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 and Dunning Enterprise, Inc.  
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9 UNITED STATES DISTRICT COURT  
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN JOSE DIVISION

12  
 13 EBAY, INC.,

14 Plaintiff,

15 v.

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

19 Defendants.  
 20  
 21

CASE NO.: CV-08-4052 JF

**DECLARATION OF ROBERT J.  
 BREAKSTONE IN SUPPORT OF  
 DEFENDANTS TODD DUNNING  
 AND DUNNING ENTERPRISE,  
 INC.'S MOTION TO STAY  
 ACTION PENDING RESOLUTION  
 OF CRIMINAL PROCEEDINGS**

Date: November 20, 2009  
 Time: 9:00 a.m.  
 Place: Courtroom 3, 5<sup>th</sup> Floor

Hon. Jeremy Fogel presiding

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 DECLARATION OF ROBERT J. BREAKSTONE ISO OF DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE,  
 INC.'S MOTION TO STAY ACTION PENDING RESOLUTION OF CRIMINAL PROCEEDINGS, CASE NO.: CV-08-4052 JF

1 I, Robert J. Breakstone, declare:

2 1. I am an attorney licensed to practice in the State of California and the State of  
3 Illinois. My practice includes representing individuals involved in criminal investigations and  
4 under indictment for violations of federal criminal law, including crimes of fraud, theft of  
5 intellectual property, and racketeering activity.

6 2. On July 13, 2007, I was retained by Todd Dunning in connection with a criminal  
7 investigation being conducted by the United States Department of Justice / Federal Bureau of  
8 Investigation in the Northern District of California.

9 3. In connection with my representation of Todd Dunning, I contacted Assistant  
10 United States Attorney Kyle F. Waldinger who is in charge of the Computer Hacking and  
11 Intellectual Property Unit ("CHIP Unit") of the Office of the United States Attorney for the  
12 Northern District of California. Mr. Waldinger confirmed that there was a grand jury  
13 investigation involving Kessler's Flying Circus and Todd Dunning. Mr. Waldinger further  
14 confirmed that in connection with the investigation, the FBI had conducted several searches  
15 pursuant to warrant and that the FBI had interviewed Todd Dunning. Mr. Waldinger further  
16 indicated that he was aware that Commission Junction, Inc. had filed a civil action against Todd  
17 Dunning and Kessler's Flying Circus, among others. I indicated to AUSA Waldinger that no  
18 further contacts of Todd Dunning should be undertaken by Department of Justice personnel since  
19 Todd Dunning was represented by counsel.

20 4. In a subsequent telephone conference with Mr. Waldinger I asked whether it would  
21 be possible for Todd Dunning and Kessler's Flying Circus to obtain a copy of the computer hard  
22 drives and other records seized by the FBI from Brian Dunning's home. I explained that Todd  
23 Dunning and Kessler's Flying Circus needed those records in order to defend the case brought by  
24 Commission Junction, Inc. (Case No. 30-2008 00101025, Superior Court of the State of  
25 California, County of Orange Central Justice Center). Mr. Waldinger said that he would think  
26 about the request, but did not believe Todd Dunning had standing to challenge the seizure of the  
27 computer and records seized from his brother's house. I understood this to mean Mr. Waldinger  
28 believed that Todd Dunning was not entitled to copies of the records seized. He informed me

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DECLARATION OF ROBERT J. BREAKSTONE ISO OF DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE,  
INC.'S MOTION TO STAY ACTION PENDING RESOLUTION OF CRIMINAL PROCEEDINGS, CASE NO.: CV-08-4052 JF

1 that Brian Dunning's criminal counsel had made a similar request. As of the date of execution of  
2 this declaration, Mr. Waldinger has not changed his position.

3 5. On August 25, 2008, e-Bay, Inc. filed a complaint in Federal District Court for the  
4 Northern District of California, San Jose Division (Case No. CV 08-4052-JF) against Todd  
5 Dunning and others alleging fraud, racketeering, violation of California Penal Code, and  
6 California Business and Professions Code 17200.

7 6. On September 16, 2008, I contacted AUSA Waldinger who stated that attorney  
8 Sharon M. Bunzel (of O'Melveny & Myers) representing eBay in the aforementioned complaint (¶  
9 5 above) had sent AUSA Waldinger a copy of the complaint. AUSA Waldinger told me that  
10 Todd Dunning was a "subject" of a federal criminal investigation and that the FBI would be  
11 working aggressively to complete its investigation. The word "subject" is a term of art within the  
12 United States Department of Justice, and it is to be distinguished from a "witness". According to  
13 the United States Attorneys' Manual Section 9:11.151, it is the policy of the Department of Justice  
14 to advise a grand jury witness of his or her rights if such witness is a "target" or "subject" of a  
15 grand jury investigation. A "subject" of an investigation is a person whose conduct is within the  
16 scope of the grand jury's investigation.

17 7. As a result of the ongoing criminal investigation involving Todd Dunning as a  
18 "subject", I have advised Mr. Dunning to assert his Fifth Amendment privilege against self-  
19 incrimination in response to any questions asked of him at any deposition, in response to any  
20 interrogatory or request for admission, and in response to a demand for production of documents.

21 8. I have reviewed the complaint in this matter and based on my understanding of the  
22 allegations and issues in this civil matter, Mr. Dunning plans to continue to assert his Fifth  
23 Amendment privilege against self-incrimination. Based upon my experience, I believe that the  
24 ongoing federal criminal investigation concerns identical issues raised in eBay's complaint. In my  
25 opinion, any court order compelling Mr. Dunning to respond to the allegations of the complaint,  
26 and/or to respond to discovery propounded to him would constitute "compelled self-  
27 incrimination" within the meaning of the Fifth Amendment and California's constitutional  
28 privilege against self-incrimination. (*See, People v. Lucas*, (1995) 12 Cal. 4th at 415, 453.)

1 I declare under penalty of perjury under the laws of the State of California that the  
2 foregoing is true and correct.

3 Executed this 30<sup>th</sup> day of September, 2009, at San Francisco, California.

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5 ROBERT J. BREAKSTONE  
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