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Attorneys for Plaintiff
Commission Junction, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE, CENTRAL BRANCH

COMMISSION JUNCTION, INC.,

Plaintiff,

v.

THUNDERWOOD HOLDINGS, INC. dba
KESSLER'S FLYING CIRCUS; TODD
DUNNING; BRIAN DUNNING; and
DOES 1 through 50, inclusive,

Defendants.

CASE NO.: 30-2008 00101025
ASSIGNED FOR ALL PURPOSES TO:
JUDGE RANDELL L. WILKINSON
DEPARTMENT C25

**SECOND AMENDED COMPLAINT
FOR DAMAGES**

- 1. Breach of Contract
- 2. Open Book Account
- 3. Account Stated
- 4. Reasonable Value
- 5. Conversion
- 6. Unfair Competition
- 7. Declaratory Relief

[Unlimited]

Plaintiff Commission Junction, Inc. alleges as follows:

- 1. At all times relevant herein, plaintiff Commission Junction, Inc. ("CJI") was a corporation organized and existing under the laws of the State of Delaware and wholly

1 owned by ValueClick, Inc., a corporation organized and existing under the laws of the
2 State of California with its principal place of business in the County Los Angeles, State of
3 California.

4 2. CJI is informed and believes that at all times relevant herein defendant
5 Kessler's Flying Circus was a California general partnership doing business in the State of
6 California and the Counties of Los Angeles and Orange.

7 3. CJI is informed and believes that at all times relevant herein defendant
8 Thunderwood Holdings, Inc. was a California corporation doing business at times as
9 "Kessler's Flying Circus", in the State of California and the Counties of Los Angeles and
10 Orange. Thunderwood Holdings, Inc. was at all times relevant a general partner of
11 Kessler's Flying Circus.

12 4. CJI is informed and believes that at all times relevant herein defendant Todd
13 Dunning is an individual doing business in the State of California and the Counties of
14 Los Angeles and Orange. Todd Dunning was at all times relevant a general partner of
15 Kessler's Flying Circus.

16 5. CJI is informed and believes that at all times relevant herein defendant Brian
17 Dunning is an individual doing business in the State of California and the Counties of
18 Los Angeles and Orange. Defendants Kessler's Flying Circus, Thunderwood Holdings,
19 Inc., Todd Dunning, and Brian Dunning will be referred to hereinafter collectively as
20 "KESSLER".

21 6. At all times herein mentioned CJI's headquarters and principal place of
22 business was in Westlake Village, California. The indebtedness described herein was
23 incurred and payable within the County of Los Angeles, State of California and in the
24 above judicial district.

25 7. Said obligation is commercial in nature and not based on a retail installment,
26 sales contract, or a conditional sales contract and is not to subject the provisions of
27 California Civil Code §1812.10 and/or §2984.4.

28 ///

1 the parties' Agreement is attached hereto as Exhibit "A" and incorporated herein by this
2 reference. While Exhibit "A" is the Agreement defendants KESSLER, DOES 1-20, and
3 each of them, entered into the with CJI, it does not show the parties' signatures inasmuch
4 as defendants KESSLER, DOES 1-20, and each of them, chose to enter into the Agreement
5 via the Internet and the defendants have a copy of the Agreement printed that day.

6 13. The Agreement includes the following provisions:

7 [KESSLER] "may not place Links to an Advertiser's Web Site or Web Site
8 content in third party newsgroups, message boards, blogs, unsolicited email
9 and other types of spam, link farms, counters, chatrooms, or guestbooks."

10 Agreement at Section 1(d)(i);

11 [KESSLER] "shall not cause any Transactions to be made that are not in
12 good faith, including, but not limited to, using any device, program, robot,
13 iframes, or hidden frames." Agreement at Section 1(d)(ii);

14 "None of Your [KESSLER's] promotional activities may infringe an
15 Advertiser's proprietary rights CJ's [CJI's] proprietary rights, or a third
16 party's proprietary rights. Agreement at Section 1(d)(iii);

17 "You [KESSLER] represent and warrant that all promotional means used by
18 You [KESSLER] will not contain objectionable content (including but not
19 limited to content that is misleading, libelous, defamatory, obscene, violent,
20 bigoted, hate-oriented, illegal, and/or promoting illegal goods, services or
21 activities), and that You [KESSLER] will not mislead others. You
22 [KESSLER] agree to: (i) use ethical and legal business practices, (ii) comply
23 with the Advertisers' Program terms and this Agreement, (iii) maintain a
24 privacy policy on Your Web site and for any non-Web site based promotional
25 method made available to Visitors, and (iv) designate Your [KESSLER]
26 Publisher Account as "special" if You [KESSLER] promote an Advertiser(s)
27 by any means other than displaying a Link to the Advertiser on Your
28 [KESSLER] Web site. CJ [CJI] must approve all of Your [KESSLER]

1 promotional activities and may deem Your [KESSLER] promotional
2 activities inappropriate and a material breach of this Agreement in CJ's
3 [CJ's] sole discretion." Agreement at Section 2(b); and
4 "You [KESSLER] represent and warrant that: (i) You [KESSLER] have all
5 appropriate authority to operate, and to any and all content on, Your
6 [KESSLER] Web site(s); (ii) You [KESSLER] have all appropriate authority
7 in any promotional method you may choose to use." Agreement at
8 Section 7(c)(ii).

9 14. CJI has performed all conditions, covenants, and promises required on its
10 part to be performed in accordance with the terms and conditions of said Agreement.

11 15. CJI is informed and believes, and on that basis alleges, that beginning in
12 April of 2007 and continuing thereafter, defendants KESSLER, DOES 1-20, and each of
13 them, breached the Agreement by, *inter alia*, the following: KESSLER was providing
14 third parties with the ability to place widgets on Websites that KESSLER did not
15 own/operate without permission from the website owners to do so; KESSLER's
16 WhoLinked provided a widget used by bloggers and webmasters to display a list of
17 high-ranking sites linking to their site; KESSLER's MySpaceMaps provided widgets users
18 placed on social networking profiles, including MySpace; and KESSLER did not comply
19 with the blog sites' terms and, importantly, the following MySpace terms, which prohibit
20 commercial activity without consent:

21 "Non-commercial Use by Members. The MySpace Services are for the
22 personal use of Members only and may not be used in connection with any
23 commercial endeavors except those that are specifically endorsed or
24 approved by MySpace.com. Illegal and/or unauthorized use of the MySpace
25 Services, including collecting usernames and/or email addresses of Members
26 by electronic or other means for the purpose of sending unsolicited email or
27 unauthorized framing of or linking to the MySpace Website is prohibited.
28 Commercial advertisements, affiliate links, and other forms of solicitation

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may be removed from Member profiles without notice and may result in termination of Membership privileges. Appropriate legal action will be taken for any illegal or unauthorized use of the MySpace Services.”

“Content/Activity Prohibited. The following is a partial list of the kind of Content that is illegal or prohibited to post on or through the MySpace Services. MySpace.com reserves the right to investigate and take appropriate legal action against anyone who, in MySpace.com’s sole discretion, violates this provision, including without limitation, removing the offending communication from the MySpace Services and terminating the Membership of such violators. Prohibited Content includes, but is not limited to Content that, in the sole discretion of MySpace.com: ... involves commercial activities and/or sales without our prior written consent such as contests, sweepstakes, barter, advertising, or pyramid schemes.”

16. CJI is informed and believes, and on that basis alleges, that beginning in April of 2007 and continuing thereafter, defendants KESSLER, DOES 1-20, and each of them, further breached the Agreement by, *inter alia*, inflating traffic, forcing cookies, infringing on other’s proprietary rights, providing links and widgets to wrongfully promote and/or force traffic to ebay.com, and promoting objectionable content as that is defined in the Agreement. In addition, such actions by KESSLER, DOES 1-20, and each of them, were fraudulent, unfair, deceptive, and misleading advertising and business practices which are also breaches of the Agreement.

17. Among other damaging results, these actions by defendants KESSLER, DOES 1-20, and each of them, resulted in alleged violations of CJI’s agreements with eBay, Inc. which further resulted in the amount of \$565,517.84 not being paid by eBay, Inc. to CJI despite CJI paying that amount to defendants KESSLER, DOES 1-20, and each of them.

18. Pursuant to Section 3 of the Agreement, CJI has a right to a return from defendants KESSLER, DOES 1-20, and each of them of the wrongful payment made to

1 defendants KESSLER, DOES 1-20, and each of them.

2 19. Since June of 2007, CJI has requested that defendants KESSLER,
3 DOES 1-20, and each of them, perform their obligation, under the Agreement, by returning
4 the inadvertent payment of \$565,517.84 made to defendants KESSLER, DOES 1-20, and
5 each of them, which payment was not due to defendants based on their conduct as set forth
6 herein above. True and correct copies of certain, but not all, requests for return of the
7 \$565,517.84 are attached hereto collectively as Exhibit "B" and incorporated herein by this
8 reference.

9 20. Defendants KESSLER, DOES 1-20, and each of them, further breached the
10 Agreement by failing and refusing to pay the sum owed as set forth herein above.

11 21. In addition, defendants KESSLER, DOES 1-20, and each of them, breached
12 the implied covenant of good faith and fair dealing by, *inter alia*, the conduct set forth
13 herein above, failing and refusing to pay the sum owed, and failing to respond to repeated
14 requests for payment.

15 22. No part of that sum has been paid, and is now due, owing and unpaid from
16 defendants, and each of them, to CJI, the sum of \$565,517.84 as of June 15, 2007, and
17 interest thereon.

18 23. As a further result of the breach by defendants KESSLER, DOES 1-20, and
19 each of them, CJI has retained counsel and has incurred, and will incur, attorneys' fees and
20 expenses in an amount according to proof, which it is entitled to recover pursuant to the
21 Agreement.

22
23 SECOND CAUSE OF ACTION

24 (For Open Book Account Against All Defendants)

25 24. CJI incorporates by reference the allegations of paragraphs 1 through 23
26 above as though fully set forth herein.

27 25. CJI is informed and believes, and thereon alleges, that within the last year,
28 defendants KESSLER, DOES 1-20, and each of them, became indebted to CJI on an open

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book account for a balance due in the sum of \$565,517.84 as of June 15, 2007 for goods and services furnished and delivered to defendants, and each of them, at their request.

26. No part of this sum has been paid, although demand therefor has been made, and the sum of \$565,517.84 is now due and owing from said defendants, and each of them, to CJI.

THIRD CAUSE OF ACTION

(For Account Stated Against All Defendants)

27. CJI incorporates by reference the allegations of paragraphs 1 through 26 above as though fully set forth herein.

28. CJI is informed and believes, and on that basis alleges, that beginning in June of 2007 and continuing thereafter, there was an account stated between CJI and defendants, and each of them, in which the sum of \$565,517.84 was agreed on as the balance due CJI.

29. No part of such sum has been paid, although demand therefor has been made, and the sum of \$565,517.84 is now due and owing from said defendants, and each of them, to CJI.

FOURTH CAUSE OF ACTION

(For Reasonable Value Against All Defendants)

30. CJI incorporates by reference the allegations of paragraphs 1 through 29 above as though fully set forth herein.

31. CJI is informed and believes, and on that basis alleges, that beginning in June 2007 and continuing thereafter defendants, and each of them, became indebted to CJI in the reasonable sum of \$565,517.84 for goods and services furnished to defendants, and each of them, at their request, and that defendants promised to pay the reasonable value for goods and services furnished.

32. No part of such sum has been paid, although demand therefor has been made, and the sum of \$565,517.84 is now due and owing from said defendants, and each of them,

1 to CJI.

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FIFTH CAUSE OF ACTION

4

(Conversion against All Defendants)

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33. CJI incorporates by this reference above paragraphs 1 through 32, inclusive, as if fully set forth herein.

7

34. At all times relevant, CJI had a right of ownership of its \$565,517.84.

8

However, based on the wrongful conduct by and activities of defendants KESSLER, DOES 1-50, and each of them, as more fully described in Paragraphs 12-18 herein above, that sum was wrongfully delivered to defendants KESSLER, DOES 1-50, and each of them.

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35. In June of 2007, CJI sent a payment of \$565,517.84 to defendants

12

KESSLER, DOES 1-50, and each of them. As set forth herein above, defendants

13

KESSLER, DOES 1-50, and each of them, were not owed the described sum of

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\$565,517.84 or at all.

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36. On numerous occasions, CJI has requested the return of the \$565,517.84

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from defendants KESSLER, DOES 1-50, and each of them, however, said defendants have

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refused to return CJI's property and have converted it as their own. The actions of

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defendants KESSLER, DOES 1-50, and each of them, wrongfully and intentionally

19

interfered with CJI's right of possession of the \$565,517.84.

20

37. Because defendants KESSLER, DOES 1-50, and each of them, have

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wrongfully exercised possession of CJI's property, there is now due, owing and unpaid

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from defendants, and each of them, to CJI, the sum of \$565,517.84 as of June 15, 2007,

23

and interest thereon.

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SIXTH CAUSE OF ACTION

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(Unfair Competition against All Defendants)

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38. CJI incorporates by this reference above paragraphs 1 through 37, inclusive,

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as if fully set forth herein.

1 39. As more fully described in Paragraphs 12-18 herein above, defendants
2 KESSLER, DOES 1-20, and each of them, engaged in unfair, deceptive, and misleading
3 advertising and business practices. Such conduct by defendants KESSLER, DOES 1-20,
4 and each of them, violates California Business and Professions Code §17200 *et al.*

5 40. Indeed, the actions of defendants KESSLER, DOES 1-20, and each of them,
6 were unfair, deceptive, and misleading advertising and business practices such that the
7 United States Federal Bureau of Investigation and/or United States Attorney initiated a
8 Grand Jury investigation into said practices and subpoenaed CJI's business records
9 regarding defendants KESSLER, DOES 1-20, and each of them.

10 41. Since July of 2007, CJI has requested that defendants KESSLER,
11 DOES 1-20, and each of them, halt its wrongful actions and return CJI's inadvertent
12 payment of \$565,517.84 made to defendants KESSLER, DOES 1-20, and each of them,
13 which payment was not due to defendants based on their conduct as set forth herein above.

14 42. Defendants KESSLER, DOES 1-20, and each of them, failed to halt their
15 wrongful conduct as herein above alleged and have failed and refused to pay the
16 outstanding sum of \$565,517.84.

17 43. No part of that sum has been paid, and is now due, owing and unpaid from
18 defendants, and each of them, to CJI, the sum of \$565,517.84 as of June 15, 2007, and
19 interest thereon.

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21 SEVENTH CAUSE OF ACTION

22 (Declaratory Relief against All Defendants)

23 44. CJI incorporates by this reference above paragraphs 1 through 43, inclusive,
24 as if fully set forth herein.

25 45. An actual controversy has arisen and now exists between CJI and defendants
26 KESSLER and DOES 1-50, inclusive. CJI contends that defendants KESSLER and
27 DOES 1-50, inclusive, engaged in unfair, deceptive, and misleading advertising and
28 business practices and are obligated to pay CJI the sum of \$565,517.84. CJI is informed

1 and believes and thereon alleges that defendants KESSLER and DOES 1-50, inclusive,
2 contend otherwise.

3 46. It would be fair, just, and appropriate for this Court to determine the rights
4 and obligations of the parties as to this matter, and declaratory relief is necessary and
5 appropriate at this time so that CJI may ascertain its rights and duties and have ascertained
6 defendants' obligations.

7 47. CJI therefore seeks a declaratory judgment providing that defendants
8 KESSLER and DOES 1-50, inclusive, are obligated to provide CJI with the sum of
9 \$565,517.84 as a result of the inadvertent payment and the defendants' conduct as
10 described herein above.

11
12 WHEREFORE, CJI prays for judgment in its favor and against defendants
13 KESSLER and DOES 1-50, and each of them, as follows on the causes of action:

14 ON THE FIRST CAUSE OF ACTION

15 1. For general and specific damages according to proof, including attorneys'
16 fees, costs, expenses, and interest thereon;

17 ON THE SECOND CAUSE OF ACTION

18 2. For general and specific damages according to proof, including attorneys'
19 fees, costs, expenses, and interest thereon;

20 ON THE THIRD CAUSE OF ACTION

21 3. For general and specific damages according to proof, including attorneys'
22 fees, costs, expenses, and interest thereon;

23 ON THE FOURTH CAUSE OF ACTION

24 4. For general and specific damages according to proof, including attorneys'
25 fees, costs, expenses, and interest thereon;

26 ON THE FIFTH CAUSE OF ACTION

27 5. For general and specific damages according to proof, including attorneys'
28 fees, costs, expenses, and interest thereon;

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ON THE SIXTH CAUSE OF ACTION

6. For general and specific damages according to proof, including attorneys' fees, costs, expenses, and interest thereon;

ON THE SEVENTH CAUSE OF ACTION

7. For a judicial declaration that defendants KESSLER and DOES 1-50, inclusive, are obligated to provide CJI with the sum of \$565,517.84 as a result of the inadvertent payment and the defendants' conduct as described herein above.

ON ALL CAUSES OF ACTION

8. For costs of suit incurred herein; and

9. For such other and further relief, legal and/or equitable, as the Court may deem just and proper.

Dated: May 15, 2008

ERNSTER LAW OFFICES, P.C.

By: Phil J. Montoya, Jr.
Phil J. Montoya, Jr.
Attorneys for Plaintiff
Commission Junction, Inc.

EXHIBIT "B"

Alyson Emmer

From: Peter Bexellus
Sent: Wednesday, June 27, 2007 6:41 PM
To: todd@dunningmarketing.com
Subject: Kessler's Flying Circus - wiring instructions
Attachments: Kesslers ltr_Final.doc

Hi Todd:

Further to our conversation, this is the letter I referred to. I appreciate your understanding in this matter. As we discussed, please wire us the funds (\$565,517.84) less your wiring fee, tomorrow morning at your convenience. If you could kindly call me at (805-450-6126) and email to confirm once done, I'd greatly appreciate it.

Below are the payment instructions for wire payment:

Wire Payment Information

Beneficiary: Commission Junction
Bank: Wells Fargo Bank
Address: 420 Montgomery Street
San Francisco,
CA 94104
Account No: 4121196406
Routing No: 121 000 248
Swift Code: BIC WFBIUS6S

Thanks again for your cooperation and understanding!

Cheers,

Peter Bexellus
Account Manager - Strategic Accounts

Commission Junction, a ValueClick Company
530 East Montecito Street
Santa Barbara, CA 93103
Direct: 805 730 8106
Fax: 805 730 8458
Email: pbexellus@cj.com

Any disclosure, copying, distribution, posting or use of the contents of this information is prohibited and may be unlawful. This e-mail may contain proprietary or confidential information and is for the sole use of the intended recipient(s). Thank you.

June 27, 2007

Mr. Brian Dunning
Mr. Todd Dunning
Kessler's Flying Circus
15 High Blf.
Laguna Niguel, CA 92677

Re: Kessler's Flying Circus—CID 1558264

On June 20, 2007, following initial approval by your firm's advertiser, eBay Inc., Commission Junction issued a US Direct Deposit payment of \$565,517.84 to your checking account number as logged in our Commission Junction Marketplace ("CJM") system. After this payment was processed by us, we were requested by eBay to suspend payouts to various publishers, including your firm, pending a review of your potentially questionable activity in CJM for the month of May.

Accordingly, we have attempted to recall the direct deposit transaction through the banking system, but have been unsuccessful in completing the recall transaction due to insufficient funds in your bank account described above.

We request your immediate cooperation by facilitating our recall of \$565,517.84 from your bank account to avoid the potential initiation of alternative actions to recall such funds.

Remittance instructions:

By mail to:

Commission Junction
#774140
4140 Solutions Center
Chicago, IL 60677-4001

Or by wire to:

Routing number: 121000248
Account number: 4121196406

Please contact Peter Bexelius at (805) 730-8106 if you require additional information.

Sincerely,

Commission Junction, Inc.