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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.,  
 24 BRIAN DUNNING,  
 25 BRIANDUNNING.COM, and DOES 1-  
 26 20,

27 Defendants.

Case No. C 08-4052 JF PVT

**JOINT CASE MANAGEMENT  
 STATEMENT AND [PROPOSED]  
 ORDER**

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

1 This Case Management Statement and Proposed Order is jointly submitted by  
2 plaintiff eBay Inc. and defendants Shawn Hogan and Digital Point Solutions, Inc. (the  
3 “DPS Defendants”), and those parties request that the Court adopt the Proposed Order as  
4 its Case Management Order in this case. Those parties, through undersigned counsel,  
5 have met and conferred on the matters contained herein. eBay was unsuccessful in its  
6 attempts to contact the remaining defendants to the above-entitled action prior to the filing  
7 of this Case Management Statement and Proposed Order.

8 **I. JURISDICTION AND SERVICE**

9 There have been no changes since the previous Joint Case Management Statement.

10 **II. FACTS**

11 There have been no changes since the previous Joint Case Management Statement.

12 **III. LEGAL ISSUES**

13 There have been no changes since the previous Joint Case Management Statement.

14 **IV. PENDING AND ANTICIPATED MOTIONS**

15 eBay’s Statement:

16 Within the last several weeks, eBay has received supplemental discovery  
17 responses, including document productions, from defendants Shawn Hogan, Digital Point  
18 Solutions, Inc., Dunning Enterprise, Inc., Brian Dunning, Thunderwood Holdings, Inc.,  
19 BrianDunning.com and Kessler’s Flying Circus in response to the Court’s January 12,  
20 2010 order granting eBay’s motions to compel. eBay continues to analyze those  
21 productions and has begun to pursue meet-and-confer discussions with defendants’  
22 counsel, but, in the event that any meet-and-confer processes are unsuccessful, eBay  
23 anticipates that it may need to: (i) move to challenge some of the confidentiality  
24 designations made by the defendants pursuant to the Stipulated Protective Order; and/or  
25 (ii) move to compel full compliance with the Court’s January 12, 2010 order.

26 eBay is also continuing to meet and confer with defendants regarding their  
27 responses to the requests in eBay’s First Set of Requests for Production that seek  
28 information regarding defendants’ financial condition, including requests for defendants’

1 financial statements and tax returns. Defendants have now produced at least some of this  
2 information as part of their recent productions, but defendant DPS, Inc. has yet to produce  
3 its tax returns to eBay. eBay may need to move to compel the production of this  
4 information in the event that an agreement cannot be reached with all defendants on this  
5 issue.

6 eBay also anticipates filing a motion for summary judgment or summary  
7 adjudication following the close of discovery. eBay further anticipates filing motions in  
8 limine before trial.

9 DPS Defendants' Statement:

10 No motions are currently pending before the Court. Defendant Digital Point  
11 Solutions, Inc. has served a document subpoena on one Benjamin Edelman, a non-party  
12 witness believed to have knowledge and information supporting the DPS Defendants'  
13 claims and defenses. Benjamin Edelman is a professor at the Harvard Business School.  
14 Professor Edelman is now represented by Plaintiff's counsel and has served objections  
15 and responses to the subpoena. The objections and responses are improper and  
16 inappropriately purport to limit the scope of the requests. Defense counsel has  
17 commenced the meet and confer process but anticipates that it may be necessary to initiate  
18 proceedings in the District of Massachusetts to compel responses from Professor  
19 Edelman.

20 The DPS Defendants further anticipate filing a motion for summary judgment  
21 and/or adjudication as well as a motion to transfer and/or dismiss on the grounds of forum  
22 non conveniens. In addition, Mr. Hogan will seek leave to amend his Answer to  
23 substantively respond to the allegations of the SAC upon the conclusion of the criminal  
24 matter and, to the extent necessary thereafter, will move to exclude any reference to the  
25 assertion of the Fifth Amendment at trial or otherwise. Finally, to the extent the action is  
26 not dismissed or transferred, the DPS Defendants anticipate requesting bifurcation and/or  
27 separate trials as to each respective defendant group.

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1 **V. AMENDMENT OF PLEADINGS**

2 eBay's Statement:

3 On March 19, 2010, defendants Kessler's Flying Circus, Thunderwood Holdings,  
4 Inc. and BrianDunning.com filed a First Amended Answer to eBay's Second Amended  
5 Complaint ("SAC"), in response to the Court's February 25, 2010 order granting eBay's  
6 motion to strike those defendants' previously-filed answer with leave to amend. The  
7 Amended Answer did not provide responses to certain allegations in the SAC. eBay  
8 intends to meet and confer with these defendants on this issue and this may be the subject  
9 of future motion practice.

10 eBay does not anticipate the need for any further amendments to the SAC at this  
11 time, but if discovery shows that defendants used additional entities to effectuate their  
12 schemes, and if the currently-named defendants did not succeed to the assets and  
13 liabilities of those entities, eBay may seek leave to amend its complaint to conform to the  
14 evidence and to substitute those entities for current Doe defendants.

15 DPS Defendants' Statement:

16 There have been no changes since the previous Joint Case Management Statement.

17 **VI. EVIDENCE PRESERVATION**

18 There have been no changes since the previous Joint Case Management Statement.

19 **VII. DISCLOSURES**

20 There have been no changes since the previous Joint Case Management Statement.

21 **VIII. DISCOVERY PLAN**

22 eBay's Statement:

23 eBay is proceeding with full fact discovery, and continues to work with defendants  
24 toward their compliance with previously-issued discovery requests, as noted above.

25 eBay continues to propose the discovery deadlines set forth in the previous Joint  
26 Case Management Statement filed on January 15, 2010 and in the attached schedule.

27 There are no other changes since eBay's statement in the previous Joint Case  
28 Management Statement.

1           DPS Defendants' Statement:

2           As noted in the parties' previous joint statement, the DPS Defendants have  
3 produced documents and provided supplemental discovery responses pursuant to the  
4 Court's January 12, 2010 discovery order. In addition, the DPS Defendants have  
5 commenced fact discovery as noted above and intend to propound additional discovery  
6 prior to the upcoming Case Management Conference.

7           As discussed below, mediation has been scheduled for April 27, 2010. The DPS  
8 Defendants' position is that discovery dates should not be set until after the parties have  
9 had an opportunity to mediate. To the extent dates are set at the Case Management  
10 Conference, fact and expert discovery should not close until May 2011 and August 2011,  
11 respectively. The DPS Defendants' understanding is that the criminal investigation  
12 remains active; the foregoing dates may need to be further extended accordingly.

13           In light of the expansive timeframe of the alleged wrongdoing and the number of  
14 potential percipient and party witnesses associated with Commission Junction, Plaintiff,  
15 and Plaintiff's subsidiaries, 25 to 30 depositions are warranted in this case.

16   **IX. RELATED CASES**

17           There have been no changes since the previous Joint Case Management Statement.

18   **X. RELIEF**

19           There have been no changes since the previous Joint Case Management Statement.

20   **XI. SETTLEMENT AND ADR**

21           eBay's Statement:

22           Pursuant to this Court's referral of the case to mediation at the last Case  
23 Management Conference on February 26, 2010, the parties have since participated in a  
24 conference call with the ADR staff and Beth Parker has been re-appointed as the mediator  
25 for this case. A mediation session has been scheduled for April 27, 2010 and a further  
26 conference call with Ms. Parker has been set for April 12, 2010 to discuss the mediation  
27 process.

28           DPS Defendants' Statement:

1 As further discussed in Plaintiff's statement, mediation has been scheduled for  
2 April 27, 2010 before Beth Parker.

3 **XII. MAGISTRATE JUDGE**

4 There have been no changes since the previous Joint Case Management Statement.

5 **XIII. OTHER REFERENCES**

6 There have been no changes since the previous Joint Case Management Statement.

7 **XIV. NARROWING OF ISSUES**

8 There have been no changes since the previous Joint Case Management Statement.

9 **XV. EXPEDITED SCHEDULE**

10 There have been no changes since the previous Joint Case Management Statement.

11 **XVI. SCHEDULING**

12 The parties' proposed schedules are attached as Exhibit A. There have been no  
13 changes to the schedule since the previous Joint Case Management Statement.

14 **XVII. TRIAL**

15 There have been no changes since the previous Joint Case Management Statement.

16 **XVIII. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR**  
17 **PERSONS**

18 There have been no changes since the previous Joint Case Management Statement.

19 Dated: March 26, 2010

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

23 By: /s/ David R. Eberhart  
David R. Eberhart

24 *Attorneys for Plaintiff*  
25 eBay Inc.

1 Dated: March 26, 2010

SEYAMACK KOURETSCHIAN  
COAST LAW GROUP, LLP

2

3

By: /s/ Ross Campbell

4

Ross Campbell

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*Attorneys for Defendants*

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Digital Point Solutions, Inc. and Shawn  
Hogan

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**ATTESTATION**

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Pursuant to General Order No. 45 X(B), I hereby attest that concurrence in the  
10 filing of this document has been obtained from each of the above-listed signatories.

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By: /s/ David R. Eberhart

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David R. Eberhart

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**CASE MANAGEMENT ORDER**

The Case Management Statement and Proposed Order is hereby adopted by this Court as the Case Management Order for the case, and the parties are ordered to comply with this Order. In addition, the Court orders that a further Case Management Conference will be held on \_\_\_\_\_.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Jeremy Fogel  
United States District Court Judge  
Northern District of California

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EXHIBIT A

Event	eBay's Proposed Dates	Defendants' Proposed Dates
Fact discovery closes	September 24, 2010	
Last day for expert reports on merits	November 12, 2010	
Last day for depositions of experts	December 3, 2010	
Last day for responsive expert reports	December 17, 2010	
Close of expert discovery	January 14, 2011	
Last day to file dispositive motions	February 18, 2011	
Oppositions to dispositive motions due	March 25, 2011	
Reply briefs in support of dispositive motions due	April 15, 2011	
Hearing on dispositive motions	May 6, 2011	
Required Meeting Prior to Pretrial Conference	June 21, 2011	
Pretrial Conference Statement	June 27, 2011	
Pretrial Conference	July 11, 2011	
Trial	August 22, 2011	