

1 KEKER & VAN NEST, LLP
 DARALYN J. DURIE - #169825
 2 CLEMENT S. ROBERTS - #209203
 RYAN M. KENT - #220441
 3 710 Sansome Street
 San Francisco, CA 94111-1704
 4 Telephone: (415) 391-5400
 Facsimile: (415) 397-7188
 5 Attorneys for Defendant
 6 GOOGLE, INC.

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

12 STEVE MIZERA, An Individual, Individually
 13 and on behalf of all others similarly situated,

14 Plaintiffs,

15 v.

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

18 Defendants.

Case No. C 05-02885 RS

E-FILING

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

Date: October 26, 2005
Time: 9:30 a.m.
Judge: Hon. Richard Seeborg

Date Comp. Filed: July 17, 2005

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

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on October 26, 2005, at 9:30 a.m. or as soon thereafter as
4 this matter may be heard before the Honorable Richard Seeborg 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 to dismiss plaintiffs’
7 claim for unjust enrichment pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground
8 that plaintiff has failed to state a claim upon which relief can be granted.

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

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 This Court should dismiss plaintiff’s unjust enrichment claim. Plaintiff brought suit
14 against Google premised on a single allegation—that Google overcharged for pay-per-click
15 advertising by failing to discover and discount for internet users who viewed plaintiff’s
16 advertisements with an ill intent and with no intention of doing business with the plaintiff.
17 Based on that allegation, plaintiff asserted three causes of action: breach of contract, unjust
18 enrichment, and unfair business practices.

19 Taking the facts pled by plaintiff as true, however, the law bars any unjust enrichment
20 claim. An unjust enrichment claim implies contractual rights where no contract exists. But
21 where, as here, an actual contract exists and governs a particular dispute, the court need not and
22 cannot imply a contract under Ninth Circuit law. Here, plaintiff alleges that the parties entered
23 into a legally binding contract that governs the parties’ respective rights, including what
24 advertisers should be charged. Plaintiff cannot avoid those contractual provisions it does not like
25 by attempting to bring a claim for unjust enrichment.

26 Further, plaintiff cannot plead, even in the alternative, that there is no legally binding
27 contract that governs the parties’ respective rights. Rule 11 requires a plaintiff to have a good
28 faith basis for allegations made in its pleadings. Here, plaintiff knows that each and every

1 advertiser through Google’s programs signs a contract with Google—a contract that governs
 2 what those advertisers will or will not be charged. Therefore, any amendment would be futile,
 3 and this Court should dismiss plaintiff’s unjust enrichment claim without leave to amend.
 4 Indeed, faced with a carbon-copy complaint Judge Whyte did exactly that in the other class-
 5 action complaint filed against Google by the plaintiff’s attorney.¹

6 II. FACTUAL BACKGROUND

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

21 III. ARGUMENT

22 Google moves this Court to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)
 23 because plaintiff has failed to state a claim for unjust enrichment. Pursuant to Rule 12(b)(6),
 24 dismissal is appropriate where there is no “cognizable legal theory or an absence of sufficient
 25 facts alleged to support a cognizable legal theory.” *See Navarro v. Block*, 250 F.3d 729, 731 (9th
 26 Cir. 2001). In making that determination, the court should accept as “true all material allegations
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28 ¹ In that case,—*Click Defense Inc. v. Google, Inc.*, Case No. C 05 02579 RMW—Judge Whyte dismissed the unjust enrichment cause of action on September 14, 2005.

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

2 California law precludes a plaintiff from asserting an implied contact cause of action
3 where an express contract defines the rights of the parties. As the Ninth Circuit explained,
4 “[u]nder both California and New York law, unjust enrichment is an action in quasi-contract,
5 which does not lie when an enforceable, binding agreement exists defining the rights of the
6 parties.” *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir.
7 1996). Indeed, “[t]here cannot be a valid, express contract and an implied contract, each
8 embracing the same subject matter, existing at the same time.” *Berkla v. Corel Corp.*, 302 F.3d
9 909, 918 (9th Cir. 2002) (quoting *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605 (1975)); *see also*
10 *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 41 Cal. App. 4th 1410 (1996); *Gerlinger*
11 *v. Amazon.Com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004); Am. Jur. 2d *Restitution and*
12 *Implied Contracts* § 24 (2005).

13 Here, plaintiff alleges that the parties entered into a legally binding contract that governs
14 the parties’ respective rights, including what advertisers should be charged. *See* Compl. ¶ 44.
15 Indeed, plaintiff alleges that “[e]very member of the Class is a party to the AdWords Program
16 Terms,” Compl. ¶ 37, and that Google breached those contracts with “by collecting fees from
17 plaintiff and the [purported] Class for click fraud even though Google knew . . . that the clicks
18 were not ‘actual click’ but rather purposeful clicks made for an improper purpose.” Compl. ¶ 44.
19 And, nowhere has plaintiff pled in the alternative that a contract does not governs the parties’
20 respective rights. Therefore, plaintiff’s unjust enrichment cause of action fails to state a claim.

21 This Court should dismiss plaintiff’s unjust enrichment claim without leave to amend. A
22 district court may deny leave to amend where an amendment would be futile. *See McQuillion v.*
23 *Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004). Rule 11 governs all statements made in
24 pleadings, even when pled in the alternative. *See* Rule 8(e)(2). Plaintiff has no possible good-
25 faith basis for denying that explicit contracts govern its as well as each and every putative class
26 members’ rights regarding what they will or will not be charged. Because those contracts
27 preclude any unjust enrichment claim, any amendment would be futile.

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IV. CONCLUSION

For the above stated reasons, Google respectfully requests that the Court dismiss plaintiff's unjust enrichment claim.

Dated: September 20, 2005

KEKER & VAN NEST, LLP

By: /s/ DARALYN J. DURIE
DARALYN J. DURIE
Attorneys for Defendant
GOOGLE, INC.