

United States District Court

FOR THE
NORTHERN DISTRICT OF CALIFORNIA

VENUE: SAN JOSE

FILED

JUN 24 P 4:51

RICHARD W. STEINBOCK
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

v.

E-filing **CR 10 0494**

RMW

BRIAN DUNNING,

DEFENDANT(S).

INDICTMENT

VIOLATIONS: 18 U.S.C. § 1343 - Wire Fraud; 18 U.S.C. § 981 (a)
(1)(C) and 28 U.S.C. § 2461 (c) - Criminal Forfeiture

CR 10-0494 (AT)

A true bill.

Sydney Benjamin
Foreman

Filed in open court this 24 day of

June, 2010
Frank Justiliano
FRANK JUSTILIANO
Clerk

Bail, \$~~50,000~~ FOR 7-22-10 SJ

[Signature]

1 JOSEPH P. RUSSONIELLO (CSBN 44332)
United States Attorney

FILED
2010 JUN 24 P 4: 52
U.S. DISTRICT COURT
SAN JOSE, CALIFORNIA
[Signature]

E-filing

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

RMW

10 SAN JOSE DIVISION

CR 10 0494
No.

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 v.)

14 BRIAN DUNNING,)

15 Defendant.)

VIOLETIONS: 18 U.S.C. § 1343 —
Wire Fraud; 18 U.S.C. § 981(a)(1)(C)
and 28 U.S.C. § 2461(c) — Criminal
Forfeiture

SAN JOSE VENUE

17 INDICTMENT

18 The Grand Jury charges:

19 At all times relevant to this Indictment:

20 BACKGROUND

21 EBay, Inc.

22 1. EBay, Inc. ("eBay") was a corporation headquartered in San Jose, California.
23 EBay owned and operated a popular on-line marketplace that enabled people to sell goods
24 or services locally, nationally, and internationally using the Internet via eBay's websites
25 (collectively referred to herein as "eBay.com"). One of eBay's most popular services was
26 the on-line auction, which allowed registered sellers to list goods or services for sale on
27 eBay.com. Sellers commonly provided descriptions and photographs of the items posted
28 for sale, and registered buyers could bid on-line for these items prior to the set end date

INDICTMENT
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1 and time of the auction. In some circumstances, registered buyers could purchase items
2 without engaging in an auction through eBay's "Buy It Now" option. eBay earned
3 revenue each time a seller posted an item for sale on eBay.com, as well as each time a
4 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
7 Affiliate Program was a means by which eBay worked with third-party marketers to
8 "drive" Internet "traffic" to eBay.com.

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

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

28 5. In order to become a member of the Affiliate Program, a would-be affiliate

1 registered through another company, Commission Junction, Inc. ("CJ"). eBay contracted
2 with CJ not only to register affiliates, but also to assist affiliates with their accounts and to
3 monitor affiliates' activity to ensure quality control and compliance with the rules and
4 regulations governing the Affiliate Program. CJ generally paid affiliates on a monthly
5 basis, with funds provided by eBay.

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

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

14 7. Kessler's Flying Circus was a member of the Affiliate Program. In 2006,
15 Kessler's Flying Circus received approximately \$2,800,000 in compensation from the
16 eBay Affiliate Program in the United States. Between January and June 2007, Kessler's
17 Flying Circus earned more than \$2,500,000 in compensation from the eBay Affiliate
18 Program in the United States. As of approximately June 2007, Kessler's Flying Circus
19 was the number-two producing account in the Affiliate Program. In other words, based on
20 data provided to eBay, Kessler's Flying Circus was purported to be the affiliate that drove
21 the second-most revenue-producing traffic to eBay.com.

22 **Affiliate Program Tracking**

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

25 9. In Internet parlance, the term "cookie" refers to a text file that is generated
26 by a website's servers when a user on a remote computer accesses it. The cookie is sent to
27 the user's computer by the website's servers, and is thereafter placed (or "dropped") on
28 that user's computer. The cookie includes information such as user preferences for a

1 particular user, connection data (including time and date of use), records of user activity
2 (including files accessed, services used, or "shopping cart" contents), and account
3 information (including usernames and passwords). The information contained in that
4 cookie is then transmitted by the user's computer to the website on subsequent visits to
5 that website by the user so that, based on that information, the website may better serve the
6 user's particular needs and preferences.

7 10. In the eBay Affiliate Program, when a visitor was referred to eBay.com from
8 an affiliate website, eBay "dropped" a "cookie" on that user's computer. This cookie
9 contained information that was used to identify the Affiliate Program member that had
10 directed that particular user to eBay.com. This information is referred to herein
11 collectively as the "Affiliate ID."

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

16 12. If cookies from more than one affiliate were present on the user's computer
17 at the time of the revenue action, the affiliate identified in the most recent cookie dropped
18 on the user's computer was credited with the revenue action. Similarly, if there was no
19 qualifying cookie on the user's computer at the time of the revenue action, then no affiliate
20 was credited.

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

24 **Affiliate Program Terms and Conditions**

25 14. eBay affiliates such as Kessler's Flying Circus agreed to certain terms and
26 conditions required by eBay in order to participate in the Affiliate Program. These terms
27 and conditions provided that the affiliate would not deliver any eBay-related cookies or
28 other tracking tags to the computers of the affiliate's user when the user was merely

1 viewing the affiliate's advertisements or while the affiliate's applications were merely
2 active or open on the affiliate's user's computer.

3 15. In addition, eBay affiliates such as Kessler's Flying Circus accepted the
4 terms of CJ's Publisher Service Agreement ("PSA") at the time of the affiliate's
5 registration in the Affiliate Program. The PSA informed affiliates that certain behavior
6 was not acceptable and was grounds for removal from the Affiliate Program. Prohibited
7 behavior included generating visitor clicks using any "device, program, [or] robot." The
8 PSA also required each affiliate to provide CJ and eBay with accurate and up-to-date
9 information about the affiliate's promotional methods.

10 "Cookie Stuffing"

11 16. For purposes of this Indictment, "cookie stuffing" is the act of depositing, or
12 causing to be deposited, a cookie containing an Affiliate ID onto a user's computer
13 without that user having clicked on an advertisement or link.

14 THE SCHEME

15 17. As set forth more fully below, beginning on a date unknown to the Grand
16 Jury, but no later than in or about early 2006, and continuing to in or about June 2007, in
17 the Northern District of California and elsewhere, the defendant,

18 BRIAN DUNNING,

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

23 18. It was part of the scheme and artifice that, through various means, the
24 defendant disseminated on a large number of web pages computer code that, when those
25 web pages were viewed by a computer user, was designed to cause that user's computer to
26 make a request to eBay's home page merely for the purpose of prompting eBay's servers
27 to serve up a cookie, which would then be "stuffed" onto the user's computer. These
28 cookies contained information that identified an Affiliate ID of Kessler's Flying Circus.

1 In such situations, the human user never actually clicked on an eBay advertisement or link
2 on Dunning's affiliate websites.

3 19. It was further part of the scheme and artifice that, in such situations, the
4 computer code prevented eBay's home page from actually "loading" on the user's
5 computer screen. Accordingly, the human user never actually viewed eBay's home page
6 when an eBay cookie identifying Kessler's Flying Circus was stuffed onto the user's
7 computer. Indeed, the human user never knew that the user's computer had made a
8 request to the website (i.e., eBay.com) that had served up the cookie to be stuffed onto the
9 computer.

10 20. It was further part of the scheme and artifice that the defendant attempted to
11 place this computer code on a large number of web pages, including web pages that were
12 not directly affiliated with Kessler's Flying Circus, all for the purpose of increasing the
13 number of computers onto which cookies containing information identifying the Affiliate
14 IDs of Kessler's Flying Circus would be stuffed.

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

23 22. It was further part of the scheme and artifice that, in the situations described
24 in the previous paragraph, the defendant caused these users' computers to transmit
25 misrepresentations of material facts to eBay, in that these users' computers transmitted
26 information contained in cookies stuffed onto those users' computers that falsely
27 represented to eBay that the defendant's affiliate had originally directed the users to
28 eBay.com and that, by implication, the affiliate was entitled to compensation from eBay if

1 the users engaged in revenue actions within the specified time periods. In fact, the affiliate
2 was not entitled to compensation from eBay with respect to the vast majority of revenue
3 actions.

4 23. It was further part of the scheme and artifice that the defendant took certain
5 actions in order to prevent eBay and CJ from detecting his fraudulent scheme. These
6 actions included, but were not necessarily limited to avoiding stuffing cookies on
7 computers that appeared to be located in San Jose, California (the location of eBay's
8 headquarters) or in Santa Barbara, California (the location of CJ's headquarters).

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

14 COUNTS ONE THROUGH FIVE: 18 U.S.C. § 1343 - Wire Fraud

15 25. The factual allegations in paragraphs 1 through 24 are re-alleged and
16 incorporated herein as if set forth in full.

17 26. Beginning on a date unknown to the Grand Jury, but by no later than in or
18 about early 2006, and continuing to in or about June 2007, in the Northern District of
19 California, and elsewhere, the defendant,

20 BRIAN DUNNING,

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

26 USE OF THE WIRES

27 27. On or about the dates listed below, for the purpose of executing the scheme

28 ///

INDICTMENT
[DUNNING]

1 and artifice to defraud set forth above, and attempting to do so, the defendant

2 BRIAN DUNNING

3 did knowingly transmit and cause to be transmitted, in interstate and foreign commerce, by
4 means of a wire communication, certain writings, signs, and signals, that is, transmissions
5 of cookies from an eBay computer server in San Jose, CA, to computers and computer
6 servers in other states and countries, as exemplified within the separate counts below,
7 where in each instance the individual did not click on an eBay advertisement or link:

COUNT	DATE	LOCATION OF COMPUTER OR COMPUTER SERVER AND IP ADDRESS OF USER	NATURE OF WIRE COMMUNICATION
One	06/08/07	Virginia IP Address 172.174.248.28	Cookie identifying Affiliate ID 2028993, pertaining to Kessler's Flying Circus
Two	06/08/07	United Kingdom (England) IP Address 86.132.112.91	Cookie identifying Affiliate ID 2028993, pertaining to Kessler's Flying Circus
Three	06/09/07	United Kingdom (England) IP Address 87.74.32.80	Cookie identifying Affiliate ID 2326993, pertaining to Kessler's Flying Circus
Four	06/11/07	United Kingdom (England) IP Address 88.105.18.148	Cookie identifying Affiliate ID 2326993, pertaining to Kessler's Flying Circus
Five	06/11/07	Ireland IP Address 89.101.229.12	Cookie identifying Affiliate ID 2326993, pertaining to Kessler's Flying Circus

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

21 **FORFEITURE ALLEGATION:** 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c)

22 28. The preceding factual allegations of this Indictment are hereby re-alleged
23 and by this reference fully incorporated herein for the purpose of alleging forfeiture
24 pursuant to the provisions of 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. 2461(c).

25 29. Upon conviction of one or more of the offenses alleged in Counts One
26 through Five of this Indictment, the defendant,

27 BRIAN DUNNING,

28 shall forfeit to the United States pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C.

INDICTMENT
[DUNNING]

1 § 2461(c) all property constituting, and derived from, proceeds the defendant obtained,
2 directly and indirectly, as the result of those violations.

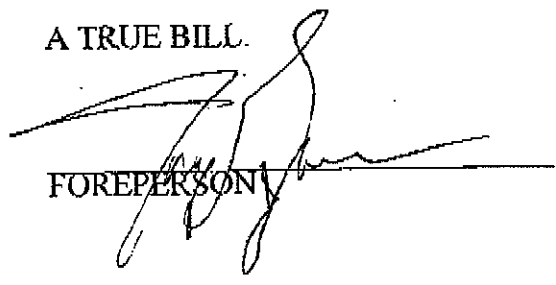
3 30. If any of the aforementioned property, as a result of any act or omission of
4 the defendant —

- 5 a. cannot be located upon the exercise of due diligence;
- 6 b. has been transferred or sold to, or deposited with, a third person;
- 7 c. has been placed beyond the jurisdiction of the Court;
- 8 d. has been substantially diminished in value; or
- 9 e. has been commingled with other property that cannot be divided without
10 difficulty;

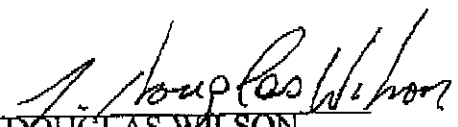
11 any and all interest defendant has in other property shall be vested in the United States and
12 forfeited to the United States pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C.
13 § 2461(c).


14 DATED: June 24, 2010

A TRUE BILL.


FOREPERSON

18 JOSEPH P. RUSSONIELLO
United States Attorney

19
20 
21 J. DOUGLAS WILSON
Acting Chief, Criminal Division

22
23 (Approved as to form: 
AUSA WALDINGER

28
INDICTMENT
[DUNNING]

AO 257 (Rev. 6/75)

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

BY: COMPLAINT INFORMATION INDICTMENT
 SUPERSEDING

OFFENSE CHARGED

Title 18, United States Code, Section 1343 - Wire Fraud (Five Counts)

Forfeiture Allegation

- Petty
- Minor
- Misdemeanor
- Felony

E-filing

PENALTY:

Maximum term of imprisonment of 20 years, maximum fine of \$250,000 or twice the gross gain/loss (whichever is greater), 3 years of supervised release, \$100 special assessment (per count)

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

NORTHERN DISTRICT OF CALIFORNIA

FILED

2010 JUN 24 4:52

DEFENDANT

BRIAN DUNNING

DISTRICT COURT NUMBER

CR 10 0494

RMW

PROCEEDING

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

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
Joseph P. Russoniello

U.S. Attorney Other U.S. Agency

Name of Assistant U.S. Attorney (if assigned)
KYLE F. WALDINGER

This report amends AO 257 previously submitted

ADDITIONAL INFORMATION OR COMMENTS

PROCESS:

SUMMONS NO PROCESS* WARRANT

If Summons, complete following:

Arraignment Initial Appearance

Defendant Address: [REDACTED]

Bail Amount: _____

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

Date/Time: July 22, 2010, 9:30 a.m. Before Judge: San Jose Duty Mag.

Comments: _____