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7 Attorneys for Defendants, SHAWN HOGAN
 8 and DIGITAL POINT SOLUTIONS, INC.

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

12	EBAY, INC.,)	Case No. CV 08-04052 JF PVT
)	
13	Plaintiff,)	ANSWER OF DEFENDANT SHAWN
)	HOGAN TO PLAINTIFF’S SECOND
14	v.)	AMENDED COMPLAINT
)	
15	DIGITAL POINT SOLUTIONS, INC., SHAWN)	Date action filed: August 25, 2008
	HOGAN, KESSLER’S FLYING CIRCUS,)	Dept.: Courtroom 3
16	THUNDERWOOD HOLDINGS, INC., TODD)	
	DUNNING, DUNNING ENTERPRISE, INC.,)	
17	BRIAN DUNNING, BRIANDUNNING.COM,)	
	and Does 1-20,)	
18)	
19	Defendants.)	
20)	
)	

21
 22 Defendant SHAWN HOGAN (“Defendant”) hereby answer the allegations of Plaintiff E-BAY,
 23 INC.’s (“Plaintiff’s”) March 26, 2009 Second Amended Complaint (“SAC”) in the above-captioned
 24 matter as follows:

25 1. In response to paragraph 1 of the SAC, Defendant is without sufficient knowledge or
 26 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
 27 basis denies each and every allegation contained therein.

28 /././

1 2. In response to paragraph 2 of the SAC, Defendant admits that Defendant DIGITAL
2 POINT SOLUTIONS, INC. was incorporated as a California corporation on May 14, 2007, but denies
3 all remaining allegations contained therein.

4 3. In response to paragraph 3 of the SAC, Defendant admits that at all relevant times,
5 Defendant was an individual residing and doing business in the State of California. Defendant admits
6 that Defendant DIGITAL POINT SOLUTIONS, INC. was incorporated as a California corporation on
7 May 14, 2007 and that Defendant has been the sole owner thereof at all relevant times thereafter.
8 Defendant denies all remaining allegations contained in paragraph 3.

9 4. In response to paragraph 4 of the SAC, this paragraph does not allege any facts and
10 therefore does not require a response.

11 5. In response to paragraph 5 of the SAC, Defendant is without sufficient knowledge or
12 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
13 basis denies each and every allegation contained therein.

14 6. In response to paragraph 6 of the SAC, Defendant is without sufficient knowledge or
15 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
16 basis denies each and every allegation contained therein.

17 7. In response to paragraph 7 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
19 basis denies each and every allegation contained therein.

20 8. In response to paragraph 8 of the SAC, Defendant is without sufficient knowledge or
21 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
22 basis denies each and every allegation contained therein.

23 9. In response to paragraph 9 of the SAC, Defendant is without sufficient knowledge or
24 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
25 basis denies each and every allegation contained therein.

26 10. In response to paragraph 10 of the SAC, Defendant is without sufficient knowledge or
27 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
28 basis denies each and every allegation contained therein.

1 11. In response to paragraph 11 of the SAC, this paragraph does not allege any facts and
2 therefore does not require a response.

3 12. In response to paragraph 12 of the SAC, Defendant is without sufficient knowledge or
4 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
5 basis denies each and every allegation contained therein.

6 13. In response to paragraph 13 of the SAC, this paragraph does not allege any facts and
7 therefore does not require a response.

8 **JURISDICTION AND VENUE**

9 14. In response to paragraph 14 of the SAC, Defendant denies each and every allegation
10 contained therein.

11 15. In response to paragraph 15 of the SAC, Defendant denies each and every allegation
12 contained therein.

13 16. In response to paragraph 16 of the SAC, Defendant denies each and every allegation
14 contained therein.

15 **INTRADISTRICT ASSIGNMENT**

16 17. In response to paragraph 17 of the SAC, Defendant is without sufficient knowledge or
17 information to form a belief as to the truth of the allegations that Plaintiff's headquarters are located in
18 San Jose, Santa Clara County, California, and on that basis denies said allegations. As to the remaining
19 allegations contained therein, Defendant asserts the privilege against self-incrimination under the Fifth
20 Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the California
21 Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant
22 determines that there is no longer potential for criminal prosecution, Defendant expressly reserves the
23 right to withdraw his assertion of the privilege, to supplement and/or seek leave to amend this response
24 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
25 purpose whatsoever.

26 **GENERAL ALLEGATIONS**

27 18. In response to paragraph 18 of the SAC, Defendant admits that Plaintiff operates an
28 online trading forum and that sellers may list items for sale and buyers may bid on and purchase items of

1 interest through Plaintiff's website. Defendant is without sufficient knowledge or information to form a
2 belief as to the truth of the allegations regarding the present circumstances under which Plaintiff operates
3 its affiliate marketing program, and on that basis denies each and every remaining allegation contained
4 therein.

5 19. In response to paragraph 19 of the SAC, Defendant is without sufficient knowledge or
6 information to form a belief as to the truth of the allegations regarding the circumstances under which
7 Plaintiff presently operates its affiliate marketing program, and on that basis denies each and every
8 allegation contained therein.

9 20. In response to paragraph 20 of the SAC, Defendant admits that Plaintiff has used the
10 services of Commission Junction's in administering the affiliate marketing program. Defendant is
11 without sufficient knowledge or information to form a belief as to the truth of the remaining allegations
12 contained in said paragraph, and on that basis denies each and every allegation contained therein.

13 21. In response to paragraph 21 of the SAC, Defendant is without sufficient knowledge or
14 information to form a belief as to the truth of the allegations regarding the circumstances under which
15 Plaintiff presently operates its affiliate marketing program, and on that basis denies each and every
16 allegation contained therein.

17 22. In response to paragraph 22 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations regarding the circumstances under which
19 Plaintiff presently operates its affiliate marketing program, and on that basis denies each and every
20 allegation contained therein.

21 23. In response to paragraph 23 of the SAC, Defendant is without sufficient knowledge or
22 information to form a belief as to the truth of the allegations regarding the circumstances under which
23 Plaintiff presently operates its affiliate marketing program, and on that basis denies each and every
24 allegation contained therein.

25 24. In response to paragraph 24 of the SAC, the alleged definition of "cookie stuffing" does
26 not allege any facts and therefore does not require a response. Defendant is without sufficient
27 knowledge or information to form a belief as to the truth of the allegations relating to Plaintiff's alleged
28 analyses, and on that basis denies each such allegation. Defendant is without sufficient knowledge or

1 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
2 each such allegation. As to the remaining allegations contained therein, Defendant asserts the privilege
3 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
4 Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence
5 Code section 940. To the extent Defendant determines that there is no longer potential for criminal
6 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to
7 supplement and/or seek leave to amend this response accordingly (in whole or in part), and to object to
8 the use or disclosure of the this response for any purpose whatsoever.

9 25. In response to paragraph 25 of the SAC, Defendant is without sufficient knowledge or
10 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
11 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
12 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
13 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
14 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
15 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
16 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
17 to object to the use or disclosure of the this response for any purpose whatsoever.

18 26. In response to paragraph 26 of the SAC, Defendant is without sufficient knowledge or
19 information to form a belief as to the truth of the allegations that the User Agreement was agreed to by
20 Defendant, and on that basis denies each such allegation contained therein. Defendant denies the
21 applicability of the alleged User Agreement and that any causes of action set forth in the SAC arose
22 therefrom. Defendant is without sufficient knowledge or information to form a belief as to the truth of
23 the allegations relating to KFC, and on that basis denies each such allegation contained therein. As to
24 the remaining allegations contained therein, Defendant hereby asserts the privilege against
25 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
26 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
27 section 940. To the extent Defendant determines that there is no longer potential for criminal
28 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek

1 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
2 use or disclosure of the this response for any purpose whatsoever.

3 27. In response to paragraph 27 of the SAC, Defendant is without sufficient knowledge or
4 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
5 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
6 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
7 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
8 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
9 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
10 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
11 to object to the use or disclosure of the this response for any purpose whatsoever.

12 28. In response to paragraph 28 of the SAC, Defendant hereby asserts the privilege against
13 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
14 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
15 section 940. To the extent Defendant determines that there is no longer potential for criminal
16 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
17 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
18 use or disclosure of the this response for any purpose whatsoever.

19 29. In response to paragraph 29 of the SAC, Defendant is without sufficient knowledge or
20 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
21 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
22 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
23 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
24 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
25 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
26 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
27 to object to the use or disclosure of the this response for any purpose whatsoever.

28 /././

1 30. In response to paragraph 30 of the SAC, Defendant hereby asserts the privilege against
2 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
3 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
4 section 940. To the extent Defendant determines that there is no longer potential for criminal
5 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
6 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
7 use or disclosure of the this response for any purpose whatsoever.

8 31. In response to paragraph 31 of the SAC, Defendant is without sufficient knowledge or
9 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
10 basis denies each and every allegation contained therein.

11 32. In response to paragraph 32 of the SAC, Defendant is without sufficient knowledge or
12 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
13 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
14 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
15 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
16 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
17 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
18 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
19 to object to the use or disclosure of the this response for any purpose whatsoever.

20 33. In response to paragraph 33 of the SAC, Defendant is without sufficient knowledge or
21 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
22 each such allegation contained therein. Defendant denies the applicability of the alleged User Agreement
23 and that any causes of action set forth in the SAC arose therefrom. As to the remaining allegations
24 contained therein, Defendant hereby asserts the privilege against self-incrimination under the Fifth
25 Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the California
26 Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant
27 determines that there is no longer potential for criminal prosecution, Defendant expressly reserves the
28 right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement this response

1 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
2 purpose whatsoever.

3 34. In response to paragraph 34 of the SAC, Defendant admits that Commission Junction
4 filed an action against Defendants Kessler's Flying Circus, Brian Dunning and Todd Dunning;
5 Commission Junction sought to recoup payments made to said defendants; and that said action has
6 settled. Defendant is without sufficient knowledge or information to form a belief as to the truth of the
7 remaining allegations contained in said paragraph, and on that basis denies each and every allegation
8 contained therein.

9 **FIRST CAUSE OF ACTION**
10 **(18 U.S.C. §1030)**

11 35. In response to paragraph 35 of the SAC, Defendant refers to and incorporates herein
12 Defendant's responses as provided in paragraphs 1 through 34 above.

13 36. In response to paragraph 36 of the SAC, Defendant is without sufficient knowledge or
14 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
15 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
16 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
17 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
18 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
19 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
20 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
21 to object to the use or disclosure of the this response for any purpose whatsoever.

22 37. In response to paragraph 37 of the SAC, Defendant is without sufficient knowledge or
23 information to form a belief as to the truth of the allegations regarding the similarity of the alleged User
24 Agreements or the terms thereof, and on that basis denies each such allegation contained therein.
25 Defendant denies the applicability of the alleged User Agreement and that any causes of action set forth
26 in the SAC arose therefrom. Defendant is without sufficient knowledge or information to form a belief
27 as to the truth of the allegations relating to KFC, and on that basis denies each such allegation contained
28 therein. As to the remaining allegations contained in said paragraph, Defendant hereby asserts the

1 privilege against self-incrimination under the Fifth Amendment to the United States Constitution; the
2 Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
3 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
4 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to
5 seek leave to amend and/or supplement this response accordingly (in whole or in part), and to object to
6 the use or disclosure of the this response for any purpose whatsoever.

7 38. In response to paragraph 38 of the SAC, Defendant is without sufficient knowledge or
8 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
9 each such allegation contained therein. Defendant denies each and every remaining allegation contained
10 therein.

11 39. In response to paragraph 39 of the SAC, Defendant is without sufficient knowledge or
12 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
13 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
14 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
15 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
16 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
17 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
18 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
19 to object to the use or disclosure of the this response for any purpose whatsoever.

20 40. In response to paragraph 40 of the SAC, Defendant hereby asserts the privilege against
21 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
22 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
23 section 940. To the extent Defendant determines that there is no longer potential for criminal
24 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
25 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
26 use or disclosure of the this response for any purpose whatsoever.

27 41. In response to paragraph 41 of the SAC, Defendant is without sufficient knowledge or
28 information to form a belief as to the truth of the allegations contained in said paragraph, and on that

1 basis denies each and every allegation contained therein.

2 42. In response to paragraph 42 of the SAC, Defendant is without sufficient knowledge or
3 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
4 basis denies each and every allegation contained therein.

5 43. In response to paragraph 43 of the SAC, Defendant is without sufficient knowledge or
6 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
7 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
8 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
9 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
10 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
11 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
12 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
13 to object to the use or disclosure of the this response for any purpose whatsoever.

14 44. In response to paragraph 44 of the SAC, Defendant responds to Plaintiff's prayer for
15 relief as set forth below.

16 **SECOND CAUSE OF ACTION**
17 **(18 U.S.C. §1962(c))**

18 45. In response to paragraph 45 of the SAC, Defendant refers to and incorporates herein
19 Defendant's responses as provided in paragraphs 1 through 44 above.

20 46. In response to paragraph 46 of the SAC, Defendant is without sufficient knowledge or
21 information to form a belief as to the truth of the allegations relating to defendants Brian Dunning and
22 Todd Dunning, and on that basis denies each such allegation contained therein. As to the remaining
23 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the
24 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
25 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
26 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
27 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
28 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response

1 for any purpose whatsoever.

2 47. In response to paragraph 47 of the SAC, Defendant admits that Defendant DIGITAL
3 POINT SOLUTIONS, INC. was incorporated as a California corporation on May 14, 2007. As to the
4 remaining allegations contained therein, Defendant hereby asserts the privilege against self-incrimination
5 under the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501;
6 the California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
7 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
8 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
9 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
10 this response for any purpose whatsoever.

11 48. In response to paragraph 48 of the SAC, Defendant hereby asserts the privilege against
12 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
13 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
14 section 940. To the extent Defendant determines that there is no longer potential for criminal
15 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
16 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
17 use or disclosure of the this response for any purpose whatsoever.

18 49. In response to paragraph 49 of the SAC, Defendant is without sufficient knowledge or
19 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
20 basis denies each and every allegation contained therein.

21 50. In response to paragraph 50 of the SAC, Defendant is without sufficient knowledge or
22 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged Dunning
23 Group, and on that basis denies each such allegation contained therein. As to the remaining allegations
24 contained therein, Defendant hereby asserts the privilege against self-incrimination under the Fifth
25 Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the California
26 Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant
27 determines that there is no longer potential for criminal prosecution, Defendant expressly reserves the
28 right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement this response

1 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
2 purpose whatsoever.

3 51. In response to paragraph 51 of the SAC, Defendant is without sufficient knowledge or
4 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged Dunning
5 Group, and on that basis denies each such allegation contained therein. As to the remaining allegations
6 contained therein, Defendant hereby asserts the privilege against self-incrimination under the Fifth
7 Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the California
8 Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant
9 determines that there is no longer potential for criminal prosecution, Defendant expressly reserves the
10 right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement this response
11 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
12 purpose whatsoever.

13 52. In response to paragraph 52 of the SAC, Defendant is without sufficient knowledge or
14 information to form a belief as to the truth of the allegations relating to any investigation conducted by
15 Plaintiff, and on that basis denies each such allegation contained therein. As to the remaining allegations
16 contained therein, Defendant hereby asserts the privilege against self-incrimination under the Fifth
17 Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the California
18 Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant
19 determines that there is no longer potential for criminal prosecution, Defendant expressly reserves the
20 right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement this response
21 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
22 purpose whatsoever.

23 53. In response to paragraph 53 of the SAC, Defendant is without sufficient knowledge or
24 information to form a belief as to the truth of the allegations relating to any tests conducted by Plaintiff,
25 and on that basis denies each such allegation contained therein. Defendant is without sufficient
26 knowledge or information to form a belief as to the truth of the allegations relating to KFC and/or the
27 alleged Dunning Group, and on that basis denies each such allegation contained therein. As to the
28 remaining allegations contained therein, Defendant hereby asserts the privilege against self-incrimination

1 under the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501;
2 the California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
3 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
4 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
5 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
6 this response for any purpose whatsoever.

7 54. In response to paragraph 54 of the SAC, Defendant is without sufficient knowledge or
8 information to form a belief as to the truth of the allegations relating to investigations conducted or
9 actions undertaken by Gallivan, Gallivan & O'Melia LLC, and on that basis denies each such allegation
10 contained therein. As to the remaining allegations contained therein, Defendant hereby asserts the
11 privilege against self-incrimination under the Fifth Amendment to the United States Constitution; the
12 Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
13 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
14 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to
15 seek leave to amend and/or supplement this response accordingly (in whole or in part), and to object to
16 the use or disclosure of the this response for any purpose whatsoever.

17 55. In response to paragraph 55 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations relating to investigations conducted or
19 actions undertaken by Gallivan, Gallivan & O'Melia LLC, and on that basis denies each such allegation
20 contained therein. As to the remaining allegations contained therein, Defendant hereby asserts the
21 privilege against self-incrimination under the Fifth Amendment to the United States Constitution; the
22 Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
23 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
24 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to
25 seek leave to amend and/or supplement this response accordingly (in whole or in part), and to object to
26 the use or disclosure of the this response for any purpose whatsoever.

27 56. In response to paragraph 56 of the SAC, Defendant is without sufficient knowledge or
28 information to form a belief as to the truth of the allegations relating to investigations conducted or

1 actions undertaken by Plaintiff, and on that basis denies each such allegation contained therein.
2 Defendant is without sufficient knowledge or information to form a belief as to the truth of the
3 allegations relating to KFC and/or the alleged Dunning Group, and on that basis denies each such
4 allegation contained therein. As to the remaining allegations contained therein, Defendant hereby asserts
5 the privilege against self-incrimination under the Fifth Amendment to the United States Constitution; the
6 Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
7 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
8 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to
9 seek leave to amend and/or supplement this response accordingly (in whole or in part), and to object to
10 the use or disclosure of the this response for any purpose whatsoever.

11 57. In response to paragraph 57 of the SAC, Defendant is without sufficient knowledge or
12 information to form a belief as to the truth of the allegations relating to actions undertaken by Plaintiff,
13 and on that basis denies each such allegation contained therein. Defendant is without sufficient
14 knowledge or information to form a belief as to the truth of the allegations relating to KFC and/or the
15 alleged Dunning Group, and on that basis denies each such allegation contained therein. As to the
16 remaining allegations contained therein, Defendant hereby asserts the privilege against self-incrimination
17 under the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501;
18 the California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
19 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
20 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
21 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
22 this response for any purpose whatsoever.

23 58. In response to paragraph 58 of the SAC, Defendant is without sufficient knowledge or
24 information to form a belief as to the truth of the allegations relating to actions undertaken by Plaintiff,
25 and on that basis denies each such allegation contained therein. Defendant is without sufficient
26 knowledge or information to form a belief as to the truth of the allegations relating to KFC and/or Todd
27 Dunning, and on that basis denies each such allegation contained therein. As to the remaining
28 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the

1 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
2 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
3 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
4 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
5 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response
6 for any purpose whatsoever.

7 59. In response to paragraph 59 of the SAC, Defendant is without sufficient knowledge or
8 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged Dunning
9 Group, and on that basis denies each such allegation contained therein. As to the remaining allegations
10 contained therein, Defendant hereby asserts the privilege against self-incrimination under the Fifth
11 Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the California
12 Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant
13 determines that there is no longer potential for criminal prosecution, Defendant expressly reserves the
14 right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement this response
15 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
16 purpose whatsoever.

17 60. In response to paragraph 60 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations relating to KFC, Todd Dunning, Brian
19 Dunning, and/or the alleged Dunning Group, and on that basis denies each such allegation contained
20 therein. As to the remaining allegations contained therein, Defendant hereby asserts the privilege against
21 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
22 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
23 section 940. To the extent Defendant determines that there is no longer potential for criminal
24 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
25 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
26 use or disclosure of the this response for any purpose whatsoever.

27 61. In response to paragraph 61 of the SAC, Defendant is without sufficient knowledge or
28 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies

1 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
2 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
3 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
4 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
5 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
6 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
7 to object to the use or disclosure of the this response for any purpose whatsoever.

8 62. In response to paragraph 62 of the SAC, Defendant is without sufficient knowledge or
9 information to form a belief as to the truth of the allegations relating to the alleged Dunning Group, and
10 on that basis denies each such allegation contained therein. As to the remaining allegations contained
11 therein, Defendant hereby asserts the privilege against self-incrimination under the Fifth Amendment to
12 the United States Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution,
13 Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant determines
14 that there is no longer potential for criminal prosecution, Defendant expressly reserves the right to
15 withdraw his assertion of the privilege, to seek leave to amend and/or supplement this response
16 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
17 purpose whatsoever.

18 63. In response to paragraph 63 of the SAC, Defendant is without sufficient knowledge or
19 information to form a belief as to the truth of the allegations relating to the alleged Dunning Group, and
20 on that basis denies each such allegation contained therein. As to the remaining allegations contained
21 therein, Defendant hereby asserts the privilege against self-incrimination under the Fifth Amendment to
22 the United States Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution,
23 Article 1, Section 15; and California Evidence Code section 940. To the extent Defendant determines
24 that there is no longer potential for criminal prosecution, Defendant expressly reserves the right to
25 withdraw his assertion of the privilege, to seek leave to amend and/or supplement this response
26 accordingly (in whole or in part), and to object to the use or disclosure of the this response for any
27 purpose whatsoever.

28 /././

1 64. In response to paragraph 64 of the SAC, Defendant responds to Plaintiff's prayer for
2 relief as set forth below.

3 **THIRD CAUSE OF ACTION**
4 **(Fraud)**

5 65. In response to paragraph 65 of the SAC, Defendant refers to and incorporates herein
6 Defendant's responses as provided in paragraphs 1 through 64 above.

7 66. In response to paragraph 66 of the SAC, Defendant is without sufficient knowledge or
8 information to form a belief as to the truth of the allegations relating to the alleged DOE defendants, and
9 on that basis denies each such allegation contained therein. As to the remaining allegations, Defendant
10 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
11 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
12 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
13 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
14 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
15 to object to the use or disclosure of the this response for any purpose whatsoever.

16 67. In response to paragraph 67 of the SAC, Defendant is without sufficient knowledge or
17 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
18 basis denies each and every allegation contained therein.

19 68. In response to paragraph 68 of the SAC, Defendant is without sufficient knowledge or
20 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged DOE
21 defendants, and on that basis denies each such allegation contained therein. As to the remaining
22 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the
23 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
24 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
25 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
26 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
27 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response
28 for any purpose whatsoever.

1 69. In response to paragraph 69 of the SAC, Defendant is without sufficient knowledge or
2 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged DOE
3 defendants, and on that basis denies each such allegation contained therein. As to the remaining
4 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the
5 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
6 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
7 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
8 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
9 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response
10 for any purpose whatsoever.

11 70. In response to paragraph 70 of the SAC, Defendant is without sufficient knowledge or
12 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged DOE
13 defendants, and on that basis denies each such allegation contained therein. As to the remaining
14 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the
15 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
16 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
17 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
18 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
19 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response
20 for any purpose whatsoever.

21 71. In response to paragraph 71 of the SAC, Defendant is without sufficient knowledge or
22 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged DOE
23 defendants, and on that basis denies each such allegation contained therein. As to the remaining
24 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the
25 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
26 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
27 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
28 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement

1 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response
2 for any purpose whatsoever.

3 72. In response to paragraph 72 of the SAC, Defendant is without sufficient knowledge or
4 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged DOE
5 defendants, and on that basis denies each such allegation contained therein. As to the remaining
6 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the
7 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
8 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
9 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
10 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
11 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response
12 for any purpose whatsoever.

13 73. In response to paragraph 73 of the SAC, Defendant hereby asserts the privilege against
14 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
15 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
16 section 940. To the extent Defendant determines that there is no longer potential for criminal
17 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
18 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
19 use or disclosure of the this response for any purpose whatsoever.

20 74. In response to paragraph 74 of the SAC, Defendant is without sufficient knowledge or
21 information to form a belief as to the truth of the allegations relating to KFC and/or the alleged DOE
22 defendants, and on that basis denies each such allegation contained therein. As to the remaining
23 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under the
24 Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
25 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the extent
26 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
27 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
28 this response accordingly (in whole or in part), and to object to the use or disclosure of the this response

1 for any purpose whatsoever.

2 75. In response to paragraph 75 of the SAC, Defendant responds to Plaintiff’s prayer for
3 relief as set forth below.

4 **FOURTH CAUSE OF ACTION**
5 **(California Penal Code §502)**

6 76. In response to paragraph 76 of the SAC, Defendant refers to and incorporates herein
7 Defendant’s responses as provided in paragraphs 1 through 75 above.

8 77. In response to paragraph 77 of the SAC, Defendant is without sufficient knowledge or
9 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
10 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
11 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
12 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
13 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
14 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
15 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
16 to object to the use or disclosure of the this response for any purpose whatsoever.

17 78. In response to paragraph 78 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
19 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
20 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
21 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
22 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
23 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
24 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
25 to object to the use or disclosure of the this response for any purpose whatsoever.

26 79. In response to paragraph 79 of the SAC, Defendant is without sufficient knowledge or
27 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
28 each such allegation contained therein. As to the remaining allegations contained therein, Defendant

1 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
2 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
3 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
4 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
5 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
6 to object to the use or disclosure of the this response for any purpose whatsoever.

7 80. In response to paragraph 80 of the SAC, Defendant is without sufficient knowledge or
8 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
9 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
10 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
11 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
12 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
13 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
14 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
15 to object to the use or disclosure of the this response for any purpose whatsoever.

16 81. In response to paragraph 81 of the SAC, Defendant responds to Plaintiff's prayer for
17 relief as set forth below.

18 **FIFTH CAUSE OF ACTION**
19 **(Restitution and Unjust Enrichment)**

20 82. In response to paragraph 82 of the SAC, Defendant refers to and incorporates herein
21 Defendant's responses as provided in paragraphs 1 through 81 above.

22 83. In response to paragraph 83 of the SAC, Defendant is without sufficient knowledge or
23 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
24 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
25 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
26 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
27 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
28 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the

1 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
2 to object to the use or disclosure of the this response for any purpose whatsoever.

3 84. In response to paragraph 84 of the SAC, Defendant is without sufficient knowledge or
4 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
5 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
6 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
7 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
8 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
9 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
10 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
11 to object to the use or disclosure of the this response for any purpose whatsoever.

12 85. In response to paragraph 85 of the SAC, Defendant is without sufficient knowledge or
13 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
14 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
15 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
16 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
17 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
18 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
19 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
20 to object to the use or disclosure of the this response for any purpose whatsoever.

21 86. In response to paragraph 86 of the SAC, Defendant responds to Plaintiff's prayer for
22 relief as set forth below.

23 **SIXTH CAUSE OF ACTION**

24 **(California Business & Professions Code §17200)**

25 87. In response to paragraph 87 of the SAC, Defendant refers to and incorporates herein
26 Defendant's responses as provided in paragraphs 1 through 86 above.

27 88. In response to paragraph 88 of the SAC, Defendant is without sufficient knowledge or
28 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies

1 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
2 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
3 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
4 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
5 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
6 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
7 to object to the use or disclosure of the this response for any purpose whatsoever.

8 89. In response to paragraph 89 of the SAC, Defendant is without sufficient knowledge or
9 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
10 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
11 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
12 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
13 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
14 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
15 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
16 to object to the use or disclosure of the this response for any purpose whatsoever.

17 90. In response to paragraph 90 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
19 each such allegation contained therein. As to the remaining allegations contained therein, Defendant
20 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
21 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
22 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
23 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
24 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
25 to object to the use or disclosure of the this response for any purpose whatsoever.

26 91. In response to paragraph 91 of the SAC, Defendant is without sufficient knowledge or
27 information to form a belief as to the truth of the allegations relating to KFC, and on that basis denies
28 each such allegation contained therein. As to the remaining allegations contained therein, Defendant

1 hereby asserts the privilege against self-incrimination under the Fifth Amendment to the United States
2 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
3 and California Evidence Code section 940. To the extent Defendant determines that there is no longer
4 potential for criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the
5 privilege, to seek leave to amend and/or supplement this response accordingly (in whole or in part), and
6 to object to the use or disclosure of the this response for any purpose whatsoever.

7 92. In response to paragraph 92 of the SAC, Defendant responds to Plaintiff's prayer for
8 relief as set forth below.

9 **AFFIRMATIVE DEFENSES**

10 Defendant alleges the following affirmative defenses:

11 **FIRST AFFIRMATIVE DEFENSE**

12 (Failure to State a Claim)

13 93. As a first, separate and distinct affirmative defense, and solely by way of an alternative
14 defense, not to be construed as an admission or waiver of any kind, Defendants allege that Plaintiff's
15 SAC, and every purported cause of action stated therein, fails to state facts sufficient to constitute a
16 cause of action against Defendant.

17 **SECOND AFFIRMATIVE DEFENSE:**

18 (Contractual Limitations Period)

19 94. As a second and separate Affirmative Defense, and solely by way of an alternative
20 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and
21 each and every cause of action therein is barred by the one-year contractual limitations provision set
22 forth in the Commission Junction Publisher Services Agreement of which Plaintiff is a third party
23 beneficiary and which Plaintiff incorporated by reference into the eBay Supplemental Terms &
24 Conditions.

25 **THIRD AFFIRMATIVE DEFENSE:**

26 (Statute of Limitations)

27 95. As a third and separate Affirmative Defense, and solely by way of an alternative defense,
28 not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and each and
every cause of action therein is barred by the applicable statute of limitations. Said limitations include,

1 but are not limited to, 18 U.S.C. §1030(g), 15 U.S.C. §15b (as applied to 18 U.S.C. §§1962, 1964),
2 California Penal Code §502(e)(5), California Code of Civil Procedure §§ 338, 339, and California
3 Business & Professions Code §17208.

4 FOURTH AFFIRMATIVE DEFENSE:
5 (Improper Venue)

6 96. As a fourth and separate Affirmative Defense, and solely by way of an alternative
7 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the filing of
8 this action in the above-captioned Court is improper based on the forum selection clause set forth in the
9 Commission Junction Publisher Services Agreement of which Plaintiff is a third party beneficiary and
10 which Plaintiff incorporated by reference into the eBay Supplemental Terms & Conditions.

11 FIFTH AFFIRMATIVE DEFENSE:
12 (Consent)

13 97. As a fifth and separate Affirmative Defense, and solely by way of an alternative defense,
14 not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and each and
15 every cause of action therein is barred because any such conduct as alleged in the SAC was consented to
16 by Plaintiff.

17 SIXTH AFFIRMATIVE DEFENSE:
18 (Authorization)

19 98. As a sixth and separate Affirmative Defense, and solely by way of an alternative defense,
20 not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and each and
21 every cause of action therein is barred because any such conduct as alleged in the SAC was known,
22 authorized, and encouraged by Plaintiff.

23 SEVENTH AFFIRMATIVE DEFENSE:
24 (Estoppel)

25 99. As a seventh and separate Affirmative Defense, and solely by way of an alternative
26 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and
27 each and every cause of action therein is barred because Plaintiff's acts, omissions, representations and
28 conduct constitute an estoppel, and bar its claims.

///

EIGHTH AFFIRMATIVE DEFENSE:
(Waiver)

100. As an eighth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission of waiver of any kind, Defendant alleges that the SAC and each and every cause of action therein is barred because Plaintiff has waived any and all claims it has made against Defendant.

NINTH AFFIRMATIVE DEFENSE:
(Laches, Unclean Hands, Acquiescence,
Ratification, Assumption of the Risk)

101. As a ninth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and each and every cause of action therein is barred by the doctrine of laches, unclean hands, acquiescence, ratification, and reasonably implied assumption of the risk.

TENTH AFFIRMATIVE DEFENSE:
(No Damages Suffered)

102. As a tenth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and each and every cause of action therein is barred because Plaintiff never sustained any damages caused by Defendant, and Plaintiff lacks standing.

ELEVENTH AFFIRMATIVE DEFENSE:
(Damages Not Subject to Reasonable Calculation)

103. As an eleventh and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and each and every cause of action therein is barred because Plaintiff's damages, if any, are not subject to reasonable calculation.

TWELFTH AFFIRMATIVE DEFENSE:
(Failure to Mitigate Damages)

104. As a twelfth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and each and every cause of action therein is barred because Plaintiff failed to exercise reasonable

1 resourcefulness, care and diligence to mitigate any damages, and any recovery against Defendant should
2 be reduced accordingly.

3 THIRTEENTH AFFIRMATIVE DEFENSE:
4 (In Pari Delicto)

5 105. As a thirteenth and separate Affirmative Defense, and solely by way of an alternative
6 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and
7 each and every cause of action therein is barred by the doctrine of in pari delicto.

8 FOURTEENTH AFFIRMATIVE DEFENSE:
9 (Plaintiff's Negligence)

10 106. As a fourteenth and separate Affirmative Defense, and solely by way of an alternative
11 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and
12 each and every cause of action therein is barred because Plaintiff's damages, if any, were caused by
13 Plaintiff's own negligence or want of ordinary care and prudence.

14 FIFTEENTH AFFIRMATIVE DEFENSE:
15 (Intervening/Superseding Actions)

16 107. As a fifteenth and separate Affirmative Defense, and solely by way of an alternative
17 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and
18 each and every cause of action therein is barred to the extent that the damages or losses allegedly
19 sustained by Plaintiff, if any, were the direct and proximate result of intervening and superceding actions
20 on the part of other parties, and not Defendant, barring Plaintiff's recovery from Defendant.

21 SIXTEENTH AFFIRMATIVE DEFENSE:
22 (No Intent to Injure)

23 108. As a sixteenth and separate Affirmative Defense, and solely by way of an alternative
24 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that the SAC and
25 each and every cause of action therein is barred because Defendant at no time acted with any intent to
26 injure Plaintiff, and the Defendant took no actions intended to cause any harm to Plaintiff.

27 SEVENTEENTH AFFIRMATIVE DEFENSE:
28 (No Willful, Malicious, Oppressive or Outrageous Conduct)

109. As a seventeenth and separate Affirmative Defense, and solely by way of an alternative

1 defense, not to be construed as an admission or waiver of any kind, Defendant alleges that Defendant did
2 not engage in any willful, malicious, oppressive or outrageous conduct with regard to Plaintiff.

3 EIGHTEENTH AFFIRMATIVE DEFENSE:
4 (Adequate Legal Remedy)

5 110. As an eighteenth and separate Affirmative Defense, and solely by way of an alternative
6 defense, not to be construed as an admission of waiver of any kind, Defendant alleges that Plaintiff's
7 prayer for injunctive relief is barred because Plaintiff has an adequate remedy at law.

8 NINETEENTH AFFIRMATIVE DEFENSE:
9 (Any Harm Proximately Caused by Others)

10 111. As a nineteenth and separate Affirmative Defense, and solely by way of an alternative
11 defense, not to be construed as an admission, Defendant alleges that the SAC and each and every cause
12 of action therein is barred because any losses, damages and/or injuries sustained by Plaintiff were
13 proximately caused by the fault of persons or entities other than Defendant, over whom Defendant has
14 no control.

15 TWENTIETH AFFIRMATIVE DEFENSE:
16 (Good Faith)

17 112. As a twentieth and separate Affirmative Defense, and solely by way of an alternative
18 defense, not to be construed as an admission of waiver of any kind, Defendant alleges that the SAC and
19 each and every cause of action therein is barred because Defendant has acted in good faith.

20 TWENTY-FIRST AFFIRMATIVE DEFENSE:
21 (Setoff)

22 113. As a twenty-first and separate Affirmative Defense, and solely by way of an alternative
23 defense, not to be construed as an admission of waiver of any kind, Defendant alleges that Plaintiff's
24 damages, if any, are subject to setoff and should be reduced accordingly.

25 TWENTY-SECOND AFFIRMATIVE DEFENSE:
26 (Indispensable Party)

27 114. As a twenty-second and separate Affirmative Defense, and solely by way of an alternative
28 defense, not to be construed as an admission of waiver of any kind, Defendant alleges that the SAC and
each and every cause of action therein is barred because Plaintiff has failed to join an indispensable party

1 or parties to this action.

2 TWENTY-THIRD AFFIRMATIVE DEFENSE:
3 (Plaintiff's Agents)

4 115. As a twenty-third and separate Affirmative Defense, and solely by way of an alternative
5 defense, not to be construed as an admission of waiver of any kind, Defendant alleges that the SAC and
6 each and every cause of action therein is barred based on the actions and/or omissions of Plaintiff's own
7 agents.

8 TWENTY-FOURTH AFFIRMATIVE DEFENSE:
9 (Reservation of Right to Assert Additional Defenses)

10 116. As an twenty-fourth and separate Affirmative Defense, and solely by way of an
11 alternative defense, not to be construed as an admission, Defendant alleges that at the time of the filing
12 of this Answer, affirmative defenses may not have been alleged for reasons that insufficient facts and
13 information were available after reasonable inquiry. Defendant therefore reserves the right to amend this
14 answer to allege additional affirmative defenses based upon subsequent discovery of new or different
15 facts or subsequent appreciation of currently known facts.

16 RESPONSE TO PRAYER FOR RELIEF

17 WHEREFORE, Defendant SHAWN HOGAN prays for judgment as follows:

- 18 1. That Plaintiff take nothing by reason of its SAC and that judgment be entered in favor of
19 Defendant;
- 20 2. That Defendant be awarded costs of suit incurred in the defense of this action including
21 reasonable attorneys' fees, to the extent allowed by law;
- 22 3. For such other and further relief as the Court deems just and proper.

23 Respectfully submitted,

24 DATED: August 31, 2009

s/Ross M. Campbell
COAST LAW GROUP, LLP
Attorneys for Defendants Shawn Hogan
and Digital Point Solutions, Inc.