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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GERAWAN FARMING, INC.,  
Plaintiff,  
vs.  
REHRIG PACIFIC COMPANY,  
Defendant.

CASE NO. 1:11-cv-01273 LJO BAM  
ORDER ON DEFENDANT’S MOTION TO  
DISMISS  
(Doc. 11)

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Now pending before the Court is Defendant Rehrig Pacific Company’s (“Rehrig’s”) motion to dismiss. Plaintiff Gerawan Farming, Inc. (“Gerawan”) has filed an opposition, and Rehrig has filed a reply. Upon consideration of the parties’ submissions and the record in this case, the Court GRANTS IN PART and DENIES IN PART the motion to dismiss.

**I. BACKGROUND**  
**A. Factual Background**

Gerawan is in the business of producing and distributing fresh produce. In 1993, Gerawan and Rehrig, a manufacturer of plastic-molded containers for industrial use, reached an agreement to patent, manufacture, and sell the “Harvest Tote,” a container for holding stone fruits such as peaches during harvesting. The agreement (“the Harvest Tote Agreement”) provided that (1) Gerawan’s founder, Ray Gerawan,<sup>1</sup> would provide the initial design for the Harvest Tote; (2) Gerawan would share in the cost of patenting the Harvest Tote; (3) the patent claims related to the Harvest Tote would be jointly owned;

\_\_\_\_\_ <sup>1</sup> Ray Gerawan’s relevant interests are assigned to Gerawan. (Doc. 1, Compl., ¶ 20.)

1 (4) Rehrig would be granted an exclusive license to sell the Harvest Tote; and (5) Rehrig would pay  
2 royalties to Gerawan from sales of the Harvest Tote.

3 During the parties' collaboration on the Harvest Tote in 1993, Rehrig filed a patent application  
4 for U.S. Patent No. 5,415,293, entitled "Grape Lug" ("the '293 Patent"). The '293 Patent relates to a  
5 container used for harvesting, storing, and transporting grapes. Among other characteristics, the '293  
6 Patent includes patent claims for "the configuration of eight side columns and an upper portion, which  
7 is recessed, in contrast with a lower portion, which has a doubling of material[,] which is characteristic  
8 of the Harvest Tote." (Doc. 1, Compl., ¶ 12.) The '293 Patent, however, does not name Ray Gerawan  
9 as a co-inventor of the Grape Lug.

10 Some time in 2001, Rehrig discontinued making royalty payments to Gerawan for sales of the  
11 Harvest Tote. At that time, Gerawan was under the impression that the payments were discontinued  
12 because sales of the Harvest Tote had fallen to the point where no royalty payments were warranted.  
13 However, in 2008 Gerawan discovered that Rehrig had made significant sales of the Harvest Tote for  
14 several years without paying Gerawan royalties. Gerawan also discovered that Rehrig developed and  
15 claimed exclusive ownership of a new container for produce ("the Second Generation Harvest Tote"),  
16 which appears to have been derived from the design of the Harvest Tote.

### 17 **B. Procedural History**

18 Gerawan initiated this action on July 29, 2011. In its complaint, Gerawan asserts eight causes  
19 of action: (1) correction of inventorship under 35 U.S.C. § 256; (2) conversion; (3) unfair competition  
20 in violation of California Business and Professional Code Section 17200 *et seq.*; (4) unjust enrichment;  
21 (5) concealment; (6) false promise; (7) unfair competition in violation of 15 U.S.C. § 1125(a); and (8)  
22 accounting. On December 9, 2011, Rehrig filed the instant motion to dismiss pursuant to Federal Rule  
23 of Civil Procedure 12(b)(6). In response, Gerawan filed an opposition on January 3, 2012, and Rehrig  
24 filed a reply on January 17, 2012. This matter was deemed suitable for decision without oral argument  
25 pursuant to Local Rule 230(g).

## 26 **II. LEGAL STANDARD**

27 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is a challenge to the  
28 legal sufficiency of a claim presented in the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.

1 2001). Where there is a “lack of a cognizable legal theory” or an “absence of sufficient facts alleged  
2 under a cognizable legal theory,” dismissal under Rule 12(b)(6) is proper. Balistreri v. Pacifica Police  
3 Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

4 To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain “enough facts to  
5 state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570  
6 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court  
7 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v.  
8 Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). While “[t]he plausibility standard is not akin  
9 to a ‘probability requirement,’ . . . it asks for more than a sheer possibility that a defendant has acted  
10 unlawfully.” Id. (quoting Twombly, 550 U.S. at 556). Naked assertions, “labels and conclusions,” or  
11 “a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555.  
12 See Iqbal, 129 S. Ct. at 1949 (“Threadbare recitals of the elements of a cause of action, supported by  
13 mere conclusory statements, do not suffice.”).

14 In deciding a motion to dismiss under Rule 12(b)(6), the court accepts the factual allegations of  
15 the complaint as true and construes the pleadings in the light most favorable to the party opposing the  
16 motion. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, the court may  
17 disregard allegations that are contradicted by matters properly subject to judicial notice or by exhibit.  
18 Id. The court may also disregard allegations that are “conclusory” or are the product of unreasonable  
19 deductions and inferences. Id. Finally, if the court concludes that dismissal under Rule 12(b)(6) is  
20 warranted, the court should not dismiss the complaint “unless it determines that the pleading could not  
21 possibly be cured by the allegation of other facts.” Cook, Perkiss & Liehe, Inc. v. Northern California  
22 Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990).

### 23 **III. DISCUSSION**

#### 24 **A. Federal Claims**

##### 25 **1. Correction of Inventorship**

26 Gerawan claims that its founder, Ray Gerawan, was omitted as a co-inventor of the ‘293 Patent  
27 and therefore seeks a court order correcting the issued patent. Rehrig argues that this claim should be  
28 dismissed because Gerawan has failed to allege facts sufficient to show that Ray Gerawan contributed

1 in a significant manner to the conception of the '293 Patent such that he should be named a co-inventor  
2 in the issued patent.

3 The issuance of a patent “creates a presumption that the named inventors are the true and only  
4 inventors.” Ethicon, Inc. v. United States Surgical Corp., 135 F.3d 1456, 1460 (Fed. Cir. 1998) (citing  
5 Hess v. Advanced Cardiovascular Sys., 106 F.3d 976, 980 (Fed. Cir. 1997)). However, if an inventor  
6 is not named in an issued patent through error and without any deceptive intention on his part, a court  
7 may order correction of the patent. See 35 U.S.C. § 256; Fina Oil & Chem. Co. v. Ewen, 123 F.3d 1466,  
8 1471 (Fed. Cir. 1997). A court may correct either a misjoinder (the patent names a person who is not  
9 an inventor) or a nonjoinder (the patent omits the name of a person who is an inventor). See Stark v.  
10 Advanced Magnetics, 119 F.3d 1551, 1553 (Fed. Cir. 1997).

11 “Conception is the touchstone” in determining inventorship. Burroughs Wellcome Co. v. Barr  
12 Laboratories, Inc., 40 F.3d 1223, 1227 (Fed. Cir. 1994). Conception is the “formation in the mind of  
13 the inventor[] of a definite and permanent idea of the complete and operative invention[.]” Id. (citation  
14 and internal quotation marks omitted). To be a joint inventor, an individual must “contribute in some  
15 significant manner to the conception of the invention.” Fina Oil & Chem., 123 F.3d at 1473. “[M]erely  
16 assisting the actual inventor after conception of the claimed invention;” providing the actual inventor  
17 well-known principles or state of the art without having a definite idea of the claimed combination as  
18 a whole; or “reducing the [actual] inventor’s idea to practice” through ordinary skill in the art does not  
19 give rise to a claim for joint inventorship. Ethicon, 135 F.3d at 1460.

20 A joint inventor need not make a contribution to the conception of every claim of a patent, nor  
21 even the same amount of contribution as another inventor. See 35 U.S.C. § 116. Rather, each inventor  
22 need only “perform . . . a part of the task which produces the invention.” Ethicon, 135 F.3d at 1460.  
23 “A contribution to one claim is enough.” Id. at 1461 (citation omitted). Thus, in the end, “the critical  
24 question for joint conception is who conceived, as that term is used in the patent law, the subject matter  
25 of the claims at issue.” Id.

26 The patent claims at issue in this case pertain to the walls of the Grape Lug, specifically “the  
27 configuration of eight side columns and an upper portion, which is recessed, in contrast with a lower  
28 portion, which has a doubling of material[.]” (Doc. 1, Compl., ¶ 12.) Gerawan alleges that these claims

1 are “characteristic” of the Harvest Tote, which Ray Gerawan provided the “initial design” for as part of  
2 the Harvest Tote Agreement. (Id. ¶¶ 9, 12.) Gerawan notes that only after Rehrig received the design  
3 for the Harvest Tote did it file its patent application for the ‘293 Patent. When viewed in the light most  
4 favorable to Gerawan, these facts suggest that Ray Gerawan conceived the distinct wall construction as  
5 part of his work on the Harvest Tote and this distinct construction was incorporated in the claims of the  
6 ‘293 Patent. This gives rise to a facially plausible claim for correction of inventorship under 35 U.S.C.  
7 § 256. Accordingly, Rehrig’s motion to dismiss is DENIED with respect to this claim.

## 8                           2.           **Unfair Competition Under the Lanham Act**

9           Gerawan claims that Rehrig’s conduct constitutes a false designation of origin, affiliation, or  
10 sponsorship in violation of the Lanham Act, 15 U.S.C. § 1125(a). Specifically, Gerawan claims that  
11 Rehrig falsely and wrongfully suggested that it is the sole inventor or source of the Harvest Tote and the  
12 Second Generation Harvest Tote. Rehrig counters that Gerawan’s allegations fail to state a cognizable  
13 claim under the Lanham Act.

14           Section 1125(a) provides, in relevant part:

15           (1) Any person who, on or in connection with any goods or services, or any container for  
16 goods, uses in commerce any word, term, name, symbol, or device, or any combination  
17 thereof, or any false designation of origin, false or misleading description of fact, or false  
18 or misleading representation of fact, which—

18           (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,  
19 connection, or association of such person with another person, or as to the origin,  
20 sponsorship, or approval of his or her goods, services, or commercial activities by  
21 another person . . .

22   \* \* \*

21           shall be liable in a civil action by any person who believes that he or she is or is likely  
22 to be damaged by such act.

23           Simply put, § 1125(a) “makes a person liable for using a false description of origin in connection with  
24 any goods or services put into commerce.” Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984).  
25 Its central purpose is to “protect consumers against deceptive designations of the origin of goods, and  
26 conversely, to enable producers to differentiate their products from those of others.” Int’l Order of Job’s  
27 Daughters v. Lindeburg & Co., 633 F.2d 912, 918 (9th Cir. 1980).

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1 The essence of Gerawan’s claim here is that Rehrig made false descriptions of origin when it  
2 used Ray Gerawan’s design for the Harvest Tote but failed to credit Ray Gerawan as a joint inventor or  
3 source of origin of the Harvest Tote or the Second Generation Harvest Tote. This theory of liability,  
4 however, relies on an incorrect construction of the word “origin” as it is used in § 1125(a). “Origin of  
5 goods” refers to the producer of the tangible goods offered to consumers for sale, not the inventor or  
6 creator of the patentable designs that the goods embody. See Dastar Corp., v. Twentieth Century Fox  
7 Film Corp., 539 U.S. 23, 31-32, 37 (2003). As the Supreme Court explained:

8 [Section 1125(a)] of the Lanham Act prohibits actions like trademark infringement that  
9 deceive consumers and impair a producer’s goodwill. It forbids, for example, the  
10 Coca-Cola Company’s passing off its product as Pepsi-Cola or reverse passing off  
11 Pepsi-Cola as its product. But the brand-loyal consumer who prefers the drink that the  
12 Coca-Cola Company or PepsiCo sells, while he believes that that company produced (or  
13 at least stands behind the production of) that product, surely does not necessarily believe  
14 that that company was the “origin” of the drink in the sense that it was the very first to  
15 devise the formula. *The consumer who buys a branded product does not automatically*  
16 *assume that the brand-name company is the same entity that came up with the idea for*  
17 *the product, or designed the product--and typically does not care whether it is. The*  
18 *words of the Lanham Act should not be stretched to cover matters that are typically of*  
19 *no consequence to purchasers.*

20 Id. at 32-33 (emphasis added). Here, it is clear that Rehrig produced the Harvest Tote and the Second  
21 Generation Harvest Tote. Therefore, any claim that Gerawan should have been identified as a source  
22 of origin of those goods must fail.

23 Gerawan’s reliance on this Court’s decision in GNI Waterman LLC v. A/M Valve Co., LLC,  
24 Case No. CV F07-0863 LJO TAG, 2007 U.S. Dist. LEXIS 68715 (E.D. Cal. Sept. 7, 2007) is misplaced.  
25 In GNI Waterman, the plaintiff and the defendant were direct competitors in the production and sale of  
26 irrigation canal gates. The plaintiff alleged that the defendant misappropriated the plaintiff’s product  
27 design patterns to create canal gates that were identical to plaintiff’s in every material respect yet sold  
28 under the defendant’s name. Based on these allegations, this Court concluded that the plaintiff stated  
a cognizable claim under § 1125(a).

The claim in GNI Waterman rested on a theory of “reverse palming off,” which is actionable  
under § 1125(a). See Smith v. Montoro, 648 F.2d 602, 605-06 (9th Cir. 1981). Reverse palming off  
generally occurs when the wrongdoer takes another party’s product, removes the party’s trademark or  
name as the origin of source, and sells the product under the wrongdoer’s own name. See Lamothe v.

1 Atlantic Recording Corp., 847 F.2d 1403, 1406 (9th Cir. 1988). In concluding that the plaintiff stated  
2 a claim for reverse palming off, this Court reasoned that appropriating a competitor's design pattern for  
3 the purpose of recreating identical products to be sold under one's own name is essentially the same as  
4 taking a competitor's product, removing the party's name as the origin of source, and selling it under  
5 the defendant's name. See GNI Waterman, 2007 U.S. Dist. LEXIS 68715, at \*10-13. Both scenarios  
6 implicated the central purpose of § 1125(a): the protection of consumers from deceptive designations  
7 of the origin of goods and enabling producers to differentiate their products from those of others. See  
8 Int'l Order of Job's Daughters, 633 F.2d at 918.

9 Those circumstances are absent here. Gerawan produces no products or services related to the  
10 Harvest Tote or the Second Generation Harvest Tote for consumers. It is simply a patent co-owner. As  
11 such, the central ingredient for a reverse palming off claim is missing: the confusion of consumers by  
12 one party taking the *products or services* of another and representing them as its own. Accordingly, this  
13 claim is DISMISSED. Furthermore, because amendment of this claim would be futile, it is dismissed  
14 without leave to amend.

## 15 **B. State Law and Common Law Claims**

16 Rehrig moves to dismiss Gerawan's state law and common law claims on the grounds that the  
17 claims are insufficiently pled, are not cognizable, are preempted by federal patent law, and are time-  
18 barred. The Court first addresses whether Gerawan alleges a cognizable claim for (1) conversion; (2)  
19 false promise; (3) fraudulent concealment; (4) unjust enrichment; (5) unfair competition under Section  
20 17200; and (6) accounting. The Court then discusses whether these claims are time-barred under the  
21 relevant statutes of limitations.

### 22 **1. Conversion**

23 Gerawan claims that Rehrig (a) withheld royalty payments due from sales of the Harvest Tote  
24 and the Second Generation Harvest Tote; and (b) wrongfully exercised control over Gerawan's interest  
25 in the '293 Patent. In its motion to dismiss, Rehrig argues that Gerawan's allegations regarding unpaid  
26 royalties give rise to a breach of contract, not conversion, and that in any event, unspecific amounts of  
27 money cannot be the subject of a claim for conversion. With respect to the '293 Patent, Rehrig argues  
28 that Gerawan's claim is preempted by federal patent law.

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**a. Royalty Payments**

“A conversion occurs where the defendant wrongfully exercises dominion over the property of another.” Bank of New York v. Fremont General Corp., 523 F.3d 902, 914 (9th Cir. 2008) (citations omitted). In California, the elements of a claim for conversion are: (1) the plaintiff’s ownership or right to possession of property at the time of the conversion; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages. Plummer v. Day/Eisenberg, LLP, 184 Cal. App. 4th 38, 45 (Ct. App. 2010).

Although “[n]either legal title nor absolute ownership of the property [at issue] is necessary” to maintain a claim for conversion, “a mere contractual right of payment, without more, will not suffice.” Farmers Ins. Exchange v. Zerlin, 53 Cal. App. 4th 445, 452 (Ct. App. 1997). For example, in Imperial Valley Land Co. v. Globe Grain & Milling Co., 187 Cal. 352 (1921), landowners brought a claim for conversion against cotton growers for breaking a lease agreement that required the growers to tender one-fourth of their crop as rent. The California Supreme Court rejected the claim, reasoning that the lease did not give the landowners any property interest in the cotton crop itself because it did not give title to nor create a lien upon the crop. Id. at 353-54. Rather, the one-fourth amount simply represented the rental rate, which the growers failed to pay. Id. at 354. This gave rise to an ordinary debt, not a claim for conversion. Id.

In this case, there is nothing to suggest that the royalty payments due to Gerawan amounted to anything more than a contractual right to payment. Gerawan does not allege that it had an ownership interest in, or the right to immediate possession of, the *specific* proceeds from the sales of the Harvest Tote and the Second Generation Harvest Tote. Cf. Weiss v. Marcus, 51 Cal. App. 3d 590, 599 (Ct. App. 1975) (where an attorney has a secured interest in settlement proceeds by way of an attorney’s lien, he may proceed with a claim for conversion when another person exercises dominion over the proceeds). Rather, Gerawan simply alleges that under the Harvest Tote Agreement, Rehrig agreed to pay certain royalties based on sales of the Harvest Tote.<sup>2</sup> This allegation, when combined with the allegation that Rehrig failed to pay royalties to Gerawan after 2001, gives rise to a debt and a breach of contract, not

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<sup>2</sup> It is unclear on what basis Gerawan claims to be entitled to royalty payments for sales of the Second Generation Harvest Tote. Presumably, Gerawan asserts that under the Harvest Tote Agreement, Gerawan is entitled to royalties on any iteration of the Harvest Tote.



1 a claim for conversion.

2 Moreover, “[m]oney cannot be the subject of a cause of action for conversion unless there is a  
3 specific, identifiable sum involved[.]” PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil &  
4 Shapiro, LLP, 150 Cal. App. 4th 384, 395 (Ct. App. 2007). Here, Gerawan fails to identify a specific  
5 sum of money that Rehrig allegedly converted. The general allegation that Rehrig failed to pay certain  
6 royalties over the span of almost ten years does not sufficiently identify a specific sum of money. See  
7 Vu v. California Commerce Club, Inc., 58 Cal. App. 4th 229, 235 (Ct. App. 1997) (“[A] generalized  
8 claim for money [is] not actionable as conversion.”); Software Design & Application, Ltd. v. Hoefer &  
9 Arnett, Inc., 49 Cal. App. 4th 472, 485 (Ct. App. 1996) (no conversion claim where money was allegedly  
10 misappropriated by the defendant “over time, in various sums, [and] without any indication that it was  
11 held in trust for” the plaintiffs).

12 Accordingly, for all these reasons, Gerawan’s claim for conversion regarding unpaid royalties  
13 is DISMISSED with leave to amend.

14 **b. The ‘293 Patent**

15 State law claims that frustrate the objectives embodied in the federal patent scheme are subject  
16 to conflict preemption. See Ultra-Precision Mfg. v. Ford Motor Co., 411 F.3d 1369, 1378 (Fed. Cir.  
17 2005). Thus, in a patent case, federal preemption occurs whenever a state law impermissibly attempts  
18 to provide patent-like protection to subject matter addressed by federal patent law. See Bonito Boats  
19 v. Thunder Craft Boats, 489 U.S. 141, 156-57, 168 (1989); Dow Chemical Co. v. Exxon Corp., 139 F.3d  
20 1470, 1473 (Fed. Cir. 1998).

21 In the specific context of a conversion claim, courts have differentiated between claims that are  
22 dependent on a determination of patent inventorship or ownership and those that are based on a non-  
23 patent theory of conversion. Claims that are dependent on a determination of patent inventorship or  
24 ownership, such as a misappropriation of patent rights, are generally preempted by federal patent law.  
25 See Smith v. Healy, 744 F. Supp. 2d 1112, 1130 (D. Or. 2010) (“Plaintiffs’ proposed conversion claim  
26 does not concern Plaintiffs’ tangible property but rather their intangible idea . . . therefore . . . Plaintiffs’  
27 proposed conversion claim would be preempted by [federal] patent law.”). In contrast, claims that can  
28 be established without reference to patent inventorship or ownership are generally not preempted by

1 federal patent law. See HIF Bio, Inc. v. Yung Shin Pharms. Industrial Co., 600 F.3d 1347, 1354 (Fed.  
2 Cir. 2010) (suggesting that plaintiffs could establish a conversion claim not preempted by federal law  
3 by basing their claim on defendants’ alleged misappropriation of experiments, experimental data, and  
4 non-public drafts of papers).

5 Here, Gerawan alleges that “[Rehrig] substantially interfered with Gerawan’s rightful property  
6 by omitting Ray Gerawan as an inventor” and as such, “wrongfully exercised control over Gerawan’s  
7 rights in . . . the ‘293 Patent[.]” (Doc. 1, Compl., ¶¶ 25-26.) In other words, Gerawan claims that Rehrig  
8 misappropriated Gerawan’s patent rights. Such a claim is preempted by federal patent law. See GE v.  
9 Wilkins, 1:10-cv-0674-OWW-JLT, 2011 U.S. Dist. LEXIS 81479, at \*26-28 (E.D. Cal. 2010) (finding  
10 conversion claim preempted where the counter claimant alleged that the counter defendant wrongfully  
11 interfered with counter claimant’s ownership interest as an inventor in certain patents). Accordingly,  
12 Gerawan’s claim for conversion regarding its “ownership interest” in the ‘293 Patent is DISMISSED  
13 with leave to amend.

## 14 2. False Promise

15 Gerawan claims that Rehrig falsely promised that patent claims derived from the Harvest Tote  
16 would be jointly owned. Rehrig moves to dismiss this claim on the ground that Gerawan has failed to  
17 allege facts with specificity regarding the alleged false promise. Rehrig takes particular issue with the  
18 absence of facts showing that Rehrig knew the alleged promise was false or misleading at the time the  
19 promise was allegedly made.

20 A false promise is defined as “[a] promise, made without any intention of performing it.” Cal.  
21 Civ. Code § 1710. In California, a cause of action may lie where a defendant uses a false promise to  
22 fraudulently induce the plaintiff into entering a contract. Lazar v. Superior Court, 12 Cal. 4th 631, 638  
23 (1996). To establish such a claim, the plaintiff must show: (1) the defendant made a promise; (2) the  
24 defendant knew the promise was false at the time it was made; (3) the defendant intended to induce the  
25 plaintiff’s reliance; (4) the plaintiff actually and justifiably relied on the promise; and (5) the plaintiff  
26 suffered damages as a result of his reliance on the promise. See Engalla v. Permanente Med. Group,  
27 Inc., 15 Cal. 4th 951, 973-74 (1997).

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1 A claim for false promise is grounded in fraud and thus is subject to the heightened pleading  
2 standard of Federal Rule of Civil Procedure 9(b). See Vess v. Ciba-Geity Corp. USA, 317 F.3d 1097,  
3 1103-04 (9th Cir. 2003) (explaining that state claims based on fraud are subject to Rule 9(b)). Under  
4 Rule 9(b), a defendant’s state of mind may be “alleged generally,” but the circumstances constituting  
5 fraud must be pled with “particularity.” Fed. R. Civ. P. 9(b). In other words, the party claiming fraud  
6 must set forth facts such “as the times, dates, places, benefits received, and other details of the alleged  
7 fraudulent activity.” Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993). It is insufficient for the  
8 party claiming fraud to simply identify a transaction and allege that it was fraudulent in a conclusory  
9 manner. See In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), superceded  
10 by statute on other grounds. The purpose of Rule 9(b) is to protect defendants from factually baseless  
11 claims of fraud inasmuch as it is meant to provide defendants notice of the claims against them. See  
12 Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009).

13 The allegations regarding Gerawan’s claim for false promise are sparse. Gerawan alleges that  
14 “in or around 1993” it reached an agreement with Rehrig in which, among other things, it promised  
15 Gerawan that patent claims related to the Harvest Tote would be jointly owned. (Doc. 1, Compl., ¶¶ 9-  
16 10.) Gerawan goes on to suggest that Rehrig had no intention of keeping this promise, as demonstrated  
17 by the fact that soon after, Rehrig omitted Ray Gerawan from the ‘293 Patent which includes “one or  
18 more claims to which Ray Gerawan made an inventive contribution [to]” in connection with his work  
19 on the Harvest Tote. (Id. ¶ 12.)

20 Without more, these allegations fall short of satisfying the “particularity” requirement of Rule  
21 9(b). Absent are specific details regarding where and on what date the parties reached the agreement;  
22 who was involved in the negotiation of the agreement; who made the promise regarding joint ownership  
23 of the patent claims; what was the exact promise made; in what context was the promise made; and why  
24 was the promise so important to Gerawan in reaching the agreement. The heightened pleading standard  
25 of Rule 9(b) requires at least this much.<sup>3</sup> See Vess, 317 F.3d at 1106 (“Averments of fraud must be  
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27 <sup>3</sup> Gerawan need not, however, allege with particularity why Rehrig’s promise was false at the time it was made, as  
28 Rehrig argues Gerawan must do. It is true in the context of false *statements* that a party claiming fraud must explain why the  
alleged statement was false when it was made and that simply pointing to subsequent, inconsistent statements or actions is  
often insufficient in this regard. See GlenFed, 42 F.3d at 1548-49. However, in the context of false *promises*, the inquiry

1 accompanied by the who, what, when, where, and how of the misconduct charged.”). Accordingly, this  
2 claim is DISMISSED with leave to amend.

### 3 3. Fraudulent Concealment

4 Gerawan claims that Rehrig fraudulently concealed the existence of the ‘293 Patent and the  
5 Second Generation Harvest Tote. Rehrig moves to dismiss these claims on the grounds that Gerawan  
6 has failed to allege facts demonstrating that Rehrig had a duty to disclose this information to Gerawan  
7 as a mere business partner in the Harvest Tote.

8 In California, a claim for fraudulent concealment consists of five elements: “(1) the defendant  
9 must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to  
10 disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the  
11 fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and  
12 would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result  
13 of the concealment or suppression of the fact, the plaintiff must have sustained damage.” Kaldenbach  
14 v. Mutual of Omaha Life Ins. Co., 178 Cal. App. 4th 830, 850 (Ct. App. 2009) (citations and internal  
15 quotation marks omitted). Because a claim for fraudulent concealment, like a claim for false promise,  
16 is grounded in fraud, it is subject to the heightened pleading standard of Rule 9(b). See Grant v. Aurora  
17 Loan Servs., 736 F. Supp. 2d 1257, 1273 (C.D. Cal. 2010).

18 There are four circumstances in which a duty to disclose may arise such that nondisclosure or  
19 concealment constitutes actionable fraud: (1) when a fiduciary relationship exists between the parties;  
20 (2) when the defendant has exclusive knowledge of material facts not known to the plaintiff; (3) when  
21 the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes a  
22 partial representation to the plaintiff while suppressing other material facts. See LiMandri v. Judkins,  
23 52 Cal. App. 4th 326, 336 (Ct. App. 1997). “The first circumstance requires a fiduciary relationship;  
24 each of the other three ‘presupposes the existence of some other relationship between the plaintiff and

25 \_\_\_\_\_  
26 is not whether a particular statement was truthful (a matter that is typically proven by reference to external, objective facts)  
27 but whether a promise was genuine (a matter that often requires proof of a person’s intentions and state of mind). See Cal.  
28 Civ. Code § 1710 (defining false promise as a promise “made without any *intention* of performing it”) (emphasis added).  
Under Rule 9(b), “intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b).  
Therefore, it is sufficient at this juncture for Gerawan to generally allege that when Rehrig made its promise to Gerawan, it  
had no intention of keeping it as demonstrated by Rehrig’s patent application for the Grape Lug shortly after.

1 defendant in which a duty to disclose can arise.” Deteresa v. ABC, 121 F.3d 460, 467 (9th Cir. 1997)  
2 (quoting LiMandri, 52 Cal. App. 4th at 336-37). Such a relationship must be transactional in nature.  
3 See LiMandri, 52 Cal. App. 4th at 337. An example is where parties form a relationship by “entering  
4 into . . . [a] contractual agreement.” Id.

5 It is unclear on what ground Gerawan claims Rehrig had a duty to disclose the existence of the  
6 ‘293 Patent and the Second Generation Harvest Tote; Gerawan simply states in its complaint that the  
7 two companies were “business partners” and fails to provide any further explanation in its opposition.  
8 (Doc. 1., Compl., ¶ 40.) To the extent that Gerawan relies solely on its contractual relationship with  
9 Rehrig to establish a duty to disclose, Gerawan’s allegations are deficient. Gerawan fails to allege any  
10 specific facts demonstrating that Rehrig had exclusive knowledge of the ‘293 Patent or the Second  
11 Generation Harvest Tote; that Rehrig *actively* tried to conceal the existence of the ‘293 Patent or the  
12 Second Generation Harvest Tote; or that Rehrig made some partial representation to Gerawan relating  
13 to the ‘293 Patent or the Second Generation Harvest Tote. Indeed, at first blush, the first two scenarios  
14 appear to be plainly implausible in light of the fact that recording a patent with the U.S. Patent Office  
15 constitutes notice to the world of its existence, see Gen. Bedding Corp. v. Echevarria, 947 F.2d 1395,  
16 1397 (9th Cir. 1991), and the fact that Rehrig presumably sold the Second Generation Harvest Tote to  
17 the general public. Therefore, the only question remaining is whether a fiduciary relationship existed  
18 between the parties by virtue of the two being “business partners.”

19 A fiduciary relationship is “not necessarily created when one party entrusts valuable intellectual  
20 property to another for commercial development in exchange for the payment of compensation [that is]  
21 contingent on commercial success.” City of Hope Nat’l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375,  
22 391 (2008). If, however, the arrangement arises to a “joint venture,” a fiduciary relationship is created  
23 among its participants as a matter of law. Id. at 386. See Weiner v. Fleischman, 54 Cal. 3d 476, 482  
24 (1991) (“[J]oint venturers are fiduciaries with a duty of disclosure and liability to account for profits.”)  
25 (quoting 9 Witkin, Summary of Cal. Law (9th ed. 1989) Partnership, § 19, at 418). Under California  
26 law, “[a] joint venture exists when there is an agreement between the parties under which they have a  
27 community of interest, that is, a joint interest, in a common business undertaking, an understanding as  
28 to the sharing of profits and losses, and a right of joint control.” Connor v. Great Western Sav. & Loan

1 Assoc., 69 Cal. 2d 850, 863 (1963) (citation and internal quotation marks omitted). Accord Orosco v.  
2 Sun-Diamond Corp., 51 Cal. App. 4th 1659, 1666 (Ct. App. 1997).

3 As currently pled, the complaint falls short of alleging the existence of a joint venture between  
4 Gerawan and Rehrig. Gerawan alleges the following facts with respect to the Harvest Tote Agreement:  
5 (1) Ray Gerawan provided the initial design of the Harvest Tote; (2) Gerawan agreed to share the costs  
6 of patenting the Harvest Tote; (3) patent claims relating to the Harvest Tote were to be jointly owned;  
7 (4) Rehrig was granted an exclusive license to sell the Harvest Tote; and (5) Rehrig was to pay royalties  
8 to Gerawan from sales of the Harvest Tote. When viewed in the light most favorable to Gerawan, these  
9 facts arguably demonstrate a common business undertaking and an understanding as to the sharing of  
10 profits, but there are no facts regarding joint control of the endeavor. This precludes a finding of a joint  
11 venture. See Orosco, 51 Cal. App. 4th at 1666; Wiltsee v. California Employment Commission, 69 Cal.  
12 App. 2d 120, 123 (Ct. App. 1945) (an interest in profits unconnected to any power of control does not  
13 make one a joint adventurer).

14 Accordingly, in the absence of facts showing a duty to disclose the existence of the '293 Patent  
15 or the Second Generation Harvest Tote, Gerawan's claim for fraudulent concealment is DISMISSED  
16 with leave to amend.

#### 17 **4. Unjust Enrichment**

18 Gerawan claims that Rehrig was unjustly enriched because it failed to pay Gerawan royalties  
19 from sales of the Harvest Tote and the Second Generation Harvest Tote. Rehrig argues that there is no  
20 independent, stand-alone cause of action for unjust enrichment in California. To the extent that there  
21 is, Rehrig argues that Gerawan's claim for unjust enrichment is either defeated by the existence of the  
22 Harvest Tote Agreement or preempted by federal patent law.

23 California courts are split as to whether unjust enrichment constitutes a stand-alone cause of  
24 action. Some courts have recognized such a claim. See, e.g., Peterson v. Cellco Partnership, 164 Cal.  
25 App. 4th 1583, 1593-94 (Ct. App. 2008); Lectrodryer v. Seoulbank, 77 Cal. App. 4th 723, 726-28 (Ct.  
26 App. 2000). Other courts have explicitly stated that "there is no cause of action in California for unjust  
27 enrichment." Melchior v. New Line Productions, Inc., 106 Cal. App. 4th 779, 793 (Ct. App. 2003). See  
28 also Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1370 (Ct. App. 2010); McBride v. Boughton,

1 123 Cal. App. 4th 379, 387 (Ct. App. 2004). These courts have explained that unjust enrichment “does  
2 not describe a theory of recovery,” Lauriedale Assoc. Ltd. v. Wilson, 7 Cal. App. 4th 1439, 1448 (Ct.  
3 App. 1992), but rather “a general principle” that underlies “various legal doctrines and remedies[.]”  
4 Melchior, 106 Cal. App. 4th at 793.

5         It appears, however, that the split is largely a dispute in semantics. See Nordberg v. Trilegiant  
6 Corp., 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006). Those courts concluding that unjust enrichment  
7 is not a stand-alone cause of action have typically recharacterized the claim as one for restitution. See  
8 Cruz v. PacifiCare Health Sys., Inc., 30 Cal. 4th 303, 320 (2003); Durell, 183 Cal. App. 4th at 1370;  
9 McBride, 123 Cal. App. 4th at 388; Lauriedale, 7 Cal. App. 4th at 1448. A claim for restitution, like a  
10 claim for unjust enrichment, sounds in equity and consists of essentially the same elements: the unjust  
11 retention of a benefit at the expense of another. Compare Lectrodryer, 77 Cal. App. 4th at 726 (“[T]he  
12 elements of a claim of unjust enrichment [are] receipt of a benefit and unjust retention of that benefit at  
13 the expense of another.”); with McBride, 123 Cal. App. 4th at 388 (“Under the law of restitution, [a]n  
14 individual is required to make restitution if he or she is unjustly enriched at the expense of another.”)  
15 (citation and internal quotation marks omitted). Therefore, for all relevant purposes, unjust enrichment  
16 appears to be “synonymous” with restitution, which is a viable cause of action under California law.  
17 Durell, 183 Cal. App. 4th at 1370.

18         Gerawan fails to state a cognizable claim regardless of whether its cause of action is construed  
19 as unjust enrichment or restitution. Under either theory of recovery, the law operates by imposing an  
20 implied or quasi-contract on the parties in order to avoid unjust enrichment. See Paracor Finance, Inc.  
21 v. GE Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996); McBride, 123 Cal. App. 4th at 388, n.6. An  
22 implied or quasi-contract cannot be imposed, however, where there is already a valid, express contract  
23 defining the rights of the parties; the two are mutually exclusive. Berkla v. Corel Corp., 302 F.3d 909,  
24 918 (9th Cir. 2002); Paracor, 96 F.3d at 1167. Therefore, a claim for unjust enrichment or restitution  
25 cannot hinge upon the existence of a valid, express contract. See, e.g., Gerlinger v. Amazon, Inc., 311  
26 F. Supp. 2d 838, 856-57 (N.D. Cal. 2004) (plaintiff cannot bring a claim for unjust enrichment while  
27 relying on the existence of a valid contract to establish standing).

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1 Here, Gerawan alleges that Rehrig received an unjust benefit “by not paying Gerawan royalties  
2 due from sales of the Harvest Tote and of the Second Generation [Harvest] Tote.” (Doc. 1, Compl., ¶  
3 36.) In order for this to constitute an unjust benefit, there must first be a basis for which Gerawan is  
4 entitled to the royalties such that Rehrig’s retention of the royalties is unjust. The only basis alleged, or  
5 at least the only one that can be reasonably inferred from the complaint, is that under the Harvest Tote  
6 Agreement, the parties were to share ownership in the Harvest Tote and Rehrig was to pay royalties from  
7 sales of the Harvest Tote. However, if Gerawan relies on the existence of the Harvest Tote Agreement  
8 to show that it was entitled to royalty payments, it cannot then turn around and argue that no agreement  
9 exists such that an implied or quasi-contract should now be imposed. This tension within Gerawan’s  
10 claim is fatal to the claim’s viability. See Paracor, 96 F.3d at 1167; Gerlinger, 311 F. Supp. 2d at 856.  
11 Accordingly, this claim is DISMISSED with leave to amend.<sup>4</sup>

## 12 5. Unfair Competition Under Section 17200

13 Gerawan claims that Rehrig’s conduct constitutes unfair competition in violation of California  
14 Business and Professions Code Section 17200. Rehrig argues, among other things, that Gerawan fails  
15 to state a claim under Section 17200 because Gerawan fails to allege with particularity the existence of  
16 an unlawful, unfair, or fraudulent business practice.

17 California’s Unfair Competition Law (“UCL”) prohibits “any unlawful, unfair or fraudulent  
18 business act or practice . . . .” Cal. Bus. & Prof. Code § 17200. Because the statute is written in the  
19 disjunctive, each prong of the UCL is a “separate and distinct theory of liability.” Kearns, 567 F.3d at  
20 1127. In other words, the UCL “applies separately to business acts or practices that are (1) unlawful,  
21 (2) unfair, or (3) fraudulent.” Clark v. Countrywide Home Loans, Inc., 732 F. Supp. 2d 1038, 1050  
22 (E.D. Cal. 2010) (citation omitted).

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25 <sup>4</sup> In its opposition, Gerawan asserts that in addition to withholding royalty payments, Rehrig was unjustly enriched  
26 by the exclusive ownership it enjoyed over the Second Generation Harvest Tote. This assertion does not alter the Court’s  
27 analysis for two reasons. First, Gerawan failed to plead this in its complaint. In its complaint, Gerawan simply alleged that  
28 Rehrig was unjustly enriched by its failure to pay Gerawan royalties. (Doc. 1, Compl., ¶¶ 36-37.) Second, Gerawan fails  
to allege any facts demonstrating that it is entitled to share in the ownership of the Second Generation Harvest Tote in the  
absence of the Harvest Tote Agreement. Therefore, Gerawan’s quasi-contract claim regarding ownership over the Second  
Generation Harvest Tote fails for the same reason discussed with respect to Gerawan’s quasi-contract claim for royalties.  
See Paracor, 96 F.3d at 1167; Gerlinger, 311 F. Supp. 2d at 856.



1 With respect to the “unlawful” prong, the UCL incorporates other laws and treats violations of  
2 those laws as unlawful business practices independently actionable under state law. See Chabner v.  
3 United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). As to the “unfair” prong, a business  
4 practice is unfair when it “offends an established public policy” or is “immoral, unethical, oppressive,  
5 unscrupulous or substantially injurious to consumers.” McDonald v. Coldwell Banker, 543 F.3d 498,  
6 506 (9th Cir. 2008) (quoting People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509,  
7 530 (Ct. App. 1984)). Finally, with respect to the “fraudulent” prong, a business practice is fraudulent  
8 “where members of the public are likely to be deceived.” Sybersound Records, Inc. v. UAV Corp., 517  
9 F.3d 1137, 1152 (9th Cir. 2008) (citation omitted).

10 It is unclear on which prong Gerawan rests its UCL claim. Indeed in its opposition, Gerawan  
11 simply asserts that its “Section 17200 claim rests on a wide range of actions touching upon patents,  
12 business collaboration, product design collaboration, competition in the marketplace and payment of  
13 royalties due.” (Doc. 16, Pl.’s Opp’n, at 9.) From what the Court can discern, it appears that Gerawan  
14 rests its UCL claims on the “unlawful” prong of the statute in that Gerawan argues that its allegations  
15 of reverse palming off and tortious conduct violate the UCL. However, because Gerawan fails to state  
16 a claim in any of those respects, Gerawan similarly fails to state a claim under the UCL. See Krantz v.  
17 Bt Visual Images, 89 Cal. App. 4th 164, 178 (Ct. App. 2001) (where a UCL claim is entirely derivative  
18 of another cause of action, it stands or falls with the underlying claim). Accordingly, Gerawan’s claim  
19 under the UCL is DISMISSED with leave to amend.

## 20 **6. Accounting**

21 Gerawan seeks an accounting of Rehrig’s profits and the unpaid royalties due from sales of the  
22 Harvest Tote and the Second Generation Harvest Tote. An accounting is a derivative action, however,  
23 and it must be based on other claims. Janis v. Cal. State Lottery Commission, 68 Cal. App. 4th 824,  
24 833-34 (Ct. App. 1998). Because Gerawan has failed to state a claim for profits and unpaid royalties,  
25 Gerawan is not entitled to an accounting. See id. at 834. Accordingly, this claim is DISMISSED with  
26 leave to amend.

## 27 **7. Statute of Limitations**

28 A plaintiff must bring a claim within the relevant limitations period, which begins to run upon

1 accrual of the cause of action. See Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 806 (2005). A  
2 cause of action generally accrues “‘when, under the substantive law, the wrongful act is done,’ or the  
3 wrongful result occurs, and the consequent ‘liability arises.’” Norgart v. Upjohn Co., 21 Cal. 4th 383,  
4 397 (1999) (quoting 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 459, at 580). In other words,  
5 under the general rule, a cause of action accrues “‘when [it] is complete with all of its elements’—those  
6 elements being wrongdoing, harm, and causation.” Poosh v. Philip Morris USA, Inc., 51 Cal. 4th 788,  
7 797 (2011) (quoting Norgart, 21 Cal. 4th at 397).

8 “An important exception to the general rule of accrual is the ‘discovery rule[.]’” Fox, 35 Cal.  
9 4th at 807. Under the discovery rule, accrual is delayed “until the plaintiff discovers, or has reason to  
10 discover, the cause of action.” Id. (citations omitted). “A plaintiff has reason to discover a cause of  
11 action when he or she ‘has reason at least to suspect a factual basis for its [generic] elements,’” that is  
12 wrongdoing, harm, and causation. Id. (quoting Norgart, 21 Cal. 4th at 398). The policy underlying the  
13 discovery rule is to mitigate the harshness of the general rule of accrual, which would otherwise allow  
14 the limitations period to expire before a plaintiff has or should have discovered a latent injury and its  
15 cause. Poosh, 51 Cal. 4th at 797-98.

16 It is clear here that under the general rule of accrual, the majority of Gerawan’s state law and  
17 common law claims are untimely. The factual underpinnings of Gerawan’s claims are: (1) the parties’  
18 Harvest Tote Agreement in 1993; (2) Rehrig’s patent application for the ‘293 Patent in 1993; (3) the  
19 issuance of the ‘293 Patent to Rehrig in 1995; (4) the discontinuance of the royalty payments related to  
20 the Harvest Tote beginning in 2001; and (5) the commercialization of the Second Generation Harvest  
21 Tote, the date of which the complaint does not provide. With the exception of the commercialization  
22 of the Second Generation Harvest Tote, all of these events plainly occurred at least nine years prior to  
23 the initiation of this suit on July 29, 2011. This far exceeds the three-year statute of limitations period  
24 for false promise, fraudulent concealment, and conversion, see Cal. Code Civ. P. § 338(c)-(d); the four-  
25 year statute of limitations period for unfair competition under the UCL, see Cal. Bus. & Prof. Code §  
26 17208; and the limitations periods for unjust enrichment and accounting, which adopt the limitations  
27 period of the underlying claim, see Fed. Deposit Ins. Corp. v. Dintino, 167 Cal. App. 4th 333, 347-48  
28 (Ct. App. 2008) (unjust enrichment claim grounded in a mistake is governed by the three-year statute

1 of limitations period for fraud or mistake); Jefferson v. J. E. French Co., 54 Cal. 2d 717, 718-19 (1960)  
2 (accounting is governed by the statute of limitations for the underlying claim).

3         The dispositive question, then, is whether Gerawan has sufficiently invoked the discovery rule  
4 to resuscitate its otherwise untimely claims. “In order to rely on the discovery rule for delayed accrual  
5 of a cause of action, ‘[a] plaintiff whose complaint shows on its face that [its] claim[s] would be barred  
6 without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner  
7 of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.’” Fox,  
8 35 Cal. 4th at 808 (quoting McKelvey v. Boeing North American, Inc., 74 Cal. App. 4th 151, 160 (Ct.  
9 App. 1999)) (emphasis in the original). The burden is “on the plaintiff to ‘show diligence;’ ‘conclusory  
10 allegations’ will not withstand [a motion to dismiss].” Id.

11         Gerawan only alleges two facts in its complaint relating to the discovery rule. First, Gerawan  
12 alleges that from 2001 to 2008, it believed that sales of the Harvest Tote had fallen to the point where  
13 no royalty payments were due. Second, Gerawan alleges that around August 2008, it discovered that  
14 Rehrig had in fact made significant sales of the Harvest Tote after 2001 and had developed the Second  
15 Generation Harvest Tote. From these two facts, Gerawan argues in its opposition that it discovered its  
16 causes of action only in August 2008, and therefore, under the discovery rule, its causes of action began  
17 to accrue only at that point.

18         While Gerawan’s allegations touch upon the discovery rule in a general sense, the allegations  
19 fall short in terms of both scope and specificity to invoke the exception to the general rule of accrual.  
20 For example, Gerawan fails to explain how it discovered the fact that Rehrig made significant sales of  
21 the Harvest Tote after 2001 and developed the Second Generation Harvest Tote. Gerawan also fails to  
22 explain the circumstances in which it discovered the existence of the ‘293 Patent. There are no facts  
23 regarding the “time” or “manner” in which Gerawan made this discovery, nor are there any facts as to  
24 why Gerawan was unable to make this discovery any earlier than it did “despite reasonable diligence.”<sup>5</sup>  
25 Fox, 35 Cal. 4th at 808.

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28         <sup>5</sup> In its opposition, Gerawan offers an explanation as to why it could not be expected to have discovered the ‘293 Patent any earlier than it did. This explanation must be sufficient pled in its complaint, not raised for the first time in its opposition. See Fox, 35 Cal. 4th at 808.

1 Accordingly, Gerawan's state law and common law claims, with the exception of those that are  
2 predicated on the commercialization of the Second Generation Harvest Tote, are untimely on their face  
3 and must be dismissed for this reason, in addition to any other reason already set forth above.<sup>6</sup>

4 **C. Leave to Amend**

5 Gerawan will be afforded the opportunity to file an amended complaint. See Cook, Perkiss &  
6 Liehe, Inc., 911 F.2d at 247. However, Gerawan should file an amended complaint only if it is able to  
7 adequately address the deficiencies identified in this order in good faith. Likewise, Rehrig should file  
8 an attack on any amended complaint Gerawan elects to file only if Rehrig's arguments are strong and  
9 substantive. This Court simply no longer has the resources to revisit pleadings repeatedly. Both parties  
10 are reminded of their obligations under Federal Rule of Civil Procedure 11.

11 **IV. CONCLUSION**

12 In accordance with the above, this Court:

- 13 1. DENIES Rehrig's motion to dismiss with respect to Gerawan's claim for correction of  
14 inventorship under 35 U.S.C. § 256;
- 15 2. GRANTS Rehrig's motion to dismiss with respect to Gerawan's Lanham Act claim for  
16 unfair competition under 15 U.S.C. § 1125(a) without leave to amend;
- 17 3. GRANTS Rehrig's motion to dismiss with leave to amend in all other respects; and
- 18 4. ORDERS Gerawan to file and serve any amended complaint it elects to submit by no  
19 later than March 23, 2012.

20  
21  
22  
23  
24 IT IS SO ORDERED.

25 **Dated: March 2, 2012**

25 /s/ Lawrence J. O'Neill  
26 UNITED STATES DISTRICT JUDGE

27 <sup>6</sup> Rehrig argues that the discovery rule does not apply to claims under the UCL, and therefore this claim should be  
28 dismissed with prejudice. There appears to be some disagreement among California courts on this issue. See Broberg v. The  
Guardian Life Ins. Co. of America, 171 Cal. App. 4th 912, 920-21 (Ct. App. 2009). Nevertheless, this Court need not reach  
that issue now because Gerawan has, in any event, failed to invoke the discovery rule at this time.