

Case No. C 13-5304 SC

ORDER RE: MOTION TO DISMISS AND
MOTION FOR PARTIAL SUMMARY
JUDGMENT

LOOKSMART LTD. and DOES 1-100,
Defendants.

Now before the Court is Defendant LookSmart Ltd.'s ("Defendant") motion to dismiss or, in the alternative, for partial summary judgment. ECF No. 11 ("Mot."); ECF No. 1 Ex. A ("Compl."). The motion is fully briefed. ECF Nos. 13 ("Opp'n"), 14 ("Reply"). The Court finds it appropriate for decision without oral argument. Civ. L.R. 7-1(b). As explained below, the motion is GRANTED in part and DENIED in part.

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1 **II. BACKGROUND**

2 Defendant is a publicly traded online advertising company.
3 Compl. ¶ 7. It acts as an intermediary between online
4 "publishers," which provide content from which they hope to
5 generate ad revenue, and "advertisers," which promote products
6 online via ads placed on publishers' websites. Id. Intermediaries
7 like Defendant help advertisers place ads on publishers' websites,
8 in exchange for a fee. See id.

9 The online advertising model relevant to this case is called
10 "pay-per-click." Id. In this model, advertisers place their ads
11 on publishers' websites and are charged a fixed sum each time a
12 user clicks the ad. Id. ¶ 9. Part of this "pay-per-click" fee is
13 then paid to the publisher on whose website the ad appeared, and
14 part goes to the intermediary that helped to place the ad. Id.

15 Plaintiff owns and operates an international network of
16 websites. Id. ¶ 11. In the online advertising ecosystem,
17 Plaintiff is primarily a publisher, and its primary source of
18 income is the revenue generated through the placement of ads on its
19 websites. Id. Plaintiff entered a contract with Defendant under
20 which Defendant would act as both intermediary and publisher. Id.
21 ¶ 17. Defendant, like Plaintiff, owns a network of websites, and
22 as part of the contract it agreed to display ads promoting
23 Plaintiff's website network on its own websites. Id. Plaintiff
24 agreed to pay Defendant based on the total number of clicks on
25 those ads, and Defendant agreed to invoice Plaintiff each month,
26 listing the number of clicks and the total amount owed. Id. The
27 price per click varied depending on the market, but it ranged
28 between \$0.01 and \$0.05. Id.

1 Though it is not a party to this lawsuit, Google and its
2 businesses are highly relevant to this case. Google is the biggest
3 intermediary in the pay-per-click advertising market. Id. ¶ 10.
4 In this capacity it operates a service called Google AdSense. Id.
5 Publishers use Google to help them place appropriate ads on their
6 websites, and per the usual publisher-advertiser-intermediary
7 relationship, Google and the publishers share pay-per-click
8 revenue. Id. Publishers usually receive between 51 and 68 percent
9 of this revenue, and Google takes the remainder. Id.

10 Plaintiff was a Google AdSense customer. Id. ¶ 12. Google
11 was Plaintiff's most important intermediary partner before
12 Plaintiff contracted with Defendant. Id. As part of that
13 arrangement, Plaintiff received the standard 51 to 68 percent of
14 pay-per-click revenue, with Google taking the rest, though Google
15 was also able to deduct more money from Plaintiff's AdSense account
16 if it determined that ad clicks originating from Plaintiff's
17 websites were illegitimate. Id. These illegitimate clicks are
18 called "click fraud" in the online ad industry. Id.

19 Click fraud is a type of fraud by which a person or computer
20 program initiates a "click" on an ad, solely to generate the fees
21 resulting from pay-per-click advertising models -- not to view the
22 ad's underlying content. Id. Advertisers get no benefit from this
23 behavior, since there is no chance for them to convert a click to a
24 sale, but the publishers and intermediaries still get paid per
25 click. Id. Click fraud is a risk for online advertising
26 publishers because, as Defendant noted in a recent 10-K filing,
27 publishers on whose sites a person or program initiates click fraud
28 must sometimes issue credits or refunds to advertisers or pay

1 revenue share to distribution network partners. Id. ¶ 14. This
2 hurts the publishers' profitability and branding. Id.

3 As Defendant stated in that 10-K, it had previously been
4 subject to advertiser complaints and litigation regarding click
5 fraud, and it anticipated continuing to respond to such behavior.
6 Id. Some small percentage of click fraud is considered unavoidable
7 and tolerated within the pay-per-click ad industry, though
8 Plaintiff states that prior to its agreement with Defendant, its
9 monthly deductions for pay-per-click traffic that Google considered
10 illegitimate averaged less than .5 percent of the total pay-per-
11 click traffic generated on Plaintiff's websites. Id. ¶ 16.

12 Plaintiff entered the contract with Defendant around October
13 31, 2011. Id. ¶ 17. As part of this contract, Plaintiff signed
14 Defendant's standard "Terms and Conditions" ("T&C"). Compl. Ex. A
15 (also called the "Agreement"). Between December 2011 and June
16 2012, Plaintiff paid Defendant \$105,273.92, pursuant to seven
17 invoices. Id. ¶ 18. Throughout this time, Plaintiff believed it
18 was paying Defendant for legitimate pay-per-click traffic, not for
19 fraudulent clicks. Id.

20 However, around May 2012, Plaintiff became aware that a
21 "significant portion" of the clicks for which Defendant was billing
22 were being identified by Google as click fraud. Id. ¶ 19. Between
23 April and July 2012, Google deducted nearly \$250,000 from
24 Plaintiff's AdSense account due to suspicious click fraud activity,
25 substantially all of which came from websites affiliated with
26 Defendant. Id.¹ Then, around July 3, 2012, Google informed

27 ¹ The Complaint does not fully explain how the perpetrators of
28 click fraud -- bot or human -- moved from Plaintiff's ads on
Defendant's websites to AdSense-related ads on Plaintiff's

1 Plaintiff that an additional \$191,000 in gross revenue (the amount
2 prior to Google taking its share) was being deducted from
3 Plaintiff's AdSense account due to click fraud originating on
4 Plaintiff's website www.pay-it-less.co.uk. Id. This deduction led
5 to a loss of \$130,000 for Plaintiff. Id. Plaintiff claims that
6 "substantially all" of the fraudulent clicks from that site can be
7 traced directly to traffic originating from websites owned or
8 controlled by Defendant. Id. Between August and December 2012,
9 Google deducted an additional \$12,500 from Plaintiff's AdSense
10 account as additional compensation for the unusually high volume of
11 click-fraud traffic originating from Plaintiff's websites,
12 substantially all of which was traceable to traffic originating
13 from Defendant's websites. Id. ¶ 23.

14 Eventually, Plaintiff's AdSense account was reduced to a
15 negative balance, and in December 2012, Plaintiff abandoned the
16 account. Id. ¶ 26. Plaintiff's business relationship with Google
17 deteriorated, leading it to use less profitable pay-per-click
18 intermediary alternatives, and only recently has Plaintiff begun to
19 repair its relationship with Google, though its previous levels of
20 usage and profit have yet to return. Id. ¶ 27.

21 Plaintiff contends that Defendant had an incentive to generate
22 click fraud traffic, because it bills Plaintiff based on the number
23 of clicks generated on its websites. Id. ¶ 21. Plaintiff also
24 states that even if Defendant was not directly responsible for

25 websites. However, it appears that Plaintiff is alleging that
26 Defendant incentivized click fraud on its own properties because of
27 the billing relationship between Plaintiff and Defendant, and then
28 whatever entity perpetrated that fraud continued to do so on the
property linked from the ad, e.g., by moving from one of
Plaintiff's ads on Defendant's sites to an AdSense-placed ad on one
of Plaintiff's sites.

1 generating the click-fraud traffic at issue, it had a duty to take
2 steps to detect click-fraud traffic on its own websites and then to
3 reduce the number of clicks for which it billed Plaintiff. Id. ¶
4 22.

5 Based on these facts, Plaintiff asserts the following causes
6 of action against Defendant: (1) breach of contract, (2) breach of
7 the covenant of good faith and fair dealing, (3) fraudulent
8 concealment, (4-5) negligent and intentional interference with
9 prospective economic advantage, (6) intentional interference with
10 contractual relations, and (7) violation of California's Unfair
11 Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. Defendant
12 now concedes the first cause of action, but argues that Plaintiff
13 is still subject to the T&C's limitation of liability,² and moves
14 to dismiss the other claims.

15
16 **III. LEGAL STANDARD**

17 A motion to dismiss under Federal Rule of Civil Procedure
18 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
19 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
20 on the lack of a cognizable legal theory or the absence of
21 sufficient facts alleged under a cognizable legal theory."
22 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
23 1988). "When there are well-pleaded factual allegations, a court
24 should assume their veracity and then determine whether they
25 plausibly give rise to an entitlement to relief." Ashcroft v.
26 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
27 must accept as true all of the allegations contained in a complaint

28

2 ² Reply at 4 n.4.

1 is inapplicable to legal conclusions. Threadbare recitals of the
2 elements of a cause of action, supported by mere conclusory
3 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
4 Twombly, 550 U.S. 544, 555 (2007)).

5 Claims sounding in fraud are subject to the heightened
6 pleading requirements of Federal Rule of Civil Procedure 9(b),
7 which requires that a plaintiff alleging fraud "must state with
8 particularity the circumstances constituting fraud." See Kearns v.
9 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy
10 Rule 9(b), a pleading must identify the who, what, when, where, and
11 how of the misconduct charged, as well as what is false or
12 misleading about [the purportedly fraudulent] statement, and why it
13 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
14 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (quotation marks and
15 citations omitted).

16
17 **IV. DISCUSSION**

18 Defendant contends that the T&C limits its liability to
19 Plaintiff. Accordingly, it seeks to dismiss all of Plaintiff's
20 claims. The relevant parts of T&C's limitation of liability clause
21 read:

- 22 (I) Under no circumstances will either party be
23 liable to the other party, whether in contract,
24 tort or otherwise, for indirect, incidental,
25 consequential, special or exemplary damages (even
26 if such damages are foreseeable and whether or
27 not the indemnified party has been advised of the
28 possibility of such damages) arising from this
agreement; and
(II) Neither party will be liable to the other party
for more than the total amount paid or payable
(plus applicable fees and costs) to [Defendant]
under this Agreement.

T&C § 8. The T&C also contains an indemnification clause:

Each party agrees to indemnify, defend and hold harmless the other party . . . from any and all liability, damages and settlements due to third-party claims or causes of action, including reasonable legal fees and expenses (collectively "Liabilities") arising out of or related to the indemnifying party's breach of any of its representations or warranties in this Agreement.

Id. § 9. Defendant argues that all of Plaintiff's claims except its breach of contract claim are barred by the T&C, as are all of Plaintiff's claimed damages beyond the \$105,273.92 invoiced amount. Mot. at 6-7. Defendant also requests summary judgment limiting the parties' liability to the total amount Plaintiff paid Defendant under their agreement. Id. at 7 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)); Reply at 2.

Plaintiff argues first that Defendant's interpretation of Section 8, which would limit Defendant's liability regardless of whether that liability arose under tort or contract law, is unenforceable under California Civil Code section 1668. Opp'n at 5-6. That section reads: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Since all but one of the disputed claims (negligent interference) is an intentional tort, Plaintiff claims that Defendant's position renders Section 8 invalidated to the extent that Defendant seeks to use it to limit liability not based on damages under the contract itself (i.e., the amount payable to Defendant under the contract). Id. at 5-6.

Plaintiff also argues that even if the T&C is taken to mean what Defendant says it does, the damages Plaintiff seeks fall

1 within Section 9's indemnification provision. Id. at 7. Plaintiff
2 contends that Google's deductions from Plaintiff's AdSense account
3 are third-party claims subject to indemnification from Defendant.
4 Id.

5 Finally, Plaintiff claims that a motion to dismiss is not the
6 proper mechanism for limiting its damages, since Rule 12(b)(6)
7 motions only refer to claims, not remedies. Id. at 8-9.

8 **A. The Economic Loss Rule**

9 First, Defendant responds that section 1668 does not bar
10 agreements that allocate risk for misrepresentations, including
11 fraudulent ones, if the "economic loss rule" applies. Reply at 1.

12 The economic loss rule, in summary, "is that no tort cause of
13 action will lie where the breach of duty is nothing more than a
14 violation of a promise which undermines the expectations of the
15 parties to an agreement." Oracle USA, Inc. v. XL Global Services,
16 Inc., C 09-00537 MHP, 2009 WL 2084154, at *4 (N.D. Cal. July 13,
17 2009). This rule serves to prevent every breach of a contract from
18 giving rise to tort liability and the threat of punitive damages:
19 "Quite simply, the economic loss rule prevents the law of contract
20 and the law of tort from dissolving one into the other." Robinson
21 Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988 (Cal. 2004)
22 (internal quotation marks and brackets omitted). Limiting recovery
23 to contract damages makes it easier for parties to "estimate in
24 advance the financial risks of their enterprise." Freeman & Mills,
25 Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 106 (Cal. 1995) (quoting
26 Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503,
27 515 (Cal. 1994)); Foley v. Interactive Data Corp., 47 Cal. 3d 654,
28 694 (Cal. 1988). As a result, the rule is particularly applicable

1 when a party alleges "commercial activities that negligently or
2 inadvertently [went] awry." Robinson Helicopter, 34 Cal. 4th at
3 991 n.7. However, the economic loss rule can still bar fraud and
4 other intentional tort liability if those claims do not arise
5 independently of the breach of contract claims. See id. at 990.

6 Defendant contends that the T&C establishes that payments are
7 due on a pay-per-click basis, and such charges would be determined
8 based only on Defendant's technology with disputes governed by
9 Defendant's reconciliation system. Reply at 5 (citing T&C ¶ 6(c)).
10 According to Defendant, Plaintiff's intentional tort claims are all
11 attempts to "dissolve the law of contract and the law of tort into
12 the other" since regardless of Plaintiff's allegations, all claims
13 arise from Defendant's obligations under the T&C, and the parties
14 bargained for the possibility of such issues. Id. at 5-6.

15 Defendant is correct. In this case, Plaintiff's intentional
16 tort claims are barred by the economic loss rule. Under the rule,
17 parties alleging fraud or deceit in connection with a contract must
18 establish tortious conduct independent of a breach of the contract
19 -- not just violation of a promise that undermines a party's
20 expectations under the contract. Robinson Helicopter, 34 Cal. 4th
21 at 990. Here, any duties Defendant owed to Plaintiff apart from
22 the general duty to act reasonably arose at the moment of contract
23 formation. See id. at 991; see also United Guar. Mortg. Indem. Co.
24 v. Countrywide Fin. Corp., 660 F. Supp. 2d 1163, 1184 (C.D. Cal.
25 2009)). Defendant assumed no other duties. Cf. Robinson
26 Helicopter, 34 Cal. 4th at 991 (economic loss rule did not apply
27 partly because the defendant separately issued affirmative
28 representations to the plaintiff).

1 Plaintiff has failed to allege any conduct that is independent
2 from the promises the parties made during the course of their
3 contractual relationship, since even the basis for Plaintiff's
4 intentional interference claims is that Defendant interfered with
5 Plaintiff's contracts and relationships by breaching its
6 representation, from Section 5(a) of the T&C, to invoice Plaintiff
7 only for legitimate clicks. See Opp'n at 7-8; Compl. ¶¶ 44-58.
8 Likewise, the T&C accounts for the bases of Plaintiff's fraudulent
9 concealment and UCL fraud claim, since Defendant's obligation to
10 monitor pay-per-click traffic for which it invoiced Plaintiff arose
11 exclusively from the contract. See United, 660 F. Supp. 2d at
12 1184; Food Safety Net Svcs. v. Eco Safe Sys. USA, Inc., 209 Cal.
13 App. 4th 1118, 1132 (Cal. Ct. App. 2012). Plaintiff's negligent
14 interference claim is somewhat distinct from the above analysis
15 because it is based on negligence, not intent. However, California
16 law holds that contracts exempting parties from liability for
17 ordinary negligence are valid if the public interest is not
18 involved and no statute prohibits such a contract. See United, 660
19 F. Supp. 2d at 1180.

20 These two sophisticated parties reached a bargain allocating
21 the risks of doing business, and the provisions of their agreement
22 displace tort duties with regard to Defendant's obligations under
23 the contract. See Reserver Ins. Co. v. Pisciotto, 30 Cal. 3d 800,
24 814 (Cal. 1982) ("It is axiomatic that absent a violation of public
25 policy, a statute, or a constitutional provision, the parties to a
26 private agreement may allocate risks in any manner they may
27 choose."). Plaintiff allocated risk for its negligence claim per
28 the T&C, and its intentional tort claims are barred by the economic

1 loss rule, per above. Plaintiff's negligent and intentional
2 interference, fraudulent concealment, and UCL claims are all
3 DISMISSED. Plaintiff has leave to amend these claims if it can
4 state facts indicating that the claims would not be subject to the
5 economic loss rule.

6 Finally, the parties did not brief the applicability of the
7 economic loss doctrine to breach of the implied covenant ("bad
8 faith") claims. However, the Court declines to dismiss that claim
9 on economic loss grounds, since California law generally precludes
10 tort recovery for non-insurance bad faith claims in the absence of
11 a violation of an independent duty arising from tort law
12 principles. Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th
13 85, 102 (Cal. 1995); Norcal Waste Sys., Inc. v. Apropos Tech.,
14 Inc., No. C-06-3410-CW, 2006 WL 2319085, at *7 (N.D. Cal. Aug. 10,
15 2006). Plaintiff may still recover under contract law for that
16 claim.

17 **B. Contract Ambiguity**

18 Plaintiff also contends that the T&C's limitation of liability
19 provision is ambiguous. Opp'n at 4-5. Its position is based on
20 Part I of Section 8's language excluding "indirect, incidental,
21 consequential, special or exemplary damages," compared to Part II's
22 limitation of either party's liability to the total amount paid or
23 payable under the contract. Id. According to Plaintiff, Defendant
24 interprets Part I to preclude either party from recovering any type
25 of damages, contract or tort, while Part II expressly provides for
26 a cap on damages, which would be internally inconsistent unless
27 Part I is not actually taken to preclude all damages, and Part II
28 is indeed just a cap. Id.

1 Plaintiff's argument is neither clear nor compelling. The T&C
2 clearly does not read as prohibiting either party from recovering
3 any type of damages, just most types of damages, and only up to a
4 limit. Direct damages up to the amount paid under the contract are
5 still allowed. T&C ¶ 8. This is not ambiguous or unusual. See 11
6 Wayne Matus, Bus. & Comm. Lit. in Fed. Courts § 130:23 (3d ed.)
7 ("[P]arties commonly seek to manage risk by excluding all but
8 direct damages (i.e., damages that would place the nonbreaching
9 party in the position it would have been in if the breaching party
10 had performed) and specifically excluding incidental, indirect,
11 special, consequential, exemplary and punitive damages.").

12 Plaintiff could therefore obtain direct damages from Defendant
13 in a breach of contract action. In any event, regardless of
14 whether Plaintiff is ultimately able to recover on a tort or
15 contract claim, Section 8 would cap Plaintiff's damages to the
16 amount it paid under the contract.

17 **C. Indemnification**

18 Regardless of Section 8's enforceability or the meaning of the
19 limitations clause, Plaintiff also argues that Section 9 of the
20 contract, which provides for indemnification in the event of
21 liability, damages, and settlements due to third-party claims or
22 causes of action, permits Plaintiff's theories and damages based on
23 Google's deductions from Plaintiff's AdSense account. Opp'n at 7-
24 8. Plaintiff states that Google's deductions from Plaintiff's
25 AdSense account "are, in essence, unilateral debits by Google from
26 Plaintiff's virtual bank account, are the primary component of
27 [Plaintiff's damages], and are a 'third-party claim.'" Id. Since
28 Section 5(a) permits Defendant to invoice Plaintiff for ad clicks,

1 Plaintiff asserts that this permission must only apply to non-
2 fraudulent clicks, so Defendant breached its representations under
3 the T&C, directly leading to Google's deductions. Id. at 8.

4 Plaintiff is wrong. Taken as true, it is not clear that the
5 pleadings establish that Google's deductions constitute a claim,
6 and they certainly do not indicate that Google brought a cause of
7 action against Plaintiff. In context, it is not clear that "claim"
8 is a broad enough term to include account deductions made by a
9 third party based on what Plaintiff alleges to have been
10 Defendant's fraudulent activity -- the fact that the provision
11 provides for indemnification in the event of liability, damages,
12 and settlements suggests that the word "claim" does not apply to
13 every loss related to the contract, such as a routine account
14 deduction. Even if that were so, as noted above, all of
15 Plaintiff's claims except breach of contract and breach of the
16 implied covenant are barred by the economic loss rule, and the
17 amount and type of Plaintiff's damages are both capped by the T&C's
18 limitation on liability.

19 **D. Defendant's Alternative Motion for Partial Summary**
20 **Judgment**

21 Defendant's alternative motion for partial summary judgment is
22 DENIED without prejudice, because the Court cannot determine what
23 facts Defendant relied on for this motion, and Plaintiff did not
24 address the motion in its opposition brief. Moreover, Defendant
25 moved in the alternative to its motion to dismiss, and given the
26 posture of the case at this point, Defendant has not made clear
27 what it intended to accomplish by moving in the alternative.
28

1 **V. CONCLUSION**

2 As explained above, the Court GRANTS Defendant LookSmart
3 Ltd.'s motion to dismiss Plaintiff WeBoost Media S.R.L.'s
4 complaint.

5 Plaintiff has leave to amend its tort claims if it can plead
6 facts stating that the claims are not subject to the economic loss
7 rule. If Plaintiff chooses to file an amended complaint, it must
8 do so within thirty (30) days of this Order's signature date.
9 Otherwise the deficient claims may be dismissed with prejudice.

10
11
12 IT IS SO ORDERED.

13
14 Dated: February 28, 2014



UNITED STATES DISTRICT JUDGE