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16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA  
18 WESTERN DIVISION

19 MIREILLE CARRIER, Individual and on  
20 behalf of others similarly situated,

21 Plaintiff,

22 v.

23 VALUECLICK, INC., a Delaware  
corporation, its wholly owned subsidiary  
24 COMMISSION JUNCTION, INC., and  
its wholly-owned subsidiary BE FREE,

25 Defendant(s).  
26

CASE NO. CV-07-02641 FMC (CTx)

(Assigned to the Honorable Florence-  
Marie Cooper, Courtroom 750)

**NOTICE OF MOTION AND MOTION  
TO DISMISS CLASS ACTION  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT**

[[Proposed] Order Granting Defendants'  
Motion to Dismiss Lodged Concurrently]

Hearing

Date: July 16, 2007

Time: 10:00 a.m.

Place: Courtroom 750 (Roybal)

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 16, 2007, at 10:00 a.m., or as soon  
3 thereafter as the matter can be heard at the United States District Court, located at  
4 located at 255 East Temple Street, Los Angeles, California in Courtroom 750, the  
5 Honorable Florence-Marie Cooper presiding, Defendants ValueClick, Inc.,  
6 Commission Junction, Inc., and Be Free (“Defendants”) will and hereby do move the  
7 Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for dismissal of  
8 Plaintiffs’ Class Action Complaint for Breach of Contract; Negligence; and Unfair  
9 Business Practices (California Business & Professions Code § 17200, *et seq.*)  
10 (“Cplt.”) on the following grounds:

11 1. Plaintiff’s claims arise from a written contract – the Publisher Service  
12 Agreement – that defines the relationship between Commission Junction and Internet  
13 publishers like Plaintiff. (Cplt. ¶ 61). According to Plaintiff, “[e]very member of the  
14 proposed Class is a party to the Agreement.” (*Id.* ¶ 65).

15 2. Each of Plaintiff’s claims are barred by the express terms of the  
16 Agreement, which releases Commission Junction from liability for precisely the  
17 claims that Plaintiff is making here. Courts repeatedly have dismissed claims – like  
18 those asserted by Plaintiff here – that are based on the violation of an alleged duty that  
19 is expressly disclaimed in a voluntary agreement between the parties. *See, e.g.,*  
20 *Graphic Arts Sys. v. Scitex Am. Corp.*, No. CV 92-6997-WMB, 1993 U.S. Dist.  
21 LEXIS 21052, at \*26 (C.D. Cal. May 26, 1993) (dismissing plaintiff’s claims for  
22 breach of contract, negligence, intentional interference and breach of the implied  
23 covenant of good faith and fair dealing on a motion to dismiss under Fed. R. Civ. P.  
24 12(b)(6) as “barred by the express language of the contracts which disclaims all  
25 warranties and limits remedies”).

26 3. In addition, Plaintiff’s second cause of action for negligence and third  
27 cause of action for alleged violation of California’s Unfair Competition Law (Cal.  
28 Bus. & Prof. Code § 17200, *et seq.*) should be dismissed because the Complaint fails

1 to allege any duty by Commission Junction to Plaintiff independent from their  
2 contractual obligations, and California case law does not permit a plaintiff to state a  
3 tort claim for an alleged breach of contract. *Erlich v. Menezes*, 21 Cal. 4th 543, 551  
4 (1999) (“[C]onduct amounting to a breach of contract becomes tortious only when it  
5 also violates a duty independent of the contract arising from principles of tort law.”).

6 4. Plaintiff’s claims should be dismissed in any event as to ValueClick and  
7 Be Free because they are not parties to the Publisher Service Agreement, and because  
8 Plaintiff has not alleged any conduct by either of these entities, other than generalized,  
9 unsupported allegations that “Commission Junction and Be Free are the alter egos of  
10 ValueClick.” (Cplt. ¶ 70).

11 This Motion to Dismiss is based on this Notice of Motion and Motion, the  
12 attached Memorandum of Points and Authorities, the concurrently filed Notice of  
13 Motion and Motion to Strike, the Memorandum of Points and Authorities in support  
14 of the concurrently filed Motion to Strike, all further materials which may be filed by  
15 Defendants herein, the paper and records on file herein, and on such further evidence  
16 and argument as the Court may permit or require at or prior to the time of the hearing  
17 on this Motion.

18 This motion is made following the conference of counsel pursuant to Local  
19 Rule 7-3 which took place on June 6, 2007.

20  
21 DATED: June 13, 2007

22 G. Charles Nierlich  
23 GIBSON, DUNN & CRUTCHER LLP

24 By:   
25 G. Charles Nierlich

26 Attorneys for Defendants  
27 VALUECLICK, INC., COMMISSION  
28 JUNCTION, INC., and BE FREE

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## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
II. SUMMARY OF ALLEGED FACTS.....	3
A. The Parties.....	3
B. The Publisher Service Agreement.....	4
C. The Alleged Use of “Adware” By Third Party Publishers on Commission Junction’s Network.....	7
D. Plaintiff’s Causes of Action.....	7
III. ARGUMENT.....	8
A. A Complaint Should Be Dismissed Where It Fails to State Sufficient Facts to Support a Cognizable Legal Theory.....	8
B. Plaintiff’s Claims Are Barred By the Agreement, Which Disclaims Liability For Precisely the Type of Claims that Plaintiff is Making Here.....	9
C. Plaintiff’s Negligence and Unfair Competition Law Claims Also Should Be Dismissed Because Plaintiff Alleges No Duty to Plaintiff Independent of the Contract at Issue.....	13
1. Plaintiff Allege No Source of Duty Independent of the Contract Between Plaintiff and Commission Junction.....	13
2. Plaintiff’s Negligence Cause of Action Fails Because Plaintiff Has Alleged No Duty Apart from the Contract Between Plaintiff and Commission Junction.....	14
3. Plaintiff’s Unfair Competition Law Cause of Action Fails Because Plaintiff Has Alleged No Unlawful, Unfair, or Fraudulent Practice Apart from Alleged Breach of Contract, which Does Not Support a UCL Claim.....	16
D. In Any Event, Plaintiff’s Claims Against ValueClick and Be Free Should Be Dismissed Because Plaintiff Has Not Stated Sufficient Allegations Against Either Entity.....	18
IV. CONCLUSION.....	20

**TABLE OF AUTHORITIES**

Page(s)

**Cases**

1

2

3

4 *Aas v. Superior Court,*  
24 Cal. 4th 627 (2000)..... 15

5 *America West Airlines, Inc. v. GPA Group, Ltd.,*  
877 F.2d 793 (9th Cir. 1989)..... 18

6 *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.,*  
7 Cal. 4th 503 (1994)..... 15

7

8 *Artukovich v. Pacific States Cast Iron Pipe Co.,*  
78 Cal. App. 2d 1 (1947)..... 11

9 *Bardin v. DaimlerChrysler Corp.,*  
136 Cal. App. 4th 1255 (2006)..... 17

10 *Benedek v. PLC Santa Monica L.L.C.,*  
104 Cal. App. 4th 1351 (2002)..... 11

11 *Bernardo v. Planned Parenthood Fed’n of Am.,*  
115 Cal. App. 4th 322 (2004)..... 16

12 *Branch v. Tunnell,*  
14 F.3d 449 (9th Cir. 1994)..... 4

13 *Carleton v. Tortosa,*  
14 Cal. App. 4th 745 (1993)..... 13

14 *Cattie v. Wal-Mart Stores, Inc.,*  
2007 U.S. Dist. LEXIS 19980 (S.D. Cal. March 21, 2007)..... 18

15 *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.,*  
20 Cal. 4th 163 (1999)..... 17

16 *Chambers v. Time Warner, Inc.,*  
282 F.3d 147 (2d Cir. 2002)..... 4

17 *Clegg v. Cult Awareness Network,*  
18 F.3d 752 (9th Cir. 1994)..... 9

18 *Erlich v. Menezes,*  
21 Cal. 4th 543 (1999)..... 2, 15

19 *Freeman & Mills v. Belcher Oil Company,*  
11 Cal. 4th 85 (1995)..... 15

20 *Galbraith v. County of Santa Clara,*  
307 F.3d 1119 (9th Cir. 2002)..... 4

21 *Graphic Arts System v. Scitex America Corp.,*  
No. CV 92-6997-WMB,  
1993 U.S. Dist. LEXIS 21052 (C.D. Cal. May, 26, 1993)..... 12

22 *Greentree Software, Inc. v. Delrina Tech., Inc.,*  
No. Civ. 95-20799 SW, 1996 WL 183041 (N.D. Cal. Apr. 11, 1996)..... 12

23 *In re Currency Conversion Fee Antitrust Litigation,*  
265 F. Supp. 2d 385 (S.D.N.Y. 2003)..... 20

24

25

26

27

28

**TABLE OF AUTHORITIES**  
**[Continued]**

Page(s)

1		
2		
3		
4	<i>In re Tobacco II Cases,</i>	
5	142 Cal. App. 4th 891,	
6	rev. granted, 2006 Cal. LEXIS 13332 (Nov. 1, 2006).....	18
7	<i>Jones v. Kelly,</i>	
8	208 Cal. 251 (1929).....	15
9	<i>Korea Supply Co. v. Lockheed Martin Corp.,</i>	
10	29 Cal. 4th 1134 (2003).....	16
11	<i>Madison v. Superior Court,</i>	
12	203 Cal. App. 3d 589 (1988).....	11
13	<i>Marder v. Lopez,</i>	
14	450 F.3d 445 (9th Cir. 2006).....	4
15	<i>McCarn v. Pacific Bell Directory,</i>	
16	3 Cal. App. 4th 173 (1992).....	12
17	<i>Meisel v. Allstate Indemnity Co.,</i>	
18	357 F. Supp. 2d 1222 (E.D. Cal. 2005).....	19
19	<i>Nat'l &amp; Int't. Bhd. of Street Racers, Inc. v. Superior Court,</i>	
20	215 Cal. App. 3d 934 (1989).....	10, 12
21	<i>Neilson v. Union Bank of Cal., N.A.,</i>	
22	290 F. Supp. 2d 1101 (C.D. Cal. 2003).....	19, 20
23	<i>Ove v. Gwinn,</i>	
24	264 F.3d 817 (9th Cir. 2001).....	9
25	<i>Paralift, Inc. v. Superior Court,</i>	
26	23 Cal. App. 4th 748 (1993).....	12
27	<i>Robertson v. Dean Witter Reynolds, Inc.,</i>	
28	749 F.2d 530 (9th Cir. 1984).....	8
	<i>Sonora Diamond Corp. v. Superior Court,</i>	
	83 Cal. App. 4th 523 (2000).....	19
	<i>United States v. Ritchie,</i>	
	342 F.3d 903 (9th Cir. 2003).....	4
	<i>Wady v. Provident Life and Accident Ins. Co. of Am.,</i>	
	216 F. Supp. 2d 1060 (C.D. Cal. 2002).....	20
	<i>Warren v. Fox Family Worldwide, Inc.,</i>	
	328 F.3d 1136 (9th Cir. 2003).....	4
	<i>YMCA of Metro. Los Angeles v. Superior Court,</i>	
	55 Cal. App. 4th 22 (1997).....	11

**TABLE OF AUTHORITIES**  
**[Continued]**

Page(s)

**Statutes**

Cal. Bus. & Prof. Code § 17204 .....17, 18  
Cal. Bus. & Prof. Code § 17200 .....16

**Rules**

FED. R. CIV. P. 12(b)(6).....8, 12

1  
2  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Commission Junction is a global leader in the online advertising channel of  
4 affiliate marketing. (Cplt. ¶ 10). Commission Junction operates an affiliate marketing  
5 network that connects advertisers (including retailers such as eBay) and publishers of  
6 Internet content who seek to display advertising links on their websites for the purpose  
7 of earning commissions from advertisers. (*Id.* ¶¶ 9-11). Commission Junction’s  
8 systems track the “clicks” and actions of end-users on advertising links displayed on  
9 publishers’ websites, and collect and process payments from advertisers to publishers  
10 based on the traffic that a publisher directs to a particular advertiser. (*Id.* ¶ 11).

11 Plaintiff is a publisher who signed up with Commission Junction’s affiliate  
12 marketing network. (*Id.* ¶ 2). She alleges that “legitimate” publishers do not receive  
13 their full amount of payments due for referring customers to advertisers because other  
14 publishers – who Plaintiff calls “Adware Affiliates” – allegedly have installed  
15 spyware or other malicious code on customers’ computers that has interfered with  
16 Commission Junction’s tracking system. (*Id.* ¶¶ 16-19.)

17 All publishers who participate in Commission Junction’s affiliate network must  
18 enter into an agreement called the “Commission Junction Publisher Service  
19 Agreement” (the “Agreement”). (*Id.* ¶ 61.) The Agreement requires publishers to  
20 agree to the Publisher’s Code of Conduct (*id.*), which prohibits members of the  
21 Commission Junction affiliate network from interfering with or seeking to influence  
22 improperly the referral of a potential customer or visitor to the website of an online  
23 advertiser (*id.* ¶ 39). The gravamen of the Complaint is that while Commission  
24 Junction has taken action against third-party publishers who have violated these  
25 policies (*id.* ¶ 54), “Commission Junction could do far more to eliminate Adware  
26 Affiliates from the CJ Affiliate Networks” (*id.* ¶ 37). For the reasons set forth below,  
27 Plaintiff’s contention that Commission Junction has failed to do enough to detect and  
28

1 prevent publishers from using Adware does not give rise to a valid cause of action  
2 under California law.

3 Most fundamentally, the express terms of the Agreement itself bar each of  
4 Plaintiff's claims, because the Agreement clearly disclaims and releases Commission  
5 Junction from any liability arising from the practices of third-party publishers  
6 (including the "Adware Affiliates") on its network. The Agreement states in clear and  
7 unambiguous terms that Commission Junction "is, under no circumstances,  
8 responsible for the practices, acts or omissions of any advertiser or publisher . . . .",  
9 and further provides that Plaintiff's sole "recourse for any earned Payouts not paid to  
10 You shall be to make a claim against the relevant Advertiser(s), and CJ disclaims any  
11 and all liability for such payment." (Agreement (Ex. A) ¶¶ 7(f) & 3(e)). California  
12 courts consistently have dismissed both contract and tort claims when – as here – they  
13 are predicated on an alleged duty that is expressly disclaimed in the parties'  
14 agreement.

15 Even if the Agreement did not bar claims based on the alleged practices of other  
16 publishers and advertisers, Plaintiff's tort claims should be dismissed for the additional  
17 reason that the Complaint fails to allege facts giving rise to any duty by Commission  
18 Junction to Plaintiff independent from its contractual obligations, or any unfair,  
19 unlawful, or fraudulent practice other than the alleged breach of contract. With limited  
20 exceptions not applicable here, California law does not permit a plaintiff to state a tort  
21 claim for an alleged breach of contract. *See Erlich v. Menezes*, 21 Cal. 4th 543, 551  
22 [87 Cal. Rptr. 2d 886] (1999) ("[C]onduct amounting to a breach of contract becomes  
23 tortious only when it also violates a duty independent of the contract arising from  
24 principles of tort law.").

25 In any event, Plaintiff's claims should be dismissed as to ValueClick and Be  
26 Free because Plaintiff has not alleged facts giving rise to any duty by these entities to  
27 Plaintiff. These companies are not parties to the Agreement, and Plaintiff has not  
28 alleged any conduct by either of these entities apart from generalized, legally deficient

1 allegations that “Commission Junction and Be Free are the alter egos of ValueClick.”  
2 (Cplt. ¶ 70).

3 In short, Plaintiff’s allegations –which arise solely from the alleged misconduct  
4 of third party publishers for which the Agreement disclaims all liability – fail to state a  
5 valid claim under California law. Accordingly, this Court should grant Defendants’  
6 motion to dismiss.

## 7 II. SUMMARY OF ALLEGED FACTS

8 The following allegations in the Complaint are deemed to be true solely for  
9 purposes of this motion.

### 10 A. The Parties

11 Plaintiff Mireille Carrier is an individual who allegedly “publishes and  
12 maintains one or more” unspecified Internet websites. (Cplt. ¶ 2). She purports to  
13 bring this action on behalf of herself and “all other persons or entities . . . who, within  
14 the past four years have entered into one or more publisher agreements with  
15 ValueClick, Commission Junction and/or Be Free for affiliate marketing management  
16 services.” (*Id.* ¶ 1).<sup>1</sup>

17 Defendant Commission Junction, Inc. (“Commission Junction”) provides  
18 affiliate management services to website publishers on its online advertising network  
19 pursuant to the terms of its Publisher Service Agreement. (*Id.* ¶ 4). Plaintiff also has  
20 filed claims against defendants ValueClick, Inc. (“ValueClick”) and Be Free, based on  
21 their alleged corporate relationship to Commission Junction and on generalized and  
22

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23  
24  
25 <sup>1</sup> On the same date that the Complaint was filed, Plaintiff’s counsel filed a virtually  
26 identical complaint in the action entitled Settlement Recovery Center, Inc. v.  
27 Commission Junction, Inc., Case No. CV07-02638 FMC (CTx) (“SRC Action”),  
28 which is currently pending before this Court. The SRC Action purportedly is  
brought on behalf of a class of “all persons and/or entities that . . . entered into an  
advertiser agreement . . . for affiliate marketing management services on the CJ  
Affiliate Networks.” SRC Cplt. ¶ 83. Defendants are concurrently moving to  
dismiss the Complaint in the SRC Action.

1 unsupported allegations that “Commission Junction and Be Free are the alter egos of  
2 ValueClick.” (*Id.* ¶¶ 3, 5, 70-76).

### 3 **B. The Publisher Service Agreement**

4 As alleged in the Complaint, Commission Junction manages an extensive  
5 network of advertisers (frequently referred to in the Complaint as “merchants”) and  
6 website publishers (also called “affiliates”), through which it “facilitate[s] a program  
7 where the affiliate operates websites to drive traffic to a merchant’s website to earn  
8 financial compensation for defined transactions.” (Cplt. ¶ 62).

9 Plaintiff entered into a publisher service agreement with Commission Junction  
10 (“Publisher Service Agreement” or “Agreement”) for the commercial purpose of  
11 joining its affiliated publisher network. (*Id.* ¶ 2). A true and correct copy of the  
12 Publisher Service Agreement is attached hereto as Exhibit A.<sup>2</sup> By joining  
13 Commission Junction’s network, Plaintiff became eligible to display advertising links  
14 sponsored by affiliated advertisers on websites operated or “published” by the  
15 Plaintiff. (*Id.* ¶ 61; Agreement (“Agrmt.”) (Ex. A) ¶ 1). In exchange for displaying an  
16 advertisement on her website(s), Plaintiff is entitled to receive commissions from the  
17 sponsoring advertiser each time an end user takes a specified action, such as

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18  
19 <sup>2</sup> The contents of the Publisher Service Agreement may be considered in the context  
20 of this motion under the doctrine of incorporation by reference. *See Marder v.*  
21 *Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). As the Ninth Circuit explained in  
22 *Marder*, “A court may consider evidence on which the complaint ‘necessarily  
23 relies’ if: (1) the complaint refers to the document; (2) the document is central to  
24 the plaintiff’s claim; and (3) no party questions the authenticity of the copy  
25 attached to the 12(b)(6) motion.” *Id.* (citing *Branch v. Tunnell*, 14 F.3d 449, 453-  
26 54 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa*  
27 *Clara*, 307 F.3d 1119 (9th Cir. 2002); *Warren v. Fox Family Worldwide, Inc.*, 328  
28 F.3d 1136, 1141 n.5 (9th Cir. 2003); *Chambers v. Time Warner, Inc.*, 282 F.3d  
147, 153 n.3 (2d Cir. 2002)). Here, the Complaint refers to the Agreement, which  
is central to Plaintiff’s claims that Commission Junction supposedly did not live up  
to the terms of its bargain with publishers. *See, e.g.*, Complaint ¶¶ 61-66  
(describing and quoting the Agreement) and ¶¶ 81-86 (alleging breach of the  
Agreement). The court in *Marder* explained that “[t]he court may treat such a  
document as ‘part of the complaint, and thus may assume that its contents are true  
for purposes of a motion to dismiss under Rule 12(b)(6).’” *Marder*, 450 F.3d at  
448 (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)).

1 “clicking” on the advertisement or completing a form. (Agrmt. (Ex. A) ¶1(a) & (b);  
2 Cplt. ¶ 62).

3 Pursuant to the Agreement, Commission Junction offers certain network  
4 services to publishers like Plaintiff who have signed up to participate in its network,  
5 including tracking ad-based transactions and collecting and processing commission  
6 payments from advertisers to publishers. (Agrmt. (Ex. A) ¶ 3). The Agreement also  
7 requires publishers to agree to the Publisher’s Code of Conduct (Cplt. ¶ 61), which  
8 prohibits members of the Commission Junction affiliate network from interfering with  
9 or seeking to influence improperly the referral of a potential customer or visitor to the  
10 website of an online advertiser (*id.* ¶ 39).

11 The Publisher Service Agreement defines the basic framework in which  
12 publishers on Commission Junction’s network operate; the specific terms and  
13 conditions governing when commissions are payable to publishers like Plaintiff,  
14 however, are dictated exclusively by the advertisers under separate agreements:

- 15 ■ “During this Agreement, [Plaintiff] may apply to Advertiser Programs for  
16 the opportunity to earn Payouts by promoting Advertisers in accordance  
17 with the Advertiser’s Program terms and complying with this  
18 Agreement.” Agrmt. (Ex. A) ¶1(a);
- 19 ■ “Upon approval by the Advertiser for acceptance into its Program,  
20 [Plaintiff] may display (and remove) Links to Advertiser’s Web site or  
21 Web site content in accordance with the Advertiser’s Program terms and  
22 this Agreement;” Agrmt. (Ex. A.) ¶1(a);
- 23 ■ “Transactions qualifying for a Payout are defined by the Advertiser.”  
24 Agrmt. (Ex. A) ¶1(b).

25 As provided in the Agreement, the services to be provided by Commission  
26 Junction to Plaintiff are limited to: (1) “determin[ing] (where possible) actual Payouts  
27 that should be credited to [Plaintiff’s] account”; (2) “provid[ing] [Plaintiff] with  
28 access to tracking and reporting tools, and to support services”; and (3) “[s]ubject to

1 other provisions in this Agreement . . . credit[ing] [Plaintiff's] Account with a Payout  
2 for each qualifying Transaction in accordance with the Advertiser's Payout rate and  
3 Program terms for the relevant Transaction." (Agrmt. (Ex. A) ¶ 3).

4 Commission Junction has no direct responsibility for making the commission  
5 payments owed to Plaintiff by the advertisers on its network, and instead, merely  
6 remits to publishers commissions that it collects from the relevant advertisers.  
7 (Agrmt. (Ex. A) ¶ 3). Indeed, as is clearly stated in the Agreement, the responsibility  
8 to make commission payments to Plaintiff rests exclusively with any advertiser that  
9 places advertising on one of Plaintiff's websites: "CJ shall have no obligation to make  
10 payment of any Payouts [to Plaintiff] for which CJ has not received payment from the  
11 relevant Advertiser of all monies due to CJ . . . ." (*Id.* ¶ 3(e)).

12 As such, in the Agreement, Commission Judgment expressly disclaims any  
13 obligation to make payments of earned commissions to the Plaintiff, providing:  
14 "[Plaintiff's] recourse for any earned Payouts not paid to You shall be to make a claim  
15 against the relevant Advertiser(s), and CJ disclaims any and all liability for such  
16 payment." (Agrmt. ¶ 3(e)). Likewise, Paragraph 7(f) of the Agreement contains the  
17 following "Disclaimer of Warranties" in capital letters:

18 **CJ IS, UNDER NO CIRCUMSTANCES, RESPONSIBLE FOR THE**  
19 **PRACTICES, ACTS OR OMISSIONS OF ANY ADVERTISER OR**  
20 **PUBLISHER . . . .**

21 (Agrmt. (Ex. A) ¶ 7(f)).

22 Plaintiff's Complaint readily acknowledges the competitive conditions in the  
23 online advertising industry, and that there were a number of different online  
24 advertising networks Plaintiff could have chosen to affiliate with rather than  
25 Commission Junction's. (Cplt. ¶¶ 13-14). Indeed, the Complaint observes that  
26 publishers and advertisers on Commission Junction's network are "not bound by long-  
27 term contracts" and can "easily cancel their agreement" and "join [a] competing  
28 network[]." (*Id.*) This is consistent with Paragraph 6(a) of the Publisher Service

1 Agreement, which provides that either party can terminate the contract “upon 15 days  
2 notice,” for any reason. (Agrmt. ¶ 6(a)).

3 **C. The Alleged Use of “Adware” By Third Party Publishers on Commission  
4 Junction’s Network**

5 Plaintiff’s claims are focused on the alleged use of “adware” or “spyware”  
6 software programs by certain third-party companies for the purpose of diverting  
7 advertising commissions to themselves that would otherwise be payable to other  
8 publishers. Specifically, Plaintiff contends that these “[a]dware perpetrators” (which  
9 Plaintiff also calls “Adware Affiliates”) join affiliate networks (like those managed by  
10 Commission Junction) and “pose as legitimate affiliates.” (Cplt. ¶ 16). According to  
11 Plaintiff, these Adware Affiliates employ adware software (which they cause to be  
12 installed on end-users’ computers) to confuse the computer programs that monitor and  
13 track commissions on online advertising networks into crediting the adware company  
14 – as opposed to another affiliate – with a particular advertising transaction. (*Id.*)  
15 Plaintiff goes to great lengths to describe the various methods by which such non-  
16 party Adware Affiliates use adware technology to perpetrate commission theft from  
17 other publishers on the same affiliated network. Plaintiff concludes – without any  
18 factual support – that “[b]etween 2002 and the present, [she] became the victim of  
19 Commission Theft on the CJ Affiliate Networks.” (*Id.* ¶ 69).

20 Tellingly, Plaintiff does not contend that Commission Junction or any of the  
21 other Defendants has engaged in commission theft, or engaged in any conduct  
22 whatsoever to Plaintiff’s detriment. Instead, Plaintiff’s allegations boil down to the  
23 proposition that Commission Junction “could do far more to eliminate Adware  
24 Affiliates” from its network (Cplt. ¶¶ 31, 37), even as she acknowledges Commission  
25 Junction’s efforts to deter and prevent the use of adware (*id.* ¶ 54).

26 **D. Plaintiff’s Causes of Action**

27 Plaintiff contends that “Defendants” breached the Publisher Service Agreement,  
28 including the alleged covenant of good faith and fair dealing, by allegedly “paying

1 commissions to Adware Affiliates even though Defendants knew, or should have  
2 reasonably known, that the commissions were wrongfully and improperly diverted by  
3 Adware Affiliates” and “by failing to restore commissions that Defendants knew, or  
4 should have reasonably known, were diverted from them by Commission Theft.”<sup>3</sup>  
5 (Cplt. ¶¶ 84-85). Plaintiff conspicuously fails to cite to any contractual provision that  
6 she contends was breached, or that imposes an obligation on Commission Junction to  
7 detect every instance in which a publisher has used adware or to collect and remit any  
8 commissions improperly diverted through the use of adware software. Indeed,  
9 Plaintiff does not even attach a copy of the Publisher Service Agreement to her  
10 Complaint, even though her claims are predicated on that contract.

11 In addition to her breach of contract claim, Plaintiff purports to bring claims for  
12 negligence and unfair business practices, also based on “Defendants”’ alleged failure  
13 to adequately “monitor” and “protect” Plaintiff from commission theft by third-party  
14 adware companies. (Cplt. ¶¶ 87-97).

15 For the reasons set forth below, the allegations in the Complaint – viewed  
16 together with the Agreement, which this Court may consider on this motion to dismiss  
17 – fail to state a legally sufficient claim against any of the Defendants. As such, the  
18 Complaint should be dismissed as a matter of law.

### 19 III. ARGUMENT

#### 20 A. A Complaint Should Be Dismissed Where It Fails to State Sufficient Facts 21 to Support a Cognizable Legal Theory

22 A complaint should be dismissed as a matter of law pursuant to Federal Rule of  
23 Civil Procedure 12(b)(6) if there is either (1) a lack of a cognizable legal theory, or (2)  
24 insufficient facts alleged under a cognizable legal theory. *See Robertson v. Dean*  
25 *Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). Although the Court must  
26

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27 <sup>3</sup> Significantly, neither ValueClick nor BeFree are parties to the Publisher Service  
28 Agreement between Commission Junction and Plaintiff. *See generally* Ex. A.

1 accept all factual allegations as true, it “is not required to accept legal conclusions cast  
2 in the form of factual allegations if those conclusions cannot reasonably be drawn  
3 from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th  
4 Cir. 1994). As noted by the Ninth Circuit, “conclusory allegations of law and  
5 unwarranted inferences are insufficient to defeat a motion to dismiss.” *Ove v. Gwinn*,  
6 264 F.3d 817, 821 (9th Cir. 2001).

7 **B. Plaintiff’s Claims Are Barred By the Agreement, Which Disclaims Liability**  
8 **For Precisely the Type of Claims that Plaintiff is Making Here**

9 Commission Junction’s obligations to the Plaintiff are defined exclusively by  
10 the Publisher Service Agreement, which Plaintiff entered into voluntarily when she  
11 elected to join Commission Junction’s affiliate network over numerous competing  
12 networks. Plaintiff’s claims for breach of contract, negligence and unfair business  
13 practices are predicated on the proposition that “Defendants” have violated  
14 obligations owed to Plaintiff by failing to “do more” to detect and prevent the use of  
15 adware software by publishers on Commission Junction’s advertising network. (Cplt.  
16 ¶ 37). These claims – and the underlying contention that Commission Junction is  
17 somehow responsible for the conduct of third party publishers on its network – are  
18 flatly precluded by the express terms of Plaintiff’s written contract with Commission  
19 Junction. The Publisher Service Agreement expressly and unambiguously releases  
20 Commission Junction from liability for the conduct of third-party publishers and  
21 which limits Plaintiff’s remedies with respect to earned but unpaid commissions to  
22 “mak[ing] a claim against the relevant Advertiser(s).” (Agrmt. (Ex. A) ¶ 3(e) & 7(f)).  
23 Courts repeatedly have dismissed such claims when – as here – they are based on the  
24 breach of an alleged duty that is expressly disclaimed in the parties’ agreement.

25 Plaintiff’s claims arise from certain publishers’ alleged use of adware software  
26 to steal credit for advertising transactions, resulting in the diversion of commissions to  
27 these publishing affiliates that otherwise would have been paid to other publishers.  
28 Plaintiff asserts that “Defendants” breached the Agreement by “paying commissions to

1 Adware Affiliates” that were stolen by other publishers using adware, and by “failing  
2 to restore commissions” that were “diverted . . . by Commission Theft.” (Cplt. ¶¶ 84-  
3 85). Likewise, Plaintiff contends that “Defendants” breached a “duty” to Plaintiff “by  
4 failing to adequately monitor” Commission Junction’s network “for adware, adware  
5 operators, Commission Theft and Transaction Fraud . . . .” (*Id.* ¶ 89).

6 Conspicuously, Plaintiff does not cite to any provision in the Agreement that  
7 imposes an obligation on Commission Junction to monitor adware practices or to  
8 detect and restore commissions that may have been diverted through publishers' use of  
9 adware software. Nor can she, because the clear and unambiguous terms of the  
10 Publisher Service Agreement *expressly disclaim and release Commission Junction*  
11 *from any liability for the conduct of publishers – such as “Adware Affiliates” – on*  
12 *its network*. Specifically, Paragraph 7(f) (“Disclaimer of Warranties”) of the  
13 Agreement provides in all capital letters: “CJ IS, UNDER NO CIRCUMSTANCES,  
14 RESPONSIBLE FOR THE PRACTICES, ACTS OR OMISSIONS OF ANY  
15 ADVERTISER OR PUBLISHER . . . .” (Agrmt. ¶ 7(f)). Paragraph 7(h) further  
16 provides: “THE PROVISIONS OF THIS SECTION 7 ARE AN ESSENTIAL  
17 ELEMENT OF THE BENEFIT OF THE BARGAIN REFLECTED IN THIS  
18 AGREEMENT.” (*Id.* ¶ 7(h)). Likewise, Paragraph 3(e) limits Plaintiff’s remedies –  
19 and releases Commission Junction from any liability – in connection with any unpaid  
20 commissions earned by Plaintiff: “Your recourse for any earned Payouts not paid to  
21 You shall be to make a claim against the relevant Advertiser(s), and *CJ disclaims any*  
22 *and all liability for such payment.*” (*Id.* ¶ 3(e)) (emphasis added).

23 Exculpatory clauses like those contained in the Publisher Service Agreement  
24 are fully enforceable under California law, as long as the limiting language is “clear,  
25 unambiguous, and explicit,” and expresses an agreement not to hold the released party  
26 responsible for the complained of conduct. *See, e.g., Nat’l & Int’t. Bhd. of Street*  
27 *Racers, Inc. v. Superior Court*, 215 Cal. App. 3d 934, 938 [264 Cal. Rptr. 44] (1989)  
28 (affirming enforceability of release as bar to claims on appeal, and holding that “to be

1 effective, a release need not achieve perfection . . . [it need only] be clear,  
2 unambiguous, and explicit, and express an agreement not to hold the released party  
3 liable”); *Madison v. Superior Court*, 203 Cal. App. 3d 589, 598 [250 Cal. Rptr. 299]  
4 (1988) (finding release that expressly relieved scuba diving instructors from liability  
5 for personal injury or wrongful death caused by negligence was free and clear from  
6 ambiguity, was enforceable and operated as a complete defense to wrongful death  
7 action); *see also Artukovich v. Pac. States Cast Iron Pipe Co.*, 78 Cal. App. 2d 1, 4  
8 [176 P.2d 962] (1947) (“In California parties may agree by their contract to the  
9 limitation of their liability in the event of a breach.”). The scope of an exculpatory  
10 provision is a question of law, to be determined based on the express language of the  
11 contract. *See, e.g., Benedek v. PLC Santa Monica L.L.C.*, 104 Cal. App. 4th 1351,  
12 1356 [129 Cal. Rptr. 2d 197] (2002); *YMCA of Metro. Los Angeles v. Superior Court*,  
13 55 Cal. App. 4th 22, 27 [63 Cal. Rptr. 2d 612] (1997).

14 Like the provisions in these case, Paragraphs 7(f) and 3(e) of the Agreement  
15 clearly, unambiguously and explicitly release Commission Junction from precisely the  
16 conduct complained of here – namely, the practice by certain publishers of using  
17 adware software to divert commissions from other publishers. Although Plaintiff  
18 asserts that Commission Junction has a contractual obligation and a “duty” to monitor,  
19 detect and reverse these publishers’ adware practices (Cplt. ¶¶ 84-85, 89), the parties’  
20 Agreement expressly disclaims any such duty, and instead provides that: “CJ IS,  
21 UNDER NO CIRCUMSTANCES, RESPONSIBLE FOR THE PRACTICES, ACTS  
22 OR OMISSIONS OF ANY . . . PUBLISHER . . . .” (Agrmt. (Ex. A) ¶ 7(f)).

23 Likewise, Plaintiff contends that Commission Junction has a duty to discover and pay  
24 to Plaintiff any earned commissions that were stolen by other publishers using adware.  
25 (Cplt. ¶¶ 84-85). Again, the Agreement clearly and unambiguously releases  
26 Commission Junction from any obligation to pay any such unpaid commissions to  
27 Plaintiff, by stating: “Your recourse for any earned Payouts not paid to You shall be  
28

1 to make a claim against the relevant Advertiser(s), and *CJ disclaims any and all*  
2 *liability for such payment.*” (Agrmt. (Ex. A) ¶ 3(e)).

3 Courts repeatedly have held that an express disclaimer of liability – such as that  
4 contained in the Agreement – operates to bar claims arising from the released subject  
5 matter as a matter of law. *See, e.g., Greentree Software, Inc. v. Delrina Tech., Inc.*,  
6 No. Civ. 95-20799 SW, 1996 WL 183041, at \*4 (N.D. Cal. Apr. 11, 1996) (granting  
7 motion to dismiss claim for negligent misrepresentation under Fed. R. Civ. P. 12(b)(6)  
8 because parties’ agreement contained a clause disclaiming liability for such conduct);  
9 *Graphic Arts Sys. v. Scitex Am. Corp.*, No. CV 92-6997-WMB, 1993 U.S. Dist.  
10 LEXIS 21052, at \*26 (C.D. Cal. May, 26, 1993) (dismissing plaintiffs’ claims for  
11 breach of contract, negligence, intentional interference and breach of the implied  
12 covenant of good faith and fair dealing on a motion to dismiss under Fed. R. Civ. P.  
13 12(b)(6) as “barred by the express language of the contracts which disclaims all  
14 warranties and limits remedies”); *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th  
15 748, 757 [29 Cal. Rptr. 2d 177] (1993) (reversing denial of summary judgment and  
16 ordering dismissal of plaintiff’s claims for wrongful death, where release contained  
17 clear and unequivocal waiver of liability for negligence and contained no ambiguities  
18 in expressing the intent of the parties); *McCarn v. Pac. Bell Directory*, 3 Cal. App. 4th  
19 173, 183 [4 Cal. Rptr. 2d 109] (1992) (affirming summary judgment dismissing claims  
20 by advertisers against publisher of telephone directory on grounds that exculpatory  
21 provisions in advertising agreement validly limited defendant’s liability); *Nat’l & Int’l*  
22 *Bhd. of Street Racers*, 215 Cal. App. 3d at 937 (reversing denial of summary  
23 judgment, and ordering dismissal of plaintiff’s claims predicated liability on  
24 defendants’ failure to assure the presence of proper safety equipment and rescue  
25 personnel at race, where plaintiff signed blanket release of responsibility on part of the  
26 race organizer and landowner containing a clear, unambiguous and explicit agreement  
27 waiving liability for negligence).

1 Put differently, the exculpatory provisions contained in the Agreement preclude  
2 Plaintiff from asserting that Commission Junction has a duty (contractual or  
3 otherwise) to detect, deter or reverse the adware practices of third party publishers on  
4 its network. *Cf. Carleton v. Tortosa*, 14 Cal. App. 4th 745, 756 [17 Cal. Rptr. 2d 734]  
5 (1993) (affirming summary judgment dismissing claims for professional negligence,  
6 where plaintiff's claim of duty was negated by the real estate listing agreements and  
7 agency disclosure forms, which advised the client to consult competent professional  
8 for legal or tax advice.)

9 Because the Publisher Service Agreement clearly and explicitly exempts  
10 Commission Junction from any liability for the practices of third-party publishers –  
11 and from any obligation to pay unpaid commissions diverted by those publishers –  
12 each of Plaintiff's claims is barred as a matter of law.

13 **C. Plaintiff's Negligence and Unfair Competition Law Claims Also Should Be**  
14 **Dismissed Because Plaintiff Alleges No Duty to Plaintiff Independent of the**  
15 **Contract at Issue**

16 **1. Plaintiff Allege No Source of Duty Independent of the Contract**  
17 **Between Plaintiff and Commission Junction**

18 Plaintiff's claims are predicated on alleged responsibilities deriving from the  
19 Agreement, which sets forth the relationship between Commission Junction and  
20 Internet publishers like Plaintiff. (Cplt. ¶ 61). The proposed class is defined by  
21 reference to the Agreement to include "all persons and/or entities that, within the past  
22 four years, entered into a publisher agreement with ValueClick and/or Commission  
23 Junction and/or Be Free for affiliate marketing management services on the CJ  
24 Affiliate Networks." (*Id.* ¶ 79). Indeed, Plaintiff alleges specifically that "[e]very  
25 member of the proposed Class is a party to the Agreement" (*id.* ¶ 65), and that the  
26 laws governing interpretation of the Agreement apply to all of Plaintiff's claims: "The  
27 Agreement provides that it is to be governed by the laws of the State of California.  
28 Therefore, a single body of substantive law applies to this action . . . ." (*id.* ¶ 66).

1 Likewise, Plaintiff's substantive allegations are based on duties supposedly  
2 arising under the Agreement. In the first cause of action, Plaintiff alleges that  
3 Commission Junction breached the Agreement by allegedly "paying commissions to  
4 Adware Affiliates even though Defendants knew, or should have reasonably known,  
5 that the commissions were wrongfully and improperly diverted by Adware Affiliates  
6 (i.e., Commission Theft) and/or were the result of Transaction Fraud." (*Id.* ¶ 84). In  
7 the second cause of action, Plaintiff alleges that Commission Junction breached a duty  
8 "to Plaintiff and the Class" – i.e., to those "persons and/or entities that . . . entered into  
9 a publisher agreement . . . for affiliate marketing management services on the CJ  
10 Affiliate Networks" – by allegedly "failing to adequately monitor the CJ Affiliate  
11 Networks . . ." (*Id.* ¶ 79, 89). And in the third cause of action, Plaintiff alleges that  
12 she may bring a claim under California's Unfair Competition Law on behalf of a  
13 purported nationwide class because "the Agreement between Defendants and Plaintiff  
14 and the Class provides that it shall be governed by the laws of the State of California,"  
15 and then alleges that Commission Junction violated the UCL by "paying commissions  
16 earned by Plaintiff and the Class to Adware Affiliates . . ." (*Id.* ¶¶ 93-94). Plaintiff  
17 identifies no source of duty whatsoever by any of the Defendants, other than the  
18 Agreement, that could somehow require Commission Junction (or any of the other  
19 Defendants) to have any responsibility to Plaintiff to monitor the CJ Affiliate  
20 Networks or to pay commissions to Plaintiff.

21 **2. Plaintiff's Negligence Cause of Action Fails Because Plaintiff Has**  
22 **Alleged No Duty Apart from the Contract Between Plaintiff and**  
23 **Commission Junction**

24 It is well established under California law that a plaintiff may not maintain a  
25 tort claim, such as Plaintiff's second cause of action for negligence, based solely on  
26 allegations of a breach of contract. The California Supreme Court has explained that  
27 "conduct amounting to a breach of contract becomes tortious only when it also  
28 violates a duty independent of the contract arising from principles of tort law." *Erlich*

1 v. *Menezes*, 21 Cal. 4th 543, 551 (1999) (citing *Applied Equip. Corp. v. Litton Saudi*  
2 *Arabia Ltd.*, 7 Cal. 4th 503, 515 [28 Cal. Rptr. 2d 475] (1994)).<sup>4</sup> Moreover, “[a]n  
3 omission to perform a contract obligation is never a tort, unless that omission is also  
4 an omission of a legal duty.” *Erlich*, 21 Cal. 4th at 551 (quoting *Jones v. Kelly*, 208  
5 Cal. 251, 255 [280 P. 942] (1929)).

6 The Court in *Erlich* explained the rationale for limiting plaintiffs to breach of  
7 contract remedies when their only relationship to the defendant is through a contract:  
8 “Our previous decisions detail the reasons for denying tort recovery in contract breach  
9 cases: the different objectives underlying tort and contract breach; the importance of  
10 predictability in assuring commercial stability in contractual dealings; the potential for  
11 converting every contract breach into a tort, with accompanying punitive damage  
12 recovery, and the preference for legislative action in affording appropriate remedies.”  
13 *Erlich*, 21 Cal. 4th at 553.

14 There are limited exceptions to this general rule barring tort claims for an  
15 alleged breach of contract, none of which exceptions apply here. The Court in *Erlich*  
16 explained that “[t]ort damages have been permitted in contract cases where a breach of  
17 duty directly causes physical injury ; for breach of the covenant of good faith and fair  
18 dealing in insurance contracts ; for wrongful discharge in violation of fundamental  
19 public policy ; or where the contract was fraudulently induced .” *Erlich*, 21 Cal. 4th at  
20 551-52 (internal citations omitted). None of those circumstances have been alleged  
21 here.

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22  
23  
24 <sup>4</sup> The California Supreme Court has consistently affirmed this principle in a variety  
25 of contexts. See, e.g., *Aas v. Superior Court*, 24 Cal. 4th 627, 643 [101 Cal. Rptr.  
26 2d 718] (2000) (“A person may not ordinarily recover in tort for the breach of  
27 duties that merely restate contractual obligations. Instead, courts will generally  
28 enforce the breach of a contractual promise through contract law, except when the  
actions that constitute the breach violate a social policy that merits the imposition  
of tort remedies.”) (internal quotations omitted); *Freeman & Mills, Inc. v. Belcher*  
*Oil Co.*, 11 Cal. 4th 85, 102 [44 Cal. Rptr. 2d 420] (1995) (holding that even bad  
faith denial of the existence of a contract does not constitute a tort).

1 Accordingly, Plaintiff's second cause of action for negligence should be  
2 dismissed.

3 **3. Plaintiff's Unfair Competition Law Cause of Action Fails Because**  
4 **Plaintiff Has Alleged No Unlawful, Unfair, or Fraudulent Practice**  
5 **Apart from Alleged Breach of Contract, which Does Not Support a**  
6 **UCL Claim**

7 Like Plaintiff's second cause of action for negligence, Plaintiff's third cause of  
8 action for alleged violation of California's Unfair Competition Law should be  
9 dismissed because Plaintiff has failed to articulate any duty separate and apart from  
10 the contract itself.

11 To state a claim under the Unfair Competition Law, a plaintiff must allege, *inter*  
12 *alia*, that a practice that is "unlawful," "unfair," or "fraudulent." Cal. Bus. & Prof.  
13 Code § 17200. Plaintiff has alleged none of these circumstances. Plaintiff's  
14 allegations in this regard are stated in Paragraph 94 of the Complaint:

15 Defendants' practice of knowingly allowing Adware on the CJ Affiliate  
16 Networks and paying commissions earned by Plaintiff and the Class to Adware  
17 Affiliates, as alleged herein above, violates and violated California Business  
18 and Professions Code § 17200 et seq. because it is and was an unlawful, unfair  
19 and/or fraudulent business act or practice.

20 (Cplt. ¶ 94).

21 This allegation is entirely duplicative of Plaintiff's breach of contract claim.  
22 The California Supreme Court has cautioned that the UCL is not intended to "be used  
23 as an all-purpose substitute for a tort or contract action, something the Legislature  
24 never intended." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1151  
25 [131 Cal. Rptr. 2d 29] (2003). Plaintiff has identified no law other than the alleged  
26 breach of contract that Commission Junction's alleged "practice" violates, and thus  
27 does not state a claim that the practice is "unlawful." *See, e.g., Bernardo v. Planned*  
28 *Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 351-52 [9 Cal. Rptr. 3d 197] (2004)

1 (finding that because plaintiff failed to state any statutory, regulatory or decisional law  
2 that the defendant violated, the plaintiff failed to show legally sufficient  
3 unlawfulness).

4 Plaintiff similarly fails to state a claim that Commission Junction's alleged  
5 practices are "unfair." There is no threat of a "violation of an antitrust law, or . . . the  
6 policy or spirit of one of those laws," or any other activity that "significantly threatens  
7 or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20  
8 Cal. 4th 163, 187 [83 Cal. Rptr. 2d 548] (1999). In *Cel-Tech*, the Supreme Court  
9 criticized the older formulations, or "purely subjective notions" of "unfairness," as  
10 "too amorphous and provid[ing] too little guidance to courts and businesses." *Id.* at  
11 184-85. The Court "sympathize[d]" with "the need for California businesses to know,  
12 to a reasonable certainty, what conduct California law prohibits and what it permits."  
13 *Id.* at 185. It ultimately discarded the older formulations in favor of a more definitive  
14 standard: "the word 'unfair' in [the UCL] means conduct that threatens an incipient  
15 violation of an antitrust law, or violates the policy or spirit of one of those laws  
16 because its effects are comparable to or the same as a violation of the law, or  
17 otherwise significantly threatens or harms competition." *Id.* at 187.<sup>5</sup>

18 Likewise, Plaintiff fails to allege any "fraudulent" conduct by Commission  
19 Junction. Plaintiff does not identify any supposedly actionable misrepresentation or  
20 omission at all by Commission Junction. Moreover, a plaintiff in a UCL case must  
21 plead and prove that she actually relied on the allegedly false statement. *See* Cal. Bus.  
22 & Prof. Code § 17204 (UCL claim may be brought by "any person who has suffered  
23

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24 <sup>5</sup> While there may be some debate as to whether the standard for "unfairness"  
25 described in *Cel-Tech* is appropriate in the consumer context, that debate is of no  
26 moment here because Plaintiff alleges a commercial relationship with Commission  
27 Junction. *See Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1264-74  
28 [39 Cal. Rptr. 3d 634] (2006) (describing various tests for "unfairness" that courts  
have considered in the consumer context); Complaint, ¶ 2 (alleging that Plaintiff  
and those on whose behalf she allegedly brings this action "entered into publisher  
agreements . . . for affiliate marketing management services").

1 injury in fact and has lost money or property as a result of such unfair competition”);  
2 *see also Cattie v. Wal-Mart Stores, Inc.*, No. 06CV0897-LAB (CAB), 2007 U.S. Dist.  
3 LEXIS 19980, \*19-24 (S.D. Cal. Mar. 21, 2007) (dismissing claim where plaintiff  
4 failed to allege reliance on allegedly false statement).<sup>6</sup> Plaintiff here has failed to  
5 allege that she relied to her detriment on any specific alleged misrepresentation or  
6 omission by Commission Junction.<sup>7</sup>

7 Accordingly, Plaintiff’s third cause of action for alleged violation of the Unfair  
8 Competition Law should be dismissed.

9 **D. In Any Event, Plaintiff’s Claims Against ValueClick and Be Free Should Be**  
10 **Dismissed Because Plaintiff Has Not Stated Sufficient Allegations Against**  
11 **Either Entity**

12 The entire Complaint addresses alleged conduct by Commission Junction. The  
13 only source of any duty alleged by Plaintiff is a contract between Commission  
14 Junction and publishers, and the proposed class is defined as all persons and/or  
15 entities that entered into a publisher agreement for affiliate marketing services on the  
16 CJ Affiliate Networks. (Cplt. ¶¶ 61, 79).

17 The Complaint fails to allege any contract between Plaintiff (or anyone else)  
18 and either ValueClick or Be Free, nor any other source of duty by these entities to  
19 Plaintiff. Thus, Plaintiff’s claims should be dismissed against ValueClick and Be  
20 Free. *See, e.g., Am. West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 800 (9th  
21 Cir. 1989) (affirming grant of motion to dismiss for failure to state a claim for breach

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22  
23 <sup>6</sup> The issue of whether the UCL requires a plaintiff to plead and prove reliance on an  
24 alleged unfair business practice is currently on review to the California Supreme  
25 Court. *See In re Tobacco II Cases*, 142 Cal. App. 4th 891 [47 Cal. Rptr. 3d 917],  
26 *rev. granted*, 2006 Cal. LEXIS 13332 (Nov. 1, 2006).

27 <sup>7</sup> For the same reasons, Plaintiff’s claims under the Unfair Competition Law should  
28 also be dismissed for lack of standing, because Plaintiff has not sufficiently alleged  
that she “has suffered injury in fact and has lost money or property as a result of  
such unfair competition.” Cal. Bus & Prof. Code § 17204. *See also* Memorandum  
in Support of Motion to Strike, sec. II.B.2 (explaining flaws in Plaintiff’s apparent  
theory of restitution).

1 of contract because the defendant was not a party to the contract forming the basis for  
2 plaintiff's action); *Meisel v. Allstate Indem. Co.*, 357 F. Supp. 2d 1222, 1227 (E.D.  
3 Cal. 2005) ("Because [defendant] is not a party to the insurance contract, he cannot be  
4 liable for a breach of that contract. Accordingly, Plaintiff cannot state a claim for  
5 breach of contract against [defendant] under well settled California law, and this claim  
6 is dismissed.").

7 Instead, Plaintiff offers generalized, unsupported allegations that "Commission  
8 Junction and Be Free are the alter egos of ValueClick." (Cplt. ¶ 70). Plaintiff's "alter  
9 ego" allegations are remarkably thin: Plaintiff alleges that ValueClick described its  
10 subsidiaries' activities in its 10-K; that the former Be Free website now redirects users  
11 to Commission Junction's website; that ValueClick's website states that ValueClick  
12 can "deliver a single-source solution by combining best-of-breed offers for paid  
13 placement, paid inclusion and organic search – all while providing complete account  
14 management and constant program reporting, analysis and optimization"; that  
15 ValueClick, Commission Junction, and Be Free engage in unspecified sales and  
16 management activities with respect to affiliate marketing programs operated by  
17 Commission Junction; and a number of other entirely conclusory allegations. (*See id.*  
18 ¶¶ 70-76).

19 Before the alter ego doctrine may be invoked, however, two elements must be  
20 alleged: "First, there must be such a unity of interest and ownership between the  
21 corporation and its equitable owner that the separate personalities of the corporation  
22 and the shareholder do not in reality exist. Second, there must be an inequitable result  
23 if the acts in question are treated as those of the corporation alone." *Neilson v. Union*  
24 *Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1115 (C.D. Cal. 2003) (quoting *Sonora*  
25 *Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 526 (2000)).

26 Plaintiff's few specific allegations in the "alter ego" section of the Complaint  
27 fall well short of these requirements, and it is well settled that Plaintiff's conclusory  
28 allegations cannot save Plaintiff's alter ego claims. "Conclusory allegations of 'alter

1 ego' status are insufficient to state a claim. Rather, a plaintiff must allege specifically  
2 both of the elements of alter ego liability, as well as facts supporting each." *Neilson*,  
3 290 F. Supp. 2d at 1116 (citing *In re Currency Conversion Fee Antitrust Litig.*, 265 F.  
4 Supp. 2d 385, 426 (S.D.N.Y. 2003) ("These purely conclusory allegations cannot  
5 suffice to state a claim based on veil-piercing or alter-ego liability, even under the  
6 liberal notice pleading standard.")); *see also Wady v. Provident Life & Accident Ins.*  
7 *Co. of Am.*, 216 F. Supp. 2d 1060, 1067 (C.D. Cal. 2002) ("More pertinent for  
8 purposes of the current discussion, none [of the allegations] contains any reference to  
9 UnumProvident being the alter ego of Provident. None alleges that UnumProvident  
10 treats the assets of Provident as its own, that it commingles funds with Provident, that  
11 it controls the finances of Provident, that it shares officers or directors with Provident,  
12 that Provident is undercapitalized, or that the separateness of the subsidiary has  
13 ceased. Without such allegations, the issue is not adequately raised . . .").

14 Accordingly, in the event that this Court does not dismiss all claims against all  
15 of the defendants for the reasons set forth above, this Court should at least dismiss all  
16 claims against ValueClick and Be Free.

#### 17 IV. CONCLUSION

18 Plaintiff's claims concern the services provided by Commission Junction to  
19 publishers pursuant to the Commission Junction Publisher Service Agreement. The  
20 express terms of this agreement bars each of Plaintiff's claims, by clearly disclaiming  
21 liability for precisely the claims that Plaintiff asserts here. In addition, Plaintiff  
22 alleges no duty by Commission Junction, ValueClick, or Be Free apart from those  
23 rights and responsibilities agreed to under the terms of the Agreement. Accordingly,  
24 Plaintiff's tort claims – for negligence and for alleged violations of the Unfair  
25 Competition Law – should be dismissed.

26 Plaintiff concedes that Commission Junction has policies prohibiting members  
27 of the CJ Affiliate Networks from interfering with or seeking to influence improperly  
28 the referral of a potential customer or visitor to the web site of an online advertiser

1 (Cplt. ¶ 39), and that Commission Junction has, in fact, taken action against third-  
2 party publishers who have violated these policies (*id.* ¶ 54). Nevertheless, Plaintiff  
3 alleges that “Commission Junction could do far more to eliminate Adware Affiliates  
4 from the CJ Affiliate Networks.” (Cplt. ¶ 37.) Commission Junction maintains that it  
5 takes appropriate actions with reference to publishers who violate its policies and  
6 interfere with or seek to influence improperly the referral of a potential customer or  
7 visitor to the website of an online advertiser, but the Court need not ever reach this  
8 issue, because the Agreement itself clearly disclaims liability based on allegations that  
9 Commission Junction “could do far more” with respect to the practices of third party  
10 publishers. If Plaintiff is not satisfied with Commission Junction’s services, she may  
11 sign up for a different affiliate program, but her perception that Commission Junction  
12 could do something more to prevent third parties from allegedly interfering with  
13 Commission Junction’s services, notwithstanding clear language in the Agreement  
14 disclaiming liability for the acts of third parties, is not a sufficient basis to maintain  
15 this action.

16  
17 DATED: June 13, 2007

18 G. Charles Nierlich  
19 GIBSON, DUNN & CRUTCHER LLP

20 By: G. Charles Nierlich  
21 G. Charles Nierlich

22 Attorneys for Defendants  
23 VALUECLICK, INC., COMMISSION  
24 JUNCTION, INC., and BE FREE

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28  
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# Exhibit A

## *Commission Junction Publisher Service Agreement*

### *Introduction*

This Publisher Service Agreement ("Agreement") is made by and agreed to between Commission Junction, Inc., a Delaware corporation, located at 530 East Montecito Street, Santa Barbara, CA 93103, USA ("CJ"), and you ("You"). As an application service provider, CJ facilitates "Performance Marketing Programs" by providing services ("Network Service") via the Internet. A "Performance Marketing Program" ("Program") is where a person, entity, affiliate or its agent, operating "Web site(s)" (internet domain, or a portion of a domain) and/or other promotional methods to drive traffic to another's Web site or Web site content ("Publisher") may earn financial compensation ("Payouts") for "Transactions" (actions by Visitors as defined by the Advertiser) referred by such Publisher via an action made by a "Visitor" (any person or entity that is not the Publisher or the Publisher's agent) through an Internet connection ("Link") to a Web site or Web site content operated by another person or entity ("Advertiser") from an Advertiser authorized promotional method used by such Publisher. The Advertiser compensates the Publisher, in accordance with this Agreement and the Program Payout specifications.

#### **1. Participation in Programs.**

(a) **Acceptance by Advertiser.** During this Agreement You may apply to Advertiser Programs for the opportunity to earn Payouts by promoting Advertisers in accordance with the Advertiser's Program terms and complying with this Agreement. Upon approval by the Advertiser for acceptance into its Program, You may display (and remove) Links to Advertiser's Web site or Web site content in accordance with the Advertiser's Program terms and this Agreement. An Advertiser's acceptance of You extends only to the entity, or individual, that enters into this Agreement with CJ.

(b) **Program Terms.** The details of an Advertiser's Program shall be available through the Network Service. Transactions qualifying for a Payout are defined by the Advertiser. Advertisers may change any Payout rate upon no less than 7 days written notice through the Network Service with effect from the 8th day (or such later date as specified by Advertiser).

(c) **Additional Terms.** Publishers and Advertisers may enter into direct contractual relationships through the apply to join process in the form of a click-through agreement hosted by CJ ("Click-through Agreement") or in the form of an offer made to You by Advertiser via the members' area on the Network Service ("Offer"). It is Your obligation to review and accept or decline a Click-through Agreement or Offer when such is presented to You. If accepted by You, compliance with the Click-through Agreement or Offer is solely Your responsibility. The terms and conditions of the Click-through Agreement or Offer may supersede or conflict with this Agreement and shall apply only with respect to Your relationship with that particular Advertiser.

#### **(d) Prohibited Uses of Links.**

(i) **Locations.** You may not place Links to an Advertiser's Web site or Web site content in third party newsgroups, message boards, blogs, unsolicited email and other types of spam, link farms, counters, chatrooms, or guestbooks. Publishers using IRC channels, instant messages or similar Internet resources must designate their program as special requiring manual review and acceptance by the Advertiser.

(ii) **Non-Bona Fide Transactions.** You must promote Advertisers such that You do not mislead the Visitor, and such that the Links deliver bona fide Transactions by the Visitor to Advertiser from the

Link. You shall not cause any Transactions to be made that are not in good faith, including, but not limited to, using any device, program, robot, Iframes, or hidden frames. You may or may not be compensated for Transactions where You or Your agent are the Visitor. Multiple Leads from the same individual, entity or IP address may be considered non-bona fide Transactions. You shall not earn Payouts for non-bona fide Transactions.

(iii) **Infringement.** None of Your promotional activities may infringe an Advertiser's proprietary rights (including but not limited to trademark rights), CJ's proprietary rights, or a third party's proprietary rights.

(e) **Updating Links.** If Links to Advertiser are not dynamically updated through the Network Service, upon notification You are obligated to update an Advertiser's Links in order to earn Payouts.

## 2. Publisher Obligations to CJ.

(a) **Accurate, Up-to-Date Information.** You agree to provide CJ and Advertiser with accurate information about You and Your promotional methods, and to maintain up-to-date "Account" information (such as contact information, Web sites used, etc.). In Your Account, You must accurately, clearly and completely describe all promotional methods by selecting the appropriate descriptions and providing additional information when necessary. Some promotional methods will be designated by the system as "special". Special programs are linked to promotional methods and practices considered unique and require manual approval and acceptance by the Advertiser. CJ reserves the right to define any program as special.

(b) **Use of Links.** You represent and warrant that all promotional means used by You will not contain objectionable content (including but not limited to content that is misleading, libelous, defamatory, obscene, violent, bigoted, hate-oriented, illegal, and/or promoting illegal goods, services or activities), and that You will not mislead others. You agree to: (i) use ethical and legal business practices, (ii) comply with the Advertisers' Program terms and this Agreement, (iii) maintain a privacy policy on Your Web site and for any non-Web site based promotional method made available to Visitors, and (iv) designate Your Publisher Account as "special" if You promote an Advertiser(s) by any means other than displaying a Link to the Advertiser on Your Web site. CJ must approve all of Your promotional activities and may deem Your promotional activities inappropriate and a material breach of this Agreement in CJ's sole discretion. Our network quality department reviews publisher conduct and any suspected fraudulent, abusive or otherwise illegal content or activity by You through Your promotional methods, or that is perpetrated through use of the Network Service, is grounds for immediate termination of this Agreement or deactivation of Your Account.

(c) **Promotional Methods.** You represent and warrant that You will not engage in and/or facilitate spamming, indiscriminate advertising or unsolicited commercial email or otherwise fail to comply with the CAN SPAM Act of 2003 (Public Law 108-187 or any successor legislation), and/or any other laws and/or regulations that govern email marketing and/or communications. You represent and warrant that You will not engage in pop-up or pop-under advertising using any means involving third party properties and/or services (software). Pop up/unders are acceptable on a first party basis only when triggered by Your site content /site visit or by downloadable software applications for which You are the owner/operator. Pop up/unders delivered through downloadable software cannot engage in means that force clicks or perform redirects, or pop over a pay-per-click listing or natural search results. Pop up/unders must honor the CJ Publisher Code of Conduct requirements (as such requirements may be modified from time to time), including but not limited to: (i) installation requirements, (ii) enduser agreement requirements, (iii) afsrc=1 requirements, (iv) requirements prohibiting usurpation of a Transaction that might otherwise result in a Payout to another Publisher (e.g. by purposefully detecting and forcing a subsequent click-through on a link of the same Advertiser) and (v) non-interference with competing advertiser/ publisher referrals.

(d) **Personally Identifiable Information of Visitors.** You represent and warrant that You will not enable the Tracking Code to collect personally identifiable information of Visitors that would allow CJ to personally identify Visitors.

(e) **Privacy.** You must conspicuously post Your privacy policy on Your Web site and otherwise make it available to all Visitors. Your privacy policy must comply with all laws and regulations regarding the privacy of Visitor information, be commercially reasonable, and fully and accurately disclose Your collection and use of

Visitor information. You must fully and accurately disclose Your use of third party technology, including CJ's tracking technology, use of cookies and options for discontinuing use of such cookies.

(f) **Applicable Codes and Code Maintenance.** In order for CJ to record the tracking of Visitors' Transactions resulting from clicks on Links to Advertisers promoted by You, You must include and maintain a CJ "Tracking Code" within the Advertiser's Links. All Advertiser Links and all advertisements ("Ad Content") must be in a Network Service compatible format.

(g) **Usage and Security of Account.** You shall be responsible for all usage and activity on Your account and for loss, theft or unauthorized disclosure of Your password (other than through CJ's negligent or willful conduct or omission). You shall provide CJ with prompt written notification of any known or suspected unauthorized use of Your Account or breach of the security of Your Account.

### 3. CJ's Services.

(a) **Tracking Transactions and Payouts.** CJ shall determine (where possible) actual Payouts that should be credited to Your Account. CJ may, in CJ's sole discretion, apply an estimated amount of Payouts, if: (i) You are referring Visitors to Advertiser as verified by clicks through Links to Advertiser with CJ Tracking Code, (ii) where there is an error in Advertiser's transmission of Tracking Code data to CJ, and (iii) where CJ is able to utilize a historical analysis of Your promotion of Advertiser to determine an equitable amount of estimated Payouts.

(b) **Charge-backs.** An Advertiser may apply, or CJ may apply, a debit to Your Account in an amount equal to a Payout previously credited to Your Account in circumstances of : (i) product returns; (ii) duplicate entry or other clear error; (iii) non-bona fide Transactions; (iv) non-receipt of payment from, or refund of payment to, the Visitor by the Advertiser; or (v) Publisher failure to comply with Advertiser's Program terms or other agreement with Advertiser ("Charge-back"). Charge-backs may be applied to Your Account at any time, including previous payment cycles.

(c) **Access to Tracking and Reporting Tools.** CJ shall provide You with access to tracking and reporting tools, and to support services. From time to time CJ may offer optional services for a fee. Fees for such optional services are at CJ's then-current published rates or as may be quoted by CJ, and are payable in advance or may be off-set against Your positive Account balance (at CJ's discretion). Tracking detail regarding Visitor Transactions is not available on a real-time basis for all Advertisers and there may be reporting delays regarding Transactions for some Advertisers. CJ may make available, for fees that CJ shall publish from time-to-time, enhanced reporting capabilities and other services that are not included in the standard Network Service.

(d) **Support.** Support for your program is available on-line through the "Contact Us" area in the CJ Account Manager, which allows You to categorize and describe Your issue. Online help also allows You to check the status of all issues through the "Check Question Status" feature. Phone support may also be available during operating hours, except holidays.

(e) **Facilitating Payment of Payouts.** Subject to other provisions in this Agreement, CJ shall credit Your Account with a Payout for each qualifying Transaction in accordance with the Advertiser's Payout rate and Program terms for the relevant Transaction. On the 20th day of each calendar month, CJ will issue to You any positive balance in Your Account for Transactions reported for the previous month, provided Your Account balance exceeds the required "Minimum Account Balance." CJ shall have no obligation to make payment of any Payouts for which CJ has not received payment from the relevant Advertiser of all monies due to CJ (including for all Payouts owed by such Advertiser to all of such Advertiser's Publishers). If CJ elects, in its own discretion, not to make payment to You for amounts not received from an Advertiser, those amounts shall not be included in the Minimum Balance Amount. Your recourse for any earned Payouts not paid to You shall be to make a claim against the relevant Advertiser(s), and CJ disclaims any and all liability for such payment. You may elect to receive payment in any of the currencies that CJ supports (as may be amended by CJ). The conversion rate shall be determined in accordance with CJ's operating standards using the rates prevailing upon the date that payment is made to You, or upon the basis of historical conversion rates if rates are unavailable. The number or amount of Transactions, credits for Payouts, and debits for Charge-backs, as calculated by CJ, shall be final and binding on You.

(f) **Dormant Accounts.** If Publisher's Account has not been credited with a valid, compensable Transaction that

has not been Charged-back during any rolling, six consecutive calendar month period ("Dormant Account"), a dormant account fee at CJ's then-current rate shall be applied to Publisher's Account each calendar month that Publisher's Account remains an open yet Dormant Account or until Your Account balance reaches a zero balance, at which time the Account shall become deactivated. Transactions will not be counted if the Transaction subsequently becomes a Charge-back.

(g) **Negative Accounts.** You may have a negative balance if Your Account is debited amounts equivalent to previous Payouts for Charge-backs and You do not have an adequate Account balance to cover the Charge-back amounts. When You have a negative balance, You must immediately remit payment to CJ in an amount sufficient to bring Your Account to a zero balance, or Your Account is subject to 1.5% interest per month, compounded monthly.

#### 4. Proprietary Rights.

(a) **Linking to Advertisers.** For each Advertiser's Program that You have been accepted to, the Advertiser is granting to You the right to display and Link to the Advertiser's Web site or Web site content in accordance with the Advertiser's Program terms for the limited purposes of Promoting the Advertiser's Program, subject to the terms and conditions of this Agreement. Your use of the Link signifies Your agreement to refrain from copying or modifying any icons, buttons, banners, graphics files or content contained in the Link, including but not limited to refraining from removing or altering any copyright or trademark notices. As between CJ and Publisher, CJ owns all rights in and to all information regarding the Visitors that You refer to Advertisers through CJ.

(b) **CJ's Use of Your Marks.** You authorize CJ to utilize Your trademarks, service marks, tradenames, and/or copyrighted material that You provide to CJ through Your Account to promote Your participation in the Network Services.

(c) **Your Use of CJ's Proprietary Rights.** You agree that Your use of any CJ Web site (such as [www.cj.com](http://www.cj.com)) and Your use of any CJ trademarks, service marks, tradenames, and/or URLs is subject to the license and terms of use that are available from such Web site ("Terms of Use"). You explicitly agree not to adopt or use in any manner any trademarks, service marks, tradenames, and/or URLs that are the same or confusingly similar to, or are combined with, those of CJ.

(d) **Retention of Rights.** All proprietary rights of Advertisers, You, and CJ, and all goodwill arising as a result of such rights, inure to the benefit of such owner.

(e) **No Challenge to CJ's/Advertiser's Proprietary Rights.** You acknowledge that You obtain no proprietary rights in CJ's trademarks, service marks, tradenames, URLs, copyrighted material, patents, and patent applications, and agree not to challenge CJ's proprietary rights. You acknowledge that You obtain no proprietary rights in Your Advertisers' proprietary rights, and agree not to challenge such Advertiser's proprietary rights.

#### 5. Confidentiality.

(a) **Obligations.** You or CJ may provide the other with information that is confidential and proprietary to that party or a third party, as is designated by the disclosing party or that is reasonably understood to be proprietary and/or confidential ("Confidential Information"). The receiving party agrees to make commercially reasonable efforts, but in no case no less effort than it uses to protect its own Confidential Information, to maintain the confidentiality of and to protect any proprietary interests of the disclosing party. Confidential Information shall not include (even if designated by a party) information: (i) that is or becomes part of the public domain through no act or omission of the receiving party; (ii) that is lawfully received by the receiving party from a third party without restriction on use or disclosure and without breach of this Agreement or any other agreement without knowledge by the receiving party of any breach of fiduciary duty, or (iii) that the receiving party had in its possession prior to the date of this Agreement. Upon termination of this Agreement, You must destroy or return to CJ any Confidential Information provided by CJ to You under this Agreement.

(b) **Provision of Info to Advertisers/Third Parties.** You agree that CJ may, but is not obligated to, provide Your email address(es) and basic Publisher Account detail (including but not limited to Your address, phone and fax number, Web site name, the date the website or subscription email first entered into operation, and visitor demographics) to Advertisers. CJ may provide any and all Visitor, Transaction and/or Tracking Code data to the Advertiser to which You referred such Visitor, and to any third party in CJ's sole discretion,

including but not limited to all regulatory, legislative and judicial bodies, and pursuant to allegations and claims of proprietary rights infringement. CJ reserves the right to be able to utilize Tracking Code data provided to it, which may include: information about Your performance statistics, to analyze Network Service trends, monitor Network Service efficiencies, maintain the integrity of the tracking code, promote Network Service capabilities and efficiencies, and promote You and Your Web performance to Advertisers.

#### **6. Term, Termination, Deactivation and Notices.**

(a) **Term.** This Agreement shall commence upon Your indication that You have accepted this Agreement by providing the required information and 'clicking through' the acceptance button on the CJ Web site and shall continue until terminated in accordance with the terms of this Agreement. This Agreement may be terminated by either party upon 15 days notice. This Agreement may be terminated immediately upon notice for Your breach of this Agreement. Your Account may be deactivated during investigation of breach of this Agreement. If this Agreement is terminated based upon Your breach, You shall not be eligible to enter into a new click-through Publisher Service Agreement with CJ, and any attempt to do so shall be null and void.

(b) **Termination by Advertiser.** An Advertiser may terminate You, one of Your Web sites, or Your ability to use a promotional method, from the Advertiser's Program for any or no reason, upon 7 days written notice with effect from the 8th day. Additionally, Advertiser may terminate You from the Advertiser's Program for breach of a third party's proprietary rights, and/or diluting, tarnishing or blurring an Advertiser's trademarks, tradenames, and/or service marks, or for Your material breach of the Advertiser's Program terms or of this Agreement.

(c) **Termination or Deactivation by CJ.** CJ may terminate You, one of Your Web sites, or Your use of a promotional method, from an Advertiser's Program, at any time in CJ's sole discretion. Breach of any Section of this Agreement is cause for immediate termination from an Advertiser's Program and/or termination of this Agreement, and may result in Chargeback of one or more Payouts. CJ may temporarily deactivate or terminate Your Account if: (i) You or Your agent are responsible for the improper functioning of Ad Content, or if You otherwise interfere with and/or fail to maintain the Tracking Code; (ii) Your Account has not been logged into and/or there have been no Transactions credited to Your Account for any 30 day period; (iii) You maintain a negative balance in Your Account; (iv) CJ determines You are diluting, tarnishing or blurring CJ's proprietary rights; (v) You begin proceedings to challenge CJ's proprietary rights; or (vi) a third party (including a CJ Advertiser) disputes Your right to use any Link, domain name, trademark, service mark, trade dress, or right to offer any service or good offered on Your Web site, or through any of Your promotional means. Upon termination of this Agreement, or in case of deactivation of Your Account, You shall no longer accrue Payouts in Your Account, including but not limited to subsequent sales and/or Leads for click-throughs that occurred prior to termination.

(d) **Termination of Programs and Offers.** Programs and Offers may be discontinued at any time.

(e) **Notices.** Except as provided elsewhere herein, both parties must send all notices relating to this Agreement to: (i) for CJ, via registered mail, return receipt requested or via an internationally recognized express mail carrier to Commission Junction, Inc., Attn: Legal Dept., 530 East Montecito Street, Santa Barbara, CA 93103 USA (effective upon actual receipt); and, (ii) for You, at the email or physical address listed on Your Account (effective upon sending as long as CJ does not receive an error message regarding delivery of the email) or five (5) days after mailing).

(f) **Post-termination.** Upon termination of this Agreement, any outstanding payments shall be paid by CJ to You within 90 days of the termination date, and any outstanding debit balance shall be paid by You to CJ within 30 days of termination of this Agreement. All payments are subject to recovery for Charge-backs. Upon termination of this Agreement, any permissions granted under this Agreement will terminate, and You must immediately remove all Links to Advertiser(s). Provisions of this Agreement that by their nature and context are intended to survive the termination of this Agreement shall survive the termination of this Agreement to the extent that and as long as is necessary to preserve a party's rights under this Agreement that accrued prior to termination.

#### **7. Representations, Warranties, Disclaimers and Limitations.**

(a) **Business Operations.** Each party will make reasonable commercial efforts to keep its Web site operational

during normal business hours. However, the parties agree that it is normal to have a certain amount of system downtime and agree not to hold each other or Your Advertisers liable for any of the consequences of such interruptions. CJ may modify the Network Service, or discontinue providing the Network Service, or any portion thereof, at any time.

(b) **Authority.** Each party represents and warrants to the other party as to itself that the person executing this Agreement is authorized to do so on such party's behalf. IF YOU ARE AN INDIVIDUAL, YOU REPRESENT AND WARRANT THAT YOU WERE AT LEAST 18 YEARS OF AGE ON THE EFFECTIVE DATE OF THIS AGREEMENT.

(c) **Non-infringement Warranties.** You represent and warrant that: (i) You have all appropriate authority to operate, and to any and all content on, Your Web site(s); (ii) You have all appropriate authority in any promotional method you may choose to use; (iii) Your Web site(s) and Your promotional methods do not and will not infringe a third party's, a CJ Advertiser's, or CJ's, proprietary rights; and (iv) You shall remain solely responsible for any and all Web sites owned and/or operated by You and all of Your promotional methods. CJ may or may not review all content on Your Web site or used by You in Your promotional methods.

(d) **Compliance with Laws.** You are responsible for compliance with the requirements of all relevant legislation (including subordinate legislation and the rules of statutorily recognized regulatory authorities) in force or applicable in the United States or in any other applicable territory, and warrant that no promotion method used by You or the content of Your Web site(s) will render CJ liable to any proceedings whatsoever.

(e) **Limitation of Liabilities.** ANY OBLIGATION OR LIABILITY OF CJ UNDER THIS AGREEMENT SHALL BE LIMITED TO THE TOTAL OF YOUR PAYOUTS PAID TO YOU BY CJ UNDER THIS AGREEMENT DURING THE YEAR PRECEDING THE CLAIM. NO ACTION, SUIT OR PROCEEDING SHALL BE BROUGHT AGAINST THE OTHER PARTY TO THIS AGREEMENT MORE THAN ONE YEAR AFTER THE TERMINATION OF THIS AGREEMENT. YOU AGREE THAT CJ SHALL NOT BE LIABLE TO YOU, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO A CLAIM BY ANOTHER PUBLISHER OR AN ADVERTISER OF THE NETWORK SERVICE), FOR ANY CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF GOODWILL, LOST PROFITS, BUSINESS INTERRUPTION, LOSS OF PROGRAMS OR OTHER DATA, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR CLAIM.

(f) **Disclaimer of Warranties.** TO THE FULLEST EXTENT PERMISSIBLE PURSUANT TO APPLICABLE LAW, CJ DISCLAIMS ALL WARRANTIES IMPLIED, INCLUDING, BUT NOT LIMITED TO, (A) MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS, (B) THAT THERE ARE NO VIRUSES OR OTHER HARMFUL COMPONENTS, (C) THAT CJ'S SECURITY METHODS WILL BE SUFFICIENT, (D) REGARDING CORRECTNESS, ACCURACY, OR RELIABILITY, OR (D) AGAINST INTERFERENCE WITH ENJOYMENT OF THE PUBLISHER'S INFORMATION OR WEB SITE. ALL 'INFORMATION' AND 'COMPUTER PROGRAMS' PROVIDED TO YOU IN THE COURSE OF THIS AGREEMENT ARE PROVIDED WITH ALL FAULTS, AND THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFORT IS WITH YOU. CJ IS, UNDER NO CIRCUMSTANCES, RESPONSIBLE FOR THE PRACTICES, ACTS OR OMISSIONS OF ANY ADVERTISER OR PUBLISHER, OR SUCH ADVERTISER OR PUBLISHER'S WEB SITE(S), AND/OR THE CONTENT OF AN ADVERTISER'S WEB SITE OR THAT AN ADVERTISER MAKES AVAILABLE THROUGH THE NETWORK SERVICE.

(g) **Remedies.** No remedy or election shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

(h) **Benefit of the Bargain.** THE PROVISIONS OF THIS SECTION 7 ARE AN ESSENTIAL ELEMENT OF THE BENEFIT OF THE BARGAIN REFLECTED IN THIS AGREEMENT.

**8. Publisher's Indemnification Obligations.** Publisher shall defend, indemnify and hold CJ and Advertisers harmless against all claims, suits, demands, damages, liabilities, losses, penalties, interest, settlements and judgments, costs and expenses (including attorneys' fees) incurred, claimed or sustained by third parties, including but not limited to Advertisers, directly or indirectly as a result of (a) Publisher's breach of or non-

compliance with this Agreement, (b) Publisher's violation of any law, or an alleged violation of law by CJ, that is a direct or indirect result of Publisher's use of the Network Service, (c) Publisher's use of the Network Service, (d) Publisher's participation in any Program, (e) any content, goods or services offered, sold or otherwise made available by Publisher to any person, (f) Publisher's acts or omissions in using, displaying or distributing any internet links obtained from the Network Service or elsewhere, including but not limited to Publisher's use of internet links via email distribution, (g) any claim that CJ is obligated to pay tax obligations in connection with payment made to Publisher pursuant to this Agreement and/or any Advertiser's Program, and (h) any violation or alleged violation by Publisher of any rights of another, including breach of a person's or entity's intellectual property rights (each (a)-(h) individually is referred to hereinafter as a "Claim"). Should any Claim give rise to a duty of indemnification under this Section 8, CJ shall promptly notify Publisher, and CJ shall be entitled, at its own expense, and upon reasonable notice to Publisher, to participate in the defense of such Claim. Participation in the defense shall not waive or reduce any of Publisher's obligations to indemnify or hold CJ harmless. Publisher shall not settle any Claim without CJs prior written consent. Publisher also shall indemnify for any reasonable attorneys' fees or other costs incurred by an indemnified party in investigating or enforcing this Section 8. In the context of this Section 8 only, the term "CJ" shall include officers, directors, employees, corporate affiliates, subsidiaries, agents, and subcontractors.

## 9. Miscellaneous.

(a) **Headings and References.** Headings of Sections are for the convenience of reference only. Words indicated in quotes and capitalized signify an abbreviation or defined term for indicated words or terms, including those definitions contained in the opening paragraph.

(b) **Third Party Disputes.** In the event of a third party claim against either: (a) CJ's intellectual property; or (b) against CJ's right to offer any service or good on CJ's Web site(s) or if, in CJ's opinion, such a claim is likely, CJ shall have the right, at its sole option and in its sole discretion, to (i) secure the right at CJ's expense to continue using the intellectual property or good or service; or (ii) at CJ's expense replace or modify the same to make it non-infringing or without misappropriation.

(c) **Relationships of Parties/Third Party Rights.** The relationships of the parties to this Agreement shall be solely that of independent contractors, and nothing contained in this Agreement shall be construed otherwise. Nothing in this Agreement or in the business or dealings between the parties shall be construed to make them joint venturers or partners with each other. Neither party shall do anything to suggest to third parties that the relationship between the parties is anything other than that of independent contractor. You agree that Your consent is not necessary to modify any Advertiser Service Agreement.

(d) **Choice of Law/Attorneys' Fees.** This Agreement is governed by the laws of the State of California (USA), except for its conflict of law provisions. The exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California. The parties consent to such venue and jurisdiction and waive any right to a trial by jury. The application of the United Nations Convention on the International Sale of Goods is expressly excluded. A party that primarily prevails in an action brought under this Agreement is entitled to recover from the other party its reasonable attorneys fees and costs. CJ controls and operates its Web site from its offices in the USA and access or use where illegal is prohibited.

(e) **Force Majeure.** Neither party shall be liable by reason of any failure or delay in the performance of its obligations hereunder for any cause beyond the reasonable control of such party, including but not limited to electrical outages, failure of Internet service providers, default due to Internet disruption (including without limitation denial of service attacks), riots, insurrection, acts of terrorism, war (or similar), fires, flood, earthquakes, explosions, and other acts of God.

(f) **Severability/Waiver.** If any provision of this Agreement is held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining provisions of this Agreement shall remain in full force and effect. The parties shall in good faith attempt to modify any invalidated provision to carry out the stated intentions in this Agreement. The waiver of any breach of any provision under this Agreement by any party shall not be deemed to be a waiver of any preceding or subsequent breach, nor shall any waiver constitute a continuing waiver.

(g) **Assignment and Acknowledgement.** Neither party may assign this Agreement without the prior express written permission of the other party. Notwithstanding the foregoing, Your consent shall not be required for assignment or transfer made by CJ (1) due to operation of law, or (2) to an entity that acquires substantially all of CJ's stock, assets or business, or (3) to a related entity (e.g. parent or subsidiary of parent). Your use of the Network Service is irrefutable acknowledgement by You that You have read, understood and agreed to each and every term and provision of this Agreement. CJ may establish from time to time rules and regulations regarding use of the Network Service as published on the Network Service and incorporated herein.

(h) **Marketing.** Publisher agrees that CJ may identify it as a CJ Publisher in client lists and may use Publisher's name and/or logo solely for such purpose in its marketing materials. Any other uses of Publisher's name and/or logo not otherwise described or contemplated herein shall require Publisher's prior written consent.

(i) **Entire Agreement, Assignment and Amendment.** This Agreement, including the Introduction, contains the entire understanding and agreement of the parties and there have been no promises, representations, agreements, warranties or undertakings by either of the parties, either oral or written, except as stated in this Agreement. This Agreement may only be altered, amended or modified by an instrument that is assented to by each party to this Agreement by verifiable means, including without limitation by written instrument signed by the parties or through a "click through" acknowledgement of assent. No interlineations to this Agreement shall be binding unless initialed by both parties. Notwithstanding the foregoing, CJ shall have the right to change, modify or amend ("Change") this Agreement, in whole or in part, by posting a revised Agreement at least 14 days prior to the effective date of such Change. Your continued use of the Network Service after the effective date of such Change shall be deemed Your acceptance of the revised Agreement.

IF YOU ARE AN INDIVIDUAL, YOU REPRESENT AND WARRANT THAT YOU WERE AT LEAST 18 YEARS OF AGE ON THE EFFECTIVE DATE OF THIS AGREEMENT.

Contact Information:

Commission Junction, Inc.  
530 East Montecito Street  
Santa Barbara, CA 93103  
p (805) 730-8000  
f (805) 730-8001