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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

BULLETIN MARKETING LLC,
Plaintiff,
v.
GOOGLE LLC,
Defendant.

Case No. 17-cv-07211-BLF

**ORDER GRANTING WITH LEAVE TO
AMEND IN PART AND WITHOUT
LEAVE TO AMEND IN PART
DEFENDANT’S MOTION TO DISMISS**

[Re: ECF 27]

This action involves purported unlawful conduct by Defendant Google LLC (“Google”) in relation to its online advertisement marketplace services. Google moves to dismiss certain claims in Plaintiff Bulletin Marketing LLC’s (“Bulletin Marketing”) first amended complaint. Mot., ECF 27. Bulletin Marketing opposes the motion. Opp’n, ECF 28. The Court has considered the parties’ briefing and oral argument presented at the hearing on the motion held on June 21, 2018. For the reasons stated below and on the record at the hearing, Google’s motion to dismiss is **GRANTED WITH LEAVE TO AMEND IN PART and WITHOUT LEAVE TO AMEND IN PART.**

I. BACKGROUND

Google is the largest online marketing/advertising business in the world. First. Am. Compl. (“FAC”) ¶ 9, ECF 25. The AdWords Advertising Program (“AdWords”) is Google’s primary advertising service. *Id.* The Google AdSense Content program (“AdSense”) enables website publishers to earn revenue from AdWords advertisements displayed on websites under their control. *Id.* ¶ 10.

Like AdSense, Google’s DoubleClick Ad Exchange (“AdX”) service allows website publishers to display advertisements in exchange for a share of the advertising revenue paid to

1 Google by advertisers for each “impression” (i.e., each time a unique user views the publisher’s
2 website displaying the advertisements). FAC ¶ 11. AdX is an ad exchange, which means that it
3 consolidates advertising demand from AdWords and other ad networks, exchanges, and demand-
4 side platforms to participating AdX publishers. *Id.* ¶ 13. AdX allows businesses to participate on
5 the publishing side as managers of websites belonging to their clients. *Id.* ¶ 16. Such businesses
6 are called Network Partner Managers (“NPM”). *Id.* Bulletin Marketing was an NPM. *Id.*

7 The Google Services Agreement, which Bulletin Marketing entered into, governs the
8 relationship between AdX publishers and Google. FAC ¶ 19; *see* Ex. 1 to FAC (“Google Services
9 Agreement”), ECF 25-1. The Google Services Agreement contains the following provision:

10 **Section 8.2: Google Payments**

11 . . .

12 (b) Google’s payments for the Services under this Agreement will
13 be based on Google’s accounting which may be filtered to exclude
14 (i) invalid queries, impressions, conversions, or clicks, and (ii) any
amounts refunded to advertisers in connection with Company’s
failure to comply with this Agreement, as reasonably determined by
Google.

15 *Id.* ¶ 20.

16 On or around February 16, 2017, a few days before Google was due to pay Bulletin
17 Marketing’s accrued AdX earnings, Google disabled Bulletin Marketing’s account for purported
18 policy violations. FAC ¶ 27. Although Google never sent any notice to Bulletin Marketing that
19 its AdX account was in violation of any policy, Google withheld payment of all of Bulletin
20 Marketing’s accrued AdX earnings for the last earnings period. *Id.* ¶ 30. Bulletin Marketing
21 submitted an internal appeal to Google. *Id.* ¶ 33. However, Google rejected that appeal through
22 an auto-generated e-mail. *Id.* ¶ 35. According to Bulletin Marketing, Google always confiscates
23 the entirety of an AdX publisher’s accrued earnings even if a substantial portion of the earnings
24 resulted from valid website traffic. *See id.* ¶ 37.

25 On December 20, 2017, Bulletin Marketing filed this purported class action against
26 Google. The operative FAC was filed on March 20, 2018. In the FAC, Bulletin Marketing asserts
27 four class action claims: (1) breach of contract; (2) breach of implied covenant of good faith and
28 fair dealing; (3) breach of implied duty to perform with reasonable care; and (4) violation of

1 California’s Unfair Competition Law. Google moves to dismiss claims 2 to 4.

2 **II. LEGAL STANDARD**

3 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
4 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
5 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When
6 considering such a motion, the Court “accept[s] factual allegations in the complaint as true and
7 construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St.*
8 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, “[t]hreadbare
9 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
10 suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

11 **III. GOOGLE’S REQUEST FOR JUDICIAL NOTICE**

12 In connection with its reply, Google requests that the Court take judicial notice of the
13 following five documents: (1) Third Amended Complaint in *Free Range Content v. Google Inc.*,
14 No. 5:14-cv-2329 (N.D. Cal.); (2) Amended Complaint in *Online Global, Inc. et al. v. Google*
15 *Inc.*, No 3:16-cv-5822 (N.D. Cal.); (3) Amended Complaint in *Super Cray Inc. v. Google Inc.*, No.
16 5:15-cv-0109 (N.D. Cal.); (4) Complaint in *Ogtanyan v. Google Inc.*, No. 1-14-cv-259301 (Cal.
17 Super. Ct.); and (5) Amended Class Action Complaint in *AdTrader, et al. v. Google LLC*, No.
18 5:17-cv-7082-BLF (N.D. Cal.). Reply 5–6 n.5, ECF 34; Wong Decl. in Supp. of Reply, ECF 35.
19 The request is GRANTED as the Court may take judicial notice of court filings although specific
20 factual findings and legal conclusions set forth in the documents may not bind this Court. *Reyn’s*
21 *Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice
22 of court filings and other matters of public record).

23 **IV. DISCUSSION**

24 The Court now turns to Google’s motion to dismiss claims 2 to 4 in the FAC pursuant to
25 Rule 12(b)(6). For the reasons that follow, Google’s motion to dismiss is GRANTED WITH
26 LEAVE TO AMEND IN PART and WITHOUT LEAVE TO AMEND IN PART.

1 **A. Second Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing**

2 The second cause of action asserts a claim for breach of the implied covenant of good faith
3 and fair dealing. According to Google, the FAC alleges four theories in support of that claim:
4 Google (1) fails to provide publishers a meaningful appeal after termination; (2) withheld accrued
5 earnings directly tied to valid activity; (3) withheld publishers' earnings close to the earnings
6 payout date; and (4) does not allow publishers to get relief from Google even when it withheld
7 earnings that are tied to valid activity. *See* Mot. 5 (citing FAC ¶¶ 72, 76, 78–80, 82). Google
8 contends that those allegations do not support a claim for breach of the implied covenant of good
9 faith and fair dealing. *Id.* at 5–8.

10 Bulletin Marketing responds that the second cause of action is adequately alleged for four
11 reasons: (1) Google frustrates publishers' right to receive accrued revenues by failing to
12 communicate and provide a meaningful appeal; (2) Bulletin Marketing is allowed to plead a claim
13 for breach of the implied covenant as an alternative to its breach of contract claim; (3) Google
14 acted in bad faith by withholding accrued earnings on or around the day those earnings were to be
15 paid by Google; and (4) Google does not allow publishers to receive the benefits of their contract
16 by making the decision to withhold payment to be final and irreversible. Opp'n 6–14.

17 The Court finds that the FAC does not adequately plead the second cause of action. “[T]he
18 implied covenant of good faith and fair dealing’s application is limited to assuring compliance
19 with the express terms of the contract, and cannot be extended to create obligations not
20 contemplated by the contract.” *Integrated Storage Consulting Servs., Inc. v. NetApp, Inc.*, No.
21 5:12-CV-06209-EJD, 2013 WL 3974537, at *7 (N.D. Cal. July 31, 2013) (internal quotation
22 marks and citation omitted). However, as pled, the FAC’s allegations attempt to add obligations
23 that do not expressly appear in the Google Services Agreement. As such, the allegations which
24 Bulletin Marketing relies on fail to support a claim for breach of the implied covenant of good
25 faith and fair dealing. The Court therefore GRANTS Google’s motion to dismiss the second cause
26 of action WITH LEAVE TO AMEND.

27 During the hearing, Google argued that the Google Services Agreement applies an
28 objective standard for Google to determine whether to make payments to the publisher. Hearing

1 Tr. 44:10–25, ECF 46 (citing § 8.2 of the Google Services Agreement). In Google’s view, the
2 application of the objective standard means that a claim for breach of the implied covenant of
3 good faith and fair dealing is subsumed by Bulletin Marketing’s breach of contract claim. *See id.*;
4 Mot. 6–7 (citing *Free Range Content, Inc. v. Google Inc.*, No. 14-CV-02329-BLF, 2016 WL
5 2902332, at *16 (N.D. Cal. May 13, 2016)). Google’s argument has merit. The Court will allow
6 Bulletin Marketing to amend the second cause of action to the extent that the parties’ contract is
7 not deemed to impose an objective standard. *See* Hearing Tr. 52:15–18.

8 **B. Third Cause of Action: Breach of the Implied Duty to Perform with Reasonable**
9 **Care**

10 The FAC’s third cause of action asserts a claim for breach of the implied duty to perform
11 with reasonable care. FAC ¶¶ 84–93. Specifically, the FAC pleads this claim in two alternative
12 situations:

- 13 (1) if “the Court find[s] that the Google Services Agreement *does not impose* an express
14 contractual obligation on Google to reasonably determine that . . .there was invalid
15 activity and that . . . amounts were refunded to advertisers in connection with a
16 publisher’s failure to comply with the Google Services Agreement, before Google
17 could withhold payments to that publisher” or
- 18 (2) if “the Court finds that the contract *does impose* such an express contractual obligation
19 upon Google, then Bulletin [Marketing] brings this claim in the alternative so that it
20 can elect between contract and tort remedies against Google.”

21 FAC ¶ 85 (emphasis added).

22 Google argues that the third cause of action is duplicative of Bulletin Marketing’s claim
23 for breach of contract because those two claims rely on the same allegations. Mot. 8–9. Google
24 also contends that the third cause of action improperly attempts to transmute the breach of contract
25 claim into a tort claim. *Id.* at 9 (citing FAC ¶ 85 (“Bulletin [Marketing] brings this claim in the
26 alternative so that it can elect between contract and tort remedies.”)).

27 Bulletin Marketing responds that Google’s arguments fail because California law
28 recognizes that a breach of the implied duty to perform with reasonable care constitutes a tort

1 claim. Opp’n 14–15 (citing *Holguin v. DISH Network LLC*, 229 Cal. App. 4th 1310, 1314 (Ct.
2 App. 2014); *see also id.* at 16 (citing *Letizia v. Facebook Inc.*, 267 F. Supp. 3d 1235, 1239 (N.D.
3 Cal. 2017)). In Bulletin Marketing’s view, its claim for breach of implied duty to perform with
4 reasonable care is broader in scope than the breach of contract claim. *Id.* at 16.

5 The Court first turns to the FAC’s second alternative situation. Bulletin Marketing seeks
6 to assert its implied duty claim when “the contract *does impose* . . . an express contractual
7 obligation upon Google.” *See* FAC ¶ 85 (emphasis added). In this situation, the alleged implied
8 duty does not exist because the contract at issue already expressly contains the purported
9 obligation. Bulletin Marketing cannot assert a non-existent implied duty. The claim which
10 Bulletin Marketing seeks to assert would be subsumed in its breach of contract claim. Thus,
11 Google’s motion to dismiss the third cause of action to the extent it is based on the FAC’s second
12 alternative situation is GRANTED WITHOUT LEAVE TO AMEND.

13 The Court next turns to the FAC’s first alternative situation. As mentioned above, Bulletin
14 Marketing seeks to bring a breach of implied duty to perform with reasonable care claim when
15 “the Google Services Agreement *does not impose* an express contractual obligation on Google to
16 reasonably determine that . . . there was invalid activity and that . . . amounts were refunded to
17 advertisers . . . before Google could withhold payments to that publisher.” FAC ¶ 85 (emphasis
18 added). Bulletin Marketing relies on *Holguin* and *Letizia* to support its position that its claim for a
19 breach of implied duty is a tort claim. *See* Opp’n 15–16.

20 However, as Google argues (Reply 9; *id.* at 9 n.7), *Holguin* and *Letizia* did not hold that a
21 claim for breach of implied duty constitutes a tort claim. For example, the court in *Holguin*
22 explained that “express contractual terms give rise to implied duties, violations of which may
23 themselves constitute *breaches of contract*.” 229 Cal. App. 4th at 1324 (emphasis added). To be
24 sure, the court stated that “a common-law duty to perform with care, skill . . . and a negligent
25 failure to observe any of these conditions is a tort, as well as a breach of contract.” *Id.* (citing
26 *Roscoe Moss Co. v. Jenkins*, 55 Cal. App. 2d 369, 376 (Ct. App. 1942)). But when citing *Roscoe*
27 *Moss*, the court in *Holguin* does not appear to have meant that a defendant who breaches a duty
28 implied in the contract is liable for tort damages. Such a reading of *Holguin* is consistent with the

1 courts' recognition that "[t]he mere negligent breach of a contract is insufficient to give rise to tort
2 damages." *Valenzuela v. ADT Sec. Servs., Inc.*, 820 F. Supp. 2d 1061, 1071 (C.D. Cal. 2010);
3 *Erllich v. Menezes*, 21 Cal. 4th 543, 551 (Cal. 1999) ("[C]onduct amounting to a breach of contract
4 becomes tortious only when it also violates a duty independent of the contract arising from
5 principles of tort law."). In fact, *Holguin* was addressing only the trial court's jury instruction
6 regarding an implied duty in connection with the plaintiff's breach of contract claim. *Id.* at 1317,
7 1324. Tort liability was not at issue.

8 Similar to *Holguin*, *Letizia* did not hold that a breach of an implied duty to perform with
9 reasonable care supports tort liability. While the court in *Letizia* recognized that an implied duty
10 is "as much a part of the contract as if expressly set forth" (267 F. Supp. 3d at 1249 (citation
11 omitted)), it did not conclude that a breach of such a duty constitutes a tort claim. Rather, the
12 court's analysis exclusively focused on the parties' contractual obligations. *See* 267 F. Supp. 3d at
13 1249–53.

14 During the hearing, counsel for Bulletin Marketing indicated that California Civil Jury
15 Instructions ("CACI") 328 titled "Breach of Implied Duty to Perform with Reasonable Care"
16 supports Bulletin Marketing's position. Hearing Tr. 19:19–20:16. However, a review of CACI
17 shows that a claim for breach of implied duty to perform with reasonable care permits contract
18 remedies rather than tort remedies. *See* CACI (listing "breach of implied duty to perform with
19 reasonable care" under the breach of contract section). In addition, Bulletin Marketing has not
20 pointed to any case where the court awarded tort damages for a breach of implied duty to perform
21 with reasonable care.

22 For the above reasons, the Court agrees with Google's argument that Bulletin Marketing
23 cannot rely on a claim for breach of implied duty to perform with reasonable care to recover tort
24 damages. The FAC alleges that this claim is asserted as a tort claim. *See* FAC ¶ 85. Accordingly,
25 Google's motion to dismiss the third cause of action is GRANTED WITH LEAVE TO AMEND
26 IN PART and WITHOUT LEAVE TO AMEND IN PART. The dismissal is without leave to
27 amend insofar as Bulletin Marketing intended to pursue that claim as a tort claim. Bulletin
28 Marketing, however, may amend the third cause of action to allege that it seeks only contract

1 remedies based on this claim. In that event, the amended claim must contain sufficient factual
2 allegations to support the elements of a claim for breach of implied duty to perform with
3 reasonable care. This ruling does not determine whether such a claim is meritorious in this case.

4 **C. Fourth Cause of Action: Violation of California’s Unfair Competition Law**

5 Google argues that Bulletin Marketing lacks standing to assert a claim under California’s
6 Unfair Competition Law (“UCL”) on the grounds that it did not bring this case for “the public in
7 general or individual consumers.” Mot. 9 (citing *Dollar Tree Stores Inc. v. Toyama Partners LLC*,
8 875 F. Supp. 2d 1058, 1083 (N.D. Cal. 2012)). Google also contends that Bulletin Marketing fails
9 to allege that Google engaged in unlawful, fraudulent, or unfair conduct. *Id.* at 10–12.

10 Bulletin Marketing responds that “Google’s practice of disabling publisher’s AdX
11 accounts and withholding the entirety of their accrued earnings implicates the public interest.”
12 Opp’n 17 (citing FAC ¶ 97). In Bulletin Marketing’s view, this Court found that nearly identical
13 allegations established standing in *Free Range Content, Inc. v. Google Inc.*, No. 14-CV-02329-
14 BLF, 2016 WL 2902332 (N.D. Cal. May 13, 2016). Opp’n 17.

15 The Court is unpersuaded by Bulletin Marketing’s arguments. “[W]here a UCL action is
16 based on contracts not involving either the public in general or individual consumers who are
17 parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks.”
18 *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (Ct. App. 2007). The
19 FAC does not contain adequate factual allegations showing that the named Plaintiff Bulletin
20 Marketing is not a sophisticated corporate plaintiff. In fact, the FAC suggests the opposite. *See*,
21 *e.g.*, FAC ¶ 15 (“AdX is viewed by industry participants as a more sophisticated ad placement
22 service compared to AdSense, and therefore attracts more experienced and/or larger publishers.”);
23 *id.* ¶ 17 (“Due to the sophisticated features offered by AdX, website content creators often engage
24 NPM partners to focus on optimizing the revenue earned from Google advertisements placed on
25 their websites.”). Also, *Free Range*, which involved Google’s AdSense service, is
26 distinguishable. In that case, the complaint alleged that the named plaintiffs—two of whom were
27 individuals—were “small and unsophisticated entities.” *See* Ex. 1 to Wong Decl. (“Third Am.
28 Comp. in Free Range”) ¶ 167, ECF 35-1. In contrast, the FAC contains no such allegations. As

1 such, the Court finds that the FAC fails to plead that the named Plaintiff Bulletin Marketing has
2 standing to bring the UCL claim.

3 The FAC also raises a concern whether it sufficiently alleges that Google engaged in
4 “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17204. The
5 Court need not reach this issue because the FAC fails to allege that the named Plaintiff Bulletin
6 Marketing has standing to pursue the UCL claim.

7 Accordingly, the Court GRANTS Google’s motion to dismiss the fourth cause of action
8 WITH LEAVE TO AMEND.

9 **V. CONCLUSION**

10 For the foregoing reasons, IT IS HEREBY ORDERED that:

11 (1) Google’s motion to dismiss the second cause of action based on breach of the implied
12 covenant of good faith and fair dealing is GRANTED WITH LEAVE TO AMEND.

13 (2) Google’s motion to dismiss the third cause of action based on breach of the implied
14 duty to perform with reasonable care is GRANTED WITH LEAVE TO AMEND IN
15 PART and WITHOUT LEAVE TO AMEND IN PART.

16 (3) Google’s motion to dismiss the fourth cause of action based on violation of California’s
17 Unfair Competition Law is GRANTED WITH LEAVE TO AMEND.

18 If Bulletin Marketing wishes to amend the complaint, the amended complaint must be filed
19 **within thirty (30) days of the date of this order.**

20 **IT IS SO ORDERED.**

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22 Dated: July 13, 2018

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BETH LABSON FREEMAN
United States District Judge