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

19 Defendants.

CASE NO.: CV-08-4052 JF

**ANSWER OF DEFENDANT TODD
DUNNING TO PLAINTIFF'S
SECOND AMENDED
COMPLAINT**

Date action filed: August 25, 2008

22 Defendant TODD DUNNING ("Defendant") answers the allegations of Plaintiff EBAY,
23 INC.'s ("Plaintiff") Second Amended Complaint ("SAC") in this matter. The responses set forth
24 herein are made solely as to, by, and on behalf of Defendant Todd Dunning:

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 every 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 response. However, Defendant will use the definition of "DPS" as used in
9 the SAC in this answer.

10 5. In response to paragraph 5 of the SAC, Defendant admits a belief in the allegations of
11 this paragraph.

12 6. In response to paragraph 6 of the SAC, Defendant admits a belief that an entity named
13 Thunderwood Holdings; Inc. was a general partner of Kessler's Flying Circus. Except as admitted
14 Defendant is without sufficient knowledge or information to form a belief as to the truth of the
15 remaining allegations in this paragraph, and on that basis denies each and every allegation contained
16 therein.

17 7. In response to paragraph 7 of the SAC, Defendant admits a belief that Brian Dunning is
18 an individual residing in the State of California. Except as so admitted, Defendant lacks sufficient
19 knowledge or information to form a belief as to the truth of the remaining allegations in this
20 paragraph, and on this basis denies the remaining allegations in this paragraph.

21 8. In response to paragraph 8 of the SAC, Defendant asserts the privilege against self-
22 incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
23 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
24 section 940. To the extent Defendant determines that there is no longer potential for criminal
25 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to
26 supplement and/or seek leave to amend this response accordingly (in whole or in part), and to object
27 to the use or disclosure of the this response for any purpose whatsoever.

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

3 **INTRADISTRICT ASSIGNMENT**

4 17. In response to paragraph 17 of the SAC, Defendant is without sufficient knowledge or
5 information to form a belief as to the truth of the allegations that Plaintiff's headquarters are located in
6 San Jose, Santa Clara County, California, and on that basis denies said allegations. As to the
7 remaining allegations contained therein, Defendant asserts the privilege against self-incrimination
8 under the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule
9 501; the California Constitution, Article 1, Section 15; and California Evidence Code section 940. To
10 the extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
11 expressly reserves the right to withdraw his assertion of the privilege, to supplement and/or seek leave
12 to amend this response accordingly (in whole or in part), and to object to the use or disclosure of the
13 this response for any purpose whatsoever.

14 **GENERAL ALLEGATIONS**

15 18. In response to paragraph 18 of the SAC, Defendant admits a belief that Plaintiff
16 operates an online trading forum and that sellers may list items for sale and buyers may bid on and
17 purchase items of interest through Plaintiff's website. Defendant is without sufficient knowledge or
18 information to form a belief as to the truth of the remaining allegations regarding the purpose and
19 circumstances under which Plaintiff operates its affiliate marketing program, and on that basis denies
20 each and every remaining allegation contained therein.

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

25 20. In response to paragraph 20 of the SAC, Defendant admits a belief that Plaintiff and
26 Commission Junction had an agreement regarding the recruiting, detecting, paying, monitoring, and
27 tracking relating to the Plaintiff's Affiliate Marketing Program. Defendant is without sufficient
28

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1 knowledge or information to form a belief as to the truth of the remaining allegations contained in said
2 paragraph, and on that basis denies each and every allegation contained therein.

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

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

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

15 24. In response to paragraph 24 of the SAC, Plaintiff's alleged definition of "cookie
16 stuffing" does not allege any facts and therefore does not require a response; however, Defendant does
17 not accept the description used in this paragraph of the SAC. Defendant is without sufficient
18 knowledge or information to form a belief as to the truth of the allegations relating to Plaintiff's
19 alleged analysis, and on that basis denies each such allegation. Defendant is without sufficient
20 knowledge or information to form a belief as to the truth of the allegations relating to DPS and the
21 Other KFC Defendants, and on that basis denies each such allegation. As to the remaining allegations
22 contained therein, Defendant asserts the privilege against self-incrimination under the Fifth
23 Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the California
24 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 supplement and/or seek leave to amend
27 this response accordingly (in whole or in part), and to object to the use or disclosure of the this
28 response for any purpose whatsoever.

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

25 27. In response to paragraph 27 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 the Other KFC
27 Defendants, 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

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

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

24 30. In response to paragraph 30 of the SAC, Defendant is without sufficient knowledge or
25 information to form a belief as to the truth of the allegations contained in said paragraph regarding
26 DPS, and on that basis denies each and every allegation contained therein.

27 31. In response to paragraph 31 of the SAC, Defendant hereby asserts the privilege against
28 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of

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

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

16 33. In response to paragraph 33 of the SAC, Defendant is without sufficient knowledge or
 17 information to form a belief as to the truth of the allegations relating to DPS and the Other KFC
 18 Defendants, and on that basis denies each such allegation contained therein. Defendant denies the
 19 applicability of the alleged User Agreement and that any causes of action set forth in the SAC arose
 20 therefrom. As to the remaining allegations contained therein, Defendant hereby asserts the privilege
 21 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
 22 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,
 25 to seek leave to amend and/or supplement this response accordingly (in whole or in part), and to
 26 object to the use or disclosure of the this response for any purpose whatsoever.

27 34. In response to paragraph 34 of the SAC, Defendant admits that Commission Junction
 28 filed an action against various parties including Defendants Kessler's Flying Circus, Brian Dunning

1 and Todd Dunning; that Commission Junction sought to recoup payments made; and that said action
2 has settled and dismissed with prejudice. Defendant denies the remaining allegations contained in
3 said paragraph.

4 **FIRST CAUSE OF ACTION**
5 **(18 U.S.C. §1030)**

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

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

18 37. In response to paragraph 37 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 the Other KFC
20 Defendants. Defendant denies the applicability of the alleged User Agreement and that any causes of
21 action set forth in the SAC arose therefrom. As to the remaining allegations against this Defendant
22 contained in said paragraph, Defendant hereby asserts the privilege against self-incrimination under
23 the 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
25 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
26 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
27 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
28 this response for any purpose whatsoever.

1 38. In response to paragraph 38 of the SAC, Defendant denies each and every allegation
2 contained in this paragraph relating to DPS and the Other KFC Defendants. As to the remaining
3 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
4 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
5 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
6 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
7 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
8 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
9 this response for any purpose whatsoever.

10 39. In response to paragraph 39 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 the Other KFC
12 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
13 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
14 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
15 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
16 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
17 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
18 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
19 this response for any purpose whatsoever.

20 40. In response to paragraph 40 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 regarding
22 DPS and the other DOE Defendants, and on that basis denies each and every allegation contained
23 therein.

24 41. In response to paragraph 41 of the SAC, 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 42. In response to paragraph 42 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 43. In response to paragraph 43 of the SAC, Defendant is without sufficient knowledge or
7 information to form a belief as to the truth of the allegations relating to DPS and the Other KFC
8 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
9 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
10 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
11 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
12 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
13 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
14 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
15 this response for any purpose whatsoever.

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

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

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

21 46. In response to paragraph 46 of the SAC, Defendant is without sufficient knowledge or
22 information to form a belief as to the truth of the allegations relating to defendants Brian Dunning and
23 Shawn Hogan, 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
25 the 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
27 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
28 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or

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

3 47. In response to paragraph 47 of the SAC, Defendant lacks sufficient knowledge or
4 information to form a belief as to the truth of the allegations in this paragraph regarding the Hogan
5 Group, and on that basis denies each such allegation contained therein.

6 48. In response to paragraph 48 of the SAC, Defendant is without sufficient knowledge or
7 information to form a belief as to the truth of the allegations contained in said paragraph regarding the
8 Hogan Group, and on that basis denies each and every allegation contained therein.

9 49. In response to paragraph 49 of the SAC, Defendant hereby asserts the privilege against
10 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
11 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
12 section 940. To the extent Defendant determines that there is no longer potential for criminal
13 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
14 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
15 use or disclosure of the this response for any purpose whatsoever,

16 50. In response to paragraph 50 of the SAC, Defendant hereby asserts the privilege against
17 self-incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
18 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
19 section 940. To the extent Defendant determines that there is no longer potential for criminal
20 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
21 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
22 use or disclosure of the this response for any

23 51. In response to paragraph 51 of the SAC, Defendant is without sufficient knowledge or
24 information to form a belief as to the truth of the allegations relating to Brian Dunning, DOES 12-20,
25 and/or the alleged Hogan Group, and on that basis denies each such allegation contained therein. As
26 to the remaining allegations contained therein, Defendant hereby asserts the privilege against self-
27 incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
28 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code

1 section 940. To the extent Defendant determines that there is no longer potential for criminal
 2 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
 3 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
 4 use or disclosure of the this response for any purpose whatsoever.

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

15 53. In response to paragraph 53 of the SAC, Defendant is without sufficient knowledge or
 16 information to form a belief as to the truth of the allegations relating to any alleged tests conducted by
 17 Plaintiff, and on that basis denies each such allegation contained therein. As to the remaining
 18 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
 19 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
 20 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
 21 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
 22 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
 23 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
 24 this response for any purpose whatsoever.

25 54. In response to paragraph 54 of the SAC, Defendant's without sufficient knowledge or
 26 information to form a belief as to the truth of the allegations relating to alleged investigations
 27 conducted or actions undertaken by Gallivan, Gallivan & O'Melia LLC, and on that basis denies each
 28 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
3 15; and California Evidence Code section 940. To the extent Defendant determines that there is no
4 longer potential for criminal prosecution, Defendant expressly reserves the right to withdraw his
5 assertion of the privilege, to seek leave to amend and/or supplement this response accordingly (in
6 whole or in part), and to object to the use or disclosure of the this response for any purpose
7 whatsoever.

8 55. In response to paragraph 55 of the SAC, Defendant is without sufficient knowledge or
9 information to form a belief as to the truth of the allegations relating to alleged investigations
10 conducted or actions undertaken by Gallivan, Gallivan & O'Melia LLC, and on that basis denies each
11 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
14 15; and California Evidence Code section 940. To the extent Defendant determines that there is no
15 longer potential for criminal prosecution, Defendant expressly reserves the right to withdraw his
16 assertion of the privilege, to seek leave to amend and/or supplement this response accordingly (in
17 whole or in part), and to object to the use or disclosure of the this response for any purpose
18 whatsoever.

19 56. In response to paragraph 56 of the SAC, Defendant is without sufficient knowledge or
20 information to form a belief as to the truth of the allegations relating to alleged investigations
21 conducted or actions undertaken by Plaintiff, and on that basis denies each such allegation contained
22 therein. As to the remaining allegations contained therein, Defendant hereby asserts the privilege
23 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
24 Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
25 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
26 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege,
27 to seek leave to amend and/or supplement this response accordingly (in whole or in part), and to
28 object to the use or disclosure of the this response for any purpose whatsoever.

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

11 58. In response to paragraph 58 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 and undertaken
13 conclusions made by Plaintiff, and on that basis denies each such allegation contained therein.
14 Defendant is without sufficient knowledge or information to form a belief as to the truth of the
15 allegations relating to DPS and the Other KFC Defendants, and on that basis denies each such
16 allegation contained therein. As to the remaining allegations contained therein, Defendant hereby
17 asserts the privilege against self-incrimination under the Fifth Amendment to the United States
18 Constitution; the Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section
19 15; and California Evidence Code section 940. To the extent Defendant determines that there is no
20 longer potential for criminal prosecution, Defendant expressly reserves the right to withdraw his
21 assertion of the privilege, to seek leave to amend and/or supplement this response accordingly (in
22 whole or in part), and to object to the use or disclosure of the this response for any purpose
23 whatsoever.

24 59. In response to paragraph 59 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, the Hogan Group, and
26 the Other KFC Defendants, and on that basis denies each such allegation contained therein. As to the
27 remaining allegations contained therein, Defendant hereby asserts the privilege against self-
28 incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of

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

6 60. In response to paragraph 60 of the SAC, Defendant is without sufficient knowledge or
7 information to form a belief as to the truth of the allegations relating to DPS, the Hogan Group, and
8 the Other KFC Defendants, and on that basis denies each such allegation contained therein. As to the
9 remaining allegations contained therein, Defendant hereby asserts the privilege against self-
10 incrimination under the Fifth Amendment to the United States Constitution; the Federal Rules of
11 Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California Evidence Code
12 section 940. To the extent Defendant determines that there is no longer potential for criminal
13 prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege, to seek
14 leave to amend and/or supplement this response accordingly (in whole or in part), and to object to the
15 use or disclosure of the this response for any purpose whatsoever.

16 61. In response to paragraph 61 of the SAC, Defendant is without sufficient knowledge or
17 information to form a belief as to the truth of the allegations relating to DPS and the Other KFC
18 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
19 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
20 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
21 California Constitution, Article 1, Section 15; and California Evidence Code Section 940. To the
22 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
23 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
24 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
25 this response for any purpose whatsoever.

26 62. In response to paragraph 62 of the SAC, Defendant is without sufficient knowledge or
27 information to form a belief as to the truth of the allegations relating to DPS, the Hogan Group, and
28 the Other KFC Defendants, and on that basis denies each such allegation contained therein. As to the

1 remaining allegations contained therein, Defendant hereby asserts the privilege against self-
 2 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 63. In response to paragraph 63 of the SAC, Defendant is without sufficient knowledge or
 9 information to form a belief as to the truth of the allegations relating to DPS, the Hogan Group, and
 10 the Other KFC Defendants, and on that basis denies each such allegation contained therein. As to the
 11 remaining allegations contained therein, Defendant hereby asserts the privilege against self-
 12 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 64. In response to paragraph 64 of the SAC, Defendant responds to Plaintiff's prayer for
 19 relief as set forth below.

20 **THIRD CAUSE OF ACTION**
 21 **(Fraud)**

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

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

27 67. In response to paragraph 67 of the SAC, Defendant is without sufficient knowledge or
 28 information to form a belief as to the truth of the allegations relating to the Other KFC Defendants and
 DOES 12-20, and on that basis denies each such allegation contained therein. As to the remaining

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

8 68. In response to paragraph 68 of the SAC, Defendant is without sufficient knowledge or
 9 information to form a belief as to the truth of the allegations relating to DPS, and the Other KFC
 10 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
 11 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
 12 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
 13 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
 14 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
 15 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
 16 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
 17 this response for any purpose whatsoever.

18 69. In response to paragraph 69 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, the Other KFC
 20 Defendants, and DOES 1-10 and 12-20, and on that basis denies each such allegation contained
 21 therein. As to the remaining allegations contained therein, Defendant hereby asserts the privilege
 22 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
 23 Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
 24 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
 25 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege,
 26 to seek leave to amend and/or supplement this response accordingly (in whole or in part), and to
 27 object to the use or disclosure of the this response for any purpose whatsoever.

28 ///

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1 70. In response to paragraph 70 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, the Other KFC
3 Defendants, and DOES 1-10 and 12-20, and on that basis denies each such allegation contained
4 therein. As to the remaining allegations contained therein, Defendant hereby asserts the privilege
5 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
6 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,
9 to seek leave to amend and/or supplement this response accordingly (in whole or in part), and to
10 object to the use or disclosure of the this response for any purpose whatsoever.

11 71. In response to paragraph 71 of the SAC, Defendant is without sufficient knowledge or
12 information to form a belief as to the truth of the allegations relating to DPS, the Other KFC
13 Defendants, and DOES 1-10 and 12-20, and on that basis denies each such allegation contained
14 therein. As to the remaining allegations contained therein, Defendant hereby asserts the privilege
15 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
16 Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
17 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
18 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege,
19 to seek leave to amend and/or supplement this response accordingly (in whole or in part), and to
20 object to the use or disclosure of the this response for any purpose whatsoever.

21 72. In response to paragraph 72 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, the Other KFC
23 Defendants, and DOES 1-10 and 12-20, and on that basis denies each such allegation contained
24 therein. As to the remaining allegations contained therein, Defendant hereby asserts the privilege
25 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
26 Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
27 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
28 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege,

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

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

10 74. In response to paragraph 74 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, the Other KFC
 12 Defendants, and DOES 1-10 and 12-20, and on that basis denies each such allegation contained
 13 therein. As to the remaining allegations contained therein, Defendant hereby asserts the privilege
 14 against self-incrimination under the Fifth Amendment to the United States Constitution; the Federal
 15 Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15; and California
 16 Evidence Code section 940. To the extent Defendant determines that there is no longer potential for
 17 criminal prosecution, Defendant expressly reserves the right to withdraw his assertion of the privilege,
 18 to seek leave to amend and/or supplement this response accordingly (in whole or in part), and to
 19 object to the use or disclosure of the this response for any purpose whatsoever.

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

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

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

25 77. In response to paragraph 77 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 the Other KFC
 27 Defendants, 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

1 the 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
 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 78. In response to paragraph 78 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 the Other KFC
 9 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
 10 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
 11 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
 12 California Constitution, Article 1, Section and California Evidence Code section 940. To the extent
 13 Defendant determines that there is no longer potential for criminal prosecution, Defendant expressly
 14 reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or supplement
 15 this response accordingly (in whole or in part), and to object to the use or disclosure of the this
 16 response for any purpose whatsoever.

17 79. In response to paragraph 79 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 the Other KFC
 19 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
 20 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
 21 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
 22 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
 23 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
 24 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
 25 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
 26 this response for any purpose whatsoever.

27 80. In response to paragraph 80 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 the Other KFC

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

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

11 **FIFTH CAUSE OF ACTION**
(Restitution and Unjust Enrichment)

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

14 83. In response to paragraph 83 of the SAC, Defendant is without sufficient knowledge or
 15 information to form a belief as to the truth of the allegations relating to DPS and the Other KFC
 16 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
 17 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
 18 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
 19 California Constitution, Article 1, Section 15; and California Evidence Code section 940. To the
 20 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
 21 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
 22 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
 23 this response for any purpose whatsoever.

24 84. In response to paragraph 84 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 the Other KFC
 26 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
 27 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
 28 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the

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

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

16 86. In response to paragraph 86 of the SAC, Defendant responds to Plaintiffs prayer for
 17 relief as set forth below.

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

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

21 88. In response to paragraph 88 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 the Other KFC
 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
 25 the 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
 27 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
 28 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or

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

3 89. In response to paragraph 89 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 the Other KFC
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
7 the 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
9 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
10 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
11 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
12 this response for any purpose whatsoever.

13 90. In response to paragraph 90 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 the Other KFC
15 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
16 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
17 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
18 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 91. In response to paragraph 91 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 the Other KFC
25 Defendants, and on that basis denies each such allegation contained therein. As to the remaining
26 allegations contained therein, Defendant hereby asserts the privilege against self-incrimination under
27 the Fifth Amendment to the United States Constitution; the Federal Rules of Evidence, Rule 501; the
28 California Constitution, Article 1, Section 15, and California Evidence Code section 940. To the

1 extent Defendant determines that there is no longer potential for criminal prosecution, Defendant
2 expressly reserves the right to withdraw his assertion of the privilege, to seek leave to amend and/or
3 supplement this response accordingly (in whole or in part), and to object to the use or disclosure of the
4 this response for any purpose whatsoever.

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

7 **AFFIRMATIVE DEFENSES**

8 Defendant alleges the following affirmative defenses:

9 **FIRST AFFIRMATIVE DEFENSE**
10 (Failure to State a Claim)

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

14 **SECOND AFFIRMATIVE DEFENSE:**
15 (Contractual Limitations Period)

16 94. As a second 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 by the one-year
18 contractual limitations provision set forth in the Commission Junction Publisher Services Agreement
19 of which Plaintiff is a third party beneficiary and which Plaintiff incorporated by reference into the
20 eBay Supplemental Terms & Conditions.

21 **THIRD AFFIRMATIVE DEFENSE:**
22 (Statute of Limitations)

23 95. As a third Affirmative Defense, and not as an admission or waiver of any kind,
24 Defendant alleges that the SAC, and each and every cause of action therein, is barred by the
25 applicable statute of limitations. Said limitations include, but are not limited to, 18 U.S.C. §1030(g),
26 15 U.S.C. § 15b (as applied to 18 U.S.C. §1962, 1964), California Penal Code §502(e)(5), California
Code of Civil Procedure § 338, 339, and California Business & Professions Code §17208.

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FOURTH AFFIRMATIVE DEFENSE:
(Improper Venue)

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

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

97. As a fifth 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 the conduct alleged in the SAC was consented to and ratified by Plaintiff and its agent, Commission Junction, Inc. Such consent and ratification resulted in a modification of the Commission Junction Publisher Service Agreement and the eBay Special Terms and Conditions so that Defendant's alleged conduct was authorized by such contractual agreements.

SIXTH AFFIRMATIVE DEFENSE:
(General Authorization and Authorized Access)

98. As a sixth 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 the conduct alleged in the SAC, including but not limited to the alleged access to Plaintiff's computers, was known, authorized, ratified, accepted, and encouraged by Plaintiff and its agent, Commission Junction, Inc.

SEVENTH AFFIRMATIVE DEFENSE:
(Estoppel)

99. As a seventh 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 Plaintiff's and its agent's, Commission Junction, Inc.'s, acts, omissions, representations and conduct constitute an estoppel, and bar all its claims alleged in the SAC.

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EIGHTH AFFIRMATIVE DEFENSE:

(Waiver)

100. As an eighth Affirmative Defense, and not 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 alleges against Defendant through Plaintiff's and its agent's, Commission Junction, Inc.'s, actual or constructive knowledge, consent and conduct in relation to the alleged participation of Defendant in Plaintiff's Affiliate Marketing Program.

NINTH AFFIRMATIVE DEFENSE:

(Laches, Unclean Hands, Acquiescence, Assumption of the Risk)

101. As a ninth 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 doctrines of laches, unclean hands, acquiescence, and reasonably implied assumption of the risk.

TENTH AFFIRMATIVE DEFENSE:

(No Damages, Losses or Impairment of Computers)

102. As a tenth 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 Plaintiff never sustained any damages or losses caused by Defendant, and Plaintiff never suffered any impairment to its computers or data therein as required and defined by the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq* and California Penal Code § 502.

ELEVENTH AFFIRMATIVE DEFENSE:

(Damages Not Subject to Reasonable Calculation)

103. As an eleventh 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 Plaintiff's alleged damages, if any, are not subject to reasonable calculation.

TWELFTH AFFIRMATIVE DEFENSE:

(Failure to Mitigate Damages)

104. As a twelfth 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

1 Plaintiff, and it's agent, Commission Junction, Inc., failed to act on information in their possession and
 2 failed to exercise reasonable resourcefulness, care and diligence to prevent and mitigate any alleged
 3 damages, so that any recovery against Defendant is barred or should be reduced accordingly.

4 THIRTEENTH AFFIRMATIVE DEFENSE:

5 (In Pari Delicto)

6 105. As a thirteenth 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 doctrine of
 8 in pari delicto. Plaintiff and/or its agent, Commission Junction, Inc., authorized, encouraged and
 9 ratified the conduct alleged in the SAC by Defendant.

10 FOURTEENTH AFFIRMATIVE DEFENSE:

11 (Plaintiffs Negligence)

12 106. As a fourteenth 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 because of
 14 Plaintiff's and it's agent's, Commission Junction, Inc.'s, negligence or want of ordinary care and
 15 prudence after having knowledge and information about Defendant's alleged conduct.

16 FIFTEENTH AFFIRMATIVE DEFENSE:

17 (Intervening/Superseding Actions)

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

24 SIXTEENTH AFFIRMATIVE DEFENSE:

25 (No Intent to Injure)

26 108. As a sixteenth 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
 28 Defendant at no time acted with any intent to injure Plaintiff. Defendant took no actions intended to

1 cause any harm to Plaintiff, and the Defendant believed in good faith that Plaintiff knowingly
2 authorized, ratified and benefitted from Defendant's alleged conduct.

3 SEVENTEENTH AFFIRMATIVE DEFENSE:

4 (Acceptance of Benefits)

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

9 EIGHTEENTH AFFIRMATIVE DEFENSE:

10 (Adequate Legal Remedy)

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

15 NINETEENTH AFFIRMATIVE DEFENSE:

16 (Any Harm Proximately Caused by Others)

17 111. As a nineteenth 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 any
19 losses, damages and/or injuries sustained by Plaintiff were proximately caused by the fault of persons
20 or entities other than Defendant, who acted without Defendant's knowledge or consent, and over
21 whom Defendant has no control. In particular, but without limitation, Defendant alleges that
22 Plaintiff's agent, Commission Junction, Inc., and Plaintiff's employees such as Christine Kim,
23 reviewed and approved Defendant's conduct under the Affiliate Marketing Program as alleged in the
24 SAC, and thus proximately caused any damages, losses or injuries claimed by Plaintiff.

25 TWENTIETH AFFIRMATIVE DEFENSE:

26 (Good Faith)

27 112. As a twentieth Affirmative Defense, and not as an admission or waiver of any kind,
28 Defendant alleges that the SAC, and each and every cause of action therein, is barred because

1 Defendant has acted in good faith based on the belief and understanding that Plaintiff and its agent
2 and employee, Commission Junction, Inc. and Christine Kim, authorized its conduct as alleged in the
3 SAC.

4 TWENTY-FIRST AFFIRMATIVE DEFENSE:

5 (Setoff)

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

9 TWENTY-SECOND AFFIRMATIVE DEFENSE:

10 (Indispensable Party)

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

15 TWENTY-THIRD AFFIRMATIVE DEFENSE:

16 (Plaintiff's Agents)

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

21 TWENTY-FOURTH AFFIRMATIVE DEFENSE

22 (No Liability For Conduct Of Other Defendants)

23 116. As a twenty-fourth Affirmative Defense, and not as an admission or waiver of any
24 kind, Defendant alleges that after December 27, 2006, this Defendant was no longer personally a
25 partner in Defendant Kessler's Flying Circus. Therefore, after such date, Defendant has no personal
26 liability or responsibility for the alleged conduct of Defendant Kessler's Flying Circus. Defendant
27 alleges that he never had any ownership, control or knowledge of the conduct of Defendants
28 BrianDunning.com, Thunderwood Holdings, Inc., or Brian Dunning. Defendant was not the agent or

1 representative for these other defendants. Therefore, Defendant has no personal liability or
2 responsibility for the alleged conduct of any 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 Todd Dunning 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.

FREELAND COOPER & FOREMAN LLP

150 Spear Street, Suite 1800
San Francisco, California 94105

KRELLMAN COOPER & FUKEMIAN LLP
150 Spear Street, Suite 1800
San Francisco, California 94105

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 Todd Dunning 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.

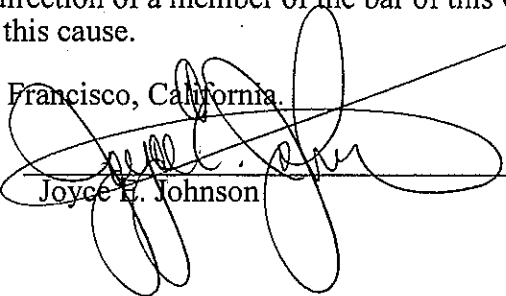
[BY FEDEX (Overnight Delivery) - CCP § 1013(c)] I caused such envelope to be delivered to the Federal Express Office in San Francisco, California, with whom we have a direct billing account, to be delivered on the next business day.

[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 K. Johnson

ATTACHED SERVICE LIST

<p>1 2 3 4 5 6</p>	<p>Leo Presiado RUS, MILIBAND & SMITH Von Karman Towers 2211 Michelson Drive, 7th Floor Irvine, CA 92612 Telephone: (949) 752-7100 Facsimile: (949) 252-1514 Attorneys for Defendants Brian Dunning and Thunderwood Holdings, Inc.</p>	<p>Seyamack Kouretchian COAST LAW GROUP 1140 S. Coast Highway 101 Encinitas, CA 92024 Attorneys for Defendants Shawn Hogan and Digital Point Solutions, Inc.</p>
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<p>7 8 9 10 11 12</p>	<p>David Eberhart O'MELVENY & MYERS LLP Embarcadero Center West 2 Embarcadero Center, 28th Floor San Francisco, CA 94111 Attorneys for Plaintiff eBay, Inc. Telephone: 415-984-8700 Facsimile: 415-984-8701 Attorneys for Plaintiff eBay, Inc.</p>	<p>Patrick K. McClellan Von Karman Towers 2211 Michelson Drive, 7th Floor Irvine, CA 92612 Attorney for Kessler's Flying Circus</p>
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150 Spear Street, Suite 1800
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