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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: June 11, 2010
 Time: 10:30 a.m.
 Judge: Hon. Jeremy Fogel

1 The parties to the above-entitled action jointly submit this Case Management
2 Statement and Proposed Order and request that the Court adopt it as its Case Management
3 Order in this case. The parties, through undersigned counsel, have met and conferred on
4 the matters contained herein.

5 **I. JURISDICTION AND SERVICE**

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

7 **II. FACTS**

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

9 **III. LEGAL ISSUES**

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

11 **IV. PENDING AND ANTICIPATED MOTIONS**

12 eBay's Statement:

13 eBay continues to meet and confer with defendants' counsel regarding defendants'
14 supplemental discovery responses. While substantial progress has been made, a few
15 outstanding issues remain. In particular, the DPS Defendants have yet to provide eBay
16 with a copy of their source code files in the manner in which they were kept in the
17 ordinary course of business, including the file names and file structure for the source code.
18 (For this type of code, file names are essential because operation of the code is often
19 commenced through use of the file name.) eBay's review of the DPS Defendants' source
20 code also has revealed that several types of associated files are missing from their
21 production, including configuration files for the servers used by defendants and image
22 files referenced in the code. The DPS Defendants also have failed to provide eBay with
23 the supporting documents, including relevant attachments, associated with the tax returns
24 that they have produced to eBay.

25 As with the DPS Defendants' production, the source code produced by the
26 Dunning Defendants is also missing several different types of files referenced in the code
27 itself, including configuration files, image files, and source files. In addition, defendants
28 Todd and Brian Dunning have failed to produce their individual tax returns to eBay,

1 despite the fact that the production of those returns is not protected by the Fifth
2 Amendment privilege. *See Federal Savings & Loan Ins. v. Rodrigues*, 717 F. Supp. 1424,
3 1425-27 (N.D. Cal. 1988). In the event that any meet-and-confer processes on these
4 issues are unsuccessful, eBay anticipates that it may need to move to compel full
5 compliance with the Court's January 12, 2010 order.

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 Defendants Shawn Hogan and Digital Point Solutions, Inc.'s (collectively "DPS
10 Defendants") Statement:

11 No motions are currently pending before the Court. The DPS Defendants have
12 commenced fact discovery, including the issuance of requests for production to Plaintiff
13 and document subpoenas to non-parties Commission Junction and Benjamin Edelman.
14 Benjamin Edelman is a professor at the Harvard Business School and has knowledge and
15 information supporting the DPS Defendants' claims and defenses. Professor Edelman is
16 now represented by Plaintiff's counsel. He has served objections and responses to the
17 subpoena, and has produced some responsive documents. The objections and responses
18 are improper and inappropriately purport to limit the scope of the requests. The DPS
19 Defendants have met and conferred on these issues on numerous occasions but Professor
20 Edelman has refused to produce any documents post-dating June of 2007. There is no
21 basis for this arbitrary and self-imposed cutoff date, particularly given the broad scope of
22 discovery under the Federal Rules. In addition, Professor Edelman has inappropriately
23 designated the vast majority of the documents that have been produced as "attorneys' eyes
24 only" under the Stipulated Protective Order. As such, the DPS Defendants will be filing a
25 motion to compel on these issues.

26 The DPS Defendants will also be filing a motion to compel as to the two requests
27 for production served on Plaintiff to date. The requests were served on March 29 and
28 April 6, 2010, respectively. Although two months have now gone by, Plaintiff has only

1 produced the following: (1) documents that Plaintiff already produced well over a year
2 ago in response to subpoenas issued by the Dunning Defendants in the Commission
3 Junction state court action (to which the DPS Defendants were not parties); and (2) 73
4 pages of documents largely consisting of various User Agreements. Plaintiff still has not
5 produced documents that are clearly responsive, including the documents identified in
6 Plaintiff's initial disclosures and documents supporting the contentions of the SAC.
7 Notwithstanding the Stipulated Protective Order in this case, Plaintiff has redacted the
8 vast majority of the information contained in the limited documents that have been
9 produced to date. In addition, as with Professor Edelman, Plaintiff has asserted that it will
10 not produce any responsive documents post-dating June of 2007 (although it now appears
11 that Plaintiff is selectively enforcing this policy). The DPS Defendants will move to
12 compel as to these issues as well.

13 Further, Plaintiff and the DPS Defendants are in the process of meeting and
14 conferring regarding the use of search terms to facilitate the location of responsive
15 electronic documents. Although Plaintiff developed a list of search terms well over a year
16 ago in the context of responding to the Dunning Defendant subpoenas in the CJ action,
17 Plaintiff did not raise the issue or provide the list to the DPS Defendants until six weeks
18 after the requests for production were initially served. Plaintiff has not made any attempt
19 to explain or justify this delay. The DPS Defendants are hopeful that these issues can be
20 resolved without the need for judicial intervention but anticipate that motion practice may
21 ultimately be necessary on this subject as well.

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

1 separate trials as to each respective defendant group.

2 Defendants Kessler’s Flying Circus, Thunderwood Holdings, Inc., Brian Dunning,
3 Brian Dunning.com, Todd Dunning and Dunning Enterprise, Inc.’s (collectively “Non-
4 DPS Defendants”) Statement:

5 No motions are currently pending before the Court. At this point, the Non-DPS
6 Defendants anticipate filing dispositive motions upon conclusion of the pending criminal
7 proceeding . As previously asserted, the Non-DPS Defendants are unable to adequately
8 defend against the claims asserted by Plaintiff until the criminal proceeding has
9 concluded.

10 As to Plaintiff’s claims regarding discovery, the Non-DPS Defendants have
11 demonstrated to Plaintiff on several occasions that they are in full compliance with the
12 discovery order of the Court.

13 **V. AMENDMENT OF PLEADINGS**

14 eBay’s Statement:

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

16 DPS Defendants’ Statement:

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

18 Non-DPS Defendants’ Statement:

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

20 **VI. EVIDENCE PRESERVATION**

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

22 **VII. DISCLOSURES**

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

24 **VIII. DISCOVERY PLAN**

25 eBay’s Statement:

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

28 eBay also has attempted to meet and confer with the DPS Defendants’ counsel

1 regarding the DPS Defendants' requests for production. eBay has been working diligently
2 to respond to the DPS Defendants' requests for production since they were first issued and
3 has, to date, made two separate productions totaling approximately 27,000 pages.
4 (Contrary to the DPS Defendants' claims, eBay has not improperly redacted information
5 and has certainly not "redacted the vast majority of the information" in those more than
6 27,000 documents.) Furthermore, eBay carefully analyzed the requests propounded by
7 the DPS Defendants, and proposed a list of nearly 100 relevant search terms which would
8 be used to conduct a substantial review of eBay's electronically stored information. (In
9 light of the DPS Defendants' requests, these search terms are a superset of the search
10 terms that eBay used to respond to the Dunning's requests in the *Commission Junction*
11 state court action.) Despite eBay's meet and confer efforts, the DPS Defendants' counsel
12 refused to agree to eBay's proposed list of search terms (1) even though the DPS
13 Defendants' counsel agreed that the use of search terms was appropriate as a general
14 matter; and (2) despite eBay's incorporation of all additional and/or revised search terms
15 that the DPS Defendants proposed. Following the DPS Defendants' refusal to agree to
16 search terms and in order to proceed with document review and production in a timely
17 manner, eBay applied the aggregate list of search terms to its electronic database and is
18 reviewing potentially responsive documents to produce to the DPS Defendants as soon as
19 possible. In addition, eBay has collected and is producing non-electronic documents. As
20 eBay has informed the DPS Defendants, eBay is working diligently in an attempt to
21 produce all responsive documents as quickly as possible and has indicated that it will
22 continue to produce documents on a rolling basis to the extent practicable.

23 In light of the defendants' delays in the discovery process, eBay has proposed
24 certain changes to the discovery schedule set forth in previous Joint Case Management
25 Statements and proposes that the fact discovery cutoff be moved until March 4, 2011 and
26 that all subsequent pretrial due dates be rescheduled accordingly. eBay's revised
27 proposed discovery schedule is attached hereto as Exhibit A.

28

1 DPS Defendants' Statement:

2 The DPS Defendants have commenced fact discovery and, as noted above, will be
3 filing motions to compel as to the Edelman subpoena and the requests for production
4 served on Plaintiff. Based on the responses provided by Professor Edelman and Plaintiff
5 to date, the DPS Defendants anticipate further lengthy discovery disputes in this case.
6 Commission Junction has produced documents in response to the DPS Defendants'
7 document subpoenas but additional meet-and-confer discussions are likely. The DPS
8 Defendants' position is that fact and expert discovery should not close until July 2011 and
9 December 2011, respectively. Additional proposed dates are set forth in Exhibit A hereto.
10 The DPS Defendants are informed that the criminal investigation remains active; the
11 foregoing dates may need to be further extended accordingly.

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

15 Non-DPS Defendants' Statement:

16 As previously asserted, the Non-DPS Defendants are unable to adequately defend
17 against the claims asserted by Plaintiff until the criminal proceeding has concluded. The
18 Non-DPS Defendants have not yet conducted facts discovery in this case due, in part, to
19 the inability to obtain the records seized by the Government in connection with the
20 pending criminal proceeding. Despite demand, the Government refuses to return (or even
21 image a copy of) the seized records.

22 The Non-DPS Defendants generally agree with the discovery timeline proposed by
23 the DPS Defendants at Exhibit "A," assuming the criminal investigation is concluded in
24 short order.

25 **IX. RELATED CASES**

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

27 **X. RELIEF**

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

1 **XI. SETTLEMENT AND ADR**

2 eBay's Statement:

3 Pursuant to this Court's referral of the case to mediation, the parties participated in
4 a mediation session with appointed mediator Beth Parker on April 27, 2010. The
5 mediation session was unsuccessful.

6 DPS Defendants' Statement:

7 The parties attended a mediation session with Beth Parker on April 27, 2010. As
8 reflected in Docket File No. 211, the case did not settle as to any parties. While the DPS
9 Defendants remain open to ADR options, the process has not been productive thus far.

10 Non-DPS Defendants' Statement:

11 The parties attended a mediation session with Beth Parker on April 27, 2010. The
12 Non-DPS Defendants remain open further ADR procedures and/or options.

13 **XII. MAGISTRATE JUDGE**

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

15 **XIII. OTHER REFERENCES**

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

17 **XIV. NARROWING OF ISSUES**

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

19 **XV. EXPEDITED SCHEDULE**

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

21 **XVI. SCHEDULING**

22 The parties' proposed schedules are attached as Exhibit A. eBay has proposed
23 certain changes to that schedule since the previous Joint Case Management Statement and
24 proposes that the fact discovery cutoff be moved until March 4, 2011 and that all
25 subsequent pretrial due dates be rescheduled accordingly.

26 **XVII. TRIAL**

27 There have been no changes since the previous Joint Case Management Statement.
28

1 **XVIII. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR**
2 **PERSONS**

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

4 Dated: June 4, 2010

5 DAVID R. EBERHART
6 SHARON M. BUNZEL
7 NORA M. PUCKETT
8 O'MELVENY & MYERS LLP

9 By: /s/ David R. Eberhart
10 David R. Eberhart

11 *Attorneys for Plaintiff*
12 eBay Inc.

13 Dated: June 4, 2010

14 SEYAMACK KOURETSCHIAN
15 COAST LAW GROUP, LLP

16 By: /s/ Ross Campbell
17 Ross Campbell

18 *Attorneys for Defendants*
19 Digital Point Solutions, Inc. and Shawn
20 Hogan

21 Dated: June 4, 2010

22 LEO J. PRESIADO
23 RUS, MILIBAND & SMITH, A
24 PROFESSIONAL CORPORATION

25 By: /s/ Leo J. Presiado
26 Leo J. Presiado

27 *Attorneys for Defendants*
28 Thunderwood Holdings, Inc., Brian
Dunning and BrianDunning.com

1 Dated: June 4, 2010

STEWART H. FOREMAN
FREELAND, COOPER & FOREMAN,
LLP

2

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By: /s/ Stewart H. Foreman
Stewart H. Foreman

5

6

Attorneys for Defendants
Todd Dunning and Dunning Enterprise,
Inc.

7

8 Dated: June 4, 2010

PATRICK K. MCCLELLAN
LAW OFFICE OF PATRICK K.
MCCLELLAN

9

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11

By: /s/ Patrick K. McClellan
Patrick K. McClellan

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13

Attorney for Defendant
Kessler's Flying Circus

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ATTESTATION

15

16

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

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

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CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order are 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	DPS Defendants' and Non-DPS Defendants' Proposed Dates
Fact discovery closes	March 4, 2011	July 29, 2011
Last day for expert reports on merits	April 22, 2011	September 23, 2011
Last day for depositions of experts	May 13, 2011	October 21, 2011
Last day for responsive expert reports	May 27, 2011	November 18, 2011
Close of expert discovery	June 24, 2011	December 16, 2011
Last day to file dispositive motions	July 29, 2011	January 27, 2012
Oppositions to dispositive motions due	September 2, 2011	March 2, 2012
Reply briefs in support of dispositive motions due	September 23, 2011	March 23, 2012
Hearing on dispositive motions	October 14, 2011	April 13, 2012
Required Meeting Prior to Pretrial Conference	November 29, 2011	June 4, 2012
Pretrial Conference Statement	December 5, 2011	June 11, 2012
Pretrial Conference	December 19, 2011	June 25, 2012
Trial	January 30, 2012	August 6, 2012

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