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

18 EBAY INC.,
 19 Plaintiff,
 20 vs.
 21 DIGITAL POINT SOLUTIONS, INC.;
 SHAWN HOGAN; KESSLER'S FLYING
 22 CIRCUS; THUNDERWOOD HOLDINGS,
 INC.; TODD DUNNING; DUNNING
 23 ENTERPRISES, INC.; BRIAN DUNNING;
 BRIANDUNNING.COM; and DOES 1-20,
 24 Defendants.
 25

CASE NO. CV 08-4052 JF PVT
**NOTICE OF MOTION AND MOTION TO
 STAY CIVIL ACTION PENDING
 RESOLUTION OF CRIMINAL
 PROCEEDINGS; MEMORANDUM OF
 POINTS AND AUTHORITIES**
 JUDGE: Hon. Jeremy Fogel
 DATE: October 1, 2010
 TIME: 9:00 a.m.
 CRTRM.: 3
 TRIAL DATE: June 8, 2012

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
2 PLEASE TAKE NOTICE that on October 1, 2010 at 9:00 a.m. in Courtroom 3
3 located at 280 South 1st Street, San Jose, California, before the Hon. Jeremy Fogel, Defendants
4 Thunderwood Holdings, Inc., Brian Dunning, BrianDunning.com, and Kessler's Flying Circus
5 (collectively, "Defendants") will and hereby do move the Court for an order staying this civil
6 action as against Defendants pending resolution of the indictment and attendant criminal
7 proceeding at *United States v. Brian Dunning*, CR 10-0494 RMW (N.D. Cal.).

8 This Motion is made on the grounds that a stay of this civil action is necessary to
9 protect Mr. Dunning's Fifth Amendment rights in connection with the above-referenced criminal
10 proceeding, which arises from the same underlying facts as this civil action. In addition, the civil
11 action should be stayed as to Defendants Thunderwood Holdings, Inc. ("THI"), Kessler's Flying
12 Circus ("KFC"), and BrianDunning.com ("BD.com"). Mr. Dunning is the only person that can
13 speak on behalf of these entities. These entities will be greatly prejudiced by their inability to
14 meaningfully defend themselves in this civil action if forced to proceed prior to resolution of Mr.
15 Dunning's criminal case.

16 This Motion is based on the accompanying Memorandum of Points and Authorities
17 and Declaration of Leo J. Presiado, filed herewith, as well as the Declarations of Brian Dunning
18 and William Kopeny, filed on October 15, 2009 in support of Defendants' prior Motion to Stay
19 Civil Action (dkt. 133) and incorporated herein by reference, all other pleadings and files in this
20 matter, and such additional evidence and argument as may be permitted by the Court.

21 DATED: July 20, 2010

22 LAW OFFICES OF PATRICK K.
23 McCLELLAN

24 By: /s/ Patrick K. McClellan

25 PATRICK K. McCLELLAN
26 Attorneys for Defendant
27 KESSLER'S FLYING CIRCUS

RUS, MILIBAND & SMITH
A Professional Corporation

By: /s/ Leo J. Presiado

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THUNDERWOOD HOLDINGS, INC.,
BRIAN DUNNING, and
BRIANDUNNING.COM

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 On February 25, 2010, the Court issued an Order denying, without prejudice,
4 Defendants' motion to stay this civil action ("Order"). (Order 13.) The Court's Order was based
5 primarily on the "potentially indefinite" duration of a pre-indictment stay and uncertainty as to the
6 "precise degree of overlap" between the government's investigation and the facts alleged in the
7 Second Amended Complaint ("SAC"). (Order 5, 7.) During the hearing on Defendants' motion to
8 stay, however, the Court recognized that "[i]f there's an indictment, then we have to *recalibrate*
9 *the entire case.*" (1/29/10 Tr. 18 (emphasis added).)

10 The government indicted Defendant Brian Dunning on June 24, 2010¹ Any
11 uncertainty as to the direction of the government's investigation or the degree of overlap between
12 the two cases is now gone. The SAC and the Dunning indictment allege nearly identical facts to
13 support their allegations of improper "cookie stuffing" by Mr. Dunning, THI, KFC, and BD.com.
14 Less than a week after the indictment was filed, the government filed a Notice of Related Case:

15 The charges filed in *United States v. Dunning*, CR 10-0494 RMW,
16 involve one of the defendants charged in the civil complaint in case
17 CV 08-4052. *In that civil case, the defendants are alleged to have*
18 *engaged in the same "cookie stuffing" scheme that is the subject*
19 *of the Indictment in case CR 10-0494 RMW.*

20 (Gov't Notice Rel. Case 1 (dkt. 218).) Moreover, Plaintiff – which opposed a *pre-indictment* stay
21 of this matter – has now suggested a willingness to stipulate to a stay, but only if it encompasses
22 all Defendants.² With formal criminal proceedings now a reality, Mr. Dunning should not be
23 saddled with the impossible burden of attempting to "present[] his civil defense in a manner that

24 ¹ On the same day, the government also indicted co-defendant Shawn Hogan. *United States v. Hogan*, CR 10-
25 0495 JF (N.D. Cal. June 24, 2004).

26 ² Despite a careful explanation to Plaintiff's counsel that the position of the other defendants was beyond Mr.
27 Dunning's control and should not impact Mr. Dunning's rights under the Fifth Amendment, Plaintiff refused to
28 stipulate to this motion. (*See* Decl. of Leo Presiado ("Presiado Decl.") ¶¶ 4-5, 7 & Exs. 1, 3 thereto.) The position of
the remaining defendants is unclear at this point, although counsel for Mr. Hogan has indicated a reluctance to stay
this matter until he receives what he believes to be delinquent discovery responses from Plaintiff. (*Id.* ¶ 6.)

1 protects his Fifth Amendment rights," when the operative facts in the SAC and the Indictment
2 mirror each other. *McCormick v. Rexroth*, No. C 09-4188, 2010 WL 934242, *3 (N.D. Cal. Mar.
3 15, 2010) (J. Fogel).

4 Civil proceedings should also be stayed against Defendants THI, KFC, and
5 BD.com because, as the sole owner and representative of THI and BD.com, Mr. Dunning is the
6 only person that can speak on their behalf. Absent a stay, these entities will be precluded from
7 offering any meaningful defense. Accordingly, this civil action should be stayed until the parallel
8 criminal proceedings are complete.

9 **2. STATEMENT OF FACTS**

10 **A. The Government's Pre-Indictment Investigation**

11 Mr. Dunning is the founder, sole shareholder and only employee of Defendant THI.
12 (*See* Decl. of Brian Dunning ("Dunning Decl.") ¶ 2, filed Oct. 15, 2009 (dkt. 133).) Defendant
13 BD.com is not a business entity, but rather a name under which Mr. Dunning does business. THI
14 and co-defendant Dunning Enterprises, Inc. ("DEI")³ did business as Kessler's Flying Circus until
15 approximately June 2007. (*Id.* ¶ 2.) KFC was in the business of implementing internet marketing
16 programs on behalf of internet merchants, including eBay. In return for promoting and directing
17 on-line traffic to eBay's website, eBay paid KFC a commission through eBay's agent, Commission
18 Junction, Inc. eBay tracks visitors to its website using small data files placed on internet users'
19 computers called "cookies." eBay alleges that the Defendants defrauded eBay by forcing the
20 placement of cookies on internet users' computers who did not knowingly visit eBay's website,
21 thereby triggering a commission payment to Defendants to which they were not entitled. (SAC ¶¶
22 25-27.)

23 On June 18, 2007, prior to the commencement of this action, the FBI conducted a
24 search of Mr. Dunning's personal residence located in Laguna Niguel, California. The FBI seized,
25 and maintains physical custody of, all electronic equipment in the home, including all computers,
26

27 ³ DEI is owned by Mr. Dunning's brother Todd Dunning, also a defendant in this case.
28

1 disk drives, hard drives, cell phones and servers used by Mr. Dunning. In addition to the search
2 and seizure, Special Agent Lisa Miller, who operates out of the San Francisco office of the FBI,
3 interviewed Mr. Dunning in his living room for approximately three hours. The focus of Agent
4 Miller's questioning was Mr. Dunning's involvement in KFC's business and, in particular, KFC's
5 relationship with eBay and Commission Junction. Agent Miller inquired specifically as to such
6 issues as "cookie stuffing," "forcing cookies," "forcing clicks," the provision of "links" and
7 "widgets," and the direction of internet traffic to eBay's website.

8 After the search of his home and his interview with the FBI, Mr. Dunning retained
9 William J. Kopeny as counsel in the criminal investigation.⁴ Mr. Kopeny learned that the FBI
10 search was the result of a warrant issued by the District Court of the Northern District of
11 California, the District in which the corporate offices of eBay are located. (*See* Kopeny Decl. ¶¶
12 2-3.) Mr. Kopeny also learned that Mr. Dunning was a target in a criminal investigation relating
13 to KFC's services to eBay, and eBay's "cookie stuffing" allegations. (*Id.* ¶¶ 4-5.) Mr. Kopeny
14 has been in contact with Assistant United States Attorney Kyle F. Waldinger, who is the lead
15 AUSA on the matter and who is assigned to the Computer Hacking and Intellectual Property
16 ("CHIP") Unit. (*Id.* ¶¶ 3, 5-6.) By its own description set forth on the U.S. Department of Justice
17 website, the CHIP Unit is charged with combating "cybercrime" and "works closely with the FBI
18 and other agencies "to establish a relationship with the local high tech community and encourage
19 them to refer cases to law enforcement."⁵

20 **B. Defendants' Pre-Indictment Motion to Stay**

21 On October 15, 2009, Defendants filed a Motion to Stay Civil Action Pending
22 Resolution of Criminal Proceedings.⁶ (Dkt. 133.) Defendants' motion was based on the
23 government's active pre-indictment investigation into the same issues alleged in the SAC, Mr.
24 Dunning's status as a "target" in that investigation, and Defendants' belief that a criminal

25 ⁴ *See* Decl. of William Kopeny ("Kopeny Decl.") ¶ 2, filed on Oct. 15, 2009 (dkt. 133).

26 ⁵ *See* <<http://www.justice.gov/criminal/cybercrime/chipfact.htm>> (last accessed on July 19, 2010).

27 ⁶ Todd Dunning also filed a motion to stay on the same day (dkt. 135), and defendants Digital Point Solutions,
28 Inc. and Shawn Hogan filed a motion to stay the following day (dkt. 140).

1 indictment was imminent. (*See* Kopeny Decl. ¶¶ 4-7.) On October 30, 2009, Plaintiff filed a
2 consolidated opposition to the Motions to Stay. (Dkt. 151.) Plaintiff's objections were premised
3 almost entirely on the fact that the Defendants had not been indicted: "No criminal charges are
4 pending, and years remain until the relevant statutes of limitations run" (Opp. 1); "the absence of
5 criminal charges against defendants is fatal to their motions to stay" (Opp. 4); "the scope of any
6 future criminal proceeding is entirely speculative." (Opp. 9).

7 On January 29, 2010, the Court heard oral argument on Defendants' Motions to
8 Stay. During the hearing, the Court expressed concern over the uncertainty surrounding the
9 timing of an indictment, if any, and what the scope of any forthcoming indictment might be,
10 stating "I don't want anybody to get caught in a situation where nine months from now we are still
11 waiting for the U.S. Attorney. That's not an acceptable situation." (1/29/10 Hr'g Tr. 18.) The
12 Court noted, however, that if an indictment came, "then we have to recalibrate the entire case."
13 (*Id.*) Plaintiff's also acknowledged that an indictment could alter the case substantially: "Frankly,
14 the parties might be in a position at that point [post-indictment] to agree upon some form of stay if
15 one is appropriate." (*Id.* at 12.)

16 The Court's February 25, 2010 Order denying Defendant's request for a pre-
17 indictment stay also focused on the uncertainty surrounding any future criminal proceedings. In
18 fact, the Court's analysis and conclusions were based almost entirely on the "absence of an actual
19 indictment" and the resulting uncertainty surrounding the degree of overlap between the facts
20 alleged in the SAC and any future indictment. (*See, e.g.*, Order 5.) The Court denied Defendant's
21 motion *without prejudice*.

22 **C. The Government Indicts Brian Dunning and Shawn Hogan**

23 On June 24, 2010, the government indicted Defendants Brian Dunning and Shawn
24 Hogan.⁷ The Indictment charges Mr. Dunning with five counts of wire fraud in connection with
25 the identical conduct alleged by eBay in the SAC. On June 29, 2010, the government filed a
26 _____

27 ⁷ *See United States v. Dunning*, CR 10-0494 RMW (N.D. Cal.); *United States v. Hogan*, CR 10-00495 JF (N.D.
28 Cal.).

1 Notice of Related Case, acknowledging that "the defendants [in the civil action] are alleged to
2 have engaged in *the same 'cookie stuffing' scheme*" alleged in the Dunning and Hogan
3 indictments. (Gov't Notice Rel. Case 2 (dkt. 218) (emphasis added).)

4 On July 15, 2010, counsel for Mr. Dunning held a telephonic meet and confer
5 conference concerning this Motion with Plaintiff's counsel. (*See* Presiado Decl. ¶¶ 3-4.) When
6 asked whether Plaintiff would stipulate to a stay of the civil proceedings as to Defendants Brian
7 Dunning, THI and BD.com, counsel for Plaintiff indicated that Plaintiff likely would not agree to
8 a stay as to these Defendants alone. (*See id.*) Plaintiff's counsel later confirmed that it was not
9 willing to stipulate to a "partial stay of discovery that includes only your clients and KFC." (*Id.* ¶
10 5 & Ex. 1 thereto.) Obviously, Mr. Dunning's counsel cannot speak for his co-defendants, but it is
11 worth noting that *all* of the defendants previously sought a pre-indictment stay of this action, and
12 the Fifth Amendment issues have only become more urgent since Messrs. Dunning and Hogan
13 were indicted.

14 **3. ARGUMENT**

15 Mr. Dunning is charged in a criminal indictment with conduct nearly identical to
16 the allegations in the SAC. Any doubt concerning the "extent to which [Mr. Dunning's] Fifth
17 Amendment rights are implicated" by this parallel civil proceeding is now gone: Mr. Dunning
18 will be unable to offer any meaningful defense to Plaintiff's allegations – both on his own behalf
19 and on behalf of THI and BD.com – without waiving his Fifth Amendment rights. As the Court
20 indicated on January 29, 2010, now that indictments have been issued, "we have to recalibrate the
21 entire case." (1/29/10 Hr'g Tr. 18.) The only recalibration that will both preserve Mr. Dunning's
22 constitutional rights *and* his ability to defend this action is to stay the civil proceedings pending
23 resolution of the criminal matter.

24 The Court has authority to stay civil proceedings "when the interests of justice
25 seem to require such action." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.
26 1995), *quoted in McCormick*, 2010 WL 934242, at *1. When faced with parallel criminal
27 proceedings, the analysis should be undertaken "in light of the particular circumstances and
28 competing interests involved in the case" and after consideration of the "extent to which the

1 defendant's fifth amendment rights are implicated." *Id.* Additional factors to be considered, *i.e.*,
2 the "*Keating*" factors, include:

- 3 (1) the interest of the Plaintiff in proceeding and the potential
prejudice of delay;
- 4 (2) the burden which the proceeding may place on Defendants;
- 5 (3) the convenience of the Court in the
management of its cases, and the efficient use of judicial
6 resources;
- 7 (4) the interests of third-parties to the civil action; and
- 8 (5) the interest of the public in the pending civil and criminal
litigation.

9 *Id.* at 324-25; *see also* Order 4-10 (addressing each of the *Keating* factors). Each of these factors
10 favors issuance of a stay.

11 **A. The Implication of Mr. Dunning's Fifth Amendment Rights Warrants A Stay**

12 "The strongest case for deferring civil proceedings until after completion of
13 criminal proceedings is where a party under indictment for a serious offense is required to defend
14 a civil or administrative action involving the same matter." *Jones v. Conte*, 2005 WL 1287017, *1
15 (N.D. Cal. Apr. 19, 2005) (J. Illston) (internal quotation omitted); *see also Continental Ins. Co. v.*
16 *Cota*, 2008 WL 4298372, *2 (N.D. Cal. Sept. 19, 2008) (stating that the extent to which fifth
17 amendment rights are implicated by a civil proceeding is the ***first consideration*** when evaluating a
18 stay request); Order 6 ("The status of the criminal proceeding is ***crucial***, though not determinative
19 in a court's decision whether or not to stay the civil case.") (emphasis added). As acknowledged
20 by the government, this civil action accuses Mr. Dunning of engaging "in the same 'cookie
21 stuffing' scheme that is the subject of the Indictment." (Notice of Related Case (dkt. 218) 2.) The
22 near perfect overlap of the facts alleged in the civil and criminal cases cannot be reasonably
23 disputed.

24 In *Jones*, the defendant was criminally charged with the unlawful distribution of
25 performance enhancing drugs. While under indictment, the defendant made a series of widely-
26 published statements relating to the alleged use of performance-enhancing drugs by professional
27 athletes, including Marion Jones. Ms. Jones subsequently filed a civil action against the
28

1 defendant, alleging defamation and tortious interference with business relations. The defendant
2 moved for a stay of the civil proceedings pending resolution of the criminal case.

3 Judge Illston noted that civil discovery in the case would overlap with issues in the
4 criminal matter, holding that "if discovery moves forward, the defendant will be faced with the
5 difficult choice between asserting his right against self-incrimination, thereby inviting prejudice in
6 the civil case, or waiving those rights, thereby courting liability in the [criminal] case." *Id.* at *1
7 (quoting *Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 75 (W.D.N.Y. 2003)). Judge Illston pointed
8 out that both the civil and criminal cases arose from the defendant's alleged involvement in the
9 distribution of performance-enhancing drugs, and that "the veracity of his statements regarding
10 plaintiff's [alleged use of performance-enhancing drugs] directly relate to his involvement with the
11 distribution of performance-enhancing drugs." *Id.* at 2. The Court stayed the civil proceedings
12 pending resolution of the criminal matter. *Id.*; *see also McCormick*, 2010 WL 934242, at *2 (N.D.
13 Cal.) (J. Fogel) (granting stay of civil proceedings pending resolution of related criminal case
14 where "factual issues in the two cases are essentially the same"); *Cota*, 2008 WL 4298372, at *2
15 (N.D. Cal.) (J. Conti) (granting stay of civil action when "[i]t is undisputed that all of the civil
16 actions and the criminal action spring from the same nucleus of facts")

17 Given the identical facts alleged in the Indictment and the SAC, "[i]t is difficult to
18 imagine how adjudication of [this civil case] would not implicate many of the factual issues
19 underlying the criminal action." *Id.* at *2. Mr. Dunning should not be forced to choose between
20 abandoning the opportunity to defend against this civil action, and "courting liability in the
21 criminal case" by waiving his Fifth Amendment rights. *Jones*, 2005 WL 1287017, at * 1. Mr.
22 Dunning's Fifth Amendment rights are directly implicated by the issues in the case, and no remedy
23 exists that will allow him to both preserve these rights and defend this action, except a stay of the
24 civil proceedings. This *Keating* factor weighs decidedly in favor of a stay.

25 ///

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1 **B. The Remainder of the *Keating* Factors Favor A Stay**

2 (1) Any Prejudice to eBay is Outweighed by Defendants' Fifth Amendment
3 Concerns

4 A stay of civil proceedings nearly always has the potential of working *some*
5 prejudice to the plaintiff. Any such prejudice in this case, however, is outweighed by "the burden
6 on [Defendants] of presenting [their] civil defense in a manner that protects [their] Fifth
7 Amendment rights." *McCormick*, 2010 WL 934242, at *3. Moreover, Plaintiff's core concern, as
8 stated in their opposition to Defendants' pre-indictment motion to stay, was the possibility of an
9 "indefinite delay" in the proceedings. (Opp. 12.) That concern was eliminated by the initiation of
10 formal criminal proceedings.

11 Plaintiff's other purported concern that delaying the civil case will somehow
12 prejudice its ability to access evidence is baseless. The criminal case will involve virtually
13 identical evidence and witnesses as the civil matter. As this Court recently held, "the fact that
14 witnesses for the two proceedings are likely to include many of the same people providing much
15 of the same testimony should reduce the danger that any testimony will be lost as a result of the
16 stay." *McCormick*, 2010 WL 934242, at *3. Moreover, as Plaintiff is aware, much of the
17 evidence in this case concerning Defendants resides on Defendants' computer equipment, which
18 was seized by the government on June 18, 2007 – over a year before Plaintiff filed its Complaint –
19 and remains in the custody of the FBI. (*See* Kopeny Decl. ¶ 4, 6-7.) As a result, the evidence
20 about which Plaintiff is concerned is preserved from loss or destruction, but is also difficult to
21 access until after the criminal matter is resolved.

22 Finally, Plaintiff's may also claim, as they did in response to Defendants' pre-
23 indictment motion to stay, that delaying the civil matter will deplete any assets available to
24 Plaintiff for a future monetary reward. But Defendants have not been found criminally or civilly
25 liable for any of the conduct alleged in the SAC or the Indictment; Defendants enjoy the
26 presumption of innocence. Plaintiff offers no evidence to suggest that funds are being secreted
27 away in an effort to defeat some future judgment. Further, Plaintiff's argument, if accepted, would
28 permit Plaintiff to leverage the government's criminal indictment to secure a virtually unopposed

1 and undeserved judgment against Defendants in the civil matter. *See Taylor, Bean & Whitaker*
2 *Mort. Corp. v. Triduanium Fin'l*, 2009 WL 2136986, *4 (E.D. Cal. July 15, 2009) (granting a stay
3 despite plaintiff's argument that it will be more difficult to recover monetary losses after the stay is
4 lifted). Defendants' interest in presenting a full and complete defense to the allegations in the SAC
5 while also preserving Mr. Dunning's Fifth Amendment rights must take priority over Plaintiff's
6 attempt to secure an ill-gotten windfall judgment.

7 (2) Proceeding With This Action Severely Burdens Mr. Dunning

8 As described above, proceeding with this case will force Mr. Dunning to choose
9 between defending himself in this action and preserving his Fifth Amendment rights. The extreme
10 prejudice that will result from forcing this choice upon Mr. Dunning outweighs any purported
11 prejudice to eBay from a finite delay in this matter.

12 (3) The Convenience Of The Court Weighs In Favor Of A Stay

13 The Court has an interest in managing its cases efficiently. (Order 9.) At the pre-
14 indictment stage, the Court found this factor weighed in favor of Plaintiff because any stay "would
15 be of unknown duration, and the extent to which common issues would be resolved in a criminal
16 proceeding is speculative when no criminal charges actually are pending." (Order 10.) The length
17 of the stay is no longer of "unknown duration" and the "common issues" between the civil and
18 criminal cases have now been confirmed. This factor weighs in favor of a stay. *See Jones*, 2005
19 WL 1287017, at *2 ("Staying the case makes efficient use of judicial resources by insuring that
20 common issues of fact will be resolved and subsequent civil discovery will proceed unobstructed
21 by concerns regarding self incrimination.") (internal citations omitted).

22 (4) No Interests Of Persons Not Parties To The Action Will Be Affected By A
23 Stay

24 The interest of persons not parties to this action will not be affected by a stay.
25 Commission Junction has released its claims against the Defendants, and there appears to be no
26 other person(s) who may be affected by this action that is not already a party. (Order 10 & n.3.)

27 ///

28 ///

1 (5) The Interest Of The Public Favors A Stay

2 The public has an interest in "ensuring that the criminal process is not subverted by
3 ongoing civil cases." *Douglas v. United States*, 2006 WL 2038375 (N.D. Cal. July 17, 2006).
4 Moreover, "the public's interest in the integrity of the criminal case is entitled to precedence over
5 the civil litigant. *Jones*, 2005 WL 1287017, at *2 (quoting *Javier H.*, 218 F.R.D. at 75). Absent
6 a stay, this case will proceed to trial parallel to the criminal case, leaving Defendants with no
7 reasonable opportunity to offer a defense. This scenario does not further the public's interest in a
8 justice system that provides a viable means of securing the fair resolution of civil and criminal
9 matters. Conversely, a stay would promote the public interest by providing Defendants with a
10 meaningful opportunity to exercise their constitutional rights *and* present a full and complete
11 defense to the allegations in the SAC.

12 C. A Stay Of This Action Pending The Conclusion Of The Criminal Proceeding
13 Is Required As to THI, KFC, and BD.com As Well

14 The Court should stay the civil proceedings as to THI, KFC, and BD.com as well.
15 BD.com is not even a separate entity; it is merely a name by which Mr. Dunning does business.
16 As for THI, Mr. Dunning is the founder, sole shareholder and only employee of that entity – and
17 the only person through whom this entity can present a meaningful defense to the allegations in
18 the SAC.⁸ In addition, THI is the general partner of KFC and, as with THI, Mr. Dunning is the
19 primary, if not only, person through whom KFC can counter Plaintiff's allegations.

20 While the Court has ordered these entity Defendants to respond to discovery
21 requests, and has authorized *en masse* responses prepared by a designated agent or corporate
22 counsel, this process has obvious limitations and will not be sufficient as the case proceeds to trial.
23 For example, while the discovery responses of THI, KFC, and BD.com need not be prepared by an
24 agent with "first hand personal knowledge" (1/12/10 Order 8-9), it will be difficult for these
25 entities to prepare for trial and present a full and complete defense without the active participation,
26

27 ⁸ See Decl. of Brian Dunning ("Dunning Decl.") ¶ 2, filed on Oct. 15, 2009 (dkt. 133).
28

1 involvement and testimony of the primary individual with first-hand knowledge of the facts in
2 dispute. Mr. Dunning will be unable to provide that assistance while the criminal matter is
3 pending – at least not without waiving his Fifth Amendment rights.

4 In *Taylor, Bean & Whitaker Mort. Corp. v. Triduanium Fin'l*, 2009 WL 2136986,
5 *4 (E.D. Cal. July 15, 2009), the Court stayed civil proceedings against both individual and entity
6 defendants. While acknowledging that the business entity had no Fifth Amendment right against
7 self-incrimination, the Court nonetheless held that:

8 the Fifth Amendment rights of every director or officer who may
9 speak on behalf of Triduanium are implicated, and thus, Triduanium
10 is likely to be greatly prejudiced in its ability to meaningfully defend
11 itself in the civil matter.

12 *Taylor, Bean & Whitaker Mort. Corp.*, 2009 WL 2136986, at *3.

13 Similarly, in *American Express Bus. Fin. Corp v. RW Prof'l Leasing Serv. Corp.*,
14 225 F. Supp 2d 263 (E.D.N.Y. 2003), the district court granted a stay of civil discovery as to the
15 two individual defendants to allow them to preserve their Fifth Amendment rights. *American*
16 *Express*, 225 F. Supp. 2d at 265. The district court also stayed civil discovery as to the entity
17 defendant, reasoning that the entity defendant would be unable to effectively conduct discovery
18 and mount a defense without the availability of the individual defendants, each of whom were
19 executive officers of the defendant corporation. *Id.* at 265-66; *see also Bruner Corp v. Balogh*,
20 819 F. Supp. 811 (E.D. Wis. 1993) (finding that “it is not likely” that the entity defendant “could
21 proceed to trial without meaningful discovery from “the individual defendant alleged to be part of
22 the RICO enterprise.”), *rev'd in part on other grounds*, 133 F.3d 491 (7th Cir. 1998).

23 Defendants THI, KFC, and BD.com will be unable to mount a meaningful defense
24 without the assistance of Mr. Dunning. Accordingly, a stay of this action is warranted as to THI,
25 KFC, and BD.com, as well.

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1 **4. CONCLUSION**

2 For all of the foregoing reasons, Defendants respectfully request that this action be
3 stayed as to Brian Dunning, BrianDunning.com, Thunderwood Holdings, Inc., and KFC, pending
4 the conclusion of the criminal proceedings against Mr. Dunning.

5
6 DATED: July 20, 2010

RUS, MILIBAND & SMITH
A Professional Corporation

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8
9 By: /s/ Leo J. Presiado

10 LEO J. PRESIADO
11 Attorneys for Defendants
12 THUNDERWOOD HOLDINGS, INC.,
13 BRIAN DUNNING, and
14 BRIANDUNNING.COM

15
16 DATED: July 20, 2010

LAW OFFICES OF PATRICK K. McCLELLAN

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20 KESSLER'S FLYING CIRCUS
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