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

12 EBAY INC.,  
 13 Plaintiff,  
 14 v.  
 15 DIGITAL POINT SOLUTIONS, INC.,  
 16 SHAWN HOGAN, KESSLER'S  
 17 FLYING CIRCUS, THUNDERWOOD  
 18 HOLDINGS, INC., TODD DUNNING,  
 19 DUNNING ENTERPRISE, INC., BRIAN  
 20 DUNNING, BRIANDUNNING.COM,  
 21 and DOES 1-20,  
 22 Defendants.

Case No. C 08-04052 JF PVT

**EBAY INC.'S NOTICE OF MOTION  
 AND MOTION TO STRIKE THE  
 ANSWER OF DEFENDANTS  
 THUNDERWOOD HOLDINGS,  
 INC., BRIANDUNNING.COM AND  
 KESSLER'S FLYING CIRCUS;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT  
 THEREOF**

Hearing Date: October 30, 2009  
 Time: 9:00 a.m.  
 Judge: Hon. Jeremy Fogel

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE THAT, on October 30, 2009, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3 of the United States District Court for the Northern District of California, San Jose Division, located at 280 South 1st St., San Jose, California, 95113, eBay Inc. will and hereby does move this Court, pursuant to Fed. R. Civ. P. 12(f), to strike the Answer to eBay's Second Amended Complaint filed by Defendants Thunderwood Holdings, Inc., BrianDunning.com and Kessler's Flying Circus.

The Motion is based on this notice, the attached memorandum of points and authorities, all supporting declarations, the pleadings and other records on file with the Court, the oral argument of counsel, all relevant matters judicially noticeable, and such further evidence and arguments as the Court may consider.

DATED: September 25, 2009

DAVID R. EBERHART  
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COLLEEN M. KENNEDY  
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By: /s/ David R. Eberhart  
DAVID R. EBERHART

Attorneys for Plaintiff eBAY INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants Thunderwood Holdings, Inc., BrianDunning.com and Kessler's Flying  
4 Circus (herein, the "BD Entities") have filed a joint answer that improperly withholds all  
5 substantive responses to the allegations in eBay's Second Amended Complaint ("SAC")  
6 based on a purported Fifth Amendment privilege. But collective entities such as these  
7 defendants unquestionably lack any Fifth Amendment privilege. Nor may the BD Entities  
8 leverage a privilege held by an officer or agent to avoid responding to eBay's SAC.  
9 Consequently, the BD Entities' answer should be stricken, and they should be ordered to  
10 file an answer that omits any reliance on the Fifth Amendment and responds substantively  
11 to the SAC.

12 Brian Dunning is also a party to the joint answer with the BD Entities. eBay's  
13 motion does not seek to strike Mr. Dunning's answer or require him to replead.

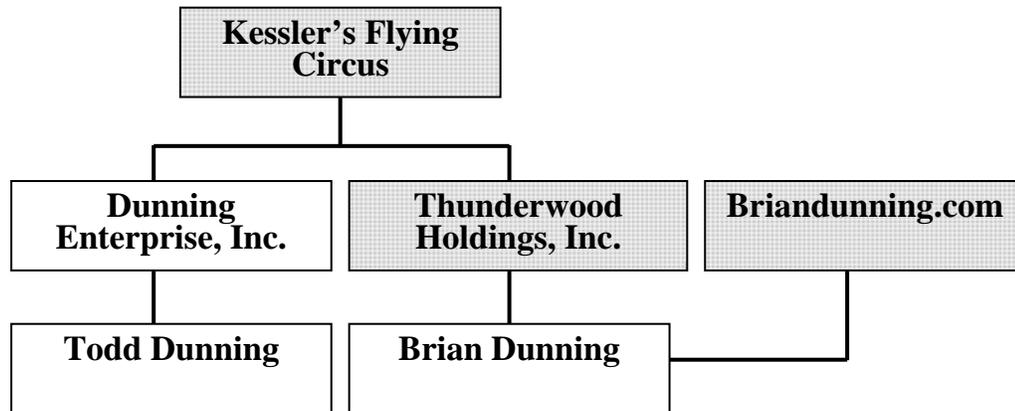
14 **II. SUMMARY OF RELEVANT FACTS**

15 Defendants in this action are individuals and entities that abused and damaged  
16 eBay's computer systems and defrauded eBay. The BD Entities comprise a subset of the  
17 defendants and have represented that they are solely owned and/or controlled by  
18 individual defendants Brian and Todd Dunning, as follows:

19 (i) Thunderwood Holdings, Inc. ("THI") and BrianDunning.com are solely  
20 owned and/or controlled by Brian Dunning; and

21 (ii) Kessler's Flying Circus ("KFC") is a partnership composed of partners THI  
22 and Dunning Enterprise, Inc. ("DEI"), which is itself solely owned and/or  
23 controlled by Todd Dunning.

24 *See* Declaration of Colleen M. Kennedy in Support of eBay's Motion to Strike ("Kennedy  
25 Decl."), Exs. 1-3, at 2. The following chart depicts those relationships. Only the shaded  
26 entities are the subject of eBay's motion to strike:



8 Defendant DEI has filed an answer to the SAC that does not improperly assert any Fifth  
9 Amendment privilege. Kennedy Decl., Ex. 4.

10 **III. ARGUMENT**

11 The BD Entities have improperly invoked the Fifth Amendment privilege against  
12 self-incrimination in their answer to eBay's SAC. The BD Entities filed a joint answer  
13 that responded to each and every paragraph of the SAC by asserting the Fifth Amendment  
14 privilege against self-incrimination. See Kennedy Decl., Ex. 5. The answer provided no  
15 substantive responses to the SAC.

16 The BD Entities' answer does not specify the basis for their assertion of the Fifth  
17 Amendment privilege, but they have elsewhere purported to assert the privilege based on  
18 the "threat of potential criminal prosecution" faced by individual defendants Brian and  
19 Todd Dunning. See, e.g., Kennedy Decl., Exs. 1-3, 6-7 at 2. However, the BD Entities  
20 **have no** Fifth Amendment privilege and may not rely on a privilege held by an officer or  
21 agent. This improper invocation of the Fifth Amendment privilege is properly remedied  
22 through a motion to strike. See Fed. R. Civ. P. 12(f) ("court may strike from a pleading an  
23 insufficient defense"); *City of Chicago v. Reliable Truck Parts Co.*, No. 88 C 1458, 1989  
24 WL 32923, at \*4 (N.D. Ill. Mar. 31, 1989) (granting motion to strike answer where  
25 corporate defendant improperly invoked Fifth Amendment privilege); *In re Livent, Inc.*  
26 *Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 444 (S.D.N.Y. 2001) (granting motion to  
27 strike answer where individual defendants improperly invoked Fifth Amendment  
28 privilege).

1 It is well established that the Fifth Amendment privilege against self-incrimination  
2 does not extend to “collective entities” such as the BD Entities. *See Braswell v. United*  
3 *States*, 487 U.S. 99, 102 (1988); *United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir.  
4 1995); *SEC v. Leach*, 156 F. Supp. 2d 491, 495 (E.D. Pa. 2001). The privilege is  
5 “essentially a personal one, applying only to natural individuals,” and therefore “cannot be  
6 utilized by or on behalf of any organization, such as a corporation.” *United States v.*  
7 *White*, 322 U.S. 694, 698-99 (1944).

8 Nor may the BD Entities refuse to answer the allegations in the SAC based on the  
9 Fifth Amendment privilege of a corporate officer, even where such officer is the “sole  
10 shareholder” or “sole representative” of the entity, as the BD Entities have previously  
11 claimed in their discovery responses. Kennedy Decl., Exs. 1-3, 6-7, at 2. A corporate  
12 entity is “obliged . . . to appoint an agent who could, without fear of self-incrimination,  
13 furnish such requested information as was available to the corporation.” *United States v.*  
14 *Kordel*, 397 U.S. 1, 8 (1970) (“It would indeed be incongruous to permit a corporation to  
15 select an individual to verify the corporation’s answers, who because he fears self-  
16 incrimination may thus secure for the corporation the benefits of a privilege it does not  
17 have.”); *see also Reliable Truck Parts Co.*, 1989 WL 32923, at \*2 (duty to appoint an  
18 agent to provide information on behalf of a corporation “extends to information that is  
19 relevant to both pleading and discovery obligations”); *Leach*, 156 F. Supp. 2d at 495-98  
20 (corporation may not refuse to answer a complaint based on a Fifth Amendment privilege  
21 held by one person within the corporation).

22 Courts have directly repudiated the argument that a collective entity may evade  
23 answering a complaint by claiming that the only individual capable of doing so has  
24 asserted the Fifth Amendment. In *SEC v. Leach*, an individual defendant and the  
25 corporation he created and controlled filed a joint answer in which both defendants  
26 “decline[d] to answer” on Fifth Amendment grounds. 156 F. Supp. 2d at 493. Seeking a  
27 protective order, the defendant corporation argued that it should be excused from  
28 answering the complaint because “the only person with the knowledge required to answer

1 the Complaint on [the corporation's] behalf" was the individual defendant who had  
 2 invoked the Fifth Amendment. *Id.* at 493, 495. The court rejected this contention,  
 3 holding that the corporation "has the ability to designate someone else to answer the  
 4 complaint without vitiating [the individual's] assertion of the Fifth Amendment  
 5 privilege." *Id.* at 497. In so holding, the court noted that "[e]ven the corporation's  
 6 attorney can serve as an agent." *Id.* at 498; *see also Reliable Truck Parts Co.*, 1989 WL  
 7 32923, at \*2-3 (rejecting defendant corporation's claim that no agent could answer the  
 8 amended complaint without fear of self-incrimination because the corporation could  
 9 appoint an agent without any first-hand personal knowledge or the corporation's attorney  
 10 could answer the complaint). Indeed, defendant DEI—which is solely controlled by  
 11 defendant Todd Dunning—has followed this proper course of action and has submitted a  
 12 substantive answer through its attorney. *See Kennedy Decl.*, Ex. 4.

13 eBay is entitled to an answer from each of the BD Entities that responds  
 14 substantively to eBay's SAC. *See Fed. R. Civ. P. 8(b)(1)(B)*. But the BD Entities have  
 15 provided nothing other than their improper assertions of the Fifth Amendment and some  
 16 24 affirmative defenses challenging the SAC. No valid privilege exists, and the BD  
 17 Entities may not hide behind Brian Dunning's privilege by joining in his answer. The  
 18 Court should strike the BD Entities' answer and require them to replead.

#### 19 **IV. CONCLUSION**

20 For the foregoing reasons, the Court should strike the BD Entities' answer and  
 21 require those defendants to file amended answers that omit any objection based on the  
 22 Fifth Amendment and provide substantive responses to eBay's SAC.

23 DATED: September 25, 2009

24 DAVID R. EBERHART  
 25 SHARON M. BUNZEL  
 26 COLLEEN M. KENNEDY  
 27 O'MELVENY & MYERS LLP

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