**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| STEPHEN SOTELO, individually and on behalf of all persons similarly situated, | |
| Plaintiff, | Case No. 05 C 2562 |
| vs. | Judge Gettleman |
| DIRECTREVENUE, LLC, DIRECTREVENUE HOLDINGS, LLC; BETTERINTERNET, LLC; BYRON UDELL & ASSOCIATES, INC., D/B/A/ ACCUQUOTE, AQUANTIVE, INC., and JOHN DOES 1-100, | |
| Defendants. | |

**DEFENDANTS DIRECTREVENUE, LLC'S AND BETTERINTERNET, LLC'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)**

Defendants DirectRevenue, L.L.C. and BetterInternet, L.L.C. (collectively, "DirectRevenue" or "Defendants"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully submit this memorandum of law in support of their motion to dismiss the Complaint.[1]

## I. SUMMARY OF THE ARGUMENT

The Complaint alleges that Plaintiff suffered damages as a result of software and advertising that Defendants allegedly distributed on the internet. But when one looks beyond the Complaint's rhetoric, it is clear that Sotelo's allegations of trespass (Count I), consumer fraud (Count II), unjust enrichment (Count III), negligence (Count IV), and computer tampering (Count V) all fail to state claims under Illinois law.

Most egregiously, Plaintiff ignores the fact that he authorized all of the acts complained of in the Complaint through the End-User License Agreement (the "EULA"). By accepting the

[1] Defendants have contemporaneously filed a motion to stay this litigation in favor of arbitration pursuant to the parties' arbitration agreement. If the Court grants that motion, it would render this motion moot.

EULA, Sotelo agreed that Defendants' software ("the Software") could be downloaded to his computer to "collect information about the website [he] access[ed]" and "use that information to display advertising on [his] computer." Sotelo never alleges that he did not view and consent to the EULA's terms. Moreover, despite repeated references to the EULA in the Complaint, Sotelo fails to attach a copy of this critical document. Accordingly, a copy of the EULA is attached hereto as Exhibit A.

The first section of the EULA explains that, by installing the software, the end-user acknowledges that he has "read and understood this Agreement and agree[s] to be bound by its terms." That section continues by unambiguously disclosing the Software's function: to monitor the websites the user visits and to use that information to provide the user with targeted advertising:

> [BI ad targeting software ("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....

(EULA § 2.) Thus, the EULA clearly discloses to potential users of the Software exactly what the Software does.[2] The EULA also explains that if the user wants to remove the Software, he or she can easily do so by going to "www.mypctuneup.com," which provides simple removal instructions. (EULA § 12.)

The fact that Plaintiff ignores the EULA is not the only shortcoming in the Complaint. For example, Plaintiff alleges fraud, yet fails to allege any facts relating to the content, time, or place of any alleged fraudulent representation. The Complaint also attempts to state an unjust

[2] Moreover, the EULA also contains an explicit "Disclaimer of Warranty" and a "Limitation of Liability," which clauses foreclose virtually all of Plaintiff's claims. (EULA §§ 10-11.)

enrichment claim based on allegations that Defendants received "additional advertising fees" as a result of its allegedly wrongful conduct. But the Complaint does not allege any basis as to why Plaintiff is the proper party to recover those fees from Defendants. Plaintiff's claim that Defendants negligently monitored third-party distributors of the Software also fails, because he does not allege any facts that would support the imposition of liability on Defendants for the actions of third-parties. In support of the trespass claim, the Complaint does not even allege that the Plaintiff or his computer sustained any damage as a result of the alleged trespass, or that the damage, if any, was caused by the Software.

Sotelo's Complaint omits more facts than it conveys, and it flies in the face of the agreed-upon terms contained in the EULA. The Complaint should be dismissed in its entirety for failure to state a cause of action.

## II. BACKGROUND

DirectRevenue operates a leading internet business, headquartered in New York, which develops and distributes the Software. Computer users download the Software in exchange for free access to other software (e.g., games, screensavers, anti-spam programs), services, and content that is available on the internet.

Computer users are required to accept the EULA before downloading the Software. By accepting the EULA and downloading the Software, the user agrees to receive "contextual advertising" through DirectRevenue. Contextual advertising is a form of behaviorally-targeted advertising which enables advertisers to send ads to users based on their prior internet-browsing preferences. DirectRevenue does not use any personally identifiable information – such as the user's name, address, email, or identity –to provide its contextual advertising. DirectRevenue simply tracks the internet-browsing preferences of the user by tracking the websites the user visits.

## III. APPLICABLE LEGAL STANDARD

In ruling on a motion to dismiss, the Court should accept as true all well-pled facts and draw all reasonable inferences in the non-moving party's favor. *McLeod v. Arrow Marine Transport, Inc.*, 258 F.3d 608, 614 (7th Cir. 2001). However, the Court should not accept as true conclusory statements of law or unsupported conclusions of fact. *Id.* (affirming trial court's dismissal of defendants' complaint containing unclear, conclusory allegations). "[A] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal

standard of Rule 12(b)(6)" and should be dismissed. *Jackson v. Brach Corp.*, 176 F.3d 971, 978 (7th Cir. 1999). Moreover, consumer fraud (as Plaintiff's alleges here) must be pled with the same particularity and specificity as that required under common law fraud. *Neff v. Capital Acquisitions & Management Co.*, 238 F. Supp. 2d 986, 994 (N.D. Ill. 2002). Under these standards, the Court should dismiss this Complaint in its entirety.

## IV. ARGUMENT

### A. PLAINTIFF FAILS TO STATE A CLAIM FOR TRESPASS TO PERSONAL PROPERTY (TRESPASS TO CHATTELS)

The Complaint's first count against DirectRevenue alleges trespass to personal property (trespass to chattels). "The gist of an action [for trespass to personal property] is an injury to, or interference with, possession, by an unlawful act or by a lawful act done in an unlawful manner." 34A Ill. Law & Prac. Tresspass § 3, "Trespass to Personal Property" (July 2004). A defendant's actions "cannot constitute a trespass" if such actions were "authorized" by plaintiff. *Skierkewiecz v. Gonzalez*, 711 F. Supp. 931, 935 (N.D. Ill. 1989). Moreover, a plaintiff may not recover under a claim for trespass to chattels if defendant's alleged trespass did not result in damages to plaintiff. *Najieb v. Chrysler-Plymouth*, No. 01 C 8295, 2002 WL 31906466, at *10-11 (N.D. Ill. Dec. 31, 2002).

In the current action, Plaintiff's claim for trespass to personal property fails for at least two reasons. First, Plaintiff does not deny that he authorized the installation of Defendants' software on his computer by signing the EULA. Second, Plaintiff alleges that "spyware and advertising" generally may harm a computer, but Plaintiff never claims that his own computer was actually harmed, or that such harm, if any, was caused by Defendant's software.

#### *1. Plaintiff expressly authorized Defendants' Actions*

Plaintiff fails to state a trespass to chattels claim because Plaintiff does not deny that he expressly authorized the activities described in the Complaint. Plaintiff concedes in the Complaint that "DirectRevenue has an agreement governing its spyware called the [EULA] that purports to inform a consumer about advertisements and monitoring that may result if he/she accepts its terms." (Complaint ¶ 11). Pursuant to the EULA, Plaintiff, by installing Defendant's software, agreed to allow Defendants to display advertisements on his computer, store non-personally identifiable statistics of the websites he visits, and uninstall other adware programs on

his computer, among other things. (*See* Exhibit A). In other words, pursuant to the EULA, Plaintiff authorized all of the alleged "wrongdoing" described in the Complaint. Notably, Plaintiff never contends that Defendant's actions were outside the scope of the authorization contained in the EULA.

Plaintiff's allegations that "DirectRevenue deceptively installs its software ... to avoid showing the [EULA] to the computer user" does not vitiate Plaintiff's authorization. (*See* Complaint ¶ 11). First, Plaintiff never alleges that he himself did not view the EULA. Second, in describing DirectRevenue's alleged efforts to "avoid showing the [EULA] to the computer user," Plaintiff does not describe any acts or omissions on the part of DirectRevenue. The fact that the computer user may choose to set his or her Microsoft security settings to "low," thereby allegedly overriding the EULA consent screen, does not constitute any wrongdoing on the part of DirectRevenue. Similarly, the fact that computer users who install "Microsoft Windows' Service Pack 2" may receive a different security warning than other users does not support the conclusion that DirectRevenue deliberately sought to avoid showing the EULA to the computer user. (Complaint ¶ 11(a) and (b)).

Third, Plaintiff complains that certain computer users are asked to agree to a "Consumer Policy Agreement" rather than the EULA. However, Plaintiff does not allege that the two documents are materially different, or that the Consumer Policy Agreement does not contain the same consent language as the EULA. In fact, the Consumer Policy Agreement is the EULA. (*See* Exhibit A). Plaintiff disingenuously alleges that the "Consumer Policy Agreement" is not available for review "on DirectRevenue's web page, or elsewhere;" but the EULA is. And Plaintiff does not (because he cannot) allege that a direct link to the full text of the EULA was not displayed on the computer screen at the time he was asked to agree to it. (*See* Complaint ¶ 11(c)).

For these reasons, the Court should dismiss Plaintiff's claim for trespass to personal property.

### *2. Plaintiff fails to plead causation and damages*

Plaintiff's claim for trespass to personal property fails also because Plaintiff does not properly plead causation and damages. The Complaint alleges generally that "spyware" and "advertisements" may cause harm to a computer. But Plaintiff never pleads (1) that any spyware

or advertisements harmed his computer (damages), or (2) that Defendants' Software caused any such harm (causation). In fact, nearly all of the Complaint's allegations under the heading "Damages Caused by Defendant's Unlawful Conduct" are cast in broad generalities, without any reference to either Plaintiff or Defendants. (*See, e.g.*, Complaint ¶ 20.)

Notably absent from the Complaint is any allegation that Plaintiff's own computer sustained any damage, or that the damage, if any, was caused by Defendants' software. Because innumerable companies participate in distributing "spyware" and "advertisements" on the Internet, Plaintiff has not adequately alleged that the damage, if any, resulted from Defendants' actions. The only other harm alleged in the damages section of the Complaint is that "DirectRevenue's spyware destroys other software programs on a computer." But this allegation is deficient because Plaintiff alleges only that Defendants' product destroys software on "a" computer, not that Defendants' product destroyed any software on *Plaintiff's* computer.[3]

For these additional reasons, Plaintiff has failed to state a cause of action for trespass to chattels Accordingly, the Court should dismiss Count I of the Complaint.

### B. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE ILLINOIS CONSUMER FRAUD ACT

Count II of Sotelo's Complaint purports to state a claim under the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1, et seq. (the "ICFA"). (*See* Complaint, p. 13.) Plaintiff's allegations are fatally conclusory and non-specific, and the Court should dismiss this count in its entirety.

#### *1. Claims under the ICFA must be pled with specificity and particularity.*

To state a claim under the ICFA, the plaintiff must allege facts sufficient to meet the following elements: "(1) a deceptive act or practice; (2) an intent by the defendant that the plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving a trade or commerce." *Thacker v. Menard, Inc.*, 105 F.3d 382, 386 (7th Cir. 1997). While the ICFA is intended to have a broad protective purpose, claimants still must plead their allegations with the same particularity and specificity as that required under common law fraud, and "notice pleading" will not suffice. *Davis v. G N Mortgage Corp.*, 244 F. Supp. 2d 950, 960

[3] Moreover, as discussed above, the removal and disabling of other software is expressly authorized by the EULA, which is incorporated into the Complaint by reference. (Exhibit A).

(N.D. Ill. 2003); *Neff v. Capital Acquisitions & Management Co.*, 238 F. Supp. 2d 986, 994 (N.D. Ill. 2002) (dismissing plaintiff's ICFA counts for lack of particularity and specificity).

***2. Specificity includes the time, place, and content of the misrepresentation.***

As acknowledged by the District Court in *Olympic Chevrolet v. General Motors Corp.*, 959 F. Supp. 918, 920 (N.D. Ill. 1997):

> Claims made pursuant to the [ICFA] ...must state the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.

*Quoting Gallagher Corp. v. Massachusetts Mut. Life Ins. Co.*, 940 F. Supp. 176 (N.D. Ill 1996). Thus, essential elements of pleading with appropriate particularity and specificity under the ICFA include alleging: (1) the identity of the misrepresenting party; (2) the time of the misrepresentation; (3) the place of the misrepresentation; (4) the content of the misrepresentation, and (5) the method by which the misrepresentation was communicated. The Illinois Supreme Court has recognized the sound policy considerations behind such particularity and specificity requirements, to wit:

> Even under the more lenient Federal rules, a claim of Fraud must be stated with particularity. The reason for this higher standard is to protect against baseless complaints. This not only weeds out unmeritorious strike suits, but also protects defendants from the harm to their reputations that follows charges of serious wrongdoing.

*Board of Educ. v. A, C and S, Inc.*, 131 Ill. 2d 428, 457, 546 N.E.2d 580, 593-94 (1989) (citations and internal quotes omitted). Here, Sotelo has presented the Court with just the type of baseless complaint the pleading standards attempt to weed out.

***3. Sotelo fails to allege facts demonstrating the content of the misrepresentation.***

Sotelo goes to great lengths in pages 2-11 of his Complaint to describe "spyware," and its alleged negative effects on consumers. Defendants, however, do not provide "spyware;" they provide consumers with software that serves targeted advertising, but only after the consumer

consents to the installation of that software. Sotelo's allegations regarding an alleged fraud are conclusory and incorrect.

For example, at paragraph 36, Sotelo engages in a game of semantics, claiming that users are told they are downloading "free" software, when, in fact, they are receiving Defendants' Software in addition to whatever "legitimate" program they have chosen to download.[4] Plaintiff's word games aside, the desired software is clearly "free" under the generally accepted understanding of that term: users are not required to pay money in exchange for the program they are receiving.

In addition, at paragraph 38, Sotelo summarily states that DirectRevenue has set up the Software in a deceptive manner, without explaining what the deception is or what representation DirectRevenue has made regarding the Software. At paragraph 39, Sotelo transmutes inconvenience into deception, by claiming that an alleged difficulty in removing the software somehow constitutes a misrepresentation. At paragraph 40, Sotelo alleges that DirectRevenue neglects to inform users of the alleged effects of the Software, which constitutes "an omission of material fact." These allegations are contradicted outright by the very first paragraphs of the EULA, which state, inter alia, in no uncertain terms, "This Software will collect information about websites you access and will use that information to display advertising on your computer." (EULA § 1.)

#### *4. Sotelo fails to allege the time of the misrepresentation.*

Nowhere in Sotelo's Complaint does he allege when DirectRevenue made a misrepresentation to him. By failing to allege the time of the misrepresentation, Sotelo has not met the specificity requirement of pleading under the ICFA. *See Olympic Chevrolet*, 959 F. Supp. at 920.

#### *5. Sotelo fails to allege the place of the misrepresentation.*

Likewise, the Complaint is silent on where the alleged misrepresentation occurred. We know that Sotelo is an Illinois resident (Complaint, p. 2), but that tells us nothing about the place

[4] This allegation fails in another respect: Plaintiff does not allege that it is actually Defendants who make this "misrepresentation." To the contrary, Plaintiff suggests that the desired "legitimate" software is published by other, unnamed entities. (*See* Complaint 37.) Therefore, any representation as to the cost of the "legitimate" software is made by those entities, not Defendants.

of any alleged misrepresentation. The Complaint does not inform the Court of (a) the location of Sotelo's computer and/or internet connection, or (b) Sotelo's and his device's location when he downloaded the complained-of Software. In sum, Sotelo fails to provide any degree of specificity regarding the place of the alleged misrepresentation, and the Complaint does not comport with the pleading requirements under the ICFA.

For all of the above reasons, the Court should dismiss Sotelo's claim under the ICFA (Count II of the Complaint).

### C. PLAINTIFF FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT

The Complaint fails to state a cause of action for unjust enrichment. In Illinois, "[t]o state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *In re Scattered Corp. Sec. Litig.*, 844 F. Supp. 416, 421 (N.D. Ill. 1994), *citing HPI Health Care Serv., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160, 545 N.E.2d 672, 679 (1989).

Plaintiff's unjust enrichment should be dismissed for two reasons. First, "because the theory [of unjust enrichment] is based on an implied contract, it has no application when," as here, "an express contract governs the relationship between the parties." *B & B Land Acquisition v. Mandell*, 305 Ill. App. 3d 1068, 1075, 714 N.E.2d 58, 63 (2d Dist. 1999). Second, Plaintiff has not alleged (because he cannot allege) the additional facts that must be pled where, as here, "plaintiff is seeking the recovery of a benefit that was transferred to the defendant by a third party." *HPI*, 131 Ill. 2d at 161, 545 N.E.2d at 679.

#### *1. The EULA bars Plaintiff's unjust enrichment claim*

"The theory of unjust enrichment is based on a contract implied in law." *Hartigan v. E&E Hauling, Inc.*, 153 Ill. 2d 473, 497, 607 N.E.2d 165, 177 (1992). "Because unjust enrichment is based on an implied contract, "where there is a specific contract which governs the relationship between the parties, the doctrine of unjust enrichment has no application." *Id. See Peleschak v. Verex Assurance, Inc.*, 272 Ill. App. 3d 1077, 1083, 651 N.E.2d 562, 566 (1st Dist. 1995) ("It is well-settled in Illinois that no claim on a contract implied in law can be asserted if an express contract exists between the parties and concerns the same subject matter.")

As discussed in detail above, Plaintiff concedes in the Complaint that "DirectRevenue has an agreement governing its spyware called the [EULA] that purports to inform a consumer about advertisements and monitoring that may result if he/she accepts its terms." (Complaint ¶ 11). Pursuant to the EULA, Plaintiff, by installing Defendants' Software, agreed to allow Defendants to display advertisements on Plaintiff's computer, store non-personally identifiable statistics of the websites Plaintiff visits, and uninstall other adware programs on Plaintiff's computers. (*See* Exhibit A). Yet, precisely these actions form the basis of the Complaint.

As discussed, Plaintiff never alleges that he himself did not view and consent to the EULA before installing the Software. Accordingly, because the "there is a specific contract which governs the relationship between the parties, the doctrine of unjust enrichment has no application." Therefore, the Court should dismiss Count III of the Complaint.

***2. Plaintiff has not demonstrated that it is entitled to recover the benefit allegedly received by Defendants***

Even if the unjust enrichment claim were not barred by the existence of an express contract, Plaintiff still fails to state a claim for unjust enrichment. According to Plaintiff, Defendants were unjustly enriched because they received "additional advertising fees" as a result of their alleged wrongdoing. (Complaint ¶ 47). Thus, unlike the typical unjust enrichment case, where "the benefit the plaintiff is seeking to recover proceeded directly from him to the defendant," in the instant case, "plaintiff is seeking recovery of a benefit that was transferred to the defendant by a third party"– *i.e.*, the advertisers. *HPI*, 131 Ill. 2d at 162, 545 N.E.2d at 679.

In *HPI*, the Illinois Supreme Court ruled that, where the alleged benefit flows from a third party to defendant, "retention of the benefit would be unjust where: (1) the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead; (2) the defendant procured the benefit from the third party through some type of wrongful conduct; or (3) the plaintiff for some other reason had a better claim to the benefit than the defendant." *HPI*, 131 Ill. 2d at 162, 545 N.E.2d at 679.

The Complaint fails to satisfy the *HPI* test. Plaintiff certainly does not contend, under the first or third prongs of the *HPI* test, that the "additional advertising fees" were given to Defendants instead of Plaintiff by "mistake," or that Plaintiff has any "better claim" to the alleged "additional advertising fees" than Defendants. Nor has Plaintiff alleged facts that would satisfy the second prong of the *HPI* test, relating to a defendant's "wrongful conduct." The case

law is clear that, where plaintiff is seeking to recover a benefit that was transferred to defendant by a third party, defendant's "wrongful conduct" alone will not support a claim for unjust enrichment if plaintiff has no "claim" or "entitlement" to the monies. *See Association Benefit Serv., Inc. v. AdvancePCS Holding Corp.*, No. 04 C 3271, 2004 WL 2101928, at *3 (N.D. Ill. Sept. 21, 2004); *Asch v. Teller, Levit & Silvertrust, P.C.*, No. 00 C. 3290, 2003 WL 22232801, at *7 (N.D. Ill. 2003).

Two cases from the Northern District of Illinois – *Association Benefit* and *Asch* – are instructive. In *Association Benefit*, the defendant promised to pay the plaintiff a certain portion of its earned commissions if plaintiff could assist defendant in procuring a particular contract with Third Party A. When defendant failed to pay as promised, plaintiff asserted two claims for unjust enrichment. First, plaintiff alleged that defendant was unjustly enriched because it improperly retained commissions from the contract with Third Party A that had been promised to plaintiff. Second, plaintiff claimed that defendant was unjustly enriched because, by virtue of its contract with Third Party A, defendant earned "billions of dollars" in a subsequent merger with Third Party B. The district court concluded that plaintiff had properly stated an unjust enrichment claim with respect to the money received from Third Party A, noting that plaintiff had pled that it was "promised" this money. But the district court rejected the unjust enrichment claim with respect to the money received from Third Party B, finding that, "[e]ven under the wrongful conduct exception discussed in *HPI* [], [plaintiff] has no claim on money given to [defendant] by a third party to which [plaintiff] is not entitled." *Id.* at 3 (emphasis added).

Similarly in *Asch*, a class of debtors sued a collection law firm alleging that the firm improperly failed to promptly credit loan payments upon receipt, allowing additional interest to build up on plaintiffs' accounts. Therefore, plaintiffs alleged that the defendant – who retained as its fee a portion of the interest it collected from plaintiffs – unjustly received additional fees from the creditor. *Asch*, 2003 WL 22232801, at *1. The district court "agree[d] that [defendants] engaged in wrongful conduct that resulted in inflated fees" pursuant to the *HPI* analysis, but it refused to grant plaintiffs' claim for unjust enrichment absent evidence that plaintiffs were "entitled" to the fees. The court stated, "[t]he parties have pointed to no case, and the court has uncovered no case, in which a court has applied *HPI*'s wrongful conduct exception where a plaintiff is attempting to recover money to which it is not entitled." *Id.*

Here, Plaintiff alleges that Defendants have been unjustly enriched as a result of monies received from third parties (the advertisers), but – like the plaintiffs in *Associated Benefit* and *Asch* – Plaintiff fails to set forth any basis as to why he is entitled to those moneys. The *Associated Benefit* and *Asch* cases underscore the inappropriateness of a claim for unjust enrichment where there is no symmetry or proportionality between the damages claimed by plaintiff, on the one hand, and the amount by which defendant has been unjustly enriched, on the other. Significantly, Plaintiff alleges elsewhere in the Complaint that he (as well as the other members of the purported class) has sustained damages of $30, a number bearing no relationship whatsoever to the amount by which Defendants were allegedly unjustly enriched. Therefore, as in *Associated Benefit* and *Asch*, Plaintiff has failed to set forth a claim for unjust enrichment.

### D. PLAINTIFF FAILS TO STATE A CLAIM FOR NEGLIGENCE

Plaintiff's Complaint presents two alternative theories of negligence. Plaintiff's first theory rests on Defendants' duty not to harm users' computers once having gained access to those computers. Plaintiff's second theory posits a duty on Defendants' part to monitor the distribution of the Software. Neither theory can succeed.

#### *1. Plaintiff Cannot State A Claim for Negligence Based On Allegations Of Intentional Conduct To Which Plaintiff Consented, Or Conduct For Which Plaintiff Assumed The Risk*

Under Illinois law, in order to succeed on a negligence claim, the plaintiff must prove "(1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; and (3) the breach was the proximate cause of the plaintiff's injury." *Mann v. Producer's Chemical Co.*, --- N.E.2d ---, 2005 WL 396584, at *3 (Ill. App. 2005). A plaintiff cannot recover for a defendant's negligent conduct when the plaintiff voluntarily assumes the risk associated with that conduct. *Bonavia v. Rockford, Inc.*, 348 Ill. App. 3d 286, 294, 808 N.E.2d 1131 (2004). Further, "[n]egligence claims address unintentional misfeasance or nonfeasance," and are not the proper vehicle to redress intentional wrongs. *Arthur v. Lutheran General Hosp., Inc.*, 295 Ill. App. 3d 818, 825, 692 N.E.2d 1238, 1242 (1998).

Plaintiff's first theory is premised on Defendants' alleged duty, having gained access to users' computers, not to harm those computers or impact their operation. This theory of negligence cannot succeed. The Complaint describes two putative subclasses, one consisting of users who saw the EULA before downloading the Software, and another of users who did not.

The EULA clearly discloses the operation of the Software, as well as its potential effects. (EULA §§ 1-2) As discussed above, Plaintiff does not deny that he viewed the EULA before downloading the Software. Plaintiff, therefore, consented to any effects of the Software, and assumed the risk of any adverse effects of the Software, which effects were explained in the EULA.

In any event, it is clear from the Complaint that Plaintiff is actually alleging an intentional trespass to his computer. Plaintiff claims that Defendants intentionally and surreptitiously installed the Software onto his computer, with the intent of producing the effects he complains of, *i.e.*, monitoring users' internet browsing habits and providing targeted advertising. Indeed, a significant portion of the Complaint is dedicated to this theory, *i.e.*, that Defendants purposefully "hide" their Software in other software in order to infiltrate users' computers, and once installed, the Software monitors internet usage and displays pop-up ads. Since Plaintiff alleges intentional conduct on the part of Defendants, a negligence claim is not the proper vehicle for recovery. Instead, any alleged effects of the Software would stem from trespass, which Plaintiff has already attempted to plead in the first count of his Complaint.[5] The negligence count is therefore improper.

### 2. *Defendants Cannot Be Held Responsible For Conduct Of Third Parties*

Plaintiff's second theory of negligence posits a duty on Defendants' part to monitor distributors of the Software, to ensure that each distributor obtains consent prior to delivering the Software to users along with their own software. Plaintiff fares no better on this theory.

In the absence of some special relationship, there is no duty to control the conduct of a third party. *See Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 228-29, 745 N.E.2d 1166, 1178 (2000); *Johnson v. Board of Jr. College Dist. No. 508*, 31 Ill. App. 3d 270, 274, 334 N.E.2d 442, 445 (1975); Restatement, Second, Torts § 315. Further, in general, one cannot be held liable for the conduct of an independent contractor. *Kouba v. East Joliet Bank*, 135 Ill. App. 3d 264, 267, 481 N.E.2d 325, 328 (1985). An independent contractor is one who, though performing some work for another, is not subject to that other's orders or control, and may use his own discretion with respect of the details of the work. *Horwitz v. Holabird & Root*, 212

[5] For the reasons discussed in Section IV-A, that trespass claim must be dismissed as well.

Ill. 2d 1, 13, 816 N.E.2d 272 (2004). Moreover, a manufacturer of a non-defective product has no duty to control that product's distribution. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 390-94, 821 N.E.2d 1099, 1125-27 (2004); *Linton v. Smith & Wesson*, 127 Ill. App. 3d 676, 678, 469 N.E.2d 339, 340 (1984).

Defendants had no duty to control the distribution of the Software by third parties. Plaintiff does not allege that the Software is somehow defective. Further, though the Complaint refers to "distributors" of the Software, it does not allege any facts that lead to the conclusion that these distributors are any more than independent contractors, third parties for whose conduct Defendants cannot be held responsible. In the absence of any allegations that would support a duty by Defendants to control the details of the distributors' work, and that they did so negligently, Plaintiff cannot base his negligence claim on the alleged failure of the distributors to obtain users' consent. The Complaint has not made (and cannot make) such allegations. For this additional reason, the Court should dismiss Plaintiff's negligence claim (Count IV of the Complaint).

### E. PLAINTIFF FAILS TO STATE A CLAIM UNDER ILLINOIS' COMPUTER CRIME PREVENTION LAW

Count V of the Plaintiff's Complaint purports to state a claim against all Defendants under Illinois' Computer Crime Prevention Law, 720 ILCS 5/16D-1, et seq. (the "CCPL"). (Complaint, pp. 16-17) The CCPL is located in the Criminal Code; however, it provides for a civil action under its Section 16D-3(c): Subsection (a)(4) of 16D-3 prohibits a person from "knowingly and without the authorization of a computer's owner," inserting a program onto a computer knowing that the program may damage the computer.[6] The allegations of Sotelo's Complaint, however, do not state a claim under the CCPL.

The text of section 16D-3(a)(4) indicates that a civil claim under the CCPL must contain the crucial element of lack of authorization. Thus, under the plain meaning of the statute, if the plaintiff authorized access to his computer, his claim cannot stand. While Sotelo alleges that the Software can be installed onto a computer with or without the user's authorization, he never alleges that he himself did not authorize installation of the Software. The only allegations Sotelo makes about his own experience with the Software appear in paragraphs 25 and 28 of the

[6] A review of Illinois case law and the annotation for Section 16D-3 revealed no decisions by courts of review pertaining to this section. While the Illinois General Assembly passed the operative subsections here into law in 1989, it appears to be a seldom, if ever, used vehicle for civil recovery.

Complaint, where he alleges that "Plaintiff had DirectRevenue's spyware downloaded to his computer and was sent the typical amount of advertisements experienced by other Class members," (¶ 25) and "Plaintiff was the owner of a computer or internet connection that was infected with Defendants' spyware." (¶ 28) Neither of these allegations mentions anything about lack of authorization. Sotelo does not allege that the Defendants installed anything on his computer without authorization. Thus, he fails to allege one of the crucial elements of a civil claim under the CCPL, and his claim fails.

In fact, in ¶ 25 of the Complaint Plaintiff appears to acknowledge that he affirmatively granted authorization for the installation of the Software. Paragraph 25 alleges that "Plaintiff had DirectRevenue's spyware downloaded..." This simple statement sets forth that Sotelo himself "had" the Software installed – indicating a positive action on Plaintiff's part (*i.e.*, "I 'had' my car fixed by the mechanic."). Because Sotelo authorized the installation of the Software, his claim under the CCPL cannot stand. The Court should therefore dismiss Count V of the Complaint.

## V. CONCLUSION

Wherefore, for the reasons stated herein, Defendants DirectRevenue, L.L.C. and BetterInternet, L.L.C. respectfully request that the Court dismiss Plaintiff Stephen Sotelo's Complaint with prejudice in its entirety, and grant Defendants such further relief, as the Court deems appropriate and just.

Dated: May 6, 2005

DIRECTREVENUE, L.L.C., AND
BETTERINTERNET, L.L.C.,
DEFENDANTS

By: _____
One of their attorneys

Bradford P. Lyerla (3127392)
Anthony S. Hind (6257797)
MARSHALL, GERSTEIN & BORUN LLP
6300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6357
(312) 474-6300

Ex 17.5 + A

a better internet

HOME MORE DOWNLOADS

[redacted]

**(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.

**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/conline/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.

All rights not expressly granted to you by the foregoing sentence are reserved by BetterInternet. Without limiting the generality of the foregoing, you may not modify, distribute, sublicense, rent, lease, or create derivative works based on the Software or any part thereof. Except as may be permitted by law, you may not reverse engineer, decompile or disassemble the Software. You may not copy the Software other than to make one copy of the Software for back-up purposes. You may not use the Software for any commercial purpose other than as permitted hereunder, and may not use the Software in the operation of a service bureau or for the benefit of any other person or entity. Moreover, you may not transfer, sell, assign or convey the Software to another party without the prior written consent of BetterInternet. You shall maintain all copyright notices, trademark notices, and other proprietary notices on the Software. You have no ownership rights in the Software. Rather, you have a license to use the Software pursuant to the terms of this Agreement. Title, ownership rights, and intellectual property rights in and to the Software and related documentation remain in BetterInternet.

**7. Proprietary Rights** - The Software, and any materials posted or delivered in connection with the use of the Software including code, images, text, illustrations, logos, audio and video files (collectively "Intellectual Property"), are protected by copyrights, trademark rights, service mark rights, or other proprietary rights which are either owned by BetterInternet, or owned by other parties who have licensed their Intellectual Property to BetterInternet.

You may not frame or utilize framing techniques to enclose any trademark, logo, or other proprietary information of BetterInternet and its affiliates without express written consent of BetterInternet. You may not use any meta tags or any other "hidden text" utilizing the name or trademarks of BetterInternet and its affiliates without the express written consent of BetterInternet and its affiliates. Any unauthorized use terminates the permission or license granted by BetterInternet in this paragraph

Use or modification of the Intellectual Property in any form, including but not limited to use on any other website or networked computer environment, without express written authorization, is a violation of BetterInternet copyrights and other proprietary rights and is strictly prohibited.

**8. Trademarks** - BetterInternet, aBetterInternet.com and other BetterInternet logos, page headers, buttons, icons, scripts, and service names are trademarks, service marks and/or trade dress of BetterInternet or its affiliates. None of BetterInternet or its affiliates' trademarks, service marks or trade dress may be used in connection with any product or service that is not a product or service of BetterInternet or its affiliates in any manner that is likely to cause confusion among users, or in any manner that disparages or discredits BetterInternet or its affiliates.

**9. Indemnification** - You agree to defend, indemnify, and hold harmless BetterInternet and its affiliates, and each of their respective officers, directors, employees, agents, representatives, information providers and licensors, from any claims, costs, losses, damages, judgments and expenses, including but not limited to reasonable attorney's fees and expenses, relating to or arising out of any breach of this Agreement or any use of the Software by you, or by any other person using the Software through you or using or accessing your computer.

**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 NONINFRINGING. 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.

IF YOU PURCHASE A PRODUCT OR SERVICE AS A RESULT OF USING THE SOFTWARE, AND A DISPUTE ARISES BETWEEN YOU AND THE SELLER, YOU IRREVOCABLY RELEASE AND DISCHARGE BETTERINTERNET AND ITS AFFILIATES, AND ANY OF ITS OR THEIR OFFICERS, DIRECTORS, LICENSORS, EMPLOYEES OR REPRESENTATIVES, FROM ANY CLAIMS, DEMANDS AND DAMAGES (ACTUAL AND CONSEQUENTIAL, DIRECT AND INDIRECT, COMPENSATORY AND PUNITIVE) OF EVERY KIND AND NATURE, KNOWN AND UNKNOWN, SUSPECTED AND UNSUSPECTED, DISCLOSED AND UNDISCLOSED, ARISING OUT OF OR IN ANY WAY CONNECTED WITH SUCH DISPUTES. YOU ACKNOWLEDGE AND AGREE THAT ANY SOFTWARE OR OTHER CONTENT DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE USE OF THE SOFTWARE IS DONE AT YOUR OWN DISCRETION AND SOLELY AT YOUR RISK AND THAT YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM THE DOWNLOADING OF SUCH SOFTWARE AND/OR CONTENT.

**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.

While you may choose to delete the Software from your computer at anytime by following the instructions herein, some third party applications may attempt to delete, disable or modify the Software with or without notice to you. You further represent to BetterInternet that BetterInternet may store a cookie, computer file or other unique identifier on your computer to identify you and automatically repair or reinstall the Software if any third party application attempts to delete, disable or modify the Software. BetterInternet may terminate this Agreement or your right to continue to use the Software at any time.

Further, you agree that you will not initiate, permit, authorize or assist any third party or application to remove the Software from your computer, or disrupt its operation or the operation of any other user. You agree that removal of the Software from your computer will only be performed by you pursuant to the instructions set forth herein.

**13. Anti-Spam Policy And Acceptable Use** - While BetterInternet encourages you to refer friends, family, colleagues, and others to use the Software, you may do so only through methods that are consistent with the terms and conditions of your own Internet Service Provider as well as prevailing standards of acceptable Internet use and behavior. In particular, you may not use the Software or the server, name, trademarks, or other Intellectual Property of BetterInternet in conjunction with the sending of unsolicited e-mail, or cause to be used BetterInternet equipment, network connectivity, or other resources to originate, deliver, relay, or otherwise transmit unsolicited e-mail messages. You may not engage in any of these prohibited activities by using the service of any other provider, third-party agent, re-mailing service, or address forwarding service, in such a way that BetterInternet network addresses or BetterInternet hosted Web or e-mail services are in any way identified as being associated with the sending of unsolicited e-mail. Other prohibited methods of advertising or promoting your involvement with BetterInternet include multiple postings of messages to Usenet newsgroups, mailing lists, chat rooms (including IRC, AIM, ICQ, or other interactive chat services) or other online forums. Incidents of "spamming" or similar inappropriate behavior or other violations of the terms of use of the Software should be reported to contact@abetterinternet.com.

You may only use the Software for lawful purposes and in strict compliance with this Agreement and all applicable laws. You may not use the Software to post or transmit any message or content, including linking to any message or content, which is abusive, vulgar, hateful, obscene, scandalous, inflammatory or otherwise objectionable; is being used to harass, stalk or otherwise threaten a person; is libelous, defamatory or invades any privacy or publicity rights of any third party; misrepresents or masks the true identity of any party; infringes any copyright, trademark, service mark, patent, trade secret or confidentiality obligation; contains any illegal contests or lotteries, or any pyramid schemes; or contains any virus, trojan horse, time bomb or any other harmful or disabling software code.

**14. Access to Software** - To use the Software, you must provide all your own equipment to establish a connection to the Internet and provide for your own access, including paying any fees. You represent and warrant to BetterInternet that you have the necessary rights and permissions to install the Software on the computer used herein.

**15. Other Websites** - The Web changes constantly, and no technique can index all pages accessible on the Web. As a result, BetterInternet cannot guarantee the completeness or accuracy of the websites or URLs to which BetterInternet's Software link or refer. Further, the process of including websites in the Software is largely automatic, if at all. BetterInternet does not screen the websites accessed through the Software, and these other websites are maintained by persons over whom BetterInternet exercises no control. For these reasons, BetterInternet assumes no responsibility for the content of any website or URL included in the Software and is not responsible for errors or omissions or for offensive or objectionable content contained on any such website or URL.

**16. Third Party Software** - During the process of downloading and/or using the Software, you may also be offered the possibility to download software from third party software vendors pursuant to license agreements or other arrangements between such vendors and yourself ("Third Party Software"). Please note that the Third Party Software is subject to different license agreements or other arrangements, which you should read carefully. By downloading and using this Third Party Software you accept these Third Party Software license agreements or other arrangements and acknowledge that you have read them and understand them. BetterInternet disclaims to the maximum extent permitted by applicable law, any responsibility for or liability related to the Third Party Software. Any questions,

complaints or claims related to the Third Party Software should be directed to the appropriate vendor. THE THIRD PARTY SOFTWARE IS PROVIDED "AS IS" AND "WITH ALL FAULTS". BETTERINTERNET MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND CONCERNING THE QUALITY, SAFETY OR SUITABILITY OF THIS SOFTWARE, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT WILL BETTERINTERNET BE LIABLE FOR ANY DIRECT, INDIRECT, PUNITIVE, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES HOWEVER THEY MAY ARISE AND EVEN IF BETTERINTERNET HAS BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

There are inherent dangers in the use of any software available for downloading on the Internet, and BetterInternet cautions you to make sure that you completely understand the potential risks before downloading any of the Third Party Software. You are solely responsible for adequate protection and backup of the data and equipment used in connection with any of the Third Party Software, and BetterInternet will not be liable for any damages that you may suffer in connection with using any of the Third Party Software.

**17. Illegal, Unauthorized, Or Fraudulent Content Or Activities** - The Software may be used only for lawful purposes and in a lawful manner and in compliance with this Agreement. You agree to comply with all applicable laws and regulations. BetterInternet has the right, but not the obligation, to investigate any reported violation of its policies and take any action it deems appropriate, including but not limited to terminating your access to the Software without notice. To protect BetterInternet systems and users, to ensure the integrity and operation of BetterInternet business and systems, or in response to subpoenas, court orders, or legal requirements, BetterInternet may access and disclose any information that it considers necessary or appropriate, including user contact details, IP addressing and traffic information, copyright infringement, and Web usage paths. By using the Software, you expressly consent to the foregoing use and disclosure.

**18. Applicable Law; Jurisdiction And Venue** - This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without giving effect to any principles of conflicts of laws, and you hereby consent to the personal and exclusive jurisdiction of the state and federal courts sitting in the County of New York, State of New York.

**19. Arbitration** - Except as provided in the next paragraph, you and BetterInternet agree that 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) shall be submitted to and resolved by means of a confidential arbitration before a single arbitrator administered by the American Arbitration Association under its then current Commercial Arbitration Rules and conducted in the County of New York, State of New York. The arbitrator's award shall be binding and may be entered as a judgment in any court of competent jurisdiction. You and BetterInternet may litigate in any court of competent jurisdiction only to stay or compel arbitration under this Agreement or to confirm, modify, vacate or enter judgment on the award rendered by the arbitrators and to enforce the judgment that is entered. This Agreement will not be governed by the United Nations Convention of Contracts for the International Sale of Goods, the application of which is hereby excluded. To 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.

However, to the extent you have in any manner violated or threatened to violate BetterInternet's rights in the Intellectual Property, BetterInternet may seek injunctive or other appropriate relief in any court of competent jurisdiction and you irrevocably consent to jurisdiction and venue in such courts.

**20. Changes** - BetterInternet may change any of the terms and conditions contained in this Agreement, including the Privacy Policy in Section 3 of this Agreement and other policies and guidelines governing the Software, at any time in its sole discretion. Notices of material changes to this Agreement will be posted on BetterInternet website at www.abetterinternet.com when they become effective. You are solely responsible for reviewing the notices and any applicable changes. You agree that your continued use of the Software after any changes to this Agreement, including the Privacy Policy, take effect will constitute your acceptance of such changes. If you do not wish to accept the changes to this Agreement, do not continue to use the Software after the effective date of such changes and uninstall the Software.

**21. General Provisions** - This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereto and supersedes and cancels all prior and contemporaneous agreements, claims, representations and understandings of the parties in connection with the subject matter hereof, oral or written. If, for any reason, an arbitrator or court of competent jurisdiction finds any provision of this Agreement, or portion thereof, unenforceable, then the remainder of this Agreement shall continue in full force and effect and the provision in question will be read, or replaced with another provision, to give maximum effect to the intention of the parties as reflected by its plain language. BetterInternet's failure to enforce the strict performance of any provision of this Agreement will not constitute a waiver of BetterInternet's right to subsequently enforce such provisions or any other provisions of this Agreement. No waiver of any provision of this Agreement shall be effective unless in writing. All provisions of this Agreement relating to ownership of Intellectual Property and proprietary rights, warranty disclaimers, limitation of liability, and indemnification shall survive the termination of this Agreement and the termination of your use or access to the Software, for whatever reason. You acknowledge that your violation of the provisions relating to Intellectual Property and proprietary rights may cause damage to BetterInternet which is unquantifiable but nonetheless real and irreparable. Accordingly, in the event BetterInternet determines in its sole discretion that you

have violated or will violate any such provision, BetterInternet will be entitled to injunctive relief from a court of competent jurisdiction restraining such violation. BetterInternet's specific remedies set forth under this Agreement for any breach by you of this Agreement or otherwise shall be cumulative and shall not restrict or limit BetterInternet ability to resort to any other remedy available under law or equity. Any rights not expressly granted herein are reserved.

**22. International Access.** The Software is provided from the United States of America. The laws of other countries may differ regarding the access and use of the Software. BetterInternet makes no representations regarding the legality of the Software in any other country and it is your responsibility to ensure that your use complies with all applicable laws outside of the U.S.A.

**Last updated January 05, 2005**

EULA | Contact Us