

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.

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

18 EBAY INC.,

19 Plaintiff,

20 v.

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

28 Defendants.

Case No. C 08-04052 JF PVT

**EBAY INC.'S NOTICE OF MOTION
 AND MOTION TO COMPEL
 RESPONSES TO REQUESTS FOR
 PRODUCTION,
 INTERROGATORIES AND
 REQUESTS FOR ADMISSION
 FROM DIGITAL POINT
 SOLUTIONS, INC. AND SHAWN
 HOGAN; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Hearing Date: November 3, 2009
 Time: 10:00 a.m.
 Judge: Hon. Patricia V. Trumbull

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT, on November 3, 2009, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5 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 for an order that:

1. Defendant Shawn Hogan, notwithstanding his continuing invocation of his Fifth Amendment right, produce all documents responsive to eBay’s First and Second Set of Requests for Production that were previously obtained by the FBI, including but not limited to any such documents that may be within his control at third party NetHere, Inc.;
2. Defendant Digital Point Solutions, Inc. conduct a diligent search for and produce all documents responsive to eBay’s First and Second Set of Requests for Production, including by exercising any and all rights that it may have to obtain documents from third party NetHere, Inc.; and
3. Defendant Digital Point Solutions, Inc.’s objections to eBay’s Interrogatories and certain of eBay’s Requests for Admission and Requests for Production on the grounds that the definition of “DPS” is overbroad, unduly burdensome and oppressive be stricken and Digital Point Solutions, Inc. provide supplemental responses to those requests that include information regarding “DPS” as defined by eBay.

eBay’s Motion is made pursuant to Federal Rule of Civil Procedure 37(a)(3)(B), and seeks an order compelling substantive responses to eBay’s Requests for Production, Interrogatories and Requests for Admission as required by Federal Rules of Civil Procedure 34(b)(2), 33(b) and 36(a), respectively. *See* Declaration of Colleen M. Kennedy in Support of eBay Inc.’s Motion to Compel (“Kennedy Decl.”).¹

¹ A comprehensive list of eBay’s discovery requests addressed in this Motion and Defendants’ responses to those requests is set forth in an exhibit to the attached Kennedy Declaration. *See* Kennedy Decl., Ex. 1.

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

5
6 DATED: September 29, 2009

7 DAVID R. EBERHART
8 SHARON M. BUNZEL
9 COLLEEN M. KENNEDY
10 O'MELVENY & MYERS LLP

11 By: /s/ David R. Eberhart
12 DAVID R. EBERHART

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14 Attorneys for Plaintiff eBAY INC.
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1 **TABLE OF AUTHORITIES**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 eBay seeks an order compelling Digital Point Solutions, Inc. (“DPS, Inc.”) and its
4 owner Shawn Hogan (collectively, “Defendants”) to provide documents and proper
5 written discovery responses. Defendants have improperly refused to produce documents
6 to eBay in two different ways. *First*, Shawn Hogan has improperly refused to produce
7 materials that were previously obtained from him by the government. Although an act of
8 production may be incriminating under some circumstances, it is not incriminating under
9 the facts presented here: the existence and location of the materials is known to the
10 government, and the government can independently authenticate those materials.
11 Consequently, Mr. Hogan’s Fifth Amendment rights cannot preclude production.

12 *Second*, DPS, Inc. has refused to produce responsive documents by claiming it has
13 none or virtually none within its possession, custody or control. This cannot be true.
14 DPS, Inc. was incorporated during the period of the wrongdoing and, during that same
15 period, took ownership of valuable servers from Mr. Hogan that were likely used in the
16 fraud. Further, third party NetHere—a company that has provided co-location services for
17 servers owned by Defendants from 1996 to the present—possesses multiple servers that
18 are within the control of one or more of the Defendants.

19 In addition, DPS, Inc. has refused to provide the full extent of the discovery sought
20 by eBay based on the contention that the broad definition of “DPS” in eBay’s requests
21 implicates Shawn Hogan’s Fifth Amendment rights against self-incrimination. But DPS,
22 Inc. has fundamentally confused the scope of the requests with the party responding to the
23 requests. eBay is fully entitled to obtain information regarding, among others, Mr. Hogan
24 from DPS, Inc., and DPS, Inc. may not hide behind Mr. Hogan’s Fifth Amendment
25 privilege to avoid responding to such discovery.

26 Defendants have improperly withheld all meaningful discovery from eBay and the
27 Court should compel compliance with eBay’s discovery requests.

28

1 **II. SUMMARY OF RELEVANT FACTS**

2 Defendants are an individual and a corporation that misused eBay's computer
3 systems and defrauded eBay through its affiliate marketing program. Defendants' "cookie
4 stuffing" scheme was identical in all relevant respects to the scheme described in detail in
5 eBay's motion to compel discovery responses from the remaining defendants (filed on
6 September 22, 2009), and that description is incorporated herein by reference.

7 eBay has diligently attempted to resolve its discovery disputes with Defendants
8 without the need for court intervention, through both correspondence and two telephonic
9 meet and confer discussions on August 27 and September 18, 2009. Kennedy Decl., ¶ 2.
10 Through these efforts, eBay has obtained (i) an acknowledgment from DPS, Inc. that it
11 does not possess a Fifth Amendment privilege to avoid responding to discovery and
12 (ii) certain supplemental responses from DPS, Inc. to eBay's interrogatories, requests for
13 admission and first set of requests for production. *See* Kennedy Decl., Exs. 2-4. But the
14 supplemental responses not only fail to resolve significant defects in Defendants'
15 discovery positions, those responses provide compelling evidence of the remaining
16 defects.

17 **III. ARGUMENT**

18 **A. Mr. Hogan Must Produce The Materials He Previously Provided To**
19 **The FBI**

20 Shawn Hogan cannot legitimately invoke the Fifth Amendment privilege to
21 withhold from production to eBay any documents already in the hands of the
22 government.² It is undisputed that Mr. Hogan possesses responsive materials that were
23 provided to the federal government in the course of its criminal investigation of
24 Defendants' cookie stuffing schemes. *See, e.g.*, Kennedy Decl., Ex. 5, at 2 ("The Federal
25 Bureau of Investigation has seized documents and materials potentially related to the
26 present action. As of the date of these responses, the FBI has not returned all of the seized

27 _____
28 ² The 32 specific document requests to which eBay moves to compel responses in this section are set forth in the Kennedy Declaration, at ¶ 4.

1 materials to Defendant, some of which may be responsive to Plaintiff's requests
2 hereunder."). Although some responsive material may still be in the government's hands,
3 Defendants concede that they currently possess the vast majority of the materials
4 previously obtained by the government, with the possible exception of some physical
5 documents. Kennedy Decl., Ex. 6, at 13 ("[I]t appears that all computer-related materials
6 have been returned by the FBI. However, the scope of the seizure is not entirely clear and
7 it appears that some physical documents are still in the possession of the FBI and/or the
8 U.S. Attorney's Office.").

9 The privilege against self-incrimination applies only to testimony; therefore, the
10 contents of voluntarily prepared documents, whether business or personal, are not
11 generally protected by the Fifth Amendment. *In re Grand Jury Proceedings*, 759 F.2d
12 1418, 1419 (9th Cir. 1985). Although in limited instances the act of producing voluntarily
13 created documents may implicate the Fifth Amendment, *id.* at 1420, such circumstances
14 are not present here. This "act of production" privilege only applies if the act of
15 producing the documents is compelled, testimonial and incriminating. *Fed. Sav. & Loan*
16 *Ins. Corp. v. Rodrigues*, 717 F. Supp. 1424, 1425 (N.D. Cal. 1998). The production of
17 responsive documents to eBay would not be "testimonial and incriminating."

18 To determine whether the act of production is testimonial and incriminating,
19 federal courts generally consider two factors. **First**, they look to whether "the existence
20 and location of the [requested] papers are unknown to the government." *In re Grand Jury*
21 *Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993). If "the
22 existence and location of the papers are a foregone conclusion" based on information
23 already known to the government, then the act of producing the documents does not
24 implicate the privilege. *Fisher v. United States*, 425 U.S. 391, 411 (1976) (holding that
25 the Fifth Amendment is not applicable to the production of documents where the
26 production "adds little or nothing to the sum total of the Government's information").

27 Because Mr. Hogan concedes that the government already possesses the documents
28 here at issue, the communicative aspects of the production regarding the "existence and

1 location” of the documents cannot be further incriminating to him. *See In re Grand Jury*
2 *Subpoena Duces Tecum*, 1 F.3d at 93 (where the government already has a copy of the
3 requested document, the subsequent production of the original document “adds little or
4 nothing to the sum total of the Government’s information”); *Henry v. Sneiders*, 490 F.2d
5 315, 317 (9th Cir. 1974) (“[E]ven if the records were incriminating, their disclosure in the
6 civil case would not have tended to incriminate the defendant. Any incriminating
7 evidence was already in the hands of the prosecuting authorities.”). Because a document
8 production in this action would add little, if anything, to the government’s quantum of
9 knowledge, its testimonial value is therefore negligible. *Fisher*, 425 U.S. at 411; *see also*
10 *United States v. Clark*, 847 F.2d 1467, 1472-73 (10th Cir. 1988) (declining to apply the
11 act of production privilege where the government already has extensive knowledge and
12 information regarding the requested documents).

13 **Second**, the act of producing documents is not incriminating when the government
14 “can independently authenticate the [documents] without using [the party’s] act of
15 producing the [documents] as evidence of their authenticity.” *United States v. Rue*, 819
16 F.2d 1488, 1494 (8th Cir. 1987). If the government can do so, then authentication of the
17 documents is a foregone conclusion that does not sufficiently implicate the right against
18 self-incrimination. *Id.*; *see also In re Grand Jury Subpoena Duces Tecum*, 1 F.3d at 93
19 (where the government already possesses the document and can provide alternative means
20 of authentication, no Fifth Amendment privilege applies to a subsequent production).
21 Here, the government has an independent means of authentication: documents obtained
22 from Mr. Hogan may be authenticated by testimony that the documents are in
23 “substantially the same condition” as they were when originally obtained. *See United*
24 *States v. Harrington*, 923 F.2d 1371, 1374 (9th Cir. 1991). Therefore, the authentication
25 of the documents sought by eBay is a “foregone conclusion,” and the act of production is
26 not incriminating. *See Thomas v. Tyler*, 841 F. Supp. 1119, 1131 (D. Kan. 1993)
27 (ordering defendant to produce all documents that have already been delivered to a third
28 party because the third party can be relied upon by the government to show their

1 existence, possession and authenticity).

2 Mr. Hogan has suggested that the allegedly involuntary nature of the “seizure” of
3 his documents requires the application of the act of production doctrine. *See* Kennedy
4 Decl., Ex. 7. But he has not identified any case holding that the applicability of the act of
5 production doctrine turns on voluntariness of the prior production. Nor has Mr. Hogan
6 provided proof that the seizure was, in fact, involuntary—a question that simply cannot be
7 assumed. *See United States v. Edgerton*, 734 F.2d 913, 919 (2d Cir. 1984) (mere assertion
8 of privilege against self-incrimination is not sufficient to establish the hazard of
9 incrimination and thus warrant the exercise of a privilege). The law does not require that
10 the Court take Mr. Hogan’s word that the Fifth Amendment is applicable; the law requires
11 him to prove that providing the discovery would tend to incriminate him. *See Martin-*
12 *Trigona v. Gouletas*, 634 F.2d 354, 360 (7th Cir. 1980) (a witness’s “say-so does not of
13 itself establish the hazard of incrimination,” rather, the witness must “tender some
14 credible reason why a response would pose a real danger of incrimination”). Mr. Hogan
15 should therefore be compelled to produce all documents in his possession, custody or
16 control that have previously been obtained by the FBI.³

17 **B. DPS, Inc. Has Access To Responsive Documents That Must Be**
18 **Produced**

19 DPS, Inc. contends that its purportedly “late” incorporation—on May 14, 2007—
20 means that it “does not have any responsive documents or information within its
21 possession, custody or control because it never conducted business with [eBay] and was
22 never involved in [eBay]’s affiliate marketing program.” Kennedy Decl., Ex. 7. DPS,
23 Inc. further claims that any interaction with eBay was undertaken by Mr. Hogan and/or a
24 sole proprietorship called “Digital Point Solutions” that existed prior to DPS, Inc.’s
25 formation. Kennedy Decl. ¶ 3, Ex. 7. Because DPS, Inc.’s claim is untenable in at least
26

27 ³ To the extent any documents previously obtained by the FBI are located on servers stored at
28 third party NetHere, Inc.—which are discussed in detail below—Mr. Hogan should be ordered to
exercise any control he may have over those documents and produce them as well.

1 two ways, DPS Inc. should be ordered to produce the documents in its possession,
2 custody, or control.⁴

3 First, the evidence strongly suggests that DPS, Inc. participated in the fraud against
4 eBay's affiliate marketing program, even if only for a month. It is undisputed that DPS,
5 Inc. existed from at least May 14, 2007 forward. *See* Kennedy Decl., Ex. 4, at DPS
6 000002-3. And eBay's Second Amended Complaint ("SAC") alleges that DPS, Inc.'s and
7 Mr. Hogan's cookie stuffing scheme persisted through June 18, 2007. (*See* SAC ¶¶ 40,
8 48, 57.) Defendants concede this timeline (although they contest the substance of their
9 behavior): in motion practice, Defendants claimed that DPS, Inc. existed "from mid-May
10 to [at least] June 2007," Kennedy Decl., Ex. 8, at 2-3, and that their participation in
11 eBay's affiliate marketing program "terminated in June of 2007." Kennedy Decl., Ex. 9,
12 at 11. Defendants' statements in their motion to dismiss the SAC also impliedly concede
13 both DPS, Inc.'s participation in the affiliate marketing program and DPS, Inc.'s
14 ownership of the servers used in the fraud. Defendants stated, "Moreover, *Defendants'*
15 *membership* in the affiliate marketing program terminated in June of 2007, when Plaintiff
16 'verif[ied]' the existence of the purported scheme, ceased authorizing payouts for the
17 alleged unearned commissions (SAC ¶¶ 34, 52-56), and the FBI seized *Defendants'*
18 *computers.*" *Id.*

19 Documents produced last week by DPS, Inc., moreover, reveal that Mr. Hogan sold
20 computer servers worth \$108,000 to DPS, Inc. on May 19, 2007—only five days after its
21 incorporation—in exchange for all of DPS, Inc.'s issued stock. Kennedy Decl., Ex. 4, at
22 DPS 000030, 000036, 000040. It strains credulity that Mr. Hogan would have chosen to
23 incorporate his "Digital Point Solutions" business using the same name, sold his valuable
24 servers to that corporation, and thereafter completely insulated that corporation from any
25 involvement in his (fraudulently) lucrative affiliate relationship with eBay.

26
27 ⁴ The 64 specific document requests to which eBay moves to compel responses in this section are
28 set forth in the Kennedy Declaration, at ¶ 5. DPS, Inc. has produced 41 pages of documents in
connection with its supplemental responses to eBay's first set of requests for production.

1 Second, it is clear that, whatever it possesses, DPS, Inc. has failed to conduct a
2 diligent search for responsive documents during the eight months that eBay's document
3 requests have been outstanding. DPS, Inc.'s document production on September 23, 2009
4 was the first time that eBay learned of DPS, Inc.'s ownership of the servers obtained from
5 Mr. Hogan in 2007. But DPS, Inc. has certainly known of those servers since 2007; yet,
6 when eBay inquired on September 24, 2009 whether those servers contained any
7 responsive material, counsel for DPS, Inc. responded: "It is my understanding that the
8 servers at issue have not been used, remain idle and do not contain any responsive
9 information. However, I will confer with Mr. Hogan upon his return [from an out-of-
10 town engagement] and will respond to your inquiry at that time." Kennedy Decl., Ex. 10.
11 DPS, Inc. has long had a duty to search these servers, especially given that they were
12 transferred from Mr. Hogan during the period of the fraud. It is, moreover, simply not
13 credible that servers transferred at a valuation of \$108,000 were never used.

14 Aside from documents currently in DPS, Inc.'s direct possession, it appears that
15 DPS, Inc. has access to and control over a substantial collection of records stored at third
16 party NetHere—a company that provides co-location services for servers owned by
17 Defendants. eBay subpoenaed NetHere in early June 2009. *See* Kennedy Decl., Ex. 11.
18 NetHere has stated that, although it provides services to Defendants, it has no access to
19 the documents sought by eBay and Defendants have exclusive access to and control over
20 their servers and the data on those servers stored at NetHere. Kennedy Decl., Exs. 12-13.
21 NetHere also indicated in its response to the subpoena that Defendants have been using
22 NetHere's services since 1996, and are currently maintaining five different servers at
23 NetHere's facility. Kennedy Decl., Ex. 12, at 2, 4. This raises a strong inference that the
24 servers stored at NetHere would contain documents relating to Defendants' relationship
25 with eBay during the period of the fraud: 2003-2007. As part of its subpoena response,
26 NetHere also produced an invoice dated July 6, 2009, issued to "Digital Point Solutions,
27 Shawn Hogan." *Id.* at 6. This invoice strongly suggests that both Mr. Hogan and DPS,
28 Inc. have control of the materials stored at NetHere. But DPS, Inc. has never exercised

1 that control despite its obligation to produce documents to eBay.⁵

2 DPS, Inc. surely has documents in its possession, custody, or control that are
3 responsive to eBay's requests for production. DPS, Inc. should be compelled to produce
4 all such documents, whether they exist on the servers sold to it by Mr. Hogan, at NetHere,
5 or otherwise.

6 **C. DPS, Inc. Cannot Limit Its Discovery Responses Based On Mr. Hogan's**
7 **Fifth Amendment Privilege**

8 DPS, Inc. has also improperly refused to provide discovery to eBay on the
9 purported grounds of a Fifth Amendment privilege of Shawn Hogan and/or any purported
10 sole proprietorship that may have existed prior to DPS, Inc.'s formation.⁶ DPS, Inc. bases
11 this argument on a claim that the broad definition of "DPS" used by eBay implicates the
12 privilege of Mr. Hogan and those other entities because it "arguably seek[s] information
13 from Mr. Hogan individually." Kennedy Decl., Ex. 7. But DPS, Inc.'s argument
14 fundamentally confuses the identity of the responding party with the subject matter of the
15 request.

16 There is a compelling reason for eBay's broad definition of "DPS"—only
17 Mr. Hogan and DPS, Inc. know the details of their business organizations. eBay
18 understood that, during the relevant period, it was dealing with an entity called "Digital
19 Point Solutions" that was owned and controlled by Shawn Hogan. See SAC ¶ 47. But, as
20 discussed above, DPS, Inc. now contends that it was not involved in eBay's affiliate
21 marketing program and that the "Digital Point Solutions" entity interacting with eBay

22 _____
23 ⁵ Nor has DPS, Inc. conducted a reasonable search for non-electronic materials. The Bylaws of
24 DPS, Inc.—also belatedly produced last week—indicate that DPS, Inc. was required to: (i) hold
25 annual meetings of the shareholders and board of directors and maintain minutes of all such
26 meetings, and (ii) file an Annual Statement of General Information. Kennedy Decl., Ex. 4, at
27 DPS 000007, 000015, 000020, 000024. When asked why DPS, Inc. had not produced all such
28 documents, counsel replied: "The fact that statements may be referenced in the bylaws does not
mean they were subsequently prepared or exist. . . . However, I will confer with Mr. Hogan
further on this issue." Kennedy Decl., Ex. 10. But DPS, Inc. was obliged to undertake that
search long ago.

⁶ The 23 requests for admission, 11 requests for production and 2 interrogatories to which eBay
moves to compel responses in this section are set forth in the Kennedy Declaration, at ¶ 6.

1 from 2003 to 2007 was a sole proprietorship controlled by Mr. Hogan. *See, e.g.*, Kennedy
2 Decl. ¶ 3, Ex. 7. Because Mr. Hogan and DPS, Inc. have the only direct knowledge of the
3 true nature of their organization(s) that dealt with eBay, eBay’s discovery requests to
4 DPS, Inc. define the term “DPS” broadly:

5 “DPS” shall mean Digital Point Solutions, Inc., and each of its
6 successor, predecessor, and related entities, including, without
7 limitation, its subsidiaries, parent corporations, divisions,
8 assigns, and any officers, directors, agents, employees,
representatives, attorneys, or other persons or entities acting
on its behalf, collectively, in any combination, or singly,
whichever is broader.

9 *See, e.g.*, Kennedy Decl., Ex. 14, at 2. As with any defined term, the use of this definition
10 indicates that the party to whom the discovery requests are issued—here, DPS, Inc.—must
11 provide all responsive information in its possession regarding the entities and individuals
12 referenced in the definition. In other words, the definition of “DPS” describes the *scope*
13 of the information that DPS, Inc. must provide; it does not somehow redirect the requests
14 to Mr. Hogan or otherwise require him to incriminate himself.

15 But DPS, Inc. has refused to provide responses based on a tortured reading of this
16 definition that construes eBay’s discovery requests as seeking information directly from
17 Mr. Hogan. DPS, Inc.’s initial discovery responses asserted the Fifth Amendment
18 privilege on that basis. *See* Kennedy Decl., Exs. 15-17. And DPS, Inc.’s counsel
19 reiterated in meet and confer correspondence that “[T]he Fifth Amendment has been
20 appropriately asserted because the definitions of ‘DPS’ set forth in plaintiff’s discovery
21 requests are ambiguous and arguably seek information from Mr. Hogan individually.”
22 Kennedy Decl., Ex. 7.

23 Following a lengthy meet-and-confer process, DPS, Inc. finally agreed to serve
24 supplemental discovery responses that it claimed would provide the responsive
25 information in its possession. eBay, moreover, explicitly agreed that it would not contend
26 that DPS, Inc.’s service of proper responses somehow waived Mr. Hogan’s Fifth
27 Amendment rights. Kennedy Decl., Ex. 18. eBay received those supplemental responses
28 last week, but they are still improperly limited. The supplemental responses continue to

1 assert the general objection that eBay’s definition of “DPS” is “overbroad, unduly
2 burdensome and oppressive in that it purports to apply to third parties collectively and/or
3 individually . . . and purports to seek responses from Mr. Hogan as phrased.” Kennedy
4 Decl., Exs. 2-4, at 2. And, more importantly, DPS, Inc. continues to improperly limit the
5 scope of its responses by refusing to provide information regarding any entity other than
6 DPS, Inc., as discussed below.

7 **1. Requests For Admission**

8 In response to eBay’s requests for admission, which asked DPS, Inc. to admit or
9 deny statements regarding “DPS’s” participation in eBay’s affiliate marketing program,
10 DPS, Inc. responded to all but two of those requests by restricting its responses to
11 information regarding only DPS, Inc. For example:

- 12 • “Defendant denies that DIGITAL POINT SOLUTIONS, INC. conducted
13 business with Plaintiff at any time, and on that basis denies this request.”
- 14 • “Defendant denies that DIGITAL POINT SOLUTIONS, INC. participated in
15 any eBay affiliate marketing programs, and on that basis denies this request.”
- 16 • “Defendant denies that DIGITAL POINT SOLUTIONS, INC. received any
17 commissions from eBay at any time, and on that basis denies this request.”

18 Kennedy Decl., Ex. 3, at 3-10. But each of eBay’s requests for admission required that
19 DPS, Inc. provide admissions or denials with respect to the activities of any of the
20 entities/individuals defined as “DPS.”

21 While the responses are improper on their face, DPS, Inc. has also demonstrated
22 that it knows how to provide a proper response when it so chooses. In its responses to
23 requests for admission Nos. 24 and 25—which requested that DPS, Inc. admit or deny that
24 “DPS engaged in cookie stuffing with intent to defraud eBay” and that “DPS defrauded
25 eBay”—DPS, Inc. stated simply that “Defendant denies this request.” *See id.* at 11.
26 These responses demonstrate that DPS, Inc. is capable of accepting eBay’s definition of
27 “DPS” without compromising Mr. Hogan’s Fifth Amendment privilege when it pleases.
28 But the rules do not give DPS, Inc. such discretion, and it must provide complete

1 responses to all of eBay's requests for admission.

2 2. **Requests For Production**

3 DPS, Inc. has also improperly restricted its responses to many of eBay's requests
4 for production. In response to requests for production No. 1-8, 13-14 and 23, DPS, Inc.
5 asserted that it has no responsive documents to produce, but only after making the
6 prefatory statement that "Defendant DIGITAL POINT SOLUTIONS, INC. never
7 conducted business with Plaintiff at any time." *See* Kennedy Decl., Ex. 4, at 3-15. These
8 responses stand in marked contrast to DPS, Inc.'s supplemental responses to eBay's other
9 requests for production, in which DPS, Inc. either agrees to produce documents (Nos. 26-
10 28), or states affirmatively that "[a] diligent search has been made in an effort to locate the
11 items requested (Nos. 9-12, 16-22, 24-25, 29).⁷ *See id.* at 7-18. This contrasting behavior
12 strongly suggests that DPS, Inc.'s statement that "Defendant DIGITAL POINT
13 SOLUTIONS, INC. never conducted business with" eBay means that DPS, Inc. is again
14 limiting its responses to those requests to documents regarding "DIGITAL POINT
15 SOLUTIONS, INC." rather than to documents regarding eBay's broader definition of
16 "DPS."

17 DPS, Inc. may not withhold otherwise responsive documents in its possession
18 based on its contention that the production of any documents related to Mr. Hogan or his
19 business as it existed prior to DPS, Inc.'s incorporation is protected by Mr. Hogan's Fifth
20 Amendment privilege. And again, DPS, Inc. made its qualifying statement in only some
21 of its responses to eBay's requests for production, demonstrating that it is able to provide
22 proper responses to eBay's requests when it suits its interests, and further undercutting the
23 basis for its improper refusal to accept eBay's defined term.

24 3. **Interrogatories**

25 DPS, Inc. used a virtually identical qualifying statement in its supplemental

26 ⁷ DPS, Inc. did not provide responses to requests for production No. 30, 31 and 32, which seek
27 documents relating to DPS, Inc.'s financial assets, financial statements and tax returns. eBay
28 continues to meet and confer with DPS, Inc. regarding these requests and will file a separate
motion to compel responses to those requests, if necessary.

1 responses to eBay's two interrogatories. When asked in interrogatory No. 1 to "[i]dentify
2 all persons or entities with knowledge regarding DPS's participation . . . in any Affiliate
3 Marketing Program," DPS, Inc. responded: "Defendant DIGITAL POINT SOLUTIONS,
4 INC. has never conducted any business of any kind with Plaintiff. Defendant otherwise
5 identifies the following persons and entities: Shawn Hogan and Google, Inc." Similarly,
6 DPS, Inc. responded to interrogatory No. 2's request that DPS, Inc. "[i]dentify all Internet
7 Forums at, within or through which DPS discussed any aspect of their participation in . . .
8 eBay's Affiliate Marketing Program, or any other Affiliate Marketing Program," by
9 stating: "Defendant DIGITAL POINT SOLUTIONS, INC. has never conducted any
10 business of any kind with Plaintiff. No such forums exist." Kennedy Decl., Ex. 2, at 3.
11 Again, the use of the qualifying statement regarding DPS, Inc's interaction with eBay
12 (putting aside its veracity) strongly suggests that DPS, Inc. has limited the content of its
13 responses by refusing to accept eBay's definition of "DPS."

14 If DPS, Inc. were not attempting to limit its responses, there would be no reason to
15 state that "Defendant DIGITAL POINT SOLUTIONS, INC." never conducted business
16 with eBay. In response to interrogatory No. 2, for example, DPS, Inc. could have simply
17 stated "No such forums exist." DPS, Inc. may not refuse to provide information in its
18 possession or control regarding Mr. Hogan's business. To the extent it has not already
19 done so, DPS, Inc. must be compelled to provide all information in its possession or
20 control regarding the subject of eBay's discovery responses, including eBay's definition
21 of "DPS."

22 **IV. CONCLUSION**

23 For the foregoing reasons, eBay respectfully requests that the Court issue an order
24 compelling discovery, as follows:

- 25 1. compelling Defendant Shawn Hogan, notwithstanding his continuing
26 invocation of his Fifth Amendment right, to produce all documents
27 responsive to eBay's First and Second Set of Requests for Production that
28 were previously obtained by the FBI, including but not limited to any such

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- documents that may be within his control at third party NetHere, Inc.;
- 2. ordering Defendant DPS, Inc. to conduct a diligent search for and produce all documents responsive to eBay’s First and Second Set of Requests for Production, including by exercising any and all rights that it may have to obtain documents from third party NetHere, Inc.; and
- 3. striking Defendant DPS, Inc.’s objections to eBay’s Interrogatories and certain of eBay’s Requests for Admission and Requests for Production on the grounds that the definition of “DPS” is overbroad, unduly burdensome and oppressive and ordering DPS, Inc. to provide supplemental responses to those requests that include information regarding “DPS” as defined by eBay.

DATED: September 29, 2009

DAVID R. EBERHART
SHARON M. BUNZEL
COLLEEN M. KENNEDY
O’MELVENY & MYERS LLP

By: /s/ David R. Eberhart
DAVID R. EBERHART

Attorneys for Plaintiff eBAY INC.