Mireille Carrier v. Valueclick Inc et al Doc. 3

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MIREILLE CARRIER, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

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

Defendants.

2:07-cv-02641-FMC-CTx

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

#31

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. 12), and Defendants' Motion to Strike Requests for Certain Relief (docket no. 13), 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. Accordingly, the hearing set for August 27, 2007, is removed from the Court's calendar. For the reasons and in the manner set forth below, the

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Court hereby **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss and **DENIES** Defendants' Motion to Strike.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant Commission Junction is a corporation that provides affiliate marketing management services to entities involved in internet sales and advertising. (Compl. ¶ 9.) Affiliate marketing is a practice by which an online publisher, such as a website or email list owner, agrees to place an advertiser's ads or links in the publisher's material. (*Id.*) Publishers join the Commission Junction affiliate network, agreeing to a Publisher Code of Conduct. (*Id.* at ¶ 61.) Publishers then apply with Commission Junction to join an advertiser's affiliate marketing program, and, once the advertiser accepts them, begin placing advertiser's ads or links. (*Id.* at ¶ 11.) Whenever an end-user (i.e., consumer) uses these ads or links to undertake an action agreed upon in the advertiser's affiliate marketing program, such as visiting the advertiser's web-site or purchasing the advertiser's product, Commission Junction tracks the event. (*Id.*) The advertiser pays, through Commission Junction, a commission for each event tracked. (*Id.*) Commission Junction then makes payments to the publisher based on the advertiser's payout rate. (*Id.*) As compensation for its services, Commission Junction also collects a fee from the advertiser for each qualifying transaction. (*Id.*)

Plaintiff, an individual who publishes and maintains one or more websites, entered into a contract with Commission Junction for affiliate marketing management services. (*Id.* at ¶ 2.) Plaintiff alleges that Commission Junction does not take reasonable steps to eliminate Adware Affiliates from its affiliate networks. (*Id.* at ¶ 37.) Adware refers to software programs that interfere with publishers' commissions, either by redirecting legitimate commissions from publishers or by creating false transactions in order to collect unearned commissions from advertisers. (*Id.* at ¶¶ 16, 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 a publisher agreement, in the last four years, for affiliate management services on the Commission Junction affiliate networks, asserting claims for breach of contract, negligence, 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), 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 of Liability" is part of the Publisher Service Agreement that the parties entered into on an unspecified date. (Mot. to Dismiss 3:9-11.) 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 Liability," as well as the entire Publisher Service Agreement, as part of Defendants' Motion to Dismiss under Rule 12(b)(6) because the agreement is incorporated by reference in Plaintiff's Complaint. Although courts may not generally consider any material beyond the pleadings in a Rule 12(b)(6) motion,

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

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

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

B. Negligence

Defendants argue that Plaintiff has failed to identify any duty that would give rise to a valid claim for negligence. They contend that the alleged conduct that constitutes a breach of contract is identical to the conduct that serves as the basis for Plaintiff's negligence claim. Although the breach of a contractual duty may support an action in tort, it does so "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). In an attempt to save her negligence claim, Plaintiff alleges the existence of a "special relationship" between Defendants, as

parties to a contract with a third-party, and Plaintiff. She argues that "conduct constituting a breach of a contract to which Plaintiff is *not* a party may . . . support a negligence claim." (Opp'n 16:8-9 (emphasis added).)

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Defendants maintain that none of the cases involving a "special relationship" involve a plaintiff that was in privity with the defendant, but they are mistaken. *See Aas v. Superior Court*, 24 Cal. 4th 627, 645 (2000) ("While the court in *J'Aire* purported only to address duties owed to persons not in contractual privity with the defendant, courts subsequently have applied *J'Aire* to cases in which privity did exist."); *Ott v. Alfa-Laval Agri*, 31 Cal. App. 4th 1439, 1454 (1995) (holding that "[t]he cases, beginning with *J'Aire*, are clear and consistent in permitting recovery even when economic injury is the only injury alleged; nor is absence of a contract remedy a requisite."). Nevertheless, Plaintiff failed to allege the existence of, or factual basis for, a "special relationship" in her Complaint. Moreover, lacking a copy of the contract between the parties, the Court is unable on the current record to determine whether Plaintiff could satisfy the six so-called *J'Aire* factors as a matter of law. *See J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979). Accordingly, the Court dismisses Plaintiff's second cause of action, for negligence, without prejudice.

C. UCL

Defendants insist that Plaintiff has failed to state a claim under the UCL because the claim is premised exclusively on Defendants' alleged breach of contract, which is insufficient, standing alone, to constitute an unlawful action under the UCL. *See Allied Grape Growers v. Bronco Wine Company*, 203 Cal. App. 3d 432, 451 (1988) (affirming judgment of trial court that plaintiff violated UCL based on breach of contract where evidence demonstrated that defendant's 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]

The Court finds that Plaintiff has alleged adequate facts to state a claim for violation of the UCL for unfair practices. According to the Complaint, Defendants have knowledge of and the means to prevent the actions of Adware

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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 definition of "unfair" does not apply to Plaintiff's UCL claim.

Affiliates. Defendants derive unearned and potentially fraudulent profits from these activities, and pay Adware Affiliates for transactions for which Plaintiff is responsible. Defendants also fail to disclose the extent to which Defendants will underpay publishers such as Plaintiff as a result of Adware Affiliates' actions and Defendants' failure to accurately track qualifying transactions. Although these actions may prove fair once the Court considers the full contract between the parties and the alleged express disclaimer therein, at this stage the Court denies Defendants' Motion to Dismiss as to Plaintiff's UCL claim.

D. Plaintiff's Alter Ego Allegations against ValueClick and Be Free

Defendants argue that the complaint does not allege any contract between Plaintiff and either ValueClick or Be Free and that those defendants should be dismissed from the action. Plaintiff responds that Value Click and Be Free are the alter egos of Commission Junction. Determining whether an alter ego exists depends on the circumstances of each particular case and is seen as an issue for the trier-of-fact. *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 1205, 1212 (1992). Under California law, "[i]ssues of alter ego do not lend themselves to strict rules and prima facie cases. Whether the corporate veil should be pierced depends upon the innumerable individual equities of each case." *United States v. Standard Beauty Supply Stores, Inc.*, 561 F.2d 774, 777 (9th Cir. 1977). However, there are two general requirements to be satisfied before such a determination can be made: "(1) That there be such unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist, and (2) if the acts are treated as those of the corporation alone, an inequitable result will follow." *Platt v. Billingsley*, 234 Cal. App. 2d 577, 582 (1965); *First W. Bank and Trust Co. v. Bookasta*, 267 Cal. App. 2d 910, 915 (1968); *Automotriz Del Golfo De Cal. v. Resnick*, 47 Cal.2d 792, 796, 306 P.2d 1, 3 (1957).

A bare "allegation that a corporation is the alter ego . . . is insufficient to

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

As to the second 'inequitable result' factor, the alter ego doctrine is in essence an equitable doctrine where the basic motivation is to assure a just and equitable result. *Alexander v. Abbey of the Chimes*, 104 Cal. App.3d 39, 48 (1980). In *Alexander*, the court found that the net effect of the transaction was to leave the company as "a hollow shell without means to satisfy its existing and 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 ¶ 72.) Defendants are all alleged to be officers, directors, partners, and representatives of each of the other Defendants. (*Id.* at ¶ 73.) Plaintiff has further alleged that Commission Junction and Be Free are both wholly owned subsidiaries of ValueClick. (*Id.* at ¶¶ 3-5.) Both ValueClick and Be Free's websites direct its users to Commission Junction's website. (*Id.* at ¶¶ 71-72.) Finally, Plaintiffs allege ValueClick, Be Free and Commission Junction all engage in sales and management of each other's indistinguishable affiliate marketing management programs. (*Id.* at ¶¶ 7, 73-76.) For purposes of the instant motion, Plaintiff has pleaded sufficient allegations to show Defendants have a unity of interest 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 Punitive Damages without Prejudice (docket no. 19). The remaining portion of Defendants' Motion to Strike argues that Plaintiff's third cause of action, alleging that Defendants violated California's UCL, does not support Plaintiff's prayer for "disgorgement."

Federal Rule of Civil Procedure 12(f) provides that a court, upon motion or

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

Although it is true, as Defendants note, that the California Supreme Court has held that one form of disgorgement, defined negatively as "nonrestitutionary disgorgement," is not available under the UCL in private actions, it does not follow that "disgorgement" is in all cases 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 will not 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 her Opposition that she is not seeking nonrestitutionary disgorgement.

Defendants argue that Plaintiff is not entitled to even restitutionary disgorgement because (1) Defendants did not receive any profits that belong to Plaintiff when it paid Adware Affiliates revenues owed to Plaintiff; the profits that belong to Plaintiff were received only by the Adware Affiliates; (2) Plaintiff's losses are not measurable due to the lack of available evidence to establish how much revenue belonging to Plaintiff was paid to Adware Affiliates; (3) Plaintiff may not plead a claim for breach of contract as well as another claim that relies on a quasi-contract, "vested rights," theory of recovery; and (4) permitting Plaintiff to recover both for breach of contract and under the UCL for the same conduct would permit every plaintiff to recover under both theories in future cases and raise constitutional due process concerns.

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. Rather, it appears that Defendants are seeking summary judgment as to Plaintiff's UCL claim for restitution before the parties have had an adequate opportunity to conduct discovery. Whether Plaintiff can obtain sufficient evidence to establish a measurable loss and whether Defendants received or held the revenue to which Plaintiff was entitled, or otherwise received profits that belonged to Plaintiff from the transactions, are fact-specific inquiries that cannot be properly resolved at this stage in the litigation.

In addition, Defendants' have failed to demonstrate that Plaintiff's UCL claim is premised on a quasi-contract theory simply because the applicable legal standard for determining whether restitution is available asks whether the plaintiff had a "vested interest" in a defendant's profits. *See Juarez v. Arcadia*

Financial, Ltd., 152 Cal. App. 4th 889, 915 (2007) (holding that the UCL permits the recovery of money or property in which a plaintiff had a vested interest). Moreover, even if Plaintiff's UCL did advance a quasi-contract theory, plaintiffs are permitted to plead multiple causes of action premised on alternative theories of liability. Fed. R. Civ. P. 8(e)(2) ("A party may . . . state as many separate claims or defenses as the party has regardless of consistency . . . ."); *Arthur v. United States by & Through Veterans Admin.*, 45 F.3d 292 (9th Cir. 1995).

Finally, 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 as to Plaintiff's second cause of action, for negligence, **DENIES** Defendants' Motion to Dismiss in all other respects, and **DENIES** Defendants' Motion to Strike.

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The Court hereby dismisses Plaintiff's claims for negligence without prejudice. Plaintiff is granted twenty days' leave to amend its Complaint in conformity with this Order. Failure to do so will result in Plaintiff's waiver of the right to reinstate any of the claims dismissed without prejudice herein. If Plaintiff does not amend, Defendants must answer the Complaint no later than twenty days after the expiration of Plaintiff's deadline to amend.

IT IS SO ORDERED.

Dated: August 24, 2007

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT