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

16 EBAY INC.,

17 Plaintiff,

18 v.

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

27 Defendants.

Case No. C 08-4052 JF PVT

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

Conference Date: February 26, 2010
 Time: 10:30 a.m.
 Judge: Hon. Jeremy Fogel

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

7 **II. FACTS**

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

9 **III. LEGAL ISSUES**

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

11 **IV. PENDING AND ANTICIPATED MOTIONS**

12 eBay's Statement:

13 By the time of the Case Management Conference on February 26, there will be
14 three sets of motions pending before this Court. First, on September 25, 2009, eBay filed
15 a motion to strike the answer to eBay's Second Amended Complaint ("SAC") that was
16 filed jointly by defendants Brian Dunning, KFC, THI and BrianDunning.com. eBay's
17 motion to strike was based on those entity defendants' improper assertion of the Fifth
18 Amendment privilege—which collective entities unquestionably lack—to withhold all
19 substantive responses to the allegations in eBay's SAC. The motion to strike was heard
20 on January 29, 2010.

21 Second, each of the three defendant groups—1) Brian Dunning, THI, KFC and
22 BrianDunning.com, 2) Todd Dunning and DEI, and 3) Shawn Hogan and DPS, Inc.—has
23 filed a motion to stay this action pending the resolution of the federal criminal
24 investigation of the three individual defendants. The first two defendant groups filed their
25 motions to stay on October 15, 2009, and Shawn Hogan and DPS, Inc. filed their motion
26 to stay on October 16, 2009. eBay has opposed defendants' motions on the grounds that
27 1) the extraordinary remedy of a stay is not appropriate where no criminal action is
28 pending against any defendant and it is unclear whether or when any indictments will

1 issue, or what the scope of any eventual indictments may be, and 2) the *Keating* factors
2 weigh against issuance of a stay because a stay would be unduly prejudicial to eBay while
3 placing only a minimal burden on defendants. Defendants' motions to stay were also
4 heard on January 29, 2010. Since that time, eBay has obtained no new information
5 regarding the status of the criminal investigation.

6 Third, prior to the Case Management Conference, eBay intends to file a motion for
7 sanctions, including contempt and an award of attorneys' fees, to be heard on April 2,
8 2010, against defendants Brian Dunning, THI, BrianDunning.com and KFC based on their
9 failure to comply with this Court's order of January 12, 2010 sustaining eBay's objections
10 to Magistrate Judge Trumbull's order of November 19, 2009 and granting eBay's motions
11 to compel. The January 12, 2010 order has been pending for more than five weeks, and
12 this Court confirmed at the January 29 hearing that defendants should comply with the
13 order unless and until a stay is issued. These defendants have made no efforts to comply,
14 and have refused until very recently even to give eBay a proposed date for compliance.
15 They now claim that they will be unable to comply until March 1, 2010, nearly seven
16 weeks after the order was issued.

17 eBay yesterday received supplemental discovery responses from defendants Shawn
18 Hogan and Digital Point Solutions, Inc., including a substantial production of documents.
19 eBay is currently analyzing that production, but anticipates that it may need to move to
20 challenge some of the confidentiality designations made by the DPS Defendants in that
21 production pursuant to the Stipulated Protective Order, in the event that a meet and confer
22 process is unsuccessful.

23 In addition to these motions, eBay anticipates that it may need to move to compel
24 responses from all defendants to the requests in eBay's First Set of Requests for
25 Production that seek information regarding defendants' financial condition, including
26 requests for defendants' financial statements and tax returns. Defendants Brian Dunning,
27 THI, BrianDunning.com and KFC have declined to complete the meet and confer on this
28 issue while their motions to stay are pending before the Court, Dunning Enterprise, Inc.

1 has stated that it will produce its responsive documents, and DPS, Inc. has agreed to
2 provide some of the requested financial records within seven days in the event its motion
3 to stay is denied. It is unclear at this stage whether an agreement can be reached with all
4 defendants on this issue.

5 eBay also anticipates filing a motion for summary judgment or summary
6 adjudication following the close of discovery. eBay further anticipates filing motions in
7 limine before trial.

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

11 The hearing on Defendants' motion to stay this action pending the resolution of the
12 federal criminal investigation was held on January 29, 2010. The Court has not yet issued
13 a ruling on the matter. eBay's motion to strike the answer of Brian Dunning, KFC, THI
14 and BrianDunning.com was also heard that day. No ruling has yet issued.

15 If the Court denies Defendants' pending motion to stay, Defendants reserve the
16 right to renew a motion to stay in the future based on the criminal proceeding. It is too
17 preliminary to identify other motions that Defendants may file in the future.

18 DPS Defendants' Statement:

19 Defendants Digital Point Solutions, Inc. and Shawn Hogan have filed a motion to
20 stay the action and/or discovery in light of the pending criminal matter and the direct
21 factual and legal overlap between the two proceedings, and the indication by the United
22 States Attorney's Office for the Northern District of California that it intends to pursue an
23 indictment after the commencement of the New Year. As of January 11, 2010, the USAO
24 has indicated that it is not willing to provide any further information regarding the status
25 of said proceedings. The motions for stay were heard on January 29, 2010 (in conjunction
26 with Plaintiff's motion to strike the joint Answer to the Second Amended Complaint filed
27 by defendants Brian Dunning, KFC, THI and BrianDunning.com).

28 The DPS Defendants further anticipate filing a motion for summary judgment

1 and/or adjudication as well as a motion to transfer and/or dismiss on the grounds of forum
2 non conveniens. In addition, Mr. Hogan will seek leave to amend his Answer to
3 substantively respond to the allegations of the SAC upon the conclusion of the criminal
4 matter and, to the extent necessary thereafter, will move to exclude any reference to the
5 assertion of the Fifth Amendment at trial or otherwise. Finally, to the extent the action is
6 not dismissed or transferred, the DPS Defendants anticipate requesting bifurcation and/or
7 separate trials as to each respective defendant group.

8 **V. AMENDMENT OF PLEADINGS**

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

10 **VI. EVIDENCE PRESERVATION**

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

12 **VII. DISCLOSURES**

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

14 **VIII. DISCOVERY PLAN**

15 eBay's Statement:

16 As described in the previous Joint Case Management Statement, eBay is
17 proceeding with full fact discovery, although its efforts have been largely thwarted by
18 defendants' repeated improper invocations of the Fifth Amendment privilege. As
19 discussed above, defendants Brian Dunning, THI, BrianDunning.com and KFC have yet
20 to comply in any respect with the Court's January 12, 2010 discovery order. eBay
21 continues to work with the remaining defendants toward their compliance with the order,
22 although some issues remain. Also as noted above, the DPS Defendants recently
23 produced to eBay a substantial number of documents pursuant to the January 12 order.
24 eBay intends to provide a brief report to the Court at the Case Management Conference
25 regarding the contents of these documents, a number of which are designated as "Highly
26 Confidential – Attorneys' Eyes Only" and therefore cannot be described in a public filing.

27 Assuming that all defendants ultimately comply with the January 12, 2010 order
28 without the need for extensive further motion practice, eBay continues to propose the

1 discovery deadlines set forth in the previous Joint Case Management Statement filed on
2 January 15, 2010 and in the attached schedule.

3 There are no other changes since eBay's statement in the previous Joint Case
4 Management Statement.

5 Non-DPS Defendants' Statement:

6 Defendants' pending Motion for Stay, if granted, should include a stay of all
7 discovery. Should Defendants' Motion for Stay be denied at this time, Defendants reserve
8 the right to renew said motion based on the criminal proceedings. Should Defendants'
9 Motion for Stay be denied, Defendants KFC, THI, Brian Dunning and BrianDunning.com
10 agree to supplement their responses per the Court's previous order on or before March 1,
11 2010.

12 Defendants Todd Dunning and Dunning Enterprise, Inc. contend that they have
13 complied with Magistrate Judge Trumbull's order.

14 DPS Defendants' Statement:

15 The DPS Defendants have produced documents and provided supplemental
16 discovery responses pursuant to the Court's January 12, 2010 discovery order. In terms of
17 discovery dates, the DPS Defendants' position is that dates should not be set until after the
18 motion for stay has been adjudicated. To the extent dates are set at the Case Management
19 Conference, fact and expert discovery should not close until April 2011 and July 2011,
20 respectively (these dates may need to be further extended depending on when the criminal
21 matter is resolved). In light of the expansive timeframe of the alleged wrongdoing and the
22 number of potential percipient and party witnesses associated with Commission Junction,
23 Plaintiff, and Plaintiff's subsidiaries, 25 to 30 depositions are warranted in this case.

24 **IX. RELATED CASES**

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

26 **X. RELIEF**

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

28

1 **XI. SETTLEMENT AND ADR**

2 eBay's Statement:

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

4 Non-DPS Defendants' Statement:

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

6 DPS Defendants' Statement:

7 As noted above, the DPS Defendants have produced documents and provided
8 supplemental discovery responses pursuant to the Court's January 12, 2010 discovery
9 order. Plaintiff previously indicated that mediation would be appropriate at this stage of
10 the proceedings. The DPS Defendants' position is that the matter should be referred to
11 mediation.

12 **XII. MAGISTRATE JUDGE**

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

14 **XIII. OTHER REFERENCES**

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

16 **XIV. NARROWING OF ISSUES**

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

18 **XV. EXPEDITED SCHEDULE**

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

20 **XVI. SCHEDULING**

21 The parties' proposed schedules are attached as Exhibit A. There have been no
22 changes to the schedule since the previous Joint Case Management Statement.

23 **XVII. TRIAL**

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

25 **XVIII. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR**
26 **PERSONS**

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

1 Dated: February 19, 2010

DAVID R. EBERHART
SHARON M. BUNZEL
COLLEEN M. KENNEDY
O'MELVENY & MYERS LLP

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

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Attorneys for Plaintiff
eBay Inc.

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8 Dated: February 19, 2010

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

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Attorneys for Defendants
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15 Dated: February 19, 2010

STEWART H. FOREMAN
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By: /s/ Stewart H. Foreman
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Attorneys for Defendants
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Inc.

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22 Dated: February 19, 2010

PATRICK K. MCCLELLAN
LAW OFFICE OF PATRICK K.
MCCLELLAN

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

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27

Attorney for Defendant
Kessler's Flying Circus

28

1 Dated: February 19, 2010

2 SEYAMACK KOURETSCHIAN
3 COAST LAW GROUP, LLP

4 By: /s/ Ross Campbell
5 Ross Campbell

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

8 **ATTESTATION**

9 Pursuant to General Order No. 45 X(B), I hereby attest that concurrence in the
10 filing of this document has been obtained from each of the above-listed signatories.
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13 By: /s/ David R. Eberhart

14 David R. Eberhart

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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

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EXHIBIT A

Event	eBay's Proposed Dates	Defendants' Proposed Dates
Fact discovery closes	September 24, 2010	
Last day for expert reports on merits	November 12, 2010	
Last day for depositions of experts	December 3, 2010	
Last day for responsive expert reports	December 17, 2010	
Close of expert discovery	January 14, 2011	
Last day to file dispositive motions	February 18, 2011	
Oppositions to dispositive motions due	March 25, 2011	
Reply briefs in support of dispositive motions due	April 15, 2011	
Hearing on dispositive motions	May 6, 2011	
Required Meeting Prior to Pretrial Conference	June 21, 2011	
Pretrial Conference Statement	June 27, 2011	
Pretrial Conference	July 11, 2011	
Trial	August 22, 2011	