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filed by LUCEY

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FILED
 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF ORANGE
 CENTRAL JUSTICE CENTER
SEP 29 2008
 ALAN CARLSON, Clerk of the Court
R. Lucey
 BY R. LUCEY

BY FAX

7 Attorneys for Defendants BRIAN DUNNING and
 8 THUNDERWOOD HOLDINGS, INC.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 11 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

12	COMMISSION JUNCTION, INC.,	)	CASE NO. ⁰⁸ 00101025
13	Plaintiff,	)	[ASSIGNED FOR ALL PURPOSES TO
14	vs.	)	THE HONORABLE RANDELL L.
15	THUNDERWOOD HOLDINGS, INC. dba	)	WILKINSON, DEPT. C25]
16	KESSLER'S FLYING CIRCUS; TODD	)	NOTICE OF MOTION AND MOTION TO
17	DUNNING; BRIAN DUNNING; and	)	STAY DISCOVERY PENDING
18	DOES 1 through 50, inclusive,	)	CONCLUSION OF CRIMINAL
19	Defendants.	)	PROCEEDINGS; MEMORANDUM OF
		)	POINTS AND AUTHORITIES;
		)	DECLARATIONS OF WILLIAM J.
)	KOPENY AND BRIAN DUNNING IN
)	SUPPORT

20 DATE: October 29, 2008
 21 TIME: 1:30 p.m.
 22 DEPT.: C25

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EXHIBIT "1"

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Attorneys for Plaintiff
Commission Junction, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE, CENTRAL BRANCH

COMMISSION JUNCTION, INC.,
Plaintiff,

v.

THUNDERWOOD HOLDINGS, INC. dba
KESSLER'S FLYING CIRCUS; TODD
DUNNING; BRIAN DUNNING; and
DOES 1 through 50, inclusive,
Defendants.

CASE NO.: 30-2008 00101025
ASSIGNED FOR ALL PURPOSES TO:
JUDGE RANDELL L. WILKINSON
DEPARTMENT C25

SECOND AMENDED COMPLAINT
FOR DAMAGES

- 1. Breach of Contract
- 2. Open Book Account
- 3. Account Stated
- 4. Reasonable Value
- 5. Conversion
- 6. Unfair Competition
- 7. Declaratory Relief

[Unlimited]

Plaintiff Commission Junction, Inc. alleges as follows:

1. At all times relevant herein, plaintiff Commission Junction, Inc. ("CJT") was a corporation organized and existing under the laws of the State of Delaware and wholly

1 owned by ValueClick, Inc., a corporation organized and existing under the laws of the
2 State of California with its principal place of business in the County Los Angeles, State of
3 California.

4 2. CJI is informed and believes that at all times relevant herein defendant
5 Kessler's Flying Circus was a California general partnership doing business in the State of
6 California and the Counties of Los Angeles and Orange.

7 3. CJI is informed and believes that at all times relevant herein defendant
8 Thunderwood Holdings, Inc. was a California corporation doing business at times as
9 "Kessler's Flying Circus", in the State of California and the Counties of Los Angeles and
10 Orange. Thunderwood Holdings, Inc. was at all times relevant a general partner of
11 Kessler's Flying Circus.

12 4. CJI is informed and believes that at all times relevant herein defendant Todd
13 Dunning is an individual doing business in the State of California and the Counties of
14 Los Angeles and Orange. Todd Dunning was at all times relevant a general partner of
15 Kessler's Flying Circus.

16 5. CJI is informed and believes that at all times relevant herein defendant Brian
17 Dunning is an individual doing business in the State of California and the Counties of
18 Los Angeles and Orange. Defendants Kessler's Flying Circus, Thunderwood Holdings,
19 Inc., Todd Dunning, and Brian Dunning will be referred to hereinafter collectively as
20 "KESSLER".

21 6. At all times herein mentioned CJI's headquarters and principal place of
22 business was in Westlake Village, California. The indebtedness described herein was
23 incurred and payable within the County of Los Angeles, State of California and in the
24 above judicial district.

25 7. Said obligation is commercial in nature and not based on a retail installment,
26 sales contract, or a conditional sales contract and is not to subject the provisions of
27 California Civil Code §1812.10 and/or §2984.4.

28 ///

1 the parties' Agreement is attached hereto as Exhibit "A" and incorporated herein by this
2 reference. While Exhibit "A" is the Agreement defendants KESSLER, DOES 1-20, and
3 each of them, entered into the with CJ, it does not show the parties' signatures inasmuch
4 as defendants KESSLER, DOES 1-20, and each of them, chose to enter into the Agreement
5 via the Internet and the defendants have a copy of the Agreement printed that day.

6 13. The Agreement includes the following provisions:

7 [KESSLER] "may not place Links to an Advertiser's Web Site or Web Site
8 content in third party newsgroups, message boards, blogs, unsolicited email
9 and other types of spam, link farms, counters, chatrooms, or guestbooks."

10 Agreement at Section 1(d)(i);

11 [KESSLER] "shall not cause any Transactions to be made that are not in
12 good faith, including, but not limited to, using any device, program, robot,
13 iframes, or hidden frames." Agreement at Section 1(d)(ii);

14 "None of Your [KESSLER's] promotional activities may infringe an
15 Advertiser's proprietary rights CJ's [CJ's] proprietary rights, or a third
16 party's proprietary rights. Agreement at Section 1(d)(iii);

17 "You [KESSLER] represent and warrant that all promotional means used by
18 You [KESSLER] will not contain objectionable content (including but not
19 limited to content that is misleading, libelous, defamatory, obscene, violent,
20 bigoted, hate-oriented, illegal, and/or promoting illegal goods, services or
21 activities), and that You [KESSLER] will not mislead others. You

22 [KESSLER] agree to: (i) use ethical and legal business practices, (ii) comply
23 with the Advertisers' Program terms and this Agreement, (iii) maintain a
24 privacy policy on Your Web site and for any non-Web site based promotional
25 method made available to Visitors, and (iv) designate Your [KESSLER]
26 Publisher Account as "special" if You [KESSLER] promote an Advertiser(s)
27 by any means other than displaying a Link to the Advertiser on Your
28 [KESSLER] Web site. CJ [CJ] must approve all of Your [KESSLER]

1 promotional activities and may deem Your [KESSLER] promotional
2 activities inappropriate and a material breach of this Agreement in CJ's
3 [CJI's] sole discretion." Agreement at Section 2(b); and
4 "You [KESSLER] represent and warrant that: (i) You [KESSLER] have all
5 appropriate authority to operate, and to any and all content on, Your
6 [KESSLER] Web site(s); (ii) You [KESSLER] have all appropriate authority
7 in any promotional method you may choose to use." Agreement at
8 Section 7(c)(ii).

9 14. CJI has performed all conditions, covenants, and promises required on its
10 part to be performed in accordance with the terms and conditions of said Agreement.

11 15. CJI is informed and believes, and on that basis alleges, that beginning in
12 April of 2007 and continuing thereafter, defendants KESSLER, DOES 1-20, and each of
13 them, breached the Agreement by, *inter alia*, the following: KESSLER was providing
14 third parties with the ability to place widgets on Websites that KESSLER did not
15 own/operate without permission from the website owners to do so; KESSLER's
16 WhoLinked provided a widget used by bloggers and webmasters to display a list of
17 high-ranking sites linking to their site; KESSLER's MySpaceMaps provided widgets users
18 placed on social networking profiles, including MySpace; and KESSLER did not comply
19 with the blog sites' terms and, importantly, the following MySpace terms, which prohibit
20 commercial activity without consent:

21 "Non-commercial Use by Members. The MySpace Services are for the
22 personal use of Members only and may not be used in connection with any
23 commercial endeavors except those that are specifically endorsed or
24 approved by MySpace.com. Illegal and/or unauthorized use of the MySpace
25 Services, including collecting usernames and/or email addresses of Members
26 by electronic or other means for the purpose of sending unsolicited email or
27 unauthorized framing of or linking to the MySpace Website is prohibited.
28 Commercial advertisements, affiliate links, and other forms of solicitation

1 may be removed from Member profiles without notice and may result in
2 termination of Membership privileges. Appropriate legal action will be taken
3 for any illegal or unauthorized use of the MySpace Services.”

4 “Content/Activity Prohibited. The following is a partial list of the kind of
5 Content that is illegal or prohibited to post on or through the MySpace
6 Services. MySpace.com reserves the right to investigate and take appropriate
7 legal action against anyone who, in MySpace.com’s sole discretion, violates
8 this provision, including without limitation, removing the offending
9 communication from the MySpace Services and terminating the Membership
10 of such violators. Prohibited Content includes, but is not limited to Content
11 that, in the sole discretion of MySpace.com: ... involves commercial
12 activities and/or sales without our prior written consent such as contests,
13 sweepstakes, barter, advertising, or pyramid schemes.”

14 16. CJI is informed and believes, and on that basis alleges, that beginning in
15 April of 2007 and continuing thereafter, defendants KESSLER, DOES 1-20, and each of
16 them, further breached the Agreement by, *inter alia*, inflating traffic, forcing cookies,
17 infringing on other’s proprietary rights, providing links and widgets to wrongfully promote
18 and/or force traffic to ebay.com, and promoting objectionable content as that is defined in
19 the Agreement. In addition, such actions by KESSLER, DOES 1-20, and each of them,
20 were fraudulent, unfair, deceptive, and misleading advertising and business practices which
21 are also breaches of the Agreement.

22 17. Among other damaging results, these actions by defendants KESSLER,
23 DOES 1-20, and each of them, resulted in alleged violations of CJI’s agreements with
24 eBay, Inc. which further resulted in the amount of \$565,517.84 not being paid by eBay,
25 Inc. to CJI despite CJI paying that amount to defendants KESSLER, DOES 1-20, and each
26 of them.

27 18. Pursuant to Section 3 of the Agreement, CJI has a right to a return from
28 defendants KESSLER, DOES 1-20, and each of them of the wrongful payment made to

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1 defendants KESSLER, DOES 1-20, and each of them.

2 19. Since June of 2007, CJI has requested that defendants KESSLER,
3 DOES 1-20, and each of them, perform their obligation, under the Agreement, by returning
4 the inadvertent payment of \$565,517.84 made to defendants KESSLER, DOES 1-20, and
5 each of them, which payment was not due to defendants based on their conduct as set forth
6 herein above. True and correct copies of certain, but not all, requests for return of the
7 \$565,517.84 are attached hereto collectively as Exhibit "B" and incorporated herein by this
8 reference.

9 20. Defendants KESSLER, DOES 1-20, and each of them, further breached the
10 Agreement by failing and refusing to pay the sum owed as set forth herein above.

11 21. In addition, defendants KESSLER, DOES 1-20, and each of them, breached
12 the implied covenant of good faith and fair dealing by, *inter alia*, the conduct set forth
13 herein above, failing and refusing to pay the sum owed, and failing to respond to repeated
14 requests for payment.

15 22. No part of that sum has been paid, and is now due, owing and unpaid from
16 defendants, and each of them, to CJI, the sum of \$565,517.84 as of June 15, 2007, and
17 interest thereon.

18 23. As a further result of the breach by defendants KESSLER, DOES 1-20, and
19 each of them, CJI has retained counsel and has incurred, and will incur, attorneys' fees and
20 expenses in an amount according to proof, which it is entitled to recover pursuant to the
21 Agreement.

22
23 SECOND CAUSE OF ACTION

24 (For Open Book Account Against All Defendants)

25 24. CJI incorporates by reference the allegations of paragraphs 1 through 23
26 above as though fully set forth herein.

27 25. CJI is informed and believes, and thereon alleges, that within the last year,
28 defendants KESSLER, DOES 1-20, and each of them, became indebted to CJI on an open

1 book account for a balance due in the sum of \$565,517.84 as of June 15, 2007 for goods
2 and services furnished and delivered to defendants, and each of them, at their request.

3 26. No part of this sum has been paid, although demand therefor has been made,
4 and the sum of \$565,517.84 is now due and owing from said defendants, and each of them,
5 to CJI.

6
7 THIRD CAUSE OF ACTION

8 (For Account Stated Against All Defendants)

9 27. CJI incorporates by reference the allegations of paragraphs 1 through 26
10 above as though fully set forth herein.

11 28. CJI is informed and believes, and on that basis alleges, that beginning in June
12 of 2007 and continuing thereafter, there was an account stated between CJI and defendants,
13 and each of them, in which the sum of \$565,517.84 was agreed on as the balance due CJI.

14 29. No part of such sum has been paid, although demand therefor has been made,
15 and the sum of \$565,517.84 is now due and owing from said defendants, and each of them,
16 to CJI.

17
18 FOURTH CAUSE OF ACTION

19 (For Reasonable Value Against All Defendants)

20 30. CJI incorporates by reference the allegations of paragraphs 1 through 29
21 above as though fully set forth herein.

22 31. CJI is informed and believes, and on that basis alleges, that beginning in
23 June 2007 and continuing thereafter defendants, and each of them, became indebted to CJI
24 in the reasonable sum of \$565,517.84 for goods and services furnished to defendants, and
25 each of them, at their request, and that defendants promised to pay the reasonable value for
26 goods and services furnished.

27 32. No part of such sum has been paid, although demand therefor has been made,
28 and the sum of \$565,517.84 is now due and owing from said defendants, and each of them,

1 to CJI.

2
3 FIFTH CAUSE OF ACTION

4 (Conversion against All Defendants)

5 33. CJI incorporates by this reference above paragraphs 1 through 32, inclusive,
6 as if fully set forth herein.

7 34. At all times relevant, CJI had a right of ownership of its \$565,517.84.
8 However, based on the wrongful conduct by and activities of defendants KESSLER, DOES
9 1-50, and each of them, as more fully described in Paragraphs 12-18 herein above, that sum
10 was wrongfully delivered to defendants KESSLER, DOES 1-50, and each of them.

11 35. In June of 2007, CJI sent a payment of \$565,517.84 to defendants
12 KESSLER, DOES 1-50, and each of them. As set forth herein above, defendants
13 KESSLER, DOES 1-50, and each of them, were not owed the described sum of
14 \$565,517.84 or at all.

15 36. On numerous occasions, CJI has requested the return of the \$565,517.84
16 from defendants KESSLER, DOES 1-50, and each of them, however, said defendants have
17 refused to return CJI's property and have converted it as their own. The actions of
18 defendants KESSLER, DOES 1-50, and each of them, wrongfully and intentionally
19 interfered with CJI's right of possession of the \$565,517.84.

20 37. Because defendants KESSLER, DOES 1-50, and each of them, have
21 wrongfully exercised possession of CJI's property, there is now due, owing and unpaid
22 from defendants, and each of them, to CJI, the sum of \$565,517.84 as of June 15, 2007,
23 and interest thereon.

24
25 SIXTH CAUSE OF ACTION

26 (Unfair Competition against All Defendants)

27 38. CJI incorporates by this reference above paragraphs 1 through 37, inclusive,
28 as if fully set forth herein.

1 and believes and thereon alleges that defendants KESSLER and DOES 1-50, inclusive,
2 contend otherwise.

3 46. It would be fair, just, and appropriate for this Court to determine the rights
4 and obligations of the parties as to this matter, and declaratory relief is necessary and
5 appropriate at this time so that CJI may ascertain its rights and duties and have ascertained
6 defendants' obligations.

7 47. CJI therefore seeks a declaratory judgment providing that defendants
8 KESSLER and DOES 1-50, inclusive, are obligated to provide CJI with the sum of
9 \$565,517.84 as a result of the inadvertent payment and the defendants' conduct as
10 described herein above.

11
12 WHEREFORE, CJI prays for judgment in its favor and against defendants
13 KESSLER and DOES 1-50, and each of them, as follows on the causes of action:

14 ON THE FIRST CAUSE OF ACTION

15 1. For general and specific damages according to proof, including attorneys'
16 fees, costs, expenses, and interest thereon;

17 ON THE SECOND CAUSE OF ACTION

18 2. For general and specific damages according to proof, including attorneys'
19 fees, costs, expenses, and interest thereon;

20 ON THE THIRD CAUSE OF ACTION

21 3. For general and specific damages according to proof, including attorneys'
22 fees, costs, expenses, and interest thereon;

23 ON THE FOURTH CAUSE OF ACTION

24 4. For general and specific damages according to proof, including attorneys'
25 fees, costs, expenses, and interest thereon;

26 ON THE FIFTH CAUSE OF ACTION

27 5. For general and specific damages according to proof, including attorneys'
28 fees, costs, expenses, and interest thereon;

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ON THE SIXTH CAUSE OF ACTION

6. For general and specific damages according to proof, including attorneys' fees, costs, expenses, and interest thereon;

ON THE SEVENTH CAUSE OF ACTION

7. For a judicial declaration that defendants KESSLER and DOES 1-50, inclusive, are obligated to provide CJI with the sum of \$565,517.84 as a result of the inadvertent payment and the defendants' conduct as described herein above.

ON ALL CAUSES OF ACTION

8. For costs of suit incurred herein; and
9. For such other and further relief, legal and/or equitable, as the Court may deem just and proper.

Dated: May 15, 2008

ERNSTER LAW OFFICES, P.C.

By: Phil J. Montoya, Jr.
Phil J. Montoya, Jr.
Attorneys for Plaintiff
Commission Junction, Inc.

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FD-597 (Rev 8-11-94)

Page 1 of 3

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

File # 288A-SF-141681

On (date) 6/18/07

- Received From
- Returned To
- Released To
- Seized

(Name) Brian Andrew Dunning

(Street Address) 15 High Bluff

(City) Laguna Niguel, CA 92677

Description of Item(s): 1) Cash check from "Progressive Solutions" for \$6000.

2) Yellow note pad with notes

3) State of CA Certificate of Title (2000 Jeep 1T8GA69149L166078)

4) Wells Fargo bank documents

5) Washington Mutual bank documents

6) white note pads w/ notes

7) Thunderwood Holdings Docs

8) Senex Docs

9) Pacific Life docs

10) IRS/ Orange Co. Clerk-Recorder Docs

11) Fidelity Docs

12) Merrill Lynch Docs

13) Cingular Cell docs

14) Misc. Docs

15) Tax returns 2003, 2004

Room A

Received By: [Signature]
(Signature)

Received From: [Signature]
(Signature)

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0000 [TX/RX NO 7614] 32

FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

288A-SF-141681

On (date) 6/18/07

- item(s) listed below were:
- Received From
- Returned To
- Released To
- Seized

(Name) Brian Andrew Dunning
 (Street Address) 15 High Bluff
 (City) Laguna Niguel, CA 92677

- Description of Item(s): 1) Toshiba laptop S/N 62064761P
16) Apple laptop (Macbook Pro) S/N N186A73ZBJ3 N/Keyboard
17) (3) Acomdata hard drives S/N 65182161, S/N 65204025, S/N (No serial #)
18) Apple mini servers (4) S/N YM6332ZQWOB, S/N YM6370SKWKN, S/N YM64505DWKN, S/N YM6391LHWOB, S/N YM6251MJU36
19) Toshiba Disk Drive S/N 16G001925
20) Gateway Laptop S/N B059847P134
21) Cingular Palm S/N PRCU01Q7H2AF
22) Garmin 59507833
23) Sprint Treo S/N PTPC02V6H1KG
24) Dynex USB 2.0
25) Apple rechargeable battery S/N KE624496TYAB, misc. cables

Room A

Received By: [Signature] Received From: [Signature]
 (Signature) (Signature)

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FD-597 (Rev 8-11-94)

Page 3 of 3

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

File # 288A-SF-141681

On (date) 6/12/09

- Item(s) listed below were:
- Received From
 - Returned To
 - Released To
 - Seized

(Name) Brian Andrew Dunning
 (Street Address) 15 High Bluff
 (City) Laguna Niguel, CA 92653

- Description of Item(s):
- 26) Apple Laptop s/n W840805ANR, cable (Room C)
 - 27) Apple desk top s/n W93201UMNHX (Room F); Keyboard
 - 28) Apple laptop s/n Q704669WJYY (Room D)
 - 29) Samsung cell phone s/n RVEAC63868X, charger (Room D)
 - 30) Samsung cell phone 24114248539, charger (Room D)
 - 31) Misc docs, 4 CDs (outside trash can)
 - 32) IPOD 30GB s/n 8K6404BRV9R (Room M)
 - 33) Apple IMAC s/n W86494QVVUV (Room J)
 - 34) Ipad 4GB YM6201NCSZC (Room J)
 - 35) Ipad 10GB s/n U23170C2NRH (Room J)

Received By: [Signature]
(Signature)

Received From: [Signature]
(Signature)