

COLLEEN BAL, State Bar No. 167637
CHARLES TAIT GRAVES, State Bar No. 197923
RIANA S. PFEFFERKORN, State Bar No. 266817
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
One Market Plaza
Spear Tower, Suite 3300
San Francisco, California 94105-1126
Telephone: (415) 947-2000
Facsimile: (415) 947-2099
Email: cbal@wsgr.com
tgraves@wsgr.com

Attorneys for Defendants
Google Inc., Google UK Ltd.,
and YouTube, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BE IN, INC., a New York corporation

Plaintiff,

v.

GOOGLE INC., a California corporation;
YOUTUBE, LLC, a Delaware limited liability
company, and GOOGLE UK LTD., a private
limited company registered in England and
Wales,

Defendants.

CASE NO.: 5:12-cv-03373-LHK

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS FIRST, THIRD, AND
FOURTH CAUSES OF ACTION OF
THE SECOND AMENDED
COMPLAINT**

Hearing Date: November 21, 2013

Hearing Time: 1:30 p.m.

Courtroom: 8, 4th Floor

Judge: Hon. Lucy H. Koh

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1 **NOTICE OF MOTION AND MOTION**

2 **PLEASE TAKE NOTICE** that on November 21, 2013, at 1:30 p.m. in Courtroom 8, 4th
3 Floor, United States District Courthouse, 280 South First Street, San Jose, CA 95113, before the
4 Honorable Lucy H. Koh, Defendants Google Inc. (“Google”), YouTube, LLC and Google UK,
5 Ltd. (“Google UK”) will and hereby move to dismiss Plaintiff Be In, Inc.’s causes of action for
6 trade secret misappropriation, breach of implied contract, and breach of written contract, and its
7 request for statutory copyright damages.

8 **RELIEF SOUGHT:** Google seeks dismissal of Plaintiff’s causes of action for (1) trade
9 secret misappropriation; (2) breach of implied contract, and (3) breach of written contract, and its
10 request for statutory copyright damages, under Rule 12(b)(6). Plaintiff has not adequately
11 alleged the elements of the asserted claims and has not registered its copyright in the time
12 required to seek statutory copyright damages.

13 This motion is based upon the Memorandum of Points and Authorities, the Declaration of
14 Colleen Bal and Exhibits attached thereto, the Proposed Order, and any other information and
15 argument before the Court at the hearing.

16 **INTRODUCTION**

17 In June 2011, Google launched an online product called “Hangouts” that allows users to
18 video chat with multiple other users, watch YouTube videos together, and share documents. In
19 June 2012, Plaintiff Be In, Inc. initiated this action, asserting that Hangouts is unlawfully similar
20 to Plaintiff’s own video chat website called CamUp, which Plaintiff claims to have publicly
21 “debuted” in March 2011 and launched online in April 2011.

22 This lawsuit is still in its early stages because Plaintiff has been represented by five
23 different law firms and has advanced four different complaints. With each iteration of the
24 complaint, Plaintiff has whittled down the fact allegations for its key claims, until it is now a
25 shell of unsupported conclusions which do not support viable claims:

- 26 • Plaintiff alleges that it disclosed secret business strategies to a single Google UK sales
27 employee named Richard Robinson at a meeting in London on May 12, 2011. It
28 originally claimed Mr. Robinson transmitted the claimed secrets from London to “Doe

1 defendants” and to Google Inc. for their use in developing Hangouts. But after Mr.
2 Robinson submitted both a detailed declaration and an answer refuting Plaintiff’s claims
3 that he had used or disclosed any of Plaintiff’s information, it dropped him from the
4 lawsuit and no longer alleges that he transmitted any of its information to anyone at
5 Google Inc. or YouTube.

- 6 • Plaintiff originally included in its complaint a graphic that it claimed to have shown Mr.
7 Robinson at the May 12, 2011 meeting. After Defendants notified Plaintiff’s counsel that
8 the mock up was a fake and could not have existed at the time of the London meeting, the
9 mock up disappeared from the next version of the complaint.
- 10 • As purported “evidence” that Defendants copied the CamUp user interface from
11 Plaintiff’s website at www.camup.com, Plaintiff originally claimed that after the May 12,
12 2011 London meeting, it experienced a “dramatic spike” in user traffic and unusually
13 long visits to the CamUp website from broad geographic areas where Defendants’
14 employees might be located. Plaintiff subsequently removed those allegations from the
15 complaint, and no longer alleges any basis to assert that anyone from any Defendant
16 visited – much less copied from – Plaintiff’s CamUp website.

17 In large part because Plaintiff abandoned these “facts,” the resulting complaint cannot
18 support three of its four claims for relief.

19 *Trade Secret Claim.* The trade secret claim should be dismissed because Plaintiff fails to
20 plead an essential element: misappropriation by improper means. The complaint merely asserts
21 that Plaintiff disclosed secret information to Mr. Robinson and, separately, that CamUp shares
22 certain similarities with Hangouts and YouTube. Having removed its accusation that Mr.
23 Robinson transmitted secrets to Google and the former “Doe” defendants, Plaintiff fails to allege
24 that anyone else at Google UK learned the alleged secrets, or that anyone transmitted them from
25 Google UK in London to Hangouts developers at Google or anyone at YouTube.

26 *Breach of Written Contract (Terms of Service) Claim.* In the fourth cause of action,
27 Plaintiff alleges that Defendants breached the written Terms of Service located on Plaintiff’s
28 CamUp website by copying design elements of the CamUp user interface from the website. The

1 claim should be dismissed for two reasons. First, the complaint does not allege that any
2 Defendant ever even saw the Terms of Service, much less agreed to be bound to them.
3 Although, as noted, Plaintiff previously alleged tenuous evidence to try to demonstrate that
4 Defendants may have visited the CamUp website (which contains a link to the Terms of Service)
5 – a claimed increase in traffic to the CamUp website from cities or an entire country where
6 Defendants have offices – even those allegations have been deleted from the operative
7 complaint. Second, even if Plaintiff had pleaded a valid contract, it has not sufficiently alleged a
8 breach. As with its trade secret claim, Plaintiff merely alleges the availability of its website to
9 Defendants and the claimed similarity between the Hangouts and CamUp user interfaces,
10 without any facts to plausibly assert that Defendants engaged in improper conduct or breached
11 any Terms of Service.

12 *Breach of Implied Contract Claim.* Plaintiff’s claim for breach of implied contract
13 should be dismissed because the terms of the alleged implied contract conflict with the terms of a
14 written non-disclosure agreement (“NDA”) covering the same subject matter. In particular,
15 although Plaintiff admits that it entered an NDA that governed its disclosure of information to
16 Defendants, it does not allege that Defendants’ claimed use of its “secret” information constitutes
17 a breach of the NDA. Instead, to avoid the rights afforded Defendants under the NDA, Plaintiff
18 conjures a claimed “implied” contract, which also supposedly prohibits use by Defendants of
19 Plaintiff’s “secret” information, and (1) not only lacks the protections of the NDA, but also (2)
20 would require Defendants to enter into a forced licensing, advertising and sponsorship
21 arrangement with Plaintiff as the remedy for allegedly breaching their non-disclosure
22 obligations.

23 Even if the implied agreement did not conflict with the written NDA, it would be
24 unenforceable for two other reasons: Plaintiff has not pleaded the terms of the claimed
25 agreement with the required certainty, and even if it had, the claimed agreement would fail
26 because it is an unenforceable “agreement to agree.”

27 For these reasons, Defendants respectfully request that the Court dismiss the first, second
28 and fourth causes of action.

BACKGROUND

Google Hangouts is a free video conferencing service from Google Inc. that enables one-on-one chats as well as group chats with up to ten people at a time. *See* SAC, ¶ 61. Hangouts also allows users to share documents, images and YouTube videos with other users, and its “On-Air” feature allows users to “broadcast” video conferences to the public. *See id.*, ¶¶ 61-63, 68, 72. Google launched Hangouts in June 2011. *Id.*, ¶ 60. In this lawsuit, Plaintiff alleges that it launched its own, online video conferencing service in April 2011 (two months before the Hangouts launch) and that it held a meeting in London with Google UK employee Richard Robinson on May 12, 2011 (six weeks before the Hangouts launch) at which Plaintiff claims to have told Mr. Robinson secret business ideas about the already-launched CamUp. *Id.*, ¶¶ 24, 34.

Each of Plaintiff’s four causes of action alleges generally that Google and YouTube (but not Google UK) copied Plaintiff’s CamUp product to create Hangouts. Plaintiff does not contend that Google copied source code or any other technical information or had access to any of Plaintiff’s underlying technology. Instead, Plaintiff contends that Google and YouTube stole “business strategies” conveyed to Mr. Robinson during the May 12, 2011 London meeting, and that they copied various design elements publicly disclosed on the CamUp user interface.

Generously construed, the “secret” business strategies Google allegedly stole are: (1) the idea of a multi-user video conferencing product, (2) the idea of Google integrating a multi-user video conferencing product with other Google product offerings, such as YouTube or Google Docs, or with third party applications (“apps”), (3) the use of a “watch with your friends” button to encourage YouTube users to launch Hangouts and thereby watch YouTube with their friends, (4) adding “chat” functionality to a video conferencing product, (5) using a multi-user video conferencing product to share educational content and documents, (6) using “virtual avatars,” and (7) publically broadcasting a video conference. *See* SAC, ¶¶ 5, 6, 40, 41, 48-51, 72-74. The design elements Google allegedly copied are: (1) a large video screen for the main speaker placed above smaller thumbnail screens for other video conference participants, (2) a chat window and playlist to the side of the main screen, (3) an “Invite Friend” button that allows users

1 to invite friends to the video conference, (4) a shaded silhouette icon to represent open seats for
2 other users, and (5) a gray and white color scheme. *Id.*, ¶¶ 62, 64.

3 The weaknesses in Plaintiff's claims are demonstrated, among other things, by its
4 successive deletion of significant factual allegations over the four iterations of its complaint
5 since June 2012.

6 *The Original Complaint.* In its original complaint, Plaintiff named both Google Inc. and
7 Google UK sales employee Richard Robinson as defendants in the action. Plaintiff alleged that
8 it disclosed secret "business strategies" to Mr. Robinson at a confidential May 12, 2011 meeting
9 in London. Plaintiff expressly accused Mr. Robinson of wrongdoing, claiming that he
10 "conspired with" and improperly transmitted those secrets to unnamed Google Inc. employees
11 and three "Doe" defendants who used them to develop Hangouts. Docket No. 1, ¶¶ 40, 43. In
12 response, Mr. Robinson submitted a detailed declaration refuting Plaintiff's claims that he had
13 used or disclosed any of Plaintiff's information, and filed a detailed Answer along the same
14 lines. *See* Docket. No. 13.

15 Plaintiff further alleged that after the May 12, 2011 London meeting, Google employees
16 in Mountain View, California improperly copied original elements of the CamUp user interface
17 by accessing Plaintiff's public CamUp website at www.camup.com. Docket No. 1, ¶¶ 32, 49.
18 As evidence that Google developers accessed and copied from Plaintiff's website, Plaintiff
19 claimed that after the May 12, 2011 meeting in London, it experienced "a dramatic spike in user
20 traffic to the CamUp site, in particular from individuals located in Mountain View, California,
21 where Google is headquartered." *Id.*, ¶ 32. According to Plaintiff, "[t]hese unique site visits
22 averaged almost 40 minutes per visit, much longer than the typical visit from a CamUp user,
23 which is on average 1-4 minutes. Also, the traffic from these locations was direct, as opposed to
24 having been directed from a search engine or via links from other websites." *Id.* Plaintiff
25 asserted that "these CamUp visits were from Google employees who logged on with the intent of
26 studying the CamUp site prior to their improper launch of Google+ and the Hangouts feature."
27 *Id.*

1 The original complaint included a graphic purporting to show a mock up of a YouTube
2 user interface containing a link to the CamUp website via a “watch with your friends” button that
3 Plaintiff allegedly showed Mr. Robinson at the May 12, 2011 meeting. *See id.*, ¶¶ 35-37. But
4 the graphic appeared to have been created after the fact because the purported YouTube interface
5 did not match what would have available on YouTube in May 2011. The viewer count was in
6 excess of the number of viewers that actually had viewed the YouTube video as of May 12,
7 2011, and certain graphical elements shown in the mock-up also did not exist on YouTube as of
8 May 2011.

9 *The First Amended Complaint.* On August 16, 2012, after Google warned Plaintiff of its
10 suspicions regarding the mock up, Plaintiff filed a First Amended Complaint which deleted the
11 mock up entirely. Docket No. 12. However, the FAC continued to assert the same claims
12 against the same defendants.

13 On February 19, 2013, Plaintiff’s counsel (Clifford Chance and Davis Wright Tremaine)
14 moved to withdraw their representation, citing non-payment. Docket No. 28. The Court granted
15 the withdrawal motion on March 7, 2013. Docket No. 33.

16 *The Gibson SAC.* In early March 2013, Gibson Dunn & Crutcher appeared as counsel for
17 Plaintiff. Docket Nos. 30, 31. On April 30, 2013, Plaintiff moved for leave to file a Second
18 Amended Complaint (the “Gibson SAC”). Docket Nos. 37-41. The Gibson SAC dropped Mr.
19 Robinson and the “Doe” defendants from the action. Docket No. 39. Although Plaintiff
20 continued to allege that it disclosed trade secrets to Mr. Robinson at a meeting in London on
21 May 12, 2011, Plaintiff no longer alleged that Mr. Robinson “conspired” with Google Inc. (or
22 any other defendant) to misappropriate Plaintiff’s trade secrets. Plaintiff, moreover, did not
23 accuse anyone else of wrongdoing in Mr. Robinson’s place, or even accuse anyone else of
24 learning the “business strategies” Plaintiff purportedly disclosed at its meeting with Mr.
25 Robinson on May 12, 2011. *See id.* Nonetheless, Plaintiff continued to advance a claim for
26 trade secret misappropriation, albeit with no accusation that anyone did anything wrong.

27 Plaintiff also continued to assert that it had evidence that Google employees visited and
28 copied its website, this time alleging that the CamUp website experienced a “dramatic spike” in

1 traffic from even more locations where employees of Google Inc. or Google UK might be found:
2 “from within the United Kingdom, the areas of Palo Alto and Mountainview California, where
3 Google is headquartered, and Seattle, Washington, where Google engineers allegedly developed
4 Hangouts.” *Id.*, ¶ 57.

5 Gibson Dunn did not last long. On May 14, 2013, Morrison & Forester (“MoFo”)
6 substituted in as counsel for Plaintiff. On June 4, 2013, MoFo withdrew the motion for leave to
7 file the Gibson SAC, and accordingly, the Gibson SAC never became operative. On June 10,
8 2013, with Google and Mr. Robinson’s consent (given expressly without waiving any rights,
9 defenses, or objections), MoFo filed the SAC that is the subject of this motion. Docket No. 59.

10 *The Second Amended Complaint.* The SAC at issue is very similar to the Gibson SAC. It
11 names the same defendants and asserts the same claims. But critically, it removes certain factual
12 allegations, suggesting MoFo’s recognition that those allegations were unsupportable.

13 Like the Gibson SAC, the SAC at issue does not allege that Mr. Robinson (or anyone
14 else) transmitted or communicated any claimed trade secrets or any other information to any
15 Defendant. It merely advances the unsupported conclusion that “Defendants have acquired,
16 disclosed, and/or intend to use Plaintiff’s trade secrets through improper means.” *See id.*, ¶ 80.

17 The SAC also removes a number of factual allegations that were present in the Gibson
18 SAC. Among them, Plaintiff no longer alleges any facts to support the claim that any Defendant
19 ever accessed the CamUp website or viewed the Terms of Service on the CamUp website. The
20 SAC erases all allegations concerning a “dramatic spike” in user traffic after the May 12, 2011
21 meeting or unusually long user visits to the website originating from locations where Google
22 employees might be found, that appeared in earlier versions of the complaint. *Compare* Gibson
23 SAC ¶ 58 (containing “dramatic spike” allegations) *with* SAC ¶¶ 57-59.

24 ARGUMENT

25 I. LEGAL STANDARD

26 Dismissal under Rule 12(b)(6) for failure to state a claim “can be based on the lack of a
27 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
28 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A motion to

1 dismiss should be granted if a plaintiff fails to plead enough “factual content to allow a court to
2 draw the reasonable inference that the defendant is liable for the alleged” misconduct; facts
3 merely consistent with a defendant’s liability are not sufficient. *Ashcroft v. Iqbal*, 556 U.S. 662,
4 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57, 570 (2007)). A plaintiff
5 that pleads no more than conclusory assertions of the elements of the cause of action does not
6 meet this standard. *Id.* Moreover, although allegations of material fact are taken as true, legal
7 conclusions, conclusory statements, unwarranted deductions of fact, and unreasonable inferences
8 need not be. *Id.*; *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

9 **II. PLAINTIFF OMITTS KEY ALLEGATIONS FROM ITS CLAIMS FOR**
10 **MISAPPROPRIATION AND BREACH OF WEBSITE TERMS OF SERVICE**

11 Plaintiff’s causes of action for (1) trade secret misappropriation, and (2) breach of the
12 CamUp website’s Terms of Service share a common flaw: Plaintiff has removed the only fact
13 allegations it previously made to accuse any Defendant of the specific conduct necessary for
14 Plaintiff to state each claim. As to trade secret misappropriation, Defendant dropped its former
15 accusation against Google UK’s Mr. Robinson, the only person it ever accused of learning, and
16 then illicitly transmitting, the alleged trade secrets to separate Defendants Google Inc. and
17 YouTube. As to the claim for breach of the Terms of Service, Plaintiff dropped its former
18 accusation that people in cities or countries where Defendants have offices visited the CamUp
19 website in the spring of 2011 at a significant rate, thereby abandoning the (tenuous) implication
20 that Defendants’ employees must have been behind such website visits.

21 Absent these allegations, Plaintiff has no fact allegations (1) to plead that anyone from
22 one Defendant, Google UK, knew about and illicitly transmitted alleged trade secrets to two
23 other Defendants, Google Inc. and YouTube; or (2) to plead that anyone from any Defendant
24 actually used Plaintiff’s website, a necessary prerequisite to agreeing to Plaintiff’s online Terms
25 of Service.

26 These are serious omissions. Defendants do not believe that Plaintiff has a Rule 11 basis
27 to allege the facts necessary to assert these claims, *i.e.*, to accuse anyone of knowing and illicitly
28 transmitting alleged trade secrets from Plaintiff’s May 2011 London meeting with Richard

1 Robinson or to accuse anyone from Defendants of agreeing to its Terms of Service. Plaintiff's
2 various amendments to the complaint strongly suggest that Plaintiff has deliberately removed
3 these required fact allegations because it realizes they are baseless. Of course, if Plaintiff
4 believes it can amend to supply the missing allegations while comporting with its Rule 11
5 obligations, it can attempt to do so. But Plaintiff should not be permitted to skate by on its
6 deficient claims without factually supporting them, particularly after dropping key allegations.

7 **III. THE MISAPPROPRIATION CLAIM SHOULD BE DISMISSED**

8 Plaintiff's trade secret claim is asserted against all three defendants: Google Inc., Google
9 UK and YouTube. To accuse each Defendant of misappropriating a trade secret, Plaintiff must
10 allege that (1) Google Inc. and YouTube learned or acquired an alleged trade secret by improper
11 means; because (2) someone at Defendant Google UK was privy to the alleged secrets from
12 Plaintiff's May 2011 meeting with Mr. Robinson and wrongfully disclosed them to both of those
13 Defendants. Plaintiff's cause of action for Uniform Trade Secrets Act ("UTSA") trade secret
14 misappropriation should be dismissed for the simple reason that Plaintiff does not allege the
15 required element of misappropriation *by improper means*. By abandoning its allegation that
16 former defendant Richard Robinson wrongfully transmitted alleged secrets to Defendant Google
17 Inc., Plaintiff dropped the only allegation it had made of improper means.

18 A California UTSA claim requires that there be misconduct by each accused defendant.
19 Specifically, "[m]isappropriation of trade secrets is an intentional tort." *PMC, Inc. v. Kadisha*,
20 78 Cal. App. 4th 1368, 1382 (2000). One who did not receive the alleged trade secret directly
21 from the plaintiff, and instead is accused of receiving the secret from someone else, cannot
22 commit "misappropriation" unless that party actually (1) wrongfully acquired the trade secret; or
23 (2) wrongfully gained "knowledge" of the trade secret. *See, e.g.*, Cal. Civ. Code § 3426.1(b).
24 These are basic principles and rarely litigated, because virtually every trade secret plaintiff
25 actually alleges that someone engaged in an act of "misappropriation" as defined by the UTSA.

26 Plaintiff here is the exception. In its original Complaint, Plaintiff alleged that former
27 defendant Richard Robinson learned alleged trade secrets during a May 2011 meeting with
28 Plaintiff in London and then wrongfully disclosed the alleged trade secrets to Google Inc. and

1 “Doe” defendants. *See* Complaint, ¶ 43 (“Plaintiff provided its trade secrets to Mr. Robinson
2 who, upon information and belief, transmitted or communicated these trade secrets to Google
3 and John Does Nos. 1-3.”). But Plaintiff has now dropped Mr. Robinson and the “Does” as
4 defendants, and the SAC does not allege that he (or anyone else) “transmitted or communicated
5 these trade secrets to Google.”

6 Instead, after Plaintiff describes its May 2011 meeting with Mr. Robinson – ending with
7 Paragraph 56 – it immediately changes the subject in Paragraph 57 and accuses Defendants of
8 “repeatedly access[ing] the [public] CamUp website for the purpose of copying” it. SAC, ¶ 56.
9 Asserting that Defendants accessed a public website is not an allegation that they
10 misappropriated trade secrets – for the obvious reason that a public website is not secret.
11 Plaintiff never alleges that (1) someone at Google UK knew of, and wrongfully disclosed, an
12 alleged trade secret that Plaintiff claims to have disclosed *exclusively* to former defendant
13 Richard Robinson; nor that (2) Defendants Google Inc. and YouTube intentionally and
14 wrongfully acquired or gained “knowledge” of such information, and thus committed
15 “misappropriation.”

16 To be sure, Plaintiff alleges in Paragraphs 68 and 75 that Defendant Google (not Google
17 UK) later launched a YouTube feature that is allegedly “the precise language and concept” that
18 Plaintiff claims it disclosed to Mr. Robinson in London in May 2011. But Plaintiff never
19 actually alleges the necessary acts of “misappropriation” in order to plead a UTSA claim. A
20 trade secret is not a monopoly right. By statute, if someone arrives at the exact same ideas by
21 independent means, there is no possible claim. *See* Cal. Civ. Code § 3426.1(a) (“[I]ndependent
22 derivation alone shall not be considered improper means.”). Moreover, in California, a trade
23 secret plaintiff bears the burden to prove that a defendant did not independently derive the same
24 information. *See Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658 (2003) (stating
25 rule). Under these rules, the gap in Plaintiff’s trade secret cause of action is fatal.

26 Plaintiff must do more than allege that it disclosed claimed trade secrets to one
27 Defendant, and that different Defendants later launched a product with the same ideas. It has to
28 bridge the gap by alleging that each of the three Defendants did something wrong, as

1 “misappropriation” is defined by the UTSA. Plaintiff’s conclusory, generic recitation of claim
2 elements in Paragraph 80 is insufficient to plead the claim. *See Twombly*, 550 U.S. at 554.
3 Plaintiff abandoned its trade secret accusation against the only person on Defendants’ side it
4 alleges attended the May 2011 meeting in London. Because it makes no new, replacement
5 allegations that anyone from Google UK actually knew of, much less transmitted, the alleged
6 secrets from that meeting to anyone at the other Defendants, it fails to state a claim for UTSA
7 trade secret misappropriation. Theft is a serious accusation. Plaintiff should be required to make
8 it properly – if it can – or not at all.

9 **IV. THE BREACH OF TERMS OF SERVICE CLAIM SHOULD BE DISMISSED**

10 **1. Plaintiff Has Not Pleaded The Formation of a Contract**

11 In its fourth cause of action, Plaintiff alleges that all three Defendants breached the Terms
12 of Service governing use of its CamUp website at www.camup.com. *See* SAC, ¶¶ 98-103. To
13 plead a claim for breach of contract under New York law,¹ a plaintiff must allege “(1) formation
14 of a contract between the plaintiff and defendant; (2) performance by the plaintiff; (3) failure by
15 the defendant to perform; and (4) resulting damages.” *Counsel Fin. Servs., LLC v. Melkersen*
16 *Law, P.C.*, 602 F. Supp. 2d 448, 452 (W.D.N.Y. 2009) (quoting *Clarke v. Max Advisors, LLC*,
17 235 F. Supp. 2d 130, 141 (N.D.N.Y. 2002)). Here, Plaintiff’s contract claim should be dismissed
18 because Plaintiff fails to plead either the formation of a contract between Plaintiff and any
19 Defendant or the breach of any such contract.

20 Plaintiff acknowledges that the Terms of Service are only available to users of its CamUp
21 website who click through a link at the bottom of the home page. SAC, ¶ 98. Users of the
22 website who do not click the link would never even see the Terms of Service. *Id.* Plaintiff

24 ¹ Plaintiff did not attach the Terms of Service to its complaint, nor identify which version of
25 the Terms of Service it alleges Defendants breached. Because the current version of the Terms
26 of Service states contains a New York choice of law provision, Defendants assume for current
27 purposes that this contract cause of action is governed by New York law. *See*
28 <http://www.camup.com/page/terms.html>. The required elements of the contract cause of action
would be the same if California law applied. *See First Commercial Mortgage Co. v. Reece*, 89
Cal. App. 4th 731, 745 (2001) (citing 4 Witkin, CALIFORNIA PROCEDURE (4th ed. 1997)
“Pleading,” § 476, p. 570); Cal. Civ. Code § 1550.

1 asserts that users manifest their “agreement” to the Terms of Service by their continued use of
2 the website, although it acknowledges that visitors to the website who do not wish to be bound
3 by the Terms of Service may simply leave the website. *Id.*

4 Plaintiff alleges no facts that any Defendant actually used or even visited the CamUp
5 website, much less agreed to the Terms of Service. Plaintiff does not claim to have records
6 showing that any Defendant created an account on the website, posted a submission on the
7 website, made any payment through the website, or otherwise used or accessed the website. And
8 while prior versions of the complaint asserted a “dramatic spike in traffic” and visits of
9 “substantially longer duration than the average CamUp visit” to the CamUp website following
10 the May 12, 2011 meeting with Mr. Robinson in London – visits that Plaintiff attributed to
11 Defendants – Plaintiff elected to remove from the operative complaint even this tenuous
12 suggestion that Defendants might have visited its website.² Compare Gibson SAC ¶¶ 58-59 with
13 SAC ¶¶ 57-59.

14 Plaintiff’s only assertion that Defendants visited its website is its statement that “[u]pon
15 information and belief, following Plaintiff’s meeting with Google in May, 2011, Defendants
16 and/or their employees, agents, and/or other individuals acting on their behalf used and/or visited
17 the CamUp website . . .” SAC, ¶¶ 59, 101. That legal conclusion lacks factual support and is
18 therefore accorded no weight on this motion. *Twombly*, 550 U.S. at 554. Even were it given
19 weight, as Plaintiff admits, persons “visiting” the CamUp website did not necessarily agree to the
20 Terms of Service. SAC, ¶98 (noting that visitors to the website who do not agree to the Terms of
21 Service may simply discontinue use of the website).

22 Without an allegation that Defendants ever agreed to the Terms of Service or even visited
23 its website, Plaintiff cannot allege that Defendants manifested an intent to be bound to an
24

25 ² Even if the SAC retained allegations that the CamUp website experienced increased traffic
26 or use from certain broad geographic locations such as cities or the entire United Kingdom, it
27 would fail to plead a plausible claim that the increased traffic/use was attributable to Defendants.
28 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (plaintiffs must allege “enough facts to
state a claim to relief that is plausible on its face” and “nudge[] their claims across the line from
conceivable to plausible”).

1 agreement with Plaintiff. *See Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 202 (S.D.N.Y. 2008)
2 (dismissing breach-of-contract counterclaims that “do not set forth a single fact relating to the
3 formation of the contract, the date it took place, ... or [the other party’s] assent to its terms”);
4 *Boyle v. Stephens, Inc.*, No. 97-cv-1351 SAS, 1997 WL 529006, at *5 (S.D.N.Y. Aug. 26, 1997)
5 (breach-of-contract claim dismissed, under pre-*Twombly* standard, where complaint failed to
6 “indicate in any way how [the other party] ‘accepted’ [plaintiff’s] alleged offer”); *see also Specht*
7 *v. Netscape Commc’ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (Sotomayor, J.) (“Mutual
8 manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of
9 contract”; applying California law and finding no manifestation of intent to be bound to online
10 terms). For instance, Plaintiff does not state who entered the alleged agreement – its reference to
11 “Defendants and/or their employees, agents, and/or other individuals acting on their behalf” at
12 once purports to identify everyone and no one. Nor does Plaintiff identify when the contract was
13 allegedly entered or the version of the Terms of Service to which the unnamed Defendants
14 allegedly agreed.

15 For all these reasons, Plaintiff has not pleaded the formation of a contract, and its claim
16 for breach of the Terms of Service should be dismissed. *See Berman*, 580 F. Supp. 2d at 202
17 (dismissing contract claim for failure to plead facts showing assent to an agreement).

18 **2. Plaintiff Has Not Pleaded A Breach of Contract**

19 Even if a Defendant had accessed the CamUp website and agreed to be bound to the
20 Terms of Service, Plaintiff has not alleged facts to support a breach of that agreement. This
21 provides an additional basis upon which the claim should be dismissed.

22 There would be nothing wrong with employees of Defendants simply accessing and using
23 Plaintiff’s public CamUp website. Defendants would have to have improperly copied or
24 distributed material from the website in violation of one or more of the provisions of the Terms
25 of Service to breach that agreement. Plaintiff alleges no facts that any Defendant did so. As
26 with its trade secret misappropriation claim, Plaintiff provides no link between (1) the possibility
27 that a Defendant accessed its website, and (2) the ultimate claimed similarity between Hangouts
28 and CamUp. Instead, it merely asserts the unsupported conclusion that “on information and

1 belief” Defendants copied the CamUp website in violation of the Terms of Service. SAC, ¶¶ 57,
2 101. But Plaintiff also alleges that Defendants saw the CamUp product at trade conferences in
3 March and April 2011. SAC, ¶¶ 33-36. Accordingly, the claimed similarity between Hangouts
4 and CamUp could be the result of independent development or the result of a Defendant’s access
5 through means other than the website. Neither would breach the Terms of Service. Plaintiff has
6 not pleaded a plausible basis to infer that Defendants improperly copied from Plaintiff’s website,
7 in violation of the Terms of Service. *See Twombly*, 550 U.S. at 557 (where factual allegations
8 are equally consistent with legal and illegal behavior, complaint “stops short of the line between
9 possibility and plausibility”). For this additional reason, the claim should be dismissed.³

10 **V. THE BREACH OF IMPLIED CONTRACT CLAIM SHOULD BE DISMISSED**

11 Plaintiff admits that Defendants’ disclosure and use of the information it shared with
12 Google UK’s Mr. Robinson at the May 12, 2011 London meeting is governed by a written non-
13 disclosure agreement (“NDA”). SAC, ¶¶ 44-46. But it does not assert a claim for breach of the
14 written NDA. Instead, it asserts that Defendants’ alleged unauthorized use of this information
15 breaches an “*implied*” agreement.⁴ *Id.*, ¶¶ 91-96. According to Plaintiff, under the terms of the

17 ³ The claim against Google UK should be dismissed for the additional reason that Plaintiff
18 identifies no conduct by Google UK that even could be a breach. Plaintiff vaguely claims that
19 “Defendants” copied the CamUp website to develop Hangouts. SAC, ¶ 101. Plaintiff does not
20 allege that Google UK played any part in the development of Hangouts. *See id.*, ¶¶ 11, 61. The
only mentions of Google UK in the SAC concern attendance at the May 12, 2011 meeting in
London by Google UK employee Richard Robinson. *See id.*, ¶¶ 38, 43-56. This failure to
identify any conduct by Google UK that even arguably could be a breach of the Terms of Service
provides an additional reason to dismiss the claim against Google UK.

21 ⁴ Plaintiff appears to assert the “implied” contract claim under California law. *See* SAC, ¶¶
22 92-96. California law would in fact apply to the alleged “implied contract” under applicable
23 choice-of-law principles, even though the NDA states that the NDA is governed by English law
24 and the implied agreement is alleged to have been made in London, England. “To determine the
25 law governing a contract, California courts look to the relevant statute and, for further guidance,
26 to the choice-of-law principles outlined in the Restatement.” *Shannon-Vail Five Inc. v. Bunch*,
27 270 F.3d 1207, 1210 (9th Cir. 2001) (citation omitted); *see also* RESTATEMENT (SECOND) OF
28 CONFLICT OF LAW § 6(1) (1971) (a court will follow its own state’s choice-of-law statutes,
subject to constitutional restrictions). The relevant statute is California Civil Code § 1646, which
provides that “[a] contract is to be interpreted according to the law and usage of the place where
it is to be performed; or, if it does not indicate a place of performance, according to the law and
usage of the place where it is made.” The place of performance of the claimed implied contract
would be California since that is where Google Inc. and YouTube are headquartered, where the
CamUp product would allegedly be licensed and used, and where advertising and sponsorship
revenues would be generated. *See* SAC, ¶¶ 53, 93; *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal.

(continued...)

1 “implied” agreement, Defendants’ use of “any aspect” of the information Plaintiff shared with
2 Mr. Robinson for their own “benefit” would require them to proceed with a business transaction
3 with Plaintiff, license CamUp for an unidentified “per user licensing fee,” and permit Be In
4 unidentified “participation” in unidentified “advertising and sponsorship revenues.” *Id.*, ¶ 53.

5 Plaintiff’s apparent purpose in seeking to plead around the written NDA is to eliminate
6 rights that the written NDA grants to Defendants. Among other things, the NDA expressly
7 provides that (1) use of non-secret or independently derived information by Google “group
8 companies” is permitted and not a breach, and (2) there is “no obligation to proceed with any
9 business transaction.” Plaintiff cannot avoid the terms of the written NDA. The written NDA
10 forecloses Plaintiff’s claim for an overlapping and contradictory “implied” agreement. The
11 implied agreement claim should be dismissed.

12 **A. Plaintiff Has Not Pleaded an Implied Contract with Defendants**

13 **(1) The Written NDA Already Governs Use and Disclosure of**
14 **Alleged Confidential Information.**

15 Plaintiff alleges that it requested and then entered into a written NDA with “Google”⁵ as
16 a condition of proceeding with the May 12, 2011 London meeting. Plaintiff admits that the NDA

17 _____
18 (...continued from previous page)
19 App. 4th 1436, 1443 (2007) (contract “‘indicate[s] a place of performance’ within the meaning
20 of section 1646 ... if the intended place of performance can be gleaned from the nature of the
21 contract and its surrounding circumstances.”).

22 ⁵ The written agreement is between Plaintiff and Google Ireland, and it describes “rights”
23 that apply to Google Ireland and its “group companies.” *See* Bal Decl. Exh. A (NDA) §§ 1, 9
24 (granting “rights under this NDA” to Google Ireland and its “group companies”). The group
25 companies are therefore intended third party beneficiaries under the NDA and may enforce their
26 rights under the NDA. *See* Cal. Civ. Code § 1559 (third party beneficiaries may enforce
27 pertinent contract terms); *Kern County Water Agency v. Belridge Water Storage Dist.*, 18 Cal.
28 App. 4th 77, 86-87 (1993) (third party beneficiaries could invoke contract interpretation
principles to enforce agreement as written); *Gen. Motors Corp. v. Superior Court*, 12 Cal. App.
4th 435, 443-44 (1993) (member of class of third party beneficiaries had standing to enforce
agreement); *Titan Global LLC v. Organo Gold Int’l, Inc.*, No. 12-cv-2104 LHK, 2012 WL
6019285, at *3-4 (N.D. Cal. Dec. 2, 2012) (same). The same is true under English law. Bal
Decl., Exhs. B & C (respectively, *Dolphin Maritime & Aviation Services Ltd. v. Sveriges
Angartygs Assurans Forening* [2009] EWHC (Comm) 716 (Eng.) (holding that a third party
beneficiary can rely on contractual terms where it was an intended purpose of the bargain);
Contracts (Rights of Third Parties) Act 1999, §1 (English law statute providing rights of third
parties to enforce contractual rights)).

1 governs Defendants' use and disclosure of information exchanged in connection with the
2 meeting. *See id.*, ¶ 44 (Plaintiff asked Mr. Robinson to sign an NDA on behalf of "Google" to
3 cover information to be discussed at the May 2011 meeting); ¶ 45 ("Be In executives previously
4 had resolved that, should Mr. Robinson refuse to sign a non-disclosure agreement on behalf of
5 Google, they would not discuss any confidential business plan or strategy at their meeting, and,
6 instead, only present their then-public platform."); ¶ 46 (Plaintiff executed NDA prior to the
7 meeting); ¶ 55 (following the meeting, Plaintiff's personnel discussed internally that the "NDA
8 was a good call" and that "Be In was 'covered' in their conversations with Google.").

9 Because Plaintiff refers to the written NDA in its complaint, the Court may review it on
10 this motion. *In re Stac Electronics Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996)
11 ("[D]ocuments whose contents are alleged in a complaint and whose authenticity no party
12 questions, but which are not physically attached to the pleading, may be considered in ruling on a
13 Rule 12(b)(6) motion to dismiss.") (quotations omitted). Under the terms of the NDA, each
14 party receives as consideration for its disclosure of information a promise that the information
15 will be used exclusively for the "Purpose" of evaluating "one or more business transactions."
16 *See* Declaration of Colleen Bal ("Bal Decl."), Exh. A (NDA), § 8 (definition of "Purpose").
17 Notwithstanding this restriction, recipients of the information are permitted (1) to develop
18 independently the same information, and (2) to use any information that is publicly available
19 without restriction. *See id.*, § 4. Information that is "publicly available" would include
20 information that was available on video chat, conferencing, and social networking websites
21 before and in early 2011. Thus, there could be no viable claim for breach under the written NDA
22 directed to use of the generic and publicly-available information over which Plaintiff asserts
23 rights here, such as (1) an individual page or "room" for each user, (2) required use of real
24 names, (3) user-created playlists, (4) group video conferencing, and (5) allowing games and
25 "apps" on a social networking website. *See* SAC, ¶¶ 28, 29, 51.

26 Another right the NDA grants is the freedom not to be forced into a business deal with
27 Plaintiff: "[t]his NDA imposes no obligation to proceed with any business transaction." *See* Bal
28 Decl., Exh. A (NDA), § 7. To safeguard these rights for Google and its "group companies," the

1 NDA contains an integration clause and requires that “[a]mendments must be in writing.” *See*
2 *id.*, § 10.

3 **(2) Plaintiff’s Claimed “Implied Contract” Conflicts with the NDA**

4 Notwithstanding the existence of this written NDA governing the use of Plaintiff’s
5 claimed confidential information, Plaintiff asserts that Defendants’ alleged misuse of the
6 information it disclosed under the NDA in May 2011 breaches a separate “implied” contract that
7 Plaintiff claims to have entered into two days after it executed the written NDA.⁶ SAC, ¶¶ 53,
8 93. According to Plaintiff, it entered an “implied in fact” contract with all three Defendants
9 through an oral agreement between Plaintiff and Google UK’s Richard Robinson at the May 12,
10 2011 London meeting. *Id.*, ¶¶ 43, 53, 93. Plaintiff alleges that, pursuant to the implied
11 agreement, it disclosed confidential information at the meeting only on the “express condition”
12 that Defendants would license Plaintiff’s CamUp website and enter into an advertising and
13 sponsorship transaction with Plaintiff if they used “any aspect” of the alleged confidential
14 information:

15 Be In disclosed its proprietary business plan to Mr. Robinson on the *mutual*
16 *understanding and express condition* that, if Google utilized any aspect of that plan
17 for its benefit, it would be licensing CamUp from Be In for a one-time, lifetime
per-user licensing fee, and that Be In would further participate in advertising and
sponsorship revenues generated through the CamUp platform and Be In’s strategy.

18 ***

19 Plaintiff disclosed its valuable, proprietary business and marketing strategies to
20 Defendants . . . in confidence, *on the condition* that they would utilize those
21 confidential strategies only if, and when, they licensed the CamUp platform from
Be In, thereby compensating Be In for the value of those proprietary business
strategies.

22
23 ⁶ Although Plaintiff labels its claim “Breach of Implied Contract,” Plaintiff may mean to
24 allege an express, oral contract. Plaintiff states that it disclosed allegedly confidential
25 information in connection with the May 12, 2011 meeting on an “express condition” that
26 “Google” would pay “a one-time, lifetime per-user licensing fee, and that Be In would further
27 participate in advertising and sponsorship revenues[.]” *See* SAC, ¶ 53. An “express” oral
28 contract and an implied contract are not the same thing. One is formed by words, and the other
is formed by conduct. *See* Cal. Civ. Code §§ 1620-21. Here, Plaintiff appears to plead the
former – it uses the word “express,” and it is hard to imagine how one would imply by conduct
alone “a one-time, lifetime per-user licensing fee” and participation in “advertising and
sponsorship revenues[.]” Regardless, as discussed herein, Plaintiff’s claim fails under both
theories.

1 See SAC, ¶¶ 53, 93 (emphasis added).

2 An alleged “implied” agreement cannot displace Defendants’ rights under the written
3 NDA. As a matter of law, a party to a written agreement cannot substitute an “implied in fact”
4 contract that varies the terms of the written contract or that is otherwise inconsistent with the
5 written contract. See *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194,
6 203 (1996) (“[I]t is well settled that an action based on an implied-in-fact or quasi-contract
7 cannot lie where there exists between the parties a valid express contract covering the same
8 subject matter”; noting that plaintiff would have to allege that the written agreement was
9 rescinded as a precondition to assert a substitute contractual theory) (citations omitted); *Tollefson*
10 *v. Roman Catholic Bishop*, 219 Cal. App. 3d 843, 855 (1990) (“[T]here simply cannot exist a
11 valid express contract on one hand and an implied contract on the other, each embracing the
12 identical subject but requiring different results and treatment.”), *disapproved on other grounds*
13 *by Scott v. Pac. Gas & Elec. Co.*, 11 Cal. 4th 454, 474 (1995); *Wal-Noon Corp. v. Hill*, 45 Cal
14 App. 3d 605, 613 (1975) (“There cannot be a valid express contract and an implied contract,
15 each embracing the same subject matter, existing at the same time.”) (citations omitted). As the
16 *Wal-Noon* court explained, the rule protects parties from the elimination of contractual rights:

17 The reason for the rule is simply that where the parties have freely, fairly and
18 voluntarily bargained for certain benefits in exchange for undertaking certain
19 obligations, it would be inequitable to imply a different liability and to withdraw
from one party benefits for which he has bargained and to which he is entitled.

20 *Id.*

21 Nor can Plaintiff rely on a claimed oral contract to vary the terms of the written NDA.
22 The NDA expressly bars amendments not in writing. Bal Decl., Exh. A (NDA), § 10. As a
23 matter of law, the alleged oral modification is therefore invalid. See Cal. Civ. Code §1698(c);
24 *Marani v. Jackson*, 183 Cal. App. 3d 695, 704-06 (1986). Moreover, even if the alleged oral
25 contract were viewed as a wholly separate agreement (and not a modification), it would still fail
26 because it purports to vary the terms of the written NDA. See Cal. Civ. Code § 1698(d)
27 (permitting “oral independent collateral contracts”); *Davidson v. ConocoPhillips Co.*, No. 08-cv-
28 1756 BZ, 2009 WL 2136535, at *5 (N.D. Cal. July 10, 2009) (oral side agreement containing

1 terms alleged “would have been at odds with a number of provisions of the [written] Agreement
2 and is therefore not independent and collateral”) (footnote and citations omitted); *Malmstrom v.*
3 *Kaiser Aluminum & Chem. Corp.*, 187 Cal. App. 3d 299, 318 (1986) (“An independent collateral
4 agreement cannot contradict the terms of a prior written contract.”) (citation omitted).

5 The written NDA and the asserted “implied” or “oral” contract conflict in at least two
6 material respects. First, the implied contract would eliminate Defendants’ right to use non-secret
7 and independently-derived information. Instead, the implied contract would require that
8 Defendants compensate Plaintiff for use of “any aspect” of Plaintiff’s CamUp information, even
9 if Defendants had already developed the same information themselves, or found it in a public
10 source. Compare SAC ¶¶ 53, 93 with NDA § 3. Second, the implied contract would eliminate
11 Defendants’ right under Section 7 of the NDA not to be forced into an involuntary business
12 transaction with Plaintiff, by inserting a remedial scheme under which Defendants’ failure to
13 comply with their non-disclosure obligations leads to a forced licensing, advertising, and
14 sponsorship deal with Plaintiff. Compare SAC ¶ 53 (use by Defendants of any aspect of
15 Plaintiff’s information would require Defendants to “licens[e] CamUp from Be In for a one-time,
16 lifetime per-user licensing fee, and that Be In would further participate in advertising and
17 sponsorship revenues generated through the CamUp platform and Be In’s strategy”) with NDA §
18 7 (“This NDA imposes no obligation to proceed with any business transaction.”). In other
19 words, Plaintiff’s unwritten contract would replace the ordinary measure of damages for breach
20 of contract with a forced business partnership as the penalty for breach. SAC, ¶ 53.

21 Plaintiff cannot state a claim for breach of an “implied” or “oral” contract that conflicts
22 with the written NDA and eliminates the “rights” that Google “group companies” possess under
23 the written NDA. Notably, Plaintiff is not without a remedy. If Defendants misused the
24 confidential information contrary to the Purpose stated under the NDA, Plaintiff can bring a
25 claim under the NDA. It has elected not to do so precisely because the terms to which it agreed
26 under the NDA – the express, written understanding of terms under which Plaintiff disclosed its
27 claimed confidential information – conflict with the implied contract it now alleges. The implied
28 contract claim should be dismissed.

1
2 **(3) The Implied Agreement Fails Basic Contract Formation**
3 **Principles**

4 Plaintiff's claim for breach of implied contract would fail even if the alleged implied
5 contract were entirely distinct from, and did not conflict with, the written NDA. That is because
6 Plaintiff has failed to plead an enforceable implied (or express oral) contract. The asserted
7 contract (1) lacks material terms, and (2) is an unenforceable agreement to agree.

8 **(a) The Claimed Implied Agreement Lacks Material Terms**

9 Under elementary contract principles, no complex commercial contract is formed in the
10 absence of material terms. *See* Cal. Civ. Code § 1598 ("Where a contract has but a single object,
11 and such object is ... so vaguely expressed as to be wholly unascertainable, the entire contract is
12 void."); *Goodworth Holdings Inc. v. Suh*, 239 F. Supp. 2d 947, 957 (N.D. Cal 2002) (no oral
13 agreement to enter a joint venture formed despite agreement on "certain essential terms" because
14 parties did not also agree on missing "[m]ajor, fundamental, essential terms" such as "'how we
15 were going to structure the deal' or 'how to structure the acquisition of the shares'"); *Citizens*
16 *Utils. Co. v. Wheeler*, 156 Cal. App. 2d 423, 433-34 (1957) (method for ascertaining price was
17 "so vaguely expressed that the price is wholly unascertainable, with the result that the
18 [m]emorandum failed to impose legally binding obligations upon the parties."). Here, Plaintiff
19 alleges that Defendants unilaterally promised that if they engaged in the same act that would
20 breach the written NDA – use of disclosed confidential information beyond the agreed-upon
21 limited evaluation – they would pay an unspecified "licensing fee" and allow unspecified
22 participation by Plaintiff in "advertising and sponsorship revenues" at some undefined price. *See*
23 SAC, ¶ 53. That purported contract is unenforceable because it lacks numerous material terms
24 necessary for contract formation:

- 25 • The alleged contract omits the license prices for each of the separate items of information
26 Plaintiff claims to have disclosed during the May 2011 London meeting. Plaintiff does
27 not even plead the bases upon which any such prices would be calculated.
28

- The alleged contract does not plead which Google products would receive license rights, or for what purposes. It also omits the platforms (*e.g.*, mobile, desktop) that would be licensed and whether or to what extent the terms would differ for different platforms.
- The alleged contract does not describe the nature of Plaintiff’s “participation” in “advertising and sponsorship revenues.” Among other things, Plaintiff does not plead the types of advertising or sponsorship in which Plaintiff was to engage, with what content, in what geographic areas, in what media, or for what length of time.
- The alleged contract omits the price Defendants would pay for “the advertising and sponsorship revenues.” Among other things, Plaintiff does not plead what metrics would be used or what prices would be agreed upon for whatever acts of advertising and sponsorship Plaintiff has in mind.
- The alleged contract does not state the term of the payment period(s) or any termination provisions. For instance, Plaintiff does not plead whether the agreement would continue year-to-year if Plaintiff’s CamUp website proved to be a failure or went offline.

Because Plaintiff has failed to plead the material terms of the oral or implied contract, the claim should be dismissed.

(b) The Claimed Implied Agreement is an Unenforceable Agreement to Agree

Even if the asserted agreement did not lack material terms, it would fail for the related but distinct reason that it is at best an unenforceable “agreement to agree.” The SAC might be read to allege that if Defendants used Plaintiff’s information for purposes prohibited by the written NDA, the parties would then reach agreement on license terms (*e.g.*, the price for a license, the scope and duration of the license, the scope of Plaintiff’s participation in advertising and sponsorship, monetary terms for such participation, etc.) and Plaintiff would grant the agreed upon license to Defendants. *See* SAC, ¶ 53. But even this (overly) generous construction of Plaintiff’s allegations would not constitute an enforceable contract because the essential terms of the claimed agreement have not been decided, but would instead be negotiated *in the future*. *See City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 433 (1959) (no enforceable contract

1 where parties reserve an essential element of the contract for future agreement); *Autry v.*
2 *Republic Prods.*, 30 Cal. 2d 144, 151-52 (1947) (“neither law nor equity provides a remedy for
3 breach of an agreement to agree in the future,” as “[t]he court may not imply what the parties
4 will agree upon”) (citations omitted); *Louis Lesser Enters., Ltd. v. Roeder*, 209 Cal. App. 2d 401,
5 405 (1962) (no binding contract “where any of the essential terms are left for future
6 determination”); *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1266-67 & n.47 (C.D.
7 Cal. 2010) (promises to enter future agreement not enforceable where important terms are left for
8 future determination). *See also Rennick v. O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 316 (9th Cir.
9 1996) (no enforceable contract where parties manifested their intent not to be bound unless and
10 until a subsequent agreement was made and approved by their respective boards of directors).
11 This provides an additional reason to dismiss Plaintiff’s claim for breach of implied contract.

12 **VI. PLAINTIFF’S REQUEST FOR STATUTORY COPYRIGHT DAMAGES**
13 **SHOULD BE DISMISSED**

14 Defendants also respectfully request that the Court dismiss Plaintiff’s request for
15 statutory copyright damages under 17 U.S.C. § 504(c). *See* SAC, Prayer for Relief, ¶ 6. A
16 plaintiff that fails to promptly register its copyrightable works within the time frame set forth in
17 the Copyright Act is barred from seeking statutory damages. Section 412 of the Copyright Act
18 provides in pertinent part that:

19 [N]o award of statutory damages or of attorney's fees, as provided by sections 504
20 and 505 [17 U.S.C. §§504 and 505], shall be made for: (1) any infringement of
21 copyright in an unpublished work commenced before the effective date of its
22 registration; or (2) any infringement of copyright commenced after first publication
of the work and before the effective date of its registration, unless such registration
is made within three months after the first publication of the work.

23 17 U.S.C. § 412; *see also Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 700-701 (9th
24 Cir. 1998) (reversing award of attorneys’ fees).

25 Plaintiff alleges that it published the work-in-suit (the CamUp user interface) in March
26 2011. It alleges that Defendants infringed the CamUp interface between March 2011 and the
27 launch of Hangouts in June 2011. *See* SAC, ¶¶ 33-36 (alleging that Google personnel had access
28 to demonstrations at SXSW and at the MIPTV conference in March and April 2011,

1 respectively); ¶ 59 (alleging that Defendants began copying the CamUp website “following
2 Plaintiff’s meeting with Google in May 2011”), ¶ 61 (alleging that “[t]he creative and expressive
3 elements of Hangouts at the time of the launch [of Hangouts in June 2011] were strikingly
4 similar to CamUp”). However, Plaintiff did not register the CamUp website until June 22, 2012,
5 nearly a year after the alleged infringement. SAC, Exh. A at 1 (copyright registration
6 certificate). Plaintiff is therefore barred from seeking statutory damages because the alleged
7 infringement “commenced after first publication of the work and before the effective date of its
8 registration,” and the registration was not within three months of first publication. *Derek*
9 *Andrew*, 528 F.3d at 700-01. The request for statutory copyright damages should be stricken.
10 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (Rule 12(b)(6) motion is
11 appropriate to seek to strike/dismiss relief sought in a complaint that is unavailable as a matter of
12 law); *Rhodes v. Placer County*, No. 2:09-CV-00489 MCE, 2011 WL 1302264, at *25 (E.D. Cal.
13 Mar. 31, 2011) (following *Whittlestone* and striking punitive damages claim under Rule 12(b)(6),
14 converted from Rule 12 (f)); *see also Consumer Solutions REO, LLC v. Hillery*, 658 F. Supp. 2d
15 1002, 1021 (N.D. Cal. 2009) (treating Rule 12(f) motion arguing that the Complaint contained
16 insufficient allegations to justify an award for punitive damages as a Rule 12(b)(6) motion).

17 CONCLUSION

18 For all of these reasons, Defendants respectfully request the Court to dismiss the first,
19 third and forth causes of action in the Second Amended Complaint.

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21 Dated: July 11, 2013

WILSON SONSINI GOODRICH & ROSATI

22 By: /s/ Colleen Bal

23 Colleen Bal

24 *Attorneys for Defendants*

25 Google Inc., YouTube, LLC and Google UK Ltd.
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