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8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

11 CLRB HANSON INDUSTRIES, LLC d/b/a
 12 INDUSTRIAL PRINTING, and HOWARD
 STERN, on behalf of themselves and all others
 13 similarly situated,

14 Plaintiffs,

15 v.

16 GOOGLE, INC.,

17 Defendant.

CASE NO. C O5-03649 JW

**DEFENDANT GOOGLE, INC.'S
 NOTICE OF MOTION AND MOTION
 TO DISMISS PLAINTIFFS' UNJUST
 ENRICHMENT CLAIM IN THE
 SECOND AMENDED COMPLAINT**

Fed. R. Civ. P. 12(b)(6)

Date: June 26, 2006
 Time: 9:00 a.m.
 Place: Courtroom 8
 Judge: Honorable James Ware

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 28 DEFENDANT GOOGLE, INC.'S NOTICE OF MOTION
 AND MOTION TO DISMISS PLAINTIFFS' UNJUST
 ENRICHMENT CLAIM IN THE SECOND AMENDED
 COMPLAINT

CASE NO. 05-03649

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Plaintiffs CLRB Hanson Industries LLC d/b/a Industrial Printing and Howard Stern (“plaintiffs”) have improperly pled, for the third time, their unjust enrichment claim against defendant Google, Inc. (“Google”). This Court dismissed plaintiffs’ prior unjust enrichment claim due to plaintiffs’ failure to allege that their contract with Google “was procured by fraud or is unenforceable or ineffective for some other reason.” In response, plaintiffs amended their claim to include an allegation that their contract is “voidable or otherwise unenforceable” due to “material misrepresentations” that they claim were made by Google.

The amended allegations are inadequate as a matter of law to support plaintiffs’ unjust enrichment claim. Plaintiffs have failed to include any allegation that the purported misrepresentations induced plaintiffs to assent to the contract or that the contract was procured as a result of fraud. In order for a contract to be *void* as a result of fraud, it must be alleged that the fraud induced the plaintiff to enter into the contract. Plaintiffs, however, are unable to properly allege fraudulent inducement. Indeed, they withdrew their fraud claims in the original complaint as a result of Google’s motion to dismiss for failure to adequately plead that cause of action and failure to plead with specificity.

Plaintiffs’ repeated failure to properly plead their unjust enrichment claim should preclude them from further asserting this claim. Accordingly, their unjust enrichment claim should be dismissed without leave to amend.

II. PROCEDURAL HISTORY

Plaintiffs’ initial Complaint, filed on August 3, 2005, alleged causes of action for unjust enrichment, breach of contract, breach of implied covenant of good faith and fair dealing, violation of California Bus. & Prof. Code §17200 et seq., negligent misrepresentation, imposition of a constructive trust, fraud-promise without intent to perform, and injunctive and/or declaratory relief. On October 12, 2005, Google filed a motion to dismiss plaintiffs’ Complaint

1 based, among other grounds, on plaintiffs' failure to alternatively plead in their unjust
2 enrichment claim the non-existence of a binding contract between the parties, plaintiffs' inability
3 to establish in their fraud and misrepresentation claims that Google made false representations or
4 concealments, and their failure to plead the fraud and misrepresentation claims with specificity.

5 In response to this motion, on November 14, 2005, plaintiffs filed their First Amended
6 Complaint ("FAC"), which withdrew their claims based on fraud and misrepresentation and
7 included a new claim for violation of California Bus. & Prof. Code §17500 et seq. In addition,
8 plaintiffs re-alleged their claim for unjust enrichment unchanged and without any allegation that
9 their purported agreement with Google was not valid. On January 3, 2006, Google filed a
10 motion to dismiss the unjust enrichment claim based on plaintiffs' failure to allege that the
11 parties' agreement is not valid and their incorporation of allegations in this claim that an express,
12 valid agreement exists between the parties.

13 On April 12, 2006, the Court granted Google's motion to dismiss, with leave to amend,
14 holding that the unjust enrichment claim "cannot include allegations that an express contract
15 governs the parties' rights, unless it also alleges that the express contract was procured by fraud
16 or is otherwise unenforceable or ineffective." Court's April 12, 2006 Order Granting
17 Defendant's Motion to Dismiss Plaintiff's Unjust Enrichment Claim with Leave to Amend
18 ("Order"), p. 5.

19 On May 4, 2006, plaintiffs filed their Second Amended Complaint ("SAC"), alleging
20 claims for breach of contract, breach of implied covenant of good faith and fair dealing, violation
21 of California Bus. & Prof. Code §17200 et seq., violation of California Bus. & Prof. Code
22 §17500 et seq., and unjust enrichment. Their amended unjust enrichment claim alleges in the
23 alternative that if the parties have entered into an express contract, "plaintiffs are still entitled to
24 restitution benefits" and that "[s]uch contract is voidable and otherwise unenforceable given
25 Google's material misrepresentations that advertisers may pause their ad without being charged
26 for those days, and that advertisers would not be billed more than their daily budget for those
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1 days that their ad runs.” SAC, ¶123. Nowhere in this claim do plaintiffs allege that the
 2 misrepresentations induced them to assent to the parties’ agreement, which is defined by
 3 plaintiffs in the SAC at ¶ 19 as a form agreement consisting of “Google Inc. AdWords Program
 4 Terms” and the “Frequently Asked Questions. . . which further explains the program and can be
 5 accessed from Google’s AdWords site.”

6 III. ARGUMENT

7 A. Plaintiffs’ Failure To Allege Inducement And Plead With Specificity Is Fatal to 8 Their Unjust Enrichment Claim.

9 Under Rule 12(b)(6), dismissal is appropriate as a matter of law where the complaint
 10 shows either a “(1) lack of a cognizable legal theory or (2) insufficient facts stated under a
 11 cognizable theory.” *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.
 12 1984). Plaintiffs’ amended unjust enrichment claim falls under both of these categories.

13 In order to claim unjust enrichment, plaintiffs must allege that the express contract was
 14 procured by fraud or is otherwise unenforceable or ineffective. *See Lance Camper Mfg. Corp. v.*
 15 *Republic Indemnity Co. of Amer.*, 44 Cal. App. 4th 194, 203 (plaintiff must allege that an express
 16 contract is void or rescinded to proceed with its unjust enrichment claim); *see also SMC Corp. v.*
 17 *PeopleSoft U.S.A. Inc.*, 2004 WL 2538641, at *3 (S.D. Ind. Oct. 12, 2004).

18 Plaintiffs allege that their express contract with Google is “voidable and otherwise
 19 unenforceable given Google’s material misrepresentations.” These purported “material
 20 misrepresentations” are allegations of actual fraud, and comprise the entire basis for plaintiffs’
 21 claim that their contract with Google is “voidable or otherwise unenforceable.” The allegation of
 22 fraud is insufficient to allege a voidable contract, because plaintiffs fail to include any allegation
 23 that the misrepresentations induced them to enter the Agreement or that the Agreement was
 24 “procured” by fraud. *See Wilke v. Coinway, Inc.*, 257 Cal. App. 2d 126, 136 (1967) (plaintiffs
 25 must show that they were induced by fraudulent misrepresentations in order to set a contract
 26 aside); *McBride v. Boughton*, 123 Cal.App.4th 379, 388 (2004) (“Restitution may be awarded in
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1 lieu of breach of contract damages when the parties had an express contract, but it was procured
2 by fraud or is unenforceable or ineffective for some reason.”)

3 The allegations of fraud are also insufficient under Federal Rule of Civil Procedure 9(b),
4 which provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud
5 or mistake shall be stated with particularity.” To properly plead fraud, the pleading “must state
6 precisely the time, place, and nature of the misleading statements, misrepresentations, and
7 specific acts of fraud.” *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994); *Williams v. WMX*
8 *Technologies, Inc.*, 112 F.3d 175, 178 (5th Cir. 1997) (“the who, what, when, and where must be
9 laid before access to the discovery process is granted”). Conclusory allegations are insufficient
10 to meet this heightened pleading requirement and need not be accepted as true absent supporting
11 allegations establishing why it was “fraudulent.” *Moore v. Kayport Package Express, Inc.*, 885
12 F.2d 531, 540 (9th Cir. 1987).

13 Here, plaintiffs’ allegations that Google misrepresented the accrual of charges during
14 pauses and misrepresented limits on advertisers’ daily budgets fail to meet the requisite
15 specificity. Plaintiffs provide virtually no information about *which* of their campaigns were
16 purportedly overcharged, *if and when* they paused their advertising campaigns, *how long* they
17 paused their campaigns or *why* the campaigns were paused, *when* their daily budgets were
18 exceeded, and *the amounts* by which the daily budgets were purportedly exceeded. They provide
19 only a few examples of alleged overcharges in February, March, and April 2005, despite their
20 claim that they have been advertising on AdWords for years. SAC, ¶¶57-61, 63-68. In fact,
21 plaintiffs fail to expressly allege whether they even paused any of their campaigns. *Id.*

22 The new allegations of “material misrepresentations” appear to be an attempt by plaintiffs
23 to re-assert, without properly pleading, the fraud and misrepresentation claims that they
24 previously withdrew from their original Complaint. If plaintiffs intend to allege claims of fraud
25 and misrepresentation, they must do so in compliance with federal pleading requirements. As it
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I, Susan E. Daniels, declare:

I am a citizen of the United States and am employed in the County of San Francisco, State of California. I am over the age of 18 years and am not a party to the within action. My business address is Perkins Coie LLP, 180 Townsend Street, 3rd Floor, San Francisco, California 94107-1909. I am personally familiar with the business practice of Perkins Coie LLP. On May 18, 2006, I served the following document(s):

DEFENDANT GOOGLE, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S UNJUST ENRICHMENT CLAIM IN THE SECOND AMENDED COMPLAINT

by placing a true copy thereof enclosed in a sealed envelope addressed to the following parties:

William M. Audet, Esq. Attorney for Plaintiffs
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XXX (By Mail) I caused each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Perkins Coie LLP.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at San Francisco, California.

DATED: May 18, 2006. _____ /S/
Susan E. Daniels