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6 Attorneys for Defendant
 GOOGLE, INC.

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 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN JOSE DIVISION

13 CLICK DEFENSE INC., a Colorado
 corporation, Individually and on behalf of all
 14 others similarly situated,

15 Plaintiffs,

16 v.

17 GOOGLE, INC., a Delaware corporation, and
 DOES 1 through 100, Inclusive,

18 Defendants.

Case No. C 05 02579 RMW

E-FILING

**GOOGLE, INC.'S REPLY
 MEMORANDUM IN SUPPORT OF
 MOTION TO DISMISS**

Date: September 2, 2005
Time: 9:00 a.m.
Judge: Hon. Ronald M. Whyte

Date Comp. Filed: June 24, 2005

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1 Defendant Google, Inc. moves the Court to dismiss plaintiff Click Defense Inc.’s
2 negligence and unjust enrichment causes of action for failure to state a claim. Dismissal is
3 appropriate for two reasons.

4 First, plaintiff failed to timely oppose this motion. On July 27, 2005, Google filed its
5 motion to dismiss and noticed that motion for hearing on September 2, 2005. Under the Local
6 Rules, if plaintiff wished to oppose the motion, its opposition was due by August 12, 2005 — 21
7 days before the hearing. Civil L.R. 7-3(a). But plaintiff filed its opposition today, the day that
8 Google’s reply was due. Indeed, counsel for Google received plaintiff’s opposition mere
9 moments before filing its reply.¹ Because plaintiff failed to comply with the rules of this Court,
10 its negligence and unjust enrichment causes of action should be dismissed. *See* Fed. Rule Civ.
11 Proc. 41(b).

12 Second, plaintiff’s causes of action fail on their merits. Plaintiff concedes that its
13 negligence action fails to state a claim, but argues that its unjust enrichment should survive
14 because a plaintiff may allege inconsistent causes of action. Plaintiff’s argument, however,
15 misses the point. While a party may allege an inconsistent cause of action, it still must allege
16 facts sufficient to support that particular cause of action. *See Navarro v. Block*, 250 F.3d 729,
17 731 (9th Cir. 2001).

18 Plaintiff failed to do so here. To state an unjust enrichment cause of action, plaintiff had
19 to allege in some manner that an explicit contract did not define the rights of the parties. *See*
20 *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996)
21 (“Under both California and New York law, unjust enrichment is an action in quasi-contract,
22 which does not lie when an enforceable, binding agreement exists defining the rights of the
23 parties.”). But Plaintiff alleged the opposite in its complaint, alleging that the parties entered into
24 a legally binding contract that governs the parties’ respective rights, including what advertisers

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26 ¹ Upon seeing plaintiff’s opposition, Google quickly halted its filing and altered its reply to
27 preliminarily address plaintiff’s arguments. Because plaintiff filed its opposition on the day
28 Google’s reply was due, however, Google was not given a fair opportunity to respond to those
arguments and reserves its right to file a supplemental memorandum in support of its motion.

1 should be charged. *See* Compl. ¶ 37 (“Every member of the Class is a party to the AdWords
2 Program Terms.”).

3 Therefore, Google respectfully requests that the Court dismiss plaintiff’s negligence and
4 unjust enrichment causes of action. Moreover, because no amendment could negate the
5 existence of the AdWords contract that governs the parties’ respective rights and because that
6 contract precludes any unjust enrichment claim, the Court should dismiss plaintiff’s unjust
7 enrichment claim without leave to amend. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091,
8 1099 (9th Cir. 2004).

9 Dated: August 19, 2005

KEKER & VAN NEST, LLP

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11 By: /s/ Ryan M. Kent
12 RYAN M. KENT
13 Attorneys for Defendant
14 GOOGLE, INC.
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