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 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

**PLAINTIFF EBAY INC.'S NOTICE  
 OF MOTION AND MOTION FOR  
 DISCOVERY SANCTIONS  
 AGAINST BRIAN DUNNING,  
 BRIANDUNNING.COM,  
 THUNDERWOOD HOLDINGS,  
 INC., AND KESSLER'S FLYING  
 CIRCUS**

Hearing Date: April 2, 2010  
 Time: 9:00 a.m.  
 Courtroom: 3  
 Judge: Hon. Jeremy Fogel

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE THAT, on April 2, 2010, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3 of the United States District Court for the Northern District of California, San Jose Division, located at 280 South 1st St., San Jose, California, 95113, Plaintiff eBay, Inc. (“eBay”) will and hereby does move for an order sanctioning and holding in contempt defendants Brian Dunning, BrianDunning.com, Thunderwood Holdings, Inc., and Kessler’s Flying Circus for their violations of this Court’s January 12, 2010 order.

eBay’s Motion seeks sanctions and an order of contempt pursuant to the Court’s inherent authority, Federal Rule of Civil Procedure 37(b)(2) and 18 U.S.C. § 401(3) against Defendants for their willful violation of the Court’s order.

The Motion is based on this Notice, the attached Memorandum of Points and Authorities, all supporting declarations and attached exhibits, the pleadings and other records on file with the Court, the oral argument of counsel, all relevant matters judicially noticeable, and such further evidence and arguments as the Court may consider.

DATED: February 26, 2010

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

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

Attorneys for Plaintiff eBAY INC.

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Defendants Brian Dunning, Thunderwood Holdings, Inc., BrianDunning.com and Kessler's Flying Circus are in contempt of this Court's January 12, 2010 Order (the "Order") because they have failed to produce the documents and discovery responses ordered by this Court. The discovery requests at issue have been pending for more than a year and these defendants have had more than six weeks to comply with the Order, yet they intentionally flout this Court's mandates.

The January 12 Order requires (i) the individual defendants to produce all responsive documents that have previously been provided to the government, and (ii) the entity defendants to provide complete responses to eBay's requests for production, interrogatories, and requests for admission. *See* Order (Docket #183), at 12-13. Even in the face of the Court's admonition on January 29, 2010 that the January 12 Order was in effect even in the absence of a ruling on the stay motion, Defendants Brian Dunning, Thunderwood Holdings, Inc. ("THI"), BrianDunning.com and Kessler's Flying Circus ("KFC") (collectively, the "BD/KFC Defendants") did not comply with the Order in any material way. Their sole alleged act of compliance was Leo Presiado's production of 44 pages of documents that Rackspace had previously produced to Mr. Presiado instead of the subpoenaing party—eBay—and which Mr. Presiado had wrongfully embargoed for nearly five months. The defendants other than the BD/KFC Defendants have taken some steps to comply with the Order and are not the subject of eBay's motion.

Rather than comply, the BD/KFC Defendants have pursued a course of delay and obfuscation—first refusing to provide any timeline for compliance and subsequently providing a litany of varied and conflicting excuses for their failure to comply. The only explanation for their inaction is that they simply do not intend to comply with the Order. Instead, they seek to delay their provision of discovery for as long as possible, in the hope that this Court would either grant their motion to stay outright (which it did not do) or would grant a stay following any future indictment. The BD/KFC Defendants' actions

1 leave eBay with no choice but to move for sanctions in order to force their compliance.

2 **II. FACTUAL BACKGROUND**

3 On January 13, 2010, the day after receiving the Court's Order granting eBay's  
4 motions to compel, eBay contacted counsel for all defendants to meet and confer  
5 regarding when their clients would comply with the Order. *See* Declaration of Colleen M.  
6 Kennedy in Support of eBay's Motion for Sanctions ("Kennedy Decl."), Ex. 1. Yet the  
7 BD/KFC Defendants' counsel refused to provide eBay with any information regarding  
8 their timeline for compliance. Patrick McClellan, counsel for KFC, never responded to  
9 eBay's January 13 correspondence. Kennedy Decl., ¶ 2. Leo Presiado, counsel for Brian  
10 Dunning, BrianDunning.com and THI, stated in response to eBay's January 13  
11 correspondence that he had "not yet had a chance to evaluate and determine what would  
12 constitute an adequate time period within which to prepare the subject responses," and  
13 invited eBay to contact him the following week. Kennedy Decl., ¶ 4, Ex. 3. eBay again  
14 contacted Mr. Presiado on January 21, 2010 to inquire about his clients' compliance with  
15 the Order, but Mr. Presiado failed to respond. Kennedy Decl., ¶ 5, Ex. 4.

16 At the January 29, 2010 Case Management Conference and motion hearing, this  
17 Court made clear that discovery should proceed pending the Court's ruling on the motions  
18 to stay. The Court explicitly stated in response to a question from one of defendants'  
19 counsel that it expected all defendants to comply with the Order: "At the moment, you  
20 should assume the January 12th order is in effect." 1/29/10 Transcript, 17:22–23. Despite  
21 this clear instruction to all parties, however, both Mr. Presiado and Mr. McClellan now  
22 state that they will not provide any discovery to eBay until March 1, at the earliest.

23 In a letter dated February 12, 2010—his last correspondence with eBay on this  
24 issue—Mr. Presiado stated that a March 1 production date is reasonable because the Order  
25 "does not state a date by which the responses are to be provided." Kennedy Decl., Ex. 5.  
26 He also indicated that his compliance with even that deadline will be contingent on this  
27 Court's denial of the motions to stay and on the absence of any indictments issued in the  
28 case. *Id.*

1 Mr. Presiado's February 12, 2010 letter appeared to abandon his previous, false  
2 assertions that he and eBay's counsel David Eberhart reached an agreement following the  
3 January 29, 2010 hearing granting Mr. Presiado's clients an additional 30 days from that  
4 date to produce the required discovery. In correspondence and conversations with eBay's  
5 counsel, Mr. Presiado made a series of conflicting and nonsensical assertions regarding  
6 this supposed agreement, which were promptly refuted by eBay. *See* Kennedy Decl., ¶¶  
7 4, 13-14, Exs. 5-10. No such agreement ever existed. *See* Declaration of David R.  
8 Eberhart in Support of eBay's Motion for Sanctions ("Eberhart Decl.") ¶¶ 2-4.

9 KFC's counsel Patrick McClellan has pursued a similar course of delay. After  
10 failing to respond for nearly one month to eBay's January 13, 2010 inquiry regarding  
11 KFC's timeline for compliance, Mr. McClellan acknowledged during a telephone  
12 conversation with eBay's counsel on February 9, 2010 that he still had yet to assess  
13 KFC's obligations under the Order. Kennedy Decl., ¶ 3, Ex. 2. Mr. McClellan  
14 subsequently promised compliance within 15 days of February 10, 2010, or more than six  
15 weeks after the Order issued. *Id.* But two days later, Mr. McClellan withdrew even this  
16 proposal, notifying eBay that he had been informed by Mr. Presiado of a purported  
17 agreement with Mr. Eberhart to a 30-day timeline, and that Mr. McClellan was now  
18 taking the position that this fictitious agreement applied equally to KFC. Kennedy Decl.,  
19 ¶ 15. Mr. McClellan therefore stated that he, too, would refuse to agree to comply with  
20 the Court's Order any earlier than March 1.

### 21 **III. ARGUMENT**

#### 22 **A. This Court Should Hold The BD/KFC Defendants In Contempt For** 23 **Their Violations Of The Order.**

24 The BD/KFC Defendants' intentional failure to comply with the Order constitutes  
25 a breach of their discovery obligations for which the Court may impose sanctions,  
26 including contempt. *See In re Heritage Bond Litig.*, 223 F.R.D. 527, 531 (C.D. Cal. 2004)  
27 (citations omitted) ("A party may be found in contempt of court in which the action is  
28 pending for failure to obey any discovery order."). Rule 37 of the Federal Rules of Civil

1 Procedure provides that if a party “fails to obey an order to provide or permit discovery,”  
2 the court may issue “further just orders,” including “treating as contempt of court the  
3 failure to obey any order.” Fed. R. Civ. P. 37(b)(2); *see also* 18 U.S.C. § 401(c)  
4 (codifying judicial enforcement of court orders). A party may be held in civil contempt if  
5 the court finds by clear and convincing evidence that the party violated an order of the  
6 court beyond substantial compliance, and that the violation was not based on a good faith  
7 and reasonable interpretation of the order. *On Command Video Corp. v. LodgeNet Entm’t*  
8 *Corp.*, 976 F. Supp. 917, 922 (N.D. Cal. 1997).

9 The BD/KFC Defendants’ conduct satisfies each of the elements of civil contempt.  
10 None of these defendants can be found to have substantially complied with the court’s  
11 order and none of them can demonstrate that “every reasonable effort has been made to  
12 comply.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th  
13 Cir. 1993). To the contrary, the BD/KFC Defendants have taken every possible  
14 opportunity to delay compliance,<sup>1</sup> and have now indicated that they do not intend to  
15 comply until March 1, nearly seven weeks after the Order was issued. The BD/KFC  
16 Defendants’ strategy of delay stands in contrast with the actions of the other defendants in  
17 this action, Todd Dunning, Dunning Enterprise, Inc., Shawn Hogan and Digital Point  
18 Solutions, Inc., who have all made efforts to comply with the Order.

19 Further, the BD/KFC Defendants’ failure to comply was neither done in good faith  
20 nor based on any reasonable interpretation of the Order. Counsel for the BD/KFC  
21 Defendants effectively refused to meet and confer with eBay at all until after their motions  
22 to stay were heard, in a blatant attempt to delay compliance in the hope that a stay would  
23 issue. Kennedy Decl., ¶¶ 2-6, Exs. 3-4. Not only did they refuse to discuss the issue with  
24 eBay in a timely manner, their later statements made clear that the BD/KFC Defendants

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25 <sup>1</sup> The only aspect of the Order with which the BD/KFC Defendants have attempted to comply  
26 was eBay’s request that Mr. Presiado turn over to eBay a small production of documents  
27 belonging to Rackspace, which were provided to Mr. Presiado by Rackspace in September 2009  
28 pursuant to eBay’s subpoena. But none of the BD/KFC Defendants has produced to eBay any of  
their own documents or otherwise attempted to provide any supplemental discovery on their own  
behalf.

1 made no effort to comply with the Order until after their stay motions were heard.

2 Kennedy Decl., ¶¶ 3-4, Ex. 2.

3 Putting aside the fabricated “agreement” to a 30-day extension, the BD/KFC  
4 Defendants have provided no basis for their contention that an additional 30 days is  
5 necessary. Nor would any such assertions be credible. Despite their repeated statements  
6 that the FBI has seized and refused to return “all of” the BD/KFC Defendants’ records and  
7 documents, *see, e.g.*, Kennedy Decl, Ex. 11, at 10, those defendants apparently have had  
8 access to some responsive materials since at least October 2008, when they submitted  
9 documents as exhibits to their motions of motions to dismiss eBay’s First Amended  
10 Complaint. Kennedy Decl., Exs. 12-13. Further, the BD/KFC Defendants can no longer  
11 dispute that they have had ongoing access to electronic materials stored on at least two  
12 servers residing at Rackspace US, Inc., as reflected by the billing records produced by  
13 Rackspace in response to eBay’s subpoena. *See* Kennedy Decl., Ex. 14. Regardless, any  
14 current claims of the need for more time ring hollow in light of the BD/KFC Defendants’  
15 decision to squander the first several weeks following the Order in the hope that a stay  
16 would issue.

17 Under these circumstances, eBay has no reason to believe that these defendants  
18 will comply with the Order without court intervention. Indeed, the most reasonable  
19 interpretation of the BD/KFC Defendants’ actions is that they have been seeking to delay  
20 their compliance with the Order for as long as possible, in the hopes that a stay would  
21 issue to relieve them from compliance. Although the BD/KFC Defendants became aware  
22 at the January 29, 2010 hearing that this Court was likely to deny their motion to stay  
23 (which it now has done), they could still attempt to delay compliance with the Order until  
24 an indictment issued, thereby providing them with a renewed basis to argue for a stay.  
25 eBay’s maintains that, even if an indictment issues, it will be impossible to assess whether  
26 a stay is appropriate until the specifics of any indictment are known, and eBay has  
27 requested the opportunity to be heard on that issue should an indictment occur. But there  
28 is certainly no basis to allow any potential future indictment to excuse the BD/KFC



1 Defendants from complying with the Order. If the BD/KFC Defendants had responded to  
2 eBay's discovery requests in a timely manner, or had complied with the Order in a timely  
3 manner, the discovery eBay seeks would have been provided long before any future  
4 indictment or resulting stay. The BD/KFC Defendants' purposeful delays in complying  
5 with the Order should not be rewarded now or in the future.

6 Even assuming that the BD/KFC Defendants' proposed March 1 compliance date  
7 had been made in good faith—and that they ultimately perform, which seems highly  
8 unlikely given their failure to make any interim production of their own documents—a  
9 delay of seven weeks to comply with a court order is patently unreasonable. This is  
10 especially true because eBay's discovery requests have been pending for more than a year  
11 and its motions to compel were filed nearly five months ago.

12 **B. eBay Is Entitled To Sanctions In The Form Of Attorneys' Fees.**

13 Rule 37 states that “the court must order the disobedient party, the attorney  
14 advising that party, or both to pay the reasonable expenses, including attorney's fees,  
15 caused by the failure, unless the failure was substantially justified or other circumstances  
16 makes an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C); *see also Hyde & Drath*  
17 *v. Baker*, 24 F.3d 1162, 1170 (9th Cir. 1994) (“Rule 37(b)(2) provides for the award of  
18 reasonable expenses and attorney's fees ‘caused by the failure’ to obey a court order to  
19 permit or provide discovery.”). The BD/KFC Defendants' persistent and unjustified  
20 refusal to comply with the Order warrants an award, at a minimum, of eBay's expenses  
21 and fees incurred as a result of these defendants' violations of the Order. Accordingly,  
22 eBay requests that the Court award \$39,545.50, plus such other amounts as the Court  
23 deems appropriate. This figure constitutes the fees expended to date by eBay's counsel on  
24 both meeting and conferring with the BD/KFC Defendants' counsel regarding their  
25 compliance with the Order and on bringing this motion. *See Eberhart Decl.*, ¶¶ 5-10, Ex.

26 A.  
27  
28



1 **IV. CONCLUSION**

2 For the reasons discussed above, eBay respectfully requests that the Court impose  
3 sanctions on Defendants Brian Dunning, BrianDunning.com, THI and KFC in the form of  
4 a contempt order and/or an award of attorneys' fees, and that the Court order these  
5 Defendants' immediate compliance with the January 12, 2010 Order.

6 DATED: February 26, 2010

7 DAVID R. EBERHART  
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