

1 RONALD RUS, #67369  
 rrus@rusmiliband.com  
 2 LEO J. PRESIADO, #166721  
 lpresiado@rusmiliband.com  
 3 RUS, MILIBAND & SMITH  
 A Professional Corporation  
 4 Seventh Floor  
 2211 Michelson Drive  
 5 Irvine, California 92612  
 Telephone: (949) 752-7100  
 6 Facsimile: (949) 252-1514  
 7 Attorneys for Defendants  
 THUNDERWOOD HOLDINGS, INC.,  
 8 BRIAN DUNNING, and BRIANDUNNING.COM  
 9 LAW OFFICES OF PATRICK K. McCLELLAN  
 Patrick K. McClellan #077352  
 10 2211 Michelson Drive, Suite 700  
 Irvine, CA 92612  
 11 Telephone (949) 261-7615  
 12 Attorney for Defendant  
 KESSLER'S FLYING CIRCUS  
 13

14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 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)  
**RESPONSE TO OBJECTION OF  
 EBAY INC. TO MAGISTRATE  
 JUDGE TRUMBULL'S ORDER OF  
 NOVEMBER 19, 2009 ON EBAY'S  
 MOTIONS TO COMPEL**  
 DATE: None Set  
 TIME: None Set  
 JUDGE: Hon. Jeremy Fogel  
 Courtroom 3

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1. INTRODUCTION ..... 2

2. STATEMENT OF FACTS ..... 3

3. ARGUMENT ..... 4

    A. Mr. Dunning Is not Required to, And Cannot, Produce Documents  
    Previously Obtained By The Government ..... 4

    B. Mr. Dunning’s Invocation Of His Fifth Amendment Privilege Against  
    Self-Incrimination Extends To The Entity Defendants Since Any Response  
    By The Entity Defendants Would Necessarily Implicate Mr. Dunning ..... 9

    C. The Order Was Not Based On Clearly Erroneous Factual Conclusions  
    With Regard to These Defendants ..... 14

    D. Judge Trumbull Did Not Incorrectly Rule That Engaging In Discovery  
    Piecemeal Would Not Advance The Litigation ..... 15

4. CONCLUSION ..... 16

1 **TABLE OF AUTHORITIES**

2 **FEDERAL CASES**

3 *Blau v. United States*,  
340 U.S. 159 (1950) ..... 12

4 *Central States, Southeast and Southwest Areas Pension Fund v. Carstengen*  
5 *Freight Lines, Inc.*, 1998 WL 413490 (N.D. Ill. 1998) ..... 12

6 *Doe v. United States*,  
487 U.S. 201 (1988) ..... 5

7 *Fisher v. United States*,  
8 425 U.S. 391 (1976) ..... 5, 7

9 *In re Grand Jury Proceedings*,  
759 F.2d 1418 (9th Cir. 1985) ..... 5

10 *Henry v. Sneider*s,  
11 490 F.2d 315 (9th Cir. 1974) ..... 7

12 *Hoffman v. United States*,  
341 U.S. 479 (1951) ..... 10

13 *Navel Orange Admin. Comm. V. Exeter Orange Co.*,  
14 722 F.2d 449 (9th Cir. 1983) ..... 11, 12

15 *Priebe v. World Ventures, Inc.*,  
407 F. Supp. 1244 (C.D. Cal 1976) ..... 12

16 *SEC v. Leach*,  
17 156 F. Supp. 2d 491 (2001) ..... 13

18 *U.S. v. Neff*,  
615 F.2d 1235 (9th Cir. 1980) ..... 10

19 *United States v. 3963 Bottles, More Or Less*,  
20 265 F.2d 332 (7th Cir. 1959) ..... 11, 12

21 *United States v. Doe*,  
465 U.S. 605 (1984) ..... 5

22 *United States v. Kordel*,  
23 397 U.S. 1 (1970) ..... 13

24 **STATE CASES**

25 *In re Misener*  
(1985) 38 Cal. 3d 543 ..... 10

26 *Prudhomme v. Sup. Ct.*  
27 (1970) 2 Cal. 3d 320 ..... 10

28

1 Defendants Brian Dunning (“Mr. Dunning”), BrianDunning.com (“BD.com”),  
2 Thunderwood Holdings, Inc. (“THI”) and Kessler’s Flying Circus (“KFC”) (collectively,  
3 “Defendants”; THI, KFC and BD.com shall collectively be referred to as the “Entity  
4 Defendants”) respond to the Objection filed by Plaintiff eBay Inc. (“Plaintiff” and/or “eBay”)  
5 to Magistrate Judge Trumbull’s Order of November 19, 2009 (the “Objection”) as follows:

6 1. INTRODUCTION

7 The irony of eBay’s Objection to Judge Trumbull’s Order on its motions to  
8 compel is that eBay argued vigorously (over Defendants’ objections) that Judge Trumbull hear  
9 its motions to compel prior to this Court’s hearing of Defendants’ motion to stay the action  
10 pending resolution of the criminal proceeding against Mr. Dunning. Now because in deciding  
11 eBay’s motions to compel Judge Trumbull has effectively stayed all discovery in this action  
12 pending the criminal proceeding, eBay seeks the aid of this Court. eBay’s Objection, however,  
13 serves only to highlight what became clear to Judge Trumbull – the particular facts of this case  
14 (and to some extent the unsettled state of the law as applied to such facts) require a stay of  
15 discovery (if not the entire action) pending the criminal proceedings in order to preserve and  
16 protect Mr. Dunning’s Fifth Amendment rights. As recognized by Judge Trumbull, a stay of  
17 discovery in this case will not prejudice eBay and is the only guarantee to safeguarding  
18 Mr. Dunning’s Constitutional right against self-incrimination.

19 Notwithstanding the propriety of a stay of this action (the motion for which is  
20 scheduled to be heard by this Court on January 22, 2009), Judge Trumbull got it right on the  
21 subject motions to compel and eBay’s objections to the Order are not well taken. More  
22 specifically, Judge Trumbull’s decision regarding Mr. Dunning obligation to produce  
23 documents previously obtained by the Government is grounded in law, particularly as applied  
24 to the facts of this case. In addition, Judge Trumbull properly determined that Mr. Dunning’s  
25 Fifth Amendment rights are protected only in the event THI, KFC and BD.com are not  
26 compelled to respond to the subject discovery. Finally, Judge Trumbull correctly ruled that  
27 piecemeal discovery would not advance the litigation and that all discovery as to Defendants

28 / / /

1 should be deferred pending resolution of the Government's criminal proceeding against  
2 Mr. Dunning.

3 Judge Trumbull's Order should not be disturbed.

4 2. STATEMENT OF FACTS

5 By its motions to compel, and as to Defendants, eBay sought to compel (1)  
6 Mr. Dunning to produce all documents responsive to eBay's document requests which had  
7 previously been obtained by the Government pursuant to search warrant, (2) KFC to respond to  
8 interrogatories; (3) THI and BD.com to respond to interrogatories and requests for admissions,  
9 and (4) Mr. Dunning, THI, KFC and BD.com (as well as Todd Dunning) to "exercise any and  
10 all rights they may have to obtain [responsive] documents from Rackspace US, Inc." (See,  
11 eBay's Notice of Motion at 1:6-24).

12 The motions to compel were fully briefed by the parties and a hearing on the  
13 motions took place before Judge Trumbull on November 13, 2009. The hearing on the  
14 motions was approximately 1 hour and 20 minutes long and the parties were given every  
15 opportunity to fully exhaust their arguments, points and authorities.<sup>1/</sup>

16 Judge Trumbull issued her ruling on the motions on November 19, 2009. As to  
17 Defendants, Judge Trumbull found, *inter alia*, that (1) Mr. Dunning may invoke his Fifth  
18 Amendment rights against self-incrimination (Order at 4:15-17), (2) Mr. Dunning is the  
19 founder and sole shareholder of THI (Order at 2:15-16; 4:6-7), (3) Defendant BD.com is not a  
20 business entity, but rather a name under which Mr. Dunning does business (Order at 4: 9-10),  
21 and (4) Mr. Dunning is the only individual or potential representative that can act on behalf of  
22 KFC (Order at 4:17-18). Based on these facts and the law cited and argued by Defendants,  
23 Judge Trumbull determined and ordered that ruling on the motions be deferred (in effect -  
24 stayed) as to Defendants pending the criminal proceedings against Mr. Dunning, with an

25 / / /

26 \_\_\_\_\_  
27 <sup>1/</sup> A true and correct copy of the Transcript of Proceedings as to the hearing on eBay's  
28 motions to compel ("Transcript") has been docketed in this action as Document 169. A true  
and correct copy of the Transcript is attached hereto for the convenience of the Court.

1 update as to the progress of such proceedings to be given to the Court at the next status  
2 conference in the case which is currently set for January 22, 2009. (Order at 4:21-25)

3 In addition, Judge Trumbull ruled that “eBay may move to compel further  
4 discovery from third parties, including the co-location known as Rackspace US, Inc. and  
5 NetHere, Inc.” (Order at 6:7-9) Judge Trumbull further ruled that Todd Dunning and/or his  
6 wife shall sign any waivers as to Rackspace’s ability to comply with the subpoena served on it  
7 by eBay. (Order at 6:10-12)

8 3. ARGUMENT

9 A. Mr. Dunning Is not Required to, And Cannot, Produce Documents Previously  
10 Obtained By The Government

11 eBay concedes and Judge Trumbull acknowledged that Mr. Dunning may invoke  
12 his Fifth Amendment rights against self-incrimination. (Objection at 4:15-17) eBay also  
13 concedes that the Fifth Amendment privilege applies to the act of production of documents  
14 where the act of producing documents is “testimonial.” (Objection at 4:22-23) What eBay  
15 contests is Judge Trumbull’s decision to defer ruling on eBay’s motion to compel Mr. Dunning  
16 to produce documents pending the criminal proceedings against Mr. Dunning.

17 First, it is important to point out the fallacy of eBay’s contention that Judge  
18 Trumbull ignored the issue of the individual defendants’ obligation to produce documents  
19 responsive to eBay’s document requests. In fact, the issue was well briefed by all parties and  
20 addressed at length by all counsel at the 1 hour and 20 minute hearing on the motions.  
21 Ultimately, the Court chose to defer (effectively stay) any ruling on the motions while the  
22 criminal proceeding was ongoing. As such, Judge Trumbull either (1) concluded that the act of  
23 producing the documents requested by eBay would be testimonial and, as such, violative of  
24 Mr. Dunning Fifth Amendment rights, or (2) as argued by Defendants as part of their  
25 opposition to eBay’s motions, a stay of this action (or at least a stay of discovery) is required  
26 pending resolution of the criminal proceedings against Mr. Dunning. Either way, Judge  
27 Trumbull got it right.

28 / / /

1 eBay misapplies the law regarding the privilege against self incrimination and  
2 the production of documents. More specifically, in *In re Grand Jury Proceedings*, 759 F. 2d  
3 1418 (9<sup>th</sup> Cir. 1985), the court specifically acknowledges that the act of producing documents is  
4 privileged because such act amount to “testifying” as to the existence of the documents,  
5 possession and control over the documents and the authenticity of the documents:

6 “[T]he teachings of *United States v. Doe* suggests that ‘[a]lthough  
7 the contents of a document may not be privileged, *the act of*  
8 *producing the document may be.*’ 104 S.Ct. at 1242 (citing  
9 *Fisher*, 425 U.S. at 410, 96 S.Ct. at 1580); accord *In re Grand*  
10 *Jury Proceedings*, 745 F.2d 1250, 1251 (9th Cir.1984). In *Doe*,  
11 the district court found that *enforcement of the subpoena would*  
12 *force the respondent to admit the existence of the records*  
13 *demanding, his possession of them, and their authenticity.* These  
14 tacit communications, if compelled by subpoena, *would constitute*  
15 *testimonial self-incrimination.* *Id.*, 104 S.Ct. at 1242-43. The  
16 Supreme Court refused to overturn the district court's findings,  
17 and, on this basis, *concluded that the respondent could not be*  
18 *compelled to produce the subpoenaed documents.* *Id.* at 1243.”  
19 *Grand Jury, supra*, 759 F. 2d at 1419; *cites in quote refer to*  
20 *Fisher v. United States*, 425 U.S. 391(1976); *United States v.*  
21 *Doe*, 465 U.S. 605 (1984); and *Doe v. United States*, 487 U.S.  
22 201 (1988) (the line of cases in which the Supreme Court  
23 emphasized that the act of producing potentially incriminating  
24 documents has impermissible testimonial aspects.)

25 As argued to Judge Trumbull, in this case production by Mr. Dunning would be  
26 testimonial as to Mr. Dunning in the manner acknowledged by the Supreme Court in *United*  
27 *States v. Doe*:

28 / / /

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

“MR. PRESIADO: Well, the production of documents would in this case be testimonial in three ways.

THE COURT: Of the corporation.

MR. PRESIADO: No. It would be testimonial -- production by the corporation would be testimonial as to the individual in three ways. It would be testimonial as to their existence, the possession, and their authenticity.

I think I heard Mr. Eberhart say that because the government has them those issues no longer exist, and that just isn't the case. Just because the FBI came into a residence where Mr. Dunning was at the time, seized documents and took them doesn't establish that those were in Mr. Dunning's possession.

Now eBay's arguing that we have to produce them, which the act of production would establish possession, custody or control? That is the incriminating aspect of the testimonial aspect -- I'm sorry -- the testimonial aspect of production.

Same thing -- the only thing that the government having these documents established is that they exist.”<sup>2/</sup>

It is not reasonably disputed that in the context of a criminal proceeding the Government has the burden on establishing the scope and extent of Mr. Dunning's relationship to the subject documents, if any. Mr. Dunning cannot be compelled to establish any such facts for the Government, as Mr. Dunning production in this case could aid in doing. eBay's argument that the Fifth Amendment protections do not apply to Mr. Dunning because he “already produced” the subject documents to the Government is based on the obvious false premise that the Government's possession of documents was a result of Mr. Dunning's voluntary production of documents in his possession and control. Judge Trumbull correctly

---

<sup>2/</sup> See, Transcript at 16:19 to 17:13.



1 found otherwise – stating in the Order her finding that the Government’s possession of  
2 documents was the result of a search warrant as opposed to any voluntary act of  
3 Mr. Dunning. (Transcript at 2:23-24) Even if it can be argued that the existence and location  
4 of the documents seized by the Government are “a foregone conclusion,” the scope and extent  
5 of Mr. Dunning’s relationship to the documents, including Mr. Dunning’s control over such  
6 documents, if any, is not established by the Government’s seizure of the documents.<sup>3/</sup>

7 Furthermore, as argued to Judge Trumbull, it cannot be reasonably disputed that  
8 the act of determining what documents are responsive to eBay’s document demands would  
9 amount to a testimonial act on the part of Mr. Dunning. Indeed, the form of eBay’s requests  
10 infer the existence of the alleged “cookie stuffing” scheme and Mr. Dunning’s participation in  
11 such alleged scheme – which underlies the Government’s criminal investigation of  
12 Mr. Dunning. For example:

13 “All documents relating to payment of commissions or other  
14 revenue obtained by Brian Dunning through participation in, or  
15 interaction with or manipulation of eBay’s Affiliate marketing  
16 Program.”

17 \* \* \*

18 “All Documents sufficient to identify the source of any  
19 technology, technique or method used by Brian Dunning to  
20 participate in, manipulate or interact with the eBay Affiliate  
21 Marketing Program. ”

22 \* \* \*

23 ///

24 ///

---

25 \_\_\_\_\_  
26 <sup>3/</sup> The cases cited by eBay, pertain only to the “foregone conclusion” of existence and  
27 location of documents produced by a defendant (i.e., “implicit authentication”), and/or the  
28 voluntary surrender of documents to the Government. See, *Henry v. Sneider*s, 490 F.2d 315,  
317 (9<sup>th</sup> Cir. 1974) (documents given to Government under agreement with prosecutor); and  
*Fisher v. U.S.*, 425 U.S. 391, 441 (existence and location of documents a “foregone  
conclusion;” control over documents not at issue).

1 “Documents sufficient to identify software used to clean, reformat  
2 or erase hard drives used by Brian Dunning or any equipment  
3 used or owned by Briandunning.com.”<sup>4/</sup>

4 Were Mr. Dunning to produce documents in response to eBay’s requests,  
5 Mr. Dunning would necessarily be admitting to incriminating facts such as his receipt of money  
6 based on the manipulation of eBay’s Affiliate Program, his knowledge of technology and  
7 techniques to manipulate eBay’s Affiliate Program, and his knowledge of software used to  
8 erase electronic records and information. It is undisputed that Mr. Dunning cannot be  
9 compelled to incriminate himself, in this case the act of producing the documents requested by  
10 eBay has the potential to just that.

11 Finally, eBay’s complaint regarding Mr. Dunning’s failure to produce the  
12 document seized by the Government does not make sense considering that eBay is well aware  
13 that even if Mr. Dunning were required to produce the documents (which he is not), the  
14 Defendants do not have access to the documents and the Government will not return the  
15 documents despite Mr. Dunning’s repeated requests. Defendants made this clear in each of  
16 their responses to eBay’s document demands by specifically stating that “the Federal Bureau of  
17 Investigation has seized all documents and computers, disk drives, hard drives, cell phones and  
18 servers containing information potentially related to this matter.” Assistant United States  
19 Attorney Kyle F. Waldinger in charge of this investigation has refused all requests to provide  
20 defendants with a copy of the material seized by the FBI.<sup>5/</sup> In any event, with respect to any  
21 documents maintained by Rackspace, Judge Trumbull ruled that eBay is free to pursue the  
22 subpoena it served on Rackspace and “either Todd Dunning or his wife shall execute the  
23 appropriate waivers to Rackspace consenting to release responsive discovery.” (Order at 6:10-  
24 13) Brian Dunning has no obligation as to the Rackspace documents.

---

26 <sup>4/</sup> See, Exhibits “10”, “11”, “13”, “18”, “19”, and “20” filed by eBay in support of the  
27 Motions to Compel.

28 <sup>5/</sup> See, the Declaration of William J. Kopeny filed in support of Defendants’ opposition to  
eBay’s motions to compel.

1 As such, Judge Trumbull's Order should not be disturbed as to eBay's motion to  
2 compel Mr. Dunning to produce documents in response to eBay's document requests.

3 B. Mr. Dunning's Invocation Of His Fifth Amendment Privilege Against  
4 Self-Incrimination Extends To The Entity Defendants Since Any Response By  
5 The Entity Defendants Would Necessarily Implicate Mr. Dunning

6 Based on the evidence submitted, Judge Trumbull found that Mr. Dunning is the  
7 founder and sole shareholder of Defendant THI. (Order at 2:15-16; 4:6-7) Judge Trumbull  
8 also concluded that Defendant BD.com is not a business entity, but rather a name under which  
9 Mr. Dunning does business. (Order at 4: 9-10) Judge Trumbull further determined that Brian  
10 Dunning is the only individual or potential representative that can act on behalf of KFC.  
11 (Order at 4:17-18). Finally, Judge Trumbull ruled that to require counsel to act on behalf of  
12 the Entity Defendants in connection with responding to discovery requests is "untenable."  
13 (Order at 6:2-4)

14 The information which eBay seeks from THI and BD.com is known only (to the  
15 extent it is known at all) by Mr. Dunning. The information which eBay seeks from KFC is  
16 known only (if known at all) by Mr. Dunning and/or his brother Todd Dunning. Judge  
17 Trumbull correctly determined that both Mr. Dunning and his brother have asserted their Fifth  
18 Amendment privilege against self-incrimination as to eBay's requests and cannot be compelled  
19 to respond to the subject requests propounded on the Entity Defendants which seek information  
20 relating to the conduct alleged by eBay against Mr. Dunning of which a parallel criminal  
21 investigation is pending -- at least until such proceeding is resolved.

22 Again, eBay ignores the over-reaching form its discovery requests. For  
23 example, based on the form of the discovery requests at issue, Mr. Dunning would have to  
24 identify all persons with knowledge of, and internet forums through which the Entity  
25 Defendants discussed, "[The Entity Defendants'] participation, manipulation or interaction in  
26 any Affiliate Program including eBay's Affiliate Program . . . including all methods,  
27 techniques, and technologies . . . used by [the Entity Defendants] to obtain revenue from, or

28 ///

1 otherwise interact with, participate in or manipulate any Affiliate Marketing Program.”<sup>6/</sup>  
2 Aside from the fact that these interrogatories as drafted improperly assume that there was  
3 “manipulation” of the eBay Affiliate Program by the Entity Defendants,<sup>7/</sup> these interrogatories  
4 specifically pertain to the conduct alleged by eBay against Mr. Dunning of which a parallel  
5 criminal investigation is pending. Indeed, as argued to Judge Trumbull, *responses to the*  
6 *discovery propounded on the Entity Defendants necessarily implicated Mr. Dunning since the*  
7 *Entity Defendants are defined as including Mr. Dunning as an individual.* eBay, has not  
8 (because it cannot) rebutted this inescapable fact.

9 As argued to Judge Trumbull, if the information sought *could, conceivably,*  
10 form a single evidentiary or factual link in a chain of circumstantial evidence which chain of  
11 evidence *could* support *an inference* that the person is culpable for any criminal offense, in  
12 violation of any state or federal law, that person cannot be compelled by legal process,  
13 subpoena or court order to provide such information, upon his or her invocation of the  
14 protection of the Fifth Amendment. *Hoffman v. United States*, 341 U.S. 479, 486 (1951);  
15 *U.S. v. Neff*, 615 F.2d 1235, 1239 (9<sup>th</sup> Cir. 1980); *Prudhomme v. Sup. Ct.* (1970) 2 Cal.3d  
16 320, 325-326; *In re Misener* (1985) 38 Cal.3d 543, 546-551. Indeed, “[I]n order to approve  
17 invocation of the privilege ‘it need only be evident from the implications of the question, in the  
18 setting in which it is asked, that a responsive answer to the question or an explanation of why it  
19 cannot be answered *might* be dangerous because injurious disclosure *could* result.’” *Cudjo,*  
20 *supra*, 6 Cal.4th at p. 617, 25 Cal.Rptr.2d 390, 863 P.2d 635, quoting *Hoffman, supra*, 341  
21 U.S. at 486. (Underlining and italics supplied.) It cannot be reasonably disputed that the  
22 information sought by eBay (the same information that underlies the Government’s criminal  
23 investigation of Mr. Dunning) *could, conceivably,* form a single evidentiary or factual link in a  
24 chain of circumstantial evidence which chain of evidence *could* support *an inference* that the  
25 person is culpable for any criminal offense, in violation of any state or federal law.

26 \_\_\_\_\_  
27 <sup>6/</sup> See, Exhibits “2,” “3” and “5” filed by eBay in support of the Motion to Compel.

28 <sup>7/</sup> eBay ignores the form of its requests. The Entity Defendants objected to the subject  
interrogatories on this basis as well.

1 Likewise, by its Requests for Admission served on the Entity Defendants, eBay  
2 requests that the Entity Defendants admit to each and every allegation of wrongdoing alleged in  
3 the SAC including “cookie stuffing,” techniques to avoid detection of “cookie stuffing,”  
4 improperly accessing “Users” computers, receiving commissions as a result of “cookie  
5 stuffing,” and otherwise “defrauding” eBay.<sup>8/</sup> Certainly, responses to these requests for  
6 admission *could, conceivably*, form a single evidentiary or factual link in a chain of  
7 circumstantial evidence which chain of evidence *could* support *an inference* that the person is  
8 culpable for any criminal offense, in violation of any state or federal law.

9 Based on the fact that Mr. Dunning is the sole owner shareholder, employee and  
10 officer of THI and BD.com, it is inconceivable that the Entity Defendants could provide  
11 responses to the interrogatories and requests without involving Mr. Dunning. There simply is  
12 no other representative of the Entity Defendants other than Mr. Dunning (and Todd Dunning as  
13 to KFC) that can provide (and verify to the extent required) the information requested by eBay.  
14 As determined by Judge Trumbull, the case cited by eBay in support of the Motion to Compel  
15 actually support Defendants’ argument that Mr. Dunning’s invocation of his Fifth Amendment  
16 privilege against self-incrimination extends to the Entity Defendants.

17 First, *Navel Orange Admin. Comm. V. Exeter Orange Co.*, 722 F.2d 449 (9<sup>th</sup>  
18 Cir. 1983), is not on point as to the argument asserted by eBay since it did not involve an entity  
19 defendant having only a single representative. What is instructive from the *Navel Orange* case  
20 is the court’s acknowledgment that the “individual [officers] themselves may not be compelled  
21 to produce any information that they allege is incriminating . . . .” *Navel Orange, supra*, 722  
22 F.2d at 454. Next, *United States v. 3963 Bottles, More Or Less*, 265 F.2d 332 (7<sup>th</sup> Cir. 1959),  
23 likewise does not involve an entity defendant having only a single representative. However,  
24 *3963 Bottles* establishes that to the extent a corporation is required to provide responses to  
25 discovery, “[i]t is the duty of [the] corporate claimant to select an agent who, *without fear of*  
26 *self-incrimination*, could provide the information requested.” *3963 Bottles, supra*, at 336

27  
28 <sup>8/</sup> See, Exhibits “8,” and “9” filed by eBay in support of the Motion to Compel.

1 (emphasis added). As such, like *Navel Orange, 3963 Bottles* affirms that a representative of a  
2 corporation cannot be compelled to respond to discovery where the representative asserts his  
3 Fifth Amended privilege against self-incrimination. In addition, *Priebe v. World Ventures,*  
4 *Inc.*, 407 F.Supp. 1244 (C.D. Cal 1976), strongly supports Defendants' position. The *Priebe*  
5 court first affirms that an individual who asserts his Fifth Amendment privilege against self-  
6 incrimination in a civil action can make a blanket refusal to answer questions where "the civil  
7 charges dovetail with those that could give rise to the risk of criminal prosecution . . . any  
8 questions that could lead to discoverable evidence admissible in the civil proceeding could also  
9 provide 'a link in the chain of evidence' needed in a criminal prosecution." *Priebe, supra*, 407  
10 F.Supp. at 1245-1246, citing *Blau v. United States*, 340 U.S. 159, 161 (1950). It cannot be  
11 reasonably disputed that eBay's claims "dovetail" with the facts underlying the pending  
12 criminal proceedings against Mr. Dunning.

13           The case of *Central States, Southeast and Southwest Areas Pension Fund, supra*,  
14 1998 WL 413490, provides ample support for Defendants' argument that the Entity Defendants  
15 cannot be compelled to respond to eBay's discovery requests since Mr. Dunning is the sole  
16 shareholder, officer and employee of THI and BD.com, and Mr. Dunning and his brother (who  
17 also asserts the Fifth Amendment privilege) are the sole individual representatives of KFC with  
18 knowledge of the alleged facts which underlie the SAC. More specifically, the *Central States*  
19 court, citing the Supreme Court, acknowledged that in such a situation the civil action should  
20 be stayed pending resolution of the criminal proceedings:

21           "The court did not address the situation *where a corporation only*  
22 *has one agent, who acts as the sole employee, shareholder and*  
23 *officer for the corporation.* The Supreme Court in *Kordel* noted  
24 'this troublesome question' and said that '*in such a case the*  
25 *appropriate remedy would be a protective order . . . , postponing*  
26 *civil discovery until termination of the criminal action.'*"

27           *Central States, Southeast and Southwest Areas Pension Fund v.*  
28           *Carstengen Freight Lines, Inc.*, 1998 WL 413490 (N.D. Ill.

1 1998), citing, *United States v. Kordel*, 397 U.S. 1, 9 (1970)  
2 (cited by eBay in the Motion to Compel at pp. 5, 6 and 7).

3 Judge Trumbull found the language of the Supreme Court in *Kordel* particularly  
4 persuasive and expressly adopted it in the Order. (Order at 3:27 to 4:5). eBay's argument that  
5 "no case rebuts the proposition that a corporation must appoint an agent to respond to  
6 discovery" (Objection at 7:1-2) is belied by the unambiguous statement of the Supreme Court  
7 in *Kordel*, dicta or not. Judge Trumbull's adoption of the Supreme Court position is not  
8 contrary to law.

9 Finally, contrary to eBay's contention, the Entity Defendants' attorneys cannot,  
10 and are not required to, provide responses to the subject requests. The Entity Defendants'  
11 attorneys have no knowledge of the information sought by eBay other than what has been told  
12 to them by Mr. Dunning. The Entity Defendants had no attorney representation prior to the  
13 FBI investigation of June 2007. Aside from the obvious attorney/client privilege implications  
14 of eBay's position, any information given by, or attested to by, the Entity Defendants'  
15 attorneys would directly implicate Mr. Dunning since he would be the only source of such  
16 information. eBay's argument in this regard is nonsensical. Indeed, the case cited by eBay in  
17 support of this argument is inapposite. In *SEC v. Leach*, 156 F.Supp.2d 491 (2001), the  
18 court's reference to the appointment of the defendant's attorney to respond was to "corporate  
19 counsel" whom presumably has knowledge of the pertinent facts. As such, Judge Trumbull  
20 properly ruled that requiring the attorneys for the Entity Defendants to answer discovery  
21 responses on behalf of such Defendants is "untenable."

22 In sum, Judge Trumbull properly concluded that Mr. Dunning's invocation of  
23 his Fifth Amendment privilege against self-incrimination extends to the Entity Defendants since  
24 any response by the Entity Defendants would necessarily implicate Mr. Dunning. As held by  
25 the Supreme Court in *Kordel*, ***the appropriate remedy would be a protective order . . . ,***  
26 ***postponing civil discovery until termination of the criminal action.***" *United States v. Kordel*,  
27 397 U.S. 1, 9 (1970). Judge Trumbull ruled just as such.

28 ///

1 C. The Order Was Not Based On Clearly Erroneous Factual Conclusions With  
2 Regard to These Defendants

3 eBay argues that “the Order failed to address the existence of responsive  
4 documents provided by Rackspace to counsel for Brian Dunning, THI and  
5 BrianDunning.com.” (Objection at 10:16-17). However, just because Judge Trumbull did not  
6 address the issue in the Order doesn’t mean that Judge Trumbull made an erroneous factual  
7 conclusion as to the matter. Indeed, eBay failed to meet its evidentiary burden as to the alleged  
8 fact that any documents held by Rackspace are responsive to eBay’s document requests to any  
9 Defendant. Any document produced by Rackspace would be in response to the subpoena  
10 served by eBay on Rackspace, not the discovery served on Defendants. Judge Trumbull  
11 specifically acknowledged this, ruling that “eBay may move to compel further discovery from  
12 third parties, including the co-location known as Rackspace US, Inc. and NetHere, Inc.”  
13 (Order at 6:7-9) Judge Trumbull further ruled that Todd Dunning and/or his wife shall sign any  
14 waivers as to Rackspace’s ability to comply with the subpoena. Indeed, *it is unclear what*  
15 *eBay’s complaint is as to Judge Trumbull’s ruling on the Rackspace documents since Judge*  
16 *Trumbull cleared the way for eBay to obtain the documents subpoenaed from Rackspace.*  
17 Why jeopardize Mr. Dunning’s Fifth Amendment rights?

18 In addition, Judge Trumbull did not treat KFC inconsistently by finding that  
19 Brian Dunning is the only person that can respond to discovery on behalf of KFC, while also  
20 ruling that Todd Dunning or his wife can execute any waivers required for Rackspace to  
21 release documents. Responding to discovery is fundamentally different than having the mere  
22 capacity to sign a waiver on behalf of KFC as a partner of KFC. There was no finding, and  
23 eBay offered no evidence, that Todd Dunning’s wife was involved in KFC to the extent she  
24 would have any knowledge of the information requested by eBay by it discovery requests.  
25 There simply is no inconsistency.

26 Finally, the fact that KFC served denials to Requests for Admissions served by  
27 eBay prior to the filing of the Second Amended Complaint in this case does not impact Judge  
28 Trumbull’s ruling. The Requests for Admissions referenced by eBay are not at issue by the



1 motion. Moreover, such responses were unverified and simply contained denials of eBay's  
2 allegations made in its First Amended Complaint which was dismissed by this Court. In  
3 addition, the denials were made with the express notification to eBay that Brian Dunning was  
4 not involved in the preparation of the response or the information contained therein. (See,  
5 Exhibit "12" to the BD Motion). It is unclear why eBay believes this helps its cause. None of  
6 the requests at issue can be responded to (if at all) without Mr. Dunning's involvement. Is  
7 eBay asking for a series of responses indicating that no responsive information is known to the  
8 Entity Defendants? Such responses certainly would not advance the litigation.

9 D. Judge Trumbull Did Not Incorrectly Rule That Engaging In Discovery  
10 Piecemeal Would Not Advance The Litigation

11 eBay incorrectly argues that Judge Trumbull based her determination that  
12 document discovery should not proceed in this case because "engaging in the process piecemeal  
13 would not appear to advance the litigation in any significant manner." (Objection at 13:7-9,  
14 citing Order at 4:18-20). Although the inefficiency of proceeding piecemeal was considered by  
15 Judge Trumbull, it certainly was not the *basis* of the Order as argued by eBay. In fact, just  
16 before the statement regarding proceeding piecemeal, Judge Trumbull re-states the primary  
17 determination that Mr. Dunning is the only person that can act on behalf of the Entity  
18 Defendants for the purposes of responding to eBay's discovery requests. *This* determination is  
19 the basis of Judge Trumbull's ruling. As such, any conclusion as to proceeding piecemeal  
20 would not have altered the Order.

21 eBay's argument regarding the language in the Order as to proceeding piecemeal  
22 is a red-herring and does not otherwise warrant a reversal of the Order.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 4. CONCLUSION

2 For all of the foregoing reasons, Defendants respectfully request that the Court  
3 deny eBay's objections to the Order.

4  
5 DATED: December 21, 2009

Respectfully submitted,

6 RUS, MILIBAND & SMITH  
A Professional Corporation

7  
8  
9 By: 

10 LEO J. PRESIADO  
Attorneys for Defendants  
THUNDERWOOD HOLDINGS, INC.,  
11 BRIAN DUNNING AND  
BRIANDUNNING.COM

12  
13 DATED: December 21, 2009

Respectfully submitted,

14 LAW OFFICES OF PATRICK K. McCLELLAN

15  
16 By: 

17 PATRICK K. McCLELLAN  
Attorney for Defendant  
18 KESSLER'S FLYING CIRCUS  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TRANSCRIPT OF PROCEEDINGS**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

BEFORE THE HONORABLE PATRICIA V. TRUMBULL, JUDGE

EBAY, INC., )  
 )  
Plaintiff, )  
 )  
v. ) NO. C 08-04052 JF PVT  
 )  
DIGITAL POINT SOLUTIONS, INC., )  
SHAWN HOGAN, KESSLER'S FLYING )  
CIRCUS, THUNDERWOOD HOLDINGS, )  
INC., TODD DUNNING, DUNNING )  
ENTERPRISE, INC., BRIAN )  
DUNNING, BRIANDUNNING.COM, )  
and DOES 1-20, )  
 )  
Defendants. )

San Jose, California  
Friday, November 13, 2009

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs: O'MELVENY & MEYERS, LLP  
Two Embarcadero Center, 28th Floor  
San Francisco, CA 94111-3823  
BY: DAVID R. EBERHART, ESQ.  
COLLEEN M. KENNEDY, ESQ.

For Defendants: RUS, MILIBAND & SMITH, APC  
Brian Dunning, Von Karman Towers  
Thunderwood 2211 Michelson Drive, 7th Floor  
Holdings, and Irvine, CA 92612  
KFC BY: LEO J. PRESIADO, ESQ.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

**APPEARANCES CONTINUED:**

For Defendants  
Digital Point  
Solutions and  
Shawn Hogan:

COAST LAW GROUP, LLP  
1140 South Coast Highway 101  
Encinitas, CA 92024  
**BY: SEYAMACK KOURETSCHIAN, ESQ.**

For Defendants  
Todd Dunning  
and Dunning  
Enterprise, Inc.:

FREELAND, COOPER & FOREMAN, LLP  
150 Spear Street, Suite 1800  
San Francisco, CA 94105  
**BY: STEWART H. FOREMAN, ESQ.**

Reported By:

CHRISTINE TRISKA, CSR, RPR  
Pro-Tem Reporter

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 Friday, November 13, 2009

2 10:23 A.M.

3 P R O C E E D I N G S

4 THE COURT: Why don't you come to the podium and  
5 make your appearances for me?

6 This is Ebay, Inc. versus Digital Point Solutions,  
7 Inc.; Shawn Hogan; Kessler's Flying Circus; Thunderwood  
8 Holdings, Inc.; Todd Dunning; Dunning Enterprises; Brian  
9 Dunning; Briandunning.com.

10 MR. EBERHART: Good morning, your Honor. David  
11 Eberhart along with my college, Colleen Kennedy on behalf of  
12 eBay.

13 THE COURT: Thank you.

14 MR. PRESIADO: Good morning, your Honor. Leo  
15 Presiado of Rus, Miliband and Smith for Brian Dunning,  
16 Briandunning.com, Thunderwood Holdings, Inc., and specially  
17 appearing for Kessler's Flying Circus.

18 THE COURT: Thank you.

19 Counsel?

20 MR. KOURETCHIAN: Good morning, your Honor.

21 Seyamack Kouretchian on behalf of defendants Shawn Hogan,  
22 Digital Point Solutions and Digital Point Solutions, Inc.

23 THE COURT: Thank you.

24 So why don't we start with eBay's Notice of Motion  
25 and Motion to Compel Responses to Requests for Production,

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 Interrogatories and Requests for Admissions?

2 MR. FOREMAN: Excuse me, your Honor, may I --

3 THE COURT: On the phone.

4 So why don't you make an appearance for me? I'm  
5 sorry. It's hard me for me to remember.

6 You can sit down. I'm letting counsel sit down  
7 while you make your appearance,

8 Go ahead.

9 MR. FOREMAN: Thank you for letting me appear by  
10 telephone. I'm Stewart Foreman of Freeland, Cooper and  
11 Foreman on behalf of defendants Todd Dunning and Dunning  
12 Enterprises.

13 THE COURT: Thank you. Sometimes it's easy to  
14 forget you because you're out there where we can't see you  
15 and when we get rolling, so you might have to yell at me if  
16 you find there's a point at which you want to say something  
17 and I haven't actually asked you yet.

18 So be proactive; okay?

19 MR. FOREMAN: Thank you very much, your Honor. I  
20 will.

21 THE COURT: Okay. Let's start with eBay -- again,  
22 with the motion that I've indicated, the Motion to Compel  
23 Responses to the Request for Production and Interrogatories  
24 and Requests for Admissions.

25 And why don't you come to the podium?

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 MR. EBERHART: Thank you.

2 THE COURT: It's easier for me if you do that.

3 MR. EBERHART: With respect to each of the  
4 motions, your Honor, it is undisputed that responsive  
5 documents exist and have not been produced.

6 With respect to DPS and Mr. Hogan, it's undisputed  
7 that Mr. Hogan and DPS, Inc., have control over documents that  
8 are physically located at a company called "NetHere." That's  
9 a company that provides hosting space, or actually  
10 co-location space.

11 With respect to the Dunning defendants, that is,  
12 Brian Dunning, Todd Dunning, Thunderwood, KFC, also known as  
13 Kessler's Flying Circus, and DEI, the only question is which  
14 of those defendants has control over the documents. And it  
15 is undisputed that the documents exist and are physically  
16 located at a hosting company called "Rackspace."

17 The answer to that question is knowable, your  
18 Honor -- the question of who controls those documents. But  
19 we don't know the answer because counsel for Brian Dunning  
20 has refused to turn over the account statements from  
21 Rackspace that would establish who has control over that  
22 account.

23 That issue should be resolved against Mr. Brian  
24 Dunning as well as his related entities, Thunderwood  
25 Holdings and KFC.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



1           It is also undisputed that all the documents are  
2 in the hands of the government already. The government has  
3 copies of all of the documents at issue.

4           And under controlling law there is nothing  
5 incriminating about producing these documents in this civil  
6 litigation, where the government already has possession of  
7 the documents.

8           And there's no question as to where they obtained  
9 the documents. They obtained them from Brian Dunning and  
10 from Shawn Hogan, and as to their -- whether those  
11 individuals possess the documents or whether they are  
12 authentic. So under controlling law there's nothing  
13 testimonial about ordering production here.

14           The defendants argue that nonetheless it would be  
15 testimonial because the selection of documents would involve  
16 some sort of testimonial act. No case recognizes that  
17 theory. But putting that aside, that theory fails for three  
18 independently sufficient reasons.

19           First, defendants have made no showing that in  
20 fact the individuals would be required to select the  
21 documents. They provide no declaration that says only the  
22 individuals could select, and the normal course of the  
23 document production suggests otherwise. Typically counsel  
24 has the documents from their client, determines what's  
25 responsive and what is privileged, and produces the

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 non-privileged responsive documents.

2 Nor would the act of selection -- second, the act  
3 of selection here would not be incriminating in any event.  
4 eBay has propounded several-dozen document requests to each  
5 of these defendants, and those defendants have the right to  
6 produce the documents in the form they are kept in in the  
7 ordinary course of business. So they need not segregate  
8 them by document request.

9 And so given the broad scope of eBay's request,  
10 whatever is selected from the materials that have already  
11 been provided to the government would not in any way provide  
12 some additional testimony that aids the government's case.

13 Third, the defendants haven't established that  
14 there would be some form of incrimination if the entity  
15 defendants produced.

16 Even if the individuals are not compelled to  
17 produce, the entity defendants can produce the documents.  
18 And the law is very clear that even if those individuals are  
19 the persons taking some act on behalf of the entity, they  
20 are only doing so in a representative capacity, and those  
21 acts cannot be used against them as evidence of criminal  
22 liability.

23 In short, none of those entities has established  
24 that they have some sort of Fifth Amendment protection  
25 against producing the documents to eBay.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1           With respect to the written discovery requests,  
2 the issues on KFC, Kessler's Flying Circus, and Thunderwood,  
3 Thunderwood Holdings are fairly simple. Those entities  
4 simply do not possess a Fifth Amendment right, and their  
5 Fifth Amendment objection should be overruled.

6           With respect to DPS, its argument is that the  
7 definition of DPS in the interrogatories renders -- somehow  
8 forces them to provide a response on behalf of Shawn Hogan.

9           But that is simply not the way in which the  
10 document requests are framed. They require DPS, Inc. to  
11 provide whatever information it has or can obtain through,  
12 for instance, reviewing documents that is responsive to  
13 eBay's request.

14           Finally, Mr. Todd Dunning claims that his  
15 declaration establishes that he has no documents and has no  
16 control over any documents. It does not establish those  
17 propositions, your Honor:

18           First of all, it does not establish that he didn't  
19 give documents to the government on some occasion other than  
20 his meeting on June 18, 2007. It also does not establish  
21 that he does not possess documents other than corporate  
22 records of Kessler's Flying Circus.

23           His declaration is very narrowly tailored to talk  
24 about documents that are the records of KFC, not documents in  
25 general. He could have personal documents. He could have

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 records of his own corporation, that is, Dunning Enterprise  
2 Inc., all of which are responsive to eBay's request.

3 Nor has he established that the corporation that he  
4 controls, DEI, Dunning Enterprise Inc., has made sufficient  
5 demand on the general partnership of which Dunning Enterprise  
6 Inc. is a general partner, that is KFC, Kessler's Flying  
7 Circus.

8 Under controlling law he's required to cause that  
9 corporation to make a demand for KFC's documents. He has not  
10 established that he has done that, and he should be required  
11 to do so.

12 In sum, the defendants bear the burden of proving  
13 that the discovery here would be somehow incriminating to  
14 them, and they have utterly failed to meet that burden.

15 THE COURT: Thank you. Let's start with the  
16 people in the courtroom first.

17 MR. PRESIADO: I guess, your Honor, I'll start  
18 with Mr. Eberhart's first statement, and that is that it's  
19 undisputed that responsive documents exist.

20 I'm not sure where that comes from, because that is  
21 not the case. All that my clients have asserted in this case  
22 in response to the request is the assertion of the Fifth  
23 Amendment. I'm not sure where it is coming from that there  
24 are, in fact, responsive documents.

25 As a matter of fact, if you look at the requests --

1 and I think what has been overlooked, at least in eBay's  
2 papers, are the forms of the request. The forms of the  
3 request in and of themselves are troublesome, but more  
4 particularly, because they assume a manipulation or a fraud  
5 in their form.

6 For example:

7 "All documents relating to payment of  
8 commissions or other revenue obtained by  
9 Brian Dunning through participation or  
10 interaction with or manipulation by eBay's  
11 affiliate marketing program."

12 It's not undisputed that documents exist. Mr.  
13 Dunning hasn't said that documents exist. All he has done  
14 is asserted the Fifth Amendment. And if you look at the  
15 form of that question you understand why the Fifth Amendment  
16 would be asserted. That is, the form throughout the  
17 requests for admissions, the interrogatories, the document  
18 demands, even the subpoena on Rackspace, such that --

19 THE COURT: So if they -- if they formulated the  
20 question in a different way, in a broader, very usual kind  
21 of request in the civil litigation part of this, then there  
22 wouldn't be Fifth Amendment issues? It's because you think  
23 they are asking for very specific things that would  
24 implicate the criminal side of this?

25 MR. PRESIADO: No, not at all, your Honor. I'm

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 pointing out what is being contested here today, and what we  
2 argued with respect to the particular request before the  
3 Court.

4           But no. The Fifth Amendment would still apply to  
5 the extent they weren't as incriminating in their content as  
6 they actually are.

7           And the Fifth Amendment applies with respect --  
8 it's true that corporate entities don't have a Fifth  
9 Amendment right. But it is also true -- and there's case  
10 law as we presented -- that individuals by extension, or  
11 corporations by extension do inherit the Fifth Amendment  
12 right of their sole proprietor.

13           It is undisputed in this case, and Mr. Eberhart  
14 agreed is undisputed, and there's evidentiary declaration to  
15 the effect that Mr. Dunning -- Mr. Brian Dunning is, in fact,  
16 the sole representative of Thunderwood. Briandunning.com is  
17 not a business entity; it's merely a fictitious business name  
18 for Mr. Dunning as an individual. And with respect to  
19 Kessler's Flying Circus, Thunderwood Holdings, which Mr.  
20 Dunning is the sole proprietor, and his brother are partners  
21 with respect to that. And as the Court is aware, his  
22 brother, Todd Dunning also asserts the Fifth Amendment.

23           So there simply is no breathing -- living,  
24 breathing person that can respond to these requests, because  
25 no one else has the information requested, even if the

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 requests were properly phrased and not incriminating in  
2 nature.

3           And also with respect to the form of the requests,  
4 I don't want it to get lost that the corporate entities in  
5 these requests are all defined as including the individual  
6 officers, shareholders, representatives.

7           So when eBay argues that a corporation does not  
8 have a Fifth Amendment right, well, to the extent the  
9 interrogatories and the requests are phrased and defined such  
10 that the corporate entities include by definition the  
11 individuals, well, there could be no --

12           THE COURT: So there's no way they could frame it  
13 to get the corporation to respond to it, because anything  
14 that they would ask would implicate the individuals?

15           In other words, it can't be parsed.

16           MR. PRESIADO: Well, if you look at the case law,  
17 your Honor, I think that's the conclusion. The conclusion  
18 is with respect --

19           THE COURT: And the reason I'm asking this is it  
20 looked to me like you were trying to parse it, because there  
21 are certain kinds of requests that seem more much specific  
22 than other kinds of requests.

23           And the specific ones may very well go directly to  
24 Fifth Amendment issues, depending on what you're asking,  
25 where broader requests may or may not include things that

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 would be Fifth Amendment but would include things that  
2 wouldn't be Fifth Amendment that should be produced, and  
3 that's what I'm trying to figure out.

4           You're saying that nothing can be produced because  
5 there are Fifth Amendment issues all the way through this, or  
6 that there are some things that would implicate the Fifth  
7 Amendment and could be produced in civil discovery?

8           MR. PRESIADO: There may be in the context of  
9 civil discovery. But in the context of the requests that  
10 are before this Court and in these papers, every one --  
11 every one of them is subject to the Fifth Amendment because  
12 of their -- because of the chain of evidence that would be  
13 invoked with respect to answering even the most basic of the  
14 requests.

15           But going back to --

16           THE COURT: I take it that that's not been  
17 presented to Judge Fogel yet.

18           MR. PRESIADO: No, no. And that --

19           THE COURT: The whole thing should be stayed  
20 because we can't do this until the U.S. Attorney's done?

21           MR. PRESIADO: Well, in our opposition to the  
22 motion, your Honor, we requested that your Honor not rule on  
23 this until after next week when my client's motion to stay  
24 the entire action is heard by Judge Fogel.

25           They have objected to that, and we're here, so I

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



1 thought I would go ahead and argue the merits that are before  
2 the Court.

3           But your Honor raises a good point. At the root of  
4 this is what is set forth in the United States Supreme Court  
5 in *Kordel*: Should the action -- should the discovery if not  
6 the entire action be stayed based on the relationship between  
7 the individual defendants and the corporate entities -- the  
8 fact that they are the sole representatives, the only people  
9 that can speak with respect to these entities?

10           And there's some argument that the corporate entity  
11 defendants -- I'm sorry -- corporate -- the individual  
12 defendant attorneys can answer these questions.

13           I just cannot for the life of me understand that,  
14 your Honor. First of all, to the extent the case law is  
15 presented --

16           THE COURT: You only know what your client's  
17 telling you; right?

18           MR. PRESIADO: We only know what our client's  
19 telling us. There's an obvious attorney-client relationship  
20 there, and to have to divulge that as an attorney, what I  
21 have learned from my client violates that.

22           Beyond that, the case law that is cited, to the  
23 extent counsel were required to respond, is because they were  
24 corporate counsel. They were involved in the underlying  
25 facts.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1           We were not hired -- as a matter of fact, Mr.  
2 Dunning and my clients did not have attorneys, corporate  
3 counsel or otherwise, until eBay terminated the relationship  
4 in June of '07. That's when we became involved, but by that  
5 time everything had ceased, and everything based in the  
6 Second Amended Complaint has to do with facts preceding that  
7 point in time.

8           So the idea that we as attorneys would have to  
9 respond to interrogatories, particularly ones in this form --  
10 as incriminating in this form, and particularly with respect  
11 to requests for admissions, it just isn't in the law, and it  
12 just does not make any sense.

13           THE COURT: How about production of documents?

14           MR. PRESIADO: Production of documents -- I heard  
15 Mr. Eberhart say that because the government has documents,  
16 whether or not they are responsive -- I don't know --  
17 because we don't have them. We haven't seen them for  
18 two-and-a-half years. We're not even sure what was taken,  
19 but everything was taken --

20           THE COURT: But a corporation doesn't have a Fifth  
21 Amendment right.

22           MR. PRESIADO: A corporation does not. But we run  
23 into the same problem. Does the production by any of the  
24 corporations implicate and eventually incriminate Mr.  
25 Dunning?

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 Well, he was the sole proprietor --

2 THE COURT: So you're talking about -- let's parse  
3 this down.

4 MR. PRESIADO: Sure.

5 THE COURT: You're talking about the individual  
6 corporate -- related to the corporation producing documents  
7 based upon document request.

8 The way those people, or that person would pick out  
9 the documents would have Fifth Amendment problems -- issues?

10 MR. PRESIADO: No. Mr. Eberhart --

11 THE COURT: 'Cause it seems to me that just the  
12 moving through of documents, unless you have confessions or  
13 something else, I'm not sure how the Fifth Amendment would  
14 apply to all corporate -- all the documents that they are  
15 seeking. It would seem to me that would be easier to parse  
16 if at all. I mean, obviously, he's writing letters of an  
17 individual that may be looked at by the U.S. Attorney's  
18 office.

19 MR. PRESIADO: Well, the production of documents  
20 would in this case be testimonial in three ways.

21 THE COURT: Of the corporation.

22 MR. PRESIADO: No. It would be testimonial --  
23 production by the corporation would be testimonial as to the  
24 individual in three ways. It would be testimonial as to  
25 their existence, the possession, and their authenticity.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 I think I heard Mr. Eberhart say that because the  
2 government has them those issues no longer exist, and that  
3 just isn't the case. Just because the FBI came into a  
4 residence where Mr. Dunning was at the time, seized  
5 documents and took them doesn't establish that those were in  
6 Mr. Dunning's possession.

7 Now eBay's arguing that we have to produce them,  
8 which the act of production would establish possession,  
9 custody or control? That is the incriminating aspect of the  
10 testimonial aspect -- I'm sorry -- the testimonial aspect of  
11 production.

12 Same thing -- the only thing that the government  
13 having these documents established is that they exist.

14 THE COURT: Have a search warrant --

15 MR. PRESIADO: I can see that.

16 THE COURT: -- walked in, seized them --

17 MR. PRESIADO: I can see that.

18 THE COURT: -- took them out.

19 MR. PRESIADO: I can see that. But there's still  
20 the possession issue and there's the authenticity issue.

21 THE COURT: But we're talking about corporate  
22 entities; right?

23 MR. PRESIADO: We are in the context of the sole  
24 proprietorships where it is --

25 THE COURT: Well, let's break it down. There's a

1 difference. I can see where there might be a difference  
2 between a sole proprietorship and a corporation.

3           If -- if defendants in a case that are being sued  
4 civilly in corporate litigation, which is what this is --  
5 this isn't the United States Attorney. This isn't U.S.  
6 versus yet. So it's a civil case. I think everybody agrees  
7 it is a civil case, and there may be criminal implications,  
8 because obviously the United States has already been involved  
9 in this to some extent.

10           But if there is a document request on the  
11 corporation, obviously there is no such thing as a  
12 corporation sifting through cupboards to find paper.  
13 Individuals have to do that.

14           So if individuals have to go through and produce  
15 documents pursuant to a request for the production of  
16 documents, I don't understand how that implicates the Fifth  
17 Amendment.

18           MR. PRESIADO: Well, it does in this respect -- in  
19 this case, your Honor.

20           The evidence set forth establishes that Mr. Dunning  
21 is the sole representative of Thunderwood Holdings. It's a  
22 one-man show; the only man that ever did anything with  
23 respect to that corporation; the only man that has knowledge  
24 with respect to what that corporation did and did not do.

25           So when a document request is propounded that

1 reads -- bear with me, your Honor --

2 -- "all documents relating to payment  
3 of commissions or other revenue obtained  
4 by Brian Dunning through participation  
5 in" -- I'm sorry. I have the wrong one.  
6 This one was propounded by Mr. Dunning, the same  
7 one that was propounded on Thunderwood, which read:

8 "All documents relating to payment of  
9 commissions or other revenues obtained by  
10 Thunderwood through participation in,  
11 interaction with or manipulation of eBay's  
12 affiliate market program."

13 Because Mr. Dunning is the only one that can  
14 determine what documents relate to the manipulation of eBay's  
15 affiliate program, and that is undisputed and an  
16 easily-established fact --

17 THE COURT: Thunderwood Holdings, Inc. is small  
18 enough that we're talking about one or two people?

19 MR. PRESIADO: We're talking about one.

20 THE COURT: Okay. So this may apply to something  
21 like Thunderwood, but not necessarily to the larger  
22 corporations.

23 MR. PRESIADO: Right, which aren't involved here.

24 With respect to my clients, we have Mr. Dunning,  
25 Thunderwood and then his fictitious business name, Kessler's

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 Flying Circus, which is the same relationship.

2 THE COURT: Right. Okay.

3 MR. PRESIADO: And I believe I have addressed all  
4 of Mr. Eberhart's points. If the Court has other questions  
5 with respect to other issues that it would like me to argue  
6 I'd be happy to argue.

7 THE COURT: Not at this point,  
8 I'd like a response.

9 MR. EBERHART: Okay.

10 THE COURT: With regard to Thunderwood.

11 MR. EBERHART: I'm sorry, your Honor?

12 THE COURT: With regard to Thunderwood Holdings  
13 Inc. he says that I can't compel production under these  
14 circumstances because it implicates the Fifth Amendment.

15 MR. EBERHART: All right. In the case law that  
16 we've cited in our reply brief, your Honor, makes very clear  
17 that there is no exception for a one-person corporation --  
18 to the rule that a corporation has no Fifth Amendment --  
19 Fifth Amendment immunity, and that the acts of individuals,  
20 who are acting as officers or employees of that corporation,  
21 are not imputed to the individuals. Those are the acts of  
22 the corporation.

23 THE COURT: So what you're saying is that he  
24 produces because it's the corporation producing, not the  
25 person producing.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 MR. EBERHART: That is correct, your Honor.

2 THE COURT: And the U.S. Attorney who will be  
3 sitting there when they charge them can't use that, and --

4 MR. EBERHART: Can't use it against the  
5 individual. That's correct. Not against the individual,  
6 because it is the act of the corporation.

7 THE COURT: You want to come up next to him and  
8 argue that? I mean, I don't know the answer to the  
9 question.

10 MR. PRESIADO: Well, that is the case, your Honor  
11 when you're talking about your normal 50-person corporation.

12 THE COURT: No, no. But he's saying that the rule  
13 applies to a one-person corporation; that the United States  
14 Attorney is not going to be able to try and admit into  
15 evidence in a criminal case to the jury that what one person  
16 in a one-person corporation incorporated properly, that no  
17 matter what he says the government can't use that against  
18 him; can only use it to the extent you would ever use it  
19 against a party.

20 MR. PRESIADO: That simply isn't the law, your  
21 Honor, and I'll just quote one section from my paper. The  
22 United States Supreme Court, as cited by the *Central States*  
23 *Case*.

24 "The Court did not address the  
25 situation where a corporation only has one

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



1 agent who acts as the sole employee,  
2 shareholder and officer of the  
3 corporation. The Supreme Court in *Kordel*  
4 noted this troublesome question, and said,  
5 quote, 'in such a case the appropriate  
6 remedy would be a protective order  
7 postponing civil discovery until  
8 termination of the criminal action.'

9 That is a direct quote from the Supreme Court. I  
10 understand there's lower cases -- lower court cases and  
11 perhaps even circuit court cases that do not -- that nuance  
12 that point. But that is, in fact, straight from the court.

13 There is not a lot of law on this particular issue,  
14 as I'm sure the Court is aware. But if you take a step back  
15 and look at the practicalities of it, I think it's pretty  
16 clear.

17 These corporations are corporate entities in name  
18 only. This is against individual -- an individual in my  
19 case, and individuals -- this individual is the only one  
20 with knowledge, the only one involved with respect to those  
21 corporations. So I think it is, and especially with respect  
22 to the Rackspace subpoena, I think it is an end-run on my  
23 particular individual clients' Fifth Amendment rights.

24 MR. EBERHART: Your Honor, with respect to the  
25 *Kordel* case, it's important to note that that case deals

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 with the government being both the civil litigant and the  
2 criminal prosecutor. In that case the government had  
3 brought a civil case against defendant and was also  
4 prosecuting a criminal case against that defendant.

5 In addition, the language he cites is dicta from  
6 *Kordel*; it's not, in fact, the holding or what the Court  
7 did.

8 And we've cited in our reply brief at page four a  
9 number of cases that establish that there is no exception to  
10 the rule that a corporation has no Fifth Amendment right.  
11 There's no exception for a one-person corporation. So I  
12 think that law is clear.

13 THE COURT: So your position is, is that as the  
14 only representative of a corporation that he should be able  
15 to provide that information, and that the government will  
16 never be able to use that against him?

17 MR. EBERHART: That is correct. But there's one  
18 caveat, your Honor. He is not the only person who can  
19 provide the information. His lawyers can take possession of  
20 those documents, go through and determine what is  
21 responsive. He does not have to do it. He has not  
22 established that by declaration, and that is not how  
23 document requests -- document productions normally take  
24 place. So there's an assumption here that simply is not  
25 correct.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1           And just one last thing, your Honor, which is that  
2 Judge Fogel made it very clear that he wants this Court to  
3 decide this motion, because it will inform his decision on  
4 the stay motions to be heard next week.

5           THE COURT: Well, I understand. He thinks I  
6 should be doing something about this.

7           MR. PRESIADO: I'm sorry. I lost my train of  
8 thought with that Judge Fogel comment.

9           THE COURT: Judge Fogel said, "Trumbull does it --  
10 makes the decision," is what he actually said. And that's  
11 fine. That's fine.

12           MR. PRESIADO: He made it very clear he didn't  
13 want anything to do with the discovery dispute.

14           THE COURT: I can see why.

15           MR. PRESIADO: Nonetheless, your Honor -- oh, with  
16 respect to the individual, *Kordel* -- I hope the Court has a  
17 chance to look at *Kordel*. It is not dicta in that respect.  
18 And this is --

19           THE COURT: Right.

20           MR. PRESIADO: -- this is an area of uncertain  
21 law, particularly with respect to the issue of a single  
22 individual who is, in fact, the corporation. The  
23 corporation is not anything but a name,

24           Other than that I think I would submit on that.

25           THE COURT: Okay. It's submitted.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 So next issue?

2 MR. EBERHART: I think --

3 MR. FOREMAN: Your Honor, this is Stewart Foreman.

4 THE COURT: Mr. Foreman.

5 MR. FOREMAN: Just a comment. Since part of this  
6 motion was directed at my client, would you like to hear  
7 from me since we're on the Dunning issues, or would you like  
8 to hear from other counsel in the court?

9 THE COURT: Okay. So why don't we -- don't why  
10 don't you go ahead and indicate what your position is?

11 It's really hard when you're coming out of a black  
12 box. We do that to accommodate you, but I think that you  
13 always know that unless you're standing at the podium it's a  
14 little bit more difficult.

15 MR. FOREMAN: Yes. And I very much appreciate  
16 your willingness to let me appear in this manner. I know  
17 it's better to be in court, but as I explained in my letter  
18 the financial burden is such --

19 THE COURT: No. I understand that. And that's  
20 why we did this.

21 MR. FOREMAN: In any case, going to the merits,  
22 however -- again, I represent Todd Dunning and Dunning  
23 Enterprises, which is also a single-purpose entity, I guess  
24 is the technical term that business lawyers use to describe  
25 a corporation that is formed for the purpose of doing one

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 thing and one thing only.

2           And in this case DEI, if I can refer to it that  
3 way, was formed merely to own a partnership interest in  
4 Kessler's Flying Circus. It was formed for that purpose. It  
5 simply held that partnership interest, and it has never  
6 conducted any other business; in fact, it is the proverbial  
7 silent partner in Kessler's Flying Circus.

8           However DEI and Todd Dunning are in a little bit  
9 different position with respect to these motions to compel,  
10 and I would like to -- and I think it's important to for  
11 purposes of our responsive motion to explore that.

12           eBay's motion as it relates to Todd Dunning and  
13 DEI is directed really at only two points.

14           As I think you mentioned earlier in the hearing one  
15 of the unusual things about this motion to compel is it is  
16 not presented in a way to compel responses to any specific  
17 requests that have been propounded. It's kind of an omnibus  
18 motion to compel, which makes it a bit different and a little  
19 difficult to deal with.

20           But nevertheless, we're here. And what eBay is  
21 asking for is an order that both Todd Dunning and DEI obtain  
22 documents from Rackspace, Inc. which is the entity down in  
23 Texas that provides essentially, I guess, computer space.

24           And they are also asking for an order that Todd  
25 Dunning obtain and produce documents that were seized from

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 Brian Dunning's home by the FBI.

2           There has never been a seizure of any documents  
3 from Todd Dunning, and that's a very important distinction, I  
4 believe, in this motion.

5           Now, Todd Dunning responded to the document  
6 request propounded by eBay by asserting his Fifth Amendment  
7 privilege, which I believe is completely appropriate.

8           He also stated in his declaration that he does not  
9 possess any documents, and I -- in my declaration  
10 accompanying this opposition I have further confirmed that  
11 based upon my representation of him after June of 2007.

12           DEI responded to eBay's document request, not by  
13 asserting a Fifth Amendment privilege on behalf of a  
14 corporation. It was a little different situation from DEI,  
15 because as it turns out, when DEI was formed Mrs. Dunning  
16 was named as secretary of the corporation. I would imagine  
17 as an individual that's not uncommon in these kinds of  
18 things, and therefore -- and I learned this later -- and  
19 therefore, there was somebody other than Mrs. Dunning who  
20 could at least act to respond on behalf of that entity to  
21 the document request.

22           And DEI responded to all the document requests in  
23 its exhibits before you, and it has stated, as the corporate  
24 entities all request, that it possesses no documents. It has  
25 stated that clearly and unequivocally.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1           Ebay, nevertheless, claims that Todd Dunning's  
2 Fifth Amendment privilege is not applicable to the documents  
3 it received by the FBI from a third party. And eBay claims  
4 that DEI should do something more to obtain documents from  
5 this Rackspace.

6           What that "something more" is is kind of unclear.  
7 But what they seem to be saying is that DEI as a general  
8 partner of KFC should make a demand on KFC.

9           Frankly, our position is that I don't think we  
10 should support, nor the Court has the time, nor should we all  
11 be engaged in a motion to compel when KFC is in front of the  
12 Court.

13           All eBay is asking for is a symbolic act, which  
14 maybe in some future course of the civil litigation will  
15 somehow try to use that in some way. But it's really  
16 nonsense quite frankly.

17           KFC is here. KFC is supposed to produce documents,  
18 and eBay will get whatever is produced. DEI doing anything  
19 further to meet that demand is truly a meaningless gesture.

20           So as to the request for DEI to obtain documents, I  
21 think it should be denied. Both DEI and Todd Dunning have  
22 requested from Rackspace that documents be provided. And  
23 they have been told, and there is an exhibit that's been part  
24 of my declaration that's been signed by the counsel for  
25 Rackspace, that says DEI and Todd Dunning are not authorized

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 representatives on the account at Rackspace.

2           We don't know, or at least I don't know because  
3 Rackspace's representatives have declined to tell me -- we  
4 don't know who the authorized representatives are. We've  
5 simply been told it's either Todd Dunning or DEI, and  
6 therefore they won't provide any documents to us. There's  
7 nothing more we can do.

8           And the law that's been cited on both the motion to  
9 compel and the opposition doesn't indicate that we have any  
10 legal obligation to do anything further. We have made a  
11 demand, and the demand has been refused. That should really  
12 end the matter.

13           As to the FBI documents, those were received from  
14 Brian Dunning's home -- not from Todd Dunning. And the  
15 question of whether requiring today -- well, let me back up  
16 for a moment.

17           We have also requested through counsel copies of  
18 the documents that were seized by the FBI. We felt -- we did  
19 that early on when there was this other parallel litigation  
20 that's been mentioned in these papers.

21           But the FBI has refused to produce copies of those  
22 documents to Todd Dunning's counsel, claiming that they  
23 weren't seized from us and they are not our documents.  
24 There's nothing further we can do to get those documents from  
25 the FBI, and yet eBay's motion seeks to compel us to do

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



1 something in that regard.

2 But it -- this would, in fact, implicate Todd  
3 Dunning's Fifth Amendment privilege if you were to order  
4 that he do something further, whatever that in theory might  
5 be with respect to either the FBI or the Rackspace  
6 documents.

7 Precisely because, since they weren't seized from  
8 him, if you were ordered -- to order him to produce  
9 documents, it would be tantamount to an admission that he  
10 had possession, control, and that he is authenticating those  
11 documents. That is precisely what the case law says that's  
12 been cited to you.

13 And at the moment neither possession, control nor  
14 authenticity of those documents with respect to Todd Dunning  
15 has been established, because nothing has been seized from  
16 him.

17 EBay is trying to get those facts established with  
18 respect to Todd Dunning by this motion, and that would be  
19 potentially incriminating, because it would establish  
20 potentially that those documents were authenticated as to  
21 him or were in his possession and control.

22 It's kind of like, "Well, did you have the gun in  
23 your possession or not?" We don't know what's in those  
24 documents.

25 But until we know what those documents are, I

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 certainly believe that Todd has a right to assert his Fifth  
2 Amendment privilege to be sure that no government agency, or  
3 certainly not eBay later in this case can argue that because  
4 he produced them in this civil litigation they were under his  
5 possession, control and therefore, he has authenticated them  
6 and they can be used against him. That's precisely what the  
7 case law says shouldn't be done in this situation.

8           So I think eBay's motion with respect to DEI and  
9 Todd Dunning in trying to seek orders that these defendants  
10 do something, to get documents either from Rackspace or the  
11 FBI must be denied. This issue about DEI making a formal  
12 request on KFC I've addressed earlier, but that also should  
13 be denied.

14           And I'd like to point out, at least just for the  
15 record, your Honor, that that particular aspect of the motion  
16 was never really made in eBay's original motion. It was only  
17 argued in their reply and I think should be disregarded for  
18 that reason.

19           So finally, your Honor, I do make a request under  
20 the provision of Rule 37 for our attorneys fees, and in  
21 opposition to this motion all of the facts that I've argued  
22 were known to eBay before they filed the motion, and  
23 certainly after they filed the motion during our meet and  
24 confer. They refused to withdraw it. I think that's without  
25 substantial justification, and we request our attorneys fees,

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 and I've set forth the basis for that in my declaration.

2 THE COURT: Response?

3 MR. EBERHART: First of all, your Honor, the  
4 notion that we are asking Todd Dunning to get documents from  
5 the FBI is a red herring. That is not what we're  
6 requesting.

7 We are requesting that Mr. Dunning be compelled to  
8 provide whatever it is he has provided to the government. We  
9 don't know -- eBay does not know whether documents were  
10 seized from Todd Dunning. Todd Dunning's declaration does  
11 not establish one way or the other whether documents were  
12 seized from him, and I encourage the Court to look closely at  
13 it.

14 Mr. Dunning's declaration has no broad statement  
15 saying, "I never gave nor had seized from me any documents  
16 by the government." Instead he has a very narrow statement,  
17 where he states there was an interview on June 18th, 2007,  
18 by the FBI, and quote, "The FBI did not request or receive  
19 any documents during this interview."

20 It leaves open the possibility of other  
21 interviews. It leaves open the possibility of warrants. It  
22 leaves open the possibility of voluntary production at some  
23 other time.

24 We don't know what Todd Dunning has given the  
25 government, but to the extent that he has given them anything

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 we're entitled to have responsive material to our document  
2 requests from that universe produced to us. Because having  
3 provided it to the government it is not testimonial to  
4 provide it now.

5           It is not merely ministerial or symbolic to  
6 require DEI to seek documents from KFC. KFC is a  
7 partnership, and I'm sure that some of the defendants are  
8 going to argue that there are different rules that apply to  
9 partnerships. But DEI is a corporation, and the rules are  
10 very clear as to corporations.

11           So asking for requiring that the corporation take  
12 the acts that it's able to do under California law to put  
13 documents into its possession such that they can be produced  
14 because that corporation has no Fifth Amendment rights is far  
15 from a symbolic or ministerial act.

16           In addition, Mr. Dunning -- Mr. Todd Dunning's  
17 declaration does not establish that he's made any sort of  
18 demand on KFC for those documents.

19           Finally, this notion that quote, "EBay knew of the  
20 facts before it filed its motion" is not true.

21           First of all, as I've discussed, the facts are not  
22 as Mr. Foreman would have them. The facts that are set forth  
23 in Mr. Todd Dunning's declaration do not establish that he  
24 does not have documents that were given to the government or  
25 that he's made a demand. And that declaration, moreover, was

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 provided after eBay filed its motion.

2 THE COURT: Respond to that?

3 MR. FOREMAN: Yes, your Honor. First of all, with  
4 respect to the issue of has Todd Dunning provided any  
5 documents to the FBI, this is -- this is really sort of  
6 making up things.

7 He -- Mr. Eberhart quoted from Mr. Dunning's  
8 declaration, as of June 18th he did not provide any documents  
9 to the FBI. That's very clear.

10 Then in my declaration, to which Mr. Dunning's  
11 declaration is an exhibit, I state in paragraph 16 on page  
12 five that I was retained by Mr. Dunning three weeks after  
13 that interview. And I go on to say that I have not produced  
14 any documents on behalf of my clients to the FBI. And  
15 I -- my clients have not had any contact with the FBI  
16 subsequent to the time of Mr. Dunning's interview on  
17 June 18.

18 So what we're talking about -- I mean, I think it  
19 makes very clear between what Mr. Dunning said in his  
20 declaration based on his personal knowledge as counsel to  
21 him that no documents have been produced to the FBI.

22 What we seem to be talking about here, Mr. Eberhart  
23 would like all of that said in his words rather than in the  
24 words that I have said and that Mr. Dunning has said.

25 I mean, it's kind of a -- what are we arguing about

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 here? It's quite clear from this record that no documents  
2 from Mr. Dunning have ever been supplied to the FBI.

3 THE COURT: So Mr. Dunning was not requested to  
4 provide documents. Mr. Dunning did not provide documents.  
5 They did not come in with a search warrant and take  
6 documents. So there has been no contact between Mr. Dunning  
7 and the FBI at all concerning the movement of the documents.

8 MR. FOREMAN: That is absolutely correct, your  
9 Honor, and I would just like to supplement, that at the time  
10 of the interview on June 18th Mr. Dunning was not served  
11 with any search warrant. He was simply interviewed.

12 And that doesn't change anything of what you said  
13 or what I said, but I just want to make sure you understand  
14 that that is an important distinction as to the origin of the  
15 first facts in this case between Todd Dunning, my client and  
16 Mr. Presiado's client, Brian Dunning.

17 Brian Dunning was served with a search warrant on  
18 June 18th. My client was not.

19 THE COURT: And I want to note for the record just  
20 so that everybody knows that, that I actually issued that  
21 search warrant when I was on criminal duty, so I don't know  
22 that that makes any difference, but it seems to me when I  
23 was preparing for this it became clear that that was when I  
24 was on criminal duty and I did the search warrant.

25 Because this is down in the Santa Cruz-beyond area,

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 down there is where that search warrant was?

2 MR. PRESIADO: Orange County, your Honor.

3 MR. FOREMAN: It was actually down in Orange  
4 County.

5 THE COURT: Then that's not the one. There's  
6 another one -- was there another search warrant in this?

7 MR. KOURETSCHIAN: There is, your Honor. That was  
8 in San Diego.

9 THE COURT: Then I'm misbelieving that I was  
10 involved in this. It seemed to me I just recently came  
11 across something that indicated that there was some service  
12 that was in our district, and it sounds like it isn't. So  
13 to the extent it's out of district I don't do it.

14 MR. FOREMAN: And your Honor, if I may be allowed  
15 to continue to respond to Mr. Eberhart's point, and I'll  
16 make it brief.

17 At one point during his counter-argument he may  
18 have inadvertently said this, and if he said this I want to  
19 correct it.

20 THE COURT: Okay.

21 MR. FOREMAN: He indicated that Todd Dunning is a  
22 partner of KFC. That is not correct. It's DEI that is the  
23 partner. So I just wanted to make sure that we're all clear  
24 about that. There are a lot of names floating around here.

25 THE COURT: Right.

1 MR. FOREMAN: And there's nothing further I can  
2 say about this request of DEI with respect to KFC. It just  
3 mystifies me what this is supposed to accomplish.

4 And KFC is here before you -- if you decide, which  
5 I'm not saying you should, but if you decide that KFC has  
6 possession, custody or control of documents responsive to the  
7 requests that it should produce, then it -- you know, then  
8 that's the end of it.

9 What does DEI's request add to this? And I don't  
10 think it's in the interest of justice or appropriate for the  
11 Court to order something that is really meaningless.

12 And I've seen that eBay is extremely resourceful in  
13 using courts' orders and statements of counsel and other  
14 things in very creative ways, and I think we should be very  
15 careful about ordering things that are unnecessary, because  
16 they do lead to mischief.

17 As far as eBay's knowledge of the facts, your  
18 Honor, as has been pointed out I believe in these papers  
19 prior to eBay filing this case in August of 2008, its agent,  
20 Commission Junction, the company that was actually providing  
21 the computer services for this affiliate marketing  
22 program -- Commission Junction had sued the Dunning  
23 defendants, shall we say, in Orange County on substantially  
24 the same theories, but for a claim that it was owed money as  
25 opposed to eBay claiming money.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



1           And during the course of that case declarations  
2 were provided that established -- that said the same thing;  
3 because Commission Junction had also requested documents  
4 from these clients.

5           Todd Dunning's declaration was substantially  
6 similar to the one here, was placed into the record there,  
7 as was Robert Breakstone, the criminal counsel's declaration  
8 with respect to the request for FBI records was also placed  
9 into the record in that case.

10           And all of those documents and the pleading  
11 records, these declarations were subpoenaed by eBay early on  
12 in this case. So they have had them prior to this motion.  
13 They are substantially the same declarations, and so it is  
14 true when I say that they knew about all of these facts  
15 before filing this motion because they had all of those  
16 pleadings.

17           And if you review the e-mail exchange between  
18 Colleen Kennedy and myself when we were meeting and  
19 conferring regarding this motion, I pointed out to her that  
20 they already had those declarations, and those declarations  
21 made these same points clear.

22           She came back and said, "No, it's not clear  
23 enough." So I agreed to provide new declarations, but tried  
24 to clarify some points.

25           I feel like the goal line keeps getting moved

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 backwards. I keep clarifying these points and she keeps  
2 saying it's not clear enough. Well, you know, we have a  
3 different way of writing, but I think the facts are very  
4 clear.

5 Thank you, your Honor.

6 MR. EBERHART: One last point, your Honor.

7 THE COURT: You may.

8 MR. EBERHART: I think despite the number of times  
9 Mr. Foreman says the record is clear, I think it behooves  
10 the Court to look at Mr. Dunning's declaration,

11 He does not exclude the possibility that he gave  
12 documents to the government, and you can't combine that --  
13 nor can you combine that with Mr. Foreman's declaration and  
14 come to the conclusion that there is no chance that Mr.  
15 Dunning provided documents to the government.

16 And in the meet and confer we asked, "Just give us  
17 a simple statement: Todd Dunning gave no documents to the  
18 government and no documents were seized from him by the  
19 government."

20 And Mr. Foreman wouldn't give us that. We wouldn't  
21 be here on this particular issue had we gotten that clear  
22 statement from Todd Dunning.

23 MR. FOREMAN: Your Honor, if I just may respond --  
24 I'm sorry -- just briefly.

25 I would have been happy to give that clear

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 statement if what has already been said has not been clear  
2 enough for eBay's counsel. However, they tied that request  
3 to some very onerous conditions which I could not accept, and  
4 that is set forth in the e-mails. That is why we're here.  
5 It's not because I refused to do what Mr. Eberhart just  
6 indicated.

7 I would have gladly avoided this motion, and I  
8 tried mightily to do that, but they continued to ask for more  
9 and more things that ultimately became both irrelevant and  
10 too onerous, and I couldn't accept them.

11 THE COURT: So if what you deemed to be requests  
12 for more than that particular issue, if it were divided up  
13 into different pieces you might be able to respond to  
14 certain ones and then not be able to respond to others?

15 MR. FOREMAN: Well --

16 THE COURT: In other words, you're telling me that  
17 you think he was asking more than just that. If he was  
18 asking just that that would have been easy enough, but it  
19 was complicated.

20 So if it was asked -- if it was asked in pieces,  
21 where one of the pieces would be just that, then that would  
22 work?

23 MR. FOREMAN: Your Honor, just so that I'm sure  
24 I'm answering what I'm answering here, if -- if standing  
25 alone, if somehow it needs to be clarified that Todd Dunning

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 has provided -- has never provided any documents to the FBI,  
2 I am willing to clarify that even for standing by itself,  
3 Yes. Because that's a true statement.

4 THE COURT: Does that give anything to anybody,  
5 Counsel?

6 MR. EBERHART: Your Honor, I think it would  
7 resolve the piece of our motion that is directed to Todd  
8 Dunning.

9 THE COURT: Okay.

10 MR. EBERHART: Because the document -- the motion  
11 that is directed to Todd Dunning only seeks for him to  
12 produce responsive material that falls within the universe  
13 of material that he produced to the FBI, and if, in fact,  
14 there is nothing, then that does resolve the motion against  
15 Todd Dunning.

16 THE COURT: Does it work to do it right here, or  
17 do you need to do it in some other context?

18 MR. EBERHART: I think Todd Dunning needs to be  
19 the one that provides the declaration that says he never  
20 provided anything to the government.

21 THE COURT: So Counsel, can you go ahead and do  
22 that?

23 MR. FOREMAN: I'm sorry. Mr. Eberhart, could you  
24 just repeat that point?

25 THE COURT: Say it again.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 MR. EBERHART: Todd Dunning needs to be the one  
2 who provides the declaration stating that he never provided  
3 any documents to the government, whether voluntarily or by  
4 seizure.

5 THE COURT: So it seems if that can be provided  
6 that that would end that issue.

7 MR. EBERHART: (Nods head.)

8 THE COURT: So I will leave it up to the two of  
9 you to figure that out.

10 MR. FOREMAN: Well --

11 THE COURT: Go ahead.

12 MR. FOREMAN: I'd be happy to do that, your Honor.  
13 I mean, I'd be happy to talk to Mr. Eberhart about resolving  
14 that, and I don't see a problem with that.

15 My only question is, given what I think is eBay's  
16 counsel's view of the limited application of the Fifth  
17 Amendment in these situations, I would want to be assured  
18 that in Todd Dunning stating this, that that is not going to  
19 be used as some argument that he's waived his Fifth Amendment  
20 privilege.

21 Now, I don't think that's the case. I don't think  
22 it's the case with the declaration that he's already  
23 provided, but I would just like some clarification of where  
24 we stand on that issue with eBay's counsel.

25 THE COURT: Well, given that statement that you

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 said and given the response, then, you know, I think it's  
2 appropriate, if you need time to figure out if there are  
3 other implications of doing anything, that you consider  
4 that.

5 But if it can be resolved and there's no harm to  
6 your client in resolving it, then do that. If it can't be  
7 resolved because of potentially ramifications on the criminal  
8 side, then I guess it leaves it as an unresolved issue.

9 MR. FOREMAN: If I may just follow up on that  
10 point.

11 If Mr. Eberhart -- if he can address this question  
12 but if you would just -- does he view that if I were to --  
13 if Mr. Dunning were to provide the declaration with the words  
14 that he just stated, what -- would he agree that that is not  
15 any waiver of Mr. Dunning's Fifth Amendment privilege?

16 THE COURT: Well, I'm not sure that he's in a --  
17 I -- you know, I'm going to leave that up to you, I'm not  
18 going to weigh in.

19 MR. FOREMAN: He and I can discuss that.

20 THE COURT: I'm not going to give any legal advice  
21 on any of those issues.

22 So is there anything further on that issue that we  
23 need to do?

24 MR. EBERHART: Your Honor, there is nothing  
25 further on the motion against Todd Dunning and his related

1 companies.

2 But I just want to be clear that that declaration  
3 only resolves the portion of the motions that is directed at  
4 Todd Dunning.

5 THE COURT: Okay. And I understand that. So  
6 that -- and it's submitted as to that portion which involves  
7 Todd Dunning.

8 So next issue.

9 And Counsel, I don't know if you want to -- I mean,  
10 if you're happy to sit on the telephone for the rest of this  
11 or not.

12 MR. FOREMAN: If you don't mind, your Honor, I  
13 will stay on --

14 THE COURT: That's fine.

15 MR. FOREMAN: -- in case something comes up.

16 THE COURT: Okay. You know, you're going to have  
17 to yell if you want to say something because I'm going to  
18 presume you're probably not as involved in the rest of this.

19 MR. FOREMAN: I -- I will make myself heard.

20 THE COURT: Okay. Thank you.

21 Go ahead.

22 MR. KOURETSCHIAN: Great, your Honor.

23 I'm here to address the three issues related to  
24 Shawn Hogan and Digital Solutions, Inc., the first issue  
25 being the production of documents by Shawn Hogan

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 individually.

2           Counsel for eBay has indicated that there really is  
3 nothing incriminating involved. I think the opposition that  
4 we provided which makes reference to the *Hubbell* decision by  
5 the Supreme Court would tend to indicate otherwise. That is  
6 especially true here.

7           If it were simply a request, not that we're  
8 conceding that such a request would be in and of itself  
9 otherwise not objectionable -- but if it were simply a  
10 request to produce all documents that had been produced or  
11 seized by the FBI, then that would give some probative weight  
12 to eBay's argument that there is essentially little or no  
13 value in producing the documents such that there isn't this  
14 testimonial aspect to the act of production.

15           In this case, however, the devil really is in the  
16 details, and the details with respect to eBay's request for  
17 production to Shawn Hogan is where we seem to be at odds  
18 with eBay.

19           They are asking ultimately for Shawn Hogan to  
20 exercise a great deal of discretion and to make certain  
21 decisions that ultimately are testimonial in responding to  
22 the request for production.

23           We cite to the one specific question but there are  
24 several, the request being:

25                   "All documents sufficient to identify

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



1           the source of any technology, technique or  
2           method used by Hogan or Hogan entities to  
3           participate in, manipulate or interact  
4           with eBay's affiliate marketing program."

5           They are essentially asking Mr. Hogan to testify,  
6 by producing documents, providing specific documents that  
7 will respond as to the issues of manipulation or interaction.  
8 That goes well beyond the case the government may already  
9 have.

10           An easy way at least for me to understand it,  
11 because frankly, I believe a lot of these issues are fairly  
12 complicated, if the government had a copy of Mr. Hogan's  
13 diary, and eBay, assuming, again, other objections don't  
14 apply, was simply asking for him to produce a copy of the  
15 diary, that act of production is nothing other than the act  
16 of surrender that Justice White had referred to in the  
17 *Hubbell* case. There is nothing inherently testimonial to  
18 that.

19           But had eBay have asked, which they are doing here  
20 in many different ways, "to identify all sections of the  
21 diary related to your contact in the affiliate program," or  
22 "all sections in your diary or passages in the diary related  
23 to this manipulative technology," well, they are now going  
24 well beyond what the government may already have.

25           The government may have the material but may not

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 know how to interpret the material. And now the questions by  
2 eBay ultimately will require my client to interpret the  
3 material that the government may very well have, and that in  
4 and of itself is testimonial.

5 Mr. Hogan would ultimately be providing information  
6 to the government that the government does not have, whether  
7 certain passages, certain information is related to eBay or  
8 related to this affiliate marketing program.

9 It may be unclear by the information alone that the  
10 government has whether it is in fact related to this or to  
11 that. And by asking Mr. Hogan to decide and to identify  
12 which pieces are related to the specific requests, there is  
13 the type of testimonial aspect that is protected by the Fifth  
14 Amendment.

15 The -- I also wanted just at the outset to make  
16 note of the fact that counsel's statements -- counsel by  
17 eBay's statements that there are a variety of indisputable  
18 facts here we take -- we don't agree with. There are  
19 frankly quite a bit of disputable facts, including whether  
20 or not the various parties are in possession of documents  
21 that are responsive and have yet to be produced.

22 The second issue here, your Honor, is the issue of  
23 the production of the documents by Digital Point Solutions.  
24 I think the -- I think the discussion that took place  
25 earlier between counsel for eBay and Mr. Presiado covered

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 the topic fairly extensively.

2 I do wish to point out that Shawn Hogan in the  
3 declaration that's been provided confirmed as much, was the  
4 sole shareholder, officer, director and representative of  
5 Digital Point Solutions, and this was an entity that was  
6 formed in May of 2007, and may -- to the extent there was any  
7 interaction may have been involved by eBay's own admission  
8 for no more than -- well, I won't say by eBay's own  
9 admission, but according to the documents we've seen by no  
10 more than one month at most.

11 In neither case there is nobody other than Mr.  
12 Hogan who would be able to provide any information related  
13 to -- DPS, Inc. is the sole shareholder, the sole officer and  
14 the sole director.

15 And the suggestion that the distinction between DPS  
16 Inc. and Mr. Hogan somehow gives eBay the ability to sidestep  
17 Mr. Hogan's individual rights to Fifth Amendment protection  
18 against self-incrimination is an end-run around the Fifth  
19 Amendment. Ultimately Mr. Hogan, and only Mr. Hogan will be  
20 able to provide responses on behalf of DPS, Inc.

21 And frankly, we've stated in our papers that the  
22 only real solution here is the stay. We've asked that this  
23 Court on this issue stay the proceedings, and we've pointed  
24 to some cases here in the Northern District that support the  
25 stay, because there isn't anybody other than Mr. Hogan who

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 can provide the responses.

2           There are also issues relating to the form of the  
3 responses. EBay is not asking DPS, Inc. to provide  
4 responses related to DPS, Inc.'s actions, whether DPS, Inc.  
5 did this or did that.

6           They are asking DPS, Inc. to provide information  
7 related to DPS, Inc. quote, "related entities," and  
8 ultimately, by calling the officer, director, et cetera,  
9 Shawn Hogan.

10           So they are asking through the artifice of, or the  
11 shield of DPS, Inc. Shawn Hogan to answer questions about  
12 Shawn Hogan. And that too is the proper subject of a motion  
13 to stay, and we had asked this Court not to hear the motion  
14 as to these two issues until the Court had resolved the issue  
15 on the motion to stay.

16           We take exception to counsel's --

17           THE COURT: The motion to stay is pending before  
18 Judge Fogel.

19           MR. KOURETSKIAN: That is correct. That is  
20 correct, your Honor. It is due to be heard next week.

21           There was some question earlier from the Court  
22 whether if it was a specific or a broader question would it  
23 have somehow changed the application of the Fifth Amendment  
24 to the individual defendant Shawn Hogan.

25           And I do wish to point out that it isn't the

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 question of specificity or breadth; it's going to boil down  
2 to the specific question asked.

3           If, for example, assuming that the government had  
4 possession of certain e-mails, if the question was -- the  
5 request from eBay was, "Produce all e-mails between party X  
6 and party Y," and these e-mails had been previously produced  
7 to the government, then it might very well be that the Fifth  
8 Amendment privilege against self-incrimination would be  
9 implicated but it might very well fall within that forgone  
10 conclusion doctrine, such that the production of that type of  
11 information doesn't offer any discernment other than  
12 information the government presumably already has. It would  
13 be able to identify party X and party Y.

14           But again, the devil here is in the details. The  
15 questions asked go far beyond that. They are asking Shawn  
16 Hogan ultimately to make decisions and to provide testimony.

17           And in their reply they suggest that we might have  
18 been nitpicking by picking out one of the questions, the one  
19 that I had already read to the Court, and they talk about a  
20 request for "all documents related to eBay," as if somehow  
21 that would have been better, or that somehow there isn't a  
22 testimonial aspect to that. And we beg to differ that there  
23 is a testimonial aspect to "all documents related to eBay."

24           Again, if the government has seized all sorts of  
25 documents it may not know what document relates to eBay. If

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 the question were all documents identifying eBay and the  
2 documents had been produced or been seized by the  
3 government, then it may very well be less of a testimonial  
4 or incriminating aspect to the question.

5           But as these questions stand, in every single one  
6 of them -- and it's unfortunate that none of them have really  
7 been referenced in the plaintiff's moving papers. They have  
8 addressed this issue generally, and I could see why they  
9 would do that.

10           But if you read the questions individually, in each  
11 one they are asking ultimately Shawn Hogan to provide some  
12 testimony, to apply his knowledge, the contents of his own  
13 mind, information that the government simply does not have in  
14 order to respond.

15           Does the Court have any questions?

16           THE COURT: No.

17           MR. KOURETCHIAN: Okay.

18           MR. EBERHART: Your Honor, I'd like to start with  
19 two of the last points that Mr. Kouretchian made.

20           First of all, all of eBay's requests are before the  
21 Court. As the Court's rules require we have of course the  
22 chart that shows the relevant requests and responses. We've  
23 also put in the specific requests.

24           Mr. Kouretchian said, "Well, perhaps if we were  
25 seeking communications between X and Y that might not

1 implicate the Fifth Amendment because it would not have any  
2 testimonial aspect to it due to the forgone conclusion  
3 doctrine."

4 I would invite the Court to look at Request For  
5 Production Number Two that we've issued to DPS and Mr. Hogan,  
6 which asks for "all documents relating to or communications  
7 with eBay or any current or former employee of eBay."

8 I believe that falls directly within the  
9 hypothetical that Mr. Kouretchian set out.

10 As I argued in my -- in my initial statement, the  
11 requests which are before the Court are quite broad when  
12 taken together, and the notion that they require specific  
13 testimony by Mr. Hogan is not, in fact, the case.

14 Let's take even one of the particular requests  
15 that they call out.

16 They are concerned about the language that asks  
17 for "methods and technologies used by DPS to obtain revenue  
18 from, manipulate or otherwise interact with eBay's affiliate  
19 marketing program."

20 If Mr. Hogan or DPS produces a document in  
21 response to that, it does not tell the government that he  
22 manipulated or DPS manipulated the program. The question is  
23 in -- or the request is in the disjunctive. Simply  
24 interacted with, otherwise interacted with the program, has  
25 no testimonial or incriminating aspect to it.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 EBay absolutely is seeking whatever information is  
2 within the possession, custody or control of DPS, Inc. And  
3 DPS, Inc. has control over the documents that were seized by  
4 the government. And DPS, Inc. through its agents, whether  
5 Mr. Hogan or its counsel or some other agent it may appoint,  
6 can review that material, both for production and to provide  
7 answers to eBay's requests for admissions.

8 As we have discussed with some of the other  
9 defendants there's an assumption here that has not been  
10 proven, which is, it has not been proven that only Shawn  
11 Hogan can conduct the review of documents that are sought by  
12 eBay's document requests.

13 In the normal course counsel would take possession  
14 of the documents, conduct a review to determine what is  
15 responsive and non-privileged and produce that material.

16 And finally, we would be happy to simply accept  
17 the production en mass of whatever was provided to the FBI.  
18 EBay would have no problem with that, and if that's a way,  
19 as Mr. Kouretchian suggested, to resolve the motion, eBay is  
20 certainly open to that option.

21 THE COURT: Is that helpful?

22 MR. PRESIADO: I wish it were, your Honor.  
23 Unfortunately -- I'm going to start with Question Number Two  
24 that counsel has referred to.

25 There is a testimonial aspect to this question. It

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



1 is asking ultimately for Mr. Hogan to identify the current or  
2 former employees of eBay. This is not a question as to a  
3 communication between X and Y. This is something a little  
4 bit broader than that and does require ultimately Mr. Hogan  
5 to exercise some discretion -- discretion that he has and  
6 information that frankly the government may not have.

7           This also ties into the final comment counsel made  
8 suggesting that as a practical matter counsel would be  
9 reviewing the information and providing the response.

10           I don't know how -- how Mr. Eberhart's office  
11 practice is, but we leave the responses for discovery and  
12 document demands to our clients.

13           If a document demand requests that our client  
14 produce a specific document -- in this case I'll refer again  
15 to Question Number Two, the Request For Production, "All  
16 documents relating to or communications with eBay or any  
17 current or former employee of eBay," it's unclear to me how,  
18 for example, I would be able to answer that question on  
19 behalf of DPS, Inc. without consulting with my client, or  
20 again, if it were simply production of document e-mail  
21 between X and Y I'd be willing to concede that that is at  
22 least something that I might be able to provide a response  
23 to.

24           But again, the response shouldn't be coming from  
25 counsel for DPS, Inc. or any counsel for anybody for that

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 matter. It should be coming from the client directly.

2 Also they make reference to the passage I quoted  
3 in my opposition regarding "manipulate" or they say -- they  
4 make reference to "interact," as if "interact" in and of  
5 itself doesn't offer any testimonial component to it.

6 Unfortunately, I don't have a copy of the  
7 Plaintiff's Second Amended Complaint in my stack over there,  
8 but I do recall that the user agreement that they are  
9 referring to relates to interactions with the eBay Web site,  
10 and so the suggestion that because the word "interact" is  
11 there and we can ignore "manipulate" somehow that makes this  
12 a less-stinging request just simply cannot be believed. It's  
13 contrary to what they've filed in their Second Amended  
14 Complaint as well.

15 THE COURT: Response to that?

16 MR. EBERHART: Yes, your Honor. There is no  
17 particular term of art applied to "interact" within either  
18 these requests or within our Second Amended Complaint, so  
19 the notion that it somehow sweeps in wrongdoing and  
20 supplants the normal definition of "interact" is simply not  
21 correct.

22 Finally, what we are suggesting is that the  
23 material that was provided to the FBI can be provided to  
24 counsel. There's no selection by Mr. Hogan involved in  
25 that, and indeed DPS, Inc. has that material, and that

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 counsel can then review that material for responsive  
2 documents.

3           If they claim they don't know who the current or  
4 former employees of eBay are, I would suggest that e-mail  
5 addresses at eBay.com might give them some insight on that.

6           Thank you.

7           THE COURT: Is that helpful?

8           MR. KOURETCHIAN: It might be helpful as to the  
9 current employees of eBay. I don't know if it's helpful as  
10 to the former, and that's frankly beside the point.

11           I did want to point out that one of the theories of  
12 liability here is the Computer Fraud and Abuse Act that is  
13 going to require reference by this Court to the user  
14 agreement.

15           And to the extent the word "interact" is being used  
16 in the user agreement and is, frankly, a big part, as I  
17 understand of the plaintiff's case, the suggestion that the  
18 one request that I had identified in my opposition is somehow  
19 non-testimonial, just -- we question that. We leave it to  
20 the Court to make that final decision.

21           Ultimately, your Honor, it's -- we've been talking  
22 again in broad context as to the Fifth Amendment right. We  
23 wouldn't have this issue if the plaintiff's case wasn't the  
24 exact parallel type of case that as I understand the U.S.  
25 Attorney's ultimately seeking to pursue against my client.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 We wouldn't be dealing with these issues.

2 As it is, we are. That with respect to the Fifth  
3 Amendment it is from our perspective impossible for the Court  
4 to piecemeal and decide Mr. Hogan's Fifth Amendment right  
5 will be respected, and DPS, Inc. will be required  
6 nevertheless to produce or to respond.

7 And we suggest that that is ultimately an untenable  
8 situation, because it leaves DPS, Inc. -- it prejudices the  
9 DPS, Inc. Ultimately DPS, Inc. is not able to defend itself  
10 if Shawn Hogan, who is still subject to criminal prosecution,  
11 is unable to or unwilling to provide responses that might  
12 very well serve to defend DPS, Inc.

13 THE COURT: I take it -- and clarify, 'cause I  
14 didn't go look for this -- that when you have appeared  
15 before Judge Fogel -- why don't you just come up to the  
16 podium?

17 Has there been a request to stay this pending the  
18 completion of the criminal stuff?

19 MR. KOURETCHIAN: That is what is pending next  
20 week, your Honor.

21 THE COURT: And you haven't argued it yet?

22 MR. KOURETCHIAN: We have not. It has been  
23 briefed and --

24 THE COURT: It seems to me after having listened  
25 to you that that's --

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 MR. PRESIADO: The hearing is on Friday, your  
2 Honor.

3 THE COURT: -- sort of the logical place to go,  
4 and I'm not sure why I'm doing this, when there is  
5 potentially a pending motion before Judge Fogel to stay the  
6 entire civil case pending the completion of the criminal  
7 case, which isn't unusual in these circumstances.

8 MR. EBERHART: Judge Fogel indicated that he  
9 believed that your ruling on these motions to compel would  
10 be informative to him on the motion to stay.

11 In fact, the defendants had asked Judge Fogel to  
12 either hear this motion or to put these motions to compel off  
13 until after Judge Fogel had heard the motion to stay. He  
14 declined to do that. He said, "No. I think it will be  
15 instructive for me to know what Judge Trumbull does."

16 THE COURT: That's interesting that that's what he  
17 said.

18 Is there anything further that anybody wants to say  
19 about anything further at this point?

20 MR. KOURETCHIAN: Just, your Honor, what they are  
21 calling the order by Judge Trumbull, or -- excuse me -- by  
22 --

23 THE COURT: Judge Fogel.

24 MR. KOURETCHIAN: Thank you. By Judge Fogel.  
25 That was part of all the briefing here.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 THE COURT: Right.

2 MR. KOURETSCHIAN: So -- and it was a statement  
3 that was made. I'm not sure it was quite in the order.

4 THE COURT: Right. Right. Okay.

5 MR. PRESIADO: If I can concur with that, your  
6 Honor. There was no order --

7 THE COURT: And I know that it was sent to me  
8 because he wanted me the deal with this --

9 MR. PRESIADO: Yes.

10 THE COURT: It wasn't so obvious to me as to  
11 why he wanted me to deal with this, and now it is more  
12 obvious to me why he wanted me to deal with this.

13 MR. PRESIADO: There was no order, and the issue  
14 was not, in fact, argued strenuously in front of him. It  
15 was more of his understanding without having read any of  
16 these papers obviously --

17 THE COURT: Right.

18 MR. PRESIADO: -- and without having read the  
19 motion to stay his understanding of how he thought things  
20 should progress, and because you have different calendars --

21 THE COURT: Because I do the discovery he was  
22 going to leave it to me to decide if there was any way for  
23 this to go forward as long as there was a pending criminal  
24 case, and what the implications would be in the criminal  
25 case.

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 MR. PRESIADO: And because there were different  
2 calendars he thought, it seemed to me, that he should just  
3 let it proceed as is, and to the extent this could be  
4 helpful to him, to the extent it could, he couldn't have  
5 known at the time that this would.

6 But to the extent it could be helpful I'm sure he  
7 thought he could take advantage of that. But I don't think  
8 it was set in stone, and certainly not an order that he  
9 needed this to be done first.

10 THE COURT: Go fight your discovery problems in  
11 front of Judge Trumbull and tell her that the Fifth  
12 Amendment is all over this place, and then let me figure out  
13 what to do depending on what she says?

14 MR. PRESIADO: Let her recommend a stay.

15 MR. EBERHART: I'll just read to you, your Honor,  
16 what he said.

17 He said:

18 "The motion to stay seems to me, just  
19 thinking about it logically, is going to  
20 be informed by the result of the motion to  
21 compel. I'd like to see what Judge  
22 Trumbull's take is on the matter before  
23 deciding whether a stay is required."

24 That's what he said.

25 MR. PRESIADO: And I think it was that simple,

1 your Honor, yes.

2 THE COURT: Okay. Is there anything else?

3 Okay. This matter is submitted and you will hear  
4 shortly what my position is.

5 MR. EBERHART: Thank you, your Honor.

6 MR. PRESIADO: Thank you, your Honor.

7 MR. FOREMAN: Thank you, your Honor.

8 THE COURT: Thank you.

9 (The proceedings concluded at 11:41 a.m.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425



CERTIFICATE OF REPORTER

I, CHRISTINE TRISKA, Pro-Tem Reporter for the United States Court, Northern District of California, San Jose Division, hereby certify that the foregoing proceedings in Case No. C 08-04052, EBAY INC. versus DIGITAL POINT SOLUTIONS, et al. were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/S/ Christine Triska

Christine Triska, CSR 12826, CSR, RPR

Monday, November 30, 2009

Christine A. Triska, CSR, RPR  
Pro-Tem Reporter - U.S. District Court  
(650) 743-8425

1 **CERTIFICATE OF SERVICE**

2 I, Rhonda Radford, declare as follows:

3 I am employed in the County of Orange, State of California; I am over the age of eighteen  
4 years and am not a party to this action; my business address is 2211 Michelson Drive, Seventh Floor,  
5 Irvine, California 92612, in said County and State. On December 21, 2009, the document(s) entitled:

6 **RESPONSE TO OBJECTION OF EBAY INC. TO MAGISTRATE JUDGE**  
7 **TRUMBULL'S ORDER OF NOVEMBER 19, 2009 ON EBAY'S MOTIONS TO COMPEL**

8 was/were served as follows:

9  **CM/ECF ELECTRONIC SERVICE:** The following are registered as CM/ECF Users with the  
10 Court, and have consented to service through the Court's automatic transmission of a notice of  
11 electronic filing:

12 David R. Eberhart  
13 Sharon M. Bunzel  
14 Colleen M. Kennedy  
15 O'Melveny & Myers  
16 Two Embarcadero, 20<sup>th</sup> Floor  
17 San Francisco, CA 94111  
18 Tel: (949) 984-8700 / Fax: (949) 984-8701  
19 Email: [deberhart@omm.com](mailto:deberhart@omm.com),  
20 [sbunzel@omm.com](mailto:sbunzel@omm.com)

*Attorneys for Plaintiff eBay, Inc.*

21 Stewart H. Foreman  
22 Freeland, Cooper & Foreman, LLP  
23 150 Spear Street, Suite 1800  
24 San Francisco, CA 94105  
25 Tel: (949) 541-0200 / Fax: (949) 495-4332  
26 Email: [foreman@freelandlaw.com](mailto:foreman@freelandlaw.com)

*Attorneys for Defendants Todd Dunning and  
Dunning Enterprises, Inc.*

27 Seyamack Kouretchian  
28 Ross M. Campbell  
Coast Law Group, LLP  
1140 S. Coast Hwy. 101  
Encinitas, CA 92024  
Tel: (760) 942-8505 / Fax: (760) 942-8515  
Email: [seyamack@coastlawgroup.com](mailto:seyamack@coastlawgroup.com)  
[Rcampbell@coastlawgroup.com](mailto:Rcampbell@coastlawgroup.com)

*Attorneys for Digital Point Solutions, Inc. and  
Shawn Hogan*

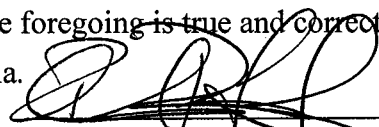
Patrick K. McClellan  
Law Offices of Patrick K. McClellan  
2211 Michelson Drive, Suite 700  
Irvine, California 92612  
Tel: (949) 261-7615 / Fax: (949) 851-2772  
Email: [pkellymc@pacbell.net](mailto:pkellymc@pacbell.net)

*Attorney for Kessler's Flying Circus*

29 I am employed in the office of Rus, Miliband & Smith, APC, a member of the bar  
30 of this Court, and the foregoing document(s) was/were printed on recycled paper.

31  **FEDERAL** I declare under penalty of perjury that the foregoing is true and correct.

32 Executed on December 21, 2009, at Irvine, California.

33   
34 \_\_\_\_\_  
35 RHONDA RADFORD