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

18 EBAY INC.,

19 Plaintiff,

20 v.

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

28 Defendants.

Case No. C 08-04052 JF PVT

**DECLARATION OF SHARON M.  
 BUNZEL IN SUPPORT OF  
 PLAINTIFF EBAY INC.'S  
 CONSOLIDATED OPPOSITION TO  
 DEFENDANTS' MOTIONS TO  
 STAY CIVIL ACTION PENDING  
 RESOLUTION OF CRIMINAL  
 PROCEEDINGS**

Hearing Date: November 20, 2009  
 Time: 9:00 a.m.  
 Courtroom: 3  
 Judge: Hon. Jeremy Fogel

1 I, Sharon M. Bunzel, declare as follows:

2 1. I am a member of the Bar of the State of California and a partner in the law  
3 firm of O'Melveny & Myers LLP, counsel for eBay Inc. in this matter. I submit this  
4 declaration in support of eBay's Consolidated Opposition to Defendants' Motions to Stay  
5 Civil Action Pending Resolution of Criminal Proceedings. I have personal knowledge of  
6 the facts set forth in this declaration and, if called to testify as a witness, could and would  
7 do so under oath.

8 2. From 1999 to 2005, I served as an Assistant United States Attorney  
9 ("AUSA") in the Criminal Division of the Northern District of California. As an AUSA, I  
10 was responsible for overseeing numerous complex criminal investigations and  
11 prosecutions. I am readily familiar with all aspects of the federal criminal charging and  
12 prosecution process, including grand jury investigations and indictments.

13 3. The United States Attorney's Manual ("USAM") contains various  
14 guidelines regarding the indictment process. Excerpts from the USAM relevant to the  
15 issues discussed in eBay's Opposition to Defendants' Stay Motions are attached hereto as  
16 **Exhibit A.**

17 4. Pursuant to the USAM, the decision to seek an indictment is within the  
18 discretion of the U.S. Attorney's Office, and an indictment should only be sought if the  
19 AUSA believes that the admissible evidence will support a conviction, which requires  
20 proof beyond a reasonable doubt (even though the grand jury itself need only find  
21 probable cause in order to return an indictment). An AUSA may decline to pursue a  
22 viable prosecution for several reasons, including if, in the AUSA's judgment, "[n]o  
23 substantial federal interest will be served by the prosecution," or "[t]here exists an  
24 adequate non-criminal alternative to prosecution." Based on my experience as an AUSA  
25 in the Northern District of California, I know that as a matter of practice in this District,  
26 after an AUSA determines that criminal charges are warranted, various levels of  
27 supervisory approval are required before an indictment can be presented to the grand jury,  
28 including approval by the AUSA's Section Chief and either the Chief of the Criminal

1 Division (in the case of a San Francisco indictment) or the Chief of the Branch Office (for  
2 an indictment in either San Jose or Oakland). Regardless of the U.S. Attorney's Office's  
3 position with respect to whether an indictment should be sought, and regardless of  
4 whether an indictment is approved as a matter of form by all appropriate supervisors, the  
5 ultimate decision to return an indictment lies with the grand jury, not with any prosecutor.

6 5. Many factors influence how an AUSA ultimately charges a given case or  
7 crafts a particular indictment. For example, pre-indictment cooperation by individuals  
8 who were previously considered subjects or targets of the investigation may lead an  
9 AUSA to decline to seek charges against such individuals.

10 6. The United States Attorney's Office is empowered to decline prosecution of  
11 any matter under investigation, except in certain limited situations related to national  
12 security, bankruptcy, and Selective Service System offenses. Upon such declinations, the  
13 U.S. Attorney's Office is only required by the USAM to make a notation in its files.  
14 Based on my experience, notice of a declined prosecution is rarely given to subjects and  
15 targets of an investigation.

16 7. I have reviewed the docket and documents filed in the matter of *Commission*  
17 *Junction, Inc. v. Thunderwood Holdings, Inc., et al.*, No. 30-2008 00101025 (Orange  
18 County, California Superior Court). Based on that review, I am informed of and believe  
19 the following: In August 2007, Commission Junction, Inc. ("CJ") filed an action (the "CJ  
20 Action") in California state court against several of the Defendants in this matter:  
21 Kessler's Flying Circus ("KFC"), Brian Dunning, Thunderwood Holdings, Inc. ("THI")  
22 and Todd Dunning (collectively, the "CJ Defendants"). CJ's lawsuit asserted breach of  
23 contract and related claims seeking to recoup commissions CJ had paid to the CJ  
24 Defendants for the month of May 2007. In September and October 2008, the CJ  
25 Defendants moved for a stay of discovery in the state court proceedings based on the same  
26 criminal investigation described in the motions to stay currently before this Court.

27 8. Attached hereto as **Exhibit B** is a true and correct copy of CJ Defendants  
28 Brian Dunning and THI's motion to stay the CJ Action, filed with the Superior Court of

1 California, County of Orange on September 29, 2008.

2 9. Attached hereto as **Exhibit C** is a true and correct copy of the Declaration of  
3 Brian Dunning in support of CJ Defendants Brian Dunning and THI's motion to stay the  
4 CJ Action, filed with the Superior Court of California, County of Orange on September  
5 29, 2008.

6 10. Attached hereto as **Exhibit D** is a true and correct copy of the Declaration of  
7 William Kopeny in support of CJ Defendants Brian Dunning and THI's motion to stay the  
8 CJ Action, filed with the Superior Court of California, County of Orange on September  
9 29, 2008.

10 11. Attached hereto as **Exhibit E** is a true and correct copy of the official court  
11 reporter's transcript of the hearing on CJ Defendants Brian Dunning and THI's motion to  
12 stay the CJ Action, held on October 29, 2008 in Superior Court of California, County of  
13 Orange.

14 12. Attached hereto as **Exhibit F** is a true and correct copy of CJ Defendants  
15 Todd Dunning and KFC's motion to stay the CJ Action, filed with the Superior Court of  
16 California, County of Orange on October 20, 2008.

17 13. Attached hereto as **Exhibit G** is a true and correct copy of the Declaration  
18 of Todd Dunning in support of CJ Defendants Todd Dunning and KFC's motion to stay  
19 the CJ Action, filed with the Superior Court of California, County of Orange on October  
20 20, 2008.

21 14. Attached hereto as **Exhibit H** is a true and correct copy of the Declaration  
22 of Robert J. Breakstone in support of CJ Defendants Todd Dunning and KFC's motion to  
23 stay the CJ Action, filed with the Superior Court of California, County of Orange on  
24 October 6, 2008.

25 15. Attached hereto as **Exhibit I** is a true and correct copy of the official court  
26 reporter's transcript of the hearing on CJ Defendants Todd Dunning and KFC's motion to  
27 stay the CJ Action, held on November 19, 2008 in Superior Court of California, County of  
28 Orange.

