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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SETTLEMENT RECOVERY CENTER, LLC, a California Limited Liability Company, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. VALUECLICK, INC., a Delaware Corporation, Its Wholly-Owned Subsidiary COMMISSION JUNCTION, INC., and Its Wholly-Owned Subsidiary BE FREE, Defendants.	No. CV-07-02638-FMC (CTx) (Assigned to the Honorable Florence-Marie Cooper, Courtroom 750) OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT DATE: July 30, 2007 TIME: 10:00 a.m. DEPT: Courtroom 750 (Roybal) ACTION FILED: April 20, 2007

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I. INTRODUCTION

Defendants ValueClick, Inc. ("ValueClick"), Commission Junction, Inc. ("CJ"), and Be Free (collectively "Defendants") may not disavow the very service they agreed to provide. Pointing to ambiguous disclaimers in an unidentified contract, Defendants argue that they cannot be held accountable for harm caused by their own failure to properly account for and process transactions on the marketing networks they operate.

Defendants' arguments fail as a matter of law. It is axiomatic that a material breach of contract must give rise to a claim for damages by the harmed party. To construe an agreement otherwise is to invalidate the agreement altogether. Defendants, who enjoy significant profits from providing their affiliate marketing services, may not at once reap the benefit of the bargain and at the same time avoid all responsibility to their advertisers and publishers.

To make matters worse, Defendants profit directly from their wrongdoing at the expense of their advertisers and publishers. By improperly crediting transactions and paying commissions to entities that employ adware, Defendants violate the trust placed in them by their advertisers and publishers, violate their duty to protect the interests of their advertisers and publishers, and destroy the integrity of their advertiser and publisher affiliate marketing programs. For the reasons set forth below, Defendants' motion to dismiss should be denied in its entirety.

II. SUMMARY OF FACTS

Affiliate marketing refers to online networks of advertisers and their independent affiliates. ¶ 9.[1] Advertisers, who are typically merchants offering goods or services to the public, engage affiliates (or "publishers") to distribute their offers

[1] All "¶ __" references are to the Class Action Complaint for: (1) Breach of Contract; (2) Negligence; (3) Unjust Enrichment; and (4) Unfair Business Practices (California Business & Professions Code 17200, *et seq.*) ("UCL"), filed on April 20, 2007 ("Complaint").

to the public via the Internet. *Id.* Publishers place advertisers' offers (and links to the advertisers' websites) on their own websites in order to drive consumers to advertisers' websites. *Id.* Publishers are compensated by the advertisers, typically by receiving a commission, whenever these consumers make a purchase on the advertisers' websites. *Id.* At least 15-20% of all online sales occur as a result of affiliate marketing publisher referrals. *Id.*

Defendants manage and operate affiliate marketing networks. ¶¶ 3-5, 10. As part of their services offered to advertiser and publishers, Defendants promise to track consumers' clicks and actions as those consumers move from publishers' websites to advertisers' websites. ¶ 11. The end and aim of Defendants' service is to calculate the commissions owed by advertisers to publishers, to provide a complete accounting to advertisers and publishers, and to collect and distribute commission payments from advertisers to publishers. *Id.*

Plaintiff Settlement Recovery Center, LLC ("Plaintiff") is an advertiser who entered into an agreement with Defendants for affiliate marketing management services. ¶ 69. Per the terms of that agreement, Defendants were required to calculate, collect and distribute commissions owed by Plaintiff to publishers who directed consumers to Plaintiff's website. ¶ 62. Based on Defendants' accounting of transactions on its affiliate marketing networks, Plaintiff paid commissions (to be distributed by Defendants to publishers responsible for driving traffic to Plaintiff's website) and corresponding fees to Defendants. ¶¶ 62, 69, 72.

Unbeknownst to Plaintiff, Defendants' accounting included payables not authorized by the agreement. Defendants' improper accounting caused Plaintiff to pay commissions (and corresponding fees to Defendants) to parties other than publishers who drove traffic to Plaintiff's website (¶¶ 16-20) ***and*** for transactions by consumers who did not come to Plaintiff through Defendants' affiliate marketing

networks (¶¶ 21-25). *See also* ¶¶ 71-72. In doing so, Defendants breached their primary obligation to Plaintiff. ¶¶ 63-65.

The sole beneficiaries of Defendants' breach were Defendants themselves, who collected fees based on illegitimate transactions (¶¶ 48-55), and "adware" entities. Adware, which is similar to "spyware," refers to malicious programs that are nefariously installed on ordinary consumers' computer, often without their knowledge. ¶ 17. Adware operates by automatically inserting the adware entity's identification code into transactions that the adware entity did not originate. ¶¶ 16-18, 21-24. This identification code serves as the pretext for Defendants to credit the adware entity with the transaction and collect corresponding fees for themselves. *Id.*

Defendants can readily detect transactions that are improperly credited to adware entities, yet fail to do so because adware transactions bring additional revenues to Defendants. ¶¶ 48-60. By failing to weed out adware transactions and adware entities, Defendants not only breached their primary obligation to charge Plaintiff only for transactions originated by publishers, but they also breached their promise to enforce their own rules, as set forth in the Code of Conduct, prohibiting the use of adware on Defendants' affiliate marketing networks. ¶¶ 39-47, 63-64.

III. ARGUMENT

A. Legal Standard

The Ninth Circuit disfavors granting Rule 12(b)(6) motions. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) ("The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."). The Ninth Circuit has stated that dismissal is proper only in "extraordinary" circumstances. *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

In assessing the legal sufficiency of a complaint on a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to plaintiff (*Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996)) and accept as true all

allegations in the complaint and the reasonable inferences drawn therefrom. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Gilligan*, 108 F.3d at 249. If plaintiff has pleaded a "short and plain" statement of its claims, the complaint should be upheld. *See* Fed. R. Civ. P. 8(a).[2]

B. Plaintiff States a Claim for Breach of Contract

1. Defendants Breached Their Promise to Track "Clicks" And Collect And Distribute Monies Owed to Legitimate Publishers

A complaint for breach of contract includes the following: (1) the existence of a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to plaintiff therefrom. *See Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal. App. 3d 887, 913 [92 Cal. Rptr. 723] (1971).

The core facts here are not in dispute. Defendants admit they promised to "track the 'clicks' and actions of end-users ... and collect and process payments from advertisers to publishers ***based on the traffic that a publisher directs to a particular advertiser***." MTD at 1.[3] This is the fundamental service Defendants agreed to provide to Plaintiff and the Advertiser Class.[4] ¶¶ 11, 62, 86-91. Defendants failed to materially perform this basic promise. ¶¶ 63-66, 88-90.

Plaintiff and the Advertiser Class performed their contractual duties by making payments to Defendants based on Defendants' accounting of affiliate transactions. ¶¶ 11, 12, 48, 62, 63, 69, 86-91. Defendants, in turn, were obligated to distribute those commissions to publishers "based on the traffic that a publisher

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[2] All citations, footnotes, and internal quotation marks omitted, and all emphasis added, unless otherwise indicated.

[3] "MTD" refers to Defendants' Notice of Motion and Motion to Dismiss Class Action Complaint; Memorandum of Points and Authorities in Support.

[4] The proposed class in the present case consists of "all persons and/or entities that, within the past four years, entered into an advertiser agreement with ValueClick and/or Commission Junction and/or Be Free for affiliate marketing management services on the CJ Affiliate Networks" ("Advertiser Class"). ¶ 83.

directs to a particular advertiser." MTD at 1. Defendants breached this duty by improperly paying entities (*e.g.*, adware affiliates), instead of paying the true publishers (who directed the traffic to Plaintiff and Advertiser Class). ¶¶ 18-25, 64. In addition, Defendants also improperly charged Plaintiff and the Advertiser class for transactions where Plaintiff and the class did not owe any money whatsoever. ¶¶ 21-23. By so breaching the agreement, Defendants harmed Plaintiff and the Advertiser Class. ¶¶ 21-23, 71-72, 86-91.

2. Defendants Affirmatively Represented They Would Not Credit or Pay Entities Who Did Not Qualify as Publishers

Defendants expressly represented in their Code of Conduct that entities who illegitimately employ adware would not be credited as publishers.[5] ¶¶ 39-47. Defendants' representations to Plaintiff and the Class included the following language in the Code of Conduct:

- "As such, [Defendants] find it necessary…***to clarify and advocate what we enforce through our respective affiliate network agreement terms*** and promote through guidelines and education."
- "The fundamental philosophy behind the revised Code of Conduct is that ***any publisher…must provide recognizable value to the End-User and the Advertiser***…It is [Defendants'] goal to eliminate the exploitation of advertisers and other publishers…"
- ***"The publishers of the Code of Conduct intend to enforce compliance with these guidelines and work to eliminate the inappropriate use of [adware]."***

Friedman Decl., Ex. A at 1.

Defendants' improper crediting of adware entities, contrary to the above representations, caused Plaintiff and the Class to pay commissions to adware entities

[5] *See* Declaration of Jeff D. Friedman in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss Complaint ("Friedman Decl."), Ex. A; Request for Judicial Notice in Support of Opposition to Defendants' Motion to Dismiss Complaint.

that did not provide "recognizable value to the End-User and the Advertiser." Notwithstanding, Defendants ***still paid themselves their fees which were associated with these transactions***. ¶¶ 12, 48, 62, 63. Thus, Defendants' failure to perform the terms contained in the Code of Conduct represents an additional breach of contract by Defendants.

3. Defendants' Interpretation of the Purported Disclaimers Is Wrong and Does Not Justify Dismissal

Defendants' sole argument to dismiss Plaintiff's breach of contract claim is a tortured interpretation of the language in paragraphs 1 and 8.4 of an unsigned document attached to Defendants' motion (hereafter, "Purported Disclaimers"). Defendants assert that these paragraphs "expressly and unambiguously disclaim[] any liability" for the complained of conduct. MTD at 9, 12. Defendants' interpretation of the Purported Disclaimers is wrong and clearly should be rejected at the pleading stage.

Interpretation of purported contractual disclaimers are "to be strictly construed against the seller." *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 694 [268 P.2d 1041] (1954). *See also Masonite Corp. v. Pacific Gas and Elec. Co.*, 65 Cal. App. 3d 1, 8-9 [135 Cal. Rptr. 170] (1976) ("ambiguities in [a] contract, ***especially in exculpatory provisions***, must be construed most strongly against the one who caused the ambiguity to exist, i.e., the drafter"); *Hauter v. Zogarts*, 14 Cal. 3d 104, 119 [534 P.2d 377] (1975) (holding that any disclaimer or modification of warranties must be strictly construed against seller). This maxim is particularly applicable to contractual language "designed to whittle down the normal and ordinary rights of a customer." *Basin Oil Co. of Cal. v. Baash-Ross Tool Co.*, 125 Cal. App. 2d 578, 595 [271 P.2d 122] (1954).

As set forth below, there is a litany of grounds to reject Defendants' interpretation of the Purported Disclaimers. First, Defendants have improperly submitted evidence that this Court cannot consider on a motion to dismiss. Second,

even if this Court were to consider Defendants' improperly submitted evidence, Defendants fail to establish as a matter of law that the Purported Disclaimers should be interpreted to bar Plaintiff's contract claim. Third, interpretation of the Purported Disclaimers is a question of fact that this Court cannot decide on a motion to dismiss. And fourth, Defendants have breached their express obligations in any agreement with Plaintiff and class members and thus, have breached the covenant of good faith and fair dealing that is a part of every contract.

a. Defendants May Not Rely on the Unsigned, Undated Document Attached to Their Motion to Dismiss

Defendants improperly submit an unsigned, undated, and unauthenticated document as an exhibit to their motion to dismiss. MTD, Ex. A. Defendants assert that this unauthenticated document is the operative contract at issue in this case. MTD at 4 (hereafter, "Unsigned Document"). The exact terms and conditions of Plaintiff's agreement with Defendants are questions of fact that cannot be decided on a motion to dismiss.[6] *See, e.g., Payday Advance Plus, Inc. v. Findwhat.com, Inc.*, 478 F. Supp. 2d 496, 500 n.3 (S.D.N.Y. 2007) (declining to consider unsigned contract on motion to dismiss "***despite the fact that the language [plaintiff] quotes in its complaint appears verbatim in the document [defendant] submitted***"); *Marshall v. Standard Ins. Co.*, 214 F. Supp. 2d 1062 (C.D. Cal. 2000) (holding that on a motion to dismiss, a court may properly consider documents whose contents are alleged in the complaint only when their authenticity is not questioned). The Court should summarily reject such improperly submitted evidence.

[6] Also at issue is how, if at all, the operative terms and conditions have changed throughout the class period. The Unsigned Document provides that "CJ shall have the right to change, modify or amend ("Change") this Agreement, in whole or in part, by posting a revised Agreement at least 14 days prior to the effective date of such Change." MTD, Ex. A at 10.6.

b. Defendants' Interpretation of the Purported Disclaimers Is Inconsistent with the Intent of the Agreement

Plaintiff alleges, and Defendants do not dispute, that Defendants drafted the agreements to which all publishers must agree. ¶¶ 61, 69. Under California law, any uncertainties in the agreement must be resolved in favor of Plaintiff. *See* Cal. Civ. Code § 1654 ("In cases of uncertainty ... the language of a contract should be interpreted ***most strongly*** against the party who caused the uncertainty to exist").

Defendants argue that the disclaimer of warranties in section 8.4 of the Unsigned Document "clear[ly] and unambiguous[ly] bars Plaintiff's claims. MTD at 10. To adopt Defendants' interpretation of the purported disclaimers, however, would allow Defendants to breach with impunity the central purpose and intent of the agreement – to track critical information regarding sales and leads from links placed by publishers and to cause advertisers to pay only legitimate publishers who "provide recognizable value to the End-User and the Advertiser." MTD, Ex. A at § 3.2; Friedman Decl., Ex. A at 1.

First, disclaimers of express contractual obligations should rarely if ever be given effect.[7] *See, e.g., Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 958 [199 Cal. Rptr. 789] (1984) ("[A] disclaimer of an express warranty is essentially contradictory"); *Hauter*, 14 Cal. 3d at 119 (holding disclaimer gives way to express warranty unless clear agreement between the parties dictates contrary intention); *Fundin*, 152 Cal. App. 3d at 958 ("[s]trict construction against the person who has both warranted a particular fact to be true and then attempted to disclaim the warranty").

[7] Defendants' express contractual obligations are enforceable express warranties. *See* 4 Witkin, Summary 10th (2005) Sales, § 51, p. 62 ("A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity.").

Second, the purported disclaimer itself recognized Defendants have duties expressly stated elsewhere in the agreement. Defendants cite the following language in support of their motion to dismiss the breach of contract claims:

> ***EXCEPT AS EXPRESSLY STATED HEREIN***, TO THE FULLEST EXTENT PERMISSIBLE PURSUANT TO APPLICABLE LAW, BOTH PARTIES DISCLAIM ALL WARRANTIES EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO...(D) REGARDING CORRECTNESS, ACCURACY, OR RELIABILITY...

MTD at 11, Ex. A at § 8.4. The phrase "except as expressly stated herein" clearly modifies the disclaimer so as not to eliminate Defendants' duty to track legitimate publisher transactions. *See, e.g., Lindberg v. Coutches*, 167 Cal. App. 2d Supp. 828, 833 [334 P.2d 701] (1959) (holding that the phase "unless otherwise specified" modified the disclaimer so as not to eliminate warranty).

Third, no reasonable interpretation of the disclaimer of "correctness, accuracy, or reliability" exists that does not contradict Defendants' express contractual obligations. Defendants try to claim that this language refers to CJ's "tracking software or transaction calculations." MTD at 10. However, nowhere in section 8.4 do the terms "tracking software" or "transaction calculations" appear. MTD, Ex. A at § 8.4. Defendants, who drafted this agreement, could have specifically included this language if they so chose. And, again, Defendants' interpretation runs counter to their express obligation to track "critical information" that results "directly from Links placed by" publishers. *See Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418, 432 [313 P.2d 936] (1957) (holding that disclaimer contradicted "provisions necessarily recognizing some sort of an obligation"); *Basin Oil*, 125 Cal. App. 2d at 596 ("[a broad disclaimer] is to be read in the light of the subject matter of the contract and the apparent intention of the parties"); Cal. Civ. Code § 1641 ("The

whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.").

Lastly, Defendants' interpretation of this disclaimer language should be rejected because it would mean the advertiser would assume the entire obligation to ensure the correctness and accuracy of transactions. As alleged in the Complaint, ***only Defendants have the ability to detect or prevent the use of adware on the CJ Networks***. ¶¶ 56-60. Interpreting this contractual term so that all such responsibility falls on Plaintiff, who has no ability to protect itself in this regard, constitutes an unreasonable allocation of risk. "If there is a type of risk allocation that should be subjected to special scrutiny, it is probably the shifting to one party of a risk that *only* the other party can avoid." *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 493 [186 Cal. Rptr. 114] (1982).

For these reasons, this Court should reject the disclaimer altogether. *See* Cal. Civ. Code § 1653 ("Word in a contract which are wholly inconsistent with its nature, or with the main intention of the party, are to be rejected."); Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").

c. Defendants' Interpretation of the Purported Disclaimers Would Render the Agreement Illusory

A contract with no remedy for breach of one party's performance is illusory. Unless both parties to a contract are bound so that either can sue the other for breach, neither is bound. *See* 1 Williston on Contracts, § 1:1, at 2-3 (4th ed.1990) ("A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"). Defendants argue that the section 8.4 disclaimer bars Plaintiff from making ***any*** claims regarding Defendants' duty to track and process transactions. MTD at 10, Ex. A at § 8.4. Plaintiff alleges, and Defendants do not deny, that tracking and processing transactions form the foundation of the agreement. MTD at 1. If the

purported disclaimer prevents Defendants from being sued for breach of their core obligations, then Defendants may perform or not perform at will, without consequence, and the obligation is illusory.

Because the Purported Disclaimers leave Plaintiff without a remedy for breach of Defendants' contractual obligations, they must fail as a matter of law as unreasonable. *See* Cal. Civ. Code § 3542 ("Interpretation must be reasonable"); *Davanzia, S.L. v. Laserscope, Inc.*, No. C 07-0247 JF (HRL), U.S. Dist. Lexis 34849, &7 (N.D. Cal. Apr. 27, 2007) ("The interpretation of a contract must be reasonable, and…[p]reference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory").[8]

d. The Purported Disclaimers Are Unconscionable

In addition to rendering the agreement illusory, Defendants' proffered meaning of the Purported Disclaimers is unconscionable. Under California law, "unconscionability has both a 'procedural' and a 'substantive' element." *A&M Produce*, 135 Cal. App. 3d at 486. The two elements are evaluated on a "sliding scale," thus, the more evidence of procedural unconscionability there is, the less evidence of substantive unconscionability is needed to render the agreement unenforceable, and vice versa. *See Armendariz v. Found. Health Psychcare Servs. Inc.*, 24 Cal. 4th 83, 99 [99 Cal. Rptr. 2d 745] (2000).

The Purported Disclaimers were presented to Plaintiff as a "take it or leave it" offer without any opportunity for meaningful negotiation. ¶ 61, 69. The agreement is thus a quintessential contract of adhesion and is procedurally unconscionable.[9] *See, e.g., Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100 [118 Cal. Rptr. 2d

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[8] Defendants' suggestion that Plaintiff has a remedy against third-party adware affiliates is unsound because Plaintiff has no ability to independently identify adware transactions. ¶¶ 56-60.

[9] Whether Plaintiff could have entered into a contract with a competing network "that does not include the offending terms is not the relevant test for procedural unconscionability." *See, e.g., Ferguson,* 298 F.3d 778, 784 (9th Cir. 2002).

862] (2002) (holding that take it or leave it clause, with no opportunity for meaningful negotiation, is procedurally unconscionable). *Accord Ferguson*, 298 F.3d 778 at 783-84.[10]

Further, as alleged in the Complaint, ***only*** Defendants can detect and prevent the use of adware on their networks. ¶¶ 56-60. Yet, the Purported Disclaimers unreasonably and without any justification place the entire burden of detecting and preventing adware on Plaintiff. MTD, Ex. A at § 8.4. Additionally, the Purported Disclaimers are so broad that they prevent Plaintiff from suing Defendants, *ex ante*, for any breach. *Id.* Defendants are under no such contractual restrictions and may sue Plaintiff freely. *Id.* Because the Purported Disclaimers unreasonably shift risk to Plaintiff and result in one-sided availability of remedies for breach, they are substantively unconscionable. *See, e.g., A&M Produce,* 135 Cal. App. 3d at 487 ("a contractual term is substantively suspect if it reallocates the risks of the bargain in a objectively unreasonable or unexpected manner").

Because the Purported Disclaimers are both procedurally and substantively unconscionable, the Court should refuse to enforce those clauses. *See* Cal. Civ. Code § 1670.5 (courts may refuse to enforce unconscionable clause in contract). *See also A&M Produce*, 135 Cal. App. 3d at 484 ("Unconscionability is a flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process.").[11]

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[10] In addition, as argued below in section III(B)(3)(f), the Purported Disclaimers were neither conspicuous nor explicit. As such, they failed to give Plaintiff actual notice of the rights it was relinquishing and support a finding of procedural unconscionability. *See, e.g., Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002) ("When assessing procedural unconscionability, [a court will] consider...the extent to which the contract clearly discloses its terms").

[11] If the Court finds that the evidence before it is insufficient at this stage, then it should deny Defendants' motion to dismiss and allow discovery to proceed. *See* Cal. Civ. Code § 1670.5(b) ("When it is claimed...that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to

e. Defendants' Interpretation of the Term "Publisher" to Refer to Adware Entities Is Patently Unreasonable

Defendants also attempt to avoid their contractual obligations by claiming that they are free to make improper payments to entities that are not owed commissions because "CJ is, under no circumstances, responsible for the practices of any Publisher or Advertiser. . . ." MTD at 10. Defendants' argument misses the point, however. Whether Defendants are immune from liability resulting from the acts of publishers is not the issue here, where Plaintiff seeks damages from Defendants for Defendants' own acts and omissions from the breach of the agreement.

Defendants appear to be advancing the remarkable claim that adware entities engaged in theft on Defendants' network somehow qualify as bona fide publishers. This contract interpretation not only strains credulity but it does violence to the letter and spirit of the agreement.

In the Introduction section of the Unsigned Document, Defendants define a "Publisher" to be "a person, entity, affiliate, publisher or its agent, operating one or more 'Web site(s)' . . . [who] may earn financial compensation . . . for 'Transactions' (sales and/or 'Leads') ***made from such Publisher's Web site***. . . ." MTD, Ex. A at 1. The Publisher Agreement defines "Publisher" as "a person, entity, affiliate or its agent, operating 'Web site(s)' . . . and/or other promotional methods ***to drive traffic to another's Web site or Web site content*** . . . ." Carrier MTD, Ex. A at 1.[12]

Adware entities do not engage in efforts to originate traffic. ¶¶ 16-20. These entities merely act as parasites to get credit for traffic developed by legitimate

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present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination").

[12] "Carrier MTD" refers to the Notice of Motion and Motion to Dismiss Class Action Complaint; Memorandum of Points and Authorities in Support, filed on June 13, 2007 in *Carrier v. ValueClick, Inc., et al.*, Case No. CV-07-02641 FMC (CTx). The "Publisher Agreement" refers to Exhibit A to the Carrier MTD that, while Plaintiff Carrier does not agree is the operative agreement, does contain the above language.

publishers and advertisers. *Id.* Thus, according to the literal language Defendants drafted, adware entities do not meet the plain definition of a "Publisher."[13]

Moreover, the contractual definition of "Publisher" comports with the parties' intent that Defendants should collect and distribute commissions only to the parties who actually direct traffic to Plaintiff's website. That the parties would intend that Defendants have no responsibility regarding who they pay commissions to – or if they are owed at all – is not in accord with common sense of the facts or business life. No reasonable advertiser would enter into an agreement that allowed Defendants to pay commissions to adware entities in lieu of the advertiser's legitimate affiliates – such an arrangement would entirely threaten the viability of the advertiser's affiliate marketing program. ¶¶ 15, 20. *See, e.g., Milton*, 152 Cal. App. 2d at 432 (rejecting defendant's interpretation of disclaimer because, in part, interpretation defied common sense). Thus, the language purporting to relieve Defendants of any responsibility "for the practices of any Publisher" is inapposite to Plaintiff's claims for breach of contract.

f. The Purported Disclaimers Do Not Reference or Appear in the Section of the Unsigned Document Concerning Adware

If the language "CJ is, under no circumstances, responsible for the practices of any Publisher" were intended to relieve Defendants of all liability related to adware, then the clause is not only ambiguously drafted, but illogically placed in the Unsigned Document. That clause appears in section 1 of the Unsigned Document. Section 1 is titled "Relationship" and pertains to criminal and/or regulatory violations. MTD, Ex. A at § 1. Nothing in section 1 deals with adware practices.

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[13] Similarly, the Unsigned Document, at section 3.2, requires that Defendants will provide "tracking of critical information regarding sales and Leads that result directly from Links placed by [Plaintiff's] Publishers through the Network Service." MTD, Ex. A at § 3.2. Adware entities do not place links through the Network Service, but instead operate through software installed directly on the end-user's computer. ¶¶ 16-20. Plainly, adware entities cannot be considered Publishers.

By contrast, section 2.2 of the Unsigned Document is titled "Publisher Use of Links" and refers extensively to adware practices which Plaintiff complains of. MTD, Ex. A at § 2.2. Section 2.2 prohibits the use of "any device, program, robot, Iframes, hidden frames, JavaScript popup windows, redirects" or forced clicks. *Id.* These practices are among those alleged to constitute adware fraud. ¶ 38. Section 2.2 does not contain any language that could be interpreted as a disclaimer.

The placement of the purported disclaimer that "CJ is, under no circumstances, responses for the practices of any Publisher or Advertiser" indicates that it was meant to relieve Defendants of responsibility for the behavior listed in section 1. If it were meant to apply to adware practices, it would have appeared in section 2.2, or in section 8.4, which section is titled "Disclaimer of Warranties." *See, e.g., Milton*, 152 Cal. App. 2d at 432 (rejecting defendant's interpretation of disclaimer because, in part, disclaimer appeared in illogical portion of the contract). [14]

4. Alternatively, Interpretation of the Disclaimer Language Is a Question of Fact Not Properly Decided on a Motion to Dismiss

Defendants' motion to dismiss Plaintiff's breach of contract claims rests entirely on Defendants' interpretation of the Unsigned Document. Plaintiff disputes Defendants' assertion that the Unsigned Document is the operative agreement in this case. Even if it were, however, nowhere in the Unsigned Document is there any clear, unequivocal and reasonable disclaimer of Defendant's duties to collect and distribute commissions based on legitimate publisher activity and to enforce its rules against the use of adware. The Unsigned Document is, at best, ambiguous. On a motion to dismiss, "where an ambiguous contract is the basis of an action, . . . [s]o long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, . . . [the court] must accept as correct plaintiff's allegations

[14] In addition to appearing in an illogical section of the Unsigned Document, the purported section 1 disclaimer is not in bold or capitalized typeface, nor does it stand out in any way. Disclaimers, in order to be effective, must be conspicuously placed in the contract so as to give actual notice to the parties. *See* Cal. Com. Code § 2316.

as to the meaning of the agreement." *Aragon-Haas v. Family Sec. Ins. Servs.*, 231 Cal. App. 3d 232, 237-38 [282 Cal. Rptr. 233] (1991). *See also Shaw v. MGM, Inc.*, 37 Cal. App. 3d 587, 599 [113 Cal. Rptr. 617] (1974) ("Obviously, we do not hold that plaintiff's interpretation of the contract is valid. We merely hold that it was error to resolve the issue against him solely on his own pleading.").

If, however, the Court determines that the record is not yet sufficiently developed to identify which contract provisions apply here and to determine the meaning of any such contract provisions, Defendants' motion to dismiss should be denied in favor of discovery to aid in the Court's interpretation of the agreement.

5. Defendants Have Breached the Covenant of Good Faith and Fair Dealing

"Inherent in every contract is a covenant of good faith and fair dealing which implies a promise that each party will refrain from doing anything to injure the right of the other to receive the benefits of the agreement." *Aragon-Haas*, 231 Cal. App. 3d at 238. *See also Carma Developers (Cal.) v. Marathon Dev. Cal. Inc.*, 2 Cal. 4th 342, 371 [6 Cal. Rptr. 2d 467] (1992) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").

Defendants promised to process payments from advertisers to publishers based on the traffic that a publisher directs to a particular advertiser (¶¶ 11, 62, 86-91) and to enforce compliance with the Code of Conduct guidelines to eliminate the inappropriate use of adware (¶¶ 39-47). These promises, which Defendants breached, were intended to protect Plaintiff from paying any illegitimate fees and commissions. *Id.* By injuring Plaintiff's right to receive the benefits of the agreement, Defendants breached the covenant of good faith and fair dealing implied in every contract.

C. Plaintiff States a Claim for Negligence

Defendants argue that Plaintiff may not bring its claim for negligence for want of "conduct...[that] also violates a duty independent of the contract arising from

principles of tort law." MTD at 15-16. By law, however, Defendants owed Plaintiff an independent duty of care with Plaintiff's money. Having accepted Plaintiff's money in order to distribute it to Plaintiff's legitimate publishers, and having collected a fee for doing so, Defendants undertook the duty of care that a bailor owes a bailee. *See* Cal. Civ. Code § 1814 ("A voluntary deposit is made by one giving to another . . . for the benefit of the former, ***or of a third party***.").

"A bailment is generally defined as the delivery of a thing to another for special object or purpose, on a contract, express or implied, to conform to the objects or purposes of the delivery which may be as various as the transactions of men... in sum, a bailment is a contractual relationship." *Windeler v. Scheers Jewelers*, 8 Cal. App. 3d 844, 850 [88 Cal. Rptr. 39] (1970). *See also Gebert v. Yank*, 172 Cal. App. 3d 544, 551 [218 Cal. Rptr. 585] (1985) (same); 13 Witkin, Summary 10th (2005) Pers. Prop., § 156, p. 168 ("A bailment (called deposit in the Civil Code) is the deposit of personal property with another, usually for a particular purpose, under an express or implied contract. The purpose may be to use or repair, keep, transport, sell, or exchange it, etc.").

The duty of care a bailee owes to a bailor is imposed by law and independent of any contractual duties owed. "[A] bailment for the benefit of both parties, . . . is a bailment for hire, and imposes on the bailee the duty to use ordinary care with respect to the bailed property." *Gebert*, 172 Cal. App. 3d at 551. "The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement. . ." *Allan v. Bekins Archival Serv., Inc.*, 91 Cal. App. 3d 835 [154 Cal. Rptr. 458, 463] (1979). *See also* Cal. Civ. Code § 1852 ("A depositary for hire must use at least ordinary care for the preservation of the thing deposited."); 13 Witkin, Summary 10th (2005) Pers. Prop., § 161, p. 172-73 ("The bailee must use ordinary

care, i.e., such care as an ordinarily prudent person exercises with respect to his or her own property of a similar description.").

Here, Defendants, as bailees in possession of Plaintiff's monies, were required to exercise ordinary care in fulfilling their express obligations to distribute Plaintiff's monies to those publishers who actually directed traffic to Plaintiff's website. By failing to do so (intentionally or otherwise), Defendants breached their agreement with Plaintiff. ¶¶ 93-98. Under California law, Defendants are liable for their failure to exercise ordinary care in accordance with their agreement with Plaintiff "through negligence or otherwise." *Greenberg Bros., Inc. v. Ernest W. Hahn, Inc.*, 246 Cal. App. 2d 529, 533 [54 Cal. Rptr. 770] (1966).

That Defendants' conduct also amounts to a breach of contract does not foreclose Defendants' separate and independent liability for negligence. "A contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner. A negligent failure to do so may be both a breach of contract and a tort." *North Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 774 [69 Cal. Rptr. 2d 466] (1997). *See also Allan*, 154 Cal. Rptr. at 463 ("Under California law, negligent failure to observe a legal duty to use reasonable care is both a tort and a breach of contract").

D. Under the Federal Rules of Civil Procedure, Plaintiff May Plead Unjust Enrichment in the Alternative

It is axiomatic that "[a] party may also state as many separate claims or defenses as the party has regardless of consistency." Fed. R. Civ. P. 8(e)(2). The Ninth Circuit has affirmed the liberal pleading rules that permit inconsistent pleadings of causes of action in contract and equity, pursuant to Rule 8(e)(2). *See, e.g., Molsbergen v. United States*, 757 F.2d 1016, 1018-19 (9th Cir. 1985) (holding lower court in error for construing inconsistent allegations as to bar claim).

It is entirely appropriate to have pleadings in equity and in contract, one for breach of contract and the other for unjust enrichment. Not only do the Federal

Rules expressly permit pleading inconsistent claims, but the facts of this case warrant it. Whether any contracts cover the subject matter in controversy here has not been determined at this stage of the litigation. If this Court ultimately finds that the subject matter was governed by contract, then it may dismiss Plaintiff's unjust enrichment claim. But if this Court should find otherwise, then Plaintiff should be allowed to proceed on its unjust enrichment claim. "Either way, it is not appropriate to dismiss the unjust enrichment claim [on a motion to dismiss]." *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 216 F. Supp. 2d 251, 261 (S.D.N.Y. 2002). *See also Adelman v. Christy*, 90 F. Supp. 2d 1034, 1045 (D. Ariz. 2000) ("A theory of unjust enrichment is unavailable only . . . if that plaintiff has already received the benefit of her contractual bargain.").

In support of their motion to dismiss, Defendants rely upon *Paracor Finance, Inc. v. Gen. Elect. Capital Corp.*, 96 F. 3d 1151 (9th Cir. 1996) and *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838 (N.D. Cal. 2004). Neither of these cases involved motions to dismiss at the pleading stage, and neither involved Rule 8(e), which permits inconsistent pleadings.[15] The situation at bar is manifestly different, since there has been no fact finding and Plaintiff is expressly permitted to plead inconsistent causes of action under Rule 8(e). Defendants' motion to dismiss Plaintiff's unjust enrichment claim should be denied.

E. Plaintiff States a Claim Under Section 17200

The UCL's scope is broad and includes "any unlawful, unfair or fraudulent business act or practice. . . . [Its] coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law."

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[15] *Paracor* was decided on appeal from an order granting summary judgment. 302 F. 2d at 1157. The court had determined that the facts showed valid and enforceable contracts that governed the parties' rights, thereby precluding recovery on the theory of unjust enrichment. *Id.* at 1167. Similarly, *Gerlinger* was decided on summary judgment (311 F. Supp. 2d at 840), and the court determined that "a valid express contract covering the same subject matter exist[ed] between the parties. *Id.* at 856.

Rubin v. Green, 4 Cal. 4th 1187, 1200 [17 Cal. Rptr. 2d 828] (1993). Defendants mistakenly assert that Plaintiff's UCL allegations are "entirely duplicative of Plaintiff's breach of contract claim" and thus must be dismissed.[16] MTD at 17. Under California law, "a breach of contract may in fact form the predicate for Section 17200 claims, provided it also constitutes conduct that is 'unlawful, or unfair, or fraudulent.'" *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1118 n.12 (C.D. Cal. 2001).

Regardless of which prong is at issue, "whether a business act or practice constitutes unfair competition within Section 17200 is a ***question of fact***." *Watson Labs.*, 178 F. Supp. 2d at 1117. *See also People v. McKale*, 25 Cal. 3d 626, 635 [159 Cal. Rptr. 811] (1979) ("What constitutes unfair competition ... under any given set of circumstances is a question of fact"); *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1472 [49 Cal. Rptr. 3d 227] (2006) ("the determination is [a] question of fact, requiring consideration and weighing of evidence from both sides before it can be resolved").

1. Plaintiff Pleads Unlawful Practices

Defendants argue that "Plaintiff has identified no law other than the alleged breach of contract...and thus does not state a claim that the practice is unlawful." MTD at 17-18. However, "[s]ince an 'unlawful' business practice actionable under the UCL is one that violates an existing law, ***including case law***, the alleged misconduct can be addressed under the UCL." *Comty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.*, 92 Cal. App. 4th 886, 891 [112 Cal. Rptr. 2d 304] (2001). Thus, if Plaintiff's allegations support its claims for breach of contract, unjust enrichment,

[16] Defendants assert that Plaintiff's Section 17200 allegations are limited to one paragraph of the complaint. Defendants ignore well-established law that "[i]f substantial facts which constitute a cause of action are averred in the complaint or can be inferred by reasonable intendment from the matters which are pleaded, although the allegations of these facts are intermingled with conclusions of law, the complaint is not subject to demurrer for insufficiency." *Krug v. Meeham*, 109 Cal. App. 2d 274, 277 [240 P.2d 732] (1952).

or negligence, then those allegations necessarily state a claim that Defendants' practices were unlawful.

2. Plaintiff Has Adequately Alleged Unfair Acts

Defendants are simply incorrect when they apply *Cel-Tech* to argue that Plaintiff fails to state a claim for unfairness because there is "no alleged threat of a violation of an antitrust law, or ... the policy of spirit of one of those law, or any other activity that significantly threatens or harms competition." MTD at 18. Defendants' argument must be rejected because the test in *Cel-Tech* concerned only claims of unfairness to competitors and was expressly "limited to that context." *Cel-Tech Commc'ns., Inc. v. Los Angeles Cellular Tel. Co.,* 20 Cal.4th 163, 187 n.12 [83 Cal. Rptr. 2d 548] (1999). *See also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 994 (9th Cir. 2000); *Pegasus Satellite Television, Inc. v. DirecTV, Inc.*, 318 F. Supp. 2d 968, 978 (C.D. Cal. 2004). Plaintiff is alleged to be a consumer of Defendants' services, not a competitor. ¶ 2. Therefore the unfairness test in *Cel-Tech* does not apply.

Prior courts have found competition to be "unfair" if it is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 854 [128 Cal. Rptr. 2d 389] (2002). "One test for determining an unfair practice is whether the gravity of the harm to the victim outweighs the utility of the defendant's conduct." *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1095 [103 Cal. Rptr. 2d 870 (2001).

Here, by causing Plaintiff to pay adware entities in lieu of publishers, and by causing Plaintiff to pay commissions where none were owing at all, Defendants have caused Plaintiff and the Advertiser Class to "suffer serious, and in many cases, irreversible losses." ¶¶ 20-25. By its conduct, Defendants failed to deliver "new, unique customers and/or leads" (¶ 9) and failed to "collect and process payments from advertisers to publishers based on the traffic that a publisher directs to a

particular advertiser." MTD at 1. The only benefit resulting from Defendants' practice is that Defendants' own revenues were increased. ¶¶ 48-55.

3. Plaintiff Pleads Fraudulent and Deceptive Statements

Defendants advance the remarkable claim that "Plaintiff does not identify any supposedly actionable misrepresentation or omission at all by Commission Junction." MTD at 18-19. To the contrary, Plaintiff alleges, *inter alia,* that: in response to allegations that an entity was stealing commissions, Defendants issued a report stating that the entity was in compliance with all rules (¶ 34); Defendants issued false and misleading statements to all of its advertisers in the form of the Code of Conduct, which Defendants do not enforce (¶¶ 39-47); and Defendants failed to disclose to Plaintiff their true policy regarding adware and the prevalence of adware activities on its networks (¶ 70).

Defendants also argue that Plaintiff has failed to allege actual reliance on allegedly false statements. MTD at 17-18. However, as Defendants point out, the issue is currently being decided by the California Supreme Court. MTD at 18 n.6. "It is therefore unsettled, as a matter of California law, whether actual reliance is required to plead a cause of action under UCL ... As the state's highest court is in the process of deciding this question, it would be imprudent for the court to reach the issue at this time." *Faigman v. Cingular Wireless, LLC*, No. C-06-04622 (MHP), 2007 U.S. Dist. Lexis 14908, at *17 (N.D. Cal. Mar. 2, 2007).[17]

F. Defendants Are on Notice of Plaintiff's Alter Ego Claims

Defendants argue that Plaintiff's "generalized, unsupported [alter ego] allegations" are insufficient to state a claim against ValueClick and Be Free. MTD

[17] Defendants cite *Cattie v. Wal-Mart Stores, Inc.* to argue that a plaintiff must plead actual reliance. MTD at 18. The *Cattie* court, however, failed altogether to take notice that the Supreme Court has granted certiorari on that exact issue. To the extent that the federal court in *Cattie* purported to determine an issue of substantive California state law currently under review by the Supreme Court, its holding is not binding on this Court.

at 21-22. Defendants, however, ignore Federal Rule of Civil Procedure 8(a)(2), "which provides that a complaint must include only a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 [122 S. Ct. 992; 152 L. Ed. 2d 1] (2002). Under Rule 8(a), "[s]uch a statement must simply give the defendant fair notice of what the plaintiff's claim is . . . [and a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 513.

In order to sufficiently put Defendants on notice, Plaintiff must show that there is such a "unity of interest and ownership" between the two corporations that their separate personalities no longer exist, and that an "inequitable result" would follow if the parent were not held liable. *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 300 [702 P.2d 601] (1985).

Plaintiff goes beyond merely conclusory allegations and pleads facts that clearly put Defendants on notice of its alter ego claims: that ValueClick ***manages*** CJ's networks devoted to its affiliate marketing business (¶ 74); that Be Free and Commission Junction share the ***same website*** (¶ 75); that ValueClick engages in direct ***sales and management*** of Commission Junction's and Be Free's affiliate marketing services (¶ 76); that ValueClick is the sole shareholder of Commission Junction and Be Free (¶¶ 4-5); that ValueClick, Commission Junction and Be Free ***all provide essentially identical affiliate marketing services***(¶¶ 3-5); and that ValueClick's, Commission Junction's and Be Free's ***affiliate networks are indistinguishable*** (¶ 7).

Plaintiff's allegations clearly meet the standards set by California courts for alter ego claims. *See, e.g., Maganallez v. Hilltop Lending Corp.*, No. C 06-07340 SI, 2007 WL 1223856, at *11 (C.D. Cal. April 25, 2007) (alleging that alter ego was "inadequately capitalized, failed to maintain corporate formalities and was designed

to limit the liability of [parent]"); *In re Napster, Inc. Copyright Litig. v. Hummer Winblad Venture Partners*, 354 F. Supp. 2d 1113, 1122 (N.D. Cal. 2005) (alleging major shareholder had "essentially full operational control"); *Fed. Reserve Bank of San Francisco v. HK Sys.*, No. 95 CV 4700 (SJ), 1997 WL 227955, at *5 (N.D. Cal. May 1, 1997) (alleging parent "dominated and controlled" the subsidiary "to such an extent that the individuality and separateness of the subsidiary had ceased"; that the parent "disregarded the corporate form of the subsidiary"; and that subsidiary was so inadequately capitalized that its capitalization was "illusory").

Defendants' cases are inapposite. In *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385 (S.D.N.Y. 2003), the court rejected the plaintiff's alter ego claim, which was supported ***only*** by an allegation that the subsidiary was wholly-owned by the parent and that the parent "exercised such dominion and control over its subsidiaries." *Id.* at 426. Defendants also cite *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060 (C.D. Cal. 2002). In *Wady*, which was decided on summary judgment, the court found that the complaint contained "no allegations" whatsoever purporting to establish the defendants as alter egos. *Id.* at 1067.[18]

The Complaint sufficiently puts Defendants on notice of Plaintiff's alter ego claims. Many of the facts to support Plaintiff's alter ego claims are solely in Defendants' possession. As one court held under similar circumstances, "[b]ecause the issue of alter ego liability is a ***fact intensive inquiry*** and because plaintiff has satisfied the notice pleading requirement, dismissal of plaintiff's alter ego theory would be inappropriate here." *Monaco v. Liberty Life Assurance Co.*, No. C06-07021 MJJ, 2007 U.S. Dist. Lexis 31298, at *19 (N.D. Cal. April 17, 2007). *See also Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 836-837

[18] Although Defendants also cite *Am. West Airlines, Inc. v. GPA Group, Ltd.*, 877 F. 2d 793 (9th Cir. 1989) and *Meisel v. Allstate Indem. Co.*, 357 F. Supp. 2d 1222 (E.D. Cal. 2005), in neither case did plaintiff invoke or plead alter ego.

[26 Cal. Rptr. 806] (1962) ("Whether alter ego [applies is a question of fact] which necessarily varies according to the circumstances of each case.").[19]

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that Defendants' motion to dismiss be overruled in its entirety. In the unlikely event this Court finds Plaintiff fails to state a claim, leave to amend should be "freely given." Fed. R. Civ. P. 15(a); *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

DATED this 16th day of July, 2007.

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[19] If the Court finds Plaintiff's alter ego allegations insufficient, Plaintiff respectfully requests leave to amend those allegations. Plaintiff will add allegations, among others, that ValueClick recently named CJ General Manager Tom Vadnais as its Chief Executive Officer. Plaintiff will also allege that on the May 30, 2007, Vadnais stated that as ValueClick's CEO, he would "continue to directly manage the businesses [he had] been involved with most recently, which [were] the affiliate marketing and Mediaplex businesses." Plaintiff will also add allegations that all Defendants share the same law firm, computer resources, and that ValueClick entirely or partially drafted Commission Junction's service agreements.

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DECLARATION OF SERVICE BY U.S. MAIL AND E-MAL

I, the undersigned, declare:

That declarant is and was, at all times herein mentioned, a citizen of the United States, and is employed in the city of Berkeley, California, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 715 Hearst Avenue, Suite 202, Berkeley, California 94710.

On July 16, 2007, declarant served the foregoing document on all interested parties in this action.

[X] **BY U.S. MAIL**

By placing a true copy thereof enclosed in sealed envelopes addressed as follows: **See Attached Service List**. That there is a regular communication by mail between the place of mailing and the places so addressed. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at Berkeley, California in the ordinary course of business.

[X] **BY E-MAIL**

I caused the above listed documents to be served by e-mail to the e-mail addresses as follows: **See Attached Service List**.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 16th day of July, 2007, at Berkeley, California.

NANCY QUON

Settlement Recovery Center v. Valueclick, Inc., et al.
Case No. 07-cv-02638-FMC (CTx)

Service List
July 16, 2007

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