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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CYBERSitter, LLC, a)	CV 12-5293 RSWL(AJWx)
California limited)	
liability company)	ORDER re: Defendant's
)	Motion to Transfer, or
Plaintiff,)	in the Alternative to
)	Dismiss Plaintiff's
v.)	State Law Claims [13]
)	
Google Inc., a Delaware)	
corporation; ContentWatch,)	
Inc., a Utah corporation,)	
d/b/a Net Nanny; and DOES)	
1-10, inclusive,)	
)	
Defendants.)	

Currently before the Court is Defendant Google Inc.'s ("Defendant") Motion to Transfer Pursuant to Federal Rule of Civil Procedure 12(b)(3), or in the Alternative to Dismiss Plaintiff's State Law Claims Pursuant to Rule 12(b)(6) [13]. The Court having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

The Court hereby **DENIES IN PART and GRANTS IN PART**

1 Defendant's Motion.

2 **I. BACKGROUND**

3 This Action stems from a Complaint filed against
4 Defendant and ContentWatch, Inc. ("ContentWatch";
5 collectively "Defendants") by CYBERSitter, LLC
6 ("Plaintiff"), a corporation that developed, markets,
7 and sells an Internet content-filtering program known
8 as "CYBERSitter." The CYBERSitter program, which went
9 to market in 1995, has been continuously marketed and
10 sold to the public since that time. Compl. ¶ 13.
11 Plaintiff is the owner of trademark rights in the
12 CYBERSitter mark. Id. at ¶ 16.

13 ContentWatch is a Utah corporation d/b/a "Net
14 Nanny." It markets and sells an Internet content-
15 filtering software program also known as "Net Nanny."
16 Id. at ¶ 9.

17 Defendant is one of the world's largest providers
18 of Internet search engine services. A portion of
19 Defendant's revenue comes from displaying sponsors'
20 paid advertisements on its search engine and other
21 Websites for which Defendant provides sponsored ads.
22 Id. at ¶ 18. In response to keyword searches on
23 Defendant's search engine, sponsors' paid advertising
24 results called "sponsored links" are displayed with
25 other search results. Id.

26 In or about 2000, Defendant launched a paid
27 advertising program known as the "AdWords" program,
28 which allows sponsors to purchase certain keywords that

1 trigger the sponsor's advertisement whenever a user
2 conducts online searches through Defendant's search
3 engine using those keywords. Id. at ¶ 20. In the
4 early 2000s, Plaintiff, d/b/a Solid Oak Software,
5 signed up online for an AdWords account in order to
6 advertise the CYBERSitter program on Defendant's
7 AdWords platform. Milburn Decl. ¶ 5. In connection
8 with the AdWords account, CYBERSitter's president,
9 Brian Milburn, was presented with a clickwrap agreement¹
10 in 2006 entitled "Google Inc. Advertising Program
11 Terms" ("Agreement"). Id. at ¶ 6. In relevant part,
12 the opening paragraph of the Agreement reads:

13 These Google Inc. Advertising Program Terms
14 (**"Terms"**) are entered into by, as applicable,
15 the customer signing these Terms . . . or that
16 accepts these Terms electronically (**"Customer"**)
17 and Google Inc. (**"Google"**). These Terms govern
18 Customer's participation in Google's
19 advertising program(s) (**"Program"**)
20 These Terms . . . are collectively referred to
21 as the **"Agreement."**

22 Opp'n 5:7-9 (bold in original).

23 In addition, the Agreement includes "miscellaneous"
24 terms that, *inter alia*, provide:

25 _____
26 ¹ Clickwrap agreements are online agreements that "require a user
27 to affirmatively click a box on the website acknowledging
28 awareness of and agreement to the terms of service before he or
she is allowed to proceed with further utilization of the
website." U.S. v. Drew, 259 F.R.D. 449, 462 n.2 (C.D. Cal.
2009).

1 ALL CLAIMS ARISING OUT OF OR RELATING TO THIS
2 AGREEMENT OR THE GOOGLE PROGRAM(S) SHALL BE
3 LITIGATED EXCLUSIVELY IN THE FEDERAL OR STATE
4 COURTS OF SANTA CLARA COUNTY, CALIFORNIA, USA,
5 AND GOOGLE AND CUSTOMER CONSENT TO PERSONAL
6 JURISDICTION IN THOSE COURTS.

7 Mot. 2:14-18 (caps in original).

8 According to Mr. Milburn, he has not run any paid
9 advertising for the CYBERSitter program though
10 Defendant's AdWords program since December 2010.

11 Milburn Decl. ¶ 6.

12 Plaintiff alleges that "[e]arlier this year," Mr.
13 Milburn learned that Defendants, as part of the Google
14 AdWords platform, were running paid advertisements for
15 ContentWatch's Net Nanny program, which included the
16 CYBERSitter trademark in them. Compl. ¶ 27.
17 Additionally, when an Internet user would search on the
18 Google search engine for "CYBERSitter," or similar
19 terms, ContentWatch's advertisements with the
20 CYBERSitter trademark would be displayed, often as the
21 first result in the user's search. Id. CYBERSitter
22 has never authorized Defendant, Net Nanny, or any other
23 party to use the CYBERSitter mark in connection with
24 ContentWatch's advertisements. Id. at ¶ 27.

25 As a result, on June 18, 2012, Plaintiff filed a
26 Complaint against both Defendants, charging them with
27 trademark infringement, false advertising, unfair
28 competition, and unjust enrichment. The Complaint

1 specifically alleges that Defendant Google has violated
2 various federal and California laws by (1) selling the
3 right to use Plaintiff's CYBERSitter trademark to
4 ContentWatch, which in turn illegally uses the
5 trademark in its online advertisements through
6 Defendant's advertising program, and (2) permitting and
7 encouraging ContentWatch's use of "CYBERSitter" in its
8 online advertisements through Defendant's advertising
9 program. Defendant subsequently filed the present
10 Motion, arguing that the Action should be transferred
11 in its entirety pursuant to the forum selection clause
12 contained in Plaintiff's AdWords Agreement with
13 Defendant or, in the alternative, that Plaintiff's
14 state law claims against Defendant should be dismissed
15 pursuant to Federal Rule of Civil Procedure 12(b)(6).

16 **II. Transfer of the Case Pursuant to Rule 12(b)(3)**

17 **A. Legal Standard**

18 1. FRCP 12(b)(3)

19 A motion to dismiss premised on the failure of a
20 plaintiff to initiate an action in the venue mandated
21 by a forum selection clause is treated as a motion to
22 dismiss under Federal Rule of Civil Procedure 12(b)(3).
23 Argueta v. Banco Mexicano, 87 F.3d 320, 324 (9th Cir.
24 1996). Furthermore, 28 U.S.C. §1406(a) states that
25 "the district court of a district in which is filed a
26 case laying venue in the wrong division or district
27 shall dismiss, or if it be in the interest of justice,
28 transfer such case to any district or division in which

1 it could have been brought." Generally a transfer will
2 be in the interest of justice because the dismissal of
3 any case that could have been brought somewhere else is
4 time-consuming and justice defeating. *Miller v.*
5 *Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990).

6 When a party seeks enforcement of a forum selection
7 clause under Rule 12(b)(3), a district court is not
8 required to accept the pleadings as true and may
9 consider facts outside of the pleadings. *Id.* See also
10 *Nextrade, Inc. V. Hyosung (Am.), Inc.*, 122 Fed. Appx.
11 892, 893 (9th Cir. 2005); *AF Holdings LLC v. Doe*, No.
12 12cv1523-AJB (KSC), 2012 WL 4339072 (S.D. Cal. Sept.
13 20, 2012). Furthermore, a court must draw all
14 reasonable inferences and resolve factual conflicts in
15 favor of the non-moving party. *Murphy v. Schneider*
16 *Nat'l*, 362 F.3d 1133, 1138 (9th Cir. 2004).

17 2. Forum Selection Clauses

18 Federal law applies to the analysis of both the
19 validity and the enforcement of a forum selection
20 clause. *Manetti-Farrow v. Gucci Am.*, 858 F.2d 509, 513
21 (9th Cir. 1988). "Forum selection clauses are *prima*
22 *facie* valid, and are enforceable absent a strong
23 showing by the party opposing the clause that
24 enforcement would be unreasonable or unjust, or that
25 the clause [is] invalid for such reasons as fraud or
26 overreaching." *Id.* at 514 (internal quotation marks
27 omitted); see also *Bagdasarian Prods., LLC v. Twentieth*
28 *Century Fox Film Corp.*, No. 2:10-CV-02991-JHN, 2010 WL

1 515136 at *2 (C.D. Cal. Aug. 12, 2010) (holding that
2 enforcement "is unreasonable where it would 'contravene
3 a strong public policy of the forum in which suit is
4 brought, whether declared by statute or by judicial
5 decision'").

6 **B. Analysis**

7 1. Plaintiff's Objections

8 As a preliminary matter, Plaintiff objects to
9 the Declaration of Ms. Buer, and the exhibits attached
10 thereto on the basis of lack of foundation and lack of
11 personal knowledge. Because the Court need not rely on
12 Ms. Buer's Declaration or the attached exhibits for its
13 analysis, Plaintiff's objections are **DENIED** as moot.

14 Additionally, Plaintiff objects to the Supplemental
15 Declaration of Ms. Buer on the basis of lack of
16 foundation, lack of personal knowledge, and
17 irrelevance. Moreover, Plaintiff objects to the
18 attached exhibits, which are screen shots of
19 Defendant's Editorial Guidelines, last accessed on
20 October 9, 2012, and Defendant's AdWords trademark
21 policies, last accessed on October 9, 2012. The Court
22 finds that Ms. Buer's statement about working as a
23 legal analyst for Defendant's Online Legal Support,
24 absent additional facts, is insufficient for finding
25 that Ms. Buer has personal knowledge about the
26 guidelines or policies to which she attests or about
27 their application to Plaintiff's Agreement. See Fed.
28 R. Evid. 602. Ms. Buer also fails to properly

1 authenticate the attached exhibits pursuant to Rule
2 901. Accordingly, the Court **GRANTS** Plaintiff's
3 objections to the Supplemental Buer Declaration and the
4 exhibits attached thereto.

5 2. Motion to Transfer

6 The Court **DENIES** Defendant's Motion to Transfer.
7 It is clear from a plain reading of the forum selection
8 clause in light of Plaintiff's Agreement that the
9 clause does not apply to the claims at issue here. See
10 Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009)
11 ("Contract terms are to be given their ordinary meaning
12 Whenever possible, the plain language of the
13 contract should be considered first. . . . We read a
14 written contract as a whole, and interpret each part
15 with reference to the whole.") The Agreement
16 explicitly "govern[s] *Customer's* participation in
17 Google's advertising program(s)". Opp'n 5:7-9
18 (emphasis added). The Agreement solely addresses
19 *Plaintiff's* participation as a customer in Defendant's
20 advertising program, not Plaintiff's rights or duties
21 in regard to a third party's unlawful infringement of
22 its trademark.

23 Defendant argues that the "Google Program(s)"
24 phrase will be rendered "superlative" if the Court
25 interprets it as covering only claims relating to
26 *Plaintiff's participation in* the Google Program. Reply
27 6:5-21. In support of its argument, Defendant relies
28 on U.S. v. Hathaway, 242 F.2d 897, 900 (9th Cir. 1957)

1 and Clarendon Nat. Ins. Co. v. Ins. Co. of the West,
2 442 F. Supp. 2d 914, 926 (E.D. Cal. 2006). These cases
3 are not on point here because the Court is neither
4 disregarding the "Google Program(s)" phrase, as
5 addressed by the Hathaway court, nor is it reading
6 inconsistent or contradictory meaning into the plain
7 language of the clause, as addressed by the Clarendon
8 court. Furthermore, this interpretation of the "Google
9 Program(s)" phrase does not amount to the objectionable
10 surplusage about which Defendant is so concerned.

11 Lastly, as to Defendant's assertion that
12 Plaintiff's claims relate directly to the Agreement
13 because of Defendant's Editorial Guidelines and
14 trademark policies that are found on separate Web
15 pages, the Court is not persuaded. Plaintiff's claims
16 are unrelated to Defendant's general monitoring
17 policies and therefore are not subject to the forum
18 selection clause.

19 Based on the aforementioned, the Court **DENIES**
20 Defendant's request to transfer the case because the
21 forum selection clause in Plaintiff's Agreement does
22 not apply to the claims at issue in the case.

23 **III. Dismissal of Plaintiff's State Law Claims**

24 **A. Legal Standard**

25 1. FRCP 12(b)(6)

26 In a Rule 12(b)(6) motion to dismiss, the Court
27 presumes all factual allegations of the complaint to be
28 true and draws all reasonable inferences in favor of

1 the non-moving party. Klarfeld v. United States, 944
2 F.2d 583, 585 (9th Cir. 1991). A dismissal can be
3 based on the lack of cognizable legal theory or the
4 lack of sufficient facts alleged under a cognizable
5 legal theory. Balistreri v. Pacifica Police Dep't, 901
6 F.2d 696, 699 (9th Cir. 1990). "While a complaint
7 attacked by a Rule 12(b)(6) motion to dismiss does not
8 need detailed factual allegations, a plaintiff's
9 obligation to provide the 'grounds' of his
10 'entitle[ment] to relief' requires more than labels and
11 conclusions, and a formulaic recitation of a cause of
12 action's elements will not do." Bell Atl. Corp. v.
13 Twombly, 550 U.S. 544, 555 (2007) (internal citation
14 omitted). Although specific facts are not necessary if
15 the complaint gives the defendant fair notice of the
16 claim and the grounds upon which the claim rests, a
17 complaint must nevertheless "contain sufficient factual
18 matter, accepted as true, to state a claim to relief
19 that is plausible on its face." Ashcroft v. Iqbal, 556
20 U.S. 662, 678 (2009) (internal quotation marks
21 omitted).

22 The Ninth Circuit has repeatedly held that a
23 district court should grant leave to amend a dismissed
24 claim, unless the court determines that the pleading
25 cannot possibly be cured by the allegation of other
26 facts. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir.
27 2000).

28 2. Communications Decency Act

1 The federal Communications Decency Act ("CDA")
2 provides, in part: "No provider or user of an
3 interactive computer service shall be treated as the
4 publisher or speaker of any information provided by
5 another information content provider." 47 U.S.C. §
6 230(c)(1). The statute goes on to define "information
7 content provider" as "any . . . entity that is
8 responsible, in whole or in part, for the creation or
9 development of information provided through the
10 Internet or any other interactive computer service."
11 Id., § 230(f)(3). The Ninth Circuit clarified that if
12 an interactive computer service provider "materially
13 contribut[es]" to the alleged illegal content, it is
14 deemed as having developed the information and acted as
15 an information content provider that is not entitled to
16 the CDA's general immunity provision. Fair Hous.
17 Council of San Fernando Valley v. Roommates.com, LLC,
18 521 F.3d 1157, 1168 (9th Cir. 2008); see also Swift v.
19 Zynga Game Network, Inc., No. C 09-05443 SBA, 2010 WL
20 4569889 at *5 (N.D. Cal. Nov. 3, 2010). An information
21 service provider does not become liable as an
22 "information content provider" merely by augmenting
23 online material; it must materially contribute to the
24 information's "alleged unlawfulness." Roommates, 521
25 F.3d at 1168.

26 ///

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1 **B. Analysis**

2 First addressing Plaintiff's state law claim of
3 false advertising, Plaintiff alleges that both
4 Defendant and ContentWatch willfully and intentionally
5 "made untrue and misleading statements in . . . False
6 Ads concerning Plaintiff's products and services."
7 Compl. ¶ 87. However, Defendant argues that the
8 advertisements were created by ContentWatch alone and
9 not by Defendant. Opp'n 13:20-14:3. Because
10 Defendant's entitlement to immunity under the CDA
11 depends on whether Defendant "developed" or materially
12 contributed to the content of these advertisements, it
13 is too early at this juncture to determine whether CDA
14 immunity applies. Thus, the Court **DENIES** Defendant's
15 Motion to Dismiss Plaintiff's eighth claim for false
16 advertising. See Chang v. Wozo LLC, No. 11-10245-DJC
17 (D. Mass. March 28, 2012).

18 As to Plaintiff's remaining state law claims of
19 trademark infringement, contributory infringement,
20 unfair competition, and unjust enrichment, Plaintiff's
21 allegations do not amount to the heightened level of
22 "material contribution" that the Ninth Circuit requires
23 in order for the Court to find that Defendant is an
24 information content provider. Thus, Defendant is
25 entitled to CDA immunity to the extent that Plaintiff's
26 state law claims attempt to hold Defendant liable for
27 infringing content of the advertisements at issue.

28 ///

1 However, to the extent Plaintiff's claims arise
2 from Defendant's tortious conduct related to something
3 other than the content of the advertisements, CDA
4 immunity does not apply. See Jurin v. Google Inc., 695
5 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010); see also
6 Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d
7 413, 419 (1st Cir. Feb. 23, 2007) (noting that "[a] key
8 limitation [of the CDA] is that immunity only applies
9 when the information that forms the basis for the state
10 law claim has been provided by 'another information
11 content provider.'" (emphasis in original)).

12 Plaintiff has pled sufficient facts in the
13 Complaint to support cognizable state law claims for
14 trademark infringement. See Vallavista Corp. v.
15 Amazon.com, Inc., 657 F. Supp. 2d 1132, 1136 (N.D. Cal.
16 2008) (finding that actions for trademark infringement
17 under both California law and the Lanham Act require
18 the same support). To prevail on a claim of trademark
19 infringement, the holder of a registered trademark must
20 show that another person is using: (1) a reproduction,
21 counterfeit, copy or colorable imitation of a mark; (2)
22 without the registrant's consent; (3) in commerce; (4)
23 in connection with the sale, offering for sale,
24 distribution, or advertising of any goods or services;
25 (5) where such use is likely to cause confusion, or to
26 cause a mistake or to deceive. 15 U.S.C. § 1114(1)(a);
27 Century 21 Real Estate Corp. v. Sanlin, 846 F.2d 1175,
28 1178 (9th Cir. 1988). Here, Plaintiff alleges that

1 Defendant, without authorization from Plaintiff, sold
2 to third parties the right to use Plaintiff's
3 CYBERSitter trademark in Defendant's advertising
4 program, AdWords. Compl. ¶ 72. Plaintiff further
5 alleges that as a result of Defendant selling the right
6 to use Plaintiff's trademark, consumers are likely to
7 mistakenly associate Plaintiff's goods and services
8 with those offered by third parties. Id. at ¶ 73.
9 Thus, Plaintiff has sufficiently pled a claim of
10 trademark infringement that is not barred by CDA
11 immunity.

12 As to Plaintiff's state law claim of contributory
13 infringement, California Business and Professions Code
14 § 14245(a)(3) provides, in relevant part, that an
15 individual who "[k]nowingly facilitate[s], enable[s],
16 or otherwise assist[s] a person to manufacture, use,
17 distribute, display, or sell goods or services bearing
18 a reproduction, counterfeit, copy, or colorable
19 imitation of a mark registered under [California
20 trademark law], without the consent of the registrant"
21 is subject to civil liability. Plaintiff alleges that
22 Defendant, without Plaintiff's consent, (1) encouraged
23 and facilitated third parties to use the CYBERSitter
24 trademark in paid advertisements, (2) facilitated,
25 encouraged, and assisted in the incorporation and
26 display of the CYBERSitter trademark in the text and
27 title of third party's advertisements, (3) sold the
28 right to use the CYBERSitter trademark to third

1 parties, (4) displayed the CYBERSitter trademark in
2 close proximity to third party advertisements, and (5),
3 displayed the CYBERSitter trademark in Defendant's
4 proprietary directory in order to encourage and
5 facilitated the mark's unlawful use in the AdWords
6 program. Compl. ¶ 72. Thus, Plaintiff's claim
7 sufficiently alleges the facts necessary under Section
8 14245(a)(3) to stand as an independent claim that does
9 not hinge on Defendant's alleged contribution to the
10 content of the injurious advertisements.

11 Under California's Unfair Competition Law ("UCL"),
12 "unfair competition . . . [means] and include[s] any
13 unlawful, unfair or fraudulent business act or practice
14 and unfair, deceptive, untrue, or misleading
15 advertising" Cal. Bus. & Prof. Code § 17200.
16 To state a claim under the UCL, a plaintiff must plead
17 that (1) the defendant engaged in one of the practices
18 prohibited by the statute, and (2) the plaintiff
19 suffered actual injury in fact as a result of
20 defendant's actions. Rolling v. E*Trade Securities,
21 LLC, 756 F. Supp. 2d 1179, 1192 (N.D. Cal. 2010). In
22 its Complaint, Plaintiff alleges that Defendant
23 violated Plaintiff's trademark rights under both
24 federal and California law and engaged in acts of false
25 and deceptive advertising. Compl. ¶ 96. Presuming
26 such allegations to be true, Plaintiff has sufficiently
27 pled a claim for unfair competition that withstands
28 Defendant's Motion to Dismiss based on CDA immunity.

1 As to Plaintiff's claim for unjust enrichment,
2 Defendant additionally argues that it should be
3 dismissed on other grounds. Mot. Part III. Because a
4 determination of whether Plaintiff's unjust enrichment
5 claim stands as an "independent tort" depends on the
6 Court's ruling on this additional argument, the Court
7 will address whether Plaintiff's unjust enrichment
8 claims survives this Motion in Part III.B, infra.

9 In sum, for the state law claims of trademark
10 infringement, contributory infringement, and unfair
11 competition, Plaintiff has sufficiently pled the facts
12 necessary to establish Defendant's acts as independent
13 torts that are not barred by CDA immunity. Therefore,
14 the Court **DENIES** Defendant's Motion to Dismiss these
15 claims.

16 **IV. DISMISSAL OF PLAINTIFF'S UNJUST ENRICHMENT CLAIM**

17 As noted by both parties, there is a split within
18 California courts regarding whether unjust enrichment
19 is an independent cause of action. Compare *Jogani v.*
20 *Superior Ct.*, 165 Cal. App. 4th 901 (2008), *McKell v.*
21 *Wash. Mut., Inc.*, 142 Cal. App. 4th 1457 (2006), and
22 *McBride v. Boughton*, 123 Cal. App. 4th 379 (2004), with
23 *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723 (2000),
24 and *First Nationwide Sav. v. Perry*, 11 Cal. App. 4th
25 1657 (1992). "Generally, federal courts in California
26 have ruled that unjust enrichment is not an independent
27 cause of action because it is duplicative of relief
28 already available under various legal doctrines." See

1 Vicuna v. Alexia Foods, Inc., No. C 11-6119 PJH, slip
2 op. at *3 (N.D. Cal. April 27, 2012). The Court
3 follows suit and **GRANTS without leave to amend**
4 Defendant's Motion to Dismiss Plaintiff's claim against
5 Defendant for unjust enrichment.

6 **V. CONCLUSION**

7 For the reasons stated above, the Court **DENIES**
8 Defendant's Motion to Transfer and Motion to Dismiss
9 Plaintiff's State Law Claims. The Court **GRANTS without**
10 **leave to amend** Defendant's Motion to Dismiss
11 Plaintiff's unjust enrichment claim against Defendant
12 Google.

13
14 **IT IS SO ORDERED.**

15 DATED: October 24, 2012

16
17 **RONALD S.W. LEW**

18 **HONORABLE RONALD S.W. LEW**
19 Senior, U.S. District Court Judge
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