

**GOETZ FITZPATRICK LLP**

Ronald D. Coleman  
55 Harristown Road  
Glen Rock, NJ 07452  
(201) 612-4444

*Attorneys for Defendant Ifficient Inc.*

MEMBER’S EDGE, LLC,

Plaintiff,

- vs. -

DOUBLEPLAY MEDIA, INC., IFFICIENT  
INC., and DOES 1 through X, inclusive,

Defendants.

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IFFICIENT INC., a Connecticut corporation,

Cross-plaintiff,

- vs. -

DOUBLEPLAY MEDIA, INC.,

Cross-defendant.

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IFFICIENT INC., a Connecticut corporation,

Third-party plaintiff,

- vs. -

TALLAC VENTURES, INC., a California  
corporation,

Third-party defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION : BERGEN COUNTY

CIVIL ACTION NO. L-5596-09

**ANSWER, CROSS-CLAIMS AND  
THIRD-PARTY COMPLAINT**

**ANSWER AND AFFIRMATIVE DEFENSES**

Defendant Ifficient Inc. (“Ifficient”), by and through its undersigned attorneys, for

its answer against the Amended Complaint of plaintiff Member's Edge, LLC ("Member's Edge"), responds and defends as follows:

### **THE PARTIES**

1. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

2. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

3. Denied to the extent of the allegations regarding Ifficient, LLC having existed "at all times mentioned" in the Amended Complaint.

4. Admitted.

5. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

6. Denied.

### **GENERAL ALLEGATIONS**

7. Denied.

8. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

9. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

10. Denied, except admitted that Ifficient's business includes lead generation.

11. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

12. Ifficient denies knowledge and information sufficient to admit or deny the

allegations of this paragraph of the Amended Complaint.

13. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

14. Admitted as to itself and denied as to any allegations involving Ifficient Interactive, LLC, except Ifficient refers to the contents of any actual agreements for their contents and provisions.

15. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

16. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

17. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

18. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

## **COUNT I**

### **Breach of Contract Against DPM**

19. Ifficient repeats and realleges its responses to the allegations incorporated herein as if set forth fully herein.

20. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

21. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

22. Ifficient denies knowledge and information sufficient to admit or deny the

allegations of this paragraph of the Amended Complaint.

23. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

24. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

25. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

26. No response is required to this paragraph of the Amended Complaint, which is not an allegation but rather a description of this Action.

27. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

## **COUNT II**

### **Breach of Covenant of Good Faith and Fair Dealing Against DPM**

28. Ifficient repeats and realleges its responses to the allegations incorporated herein as if set forth fully herein.

29. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

30. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

31. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

32. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

33. No response is required to this paragraph of the Amended Complaint, which is not an allegation but rather a description of this Action.

34. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

### **COUNT III**

#### **Breach of Contract Against Ifficient**

35. Ifficient repeats and realleges its responses to the allegations incorporated herein as if set forth fully herein.

36. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

37. Admitted as to itself and denied as to any allegations involving Ifficient Interactive, LLC, except Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph with respect to the Agreement.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. No response is required to this paragraph of the Amended Complaint, which is not an allegation but rather a description of this Action.

44. Denied.

#### **COUNT IV**

##### **Breach of Covenant of Good Faith and Fair Dealing Against Ifficient**

45. Ifficient repeats and realleges its responses to the allegations incorporated herein as if set forth fully herein.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. No response is required to this paragraph of the Amended Complaint, which is not an allegation but rather a description of this Action.

51. Denied.

#### **COUNT V**

##### **Breach of Covenant of Good Faith and Fair Dealing Against Ifficient**

52. Ifficient repeats and realleges its responses to the allegations incorporated herein as if set forth fully herein.

53. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

54. Admitted as to itself and denied as to any allegations involving Ifficient Interactive, LLC, except denied that DPM contracted with Ifficient “for the benefit of Plaintiff.”

55. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

56. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

57. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

58. Denied, except Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint as to the other defendants.

59. Denied.

60. Denied as to the actions of Ifficient.

61. Denied as to Ifficient.

62. No response is required to this paragraph of the Amended Complaint, which is not an allegation but rather a description of this Action.

63. Denied.

## **COUNT VI**

### **Breach of Covenant of Good Faith and Fair Dealing Against Ifficient**

64. Ifficient repeats and realleges its responses to the allegations incorporated herein as if set forth fully herein.

65. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

66. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

67. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the

allegations of this paragraph with respect to Ifficient.

68. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

69. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

70. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

71. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

72. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

73. No response is required to this paragraph of the Amended Complaint, which is not an allegation but rather a description of this Action.

74. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.



## **COUNT VII**

### **Breach of Covenant of Good Faith and Fair Dealing Against Ifficient**

75. Ifficient repeats and realleges its responses to the allegations incorporated herein as if set forth fully herein.

76. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

77. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

78. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

79. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

80. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint.

81. No response is required to this paragraph of the Amended Complaint, which is not an allegation but rather a description of this Action.

82. Ifficient denies knowledge and information sufficient to admit or deny the allegations of this paragraph of the Amended Complaint, except Ifficient denies the allegations of this paragraph with respect to Ifficient.

## **AFFIRMATIVE DEFENSES**

### **FIRST AFFIRMATIVE DEFENSE – Lack of Personal Jurisdiction**

This Court has no personal jurisdiction over Ifficient, a foreign corporation which does not conduct sufficient business in this State to be amenable to general jurisdiction

and performed no action sufficient to constitute grounds to assert specific jurisdiction in connection with this action, and the answering party reserves the right to move to dismiss due to lack of personal jurisdiction .

**SECOND AFFIRMATIVE DEFENSE – Failure to State a Claim**

Counts I, II and VII of the Amended Complaint purport to state claims against defendant DPM only and by definition do not state claims against defendant Ifficient.

Count V of the Amended Complaint fails to state a claim because the Amended Complaint does not allege any representations to plaintiff by Ifficient.

Count VI of the Amended Complaint fails to state a claim because the Amended Complaint does not allege any cognizable duty running from Ifficient to plaintiff.

Count IV fails to state a claim because a claim for breach of the covenant of good faith and fair dealing cannot lie against a defendant such as Ifficient where the underlying contractual claim against such a defendant is based on the theory of third party beneficiary.

**THIRD AFFIRMATIVE DEFENSE – Failure to Join Necessary Party**

Tallac Ventures, Inc. is a California corporation that does business at 405 El Camino Real #222, Menlo Park, California, is amenable to service herein, and is a party in the absence of which complete relief cannot be accorded among those already parties, and should be joined pursuant to R. 4:28-(1)(a).

**FOURTH AFFIRMATIVE DEFENSE – Negligence Claim Barred by Contractual Relationship**

The damages complained of having arisen from a contractual relationship

between plaintiff and other parties, no negligence claim can lie against any party, including Ifficient.

**FIFTH AFFIRMATIVE DEFENSE – Negligence of Others**

The occurrences complained of were proximately caused by the actions and negligence of DPM or Tallac Ventures, Inc., thereby precluding recovery against Ifficient.

**SIXTH AFFIRMATIVE DEFENSE – Comparative Negligence**

Any claim of negligence against Ifficient is barred by the doctrine of contributory negligence or should be mitigated by the comparative negligence provisions of N.J.S.A. 2A:15-5.1, *et seq.*

**CLAIM FOR CONTRIBUTION**

Ifficient demands judgment against defendant DPM under the Joint Tortfeasors Contribution Act as provided therein.

**DEMAND FOR STATEMENT OF DAMAGES CLAIMED**

Ifficient demands that plaintiff provide a written statement of the amount of damages claimed in accordance with R. 4:5-2.

WHEREFORE, defendant Interactive Inc. prays for the dismissal of the claims of plaintiff in the Amended Complaint, and for an award of costs and attorneys' fees, and for such other relief as the Court shall find just and proper.

**CROSS-CLAIM**

Cross-plaintiff Ifficient, by and through its undersigned attorneys, for its cross-

claim against cross-defendant DPM, alleges and complains as follows:

### **THE PARTIES**

1. Ifficient repeats and realleges its responses to the allegations of ¶¶ 1-3 of the Amended Complaint as to the identity of the parties named in the Amended Complaint.

### **FACTS**

2. During January, February, and March of 2009 Ifficient contracted with DPM to provide it with certain lead data in connection with a sales and marketing campaign conducted by Member's Edge together with DPM.

3. The leads Ifficient provided to DPM were, in turn, obtained by Ifficient Inc. from Tallac in exchange for payment.

4. Ifficient made no guarantee to any person of lead performance, nor did it enter into a contract with any person based on a lead performance guarantee.

5. Ifficient filtered the leads and validated key data utilizing third party software called MellissaData, making sure the lead described by Tallac as an "opt-in" was a real address; making a syntactical check of the lead's area code against the first three digits of the telephone exchange against the corresponding zip code, pursuant to the Insertion Order from DPM.

6. DPM, however, did not request that Ifficient also analyze the data with an auto-responder which would have given the opt-ins an opportunity to opt out of being billed by Members Edge.

7. Additionally the auto-responder would have verified that the email address provided was in fact valid, along with notifying the user what they signed up for besides

the 55-character headline and 250-character body of the advertisement that was the source of the contact information.

8. DPM declined to utilize and pay for these services from Ifficient.

9. Ifficient was never paid for the lead data provided to DPM.

10. On information and belief, the lead data provided by Tallac to Ifficient was deficient, as alleged in the Amended Complaint.

### **CROSS-CLAIM COUNT I:**

#### **Negligence by DPM**

11. All the foregoing allegations, as well as the responses and affirmative defenses to the Amended Complaint, are incorporated herein as if set forth fully.

12. DPM is knowledgeable and expert in the field of email and other media-based marketing.

13. DPM knew, or should have known, that the data it provided to Member's Edge should have been verified prior to use by Member's Edge to confirm the leads' opt-in status.

14. DPM knew that Ifficient made no guarantee of lead performance, nor did its contract with DPM contain a lead performance guarantee.

15. DPM's failure to verify, or have the leads provided by Ifficient verified by Ifficient or some other person, in light of the lack of lead performance guarantee, constituted negligence by DPM giving rise to any losses alleged in the Amended Complaint and any damages suffered by Ifficient by virtue of its involvement in this action.

**CROSS-CLAIM COUNT II:**

**Breach of Contract by DPM**

16. All the foregoing allegations, as well as the responses and affirmative defenses to the Amended Complaint, are incorporated herein as if set forth fully.

17. DPM has failed to pay Ifficient for the data provided and services rendered to it in connection with Ifficient's provision of the lead data that is the subject matter of this action.

18. Any deficiencies in the data having been a risk assumed by DPM by virtue of its failure, set forth above, to verify the leads or to cause those leads to be verified, such deficiencies are not a defense to DPM's obligation to compensate Ifficient as agreed to between them.

WHEREFORE, cross-plaintiff Ifficient Inc. prays for judgment against cross-defendant DPM in for indemnification of all liability as might be otherwise imposed on Ifficient b virtue of the claims of the Amended Complaint, and for an award of costs and attorneys' fees, and for such other relief as the Court shall find just and proper.

**THIRD PARTY COMPLAINT**

Third-party plaintiff Ifficient, by and through its undersigned attorneys, for its third-party complaint against Tallac Ventures, Inc., ("Tallac") alleges and complains as follows:

**THE PARTIES**

1. Ifficient repeats and realleges its responses to the allegations of ¶¶ 1-3 of the Amended Complaint as to the identity of the parties named in the Amended Complaint.

2. Tallac is a California corporation that provides lead generation products and services, and does business at 405 El Camino Real #222, Menlo Park, California.

**THIRD-PARTY COUNT I:**

**Breach of Contract by Tallac**

3. All the foregoing allegations, as well as the responses and affirmative defenses to the Amended Complaint and the allegations of the Cross-Claims, are incorporated herein as if set forth fully.

4. Tallac's provision of deficient lead data to Ifficient was a breach of the contract between Tallac and Ifficient.

**THIRD-PARTY COUNT II:**

**Breach of Warranty by Tallac**

5. All the foregoing allegations, as well as the responses and affirmative defenses to the Amended Complaint and the allegations of the Cross-Claims, are incorporated herein as if set forth fully.

6. Tallac was aware of the purpose to which Ifficient, and its customer, intended to put the lead data purchased from Tallac.

7. Tallac's sale of the lead data to Tallac was made with an implied warranty of fitness for that purpose.

8. The lead data sold by Tallac to Ifficient was not fit for the purpose for which Ifficient purchased it.

9. The lead data sold by Tallac to Ifficient was so deficient quality as not to be merchantable.

WHEREFORE, third-party plaintiff Ifficient Inc. prays for judgment against third-party defendant Tallac Ventures, Inc. for a refund of all moneys paid to Tallac in

connection with the lead data, indemnification of all liability as might be otherwise imposed on Ifficient b virtue of the claims of the Amended Complaint, and for an award of costs and attorneys' fees, and for such other relief as the Court shall find just and proper.

Dated: November 30, 2009



Ronald D. Coleman

**GOETZ FITZPATRICK LLP**  
55 Harristown Road  
Glen Rock, NJ 07452  
(201) 612-4444  
*Attorneys for Defendant Ifficient, Inc.*

**CERTIFICATION PURSUANT TO R. 4:5-1**

I certify, upon information and belief, that the matter in controversy is not the subject of any other court action or pending arbitration proceeding, and that no other parties should be joined in this action except as set forth above in the Third Affirmative Defense to the Complaint.



Ronald D. Coleman

**GOETZ FITZPATRICK LLP**  
55 Harristown Road  
Glen Rock, NJ 07452  
(201) 612-4444  
*Attorneys for Defendant Ifficient, Inc.*

**DESIGNATION OF TRIAL COUNSEL PURSUANT TO R. 4:25-4**



Ronald D. Coleman, Esq. is hereby designated as trial counsel for defendant  
Ifficient.

Dated: November 30, 2009



Ronald D. Coleman

**GOETZ FITZPATRICK LLP**  
55 Harristown Road  
Glen Rock, NJ 07452  
(201) 612-4444  
*Attorneys for Defendant Ifficient, Inc.*