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir. 1985)). In the instant case, however,
20 certain claims clearly are founded upon rights and obligations created by the AMP agreements,
21 namely including the right to commissions and referral fees. In addition, a formal third-party
22 beneficiary relationship is not required to enforce the forum selection clause against eBay.
23 Instead, the test for non-signatories to an agreement is broader: "In order to bind a non-party to a
24 forum selection clause, the party must be 'closely related' to the dispute such that it becomes
25 'foreseeable' that it will be bound." *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993)
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1 (quoting *Manetti-Farrow*, 858 F.2d at 514 n.5). As discussed previously, it is apparent that eBay
2 exercises significant control over all aspects of the AMP and its underlying agreements.
3 Accordingly, the Court concludes that any claims relating to interpretation of the PSA ordinarily
4 would be subject to the forum selection clause.
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6 At the same time, however, as discussed above and apart from any alleged violation of
7 the PSA, eBay has presented a cognizable CFAA claim that does not require interpretation of the
8 PSA. Defendants' alleged scheme had the effect of corrupting data relating to user visits, and as
9 a result the overall number of site visits may have been grossly inflated. The SAC alleges that
10 certain users who were driven to eBay's website and received a cookie never engaged in any
11 subsequent revenue action that would result in a commission payment to defendants. *See* SAC ¶
12 39 ("Defendants' access caused harm to eBay's computers and caused damage and loss to eBay
13 within the meaning of 18 U.S.C. § 1030, regardless of whether any commission was later paid to
14 Defendants for any particular act of cookie stuffing.")⁹ A determination as to whether data was
15 corrupted does not require interpretation of the PSA, nor is such an interpretation necessary in
16 order for eBay to obtain certain remedies available under the CFAA. *See* 18 U.S.C. § 1030(e)(8)
17 ("damage" under CFAA "means any impairment to the integrity or availability of data, a
18 program, a system, or information"); § 1030(e)(11) ("loss" under CFAA includes "any
19 reasonable cost to any victim, including the cost of responding to an offense, conducting a
20 damage assessment, and restoring the data, program, system, or information to its condition prior
21 to the offense, and any revenue lost, cost incurred, or other consequential damages incurred
22 because of interruption of service"); § 1030(g) (injunctive relief available).
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27 ⁹ *See also* SAC ¶ 43 ("[Defendants'] actions, whether or not they resulted in the payment
28 of any commissions to them, constitute violations of the Computer Fraud and Abuse Act, 18
U.S.C. § 1030, including but not limited to §§ 1030(a)(4), 1030(a)(5)(B) and 1030(a)(5)(C).").

1 eBay also contends that the Non-DPS Defendants cannot invoke the PSA to dismiss or
2 transfer the instant action because there is a significant factual dispute with respect to whether
3 Defendants in fact are parties to the PSA. In response to eBay’s initial discovery requests,
4 Defendants have denied any knowledge or possession of the PSA or other AMP agreements.
5 Defendants contend that they may deny being parties to the PSA and at the same time argue that
6 the forum selection clause in the PSA applies under what they refer to as the “separability
7 doctrine.” Defendants rely upon *Intercall Telecommunications, Inc. v. Instant Impact, Inc.*, 376
8 F. Supp. 2d 155 (D.P.R. 2005), which held that “Courts must distinguish between challenges to
9 the validity of the underlying contract on the one hand, and to the validity of the forum selection
10 clause in particular, on the other. Under the purview of this separability doctrine, a forum
11 selection clause is deemed to be separate from, and independent of, the contract containing it.”
12 *Id.* at 160. However, while this rule appears sound, it is not controlling here. In *Intercall*, the
13 issue was whether a forum selection clause could be enforced despite a potential finding that the
14 contract itself was invalid due to fraud. *See id.* at 159. In contrast, Defendants’ response to
15 eBay’s initial discovery requests either has been to deny being a party to the PSA, *see* DPS
16 Defendants’ Reply Br. at 6, or to deny possessing the PSA, *see* KFC Defendants’ Reply Br. at 8;
17 Todd Dunning Defendants’ Reply Br. at 3 n.6.¹⁰

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22 ¹⁰ In addition, during the CJ Action the Non-DPS Defendants submitted filed a “Joint
Trial Brief” that stated in relevant part:

23 No contract between CJI and Kessler’s was produced. CJI has
24 never produced during pretrial discovery a copy of a contract that
25 Kessler’s “accepted” for participation in CJI’s affiliate marketing
26 program. CJI attached to its Second Amended Complaint a copy
27 of a Publisher Service Agreement (“PSA”) dated in June 2005, but
28 this date is several months after CJI’s own records show, and the
Second Amended Complaint claims, that Kessler joined the
program. CJI has not provided evidence of the applicable PSA, or
Kessler’s “acceptance” in April 2005, and therefore CJI cannot

1 In light of the factually inconsistent positions taken by the parties as to the authenticity of
2 the PSA, resolution of the motion to dismiss for improper venue is premature. *See Murphy*, 362
3 F.3d at 1139 (“at least until facts are resolved, in many cases the non-moving party will survive
4 the Rule 12(b)(3) motion.”). Presumably, the applicability of the PSA and its forum selection
5 clause will be revealed through additional discovery, especially discovery obtained from
6 nonparty CJ. Alternatively, affidavits submitted by either party, either affirming or denying the
7 existence of the PSA, may be sufficient to resolve the factual dispute.¹¹ *See id.* at 1138-39.
8 Accordingly, the motion by the Non-DPS Defendants to dismiss for improper venue will be
9 denied, but the denial is without prejudice to a renewed motion once the record is developed
10 more fully. *See id.* (“district court may deny the Rule 12(b)(3) motion while granting leave to
11 refile it if further development of the record eliminates any genuine factual issue.”). *See also*
12 *Long v. Postorivo*, C 07-01547, 2007 WL 2990457, at *2 (N.D. Cal. Oct. 11, 2007) (denying
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19 meet its evidentiary burden of proving the terms of a binding
20 contract and CJ cannot prove the terms allegedly breached by
Kessler’s.

21 Kennedy Decl. Ex. 1 at 3. However, these representations are not necessarily binding here, as
22 they relate to substantive defenses that were to be raised at trial in the CJ Action.

23 ¹¹ The SAC, perhaps intentionally, does not provide specific details with respect to the
24 content of the agreements governing the AMP. *See SAC* ¶ 20 (“The relationship between eBay
25 and CJ was governed at all relevant times by various Advertiser Service Agreements.”).
26 Defendants further argue that eBay *itself* has not—and cannot—disclaim the existence of the
27 PSA because the Defendants in fact *were* parties to the PSA. eBay’s conclusory allegations that
28 the User Agreement is the only agreement at issue may be disregarded under the Rule 12(b)(3)
standard. *See Argueta*, 87 F.3d at 324 (“Under the Supreme Court’s standard for resolving
motions to dismiss based on a forum selection clause, the pleadings are not accepted as true, as
would be required under a Rule 12(b)(6) analysis.”).

1 motion to dismiss for improper venue without prejudice and with right to renew motion upon
2 additional evidence).¹²

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4 B. Dismissal for Failure to State a Claim

5 On a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6),
6 “[d]ismissal is appropriate only where the complaint lacks a cognizable legal theory or sufficient
7 facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d
8 1097, 1104 (9th Cir. 2008). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss
9 does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
10 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of
11 the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955,
12 1964-65 (2007) (citations omitted). “Generally, a district court may not consider any material
13 beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard*
14 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.1990). Exceptions to this rule include material
15 submitted with the complaint and documents whose “‘authenticity...is not contested’ and ‘the
16 plaintiff’s complaint necessarily relies’ on them.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688
17 (9th Cir. 2001). *See also Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other*
18 *grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (“documents
19 whose contents are alleged in a complaint and whose authenticity no party questions, but which
20 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
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26 ¹² Denial without prejudice also is warranted because there is evidence that Defendants
27 were participants in the AMP program (and thus signatories to the PSA) in light of the language
28 of the MSA as well as the eBay’s tracking of Defendants’ actions through their “PID” numbers.
See SAC ¶ 56. “PID” is not defined in the SAC but may refer to a “Publisher ID,” thus
indicating that Defendants were “Publishers,” *i.e.*, advertising affiliates and participants in the
AMP.

1 motion to dismiss.”). A court also may take judicial notice of “matters of public record.” *Lee*,
2 250 F.3d at 689 (citation omitted).

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4 1. Statute of Limitations Clause in PSA

5 All Defendants contend that eBay’s revised allegations reveal that the PSA was
6 terminated in June 2007, more than one year prior to the filing of the instant action. Section 7(e)
7 of the PSA states:

8 ANY OBLIGATION OR LIABILITY OF CJ UNDER THIS
9 AGREEMENT SHALL BE LIMITED TO THE TOTAL OF
10 YOUR PAYOUTS PAID TO YOU BY CJ UNDER THIS
11 AGREEMENT DURING THE YEAR PRECEDING THE
12 CLAIM. NO ACTION, SUIT OR PROCEEDING SHALL BE
13 BROUGHT AGAINST THE OTHER PARTY TO THIS
14 AGREEMENT MORE THAN ONE YEAR AFTER THE
15 TERMINATION OF THIS AGREEMENT. YOU AGREE
16 THAT CJ SHALL NOT BE LIABLE TO YOU, OR ANY
17 THIRD PARTY (INCLUDING BUT NOT LIMITED TO A
18 CLAIM BY ANOTHER PUBLISHER OR AN ADVERTISER
19 OF THE NETWORK SERVICE), FOR ANY
20 CONSEQUENTIAL, EXEMPLARY, SPECIAL,
21 INCIDENTAL, OR PUNITIVE DAMAGES, INCLUDING,
22 BUT NOT LIMITED TO, LOSS OF GOODWILL, LOST
23 PROFITS, BUSINESS INTERRUPTION, LOSS OF
24 PROGRAMS OR OTHER DATA, EVEN IF ADVISED OF
25 THE POSSIBILITY OF SUCH DAMAGES OR CLAIM.

26 Compendium Ex. 2 at 4. Defendants point out that the SAC repeatedly alleges that the cookie
27 stuffing continued from 2004 through at least June 2007, and that by June 2007 eBay had
28 gathered sufficient evidence to determine that Defendants had misled eBay. *See* SAC ¶¶ 57-58.
The Todd Dunning Defendants also have submitted a purported termination letter from CJ, dated
June 27, 2007, that stated in relevant part: “You are removed from the CJ Network and your
earnings have been forfeited. You are not eligible to rejoin the CJ Network and any attempt to
do so shall be rejected.” Foreman Supp. Decl. Ex. 3. However, the termination language of the
PSA creates a scenario in which actual termination might be a question of fact, as an affiliate’s

1 account “may be deactivated during investigation of breach of this Agreement.” Foreman Decl.
2 Ex. 1 at 3. eBay also argues that dismissal would be premature because the authenticity of the
3 PSA is in question.¹³ Because factual issues exist with respect to when the Defendants were
4 terminated from the AMP, as well as whether Defendants were in fact parties to the PSA, the
5 limitations clause does not bar eBay’s claim at this stage of the proceedings.¹⁴
6

7 2. RICO Claim

8 The Todd Dunning Defendants seek dismissal of eBay’s RICO claim on the ground that
9 the statute of limitations has expired. A civil RICO claim must be brought within four years of
10 when the plaintiff discovers the injury. *See Rotella v. Wood*, 528 U.S. 549, 552 (2000). In the
11 Ninth Circuit, a cause of action begins to accrue once a plaintiff “has reason to discover the cause
12 of action when he has reason at least to *suspect* a factual basis for its elements.” *Soliman v.*
13 *Philip Morris Inc.*, 311 F.3d 966 (9th Cir. 2002) (quoting *Norgart v. Upjohn Co.*, 21 Cal. 4th
14 383, 398 (1999)). The SAC alleges that the cookie stuffing scheme began in 2004, and the Todd
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17 ¹³ eBay contends that Fed. R. Civ. P. 12(g) bars Defendants from presenting any
18 limitations arguments in the instant motions. Rule 12(g)(2) states that “[e]xcept as provided in
19 Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion
20 under this rule raising a defense or objection that was available to the party but omitted from its
21 earlier motion.” However, “Under Rule 12(h), defenses for failure to state a claim may be
22 presented at any time up to and including trial, and under Rule 12(g), a party does not waive a
23 ground for moving to dismiss for failure to state a claim by not including that ground in an earlier
24 motion to dismiss.” *In re Harmonic, Inc., Sec. Litig.*, No. C 00-2287, 2006 WL 3591148, at *12
25 (N.D. Cal. Dec. 11, 2006) (citing Fed. R. Civ. P. 12(g), (h)). In addition, the SAC contains new
26 allegations with respect to when eBay may have discovered the cookie stuffing scheme.
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28 ¹⁴ Even if the above-quoted language is true and correct, it does not preclude eBay from
bringing a CFAA claim unrelated to the PSA. In addition, the relevant language does not appear
to bind third parties: “NO ACTION, SUIT OR PROCEEDING SHALL BE BROUGHT
AGAINST *THE OTHER PARTY TO THIS AGREEMENT* MORE THAN ONE YEAR AFTER
THE TERMINATION OF THIS AGREEMENT.” (emphasis added). This specific language
contrasts the broader language found in the forum selection clause. The Court also is not
convinced that the T&C Agreement incorporates all of the obligations of the PSA, so that eBay
stands in the shoes of CJ.

1 Dunning Defendants argue that eBay should have been tipped off as early as April 2004 because
2 of “excessive” commission payments. However, the SAC alleges that all Defendants actively
3 concealed the scheme, employing technological measures to avoid detection as well as providing
4 misinformation to eBay when questioned about the commission payments. While eBay
5 eventually was able to discern that the scheme may have reached back to 2004, the SAC alleges
6 that this discovery occurred more recently, well within the statute of limitations period, and
7 through a retrospective analysis of data. *See* SAC ¶ 57. At best, there is a question of fact with
8 respect to when eBay had reason to discover the scheme. Accordingly, the motion to dismiss the
9 RICO claim will be denied.
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12 3. Effect of Settlement in CJ Action

13 The Non-DPS Defendants contend that the settlement in the CJ Action released all claims
14 against them relating to their alleged breach of the PSA. The settlement agreement stated in
15 relevant part that CJ, “together with their principals, agents, attorneys, representatives,
16 subsidiaries, parents, assigns, successors, and predecessors...fully and forever release[] [the Non-
17 DPS Defendants]” from all claims. Compendium Ex. 10 at 2. The Non-DPS Defendants argue
18 that eBay is a principal as contemplated by the settlement, and thus is precluded from
19 maintaining the instant action.
20

21 Contrary to Defendants’ assertion that there is “no question” that CJ acted as eBay’s
22 agent when it executed the settlement agreement, the limited record before the Court instead
23 indicates that the CJ Action did not involve eBay at all. Irrespective of whether the breach of
24 contract claims at issue in the CJ Action are related to the claims asserted in the instant case, the
25 fact that eBay had superior bargaining power in connection with the AMP agreements does not
26 mean that a settlement entered into by a separate and independent corporate entity is binding
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28

1 upon eBay. The Non-DPS Defendants have presented no factual proof that eBay “controlled” CJ
2 as an agent in the traditional sense, and the MSA expressly disclaims any principal-agent
3 relationship between eBay and CJ. *See* Kennedy Decl. Ex. 19, ¶ 12.3. Defendants have the
4 burden of proving the existence of any agency relationship, *see Burbank v. Nat’l Cas. Co.*, 43
5 Cal. App. 2d 773, 781 (1941), and that burden has not been met here.¹⁵

7 C. Motion to Transfer

8 In the Ninth Circuit, a transfer pursuant to § 1404(a) lies within the discretion of the
9 district court and depends on the facts of each particular case. *Jones v. GNC Franchising, Inc.*,
10 211 F.3d 495, 498 (9th Cir. 2000). The Court must consider both public factors, which go to the
11 interests of justice, and private factors, which go to the convenience of the parties and witnesses.
12 *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 843 (9th Cir. 1986). Because the
13 Court has declined to enforce the forum selection clause at least for the time being, eBay’s choice
14 of forum (and the fact that the CFAA-related harm occurred in this district) outweigh any
15 considerations favoring transfer.¹⁶

18 **III. ORDER**

19 Good cause therefor appearing, IT IS HEREBY ORDERED that the motions by the Non-
20 DPS Defendants to dismiss for improper venue are DENIED without prejudice. The motions to
21

22 _____
23 ¹⁵ The Non-DPS Defendants may raise this defense in the future if additional discovery
reveals facts to the contrary.

24 ¹⁶ Additional factors that the Court must consider include: (1) the location where the
25 relevant agreements were negotiated and executed; (2) the forum that is most familiar with the
26 governing law; (3) the parties’ respective contacts with the forum; (4) the contacts relating to the
27 plaintiff’s cause of action in the chosen forum; (5) the differences in the costs of litigation in the
28 two forums; (6) the availability of compulsory process to compel attendance of unwilling non-
party witnesses; (7) the ease of access to sources of proof; and (8) the relevant public policy of
the forum state, if any. *See Jones*, 211 F.3d at 498-99.

1 dismiss for failure to state a claim upon which relief may be granted and the motions to transfer are
2 DENIED.

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5 DATED: August 17, 2009

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8 JEREMY FOGEL
9 United States District Judge
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1 This Order was served on the following persons:

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