

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

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1-800 CONTACTS, INC. :
 :
 Plaintiff, : 02 Civ. 8043 (DAB)
 :
 vs. : **ANSWER OF DEFENDANT**
 : **WHENU.COM, INC.**
 :
 WHENU.COM, INC. :
 :
 and :
 :
 VISION DIRECT, INC., :
 :
 Defendants. :
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Defendant, WhenU.Com, Inc., by its attorneys, Hale and Dorr LLP and Lutzker & Lutzker LLP, as its Answer states as follows:

1. Plaintiff's statements of legal claims in Paragraph 1 of the Complaint do not call for a response, Plaintiff's Complaint speaks for itself, and Defendant otherwise denies any factual allegations set forth in Paragraph 1 of the Complaint and denies that Plaintiff is entitled to any of the relief requested therein.
2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Complaint, and therefore denies them.
3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3 of the Complaint, and therefore denies them.
4. Defendant admits that it is a corporation organized and existing under the laws of the state of Delaware and that its principal place of business is in New York, New York.

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 of the Complaint, and therefore denies them.
6. Plaintiff's statements of legal claims in Paragraph 6 of the Complaint do not call for a response. However, Defendant does not contest this Court's subject matter jurisdiction over the claims set forth in Plaintiff's Complaint.
7. Plaintiff's statements of legal claims in Paragraph 7 of the Complaint do not call for a response. However, Defendant does not contest the propriety of this Court as a venue for this action.
8. Plaintiff's statements of legal claims in Paragraph 8 of the Complaint do not call for a response. However, Defendant does not contest this Court's exercise of personal jurisdiction over Defendant in this action.
9. Defendant need not respond because the allegations set forth in Paragraph 9 of the Complaint are directed against another Defendant.
10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10 of the Complaint, and therefore denies them.
11. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11 of the Complaint, and therefore denies them.
12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12 of the Complaint, and therefore denies them.
13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13 of the Complaint, and therefore denies them.
14. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 of the Complaint, and therefore denies them.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15 of the Complaint, and therefore denies them.
16. Defendant denies the allegations set forth in Paragraph 16 of the Complaint.
17. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 of the Complaint, and therefore denies them.
18. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 18 of the Complaint, and therefore denies them.
19. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 19 of the Complaint, and therefore denies them.
20. Defendant denies that Plaintiff's attempt to characterize and/or describe the functioning of the Internet, the World Wide Web, web pages, web browsers, web sites, URLs, or domain names is sufficiently accurate or complete for the purposes of addressing the issues presented in this action and therefore denies the allegations set forth in Paragraph 20 of the Complaint.
21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 21 of the Complaint, and therefore denies them.
22. Defendant admits that consumers can use the Internet in the process of comparison shopping. Due to the vague and ambiguous wording thereof, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 22 of the Complaint, and therefore denies them.
23. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 23 of the Complaint, and therefore denies them.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24 of the Complaint, and therefore denies them.

25. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25 of the Complaint, and therefore denies them.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 26 of the Complaint, and therefore denies them.

27. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 27 of the Complaint, and therefore denies them.

28. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 28 of the Complaint, and therefore denies them.

29. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 29 of the Complaint, and therefore denies them.

30. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 30 of the Complaint, and therefore denies them.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 31 of the Complaint, and therefore denies them.

32. Defendant admits that selling online advertising is among the businesses within which it is engaged. Defendant denies the remaining allegations set forth in Paragraph 32 of the Complaint.

33. Defendant admits that it distributes a downloadable software program called "SaveNow" that is generally bundled for distribution with other software programs, and that persons may download the SaveNow program and install it on their computers. Defendant admits that it delivers pop-up advertisements to the computers of persons who

install the SaveNow program. Defendant admits that its pop-up advertisements may be displayed on the screens of computers of persons who install the SaveNow program at approximately the same time as the users of such computers seek to display the websites of third parties. Defendant denies the remaining allegations set forth in Paragraph 33 of the Complaint.

34. Defendant denies the allegations set forth in Paragraph 34 of the Complaint.

35. Defendant denies that advertising it delivers to computer users appears “on the homepage for Plaintiff’s website.” Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 35 of the Complaint, and therefore denies them.

36. Defendant denies that advertising it delivers to computer users appears on the servers or web pages of Plaintiff. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 36 of the Complaint, and therefore denies them.

37. Defendant denies that advertising it delivers to computer users appears “on” any web page of Plaintiff’s web site. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 37 of the Complaint, and therefore denies them.

38. Defendant denies the allegations set forth in Paragraph 38 of the Complaint.

39. Defendant denies the allegations set forth in Paragraph 39 of the Complaint.

40. Defendant denies the allegations set forth in Paragraph 40 of the Complaint.

41. Defendant admits that it claims to have industry leading click-through rates.

Defendant denies the remaining allegations set forth in Paragraph 41 of the Complaint.

42. Defendant denies the allegations set forth in Paragraph 42 of the Complaint.
43. Defendant denies the allegations set forth in Paragraph 43 of the Complaint.
44. Defendant denies the allegations set forth in Paragraph 44 of the Complaint.
45. Defendant denies the allegations set forth in Paragraph 45 of the Complaint.
46. Defendant denies the allegations set forth in Paragraph 46 of the Complaint.
47. Defendant denies the allegations set forth in Paragraph 47 of the Complaint.
48. Defendant need not respond because the allegations set forth in Paragraph 48 of the Complaint are directed against another Defendant.
49. Defendant need not respond because the allegations set forth in Paragraph 49 of the Complaint are directed against another Defendant.
50. Defendant need not respond because the allegations set forth in Paragraph 50 of the Complaint are directed against another Defendant.
51. Defendant need not respond because the allegations set forth in Paragraph 51 of the Complaint are directed against another Defendant.
52. Defendant need not respond because the allegations set forth in Paragraph 52 of the Complaint are directed against another Defendant.
53. Defendant denies the allegations set forth in Paragraph 53 of the Complaint.
54. Defendant denies the allegations set forth in Paragraph 54 of the Complaint.
55. Defendant admits that it did not seek authorization from Plaintiff, but otherwise denies the allegations set forth in Paragraph 55 of the Complaint.
56. Defendant denies the allegations set forth in Paragraph 56 of the Complaint.
57. Defendant denies the allegations set forth in Paragraph 57 of the Complaint.
58. Defendant denies the allegations set forth in Paragraph 58 of the Complaint.

59. Defendant denies the allegations set forth in Paragraph 59 of the Complaint.
60. Defendant denies the allegations set forth in Paragraph 60 of the Complaint.
61. Defendant denies the allegations set forth in Paragraph 61 of the Complaint.
62. Defendant denies the allegations set forth in Paragraph 62 of the Complaint.
63. Defendant denies the allegations set forth in Paragraph 63 of the Complaint.
64. Defendant denies the allegations set forth in Paragraph 64 of the Complaint.
65. Defendant denies the allegations set forth in Paragraph 65 of the Complaint.
66. Defendant admits that at least as of September 24, 2002, pop-up advertisements from Vision Direct were being delivered by Defendant to the computers of Defendant's SaveNow users. Defendant denies the remaining allegations set forth in Paragraph 66 of the Complaint.
67. Defendant denies the allegations set forth in Paragraph 67 of the Complaint.
68. Defendant denies the allegations set forth in Paragraph 68 of the Complaint.
69. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-68 of this Answer as if set forth fully herein.
70. Defendant denies the allegations set forth in Paragraph 70 of the Complaint.
71. Defendant denies the allegations set forth in Paragraph 71 of the Complaint.
72. Defendant denies the allegations set forth in Paragraph 72 of the Complaint.
73. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-72 of this Answer as if set forth fully herein.
74. Defendant denies the allegations set forth in Paragraph 74 of the Complaint.
75. Defendant denies the allegations set forth in Paragraph 75 of the Complaint.
76. Defendant denies the allegations set forth in Paragraph 76 of the Complaint.

77. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-76 of this Answer as if set forth fully herein.
78. Defendant denies the allegations set forth in Paragraph 78 of the Complaint.
79. Defendant denies the allegations set forth in Paragraph 79 of the Complaint.
80. Defendant denies the allegations set forth in Paragraph 80 of the Complaint.
81. Defendant denies the allegations set forth in Paragraph 81 of the Complaint.
82. Defendant denies the allegations set forth in Paragraph 82 of the Complaint.
83. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-82 of this Answer as if set forth fully herein.
84. Defendant denies the allegations set forth in Paragraph 84 of the Complaint.
85. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-84 of this Answer as if set forth fully herein.
86. Defendant denies the allegations set forth in Paragraph 86 of the Complaint.
87. Defendant denies the allegations set forth in Paragraph 87 of the Complaint.
88. Defendant denies the allegations set forth in Paragraph 88 of the Complaint.
89. Defendant denies the allegations set forth in Paragraph 89 of the Complaint.
90. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-89 of this Answer as if set forth fully herein.
91. Defendant denies the allegations set forth in Paragraph 91 of the Complaint.
92. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-91 of this Answer as if set forth fully herein.
93. Defendant denies the allegations set forth in Paragraph 93 of the Complaint.
94. Defendant denies the allegations set forth in Paragraph 94 of the Complaint.

95. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 95 of the Complaint, and therefore denies them.

96. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 96 of the Complaint, and therefore denies them.

97. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 97 of the Complaint, and therefore denies them.

98. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-97 of this Answer as if set forth fully herein.

99. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 99 of the Complaint, and therefore denies them.

100. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 100 of the Complaint, and therefore denies them.

101. Defendant denies the allegations set forth in Paragraph 101 of the Complaint.

102. Defendant denies the allegations set forth in Paragraph 102 of the Complaint.

103. Defendant denies the allegations set forth in Paragraph 103 of the Complaint.

104. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-103 of this Answer as if set forth fully herein.

105. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 105 of the Complaint, and therefore denies them.

106. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 106 of the Complaint, and therefore denies them.

107. Defendant denies the allegations set forth in Paragraph 107 of the Complaint.

108. Defendant denies the allegations set forth in Paragraph 108 of the Complaint.

109. Defendant denies the allegations set forth in Paragraph 109 of the Complaint.
110. Defendant repeats and incorporates by reference all of the foregoing responses set forth in paragraphs 1-109 of this Answer as if set forth fully herein.
111. Defendant denies the allegations set forth in Paragraph 111 of the Complaint.
112. Defendant denies the allegations set forth in Paragraph 112 of the Complaint.
113. Defendant denies the allegations set forth in Paragraph 113 of the Complaint.
- Defendant denies that Plaintiff is entitled to any of the relief requested in the concluding paragraphs of the Complaint and any of the factual allegations subsumed therein. Any allegation set forth in the Complaint that Defendant has not expressly set forth in this Answer is expressly denied.

AFFIRMATIVE DEFENSES

Repeating and incorporating by reference its foregoing response, Defendant asserts the following affirmative and other defenses to the Complaint:

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff does not own valid and enforceable trademark or service mark rights in its alleged trademarks.

THIRD AFFIRMATIVE DEFENSE

Defendant's conduct constitutes "fair use" of any of the Plaintiff's alleged trademarks.

FOURTH AFFIRMATIVE DEFENSE

Defendant's use of any names and/or trademarks in connection with its business is not likely to cause confusion with Plaintiff or its alleged marks or names, to dilute Plaintiff's alleged marks or names, to trade on the good will or reputation of Plaintiff in its alleged marks or names, or to mislead, confuse, or deceive anyone as to Defendant's goods or services, their source, or their connection with, sponsorship by, or approval by, or affiliation with Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

Defendant has not engaged in any conduct that would constitute false designation of origin or false description or representation.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's alleged marks are not "famous" within the meaning of that term as used in any of the dilution statutes cited in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

Neither Defendant nor the users of Defendant's services have engaged in, directly, indirectly, contributorily, vicariously, or otherwise, the infringement of any valid copyright owned by Plaintiff.

EIGHTH AFFIRMATIVE DEFENSE

Any use of Plaintiff's copyrighted works by Defendant and/or the users of Defendant's services constitutes fair use of such copyrighted works and is therefore not actionable.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred in whole or in part by license from Plaintiff to users of Defendant's services and/or to Defendant.

TENTH AFFIRMATIVE DEFENSE

Defendant has not engaged in any actions constituting "cybersquatting" within the meaning of 15 U.S.C. §1125 or any other statute.

ELEVENTH AFFIRMATIVE DEFENSE

Defendant has not interfered with any prospective economic advantage of Plaintiff and Defendant has not engaged in any improper conduct relating to Plaintiff and/or Plaintiff's existing customers and/or new customers.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the First Amendment to the United States Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

Defendant has not caused Plaintiff any irreparable harm.

Defendant has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, affirmative and other defenses available. Defendant reserves the right to assert additional affirmative and other defenses in the event discovery indicates such would be appropriate.

WHEREFORE, Defendant prays for judgment on the claims alleged in Plaintiff's

Complaint as follows:

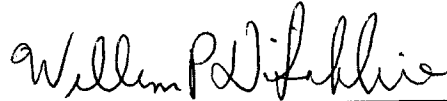
- i. that Plaintiff take nothing by its Complaint, that no injunctive relief issue against Defendant, and that judgment be awarded in favor of Defendant on all counts;
- ii. that all costs incurred herein by or on behalf of Defendant be taxed against Plaintiff;
- iii. that Plaintiff be ordered to pay all of Defendants reasonable attorneys fees and expenses in defending this action; and
- iv. that Defendant be awarded all other relief, whether at law or in equity, to which it is justly entitled.

JURY DEMAND

Defendant, WhenU.Com, Inc., by its attorneys, Hale and Dorr LLP and Lutzker & Lutzker LLP, hereby demand a trial by jury on all issues and claims triable to a jury.

Dated: November 7, 2002

Respectfully submitted,



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Attorneys for Defendant WhenU.Com, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2002, a copy of the foregoing

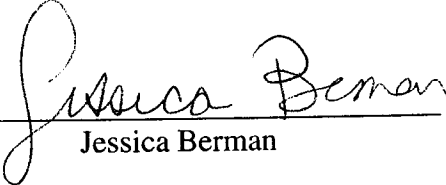
Answer was served on counsel for the following parties by hand:

Marshall R. King, Esq.
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Counsel for Plaintiff 1-800 Contacts, Inc.

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Counsel for Defendant Vision Direct, Inc.

And on counsel for Plaintiff by Express Mail:

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Jessica Berman