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6 Attorneys for Defendants Todd Dunning and
 Dunning Enterprise, Inc.

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

12 EBAY, INC.,

13 Plaintiff,

14 v.

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

18 Defendants.
 19

CASE NO.: CV-08-4052 JF

**ANSWER OF DEFENDANT
 DUNNING ENTERPRISE, INC. TO
 PLAINTIFF'S SECOND
 AMENDED COMPLAINT**

Date action filed: August 25, 2008

21 Defendant DUNNING ENTERPRISE, INC. ("Defendant") answers the allegations of Plaintiff
 22 B-BAY, INC.'s ("Plaintiff's") Second Amended Complaint ("SAC") in the above-captioned matter.
 23 The responses set forth herein are made solely as to, by, and on behalf of, Defendant DUNNING
 24 ENTERPRISE, INC.

25 **PARTIES**

26 1. In response to paragraph 1 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.

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

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

7 4. In response to paragraph 4 of the SAC, this paragraph does not allege any facts and
8 therefore does not require a substantive response. In this answer, Defendant will use the same
9 definition of "DPS" as used in the SAC.

10 5. In response to paragraph 5 of the SAC, Defendant admits that Defendant Kessler's
11 Flying Circus is a California general partnership, doing business in the State of California.

12 6. In response to paragraph 6 of the SAC, Defendant is without sufficient knowledge or
13 information to form a belief as to the truth of the allegations contained in said paragraph regarding the
14 corporate status of Defendant Thunderwood Holdings, Inc., and on that basis denies each and every
15 such allegation contained therein. Defendant admits a belief that defendant Thunderwood Holdings,
16 Inc. is a general partner in defendant Kessler's Flying Circus.

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 except that Defendant admits a belief that
20 defendant Brian Dunning resides in California.

21 8. In response to paragraph 3 of the SAC, Defendant admits that Defendant Dunning
22 Enterprise, Inc. is incorporated as a California corporation on or about December 27, 2006, and that it
23 was a general partner in defendant Kessler's Flying Circus after that date. Defendant denies all
24 remaining allegations contained in paragraph 8.

25 9. In response to paragraph 9 of the SAC, Defendant admits that defendant Todd Dunning
26 resides in the State of California and that he owns a controlling interest in this Defendant. Except as
27 so admitted, Defendant denies each and every other allegation contained therein.

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

4 11. In response to paragraph 11 of the SAC, this paragraph does not allege any facts and
5 therefore does not require a substantive response. With respect to any and all collective references to
6 "KFC" in the SAC which are intended to include this Defendant, Defendant's responses set forth in
7 this answer are made solely as to, by, and on behalf of Defendant DUNNING ENTERPRISE, INC.

8 12. In response to paragraph 12 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 13. In response to paragraph 13 of the SAC, this paragraph does not allege any facts and
12 therefore does not require a substantive response. With respect to any and all collective references to
13 "Defendants" in the SAC which are intended to include this Defendant, Defendant's responses set
14 forth in this answer are made solely as to, by, and on behalf of, Defendant DUNNING
15 ENTERPRISE, INC.

16 **JURISDICTION AND VENUE**

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

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

21 16. In response to paragraph 16 of the SAC, Defendant denies each and every) allegation
22 contained therein.

23 **INTRADISTRICT ASSIGNMENT**

24 17. In response to paragraph 17 of the SAC, Defendant is without sufficient knowledge or
25 information to form a belief as to the truth of the allegations that Plaintiff's headquarters are located in
26 San Jose, Santa Clara County, California, and on that basis denies said allegations. Defendant denies
27 each and every remaining allegation contained in paragraph 17.

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GENERAL ALLEGATIONS

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2 18. In response to paragraph 18 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 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 contained in said paragraph, and on that
7 basis denies each and every allegation contained therein.

8 20. In response to paragraph 20 of the SAC, Defendant admits its belief that Plaintiff used
9 the services of Commission Junction, Inc.'s in recruiting, tracking, monitoring, detecting, paying and
10 administering Plaintiff's Affiliate Marketing Program. Defendant is without sufficient knowledge or
11 information to form a belief as to the truth of the remaining allegations contained in said paragraph,
12 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 contained in said paragraph, and on that
15 basis denies each and every allegation contained therein.

16 22. In response to paragraph 22 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 23. In response to paragraph 23 of the SAC, Defendant is without sufficient knowledge or
20 information to form a belief as to the truth of the allegations contained in said paragraph, and on that
21 basis denies each and every allegation contained therein.

22 24. In response to paragraph 24 of the SAC, Defendant denies each and every allegation
23 contained in this paragraph.

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

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1 26. In response to paragraph 26 of the SAC, Defendant is without sufficient knowledge or
2 information to form a belief as to the truth of the allegations that the User Agreement was agreed to by
3 any other Defendant, and on that basis denies each such allegation contained therein. Defendant is
4 without sufficient knowledge or information to form a belief as to the truth of the allegations relating
5 to DPS, and on that basis denies each such allegation contained therein. Defendant denies each and
6 every remaining allegation contained in said paragraph.

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

11 28. In response to paragraph 28 of the SAC, Defendant denies each and every allegation
12 contained therein.

13 29. In response to paragraph 29 of the SAC, Defendant is without sufficient knowledge or
14 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
15 each such allegation contained therein. Defendant denies each and every remaining allegation
16 contained in said paragraph.

17 30. In response to paragraph 30 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 relating to
19 DPS, and on that basis denies each and every allegation contained therein.

20 31. In response to paragraph 31 of the SAC, Defendant denies each and every allegation
21 contained therein.

22 32. In response to paragraph 32 of the SAC, Defendant is without sufficient knowledge or
23 information to form a belief as to the truth of the allegations relating to DPS, Shawn Hogan and Brian
24 Dunning, and on that basis denies each such allegation contained therein. In response to the
25 allegations regarding additional false statements set forth in paragraph 60, said allegations do not
26 require a response, as the Second Cause of Action for alleged violations of IS U.S.C. § 1962(c) prays
27 for relief only as against the alleged Hogan Group and Dunning Group defendants as defined in the

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1 SAC. Such definition excludes this Defendant. Defendant denies each and every remaining
2 allegation contained in paragraph 32.

3 33. In response to paragraph 33 of the SAC, Defendant is without sufficient knowledge or
4 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
5 each such allegation contained therein. Defendant denies each and every remaining allegation
6 contained in paragraph 32.

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

13 **FIRST CAUSE OF ACTION**
14 **(18 U.S.C. §1030)**

15 35. In response to paragraph 35 of the SAC, Defendant refers to and incorporates herein its
16 responses as provided in paragraphs 1 through 34 above.

17 36. In response to paragraph 36 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
19 each such allegation contained therein. Defendant denies each and every remaining allegation
20 contained in said paragraph.

21 37. In response to paragraph 37 of the SAC, Defendant is without sufficient knowledge or
22 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
23 each such allegation contained therein. Defendant denies each and every remaining allegation
24 contained in said paragraph.

25 38. In response to paragraph 38 of the SAC, Defendant denies each and every allegation
26 contained therein.

27 39. In response to paragraph 39 of the SAC, Defendant denies each and every allegation
28 contained in said paragraph.

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1 40. In response to paragraph 40 of the SAC, Defendant is without sufficient knowledge or
2 information to form a belief as to the truth of the allegations relating to DPS and DOES 1-10, and on
3 that basis denies each such allegation contained therein. Defendant denies each and every remaining
4 allegation contained in said paragraph.

5 41. In response to paragraph 41 of the SAC, Defendant denies each and every allegation
6 contained therein,

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

10 43. In response to paragraph 43 of the SAC, Defendant is without sufficient knowledge or
11 information to form a belief as to the truth of the allegations relating to DPS and on that basis denies
12 each such allegation contained therein. Defendant denies each and every remaining allegation
13 contained in said paragraph.

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 its
19 responses as provided in paragraphs 1 through 44 above.

20 46. Paragraph 46 does not require a response, as the Second Cause of Action for alleged
21 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
22 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
23 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

24 47. Paragraph 47 does not require a response, as the Second Cause of Action for alleged
25 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
26 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
27 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

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1 48. Paragraph 48 does not require a response, as the Second Cause of Action for alleged
2 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
3 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
4 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

5 49. Paragraph 49 does not require a response, as the Second Cause of Action for alleged
6 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
7 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
8 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

9 50. Paragraph 50 does not require a response, as the Second Cause of Action for alleged
10 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for
11 relief only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC.
12 Such definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

13 51. Paragraph 51 does not require a response, as the Second Cause of Action for alleged
14 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
15 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
16 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

17 52. Paragraph 52 does not require a response, as the Second Cause of Action for alleged
18 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
19 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
20 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

21 53. Paragraph 53 does not require a response, as the Second Cause of Action for alleged
22 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
23 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
24 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

25 54. Paragraph 54 does not require a response, as the Second Cause of Action for alleged
26 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
27 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
28 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

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1 55. Paragraph 55 does not require a response, as the Second Cause of Action for alleged
2 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
3 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
4 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

5 56. Paragraph 56 does not require a response, as the Second Cause of Action for alleged
6 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
7 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
8 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

9 57. Paragraph 57 does not require a response, as the Second Cause of Action for alleged
10 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
11 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
12 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

13 58. Paragraph 58 does not require a response, as the Second Cause of Action for alleged
14 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
15 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
16 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

17 59. Paragraph 59 does not require a response, as the Second Cause of Action for alleged
18 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
19 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
20 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

21 60. Paragraph 60 does not require a response, as the Second Cause of Action for alleged
22 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
23 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
24 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

25 61. Paragraph 61 does not require a response, as the Second Cause of Action for alleged
26 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
27 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
28 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

1 62. Paragraph 62 does not require a response, as the Second Cause of Action for alleged
2 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for
3 relief only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC.
4 Such definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

5 63. Paragraph 63 does not require a response, as the Second Cause of Action for alleged
6 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
7 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
8 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

9 64. Paragraph 64 does not require a response, as the Second Cause of Action for alleged
10 violations of 18 U.S.C. § 1962(c) does not make allegations against this Defendant and prays for relief
11 only as against the alleged Hogan Group and Dunning Group defendants as defined in the SAC. Such
12 definition excludes this Defendant. Defendant otherwise denies all allegations in this paragraph.

13 **THIRD CAUSE OF ACTION**
14 (Fraud)

15 65. In response to paragraph 65 of the SAC, Defendant refers to and incorporates herein its
16 responses as provided in paragraphs 1 through 64 above.

17 66. In response to paragraph 66 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations relating to the DPS and DOES 1-10, and
19 on that basis denies each such allegation contained therein. Defendant denies each and every
20 remaining allegation contained in said paragraph.

21 67. In response to paragraph 67 of the SAC, Defendant is without sufficient knowledge or
22 information to form a belief as to the truth of the allegations relating to DOES 12-20 contained in said
23 paragraph, and on that basis denies each and every allegation contained therein. Defendant denies
24 each and every remaining allegation contained in this paragraph.

25 68. In response to paragraph 68 of the SAC, Defendant is without sufficient knowledge or
26 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
27 each such allegation contained therein. Defendant denies each and every remaining allegation
28 contained in said paragraph.

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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 DPS, and DOES 1-10 and 12-
3 20, and on that basis denies each such allegation contained therein. Defendant denies each and every
4 remaining allegation contained in said paragraph.

5 70. In response to paragraph 70 of the SAC, Defendant is without sufficient knowledge
6 information to form a belief as to the truth of the allegations relating to DPS and DOES 1-10 and 12-
7 20, and on that basis denies each such allegation contained therein. Defendant denies each and every
8 remaining allegation contained in said paragraph.

9 71. In response to paragraph 71 of the SAC, Defendant is without sufficient knowledge or
10 information to form a belief as to the truth of the allegations relating to DPS and DOES 1-10 and 12-
11 20, and on that basis denies each such allegation contained therein. Defendant denies each and every
12 remaining allegation contained in said paragraph.

13 72. In response to paragraph 72 of the SAC, Defendant is without sufficient knowledge or
14 information to form a belief as to the truth of the allegations relating to DPS and DOES 1-10 and 12-
15 20, and on that basis denies each such allegation contained therein. Defendant denies each and every
16 remaining allegation contained in said paragraph.

17 73. In response to paragraph 73 of the SAC, Defendant denies each and every allegation

18 74. In response to paragraph 74 of the SAC, Defendant is without sufficient knowledge or
19 information to form a belief as to the truth of the allegations relating to DPS and DOES 1-10 and 12-
20 20, and on that basis denies each such allegation contained therein. Defendant denies each and every
21 remaining allegation contained in said paragraph.

22 75. In response to paragraph 75 of the SAC, Defendant responds to Plaintiff's prayer for
23 relief as set forth below.

24 **FOURTH CAUSE OF ACTION**
25 (California Penal Code §502)

26 76. In response to paragraph 76 of the SAC, Defendant refers to and incorporates herein its
27 responses as provided in paragraphs 1 through 75 above.

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1 77. In response to paragraph 77 of the SAC, Defendant is without sufficient knowledge or
2 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
3 each such allegation contained therein. Defendant denies each and every remaining allegation
4 contained in said paragraph.

5 78. In response to paragraph 78 of the SAC, Defendant is without sufficient knowledge or
6 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
7 each such allegation contained therein. Defendant denies each and every remaining allegation
8 contained in said paragraph.

9 79. In response to paragraph 79 of the SAC, Defendant is without sufficient knowledge or
10 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
11 each such allegation contained therein. Defendant denies each and every remaining allegation
12 contained in said paragraph.

13 80. In response to paragraph 80 of the SAC, Defendant is without sufficient knowledge or
14 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
15 each such allegation contained therein. Defendant denies each and every remaining allegation
16 contained in said paragraph.

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

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

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

23 83. In response to paragraph 83 of the SAC, Defendant is without sufficient knowledge or
24 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
25 each such allegation contained therein. Defendant denies each and every remaining allegation
26 contained in said paragraph.

27 84. In response to paragraph 84 of the SAC, Defendant is without sufficient knowledge or
28 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies

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1 each such allegation contained therein. Defendant denies each and every remaining allegation
2 contained in said paragraph.

3 85. In response to paragraph 85 of the SAC, Defendant is without sufficient knowledge or
4 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
5 each such allegation contained therein. Defendant denies each and every remaining allegation
6 contained in said paragraph.

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

9 **SIXTH CAUSE OF ACTION**
10 (California Business & Professions Code §17200)

11 87. In response to paragraph 87 of the SAC, Defendant refers to and incorporates herein its
12 responses as provided in paragraphs 1 through 86 above.

13 88. In response to paragraph 88 of the SAC, Defendant is without sufficient knowledge or
14 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
15 each such allegation contained therein. Defendant denies each and every remaining allegation
16 contained in said paragraph.

17 89. In response to paragraph 89 of the SAC, Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
19 each such allegation contained therein. Defendant denies each and every remaining allegation
20 contained in said paragraph.

21 90. In response to paragraph 90 of the SAC, Defendant is without sufficient knowledge or
22 information to form a belief as to the truth of the allegations relating to DPS, and on that basis denies
23 each such allegation contained therein. Defendant denies each and every remaining allegation
24 contained in said paragraph.

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

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

3 **AFFIRMATIVE DEFENSES**

4 Defendant alleges the following affirmative defenses:

5 **FIRST AFFIRMATIVE DEFENSE**
6 (Failure to State a Claim)

7 93. As a first Affirmative Defense, and not as an admission or waiver of any kind,
8 Defendant alleges that Plaintiff's SAC, and every purported cause of action stated therein, fails to
9 allege facts sufficient to state a claim for relief of any kind against Defendant.

10 **SECOND AFFIRMATIVE DEFENSE:**
11 (Contractual Limitations Period)

12 94. As a second Affirmative Defense, and not as an admission or waiver of any kind,
13 Defendant alleges that the SAC, and each and every cause of action therein, is barred by the one-year
14 contractual limitations provision set forth in the Commission Junction Publisher Services Agreement
15 of which Plaintiff is a third party beneficiary and which Plaintiff incorporated by reference into the
16 eBay Supplemental Terms & Conditions.

17 **THIRD AFFIRMATIVE DEFENSE:**
18 (Statute of Limitations)

19 95. As a third Affirmative Defense, and not as an admission or waiver of any kind,
20 Defendant alleges that the SAC, and each and every cause of action therein, is barred by the
21 applicable statute of limitations. Said limitations include, but are not limited to, 18 U.S.C. §1030(g),
22 15 U.S.C. § 15b (as applied to 18 U.S.C. §1962, 1964), California Penal Code §502(e)(5), California
23 Code of Civil Procedure § 338, 339, and California Business & Professions Code §17208.

24 **FOURTH AFFIRMATIVE DEFENSE:**
25 (Improper Venue)

26 96. As a fourth Affirmative Defense, and not as an admission or waiver of any kind,
27 Defendant alleges that the filing of this action in the above-captioned Court is improper based on the
28 forum selection clause set forth in the Commission Junction Publisher Services Agreement of which

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1 Plaintiff is a third party beneficiary and which Plaintiff incorporated by reference into the eBay
2 Supplemental Terms & Conditions.

3 FIFTH AFFIRMATIVE DEFENSE:
4 (Consent, Ratification and Modification of Contracts)

5 97. As a fifth Affirmative Defense, and not as an admission or waiver of any kind,
6 Defendant alleges that the SAC, and each and every cause of action therein, is barred because the
7 conduct alleged in the SAC was consented to and ratified by Plaintiff and its agent, Commission
8 Junction, Inc. Such consent and ratification resulted in a modification of the Commission Junction
9 Publisher Service Agreement and the eBay Special Terms and Conditions so that Defendant's alleged
10 conduct was authorized by such contractual agreements.

11 SIXTH AFFIRMATIVE DEFENSE:
12 (General Authorization and Authorized Access)

13 98. As a sixth Affirmative Defense, and not as an admission or waiver of any kind,
14 Defendant alleges that the SAC, and each and every cause of action therein, is barred because the
15 conduct alleged in the SAC, including but not limited to the alleged access to Plaintiff's computers,
16 was known, authorized, ratified, accepted, and encouraged by Plaintiff and its agent, Commission
17 Junction, Inc.

18 SEVENTH AFFIRMATIVE DEFENSE:
19 (Estoppel)

20 99. As a seventh Affirmative Defense, and not as an admission or waiver of any kind,
21 Defendant alleges that the SAC, and each and every cause of action therein, is barred because
22 Plaintiff's and its agent's, Commission Junction, Inc.'s, acts, omissions, representations and conduct
23 constitute an estoppel, and bar all its claims alleged in the SAC.

24 EIGHTH AFFIRMATIVE DEFENSE:
25 (Waiver)

26 100. As an eighth Affirmative Defense, and not as an admission or waiver of any kind,
27 Defendant alleges that the SAC, and each and every cause of action therein, is barred because Plaintiff
28 has waived any and all claims it alleges against Defendant through Plaintiff's and its agent's,

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1 Commission Junction, Inc.'s, actual or constructive knowledge, consent and conduct in relation to the
2 alleged participation of Defendant in Plaintiff's Affiliate Marketing Program.

3 NINTH AFFIRMATIVE DEFENSE:
4 (Laches, Unclean Hands, Acquiescence,
5 Assumption of the Risk)

6 101. As a ninth Affirmative Defense, and not as an admission or waiver of any kind,
7 Defendant alleges that the SAC, and each and every cause of action therein, is barred by the doctrines
8 of laches, unclean hands, acquiescence, and reasonably implied assumption of the risk.

9 TENTH AFFIRMATIVE DEFENSE:
(No Damages, Losses or Impairment of Computers)

10 102. As a tenth Affirmative Defense, and not as an admission or waiver of any kind,
11 Defendant alleges that the SAC, and each and every cause of action therein, is barred because Plaintiff
12 never sustained any damages or losses caused by Defendant, and Plaintiff never suffered any
13 impairment to its computers or data therein as required and defined by the Computer Fraud and Abuse
14 Act, 18 U.S.C. § 1030 *et seq* and California Penal Code § 502.

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

17 103. As an eleventh Affirmative Defense, and not as an admission or waiver of any kind,
18 Defendant alleges that the SAC, and each and every cause of action therein, is barred because
19 Plaintiff's alleged damages, if any, are not subject to reasonable calculation.

20 TWELFTH AFFIRMATIVE DEFENSE:
21 (Failure to Mitigate Damages)

22 104. As a twelfth Affirmative Defense, and not as an admission or waiver of any kind,
23 Defendant alleges that the SAC, and each and every cause of action therein, is barred because
24 Plaintiff, and its agent, Commission Junction, Inc., failed to act on information in their possession and
25 failed to exercise reasonable resourcefulness, care and diligence to prevent and mitigate any alleged
26 damages, so that any recovery against Defendant is barred or should be reduced accordingly.

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THIRTEENTH AFFIRMATIVE DEFENSE:
(In Pari Delicto)

105. As a thirteenth Affirmative Defense, and not 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 in pari delicto. Plaintiff and/or its agent, Commission Junction, Inc., with knowledge authorized, encouraged and ratified the conduct alleged in the SAC by Defendant.

FOURTEENTH AFFIRMATIVE DEFENSE:
(Plaintiffs Negligence)

106. As a fourteenth Affirmative Defense, and not as an admission or waiver of any kind, Defendant alleges that the SAC, and each and every cause of action therein, is barred because of Plaintiff's and its agent's, Commission Junction, Inc.'s, negligence or want of ordinary care and prudence after having knowledge and information about Defendant's alleged conduct.

FIFTEENTH AFFIRMATIVE DEFENSE:
(Intervening/Superseding Actions)

107. As a fifteenth Affirmative Defense, and not as an admission or waiver of any kind, Defendant alleges that the SAC, and each and every cause of action therein, is barred to the extent that the damages or losses allegedly sustained by Plaintiff, if any, were the direct and proximate result of intervening and superceding actions on the part of other persons or entities, including but not limited to Commission Junction, Inc., and not Defendant, thereby barring Plaintiff's recovery from Defendant.

SIXTEENTH AFFIRMATIVE DEFENSE:
(No Intent to Injure)

108. As a sixteenth Affirmative Defense, and not as an admission or waiver of any kind, Defendant alleges that the SAC, and each and every cause of action therein, is barred because Defendant at no time acted with any intent to injure Plaintiff. Defendant took no actions intended to cause any harm to Plaintiff, and the Defendant believed in good faith that Plaintiff knowingly authorized, ratified and benefitted from Defendant's alleged conduct.

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1 SEVENTEENTH AFFIRMATIVE DEFENSE:
 2 (Acceptance of Benefits)

3 109. As a seventeenth Affirmative Defense, and not as an admission or waiver of any kind,
 4 Defendant alleges that Plaintiff knew that Defendant's conduct alleged in the SAC created substantial
 5 benefits for Plaintiff, and Plaintiff knowingly and willingly accepted such benefits. Accordingly,
 6 Plaintiff is barred from receiving any relief under the SAC.

7 EIGHTEENTH AFFIRMATIVE DEFENSE:
 8 (Adequate Legal Remedy)

9 110. As an eighteenth Affirmative Defense, and not as an admission or waiver of any kind,
 10 Defendant alleges that Plaintiff's prayer for injunctive relief is barred because Plaintiff has an
 11 adequate remedy at law by preventing Defendant from participating in the future in its Affiliate
 12 Marketing Program.

13 NINETEENTH AFFIRMATIVE DEFENSE:
 14 (Any Harm Proximately Caused by Others)

15 111. As a nineteenth Affirmative Defense, and not as an admission or waiver of any kind,
 16 Defendant alleges that the SAC, and each and every cause of action therein, is barred because any
 17 losses, damages and/or injuries sustained by Plaintiff were proximately caused by the fault of persons
 18 or entities other than Defendant, who acted without Defendant's knowledge or consent, and over
 19 whom Defendant has no control. In particular, but without limitation, Defendant alleges that
 20 Plaintiff's agent, Commission Junction, Inc., and Plaintiff's employees such as Christine Kim,
 21 reviewed and approved Defendant's conduct under the Affiliate Marketing Program as alleged in the
 22 SAC, and thus proximately caused any damages, losses or injuries claimed by Plaintiff.

23 TWENTIETH AFFIRMATIVE DEFENSE:
 24 (Good Faith)

25 112. As a twentieth Affirmative Defense, and not as an admission or waiver of any kind,
 26 Defendant alleges that the SAC, and each and every cause of action therein, is barred because
 27 Defendant has acted in good faith based on the belief and understanding that Plaintiff and its agent

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1 and employee, Commission Junction, Inc. and Christine Kim, authorized its conduct as alleged in the
2 SAC.

3 TWENTY-FIRST AFFIRMATIVE DEFENSE:
4 (Setoff)

5 113. As a twenty-first Affirmative Defense, and not as an admission or waiver of any kind,
6 Defendant alleges that Plaintiff's damages, if any, are subject to setoff and should be reduced
7 accordingly since Plaintiff has not paid all commissions due to KFC.

8 TWENTY-SECOND AFFIRMATIVE DEFENSE:
9 (Indispensable Party)

10 114. As a twenty-second Affirmative Defense, and not as an admission or waiver of any
11 kind, Defendant alleges that the SAC, and each and every cause of action therein, is barred because
12 Plaintiff has failed to join an indispensable party or parties to this action, including but not limited to
13 Commission Junction, Inc. and Christine Kim.

14 TWENTY-THIRD AFFIRMATIVE DEFENSE:
15 (Plaintiff's Agents)

16 115. As a twenty-third Affirmative Defense, and not as an admission or waiver of any kind,
17 Defendant alleges that the SAC, and each and every cause of action therein, is barred based on the
18 actions and/or omissions of Plaintiff's agents and representatives, including but not limited to
19 Commission Junction, Inc. and Christine Kim.

20 TWENTY-FOURTH AFFIRMATIVE DEFENSE
21 (No Liability For Conduct By Other Defendants)

22 116. As a twenty-fourth Affirmative Defense, and not as an admission or waiver of any
23 kind, Defendant alleges that prior to December 27, 2006, this Defendant was not a partner in
24 Defendant Kessler's Flying Circus. After such date, Defendant became a general partner in Defendant
25 Kessler's Flying Circus in place of Defendant Todd Dunning. Defendant alleges that it did not have
26 any ownership, control or knowledge of the conduct of Defendants BrianDunning.com., Thunderwood
27 Holdings, Inc., or Brian Dunning. Defendant was not an agent or representative for these
28

1 defendants. Therefore, Defendant has no liability or responsibility for the alleged conduct of any
2 other defendants under the allegations of the SAC.

3 TWENTY-FIFTH AFFIRMATIVE DEFENSE:
4 (Settlement and Release)

5 117. As a twenty-fifth Affirmative Defense, and not as an admission or waiver of any kind,
6 Defendant alleges that the SAC, and each and every cause of action therein, is barred by the full and
7 complete settlement and release of claims entered into between Defendant and Plaintiff's agent,
8 Commission Junction, Inc.

9 TWENTY-SIXTH AFFIRMATIVE DEFENSE:
10 (Reservation of Right to Assert Additional Defenses)

11 118. As a twenty-sixth Affirmative Defense, and not as an admission or waiver of any kind,
12 Defendant alleges that at the time of the filing of this Answer, affirmative defenses may not have been
13 alleged for reasons that insufficient facts and information were available after reasonable inquiry.
14 Defendant therefore reserves the right to amend this answer to allege additional affirmative defenses
15 based upon subsequent discovery of new or different facts or subsequent appreciation of currently
16 known facts.

17 RESPONSE TO PRAYER FOR RELIEF

18 WHEREFORE, Defendant DUNNING ENTERPRISE, INC. prays for judgment as follows:

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

24 Dated: September 9, 2009

FREELAND COOPER & FOREMAN LLP

25
26 By:


27 STEWART H. FOREMAN

28 Attorneys for Defendants Todd Dunning and
Dunning Enterprise, Inc.

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CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen and not a party to the within action; my business address is 150 Spear Street, Suite 1800, San Francisco, California 94105.

On September 9, 2009, I served the foregoing documents described as follows:

Answer of Defendant Dunning Enterprise, Inc. to Plaintiff's Second Amended Complaint

by placing a true and correct copy thereof enclosed in a sealed envelope addressed to the party(ies) of record whose name(s) and address(es) appear below:

SEE ATTACHED SERVICE LIST

[BY MAIL - CCP § 1013a] I caused such sealed envelope with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California, for collection and mailing to the office of addressee(s) on the date shown herein following ordinary business practice.

[HAND-DELIVERY/Personal/Messenger - CCP § 1011] I caused such envelope to be hand-delivered by a courier, who personally delivered such envelope to the office of the addressee(s) on the date herein.

[BY FACSIMILE - CCP § 1013(e)] - I caused such document(s) to be transmitted via facsimile electronic equipment transmission on the party(ies), whose name(s), address(es) and fax number(s) are listed above, on the date stated herein and at the time set forth on the attached transmission reported indicating that the facsimile transmission was complete and without error.

[BY FEDEX (Overnight Delivery) - CCP § 1013(c)] I caused such envelope to be delivered to the Federal Express Office in San Francisco, California, with whom we have a direct billing account, to be delivered on the next business day.

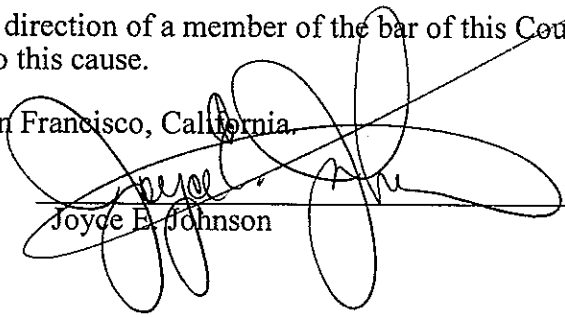
[BY E-MAIL or ELECTRONIC TRANSMISSION] . Based on a court order or agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the email addresses listed above. I did not receive within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[STATE] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[FEDERAL] Service was made under the direction of a member of the bar of this Court who is admitted to practice and is not a party to this cause.

Executed on September 9, 2009, at San Francisco, California.

Joyce E. Johnson



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