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8 Attorneys for Defendants  
THUNDERWOOD HOLDINGS, INC.,  
9 BRIAN DUNNING, and BRIANDUNNING.COM  
  
10 LAW OFFICES OF PATRICK K. McCLELLAN  
Patrick K. McClellan #077352  
11 2211 Michelson Drive, Suite 700  
Irvine, CA 92612  
12 Telephone: (949) 261-7615  
  
13 Attorney for Defendant  
KESSLER'S FLYING CIRCUS

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

17 EBAY INC.,

18 Plaintiff,

19 vs.

20 DIGITAL POINT SOLUTIONS, INC.;  
21 SHAWN HOGAN; KESSLER'S FLYING  
CIRCUS; THUNDERWOOD HOLDINGS,  
22 INC.; TODD DUNNING; DUNNING  
ENTERPRISES, INC.; BRIAN DUNNING;  
23 BRIANDUNNING.COM; and DOES 1-20,

24 Defendants.

CASE NO. CV 08-4052 JF PVT

**DECLARATION OF LEO J. PRESIADO  
IN SUPPORT OF DEFENDANTS'  
MOTION TO STAY CIVIL ACTION  
PENDING RESOLUTION OF CRIMINAL  
PROCEEDINGS**

JUDGE: Hon. Jeremy Fogel  
DATE: October 1, 2010  
TIME: 9:00 a.m.  
CRTRM.: 3

TRIAL DATE: June 8, 2012

1 I, Leo J. Presiado, declare as follows:

2 1. I am an attorney at law duly licensed to practice before the above-entitled  
3 Court and am a member of the law firm of Rus, Miliband & Smith, A Professional Corporation  
4 ("Firm"), attorneys of record for Defendants Thunderwood Holdings, Inc. ("THI"), Brian  
5 Dunning, and BrianDunning.com ("BD.com") (collectively, "Defendants").

6 2. I have personal knowledge of the matters set forth herein and if called upon  
7 as a witness could and would competently testify thereto.

8 3. On July 15, 2010, I participated in a telephonic meet and confer conference  
9 with counsel for Plaintiff, David Eberhart concerning a potential stipulation from Plaintiff to stay  
10 this matter, pending resolution of the parallel criminal proceedings at *United States v. Dunning*,  
11 CR 10-0494 RMW.

12 4. Mr. Eberhart stated that his client likely would not agree to a stay unless the  
13 other defendants also agreed to a global stay of the case. I explained that I could not speak for the  
14 remaining defendants and that, in any case, the remaining defendants' position on a stay should not  
15 impact whether Plaintiff would agree that a stay is appropriate as to Defendants.

16 5. On July 16, 2010, Mr. Eberhart sent me an e-mail stating that his client  
17 was unwilling to stipulate to a "partial stay of discovery" that included only my clients and  
18 Kessler's Flying Circus ("KFC"). A true and accurate copy of Mr. Eberhart's e-mail is attached  
19 hereto as Ex. 1.


20 6. On July 19, 2010, I responded to Mr. Eberhart's e-mail. I noted my concern  
21 over Plaintiff's acknowledgement that a stay was appropriate while simultaneously refusing to  
22 stipulate to a stay of my clients because of the positions taken by other defendants. I described  
23 what I believed to be Defendant Shawn Hogan's position that an immediate stay would prevent  
24 Mr. Hogan from receiving what he claims is delinquent discovery responses from Plaintiff.  
25 (Defendant Todd Dunning, who is now proceeding *pro se*, to my knowledge has not stated his  
26 position on a stay of the civil proceedings.) I further explained to Mr. Eberhart that his demand  
27 for additional discovery from my clients while also acknowledging the appropriateness of a stay  
28 was particularly troubling. I requested that Plaintiff, at a minimum, agree to a standstill between

1 our respective clients until Plaintiff is able to resolve its issues with the remaining defendants  
2 concerning their position on a stay and any outstanding discovery requests. A true and accurate  
3 copy of my July 19, 2010 e-mail to Mr. Eberhart is attached hereto as Ex. 2.

4 7. Later that evening, Mr. Eberhart sent me an e-mail again expressing his  
5 client's willingness to stipulate to a global stay, but refusing to stipulate to any motion from Mr.  
6 Dunning, BD.com, KFC and THI seeking a stay that did not include the remaining defendants. A  
7 true and accurate copy of Mr. Eberhart's July 19, 2010 e-mail to me is attached hereto as Ex. 3.

8 I declare under penalty of perjury under the laws of the State of California that the  
9 foregoing is true and correct.

10  
11 Executed this 20th day of July, 2010, at Irvine, California.

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14 LEO J. PRESIADO  
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## EXHIBIT 1

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**Subject:** eBay v. Digital Pt. Solutions, Inc.

From: Eberhart, David [mailto:DEberhart@OMM.com]  
Sent: Friday, July 16, 2010 11:08 AM  
To: Leo J. Presiado; patrick@patrickmcclellan.com  
Cc: rcampbell@coastlawgroup.com; seyamack@coastlawgroup.com; karinedunning@yahoo.com; Bunzel, Sharon M.; Puckett, Nora M.  
Subject: eBay v. Digital Pt. Solutions, Inc.

Leo:

eBay is not willing to stipulate to a partial stay of discovery that includes only your clients and KFC.

Please respond to the issues raised in Nora Puckett's emails to you of July 14 no later than the close of business on Monday. If you do not respond, we will assume that you refuse to provide the requested files, documents, and information, and we shall proceed accordingly.

Sincerely,

David

David R. Eberhart  
O'Melveny & Myers LLP  
Two Embarcadero Center, 28th Floor  
San Francisco, CA 94111  
(415) 984-8808 (direct)  
(415) 984-8701 (fax)

This message contains information and/or attachments that may be confidential or privileged. If you are not the intended recipient, be aware that any disclosure, copying, or use of this message is prohibited. If you have received this message by mistake, please notify me immediately and securely dispose of the message. Thank you.

## EXHIBIT 2

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**From:** Leo J. Presiado  
**Sent:** Monday, July 19, 2010 5:32 PM  
**To:** Eberhart, David  
**Cc:** rcampbell@coastlawgroup.com; seyamack@coastlawgroup.com;  
karinedunning@yahoo.com; Puckett, Nora M.; patrick@patrickmcclellan.com; Ron Rus;  
Stephen R. Cook  
**Subject:** RE: eBay v. Digital Pt. Solutions, Inc.

David,

Your indication during our last telephone conference was that due to the recently issued indictments eBay would agree to stay of the entire case as to all defendants (you indicated that it was your understanding based on Judge Fogel's comments that he contemplates a stay of the entire action). However, due to the Hogan defendants' unwillingness to agree to a stay that would prevent them from receiving discovery they claim is due them from eBay, you indicated that you would need to check with eBay to see if they would agree to a stay as to my clients (and KFC) only, at least for now. Apparently eBay will not agree to this, and a motion will be required.

Your request for further discovery from my clients coming on the heels of our conversation is troubling, to say the least. Indeed, you essentially agreed that a stay is warranted as to my clients as contemplated by Judge Fogel. I again renew the request that the action be stayed as to my clients and KFC -- or at least there be a standstill as between our clients until your issues with the Hogan defendants regarding the stay/discovery are resolved.

Of course, I remain willing to discuss the issues further at your convenience.

Sincerely,  
Leo

-----Original Message-----

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## EXHIBIT 3

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**From:** Eberhart, David [DEberhart@OMM.com]  
**Sent:** Monday, July 19, 2010 9:13 PM  
**To:** Leo J. Presiado  
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karinedunning@yahoo.com; Puckett, Nora M.; patrick@patrickmcclellan.com; Ron Rus;  
Stephen R. Cook  
**Subject:** RE: eBay v. Digital Pt. Solutions, Inc.

Leo:

You are correct that in our last teleconference:

1. You asked whether there was any stay as to which eBay would stipulate;
2. I expressed eBay's view--based on, among other things, Judge Fogel's comments at the case management conferences in this action--that Judge Fogel would stay all discovery globally if that were what defendants collectively sought; and
3. I expressed eBay's willingness to stipulate to a global stay.

As you know, however, a global stay is not what defendants are seeking: neither the Hogan defendants nor the Todd Dunning defendants currently seek a stay, despite their prior motions to the court for just such a remedy. eBay will not agree to a partial stay of discovery, and that includes a stay as to some defendants and not others. And I most certainly did not agree that a stay was "warranted as to [your] clients" -- as your inclusion of "essentially" concedes.

A partial stay is not appropriate for several reasons. As just one example: there are only 10 months remaining for fact discovery and, in light of the fact that it took more than a year for defendants to produce documents in response eBay's first requests, eBay certainly cannot lose any more time for discovery. And as the Second Amended Complaint reflects, there is significant overlap between the issues in dispute between eBay and your clients and between eBay and the remaining defendants. Surely your clients would not stipulate that they could never use in their defense any evidence developed by the remaining defendants. (Even if they did, I cannot imagine that any court would enforce such a stipulation.) Your clients cannot foreclose discovery against them while hoping to profit from other, ongoing discovery.

Your clients owe eBay substantial discovery. This is reflected in, but is not limited to, the meet and confer correspondence we sent (and/or re-sent) to you last week. And eBay will also require discovery from your clients beyond the long-outstanding document requests. The Hogan defendants also owe eBay substantial discovery. eBay will proceed to obtain all of that discovery. eBay will not agree to the partial stay or "standstill" that you seek, and we see no value in any further meet and confer on this issue.

On a related issue, we interpret your email as a refusal to provide any of the requested files, documents, and information described in Ms. Puckett's emails of July 14.

Sincerely,

David

-----Original Message-----

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To: Eberhart, David

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