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9 Attorneys for Defendants
10 DIRECTREVENUE LLC, THE BEST OFFERS NETWORK, LLC
11 (formerly known as and named in the complaint as BETTERINTERNET, LLC),
12 CHRIS DOWHAN and JOSHUA ABRAM

13 UNITED STATES DISTRICT COURT

14 FOR THE EASTERN DISTRICT OF CALIFORNIA

15 CONSUMER ADVOCATES RIGHTS) Case No.: 2:05-CV-02547-LKK-PAN
16 ENFORCEMENT SOCIETY, INC. (CARES,)
17 Inc.), a California not for Profit Corporation,) **ANSWER OF DEFENDANTS**
18 PETER MARTIN, an individual for himself) **DIRECTREVENUE, LLC, THE BEST**
19 and all those similarly situated, MATINA) **OFFERS NETWORK, LLC F/K/A**
20 DIANE BATTAGLIA, an individual for) **BETTERINTERNET, LLC, JOSHUA**
21 herself and all those similarly situated,) **ABRAM, AND CHRIS DOWHAN TO**
22) **PLAINTIFFS' COMPLAINT**

23 Plaintiffs,)

24 v.)

25 180SOLUTIONS, INC., a Washington)
26 Corporation, METRICS DIRECT, a)
27 Washington Corporation, KEITH SMITH;)
28 DANIEL TODD; KENNETH SMITH;)
DIRECTREVENUE, LLC, a Washington)
Limited Liability Corporation; CHRIS)
DOWHAN; JOSHUA ABRAM; BYRON)
UDELL; BETTERINTERNET, LLC;)
EXACT ADVERTISING, Does 1 through 50)
inclusive,)

Defendants.)

1 Defendants DIRECTREVENUE, LLC (“DirectRevenue”) and THE BEST OFFERS
2 NETWORK, LLC, formerly known as and named in the complaint as BETTERINTERNET, LLC
3 (“BON”), JOSHUA ABRAM and CHRIS DOWHAN (collectively, “Defendants”), by and through
4 their attorneys, Krieg, Keller, Sloan, Reilley & Roman LLP, for their Answer to the Complaint for
5 Damages and Injunctive Relief (the “Complaint”) brought by Plaintiffs C.A.R.E.S., Inc., Peter
6 Martin, and Matina Diane Battaglia (“Plaintiffs”) state as follows:¹

7 **ANSWER TO INTRODUCTION**

8 Defendants admit that Plaintiffs attempt to characterize this action as a class action seeking
9 various forms of relief in the Introduction to their Complaint, but Defendants deny the factual
10 allegations contained in that Introduction, deny that Defendants are entitled to the relief sought, and
11 deny that a class action is an appropriate means for this action to proceed.

12 **PARTIES**

13 1. Defendants deny knowledge or information sufficient to form a belief as to the
14 allegations contained in paragraph 1 of the Complaint, but deny that they committed any of the
15 allegedly “unlawful business practices” or “unlawful acts” attributed to them in paragraph 1.

16 2. Defendants deny knowledge or information sufficient to form a belief as to the
17 allegations contained in paragraph 2 of the Complaint, but deny that they committed any of the
18 allegedly “wrongful conduct” attributed to them in paragraph 2.

19 3. Defendants deny knowledge or information sufficient to form a belief as to the
20 allegations contained in paragraph 3 of the Complaint.

21 4. Defendants deny the allegations contained in paragraph 4 of the Complaint, except
22 admit: that The Best Offers Network, LLC, (“Best Offers”) formerly known as BetterInternet, LLC,
23 is a Delaware limited liability company with its principal place of business at 107 Grand Street, New
24 York, New York; that DirectRevenue, LLC (“DirectRevenue”) is sole member of Best Offers; and

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26 ¹ All denials and admissions made herein are made solely on behalf of Defendants, and solely
27 to the extent that the allegations in the Complaint refer to Defendants. Defendants make no
28 representations on behalf of other defendants in this action, or as to the truth of allegations to the
extent they refer to other defendants.

1 that DirectRevenue Holdings, LLC is a holding company for DirectRevenue and Best Offers.

2 5. Defendants deny the allegations contained in paragraph 5 of the Complaint, except
3 admit that Chris Dowhan and Joshua Abram (the “Individual Defendants”) are officers or employees
4 of DirectRevenue.

5 6. Defendants deny knowledge or information sufficient to form a belief as to the
6 allegations contained in paragraph 6 of the Complaint.

7 7. Defendants deny knowledge or information sufficient to form a belief as to the
8 allegations contained in paragraph 7 of the Complaint, except deny the implication that Defendants
9 participated in any conspiracy or in any alleged wrongdoing.

10 **JURISDICTION**

11 8. Paragraph 8 contains legal conclusions to which no response is required. To the
12 extent any response is required, Defendants deny that the Court has personal jurisdiction over the
13 individual defendants.

14 **VENUE**

15 9. Paragraph 9 contains legal conclusions to which no response is required, and
16 Defendants aver that those allegations are no longer relevant because the action has been removed to
17 this Court.

18 **DEFENDANTS’ UNLAWFUL BUSINESS PRACTICES**

19 10. Defendants deny the allegations contained in paragraph 10 of the Complaint, except
20 admit that DirectRevenue and/or Best Offers have distributed Aurora and eBates MoneyMaker, and
21 that DirectRevenue and/or Best Offers have had a relationship with Toprebates.

22 11. Defendants deny the allegations contained in paragraph 11 of the Complaint, except
23 admit that Internet Explorer is used to view Internet web pages, and that Internet Explorer has the
24 functionality, in certain circumstances, to provide notices that certain files are being downloaded,
25 and deny knowledge or information sufficient to form a belief as to the allegations in the final two
26 sentences of paragraph 11.

27 12. Defendants deny the allegations contained in paragraph 12 of the Complaint, except
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1 admit that on many occasions DirectRevenue/Best Offers software is bundled with other software.

2 13. Defendants deny the allegations contained in paragraph 13 of the Complaint.

3 14. Defendants deny the allegations contained in paragraph 14 of the Complaint.

4 15. Defendants deny the allegations contained in paragraph 15 of the Complaint, except
5 admit that Best Offers' software does not appear in the "All Programs" or "Programs" list described
6 in paragraph 15.

7 16. Defendants deny the allegations contained in paragraph 16 of the Complaint, except
8 admit that the Windows "Add/Remove" feature is intended, among other things, to be used to
9 uninstall software, and that, in some cases, Best Offers' software remains on a computer after
10 bundled software is removed.

11 17. Defendants deny the allegations contained in paragraph 17 of the Complaint, except
12 deny knowledge or information sufficient to form a belief as to any allegations regarding
13 "WEBRREBATES" contained in paragraph 17.

14 18. Defendants deny the allegations contained in paragraph 18 of the Complaint.

15 19. Defendants deny the allegations contained in paragraph 19 of the Complaint, except
16 admit that, in some cases, Best Offers' uninstall mechanism does require users to go to
17 www.bestoffersnetworks.com/uninstall/ to get the latest uninstall functionality, and that users can
18 initiate the removal process through the Microsoft Windows "Add/Remove Programs" utility.

19 20. Defendants deny the allegations contained in paragraph 20 of the Complaint, except
20 admit that it is the practice in the software industry for the provider to obtain the user's consent to
21 download software.

22 21. Defendants deny the allegations contained in paragraph 21 of the Complaint.

23 22. Defendants deny the allegations contained in paragraph 22 of the Complaint, except
24 admit that users' web site visits are seen by Best Offers' software in accordance with Best Offers'
25 End User License Agreement.

26 23. Defendants deny the allegations contained in paragraph 23 of the Complaint.

27 24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

1 25. Defendants deny the allegations contained in paragraph 25 of the Complaint.

2 26. Defendants deny the allegations contained in paragraph 26 of the Complaint, except
3 admit that Plaintiffs purport to complain on behalf of themselves and all other persons described in
4 their putative class. Defendants deny, however, that class certification would be appropriate in this
5 action.

6 **FIRST CAUSE OF ACTION**
7 **UNFAIR, DECEPTIVE ACTS AND PRACTICES**
8 **Business and Professions Code § 17200**

9 27. Defendants repeat, reallege, and incorporate by reference all paragraphs above as
10 though fully set forth herein.

11 28. The allegations contained in paragraph 28 of the Complaint constitute legal
12 conclusions, to which no response is required. To the extent any response is required, Defendants
13 deny the allegations contained in paragraph 28 of the Complaint.

14 29. Defendants deny the allegations contained in paragraph 29 of the Complaint.

15 30. Defendants deny the allegations contained in paragraph 20 of the Complaint.

16 31. Defendants deny the allegations contained in paragraph 31 of the Complaint.

17 32. Defendants deny the allegations contained in paragraph 32 of the Complaint.

18 **SECOND CAUSE OF ACTION**
19 **(Against All Defendants)**
20 **FALSE AND DECEPTIVE ADVERTISING**
21 **Business and professions Code § 17500**

22 33. Defendants repeat, reallege, and incorporate by reference all paragraphs above as
23 though fully set forth herein.

24 34. The allegations contained in paragraph 34 of the Complaint constitute legal
25 conclusions, to which no response is required. To the extent any response is required, Defendants
26 deny the allegations contained in paragraph 34 of the Complaint.

27 35. Defendants deny the allegations contained in paragraph 35 of the Complaint.
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THIRD CAUSE OF ACTION
(Against All Defendants)
PUBLIC AND PRIVATE NUISANCE

36. Defendants repeat, reallege, and incorporate by reference all paragraphs above as though fully set forth herein.

37. The allegations contained in paragraph 37 of the Complaint constitute legal conclusions, to which no response is required. To the extent any response is required, Defendants deny the allegations contained in paragraph 37 of the Complaint.

38. Defendants deny the allegations contained in paragraph 38 of the Complaint.

39. Defendants deny the allegations contained in paragraph 39 of the Complaint.

FOURTH CAUSE OF ACTION
(Against All Defendants)
TRESPASS TO CHATTELS

40. Defendants repeat, reallege, and incorporate by reference all paragraphs above as though fully set forth herein.

41. Defendants deny the allegations contained in paragraph 41 of the Complaint.

42. Defendants deny the allegations contained in paragraph 42 of the Complaint.

FIFTH CAUSE OF ACTION
(Against All Defendants)
UNJUST ENRICHMENT

43. Defendants repeat, reallege, and incorporate by reference all paragraphs above as though fully set forth herein.

44. Defendants deny the allegations contained in paragraph 44 of the Complaint.

SIXTH CAUSE OF ACTION
(Against All Defendants)
VIOLATION OF CIVIL CODE SECTION 1750 et seq.

45. Defendants repeat, reallege, and incorporate by reference all paragraphs above as though fully set forth herein.

46. Defendants admit that Plaintiffs purport, in paragraph 46 of the Complaint, to bring this cause of action pursuant to the Consumer Legal Remedies Act, California Civil Code § 1750, et

1 seq., but deny that Plaintiffs can recover under that statute.

2 47. The allegations contained in paragraph 47 purport to constitute notice pursuant to
3 California Civil Code § 1782, to which no response is required. To the extent that any response is
4 required, Defendants deny that such notice is adequate, and deny any remaining allegations
5 contained in paragraph 47 of the Complaint.

6 48. Defendants deny the allegations contained in paragraph 48 of the Complaint.

7 49. Defendants admit that Plaintiffs purport, in paragraph 49 of the Complaint, to seek
8 restitution, costs, attorneys' fees, and injunctive relief pursuant to California Civil Code
9 §§ 1780(a)(2), (a)(3), and 1780 (d), but Defendants deny that Plaintiffs have any basis to or are
10 entitled to recover such damages or relief.

11 50. Defendants admit that Plaintiffs assert, in paragraph 50 of the Complaint, that they
12 will seek relief pursuant to California Civil Code § 1780, but Defendants deny that Plaintiffs can
13 recover under that statute.

14 51. Defendants deny the allegations contained in paragraph 51 of the Complaint.

15 **SEVENTH CAUSE OF ACTION**

16 **(Against All Defendants)**

17 **VIOLATION OF BUSINESS AND PROFESSIONS CODE § 22947**

18 52. Defendants repeat, reallege, and incorporate by reference all paragraphs above as
19 though fully set forth herein.

20 53. Defendants deny the allegations contained in paragraph 53 of the Complaint.

21 54. Defendants deny the allegations contained in paragraph 54 of the Complaint, except
22 admit that Plaintiffs purport to bring this cause of action pursuant to California Business and
23 Professions Code § 22947. Defendants further aver that the cited statute speaks for itself, and
24 respectfully refer the Court to the statute for the contents thereof.

25 **EIGHTH CAUSE OF ACTION**

26 **(Against All Defendants)**

27 **INVASION OF PRIVACY AND RIGHT OF ASSOCIATION**

28 55. Defendants repeat, reallege, and incorporate by reference all paragraphs above as
though fully set forth herein.

1 56. Defendants deny the allegations contained in paragraph 56 of the Complaint.

2 57. Defendants deny the allegations contained in paragraph 57 of the Complaint.

3 **NINTH CAUSE OF ACTION**

4 **(Against All Defendants)**

5 **EQUITABLE RELIEF**

6 58. Defendants repeat, reallege, and incorporate by reference all paragraphs above as
7 though fully set forth herein.

8 59. Defendants deny the allegations contained in paragraph 59 of the Complaint.

9 **TENTH CAUSE OF ACTION**

10 **(Against All Defendants)**

11 **FRAUD AND MISREPRESENTATION**

12 60. Defendants repeat, reallege, and incorporate by reference all paragraphs above as
13 though fully set forth herein.

14 61. Defendants deny knowledge or information sufficient to form a belief as to the
15 allegations contained in paragraph 61 of the Complaint, except deny the allegations contained in the
16 first sentence of paragraph 61 of the Complaint.

17 **AFFIRMATIVE DEFENSES**

18 As separate and additional defenses, Defendants allege as follows, without admission that
19 Defendants carry the burden of proof or persuasion on any of the defenses set forth below:

20 **AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

21 The Complaint, in whole or in part, fails to state a cause of action against the Defendants
22 upon which relief can be granted.

23 **AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

24 Plaintiffs have not suffered any legally cognizable injury or damage.

25 **AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

26 Any legally cognizable injury or damage that Plaintiffs have suffered, to the extent any was
27 suffered, was caused either in whole or in part by the acts or omissions of Plaintiffs and not as a
28 result of any conduct by Defendants. Thus, Plaintiffs are barred from recovery, or their recovery is
reduced thereby.

1 **AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

2 Defendants are not liable to Plaintiffs for the acts of other persons or entities over whom they
3 had no control or authority.

4 **AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

5 If Plaintiffs have sustained any injuries or incurred any damages, which Defendants deny,
6 such injuries or damages, if any, were caused in whole or in part by acts or omissions of others for
7 whose conduct Defendants are not responsible.

8 **AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

9 Plaintiffs may not recover on the claims pleaded in the Complaint because all or part of the
10 damages sought are too speculative and remote.

11 **AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

12 Plaintiffs' claims are barred, in whole or in part, by the doctrines of estoppel, ratification,
13 consent, and/or waiver.

14 **AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

15 Plaintiffs' claims for relief are barred, in whole or in part, by the doctrine of unclean hands.
16 Thus, plaintiffs have no right to injunctive relief.

17 **AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

18 Plaintiffs' claims for injunctive relief are barred because, *inter alia*, Plaintiffs have an
19 adequate remedy at law.

20 **AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

21 Plaintiffs' claims are barred in whole, or in part, due to their failure to mitigate any damages.

22 **AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

23 Plaintiffs are not adequate representatives for the purported class.

24 **AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

25 The purported class definition is improper and violates constitutional due process.

26 **AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

27 The prerequisites to a class action pursuant to Federal Rule 23 cannot be met because, among
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1 other reasons, joinder of all members of the class is not impracticable; individual questions of law
2 and fact predominate over common issues; Plaintiffs' claims and/or defenses are not typical of the
3 claims and/or defenses of other proposed class members; Plaintiffs are not adequate representatives
4 for the class; final injunctive and/or declaratory relief are not appropriate with respect to the
5 proposed class as a whole; and, a class action is not superior to other available methods for fair and
6 efficient adjudication of the controversy.

7 **AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE**

8 Plaintiffs' claims are barred, in whole or in part, because any actions on the part of
9 Defendants were taken with Plaintiffs' consent and/or in accordance with the provisions of an
10 agreement with Plaintiff.

11 **AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE**

12 The Complaint fails to plead a cause of action for fraud with the particularity required by
13 Fed. R. Civ. P. 9(b).

14 **AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE**

15 The Court lacks personal jurisdiction over the Individual Defendants.

16 **AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE**

17 Plaintiffs' claims against the Individual Defendants are barred, in whole or in part, because
18 those defendants cannot be personally liable for acts performed within the scope of their
19 employment.

20 **AS AND FOR A EIGHTEENTH AFFIRMATIVE DEFENSE**

21 Defendants adopt and incorporate by reference any affirmative defense asserted by any other
22 defendant to this action to the extent that such affirmative defense applies to Defendants and reserve
23 the right to amend this Answer to raise and rely upon any defenses that become available or apparent
24 through discovery.

25 **WHEREFORE**, Defendants DirectRevenue, LLC, The Best Offers Network, LLC f/k/a
26 BetterInternet, LLC, Joshua Abram, and Chris Dowhan demand judgment against Plaintiffs
27 C.A.R.E.S., Inc., Peter Martin, and Matina Diana Battaglia as follows:

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- a) dismissing the Complaint in its entirety with prejudice;
- b) awarding Defendants the costs and disbursements of this action and their attorneys' fees;
and
- c) granting such other and further relief as the Court deems just and proper.

Dated: December 21, 2005

KRIEG, KELLER, SLOAN, REILLEY & ROMAN LLP

By: _____ /s/

CHRISTOPHER T. HOLLAND
Attorneys for Defendants
DIRECTREVENUE LLC, THE BEST OFFERS NETWORK, LLC (formerly known as and named in the complaint as **BETTERINTERNET, LLC**),
CHRIS DOWHAN and **JOSHUA ABRAM**