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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CLRB Hanson Industries, LLC d/b/a Industrial  
Printing, and Howard Stern, on behalf of  
themselves and all others similarly situated,

NO. C 05-03649 JW

**ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS PLAINTIFFS'  
UNJUST ENRICHMENT CLAIM**

Plaintiffs,

v.

Google Inc.,

Defendant.

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**I. INTRODUCTION**

CLRB Hanson Industries, LLC d/b/a Industrial Printing, and Howard Stern (collectively "Plaintiffs") filed this class action suit against Google, Inc. ("Defendant"). Plaintiffs are advertisers who paid Defendant to have their websites listed as sponsored links on search results pages. They allege Defendant has charged them in excess of the "daily budget" they set for their advertising campaigns. Plaintiffs assert claims on behalf of themselves and all others similarly situated for breach of contract, breach of implied covenant of good faith and fair dealing, unfair competition in violation of Cal. Bus. & Prof. Code §§ 17200 et seq., untrue and misleading advertising in violation of Cal. Bus. & Prof. Code §§ 17500 et seq., and unjust enrichment.

Presently before the Court is Defendant's Motion to Dismiss Plaintiffs' Unjust Enrichment Claim in the Second Amended Complaint. The Court finds it appropriate to take the matter under

1 submission, without oral argument, pursuant to Civ. L.R. 7-1(b). Based upon the parties'  
2 submissions to date, Defendant's Motion is DENIED.

## 3 II. BACKGROUND

4 Defendant owns and operates an Internet search engine called "Google" and offers a global  
5 advertising program known as "AdWords." (Second Am. Compl., "SAC," Docket Item No. 18, ¶¶  
6 11, 14.) Defendant's AdWords program allows advertisers to target their advertising campaigns and  
7 to limit the appearance of their advertisements. (SAC ¶ 18.) Specifically, advertisers may select  
8 keywords which trigger the advertisement to appear; select the geographic locations where they  
9 want the advertisement to appear; set maximum "cost-per-clicks" they want to spend each time an  
10 Internet user clicks on an advertisement; and set a "daily budget" which limits the amount of money  
11 that Defendant may charge advertisers per day. (SAC ¶¶ 11, 34.)

12 Plaintiffs allege they entered into an agreement with Defendant to advertise through the  
13 AdWords program (the "Agreement").<sup>1</sup> (SAC ¶¶ 56, 62.) The Agreement is an online form  
14 agreement which consists of a two-page document entitled "Google Inc. AdWords Program Terms"  
15 ("Terms") and 142 pages of "Frequently Asked Questions" ("FAQs"). (SAC ¶ 19.) The  
16 Agreement states that the daily budget feature allows an advertiser to control his or her daily budget  
17 by specifying how much he or she is willing to pay. (SAC ¶¶ 36.) The Agreement also states that  
18 an advertiser will "never pay more than [his or her] daily budget multiplied by the number of days in  
19 a month [his or her] campaign was active." (SAC ¶ 37.) Similarly, the Agreement gives an  
20 advertiser the right to "pause" an advertising campaign, and states that the advertiser "won't accrue  
21 charges while [his or her] ads are paused." (SAC ¶ 38.)

22 Plaintiffs allege they set daily advertising budgets and that Defendant routinely charged them  
23 in excess of the set amount and failed to credit Plaintiffs for all such overages. (SAC ¶¶ 57, 63-64.)  
24 For example, Plaintiff Stern has consistently set his daily budget at \$10. Nonetheless, Defendant

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26 <sup>1</sup> This specific allegation is not realleged or incorporated by reference in Plaintiffs' claim for  
27 unjust enrichment. (See SAC ¶¶ 116-25.)

1 charged him \$16.78, \$19.34, \$11.59, and \$16.15, respectively, for four days in April. When  
2 Plaintiff Stern complained to Defendant, Defendant responded by saying that it only provides credit  
3 for charges above 30 or 31 times an advertiser’s daily budget in a monthly billing cycle. (FAC ¶¶  
4 63-68.)

5 Plaintiffs thereby allege Defendant “wrongfully and misleadingly commits advertisers to a  
6 monthly budget, in an amount up to their daily budget times 30 or 31, with no exception made for  
7 days their ad is paused,” and that Defendant “will not provide credits for charging advertisers more  
8 than their daily budget on any given day as long as those overages do not cumulatively exceed the  
9 calculated ‘monthly’ budget (daily budget times 30 [or] 31) in any given month.” (SAC ¶¶ 45, 54.)  
10 Based on these allegations, Plaintiffs filed this class action suit against Defendant on behalf of  
11 themselves and all others similarly situated, asserting claims for breach of contract, breach of  
12 implied covenant of good faith and fair dealing, unfair competition in violation of Cal. Bus. & Prof.  
13 Code §§ 17200 et seq., untrue and misleading advertising in violation of Cal. Bus. & Prof. Code §§  
14 17500 et seq., and unjust enrichment. Plaintiffs originally filed this action in the Superior Court of  
15 Santa Clara County; Defendant removed to the Northern District of California pursuant to 28 U.S.C.  
16 § 1441(a).

17 On January 3, 2006, Defendant filed a motion to dismiss Plaintiffs’ unjust enrichment claim  
18 in the FAC. (Docket Item No. 30.) On April 12, 2006, the Court granted Defendant’s motion  
19 because Plaintiffs (i) realleged and incorporated by reference the existence and validity of a written  
20 contract in their claim for unjust enrichment but (ii) did not allege the contract was procured by  
21 fraud or was unenforceable or ineffective for some other reason. (Order Granting Defendant’s  
22 Motion to Dismiss Plaintiffs’ Unjust Enrichment Claim with Leave to Amend, “Order,” Docket Item  
23 No. 46, at 4-5.) The Court gave Plaintiffs leave to amend the FAC. (Order at 5-6.) On May 5,  
24 2006, Plaintiffs filed a SAC in which they assert the same causes of action that appear in the FAC.  
25 (Docket Item No. 47.)

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### **III. STANDARDS**

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2 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a claim.  
3 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A complaint may be dismissed as a matter of  
4 law for one of two reasons: “(1) lack of a cognizable legal theory or (2) insufficient facts stated  
5 under a cognizable theory.” Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.  
6 1984). “A complaint should not be dismissed for failure to state a claim unless it appears beyond  
7 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to  
8 relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court “must presume all factual  
9 allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving  
10 party.” Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (citing Western Reserve Oil  
11 & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985) cert. denied, 474 U.S. 1056 (1986)).  
12 Nevertheless, the court “need not assume the truth of legal conclusions cast in the form of factual  
13 allegations.” United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986) (citing  
14 Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031  
15 (1981)).

### **IV. DISCUSSION**

16  
17 The Court previously analyzed Plaintiffs’ unjust enrichment claim in the FAC under  
18 California law. (See Order at 4-5.) As the Court explained, unjust enrichment is an action in  
19 quasi-contract, Paracor Fin. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir.1996),  
20 “synonymous with restitution,” McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). A claim  
21 for unjust enrichment is generally precluded “when an enforceable, binding agreement exists  
22 defining the rights of the parties.” Paracor Fin., 96 F.3d at 1167. Nevertheless, “[r]estitution may be  
23 awarded in lieu of breach of contract damages when the parties had an express contract, but it was  
24 procured by fraud or is unenforceable or ineffective for some reason.” McBride, 123 Cal. App. 4th  
25 at 121 (citing 3 Witkin, Cal. Procedure, Actions §§ 148-50 (4th ed. 1996); 1 Witkin, Summary of  
26 Cal. Law, Contracts §§ 112, 118 (9th ed. 1987)). The Court granted Defendant’s motion to dismiss  
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1 the unjust enrichment claim in the FAC because Plaintiffs (i) realleged and incorporated by  
 2 reference the existence and validity of an express contract in their claim for unjust enrichment but  
 3 (ii) did not allege the contract was procured by fraud or was unenforceable or ineffective for some  
 4 other reason. (Order at 4-5.)

5 In the SAC, Plaintiffs assert the same causes of action that appear in the FAC, including the  
 6 claim for unjust enrichment. Unlike in the FAC, Plaintiffs do not appear to reallege or incorporate  
 7 by reference the existence and validity of an express contract in their claim for unjust enrichment in  
 8 the SAC. (See SAC ¶ 116.) The Court recognizes, as Defendant correctly points out, that Plaintiffs  
 9 reallege and incorporate by reference in their claim for unjust enrichment certain paragraphs of the  
 10 SAC that not only explain how advertisers sign up for the AdWords program but also discuss  
 11 specific terms of the Agreement. (See Defendant’s Reply to Plaintiffs’ Opposition, Docket Item No.  
 12 56, at 3). None of these paragraphs, however, contains an allegation that Plaintiffs entered into an  
 13 express contract with Defendant. Even paragraph 123 of the SAC, which falls under Plaintiffs’  
 14 unjust enrichment claim heading and addresses the possibility of an express contract being found to  
 15 exist between the parties, cannot be construed as an allegation that an express contract actually  
 16 existed between the parties.<sup>2</sup>

17 Absent an allegation in the unjust enrichment claim that an express contract existed between  
 18 the parties, Plaintiffs’ allegations are otherwise sufficient to state a claim for this particular cause of  
 19 action. To state a claim for unjust enrichment under California law, a plaintiff must allege: (i)  
 20 receipt of a benefit and (ii) unjust retention of a benefit at the expense of another. Accuimage  
 21 Diagnostics Corp. v. Terarecon, Inc., 260 F. Supp. 2d 947, 958 (N.D. Cal. 2003) (citing Lectrodryer  
 22 v. SeoulBank, 77 Cal. App. 4th 723, 726 (2000)). The Court noted in its previous Order that  
 23 Plaintiffs sufficiently alleged these elements in the FAC. (See Order at 5.) Since Plaintiffs repeat  
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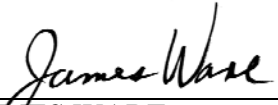
26 <sup>2</sup> In paragraph 123, Plaintiffs allege that if an express contract is found to exist between the  
 27 parties, “[s]uch contract is voidable or otherwise unenforceable given Google’s material  
 28 misrepresentations . . . .” (SAC ¶ 123.)

1 the same allegations in the SAC (see SAC ¶¶ 118-120), the Court finds these allegations are  
2 sufficient to state a claim for unjust enrichment.

3 **V. CONCLUSION**

4 The Court DENIES Defendant's Motion to Dismiss Plaintiffs' Unjust Enrichment Claim in  
5 the Second Amended Complaint.

6  
7 Dated: June 27, 2006

  
\_\_\_\_\_  
JAMES WARE  
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**  
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6 **Dated: June 27, 2006**

**Richard W. Wieking, Clerk**

8 **By:           /s/ JW Chambers**  
9 **Melissa Peralta**  
10 **Courtroom Deputy**

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