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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13	EBAY INC.,)	CASE NO. C 08-4052
14)	
14	Plaintiff,)	REPLY BY DEFENDANTS
15)	THUNDERWOOD HOLDINGS, INC.,
15	vs.)	BRIAN DUNNING AND
16)	BRIANDUNNING.COM TO EBAY'S
16	DIGITAL POINT SOLUTIONS, INC.;)	OBJECTION TO REQUEST FOR
17	SHAWN HOGAN; KESSLER's FLYING)	JUDICIAL NOTICE
17	CIRCUS; THUNDERWOOD HOLDINGS,)	
18	INC.; TODD DUNNING; DUNNING)	DATE: December 12, 2008
18	ENTERPRISES, INC.; BRIAN DUNNING;)	TIME: 9:00 a.m.
19	BRIANDUNNING.COM; and DOES 1-20,)	CTRM: 3
20	Defendants.)	Hon. Jeremy Fogel presiding

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1 Defendants Brian Dunning (“B. Dunning”), Thunderwood Holdings, Inc.
2 (“Thunderwood”) and Briandunning.com (collectively, “Defendants”) reply to the Opposition
3 to Request for Judicial Notice filed by Plaintiff eBay, Inc. (“Plaintiff” and/or “eBay”) as
4 follows:

5 1. DEFENDANTS’ REQUEST FOR JUDICIAL NOTICE IS PROPER

6 eBay is correct that Federal Rule of Evidence 201 allows for judicial notice of
7 adjudicative facts not subject to reasonable dispute. As such, judicial notice can be taken of the
8 following facts apparent from the Complaint attached to Defendants’ Compendium of Exhibits
9 as Exhibit “1” (the “Complaint”):

10 (1) Commission Junction, Inc. (“CJ”) commenced an action in Orange County
11 Superior Court against Defendants Thunderwood and B. Dunning, among others, alleging
12 causes of action for, *inter alia*, breach of contract and unfair competition;

13 (2) In the Complaint CJ states that it, on the one hand, and Thunderwood, B.
14 Dunning and other defendants named in this action, on the other hand, entered into the
15 Publisher Service Agreement (“PSA”) attached to the Complaint as Exhibit “A;”

16 (3) The PSA contains the following forum selection clause at Paragraph 9(d):
17 “This Agreement is governed by the laws of the State of California (USA),
18 except for its conflict of law provisions. The exclusive forum for any actions
19 related to this Agreement shall be in the state courts, and, to the extent that
20 federal courts have exclusive jurisdiction, in Los Angeles, California. The
21 parties consent to such venue and jurisdiction and waive any right to a trial by
22 jury[;]” and

23 (4) The Complaint, at Paragraph 16, states that Thunderwood and B. Dunning
24 breached the PSA by, *inter alia*, “providing links and widgets to wrongfully promote and/or
25 force traffic to ebay.com[;]”

26 The purpose of Defendants’ request for judicial notice of the above is not to
27 establish the truth of CJ’s allegations, but rather their existence. The existence of the
28 Complaint, the PSA and the allegations of the Complaint support the *presumed validity* of the

1 forum selection clause contained in the PSA (*See, M/S Breman v. Zapata Off-Shore Co.*, 407
2 U.S. 1, 15 (1972); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512 (9th Cir.
3 1988)), and that eBay is bound by the same.

4 Taken with the allegations made by eBay in this action, there can be no question
5 that eBay is “so closely related” to the PSA such that eBay “should benefit from or be subject
6 to” the clause. (*See, TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F. 2d
7 1351, 1354 (9th Cir. 1990)). Indeed, in the Complaint eBay admits that “eBay used the
8 services of CJ, a subsidiary of ValueClick, Inc., in administering the Affiliate Marketing
9 Program.”(Complaint at ¶ 20). In addition, eBay admits that on its behalf “CJ was responsible
10 for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance
11 with affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds
12 remitted by eBay.” (Complaint at ¶ 20). Moreover, every aspect of eBay’s claims against
13 Defendants arise from Defendants’ participation in eBay’s Affiliate Marketing Program.
14 (Complaint at ¶¶ 19 to 32). Indeed, only because Defendants were “affiliates” in eBay’s
15 “Affiliate Marketing Program” pursuant to the PSA were Defendants able to receive monies
16 from eBay for “Revenue Actions,” which eBay alleges Defendants fraudulently manipulated.
17 (Complaint at ¶ 19). Simply put, without Defendants’ participation as an affiliate in eBay’s
18 Affiliate Marketing Program via the PSA, the claims alleged by eBay in the Complaint would
19 not exist – *there would have been no basis for eBay to make the very payments to Defendants*
20 *now seeks to disgorge from Defendants by this action.*

21 Having fortified the presumed validity of the forum selection clause contained in
22 the PSA (and its application to eBay) by the Request for Judicial Notice and eBay’s own
23 allegations, the burden is on eBay to overcome the presumption by submission of competent
24 evidence.(*See, Da Cruz v. Princess Cruise Lines, Inc.*, 2000 WL 1585695, fn. 2 (N.D. Cal.
25 2000) (Plaintiff bears burden of establishing that venue is proper in the forum in which the case
26 is filed), *citing, Ariola v. King*, 505 F.Supp. 30, 31 (D.Az. 1980); *see also, Hope v. Otis*
27 *Elevator Co.*, 389 F. Supp. 2d 1235, 1243 (E.D. Cal. 2005)).

28 As set forth in detail in Defendants’ Opposition, eBay fails to meet its burden.


1 2. CONCLUSION

2 Defendants respectfully request that the Court grant their request for judicial
3 notice in its entirety.

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5 DATED: November 26, 2008

Respectfully submitted,

6 RUS, MILIBAND & SMITH
7 A Professional Corporation

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9 By: 
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SERVICE LIST

eBay, Inc. v. Digital Point Solutions, Inc., et al.
Northern District of California, San Jose Division
Case No. C 08-4052

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