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9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN JOSE DIVISION

12	BE IN, INC., a New York corporation)	CASE NO.: 5:12-CV-03373 LHK
13	Plaintiff,)	REPLY MEMORANDUM OF
14	v.)	POINTS AND AUTHORITIES IN
15	GOOGLE, INC., a California corporation,)	SUPPORT OF GOOGLE'S MOTION
16	RICHARD ROBINSON, an individual, and)	TO DISMISS PLAINTIFF'S THIRD
17	DOES 1 through 3, inclusive,)	AND FOURTH CAUSES OF
18	Defendants.)	ACTION
19)	Hearing Date: January 3, 2013
20)	Hearing Time: 1:30 pm
21)	Courtroom: 8
22)	Judge: Hon. Lucy H. Koh

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1 **INTRODUCTION**

2 Google’s opening brief demonstrated Plaintiff’s failure to plead facts necessary under
3 Rule 8 to plausibly support the elements of its trade dress and copyright claims. Plaintiff’s
4 arguments in opposition ignore binding authority and cannot make up for the glaring deficiencies
5 of these claims.

6 With respect to its trade dress claim, Plaintiff has not pleaded facts to support either (1)
7 that the claimed trade dress acquired secondary meaning, such that the consuming public learned
8 to associate, by June 2011, the appearance of Plaintiff’s video chat website with Be In, Inc.,
9 rather than merely the product itself, or (2) that because consumers so strongly associate the
10 trade dress with Plaintiff, they are likely to be confused into believing that Google’s video chat
11 Hangouts feature was created by, sponsored by, or is otherwise connected to Plaintiff.

12 Plaintiff’s contradictory arguments highlight why its trade dress claim is far below the
13 minimum necessary to state a claim. The impetus of Plaintiff’s lawsuit (including its claims for
14 trade secret misappropriation and conspiracy which are not at issue in this motion) is that Google
15 supposedly stole a secret business idea from Plaintiff and as a result severely undermined
16 Plaintiff’s video chat business in its infancy, entitling Plaintiff to damages for a business that
17 never got off the ground. In stark contrast, Plaintiff’s trade dress claim is premised on the theory
18 that the appearance of Plaintiff’s video chat website is unique and was so well known among
19 consumers within three months of its launch that Google deliberately sought to mimic the trade
20 dress to free ride on Plaintiff’s established consumer recognition and goodwill.

21 To establish secondary meaning in such a short timeframe, and thereby obtain a
22 protectable interest in its claimed trade dress, Plaintiff would have had to inundate the
23 consuming public with a marketing blitz that was so effective it caused a substantial segment of
24 consumers to associate the features of the claimed trade dress with Plaintiff in just three months,
25 just like a recognized brand name or logo. Plaintiff does not allege facts that come anywhere
26 close to meeting this standard. And indeed, because Plaintiff effectively concedes that it could
27 never plead sufficient facts, its trade dress claim should be dismissed without leave to amend.

1 Plaintiff's copyright claim is also defective. Plaintiff has not specified which aspects of
2 the appearance of its website it alleges are original, copied by Google, and thus within the scope
3 of its copyright claim. To the contrary, Plaintiff has alleged that nearly every aspect of the
4 appearance of its website is its proprietary trade dress, leaving no room for a copyright claim.
5 Plaintiff's failure to plead facts to distinguish between the two claims requires dismissal of both
6 claims.

7 ARGUMENT

8 **I. THE TRADE DRESS CLAIM IS NOT PLEADED WITH THE REQUIRED** 9 **SPECIFICITY**

10 As Google explained in its opening brief, Plaintiff enumerates only five elements of its
11 alleged trade dress in Paragraph 53 of the Amended Complaint, but does not indicate if the list is
12 exhaustive. Google's Motion to Dismiss ("Mtd.") at 7-8. The rest of the Amended Complaint
13 only serves to blur the issue, as Plaintiff elsewhere generically asserts rights to the "overall look
14 and feel" of its website. Be In's Amended Complaint ("Am. Compl."), ¶38. Website "look and
15 feel" cases are viewed "with particular caution," since they "fall far short of the exactitude that is
16 required" under Rule 8 and are notoriously "difficult to pin down." Mtd. at 7. In addition to this
17 failure to specify whether the claimed trade dress is limited to the five enumerated elements, the
18 Amended Complaint does not explain how the claimed elements "combine to create the
19 website's protectible 'look and feel.'" *Salt Optics, Inc. v. JAND, Inc.*, 2010 WL 496702, at *5
20 (C.D. Cal. Nov. 19, 2010); Mtd. at 7-8. Plaintiff's trade dress claim is therefore insufficiently
21 pleaded and should be dismissed.

22 In its opposition, Plaintiff seeks to remedy the deficiencies of its allegations by
23 acknowledging that the five elements, and not others, comprise the entirety of its claimed trade
24 dress. See Be In's Opposition to Motion to Dismiss ("Opp.") at 2 ("Be In's trade dress
25 allegations identify five specific elements, all of which interact to create a particular visual
26 impression."); 8 ("Be In does not leave open the possibility that unspecified aspects of the
27 CamUp platform comprise the trade dress."). It also seems to limit its claim to the specific
28

1 combination of these elements depicted in the screen shot of a page from its CamUp website
2 included in its Amended Complaint. Opp. at 9; Am. Compl., ¶38.

3 Plaintiff's identification of its claimed trade dress would be sufficient if Plaintiff were
4 held to those limitations. See Mtd. at 7-9. Accordingly, if Plaintiff's trade dress claim survives,
5 Google respectfully requests an order limiting the claimed trade dress (1) to the five elements
6 enumerated in Paragraph 53 of the Amended Complaint, and (2) as depicted in the image shown
7 in Paragraph 38 of the Amended Complaint.

8 **II. PLAINTIFF'S TRADE DRESS CLAIM SHOULD BE DISMISSED FOR**
9 **FAILURE TO ALLEGE SECONDARY MEANING**

10 Plaintiff does not come close to pleading facts sufficient to support the acquisition of
11 secondary meaning, *i.e.*, that a substantial segment of customers and potential customers learned
12 to associate (1) a white and gray color palette, (2) placement of a logo at the top left corner of a
13 computer screen, (3) a large window containing media, (4) with several windows below it, and
14 (5) chat and playlist features to the side of it, with Plaintiff Be In, Inc. by June 2011. Mtd. at 11;
15 *see also Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 211 (2000) (observing
16 that secondary meaning occurs when "in the minds of the public, the primary significance of
17 [trade dress] is to identify the source of the product rather than the product itself.").

18 First, from the facts pleaded in its Amended Complaint, it is not even clear that Plaintiff
19 had an ongoing business operation that could have engaged in marketing and promotional
20 efforts, as opposed to merely launching an unsuccessful website. Second, Plaintiff does not
21 allege a single user, much less any actual adoption by a substantial number of repeat users.
22 Third, Plaintiff does not allege that it spent even a penny on advertising. Fourth, Plaintiff does
23 not allege that it has any business partnerships, that anyone pays to advertise on its CamUp
24 website, or that it has received any coverage in major media (newspapers, reputable websites, or
25 other established media). Fifth, Plaintiff fails to allege facts that it has any market presence
26 whatsoever. See Mtd. at 11-17. In short, Plaintiff has pleaded no facts to suggest anything other
27 than that it is a failed startup that received virtually no notice from consumers.

1 Google is unaware of any trade dress case where a plaintiff was permitted to proceed
2 with a trade dress claim in such straitened circumstances. As reflected in the numerous cases
3 cited by Google from the Ninth Circuit and around the country, even millions of dollars' worth
4 of advertising and long and exclusive use by market leaders are often insufficient to cause a
5 substantial segment of consumers to associate the relevant product features with their source. *Id.*
6 at 14. Moreover, it would be impossible to acquire secondary meaning in just a few months
7 without a massive marketing and promotion effort and substantial market penetration, since – by
8 definition – the consuming public cannot form any association about a product's trade dress
9 when it is unaware of the product. Indeed, it is only in rare and exceptional circumstances –
10 such as those found in the *L.A. Gear v. Thom Mc An* case, where the company with the fourth
11 largest market share in athletic shoes spent millions on a promotional campaign designed to
12 inundate the American public with images of its shoe design and resulting in the sale of over four
13 million pairs of the shoes – is secondary meaning ever established in less than one year. *See*
14 *Mtd.* at 13 n.2. Any comparison between *L.A. Gear* and Plaintiff's allegations is finished before
15 it has even started.

16 Plaintiff does not address, much less distinguish, these controlling cases. It does not
17 dispute that, to be protectable, its claimed trade dress would have had to acquire secondary
18 meaning within the three short months between Plaintiff's release of CamUp in March 2011 and
19 Google's release of the Hangout's feature in June 2011. Nor does it dispute the definition of
20 secondary meaning, or that establishing the required consumer association between the CamUp
21 product design and itself within three months would be virtually unprecedented and would
22 require an *L.A. Gear*-type media blitz. In fact, Plaintiff has come up with no case in which
23 secondary meaning was ever established in such an abbreviated period with anything less than
24 such a blitz.

25 Instead, Plaintiff argues (1) that it need not allege secondary meaning at all, (2) that a
26 determination of its failure to allege secondary meaning would improperly require fact-finding
27 on a motion to dismiss, and (3) that its conclusory allegations are sufficient to allege secondary
28 meaning. Plaintiff's positions are untenable.

1 **A. Plaintiff Is Unquestionably Required to Allege Secondary Meaning.**

2 Recognizing the poverty of its secondary meaning allegations, Plaintiff first argues that it
3 need not allege secondary meaning at all. That argument borders on the frivolous. As the
4 Supreme Court established in *Wal-Mart Stores*, 529 U.S. at 212-214, a plaintiff asserting trade
5 dress in product design can only demonstrate distinctiveness (and therefore, protectability) by
6 establishing secondary meaning. *See* Mtd. at 10. A product design is never inherently
7 distinctive. *Wal-Mart Stores*, 529 U.S. at 213. Plaintiff does not dispute that it alleges a product
8 design as the subject matter of its claim.

9 Following *Wal-Mart Stores*, to meet the “distinctiveness” element of a trade dress claim,
10 it is black letter law that a plaintiff asserting trade dress in product design must allege the
11 acquisition of secondary meaning. *See, e.g., Docmagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d
12 1119, 1140 n.7 (N.D. Cal. 2010) (“Because [plaintiff] is alleging trade dress in its product
13 design, rather than product packaging, it is not permitted, as a matter of law, to allege that its
14 trade dress is inherently distinctive; to satisfy the first element of a trade dress claim it must
15 allege secondary meaning.”); *Smith & Hawken, Ltd. v. Gardendance, Inc.*, 2004 WL 2496163, at
16 *3 (N.D. Cal. Nov. 5, 2004) (dismissing trade dress claim); *Treat, Inc. v. Dessert Beauty*, 2006
17 WL 2812770, at *15 (D. Or. May 5, 2006) (same).

18 Plaintiff makes no effort to distinguish these cases because it cannot, and it offers no
19 cases holding that secondary meaning in product design trade dress need not be alleged. Instead,
20 it misleadingly cites two cases that are not about product designs, and otherwise involve facts
21 very different from those it alleged. First, both cases involved word marks, and not product
22 design trade dress for which secondary meaning is mandatory after *Wal-Mart*. *See Solid Host,*
23 *NL v. Namecheap, Inc.*, 652 F. Supp. 2d 1092, 1094 (C.D. Cal. 2009) (asserting trademark
24 infringement of domain name); *Bottlehood, Inc. v. Bottle Mill*, 2012 WL 1416272, at *5 (S.D.
25 Cal Apr. 23, 2012) (alleging infringement of word mark and associated tagline). Plaintiff does
26 not dispute that *Wal-Mart* applies here, so its reliance on these cases is misguided from the start.

27 Second, in both cases, the court found that the protectability of the word mark was clear
28 from the remaining factual allegations of the complaint. *Solid Host*, 652 F. Supp. 2d at 1107-09;

1 *Bottlehood*, 2012 WL 1416272 at *5. The decisions therefore cannot reasonably be cited for the
2 proposition that secondary meaning need not be pleaded, as Plaintiff claims. Instead, they are
3 merely examples of unusual cases in which the plaintiff was not required to use the precise term
4 “secondary meaning” to survive a motion to dismiss because the distinctiveness of the trademark
5 in question was otherwise properly alleged. These cases are no help to Plaintiff, since (1)
6 Plaintiff here is seeking protection for the appearance of a website and is therefore asserting a
7 product design trade dress case where secondary meaning is mandatory, and (2) the remaining
8 allegations of Plaintiff’s complaint not only fail to support secondary meaning in the claimed
9 trade dress, but affirmatively demonstrate its absence. *See Mtd.* at 12-17.

10 **B. Plaintiff’s Failure to Allege Secondary Meaning Is Properly Decided On This**
11 **Motion to Dismiss**

12 Equally infirm is Plaintiff’s repeated suggestion that determining the sufficiency of its
13 secondary meaning allegations requires the Court to weigh evidence and make factual
14 determinations that are improper on a motion to dismiss. *See, e.g., Opp.* at 12 (“Google’s
15 invitation to weigh the allegations and evidence is improper at the motion to dismiss stage.”), 13
16 (“Google’s factual arguments are subjects for further proceedings.”). Google is not asking the
17 Court to decide whether Plaintiff has *established* secondary meaning. It is instead seeking a
18 ruling that Plaintiff has failed to *allege* secondary meaning because Plaintiff has not alleged
19 enough “factual content to allow a court to draw the reasonable inference that the defendant is
20 liable for the alleged misconduct.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atl.*
21 *Corp. v. Twombly*, 550 U.S. 544, 556-57, 570 (2007)). Notably, Plaintiff does not mention,
22 much less try to distinguish, the numerous cases cited by Google in which courts have granted
23 Rule 12(b)(6) motions for Plaintiff’s failure to allege facts to support an allegation of secondary
24 meaning. *See Mtd.* at 6.

25 Nor is Google’s discussion of the facts alleged by Plaintiff as demonstrating the *absence*
26 of secondary meaning a request that the Court weigh evidence, as Plaintiff contends. *Opp.* at 9,
27 12. Plaintiff’s lack of long term or exclusive use of the claimed trade dress; lack of substantial
28 promotion, advertising or publicity; inability to allege substantial customers, market position or

1 market awareness; and inability to allege anything else demonstrating that customers have come
2 to associate the claimed trade dress with Plaintiff, all demonstrate the absence of facts necessary
3 to support an allegation of secondary meaning. The Court need not weigh evidence to observe
4 this quintessential pleading failure.

5 **C. Plaintiff Has Not Alleged Secondary Meaning**

6 Plaintiff's contention that its threadbare secondary meaning allegations are sufficient to
7 plead a trade dress claim is contrary to all legal authority. Not surprisingly, Plaintiff does not
8 cite a single case where analogous allegations were sufficient to survive a motion to dismiss.
9 Plaintiff's request that the Court advance its trade dress claim with virtually nothing to support
10 secondary meaning proposes a dramatic shift in the law – one that would reset the bar for
11 secondary meaning far lower than in any established jurisprudence, and that would allow
12 companies with failed products that never received any notice from consumers to exclude others
13 from using similar product designs. Plaintiff's invitation to revise the law should be rejected,
14 particularly in light of the *Wal-Mart* decision, which emphasizes the importance of an entity
15 acquiring secondary meaning in a product design before it can seek to preclude use by others of
16 allegedly similar designs.

17 Plaintiff's claim that its Amended Complaint "includes at least ten allegations relating to
18 secondary meaning" is fantasy. Opp. at 9. Excluding duplications, there are no more than three
19 allegations that even bear on the subject, and they do not support an allegation of secondary
20 meaning:

21 ***Plaintiff's "awards and accolades" allegation:*** The principal allegation relied upon by
22 Plaintiff is that its trade dress "has a secondary meaning, which is evidenced in part by the
23 awards and accolades and extensive media coverage Be In has received for its innovation and
24 creativity in developing the CamUp platform." Opp. at 10. But as Google pointed out in its
25 opening brief (and Plaintiff never addresses in its opposition), Plaintiff nowhere alleges facts to
26 support the purported "extensive media coverage." The only publicity it alleges is its appearance
27 at a single trade show, South by Southwest in Austin, Texas. Am. Compl., ¶23. A single trade
28 show could hardly have established secondary meaning even in the best of circumstances, and

1 there is no indication here that the trade dress was stressed or featured in any way. *See Mtd.* at
2 15-16; *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1383 (9th Cir. 1987) (affirming
3 finding of no secondary meaning where five-year advertising campaign had not stressed the
4 color and shape of the antifreeze so as to develop secondary meaning in those elements).
5 Likewise, Plaintiff identifies only a single award or accolade, which was given by a venture
6 capitalist firm for being “an innovative start up.” *Am. Compl.*, ¶26. In other words, the award
7 had nothing whatsoever to do with the claimed trade dress. Indeed, Plaintiff’s allegation that it
8 received an award for being an innovative start up company highlights that Plaintiff was a brand-
9 new company with a brand-new product that could not have acquired secondary meaning merely
10 for being one of innumerable Internet companies launched every week in the United States,
11 without much, much more.

12 ***Plaintiff’s allegation that it won a start up competition:*** Separately, Plaintiff relies on
13 its allegation that it won an award from a venture capitalist firm as “the best and most innovative
14 start up of the year.” *Opp.* at 10. But again, that is merely a duplicative reference to the sole
15 identified “award or accolade” received by Plaintiff, as discussed above.

16 ***Plaintiff’s allegation that Google copied CamUp.*** Finally, Plaintiff points to its
17 allegations that Google “knowingly and intentionally copied” elements of Plaintiff’s trade dress,
18 and that it is “deliberately using screens in its Google+ Hangouts platform that are confusingly
19 similar to CamUp with willful and callous disregard to Plaintiff’s rights to enforce its trade
20 dress.” *Opp.* at 11. These are nothing more than conclusory assertions that do not satisfy
21 Plaintiff’s obligations to plead facts supporting its trade dress claim. *See Iqbal*, 556 U.S. at 678.
22 But even if one were to take as true for purposes of this motion Plaintiff’s baseless assertion that
23 Google deliberately copied Plaintiff’s trade dress, that would still not help Plaintiff. Under
24 established Ninth Circuit precedent, intentional copying of a product design does not support an
25 allegation of secondary meaning, since the copying may be undertaken for any number of
26 reasons wholly unrelated to whether the copied design is an indicator of source. *Fuddrucker,*
27 *Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 844-845 (9th Cir. 1987) (“Competitors may
28 intentionally copy product features for a variety of reasons. They may, for example, choose to

1 copy wholly functional features that they perceive as lacking any secondary meaning because of
2 those features' intrinsic economic benefits.”); *Alphaville Design, Inc. v. Knoll, Inc.*, 627 F. Supp.
3 2d 1121, 1130 (N.D. Cal. 2009) (“[A] manufacturer might copy not because there is secondary
4 meaning to capitalize upon, but because consumers desire that particular style in a [] product.”);
5 *Walker & Zanger, Inc. v. Paragon Indus., Inc.*, 549 F. Supp. 2d 1168 (N.D. Cal 2007) (copying
6 not proof of secondary meaning).

7 In short, Plaintiff's allegations are not even within the realm of supporting an allegation
8 of secondary meaning. *See* Mtd. at 11-17. Plaintiff never even tries to explain how a single
9 trade show and a single award could ever support such an allegation. The only case it cites to try
10 to demonstrate the adequacy of its allegations is *Calyx Tech., Inc. v. Ellie Mae, Inc.*, No. C 04-
11 01640 SI, 2004 WL 207446 (N.D. Cal. Sept. 3, 2004), but that case is no help to Plaintiff. *Opp.*
12 at 11. In *Calyx*, the plaintiff adequately pleaded secondary meaning where it alleged that it had
13 been using its unique screen displays for over ten years, distributed copies of the software at
14 about 60 trade shows per year, spent more than \$1 million in promotion, the product had a
15 substantial customer base, there was evidence of actual confusion, and the screen images were
16 indicators of source to consumers. *Id.* at 1-3. The *Calyx* allegations bear no resemblance to the
17 allegations at issue here.

18 Plaintiff also relies on *Givenchy S.A. v. BCBG Max Azria Group, Inc.*, 2012 WL 3072327
19 (C.D. Cal. Apr. 25, 2012) throughout its opposition brief, but the case only highlights Plaintiff's
20 failure to state a claim. In *Givenchy*, a famous design house offered a luxury handbag to
21 sophisticated customers at price points ranging from \$1,355 to \$4,000. Plaintiff alleged that
22 defendant sold a knock-off version of the bag for about \$100. *Givenchy*, 2012 WL 3072327, at
23 1. The court found that Givenchy's evidence of secondary meaning was sufficient to survive a
24 motion for summary judgment: (1) six years of sales of the bag by a famous fashion house, (2)
25 over \$20 million in revenues from U.S. sales, (3) that Givenchy had engaged in “image
26 advertising” which featured the trade dress and sought to “reinforce the connection consumers
27 draw been the design features of the handbags and its source,” (4) that Givenchy's sales and
28 marketing expenses were significant, including hundreds of thousands of dollars spent on print

1 media in the U.S. alone, and (5) that plaintiff had made exclusive use of the design for six years.
2 *Id.*, at *4-5. *Givenchy* thus demonstrates the type of long and exclusive use of a source-
3 identifying trade dress well-known to consumers that is required to establish secondary meaning.
4 Plaintiff pleads nothing of the sort.

5 Finally, Plaintiff argues that Google relies too heavily on the three-month period in which
6 Plaintiff would have had to acquire secondary meaning, citing cases saying that there is no bright
7 line rule regarding the time needed to acquire secondary meaning. Opp. at 12. Plaintiff misses
8 the point. Google does not argue that secondary meaning can never be acquired within three
9 months. To the contrary, and as discussed above, Google cites the seminal *L.A. Gear* case as
10 exemplifying the type of media blitz that established secondary meaning in a mere five months.
11 Mtd. at 13 n.2. The problem for Plaintiff is that it comes nowhere close to alleging similar facts,
12 such as would be required to establish secondary meaning in an even shorter amount of time.
13 Generally, secondary meaning takes years (and advertising, promotion, market penetration, a
14 great deal of effort, etc.) to establish, as evidenced by the five-year presumption that applies for
15 federal trademark registrations. See Mtd. at 14. While secondary meaning might be acquired in
16 under a year with an exceptional media blitz, the opposite of a media blitz is alleged here.

17 Because Plaintiff does not adequately allege secondary meaning, its trade dress claim
18 should be dismissed.

19 **D. Amendment of the Trade Dress Claim Would be Futile**

20 Plaintiff has already amended once. If it could have alleged facts to support a massive
21 marketing blitz between March and June 2011, a substantial segment of consumers as its user
22 base, major media coverage during that period, or other facts to support secondary meaning, it
23 surely would have. Because Plaintiff did not argue in its Opposition that it could plead
24 additional facts if it had the opportunity, it is clear that Plaintiff has already taken its best
25 possible shot, recognizes the shortcomings with the claim, and has decided to come out swinging
26 in the hope that bold assertions that its existing allegations are good enough will somehow carry
27 the day.
28

1 Plaintiff is about as far from alleging secondary meaning as a party could possibly be.
2 Google expressly noted in its opening papers that amendment would be futile “unless Plaintiff
3 can demonstrate the ability to allege real facts supporting the acquisition of secondary meaning.”
4 Mtd. at 12 (*citing DeSoto v. Yellow Freight Sys. Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) ((leave
5 to amend properly denied where amendment would be futile)). Plaintiff has not risen to the
6 challenge, providing further proof that it cannot. Google therefore respectfully requests that
7 Plaintiff’s baseless trade dress claim be dismissed without leave to amend.

8 **III. PLAINTIFF HAS FAILED TO PLEAD LIKELIHOOD OF CONFUSION**

9 Again with respect to the likelihood of confusion factor, Plaintiff argues that a
10 determination of whether likelihood of confusion exists is a fact question that is improper for a
11 motion to dismiss. Opp. at 14-15. And again, the argument fails, because Google is seeking a
12 ruling on Plaintiff’s failure to plead plausible allegations, and not a ruling on whether likelihood
13 of confusion exists. “[O]nly a complaint that states a plausible claim for relief survives a motion
14 to dismiss.” *Iqbal*, 556 U.S. at 679.

15 It is hard to fathom how Plaintiff could adequately allege a likelihood of confusion, when
16 it has not pleaded facts to suggest any market presence or customer awareness of its business,
17 much less of its claimed trade dress. It has not alleged any substantial number of users, any
18 substantial revenue, any advertising or promotion, or any other facts to suggest that consumers
19 would have been sufficiently aware of its claimed website trade dress to confuse it with Google’s
20 Hangouts feature.

21 Plaintiff argues that it has adequately pleaded likelihood of confusion by alleging (1) that
22 Google’s Hangouts feature “is confusingly similar to the trade dress of the CamUp website,” (2)
23 that Google “knowingly and willfully copied” its trade dress, (3) that both the Hangouts feature
24 and Plaintiff’s CamUp website both provide video chat functionality; and (4) by providing a
25 screen shot of each of a page from the CamUp website and the Hangouts feature. Opp. at 14.¹

26
27 ¹ Citing paragraphs 7 and 38 of the Amended Complaint, Plaintiff asserts in its opposition
28 papers that it alleges “substantial similarity between the two social media networking platforms,”
but the cited paragraphs do not so allege. Fairly read, the most Plaintiff alleges is that the
Hangouts feature, which is a only small part of the Google+ social networking service, and

(continued...)

1 But these allegations do not sufficiently allege likelihood of confusion. The first and
2 second allegations are baseless conclusory assertions, which do not satisfy the requirement that
3 Plaintiff plead *facts* to support its trade dress claim. *See Iqbal*, 556 U.S. at 678. The third
4 suggests only a similarity in functionality (video chat) between a single feature found in the
5 Google+ social networking service and Plaintiff’s website dedicated to video chat. *See Am.*
6 *Complt.*, ¶2. Thus, viewed through the requirements of *Twombly* and *Iqbal*, Plaintiff’s factual
7 allegations are no more than that Google has a video chat feature in its Google+ service that
8 Plaintiff claims looks similar to a page of its video chat website.

9 The *ID7D* case cited by Google is almost directly on point. *See Mtd.* at 17. In *ID7D*, the
10 plaintiff conclusorily alleged that the defendant copied its trade dress, for use in a competing
11 product (*i.e.*, not simply a single overlapping feature alleged here), “in a manner that is likely to
12 cause confusion,” and provided photographs of the products at issue. *ID7D Co., Ltd. v. Sears*
13 *Holding Corp.*, 2012 WL 1247329, at *1, *11 (D. Conn. Apr. 13, 2012). The court ruled that
14 this was insufficient to plead likelihood of confusion. *Id.* at 11. Plaintiff’s effort to distinguish
15 *ID7D* is unavailing. *See Opp.* at 15.

16 Finally, Plaintiff argues that it need not allege instances of actual confusion to plead
17 likelihood of confusion. *Id.* While that may be true, its failure to have pleaded virtually any of
18 the likelihood of confusion factors (strength of the mark, evidence of actual confusion, proximity
19 of the goods/services, marketing channels used, degree of care likely to be exercised by a
20 purchaser, and likelihood of expansion of scope of goods or product lines), requires dismissal of
21 its claim. *See Opp.* at 14 (enumerating likelihood of confusion factors).

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26 (...continued from previous page)
27 Plaintiff’s CamUp website both provide video chat functionality. Plaintiff does not allege that
28 Google+ is otherwise similar to CamUp. To the contrary, it alleges that Google+ “represents
Google’s attempt to compete with Facebook.” *Am. Complt.*, ¶33.

1 **IV. THE COPYRIGHT CLAIM SHOULD BE DISMISSED**

2 **A. Having Received Corrected Information from the Copyright Office, Google**
3 **Withdraws its Argument that Plaintiff Failed to Register the Work At Issue**

4 In its opening brief, Google noted that it had visited the Copyright Office, and that it had
5 ordered and received a copy of Plaintiff’s copyright deposit. On the basis of the material it
6 received, which the Copyright Office represented to Google was a complete copy of the deposit
7 submitted by Plaintiff in connection with a copyright registration for the CamUp website, Google
8 argued that Plaintiff’s deposit was deficient in failing to include Plaintiff’s external, user-facing
9 screens. Mtd. at 18-21. Upon receiving Plaintiff’s brief stating that it had deposited more than
10 the material Google received, Google went back to the Copyright Office and learned that the
11 Copyright Office, through no fault of Google, neglected to print and provide Google with a
12 portion of the Plaintiff’s deposit. Based on these facts, Google withdraws its argument that
13 Plaintiff failed to seek a copyright registration for the work at issue. However, for the reasons
14 discussed below, Plaintiff’s copyright claim is nevertheless deficient and should be dismissed.

15 **B. Plaintiff Does Not Allege the Copyright Claim with the Required Specificity**

16 Google explained in its opening brief that copyright claims asserting the look and feel of
17 a website, without specifying the elements of the website allegedly infringed, are improper and
18 should be dismissed for failure to give adequate notice to the Court and to defendant of the scope
19 of the copyright claim. There are millions of websites which employ similar features and
20 attributes, and which are continuously evolving, with the result that website “look and feel”
21 copyright claims are notoriously vague and therefore require greater specificity of pleading. *See*
22 *Mtd.* at 7. That is particularly so in cases like this one, where the plaintiff also asserts a trade
23 dress infringement claim purporting to encompass aspects of the website’s appearance. *Mtd.* at
24 22-23 (relying on *Salt Optics, Inc.*, 2010 WL 4961702, at *4 and *Sleep Science Partners v.*
25 *Lieberman*, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010)).

26 The subsequent *Salt Optics* decision attached by Plaintiff as Exhibit C to the declaration
27 in support of its opposition emphasizes Google’s point succinctly:
28

1 Plaintiff's copyright claim . . . does not survive Defendants' 12(b)(6
2 challenge. In its First Dismissal Order, the Court instructed Plaintiffs, in any
3 amended complaint, to identify the constituent elements of its website that are
4 original and allegedly copied . . . as well as the specific images/content that
5 Defendants are alleged to have infringed.

6 Plaintiff did not heed the Court's warning. The majority of the SAC's
7 copyright allegations are averred in general terms. Plaintiff pleads copyright
8 protection in its website's "text, photographs, selection, arrangement and
9 compilation" . . . but offers no examples of specific texts or photographs that
10 Defendants allegedly infringe. This kind of imprecision is unacceptable, especially
11 in light of the Court's previous instructions.

12 *Salt Optics, Inc. v. JAND, Inc.*, No. SACV 10-828 DOC (RNBx), at 5 (C.D. Cal Mar. 4, 2011).

13 Plaintiff argues that it has adequately identified the supposedly infringed aspects of its
14 website by alleging infringement of "the text, selection, arrangement, editing, and compilation of
15 the CamUP web video chat platform." Opp. at 17. That language provides no notice at all of the
16 scope of the copyright claim, and is nearly identical to the language rejected by the *Salt Optics*
17 court. See *Salt Optics, Inc.*, 2010 WL 4961702, at *5-6 (rejecting as too vague copyright claim
18 asserting infringement of "texts, photographs, selection, arrangement and compilation" of a
19 website).

20 Citing *Facebook, Inc. v. Power Ventures, Inc.*, 2009 WL 1299698 (N.D. Cal. May 11,
21 2009), Plaintiff argues that it need not specify which aspects of its website it claims have been
22 infringed by Google. Opp. at 17. *Facebook* is easily distinguished. First, *Facebook* involved
23 allegations that the defendant made an exact electronic copy of each page of Facebook's website.
24 *Facebook*, 2009 WL 1299698, at *3. Exact replication of a copyrighted work is vastly different
25 from the claim made here by Plaintiff that Google copied limited, unidentified aspects of
26 Plaintiff's website. The defendant in *Facebook* knew exactly what it was alleged to have copied;
27 the same cannot be said of Google. Second, *Facebook* did not involve any potentially
28 overlapping allegations of trade dress infringement. *Facebook*, 2009 WL 1299698, at *1, *3-4.
There was therefore no need to distinguish the scope of the copyright claim from a trade dress
claim. In contrast, the cases cited by Google that involved both copyright and trade dress claims,
Salt Optics and *Sleep Science*, emphasize the importance of specifying the scope of the copyright
claim when, as here, there is also a trade dress claim.

1 Finally, Plaintiff relies on its having included in its Amended Complaint a screen shot of
2 each of a page from the CamUp website and the Hangouts feature as an identification of the
3 allegedly infringed and infringing elements of its copyright claim. *See* Opp. at 18. But Plaintiff
4 has already asserted that nearly all the visual elements in the Cam Up screen shot (the logo
5 placement, color, large and small windows and their contents, and rectangular boxes containing
6 chat and playlist features surrounding the windows) comprise its allegedly infringed trade dress.
7 Am. Compl., ¶53; Opp. at 1, 7-9. The screen shots are thus no help in meeting Plaintiff's
8 obligation to distinguish between the copyright and trade dress claims. *See Salt Optics*, 2010
9 WL 4961702, at *6-7 ("Plaintiff needs to delineate more clearly which facts it alleges in support
10 of its trade dress claim and which facts it alleges in support of its copyright claim."); *Science*
11 *Partners*, 2010 WL 1881770, at *5 ("[I]f [plaintiff] intends to maintain a Lanham Act claim
12 based on its website's 'look and feel,' in addition to articulating clearly the website features that
13 comprise its alleged trade dress, Plaintiff must plead a 'look and feel' that does not fall under the
14 purview of the Copyright Act."). Accordingly, the fact that Plaintiff can theoretically allege both
15 copyright and trade dress claims (*see* Opp. at 18) is no help to Plaintiff, because it must
16 nevertheless specify the allegations supporting each claim. Plaintiff's failure to do so requires
17 dismissal of both claims. *Salt Optics*, 2010 WL 4961702, at *6-7.

18 **CONCLUSION**

19 For the foregoing reasons, Google respectfully requests that this Court dismiss Plaintiff's
20 Third and Fourth Causes of Action.

21
22 Dated: October 2, 2012

WILSON SONSINI GOODRICH & ROSATI

23
24 By: /s/ Colleen Bal
Colleen Bal

25 *Attorneys for Defendants*
26 GOOGLE INC. AND RICHARD ROBINSON

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CERTIFICATION

I, Charles T. Graves, am the ECF User whose identification and password are being used to file the REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GOOGLE'S MOTION TO DISMISS. In compliance with General Order 45.X.B, I hereby attest that Colleen Bal has concurred in this filing.

Dated: October 2, 2012

WILSON SONSINI GOODRICH & ROSATI

By: /s/ Charles T. Graves
Charles T. Graves

Attorneys for Defendants
GOOGLE INC. AND RICHARD ROBINSON