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

19 SETTLEMENT RECOVERY CENTER,  
20 LLC, individually and on behalf of others  
similarly situated,

21 Plaintiff,

22 v.

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

26 Defendant(s).

CASE NO. CV-07-02638 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; Unjust  
9 Enrichment; and Unfair Business Practices (California Business & Professions Code §  
10 17200, *et seq.*) (“Cplt.”) on the following grounds:

11 1. Plaintiff’s claims arise from a written contract – the Advertiser Service  
12 Agreement – that defines the relationship between Commission Junction and Internet  
13 advertisers like Plaintiff. (Cplt. ¶ 61). According to Plaintiff, “[e]very member of the  
14 proposed Class is a party to the Agreement.” (*Id.* ¶ 67).

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 third cause of action for unjust enrichment should also be  
7 dismissed because Plaintiff claims that Plaintiff is a party to a contract with  
8 Commission Junction, and under California law, unjust enrichment is available only in  
9 the absence of a contract. *See Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838,  
10 856 (N.D. Cal. 2004) (dismissing claim for unjust enrichment because plaintiff  
11 pleaded the existence of a contract).


12 5. Plaintiff’s claims should be dismissed in any event as to ValueClick and  
13 Be Free because they are not parties to the Advertiser Service Agreement, and because  
14 Plaintiff has not alleged any conduct by either of these entities, other than generalized,  
15 unsupported allegations that “Commission Junction and Be Free are the alter egos of  
16 ValueClick.” (Cplt. ¶ 74).

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

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

3  
4 DATED: June 13, 2007

5 G. Charles Nierlich  
6 GIBSON, DUNN & CRUTCHER LLP

7 By:   
8 G. Charles Nierlich

9 Attorneys for Defendants  
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11 JUNCTION, INC., and BE FREE  
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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 “merchant that offers class action settlement services” who signed  
12 up to advertise on Commission Junction’s affiliate marketing network. (*Id.* ¶ 2).  
13 Plaintiff alleges that advertisers like Plaintiff have paid “illegitimate commission[s]”  
14 to certain publishers on Commission Junction’s network because these publishers –  
15 who Plaintiff calls “Adware Affiliates” – allegedly have installed spyware or other  
16 malicious code on customers’ computers that has interfered with Commission  
17 Junction’s tracking system. (*Id.* ¶¶ 16-25).

18 All advertisers who choose to participate in Commission Junction’s affiliate  
19 network must enter into an agreement called the “Advertiser Service Agreement” (the  
20 “Agreement”). (*Id.* ¶ 61). The Agreement clearly disclaims any liability arising from  
21 the practices of publishers and advertisers – like the use of adware – on Commission  
22 Junction’s network. (Agreement (Ex. A) ¶ 1). The gravamen of the Complaint is that  
23 while Commission Junction has taken action against third-party publishers who have  
24 violated these policies (*id.* ¶ 54), “Commission Junction could do far more to  
25 eliminate Adware Affiliates from the CJ Affiliate Networks” (*id.* ¶ 37). For the  
26 reasons set forth below, Plaintiff’s contention that Commission Junction has failed to  
27 do enough to detect and prevent publishers from using adware does not give rise to a  
28 valid cause of action under California law.

1 Most fundamentally, the express terms of the Agreement itself bar each of  
2 Plaintiff's claims, because the Agreement clearly disclaims and releases Commission  
3 Junction from any liability arising from the practices of third-party publishers  
4 (including the "Adware Affiliates") on its network. The Agreement states in clear and  
5 unambiguous terms that Commission Junction "is, under no circumstances,  
6 responsible for the practices of any Publisher or Advertiser . . .", and further  
7 disclaims any liability based on the alleged level of reliability of Commission  
8 Junction's tracking technology (Agreement (Ex. A) ¶¶ 1 & 8.4). California courts  
9 consistently have dismissed both contract and tort claims when – as here – they are  
10 predicated on an alleged duty that is expressly disclaimed in the parties' agreement.

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

21 Plaintiff's third cause of action for unjust enrichment should also be dismissed  
22 on the separate and independent ground that Plaintiff claims that Plaintiff is a party to  
23 a contract with Commission Junction, and under California law, unjust enrichment is  
24 available only in the absence of a contract.

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. ¶ 74).

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 Settlement Recovery Center “offers class action settlement services via  
12 offline and online advertising.” (Cplt. ¶ 2). Plaintiff purports to bring this action on  
13 behalf of itself and “all other persons or entities . . . who, within the past four years  
14 have entered into one or more advertiser agreements with ValueClick, Commission  
15 Junction and Be Free for affiliate marketing management services.” (*Id.* ¶ 1).<sup>1</sup>

16 Defendant Commission Junction, Inc. (“Commission Junction”) provides  
17 affiliate marketing management services to advertisers on its online advertising  
18 network pursuant to the terms of its Advertiser Service Agreement. (*Id.* ¶ 4). Plaintiff  
19 also has filed claims against defendants ValueClick, Inc. (“ValueClick”) and Be Free,  
20 based on their alleged corporate relationship to Commission Junction and on  
21 generalized and unsupported allegations that “Commission Junction and Be Free are  
22 the alter egos of ValueClick.” (*Id.* ¶¶ 3, 5, 74-80).

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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 *Carrier v. Commission Junction, Inc.*,  
27 Case No. CV07-02641 FMC (CTX) (“Carrier Action”), which is currently pending  
28 before this Court. The Carrier Action purportedly is brought on behalf of a class of  
“all persons or entities who. . . have entered into one or more publisher agreements  
with ValueClick, Commission Junction and/or Be Free for affiliate marketing  
management services.” Carrier Complaint ¶ 1. Defendants are concurrently  
moving to dismiss the Complaint in the Carrier Action.

1 **B. The Advertiser Service Agreement**

2 As alleged in the Complaint, Commission Junction manages an extensive  
3 network of advertisers (frequently referred to in the Complaint as “merchants”) and  
4 website publishers (also called “affiliates”), through which it “facilitate[s] a program  
5 where advertisers pay fees to Commission Junction for affiliates who drive traffic to  
6 that advertiser's website to earn financial compensation for defined transactions.”  
7 (Cplt. ¶ 62).

8 Plaintiff entered into an advertiser service agreement with Commission Junction  
9 (“Advertiser Service Agreement” or “Agreement”) for the commercial purpose of  
10 joining its affiliated advertiser network. (*Id.* ¶ 2). A true and correct copy of the  
11 Advertiser Service Agreement is attached hereto as Exhibit A.<sup>2</sup> By joining  
12 Commission Junction’s network, Plaintiff became eligible to accept affiliated  
13 publishers into its program and to display links advertising its “class action settlement  
14 services” on websites operated by these approved publishers. (*Id.* ¶ 62; Agreement  
15 (“Agrmt.”) (Ex. A) ¶¶ 2.1 & 2.2). Plaintiff is required to pay a commission to  
16 approved publishers who display its advertising links, each time an end user takes a  
17  
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19 <sup>2</sup> The contents of the Advertiser Service Agreement may be considered in the  
20 context of this motion under the doctrine of incorporation by reference. *See*  
21 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). As the Ninth Circuit  
22 explained in *Marder*, “A court may consider evidence on which the complaint  
23 ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document  
24 is central to the plaintiff’s claim; and (3) no party questions the authenticity of the  
25 copy attached to the 12(b)(6) motion.” *Id.* (citing *Branch v. Tunnell*, 14 F.3d 449,  
26 453-54 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of*  
27 *Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Warren v. Fox Family Worldwide,*  
28 *Inc.*, 328 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 advertisers. *See, e.g.,* Complaint ¶¶ 61-67  
(describing and quoting the Agreement) and ¶¶ 85-91 (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 specified action such as “clicking” on the link or completing a form. (Agrmt. (Ex. A)  
2 ¶ 13; Cplt. ¶ 62).

3 Pursuant to the Agreement, Commission Junction offers certain network  
4 services to advertisers 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 these advertisers to publishers. (Agrmt. (Ex. A) ¶ 3). The Agreement  
7 expressly provides up front, however, that “CJ is, under no circumstances,  
8 responsible for the practices of any Publisher or Advertiser . . .” on its network.  
9 (Agrmt. (Ex. A)) ¶ 1).

10 The Advertiser Service Agreement defines the basic framework in which  
11 advertisers on Commission Junction’s network contract with affiliated publishers;  
12 however, each advertiser has complete control over which affiliated publisher(s) it  
13 chooses to post advertising with, and only publishers who apply to and are approved  
14 by an advertiser like Plaintiff are eligible to receive commissions from the advertiser:

15 Publishers may apply to Your Program for the opportunity to earn  
16 Payouts . . . . Upon approval by You for acceptance to Your Program  
17 such a Publisher (“Your Publisher”) may post Links to Your Web site or  
18 Web site content that You provide . . . .

19 (Agrmt. (Ex. A) ¶ 2.1). Likewise, the specific terms and conditions governing when  
20 an advertiser like Plaintiff must pay commissions to approved publishers is dictated  
21 exclusively by the advertiser, who is required to “establish . . . a Payout rate for a  
22 qualifying Transaction for each of Your Campaigns” and to include “details of Your  
23 Program and any Campaigns . . . within Your ‘Information Page’ that CJ hosts and is  
24 Linked to through the Network Service.” (*Id.* ¶¶ 2.2, 3.4).

25 Commission Junction, for its part, provides various “tracking services and  
26 reporting capability,” for the purpose of “record[ing] the tracking of Visitors’  
27 Transactions resulting from clicks on Links to [the advertiser’s] Web site and/or Web  
28 site content . . . .” (*Id.* ¶ 3.2, 3.3). In addition, Commission Junction agrees to

1 “determine (*where possible*) actual Payouts” that are required to be paid by the  
2 advertiser to publishers for referring such advertising traffic, and to “make payment of  
3 Payouts to Your Publishers *upon receipt from [the advertiser] of funds for such*  
4 *Payouts.*” (*Id.*) (emphasis added)

5 Under the Agreement, advertisers like Plaintiff are required to approve each  
6 Transaction for payment before Commission Junction remits any commission  
7 payments to a publisher. (*Id.* ¶ 3.6). Plaintiff also is required to review each  
8 transaction before a commission is paid to determine whether “the Transaction is not  
9 eligible for a Payout due to: product return; duplicate entry or other clear error; non-  
10 bona fide Transaction . . .” or other disqualifying events. (*Id.*). Given that each  
11 advertiser has ultimate control over when commissions are paid to publishers, the  
12 Agreement provides that “[t]he number or amount of Transactions and clicks, credits  
13 for Payouts, and the charges for “Chargebacks . . . , as calculated by CJ shall be final  
14 and binding on” the advertiser. (*Id.* ¶ 3.5) Likewise, Paragraph 8.4 of the Agreement  
15 contains the following “Disclaimer of Warranties” in all capital letters:

16 EXCEPT AS EXPRESSLY STATED HEREIN . . . BOTH PARTIES  
17 DISCLAIM ALL WARRANTIES EXPRESS OR IMPLIED,  
18 INCLUDING, BUT NOT LIMITED TO, . . . (D) REGARDING  
19 CORRECTNESS, ACCURACY, OR RELIABILITY . . . . ALL  
20 ‘INFORMATION’ AND ‘COMPUTER PROGRAMS’ PROVIDED IN  
21 THE COURSE OF THIS AGREEMENT ARE PROVIDED WITH ALL  
22 FAULTS, AND THE ENTIRE RISK AS TO SATISFACTORY  
23 QUALITY, PERFORMANCE, ACCURACY, AND EFFORT IS WITH  
24 THE USER.

25 (Agrmt. (Ex. A) ¶ 8.4).

26 The Complaint readily acknowledges the competitive conditions in the online  
27 advertising industry, and that there were a number of different online advertising  
28 networks Plaintiff could have chosen to affiliate with rather than Commission

1 Junction's. (Cplt. ¶¶ 13-14). Indeed, the Complaint observes that advertisers on  
2 Commission Junction's network are "not bound by long-term contracts" and can  
3 "easily cancel their agreement" and "join [a] competing network[]." (*Id.*)

4 **C. The Alleged Use of "Adware" By Third Party Publishers on Commission**  
5 **Junction's Network**

6 Plaintiff's claims are focused on the alleged use of "adware" or "spyware"  
7 software programs by certain third-party companies for the purpose of diverting  
8 advertising commissions to themselves that would otherwise be payable to other  
9 publishers. Specifically, Plaintiff contends that these "[a]dware perpetrators" (which  
10 Plaintiff also calls "Adware Affiliates") join affiliate networks (like those managed by  
11 Commission Junction) and "pose as legitimate affiliates." (Cplt. ¶ 16). According to  
12 Plaintiff, these Adware Affiliates employ adware software (which they cause to be  
13 installed on end-users' computers) to confuse the computer programs that monitor and  
14 track commissions on online advertising networks into crediting the adware company  
15 – as opposed to another affiliate – with a particular advertising transaction. (*Id.*)

16 Plaintiff contends that advertisers like Plaintiff are harmed by such commission  
17 theft because "[a]dware causes merchants to pay commissions to the Adware Affiliate  
18 even when the commission is properly payable to another affiliate." (*Id.* ¶ 20) In  
19 addition, Plaintiff contends that publishers' use of adware can result in advertisers  
20 paying "duplicate" or "illegitimate commission[s]" to Adware Affiliates. (*Id.* ¶¶ 21-  
21 25).

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

1 **D. The Complaint**

2 Plaintiff contends that “Defendants” breached the Advertiser Service  
3 Agreement, including the alleged covenant of good faith and fair dealing, by allegedly  
4 “paying commissions to Adware Affiliates even though Defendants knew, or should  
5 have reasonably known, that the commissions were wrongfully and improperly  
6 diverted by Adware Affiliates” and “by charging fees to Plaintiff and the Class for  
7 commissions resulting from Commission Theft and/or Transaction Fraud.”<sup>3</sup> (Cplt. ¶¶  
8 88-89). Plaintiff conspicuously fails to cite to any contractual provision that it  
9 contends was breached, or that imposes an obligation on Commission Junction to  
10 detect every instance in which a publisher has used adware to engage in commission  
11 theft on its networks. Indeed, Plaintiff does not even attach a copy of the Advertiser  
12 Service Agreement to the Complaint, even though its claims are predicated on that  
13 contract.

14 In addition to the breach of contract claim, Plaintiff purports to bring claims for  
15 unjust enrichment, negligence, and unfair business practices, also based on  
16 “Defendants” alleged failure to adequately “monitor” and “protect” Plaintiff from the  
17 use of adware technology by third-party publishers. (Cplt. ¶¶ 92-107).

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

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



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### III. ARGUMENT

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

A complaint should be dismissed as a matter of law pursuant to Federal Rule of Civil Procedure 12(b)(6) if there is either (1) a lack of a cognizable legal theory, or (2) insufficient facts alleged under a cognizable legal theory. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). Although the Court must accept all factual allegations as true, it “is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). As noted by the Ninth Circuit, “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001).

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

Commission Junction’s obligations to the Plaintiff are defined exclusively by the Advertiser Service Agreement, which Plaintiff entered into voluntarily when electing to join Commission Junction’s affiliate network over numerous competing networks. Plaintiff’s claims for breach of contract, unjust enrichment, negligence and unfair business practices each are predicated on the proposition that “Defendants” have violated their obligations to Plaintiff by failing to “do more” to detect and prevent the use of adware software by publishers on Commission Junction’s advertising network. (Cplt. ¶ 37). These claims – and the underlying contention that Commission Junction is somehow responsible for the conduct of third party publishers on its network – are flatly precluded by the express terms of Plaintiff’s written contract with Commission Junction. The Advertiser Service Agreement expressly and unambiguously disclaims any liability for the conduct of third-party publishers, and further disclaims any warranty regarding the reliability or correctness of Commission

1 Junction's tracking systems. (Agrmt. (Ex. A) ¶ 1 & 8.4). Moreover, the Agreement  
2 squarely places the responsibility for approving publishers and individual commission  
3 payments on advertisers like the Plaintiff. Courts repeatedly have dismissed claims  
4 when – as here – they are based on the violation of an alleged duty that is expressly  
5 disclaimed in the parties' agreement.

6 Plaintiff's claims arise from certain publishers' alleged use of adware software  
7 to steal credit for advertising transactions, resulting in the diversion of commissions to  
8 these publishing affiliates that otherwise may have been paid to other publishers.  
9 Plaintiff asserts that "Defendants" breached the Agreement by "paying commissions to  
10 Adware Affiliates" that were stolen using adware, and by "by charging fees to  
11 Plaintiff and the Class for commissions resulting from Commission Theft and/or  
12 Transaction Fraud." (Cplt. ¶¶ 88-89). Likewise, Plaintiff contends that "Defendants"  
13 breached a "duty" to Plaintiff "by failing to adequately monitor" Commission  
14 Junction's network "for adware, adware operators, Commission Theft and Transaction  
15 Fraud . . . ." (*Id.* ¶ 94).

16 Conspicuously, Plaintiff does not cite to any provision in the Agreement that  
17 imposes an obligation on Commission Junction to monitor or detect publishers'  
18 adware practices or to return commission payments that may have been paid by  
19 advertisers to publishers engaging in adware practices. No such provision exists, and  
20 instead, the clear and unambiguous terms of the Advertiser Service Agreement  
21 *expressly disclaim and release Commission Junction from any liability for the*  
22 *conduct of publishers – such as "Adware Affiliates" – on its network.* Specifically,  
23 Paragraph 1 explicitly provides:

24 CJ is, under no circumstances, responsible for the practices of any  
25 Publisher or Advertiser . . . . (Agrmt. (Ex. A) ¶ 1).

26 Likewise, Paragraph 8.4 disclaims any duty or warranty with respect to the reliability  
27 or correctness of Commission Junction's tracking software or transaction calculations:  
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1 EXCEPT AS EXPRESSLY STATED HEREIN . . . BOTH PARTIES  
2 DISCLAIM ALL WARRANTIES EXPRESS OR IMPLIED, INCLUDING,  
3 BUT NOT LIMITED TO, . . . (D) REGARDING CORRECTNESS,  
4 ACCURACY, OR RELIABILITY . . . ALL 'INFORMATION' AND  
5 'COMPUTER PROGRAMS' PROVIDED IN THE COURSE OF THIS  
6 AGREEMENT ARE PROVIDED WITH ALL FAULTS, AND THE ENTIRE  
7 RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY,  
8 AND EFFORT IS WITH THE USER.

9 (Agrmt. (Ex. A) ¶ 8.4).

10 Exculpatory clauses like those contained in the Advertiser Service Agreement  
11 are fully enforceable under California law, as long as the limiting language is “clear,  
12 unambiguous, and explicit,” and expresses an agreement not to hold the released party  
13 responsible for the complained of conduct. *See, e.g., Nat'l & Int't. Bhd. of Street*  
14 *Racers, Inc. v. Superior Court*, 215 Cal. App. 3d 934, 938 [264 Cal. Rptr. 44] (1989)  
15 (affirming enforceability of release as bar to claims on appeal, and holding that “to be  
16 effective, a release need not achieve perfection . . . [it need only] be clear,  
17 unambiguous, and explicit, and express an agreement not to hold the released party  
18 liable”); *Madison v. Superior Court*, 203 Cal. App. 3d 589, 598 [250 Cal. Rptr. 299]  
19 (1988) (finding release that expressly relieved scuba diving instructors from liability  
20 for personal injury or wrongful death caused by negligence was free and clear from  
21 ambiguity, was enforceable and operated as a complete defense to wrongful death  
22 action); *see also Artukovich v. Pac. States Cast Iron Pipe Co.*, 78 Cal. App. 2d 1, 4  
23 [176 P.2d 962] (1947) (“In California parties may agree by their contract to the  
24 limitation of their liability in the event of a breach.”). The scope of an exculpatory  
25 provision is a question of law, to be determined based on the express language of the  
26 contract. *See, e.g., Benedek v. PLC Santa Monica L.L.C.*, 104 Cal. App. 4th 1351,  
27 1356 [129 Cal. Rptr. 2d 197] (2002); *YMCA of Metro. Los Angeles v. Superior Court*,  
28 55 Cal. App. 4th 22, 27 [63 Cal. Rptr. 2d 612] (1997).

1 Like the provisions in these case, Paragraphs 1 and 8.4 of the Agreement  
2 clearly, unambiguously and explicitly release Commission Junction from precisely the  
3 conduct complained of here – namely, the practice by certain publishers of using  
4 adware software to frustrate the accuracy of Commission Junction’s commission  
5 tracking technology. Although Plaintiff asserts that Commission Junction has a  
6 contractual obligation and a “duty” to monitor, detect and reverse these publishers’  
7 adware practices (Cplt. ¶ 94), the parties’ Agreement expressly disclaims any such  
8 duty, and instead provides that “CJ is, under no circumstances, responsible for the  
9 practices of any Publisher . . . .” on its network. (Agrmt. (Ex. A) ¶ 1). Likewise,  
10 Plaintiff contends that Commission Junction has breached an alleged obligation to  
11 discover and reverse commissions paid by advertisers like Plaintiff that were paid to  
12 publishers in connection with adware transactions. (Cplt. ¶¶ 84-85). Again, the  
13 Agreement clearly and unambiguously releases Commission Junction from any claims  
14 predicated on the assertion that Commission Junction’s commission tracking systems  
15 are inaccurate or unreliable:

16 EXCEPT AS EXPRESSLY STATED HEREIN . . . BOTH PARTIES  
17 DISCLAIM ALL WARRANTIES EXPRESS OR IMPLIED, INCLUDING,  
18 BUT NOT LIMITED TO, . . . (D) REGARDING CORRECTNESS,  
19 ACCURACY, OR RELIABILITY . . . . ALL ‘INFORMATION’ AND  
20 ‘COMPUTER PROGRAMS’ PROVIDED IN THE COURSE OF THIS  
21 AGREEMENT ARE PROVIDED WITH ALL FAULTS, AND THE ENTIRE  
22 RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY,  
23 AND EFFORT IS WITH THE USER AND EFFORT IS WITH THE USER.

24 (Agrmt. (Ex. A) ¶ 8.4).

25 Courts repeatedly have held that an express disclaimer of liability – such as that  
26 contained in the Agreement – operates to bar claims arising from the released subject  
27 matter as a matter of law. *See, e.g., Greentree Software, Inc. v. Delrina Tech., Inc.*,  
28 No. Civ. 95-20799 SW, 1996 WL 183041, at \*4 (N.D. Cal. Apr. 11, 1996) (granting

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

22 Put differently, the exculpatory provisions contained in the Agreement preclude  
23 Plaintiff from asserting that Commission Junction has a duty (contractual or  
24 otherwise) to detect, deter or remedy the adware practices of third party publishers on  
25 its network. *Cf. Carleton v. Tortosa*, 14 Cal. App. 4th 745, 756 [17 Cal. Rptr. 2d 734]  
26 (1993) (affirming summary judgment dismissing claims for professional negligence,  
27 where plaintiff's claim of duty was negated by the real estate listing agreements and  
28 agency disclosure forms, which advised the client to consult competent professional

1 for legal or tax advice.) Indeed, the Agreement squarely places the sole responsibility  
2 for approving publishers and commission payments on *the advertiser*, who must  
3 approve publishers for acceptance into their programs (Agrmt. (Ex. A) ¶ 2.1),  
4 authorize each payout that is made to a publisher (*id.* ¶ 3.6) and report to Commission  
5 Junction any instance in which “the Transaction is not eligible for a Payout due to . . .  
6 duplicate entry or other clear error [or] non-bona fide Transaction . . .” (*id.*).

7 Because the Advertiser Service Agreement clearly and explicitly disclaims any  
8 liability for the practices of third-party publishers or arising from the alleged  
9 inaccuracy of Commission Junction’s tracking systems – and places sole responsibility  
10 for approving publishers and individual transactions on advertisers – each of  
11 Plaintiff’s claims is barred by the express terms of the Agreement as a matter of law.

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

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

17 As discussed previously, Plaintiff’s claims are predicated on alleged  
18 responsibilities deriving from the Agreement, which sets forth the relationship  
19 between Commission Junction and Internet advertisers like Plaintiff. (Cplt. ¶ 61).  
20 The proposed class is defined by reference to the Agreement to include “all other  
21 persons or entities . . . who, within the past four years have entered into one or more  
22 advertiser agreements with ValueClick, Commission Junction and Be Free for affiliate  
23 marketing management services.” (*Id.* ¶ 1). Indeed, Plaintiff alleges specifically that  
24 “[e]very member of the proposed Class is a party to the Agreement” (*id.* ¶ 67), and  
25 that the laws governing interpretation of the Agreement apply to all of Plaintiff’s  
26 claims: “The Agreement provides that it is to be governed by the laws of the State of  
27 California. Therefore, a single body of substantive law applies to this action . . . .” (*id.*  
28 ¶ 68).

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 known, that the  
5 commissions resulted from Commission Theft and/or Transaction Fraud." (*Id.* ¶ 88).  
6 In the second cause of action, Plaintiff alleges that Commission Junction breached a  
7 duty "to Plaintiff and the Class" – *i.e.*, to those "persons and/or entities that . . .  
8 entered into one or more advertiser agreements . . . for affiliate marketing management  
9 services" – by allegedly "failing to adequately monitor the CJ Affiliate Networks . . .  
10 ." (*Id.* ¶¶ 83, 93-94). In the third cause of action, Plaintiff alleges that Commission  
11 Junction was unjustly enriched by "charging and collecting fees associated with  
12 Commission Theft and Transaction Fraud" – fees which were charged pursuant to and  
13 in accordance with the relevant provisions of the Agreement. (*Id.* ¶ 100). And in the  
14 fourth cause of action, Plaintiff alleges that she may bring a claim under California's  
15 Unfair Competition Law on behalf of a purported nationwide class because "the  
16 Agreement between Defendants and Plaintiff and the Class provides that it shall be  
17 governed by the laws of the State of California," and then alleges that Commission  
18 Junction violated the UCL by "paying commissions earned by Plaintiff and the Class  
19 to Adware Affiliates . . . ." (*Id.* ¶¶ 103-104). Plaintiff identifies no source of duty  
20 whatsoever by any of the Defendants, other than the Agreement, that could somehow  
21 require Commission Junction (or any of the other Defendants) to have any  
22 responsibility to Plaintiff to monitor the CJ Affiliate Networks or to reverse  
23 commissions paid by Plaintiff to Adware Affiliates.

24 **2. Plaintiff's Negligence and Unjust Enrichment Causes of Action Fails**  
25 **Because Plaintiff Has Alleged No Duty Apart from the Contract**  
26 **Between Plaintiff and Commission Junction**

27 It is well established under California law that a plaintiff may not maintain a  
28 tort claim, such as Plaintiff's second cause of action for negligence or third cause of

1 action for unjust enrichment, based solely on allegations of a breach of contract. The  
2 California Supreme Court has explained that “conduct amounting to a breach of  
3 contract becomes tortious only when it also violates a duty independent of the contract  
4 arising from principles of tort law.” *Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999)  
5 (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515 [28 Cal.  
6 Rptr. 2d 475] (1994)).<sup>4</sup> Moreover, “ ‘[a]n omission to perform a contract obligation is  
7 never a tort, unless that omission is also an omission of a legal duty.’ ” *Erlich*, 21 Cal.  
8 4th at 551 (quoting *Jones v. Kelly*, 208 Cal. 251, 255 [280 P. 942] (1929)).

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

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



1 551-52 (internal citations omitted). None of those circumstances have been alleged  
2 here.

3 Accordingly, Plaintiff's second cause of action for negligence and third cause of  
4 action for unjust enrichment should be dismissed.

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

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

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

17 Defendants' practice of knowingly allowing adware on the CJ Affiliate  
18 Networks, paying commissions earned by Plaintiff and the Class to Adware  
19 Affiliates, and by charging Plaintiffs and the Class with fees associated with  
20 Commission Theft and Transaction Fraud, as alleged herein above, violates and  
21 violated California Business and Professions Code § 17200 et seq. because it is  
22 and was an unlawful, unfair and/or fraudulent business act and practice.

23 (Cplt. ¶ 104).

24 This allegation is entirely duplicative of Plaintiff's breach of contract claim.  
25 The California Supreme Court has cautioned that the UCL is not intended to "be used  
26 as an all-purpose substitute for a tort or contract action, something the Legislature  
27 never intended." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1151  
28 [131 Cal. Rptr. 2d 29] (2003). Plaintiff has identified no law other than the alleged

1 breach of contract that Commission Junction’s alleged “practice” violates, and thus  
2 does not state a claim that the practice is “unlawful.” *See, e.g., Bernardo v. Planned*  
3 *Parenthood Fed’n of Am.*, 115 Cal. App. 4th 322, 351-52 [9 Cal. Rptr. 3d 197] (2004)  
4 (finding that because plaintiff failed to state any statutory, regulatory or decisional law  
5 that the defendant violated, the plaintiff failed to show legally sufficient  
6 unlawfulness).

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

21 Likewise, Plaintiff fails to allege any “fraudulent” conduct by Commission  
22 Junction. Plaintiff does not identify any supposedly actionable misrepresentation or  
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25 <sup>5</sup> While there may be some debate as to whether the standard for “unfairness”  
26 described in *Cel-Tech* is appropriate in the consumer context, that debate is of no  
27 moment here because Plaintiff alleges a commercial relationship with Commission  
28 Junction. *See Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1264-74  
[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 omission at all by Commission Junction. Moreover, a plaintiff in a UCL case must  
2 plead and prove that she actually relied on the allegedly false statement. *See* Cal. Bus.  
3 & Prof. Code § 17204 (UCL claim may be brought by “any person who has suffered  
4 injury in fact and has lost money or property as a result of such unfair competition”);  
5 *see also* *Cattie v. Wal-Mart Stores, Inc.*, No. 06CV0897-LAB (CAB), 2007 U.S. Dist.  
6 LEXIS 19980, \*19-24 (S.D. Cal. Mar. 21, 2007) (dismissing claim where plaintiff  
7 failed to allege reliance on allegedly false statement).<sup>6</sup> Plaintiff here has failed to  
8 allege that she relied to her detriment on any specific alleged misrepresentation or  
9 omission by Commission Junction.

10 Accordingly, Plaintiff’s fourth cause of action for alleged violation of the  
11 Unfair Competition Law should be dismissed.

12 **D. Plaintiff’s Unjust Enrichment Claim Also Should Be Dismissed Because**  
13 **Plaintiff Pleads the Existence of a Contract**

14 California law does not permit a plaintiff to state a claim for unjust enrichment  
15 where there is a contract that governs the relationship between the parties: “Under  
16 [California] law, unjust enrichment is an action in quasi-contract, which does not lie  
17 when an enforceable, binding agreement exists defining the rights of the parties.”  
18 *Paracor Fin. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996). Thus,  
19 where a plaintiff pleads the existence of a contract, a claim for unjust enrichment  
20 should be dismissed. *See Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856  
21 (N.D. Cal. 2004). In *Gerlinger*, the plaintiff sought restitution of “overpayments” that  
22 he and other purchasers of books from Amazon.com and Borders purportedly had  
23 made as a result of allegedly collusive and anti-competitive practices engaged in by  
24 Amazon.com and Borders. The Court in *Gerlinger* held that the plaintiff’s claim for

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

1 unjust enrichment failed as a matter of law because – even if he and other purchasers  
2 had overpaid as a result of anti-competitive practices by Amazon.com and Borders –  
3 the existence of contracts with respect to these purchases precluded any claim for  
4 unjust enrichment. *Id.* at 856. Indeed, the Court in *Gerlinger* held that the plaintiff  
5 could not even plead unjust enrichment in the alternative because, as the court put it,  
6 “plaintiff has pleaded [the existence of a contract] and relies on that contract as the  
7 basis for [antitrust] standing in the case at bar.” *Id.* The Court in *Gerlinger*  
8 concluded: “A plaintiff may recover for unjust enrichment only where there is no  
9 contractual relationship between the parties.” *Id.* at 856. *See also Langley Partners,*  
10 *L.P. v. Tripath Tech., Inc.*, No. C-05-4194 SC, 2006 U.S. Dist. LEXIS 12927, at \*22-  
11 23 (N.D. Cal. Mar. 7, 2006) (holding that Plaintiff’s claims for unjust enrichment and  
12 money had and received were barred as a matter of law where Plaintiff pleaded the  
13 existence of a contract).

14 There is no dispute here that Plaintiff pleads the existence of a contract. *See,*  
15 *e.g.*, Cplt., ¶¶ 61-68, 85-91. Accordingly, Plaintiff’s third cause of action for unjust  
16 enrichment should be dismissed.

17 **E. In Any Event, Plaintiff’s Claims Against ValueClick and Be Free Should Be**  
18 **Dismissed Because Plaintiff Has Not Stated Sufficient Allegations Against**  
19 **Either Entity**

20 The entire Complaint addresses alleged conduct by Commission Junction. The  
21 only source of any duty alleged by Plaintiff is a contract between Commission  
22 Junction and advertisers, and the proposed class is defined as all persons or entities  
23 that entered into an advertiser agreement for affiliate marketing management services.  
24 (Cplt. ¶¶ 1, 61).

25 The Complaint fails to allege any contract between Plaintiff (or anyone else)  
26 and either ValueClick or Be Free, nor any other source of duty by these entities to  
27 Plaintiff. Thus, Plaintiff’s claims should be dismissed against ValueClick and BeFree.  
28 *See, e.g., Am. West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 800 (9th Cir.

1 1989) (affirming grant of motion to dismiss for failure to state a claim for breach of  
2 contract because the defendant was not a party to the contract forming the basis for  
3 plaintiff's action); *Meisel v. Allstate Indem. Co.*, 357 F. Supp. 2d 1222, 1227 (E.D.  
4 Cal. 2005) ("Because [defendant] is not a party to the insurance contract, he cannot be  
5 liable for a breach of that contract. Accordingly, Plaintiff cannot state a claim for  
6 breach of contract against [defendant] under well settled California law, and this claim  
7 is dismissed.").

8         Instead, Plaintiff offers generalized, unsupported allegations that "Commission  
9 Junction and Be Free are the alter egos of ValueClick." (Cplt. ¶ 74). Plaintiff's "alter  
10 ego" allegations are remarkably thin: Plaintiff alleges that ValueClick described its  
11 subsidiaries' activities in its 10-K; that the former Be Free website now redirects users  
12 to Commission Junction's website; that ValueClick's website states that ValueClick  
13 can "deliver a single-source solution by combining best-of-breed offers for paid  
14 placement, paid inclusion and organic search – all while providing complete account  
15 management and constant program reporting, analysis and optimization"; that  
16 ValueClick, Commission Junction, and Be Free engage in unspecified sales and  
17 management activities with respect to affiliate marketing programs operated by  
18 Commission Junction; and a number of other entirely conclusory allegations. (*See id.*  
19 ¶¶ 74-80).

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

27         Plaintiff's few specific allegations in the "alter ego" section of the Complaint  
28 fall well short of these requirements, and it is well settled that Plaintiff's conclusory

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

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

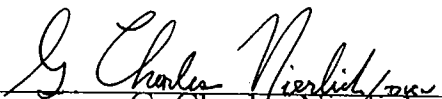
#### 18 IV. CONCLUSION

19 Plaintiff's claims concern the services provided by Commission Junction to  
20 advertisers pursuant to the Commission Junction Advertiser Service Agreement. The  
21 express terms of this agreement bars each of Plaintiff's claims, by clearly disclaiming  
22 liability for precisely the claims that Plaintiff asserts here. In addition, Plaintiff  
23 alleges no duty by Commission Junction, ValueClick, or Be Free apart from those  
24 rights and responsibilities agreed to under the terms of the Agreement. Accordingly,  
25 Plaintiff's tort claims – for negligence, unjust enrichment, and for alleged violations of  
26 the Unfair Competition Law – should be dismissed. Moreover, Plaintiff's claim for  
27 unjust enrichment cannot stand because under California law, unjust enrichment is  
28 available only in the absence of a contract.

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

19  
20 DATED: June 13, 2007

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

23 By:   
24 G. Charles Nierlich

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

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# Exhibit A



## **CJ Access Advertiser Service Agreement**

### **Introduction**

This CJ Access Advertiser Service Agreement (hereinafter the "Agreement") is made by and agreed to between Commission Junction, Inc. ("CJ"), and you ("You"). As an application service provider, CJ facilitates "Affiliate Marketing Programs" through provision of services ("Network Service") via the Internet. An "Affiliate Marketing Program" (or "Program") is where a person, entity, publisher or its agent operating one or more "Web site(s)" (domain or portion of a domain within the Internet) and/or subscription e-mail list(s) ("Publisher") may earn financial compensation ("Payouts") for "Transactions" (sales and/or "Leads") made from such Publisher's Web site or subscription e-mails through a click made by a "Visitor" (generally any person or entity that is not the Publisher or the Publisher's agent) on an Internet connection ("Link") to a Web site or Web site content operated by another person or entity ("Advertiser"). The Advertiser compensates the Publisher, in accordance with this Agreement and the Program specifications.

**1 Relationship.** In the context of Your Program, You are referred to herein as an Advertiser. You agree not to:

- (a) mislead others;
- (b) operate or utilize a Web site or e-mail Link to Web sites that contains or promotes, any of these types of content: libelous, defamatory, obscene, abusive, violent, bigoted, hate-oriented, cracking, hacking or warez, or the offer any illegal good or service, or Link to a Web site(s) that does so;
- (c) engage in spamming, indiscriminate advertising or unsolicited commercial e-mail or otherwise failing to comply with the CAN-SPAM Act of 2003 (Public Law 108-187) or other laws regulating commercial email (including, but not limited to, laws of foreign jurisdictions); and/or
- (d) engage in any illegal activity of any type, including but not limited to displaying illegal content on Your Web Site or offering any illegal good or service through Your Web Site.

If You engage in any of the foregoing, You shall be subject to termination and/or deactivation as set forth in Section 6.2 and referral by CJ to the appropriate law enforcement agencies. CJ may not review all content on Your Web site. You shall remain solely responsible for Your Web site content. CJ is, under no circumstances, responsible for the practices of any Publisher or Advertiser or such Publisher or Advertiser's Web site(s), and/or the content of Publishers' subscription e-mails and/or the content that an Advertiser makes available through the Network Service.

**2.1 Your CJ Publishers.** Upon Your "Live Activation Date" (as defined in Section 6.1), Publishers may apply to Your Program for the opportunity to earn Payouts if results are produced through promoting Your "Campaigns" (pay-per-Transaction promotions). Upon approval by You for acceptance to Your Program, such a Publisher ("Your Publisher") may post Links to Your Web site or Web site content that You provide to the Network Service in accordance with this Agreement.

**2.2 Publishers Use of Links.** Each of Your Publishers may place or remove Links from its Web sites and/or subscription e-mail messages to Your Web site at such Publisher's discretion. Your Publishers may not place Links to Your Web site in newsgroups, message boards, unsolicited e-mail and other types of spam, banner networks, counters, chatrooms, guestbooks, IRC channels or through similar Internet resources. Your Publishers must place Links to Your Web site such that it is unlikely that they will mislead the Visitor, and such that it is reasonably likely that they will deliver bona fide Transactions by the Visitor to You from the Link.

Your Publishers shall not cause or enable any Transactions to be made that are not in good faith, including, but not limited to, by means of any device, program, robot, Iframes, hidden frames, JavaScript popup windows, redirects or clicking on Links that they place to You. Your Publishers shall not establish or cause to be established any promotion that provides any rewards, points or compensation for Transactions, or that allows third parties ("Sub-Publishers") to place Links to Your Web site or Web site content on the Sub-Publisher's Web site or in its e-mails, unless permitted by Your Program or such Publisher receives Your prior written permission.

The details of Your Program and any Campaigns shall be contained within Your "Information Page" that CJ hosts and is Linked to through the Network Service. You must provide CJ with a copy of Your Information Page content prior to activating Your Program through the Network Service for CJ's review for consistency with this Agreement and the Publisher Service Agreement. If You wish to revise Your Information Page, You must submit a copy of the revised Information Page content to CJ for review for

consistency with this Agreement and the Publisher Service Agreement, and provide Your Publishers and CJ with at least 7 days written notice of the revised Information Page content which would then enter into effect upon the later of the 8th day or date specified in the notice. Through Your Information Page You may prohibit Your Publishers from receiving compensation for a Payout attributable to Transactions made directly by such Publisher or its agent using its own Links. You may permit Publishers to serve Your ad content and/or modify Your Links (including but not limited to the images contained therein). For "Lead" Campaigns, the Advertiser is compensating a Publisher when a Visitor has completed an action that is defined by the Advertiser, such as completing a form or other mechanism to identify potential customers. You shall establish Lead parameters on Your Information Page, including details regarding any disqualifying Leads or Lead form content (such as multiple Lead submissions), and the components included within an individual sale Transaction that result in a Payout. Notwithstanding the preceding, nothing contained on Your Information Page may conflict with the terms and conditions contained in this Agreement and the Publisher Service Agreement and any such conflicting terms and conditions shall be void. CJ shall not be obligated to enforce or honor any such conflicting terms and conditions.

**2.3 Terminating Publishers from Your Program/Campaign.** After You have approved a Publisher's application to Your Program, You may terminate that Publisher, one of its Sub-Publishers, or one of that Publisher's (or Sub-Publisher's) Web sites or subscription e-mail lists from Your Program or a Campaign upon 7 days written notice with effect from the 8th day from such notice ("Publisher Termination for Convenience"). You may terminate a Publisher with less than 7 days written notice if You are terminating the Publisher/Sub-Publisher upon notification for any of the following material breaches ("Publisher Termination for Material Breach"):

- (a) operation of an illegal business through its Web site and/or subscription e-mail list;
- (b) engaging in any illegal activity of any type, including but not limited to displaying illegal content on its Web Site and/or in its subscription e-mails or offering any illegal good or service through its Web Site and/or subscription e-mails;
- (c) operation of a Web site or e-mail Link to Web sites that contain or promote, any of the following content: misleading, abusive, violent, bigoted, hate-oriented;
- (d) engaging in indiscriminate or unsolicited commercial advertising e-mails or otherwise failing to comply with the CAN-SPAM Act of 2003 (Public Law 108-187) or other laws regulating commercial email (including, but not limited to, laws of foreign jurisdictions);
- (e) placing Links to a Your Web site in newsgroups, message boards, unsolicited e-mail and other types of spam, banner networks, counters, chatrooms, guestbooks, IRC channels or through similar Internet resources;
- (f) causing or enabling any Transactions to be made that are not in good faith, including, but not limited to, by means of any device, program, robot, Iframes, hidden frames, JavaScript popup windows and redirects;
- (g) establishing or causing to be established any promotion that provides any rewards, points or compensation for Transactions, or that allows third parties to place Links to a Your Web site or Web site content on such party's Web site or in its e-mails, without Your prior written permission;
- (h) breach of the licensing provisions of its Publisher Service Agreement;
- (i) breach of any other intellectual property right provision of the Publisher Service Agreement or other of Your common law intellectual property rights; and/or
- (j) diluting, blurring or tarnishing the value of Your trademarks, trade names, and/or service marks.

In order to terminate a Publisher from Your Program, You must utilize the automated function through the Network Service for Publisher Termination for Convenience. For Publisher Termination for Material Breach, You must use the "Manage Publishers" tab within the Advertiser Account Manager user interface on the Network Service, select the specific "Publisher Company" to view the Publisher Detail Page, scroll-down to bottom of the page and use the hyperlink to contact a CJ client service representative. Alternatively, You may use the "Support" tab within the Advertiser Account Manager to contact client services. CJ shall process termination requests received during normal business hours within 24 hours and those received out of normal business operating hours shall be processed within 24 hours of the next business day (excluding holidays, see Section 3.2(vii) below regarding operating hours). To terminate a Sub-Publisher or one of a Publisher's Web sites and/or subscription e-mail lists from Your Program for Publisher Termination for Convenience, You must contact the relevant Publisher and CJ client services (as described above) and provide the Publisher and CJ with 7 days notice. To terminate a Sub-Publisher or one of a Publisher's Web sites and/or subscription e-mail lists from Your Program for Publisher Termination for Material Breach, You must contact the Publisher by e-mail and inform CJ client services (as described above). CJ does not process these such requests, but if a Sub-Publisher or Publisher does not comply, You may resubmit Your notice of termination to both the Publisher and CJ client services noting the failure of the Sub-Publisher or the Publisher to comply and request that CJ terminate the

Publisher from Your Program. Requests made pursuant to the preceding sentence shall be processed in accordance with the procedures noted above for Publisher Termination for Material Breach.

CJ may terminate a Publisher from an Advertiser's Program or Campaign in CJ's sole discretion.

**3.1 Network Service Fees.** In consideration for payment of the fees due hereunder (see table below) and compliance with this Agreement, CJ shall provide You with access to the Network Service and the services listed in Section 3.2. If You wish to run multiple Programs and have access to reporting on a per "Account" (a memo account(s) kept by CJ on Your behalf per Program) basis through the Network Service You must establish more than one Account per Program (e.g. per Web site that You operate). Advertisers must pay to CJ a total of five thousand two hundred fifty US dollars (\$5,250 USD) per Program (comprising the Network Access Fee and the Deposit, "Initial Payment"), which shall be credited by CJ to "Your Account" (a memo account kept by CJ on Your behalf) and applied towards the Network Access Fee, Minimum Monthly Fees and Publisher Payouts (in that order). Upon Your acceptance of this Agreement by clicking-through and signing-up for the Network Service, the Initial Payment is due and non-refundable.

SERVICE	FEE
Network Access Fee	An initial, one (1) time per Program non-refundable set-up fee of \$2,250 USD.
Deposit	A non-refundable deposit of \$3,000 USD is due upon execution of this Agreement and shall be applied towards Transaction Fees and Payouts (in that order).
Annual Maintenance Fee	The annual fee that You are required to pay in advance each Term after the initial Term. The current rate for the Annual Maintenance Fee is \$250 USD.
Minimum Balance Amount	Positive balance amount of \$500 USD that You are required to maintain at all times in Your Account.
Transaction Fees	Transaction Fees are due for the services provided by CJ under this Agreement. For a sale or Lead Transaction, the Transaction Fees shall be the greater of either an amount equal to 30% times the Payout per Transaction, or \$0.30 USD per Transaction.
Minimum Monthly Fees	Each month CJ shall debit from Your Account \$500 USD ("Minimum Monthly Fees"), or the actual Transaction Fees incurred (if greater than \$500 USD) or the actual Transaction Fees incurred plus an amount (if any) required to equal \$500 USD.
Initial Telephone Support	1 hour of technical integration/set-up phone support free (pro-rata at \$100 USD thereafter).
Additional Transaction Offerings	Your Network Access Fee including one (1) Transaction offering (either a sale or a Lead). Additional Transaction offerings (e.g. a second sale offering, or adding a Lead offering) may be enabled for a fee of \$750 USD per Transaction offering.
Value Added Services	Any services that are not specifically listed in this Section 3.1 or 3.2 (including but not limited to migration to the CJ Vantage product line, Product Catalog, Member Messaging, etc.) are provided for additional fees (at CJ's then-current rates or as quoted by CJ) that must be paid for in advance.

For example, Transaction Fees for a sale or Lead would be calculated as follows:

(1) A sale Campaign with a Payout rate of 10% resulting in a sale of \$100 USD. The Payout equals \$10 USD, the Transaction Fee equals \$3 USD, and the Payout plus the Transaction Fee totals \$13 USD ( $[\$100 \text{ USD} \times 10\%] + [\$10 \text{ USD} \times 30\%] = \$13 \text{ USD}$ ).

(2) A sale Campaign with a Payout rate of 10% resulting in a sale of \$9 USD. The Payout equals \$0.90 USD, the Transaction Fee equals \$0.30 USD, and the Payout plus the Transaction Fee totals \$1.20 USD ( $[\$9 \text{ USD} \times 10\% = \$0.90 \text{ USD}] + \$0.30 \text{ USD} = \$1.20 \text{ USD}$ ).

(3) A Lead Campaign with a Payout rate of \$1.50 USD. For a Payout that equals \$1.50 USD, the Transaction Fee equals \$0.45 USD, and the Payout plus the Transaction Fee totals \$1.95 USD ( $[\$1.50 \text{ USD} \times 30\% = \$0.45 \text{ USD}] = \$1.95 \text{ USD}$ ).

(4) A Lead Campaign with a Payout rate of \$0.50 USD. For a Payout that equals \$0.50 USD, the Transaction Fee equals \$0.30 USD, and the Payout plus the Transaction Fee totals \$0.80 USD ( $[\$0.50 \text{ USD} + \$0.30 \text{ USD} = \$0.80 \text{ USD}]$ ).

**3.2 CJ Services.** The code provided by CJ that You are required to integrate into and maintain within Your Links enables the tracking of critical information regarding sales and Leads that result directly from Links placed by Your Publishers through the Network Service. You and Your Publishers shall be able to produce informational reports through the Network Service concerning sales and Leads debited to Your Account. In addition to tracking services and reporting capability, CJ shall provide to You the following CJ support services:

- i. a single, initial promotion of Your Program in the first CJ Publisher Newsletter that is published following Your Live Activation Date;
- ii. placement of Your Program in 1 category of the Network Service Program Directory;
- iii. promotion of Your Program within the www.cj.com New Programs Section for a period of not less than 1 week and not more than 30 days;
- iv. up to 1 hour of technical integration and set-up telephone support (one time only, not on a per month basis);
- v. payment of Payouts to Your Publishers upon receipt from You of funds for such Payouts;
- vi. US tax form processing and mailing to Your Publishers (Form 1099 or similar);
- vii. access for both You and Your Publishers to on-line support service from CJ's client services help desk (via the "help" button within the party's Network Service Account), and phone support is provided during the normal business operating hours of 8am-5pm, excepting national and CJ recognized holidays (local time and local holidays are applicable at all of CJ's business offices); and
- viii. ad serving for all commercially standard Links for product images, banners, buttons and text Links (with no reduction in fees if CJ does not serve Your Links).

**3.3 Ad Serving; Tracking Code Maintenance.** In order for CJ to record the tracking of Visitors' Transactions resulting from clicks on Links to Your Web site and/or Web site content through pixel image tracking, CJ code must be included in and maintained within the Links: "Click Tracking Code", "Impression Tracking Code" and "Transaction Tracking Code" (in the aggregate referred to herein as "Tracking Code"). Your Links and all advertisements ("Ad Content") contained in Your Links must be in a Network Service compatible format, as such format may be established by CJ from time to time. You, Your Publishers or an agent of Yours may serve standard Ad Content. If You have any non-standard Ad Content or format, these must be served by You, Your Publishers or a CJ authorized provider (please contact CJ client services for verification and authority).

You are required to provide CJ with accurate, verifiable reporting on the number and amount of Visitor Transactions, or CJ shall determine (where possible) actual Payouts that should be credited to Your Publishers Account, and alternatively apply an estimated amount of Payouts (as follows), during any period where Visitors are referred to You by Publishers but not tracking of those Visitors through the Tracking Code is impaired, where: (a) You or Your agent serve Your Ad Content, and/or (b) due to Your negligent or intentional act or omission during such non-functioning period. If under the preceding circumstances You are unable or You fail to provide CJ with actual Transaction information, CJ shall calculate Payouts, and debit Your Account for such Payouts ("Estimated Payouts") based upon Your average "Earnings Per One Hundred Clicks" ("EPC") plus Transaction Fees and an additional service fee payable to CJ equal to 15% times the Estimated Payouts. "EPC" is calculated by taking the total aggregate Payouts of Your Publishers during the most recent 30 consecutive day period ("30 Day Period") divided by the number of Clicks generated on Links to Your Web site through the Network Service divided by 100. If there is not enough data for a 30 Day Period, CJ shall calculate Estimated Payouts based upon an average EPC across the Network Service for all Advertisers for the previous calendar month. Estimated Payouts will be applied to Publishers' accounts based on a historical performance of the Publisher.

CJ may deactivate Your Account for failure by You to remedy within 7 days of written notification by CJ the improper functioning of Links to Your Web site and/or Web site content, due to Ad Content serving problems where serving is the responsibility of You or Your agent or Tracking Code problems attributable to You or Your agent. CJ may terminate this Agreement if Your Account is not reinstated due to Your refusal to cure the improper functioning of Links to Your Web site and/or Web site content.

**3.4 Payouts/Payout Rates.** You shall establish through the Network Service a Payout rate for a qualifying Transaction for each of Your Campaigns. Your Account will be debited with each Payout and corresponding Transaction Fee in accordance with Your Campaign Payout rate for the relevant Campaign for each such Visitor action directly resulting from each of Your Publisher's Web sites or within a subscription e-mail Linking to Your Web site.

You may discontinue Campaigns or Programs, or modify any Payout rate upon 7 days written notice with effect from the 8th day from such notice. CJ will send Your Publishers a notice regarding each change in Your Payout rate(s) or Campaign or Program discontinuation. If You have established custom Payout rates or other such arrangements, You are responsible for notifying Your Publishers of such changes.

**3.5 Payment.** Whenever Your Account balance is less than the Minimum Balance Amount, You must immediately remit a payment to CJ in an amount at least equal to any negative balance and an amount sufficient to restore Your Minimum Balance Amount. Your positive Account balance shall be applied towards Transaction Fees in the first instance and payment on Your behalf by CJ to Your Publishers of Payouts. CJ is under no obligation to make payment to Your Publishers of Payouts where there are insufficient funds in Your Account at the time that payment to all of Your Publishers is due. Your Publishers shall have a claim against You directly for non-payment of earned but unpaid Payouts that are unpaid because You have failed to make payment to CJ. You may make payments hereunder via check, wire transfer, or certain credit cards over the Web or by phone. When payment is made by check, Your Account will not reflect payment until the check has cleared and cash has been transferred to CJ's bank account. You and CJ may by mutual agreement establish direct deduction from Your bank account via "ACH" (Automated Clearing House) for payments hereunder. Your Account will not accrue interest. If Your Account has a negative balance for any period of 45 days or more, Your Account is subject to 1.5% interest per month, compounded monthly. Your Account aggregates Your earnings (if any) as a Publisher. CJ may apply amounts earned by You, even in a separate account and whether as a Publisher or partner (if applicable), towards amounts owed by You as an Advertiser. Your Account may be deactivated without notice for non-payment. The number or amount of Transactions and clicks, credits for Payouts, and the charges for "Chargebacks" (as defined in Section 3.6), as calculated by CJ shall be final and binding on You.

You may elect to make payment in any of the currencies that CJ supports (as may be amended from time to time). You may also elect to establish Payout rates in any supported currency. Your Account balance shall appear in US Dollars unless another supported currency is elected by You. Balances appearing in a supported currency and paid (either by You to CJ or by CJ to Publishers) in that currency are not converted. Balances and Payouts appearing in a supported currency and paid by You in a different currency are subject to conversion. The conversion rate shall be determined in accordance with CJ's and CJ's vendor's operating standards using the rates prevailing upon the date that payment is made to Your Publisher(s), or upon the basis of historical conversion rates if rates are unavailable at such time.

Any questions (including disputes) regarding Payouts and/or payment should be directed to CJ client services.

**3.6 Chargebacks.** Transactions appear in the following statuses: New, Locked, Extended, Accepted, or Corrected. "New" means that the Transaction has yet to be reviewed and confirmed by You as approved for payment. "Locked" means that the Transaction has been approved by You for payment of the Payout and Transaction Fees, either through affirmative action or deemed approved if not extended or corrected prior to the 10<sup>th</sup> of the month (for a Transaction that occurred in the prior month). "Extended" means that You have deferred acceptance or correction of the Transaction for one payment cycle. "Accepted" means that You have approved the Transaction for payment of the Payout and Transaction Fees. Once designated as Accepted, the Transaction's status cannot be changed any other status (including Corrected). "Corrected" means that You have reviewed the Transaction and that You represent and warrant that the Transaction qualifies as a "Chargeback". A "Chargeback" means that the Transaction is not eligible for a Payout due to: product return; duplicate entry or other clear error; non-bona fide Transaction; or, with respect to a sale, non-receipt of payment from, or refund of payment to, the Visitor by You. New, Extended and Corrected Transactions must be processed by You through the Account manager user interface by the 10<sup>th</sup> of the month for Transactions that occurred the prior month. Failure

to process a Transaction's status by the 10<sup>th</sup> of the month results in the status of that New Transaction being converted to a Locked Transaction and payment of the Payout and Transaction Fees associated with that Transaction deemed to be authorized by You. New Transaction statuses may be changed to Extended status by You only in circumstances where You are verifying a Lead (for Lead Campaigns) or You have a product return policy or offer to the Visitor that allows the Visitor to return the product during the "Chargeback Period" (but not beyond). "Chargeback Period" means the period of time between the date that a sale occurred (for sale Campaigns) or that the Lead was completed (for Lead Campaigns) and the 10<sup>th</sup> of the following month, unless the Transaction is Extended, in which case the Chargeback Period is extended through the 10<sup>th</sup> of the second month after the date of the Transaction.

**4.1 Proprietary Rights and Licenses.** You grant to CJ a revocable, non-transferable, royalty free, international license to display on and distribute from CJ's Web site Links to Your Web site for Your Program(s), and all trademarks, service marks, tradenames, and/or copyrighted material ("Content") that You provide to CJ through the Network Service for the limited purposes of promoting Your Program to Publishers and potential Publishers, subject to the terms and conditions of this Agreement and the Publisher's Publisher Service Agreement. The rights to display and Link to Your Web site are sub-licensable by CJ to Your Publishers. Your Publishers may not distribute and/or sublicense Your Links (and/or Content) unless authorized through Your Information Page or by Your written permission.

CJ and the sub-licensees shall not otherwise copy nor modify, in any way, any icons, buttons, banners, graphics files, or Content that You have made available through the Network Service pursuant to the foregoing license, except, with respect to CJ, as necessary to conform Your Links to a CJ compatible format. CJ and the sub-licensees may not remove or alter any copyright or trademark notices. If a Publisher's sublicense is sub-licensable, such Publisher's sub-licensee is subject to the preceding conditions.

CJ grants to You a revocable, non-transferable, royalty free, international sub-license to display on Your Web site Your Publishers' Content that is provided to You through the Network Service, subject to the terms and conditions of this Agreement and each of Your Publisher's Publisher Service Agreement. You may not distribute and/or sublicense any of Your Publishers Content unless authorized by each Publisher's written permission. You shall not copy nor modify, in any way, any Content made available to You pursuant to the foregoing license, nor remove or alter any copyright or trademark notices. You agree that Your use of any CJ Web site (such as www.cj.com), and Your use of any CJ logos, trademarks or Links is subject to the license and terms of use that are available from such Web site ("Terms of Use"). Each party may make statements that it is doing business with the other and use the other's logo with such statements.

**4.2 No Challenge to Intellectual Property.** CJ acknowledges that it obtains no proprietary rights in Your Content, and agrees not to challenge Your proprietary rights to the Content during the term of this Agreement. You acknowledge that You obtain no proprietary rights in CJ's Content, patents, and patent applications, and agree not to challenge CJ's proprietary rights in CJ's patents and patent applications, and, with respect to the Content during the term of this Agreement.

You acknowledge that You obtain no proprietary rights in each of Your Publishers' Content, and agree not to challenge such Publisher's proprietary rights to the Content until You have terminated the Publisher from Your Program or the Publisher has withdrawn from Your Program by removing all Links provided by You through the Network Service.

The licensees/sub-licensees agree that all goodwill arising as a result of the licensor's Intellectual Property shall inure to the benefit of the licensor, and that all non-licensed /or sublicense proprietary rights in the Intellectual Property remain with the licensor. Licensees/sub-licensees shall not adopt any names, trademarks, service marks or domain names that are confusingly similar to, or in combination with any of licensor's tradenames, trademarks, service marks and/or domain names.

**4.3 Terminating Licenses.** You may terminate any sublicense and/or license under this Agreement immediately upon written notice to the sublicensee/licensee if You have reasonable concerns that the sublicensee/licensee is diluting, tarnishing or blurring the value of Your trademarks, service marks, and/or tradenames, and/or breach of Your other intellectual property rights. This Agreement may be terminated in whole or part if CJ has reasonable concerns that You are diluting, tarnishing or blurring the value of CJ's trademarks, service marks, and/or tradenames, and/or for breach of CJ's other intellectual property rights.

**5.1 Privacy and Confidentiality.** 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 ("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 in order to protect any proprietary interests of the disclosing party. "Confidential Information" shall not include (even if designated by a party) information that is or becomes part of the public domain through no act or omission of the receiving party, or 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 that the receiving party had in its possession prior to the date of this Agreement.

The information that You supply to establish and maintain Your Account shall be Your Confidential Information, and You agree that CJ may provide Your e-mail address(es) and basic Advertiser Account detail (including but not limited to Web site name, date Web site first entered into operation, and visitor demographics) to Publishers. 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 grossly negligent or willful conduct or omission). You shall provide CJ with prompt notification to CJ client services help desk (via the "help" button within the party's Network Service Account), and through written notification to CJ as provided in Section 6.1 below, of any known or suspected unauthorized use of Your Account or breach of the security of Your Account.

CJ's Privacy Policy that is accessible from the home page of [www.cj.com](http://www.cj.com) and may be amended from time to time by way of republication, is incorporated into this Agreement.

**5.2 Collection and Use of Transaction Data.** CJ does not collect information about Your Visitors' Transactions, other than what it receives through the installed tracking code. CJ reserves the right to be able to utilize this data, 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 Your Program capabilities and efficiencies to Publishers. CJ may also disclose data regarding a Visitors' Transactions to the Publisher that referred the Visitor to You for the performance of this Agreement and the Publisher's Publisher Service Agreement, and for the Publisher's use for rewards programs that the Visitor is a member of (on the condition that the Visitor has authorized release of such information to the Publisher).

**5.3 Collection and Confidentiality of Visitors' Personal Data.** CJ promises not to disclose publicly, other than under compulsion of law, including subpoena, any personal or business information that can be linked specifically to any Visitors to Your Web site that result directly from Links on Your Publishers' Web sites and subscription e-mail mailings, without the Visitor's express permission (which may be through membership to a Publisher's subscription e-mail or Web site program), to the extent CJ collects any such information, including, but not limited to, the Visitor's name, e-mail address, phone number, or any other personal information.

**6.1 Term and Notices.** This Agreement shall commence upon Your indication that You have accepted this Agreement by 'clicking through' the acceptance button on the CJ Web site, and, subject to Section 6.2, shall be in effect per Program through one year ("Term") following the date (known as the "Live Activation Date") for such Program in which You (i) have properly installed the CJ tracking code within Your Links, (ii) such Links to Your Web site or Web site content are accessible to Your Publishers through the Network Service, and (iii) have made payment to CJ of the Initial Payment on a per Program basis. In order to complete Your registration to join the Network Service, You will be required to 'click-through' the acceptance button on the CJ Web site accepting the terms of the CJ standard Advertiser Service Agreement. The parties agree that this click-through shall be for administrative purposes only and that this Advertiser Service Agreement shall be controlling. Except as provided elsewhere herein, both parties must send all notices relating to this Agreement in writing via overnight mail (or international express mail by an internationally recognized courier) or facsimile: (a) to CJ at "Commission Junction, Inc., Attn: Legal Department, 1501 Chapala Street, Santa Barbara, CA 93101, USA, and/or via facsimile to (805) 560-0776, and, (b) for You, at the address and facsimile number listed on Your Account. Notices shall be effective the earlier of the notified party's actual receipt (or refusal to accept to receipt), or five (5) days after the date of mailing.

**6.2 Temporary Deactivation and Termination.** Either party may terminate this Agreement if the other party breaches this Agreement and fails to cure such breach within 30 days of receipt of written notice from the non-breaching party of the existence and nature of the breach. Notwithstanding the preceding, CJ may terminate this Agreement immediately upon notice for Your breach of Section 1(d). After the

initial Term of a Program, this Agreement shall automatically renew per Program for additional one year Terms although either party may terminate this Agreement with respect to a Program without cause (a) during a renewal Term for a Program, upon 90 days prior written notice to the other party, or (b) notice of non-renewal 30 days prior to the end of a Term for a Program. Either party may terminate this Agreement in its entirety immediately if CJ changes, modifies or amends this Agreement, in whole or in part, pursuant to Section 10.6 and You do not agree with any such change, modification or amendment. Notwithstanding the foregoing, CJ may: (i) immediately deactivate Your Account(s) if You breach Sections 1, 3.4, 3.5, 4 and 7, (ii) deactivate Your Account(s) upon 7 days' notice if You breach Section 3.3 as set forth therein, and (iii) deactivate Your Account(s) for any other breach of this Agreement upon Your failure to cure such breach within 7 days of receipt of written notice from CJ of the existence and nature of the breach. If this Agreement is terminated for Your breach, You shall not be eligible to enter into a new click-on Advertiser service agreement with CJ, and any attempt to do so shall be null and void.

Upon termination of this Agreement, an outstanding debit balance shall be due and owing from You to CJ and in no event shall outstanding payments be made to Publishers unless and until payment is received from You by CJ. Upon reconciliation of the Account, an outstanding credit balance shall be paid by CJ to You after the conclusion of the last Chargeback Period. Upon termination of this Agreement, any license or sublicense granted to You or by You under this Agreement will terminate, and the licensee/sub-licensee must immediately destroy or delete all physical and electronic copies of the Intellectual Property and the Confidential Information, and cause all Links to CJ to be removed. CJ shall (a) inform Your Publishers that Your Program(s) has ended (if terminated) or has been temporarily discontinued (in the case of deactivation), (b) stop distributing Links to Your Web site, and (c) request (or suggest, in circumstances of deactivation) that all Links placed by Your Publishers to Your Web site be removed from such Publishers' Web sites and/or subscription e-mail.

No remedy or election shall be exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

**6.3 Survival.** The provisions of this Section and Sections 1, 3.5, 3.6, 5, 6.1, 6.2, 8.3, 8.4, 9, 10.3, 10.5, and 10.6 shall survive the termination of this Agreement.

**7 Third Party Disputes.** Should any third party or a Publisher that is not a member of Your Program dispute a party's right to use any Link, domain name, trademark, service mark, trade dress, or right to offer any service or good offered on a party's Web site, a party may, immediately upon notice, terminate this Agreement or, in the case of CJ, deactivate Your Account. A party's representations regarding the preceding may or may not be relied upon in the other party's decision whether to terminate this Agreement, or, in CJ's case, deactivate You.

**8.1 Business Operations.** Each party will make reasonable commercial efforts to keep its Web site operational during normal business hours. However, the parties agree it is normal to have a certain amount of system downtime and agree not to hold each other or Your Publishers liable for any of the consequences of such interruptions.

**8.2 Authority and Compliance with Laws.** 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. Each party is responsible for compliance with all applicable state, federal, and local laws (including but not limited to international laws) in any jurisdiction from which it operates and represents and warrants such compliance. Each party represents and warrants that the party shall have all appropriate authority and rights to grant the licenses hereunder, and that to the party's knowledge the licenses, and in the case of CJ, the technology that CJ utilizes for the Network Service, do(es) not infringe a third party's (or the other party's) intellectual property rights.

**8.3 Limitation of Liabilities.** WITH THE EXCEPTION OF ADVERTISER'S INDEMNIFICATION OBLIGATIONS, ANY LIABILITY OF A PARTY UNDER THIS AGREEMENT SHALL BE LIMITED TO THE TOTAL OF YOUR PAYOUTS PAID AND PAYABLE TO YOUR PUBLISHERS (IN THE AGGREGATE) BY CJ, ALL FEES PAID AND PAYABLE BY YOU TO CJ, AND INTEREST PAID AND PAYABLE BY YOU TO CJ DURING THE TERM OF THIS AGREEMENT. WITH THE EXCEPTION OF ADVERTISER'S INDEMNIFICATION OBLIGATIONS, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO A CLAIM BY A PUBLISHER OR 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.



**8.4 Disclaimer of Warranties.** EXCEPT AS EXPRESSLY STATED HEREIN, TO THE FULLEST EXTENT PERMISSIBLE PURSUANT TO APPLICABLE LAW, BOTH PARTIES DISCLAIM ALL WARRANTIES EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, (A) MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, (B) THAT THERE ARE NO VIRUSES OR OTHER HARMFUL COMPONENTS, (C) THAT A PARTY'S SECURITY METHODS EMPLOYED WILL BE SUFFICIENT, (D) REGARDING CORRECTNESS, ACCURACY, OR RELIABILITY, OR (E) AGAINST INTERFERENCE WITH ENJOYMENT OF A PARTY'S "INFORMATION" (WEB SITE). ALL 'INFORMATION' AND 'COMPUTER PROGRAMS' PROVIDED 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 THE USER.

**8.5 Benefit of the Bargain.** THE PROVISIONS OF THIS SECTION 8 ARE AN ESSENTIAL ELEMENT OF THE BENEFIT OF THE BARGAIN REFLECTED IN THIS AGREEMENT.

**9 Indemnification.** Each party ("Indemnitor") shall defend, indemnify and hold the other party ("Indemnitee") harmless against all allegations, claims, actions, causes of action, lawsuits, damages, liabilities, obligations, costs and expenses (including without limitation reasonable attorneys' fees, costs related to in-house counsel time, court costs and witness fees) (collectively "Losses") attributable to or related to the indemnitor's breach of this Agreement and for claims of product liability and/or malpractice or misfeasance in the performance of services ("Claims"). Should any Claim give rise to a duty of indemnification under the provisions of this Agreement, then the indemnitee shall promptly notify the indemnitor, and the indemnitee shall be entitled, at its own expense, and upon reasonable notice to the indemnitor, to participate in the defense of such Claim. The indemnitor may not settle any claim without the consent of the indemnitee, except upon terms and conditions offered or consented to by the indemnitee, which consent shall not be unreasonably withheld. Participation in the defense shall not waive or reduce any obligations of the Indemnitor to indemnify or hold Indemnitee harmless.

**10.1 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.

**10.2 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. Certain provisions of this Agreement are intended to benefit each Publisher that You have approved for membership in Your Program, and reciprocally, You are intended to benefit under each such Publisher's Publisher Service Agreement. You agree that Your rights under a Publisher's Publisher Service Agreement do not exceed the Publisher's duties, as Your rights are limited by any defenses, claims and rights a Publisher may have. You agree that Your consent is not necessary to modify any Publisher Service Agreement.

**10.3 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 in Santa Barbara, California, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California. You consent to such venue and jurisdiction. 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 U.S.A. and access or use where illegal is prohibited.

**10.4 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, riots, insurrection, war (or similar), fires, flood, earthquakes, explosions, and other acts of God.

**10.5 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.

**10.6 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. Neither party may assign this Agreement without the prior express written permission of the other party. Notwithstanding the foregoing, consent of the other party shall not be required for assignment or transfer made by (a) operation of law, or (b) to an entity that requires substantially all of the party's stock, assets or business. 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. **Notwithstanding the foregoing, CJ shall have the right to change, modify or amend ("Change") this Agreement, in whole or in part (including without limitation the fees, charges and monthly minimums payable hereunder), by notifying You of such Change, by email, at least fourteen (14) days prior to the Effective Date of such Change; provided, however, that either party shall have the right to terminate this Agreement pursuant to Section 6.2 in event that You do not agree to such Change.** 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 such rules and regulations are incorporated herein.

**IN WITNESS WHEREOF**, each party has authorized the following individual (respectively) to execute this Agreement as of the date written below.

COMMISSION JUNCTION, INC.  
 1501 Chapala Street  
 Santa Barbara, CA 93101 USA

"You": \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Federal ID # (or Company Reg. No.): \_\_\_\_\_