

EXHIBIT 4

1 search. Mr. Waldinger informed me that: (a) Mr. Brian Dunning is a target of the
2 investigation, along with two other named persons; (b) the federal government is confident that
3 a criminal offense could be proven, based on the fraudulent conduct of one or more persons;
4 and (c) until the federal government has concluded its analysis of the computer media seized,
5 the federal government is unwilling to discuss any resolution of its case. Since that first
6 telephone call with Mr. Waldinger, I have had at least six other phone conversations with him
7 and faxed to him at least three letters.

8 5. I have reviewed my file and in those letters I have confirmed in writing
9 that Mr. Waldinger advised me that: (1) Mr. Dunning is a "target" of the federal criminal
10 investigation; (2) the investigation concerns Thunderwood Holdings, Inc. ("Thunderwood")
11 and Kessler's Flying Circus ("KFC") and its relationship with eBay, and allegations that
12 "cookies" had been "forced" in violation of the terms of service with Plaintiff eBay
13 ("Plaintiff") and/or Commission Junction, Inc., which allegedly constitutes "cyber-fraud"
14 under various federal fraud statutes.

15 6. I have conferred with Mr. Waldinger periodically and he has continued
16 to confirm that Mr. Dunning is a target of an active investigation, that the federal government
17 is not yet done with its investigation or analysis of the computers seized, and that he will
18 contact me in the event an indictment is issued naming my client as a defendant, including any
19 indictment for fraud, in which Plaintiff and/or eBay is the named victim based on the above.
20 The investigation remains open and active.

21 7. Mr. Waldinger has confirmed that the criminal investigation of
22 Mr. Dunning is ongoing, that search warrants other than that discussed above have issued, and
23 in my opinion, based on my experience, I believe it is likely that the federal government has
24 presented testimony in this investigation to the United States Grand Jury for the Northern
25 District of California. In addition, the federal government has sought from the District Court,
26 and obtained, several extensions of time to return all the materials seized from Mr. Dunning's
27 home pursuant to the aforementioned federal search warrant, which called for its return within
28 60 days unless additional time is granted. Typically, in order to obtain such permission from

1 the federal court, the United States Attorney must allege that there is an active criminal
2 investigation, that the federal government believes the property seized constitutes, or is likely
3 to constitute evidence of the suspected crime, and that additional time is reasonably needed to
4 complete the investigation. With the exception of approximately 10% of the items seized,
5 which items have nothing to do with Plaintiff or KFC, the federal government remains in
6 possession of all other materials seized from Mr. Dunning, on the basis of its continued
7 criminal investigation of him.

8 8. By its own description on the United States Department of Justice
9 website, the CHIP Unit is charged with combating "cybercrime and intellectual property
10 theft." In fact, that unit, and Mr. Waldinger have acquired a national reputation for being the
11 first prosecutors in the nation to bring and win cyber-prosecutions based on previously untested
12 legal theories. A true and correct copy of this description found on the website of the
13 Department of Justice, is attached as Exhibit "3." In addition, the CHIP unit "works closely
14 with the FBI and other agencies to establish a relationship with the local high tech community
15 and encourage them to refer cases to law enforcement." A true and correct copy of this
16 description found on the website of the Department of Justice, is attached as Exhibit "4."
17 The CHIP Unit is specifically charged with coordinating law enforcement and the technology
18 industry "to share expertise and information technology, to assist each other 24 hours a day,
19 seven days a week, around the clock, to prevent cybercrime wherever possible..." A true and
20 correct copy of this description found on the website of the Department of Justice, is attached
21 hereto as Exhibit "5."

22 9. The word "target" is a term of art within the United States Department
23 of Justice, and it is to be distinguished from a "witness" and/or a "person of interest." Under
24 Justice Department guidelines, the prosecutor is required to inform a person or his attorney
25 when he has achieved the status of "target" because that person is actively believed to be a
26 future defendant, based on an ongoing investigation. This guideline is in place to avoid any
27 later claim that the "target" failed to invoke his rights against self-incrimination because he or
28 she wrongly believed he was not going to be prosecuted. Thus, anyone who is informed that

1 he is a "target" has an enormous motive to obtain counsel and assert his privilege against self-
2 incrimination.

3 10. On advice of and through counsel, Mr. Dunning has asserted his right to
4 remain silent, *i.e.*, has asserted his constitutional privilege against self-incrimination under the
5 Fifth Amendment to the United States Constitution following the execution of a search warrant
6 at his home and the questioning by FBI agents, and I have advised him to assert the same
7 privilege in response to any question asked of him at any deposition, in response to any
8 interrogatory or request for admission, and in response to any demand for production of
9 documents (the possession of which is privileged under *United States v. Doe* (1988) 487 U.S.
10 201, 108 S.Ct. 2341, 101 L.Ed.2d 184).^{3/}

11 11. Under the Fifth Amendment, a person need not be guilty of any crime to
12 enjoy a constitutional privilege not to provide information that the government or any party
13 seeks to compel him or her to provide. (*People v. Lucas* (1995) 12 Cal.4th 415, 453
14 ["Innocent persons, as well as the guilty, are entitled to invoke the privilege"]; *Grunewald v.*
15 *United States* (1957) 353 U.S. 391, 421, 77 S.Ct. 963, 982, 1 L.Ed.2d 931; see also Ratner,
16 *Consequences of Exercising the Privilege Against Self-Incrimination.*) Rather, if the
17 information sought *could, conceivably*, form a single evidentiary or factual link in a chain of
18 circumstantial evidence which chain of evidence *could* support *an inference* that the person is
19 culpable for any criminal offense, in violation of any state or federal law, that person cannot be
20 compelled by legal process, subpoena or court order to provide such information, upon his or
21 her invocation of the protection of the Fifth Amendment. (*Hoffman v. United States* (1951)

22
23 ^{3/} On behalf of Mr. Dunning I herewith assert that in producing such records he would be
24 "testifying" as to their existence and to his control over them in a way that is protected by his
25 Fifth Amendment privilege against self-incrimination. *Fisher v. United States* (1976) 425 U.S.
26 391, 96 S.Ct. 1569, 48 L.Ed.2d 39; *United States v. Doe* (1984) 465 U.S. 605, 104 S.Ct.
27 1237, 79 L.Ed.2d 552 (*Doe I*); and *Doe v. United States* (1988) 487 U.S. 201, 108 S.Ct.
28 2341, 101 L.Ed.2d 184 (*Doe II*), a line of cases in which the Supreme Court emphasized that
the act of producing potentially incriminating documents under government compulsion may
have impermissible testimonial aspects. These cases are applicable to this case since they hold
that the Fifth Amendment protects against compulsory surrender of (1) personal business
records, (2) in the possession of a sole proprietor or practitioner, (3) with respect to the
testimonial act implicit in the surrender itself.

1 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118; *United States v. Neff* (9th Cir. 1980)
2 615 F.2d 1235, 1239; *Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, 325-326; *In re*
3 *Misener* (1985) 38 Cal.3d 543, 546-551.)

4 12. I have reviewed the complaint in this matter and based on my
5 understanding of the allegations and issues in this civil matter, Mr. Dunning has, through
6 counsel, already asserted his Fifth Amendment privilege against self-incrimination in
7 connection with an inquiry by the Federal Government into *the identical facts alleged in this*
8 *case*, and clearly is entitled to its protection in the context of this case. In my opinion, any
9 court order compelling Mr. Dunning to respond to the allegations of the complaint, and/or to
10 respond to discovery propounded to him would constitute "compelled self-incrimination"
11 within the meaning of the Fifth Amendment and California's constitutional privilege against
12 self-incrimination. (Please see *People v. Lucas, supra*, 12 Cal.4th at 453.)^{4f}

13 13. Based on these descriptions of the function, purpose and manner of
14 operating on the part of the CHIP Unit, together with my 35 years of experience defending
15 individuals in criminal cases, it is clear that any and all information obtained from
16 Mr. Dunning in the course of discovery in this case will be shared with, and will be monitored
17 by, the federal government in aid of the criminal investigation and/or prosecution of
18 Mr. Dunning.

19 I declare under penalty of perjury under the laws of the United States of
20 America and the State of California that the foregoing is true and correct.

21 Executed this 15th day of October, 2009, at Irvine, California.

22
23 
24 WILLIAM J. KOPENY

25
26 ^{4f} "[I]n order to approve invocation of the privilege "it need only be evident from the
27 implications of the question, in the setting in which it is asked, that a responsive answer to the
28 question or an explanation of why it cannot be answered might be dangerous because injurious
disclosure could result." (*People v. Cudjo, supra*, 6 Cal.4th at p. 617, 25 Cal.Rptr.2d 390,
863 P.2d 635, quoting *Hoffman v. United States* (1951) 341 U.S. 479, 486, 71 S.Ct. 814, 818,
95 L.Ed. 1118.)" *Id.* at p. 453 [Underlining and italics supplied.]