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 9

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

13 BE IN, INC., a New York corporation)

14 Plaintiff,)

15 v.)

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

19 Defendants.)
 20)
 21)

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

**DEFENDANTS' REPLY IN
 SUPPORT OF 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

1 **TABLE OF CONTENTS**

2 **Page**

3 INTRODUCTION..... 1

4 BACKGROUND..... 2

5 ARGUMENT 3

6 I. THE MISAPPROPRIATION CLAIM SHOULD BE DISMISSED 3

7 II. THE BREACH OF TERMS OF SERVICE CLAIM SHOULD BE DISMISSED 6

8 1. Plaintiff Has Failed To Plead A Viable Contract With Defendants..... 6

9 2. Plaintiff Has Failed to Plead A Breach Of The Terms Of Service..... 9

10 III. THE BREACH OF IMPLIED CONTRACT CLAIM SHOULD BE DISMISSED..... 10

11 1. The Claimed Implied Contract Impermissibly Conflicts With The NDA 10

12 2. The Claimed Implied Agreement Lacks Material Terms And Is An
13 Unenforceable Agreement To Agree 14

14 CONCLUSION 15

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **TABLE OF AUTHORITIES**

2 **Page(s)**

3 **CASES**

4 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) 6, 7

5 *Bell Atl. v. Twombly*, 550 U.S. 544 (2008)..... 6, 7, 9, 10

6 *Brocade Commc 'ns. Sys., Inc. v. A10 Networks, Inc.*,
7 No. 5:10-cv-03428-PSG (N.D. Cal. Oct. 29, 2010) 5

8 *Chandler v. Roach*, 156 Cal. App. 2d 435 (1957)..... 11

9 *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va 2010)..... 7, 8

10 *Cvent, Inc. v. Eventbrite, Inc.*, No. 1:10-cv-00481-LMB-IDD (E.D. Va. May 1, 2010) 7

11 *Desny v. Wilder*, 46 Cal.2d 715 (1956)..... 12, 14

12 *Gunther-Wahl Prods., Inc. v. Mattel, Inc.*, 104 Cal. App 4th 27 (2002)..... 11

13 *Minniear v. Tors*, 266 Cal. App. 2d 495 (1968)..... 12, 14

14 *Molnar v. 1-800-Flowers.com, Inc.*,
CV 08-0542 CAS (JCx), 2008 U.S. Dist. LEXIS 120863 (C.D. Cal. Sept. 29, 2008) 7

15 *Operational Risk Mgmt. LLC v. Union Bank*, No.
16 C 12-0584 SI. 2012 WL 1710893 (N.D. Cal. May 15, 2012)..... 10

17 *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000)..... 8

18 *SOAProjects, Inc. v. SCM Microsys., Inc.*,
No. 5:10-cv-01773-LHK (N.D. Cal. Aug. 22, 2010) 5

19 *Specht v. Netscape Commc 'ns Corp.*, 306 F.3d 17 (2d Cir. 2002)..... 8

20 *Thompson v. California Brewing Co.*, 150 Cal. App. 2d 469 (1957) 11

21 *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007) 8

22 *TMX Funding, Inc. v. Impero Tech. Inc.*,
23 No. 5:10-cv-00202-JF (N.D. Cal. Jan. 14, 2010) 5

24 *Vinyl Interactive, LLC v. Guarino*,
No. 4:09-cv-00987-CW (N.D. Cal. March 6, 2009) 5

25 **RULES**

26 Rule 11 1, 3, 4

27 **MISCELLANEOUS**

28 CACI No. 350 13

1 **INTRODUCTION**

2 Defendants demonstrated in their opening brief that Plaintiff’s claims for trade secret
3 misappropriation and breach of Terms of Service should be dismissed because Plaintiff
4 affirmatively *deleted* the few allegations it pleaded in prior complaints to try to support the
5 claims. In opposition, Plaintiff does not dispute that it removed (1) all allegations that the only
6 person to whom it claims to have revealed trade secrets (Richard Robinson) ever disclosed or
7 used those claimed secrets, and (2) any facts to support its assertion that Defendants ever visited
8 the CamUp website. Without an allegation that Mr. Robinson affirmatively passed Plaintiff’s
9 trade secrets on to someone else (or used them himself), Plaintiff has no trade secret claim.
10 Plaintiff likewise has no claim for breach of the online Terms of Service because it has no factual
11 support for its bare assertion that some unidentified person with some unidentified affiliation
12 with Defendants visited the CamUp website at some unidentified time and as a result somehow
13 bound all of the Defendants to a contract with Plaintiff.

14 As Defendants asserted in their opening brief, the removal of the key allegations from the
15 current version of the complaint suggests awareness by Plaintiff’s new counsel that the deleted
16 allegations were unfounded and sanctionable. Plaintiff’s failure to dispute that assertion, and the
17 conspicuous absence of any offer to supply the missing allegations in an amended complaint,
18 speak volumes. Unless Plaintiff can plead the missing allegations consistent with its Rule 11
19 obligations, the trade secret misappropriation and Terms of Service claims should be dismissed.

20 The implied contract claim fares no better. Plaintiff does not dispute that the parties’
21 written, integrated nondisclosure agreement (“NDA”) governs use of the claimed confidential
22 information Plaintiff disclosed to Mr. Robinson in May 2011 – the exact same event and the
23 exact same disclosure that are the subject of Plaintiff’s implied contract claim. Plaintiff’s
24 argument that it can nevertheless state a viable claim for breach of an implied contract that would
25 conflict with the terms of the NDA and thereby deny Defendants important rights provided to
26 them by the NDA contradicts well-established California law. The implied contract claim fails
27 for the additional reasons that the complex licensing/advertising/sponsorship implied agreement
28 asserted by Plaintiff lacks essential terms and constitutes an unenforceable agreement to agree.

BACKGROUND

Plaintiff unsuccessfully takes issue with statements made in Defendants' opening brief:

- **Deleted Allegations:** Plaintiff objects to Defendants' description of how it "whittled down the fact allegations for its key claims," arguing that its SAC is "14 pages longer, and much more detailed, than the original complaint." Opp. at 7. The length of the SAC is beside the point; it could be 140 pages longer than the original complaint, but without fact allegations to support required elements, it would still not state viable claims. Plaintiff does not dispute that it deleted the allegations (1) that former defendant Richard Robinson "conspired with" and improperly transmitted Plaintiff's claimed trade secrets to unnamed Google Inc. employees and "Doe" defendants for their use in developing Hangouts and YouTube's link to Hangouts – Plaintiff's only allegations of misappropriation by improper means, and (2) that after the May 2011 meeting in London with Mr. Robinson, Plaintiff experienced a "dramatic spike" in user traffic and unusually long visits to its CamUp website from broad geographic areas where Defendants' employees might be located – Plaintiff's only allegations that suggested (however feebly) that any of the Defendants ever viewed Plaintiff's website. MTD at 2.

- **Dropping Mr. Robinson:** Plaintiff contends that it dropped Mr. Robinson from the case "at Google's request," and not because his sworn declaration refutes its claims "as Google implies." Opp. at 8. Plaintiff tries to make it sound as if removing him from the case was a courtesy; it was not. Google provided Plaintiff with a sworn declaration of Mr. Robinson with exhibits, and advised Plaintiff that it would seek sanctions if Plaintiff pursued a false trade secret allegation against Mr. Robinson. Plaintiff later voluntarily dropped Mr. Robinson.

- **The Fake Graphic:** Plaintiff contends that it never intended to mislead the Court or Defendants with the fake mock-up that it included in its original complaint, arguing that "the complaint never alleged that the graphic was an actual screen shot shown to Mr. Robinson." Opp. at 9. That argument rests on too thin a reed. The original complaint states:

At the time that Google introduced Hangouts, it embedded a Hangouts "Watch with your friends" button under YouTube videos **that was an identical copy of the CamUp button proposed only one month earlier by Be In at the May 2011 London meeting. Below are screen shots showing the similarities between CamUp's mock-up proposal for a "Watch with your friends" button included**

1 **in YouTube and Google’s Hangouts ‘Watch with your friends’ button on**
2 **YouTube.**

3 Docket No. 1, ¶ 35 (emphasis added). The Complaint then shows the fake mock-up with the
4 caption: “CamUp ‘Watch with Your Friends’ Button as Proposed to Google During the May
5 2011 London Meeting.” *Id.* at 7. The intended meaning is undeniable.

6 **ARGUMENT**

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

8 Plaintiff’s trade secret claim contains a pleading gap that goes straight to Plaintiff’s Rule
9 11 obligation to allege only things that it reasonably believes to be true: it fails to allege that the
10 only person who learned its claimed trade secrets ever used them himself or transmitted them to
11 any other person who then misused them. Because Plaintiff did not offer to amend and fill that
12 gap, even when Defendants challenged it to do so, the reasonable inference is that it lacks a
13 colorable basis for its accusation of trade secret theft.

14 Plaintiff asserts that it told Google UK employee and former defendant Richard Robinson
15 its alleged secrets at a May 2011 meeting in London – which nobody else from Defendants
16 attended. SAC, ¶ 47. Plaintiff previously accused Mr. Robinson of misappropriating the
17 claimed secrets in conspiracy with Google. For instance, it accused him of transmitting the idea
18 for a link between Defendant YouTube’s video player and Google’s Hangouts product to people
19 in charge of developing the link. Original Complaint, ¶¶ 7-8, 40-43. Notably, Plaintiff did not
20 allege that Mr. Robinson himself was responsible for the content of YouTube’s player or the
21 development of Hangouts. Nor did it allege that Mr. Robinson’s mere receipt of alleged secrets
22 from Plaintiff was, in and of itself, a wrongful act. The alleged act of misappropriation was a
23 transmission from Mr. Robinson to someone else.

24 By abandoning its misappropriation accusation against Mr. Robinson, Plaintiff created a
25 hole in its pleading: the only person alleged to know Plaintiff’s claimed trade secrets is not
26 alleged to have developed Hangouts or the YouTube link, and is no longer accused of
27 transmitting that information to the people who were. Plaintiff therefore has not pleaded that
28 anyone capable of committing the alleged misappropriation actually received the alleged trade

1 secrets. Nor has Plaintiff pleaded that anyone besides Mr. Robinson learned the alleged trade
2 secrets (in order to transfer that information to the people alleged to have misused it).

3 Plaintiff could easily fix the hole in its pleading – if it could do so consistent with its Rule
4 11 obligations – by alleging that Mr. Robinson, or some other employee of Defendants who
5 managed to learn the alleged secrets, sent them to someone in charge of developing Hangouts or
6 the YouTube player. But Plaintiff apparently knows that it cannot make that allegation. Even in
7 its opposition papers, it is careful not to directly accuse Mr. Robinson of any wrongdoing. Nor
8 does Plaintiff deny that a trade secret plaintiff must allege the element of misappropriation by
9 improper means. Instead, Plaintiff raises several off-topic arguments that should all be rejected:

10 • Plaintiff argues that Defendants are improperly requiring Plaintiff to plead details
11 about events or people inside Google UK and YouTube to which no plaintiff would be privy at
12 the pleading stage. *See Opp.* at 13. But the gap is not a question of detail or names; it is a
13 question of failing to allege that anyone did anything wrong. Because Plaintiff has not alleged
14 that anyone other than Mr. Robinson learned its alleged secrets, or that he or anyone who works
15 for Defendants transmitted the alleged secrets to anyone in charge of the YouTube player or
16 Hangouts development, it has not pleaded the elements of a trade secret misappropriation claim.

17 • Plaintiff argues that Defendants seek a finding that Google affiliates such as Google
18 UK and YouTube are completely segregated from one another. *Opp.* at 12. That is incorrect.
19 Defendants are not attempting to rely on a distinction between the three entities to avoid liability.
20 Rather, Defendants point out that a disclosure to a single sales employee at a UK affiliate does
21 not permit Plaintiff to skip the step of alleging that the information disclosed was transmitted
22 from the UK affiliate to those who developed Hangouts or the link with YouTube. Even if
23 everyone worked for the same entity or shared the same physical office space, Plaintiff still
24 would have to allege that someone who knew its alleged secrets actually used them him or
25 herself or transmitted them to someone who did. There is no such theory as misappropriation-
26 by-osmosis among people working in large multinational affiliates. Someone has to know
27 certain information and either misuse it him or herself, or pass it to someone else who misuses it.
28 Plaintiff's pleading does not endeavor to connect those dots.

1 • Plaintiff cites a number of cases to try to support its argument that a trade secret
2 plaintiff need not allege that anyone engaged in misappropriation by improper means to state a
3 claim. Opp. at 13-14. But none of these cases actually address the question whether a trade
4 secret plaintiff can state a claim without accusing anyone of wrongdoing (especially after critical
5 allegations are deleted). To the contrary, in every one of the cases, the complaints allege that
6 someone (1) knew the plaintiff's trade secrets; and (2) either directly misused them or
7 transmitted them to others who misused them.

8 In other words, each complaint included the very allegation that is conspicuously absent
9 from Plaintiff's Second Amended Complaint. Each offers a useful contrast, highlighting what
10 Plaintiff has failed to do. See Bal Reply Decl. Exh. A, *SOAPProjects, Inc. v. SCM Microsystems, Inc.*,
11 No. 5:10-cv-01773-LHK (N.D. Cal. Aug. 22, 2010) Docket No. 22, ¶¶ 136-39 (“[I]n November
12 and December 2009 Gupta copied Trade Secret documents . . . to his computer . . . Gupta's sole
13 motivation was to facilitate his theft . . . Gupta is now making unauthorized use of SOAPProjects'
14 Trade Secrets[.]”); Bal Reply Decl. Exh. B, *TMX Funding, Inc. v. Impero Tech. Inc.*, No. 5:10-
15 cv-00202-JF (N.D. Cal. Jan. 14, 2010) Docket No. 1, ¶¶ 3-4, 60, 62, 82, 89 (“The Individual
16 Defendants have unlawfully removed, erased and otherwise misappropriated collateral, tangible
17 and intangible property and trade secrets belonging to TMX . . . [t]he Individual Defendants
18 have further misappropriated TMX's confidential trade secrets and proprietary information . . .
19 and disclosed that information to Impero.”); Bal Reply Decl. Exh. C, *Vinyl Interactive, LLC v.*
20 *Guarino*, No. 4:09-cv-00987-CW (N.D. Cal. March 6, 2009) Docket No. 1, Exh. A, ¶¶ 16-20
21 (“Guarino improperly and without authorization accessed proprietary and trade secret files on
22 Vinyl's computer system . . . Guarino subsequently admitted in an instant messaging
23 conversation with a Vinyl employee that he used and/or intended to use Vinyl trade secrets in
24 developing the [new employer/defendant's] JumpStart product[.]”); Bal Reply Decl. Exh. D,
25 *Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.*, No. 5:10-cv-03428-PSG (N.D. Cal. Oct. 29,
26 2010) Docket No. 37, ¶ 59 (“On information and belief, A10, including Chen, Jalan, Szeto, and
27 Han after their employment by Foundry ended, possessed and, on information and belief, still
28 possess one or more unauthorized copies of the Foundry source code, which embodies Plaintiffs'

1 trade secrets. On information and belief, the individual defendants and others at A10 used the
2 Foundry source code to develop the software code for the Accused Products, and actually
3 incorporated the Foundry source code, in whole or in part, into the code for the competing AX
4 series.”).

5 If Plaintiff is unwilling or unable to allege an unlawful connection between the disclosure
6 to Mr. Robinson and people involved in the development of the YouTube player or Hangouts,
7 Defendants should not have to litigate a serious and costly accusation of theft. Defendants
8 respectfully request that the claim be dismissed.

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

10 **1. Plaintiff Has Failed To Plead A Viable Contract With Defendants**

11 Plaintiff alleges no facts to support its contention that Defendants visited the CamUp
12 website, much less that, while there, they formed a contract with Plaintiff. *See* MTD at 11-13.
13 Its sole assertion that any Defendant ever visited the CamUp website is its statement that:

14 “Upon information and belief, following Plaintiff’s meeting with Google in May,
15 2011, Defendants and/or their employees, agents, and/or other individuals acting on
16 their behalf used and/or visited the CamUp website for the purpose of, or with the
results of, copying, downloading, reproducing, distributing or exploiting portions of
the CamUp Website and Content . . .”

17 SAC, ¶101; *see id.*, ¶ 59. Because it is no more than a conclusory recitation of elements, without
18 any factual support, the assertion is entitled to no weight on this motion. *See Ashcroft v. Iqbal*,
19 556 U.S. 662, 678 (2009) (“We are not bound to accept as true a legal conclusion couched as a
20 factual allegation.”) (internal citation omitted); *see also id.* at 680 (rejecting as insufficient to
21 support a cause of action the “bare assertion” that defendants “‘knew of, condoned, and willfully
22 and maliciously agreed to subject [plaintiff]’ to harsh conditions of confinement ‘as a matter of
23 policy, solely on account of [his] religion, race, and/or national original and for no legitimate
24 penological interest.”); *Bell Atl. v. Twombly*, 550 U.S. 544, 557 (2008) (allegations of parallel
25 conduct, without “further factual enhancement,” insufficient to plead unlawful agreement).

26 In opposition, Plaintiff argues that browsewrap terms of service, such as those linked to
27 its CamUp website, are “routinely enforce[d]” and should similarly bind the Defendants to the
28 CamUp Terms of Service. *Opp.* at 15-16. Plaintiff’s argument fails for at least three reasons.

1 First, Plaintiff does not attempt to excuse the absence of any fact allegations supporting
2 the assertion that Defendants “and/or their employees, agents, and/or other individuals acting on
3 their behalf” ever visited the CamUp website, a requirement that comes before any argument
4 about whether website Terms of Service are enforceable as to actual website visitors. This
5 failure alone requires dismissal of its breach of Terms of Service claim.

6 Second, in each of the browsewrap cases Plaintiff cites, the plaintiff alleged detailed facts
7 to back up an accusation that the defendant had used the website at issue. Absent such fact
8 allegations, the courts would not have needed to address whether the use and circumstances were
9 sufficient to manifest the defendant’s assent to the Plaintiff’s online terms of service. For
10 instance, in *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va 2010), the court
11 dismissed the breach of terms of service claim because the plaintiff had “not alleged sufficient
12 facts to support a plausible allegation that a contract existed” between the parties. *Id.* at 936
13 (*citing Iqbal and Twombly*). Unlike here, there was no question in *Cvent* that the defendant had
14 actually visited the website at issue. *Cvent*’s complaint expressly alleged (1) email
15 correspondence between the defendants evidencing their plan to “scrape” content from the
16 plaintiff’s website, (2) the IP addresses used by the defendants to access plaintiff’s website that
17 were available from plaintiff’s server logs, (3) the dates of access and the specific content
18 accessed by the defendants, and (4) the “user agent” strings identifying the web browsers
19 defendants used to access the plaintiff’s website. *See* Bal Reply Decl. Exh. E, *Cvent, Inc. v.*
20 *Eventbrite, Inc.*, No. 1:10-cv-00481-LMB-IDD (E.D. Va. May 1, 2010) Docket No. 1, ¶¶ 25-48.
21 Nevertheless, the court dismissed the breach of terms of service claim because plaintiff had
22 pleaded only “bare assertions” that the defendants had an opportunity to review the online terms
23 of service and manifested assent to be bound to them. *Cvent*, 739 F. Supp. 2d at 937-38. *Cvent*
24 strongly supports Defendants’ request to dismiss the Terms of Service claim. Plaintiff has not
25 only failed to plead facts manifesting Defendants’ awareness and assent to its online Terms of
26 Service (as in *Cvent*), but in addition, it does not allege that any Defendant ever even visited the
27 CamUp website.

1 Plaintiff's other browsewrap cases are similarly unhelpful to its position, all
2 demonstrating the type of facts a plaintiff would need to allege to support a claim for breach of
3 terms of service that are absent here. *See Molnar v. 1-800-Flowers.com, Inc.*, CV 08-0542 CAS
4 (JCx), 2008 U.S. Dist. LEXIS 120863 (C.D. Cal. Sept. 29, 2008) (counterclaim defendant
5 admitted use of, and purchase from, the website in question, by bringing affirmative claims
6 against website owner relating to such use and purchase); *Pollstar v. Gigmania, Ltd.*, 170 F.
7 Supp. 2d 974 (E.D. Cal. 2000) (complaint alleged that defendant's copying was evidenced by its
8 copying and reusing *false* event information from plaintiff's website); *see also Ticketmaster*
9 *L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1103 (C.D. Cal. 2007) (granting preliminary
10 injunction where plaintiff identified IP addresses registered to defendants which were used to
11 make almost 13,000 ticket purchases from plaintiff's website, along with dates of access).

12 These cases demonstrate that if Defendants used Plaintiff's CamUp website, Plaintiff
13 would likely have a record of it. But in stark contrast to its own cases, Plaintiff has alleged no
14 facts that Defendants ever visited the CamUp website: no IP addresses used by Defendants
15 culled from Plaintiff's server logs, no dates of access, no login or account records, no
16 submissions posted on the website, and no other information even suggesting that Defendants
17 were ever there. And while Plaintiff admits that it "is not concerned with users who view the
18 CamUp homepage and then turn away **without logging in or doing anything more**" (Opp. at
19 18, emphasis added), it provides no explanation for its failure to allege log in records or evidence
20 of the "anything more" that Defendants would presumably have left behind if they used the
21 CamUp website as Plaintiff claims. Nor does Plaintiff deny that it removed the only fact
22 allegation it made to try to support its claim that Defendants visited the CamUp website – the
23 claimed "dramatic spike" in traffic from broad geographic areas where Defendants' employees
24 might be found following the May 2011 London meeting – apparently because even that tenuous
25 connection was unsupportable.

26 Third, even if Plaintiff had alleged facts that Defendants visited the CamUp website, it
27 does not claim to have alleged any facts to demonstrate manifestation of assent by Defendants to
28 be bound by Plaintiff's Terms of Service. Nor does Plaintiff address, much less distinguish, any

1 of Defendants' cases requiring factual allegations demonstrating mutual assent to plead the
2 formation of a contract. *See* MTD at 13. To the contrary, Plaintiff's own *Cvent* case underscores
3 the need to plead mutual assent to state a claim for breach of online terms of service.

4 Plaintiff has completely failed to allege the existence of a contract with Defendants. Its
5 breach of Terms of Service claim should be dismissed.

6 **2. Plaintiff Has Failed to Plead A Breach Of The Terms Of Service**

7 Even if Plaintiff had alleged formation of a contract between Plaintiff and Defendants, it
8 has not alleged that Defendants copied from the CamUp website and thereby breached the
9 claimed contract. This provides an independent basis to dismiss the Terms of Service claim.

10 Plaintiff makes two arguments in support of its contention that Defendants visited the
11 CamUp website and, while there, copied from the website. Both are easily rejected.

12 First, Plaintiff argues that whether or not Defendants copied from the website "amount[s]
13 to a factual dispute[]" that cannot be decided on a motion to dismiss. *Opp.* at 11. But
14 Defendants do not dispute facts pleaded in the complaint. Rather, they point to the *absence* of
15 any facts that Defendants breached the Terms of Service as a reason to dismiss the claim.

16 Second, Plaintiff argues that it is a "plausible inference" that Defendants copied from the
17 CamUp website, because Plaintiff has pleaded (1) that Defendants were aware of CamUp,
18 because Google Inc. employees viewed demonstrations of CamUp at two industry conferences
19 and because Plaintiff met with Richard Robinson in London to discuss CamUp, and (2) that
20 Hangouts and CamUp are "strikingly similar." *Id.* at 17-18.

21 There is no plausible inference that Defendants visited the CamUp website and copied it.
22 As Plaintiff's own cases demonstrate, Plaintiff would likely possess certain evidence of
23 Defendants' visits to Plaintiff's website if they had been there, but it alleges none. There is no
24 "plausible inference" of copying from the website where Plaintiff has alleged no facts suggesting
25 that Defendants ever visited or used Plaintiffs' CamUp website.

26 Moreover, Plaintiff itself alleges two obvious "alternative explanations" for any claimed
27 similarity between the CamUp website and Hangouts. *Twombly*, 550 U.S. at 567-568 (rejecting
28 plaintiff's argument that parallel conduct evidenced illegal agreement where parallel conduct

1 could be explained by a plausible “alternative explanation”). First, because Plaintiff alleges that
2 Google Inc. employees saw multiple demonstrations of CamUp, the claimed similarity could
3 plausibly result from this exposure to CamUp having nothing whatsoever to do with accessing
4 the CamUp website. SAC, ¶¶33, 36. Second, because the similarities Plaintiff alleges between
5 CamUp and Hangouts are in widespread use in the industry – such as a large central frame for
6 viewing media, a strip of smaller frames below the central frame for user seats, company logos
7 positioned at the top left corner of the website, “bulky” icon designs, and a “grey and white color
8 scheme” (*id.*, ¶64) – the alleged similarity could plausibly result from independent development.¹

9 “Factual allegations must be enough to raise a rise to relief above the speculative level.”
10 *Twombly*, 550 U.S. at 555. Plaintiff has offered nothing but speculation that Defendants visited
11 the its website and copied from it. Under the circumstances, it “has not nudged its claim[] over
12 the line from the conceivable to the plausible,” and the claim must be dismissed. *Id.* at 570²

13 **III. THE BREACH OF IMPLIED CONTRACT CLAIM SHOULD BE DISMISSED**

14 **1. The Claimed Implied Contract Impermissibly Conflicts With The NDA**

15 Defendants moved to dismiss Plaintiff’s claim for breach of an implied contract because
16 the implied contract alleged by Plaintiff conflicts with, and would improperly eliminate
17 important rights granted to Defendants under, a written non-disclosure agreement (“NDA”).
18 MTD at 17-19. In response, Plaintiff does not challenge the key legal and factual points
19 underlying Defendants’ arguments, namely that:

- 20 • The written NDA is an enforceable contract with Plaintiff;

21
22 ¹ Defendants have not moved to dismiss the copyright infringement claim. Even assuming
23 Plaintiff could plead a viable copyright infringement claim with allegations that (a) Defendants
24 had access to a copyrighted work (such as Defendants’ access to CamUp at industry conferences
25 alleged by Plaintiff here), and (b) substantial similarity between the copyrighted and accused
26 works, those allegations would not support a viable claim for breach of contract Plaintiff here
relies on the claimed similarity between CamUp and Hangouts, without any facts to support the
existence or breach of any mutual agreement. In contrast to a copyright infringement claim,
agreement is the essence of a claim for breach of contract.

27 ² The claim against Google UK should be dismissed for the additional reason that Plaintiff
28 alleges no copying or other conduct by Google UK that would constitute a breach of the Terms
of Service. MTD at 14 n3. Plaintiff effectively concedes the point, as it never even addresses it.

- 1 • Defendants are “group companies” with rights to enforce the written NDA;
- 2 • The NDA addresses the very same disclosure of the very same information to Google
- 3 UK employee Richard Robinson at the May 2011 London meeting that is the subject
- 4 of Plaintiff’s implied contract claim;
- 5 • The NDA is an integrated agreement that requires all amendments to be in writing;
- 6 • The NDA gave Defendants (a) the right to engage in independent development; (b)
- 7 the right to use information that is publicly available, and (c) the right not to be forced
- 8 into any business deal with Plaintiff;
- 9 • The implied contract claimed by Plaintiff would require Defendants to compensate
- 10 Plaintiff for use of “any aspect” of Plaintiff’s CamUp information (even if public or
- 11 independently developed), thereby eliminating Defendants’ rights under the NDA to
- 12 use non-secret and independently-derived information;
- 13 • Plaintiff invokes the asserted implied contract to force Defendants to enter into a
- 14 licensing/advertising/sponsorship deal with Plaintiff if they used “any aspect” of
- 15 Plaintiff’s CamUp information, thereby eliminating Defendants’ right under the NDA
- 16 not to be forced into a business transaction; and
- 17 • If Defendants breached the written NDA, Plaintiff could pursue a claim for ordinary
- 18 contract remedies, including monetary damages.

19 *Compare* MTD at 14-19 *with* Opp. at 19-23. Having conceded all of these points, Plaintiff’s

20 arguments to plead around the NDA are unconvincing and inconsistent with California law.

21 *Plaintiff’s idea submission cases are irrelevant.* Plaintiff cites a line of “idea

22 submission” cases for the proposition that California law permits implied contracts where one

23 party discloses an allegedly confidential idea to another party. These cases are inapposite

24 because none involves a written contract covering the same subject matter as the claimed implied

25 contract. *See* Opp. at 19-21.³ They in no way support Plaintiff’s position that it can use an

26

27 ³*See Chandler v. Roach*, 156 Cal. App. 2d 435, 437-38 (1957) (plaintiff sued only on implied

28 contract theory; a written contract was drafted after verbal discussions but never executed); *Gunther-Wahl Prods., Inc. v. Mattel, Inc.*, 104 Cal. App 4th 27, 31 (2002) (same; plaintiff did not believe a written contract was necessary); *Thompson v. California Brewing Co.*, 150 Cal. (continued...)

1 implied contract theory to strip Defendants of rights provided under the integrated written NDA
2 that requires all amendments be in writing.

3 *Plaintiff's contention that the written NDA does not conflict with the claimed implied*
4 *contract is specious.* While Plaintiff agrees that the written NDA and the claimed implied
5 agreement cover the same events and the same subject matter, it argues that the two agreements
6 do not conflict because they supposedly do not “cover[] ‘identical’ subject matter.” Opp. at 21.
7 That argument should be rejected for three reasons.

8 First, as Defendants demonstrated in their opening memorandum, and Plaintiff does not
9 refute, California law prohibits implied or oral contracts that conflict with or would vary the
10 terms of an integrated written contract which, like the NDA here, prohibits amendments not in
11 writing. *See* MTD at 18-19. There is no requirement that a written agreement must “cover
12 identical subject matter” to benefit from the rules and, indeed, it is precisely because parties seek
13 to use claimed implied and oral agreements to *vary the terms of the written agreement* that these
14 rules apply.⁴ Plaintiff offers no authority for its contrary position.

15 Second, Plaintiff argues that the asserted implied contract does not conflict with the NDA
16 because the implied contract addresses Plaintiff’s right to receive compensation if Google
17 utilized the claimed trade secrets, *whereas the NDA supposedly does not.* Opp. at 21.
18 Incredulously, Plaintiff contends that the written NDA would not provide a remedy for breach if
19 Defendants violated the NDA by using protected information for purposes other than evaluation.
20 *See id.* (“The NDA . . . does not govern Be In’s separate right to receive compensation if Google
21

22 (...continued from previous page)
23 App. 2d 469, 473-75 (1957) (plaintiff claimed oral and implied contracts, but not a written
24 contract); *Minniear v. Tors*, 266 Cal. App. 2d 495, 497-99 (1968) (plaintiff sued on implied
25 contract theory where “no agreement was ever reduced to writing”); *Desny v. Wilder*, 46 Cal.2d
26 715, 740 (1956) (implied contract theory where no written contract existed).

27 ⁴ This is why Plaintiff’s effort to distinguish Defendants’ on-point cases is unsuccessful: just
28 as in this case, each featured a plaintiff who tried to alter the rights and obligations in a written
contract through an overlapping implied contract claim. *See* MTD at 18. Notably, Plaintiff does
not try to distinguish Defendants’ cases prohibiting a claimed oral contract from varying the
terms of the written NDA or respond to Defendants’ observation that Plaintiff seems to be
asserting an express, oral contract, not an implied contract. *See id.* at 18-19, 17 n.6.

1 utilized its trade secrets.”), *id.* at 22 (“The implied contract . . . protects Be In’s reasonable
2 expectation to receive compensation if Google utilized its idea beyond mere evaluation”).

3 Plaintiff’s argument does not pass the straight-face test. Of course the NDA governs its
4 right to receive compensation in the event that Defendants misuse the information at issue. The
5 NDA contains no terms limiting Plaintiff’s ordinary contract remedies in the event of breach.
6 *See* Bal Declaration Exhibit A (NDA). Thus, breach of the NDA would entitle Plaintiff to the
7 possibility of money compensation. *See generally* CACI No. 350 (California jury instruction).

8 And, indeed, one of the key ways in which Plaintiff’s claimed implied contract conflicts
9 with the written NDA is that Plaintiff seeks to replace the ordinary contract remedies available
10 under the NDA with a forced advertising/sponsorship/licensing partnership under the claimed
11 implied contract. *Compare* SAC, ¶53 (alleging that under implied contract, Defendants use of
12 any aspect of Plaintiff’s information would require Defendants to “licens[e] CamUp from Be In
13 for a one-time, lifetime per-user licensing fee, and that Be In would further rparticipate in
14 advertising and sponsorship revenues generated through the CamUp platform ad Be In’s
15 strategy”) *with* NDA, § 7 (“This NDA imposes no obligation to proceed with any business
16 transaction.”). Plaintiff has no convincing answer to justify this conflict. Its argument for
17 application of the forced business transaction – that “Be In did not force Google to use the
18 confidential information it conveyed, but having done so Google must pay for that use” (Opp. at
19 23) – only further emphasizes that Plaintiff seeks to improperly replace the remedy available
20 under the NDA with a new, conflicting one under the asserted implied contract.

21 Third, Plaintiff does not even mention the additional critical conflicts between the NDA
22 and the implied contract that Defendants identified in their opening brief and that bar the alleged
23 implied contract. The written NDA expressly provides Google the rights (a) to develop
24 independently the same information, and (b) to use any information that is publicly available
25 without restriction. *See id.*, § 4. Information that is “publicly available” would include
26 information Plaintiff claimed as proprietary that was available on video chat, conferencing, and
27 social networking websites before and in early 2011. Plaintiff therefore could not use the written
28 NDA to try to protect generic ideas described in its SAC, such as (1) an individual page or

1 “room” for each user, (2) requiring use of real names, (3) user-created playlists, (4) group video
2 conferencing, and (5) allowing games and “apps” on a social networking website. *See* SAC, ¶¶
3 28, 29, 51. Yet – in direct conflict with the NDA – Plaintiff invokes the implied contract to try
4 to prohibit Defendants from using “any aspect” of Plaintiff’s CamUp information. *Id.*, ¶¶ 53, 93.

5 Given the many California appellate rulings enforcing the uncontroversial rules of
6 contract interpretation that prohibit implied or oral agreements that seek to vary the terms of a
7 written agreement, there is no legitimate reason why Plaintiff should not be required to proceed
8 under the written NDA rather than its claimed implied contract. Following the NDA will honor
9 the parties’ actual agreement, will ensure that Defendants receive the rights provided by the
10 contract Plaintiff admits it executed, and will ensure that Plaintiff cannot waste the Court’s time
11 and Defendants’ money by pursuing claims over information that is obviously in the public
12 domain, and that is unprotectable under the written NDA, trade secret law, or copyright law.

13 **2. The Claimed Implied Agreement Lacks Material Terms And Is An**
14 **Unenforceable Agreement To Agree**

15 Plaintiff’s implied contract claim would fail even if the asserted implied contract did not
16 seek to vary the terms of the NDA because it lacks essential terms. MTD at 20-21. Plaintiff
17 does not even try to distinguish Defendants’ cases reflecting this bedrock rule of California law.
18 Instead, it relies on “idea submission” cases for the general proposition that an implied contract
19 might be recognized even if the parties did not agree on precise money terms. *See* Opp. at 19.⁵
20 But that general theory has no application here. As demonstrated in the authority cited by
21 Defendants and not refuted by Plaintiff, no valid contract is recognized under California law
22 where complex, essential terms – like those Plaintiff claims should be implied from the May
23 2011 London meeting – are not defined.

24
25
26 ⁵ Both of the decades-old cases Plaintiff cites were “idea submission” fact patterns where the
27 plaintiff sought money damages for the use of a screenplay for a single movie or TV show, in the
28 absence of a written contract, for the reasonable market value of the idea disclosed to the
defendant. *See generally* *Minniear*, 266 Cal. App. 2d at 504; *Desny*, 46 Cal.2d at 724-25.

1 Plaintiff asserts the existence of an implied contract where use of any aspect of its
2 information would entitle it a “one-time, lifetime per-user licensing fee” and participation in
3 “advertising and sponsorship revenues[.]” *See* SAC, ¶ 53. But it never addresses Defendants’
4 point that such complex, business terms are impermissibly vague and uncertain in an Internet-
5 based business model. Among other things, Plaintiff does not allege any agreement on (1) the
6 calculation of license prices for each of the various items of intellectual property Plaintiff claims
7 to have disclosed; (2) what Google products would receive license rights, and what terms would
8 apply to different platforms in mobile and desktop applications; (3) what “participation” in
9 “advertising” and “sponsorship” Plaintiff would engage in, with what content, in what
10 geographic markets, in what media, for what length of time; (4) what price Defendants would
11 pay for such acts of “advertising” and “sponsorship,” or what metrics would be used to value
12 such acts. *See* MTD at 20-21. Plaintiff has no answer as to how an enforceable agreement could
13 possibly exist between the parties without agreement on these terms. Parties may not imply such
14 complex terms out of thin air. The asserted implied contract fails for uncertainty.

15 Finally, Plaintiff does not contest or even mention the third reason Defendants identified
16 why the asserted implied contract is not enforceable: the “implied” licensing, advertising, and
17 sponsorship deal also constitutes an unenforceable agreement-to-agree in the future, which
18 California law forbids for such complex terms. *See id.* at 21. This is another, un rebutted reason
19 to dismiss the implied contract claim.

20 CONCLUSION

21 For the foregoing reasons, Defendants respectfully request that the Court dismiss
22 Plaintiff’s claims for trade secret misappropriation, breach of Terms of Service, and breach of
23 implied contract. Defendants further request that the Court dismiss with prejudice Plaintiff’s
24 request for statutory copyright damages, which Plaintiff has conceded are unavailable.

25 Dated: August 15, 2013

WILSON SONSINI GOODRICH & ROSATI

26 By: /s/ Colleen Bal

27 Colleen Bal

28 *Attorneys for Defendants*

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