Settlement Recovery Center LLC v. Valueclick Inc et al Doc. 30

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SETTLEMENT RECOVERY CENTER, LLC, a California Limited Liability Company, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

VALUECLICK, INC., COMMISSION JUNCTION, INC., and BE FREE,

Defendants.

2:07-cv-02638-FMC-CTx

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING DEFENDANTS' MOTION TO STRIKE

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This matter is before the Court on Defendants Value Click, Inc., Commission Junction, Inc., and Be Free's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (docket no. 11), and Defendants' Motion to Strike Requests for Certain Relief (docket no. 12), filed on June 13, 2007. The Court has read and considered the moving, opposition, and reply documents submitted in connection with both motions. The Court deems the matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons and in the manner set forth below, the Court hereby **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss and **DENIES** Defendants' Motion to Strike.

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1 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 Defendant Commission Junction is a corporation that provides affiliate
3 marketing management services to entities involved in internet sales and
4 advertising. (Compl. ¶ 9.) Affiliate marketing is a practice by which an online
5 publisher, such as a website or email list owner, agrees to place an advertiser's
6 ads or links in the publisher's material. (*Id.*) Advertisers join the Commission
7 Junction affiliate network (CJ Affiliate Network), sign an advertiser service
8 agreement, and upload their offers onto the CJ Affiliate Network . (*Id.* at ¶ 11.)
9 Affiliates then apply with Commission Junction to join an advertiser's affiliate
10 marketing program, and, once the advertiser accepts them, begin placing
11 advertiser's ads or links. (*Id.* at ¶ 11.) Every Commission Junction affiliate must
12 agree to the terms of the Publisher Service Agreement and Publisher Code of
13 Conduct and advertisers who joint the CJ Affiliate Networks reasonably expect
14 that all affiliates are bound by the terms of those agreements. (*Id.* at ¶ 40).
15 Whenever an end-user (i.e., consumer) uses these ads or links to undertake an
16 action agreed upon in the advertiser's affiliate marketing program, such as
17 visiting the advertiser's web-site or purchasing the advertiser's product,
18 Commission Junction tracks the event. (*Id.* at ¶ 11.) The advertiser pays, through
19 Commission Junction, a commission for each event tracked. (*Id.*) As
20 compensation for its services, Commission Junction also collects a fee from the
21 advertiser for each qualifying transaction. (*Id.*)

22 Plaintiff is a merchant that offers class action settlement services via
23 offline and online advertising. (*Id.* at ¶ 2.) Plaintiff contracted with Defendants
24 for affiliate marketing management services related to its online advertising and
25 internet sales. (*Id.*) Plaintiff alleges that Commission Junction does not take
26 reasonable steps to eliminate Adware Affiliates from its affiliate networks. (*Id.* at
27 ¶ 37.) Adware refers to software programs that interfere with publishers'
28 commissions (*Id.* at ¶ 16), either by redirecting legitimate commissions from

publishers (*Id.*) or by creating false transactions in order to collect unearned commissions from advertisers (*Id.* at ¶ 21). Plaintiff alleges that Adware Affiliates violate the provisions of the Publisher Service Agreement and Publisher Code of Conduct (*Id.* at ¶¶ 41-45), yet Commission Junction, which has actual and constructive notice of the adware problem (*Id.* at ¶¶ 31-36), takes no action to punish them because Commission Junction profits from their use of the network (*Id.* at ¶¶ 49-55).

On April 20, 2007, Plaintiff filed a class action complaint, on behalf of all persons and/or entities that entered into an advertiser agreement for affiliate management services on the Commission Junction affiliate networks relating to their online advertising and internet sales, asserting claims for breach of contract, negligence, unjust enrichment and unfair business practices under Cal. Bus. & Profs. Code §17200. On June 13, 2007, Defendants filed the instant Motion to Dismiss and Motion to Strike Requests for Certain Relief.

STANDARDS OF LAW

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to seek dismissal of a complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Court will not dismiss claims for relief unless the plaintiff cannot prove any set of facts in support of the claims that would entitle her to relief. *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir. 2002); *see also Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir. 2004) (citing *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). However, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir.

1994) (internal citations omitted).

A motion to dismiss may be based on matters subject to judicial notice. *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th Cir. 1997). Moreover, the Court need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. *Foster Farms Poultry, Inc. v. Suntrust Bank*, 355 F. Supp. 2d 1145 (E.D. Cal. 2004); *Sears, Roebuck & Co. v. Metropolitan Engravers*, Ltd., 245 F.2d 67, 70 (9th Cir. 1956).

If the Court dismisses the complaint, it must decide whether to grant leave to amend. Denial of leave to amend is "improper unless it is clear that the complaint could not be saved by any amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 403 F.3d 1050, 1055 (9th Cir. 2005).

DISCUSSION

I. Motion to Dismiss

A. Impact of Alleged Disclaimer of Warranties

Defendants argue that Plaintiff's claims for breach of contract, violation of California's Unfair Competition Law[1] (UCL), unjust enrichment and negligence are precluded by an express disclaimer that releases Defendants from liability for the conduct of third-party publishers. Defendants allege that this "Disclaimer ofWarranties" is part of the Advertiser Service Agreement that the parties entered into on an unspecified date. (Mot. to Dismiss 6:14-25.) Defendants have attached an unsigned, undated copy of the alleged agreement to their Motion. (*See* Mot. to Dismiss, Ex. A.)

Defendants contend that the Court may consider the "Disclaimer of Warrities," as well as the entire Advertiser Service Agreement, as part of Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) because the agreement

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[1] California Business and Professions Code section 17200 *et seq.*

1 is incorporated by reference in Plaintiff's Complaint. Although courts may not
2 generally consider any material beyond the pleadings in a Rule 12(b)(6) motion,
3 "material which is properly submitted as part of the complaint may be
4 considered." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
5 1555 (9th Cir. 1989). In addition, a court may consider evidence on which a
6 complaint "necessarily relies" even if the document is not attached to the
7 complaint if: "(1) the complaint refers to the document; (2) the document is
8 central to the plaintiff's claim; and (3) no party questions the authenticity of the
9 copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th
10 Cir. 2006); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (holding "that
11 documents whose contents are alleged in a complaint and whose authenticity no
12 party questions, but which are not physically attached to the pleading, may be
13 considered in ruling on a Rule 12(b)(6) motion to dismiss" and that "[s]uch
14 consideration does not convert the motion to dismiss into a motion for súmmary
15 judgment.") (internal quotations omitted).

16 In the instant case, Plaintiff has questioned the authenticity of the
17 Advertiser Service Agreement attached to Defendants' Motion. In addition, the
18 "Disclaimer of Warranties" is not referenced or quoted in Plaintiff's Complaint.
19 Accordingly, the Court may not consider the document or disclaimer at this stage
20 of the litigation and must reject Defendants' arguments regarding their impact on
21 Plaintiff's claims.

22 ***B. Negligence***

23 Defendants argue Plaintiff has failed to identify any duty that would give
24 rise to a negligence claim. In order to assert a claim based on negligence, a
25 plaintiff must generally establish that a duty of care was owed, that the duty was
26 breached, that there was the requisite proximate cause, and resulting damages.
27 *Paz v. State of California*, 22 Cal. 4th 550, 559, 93 Cal. Rptr. 2d 703 (2000).
28 Plaintiff responds that Defendants owed Plaintiff an independent duty of care

1 with Plaintiff's money, arguing that Defendants undertook the duty of care that a
2 bailor owes a bailee.
3 In California, the traditional bailee/bailor language has been replaced by
4 language that would denominate Defendants the "depositary" and Plaintiff the
5 "depositor." *See* Cal. Civ. Code § 1814 *et seq.* A bailment is referred to as a
6 "deposit." *Id.* However, Plaintiff's argument fails because California Civil
7 Code section 1925 expressly excludes money from the concept of bailment. *See*
8 Cal. Civ. Code §1925; *Credit Managers' Assn. v. Brubaker* 233 Cal.App.3d
9 1587, 1592 (Cal.App. 2 Dist.,1991). Plaintiff cites no authority for the
10 proposition that Defendants had an independent duty to monitor its networks for
11 adware or to protect Plaintiff from adware, nor has the Court's research
12 discovered any. There is no special relationship between Defendants and
13 Plaintiff which would give rise to any such duty. Accordingly, Plaintiff has
14 failed to state a cause of action for negligence, and Defendants' motion to
15 dismiss with respect to Plaintiff's second claim is granted.
16 ***C. Unjust Enrichment***
17 To survive a Motion to Dismiss, Plaintiff's unjust enrichment claim must
18 allege "receipt of a benefit and unjust retention of the benefit at the expense of
19 another." *Westways World Travel*, 182 F.Supp.2d at 963-64 (quoting
20 *Lectrodryer v. Seoulbank*, 77 Cal.App.4th 723, 726, 91 Cal.Rptr.2d 881, 883
21 (2000)).
22 Here, Plaintiff alleges that Defendants received and retained money at the
23 expense of Plaintiff and members of the purported class. (Compl. ¶¶ 100-101.)
24 However, Plaintiff's Complaint indicates that Plaintiff contracted with
25 Defendants for affiliate marketing management services related to its online
26 advertising and internet sales. (Compl. ¶2). Defendants argue that the Northern
27 District of California has held that an action for unjust enrichment is not possible
28 where an express contractual relationship exists between the two parties.

1 *Gerlinger v. Amazon.com, Inc.*, 311 F.Supp.2d 838, 856 (N.D.Cal. 2004)
2 (explaining that, under the California Commercial Code, a direct purchase creates
3 an express contract between the buyer and seller, Cal. Com. Code §§ 2106(1) &
4 2204(1), rendering an action in quasi-contract is inappropriate). "Even though
5 Rule 8(e)(2) of the Federal Rules of Civil Procedure allows a party to state
6 multiple, even inconsistent claims, it does not alter a substantive right between
7 the parties and accordingly does not allow a plaintiff invoking state law to an
8 unjust enrichment claim while also alleging an express contract." *Id.* (citations
9 omitted); *see also Slattery v. Apple Computer, Inc.*, 2005 WL 2204981, *5 (N.D.
10 Cal. 2005) (dismissing common law unjust enrichment claim where Plaintiff had
11 alleged formation of contract when consumers purchase either an iPod or a music
12 file from defendants). However, in *Westways World Travel*, the Central District
13 permitted both a breach of contract and an unjust enrichment claim to proceed at
14 the Motion to Dismiss stage where the plaintiffs had alleged sufficient facts to
15 state each claim. *Westways World Travel*, 182 F.Supp.2d at 963-64.

16 Here, although Plaintiff's breach of contract claim alleges formation of an
17 express contract with Defendants by virtue of the advertising agreement, the
18 Court will permit Plaintiff to pursue its unjust enrichment claim in the alternative
19 at this stage in the litigation. Accordingly, Defendants' Motion to Dismiss is
20 denied with respect to Plaintiff's third claim.

21 ***D. UCL***

22 Defendants insist that Plaintiff has failed to state a claim under the UCL
23 because the claim is premised exclusively on Defendants' alleged breach of
24 contract, which is insufficient, standing alone, to constitute an unlawful action
25 under the UCL. *See Allied Grape Growers v. Bronco Wine Company*, 203 Cal.
26 App. 3d 432, 451 (1988) (affirming judgment of trial court that plaintiff violated
27 UCL based on breach of contract where evidence demonstrated that defendant's
28 actions were also unfair and fraudulent). The scope of the UCL is extremely

broad, however, and has been described as "sweeping." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 179 (1999). The statute creates a cause of action for unfair competition, which is defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof Code § 17200. As the court explained in *Gafcon, Inc. v. Ponsor & Assocs.*:

> Virtually any law can serve as the predicate for a Business and Professions Code section 17200 action; it may be civil or criminal, federal, state or municipal, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement. Business and Professions Code section 17200 "borrows" violations of other laws and treats them as unlawful practices independently actionable under section 17200 *et seq*. Moreover, determination of whether a business practice or act is "unfair" within the meaning of the UCL entails examination of the impact of the practice or act on its victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. In general the "unfairness" prong has been used to enjoin deceptive or sharp practices. This court has held that an "unfair" business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

98 Cal. App. 4th 1388, 1426 n.15 (2002) (internal citations and quotations omitted).[2]

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[2] Defendants argue that, under *Cel-Tech Communications*, a more narrow definition of "unfair" applies in this context. Specifically, that the UCL extends only to "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." 20 Cal. 4th at 187. The court in *Cel-Tech Communications* was careful to delineate, however, that this rule applied only "[w]hen a plaintiff who claims to have suffered injury *from a direct competitor's* 'unfair' act or practice invokes section 17200 . . . ." *Id.* As Plaintiff and Defendants are not direct competitors, the Court finds *Cel-Tech Communications* more limited

1 The Court finds that Plaintiff has alleged adequate facts to state a claim for
2 violation of the UCL for unfair practices. According to the Complaint:
3 Defendants have knowledge of and the means to prevent the actions of Adware
4 Affiliates; Defendants derive unearned and potentially fraudulent profits from
5 Plaintiff because of the alleged machinations of its Adware Affiliates;
6 Defendants also fail to disclose the extent to which Defendants will overcharge
7 advertisers such as Plaintiff as a result of Adware Affiliates' actions and
8 Defendants' failure to accurately track qualifying transactions. Although these
9 actions may prove fair once the Court considers the full contract between the
10 parties and the alleged express disclaimer therein, at this stage the Court must
11 deny Defendants' Motion to Dismiss as to Plaintiff's UCL claim.

12 ***E. Plaintiff's Alter Ego Allegations against ValueClick and Be Free***

13 Defendants argue that the complaint does not allege any contract between
14 Plaintiff and either ValueClick or Be Free and that those defendants should be
15 dismissed from the action. Plaintiff responds that Value Click and Be Free are
16 the alter egos of Commission Junction. Determining whether an alter ego exists
17 depends on the circumstances of each particular case and is seen as an issue for
18 the trier-of-fact. *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 1205, 1212
19 (1992). Under California law, "(i)ssues of alter ego do not lend themselves to
20 strict rules and prima facie cases. Whether the corporate veil should be pierced
21 depends upon the innumerable individual equities of each case." *United States v.*
22 *Standard Beauty Supply Stores, Inc.*, 561 F.2d 774, 777 (9th Cir. 1977).
23 However, there are two general requirements to be satisfied before such a
24 determination can be made: "(1) That there be such unity of interest and
25 ownership that the separate personalities of the corporation and the individuals
26 no longer exist, and (2) if the acts are treated as those of the corporation alone, an
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28 definition of "unfair" does not apply to Plaintiff's UCL claim.

1 inequitable result will follow." *Platt v. Billingsley*, 234 Cal. App. 2d 577, 582
2 (1965); *First W. Bank and Trust Co. v. Bookasta*, 267 Cal. App. 2d 910, 915
3 (1968); *Automotriz Del Golfo De California v. Resnick*, 47 Cal.2d 792, 796, 306
4 P.2d 1, 3 (1957).

5 A bare "allegation that a corporation is the alter ego . . . is insufficient to
6 justify the court in disregarding the corporate entity in the absence of allegations
7 of facts from which it appears that justice cannot otherwise be accomplished."
8 *Vasey v. California Dance Co.*, 70 Cal. App. 3d 742, 749 (1977). The Court
9 may consider a variety of factors to help determine whether both prongs of this
10 test have been satisfied. *Associated Vendors, Inc. v. Oakland Meat Co., Inc.*, 210
11 Cal. App. 2d 825, 838 (1962); *Bookasta*, 267 Cal. App. 2d at 915. As to unity of
12 interest, ownership and dominance of the corporation, although not dispositive,
13 have been shown as factors that favor the piercing of the corporate veil. *U.S. v.*
14 *Healthwin-Midtown Convalescent Hospital and Rehabilitation Center, Inc.*, 511
15 F. Supp. 416 (C.D. Cal. 1981); *Associated Vendors, Inc. v. Oakland Meat Co.*,
16 210 Cal.App.2d 825, 837 (1963); *McCombs v. Rudman*, 197 Cal.App.2d 46
17 (1961). Other factors include: "commingling of funds and other assets . . . the
18 treatment by an individual of the assets of the corporation as his own . . . sole
19 ownership of all of the stock in a corporation by one individual or the members
20 of a family . . . [and] the use of a corporation as a mere shell, instrumentality or
21 conduit for a single venture or the business of an individual." *Associated*
22 *Vendors* at 838-39.

23 As to the second 'inequitable result' factor, the alter ego doctrine is in
24 essence an equitable doctrine where the basic motivation is to assure a just and
25 equitable result. *Alexander v. Abbey of the Chimes*, 104 Cal. App.3d 39, 48
26 (1980). In *Alexander*, the court found that the net effect of the transaction was to
27 leave the company as "a hollow shell without means to satisfy its existing and
28 potential creditors." *Id.* In *Bookasta*, allegations sufficient to state a cause of

action on the alter ego theory included allegations that "the individuals . . . 'dominated' the affairs of the corporation; that a 'unity of interest and ownership' existed . . . that the corporation [was] a 'mere shell and naked framework' for individual manipulations; that its income was diverted to the use of the individuals; that the corporation was . . . inadequately capitalized . . . and that adherence to the fiction of separate corporate existence would, under the circumstances, promote injustice." *Bookasta*, 267 Cal. App. 2d at 915-16.

In the instant case, Plaintiff has alleged that ValueClick, Be Free and Commission Junction have a unity of interest and ownership. (Complaint ¶76). Defendants are all alleged to be officers, directors, partners, and representatives of each of the other Defendants. (Complaint ¶77). Plaintiff has further alleged that Commission Junction and Be Free are both wholly owned subsidiaries of ValueClick. (Complaint ¶¶3-5). Both ValueClick and BeFree's websites direct its users to Commision Junction's website. (Complaint ¶¶ 75-76). Finally, Plaintiffs allege ValueClick, Be Free and Commission Junction all engage in sales and management of each other's indistinguishable affiliate marketing management programs. (Complaint ¶¶7, 76). For purposes of the instant motion, Plaintiff has pleaded sufficient allegations to show Defendants have a unity of interst and ownership. Furthermore, based on the allegations in the complaint, if ValueClick and Be Free were allowed to escape liability, an inequitable result would follow. Accordingly, Plaintiff has set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" under an alter ego theory of liability. Fed. R. Civ. P. 8(b).

II. Motion to Strike

Although Defendants' Motion to Strike asks the Court to strike Plaintiff's prayer for punitive damages, the Court granted the parties' request that Plaintiff be allowed to withdraw the demand, thereby mooting that portion of the Motion. *See* July 2, 2007, Stipulation and Order for Plaintiff's Withdrawal of Prayer for

1 Punitive Damages without Prejudice (docket no. 19). The remaining portion of
2 Defendants' Motion to Strike argues that Plaintiff's third cause of action,
3 alleging that Defendants violated California's Unfair Competition Law (UCL),
4 California Business and Professions Code § 17200 *et seq.*, does not support
5 Plaintiff's prayer for "disgorgement."

6 Federal Rule of Civil Procedure 12(f) provides that a court, upon motion or
7 *sua sponte*, "may order stricken from any pleading any insufficient defense or
8 any redundant, immaterial, impertinent, or scandalous matter." "[T]he function of
9 a 12(f) motion to strike is to avoid the expenditure of time and money that must
10 arise from litigating spurious issues by dispensing with those issues prior to trial .
11 . . ." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)
12 (internal citation omitted). Motions to strike may therefore be granted "if 'it is
13 clear that the matter to be stricken could have no possible bearing on the subject
14 matter of the litigation.'" *Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal.
15 2005) (quoting *LeDuc v. Ky. Cent. Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D.
16 Cal. 1992)). However, courts generally view motions to strike with disfavor
17 because they impose a "drastic remedy," 2 *Moore's Federal Practice* §12.37[1]
18 (Matthew Bender 3d ed.), and are "often used as delaying tactics." *Schwarzer,*
19 *Tashima & Wagstaffe, Federal Practice & Procedure Before Trial* §9.375 (2d ed.
20 1990). For this reason, courts view the challenged pleading in the light most
21 favorable to the non-moving party and frequently require a showing of prejudice
22 by the moving party. *See, e.g., Montecino v. Spherion Corp.*, 427 F. Supp. 2d
23 965, 967 (C.D. Cal. 2006) ("[A] court must deny the motion to strike if any doubt
24 exists whether the allegations in the pleadings might be relevant in the action.")
25 (citation omitted); *SEC v. Sands*, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995)
26 (citing *Schwarzer* at §§9:376, 9:407).

27 Although it is true, as Defendants note, that the California Supreme Court
28 has held that one form of disgorgement, defined negatively as "nonrestitutionary

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disgorgement," is not available under the UCL in private actions, it does not follow that "disgorgement" is similarly an impermissible remedy. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003). The Complaint does not request the prohibited form of relief, "nonrestitutionary disgorgement," and the Court denies Defendants' request to strike Plaintiff's prayer for "disgorgement" for failing to more specifically request the available subset of recoverable damages, "restitutionary disgorgement." As the law is clear that nonrestitutionary disgorgement is not available, it would have been superfluous for Plaintiff to pray for "restitutionary" disgorgement. Moreover, Plaintiff has further clarified in its Opposition that it is not seeking nonrestitutionary disgorgement.

The Court finds that Defendants have failed to meet their burden in establishing that Plaintiff's request for disgorgement is an immaterial or impertinent matter. Further, the Court is not persuaded that a failure to strike Plaintiff's prayer for disgorgement will lead to an unforeseen broadening of the scope of UCL, erode contract law, or engender constitutional due process concerns. Accordingly, the Court denies Defendants' Motion to Strike.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss with respect to Plaintiff's second cause of action for negligence and denies Defendants' Motion to Dismiss in all other respects. The Court also denies Defendants' Motion to Strike.

IT IS SO ORDERED.

Dated: August 24, 2007

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT