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E-Filed 8/25/2010

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE FACEBOOK PPC ADVERTISING
LITIGATION

Case Numbers 5:09-cv-03043-JF,
5:09-cv-03519-JF, 5:09-cv-03430-JF

ORDER¹ GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS FIRST AMENDED
COMPLAINT

[Document No. 79]

Defendant moves to dismiss Plaintiffs’ first amended complaint (“FAC”) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The Court has considered the moving and responding papers and the oral argument of counsel presented at the hearing on August 6, 2010. For the reasons discussed below, the motion will be granted in part and denied in part, with leave to amend.

I. BACKGROUND

Plaintiffs RootZoo, Inc. (“RootZoo”), Steven Price (“Price”), and Matthew Smith (“Smith”) (collectively, “Plaintiffs”) filed the instant putative class action on July 7, 2009. The

¹ This disposition is not designated for publication in the official reports.

1 dispute arises out of individual contracts between Plaintiffs and Facebook PPC (“Defendant”).
2 Defendant operates a popular social networking website, www.facebook.com. (FAC ¶ 1.)
3 RootZoo, Price, and Smith individually entered into contracts with Defendant for advertising on
4 its website. (FAC ¶¶ 54, 65, and 76.) Defendant offers to display advertisements on portions of
5 its website that are viewed by Facebook users. (FAC ¶ 8.) Each advertisement contains a link
6 either to another portion of Defendant’s website or to an external website. (*Id.*) If a user clicks
7 on the advertisement, the user’s web browser is directed to the other location. (*Id.*)

8 To place an advertisement on Defendant’s website, a potential advertiser must perform
9 four steps. (FAC ¶ 28.) First, the advertiser designs an advertisement and selects the destination
10 of the link embedded within the advertisement. (*Id.*) Second, the advertiser selects the target
11 demographic for the advertising campaign. (FAC ¶ 29.) Third, the advertiser selects the
12 payment structure for the advertising campaign. Defendant provides two payment options: cost
13 per click (“CPC”) or cost per thousand impressions (“CPM”). (FAC ¶ 31.) Plaintiffs each
14 entered into CPC contracts. (FAC ¶¶ 54, 67, 76.) Under the CPC option, the advertiser pays a
15 fee to Defendant each time a user clicks on the advertisement. (*Id.*) To select the CPC option,
16 the advertiser must specify its “Max Bid” (the maximum amount the advertiser is willing to pay
17 to Defendant for each click) and its “Daily Budget” (the maximum amount the advertiser is
18 willing to pay to Defendant each day). (FAC ¶ 30.) Defendant selects which advertisements to
19 display on its website based on a number of factors, including the historical performance of the
20 advertisement and its Max Bid.

21 Finally, the advertiser must submit its advertising design to Defendant for approval and
22 agree to certain terms and conditions. (FAC ¶ 28.) Agreements of this type commonly are
23 referred to as “click-through” agreements. Advertisers are presented with a copy of the terms and
24 conditions, and they communicate their assent to those terms and conditions by placing their
25 advertising order. (*See* Howitson Decl. ISO Def.’s Previous Mot. to Dismiss (“Howitson
26 Decl.”), Ex. 4.²) RootZoo initially contracted with Defendant in November 2007. (FAC ¶ 54).

27
28 ² In connection with its previous motion to dismiss, Defendant submitted an exemplary
screen-shot of a web page through which an advertiser agrees to place an ad. The FAC

1 Smith first contracted with Defendant in April 2009, (FAC ¶ 76), and Price first contracted with
2 Defendant in May 2009, (FAC ¶ 65). Price’s contract differs in certain respects from those
3 entered into by RootZoo and Smith.

4 RootZoo and Smith both agreed to Defendant’s Advertising Terms and Conditions (the
5 “AT&Cs”). (See Howitson Decl., Exhs. 1 and 2.³) At least with respect to the provisions
6 currently at issue, the agreements appear to be identical. The AT&Cs state that “I understand
7 that Facebook will determine, in its sole discretion, how to measure the number of impressions,
8 inquiries, conversions, clicks, or other actions taken by third parties in connection with my
9 advertisements, and all charges will be based on such measurements.” (*Id.*) The AT&Cs also
10 contain the following disclaimer:

11 I UNDERSTAND THAT THIRD PARTIES MAY GENERATE IMPRESSIONS,
12 CLICKS OR OTHER ACTIONS AFFECTING THE COST OF THE ADVERTISING
13 FOR FRAUDULENT OR IMPROPER PURPOSES, AND I ACCEPT THE RISK OF
14 ANY SUCH IMPRESSIONS, CLICKS, OR OTHER ACTIONS. FACEBOOK SHALL
HAVE NO RESPONSIBILITY OR LIABILITY TO ME IN CONNECTION WITH ANY
THIRD PARTY CLICK FRAUD OR OTHER IMPROPER ACTIONS THAT MAY
OCCUR.

15 (*Id.*) Price’s contract did not contain the AT&Cs; instead, Price appears to have assented to a
16 later agreement called a Statement of Rights and Responsibilities (the “SR&Rs”). (See Clark
17 Decl. ISO Mot. to Dismiss, Ex. A.) The SR&Rs provide that “You will pay for your Orders in
18 accordance with our Payment Terms. The amount you owe will be calculated based on our
19 tracking mechanisms.” (*Id.*) The SR&Rs also include a disclaimer: “We [Defendant] cannot

20 _____
21 references this document, and Plaintiffs do not dispute its authenticity. See *Branch v. Tunnell*, 14
22 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa*
23 *Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002) (holding that “documents whose contents are alleged
24 in a complaint and whose authenticity no party questions, but which are not physically attached
25 to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss”); and *In re*
Stac Elcs. Sec. Litig., 89 F. 3d 1399, 1405 n.4 (9th Cir. 1996) (noting that complete copies of
documents whose contents are alleged in the complaint may be considered in connection with a
motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)).

26 ³ Defendant also submitted these exhibits in connection with its previous motion to
27 dismiss. While Plaintiffs dispute that all of the terms set forth in the exhibits actually are present
28 in their contracts, they do not question the authenticity of Defendant’s exhibits and respond to the
instant motion as if the terms were included in their contracts. The Court may consider these
documents. See *Branch*, 14 F.3d at 454.

1 control how people interact with your ads, and are not responsible for click fraud or other
2 improper actions that affect the cost of running ads.” (*Id.*)

3 Notwithstanding these disclaimers, Plaintiffs allege that Defendant made representations
4 that it would charge only for certain types of clicks. Defendant’s website includes a “Help
5 Center,” which offers definitions of several terms. (FAC Exhs. B-C.) The Help Center states
6 that “clicks are counted each time a user clicks through your ad to your landing page,” (FAC Ex.
7 B), and that “[i]f your ads are bid on a CPC basis, you will be charged when users click on your
8 ads and visit your website,” (FAC Ex. C.) The Help Center also represents that “[Defendant]
9 ha[s] a variety of measures in place to ensure that [it] only report[s] and charge[s] advertisers for
10 legitimate clicks, and not clicks that come from automated programs, or clicks that may be
11 repetitive, abusive, or otherwise inauthentic.” (FAC Ex. B.) Notwithstanding these
12 representations, Plaintiffs allege that they have been charged for:

13 (a) failed attempts by Facebook users to reach an advertisement because of a glitch in
14 Facebook’s website that are improperly counted by Facebook as a billable click; (b)
15 Facebook’s counting of clicks as billable clicks when in fact there was no click at all from
16 a Facebook user; (c) clicks by Facebook users that fail to open the advertiser’s web page
17 but still result in Facebook regarding the click as a billable click; (d) improperly recorded,
18 or unreadable, clicks by Facebook users caused by an invalid proxy server or unknown
browser type (indicating that the visitor may be a computer “bot” and not a human); (e)
unintentional, multiple clicks from a Facebook user in rapid succession . . . ; and (f) . . .
clicks that were made in a deliberate effort to drive up the cost of an ad or deplete an
advertiser’s budget (this type of invalid click is referred to in the industry as “click
fraud.”).

19 (FAC ¶ 3.) Plaintiffs seek relief under California’s Unfair Competition Law (“UCL”), Cal. Bus.
20 Prof. Code § 17200 *et seq.*; remedies for breach of contract and the implied covenant of good
21 faith and fair dealing; and a judicial declaration of the rights and obligations of the parties under
22 the subject contracts.

23 II. DISCUSSION

24 A. Legal standard

25 A complaint may be dismissed for failure to state a claim upon which relief may be
26 granted if a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its
27 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations of material fact must
28 be taken as true and construed in the light most favorable to the nonmoving party. *Cahill v.*

1 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1997). However, the Court need not accept
2 as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable
3 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). *See also*
4 *Twombly*, 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a
5 motion to dismiss).

6 On a motion to dismiss, the Court’s review is limited to the face of the complaint and
7 matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.
8 1986); *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). However, under
9 the “incorporation by reference” doctrine, the Court also may consider documents which are
10 referenced extensively in the complaint and which are accepted by all parties as authentic. *In re*
11 *Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999). Leave to amend should be
12 granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment. *Lucas*
13 *v. Dep’t of Corr.*, 66 F. 3d 245, 248 (9th Cir. 1995).

14 In assessing whether to grant Plaintiffs another opportunity to amend, the Court considers
15 “the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure
16 deficiencies by previous amendments, undue prejudice to the opposing party[,] and futility of the
17 proposed amendment.” *Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001)
18 (quoting *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)). When
19 amendment would be futile, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d
20 386, 393 (9th Cir. 1996).

21 Finally, although their claims arise under state law, Plaintiffs’ allegations are subject to
22 the Federal Rules of Civil Procedure. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.
23 2009) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003)) (“[T]he
24 Federal Rules of Civil Procedure apply in federal court, ‘irrespective of the source of the subject
25 matter jurisdiction, and irrespective of whether the substantive law at issue is state or federal.’”).
26 Specifically, allegations sounding in fraud are subject to the heightened pleading requirements of
27 Fed. R. Civ. P. 9(b). *See Ciba-Geigy*, 317 F.3d at 1103-04 (if “the claim is said to be ‘grounded
28 in fraud’ or to ‘sound in fraud,’ [then] the pleading of that claim as a whole must satisfy the

1 particularity requirement of Rule 9(b).”); *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.1994)
2 (claims based in fraud “must state precisely the time, place, and nature of the misleading
3 statements, misrepresentations, and specific acts of fraud.”).

4 **B. Breach of contract claims**

5 Under California law, a *prima facie* claim for breach of contract has four elements: (1)
6 the existence of a contract, (2) the plaintiff’s performance or excuse for non-performance, (3)
7 defendant’s breach, and (4) damages to the plaintiff from defendant’s breach.

8 *Walsh v. West Valley Mission Community College Dist.*, 66 Cal. App. 4th 1532, 1545 (Cal. App.
9 6th Dist. 1998). Defendant does not dispute the existence or Plaintiffs’ performance of the
10 subject contracts. Instead, it contends that Plaintiffs cannot demonstrate that it has breached the
11 contract because the disclaimers shield it from liability for invalid third-party clicks.

12 **1. Third-party clicks**

13 Plaintiffs allege that they have been charged improperly for “failed attempts by Facebook
14 users to reach an advertisement because of a glitch in Facebook’s website that are improperly
15 counted by Facebook as a billable click; . . . billable clicks when in fact there was no click at all
16 from a Facebook user; . . . clicks by Facebook users that fail to open the advertiser’s web page
17 but still result in Facebook regarding the click as a billable click; . . . [and] unintentional,
18 multiple clicks from a Facebook user in rapid succession that Facebook regards as separate,
19 billable clicks but that should be filtered out” (FAC ¶ 3.) They also claim that they have
20 been charged inappropriately for “improperly recorded, or unreadable, clicks by Facebook users
21 caused by an invalid proxy server or unknown browser type (indicating that the visitor may be a
22 computer “bot” and not a human); . . . and . . . clicks that were made in a deliberate effort to drive
23 up the cost of an ad or deplete an advertiser’s budget (this type of invalid click is referred to in
24 the industry as ‘click fraud.’)” (*Id.*)

25 Consistent with this Court’s order dated April 22, 2010, Defendant does not challenge
26 Plaintiffs’ allegations with respect to “first-party” clicks, such as the claim that Defendant is
27 charging for clicks “when in fact there was no click at all from a Facebook user.” (FAC ¶ 3;
28 Def.’s Mot. at 8:1-4.) However, citing selectively from the order and the Court’s statements at a

1 case management conference on May 7, 2010, Defendant claims that the Court already has
2 dismissed *any* claims related to clicks that originate from third parties. While the Court in fact
3 has concluded previously that first-party clicks are not subject to the disclaimers because they
4 “arguably need not be fraudulent, improper, or the result of the actions of third parties.” (April
5 22, 2010 order at 7:5-6), this is not the same as saying that all third-party actions are covered by
6 the disclaimers.

7 At the case management conference on May 7, 2010, the Court observed that “there’s a
8 distinction between first-party and third-party invalid clicks that I try to make clear in the order. .
9 . . [W]e are not at a point *yet* where third-party clicks are in play.” (Tr. 6:14-17 (emphasis
10 added).) At the same time, the Court noted that the papers in connection with the previous
11 motion to dismiss addressed directly only deficiencies in Defendant’s system and third-party
12 *fraud*, and that “[i]f there are other types of third-party actions that aren’t fraud and thus not
13 covered by the disclaimer, that is a theory [that] has not been presented.” (Tr. 10:23-11:1.) That
14 theory now is presented in the FAC and is addressed by the instant motion.

15 2. Contract interpretation

16 Under California law, “rational interpretation [of a contract] requires at least a
17 preliminary consideration of all credible evidence offered to prove the intention of the parties.”
18 *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, 69 Cal. 2d 33, 39-40 (1968). “If the
19 court decides, after considering this evidence, that the language of a contract, in the light of all
20 the circumstances, ‘is fairly susceptible of either one of the two interpretations contended for . . .’
21 [citations], extrinsic evidence relevant to prove either of such meanings is admissible.” *Id.*
22 Nonetheless, “[t]his rule must be restricted to its stated bounds; it does no more than allow
23 extrinsic evidence of the parties’ understanding and intended meaning of the *words used in their*
24 *written agreement.*” *Brawthen v. H & R Block, Inc.*, 28 Cal. App. 3d 131, 136 (Cal. App. 1st
25 Dist. 1972) (citing *Pacific Gas & E.*, 69 Cal. 2d 33) (emphasis in the original).

26 a. The disclaimers are ambiguous

27 The AT&Cs contain the following disclaimer:

28 I [PLAINTIFF] UNDERSTAND THAT THIRD PARTIES MAY GENERATE

1 IMPRESSIONS, CLICKS OR OTHER ACTIONS AFFECTING THE COST OF THE
2 ADVERTISING FOR FRAUDULENT OR IMPROPER PURPOSES, AND I ACCEPT
3 THE RISK OF ANY SUCH IMPRESSIONS, CLICKS, OR OTHER ACTIONS.
4 FACEBOOK SHALL HAVE NO RESPONSIBILITY OR LIABILITY TO ME IN
5 CONNECTION WITH ANY THIRD PARTY CLICK FRAUD OR OTHER IMPROPER
6 ACTIONS THAT MAY OCCUR.

7 (Howitson Decl., Exhs. 1-2.) Defendant disclaims responsibility for (1) “impressions, clicks, or
8 other actions” that are (2) generated by third parties (3) affecting the cost of advertising for
9 fraudulent or improper purposes. The disclaimer does not cover Defendant’s own actions,
10 irrespective of their purpose; nor does it cover the actions of third parties if the action is not for
11 fraudulent or improper purposes. Likewise, the disclaimer in the SR&Rs covers only “click
12 fraud or other improper actions that affect the cost of running ads.” (Clark Decl. Ex. A.)

13 Neither the AT&Cs nor the SR&Rs define the terms “fraud” or “improper purpose.” The
14 term “fraud” generally is understood to suggest some type of knowing or reckless
15 misrepresentation or concealment of the truth. *See* BLACK’S LAW DICTIONARY (8th ed. 2004)
16 (defining fraud as, among other things, “[a] knowing misrepresentation of the truth or
17 concealment of a material fact to induce another to act to his or her detriment.”). However, as
18 discussed below, neither the AT&Cs nor the SR&Rs define the term “click fraud.” Moreover,
19 the parties dispute the meaning of “improper” as used in the disclaimers. Defendant points out
20 that the disclaimers refer to both fraud *and* improper actions. To construe the two terms as
21 equivalent would render the additional words superfluous, a result that generally is disfavored in
22 contract interpretation. Accordingly, Defendant proposes that “improper” clicks should be
23 construed to cover *all* invalid third-party clicks that are not fraudulent, irrespective of the intent
24 of the third-party.

25 Plaintiffs contend that “improper” implies some type of nefarious intent on the part of the
26 third party. For example, clicks that do not result in the user being directed to the destination
27 link or unintentional, multiple clicks from impatient users are not “fraudulent” in that they do not
28 involve knowing misrepresentations. At the same time, such clicks arguably are not “improper”
because they may be the result of a simple mistake. If Plaintiffs’s construction is correct, then
such third-party clicks may be invalid but nonetheless not covered by the disclaimer. For

1 purposes of a motion pursuant to Fed. R. Civ. P. 12(b)(6), the disclaimer is ambiguous with
2 respect to this issue.

3 The AT&Cs also state that “I understand that Facebook will determine, in its sole
4 discretion, how to measure the number of impressions, inquiries, conversions, clicks, or other
5 actions taken by third parties in connection with my advertisements, and all charges will be based
6 on such measurements.” Nonetheless, because the disclaimer in the AT&Cs focuses specifically
7 on “fraudulent” or “improper” third-party clicks, it is conceivable that the contract as a whole
8 could be read to mean that Defendant’s discretion does not extend at least to some types of
9 invalid clicks. Similarly, the SR&Rs provide that “[advertisers] will pay for [their] Orders in
10 accordance with [Defendant’s] Payment Terms. The amount you owe will be calculated based
11 on our tracking mechanisms.” However, the SR&Rs do not identify such “tracking
12 mechanisms.” For purposes of the instant motion, Plaintiffs have alleged adequately that
13 Defendant may have charged for third-party clicks that are neither fraudulent nor improper yet
14 still invalid.

15 **b. Extrinsic evidence**

16 Plaintiffs contend that statements in the Help Center are credible evidence of the parties’
17 understanding and the intended meanings of disputed terms, and that such statements should be
18 considered at this preliminary stage. *See Pacific Gas & E.*, 69 Cal. 2d at 39-40. In its order
19 dated April 22, 2010, the Court determined that statements in the Help Center could not be
20 relevant to the intentions of the parties at the time of contracting unless Plaintiffs could allege
21 that the statements existed at the time the contracts were formed and that Plaintiffs were aware of
22 the statements. (April 22, 2010 order at 6:7-10.) Plaintiffs now allege that “[t]he policies and
23 representations [in Defendant’s Help Center that are] set forth in [FAC Exhs. B-E] (or materially
24 similar policies and representations) were in existence at the time each of the Plaintiffs
25 contracted with Defendant for advertising services and/or utilized Defendant’s advertising
26 services.” (FAC ¶¶ 33, 34, 36, 37.) Plaintiffs also allege that “[p]rior to entering into the
27 contract with Facebook, [Plaintiffs] reviewed and relied on the policies, practices and
28 representations set forth on Facebook’s website regarding its advertising services and reasonably

1 believed that Facebook would only charge for valid clicks, that Facebook had measures in place
2 to guard against invalid clicks, and that Facebook would not charge for invalid clicks.” (FAC ¶¶
3 55, 65, 76.)

4 Defendant contends that Plaintiffs have not addressed adequately the Court’s previous
5 concerns, arguing that Plaintiffs’ allegations with respect to the statements in the Help Center are
6 subject to the heightened pleading requirement of Rule 9(b) and do not meet that requirement.
7 While in general plaintiffs are required to provide only “a short and plain statement of the claim
8 showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), claims that “sound in
9 fraud” or are “grounded in fraud” must satisfy the particularity requirements of Fed .R. Civ. P.
10 9(b), *Ciba-Geigy*, 317 F.3d at 1103-04.

11 **i. Non-fraudulent third-party clicks**

12 Plaintiffs allege that they have been charged improperly for “failed attempts by Facebook
13 users to reach an advertisement because of a glitch in Facebook’s website that are improperly
14 counted by Facebook as a billable click; . . . clicks by Facebook users that fail to open the
15 advertiser’s web page but still result in Facebook regarding the click as a billable click; . . .
16 improperly recorded, or unreadable, clicks by Facebook users caused by an invalid proxy server
17 or unknown browser type (indicating that the visitor may be a computer “bot” and not a human);
18 . . [and] unintentional, multiple clicks from a Facebook user in rapid succession that Facebook
19 regards as separate, billable clicks but that should be filtered out;” (FAC ¶ 3.) These
20 alleged clicks are not necessarily “fraudulent,” because the third-party actor need not act
21 knowingly or recklessly.

22 Defendant argues that such clicks nonetheless are covered by the disclaimers because they
23 are “improper.” Plaintiffs contend that the clicks are not “improper” as defined by the
24 disclaimer, pointing to the following statement in the Help Center: “We have a variety of
25 measures in place to ensure that we only report and charge advertisers for *legitimate* clicks, and
26 not clicks that come from *automated programs, or clicks that may be repetitive, abusive, or*
27 *otherwise inauthentic.*” (FAC Ex. B (emphasis added).) Plaintiffs argue that because Defendant
28 represented that it would not charge for these clicks, such clicks cannot be the “improper” clicks

1 as to which Defendant disclaimed liability. Defendant also represented in the Help Center that
2 “[i]f your ads are bid on a CPC basis, you will be charged when *users* click on your ads *and visit*
3 *your website.*” (FAC Ex. C (emphasis added).) Plaintiffs assert that because Defendant
4 represented that it would charge only for clicks by “users” and not for clicks that do not result in
5 a visit to the destination website, a click may be invalid without being “improper.”

6 Defendant contends that the Court may not consider the alleged representations in the
7 Help Center, even at this preliminary stage, because Plaintiffs do not plead with Rule 9
8 specificity that the statements existed at the time of contracting or that Plaintiffs reviewed the
9 statements. However, Plaintiffs’ claims with respect to non-fraudulent clicks by definition are
10 not grounded in fraud, and the representations in the Help Center are relevant to the proper
11 interpretation of the terms of the contract. As discussed previously, Plaintiffs now allege that the
12 statements in the Help Center existed at or around the time of contracting and that they reviewed
13 the policies that did exist at that time. They also argue that the statements actually are part of the
14 contracts, pointing to the statement in the AT&Cs that “[t]hese terms and conditions, the
15 Advertising Guidelines *and other applicable Facebook policies*, and the terms of any applicable
16 advertising order submitted through the site constitute the entire and exclusive agreement
17 between the parties with respect to any advertising order I place” (Howitson Decl. Exhs. 1-
18 2 (emphasis added).)⁴ These allegations are adequate to survive a motion pursuant to Rule
19 12(b)(6).

20 The Court finds and concludes that the term “improper” is fairly susceptible to either of
21 the two interpretations offered by the parties. In light of the statements in the Help Center, there
22 is a plausible argument that some or all non-fraudulent but otherwise invalid third-party clicks
23 are not “improper” within the meaning of the disclaimers

24 **ii. Fraudulent third-party clicks**

25 Plaintiffs also claim that they have been charged inappropriately for “clicks that were

26
27 ⁴ The Court notes, however, that the SR&Rs provide that “[t]his statement makes up the
28 entire agreement between the parties regarding Facebook, and supersedes any prior agreements.”
(Clark Decl. Ex. A.)

1 made in a deliberate effort to drive up the cost of an ad or deplete an advertiser’s budget (this
2 type of invalid click is referred to in the industry as ‘click fraud.’)” (FAC ¶ 3.) The disclaimers
3 in all of the relevant agreements state explicitly that Defendant cannot be liable for “click fraud.”
4 Plaintiffs again point to Defendant’s statement in the Help Center that “[w]e [Defendant] have a
5 variety of measures in place to ensure that we only report and charge advertisers for *legitimate*
6 clicks, and not clicks that come from automated programs, or *clicks that may be repetitive,*
7 *abusive, or otherwise inauthentic.*” (FAC Ex. B (emphasis added).) Though this aspect of their
8 claim expressly is directed at “click *fraud,*” Plaintiffs do not allege that Defendant has engaged in
9 any knowing or reckless misrepresentation or concealment of the truth. Instead, they claim that
10 Defendant has breached the contract by *charging* for “fraud” committed by third parties.
11 However, even applying the more lenient pleading standard of Rule 8, it is difficult to see how
12 Plaintiffs’ allegation of “click fraud” can survive disclaimers that state unambiguously that
13 Defendant will not be liable for “click fraud.” Accordingly, this portion of Plaintiff’s claim will
14 be dismissed.

15 **D. UCL claims**

16 The UCL prohibits any “unlawful, unfair or fraudulent business practices.” Cal. Bus. &
17 Prof. Code § 17200, *see also Cel-Tech Commc’ns, Inc. v Los Angeles Cellular Tel. Co.*, 20 Cal.
18 4th 163, 180 (1999). Because the statute is written in the disjunctive, it applies separately to
19 business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. *See Pastoria v. Nationwide*
20 *Ins.*, 112 Cal. App. 4th 1490, 1496 (2003). Plaintiffs contend that Defendant’s conduct has
21 violated all three prongs.

22 **1. Unlawful business practices**

23 “By proscribing ‘any unlawful’ business practice, [the UCL] ‘borrows’ violations of other
24 laws and treats them as unlawful practices that the unfair competition law makes independently
25 actionable.” *Cel-Tech*, 20 Cal. 4th at 180. In its order of April 22, 2010, the Court determined
26 that an allegation of a systematic breach of contract was sufficient to state a claim for unlawful
27 business practices. However, this allegation is better analyzed under the “unfairness” prong of
28 the UCL. *See Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1483 (Cal. App. 4th

1 Dist. 2005) (citing a series of California appellate court decisions and concluding that “it appears
2 that a systematic breach of certain types of contracts (e.g., breaches of standard consumer or
3 producer contracts involved in a class action) can constitute an *unfair* business practice under the
4 UCL.” (emphasis added)). Other than breach of contract, Plaintiffs do not allege another
5 possible predicate for a claim of unlawful conduct under the UCL.

6 **2. Fraudulent business practices**

7 In addition to the “click fraud” alleged in their breach of contract claim, Plaintiffs allege
8 in connection with their claim under the UCL’s fraud prong that Defendant itself is responsible
9 for some type of “fraudulent” activity. While fraudulent business practices in violation of the
10 UCL are not identical to common law fraud, *Daugherty v. American Honda Motor Co., Inc.*, 144
11 Cal. App. 4th 824, 838 (Cal. App. 2d Dist. 2006), allegations that are “grounded in fraud” or
12 “sound in fraud” still are subject to the heightened pleading requirement of Rule 9(b).
13 *Ciba-Geigy*, 317 F.3d at 1104. In the context of Rule 9(b), a plaintiff must include a description
14 of the “time, place, and specific content of the false representations as well as the identities of the
15 parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).
16 The purpose of Rule 9(b) is to require a plaintiff to be “specific enough to give defendants notice
17 of the particular misconduct which is alleged to constitute the fraud charged so that they can
18 defend against the charge and not just deny that they have done anything wrong.” *Id.* at 764
19 (internal quotation and citation omitted). However, in the context of a fraudulent omission
20 claim, a plaintiff cannot plead a specific time or place of a failure to act. *Washington v.*
21 *Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987). Accordingly, a plaintiff may plead fraud
22 in alternative ways. *Id.*

23 California law also requires Plaintiffs to plead actual reliance in connection with this
24 claim. Subsequent to Proposition 64, approved at a general election on November 2, 2004, a
25 private plaintiff has standing to sue “only if he or she ‘has suffered injury in fact and has lost
26 money or property as a result of such unfair competition.’” *In re Tobacco II Cases*, 46 Cal. 4th
27 298, 314 (2009). The California Supreme Court concluded that the “language [‘as a result of’]
28 imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action

1 under the UCL’s fraud prong.” *Id.* at 326. This requirement extends to claims both of
2 misrepresentations and fraudulent omissions. “Reliance is ‘an essential element of ... fraud ...
3 [R]eliance is proved by showing that the defendant’s misrepresentation or nondisclosure was ‘an
4 immediate cause’ of the plaintiff’s injury-producing conduct.” *Id.* at 326 (citing *Mirkin v.*
5 *Wasserman*, 5 Cal. 4th 1082, 1110-1111 (1993) (Kennard, J., concurring and dissenting)).

6 **a. Misrepresentations**

7 Plaintiffs contend that Defendant made certain misrepresentations, including
8 “[r]epresenting that advertisers are billed based on the number of actual and valid clicks, yet
9 charging . . . for invalid clicks; . . . [and] [r]epresenting that Defendant has adequate measures in
10 place to ensure that it only reports and charges advertisers for valid clicks, when it does not”
11 (FAC ¶¶ 93, 100.) “A plaintiff may establish that the defendant’s misrepresentation is an
12 ‘immediate cause’ of the plaintiff’s conduct by showing that in its absence the plaintiff ‘in all
13 reasonable probability’ would not have engaged in the injury-producing conduct.” *In re*
14 *Tobacco II Cases*, 46 Cal. 4th at 326 (citing *Mirkin*, 5 Cal. 4th at 1110-1111). The only sources
15 of misrepresentations identified in the FAC are the statements in Defendant’s Help Center.

16 While Plaintiffs’ pleadings with respect to the existence of the statements in the Help
17 Center are adequate for purposes of their breach of contract claims, their claims under the fraud
18 prong of the UCL must meet the heightened standards of Rule 9(b). Plaintiffs allege that the
19 statements in the Help Center “(or materially similar policies and representations) were in
20 existence at the time each of the Plaintiffs contracted with Defendant for advertising services
21 and/or utilized Defendant’s advertising services.” (FAC ¶¶ 33, 34, 36, 37.) This allegation is
22 insufficiently specific: if accepted as true, it demonstrates only that the statements existed at the
23 time of contracting *or* at some point during the performance of the contracts. The timing of the
24 statements is critical, as Plaintiffs cannot establish reliance on these statements if the statements
25 did not exist at the time of the contracting. Nor do Plaintiffs provide sufficient information with
26 respect to the contents of the statements, as it is not clear what would constitute “materially
27 similar policies and representations.”

28 ///

1 **b. Omissions**

2 Plaintiffs also contend that Defendant made certain omissions, such as “[f]ailing to
3 disclose or adequately disclose that it charges . . . for invalid clicks; [and] [f]ailing to disclose or
4 adequately disclose that it does not have adequate measures in place to ensure that it only reports
5 and charges advertisers for invalid clicks” (*Id.*) To demonstrate reliance on an omission,
6 “[o]ne need only prove that, had the omitted information been disclosed, one would have been
7 aware of it and behaved differently.” *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093 (1993).
8 Plaintiffs allege that before contracting with Defendant, they “reviewed and relied on the
9 policies, practices and representations set forth on Facebook’s website regarding its advertising
10 services” (FAC ¶¶ 54, 65, 76.) This allegation again is insufficient for purposes of Rule
11 9(b). The Court recognizes the difficulty in pleading a specific time and place of a failure to act,
12 *see Baenziger*, 673 F. Supp. at 1482, but Plaintiffs still should be able to identify with
13 particularity at least the specific policies and representations that they reviewed.

14 **3. Unfair business practices**

15 Plaintiffs do not distinguish their allegations of unfair business practices from their
16 allegations of unlawful or fraudulent business practices. As discussed above, they allege
17 generally that Defendant violated the UCL by:

- 18 a) Representing that advertisers are billed based on the number of actual and valid
19 clicks, yet charging . . . for invalid clicks;
- 20 b) Representing that Defendant has adequate measures in place to ensure that it only
21 reports and charges advertisers for valid clicks, when it does not;
- 22 c) Failing to disclose or adequately disclose that it charges . . . for invalid clicks;
- 23 d) Failing to disclose or adequately disclose that it does not have adequate measure
24 in place to ensure that it only reports and charges advertisers for valid clicks; and
- e) Failing to implement adequate measures to protect advertisers against charges for
 invalid clicks.

25 (FAC ¶¶ 93, 100.) California courts have extended the reliance requirement of *Tobacco II* at
26 least to some claims for unlawful conduct under the UCL. *See Hale v. Sharp Healthcare*, 183
27 Cal. App. 4th 1373, 1385 (2010). The California Court of Appeal noted in *Hale* that *Tobacco II*
28 “emphasize[d] that our discussion of causation in this case is limited to such cases where . . . a

1 UCL action is based on a *fraud theory involving false advertising and misrepresentations to*
2 *consumers.*” *Id.* (quoting *Tobacco II*, 46 Cal. 4th at 325, n.17) (emphasis in the original). The
3 court held that if the “basic allegation” is one of misrepresentation, a claim under the unlawful
4 prong of the UCL also must satisfy the reliance requirement. *Id.* Because Plaintiffs’ allegations
5 (a) through (d) are premised on a fraud theory involving misrepresentations and omissions, they
6 must allege reliance, irrespective of whether the claims are asserted under the fraud prong or the
7 unfair prong of the UCL. As discussed above, Plaintiffs’ current allegations of
8 misrepresentations and omissions are insufficiently specific.

9 Allegation (e) is not necessarily based on allegations of misrepresentations or omissions.
10 Plaintiffs’ allege that Defendant has failed to implement adequate measures to protect advertisers
11 from charges both for fraudulent third-party clicks and for non-fraudulent invalid third-party
12 clicks. California courts define an unfair business practice as one that 1) causes substantial
13 injury, 2) is not outweighed by any countervailing benefits to consumers or competition, and 3)
14 causes an injury that consumers themselves could not reasonably have avoided. *See Davis v.*
15 *Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 584 (Cal. App. 2d Dist. 2009) (applying the
16 unfairness test from 15 U.S.C. § 45(n) as applied by *Camacho v. Automobile Club of Southern*
17 *California*, 142 Cal. App. 4th 1394, 1405 (Cal. App. 2d Dist. 2006)). Plaintiffs, on behalf of the
18 putative class, allege sufficiently that they have been substantially injured because “[a]n injury
19 may be sufficiently substantial . . . if it does a small harm to a large number of people.”
20 *American Financial Services Asso. v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (discussing
21 substantial injury under 15 U.S.C. § 45(n)). They claim that Defendant easily could provide
22 safeguards to prevent billing for invalid and fraudulent clicks, (FAC ¶ 10), and that the
23 detriments of the subject practice are not outweighed by the countervailing benefits.

24 Ultimately, this claim mirrors Plaintiffs’ breach of contract claim. Plaintiffs allege
25 sufficiently that they reasonably could not have avoided the claimed injury because of
26 ambiguities in the contract as to the nature of “improper” clicks.⁵ Rather than being premised on

27
28 ⁵ Plaintiffs do not allege sufficiently that they could not have avoided the claimed injury
related to charges for “click fraud,” as the disclaimers in the agreement state unambiguously that

1 allegations of fraud or misrepresentations, the claim boils down to a dispute over contractual
2 interpretation, and accordingly it not subject to the pleading standards of Rule 9(b) or the reliance
3 requirements of *Tobacco II*. As discussed above, a systematic breach of contract may be an
4 unfair business practice. *See Smith*, 135 Cal. App. 4th at 1483.

5 **IV. DISPOSITION**

6 The motion to dismiss is granted with respect to Plaintiffs' breach of contract claim based
7 upon click fraud, claims under the unfair prong of the UCL based upon click fraud, and claims
8 under the unlawful and fraudulent prongs of the UCL. The motion otherwise will be denied.
9 Leave to amend is granted,⁶ any amended complaint shall be filed within thirty (30) days of the
10 date of this order.

11 IT IS SO ORDERED.

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13 DATED: 8/25/10

14 
15 JEREMY FOGEL
16 United States District Judge

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26 Defendant cannot be liable for "click fraud."

27 ⁶ In light of the time the instant case has been pending and the Court's effort to provide
28 Plaintiff with detailed guidance both in its order of April 22, 2010 and in this order, it is unlikely
that further leave to amend would be granted. *See Lee*, 245 F.3d at 1052.