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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARK TRUDEAU and TROY MARTIAL ARTS INC.,

Plaintiffs,

v.

GOOGLE, LLC,

Defendant.

Case No. 18-cv-00947 BLF

GOOGLE'S MOTION TO COMPEL ARBITRATION, OR, ALTERNATIVELY, TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT AND REQUEST FOR JUDICIAL NOTICE

Date: September 27, 2018
Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Beth L. Freeman

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NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION, OR, ALTERNATIVELY, TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT AND REQUEST FOR JUDICIAL NOTICE; STATEMENT OF RELIEF SOUGHT

PLEASE TAKE NOTICE that on September 27, 2018, at 9:00 a.m. or as soon thereafter as this Motion may be heard, in Courtroom 3 of the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, CA 95113, defendant Google LLC ("Google") will and hereby does move the Court, pursuant to 9 U.S.C. § 206 and Federal Rule of Civil Procedure 12(b)(1), for an order compelling arbitration and thus dismissing with prejudice all claims asserted against Google in the First Amended Complaint (the "Complaint" or "FAC") filed by plaintiffs Mark Trudeau and Troy Martial Arts Inc. ("Plaintiffs"). In the alternative, Google will and hereby does move the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an order dismissing with prejudice all claims asserted against Google in the Complaint. If the Court is inclined to compel arbitration without dismissing the Complaint, then Google requests a stay of all proceedings pending arbitration under Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*.

The motion to compel arbitration is based on this Notice of Motion and Motion to Dismiss Plaintiffs' Complaint and Compel Arbitration, the accompanying Memorandum of Points and Authorities, the concurrently filed Declaration of Sue-Jean Sung ("Decl."), the pleadings on file, oral argument of counsel, and such other materials and argument as may be presented in connection with the hearing of this motion. Google also moves the Court to take judicial notice of the Exhibits B, C, F, G, and H attached to the Declaration of Sue-Jean Sung, and to consider Exhibits B, C, and H under the incorporation by reference doctrine, in support of the Motion to Dismiss.

STATEMENT OF ISSUES TO BE DECIDED

1. Should the Court compel Plaintiffs to arbitrate the claims in the FAC, where Plaintiffs expressly agreed to arbitrate all disputes and claims involving their AdWords account and declined to exercise their right to "freely opt out of" arbitration? *AdTrader, Inc. v. Google LLC*, No. 17-CV-07082-BLF, 2018 WL 1876950, at *5 (N.D. Cal. Apr. 19, 2018).

2. If the Court declines to compel arbitration, should the FAC be dismissed for failure to state a claim where the obligation that Plaintiffs seek to impose, relating to "negative keywords," is

expressly disclaimed by Google in the very webpage on which Plaintiffs rely?

3. Should the Court grant judicial notice of Exhibits B, C, F, G, and H attached to the Sung Declaration, and consider Exhibits B, C, and H under the incorporation by reference doctrine, in support of the Motion to Dismiss?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a straightforward motion to enforce Plaintiffs' express agreement to arbitrate. As the Court is aware from the *AdTrader* matter, Google amended the Terms of Service for its AdWords service in September 2017 to include a new Dispute Resolution Agreement that requires individual arbitration of disputes. Plaintiffs received multiple notices of these amended terms and were notified that they could freely opt out of the Dispute Resolution Agreement, but they expressly agreed to the new Terms of Service in their entirety without opting out of arbitration. Plaintiffs now claim it would be unconscionable to enforce their agreement, parroting in large part the arguments from *AdTrader* (brought by the same counsel for Plaintiffs here). Among other allegations, Plaintiffs falsely claim that "[t]he new arbitration clause … [was] presented as a take-it-or-leave it provision to Plaintiffs," without even acknowledging the existence of the opt out. (Compl. ¶ 113.) Plaintiffs' efforts to avoid arbitration are baseless—indeed, any perceived harm from being compelled to arbitrate would be entirely "self-inflicted," given Plaintiffs' voluntary choice ***not*** to opt out of the Dispute Resolution Agreement. *AdTrader*, 2018 WL 1876950, at *5. The Court should dismiss the FAC and compel arbitration consistent with the parties' agreement.

If for some reason the Court declines to compel arbitration, it should nevertheless dismiss all claims in the FAC with prejudice for failure to state any viable claim. Plaintiffs complain that Google does not undertake certain specific steps when implementing "negative keywords," which are terms that advertisers can select to refine when their ads will be shown (and not shown) on the AdWords platform. Specifically, Plaintiffs complain that Google shows ads in response to searches in which a user ***misspells*** or uses a ***variation*** of a negative keyword in a Google search. But Plaintiffs do not allege any contract term or disclosure that obligates Google to correct misspelling and variations when applying negative keywords. Instead, Plaintiffs cherry-pick language from Google's Help Center page

about negative keywords to create the misimpression of an obligation, while strategically omitting to mention the disclosures on the very same page explaining that ***advertisers*** must undertake the steps that Plaintiffs seek to impose on Google.

II. FACTUAL BACKGROUND

A. The Parties.

Defendant is Google LLC ("Google"). (Compl. ¶ 12.) As relevant here, Google operates an online advertising platform, known as "AdWords," that allows businesses to display ads in various ways online, including next to search results on Google's search engine (additional details are discussed below at Section IV(A)). (Compl. ¶¶ 19-21; Decl. ¶ 3.)

Plaintiff Mark Trudeau is the co-owner of Plaintiff Troy Martial Arts Inc. ("Troy Martial Arts"), a corporation doing business in Troy, Michigan. Plaintiffs "accepted, by way of a clickwrap contract, the AdWords terms of service" for the first time in 2012 and have advertised through AdWords since that time.[1] (Compl. ¶ 32; Decl. ¶¶ 14-17.)

B. The AdWords Terms of Service Contain a Broad Arbitration Provision.

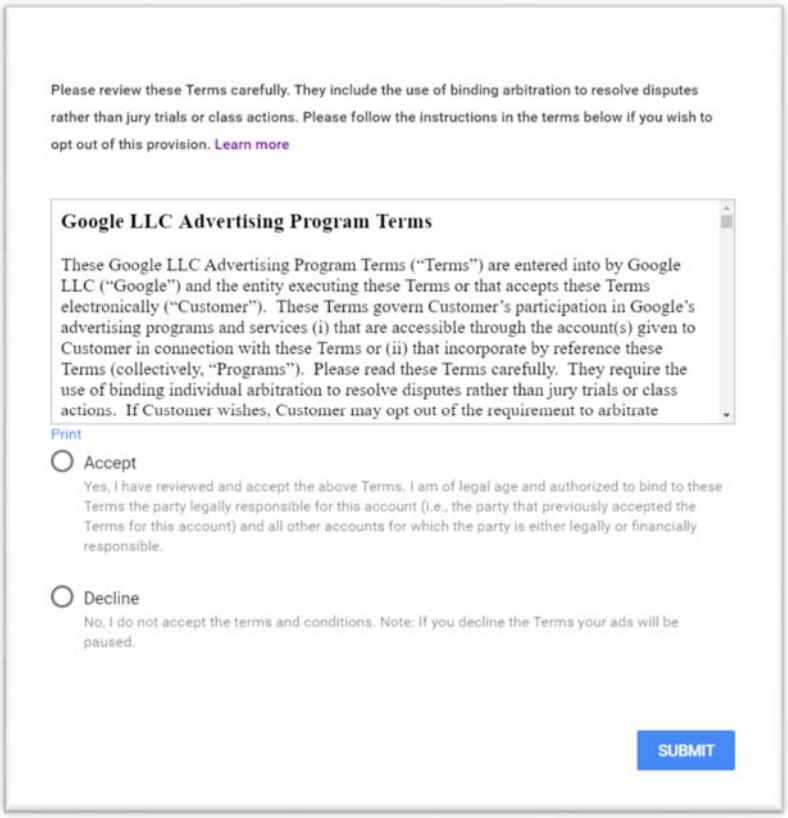
Google modified the AdWords Terms of Service in February 2013 and September 2017. This dispute is governed by the September 2017 version of the AdWords Terms of Service ("2017 AdWords TOS"), which supersedes previous versions. (Decl. ¶¶ 7, 10, Ex. C.)

Google notified AdWords users of the September 2017 AdWords TOS in various ways, including direct emails, a public blog post, and alerts shown to advertisers when they accessed their AdWords accounts. (Decl. ¶ 7.) In these notices, Google alerted users that the 2017 AdWords TOS includes a new arbitration agreement (the "Dispute Resolution Agreement") that advertisers can opt out of if they do not want to be bound. For example, in an email, Google informed advertisers that the 2017 AdWords TOS added "a provision to use arbitration to resolve disputes rather than jury trials or class actions" and instructed advertisers that they could "[f]ollow the instructions in the dispute

[1] Google's business records show that Mr. Trudeau logged on in April 2012 to register Troy Martial Arts for an AdWords account. (Decl. ¶ 14.) Mr. Trudeau did not register a separate AdWords account for himself in an individual capacity. (*Id.*) Because Mr. Trudeau is the co-owner of Troy Martial Arts and the Complaint alleges that "Plaintiffs" collectively "entered into an agreement with Google," Google does not distinguish between Plaintiffs for purposes of this Motion.

resolution section of the terms to opt out of this provision." (Decl. ¶ 16, Ex. E.)

These notices each contained a link that directed advertisers to a webpage containing the 2017 AdWords TOS, as shown below. (Decl. ¶ 9, Ex. B.)



At the top of page, Google advises advertisers to "Please review these terms carefully" and notifies them of the arbitration agreement and opt out: "They [the terms] include the use of binding arbitration to resolve disputes rather than jury trials or class actions. Please follow the instructions in the terms below if you wish to opt out of this provision." (Decl. ¶ 9, Ex. B.)

The 2017 AdWords TOS is shown in the window in the middle of the page. Advertisers can scroll through the terms in this window or print to review in hard copy (via the blue "Print" button). In the opening paragraph of the TOS, Google again advises advertisers: "Please read these Terms carefully. They require the use of binding individual arbitration to resolve disputes rather than jury trials or class actions… Customer may opt out of the requirement to arbitrate disputes by following the instructions in Section 13(F) below." (Decl. ¶ 11, Ex. C.)

At the bottom of the page, advertisers are given a choice to either click "Accept"—to indicate

"Yes, I have reviewed and accept the above Terms"—or "Decline," and must then further click "Submit" to enter their selection.

Advertisers who click to "Accept" the 2017 AdWords TOS then have 30 days to opt out of the Dispute Resolution Agreement if they do not want to be bound. Section 13(F) explains the opt out procedure as follows:

> F. 30-day opt out period. Customer (both for itself and for any Advertiser that Customer represents) and Advertiser have the right to opt out of this Dispute Resolution Agreement. A Customer or Advertiser who does not wish to be bound by this Dispute Resolution Agreement (including its waiver of class and representative claims) must notify Google as set forth below within 30 days of the first acceptance date of any version of these Terms containing an arbitration provision (unless a longer period is required by applicable law). Customer's or Advertiser's notice to Google under this subsection must be submitted via webform available at adwords.google.com/nav/arbitration.

(Decl. ¶ 11, Ex. C at ¶ 13(F).) Clicking the link shown above directs advertisers to a webpage from which they can opt out of arbitration by checking a box labeled "Opt out of arbitration" as shown at the screenshot below. (Decl. ¶ 13, Ex. D.)

Google notified Plaintiffs of the 2017 AdWords TOS by both email and an alert in the AdWords account of Troy Martial Arts. Google's data shows that Troy Martial Arts (1) accepted the 2017 AdWords TOS on September 15, 2017 by clicking the "Accept" and "Submit" buttons shown above, and (2) did not opt out within the permitted 30-day period. (Decl. ¶¶ 17-18.) Thus, Plaintiffs agreed to the Dispute Resolution Agreement of the 2017 AdWords TOS, which provides:

> Google, Customer, and Advertiser agree to ***arbitrate all disputes and claims*** between Google and Customer or between Google and Advertiser that arise out of or relate in any way to the Programs or these Terms.

(Decl. ¶ 10, Ex. C at ¶ 13(A) (emphasis added).) As Google further clarifies, this agreement to arbitrate

specifically applies to "claims that arose before Customer or Advertiser first accepted any version of these Terms containing an arbitration provision[.]" (*Id*. (emphasis added).)

III. MOTION TO COMPEL ARBITRATION

A. Legal Standards.[2]

The Federal Arbitration Act ("FAA") establishes a "federal policy favoring arbitration" and requires courts to "rigorously enforce agreements to arbitrate." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal quotation and citations omitted). The Supreme Court has instructed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983). Moreover, the Supreme Court has repeatedly upheld arbitration provisions containing class action waivers. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (enforcing an arbitration agreement with a class action waiver and rejecting plaintiff's argument that the cost of individual arbitration would exceed the amount of potential recovery); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that state law rules that purport to invalidate arbitration agreements with class action waivers are preempted by the FAA). Where a plaintiff purports to litigate claims that are subject to an enforceable arbitration agreement, the claim must be dismissed under Rule 12(b)(1) because "the court loses its subject matter jurisdiction over any claims subject to [an] arbitration clause." *Glaude v. Macy's Inc.*, No. 12-cv-5179, 2012 WL 6019069, at *3 & n.39 (N.D. Cal. Dec. 3, 2012) (citing *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-50 (1986)).

B. Plaintiffs Agreed to Arbitrate the Claims in the Complaint and That Agreement Must be Enforced Under the FAA.

There is no dispute here that Plaintiffs[3] accepted the September 2017 TOS and declined to opt out of the Dispute Resolution Agreement, thus agreeing to "arbitrate ***all disputes and claims*** … ***that arise out of or relate in any way***" to Google's advertising programs or services, including AdWords.

[2] Legal standards applicable to the motion to dismiss are discussed *infra*, section IV, B.
[3] As noted throughout, Troy Martial Arts entered into an agreement with Google, but Mr. Trudeau does not have a personal AdWords account. (*See* Decl. ¶ 14.)

(Compl. ¶ 32; Decl. ¶¶ 10, 14-17, Ex. C at ¶ 13 (emphasis added)). By clicking "Accept" and "Submit" on the webpage presenting the September 2017 TOS, Plaintiffs created a binding obligation to arbitrate claims pursuant to the terms of the Dispute Resolution Agreement. *See, e.g.*, *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007) (enforcing a prior version of Google's AdWords Terms of Service where users clicked a button indicating assent); *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1069 n.6 (S.D. Cal. 2015), *aff'd sub nom. Wiseley v. Amazon.com, Inc.*, 709 F. App'x 862 (9th Cir. 2017) ("clickwrap" agreements are enforceable because they "require[] users to expressly manifest assent to the terms by, for example, clicking an 'I accept' button.")).[4] This undisputed fact alone requires that the Complaint be dismissed and Plaintiffs compelled to honor their agreement to bring "all disputes and claims" only in individual arbitration.

C. The Dispute Resolution Agreement is Not Unconscionable.

In an effort to avoid their voluntary agreement to arbitrate, Plaintiffs argue that the Dispute Resolution Agreement is unconscionable. These arguments fail for multiple reasons.

1. The Agreement is Not Procedurally Unconscionable Because Plaintiffs had the Ability to Freely Opt Out of Arbitration.

Plaintiffs cannot avoid enforcement of the Dispute Resolution Agreement when they were given the opportunity to opt out and declined to do so. (Decl. ¶ 18.) As the Ninth Circuit has repeatedly held, "the existence of a meaningful right to opt out of [arbitration] necessarily renders the [arbitration clause] … procedurally conscionable as a matter of law." *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016) (citation omitted; brackets in original); *see also Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc) (no procedural unconscionability where arbitration clause permitted an opt out within 60 days); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) (arbitration agreement enforceable and not procedurally unconscionable where party had 30 days to opt out of the agreement).

This established law bars Plaintiffs from claiming procedural unconscionability, given the undisputed fact as recognized by this Court that "advertisers can freely opt out of the Dispute

[4] With respect to the prior AdWords TOS, Plaintiffs concede that agreeing to the "clickwrap" agreement constitutes valid acceptance. (Compl. ¶ 32 (alleging that Plaintiffs "accepted, by way of a clickwrap contract, the AdWords terms of service" in 2012).)

Resolution Agreement" in the 2017 AdWords TOS. *AdTrader*, 2018 WL 1876950, at *4. Indeed, even where an opt-out provision is "buried in the agreement" and the steps to opt out are "burdensome," the Ninth Circuit has held that the ability to opt out of arbitration precludes any finding of procedural unconscionability. *Mohamed*, 848 F.3d at 1211. The circumstances here present an even clearer case for enforcing the Dispute Resolution Agreement. The opt-out in the 2017 AdWords TOS was not "buried in the agreement"; Google highlighted the requirement to arbitrate and the ability to opt-out in (1) multiple notices to advertisers, (2) at the top of the web page where advertisers were presented with the 2017 AdWords TOS, (3) in the first paragraph of the TOS itself, and (4) again at Section 13(F). (Decl. ¶¶ 7-10, Ex. C); *compare Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 1004 (N.D. Cal. 2012) (finding that an arbitration agreement located on "the folder jacket" of certain documents and not on the rental agreement signed by the plaintiff was procedurally unconscionable, but only "moderately" so). And in contrast to the process involved in *Mohamed* (requiring parties to opt out in person at Uber's office or by overnight delivery), the 2017 AdWords TOS allows advertisers to opt out online with the click of a mouse or a tap of a finger. (*Id.* ¶¶ 12-13, Ex. D.) The ability for AdWords advertisers to "freely opt out" of arbitration, *AdTrader*, 2018 WL 1876950, at *4, unhindered by "buried" terms or "burdensome" steps, underscores why the Dispute Resolution Agreement must be enforced under Ninth Circuit law. *Mohamed*, 848 F.3d at 1211.

Plaintiffs may feign ignorance of the opt-out (and they strategically omit any mention of it in the Complaint) but they are presumed to have known of it when they clicked "Accept" to confirm that they "reviewed and accept the above Terms" including the Dispute Resolution Agreement. (Decl. ¶ 9, Ex. B); *Mohamed*, 848 F.3d at 1211 (explaining that the fact that an opt-out was "buried" "does not change the analysis" regarding enforceability because "one who signs a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument."). Plaintiffs' agreement to arbitrate—despite the option to freely opt out—bars any claim that the Dispute Resolution Agreement is procedurally unconscionable. Indeed, as this Court recognized, any purported harm that Plaintiffs might claim from being required to arbitrate would be "self-inflicted" given their voluntary choice not to opt out. *AdTrader*, 2018 WL 1876950, at *5.

2. The Agreement is Not Substantively Unconscionable.

Because the ability to opt out bars any finding of procedural unconscionability, the Court need go no further to enforce the Dispute Resolution Agreement and compel arbitration. *See Mohamed*, 848 F.3d at 1211 (declining to address substantive unconscionability issues because the availability of an opt-out was dispositive). Even if it were relevant to consider the substantive terms of the 2017 AdWords TOS, there is nothing in the arbitration agreement that comes close to meeting the high bar of substantive unconscionability, which requires terms that are so one-sided or harsh that they "shock the conscience." *Bradford v. Flagship Facility Servs. Inc.*, No. 17-CV-01245, 2017 WL 3130072, at *4 (N.D. Cal. July 24, 2017).

Plaintiffs ask the Court to invalidate the Dispute Resolution Agreement and its class action waiver provision because "Plaintiffs and the average member of the proposed class would not have enough in the value of their individual claims to justify the costs of hiring an attorney to pursue those claims." (Compl. ¶ 111.) But this flies in the face of the Supreme Court's holdings on class action waivers. Indeed, the Supreme Court has rejected the specific argument that a class action waiver can be invalidated where plaintiffs "have no economic incentive to pursue their … claims individually in arbitration." *See Italian Colors*, 570 U.S. at 234 (enforcing arbitration provision with class action waiver despite plaintiff's argument that enforcement would effectively prevent them from pursuing statutory rights); *see also AT&T Mobility*, 563 U.S. at 352 (finding that the FAA preempts state law that bars enforcement of class action waivers).

Nor can Plaintiffs credibly claim that the specific arbitration terms here are unfair, when the Dispute Resolution Agreement:

- Is bilateral and applies equally to all parties, *see Hoekman v. Tamko Bldg. Prods.*, No. 14-1581, 2015 U.S. Dist. LEXIS 113414, at *25 (E.D. Cal. Aug. 24, 2015) (bilateral agreement weighs against unconscionability);
- Is governed by American Arbitration Association ("AAA") rules that are commonly used nationwide, (Decl. ¶ 10, Ex. C at ¶ 13(C));
- Requires the arbitration to take place near the advertiser's place of business, to alleviate potential burden concerns, (Decl. ¶ 10, Ex. C at ¶ 13(C); *compare Tompkins v.*

23andMe, Inc., 840 F.3d 1016, 1030 (9th Cir. 2016) (forum selection clause not substantively unconscionable even where arbitrations required to take place in a location far away from counterparty); and

- Requires Google to pay the arbitration fees in many instances, *Ulbrich v. Overstock.com, Inc.*, 887 F. Supp. 2d 924, 932-33 (N.D. Cal. 2012) (finding no substantive unconscionability where AAA rules required the party enforcing the arbitration provision to bear most of the fees).

In combination, these even-handed provisions preclude any finding of substantive unconscionability.[5]

While Plaintiffs complain that the arbitration agreement can potentially be applied to disputes arising before the 2017 AdWords TOS went into effect, courts have routinely enforced arbitration provisions with retroactive effect, even where parties were not given an opportunity to opt out. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1123–24 (D. Kan. 2003) (giving effect to a retroactive arbitration provision where the "language plainly and unambiguously states that the [new][] version of the dispute resolution provision applies to all of the parties' claims, controversies, and disputes, regardless of whether they accrued before or after this revised provision took effect") (collecting cases); *In re Verisign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1224 (N.D. Cal. 2007) (finding arbitration provision applied to claims that occurred prior to the execution of an agreement); *In re: Lithium Ion Battery Antitrust Litig.*, No. 13-MD-02420, 2016 WL 5791357, at *5 (N.D. Cal. Oct. 4, 2016) (finding claims subject to arbitration despite claims arising prior to the parties' agreement).

The fact that ***prior*** versions of the AdWords TOS provided that changes to terms would not apply retroactively is irrelevant to evaluating the enforceability of the ***current*** 2017 AdWords TOS.

[5] As further grounds for purported unconscionability, Plaintiffs also allege that "Google told all AdWords advertisers that if they chose not to accept the new terms and conditions, Google would suspend all of their advertisements on Google's advertising platforms. Plaintiffs and the other members of the proposed class had spent years and countless funds utilizing and acclimating to Google's platforms, yet all of that work and money would have been rendered pointless unless they agreed to surrender their rights to seek legal redress against Google." (Compl. ¶ 113.) These allegations are false, as the Court noted in finding that advertisers are "are free to opt out of the new Dispute Resolution Agreement and continue using AdWords without interruption." *AdTrader*, 2018 WL 1876950, at *4. Moreover, if an advertiser declines the terms altogether, their account would simply be paused and the advertiser "can later resume using AdWords by accepting the new terms." *Id.* at *5. Indeed, it is unclear what good faith basis Plaintiffs could have had to make these allegations.

Prior versions of the terms are no longer applicable, and Plaintiffs had every opportunity to review the September 2017 TOS to see that the arbitration agreement applies to claims involving facts that occurred before September 2017. (Decl. ¶ 10, Ex. C.) Indeed, Google repeatedly advised advertisers to review the arbitration agreement. (Decl. ¶ 7.) Plaintiffs cannot claim they are somehow surprised by the scope of the arbitration agreement, when the Dispute Resolution Agreement prominently and unambiguously provides, in a separately numbered disclosure, that it applies to: "claims that arose before Customer or Advertiser first accepted any version of these Terms containing an arbitration provision[.]" (Decl. ¶10, Ex. C at ¶ 13); *see Brown v. Wells Fargo Bank, NA*, 168 Cal. App. 4th 938, 958-59 (2008) (plaintiffs cannot claim reliance on obsolete contract terms where it "had a reasonable opportunity to discover the true terms of the [new] contract"); *see also Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1163 (9th Cir. 2012) (finding failure to read terms "fatal" to plaintiff's claim and noting that "it is not reasonable to fail to read a contract before signing it"). Plaintiffs' decision not to opt-out of the Dispute Resolution Agreement thus constitutes voluntary agreement to arbitrate claims arising before September 2017. *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 577 (W.D.N.C. 2000) (finding arbitration agreement retroactively enforceable, even where it was modified to include a class action waiver, because the new terms "clearly provide[] for a retroactive effect" and the plaintiff did not opt out). Indeed, while Plaintiffs complain that enforcing the arbitration agreement here would be "retroactive," their Complaint was filed five months ***after*** they agreed to the Dispute Resolution Agreement and it involves alleged ***ongoing*** acts by Google. Regardless, any claim of harm arising from purported retroactivity would be entirely self-inflicted, given Plaintiffs' voluntary choice to be bound to the arbitration agreement. *AdTrader*, 2018 WL 1876950, at *5.

Moreover, it does not appear that Plaintiffs have any viable claim that predates the 2017 TOS, making retroactivity a moot point. Under the September 2017 Terms (as well as prior versions), advertisers seeking to dispute AdWords charges must do so within ***60 days***: "CUSTOMER WAIVES ALL CLAIMS RELATING TO ANY PROGRAM CHARGES UNLESS A CLAIM IS MADE WITHIN THE CLAIM PERIOD" of 60 days. (Decl. ¶ 10, Ex. C at ¶ 8); *see Feldman,* 513 F. Supp. 2d at 243 n.7 (holding that the 60-day provision in the AdWords TOS is enforceable); *Free Range Content, Inc. v. Google Inc.*, No. 14-cv-02329, 2016 WL 2902332, at *14 (N.D. Cal. May 13, 2016)

(holding 30-day provision in Google AdSense TOS "is a reasonable amount of time in which to notify Google of a dispute.") (Freeman, J.).

. Given this 60-day requirement, the only claims that Plaintiffs could assert would have to involve charges incurred in the 60-day period before the filing of the complaint on February 14, 2018—that is, after December 16, 2017. But by that date, Plaintiffs had ***already accepted*** the September 2017 Terms, including the arbitration agreement. (Decl. ¶ 17.) Because the 60-day requirement effectively limits the scope of disputes to charges incurred ***after*** Plaintiffs accepted the 2017 TOS, their complaints about retroactivity are entirely irrelevant.

D. All Claims in the FAC Fall Within the Broad Scope of the Dispute Resolution Agreement.

There is no reasonable dispute that all six causes of action in the Complaint come within the scope of the arbitration agreement, which applies to all claims that "arise out of or relate in any way to" Plaintiffs' AdWords activity as governed by the AdWords Terms of Service. (Decl. ¶ 10, Ex. C at ¶ 13(A).) Moreover, courts have consistently found that each type of claim alleged in the Complaint is appropriate for arbitration where, as here, they each touch on the subject matter of the parties' agreement. *See Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) (holding that a breach of contract claim clearly "touches" the underlying agreement); *Las Vegas Sands, Inc. v. Culinary Workers Union Local No. 226*, 82 Fed. Appx. 580, 584 (9th Cir. 2003) (compelling arbitration of implied covenant claim as it involved "[i]ssues such as the nature of the contractual relationship and what the parties expected from one another as fair treatment are relevant to this inquiry."); *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 938 (9th Cir. 2013) (holding that UCL, FAL and CLRA claims are arbitrable, including those that seek injunctive relief); *DiGiacomo v. Ex'pression Ctr. for New Media Inc.*, No. 08-cv-1768, 2008 WL 4239830, at *8-9 (N.D. Cal. Sept. 15, 2008) (compelling equitable claims to arbitration where they touch on the subject matter of the contract; holding that "arbitrators have the power to grant all legal and equitable remedies, including declaratory and injunctive relief.") (citations omitted); *ValueSelling Assocs., LLC v. Temple*, No. 09 CV 1493, 2009 WL 3736264, at *6 (S.D. Cal. Nov. 5, 2009) ("As the unjust enrichment claim is an extension of the other [] claims, it too is subject to arbitration.").

E. The Court Should Compel Arbitration of All Claims Asserted by Mr. Trudeau.

Mr. Trudeau's claims must also be arbitrated because they are entirely derivative of the claim involving his company Troy Martial Arts. Although Mr. Trudeau does not have a separate AdWords account, equitable estoppel prevents a party "from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999). Accordingly courts will compel arbitration on behalf of a non-signatory to an arbitration agreement where "the issues the [non-signatory] is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *In re Apple & AT & TM Antitrust Litig.*, 826 F. Supp. 2d 1168, 1176 (N.D. Cal. 2011) (quotations omitted); *cf. Evergreen Media Holdings, LLC v. Stroock & Stroock & Lavan LLP,* No. 15-01648, 2015 WL 12765630, at *3 (C.D. Cal. Apr. 16, 2015) (enforcing arbitration clause as to non-signatory plaintiffs where "there is no dispute that Plaintiffs bring suit expressly to enforce obligations formed under" the agreement containing the arbitration provision). Here, all of the claims derive from the contractual relationship between Google and Troy Martial Arts, of which Mr. Trudeau is a "co-owner." (Compl. ¶ 17.) Mr. Trudeau does not assert any additional claims against Google on behalf of himself. Thus, any claims brought by Mr. Trudeau necessarily are interwoven with the claims of Troy Martial Arts, which are governed by the September 2017 AdWords TOS and contain an arbitration agreement. As a result, Mr. Trudeau's claims must be arbitrated.

IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

If the Court does not compel the entire action to arbitration, then Plaintiffs' claims should nevertheless be dismissed as a matter of law.

A. Additional Background Re: Negative Keywords and the Google Disclosures Omitted From the Complaint.

Google's AdWords platform allows advertisers to display ads on various Google properties, including Google Search, YouTube, and other websites. (Decl. ¶ 3.) For certain types of ads, the advertiser must select terms, called "keywords," that are associated with an ad. (*Id.*) In the context of Google Search, the ad may then be shown next to search results that appear when someone enters a Google search query that includes the keywords the advertiser selected. (*Id.*) For example, an

advertiser could choose the keywords "martial arts" in order to have the ad appear next to the results for Google searches using the term "martial arts." (*Id.*)

Google also allows advertisers to use ***negative*** keywords to restrict which searches result in their ads being shown. (*Id.* ¶ 4.) If a user conducts a Google search using search terms that match an advertiser's keywords but also includes terms that match the advertiser's negative keywords, the advertiser's ad will be blocked from being shown in response to the search. (*Id.*) For example, if an advertiser designates "lunch" as a keyword and "free" as a negative keyword, if a user searches for "free lunch", the advertiser's ad will not be displayed.[6]

Plaintiffs' claims involve the specific circumstance in which (1) a user's search terms include an advertiser's keywords, (2) the search terms do ***not*** match any of the advertiser's selected negative keywords, but includes terms that are a ***misspelling or variation*** of the advertiser's negative keywords, (3) Google corrects the user's search terms for purposes of showing organic search results to the user, and (4) the advertiser's ad is shown in connection with those search results. (Compl. ¶¶ 40-45.) In this situation, Plaintiffs claim that because Google corrected the spelling of the user's search terms for purposes of showing organic search results, Google must also apply the corrected terms (not just the actual terms used in the search) to determine whether the ad should be blocked based on the advertiser's negative keywords. Put differently, Plaintiffs claim that Google must block ads from appearing not only where a user searches for a term matching an advertiser's negative keywords, but ***also*** where the search includes ***misspellings or variations*** of a negative keyword.

Google specifically explains to advertisers that negative keywords do not work this way. In explaining how negative keywords differ from keywords with respect to misspellings, Google explains in its Help Center that:

> The main difference is that ***you'll need to add*** synonyms, singular or plural versions, ***misspellings, and other close variations if you want to exclude them***.

(Decl. ¶ 22, Ex. H at 1.)[7] Thus, if an advertiser "want[s] to exclude" an ad from appearing in response

[6] However, as Google discloses on its "About negative keywords" Help Center webpage, if a query is "longer than 10 words, and [][a] negative keyword follows that 10th word" the ad may still be shown. (Decl. ¶ 22, Ex. H at 3.)

[7] Prior versions of the "About negative keywords" Help Center webpage are attached as Exhibits F and G to the Sung Declaration.

to "misspellings" or "variations" of negative keywords, the user must "add" them as additional negative keywords. Advertisers are therefore on notice that Google does not automatically identify misspellings and variations of negative keywords when it determines whether an ad should be blocked from appearing in response to a search. To reinforce this point, Google further explains that: "Your ad ***might still show*** on searches or pages that contain ***close variations of your negative keyword terms***." (*Id.*) Significantly, these disclosures are contained in the very Help Center pages that Plaintiffs claim to be misleading (Compl. ¶ 29), which Plaintiffs have selectively excerpted to omit Google's recommendations to advertisers on how to account for misspellings and variations of negative keywords. (Decl. ¶ 22, Ex. H.)

As applied to the example used in the Complaint—in which a user intends to search for the negative keyword "Southfield" but types "Douthfield" (Compl. ¶ 44)—Google's disclosures make clear that Plaintiffs' ads "might still" appear in response to the search because it involves "a close variation" of the advertiser's negative keyword. (Decl. ¶ 22, Ex. H at 3.) To avoid this result, Plaintiffs can simply "add … misspellings, and other close variations" of "Southfield" to their list of negative keywords if they want to block their ads from appearing when a user includes misspellings like "Douthfield" in a search. (Compl. ¶ 52.) Instead of following the straightforward process outlined in the Help Center, Plaintiffs have brought this Complaint in an attempt to shift the responsibility to Google. The Complaint alleges six causes of action, all seeking to impose a purported obligation on Google to identify misspellings and other variations of terms, when advertisers neglect to include such variations in their negative keywords lists. These claims all fail as a matter of law, for the following reasons.

B. Motion to Dismiss Standards.

A court should dismiss a claim under Rule 12(b)(6) when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (citation omitted). In deciding a motion under Rule 12(b)(6), "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not" survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). The Court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Stanislaus Food Prods. Co. v. USS-POSCO*

Indus., 782 F. Supp. 2d 1059, 1064 (E.D. Cal. 2011) (citation and quotations omitted). In addition, Federal Rule of Civil Procedure 9(b) requires that all averments of fraud, including "the circumstances constituting fraud," must be stated "with particularity." Fed. R. Civ. P. 9(b).

C. Plaintiffs' Breach of Contract Claim Fails For Multiple Reasons.

1. Plaintiffs Do Not Identify Any Contract Term That Was Breached.

Plaintiffs' breach of contract claim fails for the fundamental reason that Plaintiffs do not identify any specific contract term that Google allegedly breached. *See, e.g.*, *Frezza v. Google Inc.*, No. 5:12-CV-00237, 2013 WL 1736788, at *3 (N.D. Cal. Apr. 22, 2013) (dismissing breach of contract claim where plaintiffs failed to "present the contractual terms agreed upon" that were allegedly breached); *Miron v. Herbalife Int'l, Inc.*, 11 F. App'x. 927, 929 (9th Cir. 2001) (affirming dismissal of contract claim where the plaintiff "failed to allege any provision of the contract which supports their claim").

Here, Plaintiffs allege in conclusory terms that "Google has violated its contractual obligations in a number of ways," without identifying a single term that Google allegedly violated. (Compl. ¶ 85.) Such conclusory allegations are insufficient as a matter of law. *Frezza*, 2013 WL 1736788, at *2; *Parrish v. Nat'l Football League Players Ass'n*, 534 F. Supp. 2d 1081, 1096 (N.D. Cal. 2007) (dismissing breach of contract claim and explaining: "[e]ven if plaintiffs had pleaded the existence or legal effect of a contract, they have failed to allege what provision of the relevant [contract] was breached by defendants."); *Dunkel v. eBay Inc.*, No. 5:12-CV-01452-EJD, 2013 WL 415584, at *8–9 (N.D. Cal. Jan. 31, 2013) ("Even if Plaintiffs had properly alleged that the attached exhibits constituted a contract or otherwise pointed to a contract, their claim would still fail because they did not allege which provisions of this contract Defendant has breached.").

Plaintiffs' failure to identify a contract term that supports their claim is hardly surprising, as the TOS that governs the use of AdWords[8] contains no provision that imposes, or even suggests, an obligation on Google to block ads from appearing in response to misspellings or variations of negative keywords. (*See* Decl. ¶ 10, Ex. C.) Indeed, the Terms of Service make no mention of negative

[8] Plaintiffs concede that the AdWords Terms of Service governs their use of the AdWords Service. (Compl. ¶ 32.)

keywords at all. While the Complaint refers to statements in Google's Help Center page regarding negative keywords, Plaintiffs do not attempt to argue that these statements constitute part of their contract. *Parrish*, 534 F. Supp. 2d at 1095 (where "statements were not part of any contracts . . . plaintiffs cannot rely on them to allege the terms of any contract."). Nor could they, because the Help Center page undercuts Plaintiffs' claims by explaining (in statements that Plaintiffs strategically omitted from the Complaint) that ads ***can*** be shown in response to misspellings and variations of negative keywords, unless advertisers affirmatively add those variations as additional negative keywords. (Decl. ¶ 22, Ex. H at 1.)

The Court should not allow Plaintiffs to impose a purported obligation on Google that is not grounded in any contract term and is affirmatively contradicted by Google's disclosures.

2. No Allegation of Compliance.

Plaintiffs' breach of contract claim also fails because they neglect to allege their "performance or excuse for failure to perform" a key contractual obligation that is a condition to asserting their claims. *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1489 (2006). Under the AdWords TOS, advertisers seeking to dispute charges must do so within 60 days: "CUSTOMER WAIVES ALL CLAIMS RELATING TO ANY PROGRAM CHARGES UNLESS A CLAIM IS MADE WITHIN THE CLAIM PERIOD" of 60 days. (Decl. ¶ 10, Ex. C at ¶ 8.) Nowhere in the Complaint do Plaintiffs plead compliance with this obligation, which is an enforceable prerequisite to their claims. *See Feldman*, 513 F. Supp. 2d at 243 n.7 (holding that the 60-day provision in the AdWords TOS is enforceable). Indeed, Plaintiffs appear to intentionally omit any mention of when their claims first arose, in an apparent effort to obscure whether they complied with this obligation. Plaintiffs' failure to plead compliance with this contractual requirement provides further grounds to dismiss the breach of contract claim as a matter of law.

D. Plaintiffs' Claim for Breach of Implied Covenant Fails Along With the Breach of Contract Claim.

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing fails for similar reasons. "Under California law, a claim for breach of the covenant of good faith and fair dealing requires that a contract exists between the parties, that the plaintiff performed his contractual

duties or was excused from nonperformance, [and] that the defendant deprived the plaintiff of ***a benefit conferred by the contract*** in violation of the parties' expectations at the time of contracting …." *Avila v. Countrywide Home Loans*, No. 10-CV-05485-LHK, 2010 WL 5071714, at *5 (N.D. Cal. Dec. 7, 2010) (emphasis added). As discussed, the Complaint fails to show that Google had any contractual obligation to block ads from being shown when users search for misspellings or variation of an advertisers' negative keywords. Plaintiffs thus cannot claim they were deprived of any "benefit conferred by the contract." *Id*.

Further, a claim for breach of the implied covenant requires Plaintiffs to demonstrate that Google disappointed Plaintiffs' "reasonable expectation[s]." *Avila*, 2010 WL 5071714, at *5 (dismissing claim for failure to show that alleged expectations were reasonable). Here, Plaintiffs were on notice that advertisers must "add … misspellings, and other close variations" to their negative keywords, if they do not want their ads to appear when a user's search includes misspellings and variations. (Decl. ¶ 22, Ex. H at 1.) Plaintiffs cannot claim to have reasonably expected Google to automatically block ads from appearing in response to misspellings and variations of negative keywords, when Google's disclosures actively contradict any such obligation.[9] (*Id.*)

E. Plaintiffs Fail To Allege the Reasonable Reliance Needed to Support Their Fraud-Based Claims.

Plaintiffs' attempt to repackage their allegations of contractual breach as fraud-based claims fares no better. With respect to Plaintiffs' claim under the "fraudulent" prong of the Unfair Competition Law ("UCL"), Cal. Business & Professions Code § 17200 *et seq*., Plaintiffs "must demonstrate actual reliance on the allegedly deceptive or misleading statements" that are the basis of the claim. *In re Tobacco II Cases*, 46 Cal. 4th 298, 306 (2009). The same requirement of actual reliance also applies to Plaintiffs' claim under the False Advertising Law ("FAL"), Cal. Business & Professions Code § 17500 *et seq*. *See Baxter v. Intelius, Inc.*, No. SACV 09-1031, 2010 WL 3791487,

[9] And if these disclosures are deemed to be part of Plaintiffs' contract, then Plaintiffs' claim would run afoul of the established rule that plaintiffs may not impose an implied obligation (that Google must block ads from appearing in response to misspelled negative keywords) that contradicts an express term (that advertisers need to account for misspellings and variations.). *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 349-50 (2000) (established law precludes a plaintiff or class from "impos[ing] substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.").

at *3, *5 (C.D. Cal. Sept. 16, 2010) (explaining that "[f]or UCL and FAL claims, the Plaintiffs must sufficiently allege … that there was actual reliance by the Plaintiffs" and dismissing claims where Plaintiffs did "not contend that they actually relied on any statements by the Defendants.").

Plaintiffs make no such allegation in the Complaint. Indeed, Plaintiffs do not allege that they ever saw the Help Center pages referenced in the Complaint, let alone that they relied on the specific alleged misleading statements in deciding to use AdWords. The failure to allege these necessary facts is fatal to Plaintiffs' fraud-based claims under any pleading standard, and certainly under the heightened standards of Rule 9(b) applicable to these claims.[10]

Even if Plaintiffs could allege that they read the Help Center pages in question, it would only undermine their claims further. Plaintiffs pursuing fraud-based claims must allege not only that they relied on the alleged misstatements at issue, but also that such reliance was *reasonable*. *See, e.g.*, *Woods v. Google, Inc.*, 5:11-cv-01263, 889 F. Supp. 2d 1182, 1196 (N.D. Cal. 2012). Where a plaintiff claims to have been misled, but the defendants' disclosures accurately address the topic at issue, any purported reliance is not reasonable as a matter of law. *Id.* (dismissing UCL and FAL claims because plaintiff could not have reasonably relied on alleged misstatements that contradicted the plain language of the applicable contract); *Brown v. Wells Fargo Bank, NA*, 168 Cal. App. 4th 938, 958-59 (2008) (explaining that there can be no reasonable reliance where plaintiff "had a reasonable opportunity to discover the true terms of the contract"); *Davis*, 691 F.3d at 1162 (dismissing FAL claim where "advertising was not likely to deceive a reasonable consumer" because no "reasonable consumer" would believe an annual fee would not apply in light of a disclaimer to the contrary).

Here, Plaintiffs claim they were led to believe that Google would block their ads from appearing in response to searches that include misspellings and variation of negative keywords. But again, the very Help Center pages that Plaintiffs claim were misleading expressly clarify that ads

[10] When a plaintiff "allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of that claim," its claim is said to "sound in fraud" and must meet the heightened pleading standard of Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (citation omitted); *see also Rosado v. eBay, Inc.*, No. 5:12-CV-04005, 2014 U.S. Dist. LEXIS 89863, at *19 (N.D. Cal. June 30, 2014) ("Rule 9(b)'s particularity requirement applies to each of the three prongs of the UCL . . . where, as here, the claims are based on a 'unified course of fraudulent conduct'") (citing *Kearns*, 567 F.3d at 1126-27).

"might still show" in response to searches "that contain close variations of your negative keyword terms," unless advertisers follow Google's recommended steps. (Decl. ¶ 22, Ex. H at 3.) These disclosures foreclose any claim of reasonable reliance and warrant dismissal of the fraud-based claims with prejudice. (Indeed, it is ironic that Plaintiffs are accusing Google of engaging in deceptive conduct when they have selectively omitted the disclosures that undercut their claims from the Complaint.)

F. Plaintiffs' Claims Under the Other Prongs of UCL Also Fail as a Matter of Law.

1. Plaintiffs Allege No "Unfair" Conduct.

Under the "unfair" prong, Plaintiffs make the conclusory and unsupported allegation that Google engaged in activity that was "unethical, oppressive, unscrupulous, and violative of fundamental policies of" California. (Compl. ¶ 98.) This claim fails for multiple reasons.

First, Plaintiffs' claim for "unfair" conduct merely parrots the same defective allegations as the claim for "fraudulent" conduct. (*See.* Compl. ¶ 99, repeating allegation that "Plaintiffs and other members of the public are likely to be deceived by Google's false representation that such AdWords users' ads would not be displayed in search results generated from search terms that include negative keywords.") This effort to manufacture a claim for "unfair" conduct under the UCL should be dismissed along with the "fraudulent" claim for the same reasons above. In *Kearns*, the Court held that where a UCL claim for "unfair" conduct is based on the same facts as a UCL claim for "fraudulent" conduct, a court is not required to "separately analyz[e] [the plaintiff's] claims under the unfairness prong of the UCL." *Kearns*, 567 F.3d at 1126-27; *see also Hovsepian v. Apple, Inc.*, No. 08-5788, 2009 WL 5069144, at *4-6 (N.D. Cal. Dec. 17, 2009) (applying *Kearns* and dismissing UCL claim brought under both "fraudulent" and "unfair" prongs for failure to meet Rule 9(b)).

Second, Plaintiffs must demonstrate that Google had a legal obligation to refrain from charging them for clicks where Plaintiffs failed to follow Google's Help Center instructions and disclosures. *Woods*, 889 F. Supp. 2d at 1195 (noting that Plaintiffs must plead facts showing that they "had a legal right…that was violated" to "show any cognizable injury"). Plaintiffs fail to establish that Google owed Plaintiffs any such obligation. This is similar to *Woods v. Google, Inc.*, where the plaintiffs failed to allege that Google owed them a legal right to specific discounts and thus the Court held that

plaintiffs had "failed to state a claim under the unfair prong of the UCL." 889 F. Supp. 2d at 1195.

Third, Plaintiffs fail to properly allege that Google's alleged actions are "unfair" under any formulation of that term. California courts have three tests for what constitutes "unfair" conduct for the purposes of the UCL, none of which Plaintiffs can satisfy here. For example, courts have applied a three-part test that considers whether "the consumer injury [1] is substantial, [2] is not outweighed by any countervailing benefit to consumers or to competition, and [3] is not an injury the consumers themselves could reasonably have avoided." *Woods*, 889 F. Supp. 2d at 1195 (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 839 (2006)); *see also Singh v. Google Inc.*, No. 16-CV-03734, 2017 WL 2404986, at *4 (N.D. Cal. June 2, 2017) (Freeman, J.). Plaintiffs fail this test because they could have readily avoided their purported injury by simply reading and following Google's explanations on the Help Center page regarding negative keywords

Other courts have applied a balancing test to determine whether conduct was unfair under the UCL. Under that standard, "a practice is 'unfair' when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," although those considerations must be balanced against "the utility of the defendant's practice." *Singh*, 2017 WL 2404986, at *4 (citations omitted). Here, Plaintiffs' allegations are conclusory, boilerplate, and simply track the language of this balancing test without explaining exactly *why* Google's practices are allegedly "unethical, oppressive, unscrupulous, and violative of fundamental policies" of California. (Compl. at ¶ 98.) Such conclusory allegations must be dismissed. *Davidson v. Wakefield*, 167 F. App'x 588, 589 (9th Cir. 2006) ("conclusory allegations are insufficient to state a claim for relief."). Still other courts have applied the "tethering test," whereby the public policy underlying the claim "must be tethered to specific constitutional, statutory or regulatory provisions." *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257 (2010). Plaintiffs have likewise failed to identify any such specific constitutional, statutory, or regulatory provisions. *San Miguel v. HP Inc.*, No. 5:16-CV-05820, 2018 WL 1536766, at *11 (N.D. Cal. Mar. 29, 2018) (under the tethering test, finding allegations too broad where plaintiffs only make general allegations that the practices are contrary to public policy).

Finally, even assuming that Plaintiffs had alleged that the Help Center page is part of the

contract, courts have routinely dismissed UCL claims where the defendant "complied with the express terms of the contracts, and charged plaintiffs in accordance with their terms." *Spiegler v. Home Depot U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1045 (C.D. Cal. 2008). In these circumstances, "the UCL cannot be used to rewrite [the parties'] contracts or to determine whether the terms of their contracts are fair." *Id*. at 1046; *see also Guerard v. CBA Financial Corp.*, 2009 WL 3152055, at *6 (N.D. Cal. Sept. 23, 2009) (dismissing UCL and FAL claims because "the interpretation of the clear and unambiguous terms of the policy cannot constitute an unfair, unlawful or fraudulent act . . . ."); *Janda v. T-Mobile, USA, Inc.*, No. 05-03729, 2009 WL 667206, at *5 (N.D. Cal. Mar. 13, 2009) (dismissing UCL and CLRA claims where the defendant charged fees consistent with its contract terms and disclosures); *Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal. App. 4th 1284, 1299 n.6 (1993) ("The [unfair prong] does not give the courts a general license to review the fairness of contracts . . . ."). In this case, Google's Help Center webpage is clear that ***advertisers*** must account for misspellings and variations of negative keywords.

2. Plaintiffs Allege No "Unlawful" Conduct.

Under the "unlawful" prong, Plaintiffs argue that Google violated the UCL by "engaging in an unlawful act or practice by, *inter alia*, charging Plaintiffs for clicks on ads that appeared with search terms that were on their list of negative keywords." (Compl. ¶ 95.) Plaintiffs do not cite any statute that addresses this issue and must therefore be relying on their claim of a contractual breach, which itself fails for the reasons above. And even if Plaintiffs had pled a viable breach of contract claim, common law claims such as breach of contract cannot serve as a predicate act under the "unlawful" prong of the UCL as a matter of law. *See, e.g.*, *Hartless v. Clorox Co.*, No. 06-cv-2705, 2007 WL 3245260, at *5 (S.D. Cal. Nov. 2, 2007) (analyzing case law and concluding that a common law claim cannot serve as a predicate act for the UCL's unlawful prong); *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 954-55 (N.D. Cal. 2003) ("While section 17200 has broad application, . . . its scope is restricted to violations of law, not contract.") (citation omitted).

G. Plaintiffs Fail to State a Claim for Declaratory Relief.

Plaintiffs seek a declaration that the September 2017 AdWords TOS are unconscionable. However, "[d]eclaratory relief is an equitable remedy which fails to the extent that the underlying

claims fail." *Wornum v. Aurora Loan Servs., Inc.*, No. 11-2189, 2011 WL 3516055, at *10 (N.D. Cal. Aug. 11, 2011) (citation omitted). As outlined in Google's Motion to Compel Arbitration, the parties entered into a valid arbitration agreement that is both enforceable and applicable to all of Plaintiffs' claims. This Court should deny with prejudice Plaintiffs' claim for declaratory relief.

H. Plaintiffs Fail to State a Claim for Unjust Enrichment.

Plaintiffs also make a claim for unjust enrichment, arguing simply that "Plaintiffs and the other members of the proposed class were subject to improper and unlawful charges." (Compl. ¶ 118.) However, it is undisputed that Troy Martial Arts accepted the AdWords Terms of Service, and California law does not allow an independent unjust enrichment claim where the parties have entered into a contract. *GA Escrow, LLC v. Autonomy Corp. PLC*, No. 08-01784, 2008 WL 4848036, at *6 (N.D. Cal. Nov. 7, 2008) ("A plaintiff cannot survive a motion to dismiss an 'unjust enrichment' cause of action if the complaint also alleges tort claims and claims based on the existence of a valid, express contract between the parties."); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 718 (N.D. Cal. 2011) ("Because Plaintiffs allege that an express contract existed between themselves and Defendant, they cannot also assert an unjust enrichment claim").

Finally, even if the Court were to generously construe Plaintiffs' unjust enrichment claim as a claim for quasi-contract, that claim still fails. Under a theory of quasi-contract, restitution "may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct." *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004). As discussed above, Plaintiffs fail to plead sufficient facts to show any "fraud … or similar conduct." Moreover, "[t]here is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1371 (2010) (citations and quotations omitted). Here, Google explained that advertisers must account for misspellings and variations of negative keywords, and Plaintiffs received exactly what they should have expected, had they read the Help Center page referenced in the Complaint. There is no "equitable reason" for permitting recovery on a quasi-contract basis here.

V. REQUEST FOR JUDICIAL NOTICE AND INCORPORATION BY REFERENCE

In support of the Motion to Dismiss, Google requests that the Court take judicial notice of

Exhibits B, C, F, G, and H to the Sung Declaration for the following reasons.

First, Federal Rule of Evidence 201 requires judicial notice of facts "not subject to reasonable dispute" that are either (1) "generally known within the trial court's territorial jurisdiction"; or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (c)(2). Courts routinely take judicial notice of website contents under Rule 201. *See, e.g.*, *Frances Kenny Family Tr. v. World Savs. Bank FSB*, No. 04-3724, 2005 WL 106792, at *1 n.1 (N.D. Cal. Jan. 19, 2005) (taking judicial notice of content on plaintiffs' website); *Kinderstart.com, LLC v. Google, Inc.*, No. 06-2057, 2007 WL 831806, at *21 n.20 (N.D. Cal. Mar. 16, 2007) (taking judicial notice of pages on defendant Google's website).

The Court should consider Exhibits B, C, and H for the same reason because they are public webpages whose contents are not subject to reasonable dispute. (*See* Decl. ¶¶ 9, 10, 22, Exs. B, C, H.)[11] This is also true for Exhibits F and G, which are prior versions of the "About negative keywords" Help Center webpage. Courts routinely take judicial notice of archived versions of websites. *See, e.g.*, *Dzinesquare, Inc. v. Armano Luxury Alloys, Inc.*, No. 14-1918, 2014 WL 12597154, at *3 (C.D. Cal. Dec. 22, 2014).

Second, a document can be considered at the motion to dismiss stage "if the complaint specifically refers to the document and if its authenticity is not questioned." *Solis v. Webb*, 931 F. Supp. 2d 936, 943 (N.D. Cal. 2012) (quotations omitted). Further, a document is "incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document ***forms the basis*** of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (emphasis added). Both the September 2017 AdWords Terms of Service (Decl. ¶¶ 9, 10, Exs. B, C), and the "About negative keywords" Help Center webpage (Decl. ¶ 22, Ex. H) are cited in support of plaintiffs' claims, and thus "form[] the basis of the plaintiff's claim" and are therefore incorporated by reference. *Sharp v. Nationstar Mortg., LLC*, No. 14-CV-00831, 2015 WL 106844, at *4 (N.D. Cal. Jan. 7, 2015), *aff'd*, 701 F. App'x 596 (9th Cir. 2017) (quoting *Ritchie*, 342 F.3d at 908); *see also Song fi Inc. v.*

[11] Exhibits A and D to the Sung Declaration are offered only in connection with Google's Motion to Compel Arbitration and thus are not subject to the evidentiary limitations of a Rule 12(b)(6) Motion. Regardless, Exhibits A and D, are publicly available materials from Google's website and would be appropriate for judicial notice for the same reasons. Moreover, Exhibit E is an email sent from Google directly to Mr. Trudeau, also capable of judicial notice.

Google, Inc., 108 F. Supp. 3d 876, 880, 884-85 & n.2 (N.D. Cal. 2015) (considering YouTube's Terms of Service cited in the complaint as incorporated by reference in granting motion to dismiss). These materials are therefore incorporated by reference and should be considered by the Court. In particular, the "About negative keywords" Help Center webpage should be considered in its entirety to prevent plaintiffs from benefiting from their incomplete and misleading description of the webpage. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1201 n.5 (N.D. Cal. 2014) (considering blogpost that plaintiffs "selectively quote[d]" as incorporated by reference).

VI. CONCLUSION

Google respectfully requests that the Court dismiss with prejudice Plaintiffs' entire lawsuit for lack of subject matter jurisdiction, given the parties' valid and enforceable arbitration agreement. In the alternative, Google respectfully requests that the Court dismiss with prejudice each of Plaintiffs' claims against Google for failure to state a claim upon which relief can be granted.

Dated: May 2, 2018

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