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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

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

17 Plaintiffs,

18 v.

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

21 Defendants.

Case No. C 05 02579 RMW

E-FILING

**GOOGLE, INC.'S NOTICE OF MOTION
 AND MOTION TO DISMISS AND
 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

1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on September 2, 2005, at 9:00 a.m. or as soon thereafter as
4 this matter may be heard before the Honorable Ronald M. Whyte of the United States District
5 Court for the Northern District of California, 280 South First Street, San Jose, California,
6 Defendant Google, Inc. (“Google”), will and hereby does move the Court move to dismiss the
7 above referenced complaint with respect to the claims of negligence and unjust enrichment.

8 Google requests that the Court dismiss the complaint pursuant to Federal Rule of Civil
9 Procedure 12(b)(6) because plaintiff has failed to state a claim upon which relief can be granted.

10 This motion is supported by the following memorandum of points and authorities, the
11 arguments of counsel, and any other matters properly before the Court.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 This Court should dismiss plaintiff’s negligence and unjust enrichment causes of action
15 for failure to state a claim. Plaintiff brought suit against Google premised on a single
16 allegation—that Google overcharged for pay-per-click advertising by failing to discover and
17 discount for internet users who viewed plaintiff’s advertisements with an ill intent and with no
18 intention of doing business with the plaintiff. Based on that allegation, plaintiff asserted four
19 causes of action: breach of contract, negligence, unjust enrichment, and unfair business practices.
20 Taking the facts pled by plaintiff as true, however, the law bars plaintiff’s negligence and unjust
21 enrichment claims.

22 A plaintiff cannot recover for negligence “unless the defendant violates a duty
23 independent of the contract arising from principles of tort law.” *Erlich v. Menezes*, 21 Cal. 4th
24 543, 551 (1999). But plaintiff’s negligence claim is premised on the same duty that plaintiff
25 asserts Google contractually owes its advertisers—ensuring that advertisers are only charged for
26 “actual clicks.”

27 Nor can plaintiff maintain its unjust enrichment claim. Unjust enrichment implies the
28 existence of a contract. But where an actual contract exists and governs a particular dispute, the

1 court need not and cannot imply a contract. As the Ninth Circuit concisely stated, “[u]nder both
2 California and New York law, unjust enrichment is an action in quasi-contract, which does not
3 lie when an enforceable, binding agreement exists defining the rights of the parties.” *Paracor*
4 *Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). Here, plaintiff
5 alleges that the parties entered into a legally binding contract that governs the parties’ respective
6 rights, including what advertisers should be charged. Plaintiff cannot avoid those contractual
7 provisions it does not like by attempting to bring a claim for unjust enrichment.

8 II. FACTUAL BACKGROUND

9 This case is premised on the allegation that Google, Inc. (“Google”) overcharged for pay-
10 per-click advertising by failing to discover and discount for internet users who viewed plaintiff’s
11 advertisements with an ill intent and with no intention of doing business with the advertiser. *See*
12 *Plaintiffs’ Class Action Complaint (“Complaint”)* ¶¶ 44, 47, 48, 51, 55. Pay-per-click
13 advertising, as defined by plaintiff, is a system where advertisers pay an internet search
14 company, such as Google, to post advertising links on the margins of a web page. *Compl.* ¶ 17.
15 In pay-per-click advertising, an advertiser does not pay a flat fee; rather, the advertiser pays each
16 time someone clicks on the advertiser’s ad. *Compl.* ¶ 17. The complaint alleges that some
17 viewers click on ads “with an ill intent and with no intention of doing business with the
18 advertiser.” *Compl.* ¶ 21. Plaintiff defines such clicks as “fraudulent,” *Compl.* ¶ 21, and asserts
19 that the advertiser should not be charged for such clicks. *Compl.* ¶¶ 44, 48, 51, 55. On that
20 basis, plaintiff alleges four causes of action—breach of contract, negligence, unjust enrichment
21 and unfair business practices. *Id.* The Complaint fails to explain how Google is supposed to
22 derive that a particular click was made with “an ill intent.”

23 III. ARGUMENT

24 Google moves this Court to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)
25 because plaintiff has failed to state a claim for negligence or unjust enrichment. Pursuant to Rule
26 12(b)(6), dismissal is appropriate where there is no “cognizable legal theory or an absence of
27 sufficient facts alleged to support a cognizable legal theory.” *See Navarro v. Block*, 250 F.3d
28 729, 731 (9th Cir. 2001). In making that determination, the court should accept as “true all

1 material allegations of the complaint, along with all reasonable inferences therein.” *Id.* at 732.

2 **A. California Law Bars Plaintiff’s Negligence Action Because Plaintiff Failed to**
3 **Identify A Duty Independent Of the Contract**

4 A plaintiff cannot recover for negligence “unless the defendant violates a duty
5 independent of the contract arising from principles of tort law.” *Erlich v. Menezes*, 21 Cal. 4th
6 543, 551 (1999). That is because “[a]n omission to perform a contract obligation is never a tort,
7 unless that omission is also an omission of a legal duty.” *Id.* Otherwise, there would be no
8 “statutory distinction between tort and contract remedies.” *Id.* at 553-54. Accordingly, the Ninth
9 Circuit has recognized that California cases “have taken an increasingly narrow view of a
10 plaintiff’s right to recover tort damages for a claim that arises from the breach of an underlying
11 contract.” *Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002).

12 For example, in *Erlich*, the plaintiffs sought recovery on several theories, including
13 breach of contract and the negligence. 21 Cal. 4th at 549. At trial, the plaintiff prevailed on the
14 fraud and negligent misrepresentation claims. *Id.* The jury found that the defendant had
15 breached his contract with the plaintiffs by negligently constructing their home. *Id.* After an
16 appellate court sustained the jury’s award in part because defendants’ negligence exposed the
17 plaintiffs to “intolerable living conditions and a constant, justifiable fear about the safety of their
18 home,” *Id.* at 550, the Supreme Court reversed and overturned the jury verdict. The Supreme
19 Court found that because “the jury concluded [defendant] did not act intentionally; nor was he
20 guilty of fraud or misrepresentation,” the claim was actually “for negligent breach of a contract,
21 which is not sufficient to support tortious damages for violation of an independent tort duty.” *Id.*
22 at 554.

23 Like in *Erlich*, plaintiff failed to identify any duty independent of the contract that
24 Google allegedly breached. Plaintiff alleges that Google breached “a duty to . . . monitor its
25 AdWord program for click fraud and to protect [its advertisers] from click fraud to ensure that
26 [its advertisers] were charged only for ‘actual clicks.’” Compl. ¶ 47. But Google has no such
27 duty apart from whatever obligations are imposed by contract. The contracts between Google
28 and the advertisers set forth Google’s obligations; and the Complaint so recites: “Google

1 breached its contracts with Plaintiff and the [purported] Class . . . by collecting fees from
2 plaintiff and the [purported] Class for click fraud even though Google knew . . . that the clicks
3 were not ‘actual click’ but rather purposeful clicks made for an improper purpose.” Compl. ¶ 44.
4 Because plaintiff’s negligence cause of action asserts nothing more than that Google breached its
5 contract, it should be dismissed. *See Erlich*, 21 Cal. 4th at 554; *see also Freeman & Mills, Inc. v.*
6 *Belcher Oil Co.*, 11 Cal. 4th 85 (1995) (denial of existence of contract, even in bad faith, is not a
7 tort); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988) (wrongful discharge of employee
8 not a tort); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174 (1993) (same).

9 **B. California Law Bars Plaintiff’s Unjust Enrichment Claim Because No Agreement**
10 **Can Be Implied In The Face of An Express Contract**

11 California law precludes a plaintiff from asserting an implied contract cause of action
12 where an express contract defines the rights of the parties. As the Ninth Circuit explained,
13 “[u]nder both California and New York law, unjust enrichment is an action in quasi-contract,
14 which does not lie when an enforceable, binding agreement exists defining the rights of the
15 parties.” *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir.
16 1996). Indeed, “[t]here cannot be a valid, express contract and an implied contract, each
17 embracing the same subject matter, existing at the same time.” *Berkla v. Corel Corp.*, 302 F.3d
18 909, 918 (9th Cir. 2002) (quoting *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605 (1975)); *see also*
19 *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 41 Cal. App. 4th 1410 (1996); *Gerlinger*
20 *v. Amazon.Com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004); Am. Jur. 2d *Restitution and*
21 *Implied Contracts* § 24 (2005).

22 Here, plaintiff alleges that the parties entered into a legally binding contract that governs
23 the parties’ respective rights, including what advertisers should be charged. *See* Compl. ¶ 44.
24 Indeed, plaintiff alleges that “[e]very member of the Class is a party to the AdWords Program
25 Terms,” Compl. ¶ 37, and that Google breached those contracts with “by collecting fees from
26 plaintiff and the [purported] Class for click fraud even though Google knew . . . that the clicks
27 were not ‘actual click’ but rather purposeful clicks made for an improper purpose.” Compl. ¶ 44.
28 Having alleged an express contract that governs what advertisers should be charged, plaintiff

1 cannot also allege that an implied contract exists that governs the same subject matter. *See*
2 Compl. ¶ 51 (“Google has received and retains money belonging to plaintiff and the [purported]
3 Class resulting from clicks made for an improper purpose, *i.e.*, fraudulent clicks.”). Therefore,
4 plaintiff’s unjust enrichment cause of action fails to state a claim.

5 This Court should dismiss plaintiff’s unjust enrichment claim without leave to amend. A
6 district court may deny leave to amend where an amendment would be futile. *See McQuillion v.*
7 *Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004). No amendment could negate the
8 existence of the AdWords contract that governs the parties’ respective rights, and that actual
9 contract precludes any unjust enrichment claim.

10 **IV. CONCLUSION**

11 For the above stated reasons, Google respectfully requests that the Court dismiss
12 plaintiff’s negligence and unjust enrichment causes of action.

13 Dated: July 27, 2005

KEKER & VAN NEST, LLP

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15
16 By: /s/ CLEMENT S. ROBERTS
17 CLEMENT S. ROBERTS
18 Attorneys for Defendant
19 GOOGLE, INC.
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