KEVIN S. ROSEN, SBN 133304
KRosen@gibsondunn.com
DANIEL S. FLOYD, SBN 123819
DFloyd@gibsondunn.com
MICHAEL B. SMITH, SBN 235764
MBSmith@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Defendants ValueClick, Inc.,
James R. Zarley, And Samuel J. Paisley

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CARL WALDREP,

Plaintiff,

v.

VALUECLICK, INC., JAMES R. ZARLEY, and SAMUEL J. PAISLEY

Defendants.

CASE NO. 07-CV-05411 DDP (AJWx)

The Hon. Dean D. Pregerson

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE FEDERAL SECURITIES LAWS; MEMORANDUM OF POINTS AND AUTHORITIES

[REQUEST FOR JUDICIAL NOTICE AND DECLARATION OF MICHAEL B. SMITH FILED HEREWITH]

Date: June 30, 2008
Time: 10:00 a.m.
Place: Courtroom 3

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTE that on June 30, 2008, at 10:00 a.m., or as soon thereafter as the matter can be heard at the United States District Court, located at 312 N. Spring Street, Los Angeles, California, in Courtroom 3, the Honorable Dean D. Pregerson presiding, Defendants ValueClick, Inc., James R. Zarley and Samuel J. Paisely (collectively the "Defendants") will move, and do hereby move, the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6) for dismissal of Plaintiffs' Consolidated Class Action Complaint For Violation Of The Federal Securities Laws (the "CC") with prejudice. This motion to dismiss is brought pursuant to the Private Securities Litigation Reform Act of 1995 and Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief may be granted, on the following grounds:

1. Plaintiffs' first cause of action for alleged violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), fails as a matter of law because Plaintiffs fail to plead fraud with particularity, fail to plead with particularity facts giving rise to a strong inference of scienter, and fail to adequately plead loss causation. Further, Plaintiffs' first cause of action for alleged violations of Section 10(b) fails because the allegedly false or misleading statements are protected by the Private Securities Litigation Reform Act's safe harbor for forward-looking information, 15 U.S.C. § 78u-5(i)(1).

2. Plaintiffs' second cause of action for alleged violations of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), fails as a matter of law because no primary violation of the securities laws occurred.

This Motion to Dismiss is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities included herein, Defendants' Request for Judicial Notice, and Declaration of Michael B. Smith filed concurrently herewith, all further pleadings that will be filed by Defendants herein, the record on file in this

matter, and such further evidence and argument as the Court may permit or require at or prior to the time of the hearing on this Motion.

This Motion is made following conferences of counsel pursuant to Local Rule 7-3, including on February 4 and 11, 2008.

DATED: March 21, 2008

GIBSON, DUNN & CRUTCHER LLP

By:________________________________
Kevin S. Rosen

Attorneys for Defendants,
VALUECLICK, INC., JAMES R. ZARLEY, and SAMUEL J. PAISELY

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I. INTRODUCTION

Plaintiffs' Consolidated Class Action Complaint for Violations of Federal Securities Laws ("Consolidated Complaint" or "Cmplt.") is a particularly transparent example of the sort of opportunistic "fraud by hindsight" complaint that the PSLRA was designed to prevent. In May of 2007, Defendant ValueClick, Inc. ("ValueClick") announced that the FTC was commencing an inquiry into ValueClick's lead generation activities, including those of ValueClick's Webclients division. Cmplt., ¶ 86. Two months later, when ValueClick announced that it had not met its revenue and earnings guidance for the second quarter (*id.*, ¶ 90), the plaintiff's bar wasted no time in rushing to the courthouse — several copycat actions have since been stayed, dismissed, or consolidated with this action. *See, e.g.,* RJN Exs. 3-5.

Plaintiffs' theory is that ValueClick's most profitable lead generation business — Web Clients, Inc. ("Webclients"), which ValueClick acquired in June of 2005 — was a house of cards built on illegal practices, and that the FTC's inquiry into ValueClick's lead generation practices would inevitably bring it crashing to the ground. *See, e.g.,* Cmplt., ¶¶ 24-33. On the basis of this speculative presumption, Plaintiffs contend that *every one* of ValueClick's public statements regarding its financial performance between the time it acquired Webclients and the time it announced the FTC's inquiry was intentionally or recklessly false when made because ValueClick and its CEO and CAO knew or should have known that the Webclients division was engaged in — and indeed dependent upon — "illicit practices." *Id.*, ¶¶ 58-91.

The fundamental fallacy of Plaintiffs' theory was exposed soon after the filing of the Consolidated Complaint. On March 13, 2008, the FTC concluded its inquiry and filed a Complaint and Stipulated Final Judgment with this Court. RJN Exs. 1, 2. Although the FTC's ten-month investigation included a thorough examination of Webclients' practices (the subject of the Consolidated Complaint), the FTC's complaint ***does not name Webclients*** as a defendant. RJN Ex. 1. Further, the

Stipulated Final Judgment, which orders payment of a $2.9 million civil penalty, specifically states that "[t]his Civil Penalty arises from the past practices of Hi-Speed Media, Inc., and ***not any other subsidiary of ValueClick, Inc.***" RJN Ex. 2 at 33. Thus, even in hindsight, Plaintiffs' fraud theory is unsupportable – the alleged conduct underlying this action was investigated by the FTC and no action was taken.

The Consolidated Complaint fails to plead fraud and scienter with the "unprecedented degree of specificity and detail" required by the Private Securities Litigation Reform Act of 1995 ("PSLRA") for multiple independent reasons. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). *First*, Plaintiffs have failed to identify any specific false or misleading statement. *Second*, Plaintiffs have failed to allege that either of the individual defendants made any such false or misleading statement. *Third*, Plaintiffs have failed to allege particular facts sufficient to establish that Webclients was engaged in unlawful conduct.

Although Plaintiffs purport to rely on a handful of "confidential witnesses" to provide the factual basis for their claims, none of these "confidential witnesses" is properly alleged to have had personal knowledge of the alleged facts. Moreover, the alleged facts do not come close to establishing the existence of such pervasive, obvious unlawful conduct that (a) the defendants should be charged with knowledge of such conduct; and (b) such conduct would have had a material effect on ValueClick's financial results. The conclusion of the FTC's investigation confirms the debility of Plaintiffs' allegations. Further, and in any event, Plaintiffs' claims that ValueClick's financial guidance was false or misleading are barred by the statutory "safe harbor" of the PSLRA, as ValueClick's forward-looking statements were accompanied by meaningful cautionary language that warned specifically of the risk inherent in operating in an uncertain regulatory environment.

Plaintiffs also fail to properly allege loss causation. Notwithstanding the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005), Plaintiffs allege only that they were damaged

by having paid "artificially inflated prices" for ValueClick's securities. Cmplt. ¶ 118. This is precisely the sort of damages allegation that the Supreme Court held insufficient in *Dura*. *Id.* at 346-48.[1]

II. SUMMARY OF ALLEGATIONS

A. Background

ValueClick is one of the world's largest and most comprehensive online marketing services companies, selling targeted and measurable online advertising campaigns and programs for advertisers and advertising agency customers. ValueClick provides services through four main business segments: Media, Affiliate Marketing, Comparison Shopping and Technology. RJN Ex. 6 at 96. The Media Segment—which accounted for approximately 70% of ValueClick's revenue in the fiscal year ended December 31, 2006—operated in a number of areas, including promotion-based lead generation marketing, which accounted for less than 30% of Media Segment revenues (*i.e.*, 21% of ValueClick's revenue) for the quarter ended March 31, 2007. *Id.* at 2-3, 34; Cmplt., ¶ 88.

ValueClick's lead generation marketing consisted of on-line and email campaigns that generate qualified customer inquiries for an advertiser's product or service. RJN Ex. 6 at 98. A customer generates a qualified inquiry when he or she responds to the advertiser's offer by providing personal information and requesting to be contacted by the advertiser. *Id.* ValueClick's customers rely on ValueClick to target those consumers most likely to respond to a particular offer, thus maximizing the efficiency and efficacy of the campaign.

On May 18, 2007, ValueClick announced that it had received a letter from the Federal Trade Commission ("FTC") on May 16, 2007 stating that the FTC was conducting an inquiry to determine whether the Company's lead generation activities

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[1] Plaintiffs' claims for controlling person liability under Section 20(a) of the Exchange Act fail as a matter of law because the Consolidated Complaint fails to allege a primary violation of the securities laws.

violated either the Federal Trade Commission Act or the CAN-SPAM Act. Cmplt., ¶ 86; RJN Ex. 7. More specifically, the FTC letter indicated it was investigating certain of ValueClick's websites that offered free gifts and the manner in which ValueClick directed traffic to those websites. *Id.* at 209. Notably, ValueClick's stock price actually *increased* after the announcement. *See* RJN Ex. 11 at 261.

Two-and-one-half months after it announced the FTC investigation, on July 30, 2007, ValueClick announced its earnings for the second quarter of 2007. Cmplt., ¶ 90. That announcement stated that although ValueClick met the low end of its second quarter forecast for earnings per share, revenues and adjusted EBITDA fell below that guidance. *Id*. In its announcement, ValueClick attributed this minor shortfall to a downturn in the performance-based marketing sector that began in late May and became more pronounced in June of 2007. *Id*. As a result of the second quarter shortfall, ValueClick revised its earnings guidance for fiscal year 2007 slightly from $655 – $665 million to $645 – $660 million. *Id.*

On March 13, 2008, the FTC concluded its inquiry by filing a Complaint and Stipulated Final Judgment. RJN Exs. 1, 2. Significantly, though ValueClick's Webclients division is the cornerstone of the Complaint's allegations, the FTC's Complaint does not name Webclients as a defendant, and does not allege that Webclients engaged in any illegal practices. RJN Ex. 1. The Stipulated Final Judgment was entered pursuant to a settlement agreement between ValueClick and the FTC, "without adjudication of any issue of fact or law and without Defendants admitting liability for any of the matters alleged in the Complaint." RJN Ex. 2 at 27. The Stipulated Final Judgment requires ValueClick to pay a $2.9 million civil penalty, based solely on "the past practices of Hi-Speed Media, Inc., ***and not any other subsidiary of ValueClick, Inc.***" *Id.* at 33.

B. The Filing of the Consolidated Complaint

LIUNA Staff & Affiliates Pension Fund and the Laborers' International Union of North America National (Industrial) Pension Fund (collectively "Plaintiffs") filed the instant Consolidated Complaint on January 23, 2008.

C. Plaintiffs' Claims

Plaintiffs purport to bring the Consolidated Complaint on behalf of themselves and all persons who purchased or acquired ValueClick shares between June 13, 2005 and July 27, 2007 (the "Class Period"). Cmplt., p. 2. Plaintiffs assert a claim for violation of Section 10(b) of the Exchange Act against all Defendants and another claim for violation of Section 20(a) of the Exchange Act against the Individual Defendants, Zarley and Paisley. *Id.*, ¶¶ 120-139.

D. The Confidential Witnesses

The factual allegations in the Consolidated Complaint are predicated almost entirely on statements allegedly made by various confidential witnesses. *See* Cmplt., ¶¶ 34-48. Plaintiffs attribute to anonymous former employees of ValueClick statements that are supposed to support the conclusion that ValueClick was engaged in "illegal practices" during the Class Period. Plaintiffs have failed to allege facts showing that these confidential witnesses had personal knowledge of the practices they are purported to have discussed with Plaintiffs. To the contrary, it is clear from the allegations in the Consolidated Complaint that most of these individuals did not hold positions at ValueClick that would have made them privy to the facts for which Plaintiffs rely on them. *Id.* Further, the "facts" attributed to the confidential witnesses do not establish any illegal conduct, much less the systemic pattern of illegal conduct required to sustain the theory of fraud set forth in the Consolidated Complaint.

E. The Factual Allegations

The gravamen of the Consolidated Complaint is that ValueClick's financial guidance between June 13, 2005 and July 30, 2007 was misleading because ValueClick failed to disclose that the company's Webclients division was allegedly

engaged in practices that violated the FTC Act and the CAN-SPAM Act. Cmplt., ¶¶ 24-33. Plaintiffs contend that these illegal practices drove the strong performance of ValueClick's Media segment after the acquisition of Webclients, increasing that segment's revenue by "nearly 500%" by the end of the Class Period. *Id.* Plaintiffs allege that, by concealing the fact that ValueClick's strong financial results were premised on Webclients' "illicit marketing practices," the Defendants caused ValueClick's stock to *nearly triple* during the Class Period. *Id.*, ¶ 32 ("the financial picture of the Company painted during the Class Period was a sham.")

Those practices — which are described in vague and conclusory fashion — can be divided into six categories: (1) "sham" sweepstakes in which no prizes were awarded; (2) offers of "free" gifts that required the consumer to make a purchase; (3) operating through "shell" corporations; (4) failing to honor consumer "opt-outs"; (5) sending e-mails with misleading subject headings; and (6) using "long surveys." It is worth noting that these allegations were made public two months ***before*** the FTC concluded its investigation without taking any action against Webclients.

1. Allegations Regarding Sweepstakes Campaigns

Plaintiffs allege, relying entirely on two confidential witnesses, that Webclients ran sweepstakes campaigns for which no drawings were ever held, and no prizes ever awarded. Cmplt., ¶¶ 34-38. Plaintiffs assert that the Company would "instead perpetually move the date for submissions forward, continuing the sweepstakes in perpetuity." *Id.*, ¶ 37. These allegations are based upon confidential witness statements that cannot be considered by the Court because Plaintiffs have failed to establish that the confidential witnesses had personal knowledge of the alleged facts.

2. Allegations Regarding Free Gift Offers

Plaintiffs allege that ValueClick's Webclients division violated federal law by offering consumers "free" gifts in offers that required consumers to make a purchase before they could receive the free gift. Cmplt., ¶¶ 41-48. Plaintiffs do not specify

1 which federal law they contend prohibits such practices. *Id.* In fact, there is nothing
2 illegal about requiring a consumer to make a purchase in order to redeem a free gift.

3 **3. Allegations Regarding "Shell" Corporations**

4 Plaintiffs also allege that ValueClick set up "shell corporation[s]" in order to
5 conceal the origins of its "free" gift and sweepstakes offers. Cmplt., ¶ 47. Nothing in
6 the FTC Act or CAN-SPAM Act would render the use of subsidiaries illegal or require
7 any offer by a company to disclose that company's parent corporations.

8 **4. Allegations Regarding Consumer Opt-Outs**

9 Plaintiffs allege that ValueClick "refused to honor explicit requests by users to
10 opt-out of the Company's advertising campaigns." Cmplt., ¶ 39. This conclusory
11 allegation is not only unsupported, it is misleading. The confidential witnesses on
12 whom Plaintiffs rely state only that when a consumer sought to opt out of one e-mail
13 advertising campaign ValueClick did not automatically unsubscribe that consumer
14 from *other* advertising campaigns. *Id.*, ¶¶ 39-40. Plaintiffs do not cite any law
15 requiring ValueClick to unsubscribe a consumer from *all* advertising campaigns if that
16 consumer unsubscribes from only one advertising campaign. Indeed, consumers can
17 and should be able to choose the campaigns from which they wish to unsubscribe,
18 without precluding themselves from receiving other offers.

19 **5. Allegations Regarding E-Mail Subject Headings**

20 Plaintiffs allege that Defendants "caused ValueClick to initiate email messages
21 with subject headings that were likely to mislead recipients about material facts
22 regarding the contents or subject matter of the message," in violation of the CAN-
23 SPAM Act. Cmplt., ¶ 83. Plaintiffs do not identify a single e-mail allegedly sent by
24 ValueClick, or describe a single allegedly misleading subject heading, much less a
25 pattern.

26 **6. Allegations Regarding "Long Surveys"**

27 Plaintiffs allege that Defendants violated Articles 17, 31 and 38 of the Direct
28 Marketing Association's Guidelines for Ethical Business Practice by using "long

surveys to generate email addresses for resale". Cmplt., ¶ 84. None of these Articles has anything to do with "long surveys." RJN Ex. 9 at 227, 231-32, 237-38. Plaintiffs do not elaborate on what is meant by "long surveys;" nor do they explain how ValueClick's alleged use of "long surveys" violated the Guidelines, or what impact (if any) failure to comply with these Guidelines would have on ValueClick.

F. The Allegedly False Statements

Plaintiffs allege that every press release issued, conference call held, and Form 10 report filed with the SEC by ValueClick regarding its financial performance and expected future earnings for every quarter between June 13, 2005 and May 8, 2007 was false and misleading because ValueClick failed to disclose that the financial performance discussed therein was based upon the "illicit practices" described above. Cmplt., ¶¶ 58-84. Plaintiffs also allege that Defendants made "false and misleading representations regarding ValueClick's lead generation capabilities to investors and potential investors, industry analysts, and customers," but do not identify any statements regarding ValueClick's lead generation capabilities. *Id.*, ¶ 85.

G. The "Insider Trades"

Plaintiffs attempt to establish scienter by pointing to the (unremarkable) fact that Defendants Paisley and Zarley[2] sold shares of ValueClick stock during the two-year class period. Cmplt., ¶¶ 107-109. Plaintiffs do not allege any facts showing that these sales were unusual or inconsistent with prior trading practices. That two senior officers of a company consistently exercised and sold their options as they vested (and as trading windows allowed) is hardly suggestive of ulterior motives.

H. Plaintiffs' "Damages" Allegations

Plaintiffs assert that "when the full extent of the misrepresentations and omissions that ValueClick concealed from the market, and their impact and potential impact on ValueClick's prior and future financial results, were revealed in

[2] Plaintiffs' allegations include shares held in trust for Paisley and Zarley.

ValueClick's press release of July 30, 2007, the prices of ValueClick securities fell dramatically, causing substantial loss to investors." Cmplt., ¶ 111. After the July 30, 2007 announcement, "[b]illions of dollars in market value simply vanished as analysts slashed ValueClick's stock ratings and the Company's stock price declined precipitously by 42% from its Class Period high . . . ." Cmplt., ¶ 8; *see also id.* ¶ 112. The Consolidated Complaint ignores three critical facts: *First*, ValueClick had already disclosed the FTC investigation more than two months before the July 30, 2007 earnings announcement, and ValueClick's share price actually *rose* after the disclosure of that investigation. *Id.* ¶ 86; RJN Ex. 11 at 261. *Second,* most of the alleged 42% drop in ValueClick's stock price occurred *prior* to the July 30, 2007 announcement. RJN Ex. 11 at 260-61. *Third,* the revision in earnings projections made in the July 30, 2007 announcement was minimal, moving from $655 – $665 million to $645 – $660 million. Cmplt., ¶ 90.

III. LEGAL STANDARD

A. Dismissal Under FRCP 12(b)(6)

A court may dismiss a complaint pursuant to FRCP 12(b)(6) for "(1) lack of a cognizable legal claim or (2) insufficient facts under a cognizable legal theory." *SmileCare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996) (internal quotations omitted). In ruling on a motion to dismiss, a court must ordinarily take all of the material allegations in the complaint as true and construe them in the light most favorable to the plaintiff (except where, as here (*see infra* Section B.1), a court is determining whether scienter has been adequately pled under the PSLRA). *Id.* However, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1013 (9th Cir. 2005).

B. Pleading Under Section 10(b) And Rule 10b-5

To state a claim under Section 10(b) of the Exchange Act and Rule 10b-5, Plaintiffs must allege: (1) a material misrepresentation or omission of fact,

(2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss. *Id.* at 1014. The PSLRA and FRCP 9(b) impose heightened pleading requirements with respect to some of these elements. *Id.*

1. Pleading Under The PSLRA

Under the PSLRA, Plaintiffs must plead with particularity both falsity and scienter. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1084 (9th Cir. 2002). As to falsity, the PSLRA requires Plaintiffs to specify each allegedly false or misleading statement and why each statement is false or misleading. 15 U.S.C. § 78u-4(b)(1). As to scienter, the PSLRA requires Plaintiffs to "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (emphasis added).

Because falsity and scienter are generally inferred from the same set of facts, the Ninth Circuit has condensed these pleading requirements into a single inquiry: whether "particular facts in the complaint, taken as a whole, raise a strong inference that defendants intentionally or [with] 'deliberate recklessness' made false or misleading statements to investors." *Roncini v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001) (internal quotations omitted). "Deliberate recklessness" requires "a degree of recklessness that strongly suggests actual intent." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 979 (9th Cir. 1999). Where the pleadings are not sufficiently particularized or where, taken as a whole, they do not raise a "strong inference" of scienter, the complaint must be dismissed. *Roncini,* 253 F.3d at 429; *see also* 15 U.S.C. § 78u-4(b)(3)(A).

Finally, the PSLRA requires a court, in determining whether scienter has been adequately pled, to "consider *all* reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs." *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) (emphasis in original); *see also Tellabs, Inc. v. Makor Issues & Rights Ltd.,*--- U.S. --- 127 S. Ct. 2499, 2510, 168 L. Ed. 2d 179 (2007) (requiring courts to consider "plausible nonculpable explanations for the defendant's conduct").

2. Pleading Under FRCP 9(b)

FRCP 9(b) requires "particularized allegations of the circumstances *constituting* fraud." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994) (emphasis in original). To satisfy this strict requirement, Plaintiffs must set forth not only the time, place, and content of the allegedly false or misleading statement but also "an explanation as to why the disputed statement was untrue or misleading *when made*." *Id.* at 1549 (emphasis in original). Moreover, "[t]he fact that an allegedly fraudulent and a later statement are *different* does not necessarily amount to an explanation as to why the earlier statement was false." *Id.* (emphasis in original). Instead, Plaintiffs must set forth facts showing "why the difference between the earlier and the later statements is not merely the difference between two permissible judgments, but rather the result of falsehood." *Id.*

IV. ARGUMENT

A. Plaintiffs Fail To Allege That Any Of The Defendants Made A Material Misrepresentation Or Omission Of Fact.

1. Plaintiffs Fail To Identify Any Materially False Or Misleading Statement With The Particularity Required By The PSLRA.

Plaintiffs' conclusory allegations fail to satisfy the requirements of FRCP 9(b), much less the heightened pleading standards of the PSLRA. The PSLRA requires Plaintiffs to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information or belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Plaintiffs have not met this requirement. Instead, the Consolidated Complaint throws together nearly two years' worth of ValueClick's public filings, press releases and conference calls — including all Form 10-Ks and Form 10-Q's filed during the Class Period — into an unwieldy 33-page segment, and then offers the conclusory allegation that *all* of these statements were false when made. Cmplt., ¶¶ 58-85.

Such pleading tactics are contrary to established Ninth Circuit law. *See Daou*, 411 F.3d at 1017 ("A general allegation that the practices at issue resulted in a false report of company earnings is not a sufficiently particular claim of misrepresentation to satisfy Rule 9(b).") (internal quotations omitted); *see also Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1243 (N.D. Cal. 1998) ("Plaintiff[s] merely thro[w] the statements and the alleged 'true facts' together in an undifferentiated lump and apparently expec[t] the reader to sort out and pair each statement with a supposedly relevant 'true fact.'"). This Court recently rejected precisely this sort of pleading. *See In re Hansen Natural Corp. Sec. Litig.*, Case No. 527 F. Supp. 2d 1142 (C.D. Cal. 2007) .

In *Hansen*, just as here, the plaintiffs listed dozens of public filings over several years, followed by a conclusory list of "true facts" that allegedly were not disclosed during the class period. *Id.* at 1152. This Court found that the plaintiff had failed to plead fraud with particularity, because "nowhere in the Complaint does Plaintiff explain in which of the myriad of ways listed in paragraph 128 each of the 17 pages of allegedly false statements are false." *Id.* at 1152-52. Because the same is true here, this Court should dismiss the Consolidated Complaint.

2. Plaintiffs Fail To Adequately Allege That Paisley Or Zarley Made Any False Or Misleading Statements.

In addition to failing to identify any false or misleading statements with particularity, Plaintiffs also fail to allege sufficient facts to show that any of the Individual Defendants was responsible for any of the statements alleged in the Complaint. Rule 9(b) "requires that a plaintiff plead with sufficient particularity attribution of the alleged misrepresentations or omissions to each defendant." *Sunnyside Dev. Co. v. Opsys Ltd.*, No. C 05-0553 MHP, 2005 U.S. Dist. LEXIS 39303, at *12 (N.D. Cal. Aug. 8, 2005) (attached as App. A); *Hansen*, 527 F. Supp. 2d at 1153 (dismissing securities fraud complaint in part because the "there are no specific allegations that [the individual defendants] played any role whatsoever in the preparation or dissemination of any allegedly false statements"). Because the group

pleading doctrine can no longer be used to plead securities fraud, Plaintiffs are required to separately plead the fraudulent acts of *each* defendant to satisfy Rule 9(b). *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007); *Hansen*, 527 F. Supp. 2d at 1153-54; *accord Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 364-65 (5th Cir. 2004) (rejecting the group pleading doctrine and holding "the PSLRA requires the plaintiffs to distinguish among those they sue and enlighten *each defendant* as to his or her particular part in the alleged fraud" (internal quotations omitted)).

The Consolidated Complaint contains no specific allegations that Paisley played any role whatsoever in the preparation or dissemination of any of the statements identified in Paragraphs 58-81. As such, Plaintiffs have failed to state any claim against Paisley. Plaintiffs' claims against Zarley are similarly thin. Although Plaintiffs attribute certain statements in conference calls or press releases to Zarley, Plaintiffs do not specifically allege that any one of *those* statements was false or misleading, much less explain why any such statements were false or misleading when made. Moreover, as to the statements not specifically attributed to Zarley, the Consolidated Complaint is similarly devoid of any specific allegations that Zarley played any role in the preparation or dissemination of those statements. Absent such allegations, Plaintiffs cannot be said to have alleged with particularity that either of the Individual Defendants made any false or misleading statements.

3. Plaintiffs Fail To Allege Particular Facts Sufficient To Establish That Webclients Was Engaged In Unlawful Conduct.

Plaintiffs' entire Complaint turns on the contention that the Defendants failed to disclose that Webclients' lead generation practices violated federal law. *See* Cmplt., ¶¶ 2-4, 42-43, 51-73. However, Plaintiffs do not allege — and cannot allege — that Webclients has been charged with the alleged illegal practices. In fact, no court has found that *any* ValueClick subsidiary, division, officer, or director, including either of the Individual Defendants, violated any laws. Nor have Plaintiffs alleged any facts

which would show that any unlawful conduct was obvious to the Defendants. Thus, Plaintiffs' Consolidated Complaint must be dismissed.

a) No Court Has Found That Webclients Violated The Law.

In order to be misleading, an omission "must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.,* 280 F.3d 997, 1006 (9th Cir. 2002). Here, Plaintiffs have not alleged any "true facts" that contradict or affirmatively render misleading any of the statements quoted in the Complaint. The "non-public information" that Plaintiffs allege the Defendants concealed — Webclients' allegedly unlawful conduct — is not even a matter of *fact*, but rather a conclusion of law. As this Court has stated, "the [d]efendants' culpability . . . does not become a fact that must be disclosed until it is at least charged (in which case the charge is material) or proven (in which case the proven conduct is material)." *In re Teledyne Def. Contracting Deriv. Litig.*, 849 F. Supp. 1369, 1383 (C.D. Cal. 1993).

It is well settled that "the federal securities laws do not require a company to accuse itself of wrongdoing." *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004); *see also*, *Teledyne*, 849 F. Supp. at 1383; *In re Am. Express Co. S'holders Litig.*, 840 F. Supp. 260, 269 (S.D.N.Y. 1993) (noting that the Section 14(a) proxy rules "simply do not require management to accuse itself of antisocial or illegal policies"); *Ciresi v. Citicorp*, 782 F. Supp. 819, 823 (S.D.N.Y. 1991) (stating that "the law does not impose a duty to disclose uncharged, unadjudicated wrongdoing or mismanagement").

Plaintiffs do not allege any determination by a court of law that any of ValueClick's practices were illegal. On point is *In re Boston Scientific Corp. Sec. Litig.*, 490 F. Supp. 2d 142 (D. Mass. 2007). In *Boston Scientific*, the district court dismissed a claim that the defendants did not disclose material information concerning alleged violations of federal law in the marketing of coronary stents that were the subject of an ongoing Department of Justice investigation because "Defendants had no

duty to confess guilt" and "BSC fulfilled its obligations by disclosing the potential risk of an adverse outcome in the DOJ investigation in BSC's 10-K filings during the class period." *Id.* at 156. Thus, the court concluded:

> BSC's disclosures of the ongoing DOJ investigation were also consistent with SEC regulations. SEC proxy rules require additional disclosure where a director or executive officer was convicted in a criminal proceeding or is a named subject in a criminal proceeding. But neither of these scenarios was present. And as another district court has noted, the SEC's proxy disclosures do not require a company's management to confess guilt to uncharged crimes or to accuse itself of antisocial or illegal policies. . . . There is no reason why a different rule should apply under § 10(b).

Id. at 156-57 (internal quotations and footnotes omitted).

ValueClick promptly, accurately and adequately disclosed the existence of the FTC investigation. *See* Cmplt., ¶ 34; RJN, Ex. 10. No further disclosure was required, and anything more would have been — at best — irresponsible. The FTC now has concluded its investigation, and — in direct conflict with Plaintiffs' speculative allegations — has taken no action with respect to, and indeed has not even accused, Webclients. RJN Ex. 2. Plaintiffs cannot allege that any court has found that ValueClick violated the law, and the facts before the Court strongly support the conclusion that ValueClick's Webclients division did *not* violate the FTC Act or the CAN-SPAM Act. For this reason alone, Plaintiffs' claims must be dismissed.

b) Plaintiffs' Allegations Are Insufficient To Establish Any Wrongdoing.

Even if Defendants had been required to accuse themselves of unadjudicated wrongdoing—and they were not—Plaintiffs have failed to plead any facts establishing that any unlawful activity actually occurred. Plaintiffs' allegations of "illegal practices" are based upon statements attributed to "confidential witnesses." *See*

Cmplt., ¶¶ 34-48. These statements are not adequately pled and should not be considered by the Court. "[P]ersonal sources of information relied upon in the complaint should be described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." *Daou,* 411 F.3d at 1015 . Additionally, "the complaint must contain 'adequate corroborating details' to support the inference that the defendants' statements were false." *Wet Seal*, 518 F. Supp. 2d at 1170 (quoting *Daou*, 411 F.3d at 1015-16). Thus, at a bare minimum, Plaintiffs must plead the confidential witness's job duties and facts explaining how that confidential witness would have been privy to the processes that resulted in the alleged wrongdoing. *Wet Seal*, 518 F. Supp. 2d at 1170-71; *see also In re Portal S'ware, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2006 U.S. Dist. LEXIS 61589, at *18 (N.D. Cal. Aug. 17, 2006) (attached as App. B) (requiring the plaintiff to plead "specific descriptions of the employee's relevant duties and responsibilities to evaluate the reliability of their information"). Here, Plaintiffs' allegations concerning each of the "confidential witnesses" fail to establish personal knowledge of the matters allegedly discussed by those persons.

(a) Plaintiffs' Allegations Regarding "Phony" Sweepstakes Campaigns Fail To Adequately Plead Any Illegality.

Plaintiffs' allegations that Webclients ran sweepstakes campaigns for which no drawings were ever held, and no prizes ever awarded, are based entirely on statements attributed to two confidential witnesses, "CW2" and "CW3". Cmplt., ¶¶ 34-38. Plaintiffs have failed to establish that either of these confidential witnesses has actual knowledge of the administration and redemption policies and practices of any sweepstakes campaigns run by Webclients.

CW2 is described as a "copywriter" who "wrote the ads for the Company's marketing campaigns, including those that offered consumers 'free' gifts for clicking on certain ads." *Id.* ¶ 35 n.2. There are no allegations that CW2 was involved in the administration of sweepstakes contests, the purchase of sweepstakes prizes, or the

processing of entry forms. *Id.* ¶¶ 35, 37-38. Nor do Plaintiffs allege any facts that would explain how a copywriter would know whether, when, or how drawings were held, what procedures existed for selecting sweepstakes winners, or how sweepstakes campaigns were managed. In fact, Plaintiffs concede that CW2 left Webclients in October 2005, yet they purport to rely solely on CW2 for allegations regarding five currently-running sweepstakes campaigns with start dates in January 2007. *Id.*, ¶ 37.

Plaintiffs also cite hearsay statements attributed to CW3 to the effect that "employees around the Company laughed about how nobody would ever win" a lawn tractor offered in one sweepstakes campaign. Hearsay allegations "do not meet the PSLRA requirement that confidential witnesses' allegations must be based on personal knowledge." *Zucco Partners, LLC v. Digimarc Corp.*, 445 F. Supp. 2d 1201, 1207 (D. Or. 2006); *see also In re Trex Co. Sec. Litig.*, 454 F. Supp. 2d 560, 573 (W.D. Va. 2006) (declining to consider hearsay statements attributed to confidential witness).

CW3 is described as a "Data Business Manager" who was only at the company for a few months, and who "had responsibility for all third party email platforms and consulted on internal email platforms." Cmplt., ¶ 36, n.3. As with CW2, Plaintiffs' allegations do not support the inference that this individual had any personal knowledge of the administration of sweepstakes campaigns during his or her brief stint at ValueClick. Further, the vague statement attributed to CW3 does not support any specific allegation regarding Webclients' sweepstakes campaigns, and is in any event hearsay. Absent any allegations as to why these "confidential witnesses" would have knowledge of the processes upon which they purportedly comment, this Court simply cannot infer that their job responsibilities conferred any such expertise. *Wet Seal*, 518 F. Supp. 2d at 1170-71. Because the allegations in the Consolidated Complaint regarding Webclients' sweepstakes campaigns are based exclusively on statements attributed to CW2 and CW3, the Court must reject those allegations. *See* Cmplt., ¶¶ 34-38.

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(b) Plaintiffs' Allegations Regarding "Free Offers" Fail To Adequately Plead Any Illegality.

Plaintiffs allege that ValueClick's Webclients division violated federal law by requiring consumers to make purchases in order to obtain free gifts offered in Webclients' advertising campaigns. Cmplt., ¶¶ 41-49. As an initial matter, nothing in the FTC Act renders it illegal—much less a "clear violation" (Cmplt., ¶ 41)—to advertise a gift as "free" where the responding consumer is required to make purchases in order to receive that gift. Indeed, if this were so there would be no "buy one, get one free" offers.

The FTC Act requires only that advertisers "clearly and conspicuously" disclose to consumers any material terms and conditions upon which any free gift is contingent. *See*, *e.g.,* Guide Concerning Use of the Word "Free" and Similar Representations, 16 C.F.R. § 251.1 (1971) ("When making 'Free' or similar offers all the terms, conditions and obligations upon which receipt and retention of the 'Free' item are contingent should be set forth clearly and conspicuously at the outset of the offer . . . ."); *In re G.R.I. Corp*., 103 F.T.C. 442, 1984 FTC LEXIS 65 (1984) (attached as App. C) (permitting the advertising of "free" products provided the advertiser discloses "clearly and conspicuously and within close proximity to the offer that there are other conditions that a consumer assumes upon accepting the offer," and then "clearly and conspicuously set[s] forth elsewhere in the advertisement the complete details, conditions, and obligations").[3] And while Plaintiffs baldly allege that "Defendants

[3] It is far from "clear" what types of disclosures are required under the FTC Act for lead generation sites. The most recent FTC guidance concerning online disclosures states that "[t]here is no set formula for a clear and conspicuous disclosure," and that "[a]dvertisers have the flexibility to be creative in designing their ads, so long as necessary disclosures are communicated effectively and the overall message conveyed to consumers is not misleading." FED. TRADE COMM'N, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING 5 (2000) ("Guide"). Further, the guidance provided is often conflicting and qualified. For example, the Guide recommends placing "[d]isclosures that are an integral part of a claim or

[Footnote continued on next page]

failed to clearly and conspicuously disclose to consumers the material terms and conditions of its programs . . . ," nowhere do Plaintiffs plead the content of any single email, much less the disclosures contained therein or on the websites to which consumers were directed. Cmplt., ¶ 82.

Moreover, Plaintiffs' allegations are based primarily on unsubstantiated opinions and hearsay from confidential witnesses without personal knowledge of the relevant facts. For example, Plaintiffs rely on the opinion of CW3 (who is not alleged to have had any involvement with free gift offers) that Webclients' free gift offers were "basically a scam." Cmplt., ¶ 42. Plaintiffs also purport to base their allegations on a "joke" heard and recounted by CW3. *Id.*, ¶ 46. Similarly, Plaintiffs rely on opinions purportedly expressed by CW2 and CW5[4] to the effect that the requirements of Webclients' free gift campaigns were not worth the value of the free gift offered. *See*, *e.g.*, Cmplt. ¶¶ 44-46. The opinions of anonymous former employees who did not work on the campaigns in question cannot form the basis for allegations in a viable complaint under the PSLRA. *Zucco Partners*, 445 F. Supp. 2d at 1207; *Trex*, 454 F. Supp. 2d at 573.

[Footnote continued from previous page]
inseparable from it . . . on the same page and *immediately next to the claim*," and that "[t]his is particularly true for cost information." *Id*. at 7. But, the Guide qualifies this statement, noting that "[i]n some cases, the details about the additional fees might be too complex to describe adjacent to the price claims." *Id*. at 21 n.23. In these circumstances, the details "may be provided by using a hyperlink" so long as there is "a clear statement about the existence and the nature of the extra fees" that "appear[s] adjacent to the price." *Id*.

[4] CW5 is alleged to have been an "Account Manager" who "prepared information concerning [new clients'] desired ad campaigns and financial requirements." Cmplt., ¶ 43 n.6. CW5 is not alleged to have been involved in the administration of Webclients' campaigns. To the contrary, according to the Consolidated Complaint, once CW5 prepared that initial information, he or she "forwarded this information to designers, who worked directly with the customers to prepare ads," and thus CW5 had no further involvement in ValueClick's campaigns. *Id.*

(c) Plaintiffs' Allegations Regarding "Shell" Corporations Fail To Adequately Plead Any Illegality.

Plaintiffs allege that, "[i]n order to conceal the origin of these bogus 'free' offers, CW3 states that ValueClick's Webclients division would set up a 'shell corporation' in Delaware or Nevada for each of its 'free gift and sweepstakes websites." Cmplt., ¶ 47. Plaintiffs do not allege any facts that would explain how CW3, who worked on third-party email platforms for a few months in 2006, had personal knowledge of the corporate structure behind Webclients' websites. Moreover, Plaintiffs offer no reasoning supporting their veiled assertion that there is something illegal in the use of subsidiaries to manage various "free gift" campaigns. *See id.,* ¶ 47. Indeed, nothing in the FTC Act or CAN-SPAM Act renders the use of subsidiaries illegal or requires any "free gift" email to disclose that subsidiary's parent corporations. Nor do Plaintiffs allege that ValueClick somehow violated any state laws in establishing or operating through its subsidiaries.

(d) Plaintiffs' Allegations Concerning Email Opt-Out Requests Fail To Adequately Plead Any Illegality.

In their Consolidated Complaint, Plaintiffs allege that ValueClick "refused to honor explicit requests by users to opt-out of the Company's advertising campaigns" because "the Company made more money from not scrubbing its lists or reporting unsubscribeds to its customers." Cmplt., ¶¶ 39-40. Even the confidential witness statements on which Plaintiffs purport to rely do not support this allegation. Both CW3 and CW4 are alleged to have stated only that ValueClick failed to opt users out of *other campaigns* when they requested to be unsubscribed from one campaign. *See Id.*, ¶¶ 39-40.[5] Plaintiffs' actual claim is that ValueClick "forc[ed] the consumer to

[5] CW4 is alleged to have been a "Media Buyer" who "worked with publishers that ran advertisements for ValueClick customers." Cmplt., ¶ 39, n.4. CW4 is not alleged to have had any involvement in the opt-out process or with ValueClick's email promotions. *Id.*

have to separately attempt to opt-out after receiving each new promotion." *Id.*, ¶ 39 n.4. Plaintiffs do not cite to any federal law or regulation that would require ValueClick to interpret an opt-out of one promotion as an opt-out as to all promotions. Nor is such an interpretation logical. Consumers may opt out of receiving certain offers, yet still desire to be contacted for others.

Nor is it logical to assume that ValueClick would benefit from refusing to unsubscribe customers who chose to opt out of receiving certain offers. Anyone can send bulk e-mail. The advantage that ValueClick offers its customers is the ability to launch targeted campaigns at the demographics most likely to respond. Consumer opt-outs are obviously an essential data point in determining which demographics are most receptive to certain advertisers or offers. Plaintiffs offer no explanation as to how ValueClick would benefit from ignoring this data point and directing its advertising at consumers who have told ValueClick they are not interested.

(e) Plaintiffs' Allegations Regarding Misleading E-Mail Subject Lines Fail To Adequately Plead Any Illegality.

Plaintiffs allege that Defendants "caused ValueClick to initiate email messages with subject headings that were likely to mislead recipients about material facts regarding the contents or subject matter of the message," in violation of Section 5(a)(2) of the CAN-SPAM Act. Cmplt., ¶ 83. Plaintiffs do not identify a single e-mail allegedly sent by ValueClick, much less describe the subject headings and subject matter of any e-mail message purportedly sent by ValueClick.

(f) Plaintiffs' Allegations Regarding "Long Surveys" Fail To Adequately Plead Any Illegality.

Plaintiffs allege that Defendants violated Articles 17, 31 and 38 of the Direct Marketing Association's Guidelines for Ethical Business Practice by using "long surveys to generate email addresses for resale." Cmplt., ¶ 84. Plaintiffs do not elaborate on what is meant by "long surveys;" nor do they explain how ValueClick's

alleged use of "long surveys" violated the Guidelines. None of the cited Articles has anything to do with "long surveys." RJN Ex. 9 at 227, 231-32, 237-38.

4. Plaintiffs Fail To Allege Facts Demonstrating Any Of The Alleged "Illegal Practices" Were Material.

Beyond failing to plead particularized facts establishing the alleged "illegal practices," Plaintiffs fail to plead any facts indicating that the alleged "illegal practices" were material. "[I]n order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant." *Basic, Inc. v. Levinson*, 485 U.S. 224, 238, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988).

Here Plaintiffs fail to plead any facts indicating the alleged omissions pertained to a material fact. There are no allegations concerning when the alleged "illegal practices" began or how long those practices were carried on. Nor are there any allegations concerning what proportion of ValueClick's revenues was attributable to those practices. Plaintiffs allege that that promotion-based lead generation marketing accounted for 30% of Media Segment revenues. Cmplt., ¶ 6. But nowhere does the Consolidated Complaint state how much of that promotion-based lead generation revenue was a result of the allegedly "illegal practices." Indeed, even assuming that the entirety of ValueClick's July 30, 2007 downward revision in earning projections was the direct result of the cessation of the alleged "illegal practices"—and it was not—the minimal size of the revision (from $655-665 million to $645-660 million) effectively demonstrates the alleged practices were quantitatively immaterial.

Plaintiffs allege in the Consolidated Complaint that "Defendants' affirmative misrepresentations and knowing concealment of the willful and ongoing violations of federal law . . . place[d] the business at risk of both serious government sanctions and abandonment by business customers." *Id.*, ¶ 2. The truth is far less interesting. The FTC concluded its inquiry without taking any action or making any allegations against Webclients, the division of ValueClick that is the cornerstone of Plaintiffs allegations.

See, e.g., id., ¶¶ 1, 25-48. Further, Plaintiffs have not identified a single customer who has "abandoned" ValueClick.[6]

B. Plaintiffs' Claims Are Barred By The PSLRA's Statutory "Safe Harbor".

The gravamen of Plaintiffs' claims is that the Defendants painted a rosy picture of ValueClick's ability to continue to generate increasing revenues while concealing from investors the fact that the gravy train would eventually have to come to an end. *See* Cmplt., ¶ 54 ("Defendants concealed from investors that ValueClick's stellar financial performance was due in large part to illegal practices, which when halted (voluntarily or through a regulatory enforcement action), would adversely impact ValueClick's lead generation business, revenues and profits."); *see also id.*, ¶¶ 3, 32, 94. Predictions of future events such as those at issue in this case are protected by the PSLRA's statutory "safe harbor," and therefore are not actionable. *See*, *e.g.*, *In re Clorox Co. Sec. Litig.*, 238 F. Supp. 2d 1139, 1145 (N.D. Cal. 2002) ("a prediction about future events is self-evidently a forward-looking statement"), *aff'd sub nom. Emplrs. Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125 (9th Cir. 2004); *Wet Seal*, 518 F. Supp. 2d at 1169.

The PSLRA's safe harbor applies to a forward-looking statement if (a) the statement is identified as a forward-looking statement and is "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement"; (b) the statement is immaterial; or (c) the plaintiff fails to prove that the statement was made with "actual knowledge" that it was false or misleading. 15 U.S.C. § 78u-5(i)(1). As noted above, Plaintiffs have failed to establish that the alleged false and misleading

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[6] Plaintiffs allege that CW6 "learned from another Account Manager that numerous customers were 'pulling out' of their advertising campaigns with ValueClick." Cmplt., ¶ 87. Such hearsay allegations cannot be considered (*see Zucco,* 445 F. Supp. 2d at 1207*; Trex,* 454 F. Supp. 2d at 573), and are in any event far too vague to satisfy the applicable pleadings standards.

1 statements were material. As set forth below, the first and last prongs of the safe
2 harbor also apply here.

3 **1. The Forward-Looking Statements Were Accompanied By**
4 **Meaningful Cautionary Language.**

5 Every one of the forward-looking statements alleged by Plaintiffs to have been
6 false or misleading was accompanied by meaningful cautionary language that
7 specifically identified various risk factors that could materially affect predicted results.
8 15 U.S.C. § 78u-5. Specifically, each of the public statements identified in Paragraphs
9 58-81 of the Consolidated Complaint was accompanied by cautionary language that
10 referred investors to the risks highlighted in ValueClick's SEC filings, including those
11 spelled out in its SEC Forms 10-K. *See Wet Seal*, 518 F. Supp. 2d at 1169 ("It is also
12 acceptable for a safe harbor provision in a press release or conference call to refer to
13 SEC filings that may contain additional and more specific cautionary language.")
14 (citing *Emplrs. Teamsters*, 353 F.3d at 1132 and 15 U.S.C. § 78u-5(c)(2)(B)(I)). In
15 turn, ValueClick's Form 10-Ks specifically disclosed the risk inherent in the changing
16 statutory and regulatory landscape:

17 > Laws and regulations that apply to Internet communications, commerce
18 > and advertising are becoming more prevalent. These regulations could
19 > affect the costs of communicating on the Web and could adversely affect
20 > the demand for our advertising solutions or otherwise harm our business,
21 > results of operations and financial condition. . . . Other laws and
22 > regulations have been adopted and may be adopted in the future, and
23 > may address issues such as user privacy, spyware, "do not email" lists,
24 > pricing, intellectual property ownership and infringement, copyright,
25 > trademark, trade secret, export of encryption technology, click-fraud,
26 > acceptable content, taxation, and quality of products and services. This
27 > legislation could hinder growth in the use of the Web generally and could

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decrease the acceptance of the Web as a communications, commercial and advertising medium.

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> The laws governing the Internet remain largely unsettled, even in areas where there has been some legislative action. It may take years to determine how existing laws, including those governing intellectual property, privacy, libel and taxation, apply to the Internet and Internet advertising. *Our business, results of operations and financial condition could be materially and adversely affected by the adoption or modification of industry standards, laws or regulations relating to the Internet, or the application of existing laws to the Internet or Internet-based advertising.*

RJN Ex. 6 at 117 (emphasis added). In short, ValueClick warned investors that, although it believed that its practices remained in compliance with then-applicable federal laws and regulations, its ability to generate revenues was not guaranteed and was subject to significant risks, *including the shifting legal standards applicable to various Internet-based advertising practices*. ValueClick warned investors of precisely the risks Plaintiffs now claim—in hindsight—adversely impacted ValueClick's lead generation business. *Compare id. with* Cmplt., ¶ 54.[7]

2. Plaintiffs Fail To Allege "Actual Knowledge."

The standard for pleading scienter with respect to forward-looking statements is even higher than that set forth generally by the PSLRA. Plaintiffs must plead "'in great detail,' 'all the facts' forming the basis for their belief that the defendants made forward-looking statements with *actual knowledge* that they were false." *In re Splash*

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[7] For the same reasons, Plaintiffs' claims concerning ValueClick's earnings projections are barred by the "bespeaks caution" doctrine. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994).

Tech. Holdings Sec. Litig., 160 F. Supp. 2d 1059, 1069 (N.D. Cal. 2001) (quoting *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 983-84 (9th Cir. 1999)) (emphasis added). These detailed allegations must include the specific information defendants allegedly had access to and how and when they gained such knowledge. *Silicon Graphics*, 183 F.3d at 983-84.

Plaintiffs must identify specific documents or communications, their contents, who made or prepared them, and/or who received or reviewed them. *Id.* If Plaintiffs do not meet this standard, the Court is obligated to dismiss the Complaint. *Id.* As set forth in Section II.C. below, Plaintiff's vague and conclusory allegations fail even to meet the lower "deliberate recklessness" scienter standard for statements of historical fact under the PSLRA. The same allegations cannot possibly meet the heightened "actual knowledge" standard required to impose liability under the PSLRA's safe harbor provision.

C. Plaintiffs Fail To Allege Facts That, If True, Would Raise A "Strong Inference" That Any Of The Defendants Acted With Scienter.

Even if Plaintiffs had pleaded adequately the existence of any materially false or misleading statement (and they have not), and even if those statements were not protected by the PSLRA's safe harbor (and they are), the Complaint still is subject to dismissal because Plaintiffs have not pleaded facts that, if true, would demonstrate that any of the defendants made any false or misleading statement with scienter. Under the PSLRA, courts must dismiss any securities fraud complaint that fails to plead "in great detail" that each defendant participated in making false or misleading statements of present or historical fact with at least "deliberate recklessness." *Silicon Graphics*, 183 F.3d at 979; *Wet Seal*, 518 F. Supp. 2d at 1156-57. Accordingly, courts applying the PSLRA's heightened pleading standard have held that plaintiffs must plead particularized "'allegations of specific 'contemporaneous statements or conditions' that demonstrate the intentional or the deliberately reckless false or misleading nature of the statements when made.'" *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 846

(9th Cir. 2003) (citing *Ronconi*, 253 F.3d at 432).

To determine whether plaintiffs have shown a strong inference of scienter, the Court must consider *all* reasonable inferences to be drawn from the allegations, including "plausible nonculpable explanations for the defendant's conduct." *Tellabs, Inc. v. Makor Issues & Rights Ltd.,* --- U.S. ---, 127 S. Ct. 2499, 2510, 168 L. Ed. 2d 179 (2007); *see also Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) (emphasis added); *Emplrs. Teamsters*, 353 F.3d at 1134. Plaintiffs must also allege such facts as to *each* defendant. *See*, *e.g.*, *Wet Seal*, 518 F. Supp. 2d at 1157 ("the Court must also analyze scienter separately for . . . each defendant); *In re Pac. Gateway Exch., Inc. Sec. Litig.,* 169 F. Supp. 2d 1160, 1167 (N.D. Cal. 2001).

Plaintiffs' allegations are so barren of particularity that, whether addressed individually or collectively, they do not give rise to a strong inference of scienter. *Cf. Lipton v. Pathogenesis Corp.*, 284 F. 3d 1027, 1038 (9th Cir. 2002); *Portal S'ware*, 2006 U.S. Dist. LEXIS 61589, at *44. Taken as a whole, it is even more apparent that the Consolidated Complaint amounts to little more than an attempt to plead scienter through repetition or rhetoric. *Cf. In re Nash Finch Co. Sec. Litig.*, 323 F. Supp. 2d 956, 964 (D. Minn. 2004) ("The Court finds the collective minutia offered here adds up to nothing. Just as two plus two will never equal five, these allegations—whether considered apart or together—do not add up to a strong inference of scienter."). And because the Court must consider *all* reasonable inferences to be drawn from the allegations, the Court must consider the significance of the FTC's resolution of its inquiry *without* taking any action against Webclients. *Tellabs,* 127 S. Ct. at 2510.

1. Plaintiffs' Generic Allegations That Zarley And Paisley Had Positions Of Authority At ValueClick Fail To Establish A Strong Inference Of Scienter.

Plaintiffs allege that a strong inference of scienter can be shown by Zarley's and Paisley's positions of authority within the Company. Cmplt., ¶ 93. But the Complaint is devoid of facts giving rise to a strong inference that either Zarley or Paisley knew of

the allegedly illegal lead generation practices or that they in any way approved of those practices. *See Wet Seal*, 518 F. Supp. 2d at 1174 ("Courts have regularly declined to find a strong inference of scienter based on allegations that a particular defendant 'must have known' of information contradicting allegedly false statements because of that individual's position at the company."); *Hansen*, 527 F. Supp. 2d at 1158-59 (finding individual defendants' positions within the company insufficient to establish their knowledge of or involvement in the backdating of stock options).

Instead of alleging such facts, Plaintiffs conclusorily allege that Zarley and Paisley acted with scienter because "individuals who directly reported to them, including Gray and Piotroski, were directly involved in approving the deceptive and unlawful campaigns that placed the Company at risk of government enforcement activities and client abandonment." Cmplt., ¶ 93.[8] However, the Consolidated Complaint offers no particularity regarding what Gray or Piotroski are alleged to have known, or when and how they acquired any such knowledge. Further, Plaintiffs' allegations of reporting relationships are insufficient to establish what — if anything — Zarley or Paisley learned from Gray or Piotroski. There are no allegations of specific conversations, and nothing amounting to "the date on which any such communication occurred, how [Plaintiffs] learned of such a communication, the form in which such contact or communication was had, or specifics concerning information provided or received during such contact." *Hansen*, 527 F. Supp. 2d at 1159 (quoting *Splash Tech.*, 160 F. Supp. 2d at 1079-80).

[8] Plaintiffs attempt to rely on statements attributed to CW3 to imply that Gray and Piotroski were aware of illegal practices at Webclients. *See* Cmplt., ¶¶ 40, 48. As discussed above, Plaintiffs have failed to establish that CW3 would have had personal knowledge of what Gray or Piotroski did or did not know. In any event, none of CW3's statements relate to Zarley or Paisley. *Tripp v. IndyMac Bancorp, Inc.*, Case No. CV 07-1635, 2007 U.S. Dist. LEXIS 95445, at *9, *17 (C.D. Cal. Nov. 29, 2007) (attached as App. D).

Likewise, Plaintiffs allege that Zarley and Paisley must have acted with scienter because "[t]hese defendants were the senior management of the Company and thus at all times were the ones with principal responsibility for ensuring that the Company's statements were accurate and truthful." Cmplt., ¶ 93. "However, the high rank of various Individual Defendants within [the Company] are insufficient, without more, to infer a strong inference of scienter." *Hansen*, 527 F. Supp. 2d at 1159; *see also Wet Seal*, 518 F. Supp. 2d at 1174. Plaintiffs "must do more than allege that . . . key officers had the requisite knowledge by virtue of their 'hands on' positions; a ruling to the contrary would eliminate the necessity for specially pleading scienter as any corporate officer could be said to possess the requisite knowledge by virtue of his or her position." *Hansen*, 527 F. Supp. 2d at 1159 (quoting *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d 833, 844 (N.D. Cal. 2000)).

In short, Plaintiffs' bare-bones allegations that Zarley and Paisley had positions of authority within ValueClick are insufficient to establish an inference of scienter. *Read-Rite*, 335 F.3d at 848-49 ("[t]he existence of a 'reasonable inference' from [a defendant's job duties] does not satisfy the PSLRA's requirement that Plaintiffs allege particular facts that give rise to a 'strong inference' of scienter").

2. Plaintiffs' Allegations Of A "Cover Up" Do Not Give Rise To A Strong Inference Of Scienter.

Plaintiffs also attempt to establish scienter through vague allegations of a "cover up" of the FTC inquiry. Cmplt., ¶¶ 96-97. Plaintiffs allege that, "[o]nly two weeks before announcing the FTC investigation," the Individual Defendants "falsely told investors that the company was 'focused' on and consistently applied industry 'best practices,' specifically referencing the [Direct Marketing Association]." *Id.* ¶ 96.

As an initial matter, Plaintiffs do not identify any specific statements, so it is impossible to tell what Plaintiffs are actually referring to. Nor are any specific facts alleged to suggest that the vaguely described statements attributed to the Individual Defendants were false when made. Further, ValueClick announced the FTC inquiry

on May 18, 2007, only *two days* after receiving the FTC's letter. Cmplt., ¶ 86. Plaintiffs do not explain how statements made approximately two weeks *before* the FTC advised ValueClick of its intent could possibly constitute a "cover up" of the FTC inquiry. *See Yourish v. California Amplifier*, 191 F.3d 983, 997 (9th Cir. 1999).

Plaintiffs also contend that Zarley and Paisley "falsely stated that ValueClick had a legal and compliance team that analyzed and addressed legal and regulatory issues regarding their lead generation practices," and that "[i]n fact, ValueClick had no legal and regulatory compliance team. . . ." *Id.* ¶ 97. These allegations are wholly unsupported by any factual allegations. Plaintiffs complain that "[t]here were no audits concerning legal and regulatory compliance conducted during CW3's tenure" (*id.*), but CW3 is alleged to have been at ValueClick for only a few months and only for the purposes of working with third-party email platforms (*id.* ¶ 36 n.3). Given the limited scope and duration of his employment, his alleged statements cannot establish the lack of a legal and compliance team at ValueClick, or even the lack of an audit, during his short tenure, of any of the practices placed at issue in the Consolidated Complaint. Moreover, the contention that ValueClick had no legal compliance team is contradicted by Plaintiffs' own allegations, elsewhere in the Consolidated Complaint, that ValueClick did have a "Legal Affairs Manager" involved in compliance issues. *Id.* ¶ 40.[9]

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[9] Plaintiffs also allege that "CW6" stated that ValueClick met with and instructed its employees to "tell customers that they did not know about any FTC investigation." Cmplt., ¶ 87. Plaintiffs do not provide any particularized allegations concerning this supposed meeting; there are no allegations of who instructed the employees, or that any employee actually denied the existence of any investigation to customers. Further, while the Consolidated Complaint alleges that CW6 was employed as an "Account Manager" from March 2007 through July 2007, it is silent as to whether CW6 actually attended the alleged meeting, and thus fails to establish a basis for personal knowledge. *See, supra,* Section II.A.3.

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3. Plaintiffs' Insider Trading Allegations Provide No Basis For Any Inference That Any Of The Defendants Acted With Scienter.

Plaintiffs assert that sales of stock by the Individual Defendants support an inference of their scienter. *Id.* ¶¶ 107-109. Sales of stock alone, however, do not raise a strong inference of scienter. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1092 (9th Cir. 2002); *Silicon Graphics*, 183 F.3d at 986. Rather, Plaintiffs bear the burden of pleading facts showing that the Individual Defendants' trading was "dramatically out of line with prior trading practices [and] at times calculated to maximize personal benefit from undisclosed information." *Silicon Graphics*, 183 F.3d at 986; *see also Ronconi*, 253 F.3d at 435. Plaintiffs' allegations fail to meet this pleading standard.

First, the Consolidated Complaint is completely silent as to the Individual Defendants' trading practices prior to the beginning of the class period. Rather, Plaintiffs merely state Zarley's total holdings as of June 2005. Cmplt., ¶ 109. They do not even bother to allege Paisley's holdings as of that time. *Id.* ¶ 108. Because Plaintiffs have alleged nothing concerning the trading history and patterns of the Individual Defendants, there is no way for the Court to determine if the alleged purchases during the class period were "out of line with prior trading practices" or otherwise suspicious or unusual.

Second, ValueClick's judicially noticeable historical stock prices affirmatively demonstrate that the alleged trading by the Individual Defendants was not "calculated to maximize personal benefit from undisclosed information." *Silicon Graphics*, 183 F.3d at 986; *Ronconi*, 253 F.3d at 435. Plaintiffs allege that Paisley sold all but one of his shares on November 6, 2006. Cmplt., ¶ 108. ValueClick's share price on that date was $21.41, 38.8% lower than the class period high closing price of $35.00, and only $0.40 higher than its closing price after the July 30, 2007 announcement. RJN Ex. 11 at 260-61. Indeed, after reviewing ValueClick's stock performance in the period between November 6, 2006 and July 30, 2007, the only possible conclusion is that

Paisley did not act with scienter, because by selling on November 6, 2006, he missed virtually *all* of the alleged inflation in ValueClick's stock price. *See id.* at 260-65.

Likewise, Plaintiffs allege that Zarley sold a large proportion of his stock between June 2005 and November 6, 2006. But again, the timing of the sales suggest they were not made to "maximize personal benefit from undisclosed information." *Silicon Graphics*, 183 F.3d at 1001. ValueClick's share price as of June 13, 2005 (the beginning of the class period) was $10.40, and between that date and November 6, 2006 ValueClick's share price never exceeded $21.41 — the closing price on November 6, 2006. *See* RJN Ex. 11 at 265-76. As with Paisley, the only conclusion is that Zarley's sales between June 13, 2005 and November 6, 2006 could not have been intended to maximize gains from any fraudulent omission, as he too missed virtually all of the alleged inflation in ValueClick's stock price. *See id.* at 260-76.

Third, Plaintiffs have failed to tie any of the alleged insider sales to the alleged omissions. Ostensibly, Plaintiffs are attempting to tie the sales to statements made during ValueClick's November 1, 2006 conference call, but Plaintiffs have not identified how any of those statements were false or misleading when made. In reality, Plaintiffs simply allege an overly lengthy class period, baldly assert that virtually every statement made in that class period was misleading, and then plead, accordingly, that every stock sale made in that period must give rise to a strong inference of scienter. Such shoddy attempts at pleading scienter have been roundly rejected. *See Vantive*, 283 F.3d at 1092; *Hansen*, 527 F. Supp. 2d at 1160.

4. Plaintiffs' "Magnitude And Duration" Allegations Do Not Give Rise To A Strong Inference Of Scienter.

As a general rule, a court should not infer scienter based solely on the magnitude of the alleged fraud. *In re Van Wagoner Funds, Inc.*, 382 F. Supp. 2d 1173, 1187 (N.D. Cal. 2004). "To travel from magnitude of fraud to evidence of scienter, the court must blend hindsight, speculation and conjecture to forge a tenuous chain of inferences: (1) because the magnitude of the fraud was large, conspicuous warning

signs must have existed; (2) these warning signs must have been available to the [defendant] . . . ; (3) these warning signs must have made the fraud obvious and conspicuous to the [defendant]; and therefore (4) the [defendant] must have known of the fraud." *Reiger v. Price Waterhouse Coopers LLP*, 117 F. Supp. 2d 1003, 1013 (S.D. Cal. 2000). Thus, "magnitude of fraud supports an inference of scienter only when the plaintiff pleads specific and detailed facts showing that the magnitude either enhanced the suspiciousness of specifically identified transactions, or made the overall fraud glaringly conspicuous." *Id.*; *see also Van Wagoner*, 382 F. Supp. 2d at 1187.

Plaintiffs' "magnitude and duration" allegations do not support an inference of scienter, because Plaintiffs have failed to plead any facts that might constitute "conspicuous warning signs" sufficient to make the alleged fraud "obvious and conspicuous." *Reiger*, 117 F. Supp. 2d at 1013. Rather than plead any such facts, Plaintiffs attempt to inflate the importance of their allegations by pleading ValueClick's gross revenues *for all operations* for the years ended December 1, 2004 and December 1, 2006. Cmplt., ¶ 94. Plaintiffs' allegations are a red herring. ValueClick's total gross revenues tell this Court nothing about its lead generation practices. Instead, Plaintiffs' own allegations make clear that the supposed effect of the alleged fraud on ValueClick's revenues was miniscule, which at most could have resulted in a downward revision of anticipated fiscal year 2007 earnings from $655 – 665 million to $645 – 660 million. *Id.* ¶ 8. Such a minimal downward revision can hardly establish the supposed "magnitude and duration" of the alleged fraud.

D. Plaintiffs Fail Adequately To Plead Loss Causation.

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005), the Supreme Court held that in order to state a claim for securities fraud, a plaintiff cannot simply allege that the price of the stock was "artificially inflated" at the time the plaintiff purchased it. *Id.* at 347. A plaintiff must set forth allegations that "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." *Id.* Plaintiffs, however, have not set forth

any allegations that can fairly be said to indicate any loss or any causal connection between the alleged fraud and the alleged loss.

1. Plaintiffs Fail To Allege That They Sold Their Shares At A Loss.

Plaintiffs allege *only* that they bought shares of ValueClick at artificially inflated prices. Cmplt., ¶ 36. There is no allegation whatsoever that they sold their shares at a loss. This is precisely the sort of allegation that the Supreme Court held insufficient in *Dura.* 544 U.S. at 346-48, 125 S. Ct. at 1633-34; *see also In re Avista Corp. Sec. Litig.*, 415 F. Supp. 2d 1214, 1219 (E.D. Wash. 2005) (holding that an allegation that the plaintiffs paid an artificially inflated price for the defendant's shares is insufficient to plead loss causation under *Dura*). For this reason alone, Plaintiffs' securities fraud claim fails as a matter of law.

2. Plaintiffs Fail To Allege Any Connection Between The Alleged Misrepresentations And The Decrease In ValueClick's Share Price.

Even if Plaintiffs had sold their shares at a loss, that still would be insufficient to plead loss causation under the PSLRA and *Dura*. As the Supreme Court noted in *Dura*, even when a purchaser sells his shares at a lower price after disclosure of the alleged fraud, that price may not reflect the earlier misrepresentation, but rather will often reflect "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." 544 U.S. at 343. Here, Plaintiffs allege that ValueClick's stock fell when ValueClick reported that second quarter 2007 earnings fell short of earlier forecasts, and that the promotion-based sector took a downturn beginning in late May 2007. Cmplt., ¶ 22. Plaintiffs do not allege any facts that would support the inference that either the failure to meet forecasts or the downturn in the promotion-based sector had *anything* to do with alleged "illegal practices."

To the contrary, changing market dynamics were affecting the promotion-based sector industry-wide. *Id.*, ¶ 90. Indeed, ValueClick's lead generation performance

1 depended on its business and marketing alliances with other companies in the industry.
2 Ex. 6 at 115. Thus, any negative industry effects felt by those business and marketing
3 allies would eventually also be felt by ValueClick. *Id.* Further, major corporate
4 acquisitions in the industry (such as Google's planned acquisition of DoubleClick,
5 announced on April 13, 2007) may have adversely affected ValueClick's ability to
6 generate revenues by increasing competitive pressures—a risk ValueClick disclosed in
7 its 2006 Form 10-K. RJN Ex. 6 at 110, Ex. 8 at 213. The simple fact is there is
8 nothing in Plaintiffs' Consolidated Complaint to suggest the alleged "illegal practices"
9 were the cause of ValueClick's downward revision of earnings projections.

10 **E. Plaintiffs' Controlling Person Liability Claims Fail As A Matter Of Law.**

11 To establish "controlling person" liability under Section 20(a) of the Exchange
12 Act, Plaintiffs must show that (1) a primary violation occurred, and (2) the individual
13 defendants "directly or indirectly" controlled the violator. *See, e.g.*, *Paracor Fin., Inc.*
14 *v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996); *Durham v. Kelly*, 810
15 F.2d 1500, 1503 (9th Cir. 1987). Because the Consolidated Complaint fails to allege
16 that a primary violation occurred, it fails to allege controlling person liability under
17 Section 20(a).

18 **V. CONCLUSION**

19 For all the foregoing reasons, Defendants respectfully request that this Court
20 enter an order dismissing the Consolidated Complaint with prejudice.

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22 DATED: March 21, 2008 GIBSON, DUNN & CRUTCHER LLP

23

24 By: /s/
25 Kevin S. Rosen

26 Attorneys for Defendants ValueClick, Inc.,
27 James R. Zarley and Samuel J. Paisley

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