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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SETTLEMENT RECOVERY CENTER, LLC, individually and on behalf of others similarly situated,

Plaintiff,

v.

VALUECLICK, INC., a Delaware corporation, its wholly owned subsidiary COMMISSION JUNCTION, INC., and its wholly-owned subsidiary BE FREE,

Defendant(s).

CASE NO. CV-07-02638 FMC (CTx)

(Assigned to the Honorable Florence-Marie Cooper, Courtroom 750)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS CLASS ACTION COMPLAINT

[Declaration of Elizabeth Elliott Filed Concurrently]

Hearing
Date: July 30, 2007
Time: 10:00 a.m.
Place: Courtroom 750 (Roybal)

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INTRODUCTION

Defendants' moving papers established that Plaintiff's claims are barred by the express terms of the parties' written Agreement and fail to state a valid claim under California law. In its opposition, Plaintiff does not identify a single contractual provision that Commission Junction allegedly breached. Instead, Plaintiff argues – despite the Agreement's plain language to the contrary – that Commission Junction should be held responsible for certain publishers' use of adware software on its online advertising network. The express terms of the Agreement clearly state otherwise and unequivocally disclaim liability for precisely the third-party conduct complained of by the Plaintiff here.

Because the Agreement bars Plaintiff's claims, Plaintiff resorts to the usual litany of theories in an effort to undermine the Agreement: that the Agreement is supposedly illusory, unconscionable, ambiguous, or some combination of these. But under well-settled principles of California law, each of these specious arguments fails. At bottom, Plaintiff entered into a commercial contract with Commission Junction, and cannot now maintain a claim that Commission Junction breached that contract because, Plaintiff contends, Commission Junction should have done something expressly disclaimed by the contract itself.

Plaintiff also fails to demonstrate that it should be permitted to pursue – under the guise of tort – claims for negligence, unjust enrichment and unfair competition that arise from, and also are foreclosed by, the parties' Agreement. The relationship between Plaintiff and Commission Junction is based on the Agreement, and Plaintiff's claims arise solely out of the Agreement. Plaintiff's effort to shoehorn a contract dispute into tort theory should be rejected, and the motion to dismiss should be granted.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE BARRED BY THE CONTRACTUAL AGREEMENT BETWEEN THE PARTIES

A. Plaintiff Cannot Point To a Contractual Provision That Was Breached

Defendants' moving papers established that Plaintiff's claims must be dismissed because the clear and unambiguous terms of the parties' written Agreement flatly preclude the very claims that Plaintiff is asserting here.

Conspicuously, in its opposition, Plaintiff still cannot point to a specific contractual provision that it contends has been breached. Instead, Plaintiff asserts that Commission Junction has "breached" what it characterizes as the Agreement's overall "promise" to track "clicks" and collect and distribute payments only to "legitimate publishers". Pl.'s Br. at 4. Tellingly, Plaintiff does not quote from or cite to *the Agreement* when arguing the Defendants somehow breached some unspecified provision contained therein. Instead, Plaintiff cites solely to Defendants' moving papers – or engages in unilateral and misguided characterizations of the Agreement – which have no bearing on the plain terms of the parties' Agreement. Pl.'s Br. at 4-5.

The reason Plaintiff cannot identify any provision that allegedly was breached is simple: the Agreement imposes no obligation on Commission Junction to detect every (or any) instance in which a publisher uses adware to claim credit for a particular transaction or to avoid distributing commissions to publishers using adware. To the contrary, the Agreement clearly states that the Plaintiff (not Commission Junction) is responsible for determining which publishers are eligible to receive commissions and which transactions qualify for a payout. Indeed, no publisher can receive commissions from Plaintiff (including publishers engaged in the use of adware) unless *Plaintiff* has specifically approved and accepted that publisher into its program. *See* Defs.' Br., Ex. A ¶ 2.1 ("Publishers may apply to [Plaintiff's] Program for the opportunity to earn Payouts . . . Upon approval by [Plaintiff] for acceptance to [Plaintiff's] Program such a Publisher ("Your Publisher") may post Links to Your

Web site or Web site content that You provide . . . . "). Likewise, Plaintiff is solely responsible for determining those transactions that are eligible for a payout to a particular publisher. Indeed, *Plaintiff* is required to approve and review each transaction ***before a commission is paid*** to determine whether "the Transaction is not eligible for a Payout due to: product return; duplicate entry or other clear error; ***non-bona fide Transaction*** . . . " or other disqualifying Events. Defs.' Br., Ex. A ¶ 3.6. Likewise, *Plaintiff* – not Commission Junction – is responsible for "provid[ing] CJ with accurate, verifiable, reporting on the number and amount of Visitor Transactions . . . ." Defs.' Br., Ex. A ¶3.3. In short, despite Plaintiff's attempts to rewrite the parties' Agreement in its opposition, the Agreement obligates Plaintiff to track, review and approve all transactions and commission payments, and nowhere requires Commission Junction to detect or eradicate the activity Plaintiff complains of in its Complaint.

Because Plaintiff cannot identify any provision in the parties' Agreement that was breached, it attempts to save its deficient contract claim by pointing to Commission Junction's "Code of Conduct," which Plaintiff contends establish an obligation to avoid the "improper crediting of adware entities." Pl.'s Br. at 5. In fact, the very language cited by Plaintiff from the Code of Conduct only confirms that Commission Junction's efforts to combat the use of adware are (of necessity) aspirational, and do not rise to the level of a warranty or contractual obligation:

- "As such, [CJ] find[s] 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 [CJ's] 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* third-party technology applications in their respective businesses."

Pl.'s Br. at 5; Friedman Decl., Ex. A at 1-4.

Plaintiff's invocation of Commission Junction's policies and "goals" (not contained in the parties' Agreement) does not state a legally sufficient claim for breach of contract, in lieu of an allegation that a specific contractual obligation was breached.

B. The Exculpatory Provisions in the Agreement Are Valid and Controlling

Even if Plaintiff could point to a contractual obligation that allegedly was breached – and it does not – its claims nevertheless would fail because they are barred by the express language of the parties' Agreement. *See* Defs.' Br. at 2, 6, 9-14. As demonstrated in Defendants' moving papers, California courts have consistently dismissed breach of contract claims when, as here, they are predicated on an alleged duty that is expressly disclaimed in the parties' agreement. *See* Defs.' Br. at 11-13.

Tellingly, Plaintiff does not seriously dispute that the Agreement's clear exculpatory provisions – on their face – operate to bar its claims. Instead, Plaintiff mounts a series of collateral attacks on the Agreement itself, and challenges this Court's ability to consider and enforce the relevant provisions of the Agreement on this motion. First, Plaintiff asserts that there are unspecified "questions of fact" as to "the exact terms and conditions" of the Agreement, even as it conspicuously fails to supply this Court with a copy of the Agreement that forms the basis of its claims. Pl.'s Br. at 7. Next, Plaintiff argues that "[d]isclaimers of express contractual obligations should rarely if ever be given effect," despite ample case law to the contrary. Pl.'s Br. at 8. Then, Plaintiff urges this Court to "reject the disclaimers altogether" on the untenable ground that they "constitute an unreasonable allocation of risk" and render the contract "illusory." Pl.'s Br. at 10. Similarly, Plaintiff contends that the Agreement is somehow unconscionable and unenforceable, despite the fact that its Complaint affirms the validity of the parties' contract. Finally, Plaintiff strains to argue that the Agreement is somehow ambiguous, when the plain language of the Agreement proves otherwise. Each of these contentions lacks merit.

1. The Court Properly May Consider and Construe the Agreement

Without providing any evidence whatsoever to the contrary, Plaintiff attacks the authenticity of the Agreement submitted by Defendants with their opposition brief and argues that "[t]he exact terms and conditions of Plaintiff's agreement with Defendants are questions of fact that cannot be decided on a motion to dismiss." Pl.'s Br. at 7. Tellingly, Plaintiff does not provide this Court with a copy of the Agreement, which is the centerpiece of its Complaint, and which this Court is entitled to consider on this motion. *See* Defs.' Br. at 4 n.2. Plaintiff's attempts to manufacture an "issue of fact" by withholding from the Court a copy of the parties' Agreement should be squarely rejected.

Plaintiff noticeably does not – and cannot – assert that the copy of the Agreement submitted by Defendants is not an exact duplicate of the agreement that Plaintiff concedes it entered into with Commission Junction. Indeed, Plaintiff repeatedly cites to and quotes from the copy of the Agreement submitted by Defendants in its opposition. Nevertheless, Plaintiff protests that the Agreement is "unsigned, undated, and unauthenticated." Pl.'s Br. at 7. Of course, the Agreement is unsigned and undated because (as the Complaint acknowledges) it is a "click-through" agreement entered into by the parties online when Plaintiff voluntarily signed up to be a publisher on Commission Junction's network. Compl. ¶¶ 61, 67, 69. While Plaintiff does not seriously dispute the authenticity of the Agreement, Commission Junction has attached the Declaration of Elizabeth Elliott, Commission Junction's Advertiser Support Manager, affirming that the copy of the Agreement submitted by Defendants is a true and correct copy of the Agreement made by Plaintiff with Commission Junction.

Likewise, Plaintiff's contention that interpretation of the disclaimers is a "question of fact" is erroneous. Pl.'s Br. at 15-16. The scope of an exculpatory provision is a question of law, to be determined based on the express language of the contract. *See, e.g., Benedek v. PLC Santa Monica L.L.C.*, 104 Cal. App. 4th 1351,

1356 [129 Cal. Rptr. 2d 197] (2002); *YMCA of Metro. Los Angeles v. Superior Court*, 55 Cal. App. 4th 22, 27 [63 Cal. Rptr. 2d 612] (1997). And, as discussed below, California courts routinely interpret and enforce exculpatory provisions in the context of a motion to dismiss.

2. The Disclaimers Are Fully Enforceable And Bar Plaintiff's Claims

Plaintiff erroneously contends that contractual disclaimers are rarely upheld. Pl.'s Br. at 8. To the contrary, courts in California repeatedly have upheld exculpatory clauses when granting motions to dismiss claims (like those here) that were barred by the language of those provisions. *See, e.g., Greentree Software, Inc. v. Delrina Tech., Inc.*, No. Civ. 95-20799 SW, 1996 WL 183041, at *4 (N.D. Cal. Apr. 11, 1996) (interpreting a clause contained in the parties' agreement disclaiming liability for certain conduct and granting motion to dismiss); *Graphic Arts Sys. v. Scitex Am. Corp.*, No. CV 92-6997-WMB, 1993 U.S. Dist. LEXIS 21052, at *26 (C.D. Cal. May, 26, 1993) (finding that "the express language of the contracts . . . disclaims all warranties and limits remedies" and dismissing plaintiffs' claims for, inter alia, breach of contract, negligence, and breach of the implied covenant of good faith and fair dealing).

By contrast, the cases relied upon by Plaintiff are entirely inapplicable to the exculpatory provisions at issue here. Each of those cases – unlike here – involved a disclaimer of an ***express warranty*** contained in the operative agreement. *See Fundin v. Chicago Pneumatic Tool Co.*, 152 Cal. App. 3d 951, 958 [199 Cal. Rptr. 789] (1984) (applying provision of California Uniform Commercial Code which governs the disclaimer of express warranties and stating that strict construction of a disclaimer is only warranted in the case of an express warranty); *Hauter v. Zogarts*, 14 Cal. 3d 104, 118-19 [120 Cal. Rptr. 681] (1975) (applying provision of California Uniform Commercial Code which governs the disclaimer of express warranties and stating that an express or implied warranty can be modified or disclaimed if the seller "*clearly* limits his liability"). As discussed above, Plaintiff cannot point to any express

"warranty" or other contractual provision that was breached, or any provision in which Commission Junction expressly assumed responsibility to ensure that no commission payments are made to publishers who used adware to obtain credit for a particular transaction. To the contrary, any such responsibility was clearly and expressly disclaimed in the parties' Agreement. Thus, Plaintiff's reliance on the introductory phrase in Paragraph 8.4 of the Agreement – "except as expressly stated herein" – is entirely misplaced, because the Agreement nowhere states (expressly or otherwise) that Commission Junction owes a duty to avoid distributing payments to publishers using adware. Instead, the responsibility for determining which transactions are eligible for a payout rests exclusively with the Plaintiff. *See supra,* at 2-3.

Moreover, the cases cited by Plaintiff all involve disclaimers of warranties, not disclaimers of liability or exculpatory clauses like those at issue here. *See Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 612 [246 Cal. Rptr. 310] (1988) (holding that it is "clear" under California case law that "General Release" exculpatory clauses are valid). Plaintiff simply ignores numerous cases in which California courts have upheld disclaimers of liability similar to the ones at issue here. *See* Defs.' Br. at 11-13.

3. The Plain Language of the Exculpatory Provisions Is Consistent With the Intent of the Agreement

Because the plain language of the exculpatory provisions operates to bar Plaintiff's claims, Plaintiff urges this Court to "reject the disclaimers altogether "on the untenable ground that the express disclaimers somehow "constitute an unreasonable allocation of risk" to Plaintiff that certain payouts are made to publishers using adware software. Pl.'s Br. at 10.

Most fundamentally, this argument misapprehends the purpose of an exculpatory clause, which by its very nature operates to limit liability and available remedies under the contract. *See Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 101 [32 Cal. Rptr. 33] (1963) ("[N]o public policy opposes private, voluntary transactions

in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party."); *Artukovich v. Pac. States Cast Iron Pipe Co.*, 78 Cal. App. 2d 1, 4 [176 P.2d 962] (1947) ("In California parties may agree by their contract to the limitation of their liability in the event of a breach.") (citing cases).

Indeed, the "allocation of risk" contained in the exculpatory provisions is entirely consistent with the intent of the parties' are reflected in the Agreement. As provided in the Agreement, an advertiser who joins Commission Junction's network becomes eligible to accept publishers in the network into its program, at which point the publisher "may post Links to [the advertiser's] Web site or Web Site content that [advertiser] provide[s]." Defs.' Br., Ex. A ¶ 2.1. Commission Junction furnishes the network and certain ancillary services to publishers and advertisers on its network – including collecting commission payments from advertisers like Plaintiff and distributing them to publishers – but the Agreement makes crystal clear that the obligation to "provide . . . accurate, verifiable reporting" on the number of "clicks", to determine which transactions qualify for a payout, and to make commission payments to publishers, rests exclusively with the advertisers. *See* Defs.' Br. at 5-6; *see supra,* at 2-3. Nowhere in the Agreement does Commission Junction assume any duty to scrutinize each "click" or transaction to determine whether it may have resulted from the use of adware software or to eradicate the use of adware on its network.

4. The Agreement Is Not Illusory

Likewise, Plaintiff's contention that the Agreement somehow is "illusory" because the disclaimers leave Plaintiff "without a remedy for breach of Defendants' contractual obligations" is baseless. Pl.'s Br. at 10-11.

As a threshold matter, Plaintiff has not alleged any breach of the Agreement that would entitle it to a remedy. Moreover, the Agreement clearly provides the means for Plaintiff to avoid paying commissions on a "non-bona fide Transaction"; Plaintiff can

simply withhold approval of that transaction and refuse to pay a commission. Defs.' Br., Ex. A ¶ 3.6.

Commission Junction has agreed to perform many services in the Agreement, including to remit payments to publishers once it has collected those payments from advertisers like Plaintiff. *See* Defs.' Br. at 5; Ex. A ¶ 3.2 ("CJ Services"). The contract is not "illusory" because there is a remedy for breach of these provisions – none of which is at issue here. What the Agreement explicitly disclaims, however, is Plaintiff's right to bring a breach of contract claim for the conduct described in the Complaint.

5. The Agreement is Not "Unconscionable"

Plaintiff also contents that the disclaimers are unenforceable because the click-through contract in which they are contained supposedly is unconscionable. Pl.'s Br. at 11-12. This argument must fail because the Complaint does not contain any allegation that would support a finding that the Agreement is unconscionable. To the contrary, Plaintiff alleges that it voluntarily entered into the Agreement with Commission Junction, and its claims arise from and are predicated on that Agreement. Compl. ¶ 69.

Moreover, and contrary to Plaintiff's assertion, California federal courts repeatedly have upheld so-called "click-through" contracts like the one at issue here. *See, e.g., MySpace, Inc. v. The Globe.com, Inc.*, No. CV 06-3391-RGK (JCx), 2007 WL 1686966, at *9 (C.D. Cal. Feb. 27, 2007) (reasoning that while the website's terms of service were a standardized take-it-or-leave-it contract, the contract was nevertheless enforceable because the assenting party was a "sophisticated business entity whose area of expertise involves Internet related technology," that had reasonable alternatives for marketing); *Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC*, 426 F. Supp. 2d 1101, 1107 (E.D. Cal. 2006) (holding that a "shrinkwrap" license was an enforceable, non-adhesive contract); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 U.S. Dist. LEXIS 6483, at *7-9

(C.D. Cal. Mar. 7, 2003) (finding a valid contract where terms were posted on the front of the Ticketmaster.com website because "a contract can be formed by proceeding into the interior web pages after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so").

And, given Plaintiff's admission in the Complaint that it was free to join any number of other competing online advertising networks, rather than entering into the Agreement with Commission Junction, it cannot establish that the Agreement at the heart of its Complaint is unconscionable. *See Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 769 [259 Cal. Rptr. 789] (1989) (holding that "the existence of reasonably available market alternatives defeats a claim of adhesiveness"); *Freeman v. Wal-Mart Stores, Inc.*, 111 Cal. App. 4th 660, 670 [3 Cal. Rptr. 3d 860] (2003) ("Plaintiff was not subjected to a take-it-or-leave-it situation in which there was no reasonable alternative but to accept the shopping card terms. Plaintiff could simply decline to purchase a shopping card and make purchases by other means.").

6. The Agreement is not Ambiguous

Finally, Plaintiff argues that the Agreement "is, at best, ambiguous," and that this Court "must accept as correct plaintiff's allegations as to the meaning of the agreement." Pl.'s Br. at 15-16. Whether a contract is ambiguous, however, is a question of law for this Court to decide. *Carpenters Pension Trust Fund v. Underground Constr. Co.*, 31 F.3d 776, 778 (9th Cir. 1994). Here, Plaintiff has not made any showing that the clear and unequivocal disclaimers of liability in the Agreement are in any way ambiguous. Moreover, because it is not disputed that the Agreement is a "click through" contract, by definition there was no negotiation surrounding the formation of the contract and thus, no extrinsic evidence that the Court could consider in resolving any "ambiguity" in the Agreement. As such, the Agreement must be construed with reference to its plain language. *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 647-48 [3 Cal. Rptr. 3d 228] (2003) (stating that

the "clear and explicit" meaning of contractual provisions, interpreted in their "ordinary and popular sense" controls judicial interpretation).

Plaintiff's attempt to manufacture an ambiguity in the Agreement goes nowhere. Plaintiff argues that the Agreement's clear disclaimer of any liability for "the practices of any Publisher . . . ," Defs.' Br., Ex. A ¶ 1, somehow does not encompass the practices of publishers who use adware. Pl.'s Br. at 13-14. Plaintiff's argument is nothing more than a polemic claim that publishers who use adware should not be considered "bona fide publishers." Pl.'s Br. at 13. This contention has no basis in the language of the Agreement, and Plaintiff's personal beliefs that these publishers are not "legitimate publishers," Pl.'s Br. at 13-14, cannot operate to create an ambiguity where there is none. Indeed, as the Agreement clearly states, the only way a publisher can earn commissions from Plaintiff (including commissions obtained through the use of adware software) is to apply to and be approved by *Plainitff* as an eligible publisher. Defs.' Br., Ex. A ¶ 2.1. Precisely because advertisers like Plaintiff have ultimate control over which publishers they elect to do business with, Commission Junction limits all liability for the conduct publishers on its network in no uncertain terms in the Agreement.

Nor does the "placement" of the disclaimer of liability for the practices of publishers in any way create an ambiguity, or narrow the scope of that disclaimer, as Plaintiff claims. Pl.'s Br. at 14-15. Indeed, this disclaimer is contained upfront in Paragraph 1 of the Agreement, which describes the "Relationship" of Plaintiff and Commission Junction. Defs.' Br., Ex. A ¶ 1. The inclusion of this disclaimer in this opening paragraph only confirms that it is fundamental to the parties relationship, and establishes the overarching principle that Commission Junction shall not be liable for the actions of publishers – including for the use of adware – under any circumstances.

C. Plaintiff Cannot Circumvent The Clear Exculpatory Provisions in the Agreement By Relying on The Implied Covenant of Good Faith and Fair Dealing

Plaintiff attempts to bypass the exculpatory provisions contained in the parties' Agreement by invoking the implied covenant of good faith and fair dealing. Pl.'s Br. at 16. This argument is simply a red herring.

Because Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is based on an alleged duty expressly disclaimed in the Agreement, it is barred by the Agreement's exculpatory provisions to the same extent as Plaintiff's claim for breach of contract. *See Graphic Arts*, 1993 U.S. Dist. LEXIS 21052, at *26 (granting motion to dismiss because exculpatory clause barred claim for breach of the implied covenant of good faith and fair dealing). Likewise, the implied covenant of good faith and fair dealing cannot be used to expand or alter the duties owed under a contract. *See Helo v. Equilon Enters., LLC*, 126 Fed. Appx. 859, 859 (9th Cir. 2005) (affirming that the implied covenant of good faith and fair dealing "should not create obligations beyond those contemplated in the contract"). In short, Plaintiff cannot rely on the implied covenant of good faith and fair dealing to impose a duty that is expressly disclaimed by the parties' written Agreement. *See Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 349-50 [100 Cal. Rptr. 2d 352] (2000) ("[The implied covenant of good faith and fair dealing] cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.").

II. DEFENDANTS OWE NO DUTY TO PLAINTIFF BEYOND THE DUTIES EMBODIED IN THE AGREEMENT

Plaintiff's relationship with Commission Junction derives entirely from the commercial, contractual relationship between the parties. Plaintiff alleges that Commission Junction did not live up to the terms of the contract. As discussed above, Commission Junction disputes this argument. In any event, though, this is a dispute

about whether contractual terms were satisfied. Plaintiff has failed to identify any duty that would give rise to a tort claim. Plaintiff's efforts to put a round contract peg into a square tort hole should be rejected.

Plaintiff attempts to save its deficient negligence claim – which arises from the same conduct as its contract claims – by claiming that a bailment relationship existed with Commission Junction. *See* Pl.'s Br. at 16-18. The Agreement between the parties does not give rise to a bailment relationship. Money cannot be the subject of a bailment, unless there is an agreement that the identical property being deposited will be returned or paid out for a specific purpose. *Van de Kamp v. Bank of Am.*, 204 Cal. App. 3d 819, 860-61 [251 Cal. Rptr. 530] (1988) ("[T]he scope of the agency extends only to the collection of cash proceeds; after that, the agency ends and a debtor and creditor relationship commences and defendant is allowed to use and profit from the cash proceeds.").

"No bailment can be implied where it appears it was the intention of the parties, as derived from their relationship to each other and from the circumstances of the case, that the property was to be held by the party in possession in some capacity other than as bailee. A transaction is a sale, not a bailment, and title to the property is changed when the receiving party is under no obligation to return the property or to account for it." *H. S. Crocker Co. v. McFaddin*, 148 Cal. App. 2d 639, [307 P.2d 429] (1957) (internal citation omitted); *see also Associated Beverage Co. v. Bd. of Equalization*, 224 Cal. App. 3d 192, 209 [273 Cal. Rptr. 639] (1990) ("Unless the receiving party is obligated to return or account for the property, there is a sale rather than a bailment."). In this case, no bailment relationship existed because Commission Junction was under no affirmative duty to determine which transactions qualify for a payout, or to make payments to publishers for qualifying transactions. *See supra*, at 2-3.

In addition, Plaintiff's contention that the fiduciary duty a bailee owes to a bailor is independent of any contractual duties owed, Pl.'s Br. at 17, is simply

incorrect. "One's responsibility to live up to express promises has nothing to do with fiduciary status." *Fightertown Entm't, Inc. v. Robertson, Stephens & Co.*, No. G025340, 2002 WL 31661278, at *7 (Nov. 26, 2002). As demonstrated in Defendants' moving brief, it is well-settled that a tort claim must be dismissed where – as here – it is based solely on allegations of breach of contract. *See* Defs.' Br. at 15-16.

Furthermore, the Agreement between the parties expressly disclaims any purported bailment relationship. It is well-settled that the parties to a private agreement may vary or modify the terms of a common-law duty, including a duty arising under a bailment relationship. *See United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1120 (9th Cir. 2004) ("Subject to considerations of public policy, the liability of the bailee under a contract of bailment for loss or damage may be increased or diminished by stipulation."). Therefore, even if a bailment relationship existed between the parties, the parties disclaimed any duty arising under such a relationship when they entered into the Agreement. *See Van de Kamp*, 204 Cal. App. 3d at 860 (stating the rule that an agent's duty is limited to the scope of the agency set forth in the parties' agreement); *Meyers v. Guarantee Sav. & Loan Ass'n*, 79 Cal. App. 3d 307, 312 [144 Cal. Rptr. 616] (1978) (same).

III. PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION FOR UNJUST ENRICHMENT

As cited in Defendants' moving brief, California courts have held that a claim for unjust enrichment is inappropriate where "a valid express contract covering the same subject matter exists between the parties." *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004).[1]

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[1] Plaintiff argues that *Gerlinger* should be distinguished because it did not involve a motion to dismiss at the pleadings stage. Pl.'s Br. at 19. But the Court in *Gerlinger* held that plaintiff could not assert his unjust enrichment claim in the alternative and *dismissed* plaintiff's unjust enrichment claim without leave to

[Footnote continued on next page]

In California and elsewhere, "[i]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1160 [97 Cal. Rptr. 2d 722] (2000) (quoting *Lance Camper Manu. Corp. v. Republic Indemn. Co.*, 44 Cal. App. 4th 194, 203 [51 Cal. Rptr. 2d 622] (1996)). *See also Triangle Mining Co. v. Terteling Land Co.*, 753 F.2d 734, 742 (9th Cir. 1985). A plaintiff "must allege that the express contract is void or was rescinded in order to proceed with its quasi-contract claim." *Lance Camper*, 44 Cal. App. 4th at 203. Thus, an "action based on quasi-contract cannot lie where a valid express contract covering the same subject matter exists between the parties." *Gerlinger*, 311 F. Supp. 2d at 856.

Therefore, even if Plaintiff's breach of contract claim is unsuccessful, the existence of a contractual agreement between the parties would bar Plaintiff's unjust enrichment claim. The unjust enrichment claim must be dismissed.

IV. PLAINTIFF HAS NOT SUFFICIENTLY ALLEGED A CLAIM UNDER THE UNFAIR COMPETITION LAW

A. Unlawful

Plaintiff has failed to state a claim under the "unlawful" prong of the Unfair Competition Law because Plaintiff has failed to state a violation of *any* other law.

[Footnote continued from previous page]
amend. 311 F. Supp. 2d at 856. Moreover, the Court in *Gerlinger* addressed this issue from a pleading perspective:

"It should be noted that plaintiff contends that he should nevertheless be permitted to plead unjust enrichment in the alternative. Such an alternative claim might be stated if in count eight plaintiff alleged that no express agreement existed between plaintiff and either defendant. Instead, plaintiff has pleaded the opposite and relies on that contract as the basis for standing in the case at bar. *See* FAC P10. Even though Rule 8(e)(2) of the Federal Rules of Civil Procedure allows a party to state multiple, even inconsistent claims, it does not alter a substantive right between the parties and accordingly does not allow a plaintiff invoking state law to an unjust enrichment claim while also alleging an express contract." *Gerlinger*, 311 F. Supp. 2d at 856.

Plaintiff relies on its other claims to support its "unlawful" claim, but those underlying claims should be dismissed for the reasons described above. *See* Defs.' Br. at 17.

In the opposition brief, Plaintiff argues that a violation of case law can constitute "unlawful practices" under the Unfair Competition Law. *See* Pl.'s Br. at 20. The purpose of this argument is unclear, however, as there is no such allegation in Plaintiff's complaint.

Instead, Plaintiff – at best – asserts the breach of a private contractual agreement. *See* Compl. ¶¶ 88-90, 103. As is discussed more fully in Defendants' opening brief, the California Supreme Court has explained that "conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law," *Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999) (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515 [28 Cal. Rptr. 2d 475] (1994)), and that "'[a]n omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty.'" *Erlich*, 21 Cal. 4th at 551 (quoting *Jones v. Kelly*, 208 Cal. 251, 255 [280 P. 942] (1929)); *see also* Defs.' Br. at 14-15.

Indeed, if a private contractual agreement could give rise to liability under the Unfair Competition Law, then every breach of contract claim would also be a tort, dramatically expanding remedies for breach of contract. Plaintiff has failed to establish any ground for such an expansion of the law.

B. Unfair

Plaintiff also fails to state a claim that Commission Junction's alleged practices are "unfair." Plaintiff argues that Defendants incorrectly rely on the case of *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 [83 Cal. Rptr. 2d 548] (1999), because *Cel-Tech* only applies to claims of unfairness to competitors. Pl.'s Br. at 21. Instead, Plaintiff urges the Court to apply a different standard on the ground that Plaintiff is a "consumer." *Id.*

But Plaintiff does not allege a typical consumer relationship with Commission Junction. Instead, Plaintiff alleges a commercial relationship according to which Commission Junction provides specified services under a commercial contract. *See* Compl. ¶ 2 ("Plaintiff is a merchant that offers class action settlement services . . . . Plaintiff contracted with Defendants for affiliate marketing management services related to its online advertising and internet sales.").

The Court in *Cel-Tech* addressed the context of commercial competitors, but did not state that the "incipient violation" standard for unfairness applies *only* in that context. *Cel-Tech*, 20 Cal. 4th at 187, n. 12. Instead, the Court in *Cel-Tech* simply noted that it did not explicitly address the question of whether claims of unfairness would necessarily be evaluated with the same test outside the context of commercial competitors. *Id.* This case is analogous to *Cel-Tech* because it concerns a commercial relationship between sophisticated parties, not the type of consumer relationship that would call for the added protection of consumers from injury.

Plaintiff argues instead for the standard for unfairness applied in *Gregory v. Albertson's*: a practice was said by the Court in *Gregory* to be "unfair" if it "offends an established public policy or . . . 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) (internal quotations and citations omitted). Even assuming that this were the proper standard for unfairness under the UCL,[2] Plaintiff's allegations do not meet this threshold. As is discussed more fully above, the contract between Plaintiff and Commission Junction expressly disclaims the conduct alleged in the Complaint. *See supra*, at 4. Plaintiff has alleged no duty

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[2] Indeed, as one court has noted, there is some confusion as to the proper standard for unfairness under the UCL. *See Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1265-74 [39 Cal. Rptr. 3d 634] (2006) (applying several definitions of "unfair" to affirm dismissal of UCL claim and "urg[ing]" Legislature and Supreme Court to clarify correct formulation governing consumer cases). This confusion is of no moment here, however, as Plaintiff does not allege unfair conduct under any of the standards suggested.

whatsoever to Plaintiff to perform additional work as alleged in the Complaint. There is nothing "immoral, unethical, oppressive, unscrupulous or substantially injurious" about a party to a commercial contract meeting its contractual requirements, but not doing something extra that the other party to the contract might, after the fact, claim to want.

Moreover, Plaintiff's allegations here are fundamentally about an alleged breach of contract. Absent allegations of a duty separate from contract (of which there are none here), Plaintiff's alleged breach of contract should not be converted into a tort. *See Erlich*, 21 Cal. 4th at 551.

C. Fraudulent

Plaintiff asserts that it has alleged fraudulent conduct on the basis of three theories: "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 failed to disclose the prevalence of adware activities on its networks (¶ 70)." Pl.'s Br. at 22.

None of these theories constitute an allegation of an actionable false or misleading statement. In paragraph 34 of the Complaint, Plaintiff alleges that "a message from the Commission Junction staff stat[ed] that 180Solutions was in compliance with Commission Junction rules." Compl. ¶ 34. Plaintiff does not allege how she or anyone else relied on this statement to her detriment. In paragraphs 39-47, Plaintiff alleges that "Adware Affiliates" violate Commission Junction's Code of Conduct. Compl. ¶¶ 39-46. Plaintiff does not, however, allege that the Code of Conduct itself includes false statements, or that advertisers relied to their detriment on statements in the Code. Finally, Plaintiff alleges that "Commission Junction never disclosed to Plaintiff the prevalence of Adware Affiliates, Commission Theft and/or Transaction Fraud on the CJ Affiliate Networks . . . ." Compl. ¶ 70. Plaintiff fails to establish any affirmative duty for Commission Junction to have provided this

information, and, again, fails to allege that any advertiser relied to their detriment on these supposed omissions.

Plaintiff also argues that the Court should not apply the law of California as it currently stands regarding fraudulent and deceptive statements because the California Supreme Court is currently reviewing a case on the issue of reliance. Pl.'s Br. at 22, n.21. This argument is at odds with the well-settled rule that all courts must apply the law as it stands at the time of its decision. In addition, where state law on a particular issue is unclear, federal courts are required to anticipate how a state court would rule on the issue and act accordingly. *See Am. Sheet Metal, Inc. v. EM-KAY Eng'g Co., Inc.*, 478 F. Supp. 809, 813 (E.D. Cal. 1979) ("In the absence of definitive adjudication by the California Supreme Court, resolution of the issue in a diversity action is dependent upon this Court's determination as to what decision that Court would reach.").

V. PLAINTIFF'S ALTER EGO ALLEGATIONS ARE INSUFFICIENT

Plaintiff's allegations concerning the alter ego status of ValueClick and Be Free are woefully insufficient. The Complaint offers entirely generalized, unsupported allegations that "Commission Junction and Be Free are the alter egos of ValueClick," Defs.' Br. at 21, which are entirely insufficient to sustain causes of action against these companies. *See Hokama v. E.F. Hutton & Co., Inc.*, 566 F. Supp. 636, 647 (C.D. Cal. 1983) ("If plaintiffs wish to pursue such a [alter ego] theory of liability, they must allege the elements of the doctrine. Conclusory allegations of alter ego status such as those made in the present complaint are not sufficient.").

Plaintiff contends that the high threshold for pleading "alter ego" status is somehow established here because the Complaint alleges that Commission Junction, ValueClick and Be Free perform the same services and collaborate with each other in certain respects and on certain projects. Pl.'s Br. at 23. Conspicuously, however, Plaintiff has failed to allege *any* of the criteria which the cases cited by Plaintiff state are required to pierce the corporate veil under California law, such as

undercapitalization, absence of formalities, and/or a purposeful minimizing of liability. *See Platt v. Billingsley*, 234 Cal. App. 2d 577, 580-81 [44 Cal. Rptr. 476] (1965) (holding that the necessary allegations to plead the theory of alter ego liability are facts of improper domination of corporation such as, *inter alia*, undercapitalization, lack of assets and working capital, and failure to operate in compliance with corporate formalities).

In the absence of any such allegations, Plaintiff cannot found its claims against Defendants ValueClick and Be Free on an "alter ego" theory. Moreover, because Be Free and ValueClick are not parties to the Agreement, Plaintiff's breach of contract claims must be dismissed with respect to these Defendants for this independent reason. Defs.' Br. at 20-21.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should grant their motion to dismiss the Complaint for failure to state a claim upon which relief can be granted.

DATED: July 23, 3007

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