

EXHIBIT 11

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5

6 Attorneys for Plaintiff
EBAY INC.
7

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

11
12 EBAY INC.,

13 Plaintiff,

14 v.

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

19 Defendants.
20

Case No. C 08-04052 JF

**PLAINTIFF EBAY INC.'S NOTICE TO
DIGITAL POINT SOLUTIONS, INC.,
SHAWN HOGAN, KESSLER'S FLYING
CIRCUS, THUNDERWOOD
HOLDINGS, INC., TODD DUNNING,
DUNNING ENTERPRISE, INC., BRIAN
DUNNING, AND
BRIANDUNNING.COM OF SUBPOENA
TO NETHERE, INC. PURSUANT TO
FED. R. CIV. P. 45**

1 TO EACH PARTY AND TO EACH ATTORNEY OF RECORD IN THIS
2 ACTION:

3 PLEASE TAKE NOTICE that pursuant to Rules 26, 34(c), and 45 of the
4 Federal Rules of Civil Procedure, the attached subpoena will be served upon the following
5 third party, commanding the production of the papers and documents set forth in the
6 Attachment A attached hereto.

7


Producing Party	Date/Time	Location
NetHere, Inc.	June 24, 2009 10:00 a.m.	O'MELVENY & MYERS, LLP 610 Newport Center Drive, 17th Floor Newport Beach, CA 92660 Telephone: (949) 760-9600

11 Said production will take place on June 24, 2009 at 10:00 a.m. at the above-
12 listed address, or such other location as is mutually acceptable to the above-listed third
13 party and plaintiff's counsel.

14 PLEASE TAKE FURTHER NOTICE that the above-listed third party may
15 be held in contempt of court pursuant to Federal Rule of Civil Procedure 45(e) if the party
16 fails without adequate excuse to obey the subpoena served upon it, and that it has certain
17 legal rights in response to plaintiffs' subpoena served upon it as provided in Federal Rule
18 of Civil Procedure 45(d) and (e). These rights are reproduced in full on page two of the
19 subpoena served upon the third-party.
20

21 Dated: June 9, 2009

O'MELVENY & MYERS LLP

22
23 By: 

24 David R. Eberhart
O'Melveny & Myers LLP

25 Attorneys for Plaintiff
26 EBAY INC.
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PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is Two Embarcadero Center, 28th Floor, San Francisco, California 94111. On June 9, 2009, I transmitted from my business email account, modonnell@omm.com, an electronic service copy and a courtesy copy via United States Postal Service of the following:

PLAINTIFF EBAY INC.'S NOTICE TO DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, AND BRIANDUNNING.COM OF SUBPOENA TO NETHERE, INC. PURSUANT TO FED. R. CIV. P. 45

together with an electronic copy of this declaration, to the following, at the email and postal addresses indicated below:

COAST LAW GROUP LLP Seyamack Kouretchian 169 Saxony Road Suite 204 Encinitas, CA 92024 Email: seyamack@coastlawgroup.com	LAW OFFICE OF PATRICK K. MCCLELLAN Patrick Kelly McClellan 2211 Michelson Dr. #700 Irvine, CA 92612 Email: pkellymc@pacbell.net
RUS, MILIBAND & SMITH, APC Leo J. Presiado 2211 Michelson Dr. 7 th Floor Irvine, CA 92612 Email: lpresiado@rusmiliband.com	FREELAND COOPER & FOREMAN LLP Stewart H. Foreman 150 Spear Street Suite 1800 San Francisco, CA 94105 Email: foreman@freelandlaw.com

1 I declare under penalty of perjury under the laws of the United States that the
2 above is true and correct. Executed on June 9, 2009, at San Francisco, California.

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Michael O'Donnell

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AO88 (Rev. 12/07) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT
 Southern District of California

eBay Inc.

AMENDED **SUBPOENA IN A CIVIL CASE**

V.

Digital Point Solutions, Inc., et al.

Case Number:¹ Case No. CV-08-4052 JF
 Northern District of California

TO: NetHere, Inc.
 Andrew B. Taubman
 4134 Voltaire Street, San Diego, CA 92107

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See Attachment A

PLACE	DATE AND TIME
O'Melveny & Myers LLP, 610 Newport Center Drive, 17th Floor, Newport Beach, CA 92660	June 24, 2009, 10:00 a.m.

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
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Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rule of Civil Procedure 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
	6/9/2009

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
 Attorney for Plaintiff, David J. Sepanik
 O'Melveny & Myers LLP, Two Embarcadero Center, 28th Floor, San Francisco, CA 94111 (415-984-8700)

(See Federal Rule of Civil Procedure 45 (c), (d), and (e), on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

PROOF OF SERVICE

DATE

PLACE

SERVED

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Federal Rule of Civil Procedure 45 (c), (d), and (e), as amended on December 1, 2007:

(c) PROTECTING A PERSON SUBJECT TO A SUBPOENA.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) DUTIES IN RESPONDING TO A SUBPOENA.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

1 6. “eBay” shall mean plaintiff eBay Inc., www.ebay.com, all of eBay’s
2 internationally operated websites, and any and all divisions, subdivisions, departments or
3 subsidiaries of eBay.

4 7. “Commission Junction” shall mean any and all parent organizations,
5 divisions, subdivisions, departments or subsidiaries of Commission Junction.

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

11 9. “Shawn Hogan” shall mean the Person known or doing business as Shawn
12 Hogan and his employees, agents, attorneys, consultants, and representatives, any
13 fictitious business names operated by Shawn Hogan or any pseudonyms used by Shawn
14 Hogan, as well as any and all entities (business, legal or otherwise) owned, controlled or
15 used by Shawn Hogan.

16 10. “Defendants” shall mean Digital Point Solutions, Inc. and/or Shawn Hogan.

17 11. “Person” or “Persons” shall mean any natural person, proprietorship, public
18 or private corporation, partnership, joint venture, trust, association, company, firm,
19 government or government entity (including any government agency, board, authority,
20 commission, or political subdivision or department thereof), or any other form of business
21 or legal entity, organization or arrangement, group or association.

22 12. “Internet Forum” shall mean any method or facility for publication of
23 content or communication among Users that is accessed or used via the Internet or other
24 computer network including, but not limited to, message and bulletin boards, blogs,
25 Usenet newsgroups, chatrooms, IRC channels or listservs.

26 13. “Affiliate Marketing Program” shall mean any program by which a
27 company engages third parties (affiliates) to engage in marketing efforts on its behalf.
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1 14. This subpoena calls for the production of all responsive Documents that are
2 within the possession, custody or control of NetHere.

3 15. Documents in the custody or possession of NetHere's counsel are deemed to
4 be in the custody, possession or control of NetHere.

5 16. All documents requested shall be produced in the same file or organizational
6 environment in which they are maintained. For example, a document that is part of a file,
7 docket or other grouping should be physically produced together with all other documents
8 from said file, docket or other grouping responsive to said request, in the same order or
9 manner of arrangement as the original.

10 17. In the event that any document responsive to the following document
11 requests has been destroyed, otherwise disposed of, or no longer in the party's control or
12 custody, that document is to be identified by author, addressee, date, subject matter,
13 number of pages, attachments or appendices, all persons to whom it was distributed,
14 shown or explained, date and manner of destruction or other disposition, and persons
15 destroying or disposing of the document.

16 18. All documents or information not produced in response to these requests by
17 reason of a claim of privilege or otherwise, shall be included in a log that identifies with
18 respect to each document or information, the date, author, recipient, copyees, subject
19 matter, and the specific grounds for withholding the document or information from
20 production.

21 19. If NetHere contends that any discovery request is objectionable in whole or
22 in part, NetHere shall state with particularity each objection, the basis for it, and the
23 categories of information and documents to which the objections applies, and NetHere
24 shall respond to the document request insofar as it is not deemed objectionable.

25 20. If NetHere finds the meaning of any term in any discovery request unclear,
26 NetHere shall assume a reasonable meaning, state what the assumed meaning is, and
27 respond to the request according to the assumed meaning.

28 21. The words "and" and "or" shall be construed in the conjunctive or

1 disjunctive, whichever makes the request more inclusive.

2 22. The term “including” means “including, but not limited to.”

3 23. As used herein, “all,” “any,” “each,” or “every” means “all, each and
4 every.”

5 24. These requests shall be deemed continuing so as to require further and
6 supplemental production in accordance with Federal Rule of Civil Procedure 26(e).

7 **REQUESTS FOR PRODUCTION**

8 **REQUEST NO. 1:**

9 All Documents Relating to Defendants maintained by You, including all billing
10 records, service logs, contracts, agreements, documents describing the type or types of
11 service utilized by Defendants, the length of service, any records of session times and/or
12 durations for any services provided by You to Defendants, and any documents reflecting
13 the means and sources of payment utilized by Defendants, including, but not limited to, all
14 credit card numbers and/or bank account numbers.

15 **REQUEST NO. 2:**

16 All Documents Relating to Defendants’ methods or techniques intended to, or
17 causing, a User’s browser to load any eBay webpage, webpage content or data therefrom.

18 **REQUEST NO. 3:**

19 All Documents Relating to Defendants’ participation in eBay’s Affiliate Marketing
20 Program, including, but not limited to, all methods and technologies used by Defendants
21 to obtain revenue from, manipulate or otherwise interact with, eBay’s Affiliate Marketing
22 Program, including, but not limited to, all software, source code, Javascript, and HTML
23 code.
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1 **REQUEST NO. 4:**

2 All Documents Relating to the source of any technology, technique or method used
3 by Defendants to participate in, manipulate or interact with the eBay Affiliate Marketing
4 Program, or any other affiliate marketing program.
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6 **REQUEST NO. 5:**

7 Documents sufficient to identify all advertising networks, advertising syndication
8 services or websites used or purportedly used by Defendants to advertise or promote eBay
9 or to interact in any way with eBay or eBay's Affiliate Marketing Programs.
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11 **REQUEST NO. 6:**

12 All Documents Relating to advertisements for eBay used, or purported to be used,
13 by Defendants on any website or ad network that directed or referred users to eBay.
14

15 **REQUEST NO. 7:**

16 All Documents reflecting the number and identity of Users who allegedly clicked
17 on an advertisement for eBay used, or purported to be used, by Defendants to direct or
18 refer Users to eBay.
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20 **REQUEST NO. 8:**

21 All Documents reflecting the number and identity of Users as to whom Defendants
22 caused that User's browser to load any eBay webpage, webpage content or data therefrom
23 without clicking on an advertisement for eBay.
24

25 **REQUEST NO. 9:**

26 All Documents Relating to efforts, technologies, techniques or methods used by
27 Defendants to avoid detection of their technologies, techniques or methods used to
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1 participate in, manipulate or interact with the eBay Affiliate Marketing Program, or any
2 other affiliate marketing program.

3
4 **REQUEST NO. 10:**

5 All Documents Relating to payment of commissions or other revenue obtained by
6 Defendants through participation in, interaction with or manipulation of eBay's Affiliate
7 Marketing Program.

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9 **REQUEST NO. 11:**

10 All Documents Relating to Communications between Defendants and eBay or any
11 current or former employee of eBay.

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13 **REQUEST NO. 12:**

14 All Documents Relating to any affiliate marketing programs, other than eBay's
15 Affiliate Marketing Program, in which Defendants participated.

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17 **REQUEST NO. 13:**

18 All Documents Relating to, or Communications between, Defendants and
19 Commission Junction or any current or former employee of Commission Junction.

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21 **REQUEST NO. 14:**

22 All Documents Relating to, or Communications between, Defendants and Kessler's
23 Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise, Inc., briandunning.com,
24 Todd Dunning or Brian Dunning.

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26 **REQUEST NO. 15:**

27 All Documents Relating to, or Communications between, Defendants and Rachael
28 Hughes, or any companies or entities owned, controlled, affiliated with or used by

1 Rachael Hughes.

2 **REQUEST NO. 16:**

3 All Documents sufficient to describe all phone numbers, email addresses, web
4 pages, instant messenger or mail accounts and social network accounts maintained,
5 formerly maintained, or registered to Defendants.

6 **REQUEST NO. 17:**

7 Documents sufficient to identify any Aliases used by Defendants in any Internet
8 Forum at or within which Defendants discussed any aspect of their participation in,
9 manipulation of or interaction with eBay's Affiliate Marketing Program, or any other
10 affiliate marketing programs, including, but not limited to, forums such as blogs, listservs,
11 Usenet newsgroups or chat rooms.

12 **REQUEST NO. 18:**

13 Documents sufficient to identify any Internet Forum at or within which Defendants
14 discussed any aspect of their participation in, manipulation of or interaction with eBay's
15 Affiliate Marketing Programs, or any other Affiliate Marketing Programs, including, but
16 not limited to, forums such as blogs, listservs, Usenet newsgroups or chat rooms.

17 **REQUEST NO. 19:**

18 Documents sufficient to identify all internet service providers (ISPs) and IP
19 addresses used by Defendants.

20 **REQUEST NO. 20:**

21 Documents sufficient to identify all computers, servers, electronic data storage and
22 hosting companies, entities, or facilities used by Defendants.

1 **REQUEST NO. 21:**

2 Documents sufficient to identify any entity used or hired to maintain or restore
3 electronic data or systems relating to Defendants' participation in, manipulation of or
4 interaction with eBay's Affiliate Marketing Program.
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6 **REQUEST NO. 22:**

7 Documents sufficient to identify software used to clean, reformat or erase hard-
8 drives used by Defendants, or any equipment owned, used or maintained by Defendants.
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10 **REQUEST NO. 23:**

11 All documents sufficient to identify all business entities or fictitious business
12 names currently or formerly maintained by Defendants
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