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MELINDA HAAG (CABN 132612)  
United States Attorney

**Filed**  
APR 15 2013  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BRIAN DUNNING, )  
 )  
Defendant. )

No. CR 10-0494 EJD  
VIOLATION: 18 U.S.C. § 1343 –  
Wire Fraud  
  
SAN JOSE VENUE

SUPERSEDING INFORMATION

The United States Attorney charges:

At all times relevant to this Superseding Information:

BACKGROUND

eBay, Inc.

1. eBay, Inc. (“eBay”) was a corporation headquartered in San Jose, California. eBay owned and operated a popular on-line marketplace that enabled people to sell goods or services locally, nationally, and internationally using the Internet via eBay’s websites (collectively, “eBay.com”). One of eBay’s most popular services was the on-line auction, which allowed registered sellers to list goods or services for sale on eBay.com. Sellers commonly provided descriptions and photographs of the items posted for sale, and registered buyers could bid on-line

1 for these items prior to the set end date and time of the auction. In some circumstances, registered  
2 buyers could purchase items without engaging in an auction through eBay's "Buy It Now" option.  
3 eBay earned revenue each time a seller posted an item for sale on eBay.com, as well as each time  
4 a seller sold an item on eBay.com.

5 **eBay's Affiliate Program**

6 2. eBay developed what is referred to herein as the "Affiliate Program." The Affiliate  
7 Program was a means by which eBay worked with third-party marketers to "drive" Internet  
8 "traffic" to eBay.com.

9 3. Under eBay's Affiliate Program, it was intended that a third-party affiliate would  
10 send visitors to eBay.com from a website associated with the affiliate, and would do so (at least in  
11 theory) by suggesting (in some way) that the visitor "click" on a "link" to eBay.com located on the  
12 affiliate's website. If, within specified time periods, such visitors to eBay.com became new active  
13 users, won auctions, or made Buy-It-Now purchases on eBay.com, the affiliate received  
14 compensation from eBay. A "new active user" was defined to include a user who both set up a  
15 new eBay.com account and then placed a bid (whether that bid was a winning bid or not). For  
16 purposes of this Superseding Information, the actions of becoming a new active user, winning an  
17 auction, and making a purchase are referred to collectively as "revenue actions."

18 4. The Affiliate Program defined the rates and amounts of compensation that eBay  
19 paid to an affiliate. These rates and amounts of compensation were based on the monthly totals of  
20 revenue actions attributable to that affiliate. For instance, if 1 to 49 of the individuals the affiliate  
21 referred to eBay became new active users within 30 days, eBay paid the affiliate \$25.00 per new  
22 user. As another example, if the individuals the affiliate referred to eBay won auctions for items  
23 totaling \$99.99 in value within seven days, eBay paid the affiliate 50% of the revenue earned by  
24 eBay on those transactions. Each of these rates of compensation increased as the total number of  
25 new active users and the total amount of sales attributable to referrals from a particular affiliate  
26 increased.

27 5. In order to become a member of the Affiliate Program, a would-be affiliate  
28 registered through another company, Commission Junction, Inc. ("CJ"). eBay contracted with CJ

1 not only to register affiliates, but also to assist affiliates with their accounts and to monitor  
2 affiliates' activity to ensure quality control and compliance with the rules and regulations  
3 governing the Affiliate Program. CJ generally paid affiliates on a monthly basis, with funds  
4 provided by eBay.

5 **Brian Dunning and Kessler's Flying Circus**

6 6. The defendant Brian Dunning ("Dunning") was an individual who resided in the  
7 Central District of California. Kessler's Flying Circus ("KFC") was a partnership that was  
8 owned, in part, by Dunning. Dunning was also the sole owner of the company Thunderwood  
9 Holdings, Inc., and he also did business as BrianDunning.com. Thunderwood Holdings, together  
10 with the company Dunning Enterprise, Inc., did business as KFC. These non-person entities are  
11 referred to collectively as "KFC."

12 7. KFC was a member of the Affiliate Program. In 2006, KFC received  
13 approximately \$2,000,000 in compensation from the eBay Affiliate Program in the United States.  
14 Between January and June 2007, KFC earned approximately \$3,300,000 in compensation from  
15 the eBay Affiliate Program in the United States. As of approximately June 2007, KFC was the  
16 number-two producing account in the Affiliate Program. In other words, based on data provided  
17 to eBay, KFC was purported to be the affiliate that drove the second-most revenue-producing  
18 traffic to eBay.com.

19 **Affiliate Program Tracking**

20 8. eBay used an automated tracking process in an effort to ensure that affiliates  
21 received appropriate compensation. This tracking process utilized "cookies."

22 9. In Internet parlance, the term "cookie" refers to a text file that is generated by a  
23 website's servers when a user on a remote computer accesses it. The cookie is sent to the user's  
24 computer by the website's servers, and is thereafter placed (or "dropped") on that user's computer.  
25 The cookie includes information such as user preferences for a particular user, connection data  
26 (including time and date of use), records of user activity (including files accessed, services used,  
27 or "shopping cart" contents), and account information (including usernames and passwords). The  
28 information contained in that cookie is then transmitted by the user's computer to the website on

1 subsequent visits to that website by the user so that, based on that information, the website may  
2 better serve the user's particular needs and preferences.

3 10. In the eBay Affiliate Program, when a visitor was referred to eBay.com from an  
4 affiliate website, eBay dropped a "cookie" on that user's computer. This cookie contained  
5 information that was used to identify the Affiliate Program member that had directed that  
6 particular user to eBay.com. This information, which included a "publisher ID," referring to the  
7 affiliate, and/or a "campaign ID," referring to a particular program operated by the affiliate, is  
8 referred to collectively here as the "Affiliate ID."

9 11. If and when that user later engaged in a revenue action on eBay.com, the Affiliate  
10 ID would be transmitted by the user's computer to eBay. An automated tracking process  
11 performed the analysis to determine whether the revenue action had occurred within the specified  
12 time frames.

13 12. If a cookie from an affiliate was present on the user's computer at the time of the  
14 revenue action, the affiliate identified by that cookie was credited with the revenue action. If there  
15 was no qualifying cookie on the user's computer at the time of the revenue action, then no affiliate  
16 was credited.

17 13. This process was intended to ensure that affiliates in the Affiliate Program received  
18 appropriate compensation from eBay based on the rates and amounts of compensation defined by  
19 the Affiliate Program.

#### 20 **Affiliate Program Terms and Conditions**

21 14. eBay affiliates such as KFC agreed to certain terms and conditions required by  
22 eBay in order to participate in the Affiliate Program. These terms and conditions provided that  
23 the affiliate would not deliver any eBay-related cookies or other tracking tags to the computers of  
24 the affiliate's user when the user was merely viewing the affiliate's advertisements or while the  
25 affiliate's applications were merely active or open on the affiliate's user's computer.

26 15. In addition, eBay affiliates such as KFC accepted the terms of CJ's Publisher  
27 Service Agreement ("PSA") at the time of the affiliate's registration in the Affiliate Program. The  
28 PSA informed affiliates that certain behavior was not acceptable and was grounds for removal

1 from the Affiliate Program. Prohibited behavior included generating visitor clicks using any  
2 “device, program, [or] robot.” The PSA also required each affiliate to provide CJ and eBay with  
3 accurate and up-to-date information about the affiliate’s promotional methods.

4 **“Cookie Stuffing”**

5 16. For purposes of this Superseding Information, “cookie stuffing” is the act of  
6 depositing, or causing to be deposited, a cookie containing an Affiliate ID onto a user’s computer  
7 without that user having clicked on an advertisement or link.

8 **THE SCHEME**

9 17. As set forth more fully below, beginning no later than in or about May 2006, and  
10 continuing to in or about June 2007, in the Northern District of California and elsewhere, the  
11 defendant,

12 **BRIAN DUNNING,**

13 did knowingly devise and intend to devise, and did participate in, a material scheme and artifice to  
14 defraud, and to obtain money and property by means of materially false, misleading, and  
15 fraudulent pretenses, representations, omissions, and promises, which scheme and artifice is  
16 summarized below.

17 18. It was part of the scheme and artifice that, through various means, including the  
18 methods described below, the defendant disseminated on a large number of web pages computer  
19 code that, when those web pages were viewed by a computer user, was designed to cause that  
20 user’s computer to make a request to eBay’s home page merely for the purpose of prompting  
21 eBay’s servers to serve up a cookie, which would then be “stuffed” onto the user’s computer.  
22 These cookies contained information that identified an Affiliate ID of KFC. In such situations,  
23 the human user never actually clicked on an eBay advertisement or link on Dunning’s affiliate  
24 websites.

25 19. It was further part of the scheme and artifice that, in such situations, the computer  
26 code prevented eBay’s home page from actually “loading” on the user’s computer screen.  
27 Accordingly, the human user never actually viewed eBay’s home page when an eBay cookie  
28 identifying KFC was stuffed onto the user’s computer. Indeed, the human user never knew that

1 his or her computer had made a request to the website (*i.e.*, eBay.com) that had served up the  
2 cookie to be stuffed onto the computer.

3 20. It was further part of the scheme and artifice that the defendant provided free  
4 applications at two of his websites that users could download and use on their own websites:  
5 "ProfileMaps.info," which showed the physical location of visitors to a MySpace profile, and  
6 "WhoLinked.com," which showed who was linking to the user's website or blog. Any visitor to  
7 those websites could download either or both applications. Both applications included code that  
8 operated as follows: when a user visited a website that had installed the Profilemaps or Wholinked  
9 applications, the code would cause the user unknowingly to receive an eBay and/or CJ cookie  
10 with KFC's Affiliate ID without the user having clicked on an eBay ad or link, without the user  
11 knowing that his or her browser had been re-directed to the eBay and/or CJ affiliate tracking  
12 server, and without the user seeing any content of an eBay site. As a result, KFC would be paid if  
13 that user subsequently conducted an eBay revenue action within a certain period of time.

14 21. It was further part of the scheme and artifice that the defendant had the expectation  
15 and intention that many of the users whose computers had cookies stuffed on them would  
16 thereafter visit eBay.com and engage in revenue actions. If these revenue actions were within the  
17 time periods specified in the Affiliate Program, KFC would receive compensation from eBay with  
18 respect to those events. The defendant had the expectation and intention that these visits to  
19 eBay.com would be of each user's own accord, and would be separate and apart from any actions  
20 taken by the defendant to "drive" those users to eBay.com.

21 22. It was further part of the scheme and artifice that, in the situations described in the  
22 previous paragraph, the defendant caused these users' computers to transmit misrepresentations of  
23 material facts to eBay, in that these users' computers transmitted information contained in cookies  
24 stuffed onto those users' computers that falsely represented to eBay that the defendant's affiliate  
25 had originally directed the users to eBay.com and that, by implication, the affiliate was entitled to  
26 compensation from eBay if the users engaged in revenue actions within the specified time periods.  
27 In fact, the affiliate was not entitled to compensation from eBay with respect to the vast majority  
28 of revenue actions.

SUPERSEDING INFORMATION

1           23.     It was further part of the scheme and artifice that the defendant took certain actions  
2 in order to prevent eBay and CJ from detecting his fraudulent scheme. These actions included,  
3 but were not necessarily limited to, avoiding stuffing cookies on computers that appeared to be  
4 located within a 30 mile radius of the center point of Santa Barbara, California (where CJ was  
5 located) or the center point of certain other locations believed to be associated with individuals  
6 who did compliance work for CJ and/or eBay.

7           24.     It was further part of the scheme and artifice that the defendant made  
8 misrepresentations and omissions of material facts to eBay and/or Commission Junction with  
9 respect to his activities. For example, in or about September 7, 2006, the defendant falsely stated  
10 in an e-mail to an eBay employee that he was “absolutely confident” that his methods were “in  
11 line with the intended spirit of the terms” of the Affiliate Program.

12 COUNT ONE:           18 U.S.C. § 1343 – Wire Fraud

13           25.     The factual allegations in paragraphs 1 through 24 are re-alleged and incorporated  
14 as if set forth fully here.

15           26.     Beginning no later than in or about May 2006, and continuing to in or about June  
16 2007, in the Northern District of California, and elsewhere, the defendant,

17                                 BRIAN DUNNING,

18 did knowingly devise and intend to devise, and did participate in, a material scheme and artifice to  
19 defraud eBay and Commission Junction as to a material matter and to obtain money and property  
20 by means of materially false, misleading, and fraudulent pretenses, representations, omissions, and  
21 promises, and by the concealment of material facts.

22                                 USE OF THE WIRES

23           27.     On or about June 4, 2007, for the purpose of executing the scheme and artifice to  
24 defraud set forth above, and attempting to do so, the defendant did knowingly transmit and cause  
25 to be transmitted, in interstate and foreign commerce, by means of a wire communication, certain  
26 writings, signs, and signals, that is, the transmission of commands that included KFC’s Affiliate  
27 ID originating from a server the defendant controlled in Texas to a computer in California. Those  
28 commands caused the recipient computer to make connections to eBay servers, located in San

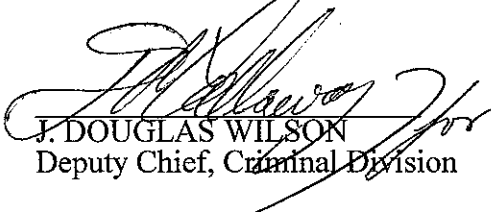
SUPERSEDING INFORMATION

1 Jose, California, that, in turn, caused a cookie with KFC's ID # 2326993 to be placed on a  
2 computer located in California, even though the user of that computer did not click on an eBay  
3 advertisement or link, and such that, if that user had later gone to eBay and conducted a revenue  
4 action within the applicable time period, KFC would have wrongfully received payment to which  
5 it was not entitled.

6 All in violation of Title 18, United States Code, Section 1343.

7 DATED: *April 15, 2013*

8 MELINDA HAAG  
9 United States Attorney

10   
11 J. DOUGLAS WILSON  
12 Deputy Chief, Criminal Division

13 (Approved as to form: )  
14 AUSA David R. Callaway

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AO 257 (Rev. 6/78)

**DEFENDANT INFORMATION RELATIVE TO A CRIMINAL ACTION - IN U.S. DISTRICT COURT**

BY:  COMPLAINT  INFORMATION  INDICTMENT  SUPERSEDING

**OFFENSE CHARGED**

18 U.S.C. 1343 - Wire Fraud (one count)

- Petty
- Minor
- Misdemeanor
- Felony

PENALTY: Maximum of 20 years prison, \$250K fine (or twice gross gain or gross loss, whichever is greater); 3 year TSR, \$100 SAF

Name of District Court, and/or Judge/Magistrate Location

NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

**Filed**  
APR 15 2013

**DEFENDANT - U.S.**

BRIAN DUNNING

DISTRICT COURT NUMBER  
CR 10-0494 EJD

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

**PROCEEDING**

Name of Complainant Agency, or Person (& Title, if any)

FBI (Special Agent Melanie Adams)

person is awaiting trial in another Federal or State Court, give name of court

this person/proceeding is transferred from another district per (circle one) FRCrp 20, 21, or 40. Show District

this is a reprosecution of charges previously dismissed which were dismissed on motion of:

U.S. ATTORNEY  DEFENSE

SHOW DOCKET NO.

this prosecution relates to a pending case involving this same defendant

MAGISTRATE CASE NO.

prior proceedings or appearance(s) before U.S. Magistrate regarding this defendant were recorded under

Name and Office of Person Furnishing Information on this form MELINDA HAAG

U.S. Attorney  Other U.S. Agency

Name of Assistant U.S. Attorney (if assigned) David R. Callaway

**DEFENDANT**

**IS NOT IN CUSTODY**

Has not been arrested, pending outcome this proceeding.

1)  If not detained give date any prior summons was served on above charges

2)  Is a Fugitive

3)  Is on Bail or Release from (show District)

NDCA (this case)

**IS IN CUSTODY**

4)  On this charge

5)  On another conviction }  Federal  State

6)  Awaiting trial on other charges  
If answer to (6) is "Yes", show name of institution

Has detainer been filed?  Yes  No

If "Yes" give date filed

DATE OF ARREST  Month/Day/Year

Or... if Arresting Agency & Warrant were not

DATE TRANSFERRED TO U.S. CUSTODY  Month/Day/Year

This report amends AO 257 previously submitted

**ADDITIONAL INFORMATION OR COMMENTS**

**PROCESS:**

SUMMONS  NO PROCESS\*  WARRANT

Bail Amount: \_\_\_\_\_

If Summons, complete following:

Arraignment  Initial Appearance

\* Where defendant previously apprehended on complaint, no new summons or warrant needed, since Magistrate has scheduled arraignment

Defendant Address: \_\_\_\_\_

Date/Time: \_\_\_\_\_ Before Judge: \_\_\_\_\_

Comments: Def. to be arraigned by EJD on Monday, April 15, 2013, at 2:00 p.m.