

1 DAVID R. EBERHART (S.B. #195474)
 2 deberhart@omm.com
 3 SHARON M. BUNZEL (S.B. #181609)
 4 sbunzel@omm.com
 5 COLLEEN M. KENNEDY (S.B. #227107)
 6 ckennedy@omm.com
 7 O'MELVENY & MYERS LLP
 8 Two Embarcadero Center, 28th Floor
 9 San Francisco, CA 94111
 10 Telephone: (415) 984-8700
 11 Facsimile: (415) 984-8701

12 Attorneys for Plaintiff eBay Inc.

13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**
 15 **SAN JOSE DIVISION**

16 EBAY INC.,

17 Plaintiff,

18 v.

19 DIGITAL POINT SOLUTIONS, INC.,
 20 SHAWN HOGAN, KESSLER'S
 21 FLYING CIRCUS, THUNDERWOOD
 22 HOLDINGS, INC., TODD DUNNING,
 23 DUNNING ENTERPRISE, INC.,
 24 BRIAN DUNNING,
 25 BRIANDUNNING.COM, and DOES 1-
 26 20,

27 Defendants.

Case No. C 08-4052 JF

**JOINT CASE MANAGEMENT
 STATEMENT AND [PROPOSED]
 ORDER**

Conference Date: September 25, 2009
 Time: 10:30 a.m.
 Judge: Hon. Jeremy Fogel

1 The parties to the above-entitled action jointly submit this Case Management
2 Statement and Proposed Order and request that the Court adopt it as its Case Management
3 Order in this case. The parties, through counsel, have met and conferred on the matters
4 contained herein.

5 **I. JURISDICTION AND SERVICE**

6 eBay's Statement:

7 eBay Inc.'s Second Amended Complaint ("SAC") alleges that Defendants, by
8 conducting fraudulent "cookie stuffing" schemes as described in more detail below, have
9 violated both federal and California law, including the federal Computer Fraud and Abuse
10 Act (the "CFAA"), 18 U.S.C. § 1030, and the federal civil RICO statute, 18 U.S.C. §
11 1962(c). The Court therefore has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.
12 Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)(1), 1391(b)(2) and
13 1391(c), and 18 U.S.C § 1965(a). Defendants have previously filed motions to dismiss
14 the SAC and/or transfer this action to the Central District of California or to Los Angeles
15 County Superior Court based on their argument that the forum selection clause in the
16 Publisher Services Agreement between Defendants and Commission Junction, Inc.
17 ("CJI") governs this action. Those motions were denied by the Court on August 17, 2009.

18 The named Defendants have been served with the SAC.

19 DPS Defendants' Statement:

20 Pursuant to the forum selection clause set forth in the Commission Junction
21 Publisher Services Agreement (PSA), of which Plaintiff is a third party beneficiary and
22 which Plaintiff incorporated by reference into the eBay Supplemental Terms &
23 Conditions, proper jurisdiction and venue for this action lies in the United States District
24 Court for the Central District or Los Angeles County Superior Court. The DPS
25 Defendants contend that the foregoing applies equally with respect to Plaintiff's First
26 Cause of Action for alleged violations of the Computer Fraud and Abuse Act, 18 U.S.C.
27 §1030, as the damages Plaintiff seeks to recover thereunder are based on the alleged
28 improper payment of commissions to defendants under Plaintiff's affiliate marketing

1 program (AMP). As with the other causes of action set forth in the SAC, such harms
2 specifically track the terms of the aforementioned AMP agreements. The DPS
3 Defendants therefore contend that the PSA's forum selection clause is applicable to all
4 claims set forth in the SAC.

5 The DPS defendants were served with Plaintiff's Second Amended Complaint
6 (SAC) on March 26, 2009, and filed and served Answers thereto on August 31, 2009 upon
7 the Court's denial of the DPS Defendants' motion to dismiss the same.

8 Todd Dunning, Dunning Enterprise, Inc., Brian Dunning, briandunning.com,
9 Thunderwood Holdings, Inc. and Kessler's Flying Circus Defendants ("Non-DPS
10 Defendants") Statement:

11 The Non-DPS Defendants incorporate the substance of the DPS Defendants'
12 statement on jurisdiction and venue issues. This action should be transferred to the
13 Central District where these defendants reside and did business with eBay's agent,
14 Commission Junction, Inc. under eBay's Affiliate Marketing Program. The Non-DPS
15 Defendants have been served with the SAC and have filed their answers.

16 **II. FACTS**

17 eBay's Statement:

18 eBay's SAC alleges that Defendants engaged in sophisticated fraudulent schemes
19 that were designed to and did defraud and cause harm to eBay over the course of at least
20 four years. eBay's Affiliate Marketing Program is designed to increase traffic to eBay's
21 site through the placement of advertisements for eBay on third-party websites. In this
22 program, compensation is provided by eBay to the persons and entities, known as
23 "affiliates," that advertise on behalf of eBay when the advertisement in question results in
24 a revenue generating action on eBay's site. eBay uses cookies to identify the site that
25 referred the user to eBay and which affiliate, if any, should be credited with the referral
26 and receive the commission.

27 Defendants' engaged in "cookie stuffing" schemes intended to defraud eBay.
28 "Cookie stuffing" is a term used to describe the forced placement of a cookie on a

1 computer, typically by causing a cookie from a particular website to be placed on the
2 user's computer without the user knowing that he or she visited the website that placed the
3 cookie. Defendants accomplished this scheme through software programs and/or code
4 that, unbeknownst to the user, redirected the user's computer to the eBay website without
5 the user actually clicking on an eBay advertisement link, or even becoming aware that
6 they had left the page they were previously viewing. As a result, the eBay site would be
7 prompted to drop an eBay cookie on the user's computer. Defendants' scheme caused
8 millions of users' computers to access eBay's computers in an unauthorized way and/or to
9 exceed the authorized access to eBay's computers provided by eBay's User Agreement.
10 The majority of those acts of unauthorized access did not cause the improper payment of a
11 commission to defendants. A minority, but economically significant, proportion of those
12 acts of unauthorized access caused eBay to pay unearned commissions to Defendants.¹

13 Defendants' schemes have been ongoing since at least December 2003, and ended
14 only when the FBI seized Defendants' computer equipment in June 2007 as part of an
15 investigation into whether the fraudulent activities alleged by eBay in this case constitute
16 federal crimes. Defendants' schemes have allowed them to receive payment from eBay
17 for a substantial number of commissions to which they were not entitled. Moreover,
18 Defendants used technological measures and engaged in activity specifically designed to
19 frustrate attempts by eBay to discover Defendants' wrongdoing.

20 DPS Defendants' Statement:

21 Defendant Digital Point Solutions, Inc. is a California corporation. Per California
22 Corporations Code section 200(c), it was not formed (and did not otherwise exist) until
23 May 14, 2007, the date of its incorporation. Digital Point Solutions, Inc. never conducted
24 business with Plaintiff and was never involved in Plaintiff's affiliate marketing program.
25 It therefore denies the substantive allegations of the SAC and any allegation of
26 wrongdoing in this case.

27 ¹ Despite Defendants' claims to the contrary, CJI is not an indispensable party within the meaning of Fed. R. Civ. P.
28 19 because the Court may accord complete relief without CJI and CJI has not claimed an interest relating to the
subject of this action.

1 Defendant Shawn Hogan is an individual residing in San Diego, California. Mr.
2 Hogan has conducted and continues to conduct business as a sole proprietorship. In June
3 of 2007, the Federal Bureau of Investigation seized a number of materials from Mr.
4 Hogan. Although Mr. Hogan denies that Plaintiff is entitled to any relief under the SAC,
5 given the pending criminal investigation, Mr. Hogan has asserted his privilege against
6 self-incrimination under the Fifth Amendment to the United States Constitution; the
7 Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;
8 and California Evidence Code section 940. The DPS Defendants intend to seek a stay of
9 this action pending the conclusion of the aforementioned criminal investigation.

10 Although Plaintiff has repeatedly grouped all defendants together, Defendants
11 Digital Point Solutions, Inc. and Shawn Hogan are distinct from the “KFC” or “Dunning”
12 defendants in this action. Any alleged acts of those defendants, including any acts that
13 may have taken place with respect to the Commission Junction lawsuit, are not
14 attributable to the DPS Defendants.

15 Non-DPS Defendants’ Statement:

16 The Non-DPS Defendants deny the truthfulness and accuracy of Plaintiff’s entire
17 narrative of the alleged facts of this case. The true facts are until December 26, 2006,
18 Todd Dunning was a general partner in defendant Kessler’s Flying Circus (“KFC”), and
19 after that date Dunning Enterprise, Inc. was a general partner in place of Todd Dunning.
20 Thunderwood Holdings, Inc. is also a general partner of KFC. KFC contracted with
21 eBay’s agent, Commission Junction, Inc. (“CJI”), to perform promotional advertising
22 services for eBay. KFC entered into a Publisher Service Agreement (“PSA”) with CJI in
23 April 2005, and eBay’s Special Terms and Conditions were incorporated into that
24 agreement. eBay approved KFC to perform these services through CJI. At all times, CJI
25 and eBay had an agreement which obligated CJI to keep eBay fully aware of the activities
26 of participants in the affiliate marketing program, to monitor, track and report on all
27 promotional methods used by KFC to generate new customers for eBay. If eBay was not
28 aware of KFC’s conduct under the affiliate marketing program, it was because

1 Commission Junction, Inc. breached of its obligations to eBay. The Non-DPS Defendants
2 relied on the approvals and authorizations by eBay representatives and Commission
3 Junction, Inc. for their conduct under the affiliate marketing program. For these reasons,
4 Commission Junction, Inc. is an indispensable party to this action. As recently as March
5 22, 2007, eBay stated to CJI that it was fully aware of KFC's "bizmodel", that KFC was
6 one of eBay's "top affiliates", and that its promotional efforts were "compliant" with the
7 Affiliate Marketing Program. KFC received payment for its promotional activities from
8 CJI, not from eBay. All payments received from CJI were for actual new customers who
9 registered at eBay and engaged on eBay's website in qualified revenue transactions within
10 a specified period of time based on KFC's promotional activity for eBay . CJI monitored
11 all this activity and reported it to eBay as required by agreements between them.
12 Therefore there was no "artificial inflation" of commissions.

13 The Non-DPS Defendants have never had a business relationship to defendants
14 Shawn Hogan and Digital Point Solutions, Inc. (collectively "DPS"). DEI, Thunderwood
15 and KFC never agreed to eBay's User Agreement. Therefore, Non-DPS Defendants
16 object to eBay's repeated and unsupported reference to all defendants in a collective
17 manner. KFC was an entirely separate and independent business from DPS, and
18 accordingly, eBay must allege and prove its allegations separately against the Non-DPS
19 Defendants and/or KFC. eBay is simply confusing the Court and these pleadings by its
20 repeated and unsupported collective allegations and references to all defendants as one
21 group or entity.

22 **III. LEGAL ISSUES**

23 eBay's Statement:

24 There have been no changes since the previous Joint Case Management Statement.

25 DPS Defendants' Statement:

26 In addition to the issues previously identified, the DPS Defendants state that the
27 following legal issues are relevant to this case:
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1. Whether Plaintiff knew of, consented to, and actively encouraged the conduct at issue because it resulted in a direct benefit to Plaintiff.
2. Whether Plaintiff’s action is barred by the one-year contractual limitations period set forth in the PSA, which must be read as “a part” of the eBay Supplemental Terms & Conditions under the doctrine of incorporation by reference.
3. Whether Plaintiff’s action is barred by the applicable statutes of limitation including those set forth in 18 U.S.C. §1030(g), 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.
4. Whether the action should be stayed pending the conclusion of the ongoing criminal investigation of the United States Attorney’s Office.

Non-DPS Defendants’ Statement:

In addition to the issues identified by the DPS Defendants above, the Non-DPS Defendants incorporate their Affirmative Defenses alleged in their answers to the Second Amended Complaint and add the following legal issues.

- 1 1. Whether Plaintiff is barred from any and all recovery because it
2 authorized, ratified and approved of KFC's conduct, and/or by the
3 general release provided to the Non-DPS Defendants by Plaintiff's
4 agent, Commission Junction, Inc.?
- 5 2. Whether Plaintiff is barred from any and all recovery because of the
6 authorization, ratification and approval of KFC's promotional
7 activities for eBay by Plaintiff's agent, Commission Junction, Inc.?
- 8 3. Whether there is an absence of a necessary party to this action,
9 namely Commission Junction, Inc., such that the Court cannot grant
10 relief to the Plaintiff?
- 11 4. Whether Plaintiff is barred from any recovery because eBay would
12 be unjustly enriched by any award in this case since KFC in fact
13 generated new customers and/or revenues for eBay as requested and
14 authorized by eBay's and CJI's programs?
- 15 5. Whether Plaintiff is barred from any recovery by equitable doctrines
16 because of the damage it has caused to the Non-DPS Defendants by
17 making untrue and unfounded allegations to the FBI to create a
18 federal investigation for the purpose of obtaining a litigation
19 advantage in this case?
- 20 6. Whether Plaintiff received the benefit of promotional services by
21 KFC for which commissions are due and owing?
- 22 7. Whether Plaintiff can prove damages with a reasonable certainty by
23 distinguishing between commissions that were properly earned and
24 those that it claims were not properly earned under the Affiliate
25 Marketing Program as a result of alleged "cookie stuffing"?
- 26 8. Whether Plaintiff can prove any damages or losses as defined and
27 required by 18 U.S.C. § 1030 *et.seq.* and/or California Penal Code §
28 502?

20 **IV. PENDING AND ANTICIPATED MOTIONS**

21 eBay's Statement:

22 There are no motions currently before the Court. eBay anticipates the need to file a
23 motion to compel responses to eBay's Requests for Admission, First Set of Interrogatories
24 and First Set of Requests for Production from Defendants Shawn Hogan, Digital Point
25 Solutions, Inc. ("DPS"), Brian Dunning, Thunderwood Holdings, Inc.,
26 BrianDunning.com, Kessler's Flying Circus, Todd Dunning and Dunning Enterprise, Inc.
27 based on the inapplicability of the Fifth Amendment privilege against self-incrimination.
28 eBay contends that it has satisfied its meet and confer obligations under Civil L.R. 37-

1 1(a). Some Defendants have asked for additional meet and confer discussions; although
2 eBay will engage in those discussions in good faith, Defendants' longstanding refusal to
3 provide complete discovery—as well as their stated intention to file a motion to stay all
4 discovery—leads eBay to the conclusion that motions to compel are unavoidable.

5 eBay also anticipates the need to file a motion to compel responses from all
6 Defendants to the requests in eBay's First Set of Requests for Production that seek
7 information regarding Defendants' financial condition, including requests for Defendants'
8 financial statements and tax returns.

9 It may also prove necessary to file motions to compel against third parties NetHere,
10 Inc. ("NetHere") and Rackspace US, Inc. ("Rackspace") for production of documents
11 pursuant to the subpoenas issued by eBay, discussed in more detail below.

12 In addition, eBay anticipates the need to file a motion to strike the Answer to
13 eBay's SAC filed jointly by Defendants Brian Dunning, Kessler's Flying Circus,
14 Thunderwood Holdings, Inc. and BrianDunning.com, based on the improper assertion of
15 the Fifth Amendment privilege by corporate entities.

16 eBay anticipates filing a motion for summary judgment or summary adjudication
17 following the close of discovery. eBay further anticipates filing motions in limine before
18 trial.

19 DPS Defendant's Statement:

20 Defendants Digital Point Solutions, Inc. and Shawn Hogan anticipate filing a
21 motion to stay the action pending the conclusion of the criminal investigation. The parties
22 previously agreed to continue the initial Case Management Conference because of the
23 ongoing nature of the investigation. The DPS Defendants further anticipate filing a
24 motion for summary judgment and/or adjudication as well as a motion to transfer and/or
25 dismiss on the grounds of forum non conveniens. In addition, Mr. Hogan will seek leave
26 to amend his Answer to substantively respond to the allegations of the SAC upon the
27 conclusion of the criminal investigation and, to the extent necessary thereafter, will move
28 to exclude any reference to the assertion of the Fifth Amendment at trial or otherwise.

1 Finally, to the extent the action is not dismissed or transferred, the DPS Defendants
2 anticipate requesting bifurcation and/or separate trials as to each respective defendant
3 group.

4 Non-DPS Defendants' Statement:

5 The Non-DPS Defendants incorporate the substance of the DPS Defendants'
6 statement above regarding their similar anticipated motions.

7 **V. AMENDMENT OF PLEADINGS**

8 eBay's Statement:

9 eBay filed its SAC on March 26, 2009, and does not anticipate the need for any
10 further amendments. Defendants' motions to dismiss the SAC and/or transfer were
11 denied on August 17, 2009. On August 31, 2009, DPS and Shawn Hogan answered the
12 SAC. On September 9, 2009, the remaining Defendants answered the SAC. If discovery
13 shows that Defendants used additional entities to effectuate their schemes, and if the
14 currently named Defendants did not succeed to the assets and liabilities of those entities,
15 eBay may seek leave to amend its complaint to conform to the evidence and to substitute
16 those entities for current Doe defendants.

17 DPS Defendant's Statement:

18 Given the pending criminal investigation, Mr. Hogan has asserted his Fifth
19 Amendment privilege in answering the SAC. As noted above, Mr. Hogan intends to seek
20 leave to amend his Answer upon the conclusion of the investigation.

21 Non-DPS Defendants Statement:

22 Given the pending criminal investigation, Todd Dunning, Brian Dunning,
23 Briandunning.com, Thunderwood Holdings, Inc. and KFC herein asserted the Fifth
24 Amendment privilege in answering the SAC. As noted above, the Non-DPS Defendants
25 intend to seek leave to amend his Answer upon the conclusion of the investigation.

26 **VI. EVIDENCE PRESERVATION**

27 There have been no changes since the previous Joint Case Management Statement.
28

1 **VII. DISCLOSURES**

2 The parties exchanged their initial disclosures on January 8, 2009. Defendants
3 DPS, Inc. and Shawn Hogan served supplemental initial disclosures on February 4, 2009.
4 eBay served amended initial disclosures on April 2, 2009.

5 **VIII. DISCOVERY PLAN**

6 eBay's Statement:

7 Discovery is open in this action, and eBay is proceeding with full fact discovery.
8 eBay served its First Set of Requests for Production, First Set of Interrogatories, and First
9 Set of Requests for Admission to all Defendants on January 22, 2009. In response, Brian
10 Dunning, Todd Dunning, and Shawn Hogan invoked their privileges against self-
11 incrimination under the Fifth Amendment. The remaining Defendants (all entities) also
12 purported to invoke the individuals' Fifth Amendment privilege, claiming that any
13 provision of responses by the entities would compromise the individuals' rights against
14 self-incrimination. However, Defendants Dunning Enterprise, Inc., BrianDunning.com,
15 Thunderwood Holdings, Inc. and Kessler's Flying Circus did provide substantive
16 responses to eBay's First Set of Requests for Production.

17 eBay served its Second Set of Requests for Production to all Defendants on May 4,
18 2009. All Defendants responded substantively to these requests and did not invoke any
19 purported Fifth Amendment privileges against self-incrimination. Defendants Brian
20 Dunning, BrianDunning.com, Thunderwood Holdings, Inc. and Kessler's Flying Circus
21 have not yet produced any documents in response to these Requests despite a commitment
22 to do so at a time and place mutually convenient to the parties.

23 Additionally, eBay served third-party subpoenas for documents on Commission
24 Junction, Inc. and their counsel Ernster Law Offices on May 4, 2009. eBay also served
25 third-party subpoenas for documents on NetHere on June 3, 2009 and on Rackspace on
26 June 4, 2009—both of which are entities that have provided server hosting and co-location
27 services to Defendants. eBay served amended subpoenas on NetHere and Rackspace on
28 June 9, 2009. Rackspace has stated its intention to produce some limited responsive

1 documents related to BrianDunning.com that have first been provided to his counsel for
2 review at his counsel's request. NetHere has indicated that it does not have control of the
3 responsive documents and that those documents are in the exclusive control of DPS.

4 Defendants have served no discovery requests to eBay, including any requests for
5 production of the documents that the non-DPS Defendants now mistakenly contend eBay
6 was required to provide with its initial disclosures. Rule 26 does not require a production
7 of documents as part of the initial disclosures, as subsection 26(a)(1)(A)(ii) makes clear.
8 The documents themselves are available to Defendants through the normal discovery
9 process at any time that Defendants see fit to propound discovery requests on eBay.

10 The parties have previously agreed that phasing of discovery is not appropriate.

11 Pursuant to the attached schedule, eBay proposes that fact discovery close on April
12 30, 2010 and expert discovery close on July 30, 2010.

13 Certain materials relevant to fact discovery in this action were seized by the FBI
14 from Defendants in June 2007 and, to eBay's understanding, only some materials have
15 been returned to Defendants. Defendants have indicated that they do not possess copies
16 of the materials still in the FBI's possession. However, the responses to, and meet and
17 confer process resulting from, eBay's subpoenas to NetHere and Rackspace lead eBay to
18 conclude that many of the same materials are available to Defendants from NetHere and
19 Rackspace. Accordingly, eBay will seek their production pursuant to the amended
20 subpoenas served on those entities and through the motions to compel production directly
21 from Defendants described above.

22 The Defendants have previously proposed that the limitations imposed by the
23 discovery rules be modified as follows: 10 depositions increased to 25, and 25
24 interrogatories increased to 50. Although eBay believes that no modifications are
25 necessary, eBay is amenable to increasing the interrogatories to 50. The increase in
26 depositions proposed by the Defendants, however, is not necessary or appropriate in this
27 case; eBay will agree to an increase in depositions from 10 to 15.

28 The parties filed a stipulated protective order, which was signed by this Court on

1 June 26, 2009.

2 DPS Defendants' Statement:

3 Given the pending criminal investigation discussed above, Defendant Shawn
4 Hogan has asserted his Fifth Amendment privilege in response to Plaintiff's discovery
5 requests. With respect to Plaintiff's requests for production, Plaintiff contends that the
6 assertion of the Fifth Amendment is not appropriate based on the FBI's prior seizure of
7 materials. The DPS Defendants have provided Plaintiff with authority regarding the
8 testimonial aspects of producing documents and contend that the seizure does not render
9 the Fifth Amendment obsolete. Plaintiff has not yet provided responsive authority but the
10 DPS Defendants will continue to meet and confer in good faith regarding the same. With
11 respect to the seizure, it appears that all computer-related materials have been returned by
12 the FBI. However, the scope of the seizure is not entirely clear and it appears that some
13 physical documents are still in the possession of the FBI and/or U.S. Attorney's Office.

14 Because Digital Point Solutions, Inc. never conducted business with Plaintiff and
15 was never involved in Plaintiff's affiliate marketing program, it does not have any
16 documents or information relevant to the SAC. The Fifth Amendment has been properly
17 asserted because the breadth of the definitions of "DPS" set forth in plaintiff's discovery
18 requests are such that the requests arguably seek information from Mr. Hogan
19 individually. In that regard, Plaintiff has been provided with authority indicating that a
20 sole proprietorship may assert the Fifth Amendment privilege and is not subject to the so-
21 called "collective entity" rule.

22 Given the foregoing, and because it appears that the FBI has yet to return any
23 seized materials to the non-DPS Defendants, a stay of the action is warranted and
24 appropriate and it appears that all defendants intend to move for such a stay. The DPS
25 Defendants' position is that discovery dates should not be set until after the motion for
26 stay has been adjudicated.

27 To the extent dates are set at the Case Management Conference, fact and expert
28 discovery should not close until November 2010 and March 2011, respectively (these

1 dates may need to be further extended depending on when the criminal investigation is
2 resolved). In light of the expansive timeframe of the alleged wrongdoing and the number
3 of potential percipient and party witnesses associated with Commission Junction, Plaintiff,
4 and Plaintiff's subsidiaries, 25 to 30 depositions are warranted in this case.

5 Non-DPS Defendants' Statement:

6 Given the pending criminal investigation discussed above, Defendant Todd
7 Dunning, Brian Dunning, briandunning.com, Thunderwood Holdings, Inc. and Kessler's
8 Flying Circus asserted the Fifth Amendment privilege in response to Plaintiff's discovery
9 requests. With respect to Plaintiff's requests for production, Todd Dunning and DEI have
10 produced the relevant, non-privileged documents in their possession, custody and control.
11 With respect to the documents seized by the FBI, Todd Dunning and DEI are not aware of
12 whether the FBI has returned any documents seized from Defendant Brian Dunning or
13 whether any documents remain in the possession of the FBI and/or U.S. Attorney's
14 Office.

15 Based on the new allegations in the SAC regarding eBay's investigations and the
16 terms of the Master Advertiser Service Agreement ("MASA") between eBay and
17 Commission Junction, Inc., it appears that eBay has not fulfilled its initial disclosure
18 obligations to provide all known relevant documents to defendants. At a minimum, the
19 reports alleged in the SAC have not been provided, and the reports prepared by
20 Commission Junction, Inc. as required by the MASA have not been provided. There are
21 also documents that were produced by Commission Junction, Inc. in the now-settled State
22 Court action that indicate eBay has extensive email communications and possibly other
23 documents that have not been provided as initial disclosures. eBay should be required to
24 update and complete its initial disclosure requirements.

25 Given these facts, a stay of the action is warranted and appropriate and it appears
26 that all defendants intend to move for such a stay. The Non-DPS Defendants' position is
27 that discovery dates should not be set until after the motion for stay has been adjudicated.

28 To the extent dates are set at the Case Management Conference, fact and expert

1 discovery should not close until November 2010 and March 2011, respectively (these
2 dates may need to be further extended depending on when the criminal investigation is
3 resolved). In light of the expansive timeframe of the alleged wrongdoing and the number
4 of potential percipient and party witnesses associated with Commission Junction, Plaintiff,
5 and Plaintiff's subsidiaries, up to 25 to 30 depositions may be warranted in this case. If
6 the Court does not stay this case, it is appropriate to provide a longer schedule for
7 discovery and trial preparation in the expectation that the criminal investigation will
8 resolve during this period. Then the Non-DPS Defendants would be able to withdraw the
9 assertion of the Fifth Amendment privilege, and fully participate in the defense of the
10 case.

11 **IX. RELATED CASES**

12 eBay's Statement:

13 eBay is not aware of any related cases.

14 DPS Defendants' Statement:

15 The DPS Defendants are not aware of any related cases.

16 Non-DPS Defendants' Statement:

17 The Non-DPS Defendants are not aware of any related cases.

18 **X. RELIEF**

19 There have been no changes since the previous Joint Case Management Statement.

20 **XI. SETTLEMENT AND ADR**

21 eBay's Statement:

22 The parties have discussed the possibility of engaging in alternative dispute
23 resolution. Defendants have disclaimed that they were involved in any cookie stuffing.
24 eBay anticipates that the outstanding discovery requests will provide direct evidence to
25 the contrary. Consequently, it is eBay's position that any ADR process would not be
26 productive until Defendants have materially complied with the long-outstanding discovery
27 requests.

28 DPS Defendants' Statement:

1 The DPS Defendants' position is that the parties are in a position to begin
 2 discussing settlement. While the DPS Defendants of course anticipate that further
 3 discovery will be beneficial in evaluating settlement positions, particularly regarding the
 4 extent to which Plaintiff was aware of and encouraged any conduct at issue and the extent
 5 to which Plaintiff's claims are time-barred under the discovery rule, there is a sufficient
 6 basis to engage in preliminary settlement discussions.

7 Non-DPS Defendants' Statement:

8 The Non-DPS Defendants believe that early efforts at settlement should be
 9 seriously pursued. The Non-DPS Defendants do not believe that further discovery is
 10 likely to reveal substantial new facts that would dramatically impact settlement
 11 possibilities. An early settlement, if possible, is in the best interests of these defendants,
 12 and presumably Plaintiff.

13 **XII. MAGISTRATE JUDGE**

14 There have been no changes since the previous Joint Case Management Statement.

15 **XIII. OTHER REFERENCES**

16 There have been no changes since the previous Joint Case Management Statement.

17 **XIV. NARROWING OF ISSUES**

18 There have been no changes since the previous Joint Case Management Statement.

19 **XV. EXPEDITED SCHEDULE**

20 There have been no changes since the previous Joint Case Management Statement.

21 **XVI. SCHEDULING**

22 The parties' proposed schedules are attached as Exhibit A.

23 **XVII. TRIAL**

24 eBay's Statement:

25 There have been no changes since the previous Joint Case Management Statement.

26 DPS Defendants' Statement:

27 Per the terms of the PSA, the right to a jury trial has been waived. Separate trials
 28 are appropriate to avoid prejudice in this case because the two defendant groups are

1 wholly distinct. While the length of trial is difficult to anticipate at this time, the DPS
2 Defendants estimate that trial may take 12 days or more.

3 Non-DPS Defendants' Statement:

4 Per the terms of the PSA, the right to a jury trial has been waived. Separate trials
5 are appropriate to avoid prejudice in this case because the two defendant groups are
6 wholly distinct. While the length of trial is difficult to anticipate at this time, the Non-
7 DPS Defendants estimate that trial may take 12 days or more.

8 **XVIII. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR**
9 **PERSONS**

10 eBay's Statement:

11 There have been no changes since the previous Joint Case Management Statement.

12 DPS Defendants' Statement:

13 Commission Junction, as Plaintiff's direct agent in administering the AMP, is an
14 interested party.

15 Non-DPS Defendants' Statement:

16 Commission Junction, as Plaintiff's direct agent in administering the AMP, is an
17 interested party.

18
19 Dated: September 14, 2001

20 DAVID R. EBERHART
21 SHARON M. BUNZEL
22 COLLEEN M. KENNEDY
23 O'MELVENY & MYERS LLP

24 By: /s/ David R. Eberhart
25 David R. Eberhart

26 *Attorneys for Plaintiff*
27 eBay Inc.
28

1 Dated: September 14, 2001

LEO J. PRESIADO
RUS, MILIBAND & SMITH, A
PROFESSIONAL CORPORATION

2

3

4

By: /s/ Leo J. Presiado
Leo J. Presiado

5

6

Attorneys for Defendants
Thunderwood Holdings, Inc., Brian
Dunning and BrianDunning.com

7

8 Dated: September 14, 2001

STEWART H. FOREMAN
FREELAND, COOPER & FOREMAN,
LLP

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By: /s/ Stewart H. Foreman
Stewart H. Foreman

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Attorneys for Defendants
Todd Dunning and Dunning Enterprise,
Inc.

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15 Dated: September 14, 2001

PATRICK K. MCCLELLAN
LAW OFFICE OF PATRICK K.
MCCLELLAN

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18

By: /s/ Patrick K. McClellan
Patrick K. McClellan

19

20

Attorney for Defendant
Kessler's Flying Circus

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22 Dated: September 14, 2001

SEYAMACK KOURETSCHIAN
COAST LAW GROUP, LLP

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By: /s/ Ross Campbell
Ross Campbell

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Attorneys for Defendants
Digital Point Solutions, Inc. and Shawn
Hogan

I, David R. Eberhart, am the ECF User whose ID and password are being used to file this Joint Case Management Statement and [Proposed] Order. In compliance with General Order 45, X.B., I hereby attest that Leo Presiado, Stewart Foreman, Patrick McClellan, and Ross Campbell have concurred in this filing.

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CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by this Court as the Case Management Order for the case, and the parties are ordered to comply with this Order. In addition, the Court orders that a further Case Management Conference will be held on _____.

IT IS SO ORDERED.

Dated: _____

The Honorable Jeremy Fogel
United States District Court Judge
Northern District of California

EXHIBIT A

Event	eBay's Proposed Dates	Defendants' Proposed Dates
Fact discovery closes	April 30, 2010	November 2010
Last day for expert reports on merits	June 18, 2010	
Last day for depositions of experts	July 2, 2010	
Last day for responsive expert reports	July 16, 2010	
Close of expert discovery	July 30, 2010	March 2011
Last day to file dispositive motions	September 3, 2010	
Oppositions to dispositive motions due	October 8, 2010	
Reply briefs in support of dispositive motions due	October 29, 2010	
Hearing on dispositive motions	November 19, 2010	
Required Meeting Prior to Pretrial Conference	January 4, 2011	
Pretrial Conference Statement	January 10, 2011	
Pretrial Conference	January 24, 2011	
Trial	March 7, 2011	September 2011