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9
10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13
14 CARL WALDREP,
15 Plaintiff,

16 v.

17 VALUECLICK, INC., JAMES R.
ZARLEY, and SAMUEL J. PAISLEY
18 Defendants.
19

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

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

13 1. Plaintiffs’ first cause of action for alleged violations of Section 10(b) of
14 the Exchange Act, 15 U.S.C. § 78j(b), fails as a matter of law because Plaintiffs fail to
15 plead fraud with particularity, fail to plead with particularity facts giving rise to a
16 strong inference of scienter, and fail to adequately plead loss causation. Further,
17 Plaintiffs’ first cause of action for alleged violations of Section 10(b) fails because the
18 allegedly false or misleading statements are protected by the Private Securities
19 Litigation Reform Act’s safe harbor for forward-looking information, 15 U.S.C. § 78u-
20 5(i)(1).

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

24 This Motion to Dismiss is based on this Notice of Motion and Motion, the
25 Memorandum of Points and Authorities included herein, Defendants’ Request for
26 Judicial Notice, and Declaration of Michael B. Smith filed concurrently herewith, all
27 further pleadings that will be filed by Defendants herein, the record on file in this
28

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

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

5
6 DATED: March 21, 2008

GIBSON, DUNN & CRUTCHER LLP

7
8 By: _____
9 Kevin S. Rosen

10 Attorneys for Defendants,
11 VALUECLICK, INC., JAMES R. ZARLEY,
12 and SAMUEL J. PAISELY
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I. INTRODUCTION

1
2 Plaintiffs' Consolidated Class Action Complaint for Violations of Federal
3 Securities Laws ("Consolidated Complaint" or "Cmplt.") is a particularly transparent
4 example of the sort of opportunistic "fraud by hindsight" complaint that the PSLRA
5 was designed to prevent. In May of 2007, Defendant ValueClick, Inc. ("ValueClick")
6 announced that the FTC was commencing an inquiry into ValueClick's lead generation
7 activities, including those of ValueClick's Webclients division. Cmplt., ¶ 86. Two
8 months later, when ValueClick announced that it had not met its revenue and earnings
9 guidance for the second quarter (*id.*, ¶ 90), the plaintiff's bar wasted no time in rushing
10 to the courthouse — several copycat actions have since been stayed, dismissed, or
11 consolidated with this action. *See, e.g.*, RJN Exs. 3-5.

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

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

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

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

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

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

1 by having paid “artificially inflated prices” for ValueClick’s securities. Cmplt. ¶ 118.
2 This is precisely the sort of damages allegation that the Supreme Court held
3 insufficient in *Dura. Id.* at 346-48.¹

4 II. SUMMARY OF ALLEGATIONS

5 A. Background

6 ValueClick is one of the world’s largest and most comprehensive online
7 marketing services companies, selling targeted and measurable online advertising
8 campaigns and programs for advertisers and advertising agency customers.

9 ValueClick provides services through four main business segments: Media, Affiliate
10 Marketing, Comparison Shopping and Technology. RJN Ex. 6 at 96. The Media
11 Segment—which accounted for approximately 70% of ValueClick’s revenue in the
12 fiscal year ended December 31, 2006—operated in a number of areas, including
13 promotion-based lead generation marketing, which accounted for less than 30% of
14 Media Segment revenues (*i.e.*, 21% of ValueClick’s revenue) for the quarter ended
15 March 31, 2007. *Id.* at 2-3, 34; Cmplt., ¶ 88.

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

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

26
27 ¹ Plaintiffs’ claims for controlling person liability under Section 20(a) of the
28 Exchange Act fail as a matter of law because the Consolidated Complaint fails to
allege a primary violation of the securities laws.

1 violated either the Federal Trade Commission Act or the CAN-SPAM Act. Cmpl.,
2 ¶ 86; RJN Ex. 7. More specifically, the FTC letter indicated it was investigating
3 certain of ValueClick’s websites that offered free gifts and the manner in which
4 ValueClick directed traffic to those websites. *Id.* at 209. Notably, ValueClick’s stock
5 price actually *increased* after the announcement. *See* RJN Ex. 11 at 261.

6 Two-and-one-half months after it announced the FTC investigation, on July 30,
7 2007, ValueClick announced its earnings for the second quarter of 2007. Cmpl., ¶ 90.
8 That announcement stated that although ValueClick met the low end of its second
9 quarter forecast for earnings per share, revenues and adjusted EBITDA fell below that
10 guidance. *Id.* In its announcement, ValueClick attributed this minor shortfall to a
11 downturn in the performance-based marketing sector that began in late May and
12 became more pronounced in June of 2007. *Id.* As a result of the second quarter
13 shortfall, ValueClick revised its earnings guidance for fiscal year 2007 slightly from
14 \$655 – \$665 million to \$645 – \$660 million. *Id.*

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

1 **B. The Filing of the Consolidated Complaint**

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

5 **C. Plaintiffs' Claims**

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

12 **D. The Confidential Witnesses**

13 The factual allegations in the Consolidated Complaint are predicated almost
14 entirely on statements allegedly made by various confidential witnesses. *See* Cmplt.,
15 ¶¶ 34-48. Plaintiffs attribute to anonymous former employees of ValueClick
16 statements that are supposed to support the conclusion that ValueClick was engaged in
17 "illegal practices" during the Class Period. Plaintiffs have failed to allege facts
18 showing that these confidential witnesses had personal knowledge of the practices they
19 are purported to have discussed with Plaintiffs. To the contrary, it is clear from the
20 allegations in the Consolidated Complaint that most of these individuals did not hold
21 positions at ValueClick that would have made them privy to the facts for which
22 Plaintiffs rely on them. *Id.* Further, the "facts" attributed to the confidential witnesses
23 do not establish any illegal conduct, much less the systemic pattern of illegal conduct
24 required to sustain the theory of fraud set forth in the Consolidated Complaint.

25 **E. The Factual Allegations**

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

1 engaged in practices that violated the FTC Act and the CAN-SPAM Act. Cmplt.,
2 ¶¶ 24-33. Plaintiffs contend that these illegal practices drove the strong performance
3 of ValueClick’s Media segment after the acquisition of Webclients, increasing that
4 segment’s revenue by “nearly 500%” by the end of the Class Period. *Id.* Plaintiffs
5 allege that, by concealing the fact that ValueClick’s strong financial results were
6 premised on Webclients’ “illicit marketing practices,” the Defendants caused
7 ValueClick’s stock to *nearly triple* during the Class Period. *Id.*, ¶ 32 (“the financial
8 picture of the Company painted during the Class Period was a sham.”)

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

16 **1. Allegations Regarding Sweepstakes Campaigns**

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

24 **2. Allegations Regarding Free Gift Offers**

25 Plaintiffs allege that ValueClick’s Webclients division violated federal law by
26 offering consumers “free” gifts in offers that required consumers to make a purchase
27 before they could receive the free gift. Cmplt., ¶¶ 41-48. Plaintiffs do not specify
28

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

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

6 **F. The Allegedly False Statements**

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

16 **G. The “Insider Trades”**

17 Plaintiffs attempt to establish scienter by pointing to the (unremarkable) fact that
18 Defendants Paisley and Zarley² sold shares of ValueClick stock during the two-year
19 class period. Cmplt., ¶¶ 107-109. Plaintiffs do not allege any facts showing that these
20 sales were unusual or inconsistent with prior trading practices. That two senior
21 officers of a company consistently exercised and sold their options as they vested (and
22 as trading windows allowed) is hardly suggestive of ulterior motives.

23 **H. Plaintiffs’ “Damages” Allegations**

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

27
28 ² Plaintiffs’ allegations include shares held in trust for Paisley and Zarley.

1 ValueClick’s press release of July 30, 2007, the prices of ValueClick securities fell
2 dramatically, causing substantial loss to investors.” Cmplt., ¶ 111. After the July 30,
3 2007 announcement, “[b]illions of dollars in market value simply vanished as analysts
4 slashed ValueClick’s stock ratings and the Company’s stock price declined
5 precipitously by 42% from its Class Period high” Cmplt., ¶ 8; *see also id.* ¶ 112.
6 The Consolidated Complaint ignores three critical facts: *First*, ValueClick had already
7 disclosed the FTC investigation more than two months before the July 30, 2007
8 earnings announcement, and ValueClick’s share price actually *rose* after the disclosure
9 of that investigation. *Id.* ¶ 86; RJN Ex. 11 at 261. *Second*, most of the alleged 42%
10 drop in ValueClick’s stock price occurred *prior* to the July 30, 2007 announcement.
11 RJN Ex. 11 at 260-61. *Third*, the revision in earnings projections made in the July 30,
12 2007 announcement was minimal, moving from \$655 – \$665 million to \$645 – \$660
13 million. Cmplt., ¶ 90.

14 III. LEGAL STANDARD

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

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

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

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

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

4 **1. Pleading Under The PSLRA**

5 Under the PSLRA, Plaintiffs must plead with particularity both falsity and
6 scienter. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1084 (9th Cir. 2002). As to
7 falsity, the PSLRA requires Plaintiffs to specify each allegedly false or misleading
8 statement and why each statement is false or misleading. 15 U.S.C. § 78u-4(b)(1). As
9 to scienter, the PSLRA requires Plaintiffs to “state with particularity facts giving rise
10 to a *strong inference* that the defendant acted with the required state of mind.”
11 15 U.S.C. § 78u-4(b)(2) (emphasis added).

12 Because falsity and scienter are generally inferred from the same set of facts, the
13 Ninth Circuit has condensed these pleading requirements into a single inquiry: whether
14 “particular facts in the complaint, taken as a whole, raise a strong inference that
15 defendants intentionally or [with] ‘deliberate recklessness’ made false or misleading
16 statements to investors.” *Roncini v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001) (internal
17 quotations omitted). “Deliberate recklessness” requires “a degree of recklessness that
18 strongly suggests actual intent.” *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970,
19 979 (9th Cir. 1999). Where the pleadings are not sufficiently particularized or where,
20 taken as a whole, they do not raise a “strong inference” of scienter, the complaint must
21 be dismissed. *Roncini*, 253 F.3d at 429; *see also* 15 U.S.C. § 78u-4(b)(3)(A).

22 Finally, the PSLRA requires a court, in determining whether scienter has been
23 adequately pled, to “consider *all* reasonable inferences to be drawn from the
24 allegations, including inferences unfavorable to the plaintiffs.” *Gompper v. VISX, Inc.*,
25 298 F.3d 893, 897 (9th Cir. 2002) (emphasis in original); *see also Tellabs, Inc. v.*
26 *Makor Issues & Rights Ltd.*, --- U.S. --- 127 S. Ct. 2499, 2510, 168 L. Ed. 2d 179
27 (2007) (requiring courts to consider “plausible nonculpable explanations for the
28 defendant’s conduct”).

1 Such pleading tactics are contrary to established Ninth Circuit law. *See Daou*,
2 411 F.3d at 1017 (“A general allegation that the practices at issue resulted in a false
3 report of company earnings is not a sufficiently particular claim of misrepresentation
4 to satisfy Rule 9(b).”) (internal quotations omitted); *see also Wenger v. Lumisys, Inc.*,
5 2 F. Supp. 2d 1231, 1243 (N.D. Cal. 1998) (“Plaintiff[s] merely thro[w] the statements
6 and the alleged ‘true facts’ together in an undifferentiated lump and apparently
7 expec[t] the reader to sort out and pair each statement with a supposedly relevant ‘true
8 fact.’”). This Court recently rejected precisely this sort of pleading. *See In re Hansen*
9 *Natural Corp. Sec. Litig.*, Case No. 527 F. Supp. 2d 1142 (C.D. Cal. 2007) .

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

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

19 In addition to failing to identify any false or misleading statements with
20 particularity, Plaintiffs also fail to allege sufficient facts to show that any of the
21 Individual Defendants was responsible for any of the statements alleged in the
22 Complaint. Rule 9(b) “requires that a plaintiff plead with sufficient particularity
23 attribution of the alleged misrepresentations or omissions to each defendant.”
24 *Sunnyside Dev. Co. v. Opsys Ltd.*, No. C 05-0553 MHP, 2005 U.S. Dist. LEXIS
25 39303, at *12 (N.D. Cal. Aug. 8, 2005) (attached as App. A); *Hansen*, 527 F. Supp. 2d
26 at 1153 (dismissing securities fraud complaint in part because the “there are no specific
27 allegations that [the individual defendants] played any role whatsoever in the
28 preparation or dissemination of any allegedly false statements”). Because the group

1 pleading doctrine can no longer be used to plead securities fraud, Plaintiffs are
2 required to separately plead the fraudulent acts of *each* defendant to satisfy Rule 9(b).
3 *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007); *Hansen*,
4 527 F. Supp. 2d at 1153-54; *accord Southland Sec. Corp. v. INSpire Ins. Solutions*
5 *Inc.*, 365 F.3d 353, 364-65 (5th Cir. 2004) (rejecting the group pleading doctrine and
6 holding “the PSLRA requires the plaintiffs to distinguish among those they sue and
7 enlighten *each defendant* as to his or her particular part in the alleged fraud” (internal
8 quotations omitted)).

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

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

23 Plaintiffs’ entire Complaint turns on the contention that the Defendants failed to
24 disclose that Webclients’ lead generation practices violated federal law. *See* Cmplt.,
25 ¶¶ 2-4, 42-43, 51-73. However, Plaintiffs do not allege — and cannot allege — that
26 Webclients has been charged with the alleged illegal practices. In fact, no court has
27 found that *any* ValueClick subsidiary, division, officer, or director, including either of
28 the Individual Defendants, violated any laws. Nor have Plaintiffs alleged any facts

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

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

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

15 It is well settled that "the federal securities laws do not require a company to
16 accuse itself of wrongdoing." *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367,
17 377 (S.D.N.Y. 2004); *see also, Teledyne*, 849 F. Supp. at 1383; *In re Am. Express Co.*
18 *S'holders Litig.*, 840 F. Supp. 260, 269 (S.D.N.Y. 1993) (noting that the Section 14(a)
19 proxy rules "simply do not require management to accuse itself of antisocial or illegal
20 policies"); *Ciresi v. Citicorp*, 782 F. Supp. 819, 823 (S.D.N.Y. 1991) (stating that "the
21 law does not impose a duty to disclose uncharged, unadjudicated wrongdoing or
22 mismanagement").

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

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

4 BSC’s disclosures of the ongoing DOJ investigation were also consistent
5 with SEC regulations. SEC proxy rules require additional disclosure
6 where a director or executive officer was convicted in a criminal
7 proceeding or is a named subject in a criminal proceeding. But neither of
8 these scenarios was present. And as another district court has noted, the
9 SEC’s proxy disclosures do not require a company’s management to
10 confess guilt to uncharged crimes or to accuse itself of antisocial or illegal
11 policies. . . . There is no reason why a different rule should apply under
12 § 10(b).

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

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

23 **b) Plaintiffs’ Allegations Are Insufficient To Establish Any**
24 **Wrongdoing.**

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

1 Cmplt., ¶¶ 34-48. These statements are not adequately pled and should not be
2 considered by the Court. “[P]ersonal sources of information relied upon in the
3 complaint should be described in the complaint with sufficient particularity to support
4 the probability that a person in the position occupied by the source would possess the
5 information alleged.” *Daou*, 411 F.3d at 1015 . Additionally, “the complaint must
6 contain ‘adequate corroborating details’ to support the inference that the defendants’
7 statements were false.” *Wet Seal*, 518 F. Supp. 2d at 1170 (quoting *Daou*, 411 F.3d at
8 1015-16). Thus, at a bare minimum, Plaintiffs must plead the confidential witness’s
9 job duties and facts explaining how that confidential witness would have been privy to
10 the processes that resulted in the alleged wrongdoing. *Wet Seal*, 518 F. Supp. 2d at
11 1170-71; *see also In re Portal S’ware, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2006
12 U.S. Dist. LEXIS 61589, at *18 (N.D. Cal. Aug. 17, 2006) (attached as App. B)
13 (requiring the plaintiff to plead “specific descriptions of the employee’s relevant duties
14 and responsibilities to evaluate the reliability of their information”). Here, Plaintiffs’
15 allegations concerning each of the “confidential witnesses” fail to establish personal
16 knowledge of the matters allegedly discussed by those persons.

17 **(a) Plaintiffs’ Allegations Regarding “Phony” Sweepstakes**
18 **Campaigns Fail To Adequately Plead Any Illegality.**

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

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

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

7 Plaintiffs also cite hearsay statements attributed to CW3 to the effect that
8 “employees around the Company laughed about how nobody would ever win” a lawn
9 tractor offered in one sweepstakes campaign. Hearsay allegations “do not meet the
10 PSLRA requirement that confidential witnesses’ allegations must be based on personal
11 knowledge.” *Zucco Partners, LLC v. Digimarc Corp.*, 445 F. Supp. 2d 1201, 1207
12 (D. Or. 2006); *see also In re Trex Co. Sec. Litig.*, 454 F. Supp. 2d 560, 573 (W.D. Va.
13 2006) (declining to consider hearsay statements attributed to confidential witness).

14 CW3 is described as a “Data Business Manager” who was only at the company
15 for a few months, and who “had responsibility for all third party email platforms and
16 consulted on internal email platforms.” Cmpl., ¶ 36, n.3. As with CW2, Plaintiffs’
17 allegations do not support the inference that this individual had any personal
18 knowledge of the administration of sweepstakes campaigns during his or her brief stint
19 at ValueClick. Further, the vague statement attributed to CW3 does not support any
20 specific allegation regarding Webclients’ sweepstakes campaigns, and is in any event
21 hearsay. Absent any allegations as to why these “confidential witnesses” would have
22 knowledge of the processes upon which they purportedly comment, this Court simply
23 cannot infer that their job responsibilities conferred any such expertise. *Wet Seal*, 518
24 F. Supp. 2d at 1170-71. Because the allegations in the Consolidated Complaint
25 regarding Webclients’ sweepstakes campaigns are based exclusively on statements
26 attributed to CW2 and CW3, the Court must reject those allegations. *See* Cmpl.,
27 ¶¶ 34-38.

28

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

5 Moreover, Plaintiffs’ allegations are based primarily on unsubstantiated
6 opinions and hearsay from confidential witnesses without personal knowledge of the
7 relevant facts. For example, Plaintiffs rely on the opinion of CW3 (who is not alleged
8 to have had any involvement with free gift offers) that Webclients’ free gift offers
9 were “basically a scam.” Cmplt., ¶ 42. Plaintiffs also purport to base their allegations
10 on a “joke” heard and recounted by CW3. *Id.*, ¶ 46. Similarly, Plaintiffs rely on
11 opinions purportedly expressed by CW2 and CW5⁴ to the effect that the requirements
12 of Webclients’ free gift campaigns were not worth the value of the free gift offered.
13 *See, e.g.*, Cmplt. ¶¶ 44-46. The opinions of anonymous former employees who did not
14 work on the campaigns in question cannot form the basis for allegations in a viable
15 complaint under the PSLRA. *Zucco Partners*, 445 F. Supp. 2d at 1207; *Trex*, 454 F.
16 Supp. 2d at 573.

17 _____
18 [Footnote continued from previous page]

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

24 ⁴ CW5 is alleged to have been an “Account Manager” who “prepared information
25 concerning [new clients’] desired ad campaigns and financial requirements.”
26 Cmplt., ¶ 43 n.6. CW5 is not alleged to have been involved in the administration of
27 Webclients’ campaigns. To the contrary, according to the Consolidated Complaint,
28 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.*

1 (c) **Plaintiffs’ Allegations Regarding “Shell” Corporations**
2 **Fail To Adequately Plead Any Illegality.**

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

15 (d) **Plaintiffs’ Allegations Concerning Email Opt-Out**
16 **Requests Fail To Adequately Plead Any Illegality.**

17 In their Consolidated Complaint, Plaintiffs allege that ValueClick “refused to
18 honor explicit requests by users to opt-out of the Company’s advertising campaigns”
19 because “the Company made more money from not scrubbing its lists or reporting
20 unsubscribes to its customers.” Cmplt., ¶¶ 39-40. Even the confidential witness
21 statements on which Plaintiffs purport to rely do not support this allegation. Both
22 CW3 and CW4 are alleged to have stated only that ValueClick failed to opt users out
23 of *other campaigns* when they requested to be unsubscribed from one campaign. *See*
24 *Id.*, ¶¶ 39-40.⁵ Plaintiffs’ actual claim is that ValueClick “forc[ed] the consumer to

25
26 ⁵ CW4 is alleged to have been a “Media Buyer” who “worked with publishers that
27 ran advertisements for ValueClick customers.” Cmplt., ¶ 39, n.4. CW4 is not
28 alleged to have had any involvement in the opt-out process or with ValueClick’s
email promotions. *Id.*

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

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

14 **(e) Plaintiffs’ Allegations Regarding Misleading E-Mail**
15 **Subject Lines Fail To Adequately Plead Any Illegality.**

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

22 **(f) Plaintiffs’ Allegations Regarding “Long Surveys” Fail To**
23 **Adequately Plead Any Illegality.**

24 Plaintiffs allege that Defendants violated Articles 17, 31 and 38 of the Direct
25 Marketing Association’s Guidelines for Ethical Business Practice by using “long
26 surveys to generate email addresses for resale.” Cmplt., ¶ 84. Plaintiffs do not
27 elaborate on what is meant by “long surveys;” nor do they explain how ValueClick’s
28

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

3 **4. Plaintiffs Fail To Allege Facts Demonstrating Any Of The Alleged**
4 **“Illegal Practices” Were Material.**

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

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

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

1 See, e.g., *id.*, ¶¶ 1, 25-48. Further, Plaintiffs have not identified a single customer who
2 has “abandoned” ValueClick.⁶

3 **B. Plaintiffs’ Claims Are Barred By The PSLRA’s Statutory “Safe Harbor”.**

4 The gravamen of Plaintiffs’ claims is that the Defendants painted a rosy picture
5 of ValueClick’s ability to continue to generate increasing revenues while concealing
6 from investors the fact that the gravy train would eventually have to come to an end.
7 See Cmpl., ¶ 54 (“Defendants concealed from investors that ValueClick’s stellar
8 financial performance was due in large part to illegal practices, which when halted
9 (voluntarily or through a regulatory enforcement action), would adversely impact
10 ValueClick’s lead generation business, revenues and profits.”); see also *id.*, ¶¶ 3, 32,
11 94. Predictions of future events such as those at issue in this case are protected by the
12 PSLRA’s statutory “safe harbor,” and therefore are not actionable. See, e.g., *In re*
13 *Clorox Co. Sec. Litig.*, 238 F. Supp. 2d 1139, 1145 (N.D. Cal. 2002) (“a prediction
14 about future events is self-evidently a forward-looking statement”), *aff’d sub nom.*
15 *Emplrs. Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d
16 1125 (9th Cir. 2004); *Wet Seal*, 518 F. Supp. 2d at 1169.

17 The PSLRA’s safe harbor applies to a forward-looking statement if (a) the
18 statement is identified as a forward-looking statement and is “accompanied by
19 meaningful cautionary statements identifying important factors that could cause actual
20 results to differ materially from those in the forward-looking statement”; (b) the
21 statement is immaterial; or (c) the plaintiff fails to prove that the statement was made
22 with “actual knowledge” that it was false or misleading. 15 U.S.C. § 78u-5(i)(1). As
23 noted above, Plaintiffs have failed to establish that the alleged false and misleading
24

25 ⁶ Plaintiffs allege that CW6 “learned from another Account Manager that numerous
26 customers were ‘pulling out’ of their advertising campaigns with ValueClick.”
27 Cmpl., ¶ 87. Such hearsay allegations cannot be considered (*see Zucco*, 445 F.
28 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
28

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

3 ***

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

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

20 **2. Plaintiffs Fail To Allege “Actual Knowledge.”**

21 The standard for pleading scienter with respect to forward-looking statements is
22 even higher than that set forth generally by the PSLRA. Plaintiffs must plead “in
23 great detail,’ ‘all the facts’ forming the basis for their belief that the defendants made
24 forward-looking statements with *actual knowledge* that they were false.” *In re Splash*
25

26
27 ⁷ For the same reasons, Plaintiffs’ claims concerning ValueClick’s earnings
28 projections are barred by the “bespeaks caution” doctrine. *In re Worlds of Wonder*
Sec. Litig., 35 F.3d 1407, 1413 (9th Cir. 1994).

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

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

14 **C. Plaintiffs Fail To Allege Facts That, If True, Would Raise A “Strong**
15 **Inference” That Any Of The Defendants Acted With Scienter.**

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

1 (9th Cir. 2003) (citing *Ronconi*, 253 F.3d at 432).

2 To determine whether plaintiffs have shown a strong inference of scienter, the
3 Court must consider *all* reasonable inferences to be drawn from the allegations,
4 including “plausible nonculpable explanations for the defendant’s conduct.” *Tellabs,*
5 *Inc. v. Makor Issues & Rights Ltd.*, --- U.S. ---, 127 S. Ct. 2499, 2510, 168 L. Ed. 2d
6 179 (2007); *see also Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002)
7 (emphasis added); *Emplrs. Teamsters*, 353 F.3d at 1134. Plaintiffs must also allege
8 such facts as to *each* defendant. *See, e.g., Wet Seal*, 518 F. Supp. 2d at 1157 (“the
9 Court must also analyze scienter separately for . . . each defendant); *In re Pac.*
10 *Gateway Exch., Inc. Sec. Litig.*, 169 F. Supp. 2d 1160, 1167 (N.D. Cal. 2001).

11 Plaintiffs’ allegations are so barren of particularity that, whether addressed
12 individually or collectively, they do not give rise to a strong inference of scienter. *Cf.*
13 *Lipton v. Pathogenesis Corp.*, 284 F. 3d 1027, 1038 (9th Cir. 2002); *Portal S’ware*,
14 2006 U.S. Dist. LEXIS 61589, at *44. Taken as a whole, it is even more apparent that
15 the Consolidated Complaint amounts to little more than an attempt to plead scienter
16 through repetition or rhetoric. *Cf. In re Nash Finch Co. Sec. Litig.*, 323 F. Supp. 2d
17 956, 964 (D. Minn. 2004) (“The Court finds the collective minutia offered here adds
18 up to nothing. Just as two plus two will never equal five, these allegations—whether
19 considered apart or together—do not add up to a strong inference of scienter.”). And
20 because the Court must consider *all* reasonable inferences to be drawn from the
21 allegations, the Court must consider the significance of the FTC’s resolution of its
22 inquiry *without* taking any action against Webclients. *Tellabs*, 127 S. Ct. at 2510.

23 **1. Plaintiffs’ Generic Allegations That Zarley And Paisley Had Positions**
24 **Of Authority At ValueClick Fail To Establish A Strong Inference Of**
25 **Scienter.**

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

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

8 Instead of alleging such facts, Plaintiffs conclusorily allege that Zarley and
9 Paisley acted with scienter because “individuals who directly reported to them,
10 including Gray and Piotroski, were directly involved in approving the deceptive and
11 unlawful campaigns that placed the Company at risk of government enforcement
12 activities and client abandonment.” Cmplt., ¶ 93.⁸ However, the Consolidated
13 Complaint offers no particularity regarding what Gray or Piotroski are alleged to have
14 known, or when and how they acquired any such knowledge. Further, Plaintiffs’
15 allegations of reporting relationships are insufficient to establish what — if anything
16 — Zarley or Paisley learned from Gray or Piotroski. There are no allegations of
17 specific conversations, and nothing amounting to “the date on which any such
18 communication occurred, how [Plaintiffs] learned of such a communication, the form
19 in which such contact or communication was had, or specifics concerning information
20 provided or received during such contact.” *Hansen*, 527 F. Supp. 2d at 1159 (quoting
21 *Splash Tech.*, 160 F. Supp. 2d at 1079-80).

22
23
24 ⁸ Plaintiffs attempt to rely on statements attributed to CW3 to imply that Gray and
25 Piotroski were aware of illegal practices at Webclients. *See* Cmplt., ¶¶ 40, 48. As
26 discussed above, Plaintiffs have failed to establish that CW3 would have had
27 personal knowledge of what Gray or Piotroski did or did not know. In any event,
28 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).

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

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

18 **2. Plaintiffs’ Allegations Of A “Cover Up” Do Not Give Rise To A**
19 **Strong Inference Of Scienter.**

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

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

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

5 Plaintiffs also contend that Zarley and Paisley “falsely stated that ValueClick
6 had a legal and compliance team that analyzed and addressed legal and regulatory
7 issues regarding their lead generation practices,” and that “[i]n fact, ValueClick had no
8 legal and regulatory compliance team. . . .” *Id.* ¶ 97. These allegations are wholly
9 unsupported by any factual allegations. Plaintiffs complain that “[t]here were no
10 audits concerning legal and regulatory compliance conducted during CW3’s tenure”
11 (*id.*), but CW3 is alleged to have been at ValueClick for only a few months and only
12 for the purposes of working with third-party email platforms (*id.* ¶ 36 n.3). Given the
13 limited scope and duration of his employment, his alleged statements cannot establish
14 the lack of a legal and compliance team at ValueClick, or even the lack of an audit,
15 during his short tenure, of any of the practices placed at issue in the Consolidated
16 Complaint. Moreover, the contention that ValueClick had no legal compliance team is
17 contradicted by Plaintiffs’ own allegations, elsewhere in the Consolidated Complaint,
18 that ValueClick did have a “Legal Affairs Manager” involved in compliance issues.
19 *Id.* ¶ 40.⁹

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23 ⁹ Plaintiffs also allege that “CW6” stated that ValueClick met with and instructed its
24 employees to “tell customers that they did not know about any FTC investigation.”
25 Cmplt., ¶ 87. Plaintiffs do not provide any particularized allegations concerning
26 this supposed meeting; there are no allegations of who instructed the employees, or
27 that any employee actually denied the existence of any investigation to customers.
28 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.

1 **3. Plaintiffs’ Insider Trading Allegations Provide No Basis For Any**
2 **Inference That Any Of The Defendants Acted With Scienter.**

3 Plaintiffs assert that sales of stock by the Individual Defendants support an
4 inference of their scienter. *Id.* ¶¶ 107-109. Sales of stock alone, however, do not raise
5 a strong inference of scienter. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1092
6 (9th Cir. 2002); *Silicon Graphics*, 183 F.3d at 986. Rather, Plaintiffs bear the burden
7 of pleading facts showing that the Individual Defendants’ trading was “dramatically
8 out of line with prior trading practices [and] at times calculated to maximize personal
9 benefit from undisclosed information.” *Silicon Graphics*, 183 F.3d at 986; *see also*
10 *Ronconi*, 253 F.3d at 435. Plaintiffs’ allegations fail to meet this pleading standard.

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

19 *Second*, ValueClick’s judicially noticeable historical stock prices affirmatively
20 demonstrate that the alleged trading by the Individual Defendants was not “calculated
21 to maximize personal benefit from undisclosed information.” *Silicon Graphics*, 183
22 F.3d at 986; *Ronconi*, 253 F.3d at 435. Plaintiffs allege that Paisley sold all but one of
23 his shares on November 6, 2006. *Cmplt.*, ¶ 108. ValueClick’s share price on that date
24 was \$21.41, 38.8% lower than the class period high closing price of \$35.00, and only
25 \$0.40 higher than its closing price after the July 30, 2007 announcement. RJN Ex. 11
26 at 260-61. Indeed, after reviewing ValueClick’s stock performance in the period
27 between November 6, 2006 and July 30, 2007, the only possible conclusion is that
28

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

3 Likewise, Plaintiffs allege that Zarley sold a large proportion of his stock
4 between June 2005 and November 6, 2006. But again, the timing of the sales suggest
5 they were not made to “maximize personal benefit from undisclosed information.”
6 *Silicon Graphics*, 183 F.3d at 1001. ValueClick’s share price as of June 13, 2005 (the
7 beginning of the class period) was \$10.40, and between that date and November 6,
8 2006 ValueClick’s share price never exceeded \$21.41 — the closing price on
9 November 6, 2006. *See RJN Ex. 11* at 265-76. As with Paisley, the only conclusion is
10 that Zarley’s sales between June 13, 2005 and November 6, 2006 could not have been
11 intended to maximize gains from any fraudulent omission, as he too missed virtually
12 all of the alleged inflation in ValueClick’s stock price. *See id.* at 260-76.

13 *Third*, Plaintiffs have failed to tie any of the alleged insider sales to the alleged
14 omissions. Ostensibly, Plaintiffs are attempting to tie the sales to statements made
15 during ValueClick’s November 1, 2006 conference call, but Plaintiffs have not
16 identified how any of those statements were false or misleading when made. In reality,
17 Plaintiffs simply allege an overly lengthy class period, baldly assert that virtually every
18 statement made in that class period was misleading, and then plead, accordingly, that
19 every stock sale made in that period must give rise to a strong inference of scienter.
20 Such shoddy attempts at pleading scienter have been roundly rejected. *See Vantive*,
21 283 F.3d at 1092; *Hansen*, 527 F. Supp. 2d at 1160.

22 **4. Plaintiffs’ “Magnitude And Duration” Allegations Do Not Give Rise**
23 **To A Strong Inference Of Scienter.**

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

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

9 Plaintiffs’ “magnitude and duration” allegations do not support an inference of
10 scienter, because Plaintiffs have failed to plead any facts that might constitute
11 “conspicuous warning signs” sufficient to make the alleged fraud “obvious and
12 conspicuous.” *Reiger*, 117 F. Supp. 2d at 1013. Rather than plead any such facts,
13 Plaintiffs attempt to inflate the importance of their allegations by pleading
14 ValueClick’s gross revenues *for all operations* for the years ended December 1, 2004
15 and December 1, 2006. Cmplt., ¶ 94. Plaintiffs’ allegations are a red herring.
16 ValueClick’s total gross revenues tell this Court nothing about its lead generation
17 practices. Instead, Plaintiffs’ own allegations make clear that the supposed effect of
18 the alleged fraud on ValueClick’s revenues was miniscule, which at most could have
19 resulted in a downward revision of anticipated fiscal year 2007 earnings from \$655 –
20 665 million to \$645 – 660 million. *Id.* ¶ 8. Such a minimal downward revision can
21 hardly establish the supposed “magnitude and duration” of the alleged fraud.

22 **D. Plaintiffs Fail Adequately To Plead Loss Causation.**

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

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

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

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

12 **2. Plaintiffs Fail To Allege Any Connection Between The Alleged**
13 **Misrepresentations And The Decrease In ValueClick’s Share Price.**

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

27 To the contrary, changing market dynamics were affecting the promotion-based
28 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.

21
22 DATED: March 21, 2008

GIBSON, DUNN & CRUTCHER LLP

23
24 By: _____
Kevin S. Rosen

25
26 Attorneys for Defendants ValueClick, Inc.,
James R. Zarley and Samuel J. Paisley

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