

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

FILED  
MAY 08 2005  
MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

STEPHEN SOTELO, individually and on behalf )  
of all persons similarly situated, )

Plaintiff, )

v. )

DIRECTREVENUE, LLC; DIRECTREVENUE )  
HOLDINGS, LLC; BETTERINTERNET, LLC; )  
BYRON UDELL & ASSOCIATES, INC., D/B/A )  
ACCUQUOTE; AQUANTIVE, INC., and JOHN )  
DOES 1-100, )

Defendants. )

Index No. 05 C 2562

Judge Gettleman

**DEFENDANTS DIRECTREVENUE, LLC, BETTERINTERNET, LLC, AND BYRON UDELL & ASSOCIATES, INC.'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STAY LITIGATION IN FAVOR OF ARBITRATION**

**PRELIMINARY STATEMENT**

Defendants DirectRevenue, LLC, ("DirectRevenue") BetterInternet, LLC, ("BetterInternet") and Byron Udell & Associates, Inc., d/b/a AccuQuote ("AccuQuote") (collectively, "Defendants") move pursuant to § 3 of the Federal Arbitration Act ("FAA") to stay the instant litigation in favor of binding arbitration, in accordance with the parties' arbitration agreement.

By way of background, Plaintiff Stephen Sotelo ("Plaintiff") purports to bring this case as a class action on behalf of all computer users in Illinois who have downloaded BetterInternet's targeted advertising software (the "Software"). Plaintiff would convince this Court that Defendants are engaged in a clandestine effort to install the Software onto users' personal computers; that Defendants conceal from users the Software's actual purpose and

function; that Defendants, without notice, bombard users with pop-up advertising; that Defendants make it impossible to remove the Software once installed; and that the Software somehow wreaks havoc with users' computers, resulting in some unspecified but grave damage. These contentions are refuted by even the most cursory examination of the actual facts.

In fact, computer users agree to the installation of the Software in order to receive other free software, such as popular computer games. As Plaintiff discusses in his complaint (the "Complaint"), prior to installation of the Software, computer users are presented with an End User License Agreement (the "EULA"), describing the software and detailing the respective rights of the user and BetterInternet should the user accept the EULA and download the Software. For example, in the very first section, the EULA clearly explains, "This Software will collect information about websites you access and will use that information to display advertising on your computer." (See EULA, annexed to this memorandum as Exhibit A, at § 1.) The EULA immediately continues to explain that "[b]y clicking 'yes' or downloading, installing or using the Software, you acknowledge that you have read and understand this Agreement and agree to be bound by its terms."

The EULA then goes on to explain, in great detail, what the Software actually does:

BI, through its advertising software known as Ceres, delivers advertising and various information and promotional messages to your computer screen while you view Internet web pages. BetterInternet is able to provide you with BI free of charge as a result of your agreement to download and use BI, and accept the advertising and promotional messages it delivers.

By installing the Software, you understand that the Software may, without any further prior notice to you, automatically perform the following: display advertisements of advertisers who pay a fee to BetterInternet, in the form of pop-up ads, pop-under ads, interstitials ads and various other ad formats, display links to and

advertisements of related websites based on the information you view and the websites you visit; store non-personally identifiable statistics of the websites you have visited; redirect certain URLs including your browser default 404-error page to or through the Software; provide advertisements, links, or information in response to search terms you use at third-party websites; provide search functionality or capabilities; automatically update the Software and install added features or functionality or additional software, including search clients and toolbars, conveniently without your input or interaction; install desktop icons and installation files; install software from BetterInternet affiliates; and install Third Party Software.

In addition, you further understand and agree, by installing the Software, that BetterInternet and/or the Software may, without any further prior notice to you, remove, disable or render inoperative other adware programs resident on your computer, which, in turn, may disable or render inoperative, other software resident on your computer, including software bundled with such adware, or have other adverse impacts on your computer.

(EULA § 2.) In view of the foregoing, any claim that Defendants are not forthcoming about the purposes and effects of their Software is incorrect. In addition, the EULA clearly explains that the user can uninstall the Software at any time, and provides a link to a website containing a utility that removes the Software. (EULA § 12.)

Most importantly for the purposes of the instant motion, the EULA also contains an “Arbitration” clause that requires the arbitration of Sotelo’s claims. Specifically, that clause requires the parties to submit “any and all disputes, controversies and claims relating in any way to the Software, this Agreement or the breach thereof (including the arbitration of any claim or dispute and the enforceability of this paragraph)” to arbitration before the American Arbitration Association in New York, New York. The arbitration clause also provides that “[t]o the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an action involving any other current or former user of the Software, whether through class arbitration proceedings or otherwise.” (EULA § 19.)

Nowhere in the Complaint does Plaintiff allege that he did not see the EULA, that he did not consent to its terms, or that the Software found its way onto his computer without his knowledge. In fact, Plaintiff alleges that an entire putative “subclass” of plaintiffs indeed had the EULA displayed to them (Complaint ¶ 22), and that he himself had the Software downloaded onto his computer like other putative class members (¶ 25). Thus, it appears that Plaintiff’s allegations are subject to dismissal on the pleadings alone. For that reason, concurrently with the instant motion, Defendants have brought a motion to dismiss under Fed. R. Civ. P. 12(b)(6). However, before considering the merits of that motion, the Court must first determine the threshold issue of whether this litigation must be stayed so that it can proceed to arbitration in accordance with the arbitration agreement between Mr. Sotelo and BetterInternet. As shown below, this dispute must be referred to arbitration.

## ARGUMENT

### **I. WHERE A VALID ARBITRATION AGREEMENT GOVERNS THE PLAINTIFF’S CLAIMS, THE COURT MUST STAY LITIGATION IN FAVOR OF ARBITRATION**

Under the Federal Arbitration Act, a provision in a contract providing for the resolution of disputes arising out of the contract “shall be valid, irrevocable, and enforceable,” except for such reasons as would invalidate any contract in general. 9 U.S.C. § 2. The FAA reflects a strong federal policy favoring arbitration of disputes. *See Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int’l, Ltd.*, 1 F.3d 639, 641 (7<sup>th</sup> Cir. 1993). “[A]ny doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1985). Even tort claims and other non-contractual claims are subject to arbitration where the arbitration agreement so provides; the arbitrability of such claims depends on “the relationship of the claim to the subject matter of the

arbitration clause.” *In re Oil Spill by the “Amoco Cadiz, etc.”* 659 F.2d 789, 794 (7<sup>th</sup> Cir. 1981). “[A] court may not deny a party’s request to arbitrate an issue ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909 (7<sup>th</sup> Cir.1999) (internal citations omitted). As a result of the foregoing principle, a broad arbitration clause “necessarily creates a presumption of arbitrability.” *Id.* at 910.

By installing the software on his computer, Plaintiff accepted the terms of BetterInternet’s EULA. Indeed, while alleging in his Complaint that some users saw the EULA and others did not, Plaintiff does not deny that he himself consented to the EULA before installing the Software. Rather, Plaintiff alleges only that he “had DirectRevenue’s spyware downloaded onto his computer.” (Complaint ¶ 25.) Prominently included in the EULA is an arbitration clause. That clause provides that:

[A]ny and all disputes, controversies and claims relating in any way to the Software, this Agreement, or the breach thereof... shall be submitted to and resolved by means of a confidential arbitration... by the American Arbitration Association under its then current Commercial Arbitration Rules and conducted in the County of New York, State of New York.

(EULA at § 19.) This arbitration clause is clearly quite broad, and reaches a wide spectrum of claims.

Plaintiff now sues under a variety of tort and quasi-contractual theories, including trespass, consumer fraud, unjust enrichment, negligence, and computer tampering. The factor that clearly unites all of these causes of action is that they all arise out of the alleged effects of Defendants’ Software. The claims are therefore clearly within the ambit of the EULA’s arbitration clause, which reaches any claim “relating in any way to the Software.” Thus, Plaintiff

must arbitrate his claims, and cannot bring this action in court. The only proper forum for Plaintiff's claims is before the American Arbitration Association in New York.

## II. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

On a motion pursuant to § 3 of the FAA, the court may consider only whether an arbitration clause is facially valid; contentions regarding the unfairness of the contract formation process, such as fraud in the inducement, are left to the arbitrator for resolution. *McIntyre v. Household Bank*, 216 F. Supp. 2d 719, 722-23 (N.D. Ill. 2002). Indeed, even when the validity of an entire contract is in dispute, as long as the claims are within the ambit of the arbitration clause, the case must proceed to arbitration. *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 277 (7<sup>th</sup> Cir. 1992); *Morgan v. Bill Kay Chrysler Plymouth*, No. 01 C 3871, 2002 WL 31133102, at \*4 (N.D. Ill. July 17, 2002). "It is well established in this circuit that arguments pertaining to the enforceability of the contractual terms are within the arbitrator's province." *McIntyre*, 216 F. Supp. 2d at 723; *See Schact v. Beacon Ins. Co.*, 742 F.2d 386, 390 (7<sup>th</sup> Cir. 1984).

In determining the validity of an agreement to arbitrate, a court must apply state contract law, resolving any ambiguities in favor of arbitration. *McIntyre*, 216 F. Supp. 2d at 722. The requisite elements of a contract are an offer, acceptance of the offer, and supporting consideration. *McKee v. First Nat'l. Bank*, 220 Ill. App. 3d 976, 581 N.E.2d 340, (1991). "Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract." *Id.* (internal citation omitted). As is the case with any contract, failure to read an arbitration clause before executing an agreement does not invalidate

the terms of the agreement or excuse a party from arbitration. *See Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp. 2d 804, 807 (N.D. Ill. 1999).<sup>1</sup>

BetterInternet's EULA, which contains the arbitration agreement at bar, clearly constitutes an offer to enter into a contractual relationship. As mentioned above, Plaintiff does not allege that he did not see the EULA prior to downloading the Software. Offer and acceptance are thus present. Likewise, the agreement is supported by adequate consideration: As alleged in the Complaint, along with the Software, the user receives some desired third-party software (such as a video game or utility) in exchange for allowing the Software to operate on the user's computer. With regard to the arbitration clause itself, each side agrees to waive the right to pursue claims in court in consideration for the other side's agreement to do so. All of the elements of a contract are thus present, and the clause itself provides no basis for a finding of facial invalidity. Since the clause is valid and all of Plaintiff's claims fall within the scope of the clause, Plaintiff is bound to arbitrate those claims.

### **III. THE ARBITRATION AGREEMENT INURES TO THE BENEFIT OF BETTERINTERNET, LLC, DIRECTREVENUE, LLC, AND ACCUQUOTE**

As discussed above, where a valid agreement to arbitrate exists and the plaintiff's claims are covered by that agreement, the court must stay litigation and allow the parties' dispute to be resolved through arbitration. Moreover, under circumstances like those present in this case, even non-signatories to an arbitration agreement can enforce the agreement and have claims against them resolved through arbitration. *See Hoffman v. Deloitte & Touche*, 143 F. Supp. 2d 995, 1004-05 (N.D. Ill. 2001).

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<sup>1</sup> Although any argument regarding the general enforceability of "click-wrap" agreements such as the one at issue is properly made to the arbitrator, not the Court, it bears mention that this Court has already held



Arbitration agreements “cover non-signatories under common law contract and agency principles.” *Messing v. Rosenkrantz*, 872 F. Supp. 539, 541 (N.D. Ill. 1995). “A non-signatory may invoke the agreement when, under agency or related principles, the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided.” *Hoffman*, 143 F. Supp. 2d at 1004. Further, a non-signatory can compel arbitration under principles of equitable estoppel when the plaintiff’s complaint alleges “substantially interdependent and concerted misconduct” by both signatory and non-signatory defendants.” *Id.* at 1005. Courts will estop signatories from avoiding arbitration when the claims against non-signatory defendants are intertwined with the claims, parties, and contracts subject to arbitration. *See Choctaw Generation Ltd. P’ship v. American Home Assurance Co.*, 271 F.3d 403, 406-07 (2d Cir. 2001); *See also MS Dealer Svc. Corp. v. Franklin*, 177 F.3d 942, 948 (11<sup>th</sup> Cir. 1999) (holding that signatory to agreement was bound to arbitrate claims against non-signatory where claims were “based on the same facts and [were] inherently inseparable”).

Applying the foregoing analysis to the present case, it is abundantly clear that, while BetterInternet is the only defendant party actually named in the EULA, the claims against DirectRevenue must also be resolved through arbitration. The Complaint alleges that DirectRevenue is the sole member and manager of BetterInternet, and that DirectRevenue “uses the trade name ‘BetterInternet’ for its spyware.” (Complaint ¶ 3.) It is also clear from the Complaint that every theory of liability leveled against DirectRevenue is based solely on the

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(continued . . .)

at least one such agreement enforceable. *See In re RealNetworks, Inc. Privacy Litigation*, No. 00 C 1366, 2000 WL 631341, at \*2-4 (N.D. Ill. May 8, 2000).



effects of BetterInternet's Software. Indeed, Plaintiff refers to BetterInternet and DirectRevenue LLC interchangeably throughout the Complaint. In light of these considerations, it is clear that the claims against DirectRevenue are completely intertwined with those brought against BetterInternet. Based on Plaintiff's own allegations, and his description of the relationship between BetterInternet and DirectRevenue, to allow Plaintiff to litigate its claims against DirectRevenue would enable Plaintiff to circumvent and effectively eviscerate the arbitration clause of the EULA. The Court should therefore stay the claims against DirectRevenue so that they can be resolved in arbitration.

Further, not only must the claims against DirectRevenue proceed to arbitration, but the claims against AccuQuote must similarly be arbitrated. The claims Plaintiff asserts against AccuQuote are similarly intertwined with those brought against BetterInternet. Like the claims against DirectRevenue, the Complaint premises any liability on AccuQuote's part entirely on the alleged actions of BetterInternet and its Software. It is only through the alleged effects of BetterInternet's Software that AccuQuote's ads reached users' computers, so if the claims against BetterInternet were to be dismissed based on the Plaintiff's acceptance of the EULA and consent to the effects of the software (including the ads), the claims against AccuQuote could not survive. Since the claims against AccuQuote and BetterInternet are based on the same facts, and are intertwined and inseparable, those claims must be resolved through arbitration.

**CONCLUSION**

For all of the foregoing reasons, Defendants DirectRevenue, LLC, BetterInternet, LLC, and Byron Udell & Associates, Inc. respectfully request that the Court grant their motion to stay this litigation pending arbitration as required by the EULA, and order such other relief as the Court deems just and proper.

Dated: May 6, 2005

DIRECTREVENUE, L.L.C.,  
BETTERINTERNET, L.L.C., and  
BYRON UDELL & ASSOCIATES,  
DEFENDANTS

By:  \_\_\_\_\_

One of their attorneys

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EXHIBIT A



HOME MORE DOWNLOADS

( CERES ADVERTISING SOFTWARE )

1. Acceptance of This Agreement - This BetterInternet End User License Agreement ("Agreement") is a contract between you ("you" or "your") and BetterInternet, LLC, a Delaware corporation with a mailing address of 2711 Centerville Road, Suite 400, Wilmington DE 19808-1660 ("BetterInternet"), and governs your use of BI ad targeting software ("BI") and other BetterInternet software and services provided to you (collectively, "Software"). The Agreement includes BetterInternet's Privacy Policy. Please read the terms of this Agreement carefully before installing and using the Software.

This Software will collect information about websites you access and will use that information to display advertising on your computer.

By clicking "yes" or downloading, installing or using the Software, you acknowledge that you have read and understand this Agreement and agree to be bound by its terms. If you do not agree to be bound by the terms of this Agreement, you may not download or use the Software, and shall close this window without downloading the Software or clicking yes to indicate your acceptance of this Agreement.

2. Functionality - BI, through its advertising software known as Ceres, delivers advertising and various information and promotional messages to your computer screen while you view Internet web pages. BetterInternet is able to provide you with BI free of charge as a result of your agreement to download and use BI, and accept the advertising and promotional messages it delivers.

By installing the Software, you understand and agree that the Software may, without any further prior notice to you, automatically perform the following: display advertisements of advertisers who pay a fee to BetterInternet, in the form of pop-up ads, pop-under ads, interstitials ads and various other ad formats, display links to and advertisements of related websites based on the information you view and the websites you visit; store non-personally identifiable statistics of the websites you have visited; redirect certain URLs including your browser default 404-error page to or through the Software; provide advertisements, links or information in response to search terms you use at third-party websites; provide search functionality or capabilities; automatically update the Software and install added features or functionality or additional software, including search clients and toolbars, conveniently without your input or interaction; install desktop icons and installation files; install software from BetterInternet affiliates; and install Third Party Software.

In addition, you further understand and agree, by installing the Software, that BetterInternet and/or the Software may, without any further prior notice to you, remove, disable or render inoperative other adware programs resident on your computer, which, in turn, may disable or render inoperative, other software resident on your computer, including software bundled with such adware, or have other adverse impacts on your computer.

Certain applications or functions that may already be on your computer or that are accessible through the Internet may attempt to install themselves or other components onto your computer by inserting particular domain names into your browser's list of "trusted sites" without providing a notice regarding such actions. By doing so, such applications or functions may use this access to your computer as a means to install unwanted or damaging components on your computer. You agree that BetterInternet may flush the list of all trusted sites in your browser from time to time for the purpose of helping your computer avoid potentially damaging downloads that occur without your prior knowledge. Thereafter, you may have to accept as trusted sites certain web sites which you had previously accepted as trusted sites. While BetterInternet believes this a benefit to you and enhances the security of your computer and your ability to choose whether or not to install certain components on your computer, if you do not wish BetterInternet to flush the list of trusted sites in your browser, you may follow the procedures set forth below in Section 12 to remove the Software.

3. Privacy Policy - BetterInternet, during the delivery and your use of the Software, does not collect any personally identifiable information about you, such as your surname, address, telephone number or e-mail address, nor does BetterInternet require such information from you before downloading or installing the Software. However, to enable BetterInternet to provide and operate its Software, BetterInternet collects certain types of non-personally identifiable information about individuals who install the Software. This information may include your Internet protocol (IP)

address, your domain, your operating system, your browser version, type and language and your Internet Service Provider.

Advertisements may be displayed of advertisers who pay a fee to BetterInternet and you may be provided with and/or redirected to content of other parties and/or links to third party websites or content or offered the opportunity to download software from third party software vendors. BetterInternet is not responsible for the privacy practices of such advertisers, content providers, third party software vendors or websites. BetterInternet encourages you to read the privacy policies of such advertisers, content providers, third party software vendors and websites.

BetterInternet may use invisible tracking or counting devices known as "web bugs" to register that a particular web page has been viewed and/or "cookies" or alphanumeric identifiers that BetterInternet transfers to your computer's hard drive through your web browser to enable BetterInternet's systems to recognize your web browser.

BetterInternet also collects and may use certain other types of non-personally identifiable information, including: certain of the web pages that you view, the amount of time that you spend on certain websites, your responses to ads served by BetterInternet, certain software installed to your computer and software characteristics and preferences, non-personally identifiable information on web pages and forms, software usage characteristics and preferences, and your ZIP code. BetterInternet associates this information with a randomly-generated anonymous identifier for your computer and may use this information to enable the functionality of the Software, to periodically update the Software, to deliver and display ads served by BetterInternet of advertisers who pay a fee to BetterInternet, provide you with or redirect you to content or websites of such advertisers or other parties and offer you the opportunity to download software from third party vendors.

BetterInternet may share non-personally identifiable aggregate information about you with third parties, including advertisers.

If you have further questions about BetterInternet's privacy practices, you may contact us at [contact@abetterinternet.com](mailto:contact@abetterinternet.com).

**4. Children's Privacy Policy and Use** - The Software is not directed to children. Because BetterInternet cannot determine with any degree of certainty whether a child is using a computer at a given time, this "Children's Privacy Policy and Use" explains BetterInternet's practices regarding the collection and use of personally identifiable and non-personally identifiable information from children under the age of thirteen and provides important information regarding your rights under federal law with respect to such information.

BetterInternet does not knowingly collect personally identifiable information from children under the age of thirteen. If BetterInternet becomes aware that it has inadvertently received personally identifiable information and/or data from a user under the age of thirteen, BetterInternet will delete such past data from its records and will cease to collect any new data from that computer, including any non-personally identifiable data.

Since BetterInternet does not knowingly collect any personally identifiable information from children under the age of thirteen, BetterInternet also does not knowingly distribute such information to third parties. Further, because BetterInternet does not knowingly collect any personally identifiable information from children under the age of thirteen, it does not condition the participation in online activities of a child under thirteen on providing personally identifiable information.

For more information on children's privacy on-line, please visit the Kidz Privacy website, sponsored by the Federal Trade Commission at <http://www.ftc.gov/bcp/online/edcams/kidzprivacy/index.html>.

**5. Age Limitation** - You must be thirteen years of age or older to download or use the Software. By downloading the Software, you represent and warrant to BetterInternet that you are thirteen years or older.

**6. Software License** - The Software, which shall be deemed to include any enhancements or modifications thereto and any related documentation, is a copyrighted work. Subject to your compliance with all of the terms and conditions of this Agreement, and in consideration of your promises reflected in this Agreement, BetterInternet grants to you a personal, nonexclusive, non-assignable and nontransferable license to download, install and use the Software to and on a single computer and to use the Software as permitted under this Agreement for non-commercial purposes only. BetterInternet may terminate this license at any time without notice.

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**10. Disclaimer Of Warranty** - YOU UNDERSTAND AND AGREE THAT THE SOFTWARE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS, WITH ALL FAULTS, AND THAT THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFECT OF THE SOFTWARE IS YOURS AND YOURS ALONE. TO THE FULLEST EXTENT PERMISSIBLE BY LAW, BETTERINTERNET AND ITS AFFILIATES DISCLAIM ALL WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF TITLE, OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. WITHOUT LIMITING THE FOREGOING, NEITHER BETTERINTERNET NOR ANY OF ITS AFFILIATES, NOR ANY OF THEIR OFFICERS, DIRECTORS, LICENSORS, EMPLOYEES OR REPRESENTATIVES REPRESENT OR WARRANT (i) THAT THE SOFTWARE, INCLUDING ITS CONTENT, WILL FULFILL ANY OF YOUR PARTICULAR PURPOSES OR NEEDS OR MEET YOUR REQUIREMENTS OR BE ACCURATE, COMPLETE, RELIABLE, OR ERROR FREE; (ii) THAT THE SOFTWARE WILL ALWAYS BE AVAILABLE OR WILL BE UNINTERRUPTED, ACCESSIBLE, TIMELY, OR SECURE; (iii) THAT ANY DEFECTS WILL BE CORRECTED, OR THAT THE SOFTWARE WILL BE FREE FROM VIRUSES, "WORMS," "TROJAN HORSES" OR OTHER HARMFUL PROPERTIES; (iv) THE ACCURACY, RELIABILITY, TIMELINESS, OR COMPLETENESS OF ANY INFORMATION OR OTHER MATERIAL PUBLISHED OR ACCESSIBLE ON OR THROUGH THE SOFTWARE; (v) THE AVAILABILITY FOR SALE, OR THE RELIABILITY OR QUALITY OF ANY PRODUCTS OR SERVICES REFERENCED USING THE SOFTWARE; (vi) ANY IMPLIED WARRANTY ARISING FROM ANY COURSE OF DEALING OR USAGE OF TRADE; AND (vii) AGAINST INTERFERENCE WITH YOUR ENJOYMENT OF THE SOFTWARE OR THAT THE SOFTWARE IS NONINFRINGEMENT. BETTERINTERNET AND ITS AFFILIATES HEREBY DISCLAIM, AND YOU HEREBY IRREVOCABLY RELEASE BETTERINTERNET AND ITS AFFILIATES FROM AND WAIVE, ANY AND ALL OBLIGATIONS, LIABILITIES, RIGHTS, CLAIMS OR REMEDIES IN TORT ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SOFTWARE, WHETHER OR NOT ARISING FROM THE NEGLIGENCE (ACTIVE, PASSIVE OR IMPUTED) OF BETTERINTERNET OR ITS AFFILIATES.

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**11. Limitation Of Liability** - IN NO EVENT AND UNDER NO CIRCUMSTANCES SHALL BETTERINTERNET OR ANY OF ITS AFFILIATES, OR ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, REPRESENTATIVES, INFORMATION PROVIDERS OR LICENSORS BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE OR OTHER DAMAGES (REGARDLESS OF THE FORM OF ACTION OR PROCEEDING) ARISING OUT OF OR RELATED TO (i) ANY USE OF THE SOFTWARE BY ANY PERSON, INCLUDING BUT NOT LIMITED TO, ANY DAMAGE CAUSED BY ANY RELIANCE ON, OR ANY DELAYS, INACCURACIES, ERRORS OR OMISSIONS IN, ANY INFORMATION AND CONTENT ACCESSED THROUGH THE SOFTWARE, (ii) ANY USE OR INABILITY TO USE THE SOFTWARE FOR WHATEVER REASON, INCLUDING BUT NOT LIMITED TO COMMUNICATIONS FAILURE OR ANY OTHER FAILURE WITH TRANSMISSION OR DELIVERY OF ANY INFORMATION



ACCESSED THROUGH THE SOFTWARE, OR (iii) ANY GOODS OR SERVICES DISCUSSED, PURCHASED OR OBTAINED, DIRECTLY OR INDIRECTLY, THROUGH THE SOFTWARE, IN EACH CASE EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Some jurisdictions do not allow for the exclusion of certain warranties or the limitation of liability for certain damages. Accordingly, some of the above limitations may not apply to you.

If any part of these warranty disclaimers or limitations of liability is found to be invalid or unenforceable for any reason or if BetterInternet is liable to you for any other reason, then BetterInternet's aggregate liability for all claims under such circumstances shall not exceed the greater of ten dollars (\$10.00) or the amount paid by you for your use of the Software.

**12. Termination and Removal of Software** - By entering into this Agreement, you represent to BetterInternet that you have intentionally chosen to install the Software and that you will personally uninstall the Software from your computer if you no longer wish the application to be present on your computer by going to <http://www.mypctuneup.com>.

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