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DISTRICT COURT

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THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY

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DEPUTY CLERK

Blake D. Miller (4090)  
Paxton R. Guymon (8188)  
Joel T. Zenger (8926)  
**MILLER MAGLEBY & GUYMON, P.C.**  
170 South Main Street, Suite 350  
Salt Lake City, Utah 84101  
Telephone: (801) 363-5600  
Facsimile: (801) 363-5601  
Special Assistant Attorneys General

Mark Shurtleff (4666)  
Philip C. Pugsley (2661)  
**UTAH ATTORNEY GENERAL'S OFFICE**  
160 East 300 South  
Suite 500  
Post Office Box 140811  
Salt Lake City, UT 84114-0811  
Telephone: (801) 366-0245  
Facsimile: (801) 366-0352

Attorneys for Defendants Olene S. Walker and Mark Shurtleff

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**IN THE THIRD JUDICIAL DISTRICT COURT**  
**SALT LAKE COUNTY, STATE OF UTAH**

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**WHENU.COM, INC. a Delaware  
corporation,**

**Plaintiff,**

**vs.**

**THE STATE OF UTAH, a body politic,  
OLENE S. WALKER, in her official  
capacity as Governor of Utah., and  
MARK SHURTLEFF in his official  
capacity as Utah Attorney General,**

**Defendants.**

**ANSWER**

**Civil No. 040907578**

**Honorable Joseph C. Fratto**

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The State of Utah, Olene S. Walker in her official capacity as Governor of Utah and Mark Shurtleff in his official capacity as Utah Attorney General, through their counsel, hereby respond to the Complaint (the "Complaint") of WhenU.com, Inc. ("WhenU"). Defendants respond to the individually numbered paragraphs to the Complaint as follows:

1. Defendants aver that the terms of the Complaint speak for themselves and deny any characterization of that document inconsistent with its terms; and deny the remaining averments of paragraph 1.

2. Defendants deny the allegations contained in paragraph 2.

3. Defendants aver that the terms of the subject Act speak for themselves and deny any characterization of the Act inconsistent with its terms; and deny the remaining averments.

4. Defendants admit the allegations contained in paragraph 4.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 5 and, therefore, deny the same.

6. Defendants admit that the State, through its legislature, enacted the subject statute and that the Act listed the effective date of May 2, 2004; and deny the remaining averments of paragraph 6.

7. Defendants admit the allegations contained in paragraph 7.

8. Defendants admit the allegations contained in paragraph 8.

9. The averments of paragraph 9 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous.

10. The averments of paragraph 10 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous.

11. The averments of paragraph 11 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous. In addition, Defendants specifically deny that it is impossible for a local regulation to have a purely local effect.

12. The averments of paragraph 12 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous.

13. The averments of paragraph 13 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous.

14. The averments of paragraph 14 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous.

15. Defendants are without knowledge or information sufficient to form a belief as to whether the software utilized by WhenU is proprietary to WhenU; deny that WhenU's advertising is unique, distinctive or innovative; and deny the remaining averments of paragraph 15.

16. Defendants admit that WhenU's software resides on a computer's hard drive; affirmatively aver that it interacts with WhenU's server; and deny the remaining averments of paragraph 16.

17. Defendants are without knowledge or information sufficient to form a belief as to the effectiveness of WhenU's advertisements; affirmatively deny that such advertisements are desired by consumers; and deny the remaining averments of paragraph 17.

18. Defendants affirmatively aver that WhenU's software provides pop-up advertisements over other targeted websites in order to lure the consumer away from a purchase at the targeted website; and deny the remaining averments of paragraph 18.

19. Defendants affirmatively aver that the terms of the Act speak for themselves and deny any characterization of the Act inconsistent with its terms; and deny the remaining averments of paragraph 19.

20. Defendants admit that 1-800-Contacts participated in lobbying efforts regarding the Act; affirmatively aver that a number of other companies, including WhenU, also participated in that effort; and deny the remaining averments of paragraph 20.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 21 and, therefore, deny the same.

22. Defendants affirmatively aver that the recordings and transcripts of the various referenced hearings speak for themselves and deny any characterization of said hearings inconsistent with what actually transpired therein; admit that 1-800-Contacts was involved in lobbying regarding the Act; affirmatively aver that other companies, including WhenU, also participate in that effort; and deny the remaining averments of paragraph 22.

23. The written terms of the Act speak for themselves and Defendants deny any characterization of the Act inconsistent with its terms; and deny the remaining averments of paragraph 23.

24. The written terms of the Act speak for themselves and Defendants deny any characterization of the Act inconsistent with its terms; and deny the remaining averments of paragraph 24.

25. The written terms of the Act speak for themselves and Defendants deny any characterization of the Act inconsistent with its terms; and deny the remaining averments of paragraph 25.

26. The written terms of the Act speak for themselves and Defendants deny any characterization of the Act inconsistent with its terms; and deny the remaining averments of paragraph 26.

27. The written terms of the Act speak for themselves and Defendants deny any characterization of the Act inconsistent with its terms; and deny the remaining averments of paragraph 27.

28. The written terms of the Act speak for themselves and Defendants deny any characterization of the Act inconsistent with its terms; and deny the remaining averments of paragraph 28.

29. The averments of paragraph 29 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous.

30. The averments of paragraph 30 are not factual averments as to these Defendants, but rather generic descriptions of various nature. The Defendants deny all such descriptions to the extent such are incomplete, inaccurate or erroneous.

31. Defendants deny the allegations contained in paragraph 31.

32. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 32 and, therefore, deny the same.

33. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 33 and, therefore, deny the same.

34. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 34 and, therefore, deny the same.

35. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 35 and, therefore, deny the same.

36. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 36 and, therefore, deny the same.

37. Defendants deny the allegations contained in paragraph 37.

38. Defendants admit that the bundling of revenue generating advertising free software is a common practice; and deny the remaining averments of paragraph 38.

39. Defendants deny the allegations contained in paragraph 39.

40. Defendants deny the allegations contained in paragraph 40.

41. Defendants deny the allegations contained in paragraph 41.

42. Defendants deny the allegations contained in paragraph 42.

43. Defendants deny the allegations contained in paragraph 43.

44. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 44 and, therefore, deny the same.

45. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 45 and, therefore, deny the same.

46. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 46 and, therefore, deny the same.

47. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 47 and, therefore, deny the same. Defendants affirmatively aver that complete uninstallation of SaveNow is not possible only using the computer's control panel Add/Remove option.

48. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 48 and, therefore, deny the same. Defendants affirmatively aver that uninstallation of SaveNow is not possible only using the computer's control panel Add/Remove option.

49. Defendants deny the allegations contained in paragraph 49.

50. Defendants deny the allegations contained in paragraph 50.

51. Defendants deny the allegations contained in paragraph 51.

52. Defendants deny the allegations contained in paragraph 52.

53. Defendants deny the allegations contained in paragraph 53.

54. Defendants deny the allegations contained in paragraph 54.

55. Defendants deny the allegations contained in paragraph 55.

56. Defendants deny the allegations contained in paragraph 56.

57. Defendants deny the allegations contained in paragraph 57.

58. Defendants deny the allegations contained in paragraph 58.

59. Defendants deny the allegations contained in paragraph 59.

60. Defendants deny the allegations contained in paragraph 60.

61. Defendants deny the allegations contained in paragraph 61.

62. Defendants deny the allegations contained in paragraph 62.

63. Defendants deny the allegations contained in paragraph 63.

64. Defendants deny the allegations contained in paragraph 64.

65. In response to paragraph 65, Defendants incorporate by reference the responses set forth in paragraphs 1-64 above.

66. Defendants deny the allegations contained in paragraph 66.

67. Defendants deny the allegations contained in paragraph 67.

68. Defendants deny the allegations contained in paragraph 68.



69. Defendants deny the allegations contained in paragraph 69.

70. Defendants deny the allegations contained in paragraph 70.

71. In response to paragraph 71, Defendants incorporate by reference the responses set forth in paragraphs 1-70 above.

72. Defendants deny the allegations contained in paragraph 72.

73. Defendants deny the allegations contained in paragraph 73.

74. Defendants deny the allegations contained in paragraph 74.

75. Defendants deny the allegations contained in paragraph 75.

76. Defendants deny the allegations contained in paragraph 76.

77. In response to paragraph 77, Defendants incorporate by reference their responses set forth in paragraphs 1-76 above.

78. Defendants deny the allegations contained in paragraph 78.

79. Defendants deny the allegations contained in paragraph 79.

80. Defendants deny the allegations contained in paragraph 80.

81. Defendants deny the allegations contained in paragraph 81.

82. Defendants deny the allegations contained in paragraph 82.

83. In response to paragraph 83, Defendants incorporate by reference their responses set forth in paragraphs 1-82 above.

84. Defendants deny the allegations contained in paragraph 84.

85. Defendants deny the allegations contained in paragraph 85.

86. Defendants deny the allegations contained in paragraph 86.

87. Defendants deny the allegations contained in paragraph 87.

88. Defendants deny the allegations contained in paragraph 88.

89. Defendants deny the allegations contained in paragraph 89.

90. Defendants deny the allegations contained in paragraph 90.

91. Defendants deny the allegations contained in paragraph 91.

92. Defendants deny the allegations contained in paragraph 92.

93. In response to paragraph 93, Defendants incorporate by reference their responses set forth in paragraphs 1-92 above.

94. Defendants deny the allegations contained in paragraph 94.

95. Defendants deny the allegations contained in paragraph 95.

96. Defendants deny the allegations contained in paragraph 96.

97. Defendants deny the allegations contained in paragraph 97.

98. Defendants deny the allegations contained in paragraph 98.

99. In response to paragraph 99, Defendants incorporate by reference their responses set forth in paragraphs 1-98 above.

100. Defendants deny the allegations contained in paragraph 100.

101. Defendants deny the allegations contained in paragraph 101.

102. Defendants deny the allegations contained in paragraph 102.

103. Defendants deny the allegations contained in paragraph 103.

104. Defendants deny the allegations contained in paragraph 104.

**FIRST DEFENSE**

The Complaint fails to state a claim against the Defendants upon which relief can be granted.

**SECOND DEFENSE**  
**(Causation)**

Plaintiff's claims are barred, in whole or in part, since to the extent Plaintiff suffered or suffers any injury or damage, such injury or damage were or are caused in whole or in part by the acts, omissions and conduct of Plaintiffs.

**THIRD DEFENSE**  
**(Intervening Causation)**

To the extent that Plaintiff has any claim for damages, which claim is expressly denied, Defendants affirmatively assert that such claims are barred because any loss, damage or injury, if any, is a direct and proximate result of intervening or superceding conduct of parties other than the Defendants, thereby absolving Defendants from any obligation to indemnify and repay Plaintiffs.

DATED this 18<sup>th</sup> day of May 2004.

**MILLER MAGLEBY & GUYMON, P.C.**



Blake D. Miller

Paxton R. Guymon

Joel T. Zenger

Attorneys for Defendants Olene S. Walker  
and Mark Shurtleff

**CERTIFICATE OF SERVICE**

I hereby certify that I am employed by the law firm of MILLER MAGLEBY & GUYMON, P.C., 170 South Main Street, Suite 350, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing ANSWER was delivered to the following this 18<sup>th</sup> day of May by:

- Hand Delivery to Alan L. Sullivan ONLY
- Facsimile
- Depositing the same in the U.S. Mail, postage prepaid
- Federal Express
- Certified Mail, Receipt No. \_\_\_\_\_, return receipt requested

Brent V. Manning  
Douglas R. Larson  
MANNING CURTIS, BRADSHAW  
& BEDNAR, LLC  
Third Floor Newhouse Building  
10 Exchange Place  
Salt Lake City, UT 84111

Alan L. Sullivan  
James D. Gardner  
SNELL & WILMER  
15 West South Temple, Suite 1200  
Gateway Tower West  
Salt Lake City, UT 84101-1004

Celia Goldwag Barenholz  
Michael D. Paley  
KRONISH LIEB WEINER & HELLMAN, LLP  
1114 Avenue of the Americas  
New York, NY 10036

