

1 Andrew P. Bridges (SBN: 122761)
 ABridges@winston.com
 2 David S. Bloch (SBN: 184530)
 DBloch@winston.com
 3 Matthew Scherb (SBN: 237461)
 MScherb@winston.com
 4 WINSTON & STRAWN LLP
 101 California Street
 5 San Francisco, CA 94111-5802
 Telephone: (415) 591-1000
 6 Facsimile: (415) 591-1400

7 Attorneys for Plaintiffs
 INTERSERVE, INC. dba TECHCRUNCH
 8 and CRUNCHPAD, INC.

9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**

11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

Winston & Strawn LLP
 101 California Street
 San Francisco, CA 94111-5802

12 INTERSERVE, INC. dba TECHCRUNCH, a)
 Delaware corporation, and CRUNCHPAD,)
 13 INC., a Delaware corporation,)
 14 Plaintiffs,)
 15 vs.)
 16 FUSION GARAGE PTE. LTD., a Singapore)
 company,)
 17 Defendant.)
 18)
 19)

Case No. C 09-cv-5812 RS (PVT)
DOCUMENT SUBMITTED UNDER SEAL
(HIGHLIGHTED PORTIONS CONTAIN
CONFIDENTIAL OR HIGHLY
CONFIDENTIAL MATERIAL)
 REPLY MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PLAINTIFFS' MOTION FOR PRELIMINARY
 INJUNCTION
 Date: May 13, 2010
 Time: 1:30 P.M.
 Place: Courtroom 3, 17th Floor

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
I. INTRODUCTION	1
II. FACTS	3
III. ARGUMENT	7
A. Plaintiffs are Likely to Succeed on the Merits.....	7
1. Plaintiffs Have Established Fusion Garage’s Breach of Fiduciary Duty	7
a. De Facto Joint Ventures in California and the Related Fiduciary Duty	7
b. TC and FG Formed a Joint Venture.....	8
2. Plaintiffs Have Established FG’s Fraud and Deceit.	13
3. The Lanham Act Claim Will Succeed.	16
B. Without Preliminary Relief, Plaintiffs Will Suffer Irreparable Harm.	17
C. The Balance of Hardships Tips in Plaintiffs’ Favor.	19
D. The Public Interest Favors Granting Relief.	20
IV. CONCLUSION	20

TABLE OF AUTHORITIES

Page(s)

CASES

1

2

3

4 *April Enterprises, Inc. v. KTTV,*
147 Cal. App. 3d 805 (1983)10

5 *Boyd v. Bevilacqua,*
247 Cal. App. 2d 272 (1966)13

6

7 *Bushnell, Inc. v. Brunton Co.,*
673 F. Supp. 2d 1241 (D. Kan. 2009).....18

8 *Campagnolo S.R.L. v. Full Speed Ahead, Inc.,*
258 F.R.D. 663 (W.D. Wash. 2009)20

9

10 *DuFour v. Be LLC,*
No. 09-3770, 2009 WL 4730897 (N.D. Cal. Dec. 7, 2009) (Breyer, J.).....19

11 *Engalla v. Permanente Medical Group, Inc.,*
15 Cal. 4th 951 (1997)13

12

13 *Franco Western Oil Co. v. Fariss,*
259 Cal. App. 2d 325 (1968)8, 9, 12

14 *Heckmann v. Ahmanson,*
168 Cal. App. 3d 119 (1985)19, 20

15

16 *Holmes v. Lerner,*
74 Cal. App. 4th 442 (1999)9, 10

17 *In re Tower,*
483 F. Supp 2d. 327 (S.D.N.Y. 2007) (Opp. at 18)15

18

19 *Kaljjan v. Parineh,*
No. F053997, 2009 WL 377089 (Cal. App. 5 Dist. Feb. 17, 2009)10

20 *Kournikova v. Gen. Media Commc’ns, Inc.,*
278 F. Supp. 2d 1111 (C.D. Cal. 2003)16

21

22 *Leff v. Gunter,*
33 Cal. 3d 508 (1983)8

23 *Pellegrini v. Weiss,*
165 Cal. App. 4th 515 (2008)7

24

25 *San Fran. Iron & Metal Co. v. American Mill. & Indus. Co.,*
115 Cal. App. 238 (1931)8, 9

26 *Tercica, Inc. v. Insmed Inc.,*
No. C 05-5027, 2006 WL 1626930 (N.D. Cal. Jun. 9, 2006) (Armstrong, J.)16

27

28 *Thomas v. Larson,*
147 F.3d 195 (2d Cir. 1998).....12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Thorn v. Reliance Van Co.,
736 F.2d 929 (3d Cir. 1984).....16

USACO Coal Co. v. Carbomin Energy, Inc.,
689 F.2d 94 (6th Cir. 1982)18

Weiner v. Fleischman,
54 Cal.3d 476 (1991)8

STATUTES

Cal. Corp. Code § 16801.....10

Cal. Corp. Code § 16202(a)8

Cal. Corp. Code § 16404(b)(1)8

1 **I. INTRODUCTION**

2 Plaintiffs’ opening brief on this motion for preliminary injunction rested upon the limited
3 information available at the time about Fusion Garage’s perfidy and plans to usurp the fruits of the
4 CrunchPad project for itself. Now, however, Fusion Garage (“FG”) – after dragging its feet for
5 months – has given up “smoking gun” documents that lay its fraudulent and deceitful conduct bare.
6 Buried in 31,000 pages of documents delivered the night before the deposition of FG’s CEO were
7 emails in which he admitted to [REDACTED]

8 [REDACTED]
9 The day before abandoning the venture, Mr. Rathankrishnan revealed his true thinking [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 (Decl. of Andrew P. Bridges in Support of Reply (“Bridges Decl.”) Ex. A (emphasis added).) [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 [REDACTED] (Bridges Decl. Ex. B.)

28 Other documents show [REDACTED]

1 [REDACTED] while at the same time FG led TC on with false reports of progress, [REDACTED] with
2 TC's expectations of a November 20 launch of the CrunchPad. For example, on September 29,
3 2009, McGrath personnel who were privy to FG's secret plans observed that:

4 [REDACTED]
5 [REDACTED]
6 (Bridges Decl. Ex. C (emphasis added).) That was over six weeks *before* FG pulled the plug on the
7 collaboration. On October 19, 2009, [REDACTED]

8 [REDACTED]
9 [REDACTED] (Bridges Decl. Ex. D.) On November 11, 2009, [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 (Bridges Decl. Ex. E.)

15 FG's opposition brief ignores each of these documents.

16 Based on these and other revelations, there can no longer be any doubt about FG's fraud and
17 breach of fiduciary duty. Plaintiffs¹ have a very strong likelihood of success in light of the
18 unambiguous evidence that has been uncovered.

19 Likewise, the danger to TC has become clearer. [REDACTED]
20 [REDACTED]

21 [REDACTED] (Rathakrishnan Dep. Tr. at 45:15-24.)² [REDACTED]
22 [REDACTED] *Id.* at 45:15-25, 159:11-

23 16. [REDACTED]
24 [REDACTED] *Id.* at 160:8-19; Bloch Decl. [Dkt. 26-2]

25 Ex. A (account status is "Restricted – High"). [REDACTED]
26

27 ¹ We refer to both Plaintiffs collectively as "Plaintiffs" or "TC." Where there is reason to distinguish
28 between the two, we will refer to the Plaintiffs individually as TechCrunch and CrunchPad.

² Rathakrishnan Dep. Tr. excerpts are Exhibits CC (public portions) and Exhibit DD (confidential portions) to the Bridges Declaration.

1 [REDACTED]
2 [REDACTED] This puts TC in still more jeopardy with respect to their ability to
3 secure meaningful relief in this case and further justifies a constructive trust as interim relief.

4 Finally, FG's CEO has made it clear that the imposition of a constructive trust would not
5 harm FG. [REDACTED]

6 (Rathakrishnan Dep. Tr. at 173:24 to 175:16.) [REDACTED]

7 [REDACTED] *Id.* at 160:8-19; Bloch Decl. Ex. A. [REDACTED]

8 [REDACTED]
9 [REDACTED] (Rathakrishnan Dep Tr. at
10 187:11-12; 189:9-14.) Given these facts, the balance of harms tips decidedly in favor of a
11 constructive trust to protect TC.

12 In light of Plaintiffs' strong likelihood of success on the merits, the probability of irreparable
13 harm to Plaintiffs if all of FG's revenues from the JooJoo flows offshore, and the absence of harm to
14 FG from a constructive trust, the Court should grant Plaintiffs' motion for a preliminary injunction to
15 impose a constructive trust on all revenues from FG's sales of the JooJoo device.

16 II. FACTS

17 The Introduction presented new documents that lay bare FG's motives. Other new
18 documents and testimony reveal a timeline of FG's fraud and expose Mr. Rathakrishnan as a two-
19 faced schemer with little credibility. TC will also address FG's misleading characterization of Mr.
20 Arrington's deposition testimony. The milestones were as follows:

21 ***Arrington's Vision.*** Mr. Arrington announces the CrunchPad project in July 2008 and
22 invited others to participate. (Arrington Decl. ¶ 2 [Dkt. No. 26-1].)

23 ***Prototype A, Without FG.*** In August, TechCrunch assembles Prototype A of the CrunchPad
24 without FG involvement. (Rathakrishnan Decl. ¶ 28 [Dkt. No. 75].)

25 ***FG Wants to Collaborate.*** In mid-September 2008, FG wants to "discuss possible
26 collaboration" and realizes it would "need to be working with [TechCrunch] at a early stage of
27 device conception." (Bridges Decl. Ex. F.) After an initial meeting in late September that kicked off
28 the parties' relationship (Arrington Decl. ¶ 4), Mr. Rathakrishnan wrote [REDACTED]

1 [REDACTED]
2 [REDACTED] (Bridges Decl. Exh. G.)

3 ***The Merger As Tangential to the Collaboration.*** The parties began merger discussions early
4 in their relationship, but these talks occurred on a separate track from their ongoing collaboration. In
5 fact, when merger talks were not progressing rapidly in November of 2008, Mr. Rathakrishnan
6 explicitly acknowledged that [REDACTED]

7 [REDACTED] (Bridges Decl. Ex. H.)

8 ***Prototype B, a Collaborative Success.*** Unlike Prototype A, Prototype B was a the fruit of
9 collaborative effort with FG working on software and TC working on other aspects of the tablet.
10 (Arrington Decl. ¶ 13 & Ex. E.) FG blog posts (which FG has since deleted to evade the truth) tout:

11 It's our software running on the tablet ... **We continue to work with [TC's] Louis Monier**
12 **on the feature set and the user experience.** We ... would like to take the opportunity to
13 thank Michael [Arrington] and Louis for giving us the opportunity to **work with them** on the
14 TechCrunch Tablet.

15 The collaboration with the Crunchpad project happened as a result of meetings we had with
16 Mike Arrington and co, subsequent to [TechCrunch50]. **We worked closely with Louis**
17 **Monier** in getting the software in shape for the hardware prototype B. **We continue to work**
18 **with them in getting the software in shape to make crunchpad an easy to use device.**

19 *Id.* (emphasis added). In his declaration, Mr. Rathakrishnan appears to disclaim FG's involvement
20 with Prototype B (Rathakrishnan Decl. ¶ 33), while in his deposition he still claimed to have
21 delivered software for the prototype. (Rathakrishnan Dep. Tr. at 60:14-15). Mr. Rathakrishnan cannot
22 keep track of his lies.

23 ***Prototype C, Sharing the Credit.*** Prototype C debuted in April 2009. (Arrington Decl. ¶ 14;
24 Rathakrishnan Decl. ¶ 37.) FG now argues that Plaintiffs gave "all credit" to FG for Prototype C.
25 (Opp. at 4-5.) Plaintiffs graciously gave this flattery to FG. But the truth is that Prototype C was a
26 continuation of the collaboration. Mr. Rathakrishnan referred to it as Prototype C of the *CrunchPad*.
27 (Rathakrishnan Dep. Tr. 59:1-9.)³ In fact, despite statements in his declaration to distance Plaintiffs

28 ³ At deposition, he tried to suggest that he gave Prototype C the alternate name "Project Fuse" –
ostensibly indicating FG control of the project – and used the name with the public for the first time
in April of 2009. (Rathakrishnan Dep. Tr. 59:1-9) This is demonstrably false. He referred to FG's
browser software business as "Project Fuse" at least as early as September of 2008 in documents FG
submitted to register at the TechCrunch50 conference; the application makes no reference to tablet
computing. (Bridges Decl. Ex. BB.)

1 from Prototype C, [REDACTED]

2 [REDACTED]
3 (Bridges Decl. Ex. I.) [REDACTED]

4 [REDACTED] (Bridges Decl. Ex. J.) [REDACTED]

5 [REDACTED]
6 (Bridges Decl. Ex. K.)

7 ***Weathering the Rocky Summer Months.*** Undeniably, the venture endured friction through
8 the summer months. One person at CrunchPad, after visiting FG in Asia, [REDACTED]

9 [REDACTED]
10 [REDACTED] (Arrington Dep. Tr. at
11 373:23 to 375:4, 390:10-11;⁴ Rathakrishnan Dep. Tr. at 317:14-23.)

12 ***Full Speed into Fall.*** The parties appeared to emerge from the summer perils with renewed
13 energy. In September 2009, FG obtained visas for FG personnel to come to California to drive the
14 project home. [REDACTED]

15 [REDACTED]
16 (Bridges Decl. Ex. L.) Photographs show the parties working feverishly in September 2009 at TC's
17 office. (Bridges Decl. Ex. M; Rathakrishnan Dep. Tr. at 227:7-12; Arrington Decl. ¶ 23.)

18 ***FG Secretly Plans a [REDACTED]*** While FG led Plaintiffs to believe its commitment to the
19 venture was strong – and as the parties worked together in each other's offices – FG was well
20 underway with “divorcing” from TC and implementing its plan to sell the CrunchPad on its own as
21 the JooJoo.

- 22 • Just before FG's hosted TC personnel in Asia in August 2009. [REDACTED]
23 [REDACTED] (Bridges Decl. Ex. N.)
- 24 • In September 2009. [REDACTED] (Bridges Decl. Ex. C.)
- 25 • [REDACTED] (Bridges Decl. Ex. O.) On October 12, 2009,² [REDACTED] (Bridges Decl. Ex. P.)
- 26 [REDACTED]
- 27 • In late October, [REDACTED]

28 ⁴ Arrington Dep. Tr. excerpts are Exhibits EE and FF to the Bridges Declaration.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(Bridges Decl. Ex. Q.)

- [REDACTED] (Bridges Decl. Ex. R.)
- On November 10, FG registered “thejoojoo.com” without informing TC. (Rathakrishnan Decl. ¶ 59.)
- [REDACTED] cl. Ex. E.) [REDACTED]

At each step of FG’s planned divorce, it assured TC that all was well. FG never hinted at its planned abandonment. In fact, each of these plot points pairs with contemporaneous FG falsehoods to TC. We make these pairings explicit while discussing TC’s fraud claim, below.

FG Drops the Bomb With a Fabricated Email. Once FG had carefully laid its plans [REDACTED] FG dropped the bomb on Plaintiffs on November 17, 2009. This termination email from Mr. Rathakrishnan, which FG admits came “out of the blue,” purports to forward an earlier email from a FG investor “unequivocally support[ing]” a plan to launch “without Arrington/TechCrunch ASAP.” (Arrington Decl. Ex. O) Mr. Rathakrishnan then writes “it’s hard for me to turn this down.” *Id.* [REDACTED]

(Bridges Decl. Ex. S) [REDACTED] *Id.* Ex. T. Mr. Rathakrishnan not only lied, but he also lied about his lies. [REDACTED] *Id.* Ex. A.

FG Launches the “JooJoo” without TC and Falsely Describes FG’s and TC’s Commercial Activities with Respect to the Project and the JooJoo as the Fruit of that Project. On December 7, 2009, just a few weeks later, FG launched the CrunchPad-turned-JooJoo with a video presentation. *Id.* Ex. U. Mr. Rathakrishnan, while using and riding on the TechCrunch’s name, denied that Plaintiffs had made any “physical,” “intellectual,” or financial contributions” to the project, and denied that there was ever a “deal on the table” with TC. *Id.*; Mot. at 12. These statements are false.

Mr. Arrington’s Deposition Testimony. The facts in this case are compelling and damning

1 for FG. Attempting distraction, FG spends two pages of its opposition (compared to the one page it
2 spends discussing TC’s fraud claim) feigning consternation that Mr. Arrington was “uncomfortable”
3 making legal conclusions at his deposition. (Opp. at 6-7.) This is pure gamesmanship. FG’s
4 counsel engaged in persistent badgering to prod Mr. Arrington to give legal conclusions to numerous
5 objectionable questions, part of an overall pattern of improper conduct by FG’s counsel at the
6 deposition.⁵ Mr. Arrington was understandably uncomfortable about drawing legal conclusions: he
7 practiced law only three years, more than a decade ago, and he is no longer an active member of the
8 bar. He is not a counsel in this case. He is a businessman, not counsel, for both TechCrunch and
9 CrunchPad, Inc. While uncomfortable testifying about legal conclusions at his deposition, Mr.
10 Arrington forthrightly testified at length about the parties’ interactions and relationship. What is
11 remarkable is not that Mr. Arrington would not provide legal analysis, but that FG counsel continued
12 to berate Mr. Arrington with poorly formed questions that called for legal conclusions, refusing to
13 rephrase them as if looking to create a controversy to bring to this Court.

14 **III. ARGUMENT**

15 **A. Plaintiffs are Likely to Succeed on the Merits**

16 **1. Plaintiffs Have Established Fusion Garage’s Breach of Fiduciary Duty .**

17 The elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary duty,
18 (2) a breach of the fiduciary duty, and (3) resulting damage. *Pellegrini v. Weiss*, 165 Cal. App. 4th
19 515, 524 (2008). FG does not deny that its actions would constitute a breach or that they caused
20 damages. Instead, FG places all its bets on denying the existence of a partnership or joint venture –
21 that is, denying it owed Plaintiffs a duty. Because the parties did enter a joint venture to develop and
22 sell the CrunchPad, Plaintiffs are likely to succeed on its breach of fiduciary duty claim.

23 **a. De Facto Joint Ventures in California and the Related Fiduciary Duty**

24 _____
25 ⁵ The conduct included FG counsel’s use of foul language, repeated threats to telephone the
26 magistrate judge from the deposition (which TC counsel also urged to occur immediately in order to
27 clear the air), repeated threats to file a motion to compel (which has never materialized), accusations
28 of perjury, a threat to withhold availability of FG’s CEO as a deponent in retaliation for his own
frustrations in the deposition, and unprofessional commentary after Mr. Arrington’s answers, which
commentary was not part of any question. FG’s counsel clearly came to the deposition to pick a
fight with Mr. Arrington and TC’s counsel. Mr. Arrington’s calm demeanor and careful testimony
stood in stark contrast to FG’s overbearing counsel. It is no wonder that, in that environment, Mr.
Arrington became cautious to the point of hesitation in answering some of the questions he faced.

1 “The association of two or more persons to carry on as coowners a business for profit forms a
2 partnership, whether or not the persons intend to form a partnership.” Cal. Corp. Code § 16202(a).
3 A joint venture is simply a limited-purpose partnership. *Weiner v. Fleischman*, 54 Cal.3d 476, 482-
4 83 (1991). Joint venture agreements may be oral or may assumed from conduct. *Id.* at 483; *Franco*
5 *Western Oil Co. v. Fariss*, 259 Cal. App. 2d 325, 345 (1968). That the joint venture agreement is
6 unwritten or lacking in certain details, such as the exact division of profits, does not put venture’s
7 existence in jeopardy. *San Fran. Iron & Metal Co. v. American Mill. & Indus. Co.*, 115 Cal. App.
8 238, 246 -247 (1931).

9 Joint venturers “are fiduciaries with a duty of disclosure and liability to account for profits.”
10 *Weiner*, 54 Cal. 3d at 482. The duty to account persists even if one venture unilaterally dissociates
11 from the venture. Cal. Corp. Code § 16404(b)(1); *Leff v. Gunter*, 33 Cal. 3d 508, 514 (1983).

12 **b. TC and FG Formed a Joint Venture.**

13 FG’s attack on the existence of a de facto TC-FG joint venture, by emphasizing irrelevant
14 facts, dances around substantial evidence showing the venture’s existence.

15 By the parties’ own calculations, their joint venture began in September 2008, when Mr.
16 Rathankrishnan and Mr. Arrington first met. Mr. Arrington said this. (Arrington Decl. ¶ 4.) [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED] (Bridges Decl. Ex. L.)

20 Photographs show that the parties in fact worked feverishly together in September of 2009 at TC’s
21 office. (Bridges Decl. Ex. M; Rathakrishnan Dep. Tr. at 227:7-12; Arrington Decl. ¶ 23.) Back in
22 February 2009, FG’s blog stated “the collaboration with the Crunchpad project happened as a result
23 of meetings we had with Mike Arrington and co, subsequent to [TechCrunch50],” which took place
24 in September 2008 (Arrington Decl. ¶ 13 & Ex. E.) The existence of the venture was clear to [REDACTED]

25 [REDACTED]
26 [REDACTED] (Bridges Decl. Ex.
27 C.) [REDACTED]

28 [REDACTED]

1 [REDACTED] (Bridges Decl. Ex. T (emphasis added).) [REDACTED]
2 [REDACTED]
3 [REDACTED]

4 ***Existence of a Formal “Agreement” Is Not Necessary.*** FG’s insistence that the parties’
5 venture lacked a formal agreement with detailed terms is inapposite. To deprive a jilted joint
6 venturer his rightful share of the venture’s fruits because of an imprecise agreement would do
7 violence to equity. “The great majority of contracts of joint adventure and of partnership do not
8 point out precisely what each party is to do under them.” *San Fran. Iron & Metal Co. v. Am. Mill. &*
9 *Indus. Co.*, 115 Cal. App. 238, 246-47 (1931). In fact, such provisions are “quite unusual, and, we
10 should say, quite impossible in many cases.” *Id.* Thus, such agreements are valid though they omit
11 “how the profits shall be divided,” *id.*, or fail to apportion “post-acquisition management and
12 operation” duties, *Franco*, 259 Cal. App. 2d at 344-45.

13 In any event, the TC-FG agreement was definite enough to induce the parties to collaborate
14 intensively and to devote substantial resources for over a year, sharing office space, money, and
15 other resources. As to profit sharing, a term that FG dwells upon (Opp. at 16), “the distinguishing
16 feature of partnership [since enactment of the Uniform Partnership Act (‘UPA’)] is association to
17 carry on business together, *not agreement to share profits.*” *Holmes v. Lerner*, 74 Cal. App. 4th 442
18 (1999) (emphasis added). Regardless, the parties’ conduct shows TC’s entitlement to at least 65%
19 of profits. In June 2009, Mr. Rathakrishnan wrote “**I will do the deal,**” agreeing to terms in which
20 FG would obtain 35% in CrunchPad, Inc.. (Arrington Decl. Ex. K.) While the parties discussed
21 other numbers after June, they never considered giving FG more than 35%. (Rathakrishnan Decl. ¶¶
22 19-20.) Thus, a 35-65 split conservatively estimates how the parties viewed the division of interests.

23 ***The Parties Did Agree to Share in Losses and Profits, and Did So.*** TC invested \$400,000
24 in the CrunchPad project, hiring contractors, paying FG’s bills, and covering other expenses.
25 (Arrington Decl. ¶¶ 18, 36 & Exh. J; Rathakrishnan Decl. ¶ 44.) It also contributed its vision, labor,
26 branding power, leadership, and industry connections. (Arrington Decl. ¶¶ 7-24.) [REDACTED]
27 [REDACTED] (Bridges Decl. Ex. V.) The buzz TechCrunch
28 created for CrunchPad was so powerful [REDACTED]

1 [REDACTED]
2 [REDACTED] (Rathakrishnan Dep. Tr. at 277:24
3 to 279:22.) To say that TC did not share investments and losses of the venture ignores reality.

4 FG harps on Mr. Arrington’s statement that he viewed the arrangement between Plaintiffs
5 and FG as one in which “each would bear its own losses of time, energy, and money if the project
6 were not successful, and to share profits if it was.” (Opp. at 9.) FG argues that no joint venture
7 could exist if each party “bore its own losses.” Not only did the parties share losses as just
8 discussed, but FG grossly misstates the law. California law simply requires that each venture “lose”
9 or contribute something of value; it does not require reimbursement or equal risk, and does not
10 prohibit each from bearing its own kind of loss. *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d
11 805, 819-820 (1983), *cited by Kaljian v. Parineh*, No. F053997, 2009 WL 377089, at *6 (Cal. App.
12 5 Dist. Feb. 17, 2009). Moreover, since enactment of the UPA, the focus is on the association to
13 carry on business, not profit or loss sharing. *Holmes*, 74 Cal. App. 4th at 442. FG and TC entered a
14 joint venture to carry on the CrunchPad business. Plaintiffs contributed labor, services, and capital.
15 So did FG. In fact, TC paid FG \$23,500 for expenses FG incurred on the project. The parties
16 shared investments, outlays, and losses on the project.

17 ***That One Party Could End the Venture is Irrelevant to the Existence of a Joint Venture.***

18 That TC made threats to end the joint venture during bouts of friction between the parties is not
19 remarkable and does not impact the existence of the venture. TC does not sue simply for FG’s
20 ending the joint venture. Instead, it sues for FG’s usurpation of the project that the joint venture
21 carried out, for fraud and deceit during the course of the joint venture, and for false advertising
22 regarding the parties’ commercial activities connected with the joint venture.

23 In fact, that TC or FG could contemplate an end to the venture – [REDACTED] – shows that a
24 joint venture existed. Joint ventures do not endure forever. *See* Cal. Corp. Code § 16801 (listing
25 events that may trigger dissolution of a partnership). FG cites no legal authority for the proposition
26 that one partner may not even *propose* to halt a collaboration without obliterating the venture.
27 Moreover, Plaintiffs *did not* end the project—and certainly did not usurp the project—but continued
28 with it, a decision it made in reliance on FG’s pattern of false statements and omissions. In the end,

1 Plaintiffs never abandoned FG. They honored their commitment. On the other hand, FG violated its
2 commitment when it jettisoned Plaintiffs and launched the fruit of the collaboration as its own
3 product.

4 Similarly irrelevant is FG's discussion of [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] (Arrington Dep. Tr. at 373:23
8 to 375:4; 390:10-11.) [REDACTED]
9 [REDACTED] (Opp. at 11 & n.7.) [REDACTED]
10 [REDACTED]
11 [REDACTED] (Rathakrishnan Dep. Tr. at 317:14-23.) This
12 not only confirms Mr. Arrington's credibility, [REDACTED]
13 [REDACTED] Again Plaintiffs did not abort the venture. FG did.

14 ***The CrunchPad Project Was An Actual Effort, not Just an Ideal.*** FG cannot contend that
15 the CrunchPad venture was a mere thought experiment (Opp. at 12) given the copious evidence of
16 both parties scrambling for funding, the parties' stated purposes, and FG's very acts in bringing the
17 JooJoo to market just days after breaking off the venture. Indeed, FG's opposition is replete with
18 contradictory statements. On page 13, in just one example, FG notes "the project to commercialize
19 the CrunchPad." Contrary to FG's assertions, the joint venture's aim was to develop and sell the
20 CrunchPad. The parties would exercise joint control over the project, technically and financially.
21 They would "share profits." (Arrington Decl. ¶ 31.) The venture's success included "going to
22 market," "taking orders," and having a "sellable product." (Arrington Dep. Tr. at 92:6 to 93:2.) The
23 *Love* case that FG cites about co-songwriters (Opp. at 12-13) is irrelevant; the songwriters never
24 discussed "commercialization."

25 ***The Venture Existed Even Without a Completed Merger or Financing.*** FG refuses to see
26 that a joint venture could, and did, persist despite an incomplete merger and financing. The
27 *existence* of a joint venture has nothing to do with *particular ways of furthering* the venture. *See*
28 *Franco*, 259 Cal. App. 2d at 344-45 (holding that written operating agreement that would have

2. Plaintiffs Have Established FG’s Fraud and Deceit.

The elements of fraud are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 974 (1997). With silence, FG concedes all elements except the first. Its sole argument against the fraud claim is that FG made no misrepresentations. (Opp. at 17-18.) But evidence of misrepresentation is inescapable. In fact, it is possible to pair FG’s misrepresentations with contemporaneous statements that FG made behind TC’s back, vividly illustrating the scope of FG’s deceit.

<i>Executing [REDACTED] Behind TC’s Back</i>	<i>Reassurances to TC</i>
<p>On August 6, 2009, [REDACTED] (Bridges Decl. Ex. N.)</p>	<p>TC personnel came to Asia to work with FG just weeks later.</p>
<p>In September 2009, [REDACTED] (Bridges Decl. Ex. C.)</p>	<p>The same month, FG asked TC to sponsor visas for FG personnel to come to the U.S. and finish the CrunchPad project with TC personnel. FG personnel came. (Arrington Decl. ¶ 23; Bridges Decl. Ex. M.) [REDACTED] <i>Id.</i> Ex. L.</p>
<p>[REDACTED] Ex. P.) <i>Id.</i> Ex. O.</p>	<p>[REDACTED] Decl. Ex. W.) [REDACTED] S</p>
<p>On October 25, 2009, [REDACTED] (Bridges Decl. Ex. Q.)</p>	<p>On Oct [REDACTED] (Bridges Decl. Ex. X.)</p>
<p>[REDACTED] (Bridges Decl. Ex. R.)</p>	<p>Just days before, FG told TC, in response to a call for status, “so yes, we should do this.” (Bridges Decl. Ex. Y.)</p>
<p>On November 10, FG registered “thejoojoo.com” without informing TC. (Rathakrishnan Decl. ¶ 59.)</p>	<p>The same day, FG assured TC “we are almost there” and “ready to go live on stage.” (Bridges Decl. Ex. Z.)</p>
<p>[REDACTED]</p>	<p>On November 13, 2009, FG assured TC that it was ready for the joint launch on November 20. (Arrington Decl. ¶ 24 & Ex. N (“we are course</p>

1 [REDACTED] . . . shd target the event in sf.”.)
2 (Bridges Decl. Ex. E.)
3 [REDACTED]

4 [REDACTED]
5 [REDACTED] at deposition, Mr. Rathakrishnan admitted that FG’s “Plan B” – to
6 “go out on our own” – was “always in place.” (Rathakrishnan Dep. Tr. at 80:13-25.) Thus, FG
7 made misrepresentations at essentially every point in the relationship, including the numerous times
8 it referred to TC as its collaborator. (E.g., Arrington Decl. ¶ 13; Bridges Decl. Ex. F (wanting to
9 “discuss possible collaboration”); *id.* Ex. G (“[REDACTED]”
10 [REDACTED]”); *id.* Ex. H [REDACTED]”)).

11 These misrepresentations, standing alone, are egregious. But they are shocking when taken
12 with [REDACTED]
13 [REDACTED]
14 [REDACTED] *Id.* Ex. A.

15 FG’s admission that Mr. Rathakrishnan’s November 17, 2009, termination email came “out
16 of the blue” (Arrington Decl. ¶ 25) underscores FG’s concealment and misrepresentations. [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] (Bridges Decl. Ex. S.) [REDACTED]
21 [REDACTED]
22 [REDACTED]. *Id.* Exs. A, T. Mr. Rathakrishnan not only lied but he also lied about his lies.

23 FG defends its duplicity as “contingency planning.” (Opp. at 18.) This is untenable given its
24 actions and its admission that it had been [REDACTED] FG was not “planning”: it was
25 executing a secret plan for months while deceiving Plaintiffs as the CrunchPad project rolled on. FG
26 pursued an alternate manufacturer to build its JooJoos after losing the manufacturer on the
27 CrunchPad project (without telling TC about the loss of the manufacturer). [REDACTED]
28 [REDACTED]

1 [REDACTED] The only people it kept in the dark were those at TC. TC does not fault FG for exploring
2 business options; it faults FG for engaging in a pattern of deception regarding its intentions and the
3 status of the CrunchPad project, [REDACTED] Plaintiffs in their
4 reasonable reliance on FG's continued participation and commitment to the joint venture, and for
5 breaching its fiduciary duty to them.

6 FG's reliance on *In re Tower*, 483 F. Supp 2d. 327 (S.D.N.Y. 2007) (Opp. at 18) to support
7 its "contingency planning" argument is misplaced; the case actually strongly supports TC's position.
8 In *Tower*, a shareholder brought a securities fraud claim based on the defendant corporation's failure
9 explicitly to disclose bankruptcy planning. The court rejected the claim, but only because the
10 defendant "disclosed its intensive efforts to ameliorate the company's liquidity problem," which
11 would have tipped shareholders off to its financial condition. *Id.* at 348. The court *would have*
12 allowed the claim, however, had the defendant "actually settled upon the details of the bankruptcy
13 plan in advance of the filing." *Id.* In this case, FG did not disclose *any* information that would have
14 communicated to TC its decision leave the joint venture. And moreover, FG had, as just discussed,
15 "actually settled upon the details" of its [REDACTED] from TC and strung TC along for months.

16 Thus, FG's fraud and deceit regarding its commitment to the project and the merger are
17 manifest and Plaintiffs are likely to succeed on this portion of their fraud claim. Plaintiffs are also
18 likely to succeed on the other aspects of the claim, they raised in their motion but which FG does not
19 persuasively address.

20 ***Concealed Loss of Pegatron.*** FG does not deny concealing the loss of Pegatron as a
21 CrunchPad manufacturer in October 2009. Mr. Rathakrishnan admitted the concealment: FG was
22 telling its investors and shareholders about the loss of Pegatron, but did not tell TC, even though FG
23 viewed TC as a potential acquirer (and even though TC and FG were working jointly on the
24 CrunchPad project). (Rathakrishnan Dep. Tr. at 74:3 to 75:8.) FG instead argues that TC should
25 have known of the loss if it had really been in a joint venture. (Opp. at 18.) This is a nonsensical
26 attempt to blame the victim for not anticipating the wrongdoer's misconduct. Plaintiffs are likely to
27 succeed on this aspect of their fraud claim.

28 Given the overwhelming evidence of misrepresentation and FG's concession that the other

1 elements of fraud are present, TC’s fraud claim will succeed.

2 **3. The Lanham Act Claim Will Succeed.**

3 FG makes only a brief argument against TC’s Lanham Act false advertising claim.

4 **Standing Exists.** It first argues that TC is not a FG competitor and lacks prudential standing.
5 For reasons explained more fully in its opposition to FG’s motion to dismiss, standing exists. Both
6 TC and FG were “vying for the same” dollars throughout their development of the CrunchPad. *See*
7 *Kournikova v. Gen. Media Commc’ns, Inc.*, 278 F. Supp. 2d 1111, 1117 (C.D. Cal. 2003). Where
8 TC and FG once vied together, they now vie separately. FG’s made its false statements to belittle
9 TC and prevent it from being an immediate competitive threat. A competitor driven from the field
10 may still sue. *See Thorn v. Reliance Van Co.*, 736 F.2d 929, 931-33 (3d Cir. 1984). Additionally,
11 potential competitors have standing. *Tercica, Inc. v. Insmmed Inc.*, No. C 05-5027, 2006 WL 1626930
12 (N.D. Cal. Jun. 9, 2006) (Armstrong, J.) [REDACTED]

13 [REDACTED]
14 **FG’s False Statements are Actionable.** FG does not address the particular false statements
15 that TC raised in its preliminary injunction motion. It simply states they are true. Instead, FG rests
16 on invalid arguments from its motion to dismiss that it purports to incorporate by reference, but
17 which it fails to relate to any particular statement. TC leaves these arguments, as FG did, to the
18 briefs on the motion to dismiss. TC does, however, demonstrate how FG’s statements are false.

19 Statement 1: TC claimed that FG falsely stated that it undertook “all of the physical and
20 intellectual business actions required to take the product to market.” (Mot. at 12.) The evidence of
21 TC’s contributions is clear.. (*Compare* Arrington Decl. *passim*; Bridges Decl. Ex. AA, Ex. M, *with*
22 *Opp.* at 19.) In fact, FG privately stated nearly the opposite of what it said publicly: “we need to
23 clearly make the link that [the JooJoo] is crunchpad with a different name.” (Bridges Decl. Ex. E.)

24 Statement 2: TC claimed that FG falsely “described itself as the sole developer of the
25 CrunchPad’s hardware design, despite the fact that TechCrunch built an initial prototype for the
26 CrunchPad—which necessarily includes its hardware design—before Fusion Garage even joined the
27 project.” (Mot. at 12; Arrington Decl. ¶ 30.) Again, FG does not explain how this statement could
28 be true. (*Opp.* at 19.) The evidence shows it to be false.

1 Statement ent 3: Finally, TC claimed that FG falsely stated “that its shareholders provided all
2 the necessary funds” for the CrunchPad project. (Mot. at 12.) Mr. Rathakrishnan’s own declaration
3 proves this statement is false. (Rathakrishnan Decl. ¶ 44; cf. Arrington Decl. ¶ 18 & Exh. J.)⁶

4 TC is likely to succeed on its breach of fiduciary duty, fraud, and Lanham Act claims.

5 **B. Without Preliminary Relief, Plaintiffs Will Suffer Irreparable Harm.**

6 The case for irreparable harm is stronger now than when TC filed its motion. Before Mr.
7 Rathakrishnan’s deposition on April 22, 2010, TC knew only of FG’s PayPal account in the United
8 States. [REDACTED]

9 [REDACTED] (Rathakrishnan Dep. Tr. at 157:10 to 158:1) [REDACTED]
10 [REDACTED]

11 [REDACTED] *id.* at 158:15 to 159:16.
12 [REDACTED]

13 *Id.* at 45:15-24 [REDACTED] FG has no
14 bank accounts in the United States. *Id.* at 42:14-17. In addition, FG’s known investors are abroad,
15 making it less likely that FG would develop any U.S.-based assets. *Id.* at 26:15 to 27:12.
16 [REDACTED]
17 [REDACTED]

18 [REDACTED] Where, as here, it is “probable that [the
19 defendant] could ‘easily dispose’ of the [its] holdings and could transfer any proceeds to foreign
20 enterprises” the court could not doubt “that plaintiffs’ rights to restitution and an accounting would
21 be irreparably harmed in the event [defendant] was successful in removing defendants’ assets from
22 the [U.S.]” *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982); *Bushnell,*
23 *Inc. v. Brunton Co.*, 673 F. Supp. 2d 1241, 1263 (D. Kan. 2009). In *Bushnell*, defendant was:

24 a foreign corporation with few assets in the United States. Plaintiffs assert that they will face
25 significant difficulty collecting damages from Lanshuo. The Court agrees that the prospect of
26 collecting money damages from a foreign defendant with few to no assets in the United
States tips in favor of a finding of irreparable harm.

27 ⁶ Other statements by FG, identified in TC’s Complaint are also demonstrably false. For example,
28 FG directly contradicts its statement that “Nothing has been signed, nothing was ever on the table”
(Compl. ¶ 61) in Paragraph 11 of Mr. Rathakrishnan’s declaration, in which he admits that TC
furnished a written Letter of Intent.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] FG concedes that TC would face irreparable injury if TC were
5 unable to collect on a judgment against FG. (Opp. 20-22.) FG makes no attempt to dispute that
6 during the parties' joint venture FG was a financially insecure start-up company funded mostly by
7 loans at confiscatory rates (Arrington Decl. ¶ 34, Ex. S); that FG represented to TechCrunch that it
8 was on a shoestring budget; or that TechCrunch paid Fusion Garage's bills, *Id.* ¶ 18. Ex. L. While,
9 as FG notes, some changes in FG's financial situation have come to light in discovery since TC filed
10 its motion, they do not diminish the irreparable harm to TC and actually show that TC's concerns
11 about collecting a judgment are amply justified.

12 FG puts great weight on its obtaining \$3 million in financing between September 2009 and
13 March 2010. (Opp. at 20; Rathakrishnan Dep. Tr. at 186:13 to 187:2.) [REDACTED]
14 [REDACTED] *id.* at 239:16-20, [REDACTED]
15 [REDACTED] *id.* 240:11-23. [REDACTED]
16 [REDACTED]
17 [REDACTED] *Id.* at 241:6-18. [REDACTED]
18 [REDACTED] *Id.* at 242:13-18. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]⁷ *See id.* at 186:3-21. FG's persistent refusal to disclose this
23 information makes it likely that the investors are either providing money on terms embarrassing or
24 dangerous to FG or have significant information about FG's wrongdoing that FG hopes to keep
25 secret for as long as possible.

26 As for additional financing, there is nothing currently but smoke and mirrors. FG talks of
27 seeking an additional \$3 million, but that is only talk.

28 ⁷ TC may be forced to file a motion to compel this information.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] *see id.* at 189:9-14, [REDACTED]
4 [REDACTED] *Id.* at 50:14 to 51:5. [REDACTED]
5 [REDACTED]
6 [REDACTED] *Id.* at 166:7-12.

7 TC has amply met its burden to show the probability of FG not having assets to satisfy a
8 judgment. *DuFour v. Be LLC*, No. 09-3770, 2009 WL 4730897, *3 (N.D. Cal. Dec. 7, 2009)
9 (Breyer, J.) (“While it is not clear at the present moment whether Be LLC retains funds to satisfy a
10 preliminarily imposed constructive trust, it is probable that Be LLC will be far less likely to be able
11 to satisfy a judgment a few months down the road.”).

12 TC faces irreparable harm both from FG’s off-shoring its assets and its financial instability.

13 **C. The Balance of Hardships Tips in Plaintiffs’ Favor.**

14 The balance of hardships weighs in TC’s favor. FG overstates the relief TC seeks, and
15 therefore overstates its envisioned harm, the insolvency of FG. FG also understates its ability to
16 contribute to the constructive trust TC seeks.

17 First, the Court need not consider FG’s solvency in balancing harms, given the illegality of
18 FG’s conduct. *Heckmann v. Ahmanson*, 168 Cal. App. 3d 119, 134 (1985) (“Numerous cases have
19 recognized the plaintiff’s right to a constructive trust over a fund of money regardless of the
20 defendant’s solvency.”).

21 Second, FG own statements undermine any hardship argument it makes [REDACTED]
22 [REDACTED]
23 [REDACTED] (Rathakrishnan Dep. Tr. at 173:24 to 175:16.)
24 Not touching the money “hasn’t harmed” FG. *Id.* at 175:14-15. [REDACTED]
25 [REDACTED] *Id.* at
26 187:11-12; 189:9-14.

27 In any event, as noted in its motion, TC does not seek to freeze all of FG’s assets, nor does
28 TC seek an ban on sales of the device itself. Nor is the goal to render FG insolvent. The goal is to

1 preserve TC's ability to obtain the profits the parties were to share as part of their joint venture. The
2 harm of having revenues tied up during the resolution of this case is minimal given TC's right to an
3 accounting and the likelihood that FG will render it impossible for TC to obtain that accounting.⁸

4 **D. The Public Interest Favors Granting Relief.**

5 The public has an interest in vindicating the rights of the aggrieved and in knowing that
6 money it pays for FG's JooJoo goes to the proper parties. Moreover, the constructive trust remedy
7 that TC seeks is particularly an instrument designed for the public good. "To paraphrase Justice
8 Cardozo, if '[a] constructive trust is the [voice] through which the conscience of equity finds
9 expression,' then a court can surely prevent the stifling of that voice before it has a chance to be
10 heard." *Heckmann*, 168 Cal. App. 3d at 136.

11 **IV. CONCLUSION**

12 The evidence of FG's breach of fiduciary duty, fraud, deceit, and false advertising is
13 unusually strong and vivid. The harm to Plaintiffs absent a preliminary injunction would be
14 irreparable and would outweigh any harm to FG. All the equities favor granting relief, and Plaintiffs
15 urge the Court to grant their motion for a preliminary injunction imposing a constructive trust on all
16 revenues from the JooJoo device in the United States.

17 Dated: May 3, 2010

WINSTON & STRAWN LLP

By: _____

Andrew P. Bridges
David S. Bloch
Matthew A. Scherb
Attorneys for Plaintiffs

21 _____
22 ⁸ FG's brief unclean hands argument (Opp. at 24) is baseless. First, TC deserves no blame for
23 allegedly disclosing public information to the public. The number of preorders could be easily
24 deduced from documents that PayPal produced to TC pursuant to subpoena with no confidentiality
designations whatsoever, and FG's (very vigorous) counsel never raised a confidentiality issue at any
time. In fact, there has been no way for TC to get this information from FG directly, so it had to
come from a third party. _____

(Rathakrishnan Dep. Tr. at 53:2-13.) Second, _____

Third, _____

26 FG's unexplained insinuations about misleading declarations and discovery disputes are
27 inflammatory, meritless, and irrelevant to this motion. Finally, for an unclean hands defense to have
28 any chance of success, the plaintiff's "unclean conduct" must relate directly to the transaction upon
which the complaint is made; mere "misconduct in the abstract, unrelated to the claim which it is
asserted as a defense, does not constitute unclean hands." *Campagnolo S.R.L. v. Full Speed Ahead,
Inc.*, 258 F.R.D. 663, 666 (W.D. Wash. 2009).