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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

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

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Plaintiffs,

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v.

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GOOGLE, INC.,

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Defendants.

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CASE NO. C 05-03649 JW

**GOOGLE'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT OR IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION**

Fed. R. Civ. P. 56

Date: November 6, 2006

Time: 9:00 a.m.

Ctrm: 8

Judge: Hon. James W. Ware

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION**

4 Plaintiffs' case can be distilled down to two claims: (1) Google was not allowed to
5 exceed charges of an AdWords advertiser's daily budget in any given day; and (2) Google was
6 not allowed to include paused days in calculating charges over the course of a month. However,
7 the AdWords Agreement (the "Agreement") provides, as each plaintiff acknowledged at
8 deposition, that Google may charge up to 20% more than the daily budget in a given day, and
9 that the total charges for the month will not exceed the average daily budget times the number of
10 days in the month. These terms are clearly set forth in the Frequently Asked Questions (the
11 "FAQs"), which together with the AdWords Program Terms (the "Program Terms"), comprise
12 the AdWords Agreement.

13 Plaintiffs argue that even though these terms are currently part of the AdWords
14 Agreement and were in the Agreement at the inception of the contract, the terms apply to other
15 AdWords advertisers but do not apply to them because: (1) they did not read the contract, and (2)
16 they do not like the terms. These are not valid reasons for ignoring the express terms of the
17 Agreement.

18 Plaintiffs' reasoning is flawed as well as inconsistent. They argue on the one hand that
19 the AdWords Agreement is unenforceable, and on the other hand that the Agreement consists of
20 only one term: "the contract is simply to be a sponsored link in exchange for paying one's own
21 daily budget." This assertion is not supported by either the facts or the law. There is an
22 enforceable contract permitting Google to charge up to 20% more than the daily budget on any
23 given day, and to calculate an average daily budget over the course of a month that includes
24 paused days. Plaintiffs are not entitled to unilaterally rewrite the contract.

25 Plaintiffs cannot prevail on a single one of their causes of action. Their breach of
26 contract claim fails because Google has complied with the express terms of the Agreement. The
27 contractual provisions that plaintiffs claim were breached are not part of the Agreement.

1 Plaintiffs cannot point to any provision in the Agreement with which Google has failed to
2 comply. Google is authorized by the Agreement to charge up to 120% of the daily budget in a
3 day and to average daily charges out over the course of a month.

4 Plaintiffs' claims for false advertising and false and deceptive trade practices cannot
5 succeed because plaintiffs cannot demonstrate that Google engaged in any false or misleading
6 advertising or any unfair, deceptive or unlawful trade practice. Plaintiffs admit that they did not
7 even read the screenshot from an online tutorial regarding daily budget (the "Screenshot") upon
8 which they purport to base their claims until after their current litigation counsel showed it to
9 them. They did not read it before signing up for the AdWords program. Moreover, the
10 Screenshot is not misleading. Plaintiffs cannot base any UCL claim upon the FAQs since they
11 testified that they never bothered to read the FAQs. Reliance is a key element of a UCL action
12 and it is undisputed that plaintiffs did not rely on any of the statements in the Screenshot or
13 FAQs they claim are deceptive.

14 As to the statements which plaintiffs contend "enticed" them to become AdWords
15 advertisers, these statements were accurate and plaintiffs have not produced a scintilla of
16 evidence to the contrary. First, it is true that there is a daily budget and it is clearly defined and
17 explained in the FAQs. Second, it is correct that AdWords advertisers have the right to control
18 their own costs, by among other things, logging onto their accounts and setting a daily budget.
19 Third, it is true that AdWords advertisers have a right to set their own maximum: their charges
20 will not exceed their daily budget averaged out over the course of each month. Fourth, the
21 statement that AdWords advertisers do not accrue charges on days their ads are paused is true.
22 When an ad is paused, it will not be shown and cannot be clicked. If an ad is not shown or
23 clicked, the advertiser will not be charged.

24 Plaintiffs cannot prevail on their unjust enrichment claim because Google was not
25 unjustly enriched. Moreover, there can be no recovery under an unjust enrichment theory in this
26 case because there is an enforceable agreement. Finally, all of plaintiffs' claims relating to
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1 charges incurred more than 60 days before the lawsuit was filed are barred by the contractual
2 limitations period in the Agreement.

3 II. RESPONSE TO COUNTERSTATEMENT OF FACTS

4 A. Plaintiffs Agreed to the Program Terms and FAQs When They Entered the 5 AdWords Agreement.

6 In order to create an AdWords account, advertisers must agree to the AdWords
7 Agreement. The AdWords Agreement is accessible to the advertiser during the account sign-up
8 process. Declaration of Heather Wilburn ("Wilburn Decl."), ¶ 3; Declaration of Michael
9 Schulman ("Schulman Decl.") ¶ 10. This process was in place both in July 2002 and October
10 2003, when plaintiffs became AdWords advertisers. Wilburn Decl. ¶ 4; Schulman Decl. ¶ 10.
11 Google periodically updates the terms of the AdWords Agreement. When this occurs, all
12 advertisers are required to accept these new terms in order to continue advertising with
13 AdWords. Advertisers have a limited amount of time (generally 30 days from the initial
14 notification of the new terms) to log in and accept the new terms; otherwise, their accounts are
15 paused (i.e., no ads are displayed) until the change has been made. Wilburn Decl. ¶ 5; Schulman
16 Decl. ¶ 11.

17 B. The Agreement Consists of the Program Terms and FAQs.

18 The AdWords Agreement consists of the AdWords Program Terms and the AdWords
19 FAQs. Schulman Decl., at ¶ 10; Jhang Decl., Exhibit C (Google Inc. Advertising Program
20 Terms printed on August 15, 2006). At the time Plaintiffs CLRB Hanson and Stern signed up
21 for AdWords in July 2002 and October 2003, respectively, the Agreement consisted of the
22 Standard Terms and Conditions, a predecessor to the current Program Terms, and the FAQs. *See*
23 Declaration of Leslie Altherr ("Altherr Decl."), Exhibit 1 (July 2002 Standard Terms and
24 Conditions), Exhibit 2 (October 2003 Standard Terms and Conditions). The Screenshot attached
25 as Exhibit A to Stern's and Hanson's declarations is neither in the Program Terms nor in the
26 FAQs, and is not part of the Agreement.

III. ARGUMENT

A. The AdWords Agreement Has Not Been Breached.

In their opposition, plaintiffs do not provide any evidence of a breach of the Agreement by Google. As noted above, the Agreement does not preclude Google from exceeding the daily budget in a given day or averaging out daily charges over the number of days in the month. Far from precluding Google's billing practice, the Agreement expressly states that Google may deliver up to 120% of the daily budget in clicks on a given day, and confirms that Google will not charge more than the daily budget times the number of days in the month.

The FAQs provide: "On any single day, the AdWords system may deliver up to 20% more ads than your daily budget calls for. . . . However, you'll never be charged more than your average daily budget over the course of a month." See, Exhibit D to Jhang Declaration, (FAQs, p. 84 of 489). The AdWords FAQs available to plaintiffs when they signed up for AdWords also provided a similar disclosure to advertisers. Altherr Decl., Exhibit 3 (July 2002 FAQs, p. GOOG-HN 20904 ("Traffic is not constant from day to day . . . To account for this and maximize the potential of your advertising, Google may allow up to 20% more clicks in one day than your daily budget specifies. If you budget \$100 per day in a 30-day month, you may receive more than \$100 in clicks on a given day, but the maximum you would pay is \$3,000 for that month)), Exhibit 4 (October 2003 FAQs, p. GOOG-HN 20888 (same)). Plaintiffs' assertion that there was no monthly calculation in the Stern or Hanson FAQs is false.

Plaintiffs ignore the plain facts. Google has never argued that it can charge an AdWords advertiser 120% of the daily budget every single day of the month. Google complies with its expressly stated practice of never charging an advertiser more in any month than the daily budget times the number of days in the month. As is explained in the FAQs and in correspondence with plaintiffs, clicks may be delivered at 120% of the daily budget on some days to make up for shortfalls on other days in that month. Google designed this system to address the natural fluctuations in click traffic on the Internet and thereby permit advertisers to more closely meet

1 their targeted advertising goals. This is illustrated by a simple example: if an advertiser has a
2 daily advertising budget of \$10, and if only \$8 worth of clicks are obtained on one day in
3 January, the next day in January the system will permit up to \$12 worth of clicks. The most this
4 advertiser would spend in January in this example would be \$310 (\$10 daily budget times 31
5 days in January). If the advertiser received extra clicks that exceeded \$12 in a day or \$310 in the
6 month, Google would not charge the advertiser for the benefit of those clicks. Instead, an over-
7 delivery credit would appear on the advertiser's invoice. Google's system helps advertisers
8 achieve their advertising goals without exceeding their budgets.

9 The cases plaintiffs cite to support their theory that the AdWords Agreement is not
10 enforceable because they did not read the FAQs are inapposite. In *Specht v. Netscape Communs.*
11 *Corp.*, 306 F.3d 17 (2d Cir. 2002), there was no requirement that the user accept the terms of the
12 agreement. Here, plaintiffs could not have advertised in the AdWords program without
13 accepting the terms and conditions and the FAQs. Wilburn Decl., ¶¶ 3-4; Schulman Decl. ¶ 10.
14 As noted by the court in *Specht*, "the few courts that have had occasion to consider click-wrap
15 contracts have held them to be valid and enforceable. See, e.g., *In re RealNetworks Inc. Privacy*
16 *Litigation*, No. 00C1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Hotmail Corp. v. Van\$*
17 *Money Pie, Inc.*, No. C 98-20064, 1998 WL 388389 (N.D. Cal. April 16, 1998)." See also,
18 *Cairo, Inc. v. Crossmedia Servs., Inc.*, 2005 WL 756610 at *5 (N.D. Cal. 2005), citing
19 *Register.com v. Verio, Inc.*, 356 F.3d 393, 401-402 (2d Cir. 2004) (repeated use of web pages can
20 form the basis of imputing knowledge of terms of service).

21 Plaintiffs assented to the AdWords Agreement, comprised of the Program Terms
22 (previously Terms and Conditions) and FAQs when they first signed up and each time they
23 renewed acceptance of the Agreement. Jhang Decl., Exhibit C (Program Terms). Altherr
24 Decl.), Exhibit 1 (Hanson July 2002 Standard Terms and Conditions), Exhibit 2 (Stern October
25 2003 Standard Terms and Conditions). In each case, the Program Terms clearly state that the
26 FAQs are incorporated in the Agreement. Plaintiffs' acceptance of the Program Terms included
27 acceptance of the FAQs, which they could review prior to accepting the Program Terms. Their
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1 failure to read the contract does not nullify its binding effect. *Powers v. Dickson, Carlson &*
2 *Campillo*, 54 Cal.App.4th 1102, 1109 (1997); *Rowland v. PaineWebber Inc.*, 4 Cal.App.4th 279,
3 287 (1992). The FAQs which plaintiffs now contest were also explained by Google in response
4 to plaintiffs' emails on numerous occasions. Indeed, the plaintiffs acknowledged the FAQs at
5 their depositions, and their contention that "acknowledgement of the words clearly lacks any
6 legal significance" is without merit. (Plaintiffs' Opposition at 15:1).

7 Plaintiffs' attempt to introduce into evidence the Screenshot attached to their
8 Declarations is not proper. It is outside the parties' integrated Agreement, and it cannot be
9 considered in interpreting the contract. See Cal. Civ. Proc. Code § 1856. *Chaknova v. Wilbur-*
10 *Ellis Co.*, 69 Cal. App. 4th 962, 968 (1999) ("[m]atters extrinsic to an integrated contract will
11 not be considered to modify the unambiguous language of those contracts"). Moreover, the
12 Screenshot has no bearing on the plaintiffs' decision to join the AdWords program since they did
13 not see it. Under the undisputed facts, plaintiffs do not have a cause of action for breach of
14 contract.

15 **B. There Has Been No Breach of the Implied Covenant of Good Faith and Fair**
16 **Dealing.**

17 Plaintiffs' claim for breach of the implied covenant is identical to their contract claim,
18 and fails for the same reason. *Bionghi v. Metropolitan Water Dist. of S. Cal.*, 70 Cal.App.4th
19 1358, 1370 (1999). Plaintiffs did not lose the benefit of the bargain. Their unfounded
20 expectations that clicks would never exceed the daily budget in a single day, and that paused
21 days should be excluded when multiplying daily budget times the days in the month, were not
22 reasonable because they conflict with the written agreement. *Celador Int'l. Ltd. V. Walt Disney*
23 *Co.*, 347 F.Supp.2d 846, 852 (C.D. Cal. 2004).

1 **C. The UCL Claims Cannot Survive Google's Summary Judgment Motion.**

2 **1. Plaintiffs Cannot Prevail on Their False Advertising Claim or Unfair**
 3 **Trade Practices Claim Because They Do Not Have Standing and**
 4 **Cannot Prove Reliance.**

5 Neither Stern nor Hanson has standing for a false advertising claim based on the
 6 Screenshot. Proposition 64 changed the standing requirements for Bus. & Prof. Code §§ 17200
 7 and 17500 claims. As a result of the amendments, an individual or representative claim may
 8 only be brought by a person "who has suffered injury in fact and has lost money or property as a
 9 result of a violation of this chapter." Both Stern and Hanson have admitted that they never saw
 10 the Screenshot they attached as Exhibit A to their declarations until their attorneys showed it to
 11 them in the course of this litigation. Plaintiffs cannot have suffered injury or lost money or
 12 property as a result of allegedly untrue or misleading statements in something they had never
 13 even seen prior to this lawsuit. Jhang Decl., Exhibit A (Hanson Dep., 45:24 – 46:2), Exhibit B
 (Stern Dep., 92:11 – 94:7, 97:3 – 97:13).

14 Since they did not see the Screenshot before entering the AdWords Agreement, neither
 15 Stern nor Hanson relied upon it in entering the Agreement. Reliance by *each plaintiff* is required
 16 for a section 17200 or 17500 claim, as a result of the Proposition 64 amendments to the statute.
 17 *Pfizer Inc. v. Super. Ct.*, 141 Cal. App. 4th 290, 296 (2006).¹ Plaintiffs would like to ignore the
 18 holding of *Pfizer*, and claim that it is contrary to the holding in *McKell v. Washington Mutual,*
 19 *Inc.*, 142 Cal.App.4th 1457 (2006). However, *McKell* is not on point. *McKell* was decided on
 20 demurrer and the issue before the court was whether the claim was properly pled with general
 21 allegations of ultimate fact rather than evidentiary facts. *Id.* at 1469. The question of whether
 22 the plaintiffs actually relied was not before the court.

23 In *Pfizer*, the plaintiffs brought an action under sections 17200 and 17500 claiming that
 24 Pfizer advertised Listerine mouthwash in a misleading manner by indicating the use of Listerine

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 26
 27 ¹ Plaintiffs incorrectly state that *Pfizer* is on appeal. Although a petition for review to the
 28 California Supreme Court was filed, it has not (as of October 20, 2006) been granted.

1 can replace the use of dental floss in reducing plaque and gingivitis. The court held that a
 2 plaintiff “would have had to read Pfizer’s label . . . or some similar statement and relied thereon
 3 in buying Listerine.” *Pfizer*, at 306. Here, notwithstanding that neither the Screenshot or FAQs
 4 are misleading, because they failed to read the Screenshot or the FAQs, plaintiffs cannot prove
 5 reliance upon them in entering the transaction, an essential element of their claim.

6 **2. Plaintiffs Cannot Prevail on Their Unfair Trade Practices Claim**
 7 **Because They Cannot Point to Any Unfair, Unlawful, Deceptive or**
 8 **False Statement.**

9 **a. There is a Daily Budget and it is Clearly Defined and**
 10 **Explained in the FAQs.**

11 Plaintiffs’ unfair trade practices claim also fails because they cannot point to any unfair,
 12 unlawful, deceptive or false statement. There is nothing misleading about the daily budget and
 13 the use of a daily budget is not an unfair trade practice. The daily budget is described as “the
 14 amount you’re willing to spend on a specific AdWords campaign each day.” Schulman Decl., ¶
 9; Jhang Decl., Exhibit D (FAQs, p. 84 of 489). The FAQs further state that:

15 AdWords displays your ad as often as possible while staying within your
 16 daily budget. When the budget limit is reached, your ads will typically
 17 stop showing for that day. How quickly your ads are shown during a
 18 given day is determined by your ad delivery setting.

19 On any single day, the AdWords system may deliver up to 20% more ads
 20 than your daily budget calls for. This helps make up for other days in
 21 which your daily budget is not reached. However, you’ll never be charged
 22 more than your average daily budget over the course of a month. For
 23 example: if your daily budget is \$10 and the month has 30 days, you might
 24 be charged up to \$12 on any single day but your monthly charges will
 25 never exceed \$300.

26 See also, Exh. D to Jhang Decl., FAQs, p. 125 of 489. Given the clear explanation of the
 27 daily budget and monthly averaging, there is nothing false or misleading about it.

28 **b. AdWords Advertisers Have the Right to Control Their Own**
Costs and Have a Right to Set their Own Maximum.

AdWords advertisers have the ability to control their own costs and set a maximum, by
 selecting the cost per click and their daily budget. Schulman Decl., ¶¶ 5-7. Advertisers are not
 charged more than the daily budget times the number of days in the month. Any amount charged

1 in excess of that number is credited back in an overdelivery credit, and this credit reflects extra
2 clicks or impressions that an advertiser received but for which the advertiser is not charged.
3 Jhang Decl., at Exhibit D (FAQs, p. 97 of 489). Advertisers also receive overdelivery credits
4 when they accrue clicks or impressions that would amount to charges in excess of 120% of their
5 daily budget in a single day. *See id.*, at Exhibit D (FAQs, p. 84 of 489, p. 97 of 489, p. 125 of
6 489). The credits are automatically issued to advertisers and are listed in their invoices. *Id.*
7 Thus, advertisers are not billed in excess of the limits set forth in their AdWords Agreement.

8 **c. AdWords Advertisers Do Not Accrue Charges on Days their**
9 **Ads are Paused.**

10 No charges accrue during a paused period because no ads are displayed and therefore no
11 clicks or impressions accrue. *See Jhang Decl.*, Exhibit D (FAQs, p. 261 of 489). However,
12 pausing does not change the number of days in a month, which is the number used to calculate
13 the maximum an advertiser will be charged in a month (i.e., daily budget times number of days
14 in the month). Nothing in the Agreement or FAQs suggests that pausing affects maximum
15 monthly charges.

16 **D. Plaintiffs May Not Recover Under an Unjust Enrichment Theory Because**
17 **There is a Binding Contract Between the Parties and Google Has Not Been**
18 **Unjustly Enriched.**

19 Plaintiffs are unable to establish an unjust enrichment claim. The Ninth Circuit has held
20 that “unjust enrichment is an action in quasi-contract, which does not lie when an enforceable,
21 binding agreement exists defining the rights of the parties.” *Paracor Finance, Inc. v. Gen. Elec.*
22 *Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). ““There cannot be a valid, express contract
23 and an implied contract, each embracing the same subject matter, existing at the same time.””
24 *Berkla v. Corel Corp.*, 302 F.3d 909, 918 (9th Cir. 2002) quoting *Wal-Noon Corp. v. Hill*, 45
25 Cal. App. 3d 605, 613 (1975); *see also Hedging Concepts, Inc. v. First Alliance Mortgage Co.*,
41 Cal. App. 4th 1410, 1419 (1996).

26 The AdWords Agreement is an enforceable, binding contract. Plaintiffs have provided
27 no authority for disregarding the Agreement just because they do not like some of the terms.

1 Plaintiffs could not have advertised on the AdWords system without agreeing to the AdWords
 2 Agreement. Wilburn Decl., ¶ 3-4. Moreover, both plaintiffs admitted that they renewed their
 3 acceptance of the AdWords Agreement in order to continue advertising under the AdWords
 4 program. Jhang Decl., Exhibit A (Hanson Dep., 42:6 – 43:10), Exhibit B (Stern Dep., 142:7 –
 5 143:25). Since a valid and enforceable agreement governs the parties, plaintiffs cannot recover
 6 for unjust enrichment and summary judgment should be entered against plaintiffs on this claim.

7 **E. The Contractual Limitations Period in the Agreement is Enforceable.**

8 Under California law, an agreement that provides a shorter limitations period will be
 9 enforced so long as the shorter period is reasonable. *See Beeson v. Schloss*, 183 Cal. 618, 622-23
 10 (1920). The 60 days limitation period in the AdWords Agreement is reasonable, particularly
 11 given that Plaintiffs acknowledged their invoices were available to them for review of the
 12 charges through their AdWords accounts. They received invoices either after 30 days, or when
 13 they reached their credit limit, whichever came first for each invoice. Jhang Decl., Exhibit D
 14 (FAQs, p. 126 of 489). Plaintiffs had ample time to contest charges within the 60 day period.

15 **IV. CONCLUSION**

16 For all of the reasons stated herein and in its memorandum of points and authorities in
 17 support of its motion, Google respectfully requests that the Court grant its motion for summary
 18 judgment as to each of plaintiffs' claims, or in the alternative, summary adjudication on the
 19 following issues of fact and law: (1) that Google is entitled, under the AdWords Agreement, to
 20 exceed an advertiser's daily budget by up to 20% on any given day, (2) that Google may base an
 21 advertiser's charges in a billing period on the number of days in that month multiplied by the
 22 advertiser's daily budget, and (3) that Plaintiffs' claims, and the claims of the putative class
 23 members, are barred for alleged breaches occurring more than 60 days prior to August 3, 2005.

24 DATED: October 23, 2006.

PERKINS COIE LLP

25 By _____ /S/
 26 David T. Biderman
 27 Attorneys for Defendant Google Inc.