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12 Attorneys for Defendant and Cross-Complainant,
13 Byron Udell & Associates, Inc.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF SAN FRANCISCO

16 JAY FINK, an individual; STEPHEN FALLS,
17 an individual; DIANA HELLMAN, an
18 individual; WALTER HILL, an individual; and
19 RICHARD WILLIS, an individual;

20 Plaintiffs,

21 v.

22 BYRON UDELL & ASSOCIATES INC., an
23 Illinois corporation; TOPICA INC., a Delaware
24 corporation; and DOES 1 - 500;

25 Defendants.

26 BYRON UDELL & ASSOCIATES, INC.,

27 Cross-Complainant,

28 v.

TOPICA INC., a Delaware corporation; DMI
PARTNERS, INC., a Florida corporation; and
ROES 1-100, inclusive,

Cross-Defendants.

**ELECTRONICALLY
FILED**
*Superior Court of California,
County of San Francisco*
07/29/2015
Clerk of the Court
BY:MICHAEL RAYRAY
Deputy Clerk

Case No. CGC-14-542524

**BYRON UDELL & ASSOCIATES, INC.'S
CROSS-COMPLAINT FOR**

- 1) **BREACH OF CONTRACT TO INDEMNIFY;**
- 2) **BREACH OF CONTRACT TO DEFEND;**
- 3) **EQUITABLE COMPARATIVE INDEMNITY;**
- 4) **TOTAL EQUITABLE INDEMNITY;**
AND
- 5) **DECLARATORY RELIEF**

Complaint Filed: November 4, 2014

Trial Date: None Yet Set

1 Defendant and cross-complainant Byron Udell & Associates, Inc. (“Cross-Complainant”), by
2 and through its attorneys, by way of cross-complaint against cross-defendants Topica Inc., a
3 Delaware corporation (“Topica”) and DMi Partners, Inc., a Florida corporation (“DMi”) and Roes 1-
4 100 (“Roes”) (collectively, “Cross-Defendants”), states as follows:

5 **THE PARTIES**

6 1. Cross-Complainant is an Illinois corporation with its principal place of business in
7 Cook County, Illinois.

8 2. Upon information and belief, Topica is a Delaware corporation with its principal
9 place of business in San Francisco, California.

10 3. Upon information and belief, DMi is a Florida corporation with its principal place of
11 business in Philadelphia, Pennsylvania.

12 4. Cross-Complainant is suing cross-defendants Roes 1 through 100 by their fictitious
13 names because Cross-Complainant does not know their true names at this time. Cross-Complainant
14 will seek leave to amend this Cross-Complaint to allege such true names when the same are
15 ascertained. Cross-Complainant is informed and believes and based thereon alleges that these
16 fictitiously named cross-defendants, whether individuals or business entities, are responsible as
17 agents, principals, alter egos, co-conspirators or otherwise for the acts alleged herein.

18 **GENERAL ALLEGATIONS**

19 5. Cross-Complainant is a company that brokers and sells insurance.

20 6. Cross-Complainant uses internet advertising as one of many methods to market its
21 services.

22 7. Cross-Complainant entered into an agreement with DMi dated October 24, 2012 (the
23 “Agreement”), whereby Cross-Complainant retained DMi to conduct online marketing and generate
24 “Valid Leads,” as defined in the Agreement, by driving on-line consumer traffic to Cross-
25 Complainant’s website, www.accuquotelife.com.

26 8. Pursuant to the Agreement, Cross-Complainant granted DMi a limited license to use
27 certain of Cross-Complainant’s intellectual property in connection with its online marketing
28 campaign under the Agreement.

1 9. In the Agreement, DMi agreed to conform its actions to industry standards and act in
2 good faith at all times.

3 10. DMi represented to Cross-Complainant that it would conduct all email marketing
4 campaigns performed on Cross-Complainant's behalf in a manner that would not violate any state or
5 federal email advertising regulations.

6 11. Cross-Complainant never authorized DMi to exceed the scope of the Agreement or to
7 market Cross-Complainant's business through advertising emails that would violate state or federal
8 law.

9 12. The Agreement also provides, in pertinent part, as follows:

10 Each party agree to indemnify, defend and hold harmless the other Party, its parents
11 and subsidiaries, and each of their respective members, owners, officers, directors,
12 employees and authorized agents, from and against any and all liability, claim, loss,
13 damage, demand and/or expense (including reasonable attorneys' fees) asserted by
14 any third party due to; or arising from; or in connection with: (a) any breach of this
15 Agreement by a Party or its third party affiliates, networks or subsidiaries of its
16 obligations, representation or warranty contained in this Agreement; (b) any claim
17 arising as a result of a Party or its third party affiliates, networks or subsidiaries'
18 negligence in violation of any local, state or federal laws or regulations regarding the
19 method and manner of lead generation or delivery.

20 13. On or about November 4, 2014, plaintiffs Jay Fink, Stephen Falls, Diana Hellman,
21 Walter Hill and Richard Willis (collectively "Plaintiffs") filed their complaint in the above-captioned
22 action, San Francisco County Superior Court case no. CGC-14-542524 (the "Complaint"). Cross-
23 Complainant hereby refers to the Complaint as though fully set forth herein and incorporates it by
24 reference.

25 14. As more fully set forth in the Complaint, Plaintiffs seek liquidated damages, costs,
26 attorneys' fees, disgorgement of profits, punitive damages and other further relief arising from their
27 alleged receipt of advertising emails that, according to Plaintiffs, violate California Business &
28 Professions Code ("B&P Code") Section 17529.5.

 15. Plaintiffs allege that Cross-Complainant and Topica sent and/or conspired to send the
emails at issue in the Complaint and are thus liable to Plaintiffs for damages.

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1 Complainant has demanded and hereby demands that DMi indemnify and hold Cross-Complainant
2 harmless as a result of the claims alleged in the Complaint and pursuant to the terms of the
3 Agreement. DMi has failed and refused to defend, indemnify and hold Cross-Complainant harmless
4 pursuant to the terms of the Agreement and has thereby breached the contract.

5 23. As a direct, proximate and foreseeable result of DMi's breaches, Cross-Complainant
6 has been compelled to incur attorneys' fees, court costs, and other expenses in connection with the
7 Complaint and this Cross-Complaint, and may in the future be compelled to incur additional
8 liability, expenses and fees by reason of settlement or judgment. Cross-Complainant is entitled to be
9 defended, held harmless and to be indemnified by DMi for Cross-Complainant's costs, fees and
10 expenses according to proof. The Agreement also includes an attorneys' fees provision entitling
11 Cross-Complainant to recover its reasonable attorneys' fees in enforcing the Agreement, according
12 to proof.

13 **SECOND CAUSE OF ACTION**

14 **(Breach of Contract to Defend – Against Cross-Defendant DMi)**

15 24. Cross-Complainant re-alleges each and every allegation contained in the preceding
16 paragraphs of this Cross-Complaint and incorporates them as though fully set forth.

17 25. The Agreement provides that DMi will indemnify and hold Cross-Complainant
18 harmless from any and all liability or damages, as more fully set forth above.

19 26. Pursuant to the Agreement, DMi or its affiliates engaged in some or all of the
20 activities and/or other acts and omissions complained of in the Complaint. Cross-Complainant has
21 at all material times hereto performed and complied with all conditions and obligations required to
22 be performed by them under and pursuant to the Agreement.

23 27. Without peril to Cross-Complainant's denial of the allegations of the Complaint,
24 Cross-Complainant alleges that DMi has an express duty and is obligated to defend Cross-
25 Complainant pursuant to the conditions of the Agreement. DMi has failed and refused to defend
26 Cross-Complainant and has thereby breached the Agreement.

27 28. As a direct, proximate and foreseeable result of DMi's breaches, Cross-Complainant
28 has been compelled to incur attorneys' fees, court costs, and the expenses of defending against this

1 action and in prosecuting this cross-action, and may in the future be compelled to incur additional
2 liability, expenses and fees by reason of DMi's failure to defend. Cross-Complainant is entitled to
3 be defended and reimbursed by DMi, for Cross-Complainant's costs, fees and expenses according to
4 proof. The Agreement also includes an attorneys' fees provision entitling Cross-Complainant to
5 recover its reasonable attorneys' fees in enforcing the Agreement, according to proof.

6 **THIRD CAUSE OF ACTION**

7 **(Equitable Comparative Indemnity; Apportionment of Fault – Against All Cross-Defendants)**

8 29. Cross-Complainant re-alleges each and every allegation contained in the preceding
9 paragraphs of this Cross-Complaint and incorporates them as though fully set forth.

10 30. Cross-Complainant does not know the true names and capacities of all of the Cross-
11 Defendants, and each of them, who were and now are, the agents, employees, co-venturers, partners,
12 affiliates or in some manner agents or principals, or both, of each other and were acting in the course
13 and scope of their agency or employment. Cross-Defendants, and each of them, were and now are
14 residents of and/or doing business in the State of California.

15 31. The Complaint alleges, among other things, conduct entitling Plaintiffs to damages
16 against Cross-Complainant.

17 32. Cross-Complainant contends that it is not liable for the events and occurrences
18 described in the Complaint.

19 33. Upon information and belief, each Cross-Defendant was responsible, in whole or in
20 part, for the injuries, if any suffered by Plaintiffs.

21 34. If Cross-Complainant is judged liable to Plaintiffs, each Cross-Defendant should be
22 required to pay a share of Plaintiffs' judgment that is in proportion to the comparative fault of that
23 cross-defendant in causing Plaintiffs' damages and to reimburse Cross-Complainant for any payment
24 Cross-Complainant made to Plaintiffs in excess of Cross-Complainant's proportional share of all
25 Cross-Defendants' fault.

26 35. As a direct and proximate result of the above, Cross-Complainant has been damaged
27 by reason of investigation, expenses, attorneys' fees, and costs that have been, and will be, incurred,

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1 in a sum not currently known. When the true amount of damages has been ascertained, Cross-
2 Complainant will amend this Cross-Complaint to insert the same.

3 **FOURTH CAUSE OF ACTION**

4 **(Total Equitable Indemnity – Against All Cross-Defendants)**

5 36. Cross-Complainant re-alleges each and every allegation in the preceding paragraphs
6 of this Cross-Complaint and incorporates them as though fully set forth.

7 37. If Cross-Complainant is found in some manner responsible to Plaintiffs or to anyone
8 else as a result of the incidents and occurrences described in the Complaint, any liability would be
9 based solely upon a derivative form of liability resulting not from Cross-Complainant's conduct, but
10 only from an obligation imposed upon Cross-Complainant by law; therefore, Cross-Complainant
11 would be entitled to complete indemnity from each Cross-Defendant.

12 **FIFTH CAUSE OF ACTION**

13 **(Declaratory Relief – Against All Cross-Defendants)**

14 38. Cross-Complainant incorporates by reference all previous paragraphs as though set
15 forth in full herein.

16 39. An actual controversy exists between the parties concerning their respective rights
17 and duties because Cross-Complainant contends, and Cross-Defendants dispute, the allegations
18 alleged in this Cross-Complaint.

19 40. Cross-Complainant requests a judicial declaration of the rights, responsibilities, and
20 obligations of the Cross-Defendants, and each of them, as to Cross-Complainant.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Cross-Complainant prays for judgment against Cross-Defendants, and each of them,
23 as follows:

- 24 1. For compensatory damages according to proof;
25 2. For total and complete indemnity for any judgment rendered against Cross-
26 Complainant;
27 3. For judgment in a proportionate share from each Cross-Defendant;

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1 4. For a judicial determination that Cross-Defendants indemnify Cross-Complainant
2 either completely or partially, for any sum of money that may be recovered against Cross-
3 Complainant by Plaintiffs;

4 5. For prejudgment and post judgment interest at the legal rate;

5 6. For Cross-Complainant's costs and expenses incurred in the defense of this matter
6 and in bringing this Cross-Complaint, including reasonable attorneys' fees; and

7 7. For such other and further relief as is just and proper.

8
9 Dated: July 29, 2015

THE KAUFMAN LAW GROUP

10
11 By: 

12 Colin Hardacre
13 1901 Avenue of the Stars, Suite 1010
14 Los Angeles, California 90067
15 (310) 286-2202
16 State Bar No. 250915
17 Attorneys for Defendant,
18 Byron Udell & Associates, Inc.
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27
28

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA)
3) ss.
4 COUNTY OF LOS ANGELES)

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a
6 party to the within action. My business address is 1901 Avenue of the Stars, Suite 1010, Los
7 Angeles, California 90067. On July 29, 2015, I served the within document(s) described as:

8 **BYRON UDELL & ASSOCIATES, INC.'S CROSS-COMPLAINT FOR**

- 9 1) **BREACH OF CONTRACT TO INDEMNIFY;**
10 2) **BREACH OF CONTRACT TO DEFEND;**
11 3) **EQUITABLE COMPARATIVE INDEMNITY;**
12 4) **TOTAL EQUITABLE INDEMNITY; AND**
13 5) **DECLARATORY RELIEF**

14 [X] BY MAIL: I placed true copies of the document(s) listed above in a sealed envelope addressed
15 as set forth below for collection and mailing. I am "readily familiar" with this firm's practice of
16 collection and processing of correspondence for mailing. It is deposited with the U.S. postal service
17 on that same day in the ordinary course of business with postage thereon fully prepaid. I am aware
18 that on motion of the party served, service by mail is presumed invalid if the postal cancellation date
19 or postage meter date is more than one day after the date of deposit for mailing contained in this
20 affidavit.

21 SERVICE LIST

22 Daniel L. Balsam, Esq. Jacob Harker, Esq.
23 THE LAW OFFICES OF DANIEL BALSAM LAW OFFICES OF JACOB HARKER
24 2601C Blanding Avenue, #271 582 Market Street, Suite 1007
25 Alameda, CA 94501 San Francisco, CA 94104

26 I declare under penalty of perjury under the laws of the United States and the State of California that
27 the above is true and correct. I declare that I am employed in the office of a member of the bar of
28 this court at whose direction the service was made.

Executed on July 29, 2015 at Los Angeles, California.



Crystal Hill