

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

12 Attorneys for Plaintiff eBay Inc.

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., BRIAN  
 24 DUNNING, BRIANDUNNING.COM,  
 25 and DOES 1-20,

26 Defendants.

Case No. C 08-04052 JF PVT

**DECLARATION OF COLLEEN M.  
 KENNEDY 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, Colleen M. Kennedy, declare as follows:

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

9 2. On January 13, 2010, the day after this Court's January 12, 2010 order (the  
10 "Order") issued, I sent an email to counsel for all defendants inquiring about the timeline  
11 for their clients' compliance with the Order. A true and correct copy of that email is  
12 attached hereto as **Exhibit 1**. Patrick McClellan, counsel for KFC, never responded to my  
13 January 13, 2010 email.

14 3. Having received no information from Mr. McClellan regarding KFC's  
15 compliance with the Order, I called him on February 8, 2010 and left a voicemail  
16 indicating that I wanted to discuss a timeline for his clients' provision of the required  
17 discovery responses. Mr. McClellan returned my call on February 9, 2010, and informed  
18 me that he was not aware of exactly what the Order had instructed KFC to do, but stated  
19 that whatever responsive information existed in KFC's possession would be provided  
20 quickly. He requested that I send him an email detailing eBay's understanding of KFC's  
21 obligations under the Order. I sent him such an email on February 10, 2010, a copy of  
22 which is attached hereto as **Exhibit 2**.

23 4. Attached hereto as **Exhibit 3** is a true and correct copy of a January 14,  
24 2010 email from Leo Presiado, counsel for Brian Dunning, BrianDunning.com and THI,  
25 to Colleen Kennedy. In this email, Mr. Presiado stated that he had not yet had a chance to  
26 determine when his clients could comply with the Order.

27 5. Attached hereto as **Exhibit 4** is a true and correct copy of a January 21,  
28 2010 email from Colleen Kennedy to Leo Presiado. Mr. Presiado never responded to this

1 email.

2 6. Following the January 29, 2010 hearing before this Court, I exchanged  
3 several rounds of meet-and-confer correspondence with Leo Presiado in an effort to obtain  
4 a prompt deadline for his clients' compliance with the Order.

5 7. Attached hereto as **Exhibit 5** is a true and correct copy of a February 12,  
6 2010 letter from Leo Presiado to Colleen Kennedy.

7 8. Attached hereto as **Exhibit 6** is a true and correct copy of a February 8,  
8 2010 letter from Colleen Kennedy to Leo Presiado.

9 9. Attached hereto as **Exhibit 7** is a true and correct copy of a February 9,  
10 2010 letter from Leo Presiado to Colleen Kennedy.

11 10. Attached hereto as **Exhibit 8** is a true and correct copy of a February 9,  
12 2010 letter from Colleen Kennedy to Leo Presiado.

13 11. Attached hereto as **Exhibit 9** is a true and correct copy of a February 10,  
14 2010 letter from Leo Presiado to Colleen Kennedy.

15 12. Attached hereto as **Exhibit 10** is a true and correct copy of a February 10,  
16 2010 letter from Colleen Kennedy to Leo Presiado.

17 13. In this meet-and-confer correspondence, Mr. Presiado initially took the  
18 position that his clients had an additional 30 days to comply with the Order pursuant to an  
19 agreement reached between eBay's counsel David Eberhart and Stewart Foreman, counsel  
20 for defendants Todd Dunning and Dunning Enterprise, Inc., and later took the position  
21 that this agreement was made between Mr. Eberhart and Ross Campbell, counsel for  
22 defendants Digital Point Solutions, Inc. and Shawn Hogan.

23 14. I subsequently had a telephone conversation with Mr. Presiado on the  
24 morning of February 12, 2010. During that conversation, Mr. Presiado reiterated the  
25 assertion that he had reached an agreement with Mr. Eberhart to the effect that Mr.  
26 Presiado's clients would have an additional 30 days from the date of the January 29, 2010  
27 hearing to produce the discovery required by the Order. When I asked Mr. Presiado for  
28 the basis of his belief that he had reached such an agreement with Mr. Eberhart, Mr.

1 Presiado told me that Mr. Eberhart was talking to all defense counsel as a group following  
2 the January 29 hearing when the concept of a 30-day timeline for compliance was  
3 discussed, and that Mr. Eberhart was looking at Mr. Presiado during this conversation.  
4 Mr. Presiado also stated to me that it was his understanding that this 30-day timeline ran  
5 from the date of the January 29 hearing, rather than the date of the Order. He further  
6 stated that it was unreasonable for eBay to move for sanctions because the Order does not  
7 provide a specific deadline for compliance.

8 15. Later in the day on February 12, 2010, I had another telephone conversation  
9 with Patrick McClellan, counsel for KFC. During that conversation, Mr. McClellan stated  
10 that he was now taking the position, in order to be consistent with Mr. Presiado, that KFC  
11 would not produce the required discovery until March 1. Mr. McClellan also stated that  
12 he had been informed by Mr. Presiado of the purported agreement with Mr. Eberhart to a  
13 30-day extension from the date of the January 29 hearing, and that any such agreement  
14 would apply equally to KFC.

15 16. Attached hereto as **Exhibit 11** is a true and correct copy of the Joint Case  
16 Management Statement, filed on January 9, 2009.

17 17. Attached hereto as **Exhibit 12** is a true and correct copy of Exhibit 1 in  
18 support of Kessler's Flying Circus's Notice of Motion and Motion to Dismiss Plaintiff's  
19 First Amended Complaint, filed on November 7, 2008.

20 18. Attached hereto as **Exhibit 13** is a true and correct copy of the Compendium  
21 of Exhibits in support of Brian Dunning, Briandunning.com, and Thunderwood Holdings,  
22 Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint, filed on October 27, 2008.

23 19. Attached hereto as **Exhibit 14** is a true and correct copy of invoices from  
24 Rackspace US, Inc. to Briandunning.com, dated February 8, 2006 through August 5,  
25 2009, and related customer agreements between Rackspace US, Inc. and  
26 Briandunning.com, bates numbered RS0001-0044.

27  
28

1 I declare under penalty of perjury under the laws of the United States and the State  
2 of California that the foregoing is true and correct. Signed on this 26th day of February,  
3 2010 in San Francisco, California.

4 /s/ Colleen M. Kennedy

5 Colleen M. Kennedy  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28