

1 Seyamack Kouretchian (State Bar No. 171741)
 Seyamack@CoastLawGroup.com
 2 Ross M. Campbell (State Bar No. 234827)
 Rcampbell@CoastLawGroup.com
 3 COAST LAW GROUP, LLP
 4 169 Saxony Road, Suite 204
 Encinitas, California 92024
 5 Tel: (760) 942-8505
 6 Fax: (760) 942-8515

7 Attorneys for Defendants, SHAWN HOGAN
 and DIGITAL POINT SOLUTIONS, INC.

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

12	EBAY, INC.,)	Case No. CV 08-04052 JF PVT
)	
13	Plaintiff,)	DEFENDANTS DIGITAL POINT
)	SOLUTIONS, INC. AND SHAWN
14	v.)	HOGAN’S REPLY BRIEF IN SUPPORT
)	OF MOTION TO TRANSFER
15	DIGITAL POINT SOLUTIONS, INC., SHAWN)	
	HOGAN, KESSLER’S FLYING CIRCUS,)	
16	THUNDERWOOD HOLDINGS, INC., TODD)	
	DUNNING, DUNNING ENTERPRISE, INC.,)	Date: June 26, 2009
17	BRIAN DUNNING, BRIANDUNNING.COM,)	Time: 9:00 a.m.
	and Does 1-20,)	Dept.: Courtroom 3
18)	
19	Defendants.)	
20)	

21
 22 **I. SUMMARY OF REPLY**

23 As detailed in the DPS Defendants’ moving papers, this action should be transferred to the
 24 Central District of California based on the forum selection clause set forth in the Commission Junction
 25 Publisher Service Agreement (PSA), the convenience of the parties and witnesses, and the interests of
 26 justice. In its opposition papers, Plaintiff contends that Plaintiff’s choice of forum is “presumptively
 27 determinative.” However, the deference normally afforded to the plaintiff’s choice of forum does not
 28 apply in this case.

1 Indeed, while the courts are traditionally deferential to plaintiff's selected forum, such deference
2 is entirely inappropriate in this case, as Plaintiff has already contractually chosen Los Angeles County
3 as the exclusive venue for adjudicating affiliate-related disputes. Given the foregoing, Plaintiff has not
4 satisfied its burden of persuading the Court that the PSA's designated forum is sufficiently inconvenient
5 to justify retention of the dispute.

6 **II. ARGUMENT**

7 **A. The Court Should Transfer this Action to the Central District of California.**

8 As a preliminary matter, for the reasons set forth in the DPS Defendants' reply brief in support
9 of their Motion to Dismiss, Plaintiff's attempts to circumvent the terms of its own mandatory form
10 agreements should be rejected. Because Plaintiff is bound by the forum selection clause set forth in the
11 PSA, *Plaintiff* bears the burden of persuading the court that the contractual forum is sufficiently
12 inconvenient to justify retention of the dispute.' [Citation]." *Digital Envoy, Inc. v. Google, Inc.* (N.D.
13 Ga. 2004) 319 F. Supp. 2d 1377, 1381.

14 Plaintiff simply has not satisfied its burden. Because the forum selection clause "is
15 determinative of the convenience to the parties" (*Unisys Corp. v. Access Co.* (ND Cal. 2005) 2005 U.S.
16 Dist. LEXIS 31897, 12), Plaintiff's claims regarding the convenience of the Northern District should be
17 disregarded. Given the heavy weight afforded forum selection clauses, the private interest factors
18 clearly favor transfer. Further, the parties concede that the public interest factors are largely neutral.
19 Accordingly, the Court should exercise its discretion to transfer this action to the Central District of
20 California.

21 **B. In the Alternative, the Court Should Dismiss this Action under the Doctrine of** 22 **Forum Non Conveniens.**

23 In *Murphy v. Schneider Nat'l, Inc.* (9th Cir. 2003) 362 F.3d 1133, the Ninth Circuit indicated that
24 "a *forum non conveniens* motion, as opposed to a motion to transfer based on 28 U.S.C. § 1404(a), is
25 appropriate" where enforcement of the forum selection clause at issue requires the parties to litigate in
26 "state court, rather than in a federal court." *Id.* at 1143, fn. 5 (citing Arthur R. Miller, Federal Practice
27 and Procedure, § 1352 (2d ed.) ("A federal court will resort to the pre-1948 motion to dismiss for *forum*
28 *non conveniens* in those instances which the alternative forum is a state court"); *see also Kelly v.*
Kelly (N.D.N.Y. 1996) 911 F. Supp. 70, 71 (district courts have discretion to raise issues of *forum non*

1 *convinens* on their own motions in the interests of justice). Here, to the extent the Court finds that the
2 action cannot be transferred to the Central District, the DPS Defendants respectfully request that the
3 action be dismissed under the doctrine of forum non conveniens.

4 **III. CONCLUSION**

5 For the foregoing reasons, the DPS Defendants respectfully request that this action be transferred
6 to the United States District Court for the Central District of California pursuant to §1404(a) or, in the
7 alternative, dismissed under the doctrine of forum non conveniens.

8 DATED: June 12, 2009

s/Ross M. Campbell
COAST LAW GROUP, LLP
Attorneys for Defendants Shawn Hogan
and Digital Point Solutions, Inc.