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 8 and DIGITAL POINT SOLUTIONS, INC.

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

12	EBAY, INC.,	)	Case No. CV 08-04052 JF PVT
		)	
13	Plaintiff,	)	<b>DECLARATION OF ROSS M.</b>
		)	<b>CAMPBELL IN SUPPORT OF</b>
14	v.	)	<b>OPPOSITION OF DEFENDANTS</b>
		)	<b>DIGITAL POINT SOLUTIONS, INC. AND</b>
15	DIGITAL POINT SOLUTIONS, INC., SHAWN	)	<b>SHAWN HOGAN TO PLAINTIFF'S</b>
	HOGAN, KESSLER'S FLYING CIRCUS,	)	<b>MOTION TO COMPEL</b>
16	THUNDERWOOD HOLDINGS, INC., TODD	)	
	DUNNING, DUNNING ENTERPRISE, INC.,	)	Date: November 13, 2009
17	BRIAN DUNNING, BRIANDUNNING.COM,	)	Time: 9:00 a.m.
	and Does 1-20,	)	Judge: Hon. Patricia V. Trumbull
18		)	Dept.: Courtroom 5
19	Defendants.	)	
		)	
20		)	

21  
 22 I, Ross M. Campbell, declare:

23 1. I am an attorney at law duly authorized to practice law before the United States District  
 24 Court for the Northern District of California and am an attorney with Coast Law Group, LLP, attorneys  
 25 of record for defendants Shawn Hogan and Digital Point Solutions, Inc. (collectively the "DPS  
 26 Defendants"). If called upon as a witness I could and would competently testify to the following facts

27 2. Attached as Exhibit "1" hereto is a true and correct copy of the Second Amended  
 28 Complaint filed by Plaintiff in this action.

1           3.       Attached as Exhibit "2" hereto is a true and correct copy of the parties' Joint Case  
2 Management Statement in this case, filed September 14, 2009.

3           4.       Attached as Exhibit "3" hereto is a true and correct copy of the DPS Defendants Notice  
4 of Motion and Motion for Stay of Proceedings and Memorandum of Points & Authorities in Support  
5 Thereof, filed October 16, 2009.

6           5.       Attached as Exhibit "4" hereto is a true and correct copy of an email from Ross Campbell  
7 to Colleen Kennedy, dated September 25, 2009.

8           6.       Attached as Exhibit "5" hereto is a true and correct copy of an email from Ross Campbell  
9 to Colleen Kennedy, dated September 29, 2009.

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

12 DATED: October 23, 2009

s/Ross M. Campbell  
COAST LAW GROUP, LLP  
Attorney for Defendants, Shawn Hogan  
and Digital Point Solutions, Inc.

# EXHIBIT 1

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8  
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 - 10 and 12 - 20,

22 Defendants.

Case No. CV 08-4052 JF (PVT)

**SECOND AMENDED COMPLAINT  
FOR**

- (1) **Violations of 18 U.S.C. § 1030**
- (2) **Violations of 18 U.S.C. § 1962(c)**
- (3) **Fraud**
- (4) **Violations of California Pen. Code § 502**
- (5) **Restitution and Unjust Enrichment**
- (6) **California B&P Code § 17200;**

**DEMAND FOR JURY TRIAL**

22 For its Second Amended Complaint, Plaintiff eBay Inc. alleges as set forth below.  
23 The factual allegations set forth herein have evidentiary support or, to the extent they are  
24 contained in a paragraph made on information and belief, likely will have evidentiary  
25 support after a reasonable opportunity for further investigation or discovery.

26 **PARTIES**

- 27 1. At all times relevant herein, Plaintiff eBay Inc. ("eBay") was a corporation  
28

1 organized and existing under the laws of the State of Delaware, with its principal place of  
2 business in the State of California.

3 2. eBay is informed and believes and, on that basis, alleges that at all times  
4 relevant herein Defendant Digital Point Solutions, Inc. (“Digital Point Solutions”) was a  
5 California corporation, sole proprietorship or other business entity, doing business in the  
6 State of California. At various times relevant herein, Defendant Digital Point Solutions  
7 may also have been known as and/or done business as “Data Point Solutions,” “Digital  
8 Point Solutions,” and/or “Digital Point.” Digital Point Solutions has succeeded to the  
9 obligations and liabilities of any and all of such predecessor entities. At all times relevant  
10 herein, Defendant Digital Point Solutions represented itself and held itself out to eBay as  
11 an independent business entity with legal status separate from that of its individual  
12 owner(s).

13 3. eBay is informed and believes and, on that basis, alleges that at all times  
14 relevant herein Defendant Shawn Hogan was an individual residing and doing business in  
15 the State of California and was the sole owner and/or sole proprietor of Defendant Digital  
16 Point Solutions in any and all of its incarnations.

17 4. Defendants Digital Point Solutions and Shawn Hogan will be collectively  
18 referred to herein as “DPS.”

19 5. eBay is informed and believes and, on that basis, alleges that at all times  
20 relevant herein Defendant Kessler’s Flying Circus was a California general partnership  
21 doing business in the State of California.

22 6. eBay is informed and believes and, on that basis, alleges that at all times  
23 relevant herein Defendant Thunderwood Holdings, Inc. was a California corporation and  
24 was a general partner of Defendant Kessler’s Flying Circus.

25 7. eBay is informed and believes and, on that basis, alleges that at all times  
26 relevant herein Defendant Brian Dunning was an individual residing and doing business in  
27 the State of California and was the sole owner of Defendant Thunderwood Holdings, Inc.

28 8. eBay is informed and believes and, on that basis, alleges that at all times

1 relevant herein Dunning Enterprise, Inc., previously substituted for the fictitiously named  
2 defendant Doe 11, was a California corporation doing business in the State of California  
3 and was a general partner of Defendant Kessler's Flying Circus.

4 9. eBay is informed and believes and, on that basis, alleges that at all times  
5 relevant herein Defendant Todd Dunning was an individual residing and doing business in  
6 the State of California and was either a general partner of Defendant Kessler's Flying  
7 Circus or held a controlling interest in Dunning Enterprise, Inc., which was a general  
8 partner of Defendant Kessler's Flying Circus.

9 10. eBay is informed and believes and, on that basis, alleges that at all times  
10 relevant herein Defendant BrianDunning.com was a website and/or business entity  
11 through which Defendants Brian Dunning and/or Todd Dunning committed some or all of  
12 the acts alleged herein.

13 11. Defendants Kessler's Flying Circus, Thunderwood Holdings, Inc., Dunning  
14 Enterprise, Inc., BrianDunning.com, Brian Dunning, and Todd Dunning will be  
15 collectively referred to herein as "KFC."

16 12. eBay is ignorant of the true names and capacities of defendants sued herein  
17 as Does 1 through 10 and 12 through 20, inclusive, and therefore sues said defendants by  
18 such fictitious names. eBay will amend this complaint to allege the true names and  
19 capacities of said defendants when they are ascertained. eBay is informed and believes  
20 and, on that basis, alleges that each of the fictitiously named defendants is responsible in  
21 some manner to pay the obligations described herein, and that eBay's losses as alleged  
22 herein were proximately caused by said defendants' conduct.

23 13. Unless otherwise specified, DPS, KFC and Does 1-10 and 12-20 will be  
24 referred to collectively herein as "Defendants."

25 **JURISDICTION AND VENUE**

26 14. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331  
27 and 1367.

28 15. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)(1),

1 1391(b)(2) and 1391(c), and 18 U.S.C. § 1965(a).

2 16. Pursuant to the User Agreements entered into by DPS and KFC, as  
3 discussed in paragraph 26 *infra*, they have consented to the jurisdiction of and venue in  
4 the Northern District of California. Specifically, under the User Agreements, the  
5 Defendants have agreed that any claim or controversy at law or equity that arises out of  
6 this Agreement or eBay's services must be resolved by a court located in Santa Clara  
7 County, California.

8 **INTRADISTRICT ASSIGNMENT**

9 17. Assignment to the San Jose Division is proper pursuant to Local Rules 3-  
10 2(c) and (e) because a substantial part of the events or omissions that give rise to eBay's  
11 claim occurred in San Jose, Santa Clara County, California. eBay's corporate  
12 headquarters are located in San Jose, Santa Clara County, California, and Defendants'  
13 wrongful actions were specifically and purposefully directed at and intended to affect  
14 eBay in San Jose, Santa Clara County, California as discussed in detail below.

15 **GENERAL ALLEGATIONS**

16 **eBay's Affiliate Marketing Program**

17 18. eBay offers to the public an online marketplace that enables trade on a local,  
18 national and international basis. Through eBay's website, sellers may list items for sale  
19 and buyers may bid on and purchase items of interest. eBay earns revenue when a seller  
20 places an item for sale and when the item is sold. eBay may also earn revenue depending  
21 on various features selected by the seller, *e.g.*, listing upgrades and photo displays.

22 19. eBay's Affiliate Marketing Program is designed to increase traffic to eBay's  
23 website through the placement of advertisements for eBay on third-party websites. eBay  
24 seeks to increase traffic to its site so that more people will be exposed to eBay's service  
25 and begin using eBay to buy or sell goods, thereby generating revenue for eBay. The  
26 persons and entities that advertise on behalf of eBay—whether on their own sites or on  
27 sites of other third parties—are known as “affiliates.” eBay's Affiliate Marketing  
28 Program is intended to compensate affiliates only when the advertisement in question

1 causes a user to take some action at eBay's site that directly provides revenue to eBay or  
2 indicates that the new user is likely to take such an action in the future. Accordingly,  
3 affiliates earn commissions payable by eBay under the Affiliate Marketing Program when  
4 the following sequence of events occurs: (1) the affiliate publishes an eBay advertisement,  
5 (2) a user clicks on the eBay advertisement and is directed to eBay's website (the  
6 "Referred Visit"), and (3) that user subsequently engages in a commission-generating  
7 event (a "Revenue Action"). Revenue Actions, include, by way of example: (1) becoming  
8 a new, registered user of eBay within 30 days of the Referred Visit, or (2) purchasing an  
9 item from a third-party seller on eBay within seven days of the Referred Visit. Because  
10 compensation to the affiliate is tied to actions by the user, it is essential that eBay be able  
11 to determine whether a Revenue Action occurred by virtue of the fact that the user was  
12 referred to eBay by a particular affiliate's advertisement. eBay and/or Commission  
13 Junction, Inc. ("CJ") tracks this information using information placed in the new user's  
14 browser, as discussed below.

15 20. At all relevant times, eBay used the services of CJ, a subsidiary of  
16 ValueClick, Inc., in administering the Affiliate Marketing Program. The relationship  
17 between eBay and CJ was governed at all relevant times by various Advertiser Service  
18 Agreements. Under those agreements, CJ was responsible for, among other things,  
19 recruiting affiliates, tracking affiliate traffic, monitoring compliance by affiliates,  
20 preventing and detecting fraudulent activity, and paying affiliates using funds remitted by  
21 eBay.

22 21. eBay's obligation to pay commissions is tracked by matching a user's  
23 Revenue Actions on eBay's site to the affiliate that directed the user to eBay. This  
24 tracking is accomplished through the use of a digital tag called a "cookie" that is stored in  
25 the user's web browser. Cookies are collections of data commonly used by websites to  
26 store and associate useful information with a given user. Cookies typically store  
27 information such as usernames, passwords, and user preferences for a particular user; that  
28 information makes it more efficient for users to access web pages and provides a means



1 for websites to track and authenticate users. Cookies are placed or “dropped” in a user’s  
2 browser by a website when that user visits the website.

3 22. In the case of eBay’s Affiliate Marketing Program, cookies are used to  
4 confirm that a user was directed to eBay from a specific affiliate. When a user clicks on  
5 an affiliate advertisement and is directed to eBay’s site, eBay’s site drops a cookie on the  
6 user’s computer. That cookie identifies the site that referred the user to eBay and/or the  
7 specific affiliate responsible for directing the traffic to eBay. If the user later engages in a  
8 Revenue Action within the specified time period, eBay and/or CJ determines—based on  
9 the data in the cookie—which affiliate, if any, should be credited with the referral and  
10 receive the commission. If cookies from multiple affiliates are present on the user’s  
11 computer, the affiliate identified in the most recent cookie dropped is credited with the  
12 Revenue Action. If there is no qualifying cookie on the computer, then no affiliate is  
13 credited. A substantial number of the Revenue Actions taken at eBay’s site are taken by  
14 users who were not referred to eBay by any affiliate; consequently, no commission is  
15 owed for those actions.

16 23. As part of the services it renders with respect to eBay’s Affiliate Marketing  
17 Program, CJ pays affiliates on a periodic basis (usually monthly), with funds remitted by  
18 eBay, based on the number of Revenue Actions taken by users referred by those affiliates.

### 19 The Fraudulent “Cookie Stuffing” Schemes

20 24. “Cookie stuffing” is a term used to describe the forced placement of a  
21 cookie on a computer, typically by causing a cookie from a particular website to be placed  
22 on the user’s computer without the user knowing that he or she visited the website that  
23 placed the cookie. DPS and KFC engaged in cookie stuffing intended to defraud eBay.  
24 The allegations made on eBay’s information and belief set forth in paragraphs 25-34, 37-  
25 41, and 47-60 below describing Defendants’ cookie stuffing schemes are based on eBay’s  
26 analysis of the Defendants’ websites and/or technology and the way in which a user’s web  
27 browser interacts with Defendants’ sites and/or technology, and on eBay’s analysis of  
28 historical data relating to traffic purportedly driven to eBay by Defendants. Certain other

1 details regarding Defendants' cookie stuffing schemes are exclusively within Defendants'  
2 control.

3 25. eBay is informed and believes and, on that basis, alleges that DPS and KFC  
4 each accomplished their cookie stuffing through software programs and/or code that,  
5 unbeknownst to the user, redirected the user's computer to the eBay website without the  
6 user actually clicking on an eBay advertisement link, or even becoming aware that they  
7 had left the page they were previously viewing. As a result, the eBay site would be  
8 prompted to drop an eBay cookie on the user's computer even though the user never  
9 clicked on an eBay advertisement or even realized that their computer had ever visited the  
10 eBay site. DPS and KFC stuffed a large number of Internet users, with the expectation  
11 and intention that some subset of those users would later come to eBay and take a  
12 Revenue Action.

13 26. eBay is informed and believes and, on that basis, alleges that the software  
14 programs utilized by each of DPS and KFC caused the user's computer to access eBay's  
15 computers in an unauthorized way and/or to exceed the authorized access to eBay's  
16 computers. Because DPS and KFC caused this access through and without the knowledge  
17 or active participation of those users, the access of any such user's computer to eBay's site  
18 is attributable to DPS and KFC. The only authorization given to the Defendants to access  
19 eBay's site in any manner was by way of eBay's User Agreement. The User Agreement  
20 was explicitly agreed to by the individual Defendants when they became registered eBay  
21 users on the following dates: Shawn Hogan on May 17, 1999; Brian Dunning on  
22 November 10, 2000; and Todd Dunning on May, 21, 2003. The remaining named  
23 Defendants, Digital Point Solutions, Kessler's Flying Circus, Thunderwood Holdings,  
24 Inc., Dunning Enterprise, Inc. and BrianDunning.com, were on constructive and/or actual  
25 notice that the User Agreement governed their access to eBay's website, based on the  
26 explicit agreement of their owners/principals to the terms of the User Agreement, as well  
27 as eBay's display on its website at all relevant times of the statement that use of the  
28 website constitutes acceptance of the User Agreement. Defendants' access to eBay was

1 unauthorized by, and violated, the terms of the User Agreement because it occurred solely  
2 to force the dropping of the eBay cookie and thereby wrongfully access eBay's computer  
3 servers. Each of the causes of action set forth herein arises out of those violations of the  
4 User Agreement.

5 27. eBay is informed and believes and, on that basis, alleges that once the  
6 cookie was stuffed on the user's computer by one or more of the Defendants, any future  
7 Revenue Actions initiated by that user when the user later visited eBay intentionally, and  
8 not as a result of any advertisement placed by Defendants, appeared to be eligible for  
9 commissions payable to one of the Defendants (provided those actions took place within  
10 the prescribed periods of time). Hence DPS or KFC would receive payment for actions by  
11 users who had not been referred to eBay by Defendants' advertisements, thereby injuring  
12 eBay.

13 28. eBay is informed and believes and, on that basis, alleges that after DPS  
14 and KFC independently began their cookie stuffing schemes, they communicated with  
15 each other regarding those cookie stuffing schemes. Those communications between  
16 DPS and KFC included, but were not limited to attempts by KFC to improve its  
17 software and/or otherwise improve the effectiveness of its cookie stuffing scheme in  
18 order to increase the amount of commissions that KFC could fraudulently obtain from  
19 eBay, as well as efforts by DPS to prevent detection of the DPS cookie stuffing  
20 scheme by eBay.

21 29. eBay is informed and believes and, on that basis, alleges that DPS and KFC  
22 used certain technological measures to prevent eBay from discovering their wrongdoing.  
23 At certain relevant times DPS and KFC used technology or technologies that would stuff  
24 cookies on only those computers that had not been previously stuffed by that Defendant.  
25 The purpose of this action was to avoid discovery by eBay and/or CJ of evidence of  
26 stuffing—e.g., by directly observing repeated stuffing to a test computer, by discovering  
27 that a single user had multiple cookies pointing to the same affiliate or by discovering that  
28 there was an abnormal ratio of cookies placed by DPS and KFC to the Revenue Actions

1 attributable to users referred by DPS and KFC—and thereby conceal the schemes from  
2 eBay’s and/or CJ’s monitoring activities. In addition, at certain relevant times DPS and/or  
3 KFC used technology that would avoid stuffing cookies on computers that appeared to be  
4 geographically located in San Jose, California (the location of eBay’s headquarters) or  
5 Santa Barbara, California (the location of CJ’s headquarters). The purpose of this action  
6 was to evade efforts by eBay and/or CJ to detect the cookie stuffing mechanism if they  
7 attempted to observe the wrongdoing from their normal places of business.

8 30. eBay is informed and believes and, on that basis, alleges that DPS also used  
9 at least one additional technological measure to conceal its wrongdoing: DPS used  
10 images placed on web pages to effectuate its cookie stuffing scheme, and caused those  
11 images to be so small that they were effectively invisible to the user and, accordingly,  
12 difficult to detect.

13 31. eBay is informed and believes and, on that basis, alleges that KFC also used  
14 at least one additional technological measure to conceal its wrongdoing: KFC used  
15 JavaScript code contained in web pages to effectuate its cookie stuffing scheme, and  
16 purposefully obscured the purpose and effect of that code so that, even when that code  
17 was discovered, it was difficult to determine its actual effect. This caused KFC’s cookie  
18 stuffing to be difficult to detect, whether by human or machine efforts.

19 32. eBay is informed and believes and, on that basis, alleges that in addition to  
20 these technological measures, DPS and KFC each actively sought to prevent detection by  
21 eBay and CJ by explicitly denying to eBay and/or CJ that any wrongdoing had occurred.  
22 For example, when Shawn Hogan was contacted by CJ in connection with suspicions of  
23 cookie stuffing by DPS, he attributed the suspicious activity to “coding errors,” which he  
24 later purported to have “corrected.” Brian Dunning also gave false information to eBay in  
25 response to questions about unusual activity regarding his account. Additional false  
26 statements intended to conceal the cookie stuffing activity are set forth below in paragraph  
27 60 and are incorporated herein.

28 33. As a result of the cookie stuffing schemes employed by DPS and KFC, DPS

1 and KFC accessed eBay's servers millions of times in an unauthorized manner that  
2 violated the User Agreement and interfered with the proper working of those computers.  
3 The majority of those acts of unauthorized access did not cause the improper payment of a  
4 commission and did not involve the performance by CJ of any obligations under any  
5 contract it had with any of the parties to this action. A minority, but economically  
6 significant, of those acts of unauthorized access caused eBay to pay commissions (via CJ)  
7 to each of DPS and KFC for a substantial number of Revenue Actions that were in no way  
8 related to the legitimate referral of any user by either DPS's or KFC's advertisements and  
9 for which neither DPS nor KFC were due compensation.

10 34. On January 4, 2008, CJ filed an action against Defendants Kessler's Flying  
11 Circus, Brian Dunning and Todd Dunning for breach of contract and other claims based  
12 on KFC's cookie stuffing scheme perpetrated against eBay. CJ sought to recoup  
13 commissions it had paid to those Defendants for the month of May 2007, after eBay  
14 discovered KFC's cookie stuffing scheme and refused to reimburse CJ for the unearned  
15 commissions it had paid to those Defendants for the previous month. CJ's action was  
16 recently settled on undisclosed terms, and a request for dismissal has been filed. eBay  
17 was not a party to CJ's action, and had no opportunity to litigate any issue in the CJ  
18 action. eBay does not seek recovery through this litigation of any of the monies sought by  
19 CJ through its now-settled litigation against Defendants Kessler's Flying Circus, Brian  
20 Dunning and Todd Dunning.

21 **FIRST CAUSE OF ACTION**

22 **(Violations of 18 U.S.C. § 1030)**

23 35. eBay realleges each and every allegation set forth in Paragraphs 1 through  
24 34, inclusive, and incorporates them by reference herein.

25 36. Through their cookie stuffing schemes as described above, DPS and KFC  
26 each knowingly, intentionally and with intent to defraud accessed eBay's computers  
27 without authorization and/or exceeded their authorized access to eBay's computers in  
28 order to further their fraudulent schemes.

1           37.     DPS's and KFC's access of eBay's computers was unauthorized because the  
2 only purpose of that access was to defraud eBay. In addition, Defendants' access of  
3 eBay's computers was unauthorized and/or exceeded their authorized access, because  
4 each Defendant was a registered eBay user and/or was bound by the eBay User  
5 Agreement in effect at the time, as set forth in paragraph 26 above. The User Agreements  
6 that bound each of the Defendants were substantially similar. The User Agreements (a)  
7 prohibited the use of any "device, software or routine" to interfere with or attempt to  
8 interfere with the proper working of the eBay site or any activities conducted on the eBay  
9 site, and (b) required compliance with all applicable laws regarding the use of eBay's  
10 servers.

11           38.     The User Agreements were the only basis on which any Defendant had  
12 authorization to access eBay's site. No agreement entered into by any Defendant in  
13 connection with eBay's Affiliate Marketing Program, including but not limited to any  
14 Publisher Service Agreement that may have been entered into between CJ and one or  
15 more of Defendants and/or any Terms and Conditions of the Affiliate Marketing Program  
16 agreed to by one or more of Defendants, provides for or in any way contemplates such  
17 access. The User Agreements therefore govern and control any access to eBay's site,  
18 whether authorized or unauthorized, by Defendants. Defendants, through their cookie  
19 stuffing schemes, violated those User Agreements by accessing eBay's computers without  
20 authorization and/or exceeded the authorized access granted to them by the User  
21 Agreements.

22           39.     Upon information and belief, Defendants' access to eBay's computers that  
23 was either unauthorized or exceeded the authorization granted by the User Agreements  
24 did not always result in a commission being paid to any Defendant (for example, where a  
25 user, after having a cookie stuffed on his or her computer by one of Defendants, did not  
26 subsequently take any Revenue Action). In other cases, Defendants' access to eBay's  
27 computers that was unauthorized or exceeded the authorization granted by the User  
28 Agreements resulted in commissions being paid to Defendants for Revenue Actions

1 initiated by users that Defendants did not refer to eBay, which were in no way related to  
2 Defendants' advertisements, and for which Defendants were due no compensation. In  
3 both instances, Defendants' access caused harm to eBay's computers and caused damage  
4 and loss to eBay within the meaning of 18 U.S.C. § 1030, regardless of whether any  
5 commission was later paid to Defendants for any particular act of cookie stuffing.

6 40. Upon information and belief, through their unauthorized access, Defendants  
7 DPS and DOES 1-10 caused harm and damage to eBay's computers including, but not  
8 limited to, impairment of the integrity of eBay's data, and caused loss to eBay including,  
9 but not limited to, costs incurred by eBay in responding to and conducting an assessment  
10 of the damage caused by these Defendants' cookie stuffing scheme. Through their  
11 unauthorized access, Defendants DPS and DOES 1-10 also caused damage and loss to  
12 eBay as a result of commissions being wrongfully paid to those Defendants. The loss to  
13 eBay that resulted from the unauthorized access by Defendants DPS and DOES 1-10 was  
14 incurred in each year from at least December 2003 through June 2007, and totaled more  
15 than \$5,000 in at least the one-month period ending June 30, 2007.

16 41. Upon information and belief, through their unauthorized access, Defendants  
17 KFC and DOES 12-20 caused harm and damage to eBay's computers including, but not  
18 limited to, impairment of the integrity of eBay's data, and caused loss to eBay including,  
19 but not limited to, costs incurred by eBay in responding to and conducting an assessment  
20 of the damage caused by these Defendants' cookie stuffing scheme. Through their  
21 unauthorized access, Defendants KFC and DOES 12-20 also caused damage and loss to  
22 eBay as a result of commissions being wrongfully paid to those Defendants. The loss to  
23 eBay that resulted from the unauthorized access by Defendants KFC and DOES 12-20  
24 was incurred in each year from at least December 2004 through June 2007, and totaled  
25 more than \$5,000 in at least the one-year period ending in June 2007.

26 42. eBay's computers are used in interstate and foreign commerce.

27 43. DPS's and KFC's actions, whether or not they resulted in the payment of  
28 any commissions to them, constitute violations of the Computer Fraud and Abuse Act, 18



1 U.S.C. § 1030, including but not limited to §§ 1030(a)(4), 1030(a)(5)(B) and  
2 1030(a)(5)(C).

3 44. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as  
4 more fully set forth below.

5 **SECOND CAUSE OF ACTION**

6 **(Violations of 18 U.S.C. § 1962(c))**

7 45. eBay realleges each and every allegation set forth in Paragraphs 1 through  
8 44, inclusive, and incorporates them by reference herein.

9 46. Defendants Shawn Hogan's, Brian Dunning's, and Todd Dunning's  
10 unlawful, tortious and otherwise actionable conduct constitutes violations of 18 U.S.C. §  
11 1962(c).

12 47. Defendant Shawn Hogan and DOES 1-10 (the "Hogan Group") engaged in  
13 activities through the company Digital Point Solutions. Digital Point Solutions has been  
14 in existence as a business entity since at least 1999. On information and belief, based on  
15 information provided on the company's website, from 1999 to the present, Digital Point  
16 Solutions has had at least four employees, including owner, President, CEO and Senior  
17 Systems Analyst Shawn Hogan, Vice President and Staff Systems Analyst R. Robin  
18 Quasebarth, Associate System Analyst Richard L. Crook, and Sales Representative D.  
19 Shawn Callahan. On information and belief, based on information provided on the  
20 company's website and information provided to an eBay employee by Defendant Shawn  
21 Hogan, at various times Digital Point Solutions also had other employees as well as a  
22 group of "volunteers" who provided services to Digital Point Solutions. Digital Point  
23 Solutions was incorporated on and/or before May 14, 2007. At all times relevant herein,  
24 Digital Point Solutions constituted an enterprise under RICO.

25 48. At all times relevant herein, through Digital Point Solutions, the Hogan  
26 Group associated with each other and others for the common purpose of causing millions  
27 of computers to access eBay's servers to defraud eBay of commission fees by designing  
28 and implementing the cookie stuffing scheme described above. Upon information and



1 belief, the Hogan Group's activities were ongoing, and Digital Point Solutions functioned  
2 as a continuing unit in operating the fraudulent cookie stuffing scheme from  
3 approximately December 2003 through June 2007.

4 49. Defendants Brian Dunning, Todd Dunning and DOES 12-20 (the "Dunning  
5 Group") engaged in activities through the companies Kessler's Flying Circus,  
6 Thunderwood Holdings, Inc., Dunning Enterprise, Inc., and BrianDunning.com, and each  
7 company constitutes a RICO enterprise. Through Kessler's Flying Circus, Thunderwood  
8 Holdings, Inc., Dunning Enterprise, Inc., and BrianDunning.com, the Dunning Group  
9 associated with each other and others for the common purpose of defrauding eBay of  
10 commission fees by designing and implementing the cookie stuffing scheme described  
11 above. Upon information and belief, the Dunning Group's activities were ongoing, and  
12 Kessler's Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise, Inc. and  
13 BrianDunning.com functioned individually, and with each other, as continuing units in  
14 operating the fraudulent cookie stuffing scheme from approximately December 2004  
15 through June 2007.

16 50. The members of the Hogan Group and Dunning Group each committed  
17 multiple violations of the predicate act of mail and wire fraud, 18 U.S.C. § 1343, both  
18 through their cookie stuffing schemes and through communications with eBay and  
19 Commission Junction designed to fraudulently conceal those schemes.

20 51. As described in Paragraphs 25-33 above, schemes to defraud eBay existed  
21 by which the members of the Hogan Group and Dunning Group each stuffed eBay  
22 cookies onto computers for the purpose of defrauding eBay of commission fees due only  
23 for legitimate Revenue Actions associated with a given affiliate. The members of the  
24 Hogan Group and Dunning Group each participated in these schemes with the specific  
25 intent to defraud eBay. Use of the Internet was essential to the schemes: the members of  
26 the Hogan Group and Dunning Group stuffed a cookie onto a computer when a user was  
27 browsing the Internet, and the stuffed cookie was later read and recognized when that  
28 Internet user accessed eBay's website on the Internet and either registered with the site,

1 purchased an item or engaged in some other Revenue Action. The members of the Hogan  
2 Group and Dunning Group each, by use of their technologies, caused users' web browsers  
3 to convey a representation by the Hogan Group and/or the Dunning Group to eBay that  
4 the user had accessed the eBay website via an advertisement placed by either DPS or  
5 KFC, when in fact, a substantial portion of those users never knowingly or intentionally  
6 visited the eBay website based on an advertisement placed by either DPS or KFC. These  
7 fraudulent acts and representations were repeated multiple times, and each act constitutes  
8 a violation of 18 U.S.C. § 1343 through the use of interstate wires. Moreover, because the  
9 Hogan Group's and the Dunning Group's cookie stuffing activities were undertaken as  
10 part of a scheme to defraud and for the purpose of executing that fraud by wire  
11 transmissions, each instance of cookie stuffing constitutes a completed violation of 18  
12 U.S.C. § 1343 regardless of whether any commission was credited or paid as a result.

13 52. On or about June 2007, eBay undertook an investigation into suspected  
14 cookie stuffing by the Hogan Group and the Dunning Group. eBay was able to verify the  
15 existence of the two schemes and to track specific instances of cookie stuffing through  
16 several different methods.

17 53. eBay first ran its own tests and was able to observe and confirm fraudulent  
18 cookie stuffing by both the Hogan Group and the Dunning Group.

19 a. For example, on or about June 5, 2007, an eBay employee visited the  
20 website [www.drago-sim.com](http://www.drago-sim.com) using a secure computer that had its IP address masked (to  
21 overcome countermeasures that prevented cookies from being stuffed onto computers  
22 with San Jose IP addresses) and that was equipped to monitor and record Internet activity  
23 occurring on the computer. The website [www.drago-sim.com](http://www.drago-sim.com) was a participant in DPS's  
24 advertising network and contained a DPS-controlled banner ad. Although the eBay  
25 employee never clicked on, or requested, any eBay ad or link to an eBay website, the  
26 Hogan Group's code in the DPS-controlled banner ad secretly redirected the computer  
27 being used by the eBay employee to an eBay website, and a DPS-associated cookie was  
28 dropped. eBay observed an identical cookie stuff by the Hogan Group on the same date

1 by visiting the site [www.songlyrics.com](http://www.songlyrics.com), which was also a participant in the DPS ad  
2 network and which also contained a DPS-controlled banner ad.

3 b. Also on or about June 5, 2007, eBay was able to observe and record  
4 fraudulent cookie stuffing activity caused by the Dunning Group's wholinked and  
5 profilemaps applications. As with the investigation of the Hogan Group's cookie stuffing,  
6 secure computers equipped with Internet monitoring and recording equipment were  
7 directed to sites containing the Dunning Group's wholinked and profilemaps applications.  
8 Without any further action being taken by the computers' users, the Dunning Group's  
9 wholinked and profilemaps applications secretly redirected the computers to an eBay  
10 website, and KFC-associated cookies were stuffed onto the computers.

11 54. In addition, on June 6, 2007, eBay asked Gallivan, Gallivan & O'Melia LLC  
12 ("GGO") to undertake a cookie stuffing investigation. On that date, a GGO employee  
13 visited the website [www.jokes-time.com](http://www.jokes-time.com) using a secure computer located in Mountain  
14 View, California that had its IP address masked and had been equipped to monitor and  
15 record Internet activity occurring on the computer. The [jokes-time.com](http://jokes-time.com) website was a  
16 participant in DPS's advertising network and contained a DPS-controlled banner ad.  
17 Without any action by the GGO employee other than visiting that website, the Hogan  
18 Group's code in the DPS-controlled banner ad secretly redirected the GGO computer to  
19 another DPS site and then to eBay's website, causing eBay's site to drop cookies that  
20 were associated with DPS onto the GGO computer. On or about June 14, 2007, an  
21 employee of GGO created a new eBay account using the computer that still contained the  
22 cookies stuffed by the Hogan Group. The GGO employee then purchased an item from  
23 eBay using the newly created account through the "buy it now" function. Using  
24 information provided by GGO, eBay then tracked this new account and purchase, and  
25 determined that DPS was credited both for the "new user" acquisition and for the sale.

26 55. On or about June 6, 2007, GGO also performed a second cookie stuffing  
27 test from its offices located in the Seattle, Washington area, following the same steps  
28 taken in Mountain View. As in the Mountain View test, the Hogan Group's code stuffed

1 DPS-associated cookies onto the GGO computer even though the computer user did not  
2 navigate to eBay's website. An eBay "buy it now" purchase was made by a GGO  
3 employee in the Seattle area the following day using the computer containing the stuffed  
4 cookies. eBay was again able to track a commission from the sale that was credited to  
5 DPS.

6 56. Having confirmed the ongoing cookie stuffing by both the Hogan Group  
7 and the Dunning Group, eBay next set out to determine the extent of that unlawful  
8 activity. On or about June 8-19, 2007, eBay made certain alterations to its website to both  
9 detect further evidence of the cookie stuffing and, if found, to assess the volume of cookie  
10 stuffing by the Hogan Group and the Dunning Group. eBay placed a special "gif" image  
11 on the eBay.com home page. This special gif was served to any browser receiving an  
12 eBay cookie. eBay had observed that Defendants' cookie stuffing schemes caused the  
13 user's browser to be secretly redirected to eBay's home page for only a short period of  
14 time—sufficient time for the cookie to be stuffed and little or no more. A browser that  
15 had been redirected to eBay for purposes of cookie stuffing would not access eBay's site  
16 long enough to be served the special gif, but a legitimate browser redirect to eBay (during  
17 which a user clicks on an ad and comes to the eBay site) would be served that gif. eBay  
18 then examined the data or traffic sent by all of its affiliates, including DPS and KFC.  
19 eBay was able to review this data with a tremendous amount of granularity, capturing  
20 individual cookie stuffs by the Hogan Group and the Dunning Group. The following are  
21 examples of such individual cookie stuffs:

- 22 • On June 8, 2007, at approximately 12:32 p.m. PST, a cookie stuffed with  
23 information for the affiliate using PID 2326993 was dropped from an eBay  
24 California server to IP address 84.13.180.86. The user of this IP address was  
25 located in Surrey, UK. PID 2326993 was an affiliate account number assigned to  
26 KFC. The special gif was not served.
- 27 • On June 8, 2007, at approximately 12:37 p.m. PST, a cookie stuffed with  
28 information for the affiliate using PID 2028993 was dropped from an eBay

1 California server to IP address 83.67.105.219. The user of this IP address was  
2 located in South Yorkshire, UK. PID 2028993 was an affiliate account number  
3 assigned to KFC. The special gif was not served.

- 4 • On June 8, 2007, at approximately 12:52 p.m. PST, a cookie stuffed with  
5 information for the affiliate using PID 2028993 was dropped from an eBay  
6 California server to IP address 172.174.248.28. The user of this IP address was a  
7 customer utilizing the ISP America Online located in Virginia. PID 2028993 was  
8 an affiliate account number assigned to KFC. The special gif was not served.
- 9 • On June 8, 2007, at approximately 12:58 p.m. PST, a cookie stuffed with  
10 information for the affiliate using PID 2225634 was dropped from an eBay  
11 California server to IP address 68.57.17.37. The user of this IP address was located  
12 in Pennsylvania. PID 2225634 was an affiliate account number assigned to DPS.  
13 The special gif was not served.
- 14 • On June 9, 2007, at approximately 12:43 p.m. PST, a cookie stuffed with  
15 information for the affiliate using PID 2326993 was dropped from an eBay  
16 California server to IP address 81.104.118.168. The user of this IP address was  
17 located in Glasgow, Scotland. PID 2326993 was an affiliate account number  
18 assigned to KFC. The special gif was not served.
- 19 • On June 9, 2007, at approximately 12:56 p.m. PST, a cookie stuffed with  
20 information for the affiliate using PID 2225635 was dropped by an eBay California  
21 server on IP address 71.210.107.53. The user of this IP address was located in  
22 Arizona. PID 2225635 was an affiliate account number assigned to DPS. The  
23 special gif was not served.
- 24 • On June 11, 2007, at approximately 12:18 p.m. PST, a cookie stuffed with  
25 information for the affiliate using PID 2225634 was dropped by an eBay California  
26 server on IP address 206.40.234.2 18. The user of this IP address is located in  
27 Utah. PID 2225634 is an affiliate account number assigned to DPS. The special  
28 gif was not served.

1 The cumulative results of the investigation demonstrated that over 99% of the traffic  
2 directed by DPS and KFC during the time period of the investigation did not receive the  
3 gif image, and was therefore fraudulent cookie stuffing traffic. During the short period of  
4 this investigation, the data demonstrated that the Hogan Group had stuffed over 650,000  
5 cookies and the Dunning Group had stuffed close to 20,000 cookies.

6 57. eBay also performed an additional analysis of historical data that uncovered  
7 further evidence of cookie stuffing by the Hogan Group and the Dunning Group over the  
8 period from April 1, 2004 through June 18, 2007. Cookie stuffing is premised on the  
9 notion that if one stuffs a large number of Internet users, some subset of those users will  
10 later come to eBay (by chance and through no action of the cookie stuffer) and take a  
11 Revenue Action. eBay examined its historical data regarding the behavior of eBay users  
12 in an effort to determine whether user behavior provided proof of cookie stuffing. eBay's  
13 analysis showed that, in fact, there were substantial differences in the behavior of  
14 legitimately-referred users and users referred by DPS and KFC, which supported the  
15 conclusion that the Hogan Group and the Dunning Group engaged in cookie stuffing. For  
16 legitimately-referred users, the historical data showed that a high percentage of Revenue  
17 Actions (e.g., establishing a new eBay account or placing a winning bid on an item)  
18 occurred within the first hour of a cookie drop. Such behavior was to be expected,  
19 because the cookie was dropped at the same time that the user visited eBay's site and was  
20 exposed to the content on the site that would drive a Revenue Action. The contrasting  
21 historical data for DPS and KFC demonstrated that both the Hogan Group and the  
22 Dunning Group had been engaged in cookie stuffing. Users allegedly referred by DPS  
23 and/or KFC demonstrated behavior consistent with cookie stuffing and inconsistent with  
24 legitimate referrals: those users did not take the high percentage of their Revenue Actions  
25 during the first hour following the cookie drop and, instead, took Revenue Actions at a  
26 nearly uniform rate over the life of the cookie. This behavior showed that those users had  
27 not been exposed to the content of the eBay site at the same time that the cookie was  
28 dropped; instead, the users had been stuffed and visited eBay at some random time after

1 the stuffing.

2 58. On information and belief, based on eBay's analysis and understanding of  
3 how the Defendants' cookie stuffing schemes worked and on statements made by Todd  
4 Dunning to one of eBay's employees, DPS and KFC retained electronic records of the IP  
5 addresses of the individual computers they stuffed with cookies in order to prevent  
6 stuffing multiple cookies on a single computer.

7 59. The Hogan Group and the Dunning Group fraudulently stuffed cookies onto  
8 the computers of a large group of users without exposing them to the content on eBay's  
9 site and a subset of those users later engaged in Revenue Actions that were unrelated to  
10 any action by DPS or KFC but still produced enormous commissions for them. In other  
11 words, DPS and KFC received commissions based on Revenue Actions by users for  
12 which they were not responsible. But every act of cookie stuffing by the Hogan Group  
13 and the Dunning Group, regardless of whether it resulted in the payment of a commission,  
14 constituted a separate violation of 18 U.S.C. § 1343, because it constituted a use of  
15 interstate wire communications in furtherance of the Defendants' schemes to defraud  
16 eBay.

17 60. In addition to their cookie stuffing schemes, which occurred over several  
18 years and involved hundreds of thousands or even millions of acts that each constituted a  
19 separate violation of 18 U.S.C. § 1343, the Hogan Group and the Dunning Group also  
20 engaged in efforts to conceal and avoid detection of their schemes through fraudulent  
21 communications involving the interstate mails and wires. Examples of such  
22 communications include the following:

- 23 • On or about September 5, 2005, after being contacted by (then) CJ employee  
24 Christine Kim regarding suspicions of possible cookie stuffing by DPS,  
25 Defendant Shawn Hogan falsely told Ms. Kim in a telephone conversation that the  
26 apparent cooking stuffing arose from a "coding error" that had since been fixed.
- 27 • On or about February 15, 2006, Todd Dunning telephoned eBay employee Dan  
28 Burkhart and reported that DPS and Hogan were cookie stuffing, which was true.



1 During the same telephone conversation, Mr. Dunning told Mr. Burkhart that his  
2 brother Brian Dunning was an honest affiliate. That statement was false. Mr.  
3 Dunning later told eBay employees that he had lied when he said that DPS and  
4 Mr. Hogan were cookie stuffing. That statement was also false.

- 5 • On or about August 9, 2006, Brian Dunning falsely told eBay employee Christine  
6 Kim in an email that he would explain KFC's "innovative" business model "in  
7 detail." Mr. Dunning subsequently provided Ms. Kim with descriptions of KFC's  
8 business model that failed to accurately describe KFC's methods, and created the  
9 false impression that KFC was actually driving users to eBay's site, instead of  
10 engaging in a fraudulent cookie stuffing scheme.
- 11 • On or about August 29, 2006, Brian Dunning falsely stated in an email to CJ  
12 employee Andrea Bardakos and eBay employee Christine Kim that the success of  
13 KFC's methods was based on "staggering amounts of up-front adoption."
- 14 • On or about August 31, 2006, Brian Dunning emailed CJ employees Andrea  
15 Bardakos and Jeff Ransdell, and eBay employee Christine Kim, thanking them for  
16 maintaining confidentiality regarding the "inner workings" of his business model  
17 and stating that "a conversation was 'due' at some point, especially given the high  
18 simplicity-to-effectiveness ratio of what we're doing." In fact, KFC's  
19 "effectiveness" in receiving commissions was due to its fraudulent cookie stuffing  
20 scheme.
- 21 • On or about September 1, 2006, eBay employee Christine Kim and Shawn Hogan  
22 conducted an instant message exchange during which Ms. Kim asked Mr. Hogan  
23 to provide specifics regarding the DPS ad network, and Mr. Hogan made various  
24 statements to actively conceal the existence of his cookie stuffing, including  
25 claims that his system "works like evolution in nature" and refusing to provide his  
26 code or analytics because "while it's really (REALLY) neat and would like to  
27 show everyone just to show off ... it's really not a good idea if I give it away."
- 28 • On or about September 7, 2006, Brian Dunning falsely stated in an email to eBay



1 employee Christine Kim that he was “absolutely confident” that KFC’s methods  
2 were “in line with the intended spirit of the terms” of the AMP.

- 3 • In early November 2006, eBay employee Christine Kim questioned Shawn Hogan  
4 after an eBay employee based in Amsterdam had written to her about DPS’s  
5 results in the Netherlands, noting that “[n]ormally we only see these low  
6 conversion rates when cookiedropping is involved.” On or about November 6,  
7 2006, Mr. Hogan falsely told Ms. Kim in a conversation via telephone or instant  
8 message that low conversion rates in the Netherlands were caused by Mr. Hogan’s  
9 failure to “deep link” his ads there after a bug fix had been made.
- 10 • On or about January 22, 2007, Brian Dunning responded by email to eBay  
11 employee Christine Kim’s query as to why KFC’s “winning bids and clicks” were  
12 below the norm by falsely stating, “I wonder if the demographic of MySpace  
13 users has much to do with it. They’re generally quite young, maybe they’re too  
14 poor to win auctions.” This statement was false and was intended to conceal his  
15 cookie stuffing because Mr. Dunning knew that the unusual statistics noted by  
16 Ms. Kim were the result of his cookie stuffing.
- 17 • On or about February 7, 2007, Brian Dunning falsely stated in an email to eBay  
18 employee Christine Kim that “in the past 3 days we’ve received click-throughs on  
19 ads from 97,743 profiles. That only counts profiles where someone clicked the  
20 ad, no telling how many other profiles people have added it to.” In fact, as Mr.  
21 Dunning knew at the time, his click-throughs were the result of cookie stuffing  
22 and not from users clicking on ads.

23 61. Each violation of 18 U.S.C. § 1343 constitutes a separate instance of  
24 “racketeering activity” as defined in 18 U.S.C. § 1961(1) and was committed in  
25 furtherance of the conspiracy to defraud eBay of commission fees not legitimately earned  
26 by either DPS or KFC. Together, these violations constitute a pattern of racketeering  
27 activity: the violations have the same or similar purposes, results, participants, victims  
28 and/or methods of commission.



1           68.     DPS and KFC also made a number of false statements regarding their  
2 business methods, described above, in an effort to conceal their fraudulent cookie stuffing  
3 schemes from detection by eBay or CJ.

4           69.     The representations made and/or caused to be made by each of DPS, KFC  
5 and DOES 1-10 and 12-20 were in fact false. The true facts were that a substantial  
6 portion of the users ostensibly referred by each of DPS, KFC and DOES 1-10 and 12-20  
7 to the eBay site had not been referred by those Defendants, that those users had never  
8 knowingly or intentionally visited the eBay site based on any advertisement or referral  
9 from any of those Defendants, and that the information contained in cookies in those  
10 users' web browsers was actually the product of the false and misleading cookie stuffing  
11 schemes employed by each of DPS, KFC and DOES 1-10 and 12-20.

12           70.     When DPS, KFC and DOES 1-10 and 12-20 made these representations (or  
13 caused them to be made), they knew them to be false and made these representations (or  
14 caused them to be made) with the intention to deceive and defraud eBay and induce eBay  
15 to act in reliance on these representations.

16           71.     eBay, at the time these representations were made (or caused to be made) by  
17 DPS, KFC and DOES 1-10 and 12-20, was ignorant of the falsity of the representations  
18 and believed them to be true. In reliance on these representations, eBay was induced to,  
19 and did, make commission payments to each of DPS and KFC (via CJ) in consideration  
20 for referrals that eBay believed to be legitimate and bona fide. Had eBay known the true  
21 facts, it would not have made such commission payments. eBay's reliance on the  
22 representations of DPS, KFC and DOES 1-10 and 12-20 was justified.

23           72.     As a proximate result of the fraudulent conduct of each of DPS, KFC and  
24 DOES 1-10 and 12-20, eBay paid commissions and fees to DPS and KFC (via CJ) for  
25 referrals that had never occurred, for which eBay received no value, and for which eBay  
26 owed nothing to DPS or KFC.

27           73.     As a proximate result thereof, eBay has been damaged in an amount to be  
28 proven at trial.

1 74. Defendants' actions were undertaken with fraud, malice or oppression, or  
2 with a conscious disregard of the rights of eBay and, therefore, eBay is entitled to an  
3 award of exemplary and punitive damages against each of DPS, KFC and DOES 1-10 and  
4 12-20, in an amount according to proof at trial.

5 75. WHEREFORE, eBay prays for judgment against each of DPS, KFC and  
6 DOES 1-10 and 12-20, as more fully set forth below.

7 **FOURTH CAUSE OF ACTION**

8 **(Violations of California Penal Code § 502)**

9 76. eBay realleges each and every allegation set forth in Paragraphs 1 through  
10 75, inclusive, and incorporates them by reference herein.

11 77. Each of DPS and KFC have knowingly and without permission: altered,  
12 damaged, deleted, destroyed, or otherwise used eBay's computer, computer system, or  
13 computer network in order to devise and execute a cookie stuffing scheme or artifice in  
14 order to defraud and deceive; and/or altered, damaged, deleted, destroyed, or otherwise  
15 used eBay's computer, computer system, or computer network in order to wrongfully  
16 control or obtain money and property; and/or accessed or caused to be accessed eBay's  
17 computer, computer system, or computer network.

18 78. DPS's and KFC's unauthorized access and use of eBay's computers has  
19 damaged and caused loss to eBay.

20 79. DPS's and KFC's actions constitute violations of California Penal Code §  
21 502(c), whether or not any commissions were credited or paid as a result of those actions.

22 80. DPS's and KFC's actions were undertaken with fraud, malice or oppression,  
23 or with a conscious disregard of the rights of eBay and, therefore, eBay is entitled to an  
24 award of exemplary and punitive damages against each of DPS and KFC, in an amount  
25 according to proof at trial.

26 81. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as  
27 more fully set forth below.

28

1 **FIFTH CAUSE OF ACTION**

2 **(Restitution and Unjust Enrichment)**

3 82. eBay realleges each and every allegation set forth in Paragraphs 1 through  
4 81, inclusive, and incorporates them by reference herein.

5 83. Through their cookie stuffing schemes, as described above, each of DPS and  
6 KFC received a benefit from eBay, in the form of artificially and fraudulently inflated  
7 commissions paid to DPS and KFC (via CJ) for Revenue Actions that were not associated  
8 with any referral from those Defendants.

9 84. In light of DPS's and KFC's conduct, it would be unjust for DPS and KFC  
10 to retain the benefits they obtained from eBay.

11 85. DPS and KFC have been unjustly enriched by eBay's payments and should  
12 be required in equity to make restitution of these payments to eBay.

13 86. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as  
14 more fully set forth below.

15 **SIXTH CAUSE OF ACTION**

16 **(California Business and Professions Code § 17200)**

17 87. eBay realleges each and every allegation set forth in Paragraphs 1 through  
18 86, inclusive, and incorporates them by reference herein.

19 88. Through their cookie stuffing schemes, as described above, each of DPS and  
20 KFC engaged in unlawful, unfair and/or fraudulent business practices. Such conduct by  
21 each of DPS and KFC violates California Business and Professions Code § 17200 et. seq.

22 89. As discussed herein, DPS's and KFC's business practices of engaging in  
23 cookie stuffing were unlawful under state and federal laws, including but not limited to  
24 the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the civil RICO statute, 18 U.S.C. §  
25 1962(c), California Penal Code § 502, and constituted common law fraud.

26 90. DPS's and KFC's conduct was also fraudulent and deceptive, and was  
27 unfair to eBay, in that it offended established public policy, and/or was immoral,  
28 unethical, oppressive, unscrupulous and substantially injurious to eBay.

1 91. As a direct result of DPS's and KFC's conduct, eBay has suffered an injury  
2 in fact and has lost money and/or property that has been wrongfully retained by each of  
3 DPS and KFC.

4 92. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as  
5 more fully set forth below.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, based upon the foregoing, eBay prays for judgment against  
8 Defendants, and each of them, for:

- 9 i. Judgment in favor of eBay and against all Defendants on all causes of  
10 action;
- 11 ii. An award of compensatory damages according to proof at trial;
- 12 iii. An award of punitive damages according to proof at trial;
- 13 iv. An award of treble damages against Defendants Shawn Hogan, Brian  
14 Dunning and Todd Dunning, pursuant to 18 U.S.C. § 1964 according to proof at trial;
- 15 v. An award requiring Defendants to disgorge all ill-gotten gains and to return  
16 the eBay funds by which Defendants have been unjustly enriched;
- 17 vi. An award of restitution, according to proof at trial;
- 18 vii. An injunction prohibiting Defendants from (a) disseminating, sharing or  
19 otherwise making available any cookie stuffing technology to others; (b) possessing,  
20 disseminating, sharing, or otherwise making available any technology intended or capable  
21 of being used to defraud eBay; and (c) having any further involvement with any person or  
22 entity participating in the eBay Affiliate Marketing Program;
- 23 viii. An award of pre-judgment and post-judgment interest;
- 24 ix. An award of attorney's fees and costs of suit incurred herein; and
- 25 x. Such other further relief as the Court may deem just and proper.
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Dated: March 26, 2009

O'MELVENY & MYERS LLP

By: /s/ David R. Eberhart  
David R. Eberhart  
Sharon M. Bunzel  
Colleen M. Kennedy  
Attorneys for Plaintiff eBay INC.

**DEMAND FOR JURY TRIAL**

eBay hereby demands a trial by jury of all claims in this action.

Dated: March 26, 2009

O'MELVENY & MYERS LLP

By: /s/ David R. Eberhart  
David R. Eberhart  
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# EXHIBIT 2



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7 Attorneys for Plaintiff eBay Inc.

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

11 EBAY INC.,

12 Plaintiff,

13 v.

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

19 Defendants.

Case No. C 08-4052 JF

**JOINT CASE MANAGEMENT  
STATEMENT AND [PROPOSED]  
ORDER**

Conference Date: September 25, 2009  
Time: 10:30 a.m.  
Judge: Hon. Jeremy Fogel

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1 The parties to the above-entitled action jointly submit this Case Management  
2 Statement and Proposed Order and request that the Court adopt it as its Case Management  
3 Order in this case. The parties, through counsel, have met and conferred on the matters  
4 contained herein.

5 **I. JURISDICTION AND SERVICE**

6 eBay's Statement:

7 eBay Inc.'s Second Amended Complaint ("SAC") alleges that Defendants, by  
8 conducting fraudulent "cookie stuffing" schemes as described in more detail below, have  
9 violated both federal and California law, including the federal Computer Fraud and Abuse  
10 Act (the "CFAA"), 18 U.S.C. § 1030, and the federal civil RICO statute, 18 U.S.C. §  
11 1962(c). The Court therefore has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.  
12 Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)(1), 1391(b)(2) and  
13 1391(c), and 18 U.S.C § 1965(a). Defendants have previously filed motions to dismiss  
14 the SAC and/or transfer this action to the Central District of California or to Los Angeles  
15 County Superior Court based on their argument that the forum selection clause in the  
16 Publisher Services Agreement between Defendants and Commission Junction, Inc.  
17 ("CJI") governs this action. Those motions were denied by the Court on August 17, 2009.

18 The named Defendants have been served with the SAC.

19 DPS Defendants' Statement:

20 Pursuant to the forum selection clause set forth in the Commission Junction  
21 Publisher Services Agreement (PSA), of which Plaintiff is a third party beneficiary and  
22 which Plaintiff incorporated by reference into the eBay Supplemental Terms &  
23 Conditions, proper jurisdiction and venue for this action lies in the United States District  
24 Court for the Central District or Los Angeles County Superior Court. The DPS  
25 Defendants contend that the foregoing applies equally with respect to Plaintiff's First  
26 Cause of Action for alleged violations of the Computer Fraud and Abuse Act, 18 U.S.C.  
27 §1030, as the damages Plaintiff seeks to recover thereunder are based on the alleged  
28 improper payment of commissions to defendants under Plaintiff's affiliate marketing

1 program (AMP). As with the other causes of action set forth in the SAC, such harms  
2 specifically track the terms of the aforementioned AMP agreements. The DPS  
3 Defendants therefore contend that the PSA's forum selection clause is applicable to all  
4 claims set forth in the SAC.

5 The DPS defendants were served with Plaintiff's Second Amended Complaint  
6 (SAC) on March 26, 2009, and filed and served Answers thereto on August 31, 2009 upon  
7 the Court's denial of the DPS Defendants' motion to dismiss the same.

8 Todd Dunning, Dunning Enterprise, Inc., Brian Dunning, briandunning.com,  
9 Thunderwood Holdings, Inc. and Kessler's Flying Circus Defendants ("Non-DPS  
10 Defendants") Statement:

11 The Non-DPS Defendants incorporate the substance of the DPS Defendants'  
12 statement on jurisdiction and venue issues. This action should be transferred to the  
13 Central District where these defendants reside and did business with eBay's agent,  
14 Commission Junction, Inc. under eBay's Affiliate Marketing Program. The Non-DPS  
15 Defendants have been served with the SAC and have filed their answers.

## 16 **II. FACTS**

### 17 eBay's Statement:

18 eBay's SAC alleges that Defendants engaged in sophisticated fraudulent schemes  
19 that were designed to and did defraud and cause harm to eBay over the course of at least  
20 four years. eBay's Affiliate Marketing Program is designed to increase traffic to eBay's  
21 site through the placement of advertisements for eBay on third-party websites. In this  
22 program, compensation is provided by eBay to the persons and entities, known as  
23 "affiliates," that advertise on behalf of eBay when the advertisement in question results in  
24 a revenue generating action on eBay's site. eBay uses cookies to identify the site that  
25 referred the user to eBay and which affiliate, if any, should be credited with the referral  
26 and receive the commission.

27 Defendants' engaged in "cookie stuffing" schemes intended to defraud eBay.  
28 "Cookie stuffing" is a term used to describe the forced placement of a cookie on a

1 computer, typically by causing a cookie from a particular website to be placed on the  
2 user's computer without the user knowing that he or she visited the website that placed the  
3 cookie. Defendants accomplished this scheme through software programs and/or code  
4 that, unbeknownst to the user, redirected the user's computer to the eBay website without  
5 the user actually clicking on an eBay advertisement link, or even becoming aware that  
6 they had left the page they were previously viewing. As a result, the eBay site would be  
7 prompted to drop an eBay cookie on the user's computer. Defendants' scheme caused  
8 millions of users' computers to access eBay's computers in an unauthorized way and/or to  
9 exceed the authorized access to eBay's computers provided by eBay's User Agreement.  
10 The majority of those acts of unauthorized access did not cause the improper payment of a  
11 commission to defendants. A minority, but economically significant, proportion of those  
12 acts of unauthorized access caused eBay to pay unearned commissions to Defendants.<sup>1</sup>

13 Defendants' schemes have been ongoing since at least December 2003, and ended  
14 only when the FBI seized Defendants' computer equipment in June 2007 as part of an  
15 investigation into whether the fraudulent activities alleged by eBay in this case constitute  
16 federal crimes. Defendants' schemes have allowed them to receive payment from eBay  
17 for a substantial number of commissions to which they were not entitled. Moreover,  
18 Defendants used technological measures and engaged in activity specifically designed to  
19 frustrate attempts by eBay to discover Defendants' wrongdoing.

20 DPS Defendants' Statement:

21 Defendant Digital Point Solutions, Inc. is a California corporation. Per California  
22 Corporations Code section 200(c), it was not formed (and did not otherwise exist) until  
23 May 14, 2007, the date of its incorporation. Digital Point Solutions, Inc. never conducted  
24 business with Plaintiff and was never involved in Plaintiff's affiliate marketing program.  
25 It therefore denies the substantive allegations of the SAC and any allegation of  
26 wrongdoing in this case.

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27 <sup>1</sup> Despite Defendants' claims to the contrary, CJI is not an indispensable party within the meaning of Fed. R. Civ. P.  
28 19 because the Court may accord complete relief without CJI and CJI has not claimed an interest relating to the  
subject of this action.

1 Defendant Shawn Hogan is an individual residing in San Diego, California. Mr.  
2 Hogan has conducted and continues to conduct business as a sole proprietorship. In June  
3 of 2007, the Federal Bureau of Investigation seized a number of materials from Mr.  
4 Hogan. Although Mr. Hogan denies that Plaintiff is entitled to any relief under the SAC,  
5 given the pending criminal investigation, Mr. Hogan has asserted his privilege against  
6 self-incrimination under the Fifth Amendment to the United States Constitution; the  
7 Federal Rules of Evidence, Rule 501; the California Constitution, Article 1, Section 15;  
8 and California Evidence Code section 940. The DPS Defendants intend to seek a stay of  
9 this action pending the conclusion of the aforementioned criminal investigation.

10 Although Plaintiff has repeatedly grouped all defendants together, Defendants  
11 Digital Point Solutions, Inc. and Shawn Hogan are distinct from the “KFC” or “Dunning”  
12 defendants in this action. Any alleged acts of those defendants, including any acts that  
13 may have taken place with respect to the Commission Junction lawsuit, are not  
14 attributable to the DPS Defendants.

15 Non-DPS Defendants’ Statement:

16 The Non-DPS Defendants deny the truthfulness and accuracy of Plaintiff’s entire  
17 narrative of the alleged facts of this case. The true facts are until December 26, 2006,  
18 Todd Dunning was a general partner in defendant Kessler’s Flying Circus (“KFC”), and  
19 after that date Dunning Enterprise, Inc. was a general partner in place of Todd Dunning.  
20 Thunderwood Holdings, Inc. is also a general partner of KFC. KFC contracted with  
21 eBay’s agent, Commission Junction, Inc. (“CJI”), to perform promotional advertising  
22 services for eBay. KFC entered into a Publisher Service Agreement (“PSA”) with CJI in  
23 April 2005, and eBay’s Special Terms and Conditions were incorporated into that  
24 agreement. eBay approved KFC to perform these services through CJI. At all times, CJI  
25 and eBay had an agreement which obligated CJI to keep eBay fully aware of the activities  
26 of participants in the affiliate marketing program, to monitor, track and report on all  
27 promotional methods used by KFC to generate new customers for eBay. If eBay was not  
28 aware of KFC’s conduct under the affiliate marketing program, it was because

1 Commission Junction, Inc. breached of its obligations to eBay. The Non-DPS Defendants  
2 relied on the approvals and authorizations by eBay representatives and Commission  
3 Junction, Inc. for their conduct under the affiliate marketing program. For these reasons,  
4 Commission Junction, Inc. is an indispensable party to this action. As recently as March  
5 22, 2007, eBay stated to CJI that it was fully aware of KFC's "bizmodel", that KFC was  
6 one of eBay's "top affiliates", and that its promotional efforts were "compliant" with the  
7 Affiliate Marketing Program. KFC received payment for its promotional activities from  
8 CJI, not from eBay. All payments received from CJI were for actual new customers who  
9 registered at eBay and engaged on eBay's website in qualified revenue transactions within  
10 a specified period of time based on KFC's promotional activity for eBay . CJI monitored  
11 all this activity and reported it to eBay as required by agreements between them.  
12 Therefore there was no "artificial inflation" of commissions.

13 The Non-DPS Defendants have never had a business relationship to defendants  
14 Shawn Hogan and Digital Point Solutions, Inc. (collectively "DPS"). DEI, Thunderwood  
15 and KFC never agreed to eBay's User Agreement. Therefore, Non-DPS Defendants  
16 object to eBay's repeated and unsupported reference to all defendants in a collective  
17 manner. KFC was an entirely separate and independent business from DPS, and  
18 accordingly, eBay must allege and prove its allegations separately against the Non-DPS  
19 Defendants and/or KFC. eBay is simply confusing the Court and these pleadings by its  
20 repeated and unsupported collective allegations and references to all defendants as one  
21 group or entity.

### 22 **III. LEGAL ISSUES**

#### 23 eBay's Statement:

24 There have been no changes since the previous Joint Case Management Statement.

#### 25 DPS Defendants' Statement:

26 In addition to the issues previously identified, the DPS Defendants state that the  
27 following legal issues are relevant to this case:  
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1. Whether Plaintiff knew of, consented to, and actively encouraged the conduct at issue because it resulted in a direct benefit to Plaintiff.
2. Whether Plaintiff’s action is barred by the one-year contractual limitations period set forth in the PSA, which must be read as “a part” of the eBay Supplemental Terms & Conditions under the doctrine of incorporation by reference.
3. Whether Plaintiff’s action is barred by the applicable statutes of limitation including those set forth in 18 U.S.C. §1030(g), 15 U.S.C. §15b (as applied to 18 U.S.C. §1962, 1964), California Penal Code §502(e)(5), California Code of Civil Procedure §§338, 339, and California Business & Professions Code §17208.
4. Whether the action should be stayed pending the conclusion of the ongoing criminal investigation of the United States Attorney’s Office.

Non-DPS Defendants’ Statement:

In addition to the issues identified by the DPS Defendants above, the Non-DPS Defendants incorporate their Affirmative Defenses alleged in their answers to the Second Amended Complaint and add the following legal issues.

- 1 1. Whether Plaintiff is barred from any and all recovery because it  
2 authorized, ratified and approved of KFC's conduct, and/or by the  
3 general release provided to the Non-DPS Defendants by Plaintiff's  
4 agent, Commission Junction, Inc.?
- 5 2. Whether Plaintiff is barred from any and all recovery because of the  
6 authorization, ratification and approval of KFC's promotional  
7 activities for eBay by Plaintiff's agent, Commission Junction, Inc.?
- 8 3. Whether there is an absence of a necessary party to this action,  
9 namely Commission Junction, Inc., such that the Court cannot grant  
10 relief to the Plaintiff?
- 11 4. Whether Plaintiff is barred from any recovery because eBay would  
12 be unjustly enriched by any award in this case since KFC in fact  
13 generated new customers and/or revenues for eBay as requested and  
14 authorized by eBay's and CJI's programs?
- 15 5. Whether Plaintiff is barred from any recovery by equitable doctrines  
16 because of the damage it has caused to the Non-DPS Defendants by  
17 making untrue and unfounded allegations to the FBI to create a  
18 federal investigation for the purpose of obtaining a litigation  
19 advantage in this case?
- 20 6. Whether Plaintiff received the benefit of promotional services by  
21 KFC for which commissions are due and owing?
- 22 7. Whether Plaintiff can prove damages with a reasonable certainty by  
23 distinguishing between commissions that were properly earned and  
24 those that it claims were not properly earned under the Affiliate  
25 Marketing Program as a result of alleged "cookie stuffing"?
- 26 8. Whether Plaintiff can prove any damages or losses as defined and  
27 required by 18 U.S.C. § 1030 *et.seq.* and/or California Penal Code §  
28 502?

#### 20 **IV. PENDING AND ANTICIPATED MOTIONS**

##### 21 eBay's Statement:

22 There are no motions currently before the Court. eBay anticipates the need to file a  
23 motion to compel responses to eBay's Requests for Admission, First Set of Interrogatories  
24 and First Set of Requests for Production from Defendants Shawn Hogan, Digital Point  
25 Solutions, Inc. ("DPS"), Brian Dunning, Thunderwood Holdings, Inc.,  
26 BrianDunning.com, Kessler's Flying Circus, Todd Dunning and Dunning Enterprise, Inc.  
27 based on the inapplicability of the Fifth Amendment privilege against self-incrimination.  
28 eBay contends that it has satisfied its meet and confer obligations under Civil L.R. 37-



1 1(a). Some Defendants have asked for additional meet and confer discussions; although  
2 eBay will engage in those discussions in good faith, Defendants' longstanding refusal to  
3 provide complete discovery—as well as their stated intention to file a motion to stay all  
4 discovery—leads eBay to the conclusion that motions to compel are unavoidable.

5 eBay also anticipates the need to file a motion to compel responses from all  
6 Defendants to the requests in eBay's First Set of Requests for Production that seek  
7 information regarding Defendants' financial condition, including requests for Defendants'  
8 financial statements and tax returns.

9 It may also prove necessary to file motions to compel against third parties NetHere,  
10 Inc. ("NetHere") and Rackspace US, Inc. ("Rackspace") for production of documents  
11 pursuant to the subpoenas issued by eBay, discussed in more detail below.

12 In addition, eBay anticipates the need to file a motion to strike the Answer to  
13 eBay's SAC filed jointly by Defendants Brian Dunning, Kessler's Flying Circus,  
14 Thunderwood Holdings, Inc. and BrianDunning.com, based on the improper assertion of  
15 the Fifth Amendment privilege by corporate entities.

16 eBay anticipates filing a motion for summary judgment or summary adjudication  
17 following the close of discovery. eBay further anticipates filing motions in limine before  
18 trial.

19 DPS Defendant's Statement:

20 Defendants Digital Point Solutions, Inc. and Shawn Hogan anticipate filing a  
21 motion to stay the action pending the conclusion of the criminal investigation. The parties  
22 previously agreed to continue the initial Case Management Conference because of the  
23 ongoing nature of the investigation. The DPS Defendants further anticipate filing a  
24 motion for summary judgment and/or adjudication as well as a motion to transfer and/or  
25 dismiss on the grounds of forum non conveniens. In addition, Mr. Hogan will seek leave  
26 to amend his Answer to substantively respond to the allegations of the SAC upon the  
27 conclusion of the criminal investigation and, to the extent necessary thereafter, will move  
28 to exclude any reference to the assertion of the Fifth Amendment at trial or otherwise.

1 Finally, to the extent the action is not dismissed or transferred, the DPS Defendants  
2 anticipate requesting bifurcation and/or separate trials as to each respective defendant  
3 group.

4 Non-DPS Defendants' Statement:

5 The Non-DPS Defendants incorporate the substance of the DPS Defendants'  
6 statement above regarding their similar anticipated motions.

7 **V. AMENDMENT OF PLEADINGS**

8 eBay's Statement:

9 eBay filed its SAC on March 26, 2009, and does not anticipate the need for any  
10 further amendments. Defendants' motions to dismiss the SAC and/or transfer were  
11 denied on August 17, 2009. On August 31, 2009, DPS and Shawn Hogan answered the  
12 SAC. On September 9, 2009, the remaining Defendants answered the SAC. If discovery  
13 shows that Defendants used additional entities to effectuate their schemes, and if the  
14 currently named Defendants did not succeed to the assets and liabilities of those entities,  
15 eBay may seek leave to amend its complaint to conform to the evidence and to substitute  
16 those entities for current Doe defendants.

17 DPS Defendant's Statement:

18 Given the pending criminal investigation, Mr. Hogan has asserted his Fifth  
19 Amendment privilege in answering the SAC. As noted above, Mr. Hogan intends to seek  
20 leave to amend his Answer upon the conclusion of the investigation.

21 Non-DPS Defendants Statement:

22 Given the pending criminal investigation, Todd Dunning, Brian Dunning,  
23 Briandunning.com, Thunderwood Holdings, Inc. and KFC herein asserted the Fifth  
24 Amendment privilege in answering the SAC. As noted above, the Non-DPS Defendants  
25 intend to seek leave to amend his Answer upon the conclusion of the investigation.

26 **VI. EVIDENCE PRESERVATION**

27 There have been no changes since the previous Joint Case Management Statement.  
28

1 **VII. DISCLOSURES**

2 The parties exchanged their initial disclosures on January 8, 2009. Defendants  
3 DPS, Inc. and Shawn Hogan served supplemental initial disclosures on February 4, 2009.  
4 eBay served amended initial disclosures on April 2, 2009.

5 **VIII. DISCOVERY PLAN**

6 eBay's Statement:

7 Discovery is open in this action, and eBay is proceeding with full fact discovery.  
8 eBay served its First Set of Requests for Production, First Set of Interrogatories, and First  
9 Set of Requests for Admission to all Defendants on January 22, 2009. In response, Brian  
10 Dunning, Todd Dunning, and Shawn Hogan invoked their privileges against self-  
11 incrimination under the Fifth Amendment. The remaining Defendants (all entities) also  
12 purported to invoke the individuals' Fifth Amendment privilege, claiming that any  
13 provision of responses by the entities would compromise the individuals' rights against  
14 self-incrimination. However, Defendants Dunning Enterprise, Inc., BrianDunning.com,  
15 Thunderwood Holdings, Inc. and Kessler's Flying Circus did provide substantive  
16 responses to eBay's First Set of Requests for Production.

17 eBay served its Second Set of Requests for Production to all Defendants on May 4,  
18 2009. All Defendants responded substantively to these requests and did not invoke any  
19 purported Fifth Amendment privileges against self-incrimination. Defendants Brian  
20 Dunning, BrianDunning.com, Thunderwood Holdings, Inc. and Kessler's Flying Circus  
21 have not yet produced any documents in response to these Requests despite a commitment  
22 to do so at a time and place mutually convenient to the parties.

23 Additionally, eBay served third-party subpoenas for documents on Commission  
24 Junction, Inc. and their counsel Ernster Law Offices on May 4, 2009. eBay also served  
25 third-party subpoenas for documents on NetHere on June 3, 2009 and on Rackspace on  
26 June 4, 2009—both of which are entities that have provided server hosting and co-location  
27 services to Defendants. eBay served amended subpoenas on NetHere and Rackspace on  
28 June 9, 2009. Rackspace has stated its intention to produce some limited responsive

1 documents related to BrianDunning.com that have first been provided to his counsel for  
2 review at his counsel's request. NetHere has indicated that it does not have control of the  
3 responsive documents and that those documents are in the exclusive control of DPS.

4 Defendants have served no discovery requests to eBay, including any requests for  
5 production of the documents that the non-DPS Defendants now mistakenly contend eBay  
6 was required to provide with its initial disclosures. Rule 26 does not require a production  
7 of documents as part of the initial disclosures, as subsection 26(a)(1)(A)(ii) makes clear.  
8 The documents themselves are available to Defendants through the normal discovery  
9 process at any time that Defendants see fit to propound discovery requests on eBay.

10 The parties have previously agreed that phasing of discovery is not appropriate.

11 Pursuant to the attached schedule, eBay proposes that fact discovery close on April  
12 30, 2010 and expert discovery close on July 30, 2010.

13 Certain materials relevant to fact discovery in this action were seized by the FBI  
14 from Defendants in June 2007 and, to eBay's understanding, only some materials have  
15 been returned to Defendants. Defendants have indicated that they do not possess copies  
16 of the materials still in the FBI's possession. However, the responses to, and meet and  
17 confer process resulting from, eBay's subpoenas to NetHere and Rackspace lead eBay to  
18 conclude that many of the same materials are available to Defendants from NetHere and  
19 Rackspace. Accordingly, eBay will seek their production pursuant to the amended  
20 subpoenas served on those entities and through the motions to compel production directly  
21 from Defendants described above.

22 The Defendants have previously proposed that the limitations imposed by the  
23 discovery rules be modified as follows: 10 depositions increased to 25, and 25  
24 interrogatories increased to 50. Although eBay believes that no modifications are  
25 necessary, eBay is amenable to increasing the interrogatories to 50. The increase in  
26 depositions proposed by the Defendants, however, is not necessary or appropriate in this  
27 case; eBay will agree to an increase in depositions from 10 to 15.

28 The parties filed a stipulated protective order, which was signed by this Court on

1 June 26, 2009.

2 DPS Defendants' Statement:

3 Given the pending criminal investigation discussed above, Defendant Shawn  
4 Hogan has asserted his Fifth Amendment privilege in response to Plaintiff's discovery  
5 requests. With respect to Plaintiff's requests for production, Plaintiff contends that the  
6 assertion of the Fifth Amendment is not appropriate based on the FBI's prior seizure of  
7 materials. The DPS Defendants have provided Plaintiff with authority regarding the  
8 testimonial aspects of producing documents and contend that the seizure does not render  
9 the Fifth Amendment obsolete. Plaintiff has not yet provided responsive authority but the  
10 DPS Defendants will continue to meet and confer in good faith regarding the same. With  
11 respect to the seizure, it appears that all computer-related materials have been returned by  
12 the FBI. However, the scope of the seizure is not entirely clear and it appears that some  
13 physical documents are still in the possession of the FBI and/or U.S. Attorney's Office.

14 Because Digital Point Solutions, Inc. never conducted business with Plaintiff and  
15 was never involved in Plaintiff's affiliate marketing program, it does not have any  
16 documents or information relevant to the SAC. The Fifth Amendment has been properly  
17 asserted because the breadth of the definitions of "DPS" set forth in plaintiff's discovery  
18 requests are such that the requests arguably seek information from Mr. Hogan  
19 individually. In that regard, Plaintiff has been provided with authority indicating that a  
20 sole proprietorship may assert the Fifth Amendment privilege and is not subject to the so-  
21 called "collective entity" rule.

22 Given the foregoing, and because it appears that the FBI has yet to return any  
23 seized materials to the non-DPS Defendants, a stay of the action is warranted and  
24 appropriate and it appears that all defendants intend to move for such a stay. The DPS  
25 Defendants' position is that discovery dates should not be set until after the motion for  
26 stay has been adjudicated.

27 To the extent dates are set at the Case Management Conference, fact and expert  
28 discovery should not close until November 2010 and March 2011, respectively (these

1 dates may need to be further extended depending on when the criminal investigation is  
2 resolved). In light of the expansive timeframe of the alleged wrongdoing and the number  
3 of potential percipient and party witnesses associated with Commission Junction, Plaintiff,  
4 and Plaintiff's subsidiaries, 25 to 30 depositions are warranted in this case.

5 Non-DPS Defendants' Statement:

6 Given the pending criminal investigation discussed above, Defendant Todd  
7 Dunning, Brian Dunning, briandunning.com, Thunderwood Holdings, Inc. and Kessler's  
8 Flying Circus asserted the Fifth Amendment privilege in response to Plaintiff's discovery  
9 requests. With respect to Plaintiff's requests for production, Todd Dunning and DEI have  
10 produced the relevant, non-privileged documents in their possession, custody and control.  
11 With respect to the documents seized by the FBI, Todd Dunning and DEI are not aware of  
12 whether the FBI has returned any documents seized from Defendant Brian Dunning or  
13 whether any documents remain in the possession of the FBI and/or U.S. Attorney's  
14 Office.

15 Based on the new allegations in the SAC regarding eBay's investigations and the  
16 terms of the Master Advertiser Service Agreement ("MASA") between eBay and  
17 Commission Junction, Inc., it appears that eBay has not fulfilled its initial disclosure  
18 obligations to provide all known relevant documents to defendants. At a minimum, the  
19 reports alleged in the SAC have not been provided, and the reports prepared by  
20 Commission Junction, Inc. as required by the MASA have not been provided. There are  
21 also documents that were produced by Commission Junction, Inc. in the now-settled State  
22 Court action that indicate eBay has extensive email communications and possibly other  
23 documents that have not been provided as initial disclosures. eBay should be required to  
24 update and complete its initial disclosure requirements.

25 Given these facts, a stay of the action is warranted and appropriate and it appears  
26 that all defendants intend to move for such a stay. The Non-DPS Defendants' position is  
27 that discovery dates should not be set until after the motion for stay has been adjudicated.

28 To the extent dates are set at the Case Management Conference, fact and expert

1 discovery should not close until November 2010 and March 2011, respectively (these  
2 dates may need to be further extended depending on when the criminal investigation is  
3 resolved). In light of the expansive timeframe of the alleged wrongdoing and the number  
4 of potential percipient and party witnesses associated with Commission Junction, Plaintiff,  
5 and Plaintiff's subsidiaries, up to 25 to 30 depositions may be warranted in this case. If  
6 the Court does not stay this case, it is appropriate to provide a longer schedule for  
7 discovery and trial preparation in the expectation that the criminal investigation will  
8 resolve during this period. Then the Non-DPS Defendants would be able to withdraw the  
9 assertion of the Fifth Amendment privilege, and fully participate in the defense of the  
10 case.

11 **IX. RELATED CASES**

12 eBay's Statement:

13 eBay is not aware of any related cases.

14 DPS Defendants' Statement:

15 The DPS Defendants are not aware of any related cases.

16 Non-DPS Defendants' Statement:

17 The Non-DPS Defendants are not aware of any related cases.

18 **X. RELIEF**

19 There have been no changes since the previous Joint Case Management Statement.

20 **XI. SETTLEMENT AND ADR**

21 eBay's Statement:

22 The parties have discussed the possibility of engaging in alternative dispute  
23 resolution. Defendants have disclaimed that they were involved in any cookie stuffing.  
24 eBay anticipates that the outstanding discovery requests will provide direct evidence to  
25 the contrary. Consequently, it is eBay's position that any ADR process would not be  
26 productive until Defendants have materially complied with the long-outstanding discovery  
27 requests.

28 DPS Defendants' Statement:



1 The DPS Defendants' position is that the parties are in a position to begin  
 2 discussing settlement. While the DPS Defendants of course anticipate that further  
 3 discovery will be beneficial in evaluating settlement positions, particularly regarding the  
 4 extent to which Plaintiff was aware of and encouraged any conduct at issue and the extent  
 5 to which Plaintiff's claims are time-barred under the discovery rule, there is a sufficient  
 6 basis to engage in preliminary settlement discussions.

7 Non-DPS Defendants' Statement:

8 The Non-DPS Defendants believe that early efforts at settlement should be  
 9 seriously pursued. The Non-DPS Defendants do not believe that further discovery is  
 10 likely to reveal substantial new facts that would dramatically impact settlement  
 11 possibilities. An early settlement, if possible, is in the best interests of these defendants,  
 12 and presumably Plaintiff.

13 **XII. MAGISTRATE JUDGE**

14 There have been no changes since the previous Joint Case Management Statement.

15 **XIII. OTHER REFERENCES**

16 There have been no changes since the previous Joint Case Management Statement.

17 **XIV. NARROWING OF ISSUES**

18 There have been no changes since the previous Joint Case Management Statement.

19 **XV. EXPEDITED SCHEDULE**

20 There have been no changes since the previous Joint Case Management Statement.

21 **XVI. SCHEDULING**

22 The parties' proposed schedules are attached as Exhibit A.

23 **XVII. TRIAL**

24 eBay's Statement:

25 There have been no changes since the previous Joint Case Management Statement.

26 DPS Defendants' Statement:

27 Per the terms of the PSA, the right to a jury trial has been waived. Separate trials  
 28 are appropriate to avoid prejudice in this case because the two defendant groups are



1 wholly distinct. While the length of trial is difficult to anticipate at this time, the DPS  
2 Defendants estimate that trial may take 12 days or more.

3 Non-DPS Defendants' Statement:

4 Per the terms of the PSA, the right to a jury trial has been waived. Separate trials  
5 are appropriate to avoid prejudice in this case because the two defendant groups are  
6 wholly distinct. While the length of trial is difficult to anticipate at this time, the Non-  
7 DPS Defendants estimate that trial may take 12 days or more.

8 **XVIII. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR**  
9 **PERSONS**

10 eBay's Statement:

11 There have been no changes since the previous Joint Case Management Statement.

12 DPS Defendants' Statement:

13 Commission Junction, as Plaintiff's direct agent in administering the AMP, is an  
14 interested party.

15 Non-DPS Defendants' Statement:

16 Commission Junction, as Plaintiff's direct agent in administering the AMP, is an  
17 interested party.

18  
19 Dated: September 14, 2001

20 DAVID R. EBERHART  
21 SHARON M. BUNZEL  
22 COLLEEN M. KENNEDY  
23 O'MELVENY & MYERS LLP

24 By: /s/ David R. Eberhart  
25 David R. Eberhart

26 *Attorneys for Plaintiff*  
27 eBay Inc.  
28

1 Dated: September 14, 2001

LEO J. PRESIADO  
RUS, MILIBAND & SMITH, A  
PROFESSIONAL CORPORATION

2

3

4

By: /s/ Leo J. Presiado  
Leo J. Presiado

5

6

*Attorneys for Defendants*  
Thunderwood Holdings, Inc., Brian  
Dunning and BrianDunning.com

7

8 Dated: September 14, 2001

STEWART H. FOREMAN  
FREELAND, COOPER & FOREMAN,  
LLP

9

10

11

By: /s/ Stewart H. Foreman  
Stewart H. Foreman

12

13

*Attorneys for Defendants*  
Todd Dunning and Dunning Enterprise,  
Inc.

14

15 Dated: September 14, 2001

PATRICK K. MCCLELLAN  
LAW OFFICE OF PATRICK K.  
MCCLELLAN

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18

By: /s/ Patrick K. McClellan  
Patrick K. McClellan

19

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*Attorney for Defendant*  
Kessler's Flying Circus

21

22 Dated: September 14, 2001

SEYAMACK KOURETSCHIAN  
COAST LAW GROUP, LLP

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By: /s/ Ross Campbell  
Ross Campbell

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*Attorneys for Defendants*  
Digital Point Solutions, Inc. and Shawn  
Hogan

I, David R. Eberhart, am the ECF User whose ID and password are being used to file this Joint Case Management Statement and [Proposed] Order. In compliance with General Order 45, X.B., I hereby attest that Leo Presiado, Stewart Foreman, Patrick McClellan, and Ross Campbell have concurred in this filing.

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**CASE MANAGEMENT ORDER**

The Case Management Statement and Proposed Order is hereby adopted by this Court as the Case Management Order for the case, and the parties are ordered to comply with this Order. In addition, the Court orders that a further Case Management Conference will be held on \_\_\_\_\_.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Jeremy Fogel  
United States District Court Judge  
Northern District of California

## EXHIBIT A

Event	eBay's Proposed Dates	Defendants' Proposed Dates
Fact discovery closes	April 30, 2010	November 2010
Last day for expert reports on merits	June 18, 2010	
Last day for depositions of experts	July 2, 2010	
Last day for responsive expert reports	July 16, 2010	
Close of expert discovery	July 30, 2010	March 2011
Last day to file dispositive motions	September 3, 2010	
Oppositions to dispositive motions due	October 8, 2010	
Reply briefs in support of dispositive motions due	October 29, 2010	
Hearing on dispositive motions	November 19, 2010	
Required Meeting Prior to Pretrial Conference	January 4, 2011	
Pretrial Conference Statement	January 10, 2011	
Pretrial Conference	January 24, 2011	
Trial	March 7, 2011	September 2011

# EXHIBIT 3

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8 and DIGITAL POINT SOLUTIONS, INC.

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

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

Case No. CV 08-04052 JF PVT  
**DEFENDANTS DIGITAL POINT SOLUTIONS, INC. AND SHAWN HOGAN'S NOTICE OF MOTION AND MOTION FOR STAY OF PROCEEDINGS; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF**  
Date: November 20, 2009  
Time: 9:00 a.m.  
Dept.: Courtroom 3

**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that on November 20, 2009 at 9:00 AM, or as soon thereafter as the matter can be heard in Courtroom 3 of the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, California 95113, defendants DIGITAL POINT SOLUTIONS, INC. and SHAWN HOGAN will move this Court for an order staying this action pending resolution of the parallel criminal investigation of the United States Attorney's Office for the Northern District of California and the Federal Bureau of Investigation. In the alternative, said Defendants shall move for a stay of all discovery in this action for a period of six months in the interests of justice.

As more fully set forth in the following Memorandum of Points and Authorities, this Motion is made on the grounds that a stay is necessary to protect Mr. Hogan's Fifth Amendment rights in connection with a criminal proceeding arising from the same underlying factual issues that give rise to this action. In addition, the action should be stayed as to defendant Digital Point Solutions, Inc. because Mr. Hogan is the only person that can speak on behalf of the corporation and, as such, defendant Digital Point Solutions, Inc. will be greatly prejudiced by its inability to meaningfully defend itself in this action.

Defendants' motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the accompanying Declarations of Seyamack Kouretchian and Ross M. Campbell, the records and file herein, and upon such other oral and documentary evidence as may be presented at the hearing on this motion.

DATED: October 16, 2009

s/Ross M. Campbell

COAST LAW GROUP, LLP  
Attorneys for Defendants, Shawn Hogan  
and Digital Point Solutions, Inc.



**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

MEMORANDUM OF POINTS & AUTHORITIES ..... 3

I. SUMMARY OF MOTION ..... 3

II. STATEMENT OF FACTS ..... 4

III. LEGAL STANDARD AND SCOPE OF REVIEW ..... 5

IV. ARGUMENT ..... 6

    A. Extent to which Mr. Hogan’s Fifth Amendment Rights are Implicated ..... 6

        1. Similarity of the Issues ..... 6

        2. Potential for Prejudice ..... 7

        3. Status of Parallel Criminal Proceedings ..... 8

        4. Stay as to Digital Point Solutions, Inc. .... 9

    B. Plaintiff’s Interests and Potential Prejudice ..... 10

    C. Interests of the Court and Judicial Economy ..... 11

        1. Potential for Resolution of Common Issues ..... 11

        2. Avoiding Unnecessary Law and Motion Practice ..... 12

    D. Interests of Third Parties and the Public ..... 12

V. CONCLUSION. .... 13

**TABLE OF AUTHORITIES**

**U.S. Supreme Court Cases**

*United States v. Kordel* (1970)  
 397 U.S. 1 ..... 13

**Federal Cases**

*Am. Motorists Ins. Co. v. Bridger Pub. Sch. Dist. #2* (D. Mont. 2007)  
 LEXIS 30140 ..... 9

*Brock v. Tolkow* (E.D.N.Y. 1985)  
 109 F.R.D. 116 ..... 8, 9, 10, 12

*Chao v. Fleming* (W.D. Mich. 2007)  
 498 F. Supp 2d 1034 ..... 6, 7, 9, 11, 12

*Continental Insurance Co. v. Cota* (N.D. Cal. 2008)  
 WL 4298372 ..... 7, 11

*Fed. Savings & Loan Ins. Corp. v. Molinaro* (9th Cir. 1989)  
 889 F.2d 899 ..... 5

*In re Adelpia Communs. Secs. Litig* (E.D. Pa. 2003)  
 LEXIS 9736 ..... 12

*In re Lewisville Properties, Inc.* (5th Cir. 1988)  
 849 F.2d 946 ..... 11, 12

*Javier H. v. Garcia-Botello* (W.D.N.Y. 2003)  
 218 F.R.D. 72 ..... 8, 11, 12

*Jones v. Conte* (N.D. Cal. 2005)  
 LEXIS 46962 ..... 5, 7, 11, 12

*Kashi v. Gratsos* (2nd Cir. 1986)  
 790 F.2d 1050 ..... 9

*Keating v. Office of Thrift Supervision* (9th Cir. 1995)  
 45 F.3d 322 ..... 5

*Medina v. Argent Mortg. Co.* (N.D. Cal. 2006)  
 LEXIS 30582 ..... 7, 9, 10, 11

1 *Mediterranean Enterprises, Inc. v. Ssangyong Corp.* (9th Cir. 1983)  
 2 708 F.2d 1458 ..... 5

3 *Par Pharm. Sec. Litig.* (S.D.N.Y. 1990)  
 4 133 F.R.D. 12 ..... 8

5 *Reyes v. Freebery* (Del. 2004)  
 6 LEXIS 15018 ..... 10

7 *SEC v. Dresser Indus.* (D.C. Cir. 1980)  
 8 628 F.2d 1368 ..... 13

9 *SEC v. Schroeder* (N.D. Cal. 2008)  
 10 LEXIS 6527 ..... 8

11 *Shell Offshore v. Courtney* (E.D. La. 2006)  
 12 LEXIS 49973 ..... 9, 10, 13

13 *Taylor, Bean & Whitaker Mortg. Corp. v. Triduanum* (C.D. Cal. 2009)  
 14 LEXIS 60849 ..... 5, 6, 7, 9, 11

15 *United States v. \$557,933.89, More or Less in U.S. Funds* (E.D.N.Y. 1998)  
 16 LEXIS 22252 ..... 8, 9

17 *United States v. Certain Real Property & Premises* (E.D.N.Y. 1989)  
 18 751 F. Supp. 1060 ..... 9, 13

19 *Volmar Distribs. v. New York Post Co.* (S.D.N.Y. 1993)  
 20 152 F.R.D. 36 ..... 10

21 *Walsh Securities, Inc. v. Cristo Property Management, Ltd.* (D.N.J. 1998)  
 22 7 F. Supp. 2d 523 ..... 6, 8, 9, 11, 12, 13

23 **Federal Statutes and Regulations**

24 18 U.S.C. §1343 ..... 3, 4, 5, 7, 9, 11

25 18 U.S.C. §1961 ..... 4

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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. SUMMARY OF MOTION**

3 Defendants Shawn Hogan and Digital Point Solutions, Inc. (collectively, the DPS Defendants)  
 4 request that the Court exercise its discretion to stay this action pending resolution of the parallel criminal  
 5 investigation of the United States Attorney’s Office for the Northern District of California (USAO) and  
 6 the Federal Bureau of Investigation (FBI). In the alternative, the DPS Defendants request that the Court,  
 7 at a minimum, stay all discovery in this action for a period of six months to avoid the potential for  
 8 prejudice in this case. A stay of this action is warranted in the interests of justice, as the scope of the  
 9 criminal investigation is based on the same “cookie stuffing” allegations at issue in the present action.  
 10 Further, Assistant United States Attorney Kyle Waldinger has indicated that the USAO intends to seek  
 11 an indictment for violations of 18 U.S.C. §1343 (for wire fraud) and anticipates that the indictment will  
 12 be issued after the commencement of the new year.

13 As detailed below, the present circumstances warrant the issuance of a stay. When there are  
 14 parallel criminal and civil proceedings such as in this case, the defendant faces the difficult choice of  
 15 asserting his Fifth Amendment rights at the risk of losing a civil trial, or waiving these rights to defend  
 16 himself in civil proceedings at the risk of incriminating himself. Although not required by the  
 17 Constitution, the courts have recognized the need to stay civil proceedings under circumstances directly  
 18 comparable to those at issue here to avoid prejudicing the defendant’s rights. Here, the issuance of a  
 19 stay is warranted in the interests of justice and should be granted for the following reasons:

20 *One.* The similarity of the issues underlying the civil and criminal actions is regarded as “the  
 21 most important factor” in determining whether to issue a stay, as the defendant’s Fifth Amendment  
 22 rights are directly implicated in such cases. Here, as Plaintiff concedes, the government is investigating  
 23 “whether the fraudulent activities *alleged by eBay in this case* constitute federal crimes.” Indeed,  
 24 because the Second Amended Complaint (SAC) alleges that Defendants engaged in multiple violations  
 25 of the predicate act of wire fraud, the underlying factual and legal issues directly overlap. As such, this  
 26 factor weighs heavily in favor of issuing a stay.

27 /././

28 /././



1 activities alleged by eBay in this case constitute federal crimes.” (Campbell Decl., Ex. 1, p. 4:15-16).  
 2 Relevant here, on September 22, 2009, Assistant United States Attorney Kyle Waldinger conveyed the  
 3 following information regarding the status of the pending criminal proceedings to defense counsel: (1)  
 4 Mr. Hogan is the subject of an ongoing criminal investigation as to whether activities associated with  
 5 Plaintiff’s affiliate marketing program constitute wire fraud under 18 U.S.C. §1343; (2) the scope of the  
 6 investigation relates to the “cookie stuffing” schemes alleged against the Defendants in this case; (3) Mr.  
 7 Waldinger believes that Section 1343 has been violated; (4) the USAO intends to seek an indictment  
 8 based on the foregoing; and (5) and it is likely that an indictment will be issued within the early part of  
 9 next year. (Kouretchian Decl. ¶2).

10 Given the foregoing circumstances a stay of the civil action is warranted and appropriate.

### 11 **III. LEGAL STANDARD AND SCOPE OF REVIEW**

12 The Court possesses the inherent power to control its own docket and calendar. *Taylor, Bean &*  
 13 *Whitaker Mortg. Corp. v. Triduanum* (C.D.Cal. 2009) 2009 U.S. Dist. LEXIS 60849, 4.

14 A trial court may, with propriety, find it is efficient for its own docket and the fairest  
 15 course of the parties to enter a stay of an action before it, pending resolution of  
 16 independent proceedings which bear upon the case. This rule . . . does not require that the  
 issues in such proceedings are necessarily controlling of the action before it.

17 *Id.* (quoting *Mediterranean Enterprises, Inc. v. Ssangyong Corp.* (9th Cir. 1983) 708 F.2d 1458, 1465.

18 Thus, it is well recognized that a court may, in its discretion, stay civil proceedings when the  
 19 interests of justice so require. *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324.

20 Although not required by the Constitution, a district court may stay civil proceedings or postpone civil  
 21 discovery pending the outcome of parallel criminal proceedings. *Fed. Savings & Loan Ins. Corp. v.*  
 22 *Molinaro* (9th Cir. 1989) 889 F.2d 899, 902.

23 The decision whether to grant a stay should be made in light of the particular circumstances and  
 24 competing interests involved in the case, and should be based on the following factors: (1) the extent to  
 25 which the defendant's Fifth Amendment rights are implicated; (2) the interest of the plaintiff in  
 26 proceeding with the litigation and the potential prejudice to plaintiff of a delay; (3) the convenience of  
 27 the court and the efficient use of judicial resources; (4) the interests of third parties; and (5) the interests  
 28 of the public. *Keating, supra*, 45 F.3d at 324-325; *Jones v. Conte* (N.D. Cal. 2005) 2005 U.S. Dist.

1 LEXIS 46962, 2.

2 In evaluating the first factor, the courts further consider the extent to which the issues in the  
3 criminal case overlap with those presented in the civil case; the status of the criminal proceeding,  
4 including whether the defendant has been indicted; and whether the civil proceedings may expand the  
5 scope of criminal discovery beyond the limits of the Federal Rules of Criminal Procedure or otherwise  
6 prejudice the case. *Walsh Securities, Inc. v. Cristo Property Management, Ltd.* (D.N.J. 1998) 7 F. Supp.  
7 2d 523, 527; *Taylor, supra*, 2009 U.S. Dist. LEXIS 60849 at 6.

#### 8 **IV. ARGUMENT**

##### 9 **A. Extent to which Mr. Hogan's Fifth Amendment Rights are Implicated**

###### 10 **1. Similarity of the Issues**

11 When there are simultaneous criminal and civil proceedings, the defendant faces the difficult  
12 choice of asserting his Fifth Amendment rights at the risk of losing a civil trial, or waiving these rights to  
13 defend himself in civil proceedings at the risk of incriminating himself. *Walsh Securities, supra*, 7 F.  
14 Supp. 2d at 528. As such, the courts have recognized that the interests of justice may warrant the  
15 issuance of a stay in such circumstances. This is particularly true to the extent the factual allegations at  
16 issue in the civil action overlap with the subject matter of the criminal investigation. Indeed, because the  
17 defendant's Fifth Amendment rights are directly implicated in such cases, the similarity of the issues  
18 underlying the civil and criminal actions is regarded as "the most important factor" in determining  
19 whether or not to grant a stay. *Chao v. Fleming* (W.D. Mich. 2007) 498 F. Supp. 2d 1034, 1039; *Walsh*  
20 *Securities, supra*, 7 F. Supp. 2d at 527.

21 In this case, it is undisputed that the allegations of the SAC directly overlap with the subject  
22 matter of the pending criminal investigation. Indeed, Plaintiff itself has emphasized this point  
23 throughout the course of this litigation. For instance, in opposing the DPS Defendants' initial Motion to  
24 Dismiss, Plaintiff asserted the following:

25 [Defendants'] schemes involved the improper placement of data known as "cookies" on  
26 the computers of potential eBay users so that eBay would be tricked into paying  
27 commissions to Defendants when no commissions were owed. And it is those schemes  
28 that caused the Federal Bureau of Investigation to raid named Defendants Shawn Hogan  
and Brian Dunning in June 2007 and to seize their computers.

1 (Campbell Decl., Ex. 2, p. 1:4-8; emphasis added).

2 Further, in Plaintiff's section of the parties' Joint Case Management Statement, Plaintiff states  
3 that the alleged cookie-stuffing scheme ceased "when the FBI seized Defendants' computer equipment  
4 in June 2007 as part of an investigation into whether the fraudulent activities alleged by eBay in this case  
5 constitute federal crimes." (Campbell Decl., Ex. 1, p. 4:13-16; emphasis added). Thus, as Plaintiff  
6 concedes, the subject of the pending criminal investigation not only overlaps with Plaintiff's allegations  
7 in this case, it is directly predicated on those allegations. Moreover, the foregoing has been confirmed  
8 by Assistant U.S. Attorney Kyle Waldinger. As noted above, Mr. Waldinger recently indicated that the  
9 USAO is actively investigating whether the alleged cookie stuffing schemes associated with Plaintiff's  
10 affiliate marketing program constitute wire fraud under 18 U.S.C. §1343. (Kouretchian Decl. ¶2). The  
11 same contentions are at issue in the present action, as Plaintiff's RICO claim is likewise predicated on  
12 alleged violations of Section 1343. (SAC ¶50).

13 Because the civil and criminal proceedings are based on the same factual and legal issues, there  
14 can be no question that Mr. Hogan's Fifth Amendment rights are implicated in this case. As such, this  
15 factor weighs heavily in favor of granting the stay. *See Jones v. Conte* (N.D. Cal. 2005) 2005 U.S. Dist.  
16 LEXIS 46962, 3 (factor weighed in favor of stay because civil defamation action and criminal  
17 proceeding both arose from defendant's alleged involvement in distribution of performance-enhancing  
18 drugs); *Continental Insurance Co. v. Cota* (N.D. Cal. 2008) WL 4298372, 2 (stay particularly  
19 appropriate where civil action and criminal action spring from "same nucleus of facts"), *Medina v.*  
20 *Argent Mortg. Co.* (N.D. Cal 2006) 2006 U.S. Dist. LEXIS 30582, (defendants' Fifth Amendment rights  
21 "clearly implicated" where civil and criminal proceedings based on same alleged abusive lending  
22 practices); *Chao, supra*, 498 F. Supp. 2d at (stay issued in context of civil and criminal ERISA  
23 violations because "substantive factual and legal issues would be almost identical.").

## 24 2. Potential for Prejudice

25 A stay is further appropriate to the extent civil proceedings may expand the scope of criminal  
26 discovery beyond the limits of the Federal Rules of Criminal Procedure, expose defense strategies to the  
27 prosecuting authorities, or otherwise prejudice the case. *Taylor, Bean & Whitaker Mortg. Corp. v.*  
28 *Triduanum* (C.D.Cal. 2009) 2009 U.S. Dist. LEXIS 60849, 4. "The risk that civil discovery will be used



1 to circumvent criminal discovery limitations becomes much greater where the same facts are at issue.”  
2 *Javier H. v. Garcia-Botello* (W.D.N.Y. 2003), 218 F.R.D. 72, 74.

3 Here, these concerns are particularly relevant, as any information or testimony procured during  
4 the discovery process will be directly relevant to the criminal investigation. Moreover, because the  
5 authorities are investigating “whether the fraudulent activities alleged by eBay in this case constitute  
6 federal crimes” (Campbell Decl. Ex. 1, p. 4:13-16), it cannot reasonably be disputed that Plaintiff has  
7 assisted with the investigation in the past. Nor can there be any question that Plaintiff has a direct  
8 interest in furthering prosecutions related to its Affiliate Marketing Program or that Plaintiff is likely to  
9 play at least some role in the development of the prosecution’s case through trial. A stay is warranted in  
10 this case to ensure that civil discovery will not be used to circumvent the discovery limitations that  
11 would otherwise apply in the criminal proceeding.

### 12 3. Status of Parallel Criminal Proceedings

13 This factor considers the status of the criminal proceeding, including whether the defendant has  
14 been indicted. *Walsh Securities, supra*, 7 F. Supp. 2d at 527. In general, the courts are more inclined to  
15 issue a stay once an indictment has been returned. *See SEC v. Schroeder* (N.D. Cal. 2008) 2008 U.S.  
16 Dist. LEXIS 6527, 4-5. Courts have concluded that the case for staying civil proceedings is far weaker  
17 when no indictment has been returned and no Fifth Amendment Privilege is threatened. *Id.*

18 Here, as detailed above, Mr. Hogan’s Fifth Amendment rights are *directly implicated*. Moreover,  
19 “[t]he fact that an indictment has not yet been returned - while it may be a factor counseling against a  
20 stay of civil proceedings- does not make consideration of the stay motion any less appropriate.” *Brock v.*  
21 *Tolkow* (E.D.N.Y. 1985) 109 F.R.D. 116, 119, fn. 2; *United States v. \$557,933.89 in U.S. Funds*  
22 (E.D.N.Y. 1998) 1998 U.S. Dist. LEXIS 22252, 13. For instance, the issuance of a pre-indictment stay  
23 is warranted where, as here, the government is conducting an active parallel investigation based on the  
24 same allegations set forth in the civil complaint. *Walsh Securities, supra*, 7 F. Supp. 2d at 527.

25 In addition, “[a] pre-indictment stay is particularly appropriate where both the civil and criminal  
26 charges arise from the same remedial statute such that the criminal investigation is likely to vindicate the  
27 same public interest as would the civil suit.” *Par Pharm. Sec. Litig.* (S.D.N.Y. 1990) 133 F.R.D. 12, 14  
28 (denying stay where criminal investigations involved misconduct before Food and Drug Administration

1 while civil action involved federal securities laws); *see also Brock, supra*, 109 F.R.D. at 118, 120 (stay  
2 granted where both proceedings involved ERISA violations). Here, as noted above, the civil and  
3 criminal proceedings arise from the same nucleus of alleged facts and are both predicated on alleged  
4 violations of 18 U.S.C. §1343. As such, this factor weighs in favor of a stay notwithstanding the pre-  
5 indictment status of the criminal proceedings.

6 Indeed, a number of courts have issued pre-indictment stays under circumstances directly  
7 comparable to those at issue in this case. *See Brock, supra*, 109 F.R.D. at 120, fn. 2, 121. (stay of all  
8 civil discovery pending outcome of criminal RICO investigation); *Walsh Securities, supra*, 7 F. Supp. 2d  
9 529, (partial stay of discovery based on U.S. Attorney's Office investigation of whether civil RICO  
10 allegations amount to criminal conduct); *Kashi v. Gratsos* (2nd Cir. 1986) 790 F.2d 1050, 1057 (trial  
11 court properly exercised discretion in staying civil trial until U.S. Attorney declined to prosecute); *Chao,*  
12 *supra*, 498 F. Supp. 2d at 1039 (issuing 3-month pre-indictment stay of entire action); *United States v.*  
13 *\$557,933.89, More or Less in U.S. Funds* (E.D.N.Y. 1998) 1998 U.S. Dist. LEXIS 22252, 10-13 (issuing  
14 16-month pre-indictment stay of all discovery where information sought to be extracted presented  
15 realistic threat of incrimination); *Am. Motorists Ins. Co. v. Bridger Pub. Sch. Dist. # 2* (D. Mont. 2007)  
16 2007 U.S. Dist. LEXIS 30140, 8-10 (granting pre-indictment stay of discovery based on active parallel  
17 criminal investigation conducted by United States); *Shell Offshore v. Courtney* (E.D. La. 2006) 2006  
18 U.S. Dist. LEXIS 49973, 2-4 (one-year pre-indictment stay of discovery in civil RICO action appropriate  
19 based on pending grand jury investigation); *United States v. Certain Real Property & Premises*  
20 (E.D.N.Y. 1989) 751 F. Supp. 1060, 1062 (pre-indictment stay appropriate where possibility that  
21 defendant might be forced to incriminate herself was neither "fanciful" nor "imaginary").

#### 22 4. Stay as to Digital Point Solutions, Inc.

23 Although corporate defendants cannot invoke the protections of the Fifth Amendment, a stay is  
24 appropriate as to such defendants where "the individual defendants are the persons most knowledgeable  
25 and the persons whom the corporation would designate to testify on its behalf." *Medina v. Argent*  
26 *Mortg. Co.* (N.D. Cal 2006) 2006 U.S. Dist. LEXIS 30582, 6. Indeed, where the Fifth Amendment  
27 rights of the corporation's officers and directors are implicated, the corporation "is likely to be greatly  
28 prejudiced in its ability to meaningfully defend itself in the civil matter." *Taylor, supra*, 2009 U.S. Dist.

1 LEXIS 60849 at 8. Further, courts have held that a stay as to all parties is preferred over a partial stay, as  
2 it avoids the duplication of effort and waste of resources during the discovery process. *Volmar Distributions*  
3 *v. New York Post Co.* (S.D.N.Y. 1993) 152 F.R.D. 36, 39, 41.

4 The foregoing concerns apply in this case, as Mr. Hogan is the sole shareholder, officer and  
5 director of defendant Digital Point Solutions, Inc., and is the person whom the corporation would  
6 designate to testify on its behalf. Because Mr. Hogan's Fifth Amendment rights are directly implicated  
7 as set forth above, a complete stay as to both DPS Defendants is warranted and appropriate. Further, the  
8 stay will reduce litigation costs and avoid burdening the Court with time-consuming discovery motions.  
9 For instance, as reflected in the motions to compel currently pending before Judge Trumbull, a number  
10 of Fifth Amendment discovery disputes have arisen with respect to the individual Defendant's right to  
11 assert the privilege and the countervailing rules relating to collective entities. Because the issuance of a  
12 stay will avoid burdening the Court with resolving these issues, a stay as to all Defendants is warranted.

#### 13 **B. Plaintiff's Interests and Potential Prejudice**

14 Where the plaintiff itself delays in pursuing its claims, it undermines any subsequent claims of  
15 prejudice resulting from the issuance of a stay. *Medina v. Argent Mortg. Co.* (N.D. Cal 2006) 2006 U.S.  
16 Dist. LEXIS 30582, 8. Further, where the plaintiff has not shown any prejudice other than delay in  
17 pursuing its suit, the plaintiff fails to establish a sufficient basis for denying the stay. *Reyes v. Freebery*  
18 (Del. 2004) 2004 U.S. Dist. LEXIS 15018, 15. Although the stay may inconvenience the plaintiff, under  
19 settled authority, protection of the defendant's Fifth Amendment rights is "the more important  
20 consideration." *Brock, supra*, 109 F.R.D. 116, 121; *Volmar Distributions v. New York Post Co.* (S.D.N.Y.  
21 1993) 152 F.R.D. 36. In addition, the consideration of prejudice to the plaintiff supports a stay where  
22 "the plaintiff does not continue to suffer losses and does not dispute that it filed a criminal complaint . .  
23 ." *Shell Offshore, Inc. v. Courtney* (E.D. La 2006) 2006 U.S. Dist. LEXIS 49973, 4.

24 Here, no threat of continuing harm exists, as Plaintiff itself has alleged that the cookie stuffing  
25 schemes ceased in June 2007 (SAC ¶¶ 48, 57). Further, the record indicates that Plaintiff will not suffer  
26 any prejudice as a result of a stay. For instance, even though Plaintiff alleges that it conducted numerous  
27 investigations in June 2007 and became aware of the details of the alleged scheme as of that date (SAC  
28 ¶¶ 52-57), Plaintiff chose not to file suit for well over a year, until August 2008. "While it is certainly

1 plausible that valid reasons supported such a delay, it undercuts plaintiff's entitlement to complain about  
 2 a roughly similar delay." *Medina, supra*, 2006 U.S. Dist. LEXIS 30582 at 8 (plaintiff's four-month  
 3 delay in serving complaint undermined subsequent claims of prejudice). Moreover, any inconvenience  
 4 resulting from the stay does not overcome the paramount concern of protecting the defendant's  
 5 constitutional rights. *Continental Insurance Co. v. Cota* (N.D. Cal. 2008) WL 4298372, 3; *see also*  
 6 *Brock, supra*, 109 F.R.D. at 121 (protection of the Fifth Amendment right is "the more important  
 7 consideration"). As such, this factor weighs in favor of granting the stay.

### 8 **C. Interests of the Court and Judicial Economy**

9 This consideration "examines the interests of courts in docket management and the expeditious  
 10 resolution of cases." *Chao, supra*, 498 F. Supp. 2d at 1040. The courts have a particular interest "in  
 11 resolving individual cases efficiently." *Walsh Securities, supra*, 7 F. Supp. 2d at 528. In considering  
 12 these factors, courts have found that staying the civil case "makes efficient use of judicial resources by  
 13 'insuring that common issues of fact will be resolved and subsequent civil discovery will proceed  
 14 unobstructed by concerns regarding self-incrimination.'" *Jones, supra*, 2005 U.S. Dist. LEXIS 46962 at  
 15 2 (quoting *Javier H. v. Garcia-Botello* (W.D.N.Y. 2003), 218 F.R.D. 72, 75); *Taylor, supra*, 2009 U.S.  
 16 Dist. LEXIS 60849 at 10. As discussed below, both of these considerations weigh in favor of granting  
 17 the stay.

#### 18 **1. Potential for Resolution of Common Issues**

19 The interests of judicial economy weigh in favor of granting the stay, as resolution of the  
 20 criminal proceedings may narrow the issues for trial in the civil action. *See Chao, supra*, 498 F.Supp. 2d  
 21 at 1040 (concluding "that scarce judicial resources in this district at this time would be best used by  
 22 staying this case in favor of the criminal case, which may ultimately reduce or eliminate the need for  
 23 discovery or result in a settlement of this case if Defendants are convicted."). Here, as noted above, the  
 24 underlying factual and legal issues significantly overlap, particularly with respect to the alleged wire  
 25 fraud violations under 18 U.S.C. §1343. As such, there is a greater likelihood that the issuance of a stay  
 26 will promote judicial economy. For instance, with respect to issues that are necessarily decided in prior  
 27 criminal actions, "[c]ollateral estoppel is available to plaintiffs in civil racketeering litigation." *In re*  
 28

1 *Lewisville Properties, Inc.* (5th Cir. 1988) 849 F.2d 946, 949.<sup>1</sup>

2 **2. Avoiding Unnecessary Law and Motion Practice**

3 This factor also weighs in favor of granting Defendants' motion. Without an appropriate stay,  
4 Defendants will be forced to continue to assert their Fifth Amendment rights, which will "burden the  
5 Magistrate Judge and this Court with deciding a constant stream of privilege issues." *Walsh Securities,*  
6 *supra*, 7 F.Supp. 2d at 528. Disputes over the scope of the privilege consume the courts' resources with  
7 unnecessary discovery litigation and law and motion practice. "In contrast, if the civil actions are stayed  
8 until the conclusion of the criminal proceedings, then these rulings will no longer be necessary." *In re*  
9 *Adelphia Communs. Secs. Litig* (E.D. Pa. 2003) 2003 U.S. Dist. LEXIS 9736, at 15.

10 Here, the foregoing concerns are directly at issue, as Plaintiff recently filed three privilege-related  
11 motions (including two motions to compel pending before Judge Trumbull and the motion to strike  
12 pending before the Court). All three motions are largely predicated on Defendants' assertion of the Fifth  
13 Amendment privilege and the extent to which those protections apply. Similar disputes are likely to  
14 arise as to the scope of the privilege in future rounds of discovery and when Defendants are deposed.  
15 Because the issuance of a stay will likely avoid unnecessary law and motion practice, this factor also  
16 weighs in favor of a stay.

17 **D. Interests of Third Parties and the Public**

18 While the public has an interest in the resolution of civil disputes, parallel criminal proceedings  
19 generally serve to protect and advance those same interests. *Brock, supra*, 109 F.R.D. 116, 121; *Chao,*  
20 *supra*, 498 F.Supp. 2d at 1040. Further, the courts have recognized that "the public interest will be  
21 furthered by a stay because 'the public's interest in the integrity of the criminal case is entitled to  
22 precedence over the civil litigant.'" *Jones, supra*, 2005 U.S. Dist. LEXIS 46962 at 2 (quoting *Javier H.*  
23 *v. Garcia-Botello* (W.D.N.Y. 2003), 218 F.R.D. 72, 75); *see also Taylor, supra*, 2009 U.S. Dist. LEXIS  
24 60849 at 10. And as the courts have explained, these principles equally apply in the context of a pending  
25

---

26  
27 <sup>1</sup> "The doctrine depends on three elements: 1) the issue at stake must be identical to the one  
28 involved in the prior litigation; 2) the issue must have been actually litigated in the prior litigation; and  
3) the determination of the issue in the prior litigation must have been a critical and necessary part of the  
judgment in that earlier action." *Id.*

1 criminal investigation:

2 [A] stay in this case would benefit the public by allowing the government to conduct a  
3 complete, unimpeded investigation into potentially criminal activity. In this case, there is  
4 no tangible harm to the public from these alleged frauds that could not be remedied by the  
criminal investigation. Therefore, the public interest weighs in favor of a stay.

5 *Walsh, supra*, 7 F. Supp. 2d at 529; *see also Shell, supra*, 2006 U.S. Dist. LEXIS 49973 at 4.

6 Notably, courts have denied stays where the civil case, brought by a government agency, was  
7 intended to protect the public by halting continuing harms such as the distribution of mislabeled drugs or  
8 the dissemination of misleading investment information. *Walsh, supra*, 7 F. Supp. 2d at 529 (citing  
9 *United States v. Kordel* (1970) 397 U.S. 1, 11, and *SEC v. Dresser Indus.* (D.C. Cir. 1980) 628 F.2d  
10 1368, 1377, respectively). However, no such concerns are at issue here, as Plaintiff itself contends that  
11 the alleged scheme ceased in June 2007 (SAC ¶48) and in any event, the harms alleged in the SAC do  
12 not meet the foregoing criteria. *See United States v. Certain Real Property & Premises* (E.D.N.Y. 1989)  
13 751 F. Supp. 1060, 1062 (this case “is not comparable in public importance to a civil enforcement action  
14 brought by a federal regulatory agency entrusted with the protection of consumers, investors, or other  
15 broad segments of the population, whose welfare could be jeopardized by deferral of the action.”).

16 Because a stay will promote the integrity of the pending criminal investigation, the interests of  
17 the public, and any relevant third parties, this factor also weighs in favor of granting the motion.

## 18 **V. CONCLUSION**

19 For the foregoing reasons, the DPS Defendants respectfully request that the Court stay this action  
20 pending resolution of the parallel criminal investigation. In the alternative, the DPS Defendants request  
21 that the Court stay all discovery in this action for a period of six months.

22 DATED: October 16, 2009

s/Ross M. Campbell  
COAST LAW GROUP, LLP  
Attorneys for Defendants, Shawn Hogan  
and Digital Point Solutions, Inc.

# EXHIBIT 4

**Ross Campbell**

---

**From:** Ross Campbell  
**Sent:** Friday, September 25, 2009 4:07 PM  
**To:** 'Kennedy, Colleen'  
**Cc:** Seyamack Kouretchian; Eberhart, David; Bunzel, Sharon M.  
**Subject:** RE: eBay v. Digital Point Solutions, Inc. et al.

Colleen:

As a preliminary matter, it is unreasonable to demand that we meet and confer on the matters raised in your email within one business day. However, please see below regarding the items you've raised. It appears that you seek to further meet and confer on four separate items.

1. Responses on behalf of "Digital Point Solutions, Inc." As you know, a corporate owner, as a natural person, is distinct from the corporation itself and the entity is recognized as having a separate legal existence. Again, Digital Point Solutions, Inc. never conducted business with plaintiff and there is no basis for it to provide responses as to Mr. Hogan with respect to non-corporate information or documents. To the extent plaintiff seeks information from Mr. Hogan individually, it has already directed separate discovery requests to Mr. Hogan and he has separately responded (and as we've indicated, a sole proprietorship is not a collective entity and the Fifth Amendment may therefore be properly asserted). Under the *Doe* decision we've cited, the records of a sole proprietorship are considered no different from the individual owner's personal records. We are not aware of any authority suggesting that personal information can be obtained through a corporate entity simply by virtue of the person holding an office with that entity. With respect to potential parent or subsidiary entities of Digital Point Solutions, Inc., no such entities exist.
2. Documents Referenced in Bylaws. With respect to the Annual Statements of General Information, we have provided the August 13, 2007 statement of information that appears to have been filed with the Secretary of State (SOS File Ref No. 389158). The SOS website appears to indicate that no other statements have been filed and we are presently unaware of any other statements of information. The fact that statements may be referenced in the bylaws does not mean they were subsequently prepared or exist. The same applies with respect to the meeting minutes you've referenced. However, I will confer with Mr. Hogan further on this issue. He is currently out of town and unavailable but I expect to be able to discuss these matters with him on October 4.
3. Server Issues: It is my understanding that the servers at issue have not been used, remain idle, and do not contain any responsive information. However, I will confer with Mr. Hogan upon his return and will respond to your inquiry at that time.
4. Applicability of Fifth Amendment to Seized Materials: Again, it is unreasonable to demand that we respond within one business day when I requested two weeks ago that you provide any responsive legal authority to the citations we provided, and Section III.B.1 of your motion purports to rely on a substantial number of cases. Such a limited time frame does not constitute an effort to confer in good faith within the meaning of Rule 37(a). I am of course willing to consider those authorities but will be unable to do so until early/mid next week. However, I do not anticipate changing our position because the authentication issue is not a "foregone conclusion" and the civil discovery process cannot be used to compel a party to refine or otherwise assist with a pending criminal investigation. Further, as we've indicated, the scope of the seizure is not clear.

Please let me know if you'd like to further discuss the above.

Ross

---

10/23/2009





**ROSS M. CAMPBELL**  
 ross@coastlawgroup.com

Coast Law Group LLP  
 1140 South Coast Highway 101  
 Encinitas, California 92024  
 tel. 760.942.8505 x105  
 fax 760.942.8515

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**From:** Kennedy, Colleen [mailto:CKennedy@OMM.com]  
**Sent:** Thursday, September 24, 2009 2:59 PM  
**To:** Ross Campbell  
**Cc:** Seyamack Kouretchian; Eberhart, David; Bunzel, Sharon M.  
**Subject:** RE: eBay v. Digital Point Solutions, Inc. et al.

Ross,

We are in receipt of the supplemental discovery responses on behalf of DPS, Inc. First, the supplemental responses have not resolved the problem we previously identified regarding the improper limitation of DPS's responses to information concerning "Digital Point Solutions, Inc." DPS, Inc. is required to provide all information in its possession regarding "DPS" as defined by eBay, including Shawn Hogan and other entities associated with DPS, Inc., and any Fifth Amendment privilege held by Mr. Hogan does not protect DPS, Inc. from doing so. Please advise by COB tomorrow whether you will agree to supplement your responses to address this issue.

Second, the documents produced in connection with yesterday's responses raise two additional issues:

- 1) The Bylaws of DPS, Inc. indicate the existence of some documents that were not produced yesterday, namely, Annual Statements of General Information for DPS, Inc. for 2008 and 2009, as well as minutes of shareholder and board meetings from the date of DPS, Inc.'s incorporation onward.
- 2) The documents indicate that Shawn Hogan transferred servers to DPS, Inc. on or about May 19, 2007. As you know, eBay's SAC alleges that the cookie stuffing continued after May 19, 2007. DPS, Inc. is therefore responsible for producing any responsive documents contained on those servers.

Please advise by COB tomorrow whether you will agree to produce the above-referenced documents to eBay.

Finally, please also advise by COB tomorrow whether you are willing to reconsider your position regarding Shawn Hogan's ability to assert the Fifth Amendment over production of documents already in the FBI's possession in light of the authority cited in Section III.B.1 of eBay's motion to compel discovery responses from the Dunning Defendants, filed on Tuesday, September 22.

I am generally available tomorrow to discuss these issues by telephone if you believe that would be productive.

Best regards,  
 Colleen

---

**From:** Ross Campbell [mailto:RCampbell@CoastLawGroup.com]  
**Sent:** Wednesday, September 23, 2009 5:07 PM  
**To:** Kennedy, Colleen

10/23/2009

**Cc:** Leo J. Presiado; Stewart Foreman; Patrick McClellan; Seyamack Kouretchian

**Subject:** eBay v. Digital Point Solutions, Inc. et al.

Colleen:

Digital Point Solutions, Inc.'s supplemental discovery responses are attached and have also been sent via mail.

Ross

	<p><b>ROSS M. CAMPBELL</b> <a href="mailto:ross@coastlawgroup.com">ross@coastlawgroup.com</a></p> <p>Coast Law Group LLP 1140 South Coast Highway 101 Encinitas, California 92024 tel. 760.942.8505 x105 fax 760.942.8515</p>
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# EXHIBIT 5

## Ross Campbell

---

**From:** Ross Campbell  
**Sent:** Tuesday, September 29, 2009 11:42 AM  
**To:** 'Kennedy, Colleen'  
**Cc:** Seyamack Kouretchian; Eberhart, David; Bunzel, Sharon M.  
**Subject:** RE: eBay v. Digital Point Solutions, Inc. et al.

Colleen:

With respect to the first item, while I remain open to discussing the matter, you have not provided a substantive response to the points I raised in my last email. As such, our position remains the same.

Second, with respect to the servers, we have provided complete responses to plaintiff's discovery requests and have fulfilled our obligations to search for responsive documents. As I indicated, the servers at issue have not been used, remain idle, and do not contain any responsive information. However, given your additional requests, I agreed in good faith to further confer with Mr. Hogan in a matter of days and continue to hope that unnecessary motion practice can be avoided.

Third, for the reasons stated in my last email and my prior communications, we continue to disagree regarding the applicability of Mr. Hogan's Fifth Amendment privilege to plaintiff's requests for production. See *e.g. In the Matter of Thirteen Grand Jury Subpoenas* (E.D.N.Y. 1988) 1988 U.S. Dist LEXIS 9271, 1, 3-5 (Fifth Amendment appropriately asserted on behalf of sole proprietorship in response to document subpoena, and government authentication of materials was not a "foregone conclusion").

Finally, regarding your ongoing claims that we've unduly delayed the discovery process, we have promptly responded to your meet and confer letters and agreed to supplement responses where appropriate. I note that in some instances plaintiff did not attempt to meet or confer for weeks or months at a time. Further, given the Court's initial ruling regarding the PSA's forum selection clause, it was appropriate to avoid burdening the Court with potentially unnecessary law and motion practice.

I am available to further discuss the above; please contact me should you wish to do so.

Thanks,

Ross



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10/23/2009

any U.S. tax issues outside the limited scope of this advice, and U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties under the Internal Revenue Code.

---

**From:** Kennedy, Colleen [mailto:CKennedy@OMM.com]  
**Sent:** Friday, September 25, 2009 7:08 PM  
**To:** Ross Campbell  
**Cc:** Seyamack Kouretchian; Eberhart, David; Bunzel, Sharon M.  
**Subject:** RE: eBay v. Digital Point Solutions, Inc. et al.

Ross,

With respect to the first point, we continue to disagree regarding the meaning of our discovery requests, which simply seek the responsive information in DPS, Inc.'s possession. Since DPS, Inc. continues to improperly limit its responses, we will be forced to move to compel on this issue.

Second, eBay's Requests for Production were served on DPS, Inc. over 8 months ago, and the referenced servers have been in DPS, Inc.'s possession throughout that time period. You have failed to comply with your obligation to search for responsive documents in DPS, Inc.'s possession, custody or control and we will therefore move to compel on this issue as well.

Third, the issue of whether Mr. Hogan may assert the Fifth Amendment regarding the production of documents in the FBI's possession has been the subject of meet and confer discussions since July 29, 2009. You were served on Tuesday with the motion to compel we filed against the Dunning defendants, which you were aware dealt with this same issue. We will wait until noon on Tuesday for a response from you on this issue, which gives you nearly one full week to assess the authorities and arguments in our motion. In light of the fact that this issue has been on the table for so long and the fact that you have indicated you are unlikely to change your position, we are unwilling to wait any longer for a response.

Best regards,  
Colleen

---

**From:** Ross Campbell [mailto:RCampbell@CoastLawGroup.com]  
**Sent:** Friday, September 25, 2009 4:07 PM  
**To:** Kennedy, Colleen  
**Cc:** Seyamack Kouretchian; Eberhart, David; Bunzel, Sharon M.  
**Subject:** RE: eBay v. Digital Point Solutions, Inc. et al.

Colleen:

As a preliminary matter, it is unreasonable to demand that we meet and confer on the matters raised in your email within one business day. However, please see below regarding the items you've raised. It appears that you seek to further meet and confer on four separate items.

1. Responses on behalf of "Digital Point Solutions, Inc." As you know, a corporate owner, as a natural person, is distinct from the corporation itself and the entity is recognized as having a separate legal existence. Again, Digital Point Solutions, Inc. never conducted business with plaintiff and there is no basis for it to provide responses as to Mr. Hogan with respect to non-corporate information or documents. To the extent plaintiff seeks information from Mr. Hogan individually, it has already directed separate discovery requests to Mr. Hogan and he has separately responded (and as we've indicated, a sole proprietorship is not a collective entity and the Fifth Amendment may therefore be properly asserted). Under the *Doe* decision we've cited, the records of a sole proprietorship are considered no different from the individual owner's personal records. We are not aware of any authority suggesting that personal information can be obtained through a corporate entity simply by virtue of the person holding an office with that entity. With respect to potential parent or subsidiary entities of Digital Point Solutions, Inc., no such entities exist.
2. Documents Referenced in Bylaws. With respect to the Annual Statements of General Information,

10/23/2009

we have provided the August 13, 2007 statement of information that appears to have been filed with the Secretary of State (SOS File Ref No. 389158). The SOS website appears to indicate that no other statements have been filed and we are presently unaware of any other statements of information. The fact that statements may be referenced in the bylaws does not mean they were subsequently prepared or exist. The same applies with respect to the meeting minutes you've referenced. However, I will confer with Mr. Hogan further on this issue. He is currently out of town and unavailable but I expect to be able to discuss these matters with him on October 4.

3. Server Issues: It is my understanding that the servers at issue have not been used, remain idle, and do not contain any responsive information. However, I will confer with Mr. Hogan upon his return and will respond to your inquiry at that time.
4. Applicability of Fifth Amendment to Seized Materials: Again, it is unreasonable to demand that we respond within one business day when I requested two weeks ago that you provide any responsive legal authority to the citations we provided, and Section III.B.1 of your motion purports to rely on a substantial number of cases. Such a limited time frame does not constitute an effort to confer in good faith within the meaning of Rule 37(a). I am of course willing to consider those authorities but will be unable to do so until early/mid next week. However, I do not anticipate changing our position because the authentication issue is not a "foregone conclusion" and the civil discovery process cannot be used to compel a party to refine or otherwise assist with a pending criminal investigation. Further, as we've indicated, the scope of the seizure is not clear.

Please let me know if you'd like to further discuss the above.

Ross



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**From:** Kennedy, Colleen [mailto:CKennedy@OMM.com]  
**Sent:** Thursday, September 24, 2009 2:59 PM  
**To:** Ross Campbell  
**Cc:** Seyamack Kouretchian; Eberhart, David; Bunzel, Sharon M.  
**Subject:** RE: eBay v. Digital Point Solutions, Inc. et al.

Ross,

We are in receipt of the supplemental discovery responses on behalf of DPS, Inc. First, the supplemental responses have not resolved the problem we previously identified regarding the improper limitation of DPS's responses to information concerning "Digital Point Solutions, Inc." DPS, Inc. is required to provide all information

10/23/2009

in its possession regarding "DPS" as defined by eBay, including Shawn Hogan and other entities associated with DPS, Inc., and any Fifth Amendment privilege held by Mr. Hogan does not protect DPS, Inc. from doing so. Please advise by COB tomorrow whether you will agree to supplement your responses to address this issue.

Second, the documents produced in connection with yesterday's responses raise two additional issues:

1) The Bylaws of DPS, Inc. indicate the existence of some documents that were not produced yesterday, namely, Annual Statements of General Information for DPS, Inc. for 2008 and 2009, as well as minutes of shareholder and board meetings from the date of DPS, Inc.'s incorporation onward.

2) The documents indicate that Shawn Hogan transferred servers to DPS, Inc. on or about May 19, 2007. As you know, eBay's SAC alleges that the cookie stuffing continued after May 19, 2007. DPS, Inc. is therefore responsible for producing any responsive documents contained on those servers.

Please advise by COB tomorrow whether you will agree to produce the above-referenced documents to eBay.

Finally, please also advise by COB tomorrow whether you are willing to reconsider your position regarding Shawn Hogan's ability to assert the Fifth Amendment over production of documents already in the FBI's possession in light of the authority cited in Section III.B.1 of eBay's motion to compel discovery responses from the Dunning Defendants, filed on Tuesday, September 22.

I am generally available tomorrow to discuss these issues by telephone if you believe that would be productive.

Best regards,  
Colleen

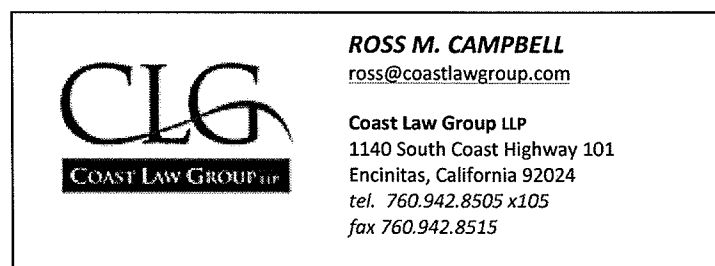
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**Sent:** Wednesday, September 23, 2009 5:07 PM  
**To:** Kennedy, Colleen  
**Cc:** Leo J. Presiado; Stewart Foreman; Patrick McClellan; Seyamack Kouretchian  
**Subject:** eBay v. Digital Point Solutions, Inc. et al.

Colleen:

Digital Point Solutions, Inc.'s supplemental discovery responses are attached and have also been sent via mail.

Ross



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10/23/2009