

1 Stewart H. Foreman (CSB #61149)
Daniel T. Bernhard (CSB #104229)
2 FREELAND COOPER & FOREMAN LLP
150 Spear Street, Suite 1800
3 San Francisco, California 94105
Telephone: (415) 541-0200
4 Facsimile: (415) 495-4332
Email: foreman@freelandlaw.com
5 bernhard@freelandlaw.com

6 Attorneys for Defendants Todd Dunning
and Dunning Enterprise, Inc.

8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

12 EBAY, INC.,

13 Plaintiff,

14 v.

15 DIGITAL POINT SOLUTIONS, INC., SHAWN
16 HOGAN, KESSLER'S FLYING CIRCUS,
THUNDERWOOD HOLDINGS, INC.,
17 TODD DUNNING, DUNNING ENTERPRISE, INC.,
BRIAN DUNNING, BRIANDUNNING.COM, and
18 DOES 1-20,

19 Defendants.

CASE NO.: CV-08-4052 JF

**DECLARATION OF STEWART H.
FOREMAN IN SUPPORT OF
DEFENDANTS TODD DUNNING
AND DUNNING ENTERPRISE,
INC.'S MOTION TO DISMISS
SECOND AMENDED
COMPLAINT AND TO
TRANSFER VENUE**

Date: June 26, 2009
Time: 9:00 a.m.
Place: Courtroom 3, 5th Floor
280 South First Street
San Jose, CA 95113

22 I, Stewart H. Foreman, declare:

23 1. I am a member of the Bar of the State of California and I am admitted to practice
24 before this Court. I am a partner in the firm of Freeland Cooper and Foreman LLP, 150 Spear Street,
25 Suite 1800, San Francisco, California 94105. I am counsel for defendants Todd Dunning and
26 Dunning Enterprise, Inc. in this matter.

27 2. I have personal knowledge of the facts contained in this Declaration and I am
28 competent to testify to these facts.

1 3. The documents referenced in this Declaration are submitted in support of the moving
2 parties' motion to change venue under Fed. Rule Civ. Proc. 12(b)(3) and to transfer venue under
3 28 U.S.C. § 1404(a).

4 4. Attached hereto and incorporated by reference herein as Exhibit 1 is a true and correct
5 copy of the Publisher Service Agreement issued by Commission Junction, Inc. as of June 18, 2005.
6 This document was referenced and relied on by this Court in its Order dated February 24, 2009,
7 dismissing the First Amended Complaint under Fed. R. Civ. Proc. 12(b)(3). This document was
8 produced by Commission Junction, Inc. in the State Court Action with document identification
9 numbers 0000636-646.

10 5. Attached hereto and incorporated by reference herein as Exhibit 2 is a true and correct
11 copy of documents entitled eBay Affiliate Program-Supplemental Terms and Conditions dated
12 November 2004, October 1, 2005, and June 2007. By their terms, these documents are incorporated
13 by reference into the Commission Junction Publisher Service Agreement, although these documents
14 were prepared by eBay, Inc. and state they are applicable to parties participating in eBay's Affiliate
15 Marketing Program ("AMP"). These documents were produced by Commission Junction, Inc. in
16 connection with the case of *Commission Junction, Inc. v. Thunderwood Holdings, Inc. et. al.* Case No.
17 30-2008-00101025 ("State Court Action") that was pending in the Superior Court of the State of
18 California, County of Orange, Central Branch, against these defendants (except for
19 Briandunning.com). These documents were produced by Commission Junction, Inc. in the State
20 Court Action with document numbers 0000636-52.

21 6. Attached hereto and incorporated by reference herein as Exhibit 3 is the Master
22 Advertiser Service Agreement as of January 1, 2006, between eBay and Commission Junction, Inc.
23 This document was produced by Commission Junction, Inc. in the State Court Action with document
24 identification numbers 00784-819.

25 7. Exhibits 1 through 3 are the documents produced by Commission Junction, Inc. which
26 purport to describe the relationship among Commission Junction, Inc., eBay, Inc. and these
27 defendants related to eBay's AMP. None of these documents contain any provision purporting to
28

1 provide these defendants' consent to venue in this federal district court. Commission Junction, Inc.
2 identified these documents and provided them as trial exhibits in the State Court Action.

3 8. Attached hereto and incorporated by reference as Exhibit 4 is a true and correct copy of
4 the User Agreement that I printed from the eBay website on October 22, 2008. By its terms, it was
5 effective on August 13, 2008, which is 12 days before this lawsuit was filed. This document states,
6 under the heading "Resolution of Disputes/Law and Forum for Disputes" that "You agree that any
7 claim or dispute *you may have against eBay* must be resolved by a court located in Santa Clara
8 County." There is no forum selection clause in this document that is binding on a defendant when
9 eBay files a lawsuit. Also, this User Agreement does not reference eBay's AMP. I previously
10 requested from David Eberhart, counsel for eBay, a copy of the User Agreement referenced in eBay's
11 complaint. He declined to provide me with a copy and no User Agreement has been attached to the
12 Second Amended Complaint.

13 9. On or about March 12, 2008, in the State Court Action, defendant Brian Dunning
14 served on eBay a Deposition Subpoena for Production of Business Records. A true and correct copy
15 of this subpoena is attached hereto and incorporated by reference herein as Exhibit 5. eBay produced
16 documents in response to this subpoena, although many were improperly redacted so as to be
17 unintelligible. The subpoena requested many categories of documents including those showing
18 communications between eBay and CJI about Kessler's business practices, software, and its
19 relationship to eBay and CJI.

20 10. Prior to the commencement of the trial of the State Court Action, CJI filed
21 "Plaintiff/Cross-Defendant Commission Junction, Inc.'s Witness List" dated March 2, 2009. This list
22 identified 24 current or former CJI employees as witnesses in the State Court Action related to alleged
23 breaches of the PSA, including alleged "cookie-stuffing". All these witnesses except for 3 are
24 identified as residing in Southern California. Based on the documents and other evidence in the State
25 Court Action, it is apparent that most, if not all, of these witnesses have evidence bearing on eBay's
26 allegations about cookie stuffing, operation of the PSA, and related topics, all central to the issues,
27 claims and defenses in this lawsuit. Because no depositions were taken in the State Court Action, the
28 TD Defendants do not know precisely what these witnesses will testify about. However, the similarity

1 of the issues and evidence in the State Court Action and this case indicates that these witnesses will
2 have evidence germane to this lawsuit.

3 I declare under penalty of perjury under the laws of the State of California and the laws of the
4 United States that the foregoing is true and correct.

5 Executed on the 27th day of April, 2009 at San Francisco, California.

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7 /s/
8 Stewart H. Foreman
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