

EXHIBIT H

1 ROGERS JOSEPH O'DONNELL
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7 Attorneys for Defendant
8 TODD DUNNING

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

OCT 06 2008

ALAN CARLSON, Clerk of the Court
BY S. HERRERA-WILSON

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ORANGE CENTRAL JUSTICE CENTER

12 COMMISSION JUNCTION, INC.,

13 Plaintiff,

14 vs.

15 THUNDERWOOD HOLDINGS, INC., dba
16 KESSLER'S FLYING CIRCUS; TODD
17 DUNNING; BRIAN DUNNING and DOES
18 1 through 50, inclusive,

19 Defendants.

2008-
Case No. 00101025

[ASSIGNED FOR ALL PURPOSES TO
THE HONORABLE RANDELL L.
WILKINSON, DEPT. C25]

**DECLARATION OF ROBERT J.
BREAKSTONE IN SUPPORT OF
DEFENDANTS' MOTION TO STAY
DISCOVERY PENDING CONCLUSION
OF CRIMINAL PROCEEDINGS**

Date: October 29, 2008
Time: 1:30 p.m.
Dept.: C25

BY FAX

Trial Date: March 9, 2009

20 I, Robert J. Breakstone, declare:

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

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

28 3. In connection with my representation of Todd Dunning, I contacted

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272464.1(00120754-2)

1 Assistant United States Attorney Kyle F. Waldinger who is in charge of the grand jury
2 investigation. Mr. Waldinger confirmed that there was a grand jury investigation involving
3 Kessler's Flying Circus and Todd Dunning. Mr. Waldinger further confirmed that in
4 connection with the investigation, the FBI had conducted several searches pursuant to warrant
5 and that the FBI had interviewed Todd Dunning. Mr. Waldinger further indicated that he was
6 aware that Commission Junction, Inc. had filed a civil action against Todd Dunning and
7 Kessler's Flying Circus, among others. I indicated to AUSA Waldinger that no further
8 contacts of Todd Dunning should be undertaken by Department of Justice personnel since
9 Todd Dunning was represented by counsel.

10 4. In a subsequent telephone conference with Mr. Waldinger I asked
11 whether it would be possible for Todd Dunning and Kessler's Flying Circus to obtain a copy
12 of the computer hard drives and other records seized by the FBI from Brian Dunning's home.
13 I explained that Todd Dunning and Kessler's Flying Circus needed those records in order to
14 defend the case brought by Commission Junction, Inc. Mr. Waldinger said that he would
15 think about the request, but he told me in a follow up telephone conversation that he would
16 not comply with the request. He informed me that Brian Dunning's criminal counsel had
17 made a similar request.

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

22 6. On September 16, 2008, I contacted AUSA Waldinger who stated that
23 attorney Sharon M. Bunzel (of O'Melveny & Myers) representing eBay in the aforementioned
24 complaint (§ 5 above) had sent AUSA Waldinger a copy of the complaint and spoke to him
25 about the complaint. AUSA Waldinger told me that Todd Dunning was a subject of the
26 federal criminal investigation and that the FBI would be working aggressively to complete its
27 investigation.
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272464.1(00120754-2)

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

6 8. I have reviewed the complaint in this matter and based on my
7 understanding of the allegations and issues in this civil matter, Mr. Dunning plans to assert
8 his Fifth Amendment privilege against self-incrimination in connection with an inquiry by the
9 Federal Government into the identical facts alleged in this case, and clearly is entitled to its
10 protection in the context of this case. In my opinion, any court order compelling Mr.
11 Dunning to respond to the allegations of the complaint, and/or to respond to discovery
12 propounded to him would constitute "compelled self-incrimination" within the meaning of
13 the Fifth Amendment and California's constitutional privilege against self-incrimination.
14 (*See, People v. Lucas*, (1995) 12 Cal. 4th at 415, 453.)

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

17 Executed this 6th day of October, 2008, at San Francisco, California.

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20 ROBERT J. BREAKSTONE
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1 **CERTIFICATE OF SERVICE**

2 I am employed in the City and County of San Francisco, State of California. I am over
3 the age of eighteen and not a party to the within action; my business address is 150 Spear
4 Street, Suite 1800, San Francisco, California 94105.

5 On October 6, 2008, I served the foregoing documents described as follows:

6 **NOTICE OF MOTION AND MOTION TO STAY DISCOVERY AGAINST**
7 **DEFENDANTS TODD DUNNING AND KESSLER'S FLYING CIRCUS PENDING**
8 **CONCLUSION OF CRIMINAL PROCEEDINGS; MEMORANDUM OF POINTS AND**
9 **AUTHORITIES; DECLARATIONS OF ROBERT BREAKSTONE, STEWART**
10 **FOREMAN AND TODD DUNNING IN SUPPORT**

11 by placing a true and correct copy thereof enclosed in a sealed envelope addressed to the
12 party(ies) of record whose name(s) and address(es) appear below:

13 **SEE ATTACHED SERVICE LIST**

14 X [BY MAIL - CCP § 1013a] I caused such sealed envelope with postage thereon fully
15 prepaid to be placed in the United States mail at San Francisco, California, for collection and
16 mailing to the office of addressee(s) on the date shown herein following ordinary business
17 practice.

18 [HAND-DELIVERY/Personal/Messenger - CCP § 1011] I caused such envelope to be
19 hand-delivered by a courier, who personally delivered such envelope to the office of the
20 addressee(s) on the date herein.

21 [BY FACSIMILE - CCP § 1013(e)] - I caused such document(s) to be transmitted via
22 facsimile electronic equipment transmission on the party(ies), whose name(s), address(es)
23 and fax number(s) are listed above, on the date stated herein and at the time set forth on the
24 attached transmission reported indicating that the facsimile transmission was complete and
25 without error.

26 [BY FEDEX (Overnight Delivery) - CCP § 1013(e)] I caused such envelope to be
27 delivered to the Federal Express Office in San Francisco, California, with whom we have a
28 direct billing account, to be delivered on the next business day.

[BY E-MAIL or ELECTRONIC TRANSMISSION] . Based on a court order or agreement of
the parties to accept service by e-mail or electronic transmission, I caused the documents to
be sent to the persons at the email addresses listed above. I did not receive within a
reasonable time after the transmission, any electronic message or other indication that the
transmission was unsuccessful.

X [STATE] I declare under penalty of perjury under the laws of the State of California that
the above is true and correct.

Executed on October 6, 2008, at San Francisco, California


Joyce E. Johnson

Attached Service List

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