

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RICK WOODS,)	Case No.: 5:11-CV-01263 EJD
)	
Plaintiff,)	ORDER GRANTING-IN-PART AND
)	DENYING-IN-PART MOTION TO
v.)	DISMISS FIRST AMENDED
)	COMPLAINT
GOOGLE, INC.,)	
)	(Re: Docket No. 73)
Defendant.)	

Presently before the court is Defendant Google Inc.’s (“Google”) Motion to Dismiss the First Amended Complaint (“FAC”) filed by Plaintiff Rick Woods (“Woods”), on behalf of himself and all others similarly situated. See Docket No. 73. Woods filed written opposition to the motion. See Docket No. 74. The court found this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and previously vacated the hearing date. Jurisdiction in this court arises pursuant to 28 U.S.C. § 1332(d)(2). For the reasons discussed below, Google’s motion to dismiss the FAC is DENIED IN PART and GRANTED IN PART with leave to amend.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. AdWords and AdSense

Google offers two advertising products: AdWords and AdSense. FAC, Docket No. 68, ¶¶ 1, 107. AdWords allows advertisers to display advertisements on google.com and other web sites across the Internet. Id. ¶ 1. AdWords advertisers pay Google each time their ad is “clicked.” Id.

1 AdSense, by contrast, allows third parties to host or “publish” Google ads on their web sites. Id. ¶ 1
2 n.1. These third parties receive a share of the revenue Google receives for each click on an
3 AdWords advertisement that appears on their web sites. Id.

4 **B. The Agreement**

5 Advertisers can join the AdWords program online by clicking through and accepting the
6 Google Inc. Advertising Program Terms (“Agreement”). Id. ¶¶ 2, 8. The Agreement states that it
7 “constitutes the entire and exclusive agreement between the parties with respect to the subject
8 matter” thereof, and that “[n]o statements or promises have been relied upon in entering into this
9 Agreement except as expressly set forth” and “any conflicting or additional terms contained in any
10 other document . . . or oral discussions are void.” Id. Ex. A § 9.

11 According to the Agreement, “[p]rogram use is subject to all applicable Google and Partner
12 policies” and such policies “may be modified at any time.” Id. Ex. A § 1. Under Section 2 of the
13 Agreement, AdWords ads:

14 may be placed on (y) any content or property provided by Google (“Google
15 Property”), and, unless Customer opts out of such placement in the manner specified
16 by Google, (z) any other content or property provided by a third party (“Partner”)
upon which Google places ads (“Partner Property”). Customer authorizes and
consents to all such placements.

17 Id. Ex. A § 2. The Agreement also provides that “[t]o the fullest extent permitted by law, Google
18 disclaims all guarantees regarding positioning, levels, quality, or timing of” clicks and the
19 adjacency or placements of ads within a program. Id. Ex. A § 5.

20 Under the Payment Terms, the Agreement asserts “[c]harges are solely based on Google’s
21 measurements for the applicable Program, unless otherwise agreed to in writing.” Id. Ex. A § 7.
22 The “[c]ustomer’s exclusive remedy, and Google’s exclusive liability, for suspected invalid
23 impressions or clicks is for [c]ustomer to make a claim for a refund in the form of advertising
24 credits.” Id. Ex. A § 5. Furthermore, “[t]o the fullest extent permitted by law, [c]ustomer waives all
25 claims relating to charges (including without limitation any claim for charges based on suspected
26 invalid clicks) unless claimed within 60 days after the charge.” Id. Ex. A § 7.

27 **C. Smart Pricing**

1 The AdWords help site promotes its “automatic pricing discount feature” called Smart
2 Pricing. Id. Ex. B. Smart Pricing is “a feature that automatically reduces the price advertisers pay
3 for clicks if [Google’s] data shows that a click from a Display Network¹ page is less likely to result
4 in a conversion.”² Id. Smart Pricing works as follows:

5 For clicks arising from websites having conversion scores less than google.com,
6 Google discounts the price of all the clicks. The total amount of the discount is
7 equal to the price of that click multiplied by (1 minus the conversion score for the
8 website or property originating the click). The Smart Pricing formula is expressed as
9 follows: Smart Pricing discount = Price of Click x (1 - Conversion Score)

10 Id. ¶ 28.

11 Woods alleges Google overcharged him by not applying the Smart Pricing discount formula
12 to numerous clicks. Id. ¶ 9. Additionally, Woods believes Google deprived him of the Smart
13 Pricing discount because it made preferential secretive deals with Special Partners. Id. Woods
14 brings four causes of action regarding the Smart Pricing issue: (1) breach of contract; (2) breach of
15 the implied covenant of good faith and fair dealing; (3) violation of the California Unfair
16 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*; and (4) violation of the
17 California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500 *et seq.*

18 **D. Non-Compliant Sites**

19 According to the FAC, Google represents to AdWords advertisers that “all web sites and
20 products are reviewed and monitored according to Google’s rigorous standards,” and “AdWords
21 ads will continue to appear only on high-quality sites and products.” Id. ¶ 105. These rigorous
22 standards include the AdSense Program Policies (“AdSense Policies”), which state how and where
23 Google’s publishers may display AdWords ads. Id. ¶ 107. The AdSense Policies prohibit certain
24 conduct such as the display of ads in connection with incentivized searching, tool bars, mobile

25 ¹ The “Google Network” consists of two components: the “Search Network” and the “Display
26 Network.” The Search Network consists of websites, like www.google.com or www.aol.com, that
27 contain a Google search box. In contrast, the Display Network consists of websites that partner
28 with Google (like www.mapquest.com and www.nytimes.com), specific Google properties (like
YouTube and Gmail), and websites and search engines available on mobile devices with full
Internet browsers. Id. ¶ 22 n.6.

² Google defines a conversion as a click resulting in an actual business result (e.g., online sale,
registration, phone call, or newsletter sign-up). Id. ¶ 23

1 applications, and clickable backgrounds. Id. Woods alleges the Agreement mandates Google to
2 enforce the AdSense Policies to its third-party publishers. Id. ¶ 106.

3 Moreover, Woods believes Google secretly entered into preferential agreements with its
4 Special Partners whereby the Special Partners were exempted from compliance with the AdSense
5 Policies. Id. ¶ 113. Woods further alleges Google exempted mobile publishers from compliance
6 with the AdSense Policies. Id. ¶ 145. As a result of Google’s actions, “advertisers had to pay for
7 accidental and meaningless clicks that are worth less than what Google charged for them.” Id. ¶
8 114. Woods brings four causes of action regarding the non-compliant site issue: (1) breach of
9 contract; (2) breach of the implied covenant of good faith and fair dealing; (3) violation of the
10 UCL; and (4) violation of the FAL.

11 **E. Location Targeting**

12 During the sign-up and ad creation process Google provides advertisers with the option to
13 specify the geographic locations in which they want their ads to appear. Id. ¶ 203. Specifically,
14 advertisers are presented with the following question in the sign-up and ad creation process:
15 “Location [help link] In what geographical location do you want your ads to appear?” Id. ¶ 204,
16 Ex. J. The help link embedded in the foregoing question, when clicked, opens a text box stating:

17 “Location targeting
18 You can target your ads to almost any set of locations, including countries,
19 territories, regions, cities and custom areas. For example, you could target specific
20 regions within the United States and a few large English-speaking cities in Europe.
21 You can view or edit your targeting options from the Settings tab for your
22 campaign.
23 Learn more about location targeting options. [hyperlink]”

21 Id. ¶ 205, Ex. K. Woods responded to the location question by selecting “Metro area: Ft. Smith-
22 Fayetteville-Springdale-Rogers AR, US[.]” Id. ¶ 206. Later, Woods discovered that Google
23 distributed his ads to users outside of his designated geographic location. Id. ¶ 208. Woods alleges
24 the location setting statements were fraudulent in violation of the UCL.

25 **E. Procedural History**

26 Woods commenced the instant action in this court on March 15, 2011. Following Google’s
27 Motion to Dismiss (see Docket No. 41), Judge Fogel dismissed Wood’s original Complaint
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1 because it failed to state a claim upon which relief may be granted. See Docket No. 64. Woods
2 filed its FAC on September 9, 2011.

3 II. LEGAL STANDARD

4 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
5 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which it
6 rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). A
7 complaint which falls short of the Rule 8(a) standard may therefore be dismissed if it fails to state a
8 claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is
9 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a
10 cognizable legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir.
11 2008).

12 When deciding whether to grant a motion to dismiss, the court must accept as true all “well-
13 pleaded factual allegations.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). The court must also
14 construe the alleged facts in the light most favorable to the plaintiff. Love v. United States, 915
15 F.2d 1242, 1245 (9th Cir. 1988). However, “courts are not bound to accept as true a legal
16 conclusion couched as a factual allegation.” Twombly, 550 U.S. at 555. Moreover, anything
17 beyond the pleadings generally may not be examined. Hal Roach Studios, Inc. v. Richard Feiner &
18 Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). But “material which is properly submitted as part of
19 the complaint may be considered.” Twombly, 550 U.S. at 555.

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

5 A. Breach of Contract

6 Under California law, a claim for breach of contract requires “(1) existence of the contract;
7 (2) plaintiff’s performance or excuse of nonperformance; (3) defendant’s breach; and (4) damages
8 to plaintiff as a result of the breach.” CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226,
9 1239 (2008).

10 1. Smart Pricing (Count 1)

11 Woods’ contract claim centers on Section 7 of the Agreement, which provides in pertinent
12 part: “Charges are solely based on Google’s measurements for the applicable Program[.]” FAC Ex.
13 A § 7. Woods interprets “measurements” to mean and include Google’s Smart Pricing
14 measurement. Id. ¶ 49. Woods attached printouts from the AdWords Help Center site to the FAC
15 (Exhibits B-G) to support this interpretation. Id. ¶ 51. Google argues that (1) the Agreement
16 contains no Smart Pricing obligation, (2) the court should not consider Exhibits B-G to interpret the
17 term “measurements,” and (3) the FAC fails to allege Google did not apply the Smart Pricing
18 formula to clicks on the “Display Network.” Mot. at 9:8-13:17.

19 Under California law, “[t]he fundamental goal of contract interpretation is to give effect to
20 the mutual intent of the parties as it existed at the time of contracting.” Miller v. Glenn Miller
21 Prods., Inc., 454 F.3d 975, 989 (9th Cir. 2006) (per curiam) (quoting U.S. Cellular Inv. Co. of L.A.
22 v. GTE Mobilnet, Inc., 281 F.3d 929, 934 (9th Cir. 2002)). “Because California law recognizes that
23 the words of a written instrument often lack a clear meaning apart from the context in which the
24 words are written, courts may preliminarily consider any extrinsic evidence offered by the parties.”
25 Id. at 989–90; see also Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384 (2006) (“[E]ven if a
26 contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence
27 which reveals more than one possible meaning to which the language of the contract is yet
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1 reasonably susceptible.” (quoting Morey v. Vannucci, 64 Cal. App. 4th 904 (1998)). ““If the court
2 decides, after consideration of this evidence, that the language of a contract, in the light of all the
3 circumstances, is fairly susceptible of either one of the two interpretations contended for, extrinsic
4 evidence relevant to prove either of such meanings is admissible.” Miller, 454 F.3d at 990
5 (quoting Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33 (1968)).

6 A “court may not dismiss on the pleadings when one party claims that extrinsic evidence
7 renders the contract ambiguous.” A. Kemp Fisheries Inc. v. Castle & Cookie, Inc., 852 F.2d 493,
8 496 n.2 (9th Cir. 1988). A party’s assertion of ambiguity, however, “does not require the district
9 court to allow additional opportunities to find or present extrinsic evidence if the court considers
10 the contract language and the evidence the parties have presented and concludes that the language
11 is reasonably susceptible to only one interpretation.” Skilstaf, Inc. v. CVS Caremark Corp, 669 F.
12 3d 1005, 1017 (9th Cir. 2012). “That conclusion can be reached on a motion for summary
13 judgment or, as here, on a motion to dismiss if the evidence can properly be considered under Rule
14 12(b)(6).” Id.

15 Google argues that the contract imposes obligations on the advertiser only and does not
16 obligate Google to base charges on the Smart Pricing formula. Google further argues that
17 interpreting the contract in a manner that obligates Google to base charges on the Smart Pricing
18 formula would add new terms and vary the term of the contract. See Mot. at 11-12.

19 “Although extrinsic evidence cannot be used to add to, detract from, or vary the
20 terms of a written contract, the terms must first be ascertained before it can be
21 determined whether the extrinsic evidence is being used impermissibly. At least a
22 preliminary consideration of all evidence offered to prove the parties’ intention—
including testimony as to the circumstances surrounding the contract—is necessary
to determine those terms.”

23 Zenger-Miller, Inc. v. Training Team, GmbH, 757 F. Supp. 1062, 1067 (N.D. Cal. 1991).

24 Here, Exhibits B-G are attached to the complaint and therefore can be properly considered
25 under Rule 12(b)(6). The court preliminarily considers this extrinsic evidence to determine whether
26 the “measurements” clause is reasonably susceptible to more than one interpretation. These
27 exhibits indicate that the Smart Pricing formula is one of the measurements Google uses to
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1 calculate charges for clicks, is included in the AdWords program, and is applied to Display
2 Network clicks. For example, in Exhibit B, Google’s AdWords Help Center site states that
3 AdWords includes two automatic pricing discount features, one of which is the Smart Pricing
4 formula. FAC Ex. B.³ The Smart Pricing feature “automatically reduces the price advertisers pay
5 for clicks if [Google’s] data shows that a click from a *Display Network* page is less likely to result
6 in a conversion.” *Id.* (emphasis added). Exhibits C, D, and F also make clear that the Smart Pricing
7 formula only reduces the price for a click on a Display Network page that is likely to result in a
8 conversion. *See id.* Ex. C (“Smart Pricing is a feature that automatically reduces the price
9 advertisers pay for clicks if our data shows that a click *from a Display Network page* is less likely
10 to result in a conversion.”) (emphasis added); Ex. D (Glossary entry for “Smart pricing” explains
11 that Google is “constantly analyzing data across our search and Display Network You may
12 notice a reduction in the cost of clicks *from Display Network sites.*”) (emphasis added.); and Ex. F
13 (“*Content clicks* may be priced differently than search clicks. Using smart pricing, AdWords
14 automatically adjusts the cost of clicks for keyword-targeted ads that appear on *content network*
15 *pages.*”) (emphasis added). Thus, these exhibits do not show that the “measurements” clause is
16 reasonably susceptible to Woods’ interpretation that Smart Pricing applies to all clicks.⁴ The
17 exhibits, however, do support the interpretation that the contract language, “[c]harges are solely
18 based on Google’s measurements for the applicable Program,” means that Google must base the
19 charges for Display Network clicks, at least in part, on the Smart Pricing formula. *Id.* ¶ 49.

20 The arguments regarding ambiguity here are very similar to the arguments in Checkmate
21 Strategic Group v. Yahoo!, Inc., No. 2:05-CV-4588-CAS-FMO, 2005 U.S. Dist. LEXIS 46959, at

22 _____
23 ³ The AdWords Help Center printouts attached to Google’s motion do not contradict this meaning.
Decl. John M. Neukom Exs. 1-3.

24 ⁴ Woods argues that the court must accept his allegation as true that Smart Pricing applies to the
25 Search Network as well as the Display Network. *See* Opp’n at 8 n.17. The court, however need not
26 accept as true allegations that contradict matters that are either subject to judicial notice or attached
27 as exhibits to the complaint. *See In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055
(9th Cir. 2008). Here, Exhibits B, C, D and F to the complaint contradict Woods’ allegation that
28 Smart Pricing applies to clicks on the Search Network. Thus, the court need not accept that
allegation as true.

1 *14-15 (C.D. Cal. Dec. 19, 2005)). In Checkmate Strategic Group, the plaintiff alleged that it
2 entered into an agreement with Yahoo for the placement of pay-per-click advertisements, which
3 stated the advertiser would be “charged for all clicks on your search listing” and that the cost of
4 each of the listings “shall be computed according to Overture’s Marketplace rules.” Id. at *2. The
5 plaintiff argued that “Overture’s Marketplace rules” were not defined in the Agreement but were
6 set forth in the “policies” section of Yahoo’s website for the Overture program, which stated that
7 Yahoo had software that ensured advertisers do not get charged for invalid clicks. Id. at *2. The
8 plaintiff filed a breach of contract claim alleging Yahoo breached the contract by charging plaintiff
9 for invalid clicks. Yahoo moved to dismiss the claim arguing that the contract was unambiguous
10 that plaintiff would pay for “all clicks” and the phrase “Overture’s Marketplace rules” could not be
11 interpreted to require Yahoo ensure charges did not include invalid clicks. The court denied
12 Yahoo’s motion to dismiss and found that the term “Overture’s Marketplace rules” was ambiguous
13 and was plausibly susceptible to the interpretation that they referred to the “policies” section of the
14 Yahoo website. Id. at *14. See also Lambotte v. IAC/InterActiveCorp, No. 08-CV-04263, 2008
15 U.S. Dist. LEXIS 91683, at *10–14 (C.D. Cal. Nov. 4, 2008) (recognizing plaintiff’s interpretation
16 of the term “user” “may not be the most reasonable interpretation[.]” but, nonetheless, denying the
17 dismissal motion concluding it “is required under California law to consider extrinsic evidence
18 regarding the possible ambiguity”); In re Yahoo! Litig., 251 F.R.D. 459, 471–72 (C.D. Cal. 2008)
19 (allowing plaintiffs to conduct discovery regarding their interpretation that references to
20 “Sponsored Search” and “Content Match” products indicate a promise to target advertisements
21 because “[a]t this stage of the proceedings . . . the Court is unable to dismiss, out of hand, plaintiffs’
22 contention that extrinsic evidence will show that they bargained for targeted advertising services,
23 even if the Agreement appears on its face to state otherwise.”).

24 Here, even if the court were to find that the phrase “[c]harges are solely based on Google’s
25 measurements for the applicable” was reasonably susceptible to the interpretation that Google was
26 obligated to apply the Smart Pricing formula to clicks on the Display Network, Woods has not
27 sufficiently alleged that Google failed to do so. Although Woods alleges that Google failed to
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1 Smart Price clicks on web sites operated by Google partner IAC (FAC ¶¶ 29-34, 41), he does not
2 allege that IAC or the IAC web sites at issue are part of the Display Network. Woods alleges that
3 Google failed to Smart Price clicks on web sites operated by Google partners Peeplo.com, Conduit,
4 InfoSpace and Xacti (*id.* ¶ 42), but does not allege that these partners or the cited web sites are part
5 of the Display Network. Woods alleges that Google failed to Smart Price “clicks from mobile
6 devices” (*id.* ¶ 39), but does not allege that any such clicks “from mobile devices” were made on
7 mobile devices with full Internet browsers, such that they would be on the Display Network (FAC
8 ¶ 6 n.6).⁵ Thus, even if the contract were interpreted to require Google to apply Smart Pricing to all
9 Display Network clicks, Woods had not stated a claim for a breach of contract because he has not
10 pleaded that any of the clicks that Google failed to Smart Price were from the Display Network.
11 Therefore, the motion to dismiss Woods’ breach of contract claim concerning Smart Pricing is
12 GRANTED with leave to amend.

13 2. Non-Compliant Sites (Count 5)

14 Section 1 of the Agreement states, “[p]rogram use is subject to all applicable Google and
15 Partner policies.” *Id.* Ex. A § 1. Woods argues that the potential ambiguities in Section 1 and
16 Section 2 of the Agreement, render this phrase reasonably susceptible to the interpretation that
17 Google is obligated to abide by the AdSense Policies. Mot. at 10:17-13:6. Google allegedly failed
18 to abide by the AdSense Policies by displaying Woods’ ads on sites that Google exempted from the
19 AdSense Policies and charging for such ads. FAC ¶¶ 113-15, 156. On the contrary, Google argues

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21 ⁵ Woods briefly argues that the FAC incorporates by referencing a billing statement. *See* Opp’n at
22 8 n.15; Degan Decl. Ex. 1. This document is a screenshot of a billing record taken on August 20,
23 2011 showing that two web pages identified in the FAC are listed as Display Network pages.
24 Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the
25 contents of the complaint. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may
26 consider evidence on which the complaint “necessarily relies” if: (1) the complaint refers to the
27 document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the
28 authenticity of the copy attached to the 12(b)(6) motion. *Id.* Woods argues he references the
document in paragraphs 36 and 43 of the FAC. Opp’n at 8 n.15. Paragraph 43 does not reference a
document. Paragraph 36 appears to refer to a different billing statement than the one provided in
the Degan Declaration. Additionally, the screenshot itself was created after the FAC was filed,
(*see* Degan Decl. ¶ 3 saying “created on August 10, 2012”) and no further information is provided
about whether the information shown in the document was available prior to the filing of the FAC.
Thus, the complaint does not refer to the document, and Woods has not shown that the complaint
necessarily relies on this document.

1 that (1) the Agreement expressly disavows any guarantees regarding ad placement, (2) that nothing
2 in the AdWords Agreement requires Google to apply AdSense policies to advertisers who are not
3 parties to the AdSense agreement, and (3) Woods is barred from asserting contract claims based on
4 ad placement because he waived all claims related to the charges.

5 Woods contends the term, “program use,” imposes an obligation on Google. However,
6 because advertisers are the only parties who “use” the AdWords Program, Woods’ interpretation
7 contradicts the plain language of the Agreement. Additionally, Woods asserts that the phrase “upon
8 which Google places ads,” which appears in Section 2 of the Agreement, “authorizes Google to
9 place ads only on sites in the ‘Google Network.’” Opp’n at 12:18-13:1. That phrase, however,
10 appears within the sentence, “Customer understands and agrees that ads may be placed on . . . any
11 other content or property provided by a third party (‘Partner’) upon which Google places ads.”
12 FAC Ex. A § 2. The phrase “upon which Google places ads” thus modifies “any other [third-party]
13 content or property,” and therefore does not obligate Google to place ads only on sites in the
14 Google Network. *Id.* Both Section 2 and Section 5 of the Agreement expressly provide that Google
15 is not restricted in how it may place ads. *See id.* Ex. A § 2 (“ads may be placed . . . on any other
16 content or property provided by a third party (‘Partner’)”); Ex. A § 5 (“[t]o the fullest extent
17 permitted by law, Google disclaims all guarantees regarding positioning, levels, quality, or timing
18 of . . . clicks . . . [and] the adjacency or placements of ads within a Program.”).

19 Thus, the Agreement expressly disavows any guarantees regarding ad placement and is
20 unambiguous on its face. Woods has not presented the court with any extrinsic evidence showing
21 there is more than one possible meaning to this portion of the contract. Because the Agreement is
22 reasonably susceptible to only one interpretation regarding ad placement, Woods’ assertions of
23 ambiguity “does not require the district court to allow additional opportunities to find or present
24 [additional] extrinsic evidence . . .” *Skilstaf, Inc.*, 669 F.3d at 1017.

25 Accordingly, the FAC does not adequately allege Google breached any term in the
26 Agreement. Google’s motion to dismiss Count 5 therefore is GRANTED with leave to amend.

27 **B. Breach of the Implied Covenant of Good Faith and Fair Dealing (Counts 2 and 6)**

1 To allege a claim for breach of the covenant of good faith and fair dealing, a plaintiff must
2 allege the following elements: (1) the plaintiff and the defendant entered into a contract; (2) the
3 plaintiff did all or substantially all of the things that the contract required him to do or that he was
4 excused from having to do; (3) all conditions required for the defendant's performance had
5 occurred; (4) the defendant unfairly interfered with the plaintiff's right to receive the benefits of the
6 contract; and (5) the defendant's conduct harmed the plaintiff. See Judicial Counsel of California
7 Civil Jury Instructions § 325 (2011); see also Oculus Innovative Sciences, Inc. v. Nofil Corp., No.
8 C 06-01686 SI, 2007 WL 2600746, at *4 (N.D. Cal. Sept. 10, 2007). A plaintiff must show "that
9 the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract
10 term, demonstrates a failure or refusal to discharge contractual responsibilities." Careau & Co. v.
11 Security Pacific Business Credit, Inc., 22 Cal. App. 3d 1371, 1395 (1990).

12 Judge Fogel previously dismissed Woods' implied-covenant claims because Woods failed
13 to allege adequately that Google deprived Woods of a benefit to which he was entitled under the
14 Agreement. Order at 11:4-5. Here, Woods again fails to show that Google had any obligation to
15 enforce the AdSense Agreement against publishers. Similarly, Woods has not pleaded that Google
16 failed to apply the Smart Pricing formula to any Display Network page. Thus, the FAC does not
17 allege adequately that Google deprived Woods of a benefit to which he was entitled under the
18 Agreement. Accordingly, the motion to dismiss Woods' implied-covenant claims is GRANTED
19 with leave to amend.

20 **C. Violation of the UCL (Counts 3 and 7)**

21 Woods contends that Google's conduct concerning the Smart Pricing issue and the non-
22 compliant sites has violated all three prongs of the UCL. With respect to these accusations, the
23 court GRANTS the motion with leave to amend for the following reasons.

24 **1. Unlawful**

25 "By proscribing 'any unlawful' business practice, [the UCL] 'borrows' violations of other
26 laws and treats them as unlawful practices that the unfair competition law makes independently
27 actionable." Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180
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1 (1999). “The only unlawful activities alleged in the [FAC] are Google’s alleged breach of contract
2 and breach of the implied covenant of good faith and fair dealing. Because Woods did not plead
3 either of those claims adequately, he failed to state a claim under this prong of the UCL.” Order at
4 11:23-26. Thus, for the same reason Judge Fogel dismissed the original Complaint, Woods has
5 failed to state a claim under the unlawful prong of the UCL.

6 **2. Unfair**

7 “An act or practice is unfair if the consumer injury [1] is substantial, [2] is not outweighed
8 by any countervailing benefit to consumers or to competition, and [3] is not an injury the
9 consumers themselves could reasonably have avoided.” Daugherty v. Am. Honda Motor Co., 144
10 Cal. App. 4th 824, 839 (2006). Plaintiffs must allege facts to support all three elements of a UCL
11 unfair business claim. Id. Woods argues that Google’s alleged practices of not applying the Smart
12 Pricing formula and not complying with the AdSense Policies are unfair. Woods, however, has not
13 alleged that Google failed to apply Smart Pricing to clicks on Display Network pages or pleaded
14 facts showing that the Smart Pricing discount applies to clicks on other pages. Likewise, Woods
15 has not pleaded facts showing that Google owed an obligation to Woods to enforce its AdSense
16 Policies. Unless Woods can plead facts showing that he and other advertisers had a legal right to
17 the Smart Pricing discounts that was violated or to the enforcement of the AdSense Policies, he
18 cannot show any cognizable injury. Thus, for the same reason Judge Fogel dismissed the original
19 Complaint, Woods has failed to state a claim under the unfair prong of the UCL.

20 **3. Fraudulent**

21 Woods alleges that Google’s statements pertaining to its AdWords program were fraudulent
22 in violation of § 17200 because they were likely to deceive advertisers into believing (1) that
23 Google would apply Smart Pricing to all clicks that were less likely to convert than clicks from
24 google.com and (2) that Google would apply the AdSense Policies to all websites. Id. ¶¶ 84, 182.
25 Google contends that Woods has failed to establish standing for his misrepresentation claims. Mot.
26 at 22:5-23:7.

1 To establish standing as a class representative for a misrepresentation claim under the UCL,
2 a plaintiff must show he personally lost money or property because of his own actual and
3 reasonable reliance on the allegedly untrue or misleading statements. See In re Tobacco II Cases,
4 46 Cal. 4th 298, 326-28 (2009). Google argues that Woods cannot have actually or reasonably
5 relied on any statement outside the scope of the AdWords Agreement because the Agreement itself
6 expressly states that “[n]o statement or promises have been relied upon in entering into this
7 Agreement except as expressly set forth herein,” and that “any conflicting or additional terms
8 contained in any other documents . . . are void.” FAC Ex. A § 9. Google contends that as a
9 practicing attorney, Woods was a sophisticated party in a position to understand the Agreement
10 into which he was entering contained a no-reliance clause.

11 Reasonableness of reliance is ordinarily a question of fact. Guido v. Koopman, 1 Cal. App.
12 4th 837, 843 (1991). However, under California law, “whether a party’s reliance was justified may
13 be decided as a matter of law if reasonable minds can come to only one conclusion based on the
14 facts.” Id.; see also In re Facebook PPC Advertising Litigation, 2010 WL 5174021, at *6 (N.D.
15 Cal. Dec. 15, 2010) (holding that contractual disclaimers regarding advertising on that web
16 property were unambiguous, and therefore that “Plaintiffs must show [at the pleadings stage] that
17 they were reasonable in relying on the representations in the Help Center even in light of these
18 disclaimers.”). In Guido, the California Court of Appeal concluded as a matter of law that reliance
19 alleged by an attorney on statements outside a written, integrated contract was not reasonable.
20 Guido, 1 Cal. App. 4th at 843-44.

21 In light of Woods’ sophistication as an attorney, Woods could not have reasonably relied
22 upon the AdSense Policies because, as discussed above, they contradict the clear language of the
23 Agreement. Woods’ reliance upon Google’s Smart Pricing statements, however, may have been
24 justified because these statements were used to interpret an ambiguous clause in the Agreement.
25 Nevertheless, even if Woods reasonably relied on Google’s Smart Pricing statements, Woods has
26 not stated facts showing that the Smart Pricing statements were untrue or misleading. The
27 statements that Woods alleged he relied upon state that Smart Pricing applies to clicks from
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1 Display Network pages, FAC ¶ 76, but Woods has not alleged that Google failed to apply the
2 Smart Pricing formula to Display Network pages.

3 **D. Violation of the FAL (Counts 4 and 8)**

4 Woods' FAL claims fail for the same reason his UCL claims fail for lacking of standing.
5 Similar to a misrepresentation claim under the UCL, a FAL claim must show the plaintiff suffered
6 an injury due to his own actual and reasonable reliance on the allegedly untrue or misleading
7 statements. See Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 326 n.9 (2011). Because Woods
8 did not adequately establish standing, as discussed above, the motion to dismiss Woods' FAL
9 claims is GRANTED with leave to amend.

10 **E. Location Targeting - Violation of the UCL (Count 9)**

11 To state a misrepresentation claim under the fraudulent prong of the UCL, “‘it is necessary
12 only to show that members of the public are likely to be deceived’ by the business practice . . . at
13 issue.” Kowalsky v. Hewlett-Packard Co., 771 F. Supp. 2d 1156, 1159 (N.D. Cal. 2011) (quoting
14 In re Tobacco II Cases, 46 Cal. 4th at 312).

15 Woods alleges Google made fraudulent representations that were “‘likely to deceive
16 advertisers into believing that Google would limit the distribution of ads to users located in the
17 geographic locations designated by advertisers.” FAC ¶ 223. Specifically, the FAC alleges that
18 when Woods was creating his advertisements on September 30, 2009, Google’s AdWords site
19 asked him, “‘In what geographical locations do you want your ads to appear?’” FAC ¶ 216. The help
20 link adjacent to this statement explained that Woods could

21 “target [his] ads to almost any set of locations, including countries, territories,
22 regions, cities and custom areas. For example, [Woods] could target specific regions
23 within the United States and a few large English-speaking cities in Europe. [Woods]
can view or edit [his] targeting options from the Settings tab for [his] campaign.”

24 Id. By answering this question, Woods expected he was establishing as his advertising “Settings”
25 the “geographical locations” in which his ads would appear. Id. ¶¶205-07, 216-17; Ex. J. Moreover,
26 Woods alleges Google distributed ads to users beyond the geographic locations designated by
27 advertisers, and charged advertisers for clicks on their ads originating outside the designated
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1 geographic locations. Id. ¶ 223. Google contends the FAC does not allege Google made any
2 representations, guarantees, or other commitments that all of Woods’ ads would appear within only
3 certain areas of Arkansas. Mot. at 23:19-22.

4 Here, Woods has identified the specific statements that he alleges are likely to deceive—the
5 geographical location question and text of the adjacent help link. Google argues that the court
6 cannot infer a misrepresentation from this question without further allegations about whether
7 Woods also read other web pages that disclose the possibility of ads appearing to users in other
8 locations. Mot. at 23:19-24:4. Google, however, has not presented these additional web pages to
9 the court or cited any authority that Google’s statements about location targeting options would not
10 mislead a reasonable consumer. Moreover, California courts “have recognized that whether a
11 business practice is deceptive will usually be a question of fact not appropriate for decision on [a
12 motion to dismiss].” Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008). Thus,
13 Woods has sufficiently pleaded a claim under the fraudulent prong of the UCL.

14 Additionally, Google argues Woods did not establish standing for his UCL claim because
15 he failed to plead any cognizable injury. Reply, Docket No. 76, at 14:24-15:13. To establish
16 standing under the UCL, a plaintiff must show he personally lost money or property because of his
17 own actual and reasonable reliance on the allegedly untrue or misleading statements. See In re
18 Tobacco II Cases, 46 Cal. 4th at 326-28. According to the FAC, Google distributed over \$20.00 of
19 exemplary clicks that were in violation of Woods’ Campaign Settings. FAC ¶¶ 209, 212. Had
20 Woods known Google distributed ads to users beyond the chosen geographic locations, he would
21 not have advertised with Google. Id. ¶ 219. This qualifies as a legally cognizable injury under the
22 UCL. See Degelmann v. Advanced Med. Optics Inc., 659 F.3d 835, 838 (9th Cir. 2011) (finding
23 that plaintiffs had standing to bring a UCL claim because they alleged that “[h]ad the product been
24 labeled accurately, they would not have been willing to pay as much for it as they did, or would
25 have refused to purchase the product altogether”).

26 Thus, Woods has pleaded facts sufficient to state a UCL claim. Google’s motion to dismiss
27 Count 9 therefore is DENIED.

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IV. ORDER

Based on the foregoing, Defendant's Motion to Dismiss the FAC is GRANTED WITH LEAVE TO AMEND as to Counts 1 through 8. Their Motion to Dismiss is DENIED as to Count 9.

Any amended complaint must be filed no later than 30 days from the filing of this order.

IT IS HEREBY ORDERED

Dated:

