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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10 Barrett-Jackson Auction Company, L.L.C., an
Arizona limited liability company; and Barrett-
11 Jackson USA, L.L.C., a Delaware limited
liability company,

12 Plaintiffs,

13 v.

14 Thumbco, a Michigan Nominee Partnership;
and David L. Clabuesch, an individual,

15 Defendants.
16

NO. CV2007-0561-PHX-EHC

**DEFENDANT THUMBCO'S
SEPARATE ANSWER TO
PLAINTIFFS' COMPLAINT**

17 NOW COMES Defendant, Thumbco, by and through counsel undersigned,
18 and for its separate Answer to Plaintiffs' Complaint, admits, denies, and alleges as
19 follows:
20

21 **NATURE OF THE CASE**

22 1. Answering paragraph 1 of Plaintiffs' Complaint, Thumbco admits
23 that the case arises from actions which occurred at the January, 2007 WestWorld Auto
24 Auction in Scottsdale, Arizona. Thumbco denies as untrue any and all allegations of
25 outrageous and defamatory actions. Thumbco denies as untrue all remaining allegations
26 in paragraph 1.

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PARTIES

2. Defendant Thumbco realleges and incorporates paragraphs 1 above as though fully set forth herein.

3. Upon information and belief, Thumbco admits the allegations in paragraph 2.

4. Upon information and belief, Thumbco admits the allegations in paragraph 3.

5. Upon information and belief, Thumbco admits the allegations in paragraph 4.

6. Thumbco admits the allegations in paragraph 5.

7. Answering paragraph 6 of Plaintiffs' Complaint, Thumbco denies that David L. Claubuesch is an authorized signatory and/or agent of Thumbco. Thumbco neither admits nor denies the remaining allegations in paragraph 6.

JURISDICTION AND VENUE

8. Defendant Thumbco realleges and incorporates paragraphs 1 through 7 above as though fully set forth herein.

9. Thumbco denies as untrue the allegations in paragraph 7.

10. Thumbco denies as untrue the allegations in paragraph 8.

THE AUCTION

11. Defendant Thumbco realleges and incorporates paragraphs 1 through 10 above as though fully set forth herein.

12. Thumbco admits the allegations in paragraph 9.

13. Thumbco admits the allegations in paragraph 10.

14. Thumbco admits the allegations in paragraph 11.

15. Thumbco admits the allegations in paragraph 12.

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- 16. Thumbco admits the allegations in paragraph 13.
- 17. Thumbco admits the allegations in paragraph 14.
- 18. Thumbco admits the allegations in paragraph 15.
- 19. Thumbco admits the allegations in paragraph 16.
- 20. Thumbco admits the allegations in paragraph 17.

21. Answering paragraph 18 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

22. Answering paragraph 19 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

23. Answering paragraph 20 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

24. Thumbco admits the allegations in paragraph 21.

25. Thumbco denies as untrue the allegations in paragraph 22.

26. Thumbco denies the allegation in paragraph 23 as the same is untrue, and by way of further answer, Defendant Thumbco incorporates herein and makes a part hereof, the same as if set forth verbatim, its affirmative defenses.

27. Answering paragraph 24 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

1 leaves Plaintiff to its proofs.

2 35. Answering paragraph 31 of Plaintiffs' Complaint, Defendant
3 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
4 without sufficient information or belief upon which to state an answer and, therefore,
5 leaves Plaintiff to its proofs.

6 36. Answering paragraph 32 of Plaintiffs' Complaint, Defendant
7 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
8 without sufficient information or belief upon which to state an answer and, therefore,
9 leaves Plaintiff to its proofs.

10 37. Thumbco denies as untrue the allegations in paragraph 33.

11 38. Answering paragraph 34 of Plaintiffs' Complaint, Defendant
12 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
13 without sufficient information or belief upon which to state an answer and, therefore,
14 leaves Plaintiff to its proofs.

15 39. Answering paragraph 35 of Plaintiffs' Complaint, Defendant
16 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
17 without sufficient information or belief upon which to state an answer and, therefore,
18 leaves Plaintiff to its proofs.

19 40. Answering paragraph 36 of Plaintiffs' Complaint, Defendant
20 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
21 without sufficient information or belief upon which to state an answer and, therefore,
22 leaves Plaintiff to its proofs.

23 41. Answering paragraph 37 of Plaintiffs' Complaint, Defendant
24 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
25 without sufficient information or belief upon which to state an answer and, therefore,
26 leaves Plaintiff to its proofs.

1 42. Answering paragraph 38 of Plaintiffs' Complaint, Defendant
2 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
3 without sufficient information or belief upon which to state an answer and, therefore,
4 leaves Plaintiff to its proofs.

5 43. Answering paragraph 39 of Plaintiffs' Complaint, Defendant
6 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
7 without sufficient information or belief upon which to state an answer and, therefore,
8 leaves Plaintiff to its proofs.

9 44. Answering paragraph 40 of Plaintiffs' Complaint, Defendant
10 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
11 without sufficient information or belief upon which to state an answer and, therefore,
12 leaves Plaintiff to its proofs.

13 **THE INTERNET POSTINGS AND OTHER DEFAMATORY PUBLICATIONS**

14 45. Defendant Thumbco realleges and incorporates paragraphs 1 through
15 44 above as though fully set forth herein.

16 46. Answering paragraph 41 of Plaintiffs' Complaint, Defendant
17 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
18 without sufficient information or belief upon which to state an answer and, therefore,
19 leaves Plaintiff to its proofs.44.

20 47. Thumbco denies as untrue the allegations in paragraph 42.

21 48. Answering paragraph 43 of Plaintiffs' Complaint, Defendant
22 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
23 without sufficient information or belief upon which to state an answer and, therefore,
24 leaves Plaintiff to its proofs.

25 49. Answering paragraph 44 of Plaintiffs' Complaint, Defendant
26 Thumbco neither admits nor denies the allegations contained therein as this Defendant is

1 without sufficient information or belief upon which to state an answer and, therefore,
2 leaves Plaintiff to its proofs.

3 50. Answering paragraph 45 of Plaintiffs' Complaint, Defendant
4 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
5 without sufficient information or belief upon which to state an answer and, therefore,
6 leaves Plaintiff to its proofs.

7 51. Answering paragraph 46 of Plaintiffs' Complaint, Defendant
8 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
9 without sufficient information or belief upon which to state an answer and, therefore,
10 leaves Plaintiff to its proofs.

11 52. Answering paragraph 47 of Plaintiffs' Complaint, Defendant
12 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
13 without sufficient information or belief upon which to state an answer and, therefore,
14 leaves Plaintiff to its proofs.

15 53. Thumbco denies as untrue the allegations in paragraph 48.

16 54. Answering paragraph 49 of Plaintiffs' Complaint, Defendant
17 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
18 without sufficient information or belief upon which to state an answer and, therefore,
19 leaves Plaintiff to its proofs.

20 **DAMAGE TO THE PALM BEACH AUCTION**

21 55. Defendant Thumbco realleges and incorporates paragraphs 1 through
22 54 above as though fully set forth herein.

23 56. Answering paragraph 50 of Plaintiffs' Complaint, Defendant
24 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
25 without sufficient information or belief upon which to state an answer and, therefore,
26 leaves Plaintiff to its proofs.

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COUNT TWO

(Breach of Covenant of Good Faith and Fair Dealing)

65. Defendant Thumbco realleges and incorporates paragraphs 1 through 64 above as though fully set forth herein.

66. As Plaintiff has stated a matter of law, no answer is required. To the extent such answer is required, Thumbco denies as untrue the allegations in paragraph 60.

67. Thumbco denies as untrue the allegations in paragraph 61.

68. Thumbco denies as untrue the allegations in paragraph 62.

69. Thumbco denies as untrue the allegations in paragraph 63.

70. Thumbco denies as untrue the allegations in paragraph 64.

COUNT THREE

(Interference with Business Expectancy)

71. Defendant Thumbco realleges and incorporates paragraphs 1 through 70 above as though fully set forth herein.

72. Answering paragraph 66 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

73. Answering paragraph 67 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

74. Thumbco denies as untrue the allegations in paragraph 68.

75. Thumbco denies as untrue the allegations in paragraph 69.

76. Thumbco denies as untrue the allegations in paragraph 70.

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COUNT FOUR
(Conversion)

77. Defendant Thumbco realleges and incorporates paragraphs 1 through 76 above as though fully set forth herein.

78. As Plaintiff has stated a matter of law, no answer is required. To the extent such answer is required, Thumbco denies as untrue the allegations in paragraph 72.

79. Thumbco denies as untrue the allegations in paragraph 73.

80. Thumbco denies as untrue the allegations in paragraph 74.

COUNT FIVE
(Injurious Falsehood to Barrett-Jackson)

81. Defendant Thumbco realleges and incorporates paragraphs 1 through 80 above as though fully set forth herein.

82. Thumbco denies as untrue the allegations in paragraph 76.

83. As Plaintiff has stated a matter of law, no answer is required. To the extent such answer is required, Defendant Thumbco neither admits nor denies the allegations in paragraph 77 as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

84. Answering paragraph 78 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

85. Answering paragraph 79 of Plaintiffs' Complaint, Defendant Thumbco neither admits nor denies the allegations contained therein as this Defendant is without sufficient information or belief upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

1 extent such answer is required, Defendant Thumbco neither admits nor denies the
2 allegations in paragraph 87 as this Defendant is without sufficient information or belief
3 upon which to state an answer and, therefore, leaves Plaintiff to its proofs.

4 94. Answering paragraph 88 of Plaintiffs' Complaint, Defendant
5 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
6 without sufficient information or belief upon which to state an answer and, therefore,
7 leaves Plaintiff to its proofs.

8 95. Answering paragraph 89 of Plaintiffs' Complaint, Defendant
9 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
10 without sufficient information or belief upon which to state an answer and, therefore,
11 leaves Plaintiff to its proofs.

12 96. Answering paragraph 90 of Plaintiffs' Complaint, Defendant
13 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
14 without sufficient information or belief upon which to state an answer and, therefore,
15 leaves Plaintiff to its proofs.

16 97. Answering paragraph 91 of Plaintiffs' Complaint, Defendant
17 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
18 without sufficient information or belief upon which to state an answer and, therefore,
19 leaves Plaintiff to its proofs.

20 98. Answering paragraph 92 of Plaintiffs' Complaint, Defendant
21 Thumbco neither admits nor denies the allegations contained therein as this Defendant is
22 without sufficient information or belief upon which to state an answer and, therefore,
23 leaves Plaintiff to its proofs.

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AFFIRMATIVE DEFENSES

**FIRST DEFENSE
(Failure to State a Cause of Action)**

Plaintiffs have failed to state a cause of action and this Defendant is entitled to a Judgment as a matter of law.

**SECOND DEFENSE
(Failure to State a Claim)**

Plaintiffs have failed to state a claim upon which relief can be granted and this Defendant is entitled to a judgment of No Cause of Action as a matter of law.

**THIRD DEFENSE
(First Amendment)**

This Defendant relies upon the First Amendment to the United States Constitution guaranteeing freedom of speech, and therefore this Defendant is entitled to a judgment as a matter of law.

**FOURTH DEFENSE
(Truth of the Matter Stated)**

This Defendant relies upon the concept that "truth of the matter stated" as a defense the allegation set forth in the complaint.

**FIFTH DEFENSE
(New York Times v Sullivan)**

This Defendant relies upon the concepts and law set forth in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 666 (1964), and made a part hereof and incorporated herein the reported case, the same as if set forth verbatim, and therefore this Defendant is entitled to a judgment as a matter of law.

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SIXTH DEFENSE
(No Publication)

This Defendant, nor any persons on its behalf, with authority, published any statements, as alleged in the Complaint.

SEVENTH DEFENSE
(No Republication)

As this Defendant never published any allegations, it specifically denies any republications as claimed in the Complaint.

EIGHTH DEFENSE
(Breach of Good Faith and Fair Dealing)

Barrett-Jackson is guilty of a breach of good faith and fair dealing as to its conduct relative to the contract between Barrett-Jackson and this Defendant.

NINTH DEFENSE
(Failure to Disclose)

Barrett-Jackson and its representatives, agents and employees failed to disclose to this Defendant and/or others that it had conducted an internal estimate/valuation of the value of the motor vehicle identified in the Consignment Agreement dated December 5, 2006 between Thumbco, Michigan Nominee Partnership, and Barrett-Jackson and such failure was a breach of contract, a breach of an implied contract of good faith and fair dealings and would have provided this Defendant with the opportunity to withdraw the motor vehicle before the auction of January 2007.

TENTH DEFENSE
(Alleged Acts of David Claubuesch not Imputed or Binding on this Defendant)

Barrett-Jackson specifically knew, or should have known, that the contract attached to the Complaint as Exhibit 1 was exclusively between Thumbco, and Barrett-Jackson and that David Claubuesch was not a party to the contract and had no authority to act in regard to such a contract. In fact, David Claubuesch specifically represented that

1 correspondence was to be directed to him at 9923 Sunset, Sand Point, Michigan, his
2 personal home and he provided his business card, on at least two documents, representing
3 "RAMCHARGERS®" David L. Claubuesch, 9923 Sunset, Sand Point, Michigan, 48755
4 E-MAIL: david@ramchargers.com., and therefore this Defendant is entitled to a judgment
5 as a matter of law.

6 **ELEVENTH DEFENSE**

7 **(Claubuesch not Acting as Agent for Thumbco)**

8 Barrett-Jackson knew, or should have known, that David L. Claubuesch had
9 not authority to act as a representative and/or agent of Defendant Thumbco, based upon
10 the Consignment Agreement dated December 5, 2006, the signature contained on the
11 Grievance Report of January 20, 2007, the handwritten letter of January 20, 2007, directed
12 to "Barrett-Jackson" and the business card presented by David L. Claubuesch. Therefore
13 this Defendant is entitled to a judgment as a matter of law.

14 **TWELFTH DEFENSE**

15 **(Consignment Agreement December 5, 2006)**

16 The Consignment Agreement of December 5, 2006, is exclusively between
17 Barrett-Jackson and Thumbco, signed by trust officer, Ben Schott. No other persons and
18 or entities signed on behalf of or were authorized to act on behalf of Thumbco, and
19 specifically, David L. Claubuesch was not identified as a person with authority to so act
20 and his actions were solely those in his individual capacity.

21 **THIRTEENTH DEFENSE**

22 **(Barrett-Jackson Acts of Publication)**

23 Barrett-Jackson chose to display the motor vehicle in an area accessible to
24 the public and by doing so was instrumental in the "publication" of any documents so
25 referenced in its Complaint and by continuing to allow any documents "posted" on the
26 motor vehicle and allowing the motor vehicle to remain visible to the public, Barrett-
Jackson is responsible for such publication and the same cannot be attributed to third

1 parties.

2 **FOURTEENTH DEFENSE**
3 **(Demand for Retraction)**

4 Barrett-Jackson failed to demand a retraction of the alleged defamatory
5 material thereby continuing its contribution to its alleged losses.

6 **FIFTEENTH DEFENSE**
7 **(Accord and Satisfaction)**

8 Barrett-Jackson, by issuing its corporate check dated February 16, 2007 to
9 Thumbco, and by the check being negotiated by Thumbco, and Barrett-Jackson having
10 issued a valid certificate of title to the purchaser, the parties have reached accord and
11 satisfaction and this Defendant is entitled to a judgment as a matter of law.

12 **SIXTEENTH DEFENSE**
13 **(Mitigation of Damages)**

14 Plaintiffs have failed to mitigate their damages.

15 **SEVENTEENTH DEFENSE**
16 **(No Right to Rely)**

17 Barrett-Jackson had no right to rely upon any representation made by any
18 third party to the Consignment Agreement dated December 5, 2006 between Barrett-
19 Jackson and Thumbco, as to any representations allegedly made on behalf of Thumbco.

20 **EIGHTEENTH DEFENSE**
21 **(Reservation of Rights)**

22 Discovery has not yet begun in this matter and new or additional affirmative
23 defenses may be discovered. Defendant Thumbco reserves right to amend this answer to
24 include any affirmative defenses set forth in Rules 8 and 12 of the Arizona Rules of Civil
25 Procedure or A. R. S. § 12-561, if any become applicable during the course of discovery.
26

1 single alleged act or omission.

2 WHEREFORE, Defendant Thumbco request that the Court grant a
3 Judgment in its favor of No Cause for Action in this matter so wrongfully brought, that
4 Plaintiffs take nothing thereby and that this Answering Defendant be awarded its costs
5 and attorneys' fees incurred herein.

6 RESPECTFULLY SUBMITTED this 17th day of April, 2007.

7 JONES, SKELTON & HOCHULI, P.L.C.
8

9
10 By /s/ Peter A. Boyle
11 Donald L. Myles, Jr.
12 Peter A. Boyle
13 2901 North Central Avenue, Suite 800
14 Phoenix, Arizona 85012
15 Attorneys for Defendant Thumbco

16 **Of Counsel:**
17 William J. Ewald
18 Brian S. Makaric
19 Braun, Kendrick & Finkbeiner, PLC
20 4301 Fashion Square Blvd.
21 Saginaw, MI 48603

22 **Electronically** filed and served
23 this 17th day of April, 2007, to:

24 **ALL PARTIES ON ELECTRONIC SERVICE LIST**

25 **COPY** hand-delivered this same date to:

26 The Honorable Earl H. Carroll
United States District Court
401 West Washington
Phoenix, Arizona 85003

/s/ Mica Milano