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2  
3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
5

6 PQ LABS, INC.,

No. 12-0450 CW

7 Plaintiff,

ORDER GRANTING IN  
PART DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT (Docket  
No. 78); GRANTING  
DEFENDANTS' MOTION  
TO AMEND (Docket  
No. 96)

8 v.

9 YANG QI, ZAAGTECH, INC., JINPENG  
10 LI, and HAIPENG LI,

11 Defendants.  
\_\_\_\_\_ /

12  
13 Plaintiff PQ Labs, Inc. brought this action against  
14 Defendants Yang Qi, Jinpeng Li, Haipeng Li, and ZaagTech, Inc. for  
15 misappropriation of trade secrets, copyright infringement,  
16 trademark infringement, breach of contract, and various other  
17 business-related torts. Defendants move for summary judgment on  
18 all claims. In addition, they move for leave to amend their  
19 answer and one of their responses to Plaintiff's requests for  
20 admissions. Plaintiff opposes both motions. After considering  
21 the parties' submissions and oral argument, the Court grants in  
22 part the motion for summary judgment and denies it in part and  
23 grants the motion for leave to amend.

24 BACKGROUND

25 The following facts are undisputed except where otherwise  
26 noted.

27 PQ Labs is a California corporation that manufactures and  
28 develops hardware and software for computer touch-screen products.

1 Docket No. 87, Declaration of Fei "Frank" Lu ¶ 1. In February  
2 2009, it entered into a contract with 22Miles, Inc. for  
3 "management and human resource services." Id., Ex. B, Vendor  
4 Agreement, at 1. Specifically, PQ Labs asked 22Miles to provide  
5 it with an independent contractor "to answer pre-sale engineering  
6 inquiries and perform sales service & support for PQ's products in  
7 the United States." Docket No. 88, Declaration of Joey Zhao ¶ 3.  
8 22Miles hired Yang Qi to play this role and assigned him to serve  
9 as PQ Labs' "account manager" for a term of one year. Id. ¶ 3; Lu  
10 Decl. ¶ 8, Ex. B, at 2-3. The vendor agreement between PQ Labs  
11 and 22Miles provided that Yang Qi's term would be renewed  
12 automatically at the end of the year unless either party expressly  
13 sought to terminate the agreement. Id. at 2.

14 Yang Qi worked in PQ Labs' San Jose office from February 2009  
15 until April 2010, when PQ Labs terminated the vendor agreement.  
16 Id. ¶ 11; Docket No. 80, Declaration of Yang Qi ¶ 8. During that  
17 period, he managed the company's global sales operations,  
18 including its relationships with distributors and customers. Lu  
19 Decl. ¶ 11; Qi Decl. ¶¶ 3, 6. His duties gave him access to "all  
20 of PQ Labs' customer contact information, pricing lists, customer  
21 discount information, and marketing lists." Lu Decl. ¶ 11.

22 In June 2009, four months after Yang Qi was assigned to PQ  
23 Labs, Jinpeng Li was hired as a hardware engineer by PinQi Digital  
24 Technology Company, Ltd., a wholly-owned subsidiary of PQ Labs  
25 based in Shanghai. Lu Decl. ¶¶ 2, 14; Docket No. 81, Declaration  
26 of Jinpeng Li ¶ 2. In that capacity, Jinpeng Li had access to  
27 various "hardware designs and schematics" for PQ Labs' products.  
28

1 Lu Decl. ¶¶ 14-15. Jinpeng Li was terminated by PinQi sometime  
2 after May 2010.<sup>1</sup>

3 In this suit, PQ Labs alleges that Yang Qi and Jinpeng Li  
4 misappropriated several of its trade secrets, including hardware  
5 schematics, confidential customer information, and software code.  
6 Docket No. 39, Second Amended Complaint (2AC) ¶¶ 12-42. It  
7 further alleges that they worked with a third individual, Haipeng  
8 Li, to form a sham distributorship in order to divert sales away  
9 from PQ Labs. Id. Finally, it alleges that Yang Qi and Jinpeng  
10 Li used the confidential information they stole from PQ Labs to  
11 help form a competing touch-screen technology company in China  
12 called ZaagTech, Inc. Id. The operative complaint charges  
13 Defendants with misappropriation of trade secrets, copyright  
14 infringement, trademark infringement, false advertising, tortious  
15 interference with contract and prospective economic advantage,  
16 breach of contract, breach of fiduciary duty, fraudulent  
17 concealment, conversion, trespass to chattels, violations of the  
18 federal Computer Fraud and Abuse Act, violations of California  
19 Penal Code section 502, and unfair competition. Id. ¶¶ 43-173.

20 DISCUSSION

21 I. Motion for Summary Judgment

22 A. Legal Standard

23 Summary judgment is properly granted when no genuine and  
24 disputed issues of material fact remain, and when, viewing the  
25 evidence most favorably to the non-moving party, the movant is

26 \_\_\_\_\_  
27 <sup>1</sup> The parties failed to submit evidence identifying the exact date  
28 of Jinpeng Li's termination; however, company e-mails indicate that he  
was still employed there at least until May 26, 2010. Lu Decl., Ex. G,  
May 26, 2010 E-Mail from F. Lu to J. Li.

1 clearly entitled to prevail as a matter of law. Fed. R. Civ.  
2 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
3 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
4 1987).

5 The moving party bears the burden of showing that there is no  
6 material factual dispute. Therefore, the court must regard as  
7 true the opposing party's evidence, if supported by affidavits or  
8 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,  
9 815 F.2d at 1289. The court must draw all reasonable inferences  
10 in favor of the party against whom summary judgment is sought.  
11 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
12 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
13 F.2d 1551, 1558 (9th Cir. 1991).

14 Material facts which would preclude entry of summary judgment  
15 are those which, under applicable substantive law, may affect the  
16 outcome of the case. The substantive law will identify which  
17 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.  
18 242, 248 (1986). Where the moving party does not bear the burden  
19 of proof on an issue at trial, the moving party may discharge its  
20 burden of production by either of two methods:

21 The moving party may produce evidence negating an  
22 essential element of the nonmoving party's case, or,  
23 after suitable discovery, the moving party may show that  
24 the nonmoving party does not have enough evidence of an  
essential element of its claim or defense to carry its  
ultimate burden of persuasion at trial.

25 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d  
26 1099, 1106 (9th Cir. 2000).

27 If the moving party discharges its burden by showing an  
28 absence of evidence to support an essential element of a claim or

1 defense, it is not required to produce evidence showing the  
2 absence of a material fact on such issues, or to support its  
3 motion with evidence negating the non-moving party's claim. Id.;  
4 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);  
5 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If  
6 the moving party shows an absence of evidence to support the non-  
7 moving party's case, the burden then shifts to the non-moving  
8 party to produce "specific evidence, through affidavits or  
9 admissible discovery material, to show that the dispute exists."  
10 Bhan, 929 F.2d at 1409.

11 If the moving party discharges its burden by negating an  
12 essential element of the non-moving party's claim or defense, it  
13 must produce affirmative evidence of such negation. Nissan, 210  
14 F.3d at 1105. If the moving party produces such evidence, the  
15 burden then shifts to the non-moving party to produce specific  
16 evidence to show that a dispute of material fact exists. Id.

17 If the moving party does not meet its initial burden of  
18 production by either method, the non-moving party is under no  
19 obligation to offer any evidence in support of its opposition.  
20 Id. This is true even though the non-moving party bears the  
21 ultimate burden of persuasion at trial. Id. at 1107.

22 B. Misappropriation of Trade Secrets (Claims 1, 2)

23 PQ Labs alleges that Yang Qi, Jinpeng Li, and ZaagTech  
24 misappropriated seventeen of its trade secrets, including certain  
25 hardware design schematics, software algorithms and code, customer  
26 lists and contact information, and other proprietary information.  
27 Docket No. 85, Declaration of Bonnie Wolf ¶ 2.

1 To prevail on a claim for misappropriation of trade secrets  
2 under the California Uniform Trade Secrets Act (CUTSA), Cal. Civ.  
3 Code §§ 3426 through 3426.11, a plaintiff must show that (1) it  
4 owned a trade secret; (2) the defendant acquired, disclosed, or  
5 used that trade secret through improper means, and (3) the  
6 defendant's actions damaged the plaintiff. Cytodyn, Inc. v.  
7 Amerimmune Pharmaceuticals, Inc., 160 Cal. App. 4th 288, 297  
8 (2008). CUTSA defines a "trade secret" as,

9 information, including a formula, pattern,  
10 compilation, program, device, method,  
11 technique, or process, that:

- 12 (1) Derives independent economic value,  
13 actual or potential, from not being  
14 generally known to the public or to other  
15 persons who can obtain economic value  
16 from its disclosure or use; and
- 17 (2) Is the subject of efforts that are  
18 reasonable under the circumstances to  
19 maintain its secrecy.

20 Cal. Civ. Code § 3426.1(d). Here, Defendants contend that PQ Labs  
21 has failed to present sufficient evidence to support an inference  
22 that it took reasonable steps to maintain the secrecy of its  
23 alleged trade secrets. This argument is not persuasive.

24 PQ Labs' evidence highlights the various measures it took to  
25 protect the information which Defendants allegedly  
26 misappropriated. The company's CEO and founder, Frank Lu, stated  
27 in his declaration that he expressly told Yang Qi on March 2, 2009  
28 not to disclose any of PQ Labs' "product design concept[s],  
implementation details, algorithms (both in conceptual level and  
in detailed level [sic]), schematics, bill of materials, customer  
lists and related information." Lu Decl. ¶ 12. Lu specifically

1 explained that this information "constituted PQ trade secrets" and  
2 "if other people, companies or potential competitors had access to  
3 this information it would have severe negative consequences for  
4 PQ's business." Id. PQ Labs' vendor agreement with 22Miles also  
5 included a provision prohibiting 22Miles and its employees from  
6 disclosing any of PQ Labs' confidential information or using that  
7 information to gain a competitive advantage over PQ Labs. Id.,  
8 Ex. B, at 2-3. Consistent with this provision, Yang Qi signed a  
9 nondisclosure agreement with 22Miles in July 2009 which required  
10 him to keep confidential PQ Labs' "[c]ustomer lists," "pricing  
11 techniques and strategies," "parts, drawings, data, sketches,  
12 plans, programs, specifications, techniques, processes, and other  
13 information relating to equipment and its use," and "[s]oftware  
14 designs, source code, object code, and any techniques, processes,  
15 methods or designs relating to multi-touch." Id., Ex. D,  
16 Confidentiality & Unfair Competition Agreement, at 12. The CEO of  
17 22Miles asserted in his declaration that he also instructed Yang  
18 Qi "to keep any information that he received from or about PQ and  
19 22Miles in the strictest confidence and not disclose [it] to any  
20 third parties." Zhao Decl. ¶ 7.

21 Like Yang Qi, Jinpeng Li was also explicitly warned not to  
22 disclose any confidential information about PQ Labs' customers or  
23 touch-screen technology. Lu stated in his declaration that he  
24 told Jinpeng Li to keep confidential "all information regarding  
25 PQ's Multi-Touch overall product design concept, implementation  
26 details, algorithms," and other technical information when PinQi  
27 hired Jinpeng Li in June 2009. Id. ¶ 16.

28

1 According to Lu's declaration, all PQ Labs employees received  
2 similar warnings and those with access to sensitive information  
3 were required to sign confidentiality agreements. Id. ¶ 5.<sup>2</sup> Lu  
4 also noted that the company rigidly controls access to its  
5 research, development, and production facilities with fingerprint  
6 scanners and security personnel and relies on passwords and  
7 firewalls to protect its electronic information. Id. ¶ 6. These  
8 protocols are sufficient to support an inference that PQ Labs took  
9 reasonable measures to protect its trade secrets. MAI Systems  
10 Corp. v. Peak Computer, Inc., 991 F.2d 511, 521 (9th Cir. 1993)  
11 ("MAI required its employees to sign confidentiality agreements  
12 respecting its trade secrets, including the Customer Database.  
13 Thus, under the [C]UTSA, the MAI Customer Database constitutes a  
14 trade secret."); Religious Tech. Ctr. v. Netcom On-Line Commc'n  
15 Servs., Inc., 923 F. Supp. 1231, 1253-54 (N.D. Cal. 1995) (finding  
16 that the plaintiff organization "put forward sufficient evidence  
17 that it took steps that were reasonable under the circumstances to  
18 protect its purported trade secrets" by submitting a declaration  
19 from its president documenting the organization's use of "security  
20 personnel," "electronic sensors attached to documents," and  
21 "confidentiality agreements for all of those given access to the  
22 materials").

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23  
24 <sup>2</sup> PQ Labs submitted examples of three such confidentiality  
25 agreements. Lu Decl., Ex. A. Defendants object to these documents on  
26 the grounds that they were signed well after Jinpeng Li and Yang Qi were  
27 hired. They also note that PQ Labs failed to produce these documents  
28 during discovery. While these points may cast doubt on the validity of  
this evidence and may even provide evidence of a discovery violation,  
the documents are nevertheless sufficient -- when combined with the  
other evidence presented -- to support an inference that PQ Labs took  
reasonable precautions to protect its trade secrets.

1 Defendants argue that the security measures that PQ Labs has  
2 identified do not constitute reasonable efforts to protect its  
3 trade secrets because they do nothing to prevent reverse-  
4 engineering of its products. Defendants point, in particular, to  
5 PQ Labs' four trade secrets relating to "printed circuit board"  
6 technology, claiming that these trade secrets are susceptible to  
7 reverse-engineering. The only evidence Defendants provide to  
8 support this claim, however, is Lu's deposition testimony, during  
9 which he stated that "if you have billions of dollars, you can  
10 reverse engineer possibly everything." Docket No. 79-9,  
11 Declaration of Perry Narancic, Ex. 9, Lu Depo. 118:11-119:3 ("As  
12 long as you have the money, you have the time, you have the  
13 people, you can do that, yeah. Everything is possible."). This  
14 perfunctory statement -- that "anything" is susceptible to  
15 reverse-engineering given enough time and resources -- does not  
16 demonstrate that PQ Labs failed to make reasonable efforts to  
17 prevent reverse-engineering of its products. Nor does it show  
18 that PQ Labs' other efforts to protect its printed circuit board  
19 technology were not "reasonable under the circumstances." Cal.  
20 Civ. Code § 3426.1(d)(2).

21 The cases that Defendants cite for support do not suggest  
22 otherwise. For instance, in Entertainment Research Group, Inc. v.  
23 Genesis Creative Group, Inc., the Ninth Circuit held that a  
24 defendant was entitled to summary judgment on a claim for breach  
25 of confidentiality because it had presented "substantial evidence  
26 indicating that [the plaintiff] never took any steps to prevent  
27 other manufacturers from looking inside [the plaintiff's products]  
28 and reverse-engineering them." 122 F.3d 1211, 1227 (9th Cir.

1 1997) (ERG). Defendants here, in contrast, have not presented  
2 "substantial evidence" that PQ Labs similarly failed to erect any  
3 barriers to reverse-engineering; instead, as noted above, they  
4 have merely presented Lu's testimony acknowledging that "possibly  
5 everything" can be reverse-engineered. Furthermore, even if  
6 Defendants had presented evidence showing that PQ Labs failed to  
7 prevent reverse-engineering, ERG would not govern the outcome of  
8 this case for another reason: the decision applied the legal  
9 standard for breach-of-confidentiality claims rather than the  
10 standard for trade secret claims. See id. ("Information need not  
11 be protectable either as a trade secret or by copyright law to be  
12 the subject of a breach of confidentiality claim.").

13 The district court cases that Defendants cite are likewise  
14 inapposite. In Gemisys Corp. v. Phoenix America, Inc., 186 F.R.D.  
15 551 (N.D. Cal. 1999), this Court granted summary judgment to the  
16 defendant on a trade secret claim because the plaintiff failed to  
17 mark its alleged trade secrets as confidential. That marking  
18 requirement, however, is irrelevant here because, as outlined  
19 above, PQ Labs has presented evidence that it used other means to  
20 notify its employees and agents that its technological and  
21 customer information was confidential. Moreover, the trade secret  
22 claims in Gemisys were brought under Colorado's trade secret  
23 statute, not CUTSA, and the marking requirement was derived from  
24 Tenth Circuit case law. See id. at 558 (citing Jensen v.  
25 Redevelopment Agency of Sandy City, 998 F.2d 1550, 1557 (10th Cir.  
26 1993)). Thus, Gemisys does not apply here.

27 The Central District of California's decision in HiRel  
28 Connectors, Inc. v. United States, 2005 WL 4958547 (C.D. Cal.),

1 also differs from the present case in important respects. There,  
2 the court granted partial summary judgment to the defendant  
3 because the plaintiff failed to act quickly to protect its trade  
4 secrets, even after it learned that the trade secrets had been  
5 published online. Id. at \*5. The court concluded that, because  
6 the plaintiff waited more than two years to protect its  
7 confidential information after it was disclosed publicly, the  
8 information ceased to be a trade secret. Id. Here, in contrast,  
9 PQ Labs waited only twenty months to file this suit once it  
10 learned of Defendants' possible misappropriation. This period is  
11 comparable to the eighteen-month delay in filing suit that the  
12 court found permissible in HiRel. See id. at \*7 ("The Court finds  
13 it would not be appropriate at this time to set any earlier date  
14 certain [i.e., earlier than eighteen months from the publication  
15 date] after which Plaintiff lost its rights to those trade  
16 secrets."). More importantly, PQ Labs' alleged trade secrets were  
17 never disclosed in a public forum. As the HiRel court explained,  
18 once a plaintiff's trade secret has been publicly disclosed,  
19 "merely filing suit against the alleged wrongdoer does not  
20 constitute 'reasonable efforts' to protect the trade secrets  
21 against others who might be interested in obtaining those  
22 secrets." Id. at \*6 (emphasis in original). This rationale does  
23 not apply in the present case, where PQ Labs' trade secrets were  
24 never publicly disclosed.

25 Finally, Defendants cannot rely on FormFactor, Inc. v. Micro-  
26 Probe, Inc., 2012 WL 2061520 (N.D. Cal.), for support because the  
27 court in that case expressly found that there was "no evidence  
28 that [the plaintiff] made reasonable efforts to protect the

1 secrecy of any particular trade secret." Id. at \*7 (emphasis  
2 added).<sup>3</sup> As noted above, PQ Labs has presented various pieces of  
3 evidence documenting its reasonable efforts to protect its trade  
4 secrets. Accordingly, Defendants are not entitled to summary  
5 judgment on PQ Labs' CUTSA claims.

6 C. Copyright Infringement (Claim 3)

7 PQ Labs alleges that Yang Qi, Jinpeng Li, and ZaagTech  
8 infringed its copyright in the "PQ Labs MultiTouch System  
9 Software," Copyright Registration No. TXu 1-620-335, by using the  
10 software to develop and sell their own touch-screen products.

11 To survive summary judgment on this claim, PQ Labs must  
12 present sufficient evidence to support an inference that (1) it  
13 owned a valid copyright; and (2) Defendants violated its exclusive  
14 rights under the Copyright Act. Ellison v. Robertson, 357 F.3d  
15 1072, 1076 (9th Cir. 2004). "If the plaintiff copyright holder  
16 survives the first step, i.e., it establishes that it owns a valid  
17 copyright, then the plaintiff must establish infringement by  
18 showing both access to its copyrighted material on the part of the  
19 alleged infringer and substantial similarity between the  
20 copyrighted work and the alleged infringing work." N. Coast  
21 Indus. v. Jason Maxwell, Inc., 972 F.2d 1031, 1033 (9th Cir.  
22 1992).

23 PQ Labs has satisfied all of these requirements here. First,  
24 it has presented evidence that it owns a valid copyright for its  
25 MultiTouch System Software and that Yang Qi, Jinpeng Li, and  
26

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27 <sup>3</sup> The FormFactor court's decision was also subsequently vacated  
28 pursuant to a stipulation between the parties, see 2012 WL 6554220, at  
\*1 (N.D. Cal.).

1 ZaagTech had access to that software. As noted above, Lu stated  
2 in his declaration that Yang Qi and Jinpeng Li had access to PQ  
3 Labs' technological information when they worked for the company.  
4 See, e.g., Lu Decl. ¶ 14 ("Jinpeng Li was hired by PinQi to  
5 develop hardware exclusively for PQ's products, and those are the  
6 type of services that Mr. Li rendered for PinQi and PQ while he  
7 was working at PinQi, which gave him access to (and extensive work  
8 experience with) PinQi's and PQ's technological information.").  
9 Furthermore, Jinpeng Li admitted that he began working for  
10 ZaagTech after he was terminated by PinQi. See Wolf Decl., Ex. O,  
11 Jinpeng Li Resp. Req. Admission No. 14, at 5-6. Taken together,  
12 this evidence is sufficient to support an inference that all  
13 Defendants had access to the copyrighted software.

14 PQ Labs has also presented evidence that its touch-screen  
15 products are substantially similar to those developed by ZaagTech.  
16 Its expert, Dr. Andrew Wolfe, stated in his report that the high  
17 degree of similarity between the two companies' products suggests  
18 that ZaagTech's products were created using PQ Labs' technology,  
19 including its algorithms and software. Docket No. 91, Declaration  
20 of Andrew Wolfe ¶¶ 1-2, 4-5, 8. This finding supports an  
21 inference that Defendants used a copy of PQ Labs' software without  
22 its consent. MAI Systems, 991 F.2d at 518-19 ("The law also  
23 supports the conclusion that Peak's loading of copyrighted  
24 software into RAM creates a 'copy' of that software in violation  
25 of the Copyright Act."); see also Airframe Systems, Inc. v.  
26 Raytheon Co., 520 F. Supp. 2d 258, 267 (D. Mass. 2007) ("With  
27 regard to software, an act of copying sufficient to violate the  
28 Copyright Act occurs each time the software is run."). Thus,

1 Wolfe's report and Lu's declaration are sufficient to satisfy PQ  
2 Labs' summary judgment burden with respect to its copyright claim.

3 Defendants note that Wolfe failed to state conclusively in  
4 his declaration that Defendants actually copied PQ Labs' software.  
5 However, at this stage in the litigation, PQ Labs does not need to  
6 establish definitively that actual copying occurred. Rather, as  
7 noted above, it is enough for PQ Labs to present evidence  
8 supporting an inference of infringement based on (1) Defendants'  
9 access to the copyrighted information and (2) substantial  
10 similarities between its own products and ZaagTech's allegedly  
11 infringing products. Because PQ Labs has met this burden,  
12 Defendants are not entitled to summary judgment on this claim.

13 D. Trademark Infringement: Lanham Act (Claim 5)

14 PQ Labs alleges that Yang Qi, Jinpeng Li, and ZaagTech  
15 violated the Lanham Act by using the mark, "PQ LABS," Trademark  
16 Registration No. 4075660, to advertise falsely that ZaagTech was a  
17 distributor and manufacturer of PQ Labs' touch-screen products.

18 "To prevail on a claim of trademark infringement under the  
19 Lanham Act, 15 U.S.C. § 1114, a party 'must prove: (1) that it has  
20 a protectible ownership interest in the mark; and (2) that the  
21 defendant's use of the mark is likely to cause consumer  
22 confusion.'" Network Automation, Inc. v. Advanced Sys. Concepts,  
23 Inc., 638 F.3d 1137, 1144 (9th Cir. 2011) (citing Dep't of Parks &  
24 Recreation v. Bazaar Del Mundo Inc., 448 F.3d 1118, 1124 (9th Cir.  
25 2006)).

26 Here, PQ Labs has submitted screenshots of multiple websites  
27 which advertise ZaagTech products and refer to ZaagTech as "China  
28 PQ Labs Manufacturer" and "PQ Labs manufacturer and exporter in

1 China." Lu Decl., Ex. I, at 1-3. These advertisements suggest a  
2 formal business relationship between ZaagTech and PQ Labs and, as  
3 such, could lead consumers to believe that ZaagTech's products  
4 were designed or developed by PQ Labs. Because PQ Labs does not  
5 have any formal business relationship with ZaagTech, these web  
6 advertisements are sufficient to support an inference that  
7 ZaagTech infringed PQ Labs' trademark.<sup>4</sup>

8 The advertisements are not, however, sufficient to support an  
9 inference that Yang Qi or Jinpeng Li infringed its trademark. PQ  
10 Labs has not presented any evidence to suggest that Yang Qi or  
11 Jinpeng Li were responsible for the ZaagTech web advertisements or  
12 that they otherwise infringed PQ Labs' trademark. Yang Qi and  
13 Jinpeng Li are therefore entitled to summary judgment on this  
14 claim.

15 The advertisements also fail to support an inference that PQ  
16 Labs suffered damages as a result of this alleged infringement.  
17 The Ninth Circuit has made clear that, in order to recover  
18 monetary damages for trademark infringement, a plaintiff "must  
19 prove both the fact and the amount of damage." Lindy Pen Co.,  
20 Inc. v. Bic Pen Corp., 982 F.2d 1400, 1407 (9th Cir. 1993). PQ  
21 Labs has not done so here. Although it asserts that its "damages  
22 due to trademark infringement are a subset of [its] damages on its  
23 trade secrets claim," Docket No. 84, Pl.'s Opp. at 17, it has not  
24

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25 <sup>4</sup> The only case Defendants cite for support, Burger King Corp. v.  
26 Cabrera, comes from the report and recommendation of a magistrate judge  
27 in the Southern District of Florida and merely restates the standard for  
28 trademark infringement. 2010 WL 5834869, at \*4 (S.D. Fla.) ("It is also  
essentially undisputed that Cabrera's use of the Burger King name and  
marks, if unauthorized, will confuse the public as to the source,  
origin, sponsorship, or affiliation of Defendant's goods.").

1 cited any damages report or other evidence to support that  
2 assertion. Accordingly, ZaagTech is entitled to summary judgment  
3 on PQ Labs' trademark infringement claim to the extent PQ Labs  
4 seeks monetary damages. PQ Labs may proceed on this claim against  
5 ZaagTech to the extent it seeks declaratory or injunctive relief  
6 but it may not recover monetary damages under the Lanham Act.

7 E. Trademark Infringement: California Law (Claims 4, 8)

8 PQ Labs asserts trademark infringement claims against Yang  
9 Qi, Jinpeng Li, and ZaagTech under California law. These claims  
10 are "subject to the same test" as their trademark infringement  
11 claims under the Lanham Act. Jada Toys, Inc. v. Mattel, Inc., 518  
12 F.3d 628, 632 (9th Cir. 2008) (citations omitted); see also  
13 Mallard Creek Indus., Inc. v. Morgan, 56 Cal. App. 4th 426, 435  
14 (1997) ("[T]he ultimate test under both federal and California law  
15 is whether the similarity between the two marks is likely to  
16 deceive or confuse the public."). Thus, because PQ Labs has  
17 submitted sufficient evidence to support an inference that  
18 ZaagTech engaged in trademark infringement under the Lanham Act,  
19 it has also submitted sufficient evidence to support an inference  
20 that ZaagTech engaged in trademark infringement under California  
21 law.

22 As explained above, however, PQ Labs has not presented any  
23 evidence that Yang Qi or Jinpeng Li infringed its trademark or  
24 that it suffered damages as a result of ZaagTech's alleged  
25 infringement. Thus, as with the Lanham Act claims, Yang Qi and  
26 Jinpeng Li are entitled to summary judgment on this claim and PQ  
27 Labs may seek only declaratory and injunctive relief from ZaagTech  
28 on this claim.

1 F. False Advertising: Lanham Act (Claim 6)

2 PQ Labs alleges that Yang Qi, Jinpeng Li, and ZaagTech  
3 violated the Lanham Act's false advertising provisions by posting  
4 the web advertisements described above.

5 To prevail on a claim for false advertising under the Lanham  
6 Act, a plaintiff must show:

7 (1) a false statement of fact by the defendant  
8 in a commercial advertisement about its own or  
9 another's product; (2) the statement actually  
10 deceived or has the tendency to deceive a  
11 substantial segment of its audience; (3) the  
12 deception is material, in that it is likely to  
13 influence the purchasing decision; (4) the  
14 defendant caused its false statement to enter  
interstate commerce; and (5) the plaintiff has  
been or is likely to be injured as a result of  
the false statement, either by direct  
diversion of sales from itself to defendant or  
by a lessening of the goodwill associated with  
its products.

15 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th  
16 Cir. 1997) (citing 15 U.S.C. § 1125(a)).

17 In this case, the web advertisements support an inference  
18 that ZaagTech engaged in false advertising under the Lanham Act.  
19 Although Defendants argue that these advertisements do not contain  
20 false statements about PQ Labs' products, the advertisements do  
21 contain an allegedly false statement about ZaagTech's own touch-  
22 screen products. This is sufficient to support an inference that  
23 ZaagTech violated the Lanham Act. See id. (recognizing that  
24 liability may be imposed for any "false statement of fact by the  
25 defendant in a commercial advertisement about its own or another's  
26 product" (emphasis added)).

27 Nevertheless, PQ Labs has not submitted any evidence that  
28 Yang Qi or Jinpeng Li are responsible for these advertisements nor

1 that it suffered any damages as a result of Defendants' allegedly  
2 misleading advertisements. Thus, just as with its trademark  
3 infringement claims, Yang Qi and Jinpeng Li are entitled to  
4 summary judgment on this claim and PQ Labs may not recover any  
5 monetary relief from ZaagTech. See Harper House, Inc. v. Thomas  
6 Nelson, Inc., 889 F.2d 197, 210 (9th Cir. 1989) (emphasis in  
7 original) ("In a suit for damages under section 43(a) [of the  
8 Lanham Act], however, actual evidence of some injury resulting  
9 from the deception is an essential element of the plaintiff's  
10 case."). It may proceed on this claim against ZaagTech only  
11 insofar as it seeks declaratory or injunctive relief.

12 G. False Advertising: California Law (Claim 7)

13 PQ Labs' state law false advertising claims are based on the  
14 same advertisements as its Lanham Act claims.

15 Section 17500 of the California Business and Professions Code  
16 makes it unlawful for a business to disseminate any statement  
17 "which is untrue or misleading, and which is known, or which by  
18 the exercise of reasonable care should be known, to be untrue or  
19 misleading." To prevail on a claim under this provision, "it is  
20 necessary only to show that members of the public are likely to be  
21 deceived" by a given advertisement. Kasky v. Nike, Inc., 27 Cal.  
22 4th 939, 951 (2002).

23 Here, PQ Labs' screenshots of the web advertisements are  
24 sufficient to support an inference that ZaagTech violated section  
25 17500. As explained above, these advertisements allegedly  
26 misrepresent the nature of PQ Labs' relationship with ZaagTech and  
27 PQ Labs' contributions to ZaagTech's products. Accordingly,  
28 ZaagTech is not entitled to summary judgment on this claim. See

1 Denbicare U.S.A. Inc. v. Toys R Us, Inc., 84 F.3d 1143, 1153 (9th  
2 Cir. 1996) (concluding that the dismissal of the plaintiff's  
3 section 17500 claims was proper because the dismissal of its  
4 Lanham Act claims was proper), abrogated on other grounds by  
5 Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

6 Nevertheless, Yang Qi and Jinpeng Li are entitled to summary  
7 judgment on this claim for the same reasons they are entitled to  
8 summary judgment on PQ Labs' claims under the Lanham Act.  
9 Furthermore, just as with its Lanham Act claims, PQ Labs may not  
10 recover damages from ZaagTech on this claim and may seek to  
11 recover only declaratory and injunctive relief. California law  
12 precludes private litigants from obtaining monetary relief for  
13 false advertising claims brought under section 17500. Chern v.  
14 Bank of Am., 15 Cal. 3d 866, 875 (1976) (recognizing that section  
15 17500 does "not authorize recovery of damages by private  
16 individuals"); Brown v. Allstate Ins. Co., 17 F. Supp. 2d 1134,  
17 1140 (S.D. Cal. 1998) (stating that, under section 17500, "private  
18 remedies are limited to equitable relief, and civil penalties are  
19 recoverable only by specified public officers").

20 H. Computer Fraud and Abuse Act (Claim 19)

21 PQ Labs alleges that, between January 2011 and December 2011,  
22 Yang Qi, Jinpeng Li, and ZaagTech sent several "phishing" e-mails  
23 to PQ Labs in violation of the federal Computer Fraud and Abuse  
24 Act (CFAA), 18 U.S.C. §§ 1030 et seq. These e-mails allegedly  
25 contained viruses which infected PQ Labs' computer system. Lu  
26 Decl. ¶¶ 28-29.

27 "The CFAA prohibits a number of different computer crimes,  
28 the majority of which involve accessing computers without

1 authorization or in excess of authorization, and then taking  
2 specified forbidden actions, ranging from obtaining information to  
3 damaging a computer or computer data." LVRC Holdings LLC v.  
4 Brekka, 581 F.3d 1127, 1131 (9th Cir. 2009). Among other acts,  
5 the statute makes it unlawful for any person to "knowingly cause[]  
6 the transmission of a program, information, code, or command, and  
7 as a result of such conduct, intentionally cause[] damage without  
8 authorization, to a protected computer." 18 U.S.C.  
9 § 1030(a)(5)(A).<sup>5</sup>

10 The CFAA provides that a "civil action for a violation of  
11 this section may be brought only if the conduct involves 1 of the  
12 factors set forth in subclauses (I), (II), (III), (IV), or (V) of  
13 subsection (c)(4)(A)(i)." Id. § 1030(g). Thus, to prevail in a  
14 civil action under the CFAA, a plaintiff must show that the  
15 defendant's conduct involves one of the following factors:

- 16 (I) loss to 1 or more persons during any 1-  
17 year period (and, for purposes of an  
18 investigation, prosecution, or other  
19 proceeding brought by the United States  
20 only, loss resulting from a related  
21 course of conduct affecting 1 or more  
22 other protected computers) aggregating  
23 at least \$5,000 in value;
- 24 (II) the modification or impairment, or  
25 potential modification or impairment, of  
26 the medical examination, diagnosis,  
27 treatment, or care of 1 or more  
28 individuals;
- (III) physical injury to any person;
- (IV) a threat to public health or safety; [or]
- (V) damage affecting a computer used by or  
for an entity of the United States  
Government in furtherance of the  
administration of justice, national  
defense, or national security; . . .

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<sup>5</sup> In its brief, PQ Labs failed to identify the specific provisions of the CFAA that Defendants allegedly violated. At the hearing, however, it indicated that it was alleging a violation of § 1030(a)(5).

1 18 U.S.C. § 1030(c)(4)(A)(i). Only the first of these  
2 factors -- namely, economic loss -- is relevant here.  
3

4 Lu stated in his declaration that PQ Labs received at least  
5 "five e-mails containing malicious code" in 2011 and that the  
6 company "expended significant resources identifying and  
7 remediating the damage caused by this malware." Decl. ¶ 29.  
8 Specifically, Lu asserted that the company spent "\$36,000 in costs  
9 to mitigate the damages to the hardware and network, and \$42,000  
10 in consulting fees and service costs." Id. Lu also explained why  
11 he believes these e-mails were sent by Yang Qi, Jinpeng Li, and  
12 ZaagTech, noting that they were sent to non-public e-mail  
13 addresses and made reference to several former PQ Labs employees  
14 using the specific Chinese characters for these employees' names.  
15 Id. ¶ 30. The messages also contained detailed information about  
16 PQ Labs' customers. Id. According to Lu, Yang Qi, Jinpeng Li,  
17 and ZaagTech are among the few people or entities which not only  
18 had access to all of this information but also possessed the  
19 technical skills and language ability to craft these e-mails. Id.

20 Defendants contend that Lu's declaration conflicts with his  
21 prior deposition testimony and, therefore, should be disregarded  
22 under the sham affidavit rule. That rule provides that "a party  
23 cannot create an issue of fact by an affidavit contradicting his  
24 prior deposition testimony." Kennedy v. Allied Mut. Ins. Co., 952  
25 F.2d 262, 266 (9th Cir. 1991). The Ninth Circuit has "recognized  
26 that the sham affidavit rule 'should be applied with caution'"  
27 because it "threatens to ensnare parties who may have simply been  
28 confused during their deposition testimony and may encourage

1 gamesmanship by opposing attorneys." Van Asdale v. Int'l Game  
2 Tech., 577 F.3d 989, 998 (9th Cir. 2009) (citations omitted). "In  
3 order to trigger the sham affidavit rule, the district court must  
4 make a factual determination that the contradiction is a sham, and  
5 the 'inconsistency between a party's deposition testimony and  
6 subsequent affidavit must be clear and unambiguous to justify  
7 striking the affidavit.'" Yeager v. Bowlin, 693 F.3d 1076, 1080  
8 (9th Cir. 2012) (citing Van Asdale, 577 F.3d at 998-99).

9 Here, the inconsistencies between Lu's deposition testimony  
10 and his declaration do not rise to this level. When asked whether  
11 any of the alleged phishing e-mails "caused damage to PQ Labs'  
12 network, [sic] or computer systems," Lu responded,

13 That I don't know exactly, because, you know,  
14 when we received the e-mail, and we checked  
15 with over 60 anti-virus software, and only  
16 less than five percent of the anti-virus  
17 software can detect that. . . . So, the virus  
18 could be hidden in our computer for years, you  
19 know? That's a tremendous risk for us.

20 Narancic Decl., Ex. 13, Lu Depo. 104:3-:11. Lu also testified  
21 that PQ Labs' hard drive crashed but admitted that he did not know  
22 whether the virus sent by the phishing e-mails was the cause of  
23 the crash. Id., Ex. 13, at 110:1-:11. This testimony -- in which  
24 Lu admits to some uncertainty about the cause of the network  
25 damage -- do not "clear[ly] and unambiguous[ly]" contradict the  
26 statements in his declaration in which he explains why he believes  
27 Defendants sent the phishing e-mails. Accordingly, Lu's  
28 declaration should not be disregarded under the sham affidavit  
rule.

1           Because Lu's declaration is admissible and contains  
2 sufficient evidence to support an inference that Yang Qi, Jinpeng  
3 Li, and ZaagTech violated the CFAA, these Defendants are not  
4 entitled to summary judgment on this claim.

5           I.     California Penal Code section 502 (Claim 10)

6           PQ Labs alleges that Yang Qi, Jinpeng Li, and ZaagTech  
7 violated section 502 of the California Penal Code in two ways:  
8 first, by using the company's computer network without its  
9 authorization to share confidential hardware schematics with each  
10 other in January 2010 and, second, by sending the phishing e-mails  
11 discussed above in 2011.

12           Section 502 was enacted "to expand the degree of protection  
13 afforded to individuals, businesses, and governmental agencies  
14 from tampering, interference, damage, and unauthorized access to  
15 lawfully created computer data and computer systems." Cal. Penal  
16 Code § 502(a). Among other acts, section 502(c) makes it a public  
17 offense for any person to access a "computer, computer system, or  
18 computer network" without permission or to "introduce[] any  
19 computer contaminant into any computer, computer system, or  
20 computer network." Id. § 502(c)(7)-(8).<sup>6</sup> In addition, section  
21 502(e) provides that the "owner or lessee of the computer,  
22 computer system, computer network, computer program, or data who  
23 suffers damage or loss by reason of a violation of any of the  
24 provisions of subdivision (c) may bring a civil action against the  
25

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26           <sup>6</sup> As with its CFAA claims, PQ Labs failed to identify in its brief  
27 the specific provisions of section 502 on which its claims are based.  
28 When asked to identify specific provisions at the hearing, PQ Labs  
indicated that its claims were most likely based on sections 502(c)(7)  
and 502(c)(8).

1 violator for compensatory damages and injunctive relief or other  
2 equitable relief." Id. § 502(e)(1).

3 To support its section 502 claims, PQ Labs relies on a log of  
4 instant messages which allegedly show that Jinpeng Li sent  
5 confidential hardware schematics to Yang Qi in January 2010 using  
6 the company's computer network. Wolf Decl., Ex. B. It also  
7 relies on the statements from Lu's declaration as evidence of  
8 Defendants' alleged phishing activities. See Lu Decl. ¶¶ 29-30.  
9 While this evidence supports an inference that Defendants violated  
10 section 502 by sending the alleged phishing e-mails, it does not  
11 support an inference that they also violated the statute by  
12 sharing the hardware schematics over PQ Labs' network. This is  
13 because, with respect to PQ Labs' claim based on the hardware  
14 schematics, Defendants are protected by California Penal Code  
15 section 502(h).

16 Section 502(h) creates a safe harbor from liability for  
17 employees who access a computer or computer network within the  
18 scope of their employment. Specifically, the provision states,

19 Subdivision (c) does not apply to punish any  
20 acts which are committed by a person within  
the scope of his or her lawful employment.  
21 For purposes of this section, a person acts  
within the scope of his or her employment when  
22 he or she performs acts which are reasonably  
necessary to the performance of his or her  
23 work assignment.

24 Cal. Penal Code § 502(h)(1). To avoid this provision, PQ Labs  
25 must present some evidence to suggest that Jinpeng Li was acting  
26 outside the scope of his employment when he sent the hardware  
27 schematics to Yang Qi. It has not done so here. Indeed, nothing  
28 in the January 2010 instant message log suggests that Jinpeng Li

1 was not authorized, in his capacity as a hardware engineer, to  
2 access to the schematics in question. See Wolf Decl., Ex. B.  
3 Furthermore, nothing in the logs suggests that he was not supposed  
4 to share these hardware schematics with Yang Qi, who was still  
5 working for PQ Labs at the time.

6 If anything, PQ Labs' evidence provides reason to believe  
7 that Jinpeng Li was, in fact, acting within the scope of his  
8 employment when he shared the hardware schematics with Yang Qi in  
9 January 2010. Lu stated in his declaration that Yang Qi and  
10 Jinpeng Li were sent to South Korea together that same month to  
11 demonstrate PQ Labs' products for a potential business partner.  
12 Lu Decl. ¶ 18. Although PQ Labs asserts that Jinpeng Li shared  
13 the schematics with Yang Qi in order "to help develop a new  
14 product for a new competitor," it failed to cite any evidence to  
15 support that assertion. See Pls.' Opp. at 21. In sum, PQ Labs  
16 has not presented sufficient evidence to support an inference that  
17 Jinpeng Li was acting outside the scope of his employment -- and  
18 therefore was not protected by section 502(h) -- when he sent the  
19 hardware schematics to Yang Qi.<sup>7</sup>

20 Thus, while PQ Labs may proceed on its section 502 claims  
21 based on the alleged 2011 phishing attack, it may not proceed on  
22 its section 502 claims based on the alleged unauthorized use of  
23 the company's computer network to share hardware schematics.

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26  
27 <sup>7</sup> Although ZaagTech is not protected by section 502(h), PQ Labs has  
28 not presented any evidence to suggest that ZaagTech ever sought to  
access PQ Labs' computer network, outside of its alleged phishing attack  
in 2011.

1 J. Trespass to Chattels (Claim 18)

2 PQ Labs' asserts a trespass-to-chattels claim against Yang  
3 Qi, Jinpeng Li, and ZaagTech based on their alleged 2011 phishing  
4 attack.

5 The "tort of trespass to chattels allows recovery for  
6 interferences with possession of personal property 'not  
7 sufficiently important to be classed as conversion, and so to  
8 compel the defendant to pay the full value of the thing with which  
9 he has interfered.'" Intel Corp. v. Hamidi, 30 Cal. 4th 1342,  
10 1350 (2003) (citations omitted). To prevail on a trespass-to-  
11 chattels claim based on "unwanted electronic contact between  
12 computers," the plaintiff must establish that the unwanted contact  
13 "involved some actual or threatened interference with the  
14 computers' functioning." Id. at 1353.

15 PQ Labs has submitted sufficient evidence of such  
16 interference here to survive summary judgment on this claim. As  
17 noted above, Lu's declaration specifically highlighted the  
18 "damages to the hardware and network" that allegedly resulted from  
19 Defendants' phishing attack. Lu Decl. ¶ 29. Yang Qi, Jinpeng Li,  
20 and ZaagTech are therefore not entitled to summary judgment on  
21 this claim.

22 K. Breach of Contract (Claim 14)

23 PQ Labs alleges that Jinpeng Li breached the confidentiality  
24 provisions of his employment contract by disclosing hardware  
25 schematics and other proprietary technological information.  
26 Jinpeng Li is entitled to summary judgment on this claim because,  
27 as noted above, he signed his employment contract with PinQi and  
28 never signed a contract with PQ Labs. Jinpeng Li Decl. ¶ 2.

1 For reasons explained more fully in the discussion of  
2 Defendants' motion for leave to amend, PQ Labs is granted leave to  
3 amend its complaint by adding PinQi as a Plaintiff. PinQi may  
4 revive this contract claim against Jinpeng Li in the amended  
5 complaint.

6 L. Breach of Fiduciary Duty (Claim 15)

7 PQ Labs alleges that Jinpeng Li and Yang Qi breached their  
8 fiduciary duty to PQ Labs by misappropriating its trade secrets  
9 and using them to support ZaagTech.

10 To prevail on a claim for breach of fiduciary duty under  
11 California law, a plaintiff must show (1) the existence of a  
12 fiduciary duty; (2) a breach of that fiduciary duty; and  
13 (3) resulting damage. Pellegrini v. Weiss, 165 Cal. App. 4th 515,  
14 524 (2008).

15 Defendants contend that PQ Labs has failed to present  
16 sufficient evidence that Jinpeng Li and Yang Qi owed it a  
17 fiduciary duty. They note that Jinpeng Li signed an employment  
18 contract with PinQi, not PQ Labs, while Yang Qi was merely  
19 assigned to work for PQ Labs by his true employer, 22Miles. Both  
20 of these arguments fail.

21 First, with respect to Jinpeng Li, PQ Labs' evidence is  
22 sufficient to support an inference that he was a fiduciary of the  
23 company. California courts have recognized that the "fiduciary of  
24 a subsidiary also owes a fiduciary duty to the subsidiary's parent  
25 corporation." Thomas Weisel Partners LLC v. BNP Paribas, 2010 WL  
26 1267744, at \*5 (N.D. Cal.); see also Richardson v. Reliance Nat.  
27 Indem. Co., 2000 WL 284211 (N.D. Cal.) (refusing to dismiss  
28 breach-of-fiduciary-duty claim because defendants owed fiduciary

1 duty to subsidiary of plaintiff's corporation). Defendants  
2 concede that PinQi was a wholly owned subsidiary of PQ Labs and  
3 that Jinpeng Li knew of this parent-subsidary relationship.  
4 Indeed, the undisputed evidence suggests that Jinpeng Li used a  
5 "PQLabs.com" e-mail address throughout his employment with PinQi.  
6 Lu Decl., Ex. G. In light of this evidence, Defendants' argument  
7 that Jinpeng Li was not a fiduciary of PQ Labs must be rejected.

8 Defendants' argument that Yang Qi was not a fiduciary of PQ  
9 Labs is similarly unavailing because the evidentiary record  
10 supports an inference that Yang Qi acted as PQ Labs' agent. As  
11 California courts have explained,

12 Agency is "the fiduciary relationship that  
13 arises when one person (a 'principal')  
14 manifests assent to another person (an  
15 'agent') that the agent shall act on the  
16 principal's behalf and subject to the  
17 principal's control, and the agent manifests  
18 assent or otherwise consents so to act."  
19 Where such a relationship arises, the agent  
20 assumes "a fiduciary duty to act loyally for  
21 the principal's benefit in all matters  
22 connected with the agency relationship."

23 Huong Que, Inc. v. Luu, 150 Cal. App. 4th 400, 410-11 (2007)  
24 (citing Restatement (Third) of Agency §§ 1.01, 8.01). Here, PQ  
25 Labs' evidence suggests that Yang Qi regularly held himself out as  
26 an agent of PQ Labs when dealing with distributors and prospective  
27 customers. Lu Decl. ¶ 11. Lu stated in his declaration that Yang  
28 Qi used a "PQLabs.com" e-mail address when communicating with  
customers and offering them sales contracts. Id. He also  
described how Yang Qi traveled to South Korea on behalf of the  
company to meet with a potential PQ Labs business partner. Id.  
¶ 18. This evidence supports an inference that Yang Qi was an

1 agent of PQ Labs and, therefore, owed the company a fiduciary  
2 duty. Violette v. Shoup, 16 Cal. App. 4th 611, 620 (1993) ("The  
3 chief characteristic of the agency is that of representation, the  
4 authority to act for and in the place of the principal for the  
5 purpose of bringing him or her into legal relations with third  
6 parties." (citations omitted)).

7 Accordingly, because PQ Labs has submitted evidence that  
8 Jinpeng Li and Yang Qi owed it a fiduciary duty, Jinpeng Li and  
9 Yang Qi are not entitled to summary judgment on this claim.

10 M. Tortious Interference with Prospective Economic  
11 Advantage and Contracts (Claims 12, 13, 20)

12 PQ Labs alleges that Yang Qi and Haipeng Li unlawfully  
13 interfered with its prospective economic advantage and contracts  
14 by stealing its customers. Specifically, it contends that Yang Qi  
15 and Haipeng Li formed a sham PQ Labs distributor which they then  
16 used to divert customers and product sales away from PQ Labs'  
17 authorized distributors. Because the sham distributor -- a  
18 company called MultiTouch Group, LLC -- allegedly kept all of the  
19 retail profits from these sales for itself, rather than sharing  
20 them with PQ Labs as other distributors were required to do, PQ  
21 Labs asserts that this scheme deprived it of its full profits on  
22 product sales.

23 To prevail on a claim for tortious interference with  
24 prospective economic advantage, a plaintiff must show "(1) an  
25 economic relationship between the plaintiff and some third party,  
26 with the probability of future economic benefit to the plaintiff;  
27 (2) the defendant's knowledge of the relationship; (3) intentional  
28 acts on the part of the defendant designed to disrupt the

1 relationship; (4) actual disruption of the relationship; and  
2 (5) economic harm to the plaintiff proximately caused by the acts  
3 of the defendant.' " Korea Supply Co. v. Lockheed Martin Corp., 29  
4 Cal. 4th 1134, 1153 (2003) (citations omitted). The standard for  
5 proving tortious interference with contract is essentially the  
6 same as the standard for proving tortious interference with  
7 prospective economic advantage except that it requires proof of a  
8 contractual relationship between the plaintiff and the third  
9 party. Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d  
10 1118, 1126 (1990) ("The tort of interference with prospective  
11 economic advantage protects the same interest in stable economic  
12 relationships as does the tort of interference with contract,  
13 though interference with prospective advantage does not require  
14 proof of a legally binding contract.").

15 PQ Labs has submitted sufficient evidence here to support an  
16 inference that Yang Qi and Haipeng Li knowingly disrupted its  
17 relations with its distributors and prospective customers. It  
18 points to a series of instant messages that Yang Qi and Haipeng Li  
19 exchanged in January and February 2010, during which Yang Qi  
20 solicited Haipeng Li's assistance in forming MultiTouch Group.  
21 See Wolf Decl. ¶ 3, Ex. A, at 1-10. During these chats, Yang Qi  
22 sent Haipeng Li a confidential pricing list which was typically  
23 used only by PQ Labs' authorized distributors. Id., Ex. A, at 7-  
24 8. He explained that they could use this list to undercut the  
25 authorized distributors and divert customers to MultiTouch Group.  
26 Id. Haipeng Li advised Yang Qi to keep their plans hidden from  
27 his supervisors at PQ Labs and Yang Qi, in turn, advised Haipeng  
28 Li to use a fake name when dealing with customers. Id., Ex. A, at

1 2, 6. While these communications do not constitute compelling  
2 proof that MultiTouch Group actually diverted profits from PQ  
3 Labs,<sup>8</sup> they nevertheless support an inference that Yang Qi and  
4 Haipeng Li knowingly sought to disrupt PQ Labs' relations with its  
5 distributors and prospective customers. This evidence is  
6 therefore sufficient to support PQ Labs' claim for tortious  
7 interference with prospective economic advantage.

8 This evidence is not sufficient, however, to support PQ Labs'  
9 claim for tortious interference with contracts. PQ Labs has not  
10 provided a single contract -- either with a distributor or with a  
11 customer -- which was allegedly disrupted by Yang Qi and Haipeng  
12 Li. Without this evidence, PQ Labs' claim for tortious  
13 interference with contracts cannot survive summary judgment. See  
14 Pac. Gas & Elec. Co., 50 Cal. 3d at 1126 (recognizing that  
15 tortious interference with contract requires "proof of a legally  
16 binding contract").

17  
18  
19 <sup>8</sup> As noted at the hearing, PQ Labs' theory of liability rests on  
20 its allegation that "authorized" distributors were required to return a  
21 portion of their retail profits to PQ Labs after every sale of a PQ Labs  
22 product. If these distributors were not required to return a portion of  
23 their retail profits to PQ Labs after these sales -- and, instead,  
24 simply paid a wholesale price to PQ Labs and kept all of the retail  
25 profits for themselves -- then PQ Labs would not be harmed by  
26 Defendants' efforts to divert sales from authorized distributors to  
27 MultiTouch Group.

28 Despite the centrality of this factual allegation to its underlying  
tortious interference claims, however, PQ Labs has not submitted any  
distribution agreements to show that its distributors actually share  
their retail profits. PQ Labs' failure to submit this evidence -- all  
of which should be in its own possession -- casts doubt on whether Yang  
Qi and Haipeng Li's alleged scheme actually deprived PQ Labs' of its  
full profits. Nevertheless, because the Court must draw all reasonable  
inferences in a light favorable to the non-moving party, it concludes  
that the evidence outlined above is sufficient to satisfy PQ Labs'  
summary judgment burden.

1 Defendants contend that PQ Labs cannot survive summary  
2 judgment on its claim for tortious interference with prospective  
3 economic advantage without presenting evidence that Haipeng Li or  
4 Yang Qi owed PQ Labs a fiduciary duty or duty of confidentiality.  
5 This argument misstates the law. While a plaintiff must  
6 demonstrate that the defendant's conduct was "wrongful by some  
7 legal measure other than the fact of interference itself," Korea  
8 Supply, 29 Cal. 4th at 1153, it can satisfy this requirement  
9 without showing a specific breach of a fiduciary duty or duty of  
10 confidentiality. In the present case, for instance, PQ Labs has  
11 met this requirement by presenting evidence that Yang Qi breached  
12 the confidentiality provisions of his contract with 22Miles by  
13 sharing PQ Labs' pricing information with Haipeng Li.

14 Further, the record contains sufficient evidence to suggest  
15 that Yang Qi did breach his fiduciary duty to PQ Labs, as  
16 explained above. It also contains evidence that Haipeng Li  
17 knowingly aided Yang Qi in breaching that duty. This evidence is  
18 sufficient to satisfy the "wrongful" element of PQ Labs' claim for  
19 tortious interference with prospective economic advantage and  
20 precludes granting summary judgment to Yang Qi and Haipeng Li on  
21 this claim.

22 N. Fraudulent Concealment (Claim 16)

23 PQ Labs alleges that Yang Qi is liable for fraudulent  
24 concealment because he failed to disclose his efforts to form  
25 MultiTouch Group while he was serving as PQ Labs' account manager.  
26 Defendants contend that this claim fails because PQ Labs has not  
27 presented any evidence that Yang Qi owed it a fiduciary duty. As  
28 explained above, however, PQ Labs' evidence is sufficient to

1 support an inference that Yang Qi was a fiduciary of PQ Labs.  
2 Thus, Yang Qi is not entitled to summary judgment on this claim.

3 O. Conversion (Claim 17)

4 PQ Labs alleges that Yang Qi and Haipeng Li took possession  
5 of a touch-screen monitor in February 2010 and then sold it  
6 through MultiTouch Group without PQ Labs' authorization. As a  
7 result, PQ Labs alleges, it was deprived of the full profits that  
8 it would have earned had the monitor been sold through an  
9 authorized distributor.

10 To prevail on a claim for conversion, a plaintiff must show:  
11 (1) ownership or right to possess the subject property; (2) the  
12 defendant's conversion by a wrongful act or disposition of the  
13 property; and (3) damages. Spates v. Dameron Hospital Ass'n, 114  
14 Cal. App. 4th 208, 221 (2003).

15 PQ Labs cites the same evidence to support its conversion  
16 claim that it cited to support its tortious interference claims:  
17 specifically, the log of instant messages exchanged by Yang Qi and  
18 Haipeng Li in January and February 2010. See Wolf Decl. ¶ 3, Ex.  
19 A, at 1-10. Once again, while this evidence does not persuasively  
20 demonstrate that PQ Labs was harmed by Yang Qi and Haipeng Li's  
21 efforts to use MultiTouch Group to distribute PQ Labs products, it  
22 is nevertheless sufficient to satisfy PQ Labs' burden on summary  
23 judgment. The instant message log is sufficient to support an  
24 inference that Yang Qi and Haipeng Li disposed of PQ Labs' touch-  
25 screen monitor without its consent and thereby deprived it of the  
26 profits it would have otherwise earned from the sale of that  
27 monitor. Accordingly, Yang Qi and Haipeng Li are not entitled to  
28 summary judgment on this claim.

1 P. Unfair Competition (Claims 8, 9, 11, 20, 21)

2 PQ Labs' unfair competition claims are based on the same  
3 allegations underlying its claims for trademark infringement,  
4 trespass to chattels, breach of fiduciary duty, fraudulent  
5 concealment, tortious interference with prospective economic  
6 advantage, misappropriation of trade secrets, and other claims  
7 discussed above. Because all of those other claims survive, so,  
8 too, do these derivative claims for unfair competition. See Cel-  
9 Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th  
10 163, 180 (1999) ("By proscribing 'any unlawful' business practice,  
11 section 17200 borrows violations of other laws and treats them as  
12 unlawful practices that the unfair competition law makes  
13 independently actionable." (quoting Cal. Bus. & Prof. Code  
14 § 17200)).

15 II. Motion for Leave to Amend

16 Defendants seek leave to amend their answer and one of their  
17 responses to PQ Labs' requests for admission. Specifically, they  
18 seek leave to withdraw their admission that Jinpeng Li signed an  
19 employment contract with PQ Labs. Defendants contend they made  
20 this admission, both in their answer and during discovery, based  
21 on Jinpeng Li's mistaken translation of his employment contract  
22 with PinQi, the Shanghai-based subsidiary of PQ Labs.

23 PQ Labs does not dispute that Jinpeng Li signed an employment  
24 contract with PinQi. Furthermore, it has not presented any  
25 evidence to suggest that Jinpeng Li actually signed an employment  
26 contract directly with PQ Labs. In fact, the translated version  
27 of the Jinpeng Li's June 2009 employment contract that PQ Labs  
28 submitted with its brief refers specifically to PinQi -- not PQ

1 Labs -- as Jinpeng Li's employer. See Wolf Decl., Ex. H. In  
2 light of this undisputed evidence, PQ Labs may not rely on  
3 Defendants' mistaken admissions as a basis for establishing that  
4 Jinpeng Li contracted directly with PQ Labs.

5 Defendants are granted leave to amend their answer and their  
6 response to PQ Labs' Request for Admission No. 2 by withdrawing  
7 their admission that Jinpeng Li signed an employment contract with  
8 PQ Labs. However, based on this correction to the record, PQ Labs  
9 is granted leave to amend its complaint by adding PinQi as a  
10 Plaintiff. PinQi may revive the breach of contract claim against  
11 Jinpeng Li in the amended complaint.

12 CONCLUSION

13 For the reasons set forth above, Defendants' motion for  
14 summary judgment (Docket No. 78) is GRANTED in part and DENIED in  
15 part. Specifically, Yang Qi and Haipeng Li are granted summary  
16 judgment on Plaintiff's claim for prospective interference with  
17 contract and Yang Qi and Jinpeng Li are granted summary judgment  
18 on Plaintiff's state and federal claims for trademark infringement  
19 and false advertising. While Plaintiff may pursue declaratory and  
20 injunctive relief against ZaagTech on its trademark infringement  
21 and false advertising claims, it may not seek monetary damages on  
22 these claims.

23 Defendants' objections to Plaintiff's evidence (Docket Nos.  
24 101, 102) are OVERRULED because they lack merit, are not timely,  
25 and were not contained in Defendants' brief as required by the  
26 local rules.

27 Finally, Defendants' motion for leave to amend (Docket No.  
28 96) is GRANTED. Defendants may withdraw their admission that

1 Jinpeng Li signed a contract with PQ Labs. However, in light of  
2 the timing of Defendants' request for leave to amend, PQ Labs is  
3 granted leave to amend its complaint to add PinQi as a Plaintiff.  
4 PQ Labs and PinQi shall file their third amended complaint within  
5 four days of this order. They shall amend their complaint only  
6 the minimum amount necessary to add PinQi as a Plaintiff and to  
7 identify which Plaintiff is asserting which claims. They may not  
8 add any new claims and must file a redline version of the third  
9 amended complaint highlighting all changes to the 2AC. Defendants  
10 shall file their answer to the third amended complaint within  
11 seven days of this order.

12 A final pretrial conference will be held at 2:00 p.m. on  
13 February 26, 2014. As stated at the hearing, the parties shall  
14 participate in a settlement conference with a magistrate judge  
15 before the final pretrial conference.

16 IT IS SO ORDERED.

17  
18 Dated: 1/29/2014

  
CLAUDIA WILKEN  
United States District Judge

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