EXHIBIT 5

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	Case5:08-cv-04052-JF Document9	1-5 Filed06/05/09 Page2 of 23	
1 2 3 4 5 6 7 8 9	RONALD RUS, #67369 rrus@rusmiliband.com LEO J. PRESIADO, #166721 lpresiado@rusmiliband.com RUS, MILIBAND & SMITH A Professional Corporation Seventh Floor 2211 Michelson Drive Irvine, California 92612 Telephone: (949) 752-7100 Facsimile: (949) 252-1514 Attorneys for Defendants THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING, and BRIANDUNNING	.COM	
10	UNITED STAT	ES DISTRICT COURT	
11	NORTHERN DISTRICT OF CALIFORNIA		
12	SAN JOSE DIVISION		
13	EBAY INC.,) CASE NO. C 08-4052 JF	
14	Plaintiff,) RESPONSES OF DEFENDANT	
15	VS.) BRIANDUNNING.COM TO FIRST SET	
16		 OF REQUESTS FOR PRODUCTION PROPOUNDED BY PLAINTIFF EBAY INC. 	
17	DIGITAL POINT SOLUTIONS, INC.; SHAWN HOGAN; KESSLER'S FLYING CIRCUS; THUNDERWOOD HOLDINGS,) EDAT INC.	
18	INC.; TODD DUNNING; DUNNING ENTERPRISES, INC.; BRIAN DUNNING;		
19	BRIANDUNNING.COM; and DOES 1-20,		
20	Defendants.		
21		_/	
22	PROPOUNDING PARTY: PLAINTIFF EI	BAY INC.	
23	RESPONDING PARTY: DEFENDANT BRIANDUNNING.COM		
24	SET NO.: ONE (1)		
25	Defendant BrianDunning.com ("Defendant" and/or "Responding Party") hereby		
26	responds to the First Set of Requests for Production (Nos. 1-33) propounded by Plaintiff eBay		
27	Inc. ("Plaintiff" and/or "Propounding Party") as follows:	
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	RESPONSES (OF BRIANDUNNING.COM TO FIRST SET OF REQUESTS FOR	

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ESPONSES OF BRIANDUNNING.COM TO FIRST SET OF REQUESTS FOR PRODUCTION PROPOUNDED BY EBAY INC. - CASE NO. C 08-4052 JF

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GENERAL STATEMENT

2 Defendant's Motion to Dismiss Plaintiff's First Amended Complaint was 3 granted by Order entered February 24, 2009. As such, Plaintiff's Complaint has been 4 dismissed with leave to amend. No amended complaint has been filed and/or served in 5 this action. As such, there is no pending claim against Defendant and Defendant is not required to respond to Plaintiff's discovery request. In this regard, Defendant requested 6 7 that Plaintiff acknowledge that no response is required or, in the alternative, grant 8 Defendant an extension of time to respond to the discovery requests until some time after 9 Plaintiff files an amended complaint against Defendant, if at all. Plaintiff refused 10Defendant's request without explanation. Defendant serves these responses out of an 11 abundance of caution in the event it is determined that such responses are required despite 12 the dismissal of Plaintiff's Complaint against Defendant. Otherwise, Defendant reserves 13 the right to withdraw these responses in total and otherwise object to the use, reference to, 14 or disclosure of these responses in any manner for any purpose.

15 Brian Dunning ("Mr. Dunning") has invoked his privilege against 16 self-incrimination pursuant to the Fifth Amendment to the U.S. Constitution, *Lefkowitz v.* 17 Turley, 414 U.S. 70, 77 (1973), Federal Rules of Evidence Rule 501, Article 1, Section 15 of 18 the California Constitution, and California Evidence Code section 940. Since Mr. Dunning is 19 the sole representative of Responding Party, and Mr. Dunning declines to sign these discovery 20 responses on behalf of Responding Party, counsel for Responding Party is signing these 21 responses pursuant to Federal Rules of Civil Procedure Rule 26(g). These responses to 22 requests for documents directed at Responding Party are not a waiver of Mr. Dunning's 23 privilege.

Furthermore, the Federal Bureau of Investigation has seized all documents and
computers, disk drives, hard drives, cell phones and servers containing information potentially
related to this matter. Assistant United States Attorney Kyle F. Waldinger in charge of this
investigation has refused all requests to provide Defendants with a copy of the material seized
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by the FBI. Those items and records may contain information responsive to the requests
 below, but those items and records are not in the possession, custody or control of defendants.
 Without waiving any of the foregoing, Responding Party responds to the
 requests below:

RESPONSES

6 **<u>REQUEST FOR PRODUCTION NO. 1</u>**:

7 All documents relating to eBay, including all agreements, terms of service and
8 terms and conditions.

9 RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

10 Responding Party objects on the ground that this request is vague and ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 11 12 to this request on the grounds that, as phrased, the request seeks documents the disclosure of 13 which might violate the attorney-client privilege and/or the work product doctrine. Subject to 14 and without waiving the foregoing objections and based on a reasonable interpretation as to the 15 meaning of this request, Responding Party responds as follows: Responding Party produced a 16 limited number of documents at the time of making its Initial Disclosures. Responding Party 17 has documents that may be responsive to this request that were produced to it by Commission 18 Junction, Inc. under a Confidentiality Order in the case of Commission Junction, Inc. v. 19 Thunderwood Holdings, Inc., et al., Superior Court, Orange County, Case No. 30-2008 20 00101025. Accordingly, Responding Party is prohibited from producing these documents at 21 this time. Responding Party has no other documents in its possession, custody or control that 22 are responsive to this request.

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REQUEST FOR PRODUCTION NO. 2:

All documents relating to, or Communications with, eBay or any current orformer employee of eBay.

26 RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

27 Responding Party objects on the ground that this request is vague and
28 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects

1 to this request on the grounds that, as phrased, the request seeks documents the disclosure of 2 which might violate the attorney-client privilege and/or the work product doctrine. Subject to 3 and without waiving the foregoing objections and based on a reasonable interpretation as to the meaning of this request, Responding Party responds as follows: Responding Party produced a 4 5 limited number of documents at the time of making its Initial Disclosures. Responding Party 6 has documents that may be responsive to this request that were produced to it by Commission 7 Junction, Inc. under a Confidentiality Order in the case of *Commission Junction*, Inc. v. 8 Thunderwood Holdings, Inc., et al., Superior Court, Orange County, Case No. 30-2008 9 00101025. Accordingly, Responding Party is prohibited from producing these documents at 10this time. Responding Party has no other documents in its possession, custody or control that 11 are responsive to this request.

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REQUEST FOR PRODUCTION NO. 3:

All documents relating to payment of commissions or other revenue obtained by
briandunning.com through participation in, interaction with or manipulation of eBay's Affiliate
Marketing Program.

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RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

17 Responding Party objects on the ground that this request is vague and 18 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 19 on the grounds that the term "manipulation" is vague, argumentative and conclusory. 20 Responding Party further objects to this request on the grounds that, as phrased, the request 21 seeks documents the disclosure of which might violate the attorney-client privilege and/or the 22 work product doctrine. Responding Party further objects to this request on the ground that it violates Responding Party's right to privacy, and seeks production of trade secrets or other 23 24 confidential information. Responding Party further objects on the ground that this information 25 is equally available to Plaintiff. Subject to and without waiving the foregoing objections and 26 based on a reasonable interpretation as to the meaning of this request, Responding Party 27 responds as follows: Responding Party produced a limited number of documents at the time of 28 making its Initial Disclosures. Responding Party has documents that may be responsive to this

request that were produced to it by Commission Junction, Inc. under a Confidentiality Order in
 the case of *Commission Junction, Inc. v. Thunderwood Holdings, Inc., et al.*, Superior Court,
 Orange County, Case No. 30-2008 00101025. Accordingly, Responding Party is prohibited
 from producing these documents at this time. Responding Party has no other documents in its
 possession, custody or control that are responsive to this request.

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REQUEST FOR PRODUCTION NO. 4:

All documents relating to eBay's Affiliate Marketing Program, including, but
not limited to, all methods and technologies used by briandunning.com to obtain revenue from,
manipulate or otherwise interact with, eBay's Affiliate Marketing Program, including, but not
limited to, all software, source code, Javascript, and HTML code.

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RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

12 Responding Party objects on the ground that this request is vague and ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 13 14 on the grounds that the term "manipulate" is vague, argumentative and conclusory. 15 Responding Party further objects to this request on the grounds that, as phrased, the request 16 seeks documents the disclosure of which might violate the attorney-client privilege and/or the 17 work product doctrine. Responding Party further objects to this request on the ground that it 18 seeks production of trade secrets or other confidential information. Subject to and without 19 waiving the foregoing objections and based on a reasonable interpretation as to the meaning of 20this request, Responding Party responds as follows: Responding Party produced a limited 21 number of documents at the time of making its Initial Disclosures. Responding Party has 22 documents that may be responsive to this request that were produced to it by Commission 23 Junction, Inc. under a Confidentiality Order in the case of *Commission Junction, Inc. v.* 24 Thunderwood Holdings, Inc., et al., Superior Court, Orange County, Case No. 30-2008 25 00101025. Accordingly, Responding Party is prohibited from producing these documents at 26 this time. Responding Party has no other documents in its possession, custody or control that 27 are responsive to this request.

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1 **REQUEST FOR PRODUCTION NO. 5**:

All documents relating to advertisements for eBay used, or purported to be used,
on any website or ad network that directed or referred Users to eBay as part of eBay's Affiliate
Marketing Program.

5 **<u>RESPONSE TO REQUEST FOR PRODUCTION NO. 5</u>**:

6 Responding Party objects on the ground that this request is vague and 7 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 8 to this request on the grounds that, as phrased, the request seeks documents the disclosure of 9 which might violate the attorney-client privilege and/or the work product doctrine. Responding 10Party further objects to this request on the ground that it seeks production of trade secrets or 11 other confidential information. Subject to and without waiving the foregoing objections and 12 based on a reasonable interpretation as to the meaning of this request, Responding Party responds as follows: Responding Party produced a limited number of documents at the time of 13 14 making its Initial Disclosures. Responding Party has documents that may be responsive to this 15 request that were produced to it by Commission Junction, Inc. under a Confidentiality Order in 16 the case of Commission Junction, Inc. v. Thunderwood Holdings, Inc., et al., Superior Court, 17 Orange County, Case No. 30-2008 00101025. Accordingly, Responding Party is prohibited 18 from producing these documents at this time. Responding Party has no other documents in its 19 possession, custody or control that are responsive to this request.

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REQUEST FOR PRODUCTION NO. 6:

All documents reflecting the number of Users who allegedly clicked on an
advertisement for eBay used, or purported to be used, by briandunning.com to direct or refer
Users to eBay as part of eBay's Affiliate Marketing Program.

24 RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

Responding Party objects on the ground that this request is vague and
ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects
to this request on the grounds that, as phrased, the request seeks documents the disclosure of
which might violate the attorney-client privilege and/or the work product doctrine. Responding

1 Party further objects to this request on the ground that it seeks production of trade secrets or 2 other confidential information. Subject to and without waiving the foregoing objections and 3 based on a reasonable interpretation as to the meaning of this request, Responding Party 4 responds as follows: Responding Party produced a limited number of documents at the time of making its Initial Disclosures. Responding Party has documents that may be responsive to this 5 6 request that were produced to it by Commission Junction, Inc. under a Confidentiality Order in 7 the case of Commission Junction, Inc. v. Thunderwood Holdings, Inc., et al., Superior Court, 8 Orange County, Case No. 30-2008 00101025. Accordingly, Responding Party is prohibited 9 from producing these documents at this time. Responding Party has no other documents in its 10 possession, custody or control that are responsive to this request.

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REQUEST FOR PRODUCTION NO. 7:

All documents relating to methods or techniques intended to, or causing, a
User's browser to load any eBay webpage, webpage content or data therefrom.

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RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

15 Responding Party objects on the ground that this request is vague and 16 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 17 to this request on the grounds that, as phrased, the request seeks documents the disclosure of 18 which might violate the attorney-client privilege and/or the work product doctrine. Responding 19 Party further objects to this request on the ground that it seeks production of trade secrets or 20 other confidential information. Subject to and without waiving the foregoing objections and 21 based on a reasonable interpretation as to the meaning of this request, Responding Party 22 responds as follows: Responding Party produced a limited number of documents at the time of 23 making its Initial Disclosures. Responding Party has documents that may be responsive to this 24 request that were produced to it by Commission Junction, Inc. under a Confidentiality Order in 25 the case of Commission Junction, Inc. v. Thunderwood Holdings, Inc., et al., Superior Court, 26 Orange County, Case No. 30-2008 00101025. Accordingly, Responding Party is prohibited 27 from producing these documents at this time. Responding Party has no other documents in its 28 possession, custody or control that are responsive to this request.

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REQUEST FOR PRODUCTION NO. 8:

All documents sufficient to identify all advertising networks, advertising
syndication services or websites used or purportedly used by briandunning.com to advertise
or promote eBay or to interact in any way with eBay or eBay's Affiliate Marketing Programs.

<u>RESPONSE TO REQUEST FOR PRODUCTION NO. 8</u>:

Responding Party objects on the ground that this request is vague and 6 7 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects to this request on the grounds that, as phrased, the request seeks documents the disclosure of 8 9 which might violate the attorney-client privilege and/or the work product doctrine. Responding 10 Party further objects to this request on the ground that it seeks production of trade secrets or other confidential information. Subject to and without waiving the foregoing objections and 11 based on a reasonable interpretation as to the meaning of this request, Responding Party 12 responds as follows: Responding Party produced a limited number of documents at the time of 13 14 making its Initial Disclosures. Responding Party has documents that may be responsive to this 15 request that were produced to it by Commission Junction, Inc. under a Confidentiality Order in the case of Commission Junction, Inc. v. Thunderwood Holdings, Inc., et al., Superior Court, 16 Orange County, Case No. 30-2008 00101025. Accordingly, Responding Party is prohibited 17 from producing these documents at this time. Responding Party has no other documents in its 18 19 possession, custody or control that are responsive to this request.

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REQUEST FOR PRODUCTION NO. 9:

All documents sufficient to identify all Affiliate Marketing Programs, not
 including eBay's Affiliate Marketing Program, with whom briandunning.com obtained revenue
 or otherwise interacted.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9**:

25 Responding Party objects on the ground that this request is vague and
26 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects
27 that to the extent this request seeks documents related to programs other than eBay's Affiliate
28 Marketing Program, the request is neither relevant to the subject matter of this action, nor

1 reasonably calculated to lead to the discovery of admissible evidence. Responding Party further 2 objects to this request on the grounds that, as phrased, the request seeks documents the 3 disclosure of which might violate the attorney-client privilege and/or the work product 4 doctrine. Responding Party further objects to this request on the ground that it seeks 5 production of trade secrets or other confidential information. Subject to and without waiving 6 the foregoing objections and based on a reasonable interpretation as to the meaning of this 7 request, Responding Party responds as follows: Responding Party does not have any responsive documents in its possession, custody or control. 8

9 **REQUEST FOR PRODUCTION NO. 10**:

10 All documents relating to and/or describing methods and techniques used by any other Affiliate Marketing Program that briandunning.com interacted with, participated in or 11 12 manipulated.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10: 13

14 Responding Party objects on the ground that this request is vague and ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 15 on the grounds that the term "manipulated" is vague, argumentative and conclusory. 16 17 Responding Party further objects that to the extent this request seeks documents related to 18 programs other than eBay's Affiliate Marketing Program, the request is neither relevant to the subject matter of this action, nor reasonably calculated to lead to the discovery of admissible 19 evidence. Responding Party further objects to this request on the grounds that, as phrased, the 20 request seeks documents the disclosure of which might violate the attorney-client privilege 21 22 and/or the work product doctrine. Responding Party further objects to this request on the 23 ground that it seeks production of trade secrets or other confidential information. Subject to 24 and without waiving the foregoing objections and based on a reasonable interpretation as to the 25 meaning of this request, Responding Party responds as follows: Responding Party does not 26 have any responsive documents in its possession, custody or control.

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1 REQUEST FOR PRODUCTION NO. 11:

All documents sufficient to identify the source of any technology, technique or
method used by briandunning.com to participate in, manipulate or interact with the eBay
Affiliate Marketing Program, or any other Affiliate Marketing Program.

5 RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

6 Responding Party objects on the ground that this request is vague and 7 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects on the grounds that the term "manipulate" is vague, argumentative and conclusory. 8 9 Responding Party further objects that to the extent this request seeks documents related to 10 programs other than eBay's Affiliate Marketing Program, the request is neither relevant to the subject matter of this action, nor reasonably calculated to lead to the discovery of admissible 11 evidence. Responding Party further objects to this request on the grounds that, as phrased, the 12 request seeks documents the disclosure of which might violate the attorney-client privilege 13 and/or the work product doctrine. Responding Party further objects to this request on the 14 ground that it seeks production of trade secrets or other confidential information. Subject to 15 and without waiving the foregoing objections and based on a reasonable interpretation as to the 16 meaning of this request, Responding Party responds as follows: Responding Party does not 17 have any responsive documents in its possession, custody or control. 18

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REQUEST FOR PRODUCTION NO. 12:

All documents sufficient to identify any individuals, groups, books, manuals or
 other materials consulted by briandunning.com while developing any technology, technique
 or method used by briandunning.com to participate in, manipulate or interact with the eBay
 Affiliate Marketing Program, or any other Affiliate Marketing Program.

24 RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

25 Responding Party objects on the ground that this request is vague and
26 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects
27 on the grounds that the term "manipulate" is vague, argumentative and conclusory.

28 Responding Party further objects that to the extent this request seeks documents related to

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1 programs other than eBay's Affiliate Marketing Program, the request is neither relevant to the 2 subject matter of this action, nor reasonably calculated to lead to the discovery of admissible 3 evidence. Responding Party further objects to this request on the grounds that, as phrased, the 4 request seeks documents the disclosure of which might violate the attorney-client privilege 5 and/or the work product doctrine. Responding Party further objects to this request on the 6 ground that it seeks production of trade secrets or other confidential information. Subject to 7 and without waiving the foregoing objections and based on a reasonable interpretation as to the 8 meaning of this request, Responding Party responds as follows: Responding Party does not 9 have any responsive documents in its possession, custody or control.

10 **REQUEST FOR PRODUCTION NO. 13**:

All documents relating to Commission Junction, including all agreements, terms
of service and terms and conditions.

13 RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

14 Responding Party objects on the ground that this request is vague and 15 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 16 to this request on the grounds that, as phrased, the request seeks documents the disclosure of 17 which might violate the attorney-client privilege and/or the work product doctrine. Responding 18 Party further objects to this request on the ground that it seeks production of trade secrets or 19 other confidential information. Subject to and without waiving the foregoing objections and 20 based on a reasonable interpretation as to the meaning of this request, Responding Party 21 responds as follows: Responding Party does not have any responsive documents in its 22 possession, custody or control.

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REQUEST FOR PRODUCTION NO. 14:

All documents relating to, or Communications with, Commission Junction or
any current or former employee of Commission Junction.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 14**:

27 Responding Party objects on the ground that this request is vague and
28 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects

to this request on the grounds that, as phrased, the request seeks documents the disclosure of
which might violate the attorney-client privilege and/or the work product doctrine. Responding
Party further objects to this request on the ground that it seeks production of trade secrets or
other confidential information. Subject to and without waiving the foregoing objections and
based on a reasonable interpretation as to the meaning of this request, Responding Party
responds as follows: Responding Party does not have any responsive documents in its
possession, custody or control.

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REQUEST FOR PRODUCTION NO. 15:

9 All documents relating to, or Communications with, Digital Point Solutions,
10 Inc., Kessler's Flying Circus, Thunderwood Holdings, Inc., or Dunning Enterprise, Inc.

11 RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

12 Responding Party objects on the ground that this request is vague and 13 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 14 to this request on the grounds that, as phrased, the request seeks documents the disclosure of 15 which might violate the attorney-client privilege and/or the work product doctrine. Responding 16 Party further objects to this request on the ground that it seeks production of trade secrets or 17 other confidential information. Subject to and without waiving the foregoing objections and 18 based on a reasonable interpretation as to the meaning of this request, Responding Party 19 responds as follows: Responding Party does not have any responsive documents in its 20possession, custody or control.

- 21 REQUEST FOR PRODUCTION NO. 16:
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All Communications with Shawn Hogan, Todd Dunning or Brian Dunning.

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RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

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Responding Party objects on the ground that this request is vague and
ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects
to this request on the grounds that, as phrased, the request seeks documents the disclosure of
which might violate the attorney-client privilege and/or the work product doctrine. Responding
Party further objects to this request on the ground that it violates privacy rights of third parties.

1 Subject to and without waiving the foregoing objections and based on a reasonable

2 interpretation as to the meaning of this request, Responding Party responds as follows:

3 Responding Party does not have any responsive documents in its possession, custody or
4 control.

5 REQUEST FOR PRODUCTION NO. 17:

6 All documents relating to, or Communications with, Rachael Hughes, or any
7 companies or entities owned, controlled, affiliated with or used by Rachael Hughes, relating to
8 eBay's Affiliate Marketing Program including, but not limited to, any agreements with Rachael
9 Hughes and company and any technology transferred to or from Rachael Hughes and company.

10

<u>RESPONSE TO REQUEST FOR PRODUCTION NO. 17</u>:

11 Responding Party objects to this request on the grounds that Rachel Hughes is
 12 unknown to Responding Party, therefore no response is possible and all objections are reserved
 13 until eBay properly identifies this person or entity.

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REQUEST FOR PRODUCTION NO. 18:

All documents sufficient to describe all phone numbers, email addresses, web
pages, instant messenger or mail accounts and social network accounts maintained, formerly
maintained or registered to briandunning.com.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 18**:

19 Responding Party objects on the ground that this request is vague and 20 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party objects that this 21 request seeks documents which are neither relevant to the subject matter of this action, nor 22 reasonably calculated to lead to the discovery of admissible evidence. Responding Party 23 further objects to this request on the ground that it seeks production of trade secrets or other confidential information. Subject to and without waiving the foregoing objections and based on 24 25 a reasonable interpretation as to the meaning of this request, Responding Party responds as 26 follows: Responding Party does not have possession, custody, or control of any responsive 27 documents.

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1 **<u>REQUEST FOR PRODUCTION NO. 19</u>**:

Documents sufficient to identify any Aliases used by briandunning.com in any
Internet Forum at or within which Briandunning.com discussed any aspect of their participation
in, manipulation of or interaction with eBay's Affiliate Marketing Program, or any other
Affiliate Marketing Programs, including, but not limited to, forums such as blogs, listservs,
Usenet newsgroups or chat rooms.

7 RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

8 Responding Party objects on the ground that this request is vague and 9 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 10 on the grounds that the term "manipulation" is vague, argumentative and conclusory. Responding Party further objects that to the extent this request seeks documents related to 11 programs other than eBay's Affiliate Marketing Program, the request is neither relevant to the 12 13 subject matter of this action, nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and based on a reasonable 14 interpretation as to the meaning of this request, Responding Party responds as follows: 15 Responding Party does not have possession, custody, or control of any responsive documents. 16

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REQUEST FOR PRODUCTION NO. 20:

18 Documents sufficient to identify any Internet Forum at or within which
19 briandunning.com discussed any aspect of their participation in, manipulation of or interaction
20 with eBay's Affiliate Marketing Programs, or any other Affiliate Marketing Programs,
21 including, but not limited to, forums such as blogs, listservs, Usenet newsgroups or chat
22 rooms.

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RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

24 Responding Party objects on the ground that this request is vague and
25 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects
26 on the grounds that the term "manipulation" is vague, argumentative and conclusory.
27 Responding Party further objects that to the extent this request seeks documents related to

28 programs other than eBay's Affiliate Marketing Program, the request is neither relevant to the

subject matter of this action, nor reasonably calculated to lead to the discovery of admissible
 evidence. Subject to and without waiving the foregoing objections and based on a reasonable
 interpretation as to the meaning of this request, Responding Party responds as follows:
 Responding Party does not have possession, custody, or control of any responsive documents.

5 **<u>REQUEST FOR PRODUCTION NO. 21</u>**:

6 Documents sufficient to identify all internet service providers (ISPs) and IP
7 addresses used by briandunning.com.

8 RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

9 Responding Party objects on the ground that this request is vague and
10 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party objects that this
11 request seeks documents which are neither relevant to the subject matter of this action, nor
12 reasonably calculated to lead to the discovery of admissible evidence. Subject to and without
13 waiving the foregoing objections and based on a reasonable interpretation as to the meaning of
14 this request, Responding Party responds as follows: Responding Party does not have
15 possession, custody, or control of any responsive documents.

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REQUEST FOR PRODUCTION NO. 22:

17 Documents sufficient to identify all computers, servers, electronic data storage18 and hosting companies, entities, or facilities used by briandunning.com.

19 RESPONSE TO REQUEST FOR PRODUCTION NO. 22:

20 Responding Party objects on the ground that this request is vague and 21 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party objects that this 22 request seeks documents which are neither relevant to the subject matter of this action, nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without 23 24 waiving the foregoing objections and based on a reasonable interpretation as to the meaning of 25 this request, Responding Party responds as follows: To the extent that Responding Party was a 26 partner in Kessler's Flying Circus, which had computers and stored data, this material is 27 currently in the possession of the FBI and not available to Responding Party. Responding 28 Party does not have possession, custody, or control of any responsive documents.

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1 **<u>REQUEST FOR PRODUCTION NO. 23</u>**:

2 Documents sufficient to identify any entity used or hired to maintain or restore
3 electronic data or systems relating to briandunning.com's participation in, manipulation of or
4 interaction with eBay's Affiliate Marketing Program.

5 RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

6 Responding Party objects on the ground that this request is vague and ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 7 8 on the grounds that the term "manipulation" is vague, argumentative and conclusory. 9 Responding Party further objects to this request on the ground that it seeks production of trade secrets or other confidential information. Subject to and without waiving the foregoing 1011 objections and based on a reasonable interpretation as to the meaning of this request, Responding Party responds as follows: Responding Party does not have possession, custody, 12 13 or control of any responsive documents.

14 **REQUEST FOR PRODUCTION NO. 24**:

15 Documents sufficient to identify software used to clean, reformat or erase
16 hard-drives used by briandunning.com, or any equipment owned, used or maintained by
17 briandunning.com.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 24**:

19 Responding Party objects on the ground that this request is vague and
20 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects
21 to this request on the ground that it seeks production of trade secrets or other confidential
22 information. Subject to and without waiving the foregoing objections and based on a
23 reasonable interpretation as to the meaning of this request, Responding Party responds as
24 follows: Responding Party does not have possession, custody, or control of any responsive
25 documents.

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REQUEST FOR PRODUCTION NO. 25:

All documents sufficient to identify all business entities or fictitious business
names currently or formerly maintained by briandunning.com.

RESPONSE TO REQUEST FOR PRODUCTION NO. 25:

Responding Party objects on the ground that this request is vague and 2 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 3 4 that this request seeks documents which are neither relevant to the subject matter of this action, nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and 5 without waiving the foregoing objections and based on a reasonable interpretation as to the 6 meaning of this request, Responding Party responds as follows: Responding Party does not 7 8 have possession, custody, or control of any responsive documents.

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All documents filed by briandunning.com with any Secretary of State.

RESPONSE TO REQUEST FOR PRODUCTION NO. 26: 11

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Responding Party objects on the ground that this request is overbroad, unduly burdensome and oppressive. Responding Party further objects that this request seeks 13 documents which are neither relevant to the subject matter of this action, nor reasonably 14 15 calculated to lead to the discovery of admissible evidence. Subject to and without waiving the 16 foregoing objections and based on a reasonable interpretation as to the meaning of this request, Responding Party responds as follows: Other than the documents Responding Party produced 17 as part of its Initial Disclosures, Responding Party has no other documents in its possession, 18 19 custody or control that are responsive to this request.

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REQUEST FOR PRODUCTION NO. 27:

REQUEST FOR PRODUCTION NO. 26:

Documents sufficient to show the structure and organization of

22 briandunning.com and all companies or other entities owned or controlled by

23 briandunning.com that were involved in or interacted with any Affiliate Marketing Program.

24

RESPONSE TO REQUEST FOR PRODUCTION NO. 27:

Responding Party objects on the ground that this request is overbroad, unduly 2526 burdensome and oppressive. Responding Party further objects that this request seeks documents which are neither relevant to the subject matter of this action, nor reasonably 27 $\mathbf{28}$ calculated to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and based on a reasonable interpretation as to the meaning of this request,
 Responding Party responds as follows: Other than the documents Responding Party produced
 as part of its Initial Disclosures, Responding Party has no other documents in its possession,
 custody or control that are responsive to this request.

5 **REQUEST FOR PRODUCTION NO. 28**:

6 Documents sufficient to identify all employees, contractors or temporary
7 employees of briandunning.com, their dates of employment, duties, salary and any other
8 compensation.

9

10 Responding Party objects on the ground that this request is overbroad, unduly
11 burdensome and oppressive. Responding Party further objects that this request seeks
12 documents which are neither relevant to the subject matter of this action, nor reasonably
13 calculated to lead to the discovery of admissible evidence. Responding Party further objects to
14 this request on the ground that it violates privacy rights of third parties, seeks production of

15 trade secrets or other confidential information.

16 **REQUEST FOR PRODUCTION NO. 29**:

All documents constituting briandunning.com's annual, quarterly and monthly
audited, compiled, reviewed or unaudited financial statements, including all income statements
and balance sheets of briandunning.com.

20 RESPONSE TO REQUEST FOR PRODUCTION NO. 29:

RESPONSE TO REQUEST FOR PRODUCTION NO. 28:

Responding Party objects on the ground that this request is overbroad, unduly
burdensome and oppressive. Responding Party further objects that this request seeks
documents which are neither relevant to the subject matter of this action, nor reasonably
calculated to lead to the discovery of admissible evidence. Responding Party further objects to
this request on the ground that it seeks production of trade secrets and confidential financial
information, and invades Responding Party's rights of privacy.

- 27 / / / /
- 28 || / / /

REQUEST FOR PRODUCTION NO. 30: 1

2 All documents sufficient to identify all assets and financial accounts (including 3 those outside of the United States) maintained or formerly maintained by briandunning.com. 4

RESPONSE TO REQUEST FOR PRODUCTION NO. 30:

5 Responding Party objects on the ground that this request is vague and 6 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects 7 that this request seeks documents which are neither relevant to the subject matter of this action, 8 nor reasonably calculated to lead to the discovery of admissible evidence. Responding Party 9 further objects to this request on the ground that it violates Responding Party's right to privacy. 10and seeks production of trade secrets and confidential financial information.

REQUEST FOR PRODUCTION NO. 31: 11

12 Documents constituting briandunning.com's tax returns for the years 2003 to the 13 present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 31: 14

RESPONSE TO REQUEST FOR PRODUCTION NO. 32:

15 Responding Party objects that this request seeks documents which are neither 16 relevant to the subject matter of this action, nor reasonably calculated to lead to the discovery 17 of admissible evidence. Responding Party further objects to this request on the ground that it 18 violates Responding Party's right to privacy, seeks privileged financial information, see e.g., 19 California Revenue and Taxation Code section 19542.

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REQUEST FOR PRODUCTION NO. 32:

All documents relating to the transfer or assumption of any liability by

22 briandunning.com.

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Responding Party objects on the ground that this request is vague and ambiguous, overbroad, unduly burdensome and oppressive. Responding Party objects that this request seeks documents which are neither relevant to the subject matter of this action, nor

27 reasonably calculated to lead to the discovery of admissible evidence. Responding Party

28 further objects to this request on the grounds that, as phrased, the request seeks documents the

disclosure of which might violate the attorney-client privilege and/or the work product
 doctrine. Subject to and without waiving the foregoing objections and based on a reasonable
 interpretation as to the meaning of this request, Responding Party responds as follows:
 Responding Party does not have possession, custody, or control of any responsive documents.

5 **REQUEST FOR PRODUCTION NO. 33**:

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All documents relating to any insurance policies relevant to this action.

7 RESPONSE TO REQUEST FOR PRODUCTION NO. 33:

8 Responding Party objects on the ground that this request is vague and
9 ambiguous, overbroad, unduly burdensome and oppressive. Responding Party further objects
10 to this request on the grounds that, as phrased, the request seeks documents the disclosure of
11 which might violate the attorney-client privilege and/or the work product doctrine. Subject to
12 and without waiving the foregoing objections and based on a reasonable interpretation as to the
13 meaning of this request, Responding Party responds as follows: Responding Party does not
14 have possession, custody, or control of any responsive documents.

DATED: February 26, 2009

RUS, MILIBAND & SMITH A Professional Corporation

By:

LEO J. PRESIADO Attorneys for Defendants Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com

	Case5:08-cv-04052-JF Document91-5 Filed06/05/09 Page22 of 23	
1	PROOF OF SERVICE	
2	eBay, Inc. v. Digital Point Solutions, Inc., et al. Northern District of California, San Jose Division	
3	Case No. C 08-4052 JF	
. 4	STATE OF CALIFORNIA)) ss.	
5	COUNTY OF ORANGE)	
6 7	I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2211 Michelson Drive, Seventh Floor, Irvine, California 92612.	
8	On February 26, 2009, I served the foregoing documents described as RESPONSES OF DEFENDANT BRIANDUNNING.COM TO FIRST SET OF REQUESTS FOR PRODUCTION PROPOUNDED BY PLAINTIFF EBAY, INC. on the	
9		
10	interested parties in this action by placing a copy thereof enclosed in sealed envelopes addressed as follows:	
11	SEE ATTACHED SERVICE LIST	
12	\checkmark As follows: I am "readily familiar" with the firm's practice of collection and processing	
13	correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California	
14 15	in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.	
16 17	(By E-Mail) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons.	
18	(By Facsimile) As follows: I caused the above-referenced document(s) to be transmitted to the above-named persons by facsimile.	
19 20	(By Hand Delivery) As follows: I caused the above-referenced document(s) to be hand delivered to the above-named persons.	
21	(By Overnight Delivery) As follows: By overnight delivery via Overnite Express	
22	and/or Federal Express to the office of the addressee noted on the attached service list.	
23	Executed on February 26, 2009, at Irvine, California.	
24	(Federal) I deplote that I am employed in the office of a member of the hard of the large	
25	(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.	
26	QLLA	
27	RHONDA RADFORD	
28		
	1	
	345638v1 rr 11/26/08 7 (2785-0002) PROOF OF SERVICE - CASE NO. C 08-4052	

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1	SERVICE LIST
2	eBay, Inc. v. Digital Point Solutions, Inc., et al. Northern District of California, San Jose Division
3	Case No. C 08-4052
4	David R. Eberhart Sharon M. Bunzel
5	Colleen M. Kennedy
6	O'Melveny & Myers Two Embarcadero, 20 th Floor
7	San Francisco, CA 94111 Tel: (949) 984-8700
8	Fax: (949) 984-8701
9 9	Email: deberhart@omm.com, sbunzel@omm.com Attorneys for Plaintiff eBay, Inc.
10	Stewart H. Foreman
10	Freeland, Cooper & Foreman, LLP 150 Spear Street, Suite 1800
_	San Francisco, CA 94105
12	Fax: (949) 495-4332
13	Email: foreman@freelandlaw.com Attorneys for Defendants Todd Dunning and Dunning Enterprises, Inc.
14	Seyamack Kouretchian
15	Coast Law Group. LLP
16	169 Saxony Road Suite 204
17	Encinitas, CA 92024 Tel: (760) 942-8505
18	Fax: (760) 942-8515 Email: seyamack@coastlawgroup.com
19	Attorneys for Digital Point Solutions, Inc. and Shawn Hogan
20	Patrick K. McClellan Law Offices of Patrick K. McClellan
21	2211 Michelson Drive, Suite 700 Irvine, California 92612
22	Tel: (949) 261-7615 Fax: (949) 851-2772
23	Email: pkellymc@pacbell.net Attorney for Kessler's Flying Circus
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27	
28	
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