

# **EXHIBIT 5**

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2785-0002

February 12, 2010

*VIA FACSIMILE*Colleen M. Kennedy, Esq.  
O'Melveny & Myers LLP  
Two Embarcadero Center, 28<sup>th</sup> Floor  
San Francisco, CA 94111Re: *eBay, Inc. v. Digital Point Solutions, Inc., et al.*  
USDC Case No. CV-08-4052 JF

Dear Colleen:

Thank you for agreeing to confer with me this morning regarding the date by which Mr. Dunning, Thunderwood Holdings and Briandunning.com ("Brian Dunning Defendants") will be able to provide supplemental responses.

Your contention that the Brian Dunning Defendants will be "in contempt" of the court's order in the event supplemental responses are not served by next Tuesday February 16<sup>th</sup> is unfounded. The order does not state a date by which the responses are to be provided and the Brian Dunning Defendants' proposal of a March 1<sup>st</sup> production date is reasonable – particularly since the Brian Dunning Defendants have already complied with your request to turn over all of the Rackspace documents. During our conversation you did not articulate why it is that your client needs the responses prior to March 1<sup>st</sup>. As previously pointed out to you, any delay eBay has experienced in obtaining discovery in this case has been as a direct result of eBay's dilatory conduct. Indeed, eBay did not bother to commence the motion to compel process until just last October – a full eight months after the Brian Dunning Defendants' responses were served.

RUS, MILIBAND & SMITH

Colleen M. Kennedy, Esq.

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Page 2

To reiterate the Brian Dunning Defendants' position, the Brian Dunning Defendants will serve their supplemental responses by March 1<sup>st</sup> assuming the court has not granted the pending motions to stay the case and indictment or criminal complaint has not issued.

Very truly yours,

RUS, MILIBAND & SMITH  
A Professional Corporation



LEO J. PRESIADO

LJP:rr

cc: Patrick McClellan (via fax)  
Ross M. Campbell (via fax)  
Stewart Foreman (via fax)