

1 DAVID R. EBERHART (S.B. #195474)
 deberhart@omm.com
 2 SHARON M. BUNZEL (S.B. #181609)
 sbunzel@omm.com
 3 COLLEEN M. KENNEDY (S.B. #227107)
 ckennedy@omm.com
 4 O'MELVENY & MYERS LLP
 Two Embarcadero Center, 28th Floor
 5 San Francisco, CA 94111
 Telephone: (415) 984-8700
 6 Facsimile: (415) 984-8701

7 Attorneys for Plaintiff eBay Inc.

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**
 10 **SAN JOSE DIVISION**

11 EBAY INC.,

12 Plaintiff,

13 v.

14 DIGITAL POINT SOLUTIONS, INC.,
 15 SHAWN HOGAN, KESSLER'S
 16 FLYING CIRCUS, THUNDERWOOD
 17 HOLDINGS, INC., TODD DUNNING,
 DUNNING ENTERPRISE, INC., BRIAN
 18 DUNNING, BRIANDUNNING.COM,
 and DOES 1-20,

19 Defendants.

Case No. C 08-04052 JF PVT

**DECLARATION OF DAVID R.
 EBERHART IN SUPPORT OF EBAY
 INC.'S 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

1 I, David R. Eberhart, declare as follows:

2 1. I am a member of the Bar of the State of California and a partner in the law
3 firm of O'Melveny & Myers LLP, counsel for eBay Inc. in this matter. I submit this
4 Declaration in support of eBay's Motion For Discovery Sanctions Against Brian Dunning,
5 BrianDunning.com, Thunderwood Holdings, Inc. ("THI"), and Kessler's Flying Circus
6 ("KFC") (collectively, the "BD/KFC Defendants"). I have personal knowledge of the
7 facts set forth in this declaration and, if called to testify as a witness, could and would do
8 so under oath.

9 2. On January 29, 2010, Sharon Bunzel and I appeared on behalf of eBay at the
10 Case Management Conference and hearing on the motions to stay and strike. Patrick
11 McClellan, counsel for KFC, did not attend the hearing. Immediately following the
12 conclusion of the hearing, I began a conversation with Ross Campbell, counsel for Digital
13 Point Solutions, Inc. and Shawn Hogan. This conversation began in the courtroom and
14 continued as Mr. Campbell and I slowly walked toward the hallway. During the
15 conversation, Mr. Campbell and I discussed his proposed timeline for his clients'
16 compliance with this Court's January 12, 2010 order (the "Order"). Although Mr.
17 Campbell had originally committed to provide the discovery to eBay within three weeks
18 from the date of the Order, during this January 29 conversation he raised the possibility
19 that his clients may need an additional week to comply. I communicated to him that eBay
20 would consider such an extension if and when requested, but no agreement was reached
21 with regard to this additional week. Following this discussion, Mr. Campbell did not
22 contact me to request this additional week for compliance, although he subsequently
23 committed to provide the discovery by February 16, 2010.

24 3. Leo Presiado, counsel for Brian Dunning, BrianDunning.com and THI, did
25 not take part in my conversation with Mr. Campbell; I was not even aware at the time that
26 Mr. Presiado was able to overhear the full substance of our conversation, if that is what
27 happened. In any event, my conversation with Mr. Campbell made no mention of and did
28 not concern Mr. Presiado's clients.

