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14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 SAN JOSE DIVISION  
 17

18	EBAY INC.,	)	CASE NO. CV 08-4052 JF (PVT)
		)	
19	Plaintiff,	)	<b>FIRST AMENDED ANSWER OF</b>
		)	<b>DEFENDANTS KESSLER'S FLYING</b>
20	vs.	)	<b>CIRCUS, THUNDERWOOD</b>
		)	<b>HOLDINGS, INC., AND</b>
21	DIGITAL POINT SOLUTIONS, INC.;	)	<b>BRIANDUNNING.COM TO</b>
	SHAWN HOGAN; KESSLER's FLYING	)	<b>SECOND AMENDED COMPLAINT</b>
22	CIRCUS; THUNDERWOOD HOLDINGS,	)	
	INC.; TODD DUNNING; DUNNING	)	
23	ENTERPRISES, INC.; BRIAN DUNNING;	)	Hon. Jeremy Fogel presiding
	BRIANDUNNING.COM; and DOES 1-20,	)	
24		)	
	Defendants.	)	
25		)	

1 Defendants Kessler’s Flying Circus, Thunderwood Holdings, Inc., and  
2 BrianDunning.com (collectively, “Defendants”) for their First Amended Answer to the  
3 Second Amended Complaint (“SAC”) of Plaintiff eBay, Inc. (“Plaintiff” and/or “eBay”),  
4 admit, deny and allege as follows:

5 **FIRST AMENDED ANSWER**

6 **PARTIES**

7 1. In response to paragraph 1 of the SAC, Defendants are without sufficient  
8 knowledge or information to form a belief as to the truth of the allegations contained in said  
9 paragraph, and on that basis deny each and every allegation contained therein.

10 2. In response to paragraph 2 of the SAC, Defendants are without sufficient  
11 knowledge or information to form a belief as to the truth of the allegations contained in said  
12 paragraph, and on that basis deny each and every allegation contained therein.

13 3. In response to paragraph 3 of the SAC, Defendants are without sufficient  
14 knowledge or information to form a belief as to the truth of the allegations contained in said  
15 paragraph, and on that basis deny each and every allegation contained therein.

16 4. Paragraph 4 of the SAC does not allege facts and therefore does not  
17 require a substantive response.

18 5. In response to paragraph 5 of the SAC, Defendants admit said  
19 allegations.

20 6. In response to paragraph 6 of the SAC, Defendants admit said  
21 allegations.

22 7. In response to paragraph 7 of the SAC, Defendants admit said  
23 allegations.

24 8. In response to paragraph 8 of the SAC, Defendants admit said  
25 allegations.

26 9. In response to paragraph 9 of the SAC, Defendants admit said  
27 allegations.

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1           19. In response to paragraph 19 of the SAC, Defendants are without  
2 sufficient knowledge or information to form a belief as to the truth of the allegations contained  
3 in said paragraph, and on that basis deny each and every allegation contained therein.

4           20. In response to paragraph 20 of the SAC, Defendants admit that Plaintiff  
5 has used the services of Commission Junction's in administering the affiliate marketing  
6 program and that Commission Junction acted as Plaintiff's agent in such regard. Defendants  
7 are without sufficient knowledge or information to form a belief as to the truth of the remaining  
8 allegations contained in said paragraph, and on that basis deny each and every allegation  
9 contained therein.

10           21. In response to paragraph 21 of the SAC, Defendants are without  
11 sufficient knowledge or information to form a belief as to the truth of the allegations contained  
12 in said paragraph, and on that basis deny each and every allegation contained therein.

13           22. In response to paragraph 22 of the SAC, Defendants are without  
14 sufficient knowledge or information to form a belief as to the truth of the allegations contained  
15 in said paragraph, and on that basis deny each and every allegation contained therein.

16           23. In response to paragraph 23 of the SAC, Defendants are without  
17 sufficient knowledge or information to form a belief as to the truth of the allegations contained  
18 in said paragraph, and on that basis deny each and every allegation contained therein.

19           24. In response to paragraph 24 of the SAC, the alleged definition of "cookie  
20 stuffing" does not allege any facts and therefore does not require a response. Defendants are  
21 without sufficient knowledge or information to form a belief as to the truth of the allegations  
22 relating to Plaintiff's alleged analyses, and on that basis deny each such allegation. Defendants  
23 are without sufficient knowledge or information to form a belief as to the truth of the  
24 allegations relating to DPS, and on that basis deny each such allegation. Defendants deny each  
25 and every remaining allegation contained in said paragraph.

26           25. In response to paragraph 25 of the SAC, Defendants are without  
27 sufficient knowledge or information to form a belief as to the truth of the allegations relating to

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1 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
2 every remaining allegation contained in said paragraph.

3           26. In response to paragraph 26 of the SAC, Defendants are without  
4 sufficient knowledge or information to form a belief as to the truth of the allegations that the  
5 User Agreement was agreed to by Defendant Brian Dunning, and on that basis deny each such  
6 allegation contained therein. Defendants are without sufficient knowledge or information to  
7 form a belief as to the truth of the allegations relating to DPS and Shawn Hogan, and on that  
8 basis deny each such allegation contained therein. Defendants deny each and every remaining  
9 allegation contained in said paragraph.

10           27. In response to paragraph 27 of the SAC, Defendants are without  
11 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
12 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
13 every remaining allegation contained in said paragraph.

14           28. In response to paragraph 28 of the SAC, Defendants deny each and every  
15 allegation contained therein.

16           29. In response to paragraph 29 of the SAC, Defendants are without  
17 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
18 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
19 every remaining allegation contained in said paragraph.

20           30. In response to paragraph 30 of the SAC, Defendants deny each and every  
21 allegation contained therein.

22           31. In response to paragraph 31 of the SAC, Defendants are without  
23 sufficient knowledge or information to form a belief as to the truth of the allegations contained  
24 in said paragraph, and on that basis deny each and every allegation contained therein.

25           32. In response to paragraph 32 of the SAC, Defendants are without  
26 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
27 DPS, Shawn Hogan and Brian Dunning, and on that basis deny each such allegation contained  
28 therein. Defendants deny each and every remaining allegation contained in paragraph 32.

1           33. In response to paragraph 33 of the SAC, Defendants are without  
2 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
3 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
4 every remaining allegation contained in said paragraph.

5           34. In response to paragraph 34 of the SAC, Defendants admit that  
6 Commission Junction filed an action against Defendants Kessler's Flying Circus, Brian  
7 Dunning and Todd Dunning; Commission Junction sought to recoup payments made to said  
8 defendants; and that said action has settled. Defendants are without sufficient knowledge or  
9 information to form a belief as to the truth of the remaining allegations contained in said  
10 paragraph, and on that basis deny each and every allegation contained therein.

11                                   **FIRST CAUSE OF ACTION**

12                                   **(18 U.S.C. §1030)**

13           35. In response to paragraph 35 of the SAC, Defendants refer to and  
14 incorporate herein their responses as provided in paragraphs 1 through 34 above.

15           36. In response to paragraph 36 of the SAC, Defendants are without  
16 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
17 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
18 every remaining allegation contained in said paragraph.

19           37. In response to paragraph 37 of the SAC, Defendants are without  
20 sufficient knowledge or information to form a belief as to the truth of the allegations regarding  
21 the terms of the alleged User Agreements, and on that basis deny each such allegation  
22 contained therein. Defendants are without sufficient knowledge or information to form a belief  
23 as to the truth of the allegations relating to DPS, and on that basis deny each such allegation  
24 contained therein. Defendants deny each and every remaining allegation contained in said  
25 paragraph.

26           38. In response to paragraph 38 of the SAC, Defendants are without  
27 sufficient knowledge or information to form a belief as to the truth of the allegations relating to

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1 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
2 every remaining allegation contained therein.

3 39. In response to paragraph 39 of the SAC, Defendants are without  
4 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
5 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
6 every remaining allegation contained in said paragraph.

7 40. In response to paragraph 40 of the SAC, Defendants are without  
8 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
9 the alleged DOE defendants, and on that basis deny each such allegation contained therein.  
10 Defendants deny each and every remaining allegation contained in said paragraph.

11 41. In response to paragraph 41 of the SAC, Defendants are without  
12 sufficient knowledge or information to form a belief as to the truth of the allegations contained  
13 in said paragraph, and on that basis deny each and every allegation contained therein.

14 42. In response to paragraph 42 of the SAC, Defendants are without  
15 sufficient knowledge or information to form a belief as to the truth of the allegations contained  
16 in said paragraph, and on that basis deny each and every allegation contained therein.

17 43. In response to paragraph 43 of the SAC, Defendants are without  
18 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
19 DPS and/or the alleged DOE defendants, and on that basis deny each such allegation contained  
20 therein. Defendants deny each and every remaining allegation contained in said paragraph.

21 44. In response to paragraph 44 of the SAC, Defendants respond to  
22 Plaintiff's prayer for relief as set forth below.

23 **SECOND CAUSE OF ACTION**

24 **(18 U.S.C. §1962(c))**

25 45. In response to paragraph 45 of the SAC, Defendants refer to and  
26 incorporate herein their responses as provided in paragraphs 1 through 44 above.

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1           46. Paragraph 46 does not require a response, as the Second Cause of Action  
2 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
3 Group and Dunning Group defendants.

4           47. Paragraph 47 does not require a response, as the Second Cause of Action  
5 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
6 Group and Dunning Group defendants.

7           48. Paragraph 48 does not require a response, as the Second Cause of Action  
8 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
9 Group and Dunning Group defendants.

10           49. Paragraph 49 does not require a response, as the Second Cause of Action  
11 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
12 Group and Dunning Group defendants.

13           50. Paragraph 50 does not require a response, as the Second Cause of Action  
14 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
15 Group and Dunning Group defendants.

16           51. Paragraph 51 does not require a response, as the Second Cause of Action  
17 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
18 Group and Dunning Group defendants.

19           52. Paragraph 52 does not require a response, as the Second Cause of Action  
20 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
21 Group and Dunning Group defendants.

22           53. Paragraph 53 does not require a response, as the Second Cause of Action  
23 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
24 Group and Dunning Group defendants.

25           54. Paragraph 54 does not require a response, as the Second Cause of Action  
26 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
27 Group and Dunning Group defendants.

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1           55. Paragraph 55 does not require a response, as the Second Cause of Action  
2 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
3 Group and Dunning Group defendants.

4           56. Paragraph 56 does not require a response, as the Second Cause of Action  
5 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
6 Group and Dunning Group defendants.

7           57. Paragraph 57 does not require a response, as the Second Cause of Action  
8 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
9 Group and Dunning Group defendants.

10           58. Paragraph 58 does not require a response, as the Second Cause of Action  
11 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
12 Group and Dunning Group defendants.

13           59. Paragraph 59 does not require a response, as the Second Cause of Action  
14 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
15 Group and Dunning Group defendants.

16           60. Paragraph 60 does not require a response, as the Second Cause of Action  
17 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
18 Group and Dunning Group defendants.

19           61. Paragraph 61 does not require a response, as the Second Cause of Action  
20 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
21 Group and Dunning Group defendants.

22           62. Paragraph 62 does not require a response, as the Second Cause of Action  
23 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
24 Group and Dunning Group defendants.

25           63. Paragraph 63 does not require a response, as the Second Cause of Action  
26 for alleged violations of 18 U.S.C. §1962(c) prays for relief only as against the alleged Hogan  
27 Group and Dunning Group defendants.

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1 DPS and/or the alleged DOE defendants, and on that basis deny each such allegation contained  
2 therein. Defendants deny each and every remaining allegation contained in said paragraph.

3 72. In response to paragraph 72 of the SAC, Defendants are without  
4 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
5 DPS and/or the alleged DOE defendants, and on that basis deny each such allegation contained  
6 therein. Defendants deny each and every remaining allegation contained in said paragraph.

7 73. In response to paragraph 73 of the SAC, Defendants deny each and every  
8 allegation contained therein.

9 74. In response to paragraph 74 of the SAC, Defendants are without  
10 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
11 DPS and/or the alleged DOE defendants, and on that basis deny each such allegation contained  
12 therein. Defendants deny each and every remaining allegation contained in said paragraph.

13 75. In response to paragraph 75 of the SAC, Defendants respond to  
14 Plaintiff's prayer for relief as set forth below.

15 **FOURTH CAUSE OF ACTION**

16 **(California Penal Code §502)**

17 76. In response to paragraph 76 of the SAC, Defendants refer to and  
18 incorporate herein their responses as provided in paragraphs 1 through 75 above.

19 77. In response to paragraph 77 of the SAC, Defendants are without  
20 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
21 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
22 every remaining allegation contained in said paragraph.

23 78. In response to paragraph 78 of the SAC, Defendants are without  
24 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
25 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
26 every remaining allegation contained in said paragraph.

27 79. In response to paragraph 79 of the SAC, Defendants are without  
28 sufficient knowledge or information to form a belief as to the truth of the allegations relating to

1 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
2 every remaining allegation contained in said paragraph.

3 80. In response to paragraph 80 of the SAC, Defendants are without  
4 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
5 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
6 every remaining allegation contained in said paragraph.

7 81. In response to paragraph 81 of the SAC, Defendants respond to  
8 Plaintiff's prayer for relief as set forth below.

9 **FIFTH CAUSE OF ACTION**

10 **(Restitution and Unjust Enrichment)**

11 82. In response to paragraph 82 of the SAC, Defendants refer to and  
12 incorporate herein their responses as provided in paragraphs 1 through 81 above.

13 83. In response to paragraph 83 of the SAC, Defendants are without  
14 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
15 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
16 every remaining allegation contained in said paragraph.

17 84. In response to paragraph 84 of the SAC, Defendants are without  
18 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
19 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
20 every remaining allegation contained in said paragraph.

21 85. In response to paragraph 85 of the SAC, Defendants are without  
22 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
23 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
24 every remaining allegation contained in said paragraph.

25 86. In response to paragraph 86 of the SAC, Defendants respond to  
26 Plaintiff's prayer for relief as set forth below.

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1 **SIXTH CAUSE OF ACTION**

2 **(California Business & Professions Code §17200)**

3 87. In response to paragraph 87 of the SAC, Defendants refer to and  
4 incorporate herein their responses as provided in paragraphs 1 through 86 above.

5 88. In response to paragraph 88 of the SAC, Defendants are without  
6 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
7 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
8 every remaining allegation contained in said paragraph.

9 89. In response to paragraph 89 of the SAC, Defendants are without  
10 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
11 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
12 every remaining allegation contained in said paragraph.

13 90. In response to paragraph 90 of the SAC, Defendants are without  
14 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
15 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
16 every remaining allegation contained in said paragraph.

17 91. In response to paragraph 91 of the SAC, Defendants are without  
18 sufficient knowledge or information to form a belief as to the truth of the allegations relating to  
19 DPS, and on that basis deny each such allegation contained therein. Defendants deny each and  
20 every remaining allegation contained in said paragraph.

21 92. In response to paragraph 92 of the SAC, Defendants respond to  
22 Plaintiff's prayer for relief as set forth below.

23 **FOR THEIR AFFIRMATIVE DEFENSES, THESE ANSWERING**  
24 **DEFENDANTS ALLEGE AS FOLLOWS:**

25 **FIRST AFFIRMATIVE DEFENSE**

26 (Failure to State a Claim)

27 93. As a first, separate and distinct affirmative defense, and solely by way of  
28 an alternative defense, not to be construed as an admission or waiver of any kind, Defendants

1 allege that Plaintiff's SAC, and every purported cause of action stated therein, fails to state  
2 facts sufficient to constitute a cause of action against Defendants.

3 **SECOND AFFIRMATIVE DEFENSE**

4 (Contractual Limitations Period)

5 94. As a second and separate Affirmative Defense, and solely by way of an  
6 alternative defense, not to be construed as an admission or waiver of any kind, Defendants  
7 allege that the SAC and each and every cause of action therein is barred by the one-year  
8 contractual limitations provision set forth in the Commission Junction Publisher Services  
9 Agreement of which Plaintiff is a third party beneficiary and which Plaintiff incorporated by  
10 reference into the eBay Supplemental Terms & Conditions.

11 **THIRD AFFIRMATIVE DEFENSE**

12 (Statute of Limitations)

13 95. As a third and separate Affirmative Defense, and solely by way of an  
14 alternative defense, not to be construed as an admission or waiver of any kind, Defendants  
15 allege that the SAC and each and every cause of action therein is barred by the applicable  
16 statute of limitations. Said limitations include, but are not limited to, 18 U.S.C. § 1030(g),  
17 15 U.S.C. § 15b (as applied to 18 U.S.C. §§ 1962, 1964), California Penal Code § 502(e)(5),  
18 California Code of Civil Procedure §§ 338, 339, and California Business & Professions Code  
19 § 17208.

20 **FOURTH AFFIRMATIVE DEFENSE**

21 (Improper Venue)

22 96. As a fourth and separate Affirmative Defense, and solely by way of an  
23 alternative defense, not to be construed as an admission or waiver of any kind, Defendants  
24 allege that the filing of this action in the above-captioned Court is improper based on the forum  
25 selection clause set forth in the Commission Junction Publisher Services Agreement of which  
26 Plaintiff is a third party beneficiary and which Plaintiff incorporated by reference into the eBay  
27 Supplemental Terms & Conditions.

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**FIFTH AFFIRMATIVE DEFENSE**

(Consent)

97. As a fifth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred because any such conduct as alleged in the SAC was consented to by Plaintiff.

**SIXTH AFFIRMATIVE DEFENSE**

(Authorization)

98. As a sixth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred because any such conduct as alleged in the SAC was known, authorized, and encouraged by Plaintiff.

**SEVENTH AFFIRMATIVE DEFENSE**

(Estoppel)

99. As a seventh and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred because Plaintiffs acts, omissions, representations and conduct constitute an estoppel, and bar its claims.

**EIGHTH AFFIRMATIVE DEFENSE**

(Waiver)

100. As an eighth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission of waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred because Plaintiff has waived any and all claims it has made against Defendants.

**NINTH AFFIRMATIVE DEFENSE**

(Laches, Unclean Hands, Acquiescence, Ratification, Assumption of the Risk)

101. As a ninth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants

1 allege that the SAC and each and every cause of action therein is barred by the doctrine of  
2 laches, unclean hands, acquiescence, ratification, and reasonably implied assumption of the  
3 risk.

4 **TENTH AFFIRMATIVE DEFENSE**

5 (No Damages Suffered)

6 102. As a tenth and separate Affirmative Defense, and solely by way of an  
7 alternative defense, not to be construed as an admission or waiver of any kind, Defendants  
8 allege that the SAC and each and every cause of action therein is barred because Plaintiff never  
9 sustained any damages caused by Defendants, and Plaintiff lacks standing.

10 **ELEVENTH AFFIRMATIVE DEFENSE**

11 (Damages Not Subject to Reasonable Calculation)

12 103. As an eleventh and separate Affirmative Defense, and solely by way of  
13 an alternative defense, not to be construed as an admission or waiver of any kind, Defendants  
14 allege that the SAC and each and every cause of action therein is barred because Plaintiff's  
15 damages, if any, are not subject to reasonable calculation.

16 **TWELFTH AFFIRMATIVE DEFENSE**

17 (Failure to Mitigate Damages)

18 104. As a twelfth and separate Affirmative Defense, and solely by way of an  
19 alternative defense, not to be construed as an admission or waiver of any kind, Defendants  
20 allege that the SAC and each and every cause of action therein is barred because Plaintiff failed  
21 to exercise reasonable resourcefulness, care and diligence to mitigate any damages, and any  
22 recovery against Defendants should be reduced accordingly.

23 **THIRTEENTH AFFIRMATIVE DEFENSE**

24 (In Pari Delicto)

25 105. As a thirteenth and separate Affirmative Defense, and solely by way of  
26 an alternative defense, not to be construed as an admission or waiver of any kind, Defendants  
27 allege that the SAC and each and every cause of action therein is barred by the doctrine of  
28 in pari delicto.



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**FOURTEENTH AFFIRMATIVE DEFENSE**

(Plaintiff's Negligence)

106. As a fourteenth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred because Plaintiff's damages, if any, were caused by Plaintiff's own negligence or want of ordinary care and prudence.

**FIFTEENTH AFFIRMATIVE DEFENSE**

(Intervening/Superseding Actions)

107. As a fifteenth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred to the extent that the damages or losses allegedly sustained by Plaintiff, if any, were the direct and proximate result of intervening and superceding actions on the part of other parties, and not Defendants, barring Plaintiff's recovery from Defendants.

**SIXTEENTH AFFIRMATIVE DEFENSE**

(No Intent to Injure)

108. As a sixteenth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred because Defendants at no time acted with any intent to injure Plaintiff, and the Defendants took no actions intended to cause any harm to Plaintiff.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

(No Willful, Malicious, Oppressive or Outrageous Conduct)

109. As a seventeenth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission or waiver of any kind, Defendants allege that Defendants did not engage in any willful, malicious, oppressive or outrageous conduct with regard to Plaintiff.

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**EIGHTEENTH AFFIRMATIVE DEFENSE**

(Adequate Legal Remedy)

110. As an eighteenth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission of waiver of any kind, Defendants allege that Plaintiff’s prayer for injunctive relief is barred because Plaintiff has an adequate remedy at law.

**NINETEENTH AFFIRMATIVE DEFENSE**

(Any Harm Proximately Caused by Others)

111. As a nineteenth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission, Defendants allege that the SAC and each and every cause of action therein is barred because any losses, damages and/or injuries sustained by Plaintiff were proximately caused by the fault of persons or entities other than Defendants, over whom Defendants have no control.

**TWENTIETH AFFIRMATIVE DEFENSE**

(Good Faith)

112. As a twentieth and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission of waiver of any kind, Defendants allege that the SAC and each and every cause of action therein is barred because Defendants have acted in good faith.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

(Setoff)

113. As a twenty-first and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission of waiver of any kind, Defendants allege that Plaintiff’s damages, if any, are subject to setoff and should be reduced accordingly.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

(Indispensable Party)

114. As a twenty-second and separate Affirmative Defense, and solely by way of an alternative defense, not to be construed as an admission of waiver of any kind,

1 Defendants allege that the SAC and each and every cause of action therein is barred because  
2 Plaintiff has failed to join an indispensable party or parties to this action.

3 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

4 (Plaintiff's Agents)

5 115. As a twenty-third and separate Affirmative Defense, and solely by way  
6 of an alternative defense, not to be construed as an admission of waiver of any kind,  
7 Defendants allege that the SAC and each and every cause of action therein is barred based on  
8 the actions and/or omissions of Plaintiff's own agents.

9 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

10 (Release)

11 116. As a twenty-fourth and separate Affirmative Defense, and solely by way  
12 of an alternative defense, not to be construed as an admission or waiver of any kind,  
13 Defendants allege that the SAC and each and every cause of action therein is barred because of  
14 Plaintiff's release of Defendants from any and all liability.

15 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

16 (Reservation of Right to Assert Additional Defenses)

17 117. As a twenty-fifth and separate Affirmative Defense, and solely by way of  
18 an alternative defense, not to be construed as an admission, Defendants allege that at the time  
19 of the filing of this Answer, affirmative defenses may not have been alleged for reasons that  
20 insufficient facts and information were available after reasonable inquiry. Defendants therefore  
21 reserve the right to amend this answer to allege additional affirmative defenses based upon  
22 subsequent discovery of new or different facts or subsequent appreciation of currently known  
23 facts.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Defendants Kessler's Flying Circus, Thunderwood Holdings,  
26 Inc., and BrianDunning.com pray as follows:

- 27 1. That Plaintiff take nothing by its Complaint;  
28 2. That the Complaint be dismissed with prejudice;


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3. That Defendants be awarded his costs of suit, including reasonable attorneys' fees;

4. That Defendants have such other, further and different relief as this Court deems just and proper.


DATED: March 19, 2010

Respectfully submitted,  
RUS, MILIBAND & SMITH  
A Professional Corporation

By:   
LEO J. PRESIADO  
Attorneys for Defendants  
THUNDERWOOD HOLDINGS, INC.,  
BRIAN DUNNING and  
BRIANDUNNING.COM

DATED: March 19, 2010

LAW OFFICES OF PATRICK K. McCLELLAN

By:   
PATRICK K. McCLELLAN  
Attorney for Defendant  
KESSLER'S FLYING CIRCUS

1 **CERTIFICATE OF SERVICE**

2 I, Rhonda Radford, declare as follows:

3 I am employed in the County of Orange, State of California; I am over the age of eighteen  
4 years and am not a party to this action; my business address is 2211 Michelson Drive, Seventh Floor,  
5 Irvine, California 92612, in said County and State. On March 19, 2010, the document(s) entitled:

6 **FIRST AMENDED ANSWER OF DEFENDANTS KESSLER'S FLYING CIRCUS,  
7 THUNDERWOOD HOLDINGS, INC. AND BRIANDUNNING.COM TO SECOND  
8 AMENDED COMPLAINT**

9 was/were served as follows:

10  **CM/ECF ELECTRONIC SERVICE:** The following are registered as CM/ECF Users with the  
11 Court, and have consented to service through the Court's automatic transmission of a notice of  
12 electronic filing:

13 David R. Eberhart  
14 Sharon M. Bunzel  
15 Colleen M. Kennedy  
16 O'Melveny & Myers  
17 Two Embarcadero, 20<sup>th</sup> Floor  
18 San Francisco, CA 94111  
19 Tel: (949) 984-8700 / Fax: (949) 984-8701  
20 Email: [deberhart@omm.com](mailto:deberhart@omm.com),  
21 [sbunzel@omm.com](mailto:sbunzel@omm.com)

*Attorneys for Plaintiff eBay, Inc.*

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23 Freeland, Cooper & Foreman, LLP  
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Dunning Enterprises, Inc.*

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*Attorneys for Digital Point Solutions, Inc. and  
Shawn Hogan*

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*Attorney for Kessler's Flying Circus*

I am employed in the office of Rus, Miliband & Smith, APC, a member of the bar  
of this Court, and the foregoing document(s) was/were printed on recycled paper.

**FEDERAL** I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 19, 2010, at Irvine, California.

  
RHONDA RADFORD