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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., BRIAN
 24 DUNNING, BRIANDUNNING.COM,
 25 and DOES 1-20,

26 Defendants.

Case No. C 08-04052 JF PVT

**DECLARATION OF COLLEEN M.
 KENNEDY IN SUPPORT OF EBAY
 INC.'S MOTION TO COMPEL
 RESPONSES TO REQUESTS FOR
 PRODUCTION,
 INTERROGATORIES AND
 REQUESTS FOR ADMISSION**

Hearing Date: October 27, 2009
 Time: 10:00 a.m.
 Judge: Hon. Patricia V. Trumbull

1 I, Colleen M. Kennedy, declare as follows:

2 1. I am a member of the Bar of the State of California and am associated with
3 the law firm of O'Melveny & Myers LLP, counsel for eBay Inc. in this matter. I submit
4 this Declaration in support of eBay's Motion to Compel Responses to Requests for
5 Production, Interrogatories and Requests for Admission. I have personal knowledge of
6 the facts set forth in this declaration and, if called to testify as a witness, could and would
7 do so under oath.

8 2. Counsel for eBay have engaged in meet and confer discussions with
9 Defendants' counsel regarding the issues raised in the accompanying Motion, both
10 through correspondence and during in-person and telephonic discussions on August 25,
11 August 27, September 17 and September 18, 2009. We were unable to reach agreement
12 on the issues addressed in this Motion.

13 3. Section III.A of eBay's Motion seeks to compel responses to the following
14 requests propounded by eBay:

- 15 • Interrogatories No. 1-2 to BrianDunning.com;
- 16 • Interrogatories No. 1-2 to Thunderwood Holdings, Inc. ("THI");
- 17 • Interrogatories No. 1-2 to Kessler's Flying Circus ("KFC");
- 18 • Requests for Admission No. 1-25 to BrianDunning.com; and
- 19 • Requests for Admission No. 1-25 to THI.

20 4. Section III.B.1 of eBay's Motion seeks to compel responses to the following
21 discovery requests propounded by eBay:

- 22 • Requests for Production No. 1-28 and 31-34 to Brian Dunning; and
- 23 • Requests for Production No. 1-28 and 31-34 to Todd Dunning.

24 5. Section III.B.2 of eBay's Motion seeks to compel responses to the following
25 discovery requests propounded by eBay:

- 26 • Requests for Production No. 1-28 and 31-34 to Brian Dunning;
- 27 • Requests for Production No. 1-28 and 32-35 to BrianDunning.com;
- 28 • Requests for Production No. 1-29 and 33-36 to THI;

- 1 • Requests for Production No. 1-28 and 31-34 to Todd Dunning;
- 2 • Requests for Production No. 1-29 and 33-36 to Dunning Enterprise, Inc.
3 (“DEI”); and
- 4 • Requests for Production No. 1-28, 32-33 and 35-36 to KFC.

5 6. The listed responses requested in Sections III.B.1 and III.B.2 include each
6 of the requests in eBay’s Second Set of Requests for Production, as well as each of the
7 requests in eBay’s First Set of Requests for Production except for those that seek
8 documents relating to Defendants’ financial assets, financial statements and/or tax returns.
9 eBay continues to meet and confer with Defendants regarding these requests and will file
10 a separate motion to compel responses to those requests, if necessary.

11 7. Attached hereto as Exhibit 1 is a chart setting forth each of the requests to
12 which eBay seeks to compel responses, along with Defendants’ objections and/or
13 responses thereto, pursuant to Civil L.R. 37-2.

14 8. During a telephonic meet and confer discussion on August 27, 2009 with
15 Leo Presiado, counsel for Brian Dunning, BrianDunning.com and THI, he and I
16 discussed, among other issues, those Defendants’ ongoing resistance to the production of
17 documents located at Rackspace US, Inc. (“Rackspace”). During this discussion, Mr.
18 Presiado represented to me that he would contact Rackspace to obtain documents
19 responsive to the subpoena issued to Rackspace by eBay, that he or his firm would review
20 Rackspace’s production for attorney-client privilege, and that he would subsequently
21 make a production of those documents to eBay.

22 9. I had a telephone conversation with Steve Priolo of Rackspace on
23 September 11, 2001 regarding Rackspace’s response to eBay’s subpoena. During that
24 conversation, Mr. Priolo advised me that Rackspace was unwilling to produce any
25 documents from Defendants’ servers, in part because Defendants have full access to and
26 control over those servers and should therefore bear the burden of producing any
27 responsive material located there. Mr. Priolo also stated that Rackspace had produced
28 approximately 20 pages of documents to Mr. Presiado on September 9, 2009, which

1 consisted of customer agreements, renewals and billing records related to Rackspace's
2 provision of services to one or more of Defendants. Mr. Priolo also confirmed that the
3 FBI had previously retrieved copies of material stored on Rackspace's servers relevant to
4 a criminal investigation of Defendants.

5 10. I subsequently had another telephonic meet and confer discussion with Mr.
6 Presiado on September 17, 2009, during which I inquired about the production of the
7 Rackspace documents to eBay, in light of the fact that none of the documents that had
8 been produced to Mr. Presiado by Rackspace could potentially implicate the attorney-
9 client privilege. Mr. Presiado stated that, contrary to his previous representations, he
10 would not turn over to eBay any of the documents produced by Rackspace unless and
11 until such time as Defendants' purportedly forthcoming motion to stay this action has
12 been heard and denied by the Court.

13 11. Attached hereto as Exhibit 2 is a true and correct copy of THI's Responses
14 to eBay's First Set of Interrogatories, dated February 26, 2009.

15 12. Attached hereto as Exhibit 3 is a true and correct copy of
16 BrianDunning.com's Responses to eBay's First Set of Interrogatories, dated February 26,
17 2009.

18 13. Attached hereto as Exhibit 4 is a true and correct copy of DEI's Responses
19 to eBay's First Set of Interrogatories, dated February 26, 2009.

20 14. Attached hereto as Exhibit 5 is a true and correct copy of the Responses of
21 KFC to eBay's First Set of Interrogatories, dated February 25, 2009.

22 15. Attached hereto as Exhibit 6 is a true and correct copy of DEI's
23 Supplemental Responses to eBay's First Set of Interrogatories, dated August 25, 2009.

24 16. Attached hereto as Exhibit 7 is a true and correct copy of DEI's Responses
25 to eBay's First Set of Requests for Admission, dated February 26, 2009.

26 17. Attached hereto as Exhibit 8 is a true and correct copy of
27 BrianDunning.com's Responses to eBay's First Set of Requests for Admission, dated
28 February 26, 2009.

1 18. Attached hereto as Exhibit 9 is a true and correct copy of THI's Responses
2 to eBay's First Set of Requests for Admission, dated February 26, 2009.

3 19. Attached hereto as Exhibit 10 is a true and correct copy of
4 BrianDunning.com's Responses to eBay's First Set of Requests for Production, dated
5 February 26, 2009.

6 20. Attached hereto as Exhibit 11 is a true and correct copy of THI's Responses
7 to eBay's Second Set of Requests for Production, dated June 3, 2009.

8 21. Attached hereto as Exhibit 12 is a true and correct copy of KFC's Responses
9 to eBay's First Set of Requests for Admission, dated February 25, 2009.

10 22. Attached hereto as Exhibit 13 is a true and correct copy of Brian Dunning's
11 Responses to eBay's First Set of Requests for Production, dated February 26, 2009.

12 23. Attached hereto as Exhibit 14 is a true and correct copy of Todd Dunning's
13 Responses to eBay's First Set of Requests for Production, dated February 26, 2009.

14 24. Attached hereto as Exhibit 15 is a true and correct copy of eBay's Notice of
15 Subpoena and Amended Subpoena to Rackspace, dated June 9, 2009.

16 25. Attached hereto as Exhibit 16 is a true and correct copy of a June 16, 2009
17 letter from Perry Robinson to David Sepanik regarding Rackspace's Objections to eBay's
18 Subpoena.

19 26. Attached hereto as Exhibit 17 is a true and correct copy of a September 16,
20 2009 letter from Colleen Kennedy to Steve Priolo regarding Rackspace's response to
21 eBay's Amended Subpoena.

22 27. Attached hereto as Exhibit 18 is a true and correct copy of Brian Dunning's
23 Responses to eBay's Second Set of Requests for Production, dated June 3, 2009.

24 28. Attached hereto as Exhibit 19 is a true and correct copy of
25 BrianDunning.com's Responses to eBay's Second Set of Requests for Production, dated
26 June 3, 2009.

27 29. Attached hereto as Exhibit 20 is a true and correct copy of KFC's Responses
28 to eBay's Second Set of Requests for Production, dated June 3, 2009.

1 30. Attached hereto as Exhibit 21 is a true and correct copy of the Reply of
2 KFC, THI, Brian Dunning and BrianDunning.com in Support of their Motion to Dismiss
3 eBay's Second Amended Complaint, dated June 12, 2009.

4 31. Attached hereto as Exhibit 22 is a true and correct copy of Todd Dunning's
5 Responses to eBay's Second Set of Requests for Production, May 22, 2009.

6 32. Attached hereto as Exhibit 23 is a true and correct copy of DEI's Responses
7 to eBay's Second Set of Requests for Production, dated May 22, 2009.

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9 I declare under penalty of perjury under the laws of the United States and the State
10 of California that the foregoing is true and correct. Signed on this 22nd day of September,
11 2009 in San Francisco, California.

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 /s/ Colleen M. Kennedy
 Colleen M. Kennedy

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