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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

**EBAY INC.'S REPLY IN SUPPORT
 OF ITS MOTION TO COMPEL
 RESPONSES TO REQUESTS FOR
 PRODUCTION FROM
 DEFENDANTS TODD DUNNING
 AND DUNNING ENTERPRISE, INC.**

Hearing Date: November 13, 2009
 Time: 10:00 a.m.
 Courtroom: 5
 Judge: Hon. Patricia V. Trumbull

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1 **I. INTRODUCTION**

2 Defendants Dunning Enterprise, Inc. (“DEI”) and Todd Dunning (collectively the
3 “TD Defendants”) claim that they have “taken the steps required of them” to obtain
4 documents held by the FBI and Rackspace US, Inc. (“Rackspace”) and that they have
5 “ma[de] clear” to eBay that they themselves do not possess any documents responsive to
6 eBay’s requests. In fact, their efforts have fallen short of what is required by federal and
7 California law. The TD Defendants have refused to confirm conclusively that they have
8 no responsive documents in their possession, custody or control. They have also refused
9 to confirm that they have never provided any documents to the FBI at any time. And they
10 have not taken adequate steps to try to obtain documents—to which they are legally
11 entitled—that are within the control of KFC and Rackspace. Finally, they have indicated
12 that they do not intend to promptly produce responsive documents if and when they
13 receive them from third parties. Instead, the TD Defendants have rebuffed eBay’s efforts
14 to resolve these discovery disputes, apparently as part of a general effort to put off all
15 meaningful discovery until their stay motion is heard.

16 The TD Defendants make three basic arguments for why their failures should be
17 excused: 1) eBay has the burden to show that responsive documents exist and has failed to
18 meet that burden; 2) any further attempts by them to obtain documents from third parties
19 would be futile; and 3) any production would first require a preliminary review, and
20 potentially an *in camera* review by this Court, to determine whether any documents
21 produced would violate Todd Dunning’s Fifth Amendment rights against self-
22 incrimination. None of these arguments has merit. There is no requirement that eBay
23 establish that responsive documents exist prior to demanding that the TD Defendants’
24 make efforts to find and produce any documents that do exist. The TD Defendants are
25 required to produce documents that are in their possession, custody or control and they are
26 required to make efforts to locate and secure such documents—regardless of whether, in
27 their opinion, such efforts would be futile. And there is no Fifth Amendment protection
28 that would apply to documents already in the possession of the government or documents

1 produced by a third party, and thus no need for any *in camera* inspection. eBay's motion
2 to compel should be granted.

3 **II. ARGUMENT**

4 **A. The TD Defendants Must Identify And Produce Responsive Documents**
5 **In Their Possession, Custody Or Control**

6 **1. eBay Has No Burden To Establish That Responsive Documents**
7 **Exist**

8 The TD Defendants do not contest the relevance of eBay's requests for production;
9 instead, they attempt to improperly place the burden on eBay to identify prospectively
10 responsive documents within the TD Defendants' possession, custody or control. But
11 eBay is not required to establish that responsive documents exist to obtain an order
12 compelling defendants to produce all responsive documents. The burden is on the
13 responding party to justify its objections or failure to provide complete responses to
14 requests for production. *See* Fed. R. Civ. P. 34(b)(2)(B) (requiring parties answering
15 requests for production of documents to either state intention to respond as requested, or
16 state an objection to the request including the reasons). There is no requirement—and the
17 TD Defendants do not cite to one—that eBay must first establish that the sought
18 documents exist. Nor would such a requirement make any sense in light of the fact that it
19 is the responding party that has direct access to, and knowledge of, the materials at issue.

20 **2. Responsive Documents Do Exist**

21 Moreover, it is clear that responsive documents do in fact exist, at least in the
22 possession of the FBI and/or Rackspace. With regard to the FBI, any documents that have
23 been provided to or seized by the government are clearly responsive to eBay's document
24 requests. The TD Defendants have repeatedly asserted in their discovery responses that
25 the FBI has seized materials relevant to this action. *See, e.g.*, Omnibus Declaration of
26 Sharon M. Bunzel in Support of eBay's Replies ("Bunzel Decl."), Ex. 8, at 2, 13. The TD
27 Defendants' currently-pending motion to stay states that "this action springs from the
28 same nucleus of facts" as the FBI investigation, and Todd Dunning states that "all
business records and other documents of KFC were seized by the FBI." TD Defendants'

1 Motion to Stay at 11; 10/15/09 T. Dunning Decl. at 3. Insofar as the TD Defendants claim
2 that KFC participated in eBay's Affiliate Marketing Program ("AMP"), KFC's documents
3 would surely be responsive to, for example, eBay's request for all documents related to
4 defendants' participation in eBay's AMP. *See* Declaration of Colleen M. Kennedy in
5 Support of eBay's Motion to Compel, previously filed on September 22, 2009 ("9/22/09
6 Kennedy Decl."), Ex. 1, at 12. Given all these facts, it cannot be contested that the
7 documents seized by or provided to the FBI would likely be responsive to eBay's requests
8 for production.

9 It is similarly likely that responsive documents exist at Rackspace. Rackspace has
10 stated that the FBI seized documents from them in connection with the criminal
11 investigation of Defendants. 9/22/09 Kennedy Decl., ¶ 9. In their opposition to eBay's
12 motion to compel, Defendants Brian Dunning, Thunderwood Holdings, Inc.,
13 BrianDunning.com and Kessler's Flying Circus do not dispute that responsive documents
14 exist at Rackspace, but instead have refused to produce such documents because such
15 production would allegedly run afoul of Brian Dunning's Fifth Amendment rights. *See*
16 Opposition of Defendants Brian Dunning, THI, BrianDunning.com and KFC to eBay's
17 Motion to Compel at 18-19. As with the documents in the FBI's possession, at least some
18 of the documents possessed by Rackspace are therefore likely to be responsive to eBay's
19 requests.

20 **3. The TD Defendants Have Not Shown That These Responsive**
21 **Documents Are Not In Their Possession, Custody Or Control**

22 Contrary to the TD Defendants' claims, they have not established that they do not
23 possess responsive documents or that they cannot obtain responsive documents. Todd
24 Dunning's October 15, 2009 declaration does not establish that he and DEI do not possess
25 any documents responsive to eBay's requests. Instead, the declaration states only that
26 neither he nor DEI have any "business records or other documents . . . of KFC." 10/15/09
27 T. Dunning Decl. at 3. This narrow statement leaves open the possibility that the TD
28 Defendants possess other documents requested by eBay's 70 requests for production that

1 are not the documents “of KFC.” For example, eBay’s requests sought all documents
2 relating to eBay (Request No. 1), all documents relating to payment of commissions or
3 other revenue obtained by DEI from eBay (Request No. 2), and all communications with
4 Brian Dunning, Todd Dunning or Shawn Hogan (Request No. 16). *See* 9/22/09 Kennedy
5 Decl., Ex. 1, at 1-98. In an effort to resolve the issue, eBay requested that Todd Dunning
6 provide a supplemental declaration stating unequivocally that neither he nor DEI has
7 possession, custody or control of any responsive documents, but the TD Defendants
8 refused to provide such a declaration. Bunzel Decl., Ex. 9.

9 Similarly, Todd Dunning’s claim that he has no right to obtain any of his own
10 documents from the FBI because “he did not provide any documents to the FBI when he
11 was interviewed on June 18, 2007” does not foreclose the possibility that the government
12 obtained documents from him at some time other than during the June 18, 2007 interview.
13 *See* Opposition of Defendants DEI and Todd Dunning to eBay’s Motion to Compel (“TD
14 Opp.”) at 6. Here again, eBay requested that the TD Defendants provide a supplemental
15 declaration stating unequivocally that no documents were provided by them to the
16 government at any time, and again the TD Defendants refused to do so. Bunzel Decl., Ex.
17 9. This leaves unanswered the question of whether the FBI has any documents from the
18 TD Defendants in its possession. If the FBI does, then the TD Defendants are required to
19 request those documents from the FBI; their duty to attempt to obtain documents would
20 not be fulfilled simply by requesting documents seized “from Brian Dunning’s home.” S.
21 Foreman Decl., ¶ 4. If there are no such documents, it would have been a simple matter
22 for the TD Defendants to so state. But they did not do so. Moreover, the fact that the FBI
23 has so far not returned any documents to the TD or BD Defendants does not moot this
24 motion; eBay is still entitled to an order compelling production of those documents if and
25 when the TD Defendants obtain possession of them.¹

26 ¹ Under Federal Rule of Civil Procedure 26, parties have a duty to supplement their document
27 production if the requested documents are later obtained. Fed. R. Civ. P. 26(e)(1); *see also*
28 *United States v. Boyce*, 148 F. Supp. 2d 1069, 1088 (S.D. Cal. 2001) (responding party has a duty
to supplement any responses with documents discovered or coming into a party’s possession at a
later time).

1 eBay also has not been able to obtain an answer to its question of who controls the
2 Rackspace material because, as explained in eBay's motion to compel, the BD Defendants
3 are holding hostage the production of documents from Rackspace that would identify
4 those individuals or entities. eBay's Motion to Compel Against the TD Defendants
5 ("eBay Mot.") at 11-12. But even assuming that the TD Defendants are not authorized to
6 access the Rackspace material, DEI has an obligation, as a general partner of KFC, to
7 make a demand for documents on KFC. Federal courts have consistently held that
8 documents are deemed to be within a party's "possession, custody or control" for
9 purposes of Rule 34 if the party has actual possession, custody, or control, ***or has the***
10 ***legal right to obtain the documents on demand.*** *A. Farber & Partners, Inc. v. Garber,*
11 *234 F.R.D. 186, 189 (C.D. Cal. 2006); see also United States v. Int'l Union of Petroleum*
12 *& Indus. Workers, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989) ("Control is defined as*
13 *the legal right to obtain documents upon demand.").*

14 Because DEI is a partner in KFC, it has the right under California law to demand
15 any information concerning KFC's business and affairs, as well as the right to access
16 KFC's books and records. *See Cal. Corp. Code § 16403(c)(2) (2009) (each partner and*
17 *the partnership must furnish to a partner, on demand, any information concerning the*
18 *partnership's business and affairs, except to the extent the demand or the information*
19 *demand is unreasonable or otherwise improper under the circumstances); 48 Cal. Jur.*
20 *3d Partnership § 58 (2009). Thus, KFC's documents are within DEI's "control" for the*
21 *purposes of Rule 34. See In re Hallmark Capital Corp., 534 F. Supp. 2d 981, 982-84 (D.*
22 *Minn. 2008) (partner ordered to produce partnership documents because such documents*
23 *were in partner's control); Gen. Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 299 n.9*
24 *(S.D. Cal. 1981) (noting that trial court rejected partnership's argument that it was not*
25 *obliged to produce documents in possession of partners); cf. Int'l Union of Petroleum &*
26 *Indus. Workers, 870 F.2d at 1452 ("A corporation must produce documents possessed by*
27 *a subsidiary that the parent corporation owns or wholly controls."); In re ATM Fee*
28 *Antitrust Litig., 233 F.R.D. 542, 544-45 (N.D. Cal. 2005) (bank holding company had*

1 legal control of documents in possession and control of its wholly owned subsidiary bank,
2 and thus was required to produce any documents in subsidiary's custody that were
3 responsive to request for production of documents).

4 DEI must make reasonable efforts to cause production of KFC's documents, and it
5 may be required to submit an affidavit outlining that such reasonable efforts were made.
6 *See Garber*, 234 F.R.D. at 190 (court ordered that defendant provide plaintiff with
7 declarations or affidavits detailing the nature of its efforts to locate responsive
8 documents); *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 522 (D. Kan.
9 2007) (warning "that there can be no collusion" between defendants and affiliate to deny
10 plaintiff access to documents). If KFC refuses to comply with DEI's request for
11 documents in bad faith, DEI could be held responsible for KFC's failure. *See Broman v.*
12 *Split Rock Assocs., Inc.*, 768 F. Supp. 51, 54 (E.D.N.Y. 1991) (judgment entered against
13 corporate defendant for affiliate's pattern of disregard of court's discovery orders, since
14 records held by affiliate could be considered to be within custody or control of
15 corporation).

16 Again, in the interest of resolving this dispute, eBay requested that the TD
17 Defendants agree to demonstrate that DEI had made a good faith effort to obtain
18 documents from KFC. Bunzel Decl., Ex. 9. Although DEI had initially indicated its
19 willingness to make a demand for documents from KFC, the TD Defendants ultimately
20 refused to make such an effort. *Id.*

21 Thus, in sum, the TD Defendants have refused to provide eBay with adequate
22 proof that they have no responsive documents in their possession and have not made good
23 faith efforts to obtain documents from KFC, the FBI and/or Rackspace that may be within
24 their control.

25 **B. There Is No Need To View The Documents Themselves To Evaluate**
26 **Whether Todd Dunning Can Assert The Fifth Amendment Over**
27 **Documents Obtained By The Government**

28 The TD Defendants fail to respond to eBay's legal argument that Todd Dunning
cannot assert a Fifth Amendment privilege over documents that have already been

1 obtained by the government. Instead, they argue that, if and when responsive documents
2 are obtained from the FBI and Rackspace, they will need to be reviewed to evaluate
3 “whether the privilege applies to some or all of the documents”—an analysis the TD
4 Defendants claim may require *in camera* review by this Court. TD Opp. at 8.

5 As explained in eBay’s motion to compel, the Fifth Amendment privilege does not
6 apply to documents previously obtained by the government because there is no testimonial
7 aspect to producing documents in a civil case when the documents are already in the
8 government’s possession and can be independently authenticated. eBay Mot. at 8-10.
9 The TD Defendants do not—and cannot—argue that that the act of production itself
10 would be incriminating to Todd Dunning since the government already possesses the
11 documents at issue. Similarly, since eBay has only sought to compel production by Todd
12 Dunning of those documents located at Rackspace that have previously been produced to
13 the government, the Fifth Amendment analysis does not turn on whether any specific
14 document(s) are sufficiently incriminating that Todd Dunning would otherwise be able to
15 assert the Fifth Amendment over their production; it instead turns on the undisputed fact
16 that these documents have previously been obtained by the government.² *See, e.g., In re*
17 *Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993)
18 (where the government already has a copy of the requested document, the subsequent
19 production of the original document “adds little or nothing to the sum total of the
20 Government’s information”); *Henry v. Sneiders*, 490 F.2d 315, 317 (9th Cir. 1974)
21 (“[E]ven if the records were incriminating, their disclosure in the civil case would not
22 have tended to incriminate the defendant. Any incriminating information was already in
23 the hands of the prosecuting authorities.”).

24 Because there is no risk of incrimination, there is no need, indeed there would be
25 no purpose, for an *in camera* review of any documents. *See United States v. Garrett*,

26 ² The TD Defendants also cannot seek shelter in the Fifth Amendment privilege for materials
27 sought by a subpoena issued to third party Rackspace. “[A] party is privileged from producing
28 the evidence but not from its production.” *In re Grand Jury Subpoena (Maltby) v. Lacoste*, 800
F.2d 981, 983 (9th Cir. 1986).

1 D.C. No. CV-97-7511-RSWL, 2001 WL 206000, at *1 (9th Cir. Feb. 28, 2001) (denying
2 request for *in camera* hearing to determine whether the Fifth Amendment privilege
3 applied where defendant failed to provide sufficient facts tending to show risk of
4 incrimination); *cf. In re Grand Jury Empanelled Mar. 8, 1983*, 722 F.2d 294, 296-97 (6th
5 Cir. 1983) (affirming district court's refusal to hold *in camera* hearing where act of
6 production privilege was found not to apply).

7 The two cases cited by the TD Defendants do not support an *in camera* review
8 here. *In re Grand Jury Subpoena*, 383 F.3d 905 (9th Cir. 2004), dealt with a government
9 subpoena on a John Doe for documents, which the Ninth Circuit held implicated Fifth
10 Amendment concerns because: 1) the government did not know what responsive
11 documents existed and were possessed by Doe, and 2) the breadth of the subpoena would
12 force Doe to reveal information that would authenticate the documents. *Id.* at 910-12.
13 Here, by contrast, the documents eBay requests are already in the government's
14 possession and can be independently authenticated.

15 Similarly, in *United States v. Griggs*, Nos. CV-08-1016-PHX-DGC, MC-08-0103-
16 PHX-DGC, 2009 WL 413614 (D. Ariz. Feb. 18, 2009), the court ordered a magistrate to
17 review the documents at issue *in camera* where it was not clear if the documents would be
18 incriminating. *Id.* at *4. The government did not previously possess the documents, and
19 it was still possible that the documents at issue would "provide a lead or clue to evidence
20 having a tendency to incriminate" the defendant. *Id.* at *2, 4. There is no possibility that
21 production of the documents at issue here could further incriminate Todd Dunning
22 because the documents are already in the government's hands.

23 In sum, any review of the documents at issue here is unnecessary because it is clear
24 that the act of producing these documents will not further incriminate Todd Dunning. The
25 TD Defendants' claim that they should further postpone production of these documents
26 pending such a review is baseless.

27 **C. The Request For Attorneys' Fees Must Be Denied**

28 eBay's motion should be granted. But should it be denied, the TD Defendants are

1 not entitled to expenses and fees because eBay was substantially justified in making this
2 motion. *See* Fed. R. Civ. P. 37(a)(5); *Postx Corp. v. Secure Data in Motion, Inc.*, No. C
3 02-04483 SI, 2004 WL 2663518, at *6 (N.D. Cal. Nov. 20, 2004) (declining to award
4 attorneys' fees where party who brought motion to compel, which was denied, was
5 substantially justified in doing so). In order to assess whether the motion was
6 "substantially justified," a court looks to whether reasonable people could differ as to
7 whether the motion was appropriately raised. *Sigma-Tau Industrie Framaceutiche*
8 *Riunite, S.P.A. v. Lonza, Ltd.*, 106 F. Supp. 2d 8, 12-13 (D.D.C. 2000) (declining to award
9 attorneys' fees where party who brought motion to compel, which was denied, was
10 substantially justified in doing so). eBay's reply demonstrates the existence of a "good
11 faith dispute concerning a discovery question" sufficient to constitute substantial
12 justification for proceeding with the hearing on its motion to compel. *Id.* Although eBay
13 and the TD Defendants attempted but failed to resolve this motion prior to the hearing,
14 legitimate discovery disputes remain. Moreover, eBay's good faith participation in the
15 meet and confer process in an effort to narrow or resolve these issues further evidences
16 that its motion "was not devoid of justification." *Id.* at 13. It should also be noted that the
17 TD Defendants provide no support for the granting of costs and fees in a case such as this
18 one, where defendant does not contest that plaintiff's motion was well-founded when
19 made but claims that the motion should have been withdrawn when the defendant later
20 produced new evidence in opposition to the motion. There is simply no justification for
21 an award of fees on these facts.

22 Moreover, in the Northern District, any motion for sanctions, including a motion
23 for attorneys' fees and expenses pursuant to Federal Rule of Civil Procedure 37, "must be
24 separately filed" from any other motion. Civil L.R. 7-8, 37-3. The TD Defendants have
25 not complied with this requirement and their request for attorneys' fees should be denied
26 on this ground alone.

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III. CONCLUSION

For the foregoing reasons, eBay respectfully requests that its Motion to Compel be granted in full.

DATED: October 30, 2009

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